

**Title: Assessing Apostasy, Blasphemy and
Excommunication (*takfir*) in Islam and Their
Modern Application by States and Non-State
Actors**

**A Thesis Submitted for the Degree of Doctor of
Philosophy by Masaki Nagata**

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Abstract

In certain contemporary Muslim majority states apostasy and blasphemy are not merely religious sins; they are acts which potentially have legal, or extra-legal, consequences. Although apostasy has not been criminalised in many such states, extrajudicial killings of apostates are carried out by some extremist groups and individuals. Such groups always justify these murders of fellow Muslims and non-Muslims on the grounds of apostasy and blasphemy. The concept and use of *takfir* (excommunication) is also a serious issue in Muslim majority states. Groups such as *Daesh* (also known as Islamic State of Iraq and Syria) rely on *takfir* to attack fellow Muslims, despite there being no legal basis in Shari'a for the use of *takfir* or for criminalising apostasy. Although the concept was developed by people, not God, *takfir* are now being used to bypass rational human judgement. Their use plays a major role in many of the religious issues confronting Muslim majority states, such as the criminalisation of apostasy and blasphemy. This thesis analyses the central issues of apostasy, blasphemy and *takfir* collectively, as their history and their contemporary use and misuse by extremist groups are inextricably entwined. The key finding is that the right to punish apostasy and blasphemy and to issue declarations of excommunication (*takfir*), all originally reserved in Islam for God only, have been appropriated by man. Through developments in the understandings of these concepts, all three have come to be seen by some scholars and ordinary believers as a 'right of man'. This evolution in interpretation and in application is inconsistent with Shari'a law.

Key Words

Islamic law; apostasy; blasphemy; *takfir*; extremist groups

Background to the research

Contemporary Islam is confronted by a number of serious issues. Extremist groups in many Muslim majority states, such as *Daesh* in Iraq and Syria, are all too willing to label their opponents or rulers ‘unbelievers’ and order their fellow Muslims to kill them in the name of God. Apostasy has effectively been criminalised in some countries even though there may be no codified apostasy law in those states. There are major conflicts around Shari’a law: some Muslims and scholars believe in the supremacy of Shari’a over their countries’ constitutions, while other scholars, mainly Western, believe that Shari’a does not recognise religious freedom and that it is therefore inconsistent with modern conceptions of human rights. This thesis has been written to confront and refute these inaccurate claims and beliefs.

(Research questions)

The thesis addresses a number of key research questions. Firstly, it examines why apostasy and blasphemy are considered to be offences punishable by death under traditional Islamic law, and why some Muslim majority states and extremist groups still consider apostasy to be a crime. Shari’a had always been interpreted by scholars until Muslim states started to codify it in the 19th CE. This thesis analyses how this codification of Shari’a has affected apostasy and blasphemy cases in these countries. It considers the reasons for Shari’a being viewed as more powerful than the constitution, and whether it is consistent with modern notions of

religious freedom and international human rights. These issues coalesce in the fundamental question of whether Islam allows true religious freedom.

(Research Methodology)

The methodology employed in this thesis is to explore the changing meaning of apostasy and blasphemy throughout Islamic history and to compare the treatment of these acts during the Prophet's era with the approaches taken in the mediaeval and contemporary eras, all with reference to Shari'a and international human rights. This thesis also analyses how the codification and usage of Shari'a has affected apostasy cases in various Muslim majority states. It examines the background to the reservations made by some such states to certain human rights treaties, and discusses the key problems facing international human rights today. As such treaties and concepts are based largely on such western ideas as natural rights law theory, which is the basis for international human rights law, the thesis explores these concepts too, with particular reference to freedom of religion and expression. The thesis compares international human rights instruments (especially those provisions relevant to freedom of religion and expression) and Shari'a, with reference to the Qur'an and *Sunna*. Finally, the link between apostasy and blasphemy and the evolution of *takfir* is explored in order to show how these two religious sins came to be seen as crimes. Although apostasy and blasphemy have been much researched the notion of *takfir* (excommunication), which is a key trigger for intra-religious conflict in Islam, has received much less attention. One of the aims of this thesis is to address the particular lack of research in this area.

(Argument)

The codification of Shari'a has had a great effect on the issues of apostasy and blasphemy in modern times. Although certain states do not have apostasy law as such, they can refer to Shari'a law if it has been codified. This touches on another issue, that regarding the distinction between divine and man-made laws. Some Muslim majority states consider international human rights to be inferior to Shari'a, as they see the former as man-made and the latter as divine.

The central argument made in the thesis is that the types of interpretations made by extremist groups and some scholars, such as that true Muslims must kill unbelievers because Shari'a does not recognise religious freedom, are inaccurate and even deliberate misinterpretations. The thesis shows, via careful readings of the Qur'an and the *Sunna*, that Islam *does* recognise religious freedom and that there is no evidence that religious sins (apostasy and blasphemy) is to be treated as a crime in this world. The issues of apostasy and blasphemy are examined by comparing the Prophet's approach to these acts with mediaeval and modern approaches. The thesis shows how their treatment has changed throughout Islamic history by analysing mediaeval Islamic texts and the evolution of the notion of *takfir*. Neither the Qur'an nor the *Sunna* consider religious sins such as apostasy and blasphemy to be crimes, but the evolution of the concept of *takfir* after the Prophet's time meant that any religious sin or even believing in or developing any new tradition or interpretation came to be considered to be possible evidence of apostasy. However, close reading of the Qur'an and *Sunna* shows that religious sinners are not (or should not be) considered apostate and that repentance for such

acts is recognised by Islam until death, when God will make his judgement. In a positive development some Muslim majority states, such as Tunisia, have started to prohibit *takfir*.

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Introduction

The term ‘Islam’ means ‘submission’ and ‘surrender’ to God.¹ The religion was founded by the Prophet Muhammed in circumstances far different from those pertaining today. There was no ‘state’ in the modern sense, either before or even during the Prophet’s time. At that time the key societal institution was the tribe, which was a kinship group; instead of the state, the tribe’s chief governed over and took care of people and their affairs.² Mohammad Muslehuddin notes that “it was to the tribe as a whole that the individual owed an allegiance and it was from the tribe as a whole that he obtained the protection of his person and property.”³ Another difference was that the key political unit was not the town but the *qabila*, which was a federation of tribes.⁴ This tribal beginning is important in understanding the treatment of apostasy and blasphemy; these ‘crimes’ were treated seriously at the time not merely because they were religious sins, but because they were always linked to other, more serious offences such as treason.

There have been many terrorist attacks made in the name of God by people calling themselves Muslim. This has led many people, especially in the West, to believe that Islam is a dangerous religion.⁵ Moreover, Shari’a is often seen, again in the west in particular, as being inapplicable to modern times because it is interpreted

¹ Nabih Amin Faris, *The Foundation of the Articles of Faith: Being a Translation of the Kitāb Qawā'id al-'Aqā'id of Al-Ghazzālī's Ih'yā' 'ulūm al-dīn* (Lahore : Sh. Muhammad Ashraf, 1963), p. 100.

² A.M. Nasr “The Structure of Society in Pre-Islamic Arabia and the Impact of the Hijra: A Traditional Archaeology” in Ian Richard Netton ed., *Golden roads: migration, pilgrimage and travel in mediaeval and modern Islam* (Richmond (Surrey) : Curzon Press, 1993), p. 3. (A.M. Nasr “The Structure of Society in Pre-Islamic Arabia.”)

³ Mohammad Muslehuddin, *Philosophy of Islamic law and the orientalist: a comparative study of Islamic legal system* (Lahore: Islamic Publications, [1977]), p. 61. (Muslehuddin, *Philosophy of Islamic law and the orientalist*).

⁴ A.M. Nasr “The Structure of Society in Pre-Islamic Arabia.”,p.3.

⁵ Organization of Islamic Cooperation (OIC), “Report on Islamophobia”, presented to the 41st Council of foreign ministers (Jeddah, Kingdom of Saudi Arabia 18-19 June 2014).

as not recognising democracy or individual human rights.⁶ Moreover, there is the widespread belief that Islam is religiously intolerant. Indeed, many Muslims themselves are strongly opposed to apostasy and blasphemy and believe that both are offences punishable by death under Shari'a law. This interpretation was illustrated in the well-known 1995 case of Abu Zayd, a professor of Islamic Studies in Egypt whose colleagues employed the Islamic concept of *hisbah* (enjoining good and forbidding bad) to accuse Abu Zayd of apostasy. Although there is no penal code that criminalises apostasy in Egypt the Court of Cassation employed a Shari'a approach to order him to divorce his wife, as under traditional Shari'a apostates cannot marry Muslim women. The issue of apostasy is currently being exploited by extremist groups such as *Daesh* and Boko Haram, who kill fellow Muslims in the name of God. They are careful never to define the meaning of apostasy but nevertheless declare all other Muslims to be apostates and excommunicate them, because these other Muslims are not living in lands ruled by Shari'a.

There is no doubt that extremist groups intentionally misinterpret the Shari'a to justify their killing of both Muslims and non-Muslims on the grounds of apostasy and blasphemy, both of which are considered to be crimes by extremist groups and some Muslim majority states. These understandings of Shari'a are far different from those of the Prophet's time.

This thesis will analyse historical and contemporary understandings of apostasy and blasphemy held by both states and extremist groups, and will also examine

⁶ ECHR, *Refah Partisi* (the Welfare Party) v Turkey (2001) 35 EHRR 3, para 72 (*Refah Partisi* (the Welfare Party) v Turkey).

the evolution of the notion of *takfir*. In particular, the reasons for criminalising apostasy and blasphemy, and for apostasy still being considered a crime in some Muslim majority states (even though many such states have not codified apostasy law), will be examined. This thesis will argue that criminalising apostasy and blasphemy is inconsistent with Shari'a and moreover that the right to declare *takfir* is one held solely by God, and only God has the right to punish apostates in the hereafter.

Chapter 1 analyses apostasy and blasphemy in Islamic law by comparing the approaches of the Prophet's time to those of the scholars that came later, particularly those of the mediaeval period. Many of these later scholars considered apostasy and blasphemy to be offences punishable by death; understanding this evolution is key to understanding the actions of extremist groups today.

Chapter 1 centres on the legal status of apostasy and blasphemy and the process by which apostasy and blasphemy became offences punishable by death. The key finding in the chapter is that there is no evidence that apostasy and blasphemy *per se* were punished during the Prophet's time. Moreover, no *hudud* (prescribed punishment) is prescribed for apostasy; rather, the Qur'an prescribes that apostasy is to be punished in the hereafter. In other words, the Qur'an prohibits man's punishment of his fellow man in this life for such 'crimes'. It is clear that apostasy and blasphemy were not recognised as punishable offences during the Prophet's time.

However, it is undeniable that apostasy and blasphemy were linked to treason or other serious crimes during the Prophet's era. Cases of so-called apostasy and blasphemy were always prosecuted together with instances of murder, highway

robbery or treason. Separating these elements was not seen as necessary at the time, and from today's perspective is very difficult. Nevertheless, it seems clear that those charged with apostasy and blasphemy were not being charged with these offences *per se*, but were actually being accused of other offences.

The key step in the evolution of approaches to apostasy and blasphemy was the interpretation by mediaeval scholars of these earlier prosecutions for blasphemy and apostasy. They failed to see that these two 'crimes' were being prosecuted in tandem with other far more serious offences, such as treason and murder; instead, they focused on blasphemy and apostasy only and concluded that they were to be treated as serious crimes and punished by death. The treatment of apostasy thus changed from the Prophet's time and no longer encompassed such acts as treason and sedition. As a result, apostasy is now seen as merely renouncing one's belief or as an expression of unbelief by an individual. However, this mediaeval understanding of apostasy and blasphemy is not supported by Shari'a, which can be flexible and interpreted dynamically through the use of the notion of *maslaha* (public interest). This chapter concludes that although apostasy and blasphemy law was created and developed by scholars, understandings of it can be altered through use of the Islamic concept of *maslaha* that was similarly created by scholars.

It is important to identify the distinction between the Shari'a and Islamic law. Whilst the *Sharia* is the fundamental source of Islamic law, it is not Islamic law in its entirety and is not law itself. The *Sharia* is the divine law which God has revealed, but Islamic law has been always developed by scholars through *fiqh*

(Islam jurisprudence),⁷ which is the necessary interpretive process of discovering and understanding the injunctions found within the *Sharia*.⁸ Thus, human beings have always been key to interpreting the *Shari'a*, and the mediaeval scholars' understandings are therefore not necessarily eternal or absolute.

Chapter 2 analyses the modern treatment of apostasy and blasphemy in Muslim majority states, with particular reference to how the codification of Shari'a has influenced this treatment. This codification is a relatively recent development in Muslim majority states; apostasy is not considered a crime *de jure* in many Muslim majority states and most do not have codified apostasy laws, although ways are still found to prosecute for apostasy. Some people have been declared apostate via case law, such as Abu Zayd in Egypt, Abdul Rahman in Afghanistan and Youcef Nadarkhani in Iran. Although there is no codified apostasy law in these countries, the judges in these cases cited traditional apostasy law on the grounds that Shari'a is codified in the constitution. For example, Hanafi Islamic jurisprudence is recognised in Afghan courts if a particular issue or situation is not specifically covered by the constitution or other laws. These and other cases discussed in Chapter 2 show how apostasy can be punished in some Muslim majority states that lack a relevant criminal law by reference to the codification of Shari'a. The key finding in the chapter is therefore that apostasy is rarely dealt with via case law. Moreover, this chapter shows how codified Shari'a law has

⁷ Abu Ameenah Bilal Philips, *The Evolution of Fiqh : (Islamic law and the Madh-habs)* 3rd ed (Riyadh : Tawheed Publications, 2006), p. 12.

Fiqh literally means, the true understanding of what is intended.

⁸ Mohammad Talaat Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach*, (The Hague, Netherlands: Martinus Nijhoff, 1968) p.106.

been interpreted in some Muslim majority states as criminalising apostasy, despite this ‘crime’ not being formally criminalised.

Chapter 3 examines the key international human rights declarations with reference to apostasy. The universal approach to human rights that began with the UDHR (Universal Declaration of Human Rights) does not view apostasy as a crime, but this universal approach has not been achieved, and will be extremely difficult to realise in the near future. This is because although almost half a century has passed since the introduction of the ICCPR (International Covenant on Civil and Political Rights) some Muslim majority states have not yet signed up to it, for example Malaysia and Saudi Arabia.⁹ Moreover, although many Muslim majority states have joined international human rights treaties such as the ICCPR, they have expressed strong reservations against religious freedom. They do not necessarily reject religious freedom itself; rather, their resistance centres around interpretations of the restrictions on this freedom. This can be seen in the Defamation Resolutions issued by the Organisation of Islamic Cooperation (OIC), which sought to place religion and religious groups under the protection of international human rights despite these rights specifically not protecting religion. These Defamation Resolutions tend to categorise religious defamation as being restricted under ICCPR Article 19(3), as it violates the human rights of the individual and in particular the rights and freedoms of others. The practices of these Muslim majority states indicate the difficulty of attempting to apply any form of universal standards for religious freedom. Interestingly, international

⁹ Other Muslim majority states that have not joined the ICCPR include Brunei, Oman, Qatar and the United Arab Emirates.

human rights instruments never define ‘religion’ as such in their calls for religious freedom.

Chapter 4 looks at Islamic human rights approaches. Unlike the international human rights approach, the Islamic approach does not stem from natural rights law theory but from Shari’a. Islam not only defines what is morally good or bad; Shari’a law tells its believers how they should behave. Nevertheless, many sources prove that freedom of belief is a cornerstone of Islam and that individual rights are acknowledged. Verse 2:256 of the Qur’an recognises religious freedom and was not abrogated by any other verses revealed subsequently. The Rightly-guided Caliphs and the Caliph of the Umayyad Dynasty, ‘Umar bin ‘Abd al-‘Aziz (d. 101AH/720CE), all stated that religious freedom is the most important factor in Islam. Moreover, the idea that Islamic law is immutable or inflexible goes against not only the practices of early generations of Islamic scholars but also against Shari’a itself. Shari’a is a set of principles and therefore its understanding and interpretation is necessarily always carried out by human beings.

The final chapter, Chapter 5, examines why apostasy and blasphemy have become such severe problems and why they are still being exploited by extremist groups. Almost all contemporary apostasy and blasphemy cases are linked with *takfir* (excommunication). Although *takfir* do not appear in Shari’a, the Khawarij and certain scholars later developed the concept. As the traditional Islamic approach is that *iman* (belief) cannot permanently disappear, *takfir* actually contravene Islam. The right to declare *takfir* is one held solely by God and as such, *takfir* declared by man amount to a violation of God’s right. Moreover, the concept of *tauba*

(repentance) allows religious sinners to return to their previous sin-free status. Their repentance is recognised for their entire life; their sin is expunged and they are not excommunicated or excluded from Islam. Finally, this chapter analyses how the Islamic concepts of *fatwa* (religious edicts) and *hisbah* (“enjoining right and forbidding wrong”) are misleadingly used by religious establishments, governments and extremist groups. These concepts were not originally employed to deal with believers whose faith was said to have disappeared.

This thesis has shown that apostasy and blasphemy were not originally seen as crimes but as sins (Chapter 1), but that this understanding began to fade or even disappear after the Prophet’s time (Chapter 2). The new interpretation of apostasy that emerged has found itself in conflict with contemporary international human rights, as the latter unconditionally recognises unbelief and renouncing one’s religion, as seen in the UDHR (Chapter 3). However, this conflict between Islam and international human rights is a false one; careful reading of the Qur’an and the words and deeds of both the Prophet and the Rightly-Guided Caliphs shows that religious freedom is fully recognised by Islam (Chapter 4). The notion of *takfir* has played a key role in apostasy and blasphemy issues throughout Islamic history; the religious sin of apostasy can be criminalised through the use of *takfir*, as will be discussed in Chapter 5. Throughout Islamic history certain scholars and sects, such as the Khawarij, have considered religious sin to be evidence for apostasy and have demanded that sinners be excluded from the fold of Islam. This belief remains a core problem for Muslim today.

Chapter 1 Apostasy and blasphemy in Islam

Introduction

A number of apostasy and blasphemy cases have been reported in recent years, and some extremist groups have killed apostates and blasphemers in the name of God. Moreover, some modern Muslim thinkers support capital punishment for apostasy and have tried to justify their beliefs using certain Qur'anic verses, and indeed some verses do directly mention apostasy. However, the arguments brought forward to support the death sentence for apostates do not hold up for a number of reasons. The main purpose of Chapter 1 is to examine the legal status of apostasy and blasphemy. It analyses the Shari'a's position on these 'crimes' and why some mediaeval scholars and even contemporary Muslims believe that apostasy and blasphemy can be treated as *hudud* (prescribed) offences and punished accordingly. The key question in this chapter is thus "Is criminalising apostates and blasphemers contrary to Shari'a?"

Firstly, the chapter will examine the definition of apostasy and whether it can be classed as a punishable offence or not under Shari'a. There is no definition of apostate in the Qur'an or *Sunna*, but there are so-called apostasy lists drawn up by mediaeval scholars. Some scholars have interpreted apostasy as a *hadd* offence, and extremists have sought to base their punishment of apostates on certain Qur'anic verses and the Prophet's *Sunna*. The chapter thus carefully examines the position of apostasy in Shari'a.

The chapter then examines the position of *Sunna*, which is the second source of Shari'a after the Qur'an itself and was developed two to three centuries after the

Prophet's time. The *Sunna* is comprised of *hadith*, which are the records of the words and deeds of the Prophet and his companions. Many of them deal with the same or similar events and were written by scholars in mediaeval times, but their authentication has been controversial. Those *hadith* that mention cases of apostasy are analysed in order to understand how this 'crime' was treated in the Prophet's era. It seems clear that these cases were not actually cases of apostasy *per se* but were instances of serious crime such as murder or robbery.

Blasphemy has been a similarly controversial issue throughout Islamic history. Based on certain Qur'anic verses some scholars consider blasphemy to be a *hadd* offence.¹⁰ Under traditional Islamic law when a Muslim blasphemes they automatically renounce Islam; some mediaeval scholars believed that blasphemy was "the speech of unbelief."¹¹ *The Reliance of the Traveller*, a mediaeval Islamic textbook, cites "To revile the religion of Islam"¹² and "To revile Allah or His messenger" as two forms of blasphemy.¹³

A key difference between apostasy and blasphemy is that only Muslims can be punished under apostasy law, but non-Muslims also can be punished under traditional blasphemy law. More significantly, under traditional Islamic law if non-Muslims blaspheme the Prophet or Allah then the covenant between Muslims

¹⁰ Qadi 'Iyad considers blasphemy as a *hadd* offence based on several Qur'anic verses. "Cursed be the liars" [Qur'an 51:10] and "May Allah curse them! How are they denying (or deviating from) the Right Path" [Qur'an 63:4]. See, Al-Qadi 'Iyad al-Yahsubi, *Ash-Shifa (Healing Through Defining The Rights of Prophets Muhammad)*, translated by Gehan 'Abdel-Raouf Hibah (Beirut: Dar Al-Kotob Al-Ilmiyah, 2009), p.718. (Qadi 'Iyad, *Ash-Shifa*).

¹¹ *ibid*, p.726.

¹² Ahmad Ibn Naqib Al-Misri, translated by Noah Ha Mim Keller, *The Reliance of the Traveller: a Classic Manual of Islamic Sacred Law* (Dubai: Modern Printing Press, 1991), p.598, o8.7 (16) (Al-Misri, *The Reliance of the Traveller*)

¹³ *ibid.*, p.597, o8.7 (4).

and non-Muslims becomes void, and Muslim leaders must instigate war against non-Muslims.

Analysis of so-called blasphemy cases during the Prophet's time shows that the Prophet never mentioned any punishments for blasphemy specifically. The development of 'traditional' Islamic approaches to both apostasy and blasphemy law are therefore controversial, as it seems clear that during and just after the Prophet's era individuals were not punished for these 'crimes' *per se*, but rather for associated acts that were seen as far more serious in the social circumstances of the day. Indeed, it was changes in social circumstances that seem to have driven the development of apostasy and blasphemy law. This chapter therefore analyses the position of apostasy and blasphemy from the Prophet's time to the mediaeval era and examines why some Muslims believe that these acts are serious offences.

1.1 Apostasy

1.1.1 Definition of Apostasy

Apostasy is often defined as an 'expression of unbelief', whether in deeds or words.¹⁴ Some argue that it relates not only to religion but also to society. For example, Caplovitz and Sherrow assert that apostasy is not only indicative of a loss of religious faith, but also of "rejection of a particular ascriptive community as a basis for self-identification."¹⁵ Apostasy has been an important issue in Islam for a

¹⁴ Rudolph Peters and Gert J. J. De Vries, "Apostasy in Islam", 17 *Die Welt des Islams*, New Series, (1976), p.3.

¹⁵ David Caplovitz and Fred Sherrow, *The Religious Drop-outs: Apostasy among College Graduates*. (Beverly Hills, CA: Sage Publications, 1977), p.31.

very long time, and is treated very seriously. One mediaeval Sunni Islamic textbook notes that an apostate is someone who turns away from the truth and accepts falsehood;¹⁶ apostasy in Islamic law therefore means rejecting Islam after having been a Muslim. Apostasy is also known in Islamic law as *irtidad* or *ridda*,¹⁷ the former relates to apostasy from Islam to another faith, such as Christianity, while the latter relates to apostasy from Islam into unbelief, or *kufr* (disbelief).¹⁸ *Irtidad* is seen as ‘giving up and deviating from Islam’,¹⁹ and has also been defined as “retraction from Islam by a person who professes Islamic faith, either through any act of speech or deed or faith.”²⁰ Although *irtidad* is seen as a major issue and is forbidden by the Shari’a, *ridda* has become a much more serious problem in Islam. This is because not only does *ridda* occur when a person declares his conversion to some non-Islamic religion, but also when he refuses to believe in any and every article of the Islamic faith. In contemporary Islam both state and non-state actors are involved in many complex *ridda* issues. For example Abu Zayd, the defendant in a 1995 Egyptian case, never tried to renounce Islam but merely to discuss it, but the court of Cassation nevertheless ruled him apostate:

Since a Muslim inherits his/her religion from his/her parents, he/she does not need to re-announce his/her Faith.²¹

¹⁶ *The Sea of Precious Virtues (Bahr al-Fava'id): a Medieval Islamic Mirror for Princes, Translated from the Persian, edited, and annotated by Julie Scott Meisami* (Salt Lake City: University of Utah Press, 1991), p.238. (*The Sea of Precious Virtues (Bahr al-Fava'id)*)

¹⁷ W. Heffening, “Murtadd” in *E.J. Brill's First Encyclopaedia of Islam: 1913-1936*, Reprint edition, eds. M.Th. Houtsma, A.J. Wensinck, H.A.R. Gibb, W. Heffening and E. Levi-Provencal (Leiden : Brill, Leiden: E.J. Brill, 1987), Vol., 6, p.736

¹⁸ Samuel M. Zwemer, *The Law of Apostasy in Islam* (London: Marshall Brothers, 1975) p.33 (Zwemer, *The Law of Apostasy in Islam*).

¹⁹ Muhammad Tahir-ul-Qadri, *Islamic Penal System and Philosophy*, (Lahore: Minhaj-ul-Qur'an Publications, 1995), p.384.

²⁰ *ibid.*

²¹ Court of Cassation, 5/11/1975 – Court decisions 1926, p.137 in The Center for Human Rights Legal Aid (CHRLA), “Dossier 14-15: From Confiscation to Charges of Apostasy” (September 1996)

Apostasy is therefore not only defined as a deed, that is, changing one's religion, but also as speech or writing. Moreover, some extremist groups, such as *Daesh* and Boko Haram, also make *takfir* declarations; these are related to *ridda*, as will be discussed in a later chapter. Although apostasy has been regarded to be a serious issue ever since the Prophet's time, its exact meaning at that time was unclear. Definitions of apostasy were however developed after the Prophet's era; for example, the Shafi'i law manual "*The Reliance of the Traveller*" lists the acts that would constitute apostasy, and therefore as requiring someone to leave Islam, as follows:

To prostrate to an idol....

To intend to commit unbelief....

To speak words that imply unbelief such as "Allah is the third of three", or "I am Allah"

To revile Allah or His messenger

To deny the existence of Allah, His beginningless eternity, His endless eternity, or to deny any of His attributes which the consensus of Muslims ascribes of Him....²²

Another definition of apostasy was provided by Ibn Qudama (d.620 AH/ 1223) in his *Al-Umda fi l-Fiqh*:

If someone denies Allah's existence, or attributes to Him a partner, or a consort, or a son, or if he accuses Allah of telling lies, or blasphemes him, or if he calls His Messenger a liar, or insults him, or if he denies a Prophet, or denies the Book of Allah or anything from it, or denies one of the basic pillars of Islam, or if he attributes lawfulness to something declared unlawful by the consensus of legal opinion, he is guilty of apostasy - unless he is one of those who are unaware of the

²² Al-Misri, *The Reliance of the Traveller*, p.596, o8.7 (1)-598, o8.7 (20).

religious duties and prohibitions, in which case he must be informed thereof, and if he does not accept, he is guilty of unbelief.²³

Similarly, the medieval Sunni Islamic textbook *Bahr al-Fava'id* notes that “whoever turns away from the truth and accepts falsehood is called an apostate.”²⁴

The same text goes on:

Whoever ascribes a partner to God or denies His Scriptures, or a single verse of the Koran, or the prophetic mission of one of His prophets, or Judgement and Resurrection, is an unbeliever, and his blood may be shed with impunity. Similarly, if denies a single pillar of the Law, or considers lawful anything forbidden by the Law on which the community affirm consensus, he becomes an unbeliever.²⁵

Modern scholars also mention apostasy. Doi explains that verbal rejection of certain fundamental Muslim tenets, such as belief in the existence of Allah, the message of Muhammad and the role of the Qur'an, amounts to apostasy.²⁶ The contemporary scholar, Wael Hallaq, has explained apostasy with reference to Islamic law, which defines apostasy as “releasing oneself from Islam (*qat' al-Islam*) by means of saying or doing something heretical, even in jest.”²⁷ He lists examples of such potentially heretical behaviour:

upholding a theological doctrine which negates the existence of God; rejecting the Prophets; mocking or cursing of God or the Prophet; kneeling down in prayer to an idol, the moon or the sun; dumping a copy of the Qur'an in a waste basket;

²³ Ibn Qudama, *The Mainstay Concerning Jurisprudence (Al-Umda fi l-Fiqh - Handbook of Hanbali Fiqh)*, translated by Muhtar Holland (Al-Baz Publishing, Incorporated, 2010), p.309 (Ibn Qudama, *The Mainstay Concerning Jurisprudence*).

²⁴ *The Sea of Precious Virtues (Bahr al-Fava'id)*, p.23.

²⁵ *ibid*, p.124.

²⁶ Abdur Rahman I Doi, *Shariah: The Islamic Law* (1984), p.265.

(Doi, *Shariah: The Islamic Law*)

²⁷ Wael Hallaq, 'Apostasy' in *Encyclopaedia of the Qur'an*, edited by Jane Dammen McAuliffe, Volume One, 'A-D,' (Leiden: Brill, 2001), p.122.

declaring legal what is otherwise strictly illegal, such as adultery, all constitute apostasy.²⁸

Although those whose behaviour coincided with that which is listed above have been deemed apostates, such acts did not figure, verbatim, in the Qur'an. They originated from scholarly writings and their lack of clarity has led to their being misconstrued in the course of Islamic history. Ambiguous definitions of apostasy have resulted in tragedies, starting with the founders of the Sunni schools themselves who were considered to have been apostates at various stages of their lives.

These 'apostates' include Abu Hanifa (d. 148 AH/767 CE), Ibn Hanbal (d. 241 AH/855 CE), Al-Ghazali (d. 505 AH/1111 CE), Ibn Hazm (d. 456 AH/1064 CE) and Ibn Taymiyya (d. 728 AH/1328CE),²⁹ despite their works on Islamic jurisprudence and their subsequent influence. Indeed, throughout Islamic history, scholars have sought to define apostasy in ways which conveniently allowed them to accuse others. The difference in the contemporary era is that in addition to scholars, states themselves now use these definitions for the same purposes. This is becoming a serious issue in Muslim majority states, as can be seen in Iran's persecution of the Baha'i sect and Pakistan's persecution of the Ahmadis; these topics will be discussed in a later chapter.

1.1.2 Punishment of apostasy

²⁸ *ibid.*

²⁹ Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy, and Islam* (Aldershot: Ashgate, 2004), p.30-31. (Saeed and Saeed, *Freedom of Religion*)

Punishment under Islamic law can be mainly divided into three categories, *hudud* (prescribed punishment), *ta'zir* (discretionary punishment) and *qisas* (retributive punishment). The Arabic term *hadd* literally signifies 'obstruction' and more specifically a 'porter' or 'gatekeeper' prohibiting people from entering.³⁰ In the context of the Shari'a a *hadd* (pl. *hudud*) is considered to be a limit imposed by God (*hudud Allah*). Retaliation for *hudud* offences is not recognised, as it is right of God and not right of man/individual. The main purpose of *hudud* punishment is to preserve social order. The *Hidayah* notes that the punishments for *hadd* offences are meant to deter people from causing harm.³¹ According to Rahman, this entitlement of Allah to enforce punishment therefore works to protect "men's rights with regard to their selves, honour and property."³² The strict application of punishments for *hudud* offences is reported in *ahadith*, where the Prophet states that "...if Fatimah the daughter of Muhammad were to steal, I would cut off her hand."³³ Similarly, the second Caliph Umar wrote to Abu 'Ubaydah regarding some Muslims and their alcohol consumption:

If they claim that wine drinking is permissible, have them killed, and if they claim that it is forbidden, have them flogged with eighty strips.³⁴

³⁰ Burhanuddin Abi Al Hasan Ali Marghinani, *The Hedaya: commentary on the Islamic laws*, translated by Charles Hamilton, 2nd ed (New Delhi: Kitab Bhavan, 1870), p.175 (Ali Marghinani, *The Hedaya*); *English Translation of Jami' At-Tirmidhi*, compiled by Imam Hafiz Abu 'Eisa Mohammad Ibn 'Eisa At-Tirmidhi, Translated by Abu Khaliyl (Riyadh: Darussalam 2007), Vol. 5, no. 2859, pp.200-201. (*Jami' At-Tirmidhi*)

³¹ Ali Marghinani, *The Hedaya*, pp.175-176.

³² Fazlur Rahman, "The Concept of Hadd in Islamic Law", 4 *Islamic Studies* (1965), p.249.

³³ *English Translation of Sahih Muslim*, compiled by Imam Abul Hussain Muslim Ibn al-Hajjaj, trans. Nasiruddin al-Khattab (Riyadh: Maktaba Dar-us-Salam, 2007), vol, 4, no. 4411, pp.459-460. (*Sahih Muslim*); The Translation of Meanings of Sahih Al-Bukhari, trans. Muhammad Muhsin Khan (Riyadh: Darussalam, 1997), vol., 8., no 6787, p.409. (*Sahih Al-Bukhari*).

³⁴ Muhammad ibn Jarir al-Tabari, *The History of al-Tabari vol. 13; The conquest of Iraq, Southwestern Persia, and Egypt*, translated and annotated by Gautier H.A.Juynboll (New York : State University of New York Press, 1989), p.152 (Al-Tabari, *The History of al-Tabari*).

Ta'zir punishments are discretionary with no particular punishment is prescribed in the Qur'an or the *Sunna*,³⁵ but Al-Mawardi (d. 450 AH/1058 CE) notes that such punishments can be employed as discipline for infractions which carry no formal legal penalty. They vary according to circumstances and the individual attracting the punishment,³⁶ but as with prescribed punishments they are intended to reform and rebuke and are proportionate to the offence.³⁷ Although a variant of the word *ta'zir* is used in the Qur'an, the word *ta'zir* itself does not appear. When within the Qur'an a crime is referred to that lacks any specific punishment, the sentence is determined at the *qadi*'s (judge's) discretion.³⁸

The third main category of punishment under Islamic law is that of the *qisas*, or retributive punishments. These are human claims such as murder and bodily injury, and are not offenses against Islam as such. The Qur'an calls for "Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal." [Qur'an 5:45], and for equality of punishment: "the free for the free, the slave for the slave, and the female for the female" [Qur'an 2:178].

It is traditionally understood within Islamic law, and commonly accepted by most jurists, that once a person becomes a Muslim they are not permitted to change religion or renounce Islam; indeed, many Islamic jurists argue that apostasy should be punishable with death, and this ultimate penalty for such a 'crime' can be seen in various medieval books or in other period literature. For example, Salim ibn Dhakwan in his *Sirat Salim* stated that

³⁵ Ali Marghinani, *The Hedaya*, p.203,

³⁶ Alī ibn Muhammad Māwardī, *The Ordinances of Government: a Translation of al-Ahkām al-Sultaniyya w' al-Wilāyāt al-Dīniyya*, translated by Wafaa H. Wahba (Reading: Garnet, 1996), p.256 (Al-Mawardi, *The Ordinances of Government*).

³⁷ *ibid.*

³⁸ Ali Marghinani, *The Hedaya*, p.175.

The path of those who have been embracing Islam since the Prophet's time is like the path of those who embraced it in his time; and the path of those who have been rejecting it in unbelief since his time – idolaters, scripturalists, hypocrites, or people of his *qibla* guilty of a capital offence – is like the path of those who in his time rejected it in unbelief or incurred the death penalty while adhering to his *qibla*.³⁹

Moreover, Al-Qadi al-Nu'man (d. 363 AH/ 974 CE) stated in his *Da'ā'im al-Islām* (*The pillars of Islam*) that

He [the Caliph Ali] ordered that an apostate be put to death. He said, "A man born a Muslim who changes his religion [and does not recant] shall not be asked to recant, and shall be killed. But he who was not a Muslim originally, but becomes a convert to Islam, and then apostatizes, should be given three days for recanting. If he repents [well and good]; if not, he shall be killed. In the case of a woman, she should be imprisoned until she recants or dies".⁴⁰

Both Shia Islam and all four Sunni Muslim schools consider apostasy to be a crime that is punishable with death. For example, in the Maliki school's law book, *al-Muwatta*, Imam Malik declares that

If [apostates] they turn in *tawba* [repentance from sin], that is accepted from them. If they do not turn in *tawba*, they are killed.⁴¹

Other schools reached similar conclusions. The Shafi'i School, for example, declared that apostates who do not repent from apostasy within three days would be punished with death. Al-Nawawi (d. 676 AH/1277 CE) stated in his *Minhaj et talibin* that an apostate who does not repent from apostasy should be put to death.⁴²

³⁹ Salim ibn Dhakwan: Patricia Crone and Fritz Zimmermann, *The Epistle of Salim Ibn Dhakwan* (Oxford: Oxford University Press, 2001), pp.73-75 (no. 34) (Ibn Dhakwan, *The Epistle of Salim Ibn Dhakwan*).

⁴⁰ Al-Qadi al-Nu'man, *The Pillars of Islam : Da'ā'im al-Islām of al-Qāḍī al-Nu'mān*, translated by Asaf A.A. Fyze; completely revised and annotated by Ismail Kurban Husein Poonawala. (New Delhi : Oxford : Oxford University Press, 2002), p.494 (Al-Qadi al-Nu'man, *The pillars of Islam*).

⁴¹ Malik Ibn Anas, *Al-Muwatta*, compiled by Yahya ibn Yahya al-Laythi., translated by 'A'isha 'Abdrahaman at-Tarjumana and Ya'qub Johnson; editor-in-chief: Idris Mears, (Norwich : Diwan Press, 1982), p.343., 36.18. 15 (Ibn Anas, *Al-Muwatta*).

⁴² Mahiudin Abu Zakaria Yahya Ibn Sharif En Nawawi, *Minhaj et Talibin. A Manual of Mohammadan law*

Moreover, *The Reliance of the Traveller* indicates that scholars were in agreement that apostates should be punished by death:

When a person who has reached puberty and is sane voluntarily apostatizes from Islam, he deserves to be killed.⁴³

According to the Hanafi law book *The Hedaya*, apostates are barred from marrying (this is also illustrated by the aforementioned Abu Zayd case of 1995):

It is not lawful that an apostate marry any woman, whether she be a believer, an Infidel, or an apostate, because an apostate is liable to be put to death; moreover, his three days of grace are granted in order that he may reflect upon the errors which occasion his apostasy; and as marriage would interfere with such reflection, the law does not permit it to him.⁴⁴

Abu Hanifa and his followers labelled anyone who denied Mohammed's message or disbelieved him to be an apostate and worthy of punishment by death, unless he repented.⁴⁵ Moreover, Muḥammad ibn al-Ḥasan al-Shaybānī (d. 189 AH/805 CE), a disciple of Abu Hanifa also considered apostasy to be punishable with death.⁴⁶ In his book *al-Siyar al-Saghir*, al-Shaybānī stated that

If a Muslim reverts from Islam, he will be invited to understand Islam. If he accepts Islam it is well and good; otherwise, he will be executed immediately.⁴⁷

Ibn Qudama declared in his *Al-Umda fi l-Fiqh* that

According to the school of Shafii, translated into English from the French edition of L.W.G. Van Den Berg by E.C. Howard (Late District Judge, Singapore) (London: William Clowes and Sons, 1914), p.437.

⁴³ Al-Misri, *The Reliance of the Traveller*, p.595, o8.1.

Also p.109, f 1.3.

⁴⁴ Ali Marghinani, *The Hedaya* p.64.

⁴⁵ Qadi 'Iyad, *Ash-Shifa*, p.734.

⁴⁶ Muḥammad ibn al-Ḥasan al-Shaybānī, *The Islamic Law of Nations: Shaybānī's Siyar*, translated with an introduction, notes, and appendices by Majid Khadduri (Baltimore : John Hopkins Press, 1966), p.195 (Al-Shaybānī, *The Islamic Law of Nations*)

⁴⁷ Muḥammad ibn al-Ḥasan al-Shaybānī, *The Shorter Book on Muslim International Law* [Kitāb al-siyar al-saghir], edited, translated and annotated by Mahmood Ahmad Ghazi. (Islamabad : Islamic Research Institute, International Islamic University, 1998), p.67. (Al-Shaybānī, *The shorter book on Muslim international law*).

If someone apostatises from Islam, whether it be a man or a woman, the penalty of death must be enforced, because of the saying of Allah's Apostle "If someone changes his religion, you must kill him". The apostate should not be killed until he has been invited three times to repent. If he repents [he is spared], but if not, he is killed by the sword.⁴⁸

Al-Ghazali saw 'Unbelief' as a legal designation (*hukm shar'i*) that reflected an apostate's loss of property rights, the legitimacy of shedding his blood and his condemnation to Hell forever.⁴⁹ The Shi'i position on apostasy is also that it is punishable with death. Ayoub notes that Imami Shi'i jurisprudence distinguishes between the *fitri* and *milli* forms of apostasy. The first form is the apostasy of a Muslim born to Muslim parents; such a person should supposedly have the innate disposition to know God and have faith in Him. The second form is the apostasy of a Muslim who had previously converted to Islam from another religion. Shi'i Islam calls for *fitri* apostates to be killed immediately and for *milli* apostates to be given three days to repent, and be killed if they don't.⁵⁰ Shaykh Tusi (d. 460 AH/1067 CE) similarly noted two types of apostates (*murtad*), namely the "born Muslim who rejects Islam and becomes an apostate" (*kafir al-fitri*) and the "born non-Muslim who reverts to Islam and then rejects it"; the first must be put to death without being given the chance to repent, while the latter can be asked to repent but will be executed if he refuses to.⁵¹

⁴⁸ Ibn Qudama, *The Mainstay Concerning Jurisprudence*, p.309.

⁴⁹ Sherman A. Jackson, *On the Boundaries of Theological Tolerance in Islam (Abu Hanid al-Ghazali's Faysal al-Tafriqa Bayna al-Islam wa-Zandaqa)* (Karachi: Oxford University Press, 2002), p.115.

⁵⁰ Mahmoud Ayoub, "Religious Freedom and the Law of Apostasy in Islam", 20 *Islamiyat Masihiyat*, (1994), p.86.

⁵¹ Shaykh Tusi, *Al-Nihayah: Concise Description of Islamic Law and Legal Opinions (al-Nihayah fi Mujarrad al-Fiqh wa al-Fatawa)*, translated by A. Ezzati (London : ICAS Press, 2008), p.492. (Shaykh Tusi, *Al-Nihayah*)

1.1.3 Is apostasy a *Hadd* offence?

The question of whether apostasy should be treated as a *hadd* offence or not is fiercely debated in Islam, especially as there is no specific Qur’anic verse outlining punishment for it. This contrasts with other *hadd* crimes, which each have precisely defined punishments laid out for them: for adultery (*zina*), “a hundred stripes” [Qur’an, 24: 2]; for armed robbery (*hirabah*), “execution or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land” [Qur’an, 5: 33]; and for theft, amputation.⁵² The Qur’an clearly prescribes punishment for these crimes, but does not set out any punishment for apostasy. This section analyses whether apostasy should be regarded as a *hadd* crime or not, and concludes that it should not be, as any reference to punishment for the ‘offence’ is intentionally avoided in both the Qur’an and *Sunna*. Apostasy *per se* is not considered a crime in the Qur’an; rather, the Prophet punished apostates for crimes such as murder, highway robbery and treason rather than for their apostasy itself.

Some Islamic scholars believe that apostasy was first categorised as a *hadd* offence in the Qur’an itself. For example, Bambale states that “*Riddah* [apostasy] is classified in among the seven destructive crimes that may be committed by any Muslims.”⁵³ Abdul al-Qader ‘Oudah concurs, noting that there are seven crimes deserving of *hadd*: adultery, false allegation of adultery, drinking, theft, plunder, apostasy and rebellion.⁵⁴ Amin lists an almost identical set of crimes to be punished with *hudud* penalties: adultery, false accusation of unlawful intercourse, drinking

⁵² [Qur’an, 5:38].

⁵³ Yahaya Yunusa Bambale, *Crimes and Punishments Under Islamic Law*, 2nd ed (Ikega (Nigeria): Malthouse Press Limited, 2003), p.74. (Bambale, *Crimes and punishments under Islamic Law*)

⁵⁴ Abdul Qader ‘Oudah Shaheed, *Criminal law of Islam*, (Karachi, Pakistan : International Islamic Publishers, 1987), p.85.

alcohol, highway robbery, theft from a secure place, rebellion against the Islamic authorities, and apostasy.⁵⁵ Siddiqi (d.1938) wrote that “certain verses of the Holy Qur’an all prescribe capital punishment for an apostate.”⁵⁶ Finally, Hamidulah states as follows:

the sayings and the doings of the Prophet, the decision and practice of the caliph Abu Bakr, the consensus of the opinion of the Companions of the Prophet and all the later Muslim jurisconsults, and even certain indirect verses of the Qur’an, all prescribed capital punishment for an apostate.⁵⁷

Moreover, certain local religious establishments in some Muslim majority countries believe that apostasy deserves a fixed punishment. Article 1 of Qatar’s Penal Code (2004), for example, considers apostasy to be a *hudud* offence. Sheikh Abdul Baseer Qazi Hotak argues that whether or not the ‘crime’ is aggravated or simple, or whether or not the apostate constitutes a threat to Islam, apostasy must be treated as a *hudud* crime because allowing conversion or atheism would negatively impact Islam.⁵⁸

Many believe that apostasy is mentioned and condemned in certain verses in the Qur’an. This is true, but careful analysis shows that these verses in fact do not say that merely leaving Islam is considered to be apostasy or that such an action is punishable with death. Moreover, all the Qur’anic verses that actually do mention or condemn apostasy are linked with military events or acts of treason that occurred

⁵⁵ Sayed Hassan Amin, *Islamic Law in the Contemporary World : Introduction, Glossary, and Bibliography* (Glasgow: Tehran : Royston; 1985), p.23.

⁵⁶ Muhammad Iqbal Siddiqi, *The Penal Law of Islam* (New Dehli : International Islamic Publishers, 1991), p.97.

⁵⁷ Muhammad Hamidulah, *Muslim Conduct of State* (Lahore: Sh. Muhammad Ashraf, 2011), p.174 (§332). (Hamidulah, *Muslim Conduct of State*)

⁵⁸ Ahmed Hamdy Tawfik, “The Concept of Crime in the Afghan Criminal Justice System: The Paradox between Secular, Tradition and Islamic Law A Viewpoint of an International Practitioner”, *9 International Criminal Law Review* (2009), 667-688, p.678. (Tawfik, “The Concept of Crime in the Afghan Criminal Justice System”).

in the Prophet's era. They therefore do not indicate that leaving Islam or having alternative ideas about it were in themselves considered to be serious crimes, or even a crime at all. In fact, the Qur'an consciously avoids treating apostasy as a crime or outlining any punishment for it. Textual analysis shows that declaring someone to be apostate was conditional upon renouncing Islam *and* upon taking part in armed attacks against the Islamic community; merely meeting the former criteria was not sufficient to establish apostasy.

Examples of the Qur'an condemning apostasy include Qur'an 4:89, which orders those who "turn back" to be killed "wherever you find them", and Qur'an 16:106, which states that "wrath from Allah" awaits apostates, and that they will meet "a great torment." Other passages variously call for believers to fight those who "revile your religion", warn that punishment awaits disbelievers and say that Allah will bring forth believers who will be powerful against the disbelievers (Qur'an 9:11-12,⁵⁹ 9:74⁶⁰ and 5:54⁶¹ respectively). These verses are considered proof by some scholars of the applicability of *hadd* punishments for apostasy. Hamidullah

⁵⁹ [Qur'an 9:11-12]

But if they repent, perform As-Salat (Iqamat-as-Salat) and give Zakat, then they are your brethren in religion. (In this way) We explain the Ayat (proofs, evidences, verses, lessons, signs, revelations, etc.) in detail for a people who know. But if they violate their oaths after their covenant, and attack your religion with disapproval and criticism then fight (you) the leaders of disbelief (chiefs of Quraish - pagans of Makkah) - for surely their oaths are nothing to them - so that they may stop (evil actions).

⁶⁰ [Qur'an 9:74]

They swear by Allah that they said nothing (bad), but really they said the word of disbelief, and they disbelieved after accepting Islam, and they resolved that (plot to murder Prophet Muhammad SAW) which they were unable to carry out, and they could not find any cause to do so except that Allah and His Messenger had enriched them of His Bounty. If then they repent, it will be better for them, but if they turn away, Allah will punish them with a painful torment in this worldly life and in the Hereafter. And there is none for them on earth as a Wali (supporter, protector) or a helper.

⁶¹ [Qur'an 5:54]

O you who believe! Whoever from among you turns back from his religion (Islam), Allah will bring a people whom He will love and they will love Him; humble towards the believers, stern towards the disbelievers, fighting in the Way of Allah, and never afraid of the blame of the blamers. That is the Grace of Allah which He bestows on whom He wills. And Allah is All-Sufficient for His creatures' needs, All-Knower.

specifically refers to Qur'an 5:54⁶² as a verse that indirectly supports the death penalty,⁶³ arguing that apostasy "constitutes a politico-religious rebellion."⁶⁴ The *fatwa* issued by the Permanent Committee for Islamic Research and Issuing *fatwa* in Saudi Arabia are premised upon the belief that the Qur'an, and in particular verse 2:217, provides sufficient evidence to punish apostasy with death.⁶⁵ However, those that make the argument that apostasy should be classified as a *hadd* offence and thus as meriting a fixed punishment have not carefully analysed the link between apostasy and treason. Furthermore, they have cited verses in an attempt to justify punishing apostates without considering the meaning behind the quoted verses or the reasons for their revelation.

No verses in the Qur'an consider the mere act of leaving Islam to constitute apostasy, nor do they advocate punishing such an action in itself; rather, it is treason or armed attack against the Muslim community that is treated as apostasy. For example, verses 9:11-12, considered by some to support *hadd* punishment, in fact indicate that the Qur'an does not view apostates as individuals but as part of military groups. Maududi sought to justify punishment against apostasy using these verses, his interpretation being that someone who renounces Islam is considered a polytheist. These verses are a continuation of Muhammad's policy, as outlined in Qur'an 9:1-5, of threatening polytheists with death, ambushes and besiegement,

⁶² [Quran, 5: 54]

O ye who believe! Whoso of you becometh a renegade from his religion, (know that in his stead) Allah will bring a people whom He loveth and who love Him, humble toward believers, stern toward disbelievers, striving in the way of Allah, and fearing not the blame of any blamer. Such is the grace of Allah which He giveth unto whom He will. Allah is All-Embracing, All-Knowing.

⁶³ Hamidulah, *Muslim Conduct of State*, p.174 (§332).

⁶⁴ *ibid.*, (§330).

⁶⁵ Fatwas of the Permanent Committee, "The first, second, and third questions of Fatwa no. 21166", <<http://www.alifta.net/Fatawa/FatawaChapters.aspx?languagename=en&View=Page&PageID=8492&PageNo=1&BookID=7>>accessed 27 June 2016.

and of ordering Muslims to make war against them.⁶⁶ Verse 9:5 is undoubtedly deemed by some scholars for example Ibn Kathir (d. 774 AH/1373 CE) to be the Sword verse:⁶⁷

Then when the Sacred Months (the 1st, 7th, 11th, and 12th months of the Islamic calendar) have passed, then kill the *Mushrikun* [polytheists] wherever you find them, and capture them and besiege them, and prepare for them each and every ambush. But if they repent and perform As-Salat (Iqamat-as-Salat), and give Zakat, then leave their way free. Verily, Allah is Oft-Forgiving, Most Merciful.

Some thinkers believe that the above verse recognises the justness of war against unbelievers. For Sayyid Qutb God's instructions were clear: outside of the four sacred months, idolaters or polythesists were to be killed or captured, unless treaty obligations were in force.⁶⁸ Qutb and other scholars have argued that this verse can be universally applied:

God's description of the unbelievers' attitude towards the Muslims is not limited to a special situation that prevailed in Arabia at a particular period of history...Indeed that statement describes a typical attitude that we meet everywhere, whenever a community of believers who submit themselves to God alone are confronted by idolaters or atheists who submit to beings other than God.⁶⁹

However, although verses 9:11-12 mention the Arabian *mushrikīn* (polytheists) who had broken their promises to the Muslim faithful, they do not mention any punishment for their apostasy.⁷⁰ The purpose of fighting such infidels was to bring

⁶⁶ Abul Ala Mawdudi, *The Punishment of the Apostate According to Islamic Law*, translated by Syed Silas Husain and Ernest Hahn, (1994), p.14.

⁶⁷ Ibn Kathir notes that [Qur'an 9:5] was called the *Ayah* of the Sword.

Ibn Kathir, *Tafsir ibn Kathir*, Abridged by a group of scholars under the supervision of Safi-ur-Rahman al-Mubarakpuri (Riyadh: Darussalam, 2003), vol. 4, p.377 (*Tafsir ibn Kathir*)

⁶⁸ Sayyid Qutb, *In the Shade of the Qur'an = Fī zilāl al-Qur'an* (Markfield : Islamic Foundation, 2001) Vol. 8, p.68.

⁶⁹ *ibid.*, p.82.

⁷⁰ Ibn Abbas, *Tafsir Ibn 'Abbas: Great Commentaries on the Holy Qur'an*, translated by Mokrane Guezzou, (Amman: Royal Aal al-Bayt Institute for Islamic Thought, 2007), p.194. (*Tafsir Ibn 'Abbas*)

them back into the fold, not kill them for their apostasy.⁷¹ Therefore, it cannot be argued, as Maududi does, that these verses consider apostasy to be a crime.

Another important Qur'anic verse, 4:89, which is closely related to the activities of war, has been interpreted by some commentators as supporting the death penalty for apostasy. As with other Qur'anic verses, this verse does not actually mention any punishment for apostates or apostasy *per se*. Siddiqi explains the background to this verse as follows:

Nowhere do these verses [4:88-91] give general permission to kill anyone. They were revealed to Prophet Muhammad at the time when the nonbelievers were attacking Makkah's Muslims and threatening those in Madinah. In contemporary jargon we may say that as the Muslims were subject to constant terrorist attacks on Madinah, Allah allowed them to defend themselves.⁷²

Furthermore, verse 4:89 is only applicable if the enemies of Islam have initiated open hostilities, at which time they are to be engaged in combat and killed.⁷³ The previous verse, 4:88, asks "what is the matter with you that you are divided into two parties about the hypocrites? Allah has cast them back (to disbelief) because of what they have earned." However, verse 4:90 tells the faithful that "...if they withdraw from you, and fight not against you, and offer you peace, then Allah has opened no way for you against them." The next verse [4:91] backs this up, as it records Allah's command that "they [hypocrites] should be fought against unless they withdraw from combat and resort to peace".⁷⁴ According to Ibn Kathir, these hypocrites "pretend to be Muslims....[to] attain safety with the Muslims for their

⁷¹ *ibid.*

⁷² Dr. Muzammil H. Siddiqi, "Does the Quran Promote Violence?" *Islamic Horizons*, Nov/Dec 2001, <<http://www.twf.org/Library/Violence.html>>accessed 27 June 2016.

⁷³ S.A. Rahman, *Punishment of Apostasy in Islam* (New Delhi: Kitab Bhavan, 1996), p.51 (Rahman, *Punishment of Apostasy in Islam*).

⁷⁴ *Tafsir ibn Kathir*, Vol. 2, p.541.

blood, property and families. However, they support the idolators in secret and worship what they worship....”⁷⁵ Therefore, this verse does not declare that apostasy *per se* is to be punished by death, but rather refers to hypocrites who are helping the enemies of Islam and fighting against the Muslim community. It does not prescribe the death penalty for apostasy; rather, it sanctions killing apostates in battle, and even then only if they have first attacked Muslims. Khan thus notes that “verses which seem to give the impression of perpetual war between the world of Islam and world of *kufr*, are decidedly topical and circumstantial in their import, and cannot be taken as permanent injunctions of God.”⁷⁶

Other verses of the Qur’an have also been misunderstood and misinterpreted as supporting the death penalty for apostates. One oft-cited verse is 16:106, which foresees the wrath of Allah descending upon apostates:

Whoever disbelieved in Allah after his belief, except him who is forced thereto and whose heart is at rest with Faith but such as open their breasts to disbelief, on them is wrath from Allah, and theirs will be a great torment.

However, the background to 16:106 does not support any punishment for apostasy. Ibn Abbas notes that “the verse was revealed about ‘Ammar Ibn Yasir whosoever utters words of disbelief willingly.”⁷⁷ It should be noted that although this verse mentions both Ammar ibn Yasir and ibn Abi Sarh, they were not punished with death for their “supposed apostasy”. Moreover, the Abbasid Caliphate of al-Ma’mun (d. 833CE) mentions Qur’an 16:106 in a letter:

⁷⁵ *ibid.*, pp.537-540.

⁷⁶ Qamaruddin Khan, *The Political Thought of Ibn Taymiyah*, (Islamabad: Islamic Research Institute, 1973), p.157. (Khan, *The Political Thought of Ibn Taymiyah*).

⁷⁷ *Tafsir Ibn ‘Abbas*, p.295.

God merely refers in this verse [16:106] to the person who holds fast [in his heart] to the faith, while outwardly professing polytheism. As for the person who holds fast [in his heart] to polytheism, while outwardly showing the faith, the verse does not refer to him [Ammar ibn Yasir] at all.⁷⁸

Whether the verse is interpreted as referring to outward or inward polytheism, it does not mention any punishment for apostasy in this world. With regard to the literal meaning, although verse 16:106 sees an apostate as “Whoever disbelieved in Allah after his belief”, it does not prescribe capital punishment and clearly was not written to provide guidance on punishing apostates in this life. Punishment is deferred to the next life, as the verse stresses: “on them [unbelievers] is wrath from Allah, and theirs will be a great torment.” Therefore, although a price for unbelief must be paid, it will be paid to Allah, not to man. Rahman therefore concurs that this verse postpones punishment for apostasy to the afterlife.⁷⁹ Similarly, Qur’an 9:73 orders the Prophet to “strive hard” and “be harsh” against apostates. The mediaeval exegetist Ibn Kathir noted that this verse refers to hypocrisy:

[Allah] informing him that the destination of the disbelievers and hypocrites is the Fire in the Hereafter.⁸⁰

Verse 9:73 does not unconditionally order Muslims to attack apostates, and any attacks that do occur can only be made for self-defence:

As long as the hypocrites have not initiated war and have not plotted against Islam, similar to the enemy alien nonbelievers, holy struggle upon them should be done only by tongue.⁸¹

⁷⁸ Al-Tabari, *The History of Al-Tabari*, vol. 32, p. 221.

⁷⁹ Rahman, *Punishment of Apostasy in Islam*, 47.

⁸⁰ *Tafsir ibn Kathir*, Vol. 4, p.475.

⁸¹ Ayatullah Sayyid Kamal Faguih Imani and a group of Muslim scholars, *An Enlightening Commentary into the Light of the Holy Qur'an*, translated by Sayyid ‘Abbas Sadr-‘āmelī and Mohammad Mehdi Baghi, (Isfahan: Amir-al-Mo'mineen Ali Library, 2002), vol. 6, p.470.

Furthermore, although some verses may mention punishments, they are not actually ordering these sentences to be carried out. For example, verse 9:74 broadly refers both to worldly punishment and to punishment in the afterlife:

If then they repent, it will be better for them, but if they turn away, Allah will punish them with a painful torment in this worldly life and in the Hereafter. And there is none for them on earth as a Wali (supporter, protector) or a helper.

Verse 9:74 indicates that if hypocrites repented “who will bring happiness to them, aid them, bring about benefit or fend off harm.”⁸² Verse 9:74 was intended only for the self-defence of the small Muslim community of the time from its enemies, from whom it was under attack. According to *Tafsir Ibn Kathir* it refers either to the case of ‘Abdullah bin Ubayy, who was planning to kill Muhammed, or to some hypocrites who were scheming to kill the Prophet while he was at the battle of Tabuk.⁸³ Thus Qur’anic interpreter Abdullah Yusuf Ali (d.1953 CE) notes that verse 9:74 is related to treason:

The reference is to a plot made by the Prophet’s enemies to kill him when he was returning from Tabuk. The plot failed....some of the conspirators were among the men of Madinah, who were enriched by the general prosperity that followed the peace and good government established through Islam in Madinah....the only return that these men could make was a return of evil for good. That was their revenge, because Islam aimed at suppressing selfishness, stood for the rights of the poorest and humblest, and judged worth by righteousness rather than by birth or position.⁸⁴

Some scholars contend that certain verses of the Qur’an, such as 5:54, can be read as indirectly supporting capital punishment. This verse states that “Whoever from among you turns back from his religion (Islam)...Fighting [them] in the Way of

⁸² *Tafsir ibn Kathir*, vol. 4, p.480.

⁸³ *ibid.*, p.477.

⁸⁴ Abdullah Yusuf Ali, *The Meaning of the Holy Quran* (Maryland: Amana Publications, 1997), P.460. (Yusuf Ali, *The Meaning of the Holy Quran*)

Allah”. However, rather than prescribing a punishment for apostasy, verse 5:54 is in fact both a warning and a prophecy, the warning being that God’s divine purpose would not be shaken by any man’s apostasy and the prophecy being that certain tribes will turn apostate after Mohammed’s death but will be replaced by true believers.⁸⁵ Yusuf Ali also saw verse 5:54 as a “warning to the Muslim body that they should not repeat the history of the Jews, and become so self-satisfied or arrogant as to depart from the spirit of Allah’s teaching.”⁸⁶ Whether interpreted as a warning or not, it seems clear that this verse does not mention any punishment for apostasy.

Another verse that has been proposed as prescribing the death penalty for apostasy, and similarly misunderstood, is Qur’an 2:217. In fact, this verse never orders any punishments for apostates in this life:

They ask you concerning fighting in the Sacred Months (i.e. 1st, 7th, 11th and 12th months of the Islamic calendar). Say, “Fighting therein is a great (transgression) but a greater (transgression) with Allah is to prevent mankind from following the Way of Allah, to disbelieve in Him, to prevent access to Al-Masjid-al-Haram (at Makkah), and to drive out its inhabitants, and Al-Fitnah is worse than killing. And they will never cease fighting you until they turn you back from your religion (Islamic Monotheism) if they can. And whosoever of you turns back from his religion and dies as a disbeliever, then his deeds will be lost in this life and in the Hereafter, and they will be the dwellers of the Fire. They will abide therein forever.

This verse was revealed during the Nakhla raid (2 AH/624 CE),⁸⁷ but does not relate to punishment for apostasy at all. The word “they” relates to “disbeliever of

⁸⁵ Rahman, *Punishment of Apostasy in Islam*, p.46.

⁸⁶ Yusuf Ali, *The Meaning of the Holy Quran*, p.266.

⁸⁷ Al-Tabari, *The History of al-Tabari*, vol. 7, p.20.

Quraysh”,⁸⁸ while the word *fitnah* here means polytheism.⁸⁹ According to Ibn Kathir,

If you had killed during the Sacred Month, they (disbeliever of Quraysh) have hindered you from the path of Allah and disbelieved in it...Trying to force the Muslims to revert from their religion and re-embrace kufr after they had believed, is worse with Allah than killing.⁹⁰

Interestingly, Ibn Kathir notes that ‘Uthman bin ‘Abdullah went back to Mecca and died there as a disbeliever.⁹¹ Moreover, Maulana Muhammad Ali notes that Qur’an 2:217 disproves the allegation that the Muslims had forcefully attempted to convert the unbelievers, as it records that it was actually the unbelievers who initiated hostilities in order to force the Muslims to leave their faith and return to unbelief.⁹² Rahman concurs, noting that 2:217 does not mention the death penalty for apostasy and that it indicates that apostates were not punished but died natural deaths.⁹³ This verse therefore not only indicates that apostates are not to be slain, but also allows them time to repent before they (naturally) die.

Another verse also supports the belief that apostasy is not to be considered as meriting *hadd* punishment. In fact, verse 4:137 would seem to offer even stronger evidence that apostates are not to be punished in this life, as it indicates that not even serial apostasy merits earthly punishment:

Verily, those who believe, then disbelieve, then believe (again), and (again) disbelieve, and go on increasing in disbelief; Allah will not forgive them, nor guide them on the (Right) Way.

⁸⁸ *ibid.*

⁸⁹ *ibid.*, p.23.

⁹⁰ *Tafsir ibn Kathir* vol. 1, p.602.

⁹¹ *ibid.*, p.603.

⁹² Maulana Muhammad Ali, *English Translation of the Holy Qur’an With Explanatory Notes* (Wembley: Ahmadiyya Anjuman Lahore Publications, U.K. 2010), p.50.

⁹³ Rahman, *Punishment of Apostasy in Islam*, p.32.

Ibn Kathir mentions that this verse is characteristic of hypocrites who “believe, then disbelieve, and this is why their hearts become sealed.”⁹⁴ It implicitly proves that the apostate was not to be punished by death, since it mentions a repetition of apostasy. If the Qur’an had prescribed the death penalty for the first instance of apostasy, then clearly such repetition of the ‘offence’ would not be possible. Kamali notes that even the increase in disbelief seen in the second rejection of Islam,⁹⁵ which might be considered to have made capital punishment more likely “had such a punishment ever been intended in the Qur’an”, did not result in such a punishment.⁹⁶ Abdullah Saeed points out that this verse indicates that apostates live in a state of unbelief until their (presumably natural) death, since there is no mention of a temporal death penalty here.⁹⁷ Clearly, verse 4:137 contradicts any Qur’an-based arguments made supporting the legitimacy of imposing the death penalty for apostasy.

These Qur’anic verses lead to three conclusions. Firstly, apostasy is not a *hadd* offence. The Qur’an may criticise apostates, but it is silent on any punishment for apostasy in this world. Secondly, the right to declare or mete out any punishment for apostasy is Allah’s alone; no human being has the right to punish apostasy, as such punishment is only for the hereafter. Thirdly, apostates are able to repent at any point until their natural death. In conclusion, punishment for apostasy cannot be justified with reference to the Qur’an.

⁹⁴ *Tafsir ibn Kathir*, vol. 2, p.611.

⁹⁵ Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Cambridge: Islamic Texts Society, 1997), p. 97 (Kamali, *Freedom of Expression in Islam*).

⁹⁶ *ibid.*, pp.97-98.

⁹⁷ Abdullah Saeed, “Muslim Debates on Human Rights and Freedom of Religion” in Thomas W.D. Davis and Brian Galligan, *Human Rights in Asia* (Cheltenham: Edward Elgar Publishing, 2011), p.79 (Saeed, “Muslim Debates on Human Rights”).

1.2 Shari'a

Shari'a can be considered as a source of law, albeit one which has been misunderstood and misused by those who see, or want to see, apostasy as a punishable offence. This section analyses the position of Shari'a, especially with reference to whether the Qur'an can be regarded as a legal document or not. The injunctions of the Qur'an are the most important source for Shari'a and for Islamic law.

Shari'a is an Arabic term which implies "the road to the watering place, the clear path to be followed, the path which the believer has to tread."⁹⁸ The metaphor is that just as water satisfies thirst and is the fundamental basis of life, Islamic laws are the essential guide for human life.⁹⁹ Furthermore, just as the existence of watering places is hopefully always to be relied upon, so is Shari'a seen as eternal and unchanging. Muslim jurists saw it as a set of instructions for controlling all spheres of life "from religious rituals and family relations to commerce, crime and much else."¹⁰⁰

Islamic law consists of Shari'a, which is unchanging, and its flexible human interpretations (*fiqh*: Islamic jurisprudence). Muslim jurists have tended to concentrate on four key sources when drawing up their interpretations, namely the Qur'an, the *Sunna*, *qiyas* and *ijma*. The crucial point to understand is that other than the Qur'an and *Sunna*, these are all juristic works. They were developed after the

⁹⁸ Joseph Schacht, "Shari'a", in *E.J. Brill's First Encyclopaedia of Islam: 1913-1936*, Reprint edition, eds. M.Th. Houtsma, A.J. Wensinck, H.A.R. Gibb, W. Heffening and E. Levi-Provencal (Leiden : Brill, Leiden: E.J. Brill, 1987), vol. 7, p.320.

⁹⁹ Abu Tariq Hilal and Abu Ismael al-Beirawi, *Understanding Usul al-Fiqh* (New Delhi: Revival Publications, 2007), p.10.

¹⁰⁰ Wael B. Hallaq, *An Introduction to Islamic Law* (Cambridge: Cambridge University Press, 2009), p.28 (Hallaq, *An Introduction to Islamic Law*).

Prophet's time in order to solve new problems that had not existed during earlier periods. Shari'a is thus immutable but its interpretation in the form of Islamic law has dynamically changed throughout Islamic history in order to adapt to new situations. Scholars after the Prophet's time developed new techniques for interpreting Shari'a because "new circumstances often arose for which no provision had been made, especially as the affairs of the community became more complex with the growth of empire."¹⁰¹ Therefore, Islamic law can be understood as a "juristic mode of reasoning."¹⁰² However, this jurist-led work is now considered by some to have become both archaic and inflexible, as discussed later in Chapter 4.

The techniques developed after the Prophet's era, namely *Sunna*, *qiyas* and *ijma*, have sometimes proven controversial. For example, the content of many *ahadith* and the authentication of that content, especially when relating to so-called apostasy and blasphemy cases, is often problematic, as will be discussed later in this section. Modern Islamic law did not exist in the Prophet's time, and the approach taken was very different. Some scholars argue that in its early stages, during Muhammad's lifetime, the development of Islamic law was "very similar to common law - based upon either revelation or the decisions and sayings of the Prophet, in most cases in response to a specific legal question".¹⁰³

The emergence of the four Sunni law schools and Shi'i Islam indicates that different interpretations of Shari'a were necessary in order to adapt to differing

¹⁰¹ Abdur Rahim, *The Principles of Muhammadan Jurisprudence, According to the Hanafi, Maliki, Shari'i and Hanbali Schools* (London: Luzac, 1911), p.18. (Rahim, *The Principles of Muhammadan Jurisprudence*)

¹⁰² David F. Forte, "Apostasy and Blasphemy in Pakistan", 10 *Connecticut Journal of International Law* (1994), 27-68, p.65.

¹⁰³ Hossein Esmaeili, "The Nature and Development of Law in Islam and the Rule of Law Challenge in the Middle East and the Muslim World", 26 *Connecticut Journal of International Law* (2010),329-366, p.356. (Esmaeili, "The Nature and Development of Law").

circumstances of society, place and time. It should be noted that the Sunni schools, which are followed by the vast majority of modern Muslims, were established between the eighth and ninth centuries, one to two hundred years after the Prophet's time. Therefore, the establishment of the basis for Islamic law was made after the Prophet's time. Coulson argues that the elaboration of Islamic law "was the result of a speculative attempt by pious scholars, working during the first three centuries of Islam, to define the will of Allah".¹⁰⁴ These mediaeval scholars' understanding of Shari'a still influences Islamic law today, as will be examined in Chapter 2.

Shari'a itself is thus an immutable source but its practice is adaptable, which has allowed Islamic law to develop significantly since the Prophet's era. One of the main reasons given by its supporters for Shari'a's stability is its divine origin, unlike the man-made legislation of other legal systems. But while its origins are divine, its interpretation is not; it is the work of man.

1.2.1 Is the Qur'an a penal code?

The position of the Qur'an in Islam should be examined here, since its text is often misunderstood to be Islamic law. The word 'Qur'an' itself means 'reciting' or 'reading'.¹⁰⁵ It is considered by scholars to be both the first and the most important base for Shari'a, because it is considered to be the "uncreated speech of God".¹⁰⁶ It

¹⁰⁴N. J. Coulson, "The State and the Individual in Islamic Law", 6 *The International and Comparative Law Quarterly* (1957), 49 – 60, p.57. (Coulson, "The State and the Individual in Islamic Law").

¹⁰⁵ Saiyed Abdus Salik, *The Early Heroes of Islam* (Calcutta: The University of Calcutta, 1926), p.159. (Salik, *The Early Heroes of Islam*)

¹⁰⁶ Ibn Babawayh, *Kitāb al-Tawhīd = The Book of Divine Unity, of al-Shaykh al-Ṣadūq*, with select commentary by Sayyid Hāshim al-Ḥusaynī al-Ṭihirānī; translated by Ali Adam; edited by Michael Mumisa and Mahmood Dhalla. (Birmingham: AMI Press, 2013), p.267.

serves as the cornerstone upon which Islamic law is built and is the primary source for its principles, in addition to other selected and specific injunctions.¹⁰⁷

The greatest difference between the Bible and the Qur'an is that the Bible is not one book; rather, it is a collection of books written or revealed over many centuries by a number of authors.¹⁰⁸ The Qur'an on the other hand is a single work, revealed to one Prophet over the course of about 23 years. It is not just divinely inspired; to the faithful, it is literally divine.¹⁰⁹ Another difference between the two is that only a few verses in the Qur'an can be interpreted as being law-like, whereas the Bible contains two books of law: Deuteronomy and Leviticus. That only a few verses of the Qur'an deal with law indicates that the main purpose of the Qur'an is not to establish legal rules. Rosen states that some verses that do seem to resemble a "rule-like statement of law" are declared to be "the claims of God"; all other areas are left to man as long as God's limits are not crossed.¹¹⁰

The Qur'an specifies punishments for the following criminal offences: adultery, armed robbery and theft. In actuality, *hudud* punishments play a deterrent role and aim to prevent offenders from committing criminal offences. *Al-Hedaya* notes that

The original design in the institution of Hidd [*hudud*] is determent, that is, warning people from the commission of offensive actions; and the absolution of

¹⁰⁷ Muḥammad ibn Idrīs al-Shāfi'ī, *The Epistle on Legal Theory*; edited and translated by Joseph E. Lowry (New York : New York University, 2013), p.15 (Al-Shafi'i, *The Epistle on Legal Theory*); Irshad Abdal-Haqq, "Islamic Law An Overview of Its Origin and Elements", 1 *The Journal of Islamic Law* (1996), 27-82, p.21. (Abdal-Haqq, "Islamic Law An Overview of Its Origin and Elements")

¹⁰⁸ Bernard Lewis and Buntzie Churchill, *Islam: The Religion and the People* (Indianapolis: Wharton Press, 2009), p.25.

¹⁰⁹ *ibid.*

¹¹⁰ Lawrence Rosen, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989), p.41 (Rosen, *The Anthropology of Justice*).

the person punished is not the original design of it, as is evident from its being awarded to Infidels in the same manner as to Mussulmans.¹¹¹

The success of the deterrence that *hudud* punishments provide is perhaps evidenced by the very limited number of *hudud* punishments recorded throughout Islamic history.

The Qur'an is more accurately seen as a work of *moral* law rather than *criminal* law. The purpose of the Qur'an is not to define law but to establish a moral society. Its ambition is to act as a social moral compass, rather than a legal code *per se*. According to Schacht, the purpose of the Qur'an is not necessarily to directly make law but rather to add "religious and ethical principles to existing legal norms and relationships":¹¹²

...the Koranic [Qur'anic] "legislation", if we can call it that, stood outside the existing legal system on which it imposed moral and not, properly speaking, legal rules.¹¹³

Moreover, Vessey-Fitzgerald notes that Muhammad does not profess to be "a lawgiver in any Western sense."¹¹⁴ This is borne out by the relatively few Qur'anic verses devoted to legal issues:

Out of 6,666 verses of the Koran, about 500 have a legal element, the vast majority of which deal with worship rituals, leaving about 80 verses of legal subject matter in the strict sense of the term."¹¹⁵

¹¹¹ Ali Marghinani, *The Hedaya*, pp.175-176.

¹¹² Joseph Schacht, "Problems of Modern Islamic Legislation", 12 *Studia Islamica* (1960), pp.106-107 (Schacht, "Problems of Modern Islamic Legislation").

¹¹³ *ibid.*

¹¹⁴ S.G. Vessey-Fitzgerald, "Nature and Sources of the Shariah" in Majid Khadduri and Herbert J. Liebesny. Vol.1, Origin and development of Islamic law, *Law in the Middle East* (Washington, D.C. : Middle East Institute, 1955), p.87.

¹¹⁵ *ibid.*

Vaglieri argues that the Qur'an sets out very few rules precisely enough to constitute law. More typically it leaves to its followers a degree of latitude in determining how best to conform to the institutions pertaining in the time and place they find themselves.¹¹⁶ The Qur'an itself does not profess to be a code of law,¹¹⁷ in that although it contains some laws, in particular concerning rituals and inheritances, it is not principally a legal book and does "not include a lengthy legal code of the kind that can be found in parts of the Hebrew Bible".¹¹⁸

According to Iqbal the main purpose of the Qur'an is not to serve as legal guidance but rather to "awaken in man the higher consciousness of his relation with God and the universe".¹¹⁹ There is doubt amongst many scholars as to whether the Qur'an supports the punishment in this life of apostates, i.e. those who have committed sins relating to religion. This is because, according to Moulavi Cheragh Ali, the Qur'an is "a revelation of certain doctrines of religion and certain general rules of morality"¹²⁰ and contains no specific rules. However, he notes that from its verses deductions are made which are "repugnant to reason, and not allowable by any law of sound interpretations".¹²¹

Another key point that supports the belief that the Qur'an was not mainly seen as or intended to be a law book is that its canon was not stable in the Prophet's time, but

¹¹⁶ Laura Veccia Vaglieri, *An Interpretation of Islam*, Translated from Italian by Aldo Caselli, with a forwarded by Muhammad Zafrulla Khan (Zurich: Islamic Foundation, 1980), p.65.

¹¹⁷ Abdal-Haqq, "Islamic Law An Overview of Its Origin and Elements", p.21.

¹¹⁸ Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton, N.J.; Woodstock: Princeton University Press, 2008), p.23. (Feldman, *The Fall and Rise of the Islamic State*)

¹¹⁹ Mohammad Iqbal, *The Reconstruction of Religious Thought in Islam* (London: Oxford University Press, 1934), p.157. (Iqbal, *The Reconstruction of Religious Thought in Islam*).

¹²⁰ Moulavi Cheragh Ali, *The Proposed Political, Legal, and Social Reforms in the Ottoman Empire and Other Mohammadan States* (Bombay: Education Society's Press, Byculla, 1883), p.xvii (Ali, *The Proposed Political, Legal, and Social Reforms in the Ottoman Empire and Other Mohammadan States*).

¹²¹ *ibid*, p. xv.

rather was being gradually changed and abrogated. It progressively evolved in “accordance with the needs and capabilities of society”.¹²² The prohibition on drinking alcohol, for example, was imposed gradually, moving from being advisory to being binding at prayer time to being absolute.¹²³

The mission of the Prophet also indicates that the Qur’an is not a law book. Schacht argues that

... the aim of Muhammad as prophet was not to create a new system of law; it was to teach men how to act, what to do and what to avoid, in order to pass scrutiny on the Day of Judgment and to enter Paradise.¹²⁴

Similarly, Ignaz Goldziher notes that if any part of Muhammad’s religious achievement may be called original, it was his doing away “with all the barbarous abominations in the cult and society of the pagan Arabs, in their tribal life, in their world view”. Muhammad ended the *jahiliya*, or “barbarism”, of the pre-Islamic Arab world.¹²⁵

It is imperative that the background to the revelation of the Qur’anic verses is understood, and not just the verses alone. Qur’anic verses constantly mention the events that occurred during the Prophet’s lifetime, to the extent that Hallaq argues that the Qur’an’s concern with legal matters is incidental.¹²⁶ Hallaq points out that

¹²² Azizah Y al-Hibri, “Islamic Constitutionalism and the Concept of Democracy,” 24 *Case Western Reserve Journal of International Law* (1992), p.10 (Al-Hibri, “Islamic Constitutionalism and the Concept of Democracy”).

¹²³ Qur’an, 11:219, 4:43 and 5:90.

¹²⁴ Joseph Schacht, “Problems of Modern Islamic Legislation”, p.106.

Also see, Joseph Schacht, *An introduction to Islamic Law* (Oxford: Clarendon Press, 1964), p.10. (Schacht, *An Introduction to Islamic Law*).

¹²⁵ Ignaz Goldziher, *Introduction to Islamic Theology and Law*, translated by Andras and Ruth Hamori; with an introd. and additional notes by Bernard Lewis (Princeton, N.J: Princeton University Press, 1981), p.13 (Goldziher, *Introduction to Islamic Theology and Law*).

¹²⁶ Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl Al-Fiqh* (Cambridge: Cambridge UP, 1997), pp.3-4.

the Qur'an "reflected events and ideas that occurred then",¹²⁷ meaning in the lifetime of the Prophet:

...whatever the Qur'an says about an event or an idea during the Prophet's lifetime, I take to be an authentic representation of that event or idea.¹²⁸

Rahim makes a similar point:

Many of the verses laying down rules of law were revealed with reference to cases which actually arose. Sometimes God in His wisdom repealed some previous injunctions, and laid down others in their stead more suitable to the needs of men.¹²⁹

According to this view, Qur'anic verses simply reflect the situation pertaining at the time they were written. We cannot interpret these verses without understanding the circumstances within which they were revealed; equally, we must note that through the centuries following their revelation, their perceived meaning has been affected just as much by the circumstances pertaining at the time of interpretation as by those pertaining at the time of their writing, if not more so.

1.2.2 Sources of Islamic law / Sources of Shari'a

The *Sunna*, *qiyas* and *ijma* all emerged after the Prophet's time and became increasingly important in Islam. Although Muslims continued to interpret the Shari'a with reference to the Qur'an, and indeed mainly derives from it, they increasingly additionally referred to these three 'new' sources. After the Prophet's death the Qur'an ceased to develop, and the need was felt to develop other

¹²⁷ *ibid*, p.2.

¹²⁸ *ibid*.

¹²⁹ Rahim, *The Principles of Muhammadan Jurisprudence*, p.17.

supplementary sources. It is crucial therefore to appreciate that *Sunna* was developed by scholars after the Prophet's era, and that it consists of sources being (re)interpreted in order to solve the new situations that arose in the centuries following Mohammed.¹³⁰

The Qur'an stands at the apex of sources of Islamic law and the other sources, including the *Sunna*, which amount to complementary sources. It is these secondary sources which cause most controversy regarding the application of Shari'a law today. According to al-Haddād the *Sunna*, which literally means 'well-known path' and is used metaphorically to refer to the practices of the Prophet,¹³¹ is "a clarification and an explanation of the Qur'an".¹³² Hossein Nasr states that the *Sunna* "provides concrete examples and access to that Muhammadan model which the Qur'an has commanded the faithful to imitate...The *Sunnah* is a commentary upon the Qur'an"¹³³ This position of the *Sunna* is recognized by Ahmad ibn Hanbal:

The *sunna*, in our view, consists of report about God's Emissary, God bless and keep him. It explicates the Qur'an and serves as a guide to its meaning.¹³⁴

Muslims who believe the Qur'an to be a Holy revelation of God, see the Prophet's deeds and words as a perfect means by which to understand the Divine. The usage of *Sunna* is therefore seen as complementary, because it describes how Muhammad

¹³⁰ Ibn Khaldūn, *The Muqaddimah: an introduction to history*, translated from the Arabic by Franz Rosenthal (Princeton, N.J: Princeton University Press, 1980), vol. 3, pp.23-24. (Ibn Khaldūn, *The Muqaddimah*).

¹³¹ Yousuf Jamal; edited by M.H. Syed. E, *Encyclopaedia of Islamic legal system* (New Delhi: Anmol Publications, 2010), vol. 3, p.64.; See also: Anwar Ahmad Qadri, *Justice in Historical Islam* (Lahore: SH. Muhammad Ashraf), p.8.

¹³² Ḥabīb Aḥmad Mashhūr al-Haddād, *Key to the Garden*, translated from the Arabic by Mostafa al-Badawi (London: Quilliam Press, 1990), p.47. (Al-Haddād, *Key to the Garden*).

¹³³ Seyyed Hossein Nasr, "Sunnah and Hadith" in Seyyed Hossein Nasr ed., *Islamic Spirituality: Foundations* (London: Routledge & Kegan Paul, 1987), p.97

¹³⁴ Ibn al-Jawzi, *Virtues of the Imam Ahmad ibn Hanbal*, edited and translated by Michael Cooperson (New York: New York University Press, 2013), vol., 1, p.317. (Al-Jawzi, *Virtues of the Imam Ahmad ibn Hanbal*).

embodied the moral and legal injunctions of the Qur'an.¹³⁵ Lammens therefore argues that it was natural that in situations not covered by the Quran and its teachings, reference should be made to the *Sunna* and to the Prophet's deeds discussed therein.¹³⁶ The important role of *Sunna* is also reported in *hadith*:

It was narrated from Abu Hurairah that the Messenger of Allah said: "How will you be when the son of Mariam descends among you and you are led by one from among you?" I said to Ibn Abi Dhi'b: "Al-Awza'i narrated to us from Az-Zuhri, from Nafi', from Abu Hurairah: 'And your Imam is one of you.'" Ibn Abi Dhi'b said: "Do you know what 'You are led by one from among you' - means?" I said: "Tell me." He said: "He will lead you according to the Book of your Lord, the Mighty and Sublime, and the Sunnah of your Prophet."¹³⁷

Similarly, the importance of the *Sunna* is recorded by Qadi 'Iyad (d. 544AH / 1149CE) in his work *Ash-Shifa*, wherein the prophet said

Adhere (you people) to my Sunnah and the Sunnah of the rightly-guided Caliphs (succeeding me), and seize it with your molar teeth (i.e. cling fast to it), and shun novelties in religion...¹³⁸

Whoever obeys me, he obeys Allah, and whoever disobeys me, he disobeys Allah, and whoever obeys the ruler I appoint, he obeys me, and whoever disobeys him, he disobeys me."¹³⁹

Qadi 'Iyad notes that

...obeying the Messenger is a part of the obedience given to Allah, since Allah ordered to obey him. Being obedient to the Messenger means to comply with Allah's ordinance and to be obedient to Him.¹⁴⁰

¹³⁵ Billoo, "Change and Authority in Islamic Law", p.641.

¹³⁶ Henry Lammens, *Islam: Beliefs and Institutions*, translated by Sir E. Denison Ross, (London: Methuen & Co. Ltd, 1968), p.68. (Lammens, *Beliefs and Institutions*).

¹³⁷ *Sahih Muslim*, Vol., 1, No. 395, pp.247-248.

¹³⁸ Qadi 'Iyad, *Ash-Shifa*, p.438.

¹³⁹ *ibid*, p.434.

¹⁴⁰ *ibid*.

The *Sunna* is essentially a compilation of descriptions in the form of specific narratives spoken by the Prophet; the narratives themselves became known as *hadith*.¹⁴¹ The orientalist John Burton summed up the difference between *hadith* and *Sunna* as being that between a document and the usage described in such a document.¹⁴² The *hadith* became one of the key sources for Shari'a law in the decades and centuries after the Prophet's time. According to John L. Esposito, this had already occurred by the early ninth century C.E. Many *hadith* collections are actually arranged by the type of jurisprudence (*fiqh*) being discussed, proving they were being used by the legal professions at a relatively early stage in Islamic history.¹⁴³

These *hadith* were, and are, used to augment Qur'anic injunctions as well as help interpret them.¹⁴⁴ Goldziher notes that *hadith* "give expression to a continued development based on the moral teaching of the Qur'an".¹⁴⁵ However, as Feldman points out, these very detailed accounts, specific to their time, place and context, cannot answer most legal problems that have subsequently arisen.¹⁴⁶

Debates around the evolution of *hadith* are highly-charged. Islamic scholars originally came to rely on *Sunna* because after the Prophet's time new situations arose that required different interpretations. *Sunna* itself is essentially the work of these jurists, albeit based on the Qur'an. This necessarily means that they were created or developed after the Prophet's time. In fact, many *hadith* collections were

¹⁴¹ Hallaq, *An Introduction to Islamic Law*, p.16.

¹⁴² John Burton, *An introduction to the Hadith* (Edinburgh: Edinburgh University Press, 1994), p. ix.

¹⁴³ John L. Esposito, *The Oxford Encyclopedia of the Islamic World* (New York, N.Y. : Oxford University Press, 2009), vol II., p 349.

¹⁴⁴ Al-Hibri, "Islamic Constitutionalism and the Concept of Democracy", p.4.

¹⁴⁵ Goldziher, *Introduction to Islamic theology and law*, p.41.

¹⁴⁶ Feldman, *The Fall and Rise of the Islamic State*, p.24.

only compiled in the mid-9th century, which means it had taken over two centuries from Mohammed's time for them to be recorded and furthermore crucially implies that *hadith* were being used as key sources before they were formally compiled. N.A Newman notes that what we now term orthodox Islam was still evolving for three centuries after the Prophet's time, up to around 900 A.D. Ibn Ishaq's history of Muhammad's life was probably composed sometime in the mid-8th century, and the earliest collections of genuine or 'sound' (*sahih*) *hadith* were only written around the mid-9th century.¹⁴⁷ Ibn Hajar al-Asqalani (d. 852 AH/1449 CE) considered *al-Jami' al-Sahih* (The Sound Comprehensive Collection), a collection assembled by Imam Muhammad ibn Isma'il al-Bkhari (d. 256 AH/ 870 CE), to be the most accurate *hadith* compilation.¹⁴⁸

Some scholars have criticised the development of the various collections of *hadith*. For example, Ali notes that the six standard collections were assembled in the third century following Mohammad's era, but that these compilations were "not based on any critical, historical, or rational principles".¹⁴⁹ Another criticism is that their content would necessarily have been influenced by the ideas and circumstances pertaining at the time of their compilation. Ignaz Goldziher argues that we should acknowledge that some *hadith* will inevitably contain some ancient material that may not derive directly from the Prophet, but rather from the earliest Muslim authorities.¹⁵⁰ He states that "not only law and custom, but theology and political

¹⁴⁷ N.A. Newman, *The early Christian-Muslim dialogue : a collection of documents from the first three Islamic centuries (632-900 A.D.)*, translated with commentary / edited by N. A. Newman (Hatfield (PA) : Interdisciplinary Biblical Research Institute, 1993) , p.vi. (Newman, *The early Christian-Muslim dialogue*).

¹⁴⁸ Ibn Hajar al-Asqalani, *Selections From the Fath Al-Bari* (Commentary on Sahih al-Bukhari), translated by Abdal Hakim Murad (Cambridge: Muslim Academic trust, 2000), p.2.

¹⁴⁹ Ali, *The Proposed Political, Legal, and Social Reforms in the Ottoman Empire and Other Mohammadan States*, p.xix.

¹⁵⁰ Godziher, *Introduction to Islamic Theology and Law*, pp.38-39.

doctrine also took the form of *hadith*.”¹⁵¹ For Goldziher, it is the *hadiths*’ evolution, not their accuracy or final form as a fixed text, that is of most interest, as *hadith* are “a direct reflection of the aspirations of the Islamic community....and....an invaluable document for the development of Islamic religious goals beyond the Qur’an”.¹⁵² Shaheen Ali have openly doubted the authority of the *hadith*:

It is a historical fact that numerous *Hadiths* were generated to reinforce the societal norms and political expediency. By narrating *hadith* favourable to its own group, political legitimacy could be acquired by the ruling elite.¹⁵³

Over time new circumstances arose to which scholars could find no answers, in either the Qur’an or *Sunna*. They needed to find a new way to respond to these emerging questions – their answer was to use the work of jurists through employing new approaches, namely *qiyas* and *ijtihad*:

Thus we hold concerning matters on which there is no binding explicit text that these should be sought by *ijtihad* –through *qiyas* – because we are under obligation to arrive at the right answers according to us.¹⁵⁴

The third source for Islamic law, after the Qur’an and the *Sunna*, is analogical deduction, or *qiyas*. In theory, if a new case is similar to the original case on which the development of a certain rule was predicated. The Caliph ‘Umar enjoined Muslims to:

Use your brain about matters that perplex you and to which neither Qur'an nor Sunnah seem to apply. Study similar cases and evaluate the situation through analogy with those similar cases.¹⁵⁵

¹⁵¹ *ibid.*, p.40.

¹⁵² *ibid.*

¹⁵³ Shaheen Sardar Ali, *Gender and Human Rights Law in Islam and International Law: Equal Before Allah, Unequal Before Man*, (Kluwer Law International, 2000), pp.21-22.

¹⁵⁴ Muhammad ibn Idrīs Shāfi‘ī, *Al-Imām Muḥammad ibn Idrīs al-Shāfi‘i’s al-Risāla fi usul al-fiqh = Treatise on the Foundations of Islamic Jurisprudence*, translated with an Introduction, Notes, and Appendices by Majid Khadduri, 2nd ed (Cambridge : Islamic Texts Society, 1987), p.292. (Shāfi‘ī, *Treatise on the Foundations of Islamic Jurisprudence*)

Qiyas is used to reveal the cause of a given law in order to apply it in other similar circumstances. Sell notes that *qiyas* implies the “analogical reasoning of the learned with regard to the teaching of the Qur’an, the *Sunna*, and the *ijma*”¹⁵⁶ and that its root means “measuring”. Al-Shafi’i differentiates between two forms of *qiyas*:

Analogy [*qiyas*] is of two kinds: the first, if the case in question is similar to the original meaning [of the precedent], no disagreement on this kind [is permitted]. The second, if the case in question is similar to several precedents, analogy must be applied to the precedent nearest in resemblance and most appropriate. But those who apply analogy are likely to disagree [in their answers].¹⁵⁷

Qiyas was thus developed to solve new problems that emerged in the decades and centuries after the Prophet’s time. *Ijtihad* was developed for the same reasons. At least one Qur’anic reference and two *hadith* have been invoked to support the use of *qiyas*.¹⁵⁸ Rahim quotes from Qur’an 59:2, wherein Allah asked the Muslims to infer analogically from the example Allah made of treacherous members of the tribe Banu Nadir.¹⁵⁹ Islamic legal scholars can thus maintain that any supposed new rule brought about by *qiyas* does not amount to a new rule at all, because *qiyas* is simply an extension of the existing law.¹⁶⁰

The fourth source for Islamic law, or the Shari’a, is *ijma*. However, there is considerable debate as to the “binding nature of *ijma*, requirements of eligibility, conditions for its nullification, [and] whether or not it is limited by time and place.”¹⁶¹ As with *qiyas*, *ijma* can be referred to when neither the Qur’an nor the

¹⁵⁵ Ibn Khaldūn, *The Muqaddimah*, pp.453-454.

¹⁵⁶ Edward Sell, *The Faith of Islam 2nd ed* (London: Kegan Paul, Trench, Trübner, & co., ltd, 1896), p.35.

¹⁵⁷ Shāfi’ī, *Treatise on the foundations of Islamic jurisprudence*, p.290.

¹⁵⁸ Abdal-Haqq, “Islamic Law An Overview of Its Origin and Elements”, p.33.

¹⁵⁹ *ibid.*, pp.32-33.

¹⁶⁰ Mohammad Hasim Kamali, *Principles of Islamic Jurisprudence* (2d rev. ed., Islamic Texts Society 1991) (1989), p.198.

¹⁶¹ Mough Shisheneh Mozafarian, “Fallacy of Hejab in Iran: A Critique of Islamic Judicial Review as

Sunna reference a particular issue. It is comprised of a number of set rules reflecting scholars' unanimous legal opinions, "so long as their collective view does not conflict with the Qur'an and *Sunna*."¹⁶² According to a leading contemporary scholar, the reasoning behind *ijma* is the "distrust of individual opinion" as opposed to the "assurance of freedom from error in the communal mind."¹⁶³ Kamali notes that the theory of *ijtihad* explicitly states that its results are binding only on the *mujtahid* himself, and that this suggests his conviction and belief in his conclusions.¹⁶⁴ *Ijtihad* is the attempt by a jurist "to deduce, with a degree of probability, the rules of the Shari'a from the evidence and indications that are found in the sources".¹⁶⁵

Qiyas and *ijtihad* are both forms of jurist work based on interpretations of the Qur'an. Shafi'i explains their importance:

On all matters touching the [life of a] Muslim there is either a binding ruling or an indication as to the right answer. If there is a ruling, it should be followed; if there is no indication as to the right answer, it should be sought by *ijtihad*, and *ijtihad* is *qiyas* (analogy)¹⁶⁶

The emergence of various new legal approaches, namely the *Sunna*, *qiyas* and *ijtihad*, indicate that early Islamic scholars were trying to find answers for the new problems that were emerging in their communities in the post-Mohammed years. Human interpretation thus does not run contrary to the Shari'a. The fourth caliph 'Ali stated that

Performed by the Guardian Council of the Islamic Republic", 12 *Southern California Review of Law and Women's Studies* (2002), p.284. (Mozafarian, "Fallacy of Hejab in Iran").

¹⁶² *ibid.*

¹⁶³ C.G. Weeramantry *Islamic Jurisprudence: An International Perspective* (Basingstoke: Macmillan, 1988), p.39; Mozafarian, "Fallacy of Hejab in Iran", p.284.

¹⁶⁴ Kamali, *Freedom of Expression in Islam*, p.46.

¹⁶⁵ *ibid.*, p.45.

¹⁶⁶ Shāfi'ī, *Treatise on the Foundations of Islamic Jurisprudence*, p.288.

We have not given men authority; we have made the Qur'an the authority. But this Qur'an is merely a writing set down between two covers. It does not speak; it is merely men who speak through it.¹⁶⁷

Moreover, Ibn Rushd (Averroes; d. 595 AH/1198 CE) also noted that

...the latter words are our own work with God's permission, whereas the words of the Qur'an are created by God...As for the letters of the written *Book*, they are our own work, with God's permission. However, one should glorify them because they refer to the words created by God and to the meaning that is not created. Now whoever looks at words apart from meaning and does not distinguish the two, would maintain that the Qur'an is created; but those who look at the meaning of the words would say that the Qur'an is not created. The truth, however, consists in combining the two views.¹⁶⁸

Human interpretation of the divine guidance found in the Qur'an is necessary and always has been, as the emergence of the new approaches (*Sunna*, *qiyas* and *ijtihad*) indicates. However, as will be discussed in Chapter 5, the contrast between the flexible approach of the early scholars and the rigid views of today's extreme groups is at the heart of this PhD.

1.3 Do Hadith support apostasy law?

There is no doubt that throughout Islamic history many people have considered apostasy to be a crime, but the actual criminalisation of apostasy clearly occurred after the Prophet's time. This section analyses the evolution of apostasy law. Although the Qur'an does not prescribe any punishment for apostasy in this life, there is a tradition among conservative scholars that apostasy should be punished

¹⁶⁷ Al-Tabari, *The History of al-Tabari*, vol. 17, p.103.

¹⁶⁸ Ibn Rushd, *Faith and Reason in Islam: Averroes' Exposition of Religious Arguments*, translated with footnotes, index, and bibliography by Ibrahim Y. Najjar (Oxford: Oneworld, 2001), p.49. (Averroes, *Faith and Reason in Islam*).

by death. Their misunderstanding of the development of apostasy law is a major area of debate in contemporary Islam.

Many contemporary scholars, such as An-Na'im, also believe that the use of the death penalty as punishment for apostasy is derived from the *Sunna*. He has stated that "The punishment of apostasy in *Shari'a* is based on *Sunnah*."¹⁶⁹ Forte notes that

It was the Traditions [*hadith*] of the Prophet in the *Sunna*, developed and codified later during a drive for the Islamisation of the early Islamic empire, which required putting the apostate to death. A primary Tradition relied upon for this view attributes to Muhammad the statement: 'Whoever changes his Islamic religion, kill him.'¹⁷⁰

One particular *hadith* mentions the fourth Caliph 'Ali's burning of some heretics (*zanadiqah*) and also records the response of the Prophet's companion Ibn 'Abbas (d. 68 AH/ 687 CE). 'Abbas stated that he would have had these apostates killed but not by burning, as the Prophet had stressed that punishing by fire was reserved for God. Nevertheless, 'Abbas supported their execution based on the Prophet's words "Whoever changed his Islamic religion, then kill him."¹⁷¹ Some contemporary scholars, for example, Bambale have cited Ibn Abbas' words as evidence for the applicability of *hadd* punishment for apostasy:

The death penalty prescribed as a *Hadd* punishment is found in the Hadith. The principal *Hadith* on which the case for death sentence for apostasy is built on is

¹⁶⁹ Abdullahi Ahmad An-Na'im, "The Islamic Law of Apostasy and its Modern Applicability, A Case from Sudan", *Religion* 16 (1986), 197-223, p.211. (An-Na'im, "The Islamic Law of Apostasy")

¹⁷⁰ David F. Forte, *Studies in Islamic Law: Classical and Contemporary Application*, (Austin & Winfield Publishers, Oxford, 1999), p.160.

¹⁷¹ *Sahih Al-Bukhari*, vol., 9, no 6922, p.46. (*Sahih Al-Bukhari*), see also Al-Qadi al-Nu'man, *The Pillars of Islam*, p.494.

the one narrated by Ibn Abbas thus: “Whosoever changes his religion, kill him.”¹⁷²

Another *hadith* based on the Prophet’s words involves one of his Companions, Mu’adh bin Jabal, who according to *Sahih Bukhari* reportedly ordered the killing of apostates based on the “verdict of Allah and His Messenger”:

A man embraced Islam and then reverted back to Judaism. Mu’adh bin Jabal came and saw the man with Abu Musa. Mu’adh asked, “What is wrong with this (man)?” Abu Musa replied, “He embraced Islam and then reverted back to Judaism.” Mu’adh said, “I will not sit down unless you kill him (as it is) the verdict of Allah and His Messenger.”¹⁷³

This text has been cited by scholars throughout Islamic history as justification for the punishment of apostates. For example, Muhammad al-Shaybani (d. 189 AH/805 CE) stated that apostasy law is based on *Sunna*:

It [punishment for apostasy] has been related to us from the Prophet [a tradition] to this effect as well as [narratives] from [the Caliph] Ali b. Abi Talib, ‘Abd-Allah b. Mas‘ud, and Mu‘adh b. Jabal. Thus this ruling is based on the *Sunna*.¹⁷⁴

Moreover, Imam Malik (d. 179 AH / 795 CE), the founder of the Maliki Islamic law school, cites this *hadith* (“Whoever changed his Islamic religion, then kill him”) as support for imposing the death penalty for apostasy. In a work entitled *Al-Muwatta*, Imam Malik argues that an apostate who does not repent should be executed:

“If someone changes his religion – then strike off his head” refers to those who leave Islam for something else - like heretics and suchlike, about whom that is known. They are killed without being called to repent because their repentance is not recognised.¹⁷⁵

¹⁷² Bambale, *Crimes and punishments under Islamic Law*, p.76.

¹⁷³ *Sahih Al-Bukhari* Vol., 9., no 7157, pp.168-169.

¹⁷⁴ Al-Shaybānī, *The Islamic Law of Nations*, p.195, (no. 985-988) Chapter VII[On Apostasy].

¹⁷⁵ Ibn Anas, *Al-Muwatta*, p.303-304. 36.18. 15)

Similarly, Ibn Rushd used this same *hadith* (“Whoever changed his Islamic religion, then kill him”) to make his case for the punishment of apostasy:

An apostate, if taken captive before he declares war, is to be executed by agreement in the case of a man, because of the words of the Prophet (God’s peace and blessings be upon him), ‘Slay those who change their *din* [religion]’.¹⁷⁶

In another example often cited as proof of the righteousness of punishing apostasy with death, the Prophet said that if a Muslim recited the *Shahada* or Profession of faith (*La ilaha illallah* (none has the right to be worshipped but Allah)) and that I [Mohammed] am the Messenger of Allah, his blood could not be shed except in three cases, one of which was if he “turns renegade from Islam (apostate) and leaves the group of Muslims (by innovating heresy, new ideas and new things, etc. in the Islamic religion)”.¹⁷⁷

The position taken by this *hadith*, and one cited by some contemporary scholars, is that apostasy should be considered a capital crime just as murder and adultery are. Many prominent scholars consider these *ahadith* to be evidence of the justness of imposing the death penalty for apostasy. As mentioned earlier, this passage has therefore become crucial to Muslim understandings of apostasy and has been proffered by some exegetes as proof that the death sentence is a justifiable penalty for this religious ‘sin’. For example, Majid Khadduri argued that irrespective of other circumstances, apostasy should be punished with death.¹⁷⁸ In the 1950s he stated that

¹⁷⁶ Ibn Rushd, *The Distinguished Jurist's Primer: a translation of Bidāyat al-mujtahid*, translated by Imran Ahsan Khan Nyazee ; reviewed by Muhammad Abdul Rauf (Reading : Garnet Publishing, 1994-1996), Volume II, p.552. (Ibn Rushd, *The Distinguished Jurist's Primer*)

¹⁷⁷ *Sahih Al-Bukhari*, vol. 9, no, 6878, p.87.

Sahih Muslim, vol.4 no. 4375, p.441; *Jami' At-Tirmidhi*, Vol. 4, no. 2158 p.229.

¹⁷⁸ Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore, MD: Johns Hopkins Press, 1955), p.150.

...theologians agree that apostasy is a violation of the law punishable in this world and the next. Not only is the person denied salvation in the next world but is liable to capital punishment by the state.¹⁷⁹

The view that the *Sunna* supports the death penalty for apostates is thus based on both Prophetic tradition (*Sunna*) and the agreement (*ijma'*) of the Prophet's followers, and many Muslim jurists consider that it provides grounds for the punishment of apostasy. Much of the traditional legal approach to apostasy was either developed from certain *hadith* and their interpretations or through analogy (*qiyas*) and individual judgement (*ijtihad*).¹⁸⁰ However, there is also considerable criticism of the idea that the *Sunna* supports death for apostasy, and valid questions concerning the interpretation and position of the *Sunna*. Firstly, there are different versions of many of the stories recorded in the *hadith*. Secondly, *Sunna* is a second source and is complementary to the Qur'an; as such, it should never be used to overturn the Qur'an. Regarding the first point, it could be assumed that it is the general meaning of the Prophet's words rather than their exact form that was recorded. For example, Aishah's account clearly links apostasy with fighting against the Muslim community: "a man who rebels and fights against Allah and His Messenger."¹⁸¹ The Prophet's well-regarded companion Ibn Mas'ud however does not mention fighting, and there is a difference in stress:

Abdullah bin Mas'ud narrated that the Messenger of Allah said: The blood of a Muslim man, who testifies that none has the right to be worshipped but Allah, and that I am the Messenger of Allah, is not lawful except for one of three cases: The

(Khadduri, *War and Peace*).

¹⁷⁹ *ibid.*, 149-150.

¹⁸⁰ Saeed and Saeed, *Freedom of Religion*, p.167.

¹⁸¹ *English Translation of Sunan Abu Dawud*, trans. Nasiruddin al-Khattab, (Riyadh: Darussalam, 2008), Vol., 5, No 4353, p.16. (*Sunan Abu Dawud*)

(previously married or) married adulterer, a life for a life, and the one who leaves his religion and parts from the *Jama'ah* (the community of Muslims)¹⁸²

This version can be interpreted as a response to potential disunity rather than as an anti-apostasy measure. It seems to portray separation from the community as the crime that is punishable by death, rather than the apostasy or difference in belief which engendered such a separation. These *ahadith*, so often held up as supporting the death penalty for apostasy, show that punishments are actually often for involvement in violent rebellion against the Muslim community rather than for leaving Islam. According to Bukhari, Abu Qilaba narrated yet another version:

I do not know that killing a person is lawful in Islam except in three cases: A married person committing illegal sexual intercourse, one who has murdered somebody unlawfully, or one who wages war against Allah and His Messenger.¹⁸³

Such *ahadith*, given as evidence of the applicability of the death penalty for apostasy, show that in the Prophet's time separation from one's faith, i.e. apostasy, was linked to breaking with the community. In other words, the death penalty was not imposed for purely religious reasons alone, but for situations when the community was threatened or damaged. Indeed Rahman points out that they should not be understood literally, as the wider context needs to be taken into account and because the Prophet's exact words cannot be known for certain.¹⁸⁴

The belief that the Prophet supports the killing of apostates is therefore not a reasonable one, as careful analysis of *ahadith* shows. Moreover, the latter show that the Prophet differentiated between apostasy itself and apostasy accompanied by

¹⁸² *Jami' At-Tirmidhi*, vol. 3, no. 1402, pp.188-189.

¹⁸³ *Sahih Al-Bukhari*, vol. 6, no. 4610, pp.64-65.

¹⁸⁴ Rahman, *Punishment of Apostasy in Islam*, pp.62-63.

high treason or armed attack against the Muslim community. He never killed or executed an apostate for purely religious reasons, and other reasons or causes were always needed to even establish any charge of apostasy. Today, most scholars agree that apostates who were punished in the Prophet's time were not being punished only for apostasy itself, but their crimes were treason or sedition, often accompanied by murder or highway robbery.¹⁸⁵ Apostasy during the Prophet's time clearly included other acts, which can be taken as evidence that those cases commonly referred to as such were not apostasy as we would understand it today.

There are references to apostasy in the Qur'an which at first site appear to be accounts of political rebellion rather than religious disagreement. In the Qur'an, such as in verses 3:86-90¹⁸⁶ and 5:33.¹⁸⁷ These quotes refer respectively to Al-Harith bin Suwayd al-Ansari, who apostatised from Islam but sought later to reverse his decision (3:86-90), and to the tribe of 'Ukl (5:33). The former case is definitely one of murder, not only renouncement of Islam. Al-Harith killed Muslims and fought against the community and was therefore executed; his case is

¹⁸⁵ Declan O'Sullivan, "Punishing Apostasy: the Case of Islam and Shari'a Law Re-considered", *Doctoral Thesis, Durham University* (2003) pp. 249-250 (O'Sullivan, "Punishing Apostasy").

¹⁸⁶ [Qur'an 3:86-90]

How shall Allah guide a people who disbelieved after their belief and after they bore witness that the Messenger (Muhammad SAW) is true and after clear proofs had come unto them? And Allah guides not the people who are Zalimun (polytheists and wrong-doers). [3:86] They are those whose recompense is that on them (rests) the Curse of Allah, of the angels, and of all mankind. [3:87] They will abide therein (Hell). Neither will their torment be lightened, nor will it be delayed or postponed (for a while). [3:88] Except for those who repent after that and do righteous deeds. Verily, Allah is Oft-Forgiving, Most Merciful. [3:89] Verily, those who disbelieved after their Belief and then went on increasing in their disbelief (i.e. disbelief in the Quran and in Prophet Muhammad SAW) - never will their repentance be accepted [because they repent only by their tongues and not from their hearts]. And they are those who are astray. [3:90]

¹⁸⁷ [Qur'an 5:33]

The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and their feet be cut off on the opposite sides, or be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the Hereafter.

thus not one of apostasy at all.¹⁸⁸ With regards to the tribe of ‘Ukl, they had actually committed theft and murder, and had fought against the Prophet. According to *Sahih Bukhari*, “they [tribe of ‘Ukl] killed the shepherd of the Prophet, and drove away all the camels.”¹⁸⁹ Therefore, the narrator Abu Qilaba says that “Those people committed theft, murder, became disbelievers after embracing Islam (*Murtadin*) and fought against Allah and His Messenger.”¹⁹⁰ Clearly, these cases are not one of punishment for passive or verbal apostasy; they had actively fought and killed Muslims. But even Qur’anic verses that do mention apostasy fail to order any punishment for such an action.

The so-called ‘Apostasy War’ is also considered to be evidence for treating apostasy as a punishable crime. When the Prophet died most Arabs outside Mecca, Medina and Ta’if apostatised, including followers of various self-proclaimed ‘prophets’ and members of tribes who had been resisting Mohammed’s central authority.¹⁹¹ Regarding those renegade Arabs that had reverted to disbelief, Abu Bakr recited the Prophet’s injunction to fight them until they became believers once again and proclaimed ‘*La ilaha illallah*’ (none has the right to be worshipped but Allah).¹⁹² Bukhari records this as follows:

When Allah’s Messenger died and Abu Bakr became the caliph, some Arabs renegaded (reverted to disbelief) (Abu Bakr decided to fight against them), ‘Umar said to Abu Bakr, “How can you fight with these people although Allah’s Messenger said, ‘I have been ordered (by Allah) to fight the people till they say: *La ilaha illallah* (none has the right to be worshipped but Allah), and whoever

¹⁸⁸ Muhammad ibn Ishaq, *The Life of Muhammad: A Translation of Ishaq's Sīrat Rasūl Allāh*, introduction and notes by A. Guillaume (London : Oxford University Press, 1955), p.242. (Ibn Ishaq, *The Life of Muhammad*).

¹⁸⁹ *Sahih Al-Bukhari*, vol. 1 no. 233, pp.178-179.

¹⁹⁰ *ibid.*

¹⁹¹ Al-Tabari, *The History of al-Tabari*, vol. 10, pp.137-138.

¹⁹² *Sahih Al-Bukhari*, vol. 1, no. 25, p.66; Al-Tabari, *The History of al-Tabari*, vol. 10, pp.58-59.

said it, then he will save his life and property from me except on transgressing (Islamic) law (rights and conditions for which he will be punished justly), and his accounts will be with Allah.”¹⁹³

Critics have argued that although Abu Bakr’s behaviour during the Apostasy War can be used to justify the death penalty for sedition, it cannot be used to support the same punishment for apostasy itself.¹⁹⁴ He was fighting an apostate tribe, but it would be hard to argue that Abu Bakr considered apostasy as being the key reason for his battles against them. The Ridda wars, or Wars of Apostasy, were not only wars of religious but also highly political events. Some had sought to return the kingship to the family of al-Mundhir; others had declared themselves apostate, or had confirmed their observance of prayer but had refused to pay taxes [*zakat*].¹⁹⁵ Abu Bakr sent these people away,¹⁹⁶ but also criticised those people he saw as endangering the authority and security of Muslim society. Bukhari also stresses the importance of the non-payment of *zakat* (tax):

In continuation of the narration of Abu Hurairah (No. 1399) Abu Bakr said, “By Allah! I will fight those who differentiate between *As-Salat* (the prayer) and the *Zakat*; as *Zakat* is the compulsory right to be taken from the property (according to Allah’s Orders). By Allah! If they refuse to pay me even a she-kid which they used to pay at the time of Allah’s Messenger, I will fight with them for withholding it”. Then ‘Umar said, “By Allah, it was nothing, but Allah opened Abu Bakr’s chest towards the decision (to fight) and I came to know that his decision was right.”¹⁹⁷

¹⁹³ *ibid.*, vol. 2, no. 1399, p.279.

¹⁹⁴ Hazrat Mirza Tahir Ahmad, *Murder in the Name of Allah*, translated by Syed Barakat Ahmad, (Cambridge: Lutterworth Press, 1989), pp.71-72.

¹⁹⁵ Al-Tabari, *The History of al-Tabari*, vol. 10 p.137.

¹⁹⁶ *ibid.*, p.40.

¹⁹⁷ *Sahih Al-Bukhari*, vol. 2, no. 1400, p.279.

It would be more reasonable to suggest that Abu Bakr fought these apostates in order to preserve the harmony of the society he governed, rather than from any desire to punish their apostasy *per se*. Becker notes that

The fight against the Ridda was not a fight against apostates; the objection was not to Islam *per se* but to the tribute which had to be paid to Medina; the fight was for the political supremacy over Arabia;¹⁹⁸

The Apostasy War was thus almost self-defence, and was far from simply being a case of the persecution of religious non-orthodoxy. It also shows that the charge of apostasy was more dependent upon armed attack against the Muslim community than upon changing religion. Taking all the evidence into consideration, it is hard to argue that the apostasy wars took place for reasons of apostasy, or of apostasy alone; politics played a major role.

The *hadith* clearly show that the Prophet himself differentiated between apostasy itself and apostasy accompanied by high treason or armed attack against the Muslim community; he never killed or executed an apostate for purely religious reasons. An analysis of *ahadith* shows that none of the recorded apostasy cases from the time of the Prophet and his Companions were individual conversions from Islam to another religion or as a result of criticism of Islam, but rather resulted from armed attacks and treason against society. Not one person was killed for apostasy, according to these records.

The *hadith* “Whoever changes his religion, kill him” is thus far removed from the approach of the Prophet and his Companions to apostasy. Although many believe

¹⁹⁸ Carl Heinrich Becker, “The Expansion of the Saracens—the East” in *The Cambridge Medieval History* vol.2 *The Rise of the Saracens and the Foundation of the Western Empire* (The Macmillan Company 1913), p.335.

that such *ahadith* as were discussed in the previous section favour the punishment of apostasy, in fact the behaviour of the Prophet and the Rightly-Guided Caliphs supports the contention that they did not view a mere change of religion or the holding of non-orthodox opinions to constitute apostasy. In fact Mohammed himself did not order any apostates to be punished, instead pardoning such ‘offenders’ as Uthman ibn Affan and Abdullah ibn Sa’d (Uthman ibn Affan’s foster brother).¹⁹⁹ Indeed, Abdullah ibn Sa’d was granted mercy even after having caused great offense.²⁰⁰ He had been employed by the Prophet in Medina to record the Qur’an,²⁰¹ subsequently becoming a Muslim and being appointed a scribe by the Prophet.²⁰² Later however he began to claim he himself had written the Qur’an and started mocking Muhammad; he then abandoned Islam and joined the infidels, yet was still pardoned.²⁰³ If the Prophet had considered apostasy to be serious enough to merit a *hadd* punishment, he would not have pardoned him; he had earlier said that “...if Fatimah the daughter of Muhammad were to steal, I would cut off her hand.”²⁰⁴

Tolerance for apostasy continued into the reign of the second Caliph, ‘Umar ibn al-Khattab, who opposed the killing of apostates:

Malik related to me from ‘Abd ar-Rahman ibn Muhammad ibn ‘Abdullah ibn ‘Abd al-Qari that his father said, “A man came to ‘Umar ibn al-Khattab from Abu Musa al-Ash’ari. ‘Umar asked after various people, and he informed him. Then

¹⁹⁹ *Sunan Abu Dawud*, vol. 3, no. 2683, pp.305-306.

²⁰⁰ *ibid.*

²⁰¹ *ibid.*, vol .5, no. 4358, p.19.

See also, Sir William Muir, *The Life of Mahomet and History of Islam to the Era of Hegira*, (London: Smith Elder and CO., Cornhill, 1861), vol. 4, p.131.

²⁰² Al-Tabari, *The History of al-Tabari*, vol. 4, p.131.

Abdullah ibn Sa’d case, whom Mahomet had employed at Medina in writing out passages of the Qur’an from his dictation.

²⁰³ Ibn Ishaq, *The Life of Muhammad*, p.550; Salik, *The Early Heroes of Islam*, p.138.

²⁰⁴ *Sahih Muslim*, vol. 4, no. 4411, pp.459-460.

‘Umar inquired, ‘Do you have any recent news?’ He said, ‘Yes. A man has become a *kafir* after his Islam.’ ‘Umar asked, ‘What have you done with him?’ He said, ‘We let him approach and struck off his head.’ ‘Umar said, ‘Didn’t you imprison him for three days and feed him a loaf of bread every day and call on him to *tawba* that he might turn in *tawba* and return to the command of Allah?’ Then ‘Umar said, ‘O Allah I was not present and I did not order it and I am not pleased since it has come to me!’ »²⁰⁵

Moreover, *ahadith* cannot overturn the Qur’an. The *Sunna’s function* is to explain the Qur’an; the latter remains the primary document. As al-Shafi‘i noted

God has declared that He abrogated [communications] of the Book only by means of other communications in it; that the sunna cannot abrogate [a text in] the Book but that it should only follow what is laid down in the Book, and that the sunna is intended to explain the meaning of communications of general [nature] set forth [in the Book].²⁰⁶

An analysis of the *Sunna* shows that none of the recorded apostasy cases from the time of the Prophet and his Companions were individual conversions from Islam to another religion or occurred as a result of criticism of Islam, but rather resulted from armed attacks and treason against society. Not one person was killed for apostasy, according to these records.

1.4 Blasphemy

Blasphemy should not necessarily be taken as evidence for apostasy. As will be discussed later in Chapter 5, one’s Islamic faith can be demonstrated simply by reciting the *Shahada*; the Prophet prohibited killing anyone who recites it.

²⁰⁵ Ibn Anas, *Al-Muwatta*, pp.343-344., 36.18. 16.

²⁰⁶ Shāfi‘ī, *Treatise on the Foundations of Islamic Jurisprudence*, pp.123-124.

Furthermore, no human being can punish apostates, as only Allah has such a right, and even then only in the hereafter.

1.4.1 Definition of Blasphemy

The main terms used to designate blasphemy in the Arabic language are *sabb* (abuse, insult) and *shatm* (abuse, vilification).²⁰⁷ Under traditional Islamic law blasphemy (*sabb*) is seen as insulting God (*sabb-Allah*) or the Prophet (*sabb-al-Rasul*). According to the *Encyclopedia of Religion and Ethics*, blasphemy in Islam can be defined as

all utterances expressive of contempt for God, for His Names, attributes, laws, commands and prohibitions...²⁰⁸

This would include a Muslim declaring Allah cannot possibly see or hear everything, or claiming that he cannot endure forever, or scoffing at Muhammad or at any other prophets.²⁰⁹ According to Devin Stewart, the two Qur'anic terms describing the most common forms of blasphemy are *takdhib* (giving the lie, denial) and *iftira'* (invention):²¹⁰

Blasphemy by denial (*takdhib*) is the outright rejection of revealed religious truths, such as the revelations and warnings of God's messengers and the announcements of the day of judgement and the meeting with God. It can also include the refusal to recognize and acknowledge God's signs, particularly the wonders of the natural world which serve as evidence of his omnipotence and

²⁰⁷ Lutz Wiederhold, "Blasphemy against the Prophet Muhammad and his Companions (*sabb al-rasul, sabb al-sahabah*): The Introduction of the Topic into Shari Legal Literature and its Relevance for Legal Practice under Mamluk Rule" *Journal of Semitic Studies*, Vol. XLII, No. 1, Spring 1997, p.40.

²⁰⁸ TH. W. Juynboll, "Blasphemy(Muhammadan)", in James Hastings et al, dd., *Encyclopaedia of Religion and Ethics* (New York: T&T Clark, 1908), vol., II, p.672.

²⁰⁹ *ibid.*

²¹⁰ Devin Stewart, "Blasphemey" in *Encyclopedia of the Qur'an*, Jane D. McAuliffe ed., (Leiden: Brill, 2001), vol. 1, p.235. (*Encyclopedia of the Qur'an*)

unity. According to passages such as Qur'an 5:10, the refusal to recognize God's signs is associated with unbelief (*kufir*).²¹¹

Stewart describes the second form of blasphemy, *iftira'* (invention), as the "public announcement of one's disbelief".²¹²

Blasphemy by invention (*iftira'*) is the declaration of a false belief of one's own contrivance. It most often occurs in the verbal idiom 'to invent a lie against God' (*iftara 'ala llahi kadhiban*, Q11:18). Similar expressions that convey this signification are "to lie against God" (*kadhaba 'ala llan*, Q39:32) and "to say a lie against God" (*qala 'ala llahi al-kadhib*, Q3:75, 78). This form of blasphemy calls down God's curse (Q11:18) and is equated with great sin or wrongdoing, as apparent from the oft-repeated rhetorical question, "Who does a greater wrong than he who invents a lie against God?" (e.g. Q6:21).²¹³

The types of deed and forms of word that can amount to blasphemy were noted by Qadi 'Iyad, who widened the definition of apostasy. Regarding blasphemy against the Prophet (*sabb-al Rasul*), he noted that someone would be guilty of blasphemy if he

scorns the Prophet (pbuh), dishonours him due to having grazed animals, or forgetfulness, or being afflicted with the trace of bewitchment, injury, defeat befalling some of his military troops, detrimental harms inflicted upon him by the enemy, or hardship in his lifetime, or owing to having been inclined to some of his wives.²¹⁴

In contemporary Islam, however the meaning has been widened further still. Lawton notes that fiction and other texts can be considered blasphemous because "they set out to assert the rights of the new community outside existing law",²¹⁵

²¹¹ *ibid.*

²¹² *ibid.*

²¹³ *ibid.*

²¹⁴ Qadi 'Iyad, *Ash-Shifa*, p.716.

²¹⁵ David Lawton, *Blasphemy* (University of Pennsylvania Press, 1993), p.141.

meaning outside the classical Islamic community. He argues that religious conservatives resist such writing as a potential threat to the community.²¹⁶

1.4.2 Punishment for blasphemy

Some scholars believe that blasphemy should be punishable by death. For example, Qadi ‘Iyad notes that “Allah prohibited offending the Prophet (pbuh) in His Book, and the scholars unanimously agreed upon killing the one who disparages him”.²¹⁷ Ibn Taymiyya decreed that death was the appropriate punishment for blasphemers. According to Hillenbrand, in 1293 Ibn Taymiyya issued a *fatwa* declaring the death penalty for a Christian accused of insulting the Prophet.²¹⁸ He argued that if a Christian insulted the Prophet, the good order of the state could only be sustained by immediate execution.

Some believe that there is historical evidence of *hadd* punishment being carried out in response to the ‘crime’ of blasphemy. Qadi ‘Iyad notes that the killing of blasphemers was prescribed in the Qur’an in the verses “Cursed be the liars” [Qur’an 51:10] and “May Allah curse them! How are they denying (or deviating from) the Right Path” [Qur’an 63:4]. Moreover, unlike with apostasy, under the traditional Islamic approach blasphemy can lead to the death penalty even for non-Muslims. Qadi ‘Iyad notes that

Yet, in case it’s committed by non-Muslims who venture to defame, degrade or ascribe any sign of atheism to the Prophet (PBUH), it’s an undisputed fact that

²¹⁶ Donna E. Arzt, “Heroes or Heretics: Religious Dissidents Under Islamic Law”, 14 *Wisconsin International Law Journal* (1996),349-421, p.400.

²¹⁷ Qadi ‘Iyad, *Ash-Shifa*, p.706.

²¹⁸ Carole Hillenbrand, *The Crusades: Islamic Perspectives* (Edinburgh: Edinburgh University Press, 1999), p.242. (Hillenbrand, *The Crusades*).

they should be sentenced to death, unless they're converted to Islam because they'll be violating the allegiance they pledges to us.²¹⁹

Similarly, the mediaeval Sunni textbook *Bahr al-Fava'id* notes that

There are six conditions in the contract of protection; if (an unbeliever) violates one of them, his blood and property are licit...if he [an unbeliever] mocks God's Scripture the Koran, and the Muslim faith, and curse them, the contract is void.²²⁰

All four Sunni Islamic law schools consider blasphemy to be a punishable offence. The four Sunni schools differ in their interpretations of blasphemy, and so the punishments against blasphemers are different. However, depending on circumstances, all four of them consider death to be an appropriate punishment. The Hanbali and Maliki traditions see it as an even more serious offence than apostasy; they do not accept repentance²²¹ and the death penalty is mandatory. Maliki jurists impose immediate execution for the 'crime'.

Such a position, i.e. that blasphemy can be punishable with death, can be seen in some Muslim majority states and also extremist groups. For example, *Daesh* has stressed the obligation to kill those who mock the Messenger:²²²

There is no khilāf (difference) amongst the Salaf that if a dhimmī kāfir mocks the Messenger (sallallāhu 'alayhi wa sallam), his covenant is thereby nullified and he must be killed.²²³

The conventional Islamic approach is that when a Muslim blasphemes they automatically renounce Islam; that is to say, a blasphemous remark can be taken as evidence of apostasy. With regard to the link between apostasy and blasphemy,

²¹⁹ Qadi 'Iyad, *Ash-Shifa*, p.764.

²²⁰ *The Sea of Precious Virtues (Bahr al-Fava'id)*, p.128.

²²¹ Qadi 'Iyad, *Ash-Shifa*, pp.712-713.

²²² "From Hypocrisy to Apostasy" *Dabiq*, p.58

²²³ *ibid.*, p.59.

many scholars believe that someone who blasphemes becomes apostate and should be punished accordingly. Qadi ‘Iyad noted that blasphemy can be “vocalized the speech of unbelief.”²²⁴ According to Imam Malik and early scholars, the defamer

is to be killed as a legal penalty not as an atheist in case he shows repentance and atones for that sin. He is treated like atheists, disbelievers and whoever commits calumny.²²⁵

Ibn al-Qasim (d. 191 AH/806 CE) wrote that anyone who “abuses, curses, dishonours or disparages the Prophet” should be killed, and that religious scholars do not differentiate between Muslim and non-Muslim blasphemers.²²⁶

1.4.3 Blasphemy in the Qur’an

As with apostasy, blasphemy is not considered to be a *hadd* offence by Islam. Neither the Qur’an nor the Prophet refer specifically to blasphemy as an offence or outline temporal punishments for it. Simply because blasphemy-related terms appear in the Qur’anic verses does not mean the Qur’an considers blasphemy to be a crime. Although many verses mention blasphemy, none of them order any punishment for the specific act itself; rather, all incidents of blasphemy also involved military activities, as with the cases of apostasy discussed earlier in this chapter.

There is no doubt that several Qur’anic verses prohibit insulting both Allah and the Prophet. For example, Qur’an 33:57 notes that

²²⁴ Qadi ‘Iyad, *Ash-Shifa*, p.726.

²²⁵ *ibid.*, p.755.

²²⁶ *ibid.*, p.713.

Verily, those who annoy Allah and His Messenger (SAW) Allah has cursed them in this world, and in the Hereafter, and has prepared for them a humiliating torment.

According to *Sahih Bukhari*, the Prophet said

Some people asked Allah's Messenger, "Whose Islam is the best (i.e., who is a very good Muslim)?" He replied, "One who avoids harming the Muslims with his tongue and hands."²²⁷

A number of Qur'anic verses mention that the Prophet was insulted by unbelievers, being called for example "a mad man" and "a forger" (verses 15:6 and 16:101 respectively). However, although these and other verses note that the Prophet was insulted, none mention any punishment in this world. These verses show that Allah was aware of the Prophet being blasphemed but that he (the Prophet) was never required by Allah to punish the blasphemers, as nowhere does the Qur'an specify any temporal punishment for blasphemy. Based on analysis of more than 200 Qur'anic verses, Maulana Wahiduddin Khan argues that abusing the Prophet is "not a subject of punishment, but is rather a subject of peaceful admonishment".²²⁸ These verses also show that even though the Prophet's contemporaries repeatedly used such language about him, indeed language which would now be deemed blasphemous or abusive within a rigid conservative view of Islamic law, nowhere in the Qur'an is there any mention of any kind of physical punishment for such a 'crime', let alone any prescription of the death penalty.²²⁹

²²⁷ *Sahih Al-Bukhari*, vol. 1, no. 11, p.60.

²²⁸ Maulana Wahiduddin Khan, "Blasphemy in Islam: The Quran does not prescribe punishment for abusing the Prophet" *The Times of India* Oct 2, 2012, <http://articles.timesofindia.indiatimes.com/2012-10-02/edit-page/34199240_1_quran-corporal-punishment-prophet> accessed 27 June 2016.

²²⁹ *ibid.*

Many references to blasphemy in the Qur'an are made against the backdrop of the wars of the Prophet's era. Such Qur'anic verses as 9:63, 8:13 and 33:57 mention blasphemy but clearly consider it to have taken the form of active hostility: Qur'an 9:63 views blasphemy as "hostility to Allah and His Messenger (SAW)", while Qur'an 8:13 notes that "they [blasphemers] defied and disobeyed Allah and His Messenger." The terms used to discuss blasphemy in the Qur'an thus differ considerably from those used in later or contemporary cases. In conclusion, no evidence can be found to support the contention that the Qur'an orders blasphemers to be punished.

1.4.4 Blasphemy in *Sunna*

Some scholars believe that justification for the punishment of blasphemy can be found in the *Sunna*. However, *Sunna* also supports the notion that blasphemy was something that occurred and was punished during wartime, not in 'normal' times. It is important when analysing these cases of alleged blasphemous comments or behaviour made against the Prophet to note that all of them clearly feature hostility against the Muslim community of the time. As the *ahadith* show, blasphemy in the Prophet's time included the intention to attack Muslim society. Stories of blasphemers from the Prophet's time include that of Ka'b b. al-Ashraf, the Medina-based Jewish leader and poet, who according to Qadi 'Iyad was assassinated for harming the Prophet.²³⁰ Ka'b b. al-Ashraf (d. 624 CE) did not only insult the Prophet but also fought against the Muslim community. He had supposedly disparaged and opposed the Prophet and Muslims in his poetry and had

²³⁰ Qadi 'Iyad, *Ash-Shifa*, p.378.

urged others to do so,²³¹ and there had also been other verbal attacks and fabricated stories. The crucial point to note, as Ibn Ishaq relates, is that the reason Muhammad ordered al-Ashraf to be killed was because the latter had gone to Mecca after the Battle of Badr and encouraged the Quraish tribe to fight the Prophet,²³² and had also tried to kill the Prophet himself.²³³ Therefore, some scholars view his actual crime as having been one of treason, not blasphemy. Qadi 'Iyad notes that Ka'b was killed for his offence, not his polytheism.²³⁴ Similarly, Saiyed Salik states that Ka'b had committed treason against the Muslim community and thus deserved to be put to death.²³⁵

Qadi 'Iyad also maintains that Abu Rafi, a chieftain of the Jewish tribes of the Khaybar, was killed for cursing the Prophet.²³⁶ His crime however was not just his words, but his actions: he had gathered various tribes and clans together against Mohammed.²³⁷ According to Al-Tabari (d. 310 AH/923 CE) the reason for his being killed was his siding with Ka'b. al-Ashraf against the Messenger of God.²³⁸ Thus, his crime was not one of blasphemy, or of blasphemy alone, but of having plotted treason and waged war against Muslim society.

²³¹ Ibn Ishaq, *Sirat Rasul Allah* (The Life of Muhammad), translated by Alfred Guillaume (Oxford: Oxford University Press, 2002), p.676. (Ibn Ishaq, *Sirat Rasul Allah*); *Sahih Al-Bukhari*, vol. 4, no. 3131, p.166.: Muhammad Shibli Nomani, *Allamah Shibli's Sirat Al-Nabi*, translated into English by Fazlur Rahman (Karachi: Pakistan Historical Society, 1970), p.354.

²³² Uri Rubin, "The Assassination of Ka'b b. al-Ashraf", 32 *Oriens* (1990), 65, p.65; Ibn Ishaq, *The Life of Muhammad: A Translation of Ishaq's Sirat Rasul Allah*, with introduction and notes by A. Guillaume (Karachi ; New York : Oxford University Press, 2001), pp, 367-368; *Sunan Abu Dawud*, Vol., 3 no. 2768, pp.360-361.

²³³ Ibn Kathir, *The Life of the Prophet Muhammad; Al-Sira Al-Nabawiyya*, translated by Trevor Le Gassick (Reading: Garnet Publishing, 2000) vol. 3, p 7 (*Al-Sira Al-Nabawiyya*); Salik, *The Early Heroes of Islam*, p.100.

²³⁴ Qadi 'Iyad, *Ash-Shifa*, pp.719-720.

²³⁵ Salik, *The Early Heroes of Islam*, p.100.

²³⁶ Qadi 'Iyad, *Ash-Shifa*, p.378; *Sahih Al-Bukhari*, vol. 4, no. 3022, pp.162-163; Al-Tabari, *The History of al-Tabari*, vol. 7, p.100.

²³⁷ Al-Tabari, *The History of al-Tabari*, vol. 7, p.99; Ibn Kathir, *The Life of the Prophet Muhammad; Al-Sira Al-Nabawiyya*, p.186.

²³⁸ Al-Tabari, *The History of al-Tabari*, vol. 7, pp.99-100.

There are various other similar cases. In one example that was recorded by Ibn Ishaq a woman named Asma bint Marwan insulted both Islam and the Prophet, and encouraged resentment against Muslims.²³⁹ When Muhammed asked “Who will rid me of Marwan’s daughter?” ‘Umayr b. ‘Adiy al-Khatmi, who was with him, went to her house and killed her. The next morning the Prophet said “You have helped God and His apostle!” When ‘Umayr asked about possible bad consequences Muhammad said “Two goats won’t butt their heads about her.”²⁴⁰ Another case is that of Abu ‘Afak, a Jewish poet who wrote and distributed verses denigrating Muhammad and his followers and was supposedly killed.²⁴¹ Watt has examined the particular circumstances pertaining at the time of the Asma bint Marwan and Abu ‘Afak cases. He notes that victory in the Battle of Badr “considerably strengthened Muhammad’s position”,²⁴² which had been weakening. Asma bint Marwan and Abu ‘Afak B. ‘Amr b. ‘Awf, both of whom had written poems against Muhammad, were killed by members of their own and related clans, but no blood feud resulted.²⁴³ In the Asma bint Marwan case, Watt notes that soon after the Battle of Badr a man called Umayr b. ‘Adiy al-Khatmi went to her house and killed her. Muhammad seemed to approve and many of the clan, perhaps already secret believers, now openly declared their Muslim faith. According to Watt the murder of ‘Abu Afak, a man who had publicly denigrated Muhammad in

²³⁹ Ibn Ishaq, *Sirat Rasul Allah*, pp.675-676.

²⁴⁰ *ibid.*, p.676.

²⁴¹ Muhammad Husayn Haykal, *The Life of Muhammad*, translated by Isma'il Raji A. al-Faruqi, (United States: North American Trust Publications, 1976), p.226; Ibn Ishaq, *Sirat Rasul Allah*, p.675; Ibn Sa'd al-Baghdadi, *Ibn Sa'd's Kitab al-tabaqat al-kabir*, English translation by S. Moinul Haq, assisted by H. K. Ghazanfar (Karachi: Pakistan Historical Society, 1967), vol. 2, p.31.

²⁴² William Montgomery Watt, *Muhammad at Medina* (Oxford: The Clarendon Press, 1956), p.15

²⁴³ *ibid.*

various ways, was similar. He notes that “After these events we may assume that there was little opposition to Muhammad among the pagans.”²⁴⁴

Another so-called blasphemy case that occurred during the Prophet’s lifetime was that of a blind man who killed a slave girl, also for insulting the Prophet. Regarding this case the Prophet reportedly stated that “Bear witness that no retaliation is due for her [blasphemer] blood.”²⁴⁵ The slave girl continually cursed the Prophet and would not stop when ordered to, so the blind man killed her with a short sword. The crucial point to appreciate with this *hadith* is that the Prophet was not condoning the murder of the girl on account of her blasphemy; his judgment relates to the crime. The blind man was asking the Prophet to excuse him any punishment for his action, rather than appealing to the Prophet on the grounds of the slave girl’s blasphemy.

Another case is that a Jewish woman was killed for insulting the Prophet,²⁴⁶ but this *hadith* is short and does not even mention the circumstances or background to the case, and only has one narrator. It is therefore classified by Abu Dawood (d. 275 AH/889 CE) as a *da’if* (weak) source, as it is extremely difficult to confirm the veracity of this story.²⁴⁷ These cases show that blasphemy itself is not seen as sufficient reason for punishment, and that many supposed blasphemy cases were actually pursued for other crimes, such as murder. These cases from the Prophet’s era show that blasphemy was only seen as a crime through its association with high treason or hostility against the Muslim community, and not for religious reasons. Moreover, all these blasphemy cases occurred during wartime and therefore, as with apostasy, they can all be seen as punishments not for blasphemy itself but for

²⁴⁴ *ibid*, p.178.

²⁴⁵ *Sunan Abu Dawud*, vol. 5, no. 4361, pp.20-21.

²⁴⁶ *ibid.*, vol.5, no. 4362, p.21.

²⁴⁷ *ibid.*

war-linked activities. As a result, the resort to violence is deemed lawful under Islamic law due to its self-defensive nature, the only lawful *jus ad bellum*.²⁴⁸

The evidence of punishment for blasphemy seems to be composed of accounts of a number of killings in the Prophet's lifetime by Muslims of non-Muslims who had insulted the Prophet, Allah or Islam and thus committed the 'offence' of blasphemy, but as will be discussed in the next section, the Prophet pardoned those who had merely issued insults; he only seems to have punished blasphemous 'groups' who had also committed treason or murder.

1.5 The Prophet's pardoning of individual blasphemers

The Prophet's approach to blasphemy highlights the dubious status of this 'offence' as interpreted in contemporary Islamic law. No blasphemers, as we would understand the term today, were ever executed by the Prophet, and he pardoned those of his critics who had converted to Christianity and Judaism from Islam. One of these was a personal scribe who had been a Christian before converting to Islam but then later recanted and reconverted to Christianity.²⁴⁹ After returning to his original faith the recanter blasphemously claimed that "Muhammad knew nothing except what I wrote for him", but even this detractor was not killed, eventually dying of natural causes.²⁵⁰

²⁴⁸ Mohamed Elewa Badar, "IUS Ad Bellum Under Islamic International Law" 13 *International Criminal Law Review* (2013) 593-625, p.612.

²⁴⁹ *Sahih Al-Bukhari*, vol. 4, no. 3617, p.492.

²⁵⁰ *ibid.*

The Prophet pardoned individuals who had annoyed or insulted him.²⁵¹ After fleeing to Mecca ‘Abd Allah b. Abi Sarh spread rumours to the effect that Mohammed used to dictate the Qur’an to him but that he would finish the sentences without the Prophet objecting; despite this provocation, Abi Sarh was pardoned.²⁵² Moreover, according to the *hadith* Abdullah bin Ubayy (ibn Salul), who was one of the chiefs of the Khazra tribe case, repeatedly insulted both the Prophet and his wife Aishah.²⁵³

They (hypocrites) say: “If we return to Al-Madinah, indeed the more honourable (‘Abdullah bin Ubai bin Salul, the chief of hypocrites at Al-Madinah) will expel therefrom the meaner (i.e. Allah’s Messenger SAW).” But honour, power and glory belong to Allah, His Messenger (Muhammad SAW), and to the believers, but the hypocrites know not. [Qur’an 63:8]

Aisha, the Prophet’s wife, was also insulted by ibn Salul’s group.²⁵⁴ Although his Companions Sa’d bin Mu’adh and ‘Umar both asked the Prophet for permission to kill him, Mohammed did not allow this:

Leave him [Abdullah bin ‘Ubayy], lest the people say that Muhammad kills his companions.²⁵⁵

Al-Tabari also recorded the Prophet as stating

... we will be gentle with him [Abdullah bin ‘Ubayy] and associate with him on friendly terms as long as he stays with us.²⁵⁶

²⁵¹ For example, ‘Abd Allah b. Abi Sarh was a Jewish convert who had been the Prophet’s scribe before later renouncing Islam.

²⁵² *Tafsir Ibn ‘Abbas*, p.145, see also *English Translation of Sunan Abu Dawud*, pp.305-306.

²⁵³ *Sahih Al-Bukhari*, vol. 4, no, 3518, p.444; *ibid.*, vol, 6, no. 4905, pp.355-356.

²⁵⁴ *Sahih Al-Bukhari*, vol, 6, no. 4750, pp.229-236

²⁵⁵ *ibid.*, vol, 6, no. 4905, pp.355-356; the same wording is reported in *Sahih Al-Bukhari*, vol. 4, No, 3518, p.444.

"(No), lest the people should say that Muhammad used to kill his companions."

²⁵⁶ Al-Tabari, *The History of al-Tabari*, vol. 8, p.55.

These repeated blasphemy cases show that the Prophet effectively pardoned those who had merely insulted him.²⁵⁷ Eventually, Abdullah bin ‘Ubayy died a natural death in 9AH / 631 CE.²⁵⁸ Although he had been blasphemous to the Prophet and his wife, the Prophet himself conducted his funeral.²⁵⁹

It is interesting to compare these cases with those of both Ka’b Ibn al-Ashraf and Abu Rafi. Whereas Abi Sarh was insulting Mohammed only as an individual, and not as part of any larger group campaign, the offences of al-Ashraf and Abu Rafi were more political in nature. Their actions involved not only blasphemy as individuals against the Prophet, but also actual rebellion or sedition. It is hard to see the al-Ashraf and Abu Rafi cases as ‘pure’ blasphemy; they were actually high treason with insults included. By contrast, the cases of Abi Sarh and Abdullah bin ‘Ubayy were really cases of blasphemy, without any armed attack or other form of physical violence towards Islamic society. Cases of this latter type were not treated as crimes that must be punished. The Prophet clearly differentiated between these two types of case, those that involved armed attacks on the Muslim community and those that didn’t, and therefore pardoned Abi Sarh and Abdullah bin ‘Ubayy.

The Umayyad Caliph, Umar Bin Abdul Aziz continued the Prophet’s stance regarding blasphemers. He had been insulted by a man (an ordinary man) from al-Madinah, but in keeping with his firm principles, ‘Umar did not charge him above what he might have charged him with, had the insulted man been an ordinary

²⁵⁷ *Sahih Al-Bukhari*, vol, 6, no. 4750, pp.229-236

²⁵⁸ W. Montgomery Watt, “Abd Allah b. Ubayy” in *The Encyclopaedia of Islam: Second Edition / prepared by a number of leading orientalists*, H.A.R. Gibb, J.H. Kramers, E. Levi-Provenca and J. Schacht, (eds) (Leiden: Brill, 1960), vol. 1, p.53.

²⁵⁹ *ibid.*

person from the *Ummah* (community).²⁶⁰ The letter that Umar sent to the Governor of al-Madinah notes that

If you kill him, your killing is on your own hands, for he did not kill anyone. As for cursing someone, was the Prophet (peace and blessings be upon) not insulted as well? Once you receive my letter, imprison him to protect the Muslims from his evil, implore him to repent, and if he does then let him be on his way.²⁶¹

By contrast to the practices of the Prophet, many blasphemy cases in contemporary Muslim majority states *have* resulted in punishment, frequently for scholars or ordinary people; this will be discussed in the next chapter. As these so-called blasphemy cases in the Prophet's time illustrate, the Prophet never actually killed 'blasphemers' for purely religious reasons only. Rather, punishments for blasphemy were clearly related to the prevailing political context.²⁶² In fact, there was no law against blasphemy at the time. During Islam's early history in Mecca and Medina it was common to have families and communities split between religions, a situation which led to resentment on the part of the non-Muslim relatives. Neither the case of Abi Sarh nor that of the chief of the Khazra tribe, Abdullah bin 'Ubayy, resulted in punishment being handed out. All the blasphemy cases that are cited as evidence of the Prophet ordering blasphemers to be put to death were in fact political cases; they were not instances of the Islamic community being insulted or criticised by individuals. Rather, they were cases of physical attacks on the community by other groups, albeit with insults as part of the campaign.

²⁶⁰ Ali Muhammad Sallabi, *'Umar Bin 'Abd Al-'Aziz: The Rightly-Guided Caliph & Great Reviver*, English Translation By Safina Naser (Riyadh: Dar-us-Salam, 2011), p.164. (Sallabi, *'Umar Bin 'Abd Al-'Aziz*)

²⁶¹ *ibid.*

²⁶² Kamali, *Freedom of Expression in Islam*, p.246.

Therefore, neither the Qur'an nor the *Sunna* support the establishment of *hadd* punishments for blasphemy. None of the Qur'an's verses mention any punishment at all for this 'crime', although many verses mention blasphemy itself. And although the *Sunna* also clearly mentions blasphemy, there are no records of any 'blasphemers' being punished with death during the Prophet's time; quite the reverse, Mohammed pardoned many blasphemers whose attacks against the Muslim community were non-violent.

1.6 Development of Apostasy and Blasphemy law

The only unambiguous references to punishment for apostasy in *Sunna* are in relation to armed attack. The changes in apostasy law over the centuries that have led to individuals being persecuted for apostasy itself have been based on a misunderstanding of how apostasy was dealt with in very early Muslim society. These early apostasy cases show that all persecutions were for armed attacks and rebellions against the fledgling Islamic community; rather than for renouncing Islam, they were for fighting against Muslims. Ibn Rushd also mentions the connection between apostasy and war. He notes that "An apostate, if taken captive before he declares war, is to be executed..."²⁶³ No instances of non-rebellious apostasy were punished, according to the *hadith*. Another *hadith* that is used to justify apostasy law notes that an apostate is "the one who turns renegade from Islam (apostate) and leaves the group of Muslims."²⁶⁴ The use of the word 'and' is crucial. Changing religion or unbelief alone was not considered a crime, rather, it was war-like activities that were the main reason for punishing apostasy.

²⁶³ Ibn Rushd, *The Distinguished Jurist's Primer*, vol. II, p.552.

²⁶⁴ *Sahih Al-Bukhari*, vol. 9, no. 6878, p.87.

The struggles against apostasy during the Prophet's time must be understood within the context of the period's tribal society. As Watt points out, the fact that the obligation was with groups, not individuals, is evidence that during this period the Islamic state was seen as a tribal federation, not a collection of like-minded individuals.²⁶⁵ It's essential to grasp the circumstances of the Prophet's time; religion was not only an individual issue, but divided society. The Constitution of Medina (1 AH/622 CE) indicates that its religious community was the equivalent of a state nowadays:

1. This is a prescript (*kitab*) of Muhammad, the Prophet [the Messenger of God] to operate among the Faithful Believers (*mu'minin*) and the Submissive to God (*muslimin*) from among the Quraish and [the people of] Yathrib and those who may be under them and join them, and take part in wars in their company.²⁶⁶

25. And verily the Jews of the Banu 'Awf shall be considered as a community (*ummah*) along with the Believers, for the Jews being their religion and for the Muslims their religion, be one client or original member of the tribe; but whosoever shall be guilty of oppression or violation (of treaty), shall put to trouble none but his own person and the members of his house (*ahl-bait*).²⁶⁷

Watt argues that Muhammad became accepted as a leader due to his prophethood, not his military leadership capabilities. The burgeoning Muslim 'community' thus had a religious foundation,²⁶⁸ and the people of Medina were "regarded as constituting a political unit of a new type, an *ummah* or 'community.'" Watt notes that it was like a clan or tribal federation.²⁶⁹ At a time where the tribe amounted to

²⁶⁵ W. Montgomery Watt, "Conditions of Membership of the Islamic Community", 21 *Studia Islamica* (1964), p.6.

²⁶⁶ Muhammad Hamidullah, *The First Written-Constitution in the World: an Important Document of the Time of the Holy Prophet* (Lahore, Pakistan Sh. Muhammad Ashraf, 1981), p.41 (Hamidullah, *The First Written-Constitution in the World*).

²⁶⁷ *ibid.*, pp.48-49.

²⁶⁸ W. Montgomery Watt, *Muhammad: Prophet and Statesman* (London: Oxford University Press, 1961), p.95 (Watt, *Muhammad: Prophet and Statesman*).

²⁶⁹ *ibid.*, p.94.

a “small state”, leaving it was interpreted as an act of rebellion against that state.²⁷⁰ Under those particular circumstances, apostasy and blasphemy were not considered to be mere religious sins. Thus, all the apostasy cases from the time of first Muslim generation were inextricably linked to war-like activities.

Although the belief that apostasy is an offence goes back many centuries, it is crucial to understand that such a belief and the law associated with it was developed *after* the Prophet’s time. According to Shah this was often for reasons of political exigency, as touched upon earlier.²⁷¹ He explains how in early Islam abandoning the faith was seen as treason against the Islamic polity as well as a rejection of the faith. It was only later that non-rebellious apostates were executed for their apostasy alone, without any association with treason being noted or required.²⁷² This is supported by verse 9:29, which was revealed during the clashes between the early Muslim community and other people of the Book.²⁷³ This verse does not indicate that apostates were punished with death for their beliefs alone. As with other Qur’anic verses referencing so-called apostasy, 9:29 is not directed towards those who have merely renounced Islam; rather, it targets those who are fighting against the Muslim community and have been branded apostate for their acts of rebellion, rather than for their lack of faith.

The Prophet prohibited the killing of polytheist women in war.²⁷⁴ Abu Zahra argues that the reason for this is that “they [women] were weak or unwilling to

²⁷⁰ A.M. Nasr, “The structure of Society in Pre-Islamic Arabia and the Impact of Hijra: A Traditional Archaeology” in Ian Richard Netton ed., *Golden roads: migration, pilgrimage and travel in mediaeval and modern Islam* (Richmond (Surrey) : Curzon Press, 1993), p.5.

²⁷¹ Niaz A. Shah, “Freedom of Religion: Koranic and Human Rights Perspectives”, 6 *Asia-Pacific Journal on Human Rights & the Law* (2005), p.87.

²⁷² *ibid.*

²⁷³ *Tafsir ibn Kathir*, vol. 4, p.405.

²⁷⁴ *Sahih Al-Bukhari*, vol. 4, no. 3014, p.158.

fight.”²⁷⁵ Ibn Abbas and Abu Hanifa both said that women are also exempted from the death sentence for apostasy.²⁷⁶ Similarly, Al-Shaybānī noted that female apostates will not be executed, but will be imprisoned until she re-embraces Islam or dies. Shia Islam also argues that female apostates should not be punished with death; rather, Shaykh Tusi notes that such women should be given life imprisonment, be on reduced rations and be “disciplined during prayer.”²⁷⁷ Shaykh Tusi also records women should not be fought, only prevented from fighting or arrested, although Muslims are allowed to defend themselves against women.²⁷⁸

The scholars who support the punishment of apostasy as a crime argue that it is an issue related to the breakdown in public order that would occur if apostasy or conversion became widespread. Some scholars believe that apostasy threatens to break the solidarity of Muslims, and that therefore apostasy law is necessary to preserve social order. This social order justification for punishing apostasy is still forwarded by many Muslim scholars. Yusuf Al-Qaradaw noted that “If they had gotten rid of the apostasy punishment Islam wouldn’t exist today.”²⁷⁹ He believes that apostasy law is necessary and should be punished severely:

Apostasy from Islam after willingly accepting it and subsequently declaring an open revolt against it in such a manner which threatens the solidarity of the Muslim community is a crime punishable by death.²⁸⁰

²⁷⁵ Sheikh Mohammad Abu Zahra, “Punishment in Islam: General Study” in Al-Azhar Academy of Islamic Research, *The Fourth Conference of the Academy of Islamic Research: Rajab 1388 September 1968* (Cairo: Al Azhar Academy of Islamic Research, 1970), p.771.

²⁷⁶ Qadi ‘Iyad, *Ash-Shifa*, p.760; Al-Mawardi, *al-Ahkam as-Sultaniyyah: the Laws of Islamic Governance*, translated by Asadullah Yate (London: Ta-Ha Publishers, 1996), p.84.

²⁷⁷ Shaykh Tusi, *Al-Nihayah*, p.492.

²⁷⁸ *ibid*, p.217.

²⁷⁹ Nonie Darwish, “If They [Muslims] Had Gotten Rid of the Punishment for Apostasy, Islam Would Not Exist Today” *Gatestone Institute* (4 February 2013), <<http://www.gatestoneinstitute.org/3572/islam-apostasy-death>>accessed 27 June 2016.

²⁸⁰ Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam : al-Halal wal-haram fil islam*, translators:

The establishment of blasphemy as a crime was completely the work of jurists; neither the Qur'an nor the *Sunna* include any law against it. Anti-blasphemy laws can be traced back to Muhammad's response to criticism by fellow Arabs and Jews; Kamali points out that during the Prophet's lifetime almost all apostasy cases also featured hostility to and abuse of the Prophet, in other words what we would normally recognise as blasphemy, and that therefore separating the offences became increasingly problematic. At the time 'repudiation of Islam', rather than 'insulting the Prophet', was seen as a more fitting charge to be made against Islam's enemies.²⁸¹

Blasphemy was certainly being punished in the decades and centuries following the Prophet's era. In a 9th century case during the reign of 'Abd al-Rahman II (206 AH/822 CE to 238 AH/852 CE) Yahya ibn Zakariya al-Hassab, who was the nephew of 'Ajab, the favoured concubine of al-Hakam I (d. 207 AH/822 CE), was executed for blasphemy.²⁸² Religious jurists in Cordova handed down a religious verdict that effectively allowed the killing of Yahya ibn Zakariya al-Hassab, who when walking in the rain had insulted God by saying "the bead-dealer began sprinkling his skins".²⁸³ Some jurists disagreed, seeing his offence as a *ta'zir* offence requiring only discretionary punishment and not the ultimate penalty.²⁸⁴ However, 'Abd al-Malik b. Habib (d. 238AH/852AD), who was the leading Maliki *faqih* (jurist) of the day, accepted responsibility for the death penalty being handed

Kamal El-Helbawy, M. Moinuddin Siddiqui, Syed Shukry (Indianapolis : American Trust Publications, 1999), p.326.

²⁸¹ Kamali, *Freedom of Expression in Islam*, p.215.

²⁸² Qadi 'Iyad, *Ash-Shifa*, p.796; Fierro, Isabel, "Andalusian 'Fatawa' on Blasphemy" 25 *Annales Islamologiques* (1990), p.104. (Fierro, "Andalusian 'Fatawa' on Blasphemy")

²⁸³ *ibid.*, p.796.

²⁸⁴ *ibid.*

down and Yahya was sentenced to die on the cross, where he was stabbed to death:²⁸⁵

Rather, I assume responsibility for shedding his blood. Shall not we take revenge against him for disparaging the Lord we worship? Then we are bad Slaves (of Allah), and we are not sincere worshippers to him.²⁸⁶

Another case that happened during the same period also shows that blasphemy could be treated as an offence punishable by death. Harun b. Habib case was the brother of ‘Abd al-Malik b. Habib, i.e. Ibn Habib who had issued the death penalty fatwa against Yahya ibn Zakariya al-Hassab.²⁸⁷ As in the earlier case, the defendant (Harun b. Habib) was accused of blasphemy against God, but Habib was acquitted and walked away a freeman. He stated that

I suffered through that illness a torment exceeding whatever punishment I might receive by killing Abu Bakr and ‘Umar.²⁸⁸

However, Ibn Habib’s *fatwa* rejected the accusations brought against his brother for two reasons, the first being that there had been only one witness to his brother’s alleged blasphemy. The second reason was that Harun b. Habib was ill and his words were “unbecoming of an intelligent person” and to be expected from a “silly and ignorant one”.²⁸⁹ Concluding that no *hadd* or punishment should be applied to his brother, Ibn Habib recommended that even if he were punished, this should consist of being imprisoned for six months.²⁹⁰ Therefore, Harun bin Habib was

²⁸⁵ *ibid.*; Fierro, “Andalusian ‘Fatawa’ on Blasphemy”, p.105.

²⁸⁶ *ibid.*

²⁸⁷ Fierro, “Andalusian ‘Fatawa’ on Blasphemy,”p. 106.

²⁸⁸ Qadi ‘Iyad, *Ash-Shifa*, p.773.

²⁸⁹ Fierro, “Andalusian ‘Fatawa’ on Blasphemy”, p.106.

²⁹⁰ *ibid.*, p.107.

exempted from death by his brother and the other three jurists, although the judge still thought he should be imprisoned and disciplined.²⁹¹

A 9th century case from the ‘Abd al-Rahman II era, who reigned from 206AH/822AD until 238AH/852AD, also supports the argument that the death penalty for blasphemy was not universally recognised or applied. It should be noted that such cases occurred during the time of the Mozarab Christian martyrs, a period of great social upheaval around 235AH/850CE. Muslims were far from being the majority at the time; according to Richard Bulliet, by 850 CE between 20 and 30 percent of the population of al-Andalus were Muslims.²⁹² The martyrs “deliberately sought martyrdom....by public denunciation of Mohammed and of Islam, offences known to be punishable by death”.²⁹³ Coope states that the Islamic government of the day “treated the martyrs’ movement as it would any form of serious disobedience on the part of a subject group: by executing or otherwise making examples of the guilty, putting pressure on community leaders, and generally making life as inconvenient as possible for all Christians.”²⁹⁴

Nevertheless, it should be noted just how few blasphemy cases were recorded in the Umayyad period. According to Fierro there were only two accusations of blasphemy against Muslims during the Umayyad period, namely the Yahya ibn Zakariya and Harun b. Habib cases.²⁹⁵ Certainly it is the case that the imposition of the death penalty for blasphemy does not seem to have been standard during this

²⁹¹ Qadi ‘Iyad, *Ash-Shifa*, p.773.

²⁹² Richard W. Bulliet, *Conversion to Islam in the Medieval Period: An Essay in Quantitative History* (Cambridge, Massachusetts and London, England. Harvard University Press, 1979), pp.124-127.

²⁹³ Roger Collins, *Early Medieval Spain: Unity in Diversity, 400-1000* (London: Macmillan, 1983), p.213.

²⁹⁴ Jessica A. Coope, *The martyrs of Córdoba: Community and Family Conflict in an Age of Mass Conversion* (Lincoln, Nebraska: University of Nebraska Press, 1995), p.15.

²⁹⁵ Fierro, “Andalusian ‘Fatawa’ on Blasphemy”, p.117.

period. These blasphemy cases should perhaps therefore be considered as proof that such a punishment was only gradually becoming established at this time.

The development of apostasy and blasphemy law shows how inappropriate it is to apply historical standards and usages to contemporary situations. Treating apostasy and blasphemy in the same fashion as the Prophet and his Companions did is wrong. The treatment of apostasy that was established by mediaeval scholars should be abandoned and replaced by more modern attitudes that meet society's contemporary needs. Unbelief and renouncing religion is no longer considered by the wider society to be treasonous or seditious; Islam should follow suit.

The Arabic word *maslahah* literally means “welfare, public interest.”²⁹⁶ The concept is based on *istihsan*, an Arabic term derived from *hasan*, meaning ‘good’. Dien notes that “as a verbal noun it designates the preference of one matter or idea meaning over another”.²⁹⁷ *Maslaha* has been developed by scholars throughout Islamic history, with the first legal case dating back to the Caliph Umar’s suspension of *hudud* punishment for theft during times of famine.²⁹⁸ Al-Ghazali identified *maslaha* as a legal term in his *Al-mustasafa min ilm al-usul*:

In its essential meaning, *al-maslaha* is a term which means to seek something beneficial [*manfa*] or avoid something harmful [*madarra*]. But this is not what we mean, because to seek the beneficial and avoid what is bad are the objectives [*maqasid*] intended by creation, and good [*salaah*] in the creation of humanity

²⁹⁶ Jonathan A. C. Brown “Maslaha” in *The Oxford encyclopedia of the Islamic world*, John L. Esposito, editor in chief (New York, N.Y.: Oxford University Press, 2009.), Vol., 3, p.516.

²⁹⁷ Mawil Izzi Dien, “Istihsan” in *The Oxford encyclopedia of the Islamic world*, John L. Esposito, editor in chief (New York, N.Y.: Oxford University Press, 2009.), Vol., 3, p.211.

²⁹⁸ Dar al-Ifta al-Misriyyah, “The Execution of Islamic Penalties (hudud): Myths and Facts,” <<http://eng.dar-alifta.org/Foreign/ViewArticle.aspx?ID=611&CategoryID=5>> accessed 29 June 2016.

consists in the attaining of these objectives [*maqasid*]. What we mean by *maslaha* is the preservation of the objective [*maqsud*] of the Law [*shar'*] which consists in five things: the protection of religion, life, intellect, lineage, and property. Whatever ensures the protection of these five principles [*usul*] is *maslaha*, whatever goes against their protection is *mafsada*, and to avoid it is *maslaha*'.²⁹⁹

Maslahah was developed by scholars to solve problems that emerged after the Prophet's time. Al-Qarafi (d. 684 AH/1285 CE) noted as follows:

Moreover, we say that the action which in itself brings a benefit (*maslaha*) should not be forbidden, and that the action which in itself causes a detriment (*mafsada*) should not be commanded. However, the doctrine of the abrogation amounts to an overturning of the nature of things in which good becomes evil and evil becomes good. Since this is impossible, abrogation [*naskh*] is also impossible.

We also say that the word of God, may He be exalted, is eternal. Since the determination of legal rulings belongs to His word, the command and prohibition are also eternal. God commanding and prohibiting the same action simultaneously is impossible. But abrogation leads to affirming such a thing, hence abrogation is impossible, which was to be demonstrated.³⁰⁰

Prominent scholars believed that *maslaha* was necessary. Ibn Hazm (d. 456 AH/1064CE) recorded Abu Hanifah as allowing the development of Islamic law by modern scholars. Ibn Hazm notes that Abu Hanifah "mostly relied on his reasoning, opinion and *istihsan*, considering something as good, as it has been narrated on his authority that he said: 'Our knowledge is an opinion whoever brings something better than this, we shall take it.'"³⁰¹

²⁹⁹ Al-Ghazali cited in Tariq Ramadan, "Ijtihad an Maslaha: The Foundations of Governance" in M.A. Muqtedar Khan, ed., *Islamic Democratic Discourse: Theory, Debates, and Philosophical Perspectives* (Lanham, MD: Lexington Books, 2006), p.5.

³⁰⁰ Shihab al-Din al-Qarafi cited in Diego R. Sarrio Cucarella, *Muslim-Christian polemics across the Mediterranean: the splendid replies of Shihab al-Din al-Qarafi (d. 684/1285)* (Boston : Brill, 2015), pp.163-164.

³⁰¹ Ibn Hazm, *Ibn Hazm's Al-Risālah Al-Bāhirah : (the magnificent epistle)*, translated for the first time with

Al-Qarafi stated that “Legal rulings depend on the interests of the particular times and the diversity of the nations” (*al-ahkam tabi’a li-masalih al-awqat wa-ikhtilaf al-umam*).³⁰² Just as apostasy and blasphemy law was created by mediaeval scholars, modern scholars should use *maslaha* to create contemporary legal rulings.

To summarise, apostasy and blasphemy law was developed after the Prophet’s time by mediaeval scholars based on their understanding of Shari’a. They stressed that apostasy and blasphemy law was necessary for keeping social solidarity and public order, and employed the concept of *maslaha* to shape interpretations of Shari’a accordingly. Clearly, mediaeval scholars believed that Islamic understandings could and should be changed from time to time.

Conclusion

There were no apostasy or blasphemy laws in the Prophet’s era, and these acts were not considered to be crimes during his lifetime. Furthermore, the Qur’an

an introduction and notes by Muhammad Saghir Hasan al-Ma’sumi ; general editor, Sharifah Shifa al-Attas (Kuala Lumpur : International Institute of Islamic Thought and Civilization, 1996), p.69, no. 74.

³⁰² Shihab al-Din al-Qarafi cited in Diego R. Sarrio Cucarella, *Muslim-Christian Polemics across the Mediterranean : the splendid replies of Shihab al-Din al-Qarafi (d. 684/1285)* (Boston : Brill, 2015), pp.164-165.

prohibits any punishment of apostates and blasphemers in this world. Any Qur'anic verses that actually do mention or condemn apostasy or blasphemy are linked with military events or acts of treason that occurred in the Prophet's era. The Prophet shows in the *hadith* that he differentiated between apostasy and blasphemy and such acts accompanied by high treason or armed attack against the Muslim community; he never killed or executed an apostate or blasphemer for purely religious reasons. The Qur'an and *hadith* therefore do not indicate that apostasy *per se* was considered to be a serious crime, or even a crime at all. Today, most scholars agree that apostates who were punished in the Prophet's time were not being punished for apostasy itself but for the crimes of treason or sedition, often accompanied by murder or highway robbery.³⁰³

As apostates and blasphemers were always linked to other crimes, such as treason, mediaeval scholars created specific apostasy and blasphemy laws. However, the Sharia's position regarding apostasy and blasphemy is clear: although they are sins, the right to punish them is reserved for God only – not for mankind. This theme will be developed throughout this thesis.

The struggles against apostasy during the Prophet's lifetime and shortly after must be understood against the backdrop of the period's tribal society. It's essential to grasp the circumstances of the era; religion was not only an individual issue, but threatened to divide society. At a time when one's tribe in effect amounted to one's state, leaving it was interpreted as an act of rebellion against that state. Under these circumstances, apostasy and blasphemy were not considered to be

³⁰³ See, Declan O'Sullivan, "Punishing Apostasy", pp.92-93; S.A. Rahman, *Punishment of Apostasy in Islam*, p.3; Kamali, *Freedom of Expression in Islam*, pp.249-250.

mere religious sins. As Montgomery Watt pointed out, being excluded from the community for having committed a serious sin may not sound too extreme a punishment, but to a 7th century Arab it certainly was. In the desert a human being had no rights and very little security, as this was inextricably linked to his community membership. If expelled, a man's life was in danger until he found a new protector.³⁰⁴ Saeed has therefore pointed out that in the early Islamic period becoming a Muslim was like joining a religious tribe; "Rebelling against it meant rejecting its values, norms and foundations."³⁰⁵ The particular structure of Arab society at the time profoundly affected the way in which apostasy was dealt with.

The apostasy and blasphemy cases analysed in this chapter are the result of extremist groups misunderstanding or deliberately misinterpreting Shari'a, as will be discussed in Chapter 5. In the Prophet's time there were no cases that purely featured apostasy and blasphemy as we understand them today, but this fact has been glossed over by extremist groups and the religious establishment in many countries, and even by some judges. This historical reinterpretation has led to a number of contemporary issues, as will be discussed in the following chapters.

³⁰⁴ W. Montgomery Watt, *Islamic Political Thought: the Basic Concepts* (Edinburgh : Edinburgh U.P., 1968), p.55 (Watt, *Islamic Political Thought*).

³⁰⁵ Saeed, "Muslim Debates on Human Rights", p. 29.

Chapter 2 State-sponsored apostasy and blasphemy in

Muslim majority states

Introduction

Apostasy and blasphemy are controversial issues in most Muslim majority states, in particular with regard to the severity of the legal penalties handed down for such ‘crimes’. Many local religious scholars and believers favour drastic measures; a recent study conducted in twenty states shows that in six of them the majority of respondents who support making Islamic law the state’s official law also favour the death penalty for apostates.³⁰⁶ Even in countries such as Morocco, whose Penal Code does not provide for the death penalty for apostasy, tensions run high. In April 2013, for example, its Supreme Council of Religious Scholars declared a religious decree which called for Moroccan Muslims who reject their faith to be “condemned to death.”³⁰⁷ Thus the belief that apostasy is or should be a punishable offence stands at several levels, from the population to local religious establishments, including religious scholars.

Although there is no legal framework for punishing apostates under codified law in any Muslim majority country other than Brunei and some states in Malaysia, lower courts in some countries have attempted to make apostasy a criminal offence.³⁰⁸

Almost all such apostasy cases have been dismissed by higher courts at a later stage.

³⁰⁶ Pew Research Centre, “The World’s Muslims: Religion, Politics and Society” (30 April 2013), p. 55 <<http://www.pewforum.org/files/2013/04/worlds-muslims-religion-politics-society-full-report.pdf>> accessed 27 June 2016.

[not including many Muslim majority states, such as Saudi Arabia, Iran and Morocco]

³⁰⁷ “Fatwa to Kill Apostates Sparks Fierce Controversy in Morocco”, *Middle East Online* (18th April, 2013), <<http://www.middle-east-online.com/english/?id=58230>> accessed 27 June 2016.

³⁰⁸ Brunei’s Syariah Penal Code Order (2013) Section 112(1).

Some Muslim majority states have attempted to solve this by including apostasy within their codified systems, but these attempts have almost always failed. In Pakistan for example, a bill was proposed in 2007 that would have made apostasy by men a capital offense, but this measure was not adopted.³⁰⁹ Similarly, in 2008 Iran's parliament initially adopted an apostasy provision, but ultimately rejected it.³¹⁰ However, Brunei has gone one step further and established a codified apostasy law. Depending upon the evidence, Section 112(1) of Brunei's Syariah Penal Code requires that a Muslim who declares himself non-Muslim either be executed or be subject to imprisonment and corporal punishment. This law was published in October 2013 and is being phased in, with the death penalty for apostasy becoming law in October 2015.³¹¹ Nobody has yet been charged with apostasy under this law.

Islamic jurisprudence was not produced or developed by the state; rather, it was developed by Muslim jurists over a lengthy period. Today Shari'a is no longer controlled by the *ulama* (religious scholars) but by states, who interpret it and codify it in their constitutions. This codification of Shari'a has triggered many high-profile cases, as will be discussed in this chapter. The problem facing Muslim states today is now to codify concepts from Shari'a law which have their roots in the mediaeval period of history and are often responses to specific social situations of the past.

³⁰⁹ Library of Congress, "Laws Criminalizing Apostasy" (May 2014)
<<http://www.loc.gov/law/help/apostasy/index.php>> accessed 27 June 2016.

³¹⁰ *ibid*

³¹¹ Rabiatul Kamit and Bandar Seri Begawan, "Kedah Officials in Brunei to Observe Syariah Law", *Brunei Times* (May 16, 2014)
<<http://www.bt.com.bn/frontpage-news-national/2014/05/16/kedah-officials-brunei-observe-syariah-law>>
accessed 27 June 2016.

Furthermore, the implementation of so called Islamic law puts states in direct conflict with the Universal Declaration of Human Rights. Historically punishment for apostasy mainly relied on a traditional Islamic approach, namely a *hudud* punishment (prescribed punishment), and this is still the case in Muslim majority states today. Such a punishment is contrary to the principle of legality outlined in Article 11(2) of the UDHR, which states that a person may not be prosecuted under a criminal law that has not been previously published and for which no punishment has been provided. The same principle of legality is actually also supported by the Qur'an [65:7, 17:15]. The role played by Shari'a varies considerably from country to country, with some states, such as Saudi Arabia and Iran, totally basing their constitutions on it. By contrast Turkey, for example, takes a completely secular approach.

It is crucial to understand that, with regards to the treatment of apostasy and blasphemy, Muslim majority states' practices are far removed from those of the Prophet and His Companions. Iran, for example, considers blasphemy to be a *hadd* offence and punishes it with death, as does Pakistan. However, the Prophet never punished anyone for apostasy or blasphemy *per se*, as was discussed in Chapter 1; he did not consider them to be acts serious enough to merit *hadd* punishment in their own right. Apostasy, by contrast to blasphemy, can be seen in case law only, except in some states in Malaysia and in Brunei, as mentioned earlier. This does not imply that apostasy goes unpunished; this chapter concludes by noting that unwritten and undefined Shari'a law is being used to punish or discourage apostasy in many Muslim majority states.

2.1 Codification of Shari'a and the notion of an Islamic State

The concept of the nation-state is a relatively recent one. Historically, political rulers did not interpret Shari'a, which before the late 19th century was controlled by jurists, not the state. Professor Rosen argues that law and government were separated in Islam:

[I]n the classical Islamic theory of the state, law and government were kept largely separate from one another. The state was seen not as an instrument for the application of law, nor were the courts, either through religious doctrine or a concept of the social good, envisioned as vehicles for economic redistribution or the construction of a particular political order.³¹²

It was Islamic jurists that traditionally controlled and interpreted Shari'a, and this style of Islamic law might keep away from misusing Shari'a by state historically. Joseph Schacht sees Islamic law as “ ‘jurist’s law’, created and developed by private specialists”.³¹³ The vast body of Islamic learning consists entirely of jurists’ work, and not of government statutes. Muslim rulers have historically lacked any *de jure* law-making authority, with the exception of divinely inspired Shi’a Imams; they were obliged to defer to Shari’a, not to legislate.³¹⁴ Believers and jurists thus hold that Islamic law is discovered, not created. Historically it has not been the political rulers but the highly trained religious scholars, the *ulama*, who have interpreted the sources and applied them to new circumstances.

Furthermore, Islamic law is far from standardised across the Muslim world.³¹⁵

Jurists have never been state-appointed; they are based within independent

³¹² Rosen, *The Anthropology of Justice*, p. 61.

³¹³ Joseph Schacht, *An Introduction to Islamic Law* (Oxford : Clarendon Press, 1964), p. 209.

³¹⁴ Ann Elizabeth Mayer, “Islam and the State”, 12 *Cardozo Law Review* (1990), 1015-1056, p. 1022. (Mayer, “Islam and the State”)

³¹⁵ Esmaeili, “The Nature and Development of Law”, p. 356.

institutions³¹⁶ and therefore Islamic law has always been a jurists' law, beyond the control of the state, its governments and rulers.³¹⁷ Therefore, Islamic jurisprudence as we know it today was not produced or developed by any state.³¹⁸

There is one record of an attempt to codify Shari'a in the two centuries following the Prophet.³¹⁹ This record indicates that the sultans tried, but failed, to introduce a centralised codified law which would allow them to use the legitimacy of Islam to exercise authority over discipline and punishment.³²⁰ Frank Vogel describes this attempted codification of Shari'a:

[Ibn al-Muqaffa (d. 140 AH/ 757 CE)] recommended to the caliph that the latter examine all of the conflicting rulings on each issue, select among them, and then codify his choices into a written law. This proposal was defeated, and with it a bid that the ruler – wielding the authority of *siyasa* [political power] with its breadth, flexibility, responsiveness to utility, and, above all, powers of compulsion – should seize control of legislation and thereby replace the ulema [Islamic jurists] and their rigorously individualistic and conscience-based *ijtihad* [independent reasoning].³²¹

This failed codification of Shari'a might indicate that mediaeval scholars believed that Islamic law should be a jurists' law, and that rulers and the state should not be involved. This approach to Shari'a certainly seems to have prevented the adoption of Shari'a by the state. However, this traditional relation between Shari'a and the state has now changed dramatically. In the last century governments across the

³¹⁶ Haider Ala Hamoudi, "The Death of Islamic Law", 38 *Georgia Journal of International and Comparative Law* (2009), 293-337, p. 302.

³¹⁷ Mayer, "Islam and the State", p. 1023.

³¹⁸ Esmaeili, "The Nature and Development of Law", p. 356.

³¹⁹ Eric Winkel, *Islam and the Living Law: the Ibn al-Arabi Approach* (Karachi : Oxford University Press, 1997), p. 30. (Winkel, *Islam and the Living Law*)

One tentative contact between those scholars who would aid the state in codification occurred within two centuries of the death of the Prophet.

³²⁰ *ibid.*

³²¹ Frank E. Vogel, "The Closing of the Door of Ijtihad and the Application of the Law," 10 *American Journal of Islamic Social Sciences* (1993), 396-401, p. 399. (Vogel, "The Closing of the Door of Ijtihad")

Muslim world strove for rapid modernisation by enacting national laws in codified form.³²² Shari'a law, codified and made part of the national legal system, was brought under the control of the state instead of being controlled by the *ulama*, meaning that Muslims without religious training could now have opinions on Shari'a issues. For the first time the authority of the *ulama* was seriously challenged, and it began to decline.³²³ Legal training in Western-style law schools replaced traditional religious education in institutions like al-Azhar as the necessary qualification for work in the legal profession, and borrowings from European law displaced Shari'a law from most areas.³²⁴

The process of codification of Shari'a, which occurred first in British India,³²⁵ has seen the distinctiveness of pre-modern Shari'a, which was a non-state community-based and bottom-up jural system, gradually disappear.³²⁶ This change has had ramifications for the relationship between the state and religion with regard to apostasy and blasphemy issues, and has led to the misuse of Shari'a by rulers. For example, Pakistan has wrongly interpreted and codified what it is to be a 'Muslim'. This example illustrates how Shari'a, which was traditionally interpreted by scholars, is being used by governments in the contemporary Muslim world for their own ends, often in a potentially dangerous way. This situation has attracted criticism. Bassiouni argues that "...their work has been covered by the dust of hundreds of years and has come to be considered as both archaic and inflexible."³²⁷

³²² Mayer, "Islam and the State", pp. 1026-1027.

³²³ Rudolph Peters, "From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified", *Mediterranean Politics*, 7: 3 (2002), 82-95, pp. 94-95. (Peters, "From Jurists' Law to Statute Law").

³²⁴ Mayer, "Islam and the State", p. 1027.

³²⁵ Hallaq, *An Introduction to Islamic Law*, p. 168.

³²⁶ *ibid*, p. 169.

³²⁷ M. Cherif Bassiouni, "Islam: Concept, Law and World Habeas Corpus" 1 *Rutgers Camden Law Journal* (1969), 160-201 p. 177.

The system will remain the same unless the law is allowed to develop and progress, either by the limitations upon the Islamic states being removed through the influence of international society and human rights or by a self-imposed determination to change.³²⁸

The notion of divine sovereignty was produced by creating an Islamic countermodel to the popular sovereignty concept borrowed from Western politics.³²⁹ This Islamic state model sees law and public policy used as instruments of social engineering by the ruling elites as a postcolonial innovation, albeit one based on the European model of the state.³³⁰ The foundation of the first Islamic state was actually in the years after the Prophet; Goldziher notes that it was Caliph ‘Umar who first enacted statutes to clarify the positions of conquered peoples within the state and regulate the economy.³³¹ Although these states did historically rule over Muslims, they were not seen as ‘Islamic states’ as such and therefore they were, and are, obliged to seek Islamic legitimacy in various ways. An-Na’im argues that the notion of the ‘contemporary Islamic state’ is a “dangerous illusion.”³³² He points out that models of the state established by Muhammad in Medina cannot possibly be replicated in the contemporary Islamic world.³³³ Moreover, Muslims lived with a different conception and practice of government until the introduction of the modern state in the nineteenth century.³³⁴ The Islamic state was basically a “federation of Arab tribes” at the time of Muhammad, and remained so right up

³²⁸ *ibid.*

³²⁹ Mayer, “Islam and the State”, p. 1037.

³³⁰ Abdullahi Ahmed An-Na’im, *Islam and the Secular State: Negotiating the Future of Shari’a* (Cambridge, MA: Harvard University Press, 2008), p. 7. (An-Na’im, *Islam and the Secular State*)

³³¹ Ignaz Goldziher, *Introduction to Islamic theology and law*, translated by Andras and Ruth Hamori ; with an introd. and additional notes by Bernard Lewis (Princeton, N.J: Princeton University Press, 1981), p. 32.

³³² An-Na’im, *Islam and the Secular State*, p. 6.

³³³ *ibid.*, p. 106.

³³⁴ Hallaq, *An Introduction to Islamic Law*, p. 7.

until the end of the Umayyad period.³³⁵ This is shown in documents preserved by Ibn Hisham and known as ‘the Constitution of Medina’; the primary parties to the agreement were eight clans of Medina Arabs and the clan of the Emigrants of Quraysh of Mecca.³³⁶ Therefore, Islamic states in the Prophet’s time were hugely different from modern states, and it is hard to draw lessons from them that can be made applicable to Islamic states today.

The so-called ‘Islamic state’ in modern times is actually an un-Islamic notion. Firstly, the fact is that the state is not a religious institution but a political one, as An-Na’im points out.³³⁷ The state is merely a means via which Islam can be promulgated; its ruler is under Shari’a, not above it. The Qur’an places responsibility for governance with the community (*umma*), not with individuals or specific groups of people, as a true Islamic state is not elitist.³³⁸ The community must make decisions communally.³³⁹ The coercion of Shari’a by the state is therefore against the practice of the Rightly-Guided Caliphs. The commander under ‘Umar, Suwayd b. Muqarrin, wrote to the ruler of Jurjan, a province in Iran, to assure him that he would protect “their persons, their possessions, and their religion and laws....”³⁴⁰

However, the contemporary notion of the ‘Islamic state’ creates a tension that was much less salient in the constitutional thought of the classical period. This conflict

³³⁵ W. Montgomery Watt, *The Majesty that was Islam: the Islamic World, 661-1100* (London : Sidgwick and Jackson, 1974), p. 44.

³³⁶ *ibid.*, p. 45.

³³⁷ An-Na’im, *Islam and the Secular State*, p.2.

³³⁸ Mahmood Monshipour, “The Muslim World Half a Century after the Universal Declaration of Human Rights: Progress and Obstacles”, 16 *Netherlands Quarterly of Human Rights* (1998), 287-314,p. 289.

³³⁹ *ibid.*.

³⁴⁰ Muḥammad ibn Jarīr al-Tabari, *The History of al-Tabari, vol. 14: The Conquest of Iran A.D. 641-643/A.H. 21-23*, translated and annotated by G. Rex Smith (New York: State University of New York Press, 1994), pp. 29-30 (*Al-Tabari, The History of al-Tabari*).

is the potential opposition between ‘divine law’ and ‘human law’, as will be discussed in the next chapter. The jurists behind the classical constitution were well aware of the existence of human law. Indeed, the formal structure of their constitutional theory was that the Shari’a allowed these other types of law. In this way, by allowing for a plurality of legal systems, these scholars also conceded their power over the fundamental law that authorised all other types of law.³⁴¹ Therefore, a new situation gradually emerged which saw the scholars disappear from Islamic institutions; essentially, “Shari’a without the scholars”.³⁴² Feldman has succinctly defined the difference: “The old Islamic state was rendered Islamic by the scholars and on their account. The new Islamic state is Islamic despite the scholars’ absence from its institutions.”³⁴³

The concept of the state in Islamic legal theory was based on the “theory of a universal state”, as applied in ancient Rome and mediaeval Christendom. The state and government were therefore seen as “a single, unified political community of believers, known as *umma*.”³⁴⁴ Sultan Hussein Tabandeh who is an Iranian Shiite leader of the Ne’ematullahi Sultanalishahi Sufi Order held that religion and politics cannot be separated in Islam, and that therefore the government and the state’s official religion cannot be detached from each other.³⁴⁵ The Islamic polity were governed by principles laid down by their deity, and were organised as a divine nomocracy.³⁴⁶ Conflict of secular and religious law in premodern Islamic culture

³⁴¹ Feldman, *The Fall and Rise of the Islamic State*, pp. 12-13.

³⁴² *ibid*, p. 117.

³⁴³ *ibid*.

³⁴⁴ Majid Khadduri, “Islam and the Modern Law of Nations”, 50 *The American Journal of International Law* (1956), 358-372, p. 358. (Khadduri, “Islam and the Modern Law of Nations”)

³⁴⁵ Sultanhussein Tabandeh, *A Muslim Commentary on the Universal Declaration of Human Rights* (London:Goulding & Co, 1970), p. 71.

³⁴⁶ Mayer, “Islam and the State”, p. 1022.

was next to impossible, because ‘law’ was conceived as coming from God in the form of Shari’a.³⁴⁷ Thus, the concept of nation-state as we understand it today in the West does not exist in Islamic jurisprudence.³⁴⁸

To sum up, the codification of Shari’a is a relatively new development; previously Shari’a was interpreted by jurists, not controlled by the state. Recent attempts to codify Shari’a regarding apostasy and blasphemy reveal the conflict between religious and political institutions. The next section examines how the often ambiguous and undefined principles of Shari’a have affected apostasy and blasphemy cases in Muslim majority states.

2.2 The position of Shari’a, apostasy and blasphemy in Muslim majority states

Let us now examine how a number of Arab countries have approached the question of whether apostasy is a crime and if so, how it should be punished. Apostasy law varies considerably throughout the Muslim world. The most striking thing is that most Muslim majority states are silent regarding any punishment for apostasy. Moreover, in some states which have codified apostasy law it is never applied. Some Muslim majority states which have not codified apostasy as a crime still class apostasy as a *hudud* offence. For example, Yemeni Courts have never applied penalties to apostasy in practise despite the fact it is included in their penal code, but Article 12 of the Yemeni Penal Code states that apostasy shall be treated as a

³⁴⁷ *ibid.*

³⁴⁸ Khadduri, “Islam and the Modern Law of Nations”, p. 358.

hudud offence.³⁴⁹ Qatar’s Law 11 of 2004 incorporated apostasy law, and classed apostasy as one of the *hudud* offences. Furthermore, Article 257 of the Qatari Penal Code criminalises proselytizing; punishments range up to seven years’ imprisonment.³⁵⁰ However, it is worth noting that no punishments for apostasy have been recorded since independence in 1971.³⁵¹ The United Arab Emirates (UAE) has not explicitly codified apostasy as a crime, but Article 1 of its Penal Code (1987) states that “Provisions of the Islamic Law shall apply to the crimes of doctrinal punishment...” However, as with Qatar, there have been no apostasy cases reported in the UAE.³⁵²

There have however been punishments for apostasy in some other Muslim majority states. Mauritania has issued its first death sentence for apostasy. In 2013 a blogger named Mohamed Cheikh Ould M’khaitir published an article on the *Aqlame* news website entitled “Religion, Religiosity and Craftsmen”. The article compared the issue of marginalisation to the Prophet’s treatment of Jews and allegedly questioned some of his decisions. The website quickly removed the article for this supposed blasphemy and on 2nd January 2014 Mohamed was arrested and charged with

³⁴⁹ Yemen: Republican Decree, By Law No. 12 for 1994, Concerning Crimes and Penalties (1994), <<http://www.refworld.org/docid/3fec62f17.html>> accessed 27 June 2016.

³⁵⁰ Article 257 of the Qatari Penal Code,
Whoever establishes, organizes or runs an assembly, association, organization or a branch aimed at opposing or challenging the basics and tenets of Islam, or calls upon, or favors or promotes another religion; cult or concept shall be punished with imprisonment for a term not exceeding ten years.

³⁵¹ The US Department of State, *International Religious Freedom Report for 2014: Qatar*, <<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2014&dliid=238474#wrapper>> accessed 27 June 2016.

³⁵² The US Department of State, *International Religious Freedom Report for 2014: the UAE*, <<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2014&dliid=238474#wrapper>> accessed 27 June 2016.

apostasy.³⁵³ The prosecution sought the death penalty under Article 306 of the Mauritanian Penal Code, which states that

[e]very Muslim guilty of the crime of apostasy, either by word or by action of apparent or obvious, will be invited to repent within three days. If the accused does not repent within this time, he is to be sentenced to death, and all of his property shall be confiscated by the government.

Although Mohamed denied the accusations of apostasy the Court of Nouadhibou found him guilty and sentenced him to death, agreeing with the prosecution's charge that the article spoke "lightly of the Prophet Mohammed." During sentencing the court reemphasized that the country's laws allow for the death penalty for "any Muslim man or woman who abandon Islam openly or through acts or statements."³⁵⁴ As of June 2016, the defendant is appealing the sentence.

Another recent apostasy case comes from Sudan. In 2014 Meriam Yahia Ibrahim Ishag, a Sudanese woman whose father is Muslim and mother Christian, was sentenced to death for apostasy under Article 126 of the Sudan Criminal Act (1991) by a court in Khartoum for marrying a Christian man.³⁵⁵ Although she claimed that she was raised as a Christian because her father left her family when she was six, Sudan's version of Islamic law meant that as her father's religion was Islam she too

³⁵³ Columbia University, "Global Freedom of Expression", <<https://globalfreedomofexpression.columbia.edu/cases/the-case-of-mauritanian-blogger-mohamed-cheikh-ould-mkhaitir/>> accessed 27 June 2016.

³⁵⁴ *ibid.*

³⁵⁵ The US Department of State, "International Religious Freedom Report for 2014: Sudan", <<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2014&dliid=238474#wrapper>> accessed 27 June 2016; Harriet Alexander, "Sudan apostasy case: Meriam Ibrahim's marriage certificate shown to disprove adultery charges", *The Telegraph* (31 May 2014), <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/sudan/10867187/Sudan-apostasy-case-Meriam-Ibrahims-marriage-certificate-shown-to-disprove-adultery-charges.html>> accessed 27 June 2016. Sudan: The criminal Act (1991) Art 126 in "Sudan: The Criminal Act 1991"9 *Arab Law Quarterly* (1994), 32-80, p. 64.

was still technically a Muslim.³⁵⁶ Consequently, the appeal court ordered her release and cancelled the death penalty.³⁵⁷

The following section focuses on seven Muslim majority states, chosen to highlight the variation in the application of apostasy and blasphemy law and the position of Shari'a. Perhaps the most striking fact to note is that in these states there is no common application of apostasy law, and furthermore that the governments or higher courts do not attempt to punish apostates. Many guilty judgements in so-called apostasy cases or even blasphemy cases are overturned by higher or supreme courts. As there are so few contemporary apostasy cases, drawing general conclusions regarding the criminalisation of apostasy is problematic.

2.2.1 Afghanistan

Afghanistan is an apt example of how Shari'a, in the form of an Islamic Penal Code, can be incorporated into state legislation, and of how it deals with certain crimes. Afghanistan recognises the concept of traditional Islamic criminal law, and as such any punishment follows this traditional understanding. Article 1 of the Afghan Penal Code (1976) states as follows:

This Law regulates the "Tazeeri" [*ta'zir*] crime and penalties. Those committing crimes of "Hodod" [*hudud*], "Qassass" [*qisas*] and "Diat" [*diya*] shall be punished in accordance with the provisions of Islamic religious law (the Hanafi religious jurisprudence).

Although the Afghan Penal Code recognises *zina* (adultery) as a *hadd* offence, apostasy and blasphemy are not included, i.e. the Islamic laws on apostasy and

³⁵⁶ "Sudan apostasy woman Mariam Ibrahim 'to campaign'", *BBC News* (28 September 2014), <<http://www.bbc.co.uk/news/world-us-canada-29399209>> accessed 27 June 2016.

³⁵⁷ "Court frees death row Sudanese woman but rearrested with family", *Sudan News.Net* (25 June 2014), <<http://www.sudannews.net/index.php/sid/223221431>> accessed 27 June 2016.

blasphemy have not been incorporated. However, un-codified apostasy law has deeply affected the Afghan approach to apostasy and blasphemy, as many cases show. Afghan tries to punish apostates by making reference to Shari'a.

Position of Shari'a

Many Muslim majority states are deeply influenced by traditional apostasy and blasphemy laws, and Afghanistan is one such state. Its population is about 99% Muslim, of which 84% are Sunni and 15% Shiite.³⁵⁸ Articles 1 and 2(1) of the Afghan constitution (2004) declare the country to be an Islamic state and the state religion to be Islam:

Afghanistan shall be an Islamic Republic, independent, unitary and indivisible state. (Articles 1)

The religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam. (Article 2(1))

The Islamic state approach employed by Afghanistan gives great power and privilege to Islam, and its position as state religion has greatly affected the country's legislation. For example, in Article 3 the constitution forbids the legislature from passing laws that violate Islam's core beliefs. This is the so-called Islamic "repugnancy clause" that provides "no law can be contrary to the sacred religion of Islam and the values of this Constitution"; this article gives Islam special status. Feldman has called this the "*constitutionalization* of the Shari'a".³⁵⁹ Article 3 serves to emphasise that the constitution recognises the importance of religious values in Afghan legislation. Repugnancy clauses are far from being a new

³⁵⁸ World Population Statistics, "Afghanistan Population 2015," (5 December 2015), <<http://www.worldpopulationstatistics.com/afghanistan-population/>> accessed 27 June 2016.

³⁵⁹ Feldman, *The Fall and Rise of the Islamic State*, p. 12.

development in Afghan law, as all the country's constitutions apart from the 1980 version have contained such a clause. Crucially however, the contemporary version neglects to define the 'beliefs and provisions of the sacred religion of Islam' or what the expression 'Islamic republican state' means.³⁶⁰

The 'special status of Islam' approach is seen again in Article 130, which states that in cases where the constitution or other laws do not provide for their prosecution or investigation, the courts shall use Hanafi Islamic jurisprudence to guide them.³⁶¹ Moreover, it's worth noting that as well as recognising Hanafi law, in Article 131 the Afghan Constitution recognises Shia law too.

With regard to criminal law, Shari'a also influences Afghan legal practice in other ways. For example, Afghanistan has incorporated the key concepts of the Islamic Penal Code, namely '*hudud*', *ta'zir* and '*qisas*'. Article 1 of the Afghan Penal Code (1976) states as follows:

This Law regulates the "Tazeeri" [*Ta'zir*] crime and penalties. Those committing crimes of "Hodod", "Qassass" and "Diat" shall be punished in accordance with the provisions of Islamic religious law (the Hanafi religious jurisprudence).

The implication of this article is that the penal code, or 'Tazeeri' law, can only be applied if the conditions for applying Islamic religious law are *not* met. However, while the 1976 Penal Code specifically mentions other offences which potentially carry *hadd* penalties, such as *zina* (adultery),³⁶² apostasy is not a crime in the Code.

³⁶⁰ Nadjma Yassari and Mohammad Hamid Saboory, "Sharia and national law in Afghanistan", Jan Michiel Otto, ed., *Sharia Incorporated: A Comparative overview of the legal systems of twelve Muslim countries in past and present* (Amsterdam: Leiden University Press, 2010), p. 298.

³⁶¹ Tawfik, "The Concept of Crime in the Afghan Criminal Justice System," 678.

³⁶² Article 427 of the Afghani Penal Code (1976) states that:

"(1) A person who commits adultery or pederasty shall be sentenced to long imprisonment".

In other words, Afghanistan does not consider apostasy to be a *hadd* offence. In the Abdul Rahman case (2006), therefore, the courts made use of Article 130 of the constitution, which as mentioned earlier allows the use of *Hanafi* jurisprudence, under Islamic Shari'a law, to examine cases where there is no codified law.³⁶³

Apostasy and blasphemy in Afghanistan

Shari'a has greatly influenced the approaches to apostasy and blasphemy in Afghanistan. There have been a number of controversial cases in the country, for example the apostasy case of Christian convert Abdul Rahman (2006) and the case of Ghaus Zalmai (2007), who was charged with an inaccurate and un-Islamic translation of several verses of the Qur'an.³⁶⁴ Another example is the 2007 case of Sayed Pervez Kambaksh, a 22-year-old journalism student convicted of "blasphemy and distribution of texts defamatory of Islam".³⁶⁵ His 'crime' was to download "blasphemous writings from the Internet" and distribute them to other students.³⁶⁶ Similarly, Shoaib Assadullah was arrested in 2010 for giving a Bible to a friend;³⁶⁷ the judge asked him to renounce or be sentenced to capital punishment for apostasy.³⁶⁸ He was finally freed after six months in prison.³⁶⁹

³⁶³ Tawfik, "The Concept of Crime in the Afghan Criminal Justice System", p. 674.

³⁶⁴ United States Department of State, *2008 Report on International Religious Freedom – Afghanistan* (2008), <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=48d5cbf4c>> accessed 27 June 2016.

³⁶⁵ AFGHANISTAN: Journalist Serving 20 Years for "Blasphemy" *IPS News Agency* (21st Oct 2008), <<http://www.ipsnews.net/2008/10/afghanistan-journalist-serving-20-years-for-blasphemy/>> accessed 27 June 2016.

³⁶⁶ Paul Wiseman, "Afghan student's death sentence hits nerve" *USA Today* (31st January 2008), <http://usatoday30.usatoday.com/news/world/2008-01-31-Afghanstudent_N.htm> accessed 27 June 2016.

³⁶⁷ Maria Abi-Habib, "U.S. Lobbies Afghanistan to Release Christian Converts", *The Wall Street Journal* (27 January 2011), <<http://www.wsj.com/articles/SB10001424052748704062604576105682253951862>> accessed 27 June 2016.

³⁶⁸ U.S. Commission on International Religious Freedom 2012 Annual Report: Afghanistan , p. 7, <<http://www.uscirf.gov/sites/default/files/resources/2012ARChapters/afghanistan%202012.pdf>> accessed 27 June 2016.

³⁶⁹ *ibid.*

It would be difficult to argue that religious freedom is truly recognised in Afghanistan. Although Article 2 of the constitution guarantees freedom of religion, this freedom is within certain unspecified limits:

...followers of other religions [than Islam] are free to exercise their faith and perform their religious rites within the limits of the provisions of law.

The right to practise a religion is thus dependent upon “provisions of law”, which in effect means Shari’a law. Ordinary legislation can considerably limit or over-ride people’s rights, as so much of the constitution is subject to these provisions. The unclear limitations to religious freedom outlined in the Afghan constitution have been criticised by various parties. For example, the United States Commission on International Religious Freedom (USCIRF) states in its 2013 report on Afghanistan that

...the constitution does not explicitly protect the right to freedom of religion or belief for every Afghan, and provides that fundamental rights can be superseded by ordinary legislation.³⁷⁰

The treatment of apostasy and blasphemy in Afghanistan is thus largely based on the Constitution, particularly Article 130. This article is used to enable Shari’a law to deal with certain issues which are not specifically legislated against in the Penal Code (1976) and are thus technically not criminalised.³⁷¹ Qamaruddin Shenwari, a director in Kabul’s court system, notes as follows:

According to Afghanistan’s constitution, if there is no clear verdict as to whether an act is criminal or not in the penal code of the Afghan Constitution, then it

³⁷⁰ United States Commission on International Religious Freedom, *USCIRF Annual Report 2013 - Tier 2: Afghanistan*, (30 April 2013), <<http://www.refworld.org/docid/51826ef1b.html>> accessed 27 June 2016.

³⁷¹ Tawfik, “The Concept of Crime in the Afghan Criminal Justice System,” p. 674.

would be referred to shari'a law, where the judge has an open hand in reaching a verdict.³⁷²

This un-codified treatment of apostasy profoundly affected the high-profile case of Abdul Rahman. Using Article 130 the Afghan authorities arrested Rahman in 2006 and charged him with conversion from Islam to Christianity.³⁷³ Although punishment for apostasy is not codified, many scholars in Afghanistan believe that apostasy is a punishable offence. As detailed in the *Heday*, a Hanafi law textbook, the position Rahman found himself in offered only two possible outcomes. This authoritative work categorically declares that an apostate can only return to Islam or face capital punishment:

In the opinion of the two disciples, on the other hand, the acts of an apostate are valid, and therefore his commission of agency is not annulled, unless in case of his dying, or being put to death, or being expatriated, by a decree of the Kazeer [*qadi*].³⁷⁴

Under *Hanafi* jurisprudence, apostasy is treated as a punishable crime for which the sentence is the death penalty. This traditional approach follows the view of the majority of the Afghan people, who see apostasy as the rejection of Islam and as a crime according to Islamic law, that is, the Shari'a.³⁷⁵

This Hanafi approach has influenced not only scholars but also court decisions. Ahmad Shah Ahmadzai is a prominent *mujahideen* leader and head of

³⁷² CNN, Matiullah Mati, "Afghan Christian Faces Trial for Alleged Conversion from Islam" *CNN* (21st November 2010), <<http://religion.blogs.cnn.com/2010/11/21/afghan-christian-faces-trial-for-alleged-conversion-from-islam/>> accessed 27 June 2016.

³⁷³ The Special Rapporteur. *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Report of the Special Rapporteur on Freedom of Religion or Belief*, ¶ 4, delivered to the General Assembly, U.N. Doc. AJHRC/4/21/Add.1 (Mar. 8, 2007)

³⁷⁴ Ali Marghinani, *The Heday*, p. 398.

³⁷⁵ Tawfik, "The Concept of Crime in the Afghan Criminal Justice System", p. 678.

Hizb-i-Iqtadar-i-Islami, a local religious establishment in Afghanistan, and was prime minister from 1992 to 1996, when the Taliban came to power. Regarding the Abdul Rahman case, he notes

Regardless of the court decision [whether or not he is hanged], there is unanimous agreement by all religious scholars from the north to the south, the east to the west of Afghanistan, that Abdul Rahman should be executed.³⁷⁶

Furthermore, although apostasy is not codified as a crime by the Afghan Penal Code, even judges consider it to be a crime. The chief judge in the case, Alhaj Ansarullah Mawlawy Zada, noted as follows:

The Attorney General is emphasizing he should be hung. It is a crime to convert to Christianity from Islam. He is teasing and insulting his family by converting....We are not against any particular religion in the world. But in Afghanistan, this sort of thing is against the law. It is an attack on Islam.³⁷⁷

The judge was clearly using the term ‘attack on Islam’ in a very different way from that in which it was used in the Prophet’s day, when crimes treated as apostasy were accompanied by actual physical and armed attacks on Islamic society. Although the prosecutor, Abdul Wasi, indicated he would drop the charges if Rahman reconverted, Rahman refused:

He would be forgiven if he changed back, but he said he was a Christian and would always remain one....We are Muslims and becoming a Christian is against our laws. He must get the death penalty.³⁷⁸

The court however did not seek to try him for his ‘crime’ of apostasy, instead viewing the case as an act of rebellion and a security issue. They therefore treated

³⁷⁶ Syed Saleem Shahzad, “Losing faith in Afghanistan”, (25 March 2006),

<http://www.atimes.com/atimes/South_Asia/HC25Df02.html> accessed 27 June 2016.

³⁷⁷ B.A. Robinson, “Apostasy in Islam The case of Abdul Rahman, an Afghan Christian”, *Religious Tolerance* (20th Mar 2006), <http://www.religioustolerance.org/isl_apos1.htm> accessed 27 June 2016.

³⁷⁸ Tim Albone, “Anger over Christian convert in Kabul who faces death”, *The Times* (21st March 2006), <<http://www.thetimes.co.uk/tto/news/world/article1983787.ece>> accessed 27 June 2016.

Rahman's actions as punishable by death under Article 204 of the 1976 Afghan Penal Code,³⁷⁹ which states that "One who by using force tries to overthrow the Republican regime of Afghanistan shall be sentenced to death." However, there is no evidence that Rahman ever endangered the security of society or its people. Rahman never attempted to physically attack the Muslim community; he merely possessed a Bible.³⁸⁰ President Karzai finally declared that Rahman's conversion proved his mental instability, and despite opposition from certain MPs and Muslim clergymen³⁸¹ he was acquitted on a "technicality about his mental condition"³⁸² and then spirited out of Afghanistan to asylum in Italy.³⁸³

A similar apostasy case was that of Said Musa, who converted to Christianity from Islam. Musa, a former Red Cross worker, faced execution for his conversion but was eventually released after nine months in jail.³⁸⁴ Although both Abdul Rahman and Said Musa were released, these cases indicate that apostasy is treated as a serious offence in Afghanistan, albeit an unwritten one. Although as yet there have not been any executions for apostasy, attempts have been made to punish apostates

³⁷⁹ Tawfik, "The Concept of Crime in the Afghan Criminal Justice System", pp. 671-672.

³⁸⁰ The Special Rapporteur. *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Report of the Special Rapporteur on Freedom of Religion or Belief*, ¶ 4, delivered to the General Assembly, U.N. Doc. AJHRC/4/21/Add.1 (Mar. 8, 2007),

³⁸¹ Elisabetta Povoledo, "Afghan Christian Convert Granted Asylum in Italy", *The New York Times* (29 Mar, 2006), <http://www.nytimes.com/2006/03/29/international/asia/29cnd-afghan.html?_r=3&oref=slogin&> accessed 27 June 2016.

³⁸² Ron Synovitz, "Afghanistan: HRW Still Concerned About Apostasy Law", *Radio Free Europe/Radio Liberty* (29th March, 2006), <<http://www.rferl.org/content/article/1067197.html>> accessed 27 June 2016.

³⁸³ Thomas J. Barfield, "Shari'a in Afghanistan", 10 *The Review of Faith & International Affairs* (2012), p. 50.

³⁸⁴ Ethan Cole, "Global Evangelical Body: Execution Trial of Afghan Convert Illegal" *The Christian Post* (13rd February 2011), <<http://www.christianpost.com/news/global-evangelical-body-execution-trial-of-afghan-convert-illegal-48960/>> accessed 27 June 2016.

under other laws. This clearly contradicts the approaches of the Prophet, his Companions and the Qur'an, none of which sought to punish apostates.

The Afghan Penal Code also lacks any written provision allowing for the imposition of the death penalty for blasphemy. Indeed, there is “nothing in the penal code related to the spoken or written utterance of insults or profanity against God, religion, sacred symbols, or religious books”,³⁸⁵ and the word ‘blasphemy’ is completely absent from the code. Nevertheless, Article 347 does allow for a punishment of “medium imprisonment and/or cash fine” for someone who “forcefully and with aversion disturbs or stops the conduct of religious rituals or rites of any religion” or who “destroys or damages the permitted places of worship where religious rituals of one of the religions are conducted, or destroys or damages any other sign or symbols respectable to followers of any religion”. Moreover, the Afghan Mass Media Law, Article 45(1), forbids mass media publication of any materials deemed to be contrary to Islam’s “principles and provisions”.³⁸⁶

There have been a number of prominent blasphemy cases in Afghanistan, some of which have attracted heavy penalties. Sayed Pervez Kambaksh was accused in 2007 of “blasphemy and distribution of texts defamatory of Islam”³⁸⁷ and was sentenced to death by a local Shari’a-based court.³⁸⁸ Although his sentence was later commuted by an Afghan appeals court³⁸⁹ and the Supreme Court upheld that

³⁸⁵ The US International Religious Freedom Report 2009; Afghanistan, <<http://www.state.gov/j/drl/rls/irf/2009/127362.htm>> accessed 27 June 2016.

³⁸⁶ United States Department of State, *2008 Report on International Religious Freedom - Afghanistan*, (19 September 2008), <www.refworld.org/cgi-bin/tehis/vtx/rwmain?docid=48d5cbf4c> accessed 27 June 2016. (US Department of State, *2008 Report*).

³⁸⁷ Zainab Mineeia, “AFGHANISTAN: Journalist Serving 20 Years for “Blasphemy” *IPS* (21st Oct 2008), <<http://www.ipsnews.net/2008/10/afghanistan-journalist-serving-20-years-for-blasphemy/>> accessed 27 June 2016. (Mineeia, “AFGHANISTAN”)

³⁸⁸ US Department of State, *2008 Report*.

³⁸⁹ Mineeia, “AFGHANISTAN”.

decision,³⁹⁰ he was still sentenced to 20 years in prison under Article 347 of the Penal Code, which as mentioned above prohibits destruction or damage to any religious signs or symbols. Another well-known Afghan blasphemy case is that of Ghaus Zalmi. In 2007 Zalmi, an ex-journalist, was sentenced to 20 years in prison for blasphemy by a Kabul Court³⁹¹ because of his supposedly “un-Islamic” interpretation of the Qur’an in a Dari translation he had written.³⁹²

These cases have highlighted many issues arising from Afghanistan’s traditional Shari’a approach to apostasy and blasphemy, one of which is the relation between the country’s constitution and its other laws. Afghanistan’s constitution is not the supreme legal document in all instances; it does not, for example, absolutely guarantee individual human rights. As noted earlier, the constitution permits ordinary legislation to abrogate or over-rule the fundamental right to freedom of religion.

2.2.2 Malaysia

Malaysia’s religious demography makes it a useful example in trying to understand how different countries deal with contemporary apostasy and blasphemy issues. Unlike Afghanistan, which has an almost exclusively Muslim population, Malaysia is a multi-religious country; although Muslims comprise about 60% of its

³⁹⁰ Abdul Waheed Wafa and Carlotta Gall, “Afghan Court Backs Prison Term for Blasphemy” (12 March 2009), <http://www.nytimes.com/2009/03/12/world/asia/12afghan.html?_r=2&ref=world&> accessed 27 June 2016.

³⁹¹ Reporters Without Borders, “President asked to intercede in case of ex-journalist sentenced to 20 years in prison for publishing translation of Koran”, (12 September 2008), available at: <<http://www.refworld.org/docid/48cf5d0c1e.html>> accessed 27 June 2016.

³⁹² US Department of State, *2008 Report*.

population, it has sizeable numbers of Christians and Buddhists.³⁹³ Wu Min Aun notes that “Malaysia is neither a secular nor theocratic state but a hybrid state with Islam as the official religion”.³⁹⁴

Malaysia has not declared itself to be an Islamic state. It has a secular constitution and Shari’a has not been codified or incorporated into the constitution at federal level. However, the traditional Shari’a approach to apostasy can be seen in various court decisions and some states have apostasy laws, although notably only apostasy against Islam is considered a crime in these states. Thus, despite the country’s multi-ethnic, multi-religious make-up, both case law and state laws in Malaysia illustrate the limits on religious freedom imposed by the state, and serve to underline the problematic nature of the issue of apostasy in the country.

Position of Shari’a

As stated above the Malaysian constitution does not base itself on Shari’a and does not declare the nation to be an ‘Islamic state’; unlike in Afghanistan, Iran and Pakistan, there is no Shari’a repugnancy clause. Article 3(1) of Malaysia’s constitution (1957) states that “Islam is the Religion of the Federation.” The meaning of this article was expanded upon by the Supreme Court in *Che Omar Che Soh v. Public Prosecutor* (1988),³⁹⁵ in which Lord President Salleh Ahas gave the Supreme Court’s position on Article 3(1):

³⁹³ CIA, “The World Factbook” (2010),

<<https://www.cia.gov/library/publications/the-world-factbook/geos/my.html>> accessed 27 June 2016.

³⁹⁴ Wu Min Aun, *The Malaysian Legal System* 3rd ed (Petaling Jaya, Selangor Darul Ehsan : Longman Malaysia, 2005), p. 190. (Aun, *The Malaysian Legal System*)

³⁹⁵ *Che Omar bin Che Soh v. Public Prosecutor*, 2 M. L.J. 56 (1988).

...the term “Islam” or “Islamic religion” in Article 3 of the Federal Constitution in the context means only such acts as relate to rituals and ceremonies...³⁹⁶

The court emphasised the secular position of the law, and moreover stated that during the British colonial era Islamic law “[w]as rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only”.³⁹⁷ The court decided that it was in this sense that the word ‘Islam’ had been used in Article 3(1) and in the constitution, and therefore that it affected only personal laws applicable to Muslims. The Federal Constitution clearly states that Islamic law is a State List matter, that is, it lies under the jurisdiction of the State, not Federal, Legislature. In this sense, therefore, Shari’a is not incorporated into the Malaysian Constitution. Nominally, Islamic law applies only to Muslims and to those issues detailed in the Federal Constitution’s State List, such as “matrimonial law, charitable endowments (*‘awqaf*), bequests and inheritance”.³⁹⁸ This approach was noted by the *Reid Commission Reports* (1957) which recommended that Islam become Malaysia’s official constitutional religion but that this should not affect non-Muslims’ right to practise their religion.³⁹⁹ The Report noted that

We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be the State religion. There was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims. In the memorandum submitted by the Alliance it was stated the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on

³⁹⁶ *ibid.*

³⁹⁷ *ibid.*

³⁹⁸ Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: a Comparative Study* (London: British Institute of International and Comparative Law, 2008), p. 49. (Abiad, *Sharia*)

³⁹⁹ Aun, *The Malaysian Legal System*, p. 181.

non Muslim nationals professing and practising their own religions and shall not imply that the State is not a secular State.⁴⁰⁰

During a debate in the Federal Legislative Council the first Prime Minister of Malaysia, Tunku Abdul Rahman, reiterated the above:

I would like to make it clear that this country is not an Islamic State as it is generally understood, we merely provide that Islam shall be the official religion of the State.⁴⁰¹

For most of Malaysia's history much of the interaction between Islam and the state was for ceremonial or ritual purposes. However, in recent years Islam's wider role has become a topic of much debate. As will be discussed later, the high profile *Lina Joy* case (2005) indicated that Islam impacts the entire legal system in Malaysia. The previously understood position as outlined in *Che Omar bin Che Soh v. Public Prosecutor* (1988), namely that Muslim law was "rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only"⁴⁰², was rejected in *Lina Joy*, which implied that Islam was not only the ceremonial religion but the state religion too.⁴⁰³

The Malaysian Constitution affords Islam special status. Article 3(5) states "Parliament may by law make provisions for regulating Islamic religious affairs"; these measures thus give Islam a position within the country not shared by other religions. Marican and Adil argue that although this particular clause seemingly implies a limit to Islam's position in Malaysia, it nevertheless serves as a subtle

⁴⁰⁰ Report of the Federation of Malaya Constitutional Commission 1957 (London: Her Majesty's Stationery Office Eight Shillings Net, Colonial No. 330), p. 75 paragraph 169.

⁴⁰¹ Aun, *The Malaysian Legal System*, p. 189.

⁴⁰² *Che Omar bin Che Soh v. Public Prosecutor*; 2 M. L.J. 56 (1988).

⁴⁰³ *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors* [2004] 2 MLJ 144. (HighCourt). (*Lina Joy v Majlis Agama Islam* 2004)

reminder that Islam is first amongst equals and that the state is obliged to “protect, defend and promote Islam in the country”.⁴⁰⁴

Moreover, there is another constitutional article that further supports the privileged status of Islam in Malaysia. Article 160 (2) of the Constitution states that “Malay means a person who professes the religion of Islam.....” By constitutional definition therefore, Malays are Muslims. Aun notes that “this peculiar identification of ethnicity and religion is indeed advantageous for the religion although it also tends to inhibit integration between Malays and other ethnic groups, namely the Chinese and the Indians”.⁴⁰⁵ Despite Shari’a being uncodified in Malaysia, this special status of Islam can affect the legal system and by extension the treatment of apostasy cases in the country.

The privileged position of Islam in Malaysia can be seen in its treatment of apostasy and blasphemy. On one level, the law does seem to treat all religions equally. Article 8(2) of the constitution notes that

Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion,

Although the constitution prohibits religious discrimination, religious freedom is subject to some exceptions. The country’s commitment to religious freedom is declared in Article 11(1) of the Federal Constitution, which states that “Every person has the right to profess and practice his religion....”⁴⁰⁶ Although the terms

⁴⁰⁴ Pawancheek Marican and Mohamed Azam Mohamed Adil, “Apostasy and Freedom of Religion in Malaysia: Constitutional Implications”, 11 *Yearbook of Islamic and Middle Eastern Law* (2004), 169–203, p.177.

⁴⁰⁵ Aun, *The Malaysian Legal System* p. 189.

⁴⁰⁶ *ibid*, Art 11(1).

‘profess’ and ‘practice’ are not defined in this article, judges have sought to explain them, for example in *Re Mohamed Said Nabi, Deceased* (1965):

Now what is the meaning attached to the word “profess”. According to the Shorter Oxford Dictionary, “profess” means: to affirm, or declare one’s faith in or allegiance to (a religion, principle, God or saint etc.).⁴⁰⁷

Wu Min Aun has explained the difference between the two terms by noting that professing a religion “indicates that he or she declares faith or belief or allegiance to that religion. This is not necessarily the same as “practising” that religion given that there are people who “profess” a religion by say declaring themselves to be of a particular religious persuasion without adhering strictly to its practice.”⁴⁰⁸ Although Article 11(1) allows a citizen to practice and profess a religion, it continues by stating that propagation is subject to Clause 4 of the same article:

State law and in respect of the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

This clause means that although non-Muslims can freely practise their religions and proselytise, they may not seek to convert Muslims as such propagation is forbidden by state and federal laws.⁴⁰⁹ Some scholars believe that this restriction on propagation of religions other than Islam shows that Islam has privileged status in Malaysia. The US International Religious Freedom Report for 2012 states as follows:

The law strictly forbids proselytizing of Muslims by non-Muslims, but allows and supports Muslims proselytizing others. Muslims who wish to convert from

⁴⁰⁷ *Re Mohamed Said Nabi, Deceased* [1965] 31 MLJ 122.

⁴⁰⁸ Aun, *The Malaysian legal system*, p. 193.

⁴⁰⁹ *ibid*, 182.

Islam face tremendous obstacles because neither the right to leave Islam nor the legal process of conversion is clearly defined in law.⁴¹⁰

The Malaysian government's argument for severely restricting proselytising of Muslims by non-Muslims is that it protects people's rights, for which read Muslims' rights. The government argues however that the prohibition does not restrict Muslims from changing their religion.⁴¹¹

However, it is clear that the religion of Islam is treated differently to other religions in Malaysian legislation, whether under the constitution or in case law. For example, with regards to propagation, Islam is treated differently to other religions. Article 5 of the *Syariah Criminal Offences (Federal Territories) Act 1997* states as follows:

Any person who propagates religious doctrine or beliefs other than the religious doctrine or beliefs of the religion of Islam among persons professing the Islamic faith shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

Many people would interpret the term 'freedom of religion' as including the right to propagate their religion; if so, the above article implies that non-Muslims' freedom of religion is restricted in Malaysia, such as by Terengganu's Control and Restriction of the Propagation of Non-Islamic Religious Enactment 1980.⁴¹²

Religious practice in Malaysia is thus severely restricted under the Constitution, even amongst Muslims. There is actually no punishment for apostasy at federal

⁴¹⁰ US Department of State, "International Religious Freedom Report for 2012"

<<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>> accessed 27 June 2016.

⁴¹¹ Abdelfattah Amor, Special Rapporteur of the Commission on Human Rights, Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, U.N.Doc.E/CN.4/1990/46 (1990), para. 58.

⁴¹² See "Qualified Religious Freedom," NECF MALAYSIA (Mar.-Apr. 2004),

<<http://www.necf.org.my/newsmaster.cfm?&menuid=2&action=view&retrieveid=412>> accessed 27 June 2016.

level in Malaysia; the *Syariah* Criminal Offences (Federal Territories) Act 1997, for example, does not prohibit it. However, the unwritten traditional approach to apostasy has profoundly affected Malaysia's legal treatment of this issue, as has been shown by a number of apostasy cases. Moreover, Malaysia is a federation within which both the national government and the 13 state governments have executive and legislative powers.⁴¹³ Unlike the national government, some states, such as Kelantan and Terengganu, do consider apostasy to be an offence and have criminal punishments such as fines and imprisonment. A 1993 Kelantan state law considers apostasy to be a *hadd* offence⁴¹⁴ that potentially carries the death penalty if the alleged apostate does not repent.⁴¹⁵ The state's Shari'a Criminal Code (II) Section 23(4) mandates up to five years' imprisonment for apostasy, even after repentance. Dawson and Thiru note that "Apostasy is a contentious issue in the Muslim world and the debate on this in the Islamic Enactments of Sabah, Malacca, Pahang and Kelantan make it clear that they consider apostasy is an offence."⁴¹⁶ Therefore, even though at the federal level apostasy is not punishable, in some states it is viewed as a crime.

With regards to conversion, Malaysia restricts changing religion from Islam. This restriction was highlighted in a high-profile case, *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan Dan 2 Lagi* [2005] 5 AMR 663.⁴¹⁷ In a famous ruling the High Court held that the plaintiff, Lina Joy, could not change her religion, as by

⁴¹³ Abiad, *Sharia*, p. 49.

⁴¹⁴ Clause 4 of *Syariah Criminal Code (II) Act 1993* [State of Kelantan, Document, Document *Syariah Criminal Code (II) Act 1993* [State of Kelantan], Arrangement of Clauses: Preliminary Source, 33 *Islamic Studies* (1994), p. 107.

⁴¹⁵ *ibid*, pp. 113-114, Clause 23 (4).

⁴¹⁶ Benjamin Dawson and Steven Thiru, "The Lina Joy Case and the Future of Religious Freedom in Malaysia", *Lawasia Journal* (2007), 151-162 p. 159. (Dawson and Thiru, "The Lina Joy Case")

⁴¹⁷ "*Lina Joy v Majlis Agama Islam Wilayah Persekutuan & 2 Ors 2005* [CA]", (24 Sep, 2005). (*Lina Joy v Majlis Agama Islam 2005*)

virtue of Article 160(2) of the Federal Constitution Malaysian Muslims must remain Muslim until the end of their life:⁴¹⁸ “Malay means a person who professes the religion of Islam.....”

The constitution thus emphasises the importance of Islam in Malaysia. It stipulates that it is because a Malay professes Islam that he or she obtains certain special privileges, and that therefore by renouncing Islam he or she will necessarily lose these rights automatically. Tun Mohd Salleh Abas, a previous Lord President of the Supreme Court of Malaysia, argues that

The notion of a non-Muslim Malay is alien to the Malay mind. Such a person would be *murtad* [apostate] – excluded from the faith. To be a Malay one must be a Muslim, although he may not be a practising or devout Muslim.⁴¹⁹

Haji Sulaiman Abdullah, Counsel for the Majlis Agama Islam (Islamic Religious Authority), argued that “because Islam is all-embracing, a Muslim would not enjoy the full measure of freedom of religion envisaged by Article 11”:⁴²⁰

There is nothing which is outside the scope of Islamic law...Islam...is a complete way of life and controls all aspects of our life...Being a Muslim is not an individual act. It is part of being the wider community, is being part of the Ummah. And the responsibility of the State is to take care of the Ummah. And therefore...no individual can make a unilateral declaration without bringing in the authorities to say that he or she is no longer a Muslim...and therefore...to say that this is an individual decision that an individual can just direct the NRD to change the description of faith...is a very, very dangerous argument.⁴²¹

⁴¹⁸ *ibid*,

⁴¹⁹ Mohd Salleh Abas, “Traditional Elements of the Malaysian Constitution” in FA Trindade & HP Lee (eds), *The Constitution of Malaysia: Further Perspectives and Developments* (Singapore; Oxford : Oxford University Press, 1986), p. 5.

⁴²⁰ See *Lina Joy* [2007] 3 CLJ 557 (Federal Court); Dawson and Thiru, “The Lina Joy Case,” p. 154.

⁴²¹ *ibid*.

The Lina Joy case is particularly complex. The Lina Joy case demonstrates the existence of an un-codified Shari'a principle in Malaysian legal practice. In 2000 she had applied to the National Registration Department (NRD) to have the word 'Islam' deleted from her ID, but this request was declined.⁴²² The NRD insisted that Joy had to have a certificate or order that proved she was not Muslim issued to her by her local Islamic Religious Authority (the Majlis Agama Islam) or from the Syariah Court, although the relevant National Registration Department Regulations 1990 (NRD Regulations) mention no such condition.⁴²³ Ignoring the constitutional guarantee of religious freedom under Article 11, the High Court agreed that a Syariah Court apostatisation order was necessary, as only they could rule on her renunciation of Islam.⁴²⁴ Joy then took her case to the Court of Appeal, which ruled as follows:

...the NRD adopts the policy that a mere statutory declaration is insufficient for it to remove the word 'Islam' from the identity card of a Muslim. It is because the renunciation of Islam is a matter of Islamic law on which the NRD is not an authority that it adopts the policy of requiring the determination of some Islamic religious authority before it can act to remove the word 'Islam' from a Muslim's identity card.⁴²⁵

Joy then appealed to the Federal Court, arguing that the demand that she secure some third party's approval of her choice of religion was contrary to her right to religious freedom as guaranteed under Article 11. The Federal Court seems to have rebuffed these arguments; it rejected her appeal (two-to-one majority) and sanctioned the NRD's decision, namely that a Muslim wanting to leave Islam must

⁴²² *Lina Joy v Majlis Agama Islam* (2005)

⁴²³ *ibid.*

⁴²⁴ *ibid.*

⁴²⁵ *ibid.*

obtain an apostatisation order from the Syariah Court.⁴²⁶ This follows Article 121(1A) of the Federal Constitution, which declares that Muslims' personal status matters fall under the control of the Sharia Court.⁴²⁷ The judgment seemed to place Islamic principles above freedom of belief, effectively following the line put forward by the Majlis Agama Islam:

...if a Muslim wishes to leave the religion of Islam, he actually uses his right under the context of the Syariah law which has its own jurisprudence on the issue of apostasy. If a person professes and practices Islam, it would definitely mean that he must comply with the Islamic law which has prescribed the way to embrace Islam and converting out of Islam.⁴²⁸

Lina Joy's lawyer, Malik Imtiaz Sarwar, himself a Muslim, condemned the Federal Court's decision as "a potential dismantling of Malaysia's...multi-ethnic [and] multi-religious [character]."⁴²⁹ Loo Lai Mee points out that the Lina Joy case highlights the tension between the constitutional right to religious freedom and the Shari'a court's treatment of those who renounce Islam.⁴³⁰ In this case Shari'a has plainly restricted constitutionally recognised religious freedom.

Apostasy is thus a major issue in Malaysia at the federal level,⁴³¹ but it is also pertinent at the state level. All states in Malaysia make leaving Islam difficult; other than Negeri Sembilan,⁴³² no states have enacted provisions for leaving Islam, although all have legal processes in place for conversion to Islam.

⁴²⁶ *Lina Joy* (2007), 557.

⁴²⁷ Article 121 (1A) of Malaysian Constitution (1957).

⁴²⁸ *Lina Joy* (2007), 587; Dawson and Thiru, "The Lina Joy Case," p. 155.

⁴²⁹ Hannah Beech, "Malaysia's Crisis of Faith", *Time* (30 May, 2007), <<http://content.time.com/time/world/article/0,8599,1626300,00.html>> accessed 27 June 2016. (Beech, "Malaysia's Crisis of Faith")

⁴³⁰ *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Another*, 4 M.L.J. 585, 593 (2007).

⁴³¹ Beech, "Malaysia's Crisis of Faith."

⁴³² Mohd Al Adib Samuria and Muzammil Quraishib, "Negotiating Apostasy: Applying to "Leave Islam" in

To sum up, the Malaysian case is a particularly interesting one, as unlike Iran or Pakistan for example, it is a multi-religious country. It is nominally secular and Shari'a is not incorporated into its laws or constitution at the federal level, but its case law does show the influence of un-codified Shari'a and its courts have recognised Islamic law. Moreover, apostasy is considered a criminal offence in some states. The Malaysian case shows that apostasy law is not only used by the state for security reasons, but is also supported by local religious establishments who would like to keep the traditional Shari'a approach to apostasy as a bulwark against Malaysia's multi-religious society.

2.2.3 Iran

The Iranian Constitution states that all laws must follow the Shari'a.⁴³³ Therefore, as a country that has declared Islam to be the state religion and has codified the Shari'a, understanding how Iran treats cases of apostasy and blasphemy promises to be highly instructive for the purposes of this thesis.

More than 99% of Iran's population are Muslim (90-95% Shia and 5-10% Sunni).⁴³⁴ Many apostasy and blasphemy cases have been reported in Iran, and both 'crimes' are punishable with death. Iran's Constitution explicitly declares the country to be a republic with Islam as its state religion; as with the Saudi Arabian constitution, which will be examined later in this section, there is very little recognition of religious freedom. Furthermore, despite the lack of measures in the

Malaysia", *Islam and Christian-Muslim Relations* Routledge (2014), p. 5.

⁴³³ Constitution of the Islamic Republic of Iran (1979) Art 4.

⁴³⁴ CIA, "The World Fact Book" (2011),

<<https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html>>accessed 27 June 2016.

Penal Code, apostates can be punished in Iran via Shari'a; Article 220 of the Iranian Penal Code (2013) and Article 289 of the Criminal Procedure Code both stipulate that *Shari'a* rules apply in cases not covered by the Penal Code. As a result, people have been sentenced to death for apostasy in Iran. Moreover, some Iranian lower courts recognise religious scholars' opinions (*fatwa*) regarding punishing apostates or blasphemers. Therefore, although apostasy is not codified, codification of Shari'a and religious scholars' opinions can effectively criminalise apostasy.

Position of Shari'a

There are many references to Shari'a in the Constitution; the preamble openly declares the constitution to be "based on Islamic principles and norms, which represent an honest aspiration of the Islamic Ummah." Article 2 of the constitution states the country is based on belief in

1. the One God (as stated in the phrase "*There is no god except Allah*"), His exclusive sovereignty and right to legislate, and the necessity of submission to His commands.
2. Divine revelation and its fundamental role in setting forth the laws.

Article 2 thus follows the traditional concept of "divine sovereignty", whereby the state system is not governed by man-made law but by divine law. The Qur'an is thus the most importance source for Iranian law. Article 4 of the constitution also emphasises the importance of Shari'a in Iranian legislation:

All civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria.

Article 4 enforces the legal power of the traditional Shari'a approach. This is the so-called 'repugnancy clause', which states that Iranian law must conform to the Iranian interpretation of Islam (i.e. Shia Islam). Mir-Hosseini notes that under this article, Shari'a "not only dominates positive law in Iran, but also prevails over every form of customary law and international law, including in the domain of human rights".⁴³⁵ Crucially, the power given to Shari'a by this article is un-codified and un-defined.

Moreover, Mayer notes that Article 4 gives clerics the right to review all draft versions of new legislation and to reject any secular laws that diverge from Islamic doctrine.⁴³⁶ The article states that Shari'a "applies absolutely and generally to all articles of the Constitution..." Abiad argues that this "establishes a hierarchy among the constitutional provisions upon which Islamic law prevails in Iran"⁴³⁷ and that Islamic principles are intended to supersede all other laws in Iran, while Cohen notes that it strengthens "the religiously oriented and appointed branches of the Iranian government, namely the Council of Guardians", vis-à-vis the elected branches of government.⁴³⁸ Mayer further argues that the constitution fully anticipates disputes between secular and religious laws and thus makes clear that Islamic principles should take priority. Indeed, she even points out that parts of the constitution itself can be branded "un-Islamic" in this way, although its aim is to establish an Islamic government.⁴³⁹ Iran is therefore a good example of one way

⁴³⁵ Ziba Mir-Hosseini, "Sharia and national law in Iran", Jan Michiel Otto, ed., *Sharia incorporated : a comparative overview of the legal systems of twelve Muslim countries in past and present* (Amsterdam : Leiden University Press, 2010), p. 361

⁴³⁶ Mayer, "Islam and the State", p. 1038.

⁴³⁷ Abiad, *Sharia*, p.44.

⁴³⁸ Jennifer F. Cohen, "Islamic Law in Iran: Can It Protect the International Legal Right of Freedom of Religion and Belief?", *Chicago Journal of International Law* (2008), 247-274, p. 256.

⁴³⁹ Mayer, "Islam and the State", p. 1038.

that apostasy and blasphemy is being treated under codified Shari'a in a contemporary Muslim state.

Apostasy and blasphemy

Apostasy is not codified as a crime in Iranian criminal law, although many apostasy cases have been reported; however, Iran considers blasphemy to be evidence of apostasy. The Iranian Constitution specifies a particular form of Islam, namely Shi'i, to be the orthodox branch of Islam in Iran. Furthermore, Article 12 specifically notes that Twelve Shi'ism is the sect to be followed in Iran, although it does guarantee 'full respect' for other Islamic traditions and allows their adherents to follow the teachings of their own school when in worship:⁴⁴⁰

The official religion of Iran is Islam and the Twelver Ja'fari School, and this principle will remain eternally immutable. Other Islamic schools, including the Hanafi, Shafi'i, Maliki, Hanbali, and Zaydi, are to be accorded full respect, and their followers are free to act in accordance with their own jurisprudence in performing their religious rites....

Despite this "full respect" however, there is evidence that Sunni Muslims have suffered discrimination and been persecuted. An October 2014 UN report on human rights in Iran notes that

15 Arabs who converted from Shia to Sunni Islam were sentenced to a one-year term of imprisonment on 21 February 2013....They were reportedly charged with spreading propaganda against the system by promoting Wahhabism and Salafism, holding group prayers, questioning the official religion of the country, producing and distributing deviant books, communicating with salafist and takfirist groups (groups accusing others of apostasy) and participating in the religious courses of salafist and takfirist elements. They were each sentenced to a term of

⁴⁴⁰ *ibid*, p. 1041.

imprisonment of one year by Branch 2 of the Revolutionary Court of Ahvaz and were summoned in April 2014 to serve their sentences.⁴⁴¹

Other groups do not even have this official recognition, and thus are severely restricted. Article 13 of the Iranian Constitution stipulates the recognised religious groups:

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

Therefore, such religious groups as Buddhists, Hindus and Baha'is are not actually recognised as religions under the Iranian Constitution and so do not have its protection; they are thus limited in the practice of their particular rites and ceremonies. The Baha'is seem to have been subjected to particularly harsh treatment. According to the US 2010 International Religious Freedom Report

The government considered Bahais to be apostates and defined the Bahai faith as a political 'sect'.⁴⁴²

The Iranian government does not consider Baha'i to be a religion, instead viewing it as a political sect. Although the government claims to permit Baha'i individuals to freely practise their religion, when they collectively practise within Baha'i institutions it criminalises them, and even executes them. Executed Baha'is are routinely alleged to have been spying for Israel or the CIA.⁴⁴³ According to a UN report

⁴⁴¹ *Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran* A/69/356(2014), para. 52.

⁴⁴² US Department of State, *2010 International Religious Freedom Report: Iran*, (13rd September 2013), p. 4, <<http://www.state.gov/documents/organization/171734.pdf>>accessed 27 June 2016.

⁴⁴³ Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* 4th ed (Boulder : Westview Press, 2007), p.181. (Mayer, *Islam and Human Rights*).

At least 734 Baha'is have reportedly been arrested since 2004, and 136 are currently detained. Another 289 have been arrested, released on bail and awaiting trial, while another 150 have been sentenced but are awaiting appeals or summons to serve.⁴⁴⁴

Moreover, the USCIRF *Annual Report 2015* notes that

Since 1979, authorities have killed or executed more than 200 Baha'i leaders, and more than 10,000 have been dismissed from government and university jobs. Although the Iranian government maintains publicly that Baha'is are free to attend university, the de facto policy of preventing Baha'is from obtaining higher education remains in effect. Approximately 750 Baha'is have been arbitrarily arrested since 2005.⁴⁴⁵

Many scholars have criticised the Iranian approach to religious freedom. Arzt argues that the distinction between individual and collective practise is a circular one, as the constitution defines political crimes in accordance with the law which is based upon Islamic principles anyway.⁴⁴⁶ Therefore, according to Arzt, “political crimes are whatever Iran’s politico-clerical leaders say they are.”⁴⁴⁷ Mayer similarly notes that, appropriately for a government based on such an ideology, it is religious rules that define political crime, and that political crimes are thus ultimately religious ones too.⁴⁴⁸ This conflation of political and religious crime is often seen in the courts, for example in the Hasan Yousefi Eshkevari case. Eshkevari is an Iranian cleric with a liberal interpretation of Islamic law. Charged

⁴⁴⁴ Special Rapporteur's March 2014 report on the situation of human rights in the Islamic Republic of Iran
Special Rapporteur's March 2014 report on the situation of human rights in the Islamic Republic of Iran,
<<http://iranhrdc.org/english/human-rights-documents/united-nations-reports/un-reports/1000000443-special-rapporteurs-march-2014-report-on-the-situation-of-human-rights-in-the-islamic-republic-of-iran.html#ftn28>> accessed 27 June 2016.

⁴⁴⁵ US Commission on International Religious Freedom, *Annual Report 2015*, p. 46,
<<http://www.uscirf.gov/sites/default/files/USCIRF%20Annual%20Report%202015%20%282%29.pdf>> accessed 27 June 2016.

⁴⁴⁶ Arzt, “Heroes or Heretics”, p. 418.

⁴⁴⁷ *ibid.*

⁴⁴⁸ Mayer, *Islam and Human Rights*, p.182.

with apostasy and “corruption on earth”, he was sentenced to death by the Special Clerical Court (SCC).⁴⁴⁹ The sentence was overturned on appeal and the charge of apostasy was later dismissed, but Eshkevari was nevertheless sentenced to seven years’ imprisonment for other lesser offences, such as “propaganda against the Islamic Republic” and “insulting top-rank officials”.⁴⁵⁰ His status as a cleric was also removed. He was eventually released in 2005 after more than four years of imprisonment.⁴⁵¹

Many other apostasy cases have been reported in Iran, despite there being no specific law that punishes conversion from Islam. Hossein Soodmand, for example, converted to Christianity from Islam in the 1960s and was hanged by a Shari’a court in 1990.⁴⁵² However, although many death sentences for apostasy are subsequently revoked by higher courts or are not ultimately carried out, some of the apostates involved have been extra-judicially murdered. For example, in a 1993 case the Reverend Mehdi Dibaj, who had converted to Christianity decades earlier and had already spent ten years in prison, was sentenced to death for apostasy by a Revolutionary Court. International pressure resulted in his release, but his death sentence was never lifted. Following his release a colleague who had campaigned for Dibaj was kidnapped and murdered, and five months later the same fate befell Dibaj.⁴⁵³

⁴⁴⁹ US, “Country Reports on Human Rights Practices: Iran”,
<<http://www.state.gov/j/drl/rls/hrrpt/2001/nea/8251.htm>>accessed 27 June 2016.

⁴⁵⁰ English PEN, “Hojjatoleslam Hasan Yousefi Eshkevari”(25 July 2005),
<<http://www.englishpen.org/hojjatoleslam-hasan-yousefi-eshkevari/>>accessed 27 June 2016.

⁴⁵¹ Kamran Hashemi, *Religious Legal Traditions, International Human Rights Law and Muslim States* (Boston : Martinus Nijhoff Publishers, 2008), p. 117. (Hashemi, *Religious Legal Traditions*)

⁴⁵²Canada: Immigration and Refugee Board of Canada, “Iran: Chronology of Events: June 1989 - July 1994,”<<http://www.refworld.org/docid/3ae6a8170.html>>accessed 27 June 2016.

⁴⁵³ Nicholas Garcés, “Islam, Till Death Do you Part? Rethinking Apostasy Laws Under Islamic Law and International Legal Obligations”, 16 *Southwestern Journal of International Law* (2010), 229-263, p.240.

Apostasy cases are still being reported. A 2012 US report on religious freedom in Iran states that

Authorities executed at least one individual on charges of apostasy. The media reported that a man identified as ‘Ali Ghorabat’ was hanged on January 26 in Karoun Prison in Ahvaz for ‘apostasy’. Ghorabat, who appears to have been Muslim, was charged with apostasy for ‘claiming to have contact with God and the 12th Shi’ite Imam.’ At least two death sentences for apostasy or evangelism were issued under judicial interpretations of Islamic law in 2010 and the case of at least one of these individuals was on appeal during the year.⁴⁵⁴

Another recent US report states that religious scholars’ opinions are also recognised and being used in the courts; apostasy law can thus be applied through *fatwa* issued by religious scholars. The US report states that

While the law does not explicitly stipulate the death penalty for the offense of apostasy, courts have administered such punishment based on their interpretation of religious fatwas. In September 2010 a lower court convicted Christian pastor Youcef Nadarkhani of ‘apostasy’ and issued a death sentence. The case was under Supreme Court review at year’s end.⁴⁵⁵

Although there are no codified apostasy laws and Articles 36 and 169 both recognise the principle of legality (the idea that all laws must be clear, ascertainable and non-retrospective), Article 167 of the constitution would seem to indicate the existence of uncodified apostasy law and to support the criminalisation of apostasy based on *fatwa*:

The judge is bound to endeavor to judge each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgment on the basis of authoritative Islamic sources and authentic fatwa. He, on the pretext of the

(Garcés, “Islam, Till Death Do you Part?”)

⁴⁵⁴ US Department of State (30 July 2012) *2011 Report on International Religious Freedom – Iran* <<http://www.state.gov/j/drl/rls/irf/2011/nea/192883.htm>>accessed 27 June 2016.

⁴⁵⁵ US Department of State (24 May 2012) *2011 Country Reports on Human Rights Practices – Iran* <<http://www.refworld.org/docid/4fc75a92af.html>>accessed 27 June 2016.

silence of or deficiency of law in the matter, or its brevity or contradictory nature, cannot refrain from admitting and examining cases and delivering his judgment.⁴⁵⁶

Thus Iranian Constitution references religious opinions in its justifications for particular punishments. Article 220 of the new Iranian Penal Code (2013) emphasises how decisions can default to Constitutional Article 167:

Article 167 of the Constitution of the Islamic Republic of Iran applies regarding the *hodud* [*hudud*] not specified in this code.

To conclude, although Iranian law does not directly classify apostasy as a crime Iranian legal practice betrays the effective existence of apostasy law in its references to uncodified Islamic sources, i.e. shari'a; this is particularly visible in Iranian law's frequent use of religious scholars' opinions (*fatwa*).

Therefore, un-codified apostasy laws have severely affected court decisions in Iran. The next section analyses the approaches to apostasy and blasphemy in Iran through examining a high-profile cases.

The Youcef Nadarkhani case

Youcef Nadarkhani rejected Islam at the age of 19 and became an evangelical Christian minister.⁴⁵⁷ He was arrested, charged with apostasy and sentenced to death in 2009 in Rasht, a city in northern Iran,⁴⁵⁸ and an appeals court upheld his sentence in 2010 after he refused to reconvert to Islam.⁴⁵⁹ The judge ruled that because

⁴⁵⁶ Constitution of the Islamic Republic of Iran (1979) Art 167.

⁴⁵⁷ Dan Merica, "Iranian pastor faces death for rape, not apostasy – report" *CNN* (1 October 2011), <<http://edition.cnn.com/2011/09/30/world/meast/iran-christian-pastor/>>accessed 27 June 2016.

⁴⁵⁸ Parisa Hafezi, "Iran court likely to revoke pastor's death sentence-lawyer" *Reuter* (3rd October 2011),

<<http://www.reuters.com/article/us-iran-court-pastor-idUSTRE7924HV20111003>>accessed 27 June 2016.

⁴⁵⁹ *ibid.*

Nadarkhani was from a Muslim family and had converted to Christianity at 19, he was an apostate. However, the Iranian Supreme Court overturned this death sentence and sent the case back to the lower court in Rasht, ordering them to re-examine some procedural flaws in the case, such as ascertaining whether Nadarkhani was still a Muslim at 15, which is seen as the age of male maturity in Iran, and whether he repented.⁴⁶⁰ In their ruling the Supreme Court rebuffed the argument that because apostasy is not in the Iranian Penal Code, it cannot be considered a crime, arguing instead that the crime is recognised in Shari'a and by Ayatollah Ruhollah Khomeini, the Islamic Republic's founder.⁴⁶¹ However, it ultimately gave local judges a free hand to decide whether to release, execute or retry Nadarkhani.⁴⁶² His sentence was subsequently reduced to three years for evangelising Muslims, not for apostasy, and he was released in 2012.⁴⁶³

The Supreme Court's position in this case is an interesting one. Although apostasy law is not codified in Iran, the Supreme Court drew attention to the fact that apostasy is recognised as a punishable crime in Shari'a law. In other words, the Supreme Court recognised the existence of un-codified apostasy law.

Blasphemy as evidence of apostasy

⁴⁶⁰ Human Rights Watch, *Codifying Repression: An Assessment of Iran's New Penal Code*, (28 August 2012) p.34, <<http://www.hrw.org/sites/default/files/reports/iran0812webwcover.pdf>> accessed 27 June 2016.

⁴⁶¹ Human Rights Watch (30 September 2011) *Iran: Christian Pastor Faces Execution for 'Apostasy'*, <<http://www.hrw.org/news/2011/09/30/iran-christian-pastor-faces-execution-apostasy>> accessed 27 June 2016.

⁴⁶² *ibid.*

⁴⁶³ Saeed Kamali Dehghan, "Iranian Christian pastor released from jail," *The Guardian* (8 September 2012) <<https://www.theguardian.com/world/2012/sep/08/iranian-christian-pastor-released-jail>> accessed 27 June 2016.

The Iranian approach to blasphemy is based on *sabb* (insult); as blasphemy is taken to be evidence for apostasy, any blasphemer can be punished with death. A 2014 UN report notes that

The Press Law (1986) continues to restrict content that is prejudicial to Islamic codes or that might damage the “foundation” of the Islamic Republic, offend government officials or religious figures or undermine the Government’s definition of decency.⁴⁶⁴

In Iran, blasphemy is considered to be evidence of apostasy. This conflation of apostasy with blasphemy has led to a number of cases, as blasphemy is mentioned in several Iranian laws (despite blasphemy not being seen as a crime by the Prophet and his Companions). For example, Article 26 of the 1986 Press Law of Iran declares that

Whoever insults Islam and its sanctities through the press and his/her guilt amounts to apostasy, shall be sentenced as an apostate and should his/her offense fall short of apostasy he/she shall be subject to the Islamic penal code.

The Iranian Press law recognises that the “Islamic penal code” can be applied in Iran. Article 262 of the new Iranian Penal Code (2013) states

Anyone who swears at or commits *qazf* against the Great Prophet [of Islam] (peace be upon him) or any of the Great Prophets, shall be considered as *Sāb ul-nabi* [a person who swears at the Prophet], and shall be sentenced to the death penalty.

This article stipulates that the death sentence is the appropriate punishment for blasphemy. Iran considers blasphemy to be a *hadd* crime, despite the Prophet never having considered blasphemy *per se* as meriting death. Fortunately, ‘coercion’ and

⁴⁶⁴ *Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran* A/69/356(2014), para. 22.

‘mistakes’ are not considered blasphemous under Article 263 of the new Iranian Penal Code (2013):

When the accused of a *sabb-e nabi* (swearing at the Prophet) claims that his/her statements have been under coercion or mistake, or in a state of drunkenness, or anger or slip of the tongue, or without paying attention to the meaning of the words, or quoting someone else, then s/he shall not be considered as *Sāb ul-nabi* [a person who swears at the Prophet].

The Iranian legal position on blasphemy has led to some high profile cases. The Hashem Aghajari case is an example of the misuse of blasphemy law; as we shall see below, mere criticism of some religious scholars resulted in Aghajari being threatened with the death penalty for blasphemy.

The Hashem Aghajari case

In 2002 Professor Hashem Aghajari was charged by Iran’s Fourteenth District Court with *sabb al-Nabi* (insulting Mohammad) for insulting the Shi’ite *Imams* and top state religious authorities.⁴⁶⁵ This ‘insult’ consisted of having made a speech declaring that Muslims were not “monkeys” who should unthinkingly follow whatever clerics tell them. Religious hardliners declared this to be an attack on Mohammed and fundamental Shi’ite doctrine.⁴⁶⁶ However, this judgment apparently did not differentiate between insulting Mohammad and unbelief. While the former violates Penal Code Article 513, the same code does not consider unbelief to be an offence. Furthermore, Kamran Hashemi argues that the judgment

⁴⁶⁵ Hashemi, *Religious Legal Traditions*, pp.117-118.

⁴⁶⁶ Hamid Dabashi and Arien Mack, “Professor Aghajari’s Case”, *The New York Review of Books* (19th December, 2002),

<<http://www.nybooks.com/articles/2002/12/19/professor-aghajaris-case/?pagination=false>>accessed 27 June 2016.

did not explain clearly enough which parts of Aghajari's speech insulted the clerics and were proof of his unbelief, or why.⁴⁶⁷

The death sentence against Aghajari was subsequently overturned by the Supreme Court and the case was sent for retrial in another lower court. The judge declared that apostasy and blasphemy were not relevant to the case, but that Aghajari could be charged with insulting the sacred things of the religion. He was eventually sentenced to five years' imprisonment and five years' deprivation of social rights.⁴⁶⁸

The Aghajari case highlighted certain crucial issues facing Iran's judiciary, the most serious of which was how religious scholars' opinions affected this ruling in particular and how they influence legal rulings in general. In this case specifically, Aghajari's lawyer argued that the original judgment by the district court in Hamadaan was due to the judge's over-dependence on hardline jurists' opinions.⁴⁶⁹ This Iranian approach is not that of the Prophet and his Companions; as discussed in the previous chapter, they never considered insults to be evidence of apostasy. The supposed unbelief in Aghajari's comments and expressions would not have been considered to be apostasy or blasphemy by the Prophet; Aghajari had merely criticised certain religious scholars.

The Iranian government has attempted to codify apostasy law but failed in parliament. Iran's Penal Code, as approved by the Guardian Council in 2012, does not criminalise apostasy or class it as a *hadd* crime. Apostasy had been prescribed in the code's bill (as were witchcraft and religious innovation), and a 2008 draft did

⁴⁶⁷ Hashemi, *Religious Legal Traditions*, p.118.

⁴⁶⁸ *ibid.*

⁴⁶⁹ *ibid.*, p.119.

include a number of relevant provisions and was even approved in principal by Parliament, but this version was not subsequently passed.⁴⁷⁰

The Iranian example shows how a Muslim-majority country which has codified Shari'a law in its constitution and declared Islam to be the state religion treats apostasy and blasphemy. Various legal cases show how apostasy law functions in practice via Shari'a law. Moreover, the Iranian example shows how *fatwas* issued by religious scholars can play an important role in criminalising apostates within a contemporary Islamic legal system.

2.2.4 Pakistan

The Pakistani population is 96% Muslim.⁴⁷¹ Although Pakistan has not codified apostasy law, its strict blasphemy law criminalises apostates. The Pakistani Constitution has declared Ahmadis to be apostate. Extraordinary killings and mob protests are serious issues in Pakistan, and violence between different Muslim sects is also becoming a problem. According to the Human Rights Commission of Pakistan Report (2013)

In the first few weeks of 2013, sectarian violence claimed the lives of over 200 Hazara Shias in Balochistan. More than 200 sectarian attacks killed 687 people. Seven Ahmadis lost their lives in targeted attacks. In the deadliest attack ever against Pakistan's Christian citizens, over 100 people were killed in a Peshawar church. A Muslim mob torched a predominantly Christian neighbourhood in Lahore after a Christian man was accused of blasphemy. 100 houses were burnt as residents fled. Individuals charged with offences relating to religion included 17 Ahmadis, 13 Christians and nine Muslims. In Badin, dead bodies of two

⁴⁷⁰ Nayyeri, "New Islamic Penal Code of the Islamic Republic of Iran."

⁴⁷¹ Pakistan Bureau of Statistic, "Population By Religion"

<<http://www.pbs.gov.pk/content/population-religionse>>accessed 27 June 2016.

Hindus were dug up by mobs that claimed that the graveyards belonged to Muslims and only Muslims could be buried there.⁴⁷²

Position of Shari'a

Pakistan's constitution (1973) declares the country to be an Islamic Republic. Article 1(1) states that "Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan..." Moreover, the constitution states that "Islam shall be the State religion of Pakistan."⁴⁷³

Islam deeply affects Pakistan's legislation. For example, Article 227(1) of the constitution is a repugnancy clause that requires Pakistan's legislation to follow the Qur'an and *Sunna*:

All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah...and no law shall be enacted which is repugnant to such Injunctions...

This provision gives the Shari'a special status, and thus severely affects freedom of religion and expression in Pakistan. For example, Article 19 states that "[e]very citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press", but these freedoms are limited by "any reasonable restrictions imposed by law in the interest of the glory of Islam or...decency or morality..."⁴⁷⁴ Similarly, Article 20 states that "every citizen shall have the right to profess, practise and propagate his religion" and that "every religious denomination and every sect thereof shall have the right to establish, maintain and manage its

⁴⁷² Human Rights Commission of Pakistan, "State of Human Rights in 2013", (March 2014), p. 5
<<http://www.hrcp-web.org/hrcpweb/report14/AR2013.pdf>> accessed 27 June 2016.

⁴⁷³ The Constitution of the Islamic Republic of Pakistan (1973), Art 2.

⁴⁷⁴ *ibid*, Art 19.

religious institutions”, but these freedoms are again “[s]ubject to law, public order and morality”.⁴⁷⁵ Unsurprisingly this morality is based on Islam, as Article 31 (see above) makes clear, but the “way of life”, “fundamental principles and basic concepts”, “meaning of life” and “moral standards” being referred to in the article are not precisely stated or explained.⁴⁷⁶

The primacy of Shari’a has been made clear in the Supreme Court. In *Zaheer-ud-din v. the State* (1993) the judge, Abdul Quadeer Chaudhary, stated as follows:

Therefore, every man-made law must now conform to the Injunctions of Islam as contained in Qur’an and Sunnah of the Holy Prophet (Peace be upon him). Therefore, even the Fundamental Rights as given in the Constitution must not violate the norms of Islam...Anything, in any fundamental right, which violates the Injunctions of Islam thus must be repugnant.⁴⁷⁷

The Pakistan judiciary thus clearly considers Shari’a law to be superior even to the Constitution, making un-codified Shari’a dominant over codified fundamental rights. This supremacy is well illustrated in Pakistan’s blasphemy cases.

There is no apostasy law in Pakistan, and therefore neither unbelief nor changing religion are seen as criminal acts. There is however a strict blasphemy law; Forte states that in the absence of a formal law prohibiting apostasy, the blasphemy prohibition “serves as a surrogate in suppressing those who dissent from Islam by word or deed”.⁴⁷⁸ Garcés argues that although this law references blasphemy, it was actually a well-disguised apostasy law, as a Muslim of the Ahmadi faith “would be

⁴⁷⁵ *ibid.* Art 20

⁴⁷⁶ *ibid.*, Art 31(1), (2)(b).

⁴⁷⁷ *Zaheeruddin v. the State* (1993) SCMR 1775. (*Zaheeruddin v. the State* (1993))

“Pakistan - *Zaheer-ud-din v. the State*” 1 *Yearbook of Islamic and Middle Eastern Law* (1994), p.572.

⁴⁷⁸ David Forte, “Apostasy and Blasphemy in Pakistan”, 10 *Connecticut Journal of Int’l Law* (1994), 27-68, p. 49.

deemed to have renounced Islam, and be punished accordingly”.⁴⁷⁹ Therefore, although apostasy is not criminalised under the Pakistan Penal Code, in effect courts consider it to be an offence and treat it as such. In 1991 Tahir Iqbal, a Christian convert accused of insulting Mohammed, was denied bail by a Sessions Court and a High Court on the grounds that “conversion from Islam into Christianity is itself a cognizable offence involving serious implications...”⁴⁸⁰ The judge in this case thus viewed apostasy as an offence and dealt with it accordingly. Tahir Iqbal died in mysterious circumstances in jail.

Furthermore, although apostasy itself is not criminalised, apostates can be punished with death through Pakistan’s blasphemy law. Section 295-C of the Pakistan Penal Code (1989) states that blaspheming the Prophet is punishable with death:

[W]hoever by words, either spoken, or written, or by visible representation, or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet (peace be upon him) shall be punished with death, or imprisonment, and shall also be liable to fine.

The wording used in this article is broad and can be easily misused, as a number of scholars have appointed out. Khan, for example, argues “virtually anyone can register a blasphemy case against anyone else in Pakistan, and the accused can face capital punishment”.⁴⁸¹

⁴⁷⁹ Garcés, “Islam, Till Death Do you Part?,” p. 245.

⁴⁸⁰ Amnesty International, “Use and Abuse of the Blasphemy Laws,” ASA/33/08/94 (1st July, 1994), <<http://www.refworld.org/docid/3ae6a9aa4.html>> accessed 27 June 2016.

⁴⁸¹ Amjad Mahmood Khan, “Pakistan’s Anti-Blasphemy Laws and the Illegitimate Use of the ‘Law, Public Order, and Morality’ Limitation on Constitutional Rights”, 13 *The Review of Faith & International Affairs* (2015),13-22 p. 17. (Khan, “Pakistan’s Anti-Blasphemy Laws”)

Even if the Prophet is not insulted, hurting others' religious feelings can amount to imprisonment or a fine in Pakistan. Section 298 of the Pakistan Penal Code notes that

Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or both.

Pakistan is thus able to use blasphemy law to criminalise people who could be regarded as apostates. For example, Section 298C of the Penal Code declares Ahmadis to be apostate and their beliefs to be blasphemous, and thus criminalises them and punishes them with imprisonment or fines:

Any person of the Qadiani group or the Lahori group (who call themselves 'Ahmadis' or by any other name), who directly or indirectly, poses himself as a Muslim, or calls, or refers to, his faith as Islam, or preaches or propagates his faith, or invites others to accept his faith, by words, either spoken or written, or by visible representations, or in any manner whatsoever outrages the religious feelings of Muslims shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

Interestingly, Pakistani law explicitly defines the difference between Muslims (and by implication, Islam) and non-Muslims. This is actually the first time in Islamic history that such definitions have been specifically formulated by law.⁴⁸² Article 260(3) of Pakistan's Constitution states that

A person who does not believe in the absolute and unqualified finality of the Prophethood of Muhammad (Peace be upon him) the last of Prophets or who claims to be a Prophet, in any sense of the word or of any description whatsoever, after Muhammad (Peace be upon him), or recognizes such claimant as a Prophet

⁴⁸² Jeffrey A. Redding, "Constitutionalizing Islam: Theory and Pakistan", 44 *Virginia Journal of International Law* (2003), 759-828, pp. 769-770. (Redding, "Constitutionalizing Islam")

or a religious reformer, is not a Muslim for the purposes of the Constitution or the law.

The Constitution then goes on in Articles 260(3)(a) and (b) to define who is and is not Muslim in more detail:

“Muslim” means a person who believes in the unity and oneness of Almighty Allah, in the absolute and unqualified finality of the Prophethood of Muhammad (peace be upon him), the last of the prophets, and does not believe in, or recognize as a prophet or religious reformer, any person who claimed or claims to be a prophet, in any sense of the word or any description whatsoever, after Muhammad (peace be upon him); and

“non-Muslim” means a person who is not a Muslim and includes a person belonging to the Christian, Hindus, Sikh, Buddhist or Parsi community, a person of the Qadiani Group or the Lahori Group who call themselves ‘Ahmadis’ or by any other name or a Bahai, and a person belonging to any of the Scheduled Castes.⁴⁸³

These constitutional definitions of Muslims and non-Muslims have had a great influence on the treatment of both apostasy and blasphemy in Pakistan. They have in effect constitutionally sanctioned widespread bigotry against the Ahmadis, a group whose beliefs are at some variance with those of the mainstream in Pakistan but who nevertheless see themselves as Muslim.⁴⁸⁴

As Ahmadis do not believe in the finality of the Prophethood of Muhammad, Article 260 (3) of the Constitution serves to define them firmly as non-Muslim and therefore amounts to a formal and legal declaration by the Pakistani government that Ahmadis are apostates; many have subsequently been persecuted. In Rabwah approximately sixty thousand Ahmadis were charged with blasphemy under the 1984 Ordinance XX penal provisions, which dealt with Ahmadi use of Muslim

⁴⁸³ *ibid*, Art 260(3)(a)(b).

⁴⁸⁴ Redding, “Constitutionalizing Islam,”p. 769.

terms and Ahmadis ‘posing’ as Muslims.⁴⁸⁵ Since 1974, when Pakistan first decreed the Ahmadi community to be non-Muslim, hundreds have been murdered by extremists;⁴⁸⁶ one estimate is of 1,274 people being charged with blasphemy between 1986 and 2010.⁴⁸⁷ These charges can be for seemingly extremely minor incidents, such as sending out greeting cards that include Qur’anic verses and Islamic salutations, or for pulling off anti-Ahmadi bus stickers.⁴⁸⁸

Mirza Ghulam Ahmad established the Ahmadi sect in 1899, proclaiming himself to be the long-awaited Messiah and Mahdi for all religions.⁴⁸⁹ The most distinctive Ahmadi doctrine deals with the concept of the last prophet:

(3) to say that Mohammad is the “seal of the Prophet” does not mean that he is the last of them. A seal is a ‘hall-mark’ and he embodies the perfection of Prophethood; but a Prophet or apostle can come after him as did the Hebrew Prophets after Moses.⁴⁹⁰

Ahmadis believe they are Muslims, follow Islam’s authentic teachings and have never renounced Islam, but they firmly reject violence as a means of further popularising Islam.⁴⁹¹ Ahmadi Muslims therefore cannot possibly be compared with the apostates of the Prophet’s time; they have never been involved in civil war with mainstream Muslim society. However, many other Muslims disagree that

⁴⁸⁵ *ibid.*

⁴⁸⁶ Qasim Rashid, “Pakistan’s Failed Commitment: How Pakistan’s institutionalized Persecution of Ahmadiyya Muslim Community Violates the International Covenant on Civil and Political Rights”, 11 *Richmond Journal of Global Law & Business* (2011), 1-42, p.24. (Rashid, “Pakistan’s Failed Commitment”)

⁴⁸⁷ ‘Timeline: Accused Under the Blasphemy Law’, *Dawn News*, (last updated 18 Aug. 18, 2013) <<http://www.dawn.com/news/750512/timeline-accused-under-the-blasphemy-law>> accessed 27 June 2016.

⁴⁸⁸ Nina Shea, “Pakistan’s Anti-Blasphemy Laws” (8 October 2009) <<http://dspace.cigilibrary.org/jspui/bitstream/123456789/26653/1/Pakistans%20Anti-Blasphemy%20Laws.pdf?1>> accessed 27 June 2016.

⁴⁸⁹ Al Islam: The Official Website of the Ahmadiyya Muslim Community, “The Promised Messiah: A Prophet to Unite Mankind in the Latter Days”, <<http://www.alislam.org/topics/messiah/index.php>> accessed 27 June 2016.

⁴⁹⁰ Mohammad Najmi, *Mohammadan law* (Allahabad : Central Law Publications, 2000), p. 21.

⁴⁹¹ Rashid, “Pakistan’s Failed Commitment,” p. 9.

Ahmadis are Muslim, holding that the Muslim belief that Muhammad is the final prophet is contravened by the Ahmadis' treatment of their founder as another prophet.⁴⁹²

Some scholars, such as Maududi, have concluded that Ahmadis are apostates. Maududi based his position on the Ahmadi assertion that Muhammed was not the last prophet; he rejected the notion that a Messiah or Prophet could appear after Muhammad and decreed that those who believed in such a concept, such as Ahmadis, were apostates. He argued that

the Qadianis [Ahmadis] penetrate into the Muslim Society posing as Muslim; they propagate their views in the name of Islam: start controversies everywhere, carry on proselytizing propaganda in an aggressive manner and continuously strive to swell their numbers at the expense of the Muslim Society. They have thus become a permanent, disintergrating force among the Muslims. How can it, therefore, be possible to show the same kind of toleration towards them as is shown towards other passive sect?⁴⁹³

Some court rulings have also concluded that Ahmadis are apostates. In the *Ghulam Aisha vs Abdur Razzaq* case (1926) Abdur Razzaq converted to the Ahmadi sect, prompting his wife, Ghulam Aisha, to file a suit in a lower court arguing that his conversion made him apostate in accordance with the Law of Shari'a in turn rendering their marriage null and void.⁴⁹⁴

The defendant argued that as the Ahmadis are a Muslim sect, conversion to the Ahmadi sect did not amount to him becoming an infidel (*kafir*) or apostate (*murtad*) and therefore there were no grounds for the dissolution of his marriage.⁴⁹⁵ However

⁴⁹² Garcés, "Islam, Till Death Do you Part?," p. 245.

⁴⁹³ Syed Abu A'la Maududi, *The Qadiani Problem* (Lahore: Islamic Publications (Pvt) Ltd, 1979), p. 18.

⁴⁹⁴ *ibid*, p. 73 (Appendix IV Verdict of Judiciary: Qadianis are Apostates i.e. outside the pale of Islam).

⁴⁹⁵ *ibid*.

the District Judge, Munshi Muhammad Akbar Khan, ruled in 1935 that Mirza Sahib (Mirza Ghulam Ahmad of Qadian) was a “false claimant of Prophethood”, and that therefore accepting him as a Prophet amounted to apostasy. Thus Abdur Razzaq, his conversion to Ahmadism made him an apostate and thus his marriage was null and void.⁴⁹⁶

The Pakistan Supreme Court has also recognised the religious discrimination against the Ahmadis outlined in the constitution, and has ruled that Ahmadi teaching is un-Islamic. In the Zaheeruddin case (1993), discussed earlier, the Supreme Court held that any laws that restrict the religious practices of Ahmadis are constitutional.⁴⁹⁷ Moreover, the Court ruled that any representation as a Muslim by Ahmadis should be viewed as defrauding and deceiving the public, as they are non-Muslims.⁴⁹⁸ The Supreme Court stated that

[W]hen an Ahmadi or Ahmadis display in public on a placard, a badge or a poster or write on walls or ceremonial gates or buntings, the ‘Kalima’, or chant other ‘Shae’re Islam’ it would amount to publicly defiling the name of Holy Prophet (p.b.u.h.) [peace be upon him] and also other Prophets...⁴⁹⁹

So, if an Ahmadi is allowed by the administration or the law to display or chant in public the ‘Shaair-e-Islam’, it is like creating a ‘Rushdie’ [Salman Rushdie, author of “The Satanic Verses” (1988)] out of him. In such a case, can the administration guarantee his life, liberty and property, and if so at what cost? Again if this permission is given to a procession or assembly on the streets of a public place, it is like permitting civil war.⁵⁰⁰

⁴⁹⁶ *ibid*, p. 74-75.

⁴⁹⁷ *Zaheeruddin v. the State* (1993),1779.

⁴⁹⁸ *Ibid*, 1752-58.

⁴⁹⁹ *Zaheeruddin*, 1993 S.C.M.R. at 1778 in M. Nadeem Ahmad Siddiq, “Enforced Apostasy: Zaheerudin v. State and the Official Persecution of the Ahmadiyya Community in Pakistan”, 14 *Law & Inequality*, (1995), 275-338, p. 324(footnote 228). (Siddiq, “Enforced Apostasy”).

⁵⁰⁰ *ibid*, 1777-1778.

The Ahmadis are thus severely prohibited in the practice of their faith in order to prevent injuring the feelings of the majority, which would allegedly elicit violent reactions and risk unsettling law and order in Pakistan. The Supreme Court has stressed how Ahmadi practices and their centenary celebrations threatened the country's culture and society by potentially unsettling Pakistan's peace and tranquillity. Supreme Court Judge Abdul Quadeer Chaudhary stated

It is thus clear that, according to the Ahmadis themselves, both the sections, i.e. Ahmadis and the main body cannot be Muslims at the same time. If one is Muslim, the other is not.... The Ahmadis are, therefore, non-Muslims, legally and constitutionally and are, of their own choice, a minority opposed to Muslims. Consequently, they have no right to use the epithets etc. and the Shaa'ir-e-Islam, which are exclusive to Muslims and they have been rightly denied their use by law.⁵⁰¹

Judge Abdul Quadeer Chaudhary clearly considers Ahmadis to be legally non-Muslim. Interestingly, the Pakistan Supreme Court has taken the line that issues related to the definition of Muslims are legal issues, not religious ones; they have even made declarations of *takfir* (excommunication) against the Ahmadi community. Gualtieri notes that the Supreme Court seems to have focused on the Ahmadis themselves, not on their actions.⁵⁰² He argues that "Ahmadis are criminals because they are Ahmadis, not because they commit any acts which, by themselves, pose any danger to society."⁵⁰³ The Court argued that Ahmadis would become "state-crafted Salman Rushdie[s]" if the government permitted them to publicly worship, as Ahmadis inherently blaspheme Islam simply by leading

⁵⁰¹ *ibid*, 1768; "Pakistan - Zaheer-ud-din v. the State" 1*Yearbook of Islamic and Middle Eastern Law* (1994), 565-573, p.571..

⁵⁰² Antonion R. Gualtieri, *Conscience and Coercion: Ahmadi Muslims and Orthodoxy in Pakistan* (Montreal : Guernica, 1989), p.28. (Gualtieri, *Conscience and Coercion*).

⁵⁰³ Siddiq, "Enforced Apostasy," pp. 294-295.

Ahmadi lives.⁵⁰⁴ The Court therefore concluded that the anti-blasphemy provisions of Ordinance XX are neither unconstitutional nor inconsistent with international human rights law (ICCPR), in as much as they protect morality and public order in order to prevent violating the integrity of Islam, which is Pakistan's official religion.⁵⁰⁵

Although the claim to prophethood made by the Founder of the Ahmadiyya Community, Mirza Ghulam Ahmad, specifically subordinated him to the Prophet Muhammad, the claim is still considered blasphemous by the Sunni Muslim *umma* and remains the primary basis for the anti-Ahmadi discrimination of the Pakistani Sunni community.⁵⁰⁶ The definition of a Muslim in Pakistan's Constitution was created by the government specifically to exclude the Ahmadi community and appease the *mullahs*, perhaps because the definition of Muslim in the Qur'an could not be used to exclude them. Siddiq agrees, noting that the Pakistan Government "wrongly defined Muslim without referring to the Holy Quran, from which Islamic law is principally derived".⁵⁰⁷ Siddiq points out that Islamic law allows Ahmadis to believe in and practice their faith without restriction, and that therefore the limitations placed on them are un-Islamic and the Pakistan Court is in violation of fundamental Islamic injunctions.⁵⁰⁸

The establishment of Pakistan's blasphemy laws occurred during the country's legal Islamisation, when President Muhammad Zia-ul-Haq issued Martial Law Ordinance XX. This amended Pakistan's Penal Code and Press Publication

⁵⁰⁴ *Zaheeruddin v. the State* (1993), 1778.

⁵⁰⁵ Amjad Mahmood Khan, "Persecution of the Ahmadiyya Community in Pakistan: An Analysis Under International Law and International Relations", 16 *Harvard Human Rights Journal*, (2003), 217-244 p.233.

⁵⁰⁶ Siddiq, "Enforced Apostasy," pp. 279-282.

⁵⁰⁷ *ibid*, p. 294.

⁵⁰⁸ *ibid*, p. 323.

Ordinance Sections 298-B and 298-C (blasphemy law).⁵⁰⁹ Moreover, definitions of Muslim and non-Muslim were made at the same time. These processes were clearly extremely politically biased, and soon led to a rise in anti-Ahmadi disturbances.

In a recent promising development the Supreme Court has criticised the constitution's discriminatory attitude towards non-Muslims and Ahmadis. In 2014 the court, under Chief Justice Tassaduq Hussain Jilani, issued a *suo moto* judgment (under Constitution Article 184(3)). The decision has reinforced key measures protecting freedom of speech and religion in Pakistan. Chief Justice Jilani noted that

It is imperative that the right to freedom of religion be restored as an individual and inalienable right, while concurrently preserving and protecting this right at a communal level, where the latter does not infringe on the former.⁵¹⁰

The freedom of religion must then be construed liberally to include freedom of conscience, thought, expression, belief and faith. Freedom, individual autonomy and rationality characterize liberal democracies and the individual freedoms thus flowing from the freedom of religion must not be curtailed by attributing an interpretation of the right to religious belief and practice exclusively as a community-based freedom.⁵¹¹

Jilani argued that Article 20 of the constitution, the 'Equal Religious Protection Clause', applies and should be applied to "every citizen, every religious denomination and every sect thereof."⁵¹² He contended that this right actually confers three distinct rights, namely the Rights to Profess, to Practice and to Propagate; by extension, he noted that Article 20 is not merely a private right to

⁵⁰⁹ *ibid*, p.288-289

⁵¹⁰ Supreme Court of Pakistan. 2014. S.M.C. No. 1 of 2014 (SC) (Pak.), para 17, <http://www.supremecourt.gov.pk/web/user_files/File/smc_1_2014.pdf> accessed 27 June 2016.

⁵¹¹ *ibid*, para 13.

⁵¹² *ibid*, para 15.

profess and practice, but also a public right to practice and propagate one's religion to others.⁵¹³ Crucially, Jilani stated that the right to propagate is not limited to Muslims but is equally conferred upon non-Muslims to propagate their religion both within and beyond their own communities. He rejected any Shari'a based restrictions on the religious practices of other religions, and argued that in Pakistan Muslims and non-Muslims have, and must be afforded, the same rights. Jilani stressed that one's right to have a religious conscience is fundamental, and not subject to other constitutional provisions. It is only subject to law, public order and morality; he notes that "Article 20 has a certain preeminence in the Constitution being only subject to the general restrictions of law, public order, and morality".⁵¹⁴ Khan notes that Jilani bases any valid restrictions on freedom of religion and speech on the ICCPR's principles of non-discrimination and neutrality, subordinating any "Islamic" concepts of order to universal guarantees.⁵¹⁵

To sum up, there is a tendency to use the blasphemy law to oppress certain religious minorities but that does not take us back to the Qur'an. The constitution has defined 'Muslim' and 'non-Muslim', making it clear that Ahmadis fall into the latter group and leading to an official *takfir* (declaration of apostasy) against the Ahmadi group. Ahmadis however are not guilty of treason and have never waged war against the broader Muslim community in Pakistan. Pakistan is thus an example of how Shari'a can be falsely interpreted by the government and used to fashion an un-Islamic blasphemy law.

⁵¹³ *ibid.*

⁵¹⁴ *ibid.*

⁵¹⁵ Khan, "Pakistan's Anti-Blasphemy Laws," pp. 20-21.

2.2.5 Egypt

About 90 percent of Egypt's population is Sunni Muslim, and the remaining 10 percent is Christian.⁵¹⁶ As with other Muslim-majority states, the court decisions reflect the dominance of Muslim ideas. Courts tend to rule that apostasy is not only an individual religious issue in Abu Zayd case but an attack against the state itself.

Position of Shari'a

The approach taken by the new Egyptian Constitution (2014) is far removed from those taken in Iran and Saudi Arabia, whose government systems follow Shari'a law and whose constitutions emphasise that they are Islamic states. Article 1 states that

The Arab Republic of Egypt is a sovereign state, united and indivisible, where nothing is dispensable, and its system is a democratic republic based on citizenship and the rule of law.

However, although the term 'Islamic state' is not used, this is not to say that Islam is without influence. Article 2 states that Islam is the state religion and that legislation is based on Shari'a:

Islam is the religion of the state and Arabic is its official language. The principles of Islamic Sharia are the principle source of legislation.

The new Egyptian Constitution thus recognises Shari'a as a source for its laws, although its impact on the constitution is as yet unclear. The most striking point in

⁵¹⁶ CIA, "The World Factbook: Egypt" (2012), <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> accessed 27 June 2016.

the whole document is the role allocated to Al-Azhar, which Article 7 declares to be the key Islamic interpretive institution and authority in Egypt:

Al-Azhar is an independent scientific Islamic institution, with exclusive competence over its own affairs. It is the main authority for religious sciences, and Islamic affairs. It is responsible for preaching Islam and disseminating the religious sciences and the Arabic language in Egypt and the world.

The power to interpret Islam given in the Constitution to Al-Azhar, a religious institution, makes Egypt a unique case. Article 7 itself is also unique, in that for the first time in Islamic history a legal provision has awarded the right to interpret Islamic science, at least within Egypt, to only one institution; Islam has not been controlled by one body since its very earliest days.

The constitution's approach to the issue of religious freedom is narrow; freedom is only extended to the so-called People of the Book (Christians and Jews, as well as Muslims). Although Article 64 states "freedom of belief is absolute", this right is only limited to these three religions. Article 3 of the Constitution states that

The principles of the laws of Egyptian Christians and Jews are the main source of laws regulating their personal status, religious affairs, and selection of spiritual leaders.⁵¹⁷

This implies that other religions, such as Baha'i, are not officially recognised in Egypt. Article 64 thus supposedly protects religious freedom but in fact Article 3 stipulates that only adherents of the main three monotheistic religions are allowed to practice. Members of other religions are therefore not officially

⁵¹⁷ Constitution of the Arab Republic of Egypt (2014), Art 3.

recognised.⁵¹⁸ This approach to religious freedom has implications for the treatment of apostasy and blasphemy.

Apostasy and blasphemy

The Supreme Constitutional Court (SCC) has ruled that while freedom of belief is an absolute, the practice of a faith may be limited in order to preserve public order and morality and protect others' rights.⁵¹⁹ These limitations can easily be seen in the Abu Zayd case, which Egyptian courts (Court of Cassation) have intensively quoted. In fact, Abu Zayd never tried to renounce Islam but merely to discuss it, in order to more fully comprehend it. The religious scholar, Susanne Olsson, notes that he "claimed not to be opposed to religion but tried to understand it scientifically",⁵²⁰ and was "critical of Islamists and their empty ideological slogans, such as 'Islam is the solution.'"⁵²¹

Although apostasy is not codified as a crime in Egyptian law, several cases have shown how Islamic apostasy law can greatly influence court decisions. For example, in the Abu Zayd case the defendant was ruled apostate by the court of Cassation, as his writing was deemed to have insulted public policy.⁵²² Moreover, the court portrayed attacks against religion as being equivalent to attacks against the state:

...what [Abu Zayd] had written contravenes not only religion, but also the constitution of the Arab Republic of Egypt. Its article 2 states that Islam is the

⁵¹⁸ Moataz Ahmed El Fegiery, "Islamic Law and Freedom of Religion: The Case of Apostasy and Its Legal Implications in Egypt," 10 *Muslim World Journal of Human Rights* (2013), 1-26, p. 5. (El Fegiery, "Islamic Law and Freedom of Religion").

⁵¹⁹ Supreme Constitutional Court, Case No. 8/17, 18 May 1996.

⁵²⁰ Susanne Olsson, "Apostasy in Egypt: Contemporary Cases of *Hisbah*", 98 *The Muslim World* (2008), 95-115. p. 105.

⁵²¹ *ibid.*

⁵²² Court of Cassation, Nos. 475, 478, 481, Year 65, 5 Aug. 1996, also see Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago: The University of Chicago Press, 2012), p. 46. (Agrama, *Questioning Secularism*)

religion of the State... Thus, an attack on the [the foundation of Islam] is an attack against the State which is founded upon it. He also contravenes article 9 of the constitution that states that the family is the basis of society, and its basis is religion.⁵²³

The stance taken by the court is an important one since it positions Islam as not merely being one of several religions, but actually as being at one with the state itself, i.e. being part of or even being inseparable and indistinguishable from the state. Therefore, any attack against the religion of Islam, such as apostasy, is considered to be an assault against the state, and therefore punishing apostasy is justifiable. Analysing this judgement, Hussein Ali Agrama notes that it does not define freedom of belief as the autonomy to believe whatever one wants to, but rather as the “protection from those actions and practices that would corrupt religious belief and obstruct the conditions needed for its proper maintenance and practice”.⁵²⁴ Moreover, it is the state’s responsibility to maintain this freedom of belief by protecting it from potentially corrupting influences.⁵²⁵

Interestingly, the traditional Islamic concept of *hisbah* was used to bring this case to court. As will be discussed later, *hisbah* has not traditionally been used for declarations of *takfir*. Ismail concludes that the Abu Zayd ruling established that courts can determine someone’s faith and declare them apostate, and that defence of the Muslim community and the public interest can be declared and acted upon by any community member.⁵²⁶

⁵²³ Cairo Court of Appeals, case no. 287 (1995) in Agrama, *Questioning Secularism*, p. 51.

⁵²⁴ Agrama, *Questioning Secularism*, p. 51.

⁵²⁵ *ibid*, p. 66.

⁵²⁶ Salwa Ismail, “Religious “orthodoxy” as public morality: The state, Islamism and cultural politics in Egypt”, 8 *Critique: Critical Middle Eastern Studies* (1999), 25-47, p. 35.

Egyptian courts have used public order grounds to prohibit renouncing Islam in other cases. For example, in the Mohamed Hegazy case (2007) Judge Muhammad Husseini clearly rejected conversion from Islam and employed hardline reasoning in his judgement:⁵²⁷

He [Hegazy] can believe whatever he wants in his heart, but on paper he can't convert.⁵²⁸

Hegazy was born to Muslim parents and as such his original identity card identified him as a Muslim, but when he later converted to Christianity the Interior Ministry refused to alter his religious registration. Hegazy invoked Article 18 of the ICCPR, which Egypt had signed. Nevertheless, the Court argued that the rules of Islamic law supersede any provisions of the ICCPR.⁵²⁹ Many apostasy and blasphemy cases have been reported in Egypt, although there is no law that prohibits apostasy. Berger notes that apostasy cases can thus only be understood as case law in Egypt:

Again, no rule prohibiting apostasy can be found in the codified part of this law, but should be sought in the remnant non-codified rules that are based on “the prevalent opinion of the Hanafi doctrine”.⁵³⁰

Berger continues that “The rules of apostasy, therefore, are limited to the field of personal status law.”⁵³¹ For example, in the Abu Zayd case (1995) the defendant was not handed down any criminal punishment, such as a fine or imprisonment, but instead was ordered to divorce his wife on the grounds that according to Islamic law

⁵²⁷ Court of Administrative Justice, Case No. 35647/61, 29 January 2008.

⁵²⁸ Ethan Cole, “Egypt Rules Christian Convert Must Remain Legally Muslim” (3 February 3, 2008), <<http://www.christianpost.com/news/egypt-rules-christian-convert-must-remain-legally-muslim-31064/>> accessed 27 June 2016.

⁵²⁹ Court of Administrative Justice, Case (2008).

See, also El Fegiery, “Islamic Law and Freedom of Religion,” p. 13.

⁵³⁰ Maurits S. Berger, “Apostasy and Public Policy in Contemporary Egypt: An Evaluation of Recent Cases from Egypt's Highest Courts” 25 *Human Rights Quarterly* (2003), 720–740, pp.722–723. (Berger, “Apostasy and Public Policy”).

⁵³¹ *ibid*, p.723.

an apostate's marriage is null and void. The reasons for this prohibition are expounded in the Hanafi law book *The Hedaya*:

It is not lawful that an apostate marry any woman, whether she be a believer, an Infidel, or an apostate, because an apostate is liable to be put to death; moreover, his three days of grace are granted in order that he may reflect upon the errors which occasion his apostasy; and as marriage would interfere with such reflection, the law does not permit it to him.⁵³²

The legal approach taken by mediaeval scholars towards apostasy was adopted unthinkingly by the court in the Abu Zayd case without any attempt to understand the difference in circumstances between mediaeval times and today.

As in other Muslim majority states, Egyptian cases of blasphemy and apostasy show that the supposed offenders being targeted are often writers or bloggers, not murderers or traitors as in Mohammad's day. This stance can be seen in Article 98(f) of the Egyptian Penal Code,⁵³³ which strictly prohibits publishing or writing 'extremist thoughts':

Detention for a period of not less than six months and not exceeding five years, or paying a fine of not less than five hundred pounds and not exceeding one thousand pounds shall be the penalty inflicted on whoever exploits and uses the religion in advocating and propagating by talk or in writing, or by any other method, extremist thoughts with the aim of instigating sedition and division or disdaining and contempting any of the heavenly religions or the sects belonging thereto, or prejudicing national unity or social peace.

In a similar case, Nawal El-Saadawi was charged with apostasy in 2001.⁵³⁴ In an interview she had referred to the pilgrimage to Mecca as an outdated custom,⁵³⁵ "a

⁵³² Ali Marghinani, *The Hedaya*, p. 64.

⁵³³ Egypt: Penal Code [Egypt], No. 58 of 1937, (August 1937), art. 98(f), <<http://www.refworld.org/docid/3f827fc44.html>>accessed 27 June 2016.

⁵³⁴ Garcés, "Islam, Till Death Do you Part?", p.243.

vestige of pagan practices”,⁵³⁶ and had also criticised the unequal gender-based Islamic inheritance laws.⁵³⁷ The lawyer who brought the case against her, Nabih El-Wahsh, argued that

What she said about the pilgrimage and the laws of inheritance is atrocious. She has offended the feelings of Muslims.

Whether she has to divorce her husband or not, is not important. What matters is that she should keep her opinions to herself, because they are against Islam. These opinions are poison for Muslims.⁵³⁸

Ultimately, as in the Abu Zayd case (1995), the marriage was threatened with termination under the law prohibiting Muslims to be married to apostates. Although the apostasy charge against El-Saadawi was rejected by Prosecutor-General Maher Abdel-Wahed, this case shows how the state uses unwritten Shari’a law to limit freedom of expression so as not to enrage public feelings.⁵³⁹

In a more recent blasphemy case, that of Alber Saber Ayad (2012), the defendant was arrested for posting an anti-Islamic amateur video (“Innocence of Muslims”) on his Facebook account, although his lawyer denied that he had posted it.⁵⁴⁰ After being found guilty of defaming Islam he was sentenced by a Misdemeanour Court to three years in prison and was fined 1,000 Egyptian pounds. Saber was released

⁵³⁵ “Court to hear Egypt apostasy case,” *BBC* (9 July, 2001), <http://news.bbc.co.uk/1/hi/world/middle_east/1429415.stm> accessed 27 June 2016. (“Court to hear Egypt apostasy case,” *BBC*)

⁵³⁶ Women Living Under Muslim Laws, “Egypt: Attempt to annul the marriage of Dr Nawal el-Saadawi” (3 May 2001), <<http://www.wluml.org/node/14>> accessed 27 June 2016.

⁵³⁷ “Court to hear Egypt apostasy case” *BBC*

⁵³⁸ *ibid.*

⁵³⁹ *ibid.*

⁵⁴⁰ US Department of State, “International Religious Freedom Report for Egypt” (2012), <<http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>>accessed 27 June 2016. (US, “International Religious Freedom Report for Egypt 2012”) See also, Amnesty International, “Egypt: ‘Outrageous’ guilty verdict in blasphemy case an assault on free expression” (12 December 2012), <<http://www.amnesty.org/en/news/egypt-outrageous-guilty-verdict-blasphemy-case-assault-free-expression-2012-12-12>>accessed 27 June 2016.

on bail shortly afterwards, pending appeal,⁵⁴¹ and subsequently left Egypt in 2013.⁵⁴²

The Islamic doctrine of *hisbah*, which is mentioned in several Qur’anic verses, also plays a central role in apostasy and blasphemy cases. For example, in 2011 a number of conservative lawyers filed a *hisbah* complaint against Karam Saber, an Egyptian writer.⁵⁴³ Both the Ben Suef Coptic Christian diocese and Al-Azhar judged his short story collection “Where is God?”⁵⁴⁴ to be offensive to religion, and in 2013 he was sentenced to five years in prison by a misdemeanour court.⁵⁴⁵

To sum up, the legal treatment of apostasy in Egypt can only be understood as case law; the ‘keeping public order’ argument is used as the reason for invoking un-codified apostasy law. Thus far, these laws have been principally used to target writers.

2.2.6 Saudi Arabia

⁵⁴¹ US, “International Religious Freedom Report for Egypt 2012”

⁵⁴² “Alber Saber: Brotherhood will drive the people to secularism”, *Daily News* (27 January 2013), <<http://www.dailynewsegypt.com/2013/01/27/alber-saber-brotherhood-will-drive-the-people-to-secularism/>> accessed 27 June 2016.

⁵⁴³ “Rights group condemn Hisba case against writer” *Daily News* (April 29, 2011), <<http://www.dailynewsegypt.com/2011/04/29/rights-group-condemn-hisba-case-against-writer/>> accessed 27 June 2016.

⁵⁴⁴ “Egyptian author Karam Saber given 5-year prison sentence for blasphemy” *Examiner. Com* (14 June 2013), <<http://www.examiner.com/article/egyptian-author-karam-saber-given-5-year-prison-sentence-for-blasphemy>> accessed 27 June 2016.

⁵⁴⁵ “Karam Saber’s trial pushed to November”, *Daily News* (22 October 2013), <<http://www.dailynewsegypt.com/2013/10/22/karam-sabers-trial-pushed-to-november/>> accessed 27 June 2016.

Needless to say, the influence that Islam exercises over Saudi Arabia's legal structure is very great indeed.⁵⁴⁶ Although there is no codified law that punishes apostasy and blasphemy in Saudi Arabia, apostates and blasphemers can actually be punished with death. Islam is completely dominant in the country. According to the World Population Review 2014 the population is 100% Muslim, with 85-90% being Sunni and the remaining 10-15% Shi'i; persecution of this latter group has been widely reported.⁵⁴⁷ Saudi Arabia has sought to establish a Shari'a-based state. Its Basic Law of Governance is treated almost as a constitution might be in other countries, although this document itself clearly states that the Holy Qur'an and *Sunna* form the nation's constitution. There have been no apostasy cases in recent years, although clerics frequently criticise liberal writers and call for the death penalty for such 'apostates'. Blasphemy is considered as proof of apostasy, and both are seen as un-codified *hadd* crimes.

Position of Shari'a

The Saudi Arabian legal system is unique, in that there is no separate constitution as such; as already stated, Article 1 of Saudi Arabia's Basic Law of Government (1992) notes that the Qur'an and *Sunna* are its constitution.

The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, The Holy Qur'an, and the Sunna (Traditions) of the Prophet (PBUH). Arabic is the language of the Kingdom. The City of Riyadh is the capital.

This article is crucial, as Saudi Arabia is not only trying to base its laws on the Qur'an and *Sunna*, it is trying to incorporate them as its constitution. Peiffer states

⁵⁴⁶ Abiad, *Sharia* p. 46.

⁵⁴⁷ World Population Review, "Saudi Arabia Population 2016", <<http://worldpopulationreview.com/countries/saudi-arabia-population/>> accessed 27 June 2016.

that the legal system is therefore based on “divine revelation, rather than judicial decisions or written law”.⁵⁴⁸ Abiad notes that Article 1 simply provides a “written explanation of what is regarded as a priori knowledge”, namely that the country’s constitution and laws are not *based* on Islamic principles, they *are* Islam. As such, the codified provisions of Islam as the state religion are essentially superfluous.⁵⁴⁹ Moreover, all laws are subordinate to the Qur’an and the *Sunna*, including the Basic Law itself. Article 7 of the Basic Law of Governance (1992) states that

Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunna of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State.

This article emphasises that the Qur’an and Sunna *are* Saudi Arabian law; they are one and the same. Moreover, Article 1 of the Law of Procedure (2000) also takes the same position:

Courts shall apply to cases before them provisions of Shari’ah laws, in accordance with the Qur’an and Sunnah of the Prophet (peace be upon him), and laws promulgated by the State that do not conflict with the Qur’an and Sunnah, and their proceedings shall comply with the provisions of this Law.

These articles clearly illustrate the importance and dominance of Shari’a in the Saudi legal system. Thus, in Saudi Arabia, all laws follow Shari’a.

Apostasy and blasphemy

The Saudi position on religious freedom is heavily influenced by Shari’a. Article 26 of the Basic Law of Governance requires the state to “protect[s] human rights in

⁵⁴⁸ Elizabeth Peiffer, “The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria”, 11 *William and Mary Journal of Women and the Law* (2004), p. 520.

⁵⁴⁹ Abiad, *Sharia*, p. 43.

accordance with the Shari'a". In effect, this means that human rights can be limited; although this clause does not specify what interpretation of the Shari'a should be applied, or by whom or how, its effect is that religious freedom is severely restricted in Saudi Arabia. Indeed, religious freedom is not even referenced in the country's laws. Article 23 states

The State shall protect the Islamic Creed, apply the Sharia, encourage good and discourage evil, and undertake its duty regarding the Propagation of Islam (Da'wa).

This article clearly prioritises Islam, and even states that "propagation of Islam" is the state's duty. Article 48 of the Basic Law states

The Courts shall apply rules of the Islamic Sharia in cases that are brought before them, according to the Holy Qur'an and the Sunna, and according to laws which are decreed by the ruler in agreement with the Holy Qur'an and the Sunna.

This article gives the courts power to apply Shari'a in cases brought to them, in accordance with the Qur'an and the *Sunna*:⁵⁵⁰

Article 23 (above) says the state has a duty to act in accordance with Shari'a, and Article 9 of the Royal Decree, which is considered to be a regulation rather than a law, similarly specifies that the "implementation of the law must be carried out in accordance with the stipulations of the Islamic faith".⁵⁵¹ Saudi legislation is thus completely in accordance with the Qur'an and *Sunna*. With regards to criminal law, Article 38 of the Basic Law of Governance (1992) sets forth that

No-one shall be punished for another's crimes. No conviction or penalty shall be inflicted without reference to the Sharia or the provisions of the Law. Punishment shall not be imposed ex post facto.

⁵⁵⁰ Abiad, *Sharia*, p. 46.

⁵⁵¹ *ibid.*

This article states that any criminal law should follow Shari'a principles. Moreover, Article 48 of the Basic Law of Governance (1992) notes that

The Courts shall apply rules of the Islamic Sharia in cases that are brought before them, according to the Holy Qur'an and the Sunna, and according to laws which are decreed by the ruler in agreement with the Holy Qur'an and the Sunna.

These articles indicate that penalties will only be carried out in accordance with Shari'a prescriptions, but the wording is extremely ambiguous. Practices are largely unwritten; in general, there is little codification in the Saudi legal system.⁵⁵²

According to Vogel, most rules applied in Saudi courts are drawn from mediaeval books of *fiqh* which record scholarly opinions and interpretations of Shari'a.⁵⁵³

The penal code in Saudi Arabia does not make reference to apostasy and blasphemy, and therefore these acts are not codified as offences. However, the Saudi interpretation of Shari'a recognises them both as punishable crimes. Article 3 of the Law of Criminal Procedure (2001) clearly states that any act defined as a crime under Shari'a is punishable:

No penal punishment shall be imposed on any person except in connection with a forbidden and punishable act, whether under Shari'ah principles or under statutory laws, and after the person has been convicted pursuant to a final judgment rendered after a trial conducted in accordance with Shari'ah principles.

Un-codified acts that are treated as crimes by Shari'a law are thus considered offences in Saudi Arabia. There have been a number of well-known apostasy and blasphemy cases in Saudi Arabia, such as that of Sabri Bogday, a Turkish barber (2007). He was believed to have sworn at God and the Prophet at his barbershop in Jeddah and was sentenced to death by Jeddah General Court for blasphemy; the

⁵⁵² Mohamed S.M. Eltayeb, *A Human Rights Approach to Combating Religious Persecution*, (2001) p. 109.

⁵⁵³ Vogel, "The Closing of the Door of Ijtihad," p. 9.

Mekka Appeals Court upheld this sentence.⁵⁵⁴ After several unsuccessful appeals⁵⁵⁵ his sentence was finally overturned after he repented and pleaded to Allah for forgiveness.⁵⁵⁶ He was released in 2009 and returned to Turkey.⁵⁵⁷

A more recent case, and one which indicates the existence of uncodified apostasy law, is that of Raif Badawi, a blogger and liberal activist. Local religious scholars called for him to be charged with apostasy and sentenced to death, and in March 2012 Sheikh Abdulrahman al-Barrak issued a religious ruling declaring Badawi an “unbeliever... and apostate who must be tried and sentenced according to what his words require”; Al-Barrak claimed that Badawi had said “that Muslims, Jews, Christians, and atheists are all equal.”⁵⁵⁸ He was arrested in 2012 under an anti-cybercrime law, found guilty of insulting Islam for his founding of an “Internet forum that violates Islamic values and propagates liberal thought”⁵⁵⁹ and sentenced in a Jeddah Court to seven years in prison and 600 lashes.⁵⁶⁰ A judge recommended that a case be brought before the high court on a charge of apostasy,⁵⁶¹ but an appeals court overturned the sentence and ordered a retrial.⁵⁶² In May 2014 Badawi

⁵⁵⁴ Human Rights Watch, “Saudi Arabia: Stop Trials for ‘Insulting’ Islam”, (13rd May 2008)

<<http://www.hrw.org/en/news/2008/05/12/saudi-arabia-stop-trials-insulting-islam>>accessed 27 June 2016.

⁵⁵⁵ Amnesty International, “Document- Saudi Arabia: Death Penalty/Unfair trial , Sabri Bogday”, (23 April 2008), <<https://www.amnesty.org/en/documents/mde23/014/2008/en/>>accessed 27 June 2016.

⁵⁵⁶ Ghazanfar Ali Khan, “Freed Turkish barber reaches home”, *Arab News* (28 January 2009),

<<http://www.arabnews.com/node/320422>>accessed 27 June 2016.

⁵⁵⁷ *ibid.*

⁵⁵⁸ Human Rights Watch “Saudi Arabia: 600 Lashes, 7 Years for Activist” (31 JULY 2013)

<<http://www.hrw.org/news/2013/07/30/saudi-arabia-600-lashes-7-years-activist>>accessed 27 June 2016.

(HRW, “Saudi Arabia: 600 Lashes”).

⁵⁵⁹ “Saudi Arabian social website editor sentenced to seven years behind bars and 600 lashes“ *Daily News* (30 July 2013),

<<http://www.nydailynews.com/news/world/saudi-arabian-social-website-editor-sentenced-years-behind-bars-600-lashes-article-1.1412811>>accessed 27 June 2016.

⁵⁶⁰ HRW, “Saudi Arabia: 600 Lashes.”

⁵⁶¹ Salma Abdelaziz “Wife: Saudi blogger recommended for apostasy trial”, *CNN* (26, December 2013),

<<http://edition.cnn.com/2013/12/25/world/meast/saudi-blogger-death-sentence/index.html>>accessed 27 June 2016.

⁵⁶² Damien Gayle “Saudi court sentences liberal blogger to ten years in jail, 1,000 lashes and orders him to pay a £133,000 fine for ‘insulting Islam’” *DailyMail* (8 May 2014),

was again convicted, and this was upheld in an appeals court in September. The sentence was 10 years in prison and 1,000 lashes, to be followed by a 10-year travel ban and a fine of one million Saudi Arabian riyals (about £133,000).⁵⁶³

The Kingdom of Saudi Arabia has a monarchical system of government, at least formally. However, the Basic Law actually restricts the King's power considerably, and his authority is far from absolute. The most prominent of these Basic Law restrictions are Articles 5(b) and 6, which limit the King's authority "in accordance with the holy Qur'an and the tradition of the Prophet"⁵⁶⁴ and serve to keep separate the King's areas of control from those legal issues that are "patently administered by the Qur'an".⁵⁶⁵

Intra-religious persecution is a prominent religious freedom issue in Saudi Arabia, as noted in the US International Religious Freedom Report 2004:

Islam is the official religion, and the law requires that all citizens be Muslims. The Government prohibits the public practice of non-Muslim religions. The Government recognizes the right of non-Muslims to worship in private; however, it does not always respect this right in practice and does not define this right in law.⁵⁶⁶

Followers of Shi'i Islam are banned from building new mosques or from enlarging or remodelling existing ones, their books and other printed works are banned, and

<<http://www.dailymail.co.uk/news/article-2623124/Saudi-court-sentences-liberal-blogger-ten-years-jail-1-000-lashes-orders-pay-133-000-fine-insulting-Islam.html>> accessed 27 June 2016.

⁵⁶³ *ibid.*

⁵⁶⁴ The Basic Law of Governance, Article 6.

⁵⁶⁵ Abiad, *Sharia*, p. 42.

⁵⁶⁶ Human Rights Watch "Saudi Arabia: Stop Trials for 'Insulting' Islam". (13 MAY 2008), <<https://www.hrw.org/news/2008/05/12/saudi-arabia-stop-trials-insulting-islam>> accessed 27 June 2016.

their scholars cannot publish.⁵⁶⁷ According to the United States Commission on International Religious Freedom (USCIRF) (2010),

Since many Saudi judges consider Shi'a and Ismaili Muslims to be "non-believers," they are frequently dealt with more severely by the courts.⁵⁶⁸

Wahhabi religious scholars issue official *fatwas* to belittle Shi'i Islam, such as that issued in 1990 by Sheikh Ibn Jibreen which stated that "the Shi'i were *rafida* (infidels) and...killing them was not a sin".⁵⁶⁹ Eltayeb notes that by labelling Shi'is polytheists, the official Wahhabi doctrine authorises and even requires Sunnis to discriminate against them; indeed, it "makes them liable to death which, according to the Wahhabi doctrine, is an obligatory duty imposed by God on believers to fight unbelievers".⁵⁷⁰ Shi'a Islam is thus seen as an apostate sect in Saudi Arabia. According to the USCIRF (2010),

...the Saudi government continues its systematic practices of short-term detentions, without trial, of minority Muslims, particularly Shi'a Muslims, for religious observance not in accordance with the government's interpretation of Islam.⁵⁷¹

To conclude, Saudi Arabia is trying to create a purely Islamic state. Although few apostasy and blasphemy cases have been reported, Saudi Arabia views members of sects other than the government-sponsored form of Islam to be apostates. For example, Shia Muslims are considered apostate; this *takfir* (declaration of apostasy) against Shi'i and its writers is a key issue in Saudi Arabia and elsewhere.

⁵⁶⁷ Mohamed S.M. Eltayeb, *A Human Rights Approach to Combating Religious Persecution*, (2001) p. 127. (Eltayeb, *A Human Rights Approach*).

⁵⁶⁸ U.S. Commission on International Religious Freedom, "Annual Report of the United States Commission on International Religious Freedom May 2010", <<http://www.uscirf.gov/sites/default/files/resources/ar2010/saudiArabia2010.pdf>>accessed 27 June 2016. ("Annual Report of the United States Commission on International Religious Freedom May 2010")

⁵⁶⁹ Eltayeb, *A Human Rights Approach*, p. 128.

⁵⁷⁰ Eltayeb, *A Human Rights Approach*, p. 106.

⁵⁷¹ "Annual Report of the United States Commission on International Religious Freedom May 2010."

2.2.7 Turkey

Unlike other Muslim majority states, the Turkish Constitution does not follow the Qur'an or *Sunna*. Although 99.8% of Turkey's population is Muslim, its legal system is completely secular. The constitution does not mention religion at all and Islam is not seen as a source of law in any respect.⁵⁷² Wing and Varol stress that "the laws of the country, not God's word, are supreme in the Turkish Republic".⁵⁷³

Turkey strictly separates religion and the state, unlikely other Muslim majority states. The secular emphasis found throughout its constitution can be traced back to its founder, Mustafa Kemal Atatürk:

Look at our history. Those who hid their real beliefs under the disguise of religion deceived our innocent nation with big words like Shari'a. You will see that what destroyed this nation, what caused its collapse, was always the deception hidden under the curtain of religion.⁵⁷⁴

The Preamble of the constitution also emphasises that "sacred religious feelings" are not justification for interference with secularism.⁵⁷⁵ The Preamble thus serves to emphasise that no activity can be afforded constitutional protection if it challenges the principle of secularism or seeks to use religion in a political way.⁵⁷⁶

⁵⁷² Abiad, *Sharia*, p. 44.

⁵⁷³ Adrien Katherine Wing and Ozan O. Varol, "Is Secularism Possible in a Majority-Muslim Country?: The Turkish Example", 42 *Texas International Law Journal* (2006), 1-54 p. 22 (Wing and Varol, "Is Secularism Possible in a Majority-Muslim Country?").

⁵⁷⁴ *ibid.* p. 12.

⁵⁷⁵ The Constitution of the Republic of Turkey (1982, amended on 23 July, 1995), *preamble*. (The Constitution of the Republic of Turkey); Also see Art 176 of the Constitution

The preamble, which states the basic views and principles the Constitution is based on, shall form an integral part of the Constitution.

⁵⁷⁶ Wing and Varol, "Is Secularism Possible in a Majority-Muslim Country?," p. 22.

Another crucial point to note is that unlike the constitutions of other Muslim majority states, which emphasise that Shari'a is the main source of law, Turkey's constitution asserts its own position as the supreme law of the land:

...commanding respect...and absolute loyalty to [the Constitution's] letter and spirit.⁵⁷⁷

The 'spirit' of the constitution is mentioned in the Preamble, and this has been cited in several Constitutional Court cases. Wing and Varol note that the court has "declared that 'secularism' was not only within the 'letter' of the constitution but also within its 'spirit', as one of the driving principles behind the Republic's existence".⁵⁷⁸ Various articles mention this same spirit, for example Article 2:

The Republic of Turkey is a democratic, secular and social state governed by the rule of law...

Article 6 also implies that the state's authority stems not from God, as it had done under the Ottoman Empire, but from the constitution.⁵⁷⁹ One of the justifications for this provision is to inhibit religious involvement in the affairs of state. The same article also states that

The exercise sovereignty shall not be delegated by any means to any individual, group or class. No person or organ shall exercise any state authority which does not emanate from the Constitution.⁵⁸⁰

Article 7 of the Constitution states that the people themselves, not the Qur'an, determine how Turkey will be governed, albeit via their elected

⁵⁷⁷ Preamble of The Constitution of the Republic of Turkey (1982 amended on 23 July, 1995)

⁵⁷⁸ Decision No. 2001/2 (Turk. Const. Ct. 2001) in Wing and Varol, "Is Secularism Possible in a Majority-Muslim Country?," p. 22.

⁵⁷⁹ Wing and Varol, "Is Secularism Possible in a Majority-Muslim Country?," p. 23.

⁵⁸⁰ The Constitution of the Republic of Turkey, Art 6.

representatives.⁵⁸¹ Because Turkey does not have a state religion, and does not officially favour Islam over any other faith, religion-based prejudice is against the constitution and also against the country's spirit of secularism. This important principle of the Turkish legal system is stressed in Article 10:

Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

This article therefore rejects the supremacy of Islam, and also of any particular Islamic sect. This approach differs greatly from that of some Muslim majority states, which emphasise the supremacy of Islam and of their country's dominant sect, such as Shi'i Islam in Iran. Moreover, the Turkish Constitution rejects any notion of employing unwritten legal practices based on Shari'a, instead considering the constitution as the provider of "fundamental legal rules".⁵⁸² Article 11 states that

The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals. Laws shall not be contrary to the Constitution.

Article 11 thus extends Turkey's secular principles to all branches of government; no legislation can contradict the commitment to secularism found throughout the constitution.⁵⁸³ This secular approach was seen in the prominent case of *Refah Partisi (The Welfare Party) and others v. Turkey*, in which Turkey prohibited an Islamic political movement that was seeking to spread Shari'a in Turkey. In 1983 former Prime Minister Necmettin Erbakan formed Refah, a political party running

⁵⁸¹ Wing and Varol, "Is Secularism Possible in a Majority-Muslim Country?," p. 24.

Also see Article 7 of the Constitution of the Republic of Turkey (1982, amended on 23 July, 1995),

Legislative power is vested in the Grand National Assembly of Turkey on behalf of Turkish Nation.

This power shall not be delegated.

⁵⁸² Wing and Varol, "Is Secularism Possible in a Majority-Muslim Country?," p. 24.

⁵⁸³ Wing and Varol, "Is Secularism Possible in a Majority-Muslim Country?," p. 24.

on Islamic fundamental values.⁵⁸⁴ Fifteen years later the Turkish Constitutional Court disbanded it and prohibited its leaders from political activities, calling it a “centre of activities contrary to the principle of secularism”.⁵⁸⁵ Following a review of Refah’s dissolution and the loss of political rights suffered by the other applicants, the ECHR ruled that these measures met a “pressing social need” and were “proportionate to the aims pursued”, and that therefore these actions may be seen as “necessary in a democratic society” (Article 11(2) of the ECHR).⁵⁸⁶ Indeed, unlike in some other Muslim majority states, the Turkish Constitution explicitly bans the use of religion for political purposes:

No one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purpose of personal or political influence, or for *even partially basing* the fundamental, social, economic, political, and legal order of the state on religious tenets.⁵⁸⁷

Apostasy is not mentioned in the Turkish Penal Code (2004);⁵⁸⁸ although Article 216 does criminalise blasphemous behaviour, it is in regard to all religions, not only Islam:

(1) Any person who openly provokes a group of people belonging to different social class, religion, race, sect, or coming from another origin, to be rancorous or

⁵⁸⁴ David Schilling, “European Islamophobia and Turkey – Refah Partisi (The Welfare Party), v. Turkey”, 3 *Loyola of Los Angeles International and Comparative Law Review* (2004),501-515, p. 502.

⁵⁸⁵ Christian Moe, “Refah Partisi (The Welfare Party) and Others v. Turkey” 6 *The International Journal of Not-for-Profit Law* (2003),

<http://www.icnl.org/research/journal/vol6iss1/special_5.htm>accessed 27 June 2016.

⁵⁸⁶ *Refah Partisi (The Welfare Party) and Others v. Turkey*, 41340/98, 41342/98, 41343/98, 41344/98, Council of Europe: European Court of Human Rights, 66 (13 February 2003), <<http://www.refworld.org/docid/3fe7097e4.html>> [accessed 22 June 2014]

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (ECHR)), Art, 11(2) .

⁵⁸⁷ The Constitution of the Republic of Turkey, Art 24.

⁵⁸⁸ Turkish Criminal Code (Law No. 5237 of September 26, 2004, as amended up to Law No. 6217 of March 31, 2011).

hostile against another group, is punished with imprisonment from one year to three years in case of such act causes risk from the aspect of public safety.

The 2004 Penal Code of Turkey also criminalises blasphemy against other religious groups. This differs from apostasy and blasphemy laws in other Muslim majority states, such as Iran and Pakistan, where only renouncing or blaspheming Islam can be punished.

To sum up, Shari'a is not incorporated into Turkish legislation. Despite its population being almost entirely Muslim, Turkey is a completely secular state which fully recognises religious freedom. Apostasy is not considered a crime, and blasphemy law extends to all religions, not only Islam.

Conclusion

What we have seen in this chapter is the variety of ways in which apostasy law has been interpreted in the Islamic world and the many ways in which it has been applied. This variation in part reflects the complex relationship between laws enshrined at a constitutional state level and Shari'a law which is often developed at a local level. Few Muslim-majority states have codified apostasy laws in their penal code but nevertheless courts have cited Shari'a law to identify and punish offenders.

Some Muslim majority states have repugnancy clauses written into their constitutions. These clauses oblige the legal system to comply with “some core conception of Islam”.⁵⁸⁹ These clauses, which vary from country to country, are

⁵⁸⁹ Haider Ala Hamoudi “Repugnancy in the Arab World” 48 *Willamette Law Review* (2012)427-450; p. 427.

often used to provide a legal basis for Islamic apostasy and blasphemy laws. As we have seen, their ambitious nature has enabled states and hardline clerics to use Shari'a to suppress religious dissent. For example, the Abu Zayd case in Egypt (1996), the Lina Joy case in Malaysia (2005) and the Youcef Nadarkhani case in Iran (2010) were all deeply influenced by unwritten Shari'a.

In this rigid interpretation of Islam, simply holding different ideas from those of the so-called orthodoxy can be considered as threatening to society and declared to be apostasy. In none of the above cases did the so-called apostates threaten rebellion or revolution but they asserted religious views which were contrary to the mainstream.

This rigid understanding of apostasy with its violent implications has deviated from its traditional and contextual significance and meaning. The traditional reading of the apostates of the Prophet's time is that they were armed attackers who attempted to destabilise Islamic society through violence.

A significant number of Muslim scholars thus believe that the application of apostasy law in such cases contradicts the practices of the Prophet and Rightly-Guided Caliphs, and they hold the view that many of today's Muslim majority states thus do not follow the Prophet's approach to apostasy and blasphemy.

Chapter 3 Human Rights Obligations of Muslim Majority States

Introduction

This chapter examines the status of apostasy and blasphemy within respect to international human rights. The treatment of apostasy and blasphemy are related to notions of religious freedom and freedom of expression, both of which are recognised by international human rights instruments as universal but are not recognised as such in many Muslim states; furthermore, unlike many other human rights, religious freedom and freedom of expression are not absolute rights as both are subject to the rights of others.

Human rights are generally defined as those rights that one holds simply from being human.⁵⁹⁰ Their existence is seen as being natural, that is, they are rights possessed by human beings because of their humanity.⁵⁹¹ The topic of human rights has become one of the most hotly debated issues and most powerful concepts of modern times, and is frequently referenced in speeches and proclamations. In 1988 for example, on the fiftieth anniversary of the Universal Declaration of Human Rights, the UN Secretary-General at the time, Kofi Annan, stated as follows:

I began this anniversary year by reaffirming the universality of human rights, and by arguing that human rights are foreign to no culture and native to all nations...from the streets of Asia to the towns of Africa to the courts of Europe...⁵⁹²

In this statement Annan clearly notes that human rights are universal. Indeed, the view that there are certain universal minimum standards is a widely supported one. For example, the human rights violations seen in the genocide and holocaust of WWII, and more recently in Bosnia, Kosovo and Rwanda, have been universally condemned. Genocidal slaughter, rape and expulsion are morally offensive regardless of who commits the acts and who the victims are.⁵⁹³ Both perpetrators and victims legitimately possess human rights from birth, and are aware of these moral codes and will be held responsible for violating them.⁵⁹⁴

⁵⁹⁰ Jack Donnelly, 'The Relative Universality of Human Rights', 29 *Human Rights Quarterly* (2007), p. 282. (Donnelly, 'The Relative Universality of Human Rights')

⁵⁹¹ Audrey Guichon, "Some Arguments on the Universality of Human Rights in Islam", in Javaid Rehman and Susan C. Breau, ed., *Religion, Human Rights and International Law* (Leiden; Boston: Martinus Nijhoff Publishers, 2007), p. 170. (Guichon, "Some Arguments on the Universality of Human Rights in Islam")

⁵⁹² Press Release, "Human Rights Day 1998 Is Time to Renew Commitment to Globalizing Justice in Age of Globalization, Secretary-General States", SG/SM/6815, HR/4390, New York (1 December 1998).

⁵⁹³ David Little, "Religion and Human Rights: A Personal Testament", 18 *Journal of Law and Religion* (2002), p.72. (Little, "Religion and Human Rights")

⁵⁹⁴ *ibid.*

The term ‘non-derogable rights’ is used to denote rights that have become universally acknowledged as *jus cogens*⁵⁹⁵ norms, or that have become unconditionally accepted for some other reason. The broad consensus on such norms serves to strengthen their position in international law. It therefore follows that a *jus cogens* norm that proscribes any violations of a fundamental human right can be taken as proof of that right’s importance.⁵⁹⁶ As David Little argues, genocide is a detestable act regardless of who commits it and in what context it is committed. There seems to be a taboo or ‘sacred prohibition’ against genocide, and indeed against other forms of arbitrary injury.⁵⁹⁷ The existence of “non-derogable rights” thus seems to be universally accepted, even if understandings of exactly what constitutes these rights may vary.

However, although human rights may well be universal, at least in some form or other, this does not mean there is a universally valid human rights approach. Each society has its own position. Resistance to the universal approach to human rights can be seen both in the reservations made by Muslim majority states against some provisions of international human rights treaties and in certain practices of such states: these states mainly ignore those international human rights standards which are inconsistent with Shari’a. Indeed, there is no doubt that culture and religion greatly influence the meaning of human rights. For example, An-Na’im defines

⁵⁹⁵ “Legal Information Institute” Cornell University Law School, <https://www.law.cornell.edu/lii/about/contact_us>accessed 29 June 2016.

Jus cogens (from Latin: compelling law; English: peremptory norm) refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted.

⁵⁹⁶ Mark S Ellis, “Islamic and International Law: Convergence or Conflict?” in Anver Emon & Mark S Ellis & Benjamin Glahn ed., *Islamic Law and International Human Rights Law: Searching for Common Ground*, (Oxford: Oxford university Press, 2012), p.101 (Ellis, “Islamic and International Law”)

⁵⁹⁷ Little, “Religion and Human Rights”, p.72.

culture as the “totality of values, institutions and forms of behaviour transmitted within a society.”⁵⁹⁸

Individual religious freedom in the legal sense was first expounded within the Universal Declaration of Human Rights (UDHR). However the interpretation of religious freedom stated therein, especially its restriction clause, did not have, and do not have, universal agreement. Muslim majority states did not approve of it, as is indicated both by the defamation resolutions and reservations against international human rights treaties they have issued. There is an inherent tension here: while on the one hand human rights treaties strive for or even require universal acceptance, on the other hand some universalists require state parties not to make any reservations. This chapter argues that although the principle of religious freedom and expression is recognised worldwide, it has not been achieved universally.

3.1 Position of Apostasy and Blasphemy in International Human Rights

Apostasy is not deemed by international law to be a crime. This international approach, supporting religious freedom, is contrary to the laws of many Muslim majority states, some of which have codified apostasy law. For example, Article 306 of the Mauritanian Penal Code and Section 112(1) of Brunei’s Syariah Penal Code criminalise apostasy.⁵⁹⁹ Even Muslim majority states that have not codified

⁵⁹⁸ Abdullahi Ahmed An-Na’im, “Problems of Universal Cultural Legitimacy” in Abdullahi Ahmed An-Na’im and F. Deng (eds.), *Human Rights in Africa* (The Brooking Institution, Washington D.C., 1990), p. 332.

⁵⁹⁹ Section 112(1) of Brunei’s Syariah Penal Code (2013)

apostasy law sometimes try to punish apostates or prevent apostasy on Shari'a grounds. For example, in the Abu Zayd case in Egypt (1996) the Court of Cassation ruled Abu Zayd apostate and ordered his divorce. In the Lina Joy case in Malaysia (2007) a Federal Court ruled that a Muslim who wishes to renounce Islam must obtain an apostatisation order from a Shari'a Court. Cases such as these severely restrict the internationally-recognised right of individuals to choose their religion. The inequality found between Muslims and non-Muslims in many Muslim majority states also seems inconsistent with the right to religious freedom spelled out in international human rights declarations. For example, Article 13 of the Iranian Constitution declares that "Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities"; other religions are not recognised in the same way. Moreover, even the new 2014 Egyptian Constitution only extends religious freedom to the so-called People of the Book (Christians and Jews, as well as Muslims).⁶⁰⁰ The Egyptian and Iranian constitutions thus only recognise Islam, Christianity and Judaism as religions, with the addition of Zoroastrianism in Iran's case. This approach clearly contradicts the standard international human rights approach.

3.1.2 Origins of Western religious liberty

This section analyses the legal history of individual religious freedom, an approach that was instigated with the UDHR.

Any Muslim who declares himself as a non-Muslim and it is proved either by *ikrar* of the accused, or by *syahadah* of at least two *syahid* according to *Hukum Syara'* after the Court is satisfied having regard to the requirements of *tazkiyah al syuhud*, is guilty of the offence of *irtidad* and shall be liable on conviction to death as *hadd*.

⁶⁰⁰ Article 3 of the Egyptian Constitution (2014).

The notion of religious liberty as interpreted in the West, from the onset of its existence to the latest jurisprudential developments, is diametrically opposed to that of Islam. “Although some people stress that religious liberty is of Western origin, it must be noted that individual liberties weren’t embedded in law until the aftermath of WWII. Indeed, Perez Zagorin notes that

the fundamental principles and values that sustain religious toleration and freedom of religion are innovations and late arrivals in world history and did not become a part of the Western tradition until recent times.⁶⁰¹

Zagorin argues that Christianity has a history of intolerance:

The sixteenth century, which witnessed the Reformation and the beginning and spread of Protestantism, was probably the most intolerant period in Christian history, marked not only by violent conflict between contending Christian denominations but by an upsurge of anti-Judaism and anti-Semitism in western Europe... In the attempt by Catholic and Protestant governments in Europe to stop the spread of heresy, and in the civil and external wars of religion waged between Catholicism and Protestantism in the sixteenth and seventeenth centuries, countless thousands of people on both sides perished or were forced to go into exile as the victims of religious persecution...⁶⁰²

The meaning of liberty can be traced back to the adversarial relationship between the state and its people in the West. John Stuart Mill (d.1873 CE) stated that liberty “meant protection against the tyranny of the political rulers. The rulers were conceived...as in a necessarily antagonistic position to the people whom they ruled”.⁶⁰³ More particularly, *individual* religious liberty was not recognised in the past in the West; rather, it was linked to the ruler’s beliefs. Indeed, the very idea of religious liberty was born with (or “rose with”) the concept of *cuius regio eius*

⁶⁰¹ Perez Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton, N.J.: Princeton University Press, 2003), p. 4.

⁶⁰² *ibid.*, p. 2

⁶⁰³ John Stuart Mill, *On liberty* (London: Penguin, 2010), p. 5. (Mill, *On liberty*)

religio, which means that the ruler beheld the freedom to choose the religion of his territory.⁶⁰⁴ Thus in the West, freedom of belief for multiple religious groups in the same territory can be traced back to the civil wars of the 16th and 17th centuries.⁶⁰⁵ Furthermore, legal dispositions relating to the religious liberty of people as members of a group are to be found in peace treaties such as the *Union of Utrecht* of 1579 (the Netherlands), the *Edict of Nantes* of 1598 (France) and the *Treaty of Westphalia* of 1648 (Germany). Vermeulen argues that these treaties “may be regarded as early codifications of the freedom of conscience and religion, and as such may be seen as the first human rights declarations.”⁶⁰⁶ However, religious liberty as understood by the authors of the aforementioned treaties is too narrow and limited for one to see in them the stem of modern religious liberty, that is, as an *individual* right. For example, Article 13 of the *Union of Utrecht* (1579), whose main objective was “mutual defense against a foreign oppressor and religious toleration”,⁶⁰⁷ states that religious liberty is limited to remaining ‘free’ within one’s current religion, thereby excluding the liberty to renounce one’s religion or to be an atheist:

...each person shall remain free in his religion and...no one shall be investigated or persecuted because of his religion....⁶⁰⁸

⁶⁰⁴ Anat Scolnicov, “Freedom of Religion or Belief: Group Right or Individual Right?” Thesis submitted towards PhD Degree The London School of Economics University of London, (2005), p. 17; John Witte Jr., A Dickensian Era of Religious Rights: An Update on Religious Human Rights in Global Perspective, 42 *William and Mary Law Review* 707 (2001) 707-770:p. 733.

⁶⁰⁵ Bernardus Petrus Vermeulen, “The Freedom of Religion in Article 9 of the European Convention on Human Rights: Historical Roots and Today’s Dilemma’s” in A. van de Beek, E. A. J. G. Van der Borcht, and B. P. Vermeulen, *Freedom of religion* (Leiden; Boston : Brill, 2010), p. 9. (Vermeulen, “The Freedom of Religion in Article 9 of the European Convention on Human Rights”)

⁶⁰⁶ *ibid.*, p. 10.

⁶⁰⁷ Lucy Maynard Salmon “The Union of Utrecht”, *Annual Report of the American Historical Association for 1893* (Washington: Government Printing Office, 1894), p.139.

⁶⁰⁸ Article 13 of the Union of Utrecht, January 1579.

No individual religious liberty is noted in it, but religious freedom was considered to be restricted to one's current religion. Similarly, Article 21 of the *Edict of Nantes* (1598) stated that

Books concerning the said religion pretended Reformed may not be printed and publicly sold, except in cities and places where the public exercise of the said religion is permitted.⁶⁰⁹

These treaties show that in 16th century Europe, the notion of religious liberty as an individual right was not protected. Even halfway through the next century *The Treaty of Westphalia* (1648) still outlines restrictions on full religious freedom. Article 28 states that

all other of the said Confession of Augsburg...shall have the free Exercise of their Religion as well in public Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God.⁶¹⁰

The recognition of religious freedom was thus geographically restricted to a certain place, within a specific border. Although Article 49 of *The Treaty of Westphalia* (1648) refers to "Liberty of the Exercise of Religion",⁶¹¹ this liberty is not intended for the individual but for the religious group. It was not a moral or religious motive that laid behind the emergence of religious liberty directed to people as a group, but rather the intention to bring religious civil wars to an end.⁶¹²

Therefore, no evidence of the origin of individual religious liberty can be found in 16th and 17th CE documents. Not only was individual religious liberty not

⁶⁰⁹ Article 21 of the The Edict of Nantes (1598)

<http://huguenotsweb.free.fr/english/edict_nantes.htm>accessed 29 June 2016

⁶¹⁰ "Treaty of Westphalia", *Avalon Project* Yale Law School,

<http://avalon.law.yale.edu/17th_century/westphal.asp>accessed 29 June 2016.

⁶¹¹ *ibid*, Art 49.

⁶¹² Vermeulen, "The Freedom of Religion in Article 9 of the European Convention on Human Rights", p. 10.

understood, recognised or protected, there was no place for atheists or for renouncement of one's religion. Küng states that

...in the face of the increasing military threat to Christendom from the Turks (who were besieging Vienna in 1529)...the Pope ordered the burning of the Arabic text of the Qur'an immediately after its publication in Venice, which was known at the time as 'the whole of the Turks.'...Ardian Reland's *De religione mohammedica* (1705), the first reasonably objective work on Islam after Ross's⁶¹³ *Pansebeia*, was promptly placed on the Roman Index of prohibited books;⁶¹⁴ but it later won the support of George Sale in his translation of the Qur'an, with its famous "Preliminary Treaties" (1734).⁶¹⁵

Hence it is difficult to identify any Christian origins for the concept or practice of individual religious liberty. The 19th Century document *Syllabus of Errors*, published in 1864 by the Holy See under Pope Pius IX, was also critical of the freedom of religion and expression. For example, it noted that

...it is false that the civil liberty of every form of worship, and the full power, given to all, of overtly and publicly manifesting any opinions whatsoever and thoughts, conduce more easily to corrupt the morals and minds of the people, and to propagate the pest of indifferentism.⁶¹⁶

Even individual liberty was rather restricted in the West. Mill argued that liberty is the priority of the group and not of the individual, and that civil or social liberty amounted to "the nature and limits of the power which can be legitimately exercised by society over the individual".⁶¹⁷

⁶¹³ The Scottish writer Alexander Ross published *pansebeia* in 1652.

⁶¹⁴ Hans Küng "A Christian Response" in Hans Küng Josef van Ess, Heinrich von Stietencron and Heinz Bechert, *Christianity and the world religions : paths of dialogue with Islam, Hinduism and Buddhism*, translated by Peter Heinegg (London : Collins, 1987), p. 20.

⁶¹⁵ *ibid.*, pp. 20-21.

⁶¹⁶ *Syllabus of Errors* accessed 29 June 2016 <<http://www.ewtn.com/library/PAPALDOC/P9SYLL.HTM>>.

⁶¹⁷ Mill, *On liberty*, p. 5.

Religious liberty is thus a novelty which came into existence only after WWII. Scolnicov notes that following the war it was clear that the pre-war group protection model of upholding religious freedom had failed. The League of Nations had not been able to enforce it and it was actually invoked by Hitler as a pretext for invading Poland.⁶¹⁸ Moreover, Vermeulen argues that the Nazi regime made it plain that “national constitutions could be easily put aside by a totalitarian state”.⁶¹⁹ Thus, individual religious liberty can be seen as a historical production of the postwar West.

3.1.3 UDHR, ICCPR, the 1981 Declaration

The birth of the modern understanding of religious liberty as an individual right came with the proclamation of the UDHR in 1948.⁶²⁰ Almost all of the UDHR’s articles refer to individual rights (“everyone”) rather than to group rights, as will be discussed later. The UDHR is thus the first document in history in which individual religious liberty is addressed in legal terms. Article 18 states that

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief...

Likewise, the 1966 International Covenant on Civil and Political Rights (ICCPR) also makes reference to these rights, albeit less directly. The ICCPR does not

⁶¹⁸ Scolnicov, “Freedom of Religion or Belief: Group Right or Individual Right?”, p. 19.

⁶¹⁹ Vermeulen, “The Freedom of Religion in Article 9 of the European Convention on Human Rights”, p. 11.

⁶²⁰ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)).

blatantly declare the right to change one's religion, but instead asserts the "freedom to have or to adopt."⁶²¹

Both the UDHR and the ICCPR state that freedom of thought, conscience and religion are rights shared by all. Nowak sees this as "the right of everyone to develop autonomously thoughts and a conscience free from impermissible external influence".⁶²² *Black's Law Dictionary* defines the term 'conscience' as meaning "the moral sense of right or wrong; esp., a moral sense applied to one's own judgment and actions."⁶²³ Moreover, "change his religion and belief" implies not only that the right to change one's religion is recognised, but that so is atheism. Belief is internal and specific to each individual; *Black's Law Dictionary* defines it as "A state of mind that regards the existence of something as likely or relatively certain."⁶²⁴ To avoid controversy, U.N. Special Rapporteur Arcot Krishnaswam used the phrase 'religion or belief' to encompass a number of theistic beliefs, such as "agnosticism, free thought, atheism and rationalism."⁶²⁵ Nowak argues that "The emphasis on freedom and on the opportunity to choose not only refers to the right to select from among existing religions or beliefs but also spans the *negative freedom* not to belong to any such group or to live without religious confession".⁶²⁶ The right to not believe in any religion is thus protected under Article 18 of the ICCPR. Moreover, the Human Rights Committee (HRC) also considers non-theistic and atheistic beliefs, and the "right not to profess any religion or belief",

⁶²¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art 18. (ICCPR).

⁶²² Manfred Nowak, *U.N. Covenant on Civil and Political Rights : CCPR commentary*, (Kehl Germany, N.P. Engel, 2005), pp. 412-413. (Nowak, *U.N. Covenant on Civil and Political Rights*)

⁶²³ Bryan A. Garner eds., *Black's Law Dictionary* 8th ed (West Group 2004), p. 322

⁶²⁴ *ibid.*, p. 164.

⁶²⁵ Arcot Krishnaswam, *Study of Discrimination in the Matter of Religious Rights and Practices* (1960), p. 1 footnote 1. (Krishnaswam, *Study of Discrimination*)

⁶²⁶ Nowak, *U.N. Covenant on Civil and Political Rights*, p.415.

as being protected under the ICCPR. The HRC *General Comment* No. 22 (1984) states

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.⁶²⁷

Therefore, changing one's belief can encompass not only changing to another religion but also choosing not to believe in any religion, that is, to be an atheist. In its *General Comment* 22 (1994) the HRC, which had been established in 1976 in order to monitor the state parties to the ICCPR, expanded upon the ICCPR's phrase to note that all people enjoyed the freedom to⁶²⁸

...choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.⁶²⁹

Both atheism and renouncing one's religion are absolute rights under the ICCPR. According to HRC *General Comment* 22, unbelief in any religion and changing one's religion are "protected unconditionally".⁶³⁰

Moreover, the ICCPR does not denounce apostasy, which remains an absolute and fundamental right at all times and in all places. In its *General Comment* 24, the HRC states that

The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the ICCPR.⁶³¹

⁶²⁷ HRC *General Comment* No. 22 (1994): The right to freedom of thought, conscience and religion (Art. 18) CCPR/C/21/Rev.1/Add.4, para 2, available at (HRC *General Comment* No. 22)

⁶²⁸ Bahiyyih G. Tahzib, *Freedom of religion or belief: ensuring effective international legal protection* (The Hague ; Boston : Martinus Nijhoff Publisher, 1996), p. 250. (Tahzib, *Freedom of religion or belief*).

⁶²⁹ HRC *General Comment* No. 22, para 5

⁶³⁰ *ibid.*

⁶³¹ Human Rights Committee, *General Comment* No. 24: (Issues relating to reservations made upon

The HRC considers that religious freedom carries a “fundamental character” and can never be limited even in the event of new circumstances. Article 4(2) of ICCPR clearly states that religious freedom does not fall into the category of derivative rights:

No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

This unconditional right to religious freedom is further recognised in another declaration. Article 1 of the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (known as the 1981 Declaration)⁶³² states that

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice....

The 1981 Declaration takes the same stance as the ICCPR: individual religious freedom is repeatedly asserted. Whether treaty (ICCPR) or declaration (UDHR and the 1981 Declaration) these international documents all consider apostasy to be a right, whether it takes the form of the renouncement of Islam or of having un-Islamic ideas. The two key markers of apostasy, namely conversion and not believing religious teaching, are not considered to be crimes under international human rights law; indeed, freedom of thought is considered to be an unconditional right.

ratification or accession to the ICCPR or the Optional Protocols thereto, or in relation to declarations under article 41 of the ICCPR), para1. (HRC, *General Comment No. 24*)

⁶³² Resolution Adopted by The General Assembly. 36/55. Declaration On The Elimination Of All Forms Of Intolerance And Of Discrimination Based On Religion Or Belief (1981)

The stance taken regarding apostasy in international law is clear: it repeatedly states that criminalising apostasy is inconsistent with international human rights standards. The Special Rapporteur on Freedom of Religion or Belief (Faith Rapporteur) for the U.N. Human Rights Council has touched on this:

A law prohibiting conversion would constitute a State policy aiming at influencing individual's desire to have or adopt a religion or belief and is therefore not acceptable under human rights law. A State also has the positive obligation of ensuring the freedom of religion or belief of the persons on its territory and under its jurisdiction.⁶³³

It must be noted however that international human rights instruments have omitted to define the term 'religion'. Some scholars have criticised this; Lerner for example has noted that even United Nations agencies dealing with religious human rights have not defined it. According to Lerner, there has been a concern to avoid using definitions in potentially delicate areas, such as religion, as this could make reaching international agreement more problematic. Nevertheless, Lerner notes that in United Nations and modern human rights law, the word 'religion' implies belief and therefore certain views and codes, as well as their absence.⁶³⁴ Vermeulen has also noted this lack of clarity:

One of the problems raised by the current religious and cultural diversity is that the concept of 'religion,' 'manifestation of religion,' 'belief,' and the like have lost their – historical – precision and predictability in that their ambit has become unclear. As a consequence, it is currently much more difficult to determine what

⁶³³ The Secretary-General, *Elimination of All Forms of Religious Intolerance: Report of the Special Rapporteur of the Commission on Human Rights on freedom of religion or belief*, para 52 delivered to the General Assembly, U.N. Doc. A/601399 (Sept. 30, 2005).

⁶³⁴ Natan Lerner, *Religion, secular beliefs and human rights : 25 years after the 1981 declaration* (Leiden : Martinus Nijhoff Publishers, 2006), p. 50. (Lerner, *Religion, secular beliefs and human rights*)

– in law – ‘counts’ as ‘religion,’ ‘religious acts,’ etc., and thus to decide whether the freedom of religion is applicable.⁶³⁵

The absence of a definition of ‘religion’ has led to ambiguities in court cases. In the *Leyla Sahin v. Turkey* case (2005) the European Court ruled that the act of wearing a *hijab* at university was a manifestation of religion, even in the absence of preaching, this followed the European Convention’s assessment of the *hijab* as being a religious symbol. Despite the fact that international human rights instruments call for religious freedom, the lack of definition of the term ‘religion’ has created a legal vacuum.

Although religious freedom is recognised under international law, the manifestation of religion is not unconditionally supported. The ICCPR notes that although religious *ideas*, as well as freedom of thought and conscience, are beyond any restriction, religious manifestations and practices can be restricted.⁶³⁶ Indeed, both international human rights declarations and treaties have restrictions on religious manifestation. In the case of the UDHR, Article 29(2) states that restrictions can be imposed by prescribed law for certain purposes:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

These restrictions are repeated in the ICCPR, which distinguishes freedom of thought, conscience, religion or belief from the freedom to manifest religion or

⁶³⁵ Vermeulen, “The Freedom of Religion in Article 9 of the European Convention”, p. 14.

⁶³⁶ Lerner, *Religion, secular beliefs and human rights*, p. 21.

belief, with the former being protected unconditionally⁶³⁷ but the latter being made subject to restrictions under the ICCPR. Article 18(3) states that freedom to manifest one's religion is not an unconditional right but is restricted by prescribed law for reasons of "public safety, order, health, or morals or the fundamental rights and freedoms of others." The act of manifesting one's religion could thus potentially lead to infringing others' rights.

Anette Faye Jacobsen has defined 'thought' as the act of thinking and exercising reason, and 'conscience' as making a reference to moral sense.⁶³⁸ This is why, she argues, the rights to freedom of thought and conscience have most frequently been employed in arguments of conscientious objection.⁶³⁹ On the other hand, 'manifestation' and 'coercion' can potentially disguise negative intent. 'Manifestation' was defined by Article 9 of the European Convention on Human Rights (1950) as "worship, teaching, practice and observance".⁶⁴⁰ These four terms were then in turn defined by the HRC:

The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the

⁶³⁷ HRC, *General Comment 22*, Article 18, para. 4.

⁶³⁸ Anette Faye Jacobsen, *Human rights monitoring: a field mission manual* (Leiden: Biggleswade : Martinus Nijhoff ; 2008), p. 284.

⁶³⁹ *ibid.*

⁶⁴⁰ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, (4 November 1950). (ECHR) art 9.

freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.⁶⁴¹

Manifestation thus includes almost all physical religious activities. The use in some court decisions of this broad definition of manifestation has proven controversial, as will be discussed later.

The ICCPR defines the coercion of a believer as that which “would impair his freedom to have or to adopt a religion or belief of his choice”,⁶⁴² that is, as undertaking any activities that interfere with individual religious freedom. Moreover, as with the ICCPR, the 1981 Declaration bans the religious activities of coercion and restricts manifestations of religion. Article 1(2) of the 1981 Declaration states that “No one shall be subject to coercion”, while 1(3) declares that religious manifestation can be restricted by law in the interests of “public safety, order, health or morals or the fundamental rights and freedoms of others”. According to *Black’s Law Dictionary*, the meaning of ‘coercion’ is “Compulsion by physical force or threat of physical force.”⁶⁴³ The HRC defines coercion in its *General Comment 22* as the “use of threat of physical force or penal sanctions”.⁶⁴⁴ Lerner argues that although coercion is not well-defined, it would seem to refer to “the use of force or threats as well as more subtle forms of illegitimate influence, such as moral pressure or material enticement”.⁶⁴⁵

The question arises as to what constitutes the difference between unconditional and restricted rights, that is, between freedom of thought and conscience on the one

⁶⁴¹ HRC, *General Comment No. 22*, para 4.

⁶⁴² Article 18(2) of the ICCPR.

⁶⁴³ Bryan A. Garner eds., *Black’s Law Dictionary* 8th ed (West Group 2004), p.275

⁶⁴⁴ HRC *General Comment No. 22*, para 5

⁶⁴⁵ Lerner, *Religion, secular beliefs and human rights*, p. 20.

hand and manifestation and coercion on the other. The restriction on manifestation of religion was expounded upon by the HRC in its *General Comment 22* (1983), which noted that any restrictions should only be applied in “specific circumstances” and should be “proportionate to the specific need”; they should not be for “discriminatory purposes”.⁶⁴⁶ Any restrictions of religious manifestation must be tightly defined and only applicable in specific situations and for specific purposes. Furthermore, biased regulations in favour of a religious majority are not recognised. The HRC states that

....limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.⁶⁴⁷

Restricting the manifestation of a particular religion to appease the religious majority’s sense of religious morality is not recognised under international human rights schemes. As will be discussed in further detail later, a society’s morals can be closely related to religion. This explains why religious activities such as manifestation are not unconditional rights but are restricted under the UDHR, ICCPR and the 1981 Declaration.

3.1.4 Blasphemy

This same conflict, that is between the contrasting understandings of religious and individual freedom held by Muslim majority states on the one hand and international human rights law on the other, can also be seen with regards to the

⁶⁴⁶ HRC *General Comment No. 22*, para 8

⁶⁴⁷ *ibid.*

issue of blasphemy. In international human rights law blasphemy is related to freedom of opinion and expression under Article 19 of the UDHR⁶⁴⁸ and to Articles 19 and 20 (2) of the ICCPR, all of which deal with hate speech.

There are some differences between Article 19 of the UDHR and Article 19 of the ICCPR. A crucial distinction to make between the way these two texts treat freedom of opinion and of expression is that in the UDHR both forms of freedom are dealt with together, whereas in Article 19 of the ICCPR they are treated separately. The former article uses the phrase “freedom of opinion and expression”, but Article 19 of the ICCPR splits these two forms of freedom into separate sub-articles, namely Article 19(1) “right to hold opinions” and (2) “right to freedom of expression.” The split seen in the ICCPR relates to the idea that these concepts are fundamentally quite different. According to *Black’s Law Dictionary*, ‘opinion’ refers to “A person’s thought, belief, or inference”⁶⁴⁹ An opinion is thus an internal thought, and therefore it is hard to see how an opinion might trample on another individual’s rights. On the other hand, the same dictionary sees the concept of ‘expression’ as encompassing the physical acts of ‘speech’, ‘press’ and ‘assembly’; this would imply that more care would be needed to so as not to infringe others’ rights.⁶⁵⁰ Karl Partsch points out that the ICCPR has thus served to sharpen the distinction between these two freedoms, arguing that the right to freedom of opinion is private and can brook no restrictions, infringements or interference,

⁶⁴⁸ Article 19 of the UDHR;

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

⁶⁴⁹ Bryan A. Garner eds., *Black’s Law Dictionary* 8th ed (West Group 2004), p. 1126. (*Black’s Law Dictionary*)

⁶⁵⁰ *ibid.*, p. 689.

whereas freedom of expression is a public and social matter and therefore inevitably has some limits.⁶⁵¹

Interpretations and understandings of the term ‘expression’ have varied greatly, even within the same definition. The HRC *General Comment* No 34 (2011), for example, explains expression as including “political discourse”, “commentary on one’s own and on public affairs”, “canvassing”, “discussion of human rights”, “journalism”, “cultural and artistic expression”, “teaching” and “religious discourse”.⁶⁵² In the case of *Ballantyne, Davidson, McIntyre v. Canada* (1989), the HRC stated that “expression” is “every form of subjective ideas and opinions capable of transmission to others.”; in other words, anything which may be seen, heard or read may come within the scope of “expression”. The term “expression” thus clearly includes an extremely broad range of activities and behaviours.

This differentiation between opinion and expression can also be seen in HRC *General Comment* (34), which states that the right to hold opinions is subject to “no exception or restriction”.⁶⁵³ Moreover, the HRC also confirms that “Restrictions on the right of freedom of opinion should never be imposed.”⁶⁵⁴ The HRC clearly states that “All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature.”⁶⁵⁵

⁶⁵¹ Karl Josef Partsch, “Freedom of Conscience and Expression, and Political Freedoms”, in Louis Henkin (ed.), *The International Bill of Rights: the Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), p. 217.

⁶⁵² Human Rights Committee, *General Comment No. 34*, para 11, 102nd session, CCPR/C/GC/34 (2011), (HRC *General Comment* No. 34).

⁶⁵³ HRC *General Comment No. 34*, para 9

⁶⁵⁴ *ibid.*

⁶⁵⁵ *ibid.*

3.1.5 Restrictions on expression

Freedom of expression is a far more complex and controversial form of freedom than freedom of opinion, and it is more often made subject to restrictions. Various international tribunals have recognised that public declarations carry risks and consequences, and that freedom of expression is not unlimited. The Criminal Tribunal for Rwanda declared that

[t]he power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for the consequences.⁶⁵⁶

Article 19(3) of the ICCPR states that freedom of expression can be restricted to ensure “respect of the rights or reputations of others” and for “protection of national security or of public order (ordre public), or of public health or morals”. This wording has led to a wide array of interpretations. Moreover, Article 20 of the ICCPR states that expressions such as “propaganda for war” and “national, racial or religious hatred” are prohibited. The HRC thus states that

In accordance with article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.⁶⁵⁷

The limits to constraining free expression have been outlined by the HRC. In *Ballantyne, Davidson, McIntyre v. Canada* (1989), the HRC outlined these limits to any restriction of expression:

Any restriction of the freedom of expression must cumulatively meet the following conditions: it must be provided for by law, it must address one of the

⁶⁵⁶ Prosecutor v Nahimana, Barayagwiza and Ngeza, Judgment and Sentence ICTR Case ICTR-99-52, para 945 (2003).

⁶⁵⁷ HRC, *General Comment No. 22*, para 7.

aims enumerated in paragraph 3(a) and (b) of article 19, and must be necessary to achieve the legitimate purpose.⁶⁵⁸

Moreover, the HRC states that any restrictions of expression should not jeopardise the right to expression itself,⁶⁵⁹ and furthermore that they must be “provided by law”, be used only when necessary and be applied in a proportional manner.⁶⁶⁰

This leads to a particular dilemma for legal systems which draw on a religious ideas. Abdelfattah Amor argues that the meaning of ‘necessity’ has been and still is inevitably influenced by cultural and social context, and varies considerably between states.⁶⁶¹ Moreover, restrictions should not be included within religious or other customary law. HRC *General Comment* No. 34 (2011) states

Since any restriction on freedom of expression constitutes a serious curtailment of human rights, it is not compatible with the Covenant for a restriction to be enshrined in traditional, religious or other such customary law.⁶⁶²

The same HRC comment singles out blasphemy laws for their incompatibility with the Covenant.⁶⁶³ Parties to the declaration may thus only restrict the freedom of religion and expression for non-discriminatory purposes, namely protecting their citizens.⁶⁶⁴ Moreover, the same document also states that blasphemy laws biased towards one particular religion, as have been widely introduced by Muslim majority states, are prohibited under international human rights law.⁶⁶⁵ Finally, the HRC declares that any corporal punishment penalties handed out to blasphemers

⁶⁵⁸ *Ballantyne, Davidson, McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993), para 11.4.

⁶⁵⁹ Human Rights Committee, General Comment 10, Article 19 (Nineteenth session, 1983), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 11 (1994), para 4.

⁶⁶⁰ HRC, *General Comment No. 34*, para 22.

⁶⁶¹ A/HRC/10/31/Add.3, para 26 (16 January 2009).

⁶⁶² HRC, *General Comment No. 34*, para 24.

⁶⁶³ *ibid*, para 48

⁶⁶⁴ *ibid*, para 44

⁶⁶⁵ *ibid*.

run contrary to the ICCPR's intentions.⁶⁶⁶ Therefore, the criminalisation of blasphemy and sentences of capital punishment for such a 'crime' are both inconsistent with international human rights standards. The laws of certain Muslim majority states, such as Pakistan and Iran, are therefore not consistent with international practice. As will be discussed later, any insult or blasphemous comment made against religion can potentially endanger individual religious freedom.

3.2 Religious freedom and freedom of expressions cases

Restrictions on religious manifestation vary from society to society and from organisation to organisation. The ECHR and the UNHRC take opposite stands regarding the *hijab*, with the former arguing that a ban on wearing it is necessary to respect the freedom of others "in democratic societies in which several religions coexist."⁶⁶⁷ However, in the *Raihon Hudoyberganova v. Uzbekistan* case (2004) the UNHRC ruled that wearing a *hijab* is recognised under Article 18(1) of the ICCPR ("have or adopt a religion") and that banning wearing it is a form of coercion, which is prohibited under Article 18(2) of the ICCPR.⁶⁶⁸

Restrictions on public manifestations of religion and belief have stirred many debates, as there is no commonly agreed boundary between what amounts to acceptable and non-acceptable manifestations. A number of cases have made

⁶⁶⁶ General comment No. 20, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40 (A/47/40), annex VI, sect. A*; HRC, *General Comment No. 34*, para 26.

⁶⁶⁷ Lerner, *Religion, Secular beliefs and human rights*, p. 192.

⁶⁶⁸ *Raihon Hudoyberganova v. Uzbekistan*, Communication No. 931/2000, U.N. Doc. CCPR/C/82/D/931/2000 (2004), para 6.2, (*Raihon Hudoyberganova v. Uzbekistan*).

important judgements concerning religious freedom. The case of *Kokkinakis v. Greece* (1993) concerned the applicant's belief that his freedom of religion was being restricted, especially with regards to proselytism. It should be noted here that 'proselytism' and 'dissemination' are controversial issues of religious freedom, and can be seen as aspects of religious "manifestation". In his concurring opinion in the *Kokkinakis v. Greece* case (1993), Judge De Meyer attempted to define it:

Proselytism, defined as "zeal in spreading the faith", cannot be punishable as such: it is a way - perfectly legitimate in itself - of "manifesting [one's] religion".⁶⁶⁹

Proselytism or dissemination of religion carries the risk of infringing upon the right of others to freedom of religion. Arcot Krishnaswami argues that one may proselytise "in so far as his actions do not impair the right of any other individual to maintain his religion or belief."⁶⁷⁰ The ECHR states that religious freedom under Article 9 of the ECHR becomes a "dead letter" if the right to proselytise is prohibited.⁶⁷¹ The ECHR's ruling proved rather tolerant of religious manifestation. However, this tolerance was not reiterated in the 2005 *Leyla Sahin v. Turkey* case in which the Court prohibited the wearing of the *hijab*, arguing that this traditional Islamic clothing is a religious symbol and wearing it is a religious manifestation.

Mustapha Kemal, the founder of the Republic of Turkey, warned of the dangers of political misuse of Islam. The awareness this created has impacted not only the country's approach to apostasy and blasphemy but also to such everyday issues as the wearing of headscarves, which the Constitutional Court considered to be

⁶⁶⁹ *Kokkinakis v. Greece* (1993).

⁶⁷⁰ Krishnaswami, *Study of Discrimination*, p. 65.

⁶⁷¹ *Kokkinakis v. Greece*, para 31

“religious symbols” that should be prohibited in the public sphere.⁶⁷²In *Leyla Sahin v. Turkey* case in (2005), the Istanbul University’s Vice-Chancellor issued a circular which included the following:

[S]tudents whose ‘heads are covered’ (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials. Consequently, the name and number of any student with a beard or wearing the Islamic headscarf must not be added to the lists of registered students.....⁶⁷³

Leyla Sahin, a medical student at the university, held that her rights under the European Convention on Human Rights had been infringed by these new regulations.⁶⁷⁴But the ECHR unanimously held that her right to freedom of thought, conscience, and religion, as guaranteed under Article 9, had not been violated. The court concluded that wearing the *hijab* was a manifestation of religion and that banning it was necessary for the protection of the “rights and freedoms of others” and for the “maintenance of public order” in the country. Summing up, the Court emphasized that “in democratic societies in which several religions coexist...it may be necessary to place restrictions on freedom to manifest one’s religion or belief.”⁶⁷⁵The ban on wearing the *hijab* was seen to meet a ‘social need’.⁶⁷⁶

An-Na’im notes that the court “upheld the ban as primarily pursuing the legitimate aims of protecting the rights and freedoms of others and of protecting public order.”⁶⁷⁷ Yet wearing the *hijab* is considered to be a manifestation of religion, it is

⁶⁷² *Refah Partisi (The Welfare Party) and Others v. Turkey*, 41340/98, 41342/98, 41343/98, 41344/98, Council of Europe: European Court of Human Rights, 13 February 2003, available at: <http://www.refworld.org/docid/3fe7097e4.html> [accessed 22 June 2014]

⁶⁷³ *Case of Leyla Sahin v. Turkey* (2005), para 16.

⁶⁷⁴ *ibid.*

⁶⁷⁵ *ibid.*, para 106

⁶⁷⁶ *ibid.*, para 115.

⁶⁷⁷ Abdullahi Ahmed An-Na’im, *Islam and the Secular State: Negotiating the Future of Shari’a* (Cambridge,

quite difficult to comprehend how it may endanger the freedoms of others as well as the secular constitution of Turkey and threaten the maintenance of public order.⁶⁷⁸ Vermeulen argues that although the Court accepted the ban on the *hijab* in order to maintain “internal order” at university, there was no evidence of “disorder brought about by students wearing the headscarf, or by others reacting aggressively.”⁶⁷⁹ He contends that

It seems to me that the Court, in fact, accepted the argument of the Turkish government that ‘public order’ not only refers to the order in the street and to the order within and between social groups, but even encompasses the constitutional principles – such as Turkey’s secularism – on which a state is grounded.⁶⁸⁰

The decision in the *Leyla Sahin v. Turkey* case contrasts with the decision reached in a similar case judged by the United Nations Human Rights Committee (UNHRC). In *Raihon Hudoyberganova v. Uzbekistan* (2004), the plaintiff started wearing a *hijab* to her college, Tashkent State Institute. Following the introduction of a regulation barring students from wearing religious clothing, Hudoyberganova was suspended from the college. The UNHRC ruled that Tashkent State Institute’s treatment of Hudoyberganova contravened ICCPR Article 18, which forbids “coercion that would impair the individual’s freedom to have or adopt a religion”.⁶⁸¹ In this case the UNHRC considered banning the wearing of the *hijab* as a violation of the right to “have or adopt a religion” and as a form of coercion, prohibited in ICCPR Article 18. The UNHRC stated that

The Committee considers that the freedom to manifest one’s religion encompasses the right to wear clothes or attire in public which is in conformity

MA: Harvard University Press, 2008), p. 211.

⁶⁷⁸ HRC, *General Comment No. 22*, para 4

⁶⁷⁹ Vermeulen, “The Freedom of Religion in Article 9 of the European Convention”, p. 23.

⁶⁸⁰ *ibid*, p. 23.

⁶⁸¹ *Raihon Hudoyberganova v. Uzbekistan*, para 6.2:

with the individual's faith or religion....to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion.⁶⁸²

In this case the UNHRC judged that wearing religious clothes does not endanger the rights of others, and recognised it as being protected by an individual's right to religious freedom.

This divergence of views between the ECHR and the UNHRC regarding the boundaries of religious manifestation emerged in another recent case. In the *S.A.S. v. France* case (2014), the ECHR expanded its restrictions of the manifestation of religion on the grounds of respecting the freedom of others to live together. The Court stated that

...under certain conditions the “respect for the minimum requirements of life in society” referred to by the Government – or of “living together”, as stated in the explanatory memorandum accompanying the Bill (see paragraph 25 above) – can be linked to the legitimate aim of the “protection of the rights and freedoms of others”.⁶⁸³

The ECHR argued that wearing the *burqa* was “deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of ‘living together’”.⁶⁸⁴ In this case the Court considered the wearing of the *burqa* to be a retractable religious manifestation that potentially endangers the freedom of others in France. This decision led to criticism, notably from Nussberger and Jaderblom in their dissenting opinion:

⁶⁸² *ibid.*

⁶⁸³ *S.A.S. v. France* (2014), para 121.

⁶⁸⁴ *ibid.*

French legislature has restricted pluralism, since the measure prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public (see paragraph 153). Therefore the blanket ban could be interpreted as a sign of selective pluralism and restricted tolerance.⁶⁸⁵

Yusuf notes that “the notion of living together involves the need for a minority to succumb to the preferences of a majority”, and contends that “there is no solid legal or moral justification for imposing the will (real or imagined) of the majority.”⁶⁸⁶ The dangers of the ECHR’s notion of “living together” has been discussed by many scholars. Henrard argues that

Accepting such a legitimate aim carries the risk that anything that makes the majority feel uncomfortable will be banned, which seems very hard to reconcile with the Court’s steady line of jurisprudence on the importance of pluralism and the protection of minorities against undue majority pressure.⁶⁸⁷

As with both UDHR and the ICCPR, Article 10 of the ECHR (European Court of Human Rights) recognises freedom of opinion and expression. Restrictions on it are only applicable when they are “prescribed by law and are necessary in a democratic society”, and are for the purposes of “national security”, “public safety”, “protection of health or morals” or “for the protection of the reputation or rights of others”. Judgments by the European Court clearly illustrate how these restrictions can vary between societies. For example, in the *Faurison v. France* case (1996) the defendant was convicted for expressing doubts concerning the use of gas chambers by the Nazis. The Human Rights Committee chose to focus on the impact of this statement on other persons and the community as a whole, rather than on Mr.

⁶⁸⁵ “Dissenting opinions of Nussberger and Jaderblom” in *S.A.S. v. France* (2014), para 14.

⁶⁸⁶ Hakeem O. Yusuf, “S.A.S v France: Supporting “Living Together” or Forced Assimilation”, *International Human Rights Law Review* (2014): 277-302, p. 285.

⁶⁸⁷ Kristin Henrard, “How the European Court of Human Rights’ Concern Regarding European Consensus Tempers the Effective Protection of Freedom of Religion,” 4 *Oxford Journal of Law and Religion* (2015):1-23, p. 6.

Faurisson's intent. Since his opinions could be seen as strengthening anti-semitism and impacting the rights of the Jewish community, the Committee concluded that restricting the author's freedom of expression was permissible under Article 19 of the Covenant (ICCPR).⁶⁸⁸ The European Commission on Human Rights used a similar argument in the *D.I. v. Germany* case to restrict freedom of expression:

the requirement of protecting [the Jewish community] reputation and rights, outweigh, in a democratic society, the applicant's freedom to impart publications denying the existence of the gassing of Jews under the Nazi regime...⁶⁸⁹

The European court refers to the 'reputation' of the community in this case, arguing that denial of the existence of the Holocaust's gas chambers violates the reputation of the Jewish community. This case demonstrates that the right to freedom of expression only goes so far; refuting a belief held by the majority of people is not to be permitted under the European Convention on Human Rights.

This section has provided an overview of case law pertaining to "religious manifestation" and "freedom of expression". Despite the lack of a unanimously defined boundary as to what amounts to an acceptable manifestation of religion, freedom of expression and of religion are invariably bound by the rights of others.

To sum up, these cases show that restrictions on the manifestation of religion are highly relative. There are no clear borders separating what is and is not allowed, and this is clearly shown by the UNHRC and the ECHR's disparate rulings. While the UNHRC considers wearing the *hijab* to be recognised under the ICCPR, the

⁶⁸⁸ *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996).

⁶⁸⁹ *D.I. v. Germany*, App. No. 26551/95, Eur. Comm'n H.R. (26 June 1996) in David Weissbrodt and Connie de la Vega, *International human rights law : an introduction* (Philadelphia : University of Pennsylvania Press, 2007), p. 106. (Weissbrodt and de la Vega, *International human rights law: an introduction*)

ECHR argues that it can only be legitimised by not infringing others' rights and social necessity. These contrasting viewpoints illustrate the varying scope of the boundaries employed from society to society to restrict religious manifestation.

3.3 Human Rights Obligations

International law not only regulates inter-state relations, it also regulates inter-individual relations via international human rights law. This is a relatively new development, as in the past individuals were not subjects.⁶⁹⁰ The will to change the paradigm of international law was a reaction to the atrocities committed during WWII. Indeed, prior to the war, there was a legal void with regards to massacres perpetrated by state governments and aimed at a particular religion or race. In the aftermath of WWII the UN Charter pioneered the idea of natural law-based human rights. It stressed the universal character of human rights, although in fact their content and meaning were established by the UDHR. At the time however some states resented the wording of the UDHR (reproduced in the ICCPR in the form of a treaty) and deemed it too "Western" and thus biased. While some Muslim majority states made reservations to the ICCPR, others simply refused to sign the treaty because they considered it incoherent or in contradiction with the Shari'a. Even the Muslim majority states that did ratify the ICCPR do not adhere to the principles of religious freedom declared within it, as discussed in Chapter 2. Particular regional or state practices illustrate the difficulty of imposing

⁶⁹⁰ Louis B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States", 32 *American University Law Review* (1982), p.9 (Sohn, "The New International Law"); Pieter N. Drost, *The crime of state; penal protection for fundamental freedoms of persons and peoples*, (Leyden, A.W. Sythoff, 1959), p. 64. (Drost, *The crime of state*)

a universal standard of international human rights. This is shown by the Defamation Resolutions of the OIC, which demonstrate that understandings of religious freedom and freedom of expression are far from having worldwide agreement.

The UN Charter⁶⁹¹ sees the promotion of human rights as being among the key purposes of the UN, along with maintaining global peace and security.⁶⁹² Its members were, and are, required to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”⁶⁹³ However, there is actually no specific definition of human rights in the UN Charter. Although the Charter is binding upon all member states, regarding human rights it merely uses the words ‘respect’ or ‘promote’.

Although the UN Charter does not define the meaning of human rights, it has played a key role in establishing human rights obligations. Arat argues that the United Nations has been key in initiating the global movement towards a redefinition of “not only the interstate relationship, but also the relationship between states and individuals”.⁶⁹⁴ Article 1(3) of the UN Charter states that one of the key purposes of the UN is

promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

According to Tesón, the term ‘for all’ means “for all individuals on earth, and not just for all individuals within a given state”.⁶⁹⁵ The UN Charter turned the

⁶⁹¹ U.N. Charter, *signed* 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (*entered into force* 24 Oct. 1945).

⁶⁹² *ibid*, art. 1.

⁶⁹³ *ibid*, art. 55.

⁶⁹⁴ *ibid*, art. 56; Zehra F. Kabasakal Arat, “Forging A Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights”, 28 *Human Rights Quarterly* (2006), p. 417. (Arat, “Forging A Global Culture of Human Rights”)

⁶⁹⁵ Fernando R. Tesón, “International Human Rights and Cultural Relativism”, 25 *Virginia Journal of*

individual into a subject of rights. Prior to this, international law did not address individuals' rights and a citizen's protection was contingent on the conduct of his state.⁶⁹⁶ The shift towards the protection of the individual under international law was a reaction to the atrocities committed during WWII. Drinan notes that the horrors of WWII drove the United Nations to try to prevent anything similar from ever again happening; "the primary purpose of the United Nations was to guarantee religious freedom in order to forestall anything approaching the Holocaust".⁶⁹⁷ Tesón similarly notes that "From its inception at the end of World War II, the modern international law of human rights has been indissolubly linked with the moral concerns prompted by the Nazi horrors."⁶⁹⁸ The U.N.'s founders were sought "to restore human dignity and give it legal status", and that moral imperative has carried through to human rights laws today.⁶⁹⁹ Their state of mind during the drafting process was reflected in the UN Charter's wording. Sachedina states that the victorious nations were seeking a form of universal language to encapsulate the postwar mood of crisis and to propose a means of ensuring that the world and its people would never face such horrors again.⁷⁰⁰ While the UN Charter doesn't precisely define what human rights are comprised of, it was the pivotal starting point for modern human rights.

International Law (1984), p.879. (Tesón, "International Human Rights and Cultural Relativism")

⁶⁹⁶ Sohn, "The New International Law", p.9; Drost, *The crime of state*, p. 64.

⁶⁹⁷ Robert F. Drinan, *Can God & Caesar coexist? : balancing religious freedom and international law* (New Haven ; London : Yale University Press, 2004), p. 30. (Drinan, *Can God & Caesar coexist?*)

⁶⁹⁸ Tesón, "International Human Rights and Cultural Relativism", p.885.

⁶⁹⁹ *ibid.*

⁷⁰⁰ Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford: Oxford University Press, 2009), p.8.

3.3.1 Status of the Universal Declaration of Human Rights (UDHR)

Many legal experts, politicians and ordinary people see the UDHR as a “moral, symbolic, and legal document”,⁷⁰¹ but there is considerable argument regarding its exact legal position. Kokott notes that the UN Charter itself does not specifically define human rights, and therefore the Declaration could be seen as an “authoritative interpretation” of the Charter and furthermore as being effectively incorporated within it and as binding upon its members in the same way.⁷⁰² Some argue the UDHR to have become binding upon all states because the Declaration can be considered to be a general principle of law under Article 38(C) of the Statute of International Court of Justice.⁷⁰³

Moreover, some scholars argue that the UDHR has achieved the status of customary international law, which is a key source of international law under Article 38(b) of the Statute of the International Court of Justice. Sohn notes that

The Declaration[UDHR], as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states, not only

⁷⁰¹ Tahzib, *Freedom of religion or belief*, p. 79.

⁷⁰² Sohn, “The New International Law”, p.16; Juliane Kokott, “The Protection of Fundamental Rights Under German and international Law”, 8 *African Journal of International and Comparative Law* (1996), pp. 378-379. (Kokott, “The Protection of Fundamental Rights”)

⁷⁰³ Statute of the International Court of Justice, Article 38(C) <<http://www.icj-cij.org/documents/?p1=4&p2=2>>accessed 29 June 2016. (Statute of the ICJ).

For example, Zuijdwijk argues that

the Universal Declaration is the codification of general principles of law recognised by civilized nations, which is a source of international law as indicated by Article 38 of the Statute of International Court of Justice.

Ton J.M. Zuijdwijk, *Petitioning the United Nations: A Study in human Rights* (Aldershot : Gower, 1982), pp. 101-102 (Zuijdwijk, *Petitioning the United Nations*)

on members of the United Nations. Another revolutionary step thus has been taken in protecting human rights on a worldwide scale.⁷⁰⁴

It is crucial to remember that the UDHR is just that, i.e. a *declaration*, and therefore has no binding legal force. However, various UN bodies and member states increasingly refer to the Declaration's guarantees and it has been referred to many times by various other international declarations and conferences, such as the Vienna Declaration and Programme of Action (1993), where it was noted that the UDHR "constitutes a common standard of achievement for all peoples and all nations..."⁷⁰⁵ Kokott notes that at Vienna and at the Tunis Declaration of the African states, the San Jose Declaration of the Latin American and Caribbean states and the Bangkok Declaration of the Asian states, all reaffirmed their commitment to the UDHR.⁷⁰⁶ The Vienna Declaration and Programme of Action, which was adopted by the World Conference on Human Rights, was comprised of 171 states. It declared that

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁷⁰⁷

Moreover, the UN Millennium Declaration of the General Assembly (2000) stated its commitment "To respect fully and uphold the Universal Declaration of Human

⁷⁰⁴ Sohn, "The New International Law", p.17.

⁷⁰⁵ (1993) 32ILM 1663.

For example, Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 (preamble, para 8), (Vienna Declaration and Programme of Action)

⁷⁰⁶ Kokott, "The Protection of Fundamental Rights", p. 378.

⁷⁰⁷ Vienna Declaration and Programme of Action; see also, "World Conference on Human Rights", 14-25 June 1993, Vienna, Austria

Rights”⁷⁰⁸ Similarly, the 2005 World Summit Outcome acknowledged the UDHR as the cornerstone of global human rights:

We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for and the observance and protection of all human rights and fundamental freedoms for all in accordance with the Charter, the Universal Declaration of Human Rights and other instruments relating to human rights and international law. The universal nature of these rights and freedoms is beyond question.⁷⁰⁹

Because of the multiple references to the UDHR in other legal documents, scholars such as Tomuschat believe that the UDHR has entered the body of common legal principles which are no longer challenged.⁷¹⁰ Certainly some of the human rights proclaimed in the Declaration already existed, and therefore it could be argued that the UDHR is essentially a codification of pre-existing customary international law.⁷¹¹ Furthermore, it is well recognised that UN Declarations can form the basis for the continuing development of customary international law.⁷¹²

However, the many statements in other declarations regarding the importance of the UDHR does not imply that the content of the UDHR is recognised worldwide and has formally acquired universal legal status. Rather, the Declaration’s importance, as An-Na’im points out, lies in its role as an “enabling document for efforts to define human rights and devise mechanisms and strategies for their implementation”.⁷¹³

⁷⁰⁸ GA Res 55/2, 8 September 2000. (para 25)

⁷⁰⁹ 2005 World Summit Outcome, GA Res 60/1, 16 September 2005, para 120.

⁷¹⁰ Christian Tomuschat, *Human Rights: Between Idealism and Realism* 2nd ed (Oxford: Oxford University Press, 2008), p. 74. (Tomuschat, *Human Rights: Between Idealism and Realism*)

⁷¹¹ Zuijdwijk, *Petitioning the United Nations*, p. 102.

⁷¹² Kokott, “The Protection of Fundamental Rights”, p. 378.

⁷¹³ Abdullahi Ahmed An-Na’im, “Islam and Human Rights: Beyond the Universality Debate”, ASIL Annual Meeting Proceedings, 94 *American Society of International Law* (2000), p. 96. (An-Na’im, “Islam and Human

Although the UDHR is generally credited with creating our modern understanding of human rights, the origins of the UDHR itself are much debated, with critics charging that it was flawed from its very beginning (the so-called ‘birth defect’ theory) especially regarding whether its universality argument was weakened by the limited number of participant states involved in its foundation. The United Nations had only been established a few years earlier, at the 1945 San Francisco Conference; by the time of the Declaration in 1948 it only had 56 members (mainly European countries), as opposed to 193 members today,⁷¹⁴ as most of the countries we now label ‘developing’ were under colonial rule.⁷¹⁵ There were only three African members (Egypt, Ethiopia and Liberia) and eleven Asian members (Afghanistan, Burma, China, India, Iran, Iraq, Lebanon, Pakistan, Philippines, Syria and Thailand). Much of the rest of Asia and Africa could not take part in the drafting process of the UDHR, since they had been colonised by Western countries. Therefore some authors, such as Adamantia Pollis and Peter Schwab, argue that the concept and practice of human rights is a purely modern phenomenon which can be traced back to the influence of the postwar West, and in particular to the UK, France and the United States.⁷¹⁶

Other authors, however, reject this ‘birth defect’ criticism of the UDHR. They argue that although the drafting process of the UDHR was dominated by the Western countries, this does not mean the rights proclaimed within were a purely Western idea, as some Asian and Muslim countries also contributed. Nevertheless,

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⁷¹⁴ See UN, “UN Member States: On the Record”, <<http://www.un.org/depts/dhl/unms/whatisms.shtml>> accessed 29 June 2016.

⁷¹⁵ Adamantia Pollis & Peter Schwab, “Human Rights: A Western Construct With Limited Applicability”, in *Human Rights: Cultural and Ideological Perspectives* (Adamantia Pollis & Peter Schwab eds., 1979), p.4. (Pollis & Schwab, *Human Rights: Cultural and Ideological Perspectives*)

⁷¹⁶ *ibid.*

Tomuschat notes that while it is evident that Muslim countries made a considerable contribution to the process and establishment of the UDHR,⁷¹⁷ citing the involvement of India's Hansa Mehta and Lebanon's Charles Malik, it nevertheless remains the case that the membership of the bodies which drafted the UDHR did not reflect the ethnic, cultural and religious balance of the world's population.⁷¹⁸

...throughout history missionaries had often abused their rights by becoming the forerunners of a political intervention, and there were many instances where peoples had been drawn into murderous conflict by the missionaries' efforts to convert them.⁷¹⁹

The representatives of some Muslim majority states had different views regarding religious freedom. The Pakistani representative, Mohammed Zafrullan Khan, stated that

The Moslem religion was a missionary religion: it strove to persuade men to change their faith and alter their way of living, so as to follow the faith and way of living it preached, but it recognized the same right of conversion for other religions as for itself.⁷²⁰

Khan cited Qur'an 18:29, arguing that UDHR Article 18 was not contrary to the Qur'an. The Egyptian representative however, Wahid Raafat, stated that changing one's religion is "not entirely in agreement with that 'right'".⁷²¹ Indeed, one may change one's religion for what Khan qualifies as "not very commendable" purposes such as to avoid inheritance (between Muslims and non-Muslims) or to obtain a

⁷¹⁷ Tomuschat, *Human Rights: Between Idealism and Realism*, p. 74.

⁷¹⁸ *ibid.*

⁷¹⁹ UN Doc. A/C.3/SR.127, (9 November 1948), p. 391.

⁷²⁰ U.N. Doc. A/PV. 182 (1948), p. 890, (U.N. Doc. A/PV. 182)

⁷²¹ *ibid.*, p. 913,

divorce which would otherwise not be granted by a particular religious authority.⁷²²

He stated that

...but that it also proclaimed man's right to change his religion or belief; the Egyptian delegation was not entirely in agreement with that "right". Religious beliefs could not be cast aside lightly. When a man changed his religion it was often due to outside influences or for purposes which were not very commendable, such as divorce. His delegation feared that by proclaiming man's freedom to change his religion or belief the declaration would be encouraging, even though it might not be intentional, the machinations of certain missions, well known in the Orient, which relentlessly pursued their efforts to convert to their own beliefs the masses of population of the Orient.⁷²³

The Pakistani delegate also held that the "right to change one's religion" would encourage missionary activities that would lead to the conversion *en masse* of the population, and that "it was undeniable that their activity had sometimes assumed a political character which had given rise to justifiable objections"⁷²⁴ Muslim majority states thus recognise religious freedom in the *Travaux Préparatoires* of the UDHR, but there is no consensus as to its content.

The basic stance taken by the UDHR, to protect individuals from the abuse of power by governments, heavily reflected the events of WWII in Europe. Freeman points out that the contemporary understanding and practice of human rights remains the same, namely to prevent abuses of power by governments.⁷²⁵ There is no doubt that the authors of the UDHR were responding to a specifically European/Western tragedy, namely the carnage of World War II and the Holocaust. Morsink shows in admirable detail how each article in the UDHR was a response to

⁷²² *ibid.*

⁷²³ *ibid.*

⁷²⁴ U.N. Doc. A/PV. 182 (1948), p. 890

⁷²⁵ Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge: Polity Press, 2002), p.15.

the urgent need to protect human personhood in all its manifestations with respect to the social and political contexts pertaining in the nation-states of its authors.⁷²⁶

It is difficult to accept that the UDHR became the legal status. Firstly, it is crucial to remember that the UDHR is just that, i.e. a *declaration*, and therefore has no legal force. The Egyptian Islamic institution, Dar-al-Ifta, states that the UDHR “is merely a non-compulsory declaration issued by the United Nations.”⁷²⁷ Moreover, although the Universal Declaration has been repeated in other declarations many times, its contents are far from being universally agreed upon.

Some scholars have doubted the applicability of the UDHR. For example, Pollis and Schwab argue that the Western political philosophy underpinning the UN Charter and the UDHR are only one interpretation of human rights, and it may not be applicable in non-Western jurisdictions”.⁷²⁸ Even though the contents of the UDHR and its applicability can be debated, its impact is undeniable. Kalanges argues that

Despite the Declaration’s lack of binding status, it is significant both for recognizing religious liberty as a human right and for imposing a moral obligation on signatory states to uphold it.⁷²⁹

3.3.2 Status of the ICCPR

The ICCPR, proclaimed in 1966, is now recognised almost worldwide. As of April 2016, 168 states have signed the treaty, including many Muslim majority states.⁷³⁰

⁷²⁶ Johannes Morsink cited in Abdulaziz Sachedina, “The Clash of Universalisms: Religious and Secular in Human Rights”, *The Hedgehog Review* (2007), pp. 53-54.

⁷²⁷ Dar Al-Ifta, “What is the difference between Islam and man-made laws regarding human rights?” <<http://eng.dar-alifta.org/foreign/ViewFatwa.aspx?ID=8038&LangID=2> >accessed 29 June 2016.

⁷²⁸ Pollis & Schwab, *Human Rights: Cultural and Ideological Perspectives*, p. 1.

⁷²⁹ Kristine Kalanges, *Religious Liberty in Western and Islamic Law: Towards a World Legal Tradition*, (Oxford: Oxford University Press, 2012), p. 59.

The main object and purpose of the ICCPR is “to create legally binding standards for human rights”⁷³¹ Many of its articles have a similar wording to those of the UDHR, and it might therefore seem as if the ICCPR has embodied the UDHR in the form of a treaty. However, if so, this treaty-based approach to universal human rights seems to have failed to set universally applicable human rights. Although 168 states have signed the treaty more than 20 others have not, even after half a century. For example, such Muslim majority states as Malaysia, Saudi Arabia, the United Arab Emirates, Brunei and Qatar have not yet joined the ICCPR. Indeed, the state practices of many Muslim majority states would seem to point to the difficulty of agreeing upon human rights standards. The ICCPR requires member states to enforce obligations pertaining to the treaty’s human rights’ standards. Article 2(1) asks state parties to “respect” and “ensure to all individuals” that human rights enshrined in the treaty are guaranteed. Moreover, Article 2(2) asks state parties to take “necessary steps”, such as passing laws to protect human rights enshrined under the ICCPR. The HRC *General Comment 31* (2004) notes that Article 2 asks state parties to “adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.”⁷³² Moreover, the HRC asks state parties to make “changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant [ICCPR].”⁷³³ Shelton argues that ICCPR Article 2 requires that

⁷³⁰ See Status of Treaties treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en accessed 29 June 2016.

⁷³¹ HRC, *General Comment No. 24* (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), para 7.

⁷³² *General Comment No. 31* (80) Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 2004/05/26.CCPR/C/21/Rev.1/Add.13. (General Comments), para 7.

⁷³³ *ibid.*, para 13.

implementation and enforcement of rights in domestic law. First, the State must enact legislative or other measures as may be necessary to give effect to the rights, and second, the State has a duty to provide access to justice and measures of redress and enforcement when rights are violated.⁷³⁴

The problem with such an approach is that it imposes on member states a uniform understanding of what religious freedom encompasses. Such a universal approach risks controversy, as illustrated by the *Hertsbeg et al. v. Dinland (1982)* case⁷³⁵ in which the HRC recognised that “no universally applicable common Standard” exists but that “public morals differ widely”.⁷³⁶ David Weissbrodt and Connie de la Vega point out that as the HRC decision shows, there are no universal nor static standards regarding the protection of public morals.⁷³⁷ What’s more, the public’s sense of morality may have become closely intertwined with religion. Robert Drinan argues that “in nations with a long-standing relationship between government and religion, many will claim that any weakening of the hegemony of the traditional religious belief would threaten the morality and well-being of the country”.⁷³⁸

3.3.3 Relative Human Rights Approach and the Lack of applicability of Universal Approach

The UN Charter, the UDHR and the ICCPR have all taken a universal approach to human rights. The universal approach is the idea that human rights are held by all people on earth in the “same fashion” without consideration given to any local

⁷³⁴ Dinah L. Shelton, *Advanced introduction to international human rights law* (Cheltenham, UK ; Edward Elgar, 2014), p. 192.

⁷³⁵ Weissbrodt and de la Vega, *International human rights law : an introduction*, p. 103.

⁷³⁶ Leo R- Hertzberg, Uit Mansson, Astrid Nikula and Marko and Tuovi Putkonen, represented by SETA (Organization for Sexual Equality) v. Finland, Communication No. R.14/61, U.N. Doc. Supp. No. 40 (A/37/40) at 161 (1982), para 10. 3.

⁷³⁷ Weissbrodt and de la Vega, *International Human Rights Law:An Introduction*, p. 104.

⁷³⁸ Drinan, *Can God & Caesar Coexist?*, p. 11.

social, political or religious situations. This approach ignores any local cultural or traditional particularities. In the *Tyrer Case* in the Isle of Man. This was a rejection of a Manx local tradition by the ECHR. Corporal punishment in the form of birching had long been seen as a local ‘tradition’ on the island, and Article 63(3) of the European Convention on Human Rights (ECHR) would seem to allow for this in its use of the term “local requirements”:

[t]he provisions of this Convention shall be applied in [colonial territories] with due regard, however, to local requirements.⁷³⁹

Although this provision seems to support cultural relativism, since the parties would be exempted from enforcing the human rights guaranteed by the ECHR in those territories where “local requirements” conflict with the Convention,⁷⁴⁰ this interpretation was rejected by the European Court of Human Rights.⁷⁴¹ The court judged that the term “requirements” implied necessity, and that such punishment, despite tradition and public acceptance, was not necessary and therefore violated the Convention.⁷⁴² Furthermore, the court wrote that Article 3 of the ECHR, which prohibits degrading punishment, overrode any local requirements. This ruling thus suggests that despite tradition, public opinion or state policy, human rights are non-negotiable.

Although some human rights may well be universally recognised and understood, such as the right to life, freedom from torture, freedom from slavery and freedom from *ex post facto* application of criminal law, these rights are also universally recognised in regional human rights instruments. Moreover, certain universal

⁷³⁹ ECHR, 213 U.N.T.S. 221, 1950 Gr. Brit. T.S. No. 71 (Cmd. 8969) (1950).

⁷⁴⁰ Tesón, “International Human Rights and Cultural Relativism”, p.877.

⁷⁴¹ Eur. Ct. Hum. Rts., *Tyrer Case*, Judgment of 25 April 1978, Series A No. 26.

⁷⁴² Tesón, “International Human Rights and Cultural Relativism”, pp.877-878.

minimum standards do seem to exist. This view is widely supported. For example, with regard to the genocide and holocaust of WWII, and more recently to events in Bosnia, Kosovo and Rwanda, the human rights violations seen in these cases were universally condemned. Genocidal slaughter, rape and expulsion are morally offensive, regardless of who commits the acts and who the victims are.⁷⁴³ Both perpetrators and victims legitimately possess human rights from birth, and are aware of these moral codes and will be held responsible for violating them.

Various international treaties and declarations proclaim the existence of universal human rights. For example, the UN Charter and the UDHR declare human rights to be the equal and inalienable right of all individuals. Article 1 of the UDHR states “All human beings are born free and equal in dignity and rights”. Moreover, ICCPR Article 10 states that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” Similarly, the UN General Assembly stated once more in 2012 that

The universal nature of [all human rights and fundamental freedom] is beyond question.⁷⁴⁴

Similarly, Principle VII of the Helsinki Accords affirms that the participating states will promote the effective exercise of human rights and freedoms, “all of which derive from the inherent dignity of the human person.”⁷⁴⁵ The notion that rights derive from one’s ‘inherent dignity’ is important, as by implication they do not derive from the state or its apparatus.⁷⁴⁶ For Donnelly, a basic moral equality or

⁷⁴³ Little, “Religion and Human Rights”, p.72.

⁷⁴⁴ GA Res67/1, 24 September 2012, Declaration of the high-level meeting of the GA on the rule of law at the national and international levels, para 6.

⁷⁴⁵ The Final Act of the Conference on Security and Cooperation in Europe, Aug. 1, 1975, 14 I.L.M. 1292 (Helsinki Declaration).

⁷⁴⁶ Oscar Schachter, “Human Dignity as a Normative Concept”, 77 *The American Journal of International Law*

equality of respect is an indispensable element of that dignity.⁷⁴⁷ According to Schachter, it is easier to recognise a violation of this human dignity than it is to define it: “I know it when I see it even if I cannot tell you what it is.”⁷⁴⁸ The natural law tradition alludes to supposed normative principles that already existed prior to the first man-made legislation.⁷⁴⁹ Therefore, this natural law constitutes a form of ‘prejudice’ that assumes morality to be the same everywhere.

The idea behind natural law is that human rights are cosmopolitan;⁷⁵⁰ they are “due to all human beings by virtue of their humanity, without distinction on such grounds as race, sex (gender), religion, language or national origin.”⁷⁵¹ This declared universality of human rights is derived from natural rights theory, which states that human dignity is the same everywhere in the world. The *Princeton Encyclopedia of Islamic Political Thought* has defined natural law as follows:

Natural law is a system of rights or justice held to be common to all humans and derived from nature rather than from the conventions of society. Its opposite is “positive law” in the sense of a law that has been “set” for a society either by itself, its rules, or a higher, transcendent authority.⁷⁵²

Natural rights theory is the cornerstone for contemporary international standards of human rights. Regardless of one’s origin, residence or cultural environment, all individuals are entitled to the same fundamental human rights under international

(1983), p. 853. (Schachter, “Human Dignity as a Normative Concept”)

⁷⁴⁷ Jack Donnelly, “Human Rights as Natural Rights”, 4 *Human Rights Quarterly* (1982), p. 399.

⁷⁴⁸ Schachter, “Human Dignity as a Normative Concept”, p. 849.

⁷⁴⁹ Heiner Bielefeldt, “Western’ Versus ‘Islamic’ Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights”, 28 *Political Theory* (2000), p. 93. (Bielefeldt, “Western’ Versus ‘Islamic’ Human Rights Conceptions?”)

⁷⁵⁰ Heiner Bielefeldt, “Muslim Voices in the Human Rights Debate” 17 *Human Rights Quarterly* (1995), p. 589.

⁷⁵¹ An-Na’im, “Islam and Human Rights”, p. 95.

⁷⁵² Gerhard Bowering, ed., *The Princeton Encyclopedia of Islamic Political Thought* (Princeton: Princeton University Press, 2013), p. 390.

law. Tesón therefore argues that international law obliges governments to observe these rights even when they might be inconsistent with local traditions.⁷⁵³ Thus, entitlement to human rights does not vary according to differing traditions in diverse states, and national boundaries do not affect the non-discrimination requirement.

This natural rights law theory was used in the West to vindicate both the American and French revolutions in the 18th CE,⁷⁵⁴ but its origin can be traced back to the idea of “form of the good” by the Greek philosopher Plato.⁷⁵⁵ Aristotle then expanded upon this: “The moral law is far superior and conversant with far superior objects than the written law.”⁷⁵⁶ He also observed that

Universal law is the law of Nature. For there really is, as every one to some extent divines, a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other.⁷⁵⁷

This ancient Greek notion of natural rights was developed by the Western scholar Thomas Hobbes (d. 1679), who viewed natural rights as a “precept or general law”.⁷⁵⁸ John Locke further linked natural law theory and liberty:

⁷⁵³ Tesón, “International Human Rights and Cultural Relativism”, p.884.

⁷⁵⁴ Peter Jones, *Rights* (Houndmills, Basingstoke, Hampshire: Macmillan, 1994), p. 3.

⁷⁵⁵ Plato, *Republic*, translated by G.M.A. Grube; revised by C.D.C. Reeve (Indianapolis : Hackett Pub. Co., 1992), p. 182 (508e).

This (form of the good) is explained by Plato

And aren't we in this ridiculous position because at that time we did not introduce every form of difference and sameness in nature, but focused on the one form of sameness and difference that was relevant to the particular ways of life themselves?

ibid., p. 128 (454C)

⁷⁵⁶ Aristotle, *The politics of Aristotle : a treatise on government*, translated by William Ellis. (Auckland, New Zealand : Floating Press, 1912), p.173.

⁷⁵⁷ Aristotle, *Rhetoric* [electronic resource], translated by W. Rhys Roberts, (Blacksburg, VA : Virginia Tech, 2001.), p. 35.

⁷⁵⁸ Thomas Hobbes, *Leviathan*, edited by A.P. Martinich and Brian Battiste. (Peterborough, Ont. : Broadview Press, 2010), p. 64. (Part 1. Chapter 14).

Men being, as has been said, by nature, all free, equal and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent.⁷⁵⁹

Locke's words are almost identical to those of the UDHR ("All human beings are born free and equal in dignity and rights"); furthermore, his notion of natural rights reflects Christian understandings. John Dunn argues that

...the entire ratiocinative structure in which it is considered in the *Two Treatises* and from which the political conclusions follow is saturated with Christian assumptions – and those of a Christianity in which the New Testament counted *very* much more than the Old.⁷⁶⁰

Jeremy Waldron also argues that Locke's theory seemed to only appeal to "those who were willing to buy into a particular set of Protestant Christian assumptions."⁷⁶¹ The basis of Locke's idea of natural rights is far from being a natural approach; it is mainly of Christian origin. Dunn points out that

Jesus Christ (and Saint Paul) may not appear in person in the text of the *Two Treatises* but their presence can hardly be missed when we come upon the normative creaturely equality of all men in virtue of their shared species-membership.⁷⁶²

According to Dunn, the state of nature is one in which "all men are naturally in";⁷⁶³ it is not an asocial condition but an ahistorical (or timeless) one, set by God. As

⁷⁵⁹ John Locke, *Two treatises of government*, edited by Mark Goldie (London : Rutland, Vt. : J.M. Dent ; 1993), p. 162 (chapter 8, §95). (Locke, *Two treatises of government*)

See also *ibid.*, pp. 190-191 (chapter 13, §149).

⁷⁶⁰ John Dunn, *The political thought of John Locke: an historical account of the argument of the 'Two treatises of government'* (London : Cambridge U.P, 1969), p. 99 (Dunn, *The political thought of John Locke*)

⁷⁶¹ Jeremy Waldron, *God, Locke, and equality [electronic resource] : Christian foundations of John Locke's political thought* (Cambridge ; New York : Cambridge University Press, 2002), p. 13.

⁷⁶² Dunn, *The political thought of John Locke*, p. 99.

⁷⁶³ Locke, *Two treatises of government*, p. 116 (chapter 2, §4).

such, it is a topic pertaining to the theological field, not the anthropological one.⁷⁶⁴

Sir William Blackstone states that

...the law of nature....dictated by God himself....is binding....in all countries and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately or immediately, from this original.⁷⁶⁵

Tierney argues that “Natural rights theories seem to be a distinctively Western invention. But such theories have not been characteristic even of Western culture at all times and places.”⁷⁶⁶ His studies of ancient Greek and Roman philosophers, such as Diogenes Laertius (d. 3rd CE) and Cicero (d.43 BC), found that their ideas were far-removed “from a doctrine of individual natural rights.”⁷⁶⁷ Therefore, individual human rights as declared in the UDHR are a relatively novel and recent concept.

The supposed ‘natural theory’ underpinning the universal approach is controversial. The mutual respect and equality written into the UDHR is not universally agreed upon, and the issue of whether human rights are universal or are culturally relative remains much debated. On the one hand, articles in the UN Charter and UDHR declare that human rights are universal. Universalists argue that at least some moral judgments, such as the rights outlined in the UDHR and other international conventions, are “universally valid”.⁷⁶⁸ On the other hand, cultural relativists such

⁷⁶⁴ Dunn, *The political thought of John Locke*, p. 97.

⁷⁶⁵ Sir William Blackstone, *Commentaries on the laws of England*,(1807), pp. 40-41 in Harold J. Berman, “Religious Foundations of Law in the West: An Historical Perspective”, 1 *Journal of Law and Religion* (1983), p. 4.

⁷⁶⁶ Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625*(Michigan: Eerdmans Publication, 1997), p. 45.

⁷⁶⁷ *ibid.*, pp. 45-46.

⁷⁶⁸ Michael Goodhart, “Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization”, 25 *Human Rights Quarterly* (2003), p. 940.

as Susan Breau argue that other cultures should not be judged using our own culture's standards: "each culture should be analysed on its own terms."⁷⁶⁹

Many scholars believe that human rights (or perhaps more accurately, the concept of such rights) are of Western origin. Professor Guyora Binder points out that "Free speech, elections and the rule of law are fundamental to western traditions, not to human nature or human dignity,"⁷⁷⁰ and that these norms, now embodied in international human rights law, are seen as legitimate only because they echo the political culture of Western society.⁷⁷¹ Likewise, the American Anthropological Association states that

Ideas of right and wrong, good and evil, are found in all societies, though they differ in their expression among different peoples. What is held to be a human right in one society may be regarded as anti-social by another people, or by the same people in a different period of their history.⁷⁷²

The universal human rights approach has been criticised by some Muslim majority states. For example in 1984 Iran's UN representative, Said Raja'i-Khorasani, stated that

The Universal Declaration of Human Rights, which represented secular understanding of the Judaeo-Christian tradition, could not be implemented by Muslims and did not accord with the system of values recognised by the Islamic Republic of Iran; his country would therefore not hesitate to violate its provisions.⁷⁷³

⁷⁶⁹ Susan C. Breau, "Human Rights and Cultural Relativism: The False Dichotomy" in Javaid Rehman and Susan C. Breau, ed., *Religion, Human Rights and International Law* (Leiden; Boston: Martinus Nijhoff Publishers, 2007), p. 138; William J. Talbott, *Which Rights Should Be Universal?* (Oxford: Oxford University Press, 2005), pp. 39-41.

⁷⁷⁰ Guyora Binder, "Culture Relativism and Cultural Imperialism in Human Rights Law", 5 *Buffalo Human Rights Law Review* (1999), p. 214.

⁷⁷¹ *ibid.*

⁷⁷² The Executive Board, American Anthropological Association "Statement on Human Rights 49 *American Anthropologist*, New Series, (Oct. - Dec., 1947), p. 542.

⁷⁷³ UNGA, 38th Session, 3rd Committee, 65th meeting, held on Friday 7th December, 1984, New York.

There are many other arguments against the universality of human rights; indeed, some see them as a “project”, since in practice their universality is not yet a reality.⁷⁷⁴ Others argue that the proclamation of universal human rights amounts to Western cultural imperialism.⁷⁷⁵ Bielefeldt takes another view, arguing that as the Catholic Church and other later Christian churches rejected human rights for centuries, they are clearly not a result of Western history or culture. According to this line of argument therefore, the roots of human rights are not in occidental history or in the traditions of Europe.⁷⁷⁶

Similarly, Donnelly notes that before the seventeenth century there was no society on Earth that practiced equal and inalienable individual human rights; Western societies were no exception.⁷⁷⁷ The term ‘dignity’ was used in the plural as ‘dignities’, referring to the different dignities of people according to their rank, status and position within Middle Ages society. However, our modern world of supposed equality and freedom has clearly rejected this medieval cosmology, and seeks to develop human rights laws based on egalitarian terms.⁷⁷⁸

Donnelly sees the Western emergence of the “individualistic human rights approach” as a historical accident, stemming from the fact that the joint rise of capitalism and the modern state happened to occur in the West. According to Donnelly, human rights concepts emerged, and later became nearly universal, as a

A/C.3/39/SR.65

⁷⁷⁴ Guichon, “Some Arguments on the Universality of Human Rights in Islam”, p. 176.

⁷⁷⁵ Arat, “Forging A Global Culture of Human Rights”, p. 418.

⁷⁷⁶ Bielefeldt, “Western’ Versus ‘Islamic’ Human Rights Conceptions?”, pp. 96-97.

Bielefeldt states;

⁷⁷⁷ Donnelly, ‘The Relative Universality of Human Rights’, pp. 284-285; Jack Donnelly, “Human Dignity and Human Rights” *JUNE 2009 Swiss Initiative to Commemorate the 60th Anniversary of the UDHR Protecting Dignity: An Agenda for Human Rights*, (2009), p. 12.

⁷⁷⁸ Bielefeldt, “Western’ Versus ‘Islamic’ Human Rights Conceptions?”, p. 95.

response to these “social disruptions of modernity.”⁷⁷⁹ The birth of nation-state polities greatly influenced understandings of these individual rights. Arguably the most critical change related to citizenship, which enabled individuals to claim rights as well as obliging them to perform certain duties. Through claiming these rights people could now appeal to, and against, authority, irrespective of their backgrounds or other affiliations.⁷⁸⁰

The excesses of the Second World War also strengthened this anti-state, individualistic conception of human rights, and this found expression in the UDHR. Needless to say the text of the UDHR is strongly influenced by Western experience and culture, as it was written against the context of human rights abuses that had taken place, or still were taking place, in the West. As human rights represent a development required by the exigencies of the modern state, they have become obligatory. They are intricately linked to the necessity of filling a void regarding individuals’ relations to modern states.⁷⁸¹ Therefore, Tibi states that “Individual human rights are clearly a cultural concept of morality, European in origin.”⁷⁸² This understanding grew from theories of natural law and has been associated with the processes of individuation that took place following the birth of the modern state.⁷⁸³

3.4 State practices of Muslim majority states

⁷⁷⁹ Jack Donnelly, “Human Rights and Asian Values: A Defense of Western Individualism” in *The East Asian Challenge for Human Rights* (Joanne R. Bauer & Daniel A. Bell eds., 1999), p. 63.

⁷⁸⁰ Moosa, “The Dilemma of Islamic Rights Schemes”, p. 190.

⁷⁸¹ Guichon, “Some Arguments on the Universality of Human Rights in Islam”, p. 176.

⁷⁸² Bassam Tibi, “Islamic Law/*Shari’a*, Human Rights, Universal Morality and International Relations”, 16 *Human Rights Quarterly* (1994), p. 280.

⁷⁸³ *ibid.*

State practices in Muslim majority states demonstrate the dilemma and challenge of applying a universal human rights standard, in particular with regards to religious freedom and freedom of expression. For example, some of the Muslim majority states which have ratified the ICCPR deem apostasy to be a criminal offence. Apostasy cases have been reported in states which ratified the ICCPR without expressing reservations to Articles 18 and 19, such as Afghanistan (1983), Nigeria (1993), Egypt (1982), Iran (1975) Pakistan (2010) and Yemen (1987). Other Muslim majority states have made reservations to human rights treaty provisions which they deemed contrary to the Shari'a. What is more, defamation resolutions submitted by the OIC show that many Muslim majority states disagree with the international human rights standard of freedom of expression.

3.4.1 Reservations against treaties

Resistance by Muslim majority states to the supposed universality of human rights can be seen in the state practices of some states and in the reservations some have made against certain provisions of international treaties. These states mainly ignore those international human rights standards which are deemed inconsistent with Shari'a. According to the 1969 Vienna Convention on the Law of Treaties (VCLT), any states are allowed to enter reservations as long as no other states refuse this, and these reservations are valid as long as they do not contradict the object of the treaty.⁷⁸⁴ The VCLT regime recognised the “sovereign equality of States”, taking a

⁷⁸⁴ Vienna Convention of Law of Treaties (1969), UN Doc. A/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679 (1969) / 63 AJIL 875 (1969) Art 19, see also Art 20 and 21.

flexible approach in order to promote wider acceptance of treaties by states.⁷⁸⁵

Sawad notes that it seems the entire process of determining whether a state's reservations can be understood as being compatible with a treaty's object and purpose "remains a subjective exercise left to the discretion of the States parties."⁷⁸⁶

The reservations of Muslim majority states regarding certain aspects or even the entirety of international treaties show their disagreement with the universal approach. For example, with respect to the 1989 Convention on the Rights of the Child (CRC), nine Muslim majority states expressed general reservations and 15 Muslim majority states had reservations on specific provisions, mainly regarding Article 14 (freedom of religion of the child).⁷⁸⁷ Many of these states argue that certain CRC provisions contradict Shari'a. For example, Afghanistan and Iran state that CRC provisions are respectively "incompatible" with and "contrary" to the Shari'a.⁷⁸⁸ The Maldives states that "Shariah[Shari'a] is one of the fundamental sources of Maldivian Law" and that therefore any law that does not contain the Shari'a is unacceptable.⁷⁸⁹ Although Saudi Arabia ratified the CRC, they made a general reservation:

The Government of Saudi Arabia enters reservations with respect to all such articles as are in conflict with the provisions of Islamic law.⁷⁹⁰

⁷⁸⁵First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, UN Doc A/CN.4/144, (26 March 1962)," (1962) Vol. II *Yearbook of the International Law Commission* 77 para.7.

Ahmed Ali Sawad, "Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations", p. 56 (Sawad, "Reservations to Human Rights Treaties and the Diversity Paradigm").

⁷⁸⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion (1951) International Court of Justice Reports, 24.

Sawad, "Reservations to Human Rights Treaties and the Diversity Paradigm", p. 56.

⁷⁸⁷ United Nations Treaties collection: Status of Treaties , <
https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en>enaccessed 29 June 2016.

⁷⁸⁸ *ibid.*

⁷⁸⁹ *ibid.*

⁷⁹⁰ *ibid.*

Moreover, many Islamic states have also expressed reservations concerning the Committee on the Elimination of Discrimination against Women (CEDAW).⁷⁹¹ These countries argue that some articles in this treaty are contrary to Shari'a, and consequently against the national legislation of their countries. Seven Muslim majority states made general reservations to the treaty (Malaysia, Maldives, Mauritania, Pakistan, Saudi Arabia, Tunisia and Turkey), while 14 other states expressed reservations regarding some of the CEDAW's provisions, mainly based on conflict between these provisions and Shari'a. For example, the Malaysian government stated as follows:

The Government of Malaysia declares that Malaysia's accession is subject to the understanding that the provisions of the Convention do not conflict with the provisions of the Islamic *Shari'a* law and the Federal Constitution of Malaysia.⁷⁹²

The ICCPR is another example of a major treaty which Muslim nations have expressed reservations towards, with Iraq and Libya expressing general reservations and the Maldives and Mauritania voicing reservations specifically regarding Article 18.⁷⁹³ Mauritania declared that its approval of the Covenant "shall be without prejudice to the Islamic *Shari'ah*", meaning, in essence, that the scope of the article will be curtailed by the provisions of Islamic law on freedom of religion.⁷⁹⁴

Some universalists have criticised the very notion of expressing or accepting reservations against treaties. Some see the VCLT system as being too flexible and as inappropriate for human rights treaties. The whole idea of human rights treaties,

⁷⁹¹ *ibid.*

⁷⁹² *ibid.*

⁷⁹³ *ibid.*

⁷⁹⁴ *ibid.*

as opposed to contractual treaties, is that they have a universal character. For example, in *The Effect of Reservations* case, the Inter-American Court of Human Rights held that human rights treaties are “not multilateral treaties of the traditional type”:

Their [human rights treaties] object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.⁷⁹⁵

Supporters of the universal approach argue that human rights treaties should therefore be subject to a special rule, since human rights are the birth-right of all individuals and not to be under the control of any state.⁷⁹⁶ Universalists strongly object to the fact that from the very outset, Article 19 of the Vienna Convention presumes that states have the right to express reservations unless other states object or these reservations contradict the point of the treaty. They argue that such a right seems to undermine the very reason for formulating human rights declarations.

Undoubtedly, some human rights norms are considered peremptory rights, pertaining to *jus cogens*. Schwinn has pointed out human rights treaties “provide rights to individuals or groups and are the embodiment of a certain set of values.”⁷⁹⁷

⁷⁹⁵ *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights* (Arts. 74 and 75), Advisory Opinion OC-2/82, September 24, 1982, Inter-Am. Ct. H.R. (Ser. A) No. 2 (1982), para 29.

⁷⁹⁶ Ineta Ziemele and Lāsma Liede, “Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6”, 24 *The European Journal of International Law* (2013), pp. 1138-1139. (Ziemele and Liede, “Reservations to Human Rights Treaties”)

⁷⁹⁷ Scheinin, ‘Reservations by States under the ICCPR and Its Optional Protocols’, in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime: Conflict, Harmony or Reconciliation* (2004), p. 44. (Scheinin, ‘Reservation by States under the ICCPR’)

According to the former President of the ICJ (International Court of Justice),
Rosalyn Higgins,

Human rights treaties - as the jurisprudence of various human rights organs have from time to time reminded us - reflect rights inherent in human beings, not dependent upon grant by the state.⁷⁹⁸

This position summarises the criticisms of some authors regarding the practice of some states of expressing reservations against the provisions of human rights treaties. Universalists argue that any reservations against human rights treaties are by definition incompatible with the ‘object’ and ‘purpose’ of the treaties. The *Genocide Convention Case* has provided another example of this argument. In this case, Judge Alvarez’s single dissenting opinion proposed that normative human rights treaties should be afforded special treatment; he considered such declarations to constitute “new international constitutional law” and to be “the Constitution of international society”,⁷⁹⁹ as they “are not established for the benefit of private interests but for that of the general interests.”⁸⁰⁰ He argued that these treaties

impose obligations upon States without granting them rights, and in this respect are unlike ordinary multilateral conventions which confer rights as well as obligations upon their parties.⁸⁰¹

There are therefore many questions about whether the reservations made against the provisions of human rights treaties are compatible with the ‘object and purpose’ of such treaties. There is an inherent tension here: while on the one hand human rights treaties strive for or even require universal acceptance, on the other hand

⁷⁹⁸ Rosalyn Higgins, “The United Nations: Still A Force For Peace”, 52 *The Modern Law Review* (1989), p. 11.

⁷⁹⁹ See Individual dissenting opinion of Judge Alvarez, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, (1951) International Court of Justice Reports 49-55.

⁸⁰⁰ *ibid.*, 51.

⁸⁰¹ *ibid.*

some universalists require state parties not to make any reservations. However, the approach adopted by the VCLT regime has considerable support. The Advisory Opinion given by the ICJ in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) argued that the ‘object and purpose’ compatibility test was fully applicable even to normative treaties, such as those on human rights:

...[the test was applicable to treaties] manifestly adopted for a purely humanitarian and civilizing *purpose*...since its *object* on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality.⁸⁰²

Although the Court recognised that some treaties have a special character that require worldwide participation, the ability to express reservations against normative treaties is important in achieving worldwide participation.⁸⁰³

‘[t]he appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case’.⁸⁰⁴

The Joint Dissenting Judges in the *Genocide Convention Case* alluded to this point when they noted that the chief aim when assessing reservations should not be to impose universality whatever the cost, but rather the “acceptance of common obligations – keeping step with like-minded States – in order to attain a high objective for all humanity”,⁸⁰⁵ and that “integrity of the terms of the Convention” took precedence over “mere universality.”⁸⁰⁶ However, the VCLT approach was

⁸⁰² *ibid.* (emphasis added), p. 12.

⁸⁰³ Ziemele and Liede, “Reservations to Human Rights Treaties”, p. 1137.

⁸⁰⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion [1951] ICJ Rep. 26.

⁸⁰⁵ The Joint Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, (1951) International Court of Justice Reports, 47.

⁸⁰⁶ *ibid.*, p. 46.

rejected by the ICCPR's Human Rights Committee (HRC). The HRC affirmed the universal approach in its *General Comment 24*:

...[The] traditional reservations approach taken by VCLT is incompatible with human rights treaties. Such treaties, and the Covenant specifically, are not a web of inter-state exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-state reciprocity has no place [there].⁸⁰⁷

HRC have therefore concluded that the traditional approach taken by VCLT is not applicable to human rights treaties, since such treaties are not for regulating relations among states but for asserting individual rights. Behind the HRC approach is the idea that human rights are universal, since human rights treaties have a normative object and purpose.⁸⁰⁸

This line of argument therefore sees natural rights theory and the universal approach as trumping the sovereign freedom to express reservations regarding declarations or the rights therein, since it regards all people, without boundaries, as being naturally endowed with human rights.

Moreover, the compatibility of reservations in human rights treaties is not determined by the individual states but by the Committee itself. HRC states that

Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task.⁸⁰⁹

⁸⁰⁷ CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 Nov. 1994, CCPR/C/21/Rev. 1/Add. 6. Para 17.

⁸⁰⁸ Sawad, "Reservations to Human Rights Treaties and the Diversity Paradigm", p. 25.

⁸⁰⁹ HRC, General Comment 24 (52), para. 18.

Therefore, in the HRC's opinion any reservations against human rights treaties would impact on the object of the treaties. This would fall foul of the 'object and purpose' rule that determines whether a reservation is compatible or not. This HRC approach has been supported by judges. For example, in their Joint Separate Opinion in *Democratic Republic of Congo v. Rwanda*) in 2002, Judges Higgins, Kooijmans, Elaraby, Owada, and Simma declared that

The Human Rights Committee in General Comment No. 24 (52) has sought to provide some answers to contemporary problems in the context of the International Covenant on Civil and Political Rights, with its analysis being very close to that of the European Court of Human Rights and the Inter-American Court. The practice of such bodies is not to be viewed as 'making an exception' to the law as determined in 1951 by the International Court; we take the view that it is rather a development to cover what the Court was never asked at that time, and to address new issues that have arisen subsequently.⁸¹⁰

The HRC approach to reservations is incompatible with that of the VCLT, as the HRC approach denies the state's absolute sovereignty. Professor Scheinin backs up the argument that the VCLT and HRC's *General Comment* are incompatible, noting that *General Comment* No. 24 included two key elements:

- (a) A human rights treaty body, established for the purpose of interpreting the treaty and monitoring the compliance by States with its provisions, has the competence to address the permissibility of reservations made under the treaty in question;
- (b) The usual (but not automatic) consequences of an impermissible reservation will be its severability, i.e., the State in question is considered bound by the treaty but without the benefit of its reservation.⁸¹¹

⁸¹⁰ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda), Jurisdiction and Admissibility, Judgment* [2006] ICJ Rep. 6, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, at para. 16, 69 in Ziemele and Liede, "Reservations to Human Rights Treaties", pp. 1151-1152.

⁸¹¹ HRC *General Comment No. 24*, para 18.

The HRC reserves for itself the right to determine the compatibility of reservations. This is in contrast to the position outlined in the VCLT, which declared that individual states enjoyed the right to make a reservation. This is justified by affording human rights treaties a special status. The HRC have thus removed the sovereignty right of states to issue reservations against treaties; this is a radical move away from the stance outlined in the VCLT.

However, the HRC's rejection of the VCLT position on reservations is not widely supported. The VCLT definition of a 'reservation' in Article 2(1)(d) remains the standard for international treaty law, as can be seen in the ILC's (International Law Commission) ongoing work on the topic.⁸¹² The VCLT's compatibility test for reservations is also still seen as being applicable to human rights treaties.⁸¹³

The ILC has thus rejected the universal approach to human rights treaties, stating that

the Special Rapporteur wondered whether...special rules would be applicable to the "special" category of normative treaties formed by human rights treaties. In that regard, he pointed out that, despite the eloquent pleading by human rights specialists for a regime specific to reservations to human rights treaties, none of the arguments offered a convincing basis for such a specific regime. In actual fact, it was the lacunae and the ambiguities of the Vienna regime that were questioned, lacunae and ambiguities of the *general regime* and not its application to certain categories of treaties.⁸¹⁴

Moreover, the ILC has declared that "The Vienna regime was designed to be applied *universally* and without exception."⁸¹⁵ The ILC thus recognised the right to express reservations against human rights treaties and dismissed the concept of a

⁸¹² A/CN.4/558/Add.1, (30 June 2005), para.167

⁸¹³ *ibid.*, para.109

⁸¹⁴ Report of the International Law Commission on the work of its forty-ninth session, p. 48, paragraph 75.

⁸¹⁵ *ibid.*, paragraph 76(a).

special regime for them arguing in effect that human rights treaties are simply another form of treaty, and that therefore the Vienna regime is applicable to them. The reservations expressed by some Muslim majority states against certain human rights treaties are thus legal; furthermore, the widely-held acceptance of their right to express such reservations casts doubts on the chances for success of the universal approach to human rights.

3.4.2 Defamation Resolution: a Muslim approach to religious defamation

Religious hate speech, or defamation, is a highly controversial issue. According to *Black's Law Dictionary*, defamation is “The act of harming the reputation of another by making a false statement to a third person”.⁸¹⁶ The same source defines hate speech as that which “carries no meaning other than the expression of hatred for some group” and “is likely to provoke” violence.⁸¹⁷ Both defamation and religious hate are characteristic of malicious expression and can jeopardise others’ rights.

Defamation of religion is a particularly complex issue in the international human rights sphere, since protection of the rights of religious believers might infringe upon freedom of speech. There is also the issue of whether or not religion and religious groups are protected by international human rights instruments, as

⁸¹⁶ *Black's Law Dictionary*, p. 448.

⁸¹⁷ *ibid.*, p. 1436.

defamation of religion and religious hate speech can endanger the rights of such groups as well as the individual right to freedom of religion. The Defamation Resolutions clearly illustrates this paradox. On the one hand, several court decisions have stated that religion itself is not recognised or protected by any international human rights instruments, but in reality the individual's right to religious freedom can be endangered by defamation of religion and hate speech. The Defamation Resolutions have sought to place religion and/or religious groups under the protection of international human rights. Although this attempt failed, defamation of religion may be considered to be a grey area in terms of restricting or allowing freedom of expression.

Legal position of Religious Defamation under International Human Rights

Article 20(2) of the ICCPR declares that each party to the Covenant must adopt legislation banning religious hate speech.⁸¹⁸ In *General Comment 11* the Office of the High Commissioner For Human Rights states that those parties that still have not enacted any law to restrict “national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence” should do so, since it is the state parties to the covenant that have ultimate responsibility for passing such legislation.⁸¹⁹

⁸¹⁸ Article 20(2) of ICCPR

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

⁸¹⁹ *General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred* (Art. 20), (1983), para 2.

Although international human rights instruments do not define what “religious hatred” is, they do prohibit the “advocacy” of religious hate speech. However, ICCPR Article 20 has only been very narrowly applied. The HRC stated in the *Kasem Said Ahmad and Asmaa Abdol-Hamid v. Denmark* case that “advocacy” should not only support the nature of racial or religious hatred, but must also lead to “incitement to discrimination, hostility or violence.”⁸²⁰ The HRC laid down that hate speech can only be restricted if it was made for the “purpose of inciting religious hatred.”⁸²¹ Moreover, any restriction based on Article 20 of the ICCPR must be compatible with Article 19; Article 20 can thus only be applied under extraordinary circumstances. This confined application of Article 20 is a reflection of the context within which it was drafted. It was aimed at preventing the repetition of the tragedies of WWII, particularly the massacre of people based on their race or religion. Manfred Nowak states that “Article 20(2) was drafted to prevent a recurrence of the large-scale campaigns of racist hatred in the Third Reich.”⁸²² The drafters did not intend to restrict religious hatred *per se*, however. Nowak notes that

Art 20(2) as well may be sensibly interpreted only in light of its object and purpose, i.e., taking into consideration its *responsive character* with regard to the Nazi racial hatred campaigns, which ultimately led to the murder of millions of human beings on the basis of racial, religious and national criteria. Thus, despite its unclear formulation, Art. 20(2) does not require States parties to prohibit advocacy of hatred in private that instigates non-violent acts of racial or religious discrimination.⁸²³

⁸²⁰ *Kasem Said Ahmad and Asmaa Abdol-Hamid v. Denmark*, CCPR/C/92/D/1487/2006 18 April 2008, Communication No. 1487/2006, para 4.7.

⁸²¹ CCPR/C/109/D/1879/2009, para. 4.6.

⁸²² Nowak, *U.N. Covenant on Civil and Political Rights*, p.475.

⁸²³ *ibid.*

In this sense, it is difficult to rely on Article 20 to prevent individual religious defamation. The restrictions described in Article 20 are mainly aimed at prohibiting religious hatred on behalf of and by armed groups.

Religions are not considered to be protected from any criticism or defamation under international human rights law. Asma Jahangir and Doudou Diène, who was the Special Rapporteur on Freedom of Religion or Belief, note that

the right to freedom of religion or belief, as enshrined in relevant international legal standards, does not include the right to have a religion or belief that is free from criticism or ridicule.⁸²⁴

Similarly the ECHR also notes that religion is not protected from criticism under international human rights, mentioning this many times in court decisions. In *Church of Scientology and 128 of its Members v Sweden* (1980), for example, the ECHR states that religion is not “free from criticism”.⁸²⁵ In the *Otto-Preminger-institut v. Austria* case the ECHR stated that religion is not to be seen as immune from criticism and must tolerate denial and hostility.⁸²⁶ Likewise, in their joint dissenting opinion in the *Otto-Preminger-institut v. Austria* case the three dissenting judges stated that the right to freedom of religion does not entail a right to protect “religious feelings”, yet it does include the “right to express views critical of the religious opinions of others”.⁸²⁷

Several cases illustrate that defamation of religion is not restricted *per se* and that religious feelings are not protected at all. For example, in the *Giniewski v. France*

⁸²⁴ Special Rapporteur on Freedom of Religion or Belief, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”, U.N. Doc.A/HRC/2/3 at ¶ 36 (Sept. 20, 2006) (by Asma Jahangir and Doudou Diène).

⁸²⁵ *Church of Scientology and 128 of its Members v Sweden* (1980), App. No. 8282/78, 21 Eur. Comm’n H.R. Dec. & Rep. 109 (1980) para 5 (*Church of Scientology v Sweden*).

⁸²⁶ *Otto-Preminger-institut v. Austria case para 47*

⁸²⁷ *ibid.*, para. 6..

case (2006) the ECHR stated that an analysis of Catholic doctrine which highlighted supposed links to the origins of the Holocaust and to anti-Semitism more generally constitutes a form of protected speech.⁸²⁸ As the scholar's article was not "gratuitously offensive" and did not incite disrespect or hatred, it should not have been restricted by the state, in this case France.⁸²⁹

Religion is not seen as being protected from criticism by international human rights instruments, but defamation of religion is a more complex issue, since defamation can endanger the freedom and reputations of others and thus violate the human rights of believers. Nevertheless, defamation of religion is not a harmless act. In fact, it can be incompatible with a democratic society and tamper with or even severely infringe the religious freedom of others. Several court cases have illustrated this, for example the *Church of Scientology and 128 of its Members v Sweden* case of 1980. In this case the ECHR stated that defamation of religion "might endanger freedom of religion".⁸³⁰

Although religion is not protected *per se*, the rights of others (believers) can be protected via international human rights instruments and states have positive obligations to protect religious freedom from acts of religious intolerance. The UN Special Rapporteurs Asma Jahangir and Doudou Diène noted that

Acts of religious intolerance or other acts that may violate the right to freedom of religion or belief can be committed by States but also by non-State entities or actors. States have an obligation to address acts that are perpetrated by non-State

⁸²⁸ Case of *Giniewski v. France* Application no. 64016/00, (2006) Para52

⁸²⁹ *ibid.*

⁸³⁰ *Church of Scientology v Sweden*, para 5.

actors and which result in violations of the right to freedom of religion of others. This is part of the positive obligation under article 18 of the Covenant.⁸³¹

The possibility that defaming religion could somehow endanger or violate the freedom of others and of their reputations was examined by the HRC in the *Malcolm Ross v. Canada* case (2000). The issue was whether Canada had breached Malcolm Ross' right to freedom of expression by approving his dismissal from his teaching position after complaints that he had made racist and derogatory comments about Judaism and Jewish people in books, pamphlets and interviews.⁸³² One complaint was that this had created a "poisoned environment" which had negatively affected Jewish and other minority children in the district.⁸³³ Citing ICCPR Articles 19 and Article 20(2), the HRC argued that Ross' right to freedom of expression could reasonably be limited on the basis of the right of others 'to be protected from religious hatred', or more specifically the students' right to protection from religious hatred.⁸³⁴ They reasoned that such restrictions are acceptable regarding comments which could potentially create or increase hostility towards those of other religions. It is worth noting that the Committee looked more at whether or not Ross' comments could threaten others' rights than at whether students' religious feelings were actually hurt.⁸³⁵ Moreover, the HRC argued that not only did Ross' statements denigrate Judaism, they appealed to Christians to

⁸³¹ Special Rapporteur on Freedom of Religion or Belief, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council", U.N. Doc.A/HRC/2/3, para. 35 (Sept. 20, 2006) (by Asma Jahangir and Doudou Diène).

⁸³² *Malcolm Ross v. Canada*, Communication No. 736/1997, U.N. Doc. CCPR/C/70/D/736/1997 (2000) para 4.2.

⁸³³ *ibid.*, para 2.1, 2.3, 4.3 and 11.5

⁸³⁴ *ibid.*, para 11.6

⁸³⁵ *ibid.*

look down on Jews for their undermining of freedom and democracy.⁸³⁶ The HRC states that

...the rights or reputations of others for the protection of which restrictions may be permitted under article 19, may relate to other persons or to a community as a whole.⁸³⁷

This implies that freedom of expression, or more specifically defamation of religion, can be related to the rights and reputations of others. The Committee therefore concluded that

[R]estrictions imposed on him [Malcolm Ross] were for the purpose of protecting the “rights or reputations” of persons of Jewish faith...⁸³⁸

This case showed that defamation of religion could be seen as a violation of human rights, and that it could therefore be restricted in order to protect believers, in this case Jews.

There is a considerable body of ECHR case law relating to defamation. For example, in *Gay News Ltd. and Lemon v. United Kingdom* (1982) the ECHR held that the right to defame religion can be restricted in order to protect the religious feelings of others, in other words, to protect their rights.⁸³⁹ Similarly, in the *Otto-Preminger-institut v. Austria* case the ECHR recognised that defamation or criticism of religion can violate the human rights of believers:

⁸³⁶ *ibid.*, para 11.5

⁸³⁷ *ibid.*

⁸³⁸ *ibid.*

⁸³⁹ *X Ltd. and Y v. United Kingdom*, App. No. 8710/79 (EComHR, 28 Decisions and Reports 77, 7 May 1982). At 83, para 11-12

Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them.⁸⁴⁰

In other cases the ECHR has expanded its views on religious defamation. In *I.A. v. Turkey* (2005) it recognised that there was a duty and responsibility to prohibit “improper attacks” against religion. The court stated that

As paragraph 2 of Article 10 recognises, the exercise of that freedom carries with it duties and responsibilities. Among them, in the context of religious beliefs, [there] may legitimately be included a duty to avoid expressions that are gratuitously offensive to others and profane...as a matter of principle it may be considered necessary to punish improper attacks on objects of religious veneration⁸⁴¹

The striking thing in this case is that the court recognised the impact of defamation of religion in societies where the majority population belongs to one particular religion, and that they recognised the validity of punishing someone who defamed such a majority religion.

The judgment was that Turkey did not infringe freedom of expression in its conviction and sentencing of the applicant, a publisher, for insulting “God, the Religion, the Prophet and the Holy Book”. The defendant. The initial indictment had been much earlier, in 1994, when the Istanbul public prosecutor had charged Mr I.A under Criminal Code Article 175 for his publication of a book which blasphemed “God, the Religion, the Prophet and the Holy Book”.⁸⁴² The first judgment, in 1996, convicted the defendant, sentencing him to two years’ imprisonment and a fine;⁸⁴³ the next year the Court of Cassation upheld this

⁸⁴⁰ *Otto-Preminger-institut v. Austria*, para. 47.

⁸⁴¹ *I.A. v. Turkey*, 45 Eur. H. R. Rep. 30, (2005), para 24.

⁸⁴² *ibid.*, para 6.

⁸⁴³ *ibid.*, para 13.

judgment.⁸⁴⁴ Mr I.A then went to the European Court, relying on Article 10 of the ECHR [freedom of expression] to claim that his rights had been violated.⁸⁴⁵ The Turkish Government however argued that as the book had defamed religion, in this case Islam in a majority Muslim country, and had offended religious sensitivities, the conviction had been necessary.⁸⁴⁶ The European Court concurred:

However, the present case concerns not only comments that offend or shock, or a “provocative” opinion, but also an abusive attack on the Prophet of Islam.⁸⁴⁷

The court argued that the language used regarding Islam “had fallen short of the level of responsibility to be expected of criticism in a country where the majority of the population were Muslim”.⁸⁴⁸ The court thus accepted that “social need” can justify the protection of religious feelings through the imposition of certain restrictions on freedom of speech, and that punishing those who breach these restrictions can be appropriate if it is proportionate: The Court therefore considers that the measure taken in respect of the statements in issue was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. In that respect it finds that the measure may reasonably be held to have met a “pressing social need”.⁸⁴⁹

This case shows that defamation of religion can be prohibited on the grounds of protecting social order. Jeroen Temperman has argued that although the ECHR’s use of demographics (i.e. the percentage of the population that is Muslim) was

⁸⁴⁴ *ibid*, para 15.

⁸⁴⁵ *ibid*, para 19.

⁸⁴⁶ *ibid*, para 20.

⁸⁴⁷ *ibid*, para 29.

⁸⁴⁸ *ibid*, para 20.

⁸⁴⁹ *ibid*, para 30.

probably correct, the reverse argument could actually be made more easily.⁸⁵⁰ In an overwhelmingly mono-religious society, Temperman thought that a “shocking view presented by an outsider is not likely to undermine any person’s individual religious rights”. He argues that demographics would only be appropriate “if they substantiate that the group of people targeted by a speech or publication is a vulnerable minority, or if the statistics show that the group at hand does indeed suffer from hate crimes or other similar persecution”.⁸⁵¹

Defamation of religion can be inconsistent with the objectives of international human rights instruments. In the *Otto-Preminger-institut v. Austria* case (1994) the ECHR stated that defamation of religion can amount to a “malicious violation of the spirit of tolerance, which must also be a feature of democratic society.”⁸⁵² Temperman argues that when dealing with the issues of freedom of expression and religious sensitivities, the ECHR has not adequately dealt with defamation prohibitions because these restrictions tend to apply only to protect the predominant religion of the state in question. Temperman notes “it is hard to see how an inherently discriminatory law could ever form the basis for such restrictions.”⁸⁵³ He argues that the European Court’s view that the right to freedom of thought, conscience and religion includes the right not to have one’s religious feelings insulted is at best questionable and has led to the court’s attempts to balance the “two conflicting rights of freedom of expression and freedom of religion”,⁸⁵⁴

⁸⁵⁰ Jeroen Temperman, “Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech” 2011 *Brigham Young University Law Review* (2011), pp. 734-735 (Temperman, “Freedom of Expression and Religious Sensitivities”).

⁸⁵¹ *ibid*, p. 735.

⁸⁵² *Otto-Preminger-institut v. Austria*, para. 47.

⁸⁵³ Temperman, “Freedom of Expression and Religious Sensitivities”, p. 737.

⁸⁵⁴ Jeroen Temperman, “Protection Against Religious Hatred under the United Nations ICCPR and the European Convention System” in Silvio Ferrari and Rinaldo Cristofori ed., *Law and Religion in the 21st Century : Relations Between States and Religious Communities* (Farnham, Surrey ; Burlington, VT : Ashgate

although this does not mean that the right to express oneself freely can never be restricted. Temperman submits that states should not be able to limit freedom of expression in advance and *in abstracto*; rather, the onus should be placed upon states to prove in particular cases that full freedom of expression would endanger the freedom of religion of others.

Defamation of religion is one example where individual rights may collide with others' rights; defamation of religion committed by an individual may infringe the rights of religious believers as a group. As such, it is incompatible with the duty to respect others' human rights. Nevertheless criminalising the defamation of religion is a sensitive issue, as shall be discussed in the following section.

According to the traditional Islamic law approach, defamation of religion amounts to a criminal offence. According to some Islamic text books if non-Muslims insult Allah, the Prophet or Islam, the covenant governing the protection of unbelievers has been violated and Muslim leaders must instigate war against non-Muslims. The mediaeval Shafi'i manual *The Reliance of the Traveller* notes that

The agreement [covenant of protection] is also violated ... if one of the subject people ...mentions something impermissible about Allah, the Prophet (Allah bless him and give him peace) or Islam.⁸⁵⁵

The same manual elaborates on the consequences of violating a covenant of protection:

When a subject's agreement with the state has been violated, the caliph chooses between the four alternatives mentioned above in connection with prisoners of war.⁸⁵⁶

Pub., 2010), p. 217.

⁸⁵⁵ Al-Misri, *The Reliance of the Traveller*, p.609 o11.10

Although it is true that the defamation of Islam has traditionally been prohibited, some Muslim majority states have tried to gain acceptance of the ‘right’ for religion to be protected under international human rights law. In Clause 9 of his ‘Rights of Citizens in an Islamic State’, Mawdudi touched upon ‘Protection of Religious Sentiments’:

Along with the freedom of conviction and freedom of conscience, Islam guarantees the individual that his religious sentiments will be given due respect and that nothing will be said or done which may encroach upon his right.⁸⁵⁷

As well as individual scholars such as Mawdudi, various bodies have also issued similar calls. The OIC’s International Islamic Fiqh Academy proclaimed *fatwas* calling for international legislation that would protect “the interests and values of [Islamic] society” by prohibiting certain forms of free speech; the *fatwas* also called for punishments for apostates from Islam. The OIC Secretary General stressed “no one has the right to insult another for their beliefs.”⁸⁵⁸

Defamation Resolutions have tried to expand the definitions of religious hate speech⁸⁵⁹ by including such terms as ‘stereotyping’, ‘intolerance’ and ‘identifying Islam with terrorism’.⁸⁶⁰ The OIC identified the issue of defamation as being of concern long before the controversies of *The Satanic Verses* and the Danish cartoon affair. Indeed, the OIC declared in 1981 that it refuted the “systematic media

⁸⁵⁶ *ibid.*

⁸⁵⁷ Abul A‘la’ Mawdudi, *Human Rights in Islam* (Lahore: Islamic Publications, 1995), p. 30.

⁸⁵⁸ Nina Shea and Paul Maeshall, “OIC demands world-wide bans on criticizing Islam” *The Muslim Times* (5 December 2011), <<https://themuslimtimes.info/2011/12/05/oic-demands-world-wide-bans-on-criticizing-islam/>> accessed 29 June 2016.

⁸⁵⁹ Julia Alfandari, Jo Baker & Regula Atteya, “Defamation of Religions: International Developments and Challenges on the Ground; SOAS International Human Rights Clinic Project”, *Research Paper* No. 09/2011, p. 12.

⁸⁶⁰ HRC, Res. 13/16, (25 March 2010), paras 1, 2, 4, and 9.

campaigns aimed at isolating, misleading, slandering and defaming our nation.”⁸⁶¹ Similarly, in the 1991 Dakar Declaration the OIC stated that there is a duty to “individually and collectively endeavour to protect and promote the rights of Muslim communities and minorities in non-member states.”⁸⁶² These declarations finally led to the submission of the Defamation Resolutions. In 1999 Pakistan, representing the OIC as a whole, tabled a resolution at an HRC meeting which⁸⁶³ sought to address anti-Islamic discrimination.⁸⁶⁴ The 1999 Defamation Resolution states that

all States, within their national legal framework, in conformity with international human rights instruments, to take all necessary measures to combat hatred, discrimination, intolerance and acts of violence, intimidation and coercion motivated by religious intolerance, including attacks on religious places, and to encourage understanding, tolerance and respect in matters relating to freedom of religion or belief.⁸⁶⁵

The Defamation Resolutions declare that the universal right to freedom of expression can be limited to prevent religious defamation; they aim at severely punishing those who criticise other religions.⁸⁶⁶ Such resolutions were submitted throughout the period 1999-2011 and were adopted initially by the UNCHR and then from 2006 by its successor UNHRC. Their authors concern was to prevent the Islamophobia that they believed had been growing in parts of the world in recent

⁸⁶¹ OIC Final Communique, Islamic Summit Conference, 3rd session (28 January 1981), para 6, <<http://www.oic-oci.org/english/conf/is/3/3rd-is-sum.htm>>accessed 29 June 2016.

⁸⁶² OIC, Dakar Declaration, Islamic Summit Conference, 6th session (11 December 1991), chapter 1 (xiii), <<http://www.oic-oci.org/english/conf/is/6/6th-is-sum%28declaration%29.htm>>accessed 29 June 2016.

⁸⁶³ U.N. Econ. & Soc. Council [ESOSOC], Comm’n on Human Rights, Draft Res.: Racism, Racial Discrimination, Xenophobia and all Forms of Discrimination, UN. Doc. E/CN.4/1999/L.40 (April 20, 1999) (U.N. Econ. & Soc. Council, Comm’n on Human Rights, Draft Res).

⁸⁶⁴ Comm’n on Human Rights Res., 62nd Meeting, U.N. Doc. E/CN.4/1999/SR.61, para 1.

⁸⁶⁵ U.N. Econ. & Soc. Council, Comm’n on Human Rights, Draft Res

⁸⁶⁶ Rebecca J. Dobras, “Is the United Nations Endorsing Human Rights Violations?: An Analysis of the United Nations’ Combating Defamation of Religions Resolutions and Pakistan’s Blasphemy Laws”, 37*Georgia Journal of International and Comparative Law* (2008), p. 344. (Dobras, “Is the United Nations Endorsing Human Rights Violations?”)

years; they feared that if left unchecked, these new manifestations of bigotry and misunderstanding could become as widespread and endemic as antisemitism had previously been.⁸⁶⁷ This concern regarding Islamophobia was repeated in the Durban Declaration of 2001, made at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The declaration noted a rise in Islamophobia around the world and an increase in the number of racist movements targeting Muslim communities,⁸⁶⁸ and called for states to do more.⁸⁶⁹ The declaration also noted that the events of 9/11 undoubtedly led to an increase in Islamophobia and to “ethnic and religious profiling of Muslim minorities”.⁸⁷⁰ According to Diene, negative images of Muslims outnumber positive ones sixteen to one in the United States, and a quarter of the population believe Islam actually teaches violence and hate.⁸⁷¹ The aim of defamation resolutions is to protect believers and Islam itself from Islamophobia, as this affects the human rights of the believers and the religion itself. The Defamation Resolutions asked that “enforcement of laws and administrative measures” be taken to protect Muslim minorities in the West in order to guarantee the “full enjoyment of human rights..”⁸⁷². The Sudanese representative was concerned about a 2005 Danish cartoon that supposedly mocked the Prophet Muhammad, and called for an

⁸⁶⁷ Comm’n on Human Rights Res., 62nd Meeting, U.N. Doc. E/CN.4/1999/SR.61, para 1.

⁸⁶⁸ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa, Aug. 3 I-Sept. 8, 2001, *Durban Declaration and Programme of Action*, para 61, 150, U.N. Doc. A/CONF. 189/12 (Sept. 2001).

⁸⁶⁹ *ibid.*

⁸⁷⁰ U.N.H.R.C. Res. 4/9, para 3; HRC, Res. 13/ 16, 25 March 2010, A/HRC/RES/13/16, para 2.

⁸⁷¹ U.N. Econ. & Soc. Council, Comm. on Human Rights, *Report: Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, U.N. Doc. E/CN.4/2005/18/Add.4 (Dec. 13, 2004) (*prepared by Doudou Diene*) ¶24.

⁸⁷² A/HRC/RES/13/16_(15 April 2010).

international legal instrument that stated could end such defamation and maintain international peace, security, and stability.⁸⁷³

Defamation Resolutions illustrate the complexity of the conflict between Muslim majority states and international human rights proponents concerning restrictions on freedom of expression. Representatives from many Muslim countries, such as Algeria, Morocco, Malaysia and Iran, sought to address this essential issue in 2006 at the UN Human Rights Council. The representative from Azerbaijan, Azad Jafaro, noted that “any statement defaming a religion was equal to a racist statement...and therefore, had nothing to do with the enjoyment of the right to freedom of expression.”⁸⁷⁴

The most noteworthy point regarding Defamation Resolutions is the misconception of their drafters that the ICCPR restricts religious defamation. Alfandari et al have stressed the importance of noting that defamation resolutions do not call for new international measures to counter religious defamation; rather, they argue that the such defamation is already banned by existing human rights instruments,⁸⁷⁵ such as Defamation Resolution 16/18 (2011):

[Defamation Resolution 16/18 (2011)] urges States to take effective measures, as set forth in the present resolution, consistent with their obligations under international human rights law, to address and combat such incidents;⁸⁷⁶

⁸⁷³ U.N. GAOR, 61st Sess., 48th plen. mtg. at 5, U.N. Doc. A/61/PV.48 (Nov. 3, 2006)

⁸⁷⁴ Press Release, Human Rights Council, Human Rights Council Discusses Reports on Health, Right to Food and Human Rights Defenders, U.N. Doc. HR/HRC/06/44, 6 (22 September, 2006)

⁸⁷⁵ Julia Alfandari, Jo Baker & Regula Atteya, “Defamation of Religions: International Developments and Challenges on the Ground; SOAS International Human Rights Clinic Project”, *Research Paper* No. 09/2011, p. 8. (Alfandari, Baker & Atteya, “Defamation of Religions”)

⁸⁷⁶ A/HRC/RES/16/18 (12 April 2011), para 2.

The Defamation Resolutions was trying to add “respect for religions and beliefs” to the limitations on freedom of expression in ICCPR Article 19(3).⁸⁷⁷ These resolutions tend to categorise religious defamation as being restricted under ICCPR Article 19(3), as it violates the human rights of the individual and in particular the rights and freedoms of others.

Moreover, they argue that defamation potentially endangers world peace, which also constitutes a limitation under the same article.⁸⁷⁸ Defamation Resolutions have also sought justification by referring to Article 20 of the ICCPR. The drafters of the Defamation Resolutions believe that their calls can be justified by making reference to ICCPR Article 20 and that defamation of religion can amount to “incitement to racial and religious hatred, hostility or violence.”⁸⁷⁹

However, there is a risk here. As Alfandari et al make clear, through establishing a linkage between defamation and Article 20(2), which sets out the restrictions on freedom of expression needed to protect equality, there is a danger that “defamation of religions may fall into the category of incitement to hatred and can therefore no longer be protected by provisions set out in Article 19 on freedom of expression”.⁸⁸⁰

The Special Rapporteur Doudou Diene also recognises and warns about the development of Islamophobia and stresses that respect for religion is a requirement that guarantees everyone’s religious freedom:

[There is a] need to pay particular attention and vigilance to maintain a careful balance between secularism and the respect of freedom of religion. A growing

⁸⁷⁷ UN Human Rights Council, *Report to the General Assembly on the Fourth Session of the Human Rights Council*, G.A. Res. 4/9, U.N. Doc. A/HRC/4/123 (30 Mar, 2007), para 10.

⁸⁷⁸ Alfandari, Baker & Atteya, “Defamation of Religions”, p. 8.

⁸⁷⁹ Resolution 7/19 (2008), para 8, also see, A/HRC/7/L.15, para 13, (20 March 2008).

⁸⁸⁰ Alfandari, Baker & Atteya, “Defamation of Religions”, p. 12.

anti-religious culture and rhetoric is a central source of defamation of all religions and discrimination against their believers and practitioners. In this context governments should pay a particular attention to guaranteeing and protecting the places of worship and culture of all religions.⁸⁸¹

There are a number of criticisms that have been made of the Defamation Resolutions, but undoubtedly the key one is that religion itself, or religions themselves, should not enjoy international human rights protection. John Cerone, for example, states that “the defamation of religion is not *always* a recognized human right”.⁸⁸² An EU representative at the UN stated that

The concept of defamation of religions was not a valid one in a human rights discourse; international human rights law protected individuals in the exercise of their freedom of religion, and not religions as such.⁸⁸³

Criticisms have also been expressed by the UN High Commissioner for Human Rights (UNCHR). In 1999 Abdelfattah Amor, then a UNCHR Special Rapporteur, warned that the efforts to combat the defamation of religion “may be manipulated for purposes contrary to human rights”,⁸⁸⁴ as they could potentially be used to restrict or ban religious criticism. Similarly, in 2006 Asma Jahangir, the Special Rapporteur on freedom of religion or belief, also warned against defamation of religion and the risk that defamation resolutions can limit religious freedom.⁸⁸⁵ Jahangir stressed that the primary function of international human rights law remains protecting individuals, not belief systems.⁸⁸⁶ Moreover, the UNHCR

⁸⁸¹ HRC, 21 August 2007, A/HRC/6/6, para 78(e).

⁸⁸² John Cerone, “Inappropriate Renderings: The Danger of Reductionist Resolutions”, 33 *Brooklyn Journal of International Law* (2008), 357-378, pp. 374-375.

⁸⁸³ Meeting Coverage and Press Releases, U.N. Gen. Assembly, Third Comm. Approves Draft Resolution Urging Full Respect for All Human Rights by Democratic People's Republic of Korea, U.N. Doc. GA/SHC/3874 (17 November, 2006).

⁸⁸⁴ U.N. General Assembly, *Elimination of All Forms of Religious Intolerance*, para 118 U.N. Doc. A/54/386 (Sept. 23, 1999) (*prepared by Abdelfattah Amor*).

⁸⁸⁵ HRC, (20 September 2006), A/HRC/2/3, para 50.

⁸⁸⁶ *Ibid*, para 27

has noted that the ability to criticise religion or religions is essential in pluralist societies. Jahangir, the UN's Special Rapporteur on freedom of religion or belief, stated that

The recognition, respect and practice of religious pluralism, which encompasses criticism, discussion and questioning of each other's values, should be the cornerstone of their relationships and their combat against all forms of discrimination.⁸⁸⁷

Jahangir's stance was echoed by Heiner Bielefeldt, who was the Special Rapporteur on freedom of religion or belief in 2010. Bielefeldt stated that religion or belief does not have the right to be "free from criticism or all adverse comment."⁸⁸⁸ International human rights instruments do not prohibit "criticism" or "adverse comments" against religion. Nevertheless, as previously mentioned, several court decisions have argued that defamation resolutions can endanger others' religious freedom and be inconsistent with a democratic society.

Yet although defamation resolutions carry the aforementioned risks, international human rights instruments do not prohibit defamation of religion *a priori*. This is because an *a priori* prohibition of defamation of religion may threaten the religious freedom of minority religious groups and atheists. Dobras notes how the precautionary approach of defamation resolutions might endanger human rights, as in addition to limiting what people are allowed to say or write, they also enable states to "take precautions to prevent actions that may result in religious

⁸⁸⁷ *ibid.*, para 65.

⁸⁸⁸ Statement by Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief, 65th session of the General Assembly, Third Committee, (21 October 2010), <http://www.ohchr.org/Documents/Issues/Religion/GA65statement_2010.pdf> accessed 29 June 2016.

discrimination or intolerance”.⁸⁸⁹ Thus an *ante* or precautionary criminalisation of the defamation of religion represents a danger.

Another risk relates to blasphemy laws which may potentially endanger the rights of religious groups which are not part of the majority. Jahangir argues that the very concept of defamation resolutions is dangerous because it can be used to lend support and legitimacy to anti-blasphemy legislation, and also can be used against dissenters and atheists:

Concerning blasphemy laws, there are worrying trends towards applying such domestic provisions in a discriminatory manner and they often disproportionately punish members of religious minorities, dissenting believers and non-theists or atheists.⁸⁹⁰

The definition of defamation and religious hate speech is another issue; Paul Marshall points out that there are no clear definitions or even common practice regarding blasphemy crimes in the OIC countries. Practices vary considerably from country to country, and have evolved and adapted over many years. Marshall notes that these concepts are usually defined by case law, often unwritten, and that the subjectivity of local authorities is usually the determining factor.⁸⁹¹ Therefore, the term ‘defamation’ is quite difficult to define and criminalise. Maxim Grinberg has noted the difference in approach between the resolutions and the ICCPR. The Defamation Resolutions would prohibit any dissemination of bigotry or expressions of intolerance but such forms of expression, as unpleasant as they be, do not qualify as religious hatred under ICCPR Articles 19 or 20.⁸⁹² Although

⁸⁸⁹ Dobras, “Is the United Nations Endorsing Human Rights Violations?”, p. 354.

⁸⁹⁰ GA, 20 August 2007, A/62/280, para 76.

⁸⁹¹ Paul Marshall, “Exporting Blasphemy Restrictions: The Organization of the Islamic Conference and the United Nations”, *The Review of Faith & International Affairs* (2011), p. 61.

⁸⁹² Maxim Grinberg, Note, *Defamation of Religions v. Freedom of Expression: Finding*

criminalising the defamation of religion can prove to be an arduous task, defamation resolutions maintain nonetheless that individuals have a duty to respect the beliefs and believers of other faiths.

The Defamation Resolutions were terminated in 2011. HRC General Comment 34 noted that religion and religious belief is not protected under international human rights and that blasphemy law is “incompatible” with the ICCPR. It further states that punishing “criticism of religious leaders or commentary on religious doctrine and tenets of faith” is not permissible.⁸⁹³ Although the Defamation Resolutions failed to become law and gain international human rights status, they did serve to highlight that there is a clear conflict between the Muslim majority states and international human rights instruments regarding restrictions on freedom of expression, particularly between whether religions themselves, not only religious believers, should be protected. The debate around the resolutions underlined problems with the universal approach to human rights. Although the US, Canada and many other western states opposed the Resolutions, they did acquire considerable support with a clear majority each time. This suggests that universally approved human rights standards cannot be agreed upon in the near future.

the Balance in a Democratic Society, 18 *Sri Lankan Journal on International Law* (2006), p. 203-204.

⁸⁹³ General Comment No 34, para 48.

Conclusion

As the Defamation Resolutions indicate, there are major differences, and even conflicts, between Muslim majority states and international human rights supporters regarding the interpretation of religious freedom and freedom of expression. These conflicts show that interpretations of human rights are not necessarily the same worldwide, and will not be solved in the near future. The universal approach to religious freedom and freedom of expression has not been fully successful, because these freedoms are always subject to others' rights. As many cases have shown, there is no doubt that manifestations or expressions of belief will always carry the potential to endanger others' rights.

Chapter 4 Islamic Approaches to Human Rights

Introduction

Many scholars and indeed ordinary believers argue that for Muslims, Islam is not only their religion but life itself. Islam not only defines what is morally good or bad, but also what a believer should do. Ameer Ali Syed (d. 1928 CE), stated that

[Islam] is not “a mere creed; it is a life to be lived in the present” – a religion of right-doing, right-thinking, and right-speaking, founded on divine love, universal charity, and the equality of man in the sight of the Lord.⁸⁹⁴

For many centuries, this approach to Islam has taken its ideas beyond the Mosque and the minaret and into every aspect of public life, including the law. The Italian orientalist Laura Vaglieri noted that Shari’a is far more than mere ritual:

All aspects of public and private life are subject to its rulings and it has the purpose of relating every act of the individual with his religious duties.⁸⁹⁵

Muslim states have constructed legal systems based primarily on this Islamic approach. The Sudanese government argues that

Islam is regarded by Muslims not as a mere religion but as a complete system of life. Its rules are prescribed not only to govern the individual’s conduct but also to shape the basic laws and public order in the Muslim State...⁸⁹⁶

For many Muslims, the concept of human rights is intrinsic to Shari’a and to the words and deeds of the Prophet. The UIDHR (Universal Islamic Declaration of Human Rights) notes that “Islam gave to mankind an ideal code of human rights

⁸⁹⁴ Ameer Ali Syed, *The Spirit of Islam Or the Life and Teachings of Mohammad* (New Jersey: Gorgias Press, 2002), p. 157.

⁸⁹⁵ Vaglieri, *An Interpretation of Islam*, p. 64.

⁸⁹⁶ *Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, U.N. ESCOR, 49th Sess., Provisional Agenda Item 22, Commission on Human Rights, 56, U.N. Doc. E/CN.4/1993/62.

fourteen centuries ago.”⁸⁹⁷ Similarly, the Pakistan UN representative Munir Akram stated in a 1999 UN meeting that

Islam was a religion of peace which had enunciated the concept of human rights more than 14 centuries earlier.⁸⁹⁸

Many scholars, such as Monshipouri, stress that the Islamic approach to human rights is based on Shari’a, which is in turn based on revelation and ultimately emanates from God. Monshipouri notes the all-encompassing nature of Shari’a: it combines spiritual with temporal, public with private, and faith with law.⁸⁹⁹

Yet the Islamic human rights approach is sometimes in conflict with conceptions of human rights held by those outside the Muslim world. An example can be seen in the decision of the European Court of Human Rights (ECHR) in the case of *Refah Partisi (Welfare Party) and Others v Turkey*, wherein according to Baderin “the court emphatically expressed its (mis)understanding that Islamic law is static and invariable and thus incompatible with human rights”.⁹⁰⁰ The ECHR concluded that Shari’a does not respect democracy or human rights.⁹⁰¹

However, Shari’a itself is not a body of rules or laws but a set of moral principles, and can thus be interpreted and applied in a variety of ways. Moreover although in Islam, the source of these principles is seen as having divine inspiration, those applying them are merely human. This traditional Islamic approach at times

⁸⁹⁷ Universal Islamic Declaration of Human Rights, adopted by the *Islamic Council of Europe* on 19 September 1981/21 *Dhul Qaidah 1401*. Foreword. (UIDHR)

⁸⁹⁸ E/CN.4/1999/SR.2, para 63.

⁸⁹⁹ Mahmood Monshipouri, *Islamism, Secularism, and Human Rights in the Middle East* (Boulder : Lynne Rienner, 1998), p. 19. (Monshipouri, *Islamism, secularism*)

⁹⁰⁰ Mashood A. Baderin, “Islamic Law and the Implementation of International Human Rights Law: A Case Study of the International Covenant on Civil and Political Rights”, in *International Human Rights Law: Six Decades After the UDHR and Beyond* (Burlington, VT: Ashgate Pub., 2010), p. 340. (Baderin, “Islamic Law and the Implementation of International Human Rights Law”)

⁹⁰¹ *Refah Partisi (the Welfare Party) v Turkey*, para 123

conflicts with the international human rights approach, especially with regard to religious freedom and individual rights. But this does not necessarily imply that Islam has no understanding of these concepts; it has its own, different approach, but it is certainly the case that Islam recognises individual rights, religious freedom and freedom of expression.

Furthermore, ‘traditional’ interpretations of Shari’a that have been deeply affected by later mediaeval scholarly understandings. It is these developments which occurred after the time of the Prophet that seem most in conflict with modern, international human rights notions. For example, the inequality seen between Muslims and non-Muslims in the Islamic approach today is a product of history, specifically of the mediaeval approach, and does not mean Shari’a itself is incompatible with human rights.

Mahmassani claimed mediaeval jurists mixed religion and daily life so that “incidental worldly matters were placed on the same level with the original, essential and immortal provisions of religion.”⁹⁰² The legal distinctions drawn in many contemporary Islamic societies between Muslims and others are therefore a product of mediaeval jurists, not necessarily of Shari’a principles at all.

4.1 Islamic Human Rights Instruments

Muslim majority states base their human rights understanding on Shari’a. In the Muslim world there are three key human rights instruments: the treaty-based Arab

⁹⁰² Sobhi Mahmassani, “Adaptation of Islamic Jurisprudence to Modern Social Needs,” in by John J. Donohue and John L. Esposito eds., *Islam in Transition: Muslim Perspectives* (New York; Oxford: Oxford University Press, 1982), p. 185.

Charter on Human Rights (2004),⁹⁰³ published by the League of Arab States; the OIC (Organisation of the Islamic Conference) Cairo Declaration on Human Rights in Islam (1990);⁹⁰⁴ and the Universal Islamic Declaration of Human Rights (UIDHR; 1981), produced by the Islamic Council of Europe. None of these documents refers to there being any right to proselytise or disseminate information. Religious freedom under these three Islamic human rights instruments is actually religious freedom within one's existing religion; for Muslims, there is no right to any form of religious manifestation that conflicts with Shari'a. Article 13 of the Universal Islamic Declaration of Human Rights (1981) states "Every person has the right to freedom of conscience and worship in accordance with his religious beliefs." This right seems to recognise religious freedom, but is limited by "his religious beliefs" - religious activities are limited by one's religion. Muslim countries with legal systems that draw on Shari'a principles often limit the rights of their citizens to challenge the dominant belief system. As with the UIDHR, the Cairo Declaration's approach differs significantly from that of other regional human rights instruments. The Cairo Declaration was adopted by the Organisation of the Islamic Cooperation, composed of representatives from the Islamic states. It is not legally binding, but is important for gauging leading Muslims' positions on human rights.⁹⁰⁵ Article 24 of the Cairo Declaration states that "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah." The Cairo Declaration does not mention any restrictions on grounds of 'national security' or 'public security'; rather, all restrictions are based on Shari'a. Moreover, Article 25 emphasises the

⁹⁰³ League of Arab States, Arab Charter on Human Rights, (2004) (Arab Charter).

⁹⁰⁴ Cairo Declaration on Human Rights in Islam (1990), U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993). (Cairo Declaration)

⁹⁰⁵ Juliane Kokott, "The Protection of Fundamental Rights Under German and international Law", 8 *African Journal of International and Comparative Law* (1996), 347-392, p. 386.

role of Shari'a in this declaration: "The Islamic Shari'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration." Therefore, all restrictions on human rights are based on Shari'a.

With regard to freedom of thought and expression. Article 12 of the UIDHR states that "Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law." Although the UIDHR does contain provisions for freedom of expression, there are variations between the English and Arabic versions. In the English language version Article 12 gives "every person the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law....", but the Arabic version specifically states that this right is set within the limits of Shari'a law.⁹⁰⁶ Article 22(a) of the Cairo Declaration also references the Shari'a:

Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.

This explicitly states that all public expression must follow Shari'a. Professor Heiner Bielefeldt argues that this "weakens or denies some basic international human rights by claiming a general priority for traditional *Shari'a*".⁹⁰⁷ This violates the principle of equality that is fundamental to human rights by giving Islam a privileged status above all other religions. Cairo Declaration Article 10 reads as follows:

⁹⁰⁶ Nicole Ruzinski, "The Treatment of Religious Minorities in Saudi Arabia: A Violation of Islamic Principles and International Law", 9 *International Journal of Civil Society Law* (2011), 37-52, pp. 42-43. (Ruzinski, "The Treatment of Religious Minorities in Saudi Arabia").

⁹⁰⁷ Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate" 17 *Human Rights Quarterly* (1995), 587-617, p. 606. (Bielefeldt, "Muslim Voices")

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

Protection of the Islamic religion, as demanded by traditional *Shari'a* interpretations, thus apparently prevails over religious freedom of the individual as well as over the principle of equality of different religions.⁹⁰⁸ This is clearly contrary to the universal approach, which prohibits any bias towards the majority religion in a given state. The Cairo Declaration therefore amounts to a one-sided and uncritical Islamisation of human rights language at the expense of both the universalism and the emancipatory spirit of human rights.⁹⁰⁹ In summary, the Cairo Declaration prioritises Islam over freedom and rights.

Another important agreement in the Muslim world is the Arab Charter on Human Rights (2004), a treaty signed by 17 states: Algeria, Bahrain, Egypt (signed, but not yet ratified), Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco (signed, but not yet ratified), Palestine, Qatar, Saudi Arabia, Sudan (signed, but not yet ratified), Syria, Tunisia (signed, but not yet ratified), the United Arab Emirates, and Yemen.⁹¹⁰

Article 30 of the charter recognises religious freedom:

1. Everyone has the right to freedom of thought, conscience and religion and no restrictions may be imposed on the exercise of such freedoms except as provided for by law.
2. The freedom to manifest one's religion or beliefs or to perform religious observances, either alone or in community with others, shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society

⁹⁰⁸ Heiner Bielefeldt, "'Western' Versus 'Islamic' Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights", 28 *Political Theory* (2000), 90-121, p. 105. (Bielefeldt, "'Western' Versus 'Islamic'")

⁹⁰⁹ *ibid*, pp. 105-106.

⁹¹⁰ The International Center for Not-for-Profit Law, "NGO Law Monitor: League of Arab States" (19 March 2016), <<http://www.icnl.org/research/monitor/las.html>> accessed 27 June 2016.

that respects human rights and freedoms for the protection of public safety, public order, public health or morals or the fundamental rights and freedoms of others.

Religious freedom is thus not restricted by Shari'a *per se* in this article; indeed, the Arab Charter is silent regarding the role of Shari'a other than in Article 3(3) relating to Rights of Women”, based on “positive discrimination established in favour of women by the Islamic Shari'a”.

Another example of a regional human rights instrument is the Organisation of Islamic Cooperation (OIC). The OIC is the second-largest intergovernmental organisation in the world after the UN, with 57 Muslim majority states in 2016.⁹¹¹ In 2008 the OIC set up the Independent Permanent Human Rights Commission (IPHRC) in order to promote the human rights practices of its members, and in 2011 the OIC Council of Foreign Ministers adopted The Organization of Islamic Cooperation's Statute, as drafted by the OIC Independent Permanent Human Rights Commission.⁹¹² However, the statute has no complaint mechanism allowing for the Commission to hear allegations of human rights violations; the Commission currently can only act as an advisory organ, like the UN Advisory Committee to the Human Rights Council, and not like the UN Human Rights Council itself, which can receive such complaints. It is therefore not currently performing the role envisaged for it, which was to enable victims of human rights violations in the OIC's member states to access justice. It can only provide advice and “technical

⁹¹¹ See, Organization of Islamic “Cooperation, Member States” <<http://www.oic-oci.org/oicv3/states/?lan=en>> accessed 27 June 2016.

⁹¹² Article 10 of Statute of the OIC Commission

4. The Independent Permanent Human Rights Commission, “About IPHRC”, <<http://www.oic-iphrc.org/en/about/>> accessed 27 June 2016.

cooperation in the field of human rights and awareness-raising”, and undertake studies and research.⁹¹³

4.2 Islamic Approach to Human Rights

Many people would argue that Shari’a does not recognise individual rights only duty to God, and that because Islam does not separate church and state it does not, or cannot, protect individuals against the state. Moreover, some people believe that Islam does not recognise religious freedom. Some scholars argue that because of its divinity Shari’a is immutable and inflexible, because no human being has the right to alter it, only God.

However, these arguments are misplaced. Islam does recognise individual rights, but takes a different approach to that of the West. Moreover, individuals are protected by the state and government; the authorities are obliged by Shari’a as part of their duty to protect individuals. Furthermore, the Qur’an does prescribe individual religious freedom. It sees religious matters as purely an individual issue, and therefore the state/government/authority has no right to force an individual to change religion. The argument that divine law must prevail over man-made law is also a false one. The first generation of Islamic scholars recognised that Shari’a was not inflexible, and that it was open to dynamic interpretation and understanding.

4.2.1 Sovereignty

⁹¹³ *ibid.*

Arguably the most serious source of tension between international and Islamic human rights schemes centres on the “sovereignty of the individual as a right-bearer”.⁹¹⁴ This is far more limited in Islamic understandings, where rights are by definition linked to God and cannot exist without him. The fact that Islamic rights are seen as being divinely ordained can be understood from the words of one of the Companions of the Prophet, ‘Amr ibn al-‘As (d. 664 CE): “The right which the Creator gives”.⁹¹⁵ Moreover, the Qur’an itself declares that “And you will not find any change in the Way of Allah.” [Qur’an 48:23]. Moreover, Qur’an 4:59 asks the believer to obey Allah and the Prophet.⁹¹⁶ Shari’a is thus not regarded as “an expression of the will of the state, but of God’s will”, unlike modern Western law.⁹¹⁷ In the Western system the will of the people dictates governments’ actions, but in Islamic states the Government and people collectively strive to fulfill God’s purpose. According to Hussain, in this understanding the Islamic state is “subservient to the Divine Law and exercises its authority within the limits prescribed by the Shari’a.”⁹¹⁸ The law is established by God and the rights of man only apply within God’s law.

The notion that there is only one God, that he created all we know and that he alone has the right to command or forbid is known as *tawhid*. Many verses of the Qur’an mention this concept, for example 67:1, 21:23, 18:27 and 2:255. The

⁹¹⁴ Ebrahim Moosa, “The Dilemma of Islamic Rights Schemes”, 15 *Journal of Law and Religion* (2004), 185-215 p. 198. (Moosa, “The Dilemma of Islamic Rights Schemes”)

⁹¹⁵ F. Nau “Dialogue Between the Patriarch John I and the Amir of the Hagarenes; The Jacobite Patriarch John I and the Amir ‘Amr b. al-‘As 639 AD” in Newman, *The Early Christian-Muslim Dialogue*, p. 14.

⁹¹⁶ [Qur’an 4:59]

O you who believe! Obey Allah and obey the Messenger (Muhammad SAW), and those of you (Muslims) who are in authority. (And) if you differ in anything amongst yourselves, refer it to Allah and His Messenger (SAW), if you believe in Allah and in the Last Day. That is better and more suitable for final determination.

⁹¹⁷ Peters, “From Jurists’ Law to Statute Law,” p. 82.

⁹¹⁸ Shaikat Hussain, *Human rights in Islam* (New Delhi: Kitab Bhavan, 1990), p. 6.

principle of *tawhid* “altogether negates the concept of legal and political sovereignty of human beings. No individual, family, class or race can set itself above God. God alone is the ruler and His commandments are the laws of Islam”.⁹¹⁹ Ahmad ibn Muhammad Ibn Abi al-Rabi (d. 272 AH / 885 CE) states in his *Suluk al-Malik fi Tadbir al-Mamalik* that

Allah established laws and duties to which they might have recourse and which they might regard as a final authority, and he raised up rulers for them to preserve the laws and conduct them [i.e. the people] by means of them [i.e. the laws], so that their affairs might be put in order, they be united and injustice and transgression, which is the cause of division and corruption, part from them.⁹²⁰

The word “*hukm*” is a key term in this discussion but it has a number of potential meanings. According to *The Encyclopaedia of Islam*, “*Hukm* means...the judgment or act by which the mind affirms or denies one thing with regard to another, and thus unites or separates them.”⁹²¹ Masud points out that because *hukm* “intersects the various ideas of law and order”, it is key to understanding both political thought and Islamic jurisprudence. He notes that *hukm* has been applied to a broad range of legal topics and discussions, and that one well-known Qur’anic verse used both by the Khawarij sect in the 7th CE and by modern-day Islamists to denote a Muslim state is *al-hukm illa lillah* (“The command (or the judgement) is for none but Allah”); Qur’an 12:40).⁹²² Such arguments often rely on Ibn Taymiyya’s doctrine of *al-Siyasa al-Shar’iyya*, which has greatly

⁹¹⁹ *ibid.*

⁹²⁰ Ahmad ibn Muhammad Ibn Abi al-Rabi cited from Paul L. Heck, *The construction of knowledge in Islamic civilization: Qudāma b. Ja’far and his Kitāb al-Kharāj wa-simnā’at al-kitāba* (Leiden; Boston : Brill, 2002), p. 217.

⁹²¹ H. Fleisch, “Hukm” in H.A.R. Gibb, et al. eds., *The Encyclopaedia of Islam : New Edition / prepared by a number of leading orientologists* (Leiden : Brill, 1971), volume 3., pp. 549-551.

⁹²² Muhammad Khalid Masud, “Clearing Ground: Commentary to ‘Shari’a and the Modern State’” in Anver Emon & Mark S Ellis & Benjamin Glahn ed., *Islamic Law and International Human Rights Law: Searching for Common Ground*, (Oxford: Oxford university Press, 2012),p.109. (Masud, “Clearing Ground”)

influenced modern theories of the Islamic state.⁹²³ In this doctrine he argues that “religion and state were intertwined and inseparable, the state’s powers and its revenues must be employed in service to God.”⁹²⁴ Masud notes how Maududi further developed this code into the concept of *Hakimiyyat Ilahiyya* (‘Sovereignty of God’), strengthening the rejection of the sovereignty of the people.⁹²⁵ Maududi argued that

...since in Islam human rights have been conferred by God, no legislative assembly in the world, or any government on earth has the right or authority to make any amendment or change in the[se] rights.⁹²⁶

Law in traditional Islamic theory is thus revealed by God and is not preceded by the Muslim state, because it is a divinely ordained system that is not controlled by Muslim society.⁹²⁷ This understanding of *hukm* has shaped the contemporary Islamic approach to human rights, and is widely accepted by scholars. Khadduri argues that “Human rights in Islam are the privilege of Allah, because authority ultimately belongs to Him.”⁹²⁸ Moreover, Al-Hargan argues that in *Shari’a* law God is the ruler and Muslims always abide by his words, and that therefore *Shari’a* law has priority over human rights. Individuals are only entitled to human rights if *Shari’a* law explicitly acknowledges this.⁹²⁹ These various statements clearly declare that ultimate sovereignty belongs to God.

⁹²³ *ibid.*

⁹²⁴ Warren C. Schultz, “Ibn Taymiyya”, in Josef W. Meri., ed, *Medieval Islamic Civilization: An Encyclopedia* (London : Routledge, 2006), Vol., 1, p. 372.

⁹²⁵ Masud, “Clearing Ground”, pp.109-110.

⁹²⁶ Abul A’la Maududi, *Human Rights in Islam*, 2nd ed (Lahore: Islamic Publications, 1995), p. 12

⁹²⁷ N. J. Coulson, *A History of Islamic Law* (Edinburgh: University Press, 1964), p. 2. (Coulson, *A History of Islamic Law*).

⁹²⁸ Majid Khadduri, “Human Rights in Islam,” 243 *The Annals of the American Academy of Political and Social Science* (1946), 77-81, p. 78.

⁹²⁹ Abdulhamid A. Al-Hargan, “Saudi Arabia and the International Covenant on Civil and Political Rights 1966: A Stalemate Situation”, 9 *The International Journal of Human Rights* (2005), 491-505, p.495.

The divine sovereignty approach differs from that of international human rights, which is based on natural rights theory (i.e. the idea that people are endowed naturally with rights) and holds that the individual is the rights-bearer. There has been considerable debate around Islam's recognition, or non-recognition, of individual rights. The Egyptian philosopher Muhammad 'Imara for example argues that Islam respects individual rights but "has a moderate view of the individual: the individual is free in so far as it is of benefit to the community."⁹³⁰ This understanding has also been examined by Mayer, who noted that "In the premodern era, Islamic thought on human rights, like the Judeo-Christian tradition, emphasised the duties of the believers vis-à-vis the deity, not the protection of individual freedoms."⁹³¹ Many Western scholars firmly believe that Shari'a does not recognise individual human rights. For example, Coulson states that

[t]o represent, in actual fact, a real guarantee of individual liberties, the idea of the rule of law must carry with it certain essential implications. The first of these is, obviously enough, the recognition of certain individual liberties by the law itself. No such recognition is to be found in the Shari'a....⁹³²

Dalacoura argues that Islamic human rights aim "to protect people from themselves and each other, through separation and stringent moral prohibition"; this relies on "the fear of God and the threat of punishment."⁹³³ There is no entitlement to rights; rather, people have duties they have to fulfil. Duties and rights can certainly be compatible in international systems too but, unlike in Islam,

⁹³⁰ Muhammad 'Imara cited from Kevin Dwyer, *Arab Voices: The Human Rights Debate in the Middle East* (London: Routledge, 1991), p. 78.

⁹³¹ Ann Elizabeth Mayer, "Current Muslim Thinking on Human Rights", in Abdullahi Ahmed An-Naim & Francis M. Deng eds, *Human Rights in Africa: Cross-Cultural Perspectives* (Washington: Brookings Institution), p. 133.

⁹³² Coulson, "The State and the Individual in Islamic Law," pp. 50-51.

⁹³³ Katerina Dalacoura, *Islam, Liberalism and Human Rights* (London: IB Taurus, 1998), p. 58.

rights are entitlements and perforce must precede duties.⁹³⁴ The main difference between the international human rights approach and Islamic approaches is therefore that the former considers rights as individual claims on natural rights theory, whereby rights are naturally endowed irrespective of any religious concept, while the latter stress the duties to God that each individual has.

Another way in which *Shari'a* might not be consistent with western or international conceptions of human rights is that from the Islamic cultural point of view, public recognition can only be achieved by an individual through his community and family. In stark contrast to international interpretations, individuals themselves do not have the unique human rights that their western counterparts possess by dint of their humanity; conversely, these western individuals lack the corresponding obligatory duty that Muslims have.⁹³⁵ The mediaeval Sunni textbook *Bahr al-Fava'id* notes that the individual has an obligation to know God and the Prophet by proof, not by authority, and has individual duties required of him or her.⁹³⁶ Islam thus focuses on individual duties and obligations rather than claiming individual rights. Mahmood Monshipouri notes that in Islam "Individuals (as vice-regents of God) can enjoy human rights in their relationship with God insofar as obligations to God have been fulfilled".⁹³⁷ As rights are owned by God anyway, duties and obligations are prioritised over an individual's human rights.

⁹³⁴ *ibid*, p. 57.

⁹³⁵ See Niaz A. Shah, "Women's Human Rights in the Koran: An Interpretive Approach", 28 *Human Rights Quarterly* (2006), 868-903, p. 872.

⁹³⁶ *The Sea of Precious Virtues (Bahr al-Fava'id)*, pp. 256-257.

⁹³⁷ Monshipouri, *Islamism, secularism*, p. 19.

As discussed in Chapter 3, modern understandings of individualistic human rights, whereby people's entitlement to rights is expressed in terms that contrast such rights with the claims made by states (or religions) upon its people, are in historical terms a new phenomenon. The 'individual claim' approach to human rights has only come to the attention of Islamic law in the last half century or so. Al-Jabiri has noted that the terms 'human rights' or 'people's entitlement to rights' were "not known in Arab-Islamic texts before about the middle of the last century."⁹³⁸ An-Na'im states that "Many rights are given under *Shari'a* in accordance with a strict classification based on faith...and are not given to human beings as such."⁹³⁹ Therefore, *Shari'a* as practiced in Muslim countries does not cover all the human rights recognised in the West, as human rights under Islam do not stem from claims made against a ruler but from duties due to God and the community. The Prophet stated that

(I order you) to give the rights that are on you and to ask your rights from Allah.⁹⁴⁰

Under Islam therefore, rights are seen as God-given and are expressed in the form of obligations or duties.

Moreover, the individual Muslim is merely part of the *umma*,⁹⁴¹ the community of believers, to which he or she has *fara'id* (duties) but "no individual rights in the

⁹³⁸ Muhammad 'Abid al-Jabiri "The Concepts of Rights and Justice in Arab-Islamic Texts", in Salma J. Jayyusi ed., *Human rights in Arab Thought: a Reader* (New York: I.B. Tauris, 2009), pp.17-18. (Al-Jabiri "The Concepts of rights and Justice")

⁹³⁹ An-Na'im, "Human Rights in the Muslim World", p. 22.

⁹⁴⁰ *Sahih Al-Bukhari*, vol. 4, no. 3603, pp. 60-61.

⁹⁴¹ R. Paret, "Umma," in *E.J. Brill's First Encyclopaedia of Islam:1913-1936*, Reprint edition, eds. M.Th. Houtsma, A.J. Wensinck, H.A.R. Gibb, W. Heffening and E. Levi-Provencal(Leiden : Brill, Leiden: E.J. Brill, 1987), vol. 8, p. 1015.

umma means,

'the ethnical, linguistic or religious bodies of people who are the objects of the divine plan of salvation.'

sense of entitlements.”⁹⁴² According to Esposito it is the *umma*, not the individual, that is “the dynamic vehicle for the realization of the divine pattern.”⁹⁴³ The rights of the individual are secondary to those of the *umma*, and crucially “the violation of those rights can be justified when it benefits the community.”⁹⁴⁴ This superiority of the *umma* can be seen in the Abu Zayd case in Egypt (1995), in which the Court of Cassation stated as follows:

No individual has the right to proclaim that which contradicts the public policy or morals (*al-nizam al-'amm aw al-'adab*), use his opinion to harm the fundamentals upon which the society is built, to revile the sacred things, or to disdain Islam or any other heavenly religion.⁹⁴⁵

Islamic declarations illustrate this perceived hierarchy, with duties privileged over rights. For example, the Preamble to the 1981 Universal Islamic Declaration of Human Rights (UIDHR) states that the “terms of our primeval covenant with God, our duties and obligations have priority over our rights.” Similarly, Coulson argues that

...the whole of the Shari'a is *haqq* Allah, for all rights and obligations are derived from His command. The stress, therefore, throughout the entire Shari'a, lies upon the duty of the individual to act in accordance with the divine injunctions...When the texts do assert the principles of “original freedom” and the inviolability of property, life and honour they treat them as principles which secure the general order and well-being of the whole community-the purpose and the right of Allah-and not as fundamental liberties of the individual.⁹⁴⁶

⁹⁴² Bassam Tibi, “Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations”, 16 *Human Rights Quarterly* (1994), 277-299, p. 289.

⁹⁴³ John L. Esposito, *Women in Muslim Family Law* (New York: Syracuse University Press, 1982), p. 1.

⁹⁴⁴ Audrey Guichon, “Some Arguments on the Universality of Human Rights in Islam”, in Javaid Rehman and Susan C. Breau, ed., *Religion, Human Rights and International Law* (Leiden; Boston: Martinus Nijhoff Publishers, 2007), p. 173. (Guichon, “Some Arguments on the Universality of Human Rights”).

⁹⁴⁵ Court of Cassation, Nos. 475, 478, 481, Year 65, 5 Aug. 1996 in Berger, “Apostasy and Public Policy”, p. 733.

⁹⁴⁶ Coulson, “The State and the Individual in Islamic Law”, pp. 50-51.

According to this understanding of Islamic human rights, Islam does recognise rights, but that duties are placed higher than rights. This serves to distinguish schemes of Islamic rights from international human rights; in the latter, ‘rights’ refers to those fundamental and unconditional entitlements that stem simply from being human. Moosa draws attention to the fact that the Islamic argument is that duties supersede rights, with the latter only being earned through fulfilment of the former; he therefore argues that Universal Islamic Declaration of Human *Duties* may have been a better title for the document.⁹⁴⁷

There is no doubt that traditional understandings of Shari’a norms restrict the type of individual freedoms that are enshrined in international human rights agreements. But this tradition does not mean the Qur’an and the *Sunna* reject individual freedoms. The *umma*’s superiority to the individual in Islam, and the argument that the individual has only duties and obligations to God but does not have not rights in the Western sense of the word, do not mean that individual rights are not recognised. Rather, Islam has its own approach to individual liberty. Regarding Islamic law Schacht notes an important contrast with international legal systems, namely that although the former addresses individuals this is not in isolation but rather as part of the community. Nevertheless, although acknowledging that Islamic law seeks to regulate society, Schacht stresses that “(t)he formal structure of Islamic law is individualist.”⁹⁴⁸ If individuals benefit from laws which profit society, as many Islamic scholars claim, then a case can be made for Islamic human rights recognising individual rights. Rahman argues that

⁹⁴⁷ Moosa, “The Dilemma of Islamic Rights Schemes”, pp. 196-197.

⁹⁴⁸ Joseph Schacht, “Islamic Law in Contemporary States”, 8 *American Journal of Contemporary Law*, (1959), p. 133-147; p. 138-140.

‘obligations’ and ‘rights’ are two sides of the same coin, and that neither can last long without the other.⁹⁴⁹

The term *haqq*, meaning truth [Qur’an 6:4-5, 12:51-52] or an “established fact, truth, justice, right, claim or reality”,⁹⁵⁰ is a key one; in the Qur’an it sometimes connotes ‘duty’ and sometimes ‘right’, but the latter is seen as more important.⁹⁵¹ Supporting this interpretation, Baderin notes that Ibn Nujaym, a sixteenth-century Hanafi jurist, used the term *haqq as ma yastahiqquhu al-insan* (“that to which a person is entitled”)⁹⁵² to imply rights rather than duties. As Baderin points out, texts in the Qur’an and *Sunna* which seek to protect human dignity almost always allude to the individual; indeed, Islamic law applies to every individual as much as to the whole community.⁹⁵³

if anyone killed a person not in retaliation of murder, or (and) to spread mischief in the land - it would be as if he killed all mankind, and if anyone saved a life, it would be as if he saved the life of all mankind. [Qur’an 5:32]

4.2.2 Freedom and Equality in Islam

Traditionally the sense of ‘freedom’ debated by Muslim academics had nothing to do with being free to say or do something. This is a crucial difference between the West and Islam regarding the meaning of freedom. According to *Black’s Law Dictionary* the term ‘free’ means “Having legal and political rights; enjoying

⁹⁴⁹ Fazlur Rahman, *Major themes of the Qur’an* (Minneapolis, MN : Bibliotheca Islamica, 1980), p.46. (Rahman, *Major themes of the Qur’an*).

⁹⁵⁰ Saeed, “Muslim Debates on Human Rights,” p. 25.

⁹⁵¹ Mashood A. Baderin, “Establishing Areas of Common Ground between Islamic Law and International Human Rights”, 5 *The International Journal of Human Rights* (2001), 72-113 p. 84.

⁹⁵² *ibid*, p. 83.

⁹⁵³ *ibid*, p. 103.

political and civil liberty”,⁹⁵⁴ but this is not the Islamic understanding of ‘free’. Rosenthal stresses that freedom was conceived as an “ethical quality”, in line with pre-Islamic connotations of the Arabic term *hurr* (free);⁹⁵⁵ he notes that this term went beyond ‘freedom’ to become a “vague term of approval”. Arabic therefore did not have a fully equivalent term to the Western concept of freedom until the latter became more widely understood in the Arabic world and gave new meaning to the term ‘*hurriyyah*’.⁹⁵⁶

The term ‘freedom’ has not traditionally been extensively used in Islam. Rosenthal explains that ‘*hurriyyah*’, meaning ‘freedom’, may have been used in early Arabic to express the opposite sense to the legal term ‘slavery’, but posits that wider usage of the word may have begun when Islam came into greater contact with Western (i.e. Mediterranean) philosophy.⁹⁵⁷ Indeed, although the Qur’an speaks of freedom, the word *hurriyya* does not occur anywhere in the Qur’an or the *hadith*.⁹⁵⁸ Ali b. Ahmed al-Wahidi (d. 468 AH/1075-76 CE) long ago explored the etymological roots of the term ‘*hurr*’, meaning ‘free’, and his work was then quoted by Ibn al-Mulaqqin (d. 804 AH/1401 CE):

The etymonogists say that *hurr* is derived from *harr* which is the opposite of cold, because the free man possesses a pride and warm zeal that causes him to seek noble character qualities, in contrast to the slave.⁹⁵⁹

⁹⁵⁴ Bryan A. Garner eds., *Black’s Law Dictionary* 8th ed (West Group 2004), p. 688.

⁹⁵⁵ Franz Rosenthal, *The Muslim Concept of Freedom Prior to the Nineteenth Century* (Leiden: Brill, 1960), p. 23. (Rosenthal, *The Muslim Concept of Freedom*)

⁹⁵⁶ *ibid*, p. 11.

⁹⁵⁷ *ibid*, p. 9.

⁹⁵⁸ Muhammad Abu Laylah, *In Pursuit of Virtue: the Moral Theology and Psychology of Ibn Hazm al-Andalusi [384-456 AH 994-1064 AD], with a translation of his book Al-Akhlaq wa’l-Siyar* (London: Ta-Ha, 1990), p. 97.

⁹⁵⁹ Ali b. Ahmed al-Wahidi cited in Rosenthal, *The Muslim Concept of Freedom*, p. 23.

Ibn ‘Arabi defined ‘free’ as “he who controls all created things, and is controlled by neither property nor rank”.⁹⁶⁰ In other words God, and only God, was free, and there could be no freedom for mankind; nor should there be, as freedom from God would be unsound. According to Ibn ‘Arabi, for Sufis and others freedom from everything except God was possible, and this was true slavery (*‘ubudiyah*) under God.”⁹⁶¹ However, exploring the concept further, he noted that true freedom is also impossible for God, who is just as entwined in a relationship with people as they are with him, and “there is no freedom where there is relationship.”⁹⁶² Rosenthal also stresses this, noting the “concept of freedom as the submission of the individual to a divine law and order”.⁹⁶³

Although ‘freedom’ in Islam and Arabic did not carry the same meaning as in the West, Islam did, and does, recognise fundamental freedoms. Rahman notes that Islamic lawyers have long acknowledged four fundamental freedoms, all of which the state must protect: these are the rights to life, to religion, to earnings and property and to personal human honour and dignity. He further stated that Islam guaranteed political freedom, freedom of thought, religious freedom and civil freedom, and that these were sacred rights.⁹⁶⁴

Some scholars argue that Muslims and non-Muslims are not treated equally. They point to the many mediaeval Islamic scholars who believed that non-Muslims should be forced to choose from three options: conversion to Islam, payment of *jizya* (tax) or execution. For example, al-Shaybānī stated that

⁹⁶⁰ Ibn ‘Arabi cited in Rosenthal, *The Muslim Concept of Freedom*, p. 115.

⁹⁶¹ *ibid.*

⁹⁶² *ibid.*, pp. 115-116.

⁹⁶³ *ibid.*, p. 4.

⁹⁶⁴ Abd al-Rahman Azzam, *The Eternal Message of Muhammad*, translated from the Arabic by Caesar E. Farah, (Cambridge: Islamic Texts Society, 1993), pp. 105-106.

No agreement of peace or Guarantee shall be accepted from the Polytheists of Arabia. They should, rather, be invited to accept Islam; if they accept Islam, well and good; otherwise, they should be executed...⁹⁶⁵

This discriminatory treatment of non-Muslims can be traced back to the conquests of the Rightly-Guided Caliphs in the 7th CE. For example, in the battle against Persia, Umar's governor Ribī b. Amir said

Choose Islam, and we shall leave you alone on your land; or choose [to pay] the poll tax, and we shall be content and refrain from fighting you...Otherwise it will be war on the fourth day.⁹⁶⁶

Similarly, the Companion of the Prophet and the governor of Oman, Hudhayfah b. Mihsan [Hudhayfah al-Bariqi], stated that

He [God] ordered us to summon the people to one of three options. Whichever you accept will be accepted by us. [If you embrace] Islam, we shall leave you alone. If [you agree to pay] the poll tax, we shall protect you if you need our protection. Otherwise, it is war.⁹⁶⁷

These records indicate that non-Muslims were forced to choose between three options. Qur'an 32:18 also touches on the relation between believers and non-believers:

Is then he who is a believer like him who is Fasiq (disbeliever and disobedient to Allah)? Not equal are they.

Some people believe that this verse and the deeds of the Prophet's Companions are evidence of the inequality of believers and unbelievers. This *de facto* discrimination of non-believers appears to conflict with passages in the Qur'an which assert the equality of all people. Rahman notes that at the core of the concept of human rights

⁹⁶⁵ Al-Shaybānī, *The shorter book on Muslim international law*, p. 73 (no. 127).

⁹⁶⁶ Al-Tabari, *The History of al-Tabari*, vol.12, p. 68.

⁹⁶⁷ *ibid*, p. 69.

is the equality of all mankind, and that this is affirmed by the Qur'an in its removal of all distinctions between men other than goodness and virtue (*taqwa*) [Qur'an 49:11-13].⁹⁶⁸ This Qur'anic emphasis on equality was also affirmed by the Prophet:

Is your Lord not One Lord? There is no difference between an Arab and a non-Arab or a white man and a black man.

You should listen to and obey your *Imam* (Muslim ruler) even if he is an Ethiopian (black) slave whose head looks like a raisin.⁹⁶⁹

The Prophet's approach was continued by his successor, the first Caliph Abu Bakr. Atta Mohy-ud-Din notes that Abu Bakr continually stressed that he regarded himself as no better than those he ruled over, as both he and they were created by the same God and equal in both God's and his (Abu Bakr's) eyes.⁹⁷⁰ Abu Bakr saw himself merely as God's lieutenant, with his duties being "the establishing of equity, the safeguarding of persons and property and the protection of his people from oppression."⁹⁷¹ Because he saw himself as fallible important state business was often carried out by the Prophet's principal companions, known as the Council of Elders. The council's decisions, which were reached through majority vote, were binding.⁹⁷² Regarding civil rights, the Caliph 'Umar treated both groups equally and very brutally. If a Muslim killed a non-Muslim, he was executed;⁹⁷³ if a Muslim insulted a non-Muslim, he was punished.⁹⁷⁴ Fiscal policy under Umar

⁹⁶⁸ Rahman, *Major themes of the Qur'an*, p.45.

⁹⁶⁹ *Sahih Al-Bukhari*, Vol., 9, no. 7142, p. 162.

⁹⁷⁰ Atta Mohy-ud-Din, *Abu Bakr* (Karachi: Ferozsons, 1958), p.120.

⁹⁷¹ *ibid*, pp.120-121.

⁹⁷² *ibid*, p.121.

⁹⁷³ Shamsul 'Ulama 'Allama Shibli Nu'mani, *Omar the great: the second caliph of Islam* (Lahore: Sh. Muhammad Ashraf, 1957 [reprint. 1967]), vol. 2, pp. 172-173 (Nu'mani, *Omar the great*).

⁹⁷⁴ *ibid*, p. 173.

was based on equality. All Muslims had an equal share of public money, and no group could claim any form of monopoly over resources or power other groups.⁹⁷⁵

4.2.3 Religious Liberty

Some people argue that Islam does not recognise other religions or is intolerant of other religions. Samuel Zwemer (d. 1952 CE), a Christian missionary in Egypt, explained the low number of converts from Islam to Christianity as being a result of the fear engendered by the death sentence for apostasy. He further noted that “the idea of personal liberty - freedom of conscience - has no place in Moslem Law, whether religious or civil”; indeed, all 75 of his converts were persecuted.⁹⁷⁶ Moreover, Alfred von Kremer misinterpreted the ideological background of the Islamic state, describing it as follows:

In the first century the Islamic state was a purely military state. Aside from Sparta, there had never been one like it; yet Islam did not recognise within it any aristocracy. The Muslims were a nation of warriors who cast their livelihood and economy on the conquered nations....⁹⁷⁷

Von Kremer considered the nascent Islamic state to be a “nation of warriors” who issued “severe directives regarding Christians”, but any analysis of the deeds of the Prophet and his successors shows that this argument is simply incorrect.

There is no doubt that some records indicate that Islam can be intolerant of other religious groups. For example, the Prophet himself stated that “Two religions

⁹⁷⁵ Sallabi, *Umar Bin 'Abd Al-'Aziz*, p. 161.

⁹⁷⁶ Zwemer, *The Law of Apostasy in Islam*, pp. 19-20.

⁹⁷⁷ Alfred von Kremer cited in Moshe Gil, *Jews in Islamic countries in the Middle Ages*, translated from the Hebrew by David Strassler (Leiden ; Boston : Brill, 2004), p. 273.

cannot coexist in the Arabian peninsula”,⁹⁷⁸ and Caliph ‘Umar expelled groups who “had no treaty from the Messenger of God”.⁹⁷⁹ However, the groups expelled by ‘Umar were not simply excluded on religious grounds; at the time, the Muslims were at war with other religious groups. The circumstances and background pertaining at the time must be taken into account when considering the words and deeds of the Prophet and Caliph ‘Umar. Their language and actions do not indicate that Islam was intolerant of other religions per se; in fact, they recognised those religious groups with whom they had treaties or covenants, and ‘Umar protected other religious groups, their religion and their laws. For example, ‘Utbah b. Farqad, a regional governor in Azerbaijan during ‘Umar’s reign, agreed to protect “all people of whatever religion, viz., security for their persons, their possessions, their religion and laws”.⁹⁸⁰ Furthermore ‘Umar made peace with the people of Jerusalem in al-Jahiyah. He wrote for them the peace conditions. He wrote one letter to all provinces (of Palestine)

In the name of God, the Merciful, the Compassionate. This is the assurance of safety (*aman*) which the servant of God, ‘Umar, the Commander of the Faithful, has granted to the people of Jerusalem. He has given them an assurance of safety for themselves, for their property, their churches, their crosses, the sick and healthy of the city, and for all the rituals that belong to their religion. Their churches will not be inhabited [by Muslims] and will not be destroyed. Neither they, nor the land on which they stand, nor their cross, nor their property will be damaged. They will not be forcibly converted....⁹⁸¹

Other religious groups were recognised and there was a considerable degree of religious freedom. The Constitution of Medina, which was an agreement between

⁹⁷⁸ Al-Tabarī, *The History of al-Tabari*, vol. 8, p. 130.

⁹⁷⁹ *ibid.*

⁹⁸⁰ Al-Tabari, *The History of al-Tabari*, vol. 14, p. 33.

⁹⁸¹ Al-Tabarī, *The History of al-Tabari* vol.12, p. 191

Muslims, Jews and Christians and other pagan groups in Medina at the Prophet's time, clearly allows for religious tolerance. The Constitution notes as follows:

And verily the Jews of the Banu 'Awf shall be considered as a community (ummah) along with the Believers, for the Jews being their religion and for the Muslims their religion, be one client or original member of the tribe; but whosoever shall be guilty of oppression or violation (of treaty), shall put to trouble none but his own person and the members of his house (*ahl-bait*).⁹⁸²

In the Medina Constitution the Prophet recognised the right of other groups to practice their religion. This early Islamic approach to religious freedom can also be seen in the Qur'an. For example, Qur'an 10:99 orders Muslims not to force 'infidels' to convert to Islam or be harsh with them, as it notes that "And if thy Lord willed, all who are in the earth would have believed together. Wouldst thou (Muhammad) compel men until they are believers?" Similarly, verse 2:256 is commonly cited by scholars as proof of the Qur'an's recognition of religious freedom: "There is no compulsion in religion". In this reading of the Qur'an, religious matters are an individual issue and that the state or other authorities should not force a person to change religion. According to Shah, verse 2:256 has two implications: the first is that "no one is compelled to adopt Islam as his or her religion", and the second is that "once someone embraces Islam, h/she should not be forced to follow what others believe".⁹⁸³ The revelation of this verse fully supports the assertion that the Qur'an orders Muslims to allow religious freedom. The warning against compelling anyone to become Muslim is central to the verse. According to Ibn Kathir, its meaning is as follows:

⁹⁸² Hamidullah, *The First Written-Constitution in the World* pp. 48-49 (Article 25).

⁹⁸³ Shah, "Freedom of Religion", p. 71.

Do not force anyone to become Muslim, for Islam is plain and clear, and its proofs and evidence are plain and clear. Therefore, there is no need to force anyone to embrace Islam. Rather, whoever Allah directs to Islam, opens his heart for it and enlightens his mind, will embrace Islam with certainty. Whoever Allah blinds his heart and seals his hearing and sight, then he will not benefit from being forced to embrace Islam.⁹⁸⁴

Verse 2:256 thus supports the argument that Islam does not force Islam upon non-Muslims. However, this religiously tolerant verse is believed by some scholars to have been abrogated by other verses that were revealed later. This perhaps partly explains why some mediaeval Islamic scholars believed that apostasy can be treated as a punishable offence.

To “abrogate” means to cancel an obligation: it was correct while in force, but it became correct to omit it once God abrogated it.⁹⁸⁵

Bell explained that the doctrine of abrogation was supported by the concept that “certain commands to the Muslims in the Qur’an were only of temporary application, and that when circumstances changed they were abrogated or replaced by others”.⁹⁸⁶ The concept of abrogation [*naskh*] is clearly alluded to in the Qur’an, which notes “Whatever a Verse (revelation) do We abrogate or cause to be forgotten, We bring a better one or similar to it.” [2:106] and “And when We change a Verse in place of another...” [16:101]. However, Bell noted that as these commands (the abrogated verses) were part of the Qur’an and thus undoubtedly the word of God, they were still recited.⁹⁸⁷ For example, the command at the beginning of *sura 73* to spend much of the night praying was

⁹⁸⁴ *Tafsir ibn Kathir*, Vol. 2, p. 30.

⁹⁸⁵ Al-Shafi’i, *The Epistle on Legal Theory*, p. 97.

⁹⁸⁶ Richard Bell, *Bell's introduction to the Qur'an*, completely revised and enlarged by W. Montgomery Watt (Edinburgh : Edinburgh University Press, 1970), pp.87-88. (Bell, *Bell's introduction to the Qur'an*)

⁹⁸⁷ Bell, *Bell's Introduction to the Qur'an*, p.88.

abrogated by verse 20, probably because Muhammad's public duties in Medina made this impractical.⁹⁸⁸ The argument proposed is thus that the Qur'an was not mainly seen as, and was never intended to be, a law book, as discussed in Chapter 1. Interpretations of its meaning were not stable in the Prophet's time, but rather were being gradually changed and abrogated. Understandings progressively evolved in "accordance with the needs and capabilities of society".⁹⁸⁹ For example, the prohibition on drinking alcohol was imposed gradually, moving from being advisory to being binding at prayer time to being absolute.⁹⁹⁰ Syed Qutb has made a related argument:

Allah Most High did not desire that all laws and regulations be revealed during the Makkan period so that Muslims would have a ready-made system to be applied as soon as they reached Medina; this is out of character for this religion. Islam is more practical than this and has more foresight; it does not find solution to hypothetical problems. It first looks at the prevailing conditions, and if it finds a viable society which, according to its form, conditions or temperament, is a Muslim society, which has submitted itself to the law of Allah and is weary of laws emanating from other sources, then indeed this religion provides a method for the legislation of laws according to the needs of such a society.⁹⁹¹

Some scholars believe that this verse (2:256) was later abrogated by other Qur'anic verses, such as 9:5⁹⁹² and 9:29.⁹⁹³ Moreover, Qur'an 9:29, the so-called

⁹⁸⁸ *ibid.*

⁹⁸⁹ Azizah Y al-Hibri, "Islamic Constitutionalism and the Concept of Democracy" 24 *Case Western Reserve Journal of International Law* (1992), 1-27, p. 10.

⁹⁹⁰ *Ibid.* Also See, [Qur'an 11:219, 4:43, 5:90].

⁹⁹¹ Syed Qutb, *Milestones*, edited by A.B. al-Mehri (Birmingham : , Maktabah Booksellers and Publishers 2006), p. 47. (Qutb, *Milestones*).

⁹⁹² [Qur'an 9:5]

Then when the Sacred Months (the 1st, 7th, 11th, and 12th months of the Islamic calendar) have passed, then kill the Mushrikun (see V.2:105) [polytheists] wherever you find them, and capture them and besiege them, and prepare for them each and every ambush. But if they repent and perform As-Salat (Iqamat-as-Salat), and give Zakat, then leave their way free. Verily, Allah is Oft-Forgiving, Most Merciful.

⁹⁹³ [Qur'an 9:29]

Fight against those who (1) believe not in Allah, (2) nor in the Last Day, (3) nor forbid that which has been forbidden by Allah and His Messenger (4) and those who acknowledge not the religion of

fighting verse, orders Muslims to fight non-believers. According to Ibn Kathir, the verse was revealed with reference to the Battle of Tabuk; he claims that it abrogates verse 2:256, Ibn Kathir stated as follows:

When Allah, Most High, ordered the believers to prohibit the disbelievers from entering or coming near the sacred Mosque. On that, Quraish thought that this would reduce their profits from trade. Therefore, Allah, Most High, compensated them and ordered them to fight the people of the Book until they embrace Islam or pay the *Jizyah*.⁹⁹⁴

Therefore, the Messenger of Allah (peace and blessings of Allah be upon him) decided to fight the Romans in order to call them to Islam.⁹⁹⁵

As discussed in Chapter 1, neither Qur'an 9:5 nor 9:29 target unbelievers or non-Muslims *per se*, but rather target unbelievers and non-Muslims who have actually fought against the Muslims.

An-Na'im has argued that the legal principles of Shari'a were not based on the early Meccan texts (of between 610 and 622, and dealing with the principle of freedom of choice and voluntary conversion), although Qur'anic texts of this class are often used to attempt to show that Shari'a law is tolerant of religious freedom.⁹⁹⁶ These more religiously-tolerant Meccan verses were repealed or abrogated (*naskh*) by the far more politically-motivated texts of religious compulsion revealed subsequent to the Prophet's 622 A.D. migration to Medina; because of this, the legally-binding aspects of Shari'a law are actually based on

truth (i.e. Islam) among the people of the Scripture (Jews and Christians), until they pay the Jizyah with willing submission, and feel themselves subdued.

⁹⁹⁴ Ibn Kathir, *The Battles of the Prophet [Ghazwat ul Rasul]* translated by Wa'il 'Abdul Mut 'aal Shihab (El-Mansoura: Dar Al-Manarah, 2000), p. 183.

⁹⁹⁵ *ibid*, p. 184.

⁹⁹⁶ See, e.g. [Qur'an 16:125, 18:29].

these latter verses only.⁹⁹⁷ This fundamental change, most clearly seen in the Shari'a's provisions for *jihad* and discrimination against non-Muslims, is outlined by Mohammed in the *Sunna*.⁹⁹⁸

Some Western scholars believe that from the Meccan period to the Medinan period Islam changed from a tolerant attitude towards other religions to a far more intolerant stance. The Germany sociologist Max Weber (d. 1920 CE) argued that Islam changed its religion from its "pristine form" in the Meccan period to "a national Arabic warrior religion."⁹⁹⁹ There is no doubt that the character of the Qur'anic ordinances issued during the Meccan and Medinan periods are quite different. This is perhaps a reflection of the changing circumstances. Philips explains that the Muslim "oppressed minority" of the Meccan period became the "ruling majority" in the Medinan period.¹⁰⁰⁰ He contends that the Qur'anic verses revealed in the Meccan period were "mainly concerned with building the ideological foundation of Islam."¹⁰⁰¹ These verses were quite tolerant of other religions, because there was no great conflict with other religious groups. These religiously tolerant verses differed fundamentally from the more intolerant verses expressed against other religious groups and hypocrite Muslims after the *Hijrah* [migration] to Medina. Following the spread of Islam in Medina Mohammed was appointed its ruler, and the Muslim community became a fledging Muslim state.

⁹⁹⁷ Abdullahi Ahmed An-Na'im, "The Islamic Law of Apostasy and its Modern Applicability: A Case from The Sudan", 16 *Religion* (1986), 197-224, p. 215.

⁹⁹⁸ *Sahih al-Bukhari*, vol. 1, no 25, p. 66.

⁹⁹⁹ Max Weber, *Economy and society: an outline of interpretive sociology*, Edited by Guenther Roth and Claus Wittich. Translators: Ephraim Fischhoff [and others] (New York : Bedminster Press, 1968), vol.2, pp. 623-624.

¹⁰⁰⁰ Abu Ameenah Bilal Philips, *The Evolution of Fiqh: (Islamic law and the Madh-habs)* New revised edition 3 (Riyadh: Tawheed Publications, 2006), p. 22.

¹⁰⁰¹ *ibid*, p. 23.

Philips notes that the revelations from this Medinan period were thus primarily concerned with organising the nascent state.¹⁰⁰²

Some scholars thus argue that the earlier Qur'anic verses of religious tolerance were abrogated by these later less tolerant passages of the Medinan period (622-632 C.E.). Saeed notes that during the Medinan period religious belief broadened, becoming a mark of membership of a particular religious-political community.¹⁰⁰³ Rahman argues that the terms 'sect' and 'party' (*ahzab* and *shiya'*) as used in Mecca disappear in the subsequent Medinan period, being replaced with the term *Umma* (community) and the collective term "the People of the Book" (*ahl al-kitab*).¹⁰⁰⁴

In Medina attitudes hardened towards non-believers or apostates, becoming more intolerant. For example, verse 8:39 says "And fight them until persecution is no more...", while 4:89 orders those who "turn back" to be slain "wherever you find them". Therefore, certain earlier writers came to believe that many of the original Qur'anic verses which seemed to support religious freedom needed to be re-read and re-interpreted in the light of subsequent passages in the Qur'an, which were more restrictive.¹⁰⁰⁵

This abrogation of the religious tolerance of the early Meccan verses contradicts the deeds and words of the Rightly-Guided Caliphs. Indeed, there is evidence from the *Hadith* that verse 2:256 has not been abrogated by any other verses. For example,

¹⁰⁰² *ibid*, p. 24.

¹⁰⁰³ Saeed, 'Muslim Debates on Human Rights,' pp. 29-30.

¹⁰⁰⁴ Rahman, *Major themes of the Qur'an*, pp.144-145.

¹⁰⁰⁵ Kamali, *Freedom of expression in Islam*, p. 88.

after Jerusalem surrendered Umar bin al-Khat'tab, the second caliph, said to its people as follows:

In the name of God, the Merciful, the Compassionate. This is the assurance of safety (*aman*) which the servant of God, 'Umar, the Commander of the Faithful, has granted to the people of Jerusalem. He has given them an assurance of safety for themselves, for their property, their churches, their crosses, the sick and healthy of the city, and for all the rituals that belong to their religion. Their churches will not be inhabited [by Muslims] and will not be destroyed. Neither they, nor the land on which they stand, nor their cross, nor their property will be damaged. They will not be forcibly converted....¹⁰⁰⁶

The *Dhimmis* (non-Muslims in an Islamic state) had total religious freedom. They were allowed to participate in all their rites and their religious leaders maintained their positions and authority.¹⁰⁰⁷ The approach of the Rightly Guided-Caliphs, based upon the 'no compulsion in religion' verse, Qur'an 2:256, continued under the Caliph of the Umayyad Dynasty, 'Umar bin 'Abd al-'Aziz. He promoted freedom of faith backed up by covenants and agreements which established justice for Christian and Jews, guaranteeing that their beliefs would not be suppressed.¹⁰⁰⁸ Provided that Christians and Jews accepted the rights of Muslims and the existence of Islam, 'Umar bin 'Abd al-'Aziz treated these non-Muslims as he did Muslims:

If a Christian, Jew or Zoroastrian among the people of al-Jazirah (Upper Mesopotamia) embraces Islam from today onwards, then let him share the domain of the Muslims and differentiate the domain that he was previously in, for he is entitled to the same as the Muslims, just as what is upon them is also upon him. They are thereby obliged to allow him to mix freely and treat him equally.¹⁰⁰⁹

¹⁰⁰⁶ Al-Tabari, *The History of al-Tabari*, vol.12, p. 191

¹⁰⁰⁷ Nu'mani, *Omar the great*, p. 171.

¹⁰⁰⁸ Sallabi, *'Umar Bin 'Abd Al-'Aziz*, pp. 165-166

¹⁰⁰⁹ *ibid*, p. 162.

This Islamic approach to religious freedom can be seen in 14th Century Damascus, where the medieval traveller Ibn Batutat (d. 720AH/1368-1369 CE) noted that both Christian and Jews were allowed to practice their religion and were living together.¹⁰¹⁰ It therefore seems reasonable to conclude that the Qur'an commands Muslims not to force others to accept Islam. Other Qur'anic verses also prohibit coercion of religion and recognise the legitimacy of rejection of the faith, thus seemingly supporting religious freedom. For example, Qur'an 10:99 has been interpreted by Yusuf Ali, as follows:

[i]f it had been Allah's Plan or Will not to grant the limited Free-will that He has granted to man, His omnipotence could have made all mankind alike: all would then have had Faith...¹⁰¹¹

According to Ali's reading of the verse, God has clearly given human beings the right to believe or not to believe, to be or not be Muslim. As Shah puts it, God has reserved for himself the right to make mankind believe in him.¹⁰¹² Moreover, although certain Medinan verses, such as Qur'an 4:115,¹⁰¹³ 4:89¹⁰¹⁴ and 8:39,¹⁰¹⁵

¹⁰¹⁰ Muhammad ibn 'Abd Allāh Ibn Batutat, *The Travels of Ibn Battuta A.D. 1325-1354*, translated with revisions and notes from the Arabic text edited by C. Defrémery and B.R. Sanguinetti by H.A.R. Gibb ; translation completed with annotations by C.F. Beckingham (Cambridge: Cambridge University Press, 1958), vol. 1, p. 144. (Ibn Batutat, *The Travels of Ibn Battuta*).

¹⁰¹¹ Abdullah Yusuf Ali, *The Holy Qur'an: English translation of the meanings and commentary*, revised & edited by the Presidency of Islamic Researches, IFTA [based on the translation by Abdullah Yusuf Ali] (Medina 1990), p 576 (footnote, 1480).

¹⁰¹² Shah, "Freedom of Religion," p. 72..

¹⁰¹³ [Quran, 4: 115]

And whoso opposeth the messenger after the guidance (of Allah) hath been manifested unto him, and followeth other than the believer's way, We appoint for him that unto which he himself hath turned, and expose him unto hell - a hapless journey's end!

¹⁰¹⁴ [Quran, 4: 89]

They long that ye should disbelieve even as they disbelieve, that ye may be upon a level (with them). So choose not friends from them till they forsake their homes in the way of Allah; if they turn back (to enmity) then take them and kill them wherever ye find them, and choose no friend nor helper from among them"

¹⁰¹⁵ [Quran, 8: 39]

And fight them until persecution is no more, and religion is all for Allah. But if they cease, then lo! Allah is Seer of what they do.

clearly condemn apostasy and non-believers, even these verses do not mention any earthly punishment. If verse 2:256 had been abrogated, it is reasonable to suppose that any punishment would be described in these three later verses. However, they only condemn apostates who physically attacked the Islamic communities of the time, as discussed in Chapter 1.

Thus, verse 2:256 was not abrogated by other verses, in fact quite the opposite: the Medina verses actually support the religious freedom promoted in 2:256. The religious freedom allowed, and even guaranteed, by the Rightly-Guided Caliphs and their successors indicates that verse 2:256 was not abrogated, and that religious freedom was still seen as being protected by the Qur'an. Islamic texts were not at this time being interpreted in a way that would give Muslims the right to pass judgement on the beliefs of followers of other religions.¹⁰¹⁶ Goldziher notes that Qur'an 2:256 was also referenced as defence by forced converts to Islam in later apostasy cases in order to save them severe punishment for renouncing the faith.¹⁰¹⁷

4.2.4 Nonadversarial Relationship

Islamic conceptions of the ideal state are based on the premise of a nonadversarial relationship; indeed, some scholars believe that Islam does not recognise adversarial relationships. For example, Arzt notes that Islamic systems lack the governmental checks and balances seen as essential to the guarantee of human

¹⁰¹⁶ Vaglieri, *An Interpretation of Islam*, pp. 34-3

¹⁰¹⁷ Goldziher, *Introduction to Islamic theology and law*, p. 33.

rights in the West.¹⁰¹⁸ Similarly, Coulson argues that the rejection of any possibility of conflict between the executive and the law means that Islamic legal systems lack the mechanisms required to protect the individual against the state; for Coulson, Islamic law is “fundamentally opposed to the notion of an independent judiciary.”¹⁰¹⁹ Schooley points out that “Islamic culture is a religious tradition with no distinction between church and state or public and private.”¹⁰²⁰ Similarly Jeffery notes that “theoretically there is no separation of church and State in Islam, and in actual practice there has been none until quite modern times when Western influences have in some areas brought about a certain separation of the two.”¹⁰²¹ In common with other observers, Schooley notes that Islamic individuals lack the autonomy and isolation of their western counterparts; a Muslim can only exist within their family and community.¹⁰²² Therefore, the traditional Islamic Shari’a law that governs the relationship between the state and individual is in conflict with international human rights standards, which hold that all individuals are entitled to equal treatment and inalienable rights that enable them to raise grievances against the state and society.¹⁰²³

Various statements by Mohammed support this Islamic notion of non-adversarial relationships expressed in the form of unquestioning obedience and duty. He stated that “He who obeys the Muslim chief, obeys me; and he who disobeys the Muslim

¹⁰¹⁸ Donna E. Arzt, “The Application of International Human Rights Law in Islamic States”, 12 *Human Rights Quarterly* (1990), 202-230, pp. 206-207. (Arzt, “The Application of International Human Rights Law”)

¹⁰¹⁹ Coulson, “The State and the Individual in Islamic Law,” p. 59.

¹⁰²⁰ Kimberly Younce Schooley, “Cultural Sovereignty, Islam, and Human Rights – Toward a Communitarian Revision”, 25 *Cumberland Law Review* (1994), 651-714 p. 712. (Schooley, “Cultural Sovereignty”)

¹⁰²¹ Arthur Jeffery, *A Reader on Islam: Passages From Standard Arabic Writings Illustrative of the Beliefs and Practices of Muslims* (New York : Books for Libraries, a division of Arno Press, 1980), p. 254.

¹⁰²² Schooley, “Cultural Sovereignty,”p. 712.

¹⁰²³ Jack Donnelly, “The Relative Universality of Human Rights”, 29 *Human Rights Quarterly* (2007), 281-306, pp. 284-285.

chief, disobeys me”¹⁰²⁴ Mohammed went further, noting that even if one disapproves of the acts or deeds of one’s ruler, one should not question or separate from that ruler, else risk dying “as those who died in the Pre-Islamic Period of Ignorance (i.e., as rebellious sinners)”¹⁰²⁵ These statements support the idea that in Islam there is no tradition or culture of questioning leaders, unlike in the Western approach.

The argument that Islamic legal systems lack the mechanisms required to protect the individual against the state is one that is based upon a Western conception of the relationship between these two parties. Islam takes a fundamentally different approach, but even this does not necessarily mean a lack of individual rights; supporters of Islamic legal systems would argue that individuals are protected *by* the state and have duties to their maker, and in return “receive protection from a correlative right.”¹⁰²⁶ In practice this means that individuals’ duties to God are channelled through some form of authority, which in turn also has duties to God. Tamimi points out that as both individuals and this authority must follow divine law¹⁰²⁷ there can be no inherent conflict between them, thus removing the need for rights. Indeed, some academics claim that obeying the state is only necessary when the state itself is following the Shari’a.¹⁰²⁸ This is supported by the Qur’an [26:151-152]:

Obey not the command of those who have crossed limits. They spread disorder in earth and reform not.

¹⁰²⁴ *Sahih Al-Bukhari*, vol. 4, no.2957, p. 131.

¹⁰²⁵ *ibid.*, vol. 9, no.7053, p. 125.

¹⁰²⁶ Guichon, “Some Arguments on the Universality of Human Rights,” p. 171.

¹⁰²⁷ Azzam Tamimi, “Human Rights and Muslim Identity” (Conference: ‘Muslim Identity in the 21st Century: Challenges of Modernity’, London, 31/10/98), <<http://www.ikhwanweb.com/article.php?id=5158> >accessed 27 June 2016.

¹⁰²⁸ Arzt, “The Application of International Human Rights Law,” p. 206.

Clearly certain Qur’anic verses ask believers to not only obey Allah and the Prophet but also to obey “those of you (Muslims) who are in authority”, for example Qur’an 4:59. However, although verse 4:59 declares obedience to authority to be a duty, it does not dictate that believers should obey their government unconditionally. Imām al-Bayhaqī (d. 384 AH /994 CE) posited that 4:59 “refers to men in authority over raiding parties, or to the *ulema*.”¹⁰²⁹ Moreover, Bernard Lewis argues that if a ruler’s words or deeds contradict the divine law, “not only is there no duty of obedience, but there is a duty of disobedience.” He notes that this is more than the Western political notion of the *right* to revolt; it is a *duty* to revolt, or at least a duty to disobey and oppose authority. A similar wording that also serves to limit a ruler’s authority is “do not obey a creature against his creator.”¹⁰³⁰ Any Muslim rulers were to be obeyed so long as their actions corresponded with the Shari’a.¹⁰³¹

Moreover, Fahmi Jad’an argues that although Muslims naturally seek to avoid armed conflict, ‘Annulment of the sword’ does not apply to other forms of dissent.¹⁰³²

[O]bedience and avoidance of armed dissension are the natural behaviour of the Muslim as a member of an Islamic community governed by an administration based on Islam and its laws. This Muslim’s right to dispute the state’s authority is an undesirable one, even when we take into account the text commanding disobedience in the case of wrong-doing ordered by the imam, ruler, guardian or the state. This does not, even so imply absolute consent and acceptance.

¹⁰²⁹ Imām al-Bayhaqī, *The Seventy-Seven Branches of Faith*, abridged by Imām al-Qazwīnī ; translated by Abdal-Hakim Murad (Buckinghamshire: The Quilliam Press, 1990), p. 42.

¹⁰³⁰ Bernard Lewis, “Freedom and Justice in the Modern Middle East”, 84 *Foreign Affairs* (2005) 36-51, p. 40. (Lewis, “Freedom and Justice”).

¹⁰³¹ Ruzinski, “The Treatment of Religious Minorities in Saudi Arabia,” p. 42.

¹⁰³² Fahmi Jad’an, “Obedience and Disagreement in the Context of Human Rights in Islam” in Salma J. Jayyusi ed., *Human rights in Arab Thought: a Reader* (New York: I.B. Tauris, 2009), pp. 88-89.

‘Annulment of the sword’ does not in fact mean annulment of other forms of protest or ‘passive’ rejection.¹⁰³³

Interestingly, Fahmi Jad‘an argues that if obedience is considered to be a duty, “disagreement is a right”. Nevertheless, Islam does not recognise any criticisms leading to rebellion; criticism of government is limited to areas around the public good. He states that the classical Islamic term ‘*iftiraq*’ (‘division’ or ‘desertion’) is not a right but rather “a loathsome course of action to be avoided”.¹⁰³⁴ According to Lewis the Arabic word *bay‘a*, which literally means a commercial transaction or a sale, also means ‘deal’; from this meaning it has come to imply ‘allegiance’, or in other words “a contract between the ruler and the ruled in which both have obligations.”¹⁰³⁵ The term thus includes a sense of mutual respect between individuals and states, as represented by their rulers. Similarly, Muhammad ‘Abid al-Jabiri argues that “the concept of ‘*ra‘i/ra‘iyya*’ as ‘ruler/subjects’ is foreign to Islam”,¹⁰³⁶ as Mohammed’s followers did not see themselves as being ruled over. They were referred to by themselves and others by a term lacking any connotations of kingship or hierarchy; “they were simply the ‘followers’ of Muhammad, or his ‘companions’ ”.¹⁰³⁷ Hourani notes that “Rulers, like other men, were not independent agents but the channels through which God worked”:¹⁰³⁸

For a Muslim ruler, as for all Muslims, to be good or bad was to submit to God’s purposes or revolt against them. The Shari‘a, the statement of God’s will,

¹⁰³³ *ibid.*

¹⁰³⁴ *ibid.*, p. 90.

¹⁰³⁵ Lewis, “Freedom and Justice,” p. 42.

¹⁰³⁶ Al-Jabiri “The Concepts of rights and Justice,” p. 33.

¹⁰³⁷ *ibid.*

¹⁰³⁸ Albert Hourani, *Arabic Thought in the Liberal Age, 1798-1939*. (London: Oxford University Press, 1962), p. 5. (Hourani, *Arabic Thought in the Liberal Age*).

was therefore supreme in society, and a whole sphere of political activity – that of legislation – was in principle removed from the competence of the ruler.¹⁰³⁹

Therefore, there is no concept of or understanding that rulers are superior to those they rule, and thus it is hard to view Islam as focusing on a ruler's right to rule or on the rights of those being ruled.

Hadith show that Islam recognises the right to protest against governments or rulers. Furthermore, it not only grants the right to resist tyranny but also the right to reject any arbitrary laws and orders which contravene Islam's rules.¹⁰⁴⁰ The Prophet reportedly said that

A Muslim has to listen to and obey (the order of his Muslim ruler) whether he likes it or not, as long as his orders involve not one in disobedience (to Allah), but if an act of disobedience (to Allah) is imposed, one should not listen to it or obey it.¹⁰⁴¹

Throughout his rule Umar Bin Abdul Aziz supported the people's right to enjoy good and forbid evil. He asked as follows:

Is surrendering to a man not in contradiction of the *Sunnah* (Prophetic Tradition)? There is no obedience to creation in disobedience to Allah, while you call the one who flees from oppression disobedient, when in fact the former is only disobedient in the face of the oppressor.¹⁰⁴²

The separation of church and State is a Western idea that was largely the result of the experience of civil war. The importance of separating religion and government was pointed out by John Locke:

I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the

¹⁰³⁹ *ibid.*

¹⁰⁴⁰ Shaukat Hussain, *Human rights in Islam* (New Delhi : Kitab Bhavan, 1990), p. 51.

¹⁰⁴¹ *Sahih Al-Bukhari*, vol. 9, no. 7144, p. 163.

¹⁰⁴² Sallabi, 'Umar Bin 'Abd Al-'Aziz,' pp. 167.

one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls, and, on the other side, a care of the commonwealth.¹⁰⁴³

Iqbal notes that the separation comes from the history of European political ideas. He argues that as primitive Christianity was founded “as a monastic order in a profane world”; it had nothing to do with civil affairs and followed the prevailing Roman political authority. This meant that when the State officially converted to Christianity, “State and Church confronted each other as distinct powers with interminable boundary disputes”. Iqbal argues that this is unthinkable in Islam, as it was always a civil society governed by Qur’anic legal principles which allowed for expansion and endless reinterpretation. The dualism inherent in the nationalist theory of state is therefore completely lacking in Islam.¹⁰⁴⁴

4.2.5 The divine approach to human rights

The origin of the conflict between the divine and human law approaches can be traced back to just after the Prophet’s time. It is true that Shari’a is divine principle but its interpretation has not been stable throughout Islamic history and has varied considerably over time, as discussed earlier. Those who argue that Islamic and international human rights are incompatible hold that Islamic duties and rights are divinely ordained, not the creation of man. The Qur’an notes that “He [Allah] may make it (Islam) superior over all religions”¹⁰⁴⁵ Weiss argues that within traditional law God is “the ultimate sovereign, the possessor of all original

¹⁰⁴³ John Locke, *A Letter Concerning Toleration* (Buffalo, N.Y.: Prometheus Books, 1990), p. 18.

¹⁰⁴⁴ Iqbal, *The Reconstruction of Religious Thought in Islam*, p. 148.

¹⁰⁴⁵ see [Quran, 48:28]

rights.”¹⁰⁴⁶ Shari’a is thus not regarded as an expression of the will of the state but of God’s will, unlike modern Western law.¹⁰⁴⁷

The differences between these two approaches can be examined with reference to divine rights theory. The difference between man-made and divine law was explored by Mohammad Muslehuddin:

...human laws being the product of reason (which is subject to change and also liable to err) are always in a state of flux and fluidity, and Islamic law (shari’a), Divine and based on the Wisdom of the All-Wise God, is alone ideal, i.e. perfect and for all time, hence its ideal form is to be preserved at all costs.¹⁰⁴⁸

The key concept behind divine law is that it is not created by man, and so we do not have the right to alter it even when circumstances change; man-made law by contrast dynamically changes over time, because human society, culture and circumstances change, and so do people themselves. Divine law is seen as unchangeable and irrevocable, and furthermore as eternally and universally applicable. Muslehuddin notes that divine law “has its own method and ethical norms of good and bad which keep social change itself within bounds”,¹⁰⁴⁹ this clearly differentiates it from human law, which Drost argues is not only man-made but inevitably directed to man and man-meant.¹⁰⁵⁰ According to these arguments divine law, unalterable and perfect, always prevails over man-made law.

¹⁰⁴⁶ Bernard G. Weiss, *The Spirit of Islamic Law* (Athens: University of Georgia Press, 2006), p. 24.

¹⁰⁴⁷ Peters, “From Jurists’ Law to Statute Law,” p. 82.

¹⁰⁴⁸ Mohammad Muslehuddin, *Philosophy of Islamic law and the orientalist: a comparative study of Islamic legal system* (Lahore : Islamic Publications, [1977]), p.186. (Muslehuddin, *Philosophy of Islamic law and the orientalist*).

¹⁰⁴⁹ *ibid*, p.118.

¹⁰⁵⁰ Pieter N. Drost, *The Crime of State; Penal Protection for Fundamental Freedoms of Persons and Peoples*, (Leyden, A.W. Sythoff, 1959), p. 56, 66-67.

This divine origin of Islamic law is reflected in constitutional provisions in certain Muslim-majority states, such as Article 2 of the Iranian Constitution which states that "...the Islamic Republic is...the exclusive sovereignty of God..." Similarly, Article 1 of Saudi Arabia's Basic Law of Governance begins by noting that "Saudi Arabia is a sovereign Arab Islamic State...its constitution is Almighty God's Book". Finally, the Preamble of the Pakistan Constitution (1973) states "...sovereignty over the entire Universe belongs to Almighty Allah alone." This 'divine' human rights argument is controversial but has in effect been incorporated into the constitutions of a number of Muslim majority states, such as Afghanistan, Iraq and Iran, in the form of so-called 'repugnancy clauses'. These clauses, which require all laws to follow the core principles of the Shari'a and thus ensure that God's law remains inviolable, have themselves become issues in Muslim-majority states. In some such countries this unwritten Islamic principle is used to punish apostates, such as in the Abu Zayd Case (1995) in Egypt and the Abdul Rahman case (2006) in Afghanistan. Although neither state has an apostasy law Abu Zayd was still judged to be an apostate by the Court and following a review of *Hanafi* jurisprudence Abdul Rahman was almost punished as one. All these cases were influenced by the belief that divine law must prevail over man-made law. Abul A'la Maududi notes that in Muslim countries divine sovereignty requires God's law, or *Shari'a*, not man-made law, to take precedence.¹⁰⁵¹

Some scholars have sought to shape or reinterpret understandings of the divine source of law, relying on arguments that stress the 'eternal', 'immutable' and 'inflexible' nature of the Shari'a. For example, Qutb noted that 'Divine Law' itself

¹⁰⁵¹ Abul A'la Maududi, *Islamic Law and Constitution*, 7th ed, Translated and edited by Khurshid Ahmad (Lahore: Islamic Publications, 1980), p. 258.

was not merely ‘law’ in the sense of a legal system; it extended beyond questions of the state and government, and even beyond religious law and ideology. Qutb argued that it covers

the entire scheme that God has devised for regulating human life...[including] the regulation of thoughts and views, fundamentals of statecraft, principles of ethics and culture, laws of transactions, and regulations of knowledge and the arts.¹⁰⁵²

According to Qutb, everything in Islamic society was covered by divine law. As discussed in Chapter 2, various Muslim majority states have codified Shari’a in their constitutions. This implementation of Shari’a is a direct result of the idea that “divine rules are superior to human ones.”¹⁰⁵³

Although this tension between human law and divine law can actually be traced back to just after the Prophet’s time, the contemporary codification of Shari’a has greatly amplified it. Feldman argues that actual conflict between divine and human law, as opposed to their mere coexistence, is a relatively new development. He argues that it is the very constitutionalisation of the Shari’a, which has been attempted by a number of Islamic countries in order to resuscitate the Islamic state as a legal state, that has introduced “a tension that was much less salient in the constitutional thought of the classical Islamic state: the potential conflict between divine law and human law”.¹⁰⁵⁴

¹⁰⁵² Sayyid Qutb, “Islam as the Foundation of Knowledge”, in Mansoor Moaddel and Kamran Talattof ed., *Contemporary Debates in Islam: An Anthology of Modernist and Fundamentalist Thought* (Basingstoke : Macmillan, 2000), p. 198.

¹⁰⁵³ Fouad Zakariyya, *Myth and Reality in the Contemporary Islamist Movement*, translated with an introduction and bibliography by Ibrahim M. Abu-Rabi (London: Pluto Press, 2005), p. 134. (Zakariyya, *Myth and Reality*).

¹⁰⁵⁴ Feldman, *The Fall and Rise of the Islamic State*, p. 12.

The Qur'an states that God's Law cannot change: "So no change will you find in Allah's Sunnah, and no turning off will you find in Allah's Sunnah." [Qur'an 35:43] It should be noted that although the divine source and principle, in other words Shari'a itself, derives from God, the interpretation and understanding of it is made by human beings. Perhaps unsurprisingly, the arguments made by Qutb and others have been used by both states and religious groups seeking to strengthen their claims to authority. The importance of human use of the divine principle was noted by the Fourth Caliph Ali:

We have not given men authority; we have made the Qur'an the authority. But this Qur'an is merely a writing set down between two covers. It does not speak; it is merely men who speak through it.¹⁰⁵⁵

Similarly, Ibn Rushd distinguished between the Qur'an, which is the speech of God and is denoted by words created by God, and the words used elsewhere (i.e. not in the Qur'an), which "are our own work with God's permission".¹⁰⁵⁶ The latter should also be glorified, according to Ibn Rushd, because they refer to God's words, but he did at least acknowledge some measure of human agency in the process of interpretation.¹⁰⁵⁷ From today's perspective it seems incontestably obvious that individuals and human law have played a key role in interpreting divine Shari'a, but the earliest Islamic scholars, those who crafted the classical constitution, were just as aware of this.¹⁰⁵⁸

¹⁰⁵⁵ Al-Tabari, *The History of al-Tabari*, vol. 17, p. 103.

¹⁰⁵⁶ Ibn Rushd, *Faith and Reason in Islam*, p. 49.

¹⁰⁵⁷ *ibid.*

¹⁰⁵⁸ Feldman, *The Fall and Rise of the Islamic State*, pp. 12-13.

Some scholars have warned of the potential dangers in this divine approach. In his 1980s assessment of the ‘divine versus man-made’ law debate, Peters sought to summarise the Islamist argument for the necessity of utilising Shari’a law:

Why must *Shari’a* be enforced?...Because the supreme sovereignty belongs to God, man must submit to His will....Since the *Shari’a* is of divine origin, it is naturally superior to any human law. The principles of the *Shari’a* are immutable and cannot, for that reason, become tools in the hands of despotic and tyrannical rulers. For they, like all other Muslims, have to follow the *Shari’a* and cannot amend it at their pleasure as rulers can where there is only man-made law.¹⁰⁵⁹

Peters highlighted the risk that a divine law justification might be misused by those seeking to seize power in Muslim states. Certainly, such a justification has been employed in a number of apostasy and blasphemy cases, as discussed in Chapters 2.

Fouad Zakariyya, an Egyptian commentator, portrays the ‘divine law versus human law’ debate as an ideological construction. He points out that those who use divine law to prop up their own positions and interests are of course human beings themselves, and far from being divine. However, they refuse to recognise this or to partake in open debate and discourse.

The real choice is not between divine and human rules but between a human rule that claims that it speaks in the name of divine revelation and another which admits its human foundation. The danger of the former, which is always accompanied by human errors, is that it paints these errors and desires with the tincture of the sacred, an intentionally mixes the divine root of these rules with their human interpretations. In this sense, this combination insinuates that the whims and faults of the ruler are but a form of obedience to divine revelation, and it endows the weakness of the ruler with an infallibility that is completely undeserved.¹⁰⁶⁰

¹⁰⁵⁹ Rudolph Peters, “Divine Law or Man-Made Law? Egypt and the Application of the Shari’a”, 3 *Arab Law Quarterly* (1988), 231-253, p. 244.

¹⁰⁶⁰ Zakariyya, *Myth and Reality*, p. 134.

Both the divine and human law approaches are used by human beings; by definition, there can be no approach that is completely and perfectly divine. Muhammad Rashid Rida stated that “...whereas religious guidance is of divine origin, philosophical wisdom is after all human.”¹⁰⁶¹ Moreover, Majid Khadduri noted that

Islam was neither the first nor the last of the nations that sought to establish a world public order based on divine legislation.¹⁰⁶²

Therefore, the belief that Shari’a’s divinity makes it immutable and inflexible seems hard to justify, as the divine approach itself was developed by scholars.

The fact that Islamic law continued to evolve after the Prophet’s era is clear evidence that scholars and other individuals have played key roles in its development. Newman notes that orthodox Islam itself was still evolving throughout Islam’s first three centuries, up to 900 A.D, and that the earliest ‘genuine’ *hadith* were written down around the mid-9th century. Furthermore, Ibn Ishaq’s history of Muhammad’s life was probably composed in the mid-8th century.¹⁰⁶³ Early scholars recognised that Shari’a was not inflexible, and that it was open to dynamic interpretation and understanding. The assertion that divine law was immutable was made later by mediaeval scholars.

Conclusion

The belief that Islam is inconsistent with modern human rights and that it doesn’t recognise religious freedom is incorrect. Islam fully recognises individual rights,

¹⁰⁶¹ Muhammad Rashid Rida, *The Revelation to Muhammad*, translated from the Arabic by Abdus-Samad Sharafuddin. (Bhiwandi: Ad-darul-Qayyimah, 1960), Part 1., p. 38.

¹⁰⁶² Muhammad ibn al-Hasan Shaybānī, *The Islamic Law of Nations: Shaybānī’s Siyar*, translated with an introduction, notes, and appendices by Majid Khadduri (Baltimore : John Hopkins Press, 1966), p. xi.

¹⁰⁶³ Newman, *The Early Christian-Muslim Dialogue*, p. vi.

and it prescribed individual religious freedom much earlier than the West. This religious freedom can be seen in the deeds and words of the Rightly-Guided Caliphs and the Caliph of the Umayyad Dynasty, ‘Umar bin ‘Abd al-‘Aziz.

Moreover, the belief that Islamic law is “immutable” and “inflexible” was made by mediaeval scholars; this contrasted with the earliest Islamic scholars, who interpreted Shari’a flexibly and dynamically. Finally, the belief that Shari’a is divine is not accurate; human beings have always played key roles in interpreting Shari’a. Thus, the belief that Shari’a is inconsistent with modern international human rights is simply incorrect.

Chapter 5: *Takfir* and non-state actors

Introduction

The practice of *takfir* in its raw and unvarnished form consists of declaring a person's religious belief (*iman*) as impure or as false and wrong. As such, it is an institutional act of religious censure used to deprive a Muslim of their Islamic status (excommunication).¹⁰⁶⁴ The term is explained by Toshihiko Izutsu as “literally declaring somebody – who, in this case, is an actual member of the community and passes for a believer – to be a *kafir* [unbeliever], and condemning him as such”.¹⁰⁶⁵ The delegitimising concept signifies the act of declaring a nominal Muslim an infidel due to that person's belief being non-existent and/or false, and therefore excluding them from Islam. The danger with the free practice of *takfir* is that it risks being used as an “object of conscious subjectivism, rendering it an extremely dangerous weapon in the hands of those who are attached fanatically to their own sect.”¹⁰⁶⁶ This can be seen in such authorised *takfir* as that of the Al-Azhar scholars against Abu Zayd, that against Mahmoud Mohammed Taha in Sudan (1985) or that of the OIC against Salman Rushdie, but *takfir* can also be arbitrary in nature, as seen in declarations made by Muslim extremists against other sects, for example. Many apostasy cases have begun with *takfir*-based judgments made by religious establishments and groups or in court decisions and even state constitutions.

¹⁰⁶⁴ Ibrahim A. Karawan, “Takfir” in *The Oxford Encyclopaedia of the Modern Islamic World*, ed. John Esposito (New York: Oxford U.P., 2009), vol. 5, p. 311.

¹⁰⁶⁵ Toshihiko Izutsu, *The Concept of Belief in Islamic Theology: a Semantic Analysis of Iman and Islam* (New York: Books for Libraries, 1980), p. 11. (Izutsu, *The Concept of Belief in Islamic Theology*)

¹⁰⁶⁶ *ibid.*, p. 17.

One development is that religious establishments and extreme groups, or even governments, now proclaim *takfir* against individuals who have tried to interpret Shari'a. All such cases involve human interpretation of Shari'a by both scholars and religious thinkers. In recent years *takfir* have become more widely used by non-state actors, such as extremists and even local religious establishments, in Muslim majority states. Such declarations are now one of the main apostasy issues relating to non-state actors in the contemporary Muslim world.

This chapter shows that the evolution in the concept and usage of *takfir* is one of the reasons for apostasy and blasphemy nowadays being considered to be such serious offences.

5.1 Practice of *takfir* by state and non-state actors

The great number and variety of *takfir*, expounded and propagated by governments, militant groups, religious establishments and other organisations and individuals, has caused extensive division within Islamic societies. Saeed and Saeed note that *takfir* are frequently used to attack or threaten opponents, and that "Mere accusation can lead to the endangering of a person's life."¹⁰⁶⁷ Indeed, one of the most effective means employed by the political and religious establishment (which are often the same thing) to silence those with potentially threatening views is to implicitly or explicitly support "private acts of violence."¹⁰⁶⁸ Such support can even take the form of open declarations that an individual is no longer Muslim. Imams in local mosques might seek to publicise someone's alleged apostasy by reference to their supposedly incriminating behaviour or speech. These public pronouncements can

¹⁰⁶⁷ Saeed and Saeed, *Freedom of Religion*, p. 108.

¹⁰⁶⁸ Saeed, "Ambiguities of Apostasy", p. 36.

often lead to mob harassment and violence, especially in areas where the state is weak.

Takfir can seemingly be made by anyone, from religious leaders through to politicians and even ordinary citizens, as well as of course by extremists of many types. Indeed, if *takfir* pronouncements by states are serious enough, when made by non-state actors such declarations can become extremely dangerous. This latter category includes *takfir* issued against state officials; the 1981 assassination of President Sadat of Egypt is an illustration of this. Khalid Islambouli, who was one of Sadat's assassins, asked the judge as follows:

Do you want to know why I killed him? Then you get this as proof. Here is the ruler of a Muslim country! You say that the constitution provides the Koran [Qur'an] and the *sharia* [Shari'a] as the law of our country. Look here, so you can know why I killed him.¹⁰⁶⁹

His assassination of Sadat was thus based on the belief that Sadat had broken God's law and was therefore to be excluded from Islam; killing him then became an obligation for all Muslims. In court the defendants cited Sadat's signing of the Camp David peace accords, which they viewed as capitulation, as the key reason for their actions. Islambouli declared "I by no means committed a base crime. I am proud of what I accomplished with my own hands. You must recognise who is criminal and who is innocent."¹⁰⁷⁰

Kepel notes that Sadat was assassinated at the height of his unpopularity and that "No assassin had ever been more fashionable, while the funeral of his victim, attended by the world's leaders, met with an openly sullen reaction from the

¹⁰⁶⁹ Wilhelm Dietl, *Holy War*, translated by Martha Humphreys (New York : Macmillan, 1984), p. 90. (Dietl, *Holy War*)

¹⁰⁷⁰ *ibid.*, pp. 90-91

Egyptian people.” Indeed, to the Egyptian public Khalid represented the ‘right arm’ of popular will, and was not merely an Islamic militant with links to former members of Takfir wal-Hijra, a radical Islamist group.¹⁰⁷¹ *Takfir* became a key issue in the Islamic world, with some groups coming to believe that replacing un-Islamic rulers was a necessary duty for devout Muslims. The impact of Sadat’s assassination and the issues it highlighted is still being felt today, particularly in the actions of *Daesh*.

Takfir is used by some Muslim majority states to further their own particular policies and achieve various ends; for example, Pakistan’s government has used *takfir* against the Ahmadi sect. Although the sect’s members themselves publicly declare themselves to be Muslim, Pakistan’s Constitution declares Ahmadis to be non-Muslim.¹⁰⁷² As mentioned in Chapter 2, this constitutional position is largely based upon the fact that Ahmadi Muslims do not believe in the “finality of the Prophethood of Muhammad”. Sections 298-B and 298-C of the Pakistan Penal Code allow for the punishment of Ahmadis on the grounds of their ‘blasphemous’ behaviour.¹⁰⁷³ Because the Constitution explicitly defines the term ‘Muslim’ those that do not meet this definition, such as Ahmadis, are considered to be non-Muslim.¹⁰⁷⁴ In the *Zaheeruddin* case (1993), discussed in Chapter 2, Pakistan’s Supreme Court recognised this constitutional approach to the Ahmadi issue. The Pakistan Constitution’s position regarding such groups is thus an example of an authorised declaration, or *takfir*, against a minority community.

¹⁰⁷¹ Gilles Kepel, *The Prophet and Pharaoh: Muslim Extremism in Egypt*, translated by Jon Rothschild (London: Al Saqi Book, 1985), p.192.

¹⁰⁷² Article 260(3)(b) goes on to explicitly state that Ahmadis, and other religious groups are non-Muslims. Pakistan Constitution, art. 260(3)(b).

¹⁰⁷³ Pakistan Penal Code § 295-B, C.

¹⁰⁷⁴ Pakistan. Constitution., Art. 260(3)(a).

There are some case law examples of courts issuing *takfir* against individuals. For example, in a well-known 1995 Egyptian apostasy case the Court of Cassation issued a *takfir* against Abu Zayd based on his supposedly insulting writing. Court decisions were also key to a 1985 case in Sudan against Mahmoud Muhammad Taha, a Sudanese religious thinker and reformer who was also the leader of the Republican Party. Taha's argument was that when read correctly, Islam espoused equality between men and women and also between Muslims and non-Muslims.¹⁰⁷⁵ Furthermore, Taha claimed that the Shari'a was no longer able to meet the needs of modern Muslims.¹⁰⁷⁶ Earlier opposition to Taha's ideas had led in 1968 to he and his followers being declared *kafir*, in other words heathen or non-Muslim, and to Taha being convicted of apostasy. In once again convicting Taha of apostasy in 1985 the Court relied almost exclusively on two points, firstly upon the same 1968 ruling by a *Shari'a* Court in Khartoum,¹⁰⁷⁷ and secondly upon extra-judicial declarations of Taha's apostasy made by two foreign institutions, Al-Azhar University in Egypt and the Islamic World League Organization in Mecca, Saudi Arabia, in 1972 and 1975 respectively.¹⁰⁷⁸ Islamic conservatives both in Sudan and elsewhere had long despised Taha's liberalism, but nevertheless even in 1985 there was still no Sudanese law in place that criminalised apostasy,¹⁰⁷⁹ explaining why

¹⁰⁷⁵ Mahmoud Mohamed Taha, *The Second Message of Islam* translation and introduction by Abdullahi Ahmed An-Na'im (Syracuse, N.Y. : Syracuse U.P., 1987), pp.62, 64, 139. (Taha, *The Second Message of Islam*)

¹⁰⁷⁶ Mohamed A. Mahmoud, *Quest for Divinity: a Critical Examination of the Thought of Mahmud Muhammad Taha* (Syracuse, N.Y.: Syracuse University Press, 2007), p. 28. (Mahmoud, *Quest for divinity*)
See also Taha, *The Second Message of Islam*, p. 37.

¹⁰⁷⁷ *ibid.*, p. 22.

¹⁰⁷⁸ *ibid.*, p. 25; An-Na'im, "The Islamic Law of Apostasy", p. 209; Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* 4th ed (Boulder : Westview Press, 2007), p.186.

¹⁰⁷⁹ Mahmoud, *Quest for divinity*, p. 28; Ann Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* 4th ed (Boulder: Westview Press, 2007), p.186.

the prosecution depended heavily upon the earlier court conviction and the foreign declarations.¹⁰⁸⁰

5.2 The origin and evolution of *takfir*

This section analyses the origin and evolution of *takfir* as a concept, with particular attention paid to the historical events and scholars that shaped its development. *Takfir* can be traced back to the 7th century, just after the Prophet's time. The so-called 'Apostasy War', led by the first Caliph Abu Bakr, might seem to have featured examples of *takfir* but actually the Caliph was seeking to quash rebellions in order to hold Islamic society together, and therefore as previously mentioned in Chapter 1 it is difficult to consider these events as being related to *takfir*. Thus, the origins of *takfir* can be more accurately traced back to the age of the fourth Caliph Ali, when it was made use of by the Khawarij group.

5.2.1 The Khawarij

The term 'Khawarij' literally means dissenters,¹⁰⁸¹ and was used as the name for what is thought to be the oldest Islamic sect.¹⁰⁸² The origins of the Khawarij were thus as nonconformists or dissidents; today they are considered by many to have been a seditious group and the term has negative connotations in the Muslim world. Klein notes that "every one who rebels against the *Imam*, lawfully appointed by the Muslim nation, is called a Khawarij".¹⁰⁸³ The turmoil of the Khawarij movement can be traced back to the Prophet himself, who considered the Khawarij to be false

¹⁰⁸⁰ Declan O'Sullivan, "The Death Sentence for Mahmud Muhammad Taha: Misuse of the Sudanese Legal System and Islamic *Shariah*" 15 *The International Journal of Human Rights* (2001), p.56.

¹⁰⁸¹ Lammens, *Beliefs and Institutions*, p. 141.

¹⁰⁸² *ibid.*

¹⁰⁸³ Frederick Augustus Klein, *The Religion of Islam* (London: Curzon Press, 1971), p. 231. (Klein, *The religion of Islam*)

Muslims;¹⁰⁸⁴ he noted that “They [Khawarij] will kill the Muslims but will leave the idolaters”,¹⁰⁸⁵ that they “will desert Islam (go out of religion) as an arrow goes through the victim’s body”¹⁰⁸⁶ and that they “are the most evil of people.”¹⁰⁸⁷

During the fourth Caliph ‘Ali’s reign the Khawarij and Shi’a movements split from the orthodox Sunni majority.¹⁰⁸⁸ Al-Tabari notes that the first Khawarij were the 12,000 men who rebelled against ‘Ali after fighting with him at the battle of Siffin (657 C.E.).¹⁰⁸⁹ The origins of *takfir* thus lie in this Muslim civil war; indeed, the Khawarij revolt against the Caliph represented the first time in Islamic history that a heterodox group had challenged Muslim state power.¹⁰⁹⁰ The Khawarij argued that ‘Ali had not followed divine judgment (*hukm*) but human judgment, which was clearly *kufir*, and thus declared a *takfir* upon ‘Ali and his fellow arbiters.¹⁰⁹¹ The Khawarij reportedly stated that

Enemies of God, you [the Caliph ‘Ali] have fallen short in God’s affair and you have appointed arbitrators.¹⁰⁹²

The above declaration was the first time in Islamic history that one Islamic sect had issued a *takfir* against another merely on the grounds of their different views. The Khawarij abandoned ‘Ali when he turned to arbitration, as this demonstrated his willingness to follow the judgement of man; for the Khawarij, only God could

¹⁰⁸⁴ Muhammad Tahir-ul-Qadri; foreword by John L. Esposito; introduction by Joel S. Hayward. *Fatwa on terrorism and suicide bombings*, (London: Minhaj-ul-Quran International, 2010), p. 266. (Tahir-ul-Qadri *Fatwa on terrorism and suicide bombings*)

¹⁰⁸⁵ *Sahih Al-Bukhari*, vol. 4., no 3344, pp. 339-340; *Sahih Muslim*, Translated by Nasiruddin al-Khattab, (Riyadh: Darussalam, 2007) volume 3, no. 2451, pp. 114-115.

¹⁰⁸⁶ *Sahih Al-Bukhari*, vol. 8, no, 6163, pp. 106-107; *Sahih Muslim*, vol. 3, no. 2470, p. 128.

¹⁰⁸⁷ *Sahih Muslim*, vol. 3, no. 2457, pp. 120.

¹⁰⁸⁸ Schacht, *An Introduction to Islamic Law*, p. 16.

¹⁰⁸⁹ Al-Tabari, *The History of al-Tabari*, vol. 17, p. 98; Klein, *The religion of Islam*, p. 231.

¹⁰⁹⁰ Tahir-ul-Qadri *Fatwa on terrorism and suicide bombings*, p. 269.

¹⁰⁹¹ Izutsu, *The Concept of Belief in Islamic Theology*, pp. 11-12; Al-Tabari, *The History of al-Tabari*, vol. 17, p.113.

¹⁰⁹² Al-Tabari, *The History of al-Tabari*, vol. 17, p. 98,

judge such things. Furthermore, the Khawarij contended that anyone who did not follow the judgement of God should be punished by death:

You [the Caliph ‘Ali] have appointed men as arbitrators (*hakams*) in the affairs of God, but God has effected His precept (*hukm*) regarding Mu‘awiyah [founder of the Umayyad Dynasty of the Caliphate; r.661-680] and his party – that they should be killed or repent.¹⁰⁹³

The Khawarij argued that true Muslims only needed to follow the Qur’an, and that Allah’s decisions are written there and there alone; rulers who do not follow God’s judgement are apostates. In a letter to Simak b. ‘Ubayd (the governor of Ctesiphon), the Khawarij Al-Mustawrid b. ‘Ullifah, referred to ‘Ali and ‘Uthman’s supposed apostasy:

I also call upon you to disavow ‘Uthman and ‘Ali for their innovation in religion [*ihdath fi al-din*] and their abandonment of the judgement of the Book. If you accept, you will have come to your senses; and if you do not, we will have run out of excuses for you, and we will permit war against you....¹⁰⁹⁴

This *takfir* followed a simple principle, namely that anyone committing a sin or disobeying God should be condemned as an unbeliever (*kafir*) and excommunicated.¹⁰⁹⁵ The Khawarij claimed that only the word of God, in the form of the Qur’an, should shape political decisions;¹⁰⁹⁶ indeed a Qur’anic slogan, *la hukma illa lillah* (“Authority belongs to God alone”), constituted the foundation of their theology,¹⁰⁹⁷ and the same message could be found in Qur’an 6:57,¹⁰⁹⁸

¹⁰⁹³ *ibid.*, p. 101.

¹⁰⁹⁴ Al-Tabari, *The History of al-Tabari*, vol. 18, p. 46.

¹⁰⁹⁵ Izutsu, *The Concept of Belief in Islamic Theology*, p. 12. See also: *The Sea of Precious Virtues (Bahr al-Fava'id)*, p. 106.

¹⁰⁹⁶ Watt, *Islamic Political Thought*, p. 54.

¹⁰⁹⁷ *ibid.*; Al-Tabari, *The History of al-Tabari* vol. 17, pp. 98, 100, 113.

¹⁰⁹⁸ [Qur’an 6:57]

The decision is only for Allah, He declares the truth, and He is the Best of judges.

12:40¹⁰⁹⁹ and 12:67.¹¹⁰⁰ The Khawarij cited a precedent for their actions, namely the murder of the third caliph, ‘Uthman. This murder had been justified by declaring that ‘Uthman had “broken God’s law by not inflicting a penalty prescribed in the Qur’an”,¹¹⁰¹ and that by breaking this law he was by default excluded from the community and his murder by any Muslim rendered lawful.¹¹⁰²

Islam stresses the duty incumbent upon all Muslims to obey their ruler (the unwritten assumption being that the ruler too is a Muslim),¹¹⁰³ but the Khawarij argued that this duty was replaced by a duty to disobey any ruler contravening God’s law¹¹⁰⁴ and quoted the Prophet as support for their position: “There is no obedience in sin” and “Do not obey a creature against his creator”.¹¹⁰⁵ They saw themselves as the only true Muslims and branded everyone else as unbelievers, including all other Muslims; as a result, killing such people was not seen as sinful.¹¹⁰⁶ Abu Mansur al-Baghdadi (429 AH/1037 CE) noted in his *Al-Fark Bain al-Firak* that

The Khawarij also declare ‘Ali and his sons, as well as ibn ‘Abbas and Abu Ayyub al-Ansari to be infidels. They also brand ‘Uthman, ‘A’ishia, Talha and al-Zubair as unbelievers, and everyone who did not secede from ‘Ali and Mu‘awiya after the arbitration. They call any sinner in the community an infidel.

¹⁰⁹⁹ [Qur’an 12:40]

If not Him, ye worship nothing but names which ye have named,- ye and your fathers,- for which Allah hath sent down no authority: the command is for none but Allah: He hath commanded that ye worship none but Him: that is the right religion, but most men understand not..

¹¹⁰⁰ [Qur’an 12:67]

Not that I can profit you aught against Allah (with my advice): None can command except Allah: On Him do I put my trust: and let all that trust put their trust on Him.

¹¹⁰¹ Ibn Dhakwan, *The Epistle of Salim Ibn Dhakwan*, p.81 (no. 45).

¹¹⁰² Watt, *Islamic Political Thought*, pp.54-55.

¹¹⁰³ Bernard Lewis, *The Crisis of Islam: Holy War and Unholy Terror* (London: Phoenix, 2004), pp.122-123. (Lewis, *The Crisis of Islam*)

¹¹⁰⁴ *ibid.*, p.123.

¹¹⁰⁵ *ibid.*

¹¹⁰⁶ Watt, *Islamic Political Thought*, pp. 55-56.

But he who believes in branding most of the Companions as infidels cannot be on the right path trodden by them.¹¹⁰⁷

Perhaps the most notable aspect of the Khawarij introduction of the concept of *takfir* was that they believed that killing infidel rulers was a duty for all Muslims and that Muslims who killed apostates were not to be punished. By declaring apostate the Fourth Caliph ‘Ali the Khawarij felt they were doing their duty as devout Muslims, as all those accepting arbitration were by definition *kafirs*.¹¹⁰⁸ Tahir-ul-Qadri notes that their fanaticism soon resulted in “extremist proclamations and terrorist activities”, and that they “began to brand everyone infidel or *kafir* and outside the law who did not accept their point of view”.¹¹⁰⁹ The Khawarij thus not only introduced *takfir* but also extrajudicial killings of fellow Muslims, in other words punishment by members of society rather than by the state; extra-judicial killing remains a huge factor in many contemporary instances of *takfir*.

5.2.2 Ibn Taymiyya

Ibn Taymiyya is a key figure in the development of *takfir*. Although the *takfir* concept had been known for about six hundred years, Ibn Taymiyya developed new understandings of it by differentiating man-made law from divine law, and labelling those who lived by the former ‘unbelievers’. One such man-made law was

¹¹⁰⁷ Abū-Mansūr `Abd-al-Kāhir ibn Tāhir al-Baghdādī, *Moslem Schisms and Sects (al-Farq bain al-firak) being the History of the Various Philosophic Systems Developed in Islam*, Translated from the Arabic with Introduction and notes by Abraham S. Halkin (Tel-Aviv, Palestine Publishing, 1935), part2, p. 168.

¹¹⁰⁸ Al-Tabari, *The History of al-Tabari* vol. 17, p. 100.

¹¹⁰⁹ Tauqir Mohammad Khan; co-editor, M. H. Syed, *Jurisprudence in Islam* (New Delhi: Pentagon Press, 2007), p. 229.

the traditional Mongol *Yasa* code developed, according to “his reason and his own opinion”, by Genghis Khan himself, the founder of the Mongol empire. This man-made legal innovation enabled Ibn Taymiyya to argue that the Mongols had strayed from divine law;¹¹¹⁰ although the Mongols themselves claimed to be Muslim, Ibn Taymiyya declared them non-Muslims “because of their irreligious behaviour and their failure to enforce the Shari’a”.¹¹¹¹

He has caused innovated: his way of the Age of Ignorance (*sunnat al-jahiliyya*) and his infidel law (*shari’ati-hi al-kufriyya*).¹¹¹²

Ibn Taymiyya classified the *kuffar* (unbelievers) into several groups. One the groups was those who belonged to another religion, such as Christianity. Peace agreements could be made with members of this group.¹¹¹³ Another group were the *murtadd* (apostates) such as the Persians and Romans, as well as other Arab tribes, who had returned to their earlier infidel ways. No peace agreements could be made with these people and no security given to them; Taymiyya declared that fighting them was obligatory if they did not return to Islam.¹¹¹⁴ The third group comprised those who claimed to belong to Islam but who did not perform the duties and

¹¹¹⁰ Denise Aigle, *Mongol empire between myth and reality : studies in anthropological history* (Leiden: Brill, 2014), p. 301. (Aigle, *Mongol empire between myth and reality*)

¹¹¹¹ Ibn Taymiyyah, *The Religious and Moral Doctrine of Jihad* (Birmingham, England: Maktabah al Ansaar Publications, 2001), p. 12 (Ibn Taymiyya, *The Religious and Moral Doctrine of Jihad*) Rachel Scott, “An ‘official’ Islamic response to the Egyptian al-jihad movement”, 8 *Journal of Political Ideologies* (2003): 39-61, p. 44. See also: Johannes J.G. Jansen, “Ibn Taymiyyah and the Thirteenth Century: A Formative Period of Modern Muslim Radicalism”, 5/6 *Quaderni di Studi Arabi* (1987):391-396, p.394 (Jansen, “Ibn Taymiyyah and the Thirteenth Century”); See also: Majmu Fatawa 28:530 in Denise Aigle. “The Mongol Invasions of Bilad al-Sham by Ghazan Khan and Ibn Taymiyah’s Three “Anti-Mongol” Fatwas” *Mamluk Studies Review*11 (2007): 89-120, p. 96. “...the rules of the associationists - such as the *yāsā* of Chinggis Khan, king of the polytheists - is most gravely contrary to the religion of Islam’. ‘Ibn Taymiyya held that the Mongols were still following their own customary laws, known as *Yasa* or *Yasiq*, rendering their conversion to Islam effectively invalid. He argued that by not observing Shari’a law they could not be classed as Muslims and were apostate.”

¹¹¹² Ibn Taymiyyah cited from Aigle, *Mongol Empire Between Myth and Reality*, p. 301.

¹¹¹³ Ibn Taymiyya, *The Religious and Moral Doctrine of Jihad*, p. 8.

¹¹¹⁴ *ibid.*, p. 9.

practices of Islam, such as *salah*, *zakat*, and *hajji*; again, Muslims were obliged to fight them. The final group was seen by Taymiyya as the most evil of all. These people were seen as infidels who had “reverted from Islam because they entered Islam without following its Shari’a”. Taymiyya argued that these groups should be fought until they returned to Islam.¹¹¹⁵ Ibn Taymiyya’s aggressive approach to *kuffar* (unbelievers) is critically important for the evolution of the concept of *takfir* and indeed for all subsequent Islamic history, because not only did he consider the Mongols non-Muslim for not following Shari’a law, he also urged all Muslims to fight their Mongol rulers:

All Muslim Imams command to fight them. The Mongols and their likes are even more rebellious against the laws of Islam than these *Khawarij* [or any other group]. Whosoever doubts whether they should be fought is most ignorant of the religion of Islam. Since fighting them is obligatory they have to be fought, even though there are amongst them some who have been forced to join their ranks.¹¹¹⁶

Ibn Taymiyya’s approach has greatly affected contemporary Islamic extremism. His words are still cited today by non-state actors, such as Muslim extremists, as justification for their *takfir* against Muslim governments or groups. Abd al-Salam Faraj, for example, leader of the Cairo branch of *al-jihad* that assassinated President Sadat in 1981, cited Ibn Taymiyya’s *fatwa* condemning Mongol rule as justification for *al-jihad*’s actions. Faraj’s argument was that the Mongols’ customary laws were less sinful than those laws he saw as having been imposed upon Islamic nations by the West; these latter he saw as having no connection with Islam, or indeed with any other religion of the book.¹¹¹⁷ Just as Ibn Taymiyya had proclaimed a *fatwa*

¹¹¹⁵ *ibid.*, pp. 9-10.

¹¹¹⁶ Jansen, “Ibn Taymiyyah and the Thirteenth Century”, p.395.

¹¹¹⁷ Johannes J. G. Jansen, *The Neglected Duty: The Creed of Sadat's Assassins and Islamic Resurgence in the Middle East* (New York : Macmillan, 1986), p. 172. (Jansen, *The Neglected Duty*)

against a regime he believed was governing by non-Islamic principles, so did Faraj order *jihad* against a regime that employed a legal system based at least in part on Western legislation.¹¹¹⁸

The Rulers of this age are in apostasy from Islam. They were raised at the tables of imperialism, be it Crusaderism, or Communism, or Zionism. They carry nothing from Islam but their names, even though they pray and fast and claim (*idda'a*) to be Muslim.¹¹¹⁹

To give a more recent example, Boko Haram, a Nigerian extremist Islamic movement, has also referred to the importance of Ibn Taymiyya's writings.¹¹²⁰ Similarly, *Daesh* has relied heavily on his words to justify their actions. For example, in the video in which the Jordanian Air Force pilot Muath al-Kaseasbeh was burned to death, *Daesh* claimed that

If in public exemplary punishment (*tamthil*) there is a call to [the unbelievers] to believe or a deterrence for them from hostility, then it is here [a matter of] carrying out the prescribed punishments and legal *jihad*.¹¹²¹

5.2.3 Muhammad Ibn 'Abd al-Wahhab

Muhammad Ibn 'Abd al-Wahhab (d. 1792 CE), the 18th century CE founder of the Wahhabi doctrine, is a key person in the development of the concept of *takfir*. Al-Wahhab sought to purify the Islamic community of his day, asking the whole of Muslim society to return to the ways of the Prophet's era and the first generations of

¹¹¹⁸ Gilles Kepel, *Muslim Extremism in Egypt: The Prophet & Pharaoh*, translated from the French by Jon Rothschild (Berkeley, CA: University of California Press, 1985), p. 194.

¹¹¹⁹ "Translation of Muhammad 'Abd al-Salam Faraj's Text Entitled *Al-Faridah al-Gha'ibah*" (§25) The Rulers of the Muslims Today are in Apostasy from Islam Jansen, *The Neglected Duty*, p. 169.

¹¹²⁰ Johnson, Toni (2011-12-27). "Backgrounder - Boko Haram". *Council of Foreign Relations* (5 March 2015), <<http://www.cfr.org/nigeria/boko-haram/p25739>> accessed 29 June 2016.

¹¹²¹ Jon Hoover, "How to read the medieval scholar the Islamic State used to justify al-Kasasbeh murder", *The Conversation* (6th February 2015), <<http://theconversation.com/how-to-read-the-medieval-scholar-the-islamic-state-used-to-justify-al-kasasbeh-murder-37293>> accessed 29 June 2016.

Muslims.¹¹²² He saw the worship of saints' graves, as well as of stones and sacred trees, as the actions of *shirk* (polytheists):¹¹²³

That the Prophet came to people who had differences in their (objects of) worship: from them were the worshippers of the angels. And from them were the worshippers of the prophets and the pious. And from them were the worshippers of the trees and the stones. And from them were the worshippers of the sun and the moon. But the Messenger of Allah fought them all, and did not consider the differences between them.¹¹²⁴

Such 'polytheism' was seen by al-Wahhab as a *jahilliya* custom.¹¹²⁵ According to the Encyclopaedia of the Qur'an, *jahiliyya* can be translated into English as 'The Age of Ignorance'.¹¹²⁶ It is used by Muslims to refer to the era immediately preceding Muhammad, a period seen as having been ignorant of the divine truth.¹¹²⁷ The Wahhabis use of *jahilliya* constituted a new approach, since they employed it not only to refer to the age before Islam, but more generally to imply "ignorance of or disregard for the Right Way laid down by God for the followers of Islam".¹¹²⁸

Al-Wahhab introduced a new type of *takfir*. He rejected any traditions that originated after the first generation of Islam (after the Prophet and His Companions)¹¹²⁹ and argued that *shirk* in his time was far more dangerous than the

¹¹²² George Rentz "The Wahhabis" in A.J. Arberry, ed., *Religion in the Middle East : three religions in concord and conflict* (Cambridge : University Press, 1969), vol. 2, p. 272.

¹¹²³ Bernard Haykel, *Revival and reform in Islam: the legacy of Muhammad al-Shawkānī* (Cambridge : Cambridge University Press, 2003), p. 136 (Haykel, *Revival and reform in Islam*)

The zeal with which the Wahhabis attacked the practice of visiting the tombs of saints....

¹¹²⁴ Muhammad ibn 'Abd al-Wahhāb, *An explanation of Muhammad ibn 'Abd al-Wahhāb's four principles of shirk*, translation and commentary by Abu Ammaar Yasir Qadhi. (Birmingham, UK : Al-Hidaayah , 2002), p. 52 (Al-Wahhāb, *An explanation*)

¹¹²⁵ George S. Rentz, *The Birth of the Islamic Reform Movement in Saudi Arabia; Muhammad ibn 'Abd al-Wahhab (1703/4-1792) and the Beginnings of Unitarian Empire in Arabia*, edited with an Introduction by William Facey (London : Arabian Publishing , 2005), p. 19 (Rentz, *The birth of the Islamic Reform Movement in Saudi Arabia*); Hourani, *Arabic Thought in the Liberal Age*, p. 37.

¹¹²⁶ *Encyclopaedia of the Qur'an*, p. 37.

¹¹²⁷ *ibid.*

¹¹²⁸ Rentz, *The Birth of the Islamic Reform Movement in Saudi Arabia*, p. 19.

¹¹²⁹ Edward Sell, *The Faith of Islam 2nd ed* (London: Kegan Paul, Trench, Trübner, & co., ltd, 1896), p. 16, See

shirk of the Prophet's era,¹¹³⁰ as "those whom the Prophet fought were more intelligent and committed a lesser type of *shirk* than the people of our own times."¹¹³¹ During the earlier period, al-Wahhab argued, polytheists such as pagan Arabs "would call out to other than Allah only at times of ease, as for times of distress, then they would only call out to Allah alone, and leave calling out to their leaders",¹¹³² but in al-Wahhab's time the polytheists "call out to people besides Allah who are the most wicked and evil people of mankind."¹¹³³ Therefore, Al-Wahhab preached that the Muslim community was guilty of unbelief and idolatry, and that true Muslims must purify Islam by prohibiting all traditions that evolved after the first generation of Islam.

5.2.4 Sayyid Qutb

Sayyid Qutb was a leading member of the Muslim Brotherhood in Egypt who brought *takfir* into the twentieth century by combining it with the concept of *jahiliyyah*. Qutb re-applied the well-known Islamic notion of *jahiliyyah* to contemporary Muslim society, as al-Wahhab had done, noting how it differed from the ignorance of pre-Islamic times. Contemporary *jahiliyyah* consisted of man believing that he and not Allah had the right and the ability to control his own destiny, for example by passing laws and creating values. Man's rebellion had resulted in his oppression, whether under capitalism or communism; his own

also Klein, *The religion of Islam*, p. 237.

¹¹³⁰ Al-Wahhāb, *An explanation*, p. 155.

¹¹³¹ *ibid.*, p. 165.

¹¹³² *ibid.*, p. 157.

¹¹³³ *ibid.*, p. 162.

actions had robbed him of his God-given dignity.¹¹³⁴ Deviation from Allah and the resultant transfer of sovereignty had made some men lords over others¹¹³⁵ and led to man's ruin and downfall.¹¹³⁶ Qutb argued that all contemporary Muslim societies could be classed as being ignorant of the divine truth¹¹³⁷ and that despite all the comforts and technologies of modern life, we nevertheless are living in a world characterised by *jahiliyyah*.¹¹³⁸

Qutb also criticised governments for their ignorance, as he viewed any government not based on Islamic law as *jahiliyyah* even if its members professed Islam and seemed to be practising Islamic customs:

Islam cannot accept any mixing with *jahiliyyah*, either in its concept or in the modes of living which are derived from this concept. Either Islam will remain, or *jahiliyyah*: Islam cannot accept or agree to a situation which is half-Islam and half-*jahiliyyah*. In this respect, Islam's stand is very clear. It says that the truth is one and cannot be divided; if it is not the truth, then it must be falsehood. The mixing and coexistence of the truth and falsehood is impossible.¹¹³⁹

Modern governments were thus condemned by Qutb as being characterised by ignorance and as being profoundly un-Islamic. The Egyptian government and others could be likened to pre-Muslim Arabia in their disregard for Islam, and so could rightly be referred to as *jahiliyyah*.¹¹⁴⁰

Furthermore, he saw *fiqh* (jurisprudence) as mere human opinion and not as part of Shari'a itself, which was not and could not be subject to scholarly interpretations or

¹¹³⁴ Syed Qutb, *Milestones*, edited by A.B. al-Mehri (Birmingham: Maktabah Booksellers and Publishers 2006), p. 27. (Qutb, *Milestones*)

¹¹³⁵ *ibid.*

¹¹³⁶ *ibid.*, p. 146.

¹¹³⁷ *ibid.*, pp. 26-27.

¹¹³⁸ *ibid.*, pp. 26-27.

¹¹³⁹ *ibid.*, p. 146.

¹¹⁴⁰ *ibid.*, p. 11.

inferences.¹¹⁴¹ He believed that Shari'a constituted the explicit ordinances and directives, known as *nusus*, of the Qur'an and the *Sunna* in their entirety. These, and only these, constitute Islam's primary and constant law in the form of the Shari'a of *hakimiyyah* (Sovereignty of God). Qutb declared that this was the only system available to Muslims; only one legal code and approach could be recognised as real Islam, and any other system was a *jahili* (ignorant) system.¹¹⁴² All judgements must be based on what God has revealed, as to make judgements on any other basis would be "tantamount to disbelief, wrongdoing and transgression".¹¹⁴³ For Qutb, the logic was clear. As there was only one God, who was the creator and owner of all, there was perforce "one judge, legislator and master commanding all authority" and only one legal code and one approach. This in turn implied "either obedience and judgement in accordance with God's law, which is the prerequisite of faith, or there can be disobedience, rebellion and judgement on some other basis, which is the mark of disbelief, wrongdoing and transgression".¹¹⁴⁴ A key Qur'anic verse, used by Qutb to support his claims of ignorance, was Qur'an 5:44:

If any do fail to judge by (the light of) what Allah hath revealed, they are (no better than) Unbelievers.

According to Qutb this verse orders Muslims to follow God's law and no other, and makes clear that anyone basing their judgments on something other than what has been revealed by God have by definition rejected God's universal pre-eminence. Even though they may see themselves as Muslims their actions reveal them to not

¹¹⁴¹ Sayed Khatab, "Hakimiyyah and Jahiliyyah in the Thought of Sayyid Qutb", 38 *Middle Eastern Studies* (2002): 145-170, p. 163. (Khatab, *Hakimiyyah and Jahiliyyah*)

¹¹⁴² *ibid.*, p. 163.

¹¹⁴³ Sayyid Qutb, *In the Shade of the Qur'an = Fī zilāl al-Qur'ān* (Markfield : Islamic Foundation, 2001) Vol. 4, p. 4 (Qutb, *In the Shade of the Qur'an*).

¹¹⁴⁴ *ibid.*

be, and thus Qutb argued that the Qur'an views them as unbelievers and wrongdoers.¹¹⁴⁵ He thus argued that the "laws of Allah [had become] suspended on earth"¹¹⁴⁶ and all contemporary Muslim society was un-Islamic and illegal.¹¹⁴⁷ Qutb's *jahiliyyah*-based *takfir* against the Muslim governments of his day has become one of the theoretical cornerstones for contemporary militant groups.

5.2.5 Abul Ala Maududi

The Indian/Pakistani thinker Abul Ala Maududi founded the political organisation Jamaat-e-Islami in 1941, in British India. Maududi condemned Muslim majority states for borrowing their constitutions, laws and principles from nonbelievers, or *kafirs*, arguing that in some supposedly independent states Islamic law had been reduced to mere personal law, or even to nothing at all.¹¹⁴⁸ His writing and speeches, in which he referred to 'jihad', have become highly influential. It was Maududi who coined the term 'Islamic State' to describe what he saw as Muslims' mission and the form of government that they must aspire to.¹¹⁴⁹ He criticised people's behaviour, arguing that many Muslims followed other humans rather than God:

...your head which did not bow before anybody except Allah is now bowed before human beings.¹¹⁵⁰

¹¹⁴⁵ Qutb, *In the Shade of the Qur'an*, p. 4.

¹¹⁴⁶ Qutb, *Milestones*, p.25.

¹¹⁴⁷ *ibid*, 95.

¹¹⁴⁸ Abul Al'a Maududi, *Witnesses Unto Mankind: The Purpose and Duty of the Muslim*, Trans. Khurram Murad (Leicester: Islamic Foundation, 1986), p. 36.

¹¹⁴⁹ Abul Ala Maududi, *Jihad in Islam* (Beirut: The Holy Koran Publishing House 2006), p.22; Abu al-A'la Maududi, *The Islamic Law and Constitution*, trans. Khurshid Ahmad (Lahore: Islamic Publications Ltd, 1960), 144-145.

¹¹⁵⁰ Abul A'la Maududi, *Khutabat = Fundamentals of Islam* 2nd ed, (Chicago: Kazi Publications, 1977), p. 12.

Maududi claimed that human agency cannot possess real legal and political sovereignty as its powers are circumscribed by supreme law, which is unalterable by man.¹¹⁵¹

Maududi's model Islamic state was based on three idealised principles: *tawhid* (unity of God), *risalat* (prophethood) and *khilafat* (viceregency).¹¹⁵² Maududi saw *tawhid* as meaning that sovereignty is Allah's alone, and that his will cannot be challenged or questioned.¹¹⁵³ This principle of the Oneness of God overrules any legal or political sovereignty claimed by human beings.¹¹⁵⁴ Maududi wrote that *risalat*, or prophethood, was the medium through which the Law of God was communicated to man and therefore represents the Shari'a, the Qur'an and *Sunnah*, which are the primary sources of reference for Islam and for Muslims, but also the interpretation and embodiment of these works by Muhammed in his role as God's final messenger.¹¹⁵⁵

The third key principle deemed necessary by Maududi for the institution of an Islamic state is *khilafat*. This pointedly refers to the *viceregency* of man, not regency, thus differentiating the Islamic conception of the state from that of Western democracy. According to Qur'an 24:55 this viceregency is the collective right of all good Muslims, that is, those who believe in God's sovereignty over them and over all man-made laws.¹¹⁵⁶ Democracy within Islam is thus framed or affected by the belief in God's final sovereignty, whereas in most western

¹¹⁵¹ Abu Al'a Maududi, *The Islamic Law and Constitution* 2nd ed, translated by Khurshid Ahmad (Lahore: Islamic Publications Ltd, 1960), p. 77 (Maududi, *The Islamic Law and Constitution*)

¹¹⁵² Abu al-A'la al-Mawdudi, *Islamic Way of Life* (faisal al otaibi, 1996), p. 48

¹¹⁵³ *ibid.*

¹¹⁵⁴ *ibid.*, p. 49

¹¹⁵⁵ *ibid.*, pp. 49-50

¹¹⁵⁶ Maududi, *The Islamic Law and Constitution*, p. 235.

democracies, the elected assemblies or parliaments are the highest authorities. Western democratic states enjoy absolute authority, but in Muslim ‘democracies’ man’s writ is prescribed by the Divine Code as embodied by the *khilafat*.¹¹⁵⁷

In Maududi’s idealised Islamic model all of a state’s people are responsible for its administration and thus have a measure of agency,¹¹⁵⁸ although they have no sovereignty, which remains with God.¹¹⁵⁹ He stated that

No Muslim has any right to decide it on the basis of his own opinion, and that those who do not decide in accordance with the Divine Code, are Unbelievers.¹¹⁶⁰

Western states, by contrast, vest absolute sovereignty with their people via the political philosophy of democracy; governments come and go through the will of ordinary people as expressed at the ballot box.¹¹⁶¹ Maududi cited Qur’anic passages to support his arguments, claiming that such verses as 12:40, 3:154, 15:116 and 5:44 support his call for an Islamic state,¹¹⁶² and that such verses as 4:64, 6:90 and 3:79 clearly prove that the acceptance and admission of the *de jure* sovereignty of God is *Islam* and its denial is *kufr*.¹¹⁶³

As mentioned earlier Maududi coined the term ‘Islamic state’ and his ideas are often cited by extremist leaders, such as Abu Bakr al-Baghdadi, leader of *Daesh*. Al-Baghdadi referred to Maududi’s notion of a pan-Islamic state, with himself installed as Caliph, when he spoke at Mosul’s Great Mosque in 2014.¹¹⁶⁴

¹¹⁵⁷ *ibid.*

¹¹⁵⁸ *ibid.*, p. 139; p, 218.

¹¹⁵⁹ *ibid.*, p. 146

¹¹⁶⁰ *ibid.*, p, 221.

¹¹⁶¹ *ibid.*, p, 147.

¹¹⁶² *ibid.*, p, 145.

¹¹⁶³ *ibid.*, p, 217.

¹¹⁶⁴ Kevin McDonald, “Islamic State’s ‘medieval’ ideology owes a lot to revolutionary France “, The Conversation (8 September, 2014), <<https://theconversation.com/islamic-states-medieval-ideology-owes-a-lot-to-revolutionary-france-31206>>ac

Maududi's ideas have also affected the contemporary extremist group Boko Haram. In 2012 it kidnapped 200 girls from schools in Nigeria, its leader, Abubakar Shekau, has stated that "Allah has instructed me to sell them [kidnapped women]. They are his property and I will carry out his instructions."¹¹⁶⁵ This action was justified by referring to Maududi's interpretation of a specific Qur'anic verse:

Also (prohibited are) women already married, except those whom your right hands possess: Thus hath Allah ordained (Prohibitions) against you: Except for these, all others are lawful, provided ye seek (them in marriage) with gifts from your property, - desiring chastity, not lust, seeing that ye derive benefit from them, give them their dowers (at least) as prescribed; but if, after a dower is prescribed, agree Mutually (to vary it), there is no blame on you, and Allah is All-knowing, All-wise. [Qur'an 4:24]

Maududi noted of this verse that "This is Allah's decree and it is binding upon you."¹¹⁶⁶ The leader of Boko Haram, Abubakar Shekau, used this verse to justify the rape of non-Muslim female prisoners-of-war.¹¹⁶⁷

So what we have seen in the contemporary Islamic World is a series of cases in which extremist groups claim that in order to protect the Sovereignty of God, or *hakimiya* as Maududi termed it, they are entitled not only to persecute religious minorities but also to crush groups who they see as deviating from Islamic orthodoxy.¹¹⁶⁸

cessed 27 June 2016.

¹¹⁶⁵ Tarek Fatah, "Muslims must denounce Nigeria kidnap outrage", *Toronto Sun* (6 May 2014), <<http://www.torontosun.com/2014/05/06/muslims-must-denounce-nigerian-kidnap-outrage>>accessed 27 June 2016.

¹¹⁶⁶ Abul A'lā Mawdūdī, *Towards understanding the Qur'ān*, translated and edited by Zafar Ishaq Ansari (Leicester : The Islamic Foundation, 1989), Vol. 2 , p. 26

¹¹⁶⁷ Tarek Fatah "Muslim must denounce Nigeria kidnap outrage" (6 May, 2014) <<http://www.torontosun.com/2014/05/06/muslims-must-denounce-nigerian-kidnap-outrage>>accessed 27 June 2016.

¹¹⁶⁸ Maududi, *The Islamic Law and Constitution*, p. 212; MohammadAhmad, "ISIS and Pakistan" (21 October 2014), <<http://www.dailytimes.com.pk/opinion/21-Oct-2014/isis-and-pakistan>>accessed 27 June

5.2.6 Modern *takfiri* groups

This section thus examines how Muslim-majority states and two of the largest *takfiri* groups, *Daesh* and Boko Haram, have engaged with the concept of *takfir*. Their *takfir* are of particular interest because not only have they criticised their fellow Muslims in the Middle East, but also Muslims in the west.

Although *takfir* have been around a long time, modern declarations are potentially more sophisticated and well organised militant groups and terrorist attacks. At the same time the scholarly justification for *takfir* has developed a new tone. For example, in the case of President Sadat's assassination, Muhammad abd-al-Salam Faraj, theorist and pamphleteer (*Al-Faridah al-Gha'ibah* – 'The Neglected Duty'), stated that

The laws by which the Muslims are ruled today are the laws of unbelief, they are actually codes of law that were made by infidels who then subjected the Muslims to these (codes)...The basis of the existence of imperialism in the lands of Islam is these self-same rulers. To begin with the struggle against imperialism is a work which is neither glorious nor useful, and it is only a waste of time. It is our duty to concentrate on our Islamic cause, and that is the establishment first of all of God's law in our own country and causing the word of God to prevail. There is no doubt that the first battlefield of the *jihad* is the extirpation of these infidel leaderships and their replacement by a perfect Islamic order...¹¹⁶⁹

As in Ibn Taymiyya's *takfir*, Faraj called upon his fellow Muslims to fight and destroy the government. This approach continues today in the *takfir* issued by extremist groups, of whom the most notable contemporary group is *Daesh*. They

2016.

¹¹⁶⁹ Lewis, *The Crisis of Islam*, pp.115-116.

consider any individual or group opposed to them as apostate, and see killing apostates as an “obligation”.¹¹⁷⁰ However, although *Daesh* regularly charge others with apostasy, they have never actually defined the term.

UNAMI (United Nations Assistance Mission for Iraq) have reported that *Daesh* have required Iraqi security forces personnel and other government workers to show ‘repentance’ or face trial and possible execution,¹¹⁷¹ and furthermore have issued a *fatwa* calling for the elimination of the Sunni Arab al-Zergoius tribe for their collaboration with ISF (the Iraqi Security Forces).¹¹⁷² The targets of the *takfir* issued by *Daesh* are not only individuals and ethno-religious groups, but governments. *Daesh* see many Muslim countries as being ruled by “apostate tyrannical rulers.”¹¹⁷³ Its leader, Abu Bakr al-Baghdadi, views such societies as being under the control of the West:

O Muslims, the apostate tyrannical rulers who rule your lands in the lands of the Two Holy Sanctuaries (Mecca and Medina), Yemen, Shām (the Levant), Iraq, Egypt, North Africa, Khorasan, the Caucasus, the Indian Subcontinent, Africa, and elsewhere, are the allies of the Jews and Crusaders. Rather, they are their slaves, servants, and guard dogs, and nothing else.¹¹⁷⁴

In July 2014 Al-Baghdadi declared himself Caliph and called on all Muslims everywhere to obey him. Disobedience to al-Baghdadi, and thus to *Daesh*, would make a Muslim the enemy of Islam.¹¹⁷⁵ *Daesh* view the killing of *munāfiq*

¹¹⁷⁰ “From Hypocrisy to Apostasy”, *Dabiq*, p. 21.

¹¹⁷¹ UNAMI, *Report on the Protection of Civilians in the Armed Conflict in Iraq: 6 July to 10 September 2014*, p. 6.

¹¹⁷² *Report on the Protection of Civilians in the Armed Conflict in Iraq: 11 Sep to 10 Dec 2014*. P. 16.

¹¹⁷³ “A New Audio Message by Abu Bakr al-Baghdadi ~ March Forth Whether Light or Heavy” <<https://pietervanostaeyen.wordpress.com/>>27 June 2016. (“A New Audio Message by Abu Bakr al-Baghdadi”)

¹¹⁷⁴ *ibid.*

¹¹⁷⁵ *Report on the Protection of Civilians in the Armed Conflict in Iraq: 6 July to 10 September 2014* p. 2 “The Laws of Allah or the Laws of Men”, *Dabiq* p. 50.

(hypocrites) or apostates as being justified by Qur'an 9:73 and 5:54, amongst other verses.¹¹⁷⁶

The group generally known as Boko Haram actually use a different name for themselves: they prefer “*Ahl as-Sunnah wa al-Jama'a ala Minhaj as-Salaf*”, which translates as “People of the Way of the Prophet Muhammad (peace be upon him) and the Community (of Muslims), in line with the earliest generation of Muslims”.¹¹⁷⁷ Whichever name is used, Boko Haram has certainly become one of the most dangerous *takfiri* groups and according to UNICEF are responsible for many atrocities:

Since 2009, when the Boko Haram group made a marked turn towards violence, at least 15,000 people have been killed, with more than 7,300 killed in 2014 alone. In recent months, Boko Haram attacks have increased in frequency and brutality, killing more than 1,000 civilians since the beginning of the year [2015].¹¹⁷⁸

The name ‘Boko Haram’ combines the Hausa word ‘boko’, meaning book, with the Arabic word ‘haram’, meaning “something forbidden, ungodly, sinful”.¹¹⁷⁹ It thus literally means ‘book is sinful’, but ‘boko’ is generally taken in Nigeria to refer to formal secular education, which is seen as a Western system. ‘Boko’ thus refers to

¹¹⁷⁶ “From Hypocrisy to Apostasy”, *Dabiq*, p. 21.

Strive hard against the disbelievers and the hypocrites, and be harsh against them, their abode is Hell [Qur'an 9:73]

Whoever from among you turns back from his religion (Islam), Allah will bring a people whom He will love and they will love Him; humble towards the believers, stern towards the disbelievers... [Qur'an 5:54]

¹¹⁷⁷ Da'wah Coordination Council of Nigeria (DCCN), *The 'Boko Haram' tragedy: frequently asked questions*, Minna, Niger State: DCCN, 2009, p. 10.

¹¹⁷⁸ UNICEF “Child Alert: Missing Childhoods The impact of armed conflict on children in Nigeria and beyond” (2015), p. 4.

¹¹⁷⁹ Abimbola O. Adesoji, “Between Maitatsine and Boko Haram: Islamic Fundamentalism and the Response of the Nigerian State”, *57 Africa Today* (2011), p.106. (Adesoji, “Between Maitatsine and Boko Haram”)

Western education and all that is implied by it,¹¹⁸⁰ and ‘Boko Haram’ more fundamentally implies that Western education is ungodly and should be banned.¹¹⁸¹

...our land was an Islamic state (Borno) before the colonial masters turned it to a *kafir* land. The current system is contrary to true Islamic beliefs.¹¹⁸²

Boko Haram are highly critical of their government and its laws and constitution, and of democracy in general. Their current leader, Abubakar Shekau, states that

Catastrophe is caused by unbelief, unrest is unbelief, injustice is unbelief, democracy is unbelief and the constitution is unbelief.¹¹⁸³

Boko Haram characterise non-members as *kuffar* (unbelievers) or *fasiqun* (wrong-doers).¹¹⁸⁴ This stance is thus similar to that of the 7th century Khawarij sect, in that someone who sins has their Muslim status removed from them.

5.3 Criticism of *takfir*

5.3.1 *Iman* (belief) and *kufr* (unbelief)

‘Belief’ and ‘believer’ are expressed in Arabic as *iman* and *mu’min* respectively. In its purest form *iman* means to be faithful, reliable, safe and secure from fear, and it can be translated into English as either faith or belief.¹¹⁸⁵ The related Arabic term *mu’min* draws on this to mean “one to whom security and safety are ascribed because He conveys the means to attain them and blocks the paths of dangers”.¹¹⁸⁶

¹¹⁸⁰ Da’wah Coordination Council of Nigeria (DCCN), *The ‘Boko Haram’ tragedy: frequently asked questions*, Minna, Niger State: DCCN, 2009, p. 10. (DCCN, *The ‘Boko Haram’ tragedy*)

¹¹⁸¹ Adesoji, “Between Maitatsine and Boko Haram”, p.106.

¹¹⁸² Ahmad Salkida, “Sect Leader Vows Revenge,” Daily Trust (July 27, 2009), <<http://wwwn.org/articles/31419/?&place=nigeria>> accessed 27 June 2016.

¹¹⁸³ “Nigeria’s Boko Haram defends killings,” *Al-Jazeera* (12 January 2012), <<http://www.aljazeera.com/news/africa/2012/01/20121122529369976.html>> accessed 27 June 2016.

¹¹⁸⁴ DCCN, *The ‘Boko Haram’ tragedy*, p. 14.

¹¹⁸⁵ *Encyclopaedia of the Qur’an*, p.163.

¹¹⁸⁶ Robert Charles Stade, *Ninety-nine names of Gods in Islam: a translation of the major portion of*

By contrast the Arabic terms ‘*kufr*’ and ‘*kafir*’ are commonly translated as unbelief and unbeliever respectively, with *kufr* being contrasted to *iman* in modern usage.

The concepts of *kufr* and *iman* are closely related to that of *takfir*, since *takfir* is effectively a declaration that a Muslim’s *iman* has completely disappeared and became *kufr*, thus excluding the individual concerned from the fold of Islam. Indeed, Omar argues that *takfir* is used in Islam in a legal sense to differentiate between *kufr* and *iman*.¹¹⁸⁷ There has long been a debate in Islam as to what thoughts or actions mark the difference between a believer and an unbeliever. For example, the Khawarij held that if a person committed a sin, he lost his *iman* and became a disbeliever.¹¹⁸⁸ They believed that such sinful acts as drinking alcohol, fornication or usury can turn a believer into an unbeliever, and when that idea forms part of the legal system it justifies the punishment of the unbeliever, such as confiscating his property¹¹⁸⁹ For the Khawarij, faith was an act of obedience¹¹⁹⁰ but alone it was not enough; action must follow Islamic principle. This approach has been taken up by some modern scholars, for example Qutb. He cites Qur’an 4:59 to argue that referring disputes to God and to the Prophet and obeying them both, as well as other believers in positions of authority, are all conditions of

Al-Ghazālī’s Al-Maṣṣad Al-Asnā (Ibadan : Daystar Press, 1970), p. 62.

¹¹⁸⁷ Hanaa H. Kilany Omar, ‘Apostasy in the Mamluk Period: The Politics of Accusations of Unbelief’, Presented to the Faculties of the University of Pennsylvania in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy (2001), p. 12. (Omar, ‘Apostasy in the Mamluk Period’)

¹¹⁸⁸ *The Sea of Precious Virtues (Bahr al-Fava’id)*, p. 106; Jamaal al-Din M. Zarabozo, *Commentary on the Forty Hadith of Al-Nawawi* (Dar Dawat al-Basheer for Publications, 1999), p. 168; W. Montgomery Watt, ‘Conditions of Membership of the Islamic Community’, 21 *Studia Islamica* (1964), p.7 (Watt, ‘Conditions of Membership of the Islamic Community’)

¹¹⁸⁹ *ibid.*

¹¹⁹⁰ Imam al-Haramayn al-Juwayni, *A Guide to Conclusive Proofs for the Principles of Belief = Kitāb al-irshād ilā qawā’i’ al-adilla fi usul al-i’tiqād*, translated by Dr Paul Walker; reviewed by Dr Muhammad S. Eissa (Reading : Garnet Publishing, 2000), p. 217 (Al-Juwayni, *A guide to conclusive proofs*).

believing in God; “Faith does not come into existence unless this condition is fulfilled and its result comes into effect”.¹¹⁹¹

Iman and Islam can at times seem almost synonymous; Smith argues that in the Qur’an there is no clear distinction between the two.¹¹⁹² In *hadith*, however, the Prophet himself did seek to explain the difference between Islam and *iman*. He was reported to define Islam as “To not associate anything with Allah, to establish the Salat, to pay the *Zakat*, and to observe fast (the month of) Ramadan.”¹¹⁹³ *Iman*, by contrast, meant “To believe in Allah, His Angels, His Book, the meeting with Him, and His Messengers, and to believe in the Resurrection, and to believe in *Al-Qadar* (the divine decree), all of it.”¹¹⁹⁴ For Mohammed, *iman* was in the heart and was the source of piety, while Islam was more overt.¹¹⁹⁵ Similarly, al-Tufi (d.716 AH/1316 CE) wrote that “outward duties constitute *islam*...”¹¹⁹⁶ The Qur’an also touches on the difference in meaning between the two:

The bedouins say: “We believe.” Say: “You believe not but you only say, ‘We have surrendered (in Islam),’ for Faith has not yet entered your hearts. But if you obey Allah and His Messenger (SAW), He will not decrease anything in reward for your deeds. Verily, Allah is Oft-Forgiving, Most Merciful.” [Qur’an 49:14]

Al-Ghazali explained that this verse meant that the Bedouin had only surrendered outwardly with their tongues, not inwardly with their minds.¹¹⁹⁷ He stressed that Islam meant verbal “submission and surrender and avoidance of unbelief, rebellion

¹¹⁹¹ Sayyid Qutb, *In the Shade of the Qur’an*, vol. 3, p. 167.

¹¹⁹² *Encyclopaedia of the Qur’an*, Vol. 2, p. 168.

¹¹⁹³ *Sahih Muslim*, vol. I, p. 98.

¹¹⁹⁴ *ibid*.

¹¹⁹⁵ *Encyclopaedia of the Qur’an*, Vol. 2, p. 168.

¹¹⁹⁶ Najm al-Din Sulayman b. ‘Abd al-Qawi al-Tufi, quoted in Ibn Hajar al Asqalani, *Selections from Fath Al-Bari*, translated by Adal Hakim Murad (Cambridge: Muslim Academic Trust, 2000), p. 20.

¹¹⁹⁷ Al-Ghazzālī, *The Foundation of the Articles of Faith: Being a Translation of the Kitāb Qawā'id al-'Aqā'id of Al-Ghazzālī's Ihya' 'ulūm al-dīn* Contributors, Nabih Amin Faris (Lahore : Sh. Muhammad Ashraf, 1963), p. 101. (Al-Ghazzālī, *The Foundation of the Articles of Faith*)

and disobedience”.¹¹⁹⁸ Similarly, Abu Hanifa said that Islam is submission and obedience to Allah’s command. Nevertheless, the two are intertwined; there may be a linguistic difference but as Abu Zahra notes, “there is no faith without Islam and no Islam without faith. They are like the outward is to the inward”.¹¹⁹⁹

Some scholars and groups consider *Kuffar* (unbelievers; plural of *kafir*) to be sinful people. Al-Wahhab noted that *kufr* is “the general name given to any act, statement or belief that might expel a person from the fold of Islam”.¹²⁰⁰ Similarly, *Daesh* state that they will “wage war against *kufr* until the religion is entirely for Allah.”¹²⁰¹ They label unbelievers as *kafir*, and declare that such people can be removed from the Islamic community.

Both Al-Wahhab and *Daesh* consider *kufr* to mean unbelief but its original meaning is difficult to define. In fact, ambiguity over the term *kufr* is the main reason behind declarations of *takfir*. *Kufr* comes in many forms, one of which is denial of the truth of the Prophet’s words and of the Qur’an; other forms include arrogance, doubtfulness and hypocrisy. *Kufr* is criticised in various verses in the Qur’an. For example, verse 2:88 states that “Allah has cursed them for their disbelief.” Ibn Kathir says this means that “Allah expelled them and deprived them of every type of righteousness”.¹²⁰²

The treatment of unbelievers varies widely in the Qur’an; for example, Qur’an 83:34 states that *kafir* (non-believers) will be laughed at. But unbelievers can also

¹¹⁹⁸ Maulana Fazul-Ul-Karim, *Imam Gazzali’s Ihya Ulum-Id-Din* (Lahore: Sind Sagar Academy, 1978), p. Book I, 144.

¹¹⁹⁹ Muhammad Abu Zahra. *The Four Imams: the Lives and Teaching of Their Founders* 2nd ed (London : Dar Al-Taqwa, 2005), p. 216. (Abu Zahra, *The four imams*)

¹²⁰⁰ Al-Wahhāb, *An explanation*, p. 59.

¹²⁰¹ “Shari’ah Alone Will Rule Africa,” *Dabiq* Issue 9 (2014), p.15.

¹²⁰² *Tafsir ibn Kathir*, vol. 1, p.290.

be punished physically in a multitude of ways, as the following Qur’anic excerpts illustrate:

...when ye meet the Unbelievers (in fight), smite at their necks [Qur’an 47:4];

...instil terror into the hearts of the Unbelievers: smite ye above their necks and smite all their finger-tips off them [Qur’an 8:12];

But ye have indeed rejected (Him), and soon will come the inevitable (punishment)! [Qur’an 25:77];

...seize them [unbelievers] and slay them wherever ye get them: In their case We have provided you with a clear argument against them [Qur’an 4: 91].

The English word unbelief appears rather weak as a translation of *kafir* as it appears in the Qur’an. Warner argues this translation as incorrect and inadequate. Warner argues that the word ‘unbeliever’ is logically and emotionally neutral, whereas *kafir* is the most abusive, prejudiced and hateful word in any language.¹²⁰³ Some Islamic scholars view *kufr* as the greatest of sins. It is in some readings a challenge to the sovereignty of God. As such it is often associated with those who rebel against the power of earthly sovereigns and rulers. Therefore, Islamic-led regimes have often responded to rebellion with ex-communication, punishing *kufr* with *takfir*.

According to Maududi *kufr* is a form of tyranny, but not any ‘normal’ tyranny, which he defines as an “unjust use of force or power.... compel[ing] a thing to act unjustly or against its true nature, its real will and its inherent attitude”;¹²⁰⁴ more than this, it is “the worst of all tyrannies”. Maududi states that *kufr* goes beyond mere tyranny to embrace “rebellion, ingratitude and infidelity”.¹²⁰⁵ In short, if *kufr*

¹²⁰³ Warner, *Sharia for the Non-Muslim*)

¹²⁰⁴ Abul A’la Mawdudi, *Towards Understanding Islam*, (U.K. I.M. Dawah Centre), p. 8.

¹²⁰⁵ *ibid.*, p. 9.

exists it directly corresponds to the degree of resistance to God's sovereignty.¹²⁰⁶ *Kufr* can act as a trigger for *takfir*, since *kufr* are seen not merely as unbelievers but as enemies of Islam.

Some scholars argue that initially *kufr* meant not unbelief but rather the behaviour of those people in the Prophet's era who did not feel grateful towards God. Bell intriguingly argues that as *kufr* "seems to have meant originally 'ingratitude', it may be that the very meaning of 'unbelief' came from the idea that not to acknowledge the signs of God's power and goodness and to worship him was a mark of ingratitude."¹²⁰⁷ The original meaning of *kufr* was thus not necessarily unbelief but indicates simply those who felt ungrateful upon hearing Allah's message.

Regarding the specific relationship between *kafir* and *mu'min*, Izutsu explains that it was "only at the second stage of development, that is, within the Qur'anic system, that the two are put in opposition to one another."¹²⁰⁸ He notes that if these two key terms are traced back to the pre-Islamic period, they were not seen as binary opposites and had no essential connection.¹²⁰⁹ Omar notes that the overall binary opposition, between *kufr* (unbelief) and *iman* (belief), is used often in the Qur'an to illustrate the relationship between God and man.¹²¹⁰ The pagan Meccans were idol-worshippers, and Muslims have thus understood idol-worship as a denial of

¹²⁰⁶ Abul A'la Maududi, *Fundamentals of Islam*, (Lahore, Islamic Publications,) p. 50

¹²⁰⁷ Richard Bell, *Bell's Introduction to the Qur'an*, completely revised and enlarged by W. Montgomery Watt (Edinburgh: Edinburgh University Press, 1970), p. 150.

¹²⁰⁸ Toshihiko Izutsu, *God and Man in the Qur'an: Semantics of the Qur'anic Weltanschauung* (Tokyo: Keio University 1964), p. 49. (Izutsu, *God and Man in the Qur'an*)

¹²⁰⁹ *ibid.*

¹²¹⁰ Omar, "Apostasy in the Mamluk Period", p. 12-13.

God. Conversion to Islam required these early Meccans to attest to the Oneness of God and to believe in its prophets, angels and books; this constituted *iman*.¹²¹¹

The messenger believeth in that which hath been revealed unto him from His Lord, and (so do) the believers. Each one believeth in Allah and His angels and His scriptures and His messengers-we have no distinction between any of His Messengers. [Qur'an 2:285]

The division between believer and non-believer developed from the early Muslim experience of war. The followers of this new religion, few in number, tried to persuade unbelievers to embrace Islam; it was “a war between Islam and *kufir*, between ‘Muslims’ and ‘*kafirs*’.”¹²¹² The root term, *kafir*, appears to have evolved in line with Muhammad’s own changing perspective regarding his enemies. Over time it became the strongest word used by the growing Muslim community to describe their opponents,¹²¹³ and increasingly came to stand for the opposite to belief. Izutsu posits that *kufir* “...deviates little by little from the original meaning of ‘ingratitude’ and comes nearer to the meaning of ‘disbelief’ or ‘unbelief’.”¹²¹⁴ Watt similarly notes that the meaning of ‘*kafir*’ has shifted over the centuries, having previously implied ingratitude. This suggests that Muslims associated a lack of faith with ungratefulness towards God.¹²¹⁵ He prefers to see *kufir* as that which characterises non-Muslims or opponents of Islam, and also as that which prompts a Muslim to leave the community. An action indicative of such a break would thus be taken as *kufir*.¹²¹⁶ The concept is therefore far from stable in its meaning.

¹²¹¹ *ibid.*, p. 13.

¹²¹² Izutsu, *God and Man in the Qur'an*, p. 53.

¹²¹³ O’Sullivan, Declan Patrick, “Punishing Apostasy: the Case of Islam and Shari’a Law Re-considered”, *Doctoral thesis, Durham University* (2003) p. 111

¹²¹⁴ Izutsu, *God and Man in the Qur'an*, p. 15.

¹²¹⁵ Watt, *Muhammad: Prophet and Statesman*, p. 29.

¹²¹⁶ Watt, “Conditions of Membership of the Islamic Community”, p.11.

This ‘ungrateful’ sense to *kufṛ* seems to have changed after the emergence of the concept of hypocrisy in the Medina period. *Kufṛ* is associated with hypocrisy, in other words with those who say they are Muslim but do not obey God perfectly. In this sense, hypocrites are nominal Muslims; Qur’an 3:167 describes them as “saying with their mouths what was not in their hearts”.¹²¹⁷ *Rasa’il Ikhwan al-Safa*, written in the 10th CE by scholars in Basrah in Iraq, noted that

those who pay lip-service to the Faith but secretly betray Islam, hypocritically hide their real thoughts (which are very different from what they say and profess in public), and beguile and circumvent the Lawgiver, are called *hypocrites*.¹²¹⁸

Ibn Qayyim notes that

The hypocrites are those who remember God but little. To remember God little is a sign of hypocrisy, to remember Him much is a protection from it. [Indeed] God is too generous to afflict with hypocrisy a remembering heart. It is for hearts which are heedless.¹²¹⁹

Many Qur’anic verses refer to hypocrites (*munafiq*) and hypocrisy (*nifaq*). For example, verse 2:8 notes that hypocrites do not really believe Allah, despite saying they do.¹²²⁰ In *Sahih Muslim*, the Prophet reportedly says that “The signs of the hypocrite are three: When he speaks he lies, when he makes a promise he breaks it, and when he is entrusted with something he betrays that trust.”¹²²¹ The Qur’an

¹²¹⁷ See also Qadi ‘Iyad, *Ash-Shifa*, p. 430.

The medieval Islamic scholar Qadi Iyad similarly notes that

Yet, the most dispraised state involves the testimony pronounced by the tongue without the presence of belief (faith) in the heart, and this is called ‘hypocrisy’.

¹²¹⁸ Eric van Reijn, *The Epistles of the Sincere Brethren (Rasa’il Ikhwan al-Safa’) : an annotated translation of Epistles 43 to 47* (London : Minerva Press, 1995), p.100.

¹²¹⁹ Ibn Qayyim al-Jawziyah, *Ibn Qayyim al-Jawziyya on the Invocation of God : Al-Wābil al-Sayyib min al-Kalim al-Tayyib*, translated by Michael Abdurrahman Fitzgerald & Moulay Youssef Slitine (Cambridge : Islamic Texts Society, 2000), p. 105. (*Ibn Qayyim al-Jawziyya on the invocation of God*)

¹²²⁰ [Qur’an 2:8]

And of mankind, there are some (hypocrites) who say: "We believe in Allah and the Last Day" while in fact they believe not.

¹²²¹ *Sahih Muslim*, Translated by Nasiruddin al-Khattab, (Riyadh: Darussalam, 2007) Vol 1, no, 210, pp 155-156.

strongly criticises and condemns such people: “In their hearts is a disease” [Qur’an 2:10]; “For Allah will collect the hypocrites and those who defy faith - all in Hell.” [Qur’an 4:140]

This emergence of the concept of the hypocrite changed the meaning of *kufir* and *kafir*. Izutsu argued that the concept of *kafir* has “lost its denotative stability and fixedness, and become something mobile, ready to be applied even to a pious Muslim if he happens to do this or that.”¹²²² He makes the crucial point that this is a fundamental change in meaning – this is no longer a term that solely signifies non-Muslims, that is, the opposite to ‘Muslim’, but has become a word that can also be used to denigrate or accuse a ‘real’ Muslim of non-Islamic behaviour or words. This conceptual change is essential to understanding the origins of *takfir*.

In the Meccan era, according to Ibn Kathir, there were seen to be no problems relating to hypocrites; these problems only arose following the *hijra* (migration from Mecca to Medina in 622 CE), when Islamic society grew larger than during the Meccan period.¹²²³ It was however still a relatively small community, and moreover was surrounded by ‘infidel’ *kafirs* that refused to join the emerging religion and were willing to fight against it.¹²²⁴ This situation changed after the great Islamic conquests, which united people with hugely diverse cultural backgrounds within the Islamic empire. The effect of this great expansion was that Islam’s most dangerous enemies were now within the community, not around it.¹²²⁵ These new ‘converts’ accepted Islam’s basic principles and were therefore formally Muslim, but Izutsu notes that they wilfully misinterpreted their duties and

¹²²² Izutsu, *God and Man in the Qur’an*, p. 51.

¹²²³ *Tafsir ibn Kathir*, vol. 1., pp. 124-125, see also Taha, *The Second Message of Islam*, p. 126.

¹²²⁴ Izutsu, *The Concept of Belief in Islamic Theology*, p. 9.

¹²²⁵ *ibid.*

obligations as Muslims such that they threatened to undermine the religion itself.¹²²⁶ As a result, *kafir* came to denote ‘wrong believer’ as well as, or even rather than, ‘unbeliever’.¹²²⁷

The existence of hypocrisy and hypocrites was very common even in the Prophet’s time; even the Prophet’s Companions worried about becoming hypocrites. For example, in one *hadith* Ibn Abi Mulaykah stated

I met thirty Companions of the Prophet and each of them was afraid of becoming a hypocrite and none of them said that he was as strong in belief as the angel Jibril (Gabriel) or Mikael (Michael).¹²²⁸

Various *hadith* record warnings of the spread of hypocrisy after the Prophet’s time. Al-Hasan al-Basri (d. 728 CE/110 AH) reportedly stated that “It is only a faithful believer who dreads hypocrisy and only a hypocrite who considers himself safe (is not afraid of hypocrisy)”.¹²²⁹ Similarly, one of the Companions of the Prophet, Hudhayfah ibn al-Yaman, noted the rise in the number of hypocrites after the Prophet’s era and their changing behaviour:

Hypocrites are more numerous today than they were at the time of the Prophet. At that time they used to conceal their hypocrisy; now they [are not ashamed to] reveal it.¹²³⁰

Kufr had thus evolved from implying mere unbelief to meaning unbelief and resistance to Islam. This growing hypocrisy problem also triggered the birth of the *takfir* issue.

5.3.2 *Iman* and sin

¹²²⁶ *ibid.*, p.10.

¹²²⁷ *ibid.*

¹²²⁸ *Sahih Al-Bukhari*, pp. 79-80. Vol. 1, no, 36, pp. 79-80.

¹²²⁹ *ibid.*

¹²³⁰ Al-Ghazzāli, *The Foundation of the Articles of Faith*, p. 128.

Some scholars and groups believe that someone who has committed a sin loses his *iman* permanently and becomes a disbeliever. Moreover, the Khawarij hold that someone who has committed any major sin should not only be removed from the fold of Islam, they also become its enemy,¹²³¹ and that furthermore this places an individual obligation on all Muslims to kill that person. Yet there are other interpretations which recognise that the gap between belief and disbelief can be very narrow and indeed even for the believer, faith can wax and wane. *Iman* does not permanently disappear following sinful behaviour; rather, it decreases and increases throughout life. This indicates that *takfir* (excommunication) cannot justifiably be supported by reference to correct Islamic understandings of *iman*, since *iman* can be recovered, as verse 9:124 illustrates: “As for those who believe, it has increased their Faith, and they rejoice.” Al-Juwayni (d. 478AH/1085CE) noted:

We know very well that in regard to someone who serves another and expends his effort constantly to fulfil his obligation to him during a period of a hundred years and beyond but then commits a single infraction, no one would consider good despoiling him of credit for all his good actions on account of a single bad deed. If it were true that reward and punishment cancel each other, reward is no more appropriately reduced and spoiled than punishment annulled. The law demonstrates the obviation of bad by good deeds and the vitiating of a punishment is the mere appropriate.¹²³²

Similarly, *Jami'At-Tirmidhi* records the Prophet as declaring that *iman* could not permanently disappear; it would recover, even if an individual committed a sin.¹²³³

This waxing and waning of faith is supported by both Ibn Kathir and Ahmad ibn Hanbal.¹²³⁴ Other scholars, for example, Abu Hanifa had a different view of *iman*.

¹²³¹ *The Sea of Precious Virtues (Bahr al-Fawa'id)*, p. 106.

¹²³² Al-Juwayni, *A Guide to Conclusive Proofs*, p. 212.

¹²³³ *Jami'At-Tirmidhi*, vol. 5, no. 2625, pp. 33-34. (*English Translation of Jami'At-Tirmidhi*)

¹²³⁴ *Tafsir ibn Kathir*, Vol., 1, p. 311; Ahmad ibn Hanbal cited in Al-Jawzi, *Virtues of the Imam Ahmad ibn Hanbal*, vol. 1, p. 311.

Abu-Hanifa saw belief as confirmation, and this belief did not increase or decrease; those who disobeyed the Shari'a were not therefore unbelievers, as they had a basis for their faith. Rather, the disobedient were believers who combined righteous and evil action.¹²³⁵ The Hanafi law school therefore does not view action as part of faith.¹²³⁶ However, both the traditional view and Abu Hanifa's view hold that someone who sins has not lost all his *iman*, and can be returned to faith. Similarly, Hanbal argues that a believer may fall from belief into mere submission, but that renewal or deepening one's spiritual state can return one to belief again. Nothing can remove him from submission except polytheism or deliberately refusing to carry out a religious obligation.¹²³⁷

Therefore, the Khawarij approach differed markedly from traditional definitions of *iman* (belief), which allowed for the strengthening and weakening of belief. However, the approach employed by the Khawarij is based on false interpretations. Sin and belief are not connected within Islam; one mediaeval Sunni Islamic textbook notes that a believer does not become an unbeliever simply by sinning, rather, a believer is a believer through his or her faith, and a sinner becomes a sinner by sinning, not through unbelief.¹²³⁸ Ibn Hajar (d. 852 AH/1449CE) argued in *Fath al Bari* that "someone who disobeys Allah does not become a disbeliever unless he associates others with Allah".¹²³⁹ He noted that although the Khawarij view sinners as disbelievers, this approach is rejected by Allah:¹²⁴⁰

¹²³⁵ Abu Zahra, *The Four Imams*, p. 219.

¹²³⁶ *ibid.*

¹²³⁷ Ibn al-Jawzi, *Virtues of the Imam Ahmad ibn Hanbal*, Vol., 1, p. 311.

¹²³⁸ *The Sea of Precious Virtues (Bahr al-Fawa'id)*, pp. 105-106, 253.

¹²³⁹ Imam Ibn Hajar al Asqalani, *Tafsir Sahih Bukhari: Fath al Bari*, translated by students of Madina university and Al-Azhar university and supervised by both schools (SunnahMuakada, 2014), p. 129.

¹²⁴⁰ *ibid.*

Verily! Allah forgives not (the sin of) setting up partners in worship with Him, but He forgives whom he pleases sins other than that, and whoever sets up partners in worship with Allah, has indeed strayed far away. [Qur'an 4:116]

Moreover, the Umayyad Caliph Umar ibn Abd al-Aziz stated that failure of *iman* is only “incomplete”. If someone does not follow “*fara'id* (enjoined duties), legal laws and *hudud* (Allah’s boundary limits between lawful and unlawful things) and *sunan*”, their *iman* does not disappear completely.¹²⁴¹

The Islamic concept of *tauba* (repentance) also implies that someone who commits a sin cannot be removed from the fold of Islam. According to al-Juwayni repentance means to return and thus “one says in Arabic *taba* [*tauba*], *naba* or *anaba* about someone who ‘comes back’ or ‘returns’ ”.¹²⁴² He argued that “If repentance is ascribed to the acts of God, it signifies the restoration of His favour and beneficence to His servant.”¹²⁴³ According to Ibn Qayyim, the acts of sinning followed by repentance can actually be positive:

If a servant’s good deeds prevail, they will repel from him many sins; and whenever he repents from a sin, his repentance gains him so much goodness that it may even exceed the good that the sin had annulled.¹²⁴⁴

The Prophet himself stated that even if someone commits a sin, his faith can be recovered:

If a worshipper commits adultery then faith leaves him, so it remains above his head like a shadow, then if he leaves that action the faith returns to him.¹²⁴⁵

¹²⁴¹ *Sahih Al-Bukhari*, vol. 1, no. 7, p. 57.

¹²⁴² Al-Juwayni, *A Guide to Conclusive Proofs*, p. 220.

¹²⁴³ *ibid.*

¹²⁴⁴ *Ibn Qayyim al-Jawziyya on the Invocation of God*, p. 11.

¹²⁴⁵ *Jami' At-Tirmidhi*, pp. Vol., 5, no. 2625, pp. 33-34.

Intriguingly, in other contexts it could be inferred that the Prophet said human beings have no power to punish those who commit religious sins:

It was reported that Abu Ja'far Muhammad bin 'Ali said: "In this is a departure from faith to Islam." Through other routes, it has been reported that the Prophet said about adultery and theft: "Whoever does any of that then the penalty (for the crime) is implemented upon him, that will be an atonement for his sin. And whoever does any of that, and Allah covers it for him then, it is up to Allah, the Exalted - if He wishes, He punishes him on the Day of Judgement, and if He wishes, He forgives him." This was narrated by 'Ali bin Abi Talib, 'Ubadah bin As-Samit and Khuzaymah bin Thabit from the Prophet.¹²⁴⁶

Thus, believers do not easily or immediately become unbelievers and *iman* does not disappear simply by sinning. Only Allah, in the hereafter, has the right to punish or forgive sins; punishing any religious sinner in this life is against Shari'a. The Khawarij argument that someone who sins and does not repent necessarily undoes all his good deeds and dies destined to remain in hellfire forever is therefore not one that can be supported with reference to the Qur'an, to the words and deeds of the Prophet or to the writings of many Muslim academics.¹²⁴⁷

5.3.3 *Shahadah* and *takfir*

The *shahadah* (declaring "There is no god but Allah, Muhammad is his messenger") is the Islamic profession of faith.¹²⁴⁸ Zarabozo interprets the *shahadah* as a "testimony of faith that must be implemented in one's heart, tongue and actions".¹²⁴⁹ However, there is some debate as to whether a declaration of

¹²⁴⁶ *ibid.*

¹²⁴⁷ Al-Juwayni, *A Guide to Conclusive Proofs*, p. 211.

¹²⁴⁸ Carra De Vaux, "Shahada" in *E.J. Brill's First Encyclopaedia of Islam: 1913-1936*, Reprint edition, eds. M.Th. Houtsma, A.J. Wensinck, H.A.R. Gibb, W. Heffening and E. Levi-Provencal (Leiden : Brill, Leiden: E.J. Brill, 1987), vol. 7, p. 259.

¹²⁴⁹ Jamaal al-Din M. Zarabozo, *Commentary on the Forty Hadith of Al-Nawawi* (Dar Dawat al-Basheer for Publications, 1999) p. 286 (Zarabozo, *Commentary*)

shahadah is enough to prove one's faith or not; some scholars and groups do not recognise it as such. They argue that over time verbally stating the *shahadah* came to be deemed as insufficient evidence of one's Muslim faith, and inadequate for ensuring salvation.¹²⁵⁰ For example, Ibn Taymiyya did not consider the Mongols to be Muslim even though they professed themselves to be. He argued that their declarations of the *shahadah* were not enough to demonstrate their faith; this could only be proved by them following Islamic texts and leading Muslim lives:

Any group of people that rebels against any single prescript of the clear and reliably transmitted precepts of Islam has to be fought, according to the leading scholars of Islam, even if the members of this group make a public formal confession of their [Islamic] Faith by pronouncing the *shahadah*.¹²⁵¹

Al-Wahhab also argued that mere recitation of the *shahadah* is insufficient proof of Islamic faith. He cited a number of examples of Muslims who had declared the *shahadah* who were then killed by the Prophet or his companions; the tribe of Banu Hanifa, for example, who testified *shahadah* and professed to be Muslims, were fought against by the companions.¹²⁵² Similarly, al-Wahhab noted the case of the Fourth Caliph, 'Ali ibn Talib, who burnt to death some people who had recited the *shahadah* and testified that they were Muslims.¹²⁵³ He also said of the Khawarij that their *shahadah* was not sufficient proof of their Islamic faith:

¹²⁵⁰ *ibid.*, p. 282.

¹²⁵¹ *Majmu' at Fatawa...Ibn Taymiyyah*, Ed. Faraj Allah Zaki Al-Kurdi, Cairo (Matb. Kurdistan al 'Ilmiyyah), 1329, IV, 281; quoted in *Al-Faridah al-Gha'ibah*, § 27 in Jansen, "Ibn Taymiyyah and the Thirteenth Century", p.395.

¹²⁵² Al-Wahhāb, *An Explanation*, pp. 184-185.

¹²⁵³ *ibid.*, p. 171.

Their [Khawarij] profession of *La ilah illah Allah* did not benefit them, and neither did their worship, or their claim to be Muslims, because they openly showed through other matters their rejection of Islamic law.¹²⁵⁴

For al-Wahhab it was total commitment to Islamic teaching that made one a Muslim. He considered the Khawarij to be unbelievers, concluding that their *shahadah* was not evidence of their faith:

...a person who denies the Day of Judgement becomes a disbeliever and should be killed, even if he testifies *La ilah illa Allah*, as does the one who denies one of the pillars of Islam – he too becomes a disbeliever and should be killed, even if he testifies....¹²⁵⁵

Al-Wahhab concluded that “testimony of faith and prayer is useless”,¹²⁵⁶ and that reciting the *shahadah* did not constitute obedience to Allah. Similarly, Maududi argues that Muslims should understand Islam and be knowledgeable about it, otherwise any declarations of Islam are empty. He denounces those supposed Muslims who publicly recite the *shahadah* but do not act accordingly:

If a Muslim’s behaviour is the same as that of a non-Muslim, what difference is there between him and a *kafir*? In short, if a Muslim is as much devoid of knowledge about Islam as a *kafir* is and if a Muslim does all those things which a *kafir* does, then why should his doom be not the same as that of a *kafir*?¹²⁵⁷

Maududi’s argument is that it is knowledge and behaviour that separate a Muslim and a *kafir*; if a man acts like a *kafir* but calls himself Muslim, he is lying.¹²⁵⁸

Merely reciting the *shahadah* cannot turn a *kafir* into a Muslim.¹²⁵⁹

¹²⁵⁴ *ibid.*, p. 187.

¹²⁵⁵ *ibid.*, p. 185.

¹²⁵⁶ *ibid.*, p. 170.

¹²⁵⁷ Abul A’la Maududi, *Fundamentals of Islam*, (Lahore, Islamic Publications) p. 14 (Maududi, *Fundamentals of Islam*)

¹²⁵⁸ *ibid.*, p. 13.

¹²⁵⁹ *ibid.*, p. 26.

Maududi argued in the Court of Inquiry in 1953 that Muslims needed to believe in the *tawhid*, Prophethood, “all the books revealed by God” and the Day of Judgement; “any alteration in any one of these articles will take him out of the pale of Islam.”¹²⁶⁰ This approach has been adopted by contemporary *takfiri* groups. *Daesh*, for example, claims that even reciting the *shahadah* (There is no god but Allah, Muhammad is his messenger) is not enough: “Speech will not benefit you without action, for there is no faith without action.”¹²⁶¹

However, the arguments by scholars such as al-Wahhab in attempting to develop the concept of *takfir* can be criticised on a number of counts.

Scholars such as Al-Wahhab look back into history, particularly to the era of the Prophet, to justify their views on *takfir*. Many of the cases he refers to relate to periods of war and rebellion within Muslim society. It is difficult to find a direct correlation with modern circumstances. However, groups such as *Daesh* see in Al-Wahhab's writings a justification for militant action against all they see as unbelievers, including many enemies who profess themselves to be followers of the Muslim faith.

Some authors believe mere recitation of the *shahadah* is meaningless without understanding its meaning. Zarabozo argues that understanding one's faith, and its corresponding duties and obligations, is crucial, as “a testimony about something

¹²⁶⁰ Report of the Court of Inquiry Constituted Under Punjab Act II of 1954 To Enquire into the Punjab Disturbances of 1953(Lahore, Superintendent, Government Printing, 1954), pp.215-216, <http://www.satp.org/satporgtp/countries/pakistan/document/papers/Munir_Report_1954.pdf>accessed 27 June 2016.

¹²⁶¹ “A New Audio Message by Abu Bakr al-Baghdadi.”

that one does not have any knowledge of is unacceptable”¹²⁶² The Qur’an makes a similar point:

And those whom they invoke instead of Him have no power of intercession; except those who bear witness to the truth (i.e. believed in the Oneness of Allah, and obeyed His Orders), and they know (the facts about the Oneness of Allah). [Qur’an 43:86]

Ibn Kathir explains that this verse means idols and false Gods cannot intercede for those who believe in them; only those with the knowledge and insight to believe in Allah can expect Allah’s intercession.¹²⁶³ The fundamental commitments made by anyone testifying to the *shahadah* must be understood; if, for example, the speaker does not understand that Allah alone is worthy of worship, then his testimony is worthless and unacceptable to Allah.¹²⁶⁴ However, although the Qur’an requires knowledge and insight of the *shahadah*, proving that one possesses complete knowledge and insight regarding Islam is not needed. Al-Juwayni argued that “The proof that faith is the declaration of true belief is its lexical sense and Arabic root. This cannot be denied and thus there is no need to prove it”.¹²⁶⁵ For Al-Juwayni, Muslims did not need to prove their belief by demonstrating complete knowledge of Islam; a declaration of the *shahadah* was sufficient. He cited Qur’an 12:17: “...you will never believe us even when we speak the truth”. He held that a believer should never doubt the belief of another. He noted that impious people can also be considered to be believers in a legal sense:

...it is a doctrine of the orthodox to portray the impious person [*fasiq*] as a believer. The proof on the basis of which he is termed a believer is lexical....The

¹²⁶² Zarabozo, *Commentary*, p. 283.

¹²⁶³ *Tafsir ibn Kathir*, vol. 8., p. 666.

¹²⁶⁴ Zarabozo, *Commentary*, p. 283.

¹²⁶⁵ Al-Juwayni, *A Guide to Conclusive Proofs*, p. 217.

sign of this in the law is that legal judgment that are addressed exclusively to the believers are directed to the impious all the same as they are directed....towards the pious. Thus the impious person is treated as a believer in respect to the legal rules that apply to him....¹²⁶⁶

One of the most problematic issues concerning *takfir* is that someone who proclaims him or herself to be a Muslim can be considered a non-Muslim by others. However, the Qur'an does not define 'apostate' or 'apostasy', and defines 'Muslim' as follows:

Only those are Believers who have believed in Allah and His Messenger, and have never since doubted, but have striven with their belongings and their persons in the Cause of Allah: Such are the sincere ones. [Qur'an 49:15]

The Qur'an does not question whether someone who has declared the *shahadah* understands its meaning or not. Moreover, *hadith* in both the al-Bukhari and Abu Da'ud collections detail the Prophet Muhammad's pronouncement that expressing the *shahadah* is sufficient proof of an individual's religious sincerity. The Abu Da'ud version reads as follows:

...the Messenger of Allah said: "I have been commanded to fight the people until they say: '*La ilaha illallah*' (None has the right to be worshipped but Allah). So whoever says '*La ilaha illallah*' has protected his wealth and his life from me, except for a right, and his judgment will be with Allah?"¹²⁶⁷

Killing someone who has declared the *shahadah* is prohibited in Shari'a law. The Prophet's condemnation of this act can be found in various *hadith*, for example in *Sahih Muslim*:

A man from among the *Ansar* and I caught one of their men, and when we overpowered him, he said: *La ilaha illallah*. The *Ansari* left him alone but I

¹²⁶⁶ *ibid.*

¹²⁶⁷ *English Translation of Sunan Abu Dawud*, Translated by Nasiruddin al-Khattab, (Riyadh: Darussalam, 2008), vol. 2, no.1556, pp. 234-235 (*Sunan Abu Dawud*).

stabbed him with my spear and killed him. When we came back, news of that reached the Prophet and he said to me: ‘O Usamah, did you kill him after he said *La ilaha illallah?*’ I said: ‘O Messenger of Allah, he was only trying to protect himself.’ He said: ‘Did you kill him after he said *La ilaha illallah?*’ and he kept repeating it until I wished that I had not become Muslim before that day.¹²⁶⁸

It’s clear that the Prophet’s approach was to avoid conflict between Muslims; he thus required merely the recitation of the *shahadah* as proof of an individual’s Muslim faith.

5.3.4 Human judgements and *takfir*

Some scholars and groups commonly reject human judgement and call for a return to divine rule (*hakimiyyah*), which is seen as superior to man-made rules.¹²⁶⁹ The Khawarij, for example, asked

Do you seek judgment from men in that which is God’s command? There is no judgment but for God!¹²⁷⁰

Ibn Taymiyya labelled those who lived by the Mongol legal code (*Yasa*) unbelievers, because *Yasa* was a human law and not divine. Al-Wahhab claimed that he was returning Islam to its original true and pure meaning, as written in the Qur’an and taught by Muhammed. Both Qutb and Maududi criticised modern legal systems in Muslim majority states as being un-Islamic; basing their appeals on Qur’an 5:44, they called for all laws to be based on Shari’a:

And whosoever does not judge by what Allah has revealed, such are the Kafirun (i.e. disbelievers - of a lesser degree as they do not act on Allah’s Laws). [Qur’an 5:44].

¹²⁶⁸ *Sahih Muslim*, vol. 1, no. 159, p. 185.

¹²⁶⁹ Zakariyya, *Myth and Reality*, p. 134.

¹²⁷⁰ Ali ibn al-Athir, *al-Kamil fi'l Tarikh* (The Complete History), 3:196 in Tahir-ul-Qadri *Fatwa on Terrorism and Suicide Bombings*, p. 272.

The Khawarij were the first Islamic sect to divide the Muslim world between *Dar al-Islam* (Territory of Islam) and *Dar al-harb* (Territory of War). Parvin and Sommer see the former as a “political-territorial expression of that community in which the Islamic religion is practiced and where it is protected by a Muslim ruler”, whereas in the latter territory, although Islam may have been practiced, it was not protected by its non-Muslim ruler.¹²⁷¹ Esposito notes that the Khawarij saw the world as being “divided neatly into the realms of belief and un-belief, Muslim (followers of God) and non-Muslim (enemies of God), peace and warfare”.¹²⁷² This division of the world was re-introduced by Ibn Taymiyya in his appropriation of the concept of *hijra* (migration from Mecca to Medina in 622 CE). He called on all Muslims to permanently migrate,¹²⁷³ as he held that Muslims can only live in lands regulated by Shari’a:

If he who resides in [Mardin] is unable to practice his religion, then he must emigrate. If this is not the case, then it remains preferable but not mandatory.¹²⁷⁴

He argued that Muslim land (*Dar-al-Islam*; Territory of Islam) could become *Dar al-harb* (Territory of War) if Islamic law wasn’t enacted and followed:

As for whether it is a land of war or peace, it is a composite situation. It is not an abode of peace where the legal rulings of Islam are applied and its armed forces are Muslim.¹²⁷⁵

¹²⁷¹ Manoucher Parvin and Maurie Sommer, “Dar al-Islam: The Evolution of Muslim Territoriality and Its Implications for Conflict Resolution in the Middle East” 11 *International Journal of Middle East Studies* (1980), pp. 4-5.

¹²⁷² John L. Esposito, *Islam: the straight path* (New York; Oxford: Oxford University Press, 2005), p. 42.

¹²⁷³ Watt explains *hijrah*,

The Arabic word *hijrah* (which still sometimes appears in the Latin from *hegira*) does not mean ‘fight’ but is best translated ‘emigration’. It has the connotation not of geographical transference, but of separation from one’s family and clan and attachment to others.

Watt, *Muhammad: Prophet and Statesman*, p. 91.

¹²⁷⁴ Ibn Taymiyy cited from Aigle, *Mongol Empire Between Myth and Reality*, p. 273.

¹²⁷⁵ Abd al-Wahhab al-Turayr, “The Mardin Conference: Understanding Ibn Taymiyyah's Fatwa”, (2010), <<http://muslimmatters.org/2010/06/29/the-mardin-conference-%E2%80%93-a-detailed-account/>>accessed 27

Ibn Taymiyya added to the term '*hijra*' the sense that it implied "insistence on a decisive repudiation of unbelief."¹²⁷⁶ Nafi notes an interesting example of this dating from the early 20th CE.¹²⁷⁷ In 1903 Nigeria fell to the British, leading the Sokotan Caliph to declare that Sokoto [part of Nigeria] was no longer part of *dar al-Islam*. Despite British assurances of non-intervention, he insisted the Muslim community embark on a *hijra* and so led his followers to Sudan. This updated understanding of the *hijra* has been used by the contemporary *takfiri* group, *Daesh*:

Hijrah [migration] is an obligation from dārul-kufr [Territory of disbelief] to Dārul-Islām...The fuqahā' [Islamic jurists] after them [Sahabah] did not consider the lands ruled by the Tatar or 'Ubaydī rulers to be Dārul-Islām, for although these rulers claimed Islam and ruled by some of its laws, they committed apostasy by abandoning some of its laws or teachings.¹²⁷⁸

Daesh states that "every Muslim [ought] to be obliged to make *hijrah* from dārul-kufr to dārul-islām."¹²⁷⁹ However, the form of *takfiri hijra* urged on Muslims by *Daesh* is an innovation created by scholars; it has no precedence in either the Qur'an or the *Sunna*. Notions such as a return to divine rule (*hakimiyya*), the division of the world between *Dar al-Islam* (Territory of Islam) and *Dar al-harb* (Territory of War), and *hijra* conducted for the purpose of avoiding living under the rule of unbelievers, are all scholarly constructs. They have no basis in divine law or Shari'a.

June 2016.

¹²⁷⁶ Roger Webster, "*Hijra* and the Dissemination of Wahhabi Doctrine in Saudi Arabia," in Ian Richard Netton ed., *Golden roads: migration, pilgrimage and travel in mediæval and modern Islam* (Richmond (Surrey): Curzon Press, 1993), p. 11.

¹²⁷⁷ Basheer M. Nafi, "Fatwa and War: On the Allegiance of the American Muslim Soldiers in the Aftermath of September 11", 11 *Islamic Law and Society* (2004), p. 87.

¹²⁷⁸ "From the Battle of Al-Ahzab to the War of Coalitions", *Dabiq*, Issue 11, p. 22.

¹²⁷⁹ "The Laws of Allah or the Laws of Men", *Dabiq*, Issue 10, p. 47.

Sayyid Qutb renewed and re-introduced the concept of *jahilliya* (ignorance) to the modern world. He considered the Muslim world to be surrounded by ignorant legal systems, such that the Muslim world had become *Dar al jahilliya* (*The land of jahilliya*). He believed that the true Muslim community was long extinct, and that as the “laws of Allah [had become] suspended on earth”¹²⁸⁰ all contemporary Muslim society was unIslamic and illegal.¹²⁸¹ Modern so-called Muslims were *jahiliyyah* not because they did not claim to be Muslim or because they did not pray, but because they did not live as Muslims should, with total devotion to God and by following Muslim law.¹²⁸² Only one legal code and approach could be recognised as real Islam, and any other system was a *jahili* (ignorant) system.¹²⁸³ As Al-Wahhab and Qutb had done, Maududi also rejected any development of Islamic law made by human judgment. Similarly, *Daesh* believe Muslim societies are ruled by infidel governments and leaders due to their being subject to Western influence.¹²⁸⁴ They reject human judgment as a *jahili* legal system, and consider those not living under perfect Shari’a as living in *Dar-al-jahilliya* (*The land of Jahiliyya*).

The groups discussed here, namely the Khawarij sect, certain scholars (Wahhab, Sayyed Qutb and Maududi) and modern *takfir* movements (*Daesh* and Boko Haram), all commonly denied or deny the validity of human judgment (*ijtihad*, or ‘independent juristic reasoning’), which is one of the key sources of Shari’a and

¹²⁸⁰ Qutb, *Milestones*, p. 25.

¹²⁸¹ *ibid.*, p. 95

¹²⁸² Saodah Bt. Abd. Rahman, “The Concept of Takfir (Accusing of Disbelief) Among Some Contemporary Islamic Movements With Special Reference to Egypt”, A thesis submitted to the Faculty of Arts University of Birmingham for the degree of Doctor of Philosophy (1994), p. 175. (Rahman, “The Concept of Takfir”)

¹²⁸³ Khatab, *Hakimiyyah and Jahiliyyah*, p. 163.

¹²⁸⁴ “A New Audio Message by Abu Bakr al-Baghdadi”,

furthermore is one recognised by the Prophet. Both *Sahih Bukhari* and *Sahih Muslim* note the importance of human judgement. The Prophet reportedly said

O Sa'd! [Sa'd bin Mu'adh] You have judged amongst them with (or similar to) the judgement of the King (Allah).¹²⁸⁵

You [Sa'd bin Mu'adh] have judged in accordance with the ruling of Allah. Or he said: With the ruling of the Sovereign (Allah).¹²⁸⁶

A number of scholars have sought to emphasise the importance of human judgement. Muhammad 'Abduh stressed the importance of human judgment under Shari'a, noting that 'revelation' is God's disclosure to the prophets which we define as "the knowledge a man finds within himself with the utter assurance that it has come from God, by or without an intermediary."¹²⁸⁷ Indeed, it should be noted that the development of Islamic law has always been due to human interpretation. Some scholars have criticised the ignorance of the role played by human judgement, for example, Vali Rezam:

Although traditional divines idealized the early history of Islam, they did not view what followed that era to be 'un-Islamic'¹²⁸⁸....Maududi did not view Islamic history as the history of Islam but as the history of un-Islam or *jahiliyah*. Islamic history as the product of human choice, was corruptible and corrupted.¹²⁸⁹

Al-Wahhab not only rejected the evolution of Islamic law after the era of the Prophet and his Companions, he also rejected any customs that developed after this time. Al-Wahhab considered visiting the tomb of a saint to be the act of an

¹²⁸⁵ *Sahih Al-Bukhari*, vol. 4. no. 3043, p. 173.

¹²⁸⁶ *Sahih Muslim*, vol.1 no. 223, p. 161.

Also see *Abu Dawud*, vol. 5, no. 4596, pp. 59-60.

¹²⁸⁷ Muhammad 'Abduh, *The Theology of Unity*, translated by Ishaq Musa'ad and Kenneth Cragg (London : George Allan and Unwin, 1966), p. 94.

¹²⁸⁸ Nasr, Seyyed Vali Rezam *Mawdudi and the Making of Islamic Revivalism*. (Oxford, New York: Oxford University Press. 1996), p. 59.

¹²⁸⁹ *ibid.*, p. 60.

unbeliever, but nowhere do the Qur'an or *Sunna* state that such visits constitute unbelief. The 19th Islamic jurist Muhammad ash-Shawkani (d. 1250 AH/ 1839 CE) viewed visiting graves merely as a misdeed and not as unbelief, and furthermore saw labelling such visitors as unbelievers as deviant in itself. He criticised Wahhabis in a poem:

How is it said that people [i.e., visitors] are unbelievers // if one sees stones and sticks by their graves.... But this [i.e., the actions of the visitors of graves] is a misdeed (*dhanb*) and not unbelief (*kufir*), // nor is it sinfulness (*fisq*) , is there in this any refutation? For if there is, it would entail calling the person who disobeys through a misdeed // an unbeliever, and such an assertion is deviant...¹²⁹⁰

Both Maududi and Qutb cite Qur'an 5:44 as evidence for their *takfir* arguments and declarations, and so it's important to understand the background to this verse. According to Fluehr-Lobban it was actually revealed to Muhammad when Jewish people requested that he punish two Jewish adulterers. When Muhammad asked what the Torah prescribed as punishment they didn't mention stoning, but a recent Muslim convert from Judaism informed Mohammed that the punishment really prescribed in the Torah was indeed stoning. The Prophet thus ordered the adulterers to be stoned, and recited verse 5:44.¹²⁹¹ This verse illustrates how difficult it is to apply or use such verses to critique modern laws in Muslim majority states. Muhammad Sa'id al-'Ashmawi, who was an Egyptian Supreme Court justice and former head of the Court of State Security, noted how Qur'an 5:44 was "revealed in response to a specific incident and cannot be interpreted outside its historical context".¹²⁹² Fluehr-Lobban also notes that although the term '*kafirun*' in the

¹²⁹⁰ Haykel, *Revival and reform in Islam*, p. 129.

¹²⁹¹ Carolyn Fluehr-Lobban, ed., *Against Islamic extremism: the writings of Muhammad Sa'id al-'Ashmawy* (Gainesville : UP of Florida, 1998), p. 96, see also, *Sahih Al-Bukhari*, Vol., 6, no. 4556, pp. 72-73.

¹²⁹² *ibid.*

Jewish adulterers' story means "those who deny the Mosaic punishment", this term has been deliberately "misinterpreted and distorted by the militants to accuse every society and every government of unbelief"; in other words, it has been wilfully misused for their own ends."¹²⁹³

Throughout history certain scholars and groups have commonly been criticised at the time as deviants or heretics. The Companions of the Prophet and certain scholars held that the Khawarij were misusing the divinity of God's command and had rejected human reasoning. When the Caliph 'Ali heard that the Khawarij slogan was *la hukma illa lillah* ("Authority belongs to God alone"), he reportedly stated that although the final verdict was for Allah alone, governance was not - men must govern, and inevitably some rulers will be good, some bad. For Ali, the Khawarij rallying call was a case of "true words being used for false purposes."¹²⁹⁴ The Khawarij slogan was also criticised as a misappropriation of Islamic text in *Sirat Salim ibn Dhakwan*, an early epistle of the Ibadī Islamic school written around the 8th CE. It notes that the Khawarij were seeking to use God's right for their own benefit:

Then the Kharijite [Khawarij] Muslims followed one another, adhering to that way. They would make God their sole judge and accept the path of the Muslims who had gone before them.¹²⁹⁵

Abu Zahra states that the Khawarij believed that people who made mistakes were unbelievers. They did not distinguish between evil intention and errors resulting

¹²⁹³ *ibid.*

¹²⁹⁴ Imam Ali ibn Abi Talib, edited and published by Ahlul-Bayt Assembly of America, *Nahjul Balaaghah* (Potomac: Ahlul-Bayt Assembly of America, 1996), p. 28; Al-Tabari, *The History of al-Tabari*, vol. 17, p. 112; *Sahih Muslim*, vol. 3, no. 2468, p. 126.

¹²⁹⁵ Ibn Dhakwan, *The Epistle of Salim Ibn Dhakwan*, p. 97 (no. 65).

from *ijtihad* (independent reasoning), which explains why they condemned ‘Ali as an unbeliever for agreeing to arbitration.¹²⁹⁶

The Khawarij cited divine judgement as justification for attacking other groups but their own judgements were not divine, as they deviated from the teachings of the Qur’an and the *Sunna*. Many commentators would see this as a misuse of God’s message, and the Khawarij as sinful Muslims. Qamaruddin Khan points out that the Khawarij slogan “There is no rule but of God” at first may suggest that there should be no government; indeed, Bassiouni and others have noted that the Khawarij have often been labelled as anarchists.¹²⁹⁷ However, Khan argues that it actually means that nothing can be decided without reference to the Qur’an.¹²⁹⁸ For Tahir-ul-Qadri the Khawarij movement was essentially one of violence; they continually resisted dialogue and peaceful settlements.¹²⁹⁹ He notes that the “major objective of the Khawarij is to destabilize the foundations of the Muslim state in the name of the religion”.¹³⁰⁰ Khadduri records their fierceness and brutality; “in war they killed women and children and condemned to death prisoners of war”.¹³⁰¹ It should be noted that introducing the concept of *takfir* was not the Khawarij’s only ‘innovation’; they also pioneered the use of a particular brand of Islam (i.e. theirs) as a political weapon with which to attack other groups. Their use of *takfir* actually had no basis in Shari’a, or any legal justification at all; rather, the prevailing political circumstances determined their strategy. The Khawarij did not therefore

¹²⁹⁶ Abu Zahra, *The Four Imams*, p. 321.

¹²⁹⁷ M. Cherif Bassiouni, “Islam: Concept, Law and World Habeas Corpus” 1 *Rutgers Camden Law Journal* (1969), pp. 185-186.

¹²⁹⁸ Khan, *The Political Thought of Ibn Taymiyah*, p. 29.

¹²⁹⁹ Tahir-ul-Qadri *Fatwa on terrorism and suicide bombings*, pp. 270-271.

¹³⁰⁰ *ibid*, p. 270.

¹³⁰¹ Khadduri, *War and Peace*, p. 68.

practise what they preached; they did not follow divine judgement but rather followed their own judgment when accusing another groups.

Ibn Taymiyya's rejection of the Mongols' *Yasa* code (Mongol customary legal code) can be compared to the contemporary rejection by certain Islamic groups of Western legal influence. It should be noted that contemporary legal scholars and judges did not necessarily agree with Ibn Taymiyya, and he was accused of heresy. Mamluk courts found him guilty of various offenses, such as issuing innovative legal rulings, and he eventually died in jail in Damascus.¹³⁰² One such court case was recorded by the 14th CE Muslim traveller Ibn Batuta:

The *qadis* [judge] and doctors were assembled in the audience hall of al-Malik al-Nasir, and Sharaf al-Din al-Zuwawi, the Malikite, made an accusation saying 'This man [Ibn Taymiyya] said so-and-so', enumerating the charges [of heresy] brought against Ibn Taimiya.¹³⁰³ Consequently al-Malik al-Nasir ordered him to be put in prison.¹³⁰⁴

Ibn Taymiyya's words are still cited today by non-state actors, such as Muslim extremists, as justification for their *takfir* against Muslim governments or groups. However, his *takfir* against the Mongol invaders of his day and against nominal Muslims or apostates are completely bound by their time and circumstances. Michot notes that Ibn Taymiyya's key anti-Mongol *fatwa* was intended to mobilise Muslim opposition against their foreign occupiers, the Mongols.¹³⁰⁵ Moreover, Ibn Taymiyya also stated that "we should only fight those who fight us, if we really want the Religion of Allah to be victorious".¹³⁰⁶ In other words, he was against

¹³⁰² Mohammad Hassan Khalil, *Islam and the Fate of Others: The Salvation Question* (Oxford: Oxford University Press, 2012), p. 75.

¹³⁰³ Ibn Batutut, *The Travels of Ibn Battuta*, vol. 1, pp. 135-136.

¹³⁰⁴ *ibid.*, p. 136.

¹³⁰⁵ Yahya Michot, *Muslims under Non-Muslim Rule* (Oxford: Interface Publications, 2006), p. 50.

¹³⁰⁶ Ibn Taymiyya, *Ibn Taimiyya on Public and Private Law in Islam*, trans. Omar A. Farrukh (Beirut: Khayats,

fighting non-combatants; those who “do not constitute a defensive or offensive power, like the women, the children, the monks, old people, the blind, and the permanently disabled should not be fought”.¹³⁰⁷ Crucially, he also stated that “if those in authority did not comply wholly with the orders of Allah, you should, anyway, obey them”; this was because “sixty years domination of a despotic ruler are better than one single night passed without a ruler”.¹³⁰⁸ Ibn Taymiyya believed that Muslims needed to look to themselves first. Hillenbrand notes that he favoured moral rearmament of the Muslims internally, coupled with strong resistance to external aggression. She argues that his “implacable diatribes against all kinds of innovations in Islam – against mystical practices, philosophy, theology, the veneration of tombs are all motivated by his desire that the True Religion should not resemble in any way the practice of non-Muslims”.¹³⁰⁹ Ibn Taymiyya lived “under the shadow of the Mongol threat”¹³¹⁰ in a very different situation than pertains in the Middle East nowadays; it is therefore very hard to justify the use of his approach and texts today.

Similarly Al-Wahhab claimed that Islamic society had become un-Islamic and so urged a return to the religious climate of the Prophet’s era, but in fact his approach markedly deviated from Shari’a. The Shafi’i *mufti* of Mecca, Ahmad b. Zayni Dahlan (d. 1304 AH/ 1886 CE), stated that

1966), p. 141.

¹³⁰⁷ *ibid.*, p.140.

¹³⁰⁸ *ibid.*, p. 188.

¹³⁰⁹ Hillenbrand, *The Crusades*, p. 243.

¹³¹⁰ Michael Doran, “The Pragmatic Fanaticism of al Qaeda: An Anatomy of Extremism in Middle Eastern Politics”, 117 *Political Science Quarterly* (2002): 177-190, p. 179.

...he [al-Wahhab] claimed that the aim of the sect he originated was to purify *tauhid* [*tawhid*], to free it from all trace of *shirk*, the state in which people had allegedly been for six hundred years, and to renew their religion for them.¹³¹¹

Moreover, many scholars have criticised Al-Wahhab's approach to 'purifying' the Muslim community, for example Bidwell:

He [Al-Wahhab] demanded a return to the purest form of original Islam and preached that every innovation or change since the days of the Prophet was totally wrong. He assured his followers that all who disagreed with him were infidels whose property should be liberated by the true believers, any of whom killed in this holy war were assured of instant entry to Paradise.¹³¹²

Ironically, al-Wahhab's call to purify the Islamic community could actually be seen as a return, or an attempted return, not to the Prophet's time but to the preceding age of *Jahilliya*, the age of ignorance. Arguably, he should be seen not as a reformer but as someone who ignored Islam's traditional approach; indeed, the Ottoman imperial state and other foreign observers viewed the Wahhabis as an anti-Islamic movement. Silvestre de Sacy (d. 1838 CE) saw them as totally hostile to Islam.¹³¹³

5.4 *Takfir* and Shari'a law

For *Daesh* and other groups *takfir* has been the basis for punishment of those who they see as non-believers, including people who profess to follow the Muslim faith. They extrapolate from Qur'anic verses to justify such actions. Yet there is also a school of thought within Islam which sees this as a misinterpretation of the Qur'an.

¹³¹¹ Ahmad b. Zayni Dahlan cited in Hamid Algar, *Wahhabism: a Critical Essay* (Oneonta, N.Y.: Islamic Publications International, 2002), p. 80. (Algar, Wahhabism)

¹³¹² Lewis Pelly, *Report on a journey to Riyadh in central Arabia, 1865*, with a new introduction by R. L. Bidwell (Cambridge: Oleander, 1978), p. v.

¹³¹³ Antoine Isaac Silvestre de Sacy cited in Giovanni Bonacina, *The Wahhabis Seen Through European Eyes 1772-1830: Deists and Puritans of Islam* (Leiden: Brill, 2015), p. 50.

In this reading, man does not have the right to declare *takfir*, only God. This is because only *Allah* holds the right to decide whether one is a believer or not, and this decision would be made in the hereafter. As such, *takfir* declarations amount to a religious sin under Shari'a law.

This section analyses *takfir* with regards to Shari'a and to its relation with the concepts of *hisbah* and *fatwa*. It then looks at how Islamic law schools have co-opted *takfir*, in particular the Shia law schools, which recognise the concept. It must be underlined that the concepts of *hisbah* and *fatwa* were not traditionally used to deliver *takfir*. *Fatwa* are relative legal opinions, not absolute ones, and as such they may be countered (or replaced) by another *fatwa*. *Hisbah* are limited to the use of particular officials and confined to particular areas of society (specifically, marketplaces); using *hisbah* to issue *takfir* is therefore problematic. Finally, although Shia Islam recognises *takfir*, their declarations differ considerably from those issued by the Khawarij and *Daesh*.

5.4.1 The *Qur'an* and the *Sunna*

This section examines how *Daesh* reinterprets Shari'a dispositions to develop their own understanding of *takfir*. Typically *Daesh* will only cite a few words from a particular passage, without analysing the meaning and background of the verses quoted. For example, they consider Qur'an 9:73, which calls for Muslims to "strive against the unbelievers and the Hypocrites", to be a 'sword' for hypocrites.¹³¹⁴

¹³¹⁴ "From Hypocrisy to Apostasy", *Dabiq*, Issue 10, p. 21

However, Qur'an 9:73 does not unconditionally order Muslims to attack apostates. Any attacks that do occur can only be made for self-defence purposes, as discussed in Chapter 1. *Daesh* also seek to justify killing apostates by referring to Qur'an 5:54, which states that "Whoever from among you turns back from his religion (Islam)...Fighting [them] in the Way of Allah". This is yet another example of *Daesh* interpreting the Qur'an at their discretion so as to extrapolate from it a punishment for apostasy. However, rather than prescribing a punishment for apostasy, verse 5:54 is in fact both a warning and a prophecy, as discussed in Chapter 1. Another example is Qur'an 4:140 ("...when you hear the Verses of Allah being denied and mocked at, then sit not with them"), which *Daesh* cite in order to support their claim that someone doing nothing should be considered *kafir*. *Daesh* state that

...merely sitting silently with the *kuffār* during a gathering of *kufr* is *kufr*....There is no doubt that such deeds are apostasy.¹³¹⁵

However, this verse does not actually suggest that someone sitting silently with unbelievers becomes an apostate. According to Ibn Abbas, this verse is preventatively aimed at discouraging anyone planning to attack Muslim society:

...when Muhammad and the Qur'an are rejected and derided, ((ye) sit not with them (who disbelieve and mock)) and engage in the same conversation (until they engage in some other conversation) other than about Muhammad and the Qur'an. (Lo! in that case (if ye stayed)) i.e. if you sit with them without being coerced to do so (ye would be like unto them) in engaging in the same conversation and in showing derision.¹³¹⁶

¹³¹⁵ *ibid*, p. 60.

¹³¹⁶ *Tafsir Ibn 'Abbas*, p. 105.

Clearly, verse 4:140 does not specifically define who is an apostate and who is not. Yet, the *Daesh* interpretation of this passage leads to a militant position which is in conflict with the original intention.

The *Sunna* is used metaphorically to refer to the work which collects the Prophet's words and deeds, is also cited by *Daesh*. In order to justify their massacres of both Muslims and non-believers.¹³¹⁷ As discussed in Chapter 1, all the so-called apostasy and blasphemy cases in the Prophet's time were not merely instances of religious sin but also serious offences such as treason or murder. The Prophet did not kill any blasphemers *per se*; killing blasphemers is prohibited in Shari'a. Another *hadith* notes specifically that killing *mu'ahid* (non-Muslims living under Muslim rule) is also forbidden. This prohibition of killing non-Muslims is mentioned by the Prophet in both *Sahih Bukhari* and *Jami At-Tirmidhi*:

Whoever killed a *Mu'ahid* shall not smell the fragrance of Paradise though its fragrance can be smelt at a distance of forty years (of travelling).¹³¹⁸

...whoever kills a *Mu'ahid* that has a covenant from Allah and a covenant from His Messenger, then he has violated the covenant with Allah and the covenant of His Messenger, so he shall not smell the fragrance of Paradise; even though its fragrance can be sensed from the distance of seventy autumns.¹³¹⁹

It is therefore hard to see how the Prophet could have ordered or approved the killing of the slave girl for her blasphemous statements. Taken together, all four of these *hadith* indicate that the *Daesh* approach to *takfir* is contrary to Shari'a precepts.

¹³¹⁷ , "From Hypocrisy to Apostasy", *Dabiq*, p. 59.

¹³¹⁸ *Sahih al-Bukhari*, vol. 9 no. 6914 p. 87.

¹³¹⁹ *Jami At-Tirmidhi*, vol. 3, no 1403 p. 189.

None of these blasphemy cases or Qur’anic verses can or should be used to justify *takfir*, as none of them relate to the punishment of unbelievers, or *kafir*. In their misappropriation of these *hadith Daesh* have violated the Shari’a, which clearly states that declarations of *takfir* are prohibited. The justifications *Daesh* use for their killing of apostates and blasphemers derive from unintentional or probably wilful misinterpretations of the Qur’an and the *hadith*.

Understanding the Qur’anic position on *takfir* is the crux of the matter. Although the word itself is not referenced in the Qur’an, it is indirectly prohibited. For example, Qur’an 6:108 reads as follows:

Revile not ye those whom they call upon besides Allah [non-believers], lest they out of spite revile Allah in their ignorance. Thus have We made alluring to each people its own doings. In the end will they return to their Lord, and We shall then tell them the truth of all that they did.

This verse was revealed in the third Meccan period.¹³²⁰ According to Ibn Kathir, it means that Allah has forbidden Mohammed and his followers from insulting other religions, as such insults could lead to their followers retaliating in kind. ‘Ali bin Abi Talhah, a *muhaddith* (*hadith* scholar), wrote that Ibn ‘Abbas had noted that certain disbelievers had said “O Muhammad! You will stop insulting our gods, or we will insult your Lord.”¹³²¹ Allah therefore ordered all Muslims to refrain from insulting the idols of any other religions, lest they insulted Allah in return.¹³²² This prohibition of *takfir* is repeated in other verses:

O ye who believe! When ye go abroad in the cause of Allah, investigate carefully, and say not to anyone who offers you a salutation: “Thou art none of a believer!”

¹³²⁰ *Encyclopedia of the Qur’an*, p. 497.

¹³²¹ *Tafsir ibn Kathir*, vol. 3, p. 436.

¹³²² *ibid.*

Coveting the perishable goods of this life: with Allah are profits and spoils abundant. Even thus were ye yourselves before, till Allah conferred on you His favours: Therefore carefully investigate. For Allah is well aware of all that ye do.
[Qur'an 4:94]

According to Abbas, verse 4:94 was revealed by Allah following the murder of Mirdas Ibn Nuhayk al-Farari by Usamah Ibn Zayd, both of whom were Muslims.¹³²³ In this verse the Qur'an prohibits the killing of any Muslim who openly commits to Allah by reciting the *shahadah* ('There is no god but Allah, Muhammad is the Messenger of Allah').¹³²⁴ According to O'Sullivan, verse 4:94 guides Muslims to be tolerant of others and not approach them with predetermined assumptions.¹³²⁵ He argues that its intention is for Muslims to take such salutations as 'peace be with you' at face value, whether the speaker is known to the Muslim listener or not, or whether the speaker is known to be Muslim, non-Muslim or even worse, a hypocrite.¹³²⁶

The stance taken by the Prophet is recorded in the *hadith*. The Prophet warns Muslims "...not to declare a person a disbeliever for committing a sin, and not to expel him from Islam by an action."¹³²⁷ Moreover, The Prophet states that insulting a believer is "an evil action."¹³²⁸ Mohammed sees someone who calls another a 'takfir' to be one himself. His teachings on this are to be found in several *hadith*, for example in *Sahih Bukhari*,¹³²⁹ *Sahih Muslim*¹³³⁰ and *Sunan An-Nasa'i*.¹³³¹ These

¹³²³ *Tafsir Ibn 'Abbās*, p. 98.

¹³²⁴ *Shahadah*, that is, a belief in only one God (*tawhid*) and an acknowledgement that Muhammad is his Messenger.

¹³²⁵ O'Sullivan, "Egyptian Cases of Blasphemy and Apostasy against Islam", p.113.

¹³²⁶ *ibid.*, pp. 113-114; *Encyclopaedia of the Qur'an*, Vol. 2, p.166

¹³²⁷ *Sunan Abu Dawud*, vol 3, no. 2532, p. 223.

¹³²⁸ Abu Abdullah Ahmad bin Muhammad bin Hanbal Ash-Shaibani, *English translation of Musnad Imam Ahmad bin Hanbal*, translated by Nasiruddin Al-Khattab; edited by Huda Al-Khattab (Riyadh : Darussalam, 2012), vol. 3, no. 4345, p. 591.

¹³²⁹ *Sahih Al-Bukhari*, vol. 8, no, 6103, p. 77..

If a man says to his brother, 'O *Kafir* (disbeliever)!' Then surely, one of them is such (i.e., a *kafir*).

hadith demonstrate not only that the Prophet prohibits *takfir*, but also that he considers it to be a sin. A number of related *hadith* all stress that any doubt regarding the sincerity of a particular Muslim can be negated by the consistency of their devotional actions, for example their manners of worship and dietary preparations. In *Sahih Bukhari*, the Prophet says

Whoever offers *Salat* (prayer) like us and faces our Qiblah (Ka'bah at Makkah during *Salat* and eats our slaughtered animals), is a Muslim and is under Allah's and His Messenger's Protection. So do not betray Allah by betraying those who are in His Protection.¹³³²

In the *Muwatta* Imam Malik again underlined the prohibition of *takfir* with a direct quote from the Prophet:

'Doesn't he [hypocrite] testify that there is no god but Allah and that Muhammad is the Messenger of Allah?' The man replied, 'Of course, but he hasn't really done so.' He said, 'Doesn't he do the prayer?' and the man replied, 'Of course, but he doesn't really do the prayer.' He said, may Allah bless him and grant him peace, 'Those are the ones whom Allah has forbidden me (to kill).'¹³³³

In this story the Prophet recognises that someone who has declared *shahadah* is undoubtedly Muslim and that God has prohibited the killing of such a person. The Qur'an and the *Sunna* both clearly prohibit *takfir*, despite the change in direction effected by later scholars. According to O'Sullivan, such *hadith* strengthened the Islamic community by establishing a general unity between fellow believers and

¹³³⁰ *Sahih Muslim*, vol. 1, no. 217, p.158,

Whoever calls a man a disbeliever (*Kafir*) or says to him: 'O enemy of Allah!' when he is not like that, it will rebound upon him.

¹³³¹ *Sunan An-Nasa'i*, translated by Nasiruddin al-Khattab (Riyadh: Maktaba Dar-us-Salam, 2007), vol. 5, no. 4113, p. 85.

Defaming a Muslim is evildoing and fighting him is *kufir*.

¹³³² *Sahih Al-Bukhari*, Vol., 1, no. 391, p. 259.

¹³³³ Ibn Anas, *Al-Muwatta*, p. 74 (Book 9, Number 9.24.87).

building mutual support. This prevented the use of the term ‘disbeliever’, which could have led to a reduction in the size of the nascent community.¹³³⁴

Fighting amongst Muslims on the basis of differences in belief has long been prohibited by scholars. For example, Al-Mawardi argued that small groups of non-consensual Muslims could be tolerated and should not be fought, and that the normal rules of law and rights, duties and punishment should apply to them.¹³³⁵

Al-Mawardi also stated that without overt evidence of an individual’s lack of faith, their denial of allegations of apostasy should be recognised.¹³³⁶

Takfir is condemned by Al-Ghazali, who points out that

....whenever one finds oneself unable to commit (to his would-be source), he should refrain from branding a person an Unbeliever. Indeed, rushing to brand people Unbelievers is the habit of those whose natures have been overrun by ignorance.¹³³⁷

In the same vein, Ahmad ibn Hanbal reportedly stated that the Prophet

...does not declare any Muslim destined for the Garden by virtue of his good works, nor condemn him to the Fire for any sin he commits; rather, he leaves God to do with His creatures what he likes....¹³³⁸

Imam Ḥabīb Aḥmad Mashhūr al-Ḥaddād stated that

It is not permissible for anyone to charge into this area and declare people to be outside Islam merely on the basis of one’s own imagination and conjectures,

¹³³⁴ O’Sullivan, “Egyptian Cases of Blasphemy and Apostasy against Islam”, p. 116.

¹³³⁵ Al-Mawardi, *The Ordinances of Government*, p. 64.

¹³³⁶ *ibid.*, p. 63.

¹³³⁷ Sherman A. Jackson, *On the Boundaries of Theological Tolerance in Islam (Abu Hanid al-Ghazali’s Faysal al-Tafriqa Bayna al-Islam wa-Zandaqa)* (Karachi: Oxford University Press, 2002), p. 115.

¹³³⁸ Al-Jawzi, *Virtues of the Imam Ahmad ibn Hanbal*, Vol., 1, p. 307.

without seeking firmly established knowledge. Otherwise, great confusion would ensure, and very few Muslims would be left on the face of the earth.¹³³⁹

Equally prohibited are declarations of *takfir* against rulers, such as are commonly used by the *Daesh*. Ahmad ibn Hanbal stated that

...under the rule of whatever government there is, just or unjust; believing that we should not take up arms against rulers, even oppressive ones; not holding anyone who professes the oneness of God to be an Ingrate [*Kafir*], even if he commits grave sin...This is the *sunnah*; if you follow it, you will be saved. To adopt it is a blessing and to break from it is to be lost.¹³⁴⁰

Thus declaring *takfir*, which has been prohibited ever since the Prophet's epoch, amounts to a sin. The Qur'an and the *Sunna* are unequivocal that *takfir* is contrary to Islamic precepts and that God only has the right to decide, in the hereafter, one's Muslim or non-believer status. In this sense, if humans of the Muslim faith take ownership of God's right to declare *takfir*, they themselves become sinful Muslims.

5.4.2 The Shi'i position on *takfir*

The Shia branch of Islam has its own understanding of *takfir* which is based on the concept of *imamah* (leadership) and is aimed at those who went to war against Islam. However, such people are not necessarily excluded from the fold of Islam. The meaning of the term 'Shia' is party or group; more specifically it refers to the Shi'ites, the followers of the fourth Caliph Ali, who was the Prophet's cousin and the husband of his daughter Fatima. The Shi'ites believe Ali should have been

¹³³⁹ Al-Haddād, *Key to the Garden*, pp. 70-71.

¹³⁴⁰ Al-Jawzi, *Virtues of the Imam Ahmad ibn Hanbal*, Vol., 1, p. 327.

Mohammed's immediate successor.¹³⁴¹ Shi'ism has generally been based upon the opinions and views of various imams from the Prophet's family.¹³⁴²

Three important doctrines distinguish Shi'ism from Sunnism, namely the concepts of *imamah* (leadership), *taqiyyah* (prudent fear) and *raj'a* (return).¹³⁴³ The first of these, the doctrine of *imamah*, is crucial in understanding why the Shi'ites adopted the notion of *takfir*. The term 'imam' means 'leader'; the institution of the *imamate* is seen as a "continuation of Prophethood".¹³⁴⁴ For Shi'a Islam, only the Prophet and the other previous *Imams* had the right to appoint an *Imam*. This is based on the Prophet's words to the fourth Caliph Ali, which were as follows:

Medina will only be properly looked after by myself and by you. You[Ali] are my deputy (*khalifa*) among my family (*ahl al-bayt*) and in the place of my emigration and my people. Are you not content, 'Ali, that you have the same rank with regard to me as Aaron had with regard to Moses, except that there is no prophet after me?"¹³⁴⁵

In the Shi'i usage of *imam*, the term signifies the person in charge of a nation's political and religious affairs. The *imam* is someone appointed by God and nominated by the Prophet and other *imams* via explicit designation (*nass*) to lead all Muslims; this includes the right to "interpret and safeguard both religion and law (*shari'a*)".¹³⁴⁶ The power held and sometimes wielded by the *imams* is closely linked to their authority to pronounce *takfir*. According to Al-Shaykh Al-Mufid (d. 413 AH/1022 CE), who was an eminent Twelver Shi'a theologian, the *imams* "take

¹³⁴¹ Mohammad Najmi, *Mohammadan law*, (Allahabad : Central Law Publications, 2000), p. 16.

¹³⁴² Hossein Modarressi Tabataba'i, *An Introduction to Shi'i law: a Bibliographical Study* (London : Ithaca Press, 1984), p. 2.

¹³⁴³ Rahman, "The Concept of Takfir", p. 65.

¹³⁴⁴ Muhammad Riqa al-Muzaffar, *The Faith of Shi'a Islam*, (Qum: Ansariyan Publication, 1982), p. 93.

¹³⁴⁵ Shaykh al-Mufid, *Kitab al-Irshad : the book of guidance into the lives of the twelve Imams*, translated by I.K.A. Howard with a preface by Seyyed Hossein Nasr (London, The Muhammadi Trust, 1981), p. 108.

¹³⁴⁶ Muhammad Riqa al-Muzaffar, *The faith of Shi'a Islam*, (Qum : Ansariyan Publication, 1982), p. 93.

the place of the Prophets in enforcing judgments, seeing to the execution of the legal penalties, safeguarding the Law, and educating mankind”.¹³⁴⁷ The special status enjoyed by the *imam* is important in order to understand why the Shi’i adopted *takfir*. Coulson explains that the Shi’ites saw leadership as a matter of divine right, the ruler deriving authority from the hereditary transmission of divine inspiration along the line of the Prophet’s descendants.¹³⁴⁸ Unlike the Khawarij and Sunnites, who believed that divine revelation could be supplemented and extended by juristic reasoning, the majority of the Shi’ites rejected juristic reasoning, believing that legal elaboration remained reserved for their *imam*.¹³⁴⁹ The 5th Imam Muhammad al-Baqir (Abu Ja‘far; 114 AH/ 733CE) stated that

Everyone who is obedient to Allah, to whom belong Might and Majesty, by worship in which he exerts effort, but who does not have an Imam (appointed) from Allah, his strivings are unacceptable...If such a person dies in this condition, he dies the death of unbelief and hypocrisy.¹³⁵⁰

Shi’ites have a duty to obey their *imam* as well as Allah. The divine character of the *imam* had an impact on the use of *takfir*, as anyone who doubted his divinity was deemed an unbeliever by his followers. Furthermore, and as argued by Saodah Rahman, understanding the political and doctrinal context in which Shi’ism came into existence is pivotal for grasping the Shia perception of *takfir*.¹³⁵¹ As mentioned earlier, the meaning of the word ‘Shi’a’ is ‘party’; Shi’a Islam began not

¹³⁴⁷ Al-Mufid cited in Martin J. McDermott, *The theology of al-Shaikh al-Mufid (d. 413/1022)*, (Beyrouth: Dar el-Machreq éditeurs : distribution, Librairie orientale, 1978.), p. 105.

¹³⁴⁸ Coulson, *A History of Islamic Law*, p.104.

¹³⁴⁹ *ibid*, pp.105-106.

¹³⁵⁰ Muhammad ibn Ya‘qūb al-Kulaynī, *al-Kāfi*, compiled by Abū Ja‘far Muḥammad ibn Ya‘qūb ibn Ishāq al-Kulaynī ar-Rāzī (Tehran, Iran : Karachi : Group of Muslim Brothers; 1981), vol. 1, part 2 The Book of Divine Proof (1), pp. 49-50, no. 472.

¹³⁵¹ Rahman, “The Concept of Takfir”, p. 64.

as an Islamic law school but as a form of political party that supported Ali's authority as leader.

Although Shi'ites recognise *takfir*, they do not exclude from the realm of religion those individuals who have been declared to be unbelievers. Al-Shaykh Al-Mufid (d. 413 AH/1022 CE) noted as follows:

The Shi'a agree in declaring unbelievers those who warred against the Commander of the Faithful. But they do not exclude them from the religion (*din*) of Islam, since their unbelief was a matter of interpretation (*kufr milla*), not the unbelief of apostasy from the Law itself (*kufr ridda*). For they abided by the Law as a whole, and they professed the two clauses of *shahada* [*shahadah*]. They therefore avoided *kufr ridda*, which excludes one from Islam. However, by their unbelief they did exclude themselves from faith and have deserved a curse and to be forever in the Fire, as we have said.¹³⁵²

To conclude, the adoption of *takfir* by Shi'i Islam was affected by the prevailing political circumstances and also by the process of the establishment of Shi'i Islam itself. Thus, *takfir* issued by Shi'a Islam differ from those issued by the 7th century Khawarij sect, certain medieval scholars and current extremist groups.

5.4.3 Interpretation of the Islamic concepts of *fatwa* and *hisbah*

One of the key concepts in Islamic legal systems is *fatwa* (or *fatawa* in plural). These are the declarations made by religious scholars on a range of social issues, particularly in reference to whether the actions of a group or individual are in line with the law. *Fatawa* are particularly valued when the interpretation of written law is ambiguous. This section analyses *takfir* and *fatwa* and their legal status by

¹³⁵² Martin J. McDermott, *The theology of al-Shaikh al-Mufid (d. 413/1022)*, (Beyrouth: Dar el-Machreq éditeurs : distribution, Librairie orientale, 1978.), p. 247.

reviewing court decisions and relevant cases. *Fatwa* and *takfir* are intimately related, as there are many *fatawa* which contain *takfir*. Whether issued by individuals or local religious establishments, *takfir* and the concept of *fatwa* are central to many apostasy and blasphemy cases. The root of the term ‘*fatwa*’ is ‘*fata*’, which refers to “youth, newness, clarification, explanation”.¹³⁵³ According to *the Encyclopedia of Islam and the Muslim World* (2004), a *fatwa* is

An advisory opinion issued by a recognised authority on law and tradition in answer to a specific question.¹³⁵⁴

Fatawa are widely used in Muslim majority states. In Iran, for example, Article 167 of the constitution (Rule of Law for Judiciary) stipulates that judges must make use of “Islamic sources and...*fatwas*” regarding issues on which Iranian law books are silent. In the same vein, large local religious establishments, such as the Council of Islamic Ideology (Pakistan), Hay’ah Kibar al-‘Ulama’ (Saudi Arabia) and Al-Azhar (Egypt), have also issued *fatawa*.

Many *fatawa* contain declarations of *takfir*, known as *takfiri fatawa*. Over the centuries many local religious establishments and scholars have issued *takfiri fatawa*. For example, in 1974 the Muslim World League, the largest Islamic NGO (Non-Governmental Organisation), issued a *fatwa* that declared Ahmadi Muslims to be apostates:

The Islamic Fiqh Council unanimously decided that the Qadiani (Ahmadiyya) creed is totally out of Islam and its followers are infidels. Their pretension of being Muslims is merely for a deception and misguidance.¹³⁵⁵

¹³⁵³ Muhammad Khalid Masud Updated by Joseph A. Kechichian “Fatwa” in John L. Esposito, ed., *The Oxford Encyclopedia of the Islamic World* (New York, N.Y.: Oxford University Press, 2009), Vol. 2., p. 233.

¹³⁵⁴ Daniel C. Peterson, “Fatwa” in Richard C. Martin ed., *Encyclopedia of Islam and the Muslim World*, (New York: Macmillan Reference, 2004), vol. 1, p. 255.

Likewise, the Muslim World League made a declaration of *takfir* against the Baha'i sect in 1977:

Bahatism and Babism are out of Islam and these are considered as contrary and hostile to Islam, and their followers are openly and unequivocally *Kafirs* (infidels).¹³⁵⁶

Contemporary scholars have also issued *takfir fatawa*. The *fatwa* issued against Salman Rushdie in 1989 by Iranian Supreme Leader Ayatollah Khomeini is particularly notable:

I inform the proud Muslim people of the world that the author of the Satanic Verses book, which is against Islam, the Prophet and the Koran, and all those involved in its publication who are aware of its content are sentenced to death.¹³⁵⁷

Abdul-Rahman al-Barrak, a Saudi Arabian cleric, issued a *fatwa* in 2006 in which he declared *takfir* against the Shi'ites:

By and large, rejectionists (Shiites) are the most evil sect of the nation and they have all the ingredients of the infidels. The general ruling is that they are infidels, apostates and hypocrites. They are more dangerous than Jews and Christians.¹³⁵⁸

Fatwas have often proven to be the trigger for extrajudicial killings, as with the murder of the Egyptian secularist writer Farag Foda in 1992. He had been declared *takfir* and his assassination called for in a *fatwa* proclaimed by the majority of Al-Azhar's sheikhs, including Abdul Ghaffar Aziz.¹³⁵⁹ Furthermore, he was

¹³⁵⁵ Muslim World League "The Third Resolution on Qadiani Sect and Associating With It", <<http://en.themwl.org/content/third-resolution-qadiani-sect-and-associating-it>>accessed 29 June 2016.

¹³⁵⁶ Muslim World League, "The Fourth Resolution On Bahai Sect and Associating with It", <<http://en.themwl.org/content/fourth-resolution-bahai-sect-and-associating-it>>accessed 29 June 2016.

¹³⁵⁷ "1989: Ayatollah sentences author to death" *BBC*, <http://news.bbc.co.uk/onthisday/hi/dates/stories/february/14/newsid_2541000/2541149.stm>accessed 29 June 2016.

¹³⁵⁸ World Muslim Congress, "Saudi Cleric -Shia infidels", (13 January 2008), <<http://worldmuslimcongress.blogspot.co.uk/2008/01/saudi-cleric-shia-infidels.html>>accessed 29 June 2016.

¹³⁵⁹ Ahmed Fouad, "Egypt Pulse: Al-Azhar Refuses to Consider the Islamic State an Apostate", *Al Monitor* (23

declared an apostate by the radical Egyptian group al-Gama'a al-Islamiyya. An earlier *fatwa* declaring secularist writers to be enemies of Islam was referenced by a number of establishment al-Azhar 'ulama (religious scholars), and Foda's murderers claimed they had merely carried out al-Azhar's sentence.¹³⁶⁰ At the killer's trial the respected Egyptian scholar Muhammad al-Ghazali testified that Foda deserved to die for espousing secularism, and that there is no punishment for the killers of apostates in Islamic law.¹³⁶¹ Al-Ghazali testified that Foda's views by definition made him a *murtadd* (an apostate):¹³⁶² "anyone who openly resisted the full imposition of Islamic law was an apostate who should be killed either by the government or by devout individuals."¹³⁶³

Extremist groups often issue *takfir fatawa*. Although the assassination of Sadat is a particularly well-known example of a murder triggered by a *takfir fatwa*, there are many others featuring less celebrated figures, and *fatawa* including declarations of *takfir* by non-state actors have led to many unjudicial killings. The powerful Pakistani organisation, Jamaat Ahle Sunnat, declared Salman Taseer, governor of the province of Punjab, apostate due to his comments and criticisms; the *fatwa* stipulated that he would remain so until he repented, a position supported by other religious groups.¹³⁶⁴ Taseer was assassinated in 2011, with his murderer citing

February, 2015),
 <<http://www.al-monitor.com/pulse/originals/2015/02/azhar-egypt-radicals-islamic-state-apostates.html>> accessed 29 June 2016.

¹³⁶⁰ Shmuel Bar, *Warrant for terror : fatwās of radical Islam and the duty of jihad* (Lanham, Md. : Rowman & Littlefield, 2006), p. 16, footnote 8.

¹³⁶¹ Saeed and Saeed, *Freedom of Religion*, p. 102.

¹³⁶² As'ad AbuKhalil, "The Incoherence of Islamic Fundamentalism: Arab Islamic Thought at the End of the 20th Century", 48 *Middle East Journal* (1994), p. 679.

¹³⁶³ Douglas Jehl, "Mohammed al-Ghazali, 78, An Egyptian Cleric and Scholar", *The New York Times* (14th March, 1996),
 <<http://www.nytimes.com/1996/03/14/world/mohammed-al-ghazali-78-an-egyptian-cleric-and-scholar.html>>
 accessed 29 June 2016.

¹³⁶⁴ Pak Tea House, Salman Taseer "Apostate"?, (25 November 2010),

Taseer's alleged blasphemy as the reason.¹³⁶⁵ Although *fatawa* do not have the legitimacy of a judicial ruling behind them, many people view them as valid and act accordingly, even to the extent of killing someone declared apostate.

The misuse of *fatawa* is not a recent issue, but one which goes far back in Islamic history. Barbara Metcalf has examined how *fatawa* have been misused, noting that *fatawa* verdicts have stained Islam's thirteen centuries with "the blood of thousands of truthful persons"; she even argues that *muftis* (court officials) and generals have been of equal service to Islamic rulers.¹³⁶⁶ It was the *muftis* who traditionally delivered a *fatwa* to the *Qadi* or judge as direction or as an opinion regarding an emerging issue.¹³⁶⁷ In 19th century British India Metcalf notes that *fatawa* were directly issued as guidance to believers in coping with their changed circumstances. Despite no longer holding any coercive power or being used to deliver opinions on many state-wide issues, *fatawa* were used to publicise rulings on very detailed matters of everyday life, particularly those relating to Islamic belief and practice under the Raj.¹³⁶⁸

In the contemporary era *fatawa* have been, and still are being, misused by scholars and individuals who give them more weight than the Qur'an intended. It is certainly clear in the Qur'an that as a *fatwa* amounts to a relative, and not absolute, opinion, it cannot be used to declare *takfir*. According to the Qur'an, a *fatwa* is a legally

<<https://pakteahouse.wordpress.com/2010/11/25/11019/>>accessed 29 June 2016

¹³⁶⁵ *ibid.*

"Ghazi Malik Mumtaz Qadri is the one who killed Governor Punjab Salman Taseer," Samaa TV, January 4, 2011 n Saeed, "Ambiguities of Apostasy", pp. 36-37.

¹³⁶⁶ Christian W. Troll, "Abul Kalam Azad's Sarmad the Martyr" in Christopher Shackle ed., *Urdu and Muslim south Asia: studies in honour of Ralph Russell* (London : School of Oriental and African Studies, University of London, 1989), p. 124.

¹³⁶⁷ Barbara Daly Metcalf, *Islamic revival in British India: Deoband, 1860-1900* (Princeton : Princeton University Press, 1982), p. 50.

¹³⁶⁸ *ibid.*

non-binding answer given by a scholar to a very specific question. The term *fatwa* has two meanings, “asking for a definitive answer” (Qur’an 4:127) and “giving a definitive answer” (Qur’an 4:176), but neither of these verses has a binding force. Bernard Lewis has measured the importance a *fatwa* bears in Islamic law: “*Fatwa* is a technical term in Islamic jurisprudence for a legal opinion or ruling on a point of law. It is the Shari’a equivalent of the *response prudentium* of Roman law.”¹³⁶⁹ In early Islam the concept of *fatwa* therefore developed as a “question-and-answer process to better communicate on religious matters”,¹³⁷⁰ and is thus key to the development of Islamic law. According to Hallaq it was *fatawa*, rather than court decisions, that were collected and published; those that contained new laws or new legal interpretations of pre-existing problems were of particular interest.¹³⁷¹ Therefore, the origins of *fatawa* have no link whatsoever to making declarations of *takfir*. Rather, *fatawa* are, to a considerable extent, the product of *mufti* question-and-answer activities.¹³⁷²

It must be noted however that the non-binding nature of *fatawa* in the Qur’an seems to have been lost. Whereas the content of a *fatwa* would traditionally have been considered when issuing a subsequent court decision or ruling, in the same way as an advisory opinion, recent cases show that the *takfiri fatawa* have themselves prompted extrajudicial killings in Muslim majority states, as discussed earlier. In these instances there was no associated ruling based on the content of these declarations nor was there any subsequent court decision. *Fatawa* are being misused as instruments by extremist groups; for example, *Daesh* regularly issue

¹³⁶⁹ Lewis, *The Crisis of Islam*, p.119.

¹³⁷⁰ Muhammad Khalid Masud Updated by Joseph A. Kechichian “Fatwa” in John L. Esposito, ed., *The Oxford Encyclopedia of the Islamic World* (New York, N.Y. : Oxford University Press, 2009), Vol. 2., p. 233.

¹³⁷¹ Hallaq, *An Introduction to Islamic Law*, p. 10.

¹³⁷² *ibid*, p. 9.

fatawa against their enemies. Just as notions of apostasy and blasphemy have evolved throughout Islamic history, so have *fatawa* themselves. Although modern-day *fatawa* are often essentially vehicles for *takfir* declarations, their original format was quite different. As stated earlier, they began with a question addressed to a *mufti* and ended with an answer provided by that *mufti*.¹³⁷³

A *fatwa* can be overruled by another *fatwa*. Purohit notes that although *fatawa* declared by a *mufti* had considerable authority, it remained at the judge's (*qadi*) discretion as to whether they were followed or disregarded; in other words, there was no requirement to adhere to a *fatwa*'s directives.¹³⁷⁴ However, Hallaq notes that on those occasions when a *fatwa* was ignored, it tended to be because an opposing *fatwa* was better-reasoned; only rarely would a judge dismiss a *fatwa* without there being another *fatwa* available to base his conclusions upon.¹³⁷⁵

The main point to consider here is that a *fatwa* does not bear the same *legal* weight as a court ruling. Masud has noted that the major difference is enforceability, in that *qada* (carrying out a court judgement or court rulings) are binding whereas *fatawa* are *stricto sensu* (totally optional) and voluntary. He argues however that *fatawa* can be seen as "an indirect instrument for defining formal concepts of law when applied in courts".¹³⁷⁶ Therefore, *fatawa* are not absolute but are relative; they are the creations of jurists formulated in response to specific questions or issues.

¹³⁷³ Wael B. Hallaq, From "Fatwas to Furu: Growth and Change in Islamic Substantive Law", 1 *Islamic Law and Society* (1994), pp.31-32.

¹³⁷⁴ Nishi Purohit *The Principles of Mohammedan Law* (Pune: C.T.J. Publications, 1995), p. 30.

¹³⁷⁵ Hallaq, *An Introduction to Islamic Law*, pp. 9-10.

¹³⁷⁶ Muhammad Khalid Masud Updated by Joseph A. Kechichian "Fatwa" in John L. Esposito, ed., *The Oxford Encyclopedia of the Islamic World* (New York, N.Y. : Oxford University Press, 2009), Vol. 2., p. 233.

Furthermore, *takfiri fatawa* are not recognised under Shari'a. Firstly, Shari'a prohibits *takfir* pronounced by man: as previously discussed, human beings cannot determine whether someone is an apostate or not, since that right belongs to God only. Secondly, a *fatwa* is just a legally non-binding opinion. Ibn Hazm argued that Muslims should not declare any *fatwa* relating to faith:

By my life! Verily the thing which is allowed to be thrown to the wall by the hearer, deserve to be instantly thrown to the wall, and should not be given in a *fatwa* relating to the faith, nor should it be informed of on the authority of Allah, the Exalted and Gracious.¹³⁷⁷

Takfir and the concept of fatwa and hisbah

Whilst the concept of a *fatwa* normally relates to the infringement of a law or social convention, a related concept, the *hisbah*, suggests a believer must do what is morally right as well as avoid sin. As with *fatwa*, *hisbah* have been misused as justification for *takfir*. *Hisbah* are mentioned in the Qur'an, for example in verse 3:104: "enjoining what is right, and forbidding what is wrong" (reiterated in verse 3:110). According to Ibn Kathir, verse 3:104 asserts that although *hisbah* is incumbent on each member of the *Ummah*¹³⁷⁸ to the extent of one's ability, this task should be fulfilled by a specific segment of the *Ummah*.¹³⁷⁹ Thus *hisbah* bears two meanings: firstly it means following the precepts of Islam, and secondly it refers to the body of Muslims who ensure that the wider community of Muslims respects *hisbah* (i.e. the precepts of Islam). As shall be discussed shortly, the

¹³⁷⁷ Ibn Hāzm, *Ibn Hāzm's al-risālah al-bāhirah : (the magnificent epistle)*, translated for the first time with an introduction and notes by Muhammad Saghir Hasan al-Ma'sumi ; general editor, Sharifah Shifa al-Attas (Kuala Lumpur : International Institute of Islamic Thought and Civilization, 1996), pp. 70-71 no. 79.

¹³⁷⁸ *Ummah* designates the Muslim community or society in its entirety

¹³⁷⁹ Ibn Kathir, *Tafsir ibn Kathir*, Vol., 2, p. 233.

concept of *hisbah* has been used in both senses by states, extremist groups and courts.¹³⁸⁰

Hisbah plays a role in maintaining public order in Saudi Arabia, where it is carried out by the *mutawa'in* (religious police) on behalf of HAIA, a governmental body (Committee for the Promotion of Virtue and the Prevention of Vice).¹³⁸¹ They enforce prayer observance and separation of unrelated men and women, amongst other 'virtues' and 'vices', but since 2007 HAIA's powers and funding have declined.¹³⁸²

Hisbah have also been also used by extremist groups who view declarations of *takfir* as falling within their list of duties. The *Daesh* has used *hisbah*; as with Saudi Arabia, *Daesh* has its own religious police force to ensure compliance with *hisbah's* requirements. These include investigating reports of drug or alcohol use and seizing such forbidden items as musical instruments or polytheistic idols. The religious police are also responsible for pursuing alleged violations of shari'a; serious crimes may be referred to court.¹³⁸³ One of the many instances where *Daesh* relied on *hisbah* to carry out a death sentence on the grounds of *takfir* was uploaded to YouTube. In that clip, a man accused of possessing talismans and engaging in witchcraft is publicly beheaded by al-Hisbah (religious police).¹³⁸⁴

¹³⁸⁰ *hisbah* is an important concept which touches all Muslims alike. The medieval Islamic Scholar Ibn Qudama (d. 620 AH 1223CE) states that

[*hisbah*] is the most fundamental of the religion, and is the mission that Allah sent the prophets to fulfil. If it were folded up and put away, religion itself would vanish, dissolution appear, and whole lands come to ruin.

Al-Misri, *The Reliance of the Traveller*, p. 714 q0.2

¹³⁸¹ Sherifa Zuhur, *Saudi Arabia*, (ABC-CLIO, 2012), p. 432.

¹³⁸² Ibid.

¹³⁸³ Andrew F. March and Mara Revkin, "Caliphate of Law", *Foreign Affairs* (15th April 2015), <<https://www.foreignaffairs.com/articles/syria/2015-04-15/caliphate-law>>accessed 27 June 2016.

¹³⁸⁴ "ISIS Video Showcases Religious Police Activity In Al-Raqqa" *MEMRI* (9th June 2015),

There are also occurrences of *hisbah* being used in court as a means to reach a *takfir* sentence, such as was declared by the Supreme Shari'a Court of Sudan against al-Amin Da'ud Mohammed Taha. The point of interest in this case is that the litigants used *hisbah* as the grounds for their legal action against Taha.¹³⁸⁵

Another telling example of the use of *hisbah* by a court is that of the 1995 Egyptian case involving Nasr Hamid Abu Zayd, an Arabic Literature lecturer at Cairo University. Abu Zayd's promotion to Professor was blocked by Dr. 'Abd al-Sabur Shahin, a member of the review committee. Shahin declared a *takfir* stating that Zaid's work offended Islam; as he was head of the ruling party's Religious Commission and sat on the Higher Council for Islamic Affairs, his views carried considerable weight.¹³⁸⁶ Some of the university's academics (and their lawyers) argued that on the basis of the concept of *hisbah* they could file a lawsuit against Abu Zayd.¹³⁸⁷ The relevant point for this thesis is that the court deemed *hisbah* an acceptable ground for filing the lawsuit against Abu Zayd. The Court of Appeals indicated that as a right of God, *hisbah* may be applied to "seek the application of God's penalties", even in the absence of a codified law prohibiting apostasy (there are no provisions in the Egyptian Penal Code which criminalise apostasy).¹³⁸⁸ The Court asserted that what comes under "the right of God" relates to that which "concerns the public interest or the general affairs of the Islamic community (*Ummah*)". In addition, the Court of Cassation stressed that *hisbah* was an admissible

<<http://www.memrijttm.org/isis-video-showcases-religious-police-activity-in-al-raqqah.html>>accessed 27 June 2016.

¹³⁸⁵ Mahmoud, *Quest for divinity* p. 22.

¹³⁸⁶ Susanne Olsson, "Apostasy in Egypt: Contemporary Cases of *Hisbah*", 98 *The Muslim World* (2008), p. 104.

¹³⁸⁷ Agrama, *Questioning Secularism*, p. 46.

¹³⁸⁸ In this case the Court ordered that Abu Zayd, deemed an apostate, divorce his wife, as a Muslim woman may not be married to an apostate; *ibid*, p. 49.

ground to engage in a legal proceeding, even in the absence of an authority's permission to do so, because the issue at stake, namely apostasy, was so critical that it became an individual duty incumbent on each and every Muslim. Thus the Court noted that

...Islamic scholars concur that *hisba* [*hisbah*] does not require permission or authorization from the ruling authority [in order to be enacted]...it is an individual duty (*fard 'ayn*) upon every Muslim who is capable of enacting it.¹³⁸⁹

This decision was criticised by Hussein Ali Agrama, who remarked that freedom of belief as well as protection of belief from corrupt influences amounted to a state responsibility; as discussed before, religious freedom is recognised under the Egyptian Constitution. As such, Agrama argued that one could engage a legal *hisbah* proceeding against the State itself for failing to protect belief from corrupting influences.¹³⁹⁰). Nobody is allowed to ignore them and interfere with their implementation.¹³⁹¹

There is a blurred line between individual and communal *hisbah*. Although it is true that *hisbah* amounts to an individual duty, one cannot go so far as to imply that individuals have the initiative to enforce it. Although *hisbah* amounts to an individual duty it is a circumscribed one, and therefore taking the personal initiative to enforce it implies crossing the limits of one's duty. In his *Reliance of the Traveller*, Al-Misri gives a detailed account of the small margin of manoeuvre given to Muslims to individually enforce *hisbah*:

¹³⁸⁹ Court of Cassation, case nos., 475, 478, 481 (August 1996) in Agrama, *Questioning Secularism*, pp. 51-52.

¹³⁹⁰ Agrama, *Questioning Secularism*, p. 66.

¹³⁹¹ Shaykh Tusi, *Al-Nihayah: Concise Description of Islamic Law and Legal Opinions (al-Nihayah fi Mujarrad al-Fiqh wa al-Fatawa)*, translated by A. Ezzati (London: ICAS Press, 2008), p. 222. (Tusi, *Al-Nihaya*)

...there are five levels of censure: explaining the wrong nature of the act, admonishing the person politely, reviling him and harshness, forcibly stopping the act (such as by breaking musical instruments or pouring out wine), and finally, intimidation and threatening to strike the person or actually hitting him to stop what he is doing. It is the latter level, not the first four, that requires the Caliph, because it may lead to civil disorder.¹³⁹²

Individual initiative regarding *hisbah* is thus restricted; the fifth and final level of censure in particular requires permission from the Caliph. As such, *hisbah* amounts to a communal duty. This is accounted for by the Prophet in various *hadith*:

By the One in Whose Hand is my soul! Either you command good and forbid evil, or Allah will soon send upon you a punishment from Him, then you will call upon Him, but He will not respond to you.¹³⁹³

In another *hadith*, the Prophet is reported to have said

Whoever among you sees an evil action, let him change it with his hand (by taking action); if he cannot, then with his tongue (by speaking out); and if he cannot, then with his heart (by hating it and feeling it is wrong), and that is the weakest of faith.¹³⁹⁴

Traditionally the actual performance of *hisbah* itself was usually carried out by a particular official, the *muhtasib*, who stood between the *qadi* and police and sought to ensure that religious and moral edicts were being followed.¹³⁹⁵ The existence of *muhtasib*¹³⁹⁶ indicates that *hisbah* is a collective obligation incumbent on Muslims as a whole. The *Nihayat al-Rutba fi Talab al-Hisba* (the Upmost Authority in the pursuit of *Hisbah*), a manual written in the 12th CE intended for practical use by the Islamic inspector of markets, outlined the ideal *muhtasib*:

¹³⁹² Al-Misri, *The Reliance of the Traveller*, p. 716-717 q2.3.

¹³⁹³ *Jami' At-Tirmidhi*, vol. 4, no. 2169, p.229.

¹³⁹⁴ *Sahih Muslim*, vol. 1, no. 177, pp.143-144.

¹³⁹⁵ Knut S. Vikor, *Between God and the Sultan: an Historical Introduction to Islamic Law* (London : Hurst, 2004), p. 197 (Vikor, *Between God and the Sultan*).

¹³⁹⁶ *muhtasib*: official in charge of carrying out/enforcing *hisbah*.

The *muhtasib* has to be a *faqih* [someone with an understanding *fiqh* (Islamic jurisprudence)], aware of the rules of Islamic law so as to know what to order and what to forbid.¹³⁹⁷

Although *hisbah* obligations bound everyone, it fell to the *muhtasib* to carry them out. These obligations included such varied duties as requiring general attendance at Friday prayers (a duty to God), maintaining the water-supply (a duty to man) and limiting the height of buildings (a duty to both God and man).¹³⁹⁸ The *muhtasib* is in charge of investigating abuses and of applying the appropriate punishments and corrective measures.¹³⁹⁹ Far from being restricted to quarrels and complaints, the *muhtasib*'s role involves looking out for and ruling on everything that comes to his knowledge or may be reported to him. He has no authority over general legal claims (and thus traditionally, is subordinate to the office of the judge), he does have authority over anything relating to fraud or deception in connection with food (among other things) as well as weights and measures.¹⁴⁰⁰

Unlike the *muhtasib*, individuals are not in a position to carry out *hisbah*. According to Al-Mawardi, even though *hisbah* is expected of all Muslims, there are nine differences between those who volunteer to do it and the public official trusted with discharging it. Overall, he notes that while the *muhtasib* may penalise an evident violation without reaching the level of a legal punishment, a volunteer may never legitimately penalise such a violation.¹⁴⁰¹ The *muhtasib*'s role thus compares to that of modern-day police officials. Muhammad Sa'id al-'Ashmawi, who was a

¹³⁹⁷ 'Abd al-Rahmān b. Nasr al-Shayzarī, *The Book of the Islamic Market Inspector: Nihayat al-Rutba fi Talab al-Hisba (the Utmost Authority in the Pursuit of Hisba)*, translated with an introduction and notes by R. P. Buckley (Oxford; New York : Oxford University Press, 1999), p.28. (Al-Shayzarī, *The Book of the Islamic Market Inspector*)

¹³⁹⁸ Qadri, *Justice in historical Islam*, p. 52.

¹³⁹⁹ Ibn Khaldūn, *The Muqaddima*, vol. 1., p. 463.

¹⁴⁰⁰ *ibid.*

¹⁴⁰¹ Al-Mawardi, *The Ordinances of Government*, p. 260.

justice at the Egyptian Supreme Court and former head of the Court of State Security, explains the circumstances under which individual *hisbah* may be carried out and why the Qur'an ordered Muslims to do so:

The individual Muslim was enjoined, personally and physically, to remedy faults in the Medina community, where no police force had been established. Every individual citizen of that community was himself a policeman, and all members of the community were expected to forbid wrongdoing.¹⁴⁰²

The aforementioned mediaeval Islamic textbook *The Reliance of the Traveller* argues that according to verse 3:104, "commanding the right and forbidding the wrong are a communal rather than a personal obligation..."¹⁴⁰³ The collective nature of *hisbah* is similarly stressed in the mediaeval Sunni textbook *Bahr al-Fava'id*.¹⁴⁰⁴

Shaykh Tusi also wrote that "only the legitimate ruling...is allowed to do this"¹⁴⁰⁵ All the aforementioned sources agree that *hisbah* is to be enforced by an authoritative collective body, not by Muslims individually.

Hisbah was not originally intended as a means for pursuing allegations of apostasy and thus enabling declarations of *takfir*, in fact quite the opposite: the concept behind *hisbah* is 'balance', and in this sense it can refer to the maintenance of a balanced society.¹⁴⁰⁶ According to *Nihayat al-Rutba fi Talab al-Hisba (the Utmost Authority in the Pursuit of Hisba)*, *hisbah* was intended for "the establishment of

¹⁴⁰² Muhammad Sa'id al-'Ashmawi cited in Shamsuddin al-Kaylani, "Concepts of Human Rights in Islamic Doctrines (Sunnis, Shi'ites, Isma'ilis, Qarmatians Mu'tazilis, Sufis, Wahhabis)" in Salma J. Jayyusi ed., *Human rights in Arab Thought: a Reader* (New York: I.B. Tauris, 2009), p. 189.

¹⁴⁰³ Al-Misri, *The Reliance of the Traveller*, p. 714 q1.1

¹⁴⁰⁴ *The Sea of Precious Virtues (Bahr al-Fava'id)*, p. 258.

¹⁴⁰⁵ Tusi, *Al-Nihaya*, p. 223.

¹⁴⁰⁶ Viktor, *Between God and the Sultan*, p. 195.

See also Omar, "Apostasy in the Mamluk Period", p. vii.

order between the people”.¹⁴⁰⁷ Its aim was not to punish people but to keep social order, especially in the marketplace; as discussed earlier, private declarations of *takfir* were prohibited under Shari’a. Shaykh Tusi notes that

They [*hisbah*] are obligatory upon one’s heart, tongue and hands (one’s intention, words and deeds). Whoever is able to do so must make sure that the implementation of these obligations does not cause harm to oneself or to any member of the Muslim community immediately, or in the future.¹⁴⁰⁸

Any attempt by an individual to use *hisbah* to prosecute someone’s supposed apostasy is not therefore something that can be justified with reference to any form of traditional approach.

5.4.4 Al-Azhar’s stance and the prohibition of *takfir*

Al-Azhar is a mosque and university founded in Cairo by the Fatimid Isma‘ili imam and Caliph al-Mu‘izz li-Din Allah (d. 975).¹⁴⁰⁹ It is one of the most important universities in the Muslim world,¹⁴¹⁰ and the Sunnis consider it to be the highest authority on questions of religious faith.¹⁴¹¹ According to Jansen, Al-Azhar University is seen as the “final Islamic scholarly religious authority and beacon”.¹⁴¹² Sheikh Gad al-Haq, the Grand Imam of Al-Azhar between 1982 and 1996, has noted that its role is to “teach both modern sciences and Islamic

¹⁴⁰⁷ Al-Shayzarī, *The Book of the Islamic Market Inspector*, p.28.

¹⁴⁰⁸ Tusi, *Al-Nihaya*, p. 222.

¹⁴⁰⁹ *The Founder of Cairo: the Fatimid Imam-Caliph Al-Mu‘izz and his era*, translated with annotations by Shainool Jiwa (London : I.B.Tauris, 2013), p. 24.

¹⁴¹⁰ Diana Steigerwald, “Al-Azhar” in Richard C. Martin ed., *Encyclopedia of Islam and the Muslim World* (New York: Macmillan Reference, 2004), Vol 1, p. 92.

¹⁴¹¹ Dietl, *Holy War*, p. 108.

¹⁴¹² Jansen, *The Neglected Duty*, p. 36.

knowledge”.¹⁴¹³ Although al-Azhar has never issued official declarations of *takfir* itself, some of its scholars have done so in the past, for example in the Farag Foda and Abu Zayd cases in Egypt (1992 and 1995 respectively) and the Mahmoud Mohammed Taha case in Sudan (1985). The historic use of *takfir* by some Al-Azhar scholars has found support in the words of previous Grand Imams, such as Shaykh ‘Abd al-Halim, who was the Grand Imam of Al-Azhar between 1973 and 1978:

....to go to war for God’s cause, *al-jihad fi sabilAllah*, is at present a duty (*fard*) for the Muslims individually (*afradan*), and it is a duty for all Islamic states, and whoever is slow or lax in this is a sinner.¹⁴¹⁴

Whosoever does not rule by the laws of Islam is no longer a Muslim.¹⁴¹⁵

However, the Al-Azhar position on *takfir* has changed, and they now officially criticise the concept. Al-Azhar has publicly condemned declarations of *takfir*, viewing them as “blind sedition and a catastrophe for Islam”.¹⁴¹⁶ As proof of this they have refused to declare *takfir* against *Daesh*. According to the daily newspaper *al-Ahram* the current Sheikh of Al-Azhar Ahmed Al-Tayyeb has emphasised that *takfir* distorts the image of Islam.¹⁴¹⁷ Al-Tayyeb has also criticised the use of *takfiri fatawa*, saying that they undermine Islam rather than defend its values, and he has encouraged those deceived by the sheikhs issuing such *fatwas* to renounce *takfir*.¹⁴¹⁸

¹⁴¹³ Dietl, *Holy War*, p. 117.

¹⁴¹⁴ Jansen, *The Neglected Duty*, p. 41.

¹⁴¹⁵ *ibid*, p. 43.

¹⁴¹⁶ “Sheikh of al-Azhar: Takfir, A Fitna Aiming to Distort Islam’s Image”, *AhloBayt News Agency* (13 January 2014), <<http://en.abna24.com/service/africa/archive/2014/01/13/496697/story.html>>accessed 27 June 2016.

¹⁴¹⁷ *ibid*

¹⁴¹⁸ “Sheikh of al-Azhar: Takfir, A Fitna Aiming to Distort Islam’s Image” *AhloBayt News Agency* (13 January, 2014) <<http://en.abna24.com/service/africa/archive/2014/01/13/496697/story.html>>accessed 27 June 2016.

In one interview an earlier Sheikh of Al-Azhar, Gad al-Haq (d.1996), stated that the killing of President Sadat in the name of Allah was an “absolute wrong” as “fighting between Muslims is forbidden by Islam”. He contended that if Muslims killed fellow Muslims, they “took the wrong path.”¹⁴¹⁹ This Al-Azhar stance of condemning fighting among Muslims has been supported by other Islamic religious establishments and scholars. The Islamic research institution *Dar al-Ifta al-Misriyyah* issued a *fatwa* in which they prohibited *takfir*:

It is impermissible to accuse him or her of disbelief and polytheism because his Islam is strong evidence to his belief. This is a general rule that all Muslims must follow when judging the actions of their Muslim brothers.¹⁴²⁰

Therefore, positions regarding *takfir* are changing and now many religious establishments and scholars see it as contrary to Shari’a precepts and concepts. As shall be examined in the next section, this stance has also been adopted by some Muslim majority states.

The prohibition of *takfir* has become a matter of great debate. Islamic scholars have judged the concept to be dangerous and called on Muslims around the world to not use *takfir*. This call was first made in the 2004 Amman Message, in which 24 of the most senior religious scholars from all the branches and schools of Islam, such as Muhammad Sayyid Tantawy, the Grand Imam of Al-Azhar, declared a prohibition on *takfir* between Muslims. The Amman Message was a response to three questions set by King Abdullah II of Jordan, namely ‘Who is a Muslim?’, ‘Is it permissible to declare someone apostate?’ and ‘Who has the right to issue *fatawa*?’ The scholars declared that Shi’a Islam, Ibadhi Islam and all eight Sunnii Mathhabs (legal

¹⁴¹⁹ Dietl, *Holy War*, p. 117.

¹⁴²⁰ Dar al-Ifta al-Misriyyah, Fatwas, “The ruling of Takfir”, <<http://eng.dar-alifta.org/foreign/ViewFatwa.aspx?ID=4790&text=takfir>> accessed 27 June 2016.

schools) were valid expressions of Islam, as were traditional Islamic Theology (Ash'arism), Islamic Mysticism (Sufism) and true Salafi thought; this therefore allowed a precise definition of 'Muslim', which in turn enabled them to forbade *takfir* between Muslims.¹⁴²¹ Finally, in answer to King Abdullah's third question, the scholars set out the necessary preconditions for issuing *fatawa*.¹⁴²²

The significance of the Amman Message was that for the first time in Islamic history a respected body, composed of a total of 552 notable scholars, had recognised the members of a variety of sects as being true Muslims.¹⁴²³ Furthermore, it was made official that the major Islamic schools considered *takfir* to be inconsistent with Shari'a and illegal under Shari'a law.

Although the Amman Message prohibited declarations of *takfir* between Muslims, both Al-Azhar University and *Dar al-Ifta al-Misriyyah* have subsequently gone further by prohibiting *takfir* completely. An emerging anti-*takfir* stance can also be seen in the laws of some Muslim majority states. For example, Article 7 of Iraq's constitution (2005) states that "accusations of being an infidel (*takfir*)...shall be prohibited". This article is a positive development in that it forbids racism and calling people "infidels".¹⁴²⁴ Another example can be seen in Article 6 of the 2014

Tunisian Constitution:

The state is the guardian of religion. It undertakes equally to prohibit and fight against calls for *Takfir* and the incitement of violence and hatred.

¹⁴²¹ The Official Website of Amman Message, Summery, <<http://ammanmessage.com/>>accessed 27 June 2016.

¹⁴²² *ibid.*

¹⁴²³ Amman Message "Grand List of Endorsements of the Amman Message and Its Three Points", <http://ammanmessage.com/index.php?option=com_content&task=view&id=17&Itemid=31>accessd 27 June 2016.

¹⁴²⁴ *ibid.*

Some Malaysian states have also criminalised *takfir*. Section 205 of the Administration of Islamic Religion Affairs (Terengganu) Enactment (1986) states that

(1) No person...accuse any person professing the Religion of Islam of being *murtad* [apostasy], *syirik* [polytheism], or an infidel. (2) No person, except Hakim Syar'i, shall decide any person professing the Religion of Islam of being *murtad*, *syirik*, or an infidel.

In the event that someone commits the offence of *takfir* the same law declares that they “shall be punished with a fine not exceeding five thousand ringgit or with imprisonment not exceeding three years or with both.”¹⁴²⁵ Taken together across a number of Muslim majority states, these laws are contributing to ending declarations of *takfir*.

Conclusion

Over a long period of Islamic history, the concept of *takfir* has been used as a weapon against persons or groups who challenge orthodoxy. Those who see themselves as the true and righteous Muslims have often branded others as unbelievers and this applies both to other Muslim sects and followers of other faiths. Those who are viewed as being unorthodox can face punishment or suppression which links the *takfir* to conflict and violence. Furthermore, pronouncements of *takfir* have created an atmosphere of fear and violence in which extrajudicial killings take place. Given the sectarian conflicts that *takfir* have created, it is perhaps not surprising that many Islamic scholars have attempt to restrict their use

¹⁴²⁵ Section 205 of Administration of Islamic Religion Affairs (Terengganu) Enactment (1986).

or brand them as altogether unlawful. Those who disapprove of the concept of *takfir* maintain that it has no legal basis in the Qur'an or the *Sunna*, and claim that both of these prohibit the practice. Such scholars maintain that *takfir* were developed after the time of the Prophet as part of a spiritual counter attack against insurgency. They argue that this is quite different to the passages in the Qur'an in which the Prophet and his followers discuss the appropriate way to deal with hypocrites.

Contemporary extremist groups often quote Ibn Taymiyya and his *takfiri fatwa* against the Mongols. They argue that his actions act as a model for Islamic states in conflict with those of other beliefs. Yet it should be noted that Ibn Tamiyya was a scholar of religious law, not a soldier or rebel leader. His *takfiri fatwa* against the Mongol rulers of his day were of his place and his time. The appropriation of his ideas by *Daesh* has been condemned by many contemporary Islamic scholars. Indeed, there is a growing body of Muslim scholarship, including the Al-Azhar University which views *takfir* as contrary the ideas of concepts of Islam in the Qur'an and the *Sunna* and in recent years, the condemnation of *takfir* has been widespread, particularly in response to the violent extremism which has led to the killing of Muslims by Muslims.

Thesis conclusion

This thesis has examined the issues of apostasy and blasphemy and the use of *takfir* by both states and extremist groups. It is only within certain Muslim majority states that apostasy and blasphemy are considered to be offences punishable by death, and this remains highly contentious both within and beyond the Islamic world. There have been attempts to use Shari'a law to prosecute and punish apostates and unbelievers but many modern scholars say that there is no basis within the Qur'an for man to sanction religious sin in this world. Therefore, the criminalisation of apostasy, as has been enacted by some Muslim majority states, is inconsistent with Shari'a.

Although the Prophet Muhammad never killed any of his co-religionists on the grounds of apostasy and blasphemy *per se*, subsequent events, such as the revolt of the Khawarij Sect in the 7th CE and the Mongol invasion in the 13th CE, led to the development of the notion of *takfir* and in turn to apostasy and blasphemy being treated as serious offences. These non-Shari'a based readings of *takfir* have caused grave tragedies throughout Islamic history, culminating today in the rise of such extremist groups as *Daesh* and Boko Haram, both of which kill fellow Muslims in the name of God. The killing of apostates by extremist groups and prosecutions for the 'crime' of apostasy by Muslim majority states are sometimes justified on religious grounds but the core ideas of Islam suggest that only God has the right to decide the fate of sinners and to forgive them or elicit punishment in the next life.

The type of extrajudicial killing that was pioneered by the Khawarij sect in the 7th CE is often linked to *takfir*. Although the attempts in some Muslim majority states

to legally ban these public declarations of another's apostasy are important, actually stopping extremist groups and local religious establishments from issuing *takfir* is considerably more challenging but arguably more important in order to break the cycle of persecution. This is because extremist groups or local religious establishments in Muslim majority states play more of a key role today than states do in driving apostasy and blasphemy issues, as so-called apostates or blasphemers are more likely to be killed by extrajudicial killing than pursued by the state.

Moreover, Islamic concepts such as *fatwa* and *hisbah* are exploited by extremist groups and local religious establishments as devices for delivering *takfir*. For example, in the Farag Foda case in Egypt (1992) and the Salman Taseer case in Pakistan (2011) neither defendant was criminalised by the government, but both were killed extrajudicially by extremist groups citing *takfiri fatwa* as justification. Even in some case law, such as the Abu Zayd case, the Court recognised to sue through the concept of *hisbah*. As discussed in this thesis neither *fatwa* nor *hisbah* were intended for the delivery of *takfir*.

The conflict between the Islamic and international approaches to human rights is often very profound. This reflects a reluctance of Islamic states to extend jurisprudence to any bodies which are not primarily religious in nature. Furthermore, the concepts of religious freedom enshrined in the UDHR seem to many Muslims to present a threat to sacred ideas. Yet Islamic law goes beyond the constitutions of states and has developed over many centuries through Shari'a into a form that is neither immutable nor inflexible, and can be seen as fully compatible with modern international human rights conceptions. The Qur'an

recognises complete religious freedom, as can be seen in the deeds and words of the Rightly-Guided Caliphs and Umar Bin Abdul Aziz (Umayyad Caliph).

The task of *ijtihad* (interpreting the Shari'a) has historically been carried out by scholars, not states nor governments. Codification bears the risk of interpreting the Shari'a to suit a given government's particular political persuasion at a specific point in time, and thus misconstrue the Qur'an and *hadith*'s terms and contextual meaning. As illustrated in Chapter 2 some Muslim majority states still criminalise apostasy, and Chapter 2 showed how codifications of the Shari'a have led to court hearings of apostasy cases. Although apostasy is not codified, the codification of Shari'a and religious scholars' opinions can effectively criminalise it.

Tensions arise when Shari'a are brought in line with a modern legal system. This problem is especially acute when the interpretations of Shari'a by mediaeval scholars are used a source of law, as these interpretations conflict with modern concepts.

Some extremist groups, such as *Daesh*, believe that Muslims can only live in lands governed by Shari'a; if they do not live in such a land they must migrate (*hijra*). This division of the Muslim world between *Dar al-Islam* (Territory of Islam) and *Dar al-harb* (Territory of War) is often used by extremist groups to justify killing fellow Muslims or attacking the government. However, notions such as a return to divine rule (*hakimiyya*), the division of the world between *Dar al-Islam* (Territory of Islam) and *Dar al-harb* (Territory of War) and *hijra* conducted for the purpose of avoiding living under the rule of unbelievers are all scholarly constructs with no precedence in Shari'a, the Qur'an or the *Sunna*.

There remains a question as to what happens to a believer who loses, or chooses to abandon, his faith or *iman*. In some interpretations, this is religious sin which should be punished and the unbeliever excluded from the fold of Islam. Yet many scholars have recognised that faith and doubt are linked and they assert one's *iman* is not lost permanently and the chance for repentance is recognised until death. This appears to be consistent with the words and deeds of the Prophet and his Companions.

Apostasy and blasphemy laws were introduced in the mediaeval ages, as Sunni Islamic law schools and Shia Islam came to consider these acts to be crimes. The evolution in the understanding of these 'sins' can be directly linked to the development of the notion of *takfir*. The Khawarij sect considered any religious sin or failure of any Islamic obligation to be evidence for apostasy, which in turn obliged all good Muslims to kill such sinners. Moreover, mediaeval scholars did not differentiate between apostasy in the context of religious belief or heresy and the apostasy of murderers or highway robbers. Apostasy was typically linked with other crimes, and therefore apostasy came to be seen as a mark of social disorder and treason. However, even if this once was the case, it is surely not applicable today. Renouncing one's religion and expressions of unbelief are not necessarily linked with other crimes in the contemporary Islamic world. It is time to reconsider the application of apostasy law.

The need to reconsider the treatment of apostasy and blasphemy has been given new impetus by the appearance and rapid growth over the last decade of extremist groups such as *Daesh* and Boko Haram. These groups selectively use and cite apostasy law; for example, *Daesh* never define exactly who is apostate and who is

not. They deliver *takfir* against fellow Muslims, as the Khawarij sect did in the 7th CE; this is resulting in tragedy across the Muslim world. The concept and use of *takfir* is not a notion consistent with Shari'a and it is causing serious disorder in many Muslim majority states.

It is time to reflect on how the criminalisation of apostasy and blasphemy and the use of *takfir* have brought serious conflict among Muslims and even civil wars. Although the extremist groups call for a purification of society from apostates and blasphemers, the greater need is to purify Islam from the savagery arising from those who claim to take up the sword in the name of God.

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