CONCLUSION

Through all three of the concentric circles of safeguarding religious freedom, acknowledging religious identity, and valuing partnership with religious communities, it is evident that religion continues to play a crucially important part in contemporary and diverse democratic societies. It is particularly remarkable to note the way in which the profile of faith in public life is being raised after a period in which it was assumed to be in terminal decline. At the same time, to ensure that people of faith and faith communities can participate as fully and as effectively as possible in civic society, there needs to be an enhanced understanding of the distinctive character of religious freedom, identity and partnerships, and a developing body of jurisprudence, public theory, and social practice to ensure that religious contributions are adequately received for the good of all.

CHAPTER 4

Conflicting Values or Misplaced Interpretations? Examining the Inevitability of a Clash between 'Religions' and 'Human Rights'

Javaid Rehman

1. INTRODUCTION

The debate on the conflict between religions and human rights is both historic and contemporary.[1] This debate has been well-rehearsed, and its facets well documented and examined exhaustively, from theoretical as well as practical perspectives.[2] The inevitability of a clash between religion and human rights is so fervently argued, the breadth of the apparent conflict so profoundly explored, that it appears almost nonsensical to dissent. Religions are perceived as advocating regressive policies, whereas the ideals of human rights are viewed as accommodating and progressive. Amidst this impasse, the present chapter adopts a challenging position – it argues that it is possible, indeed imperative, to reconcile the values of religions with those of human rights law. From a contextual and methodological context, it is argued that over time the meanings provided to 'human rights' and 'religion' have varied greatly; and their interpretations continue to vary. In the contemporary legal and political

I am thankful to Dr Nazila Ghanea and Raphael Walden for their generous invitation to present a paper at a conference organised in London (February 2005), and for their support in developing my arguments as presented in this chapter.

1 See B. G. Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (The Hague: Martinus Nijhoff Publishers, 1995); E. Benito, *Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief* (New York: United Nations, 1989); B. Dickson, 'The United Nations and Freedom of Religion', *International and Comparative Law Quarterly*, 44 (1995), 327; R. S. Clark, 'The United Nations and Religious Freedom', *New York University Journal of International Law and Politics*, 11 (1978), 197; D. J. Sullivan, 'Advancing the Freedom of Religion or Belief through the UN Declaration on the Elimination of Religious Intolerance and Discrimination', *American Journal of International Law*, 82 (1988), 487.

2 See R. O'Dair and A. Lewis (eds.), *Law and Religion* (Oxford: OUP, 2001); A. Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices* (UN Publication Sales E. 60.X.IV.2, 1960); Benito, *Elimination of Intolerance*; S. C. Neff, 'An Evolving International Legal Norm of Religious Freedom: Problems and Prospects', *California Western International Law Journal*, 7 (1973) 543.

environment, reconciliation is advocated on the basis that not only do the jurisprudence of 'human rights' and 'religion' retain a strong relationship with each other, but elements of ambiguity contained within these two disciplines also allow for numerous possibilities of rapprochement.

The chapter is divided into four main sections. After this introductory section, the next section, section 2, analyses the complexities within international human rights law. The jurisprudential kaleidoscope of 'human rights' raises profound questions regarding the meaning of 'rights' within the international legal framework.[3] As this discussion elaborates, in addition to the conceptual difficulties, there continue to remain substantial disagreements in formulating a substantive code of human rights. The obstacles in establishing a coherent set of human rights standards in international arenas are examined within section 2.

If the consensus on 'human rights' principles is not readily discernable, religious values are often conspicuous through their apparent rigidity. Section 3 elaborates on the difficulties facing conventional interpretations of religions.

The history of all the major religions is littered with instances of a tragic involvement with acts of violence, aggression and substantial violations of human rights. The world's major religions evoke stresses and strains when confronted with modern day challenges posed by marginalised groups such as homosexuals, religious minorities and indigenous peoples. While insular and rigid interpretations of Christianity, Judaism and Islam sanctify inequalities and advocate violence, Islam and Muslim communities have been under the spotlight particularly since the events of 11 September 2001, and the Madrid, Bali and London bombings.[4] Critics argue that Islam is a religion which engenders discrimination

3 J. Shestack, 'The Jurisprudence of Human Rights' in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984), 69–113.

4 See National Commission on Terrorist Attack Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (New York: Norton, 2004); P. Ford, 'Terrorism Web emerges from Madrid bombing' <http://www.csmonitor.com/2004/0322/p01s02-woeu.html> accessed 10 July 2005; J. Aglionby, 'Smiling Bomber to Face Firing Squad for Bali Blasts: Relatives in Court Cheer and Weep – But Fear Execution will Create a Martyr', *The Guardian Unlimited* (8 August, 2003) <http://www.guardian.co.uk/international/story/0,,1014406,00.html> accessed 19 September 2004. For a useful summary of terrorist attacks see B. Davies, *Terrorism: Inside a World Phenomenon* (London: Virgin

and supports violence and terrorism.[5] With its focus upon Islam, section 3 of the chapter elaborates upon the methodological and contextual interpretation of *Sharia*.[6] Through a scheme of contextualisation and comprehension, the central message of Islam is advanced – a message that is not antithetical towards human rights and seeks reconciliation and accommodation. Section 4, the final section, provides a number of concluding observations.

2. THE COMPLEXITIES WITHIN INTERNATIONAL HUMAN RIGHTS

(*a*) *The jurisprudential quagmire*

A simplified construction of 'human rights' – though highly desirable – does not record the conceptual and jurisprudential difficulties inherent in the concept.[7] Establishing a unified jurisprudential base for 'human

Books, 2003) 93–127; BBC, 'London Attacks' <http://news.bbc.co.uk/1/hi/in_depth/uk/2005/london_explosions/default.stm> accessed 10 July 2005.

5 For an analysis of the debate surrounding Islam's relationship with human rights law and norms prohibiting discrimination, violence and terrorism see A. E. Mayer, *Islam and Human Rights: Tradition and Politics* (2nd edn, Boulder, Col.: Westview Press, 1995); A. A. An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse NY: Syracuse University Press, 1990); F. M. Denny, *An Introduction to Islam* (New York: Macmillan, 1994); C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (London: Macmillan, 1988); R. Landau, *Islam and the Arabs* (London: George Allen and Unwin, 1958); M. A. Baderin, *International Human Rights and Islamic Law* (Oxford: OUP, 2003); R. Afshari, 'An Essay on Islamic Cultural Relativism in the Discourse of Human Rights', *Human Rights Quarterly*, 16 (1994), 235; P. J. Riga, 'Islamic Law and Modernity: Conflict and Evolution', *American Journal of Jurisprudence*, 36 (1991), 103; J. Entelis, 'International Human Rights: Islam's Friend or Foe? Algeria as an Example of the Compatibility of International Human Rights regarding Women's Equality and Islamic Law', *Fordham International Law Journal*, 20 (1997), 1251; S. S. Ali, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (The Hague: Kluwer Law International, 2000).

6 Islamic Law. Note that the concept of Sharia is not confined to legal norms but conveys a more holistic picture; the Arabic translation of Sharia is 'the road to the watering place'. R Landau, *Islam and the Arabs* (London: George Allen and Unwin, 1958), 141; A. A. Oba, 'Islamic Law as Customary Law: The Changing Perspective in Nigeria', *International and Comparative Law Quarterly*, 51 (2002), 819; A. R. Doi, *Sharíah: The Islamic Law* (London: Taha Publishers, 1997), 2; L. W. Adamec, *Historical Dictionary of Islam* (Lanham, Maryland and London: The Scarecrow Press, 2001), 241.

7 See A. Cassese, *Human Rights in a Changing World* (Philadelphia: Temple University Press, 1990); K. E. Mahoney and P. Mahoney (eds), *Human Rights in the Twenty-First Century, A Global Challenge* (Dordrecht: Maritnus Nijhoff, 1993); A. H. Robertson and J. G. Merrills, *Human Rights in the World: An Introduction to the Study of*

rights' raises profound moral, ethical, philosophical and legal questions. The genesis of human rights law remains contentious: natural lawyers, positivists, utilitarians and relativists have all laid claims to it. In the development of international human rights law the pervading influence has been that of 'natural law' – a philosophy heavily influenced by Greek mythology and Judeo-Christian scriptures. In its pristine form, natural law relies upon the commandments of God as immutable and unalterable laws of nature. During the seventeenth century, attempts were made to detach natural law from religion per se and associate the concept with reason, logic and rationality. Thus Hugo Grotius, the father of modern international law, envisioned natural law as the 'dictate of right reason which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity'.[8] Notwithstanding that 'reason', 'rationality' and 'just cause' are its cornerstones, natural law theorists fail to articulate a catalogue of rights that is compatible with modern paradigms of human rights. Natural lawyers continue to express misgivings over such controversial issues as abortion, euthanasia and the abolition of capital punishment.

Despite criticisms, alternative theorists – for example those campaigning for utilitarianism or positivism – have themselves failed to comprehensively and coherently provide a rationale for human rights.[9] In their emphasis upon the role of legal systems as administered by sov-

International Protection of Human Rights (4th edn, Manchester: Manchester University Press, 1996); L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981); M. S. McDougal, H. D. Lasswell and L.-C. Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven, Conn.: Yale University Press, 1980); D. J. Harris, *Cases and Materials on International Law* (6th edn, London: Sweet and Maxwell, 2004), 654–785; D. Weissbrodt, J. Fitzpatrick and F. Newman, *International Human Rights: Law, Policy and Process* (3rd edn, Cincinnati: Anderson, 2001); H. Steiner and P. Alston, *International Human Rights in Context* (2nd edn, Oxford: Clarendon Press, 2001).

8 H. Grotius, *De Jure Belli ac Pacis,* bk. I, ch. 1, cited in J. Shestack, 'The Jurisprudence of Human Rights', in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984), 77.

9 See J. S. Mill, *Utilitarianism* (London: Longman, Green, Reader & Dyer, 1871); J. Austin, *The Province of Jurisprudence Determined* (London: Weinfeld and Nicolson, 1955); J. Bentham, *A Fragment on Government* (Oxford: Basil Blackwell, 1967); H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961); P. Hayden, *The Philosophy of Human Rights* (New York: Paragon House, 2001), 136–62.

ereign States, legal positivists deny an a priori source of rights. For these positivists, there is no legitimacy in the moral argumentation of what law 'ought' to be. As a dictate of the sovereign, laws have to be obeyed regardless of their iniquitous nature or disregard for human rights values.[10]

Amidst the jurisprudential conundrum not only do the sources of human rights provoke dissensions, the nature of the term 'human rights' itself has been profoundly complicated. The usage of the word 'rights', a 'chameleon-hued' term, raises more problems than it aims to address.[11] In his exhaustive analysis, *Fundamental Legal Conceptions as Applied in Judicial Reasoning I*, Professor Wesley Hohfeld advances the position that the word 'rights' has been used to identify the existence of a number of varied relationships. It has sometimes been used in a strict sense, reflecting that the right-holder is entitled to something with a co-relative duty on another person. Equally, the term 'rights' has been used to refer to an immunity from having a legal status altered, or to indicate a privilege to do something, or a power to create and alter legal relationships.[12] The application of Hohfeld's paradigm of 'rights', as has been pointed out by Shestack, raises complex scenarios – its application in international law could be particularly disturbing. Investigating this puzzle, Shestack makes the point that

> some of the civil and political rights [as provided in the International Covenant for Civil and Political Rights] are in the nature

10 See H. McCoubrey and N. White, *Textbook on Jurisprudence* (London: Blackstone Press, 1993), 7–54.

11 'One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to "rights" and "duties", and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests . . . for in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression' (W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', in W. Cook (ed.), *Fundamental Legal Conceptions as Applied in Judicial Reasoning: Essays by Wesley Newcomb Hohfeld* (New Haven: Yale University Press, 1923), 35).

12 See Hohfeld, op. cit.; F. Von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (London: Mansell, 1987), 10; N. E. Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (London: Sweet and Maxwell, 1986), 129–30; J. Rehman, *The Weaknesses in the International Protection of Minority Rights* (The Hague: Kluwer Law International, 2000), 10–14.

> of immunities meaning that governments cannot derogate from them. But are there any absolute rights? Surely the right to life guaranteed by Article 6(1) of the Covenant would seem to be so basic as to be considered absolute. Yet, Article 6(1) only offers protection against 'arbitrary' deprivation of life. What is the effect of this qualification on the nature of the right involved. When we speak of inalienable rights, what do we mean? Do we mean a right to which no exceptions or limitations are valid? Or do we mean a 'prima facie' right with a special burden on the proponent of any defeasance? Or do we mean a principle which must be followed unless some other principle weighty enough to allow abridgement arises? Must considerations which justify an exception be of the same moral category as those that underlie the right?[13]

If uncertainty remains as to the nature of fundamental rights, such as the 'right to life', what are we to make of the rights which are derogable? Are they, in the Hohfeldian scheme, rights in the strict sense, or immunities or privileges? A pertinent example would be the case of the United Kingdom – in the absence of a written constitution with an entrenched bill of rights, there remains the possibility of abridgement of many of the fundamental rights. Fundamental human rights in the British constitutional framework are therefore more in the nature of Hohfeldian liberty than immunity. Further confusion arises in relation to the position of economic, social and cultural rights which do not always carry obligations of immediate implementation and some claim are akin to aspirations or goals. Considering their nature, some don't regard them as 'rights', because it is not always clear on whom lies the duties to implement these 'rights'.[14] Still greater confusion ensues when the so-called 'third generation' rights are bracketed into the category of rights. There are substantial difficulties in attempting to treat such rights as the 'right to self-determination' or the 'right to development' as rights *stricto sensu*,

13 J. Shestack, 'The Jurisprudence of Human Rights', in T. Meron (ed.), above n. 3, 69–113.

14 This aspirational approach is reflected by the terms of the International Covenant on Economic, Social and Cultural Rights; see D. M. Trubeck, 'Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs', in T. Meron (ed.), above n. 3, 213; W. McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983), 103–4.

as well as distinguishing the right-holders from the ones who bear correlative duties. Who, for example, are holders of the 'right to self-determination' and the 'right to development', and upon whom lies the correlative duty? Can the 'peoples' in fact be treated as synonymous to the State itself, meaning thereby that the holder of 'rights' and the bearer of 'duties' is the identical identity of the State?

(*b*) *Complexities in the substance of 'human rights'*

If the jurisprudential debate is bewildering and complex, an agreement on the substance of human rights has proved impossible. Diversity and dissensions from religious and cultural relativists continually rupture the finely crafted fabric of international human rights law.[15] These disagreements and divisions pervade the core of human rights, raising troubling and irresolvable questions over fundamental rights such as the right to life and the prohibition on torture. The right to life, as noted earlier, is the quintessential right within the architecture of human rights law: all of the international law instruments without exception vigorously defend this right.[16] Yet it '. . . is one of the more controversial rights, due to the

15 See E. Brems, *Human Rights: Universality and Diversity* (The Hague: Kluwer Law International, 2001); A. D. Renteln, *International Human Rights: Universalism versus Relativism* (Newbury Park: Sage Publications, 1990); A. D. Renteln, 'The Unanswered Challenge of Relativism and Consequences of Human Rights', *Human Rights Quarterly*, 7 (1985), 514; H. Gros-Espiell, 'The Evolving Concept of Human Rights: Western, Socialist and Third World Approaches' in B. G. Ramcharan (ed.), *Human Rights: Thirty Years after the Universal Declaration: Commemorative Volume on the Occasion of the Thirtieth Anniversary of the Universal Declaration of Human Rights* (The Hague: Martinus Nijhoff Publishers, 1979), 41–65; D. Donoho, 'Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards', *Stanford Law Journal*, 27 (1991), 345; A. Eide, 'Making Human Rights Universal: Unfinished Business', *Nordic Journal of Human Rights*, 6 (1988), 51; J. Donnelly, 'Cultural Relativism and Universal Human Rights', *Human Rights Quarterly*, 6 (1984), 400; M. D. Evans, 'Human Rights and the Universality Debate', in R. O'Dair and A. Lewis (eds), above n. 2, 205–26.

16 See Article 3 of the Universal Declaration of Human Rights (adopted 10 December, 1948, UN GA Res. 217 A (III)), (UN Doc. A/810, 1948), 71; Article 2 of the European Convention on Human Rights (Signed at Rome, 4 November 1950; entered into force 3 September 1953. 213 U.N.T.S. 221; E.T.S. 5); Article 1 of the American Declaration of Human Rights; Final Act of the Ninth International Conference of American States, Bogotá, Colombia, 30 March – 2 May 1948, 48. (OEA/Ser/L.V/11.7, (1988), 17); Article 4 of the American Convention on Human Rights (Signed November 1969; entered into force 18 July 1978. O.A.S.T.S. Off. Rec. OEA/Ser.L/V/11.23, doc.21, rev. (1979). 9 I.L.M. (1970) at 673); Article 4 of the African Charter on Human and People's Rights (Adopted on 27 June 1981; entered into force 21 October, 1986. OAU Doc. CAB/LEG/67/3 Rev. 5,

inherent problems in defining its scope at the peripheries – the beginning and the end of life'.[17] There are irresolvable conflicts on the central issues as to when life begins, when it ends, under what circumstances the State is authorised to take life, and what the obligation of the State is in promoting and protecting this right.[18] The International Covenant on Civil and Political Rights, a treaty now ratified by over three-quarters of the international community, demonstrates the problems.[19]

Article 6 of the Covenant protects what it regards as the 'inherent right to life', though this protection extends only so far as 'arbitrary' taking of life is concerned.[20] The Article does not prohibit capital punishment if it is carried out 'in accordance with the law in force [and] a final judgement [is] rendered by a competent court'.[21] Women while pregnant and persons below the age of eighteen are exempt from capital punishment.[22] These restrictions however have not prevented capital punishment being imposed upon minors, and in some instances the verdict of the death penalty is hugely disproportionate to the offences committed. Professor Harris makes the sober observation that the death penalty

> exists for political offences (e.g. treason), military offences (e.g. mutiny), terrorist offences (e.g. hijacking), drug trafficking

21 I.L.M (1982) at 58); Also see General Comments by the Human Rights Committee, General Comment no. 6; General Comment no. 14, *Nuclear Weapons and the Right to Life* (Article 6) (Twenty-third Session, 1984), para. 1.

17 R. K. M. Smith, *Textbook on International Human Rights* (Oxford: Clarendon Press, 2005), 205.

18 See W. P. Gromley, 'The Right to Life and the Rule of Non-Derogability: Peremptory Norms and Jus Cogens', in B. G. Ramcharan (ed.), *The Right to Life in International Law* (Dordrecht: Martinus Nijhoff, 1985), 120–59; S. Joseph, 'The Right to Life', in D. J. Harris and S. Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press, 1995), 153–83; S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases and Material and Commentary* (Oxford: Clarendon Press, 2000), 108–243; Y. Dinstein, 'The Right to Life, Physical Integrity and Liberty', in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), 114–37; P. Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (Oxford: Clarendon Press, 1985).

19 As at 9 June 2005, there are 152 States parties to the Covenant. <http://www.unhchr.ch/pdf/report.pdf.> accessed 1 July 2005.

20 J. Shestack, above n. 3, 71.

21 See Article 6 sections (1) and (2) of the ICCPR.

22 Ibid., section (5).

> offences, ordinary offences (e.g. murder, kidnapping), economic offences (e.g. public corruption) and rape. Some Islamic states make apostasy, adultery, sodomy, drinking liquor, and sex between a Muslim and a non-Muslim capital offences. Are these all 'the most serious crimes'? Consistently with the US Constitution, some US states make juveniles of 16 or 17 liable for death penalty; the US made a reservation when ratifying the [International Covenant on Civil and Political Rights] to safeguard this position in view of Article 6(5).[23]

Apart from capital punishment, there are a number of other thorny issues linked to the right to life. There is nothing in the covenant, indeed in the entirety of international human rights law, to identify the point of creation and expiration of human life; abortion and euthanasia, though pre-eminently critical areas, remain conspicuous due to the absence of consensus. The subjects of abortion and euthanasia are shrouded in legal, moral and societal ambiguities.[24] Article 4 of the American Convention on Human Rights (1969)[25] provides, '[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.' This provision, no doubt inspired by the Catholic religious ethos of the American continent, has nevertheless failed to resolve the ambiguities over the subject of abortion – the question as to whether abortion is a violation of the Convention has been considered by the Inter-American Commission on Human Rights in a case arising from the United States, which is not a party to the American Convention. After considering the *travaux préparatoires* of the American Declaration, the Commission concluded that abortion of a foetus did not lead to a violation of the Declaration. The Commission also held obiter that the term

23 D. J. Harris, *Cases and Materials on International Law* (5th edn, London: Sweet and Maxwell, 1998), 660–1.

24 H. Biggs, 'Euthanasia and Death with Dignity: Still poised on the Fulcrum of Homicide', *Criminal Law Review*, (1996), 878–8; H. Biggs, *Euthanasia: Death with Dignity and the Law* (Oxford: Hart Publishing, 2001); A. McCall-Smith, 'Euthanasia: The Strength of the Middle Ground', *Medical Law Review*, 7, 194–207; J. Davies, 'Raping and Making Love are Different Concepts: So are Killing and Euthanasia', *Journal Medical Ethics*, 14 (1988), 148–9.

25 Signed November 1969; entered into force 18 July 1978. O.A.S.T.S. Off. Rec. OEA/Ser.L/V/11.23, doc.21, rev. (1979). 9 I.L.M. (1970) 673.

'in general' allowed States the discretion to determine the validity of their respective abortion laws.[26] In the context of European constitutional systems there remain considerable differences.[27] There are outstanding controversies surrounding the subject of abortion over the conflicting rights of the unborn child, the mother and in some cases the father.[28]

If there are irresolvable conflicts over the meaning of a right as fundamental as the 'right to life', it is hardly surprising to find divisions over other important rights, as the right to privacy and freedom of expression.[29] The European human rights jurisprudence is littered with conflicting paradigms of privacy and expression; many examples can be cited of a spectacular shifting of positions by the Strasbourg Court of Human Rights.[30] This introspection over consensus-building in relation

26 See *Baby Boy*, Case No. 2141 (United States), Res. 23/81, OEA/Ser. L/V/II.54, Doc. 9, rev. 1, Oct. 16, 1981. For commentary on the case see D. Shelton, 'Abortion and the Right to Life in the Inter-American System: The Case of "Baby Boy"', *Human Rights Law Journal*, 2 (1981), 309.

27 See J. Keown, 'The Law and Practice of Euthanasia in the Netherlands', *Law Quarterly Review*, 100 (1992), 51–78; J. Griffiths, 'The Regulation of Euthanasia and Related Medical Procedures that Shorten Life in the Netherlands', *Medical Law International*, 1 (1994), 137–58.

28 D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), 41–3; *Open Door Counselling* v. *Ireland*, Judgement of 29 October 1992, Series A, No. 246, 142 NLJ (1696); *Paton* v. *United Kingdom*, App. No. 8416/79 19 DR 244 (1980); *H* v. *Norway*, App. No. 17004/90 (1992) unreported; *Brugggemann and Scheuten* v. *FRG*, App. No. 6959/75, 10 DR 100 (1977). L. A. Rehof, 'Article 3', in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff, 1999), 97; for a consideration at the international level see P. Alston, 'The Unborn Child and Abortion under the Draft Convention on the Rights of the Child', *Human Rights Quarterly*, 12 (1990), 156.

29 D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991), 459–97; J. P. Humphrey, 'Political and Related Rights', in T. Meron, above n. 3, 171–203; J. Michael, 'Privacy', in D. J. Harris and S. Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press, 1995), 333–53; P. Cumper, 'Freedom of thought, Conscience and Religion', ibid., 355–89; D. Feldman, 'Freedom of Expression', ibid. 391–437; K. Ewing, 'Freedom of Association and Trade Union Rights', ibid., 465–89.

30 See J. Rehman, *International Human Rights Law: A Practical Approach* (Harlow: Longman, 2003), 150–53; I. Karstan, 'Atypical Families and the Human Rights Act: The Rights of Unmarried Fathers, Same Sex Couples and Transsexuals', *European Human Rights Law Review*, 3 (1999), 195; *Dudgeon* v. *United Kingdom*, Judgement of 22 October 1981, Series A. No. 45; *Rees* v. *United Kingdom*, Judgement of 17 October 1986,

to the firmly grounded civil and political rights presents an unfortunate backdrop to other 'lesser' rights: the existence of economic, social and cultural rights and the so-called 'third generation' right continue to be questioned.

(*c*) *Shifting paradigms and the human rights standards*

The difficulty displayed in formulating human rights standards has brought to light the malleable and amorphous nature of human rights law. Although change is integral to all legal disciplines, the international human rights scenery has been particularly tumultuous. The conservatism of the International Covenant on Civil and Political Rights (1966)[31] and the European Convention on Human Rights (1950)[32] is manifest through the retention of capital punishment and through a disregard for collective group rights.[33] The American Convention on Human Rights, notwithstanding caveats and restrictions, does not expressly prohibit capital punishment. Similarly there are no explicit provisions abolishing the death penalty under the African Charter on Human and Peoples'

Series A, No. 106, paras 42–6; cf. *B* v. *France*, Judgement of 25 March 1992, Series A, No. 232-C, paras 49–62.

31 Adopted at New York, 16 December, 1966; entered into force 23 March 1976. GA Res. 2200A (XXI) UN Doc. A/6316 (1966) 999 U.N.T.S. 171; 6 I.L.M. (1967) 368.

32 Signed at Rome, 4 November 1950; entered into force 3 September 1953. 213 U.N.T.S. 221; E.T.S. 5.

33 The European Convention on Human Rights does not contain any article to protect minority rights. See however the Council of Europe's Framework Convention on the Rights of National Minorities (1994) <http://www.coe.int/T/E/human_rights/minorities/> accessed 10 July 2005, and Council of Europe's European Charter for Regional and Minority Languages, 14 (1992), *Human Rights Law Journal* (1993), 152; for commentary on the protection of minorities in Europe see J. Rehman, 'Autonomy and the Rights of Minorities in Europe', in S. Wheatley and P. Cumper (eds), *Minority Rights in the New Europe* (Hague: Kluwer Law International, 1999), 217–31. Article 27 of the International Covenant on Civil and Political Rights (1966) has come under substantial criticism for adopting an individualistic position in its reference to minority rights. For a discussion of the subject of minority rights and indigenous peoples see Rehman, above n. 30, 297–343.

Rights,[34] the Universal Islamic Declaration on Human Rights (1981)[35] and the more recent Arab Charter of Human Rights.[36]

As noted above, the International Covenant on Civil and Political Rights, European Convention on Human Rights and the American Convention on Human Rights sanction capital punishment, albeit with caveats, restraints and restrictions. It was only in 1989 with the adoption of the second Optional Protocol,[37] in 1983 with the adoption of the sixth Protocol to the European Convention on Human Rights[38] and in 1990 through the adoption of the Additional Protocol to the American Convention to Abolish the Death Penalty[39] that a firm move was made to abolish capital punishment. The nature of these protocols remains controversial, in particular the ICCPR second Optional Protocol, which has not been ratified by nearly three-quarters of the world's states, including powerful ones such as the USA, China, India and almost all member-states of the Organization of the Islamic Conference (OIC).[40]

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34 Adopted on 27 June 1981; entered into force 21 October, 1986. OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M (1982) 58; 7 HRLJ (1986) 403.

35 An Instrument prepared by a number of Islamic states including Egypt, Pakistan and Saudi Arabia under the auspices of the Islamic Council (a private London–based organization, working in conjunction with the Muslim World League, an international non-governmental organization). For an analysis of the Declaration see Mayer, n. 5 above, 22.

36 See Council of the League of Arab States, (102nd session, Resolution 5437, 15 September 1994); Robertson and Merrills, above n. 7, 238–42.

37 Annex to GA Res. 44/128. Reprinted in 29 I.L.M (1990) 1464. See generally W. A. Schabas, *The Abolition of Death Penalty in International Law* (Cambridge: CUP, 2002), 155–210.

38 See Protocol no. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of Death Penalty, ETS no. 114. Schabas, above n. 37, 259–309.

39 Protocol to the American Convention on Human Rights to Abolish the Death Penalty, O.A.S.T.S. 73 (1990), adopted 8 June 1990, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc. 6 rev. 1 at 80 (1992); 29 I.L.M. (1990) 1447.

40 As at 9 June 2005, there are fifty states parties to the Covenant. <http://www.unhchr.ch/pdf/report.pdf.> accessed 1 July 2005. According to Amnesty International's most recent report on China, 'The death penalty continued to be used extensively and arbitrarily, at times as a result of political interference. People were executed for non-violent crimes such as tax fraud and embezzlement as well as drug offences and violent crimes. The authorities continued to keep national statistics on death sentences and executions secret. Based on public reports available, AI estimated that at least 3,400 people had been executed and at least 6,000 sentenced to death by the end of the year,

The divisions over the issue of capital punishment are matched by disagreements on the rights of marginalised communities such as homosexuals, transsexuals, same-sex partners, minorities and indigenous peoples.[41] There is also an ongoing debate over the scope of individual rights such as the right to privacy and family life.[42] The sequence of events in the human rights arena, regretfully, has not always been towards greater recognition of civil liberties. The rise of right-wing conservatism in the United States and global developments since 11 September 2001 have led to a significant curtailment of individual rights: the prohibition on torture and cruel, inhuman and degrading treatment has been violated by the United States in Guantánamo Bay, Iraq and Afghanistan.[43] In the course of the 'global war on terror', states have also vacillated over well-established rights such as the right to liberty and protection against unlawful detention. The United Kingdom entered a reservation to Article 5 of the

although the true figures were believed to be much higher.' See Amnesty International, *China – Report 2005* <http://web.amnesty.org/report2005/chn-summary-eng> accessed 6 July 2005. On the contemporary position on death penalty in the USA see <http://www.amnestyusa.org/abolish/index.do> accessed 6 July 2005. For the background of OIC see J. Rehman, *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilizations' in the New World Order* (Oxford: Hart Publishing, 2005), 27–42;

41 On sexual orientation and discrimination see I. Leigh, 'Clashing Rights, Exemption and Opt-Out: Religious Liberty and "Homophobia"', in R. O'Dair and A. Lewis (eds), above n. 2, 247–273; on same-sex issues see R. Wintemute and M. Andenas (eds), *Legal Recognition of Same-Sex Partnership: A Study of National, European and International Law* (Oxford: Hart Publishing, 2001); R. Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention and the Canadian Charter* (Oxford: Clarendon Press, 1997). On the subject of minorities and indigenous peoples there is huge amount of legal literature; for further sources see S. S. Ali and J. Rehman, *Indigenous Peoples and Ethnic Minorities of Pakistan* (London: Routledge/Curzon Press, 2001); P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991); P. Thornberry, *Minorities and Human Rights Law* (London: Minority Rights Group, 1991); C. Brölmann, R. Lefeber and M. Zieck (eds), *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff, 1993); G. Alfredsson and A. de Zayas, 'Minority Rights: Protection by the United Nations', *Human Rights Law Journal*, 14 (1993), 1; N. Ghanea and A. Xanthaki (eds), *Minorities, Peoples and Self-Determination: Essays in Honour of Patrick Thornberry* (Leiden: Martinus Nijhoff, 2005).

42 See above n. 30 for references and relevant case-law.

43 See P. A. Thomas, 'September 11th and Good Governance', *Northern Ireland Legal Quarterly*, 53 (2002), 389; E. Katselli and S. Shah, 'September 11 and the UK Response', *International and Comparative Law Quarterly*, 52 (2003), 245; also see Rehman, above n. 40, 221–30.

ECHR, and has insisted in continuing with a form of internment which it argues is essential to prevent international terrorists from operating within its national borders.[44] This lack of consistency in establishing firm standards of such fundamental human rights as the right to life, the prohibition of torture and cruel, inhuman and degrading treatment, the right to liberty and protection against unlawful detention demonstrates the fragile nature of human rights law.

3. RELIGION AND HUMAN RIGHTS: REVISITING THE 'INEVITABILITY OF A CLASH' ARGUMENT

□ *The case of Islam*

All religions, beliefs or ideologies are to a certain degree infected with forms of inherent tension and contradictions. A strictly literal interpretation of religious norms would amount to the breaching of fundamental norms of equality and non-discrimination. A promise of eternity, of absolute truth and providence – a hallmark of many of the world religions – has acted as the great determinant of human existence. As Macaulay put it:

> I am in the right and you are wrong. When you are stronger, you ought to tolerate me; for it is your duty to tolerate truth. But when I am stronger, I shall persecute you; for it is my duty to persecute you.[45]

Champions of the monotheistic religions Christianity, Judaism, and Islam often find it difficult to reconcile burgeoning modern values of human rights law. Indeed, at the level of principle, proponents of religious and ideological doctrines purport an inherently discriminatory policy in that

> the question of religion takes international law to the limits of human rights, at least in so far as the law functions in a community of states. It is quite meaningless, for example, to the adherents of a religion to have their beliefs or practices declared to be

44 See J. Rehman, 'Islamophobia after 9/11: International Terrorism, Sharia and Muslim Minorities of Europe – The Case of the United Kingdom', *European Yearbook of Minority Issues*, 3 (2005), 217.

45 T. B. Macaulay, *Cultural and Historical Essays* (London, 1870), 336.

> contrary to 'public morality'. To the believer, religion is morality itself and its transcendental foundation grounds it more firmly in terms of obligation than any secular rival, or the tenets of other religions. All religions are to a greater or lesser extent 'fundamentalist' in character in that they recognise that theirs is the just rule, the correct avenue to truth.[46]

The overpowering nature of religion, however, has also been used as a weapon for generating intolerance, and as an instrument for the persecution and ultimate destruction of religious minorities. Religious intolerance and repression were the great predisposing factors of history.[47] Within the texts of religious scriptures, forms of genocide of religious minorities were sanctioned. The tragic wars of the Middle Ages, the Crusades and the *jihads*, translated these religious ordinances into action rigorously.[48] All of the world's major religions have been subjected to intense scrutiny and wide ranging interpretations. However, in the contemporary political environment, Islam faces the sternest examination regarding its human rights credentials.

(i) *Islam as a religion of violence and aggression*

The debate on the compatibility of Islamic values with those of modern human rights is volatile. Classical Islam is equated with violence and aggression – the concept of *jihad* is considered particularly problematic.[49] Islamic law is also considered to perpetuate gender-based discrimination and violate the rights of minorities.[50] Several Western jurists and

46 P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991), 324.

47 See B. Whitaker, *Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc E/CN.4/Sub.2/1985/6, pp. 6–7.

48 L. Kuper, *International Action Against Genocide* (London: Minority Rights Group, 1984), 1; L. Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven: Yale University Press, 1981), 12–14; J. Kelsay and J. T. Johnson (eds), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (New York: Greenwood Press, 1991).

49 See S. S. Ali and J. Rehman, 'The Concept of *Jihad* in Islamic International Law', *Journal of Conflict and Security Law*, 10(3) (2005), 321–43.

50 J. Rehman, 'Accommodating Religious Identities in an Islamic State: International Law, Freedom of Religion and the Rights of Religious Minorities', *International Journal on Minority and Group Rights*, 7 (2000), 139; J. Rehman 'Minority Rights and Constitutional Dilemmas of Pakistan' *Netherlands Quarterly of Human Rights*, 19 (2001), 417.

statesmen have adopted a negative stance towards Islam and Islamic civilisations.[51] In engineering the 'clash of civilisations', the chief propagator of the doctrine, Samuel Huntington, has perceived Islam as a violent religion, 'a religion of the sword . . . glorify[ing] military virtues'.[52] He argues that 'the Koran and other statements of Muslim beliefs contain few prohibitions on violence, and a concept of non-violence is absent from Muslim doctrine and practice'.[53] Similar sentiments are echoed by J. L. Payne. Payne contrasts what he perceives as the 'Western view of what religion is and ought to be, namely, a voluntary sphere where coercion has no place' with that of Islam.[54] In the course of this comparison he notes that

> the emphasis on non-violence is not the pattern in the Muslim culture. To the contrary, violence has been a central, accepted element, both in Muslim teaching and in the historical conduct of the religion. For over a thousand years, the religious bias in the Middle Eastern culture has not been to discourage the use of force, but to encourage it.[55]

According to another Western academic, Roda Mushkat,

> Islamic law enjoins Muslims to maintain a state of permanent belligerence with all non-believers, collectively encompassed in

51 In the immediate aftermath of the events of 11 September 2001, the Italian prime minister made the controversial though profound statement that 'we must be aware of the superiority of our civilization, a system that has guaranteed well-being, respect for human rights and – in contrast with Islamic countries – respect for religious and political rights. Islamic civilization is stuck where it was fourteen hundred years ago' (Italian prime minister Silvio Berlusconi, comments made in Berlin, 26 September 2001). These comments have been cited extensively: see A. Palmer, 'Is the West Really Best', *Sunday Telegraph* (London, 30 September 2001), 14; A. Osburn, 'On the Brink of War: Reaction – Scorn Poured on Berlusconi Views – European and Muslim Leaders Express Disgust', *The Guardian* (London, 28 September 2001), 4; 'EU deplores "Dangerous" Islam Jibe', BBC News <http://news.bbc.co.uk/1/hi/world/middle_east/1565664.stm> accessed 9 October 2004.

52 S. P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (London: Simon & Schuster, 1996), 263.

53 A. A. An-Na'im, 'Upholding International Legality against Islamic and American Jihad' in K. Booth and T. Dunne (eds), *Words in Collision: Terror and the Future of Global Order* (New York: Palgrave Macmillan, 2002), 162–71

54 J. L. Payne, *Why Nations Arm* (Oxford: Basil Blackwell, 1989), 121.

55 Ibid. 122.

> the *dar al-harb*, the domain of war. The Muslims are, therefore, under a legal obligation to reduce non-Muslim communities to Islamic rule in order to achieve Islam's ultimate objective, namely the enforcement of God's law (the Sharia) over the entire world. The instrument by which the Islamic state is to carry out that objective is called the *jihad* (popularly known as the 'holy war') and is always just, if waged against the infidels and the enemies of the faith.[56]

The association of Islam with violence and aggression has not only been the preoccupation of Western scholars; several Muslim jurists have taken the position that the classical interpretations of Sharia are incompatible with modern international law and human rights law. Professor Majid Khudduri, a leading academic, has, for instance, emphasised the aggressive nature of *jihad*, propounding its apparent incompatibility with modern norms on the ground of the latter's prohibition on the use of force. According to Khadduri,

> In theory the *dar al-Islam* was always at war with *dar al-harb*. The Muslims were under a legal obligation to reduce the latter to Muslim rule in order to achieve Islam's ultimate objective, namely, the enforcement of God's Law (the *Shari'a*) over the entire world. The instrument by which the Islamic States were to carry out that objective was *jihād* (popularly know as holy war), which was always justifiably waged against the infidels and the enemies of the faith. Thus the *jihād* was the Islam's *bellum justum*.[57]

Professor Abduallahi Ahmed An-Na'im, a Sudanese human rights scholar, expresses his concern in the following manner:

> the term *jihad* can also refer to religiously sanctioned aggressive war to propagate or 'defend' the faith. What is problematic about this latter sense of *jihad* is that it involves direct and unregulated violent action in pursuit of political objectives, or self-help

56 R. Mushkat, 'Is War Ever Justifiable? A Comparative Survey', *Loyola of Los Angeles International and Comparative Law Journal*, 9 (1987), 227.

57 M. Khadduri, 'Islam and the Modern Law of Nations', *American Journal of International Law*, 50 (1956), 359.

in redressing perceived injustice, at the risk of harm to innocent bystanders.[58]

These scholars from the world of Islam also highlight the differences and disagreements between classical Islamic legal theory and modern human rights law. The most thorough exposition of the subject matter, it would appear, has been provided by Professor Abdullah Ahmed An-Na'im. In his seminal work, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, Professor An-Na'im presents a detailed and convincing exposition of the discriminatory nature of what he terms 'pre-modern Sharia'.[59] In advancing his argument, Professor An-Na'im examines the position of women and religious minorities within classical Sharia. As regards religious minorities, he argues that under a strict interpretation of the Sharia human beings are placed within three classifications. First is that of the male Muslim, who holds a predominantly strong, unchallengeable and unassailable position. This category is clearly accorded the highest status. The second category is that of Christians and Jews, who are regarded as the recipients of divine revelations prior to Islam (also known as People of the Book – *ahal-i-kitab*). Jews and Christians ruled by Muslims had the political status of *dhimmis,* being accorded toleration in return for submitting to Muslim rule and accepting a number of conditions governing their conduct. *Dhimmis* had to pay a special capitulations tax known as *jizya*, though they were excluded from high governmental positions. Although generally subject to Sharia law, *dhimmis* were allowed to follow their own rule of personal status, but they were subject to Islamic law in mixed cases in which persons of different faiths were involved, and especially when the other party was a Muslim. The third and final category consisted of the 'non-believers'. It appears that in strict doctrinal terms there was a particular dearth of tolerance for pagan or polytheist minorities. When under conquest their choices were limited: to embrace Islam or perish.[60] In asserting this view of Islam, Khaduri notes that

58 Ibid. 163.

59 An-Na'im, above n. 5.

60 According to Azrt, 'The other class of non-Muslims who were not dhimmis were slaves, the fate of polytheists and idolaters who had been captured as prisoners of war rather than slain in or after battle. They had the choice only of slavery, conversion to Islam or death; no special communal contract allowed them to quietly or even humbly

> no compromise is permitted with those who fail to believe in God; they have either to accept Islam or fight. In several Qura'nic injunctions, the Muslims are under the obligation to 'fight the polytheists wherever ye may find them'; to 'fight those who are near to you of the polytheists, and let them find in you sternness'; and 'when you meet those who misbelieve, strike off their head until you have massacred them . . .' In the Hadith of the Prophet Mohammad he is reported to have declared: 'I am ordered to fight polytheists until they say: "There is no god but Allah."' All the jurists, perhaps without exception, assert polytheism and Islam cannot exist together; the polytheists, who enjoin other gods with Allah, must choose between war or Islam.[61]

(ii) *Contextualising, comprehending and interpreting the central message*

If all Sharia and Islam have to offer to minority communities is death, destruction and discrimination, there would be no point in attempting to reconcile Muslim values with human rights law. Fortunately there are significant possibilities of interpretative flexibility contained within the Sharia that offer versatility and hope. A contextualised, methodological interpretation of Islam and Sharia brings out the central message, which is one of peace, reconciliation and protection of human rights. This approach of a contextualised and methodological analysis of Islam (although a taxing assignment) can nevertheless be illustrated through an examination of the Qur'anic verses, the principal source of the Sharia. Those who advocate that Islam and Sharia are based upon aggression and violence frequently cite the following verse from the Qur'an:

> When the period of four months during which hostilities are suspended expires, without the idolaters having settled the terms of peace with you, resume fighting with them and kill them wherever you find them and make them prisoners and beleaguer them, and lie in wait for them at every place of ambush.[62]

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practice their religion' (D. E. Azrt, 'The Role of Compulsion in Islamic Conversion: Jihad, Dhimma and Rida', *Buffalo Human Rights Law Review*, 8 (2002), 27.

61 M. Khadduri, *War and Peace in the Law of Islam* (Baltimore: John Hopkins, 1955), 75.

62 Qur'an 9:3–5.

I would submit that this verse, coupled with a number of other injunctions from the Qur'an, does not represent a complete picture of *jihad* within the Sharia. Critics of the Sharia frequently rely on these ordinances to condemn Islam as aggressive, violent and intolerant. However, in doing so they overlook the context in which the verses of the Qur'an were revealed. Islam in its formative phases had to undergo a difficult and uncertain future. The Prophet Muhammad and his followers represented a community facing extermination. Indeed, Muhammad himself was forced to migrate to Medina to avoid persecution and assassination, his migration marking the beginning of the Muslim calendar.[63] It was in the context of persecution, betrayals, attempted humiliation and disregard for kinship and obligations on the part of the Quresh of Mecca that a number of these verses were revealed. Even taking these verses at face value, and comprehending them in their entirety, they do not in fact advocate unconditional aggression and violence. The aforementioned pronouncements are accompanied by a number of caveats and moderating references. For example:

> Warn the disbelievers of a painful chastisement, excepting those of them with who you have a pact and who have not defaulted in any respect, nor supported anyone against you. Carry out the obligations you have assumed towards them till the end of their terms. Surely Allah loves those who are mindful of their obligations. When the period of four months during which hostilities are suspended expires, without the idolaters having settled the terms of peace with you, resume fighting with them and kill them wherever you find them and make them prisoners and beleaguer them, and lie in wait for them at every place of ambush. Then if they repent and observe Prayer and pay the Zakat, leave them alone. Surely Allah is Most Forgiving, Ever Merciful. If any one of the idolaters seeks asylum with thee, grant him asylum so that he may hear the Word of Allah; then convey him to a place of security for him, for they are a people who lack knowledge.[64]

63 Weeramantry, n. 5 above, 4–5; J. Rehman, 'Self-Determination, State Building and the Muhajirs: An International Legal Perspective of the Role of the Indian Muslim Refugees in the Constitutional Development of Pakistan', *Contemporary South Asia*, 3 (1994), 113.

64 *Qur'an* 9:3–6.

In interpreting God's commandments in their proper historical and methodological context, it becomes apparent that there are serious restraints, restrictions and limitations imposed on using force. In the context of freedom of religion, there are similar strong instructions to establish individual autonomy and personal liberties coupled with an egalitarian and just social and legal order. There are also verses within the Qur'an advocating complete freedom of religion. It notes explicitly that 'there is no compulsion in religion. The right direction has become distinct from error'.[65] Similarly, the Qur'an makes the observation, 'Unto you your religion and me my religion'.[66] These are not merely hortatory statements lacking in purpose or meaning. Islamic civilisation at its zenith presented an impressive model of promoting civil rights and protecting the rights of minority communities. Judged by the standards of the time, the practices of Muslim states were a huge advance. In emphasising this egalitarianism and protection of minority rights, one authority makes the point that 'although, like Christianity, Islam was an aggressively universalist religion, it also displayed far more tolerance to followers of other faiths, and particularly Jews and Christians who, like followers of Islam were considered to be "Peoples of the Book". Jewish and Christian communities were, therefore, permitted a large degree of freedom in both religious and civil affairs . . .'.[67] It also remains the case that the practices of the Prophet Muhammad and subsequently those of the Muslim rulers (which now form part of the wider code of Islamic law through the Sharia) seriously defy the 'Western images of Muslim conquerors presenting the conquered peoples with the choice of conversion to Islam or the sword'.[68] On the contrary, 'conquered Christians and Jews were allowed to persist in their beliefs because Islamic law opposes compelled conversions'.[69] Commenting on the facts as they prevailed during the prime of Islam, Eaton remarks that

> the rapidity with which Islam spread across the known world of the seventh century was strange enough, but stranger still is the

65 *Qur'an* 2:256.

66 *Qur'an* 109:6.

67 M. D. Evans, *Religious Liberty and International Law in Europe* (Cambridge: CUP, 1997), 59.

68 Mayer, n. 5 above, 126.

69 Ibid. 126–7.

> fact that no rivers flowed with blood, no fields were enriched with the corpses of the vanquished. As warriors the Arabs might have been no better than others of their kind who had ravaged and slaughtered across the peopled lands but, unlike these others, they were on a leash. There were no massacres, no rapes, no cities burned. These men feared God to a degree scarcely imaginable in our time and were in awe of His all-seeking presence, aware of it in the wind and the trees, behind every rock and in every valley. Even in these strange lands there was no place in which they could hide from this presence, and while vast distances beckoned them ever onwards they trod softly on the earth, as they had been commanded to do. There had never been a conquest like this.[70]

In view of these considerations it would be convincing to argue that the *dhimmis*, the *ahl al-kitab*, in fact enjoyed a better status under the jurisdiction of Islam than religious minorities under a Christian state.[71] This contention certainly appears to carry considerable weight during the zenith of Ottoman rule in the Middle East, North Africa and central and eastern Europe. The Ottoman rule, for several centuries, retained a vast empire with adherents of various religions.[72] While religious minorities were not always treated with tolerance, the Ottomans did experiment with a special mechanism for the granting of autonomy through the *millet* system – a system allowing various religious minorities to enjoy a generous measure of autonomy, in social, civil and religious affairs.[73] Professor Van Dyke's comments are valid when, analysing the *millet* system, he notes that 'it was an application of the right of

70 G. Eaton, *Islam and the Destiny of Man* (Cambridge: Islamic Text Society, 1994), 29–30.

71 'Despite incidents of discrimination and mistreatment of non-Muslims, it is fair to say that the Muslim world, when judged by the standards of the day, generally showed far greater tolerance and humanity in its treatment of religious minorities than did the Christian West. In particular, the treatment of the Jewish minority in Muslim societies stands out as fair and enlightened when compared with the dismal record of Christian European persecution of Jews over the centuries'. Mayer, n. 5 above, 127–8.

72 H. Inalcik, *The Ottoman Empire: the Classical Age 1300–1600* (London: Phoenix, 1994); P. Mansfield, *The Ottoman Empire and Its Successor* (London: Macmillan, 1973); J. McCarthy, *The Ottoman Peoples and the End of Empire* (London: Hodder and Stoughton, 2000).

73 J. A. Laponce, *The Protection of Minorities* (Berkeley: University of California Press, 1960), 84–5.

self-determination in advance of Woodrow Wilson.'[74] The Ottomans also continued the Islamic practice of granting capitulations to Christians and other Westerners. The capitulations provided a degree of autonomy and self-government including the exercise of civil and criminal jurisdiction over other co-nationals.[75] This latter portrayal of Sharia and Islamic-state practices is radically different from the one noted earlier in this chapter.

In light of these apparently opposing interpretations of freedom of religion and the rights of religious minorities within Islam, critics may point to a confused picture, or they may suggest that Islam is a religion of contradictions and ambiguities. The hypothesis of the present chapter however has been that indetermination and equivocacy within religions (in this case Islam) provides the requisite elements of flexibility to construct a path of reconciliation between religions and human rights. Islamic values can be moulded and accommodated into the framework of modern human rights law.

4. CONCLUDING OBSERVATIONS

This chapter has put forward a number of arguments, advancing the thesis that religious values and human rights are not necessarily mutually incompatible; their overlapping paths do not always lead to a conflict. Among its key arguments, the chapter first adopted the position that there is no single unified meaning to the term 'human rights'. Secondly, it demonstrated that there remain difficulties in ascertaining the substance of human rights; considerable divisions pervade the body of international law on such core rights as the 'right to life'. Thirdly, it pointed towards the inherent contradictions and tensions within all mainstream religions and beliefs; Islam, the focus of this examination, does not prove an exception to this general principle.

74 V. Van Dyke, *Human Rights, Ethnicity and Discrimination* (Westport: Greenwood Press, 1985), 74; 'while the [*millet*] system was hardly based on any recognition of "human rights", its application is most compatible with the philosophy of human rights' (J. Packer, 'The Protection of Ethnic and Linguistic Minorities in Europe', in J. Packer and K. Myntti (eds), *The Protection of Ethnic and Linguistic Minorities in Europe* (Turku/Åbo: Åbo Akademi, Institute for Human Rights, Åbo Akademi University, 1993), 42.

75 M. Evans, *Religious Liberty and International Law in Europe* (Cambridge: CUP, 1997), 60.

A study of the Sharia however reveals that there are a range of possible interpretations that could be given to such key concepts as *jihad*, minority rights and fundamental rights. An insular, myopic and archaic view of Sharia is contrary to human rights law. Yet at the same time there is considerable evidence in favour of an interpretation of Sharia in a manner fully according with modern human rights law. Such an exposition is possible through a contextualised and methodological analysis of Sharia and religion itself; the central message of Islam does not advocate aggression and violence of human rights. This latter interpretation of the Sharia provides a real, credible alternative that, in the current climate, must be pursued.

CHAPTER 5

Religion and Human Rights with Special Reference to Judaism

Norman Solomon

In the West, in recent times, religions have been strongly associated with peace and anti-war movements of all kinds. Yet history demonstrates that the same religions, not least Christianity, have often urged people in the name of God to engage in persecution, aggressive war and other barbarous acts, such as the Crusades, the Inquisition, the excesses of the Spanish conquest of South and Central America and the wars of religion in early modern Europe.

Accordingly, there is a popular perception that there is something inherently contradictory about religions, for while they are tireless in their advocacy of peace, historically they have proved themselves ruthless as well as tireless in their pursuit of war.

This common perception is muddled. There is a category error. Religions, as such, are neither peaceful nor warlike. Religions don't do anything; they are abstractions. It is followers of religion who are tireless in their advocacy of peace, and followers of religion who historically have proved themselves ruthless as well as tireless in the pursuit of war.

This is not a semantic quibble. Between the abstraction and the reality comes the interpretation. If the followers of a religion encourage or engage in discrimination, persecution or warfare, this is not the inevitable consequence of an abstract ideal, or of reading a sacred text. A whole complex of circumstances must be present before such an action can take place. There must be a holy text (written or oral), an apposite interpretation of that text by priests, teachers or the like, and a commitment by that particular religious community to the authority of the priests who are responsible for that interpretation of the text and for its application in specific circumstances.

To spell this out more clearly, for a religious group (community, society, nation) to act as a religious group, five things are necessary: