

HARMONISATION OF *SHARI'AH* AND INTERNATIONAL LAW IN TREATY MAKING, TREATY RATIFICATION AND INTERNATIONAL NORM CREATION

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ABSTRACT

This article discusses the progress and achievements in harmonisation of *Shari'ah* and international law in the processes

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of treaty making, treaty ratification and norm creation. This article focuses only on several treaties and declarations. Some of these instruments were drafted in the aftermath of World War II, and the other category is mainly international human rights law instruments. This research analyses the drafting history of the treaties and declarations while examining some of the provisions of the instruments in comparison with the position of the *Shari'ah*, and determines the Muslim majority States' attitude towards those instruments. Areas covered include prohibition of the use of force, freedom to change religion, women's rights and freedom of expression. The progress of harmonisation varies from one area to another. There are areas where harmonisation is easy, but there are other areas where it is impossible, or very difficult and unlikely. Total and comprehensive harmonisation of *Shari'ah* and international law is neither possible nor permitted by the *Shari'ah*.

Keywords: Harmonisation, International Law, Prohibition of Use of Force, Freedom to Change Religion, Freedom of Expression.

HARMONISASI SYARIAH DAN UNDANG-UNDANG ANTARABANGSA DALAM PEMETERAIAN TRITI, RATIFIKASI TRITI DAN PENCIPTAAN NORMA ANTARABANGSA

ABSTRAK

Makalah ini membincangkan kemajuan dan pencapaian dalam harmonisasi antara Syariah dan undang-undang antarabangsa dalam proses pemeteraian triti, ratifikasi triti dan penciptaan norma antarabangsa. Makalah ini fokus hanya pada beberapa triti dan deklarasi. Sebahagian daripada instrument ini dideraf selepas tamat Perang Dunia Kedua, dan kategori lain ialah kebanyakannya instrumen hak asasi manusia antarabangsa. Penyelidikan ini menganalisa sejarah pendrafan triti dan deklarasi, meneliti beberapa peruntukan instrumen-instrumen tersebut, dengan membandingkannya dengan pendirian Syariah tentang perkara tersebut, dan menentukan sikap negara majoriti Muslim terhadap instrumen-instrumen berkenaan. Bidang yang dicakupi termasuk larangan penggunaan kekerasan, kebebasan

menukar agama, hak wanita dan kebebasan bersuara. Kemajuan harmonisasi berbeza-beza dari satu bidang ke bidang lain. Ada bidang di mana harmonisasi mudah, tetapi ada bidang di mana ia mustahil atau sangat sukar atau sangat tidak mungkin. Harmonisasi penuh and menyeluruh antara Syariah dan undang-undang antarabangsa adalah mustahil dan dilarang oleh Syariah.

Kata Kunci: Harmonisasi, Undang-Undang Antarabangsa, Larangan Penggunaan Kekerasan, Kebebasan Menukar Agama, Kebebasan Bersuara.

INTRODUCTION

This article discusses the progress and achievements in harmonisation of *Shari'ah* and international law in treaty making and international norm creation. Harmonisation is the action of making the two laws to be compatible with one another. The term "ratification" in the title of this article refers to one of the ways States express consent on multilateral treaties, making the treaties binding on such States. The other ways are signature and accession. Expressing consent to treaties is the main way of international legal norm creation.¹

In addition to treaties, international law is also created by widespread and consistent State practice, which the States believe to be binding on them, and this type of law is called customary international law (CIL). Multilateral treaties and declarations of international organisations may be material sources of CIL or the documents where the customary rules are located.²

International law is made by States that have different ideologies and cultures. When negotiating to conclude treaties, States try to

¹ Vienna Convention on the Law of the Treaties 1969, Articles 11-15. Consent is expressed by signature when the parties to the treaty sign the treaty. Consent is expressed by ratification when the negotiating States sign and deposit the instruments of ratification. Consent is expressed by accession when non-negotiating States sign and deposit the instruments of accession. The way consent should be expressed to a treaty is normally prescribed by the treaty itself.

² *North Sea Continental Shelf Cases* (1969) ICJ Report 3; *Nicaragua Case (Merits)* (1986) ICJ Report 14.

ensure that the treaties do not end up going against their own political and legal systems. Before expressing consent to a treaty, States would study whether all provisions in the treaty are compatible with the States' national laws. The same attitude is shown by Muslim States that apply Islamic law to varying degrees. Muslim States would not want to sign, ratify or accede to treaties that are contrary to the *Shari'ah*.

In Islam, the Law of Allah is obligatory on Muslims, including Muslim heads of State and heads of government. On the other hand, under Public International Law, a treaty is binding on States parties to it,³ while CIL is binding on all States except the persistent objector.⁴ If a Muslim State does express consent to a treaty that is contrary to its Islamic law, applying one of the two means the Muslim State may breach its international law obligation or go against its own religious law.

An earlier work entitled "Islamic Law and International Treaties: In Search of a Methodology of Harmonisation"⁵ suggests a methodology of harmonisation between Islamic law and international treaties, while this article furthers the discussion by analysing the extent to which harmonisation has been carried out in the processes of treaty making, treaty ratification, and norm creation.

There are hundreds of multilateral treaties⁶ and declarations,⁷ and this work focuses only on several. Some of these instruments were drafted after World War II had ended, and the other category is mainly the international human rights law instruments that were drafted in the following decades. This article analyses the drafting history of the treaties and declarations, examines some of the provisions of the instruments, and determines the Muslim majority States' attitude

³ Vienna Convention on the Law of the Treaties 1969, Article 26.

⁴ *Anglo-Norwegian Fisheries Case* (1951) ICJ Report 116.

⁵ Mohd Hisham Mohd Kamal *et al.*, "Islamic Law and International Treaties: In Search of A Methodology of Harmonisation", in *Harmonization of Shari'ah and Law: Approaches and Progress*, ed. Najibah Mohd Zin *et al.* (Kuala Lumpur: Harun M. Hashim Law Centre, 2023), 3-31.

⁶ <https://treaties.un.org/>.

⁷ A treaty is an agreement between States and/or international organisations, binding on the parties to it. Declarations of certain aspirations are not always binding.

towards the instruments. The purpose of taking this methodology is to see the contribution of the Muslim States in the drafting process, and determine their attitude during the drafting process and thereafter, especially when the provisions were incompatible with the *Shari'ah*. In order to determine the compatibility of the international law instruments with the *Shari'ah*, the position of the *Shari'ah* on the matters are determined by referring to its sources. In the final section, this article suggests that Muslim States take their own initiatives in making treaties and creating norms.

Muhammad Amanullah has suggested that total and comprehensive harmonisation between Islamic *fiqh* and human-made law is neither possible nor permitted by the *Shari'ah*.⁸ This article may come to the conclusion that total and comprehensive harmonisation of *Shari'ah* and international law is also neither possible nor permitted by the *Shari'ah*.

Treaty Making and Norm Creation in the Aftermath of World War II

There were several multilateral treaties that were concluded after the end of World War II, at a time when many Muslim nations were still colonised or had just gained their independence. Muslim States were also not the initiators of these treaties. Furthermore, Muslim scholars at that time were focusing on matters such as mobilising the *ummah* in gaining independence and establishing governments, and giving a basic understanding of the religion to the communities. After centuries of Western colonialism, many eventual leaders of the Muslim States were Western educated.

The main treaty adopted at that time was the Charter of the United Nations 1945. The United States of America, the United Kingdom, the Soviet Union, and China were involved in the earlier stages of drafting the Charter at Dumbarton Oak and then at Yalta. Later, at the San Francisco Conference, there were fifty (50) participating States, including only seven (7) Muslim majority States,

⁸ Muhammad Amanullah, "Principles to be Followed in Partial Harmonization between Islamic *Fiqh* and Man-Made Law", *IJUM Law Journal* 16 (2008): 253.

namely: Egypt, Iran, Iraq, Lebanon, Saudi Arabia, Syria, and Turkey.⁹ The UN Charter introduced several new principles of international law, but this article refers to only two principles.

The Charter established the UN organisation, with the aim to prevent the occurrence of a third world war. For this purpose, the Charter prohibits the use of force, except in self-defence and when authorised by the UN Security Council, and strengthens the concept of collective security, where an attack by any State against any other State should see all the other States assisting the aggressed State and punishing the aggressor.¹⁰ The permissibility of collective security in Islam depends on the nature of *jihad*, whether it is exclusively defensive or both defensive and offensive. If *jihad* is exclusively defensive, it is permissible under the *Shari'ah* for Muslim States to be parties to the UN Charter, but if *jihad* is offensive and must be initiated against non-Muslims, it is not permissible under the *Shari'ah* for Muslim States to be parties to the Charter. The concept of *jihad* is so embodied in numerous verses of the Qur'an and the practice of the Messenger (s.a.w.) who was involved in a number of battles, but probably the first work that discussed collective security from an Islamic perspective was a 2005 thesis on collective security,¹¹ whereas at that time, all existing Muslim States had already become members of the UN. Not only that the seven participating Muslim States did not determine the compatibility of the concept of collective security with the concept of *jihad*, but the other Muslim majority States which subsequently became members of the UN also did not make any such determination before joining.

As some Muslim jurists – including Abu Hanifah and Sufyan al-Thawri – are of the view that *jihad* is limited to defensive situations only,¹² whereas some others – including Muhammad ibn al-Hassan al-

⁹<chromeextension://efaidnbmnnnibpcajpcglclefindmkaj/https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

¹⁰ Charter of the United Nations, Articles 2(4) and 51, and Chapter VII.

¹¹ Mohd Hisham bin Mohd Kamal, "Collective Security: United Nations Practice and Islamic Perspective" (PhD thesis, IIUM, 2005), 169-208.

¹² Muhammad ibn al-Hasan al-Shaybani, *al-Siyar al-Kabir* on the margin of *al-Siyar al-Kabir*, ed. 'Abd al-'Aziz Ahmad (Cairo: Matba'ah Sharikat al-I'lanat al-Sharqiyah, Vol. 1, 1971), 187.

Shaybani – are of the view that *jihad* is both defensive and offensive,¹³ it means that there is no *ijma* ‘ (consensus of the *mujtahidun*) that has been achieved. As only Allah Knows which view is better, it is submitted that the UN Charter prohibition of the use of force and the concept of collective security are not contrary to the concept of *jihad* as understood by some great jurists.

The second principle relates to the UN’s purpose of promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.¹⁴ The Charter does not enumerate the human rights and fundamental freedoms that the States parties should observe, but three (3) years later, the UN General Assembly adopted a resolution called the Universal Declaration of Human Rights 1948 (UDHR) which proclaims basic principles of human rights and freedoms.¹⁵ The UDHR was drafted by a commission, and none of its members was a Muslim jurist.¹⁶ Although the UDHR is not a binding instrument,¹⁷ it had an impact in shaping subsequent treaties on human rights and the provisions on fundamental rights in the constitutions of new States.¹⁸

¹³ *Ibid.*, 187.

¹⁴ UN Charter, Article 1(3).

¹⁵ General Assembly Resolution 217 A (III) on 10 December 1948.

¹⁶ Mrs. Eleanor Roosevelt (USA) was the Chairperson of the Commission on Human Rights, and the other members were Peng-chun Chang (China), Charles Malik (Lebanon), William Hodgson (Australia), Hernan Santa Cruz (Chile), Rene Cassin (France), Alexandre Bogomolov (Soviet Union), Charles Dukes (UK), and John P. Humphrey (Canada).

¹⁷ During its drafting, Mrs. Eleanor Roosevelt issued a statement that the document was not a treaty or an international agreement, and “is not and does not purport to be a statement of law or of legal obligations. It is a declaration of basic principles of human rights and freedoms ... to serve as a common standard of achievement for all peoples of all nations”. See (1948) 19 *United States, Department of States Bulletin* 751; H.O. Agarwal, *International Law & Human Rights*, 5th Edition (Allahabad: Central Law Publications, 1999), 656-657; Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach*, 4th Edition (Malaysia: Sweet & Maxwell, 2019), 333 n. 40.

¹⁸ Abdul Ghafur Hamid @ Khin Maung Sein, *Public International Law: A Practical Approach*, 5th Edition (Malaysia: Sweet & Maxwell, 2023), 314.

There were nine (9) Muslim majority States which were present when the UDHR was debated, namely: Afghanistan, Egypt, Iran, Iraq, Lebanon, Pakistan, Saudi Arabia, Syria and Turkey.¹⁹ They were active in the preparation of the UDHR.²⁰ When the declaration was adopted by way of voting, Saudi Arabia decided to abstain from voting, claiming that some of its provisions were contrary to Islam, especially Article 18 thereof that provided for freedom to change religion which included the situation of apostasy.²¹ However, the Muslim delegate from Pakistan, Zafrullah Khan, argued that “Islamic sources could support Article 18 as drafted”.²² The other Muslim States were also concerned about apostasy from Islam,²³ but they voted in favour of the UDHR. There are divergent views among Muslim jurists on many matters, but the criminality of apostasy has been solved by way of *ijma*‘ that was achieved during the era of the Rightly Guided Caliphs. The

¹⁹ Amjad Mahmood Khan, “A Courageous Muslim Voice: How Sir Muhammad Zafrulla Khan Saved Article 18 of the UDHR”, 11 December 2023, <https://www.tandfonline.com/doi/full/10.1080/15570274.2023.2272425>, Accessed November 4, 2024.

²⁰ Turan Kayaoglu, “The Organization of Islamic Cooperation’s Declaration on Human Rights: Promises and Pitfalls”, *Policy Brief* (Brookings Doha Centre, September 2020), 2, <https://www.brookings.edu/research/the-organization-of-islamic-cooperations-declaration-on-human-rights-promises-and-pitfalls/>, accessed July 31, 2024.

²¹ Donna E. Arzt, “The Treatment of Religious Dissidents under Classical and Contemporary Islamic Law”, in *Religious Human Rights in Global Perspective: Religious Perspective*, ed. John Witte, Jr. and Johan D. van der Vyver (The Hague: Martinus Nijhoff Publishers, 1996), 425; Abdul Aziz Bari, “Isu Murtad dan Kebebasan Beragama dalam Kerangka Perlembagaan Persekutuan”, in *Murtad: Kedudukannya di Sisi Islam dan Perlembagaan Malaysia*, ed. Farid Sufian Shuaib (Petaling Jaya: Intel Multimedia and Publication, 2005), 44.

In 1984, Iran voiced a rejection of the UDHR. See Arzt, “Treatment of Religious Dissidents”, 425 n. 128; Kayaoglu, “Organization of Islamic Cooperation’s Declaration on Human Rights”, 2.

²² Zafrullah Khan, *Islam and Human Rights* (London: Islam International Publications, 1967), 117.

²³ Shannon Dunn, “Islamic Law and Human Rights”, *Oxford Handbook of Islamic Law*, November 2018, <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199679010.001.0001/oxfordhb-9780199679010-e-26>, Accessed November 23, 2021.

sanad (basis) of this *ijma'* was the several *ahadith* where the Messenger (s.a.w.) prescribed the death penalty for an apostate.²⁴ Shams al-Din ibn Qudamah al-Muqaddasi identifies that Abu Bakr, 'Umar ibn al-Khattab, 'Uthman ibn 'Affan, 'Ali ibn Abi Talib, Mu'adh ibn Jabal, Abu Musa al-Ash'ari, 'Abd Allah ibn 'Abbas, Khalid ibn al-Walid and other Companions of the Messenger had reached the same opinion, and observes that no other *mujtahid* among them had a different view.²⁵ Based on the *hadith*: "My nation will not agree on a mistake", any decision on which all *mujtahidun* have agreed, without a single different view, is the truth and is binding on all Muslims in that generation and all the subsequent generations, and thus cannot be

²⁴ *Hadith*: Whoever changes his religion (from Islam), kill him. See Abu 'Abd Allah Muhammad ibn Isma'il al-Bukhari, *Sahih al-Bukhari* (Riyadh: Dar al-Salam li-al-Nashr wa-al-Tawzi', 1419H/1999), 1193; Abu Dawud Sulayman ibn al-Ash'at al-Sajastani al-Azadi, *Sunan Abi Dawud* (Beirut: Dar Ibn Hazm, 1419H/1998), *hadith* no. 4351, at 657; Muhammad ibn 'Ali ibn Muhammad al-Shawkani, *Nayl al-Awtar* (Beirut: Mu'assasat al-Tarikh al-'Arabi, n.d., Vol. 7), 216. *Hadith*: Whoever changes his religion (from Islam), smite his neck.

See Malik ibn Anas, *al-Muwatta'* (Beirut: Dar Ahya' al-Turath al-'Arabi, 1418H/1997), 454. *Hadith*: It is not lawful to shed the blood of a person professing Islam, who testifies that there is no god but Allah and that I am the Messenger of Allah, except in three cases: life for a life, or a married person guilty of adultery, or a person who separates from his faith and deserts the community. (Emphasis added)

See al-Bukhari, 1185; Abu Dawud, *hadith* no. 4353, at 657. *Hadith*: If a man has apostatised from Islam, call him to return to Islam; if he returns, release him; if he refuses, smite his neck. If a woman has apostatised from Islam, persuade her to return to Islam; if she returns, release her; if she refuses, smite her neck.

See al-Shawkani, Vol. 7, 218-219.

²⁵ 'Abd Allah ibn Ahmad ibn Muhammad ibn Qudamah al-Muqaddasi and Shams al-Din 'Abd al-Rahman ibn Muhammad ibn Ahmad ibn Qudamah al-Muqaddasi, *al-Mughni 'ala Mukhtasar al-Kharqi, wa ma'a-hu: al-Sharh al-Kabir 'ala Matn al-Muqni'* (Beirut: Dar al-Kutub al-'Ilmiyyah, 2009, Vol. 11), 89.

See also Fajri Matahati Muhammadin and Nur Fajri Romadhon, "Death Penalty and *Riddah*: A Critical Evaluation towards the Claim of A Juristic *Ijmā'*", *IJUM Law Journal* 31(2) (2023): 322-324.

contradicted and the matter cannot be reopened for *ijtihad*.²⁶ Therefore, the view of the Pakistani delegate is disputable.

It is not that in all types of human rights the *Shari'ah* is incompatible with international law. Basically, the *Shari'ah* accepts many rights that are recognised by international human rights law documents such as the right to protection from arbitrary killing, and the rights to property and personal liberty. In these areas, harmonisation may not be difficult to achieve.

However, it was only in 1990 that the Organisation of Islamic Conference responded to the UDHR, by introducing the Cairo Declaration on Human Rights in Islam (CDHRI). It is obvious that the name of the Declaration contains the phrase “in Islam”, so the rights and freedoms stipulated therein are in accordance with and subject to the *Shari'ah*.²⁷ In particular, the CDHRI does not provide for freedom to change religion from Islam. Instead, Article 10 thereof provides:

Islam is the religion of true unspoiled nature. It is prohibited to exercise any form of pressure on man or to exploit his poverty or ignorance in order to force him to change his religion to another religion or atheism.

Another set of treaties concluded after World War II had ended was the four Geneva Conventions 1949 (GCs) on how the wounded, the prisoners of war and the civilians should be treated in armed conflicts. Out of 48 negotiating States, only eight (8) were Muslim majority States, namely: Afghanistan, Albania, Egypt, Iran, Lebanon, Pakistan, Syria and Turkey.²⁸ In 1977, two Additional Protocols to the GCs (APs) were concluded to strengthen the protection of victims of armed conflicts. The GCs and the APs are generally compatible with the Islamic law of armed conflict. The principle of distinction that

²⁶ Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Kuala Lumpur: The Other Press, 2003), 182-192.

²⁷ Cairo Declaration on Human Rights in Islam, the Preamble & Article 24.

²⁸ International Committee of the Red Cross, *The Geneva Conventions of 12 August 1949*, Geneva: International Committee of the Red Cross, n.d., at 21, <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.icrc.org/sites/default/files/external/doc/en/assets/files/publications/icrc-002-0173.pdf>, Accessed November 5, 2024.

protects civilians and civilian objects from being targeted,²⁹ and the principles of proportionality³⁰ and precautions³¹ that are prescribed to avoid excessive incidental damage can also be found in the Qur'an and the practice of the Messenger (s.a.w.).³² In fact, Article 3 of the CDHRI contains some of the Islamic legal principles – the protection of non-belligerents and civilian objects during armed conflicts, the right of the wounded and the sick to medical treatment, the rights of prisoners of war, and the prohibition of mutilation – which are all compatible with the modern International Humanitarian Law (IHL). Modern IHL treaties have provisions for the protection of non-belligerents and civilian objects during armed conflicts,³³ the right of the wounded and the sick to medical treatment,³⁴ the rights of prisoners of war,³⁵ and the prohibition of mutilation.³⁶ This branch of law is where harmonisation between the *Shari'ah* and international law is easy.

Human Rights Declarations and Treaties

In 1950s and 1960s, more Muslim majority States gained independence. Since 1959, there have been several declarations and

²⁹ Additional Protocol I, Articles 48, 51 & 52.

³⁰ Additional Protocol II, Article 57(2)(b)-(c).

³¹ Additional Protocol II, Articles 57 and 58.

³² See Mohd Hisham Mohd Kamal, "Principles of Distinction, Proportionality and Precautions under the Geneva Conventions: the Perspective of Islamic Law" in *Revisiting the Geneva Conventions: 1949-2019*, ed. Borhan Uddin Khan and Md Jahid Hossain Bhuiyan (BRILL | NIJHOFF, 2019), 244-261; Fajri Matahati Muhammadin and Thara Kunarti Wahab, "*Fiqh al-Jihād* in Modern Warfare: Analyzing Its Prospects and Challenges with Special Reference to International Humanitarian Law", *IJUM Law Journal* 26(2) (2018): 241-274. Regarding the compatibility of the modern International Humanitarian Law with the *Shari'ah* on the means and methods of warfare, see Fajri Matahati Muhammadin, "*Fiqh al-Jihad* in the Contemporary World: Addressing the Gaps in the Regulations on the Means and Methods of Warfare" (PhD thesis, IIUM, 2020).

³³ Additional Protocol I, Articles 48, 51 & 52.

³⁴ Geneva Conventions I & II.

³⁵ Geneva Convention III.

³⁶ Geneva Conventions, Common Article 3(1)(a).

treaties on human rights. A few are general such as the International Covenant on Civil and Political Rights 1966 (ICCPR)³⁷ and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR),³⁸ while some others are specific, such as the Declaration on the Rights of Child 1959, the Convention on the Rights of Child 1989,³⁹ the Declaration Against Torture 1975, and the Convention Against Torture 1984.⁴⁰ Some provisions are compatible with the *Shari'ah*, such as the right to protection from arbitrary killing, and the rights to property and to personal liberty, but there are other provisions that are fundamentally incompatible with the *Shari'ah*.

When Article 18 of the ICCPR was drafted, the drafting committee initially included the phrase “freedom to change [one’s] religion or belief” which was precisely the same as in Article 18 of the UDHR.⁴¹ Muslim countries such as Afghanistan, Egypt, Saudi Arabia and Yemen objected to the provision, and as a result, the final text of Article 18 of the ICCPR was changed with the substituted phrase of “freedom to have or to adopt a religion or belief of [one’s] choice”.⁴² Nevertheless, if one compares the two phrases, it seems that there is no difference in meaning. The Human Rights Committee (HRC) has reaffirmed this position in its *General Comment No. 22* on freedom of

³⁷https://treaties.un.org/PAGES/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=TREATY.

³⁸https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en.

³⁹https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4.

⁴⁰https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-9&chapter=4&clang=_en.

⁴¹Mashood A. Baderin, “Islamic Law and the Implementation of the International Human Rights Law: A Case Study of the International Covenant on Civil and Political Rights”, *Law Explorer*, 6 October 2015, <https://lawexplores.com/islamic-law-and-the-implementation-of-international-human-rights-law-a-case-study-of-the-international-covenant-on-civil-and-political-rights/>, Accessed November 24, 2021.

⁴²*Ibid.*; Martin Scheinin, “Article 18” in *The Universal Declaration of Human Rights: A Common Standard of Achievement*, ed. Gudmundur Alfredsson and Asbjørn Eide (The Hague: Martinus Nijhoff Publishers, 1999), 383.

religion.⁴³ The HRC “observes that the freedom to ‘have or to adopt’ a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views.”⁴⁴ This perception might have influenced some Muslim States such as Bahrain, the Maldives and Mauritania to attach reservations to the ICCPR on grounds of the *Shari’ah*.⁴⁵ Some other Muslim States such as Malaysia have remained non-parties to the ICCPR.

Egypt and Saudi Arabia which objected to the phrase “freedom to change [one’s] religion or belief” from being included in Article 18 of the ICCPR should have taken the opportunity to interpret the eventual phrase “freedom to have or to adopt a religion or belief of [one’s] choice” to mean that everyone’s right to freedom of religion includes freedom to change one’s religion or belief if the person’s original religion does not criminalise apostasy. A religion that criminalises apostasy is Islam based on the *ahadith* cited in the preceding section. Thus, a Muslim has no right to change his/her religion. The other religions do not criminalise apostasy or probably criminalised the act centuries ago but no longer criminalise it today. Thus, the followers of these religions have the right to change their respective religions.

Egypt ratified the ICCPR without making any reservation,⁴⁶ hence making an interpretative declaration would safeguard its Islamic law position better. Egypt ratified the ICCPR in 1982, which was 11 years earlier than the HRC’s *General Comment No. 22*. Meanwhile,

⁴³ Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of Thought, Conscience, and Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4.

⁴⁴ Human Rights Committee, *General Comment No. 22*, para 5.

⁴⁵ Bahrain has made a reservation that it interprets Articles 3, 18 and 23 in a way as not affecting the *Shari’ah*; Maldives has made a reservation that the application of Article 18 of the ICCPR shall be without prejudice to its Constitution; and Mauritania has made a reservation that the application of Article 18 of the ICCPR shall be without prejudice to the *Shari’ah*. See

https://treaties.un.org/PAGES/ViewDetails.aspx?chapter=4&clang=_en&msgid=IV-4&src=TREATY.

⁴⁶ https://treaties.un.org/PAGES/ViewDetails.aspx?chapter=4&clang=_en&msgid=IV-4&src=TREATY.

Saudi Arabia has remained a non-party to the ICCPR. By remaining a non-party, Saudi Arabia allowed the HRC to interpret Article 18 simplistically, which is observable in the above quotation, despite the total incompatibility between Islam and the West on the issue of apostasy. Had Saudi Arabia ratified the ICCPR and subsequently executed an apostate in the event an apostasy occurred in its territory, despite the foreseeable objections by Western States parties, Saudi Arabia could have argued for the interpretation of Article 18 as suggested in the preceding paragraph, and the HRC would not have been too simplistic in its *General Comment No. 22*. Should the suggested interpretation had been made by Saudi Arabia and Egypt, there would be a stronger basis to advocate for the harmonisation between the *Shari'ah* and international law on the freedom to change religion.

Although a treaty provision must be understood in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,⁴⁷ it can be further submitted that as the phrase “freedom to have or to adopt a religion or belief of [one’s] choice” is not similar to the abandoned phrase “freedom to change [one’s] religion or belief”, the eventual phrase does not have the same meaning as the abandoned phrase.

If Muslim States decide to be parties to human rights treaties that are not 100 per cent compatible with the *Shari'ah*, they may resort to making reservation, that is, unilaterally excluding or modifying the legal effect of certain provisions of the treaty in their application to the reserving State.⁴⁸ For example, many Muslim States have expressed consent to the Convention on Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) but made reservations to, for instance, Article 16(1)(a) thereof which provides *inter alia* that men and women have the same right to enter into marriage. As a treaty must be interpreted in accordance with its ordinary meaning, the word “same” means that the right of women to enter into marriage is exactly similar to the right of men to enter into marriage. However, in Islam, women can enter into a marital contract only with the permission from their *wali* (guardian), if the women enter into the marriage for the first

⁴⁷ Vienna Convention on the Law of Treaties (VCLT), Article 31(1).

⁴⁸ VCLT, Article 2(1)(d).

time or, according to a certain *madhhab*, if the women are minors, whereas men need no *wali* to enter into marriage. It means that the right of women to enter into marriage is not exactly similar to the right of men to do the same. Another difference is that a Muslim man is permitted by the religion to be married to a maximum of four (4) wives at the same time, while a woman can have only one (1) husband. Therefore, Article 16(1)(a) is not fully compatible with the *Shari'ah*, hence the reservations.

The use of reservation is a tool for harmonisation. However, a reservation cannot be incompatible with the object and purpose of the treaty,⁴⁹ or it will be invalid, and consequently a State making such invalid reservation may have become a party to the treaty with no reservation. In other words, the State may have accepted all the obligations as provided in the treaty.⁵⁰

After issuing the CDHRI in 1990, the Organisation of Islamic Cooperation (OIC) issued another declaration, namely: the OIC Declaration on Human Rights (ODHR),⁵¹ in 2020. The Declaration does not contain the phrase “in Islam” in its name and does not mention the term “*Shari'ah*” in its Preamble nor in any of its provisions. Instead, the ODHR stipulates that the rights and freedoms are in accordance with the Islamic “values” and “principles”. In some of its provisions, the wordings in the ODHR are closer to those of the UDHR or the ICCPR than to those of the CDHRI.⁵² However, this position does not mean that the ODHR in general is closer to the UDHR and ICCPR than the CDHRI,⁵³ because in some other provisions, the ODHR wordings are closer to those of the CDHRI than to those of the

⁴⁹ VCLT, Article 19(c).

⁵⁰ *Loizidou v Turkey* (1995) 310 European Court of Human Rights (series A) 7; *Belilos v Switzerland* (1988) 132 European Court of Human Rights (series A) 7; Mohd Hisham Mohd Kamal *et al.*, “Islamic Law and International Treaties”, 12.

⁵¹ https://www.oicoci.org/upload/pages/conventions/en/CDHRI_2021_ENG.pdf.

⁵² For example, Article 20 of the ODHR is closer to Article 18 of the ICCPR, than to Article 10 of the CDHRI.

⁵³ Cf. Kayaoglu, “Organization of Islamic Cooperation’s Declaration on Human Rights”, 5-6.

UDHR or the ICCPR.⁵⁴ Replacing the references to the *Shari'ah* with references to Islamic values and principles can be considered a way to harmonise the *Shari'ah* and international law in relation to human rights. However, as a consequence, the ODHR has watered down some aspects of the *Shari'ah* with which the international human rights law instruments are fundamentally incompatible.

With regard to freedom of religion, Article 20 of the ODHR does not repeat the phrase “freedom to change [one’s] religion or belief” of Article 18 of the UDHR nor the phrase “freedom to have or to adopt a religion or belief of [one’s] choice” of Article 18 of the ICCPR. Article 20 of the ODHR is cautious when it provides:

- a. Everyone shall have the right to freedom of thought, conscience and religion. Freedom to manifest one’s religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the rights and fundamental freedoms of others.
- b. No one shall be subject to coercion, which would impair his/her freedom to have or to adopt a religion or belief of his choice.

The wording of Article 20 of the ODHR is not following the provision of Article 10 of the CDHRI. On the contrary, the wording of Article 20 of the ODHR is closer to that of Article 18 of the ICCPR. Though the ODHR does not consider apostasy from Islam as a right, it is unfortunate that the ODHR does not spell out firmly and clearly the *Shari'ah* prohibition of apostasy from Islam.

Problem of Ignorance of the *Shari'ah*

From the above scenarios, some of the challenges in harmonisation can be identified. Most treaties have been made under the auspices of the United Nations which is not an Islamic organisation. In addition, the majority of States that are also involved in treaty making are non-Muslim States. As a result, a treaty may not be fully compatible with the *Shari'ah*. Sometimes the incompatibility is with a principle in the *Shari'ah* that is fundamental.

⁵⁴For example, Article 21(c) of the ODHR is closer to Article 22(c) of the CDHRI, than to Article 19 of the UDHR and Article 19 of the ICCPR.

Muslim majority States that decide to express consent to a treaty that is not fully compatible with the *Shari'ah* may resort to making a reservation. Another tool that Muslim States could use is interpretative declaration.

Problems also come in the form of ignorance or misunderstanding of *Shari'ah* principles, for example, when Pakistan accepted Article 18 of the UDHR that was fundamentally incompatible with the *Shari'ah*. Misunderstanding can be avoided by being prepared thoroughly well in advance, for example, by consulting Islamic jurists. Islamic jurists should stick to the acceptable methods of deducing *hukm*, such as referring to the Qur'an, the *Sunnah* and *ijma'* as well as employing methods such as *qiyas* and *al-masalih al-mursalah*. These two methods are useful tools in harmonisation.

Qiyas is the extension of a *hukm* (rule) from a case directly dealt with in the Qur'an and/or the *Sunnah* ("original case") to a case on which there is no direct reference in the Qur'an and/or the *Sunnah* ("new case"), because the new case has the same effective cause (*'illah*) as the original case. An *'illah* is the cause or reason for the *hukm* of the original case. In some cases, the *'illah* is expressly stated in the Qur'an and/or the *Sunnah*; and in other cases, jurists have to identify the *'illah*.⁵⁵ For example, once the Messenger (s.a.w.) sent a force and instructed its members, among other things, "not to kill a decrepit old man, or a young infant, or a child, or a woman".⁵⁶ The *'illah* for the prohibition of killing old men, young infants, children and women in a battle is that these individuals do not fight. By way of *qiyas*, the prohibition of killing or harming or targeting old persons, children and women can be extended to any man of the enemy State who does not fight. Article 3 of the CDHRI uses the term "non-belligerents" and gives old men, women and children as the examples. This position is strengthened by ODHR, when its Article 24 safeguards "the rights of all persons protected by [the IHL] rules, including but not limited to non-combatants, older persons, the infirm, persons with disabilities, women, children, civilians, journalists, humanitarian workers and prisoners of war". The wide scope of the protection under the two OIC declarations is in line with the *Shari'ah* and is also

⁵⁵ Nyazee, *Islamic Jurisprudence*, 214-224.

⁵⁶ Abu Dawud, Vol. 3, *hadith* no. 2614.

compatible with the IHL. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (Geneva Convention IV) protects civilian persons who take no part in hostilities. It can be seen that the scope of the protected persons under the Geneva Convention IV is wide.

Where there is no legal text even to make an analogical deduction on a particular matter, it is suggested that *al-masalih al-mursalah* can be used. The *hukm* will be determined based on the benefits that the matter brings to the people. For example, the United Nations Convention on the Law of the Sea (UNCLOS) contains many legal concepts such as the right of foreign ships to innocent passage in the territorial water of a coastal State, and the rights of a coastal State to explore and exploit natural resources in its exclusive economic zone and continental shelf. These matters are not found in the Qur'an and the *Sunnah*. Nevertheless, as there are many benefits in such concepts, it may be deduced, using *al-masalih al-mursalah*, that the said concepts are permissible from the *Shari'ah* perspective.⁵⁷

Muslim States Should Initiate

Muslim States should lead by initiating declarations and treaties. One aspect is to get recognition for the right of persons who adopt a religion not to be offended – by way of blasphemy - in their religious belief.

So far, the OIC's focus is on outlawing defamation of religions, in particular, Islam. While acknowledging the right of everyone to express one's opinion freely as long as it is not contrary to the *Shari'ah*, Article 22 of the CDHRI also provides that information may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets. The scope of this provision is narrow, because the term "Prophets" would represent the Abrahamic religions only. The provision does not even cover the other aspects of the religions, such as the greatness of God.

Later, in 1999, Pakistan, on behalf of the OIC, brought before the UN Commission on Human Rights (CHR) a resolution entitled "Defamation of Islam", expressing deep concern at the defamation of

⁵⁷Nyazee, *Islamic Jurisprudence*, 240-248.

Islam and urging members of the UN to combat religious intolerance against Muslims. The CHR adopted the non-binding resolution after changing its title to “Defamation of Religions” so as to embrace all religions. The resolution urged States to take measures to combat hatred, intolerance and acts of violence, intimidation and coercion motivated by religious intolerance, including attacks on religious places, and to encourage understanding, tolerance and respect in matters relating to freedom of religion or belief.⁵⁸

Similar resolutions on “Combating Defamation of Religions” were passed by the CHR and its successor, namely: the HRC.⁵⁹ The 1999 and the 2000 resolutions were passed without a vote. But from 2001, the resolutions on combating defamation of religions were passed after voting. Such resolutions obtained support mainly from the OIC Member States.⁶⁰ The number of States which gave affirmative votes to the resolutions was more than the number of States which voted against the resolutions, but the total number of States which casted negative votes and States that abstained from voting was high.⁶¹

⁵⁸Office of the High Commissioner for Human Rights, “Defamation of Religions”, Commission on Human Rights resolution 1999/82, para 4; Kari Telle, “UN Resolution 16/18 and the Istanbul Process: What has been achieved? A charting of blasphemy trends in Pakistan and Indonesia”, *Christian Michelsen Institute Report* (Bergen: Christian Michelsen Institute, 2022), <https://www.cmi.no/publications/8174-un-resolution-16-18-and-the-istanbul-process-what-has-been-achieved>, Accessed November 6, 2024.

⁵⁹The CHR became the United Nations Human Rights Council (HRC) in 2006.

⁶⁰Telle, “UN Resolution 16/18”.

⁶¹The 2001 resolution was passed by 28 affirmative votes to 15 negative votes, with 9 abstentions; the 2002 resolution was passed by 30 affirmative votes to 15 negative votes, with 8 abstentions; the 2007 resolution was passed by 24 affirmative votes to 14 negative votes, with 9 abstentions (see <https://www.right-docs.org/doc/a-hrc-res-4-9/>); the 2008 resolution was passed by 21 affirmative votes to 10 negative votes, with 14 abstentions (see https://efaidnbmnnnibpcajpcgclefindmkaj/https://ap.ohchr.org/documents/e/hrc/resolutions/a_hrc_res_7_19.pdf); the 2009 resolution was passed by 23 affirmative votes to 11 negative votes, with 13 abstentions (see https://efaidnbmnnnibpcajpcgclefindmkaj/https://ap.ohchr.org/documents/e/hrc/resolutions/a_hrc_res_7_19.pdf).

In 2005, on behalf of the OIC, Yemen introduced the resolution in the UN General Assembly. From that year, General Assembly resolutions on “Combating Defamation of Religions” were passed every year, for several years.⁶² Nevertheless, the opposition was strong. In 2007, the OIC indicated its desire for the adoption of an international treaty to protect religions from defamation.⁶³ However, the opposition by human rights jurists to the resolutions on “Combating Defamation of Religions” and the planned treaty is strong. The critics argue that the idea of defamation of religions is incompatible with the international human rights standards and they are concerned with the potential abuse of the criminal laws.⁶⁴ Since 2008, support for these

extension://efaidnbmnibpcjpcglclefindmkaj/https://ap.ohchr.org/documents/E/HRC/resolutions/). See International Center for Law and Religion Studies, “*Defamation of Religions*” – *Related UN Documents*, <https://www.iclrs.org/defamation-of-religions-un-documents-relating-to-the-topic/>.

⁶² The 2005 resolution (A/RES/60/150) was passed by 101 affirmative votes to 53 negative votes, with 20 abstentions; the 2006 resolution (A/RES/62/154) was passed by 111 affirmative votes to 54 negative votes, with 18 abstentions; the 2007 resolution (A/RES/62/154) was passed by 108 affirmative votes to 51 negative votes, with 25 abstentions; the 2008 resolution was passed by 85 affirmative votes to 50 negative votes, with 42 abstentions; the 2009 resolution (A/RES/64/156) was passed by 80 affirmative votes to 61 negative votes, with 42 abstentions. See International Center for Law and Religion Studies, “*Defamation of Religions*” – *Related UN Documents*, <https://www.iclrs.org/defamation-of-religions-un-documents-relating-to-the-topic/>.

See also Javier Martínez-Torrón & W. Cole Durham, Jr., “Religion and the Secular State”, n.d., at 52, [chrome-extension://efaidnbmnibpcjpcglclefindmkaj/https://www.strasbourgconsortium.org/content/blurb/files/General%20Report%202014%20REVI%20SED.pdf](https://www.strasbourgconsortium.org/content/blurb/files/General%20Report%202014%20REVI%20SED.pdf).

⁶³ Becket Fund for Religious Liberty, “Combating Defamation of Religions” (2 June 2008), <http://www.becketfund.org/files/73099.pdf>, accessed May 6, 2024; Leonard A. Leo, Felice D. Gaer and Elizabeth K. Cassidy, “Protecting Religions from ‘Defamation’: A Threat to Universal Human Rights Standards”, *Harvard Journal of Law & Public Policy* 34(2) (2011): 771.

⁶⁴ Leo, Gaer and Cassidy, “Protecting Religions from ‘Defamation’”, 770-774; Martínez-Torrón & Durham, Jr., “Religion and the Secular State”, 52.

resolutions has been declining.⁶⁵ Until now, the planned treaty has not materialised.

The planned treaty may have more likelihood to receive support should it follow the international human rights law regime by focusing on the protection of the right of individuals rather than the protection of religions or its institutions. Article 19 of the ICCPR establishes a general right to freedom of expression which can be restricted on the ground of rights or reputations of others, national security, public order, public health or morals. The restriction must be prescribed by law. Restricting expression is in terms of the collective good that such restriction promotes or the rights of individuals that such restriction protects.⁶⁶ According to sub-paragraph (3)(a) of Article 19 of the ICCPR, freedom of expression can be restricted for respect of the rights of others, and these rights include the rights of others to freedom of religion. States parties to the ICCPR may have positive duties to protect followers of religion from the intolerance, contempt, and hatred of others.⁶⁷ Respecting the rights of others includes respecting the right of persons who adopt a religion not to be offended by their religious belief.⁶⁸ Having laws that protect believers from matters that are bound to outrage them is a legitimate means of securing the rights of others to freedom of religion guaranteed in Article 18. In this way, the planned treaty will be in harmony with Articles 18 and 19 of the ICCPR. Thus, States parties to the planned treaty may enact a criminal law, not to protect religions, but to protect the rights of followers of a religion from being offended in their religious belief.

The planned treaty should not only protect the rights of Muslims but must also protect the rights of the followers of non-Islamic religions. This suggestion is compatible with verse 6:108 of the Qur'an⁶⁹ which prohibits Muslims from mocking non-Muslims' idols.

⁶⁵ Leo, Gaer and Cassidy, "Protecting Religions from 'Defamation'", 770.

⁶⁶ See Howard Davis, *Human Rights Law Directions* (Oxford: Oxford University Press, 2007), 334.

⁶⁷ See Davis, *Human Rights Law Directions*, 320.

⁶⁸ See Davis, *Human Rights Law Directions*, 344.

⁶⁹ Qur'an, 6:108 in part: And insult not those they invoke other than Allah, lest they (in return) insult Allah out of spite and ignorance ...

However, even after support for the resolutions to protect religions from defamation has been declining, the OIC – in 2020, when it passed the ODHR – was still looking at the issue from the same angle. Article 21 of the Declaration provides that everyone has the right to freedom of expression, which can be restricted by law on certain specified grounds only, and which should not be used to denigrate religions and prophets or to violate the sanctities of religious symbols. It seems that the OIC has not changed its perspective and this attitude will not help the organisation to effectuate the planned treaty.

CONCLUSION

The *Shari'ah* contains universal norms that are also shared by all other societies and cultures. With regard to these norms, harmonisation between the *Shari'ah* and international law is easy. For example, the four GCs are generally compatible with the Islamic law of armed conflict that protects civilians and civilian objects from being targeted and prevents excessive incidental damage.

Another situation where harmonisation may occur is if there are differences of opinion among Muslim jurists, and international law is compatible with one of the views. The UN Charter prohibition of the use of force and the concept of collective security are examples, as there are differences of opinion among Muslim jurists on the nature of *jihad*, even though at the time of the drafting of the Charter, Muslim scholars were occupied with the peoples' struggles to gain independence so that they did not deliberate the purposes and principles of the UN.

The *Shari'ah* is based on the submission of human beings to the Will of Allah Who wants to be the only One being worshipped. Allah loves being praised and hates being associated with creatures, so, through the truthful words of His Messenger (s.a.w.), He criminalises apostasy and blasphemy. All *mujtahidun* have understood that these two acts are crimes, and no one has opined differently. It is in such areas of human rights that harmonisation is impossible or very difficult. Nevertheless, if the OIC changes the focus of its planned treaty to criminalising the act of offending followers of a religion in their religious belief, rather than protecting religions, the planned treaty can be harmonised with Articles 18 and 19 of the ICCPR and thus may have more likelihood to receive support.

In conclusion, while there are possible instances of harmonisation of *Shari'ah* and international law, total and comprehensive harmonisation is neither possible nor permitted by the *Shari'ah*.

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