



International Comparative Jurisprudence



THE RIGHT TO FREEDOM OF CONSCIENCE: WESTERN AND ISLAMIC PERSPECTIVES

Juozas Valciukas¹

Mykolas Romeris University, Lithuania
E-mail: vjuozas@mruni.eu

Mohammad Khazer Saleh Al Majali²

Qatar University, Qatar
E-mail: mkmajali@qu.edu.qa

Received: 29 April 2021; accepted: 19 May 2021
DOI: <http://dx.doi.org/10.13165/j.icj.2021.06.001>

Abstract. With the constant reoccurrence of the question of peaceful coexistence among people of different religions, legal traditions, and understandings of freedom and human nature, there is a need for a fresh study of the concept of freedom of conscience. This article addresses conceptual, doctrinal, and normative issues relating to the concept of freedom of conscience as a human right by examining it from Islamic and Western perspectives. Chapter 1 of this paper considers the Western perspective on the right to freedom of conscience in three key areas. The religious, philosophical, and legal aspects of this concept receive particular attention in an attempt to discern the essence of what freedom of conscience means in the West. To understand how this concept is articulated in legal terms, this article analyses both its national and international legal bases, alongside the relevant case law of the European Court of Human Rights. Chapter 2 of this paper is devoted to the study of the Islamic perspective on the concept of freedom in general and on the right to freedom of conscience in particular, in order to ascertain whether or not this right exists in Islamic legal tradition. In doing so, this paper explores the most fundamental Islamic sources – namely, the Quran and the Sunna – in order to understand the role that this freedom plays in them. Two constitutional examples from Jordan and Qatar are then analyzed, before final conclusions are delivered.

Keywords: conscience, right to freedom of conscience, religious freedom, Western legal tradition, Islam, Islamic law

Introduction

In seeking to understand the Western and Islamic origins of the concept of conscience, Christian and Islamic thought can provide us with a key. Both elucidate the human capacity to choose between what is right and what is wrong. As Jacques Maritain noted, the only practical knowledge that all men in the world naturally and infallibly have in common is that we do good and we avoid evil (Maritain, 2011). The question that then needs to be posed is: how independent and free does a person remain in their conscience-based decisions in the West and in Islam. How free is the conscience of a Muslim living in the West? Should a religion, a government, a positive law, or the inner moral code of an autonomous person be the main source of personal conscience from the Western and Islamic perspectives?

To consider an analogy which might illustrate the profound transformation of the status of the freedom of conscience in the West, one might look to the personal experience of Thomas Jefferson – specifically, his

¹ Dr. Juozas Valciukas is a lecturer at the Law School of Mykolas Romeris University.

² Dr. Mohammad Khazer Saleh Al Majali is a professor of Qur'anic studies at the College of Sharia and Islamic Studies of Qatar University.

comparison between his attitude towards conscience (and religion) before and after his stay as an ambassador in France.³ Jefferson's shift in attitude is similar to the transformation of both the role played by religion in the West and of the concept of conscience which, over time, became of profound importance. In fact, this importance grew to such an extent that conscience came to be treated as more of a universal part of human nature than religion in the secular West (Waldron, 2013). Despite the predominance of the principle of secularism, differences in understanding of the freedom of conscience are evident to this day in various Western states. As an example, one might consider the Constitution of Greece, which speaks exclusively of a religious conscience.⁴ Or the statement of the US Supreme Court from the middle of the 20th century that described the people of the US as "a religious people whose institutions presuppose a Supreme Being" (*Zorah v. Clauson*, 1952). Whilst these examples might be seen more as an exception than a rule, at the same time they demonstrate the broad plurality of secular Western thought.

In contrast, the concept of personal conscience in Muslim states is mainly connected to religion, and the Islamic faith in the popular mind. People in the West sometimes believe that there is a lack of freedom of conscience in Islam because decisions are pre-determined by Islamic scriptures and their religious-legal interpretations. However, if we look closer, the concept of freedom in Islam is far richer than first assumed, and needs to be considered from a variety of angles. Within the Quran, one can find over twenty stipulations urging a person or a community to do good and to avoid evil in their daily activities.⁵ According to a number of Muslim scholars, these and other exemplary provisions of the Quran reflect the essence of the autonomy of a personal conscience. Moreover, the Constitution of Tunisia – as a composite text written by influential religious and secular figures – might be seen as a liberal document that names Islam as the state's religion, while at the same time recognizing freedom of conscience and belief, and equality between the sexes.⁶ Does this mean that the right to freedom of conscience is a constituent part of the entire concept of freedom in Islam? Or did Tunisia, a majority Muslim state, make an incorrect decision from an Islamic perspective? To answer these questions, we must consider whether freedom of conscience does not necessarily depend solely on religious textual prescriptions in Muslim states, but rather belongs to every person regardless of the system of beliefs to which they belong.

With this introductory paper we seek to open a series of discussions in order to foster more in-depth research into rethinking the entirety of freedom of conscience, both in the West and in Islam. The main purpose of this paper is to discuss the origins, meaning, and relevant statuses of this concept in these areas. The objects of research are the Western and Islamic perspectives on the very notion of the freedom of conscience. The methodology used in the analysis is one of comparative conduct, involving the comparison of primary sources, legal documents, and court judgments. The historical method helps to uncover the foundations of the concept of freedom of conscience across

³ Thomas Jefferson's time as the ambassador of the US in France (1785–1789) coincided with the most antireligious period yet in Western history. As Noah Feldman writes, "not coincidentally, Jefferson's thoughts and writings from the years before he went to France and became immersed in the distinctive intellectual style of the French Enlightenment differ dramatically from those that came after. During his early phase of career, he rarely took an anticlerical tone in private, and certainly never in public. After his return from France, he became more radical about religious matters. The focus turned on the liberty of conscience and the necessity of individual judgment in finding truth." More on this topic can be found in: Feldman, N. (2006). *Divided by God: America's church-state problem and what we should do about it*. New York: Farrar, Straus and Giroux.

⁴ According to Article 13 of the Constitution of Greece, "Freedom of religious conscience is inviolable. The enjoyment of civil rights and liberties does not depend on the individual's religious beliefs".

⁵ The duty of commanding right and forbidding wrong, according to the Quran, is in its nature collective as well as individual. Here we might cite Quranic verse 3:110 which reflects the collective nature of the duty: "You are the best community brought forth unto mankind, enjoining right, forbidding wrong, and believing in God". In Quranic verse 7:165 it is said that God saved those who forbade evil, and punished those who did wrong. From this verse, it is clear that the duty belongs to each member of the community. One can pursue this topic with Cook (2001).

⁶ Constitution of Tunisia (Article 6): "The state is the guardian of religion. It guarantees freedom of conscience and belief, the free exercise of religious practices and the neutrality of mosques and places of worship from all partisan instrumentalization".

various sources. The analysis of legal documents as well as the relevant case law is also necessary in order to produce a fully-fledged study.

Chapter 1 of this paper invites discussion on the concept of the right to freedom of conscience in the West, with the aim of demonstrating that this human right might be regarded as ultimate in the future directions of both Western society in general and Western law tradition in particular. The first section of the chapter reveals the religious, philosophical, and legal origins of the freedom of conscience in the West – a freedom which, after particular historical circumstances (namely the Reformation of the 16th century), came to be deemed a natural human right (Wilken, 2019). Further, paying attention to the legal interpretation of the freedom of conscience, the paper asks how national and international legal regulation describes the right to freedom of conscience. In addition, some landmark judgments of the European Court of Human Rights (ECtHR) are discussed.

Chapter 2 turns attention towards the question of the right to freedom of conscience in Islam. One might argue that this right is a purely Western liberal value that came solely out of the Enlightenment and secularization (Roy, 2019). It might even seem that the Islamic concept of freedom, as influenced by religion, has nothing in common with freedom of conscience. However, chapter 2 takes into consideration a number of fundamental sources in order to establish the essence of this question. Firstly, the primary sources of Islam are explored in order to argue that the freedom of conscience is a constituent part of the Quran and Sunna of the Prophet. In addition to this, Islamic legal tradition is analyzed alongside the constitutional examples of Jordan and Qatar in order to understand whether the right to freedom of conscience has a place therein.

1. The right to freedom of conscience in the West

In Chapter 1 of this paper, the right to freedom of conscience is approached from three directions. First, some religious and philosophical aspects of the concept are explored. Second, the paper considers national and international legal regulation in order to ascertain the place occupied therein by the right to freedom of conscience. Third, via the study of a relevant landmark case of the ECtHR, the paper looks at the legal interpretation of the right to freedom of conscience and related issues.

1.1. Some religious, philosophical, and legal aspects of freedom of conscience in Western thought

The term “conscience” came into the vocabulary of Christians with the writings of the apostle Paul. In the words of the letter to the Romans, Paul says that even though the Gentiles do not have the law, there is a law written in their hearts, and their conscience bears witness to what they have done – accusing them or excusing them (The Bible, Romans 2:15). Thus, conscience constrains people to doing what is written in their hearts. The very feeling of what is good and what is wrong is written inside a human being. In scholarly thought, a law written in the hearts means a moral law, and “heart” means the natural knowledge of moral good and moral evil inscribed into human reason itself (Gregg, 2019). Therefore, as outlined by Noah Feldman (2006), conscience is a distinctively human faculty for telling people what is right and what is wrong.

Further passages of the Bible speak of the guiding role conscience plays in order to discern what one should do. In Corinth, a dispute arises regarding whether Christians should eat meat that has been roasted in a ritual sacrifice and then sent out for sale in the market. If such meat is offered to you at a dinner party, Paul writes, let your conscience be your guide as to what you should do (The Bible, 1 Corinthians 10:29). For a person’s liberty should not be determined by another man’s conscience – that is, by another man’s judgment as to what is right or wrong (The Bible, 1 Corinthians 10:29, 30). In addition to this, Paul mentions conscience by saying that the testimony of conscience in behavior involving others is based on holiness and godly sincerity (The Bible, 2 Corinthians 1:12). Here, the testimony of conscience is not about being true to oneself, but about obedience to the word of God. In Paul’s writings, the term conscience has a dual role: inner knowledge and judgment of past actions, and tutor of future deed (Wilken, 2019). This knowledge and judgment, influenced by the word of God, comes from inside a

person. It is clear from this and other passages in the Bible that religious conscience plays the role of a guide, a companion within oneself, and a pedagogue in matters of right and wrong.

In philosophical terms, conscience might be understood in two ways: as a moral capability, and as a practical moral judgment. Moral capability sets out the duties of a person and encourages compliance, whereas a practical moral judgment outlines moral responsibilities in concrete situations (Peschke, 1997). To Aquinas, conscience is not simply composed of thoughts about what one has done or what one should do, because it is an act of judgment that leads to an action – knowledge with the force of command (Wilken, 2019). In the time of the Reformation, conscience was still not an appeal to private judgment, but the invocation of a living intelligence formed by the Scriptures and grounded in the tradition of the church (Wilken, 2019). John Lock was committed to the freedom of conscience which had come to be seen as an inalienable right in the pantheon that featured life, liberty, and justice (Witte, 2005). Locke’s school of thought grew gradually out of the Christian notion of conscience, understood as a spark of inner moral guidance that exists in every soul. In the US, although it is uncertain why the final language of the First Amendment of the Constitution omitted reference to the freedom of conscience,⁷ this concept – according to N. Feldman – played a major role in understanding how The Establishment Clause and The Free Exercise Clause, as the constituent guarantees enshrined in the First Amendment, should protect citizens and their personal autonomy⁸ (Feldman, 2006).

It is certain that, unlike in previous eras of Western civilization when religion played a major role in society, human conscience in the West cannot now be limited to religious conscience, or replaced by religion. As concluded by Charles Taylor, the modern Western state is free from its connection to religious faith (Taylor, 2007) because Western modernity presupposes secularity in its three forms: secularized public spaces, the decline of belief and religious practice, and new conditions of belief (Taylor, 2007). It is important to note that the great majority of aspects of public policy in the secular West are affected by a growing number of conflicts in beliefs and moral values that lead to opposing opinions on how laws should be maintained or transformed. Disagreements about religious practices (*Holt v. Hobbs*, 2015), the norms of religious laws and their accommodation (*Molla Sali v. Greece*, 2018), the tolerance of diverse moral standards regarding same-sex marriage (*Oliari and others v. Italy*, 2015), abortion (*Planned Parenthood v. Casey*, 1992), assisted suicide, free speech, religious symbols, family issues, and many other issues that divide current opinion are influenced by varying beliefs and convictions in the West. Even the question of whether or not to sell a wedding cake can today be divisive in this regard (*Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 2018).

In the West, courts have become a major battleground for determining issues of conscience-based and religion-based belief systems, and even redrawing the boundaries of the freedom of conscience. The last judgment of the Constitutional court in Poland is perhaps the most relevant example of how laws changed by the government might attempt to transform the concept of the right to freedom of conscience in the West. The question then emerges as to whether the beliefs of religious people or secularists should play a specific role in politics in the West. Should religion or the moral values of secular groups guide Western governments when they regulate sensitive questions of contemporary society? Eventually, could religious faith or the moral beliefs of secular thought provide the values required by government to compose laws in order to resolve disputes? As Feldman (2006) rightly pointed

⁷ The draft language of the First Amendment included the notion of liberty of conscience: “no religion shall be established by law, nor shall the equal rights of conscience be infringed”.

⁸ The First Amendment of the US Constitution sets out first that the government shall not compel anybody to support any religious teaching or worship with which they conscientiously disagree (The Establishment Clause). Second, it guarantees that the government shall not stop anybody from worshipping or practicing their religion as they choose (The Free Exercise Clause).

out, the so called “values evangelicals”⁹ and “legal secularists”¹⁰ are the two main factions in the West, and the question now is of the time when one or another group will take the lead and the right to somehow change the law.

1.2. Freedom of conscience in the West: some remarks on national and international legal regulation

Right to freedom of conscience occurs in all of the main international legal documents in the West. Usually, it takes its place alongside the other two freedoms, namely freedom of thought and freedom of religion. All three are simultaneously interconnected and unique in meaning and content. Freedom of thought is the freedom to formulate a set of minds and to take lessons from making mistakes in a time of expressing ideas and personal views. Freedom of religion relates to the freedom to possess a religious faith, to belong to a particular religious community, and to live according to one’s chosen religious faith by expressing religious beliefs in public ways. In fact, the individual’s conscience must be left free in order for religious faith to have any meaning at all (Feldman, 2006). Freedom of conscience involves a set of moral obligations whereby a person conducts their life. The moral responsibility of a person to live their life according to a particular moral philosophy plays a special role in the expression of personal convictions – convictions which are not somehow chaotic but, rather, reflect a particular system of personal views on life. As stated by the ECtHR, in order to consider views as personal convictions within the meaning of Article 9 of the Convention, they must attain a particular level of cogency, seriousness, cohesion, and importance; moreover, they need to be regarded as philosophical convictions (*Campbell and Cosans v. the United Kingdom*, 1982). When a person has freedom of conscience, they are free to live according to their own personal convictions in a private as well as a public space. This kind of personal freedom is guaranteed by law – more concretely, by the right to freedom of conscience.

Conscience and freedom of conscience is expressed twice in the text of the Universal Declaration of Human Rights (UN General Assembly, 1948), not to mention its close ties with the other human rights and related articles. The textual provision of the Declaration (Art. 18) affirms that people have the right to freedom of thought, conscience, and religion; this right, according to the Declaration, includes freedom to change religion or belief, and freedom to manifest religion in teaching, practice, worship, and observance. In addition to this, conscience receives a separate special place in the Declaration. The role and meaning of it is evident if one looks to the beginning of the Declaration, where it is affirmed that people are not only born with freedom and equality in dignity and rights, but they are also endowed with reason and conscience. It is necessary to note that both textual provisions reflect how significant it was for the forebears of the Declaration to enshrine the concept of freedom of conscience into the text. On this, it is important to mention two things: first, that the primary draft papers of the Declaration talked about a sacred conscience and reason; and second, that despite the absence of sacred elements the representative from Lebanon, Charles Maliki, convinced the others to integrate the concept of freedom of conscience into the text. Later on, some political figures in the West publicly declared that a representative of Lebanon had not been nominated to speak in the name of such Western ideas as human dignity and human rights (Hazard, 1947). This could suggest that the rights to human dignity and freedom of conscience are not necessarily solely Western.

The European Convention of Human Rights (ECHR) mentions the right to freedom of conscience in an explicit manner, stating that people have the right to freedom of thought, conscience, and religion. This right includes freedom to change religion or belief and freedom to manifest religion or belief in worship, teaching, practice, and observance (ECHR, 1950). In the second part of Article 9, it is stated that the freedom to manifest one’s religion or belief can be subject to such limitations that are prescribed by law and are necessary in a democratic society. The content of this triple right is revealed in the interpretations delivered by the ECtHR where, in a number of cases, the Court explains the religious dimension of this right aimed at safeguarding the religious beliefs of people (*Bayatyan v. Armenia*, 2011). The secular dimension of rights that are of a religious nature was mentioned in

⁹ The goal of this group is to evangelize values – more precisely, they promote a strong set of religious ideas about the best way to live one’s life, and urge governments to adopt these values into law and public policy.

¹⁰ This group, according to N. Feldman, see religion as a matter of personal belief and choice largely irrelevant to government. This group believe that government should be secular and laws should make it so.

another case where, discussing Article 9, the Court made a distinction between two protected sets of rights: personal moral beliefs and religious beliefs (*Blumberg v. Germany*, 2008). To conclude, Article 9 of the Convention consists of religious and secular dimensions which, respectively, guarantee the right to religious freedom and the right to freedom of conscience.

The Charter of Fundamental Rights of the European Union consists of a number of fundamental human rights, among which the right to freedom of conscience is enshrined in Article 10 (Charter of Fundamental Rights of the European Union, 2000). The right to freedom of thought, conscience, and religion is also mentioned in this article. This includes the right to publicly profess a religious as well as secular belief, and the right to change religion and personal moral philosophy. To more closely read the textual expression of the right to freedom of conscience in European law, there is a need to look at the national regulation of European states. A number of the constitutional provisions of European countries are selected for case study here in order to reveal a varying legal vocabulary that expresses the right to freedom of conscience.

Poland's Constitution states that Poland plays an impartial role in matters of personal conviction – whether religious or philosophical – or in relation to outlooks on life (Constitution of Poland, 1997). The Constitution of the Kingdom of Greece, on the one hand, speaks of the right to freely develop a personality (Article 5), whilst on the other hand affirming that freedom of religious conscience is inviolable (Article 13). According to Article 16, the aim of national education is the development of the religious conscience of youth (Constitution of the Kingdom of Greece, 2008). The Constitution of Ukraine states (Article 35) that everyone has the right to freedom of personal philosophy and religion (Constitution of Ukraine, 1991). According to the Basic Law of Germany (Article 4), freedom of faith and of conscience and freedom to profess a religious and philosophical creed is inviolable (The Basic Law of Germany, 1949). The Constitution of Croatia (Article 40) provides a similar stipulation by stating that freedom of conscience and religion and freedom to manifest religion and other convictions shall be guaranteed (The Constitution of Croatia, 1991). In the Constitution of the Netherlands, one cannot find the word “conscience”, but in Article 6 the right to profess religion or belief is stated (The Constitution of Netherlands, 2018). The Constitution of Spain (Article 16) states that freedom of thought, religion, and worship is guaranteed (The Constitution of Spain, 1992). Finally, Finland's Constitutional act states that everyone in Finland has the right to freedom of religion and conscience. According to Article 11, the freedom of religion and conscience entails the right to express one's convictions (The Constitution of Finland, 2000).

It might be said that all around Europe freedom of religion and conscience is somehow expressed in constitutional texts. Sometimes, instead of using the word “conscience”, constitutional texts speak of personal belief, personal philosophy, or convictions. This means that the religious and secular dimensions of personal views and beliefs are grounded at the constitutional level. In truth, the case of Greece shows that it's possible neither freedom of religion and freedom of conscience to exist without separate expressions in the text. Instead, the term religious conscience is used with the aim of reflecting the historical traditions of the state. It is evident that European states have much in common, whilst simultaneously being very different in terms of their traditions, historical development, and sense of public morality – the concept of freedom of conscience illustrates this perfectly. It is also true that these constitutional texts are usually expressed in a very general manner. This is why it is necessary to pay attention to the textual interpretations provided by the courts. In the following section of this chapter, two landmark judgments in one case of the ECtHR are analyzed in order to ascertain what the concept of the right to freedom of conscience consists of in Western jurisprudence.

1.3. Lautsi v. Italy, or personal conscience v. the traditions of the state

The Strasbourg court, having the task of safeguarding a set of fundamental human rights written in the European Convention on Human Rights, leaves a margin of appreciation to the national states. Therefore, national authorities have the right to decide – according to the state's historical traditions, local customs, and the prevailing morality among people – on a number of varying issues involving, for instance, freedom of thought, conscience, and religion. According to the ECtHR, this margin will be narrower where the right at stake is crucial to the individual's

effective enjoyment of “intimate” key rights (*Fernandez Martinez v. Spain*, 2014). These key or “intimate” rights, the ECtHR affirmed, relate to the individual’s existence or identity. Besides this, the ECtHR stressed that, from the point of view of the right to establish and develop relationships with the outside world, the notion of personal autonomy is an important principle underlying the interpretation of the legal guarantees laid down in the Convention (*Pretty v. the United Kingdom*, 2002). Overall, this margin of appreciation, the concept of “intimate” or key rights, and the notion of personal autonomy are meaningful subjects for further discussion on the concept of the right to freedom of conscience in the interpretation of the Strasbourg court. The right to freedom of conscience is derived from autonomy of conscience, which is inseparable from personal autonomy (Feldman, 2006).

The ECtHR issued a landmark judgment – or, more precisely, two judgements – in the case *Lautsi v. Italy*. One judgement was delivered by the Chamber of Second Section in 2009, and the other by the Grand Chamber in 2011. It is important to note that both judgments were totally different in their conclusions. Generally speaking, this case touched upon the question of how free a person in Italy is in their personal convictions or conscience to raise their children in a religiously neutral and impartial state school. Two main issues were significant here: first, the case related to the freedom of parents to bring up their children in conformity with their own convictions – whether secular or religious; and second, the symbol of crucifix – being both religious and national, as argued by Italy – has close links to Italian history and the traditions of Western civilization itself, which is indelibly linked to Christianity (*Lautsi v. Italy*, 2009). In the first judgment, delivered by the Chamber of Second Section, the ECtHR unanimously affirmed that the compulsory display of a symbol of a particular faith restricts the right of parents to educate their children in conformity with their personal convictions and the right of schoolchildren to believe or not to believe (*Lautsi v. Italy*, 2009). In conclusion, the Strasbourg court concluded that the Convention and Article 9 had been violated.

In contrast, the Grand Chamber reversed the decision on this case and issued an entirely different judgment. Speaking of the traditions of the state, the Court affirmed that reference to tradition cannot relieve the state of its obligation to respect the fundamental rights and freedoms enshrined in the Convention (*Lautsi v. Italy*, 2011). The Court concluded that the matter of crucifixes and the place of religion fall within the margin of appreciation of the respondent states, as a consensus on these questions is not achieved in European countries. At the same time, as noted by the Court, this margin of appreciation goes hand in hand with European supervision (*Leyla Sahin v. Turkey*, 2005). In conclusion, the Grand Chamber did not agree with the previous judgment and found no violation of Article 9 of the Convention. In the final arguments, the Court noted that in deciding to keep crucifixes in the classrooms of the State school attended by the first applicant’s children, Italian authorities acted within the limits of the margin of appreciation left to the state in the context of its obligation to respect, in the exercise of the functions it assumes in relation to education and teaching, the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions (*Lautsi v. Italy*, 2011).

In fact, cases that involve the sensitive questions of the day have the potential to answer popular questions on topics such as public education, family matters, and other controversial issues. Judgments in such cases draw a line between two major paradigms in Western (legal) thought – namely, the liberal and the communitarian. The former defends personal human rights issues and gives priority to the autonomy of a person in their relationship with community and state interests. The latter defends the interests and values of the community, and gives priority to the traditions, customs, and common ways of life which have the strength to unite the people of a state, region, and even civilization. The question of a predominant paradigm also applies to the court room and judges delivering such landmark judgments as in the case of *Lautsi vs Italy*.

2. The right to freedom of conscience: religious and legal perspectives in Islam

This part of the paper studies the right to freedom of conscience in Islam from several points of view. First, the origins of the concept of freedom and of the right to freedom of conscience are analyzed according to the letter and spirit of the Qur’an and the Sunnah of the Prophet. Then, legal traditions and practices regarding freedom of

conscience are taken into consideration. Lastly, the paper examines constitutional norms on the question of the right to freedom of conscience, where the constitutions of Jordan and Qatar are considered as examples.

2.1. Freedom of conscience in the Quran and Sunna

There are a good number of Quranic verses that discuss freedom of conscience. These verses might be explored by taking into account various Chapters of the Quran, as it is important to take into consideration the contexts of the verses and the topics of the chapters in which they are mentioned when studying them. It is also necessary to emphasize the significance of various verses, either direct or indirect. Thus, in this section, the most important of these Quranic verses are presented in order to ascertain the very meaning of freedom and freedom of conscience. As for the Sunnah, there is also clear evidence on this subject that will be discussed here.

Before presenting texts from the Qur'an and Sunnah, it must be noted that the focus of this paper is limited, and is not open to a more general discussion on the criticisms that have been directed towards Islam regarding freedom in general, and freedom of conscience in particular. There are other studies that can be referred to in this regard.

In this paper, the clear textual provisions of the Qur'an and the Sunnah are explored. All of these texts have authority over the behavior of Muslims, and play the role of a source of legal rulings that must be obeyed. As for behavior that contradicts the concepts of these texts, this represents individual behavior or individual reasoning that scholars refer to as a "slip" or an "error", and the principle in Islam is to avoid following people who behave in this way. It is commonly believed in Islam that such persons must be advised and guided towards the right path.

Here it is necessary to consider some facets of understanding these texts, whether from the Qur'an or the Sunnah, where they solve the problem of what appears to be a contradiction. These contradictions cause misunderstanding in general, whether in the Islamic text or elsewhere. First, every text of the Qur'an is general in its rulings. Often it is not possible to understand the ruling of a Quranic verse or a ruling written in the Sunna as they might both be very general. These situations create a contradiction if one seeks to answer a specific question. Here, it is necessary to remember that the text is sometimes restricted to application in special conditions, and in any given situation this clue should be identified through the process of interpretation of the primary sources of Islam. Second, in order to assess any religion, it is necessary to refer to comprehensive general texts and not to specific restrictions.

From here, a simple comment on these Qur'anic texts is sufficient as their implications are clear. As for the Sunnah, discussions relate to the topic of apostasy, the outward appearance of which indicates a violation of the concept of freedom of conscience. Therefore, a simple explanation is required that removes the problem and clarifies the issue.

2.1.1. The Qur'anic texts¹¹:

- “There is no compulsion in religion. Verily, the Right Path has become distinct from the wrong path. Whoever disbelieves in transgress (*Tāghut*) and believes in Allah, then he has grasped the most trustworthy handhold that will never break. And Allah is All-Hearer, All-Knower”. (The Quran, 2:257)
- “Not upon you (Muḥammad) is their guidance, but Allah guides whom He wills”. (The Quran, 2:272)
- “And had your Lord willed, those on earth would have believed, all of them together. So, will you (O Muḥammad SAW) then compel mankind, until they become believers”, (The Quran, 10:99).
- “Whoever chooses to follow the right path follows it but for his own good; and whoever goes astray goes but astray to his own hurt” (The Quran, 17:15).

¹¹ It should be noted that the Qur'anic translation followed in this paper is *Interpretation of the meanings of the Noble Quran* (2020), translated by Muhammad Taqi-ud-Dīn Al-Hilālī & Muhammad Muhsin Khān.

- “And say: The truth is from your Lord. Then whosoever wills, let him believe, and whosoever wills, let him disbelieve” (The Quran, 17:29).
- “And say, `It is the truth from your Lord; wherefore let him who will, believe, and let him, who will, disbelieve....” (The Quran, 18:29).
- “The Messenger’s duty is only to convey (the message) in a clear way (i.e. to preach in a plain way)” (The Quran, 24:54).
- “Your task is only to exhort; you cannot compel them [to believe]” (The Quran, 88:21).

These texts, in their entirety, indicate the complete negation of coercion in religion and, *a fortiori*, that it is not permissible to coerce others into religion. Religion rejects the idea of coercion completely, and these verses show that the mission of the Messenger (which is also the task of his followers after him) is to convey the message, and after that, people are free to accept Islam or to remain with their other religions. Even more, Islam affirms respect for human rights and the enshrinement of the principle of freedom. Accordingly, a successful society is one whose members belong to it voluntarily, not by coercion, which leads to the stability, security, and prosperity of all.

In addition, the verses mentioned demonstrate that if faith is a form of guidance, then whoever wills should believe and whoever wills should disbelieve. If the Messengers themselves are nothing but missionaries and warning men, and if the Qur’an is universal (not only for the followers of Muḥammad), then all of this and more requires, *a priori*, complete freedom in religiosity and the banishment of all forms of coercion. In conclusion, it is important to note that the issue of religious freedom is fixed in the Qur’an through clear verses that cannot be abrogated or distorted from their meaning.

2.1.2. Evidences from the Prophet’s Sunnah

As for the Sunnah of the Prophet, the excerpts discussed in this paper provide practical examples from the biography of the Prophet. At the beginning of his reign in Medina where Muslims, Jews, and polytheists lived, he did not coerce anyone into religion. Rather, the Medina document states that the rights belong to its people regardless of their religion. This means that the Prophet recognized religious freedom in the first constitution of Medina, when he recognized that Jews and Muslims constitute one nation.

This is generally the case with all people. On the other hand, as for Muslims who want to change their religion, the Prophet said: “The blood of a Muslim who professes that there is no God but Allah and I am His Messenger is sacrosanct except in three cases: in the case of a married adulterer, one who has killed a human being, and one who has abandoned his religion, while splitting himself off from the community”.¹² It is worth noting that the Qur’an does not mention the punishment of an apostate – it is mentioned solely in the Sunna.

If one looks at the Sunna texts, a Muslim is not free to change their religion. According to this, anyone can object to Islam’s claim to deny coercion into religion. However, it is necessary to clarify our understanding of these prophetic texts – they are not as they appear, and require more attention and comparison. Without this, the texts of the Sunna might appear to oppose to each other or, further, even to oppose the Qur’an itself.

In essence, there is a need to differentiate between someone who converts from their religion and keeps this a personal matter, without any intention to harm society, and someone who changes their religion in order to revolt against government and society by causing chaos. Perhaps what happened in the wars of the apostates is indicative of the latter, hence their branding as apostates even though they did not leave their religion completely, instead only denying some parts of their religion (*alms*) and siding against the caliph.

¹² Narrated by Al-Bukhāri, Muhammad bin Ismā’īl, No. 6878.

In addition, the reference here to "splitting himself off from the community" is interpreted to mean one who actively boycotts and challenges the community and its legitimate leadership. The various texts of the Prophet that appear to command Muslims to kill apostates from Islam must, therefore, be understood in their proper political context. Most Muslim scholars today rely on the legal reasoning of the classical jurists, without considering whether their reasoning should be considered authoritative or how changes in the political and legal conditions should shape our reception of that tradition's authoritative elements (Al-Alwani, 2006).

This explains why the Prophet used such strong words, warning those who tried to separate the community while it was united and describing it as a "horrible event".¹³ In fact, this was a crime, which was committed against the whole community in order to disquiet it, and leniency in permitting it was perceived to lead to the upset of this system. Apostasy is regarded as a rupture in a Muslim's commitment to the religion they have chosen. Thus, punishment was legislated for this rupture and ensuing chaos, but not for choosing another religion (Zaydan, 1982). It is for this reason that some scholars regard this punishment as one of censure, just as some crimes that disturb the security of society call for harsh punishment that is prescribed by the state – even in secular countries.

2.2. The right to freedom of conscience in Islamic legal tradition

Muslim interpreters of the Qur'an, jurists, theologians, and historians agree on Islam's affirmation of the principle of freedom being the symbol of humanity and honor. Thus, freedom does not contradict Islamic principles and rulings, and this principle also applies to the freedom to choose religion and conscience.

From the standpoint of the religious freedom guaranteed by Islam, the second Caliph, Omar bin Al-Khattāb, said in his treaty signed with the people of Bayt al-Maqdis (Jerusalem) after its conquest: "In the name of God, the Compassionate, the Merciful. This is what Abdullah Omar, Commander of the Faithful, gave the people of Elyah (Jerusalem) the security over their lives, their churches and their crosses, neither of them is harmed nor compelled because of their religion".¹⁴ The same was assured by 'Amr bin al-'As to the Egyptian Copts.¹⁵ It is also important to remember that the period of Islamic rule in Andalusia (Spain) was an era of scientific and civilizational prosperity in various ways, during which the voice of religious freedom and discussions on the issues of religion and belief flourished.¹⁶

It is necessary here to consider some of the texts mentioned by jurists and representatives of the scholarly community in expressing the meaning of freedom in Islam. This might help to elucidate the content and meaning of the concept of freedom in Islam:

- It is logical that "the presence of reparation means the absence of choice, just as the presence of choice means the absence of reparation, as each party stops the work of the other and cancels it" (Al-Khatib, 1993).
- Ibn 'Ashur says: "Know that attacking freedom is one of the greatest injustices" (Ibn Ashur, 2001). He also says: "Among the rules of jurisprudence is the saying of the jurists: (The legislator seeks freedom)" (Ibn 'Ashur, 2001).
- "Freedom is a legitimate aim, and this is an extrapolation from the actions of Sharia, which indicated that one of its most important objectives is the abolition of slavery and the generalization of freedom, and this

¹³ As reported by Muslim, 3/1479-80, No. 1852; al-Nasā'ī, 7/92-3.

¹⁴ As acknowledged in many historical references, such as: Ibn 'Asākir, 'Alī bin al-Hasan. (2008). *The history of Damascus*. Beirut.

¹⁵ See Ibn Kathīr, Isma'īl, *The Beginning and the End*, Beirut, 10:92.

¹⁶ See for instance: <https://www.21global.ucsb.edu/global-e/november-2017/tolerant-islam-andalusian-legacy> retrieved on 10 April 2021.

confirms that the principle of legislation is the establishment of interests, and the overall purposes are not peripheral, and interests are subordinate to it”.¹⁷

- “Religion and coercion cannot be combined; once the coercion is proven, the religion is void”.¹⁸
- “Guidance from God, and be whoever you wish, because you do not guide the one you love”. Coercion in religion is contrary to the wisdom of God Almighty.¹⁹
- “Variation is normal in humans, and it is God’s wisdom that is not rejected”.²⁰
- “The Sharia warns of this that freedom is life, and slavery is death”.²¹
- Omar bin Al-Khaṭṭāb said to Amr bin Al-‘As regarding the Coptic man, and he was cruel to him: “When will you enslave people when their mothers give birth to them as free?”²²

All of this might serve to illustrate that, in scholarly and juristic thought, freedom is a sacred issue in Islam, and any apparent restriction is necessary because personal freedoms sometime endanger the freedom and security of society.

2.3. The right to freedom of conscience in Jordan and Qatar: a constitutional perspective

Before presenting the constitutional provisions of both Jordan and Qatar that relate to respect for freedom of religion and conscience, one notion must be considered. Although Islam is the religion of these states, the dominant approach in Islamic countries, including in both Jordan and Qatar, is based on the principle of secularism. Religion has an effect on legislation solely regarding issues regulated by personal status laws.

Moreover, it is not an exaggeration to say that some habits and traditions in Arab countries supersede religion, especially in Jordan, where the law is transgressed by both Muslims and Christians. Specifically, the issue of murder is a clear example, whether in cases of so-called honor killing or in cases of converting to another religion. This confirms the idea that individual behavior in certain cases has nothing to do with religion.

2.3.1. Articles that relate to freedom of conscience in the Jordanian Constitution

There is more than one article of the Jordanian Constitution that speaks directly or indirectly of the right to freedom of conscience. Article 6 enshrines the principle of equality before the law (The Constitution of the Hashemite Kingdom of Jordan, 2014), in addition to stating that discrimination on the grounds of race, language, and religion is unlawful. Another provision of the Jordanian Constitution (Article 7) guarantees the personal freedom of all Jordanian people, adding that every infringement on rights and public freedoms or the inviolability of the private life of Jordanians is a crime punishable by law. Article 14 also warrants mention here, according to which the state is entitled to safeguard the free exercise of all forms of worship and religious rites in accordance with the customs observed in the Kingdom of Jordan, unless these are inconsistent with public order or morality. Article 15 of the Constitution of Jordan also guarantees freedom of opinion by affirming that every Jordanian is free to express their opinion in speech, in writing, or by means of photographic representation or other forms of expression, again provided that this does not violate the law. To conclude, these constitutional provisions clearly demonstrate that human rights and freedom are respected in the matters of religion and conscience. The law of Jordan protects the right to freedom of religion and conscience and punishes those that violate it. It is important to note, in the context

¹⁷ See Al-Shāhibī, Abu Ishāq, *Approvals in the Principles of Sharīa*, 350/2.

¹⁸ See Quhb, 1971, 1/315.

¹⁹ For more detail, see: Al-Sa’idī, ‘Abd al-Muta’āl, *Religious freedom in Islam*. Cairo: Arab Thought House.

²⁰ This is according to some Qur’anic verses such as: “And if your Lord had so willed, He could surely have made mankind one nation or community (following one religion only i.e. Islam), but they will not cease to disagree except him on whom your Lord has bestowed His Mercy, and for that did He create them” (11:118-119).

²¹ Ibn ‘Ashūr, Al-Tahir, Al-Tahrīr wa Al-Tanwīr, 5/159.

²² See al-Muttaqī al-Hendī, Alī bin Husām al-Dīn (1990).

of the topic of this paper, that the abovementioned constitutional provisions were derived from the Islamic religion before they were taken from any other source.

In Jordan, there are two main religions. Islam is the religion of the majority, and Christianity is the religion of a minority (less than 5%). The Christian minority enjoys wide influence in government and trade activities, and a full social life. Christian sects and churches are protected – first by ordinary citizens and then by the state with the prestige of law – and relations between Muslims and Christians are solid and without disturbance. It might be said that in Jordan there is a real coexistence between Jordanians of different faiths, religions, and beliefs. It must also be noted that some members of the Christian minority in Jordan are accused of intolerance among themselves, especially with regard to those who change their religion and convert to Islam. Cases of assault have been known to escalate to murder,²³ and as a result some adherents conceal their Islamic faith for fear of invoking the oppression of their families. Undoubtedly, this is an act that follows tribal intolerance and the arbitration of customs and traditions over respecting the religions themselves.

2.3.2. Freedom of conscience in the Qatari Constitution

As in the case of the Jordanian constitution, the Constitution of Qatar consists of more than one article regarding the right to freedom of religion and conscience (The Constitution of Qatar, 2004). For instance, Article 34 of the Constitution states that the Citizens of Qatar are equal in public rights and duties. Another constitutional provision (Article 35) affirms that all persons are equal before the law, and that discrimination on the grounds of sex, race, language, or religion is unlawful. Constitutional Article 50 guarantees to all persons the freedom to practice religious rites in accordance with the law and the requirements of maintaining public order and morality. It is important here to note that the Qatari constitution stipulates this religion, although an absolute majority of Qataris are Muslims. With respect to non-Qatari residents, Qatar – much like the rest of the Gulf countries – is a country with many working nationalities, and in terms of Christianity, Buddhism, Hinduism, and others, religious freedom is guaranteed. There is also a religious building complex for all non-Muslim sects, in which they perform the rituals of their religions with freedom, respect, and safety.

Conclusions

1. Conscience in the West emanates from its roots in religious tradition. When religion played a major role in society, conscience took its strength from Scriptures. Later, although the concept of freedom of conscience underwent a huge transformation in the West during the period of the Reformation, it was still regarded as a religious conscience. In the modern period, conscience came to be treated as a more universal part of human nature than religion in the secular West.
2. In the long run the courts became a major battleground in determining issues of conscience-based and religion-based belief systems, and even in redrawing the boundaries of freedom of conscience in the West. The borders of these boundaries depend on the predominant school of thought in a society and its representative government, which is capable of instilling or barring religion-based values from law and public policy.
3. The main international legal documents – the European Convention of Human Rights, the UN Declaration of Human Rights, and The Charter of Fundamental Rights of the European Union – are the primary safeguards of the right to freedom of conscience. In these documents, this right is enshrined alongside freedom of religion and freedom of thought. Although, in the majority of cases, national legal regulation in the West affirms the right to freedom of conscience (philosophical convictions), there are some case (for instance, Greece) where a constitution guarantees freedom of religious conscience. Very often, differences in legal terminology across Western countries reflect historical traditions, public morality, and the status of the church in these countries.

²³ For example refer to: <https://www.al-monitor.com/originals/2014/05/honor-killings-jordan-surge.html>

4. In Islam, there are clear Qur'anic textual provisions that affirm the principle of freedom in general and freedom of conscience in particular. There are texts from the Sunnah that support the Qur'an in general, although whilst the rule of apostates is mentioned in the Sunnah, the Qur'an says nothing on this subject. It might seem that the rules of the Sunnah contradict the entire concept of freedom in general and freedom of conscience in particular in Islam. In order to understand the Qur'anic and Prophetic texts, it is necessary to relate them to their time and context. They cannot be generalized, and this rule is especially important in understanding the concept of freedom of conscience in Islam.

5. The provisions of Sharia law and the writings of scholars affirm the Islamic principle of freedom, which is consistent with the humanity and honor of man. The texts and principles of Islam are not based on the behavior of individuals; they need to be read using a systematic method which necessitates the interpretation of Islamic sources in their relevant times and contexts.

6. The Jordanian constitution and the Qatari constitution protect the right to freedom of conscience. There are explicit provisions for guaranteeing human freedom, including freedom of conscience.

References

- Al-Alwani, T. J. (2006). *There is no compulsion in religion, the problem of apostasy and apostates from the earliest days of Islam to this day* (2nd ed.). London: The International Institute for Islamic Thought.
- Al-Khaṭīb, H. Y. (1993). *Islam and the concept of freedom*. Cyprus: Al-Multaqā Publishing House.
- Al-Muttaqī al-Hendī, Alī bin Ḥusām al-Dīn. (1990). *The elected treasure of the workers in the Sunnah of sayings and deeds*. Beirut: House of Revival of Arab Heritage.
- Basic Law of Germany (1949). Link on the internet: https://www.gesetze-im-internet.de/englisch_gg/
- Bayatyan v. Armenia, Application No. 23459/03, 7 July 2011. ECLI:CE:ECHR:2011:0707JUD002345903.
- Blumberg v. Germany, Application No. 14618/03, 18 March 2008. ECLI:CE:ECHR:2008:0318DEC001461803
- Campbell and Cosans v. the United Kingdom, 25 Feb 1982, Series A No. 48, 4 EHRR 293, 40.
- Charter of Fundamental Rights of European Union (2009). *OJ*, C 326, 26.10.2012, p. 391–407. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT>
- Constitution of the Republic of Poland (1997). Retrieved from <https://www.sejm.gov.pl/prawo/konst/angielski/konse.htm>
- Constitution of the Kingdom of Greece (2008). Retrieved from <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-180%20galliko.pdf>
- Constitution of Ukraine (1991). Retrieved from <https://unece.org/fileadmin/DAM/hlm/prgm/cph/experts/ukraine/ukr.constitution.e.pdf>
- Constitution of Finland (2000). Retrieved from <https://finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>
- Constitution of the Kingdom of the Netherlands (2018). Retrieved from <https://www.government.nl/documents/reports/2019/02/28/the-constitution-of-the-kingdom-of-the-netherlands>
- Constitution of the Kingdom of Spain (1992). Retrieved from <https://www.senado.es/web/conocersenado/normas/constitucion/index.html?lang=en>
- Constitution of Qatar (2004). Retrieved from <https://www.almeezan.qa/LawView.aspx?opt&LawID=2284&language=en>
- Cook, M. (2001). *Commanding right and forbidding wrong in Islamic thought*. Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9780511497452>
- European Convention of Human Rights (1950). Retrieved from https://www.echr.coe.int/documents/convention_eng.pdf
- Feldman, N. (2006). *Divided by God: America's church-state problem and what we should do about it*. New York: Farrar, Straus and Giroux.
- Fernandez Martinez v. Spain, Application No. 56030/07, 12 June 2014. ECLI:CE:ECHR:2014:0612JUD005603007.
- Gregg, S. (2019). *Reason, faith, and the struggle for Western civilization*. New Jersey: Regnery Gateway.
- Hazard, J. (1947). The Soviet Union and the World Bill of Rights. *Columbia Law Review*, 47(7), 1095–1117.
- Holt v. Hobbs, 574 U.S. 352 (2015).
- Ibn 'Ashur, Al-Tahir. (2001). *Aims of Islamic law* (2nd ed.). Amman: Al-Nafā'is House.
- Interpretation of the Meanings of The Noble Quran* (M. Taqi-ud-Dīn Al-Hilālī & M. Muḥsin Khān, Trans.). (2020). Madinah: King Fahd Complex for the Printing of the Holy Quran.
- Lautsi and Others v. Italy, Application No. 30814/07, 3 November 2009. ECRH (2d sec.).
- Lautsi and Others v. Italy, Application No. 30814/06, 18 March 2011. ECLI:CE:ECHR:2011:0318JUD003081406.
- Leyla Sahin v. Turkey, Application No. 44774/98, 10 November 2005. ECLI:CE:ECHR:2005:1110JUD004477498.
- Maritain, J. (2011). *Christianity and democracy and the rights of man and the natural law* (D. A. Anson, Trans.). San Francisco: Ignatius Press.
- Masterpiece Cakeshop v. Colorado Civil Rights Commission, 584 U.S. (2018).
- Molla Sali v. Greece, Application No. 20452/14, 19 December 2018. ECLI:CE:ECHR:2018:1219JUD002045214.

- Oliari and Others v. Italy, Application No. 18766/11 and 36030/11, 21 July 2015. ECLI:CE:ECHR:2015:0721JUD001876611.
- Peschke, K. H. (1997). *Krikščioniškoji etika: bendroji moralinė teologija. Vatikano II Susirinkimo dvasia* [Christian ethics: General moral theology. The spirit of the Second Vatican Council] (Vol. 1). Vilnius: Katalikų pasaulis.
- Planned Parenthood v. Casey, 505 U.S. 833 (1992).
- Pretty v. the United Kingdom, Application No. 2346/02, 29 April 2002. ECHR 2002-III. ECLI:CE:ECHR:2002:0429JUD000234602.
- Quhb, S. (1971). *In the shade of the Qur'an*. Beirut: House of Revival of Arab Heritage.
- Roy, O. (2019). *Is Europe Christian?* London: Hurst & Company.
- Taylor, C. (2007). *A secular age*. London: The Belknap Press of Harvard University Press.
- UN General Assembly. (1948). Universal declaration of human rights (217 [III] A). Retrieved from https://www.ohchr.org/en/udhr/documents/udhr_translations/eng.pdf
- Waldron, M. A., (2013). *Free to believe: Rethinking freedom of conscience and religion in Canada*. Toronto: University of Toronto Press.
- Wilken, R. L. (2019). *Liberty of the things of God: The Christian origins of religious freedom*. New Haven: Yale University Press.
- Witte, J. (2005). *Religion and the American constitutional experiment* (2nd ed.). Boulder, CO: Westview Press.
- Zaydān, 'Abd al-Karīm. (1982). *Introduction to the study of Islamic law* (6th ed.). Beirut: The Message Foundation.
- Zorah v. Clauson, 343 U.S. 306, 313 (1952).

Copyright © 2021 by author(s) and Mykolas Romeris University

This work is licensed under the Creative Commons Attribution International License (CC BY).

<http://creativecommons.org/licenses/by/4.0/>

