



**NEAR EAST UNIVERSITY**  
**INSTITUTE OF GRADUATE STUDIES**  
**DEPARTMENT OF INTERNATIONAL LAW**

**EXAMINING THE IMPACT OF SECULARISM AND  
STATE-RELIGION RELATIONS ON HUMAN RIGHTS**

**MSC THESIS**

**Sarkawt Alyaqoobi**  
**20194084**

**Nicosia**

**April, 2022**



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**Sarkawt Alyaqoobi**

**Supervisor**  
**Assist. Prof. Dr. Nabi Berkut**

**Nicosia**

**April, 2022**

## Approval

We certify that we have read the thesis submitted by Sarkawt Alyaqoobi titled **“Examining the impact of secularism and state-religion relations on human rights”** and that in our combined opinion it is fully adequate, in scope and in quality, as a thesis for the degree of Master of International Law.

Examining Committee	Name-Surname	Signature
Head of the Committee:	Prof. Dr.	.....
Committee Member:	Assist. Prof.	.....
Supervisor:	Assist. Prof. Dr. Nabi Berkut	.....

Approved by the Head of the Department

...../...../2022

.....

Prof. Dr.....

Head of Department

Approved by the Institute of Graduate Studies

...../...../2022

Prof. Dr. Kemal Hüsnü Can Başer

Head of the Institute

## **Declaration**

I hereby certify that all data, documents, analyses, and findings in this thesis were gathered and presented in accordance with the academic regulations and ethical principles of the Institute of Graduate Studies at Near East University. I further declare that, as required by these rules and conduct, I have properly attributed and referenced all non-original material and information.

Sarkawt Ayaqoobi

16/ April/ 2022

## **Dedication**

*To my Family and Friends*

## **Acknowledgements**

*I would like to express my appreciation to my advisor Assist. Prof. Dr. Nabi Berkut who has been of tremendous help to me. I would also like to thank my family for their great support and always believing in me.*

Sarkawt Alyaqoobi

## **Abstract**

### **Examining the impact of secularism and state-religion relations on human rights**

**Sarkawt Alyaqoobi**

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The study primarily examines the impact of secularism and state religious relations on human rights. Efforts to determine whether religious freedom should be considered as group rights or individual rights led to the acceptance that religious freedom is an individual right. Additionally, the findings established that religious group rights can supervene the rights of individuals but would not be reducible to an aggregate of individual rights. Nevertheless, the study highlighted that the idea of an Islamic state is a “dangerous illusion” and that “the notion that shari’a principles can be enforced through the coercive power of the state” is a “belief contrary to the nature of shari’a itself and the nature of the state. The study concludes that secularist ideas are needed in Iraq but the problem of practically achieving their implementation is of huge concern because of constitutional arrangements rebuking any legal, social and economic activity undermining Islam. Consequently, secularism can manage to deal with human rights violations in Iraq to a lesser extent though it can be used as a human rights protection strategy. It was suggested that legislators must be flexible enough to consider the social, economic and political benefits of secularism aiding in protecting and enforcing human rights protection measures by aligning proposed secularists, religious freedom and/or human rights laws, and Islamic values by making sure that the shari’a norms are better than earlier solutions, just and rational. Furthermore, the study proposes the need and importance of addressing the three inequalities undermining Islam and human rights in the form of challenges between jurist and non-jurist, men and women, and Muslim and non-Muslims. The implications of such inequalities are undoubted as gross rights like suicide bombings, torture, terrorist activities and other human rights crimes criticised by the UNHR and other international bodies like the ICC are being perpetrated in the name of protecting religious values and norms.

**Keywords:** Freedom of belief, human rights, Islam, religion, religious freedom, secularism,

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## Abbreviations

<b>AP:</b>	Additional Protocol
<b>HRVs:</b>	Human Rights Violations
<b>IACs:</b>	International armed conflicts
<b>Ibid:</b>	ibidem
<b>ICC:</b>	International Criminal Court
<b>ICJ:</b>	International Court of Justice.
<b>ICRC:</b>	International Committee of the Red Cross
<b>ICESCR:</b>	International Covenant on Economic, Social and Cultural Rights
<b>ICTY:</b>	International Criminal Tribunal for the former Yugoslavia
<b>IHL:</b>	International Humanitarian Law
<b>IIACS:</b>	Internationalized Internal Armed Conflicts
<b>ISIL:</b>	Islamic State of Iraq and the Levant
<b>NIACs:</b>	Non-International Armed Conflicts
<b>pp:</b>	Pages
<b>UN:</b>	United Nations
<b>UNSC:</b>	United Nations Security Council
<b>HRC:</b>	Human Rights Committee
<b>Vol:</b>	Volume
<b>ICCPR:</b>	International Covenant on Civil and Political Rights

# CHAPTER I

## Introduction

### Background of the Study

Human rights are vital for strengthening social and economic development, and political stability and hence states and non-state actors have been advocating for the protection of human rights. The Universal Declaration of Human Rights (UDHR) defines human rights as rights we have simply because we exist as human beings and are not granted by any state<sup>1</sup>. These universal rights are inherent to us all, regardless of language, religion, colour, ethnic origin, nationality, sex, or any other status. They range from the most fundamental right to life to those that make life worth living, like liberty, health, work, education, and the right to food<sup>2</sup>. Over the past few years, Iraq has been struggling to deal with extremist groups known as ISIL (the Islamic State of Iraq and the Levant), or ISIS (Islamic State of Iraq and Syria). ISIS is a religious Sunni jihadist group with a particularly violent ideology that calls itself a caliphate and claims religious authority over all Muslims<sup>3</sup>. Gross human rights violations perpetrated in the name of religious freedom include rape, torture, murder, forced child soldiers etc.

Crimes committed by this extremist group and other religious groups all have a common religious background. Such a background is what some studies consider to be a result of what is known as a prominent and inevitable feature formed through state-religion relations<sup>4,5</sup>. This implies that state-religion relations have and are still playing a vital role in influencing the experienced cases of gross human rights violations experienced in Iraq. This brings to the need and importance of dealing with gross human rights violations. It is at this stage that secularism

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<sup>1</sup> The Universal Declaration of Human Rights (UDHR). What are human rights? (n.d), <<https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>> accessed on 18 September, 2021.

<sup>2</sup> Ibid.

<sup>3</sup> The Rand Organisation. The Islamic State (Terrorist Organization), (n.d), <<https://www.rand.org/topics/the-islamic-state-terrorist-organization.html>> accessed on 18 September, 2021.

<sup>4</sup> Breskaya Olga, Giuseppe Giordan and Siniša Zrinščak, 'Social Perception of Religious Freedom: Testing the Impact of Secularism and State-Religion Relation' (2021) 68(3) SC 282, 283.

<sup>5</sup> Durham, W. Cole, 'Patterns of Religion State Relations, Religion and Human Rights (2012), IBTRS 360, 362.

can be introduced as there has been growing academic coverage and concerns about secularism's capacity to deal with political instabilities<sup>6,7</sup>. However, it is important to note that secularisms exist in two distinct dimensions, which are 'assertive' and 'passive' secularism, and this alone broadens secularism's scope and implications on human rights protections. Not to mention alone that there are also diverse patterns of state-religion relations<sup>8</sup>. Thus, this undermines efforts to examine the connection linking secularism and state-religion relations to human rights. Such connections are still yet to be explored, especially in the context of Iraq. Hence, the originality and novelty of this study are evident in such efforts and aspirations.

### **A Background of Religious State Relations, Religious Terrorism and Human Rights Violations in Iraq**

Iraq is a Muslim nation that is composed of various Islamic groups such as Yazid, Sunni Arabs, Shia Arabs, Yarsanism, Shabakism, Mandaicism and Christianity<sup>9</sup>. However, Islam is undoubtedly the most dominant religious group not only in Iraq but also in the Middle East. Consequently, state affairs and other political arrangements are presumed to follow Islamic guidelines<sup>10,11,12</sup>. Thus, state-religion relations observable in the Middle East region, especially Iraq are established on Islamic principles.

The major problem with Iraq's state-Islamic religious relations is that other extremists groups have taken advantage of its religious laws and state relations to perpetrate crime and gross human rights violations. For instance, the Islamic 'Haram belief' that considers western culture as forbidden restricts other Islamic and non-Islamic groups from engaging and

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<sup>6</sup> Diamantides Marinos and Anton Schütz, *'The Transition from Secularism to Post-secularism' Political Theology*. (EUP 2017) 17.

<sup>7</sup> Berlinerblau, Jacques, *'Political Secularism'* New York (OUP 2017) 18.

<sup>8</sup> Johnson Nels, *'Islam and the Politics of Meaning in Palestinian Nationalism'* (RLE Politics of Islam), (Routledge, 2013) 21.

<sup>9</sup> Heper Metin and Raphael Israeli, *'Islam and Politics in the Modern Middle East'* (eds), RLE Politics of Islam (Routledge, 2014) 13.

<sup>10</sup> Gelvin, James L, 'The "politics of notables" forty years after' (2006) 40(1) RMES 19, 20.

<sup>11</sup> Watenpaugh Keith D, 'Middle-class modernity and the persistence of the politics of notables in inter-war Syria' (2003) 35(2) IJMES 257, 259.

<sup>12</sup> Porter Donald, *'Managing politics and Islam in Indonesia'* (Routledge 2004) 2.

associating with anything that is considered haram<sup>13</sup>. As a result, gross human rights violations like torture, murder and rape etc., have been committed in the name of religious freedom. However, the relation between state-religion relations and human rights violations still needs to be explored in the context of Iraq. Additionally, the growing importance of secularism can also play a vital role in addressing these issues but the challenge is that there are limited studies that connect these ideas. More so, these ideas can be integrated to establish a major empirical framework that studies are still yet to explore further. This highlights the significance of this study in analyzing both the connections and effects of state-religion relations and secularism on human rights.

## Study Problems

With rising cases of religious terrorism, both States and non-state actors have been left divided and struggling to try to find the best propositions for dealing with religious-related political instabilities. Such problems are highly evident in countries like Afghanistan, Syria and Iraq with Iraq being considered to have been significantly affected by such problems<sup>14</sup>. Consequently, religious terrorism and related cases of instabilities are regarded as the major forms of political instabilities that crippled the Iraqi state<sup>15</sup>. As it stands, more than sixty thousand people died in 2017, while were displaced and more than hundreds of thousands were displaced from their homes due to the rising cases of religious terrorism<sup>16</sup>. Provided suggestions noted that these problems can be linked to severe religious freedom being accorded to specific religious groups<sup>17</sup>. However, not much has been done to explore such suggestions, especially in the context of Islamic groups in the Middle East. As a result, this undermines efforts to study and understand if there is a connection between secularism and state religious relations and how they affect the protection of human rights notably in Iraq.

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<sup>13</sup> Porter, p. 2.

<sup>14</sup> Ibid, p. 7.

<sup>15</sup> Ibid, p. 8.

<sup>16</sup> Kendra Dupuy and Siri Rustag, 'Trends in Armed Conflict, 1946–2017' <<https://reliefweb.int/sites/reliefweb.int/files/resources/Dupuy%20Rustad-%20Trends%20in%20Armed%20Conflict%20201946%E2%80%932017%20Conflict%20Trends%205-2018.pdf>> accessed 19 September 2021.

<sup>17</sup> Ibid, p. 9, 10, 12.

Studies addressing gross human rights issues propose that effective remedies and human rights protection measures are established on a solid understanding of the association between human rights violations and related causes<sup>18, 19</sup>. Nevertheless, such has not been the case in Iraq as there is little empirical evidence revealing the significance of human rights violations being committed in the name of religious freedom as other studies oppose such a notion citing that the political faced in Iraq are because of Western countries agenda of destabilizing the Middle East region for geo-economical<sup>20</sup> and geopolitical reasons<sup>21</sup>.

Meanwhile, there have been growing concerns advocating the use and importance of secularism citing that it is vital for dealing with religious terrorism<sup>22,23,24</sup>. But concerns can be raised as to whether secularism will be capable of dealing with the unique forms of religious terrorism experienced in the Middle East that have proved to be politically stubborn and a ‘pandemic’ with no concrete ‘cure’ for both affected states, neighbouring states, European and other Western countries. Besides, religious state relations are a common feature in the Middle East and this significantly influences both religious affairs and political activities and stability, and human rights protection in such places. Thus, it is empirically challenging to answer the question of to what extent has secularism managed to deal with human rights violations when countries like Iraq are brought into the picture. Therefore, it remains to be answered as to whether secularism and state religious relations can be used in dealing with human rights violations in Iraq. Such also includes identifying if they are effective in addressing gross human rights violations and whether they need other legal measures to reinforce their effectiveness in protecting Iraqi people’s human rights.

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<sup>18</sup> Akhmedshina Farman, ‘Violence against women: a form of discrimination and human rights violations’ (2020) 1 MESMJ 13, 14.

<sup>19</sup> Ibid.

<sup>20</sup> Liou Ryan Yu-Lin, Amanda Murdie and Dursun Peksen, ‘Revisiting the Causal Links between Economic Sanctions and Human Rights Violations’ (2020) 74(4) PRQ 808.

<sup>21</sup> Bompard Ettore, Carpignano Andrea and Profumo Fedrick, ‘National energy security assessment in a geopolitical perspective’ (2020) 130 Energy 144, 147.

<sup>22</sup> Ibid, p. 809.

<sup>23</sup> Ibid, p. 810.

<sup>24</sup> Ibid, p. 811.

## Research Questions

The study strives to answer the following questions;

- i. Should religious rights or freedom be considered a group right or an individual right?
- ii. What are the Islamic Arguments for a Secular State?
- iii. How feasible is it to enforce or promote secularist ideas in Islamic states like Iraq and are there any possible challenges hindering the promotion of secularism in Iraq?
- iv. Can secularism and state religious relations be used to deal with human rights violations in Iraq?, and if so, then, how effective are they in addressing gross human rights violations and what other legal measures are required to reinforce their effectiveness in protecting the Iraqi people's human rights?

## Significance and Justification of the Study

It is apparent to note that there has been a rise in the number of religious terrorism cases, and this has created significant traces of political instabilities, especially in the Middle East region. Hence, this study is being conducted at a time when states and non-state actors are still facing daunting tasks of dealing with religious terrorism and other religious related cases of political instabilities. More so, secularism is presumed to be one of the key strategies required in dealing with religious terrorism and other religious related cases of political instabilities. However, such studies are limited to developing countries<sup>25</sup> such as Turkey<sup>26</sup> and non-developing countries<sup>27</sup> like those situated in West Africa<sup>28</sup>. As a result, empirical gaps have been highly dominant, especially when the Middle East region is brought into the picture with countries like dominating at the forefront. Besides, the unique and diverse forms of religious groups like Yazid, Sunni Arabs, Shia Arabs, Yarsanism, Shabakism, Mandaism and Christianity<sup>29</sup>. This presents distinctively new and novel legal, human rights and religious areas

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<sup>25</sup> Bompard Ettore, Carpignano Andrea and Profumo Fedrick, p. 145.

<sup>26</sup> Özkara Muhammet, 'Secularism as an Antidote to Religious Terrorism: The Case of Turkey' Doctoral dissertation, (CEU 2017) 17.

<sup>27</sup> Ibid, P. 27.

<sup>28</sup> Philpott Daniel, '*The rise and fall of secularism in international relations*' In Handbook on Religion and International Relations (EEP 2021) 13.

<sup>29</sup> Philpott, p. 29.



calling for further examinations to be made in these respects. As a result, the study contributes toward improving understanding of religious terrorism, religious state relations and human rights in the Middle East or Arab community. Additionally, the ideas provided in this study create a platform for enhancing our understanding of the role of states and non-state actors in dealing with terrorism and protecting human rights. Moreover, the study has a significant bearing on future studies and how they can use proposed study areas and suggestions related to study gaps.

### **Structure of the Study**

The study proposes to use a six-chapter framework composed of the following chapter details or insights;

- **Chapter one:** In this chapter, the study resorts to highlighting the general human rights background worldwide and how it has been highly proliferating in the Middle region. The first chapter creates a platform for highlighting human rights issues linked to religious terrorism and religious state relations, and how secularism can potentially be used as a solution to such problems. However, the same chapter identifies that this is subject to specific conditions like the connection between secularism and state religious relations, the significance of human rights violations being committed in the name of religious freedom, the extent to which secularism deals with human rights violations and if they can be effectively used to deal with human rights violations in Iraq.
- **Chapter two:** The second chapter uses theoretical and empirical ideas to illustrate essential aspects of religious state relations and how they connect to human rights problems faced in Iraq. As such, this chapter builds an acceptable base for incorporating the important aspect of religious terrorism and the extent to which they reflect the Iraq situation.
- **Chapter three:** Is an extension of chapter two but significantly focuses on addressing problems of religious terrorism and how the Iraq situation perfectly fits this scenario and calls for examination to be made to effectively handle such problems.
- **Chapter four:** Forms a major base on which the human rights situation in Iraq is brought into the picture. It is in this study that cases, statistics and other secondary sources of

information are used to highlight the severity of human rights issues posed by religious state relations and terrorism.

- **Chapter five:** Discusses ideas provided in the first four chapters of the study to answer the established research questions. It also helps in filling related empirical gaps and thereby contributing to existing studies.
- **Chapter six:** Concludes the study by looking at possible conclusions, and theoretical and practical suggestions drawn from the studies. It also offers suggestions on how to improve future studies.

### **Scope of the Study**

The study proposes to analyse the connection between secularism, religious state relations and human rights in the context of Iraq. Hence, the evidence to be provided in this study was analysed using the Islamic religious context and how extremist Islamic groups have been perpetrating gross human rights violations in the name of religious freedom.

### **Methodology**

The study used deductive reasoning that is also known as a “top-down” approach<sup>30</sup>. According to Cramer-Petersen, Christensen and Ahmed-Kristensen (2019), a “top-down” approach works from the more general to the more specific study and understanding of a research issue. That is, it involves thinking up a theory about our topic of interest capable of addressing the impact of secularism and state-religion relations on human rights in Iraq<sup>31</sup>. Additionally, the ideas will then be narrowed down into more specific research questions of hypotheses that can be analysed and answered. This ultimately leads to confirming or not the applied legal theories, ideas, cases, laws and regulations will validly and reliably address issues about the impact of secularism and state-religion relations on human rights in Iraq.

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<sup>30</sup> Philpott, p. 30.

<sup>31</sup> Philpott, p. 31.

## **CHAPTER II**

### **The Right to Freedom of Religion as a Group and their protection In International Law**

#### **Introduction**

This chapter is a theoretical analysis of religious freedom as a right and explains how international law deals with matters pertaining to religious freedom and how it recognizes and enforces religious rights. As such, it highlights those religious rights are vital and should be protected by states and other parties because they are an integral part of human rights. Besides, observing and protecting human rights is important for avoiding religious conflicts.

This chapter also discloses that group rights are distinctively different from individual rights and that religious freedom is best classified as individual rights instead of group rights. Additionally, this chapter also demonstrates that legal protection provided against religious rights violations is affected by tensions between equality and liberty. Focus is also given to the role of the liberal theory in justifying the need to observe and protect religious rights and address neutrality concerns between religious and non-religious beliefs, and how it may conflict with how certain religions regard the state's role and their own roles. Lastly, this chapter argues for a coherent interpretation of secularism based according to principles provided.

#### **Religion as a Group**

Efforts to consider whether religious rights or freedom should be considered as a group right or an individual right are based on the need and importance of understanding what group rights should be. This in turn leads to suggestions about what group rights do not refer to and include as part or parcel of group rights. Hence, it is crucial to provide clarification regarding what group rights are and do not imply. Though individual rights are exercised communally, they are together with group rights and are not a combination of individual rights.

Religion has several participants and is also a social institution and this has several implications for its application and governing principles. For instance, an individual cannot hold a religion but can hold a belief. In this regard, we can presume religious freedom to be a group right irrespective of it being an individual right. Nevertheless, this argument is faultily established on an incorrect foundation of understanding of group rights and individual rights. The idea that at least one individual is required in order to exercise certain rights is not adequate to consider it a group right. As a result, an individual right can be regarded as freedom of association as it is impossible to practice it on its own.

An individual right is part of and/or is freedom of expression but it is as it is impossible to practice it on its own because there have to be co-religionists for the worshippers and an audience to cater for the speaker. Furthermore, the principle of group rights entails the rights of the entire group. Group rights cannot be reduced to a total of individual rights but can override individual rights. Group rights entail the right of the entire group and by their nature, they can override individual members' rights. It is believed that any group has legal authority to deal with legal disputes experienced internally and is entitled to a jurisdiction that gives it rights to a legal system<sup>32</sup>. Thus, the effective operational capacity of such a legal system requires that it supersedes its members' freedom in the sense that they are bound to accept its final decision. Consequently, group rights cannot be reduced to individual group members' rights and are entitled to a proper legal system. Thus, recognising and exercising group rights affects members of the group and individuals requiring such rights to be recognised must be justified in advocating for their recognition.

Groups can be identified based on the groups themselves as evidenced by a ruling stance taken by the US Supreme Court in *Santa Clara Pueblo v. Martinez* (relating to a tribal, rather than religious group)<sup>33</sup>. The Supreme Court rules that it was not to the discretion of Federal Courts to intervene in the decision of the Pueblo, according to its Membership Ordinance concerning the non-granting of membership to children of a non-tribe father and Santa-Claran mother but rather vice versa. The membership rules as “no more or less than a mechanism of

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<sup>32</sup> See the Draft UN Declaration on the Rights of Indigenous Peoples, Article 33 (Adopted by the Sub Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1994/L.54), which will guarantee the right to an internal legal system to an indigenous group.

<sup>33</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

social... self-definition... basic to the tribe's survival as a cultural and economic entity"<sup>34</sup>. The Court asserted that "the equal protection guarantee ... should not be construed in a manner which would require or authorise this Court to determine which traditional values will promote cultural survival ... such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, ...[but because] to abrogate tribal decisions, particularly in the delicate area of membership... is to destroy cultural identity under the guise of saving it"<sup>35</sup>. The Court upheld the discriminatory tribal decision.

### **Freedom of Religion: A Distinction between Liberty and Equality**

Freedom of religion or religious liberty is one of the key rights entitled to individuals and its importance is widely evident worldwide. This is evidenced by several legal and international laws advocating for its protection. For instance, the International Declaration of Human Rights (IDHR) under Article 18 states that entire forms of discrimination and intolerance based on belief or religion must be eliminated<sup>36</sup>. Furthermore, the importance of freedom of religion can be connected to several conventions advocating for its protection and these include the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, etc.

Meanwhile, the implications of religious freedom on human rights as well as its interaction with secularism ideas are best understood by defining freedom of religion. Additionally, this should be centred on analysing its key features or elements. As such, freedom of religion can be defined as an entitlement that accords people or communities either in private or public to manifest belief or religion in observance, worship, practice and teaching<sup>37</sup>. Meanwhile, it is crucial to establish that freedom of religion is practically different from freedom of belief in the sense that the latter does not relatively allow the right to practice the belief or religion outwardly and openly in a public manner. Nevertheless, there are conditions where a state can have what is known as a state religion and affects the practice of other religions. For

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<sup>34</sup> 402 F. Supp 5.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid, p. 48.

<sup>37</sup> Cingranelli David and Carl Kalmick, 'Is religion the enemy of human rights?.' *Human Rights Quarterly* 41.3 (2019): 725-752.

instance, it is widely accepted that a situation where a country has a state religion permits other sects distinct from the state religion to practice their belief or religions without being persecuted<sup>38</sup>. Moreover, such circumstances do not also permit individuals categorised under a state religion to persecute other religious groups<sup>39</sup>.

Religious freedom as a right can be best understood by analysing either the communist view or the individualist approach to religious freedom. The former considers religion to be an identity and suggests that equality between religious groups should be observed at all costs while the latter solely considers the existence of religious freedom<sup>40</sup>. However, it is essential to note that religion is not a group right but only relates to groups. That is, religion deals with group membership and the way members subscribe to that group's beliefs, customs and modes of worship. Studies noted that religion possesses different and similar characteristics that one can either use to classify it as a group or not as a group<sup>41</sup>.

The decision to use international or national law is often influenced by either individual, state or non-state actors to accord protection to group-defining characteristics like race and religion. Differences between religion and race are quite apparent. For instance, religion is not immutable whereas race is immutable. It is a fact that upholding religious freedom rights serves to allow any individual to change their religion<sup>42</sup>. Such a decision is legally safeguarded by international law<sup>43</sup>. Nonetheless, religion mutability does entail that immutable characteristics significantly deserve legal protection than religious affiliation.

In as much as all individuals' right to hold to their religion is protected, the decision to change religion is also protected. Religion is not only a reflection but also a part of nationality, race, personhood or identity. Hence, these characteristics are some of the key elements making religion assume its unique features. Additionally, nationality or race do not have correlative rights and yet one has the right to choose belief or religion.

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<sup>38</sup> Ibid, p. 726.

<sup>39</sup> Ibid, p. 727.

Morsink Johannes, *'The Universal Declaration of Human Rights and the Challenge of Religion'* (UMP, 2017) 46.

<sup>41</sup> Ibid, p. 47.

<sup>42</sup> Ibid, p. 48.

<sup>43</sup> Ibid.

Meanwhile, there are various propositions concerning the inert characteristics of religion. For instance, it is deemed that religion possesses both subjects of equality and freedom of speech (subject of liberty)<sup>44</sup>. Such individual characteristics merit the protection of nationality, race or gender laws. Hence, an individual can be affiliated with a certain religion and be protected against religious discrimination. Similarly, an individual can be of a specific race and at the same time entitled to protection against racial discrimination. Therefore, it does not serve much purpose to consider ‘freedom of race’, when there is a need to safeguard religious freedom. As a result, religion cannot only be regarded as an identity. Religious freedom is an activity that accords protection in open manifestations and its robust nature is characterised by speech, criticism and thoughts. Some propositions highlight that religious freedom contains two equally vital features, namely as identity and an avenue of critical thoughts<sup>45</sup>. Hence, perceptions about religion can be derived using essential ideas provided by communitarian and liberal theories. It is on such duality that religious freedom rights must be established. Furthermore, the duality perception possesses vital implications in contemporary legal debates. Moreover, this is evidenced by two essential international law references (the prohibition of discrimination and the prohibition of incitement).

The International Covenant on Civil and Political Rights makes no distinction in its provision on incitement between religious hatred and racial hatred states that: “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”<sup>46</sup>. It defines “racism and xenophobia”, which its provisions prohibit, as “the belief in race, colour, descent, religion or belief, national or ethnic origin as a factor in determining aversion to individuals or groups”<sup>47</sup>.

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<sup>44</sup> Cingranelli David and Carl Kalmick, 2019, p. 726.

<sup>45</sup> Ibid, p. 727.

<sup>46</sup> Tomuschat Christian, ‘*Equality and non-discrimination under the International Covenant on Civil and Political Rights*’ (De Gruyter 2019) 16.

<sup>47</sup> Ibid, p. 270.

## **Individual Religious Freedom As Equal Liberty**

Political decisions can often at times fail to reflect other individuals' preferences about what other individuals have and shall do. It is in such regard that they ought to accommodate differences in personal preferences. As a result, John Rawls applied the liberal political theory incorporating the principle of equality into liberal theory. Rawls asserts that liberty of conscience is liberty that both protects individuals against Church and protects Church (any religious association) against the state<sup>48</sup>. It will be demonstrated in the following sections that there are antagonistic elements between these two forms of liberty. For instance, it is questionable as to which right will stand when churches demand states to uphold their liberty irrespective of the fact that their activities or actions override individual rights. Rawls' propositions do not address such empirical gaps though elements of compatibility are only observable with his initial principle. Efforts to ensure that individuals enjoy equal rights to religious liberty are vital in addressing conflict of liberties. Hence, it is practically challenging to demand religious liberty rights that are incompatible with equal liberties for all individuals. As a result, such a principle, limits group rights, especially issues of incompatibility are observable between them and equal individual rights, placing religious freedom on solid pedestals as individual rights.

The application of the principle of liberty as equality influences the legal interpretation of the right to religious liberty. However, international law ought to institute acceptable conditions safeguarding each individual's religious freedom and the need to enjoy human rights, notably by underprivileged groups of the society like religious dissenters, homosexuals, children, and women regardless of the fact that this can demand state or group policy interventions are required. Such should occur when the equality of treatment or equality of opportunity is deemed to be instrumental to religious liberty.

Religious freedom is attached to various rights and can also have various implications on diverse legal and political activities and affairs. For instance, religious freedom can imply opportunities being granted to all citizens irrespective of their religious beliefs or backgrounds. Similar to political freedom, all citizens must be politically treated irrespective of their religious beliefs and how they are politically connected. This also entails having legal systems ensuring

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<sup>48</sup> Ibid, p. 43.



that all individuals have access to basic political freedom. This aligns with Rawls' neutrality propositions asserting that states are to assume a neutral position, especially when matters of religion are concerned<sup>49</sup>. This prevents religion from being a group and makes it an individual, thereby removing from it the public affairs legitimacy. Additionally, such demands have other implications concerning the advocated suggestions for legislating particular religious laws. Therefore, introducing the principle of neutrality was deemed as an essential component of doctrines of the good and not just merely dealing with religious concerns<sup>50</sup>. Nonetheless, it carries vital significance in as much as religious affairs are concerned. Such is attached to reasons denoting that religion contradicts liberal assumptions about the ethical program of good related to public and personal life and prescribes solid moral guidelines compared to other civic organisations. However, liberal ideas have been against the principle of neutrality. For instance, Barry argues that the principle of neutrality does not lay a solid foundation upon which religious freedom can be guaranteed and hence, may not be a good *m*<sup>51</sup>. Hence, Barry opines that several principles of liberalism must be accepted so as to comprehend the principle of neutrality<sup>52</sup>.

Nonetheless, there are notable issues undermining the concept of neutrality as it cannot be reconciled with a religious view. As such, several religious groups may use the principle on the basis that moral reprehensibility is applied to all aspects of the good and equally treated in the public sphere. Which, are vital elements of such doctrines demanding states to assume public good positions<sup>53</sup>. Examples can be drawn from the Roman Catholic Church, which regards its doctrines as non-applicable in the public sphere but only confined to individual beliefs<sup>54</sup>. In such cases, several non-liberals will act against the principle of neutrality. Several attempts to address such critics include notable suggestions provided by Rawls' introduction of the distinction between comprehensive liberalism and political liberalism. Rawls contends that comprehensive liberalism encompasses cultural guidelines of civil society and political components<sup>55</sup>.

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<sup>49</sup> Tomuschat Christian, 2019, p. 14.

<sup>50</sup> Subramanian Simon, *'Inequality and Poverty'* (Springer 2019) 31.

<sup>51</sup> Beckwith Francis J, 'Gotta Serve Somebody? Religious Liberty, Freedom of Conscience, and Religion as Comprehensive Doctrine' (2020) 33(2) *SCE* 168, 170.

<sup>52</sup> *Ibid*, p. 169.

<sup>53</sup> Michelman Frank, 'Democracy and positive liberty.' *Constitutionalism and Democracy* (Routledge 2017) 287.

<sup>54</sup> *Ibid*, p. 289.

<sup>55</sup> *Ibid*, p. 290.

Political liberalism considers that society can have incompatible thorough non-religious and religious doctrines and at the same time possess a plurality of reasonable. This clearly denotes that such a form of liberalism is more minimalistic. Therefore, efforts to align the plurality of non-liberal views with liberalism led to criticisms that a political theory is an impossibility if it cannot claim any view of the good<sup>56</sup>. Vital arguments forming crucial criticism of liberal neutrality are coined perfectionists' liberal views like the ones set forth by Harrison, claiming that liberal political theory should assume a position as to whether humans are better off under non-liberal institutions or liberal ones<sup>57</sup>. He asserts that value choices are intrinsically better than others leading to the idea that liberalism must not and cannot consider all value choices as being equal<sup>58</sup>. Therefore, political liberalism is undesirable though it is not applicable in certain situations. Besides, Flanigan does not comprehend Rawls' political liberalism and argues that religious views should be considered as part of the public policy debate<sup>59</sup>.

### **Existing Protection Of Religious Freedom In International Law**

Several human rights systems together with international law recognise religious freedom. However, its enforcement is associated with several problems that are often overlooked when it is being reiterated. Most often at times, states' infringement of religious freedom or religious rights because of their stance on religion is not considered a religious issue or impediment. Therefore, examinations of the underlying principles governing religious freedom are instrumental in deciding how religious rights should be implemented in international law. This will assist in determining how exactly this examination will fit into the current legal guidelines and a brief analysis of the appropriate international legal documents is required in such cases. Such an analysis is crucial for understanding how such rights should be regarded, approached and addressed in international law. Nonetheless, previous religious freedom developments and their legal incorporation in international law shed evidence about efforts made in recognising individual rights, which is slightly a divergence away from protecting groups

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<sup>56</sup> Harrison Joel, 'Christian Accounts of Religious Liberty: Two Views of Conscience' (2020) 46 BYUL Rev. 1273.

<sup>57</sup> Ibid, p. 1274

<sup>58</sup> Ibid, p. 1276..

<sup>59</sup> Flanigan Jessica, 'All liberty is basic' (2018) 24(4) *Res Publica* 455.

rights. Therefore, contradictions to individual rights, in this case, can in most cases be associated with a huge move towards safeguarding the protection of group rights<sup>60</sup>. It is of huge essence to compound on this matter and acknowledges that the protection of individual rights in international law is attached to religious freedom. However, it will be illustrated in the next sections that the protection of group rights has been taking huge precedence over individual rights, especially in certain documented regional laws. Additionally, it will be illustrated that this undermines the protection of the right to religious freedom.

Meanwhile, efforts to promote religious tolerance were later achieved following the adoption of the principle of tolerance of other religions by vast religions in antiquity<sup>61</sup>. However, the emergence of international law parallels the emergence of a legal principle of religious freedom. Prior to that, such freedom was only recognizable as the freedom of state rulers to choose their states' religion, *cuius regio eius religio*. For example, Catholic princes and Lutheran princes were accorded similar status by the Peace of Augsburg (1555), irrespective of the notion that lay princes were responsible for deciding which religion to adopt within their territories and gave the Lutheran Church self-governance<sup>62</sup>. Both treaties were instrumental in solidifying efforts made to promote religious freedom. Additionally, such efforts are commended on the basis of not only promoting religious tolerance but also for resulting in the enactment of laws safeguarding the right to choose a religious belief without being politically, socially or religiously discriminated against<sup>63</sup>.

Several measures were devised so as to protect religious minorities groups. Notable examples include the institutions of bi-lateral treaties enacted, especially after the Peace of Westphalia, which was aimed at modifying was propagating rulers to choose the religion of their states and the previous rule of *cuius regio eius religio*. Such bi-lateral treaties, especially those enacted in the 17<sup>th</sup> century had religious protection clauses that were based on the concept of reciprocity between three signatories. Religious rights were in most situations considered a

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<sup>60</sup> Kearns Paul, 'Freedom of Artistic Expression in International Law' (2020) 25(2) AAL 99.

<sup>61</sup> Gunner Görän and Pamela Paulina Slotte, 'The Rights of Religious Minorities.' *Human Rights, Religious Freedom and Faces of Faith* (Globethics 2019) 15.

<sup>62</sup> Hough Adam Glen, *The Peace of Augsburg and the Meckhart Confession: Moderate Religion in an Age of Militancy*. (Routledge 2019) 6.

<sup>63</sup> Evans Martin and Kenneth Lunn, *War and memory in the twentieth century* (BP 1997) 3.

condition instrumental for the recognition of the territorial arrangement of states<sup>64</sup>. Such developments stirred the practical adoption of modern liberal philosophy in international law aimed at separating the state from religion to avert conflicts. Muslims accepted these European international law principles including a permanent state of war with such states, abandoning the shari'a principles of non-recognition of non-Muslim states and full recognition of non-Muslim states<sup>65</sup>. Hence, the modern religious freedom protection period commenced after the First World War and led to the inception of other vital legal frameworks like the Minority Treaties and the League of Nations aimed at fostering religious freedom.

The Covenant of the League of Nations overlooked the Draft Article 20 instituting parties not to interfere with religious activities. This resulted in the establishment of several minor treaties. Such included the 1919 Minorities Treaty between Poland and Principled Allied and Associated Forces aimed at providing education through the dismally failed Jewish education treaty the decision not to use Sabbath observance to disadvantage Jews and other charitable and religious causes, equal funding for education, and non-discrimination of religious minorities<sup>66</sup>. Such a treaty had a triangular structure and was monitored by the Council of the League of Nations which demanded Poland as having international obligations to its signatories to observe such obligations in as much as the religious freedom of the minorities was concerned<sup>67</sup>.

## **The Right to Freedom in UN Documents and International Human Rights Covenants**

Efforts to analyse the connection between State activities are based analysed by how the UN deals with human rights issues. This is because the UN's roles and legal guidelines or statutes influence the extent to which States can interfere with religious activities. The decision by some States to avoid secularism and interfere with religious activities is often motivated by the failure of related religious governing bodies to regulate religious activities within the guidelines of the States. For instance, this can be linked to the failure of the League of Nations

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<sup>64</sup> Poddar Mihika, 'The Citizenship (Amendment) Bill, 2016: international law on religion-based discrimination and naturalisation law' (2018) 2(1) ILR 110.

<sup>65</sup> An-Naim Abdullahi Ahmed and Francis Deng, 'Human rights in Africa: cross-cultural perspectives' (1<sup>ST</sup> edn, BIP 2010) 14.

<sup>66</sup> Berman Nathaniel, 'The International Law of Nationalism: Group Identity and Legal History' *International Law and Ethnic Conflict*. CUP 2018) 25.

<sup>67</sup> Rynkowski Michal, 'State and church in Poland' In *State and church in the European Union*' (Schaft mbH & Co. KG, 2019) 13.

method to uphold religious freedom after the Second World War<sup>68</sup>. As such, the League of Nations led by Hitler could not enforce religious liberty rules and laws and believed to have led to the invasion of Poland and start triggered the Second World War<sup>69</sup>. Nevertheless, in such cases, States can be viewed as a major threat to religious rights and the need to adopt secularism is justifiable in such instances. The UN started recognizing religious freedom as part of universal individual rights and this was a major shift away from the mere consideration of religious rights among the United Nations principles and purposes:

*(3) To achieve international co-operation in solving international problems of a humanitarian, cultural, social, economic, or character, in encouraging and promoting respect for fundamental freedoms and human rights for all without distinction as to religion, language, sex, or race<sup>70</sup>;*

Religious rights are evident in several International Human Rights Covenants (IHRC) and notable covenants that strictly acknowledges and emphasises the importance of religious rights as part of human rights are the International Covenant on Civil and Political Rights (ICCPR) and the 1996 UN Human Rights Covenants. Under Article 18 of the ICCPR, it is stated that<sup>71</sup>:

- 1) Every individual is entitled to the right to freedom of religion, conscience and thought. This encompasses the right to choose a belief or religion of their choice either in community privately or publicly with others or individually or in community with others and manifest their teaching, practice, observance, and belief in worship or religion.
- 2) No individual shall be forced in anyhow in a manner that will undermine their ability and freedom to adopt a belief or religion of their choice,
- 3) The law shall prescribe specific limits that are necessary for protecting the freedoms, fundamental rights, morals, health, order, or public safety of others.
- 4) State Parties should uphold parents’ liberty where applicable, legal guardians to ensure that their children’s moral education and religion according to their specific convictions.

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<sup>68</sup> Jackson Simon and Alanna O'Malley, *The Institution of International Order: From the League of Nations to the United Nations* (1<sup>ST</sup> eds, Routledge 2018) 4.

<sup>69</sup> Ibid, p. 6.

<sup>70</sup> Ibid, p. 7.

<sup>71</sup> Joseph Sarah, 'Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36' (2019) *Human Rights Law Review* 19(2) HRLR 347, 350.

The above-mentioned rights including religious rights are warranted and no individuals shall be discriminated against based on such grounds nor be denied such rights<sup>72</sup>. Additionally, the ICESCR (International Covenant on Economic, Social and Cultural Rights) asserts that all rights mentioned under such Covenant are to be exercised irrespective of gender, race, nationality, or religious factors<sup>73</sup>. Furthermore, complementary laws or statutes supporting the need to observe and protect these rights are also prescribed under Article 27 of the ICCPR, which states that such rights must also be accorded to minority religious groups<sup>74</sup>. The same Article also clearly states that all individuals are entitled to all the rights it stipulates.

Amendments were subsequently made advocating that ethnic, religious and linguistic minorities are to be allowed rights to use their language, practice and profess their own religion, and enjoy their own culture (see the Subcommission on Prevention of Discrimination and Protection of Minorities discussed drafts of Article 27<sup>75</sup> and the 1948 resolution 217c(iii)<sup>76</sup>. Furthermore, any individual belonging to such minority groups is entitled to all the related or necessary rights to promote fair treatment of minority groups. However, challenges were observed regarding the interpretation of the words “in community with the other members of their group”<sup>77</sup>. Such a phrase “in those states in which ethnic, religious or linguistic minorities exist”<sup>78</sup>.

The above-mentioned ideas imply or denote that recognising religious rights as group rights is problematic as it results in challenges related to the development and self-determination issues undermining the recognition of group rights. Additionally, individuals’ choices of people classified under a religious group can be a huge issue as well. Besides, the rights of the group themselves can conflict with individual rights within it. Cases, where rights are exercised collectively, are subject to challenges, especially when a potential conflict of interest-related problems emerge as individual choices are compromised. Such usually occurs when matters

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<sup>72</sup> Article 2.

<sup>73</sup> Adopted 16 December 1966, 999 UNTS 3.

<sup>74</sup> Article 27: “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”.

<sup>75</sup> Report of Sub-Commission UN Doc E/CN.4/358, paras. 39-48.

<sup>76</sup> Pursuant to UNGA Res. 217c(III) adopted 10 December 1948.

<sup>77</sup> Morsink, p. 23.

<sup>78</sup> De Zayas, [1992] points to HRC Comm. No. 208/1986 Singh Bhinder v. Canada UN Doc. A /45/40 Vol. II p. 50, in which the issue was not but could have been raised.

involve the use of natural resources and these may conflict with individuals' choices within the group. However, there are inherent conflicts between religious group members and the group as a whole. This is because religious groups strive to regulate their members' spiritual growth, moral conduct and behaviour both privately and publicly. Therefore, recognizing religious rights as group rights is very challenging compared to other groups like cultural or linguistic groups. This is because culture and language usually include outside ideas concerning their members' lives. As a result, possible conflicts between individual determination and the group are essentially huge with respect to religion.

## CHAPTER III

### Church and State-Religion Relations and Secularism

#### Religions as a Divider Loyalty

Since the Reformation, religious authority has troubled secular authorities and political philosophers. Machiavelli blamed Catholicism for keeping Italy divided. Hobbes warned against the civil strife that would result from dividing the “sword of justice and the shield of faith” (Hobbes 1985, 499). Yet both of them maintained a place for religion in their political theories. A major concern of early modern political philosophy was over how to retain the benefits of religion while avoiding its pitfalls.

Rousseau sought to refute what he believed were the extreme opinions of Bayle and Warburton. “The former argues that no religion is useful to the body politic, while the latter maintains the opposite, that Christianity is its surest support” (Rousseau 1999, 162). Rousseau divides religion into three types: civil religion, the religion of man, and the religion of the priest. He instantly dismisses the third, for the same reason as Hobbes that it divides sovereignty and leads to anarchy and disorder<sup>79</sup>. Of the other two types, he says that despite civil religion being based on “error and lies” and the religion of man being “true, sacred, and holy” a state ought to promote the former over the latter (Rousseau 1999). This is because the religion of man lacks the passion, concern for worldly affairs, and the strict adherence to civic duty promoted by civil religion. The precise characteristics of the civil religion are unimportant to Rousseau so long as they promote obedience to the rule of law and avoid intolerance. Intolerance is the greatest ill caused by religion and wherever it is allowed, it divides the sovereign power. The civil religion, therefore, is tolerant of any belief, so long as it is consistent with sociability within the republic. Its tenets are therefore not ‘religious dogmas’ but instead ‘sentiments of sociability. As we saw in the previous two chapters, with the rise of secularism a civilizational notion of the good takes on

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<sup>79</sup> Thomas Hobbes, the philosopher, has clearly perceived both the disease and its remedy and dared to suggest the reunion of the two heads of the eagle” (Rousseau 1999, 161).



the trappings of religion. The emphasis shifts from developing devout Christian souls, to developing good French citizens.

Rousseau's criticism of the 'church of the priest' takes all religion with clergy to be a division of sovereignty, with all the attendant worries that Hobbes predicted. Unlike Hobbes, he was not only critical of churches that had independent ecclesiastical authorities, but also of those state churches that placed the monarch at their head. The latter, he believed, was as bad as the former because the sovereign was not able to then abolish or truly reform the religion. They were therefore "not its legislators, but only its rulers" (Rousseau 1999, 161). The reasons for Rousseau's criticism of the 'church of the priest' are that he felt that priests enriched themselves at the expense of the political community and that priests posed a danger to the unity of the state. While many institutional functions were still performed by the church (e.g. marriage, birth, and last rites), he believed that the state must appropriate these functions or else risk the church leveraging them into further powers for themselves<sup>80</sup>.

Added to the worry that religion might divide loyalty, were worries that such citizens would logically follow their religious laws over their civil laws because God's law and authority superseded sovereign law and authority. Hobbes saw the higher set of demands that religion was able to place on its adherents as a particularly important danger that religion presented to political authorities. He writes: "It is impossible a Commonwealth should stand where any other than the Sovereign, hath a power of giving greater rewards than Life; and of inflicting greater punishments, than Death" (Hobbes 1985). The justice of the state depends on law and the law depends on the power of the sovereign over the life and death of its subjects. A problem for secular political philosophers, such as Hobbes, is making sure that the state retains the ability to inflict the 'ultimate punishment' if religion offers the possibility of an even greater punishment, then people will be inclined to follow the ecclesiastical authorities and subvert the laws of the commonwealth. This fear about the ability of religion to impose a higher set of demands on political subjects becomes a general feature of secular anxiety about religious believers. Martha Nussbaum sees this fear as a feature of both anti-Semitism and islamophobia<sup>81</sup>. "Muslims, like Jews, are always accused of

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<sup>80</sup> Beal JP and others, *Church ethics and its organizational context: Learning from the sex abuse scandal in the Catholic Church* (Sheed & Ward, 2005) 5.

<sup>81</sup> Sajoo, Aryn, 'Fitting Islamophobia into an Historical Pattern' 34(2) JMMA 191, 192.

having a double loyalty, and both are seen to submit themselves to a double set of legal requirements religious law somehow making them bad subjects of civil law”<sup>82</sup>. At stake is the worry that when authority is placed in different hands, those authorities will always come into conflict and religious adherents will inevitably side with religious law. Yet this worry about religion’s divisive effect on sovereignty might not be as inevitable as these theories assume.

Brian T. McGraw’s empirical examination of the role played by religiously motivated political parties in Europe “shows that socially and politically mobilized sectarianism can work powerfully to solidify and entrench, not upend and destroy, free and stable democratic institutions” (McGraw 2010, loc. 311)<sup>83</sup>. Many of these parties, like the Dutch Calvinists’ Anti-Revolutionary Party, felt that religion had a role to play in every aspect of life and hoped to use the political process to advance their sectarian agenda. Nevertheless, Batugal finds that most of these sectarian parties managed to reconcile themselves to the democratic process as the best means to achieve their aims. One reason he advances this counter-intuitive position is that when religious parties seek to mobilize their members, they often end up (sometimes accidentally) accepting the legitimacy of the democratic political instruments that bring them to power<sup>84</sup>. Once religious believers accept that politics is best conducted through electoral institutions, the state becomes that much more stable.

Insofar as different religious communities inculcate respect for law and order, justly derived political authority, and discipline they are capable of improving social stability and contributing toward a democratic order. Liberal secularists, like Locke or Rawls, acknowledge this possibility, but note that some religious communities refuse to engage in deliberative restraint or to engage in the political process reasonably (as Locke believed was the case for Muslims)<sup>85</sup>. These types of religious beliefs are indeed the ones that are causing problems. Yet it is worth asking how much contemporary religious conflicts are motivated by an unreasonable attachment to a fictional belief, as the metaphysical approach to religion maintains, and how much there are political

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<sup>82</sup> Nussbaum, Martha C. *The new religious intolerance* (HUP 2012) 6.

<sup>83</sup> McGraw Bryan, *Faith in politics: religion and liberal democracy* (CUP 2010) 7.

<sup>84</sup> Batugal Maria Leodevina, ‘Organizational Culture, Commitment and Job Satisfaction of Faculty in Private-Sectarian Higher Education Institutions (HEIs)’ 9(2) WJE 123, 125.

<sup>85</sup> See chapter four for a discussion of Locke’s anxiety over Islam and its politicization as well as an account of Rawls’s differentiation between reasonable and unreasonable comprehensive doctrines (such as religious views).

reasons that can help to explain the divergence between groups that accept the democratic process and those that do not.

### **Conflicting Ideals between State Authority and Religious Rights**

Conflicting ideals between state authority and religious rights are bound to exist for several reasons. Foremost, it is vital to note that every religion tends to have distinct if not, then universal beliefs and perceptions about its world-view that it regards as “truth”. Secondly, such conflicts are bound to exist as a result of different ideologies and approaches used by international organisations. For instance, the West’s ‘cultural imperialism’ and “arrogance” are presumed to be highly visible through “their pretension to universality” reflected by the use of instruments pertaining to the ICESCR, ICCPR, and UDHR. Additionally, the West’s traditional urge is highly evident in Christianity (religious faith) and liberalism (political ideology) and regards its beliefs and forms as universal, and hence, endeavours to universalise them”<sup>86</sup>.

According to Henkin, human rights, constitutionalism, democracy, popular sovereignty, nationality, sovereignty, and statehood ideologies emerged in “the West” from a tradition encompassing Europe, Rome, and Greece’s political offspring, and monotheistic religions”<sup>87</sup>. Nevertheless, secular thoughts have been guiding evolution since its enlightenment and were significantly influenced by monotheistic religions, like Christianity during such periods. As a result, secularism is the modern concept of human rights amid the use of communitarianism and secularism to replace religious paradigms<sup>88</sup>. For instance, Aspland notes that in Indonesia human rights “often tend to be portrayed and perceived in such a manner that they appear as a quasi-religion or an alternative belief system” and that “human rights emerge as a competitor challenging existing belief systems, ideologies and religions”<sup>89</sup>.

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<sup>86</sup> Nussbaum, P. 7.

<sup>87</sup> Henkin also notes that “this is not to suggest that their contributions did not draw on other civilizations... or that ideas of justice and the good society were unknown in other traditions, for example in China, India and elsewhere in Asia.”

<sup>88</sup> Frances Raday, ‘Culture, Religion, and Gender’ (2003) 1(4) IJCL 663.

<sup>89</sup> Cecile Laborde and Aurelia Bardon, ‘Religion in Liberal Political Philosophy’ (OUP 2017) 2.

It politically and legally appears that founding ideologies about religion and the state are distinct institutions with different tools and ideologies for maintaining power. This is a notable issue being used to criticise human rights as it is cited that they act as a cover to impose western cultures and values on other cultures and civilizations. Similarly, “cultural relativism” and “Asian Values” ideologies consider at the beginning that all civilizations and cultures are equal but end up prioritising various elements. Additionally, existing huge numbers of cases on the legality of government efforts to restrict religious freedom’s manifestations significantly highlight the pull and push forces between religious communities’ values and those of the state.

It is also presently important to note that there are various types of conflicting ideas between state authority and religious rights existing in five distinct forms. With special references being taken from the Constitution of Myanmar in Chapter VIII, Article 361 states that “The Union recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union.”<sup>90</sup>. Superficially a state’s support or preference for a particular religion may appear harmless. An act of a constitution singling out a specific religion for support causes ideological conflicts that affect the constitution itself and such conflicts are;

- (i) When liberal democratic tradition ideologies conflict with preferred or endorsed religious ideologies of other religions<sup>91</sup>. Such a conflict arises when states are bound to protect other religions irrespective of their ideological traditions differences and obligated to support a specific religion. This form of conflict takes place when states do not commence from a neutral standpoint of view in prescribing behaviour, restricting religious behaviour, and granting religious freedoms.
- (ii) When liberal democratic tradition ideologies conflict with preferred or endorsed religious ideologies of other internal religions. This type of conflict when states are governed by secularism policies and laws and a specific religion's ideologies.

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<sup>90</sup> Article 361 of the Constitution of Myanmar 2008.

<sup>91</sup> UN Human Rights Committee, General Comment 22.

For instance, equality rights provisions consider gay marriages legal but several Christian Churches are against their legalization.

A conflict of the second kind occurs when the state is duty-bound to support one religion and also protect the religious freedoms of other religions with differing ideological traditions. It is important to note that ideology is not limited to the mind but manifests itself in action and behaviour.

In a country as communally diverse as Iraq it is inevitable for some opinions to trump others, but where this happens through a democratic process there will be no conflict. The conflict occurs when the constitution has artificially promised a religion's foremost place and tries to satisfy that promise, for the freedom to manifest one's religion is not an unlimited, completely inviolable right. For reasons such as national security, public order, and matters of public health, among other things, a state may see fit to reduce the scope of the manifestation of one's religion. For example, Iraq places restrictions on all freedoms including the freedom of thought, conscience and religion under eight circumstances listed in Article 15 of the Constitution of Iraq<sup>92</sup>. If a state does not begin from a place of neutrality, any restrictions placed on religious communities may appear to target religions not endorsed by the state, even during circumstances when they do not. Whenever a restriction is placed on the manifestation of religion, the following questions will always arise: is the restriction placed on a religion or religions a result of a legitimate, neutral state duty to its citizens, or is the restriction placed on religion/religions in the interest of the endorsed religion as the result of a perceived threat to the endorsed religion? Is the state acting on its duty to protect its citizens or on its duty to protect the endorsed religion?

The state's decision to endorse a specific religion can instil a sense of alienation and "other" religious minorities. McCrea observes that "Sager and Eisgruber, and Nussbaum have spoken of the sense of alienation, exclusion, or inferiority that may be produced when individuals see state endorsement of a faith they do not share but it is not clear whether this sense of alienation or inferiority is itself a rights violation or whether it is problematic for other

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<sup>92</sup> Article 15 of the Constitution of the Democratic Socialist Republic of Iraq 1978 (as amended).

reasons”<sup>93</sup>. Studies perceive that states’ own human rights acts are complex and not easily measurable, especially when they inferior, alienate or mistreat prisoners<sup>94</sup>. In most cases, such acts are traceable to situations involving religious minority groups. As a result, it is difficult to draw the violation of specific human rights, inferiority, exclusion or emotions of alienation. To make matters worse, contemporary human rights discourse cannot clearly answer the question of “whose intentions are important for determining whether actions constitute state violations of human rights?”<sup>95</sup>. Who would be held responsible for the inclusion of the endorsement of religion in the constitution?

### **Separation Between State Neutrality and Secularism**

The UN Rapporteur on Freedom of Religion and Belief, Ahmed Shaheed observes in his most recent report that “where a State explicitly associates itself with a particular religion(s) or truth claim(s), members of unaffiliated groups invariably suffer various forms of discrimination including direct, indirect, or both which have a negative impact on their ability to exercise their freedom of religion or belief”<sup>96</sup>.

The UN Human Rights Committee in paragraph 9 of General Comment 22 observes that the fact that a state recognizes an official religion or that its followers comprise the majority of a population “shall not result in any impairment of the enjoyment of any rights under the covenant”<sup>97</sup>. However, the use of the term “shall not” by the committee implies that states are capable of denying those belonging to a minority religion or belonging to a religion not endorsed by the state their rights. Paragraph 9 is a directive to these states not to do so. Paragraph 9 is not explicit approval by the UN of state religions or states giving particular religions preferential treatment.

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<sup>93</sup> Ronan Mccrea. “Rights as a basis for the religious neutrality of the state: Lessons from Europe for American defenders of non-establishment” (2016) 14:4 International Journal of Constitutional Law 1009 at 1013

<sup>94</sup> Michael Stohl, et al. “State Violation of Human Rights: Issues and Problems of Measurement” (1986) 8:4 Human Rights Quarterly 592 at 594.

<sup>95</sup> Ibid.

<sup>96</sup> See UN Human Rights Council, A/HRC/19/60, para. 62;

<sup>97</sup> UN Human Rights Committee, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art.18) U.N. Doc. CCPR/C/21/Rev.1/Add.4 (1993) at paragraph 9.

The UN Rapporteur too warns that “[a] State must...ensure that the “purpose” or “effect” of its entanglement with religion does not lead to “the nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis”<sup>98</sup>. Religious neutrality is increasingly considered “a necessary characteristic of contemporary democratic states”<sup>99</sup>. Moon (writing of the Canadian context) observes that “the requirement of state neutrality (that the state should take no position on religious issues) may be understood as simply a pragmatic recognition that religious issues are difficult to resolve within the political process and may generate significant social and political conflict and so are best removed from the political contest”<sup>100</sup>. Is “religious neutrality” a code word for “secularism”?<sup>101</sup>. Martinez-Torron states that “neutrality cannot be understood as synonymous with strict separation between state and religion”<sup>102</sup>.

Inter-community tensions in Iraq are not new phenomena and continue to take place irrespective of it being a multicultural state. Such tensions have affected various aspects ranging from religious balance to social, political and economic stability. Meanwhile, in states where unwritten political and behavioural norms are aligned with democratic values based on less risky good faith exercised by the government. In other words, states are not permitted to take advantage of the conflict of provisions. Unfortunately, such has been the case not only in Islamic countries but also in some Western and African countries. hence, it can be suggested that states will be more ideological and transparent for them to be secular. Nevertheless, secularism does not exclude communal violence and also, and it does not warrant religious freedom for minority groups on its own. Such can be evidenced by communal violence that took place in India irrespective of it being a multi-religious secular and multicultural situation, the state has periodically experienced waves. For instance, in India in 2017, “Approximately one-third of state governments enforced anti-conversion and/or anti-cow slaughter laws against non-Hindus, and

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<sup>98</sup> UN Human Rights Council, Report of the Special Rapporteur on freedom of religion and belief, 37th Sess, UN Doc A/HRC/37/49 (28th February 2018).

<sup>99</sup> Javier Martinez-Torron, "Institutional Religious Symbols, State Neutrality and Protection of Minorities in Europe" [2013] 171 L & Justice - The Christian L Rev 21.

<sup>100</sup> Richard Moon. Freedom of Conscience and Religion, (Toronto: Irwin Law, 2014) at 20.

<sup>101</sup> Martinez-Torron, note 35

<sup>102</sup> Martinez-Torron, note 35 at 25.

mobs engaged in violence against Muslims or Dalits whose families have been engaged in the dairy, leather, or beef trades for generations, and against Christians for proselytizing”<sup>103</sup>.

States can neither be truly neutral nor secular and this causes duplicity, especially when presumptions that they have duties or legal obligation to religion. Hence, states with an official religion are less precarious than those preferring or endorsing a specific religion human rights conditions in such states. Alternatively, states can be lacking a straightforward and transparent direction they pretend to be something they are basically not. For instance, Women in some states, especially in Western countries regard themselves as having the same rights as men because of their warrants equality between women and men. But such is not always the case with Islamic countries like Iraq as they consider women unequal with men believing that they possessed the same rights as men. As a result, an effort to promote gender neutrality is often met with severe resistance and at most, they are not tolerated because of religious values<sup>104</sup>. Therefore, there are substantial concerns about defining neutrality and its related baseline in examining situations in which governments are not neutral<sup>105</sup>.

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<sup>103</sup> Dwight Bashir, Elizabeth K Cassidy & Isaac Six. Annual Report of The U.S. Commission On International Religious Freedom, rep. (U.S. Commission on International Religious Freedom, 2018) at 37.

<sup>104</sup> Ibid.

<sup>105</sup> Levine, Samuel J. “Review Essay: The Challenges of Religious Neutrality” (1996) XIII Journal of Law and Religion 531.



## CHAPTER IV

### Secularism, State Religion, and Human Rights in the Context of the Iraq Constitution

#### Religious Rights under the Iraqi Constitution

Section 1, Article 2 of the 2005 Iraq constitution considers Islam as the State's main official religion and that it is a foundation source of legislation<sup>106</sup>. This aligns with ICCPR guidelines stipulating that religion is established as an official religion when its followers constitute the majority of the population<sup>107</sup>. Such an allowance clearly shows that the impairment of any adherents or non-believers' rights and discrimination by religion are prohibited as stipulated by the ICCPR. More so, it also shows the strong relationship or interactional activities between the States and religious affairs. Additionally, such provisions also show that the formulation of the Iraq constitution has significant implications not only on religious rights but also on human rights in general. This is because all the state activities and legal affairs revolve around Islam and thus, certain rights that would have been prevalent when other religions were used to formulate the constitution are excluded. Islam and other religions, especially Christianity have always been known to be two distinct and extreme religions<sup>108</sup>.

The notable observation about the strong relationship between the Iraq constitution and Islam is also evident under Section A, Article 2 which refutes the enactment of any law contradicting Islam's provisions<sup>109</sup>. Such enactments are a clear distinction that efforts to promote certain rights that are not prevalent under Islam will be futile. Additionally, the role of the IHL, in this case, can be ineffective as the domestic laws guided by the constitution take precedence over the IHL.

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<sup>106</sup> Constitute Project, 'Iraq Constitution of 2005' (Constitute Project, 26 August 2021)

<[https://www.constituteproject.org/constitution/Iraq\\_2005.pdf?lang=en](https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en)> accessed on 13 November 2021.

<sup>107</sup> Iraq signed without reservation or declaration the ICCPR on 23 March 1976.

<sup>108</sup> Constitute Project, p. 13.

<sup>109</sup> Ibid, p. 14.

It must, however, be commended that the Iraq constitution does tolerate any law or religious activity that undermines democracy. Section B, Article 2 of the Iraq constitution states that no laws undermining its democracy should be enacted<sup>110</sup>. The existence of such laws fostering democracy is, however, insufficient as incidences inhibiting democracy and human rights can exist irrespective of such a law preventing such causes. Notable examples can be drawn from the same country in which the likes of Saddam Hussein were accused of undermining the democracy and human rights of the Iraqi people<sup>111</sup>. Again, basic freedoms and rights are by no means not allowed to be jeopardized by any law under the Iraq constitution and such stipulations are made under Section C. This shows that the constitution has no room for any religious and human rights activities not embodied under the constitution are not considered. Furthermore, any possible religious and human rights amendments have to be within the constitutional grounds if they are to be given due consideration.

Nevertheless, other religious groups like Mandeans, Yazidis and Christians are allowed to exercise their liberty as prescribed under Section 2 of the Iraq constitution<sup>112</sup>. But the Iraqi people's identity is regarded as being mainly 'shaped' around Islam<sup>113</sup>. Hence, it becomes imperative to note that religion plays an instrumental role in Iraq's constitution and other national affairs like identity and culture. Thus, secularism ideas in this context will hold significant relevance and implications when related to religious rights and other forms of human rights.

The Iraq constitution does contradict other legal guidelines regarding the protection of religious rights. Such contradictions are still yet to be further reviewed within the courts of law and this, in turn, puts significant pressure on human rights organisations to protect religious freedom. For instance, the government has instituted laws preventing the conversion of individuals from Islam to other religions<sup>114</sup>. The same laws also commend children to be converted to Islam the moment one of the parents converts to Islam<sup>115</sup>. Besides, the existence of

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<sup>110</sup> Constitute Project, p. 15.

<sup>111</sup> Ibid, p. 16.

<sup>112</sup> Alkifaey Hamid, 'The Failure of Democracy in Iraq: Religion, Ideology and Sectarianism' (Routledge 2018) 2.

<sup>113</sup> Ibid, p. 5.

<sup>114</sup> Al-Dabbagh Harith, 'The Rights of Religious Minorities in Iraq: The Case of the Forced Conversion of Minors' (2021) ALQ 1, 3.

<sup>115</sup> Ibid, p. 5.

certain resolutions, and laws overriding and limiting the practice of some faiths is still a prominent issue to reckon with. Thus, secularism, in this case, can be seen as instrumental in fostering freedom among other faiths. Secularism, in this case, can also be a channel through which governments and other human rights organisations can pave a way through which religious equality can be fostered between Islam and non-Islam believers.

### **Islam as “the religion” of the state**

Key aspects that can influence how state and religious affairs influence religious rights and other forms of human rights and the role of secularism in Iraq are mainly underpinned by Islam as the religion of the state. Preliminary insights provided showed that Islam is regarded as the official religion of the state under the Iraqi constitution<sup>116</sup>. Other studies consider this as harmless so long as the religion does not have a state character<sup>117</sup> while others consider this to be responsible for emerging and contemporary issues being observed, especially in the Middle East region<sup>118</sup>. Such follows the perpetration of crimes and human rights violations perpetrated in the name of protecting religious values. Notable cases of ISIS, Daesh and other religious extremist groups are a good reflection of how religion can interfere with state affairs and undermine human rights. To make matters worse, it is recorded that the number of ISIS-related deaths recorded in Iraq topped 9 926 deaths up from 2013’s ordinary terrorism-related death levels<sup>119</sup>. An estimated total of 209 161 civilian deaths caused by extremist-related groups were recorded in Iraq by the year 2021<sup>120</sup>. Besides, issues like women being raped, people being tortured, home displacements and children being recruited as part of militias were also raised as major concerns against the violent and human rights-abusing religious extremist group ISIS<sup>121</sup>. Hence, in some circumstances, it would be rational to suggest that these challenges and human rights abuses could have been avoided if secularism structures were built in place. This can be reinforced by

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<sup>116</sup> Machlis Elisheva, ‘Shii-Kurd Relations in Post-2003 Iraq: Visions of Nationalism’ (2021) MEP 1.

<sup>117</sup> Ibid, p. 4.

<sup>118</sup> Ibid, p. 7.

<sup>119</sup> Statista ‘Number of Deaths in Iraq due to terrorism between 2006 and 2019’ (n.d)

<<https://www.statista.com/statistics/202861/number-of-deaths-in-iraq-due-to-terrorism/>> accessed on 14 October 2021.

<sup>120</sup> Iraq Body Count, ‘Iraq Body Count’ (n.d) <<https://www.iraqbodycount.org/>> accessed on 14 October 2021.

<sup>121</sup> Helfont Samuel, ‘Compulsion in religion: Saddam Hussein, Islam, and the roots of insurgencies in Iraq’ (OUP 2018) 7.

arguments stating that religious extremist groups exploited religious laws and beliefs to perpetrate crimes and human rights violations<sup>122</sup>.

The constitutional decree regarding Islam as being the official religion is not found in the Iraq constitution but is also embedded in other constitutions like the Moroccan, Kuwait and Tunisia constitutions<sup>123</sup>. Reasons behind the wide spread of Islam as the official religion of most Arabic countries follow events that transpired during their occupation by western countries. Such incidences contributed to linguistic structures, and legal, social and cultural changes. Thus, the attainment of independence by Arabic countries provided them with a platform as part of efforts to preserve their identity and break away from the colonial era and its related effects<sup>124</sup>.

Therefore, any human rights infringements observed in such states are possibly addressed using other legal and religious avenues that are completely different from secularists' suggestions.

Various concerns and questions are still being raised as to;

- If states have a religion or not.
- If states should have a religion or not.?
- If “declaring the religion of the state,” entails that there is positive discrimination in support of citizens belonging to the same religion of the state. Alternatively, does this entail that citizens who believe in other forms of religions other than Islam are being discriminated against or not?

Such a provision is impactless from a constitutional and legal point of view because considering states as Muslim nations do not impose clear rights and duties or obligations. For example, article 149 of the Egyptian Constitution of 1923 considers Arabic as the official language and Islam as the state religion<sup>125</sup>. However, it does not in any way result in the prevention of activities or acts that are inconsistent with the provisions of the law and hence, this does not pose any effects on citizens' public lives.

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<sup>122</sup> Helfont, p. 8.

<sup>123</sup> Ibid, p. 11.

<sup>124</sup> Elkins Zachary, 'On the Paradox of State Religion and Religious Freedom.' (2019) WGLD 1.

<sup>125</sup> Ibid, p. 3.

## **Islam as “Identity”**

Issues and concerns about secularism and how it influences relationships between the State and religious affairs are mostly governed by the role religion plays in promoting and safeguarding national identity. Cases, where Islam is viewed as part of the national identity, can pose serious challenges in having secularist ideas being introduced in such states. Under Article 2, Section II of the Iraq constitution, it is asserted that the constitution shall and does guarantee the protection of the Islamic identity among the Iraqi citizens<sup>126</sup>. Circumstantial conditions mentioned under Section I of the same Article in which Islam is regarded as a state religion are also reflected in constitutional provisions regarding it as an identity<sup>127</sup>. Thus, the Iraqi constitution is deemed to be an instrument of confirming and safeguarding the Iraqi identity but the legality of such a statement is questionable and carries little impact. This is because the constitution clearly states that it guarantees religious identity as depicted by the terms “this constitution guarantees...”<sup>128</sup>. In such a case, questions will be asked as to how the constitution guarantees the protection of religious identity. This is because the constitution only represents the makers’ will and the makers’ desire to have the constitution guarantee the preservation of religious identity, then players like the state are required to significantly demonstrate a desirable high level of commitment instead of just relying on a structural document or report. Besides, some studies consider that constitutions can be devoid and lack an effective capacity to warranty tangible guarantee for only preserving religious identity, but other legal and institutional laws and conducts<sup>129</sup>. Thus, the state serves as the best entity to guarantee the preservation of religious identity as opposed to the constitution.

## **Islam as “the source of legislation”**

Preliminary ideas provided in this chapter revealed that the Iraq constitution considers Islam to be a source of legislation. Others consider Islam to be a law on its own and the constitution does provide a significant legal back as it highlights that no laws shall be enacted

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<sup>126</sup> Ibid. p. 18.

<sup>127</sup> See Article 2, Section 1 of the Iraqi constitution that considers that the constitution will uphold all proofs that Islam is a state religion and must be safeguarded.

<sup>128</sup> Ibid.

<sup>129</sup> Asadzade Peyman, ‘War and Religion: The Iran– Iraq War’ (OREP 2019) 5.

that contradict the established provisions of Islam<sup>130</sup>. Such a provision makes it difficult to separate whether State activities are being controlled on a solely legal state basis or a religious point of view. That is, this legal provision ensures that state affairs are organised, conducted, and directed using Islamic statutes, rules or laws. Thus, the need to advocate for secularism in this context is justifiable, especially when religious equality does not exist. Therefore, secularists' ideas are advocated as a basis for ensuring that all religious groups are equally represented in the management of the state together with other social, economic and political activities. It can be seen that not only religious rights but also human rights overall are undermined by the fact that Islam serves as a source of legislation.

Considerations can also be pointed towards how economic transactions are conducted between Iraqi individuals as certain business or economic practices are forbidden under Islam. For instance, it is forbidden to charge interest on any borrowed amount under the Islamic religion<sup>131</sup>. Though there are no legal enforcements on such matters, the social and religious implications of such beliefs psychologically hinder individuals from levying interest even when they are duly and legally justifiable to levy and collect it from other individuals. Such psychological effects can deprive individuals of their emotional peace and stability, and consequently affect their well-being. Such adverse effects are not accounted for though they are triggered by the legal implications of using Islam as a source of legislation.

Concerns can be raised regarding the wording 'source of legislation' as this entails or relates to court rulings, customs, and laws. Such entails that Islam sits in a similar position though it does not override other laws or legislations. Furthermore, the parliament being the legislators can derive laws from any source without any constitutional violation or order<sup>132</sup>. However, such a provision does have negative effects on religious and human rights overall. This is because laws that are contrary to Islam are prohibited though they may be having significant positive effects on both religious and human rights as highlighted under Article 2 of the Iraqi constitution<sup>133</sup>. Alternatively, this confers significant power and authority to religious matters

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<sup>130</sup> Peyman, p. 6.

<sup>131</sup> Akbaba, Yasemin, and Zeynep Taydas. "8. Religion, Security Dilemma, and Conflict: The Case of Iraq." *Religion, Identity, and Global Governance*. University of Toronto Press, 2017. 159-186.

<sup>132</sup> *Ibid*, p. 160.

<sup>133</sup> *Ibid*, p. 161.

over state activities that are managed from an Islamic basis or perspective. In this case, secularism can serve vital functions of enhancing flexibility and creating more room for improving human rights protection measures. Furthermore, having Islam as a source of legislation entails that Islamic law has superior authority over other laws and this can further complicate other legal initiatives and human rights protection measures. Aspects like freedom of worship can be compromised when the affected religion's activities are contradicting Islamic beliefs and enacted laws. If not, then the constitution will be violated. Hence, any secularist ideas that interfere with Islam as the source of legislation tend to be under the Iraq constitution and can be repelled on such basis and religious grounds as well. Such efforts are irrespective of their contributions to either religious freedom or human rights overall. In other words, the Iraqi constitution can be said to favour religious beliefs at the expense of any law favouring the promotion and protection of either religious freedom and/or human rights overall.

Meanwhile, there is a legal basis on which legislators can craft laws by considering their effects on Islamic values and beliefs. As a result, it becomes feasible to implement secularist ideas by simply ensuring that the proposed religious freedom and/or human rights laws are aligned with Islamic beliefs. This eventually shows that it is highly feasible in implementing secularist ideas separating state activities and religious affairs in Iraq so long as the proposed suggestions are in alignment with Islamic beliefs, values and laws.

Other aspects such as the consistency and accuracy of drafting the constitution are significantly influenced by Islam's impact and role as a source of legislation. Such a condition must not be violated and requires that Islam be in alignment with other provisions and must not in any way differentiate itself from others. Secularist ideas and propositions may be called in cases where differentiations exist between Islam and other provisions and causes it to interfere with state affairs. The terminology itself is a cause for concern as it is surrounded by uncertainty and the judiciary may fail, to unify Islamic law with constitutional provisions. The two distinct terms must be clarified as they lack clarification under the Iraq constitution. For instance, it is unclear whether the non-violating Islam provisions imply something different than Islam as a legal basis. Besides, a broader authority may be required when interpreting constitutional provisions related to such matters.

## Principle of Secularity or Areligiosity of the State

Secularism is best defined as the separation of religion from the state and civic affairs<sup>134</sup> Others consider it to be an idea that deals with human affairs based on naturalistic and secular considerations<sup>135</sup> It is vital to note that secularism has various meanings and implications and hence, its interpretation in international law is subject to vary. Nevertheless, secularism aims to minimize the extent to which religious affairs interfere with public institutions and state activities. In other words, secularism approaches life without recourse to religion-based material world principles.

It is widely known or agreed in certain circumstances that no religion shall have a state character<sup>136</sup>. In some cases, others consider the same idea by interpreting and stating that ‘the state is not religious’<sup>137</sup>. This implies that there is no official state religion but such is not the case when the Iraq state and religious affairs are brought into question. This is because Islam under the Iraq constitution is regarded as the official state religion<sup>138</sup>. Alternatively, this signifies that the Iraq State has an Islamic religion or simply considers it religious.

The Iraq constitution clearly highlights its position on the role of the Islamic religion and how it influences state affairs. Hence, there are always huge efforts being placed by the state through its legal and religious organisations to enforce and uphold Islamic beliefs and conduct. Thus, the aspect of secularism in this context can be said to be far outside the reach of being attained. Reconciling certain religious matters and laws as part of secularism initiatives can prove to be difficult as equality can hinder the absolute triumph of freedom or vice versa. Besides, making constitutional amendments that incorporate the vital aspects of secularism to avoid conflicting interferences between a secular state and a religious state. Secularism is presumed to be essential for preserving peace and hence, the importance of separating religious laws and activities from state activities and affairs is well justified<sup>139</sup>. Though a one-state religion is presumed to promote social peace as it reduces conflicts induced by different religious beliefs

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<sup>134</sup> Genauer, Jessica. "Comparing inclusion in constitution-making in Egypt, Tunisia, and Iraq." *The Journal of North African Studies* 26.6 (2021): 1190-1220.

<sup>135</sup> *Ibid*, p. 1991.

<sup>136</sup> Chernus Ira, ‘The war in Iraq and the academic study of religion.’ (2008) 76(4) *JAAR* 844, 845.

<sup>137</sup> *Ibid*, p. 845.

<sup>138</sup> *Ibid*, p. 846.

<sup>139</sup> *Ibid*, p. 847.



and values, this is not always the case with most Islamic religious states<sup>140</sup>. For example, the rise of extremists groups like Daesh and ISIS has its origin emanating from Islamic religious nations like Iraq, Yemen, Syria and Afghanistan. Such groups have not only threatened social peace but have undermined all the distinct types of peace and thwarted hopes of achieving better social and economic development levels. Another vital aspect that can be incorporated in this cases concern separation of the church and state, and neutrality of the state in religious matters that are discussed as follows;

### **Separation of church and state**

Religion exists in almost every society through differences attached to the type of religion being considered the official religion. In domestic law, public authorities in their three levels (municipal, regional and central) are viewed as autonomous and independent entities<sup>141</sup>. Thus, there should be non-interference by either the state or the Islamic religion. Alternatively, this implies that churches' internal operations must not interfere with public authorities' affairs and activities. On the other hand, public authorities' affairs and activities must also not interfere with churches' internal operations. Some studies assert that public authorities' affairs and activities must not in any way or anyhow bring confusion between religious and state functions<sup>142</sup>.

The extent to which religious activities interfere with state affairs and activities is also influenced by how the Iraq constitution governs the distribution of power. Iraq being an Islam nation whose constitution is established on the foundations of Islam entails that religious activities have both direct and indirect influence on state activities. Such effects are regulated or determined by the distribution of power as stipulated by the constitution.

The Iraq constitution contends that powers are shared between governments<sup>143</sup>. That is the division of powers between the Kurdistan government and its governorates and the Baghdad federal government. Too much power-sharing has always been known to be problematic as it

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<sup>140</sup> Chernus, p. 849.

<sup>141</sup> Froese Paul and Carson Mencken, 'A US holy war? The effects of religion on Iraq war policy attitudes' (2009) 90(1) SSQ 103, 103.

<sup>142</sup> Ibid, p. 104.

<sup>143</sup> Ibid, p. 111.

results in delays in decision-making<sup>144</sup>. Most importantly, states have confronted the burden of having to influence other parties to consent to certain religious and human rights matters. Other studies reckon that sharing power gives birth to various social and religious groups that can use religious apparatus to influence State activities<sup>145</sup>. The decision at this stage whether religion or states influence the other is still subjective. For instance, it was highlighted that states through legislative branches influence both cultural, social and religious activities<sup>146</sup>. However, in the case of Iraq where the constitution is established using a set of religious principles implies that religion is the one that influences state activities.

### **The neutrality of the state in religious matters**

Matters about secularism are well presumed to consider the state as taking a neutral stance involving any religious issue. This entails that public authorities are not at liberty to examine and instruct various religious creeds but rather belong to communities and individuals entitled to basic religious freedom. States' ability in appraising the legitimacy of religious matters is questionable and this has led to them through acts of faith being regarded as spiritually incapable and incompetent in appraising the legitimacy of religious matters<sup>147</sup>. As a result, the term "sect" is a sociological term because it possesses adverse connotations and hence, cannot be considered to be a legal term. Furthermore, states are at most incapable of differentiating between specific groups' religious orthodoxy or heterodoxy.

Meanwhile, religious communities must comply with given religious laws instituted by the state. Additionally, their authenticity must be verified by public authorities and listed under a specific governmental body responsible for their supervision and monitoring<sup>148</sup>. Such requirements represent the formal procedures and requirements religious institutions must comply with. Furthermore, things like their representative organs, the type of operation, address, Human Rights Commission and denomination must be made known to public authorities. Article

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<sup>144</sup> Froese Paul and Carson Mencken, p. 113.

<sup>145</sup> Ibid, p. 114.

<sup>146</sup> Ibid, p. 115.

<sup>147</sup> "The creation of a registry (...) does not authorise the state to carry out controls of the legitimacy of religious beliefs (...), it only authorises it to verify only as an act of confirmation and not one of qualification that the applicant is not an entity that is excluded in Article 3.2 of the OLRF.

<sup>148</sup> Froese Paul and Carson Mencken, p. 116.

18 of the HRD instituted by the Human Rights Commission emphasises the importance of such a declaration as a reflection of the concept of secularity. Hence, states are required to adopt “acts of faith”, when establishing terms “religion” or “belief” through which “the right to religion, conscience and thought” become the foundation on which terms will be derived. Such encompasses the right not to profess any religion or belief, atheist beliefs, non-theistic and theistic beliefs as a way of broadly interpreting such rights<sup>149</sup>. However, this does not imply that religious governing bodies instituted by the state do not possess the necessary control instruments or tools. Once religious groups are registered under specific religious ministries as in the case of Iraq, the laws in effect act as either legislative or constitutional filters. That is, they cannot be applied preventively. The Iraq constitution through Section A contends that religious groups pursuing goals or using criminal means are subject to prosecution and to be treated as illegal and hence may not be registered as religious institutions under the religious Act. However, two challenges affecting the act of exercising religious freedom exist and these are<sup>150</sup>;

- Violation of morality, health and public safety aspects of public order.
- Violation of other individuals’ rights.

Article 3 of the same Section 2 has been a subject of controversy and establishes that “activities, aims and entities related to study and research psychic or para-psychological phenomena or humanistic or spiritualistic values or other analogous ends foreign to the religious world” are outside the constitution’s scope and should not be registered under the governing religious authority of supervising ministry. A judgement passed by the Iraq Constitutional Court (46/2001) asserts that the State is subject to answer the following inquiries<sup>151</sup>:

- a) There are no violations of public order and other individuals’ fundamental rights posed by religious groups.
- b) Religious groups requesting registration are not excluded from Section A and B’s propositions and legalities as implied in the constitution.

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<sup>149</sup> General Observatory of the United Nations Human Rights Council (Observatori General del Comitè de Drets de l’Home de les Nacions Unides) Number 22 (48) of 20 July 1993.

<sup>150</sup> Judgement of the Iraq Constitutional Court 46/2001 Opinion 8

<sup>151</sup> Ibid.

The second point has been riddled with many challenges as one can consider it as poorly drafted. This is because it does not cater for entities governed and influenced by specific features like those aimed at researching parapsychological or psychic phenomena or spreading humanistic values. Such a problem affects all religions in all aspects ranging from the application and scope of laws governing religious freedom<sup>152</sup>. For instance, anybody can regard that miracles or prayers are vital for several religions and parapsychological or psychics capable of being preached by any religious group. That is, the same section uses a law that excludes certain groups with similar features as those of groups that have been included under the set criteria<sup>153</sup>. As a result, no objections have been made to this paragraph in the form of either an unconstitutional question or an appeal though one can ascertain that it is contradictory. However, the same idea is used in outlining that control should not be subject to qualification but rather to verification concerning acts contradicting public order or fundamental rights. Alternatively, incidences committed by religious groups violating public order or fundamental rights are not interpreted using a preventive feature concerning potential risks. Additionally, assumptions must not be used in limiting the ability to exercise religious freedom by using public order clauses but rather on sound verification when the above-mentioned are fit for critiquing.

### **Islamic Arguments for a Secular State and the Liberal Concepts of Shari'a**

Relations between the state and religion are governed by laws setting up frameworks for such relations. That is, some laws define and regulate relations between the state and religion and Shari'a. Under normal circumstances, there are courts, parliaments, a prophetic lawgiver, and divine legislator<sup>154</sup>. Moreover, Shari'a is not and does not have a monolithic body and it is empirically well noted for being combined with various legal practices<sup>155</sup>. However, the enactment of shari'a by a state entails that it adopts, codifies and enforces its rulings thereby making it a secular tool. In other words, this makes shari'a between religion and the state and offers a legitimate religious basis for states and their apparatus. Such mediation roles are the

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<sup>152</sup> Froese and Mencken, p. 114

<sup>153</sup> Ibid, p. 114.

<sup>154</sup> Ibid, p. 115

<sup>155</sup> Ibid, p. 117.

main reasons why conflicting ideas have emerged between proponents of Islamisation and secularization.

It is essential to note that proponents of Islam view Islam as a political tool that should be used to Islamise societies. But the challenge is that they do not realise that it is similarly an apparatus that enhances state law. For example, Saudi Arabia had decreed and did not have laws even a constitution for it was formed solely on Sunna and the Qur'an<sup>156</sup>. However, appeal courts and other contemporary legal institutions were later introduced with time<sup>157</sup>. The major problem with such a move is that the establishment of an Islamic state makes it difficult to practically implement Islamism in practice so that it does not consider un-Islamic or heretic.

### **The dualism of the secular and the religious in lawmaking**

Law has an arbitrariness general feature that characterises its application and scope. For instance, it is practically challenging to deal with moral issues by establishing laws protecting them. This can be illustrated using a proposition denoting that legal questions are not dealt with the similar categories because of the suggested questions. Such questions tend to address matters concerning what is preferable, recommended, harmful or forbidden. On the other, law deals with matters of morality regarding what is “illegal” and “legal”. A notable example relates to organ donations carried out in Saudi Arabia and the states regard them as lawful. However, several individuals are uncomfortable with such acts and tend to engage Muftis to obtain moral guidance. On the other hand, the establishment of legal acts by the Saudi state supporting such acts had been accompanied by positive Islamic legal opinions (Muftis issued fatwas) regarding such a controversial exercise.

Meanwhile, there are several contradicting arguments suggested in academic studies concerning shari'a. for instance, some studies consider other laws as distinct from shari'a because it is all-embracing and revolve around the lawgiver<sup>158</sup>. However, such an argument does not hold valid significance because the law remains arbitrary and incomplete due to the existence

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<sup>156</sup> Froese and Mencken, p. 121

<sup>157</sup> Ibid, p. 122.

<sup>158</sup> Ibid, p. 124.

of controversial issues and dissenting opinions. As a result, there are dualism issues encountered between secularism and religion in the process of lawmaking and exist on three distinct levels;

The first level pertains to the normative definition of death as life as well. Various secular documents like religious texts such as the Bible and the Qur'an, hadith, economic, juridical, and medical texts. National institutions are found at the second level and this can be evidenced by the religious side position of al-Azhar and the secular side of the Egyptian parliament<sup>159</sup>.

Organisations like the Organisation of the Islamic Conference and other transnational institutions are found at the third level. Such a level is dominated by institutions overseeing Islamic affairs worldwide and only religious figures can participate at such levels. Consequently, the lawmaking process tends to assume or encompass various aspects of decision-making. For instance, there is knowledge, authority and consensus of reason on one hand versus compromise and majority in all cases.

Regarding matters pertaining to aspects like compromise and majority vote, the entire decision-making process will or is centred on the concept of equality between individuals and may disregard that certain individuals may know more than others (question about truth and knowledge). That is, a limited number of knowledgeable individuals can and is capable of avoiding wrong decisions and hence, making decisions on behalf of others.

Meanwhile, it is instrumental, to depict that religious law is essential in legitimising certain religious, social, and cultural aspects. However, there are vast absolute democracy and discussion problems that have been noted to exist during the legitimisation era. For instance, governments proclaim to be possessing reasons for representing the majority but their claim can be contested. Thus, Islamic or Arabic governments tend to have weak democratic legitimisation regardless of the idea that they have adopted elections as a mode of legitimisation. Additionally, Islamic law tends to provide additional forms of legitimisation required by Islamic or Arabic governments. This is because Islam is authoritative, significant, religious and represents a common sense of heritage, culture and identity.

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<sup>159</sup> Froese and Mencken, p. 125.

Nevertheless, the concept or issue of overlapping scopes between secularism and religious acts can be referenced to the state muftis<sup>160</sup>. This is because they played an instrumental role in pressing for reforms and modernising Islam and at the same time they were closely linked to the khedive during the post-independence area under British rule. As a result, states like Egypt through their state mufti recommend that Islamisation be conducted by appropriate authorities and scholars and still continue to welcome its idea.

### **Two problems associated with shari'a becoming state law**

The Islamic essence is based on the constitution of the kernel of Islam. That is, it is constituted based on the science of lawmaking (fiqh) and legal opinions (fatwas). This entails that the normative kernel of Islam can be used as a basis for analysing Shari'a. It is essential to note that Islam also deals with the believers' moral conduct similarly to any other religion. Consequently, the incorporation of Islamic law into state laws entails that it regulates human beings' moral conduct and personal affairs without justification or an anthropocentric ethical concept<sup>161</sup>. Such tends to create two significant issues. Foremost, God is the one who establishes such a ruling used in representing morality and ensures that it is morally self-adequate<sup>162</sup>. Alternatively, it does not cater for moral conduct governing specific behaviour or acts but rather deals with religiosity's outer appearances. This tends to reduce religion to being a difference and identity marker that emphasises the outer appearances that it implies and this includes fasting during Ramadan and the headscarf.

The second challenge undermining the application of shari'a as state law relates to the fact that the state imposes reasonable judgment instead of being dependent on individuals' reasonable judgment<sup>163</sup>. In other words, legal logic causes something illegal or legal to become preferable, recommended, harmful or forbidden in religious logic. Thus, it becomes highly religious each time the state forcefully imposes such conduct. There is a long history of emphasising kalam instead of shari'a (ethics or theology). For instance, there are no faculties of kalam and yet there are shari'a faculties in Arab universities. Notable references can be drawn

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<sup>160</sup> In Egypt, this office was established towards the end of the nineteenth century and had produced over 66,000 fatwas by the 1990s.

<sup>161</sup> Skovgaard-Petersen, Jakob, 'Defining Islam for the Egyptian State: Muftis and Fatwas of the Dār al-iftā' (Brill 1997) 7.

<sup>162</sup> Ibid, p. 8.

<sup>163</sup> Ibid, p. 11.

from Azhar University where kalam is secondary to fiqh, hadith and tafsir<sup>164</sup>. It is not autonomously taught as a subject in both secular and religious universities. Additionally, philosophy (falsafa) and kalam are taught side by side in secular universities and several kalam scholars who graduated from secular universities' faculties of history and humanities did not graduate from religious seminars, but from secular universities<sup>165</sup>. Such entails that questions related to "what does it mean for religious individuals to live in a modern world?" are easily answered using substantial fatwas (normative details) and not theological philosophical speculation. This merely reflects conflicts between normative production and theological speculation that is traceable to early Islam. Apparently, such conflicts are a reflection of differences between orthodox Islam and the rational school of Islam<sup>166</sup>.

### **Three Arguments for a Secular State**

Several ideas support secularism in Islamic states characterised by a Muslim majority as noted by various modern Islamic scholars like Abdullahi Na'im contending that religiously neutral states are incapable of enforcing shari'a. Additionally, Na'im uses a deep-reaching and systematic approach that separates states and religion in differentiating and/or separating between governments and politics. Moreover, he regards Islamic state ideologies as a "dangerous illusion". He adds that "the notion that shari'a principles can be enforced through the coercive power of the state" is a "belief contrary to the nature of shari'a itself and the nature of the state"<sup>167</sup>. Since the state is secular from the very beginning, "consequently, whatever the state enforces in the name of shari'a will necessarily be secular, the product of coercive political power and not superior Islamic authority. In fact, the notion of an Islamic state is a post-colonial idea that is premised on a European model of the state as a totalitarian view of the law, and public policy as the instruments of social engineering by ruling elites". Islamic norms are only "religious obligations for individual Muslims". Na'im perceives Islam as implying "that each and every Muslim is personally responsible for knowing and complying with what is required of

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<sup>164</sup> Ibid, p. 12.

<sup>165</sup> Abdullahi Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (HUP 2008) 12.

<sup>166</sup> Ibid, p. 13.

<sup>167</sup> Ibid, p. 15.



him or her as a matter of religious obligation”<sup>168</sup>. He quotes several Quranic verses to clearly support his arguments and question the restrictive capacity and effectiveness of juridical consensus on future generations. However, it is imperative to bear in mind that such an approach is practically impossible in reality and only applies on a theoretical basis when used to separate states and religion in dealing with the dualism of the secular challenges.

The other limitation concerns problem is such an approach is that it does not address legitimisation issues and contradicts Islamic state ideologies. Related studies contend that Quranic morality should be used to address matters pertaining to Islamic authority<sup>169</sup>. Such studies highlight that no individual is capable of speaking on behalf of God without proper authorisation and advocate that complex issues and faith-related assumptions are effectively addressed using proper “conscientious pauses”. Additionally, it entails that submitting to God’s ordinances does not entail a “blind submission to those who claim to represent God’s law, and it does not mean submitting to the contentment and comfort of arrogant self-reference”. On the other hand, Muhammad through the Qur'an does not dominate nor control people but rather teaches them. This depicts that the Qur'an’s authority is not dictatorial but rather it is persuasive. Hence, Quranic interpretations must be centred on reasonableness, comprehensiveness, self-restraint, diligence, and honesty.

Mohsen Kadivar an Iranian scholar attempted to reconcile Islam with human rights citing that the major issue confronting modern Islam concerns three different types of inequalities: jurist and non jurist, men and women, and Muslims and non-Muslims<sup>170</sup>. In addition, Islam does not apply principles of equality to address human rights issues. Thus, traditional methods to shari’a consider human rights to a lesser extent. Thus, it is crucial to broadly define basic rights by separating mutable rights from contextual rights so as to deal with such contradictions. As a result, Shari’a norms must fulfil these three basic requirements regarding ‘being better than earlier solutions’, ‘just’ and ‘rational’.

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<sup>168</sup> Na’im, p. 16.

<sup>169</sup> Ibid, p. 17.

<sup>170</sup> Ibid, p. 19.

## Secularism and, Religious and Human Rights in Iraq

Secularism has been applied in different contexts and this has resulted in the development of various secularism models and notable models are related to Anglo-American, Turkish and French models<sup>171</sup>. As a result, reasons supporting secularism tend to differ and this significantly affects how secularism subject matters are viewed as affecting human rights and international law and how international law can be used to govern both religious and state affairs.

Iraq can be said to be going through a development phase and is still yet to be classified as a developed economy as it has been destroyed by civil war and the high prevalence of insurgent groups. The prevalence of war since the Saddam Hussein era led to major destruction of infrastructure<sup>172</sup>. Consequently, the Iraq state has been caught in a ‘wave’ of traditionalism as investors and other forms of economic and social development have been restricted due to high risks. Thus, the importance of secularism in this context can be said to promote modernization as it aligns with previous examinations. As such, secularism is vital for dealing with divisive and backward traditional and religious values.

The connection linking secularism with religious rights in Iraq is also best understood by drawing ideas from sectarian issues that have been dividing the Iraqis and how they have undermined their efforts to have a common national identity. These challenges were mainly spearheaded by political tensions linked to religious differences between the Sunni minority and Shia majority<sup>173</sup>. The existence of political tensions between these two religious groups has been the centre of significant tensions observed in Iraq that led to the occurrence of sectarian problems that destabilized Iraq and undermined state-building processes. As such, secularism in this context is vital for establishing neutral conditions under which minority and majority groups will interact with each other. For example, the interference of the state in Islam, Christianity, or Yazid’s internal operations. Cases of such incidences are relatively few as the Iraq constitution does uphold the religious values of other groups like Christians, Suni and Yazid. However, there are cases where public authorities can work toward providing counsel to religious groups. This is

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<sup>171</sup> See the 2005 Iraq constitution, p. 4. <[https://www.constituteproject.org/constitution/Iraq\\_2005.pdf?lang=en](https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en)> accessed 13 November 2021.

<sup>172</sup> Na’im, p. 20.

<sup>173</sup> Ibid, p. 21.

guided by the principle of cooperation which guides both the state and religious groups not to interfere with each other's affairs and activities. Both parties (the state and religious groups) can engage in less interventionist and paternalistic.

There has been little effort being expended on examining how secularism can serve an instrumental role in protecting and fostering religious rights. Hence, arguments laid forth in this study commence on a foundation of the belief that secularism can and plays an instrumental role in protecting and fostering religious rights. Such ideas will be related to the situation in Iraq on an empirical basis.

Foremost, there have not been reported cases of abuse of religious freedom in Iraq. Nevertheless, there are vast reported issues concerning discrimination and restrictions of rights based on religion. For instance, it is highly noted that cases surrounding the sectarian misuse of power by states are highly evident in Iraq<sup>174</sup>. This following rising concerns about the restriction of religious freedom by Iraq's regional governments<sup>175</sup>.

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<sup>174</sup> United States Department of State, 'International Religious Freedom Report for 2011' Bureau of Democracy, Human Rights and Labor' <<https://2009-2017.state.gov/documents/organization/193097.pdf>> accessed on 23 October 2021.

<sup>175</sup> Ibid, p. 7.

## CHAPTER V

### Conclusions, Recommendations and Suggestions for Future Studies

#### Conclusions

The study primarily examines the impact of secularism and state religious relations on human rights. This follows the identification of problems concerning whether religious rights should be considered as a group right or an individual right and that many gross human rights violations are being perpetrated in the name of defending religious values and norms. As a result, related empirical studies were reviewed to enhance understanding regarding the treatment of religious rights and obtain further details concerning religion and state relations. Such examinations were made in the context of Iraq which considers Islam as its official or state religion and has been witnessing several incidences of gross human rights violations connected to religion.

Preliminary examinations made in this study revealed that religious groups are social institutions, and their practice implies the existence of more than one participant. Thus, the existence of religious groups like Christianity, Islam, Judaism, Yazidi, etc., implies that respective individuals can hold a belief but not a religion. Consequently, the right to freedom is a group right though it can be an individual right. Nevertheless, the act of requiring that at least one individual is required in exercising specific rights is inadequate to make them group rights. Hence, an individual right is freedom of association regardless of the notion that it is impossible to practise alone. In as many religious groups require an audience, religious worshippers or believers must have the right to express and worship. As a result, religious freedom is an individual right. Nevertheless, this does not discount the idea that religious group rights can override individual rights and are not reduced to a combination of individual rights.

The second aim of the study was centred on the need to determine the feasibility of enforcing or promoting secularist ideas in Islamic states like Iraq and identify any possible challenges hindering the promotion of secularism in Iraq. Answers to the related questions were mainly influenced by the relationship between the state and religion. As such, arguments

provided in this study showed states are to assume a neutral position concerning religious matters. That is, public authorities do not have the mandate to examine and direct various religious decrees but rather it is communities and individuals that are entitled to basic religious rights. Supporting evidence showed that the states cannot appraise the legitimacy of religious freedom, in acts of faith, and according to the stipulations of the constitutional court and hence, is incompetent to enforce the legitimacy of such rights<sup>176</sup>. Additionally, certain religious terms and principles do have legal backing or implications. For instance, the word “sect” is sociological and not a legal term because of its negative implications. Furthermore, other inherent problems influence the state’s relationship with religion or religious groups. The other notable concern relates to states' incapacity to differentiate between specific groups’ religious orthodoxy or heterodoxy. Therefore, secularism or the spirit of secularity demands that religious purposes be declared by religious communities upon successful verification and authentication by responsible public authorities. Such aligns with the Human Rights Declaration propositions outlined under Article 18 as suggested by the Human Rights Commission about the right to religion, conscience and freedom of thought” used in establishing the terms “religion” or “belief”. Additionally, such encompasses vital aspects like the right not to profess any religion or belief, atheist and non-theistic and theistic beliefs.

Meanwhile, some studies consider that states must be neutral and not have a religion<sup>177</sup> hence, secularism ideas can be justified when states have a religion that influences their activities and ability to administer justice. Such is the case with Iraq, which considers Islam as its official religion. This act of having Islam as Iraqi’s official religion is widely blamed for the mass human rights violations perpetrated by extremist religious groups like ISIS and Daesh responsible for manslaughter, kidnapping, suicide bombing, torture, massive engagements in child soldiers and other several gross human rights violations rebuked by the IHL are in against of UNHRC, UDHR, ICCPR etc. However, evidence provided in this study shows that the Iraqi constitution does create more room for promoting religious freedom as it allows other religious groups the same freedom. Hence, on this basis, one can say there is no need to promote secularism as far as religious rights are concerned. Nevertheless, this is not always the case as the Iraq constitution

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<sup>176</sup> See Article 3.2 of the OLRF.

<sup>177</sup> *Ibid*, p. 1151.

does not allow any law opposing Islam to be enacted. As a result, Islam dominates other religious groups and is a legal tool that the Iraqi government uses to administer justice and perform its legal obligations as a state. This can be supported by Section A, Article 2 of the Iraq constitution which refutes the enactment of any law contradicting Islam's provisions<sup>178</sup>. Additionally, Section B, Article 2 of the Iraq constitution states that no laws undermining its democracy should be enacted<sup>179</sup>. This entails that the possibility of refusing religious changes undermining efforts to promote and enforce human rights in Iraq is very high. Such is the main reason behind the rise of ISIS and Daesh groups that consider Western culture as 'Haram'. Consequently, this hinders social, economic and technological developments and hence the need to promote secularist ideas is justifiable. Besides, massive criminal activities are still being perpetrated in the name of religion and hence the adoption of secularist ideas will aid in curbing such gross human rights violations. Furthermore, the need to adopt secularism in Iraq is significant, especially at a time when globalisation and international trade activities are increasing.

There are, however, Islamic arguments in support of and against secularism. Thus, the second aim of the study was to explore the Islamic arguments for a Secular State. It has been established that related scholars consider the idea of an Islamic state a "dangerous illusion" and that "the notion that shari'a principles can be enforced through the coercive power of the state" is a "belief contrary to the nature of shari'a itself and the nature of the state"<sup>180</sup>. This is based on the belief that any Islamic state is secular from the onset, and thus, anything enforced by shari'a will be secular. This results in coercive political power and not superior Islamic authority. Additionally, the decision to adopt secularist ideas can be justified in the context that Islamic state ideas are post-colonial conceptions using social engineering instruments composed of public policy and totalitarian aspects of the law established by ruling elites on European models. Moreover, this study argues that Islamic norms are only "religious obligations for individual Muslims". Secularism ideas can be called for in cases where Islam is used as a tool to Islamise every individual either directly by force or indirectly through its principles. For instance, a child born to Islam parents is forced to convert to Islam and thus, violating the child's right to choose

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<sup>178</sup> Cismas, p 1152.

<sup>179</sup> Ibid, p. 1153.

<sup>180</sup> Ibid, p. 1154.

his or her desired religion. Thus, on its own Islam does violate certain religious rights, especially that of children. Moreover, there are problematic concerns about Islam when taken to mean “that each Muslim is personally responsible for knowing and complying with what is required of him or her as a matter of religious obligation”. Yet there is no binding and quality juridical consensus on successive generations. Such a method is practically difficult because it separates religion and state relations to solve the dualism of the secular. As a result, it does not address legitimisation concerns and conflicts with Islamic State ideologies. Again, the interpretation of the Qur’anic itself must be based on reasonableness, comprehensiveness, self-restraint, diligence, and honesty. The extent to which these values or principles adhere is questionable and thereby, calls for the adoption of secularist ideas.

Lastly, the study sought to establish not only the connection between Islam and the protection of human rights but also how secularist ideas can be adopted to enforce and promote human rights. The study has established that Islam on its own has inherent problems affecting it. Most importantly, there are three forms of inequalities affecting Islam. Firstly concerns jurist and non-jurist, secondly between men and women, and thirdly between Muslim and non-Muslims. As a result, the shari’a traditional approach is capable of accepting human rights to a very low extent. Thus, efforts to solve these problems require a broad definition of fundamental rights capable of being separated from mutable and contextual rights. However, shari’a norms do not fulfil three qualifications of being better than earlier solutions, just and rational. This clearly shows that there are inherent human rights violations problems engraved in Islam and that its adoption has been undermining human rights to a relative extent. Hence, secularism will act as a tool for promoting and enforcing human rights protection as far as jurist and non-jurist, men and women, and Muslim and non-Muslim related rights are concerned. Moreover, this can be worse, especially at a time when gross human rights like suicide bombings, torture, terrorist activities and other human rights crimes criticised by the UNHR and other international bodies like the ICC are being perpetrated in the name of protecting religious values and norms. Therefore, secularist ideas are needed in Iraq the problem of practically achieving their implementation is of huge concern because of constitutional arrangements rebuking any legal, social and economic activity undermining Islam. Hence, this study concludes by stating that secularism can manage to

deal with human rights violations in Iraq to a lesser extent though it can be used as a human rights protection strategy.

## **Recommendations**

Given that the Iraqi constitution's approach about Islam being a state religion, identity and source of legislation, any attempt to promote secularist ideas separating state activities from religious affairs can be futile even though they may lead to improvements in religious freedom and/or human rights protection and enforcement. As a result, the following suggestions will be made;

- Legislators must be flexible enough to consider the social, economic and political benefits of secularism, especially when they aid in protecting and enforcing human rights protection measures. This possibly requires that legislators align any proposed secularists, religious freedom and/or human rights laws with Islamic values, laws and beliefs when amending and implementing laws and legislations.
- Religious leaders must be actively involved in matters about human rights violations by participating in related matters and the drafting and amending of the constitution to allow more flexibility in promoting and enforcing human rights. This can be done by implementing changes addressing the three forms of inequality affecting Islam (jurist and non-jurist, between men and women, and between Muslim and non-Muslims).
- A separation between religious activities and the formulation of economic policies is greatly needed to foster the attainment of secularist goals of promoting economic growth and development. This can be done by ensuring that economic policies are strictly based on growth and development, and other monetary and non-monetary targets. This can be made possible by making sure that the shari'a norms are better than earlier solutions, just and rational.



## **Suggestions for Future Studies**

The study provides a general approach to the examination of how secularism and state-religion relations affect human rights. As a result, the study lacks detailed insights into the exact nature of human rights affected by such relations. Therefore, future studies can be specifically designed to address specific human rights affected by secularism and state-religion relations such as the right to life, the right to freedom from torture and inhumane treatment, and the right to equal treatment before the law, the right to asylum, etc. Additionally, the study analysed secularism and state-religion relations based on Islamic perspectives and thereby relatively neglecting the perspectives of other religious groups like Yazidi, Suni, Shia Arabs etc., thus, a balanced examination and insights into secularism and state-religion relations require the incorporation of such perspectives in future studies.

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## Similarity index

## **Ethical committee approval**

