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### The Right to Freedom of Religion vis a vis Religious Intolerance in the New Millennium

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BUIHE PAULINE OKENU

The Right to Freedom of Religion vis a vis Religious Intolerance in the New Millenium  
(Under the Direction of PROFESSOR GABRIEL M. WILNER)

The right to freedom of religion has come to limelight with the increase in religious violence and intolerance. With the multiplicity of religions, there tends to be an increase in conflicts. Protection of religion as well as protection from religion has become a dire necessity, if there is to be peace in our world today. Individual religious rights as well as group rights and religious minority rights need to be addressed. There is need for a convention on religion, which will have binding and legal effect on all nations. The issue of the enforcement of the right to freedom of religion or belief cannot be ignored. A call is being made for a stronger mechanism of enforcement at the international and regional levels. Individuals, groups of persons, and states must all have equal access to the machinery for the enforcement of the right.

INDEX WORDS: Religion, Human Rights Instruments, Discrimination, Intolerance,  
Enforcement of Rights, Religious Freedom

THE RIGHT TO FREEDOM OF RELIGION VIS A VIS RELIGIOUS INTOLERANCE  
IN THE NEW MILLENIUM

By

BUIHE PAULINE OKENU

L.L.B., The University of Nigeria, Enugu Campus, Nigeria, 1996

A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial  
Fulfillment of the Requirements for the Degree

MASTER OF LAWS

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2002

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May 2002

## **DEDICATION**

To my two Daniels - Daniel Michael Nwabufo Okenu and Daniel Kenechukwu Okenu, in gratitude for all your love and support.

## **ACKNOWLEDGEMENTS**

Blessed be the Almighty God and Father in whom all things are possible. I would like to thank my mother Professor J.O. Agbasiere, my sisters and my brother for all their prayers and support. I thank my dear aunt, Mrs. Angie Brown, for making this dream possible. In a special way I thank my husband Dan for all his help, for giving me the strength to carry on, and for standing by me through thick and thin. I thank my baby K.C. for being a big bundle of joy and inspiration to me. I am grateful to Professor Obi Aginam for his advice. I am highly indebted to Professor Wilner for his patient supervision. And finally I am grateful to my colleagues; the L.L.M. Class of 2002. May God bless us all.

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## CHAPTER 1

### INTRODUCTION

Human rights appertain to human beings solely as a result of our human nature. They are intrinsic to us by the mere incidence of life. That is why there can be no distinction or discrimination in the enjoyment of such rights.<sup>1</sup>

The right to freedom of religion is very important because for those who believe, it presupposes life itself; neither enlightenment nor reason nor science has been able to quash religion or its practice, which is based totally on faith.<sup>2</sup> It has had a difficult evolution due to intolerance and discrimination.<sup>3</sup> History has indeed been marked by wars fueled by religious intolerance such as the hundred-year war, the crusades and the Islamic conquests.<sup>4</sup>

This paper intends to examine some provisions of United Nations Conventions and Declarations relating to the right to freedom of religion or belief. The relevant articles of some regional instruments and national constitutions will also be examined, in order to determine the scope of the right. The machinery of enforcement will also be analyzed. The paper will go further to study the religious tension in Nigeria against the historical development of the country, bearing in mind that Nigeria is a member of the United Nations and has adopted most of the international human rights instruments,

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<sup>1</sup> NAGENDRA SINGH, *ENFORCEMENT OF HUMAN RIGHTS* 1 (1986).

<sup>2</sup> Martin E. Marty, *Religious Dimensions of Human Rights*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE* 1,1 (John Witte, Jr. et al. eds., (1996).

<sup>3</sup> See generally Brian Tierney, *Religious Rights: A Historical Perspective*, in *RELIGIOUS LIBERTY IN WESTERN THOUGHT* 29 (Noel B. Reynold et al. eds., 1996).

<sup>4</sup> SINGH, *supra* note 1, at 2.

including the International Covenants as well as the African Charter on Human and Peoples' Rights. It will conclude with positive suggestions towards a better-enshrined and implementable right to freedom of religion.

## CHAPTER 2

### THE SCOPE OF THE RIGHT TO FREEDOM OF RELIGION

It has been observed that the origin of human rights lies in the long history of protecting religious minorities.<sup>5</sup>

The Treaty of Westphalia 1648 was one of the earliest documents granting some measure of international protection to religious freedom.<sup>6</sup> It was enacted as a peace treaty, ending the thirty-year war between the Catholics and Protestants, which had embroiled Europe.

It stated inter alia,

That those of the Confession of Augsburg, and particularly the Inhabitants of Oppenheim, shall be put in possession again of their Churches, and Ecclesiastical Estates, as they were in the Year 1624. As also that all others of the said Confession of Augsburg, who shall demand it, shall have the free Exercise of their Religion, as well in public Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God.<sup>7</sup>

Some eighteenth century documents such as the U. S. Constitution and the Declaration of the Rights of Man and of the Citizen, also afforded protection to religious freedom.<sup>8</sup> The first amendment to the U.S. Constitution was drafted in 1789 and ratified

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<sup>5</sup> Martin Scheinin, *Art. 18 in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS A COMMON STANDARD OF ACHIEVEMENT* 379 (Gudmundur Alfredsson et al eds., 1999). See also NATAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* 7 (1991).

<sup>6</sup> W. Cole Durham Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE* LEGAL PERSPECTIVES 1, 1 (Johan D. van der Vyver et al eds., 1996).

<sup>7</sup> See article XXVIII of the Treaty of Westphalia, available at <http://www.tufts.edu/departments/fletcher/multi/texts/historical/westphalia.txt>

<sup>8</sup> Durham Jr., *supra* note 6, at 1 n. 3. See also SINGH, *supra* note 1, at 4.

in 1791 and has been described as a “bold constitutional experiment.”<sup>9</sup> The first amendment provides that congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

This provision arose as a result of the turmoil, civil strife and persecution generated by established sects to maintain their political and religious supremacy during the colonial era. The English Crown designated individuals and companies in the colonies to erect religious establishments. Believers and non-believers had to pay taxes to support them.<sup>10</sup> Against this background therefore the first amendment was drafted prohibiting the establishment of a religion.<sup>11</sup>

The provision has two parts. The first is the establishment clause, which precludes the establishment of any religion by congress. The second is the free exercise clause, which prohibits government from regulating, prohibiting or rewarding religious belief.<sup>12</sup>

The Declaration of the Rights of Man and of the Citizen<sup>13</sup> was adopted by the National Assembly of France on August 26, 1789 as a declaration of the “natural inalienable and sacred rights of man”<sup>14</sup>. Art. 10 states that “ No man is to be interfered with because of his opinions, not even because of religious opinions, provided his avowal of them does not disturb public order as established by law.”

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<sup>9</sup> John Witte Jr. & M. Christian Green, *American Constitutional Experiment in Religious Human Rights: The Perennial Search for Principles*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE LEGAL PERSPECTIVES 497, 497 (Johan D. van der Vyver et al eds., 1996).

<sup>10</sup> *Everson v Board of Education* 330 U.S. 1 (1947).

<sup>11</sup> At this time some States had established religion. See generally, CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982).

<sup>12</sup> *McDaniel v Paty* 435 US 618 (1978).

<sup>13</sup> BASIC DOCUMENTS ON HUMAN RIGHTS, 8 (Ian Brownlie ed., 1971).

<sup>14</sup> Preamble to the Declaration of the Rights of Man and of the Citizen.

With the adoption of the United Nations Charter in 1945,<sup>15</sup> human rights in general took a new dimension.<sup>16</sup> The Charter laid down the foundation for the protection of human rights. It is the “constitution of the international community and the foundation upon which a large body of international human rights law has been built in the post world war II period.”<sup>17</sup>

Art. 1(3) states that one of the purposes of the United Nations is to promote and encourage respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

The right to freedom of religion or belief has expanded from the narrow provisions of earlier century documents. All the various components of the right will now be examined to determine the scope of the right.

#### A. The Right to Freedom of Thought Conscience and Religion.

All international human rights instruments begin by generally recognizing the right to freedom of thought conscience and religion. The Universal Declaration of Human Rights (hereafter referred to as Universal Declaration)<sup>18</sup> was adopted by the General Assembly of the United Nations in 1948. It is a universal declaration of human rights that serves as a common standard for peoples and nations. It calls upon the member states to respect and encourage the rights both at the national and international level. This is to be

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<sup>15</sup> BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 13, at 93.

<sup>16</sup> The adoption of the United Nations Charter was as a result of World War II, which caused many atrocities, the highlight of which was the persecution of the Jews. Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices* reprinted in II N.Y.U.J. INT’L. L. & POL. 227, 274-275 (1978).

<sup>17</sup> BAHIIYYIH G. TAHZIB, FREEDOM OF RELIGION OR BELIEF ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION. 66 (1996)

<sup>18</sup> BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 13, at 106.

achieved by teaching and education, and other progressive measures by the member states and the peoples of territories under their jurisdiction.<sup>19</sup>

It states in art.18 that everyone has the right to freedom of thought, conscience and religion.<sup>20</sup> The Universal Declaration does not define the terms ‘thought’, ‘conscience’ and ‘religion’. They are however thought to cover “all possible attitudes of the individual toward the world, toward society, and towards that which determines his faith and the destiny of the world, be it a divinity, some superior being or just reason or rationalism, or chance.”<sup>21</sup>

The International Covenants as well as other regional instruments adopt the same wordings. Differences however lie in other components of the right, which we shall examine.

#### B. Freedom to Change One’s Religion.

The Universal Declaration states in art. 18 that the right freedom of thought conscience and religion shall include freedom to change ones religion or belief. This provision might go contrary to some religions, especially Islam which does not permit its members to leave the religion. There were some objections to this but the provision was still adopted. Saudi Arabia objected to the provision and hence did not vote in favor of the Declaration. The other Islamic states adopted the declaration, with Egypt registering its objection to the provision.<sup>22</sup>

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<sup>19</sup> Preamble to the Universal Declaration.

<sup>20</sup> See generally NEHEMIAH ROBINSON, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS:ITS ORIGINS SIGNIFICANCE AND INTERPRETATION ( 1950).

<sup>21</sup> Scheinin, supra note 5 at 380.

<sup>22</sup> TAHZIB, supra note 17, 76-77.

Art.18 of the International Covenant on Civil and Political Rights<sup>23</sup> states that the right to freedom of thought conscience and religion shall include freedom to have or to adopt a religion or belief of one's choice. There is a noticeable difference in the language. Whereas art. 18 of the Universal Declaration explicitly states the freedom to change one's religion, art. 18 of the ICCPR uses the words "freedom to have or to adopt a religion or belief." This use of milder language is thought to be a compromise in order to enable more states to adopt the Covenant<sup>24</sup>. Most of the Islamic States insist that Islam does not permit change from the religion. It is also thought to protect individuals against zealous proselytizers and missionaries.<sup>25</sup>

Art. 1 of the United Nations Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief (1981 Declaration)<sup>26</sup> states that everyone shall have the right to freedom of thought conscience and religion. The right includes freedom to have a religion or whatever belief of one's choice. Art. 1 of the Declaration does not import the express provision of the Declaration relating to freedom to change one's religion or belief. It also does not import the wordings of art. 18 of the

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<sup>23</sup> BASIC DOCUMENTS ON HUMAN RIGHTS, supra note 13, at 211.

<sup>24</sup> Natan Lerner, *Religious Human Rights Under the United Nations*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVES LEGAL PERSPECTIVES 79, 91 (Johan D. van der Vyver et al eds., 1996).

<sup>25</sup> Scheinin, supra note 5 at 383.

<sup>26</sup> UNITED NATIONS, A COMPILATION OF INTERNATIONAL INSTRUMENTS VOLUME 1 (FIRST PART) UNIVERSAL INSTRUMENTS 122 (1993). The adoption of the 1981 Declaration was preceded by 20 years of extensive discussion due to the sensitivity of the right to freedom of thought, conscience, and religion. See ELIZABETH ODIO BENITO, ELIMINATION OF ALL FORMS OF INTOLERANCE AND DISCRIMINATION BASED ON RELIGION OR BELIEF 48 (1989). The report of Arcot Krishnaswami greatly influenced the 1981 Declaration. See Krishnaswami, supra note 16, at 277-281 (The basic rules for the right to freedom of religion or belief.) The preamble reaffirms the dignity and equality of all human beings as being one of the basic principles of the United Nations Charter. It also upholds the principles of non-discrimination and equality before the law as stated in the Universal Declaration and International Covenants. It states that the disregard and infringement of the right has led to wars, considering that religion or belief for those who so profess is one of the fundamental elements in their concept of life. It therefore states that it is essential to promote understanding tolerance and respect in matters of religion or belief. The International Community is therefore resolved to adopt all necessary measures for the speedy elimination of such intolerance in all its forms and manifestations and to prevent and combat discrimination on the grounds of religion or belief.



ICCPR relating to freedom to adopt a religion. This is seen as a compromise once more in order to gain the cooperation of the Islamic states who held the key to the passage of the resolution.<sup>27</sup>

This would therefore seem to be a set back in the expansion of the right to change one's religion or belief. Art. 8 however is referred to as the saving provision because it declares that "nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.

After an analysis of art. 18 of the Universal Declaration, art. 18 of the ICCPR and art. 1 of the 1981 Declaration, Odio Benito states "the 1981 Declaration without repeating the Universal Declaration or the International Covenant word for word, encompasses the right to change one's religion or belief and to adopt another or to have none at all."<sup>28</sup>

Art. 9 of the European Convention on Human Rights and Fundamental Freedoms<sup>29</sup> contains the provision on the right to freedom of religion, and adopts similar wording with the Universal Declaration as regards the freedom to change one's belief.

Art. 12 (1) of the American Convention on Human Rights<sup>30</sup> also expressly provides for the right to change one's religion. Art. 12 (2) further emphasizes that the freedom to change or maintain ones religion or beliefs, shall not be restricted in such a

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<sup>27</sup> TAHZIB, *supra* note 17, at 168.

<sup>28</sup> BENITO *supra* note 26, at 50.

<sup>29</sup> UNITED NATIONS, HUMAN RIGHTS A COMPILATION OF INTERNATIONAL INSTRUMENTS VOL. II REGIONAL INSTRUMENTS 73 (1997). The European Convention was convened by the Council of Europe in Rome. It was concluded in 1950, and entered into force in 1953. See T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVES LEGAL PERSPECTIVES 305.305 n. 2 (Johan D. van der Vyver et al eds., 1996).

<sup>30</sup> UNITED NATIONS, *supra* note 29, at 14.

manner as to impair the right. This goes a step further than the other Instruments and Declarations.

Art. 8 of the African Charter on Human and Peoples' Rights<sup>31</sup> guarantees freedom of conscience, the profession and free practice of religion. It however makes no mention of the right to change one's religion.<sup>32</sup>

### C. Freedom to Manifest One's Religion or Belief.

This is guaranteed in Art.18 of the Universal Declaration, which provides for freedom whether alone or with others in public or private, to manifest one's religion or belief in teaching, practice, practice, worship and observance.<sup>33</sup> Some religions however ban missionary activities, while other religions are missionary in nature. Just recently Heather Mercer and Dana Curry were released from Afghanistan after being imprisoned for attempting to convert the locals to Christianity. Afghanistan is an Islamic State where preaching Christianity or any other religion apart from Islam was a crime under the Taliban regime.<sup>34</sup>

Article 18 of the ICCPR also guarantees freedom, either individually or in community with others and in public or private, to manifest one's religion or belief in

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<sup>31</sup> UNITED NATIONS, supra note 29, at 330.

<sup>32</sup> The African charter came into force on 21 October 1986. Its distinctive feature is that it includes not only rights but also duties, which accords with the African concept of rights as inseparable from duties. See UNITED NATIONS, AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHT 1 (1990).

<sup>33</sup> Art. 18 of the Universal Declaration is the major provision that declares the right to freedom of religion. The first clause declares that everyone has the right to freedom of thought, conscience and religion. The second clause illustrates some of the constituents of the right. They include freedom to change one's religion or belief, freedom whether alone or with others in public or private, to manifest one's religion or belief in teaching practice, practice, worship and observance. These two clauses are usually referred to as forum internum and forum externum respectively. See Natan lerner, *The Nature and Minimum Standard of Freedom of Religion or Belief* B.Y.U.L Rev 905, 911 (2000).

<sup>34</sup> Some writers have called for cultural relativism as well as Islamic reform to reduce the tension that exists between Islam and some aspects of international human rights. See Makua wa Mutua, *Limitations on Religious Rights: Problematizing Religious Freedom in the African Context* 5 Buff. Hum. Rts L.Rev.75, 84 (1999). See generally Isha Khan, *Islamic Human Rights: Islamic Law and International Human Rights Standards* 5 Appeal 74. (1999).

worship, observance, practice and teaching. This has been defined by the Human Rights Committee in the General Comments on Art. 18 . It states inter alia that:

The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.<sup>35</sup>

In *MAB, WAT and J-AYI v. Canada*<sup>36</sup> the issue was whether the worship of marijuana qualified as religion or belief under Article 18. Members of an organization called ‘Assembly of the Church of the Universe’ argued that their belief involved the worship and distribution of marijuana. The Committee declared the communication to be inadmissible on the grounds that the belief, which consisted mainly in the worship and distribution of a narcotic drug, couldn’t be brought within the scope of Art. 18.

Art. 6 of the 1981 Declaration expands the right to manifest one’s religion. It states

In accordance with article I of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;

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<sup>35</sup> General Comment No. 22 (48<sup>th</sup> Session, 1993), published in U.N. Doc.HR/GEN/1/Rev. 3. para. 4.

<sup>36</sup> Comm. No. 570/1993, Decision of 8 April 1994, HRC Report 1994, GAOR A/49/40, Vol. II, Annex X Sect: DD; (1994), International Human Rights Report, 1(3) p.57.

- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and relevant to non-religious beliefs.

It has been lauded as enumerating rights and practices that are relevant to both religious and non-religious beliefs.<sup>37</sup>

Art. 9 of the European Convention adopts the wordings of the right to manifest one's religion used in the Universal Declaration. In *Kokkinakis v. Greece*<sup>38</sup> the Greek Government convicted an elderly Jehovah's Witness couple for illegal proselytizing. Upon petition to the European Court of Human Rights, the court found that the government had interfered with the individuals right to manifest his religion or belief, and held this to be a breach of Art. 9 of the European Convention.

Art.12 (1) of the American Convention guarantees freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.

#### D. Freedom from Coercion

Art. 18 (2) of the ICCPR provides that "No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice." There is however no definition of the term 'coercion'. It is thought that this includes not only the use of threat or force, but also moral pressure or material enticement.<sup>39</sup> Art.1 (2)

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<sup>37</sup> Donna J. Sullivan, Advancing the Freedom of Religion or Belief Through the United Nations Declaration on the Elimination of Religious Intolerance and Discrimination 82 A.J.I.L. 487, 500-501 (1988).

<sup>38</sup> 260-A Eur. Ct. H. R. (ser. A) 18 (1993).

<sup>39</sup> Lerner, *supra* note 24, at 91.

of the 1981 Declaration employs the same language as the ICCPR in granting freedom from coercion.<sup>40</sup>

#### E. Right of Parents to Ensure Religious/Moral Education for their Children

Art. 13 (3) of the International Covenant on Economic Social and Cultural Rights (ICESCR)<sup>41</sup> states that

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

This therefore ensures that children receive religious and moral education in accordance with their parents or legal guardians wishes. What happens where the child's religious belief is in conflict with that of his parents.<sup>42</sup> And what is the legal age of a child?. These are answers that are not supplied by the ICESCR, which could cause some problems in the enforcement of the provision.

Art. 18 (4) of the ICCPR provides, "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions." The Human Rights Committee has stated in its General Comments on art. 18 (4) that instruction in a particular religion or belief as a part of public education is

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<sup>40</sup> For an elaborate discussion on what may constitute coercion see Sullivan, *supra* note 37, at 493-496 (1988).

<sup>41</sup> BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 13 at 199. The ICESCR along with the International Covenant on Civil and Political Rights were adopted by the General Assembly of the United Nations on December 16<sup>th</sup> 1966. They were meant to enhance the Universal Declaration since they would have legal force as treaties for the parties to them. See *id.* at 211.

<sup>42</sup> See generally John E. Coons, *The Religious Rights of Children*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE RELIGIOUS PERSPECTIVES 157 (John Witte, Jr. et al. eds., 1996).

inconsistent with art. 18 (4) unless provision is made for non-discriminatory exemptions or alternatives which would accommodate the wishes of parents. The article permits public school instructions in subjects such as the general history of religion and ethics if it is given in a neutral and objective way.<sup>43</sup> *Hartikainen et al v. Finland*<sup>44</sup> involved legislation, which stated that Finnish school children who did not belong to the Lutheran State Church had the right to be exempted from religious instructions in public schools, and to receive instead, the history of religion and ethics. It was alleged that this alternative was religious in nature, and not neutral, and as such it was inconsistent with art. 18 (4). The Committee held the view that there was not any violation of art. 18 because the relevant provisions of the Finnish law met the obligations under the Covenant, and that appropriate action was being taken to resolve the problem, as there was a reform of a new non denominational alternative ethics being created.

Art. 5 of the 1981 Declaration provides for the protection of the child, and it states:

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.
2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.
3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion

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<sup>43</sup> See Scheinin, *supra* note 5, at 385.

<sup>44</sup> Communication No. 40/1978, Selected Decisions of the Human Rights Committee under the optional protocol, vol. 1 p.74.

or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men. 4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle. 5. Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.

It can be seen that preference is given to the wishes of the parents, however the best interest of the child is the guiding principle.<sup>45</sup>

Art. 5 (1) (b) of the UNESCO Convention Against Discrimination in Education<sup>46</sup>

states:

It is essential to respect the liberty of parents and, where applicable, of legal guardians, firstly to choose for their children institutions other than those maintained by the public authorities but conforming to such minimum educational standards as may be laid down or approved by the competent authorities and, secondly, to ensure in a manner consistent with the procedures followed in the State for the application of its legislation, the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction;

Art. 14 of The Convention on the Rights of the Child<sup>47</sup> states inter alia

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.<sup>48</sup>

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<sup>45</sup> TAHZIB supra note 17, at 179.

<sup>46</sup> Available at <http://firewall.unesco.org/most/rr4educ.htm> The UNESCO Convention Against Discrimination in Education was adopted on 14 December 1960 and entered into force on 22 May 1962.

<sup>47</sup> Available at <http://firewall.unesco.org/most/rr4crc.htm> This was adopted by the United Nations General Assembly in Resolution 44/25 on 20 November 1989 and entered into force on 2 September 1990.

<sup>48</sup> For a comprehensive analysis of Children's rights under the Convention on the Rights of the Child, see CHILDREN, RIGHTS, AND THE LAW (Philip Alston ed. 1992).

Art. 12 (4) of the American Convention states “ Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.”

#### F. Freedom from Discrimination and Intolerance Due to Religion or Belief.

This is safe guarded in many of the international instruments. Art. 2 of the Universal Declaration states that everyone is entitled to the rights and freedom put forth in the Declaration without distinction of any kind such as religion etc. This provision therefore forbids discrimination on the basis of ones’ religion.

Art. 2 (2) of the ICESCR says that the states parties undertake to guarantee the exercise of the rights enunciated without discrimination as to race, color, sex, language, religion, etc. Art 2(1) of the ICCPR is similar to Art. 2.(2) of the ICESCR which prohibits discrimination on the grounds of religion. Art. 26 of the ICCPR also grants equality before the law and forbids discrimination on any grounds such as religion.

Art. 2 (1) of the 1981 Declaration states that no one shall be subject to discrimination by any state, institution, group of persons or person on grounds of religion or other belief. This prohibition of discrimination goes beyond conducts attributable to the states, and thus gives wider protection than the Universal Declaration and the International Covenants.<sup>49</sup>

Art. 2 (2) of the 1981 Declaration defines intolerance and discrimination based on religion or belief as “any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of

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<sup>49</sup> Sullivan, *supra* note 37, at 504.



the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.”

Intolerance and discrimination are defined together, but Art. 4 (2) suggests that they have different meanings. It states: “All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter”. It has been remarked that intolerance refers to “...conduct manifesting hatred or prejudice based on religion or belief...”<sup>50</sup>

Art. 1 (1) of the UNESCO Convention defines discrimination in education as follows:

For the purposes of this Convention, the term "discrimination" includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality or treatment in education .

The International Convention on the Elimination of All Forms of Racial Discrimination<sup>51</sup> also forbids discrimination on the basis of religion or belief. Art. 5 states:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Party undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the rights of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

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<sup>50</sup> Id. at 505.

<sup>51</sup> Available at <http://firewall.unesco.org/most/tr4icerd.htm> The International Convention on the Elimination of All Forms of Racial Discrimination was adopted and opened for signature and ratification by the United Nations General Assembly in resolution 2106 (XX) of 21 December 1965. It entered into force on 4 January 1969.

Art 14 of the European Convention prohibits discrimination. It provides that “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Art.1(1) of the American Convention Obliges the states to respect the rights of every person as specified in the convention without discrimination as to any of various factors including religion. Section 2 of the article emphasizes that person means every human being, not just citizens.

Art. 2 of the African Charter also contains the non-discriminatory provision of the application of the rights on the basis of religion, etc.

The Indian Constitution upholds freedom from discrimination. India was a former colony of Britain, which gained independence in 1947.<sup>52</sup> The preamble to its Constitution states:

We the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation; in our constituent assembly this twenty-sixth day of November, 1949, do hereby adopt, enact and give to ourselves this Constitution.

There is an emphasis on the liberty of thought, expression, belief, faith and worship, despite the fact that it is a secular state.<sup>53</sup> India is home to Hinduism, Islam, Christianity,

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<sup>52</sup> SINGH, *supra* note 1 at 83-84. See generally GLEDHILL, *THE REPUBLIC OF INDIA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* (2<sup>nd</sup> edn. 1964).

<sup>53</sup> *Id.*, at 92.

Buddhism, Jainism, Sikhism and other innumerable religious traditions. Hinduism is the dominant faith, practiced by over 80% of the population.<sup>54</sup>

Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth. It states:

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
- (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-
  - (a) access to shops, public restaurants, hotels and places of public entertainment; or
  - (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

#### G. Freedom from Religion

The Universal Declaration does not define religion. It however uses the terms “religion or belief”. The inclusion of belief has been interpreted as being incorporated to protect non-religious convictions such as atheism or agnosticism.<sup>55</sup>

The Human Rights Committee in its general comments declared that Article 18 of the ICCPR protects theistic, non-theistic and atheistic beliefs, as well as the right not to believe or have a religion.

The 1981 Declaration uses the words “religion or whatever belief”. The term ‘whatever’ is also used in the preamble. It was included in order to satisfy some Communist Countries and Eastern European States, who wanted better protection for

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<sup>54</sup> More information is available on India at <http://www.sansad.com>

<sup>55</sup> Lerner, *supra* note 24, at 87. See also R. S. Clarke, *The United Nations and Religious Freedom*, II N.Y.U.J. INT’L. L & POL. 197, 208-209 (1978).

atheists.<sup>56</sup> It thus expands the right to freedom of religion to include freedom from religion.

#### H. The Right to Conscientious Objection

This has been described as an emerging and potential right.<sup>57</sup> The right of persons to refuse service in the military or police forces to enforce apartheid was recognized by the United Nations General Assembly in 1978.<sup>58</sup>

In *L.T.K. v. Finland*<sup>59</sup> the petitioner claimed that the Finnish authorities failed to recognize his status of conscientious objector thus breaching his rights under Art. 18 and 19 of the ICCPR. The Human Rights Committee declared the case inadmissible on the grounds that neither art. 18 nor art.19 of the ICCPR provides for the right of conscientious objection.

The Committee however seems to have changed its position, as it stated in its General comments that “...such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief.”<sup>60</sup> The Commission has gone further to declare the right of everyone to have conscientious objections to military service to be “...a legitimate exercise of the right to freedom of thought conscience and religion, as

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<sup>56</sup> Lerner, supra note 24, at 115.

<sup>57</sup> Scheinin, supra note 5, at 388.

<sup>58</sup> Id.

<sup>59</sup> Communication No. 185/1984, Selected Decisions of the Human Rights Committee under the Optional Protocol, vol. p.61 para. 5.2.

<sup>60</sup> General Comment No. 22 (48), para. 11.

laid down in article 18 of the Universal Declaration of Human Rights, as well as article 18 of the International Covenant on Civil and Political Rights.<sup>61</sup>

## I. Religious Minority Rights

Art. 27 of the ICCPR grants protection to religious minority groups. It states:

In those States in which ethnic, religious or linguistic minorities exist persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities<sup>62</sup> is a very important document for the protection of minorities. Art 1(1) provides “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.”

Art. 2 states:

1. Persons belonging to national or ethnic, religious and linguistic minorities (hereinafter referred to as persons belonging to minorities) have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination.
2. Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life.
3. Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.

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<sup>61</sup> Commission on Human Rights, resolution 1995/83.

<sup>62</sup> Available at <http://firewall.unesco.org/most/rr4dec92.htm> The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities was adopted by the United Nations General Assembly in resolution 47/135 of 18 December 1992.

4. Persons belonging to minorities have the right to establish and maintain their own associations.
5. Persons belonging to minorities have the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.

Article 4 mandates States to take measures to “create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards.”

This is an important aspect of religious freedom, as shown by the situation in Iran.

Iran has an established religion. Article 1 of section 1 of its Constitution <sup>63</sup> states:

The form of government of Iran is that of an Islamic Republic, endorsed by the people of Iran on the basis of their longstanding belief in the sovereignty of truth and Qur'anic justice, in the referendum of Farwardin 9 and 10 in the year 1358 of the solar Islamic calendar, corresponding to Jamadi al-'Awwal 1 and 2 in the year 1399 of the lunar Islamic calendar (March 29 and 30, 1979], through the affirmative vote of a majority of 98.2\% of eligible voters, held after the victorious Islamic Revolution led by the eminent marji' al-taqlid, Ayatullah al-Uzma Imam Khomeini.

Article 13 of section 1 states “Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education.”

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<sup>63</sup> The Constitution of Iran is available at <http://www.SalamIran.org/IranInfo/State/Constitution/>

What then becomes of religious minorities that are not recognized? This has been a big source of conflict with the Baha'is.<sup>64</sup> They form the largest religious minority in Iran.<sup>65</sup> They claim that they are denied official documents, face harassment and detention, and even execution, all to make them recant their faith.<sup>66</sup> This is despite Article 23 of section 2, which states:

The investigation of individuals' beliefs is forbidden, and no one may be molested or taken to task simply for holding a certain belief. Islamic Republic of Iran and all Muslims are duty-bound to treat non-Muslims in conformity with ethical norms and the principles of Islamic justice and equity, and to respect their human rights. This principle applies to all who refrain from engaging in conspiracy or activity against Islam and the Islamic Republic of Iran.

#### J. Religious Group Rights

The Convention on the Prevention and Punishment of Crime of Genocide (1948)<sup>67</sup> asserts group rights for religious associations. Art. I of the Convention declares genocide to be a crime under international law. Art. II defines genocide as certain acts committed with intent to destroy in whole or in part, a national, ethnical racial or religious group. Such acts include killing members of the group, causing serious bodily or mental harm, inflicting conditions of life calculated to bring about physical destruction in whole or in part, measures to prevent births within the group and forcibly transferring children of the group to another group.<sup>68</sup>

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<sup>64</sup> BENITO, *supra* note 26, at 10.

<sup>65</sup> Donna E. Artz, *The Treatment of Islamic Dissidents Under Islamic Law*, in *RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE* 387,449 (John Witte, Jr. et al. eds., (1996).

<sup>66</sup> *Id.*

<sup>67</sup> The Genocide Convention has been in force since 12<sup>th</sup> January 1951. See *BASIC DOCUMENTS ON HUMAN RIGHTS*, *supra* note 13 at 116.

<sup>68</sup> For a detailed analysis of the Genocide Convention see NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION A COMMENTARY* (1960). For an in-depth study of group rights, see LERNER, *supra* note 5.

## K. Religious Rights of Prisoners

The Third Convention on the Laws of War<sup>69</sup> relates to the treatment of prisoners of war. Art. 3 forbids discrimination against prisoners on the basis of religion or faith. Art. 16 also forbids adverse treatment on the basis of religious belief. It goes further to secure the exercise of religious activities, including attendance of services and availability of ministers.<sup>70</sup>

## L. Religious Rights of Refugees

The Convention Relating to the Status of Refugees<sup>71</sup> recognizes the right of refugees to their religion. Article 4 states that “The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.”

Article 33 goes further to prohibit expulsion of a refugee based on his religion.

## M. Religious Rights of Migrant Workers

The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families<sup>72</sup> guarantees the right to freedom of religion for migrant workers and their families. Art. 12 of the Convention states:

1. Migrant workers and members of their families shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of their choice and

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<sup>69</sup> UNITED NATIONS, A COMPILATION OF INTERNATIONAL INSTRUMENTS VOLUME 1 (SECOND PART) UNIVERSAL INSTRUMENTS 728 (1993).

<sup>70</sup> See Articles 34-37 of the Third Convention.

<sup>71</sup> Available at <http://firewall.unesco.org/most/rr4ref.htm> It was adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950. It entered into force on 22 April 1954.

<sup>72</sup> Available at <http://firewall.unesco.org/most/rr4icrmw.htm> .



freedom either individually or in community with others and in public or private to manifest their religion or belief in worship, observance, practice and teaching.

2. Migrant workers and members of their families shall not be subject to coercion that would impair their freedom to have or to adopt a religion or belief of their choice.

3. 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 fundamental rights and freedoms of others.

4. States Parties to the present Convention undertake to have respect for the liberty of parents, at least one of whom is a migrant worker, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

#### N. Religious Rights of Aliens

Art. 5 of the Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live<sup>73</sup> secures religious rights for aliens. It states inter alia:

1. Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligations of the State in which they are present, in particular the following rights:

(e) The right to freedom of thought, opinion, conscience and religion; the right to manifest their religion or beliefs, subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others;

Art. 7 further forbids expulsion of aliens on the grounds of their religion.

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<sup>73</sup>Available at <http://firewall.unesco.org/most/rr4dec85.htm> It was adopted on 13 December 1985.

### **CHAPTER 3**

#### **ENFORCEMENT OF THE RIGHT TO FREEDOM OF RELIGION**

Enforcement of United Nations declarations and resolutions has always been a problem. This is because of the controversy as to their legal status.

A school of thought is of the opinion that declarations which normally come in the nature of resolutions are not binding. They are mere recommendations about the conduct to be adopted.<sup>74</sup>

The dominant view however maintains that on the basis of Art.1(3) of the U.N. Charter, states are obliged to accept them. They do not have the binding force of conventions, but they contain values, which should govern the conduct of individuals and states.<sup>75</sup> They are also taken as part of International law, being a unification of general principles of law recognized by civilized nations.<sup>76</sup>

The United Nations has however set up some treaty bodies for the supervision of human rights.

##### **A. Human Rights Committee**

This is the committee set up under the ICCPR for the enforcements of the rights contained therein. The Human Rights Committee consists of eighteen members who are nationals of the states parties to the ICCPR. They are persons of high moral character and

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<sup>74</sup> BENITO, supra note 26, at 4.

<sup>75</sup> Id. at 49.

<sup>76</sup> TAHZIB, supra note 17, at 80. The sources of International Law are treaties, customary international law and the general principles of law recognized by civilized nations. See DJ HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 22 (1973).

legal experience and competence in the field of human rights, and they serve in their personal capacity.<sup>77</sup> They are elected for a term of four years.<sup>78</sup> Their emoluments are paid by the United Nations.<sup>79</sup>

One of the duties of the Committee is the consideration of state reports. Under the ICCPR the states undertake to submit reports on the measures they have adopted to give effect to the rights contained therein. They are also to indicate the factors and difficulties affecting the implementation of the covenant. The Committee studies the report and then transmits its report and general comments to the states parties.<sup>80</sup> The reports of the Committee have touched on issues of religious belief.<sup>81</sup> The Committee however adopts a conciliatory tone of dialogue, which favors the traditional view of state sovereignty, as opposed to an inquisitorial stand.<sup>82</sup>

Another duty of the Committee is to receive communications from a state party against another state party that is not fulfilling its obligations under the Covenant.<sup>83</sup> This inter state complaint system has never been used. This is because most of the states that have accepted it are members of the Council of Europe and would thus prefer to give priority to their own regional system, and the remaining states would not seem to raise human rights problems among themselves.<sup>84</sup>

The Committee initiated the practice of issuing general comments on articles or issues arising from the ICCPR in 1981. The Committee based on their experience in examining

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<sup>77</sup> Art. 28 ICCPR.

<sup>78</sup> Art. 32 ICCPR.

<sup>79</sup> Art. 35 ICCPR.

<sup>80</sup> Art. 40 ICCPR.

<sup>81</sup> TAHZIB, *supra* note 17, at 251-273.

<sup>82</sup> See Makua wa Mutua, Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement 4 *Buff. Hum. Rts. L. Rev.* 211, 227 (1998).

<sup>83</sup> Art. 41 of the ICCPR.

<sup>84</sup> Torkel Opsahl, The Human Rights Committee, in *THE UNITED NATIONS AND HUMAN RIGHTS A CRITICAL APPRAISAL* 367 420 (Philip Alston ed. 1995).

state reports makes these general comments. They promote better implementation of the covenant and clarify some insufficiencies contained therein.<sup>85</sup> The Committee issued a general comment on Art. 18 of the ICCPR. Some of the highlights are as follows:

1. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the rights not to believe or have a religion.
2. The freedom of thought and conscience and the freedom to have or adopt a religion of one's choice are non derogable.
3. No one shall be subject to coercion in his or her religious beliefs.
4. Public school education should be administered in a neutral and objective way regarding the history of religion and ethics.
5. The right of religious minorities should be protected especially where there is a state religion.
6. There should not be discrimination against conscientious objectors.<sup>86</sup>

The final duty of the Committee is the examination of individual communications. The Optional Protocol to the ICCPR<sup>87</sup> permits individuals to file complaints before the committee.<sup>88</sup> The state must be a state party to the O. P. All local remedies have to be exhausted. The state party is notified of the complaint and given six months to submit a statement in reply. This is communicated to the individual who can submit additional information. After consideration of the communication, the committee forwards its views

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<sup>85</sup> See P. R. GHANDI, *THE HUMAN RIGHTS COMMITTEE AND THE RIGHT OF INDIVIDUAL COMMUNICATION LAW & PRACTICE* (1998).

<sup>86</sup> Lerner, *supra* note 17, at 94-98. GAOR 48<sup>th</sup> sess. Supp. No 40 A/48/40 p. 25 Annex VI (1993).

<sup>87</sup> BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 13, at 232.

<sup>88</sup> See Cynthia R. C. Faithweather, *Obstacles to enforcing International Human Rights Law in Domestic Courts* 4 U. C. Davis J. Int'l L. & Pol'y 119, 124 (1998).

to the state party and the individual. The views are however not legally binding, and so there is no enforcement mechanism for them.<sup>89</sup>

There are some decisions that have arisen from the interpretation of article 18 of the I.C.C.P.R. by the Committee. In *K. Singh Bhinder v. Canada*<sup>90</sup> the petitioner, a maintenance electrician of the government owned Canadian National Railway Company claimed that he was of the Sikh religion, and was thus obliged to wear a turban. His employment was however terminated because of his refusal to wear safety headgear, which would have meant that he would not wear his turban. He argued that the safety limitation on his right to manifest his religion was not valid because the risk being undertaken was his own. The Committee was of the view that the use of head hats in Federal employment for safety purposes was reasonable and compatible with art.18 (3), which prescribed limitations to the right to freedom of thought conscience and religion.

In *AR Coriel and MAR Aurik v. The Netherlands*,<sup>91</sup> the petitioners wished to change their surnames consequent to their adoption of Hindu religion, in order to train as priests. The Committee declared this to be a matter of public order, which could limit the right to manifest one's religious practices.<sup>92</sup>

It has been stated that:

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<sup>89</sup> See the rules of the O. P., and Committees rules of procedure. See TAHZIB, supra note 17, at 277-306.

<sup>90</sup> Comm. No. 208/1986, Views of 9 November 1989, HRC Report, GAOR A/45/50, 1990, Vol.II annex IX, SECT.E.

<sup>91</sup> Views of 31 October 1994, HRC Report, 1995, GAOR A/50/40, Vol. II Annex X sect.D; (1995) International Human Rights Reports, 2, p.297.

<sup>92</sup> For a discussion these cases as well as others see Malcom D. Evans, The United Nations and Freedom of Religion: The Work of the Human Rights Committee LAW AND RELIGION 35 (Rex J. Ahdar ed. 2000. See also APPLICATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS UNDER THE OPTIONAL PROTOCOL BY THE HUMAN RIGHTS COMMITTEE 45-46 (Alfred de Zayas et al. eds., 1989).

The greatest difficulty in the way of implementation of these international conventions is that the individual who suffers and is the subject of the violation of human rights has no *locus standi* in a regime which is governed by inter-state law which accepts states alone as the subject of the law. The individual has no locus standi as yet to the extent to which it may be merited.”<sup>93</sup>

And as another scholar has stated:

“The impressive dialogue of rights guaranteed by the ICCPR and the corresponding weakness of the HRC are a testament to a basic trade off in virtually all human rights instruments and institutions. As a general rule, States are reluctant to couple a strong instrument with a powerful and effective enforcement body”<sup>94</sup>

The Committee is also required to submit to the General Assembly, through the Economic and Social Council, an annual report on its activities<sup>95</sup>

#### B. The Economic and Social Council (ECOSOC)

The ICESCR mandates state parties to submit reports on the measures they have adopted and the progress they have made in the observance of the rights.<sup>96</sup> The reports are submitted to the Secretary General who submits it to ECOSOC for consideration. ECOSOC may submit to the General Assembly recommendations of a general nature and a summary of information received from the state parties.<sup>97</sup> A Committee on Economic, Social and Cultural Rights was later established with the task of overseeing the implementation of the ICESCR. The difference between this Committee and the Human Rights Committee is that the latter is an independent treaty based organ with its mandate laid down by the ICCPR, while the former exists at the pleasure of ECOSOC.<sup>98</sup>

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<sup>93</sup> SINGH, supra note 1 at 39.

<sup>94</sup> Makua wa Mutua supra note 82, at 216.

<sup>95</sup> Art. 45 ICCPR.

<sup>96</sup> Art. 16 ICESCR.

<sup>97</sup> Art. 21 ICESCR.

<sup>98</sup> Philip Alston, The Economic Rights Committee, in THE UNITED NATIONS AND HUMAN RIGHTS A CRITICAL APPRAISAL 473 488 (Philip Alston ed. 1995).

The Committee submits its report to ECOSOC. It does not however have enforcement powers.<sup>99</sup>

### C. European Court of Human Rights

The European Convention on Human Rights set up a system of enforcement for the right contained therein. This consists of the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe. Where contracting states accept the right of individual petition, the individual applicant can lodge complaints against contracting states for violation. Contracting states can also lodge complaints. These complaints would go to the commission and if admissible, and no friendly settlement had been reached, the commission would express an opinion and send it to the committee of ministers. The matter would then be brought to the court. Individuals however were not entitled to bring their cases before the court<sup>100</sup>.

Protocol No 9<sup>101</sup> to the European Convention was subsequently adopted and this enabled individuals to bring cases to court subject to ratification of the Protocol by the respondent state and acceptance by a screening panel. Protocol No 11 created a new court that was better equipped to deal with cases coming before it. The number of Judges is equal to the number of contracting parties. They serve for a term of six years, and sit in their individual capacity. Final decisions of the Court are binding on the parties. The

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<sup>99</sup> TAHZIB, *supra* note 17, at 406-407.

<sup>100</sup> See Articles 19-56 of the European Convention

<sup>101</sup> UNITED NATIONS, *supra* note 29, at 107.

Court can also issue Advisory Opinions on legal issues concerning the Convention and the Protocols at the request of the Council of Ministers.<sup>102</sup>

The European human rights system as established by the convention has been described as “not only the oldest but also the most advanced and effective of those currently in existence.”<sup>103</sup> It has also dealt with cases concerning the freedom of religion.<sup>104</sup>

The Convention requires that countries incorporate it into their internal law.<sup>105</sup> Some state parties such as Austria, Spain and Switzerland have done so. Others such as The United Kingdom and the Scandinavian countries have not done so.<sup>106</sup>

#### D. Inter American Commission on Human Rights

Article 33 of the American Convention creates the Inter American Commission on Human Rights and the Inter American Court of Human Rights.<sup>107</sup> The commission is composed of seven members of high moral character and competence in the field of human rights.<sup>108</sup> They are elected for a term of four years and may be reelected only once.<sup>109</sup>

The main function of the commission is to promote respect for and defense of human rights. Art. 41 states:

The main function of the Commission shall be to promote respect for and

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<sup>102</sup> See Protocol No 11, id. at 113.

<sup>103</sup> Gunn, *supra* note 29, at 306.

<sup>104</sup> Id. at 310-323.

<sup>105</sup> Art 1 of the European Convention.

<sup>106</sup> Gabriel M. Wilner, *Status and Future of the Customary International Law of Human Rights, Reflections on Regional Human Rights Law* 25 Ga J. Int'l & Comp. L. 407, 414 (1996).

<sup>107</sup> See also the Statute of the Inter-American Court on Human Rights, in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 133 (1992).

<sup>108</sup> Art. 34 of the American Convention.

<sup>109</sup> Art. 36 of the American Convention.



defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

- a. to develop an awareness of human rights among the peoples of America;
- b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- c. to prepare such studies or reports as it considers advisable in the performance of its duties;
- d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
- g. to submit an annual report to the General Assembly of the Organization of American States.

The Commission is open to persons or groups of persons, or nongovernmental entities legally recognized in one or more member states of the Organization, who may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.<sup>110</sup> State Parties may, when depositing their instruments of ratification of or adherence to this Convention, or at any later time, declare that they recognize the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in the Convention.<sup>111</sup>

Admission of petitions from individuals and organizations are based on the following conditions:

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<sup>110</sup> Article 44 of the American Convention.

<sup>111</sup> Art. 45 of the American Convention.

- a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
  - b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
  - c. that the subject of the petition or communication is not pending in another international proceeding for settlement; and
  - d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.(Art. 46)
2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:
- a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
  - b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them;
- or
- c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.<sup>112</sup>

The Commission received a complaint from Jehovah Witnesses about an Argentine decree that prohibited the activities of the religious association known as Jehovah's Witnesses. They complained that troops closed their official offices and headquarters preventing them from assembling in their places of worship. The complained of being beaten and having their private homes raided. Their children were expelled from schools because they refused to salute the national emblems and sing the national anthem.

The Commission declared that the Government of Argentina violated the right to freedom of religion among other rights, and recommended that it reestablish the

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<sup>112</sup> Art. 46 of the American Convention.

observance of religious freedom, that it repeal the Decree, and inform the commission within 60 days as to the measures taken to comply with the Resolution.<sup>113</sup>

#### E. Inter American Court of Human Rights

The court is seated in San Jose, Costa Rica. It consists of seven judges elected in their individual capacity.<sup>114</sup> They are elected for a term of six years.<sup>115</sup> They should be of high moral authority and of recognized competence in the field of human rights. They should also possess the qualifications required for the exercise of the highest judicial function in conformity with the law of their state.<sup>116</sup> Only the state parties and the commission have the right to submit a case to the court.<sup>117</sup> Individuals or organization cannot submit a case to the court. They may lodge petitions with the commission.<sup>118</sup> All local remedies must have been exhausted, and the subject of petition must not be pending before another international proceeding.<sup>119</sup> The commission may or may not submit the matter to the court, depending on whether or not a settlement is reached.<sup>120</sup> Judgment of the court is final and not subject to appeal.<sup>121</sup> The state parties undertake to comply with the judgment of the court in any case to which they are parties.<sup>122</sup>

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<sup>113</sup> THOMAS BUERGENTHAL ET AL PROTECTING HUMAN RIGHTS IN THE AMERICAS  
SELECTED PROBLEMS 76 (1<sup>ST</sup> ed. 1982.)

<sup>114</sup> Art. 52 of the American Convention.

<sup>115</sup> Art. 54 of the American Convention.

<sup>116</sup> Art. 52 of the American Convention.

<sup>117</sup> Art. 61 of the American Convention.

<sup>118</sup> Art. 44 of the American Convention.

<sup>119</sup> Art. 46 of the American Convention.

<sup>120</sup> Art. 51 of the American Convention.

<sup>121</sup> Art. 67 of the American Convention.

<sup>122</sup> Art. 68 of the American Convention. See generally Juan E. Mendez, The Inter-American System of Protection: Its contributions to the International Law of human rights in REALIZING HUMAN RIGHTS MOVING FROM INSPIRATION TO IMPACT 111 131 (Samantha Power et al eds., 2000).

## F. African Commission on Human and Peoples' Rights.

Art. 30 of the African Charter establishes the African Commission on Human and Peoples' Rights (The African Commission). It consists of eleven members chosen from African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in human rights, as well as legal experience.<sup>123</sup> They serve in their personal capacity for a six-year period.<sup>124</sup> The secretariat of the African Commission is located in Banjul, The Gambia. It however holds its biannual ordinary sessions in different states.<sup>125</sup> The functions of the commission are:

1. To promote Human and Peoples' Rights and in particular:
  - (a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments.
  - (b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations.
  - (c) co-operate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU or an African Organization recognized by the OAU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.”<sup>126</sup>

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<sup>123</sup> Art. 31 of the African Charter.

<sup>124</sup> Art. 31(2), Art. 36 of the African Charter.

<sup>125</sup> Udeme Esseini, *The African Commission on Human and Peoples' Rights: Eleven Years After* 6 Buff. Hum. Rts L. Rev. 93, 93 (2000).

<sup>126</sup> Art. 45 of the African Charter.

The commission has been involved in the organization of seminars, symposia and conferences in the promotion of human and peoples' rights.<sup>127</sup> It has made recommendations to governments such as the Resolution on Nigeria.<sup>128</sup>

The commission receives communications from state parties against fellow state parties who have allegedly violated the charter.<sup>129</sup> Individuals and groups can also bring communication to the commission, which shall be considered if a simple majority of the members so decide.<sup>130</sup> In all cases the commission deals only with matters submitted to it, where all local remedies have been exhausted.<sup>131</sup> Art. 56 prescribes additional conditions for the admissibility of communications emanating from individuals or groups not being States Parties. It states:

Communications relating to human and peoples' rights referred to in 55 received by the Commission, shall be considered if they:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,
4. Are not based exclusively on news discriminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases, which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

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<sup>127</sup> Essein, *supra* note 125, at 96.

<sup>128</sup> *Id.* at 96.

<sup>129</sup> See articles 45 & 47 of the African Charter.

<sup>130</sup> Art. 55 of the African Charter.

<sup>131</sup> Art. 50 of the African Charter.

In practice the African Commission lacks proper enforcement powers. It has been more active and efficient in its promotional duties than in its protective duties.<sup>132</sup> In *Constitutional Rights Project v. Nigeria* a petition was made to the commission challenging a death penalty case imposed in violation of the due process of law. The Commission declared that the Charter provisions had been violated and recommended that Nigeria free the prisoners. The Nigerian government did not do so and the matter ended there.<sup>133</sup> Also in *Civil Liberties Organization v. Nigeria* the Commission found that the Nigerian Government enacted laws in violation of the Charter, which abridged due process rights and undermined the independence of the judiciary. The matter also ended there.<sup>134</sup>

It is thought that the weak enforcement machinery of the commission is all that was feasible at the time of the Adoption of the Charter, especially as none of the African leaders who adopted the Charter were not democratically elected, and thus would not be want to relinquish any measure of their state sovereignty.<sup>135</sup>

#### G. African Court of Human and Peoples' Rights

Debate arose as to whether the creation of a court of human rights was the solution to the weakness of the African Human rights system. Some people were of the view that a court was not in keeping with traditional African ways of dispute settlement, and that mediation and conciliation were the proper avenues. A counter argument was made to the effect that domestic legal institutions of African states were not modeled on

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<sup>132</sup> Mutua, supra note 82, at 254.

<sup>133</sup> Makau Mutua, *The Construction of the African Human Rights System: Prospects and Pitfalls in REALIZING HUMAN RIGHTS MOVING FROM INSPIRATION TO IMPACT* 143 150 (Samantha Power et al eds., 2000).

<sup>134</sup> Id.

<sup>135</sup> Vincent O. Orlu Nmeihelle, *Towards an African Court of Human Rights: Structuring and the Court* 6 Ann. Surv. Int'l & Comp. L. 27 38 (2000). See also Mutua, supra note 133, at 145.

traditional African ways of dispute resolution.<sup>136</sup> Could this be why there has not been much success in dispute resolution at the domestic level? After all if the court system is alien to Africa then it cannot be expected to have much success in dispute resolution.

Others were of the view that with the creation of a court one legal system would dominate the court to the subordination or exclusion of values of other systems. This has been countered with the argument that a regional court would apply principles of international law based on international custom rather than any particular body of common or civil law.<sup>137</sup>

The prevailing view however was that the creation of an African court of human rights had to be established as soon as possible to salvage the African human rights system from its deficiencies and thus “put some teeth in the system”<sup>138</sup> In 1997 an Organization of African Unity Ministers meeting adopted a protocol on the establishment of an African Court of Human and peoples Rights<sup>139</sup> This should complement the African Commission and serve as machinery for the enforcement of the rights enshrined in the Charter.<sup>140</sup> In the preamble to the protocol it states that the “attainment of the objectives of the African Charter on Human and Peoples’ Rights requires the establishment of an African Court of Human and Peoples’ Rights to complement and reinforce the mission of the African Commission on Human and Peoples’ Rights”.

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<sup>136</sup> Nmehielle, supra note 135 at 36.

<sup>137</sup> Id.

<sup>138</sup> Mutua, supra note 133, at 153.

<sup>139</sup> Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights. OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).

<sup>140</sup> See generally Nmehielle, supra note 135.

Art. 1 establishes the Court, while Art. 2 states that the Court shall complement the protective mandate of the African Commission conferred upon it by the African Charter on Human and Peoples' Rights ("Charter").

The Court shall consist of eleven judges, nationals of the Member States of the OAU, elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights.<sup>141</sup> They are to be elected for a period of six years and may be re-elected only once.<sup>142</sup> Their independence is to be ensured. The Court shall decide matters before it impartially, on the basis of fact and in accordance with the law, without any restrictions, undue influence, inducement, pressure, threat or interference, direct or indirect, from any quarter for any reason. The judges of the Court shall enjoy diplomatic immunity in accordance with international law, and they shall not be liable for any decisions or opinions issued in the exercise of their functions.<sup>143</sup>

The Commission, the State Party, which has lodged a complaint to the Commission, and the State party against which the complaint has been lodged at the Commission are entitled to appear before the Court.<sup>144</sup> Art. 6 however grants jurisdiction in some exceptional cases. It states inter alia that "Notwithstanding the provisions of Article 5, the Court may, on exceptional grounds, allow individuals, non-governmental organisations and groups of individuals to bring cases before the Court, without first proceeding under Article 55 of the Charter." This limits access to individuals. Firstly the State against which the petition is being made must have made a declaration-accepting

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<sup>141</sup> Art.10 of the African Charter.

<sup>142</sup> Art. 14 of the African Charter.

<sup>143</sup> Art 15 of the African Charter.

<sup>144</sup> Art.5 of the African Charter.



jurisdiction of the court to hear the case, then the court will consider whether to grant or deny access. This has been described as a “terrible blow to the standing and reputation of the Court in the eyes of most Africans”<sup>145</sup> Individuals are the ones in dire need of the court, and not the commission and the state parties who have unfettered access to the court.

The court is granted wide jurisdiction, which extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other African human rights Convention.<sup>146</sup> The Court shall conduct its proceedings in public except in cases where it is satisfied it is in the interest of justice to hold the proceedings in camera. Parties to a case shall be entitled to be represented by a legal representative of their choice. Free legal representation may be provided where the interests of justice so require. Also any person, witness, or representative of the parties, who appears before the Court, shall enjoy the immunities and privileges in accordance with international law necessary for the discharging of their functions, tasks and duties in relation to the Court.<sup>147</sup>

Where the Court finds that there has been a violation of a human or peoples' right, it shall, order an appropriate measure to remedy the violation. It may also order, that the consequences of the measure or situation that constituted the breach of such right be remedied and that fair compensation or reparation be paid or made to the injured party.

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<sup>145</sup> .Mutua, supra note 133, at 156.

<sup>146</sup> Art.3 of the African Charter.

<sup>147</sup> Art. 9 of the African Charter.

Also, in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems necessary.<sup>148</sup>

The judgment of the Court taken by majority shall be final and not subject to appeal. It shall be read in open court, due notice having been given to the parties. Reasons shall be given for the judgment of the Court, and separate or dissenting opinions shall be allowed.<sup>149</sup> Execution of judgment is by the States Parties, who undertake to comply with the judgment in any case to which they are parties and to guarantee its execution. This is exactly the same problem the Commission has. Stringent measures have to be put in place by the Organization of African Unity to enforce the judgment. A time limit should be imposed on the State to enforce the judgment after which it will be fined or suspended from the Organization. Sanctions may also be imposed on the state depending on the severity of the action.

The Court lists states that have not complied with its judgments, as a type of shaming method but this is of little practical effect.<sup>150</sup>

The Court is also given powers to grant advisory opinions on any legal matter relating to the Charter or any African human rights instrument, at the request of a Member State of the OAU any of its organs, or an African organization recognized by the OAU.<sup>151</sup>

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<sup>148</sup> Art. 24 of the African Charter.

<sup>149</sup> Art. 25 of the African Charter.

<sup>150</sup> Art.27 of the African Charter.

<sup>151</sup> Art.4 of the African Charter.

## CHAPTER 4

### RELIGIOUS FREEDOM IN NIGERIA

#### A. The Colonial Heritage: UK and Religious Liberty

Britain started off as a homogenous Christian nation.<sup>152</sup> Religion was merged with the state and as such “toleration of religious differences was largely unheard of during the Middle Ages.”<sup>153</sup> The protestant reformation led to an increase in religious intolerance. A lot of restrictions were imposed on Catholics and dissenting protestants by the Recusancy legislation.<sup>154</sup> This era was dominated by feuds and animosity between the Catholics and the Protestants. Those who were not Protestants were denied a lot of rights and privileges.

With the passage of time certain legislations were passed such as the Catholic Relief Act, which granted rights to non-Anglicans.<sup>155</sup> In the present day United Kingdom there is still the establishment of the Church of England. There is however freedom of practice of religion for those who do not belong to the Church of England.

The Church enjoys various privileges. One instance of this is the presence of the twenty-six most senior Bishops of the Church of England in the House of Lords.<sup>156</sup> The Church is immune from blasphemy. This privilege does not extend to other religions, as

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<sup>152</sup> Peter Cumper, *Freedom of Thought, Conscience and Religion*, in THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 355 357 (David Harris et al eds., 1995).

<sup>153</sup> Peter Cumper, *Religious Liberty in the United Kingdom*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE LEGAL PERSPECTIVES 205, 206 (Johan D. van der Vyver et al eds., 1996). For the United Kingdom Bill of Rights, 1688, see BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 13, at 3.

<sup>154</sup> *Id.* at 207.

<sup>155</sup> *Id.* at 211.

<sup>156</sup> Cumper, *supra* note 152, at 362.

exemplified when some Muslims unsuccessfully tried to bring an action of blasphemy against Salmon Rushdie for his authorship of the Satanic Verses.<sup>157</sup>

Freedom to change one's religion is recognized by the law in the UK, with one exception. The monarch is not permitted to change his or her religion while in office. She must be a communicant of the Church, must pledge to uphold the protestant succession to the throne, and is also forbidden from marrying a Roman Catholic.<sup>158</sup>

#### B. Evolution of the State of Nigeria.

Prior to the colonization by the British, the entity now known as Nigeria was made up of different tribal kingdoms. In the south there were the Yorubas and the Binis who had the most advanced social and political structure.<sup>159</sup> In the north there was the Hausas, Fulanis, Kanuris, Nupes, Jukuns. These all had a highly efficient centralized government. The Fulanis established its dominance over a greater part of the north through the jihads that occurred in the nineteenth century, thus introducing Islam to the north.<sup>160</sup> Sheik Usman Dan Fodio led the Jihad, which established Sharia as the governing law in all aspects of life throughout the Sokoto caliphate, a substantial part of which comprises the modern day Northern Nigeria.<sup>161</sup>

I In the east there were the Igbos, Ibibios, Ijaws and the Efiks. The Igbos who formed the larger population had a republican form of government without any central

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<sup>157</sup> Id. at 366. This type of discrimination is seen as a violation of Art. 14 of the European Convention, which forbids discrimination in the enforcement of the rights on the basis of religion. See Cumper, *supra* note 153, at 225-226.

<sup>158</sup> Cumper, *supra* note 152 at 371.

<sup>159</sup> T. O. ELIAS, NIGERIA THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION 1 (1967).

<sup>160</sup> Id. at 3.

<sup>161</sup> Hon. Mr. Justice Mohammed Bello, *Sharia and the Constitution*, in THE SHARIA ISSUE: WORKING PAPERS FOR A DIALOGUE 6 (Chief S.L. Edu et al. eds. 2000).

control. They had a ward system, with council of elders making the necessary decisions.<sup>162</sup>

Britain became involved in Nigeria through trade. Rivalry existed between the British, French and Germans who all had vested interests in the region. The abolition of slave trade and the protection of missionaries also became important factors in establishing some form of British administration over the area. Thus the British consulate was established in 1849 for the Bight of Benin and Biafra.<sup>163</sup>

Through the use of treaties of cessation signed with some of the local rulers, and “gun boats tactics”<sup>164</sup> in other instances, the British gained more ground. In the north the British ascendancy was settled militarily, and with an assurance on the part of the British that the religion of Islam and the existing system of law would not be disturbed.<sup>165</sup> In 1914 the northern protectorate and the southern protectorate were merged, along with the colony of Lagos to form Nigeria. The indirect rule system was imposed on the territory with Sir Lord Frederick Lugard as Governor General.<sup>166</sup> Nigeria gained independence in 1960. In 1963 She became a Republic.

After some experimentation with the parliamentary system of government, which was not successful due to the diversity of the nation, a federal system of Government was adopted.<sup>167</sup>

The present day Nigeria has an estimated population of over 100 million, with over 200 ethnic groups. The dominant ones are the Hausa-Fulanis, Igbos and Yorubas.<sup>168</sup>

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<sup>162</sup> Id. at 12.

<sup>163</sup> B. O. NWABUEZE, A CONSTITUTIONAL HISTORY OF NIGERIA, 5 (1982 ).

<sup>164</sup> Major Nannguhan Madza, *The Judicial System of Nigeria* Army Law. 20, 20 (1987).

<sup>165</sup> ELIAS, *supra* note 159, at 7. Krishnaswami, *supra* note 16, at 254-255 n. 1.

<sup>166</sup> Madza, *supra* note 164, at 21.

<sup>167</sup> The Nigerian Constitution is largely modeled on the U. S. Constitution. See generally, Broadus N. Butler, *The 1979 Constitution of the Federal Republic of Nigeria and the Constitution of the United States of America: A Historical and Philosophical Comparison* How. L. J. 733 (1987).

The religious distribution is 5.6% tribal religion, 45% Islam, 49% Christian. So Christianity and Islam are the dominant religions.<sup>169</sup>

Because of the plurality of Nigeria's religiosity, she has adopted the right to freedom of religion in all her Constitutions.<sup>170</sup> There is also case law upholding the right to freedom of religion. *Ojiegbe & Ors v. Ubani & Ors*<sup>171</sup> was decided under the 1963 Constitution. The appellants alleged that the elections into the House of Representatives which were held on a Saturday discriminated against them, because as members of the Seventh Day Adventist Church they were obliged not to partake in any activities on Saturdays. The court acknowledged their right to religion but stated that the elections which were held on Saturday did not in any way negate their right to practice their religion, and that they failed to prove that they had the requisite 6000 – 7000 votes that would have affected the electoral positions of their candidate.

*Jenubu Oyonye v. Adegbudu*<sup>172</sup> arose under section 35 of the 1979 Constitution, which is similar to Section 38 of the 1999 Constitution. There the appellant refused to buy a goat for the burial sacrifice of her deceased husband according to the Adoka native law and custom, on the grounds that it was against her Christian faith. The Court of Appeal held that the appellant was guaranteed her right to freedom of religion under section 35 of the constitution and that the Adoka custom in as much as it compels her to do what is against her religion violates section 35 of the Constitution and as such is void

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<sup>168</sup> Philip C. Aka, *Nigeria: The Need for an Effective Policy of Ethnic Reconciliation in the New Century* 14 Temp. Int'l & Comp. L. J. 327, 330 (2000).

<sup>169</sup> John S. Pobee, *Africa's Search for Religious Human Rights Through Returning to Wells of living Water*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE LEGAL PERSPECTIVE 391, 403 (Johan D. van der Vyver et al eds., 1996).

<sup>170</sup> Section 24 of the 1963 Constitution, Section 35 of the 1979 Constitution, Section 38 of the 1999 Constitution).

<sup>171</sup> (1961) ALL NLR 277.

<sup>172</sup> (1983) 4 NCLR 492.

by virtue of section 1 (3) of the Constitution which declares the Constitution to be the supreme law of the land.

*Adamu & Ors v. A.G. of Borno State & Ors*<sup>173</sup> also came under the 1979 Constitution. The plaintiffs/appellants claimed that both Christians and Moslems pupils in primary school in Gwoza Local Government Area of Borno State were entitled to equal treatment in both education and religion, and that the practice whereby Christians had to pay for their children to learn Christianity, while the Local Government paid Islamic teachers was unlawful and unconstitutional. They sought among other reliefs, a declaration that it was unlawful for pupils to be taught Islamic religion and Arabic language against their will and the wish of the parents. The Court granted the reliefs sought by the appellants, as they were incidental to their right to freedom of religion and freedom from discrimination on grounds of religion.

Presently there is a matter in the High Court of Ile Ife, Osun State, about an alleged harassment over Islamic dressing. The Plaintiff an undergraduate of the Obafemi Awolowo University is suing her parents who she accused of having beaten her because of her insistence on wearing her black veil. She also joined the Vice Chancellor, the Registrar and the Governing Council of the University in the suit, claiming that she had been intimidated and insulted by two of her lecturers who wanted to prevent her from entering their classes dressed in her veil. She claims that wearing her Islamic purdah dress whether in school, public or private is her legitimate, lawful and valid fundamental

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<sup>173</sup> (1996) 8 NWLR (Pt. 465) 203.

religious right as guaranteed by the Constitution of the Federal Republic of Nigeria, 1999. The matter is still in court.<sup>174</sup>

### C. The Sharia Controversy

Sharia law is a legal system applicable to Moslem States. It is seen by Moslems as a divine law established through Eternal Order, through the Prophet Mohammed. Its guiding principles are contained in the Holy Quran and the Hadith or Sunnah, which is a way or conduct of life approved by the prophet Mohammed. It is supplemented by Ijma and Qiyas, which is analogical reasoning in which matters neither in the Quran nor in the Sunnah are solved through analogy in similar cases.<sup>175</sup> Islamic scholars regard it as “The highway of righteous life leading to God or the sum total of divine Commands to man.”<sup>176</sup> Sharia Law is thus a way of life that is all embracing covering the religious social political and economic aspects of life.<sup>177</sup>

It has been stated that the manifestation of intolerance can be attributed to the historic consequences of the colonial era which promoted inter communal intolerance in order to consolidate the power of the colonial masters.<sup>178</sup>

As previously indicated the British in their dealings with the northern protectorate promised to ensure that there was no disruption of Islam. Thus there were no missionary activities or western education in the area. It was isolated from the south, which was a beehive for missionary activities, leading to conversion of the greater majority to

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<sup>174</sup> Kola Alade, *Girl Sues Parents, VC, Alleges Harrassment Over Islamic Dressing*, in THE GUARDIAN (March 7, 2002) at <http://www.ngrguardiannews.com>

<sup>175</sup> Bello, supra note 161. Emma. O. Omuojire, *Sharia Law: How The Constitution Recognizes It*, in THE GUARDIAN (Feb. 29, 2000) at <http://www.ngrguardiannews.com>

<sup>176</sup> J.O. Odion, *The Advent of Sharia Law in the Nigerian Legal System: Constitutional Issues Arising*, in LAW AND PRACTICE JOURNAL 1, 8

<sup>177</sup> Bello, supra note 161, at 5.

<sup>178</sup> BENITO, supra note 26, at 44.



Christianity. The system of indirect rule allowed the north to continue with its political structure, which was based on Islam. This was however only for civil matters. In criminal matters there were some modifications such as imposing death by hanging for homicide and adultery instead of stoning to death as prescribed by Sharia Law. Amputation of hands for theft was replaced by imprisonment.<sup>179</sup> This was administered by the Alkali Courts(now known as Area courts). The South practiced customary law alongside the newly introduced Common Law system.

In 1959 when Northern Nigeria became self-governing they advocated for the passing of Islamic legislation to reflect their values. The British then modified the British Criminal law, which was in force, to include certain aspects of Sharia law, thus forming the Penal Code of Northern Nigeria.<sup>180</sup> In 1977 the Constitution Drafting Committee proposed the introduction of Sharia into the draft constitution. This would have amounted to running two parallel systems of law, having a Federal Supreme Sharia Court at the same level with the Supreme Court.<sup>181</sup> Eventually there was a compromise and the Sharia court was to be included in the constitution, to be established at the state level.<sup>182</sup>

In 1987 the then President, General Babangida smuggled Nigeria into the Organization of Islamic Conference. It was done without the approval of the Armed Forces Ruling Council. He set up Advisory Council on Religious affairs and made

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<sup>179</sup> Bello, supra note 161, at 6-7.

<sup>180</sup> This was based on the Penal code of India, Pakistan, Malaysia, Indonesia, and Sudan who with the exception of India have a majority of Moslems. See Bello, id. at 9. Madza, supra note 164, at 21. The Penal Code in Force in the North includes adultery and drinking alcohol as offences. These are not offences in the South, where the Criminal Code is in force.

<sup>181</sup> Omo Omoruyi, *An appeal to President Olusegun Obasanjo: Nigeria Neither an Islamic nor a Christian Community*, in NIGERIA WORLD FEATURE (Mar.7 2001), at <http://www.nigeriaworld.com>

<sup>182</sup> Professor B.O. Nwabueze, *Constitutional Problems of Sharia in THE SHARIA ISSUE: WORKING PAPERS FOR A DIALOGUE* 18 (Chief S.L. Edu et al.eds. 2000).

Nigeria a shareholder of the Islamic Development Bank.<sup>183</sup> Christian leaders protested to no avail.

In the 1980s religious riots had sprung up in the North by some sects who wanted a purification of the practice of Islam.<sup>184</sup> This resulted in loss of lives and property.

In 1997, General Abacha, another former head of state put Nigeria into the D8, an organization of eight Islamic countries comprising Egypt, Malaysia, Indonesia, Iran, Turkey, Pakistan and Bangladesh.

In October 1999, the Governor of Zamfara State, one of the northern predominantly Moslem states proclaimed Sharia law to be the Supreme law of the land. He created a Religious Affairs ministry and Council of Ulamas (Moslem Clerics) to create awareness to the citizenry. He recruited Islamic preachers to preach Islam at the grassroots. A directive was given to single women in the state to get married within three months or leave the state.<sup>185</sup>

He was quoted as stating “Whoever administers or governs any society not based on Sharia is an unbeliever”<sup>186</sup> He stated that Sharia was not a punishment but a way of deterring people from committing sin. He declared that his faith was of paramount importance to him and that rather than not propagate Islam through his administration he would resign and go back to his family since according to him Sharia law was superior to the Constitution.<sup>187</sup>

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<sup>183</sup> Omoruyi, *supra* note 181.

<sup>184</sup> Femi Ajayi, *Sharia Law and Nigerian Unity*, in NIGERIA WORLD FEATURE (Feb. 29 2001), at <http://www.nigeriaworld.com>

<sup>185</sup> CLO’s report *Sharia, the Constitution and Nigeria’s future*, in NIGERIA WORLD FEATURE (Mar.3 2000), at <http://www.nigeriaworld.com>

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

Alhaji Mohammed Bawa Guasau, the Speaker of the House of Assembly was of the opinion that the indigenes who were predominantly Moslems wanted Sharia, and that they had been promised during the campaign period that their state would be ruled by Sharia.<sup>188</sup> He further stated that the State was not being Islamised rather it was the people in it who were being Islamised.<sup>189</sup>

Subsequently, Christian bodies complained that were being denied land on which to build churches, and that they were also denied access to the use of state owned media.<sup>190</sup> Right Reverend Samson Bala, the first Bishop of Gusau Diocese in Zamfara State claimed that the radio station in the state discriminated against Christians, and that commercials and paid advertisements containing Christian literature were rejected.<sup>191</sup>

Christians complained that a lot of tax payers' money was spent on building new mosques and propagating Islam while Christianity was being ignored.<sup>192</sup>

The Labor Union in Zamfara State did not find any problem with the implementation of Sharia law because it did not contravene any international or labor laws, and workers had been paid arrears of their salaries, and had their minimum wages increased.<sup>193</sup> It also stated that there had not been any complaint by workers of any form of discrimination based on sex, religion, or ethnicity.

The Sharia fever began to spread in the northern parts of Nigeria. This resulted in riots and demonstrations by people who were for and against the practice, eventually leading to loss of lives and property.

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<sup>188</sup> Id.

<sup>189</sup> Id.

<sup>190</sup> Dickson Adeyanju, *Governments Inability to End Sharia Worries Bishops*, in THE GUARDIAN (Sept 19 2000) at <http://www.ngrguardiannews.com>

<sup>191</sup> CLO's report, supra note 185.

<sup>192</sup> Id.

<sup>193</sup> Id.

In Kaduna State in particular the Sharia issue led to a bloody crisis between the Christians and the Moslems, and eventually it had to be put on hold.<sup>194</sup> In February and May 2000, more than seven hundred people were killed in the town, and this was followed by reprisal killings in the southeast, in clashes between Muslim and Christian communities over the mooted extension of the application of Sharia.<sup>195</sup>

This development led to an uproar by Christians who protested the Sharia implementation and called upon the President to call the Sharia states to order.<sup>196</sup> The President was however quoted as saying that the Sharia issue was going to ‘fizzle’ out.<sup>197</sup> Unfortunately that was not the case, rather even more violence ensued.

In July and August 2001, violence broke out between Christians and Muslims in Bauchi state, another Northern predominantly Moslem state, apparently in response to the introduction of Sharia law there.<sup>198</sup> Between September 7 and 13, 2001, the city of Jos became the scene of mass killing and destruction for the first time in its history. Christians and Muslims were both perpetrators and victims. Jos is a city with a majority of Christians. Religious tension due to the Sharia issue prevalent in the northern part of Nigeria led to the killings. Thousands of houses and buildings were smashed or burnt; homes and businesses were looted; and some villages, such as Dilimi on the outskirts of Jos, were virtually razed to the ground.<sup>199</sup>

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<sup>194</sup> Saxone Akhaine, *Why Government Must Solve Sharia Question, By Clergymen*, in THE GUARDIAN (Sept 13 2000), at <http://www.nguardiannews.com>

<sup>195</sup> HUMAN RIGHTS WATCH NIGERIA 2001 available at <http://www.hrw.org/reports/2001/nigeria/>

<sup>196</sup> Saxone Akhaine, *supra* note 194.

<sup>197</sup> CLO’s report, *supra* note 185.

<sup>198</sup> HUMAN RIGHTS WATCH NIGERIA 2001 available at <http://www.hrw.org/reports/2001/nigeria/>

<sup>199</sup> *Id.*

In October 2001, further violence erupted in the northern State of Kano following protests against the United States military attacks on Afghanistan. Surprisingly the violence was directed against the Christians.<sup>200</sup>

Some people believe the adoption of Sharia is really a political issue. A game plan by the north to hold on to power since Sharia advocates that a non-Moslem should not rule over a Moslem.<sup>201</sup> Consequent to the adoption of Sharia by some states the number of human rights abuses has increased. In October 2001, a woman in Sokoto state (one of the states that adopted Sharia) was found guilty of premarital sex by a Sharia court and has been sentenced to death.

On January 3, 2001, a man was executed in Katsina State (another Sharia state) on the sentence of a local Islamic court. He had no legal representation and there was no appeal.

In Zamfara State a teenage mother was sentenced to flogging of one hundred lashes in September 2000 for having sex outside marriage and bringing false charges upon the men she allegedly had sex with. The sentence was carried out despite the fact that her appeal was pending.<sup>202</sup> Cases of flogging, stoning and other degrading punishments abound.

In Kebbi State, a Sharia court found a sixteen-year-old boy guilty of stealing money. He was sentenced to the amputation of his hand.<sup>203</sup>

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<sup>200</sup> Id.

<sup>201</sup> Ben Omoni, *Sharia and Religious Intolerance in Nigeria*, in NIGERIA WORLD FEATURE (June 20 2000), at <http://www.nigeriaworld.com> )

<sup>202</sup> For these and other human right abuses arising from the application of Sharia see Human Rights Watch World Report 2001: Nigeria, available at <http://www.hrw.org/press/2002/01/nigeria0108.htm>

<sup>203</sup> HRW world Report 2001: Women's Human Rights, available at <http://www.hrw.org/press/2001/10/nigeria1023.htm>

#### D. The Constitution of the Federal Republic of Nigeria and Sharia

Some scholars have stated that our founding fathers should never have included in the Constitution, articles on religion that were “porously written and carelessly defined...”<sup>204</sup> The preamble of the Constitution states

We the people of the Federal Republic of Nigeria, having firmly and solemnly resolved, to live in unity and harmony as one indivisible and indissoluble sovereign nation under God, dedicated to the promotion of inter-African solidarity, world peace, international co-operation and understanding, and to provide for a Constitution for the purpose of promoting the good government and welfare of all persons in our country, on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people;

Do hereby make, enact and give to ourselves the following Constitution:-

It incorporates the principles of indivisibility, freedom, equality, justice and unity.

Section 10 of the Constitution states “. The Government of the Federation or of a State shall not adopt any religion as State Religion”. This is an anti establishment clause which protects the populace from being bound to a particular religion. Following the interpretation of the anti establishment of the United States Constitution on which the Nigerian Constitution is largely modeled, it implies that not only must the government not establish or adopt a particular religion as the state religion, but it must also treat all religions equally, not promoting or protecting any, nor showing favoritism to any.<sup>205</sup>

A school of thought is however of the view that Nigeria is not a secular state but rather a liberal multi-religious state wherein freedom of religion is safeguarded. The State cannot adopt either Christianity or Islam as a State religion, but that is different from

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<sup>204</sup> See Ogbeide Gideon, *Why Sharia Then And Why Sharia Now*, in NIGERIA WORLD FEATURE (Mar. 12 2000), at <http://www.nigeriaworld.com>

<sup>205</sup> Nwabueze, *supra* note 182, at 18.

secularism.<sup>206</sup> The school of thought also defends the criticism of Sharia as a religion-based law stating that African customary law is rooted in religion and principles derived from African traditional belief, and the Common Law is Christianity based, and that Moslems have the right to practise Sharia in accordance with their right to freedom of religion.<sup>207</sup>

Under Chapter two, which contains fundamental objectives and directive principles of state policy, section 15 states

For the purpose of promoting national integration, it shall be the duty of the State to:

(c) encourage inter-marriage among persons from different places of origin, or of different religious, ethnic or linguistic association or ties; and  
(d) promote or encourage the formation of associations that cut across ethnic, linguistic, religious and or other sectional barriers.”(It should be noted that the provisions of this chapter are not justiciable. See s.6 (6) (c) Their inclusion in the Constitution however emphasizes their importance as goals, which ought to be achieved)

This section demonstrates promotion of understanding between different religions, by marriage as well as by the formation of associations.

Chapter four of the Constitution contains the human rights provisions. Section 38 contains the provision on the right to freedom of religion. It states:

(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian.

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<sup>206</sup> Dr. Abdul-Lateef Adegbeti, *Sharia in the Context of Nigeria*, in THE SHARIA ISSUE: WORKING PAPERS FOR A DIALOGUE 72-73 (Chief S.L. Edu et al.eds. 2000).

<sup>207</sup> Id. at 68.

(3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.

(4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.

Subsection 1 is more or less a reenactment of article 18 of the Universal Declaration. It guarantees freedom to change ones religion or belief as well as freedom to manifest it.

It makes no mention of coercion; however subsection 2 protects a person attending any place of education from being subjected to religious ceremony or observances in a religion other than his own, or in the case of a child that of his parents.

Subsection 3 guarantees the right of religious communities and denominations to propagate their religion in places of education maintained wholly by them.

Subsection four is rather vague, as it does not define “a secret society”. With the extension of the protection of religion to include belief, there might be some conflict as to whether somebody’s belief and membership of a group amounts to belonging to a secret society.

Section 42 is a non-discrimination section and it states in part:

(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.



Section 45 (1) states:

Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society

(a) in the interest of defence, public safety, public order, public morality or public health; or

(b) for the purpose of protecting the rights and freedom of other persons

The import of this is that the right to freedom of religion is a derogable right. It does not distinguish between the right to freedom of religion and belief, and the right to manifest ones religion or belief, as some international instruments do.<sup>208</sup>

In section 6(5) there is an enumeration of the courts that shall exist in the judicial system. This list consists:

(a) the Supreme Court of Nigeria;

(b) the Court of Appeal;

(c) the Federal High Court;

(d) the high Court of the Federal Capital Territory, Abuja;

(e) the Sharia Court of Appeal of the Federal Capital Territory, Abuja;

(g) a Sharia Court of Appeal of a State;

(h) the Customary Court of Appeal of the Federal Capital Territory, Abuja;

(f) a Customary Court of Appeal of a State;

Of special reference to us are the Sharia courts mentioned. Section 260 provides for a Sharia Court of Appeal for the Federal Capital Territory, Abuja. It shall consist of a Grand Kadi and such number of Kadis as may be prescribed by the National Assembly.

It further goes to state that :

A person shall not be qualified to hold office as Grand Kadi or Kadi of the Sharia Court of Appeal of the Federal Capital Territory, Abuja unless -

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<sup>208</sup> See for instance art. 18 of the ICCPR.

- (a) he is a legal practitioner in Nigeria and has so qualified for a period of not less than ten years and has obtained a recognized qualification in Islamic law from an institution acceptable to the National Judicial Council; or
- (b) he has attended and has obtained a recognized qualification in Islamic law from an institution approved by the National Judicial Council and has held the qualification for a period of not less than twelve years; and
- (i) he either has considerable experience in the Practice of Islamic law, or
- (ii) he is a distinguished scholar of Islamic law.

Section 262 states the jurisdiction of the court as follows:

- (1) The Sharia Court of Appeal shall, in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law.
- (2) For the purpose of subsection (1) of this section, the Sharia Court of Appeal shall be competent to decide -
  - (a) any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;
  - (b) where all the parties to the proceeding are Muslims, any question of Islamic personal law regarding a marriage, including the validity or dissolution of that marriage, or regarding family relationship, a foundling or the guardianship of an infant;
  - (c) any question of Islamic personal law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Muslim;
  - (d) any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or the guardianship of a Muslim who is physically or mentally infirm; or
  - (e) where all the parties to the proceedings, being Muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.

Sections 274 276 and 277 contain similar provisions for the Sharia Court of Appeal of a state. It can be seen that the jurisdiction of the Sharia courts is limited to Islamic personal

law, where the parties are Muslims. And that is indeed how it has been practised all along. Nowhere is it specified that they will have criminal jurisdiction.<sup>209</sup>

Section 36 states:

(12) Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

Sharia law does not qualify as a written law under this provision.<sup>210</sup> Where then is the justification for the Sharia Law.<sup>211</sup>

The punishments imposed by the Sharia courts such as whipping and other acts of public humiliation are inhuman and degrading. And Section 34 (1) states inter alia, “Every individual is entitled to respect for the dignity of his person, and accordingly - no person shall be subject to torture or to inhuman or degrading treatment;”

And section 1 (3) states, “If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.”

The adoption of Sharia as a comprehensive set of laws clearly violates the establishment clause of the Constitution. It violates the right to freedom of religion as well as the anti discrimination clause contained both in the Constitution, and under international human rights law. It is also inconsistent with the right to dignity of person.

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<sup>209</sup> See Dr. Jones O. Edobor The Sharia and the Nigerian Constitution: Religion and The State May 7<sup>th</sup> 2000 Nigeria World.

<sup>210</sup> See Bello, supra note 157, at 13.

<sup>211</sup> One writer is of the view that the Sharia states have not adopted a state religion, as prohibited by the Constitution but have only adopted the Sharia law as the law governing their States. This he claims does not violate the Constitution. Muiyiwa Sobo Esq. The Sharia and the Constitution. 26<sup>TH</sup> January 2000.

It violates both the letter and the spirit of the Constitution and by virtue of section 1(3) it is void.

Section 315 states:

Subject to the provisions of this Constitution, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this Constitution and shall be deemed to be –

(a) an Act of the National Assembly to the extent that it is a law with respect to any matter on which the National Assembly is empowered by this Constitution to make laws; and

(b) a Law made by a House of Assembly to the extent that it is a law with respect to any matter on which a House of Assembly is empowered by this Constitution to make laws

Only the application of Sharia law as contained in the Penal Code, as well as Sharia civil law are saved under this provision, and this is so long as they are not inconsistent with the Constitution.<sup>212</sup>

Just recently the Attorney General of the Federation and the Justice Minister, Chief Godwin Kanu Agabi (SAN) made a declaration on the issue in a letter entitled ‘Prohibition of Discriminatory Punishments’ circulated to the States practicing Sharia law which stated inter alia,

It is my solemn duty to bring to your notice the hundreds of letters which I receive daily from all over the world protesting the discriminatory punishments now imposed by some Sharia courts for certain offences...The fact that Sharia law applies to only Moslems or to those who elect to be bound by it makes imperative that the rights of such persons to equality with other citizens under the Constitution be not infringed. A Moslem should not be subjected to a punishment more severe than would be imposed on other Nigerians for the same offence. Equality before the law means that Moslems should not be discriminated against...Individuals and States must comply with the Constitution. A court which imposes discriminatory punishments is deliberately flouting the Constitution. The stability, unity and integrity of the nation are threatened by such action. In order to implement policies or programmes inconsistent with the Constitution we must first secure its amendment.

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<sup>212</sup> Nwabueze supra note 182, at 15.

Until that is done, we have to abide by it. To proceed on the basis either that the Constitution does not exist or that it is irrelevant is to deny the existence of the nation itself. We cannot deny the rule of law and hope to have peace and stability.<sup>213</sup>

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<sup>213</sup> Emmanuel Onwubiko, *Nigeria Declares Sharia Rule Illegal*, in THE GUARDIAN (March 21 2002), at <http://www.ngrguardiannews.com>

## **CHAPTER 5**

### **CONCLUSION**

It can be seen that the right to freedom of religion has come a long way in its evolution. There are still some areas of controversy such as in the freedom to change one's religion as well as the right to manifest one's religion. It is important for more negotiations and accommodation by the various religions and states in order to modify their positions. It is well known that the various religions have all evolved from what they used to be in the middle ages and even in the eighteenth century.

There is dire need for a Convention on the right to freedom of religion. A comprehensive instrument embodying the various components of the right, with binding legal effect should be drafted and adopted.

There are two main problems with the enforcement of the right to freedom of religion. The first is that individuals do not yet have easy access to the machinery of justice. Secondly Committees are sometimes used for settling such disputes and their decisions cannot be enforced. Even where courts decide the issues they are still dependent on the goodwill of individual states for enforcement of the judgments. This situation can be exemplified by the African human rights enforcement policy, which can at best be described as toothless.

The African Commission should be limited to promotional functions, such as the creation of awareness on the right to freedom of religion as well as human rights in general. This is because in Africa unlike in Europe and the Americas the Charter was

created by undemocratically elected leaders, rather than being born out of the victory of democracy.<sup>214</sup> Thus there has to be an increase of human rights awareness campaigns.

Individuals need to have unfettered access to the court. Membership of the O.A.U. should suffice for States to be under the jurisdiction of the court in all issues including individual petitions.

The judges of the court have to be full time judges completely independent of their governments in order to ensure fair and fearless judgments.

Enforcement of judgments have to be coordinated by the O.A.U. and there has to be strict measures for non compliance ranging from imposition of fines to imposition of sanctions, and suspension from the Organization depending on the severity of the action.

The situation in Nigeria has shown the amount of destruction and death that can occur as a result of the violation of the right to freedom of religion. Nigeria needs to realize that She is a member of the United Nations and is thus bound by the United Nations Declarations. She has also adopted the International Covenants and thus runs the risk of a state bringing a complaint against her, or individuals bringing petitions against her. Nigeria is equally a member of the Organization of African Unity, and signatory to the African Charter on Human and People's Right.

The Sharia issue even though it is a national problem has international dimensions, as it contravenes international human rights law, in a world that has become a global village. The erring states therefore have to be called to order as they are subject to both national law and international law.

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<sup>214</sup> Mendez, *supra* note 122 at 131. See also Mutua, *supra* note 133, at 145.

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