

## Limitations on Freedom of Religion and Expression under Muslim Legal Traditions of Apostasy and under International Human Rights Law

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### Abstract

Developing an approach to integrate religious legal traditions within modern universal values, as expressed through international human rights norms, is an important priority. The paper provides a study on Muslim Legal Traditions of Apostasy (MLTA) and the international human rights norms relevant to them. The study distinguishes among the three different phenomena of MLTA, which can be listed as conversion, heresy and sabb (blasphemy). While in practice these three concepts appear differently, for Muslim jurists the term irtidad (ridda) is generally used to describe the act of a convert, a blasphemous or a heretic. The study also makes a distinction between the public aspects of these traditions and their personal aspects. Public rules of MLTA include prohibition and punishment of the three different alleged offences, conversion, blasphemy and heresy, along with the civil consequences of these offences, such as confiscation of the property of the offender. With regard to personal aspects of MLTA, it should be noted that, whether the punishment is imposed on an apostate or not, the act of apostasy automatically leads to some family law consequences, such as dissolving the marriage of the apostate, and depriving him/her of the custody of his/her children.

**Keywords:** Apostasy; Inside Religious Freedom; Freedom of Speech, Islam; Traditional Fiqh.

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## 1. Introduction

Developing an approach to a religious interpretation that can integrate legal traditions with universal human rights principles is a priority for the international community. This paper provides a comparative study on Muslim Legal Traditions of Apostasy (MLTA), and the international human rights norms relevant to them.

In examining MLTA the paper distinguishes between the three different phenomena of apostasy, which can be listed as conversion, heresy and sabb (blasphemy). While these three phenomena may overlap in some ways, for Muslim jurists the term irtidad (ridda) is generally used to describe the act of a convert, a blasphemmer or a heretic.<sup>1</sup>

For the purpose of this study, MLT is divided into two categories. One category deals with personal law issues, including such matters as marriage, inheritance and custody of children. The other concerns public law issues, notably freedom of religion and expression, and penal law. This distinction is in line with the historical varying level of application of personal and public MLT by Muslims, as Schacht states: "In terms of subject matter the hold of Shariah was and is strongest in the area of personal status (marriage, divorce, maintenance, matters of minors such as custody and guardianship, and inheritance), and weakest or non-existent in areas such as penal law, taxation, and constitutional law."<sup>2</sup>

Public rules of MLTA include prohibition and punishment of the three different alleged offences, conversion, blasphemy and heresy, along with the civil consequences of these offences, such as confiscation of the property of the offender. Despite their partly insertion in legislation of some Muslim states, public rules of MLTA are not applicable anymore and therefore have been gradually abandoned in case law. Yet, the remnants of personal MLTA, notably the family law consequences of apostasy, such as dissolving the marriage of the convert, though might not be incorporated in legislation, can be found in domestic case law.

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1. To present some recent examples for each phenomenon: charging Mr. Abdul Rahman in March 2006 for rejecting Islam in a lower court in Kabul is an issue of conversion; the famous controversial case of the Danish Cartoons in September 2005 is a matter of sabb; and current declaring Shiites as apostates in Iraq by some militant extremist is an issue of heresy.

2. See: Schacht, 1964: 76.

As international human rights norms are concerned, the main focus of the study is on intra-religious freedoms, or freedoms of followers of a religion within their religious community, rather than inter-religious issues which involve the relations between different religions. Also within the broad scope of freedom of religion, opinion and expression, this study addresses only those aspects of the issues which are directly linked to the effects of MLTA. In this regard, the phenomenon of conversion in MLTA engages the right to change religion under Article 18 of both Universal Declaration of Human Rights Universal Declaration of Human Rights (UDHR)<sup>1</sup> and the International Covenant on Civil and Political Rights (ICCPR)<sup>2</sup>. Similarly the phenomena of sabb and heresy will be examined with regard to the legitimacy of limitations on freedom of religion, opinion and expression under Article 18(3), 19(3) and 20 of the ICCPR.

Finally, for the purpose of this research, the term MLT is reserved for a reference to early (classical, historical or traditional) Muslim law. 'Legal traditions' or 'religious legal traditions' are also familiar terms for non-Muslim readers, because other religions and civilizations have such traditions as well.<sup>3</sup> Furthermore, by using the term 'traditions' it is easier to remember that when comparing MLT with modern human rights norms the former dates from before the 10th century, while the latter is the achievement of the last 6 decades of post-modernity. As Bielfeldt states: "The emancipatory principle has been articulated only in the modern era. By comparison, the Islamic Shariah, the normative tradition commonly known as Islamic law, is much older."<sup>4</sup>

## 2. Related MLTA and Their Three Different Phenomena

### 2.1. Conversion

According to Koranic principles every human being is free to choose his/her religion or belief on his/her own will: "Duress is not permissible in religion, as the path has become clear from falsehood." (See: Kadivar, 2001)<sup>5</sup>

1. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

2. The International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

3. For study of other legal traditions such as Chthonic, Talmudic, Civil Law, Common Law and Hindu, see for example, Glenn, 2000.

4. See: Bielefeldt, 1995: 595.

5. See: Quran 2: 256. Kadivar has numerated different Koranic principles on freedom of religion among which are the denial of duress and force in religion and faith, and freedom as a means of guidance and manifestation. See: Kadivar, (2001).

Yet, similar to many other progressive ideals, the Koranic principles on freedom of religion have been modified to be compatible with the social context of their elaboration, and the situations of war in early centuries of Muslim history. In fact, when studying the concept of freedom of religion in early Muslim communities, “one needs to avoid thinking in [post modern] twentieth century terms [of the West], that is, from an individualistic perspective, which tends to interpret religious creed as an entirely personal matter.” (Arzt, 2002: 32)

To briefly elaborate on the reasoning for this contradiction, it seems that despite the Koranic principle of freedom to choose one’s religion, in practice early Muslim jurisprudence had to consider protection of the newly emerged Muslim community. While early Muslims were in a state of war with surrounding unbeliever enemies, conversion by any member of their community to the religion of their enemies could be interpreted as joining the enemy camp. While the only fabric of the new Muslim society was religion, for early Muslims conversion was considered not merely matter of faith, but “equal to treason”<sup>1</sup>, “submission to foreign domination” (Arzt, 2002: 25), “treason against a very basic and all-encompassing group identity and loyalty” (Makiya, 1993, Quoted in: Arzt, 2002: 29), and an “act of war against the Muslims.” (Riffat, 1982, In: Swidler, 1982: 61) Rahman notes that: “Apostates involved were not merely renegades from the faith but also in active opposition to the Muslims, having joined the warring disbelievers’ camp.” (Rahman, 1972: 70)

In this sense, as will be discussed later, the majority of Muslim schools of law did not consider imposing the death penalty for women apostates, presumably because women would not engage in war against Muslims.<sup>2</sup> Even today concern for the protection of the community is more serious in multi religious communities, where each community has to protect its identity and existence from the threats of other communities.

Despite what was mentioned on the logic of considering conversion as an offence, in later criminalizing the conversion, the factor of ‘intent’ was neglected by Muslim jurists. Therefore, whether the conversion has taken place as a search for truth or as a hostile act to the community, it was considered as a crime, liable to punishment.

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1. See: S. M. Rizvi, ‘Apostasy (Irtidad) in Islam’, available at <<http://www.al-islam.org/short/apostacy.htm>>.

2. See: Talbi, 1986: 182-183.

By the same token a Muslim child after reaching the age of maturity had to take on the religion of his/her father, i.e. Islam. This again was against the Koranic principles of freedom of religion. In fact, 'obeying parents' as a justification for nonbelievers to follow the religion of their fathers has been rejected by the Koran.<sup>1</sup> By contrast, according to another rule of MLT, every Muslim from the age of maturity (a boy at 15 years and a girl at 9-13 years of age) should stand for the principles of his/her religion on his/her own findings.<sup>2</sup>

It should be noted that the prohibition of conversion is not merely an issue of MLT. A similar view was held by Thomas Aquinas, that those "who at one time accepted the Faith and professed it; they must be compelled, even by physical force, to carry out what they promised and to hold what they once accepted." (D'Arcy, 1961:159, quoted in Stahnke, 1999: 282)

Among the temporary Sunni jurists, Sheikh Yousef Al-Qaradhawi holds a different view to the traditional views on punishment of conversion. He makes a distinction between 'limited conversion' that is merely conversion of an individual, and 'expanded conversion', which is conversion of an individual that is extended to others. While there is no punishment for the former, the latter is subject to punishment: "Limited ridda is the ridda of the individual who switches religion and is not interested in others.... [Yet,] one of the freedoms that Islam does not accept is the freedom of ridda that expands and threatens the social fabric and its foundations.... [This] is a ridda in which the individual who abandons Islam calls [upon others] to do likewise, a group whose path is not the path of society and whose goal is not the goal of the nation, and whose allegiance is not to the Islamic nation. Such [individuals] endanger the social fabric, and they are like the murtaddoon [apostates], who were fought by [the first Caliph] Abu Bakr together with the Companions of the Prophet [the Sahaabi]. Those murtaddoon falsely claimed that they were prophets with the same inspiration as was given to the Prophet Muhammad..."<sup>3</sup>

1. See: Qoran, 2:170; 5:104, 7:28; 10:78; 21: 53, 54; 26: 74-76; 31: 21; 43: 22, 23.

2. It is the view of all grand Shiite jurists (Mujtahids), as proclaimed in the first Article of their main jurisprudential book called 'Resaaleh Tawdhih-al-Masael,' that "Taqlid (imitation) in principles of religion is not permissible, and a Muslim should be certain about principles of the religion [by his/her own findings]". See for example the view of Ayatollah Fazel Lankarani in English, available at his website : <<http://www.lankarani.org>>

3. Al-Ahram Al-Arabi (Egypt), July 3, 2004, translation in English in Aluma Dankowitz, 'Accusing Muslim Intellectuals of Apostasy', in *Inquiry and Analysis Series* - No. 208 February 18, 2005 available at: <[http://memri.org/bin/articles.cgi? Page=archives&Area=ia&ID=IA20805#\\_edn3](http://memri.org/bin/articles.cgi? Page=archives&Area=ia&ID=IA20805#_edn3)>

As with the most prominent Shiite jurists, with a few exceptions the majority repeat identically the rules of MLTA on converts.<sup>1</sup> Yet, according to Ayatollah Makarem Shirazi, if a murtad (apostate) does not declare his/her unbelief he will not be punished.<sup>2</sup> Ayatollah Jannaati also does not give his opinion on apostate on grounds that the issue requires scrutiny.<sup>3</sup> Ayatollah Montazeri refers to those who in the past had converted from Islam and reiterates that the penalty for such murtads used to be applied to those who were Muslim and “then on ground of hostility and with the intent to damage Islam” became unbelievers. Ayatollah Montazeri does not state whether, if such a hostile conversion happens in current times, the punishment should be applied or not. Yet, according to him, “merely doubting or changing one’s belief, if it happens after research, does not result in the death penalty”. He reiterates that for accusing somebody of irtidad, obtaining assurance (ihraz) is obligatory for the judge. In this sense he refers to a main principle of Islamic jurisprudence (fiqh), which holds: “Don’t enforce punishment (hudood) in case of doubt.”<sup>4</sup>

Considering the issue of proselytising it should be noted that different religions have different views on the practice of proselytism. While for Christians proselytizing is an ‘essential mission’ of the religion and linked to conversion,<sup>5</sup> for Muslims this issue is different. Though inviting non-believers to Islam is generally persuaded in accordance with Muslim religious teaching, unlike Christians, proselytizing for Muslims is not considered as one of the religious duties or practices. While conversion

1. For Ayatollah Fazel Lankarani see pages 438, Questions 1152-1154 at his website in Persian at: <<http://www.lankarani.com/Persian/ahkam/jm2/j20.html#432>>. For Ayatollah Musavi Ardabili see his website in Persian at: <<http://www.ardebili.org/Per/FAQ/NewFAQ/>>. For Ayatollah Sistani see his website in Persian at: <<http://www.sistani.org/html/far/main/index-istifta.php?page=4&lang=far&part=4>>.

2. For the views of Ayatollah Makarem Shirazi see his website in Persian at: <<http://www.makaremshirazi.org/persian/modules.php?name=es&p=2&id=119>>. Also for his views about some heretic group see: <<http://www.makaremshirazi.org/persian/modules.php?name=es&p=2&id=122>>.

3. See: Jannaati, 1995: 438-439.

4. For the views of Ayatollah Hoseinali Montazeri, see questions 885- 891 and 2506- 2509 in his website in Persian at: <<http://www.amontazeri.com>>. For his views also see a report at BBC website in Persian: <[http://www.bbc.co.uk/persian/iran/story/2005/02/050202\\_mj-montzari-renegade.shtml](http://www.bbc.co.uk/persian/iran/story/2005/02/050202_mj-montzari-renegade.shtml)>.

5. See: *Kokkinakis v. Greece* Case, 260-A Eur. Ct. H.R. (ser.A) (1993). In this case court referred to a report by the World Council of Churches to determine that proselytism was part of the ‘essential mission’ of all Christians and that improper proselytism was a corruption of the mission of Christians. Consequently, the majority of the Court held that the attempt to convert non-believers was an essential part of the religious obligations of many Christians.

from Islam was considered an offence according to MLT, in the same sense Muslims did not tolerate proselytizing by other fellow religions targeting Muslims. It was also one of the dhimmah conditions that non-Muslims were not allowed to propagate their religions among Muslims.<sup>1</sup>

## 2.2. Blasphemy or Sabb

'Sabb' means 'insulting', and in MLTA, the offence of insulting God and the Prophet are called 'sabb-Allah' and 'sabb-al Rasul' ('sabb- al Nabi') respectively. According to Saeed, "In the discussion on apostasy there is a special category in which the jurists explore the use of foul language primarily with regard to the Prophet. This is known as sabb-al-Rasul. Later on this was considered to include the use of foul language with regard to Allah (sabb-Allah)." (Saeed & Saeed, 2004: 37-38)

Despite the explicit statement of the Bible that "blaspheming the Holy Spirit is unforgivable", (Luke 12:10) "neither the Koran nor the Prophet stated clearly the existence of an offence called blasphemy or a specific temporal punishment for it." (Saeed & Saeed, 2004: 38) According to the Quran a good Muslim is one who does not care about others behaving badly, "And they who do not bear witness to what is false, and when they pass by what is vain, they pass by nobly." (Quran, 25:72) The Koran also explicitly prohibits Muslims insulting non-believers and their sanctities: "Don't insult those who call on other than God (non believers), for then they may insult [your] God openly in their ignorance." (Quran, 6:108)

However, from the early Muslim times during the wars of the Prophet, few cases of punishment of militant enemies for sabb have been reported, the most famous one of which was the case of Ka'b ben al-Ashraf, who in his composed *poetry* denigrated the Prophet and his followers. In the time of war all adult enemy men were considered combatants, and Ka'b was attacked and killed by some solders from the Muslim camp.<sup>2</sup>

While in few early cases of sabb the punishment was merely carried out against enemy combatants, in later codifications of MLTA, the offence along with its instant punishment was extended to Muslim offenders as well. In this regard, while in cases of conversion an authorized judge decided on the offence and its punishment, for sabb any individual Muslim was capable of realizing the offence and also allowed,

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1. See: Kadivar, 2001: Note 7.

2. See: Torbatinejad, 2003: 262-265.

or according to some jurists even religiously obliged,<sup>1</sup> to an instant implementation of the punishment, the killing of the offender.

According to Sunni jurists, along with God and the Prophet, the list of the sanctities that are subject to death punishment might extend to angels and the Prophet's companions (sahabis). According to the majority of contemporary major Shiite jurists, the death punishment is applied to insulters of the prophet and the 12 Shiite Imams. Some other Shiite jurists have added to the list Fatemeh (the daughter of the Prophet), and all other prophets as well.<sup>2</sup>

Finally it should be noted that according to the Muslim jurists, insult is a matter of relativism. Therefore, customs (urf) of each society is the criterion for recognizing the offence. Baghi states: "even the custom among scholars is different from those of ordinary people in the same society."<sup>3</sup> This means that while the expression of an opinion by a scholar in public might be considered sabb, the same expression in an academic atmosphere may not be, and may even be encouraged.

### 2.3. Heresy

Historically, blasphemy laws have been used for punishment of heretics or those whose beliefs were considered a threat to the dominant religion. Thus, Jesus was convicted under the Jewish blasphemy laws. Matthew's account of this trial reports that after Jesus had confessed his claim to divinity before the Jewish Sanhedrin, the High Priest Caiphas, was so outraged that he tore his clothes and said "He has blasphemed! There, you have just heard the blasphemy, what is your opinion? To which the other members of the council replied 'He deserves to die.'"<sup>4</sup>

According to Muslim jurists a heretic or 'zandiq' is, "an unbeliever who hides his unbelief and pretends to be Muslim." (Ayatollah Jannaati, 1995, note 21: 438-439.) Yet, to survey the practical aspects of the matter, this study has reserved a specific concept of heresy. While the first definition of irtidad, or conversion, refers to a Muslim who has formally renounced Islam, according to the definition of heresy a Muslim is accused of unbelief on grounds of his opinion being different from that of

1. See: Ayatollah Montazeri, note 22, Available At: <<http://www.amontazeri.com>>.

2. See: Mirmohammadsadeghi, 1383: 166.

3. E. Baghi, 'Where is the Crisis?', 13 February 2006, in Persian, available at : <[http://www.emrouz.info/archives/2006/02/00247\\_24.php](http://www.emrouz.info/archives/2006/02/00247_24.php)>

4. Mt.26:64-66, quoted in N. Cox, *Blasphemy and the Law in Ireland*, (The Edwin Mellen Press, LTD, 2000), p.3.



the majority or orthodoxy. As Arzt states: "While the terms 'apostasy' and 'heresy' are often used interchangeably in popular discussions of Islam, the former applies to Muslims who have rejected Islamic belief, while the latter is used to refer to Muslim believers who advocate internal reform or a heterodox interpretation of Islam." (Arzt, 1996)

The concept of heresy chosen for this study is also a familiar one in Western literature. According to the Oxford English Dictionary, heresy is a "theological or religious opinion or doctrine maintained in opposition, or held to be contrary, to the 'catholic' or orthodox doctrine of the Christian Church, or, by extension, to that of any church, creed, or religious system, considered as orthodox."<sup>1</sup>

The deeds of the prophet and his successors showed great tolerance with all their religious and political dissidents who believed in a different version of the religion. Ali's deed showed that Khavarij, as his main political and religious opponents, were free to express their views and argue about their beliefs in public, as long as they did not take up their sword against the Caliph. While Muslims have a brilliant history of scientific dialogue among different religious opinions and even between Muslims and atheists, nevertheless, in the history of Muslims, cases of charging people with heresy have not been rare, particularly where the rulers used heresy as a pretext for oppressing their opponents. Saeed points out that, "State involvement in theological matters began during the Umayyad period. Some rulers took a particularly harsh stand against thinkers with a Qadari orientation." (Saeed, 2004: 28)<sup>2</sup>

1. <<http://www.reference.com/browse/wiki/Heresy>>

2. The author refers to Ma'bad al-Juhani who was executed for his views on free will by order of the Umayyad Caliph Abdal-Malik Marwan (d.86/705) and Ghaylan b. Muslim al-Dimashqi who was put to death for the same reason by Caliph Hisham b. Abd al-Malik. Saeed has also provided information about a list of very famous Muslim scholars, respected and recognized today as major contributors to Islamic civilizations, who were accused in their times for heresy, some of whom were prosecuted and even executed. Among these scholars are: Abu Hanifa, the imam of Hanafi school of law, Ahmad b. Hanbal, the imam of Hanbali school of law, Muhammad b. Isma'il al-Bukhari, Al-Hussayn b. Mansur al-Hallaj, Abu Hamid Muhamamd al-Ghazali, Avicenna ( Ibn Sina), Ibn Hazm, Farabi, Ibn Rushd, Sarakhsi. See: Saeed, 2004: 30-31. Kadivar also has provided another list of some prominent Muslim scholars whether sophist or philosopher who have been charged for their views. The list includes Avicenna, Sohrevardi, Sad ol'Moteahelin, Mohiedin ebn Arabi and Sheikh Haadi Najm Aabaadi (Known as Mokafer) See: Kadivar, 2001, note 7. On heresy in Muslim history also see Johannes J G Jansen, 'Muslim Victims of Jihad', Utrecht University, The Netherlands, 2005 available at: <<http://www.iheu.org/node/1545>> .

For Muslims jurists, the concept of heresy emerged from the concept of conversion. According to all Muslim jurists, denying one of the main principles of Islam is cause to conversion. Muslim jurists have reached consensus on at least on two of these principles, believing in one God, and the prophet-hood of Muhammad. However, according to some jurists, denying, and even doubting the essential requirements of the religion (dharuriyat-e din) are also cause to conversion. According to this view a Muslim is not free to deny the affairs that are indispensable to religion. The list of these affairs, however, varies according to different jurists and might be considered as narrow as opposing one rule of MLT.<sup>1</sup>

Heresy is defined by Thomas Aquinas as “a species of infidelity in men who, having professed the faith of Christ, corrupt its dogmas.”<sup>2</sup> The concept of dogma, as exists in Catholicism, is not familiar to Muslims, and no official institution or authorized person has been introduced in the Koran or by the Prophet as the final interpreter of the text or the authority for the identification of heretic beliefs. While this phenomenon can help in exploring the new scientific era, where the issue of heresy is concerned, it might happen that even a mufti or mujtahid, or even an ordinary person who doesn't have the authority from the ruler, considers himself to have this right to declare a fatwa<sup>3</sup> with which to label an individual, an opinion or a sect as heretic. This act of declaring other Muslims heretic or unbelievers is called 'takfir'. Though a fatwa by itself lacks the power of enforcement, it might be enforced against an accused heretic arbitrarily by the followers of the mufti as a religious duty.

The broad definition of heresy has sometimes been the cause of the situation where a whole Muslim sect or a religious group has become the subject of takfir, or has been called heretic by another sect. This labeling of another religious group as heretic has resonances among Christians as well: “Heresy' has no purely objective meaning: the category exists only from the point-of-view of a position within a sect that has been previously defined as 'orthodox'. Heresy is a value-judgment and the expression of a view from within an established belief system. For instance, Roman

1. For different opinions of Sunni jurists on these instances. See: Saeed, 2004: 43-48.

2. Available at: <http://www.reference.com/browse/wiki/Heresy>.

3. Fatwa is a ruling issued by qualified Muslim jurist.

Catholics held Protestantism as a heresy while some non-Catholics considered Catholicism the 'Great Apostasy.'<sup>1</sup>

Of the contemporary major Shiite jurists, Ayatollah Montazeri has tried to clarify the ambiguities of the issue. According to him: "If for a Muslim any of the commandments of the religion have not been proven as necessities of the religion and therefore he/she denies such commandments on the grounds of his/her doubt (for example if he/she finds that prayer was obligatory exclusively for the early Muslims, or if he/she does not believe in the obligation of hijab hair dress for women), he/she is not to be considered a murtad, and therefore the rules of murtad [family law consequences of irtidad] will not be applied on him/her."<sup>2</sup>

Ayatollah Sistani apparently has a similar view. In response to a question on the consequences for a person who denies the necessity of the Morning Prayer, Ayatollah Sistani states: "such denying is denying the necessities of religion". Yet, he further reiterates that "denying the necessities of religion, [only] if it results in the denying of God and the Prophet, such act is to be considered irtidad."<sup>3</sup> That means if the denying of Morning Prayer, though a necessity of religion, does not result in denying of God and the Prophet, the person is not considered a murtad.

#### 2.4. Punishment of Apostasy

In the Koran there is not any verse prescribing punishment for conversion.<sup>4</sup> Yet, according to MLTA, in the case of conversion, the death penalty for males and life imprisonment for females is imposed under certain conditions. For blasphemy the death penalty might also be extended to females as well. Prescriptions of rules for such punishment by Muslim jurists were apparently based on the rules of precedent religions or customs of the time. For example, for punishment of blasphemy, the Bible states: "He who blasphemeth the name of the Lord shall be put to death. The entire assembly must stone him, whether an alien or a native born, when he blasphemeth the Name, he must be put to death." (Leviticus, 24:16) There is also another biblical basis for such a punishment that states:

If your brother, the son of your mother, or your son, or your daughter, or the wife of your bosom, or your friend who is as your own soul, entices

1. Available at: <http://www.reference.com/browse/wiki/Heresy>.

2. See: Ayatollah Montazeri, note 22. Available at: <http://www.amontazeri.com>.

3. See: the website of Ayatollah Sistani in Persian, note 19.

4. See: for example the Koran, 2: 256, 3:72, 3:90, 4:48, 4:137 and 5:54.

you secretly saying, 'Let us go and serve other gods', which neither you nor your father have known, some of the gods of the people that are round about you, whether near you, or far off from you, from the one end of the earth to the other, you shall not yield to him or listen to him, nor shall your eye pity him, nor shall you spare him, nor shall you conceal him; but you shall kill him; your hand shall be first against him to put him to death, and afterwards the hands of all people. (Saeed, 2004: 35)<sup>1</sup>

According to the majority of Sunni jurists though the punishment for a male apostate is death, a period of at least 3 days must be given the apostate to repent.<sup>2</sup> Upon repenting, no punishment is applied on the apostate.<sup>3</sup> Shiite jurists, however, divide converts into two groups: Those who were born Muslim and then became converts or murtads (murtad fitri) and those who were born non-Muslims and converted to Islam, then after their conversion renounced Islam (murtad milli). According to the majority of Shiite jurists a male murtad fitri has no right to repent, though, a murtad milli has such a right. Both Sunni and Shiite jurists prescribe lifelong imprisonment for a female murtad. During the imprisonment any time a female murtad repents, her repent would be accepted and she will be released upon repenting.<sup>4</sup>

While the punishment of heresy apparently is similar to punishment for conversion, the punishment of sabb is different. There are also different views on the possibility of affording the opportunity to repent to blasphemers. Sabb, according to some jurists is an offence that leads to irtidad (apostasy), thus the offence is liable to death. Based on this argument the same opportunity to repent as described above is considered for the offender. For some other jurists, sabb is a separate offence liable to death. Therefore, whether sabb is carried out by a male or apparently even a female Muslim, or non-Muslim, the offender is liable to death. That seems the reason why, according to some jurists, repenting is not accepted for sabb.<sup>5</sup>

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1. Deuteronomy, 13:6-9, Revised Standard Version. Saeed says that in the medieval period this verse was the Biblical basis for punishment of apostasy and heresy that was often death.

2. The al-Azhar Creed and Philosophy Committee affiliated to al-Azhar Islamic Research Institute recently recommended a change in the application of the apostasy law by giving the accused apostate a whole lifetime to renounce his apostasy instead of the three-day period laid down in ML. See 'The Application of the Apostasy Law in the World Today', Barnabas Fund, May 2003, available at: [http://www.barnabasfund.org/Apostasy/\\_edn2#\\_edn2](http://www.barnabasfund.org/Apostasy/_edn2#_edn2).

3. On Sunni views on punishment of apostasy See: Saeed, 2004: 51-68.

4. See: Kadivar, 2004.

5. On this issue See: also Saeed, 2004: 37-39.

Another difference between punishment of sabb and conversion is the possibility and even the necessity of instant punishment of the offender by any one who realizes the offence or any other who comes to know about it. As mentioned before it seems that such an instant punishment of a blasphemer was for a situation of war and against the enemies. Yet, according to the majority of Shiite jurists, in cases of sabb, instant punishment (killing) of the offender, either Muslim or non-Muslim, is not only permissible, but also a religious obligation for any Muslim. In this sense, as soon as the offence takes place, the offender must be killed immediately by any one who does not fear for his own life to be endangered.<sup>1</sup>

A concept of Penal MLT that is linked to the punishment of a *murtad* is that of 'mahduroddam' or outlaw. Outlaw means one whose life and safety is not protected by the law, for example an attacker. Even, if someone is considered mahduroddam by mistake, his/her arbitrary killing is not considered a murder, and therefore liable to *qisas* (retaliation), or blood money, but it is an offence of a lesser degree, liable to *tazir*, where the judge has room for determining the punishment.<sup>2</sup>

## 2.5. Legal Consequences of Apostasy

As mentioned before, according to MLTA, two kinds of legal consequences could be expected for an act of apostasy; those pertaining to family law matters and to civil law matters. Considering application of different religious family laws for Muslims and non-Muslims in MLT, not only conversion from Islam, but conversion to Islam, automatically leads to a change in the personal law of the convert. Yet, as in cases of conflicts of religious laws, where Muslim law prevails, converts from Islam have to

1. There is consensus among all cotemporary Shiite jurists on the instant punishment of a blasphemer. For example in response to a question Ayatollah Montazeri has made a reference to this issue: "In cases of sabb al-Nabi .... if the witness dose not have fear of his/her life and also there is no fear of mischief (*mafsadeh*) it is obligatory for him/her to kill the insulter". See: Ayatollah Montazeri, question 885, Available At: <<http://www.amontazeri.com>>.
2. The more famous cases that happen among Muslims nowadays are cases of honour killing for adultery. There are a number of controversial cases of murder in Iranian jurisprudence, the last of which is so called 'Group Murder' in 2002 in Kerman (Iran). While the brutal murders by a group of vigilantes in this southern city of Iran had shocked the country the killers claimed that the victims were mahuroddam and therefore liable to death. For more information about this case *see* for example <<http://www.iran-daily.com/1384/2318/html/national.htm>>. Also for three other cases of Mahduroddam in Iran. See: Sabri , 2002: 32-37, 67-68 & 94-95 , in Persian.

expect to be deprived of some of their rights, such as custody of children, inheritance from Muslim relatives and dissolution of marriage.

On the other hand, for converts from Islam the change of personal law is not the only legal consequence of apostasy. As a majority of Muslim jurists consider an apostate an outlaw, even if the death penalty is not imposed on him, civil consequences of death (so called civil death), such as confiscation of property by the ruler or its distribution among inhabitants could be imposed on him/her. These consequences are as follows:

- The apostate is not allowed to marry a Muslim or a non-Muslim;
- When a married person becomes an apostate, the marriage is dissolved no matter whether the wife/husband converts with him/her;
- The apostate's right to exercise his/her custody over his children will be waived, no matter if his/her children convert with him/her;
- His/her right of inheritance will be waived;
- The apostate's right to dispose of his property is in abeyance and the legal effects of his acts are suspended.<sup>1</sup>

Regarding the legal consequences of conversion for blasphemy, the viewpoint of Muslim jurists is not clear. Considering what was mentioned on the relevance of sabb and irtidad, it is logical to conclude that according to those jurists for whom blasphemy results in irtidad of a Muslim, the legal consequence of irtidad is imposed on the blasphemer as well; and for those jurists who believe in blasphemy as a different offence, the legal consequences are not necessarily imposed.

### 3. Relevant International Human Rights Norms

#### 3.1. Conversion and Proselytizing

Unlike in MLTA, freedom to change one's religion is explicitly recognized in Article 18 of the UDHR,<sup>2</sup> Article 9(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (the ECHR)<sup>3</sup> and Article 12(1) of the American Convention on

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1. See: Rudolph & De Vries , 'Apostasy in Islam', in: *Die Welt des Islams*, 1976 :7.

2. UDHR.

3. The European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

Human Rights.<sup>1</sup> The related article of the UDHR reads as follows: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”<sup>2</sup>

This right is not explicitly recognized in Article 18 of the ICCPR, the African Charter of Human Rights,<sup>3</sup> and the Declaration on Elimination of All Forms of Intolerance Based on Religion or Belief (the Religion Declaration).<sup>4</sup> However, the Human Rights Committee in its General Comment 22 on Article 18 of the ICCPR observes that: “the freedom to ‘have or to adopt a religion’ or belief necessarily entails the freedom to choose a religion or belief, including the right to ‘replace one’s current religion or belief with another’ or to adopt atheistic views, as well as the right to retain one’s religion or belief.”<sup>5</sup> Furthermore, Article 8 of the Religion Declaration reiterates 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.”<sup>6</sup>

On the other hand, as stated in Article 29(2) of the UDHR, and more clearly in Article 18(3) of the ICCPR, freedom to manifest one’s religion or beliefs may be subject to limitations when they are necessary to protect, among others, public order, moral values, and rights and freedoms of others.<sup>7</sup> Yet, when imposing these limitations, the three principles of non-

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1. The American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

2. the UDHR.

3. The African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986

4. The Declaration on Elimination of All Forms of Intolerance Based on Religion or Belief, G.A. res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684 (1981).

5. Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993). *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994).

6. Religion Declaration.

7. According to article 29(2) of the UDHR: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” Article 18(3) of the ICCPR states that: “Freedom to manifest →

discrimination, proportionality, and legality have to be considered by states. According to General Comment 22: “Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.” (General Comment 22, Paragraph 4)

On imposing the limitations, Article 18 distinguishes freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. According to General Comment 22: “the article does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice. These freedoms are protected unconditionally.” (General Comment 22, Paragraph 4)

Based on this Comment, changing of religion is an unconditional right as far as it does not contain elements of manifestation of religion, such as propagating for the new religion, or against the previous religion. Such manifestations might fall under the limitation clause of not only Article 18(3) of the ICCPR, but also, as will be discussed in chapter 4, Articles 19(3) and 20 of the ICCPR on freedom of expression.

However, freedom to have or change one’s religion is linked to the right to proselytize, a form of manifestation of religion, which itself is conducted mainly through expression. As Stahnke explains: ...proselytism may take different forms, such as religious discussions, preaching, teaching, the publication, distribution or sale of printed and electronic works, broadcasting, solicitation of funds, or provision of humanitarian or social services. All of these actions can be proselytism depending upon the intent with which they are undertaken. Therefore, regulation of any of these activities may intentionally or unintentionally restrict proselytism. (Stahnke, 1999: 262)

Neither proselytism nor propagation for a new religion has been an explicit subject of international instruments of human rights. Yet according to the General Comment 22 “The freedom to manifest religion

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←to one’s religion or beliefs 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.” Also article 9(2) of the European Convention states that: “Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”



or belief in worship, observance, practice and teaching encompasses a broad range of acts,” (General Comment 22, Paragraph 4) which easily can include many elements of proselytizing and propagating for a new religion. The American Convention explicitly states in Article 12(1) that the right to freedom of religion includes the freedom to “disseminate one's religion or beliefs”. Also, despite an explicit prohibition of proselytism in the Constitution of Greece,<sup>1</sup> in the *Kokkinakis v .Greece* case, “the majority of the European Court of Human Rights, without giving a definition on proselytising, held that the attempt to convert non-believers was an essential part of the religious obligations of many Christians. The Court further stated that the freedom to change religion would likely be a dead letter if the freedom to manifest religion did not include “the right to try to convince one’s neighbour.” (*Kokkinakis v .Greece* Case, 260-A Eur. Ct. H.R. (ser.A) (1993))<sup>2</sup>

As mentioned above, similar to other aspects of manifestation of religion and expression, states have had an open hand to impose limitations against this right. Furthermore Article 18(2) of ICCPR on prohibition of coercion provides a further ground for restrictions against proselytizing. This article reads as follows: “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” Similarly Article 1(2) of the Religion Declaration also prohibits coercion, “No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

Similar to the cases of publicizing conversion, proselytizing might also include criticism or attacking the religious beliefs of targeted religions. As will be discussed in the following sections, if such criticism of a religion is

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1. Article 13 (2) of the Constitution of Greece states, “All known religions shall be free and their rites of worship shall be performed unhindered and under the protection of the law. The practice of rites of worship is not allowed to offend public order or the good usages. Proselytism is prohibited.” See: the Constitution of Greece, adopted on: 11 June 1975.
  2. Mr. Kokkinakis was an elderly Jehovah’s Witness, who was convicted of breaching the prohibition against proselytism in Greek law. The court referred to a report by the World Council of Churches to determine that proselytism was part of the ‘essential mission’ of all Christians and that improper proselytism was a corruption of the mission of Christians. Consequently, the majority of the Court held that the attempt to convert non-believers was an essential part of the religious obligations of many Christians .The fact that “this report condemned pressure being put on people in distress to change their religion or the use of violence or brainwashing techniques as a violation of the rights of others.” See: also Evans ‘Religious Freedom in European Human Rights Law, The Search for a Guiding Conception’, in: Janis, 1999: 121-163.

not conducted in a proper way, it might stand against the followers of targeted religions being protected from injury to their religious feelings and maintaining their religious identity. These acts sometimes are restricted under the regulations on offences against religions such as blasphemy laws or laws against injuring religious feelings, which give the state an open hand to limit proselytism, especially in sensitive multi-religious societies.

### **3.2. Offences against Religion, and Religious Hatred Speech**

In connection with the phenomena of sabb and heresy in MLTA, the legitimacy of limitations on freedom of expression will be discussed in this section. Article 19(1) of the ICCPR states that “Everyone shall have the right to hold opinions without interference.” According to the HRC General Comment 10: “This is a right to which the Covenant permits no exception or restriction.” On the other hand, every one is free to express his opinions. According to Article 19(2) of the ICCPR “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

Unlike freedom of opinion, freedom of expression is subject to responsibilities and duties and therefore subject to limitations. According to Article 19(3) of the ICCPR: “The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions.” According to the same article these limitations, however, “shall only be such as are provided for by law and are necessary: (a) For the respect of the rights or reputations of others; (b) For the protection of national security or public order (order public), or of public health or morals.” There is a similar limitation clause for freedom of expression in Article 15(2) of American Convention on Human Rights and Article 10(2) of the European Convention of Human Rights. The limitation clause in the European Convention provides more grounds for limitations than that of 9(2) of ICCPR: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection

of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

It is a common policy among the majority of states to pass legislation on insulting religions and religious feelings. Some Muslim states have incorporated such restricting measures either in their Press Code and/or Penal Code. As an example from a Muslim state, Article 160/3 of the Penal Code of Algeria provides penalties for those who deface, destroy or profane any places of worship whatsoever, and Article 160/4 provides penalties for those who mutilate, destroy or defile “monuments, statues, pictures or other objects that may be used for the purposes of religious worship.” Likewise, Article 77 of the Act of 3 April 1990 on information provides penalties for anyone who, in writing, or by sounds, images, drawings or any other direct or indirect means, offends against Islam and the other celestial religions.<sup>1</sup>

Religion related limitations against freedom of expression in some European states are found in laws against blasphemy or insulting religion.<sup>2</sup> As an example, Austrian law designed to protect injury to religious feelings reads as follows: “Whoever, in circumstances where his behaviour is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates.” (Section 188 of Austrian Penal Code, reprinted in Otto-Preminger, 295 Eur. Ct. H.R. (Ser. A) at 12.)

The following definition of blasphemous libel in the UK was given by the trial judge in the case of *Whitehouse v. Lemon* (The Gay News case.), “Blasphemous libel is committed if there is published any writing concerning God or Christ, the Christian religion, the Bible, or some

1. See the Second State party report of Algeria on Implementation of Covenant on Civil and Political Rights: *Second periodic reports of States parties due in 1995: Algeria. 18/05/98. CCPR.C.101.Add.1, ¶160. For another example see Article 103 of 1990 Yemen Law on the Press and Publications, Law No 25, signed in December 1990.*

2. Such laws still exist in legislation of several Western countries, such as in Austria (Articles 188, 189 of the criminal code), Finland (Section 10 of chapter 17 of the penal code), Germany (Article 166 of the criminal code), Ireland ( art. 40(6.1.i) of the constitution), The Netherlands (Article 147 of the criminal code), Spain (Article 525 of the criminal code. Yet, there has been a tendency in Western countries towards the repeal or reform of blasphemy laws, and these laws are only infrequently enforced where they exist.

sacred subject, using words which are scurrilous, abusive or offensive and which tend to vilify the Christian religion (and therefore have a tendency to lead to a breach of the peace.)<sup>1</sup>

While the Austrian blasphemy law criminalizes insulting against all recognized religions, in the United Kingdom, as well as in some other Western and Muslim countries, the subject of blasphemy law is only insulting the dominant religion. The European Commission has stated that the “main purpose” of the English common law offence of blasphemous libel is “to protect the rights of citizens not to be offended in their religious feelings.” (*Gay News Ltd. v. United Kingdom*, 5 Eur. H.R. Rep. 123, P11 (1983) (Commission report).) However, the *Rushdie* case supports an opposite view. Members of the Muslim community in Britain referred the case of *Rushdie* to court in order to complain about the blasphemies in the Satanic Verses. The complaint was dismissed for the reason that the common law of blasphemy did not protect the Muslim belief.<sup>2</sup> The European Court of Human Rights also refused the case, saying that there was no positive obligation for the UK to protect Muslims from blasphemy.<sup>3</sup>

Similarly blasphemy law in Massachusetts is addressing only Christianity. Section 36 of Chapter 272 of the Massachusetts General Laws reads as follows:

Whoever wilfully blasphemes the holy name of God by denying, cursing or contumeliously reproaching God, his creation, government or final judging of the world, or by cursing or contumeliously reproaching Jesus Christ or the Holy Ghost, or by cursing or contumeliously reproaching or exposing to contempt and ridicule, the holy word of God contained in the holy scriptures shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars, and may also be bound to good behaviour.<sup>4</sup>

1. *R. v. Lemon, R. v. Gay News Ltd.* Central Criminal Court, 11 July 1977 (transcript, p.9), Quoted in Great Britain, Law Commission, *Offences against Religion and Public worship* (London : H.M.S.O., 1981), pp.2-3.
2. *R. v. Chief Metropolitan Stipendary Magistrate, ex parte Choudhury*, 1 All E.R. 306 (Q.B. 1991). In that case, a British Muslim had sought to bring summonses against Salman Rushdie and his publisher for The Satanic Verses.
3. The European Commission determined that the protection provided by English blasphemy law only to the Church of England, and in some respects to Christianity as a whole, was not discrimination on the basis of religion in violation of Art. 14 of the European Convention. See *Choudhury v. U. Kapplition* No.17439/1990 reprinted in 12 Hum. R. L. J. 172-73 (1991).
4. <<http://www.reference.com/browse/wiki/Blasphemy>>

Article 20 of the ICCPR introduces a new area for limitations against freedom of expression. It also obliges states to adopt legislative measures against such expressions. The article reads as follows: “1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

In the European Convention of Human Rights, there is no article similar to Article 20 of the ICCPR, but Article 13(5) of American Convention on Human Rights is equivalent to it. Article 13(5) of the American Convention reads as follows: “Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, colour, religion, language, or national origin shall be considered as offences punishable by law.” However, “while Article 13(5) requires the prohibition of advocacy that constitutes incitement to violence, Article 20 of the ICCPR requires the much broader prohibition of advocacy that constitutes incitement to discrimination, hostility or violence.”<sup>1</sup> Nevertheless the American Convention offers protection to a broader range of groups than Article 20, as indicated in Article 13(5), which states: “the enumerated grounds for protection are illustrative only.”<sup>2</sup>

Finally it should be noted that despite the earlier drafts of the Religion Declaration, it contains no similar article to that of Article 20(2) of the ICCPR on religious hatred, as Boyle states:

Although the 1981 [Religion] Declaration couples intolerance with discrimination in its title, it is primarily concerned with the question of discrimination. Thus it has no clause equivalent to Article 4 of the CERD Convention [Convention on the Elimination of All Forms of Racial Discrimination]<sup>3</sup> on incitement to religious discrimination or hatred,

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1. See: Oyediran, ‘Article 13(5) of the American Convention on Human Rights’, in: Coliver (ed.), 1992: 33.

2. See: Oyediran, ‘Article 13(5) of the American Convention on Human Rights’, in: Coliver (ed.), 1992: 33.

3. The Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969. Article 4 of the Convention reads as follows: “States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in→

although in other respects it follows the structure of that treaty. The draft Convention and early drafts prepared by the Sub-commission of what became the 1981 Declaration did have an anti- incitement clause.<sup>1</sup>

The main purpose of Article 20(1) is protection of peace world wide. Article 20(2) has another major purpose equivalent to Article 4 of the CERD, which is protection of vulnerable 'others' to live free from fear. In this sense, it is similar to the purposes of provisions of other international and regional instruments on protection of vulnerable peoples, for which affirmative measures have to be undertaken. These purposes are different from 'rights of others' or 'public order' under Article 19(3) of the ICCPR, or other limitation clauses in international and regional instruments.

However, according to Boyle, "while this obligation [in the Article 20] should constitute an adequate international guarantee, comments made by [the Human Rights] Committee members suggest that many countries do not appear to take their obligations under Article 20 seriously."<sup>2</sup> In other words, those states which have not resorted to affirmative measures against religious hatred will continue to be in breach of their international obligations under Article 20(2).

Finally, there are many more circumstances under Articles 19(3) and Article 20 of the ICCPR in which freedom of expression can be circumscribed than there are under the limitations against freedom of religion under Article 18(3) of the ICCPR. However, when freedom of religion overlaps with freedom of expression, those restrictions against

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← any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."

1. K. Boyle, 'Religious Intolerance and the Incitement of Hatred', In: Coliver, 1992: 64. For further information on the issue of religious hatred speech on Draft Convention and Draft Declaration See: K. Boyle, 'Religious Intolerance and the Incitement of Hatred', In: Coliver, 1992: 64-65.

2. See: K. Boyle, 'Religious Intolerance and the Incitement of Hatred', in: Coliver, 1992: 65.

the latter might encroach upon the former. In this sense, the provision of Article 20 is reiterated in the HRC general comment 22 on freedom of religion: “In accordance with Article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”

#### **- Criticizing a Religion**

Criticizing a religion or part of its elements should be respected in a democratic society. Yet, such criticism, if it is not conducted in a proper way, might face some limitations under Article 19(3). Furthermore, if such criticism includes elements of hate speech or violence, such expression should be prohibited under Article 20 of the ICCPR.

An important relevant issue that will be discussed in chapter 5 in more detail under the subject of heresy is that blasphemy law might be used as a pretext to limit criticism against religion or restrict other religious opinions different from the orthodox version of the religion. As Krishnaswami states: Unfortunately, in some cases the laws against blasphemy have been framed in such a manner that they characterize any pronouncement not in conformity with the predominant faith as blasphemous. [They] have sometimes been used to limit unduly - or even to prohibit altogether - the dissemination of beliefs other than those of the predominant religion or philosophy.<sup>1</sup>

In fact the distinction between a legal and illegal expression against a religion is not the substantive question, but rather the manner in which the expression is presented. According to the English court in the *Wingrove v. United Kingdom* case, which was confirmed by the European Court,<sup>2</sup> the distinction between an illegal blasphemy act and legal criticism against a religion is the manner the criticism is presented and not the substances of a criticism. The court held: “It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines

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1. A. Krishnaswami, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of Discrimination in the matter of Religious Rights and Practices* (United Nations publication, Sales No.60.XIV.2, New York, 1960) (Krishnaswami Study), p.35.

2. 24 Eur. H.R. Rep. 1 (1996).

are advocated and not to the substance of the doctrines themselves.” (24 Eur. H.R. Rep. 1 (1996).)<sup>1</sup>

In another case, in which the Austrian law was applied to seize a film entitled ‘*Das Liebeskonzil*’ (Council in Heaven),<sup>2</sup> the court stated that followers of a religion cannot be exempted from general criticism of others: “Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial of their religious beliefs by others and even the propagation of doctrines hostile to their faith.”<sup>3</sup>

Similarly, the view point of the United States Supreme Court in *United States v. Ballard* represents a valuable insight, that contents of a religion or an individual’s beliefs cannot be considered as a ground for referring them to trial:<sup>4</sup> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the

1. At 14 (emphasis added) (quoting art. 214 of Stephen’s Digest of the Criminal Law (9th ed. 1950).

2. See: Otto-Preminger, 295 Eur. Ct. H.R. (Ser. A) at 8-9. According to the report of the case, the film was based on a play written by Oskar Panizza that was published in 1894. Panizza was later imprisoned by a German court for “crimes against religion,” and the play was banned in Germany. *Ibid*, at 11.

3. *Ibid*, at 28.

4. 322 U.S. 78 (1944). at 79. In that case, the leaders of a religious movement called ‘I Am’ were charged with selling literature and soliciting funds and memberships “by means of false and fraudulent representations, pretences and promises.” The Supreme Court was faced with the issue of whether the trial court was correct to withhold from the jury any question as to the truth of the asserted religious beliefs and limit the jury question to whether the movement’s leaders “honestly and in good faith believed” those beliefs. The Court upheld the trial court’s decision on the grounds that the First Amendment precludes courts from deciding the truth or falsity of religious doctrines and beliefs.



constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible tolerance of conflicting views. The religious views espoused by [the movement's leaders] might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the tiers of fact undertake that task, they enter a forbidden domain.<sup>1</sup>

In *Das Liebeskonzil*, the court points out how criticism of a religion might interfere with an adherent's right to freedom of religion: "Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them."<sup>2</sup>

The court further states that the duties and responsibilities of those who are expressing their opinions on religious matters, are to avoid expressions that are gratuitously offensive to others and therefore do not contribute to any form of public debate: "Whoever exercises the rights and freedoms enshrined in the first paragraph of that article undertakes 'duties and responsibilities'. Amongst them - in the context of religious opinions and beliefs - may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs." (Otto-Preminger, 295 Eur. Ct. H.R. (ser. A) at 19)

#### 4. Conclusion

##### - Intra-religious Rights and Tolerance

On the issue of freedom of religion and religious intolerance, the focus of international human rights law is on inter-religious issues rather than intra-religious ones. While inter-religious rights address freedom to followers of a religion in connection with other religions, the intra-religious rights are a matter of freedom of individuals and smaller religious groups within the same larger religious community. Intra-religious rights appear in

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1. *Ibid*, at 86-87.

2. *Ibid*, at 28.

three different categories. First is the freedom to criticise a religion as a whole or in part, especially the orthodox version of a religion. Second is the right to practice the religion in a different way than the majority or to be excluded from part of religious practices including its legal traditions, such as the family law. Third is the right of those who wish to exclude themselves from the domain of their religion or their religious community as a whole or in other words renounce their religion.

Among the three intra-religious issues, only the third category, the right to change/renounce the religion, has been brought into special focus of related international instruments, and the two other categories have been insufficiently treated. For these two categories a distinction should be made between intra-religious intolerance and intra-religious freedoms. While the issue of intra-religious intolerance has become a subject of special attention after the rise of militant extremism in Muslim countries during the last decade,<sup>1</sup> the intra-religious rights are still neglected. In this sense, while the right to criticise a religion is partly considered under Article 19 of the ICCPR on freedom of expression, the right to be excluded from part of religious practices or perform it in a different way from the majority has been omitted from the discourse. This needs to be rectified since as noted by Eltayeb, “What is particularly necessary is to secure and guarantee the right of dissent within a religious community.”<sup>2</sup>

#### **- Conversion and Proselytizing**

In this paper the three different phenomena of MLTA, conversion, blasphemy and heresy, along with the relevant human right standards, were discussed in detail. Firstly, with regard to conversion it should be noted that despite what was mentioned on the logic of considering conversion as an offence in earlier Muslim history, in later criminalizing the conversion, the factor of ‘intent’ has been neglected by the majority of Muslim jurists. Accordingly, whether the conversion has taken place as a search for truth or as hostile to the community, it was considered a crime, liable to punishment. Not only conversion from Islam was considered an

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1. See: for example Mr. Abdelfattah Amor: Special Rapporteur on freedom of religion or belief, *Report submitted pursuant to Commission on Human Rights resolution 2002/40, Addendum, Visit to Algeria (16-26 September 2002)*, E/CN.4/2003/66/Add.1, (9 January 003).

2. Eltayeb, ‘A Human Rights Framework for Defining and Understanding Intra-Religious Persecutions in Muslim Countries’, in: Ghanea (ed.), 2003: 85.

offence, it was also of the dhimmah conditions that non-Muslims were not allowed to propagate their religions among Muslims.

Under Article 18 of both the UDHR and the ICCPR, changing one's religion when it does not contain elements of manifestation of religion is an unconditional right and subject to no restrictions. Yet, if conversion contains elements of manifestation of religion, such as propagating for the new religion or against the previous religion, such manifestations might fall under the limitation clause of not only Article 18(3) of the ICCPR on freedom of religion but also Articles 19(3) and 20 ICCPR on freedom of expression. Similarly, proselytizing as a kind of manifestation of religion, which is conducted mainly through expression, might fall under the same limitations on freedom of religion and expression.

States can resort to legitimate restrictions against manifestations of religion, among which restrictions against some special kinds of proselytizing in sensitive multi-religious communities seems logical. In these societies, the activities of foreign missionaries in particular may remain under control. However, as reiterated in the HRC General Comment 22, when imposing any limitation on human rights, the three principles of non-discrimination, proportionality and legality have to be considered by states.

While in the Koran there is no verse prescribing punishment for conversion, according to MLTA, the death penalty for males and life imprisonment for females converts are imposed under certain conditions. Considering the modern standard of human rights, even if the conversion is conducted as a hostile act towards the community, prescribing the death penalty for such an offence is not justifiable.<sup>1</sup>

Also, whether the death penalty is imposed on an apostate or not, the act of apostasy automatically leads to some civil and family law consequences, such as dissolving the marriage of the apostate, depriving him/her of the custody of his/her children and confiscation of his/her property. Imposing the legal consequences of apostasy is a violation of the fundamental rights of the apostate, such as the right to property, right to inherit, right to family and right to custody of children.

Furthermore, as changing a religion in theory causes a change in the applicable religious personal law, in cases of conflict of religious laws

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1. According to Article 6.2 of the ICCPR : "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes."

between the new religious law and the Muslim law, the latter prevails, which can be discriminatory against the convert. In practice, such discrimination varies in different Muslim countries, depending on the modification of the related provisions of the civil code. Yet the best solution for avoiding the discriminatory aspects of conflicts of religious laws is by adopting an optional civil code that can be applied in cases of conflicts of laws.<sup>1</sup>

As mentioned above, given the religious sensitivities among the majority of Muslim communities, for some Muslim states it is difficult to explicitly recognize the right to change religion in their formal position, though at least in practice they should lift the restrictions in fulfilment of this right. In this sense the first priority is to minimize the role of the government and governmental institutions in the process of conversion.

Cases of conversion are very rare hence the right to change religion has not been a priority of the UN related bodies responsible for setting relevant international standards. Furthermore, problematic legislation which is not actually applied in practice is not an issue of great concern for the UN. Still, the cases of unwritten family law consequences of conversion deserve more attention.

#### **- Sabb and Blasphemy**

Insulting religious sanctities is one of the major sources of violence in sensitive multi-religious communities. While the religious sensibilities of the dominant religion are an issue of public order and of more concern for the governments, similar provisions for insulting the religious feelings of followers of minority religions and beliefs is also required. For Muslims, insulting other religions and beliefs has been explicitly prohibited in the Koran.

The distinction between an illegal blasphemy act and a legal criticism of a religion is the manner in which the criticism is presented, and not the substance of the criticism. Criticizing a religion or part of its elements should be respected in a democratic society. Yet such criticism, if it is not conducted in a proper way, might face some limitations under Article 19(3) of the ICCPR. Furthermore if such criticism includes elements of

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1. According to Mr. Zakhia, a member of Human Rights Committee, "Several third world countries which had been in a [similar] situation had opted for that solution." *see* Summary record of the 1684th meeting: Algeria. CCPR/C/SR.1684, ¶ 5. (4 December 1998).

hate speech or violence, such expression should be prohibited, as according to Article 20 of the ICCPR, states are obliged to adopt legislation against advocacy of religious hatred that might be conducted against individuals or a religious group as a whole.

Sabb means insulting, and in MLTA the offence of insulting God and the Prophet are called sabb-Allah and sabb-al Rasul (sabb- al Nabi) respectively. On the other hand, according to Muslim jurists, insult is a matter of relativism and the customs (urf) of each society are the criterion for recognizing the offence. Therefore as the act of insult might be comprehended differently in different times and places and in accordance with different views, the necessity for a jury to realize the offence of blasphemy or sabb is evident. A case of sabb, according to MLTA, can be recognized by an ordinary, reasonable person and not necessarily by a mufti or mujtahid. Therefore, in the cases of sabb, the jury should not, as suggested by an Iranian lawyer, consist of religious jurists,<sup>1</sup> but as prescribed in Article 34 of Iranian Press Code, consist of representatives of ordinary people.<sup>2</sup>

Among the three phenomena of apostasy, only prohibition and punishment of sabb can be justifiable under modern human rights standards. However, imposing the death penalty and legal consequence of apostasy for the offender of sabb, as discussed above, is in conflict with international human rights law.

#### **- Heresy and Takfir**

Finally, the ambiguous concept of heresy in MLTA is a matter of investigating beliefs and opinions. This concept is also linked to the concept of conversion and the same punishment is applied for both. Yet, while a convert formally renounces Islam, a heretic is a Muslim who is accused of unbelief on grounds of his opinion being different from that of

1. The well-known Iranian lawyer of the majority of these cases, Mr. Seyfzaadeh, has enquired the opinion of Mujtahids in recognizing the offence. Yet, it seems that while according to MLTA insulting can be recognized by ordinary people, obtaining the view points of Mujtahids are therefore was not necessary. See S.M. Seyfzaadeh, 'Rereading the case of Samiei-nezad' in Persian, available at: <<http://roozonline.com/02article/010301.shtml>>. For the trial for Neshat Daily see his views in Persian at <<http://www.sharghnewspaper.com/831220/html/online.htm#s198606>>.

2. Ratified on March 19, 1986 and is in force since January 31, 1987, available at: <[http://www.autopars.com/state/l\\_press.htm](http://www.autopars.com/state/l_press.htm)> or <[http://www.iranembassy.hu/political\\_press.html](http://www.iranembassy.hu/political_press.html)>.

the majority or orthodoxy. Criminalizing heresy is even worse than criminalizing conversion, as the freedom of opinion of the accused would be at stake as well as his/her freedom of conscience.

Freedom to hold an opinion which is guaranteed under Article 19 of the ICCPR is an unconditional right to which the Covenant permits no limitation or restriction. It is no need to say that the duty of the state is to determine the existence of fraud or misrepresentation by an individual or religious group. The state is not in the position of determining the truth or falsity of religious beliefs. The state should recognize offences and not investigate beliefs and opinions.

Among all aspects of the three phenomena of MLTA the major problematic issue which is linked to heresy is takfir, or declaring other Muslim individuals or religious groups as infidel. Takfir has had a destructive impact on freedom of religion, opinion and expression in Muslim societies and arbitrary takfir has been the main source of intra-religious violence within Muslim communities, the best examples of which is mass killings of innocent people in Algeria, Iraq and other Muslim countries by militant extremist groups in last decade.

Takfir, is in fact legitimizes murder against the freedom of opinion. It not only should be prohibited but also should be considered a criminal act subject to punishment. One ground for such legislative measures against practice of takfir is Article 20(2) of the ICCPR, according to which takfir can be considered as a clear example of religious hatred speech.

It is said that only a learned person like a judge or mufti is entitled to declare takfir. Though these kind of comments are useful in limiting the extent of violence raised by arbitrary declarations of takfir, they seem very conservative as well. In fact such views imply that the right to declare takfir is reserved for religious authorities. Surely the initiative for such prohibition of takfir should first address official religious centres such as Al-Azhar in Egypt, since the declaring of takfir by such centres gives justifications for other, unofficial and arbitrary cases. In Malaysia labelling a Muslim an apostate, an infidel and so on, is in itself an offence.<sup>1</sup> Such a regulation has to be included in the legislation of all related Muslim countries.

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1. See: for instance Section 205, Administration of Islamic Religion Affairs (Trengganu) Enactment 1986, See: Saeed, 2004: 128.

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