THE IMPACT OF THE APPLICATION OF SHARIA LAW ON THE RIGHTS OF NON-MUSLIMS IN THE LIGHT OF INTERNATIONAL PRINCIPLES: THE CASE OF SUDAN

By

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To my Coptic Community, to all the Sudanese people, Muslims and non-Muslims united in peace;

This work is dedicated.

Abstract

The idea of exploring the topic of the thesis has been promoted by the revival of Islam as a legal system in a number of Islamic nation states, as an assertion and part of their identity. This development is regarded by some as adversely affecting non-Muslim citizens in such states when looked at in the light of international principles.

Sudan, a multireligious state, declared the application of Sharia laws in 1983. The thesis addresses the impact of the application of Sharia law on non-Muslims within the historical, political and legal context of Sudan. This is examined in the light of international principles.

To this end, the thesis uses a comparative methodology, entailing the identification of the areas of inconsistencies between rules of Sharia governing non-Muslim subjects and international norms. Thus, an examination of Sudanese laws based on Sharia having an impact on non-Muslims is made.

Résumé

L'idée d'explorer le sujet de la thèse a été servie par le réveil d'Islam comme un système légal, dans nombre d'États musulmans, et comme une affirmation et partie de l'identité musulmane. Cette situation est perçue, par certains, comme négativement affectant les citoyens non-musulmans, dans ces États, à la lumière des principes internationaux.

Le Soudan, un État multireligieux, a déclaré l'application des lois de la Sharia en 1983. La thèse dresse l'impact de l'application de la Sharia sur les non-musulmans dans le contexte historique, politique et légal du Soudan. Cet examen se fait à la lumière de principes internationaux.

A cette fin, la thèse utilise une méthodologie comparative, entraînant l'identification des régions de contradictions entre les règles de la Sharia concernant les sujets non-musulman et les normes internationales. Suit un examen de l'impact des lois soudanaises, inspirées de la Sharia, sur les non-musulmans.

INTRODUCTION

The status and rights of non-Muslim subjects in the Islamic state is not a historical subject. It arises with the present revival, by a number of Islamic states, of the application of Sharia Islamic law as a system regulating all aspects of the society and its subjects. For these states, Sharia is a comprehensive religious law derived from the basic sources, namely Quran (the Muslim's Holy Book) and Sunnah (traditions of the Prophet Mohammed). It was mainly the direct result of the divine Quranic revelation and as such was entitled to be recognized not only as permanently valid and binding, but also as the only religiously valid legal system.[1]

Under traditional Sharia, the subjects of the Islamic state are generally classified according to their belief. The legal consequences of such classification have greatly contributed to the determination of the status and rights of the subjects. The Muslims who constitute the *Ummah* (Islamic nation) are the citizens with full rights, while non-Muslim subjects are, by virtue of their belief, and as the result of religious nature of the Islamic state, not entitled to participate in running or shaping the policy of the state, or to be appointed to key posts. Freedom of religion is to be exercised in accordance with the limits established by Islamic Sharia principles. In the area of public law and in cases of conflict of laws, Sharia is applicable, being the state law.

The revival of Islam as such has had its influence on Sudan at different

[1] Coulson, N., *A History of Islamic Law* (Edinburgh: University Press, 1964) at 75. The subject of the research are non-Muslims, i.e. People of the Book, thus excluding others who are subject to different rules in Sharia.

historical periods.[2] However, practical steps towards the Islamization of the whole political and legal system started in September, 1983, when Sudan declared the application of Sharia and started to gradually replace secular laws with Islamic laws, such as the *Penal Code, 1983*, *Civil Transactions Act, 1984*, *Evidence Act 1983*, and the *Judgments (Basic Rules) Act, 1983*, with Sharia as the main source of laws to whose principles and spirit all legislations should conform. Not only that, but on several occasions, Sudan has been declared to be an Islamic state and the whole legal political, economic and social system is to be reshaped accordingly. The Islamization of laws in Sudan, a country known for its religious and cultural diversities, raises the question as to what status and rights its non-Muslim minorities are entitled to, and the extent of fulfilment of Sudan's international obligation towards minorities.

1. The Problem

This Islamic revival has been viewed as negatively affecting the rights of non-Muslim minorities, being inconsistent with international principles for the protection and guarantee of minority rights in certain cases. Basically, there are two concepts which challenge principles of the international law of human rights for the protection of religious minorities. First, the concept of equality in Islam, which is based on the criterion of religion, regards only Muslim subjects as being of full legal capacity. Second, freedom of belief is also considered an important area of inconsistency with international norms, since the extent and content of such a concept in Islam touches upon an important ideological aspect of traditional Muslim views, relating to early

[2] See Esposito, J.L., *Sudan: The Politics of Islamic Revivalism: Diversity and Unity*, Hunter, S.T., ed., (Bloomington: Indiana University Press, 1988) at 187-203.

sources on the issue of apostasy and the restrictions on the practice of religion.[3]

The consequence of this was expressed by Khadduri when he stated:

> Human Rights in Islam, as prescribed by the Divine law (Sharia) are privileges only of persons of full capacity. A person with full legal capacity is a living human of mature age, free and of Muslim faith. It follows accordingly that non-Muslims and slaves who live in the Islamic states were only partially protected by law or had no legal capacity at all.[4]

The protection of minorities under international law is based on the two principles of equality (non-discrimination) and freedom of religion and belief.[5] The United Nations Charter generally commits Member States to respect and observe human rights, fundamental freedoms, and equality for all without distinction as to race, sex, language or religion. In addition, Article 55 of the Universal Declaration of Human Rights, 1948[6] affirms in Article 1 that all human beings are born free and equal in dignity and rights.[7] More specifically, Article 18 of the Covenant on Civil

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[3] See Abdul Hameed Abu Sulayman, "Al-Dhimmah and Related Concepts in Historical Perspective" (1988) 9:1 *Journal Institute of Muslim Minority Affairs* 8.

[4] Khadduri, M., "Human Rights in Islam" (1946) 243 *The Annals of the American Academy of Political and Social Science* 77-81.

[5] To Capotori, the prevention of discrimination and the implementation of special measures to protect minorities are merely two aspects of the same problem: that of fully ensuring equal rights to all persons. The guiding principles is that no individual should be placed at a disadvantage because he is a member of a particular ethnic, religious or linguistic group. See Capotori, "The protection of Minorities Under Multilateral Agreements on Human Rights" (1976) *Italian Yearbook of International Law* 2.

[6] G.A. Res. 217 A (III). UN Doc. A/810, p. 71 (1948) [*hereinafter* Universal Declaration].

[7] G.A. Res. 217A (III), UN Doc. A/8/10 (1948).

and Political Rights[8] provides for the right of everyone to freedom of thought, conscience and religion. The content of the right to freedom of religion and belief includes freedom to have or adopt a religion or belief of one's choice, and freedom to practice it 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."[9]

In the light of the above principles provided for by international law, states are under an international obligation to treat their non-Muslim minorities in accordance with such principles. These international instruments are addressed to, and bind, states to enact legislation and take measures to ensure protection and equality for their religious minorities in compliance with the principles of equality and freedom of religion. However, Islamic states applying traditional Islamic rules claim that the rules applicable to non-Muslims, being based on religious criteria, are established norms and rules derivative from authoritative source texts, mainly the Quran and Sunnah.

In fact, this inconsistency has led to a number of comments by Muslim and non-Muslim modern scholars as to how to reconcile such inconsistency arising from the application of traditional Islamic Sharia and the international principles of equality and freedom of religion for the protection of non-Muslim minorities.

An-Na'im commenting on this, stated:

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[8] G.A. Res 2200A, 21 GAOR Supp. No. 16, UN Doc. UNPO A/6313 (1966) at 52. UN Doc. A/6316 (1966). The Convention opened for signature in December, 1966, and entered into force on 23 March, 1976.

[9] See also the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion Or Belief*, G.A. Res. 55. UN GAOR. Supp. No. 51, UN Doc. A/RES/36/55 (1982). The Declaration was passed on November 25, 1981, and adopted on 18 January, 1982.

> The Muslims are not to be allowed to treat religious minorities in this way because they believe that their own religious law authorizes them to do so... If this type of argument is allowed, all forms and degrees of human rights violations, including torture and even genocide, may be rationalized or justified with reference to alleged religious or cultural codes or norms.

In relation to the inconsistencies that arise, he contends that:

1. the status of non-Muslim religious minorities under Sharia is not consistent with current universal standards of human rights.

2. The current state of affairs cannot be justified on claims of Islamic cultural relativism. Muslims are not free to treat their religious minorities as they please unless and until the Muslim cultural norms are consistent with the relevant universal standards.

3. It is not only possible, but also imperative that the status of non-Muslims under Sharia be reformed from within the fundamental sources of Islam, namely the Quran and Sunnah. Such reform would at once be both Islamic and fully consistent with universal human rights standards.[10]

An-Na'im's contention represents the first category of the conflict between two schools of thought. One one side are the Modernists, who denounce strict conformity to the traditional Islamic standards as incompatible with modern conditions. One

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[10] An-Na'im, A., "Religious Minorities under Islamic Law and the limits of Cultural Relativism" (1987) 1 *Human Rights Quarterly* 17. For the doctrinal mechanisms in Sharia which may be used for adaptation to reconcile Sharia with international principles as proposed by the same author, see An-Na'im, A., *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (Cairo: The American University in Cairo Press, 1992).

modern scholar reflected the effect of this by stating that "...thus owing to its narrow interpretation of basic Islamic values the classical juristic attitude towards tolerance lost some of its flexibility in dealing with non-Muslim communities. Where it could have allowed many creative policies to develop, it instead became relatively rigid and became bound by certain historic precedents."[11] The second school is that of the Revivalists who demand full restoration and application of traditional Islamic standards.[12] From an Islamic traditional perspective, law is based on divine sources and the rules relating to non-Muslims are based on static conceptions in Islamic tradition. Thus any rights to be granted to non-Muslims should be in accordance with the norms, principles and spirit of Sharia.[13] From the perspective of this school, non-Muslims do not possess the full legal capacity that would entitle them to equal rights with Muslims by virtue of their belief in certain cases.

Although one does not dispute An Na'im's contention as to the necessity for reconciling inconsistencies regarding the treatment of non-Muslims, the issue, however, still remains and constitutes part of the general subject of debate as to how to reconcile inconsistencies between principles of international human rights law with norms of other traditions, including Islamic tradition. The lack of cultural legitimacy is considered to be one of the main causes for the invocation of human rights, since the legal system of such Islamic states is based on historical religious traditions. The main argument of Islamic states is that they are entitled to enact laws in accordance with the established norms of Islamic culture and traditions, and that they need not

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[11] Abdul Hameed Abu Sulayman, *supra* note 3, at 13.

[12] See Khadduri, M., *The Islamic Conception of Justice* (Baltimore and London: Johns Hopkins University Press, 1984) at 207.

[13] See Kourides, N., "Traditionalism and Modernisation in Islamic Law: A Review" (1972) 11 *Columbia Journal of Transnational Law* 491.

comply with some of the international norms because those norms are alien and unrepresentative of their own cultural values.[14] Thus, it is not enough to rely on international law obligations to bring national laws, including religious and customary laws, into compliance with international human rights principles. What is needed is to enhance the legitimacy of human rights standards by rooting them in the various cultural traditions; without such legitimacy, the law will not be capable of improving the status of non-Muslims in Islamic states.[15]

However, there are opposing views arguing that reforms within religion or culture are meaningless since religion and culture consist of norms which are not easy to change. Hence, reform by secular laws is the option. Though this view on its first part may be true, the secular option as a means of reform is a temporary solution because laws may be changed by political regimes, but where human rights principles are rooted and legitimised in the tradition, it would not be easy to change them.

Reconcilability is essential since Muslims claim that Islam is able to build a pluralistic society on a much more explicitly religious base; then only can one say that pluralism has been achieved. As Shepard comments:

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[14] This argument reflects the current and unanswered debate on cross-cultural diversity. It is not the scope of this research to discuss the question of cultural relativism or universality of human rights as the research shall focus on examining the inconsistencies between the two traditions in relation to rules applied to non-Muslim religious minorities and its impact on their status taking Sudan as the case study. For different views on the topic, see Donnelly, J., "Cultural Relativism and Universal Human Rights" (1984) 61 *Human Rights Quarterly* 400. As to the need to define the concept of Human Rights, read Renteln, D., "The Unanswered Challenge of Relativism and the Consequence for Human Rights" (1985) 7 *Human Rights Quarterly* 514.

[15] An-Na'im, A., "Islam, Islamic Laws and the Dilemma of Cultural Legitimacy for Universal Human Rights" in Welch, C.E. & V. Leary, eds., *Asia Perspectives on Human Rights* (Boulder: Westview Press, 1990) at 31.

> Muslims claim that Islam is able to build a pluralistic society on a much more explicitly religious base. Their past accomplishments give some plausibility to this claim. But it still remains for them to build, on the Islamic base, a pluralist society truly adequate to today's changed conditions... The point at which Muslims must begin this task and the point at which they will be chiefly judged by outsiders, is in relation to the non-Muslim minorities in the societies in which they predominate.[16]

The purpose of this study is to examine the impact of application of Sharia Islamic laws on non-Muslim rights in the Sudan in the light of international principles, mainly the principle of equality and freedom of religion.

The thesis is divided into three parts. Part I examines the effect of religious criteria on non-Muslim subjects living in the traditional Islamic state. This examination will be done with a view to emphasizing the fact that where the state criterion is religion, the consequence is reflected in differences in equality of the rights of subjects who do not belong to the same state religion. This raises issues concerning the nature of the Islamic state and sources of Sharia law to which I found it necessary to refer as the basis of traditional Sharia rules, since Sudanese courts are directed by the *Judgment (Basic Rules) Act* of 1983 to refer to these rules in interpreting or applying any law.

This Part then addresses some of the issues pertaining to the status and rights of non-Muslims under Islamic law. In examining traditional Islamic rules governing non-Muslims, reference is made mainly to original sources (Quran[17] and Sunnah) and to established rules based on such sources as interpreted by classic Islamic jurists.

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[16] Shepard, W., "Rights of Non-Muslims in Islam" (1986) 7 *Journal Institute of Muslim Minority Affairs* 307.

[17] The translation of verses of the Quran which has been referred to for the purposes of this thesis is Rodwell, J.M., trans., *The Quran* (Dutton, New York: Everyman's Library, 1968).

However, since certain rules have given rise to controversy among Islamic jurists, reference is made to rules agreed to by the majority of jurists.

The tension raised by the application of traditional rules of Sharia lies in the inconsistency arising between Sudan's responsibility to fulfil its religious obligations (the majority of its population being Muslims), and its international obligations, being a modern nation state and member of the international community. It is here that I found it necessary to make an overview of the international standards and principles which constitute a source for the rights of non-Muslims.

Part II starts by describing international principles for the protection of religious minorities, mainly the principle of equality and the freedom of religion. The extent and content of such principles are examined for the purpose of highlighting the inconsistency that arises when they are applied within the Islamic law as a result of conceptual differences in content in each tradition.

Part III examines the impact on non-Muslim religious minorities of the application of Sharia as the state law in Sudan in 1983. For this purpose reference is made to the status of Sharia during different historical periods of the Sudanese legal system. The status of international law in Sudan before and after the application of Sharia shall be examined with a view to showing its impact on the international obligations of Sudan towards its non-Muslims in the light of the international principles discussed in Part II. Specific laws enacted after 1983 based on Sharia, which affect substantial rights of non-Muslims, shall be critically examined.

The Conclusion examines the extent to which Sudan succeeded in

accommodating such inconsistencies. It shows that inconsistency in the content and extent of such principles (i.e. equality and freedom of religion) results from the fact that each operates within different norms applied in the international tradition and Islamic tradition, though similarities in the use of the concepts exist in both traditions. The thesis, however, concludes that if Sharia rules are to be applied in Sudan, then the basis should be equality for all citizens irrespective of any differences, an equality which is genuinely based on diversity.

The research is not intended to criticize or pass judgment on Sharia; it has been undertaken for academic purposes. Its aim is to describe the rules applied to non-Muslims within the context of Sharia as a legal system based on specific concepts and principles, and the inconsistencies which arise when applied by a nation state like Sudan consisting of religious diversities, in the light of international principles for the protection of religious minorities. It is to be mentioned that the emphasis is placed on the controversial issues which demonstrate inconsistency as far as non-Muslims are concerned.

Finally, to the best of my knowledge, this is the first comprehensive study to be made with regard to the topic relating to Sudan (although general reference has been made by some scholars to the problem of non-Muslims' status after the application of Sharia in 1983). However, the importance of this research arises from the fact that Sudan is claimed to have invoked international conventions in applying Sharia laws to non-Muslims in Sudan.[18]

[18] See The Report of the International Commission of Jurists in (1988) 41 *International Commission of Jurists: The Review*, at 21 and 30.

PART I: THE STATUS AND RIGHTS OF NON-MUSLIM SUBJECTS UNDER TRADITIONAL ISLAMIC LAW (SHARIA)

Chapter One: Factors Contributing to Shaping the Status and Rights of Non-Muslim Subjects in the Traditional Islamic State

1. Introduction

The rules governing the status and rights of non-Muslims constitute an important part of Sharia Islamic law.[19] These rules have been influenced and shaped by basic religious concepts in Islamic political theory, namely, the concepts of state, sovereignty and *Ummah*. These concepts are considered fundamental to the framing of the whole political, legal and social Islamic system, including the relationship between the state and its Muslim and non-Muslim subjects.[20] Before examining the status and rights of non-Muslims in Sharia Islamic law, it is thus necessary to first describe such concepts and the main sources of Sharia Islamic law with particular reference to non-Muslims.[21]

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[19] "Sharia Islamic law" is a term used in Islamic jurisprudence to denote the entire system of religious law in Islam, consisting of the Quran and Sunna as its basic sources. However, the scope of the research shall be limited to that part of Sharia law dealing with the status and rights of non-Muslim subjects. For a general description of the nature and development of Sharia Islamic law, see Coulson, *supra* note 1.

[20] The examination of these fundamental concepts will be limited to showing the extent to which they have influenced the status and rights of non-Muslims.

[21] Under Islamic law, non-Muslims are categorized into two groups. The first are those who do not possess a revealed Book. Their status under Islamic law is not the subject of this research. The other group consists of the people of the Book, that is, believers of Holy Books, e.g. the Torah and the scriptures. This research mainly focuses on the status and rights of the latter group.

2. The Concept of State in Islam

a. Religious Foundations

The traditional Islamic State existed solely for the realization of the divine will of Allah (God) revealed in the Quran and Sunnah.[22] The purpose of the state is to regulate all aspects of life in the society, notably in the political, legal, economic and social spheres, by reference to the divine will. This is established by Islamic norms deduced from the following Quranic verse:

> Muslims are those if we give them power in the land, establish the system of *sulat* (worship) and *zakat* (poor dues) and enjoin virtue and forbid evil and inequality.[23]

According to this verse, the state in Islam is characterized as temporal and religious, its function being to regulate and administer the temporal affairs of society in accordance with the divine law of God as revealed in the Quran. The divine law

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[22] The first Islamic state was established by the Prophet Muhammad in Medina after his migration from Mecca. Being the religious and political head of the state, the Prophet received revelations from God, and as a ruler, interpreted and applied them as rules of conduct for the public and private affairs of the subjects of his state. The state consisted of those who accepted his message (Muslims) and those who did not (non-Muslims) but agreed to live in the Islamic state. It was then that the question arose as to the status of non-Muslims in the Islamic state. The prophet concluded a treaty with them, called *Dhimmah*, under which they accepted the authority and sovereignty of Islam as a political system, in return for which they were guaranteed protection of their person, property and freedom of religion. The provisions of the treaty and later treaties formed the basis of the rules governing non-Muslims in the traditional Islamic state. For a detailed survey of the historical development of the Islamic state, see Najjar, F.M., *The Islamic State* (Darien Monographic Press, 1967). The state established by the Prophet in Medina became the model followed under which the Muslim ruler combined all legislative, executive and judicial powers. See Sheikh Ali, B., *Islam, A Cultural Orientation* (New Delhi: Macmillan India, 1981) at 65 et. seq, For the development of institutions of the Islamic state, see, Goitein, S.D., *Studies in Islamic History and Institutions* (Leiden: E.J. Brill, 1968) at 169. See also El Awa, M.S., *The Political System of the Islamic State* (Indianapolis: American Trust Publications, 1980); and Hitti, X.P.K., *History of the Arabs* (New York: St. Martin Press, 1970).

[23] Quran, XXII, 41.

therefore precedes the state in that it provides the basis for the state in Islam, and the source of governing authority.[24]

This raises the question of who is entitled to sovereignty in the Islamic state. Sovereignty rests in Allah (God) alone; thus, the state surrenders its sovereignty to God who is the sovereign lawgiver, since all authority is vested in Him. This is shown in the following Quranic verses:

> The authority rests with none but Allah. He commands you not to surrender to anyone save him. This the right way (of life):[25]

> They ask: "have we got some authority?"
> Say: "all authority belongs to God alone."[26]

The implications of the notion of God's sovereignty in Islam have been explained by Mawdudi, one of the leading contemporary Muslim jurists. In describing the characteristics of the Islamic state as deduced from express statements of the Holy Quran, he maintains that:[27]

> 1. No person, class or group, not even the entire population of the state as a whole, can lay claim to sovereignty. Allah alone is the real sovereign, all others are merely his subjects.

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[24] As to the category of statehood, to which the Islamic state should belong, see Khadduri, M., *War and Peace in the Law of Islam* (Baltimore: The John Hopkins Press, 1955) at 14 et. seq. See also Hasan, J., *The Concept of State and Law in Islam* (Washington, D.C.: University Press of America, 1981) at 31.

[25] Quran, III, 154.

[26] Quran, III. 154.

[27] See Mawdudi, Sayyid Abul A'la, *The Islamic Law and Constitution* (Lahore: Islamic Publications Ltd, 1955) at 738.

> 2. Allah is the real law-giver, and the authority of absolute legislation rests in Him. The believers cannot resort to totally independent primary legislation though Allah may delegate powers to them so to do in certain areas in accordance with this guidance. Furthermore they cannot modify any law which Allah has laid down, even if the desire to effect such legislation or change in Divine laws is unanimous; and
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> 3. An Islamic state must in all respects be founded upon the law laid down by Allah through his prophet. The government which runs such a state will be entitled to obedience in its capacity as a political agency set to enforce the laws of Allah, and only in so far as it acts in that capacity. If it disregards the law revealed by Allah, its commands will not be binding on the believers.

Thus, both the legal and political sovereignty in the Islamic state belong to Allah alone. However, this sovereignty was exercised by the Prophet who acted in the name of the ultimate sovereign. After the Prophet, the *Ummah* (the Muslim nation, excluding non-Muslim subjects) acted as the agent of the divine sovereign. A Caliphate (vice-regency) from the Muslim *Ummah*[28] was to act as a human agent to enforce the laws of Allah, according to the Quranic verse:

> Allah has promised such of you as have become believers and done good deeds that he will most surely make them vicar agents in the earth.[29]

However, the human agency does not possess real sovereignty since its powers are limited and defined by a supreme divine law which it has no power to change or modify.[30]

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[28] The title "Caliphates" was used for the rulers who succeeded the Prophet as governors of the Islamic state.

[29] Quran, XXIV, 55.

[30] See Mawdudi, *supra* note 27, at 219. See also Lambton, A.K.S., *State and Government in Medieval Islam* (London: Oxford University Press, 1981).

b. The Notion of *Ummah*

It has been mentioned that the traditional Islamic state is a religious and political state whose purpose is to apply the divine law as revealed in the Quran and Sunnah. The Muslim subjects of such a state constitute the *Ummah* (the Muslim nation) and they enjoy equal status and rights on the basis of their common faith in the Islamic religion, and their submission and acceptance of Sharia as the divine law of God.[31] The individual has no rights attached to his person, since his rights are determined by virtue of being a member of the *Ummah*.

This Islamic notion of *Ummah*, based as it is on a personal criterion, that is, on the person's allegiance to the Islamic faith, stems from two factors. Before the rise of Islam as a political and religious system, the people of Arabia (where Islam as a religion began) were divided into tribes. Thus, a tribal system prevailed under which the loyalty of individuals was to the tribe. The Prophet then unified these tribes into one homogenous nation, using the political and ideological thought of Islam. Besides ideology, which was the most important factor, language and historical heritage are the other two factors that contributed to this unity.[32] The ideological thought, the common heritage, and the choice of one official language, brought about the political unity and entity called the Islamic nation (*Ummah*). As described by the Quran:

> Verily, this nation of yours constitutes one nation and I am your God, therefore worship me (alone).[33]

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[31] For the concept of the *Ummah* in the Quran and in early Islamic history, see Abdullah al-Ahsan, "The Quranic Concept of Ummah" (1988) 9 *Journal Institute of Muslim Minority Affairs* 8.

[32] See Abdulrahman Abdul Kadir Kurdi, *The Islamic State, A Study Based on the Islamic Holy Constitution* (London: Mansell Publishing Ltd, 1984) at 54.

[33] Quran, 21:92. The same meaning was affirmed by the Prophet in verse 1 of his Declaration of Medina.

Because of this notion, subjects of the Islamic state are classified into two: Muslims (individuals constituting the *Ummah*), and non-Muslims (excluded from the *Ummah*) who enjoy specific status and rights by virtue of their faith.[34] However, classic Islamic jurists held differing views as to whether non-Muslims are to be considered nationals of the traditional Islamic state. Some jurists regard them as people of Dar Al Islam (i.e. nationals of the Islamic territory or state).[35] However, to the majority of classic Islamic jurists, non-Muslim subjects in the Islamic state are foreigners enjoying specific status and rights under the contract of *Dhimma*.[36]

The legal consequences of the concept of state sovereignty and *Ummah* described earlier has influenced the categorization of non-Muslim subjects into two groups: Muslim citizens, identified on the basis of their belief, which is the ideology of the Islamic state, and non-Muslim subjects, described as *dhimmis* under the *Dhimma* contract. By acquiring the status of *dhimmis*, their rights and obligations were determined by the basic sources and the provisions of subsequent treaties. The extent of the exercise of such rights was to be in accordance with the limits and standards prescribed by Islamic principles and rules of Sharia Islamic law.

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[34] Non-Muslims are classified into three categories: non-Muslims who entered the jurisdiction of the Islamic state as traders, etc; non-Muslims who live outside the jurisdiction of the Islamic state; and non-Muslims who are born in the state and granted the right of permanent residence under the *Dhimma* contract. The latter are called people of the Book (*Ahl Al-Kitab*), and, as mentioned earlier, are the subject matter of this research.

[35] Abu Hanifa held this view. See Lee-Shams Al-Aeemam Abi-Bader Muhammed Al Sarkhasi, *Al-Mabsout* (Egypt: Maktabaat Al-Saada, 1324 Hijrii) at 81.

[36] Ibn Qayyim al-Jawziya, Shams al-Din Abu Abd-Allah Muhammad ibn Ali-Bakr, *Ahkam Ahl Al-Dhimmah* (Damascus: Maktabaat Jamiat Damishq, 1961) Vol. 1 at 89.

3. The Main Sources of Sharia Islamic Law as Rules Governing Non-Muslims in the Islamic State

Sharia has been defined as the comprehensive Muslim religious law derived from the basic sources, namely, the Quran and Sunnah.[37] Sharia was mainly the direct result of the divine Quranic revelations and as such was entitled to recognition, not only as permanently valid and binding, but also as the only religiously valid legal system.[38]

The rights, obligations and status of non-Muslims (*dhimma*) are mainly determined by these two basic texts, and in addition, by treaties or contracts between the non-Muslim subjects and Caliphas of the Islamic states. A distinction, however, has to be made between treaties or contracts concluded by the Prophet, and those concluded by successive Muslim rulers, since the practice of the Prophet is part of Islamic law and is therefore unchangeable and binding on every Muslim ruler. However, subsequent treaties concluded by the Prophet's successors remain valid, and provide the flexibility necessary for the administration of matters pertaining to such a contract, as long as they are subordinate to all basic texts and practices of the Prophet.[39] Being a system of rules, Islamic law recognises a hierarchy of sources of

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[37] The term Sharia is used here because the rules of Islamic law discussed in this part are directly based on the Quran and Sunna Verses 9:29 of the Quran, in the main, regulates the status of non-Muslims in Islam. See Schacht, J., *The Origins of Muhammadan Jurisprudence* (Oxford: Oxford University Press, 1959). On the sources of Sharia, see Vesey-Fitzerald, "Nature and Sources of Sharia" in Khadduri M. & H. Liebesny, eds., *Law in the Middle East* (Washington, D.C.: Middle East Institute, 1955) at 86 et. seq.

[38] See Coulson, *supra* note 1, at 75. See also Abd al Razig Sanhuri, *Masadir al-Hag Fi al-Figh al-Islami* (Cairo: Dar Al Fikr, 1967).

[39] For examples of terms of treaties or covenants concluded with non-Muslims in the traditional Islamic states, see Tritton, A.S., *The Caliphs and Their Non-Muslim Subjects* (Oxford: Oxford University Press, 1930). See also Fazlur, R., "Concepts of Sunnah, Ijtihad and Ijmma in the Early

law. The fundamental law in this hierarchy is the Quran (the Constitution of the Islamic state), followed by the Sunnah, and then rules developed by classic Islamic jurists on the two basic sources.[40]

a. Quran

To Muslims, the Quran is the very word of God revealed to the Prophet Muhammed. It is thus considered the Constitution and the basic law of the Islamic state, from which all other rules derive their validity. God is the ultimate lawmaker, because sovereignty rests in Him, and any rules which are inconsistent with, or tend to modify, the express and clear principles of the Quran, are regarded as void and of no effect.[41] This is reflected in the Quranic verse:

> It is not for a believing man or a believing woman to have a say in any affair when it has been decided by Allah and His Messenger; and whoever disobeys Allah and his Messenger, he goes astray manifestly.[42]

The Quran, besides being a book of religious guidance for Muslims, constitutes the basis of a system of law regulating their conduct and relations with

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Period" (1962) 1 *Islamic Studies* 237.

[40] The development of Islamic law was carried through individual jurists' interpretations of basic sources in cases of uncertainty and individual reasoning in cases not provided for by main sources. These methods were adopted in accordance with principles laid down by the main sources. However, with the passage of time, these views and interpretations formed the basic juristic schools in Islamic jurisprudence, the four main ones of which are the Hanafii, Hanabli, Maliki and Shafii schools.

[41] See generally, Hassab Allah, Ali, *Usul Al Tashree Al Islammi* (Cairo: Dar Al Musaqf Al Arabi, 1982).

[42] Quran, XXX, 36. To Muslims the compilation and arrangement of the Chapters of the Quran were completed by the Prophet himself under Divine instructions. On how the Quran was compiled, see Ramadan, S., *Islamic Law, Its Scope and Equity* (London: P.R. Macmillan, 1970) at 31-33.

other non-Muslim communities in the Islamic state.

b. Sunnah

The second source of Islamic law is the Sunnah of the Prophet. The term "Sunnah" in Islamic Jurisprudence means a rule declared as authoritative, derived from the statements and conduct of the Prophet, or the approval by the Prophet of the action or practice of another as narrated in a *Hadith*. Such statements or conduct are intended to shed more light on the meaning of the Quran or to supplement its ruling.[43] The Sunnah remained an oral tradition for a long time, while the Quran was collected and recorded soon after the Prophet Muhammed's death.[44] However, in the event of inconsistency between the Quran and the Sunnah, the two must, if possible, be harmonized; otherwise, the Quran prevails.[45]

The Quran and Sunnah, considered as the Constitution of the Islamic state, have been characterized as being basically inclined towards establishing general rules without giving much detail.[46] The Quran, however, sought to establish certain basic standards of behaviour for the Muslim community, while at the same time leaving the door open to further interpretation in future cases. Such interpretations are to be upheld as long as they are not inconsistent with the Quran and the Sunnah, and as far as the Quran or Sunnah are silent about the issues on which such interpretations

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[43] See generally, Ibn Majah, Muhammed Ibn Yazid, *Sunnan al Mustafah* (Al-Qahirah: Isa al-Babi al-Halabi, 1952-1954). See also Abu Da'ud, *Sunan* (Cairo: Dar al-Fikr al-Arabi, 1935).

[44] See Schacht, *supra* note 37, at 3 et. seq.

[45] See Ali, *supra* note 41, at 48.

[46] Ramadan, *supra* note 42, at 54.

are sought.[47] The other sources that follow in the hierarchy are *Ijmma* and *Qiyas*, the two being the product of the *Ijtihad* (i.e. the exercise of juristic reasoning), of the jurists of the second and third centuries of Islam.[48]

c. *Ijmma* (Consensus)

Ijmma originally meant the consensus of the companions of the Prophet and their immediate successors, and was used later to mean the agreement of all Muslim jurists on a religious or legal matter. Its legitimacy as a source of Islamic law is based on the statement of Muhammed that: "My people never agree upon error."[49]

It is an accepted principle in Islam that the interpretations of the Quran and Sunnah having the unanimous approval of the companions of the Prophet, the decisions of the Caliphas and the unanimous acceptance of the Muslim community, are binding on all for all times. Following this principle, *Ijmma* is defined as the general consensus of Islamic scholars of a particular age in relation to the legal rule correctly applicable to the situation.[50] The limitation on the authority of *Ijmma* is that it must not be in conflict with the Quran and the Sunnah. Although *Ijmma* is accepted as a source of Sharia, considerable controversy exists as to its meaning and

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[47] The interpretations are those made by the first founding jurists of the four Islamic schools, namely, Maliki, Shafi'i, Abu Hannifa, and Ibn Hanbal. For the debate by these schools over the "sources" of law, see Khadduri, *supra* note 24, at 34 et. seq.

[48] Coulson, *supra* note 1, at 11.

[49] See Al-Ghazali, Al-Mustafa, *Mai Ilm al-Usul* (Cairo, 356/1937) Vol I, at 110 and 111. After the Prophet, the first four Caliphas passed rules for the administration of the Islamic state, which are considered precedents (*Ijmma*). Some of these rules applied to non-Muslim subjects and regulated their status and rights. For the details of such rules, see Tritton, *supra* note 39.

[50] Rahman, *supra* note 39, at 60.

source of Sharia, considerable controversy exists as to its meaning and scope.[51]

d. *Qiyas* (Analogy)

Qiyas is a method or technique followed by Islamic jurists entailing the exercise of individual reasoning to decide cases not covered by the Quran. It must not be inconsistent with the spirit or rules and principles of Sharia. The technique used in the application of *Qiyas* was to deduce the similarities between the case in issue and the one in the Quran, and thereby reach a decision on the strength of a common essential feature called the *Illa* (reason).[52] *Qiyas* is one of the techniques of *Ijtihad*, and has been recognised by the Prophet in cases not expressly provided for in the Quran or Sunnah.[53]

These, then, are the main sources of Sharia rules which determine and shape the status and rights of non-Muslims in the Islamic state. In sum, they are the Quran

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[51] Hassan, A., "The Classical Definition of Ijmma: The Nature of Consensus" (1975) 14 *Islamic Studies* 261-70. See also Khadduri, M., "Nature and Sources of Islamic Law" (1953) *George Washington Law Review* 3 at 22.

[52] See Ramadan, *supra* note 42, at 65.

[53] The background to the use of *Ijtihad* as a source of Islamic law is provided in the following narration of a dialogue between the Prophet and a judge."When the Prophet appointed Mu'az as *Quadi* (Judge) of Yemen, he asked him what rule he would follow when he had to make a decision. Mu'az said he would look for the rule in the book of Allah ." "And if you do not find the answer in the Book?" asked the Prophet, "I shall seek for it in the example of the Prophet." "And if you still lack answer?" "I shall exercise my own judgment (*Ijtihad*)." "That is the right way," he was assured by the Prophet. See Khadduri, *supra* note 24, at 11, n. 10.

Ijtihad had contributed to the development and elaboration of Sharia during the eighth and ninth centuries, AD. However, the gate of *Ijtihad* was closed in the tenth century. For the controversy among contemporary scholars as to whether the gate of *Ijtihad* was closed, see Hallaq, W., "Was the Gate of Ijtihad Closed?" (1984) 16 *International Journal of Middle East Studies* 3. See also Weiss, B., "Interpretation in Islamic Law: The Theory of Ijtihad" (1978) 76 *The American Journal of Comparative Law Quarterly* 208; and Rahman, *supra* note 39, at 237.

and Sunnah, and the rules applied to non-Muslims by Caliphas and jurists as a result of *Ijmma* or *Ijtihad*.

Chapter Two: The Status and Rights of Non-Muslim Subjects Under the *Dhimmah* System

1. Introduction

When considering the general status and rights of subjects in the traditional Islamic state, the main characteristics of the state in Islam and its influence in shaping such status and rights should be borne in mind. It is the religious and ideological nature of the Islamic state that has resulted in the classification of subjects into two classes of people, based on their faith. Muslim subjects constituting the *Ummah* enjoy full rights in running the state, and participate in shaping its policies. The second class consists of non-Muslims, who are divided into two groups: The first group consists of the *Ahl Al-Kitab* (people and believers of the Holy Books - mainly Jews and Christians), also called *dhimmis*. The latter term refers to the contract or compact of *Dhimmah* under which non-Muslims were guaranteed permanent residence in the Islamic state. The second group of non-Muslims are the non-believers. They have no rights or status in the Islamic state, and were denied the status of *dhimmis*, since they either had to choose Islam or be fought.[54]

2. The Status of Non-Muslims Under The *Dhimmah* System

The legal framework of the *Dhimmah* system in Islam has evolved progressively since the Prophet's days, as a result of historical incidents, later

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[54] The term "non-Muslim" is used by most contemporary Islamic scholars to refer to believers of the Holy Books (i.e. Christian and Jews). The term shall be used in the same sense throughout this research. On the debate among classic Islamic jurists as to whether other believers are to be included in the *dhimma* system, see Ibn Qudama, Abd Allah Ibn Ahmad Ibn Muhammad, *Kitab al-Mughani*, 3rd Ed. (Cairo: Tabat Edarat Al Manar, 1367 Higiri) Vol. 3 at 500.

interpretations of Quranic verses by classic Islamic Jurists, and the practices of the Caliphas (rulers) of the first traditional Islamic states. All these contributed to the development of a set of rules known as *Akham Ahl Al Dhimma* governing non-Muslim subjects in the Islamic state.

The Jewish and Christian tribes who refused to convert to Islam during the life of the Prophet surrendered under terms of a treaty (compact) known as *Dhimmah*,[55] according to which they were permitted to have permanent residence and engage in farming activities on the condition that they hand to the Prophet half of their product as *Jizya* (poll tax); in return, he undertook to respect their religion and protect their life and property. With the increase of Arab military conquest and spread of *Jihad* (holy war) and the Islamic state, the treaty of *Dhimmah* provided the basis for defining the legal status of non-Muslim religious subjects within that state.[56]

Generally speaking, under the *Dhimmah* treaty, non-Muslims were under an obligation to pay *Jizya*, in return for which their person and property were protected. They were subject to Islamic law (Sharia) in public matters, while their personal matters were governed to a great extent by their own religious laws. However, when Muslim interests were involved or the non-Muslim parties submitted to the

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[55] The word "*Dhimmah*" literally means those whose obligations are a trust upon the conscience and pledge of the state or the nation. See Ramadan, *supra* note 42, at 154. For a historical account of the political and social conditions of *dhimmis* at different periods of Islamic conquest, see Bat Ye'or, *The Dhimmis, Laws and Customs Under Islam* (Fairleigh: Dickinson University Press, 1985).

[56] For models of such treaties, see Tritton, *supra* note 39, at 6 et. seq. See also Lewis, B., ed., trans., *Islam from the Prophet Muhammad to the Capture of Constantinople Religion and Society* (New York: Oxford University Press, 1987) at 217 et. seq.

jurisdiction of Muslim law, Sharia was applicable.[57]

The *Dhimmah* treaty was generally intended to be a permanent treaty. However, there are circumstances in which a non-Muslim was to lose the status of *dhimmi* and consequently terminate the treaty. Classic Islamic jurists held different views on the cases in which "dhimmification" comes to an end. To some, this included rebellion; espionage in favour of, and granting asylum to, enemies of the Islamic state; outraging the sanctity of God, His Messengers and His Books; engaging in brigandage; and denial of the obligation to pay *Jizya*.[58] To other jurists, the treaty ends when the *dhimmi* converts to Islam. On the commission of any other offence, the *dhimmi* should then be penalised according to the nature of act committed.[59] However, the majority of Islamic jurists are of view that a *dhimmi* would be deprived of his status in two cases: first, if he leaves the Islamic state and joins the enemy; and secondly, if he revolts against the state.[60]

"*Al-Dimmah*" as a term was originally used before Islam as a social principle, that is, a principle of honour governing individual relations between the tribes of Arabia. However, the Prophet, by concluding the *Dhimmah* treaties, gave them a religious characteristic by assuming a divine moral obligation to fulfil God's covenant with non-Muslim subjects. After the Prophet, the *Dhimmah* treaty was strictly

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[57] The *Dhimmah* system as such has been described as self-rule. See Goiten, S.D., "Minority Self-Rule and Government Control in Islam" (1970) 3 *Studio Islamica* 105.

[58] The Shafia school holds this view. Quoted by Zaydan Abdl-Al-Karim, *Ahkam Ahl-Al dhimiyin wa-al-Musta'maiun fii Dar al-Islam* (Iraq: Maktabat Al Quds, 1982) at 42.

[59] This view is held by the Hanifia school. See Zaydan, *supra* note 58, at 43.

[60] This view is held by Mawdudi, *supra* note 27, at 306-307.

regarded as a legal instrument defining the legal status and rights of non-Muslims in the Islamic state.[61]

3. The Rights and Obligations of Non-Muslim Subjects

The word *Hagg* (right) is defined in Islamic jurisprudence as the command or injunction of Allah (God).[62] However, according to its most common definition, "*Hagg* is a benefit, or advantage (material or otherwise) totally enjoyed by whoever proves by his claim to it, to the exclusion of others, and that the exclusive enjoyment of it be approved by Sharia law."[63] According to this definition the origin of all rights is Allah since all Sharia commands originate from him. All rights have corresponding duties in Islamic jurisprudence. These rights are at the same time regarded primarily as duties because they are the commands of Allah.[64] Thus, the individual as such acquires rights which are conferred on him by Allah.

According to the above, the rights and duties of the non-Muslim subject are the commands of Allah and are consequently inalienable, being of a divine source.[65] The Quran formed the basis from which rules applied to non-Muslims derive their validity. In addition, the terms of the treaties concluded between the Prophet and his non-Muslim subjects were considered obligations which all Caliphas (rulers) of the

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[61] For more elaboration on the development of the concept of *Al-Dhimmah*, see Sulayman, *supra* note 3, at 8.

[62] See Ali Alkhafif, *Al-Hagg Wal Dhima* (Cairo: Dar al-Fikr al-Arabi, 1945) at 193.

[63] Sanhuri, *supra* note 38, at 14.

[64] On the concept of "right" in Islam, see Ibn Taymiyia, *Al-Siyasa Al-Sharriyah* (Cairo: Dar al Fikr Al-Arabi, 1958) at 34.

[65] See Mawdudi, *supra* note 27, at 153.

Islamic state had to honour. In practice, though, some of the rules which were applicable to non-Muslims at different historical periods after the Prophet, varied in accordance with the policies adopted by the Caliphas.[66]

Non-Muslims were subject to a number of obligations which were characteristic of the *Dhimma* contract. These obligations have been classified by Al-Mawardi into two categories. The first consists of obligations which are absolutely necessary, the breach of which terminates the contract. The obligations of the second category, on the other hand, are considered desirable, that is their violation, though not terminating the contract, attracts penalties.[67]

a. The Obligation to Pay *Al-Jizyah* (Poll-tax)

Al-Jizyah is a form of tax payable by an adult non-Muslim male subject who was a permanent resident, and able to work under the *Dhimmah* contract. The amount payable was to be specified by the ruler of the Islamic state. This obligation was considered the most important provision in the contract,[68] being understood by classic Islamic jurists as an obligation provided for by the Quran itself:

> Fight those people of the Book who do not believe in God or the last Day, nor hold as forbidden what has been forbidden by God and His

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[66] For a general account of the treatment and conditions of non-Muslims at different historical periods of the Islamic states, see Tritton, *supra* note 39.

[67] Mawardi, Abu al-Hassan Ali ibn Muhammed ibn Habib, *Kitab al-Ahkam al-Sultaniyya* (Bonn, M. Euger, 1853) at 250 et. seq.

[68] *Jizya* was not imposed on non-Muslims until late in the Medina stage of the Prophet's life.

> Apostle (the Prophet of Islam), nor acknowledge the Religion of Truth (Islam) until they pay *Jizya* with willing submission and feel themselves subdued.[69]

Jurists hold different views on the purpose for the payment of *al-Jizya* by non-Muslim subjects. There are those who hold the view that the payment of *Jizya* was a form of punishment for their disbelief and humiliation.[70] The majority of jurists, however, are of the view that *Jizya* was required from non-Muslims in exchange for the protection of their property and persons by the Muslims, because non-Muslims were exempted from fighting in the Muslim army. That is why some jurists call the *Jizya* "protection tax".[71] Non-Muslims were exempted from payment of *al-Jizya* on conversion to Islam.[72]

In addition to payment of *al-Jizya*, they had to submit to the rules of Islam. The other obligations, the breach of which terminate the *Dhimmah* contract, include the following: the *dhimmi* should not attack the religion of Islam or show any disrespect for Muslim practices; they should not injure the life or the property of a Muslim, nor abjure his belief or induce him to apostatize; the *dhimmi* is not permitted to marry a Muslim woman or have sexual intercourse with her (*zina*); they are also not permitted to assist the enemy, give refuge to a foreigner, or harbour spies.

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[69] Quran, verse 9:29.

[70] See Ibn Qayyim al Jawziyya, *supra* note 36, at 25.

[71] See Al-Mawardi, *supra* note 67, Vol. 10 at 81 et. seq.

[72] In addition to *Jizya*, non-Muslims were under an obligation to pay land and trade taxes. See Dennett, D.C., *Conversion and the Poll Tax in Early Islam* (Cambridge: Harvard University Press, 1950). The *Jizya* ceased to exist only when it was abolished in the Ottoman Empire in late 1839.

The second category of obligations, the breach of which attracts punishment, includes prohibition from practicing usury in their business transactions with Muslims. *Dhimmis* are also not permitted to drink wine or eat pork in public.[73]

The above obligations had evolved in the form of decrees issued by Caliphas and based on the Quran and Sunnah as interpreted by classic Islamic jurists.[74]

b. Freedom of Religion

The nature, content and extent of the term "freedom of religion" in Islam has been defined by classic Islamic jurists in the light of the Quran and Sunnah. The nature and purpose of the Islamic state had also contributed to the specification of the limits on the exercise of such freedom. The general principles adopted in Islam towards other faiths is reflected in Quranic teachings:

"Let there be no compulsion in religion"[75]

The religion of Islam strictly recognises all other prophets before it. According to the above verse, a non-Muslim is to choose either to convert to Islam or adhere to his religion. However, the consequence of choosing not to convert to Islam will

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[73] Other social restrictions in the form of obligations were imposed on non-Muslims: they were required to wear distinctive clothing distinguishing them from Muslims; they are not permitted to ride on horse back or carry weapons; their houses should not be higher than Muslim houses; they should not ring their church bells loudly nor raise their voices loudly in prayer; and their dead should be buried in places away from Muslim quarters. These rules were provided for in the Covenant of Omer which is recognised as governing the status of non-Muslims in Islam. See Khadduri, *supra* note 24, at 196-198. See also Ibn Qudama, *supra* note 54, at 619.

[74] For the general nature of these decrees, see Tritton, *supra* note 39.

[75] The Quran: XI: 133 and 136.

subject him to a status of *dhimmi* with specified rights and duties in the Islamic state. In fact, it is the very nature of the Islamic state that has contributed to shaping the rules relating to the content and extent of freedom of religion, a freedom which entails the choice, practice and preaching of one's religion. The *dhimmi* status has been established for the sole purpose of spreading Islam, and Islam therefore ranks as the superior religion in the state. According to the Quran:

> Whoso desireth any other religion than Islam, that religion shall never be accepted from him, and in the next world he shall be among the lost.[76]

This superior treatment of Islam has been acknowledged by a Muslim scholar in his observation that: "Islamic tradition and practice indicates a definite preferential treatment and higher status for the Muslim religion in the Muslim state."[77]

Consequently, limitations have been imposed on non-Muslims relating to the practice and preaching of their religion in the Islamic state. Among these were the prohibition from ringing church bells loudly or raising their voices loudly in prayer. In practicing their religion, non-Muslims were not allowed to preach to Muslims or to convert them, or to criticize other religions and convert others to Islam. They were also not allowed to construct new churches or worship buildings, or to exhibit their Holy Books or crosses.[78] Islamic jurists are of the view that these restrictions, when

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[76] Quran III:85.

[77] Bassiouni, C., "Sources of Islamic law and the Protection of Human Rights in the Islamic Criminal Justice System" in Bassiouni, C., ed., *The Islamic Criminal Justice System* (London: Oceana Publications, 1982) at 21.

[78] For the history of the treatment meted out to the *dhimmis* on account of their belief, see the Covenant of Omer, preserved in the form of a letter submitted by the Christians of Syria to Abu Obeida, and ratified by Omer. The text is translated and quoted in Tritton, *supra* note 39, and Bat

included in the contract of *Dhimma* as obligations, are conditions the breach of which affects the validity of the contract.[79]

c. Participation in Public Offices and Affairs

The participation of non-Muslim subjects in holding offices and formulating state policies in the Islamic state is determined by the fact that the state is essentially based on Islam as an ideology, and its objective is to establish that ideology. Consequently, the right to shape its policies and run its affairs is limited to those who subscribe to that ideology. Non-Muslims as such do not have a right to participate in shaping the fundamental policies of the state or to influence its policy, nor are considered qualified to occupy key offices.[80] The ineligibility of non-Muslims to hold public offices is based on Quranic verses and a *Hadith* (Prophet's saying), according to which an infidel ought never to exert authority over a Muslim.[81] The basic verse, however, reads:

> O you who believe, obey God, His Apostle and **those set in command from among you.**[82] (Emphasis added)

According to the above verse, it is to be understood that the supreme authority after the Prophet is confined to those who are set in command from among

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Ye'or, *supra* note 55, at 53 et. seq.

[79] See Ibn Qudama, *supra* note 54, at 613.

[80] See Mawdudi, *supra* note 27, at 264.

[81] See Ibn al-Qayyim al-Jawziyya, *supra* note 36, at 208.

[82] Quran, IV: 59.

the believers. This is because the Islamic state is an ideological state and Muslim obedience can only be to the command of an authority that is capable of translating the principles of such ideology into practice. However, it should be pointed out that "those in command" have not been specifically identified by either the Quran or the Sunnah. These basic sources do not prescribe any specific form of government for the Islamic state, but only set out general principles.

However, the phrase "those in command" has been interpreted by Islamic jurists to refer to the post of the head of the Islamic state selected from Muslims of the *Ummah* (Muslim nation). Since non-Muslims are not considered members of the *Ummah*, they are not qualified to occupy key posts, which include, in addition to the head of state, governor of a province, judge, head of any government department, and commander of the army.[83] However, other Muslim jurists differentiate between the type of posts on the basis of the nature of the authority exercised. Under Islamic political theory, authority is divided into delegable authority (*Tafweedia*), and executive authority (*Tanfeezia*). These jurists argue that non-Muslims may occupy posts in which the authority is only of an executive nature. Al-Mawardi, who shares this view with other Muslim jurists, states that "[t]he Caliph may lawfully nominate non-Muslim subjects as ministers and members of executive councils."[84]

Non-Muslims were also not qualified to be elected as members of advisory councils, or to give their opinion in the election of the head of the Islamic state, or in other political matters, because they are not members of the *Ummah* (source of

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[83] All Islamic jurists held the view that the offices of head of state and head of army should be occupied by a Muslim. See Al Mawardi, *supra* note 67, at 37 and 57.

[84] Al Mawardi, *supra* note 67, at 33 and 44.

authority), and were not so appointed during the life of the Prophet and his successors. However, non-Muslims had their independent advisory council to decide on matters pertaining to their own affairs.[85]

d. Law Applicable to Non-Muslims

Judicial autonomy was prescribed for non-Muslims in personal matters; their religious laws were applicable in such matters, except in two cases. First, where one of the parties is a Muslim, then Islamic law was applicable. Secondly, if both parties were non-Muslims and submitted to Muslim jurisdiction in a personal matter, then Islamic law was applicable.[86] In cases other than personal matters, the view unanimously held by Islamic jurists is that non-Muslims in the Islamic state are subject to the application of Islamic public law as state law which does not recognize any other superior rules. It is to be recalled here that the *Dhimmah* contract was valid only on the fulfilment of two conditions: payment of *Jizya*, and acceptance to submit to Islamic law. This characteristic of Islamic law as territorial and personal law together enabled non-Muslim communities as subjects of Islamic state to enjoy relative autonomy in running their religious and personal affairs.

In civil matters, non-Muslims are, like Muslims, subject to the rules of Sharia and to the Islamic jurisdiction of the courts. However, non-Muslims are subject to specific rules by virtue of their faith. While a Muslim man can marry a non-Muslim woman, a non-Muslim man is not allowed to marry a Muslim woman. Such a contract

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[85] This system has been described as forming a state within the Islamic state, since the minority owed obedience to heads of their councils. See Goiten, *supra* note 57, at 109 et. seq.

[86] See Al Qurtabi, Abi Al-Walid, *Bedayat Al-Mujtihad* (Tabaat Al Kharji, 1329 Hijrii) Vol. 2, at 395.

of marriage is void under Islamic personal law, and children born out of such marriage are regarded illegitimate under the law. A non-Muslim cannot inherit from a spouse or Muslim family.[87] A non-Muslim, though allowed to possess and use pork and alcohol (these are prohibited for a Muslim), is prohibited from selling it to a Muslim.

It is to be mentioned here that in matters applicable to non-Muslims by virtue of their faith, Islamic jurists laid down specific rules derived from Sharia Islamic law, such law being considered as a general divine law applicable to all.[88] However, adopting criteria of belief or religion in the application of certain rules had led to unequal treatment of non-Muslims before the law. For example, under the Islamic rules of evidence, the testimony of a non-Muslim is inadmissible in criminal offenses. The reason for this is that testimony in Islam is regarded as a form of *Wilaya* (authority); however, as the Quran maintains, non-Muslims have no *Wilaya* over a Muslim and consequently do not have the legal capacity in Islam to testify against a Muslim. Islamic jurists hold different views as to whether a non-Muslim's testimony is admissible in cases of necessity and civil transactions, but they are agreed that non-Muslim testimony is inadmissable in criminal cases and in personal matters involving Muslims. However, all Islamic jurist agree that a Muslim is competent to testify in cases involving non-Muslims.[89]

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[87] See Abu Zahara, *Ahmmayat Ageed Al Zawag Wa Asurah* "(Marriage Contract and Its Consequences) (Cairo: Maktabat Mekaymer, 1957) at 192 et. seq. See also Ibn Qudama, *supra* note 54, at 294.

[88] See Ibn Quayyim, *supra* note 36, at 728 et. seq.

[89] See Ibn Qudama, *supra* note 54, at 184 et. seq. See also Salama, M.M., "General Principles of the Law of Evidence in Criminal Matters" in Bassiouni, *supra* note 77, at 109.

Under Islamic penal laws, penalties applicable to non-Muslims are those applicable to Muslims in similar cases. For example, payment of *Diyia* (a monetary compensation paid to surviving blood relatives of a victim of unintentional killing) for the unintentional killing of a *dhimmi* by a Muslim, is lower than for a similar offence committed by a Muslim against another Muslim.[90] In case of *zina* (sexual offenses) committed by a *dhimmi* against a Muslim woman, the punishment is death, while the penalty of lashing is prescribed if a similar offence is committed by a Muslim on another Muslim.[91] In addition, the penalty (*hudd*) for the offence of unproven accusation of fornication, is much more severe in cases where the accused is a Muslim, than in cases where the accusation is made against a non-Muslim.[92]

e. The Right of Non-Muslims To Benefit From The Public Islamic State Treasury (*Bayt El Mal*)

Islamic jurists held different views as to whether a non-Muslim, if sick, unemployed, of age or poor, is entitled to monetary assistance from the public treasury of the Islamic state. However, the majority are of the view that non-Muslims are not entitled by virtue of their faith, since such assistance is reserved for Muslims.[93]

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[90] Where a *dhimmi* unintentionally kills a Muslim, the compensation payable is the same as that paid by a Muslim who unintentionally kills another Muslim. The exact amount of *diyia* payable is not unanimously agreed upon among Islamic jurists. See Zaydan, *supra* note 58, at 275 et. seq.

[91] *Ibid.*, at 309.

[92] See Ibn Qudama, *supra* note 54 (Vol. 2), at 654. *Huddud* (*hadd* in singular) are penalties expressly provided for in the Quran and Sunnah, and agreed upon by the majority of Islamic jurists, for the serious offenses of adultery, theft, apostasy, unproven accusation of fornication, drinking alcohol (intoxication) and armed robbery. The penalties range from death and crucifixion to amputation and lashing, and are intended to protect person, property, religion and chastity.

[93] *Ibid.* There are other rules applicable to non-Muslims in the Islamic state. However, reference here is made to the basic rules that directly affect the status and rights of non-Muslims.

4. Conclusion

It has been shown that the society before Islam was based on a secular tribal system. However, the religious state founded by Mohammed was based on divine rules which united all tribes under one religion (Islam), to which all should adhere irrespective of other differences.

It has been shown that the status and rights of non-Muslims in Islam are influenced and shaped by the concept of the state in Islam, sovereignty and the political structure of the state, under which Muslims as a whole constitute the *Ummah* or Islamic nation. Thus non-Muslims, who are the subject matter of this research, are called *Ahl-al-Kitab* (People of the Book, mainly Christians and Jews). By virtue of the *Dhimmah* treaty they acquire a permanent residence with a legal status known as *dhimmis* in the Islamic state. Under the *Dhimmah* they are generally guaranteed security of their persons and property, and a degree of autonomy to practice their own religion and conduct their personal affairs in accordance with their own personal laws. In exchange for these, non-Muslims undertake to pay *Jizya* and submit to Islamic sovereignty in all other public affairs.

This political status and allegiance to one's community resulted in the situation whereby non-Muslims in the Islamic state owed allegiance to two social orders and were subject to two legal systems - their own in personal matters, and that of the Islamic state. This is a direct consequence of the application of religion as a criterion for determining the status and rights of the subjects of a state.

It has been shown that non-Muslims under traditional Islamic law are subject

to their religious law in personal and private matters, and also subject to Islamic law in public matters. However, as a subject of the Islamic state, the non-Muslim is not regarded as having the same legal capacity as a Muslim. Thus, he is not equal in rights to a Muslim. As a result of the ideological nature of the state, a non-Muslim is not considered part of the Muslim *Ummah*, which exists as a source of authority and the agent of the divine sovereign on earth. Consequently, its members alone have the right to elect a ruler from among them to apply and enforce the word of God as revealed in divine sources, and to rule in accordance with its rules and norms. Non-Muslims also have no right to participate in shaping the policy of the state. By virtue of their belief they are not legally qualified to occupy key posts, especially those through which they can influence the policy of the state, notably the head of the state, army and Judiciary. They do not possess full legal capacity in matters of testimony, criminal law and marriage. Although they are allowed to practice religion in private, certain restrictions are imposed on them.

It has also been shown that the basic sources of these rights are the Quran and Sunnah, together with the rules applicable to the other treaties concluded by the Caliphas at different historical periods of the Islamic state. In fact, the rules applicable were rather the result of the interpretation of the basic sources by classic Islamic jurists which constituted the whole of Sharia Islamic law. It has also been shown that the main characteristic of the Islamic law is its territorial and personal nature. Under the Islamic law, the state has absolute authority in dictating the law, which is obligatory on all subjects within the Islamic territory irrespective of their religion. On the basis of the predominance of Islamic law certain rules were applicable, for example, the Muslim judge is competent to apply Islamic law in cases where one of the parties is a Muslim, or if both parties, being non-Muslims, submit

to Islamic jurisdiction. The same rule, however, does not apply to Muslims (i.e a non-Muslim is not competent to have authority to act as a judge over a Muslim.) This characteristic of Islamic law as the territorial law of the state with its rules based on religious criterion, raises the question as to the status and rights of non-Muslims under such law. As such, non-Muslims in Islam are regarded as tolerated groups. Tolerance is constructed in Islam in a way as have been shown, while permitting diversity. However, such tolerance is shaped by the Sharia values as the dominant legal system.

The rules of Sharia and the status of non-Muslims in the traditional Islamic state as described above is not only of historical interest. It is important to mention that with the revival of the establishment of a traditional Islamic state and the application of Sharia rules, the status of non-Muslims is considered by both Muslim and non-Muslim scholars as being one of the controversial issues under the modern nation state. Moreover, the status of non-Muslims in an Islamic state now has its international implications, being in conflict with international principles for the protection of religious minorities. Of particular relevance here is the principle of equality between citizens regardless of belief.

This conflict arises particularly as a result of the application of the notion of *Ummah*, the effect of which is the classification of the subjects of the state into two, based on a personal criterion of one's allegiance to the Islamic faith. Consequently, Muslims are the only citizens with full rights in the state, while non-Muslims are not considered citizens with full rights. As described by Mawdudi:

> Islam does not divide people on the basis of tribe, race, colour, language or class. It differentiates between them on the basis of a

> principle and an ideology. And whoever accepts the ideology which is its basic principles, its raison d'etre, governing all its actions, etc, becomes entitled to the rights of full citizenship.[94]

The conflict has been described by Coulson, who states that "any Muslim country, however, which might wish to preserve the basic ideal of a religious state as wherein all relationship are regulated by the authority of Islamic religious command must accept the fact stated that the doctrines of the medieval texts invested with a final and indisputable authority is to be revised in light of a new and liberal interpretation of the original sources of Islamic law in the Quran and the traditions of the Prophet,[95] so as to provide a basis of equality between the citizens of the modern nation state irrespective of any differences. This conflict between the rules of Islamic law and international principles for the protection of non-Muslims shall be examined in the following pages with specific reference to the status of non-Muslims in Sudan after the application of Sharia as state law in 1983.

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[94] Mawdudi, *supra* note 27, at 201.

[95] Coulson, *supra* note 1, at 60.

PART II: THE INTERNATIONAL PROTECTION OF RELIGIOUS MINORITIES AND THE ISLAMIC APPROACH

Chapter Three: International Principles for the Protection of Non-Muslim Religious Minorities and the Islamic Approach

Introduction

Two main general principles are considered the source of rights and the basis of rules for the protection of non-Muslim religious minorities in international law. First is the principle of equality or non-discrimination on grounds of religion or belief. The second is the right to freedom of religion and belief. These principles were cited by the Permanent Court of International Justice in its advisory opinion in the case of *Minority Schools in Albania*, when it examined the purposes of treaties for the protection of members of minorities in general under the League system:[96]

> The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a state, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.
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> In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.
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> The first is to ensure that nationals belonging to racial, religious or

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[96] For review of treaties see Capotori, F., *Study of the Rights of Persons Belonging to Ethnic Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub. 2/ 384/ Rev. 1. For a discussion of some of the provisions of these treaties, see McKean, W.A, *Equality and Discrimination Under International Law* (Oxford: Clarendon Press, 1983, New York) at 46 et. seq. For a detailed analysis of the League system and reasons for its failure to protect minorities generally, see Thornberry, P., *International Law and the Rights of Minorities*, (Oxford; New York: Clarendon Press, 1992) at 38 et. seq. See also Chaszar, E., *The International Problem of National Minorities* (Indiana: Indiana University of Pennsylvania, 1988) at 2.

linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the state.

The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics. These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the later were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.[97]

These principles were also affirmed in the United Nations Charter and the Universal Declaration.[98] under the defence of human rights, by giving a broader scope to the principle of human equality and dignity which inspired minorities treaties under the League.[99] The United Nations' purpose is the protection of the dignity of the human person, by providing for the respect and protection of individual rights irrespective of religious or other differences. Consequently, individuals were brought under the protection of international law.[100] Article 55(c) of the United Nations Charter enjoins all member states to promote "universal respect for all without distinction as to race, sex, language or religion." The Universal Declaration,[101] after reaffirming in Article 1 that "all human beings are born free and equal in

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[97] *Minority Schools in Albania* (1935) P.C.I.J. Ser, A/B. No. 64. at 17 et seq.

[98] *Supra* note 6.

[99] The basis of the League of Nations system for the protection of religious minorities consisted of a series of treaties under which states which had minorities, accepted provisions relating to the treatment of minorities groups and at the same time recognized the League as guarantor. See De Nova, R., "The International Protection of National Minorities and Human Rights" (1965) 2 *Howard Law Journal* 285.

[100] The issue of collective versus individual rights of religious minorities shall not be discussed here, since the emphasis is on the individual's right as member of the minority group. For a discussion of the issue, see Sanders, D., "Collective Rights" (1991) 13 *Human Rights Quarterly* 368-386.

[101] *Supra* note 6.

dignity and rights", lays the basic principle in Article 2:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The first international instrument providing for the legal protection of religious minorities is the International Covenant on Civil and Political Rights, 1966.[102] Article (2) of the Covenant provides for the basic principle of non-discrimination on grounds of religion, while Articles 18 and 27 provide for freedom of religion as a special protection for religious minorities. State parties to the Covenant are thus legally bound to implement such principles in their national laws. However, these principles only vaguely identified the specific rights of religious minorities. There was thus a need for more detailed guidance in the application of general principles. Two Declarations were passed to address this need: the Declaration on the Elimination of All Forms of Discrimination Based on Religion or Belief, 1981,[103] and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992.[104] Though the two Declarations were considered as creating a moral obligation, yet their provisions give specific content to the right to freedom of religion.

In fact, the issue of the protection of non-Muslim religious minorities in international law is inspired by the principles of equality (or non-discrimination) and

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[102] Supra note 8.

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

[104] United Nations General Assembly Resolution 47/135, adopted without a vote on 18 December 1992. For full text of the Declaration, see (1993) 14:1-2 *Human Rights Law Journal* 54-56.

religious freedom, both of which are well established principles of international human rights law. These two principles are central to the determination of the nature, content and extent of minority rights under international law. However, non-Muslim rights in an Islamic state are determined and influenced by a number of factors which account for their inconsistency with international principles. Since international law norms are considered the yardstick to which all municipal laws of states should conform, the importance of the question concerning the protection of non-Muslims arises particularly upon the application of Islamic rules which are inconsistent with such norms. Thus, it is necessary to show the difference in the approach towards the principles in each tradition by examining the notions of equality and freedom of religion. In fact, the content of such notions in Islam cannot be defined in isolation from the religious, political and social factors prevailing, as these terms denote different contents with reference to specific norms in Islam.

I shall seek to explain in section I and II the content of equality and freedom of religion as expressed in legal terms in the Quran, its underlying rules and factors as interpreted by classic Islamic jurists and accepted as binding by Muslims.[105]

[105] Since it is beyond the scope of this research to accommodate all the philosophical views about the two notions of equality and freedom of religion in each tradition, reference to some of the main views shall be made as far as it suffices to elaborate the differences in the term between the two traditions. This will be done with a view to setting the underlying norms and values indicating the scale of inconsistency.

I. EQUALITY

A. The Notion of Equality in Western Tradition

1. Theories of Equality

The term "equality" is a vague term used by philosophers to describe a variety of legal implications; each description denotes a different degree of protection and produces different results. The notion of equality is reflected in the writings of philosophers such as Rousseau, Aristotle, Laski and Rawls. All of these writers share the view that equality is an inalienable right. However, to them equality is not absolute but may entail differences in treatment.

The importance of the principle of equality in western tradition lies in the fact that it is considered to be deeply rooted in human thought. It goes back to the natural law doctrine of the Stoics who postulated in the name of universal reason the equality of individuals. Historically, the assertion of natural rights has often stemmed from a humanitarian belief in the equality and dignity of all men, and has been linked to a revolt against the state or authority.[106]

To Rousseau, equality and freedom are inalienable rights. Men unite under a social contract, in order to have their freedom and equality guaranteed by the state.

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[106] For an exposition and analysis of the natural law theory and its development, see Friedmann, W., *Legal Theory*, 5th Ed. (London: Stevens and Sons, 1967) at 95 et. seq. With changing social and political conditions, notions about natural law have changed. The only thing that has remained constant is the appeal to something higher than positive law. This theory has had a significant influence on the status and legitimacy of human rights as part of the international law system. See Lauterpacht, H., *International Law and Human Rights* (London: Stevens and Sons, 1950). For the effect of the theory on sources of human rights, see Shetack, J.J., "The Jurisprudence of Human Rights" in Meron, T., ed., *Human Rights in International Law: Legal and Policy Issues*(Oxford: Clarendon Press, 1984) Vol. 1. at 69. See also generally Tawneg, R.H., *Equality* (London: Allen and Unwin, 1952).

Thus the state and its law remain subject to the "general will", which creates the state for the better protection of freedom and equality.[107] To Aristotle, the notion of equality is based on his "Rule of Justice" - treat alike (equally) those who are alike (equal) in relevant respects, and treat differently (unequally) those who are different (unequal) in relevant respects in direct proportion to the relevant differences (inequalities) between them. Thus according to Aristotle, "distributive justice" demands the equal treatment of those equal before the law. The question as to who are equal before the law is to be determined by the particular legal order.[108] To him, equality is a component of justice: different treatment of individuals by the legal order should be based on justice. However, the most important condition for making such differences between individuals is that it is justified by an adequate reason. Laski shares the same view so long as the differences are relevant to the common good.[109] As to what is a "reasonable justification" or "common good", that is to be determined in accordance with the values in each particular society. Equality as such is not absolute but qualified by natural inequalities. To Friedmann, the task of law is not the abolition of natural differences, but of the man-made differences inherent in the organization of society.[110]

Thus, the principle of equality encompasses the possibility of different

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[107] However, Rousseau has been criticised on the basis that the reconciliation of popular will with individual rights, and in particular, of the rights of the majority with those of the minority, conflicts with the democratic political theory which is apparent in his social contract theory; if the will of the majority is the supreme will, individual rights cannot be inalienable. See Friedmann, *supra* note 106, at 420. However, Ronald Dworkin has advanced his own theory for reconciling the tension between liberty and equality. See Dworkin, R., *Taking Rights Seriously* (London: Duckworth, 1977).

[108] See Friedman, *supra* note 106, at 126.

[109] See McKean, *supra* note 96, at 5.

[110] Friedmann, *supra* note 106, at 127.

treatment, that is, a departure from identical treatment, which has been described as normative equality.[111] In this sense, equality is to be considered a component of social justice. However, the issue here is when differences in treatment are justified. Under his theory of justice, Rawls argues in favour of a contractual model of normative equality, according to which just social arrangements are made. He conceives of citizens in an original position of equality with respect to power and freedom, in which they ignore their own particular qualities and status. In such a society, two principles of justice will operate. The first principle is that each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for others. The second principle is that social and economic inequalities are to be arranged so they are both (a) to the greatest benefit of the least advantaged and (b) attached to positions and offices open to all (equal opportunity).[112] According to the second principle of Rawls' theory, a standard of normative equality (social justice) is to be achieved by allowing for differences in treatment or "special measures". In this sense, equality is a social goal to be viewed in terms of rights.[113]

In sum, the notion of equality in the Western tradition entails the inalienability of equality as a right to all human beings based on the inherent dignity of all men. It also accommodates differences in the treatment of individuals (in a restricted number of cases) for the purpose of achieving social justice. Such differences are legitimate provided that they are reasonable and justifiable with

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[111] See McKean, *supra* note 96, at 8.

[112] See Rawls, J., *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

[113] See Sen, A., "Rights As Goals" in Guest S. & A. Milne, eds., *Equality and Discrimination: Essays in Freedom and Justice* (Stuttgart, Wiesbaden: Franz Steiner Verlag, 1985).

reference to the values of the legal order in each society.

2. Influence on International Human Rights Law

The above notions of equality have influenced international human rights standards and norms, particularly with regard to principles governing religious minorities; international standards affirm the principle of equality of persons in dignity and rights, and reject personal differences between human beings based on the criteria of religion or other qualities. The qualities that necessitate unreasonable treatment are prohibited under international law. Thus the Universal Declaration in its preamble affirmed the recognition of "the inherent dignity and of the equal and inalienable rights of all members of the human family" as "the foundation of freedom, justice and peace in the world." Article 2 provided that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status..."

In addition, one of the principles underlying international human rights is that identical treatment does not necessarily guarantee equality. Refusal to accommodate differences may create injustice: it can impose a substantive hardship on the minority without any benefit to the majority. Thus the principle of "special measures" for religious minorities are justified in terms of rights which are in turn justified in terms of justice and genuine equality. This was stated by the Permanent Court in the *Minority Schools in Albania Case*:

> It is easy to imagine cases in which the equality of treatment of the minority whose situation and requirement are different would result in

inequalities in fact. Equality between members of the majority and minority must be an effective genuine equality.[114]

In this sense, equality has been characterized as a relative concept. According to the dissenting opinion of Judge Tanaka in the *South West African Case*, the notion of equality should be one which "permits different treatment based on an objective justification (concrete individual circumstances) as long as the difference in treatment is proportionate to the justification and meets the criteria of justice of reasonableness."[115]

Thus, according to the above opinions, the principle of equality as enjoyment of rights on an equal footing does not mean identical treatment in every instance. Distinctions that are based on reasonable and objective criteria undertaken for a purpose which is permissible under international law, do not constitute discrimination.

In addition to the notion of special measures, the concept of equality in international law includes another notion - the principle of non-discrimination. "Discrimination" has been interpreted to mean "invidious distinction", and as having the derogatory meaning of "unfair, unequal treatment".[116] Thus, non-discrimination is a negative way of stating the principle of equality, that is, the prevention of discrimination; the positive aspect of equality is that which provides for the

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[114] *Supra* note 97, at 9.

[115] *South West Africa Cases (Second Phase)* [1966] 6 I.C.J. Rep. at 313-16.

[116] This interpretation was adopted by the United Nations Sub-Committee on the Prevention of Dis-crimination and Protection of Minority. UN Docs. E/CN. 4/ Sub. 2/ 401/ Rev. 1; and E/CN. 4/S.R. 53.

protection of the religious minority. In fact, both the prevention of discrimination and protection of minorities represent different aspects of the same principle of equal treatment for all. It does not require absolute or identical treatment, but recognises relative equality, that is, different treatment proportionate to concrete individual circumstances, which must be reasonable and not arbitrary.[117]

Thus, discrimination against persons on religious or other grounds, thereby depriving them of rights and freedoms under natural law, is prohibited and considered a violation of international law, being inconsistent with the latter's principles of equality based on justice.

B. International Instruments and the Equality Principle

From the principle of equality, a system of rights applicable to religious minorities has evolved under international instruments. In fact, the object of the basic guarantee of equality articulated in international instruments is not only to ensure that religious minorities receive treatment identical to that of the majority, but also to ensure that religion is not used as a criterion to impede the individual's ability to exercise rights protected by the international law of human rights.

The norm of equality (non-discrimination) evolved with the rise of nationalism and the problem of national religious minorities under the League of Nations system. Clauses on minorities and religious discrimination were not expressly provided for

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[117] See McKean, *supra* note 96, at 286 et. seq. In fact, the criterion of reasonable and non-arbitrariness is vague. Its substantive content is not specified under international law since it entails a subjective determination.

in the Covenant of the League, but the League as guarantor provided protection to such minorities through the conclusion of a number of treaties with their states. Two basic principles were provided for by such treaties for the protection of religious minorities.[118] These were, first, the principle of equality and non-discrimination, and second, the principle that persons belonging to religious groups should be guaranteed a number of special rights. Under the first principle, the protection afforded members of religious minorities could be exercised individually, while the second conferred a number of special rights which could only be exercised by members of minority groups acting in concert.[119] However, the importance of the treaties lay in the fact that the treatment of minorities now constituted an obligation of international concern and was placed under the guarantee of the League.

Specific mention of religious minorities is not made in the United Nations Charter, which replaced the League system. The Charter, however, affirmed the principle of non-discrimination and equality in providing that individuals shall enjoy certain basic rights, and that those rights shall be enjoyed by persons without distinction. Under Article 55(4), the United Nations is to promote "universal respect for all without distinction as to race, sex, language or religion." Under Article 56, member states are required "to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55. Thus, both Articles of the Charter created a general obligation for states to cooperate with the United Nations in promoting respect for human rights under the principle of equality (or non-discrimination). Thus, such obligations are no longer matters essentially

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[118] For such treaties see generally, de Azcarate, P., *League of Nations and National Minorities; An Experiment*, trans. Brooke, E.O., (Washington, D.C.: Carnegie Endowment, 1945).

[119] See generally de Nova, *supra* note 99, at 275.

within the domestic jurisdiction of the members of the United Nations.

The Universal Declaration implemented the Charter by defining the content of human rights and reaffirming the principle of equality and non-discrimination.[120] Article 2 states in part that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion." The rights which evolve from such a principle were enumerated in Articles 7, 16, and 23(2). Article 7 embodied basic rights in providing that "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination". Article 6 deals with the right to marry, and declares that the enjoyment of the right should be "without any limitations due to race, nationality or religion." Article 23(2) refers to the right to equal pay for equal work "without any distinctions".

Article 7 is considered an important provision as far as non-Muslim religious minorities are concerned, because it embodies several relevant concepts. These comprise: (a) equality of all before the law; (b) equal protection of the law without discrimination; (c) equal protection of the law against discrimination in violation of the Declaration; and (d) equal protection of the law against incitement to such discrimination.

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[120] The Declaration did not expressly mention minorities. This is because some delegations argued that the problem of minorities would be automatically solved by the complete implementation of the Declaration, and that since human rights are enjoyed by all under the equality principle, there was no need to grant special rights to minority groups. See UN Doc. E/CN. 4/S.R. 73, at 5-6. See also Kunz, "The United Nations Declaration and Human Dignity" (1949) 43 *American Journal of International Law* 316.

However, the concept of "equality of all before the law" has been the subject of debate, since it is considered vague when applied to minorities. It is not clear whether it means that there should be laws which should be applied equally, or that all are equally entitled to the protection of whatever laws existed.[121] Such a determination is important because in order to preclude the imposition of disabilities on groups such as religious minorities, one should be certain as to the extent to which the law is intended to apply equally to all.[122] It was, however, explained that the concept meant equality, not identity of treatment which did not preclude reasonable differentiation between individuals and groups.[123] This interpretation of the principle of equality is consistent with the international law approach discussed earlier. For instance, on the issue of which rights are to be protected by Article 7, McKean states: "[i]t only provides for equal protection of the law, and if the discrimination is not made or sustained by law, it will not be construed as violating the Declaration, unless it concerns a right included in the Declaration, in which case the second sentences of Article 7 and Article 2 are relevant. Article 7 first spells out Article 2 in a more positive manner. The law must protect every person against any invidious distinction being drawn with respect to his entitlement to the rights enumerated in the Declaration."[124]

The first international agreement to reinforce the moral and political impact of the Universal Declaration provisions, especially those relating to members of

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[121] The unclarity of the concept was raised by a member of the Third Committee during debates on the Draft Declaration, see 3 UN GAOR, C. 3, 112d Mtg., 234 (1948).

[122] The importance of these concepts to non-Muslim religious minorities in Islamic law shall be discussed in section II.

[123] See UN Doc. A/2929, GAOR, 10th Sess., para. 179.

[124] McKean, *supra* note 96, at 69.

religious minorities, was the International Covenant on Civil and Political Rights.[125] The importance of the Convention does not lie only in its reaffirmation of the fundamental principle of equality or non-discrimination (Article 2(1)), but also its treatment of the principle of non-discrimination on grounds of religion as a legally binding international treaty provision between the states ratifying the Convention. It therefore imposes on such states an international obligation to enact and implement laws embodying the principle within their domestic jurisdictions.

Under the Covenant, provisions for the equality of individuals[126] before the courts (Article 14) and equality in respect of the conduct of public affairs (Article 25), are considered rights resulting from the main principle of equality. Article 25 specifically elaborated the right to participate in public affairs by providing that "[e]very citizen should have the right and the opportunity, without any of the restrictions mentioned in Article 2, and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country."[127]

The phrase "without unreasonable distinctions", which constitutes an essential

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[125] *Supra* note 8. The Preamble of the Covenant recognises the inherent dignity of the human person, and the principle that the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

[126] Article 30 of the Universal Declaration provided for the right of everyone to take an effective part in the governing of the state of which he is a citizen. Article 31 embodied the right of equal access to public services.

[127] For criterion and vagueness of Article 25, see Thornberry, *supra* note 96, at 137.

element of the notion of equality, is provided for in Article 25. It means that necessary distinctions relating to qualifications for public services is permitted, being different from the distinctions prohibited by Article 2(1), among which is religion. Thus, Article 25 applies the notion of equality as understood under international law, which does not require identical treatment for all, or forbid relevant and reasonable distinctions.

Similarly, Article 26 provides that "all persons are equal before law and are entitled without any discrimination to the equal protection of the law." It prohibits discrimination on grounds of religion. The phrase "equal before the law" reflects the notion of equality before the courts, while "equal protection of the law" incorporates a general prohibition of discrimination on forbidden grounds as religion, not only in court, but wherever it manifests itself in law; in so far as equality means equal treatment of equals and unequal treatment of unequals so that differential treatment is permissible on the interpretation of "equality and equals".[128]

Article 27 provides for the differential treatment of religious minorities as a group by providing that "In those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language". Thus, it affirms the principle that differential treatment might be granted to religious minorities in order to ensure their real equality with the rest of the majority. In such cases, differential treatment is justified because it aims at safeguarding the rights of

[128] *Ibid*, at 285.

religious minority groups.[129]

In addition to the mentioned instruments, The General Assembly adopted the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,[130] and the Declaration on the Rights of Persons belonging to National or Ethnic or Religious, Linguistic Minorities.[131] The greatest significance of these Declarations rests in the fact that they are the first international instruments specifically prohibiting discrimination on grounds of religion. They generally restate the basic principles of the UN Charter and the UN Declaration of Human Rights, that is, equality and non-discrimination as a basis for protection of religious minorities.

C. The Notion of Equality in Islam

The notion of equality of individuals in Islam and the extent of its application to non-Muslims within the Islamic state, can best be considered only within the religious framework of basic concepts such as the superiority of Islamic law and its divine sources. Islamic law is the yardstick to which the structure of the state, society and status of individuals must ideally conform. Thus it is necessary first to provide

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[129] See Bruegel, J.W., "A Neglected Field: the Protection of Minorities" (1971) 4 *Human Rights Journal* 413. The importance of Article 27 lies in the fact that membership of a group is not a permissible basis for the denial of rights to individuals.

[130] *Supra* note 9.

[131] *Supra* note 104. The Declaration It restated the general contents of existing rights and principles under international instruments so far discussed. However, in the preamble, the Declaration ties religious minority rights to "the development of society as a whole and within a democratic framework based on the rule of law". For a general commentary on such rights see Alfredsoon G. & A. de Zayas, "Minority Rights: Protection by the United Nations" (1993) 14:1-2 *Human Rights Law Journal* 2.

a brief description of the concept of law in Islam, the relationship between the individual and the state, the status of man as a human being, and other related notions.

The normative nature of relations between Muslims and non-Muslims is provided for in Islamic law, which is considered the direct rule of Allah (God). Islamic law, the Sharia, is the sole yardstick of behaviour, having been imposed by God, and postulating the externally valid standards to which the state, society and status of its subjects must conform.[132] The authority of the state emanates from Allah, since in Islamic political theory God is the sovereign of the community, who delegates His authority to the ruler as His representative. The ruler derives his authority not directly from God but from God's law. Thus the main function of the state is to enforce the principles of Sharia,[133] achieve social justice and promote public order in accordance with Islam.

However, in Islam, a distinction is made between the rights of God (*huquq Allah*) and the rights of men (*huquq ibad*). The Sharia is *haqq Allah*, because all the rights and obligations it embodies are derived from God's command.[134] Thus, Islam views the individual as divinely endowed with social and political rights, but these rights exist only in relation to a far greater obligation to the communal group of

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[132] See Muslim, Ibn al-Hajjaj, *Sahih* (with notes by al-Imam al-Mawardi) (Cairo: 1929) at 125 et. seq.

[133] See Hassan, F., *The Concept of State and Law in Islam* (Washington, D.C.: University Press of America, 1981) at 70 et. seq.

[134] In this sense, *huquq* (rights) is said to mean the legislative rules and principles of Sharia; in other words, the term *Hagg* is equal to law. Since the origin of all rights is Allah, rights as such are inalienable. For a detailed analysis of the concept of rights in Islamic jurisprudence, see Omran, A.M., *Islamic Law and The Western Concept of Human Rights. A Comparative Study* (Faculty of Law, University of Saskatchewan, 1985) [unpublished] at 66 et. seq.

believers and the state, and his personal rights can be realised only in submission to the Divine Will expressed in the Sharia.[135] The communal group is referred to as the *Ummah*, which in Islamic jurisprudence refers to all Muslim believers as the collective original agent of the divine sovereign.[136]

The principle of equality forms the very foundation of the community of believers (*Ummah*), as shown by the following Quranic verse:

> O men, verily, we have created you of a male and a female, and we have divided you into people and tribes that you might have knowledge one of another. Truly, the most worthy of honour in the sight of Allah is he who fearth Him most.[137]

The above verse is interpreted by Islamic jurists as having laid down the rule of preference or the criteria for the entitlement to Allah's endowment of honour or dignity. According to Islamic jurisprudence, men are not absolutely equal in the dignity and honour bestowed upon them by Allah. Rather, according to the above verse, the principle of *takwa* (fear and worship of Allah) is the basic qualification for the entitlement to dignity.[138]

According to Islamic jurists, fear of Allah or righteousness means *Al-Amri-bil-*

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[135] See Dudley, J., "Human Rights Practices in the Arab States: The Modern Impact of Sharia Values" (1982) 12 *Georgia Journal of International and Comparative Law* at 55 and 61.

[136] For the concept see Chapter I of this research, *supra*. As to the meaning of the concept of *Ummah* within the Islamic social, political and religious setting, see Deiranieh, A.R., *The Classical Concept of State in Islam* (Ann Arbor, Michigan: University Microfilms International, 1982) at 68.

[137] Quran, XLXI, 13.

[138] Ibn Kathir, Ismail Ibn Umar, *Tafsir al-Quran al Azim* (Interpretations of the Great Quran) (Cairo: Matbat al-Mustafa Muhammad, 1947) section 16, at 146.

marouf, wa' al-nahi-an-almunkar, that is, to do what Allah ordered man to do, and to refrain from, and prohibit, what Allah prohibits.[139] In Islam, this standard of righteousness is met by Muslims, since all Allah's orders and prohibitions to man are believed to be embodied in the Islamic Sharia. Thus, although all men are born with the honour and dignity they inherited from Adam (the first ancestor), the equality of human beings is not absolute but qualified by the condition of righteousness. Islam recognises no distinction among believers, such as race, creed, and colour, their membership in the Islamic brotherhood, that is, according to their belief. As stated by Khadduri:

> The principles of brotherhood and equality, forming the very foundation of the community of believers (*Ummah*), are given far more literary expression than freedom. All men who believe in the One God and in the Message of His Apostle are considered brothers in religion and equal members of the community, without distinction on ethnic or social grounds. "The most honourable of you in the sight of God is the most pious and Godfearing of you" (Q. XLIX, 13). Such brotherhood and equality were the privileges only of believers.[140]

Thus, non-Muslims are not accorded equal status with Muslims, not being members of the *Ummah*. Their status and rights are regulated in accordance with a standard of justice determined by the will and justice of God. The Islamic community is the *subject* of God's justice, whereas all other communities are the *object* of justice. It follows that no other standard of justice would have been acceptable to Islam apart from God's.[141]

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[139] See Mawdudi, *supra* note 27, at 158.

[140] See Khadduri, *supra* note 12, at 143.

[141] *Ibid*, at 162. See also Khadduri, *supra* note 4.

From the above description, certain conclusions can be drawn with reference to the notion of equality in Islam:

(1) The concept of equality as understood in Islam is one of the factors which explains the differences concerning the rights of non-Muslims living in an Islamic state.

(2) As a result of the religious nature of the state, subjects are classified according to their belief, and the rights conferred on them depends on such belief. Thus, the right to run the affairs of the state is given to those who adhere to Islam as a religion. Thus, non-Muslims' rights to equal access to public offices that exercise authority over Muslims, is limited. Sharia allows them a degree of communal autonomy and power to conduct the private affairs of their religious community, but they are not qualified to hold key offices or join the military service of the Islamic state. In other words, their political rights are limited. A distinction is also made under Sharia penal law. In addition, the Sharia law of evidence differentiates among witnesses with regard to their legal capacity, on grounds of belief. Furthermore, under Sharia personal law, while a Muslim male can marry a non-Muslim woman, a non-Muslim man is prohibited from marrying a Muslim woman.[142] All these reflect the fact that persons are not equal before the law on the basis of their belief.

(3) The definition of *Ummah*, together with its various implications, to a great extent affects the notion of equality. Being defined as the agent of the divine sovereign, it excludes non-Muslims from enjoying the full rights of citizenship in the Islamic state.

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[142] See Chapter Two of this research, *supra*.

(4) Since rights are seen as originating from Allah's will as expressed in the Quran, the rights of non-Muslims as such are those set out in the divine sources of Quran and Sunnah. Thus, such rights are not subject to modification or change, and any other rights to be granted to the non-Muslims must not be repugnant to the spirit and general principles of Sharia.

D. The Notion of Equality and Basic Inconsistency Between the International Law Tradition and Islamic Tradition

Under international law, the basic norms for the protection of religious minorities under equality and non-discrimination are equality before the law and equal enjoyment of political and civil rights irrespective of religion, race, sex or language. However, from what has been mentioned above, it is clear that the definition of the concept of equal treatment or non-discrimination in international law, as far as religious minorities are concerned, is based on the fact that not all differences in treatment are discriminatory. Equality does not mean identical treatment. A distinction is discriminatory if it has no objective and reasonable justification, or is arbitrary, or does not pursue a legitimate aim, or if there is no reasonable relationship of proportionality between that aim and the means employed to attain it.

In light of the above, if equality is to be taken as denoting identical treatment as a claim against a state to refrain from any acts differentiating its citizens or denying them freedom of religion, then the basis for ascertaining such a claim must first be understood. If it stems from a concept such as the nature of humanity, as under international human rights law, or from a religious concept such as the divine

will in Islamic law, then the claim may be absolute, to which no other norms should apply and which no other norm may change. The rights of religious minorities, founded on equality under international law, are based on the unchangeable humanity and dignity of all human beings, while under Islamic law the rights of Muslims and non-Muslims are determined by the divine law. Thus, the unequal status and rights of non-Muslims cannot be altered, and it is here that the dilemma of inconsistencies between the two traditions based on the sources of such claims arise.

Under the natural rights theory which has greatly influenced rights discourse, particularly in international human rights law, all persons are in a state of equality and no one is subject to the will or authority of another. The government is obliged to protect the natural rights of its subjects and if the government neglected this obligation, it would forfeit its validity.[143] This concept is apparently at variance with Islam. Rights in Islam are primarily commands of Allah, and the purpose of the state or government is to enforce and execute such commands. Thus, any attempt to revoke such duty by the state would entitle Muslims (constituting the *Ummah*) to disobey and end such government.

Unlike the international law of human rights under which rights are attached by virtue of being a human being, Islamic law assumes that all authority is derived from what God has commanded. Under such law, the source of rights is to be found only in the commandment of God as expressed in the basic divine sources. Thus the concept of equality, its content and extent, is determined by such sources. It is not under human or state control to determine considerations of limitations or change to such rights.

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[143] See Meron, *supra* note 106, at 86.

Under international law relating to religious minorities, all nationals enjoy rights equally, without distinction as to religion. In Islam, on the other hand, non-Muslims do not have the same rights as Muslims, being considered as subjects of the Islamic state with a specific status under the *Dhimmah* contract. However, the justification for differential treatment or inequality of rights conferred on non-Muslims by Sharia on the basis of religion, is in direct conflict with the principle of international law, which prohibits distinction on grounds of religion. This is so, although equality in both Islam and international law is not absolute but qualified or relative, based on conflicting norms under both traditions. Relative equality as understood in islam is inconsistent with Rawls' principles of equality based on justice which conceives of citizens in an original position of equality with respect to power and freedom in which they ignore their own particular qualities. To Muslim philosophers, justice is an abstract and idealist concept whose terms are expressed in divine sources.[144]

Under international law, equality claims may be balanced against societal interests such as national security, public morals and order, provided this is based on reasonable justification and is not arbitrary. Under Islamic law, equality as understood on the basis of divine sources - only enjoyed by Muslims - is not subject to any other balance, since it is rooted in the commands of Allah. There is absolute equality irrespective of race, colour, language or creed. However, when there is a conflict between the collective interests of the community and the interests of the individual believer - that is, between public and private interest - the latter must be subordinated to the former. In Sharia, the purpose of the law is to protect the

[144] No serious attempt to view justice as a positive concept and analyze it in terms of existing social conditions was made by classic Muslim philosophers. For a detailed analysis of the concept and its development in Islam, see Khadduri, *supra* note 12, at 174 et. seq.

interests of believers as a whole; the interests of the individual are protected only in so far as they do not conflict with the general interest.[145] In fact, this principle is applied in cases in which non-Muslim religious rights conflict with Muslim rights, the latter representing the general interest.

Thus in Islam, no derogation by the state could be made to the equality principle as determined by Islamic law regarding non-Muslim rights. The justification for the non-derogation from the principle of equality in Islam on the basis of religion is based on notions of the nature of the state, the superiority of Islam and other values. Thus to enjoy equality, the sole qualification is to embrace Islam as a religion. This is clearly inconsistent with the principle of equality in international human rights with regard to religious minorities, given that in Islam the Islamic law is the only law to which other norms should conform, and any inconsistent norm is invalid.[146] Thus the content of the principle of equality is determined by reference to Islamic norms and values which are based on divine sources. What constitutes reasonable justification or relevant distinction is therefore based on the static value inherent in the Islamic society and legal order. A contemporary Islamic scholar commenting on this, stated:

> The limited success of the classical Islamic sense of equality could and should be redirected to reach out to humanity and build relationships on the optimistic foundation of *fitrah* (nature, or goodness of human nature) and *da'wah* (invitation or call, specifically to Islam), rather than on the pessimistic foundation of *Kufr* (denial of God, disbelief or infidelity); provided of course, that the Muslim world and the Islamic

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[145] See Khadduri, *supra* note 12, at 138.

[146] In fact, this has been a central focus for much of the modern debate on cultural relativism and non-Muslim rights, which in turn is part of the broad debate on the universality of human rights.

call (*da'wa*) are inclined to take this optimistic and humane approach.[147]

II. Freedom of Religion

A. In the Western Tradition

The evolution of the individual as the ultimate measure of things and the consideration of inalienable rights and freedoms, constitute a basic political and legal ideal of the western tradition. In fact, the inalienability of freedom or liberty is one of the foundations of natural law theory as formulated by western philosophers.

Locke placed the individual at the centre of his theory and invested him with inalienable natural rights, among which is the right to liberty. To him, the individual has an inherent right to life, liberty, and estate, which precedes the social contract. Thus, it is the function of the government to preserve and protect these fundamental rights as well as other natural rights. However, though Rousseau calls for the inalienable freedom of all men, he believes in freedom in relation to the community within which people live in harmony.[148] Thus freedom, though inalienable, is not an absolute right, its extent being determined by the harmony within the community. Kant recognises the freedom of man in so far as it can co-exist with every one else's freedom under a general law. By this, he is proposing a balance between one's individual freedom and others', when practiced in a specific society under the law. In fact, he defines law in relation to individual freedom as "the aggregate of the conditions under which the arbitrary will of one individual may be combined with

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[147] Abdul Hameed Abu Sulayman, *supra* note 3, at 15.

[148] For the whole theory of Locke, see Friedmann, *supra* note 106, at 123 et. seq.

that of another under a general inclusive law of freedom." Therefore, it is in accordance with the principle of freedom that an individual should act in a way that enables all other equally rational beings to act in a similar manner.[149]

Unlike Kant, Rawls maintains that "in a just society the liberties of equal citizenship are settled, the rights secured by justice are not subject to political bargaining or to the calculus of social interest".[150] To him, liberty, among other social primary goods, is to be distributed equally unless an unequal distribution of it is to the advantage of the least favoured (the Difference Principle).

Among the basic liberties included under his First Principle[151] is liberty of conscience and thought, which is to be equally distributed among the citizens of a just society. To him, there are two cases under which liberty can generally be restricted: first, a less extensive liberty must strengthen the total system of liberty shared by all; second, a less than equal liberty must be acceptable to those citizens with the lesser liberties.[152]

However, in the case of conflict between individual liberty and other interests, he proposes a principle of reconciliation based on the common interest. In other words, individual liberty is limited only in cases where there would be an advantage to the total system of basic liberties.[153] However, the term "benefit of the total system

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[149] *Ibid*, at 154.

[150] Rawls, *supra* note 112, at 28.

[151] See page 46, *supra*.

[152] See Rawls, *supra* note 112, at 205.

[153] See Shetack, *supra* note 106, at 91.

of basic liberties" as a means for limiting liberty, is vague since it is subjective; each political order can justify limitations or restrictions of liberty by referring to the benefit of its total system.

B. Freedom of Religion Under International Law

The right to freedom of religion is recognised as a fundamental legal right not only in international law but also the municipal laws of most states. The basic norms and standards governing freedom of religion or belief are to be deduced from international human rights instruments. These instruments constitute the source for the basic rights of religious minorities. The importance of the freedom of religion lies in the fact that religious liberty is not separable from other human rights and fundamental freedoms. The exercise of religious liberty includes the right to physical and mental integrity of the human person, the right to peaceful assembly and association, the right to freedom of opinion and expression, the right to move freely, and the right to education.[154] The content and extent of the right to freedom of religion should therefore be construed within this broad umbrella of human rights; freedom of religion would be meaningless in cases where these rights are not guaranteed under the domestic legal system.

A general review of international documents reveals the content and extent of religious freedom. The source of the rights of members of religious minorities is provided for in Articles 18 of both the Universal Declaration and the Covenant on

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[154] See Report by Mrs. Elizabeth Odio Benito (Special Rapporteur), "Elimination of All Forms of Intolerance and Discrimination Based on Religion Or Belief", 39 UN ESCOR Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub. 2/1987/26, para. 22 (1987).

Civil and Political Rights: it is the right of everyone to freedom of thought, conscience and religion. The general demonstration of the content of the right of freedom of religion includes the freedom to have or to adopt a religion or belief of one's choice, and the freedom to manifest one's religion or belief in worship, observance, practice and teaching, either individually or in community with others.

The importance of this freedom as demonstrated under the above-mentioned instruments, shall be examined in relation to the right to freely choose one's belief, to manifest one's religious belief through worship, practice and teaching, and the extent of exercising such a right under international law.

Under Article 18 of the Covenant, the right of the individual to freely choose his belief includes freedom to change his religion or belief (Article 18 of Universal Declaration).[155] However, the exercise of such a right is to be free from any form of coercion which would impair his freedom to have or to adopt a religion or belief of his choice (Article 18(2) of Covenant). It is to be noted that the right under this Article is not confined to the freedom to hold one's personal belief, but also includes the freedom to choose whether or not to be a member of a particular religious group. Although the freedom to maintain or change one's religion is claimed to be determined by the norms of the specific religion of the person,[156] international rules

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[155] The same rules are provided for in Article 1 of both the *Declaration on the Elimination of All Forms of Intolerance and Discrimination or Belief, 1982, supra* note 9, and the *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, 1992, supra* note 104.

[156] The right to change one's religion under international instruments has given rise to a debate, especially in Muslim states, since it is in conflict with Islamic Sharia law under which a Muslim who changes or converts from Islam is committing a capital offence called apostasy. The objection was made by the ambassador of Saudi Arabia to the United Nations on the ground that the Quran forbids a Muslim to change his faith. For the debate concerning its inclusion in the Universal Declaration, see 3 UN GAOR C. 3, 127 Mtg, at 391, UN Doc. A/C. 3/SR. 127, (1948). For debate regarding

are applied to prevent the curtailment of the freedom to choose one's religion. This would arise, for example, in cases where a person is compelled to join or convert from his religion or belief against his free will. The form of coercion prohibited from impairing the freedom to freely choose or have a religion, does not include the use of physical force or threats, but includes "moral coercion", which is interpreted to include "mental or psychological means of compulsion."[157] The prohibition also includes practices such as conditioning the receipt of benefits or services from the government upon the renunciation or acceptance of a particular religious belief.[158]

The freedom to manifest one's religion in the form of communal religious observance is important to the continued existence of the religious group. This is protected by Article 27 of the Covenant on Civil and Political Rights, which imposes on states the obligation not to deny to religious minorities the right to enjoy their own culture, to profess and practice their own religion or to use their own language. The Article is to be interpreted to promote the material equality of religious communities in the form of special measures. However, the appropriate measures to be taken is left to the state concerned.[159] The standards provided for under Article 27 form a wide ambit under which other freedoms and rights necessary for the exercise of religious freedom exist.[160] In addition, the grant of rights, to be effective,

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Article 18 of Political Covenant, see UN Doc. A/C.3/SR. 367, para 41 (1951).

[157] See Ribeiro Report, UN Doc. E/CN.4/1988/45, (1988) at 2. See also Sullivan, D.J., "Advancing the Freedom of Religion Or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination" (1988) 82 *The American Journal of International Law* 487.

[158] *Ibid.*

[159] See Thornberry, *supra* note 96, at 193.

[160] Article 6 of the 1981 *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, *supra* note 9, interprets the term "freedom of religion" to include: freedom to worship or assemble in connection with a religion, to establish and maintain

requires the enactment and modification of domestic legislation to the extent necessary for removing obstacles to religious observance that are inconsistent with the notion of preservation of the religious value of minorities.[161]

As mentioned earlier, the purpose behind these special rights for religious minority groups is to ensure the preservation of the dignity, minority characteristics and traditions that distinguish the group from the majority of the population. The collective enjoyment of special rights includes using native languages, running the group's own schools and managing its internal affairs while benefiting from other services.[162] Religious tribunals and the implementation of religious law are considered manifestations of religious belief. However, the extent to which religious law may be administered varies with the substantive content of the law and the nature of the subject matter and personal jurisdiction vested in the religious courts.[163]

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places for these purposes; to establish and maintain appropriate charitable or humanitarian institutions; to make, acquire and use to an adequate extent the necessary articles and materials related to rites or customs of a religion or belief; to write and issue relevant publications; to teach a religion or belief in suitable places; to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief; to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels. For an analysis of the provisions of the above Declaration, see Sullivan, *supra* note 157. See also Article 2 of the *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, 1992 supra* note 104.

[161] Article 27 has been criticised as not providing a ready solution for conflict of interest situations as in cases where the days of rest or religious observance of the majority and minority may not coincide. Other situations cover the issue as to whether the marriage ceremony of minority religions should have the same legal effect as those of majority religions, or whether religious laws should prevail over secular legislation or whether the objections of members of a minority religion to military service should be recognised or whether instruction in the majority religion is to be given to members of minority religious groups. See Thornberry, *supra* note 96, at 195-196.

[162] See Alfredsoon & de Zayas, *supra* note 131, at 1.

[163] See Sullivan, *supra* note 157, at 514.

Generally, the right to freedom of religion or belief under international law is not absolute; a distinction has to be made between the freedom to choose one's religion[164] and the exercise of such religion or belief. In the former case, the freedom is absolute. In the latter case, the freedom of religion is not absolute; international instruments provide for cases in which a state is justified in passing enactments to restrict the practice but not the religious belief itself. As provided in Article 18(3) of the Covenant on Civil and Political Rights,

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

Unlike the Covenant on Civil and Political Rights, which establishes specific limitations on the exercise of religious freedom, the Universal Declaration provided for general limitations upon all the rights and freedoms mentioned in the Declaration, including the freedom of religion. Article 29(2) of the Declaration provides:

> 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 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.

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[164] This is reflected in Krishnaswami's study: "Freedom to maintain or to change religion or belief falls primarily within the domain of the inner faith and conscience of an individual. Viewed from this angle, one would assume that any intervention from outside is not only illegitimate but impossible." See Krishnaswami, (Rapporteur), "Study of Discrimination in the Matter of Religious Rights and Practices" UN Doc. E/CN.4/Sub. 2/200/Rev. 1 (1960) at 16. See also Clark, R.S., "The United Nations and Religious Freedom" (1978) 11 *New York University Journal of International Law and Politics* 197.

Thus, general principles specify limitations upon the freedom of religion in the interest of preserving the rights of others, the integrity of order and the good and well-being of society as a whole - a principle forming the basis of the exercise of liberty in Western tradition. However, such a limitation ought to satisfy two main criteria. First, the extent and nature of the limitation must be "determined by law." Secondly, it must be enforced solely for one or several of the purposes mentioned in the above Articles.[165] In fact, the limitations permissible under the above Articles constitute a real threat to religious freedom. The concepts of "public order" and "morals", etc., are vague terms that give rise to different interpretations, and may be used to challenge the principles upon which the concepts of equality (non-discrimination) and religious freedom are based.

However, as Professor Humphrey has commented on the limitations created by the Universal Declaration: "Any limitation put on the free exercise of religion or on the other rights and freedoms proclaimed by the Universal Declaration in the interest of morality, public order or the general welfare is, in any case, suspect in the sense that the burden of proving the imperative necessity falls on the authority imposing the limitation."[166]

C. Freedom of Religion in Islam and Non-Muslims

The content and extent of the freedom of religion of non-Muslim subjects in Islam is to be understood within the context of the Islamic notion of freedom and the nature of the Islamic state.

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[165] See Krishnaswami, *supra* note 164, at 232-233.

[166] See Humphrey, J.P.H., "Political and Related Rights" in Meron, *supra* note 106, at 180.

Unlike the Western tradition which regards the individual as the centre of freedom, the individual in Islam is replaced by the community of Muslim believers (*Ummah*) who are to enforce the divine rules of God. Thus freedom is defined as belonging to the community.[167] Islamic jurists see human freedom in terms of personal surrender to the Divine will. Having been created by God, human beings possess certain obligations towards Him. When they fulfil such obligations, they acquire certain rights and freedoms prescribed by Sharia. Those who do not accept such obligations have limited rights or freedoms.[168] Therefore, freedom in Islam is not to be understood as a matter of individual choice, as in Western tradition. Instead, it means the individual's willingness and ability to submit to God as his Creator since absolute freedom belongs to God alone.[169] Thus, the individual is granted personal freedom necessary in order to approach God. With regard to his status as a member of the community, man is free to act unless forbidden by the law.[170]

This notion of individual freedom in Islam has been summarized by Qutub in the following words: "Freedom is man's will and man's ability to submit to no one but

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[167] For an examination and development of the concept of freedom before and after Islam, see Rosenthal, F., *The Muslim Concept of Freedom prior to the Nineteenth Century* (Leiden: E.J. Brill, 1960).

[168] See Abdul Aziz Said, "Human Rights in Islamic Perspectives" in Pollis, A. & P. Schwab, eds., *Human Rights in Cultural and Ideological Perspectives* (New York: Praeger Publishers, 1979).

[169] This notion is reflected in rules applied to the freedom of Muslims to change their religion. In Islam, a Muslim who turns back from his religion (Islam) is subject to a penalty, in accordance to the Quran (Q. IV. 88-89, v. 54, XVI. 106). However, the majority of Islamic jurists agree that a believer who apostatizes (turns back from Islam) openly or secretly, must be killed if he persists in disbelief. For more details on apostasy in Islam and Islamic law, see Mawardi, *supra* note 67, at 91 et. seq.

[170] Sharia determines what are permitted and forbidden acts. See Khadduri, *supra* note 12, at 142.

Allah."[171] The basic element of freedom is the submission of the individual to God and his Divine law. Thus in Islam, freedom is not a personal or inalienable right, but is surrendered to the Divine because the individual owes obligations to God which he is to fulfil. On the other hand, the rights and freedom conferred on him in his personal status in the community is determined by Sharia divine law. Since the whole of Sharia is *haqq Allah* (all rights and obligations are derived from God's command), when the texts assert the principle of "original freedom" and the inviolability of property, life and honour, they treat them as principles which secure the general order and well-being of the whole community - the purpose being to safeguard the right of Allah - and not as fundamental liberties of the individual.[172]

It has been mentioned earlier that in Islam there is no separation between the state and religion and that the main purpose of the state is to enforce and maintain the word of Allah as provided for in the Quran, according to which Islam is supreme. It is this very nature of the state that has influenced the nature and limits of freedom of religion of non-Muslims in Islam. It has also led to the classification of subjects into Muslim believers with full rights, and non-Muslim subjects with limited rights, including the right to freedom of religion.

However, the extent of their freedom is determined by the Divine law (Sharia) which confers a wider freedom on Muslims for exercising their religion, compared to non-Muslims, on the basis of the supremacy of Islam as a political and legal

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[171] Qutub, M. Tablia, *Al-Islam Wa Huggug Al Insan*, (Cairo: Dar al-Fikkr, 1976) at 332.

[172] See Coulson, "The State and Individual in Islamic Law" (1957) 6 *International and Comparative Law Quarterly* 49-60.

system.[173]

Taking into account the above notions of freedom and the nature of the Islamic state as factors contributing to the definition and determination of the nature and extent of the freedom of religion of non-Muslims, one may argue that such freedom as understood in Islam is characterised by tolerance and is not identical to freedom as understood in Western tradition. This attitude is based on the Quranic verse: "Verily, they who believe, and the Jews and the Sabeites and the Christians whoever of them believeth in God and in the last day, and doth what is right, on them shall come no fear, neither shall they be put to grief."[174]

This policy of tolerance provided for in the Quran is reflected in the provisions of *Dhimma* treaties concluded by the Prophet with non-Muslims (mainly Christian and Jewish) under which non-Muslims were to retain their own religion, while their life, property and belief, were to be protected in exchange for the payment of *Jizya* (poll tax).

However, the mere fact that non-Muslims were to pay *Jizya* in return for granting them rights to retain and exercise their religion, means that such freedom is not inalienable. Instead, it is a privilege conferred on them, and likely to be forfeited in case of a default in payment considered a breach of the *Dhimma* contract.[175] Some classic Muslim jurists regard payment of *Jizya* by non-Muslims as

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[173] See Mawdudi, *supra* note 27, at 243.

[174] Quran, V: 89.

[175] Some classic jurists are of the opinion that in case of non-payment of *Jizya* by a non-Muslim, the Islamic ruler should fight them. See Ibn al-Qayyim al-Jawziyya, *supra* note 36, Vol. 11 at 795.

the consequence for embracing a religion other than Islam. Ibn al-Qayyim al-Jawziyya was of the view that since *al-dhimmah* agreements required non-Muslims to pay *al-Jizya*, these agreements were intended to punish non-believers.[176] As admitted by Nawar, a contemporary Muslim scholar, "Historically, *Jizya* (poll tax) was imposed only upon non-Muslims. However, it should be pointed out that, if *Jizya* had restricted the right to pursue religious freedom and also imposed restrictions on property, it also secured the same freedoms. Thus, within limits, non-Muslims enjoyed the freedom of religion and property."[177] The payment of *Jizya* therefore contributed towards the restriction of their right to freely exercise their religion.

After the Prophet, and with the expansion of the Islamic state, the policy of tolerance towards non-Muslims changed through the imposition of additional restrictions in the form of rules issued by Caliphas who succeeded the Prophet. The Covenant of Omer (Calipha) laid down rules governing *dhimmis* within the Islamic state during that period. The provisions of the Covenant had been reinstated by the Christians of Syria in the form of a letter submitted to Abu Ubayada (Governor of Syria) which Omer ratified. Parts of the text contain rules such as the following:

> When thou camest into our land we asked of thee safety for our lives and the people of our religion, and we imposed these terms on ourselves: not to build in Damascus and its environs church, convent, chapel, monk's hermitage; not to repair what is dilapidated of our churches nor any of them that are in Muslim quarters; not to withhold our churches from Muslims stopping there by night or day; ... to beat the *nagus* (church bells) only gently in our churches; not to display a cross on them (the Muslims); not to raise our voices in prayer or

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[176] See Ibn al-Qayyim al-Jawziyya, *supra* note 16, Vol. 1 at 17.

[177] See Nawaz, M.K., "The Concept of Human Rights in Islamic Law" (1965) 11 *Howard Law Journal* 327.

> chanting in our churches; not to carry in procession a cross or our book; not to take our Easter or Palm Sunday processions; .... not to prevent any relative from entering Islam if he wish it; to keep our religion whenever we are.[178]

Although at their time and within their historical context, such rules were justified in accordance to Muslims' view,[179] these rules no doubt imposed restrictions which greatly undermined the freedom to manifest and practice one's religion in accordance to standards pertaining to the freedom of religion under international law. In fact, the restrictions on the exercise of freedom of religion according to the above-mentioned rules may amount to a form of direct or indirect restriction because non-Muslims have to accept Islam if they are to be treated equally. As Khadduri has stated, "such brotherhood and equality were the privileges only of believers (Muslims), but no barrier was set before anyone who wished to join the community of believers."[180]

III. Inconsistencies Between International Norms and the Islamic Approach

After examining the standards and norms provided for under international instruments to which most Muslim states have consented, and discussing the Islamic approach regarding the status and rights of non-Muslim subjects, it is necessary at

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[178] Quoted and translated from Tritton, *supra* note 39, at 6-8.

[179] One Muslim scholar commenting on the notion of freedom of religion in Islam stated: "Apart from anything else, the issue of freedom of belief in Muslim societies has to be made conceptually very clear. For Muslim societies, the issue is not an internal one alone but touches upon an important ideological aspect of their relations with other peoples. Clarification is essential if the Muslim society is to be a truly open one in which civil rights are guaranteed and available to all members of society in a reciprocal relationship between rights and duties." See Abdul Hameed, *supra* note 3, at 16.

[180] See Khadduri, *supra* note 12, at 143.

this stage to summarize the fundamental inconsistencies between the two traditions as far as non-Muslim rights are concerned.

1. The principle of equality based on human dignity is considered a fundamental right under international instruments, and recognized as inalienable in Western tradition. In Islam, however, this principle conflicts with the principle of dignity and brotherhood, originally the preserve of believers in Islam, and based on religion as the symbol of identity. In addition, the notion of religious identity in Islam is in conflict with the nationhood concept and the right of everyone to be recognised as a person, as provided in Article 6 of the Universal Declaration and Article 16 of the Covenant on Civil and Political Rights.[181]

2. Islam recognises no distinctions between persons on the basis of colour, race, creed or language, but inequalities arise on grounds of religion in relation to specific rights.

(a) Non-Muslims, being non-members of the *Ummah*, are not qualified in the Islamic state for specific influential key posts (judicial, legislative and executive offices). They are also not qualified for military service. They do not have a right to participate in laying down the influential policies of the Islamic state.[182] However justified in Islam, these distinctions are inconsistent with Articles 21 and 23 of the Universal

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[181] The problem which nation states applying Sharia law as a complete system face today is how to reconcile differences resulting from both the concept of nationhood under which all citizens are equal, and Sharia norms resulting from the notion of superiority of Islam and religious identity. See Rosenthal, E.I.J., *Islam in the Modern National State* (Cambridge: Cambridge University Press, 1965). See also Imarah, M.A., *Al Islam wa al-Wihdda al-Watanya* (Jeddah: Dar Al-Kitab, 1979). As to the impact of the religious state on minorities, see Galuon, B., *Al-Masala Al-Taafiya wa-Mushklat Al-Akalyat* (Beirut: Sind, 1988).

[182] For the conflict with the Islamic principle of political justice, see Khadduri, *supra* note 12, at 239.

Declaration, and generally with the principle of non-discrimination on the basis of religion. Article 25 provides in part that "[e]veryone has the right to take part in the government of his country," and Article 23 also states in part that "[e]very one has the right to work" and "to free choice of employment."

(b) Non-Muslims are generally not regarded as possessing full legal capacity under Islamic law in matters of testimony, criminal law and marriage.[183] Such treatment is in conflict with the principle of equality before and protection of, the law, irrespective of religion, as provided in Article 7 of the Declaration and Article 26 of the Covenant. The latter Article provides in part that "[t]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground."

As regards freedom of religion, the conflict is related to the difference in the content of the notion of `freedom'. The notion of freedom or liberty in Western jurisprudence is based on the individualistic notion of man, according to which an individual chooses his religion by his own free will. This is because liberty is an inalienable right enjoyed by a person on the basis of his humanity, and is to be protected by the state. In Islam, however, since the individual will is seen as a reflection of God's will, absolute freedom belongs to God alone, and the Islamic state is to maintain, enforce and execute the rules of God. Thus, a non-Muslim, by choosing to retain his religion in the Islamic state, is subject to a number of restrictions such as the payment of *Jizya*, which is to be lifted if the non-Muslim renounces his religion and embraces Islam. In that event, he would lose the choice to convert from Islam, else he will be considered an apostate. This Islamic concept

[183] See Chapter Two of this research, *supra*.

of individual freedom is in conflict with Articles 18 in the Universal Declaration and the Covenant which both provide for freedom of religion, including freedom to change one's own religion.[184]

The norms underlying the right to exercise one's freedom of religion are based on the principle that there should be no unreasonable and unjustifiable restrictions on such a right. As mentioned earlier, the right of non-Muslims in Islam to manifest their religion through public worship, is curtailed in certain cases. Under international norms, refusal of the opening or establishment of places of worship, the grant of permission for the assembly of a group, the issuance of a licence on terms which are difficult to comply with, and the failure to protect places of worship, are all considered restrictions on freedom of religion. This is based on the principle that if equal protection is not afforded to all faiths, either in law or in fact, the result is discrimination.

Another conflict arises with regard to the permissible limitations on the rights and freedoms of non-Muslims under international instruments,[185] mainly reflected in the phrase "for purposes of public order, moral and for securing fundamental rights and freedom of others and the good interest of the society." Having been drafted vaguely, these terms allow for wide interpretations to be made under the laws of

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[184] Among the states which abstained from subscribing to Article 18 of the 1948 Declaration was Saudi Arabia. Its objection was based on the contention that the Quran forbids a Muslim to change his faith. See 3 UN GAOR C.3, 127 Mtg., at 391-92, UN. Doc. A/C.3/SR. 127 (1948).

[185] The limitations clause of the Universal Declaration (Article 29(2)) states:

> "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 seeing due recognition and respect for the rights and freedoms of others and of meeting the just requirement of morality, public order and the general welfare in a democratic society."

Sharia. The conflict or inconsistency arises from the fact that "public order", "morals" and the "good interest of society" are concepts in Islam which have legal consequences different from those intended by international instruments.

The term "fundamental right and freedom of others" provided for under international instruments as a ground for limiting the freedom to manifest one's religion, gives rise to conflicts since it in turn raises the question as to which rights are fundamental in international law. In fact, the absence of any general agreement on the relative importance of some human rights vis-a-vis other rights suggests that there is no clear substitute or definite legal distinction between those human rights that are "fundamental" and those that are not.[186] This may lead to a conflict between the rights of non-Muslims under international law, and rights of Muslims under the same law: which of these rights is to be limited for the sake of the other? Moreover, in case of conflict under Sharia law, the rights of believers are to prevail on the basis of the supremacy of Islam.[187]

Given the vagueness of the term "good interest of the society or public security", a state may use it to justify restrictions on religious freedom by claiming that a religious group is engaged in activity threatening the good interest of the society or its public security as determined by that state's own domestic laws. In the Islamic state, Sharia rules may be applied to non-Muslims in a manner which may restrain their freedom of religion, but such limitations could be justified by the staet

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[186] See Sullivan, *supra* note 157, at 514.

[187] The representative of Iran in his statement before the Human Rights Committee, asserted that Article 18 of the Political Covenant would permit Muslims to practice Islamic law including criminal law. He also asserted that in the case of differences between the Covenant and the teachings of Islam (i.e. between the two sets of laws), the tenets of Islam would prevail. See UN GAOR, 36th Sess., 29th Mtg, paras. 6, 16, UN Doc. A/C/.3/36/SR.29 (1981). See also 72 UN Doc. A/37/40/ (1982).

on the ground of the "superior interest of the Islamic society." This particularly with reference to Sharia rules which may be applied to non-Muslims and be regarded as restraining the freedom to manifest religion. Such limitations may be justified in reference to Sharia rules on the ground of the "superior interest of the society", or other distinctions.

Finally, although the authoritative interpretation of the general principles of non-discrimination in international conventions have established that not all differentiation of treatment amounts to discrimination, distinctions that are based on reasonable and objective criteria or justifications do not constitute discrimination. However, any assessments of whether or not a rule of Sharia law or practice constitutes discrimination against non-Muslims as defined in international law, must take account of the manner in which persons are classified, the nature and role of the Islamic law and the purpose of the state in Islam. It can then be determined whether an "objective" and "reasonable" basis exists for the distinctions made in the law.

By examining the rules governing non-Muslim religious minorities in the previous pages under both traditions, and uncovering the inconsistencies in such rules, it is clear that such inconsistencies arise because each rule operates within the different norms which characterize each tradition. The issue which then arises is to what extent a modern state with non-Muslim religious minorities, and applying Sharia law as its territorial law, would be able to reconcile these inconsistencies within its legal system. This issue will be examined with reference to Sudan as a case study. To what extent has Sudan, being a multicultural nation state with non-Muslim religious minorities, and applying Sharia law as its territorial law since 1983, been able to

accommodate these inconsistencies within its legal system as far as non-Muslim minority rights are concerned?

PART III: RULES GOVERNING NON-MUSLIMS UNDER THE SUDANESE LEGAL SYSTEM

Chapter Four: The International Obligations of Sudan for the Protection of Non-Muslim Minorities

Sudan has ratified a number of international instruments. An examination of the status of international law in the Sudanese legal system shall be made to show to what extent Sudan has complied with such instruments in fulfilment of its international obligations. The review will include an overview of sources giving rise to international obligations in international law, the methods of incorporating international obligations of human rights into the Sudanese legal system, and the effect of such methods on Sudan's ability to fulfil its international obligations in respect of its non-Muslim minorities. A general overview of the classification and socio-political roots of non-Muslim minorities in Sudan shall be made first.

I. The Socio-Political Roots of Minorities

The diversity and pluralism of Sudanese society has been reflected in the various ethnic, linguistic and religious minorities of its population. The northern part of the country is largely populated by Arabs and Muslims, while inhabitants of the South are mainly Christian Negroids. Non-Muslim minorities live in various parts of Sudan, but the prominent religious minority groups are the Southerners and the Copts in the North.[188]

A small number of Christian minorities are to be found in the Nuba Hills in Western Sudan. Other non-Muslim religious sects, predominantly Copts, live in the

[188] Other non-Muslim minorities are found in different parts of the west and east. See Fanthene, G., *The History of Christianity in Old Nubian Kingdoms and Modern Sudan* (Arabic Version) (Khartoum: Khartoum Press, 1978).

North. The Sudanese Copts are members of the Egyptian Coptic Orthodox Church, and constitute the largest Christian group in the Middle East.[189] After the collapse of the Christian kingdoms of northern Sudan, the Coptic communities moved mainly to Egypt. However, because of the oppression from the Muslim rulers of Egypt,[190] they moved back to Sudan, thereby reviving Christianity in the North. When the Mahdi seized power in Sudan in 1885, imposing a harsh rule and declaring that his mission was to revive Islam and establish an Islamic state in Sudan, a large number of them moved back to Egypt. After the fall of the Mahdist state in 1898, the Copts returned to Sudan. Since then, they have been integrated into Sudanese society as nationals.

The first central political establishment in Sudan came into existence in 1829 when the Arab-Muslim Turks and Egyptians conquered the small scattered kingdoms in Northern Sudan. The invaders gradually moved southwards, but were resisted by the southern tribes and kingdoms.[191]

In the 19th century the forces of Arab-Islam in the North, led by the Sudanese Islamic nationalist El Mahdi, penetrated the South fighting in the name of *Jihad* and Islam in an effort to impose Islam on southern tribes. In 1889, however, the Mahdist state fell after the Anglo-Egyptian conquest. Under the Anglo-Egyptian regime Christianity was developed in the South by Roman Catholic missionaries under the

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[189] See Mordechai, N., *Minorities in the Middle East: A History of Struggle and Self-Expression* (North Carolina; London: Jefferson, 1991) at 115-127.

[190] Mordechai, *supra* note 189.

[191] Holt, P.M. & M.W. Daly, *A History of the Sudan: From the Coming of Islam to the Present Day*, 3rd Ed. (London: Wiedenfield and Nicolson, 1979) at 2 et. seq. See also Arkell, A.J., *A History of the Sudan from the Earliest Times to 1821* (London: Athlone Press, 1961) at 186-220.

policy of the creation of a distinct African Christian territory. Tribal courts were established to apply customary law. Education was provided by Christian missionary schools, English became the official language, and Sunday was the official day of rest in the South.[192] Apart from their common features, the southern tribes had their own customs that characterised their way of life.[193]

After the second world war, and with the spread of modern nationalism - a trend that was inclusive, embracing citizens irrespective of religion and language - a new policy was followed by the British; the objective became the integration of the North and South. The Arabic language was chosen as the national language, and Christian activities were curtailed. These measures were intended to prepare for one large Sudan in the form of an Arab-Muslim entity when the country became independent in 1956.[194]

The definition of Sudan as an Arab-Muslim state after independence was rejected by the Southerners, mainly because it disregarded their African Christian identity.[195] Consequently, a civil war broke out in the South from 1956 to 1972. The

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[192] Rajia Hassan Ahmed, "Regionalism, Ethnic and Socio-Cultural Pluralism: The Case of Southern Sudan" in Mohamed Omer Beshir, ed., *Southern Sudan: Regionalism and Religion* (Khartoum: University of Khartoum, 1984) (Graduate College Pub. No. 10) at 10-59. See also Sid Ahmed, S.M., "Christian Missionary Activity in Sudan, 1926-1946" in Beshir, ed., *ibid.*, at 53.

[193] Deng, F.M., *Tradition and Modernization: A Challenge for Law Among the Dinka of Sudan* (New Haven, London: Yale University Press, 1971).

[194] For more historical details, see Sudan Ministry of Foreign Affairs, *Peace and Unity in the Sudan: An African Achievement* (Khartoum: Khartoum University Press, 1973) at 26 et. seq. See also Johnson, D.H., "The Sudan under the British" (1988) 29 *Journal of African History* 541.

[195] There were other political and economic reasons for such a rejection. These are not the subject of this paper. For a full account of the southern problem, see Alier, A., *Southern Sudan: Too Many Agreements Dishonoured* (Reading, Great Britain: Ithaca Press, 1992). See also Beshir, M-O., *The Southern Sudan: Background to Conflict* (London: C. Hurst & Co., 1968).

civil war ended with the signing of the Addis Ababa Agreement in 1972. The Agreement provided for regional autonomy based on local governments within a united Sudan. Religious freedom and the recognition of Christianity were guaranteed in the 1973 Permanent Constitution, and English was recognised as the principal language in the southern region.[196] The Agreement also provided for equality of all citizens irrespective of religion. For various reasons, the 1972 Agreement did not satisfy the expectations of the North and South.[197] In 1983, the government declared Sharia law as the law of Sudan. This declaration was regarded by Southerners as entailing the suppression of Christianity and curtailment of their freedom of worship. They feared that under an Islamic state, Christians as *dhimmis* would be regarded as second class citizens.[198]

II. The International Obligations of Sudan

A. The Sources Giving Rise to the State's International Obligations in International Law

It is a well established principle in traditional international law that a state's international obligations are superior to any obligations it may have under its national law. This obligation may arise as a result of the conclusion of an agreement between states, or the existence of a rule of customary international law, or both. In any case, a state cannot invoke its own inconsistent national law as an excuse for

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[196] For the terms and provisions of the Addis Ababa Agreement, see Alier, *supra* note 195, at 185.

[197] *Ibid.*, at 185.

[198] See Malwal, B., *The Sudan: A Second Challenge to Nationhood* (New York: Thornton Books, 1985).

non-compliance with international law. This principle was affirmed, with reference to treaty obligations, by the Permanent Court of International Justice in its Advisory Opinion in the *Greco-Bulgarian Communities Case*, when it stated:

> It is a generally accepted principle of international law that in relations between powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.[199]

The Permanent Court also ruled that the same principle applies even when a state invokes its Constitution with the view to evading obligations incumbent upon it under international law or treaties in force.[200] The principle of the supremacy of provisions of international agreements over domestic laws has been codified in the Vienna Convention on the Law of Treaties, 1969. Article 27 of the Convention states: "A Party may not invoke the provisions of its internal laws as justification for its failure to perform a treaty." A state is also bound to perform *bona fide* the provisions of an international agreement, in accordance with the customary law doctrine of *pacta sunt servanda*. This principle is codified in Article 26 of the Convention, which states: "Every international agreement in force is binding upon the parties to it and must be performed by them in good faith".

In addition, it is a well-established principle of customary international law that a state is obliged to make whatever domestic legal changes are necessary to comply with its international obligations.[201] In other words, a state shall not rely on

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[199] P.C.I.J. Series B, No. 17, (1930) at 38.

[200] *Treatment of Polish Nationals in the Danzig Territories*, (1932) P.C.I.J. Series A/B, No. 44, at 28.

[201] *Supra* note ? at 32; and note 200 at 24.

a domestic statute or a constitutional provision as a defence to an allegation of non-compliance. The same applies to the interpretation of treaties: the interpretation of the terms of a treaty is not a question within the domestic jurisdiction of a state, but rather a question of international law.[202]

Apart from international agreements, another source giving rise to state international obligations are rules of customary international law. Article 38(1)(b) of the Statute of the International Court of Justice (ICJ) provides that custom is another source of international law obligations binding on states. The term "international custom" is defined as "evidence of a general practice accepted as law." The traditional concept of the constitutive elements of international customary law are: a general and consistent state practice of following a rule; and a belief by the state that it is complying with a legal obligation by following a particular practice.[203]

Thus, on the issue of a state's obligation under customary law, the general practice of states is binding on it without the need for its consent. In fact, Article 38(1)(b) of the ICJ Statute does not even require unanimous consent as a prerequisite for the existence of a customary rule, and treats the consensus of a majority reflecting an international opinion as sufficient.

B. The Status of International Law in the Sudanese Legal System.

The status of international law under the Sudanese legal system shall be

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[202] This principle was affirmed by the I.C.J. in the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* Advisory Opinion (1950) I.C.J. Rep. 65 at 70-1.

[203] See Kunz, J., "The Nature of Customary International Law" (1993) 47 *American Journal of International Law* 662.

examined with reference to two periods: (a) before the application of Sharia as state law in 1983, and (b) the period of application of Sharia law. These periods will be used as contexts for showing what weight is accorded to international law in Sudan. This section shall also address several general issues concerning the principle of equality or non-discrimination embodied in the Charter and the Declarations of the United Nations. Since these international human rights instruments are the ones claimed to be invoked in connection with the question of non-Muslims in Sudan, this section will address the issue of whether such norms constitute a rule of customary international law binding on Sudan even in the absence of a ratified agreement.

1. The Period Before 1983

Under the Anglo-Egyptian regime (1898-1956) the Sudanese legal system was divided into Civil and Sharia divisions.[204] The Civil division (adjudicating criminal and civil matters) was based on the application of English common law, the Sharia division (concerned with personal law matters for Muslims) applied Islamic Law. The consequence of this division had been that the legal system was influenced by English common law mainly, while Islamic rules were confined to personal matters for Muslims.

The introduction of English common law in Sudan[205] implied the adoption of

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[204] For more details on the structure, hierarchy and jurisdiction of the two systems, see Tier, A.M. *The Legal System of the Sudan* (Khartoum: Faculty of Law, University of Khartoum) [unpublished].

[205] For the reception and application of English law see Mustafa, Z., *The Common Law in the Sudan* (Oxford: Clarendon Press, 1971). See also Guffman, "The Reception of Common Law in the Sudan" (1957) 6 *International and Comparative Law Quarterly* 401; and Twining, "Some Aspects of Reception" (1957) *Sudan Law Journal and Reports* 229. For courts application, read Akolawin, "The Courts and the Reception of English Law in the Sudan: A Case Study of Application of Justice,

English positivist legal philosophy - the dominant philosophy of law in England at the same time.[206] This philosophy has influenced Sudan's legal system as well as the status of international law in Sudan, and the rules governing the international obligations of Sudan.[207]

Generally speaking, according to positivism, international law does not qualify as law (as positivists emphasize the requisites of a sovereign and sanctions for any rule to qualify as law). It is binding only if willed by a sovereign. The will of the state is usually expressed by its Parliament when the latter exists as an independent institution (Parliamentary Supremacy). However, if such supremacy does not exist, as is the case in the Sudan, the state acts both as the executive and the legislature. The will of the sovereign is expressed by transforming an international obligation into municipal law through an Act of Parliament. Only when so transformed does international law become law, as the municipal legal system gives international law its binding character. However, according to positivism, the whole matter depends on the consent of the state under which international law acquires an inferior ranking to municipal law, i.e., in cases of conflict municipal law prevails.[208]

The Sudan adopts the positivist notion of transformation as a technique for

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Equity and Good Conscience under the Sudan Civil Justice Ordinance" (1968) *Sudan Law Journal and Reports* 230.

[206] For the theory, see Hart, H.L.A., *The Concept of Law* (Oxford: Clarendon Press, 1961). See also Friedman, *supra* note 106, at 253.

[207] For a full account of positivist legal theory of international law and obligations, and the factors that facilitated its recognition and application in Sudan, see El Obeid, A., *International Obligations Under the Sudanese Legal System: The Case of Human Rights Obligations* (Faculty of Law, University of Saskatchewan, 1990) [unpublished] at 43.

[208] *Ibid.*, at 67-68.

incorporating treaties under domestic law. Under this notion, international law is not binding unless incorporated or transformed into law by a legislative Act which rests upon a belief in the state's exclusive sovereignty, and on the dualistic view that each individual rule of international law must be transformed into municipal law before it becomes applicable in the domestic sphere.[209] The problem under this notion, as it shall be seen later, is that statutes incorporating international obligations are interpreted in the same way as ordinary legislation and the same rules of statutory interpretation apply to it.

Under the Sudanese legal system, the conclusion and ratification of an international treaty is governed by the Constitution under which a treaty is concluded by the executive and ratified by the legislature, thus ordering its application in municipal law by means of a special legislative Act. Under such a procedure, the validity acquired by the treaty does not derive from a provision of the Constitution but simply from the special law passed in respect of it.[210] Thus treaties become binding when ratified by the legislature in a statutory form.

Accordingly, Article 103 of the abrogated 1973 Permanent Constitution of the Sudan provided:

> The President of the Republic concludes and ratifies treaties, he communicates them to the People's Assembly together with any relevant information. Upon ratification by the President the treaties

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[209] *Id.*, at 24 & 25.

[210] Art. 67 of the suspended Transitional Constitution of 1956 provided for a bicameral legislature, the Senate and House of Representatives, together with the Supreme Council were entrusted with the power of treaty-making and that treaty or convention should be approved by Parliament of law.

> shall come into force. Peace treaties, alliance treaties, and all treaties concerning change of boundaries or pertaining to sovereignty or affecting the regime or imposing new obligations on the state or requiring an expenditure not provided for in the budget or requiring legislative amendment or affecting the civil right of individuals, shall not come into force until ratified by the People's Assembly.[211]

By the Constitutional Order No. (1), conclusion and ratification of laws and treaties is to be made by the Chairman of the Revolutionary Salvation Council (the head of State), the Prime Minister, Minister of Defence and Commander-in-Chief of the Armed Forces.[212]

One important consequence of the above procedure is that it raises the question as to the treaty's status in the hierarchy of rules of municipal law. By incorporating international obligations into domestic law by an Act of the legislature, such obligations or treaty ranks as ordinary legislation within the legal system. The above-mentioned Article of the Constitution of 1973 expressly provided that once ratified, the treaty acquires the force of law. It did not expressly describe the treaty as taking precedence over the Constitution and laws of Sudan. Thus, treaties rank with ordinary national laws.[213]

As a result, international obligations arising from agreements do not enjoy a separate distinct status in the Sudanese legal system; once ratified, they are treated

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[211] Under the above Constitution, the President of the military regime, as head of the Executive, concluded treaties and ratified them as head of state.

[212] Constitutional Order No. 1, June 30, 1989, in *Laws of Sudan*, 6th Edn., (Khartoum: Ministry of Justice and Chamber of Attorney-General, 1992) Vol. 1 at 1.

[213] See Ignaz, S.H., "Transformation or Adoption of International Law into Municipal Law" (1963) 12 *International and Comparative Law Quarterly* 88.

as ordinary law, which implies that they are to be subjected to the same rules of statutory interpretation, and in case of conflict between international obligations and ordinary statutes, the same rules concerning conflict between statutes apply.[214] Thus, in case of conflict between a constitutional provision and a law (international obligations included) the constitutional provisions prevail.

2. The Period After 1983

After the application of Sharia as the source of law in 1983, the *Judgment (Basic Rules) Act, 1983* was enacted. The Act provided that courts shall apply and interpret laws in accordance with Sharia rules as established by the Quran and Sunnah. Any law which is inconsistent with Sharia rules and principles is accordingly null and void.[215]

This provision is based on the notion of supremacy of Islam; in other words, Islam is to prevail in case of conflict with other laws. This was affirmed by the Sudanese representative to the Human Rights Committee of the United Nations, during the review by the Committee of the initial report of Sudan under the Covenant on Civil and Political Rights. In response to the Committee's discussion of conflicts between the Covenant and certain provisions of the Sudanese Penal Code, he stated that "It was true that certain Islamic laws did not comply with the provisions of the Covenant. In that case, the Covenant should be adapted to the Islamization movement, which was recent, and the wording of the Covenant's

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[214] This issue was discussed in the case of *Nasr Abdel Rahmen Mohamed v. The Legislative Assembly* [1979] *Sudan Law Journal Reports* 16.

[215] Reference shall be made to the Act in detail in this chapter.

provisions, which dated from a bygone era, should be amended."[216]

Thus, as shall be observed, the law or statute by which a treaty is transformed into a municipal law shall be subject to rules of interpretation of Sharia which, in some cases, may be inconsistent with international norms applicable to non-Muslims. Moreover, the capacity of Sudan to conclude or accept international obligations, is to a great extent determined and dictated by Sharia rules, being the fundamental law of the state.[217] In other words, the Sudanese government can only conclude treaties under which its obligations do not contradict the basic principles and spirit of Sharia.

As for rules of customary international law, their status is not included in the framework of the constitution of Sudan. Therefore, international customary rules cannot directly affect the Sudanese legal system in the sense that individuals cannot invoke customary rules before domestic judicial organs in cases where these rules are inconsistent with Sharia rules. Customary rules, however, are nonetheless binding on Sudan, and their violation would engage its international responsibility vis-a-vis other states.

On January 2, 1958, Sudan deposited with the Secretary General of the United Nations a declaration accepting the compulsory jurisdiction of the

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[216] *Summary Record of the Consideration of the Initial Report of the Sudan*, UN Human Rights Commission, 42d. Sess., 1067th Mtg., paras 2, 13, UN Doc. CCPR/C/SR.1067 (1991).

[217] In traditional Islam, since the divine legislation did not rule directly, the ruler of the Islamic state represents God on Earth, to whom God's authority was delegated. As such, the ruler, whose primary task was to put God's law into practice, is to act in accordance with his law. Although the legislative, executive and judicial powers resides in the ruler in the traditional Islamic state, yet he might delegate such power. For more details on this issue and on the rules governing the Islamic state in its relation with modern nation states under international law, see Khadduri, "Islam and the Modern Law of Nations" (1956) 50 *The American Journal of International Law* 358-372.

International Court of Justice under Article 36(2) of the statute of the Court.[218] By accepting the jurisdiction of International Court of Justice, it impliedly accepted to be bound by rules of customary international law. This is because under Article 38(1)(b) of the ICJ statute, customary law would be considered one of the sources for the decision of the ICJ in a dispute to which Sudan is a party. However, with regard to the acceptance of rules of customary international law applied within the Sudanese legal system, one could argue that even if such norms are inconsistent with Sharia, they are nevertheless still binding on Sudan.

C. The International Obligations of Sudan vis-a-vis its Non-Muslim Minorities

The obligation under international law which Sudan is bound to respect vis-a-vis non-Muslims minorities are rooted, in the first place, in the international instruments to which Sudan is a party. As a member state of the United Nations, the Sudan is also bound by the Charter of the United Nations. Furthermore, it is obliged to comply with applicable international human rights instruments and to ensure that all individuals in its territory and subject to its jurisdiction, including members of all religious and ethnic groups, fully enjoy the rights guaranteed in these instruments.[219]

By ratifying the Covenant on Civil and Political Rights of 1966, Sudan has

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[218] However, Sudan excluded from its acceptance "(ii) disputes in regard to matters which are essentially within the domestic jurisdiction of the Republic of the Sudan as determined by the Government of the Republic of the Sudan". As for the effectiveness of such reservation, see Faisal Abdul Rahman Ali Taha, "A Plea for the Withdrawal of the "Automatic Reservation" From the Sudan's Declaration under the Optimal Clause" (1971) *The Sudan Law Journal and Reports* 149.

[219] For a full account of international instruments to which Sudan is a party, see *Report of Special Rapporteur of U.N.* in "Human Rights Questions: Human Rights Situation in the Sudan" UN GA A/48/60/ 48th Sess., para. 9 (1993). For the full text of this Covenant, see Centre for Human Rights, *A Compilation of International Instruments* (New York: United Nations, 1988).

committed itself to abide by the provisions of the Covenants, with specific reference to the protection of its non-Muslim minorities.[220] Article 2 commits states parties to the Covenant to protect the rights specified, and also lays down the procedure to be taken by states in honouring their international obligations. As far as minorities protection is concerned, no limitations are permitted by the Covenant under concepts such as sovereignty and territorial integrity. Even in cases of public emergency (Article 4), state parties are permitted to take measures derogating from their obligations under the Covenant only to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law, and do not involve discrimination solely on grounds such as race and religion. Therefore, Sudan cannot invoke its domestic laws as justification for failure to comply with its international obligation under the Covenant.[221]

Thus, the international obligation of states (including Sudan) for the protection of their national minorities and guarantee of their rights under the Covenant, is strict, with no derogation being allowed even in case of public emergency. However, such protection is undermined by the fact that Sudan did not ratify the Protocol of the Covenant, which suggests that Sudan is reluctant to

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[220] Sudan signed the Covenant in 1986. See Marie, J-B. et. al., eds., *International Instruments Relating to Human Rights*. Classification and Chart Showing Ratifications as of 1 Jan. 1989 (Strasbourg: N.P. Engel Publishers, 1989) at 112.

[221] See Summary Record of the consideration of the initial Report of the Sudan, *supra* note 216, at 25, 30, 36-37, 39, 46, containing statements by members of the Human Rights Committee during the review of the initial report of the Sudan under the Political Covenant, stressing that Sudan could not assert Islamic law as justification for failure to comply with obligations under the Covenant, since it had not entered reserva-tions to the relevant Article on the issue. However, it is to be noted here that the Committee did not raise the issue of rights of non-Muslims (other than the application of Penal Code) on the basis of the principle of equality under Islamic laws based on Sharia as the source of law.

recognize the jurisdiction of an independent international organ in matters of protection of individual human rights.

The other international obligations of Sudan, stemming from its membership of the United Nations, are based on Article 1 of the United Nations Charter. That Article provides: "that one of the purposes of the United Nations is to accomplish international cooperation through promoting and encouraging respect for human rights, and for fundamental freedom for all without distinction as to race, sex, language or religion." Though the provision does not impose an obligation upon members as such, it does so when read together with Article 56 of the Charter, which imposes obligations upon the member states of the United Nations. The word "pledge" in Article 56 implies obligation, and the reference to "separate action" (contrary to joint action) indicates that member states are bound to act individually for the achievement of universal respect for the observance of human rights and fundamental freedoms for all without distinction.[222]

Sudan is also committed internationally to act in accordance with standards set by United Nations declarations on human rights, particularly the Universal Declaration,[223] Article 2 of which provides that:

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[222] See generally, Lauterpacht, *supra* note 106.

[223] "The Universal Declaration, while not a treaty, is regarded as constituting an authoritative interpretation of the Charter of the highest order and has over the years become a part of customary law." This statement was made on the legal effect of the Universal Declaration when the Assembly for Human Rights met in Montreal, March, 1968. See Montreal Statement of the Assembly for Human Rights, (1968) 9:1 *Journal of the International Commission of Jurists* 94, at 95. For a discussion on the controversy over the binding effect of UN Declarations and the Universal Declaration, which is beyond the scope of this research, see McKean, *supra* note 96. See also Johnson, "The Effect of Resolutions of the General Assembly of the United Nations" (1955-56) 33 *British Yearbook of International Law* 97. As for the normative force of the Universal Declaration being recognised as becoming a basic component of international customary law, see Sohn, L.B. "Generally Accepted International Rules" (1986) 61 *Washington Law Review* 1073 at 1078.

> Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion...

The international principles of equality and non-discrimination for the protection of non-Muslim minorities are binding on states, being principles that are rooted in established sources of international law.[224] The continual recitation by the General Assembly of such principles as binding obligations, and their embodiment in the national Constitutions of a large number of states (including the Permanent Constitution of Sudan of 1973, Article 103), all support the view that the principle of equality is a general principle of law recognised by civilised nations, and is a rule of customary international law binding on all states.[225] As Judge Ammoun stated in the *Namibia Case*: "one right which must certainly be considered a pre-existing binding customary norms which the Universal Declaration codified is the right to equality."[226]

Thus, as a member of the United Nations, Sudan has assumed international obligations in respect of the rights of its non-Muslim minorities. This is based on the principle of equality embodied in international human rights law. This was affirmed by the Covenant of 1989 when it declared that one of the bases of Islamic Sharia is

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[224] See Chapter Two, Section I of this research, *supra*.

[225] See McKean, *supra* note 96, at 277.

[226] *Namibia (Advisory Opinion)* [1971] I.C.J. Rep. 285. This statement was made by Judge Ammoun in response to the written statement of the French Government, which had argued that violation of the Universal Declaration was not a violation of a treaty and did not sanction the revocation of the mandate in the Advisory Opinion of the International Court of Justice on Namibia. Quoted by Thornberry, *supra* note 96, at 321. See also Judge Tanaka's dissenting opinion in the *South West Africa Cases*, *supra* note 115, 311, in which he affirmed the same point at 284-316.

equality before law and respect of international Conventions and treaties.[227] It will be demonstrated to what extent Sudan has upheld this international obligation. For this purpose, the following pages will be devoted to examining the laws based on Sharia which are applicable to non-Muslims.

[227] The Revolutionary Council and Council of Ministers affirmed this on the approval of the plan of application of Sharia in its meeting dated 13/1/1991. See 1353 *Al-Ingaz Al-Watani* (Sudan Government Daily Magazine) (17 October, 1993) at 8.

Chapter Five: Sharia Laws Governing Non-Muslims in Sudan in the Light of International Principles

Introduction

Since Sudan gained independence in 1956, views concerning the appropriate role of Islam in the political and legal process have been widely divergent. One important factor contributing to this divergence has been the characteristic of Sudan as a multi-religious state with a non-Muslim minority.[228] However, in 1983 a practical step was taken by declaring Sharia as the law of the state and enacting a number of laws based on Sharia law. Since then, the process of Islamization of the whole legal system has gradually been taking place.[229]

The purpose of this Part is to evaluate some of the salient features of Sharia laws applicable to non-Muslims in Sudan in the light of the international norms discussed earlier in this research. The historical development of Sharia and its application as a constitutional source of law in the Sudanese legal system shall be examined, including some features of the Sudanese legal system and its development. The effect of Sharia law on non-Muslims' rights varies depending on whether that law constitutes the dominant legal tradition (after 1983) or one strand within a pluralist legal system (before 1983).

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[228] As to the question of Muslim and non-Muslim relations in the historical development of Sudanese politics, see Woodward, P., "Islam and Politics in Sudan Since Independence: Studies of the Political Development Since 1956" in Muddathir Abd Al-Rahim, et. al., Ed., *Sudan Since Independence* (London: Gower, 1986).

[229] For the political reasons which led to the application of Sharia in 1983, see Mansour Khalid, *Nimeiri and the Revolution of Dis-May* (London: K.P.I., 1985).

The examination of the impact of Sharia law on non-Muslims shall be made with reference to certain legislation, including the *Judgment (Basic Rules) Act, 1983*, the *Penal Code, 1983*, the *Evidence Act, 1983*, and the *Personal Law Act for Muslims, 1991*.

I. The Status of Sharia Rules in the Sudanese Legal System

A. The Periods of Sudanese Legal History and Status of Sharia Rules

The fundamental features of Sharia laws which affect the status and rights of non-Muslims, can only be explained in the light of the legal and political history of Sudan. It is thus necessary to examine the process by which the Sudanese legal system was created, and the legal developments which have produced the present Sharia laws.

Generally speaking, there have been three major periods in the legal history of Sudan: first, the pre-colonial period; second, the colonial period or period of reception of English law; and third, the post-colonial period (after independence). The third period may be sub-divided into two broad periods: from 1956 to 1983, and the period of application of Sharia law starting from 1983. The discussion of the status of Sharia rules shall be made within the framework of these three periods.

1. The Pre-Colonial Period[230]

Before 1821, the Sudan was divided into small tribal kingdoms with a central system of administration. The administration of justice varied from one area to another, being influenced by the norms, values, religious belief and social organization of each area. However, about 1504 A.D, an Islamic kingdom known as the Kingdom of Sennar was founded in the south-eastern region along the Blue Nile. It was generally Muslim in character, and Sharia rules were applied in addition to customary law. At the same time, a Sultanate founded at El Fashir and known as Dar fur Sultanate, existed in the western part of the country, where a body of customary law was applied by courts of elders known as *Ajaweid* or Mediators.[231]

The next significant event of the historic development was in 1821 when the Turks and Egyptians conquered the small scattered kingdoms and moved southward to establish the first central political state known as Sudan.[232] At the beginning of the Turkish rule, Islamic law continued to be applied, judicial circulars and regulations were introduced for the first time, and a systematic judicial organization was established.[233] In addition, Turco-Egyptian codes were applied, while for the majority of Sudanese, customary law was modified by Islamic law in the Northern and Western parts.

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[230] This period is dated before 1898, that is, before the Anglo-Egyptian conquest of Sudan in 1899.

[231] See Khalil, M.I., "The Legal System of the Sudan" (1971) 20 *International and Comparative Law Quarterly* 626-627. See also Abdul Rahman Ibrahim El Khalifa, *Development and Future of English and Islamic law in the Sudan* (Faculty of Law, McGill University, 1988) [unpublished].

[232] El Khalifa, *ibid* at 25.

[233] See Salman, S.M., "Lay Tribunals in the Sudan: An Historical and Socio-Legal Analysis" (1983) 21 *Journal of Legal Pluralism* 63.

This was a period of military rule full of oppression, heavy taxes and injustices. Such harsh treatment led to the formation of the national religious movement in 1881 led by the Mahdi. The primary goal of the Mahdi was to revive Islam and apply it fully in Sudan and the whole world.[234] It was during this period that Islamic law became the territorial law and thus regained full jurisdiction over all matters. The main features of the legal system was that the sources of law comprised the Quran and Sunnah and the circulars issued by the Mahdi. Supreme judicial authority was vested in the Mahdi as head of the state, and he was the final and conclusive reference in judicial matters, although his powers to hear and determine disputes were widely delegated. He was also the supreme legislative authority issuing circulars on a number of issues, including the prohibition of alcohol, family organization, status of women, and the protection of public morality, thus disposing of customs and social usages that were inconsistent with Islamic law. Most of his circulars were recitations of rules of Sharia law.[235] The Mahdist state fell with the Anglo-Egyptian conquest of Sudan in 1898. Thus, the revival of Islam derives from the period of El Mahdi.

2. The Colonial Period

The basis and structure of a modern legal system was set up by the British Administration after the Anglo Egyptian conquest in 1898. With the fall of the Mahdi's state, the whole legal structure it set up fell with it, and the new rulers were faced with the task of determining what type of law and legal system was most

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[234] *Ibid.*, at 63.

[235] El Khalifa, *supra* note 231, at 32 and 34. Sharia was applied as a comprehensive legal system during the Mahdi's state from 1884-98. See Holt, P.M., *The Mahdist State in the Sudan, 1881-1898. A Study of its Origin, Development and Overthrow* (Oxford, Clarendon Press, 1958).

convenient for application to the diversity and pluralism of Sudanese society. This was settled by adopting a dual legal system which consisted of Sharia and Civil divisions, each comprising its own set of courts which exercised independent jurisdiction and applied a different system of jurisprudence. Thus, Sharia was relegated from territorial law under the Mahdist state to personal law for Muslims. Suffice here to generalize that the latter (i.e. Sharia courts) were endowed with the power to apply Islamic law in cases of personal status involving Muslims, according to section 6 of the *Sudan Mohammedan law Courts Ordinance, 1902*. A Sharia court also had jurisdiction to try cases of parties irrespective of religion, only if the parties consented or submitted to its jurisdiction; in such cases, Sharia law was applicable.[236] Civil matters were to be decided in accordance with the concept of "justice, equity and good conscience." That term was interpreted by Sudanese courts until the period after independence, to mean mainly English common law. This contributed towards the introduction of common law in Sudan.[237]

Criminal matters were decided in accordance with the provisions of the Criminal Code of 1900, which was based on Indian criminal law. The content of the general territorial law had predominantly reflected English law (being legislation and judge-made law) during this period, and was applicable to all Sudanese. However, customary rules were applied under the Chiefs' Court Ordinance of 1931, which governed the three southern provinces.[238]

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[236] See Khalil, *supra* note 231, at 628 and 629.

[237] See, generally Zaki, Mustafa, *The Common Law in the Sudan, An Account of the Justice, Equity and Good Conscience Provision* (Clarendon Press, Oxford, 1971). See also Akolowin, Natale Olwak, "The Courts and the Reception of English Law in the Sudan" (1968) *Sudan Law Journal* 230. It is to be mentioned here that customary law was applied during this period.

[238] See Thompson, C.F., "The Sources of Law in the New Nations of Africa: A Case Study from the Republic of the Sudan" (1966) *Wisconsin Law Review* 149. For a full account of the courts'

3. The Post-Colonial Period

During the first few years after independence, no radical changes were introduced, but a national debate over the future of the country's constitutional and legal system started soon after independence. A call for the integration of laws and reforms started, each made from a distinct political viewpoint: the Islamists called for Islamizing the whole legal system, while the secularists insisted on the continuation of the system based on English law.

Attempts were made during different regimes to introduce changes, but all these efforts were unsuccessful, and until 1983, nothing practical was done to change the essential nature and content of the pre-existing legal system.[239] In that year, the gradual Islamization of the whole system began.

B. The Question of Sharia as a Constitutional Source After Independence and the Status of Non-Muslims

Sudan as a unified state achieved full independence from Anglo-Egyptian rule in 1956. The Transitional Constitution adopted in 1956 provided mainly for a multi-party parliamentary government. It provided for the guarantee of fundamental rights, including the right of all Sudanese to equality before the law, their right not to be arrested, imprisoned, or deprived of the use of their property except by due process of law, and the protection of their freedom of expression and association subject to

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structure during this period, see Tier, A.M., *The Legal System of the Sudan* (Khartoum: Faculty of Law, University of Khartoum) [unpublished]. See also El Khalifa, *supra* note 231, at 51 et. seq.

[239] See Gordon, C.N., "The Islamic Legal Revolution - The Case of Sudan" (1985) 19:2 *The International Lawyer* 793.

the law. The effect of this was that under the 1956 Transitional Constitution, all Muslims and non-Muslims living within the geographical boundaries of Sudan enjoyed equal rights as first class citizens irrespective of religion. However, the constitution did not provide for a source of law in Sudan.

Following the 1958 elections, the main issue which came to preoccupy the Constituent Assembly (the Parliament) was the adoption of a Permanent Constitution. A debate arose between political parties as to the significance to be given to the Constitution. The Islamists challenged the Constitution as inappropriate to conditions in Sudan and demanded an Islamic constitution, but this was opposed by the other political parties.[240] The debate ended with the first coup d'etat of November, 1958, which suspended the Constitution and fundamental rights. Another revolution in October, 1964, ended the military regime and readopted the Transitional Constitution of 1956.[241] However, the issue was revived on the adoption of the Permanent Constitution, and was based mainly on the question whether Sudan was to be declared a Muslim state in deference to the religious beliefs of the majority of its citizens, or be left as a secular state in deference to the cause of national

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[240] Following the adoption of the 1956 Transitional Constitution, a national committee was set up to draft a Permanent Constitution. The debate was based on the proposal made to refer in the draft Constitution to Sudan as an Islamic state and the legal impact of that on non-Muslim Sudanese. For a full account of the debate, see *Summary of the Meetings of the National Committee for the Constitution, No. 2* (Khartoum: Macor Kodail, 1957) at 207 et. seq.

[241] Under the military rule of 1958-1964, the Islamization and Arabization was accelerated, the policy of the Government was national integration through the enforced spread of Islamic education and the conversion and promotion of Arabic as the national language. Missionary schools were nationalized, foreign missionaries expelled, and the day of rest changed from Sunday to Friday. See Fleuhr-Lobban, C., "Islamization in Sudan: A Critical Assessment" (1990) 44:4 *Middle East Journal* 610.

integration and religious harmony.[242]

A committee was set up to draft a national constitution. The committee submitted a Draft Islamic Constitution in 1968 to the Constituent Assembly for discussion. The Draft mainly provided that Islamic law was to be considered the main source of law; Article 113 of the Draft Constitution provided that any laws contrary or repugnant to rules of Sharia should be declared void. It also provided that the enactment of future laws should be in accordance with Sharia.

Under Articles 1 and 3, the state was to be a "democratic, socialist, republic based on the guidance of Islam," and Islam was declared the "official religion." Thus, Islam became the established religion in the state. The religious state was to "strive to spread religious enlightenment among citizens, and eradicate atheism, all kinds of corruption and moral turpitude" (Article 14). With reference to non-Muslim minorities, Article 19 provided that "The state shall guarantee freedom to religious minorities to establish their education institutions and to administer such institutions in accordance with the law." Article 32 provided for guarantee of freedom of religion, opinion, and conscience and the right to profess one's religious beliefs subject to such reasonable limitations in the interest of morality, health or public order as may be imposed by law.[243]

The Draft Islamic Constitution was abrogated as a result of a coup d'etat of

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[242] On the debate of whether to adopt an Islamic Constitution and its effect on non-Muslim minorities constituting one-third of the population, see the *Memorandum of the Committee for Constitutional studies on the Proposed Constitution of Republic of Sudan* (Khartoum, Khartoum University Press, 1968) at 16 et. seq. See also Ali Suliman Fdhalla, "The Search for a Constitution" in Abdel Rahim, ed., *supra* note 228, at 44.

[243] Ali Suliman, *supra* note 242, at 44 & 45.

May, 1969.[244] Under the new military regime, the first Permanent Constitution was adopted in 1973, and it provided for a secular one-party state. In addition, Article 9 provided:

> The Islamic Law and custom shall be the main sources of legislation. Personal matters of non-Muslims shall be governed by their personal laws.

Under Article 6, Islam, Christianity and "heavenly" religions are equally protected; it also guaranteed the equality of all citizens. The impact of Article 9 in relation to non-Muslims, however, is clarified when read with Article 38 of the Constitution, which provides that "the Sudanese have equal rights and duties, irrespective of origin, race, locality, sex, language or religion. Inconsistencies arise in the interpretation of both Articles. The provision for Sharia as a source of public law implies that laws should be enacted or interpreted in accordance with Sharia. This raises the issue of equality between Sudanese as guaranteed by Article 38 in the light of the provision in Article 9. However, taking into consideration the political setup under which the 1973 Constitution was promulgated,[245] the drafter of the Constitution would be assumed to have intended a different interpretation, not intending Sharia to be the main source, but one of the sources of law.

Thus, according to Article 9, Islamic law is to be a source of law. However in

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[244] The impact of such provisions on non-Muslims shall be discussed in section II of this chapter.

[245] The first part providing for Sharia as the main source was adopted to make the Constitution more acceptable to those calling for the application of Islamic laws. The second part was adopted to be acceptable to other non-Muslims and to make the constitution compatible with the terms of the Addis Ababa Agreement. See An-Na'im, A., "Constitutional Discourse and the Civil War in the Sudan" in Daly, M.W. & Ahmad Al Awad Sikainga, eds., *Civil War in the Sudan* (London: British Academic Press, 1993) Chap. 5.

practice and until 1983, laws in force were based on English common law principles. It is to be noted that though Sharia and custom are sources of law under Article 9, all legislation passed by the legislature since 1983 have been based on Islamic sources only.

In 1983 the so-called "September laws" based on Sharia were enacted, and in 1984 the military regime of 1969 was overthrown. The Transitional Military Council of 1985 left the question of the principle and manner of implementation of Sharia to the proposed parliament of the elected government of 1986.[246]

The issue of the Sharia and its implementation as far as the status of non-Muslims is concerned, arose again after the formation of the "national unity government" in May 1988. However, a new draft legal code was passed; it sought to establish a dual legal system for Muslims and non-Muslims, to repeal the "September laws" and replace them with a modified Islamic law which would be applied in the predominantly Muslim areas of the country. A second non-Islamic secular legal code was to be applied in the remaining areas, that is, where non-Muslims constitute the majority.[247]

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[246] The Transitional Military Government of 1985 adopted the Transitional Constitution on October 1985. Generally, the Constitution's provisions were similar to that of 1973 in granting equal protection, freedom of religion, etc. However, it did not contain a state religion pronouncement similar to that of Article 16 of the 1973 Constitution. See Sherman, S.C., "Sharia Law in the Sudan: Why it Does Not Work Under the Sudanese Constitutions of 1973 and 1985" (1989) 7:2 *Dickinson Journal of International Law* 277.

[247] The debate on the approval of the Draft by the Constituent Assembly was on the impracticability of the Code. If the dual Codes were applied by geographical area, that would be a problem in areas where there are significant minorities, such as in the Nuba Mountains and in Northern Sudan.

II. LAWS AFFECTING NON-MUSLIMS

A number of laws based on Sharia law have been enacted since 1983. These have both directly and indirectly affected non-Muslims. The main laws among these shall be examined in the light of the international standards described earlier.

A. The *Judgment (Basic Rules) Act, 1983*[248]

To understand the general framework within which the implementation and interpretation of laws applied by courts to non-Muslims is conducted, it is essential to view first some of the general features and consequences of the *Judgment (Basic Rules) Act* of 1983. The significance of the Act lies in the fact that it is to be considered as a code of procedure for the Courts, since it lays down the general directives, guiding principles and rules to be followed by courts when implementing or interpreting laws. Section 2 of the Act provides:

> In interpreting legislative provisions, unless such provisions are already interpreted or have been given a definite meaning:
>
> (a) a Judge shall presume that the legislator did not intend to contradict Sharia for the purpose of holding a definite duty in abeyance or allowing that which is clearly prohibited and shall pay due regard to Sharia directives of approbation and disapprobation;
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> (b) a Judge shall interpret generalities and discretionary provisions in accordance with the rules, principles and general spirit of Sharia; and

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[248] The Act was promulgated in 1983 as a "Provisional Order" No. 35. Under Article 106 of the Permanent Constitution of 1973 (repealed), it became law and took effect on the date of its initial promulgation, in addition to other Islamic laws, mainly the *Evidence Act, 1983*, by Provincial Order No. 36, the *Penal Code, 1983*, the *Civil Transaction Act, 1984*, approved by the People's Assembly on March 1984.

(c) a Judge shall interpret jurisprudential terms and expressions in the light of the basic linguistic rules of Islamic jurisprudence.

Thus, the above section establishes the general framework within which the courts are bound to operate in interpreting any legislative provisions. By stating that a judge shall presume that the legislature does not intend to contradict Sharia, section 2(a) is intended to foreclose the application by the courts of any norms, rules or standards which are inconsistent with Sharia law. Moreover, as expressed by section 2(b), the courts may only resort to rules of interpretation which ensure that generalities and discretionary provisions are consistent with rules, principles and general spirit of Sharia.[249]

Apart from rules of interpretation, the second situation with which the Act deals is mentioned in section 3:

Notwithstanding any provisions in any other law, and in the absence of a legislative provision governing an event:

(a) a judge shall apply the existing Sharia rule as established by the Koran and the Sunnah...

This section speaks about two cases in which a judge is bound to apply rules of Sharia established by the Quran and Sunnah: first, notwithstanding any legislative provision in any other law, and secondly in the absence of an express provision. Thus, the court is bound to refer to rules of Sharia based on the Quran and Sunnah as

[249] For an examination of the rules of interpretation under Sharia, and comments on the Act, see Mohammed Sheita Abu Saad, *Sharh Qanoun Usul Al Ahkam Al Qadai Al Islami Al Soudani* (Cairo: University Press, 1983). See, for a full account of the different rules of interpretation in Sharia, Khadduri, *supra* note 51.

original sources of Sharia, both in cases of the existence of ambiguous provisions, and the absence of substantive legislation. The intended consequence of the section is to widen the application of rules of Sharia to cover all branches of law. Equally it conforms to the general rule that Sharia rules as established by the Quran and Sunnah, are an integral part of the public order in an Islamic state and are therefore to be applied by the courts in all cases.[250]

The effect of the above section is that it prevents courts from referring to any other sources in the absence of a provision, such as principles established in Sudanese judicial decisions, or good conscience, as was permitted before 1983.[251] A provision similar to the section above-mentioned is contained in section 3 of the *Civil Transactions Act, 1984*. That section provides that "[i]n applying the provisions of this Act, interpreting the words and expressions in it and in cases not provided for by any law the courts shall be guided by Sharia principles and the rules embodied in the sources of the *Judgments (Basic Rules) Act, 1983*."[252] However, the phrase "existing Sharia rules as established by Koran and Sunnah" mentioned in section 3(a) of the Judgment Act, is vague as to what is meant by "existing Sharia rules". This is because Sharia does not comprise only Quran and Sunnah but other sources of Islamic law

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[250] See Khalifa, *supra* note 231, at 220.

[251] It is to be mentioned here that although Sharia was confined to personal matters before 1983, section 6(2) of the *Civil Procedure Act, 1974* (repealed and replaced by section 6(2) of the *Civil procedure Act, 1983*), required civil courts to decide in the absence of legislation according to the principles which are established in the Sudanese judicial decision, the principles of Sharia law, custom and good conscience. This section empowered courts to extend Sharia rules to areas other than personal matters (territorial law). However, in practice civil courts rarely referred to Sharia rules till 1983. See Tier, A.M., "Islamization of the Sudan Law and Constitution: Its Allure and its Impracticability" (1988) 99 *Third World Legal Studies* 118.

[252] Similar provisions are in section 81 of the *Evidence Act, 1983*, which provides that "the provisions of this shall be interpreted in accordance to rules of Sharia". See also section 458 of the *Sudan Penal Code, 1983*.

(*usul*) which interpret the basic sources, including *ijmma* (the consensus of jurists), *qiyas* (analogical deductions), etc.[253] Section 3(a) by itself gives judges discretionary power to refer to the various rules set out by Islamic jurists (which vary with the different schools of Islamic thought), and may lead to conflicting decisions on the same issue by different courts.

Section 3(b) of the *Judgment (Basic Rules) Act* provides that in the absence of a provision in Sharia:

> [t]he judge shall exert his thought and be guided in so doing by the principles hereinafter mentioned...

The above section in fact gives a judge power to use his own reasoning to arrive at a decision in the absence of an express provision in Sharia covering an issue before the court, provided that he exercises this power within the relevant guidelines of Sharia. Commenting on this subsection, Khalifa is of the view that it brings the issue of *ijtihad* as defined in Islamic jurisprudence, that is, as "an exercise of one's reasoning to arrive at a logical conclusion to deduce a conclusion as to the effectiveness of a legal precept in Islam."[254] He reflected on this by stating:

> The *Judgment (Basic Rules) Act, 1983* is an instance of a breakthrough from the long maintained forceful rejection of Islamic law. It is the first attempt of its kind throughout the contemporary Islamic world that aims at taking the Muslims to their original, authentic and primary sources of law, viz, the Quran and the Sunnah. Nothing should hamper the judge's faculty for exerting his thought where there is a hiatus in

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[253] For main sources of Sharia law, see Chapter One of this research, *supra*.

[254] For a full comment on this subsection and rules governing *ijtihad* in Islamic law, see Khalifa, *supra* note 231, at 220-231.

> the *fiqh*, allowing such a judge room to invoke Islamic concepts of justice. There is a pressing need for the *fiqh* to come to grips with new challenges and opportunities. The Quran and the Sunnah are flexible enough, they generally draw broad lines and leave a lot of details to adapt to time and space. The revival of "*ijtihad*" is the most far-reaching and effective element in bringing *fiqh* to grips with the realities of modern life.[255]

The effect of section 3(b) is that it gives courts the power to create law in the absence of a provision, a practice which might lead to confusion. A case illustrating the effect of the implementation of section 3 of the Act was the *Government of Sudan vs. Laleet Ratinlal Shah*.[256] In that case, a non-Muslim resident was charged with engaging in the lending of money without a licence, and of charging interest on his loans. The Sudan Penal Code of 1983 does not expressly refer to the charging of interest as a criminal offence.[257] However, the appeal court in affirming the conviction by the trial court, held that in as much as the Quran expressly forbids the charging of interest (*riba*), the general provisions of the Judgment Act, which provides that provisions of Sharia shall be applied in the absence of other legislative provisions, were applicable. By this decision, the *Laleet Case* laid the rule that engaging in *riba* is a criminal offence, and since it is prohibited by rules of Sharia, the rule is applicable to all persons, whether Muslims or non-Muslims.[258]

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[255] *Ibid.*, at 221-222. It is, however, to be mentioned here that the question of whether the door of *ijtihad* is closed or not is still a controversy among contemporary Muslim scholars. See Hallaq, *supra* note 53, and Chapter One of this research.

[256] (1988) *Sudan Judicial Rules Journal* 42.

[257] In Islam the term *riba* means "any unjustified increase of capital for which no compensation is given" and in Sharia is deemed to include a prohibition of the charging of interest by a lender. See Coulson, *supra* note 1, at 139.

[258] A challenge before the Supreme Court as to the constitutionality of criminally charging the defendant under Article 70 of the 1973 Constitution for engaging in *riba* was dismissed. The said Article stated in part: "No person shall be punished for an act which was not an offence at the time he committed that act..." After this case, the *Judgment (Basic Rules) Act* was amended in 1984 in that

Therefore, the main effect of the sections referred to is that courts under the Act have wide discretionary powers to apply and refer to Sharia rules which governed non-Muslims under the classic *dhimma* system, such as rules rendering them unequal before law with Muslims in certain cases. In fact, the rules governing non-Muslims in Sharia go beyond those enumerated or provided for in legislation which a court is empowered to apply according to section 3 of the Act.

B. Equality before the Law and Rules of Evidence

Before the application of Sharia law in 1983, the rules of evidence applicable by Sudanese courts were based on principles of English common law.[259] In 1983, the Evidence Act was passed, mainly based on Islamic rules of evidence. The most important of all the provisions of the Act are those evidentiary rules of traditional Sharia relating to proof of certain offenses in Islam under which distinctions on the basis of religion are made.[260]

Section 27 of the Act provides that "any sane person of sound mind who is knowledgeable of the facts at issue is a competent witness". But the same Act contains other provisions which deny non-Muslims such competence: sections 77 and 78 of the Act provide for the application of Sharia rules of evidence in the proof of

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section 3(b) was to be applicable only to civil cases. Consequently, a criminal court is bound to decide that an act is an offence when expressly provided for as such under the *Penal Code, 1983.* In other words, the judge exercises *ijtihad* under section 3(b) only in civil cases.

[259] For the rules of evidence applicable by Sudanese courts, see Krishna, V., *The law of Evidence in the Sudan* (London: Butterworths, 1981).

[260] Proof of *huddud* offenses to which Islam attaches specific penalties include adultery, consumption of alcohol, apostasy from Islam, armed robbery and theft, false accusation of fornication, unchastity.

huddud offenses. In addition, section 81 expressly states that no provision of the Act may be interpreted in any way inconsistent with Sharia.

These rules are to be applied in accordance with Sharia rules of evidence, under which a non-Muslim is incompetent to give evidence against a Muslim in *huddud* offenses. Judicial Circular No. 97/83 expressly provides that one of the conditions required to determine competency of a witness to testify in *huddud* offenses is adherence to Islam; the testimony of non-Muslims is admissible only in cases of necessity.[261]

However, the Supreme Court in the case of *Sudan Government v. Badr El Din Abbas Abu Nora*,[262] when discussing the issue of admissibility of the testimony of a non-Muslim in a murder case, overruled the decision of the court of first instance that the testimony of the witness is not admissible under Sharia since he is a Christian (non-Muslim). The majority of the Supreme Court judges admitted the non-Muslim testimony, referring to Judicial Circular 97/83 which permits non-Muslims to give testimony in cases of necessity as an exception to the general rule that a just witness in *huddud* offenses must be a Muslim.[263] Judge Salah El Amin

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[261] Judicial Circulars are issued by the Chief Justice and are designed to interpret vagueness or fill gaps in certain provisions. Circulars are binding on courts.

[262] *Supra* note 256, at 63.

[263] The dissenting opinion argued that a non-Muslim testimony is not admissible in *huddud* offenses (as argued by Maliki and Shafia) in accordance with s. 31 of the *Evidence Act, 1983*, despite its inconsistency with sections 3, 17 and 33 of the Transitional Constitution which provided for equality before law irrespective of religion, *inter alia*. The dissenting opinion of judges argued that the decision on constitutionality of laws and legal provisions needs independent procedures in accordance with section 323 of the *Civil Procedure Act, 1983*, The cases of necessity in Sharia are specified as including making a will orally by a dying Muslim in the absence of Muslims witnesses, which was not the situation in that case.

stated that:

> Though admissibility of non-Muslim testimony is only in cases of necessity by way of exception yet I think that it should be applied in a broader sense as more than one quarter of the Sudanese population are non-Muslims, it will be unjust to refuse their testimony on basis of religion as it will be violating Article 17 of the Transitional Constitution of 1985 which provided that "all persons are equal before law, and citizens are equal in rights and duties without discrimination on basis of race, religion, colour, sex or political opinion."[264]

It should be mentioned here that although the testimony of non-Muslims was accepted as an exception to the general rule and in a broader sense to be consistent with provisions of the Constitution of 1985, one should be optimistic as to the awareness of the courts in passing decisions in conformity with international principles. This is because the Supreme Court, by basing its decisions on Article 17 of the Transitional Constitution which provides for the international principle of equality, in fact demonstrates the awareness of the Sudanese courts of the international obligations of Sudan towards its non-Muslim minorities.[265]

C. Criminal Justice and Non-Muslims

As to the legislation on criminal matters before 1983, the applicable Penal Code was based mainly on English common law principles, and allowed a degree of

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[264] The Transitional Constitution was suspended by Constitutional Order 1, 1989. For the Constitutional Order, see *Laws of Sudan, No. 1, Constitutional Orders and Penal Codes and its Procedures*, 6th. ed. (Khartoum: Ministry of Justice and Attorney-General Chamber, 1992).

[265] This awareness is undermined by the fact that the decision may not be binding according to s. 3(b) 5 of the *Judgment (Basic Rules) Act, 1983*, which direct the judge to be guided by established judicial precedents in the Sudan in so far as they are not inconsistent with Sharia. This is the first time where it is stipulated that it is not enough for a judicial precedent to be established. It has to meet with the condition of being consistent with Sharia.

flexibility in application, thus enabling the courts to take account of local tribal laws and customs.[266] The Islamic Penal Code was first introduced in 1983 and subsequently replaced with the 1991 Criminal Act. The main features of the 1983 Code[267] were the introduction and application of *huddud* penalties. These are specific punishments for named offenses under the law, some of which are proved by special evidentiary rules.[268] The Code made the infliction of certain *huddud* penalties dependent on the religion of the offender.[269]

The Penal Code of 1983 was abolished and replaced by the 1991 Criminal Act, which does not provide for variation of punishment on the basis of religion, but rather on a geographical basis. All sections of the Act are applicable to non-Muslims as well as Muslims in the North, except that *huddud* offenses will not be applicable to the southern regions where the majority are Christians.[270] Section 5(3) of the Act

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[266] This was the *Penal Code Act, 1974* which repealed and replaced the *Penal Code* of 1925 which was enacted under the Anglo-Egyptian rule.

[267] For a full analysis and criticism of the *Penal Code, 1983*, see Zein, I.M., *Religion, Legality, and the State: 1983 Sudanese Penal Code* (Department of Religion, University of Michigan, 1989). [unpublished].

[268] Example is the *hadd* for *zina* (fornication) which is to be proved by the testimony of four male witnesses to the actual act of intercourse. These offenses and their *huddud* will be mentioned in this part. The *huddud* punishments have been described by the Human Rights Committee as inhuman and degrading punishment violating international law. The Sudanese representative replied that this constitutes an aspect of Muslims' right of "free choice" of laws in accordance with their religion. See UN Doc. CCPR/C/SR. 1067, p. 213 (1991).

[269] An example is section 318 on adultery, which provided that "...this punishment shall not be imposed on any person whose "heavenly religion" established a different punishment for this offence. In the absence of punishment in his religious law he will be punished not more than eighty lashes and fine or imprisonment for more than one year." However, for a Muslim who committed adultery (*zina* or fornication), the punishment is exile and flogging for an unmarried man, 100 lashes where the victim is a virgin girl; death in case of women, and stoning (*rajm*) in case of a married man. For more elaboration on the 1983 Code, see An Na'im, *supra* note 10, at 127 et. seq. See also Tier, *supra* note 251, at 209.

[270] *Laws of Sudan*, Vol. 1 at 37.

provided that "The provisions of sections 78(1), 79, 85, 126, 139(1), 146(1) and (3), 157, 168(1) and 171 shall not apply to the Southern states unless the accused himself request the application of the said provisions on him or the legislative body concerned decides to the contrary."

The exceptions provided for on a geographical basis under section 5(3) of the Act pertain to three cases:

1. Where the act in issue does not constitute an offence in the southern region, though the same act is a *hadd* offence punishable under the Code if committed in the northern region. An example of this is provided for in the following cases:

(a) The possession and drinking of alcohol does not constitute an offence in the South by way of exception under sections 5(3);

(b) The same is true of sale of carcass, that is, a dead terrestrial animal, whether it died naturally or was slaughtered in a manner contrary to Sharia under section 85(1);

(c) Under section 126 of the Act, conversion from Islam is considered an apostasy (*ridda*), and is treated as a crime punishable with death. However, according to section 5(3), the same act does not constitute an offence in the South.

(d) False accusation of unchastity (*qasf*) under section 157. A person is guilty of this offence when he falsely, whether expressly or by implication or in writing or clear signal, imputes adultery, homosexuality or negation of lineage, to a chaste person

even if such person is dead. The same act is not considered an offence in the South. However, defamation under section 159 is an offence in both regions.

2. The second exception is in respect of cases where the act constitutes an offence generally, but the punishment inflicted varies on a geographical basis, as demonstrated in the following instances:

(a) The basic punishment in the North for intentional bodily wounds is retribution (*qisas*), or in its absence, imprisonment or fine or both, under section 139(1). Under section 139(2), the punishment for the same offence committed in the South is imprisonment or fine, or both.

(b) The offence of *zina* (adultery) is punishable with death by stoning for a married (*muhsan*) offender, and 100 lashes for an unmarried (*non-muhsan*) offender. In addition to whipping, a non-married offender may be punished, in addition to whipping, with expatriation for one year.[271] In the southern regions, however, punishment for the same act is imprisonment or fine, or both.[272]

(c) Under section 171(1), whoever commits the offence of capital theft[273] is punished with amputation of the right hand from the joint. However, the punishment for the same act is remitted to that of ordinary theft in the South, punishable with

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[271] *The Criminal Act, 1991*, s. 146.

[272] *Ibid.*, s. 146(4).

[273] Section 170(1) of the Act, which defines "capital theft", provides: "...whoever covertly takes, with the intention of appropriation, any movable property belonging to another, provided that the property shall be taken out of its *hirz* and be of value", that is theft of movable property valued at no less than a dinar of gold weighing 4.24 grammes or its value in money as determined by competent authorities (subsection 5).

imprisonment or fine or 100 lashes.[274]

(d) Armed robbery (*hiraba*) is punishable with death, crucifixion or cross-amputation (i.e. amputation of the right hand and left foot) or imprisonment.[275] In the South, the offence is punishable with death (if the act results in death) or imprisonment.[276]

3. The third exception is where the provisions of the Act applies equally to Muslims and non-Muslims in all of Northern Sudan. However, the only exception is in relation to the offence of drinking and possessing alcohol under section 78(1) which exempts only non-Muslims from its application. Under sections 78(1) and 79, non-Muslims are allowed to drink and possess alcohol, provided it does not provoke the feelings of others, or cause annoyance or nuisance, and they do not drink the alcohol in a public place or come to such a place in a state of drunkenness. However, dealing in alcohol by storing, transport, sale or purchase, etc., is an offence under section 79 for Muslims and non-Muslims, a restriction which undermines the freedom of non-Muslims to drink.

Another section which may affect non-Muslims is section 152(1). It prohibits the commission of indecent and immoral acts contrary to public morality or the wearing of indecent or immoral uniforms which causes annoyance to public feelings. An act shall be considered contrary to public morality if it is so considered in the religion of the doer, or the custom of the country where such act has occurred. Thus,

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[274] *Supra* note 271, s. 174(2).

[275] *Ibid.*, s. 168(1).

[276] *Id.*, s. 168(2).

according to this section, two grounds exist for considering an act as contrary to public morality: first, its treatment as such by the religion of the doer, and second, the custom of the country. Either one of these grounds is sufficient. Since, however, the custom of the country is presumed to be the applicable rules of Sharia, it may be inferred that if the act is not immoral according to the religion of the doer, the section will still be applicable in cases where the act is considered to be contrary to public morality as defined by Sharia.

1. The impracticability of the Application of the Criminal Act, 1991

The exception to the application of huddud offenses to the southern region as provided for in section 5(3), may be waived at the request of the accused or if the competent legislative authority so decides. The section as such does not achieve the purpose intended (i.e. exemption of the application of *huddud* from the regions where Christians are a majority) for two reasons. First, the exception may be abrogated at any time by the competent authority. Secondly, it is inconceivable that in the absence of a religious motive a non-Muslim may waive the exception applied to him and request application of *huddud*. This may, however, be so for a Muslim in the South who may request imposition of the punishment (*hadd*) commanded by God for his repentance on earth for sins he commits.[277] Another reason for which a non-Muslim may not be expected to make such a request is that although the degree of proving the act is higher in *huddud* offenses, he will not be discharged but be subject to less punishment if the act is not proved.[278]

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[277] See Awad Hassan Al Nour, *The Sudanese Islamic Criminal Act* (Khartoum: Dar Hayl Li-Tibaah Wa-Al Nashir, 1992) at 16.

[278] See Auda, Abd al-Qadir, *Al-Tashri al-Jan 'iy al-Islamiy* (Beirut: Dar al Kitab al Arabi, 1960).

In addition, the geographical limitation on the scope of application of the Act does not achieve justice or its objectives because there is a great number of non-Muslims in the North who will be subject to the application of Islamic *huddud* under the Act (other than the offence of drinking alcohol).[279] On the other hand, Muslims in the South are given the freedom to choose whether or not the sections would be applied to them. This means that Sharia rules are extended to the South by the parties' choice of law. This is contrary to the principles of Sharia under which Sharia criminal law (being part of public law) is to be applicable tc all subjects within the Islamic state, whether Muslims or non-Muslims.

However, the non-Muslims in the North have no such choice to exempt them from the application of such rules. The mere fact that the exceptions are applied to persons in the South regardless of religion implies that when they move from the South they will lose such treatment, in which case their freedom of movement may be considered as indirectly restricted. In addition, the Act creates an uncertainty in criminal law, since an act which does not constitute an offence in the South for non-Muslims may constitute an offence for non-Muslims in the North.[280]

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[279] The Act was passed having regard to the social and cultural diversity in the country. This had been reflected in the National Islamic Front's Sudan Charter of January 1987. It stated, among others, that the "effectiveness of some laws shall be subject to territorial limitations, considering the prevalence of certain religion, or cultures in the area at variance with the religion dominant in the country at large, and regarding matters where an exception can be made - not according to each person's or family choice but to the dominant choice in the area. In these matters exclusive rules can be established in the area based on the local majority mandate - any local minority remaining subject of the democratic principles". National Islamic Front, Sudan Charter: National Unity and Diversity (Khartoum: 1987) at 4. (Quoted by Niblock, T., "Islamic Movements and Sudan's Political Coherence" in *Sudan, History Identity, Ideology*, Bleuchot, H., ed., (Oxford; Reading: Ithaca Press, 1991) at 264.

[280] On whether *huddud* as such are constitutional or not, see Sherman, *supra* note 246, at 277.

D. The Law Applicable to the Personal Matters of Non-Muslims

1. Procedural Matters

It is agreed by all Islamic jurists that non-Muslims within the Islamic state are subject to the application of Islamic laws. However, in personal matters their religious laws are to be applicable unless one of the parties is a Muslim and the matter in issue relates to divorce, inheritance, maintenance, gifts and custody. In such cases, the law applicable shall be Sharia law. Some jurists are of the opinion that if both parties are non-Muslims and consent to submit to Sharia jurisdiction, then Sharia law is applicable.[281]

Before independence, the condominium government followed the policy of non-interference with the religion and personal affairs of the Sudanese natives. Its policy in dealing with personal matters was that Muslims were to be governed by Sharia law in any question regarding marriage, divorce, guardianship and family relations.[282]

By section 5(9) of the *Civil Justice Ordinance, 1929*, the civil court is required to apply "any custom applicable to the parties" in matters of marriage, divorce, succession, gifts and custody. However, conflicting decisions were passed by courts as to the meaning of the term "custom". Generally, the word "custom" is understood to mean the laws of different people who are members of the Sudanese excepted communities (i.e. Christians and Jews and other ethnic communities). The term "custom" was interpreted and used to extend the subject matter of the personal laws

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[281] See generally Abu Zahara, *supra* note 87.

[282] *The Civil Justice Ordinance 1929*, s. 5.

of excepted communities to all matters of family law and succession.[283] In fact, Sudanese courts had interpreted the term as referring not only to customary law or rules of justice and equity, but also to the church law of the parties.[284]

The extension of Sharia law to non-Muslims in personal matters was made through the jurisdictional rules of Sharia courts. Under section 6 of the *Sudan Mohammedan Law Courts Ordinance, 1902*, Sharia courts had jurisdiction to decide on and apply Sharia law to the personal matters of Muslims. They also had jurisdiction over any matrimonial matter if the parties were Muslims or when the marriage was contracted in accordance with Sharia law.[285] They also exercised jurisdiction in questions regarding *wakf*, gift, succession, wills, interdiction or guardianship of interdicted or lost persons, provided that the endower, donor or deceased, etc., is Muslim.[286] Under section 6(c), the subject matter over which Sharia courts had jurisdiction may be extended to all civil matters if the parties, whether Muslims or non-Muslims, make a formal demand signed by them asking the court to entertain the question and stating that they agree to be bound by the ruling of Mohammedan law. The above Ordinance was repealed and re-enacted by the *Sharia Courts Act, 1967*, but section 5(1) of the latter Act retained the jurisdictional rules under the 1902 Ordinance.[287] Thus, according to the above sections, Sharia law may apply to a non-Muslim in two cases. Firstly, when one of the parties is a Muslim and

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[283] For a full account of the courts' interpretation of "custom", see Tier, A.M. "The Evolution of Personal Laws in India and Sudan" (1984) 26 *Journal of the Indian Law Institute* 503.

[284] See Akolawin, N.O., "Personal law in the Sudan, Trends and Developments" (1973) 17 *Journal of African Law* 149.

[285] *Sudan Mohammedan Law Courts Ordinance, 1902*, s. 6(9).

[286] *Ibid.*, subs. 6.

[287] *The Sharia Courts Act 1967* was repealed in 1972 by *The Judiciary Act, 1972*.

the Sharia law is applied as legal rules of conflict of personal laws. The second case relates to the following: questions relating to a gift or succession are determined by the religious law of deceased (where the donor or deceased is a Muslim); in case of marriage, the validity of marriage is determined by the law under which it was celebrated (i.e. Sharia law); and the rule that any matter of personal law is determined by the law which the parties have chosen (Sharia law).[288]

The first development after independence which had a bearing on the personal law of non-Muslims was the provision in the Constitution of 1973 guaranteeing the right of non-Muslims to be governed by their personal laws. Article 9 provided that Islamic law and custom shall be the main sources of legislation in Sudan, and that personal matters of non-Muslims shall be governed by their personal laws. However, in two instances, Sharia courts continued to exercise jurisdiction in cases relating to marriage, divorce, succession, custody, and gifts: where one party is a Muslim and where two non-Muslim parties consented to the courts' jurisdiction.[289]

After 1983, the rules remained the same under the *Civil Procedure Act, 1983*, with regard to matters of personal status. Under section 5(b) of the Act, where in any suit proceeding in a civil court, any question arises regarding succession, inheritance, marriage, divorce, etc., and the parties are non-Muslims, the law applicable is "any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience and has not been altered or abolished by this or any other enactment or has not been declared void by a decision of a competent court". With

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[288] See Tier, A.M., "Techniques of Choice of Law in Conflict of Personal Law" (1986) 30 *Journal of African Law* at 13 et. seq.

[289] See the Second Schedule to the *Civil Procedure Act, 1974.*

regard to the condition providing that custom not be contrary to justice, equity and good conscience, the issue which might arise here is that the courts, having regard to section 3 of the *Judgment (Basic Rules) Act, 1983*, may refuse to apply a custom which is repugnant to Sharia rules or morals, on the ground that to them Sharia rules are the only true reflection of justice.[290] In fact, the Court of Appeal dismissed an appeal on the ground that a custom which is contrary to rules of Sharia is invalid.[291]

The jurisdiction of Sharia courts is extended by section 12 of the second schedule of the *Civil Procedure Act, 1983*, in two cases. First, Sharia courts are competent to decide any suit not falling within their jurisdiction as specified by law, upon request by the parties. Secondly, "a suit of a matter of personal status of non-Muslims can be entertained by Sharia courts on the basis of jurisdiction", that is, if one party is a Muslim.[292]

2. Application of Substantive Rules

The substantive rules applied by Sharia courts are provided for by the *Personal*

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[290] In the case of *Yanni Krithany v. Mariam Bait Dasta* (1900-31) 1 *Sudan Law Reports* 91, a suit was instituted by an Ethiopian woman against a Greek national for the maintenance of the issue of their cohabitation. The court did not consider the religion of the parties, which could have meant "custom" under section 5 of the *Civil Justice Ordinance, 1929* applicable. The court pointed out that the case must be decided in accordance with the "justice, equity and good conscience" provision of section 9. The judge referred to a number of sources of law, including Roman civil law, modern European law and the Muslim law, to find principles of "justice, equity and good conscience."

[291] Court of Appeal, Appeal No. 109/1405 Hijirii, (16/1/1985) Sudan Judiciary Rules, 1985, at 32. See Muhammad Abu Rannat, "The Relationship between Islamic and Customary Law in the Sudan" (1960) *Journal of African Law* 9.

[292] On the whole Act, see Mohammed El Sheikh Omer, *Qanoun Al-Ijraat Al-Madania Li-Sanaat 1983* 2 Vols. (Beirut: Baraj wa Khatib Marqaz, 1983).

Law Act for Muslims, 1991.[293] The difference in treatment of non-Muslims in personal matters is evident under various provisions of the Act. Under section 158, a husband shall be subject to medical examination to be conducted by a competent Muslim doctor in a divorce case instituted by his wife on the grounds of his uncured disease or illness. Thus, under this section, a non-Muslim physician or doctor is not competent to testify in such cases before Sharia courts.

Another section of the Act to which reference should be made is section 114, which provides for the grant of custody. Section 5(1) states that "The child in custody will follow the *best religion* of his parent."[294] However, subsection 2 states that when the child attains five years, the female custodian will lose custody if she is of a religion different from that of the Muslim father, [295] or if there is a fear that she will raise the child in a religious environment different from that of the child's father (i.e. Islam).

Section 1 raises the question as to the criteria to be adopted by a court in

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[293] Legislative Supplement to the Official Gazette of the Republic of Sudan No. 1554, issued 25 July, 1991, No. 1.

[294] Before the 1991 Act, there was no codified personal law applicable to Muslims. The Sharia rules which were applied in Sudan in personal matters by courts consisted of Judicial Circulars and memorandum and in their absence *Madhab Al Hanafia* (school of Hanafia). Regarding custody in Sharia law, the children stay with their mother (irrespective of her religion) until the girl is aged nine and the boy seven, at which age each is transferred into the custody of the father. However, the non-Muslim mother loses her right to custody if she started to teach the children her religion and this will influence the child to change him from the religion of his father. For rules of Sharia on custody, see Abu Zahara, *supra* note 87, at 477 et. seq. On the application of such rules in Sudan, see Maawad Mohammad Mustafa Sarhaan, *Al-Ahwaal Al-Shaksia Hasaab Al Maamul Beeh Fi Al Mhaakm Al Shariaah Al Masriya wal-Al Soudani*, (Alexandria: Mattabh Ramsis, 1953).

[295] Under section 115(1) & (2) of the same Act the custody of a woman shall continue until the male child is seven years and the girl is 9 years. However, the judge may allow her to continue her custody after the above age if the court sees that it is in the interest of child.

determining what is the best religion, or the interest of the child, when one of the parents is a non-Muslim. The interpretation of section 114 was discussed by the Court of Appeal in Appeal No. 171/1992.[296] In that case, the parents were Christians married in accordance with their religious law (Coptic orthodox) in 1974, and had two children. The wife converted to Islam in 1989 and instituted a suit in the Sharia Court for custody of her children on the ground that her children, before reaching puberty, became Muslims as a result of her conversion, and she was accordingly claiming custody to teach them and let them grow in accordance with Islamic religion. The court of first instance held that the mother, being a Muslim, has the right to custody on the basis of section 114. The court interpreted the term "best religion" as meaning the Islamic religion. On appeal, the appellate court stated that "there is no doubt (referring to section 114(1)) Islamic religion is the best religion as determined by God in stating that "the religion to Allah is Islam" and "whoso desireth any other religion than Islam, that religion shall never be accepted from him, and in the next world he shall be among the lost." However, the court in interpreting subsection 1, stated that the section refers to the religion to be followed by the child, that is, the best religion of his parents. Thus, if one of the parents is a Muslim, then the child becomes a Muslim since "Islam is absolutely the best religion."

The applicable rules regarding custody are stated in subsection 2, and are based on rules of Sharia governing *dhimmis*.[297] However, the appellate court in differentiating between subsection 1 as referring to the religion to be followed, and subsection 2 as referring to custody, decided that "in case of difference of religion of

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[296] (1992) *Sudan Judicial Rules Journal* at 26 et. seq.

[297] The court stated that the rules governing *dhimmis* in Sharia as agreed by Islamic jurists provided that a Muslim who marries a *Kitabia* (Christian or Jewish) his children are considered Muslims as the rule is that the child follows the best religion of his parents. *Ibid.*, at 30.

parents then the judge shall take into consideration in determining custody the "interest of child" and difference of religion by itself is not a determining factor preventing custody." It ordered the retrial of the case by the court of first instance in the light of the above interpretation.

Given the above interpretation of section 114 by Court of Appeal, it is to be understood that differences in religion are not a factor by themselves; however, it is assumed to be one of the factors to be considered in determining the whole issue of what is the interest of the child.

E. The Recognition and Protection of Freedom of Religion

It has been mentioned earlier that the right to freedom of religion is provided for and guaranteed under various international instruments. It has also been noted that such freedom implies the freedom to choose and practice one's religion, which includes the freedom of expression, opinion, and association, and the freedom to preach one's faith.[298] The issue then is to what extent this right is recognised and protected by the Sudanese legal system.

The constitutional protection of religion was emphasised in all Sudanese Constitutions. Article 47 of the Permanent Constitution of 1973 provided that "Freedom of belief, prayer and performance of religious practices, without infringement of public order or morals is guaranteed." A wider and detailed protection was given to citizens belonging to religious groups in Article 16, which provided in part:

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[298] See Chapter IV, section II of this research, *supra*.

(c) Heavenly religions and the noble aspects of spiritual beliefs shall not be insulted or held in contempt;

(d) The state shall treat followers of religious and noble spiritual beliefs without discrimination as to the rights and freedoms guaranteed to them as citizens by this Constitution. The state shall not impose any restrictions on the citizens of community on the grounds of religious faith.

(c) The abuse of religious and noble spiritual beliefs for political exploitation is forbidden. Any act which is intended or is likely to promote feelings of hatred, enmity or discord among religious community shall be contrary to this Constitution and punishable by law.

The above article provides for the principle of non-discrimination to citizens of religious groups in the exercise of their religious practices, and requires state laws to be enacted in accordance with this principle. In pursuance of the objectives of the above article, the *Criminal Act, 1991*, provided for offenses relating to religion. It states in Chapter 13 that: "[i]t is an offence to insult or excite contempt of any religion in such a manner as to be likely to lead to a breach of peace or to excite or provoke feelings of hatred, enmity or discord among religious communities, or to commit trespass in any place of worship or burial with the intention of wounding the feelings of any person or insulting the religion of any person or to disturb voluntarily any assembly lawfully engaged in the performance of a religious worship or ceremony."[299]

The effect of tolerance reflected in the wider protection afforded to religions in general under the above sections shall be examined in relation to the extent to which such freedom is exercised in practice. With regard to Article 1 of the

[299] Ss. 125-128 of *the Criminal Act, 1991*, in *Laws of Sudan, supra* note 270, at 84-85.

Constituent Order No. 7 mentioned above, the first part provides that Islamic law and principles are binding and according to the *Judgment (Basic Rules) Act*, Sharia rules are applicable in the absence of law, and even in the presence of law or provision, the interpretation and application of such laws is subject to Sharia rules.

Taking into account these rules, the freedom of religion shall be examined with regard to freedom to choose one's own religion and the right to exercise such freedom.

With regard to the second part of Article 1 above, it is provided that religions other than Islam are a free choice for all. This raises the question of the offence of apostasy under traditional Sharia and Sudanese law, since apostasy does not concern Muslims only. Cases exist in which non-Muslims convert to Islam for reasons such as marriage, divorce, etc. Under Sharia, apostasy is an offence punishable with death. An apostate is one who is held to have converted from Islam, regardless of whether or not he subsequently embraced another faith.[300] The offence of apostasy has been embodied in section 126(1) of the *Criminal Act, 1991*, which provides that "there shall be deemed to commit the offence of apostasy, every Muslim who propagates for the renunciation of the creed of Islam or publicly declares his renouncement thereof by an express statement or conclusive act". Subsection 2 provides for a penalty in stating that "whoever commits apostasy, shall be given a chance to repent during a period to be determined by the court; where he insists upon apostasy, and not being a recent convert to Islam, shall be punished with death." The penalty shall, however, be

[300] See An Na'im, "The Islamic Law of Apostasy and Its Modern Applicability: A Case from the Sudan" (1986) 16 *Religion* 197-224.

remitted whenever the apostate renounces his apostasy before execution.[301] Thus, by providing for apostasy as a capital offence committed by non-Muslims who converted to Islam, their choice to freely change their faith is curtailed since they may not take the risk.

Another point which may be raised in connection with offenses relating to religions under Chapter 13 of the Criminal Act is whether the mere expression of an opinion or criticism about a religious rule in any of the protected religions is considered an insult to that religion and thus constitutes an offence punishable under the Act.

Both the Constitutions of 1973 and 1985 provided for the freedom of religion, but its outward manifestation should be within the limits established by law, public order, morals, etc. In fact, this limitation is intended to safeguard the freedom of others, and the duty of the state to maintain peace and public order. The limitations are consistent with international instruments, and they are justifiable when they ensure that all citizens enjoy equal rights in the absence of discriminatory laws. Although the Constituent Order No. 7 provides that no restrictions shall be imposed, it is assumed that the outward manifestation of such a right or freedom should not infringe public order, peace and morals as determined by the laws based on Sharia.

Freedom to exercise or manifest a religious belief includes freedom to worship, assemble, establish and maintain places for these purposes. It also includes

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[301] The statement by the representative of Sudan before the Human Rights Committee described the implementation of Islamic Sharia law in the Sudanese Penal Code as an aspect of Muslims' right of "free choice of laws in accordance with their religion". UN Doc. CCPR/C/SR. 1067, pp. 2, 13 (1991).

freedom to observe days of rest in the southern regions. An indirect obstruction of this freedom is the refusal to give permission or licence to build new places for this purpose. Sunday is recognised as the day of rest, but non-Muslims in the North working in government departments are allowed to attend their religious prayers on Sunday and then proceed with their work. In other words, Sunday is not recognized as a full day for resting.[302] Freedom of religion also includes the freedom to preach one's faith. However, under the *Missionary Societies Act, 1962*[303] missionary societies are subject to certain regulations under which they are prohibited from doing certain acts under section 7. That section provides that no missionary society shall:

> (a) do any missionary act in regions or places other than those specified in the licence;
>
> (b) do any missionary act towards any person or persons professing any religion or sect or belief thereof other than that specified in its licence;
>
> (c) do any missionary act calculated or likely to cause a breach of the public peace or a threat to law and order;
>
> (d) interfere in any political activity of any kind;
>
> (e) practice any social activities except within the limits and in the manner laid down from time to time by regulations made under section 10.

The above restrictions are meant to control the activities of such missionaries. However, in one form or another, such restrictions negate the manifestations associated with the freedom of religion, including the dissemination of religious ideas,

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[302] Friday is a general holiday for Muslims and non-Muslims in the North.

[303] See (1992) 5 *Sudan Laws* at 12.

freedom of speech and association, and the keeping of places of worship.[304]

F. Conclusion

It has been shown in the first part of this chapter that Sharia law in Sudan was historically applied, although the extent of its application varied during different historical periods, reflecting the different political eras that prevailed. Sharia was applied in its strictest form as territorial law from 1884 to 1898 during the Mahdi's regime in Northern Sudan. The South was autonomous (under tribal rule) and the law applicable was mainly customary rules. After 1898 the Anglo-Egyptian regime confined the application of Sharia to personal matters for Muslims. Other than that, English common law later adapted to Sudanese conditions and custom, was applied to all persons. After independence, the issue became the extent of application of Sharia law, and whether it should be confined to the status of personal law or applied as state law. Whenever the issue of Sharia arose, the debate among parliamentary members focused on the status and rights of non-Muslims and how they would be dealt with. The first time Sharia was provided for as a constitutional source of law in addition to custom was under the Constitution of 1973. The same Constitution provided for fundamental personal liberties and equal rights for all citizens irrespective of religion. The practical steps towards codification of Sharia laws started in 1983 with the enactment of a number of laws,[305] followed by the policy of Islamization of the whole legal system.

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[304] For a detailed analysis of the *Missionaries Society Act, 1960*, see Tier, A.M., "Freedom of Religion under the Sudan Constitution and Laws" (1982) 26 *Journal of African Law* 133, at 141 et. seq.

[305] The enactment of Sharia law in 1983 contained provisions in violation of the existing Constitution of 1973 which provided for equality of all citizens irrespective of religion, and raises the question of constitutionality with respect to such laws. See Sherman, *supra* note 246.

The effect of such laws on non-Muslims has been shown by an overview of specific legislations, the most important of all being the *Judgment (Basic Rules) Act, 1983*. The importance of the Act lies in the fact that it gives wide powers to courts to apply Sharia rules in the interpretation of any law, or in the absence of a specific provision on an issue. Moreover, courts have the power to apply Sharia rules notwithstanding any provision to the contrary. The effect of this is that the courts have power to implement the various rules of traditional Sharia governing *dhimmis*, as discussed in Part I of this study.

It has also been shown that with reference to certain laws, non-Muslims suffer disabilities with regard to testimony before courts in certain cases. In personal matters involving the interest of a Muslim, Sharia courts have jurisdiction, as in case of custody where one of the parties is a Muslim; religion is a relevant, if not conclusive, factor to be considered in deciding what amounts to the interest of the child. Although freedom of religion is guaranteed, the offence of apostasy, in addition to other restrictions, curtail its enjoyment. The exercise of religious freedom is limited in accordance with laws based on Sharia rules. The Criminal Act does not provide equal protection to non-Muslims in the North and South, resulting in the differences in the scope of application of certain sections on a geographical basis. Other rules of Sharia providing disabilities may be implemented on the basis of section 3 of the *Judgment (Basic Rules) Act*. This is because the various rules of Sharia go beyond legislation providing for the equality of all citizens irrespective of religion, and a system under which citizenship is the source of rights for all.

CONCLUSION

From the above discussion, it is to be concluded that the inconsistency between Islamic and international principles on equality and freedom of religion results from the following:

1. The fact that the sources of non-Muslim rights in each tradition are looked at from two different perspectives. The basis of the rights of minorities in the international tradition is purely humanistic, involving a concept of inalienable liberty possessed by each person and exercisable within a framework of democratic and liberal political order. The other (Islam) is purely religious, representing Divinely granted rights as expressed in the Quran and Sunnah and elaborated in the Sharia. Accordingly, Islam has a conception of the right of non-Muslims as religiously affirmed and provided in its tradition to be exercised within the Islamic state. Thus, the foundation of non-Muslim rights is confined to a religious view.

In Islam, the status and rights of non-Muslims are based on the recognition of the autonomy of religious traditions (i.e. People of the Book) and juridical rules governing their relations with both the state and Muslim subjects. Thus, when one speaks of the rights of non-Muslims within Islam, reference should be made to the Islamic framework within which such rights operate. Based on the legal and political supremacy of Islam, the framework does not affirm diversity as such but at the same time, in order to live in peace and mutual respect, it affords tolerance to non-Muslims within the Islamic state and provides guidelines to advance their own religious interests or claims; in other words, it affords religious diversity.

2. Secondly, another variation or differentiation which is decisive is the religious conception of equality and freedom, compared to international standards. The concept of the state in Islam as a religious state, with the purpose of implementing the commands of Allah as reflected in Quran and Sunnah, greatly influences the status of non-Muslims and their political rights.

In fact, these differences lead to a different concept of non-Muslim minorities in both traditions, a difference which is reflected in the content of their rights as a result of the fact that each operates within different norms (whether legal , social or political). Of all rights, equality and freedom of religion are important to non-Muslims. Religious freedom is provided for in both traditions. However, each tradition refers to a set of standards affecting the content and extent of such freedom. It has been shown that the difference lies in the fact that in Islam freedom is submissiveness to God, thus resulting in the denial or prevention of a Muslim from converting from Islam. However, a non-Muslim who chooses to retain his faith would be subject to specific rights, and his status as such is not equated with those embracing the Islamic faith. Freedom includes the right to preach one's faith with the aim of converting others, and to manifest one's religion. In Islam these freedoms are limited in extent by the Sharia rules discussed above. However, this is inconsistent with freedom of religion as provided for in international instruments, which includes freedom to change religion or belief, to manifest one's own religion or belief in teaching, practice and preaching.

The right of freedom of religion is accorded to non-Muslims as members of a religious group, but their rights as citizens of the Islamic state are determined by the principle of equality as understood in Islam, the basis of which is conformity to

the membership of the religion of the Islamic state as a qualification for the exercise of full civil and political rights. Consequently, the concept of equality of men is based on religion according to which men are classified. This is at variance with international principles according to which all persons are equal irrespective of religion.

(ii) The impact of Islamic rules and international principles governing non-Muslims in the Sudanese legal system and the extent to which Sudan has attempted to reconcile the inconsistency with regard to the above can be summarised as follows:

With regard to the status of international law in the Sudanese legal system and Sudan's international obligations towards its non-Muslim subjects, it has been shown that these are affected by the status accorded to Sharia rules, according to which Sharia rules are to be regarded as superior and prevailing over any other laws as provided for in section 3 of the *Judgment (Basic Rules) Act, 1983*. The fact that international treaties are regarded as ordinary law subject to the interpretation of Sudanese domestic law, resulted in the inapplicability of international principles which are inconsistent with the rules and spirit of Sharia. However, this contravenes the well-established principle that a state may not invoke the provisions of municipal law to justify the failure to comply with its international obligations. This principle is of particular relevance with regard to Sudan's obligations under the Political Covenant as far as its non-Muslim subjects are concerned. During the review of the Sudanese Report on the Political Covenant, the Human Rights Committee members stressed that the government could not use Islamic law as justification for its failure to comply with its obligations under the Covenant since it had not entered any

reservations to the Covenant's provisions.[306]

However, the nature of the problem facing Sudanese courts in enforcing norms of international law stem from its treatment as ordinary law. In addition, Sharia rules would prevail in cases of inconsistency. However, the enforcement of international law by domestic Sudanese Courts is an important matter concerning which considerations of justice and national policy are of utmost importance. Courts which deal with the applicability or non-applicability of international standards are required to make a balance to reach a decision by Sharia rules against the factual situation, as the Supreme Court held in the case of *Nora*. The decision of the Supreme Court reflected this principle since the court by adopting a liberal attitude gave a broader application to Sharia rules taking into consideration the fact that non-Muslims in Sudan represent one-third of the population, their testimony is admissible for purposes of justice.

However, Sudan attempted to reconcile inconsistencies arising from the application of Sharia rules to its non-Muslim subjects by ostensibly providing for special measures as reflected in according non-Muslims religious autonomy, and in certain areas of public law for the application of Sharia rules on a geographical basis in order to avoid its application to areas in which the majority are non-Muslims. However, the issue is to what extent Sudan succeeded in reconciling these inconsistencies. In examining the laws referred to earlier in this research, the following observations could be made:

(a) The constitutional guarantee of equality between all citizens before the law

[306] See the Initial Report of Sudan before the Human Rights Committee, *supra* note 216.

is violated by the rules of evidence providing for inadmissibility of non-Muslim testimony in certain offenses under the 1983 *Evidence Act*. In addition, though Sharia rules are not all codified, the courts under the *Judgment Act, 1983*, have wide powers to refer to them. In fact, the Act leaves little room for courts to refer to other norms inconsistent with Sharia. For example, section 6 of the *Civil Procedure Act* provides that the law to be applied in the absence of any express provision is Sharia and the established judicial precedents, custom, justice and good conscience. However, with the presence of the *Judgment (Basic Rules) Act, 1983*, section 6 becomes redundant.[307] Thus, courts are required to apply the Islamic notion of equality with regards to rules applied and interpreted by courts.

(b) The application of *huddud* under the *Criminal Act, 1991* on a geographical basis did not achieve the purpose for which it was proposed since it resulted in inequality in its application, not only between non-Muslims in the North and South, but between Muslims themselves in both geographical areas. Thus the abrogation of *huddud* punishment as such would not remedy the negative effects of the Act.

(c) The legal autonomy accorded to non-Muslims in personal matters is affected by the extension of application of Sharia jurisdiction to marriage, divorce, and child custody on the ground of the involvement of Muslim interest, that is, when one party is a Muslim. This extension has its impact on non-Muslim rights in the area of family law, as for example the prohibition of a non-Muslim from marrying a Muslim woman,[308] and the consideration of Islamic religion as one of the factors

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[307] Khalifa, *supra* note 231, at 233.

[308] See Article 6 of the Universal Declaration, and Article 23(4) of the Covenant on Civil and Political Rights, 1966 providing for equal rights of men and women regarding entry into marriage.

determining custody when one party is a Muslim.

However, it should be noted that non-Muslims, in relation to rights other than those mentioned above, are accorded equal treatment. Apparently, there is no express provision or law in Sudan providing for distinction on the basis of religion with regard to political rights or occupation of key posts such as in the judiciary, military or head of the state which tends to affect the rights of non-Muslims on the basis of citizenship.[309]

In any case, the attempt of Sudan to reconcile such inconsistencies should not be disregarded since the extent of observance of international principles in the contemporary Islamic state is greatly affected by variations in prevailing political, economic and social attitudes. However, the extent of the influence that may be exerted by non-Muslim minorities on state policies depends on the relative number of, and the weight accorded to, such minorities in each state.

It is submitted that the rules governing the status and rights of non-Muslims in Sharia are based on established norms. Its impact on Sudanese non-Muslims (whether Sudan is justified in implementing Sharia rules or not) constitutes inconsistency in certain cases with international principles based on equality and freedom of religion. This inconsistency shall persist as far as there are two different

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[309] In my view, this is due to the fact that in Sudan up till the time this research is written, no Islamic Constitution has been promulgated, a fact which indicates that sources of rights are still based on citizenship. On this Dr. Chazi Salah Uddin Atabani, Minister for Political Affairs, The Presidency, in Sudan, stated: "The Islamic experience in the Sudan does not regard the non-Muslim Sudanese as a protected person or "Zimmi". Rather it compares the status of non-Muslims to the status of the Jews of "Madina" who entered into a contractual relationship with the Muslims. This entails that they derive their rights by virtue of their citizenship within the framework of the Constitution and the law." See Chazi Salah Uddin Atabani, "Conference on Human Rights in Islam", Sudan Bar Association, 11-13 Jan. 1993, The Friendship Hall, at 9.

traditions based on different norms and concepts.

However, the impact of Sharia law on non-Muslims must be assessed within specific historical contexts, taking into account the effect of the religious role of the nation state in constructing and promoting equality. As Khadduri has suggested:

> The general treatment of *dhimmis* under Muslim rule, however, must be measured not in terms of such a suffering at the hands of careless Caliphs and individual Muslims but in the spirit of tolerance embodied in the law and in the general spirit prevailing in each age and generation.[310] (Emphasis added)

In fact, international principles of equality and freedom offer a framework within which rights of non-Muslims are to be promoted. Such principles allow limitations on rights and freedoms that are necessary to ensure that other persons' rights and freedoms are not violated. However, the process of balancing the competing interests of persons involved must take into account the fact that religion does not operate in isolation from other factors and that distinctions based on religion constitute objective and reasonable justification. Thus, a genuine commitment to respect for non-Muslim rights based on equality and recognition of legal diversity, should be taken into account if Sharia is to be applied. This view is reflected in Duclos' interactive theory which postulates that the law which may accommodate diversities in the society is that which:

> [a]llows us to recognize the dignity of the generalised other through our acknowledgment of the moral identity of the concrete other. It acknowledges the plurality of modes of being human and differences among humans, without endorsing all these plurality and differences as

[310] Khadduri, *supra* note 24, at 201.

morally and politically valid. Such a theoretical foundation has sufficient flex in it to permit a dynamic and unstable interaction between the general and particular, commonality and differences whose goal is to celebrate the complicated multiplicity of our group identity to permit them to co-exist, interact and enrich each other without falling into patterns of dominance and oppression. By such theory we have a state where difference means diversity not hierarchy.[311]

[311] Duclos, N., "Lessons of Difference: Feminist Theory on Cultural Diversity" (1990) 38 *Buffalo Law Review* 325, at 361.

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