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THE DARK AGES OF ISLAM: IJTIHAD, APOSTASY, AND HUMAN RIGHTS IN CONTEMPORARY ISLAMIC JURISPRUDENCE

David A. Jordan

I. INTRODUCTION

On November 27, 2002, Muslim clerics from the northern Nigerian state of Zamfara issued a fatwa ordering Muslims worldwide to execute reporter Isioma Daniel. The fatwa was issued after an article she had written sparked riots in the northern Nigerian city of Kaduma. More than two hundred people were killed during the unrest. The offending article discussed the upcoming Miss World pageant, and speculated as to which woman Mohammed would have selected were he alive today. Muslim clerics found the comment to be blasphemous, and promptly issued the death sentence.

On January 21, 2003, Indonesian religious leaders charged moderate Muslim leader Ulil Abdalla Abshalla with blasphemy and issued a fatwa ordering his death. The scholar had suggested that Mohammed "was merely a historical figure, open to criticism." He also asserted that Islamic law did not exist. This was the first time that such an order was issued by one Indonesian religious leader against another. These recent occurrences have brought international attention to some aspects of Islamic law, which could be seen to conflict with fundamental human rights principles.

The integration of international human rights law into some Islamic states has been slowed by the fundamental differences that exist between Western and Islamic ideologies. Much of the Islamic world’s rejection of human

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1 Candidate for Juris Doctor, May 2003, Washington and Lee University School of Law. The author wishes to thank Professor David Caudill for his support on this project.
3 Nigeria has the largest population in Africa. The population is approximately 50% Muslim, 40% Christian, and 10% follow indigenous beliefs. The Nigerian legal system is primarily based on English common law, however Islamic Shari’ah law has been imposed in some northern states. See CIA, THE WORLD FACTBOOK, NIGERIA (2003), available at http://www.cia.gov/cia/publications/factbook/geos/ni.html (last visited Jan. 31, 2003).
4 See Nigeria Miss World, supra note 2.
6 See id.
7 See id.
8 See id.
rights principles stems from its aversion to the West. However, the refusal to allow reinterpretation of the Holy Scriptures over the last thousand years of Sunni jurisprudence is equally responsible for these deficiencies in Islamic jurisprudential development. Some scholars believe that the period of juristic interpretation known as al-ijtihad should be reopened, and inquiry into the meaning of the Holy Scriptures resumed.

This paper examines Islamic jurisprudence, shari'ah criminal proscriptions, and the difficulty of integrating Western conceptions of basic human rights into the shari'ah. Emphasis is placed on the treatment of apostasy and blasphemy under the shari'ah.

In the end, I argue that the period of interpretation should be reopened. The death penalty is an inappropriate penalty for apostasy in modern day. Freedom of religion naturally implies a freedom to change one's religion. Executing individuals for apostasy is a clear violation of fundamental human rights principles. A reinterpretation of the shari'ah could allow changes to be made. Alternatively, "human rights" could be redefined as substantive limitations on the power of government in order to avoid conflict with traditional Islamic notions of the umma. Individuals do not need to be seen as possessing

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9 See Universal Declaration of Human Rights, art. 18, G.A. Res. 217A (III), at 71, U.N. Doc A/810 (1948) ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."); International Covenant on Civil and Political Rights, art. 18(1), 999 U.N.T.S. 171 ("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."); International Covenant on Civil and Political Rights, art. 18(2), 999 U.N.T.S. 171 ("No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."); International Covenant on Civil and Political Rights, art. 18(2), 999 U.N.T.S. 171 ("Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."); The Universal Islamic Declaration of Human Rights, art. 2, Sept. 19, 1981 ("(a) Man is born free. No inroads shall be made on his right to liberty except under the authority and in due process of the Law. (b) Every individual and every people has the inalienable right to freedom in all its forms; physical, cultural, economic and political—and shall be entitled to struggle by all available means against any infringement or abrogation of this right; and every oppressed individual or people has a legitimate claim to the support of other individuals and/or peoples in such a struggle."); see also The Universal Islamic Declaration of Human Rights, art. 12, Sept. 19, 1981 ("(a) Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons. (b) Pursuit of knowledge and search after truth is not only a right but a duty of every Muslim. (c) It is the right and duty of every Muslim to protest and strive (within the limits set out by the Law) against oppression even if it involves challenging the highest authority in the state. (d) There shall be no bar on the dissemination of information provided it does not endanger the security of the society or the state and is confined within the limits imposed by the Law. (e) No one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims.").
rights, as Muslims believe that only Allah can provide rights. Rather, the governments of Islamic states would be assuming treaty obligations that would limit their ability to impose punishments that violate internationally recognized norms of civilized behavior.

II. ISLAMIC JURISPRUDENCE AND THE DEVELOPMENT OF THE SHARI'AH

The word Islam, literally translated, means "submission to the will of God." In Islam, individuals owe duties to God. Individualism is not permitted, and the umma, or community, is of paramount importance. The umma is comprised of all those who uphold the Five Pillars of Islam: pilgrimage to Mecca, praying five times daily, fasting during the holy month of Ramadan, paying alms to the poor, and professing that there is but one God and Mohammed is his Prophet. As law is the sine qua non of any community, a pervasive body of law known as the shari'ah, or holy law of Islam, has developed, which substantively governs most aspects of human conduct and existence within an Islamic state.

During the lifetime of Mohammed, the Prophet himself decided all cases and controversies. The Qur'anic verse, "[h]is words are not of his own devising," was interpreted to mean that all decisions by Mohammed were divinely inspired, and represented the direct and undisputable will of God. These decisions of Mohammed, along with other recordings about his life, comprise what is known as the Sunna. All schools of Islamic jurisprudence accept the Sunna as divinely inspired. The Sunna was recorded in the Hadith.

10 See Foreword to The Universal Islamic Declaration of Human Rights, Sept. 19, 1981 ("Human rights in Islam are firmly rooted in the belief that God, and God alone, is the Law Giver and the Source of all human rights.").
14 See Artz, supra note 11, at 352.
17 See NASIR, supra note 13, at 17.
18 See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining sunna as "[t]he way of life prescribed as normative in Islam, based on the teachings and practices of Muhammad and on exegesis of the Koran"); NASIR, supra note 15, at 265 (defining sunna as the Traditions attributed to the Prophet and stating that "the Prophet's Sunna is usually divided into (a) verbal utterances (sunna qawlia or hadith); (b) acts of the Prophet (sunna filia); and (c) the tacit assent of the Prophet (sunna taqririyya"); see generally JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW (1964) (challenging the authenticity of the Sunna).
19 See Artz, supra note 11, at 367 (explaining that the Sunna represents the second highest source of Islamic
or Traditions. Together, the Qur'an and Sunna represent the fundamental sources of, and preponderant authorities in the shari'ah.²⁰

After the death of Mohammed, legal controversies continued to arise. Ali, the son-in-law of Mohammed, and husband of Fatima,²¹ became the first Islamic caliph.²² He continued the juristic tradition of personally resolving controversies that arose within the Islamic state. All controversies were resolved through reference to the Qur'an and Sunna. After the assassination of Ali, Islam splintered into two sects, the Sunni and Shia.²³ These two groups differ in their beliefs regarding the appropriate lineage and legal tradition of Islam, and are sharply divided on the theoretical and theological bases of the shari'ah.²⁴

After the death of Ali, Sunni and Shiite jurists continued to attempt to resolve legal conflicts through reference to the holy Qur'an and Sunna alone. The Sunna at this time had not been recorded, but merely was remembered by those close to Mohammed during his life.²⁵ Eventually, it became apparent that not every conflict could be resolved through direct application of these authorities.²⁶ Thus began the period known as al-itihad, the period of informed reasoned opinion. Al-quistas, or reasoning by analogy, was used to apply previously decided cases to subsequent situations. A body of law gradually developed based on the disposition of these cases. This body has come to represent a third source of Islamic law. During the period of al-itihad, a fourth source of law based on scholarly consensus known as al-ijma also developed.²⁷ Together, all of these sources are used to determine the appropriate resolution to legalistic problems that occur within an Islamic state.

There is a stark contrast between the Sunni and Shiite jurisprudential traditions.²⁸ Although the fundamental authority of the Qur'an and the Hadith is

²⁰ See NASIR, supra note 15, at 17.
²¹ See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) ("Daughter of the Islamic Prophet Muhammad. She married Ali, among the first to embrace Islam, and is regarded by Muslims as one of the Four Perfect Women.").
²² See id. (defining Ali as a "Muslim caliph (656-661) the assassination of whom lead to the division of Islam into the Sunnite and Shiite sects").
²³ See id.
²⁴ See NASIR, supra note 15, at 17.
²⁶ See ARTZ, supra note 11, at 367.
²⁷ See id.
²⁸ The Shiites Imams follow a hereditary line of succession through Ali, the son-in-law of Mohammed. Shiite Muslims believe that interpretation of the Holy Scriptures should be carried out by members of the Prophet's family. Shiites continue to engage in the process of ijtihad, while Sunnite scholars closed the gate of interpretation three centuries after the death of Mohammed. They do not recognize the four Sunni caliphs as legitimate theological authorities. See THE BRITANNICA CONCISE ENCYCLOPEDIA (2003).
universal across all schools of Islamic juristic interpretation, there exist multiple interpretations of the Holy Islamic Scriptures, and differing degrees of weight are accorded to the different sources of law. A full discussion of the jurisprudence of both sects is beyond the scope of this article. This article will focus mainly on the Sunni, as they are the majority Islamic sect consisting of 90% of Muslims worldwide.

Historically speaking, the Sunni are considered Orthodox Muslims, espousing traditional views on theology and juristic interpretations of the Holy Scriptures. The Sunni trace their jurisprudential lineage through the first four Umayyad caliphs. These Imams, or founding fathers, developed separate schools of legal thought during the great period of theological interpretation that occurred following the death of Mohammed. These schools, named after their respective Imams, are the Shafi‘ite, Malikite, Hanafite, and Hanbalite schools. Sunni Muslims consider these four Imams to be the only true caliphs. Their schools of legal thought are considered exclusively authoritative; no other conflicting interpretation is allowed.

Once a scholarly consensus (al-ijma) is reached, the matter is considered decided for all time. By the tenth century A.D., most of the major principles of Islamic law had been decided by general consensus. At this point, the “gate of interpretation” was closed. The period of enlightenment known as al-ijtihad was declared to be over, and no further individual claimed the status of Imam. A period of imitation followed, when the methods of the preceding Imams were applied and interpreted by subsequent jurists and scholars. However, no attempt was made to make further investigation into the fundamental principles of law. Any conflicting interpretation after this point is considered heresy, and has been severely punished under shari‘ah law.

Nothing in the Qur’an or Sunna required the era of interpretation to end. Al-ijtihad ended by scholarly fiat because it was believed that all possible

29 See NASIR, supra note 15, at 17.
31 See id.
32 See id.
33 See NASIR, supra note 15, at 17.
34 See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining Sunni as “[t]he branch of Islam that accepts the first four caliphs as rightful successors of Muhammad”).
35 See FORTE, supra note 25, at 41.
36 See id.
38 See NASIR, supra note 15, at 17.
39 See id. at 20.
40 See id.
scenarios had been resolved in a permanent fashion. The refusal to reinterpret the Holy Scriptures has created inflexibility and injustice, as attempts to apply anachronistic provisions to modern situations occur. Many current situations exist today that the Imams could not possibly have contemplated over one thousand years ago. This rigidity accounts for much of the resistance to the adoption of international notions of universal human rights throughout the world. The criminal proscriptions of the shari’ah are particularly draconian, however are still used today by many Islamic nations.

III. CRIME AND PUNISHMENT UNDER THE SHARI’AH

In general, there are three categories of crimes under the shari’ah: ta’azir, quesas, and hudad. Ta’azir are crimes for which there is not a penalty articulated in Islamic law. The penalties for these crimes are left to the discretion of the state; they are generally less severe than for quesas and hudad offenses. Quesas are crimes for which the penalty is largely left to the discretion of the victim or family of the victim. This category includes such violent crimes as battery, assault, and all forms of homicide. When one has committed this type of offense, the victim, or the family of the victim, may elect to exact punishment in the manner they see fit, within the limits set by the shari’ah. Appropriate sanctions are equivalent retribution, i.e. an eye for an eye, or the payment of monetary compensation, depending on the wishes of the victim. The final category of crime is the hudad offenses, of which there are seven, most with mandatory penalties set by the shari’ah.

The seven hudad crimes are adultery, fornication, rebellion, highway robbery, theft, use of alcohol and apostasy. The crime of adultery is punishable by death by stoning. Fornication falls within the Islamic legal category of a zina offense, and is punishable by 100 lashes. Rebellion that is an attempt to

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42 See id.
43 See id. at 15.
44 See id. at 7.
45 See id. at 15.
46 See id.
48 See Gravelle, supra note 41, at 15.
49 See Boyle-Lewicki, supra note 13, at 58.
50 See id. at 57.
51 See id.
overthrow the legitimate ruler of an Islamic state is punishable by death, although some Islamic jurists believe that all Muslims have a duty to rebel against an unjust or totalitarian dictator.\textsuperscript{52} Brigandage, or highway robbery, is punishable by death by crucifixion, beheading, cross amputation, or banishment.\textsuperscript{53} Theft is punished by amputation of the thief's hand with recidivists facing amputation of the other hand, and each foot for subsequent offenses.\textsuperscript{54} The use of alcohol is strictly prohibited by Islamic law, and is punishable as a \textit{hudad} offense with a mandatory punishment of 80 lashes.\textsuperscript{55} The final \textit{hudad} crime is apostasy, which can be defined as the abandonment of one's religious faith for another, or for no faith.\textsuperscript{56} Although the Qur'an states that "there is no compulsion in religion,"\textsuperscript{57} apostasy has been outlawed in many \textit{shari'ah} law countries for centuries. The death penalty has been adopted by many \textit{shari'ah} law countries to punish apostasy. Although apostasy is mentioned in thirteen versus of the Qur'an, nowhere is a specific earthly penalty delineated.\textsuperscript{58} The Qur'an penalizes apostates with eternal damnation in the afterlife, but neglects to specify a penalty here on earth.\textsuperscript{59} In fact, Mohammed never issued the penalty of death for mere apostasy. In each instance where Mohammed imposed a death sentence on an accused apostate, the condemned had also committed some form of political or military betrayal. It is likely that the death penalty was meant to apply only in treasonous situations, and not for mere apostasy. The death penalty for apostasy has been incorporated into the \textit{shari'ah} mainly based on statements by Mohammed. One such statement, recorded in the \textit{Hadith}, states that whosoever should change their Islamic religion must be killed.\textsuperscript{60} However, this passage should not be

\textsuperscript{52} See id. at 64.
\textsuperscript{53} See \textit{THE HOLY QUR'AN: Surat al-Ma' idah} 5:33 (stating that the "reward for those who wage war upon Allah and His Messenger, and strive after corruption in the land, will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land"), available at http://www.unn.ac.uk/societies/islamic/quran/noble/nobae005.htm (last visited Dec. 26, 2002); see also Gravelle, \textit{supra} note 41, at 8 (stating that brigandage, or highway robbery, is this type of offense against Islam carrying with it the punishments illustrated in the aforementioned passage of the Holy Qur'an).
\textsuperscript{54} See Boyle-Lewicki, \textit{supra} note 13, at 64.
\textsuperscript{55} See id.
\textsuperscript{56} See \textit{THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE} (4th ed. 2000) (defining apostasy as "[a]bandonment of one’s religious faith, a political party, one’s principles, or a cause").
\textsuperscript{57} \textit{THE HOLY QUR'AN: Surat al-Baqarah} 2:256 ("There is no compulsion in religion. Verily, the Right Path has become distinct from the wrong path. Whoever disbelieves in \textit{Taghut} and believes in Allah, then he has grasped the most trustworthy handhold that will never break. And Allah is All-Hearer, All-Knower.")., available at http://www.unn.ac.uk/societies/islamic/quran/noble/nobae002.htm (last visited Dec. 26, 2002).
\textsuperscript{58} See Boyle-Lewicki, \textit{supra} note 13, at 57.
\textsuperscript{59} See W. Heffening, \textit{Murtadd}, in \textit{7 THE ENCYCLOPEDIA OF ISLAM} 635 (C.E. Bosworth et al. eds., 1992); see also MOHAMMED S. EL-AWA, \textit{PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY} 102 (1984) (stating that although apostasy is mentioned in 13 verses of the Qur'an, "no punishment in this life is prescribed").
\textsuperscript{60} See MATTHEW LIPPMANN ET AL., \textit{ISLAMIC CRIMINAL LAW AND PROCEDURE} 38, 49 (1988).
taken out of context. The statement was made, and the death penalty was imposed in that case, because the apostate in question was found to have waged war on Islam, not just renounced his faith.

The penalty of death for apostasy was only necessary during the period directly following the death of Mohammed. At that time, many allied tribes apostatized by returning to previously espoused polytheistic paganism and staged insurrections against the Muslim-run government in Medina. The very survival of the Islamic faith was in jeopardy, and a stern penalty was necessary to dissuade others from apostatizing in similar fashion. The penalty was termed under apostasy, but really only applied to those who had left Islam and actively engaged in war against it.

An example that supports the proposition that only apostasy coupled with acts of war against Islam merited death, is shown by the Hanafi school of Sunni jurisprudence. Followers of the Hanafi school mandate that women cannot be executed for apostasy because women are forbidden to be killed in wartime. The link between apostasy and waging war against Islam is what has merited a death sentence, not the act of apostasy alone.

In addition to physical death, the shari'ah is almost universally interpreted to impose civil death upon apostates. The functional effect of this is that one’s rights and protections under Islamic law are rescinded immediately upon apostatizing. Marriages are automatically annulled as a matter of law, which causes further acts of sexual intercourse between the formally married couple to constitute fornication, which is severely punished as a hudson crime under shari'ah law. In addition, because an apostate loses all protection under the law of Islam, if that person is subsequently murdered, it is not considered a criminal offense. The way in which apostasy has been prosecuted in some Islamic states raises serious human rights concerns.

IV. NATIONAL APPLICATION OF THE SHARI'AH

A. Iran

Perhaps the most notable examples of accusation and punishment of apostates come from Iran.

61 See David F. Forte, Apostasy and Blasphemy in Pakistan, 10 CONN. J. INT’L L. 27, 44 (1994) (describing how Abu Bekr, the first Islamic caliph, ordered the death of all apostates from the Islamic faith).
62 See id. at 45 (citing 2 THE HEDAYA 228 (Charles Hamilton trans. 1985) (1791), a primary text containing Hanifite juristic interpretation).
63 See ABDUR RAHIM, THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE ACCORDING TO THE HANAFI, MALIKI, SHAF'I AND HANBALI SCHOOLS 153 (1911).
1. The Baha’is

Baha’ism is a religion that was founded in Iran by Mirza Husayn-Ali in the middle of the nineteenth century. The religion currently boasts approximately six million followers around the world. Husayn-Ali, known as Baha’ulla, claimed to be a prophet subsequent to Mohammed and therefore immediately suffered persecution at the hands of Ottoman authorities. During his lifetime, he was exiled twice and died while incarcerated in 1892. He was buried in Haifa, Israel which today represents the world headquarters of the Baha’i religion.

Baha’ists were considered to be heretics and have traditionally been persecuted by Muslims throughout the Islamic world. Despite the adversity, Baha’ism grew to approximately one million adherents in Iran, and represented a substantial minority constituent throughout the reign of M.R. Pahlavi, the last Shah of Iran. The Shah’s regime was a time of political and religious tolerance when women and religious minorities experienced relative equality with Muslim males. The Baha’i is enjoyed some positions of authority and influence under the Shah, but persecution resumed following the revolution and establishment of an

[64] See THE COLOMBIA ENCYCLOPEDIA (6th ed. 2001) (describing Baha’ism as “a religion founded by Baha Ullah (born Husceyn Ali Nuri) and promulgated by his eldest son, Abdul Baha (1844-1921). It is a doctrinal outgrowth of Babism, with Baha Allah as the Promised One of the earlier religion. Baha’ism holds that God can be made known to man through manifestations that have come at various stated of human progress’. Prophets include Abraham, Moses, Christ, Muhammad, the Bab, and Baha Allah. Baha’ists believe in the unity of all religions, in universal education, in world peace, and in the equality of men and women. An international language and an international government are advocated. Emphasis is laid upon simplicity of living and upon service to the suffering. The teachings spread in the 20th cent., particularly in Africa. The center of the faith in the United States is the great house of worship at Wilmette, Ill. The administrative center of the world faith is in Haifa, Israel, the site of Baha Allah’s tomb. There are some 5 million Baha’is in the world, with the largest communities in India and Iran. Prior to the Iranian revolution (1979) there were about 1 million Iranian Baha’is, who, despite widespread societal discrimination, had generally prospered. Under the Iranian Islamic republic, which regards the religion as an Islamic heresy, Baha’i religious institutions were closed and property confiscated. Baha’is were removed from government posts, thousands were imprisoned, and several hundred were executed.”), available at http://www.bartleby.com/65/ba/Bahaism.html (last visited Apr. 1, 2003).


[67] See THE BRITANNICA CONCISE ENCYCLOPEDIA (2003) (describing the Shah of Iran M.R. Pahlavi as “noted for his pro-Western orientation and autocratic rule. After an education in Switzerland, he replaced his father, R. Shah Pahlavi, as ruler when the latter was forced into exile. His rule was marked by a power struggle with his premier, M. Mosaddeq, who almost succeeded in deposing him in 1953; intervention by British and U.S. intelligence returned him to the throne the next year. His program of rapid modernization and oil-field development initially brought him popular support, but his autocratic style and suppression of dissent, along with corruption and the unequal distribution of Iran's new oil wealth, led to increasing opposition, led by the exiled R. Khomeini. In 1979 he was forced into exile, where he died of cancer.”).
Islamic state by the Ayatollah Khomeini in 1979. One of the Ayatollah’s missions was to rid the territory of religious deviancy and heresy.

The Baha’is’ professed belief in their founder as a prophet subsequent to Mohammed spawned a multiplicity of attacks. This belief, which is in direct contradiction to the Islamic belief that there are to be no further prophets after Mohammed, was considered heresy. The assertion that there has been any divine revelation after the Prophet is considered blasphemous. Of course, converts to the Baha’i faith were apostates, and thus liable for harsh criminal sanctions under the shari‘ah.

International pressure has forced Iranian persecution of Baha’is to take a variety of disguised forms. The Baha’i world headquarters is located in Haifa, so many Baha’is are accused of spying for Israel and executed on those grounds. Others are accused and convicted of apostasy. Some are accused of being foreign agents sent by the enemies of Islam to divide Muslims and encourage apostasy. The official government position on the Baha’is is that they are not a religious group; rather they are a political organization with ties to the former Shah of Iran. As such, they are persecuted ostensibly because they are thought to represent a threat to the Islamic state.

The property rights of many Baha’is are not accorded protection against theft. The succession of Baha’i property has often been impeded, resulting in substantial confiscation of property by the state. Freedom of worship and freedom of assembly have been officially prevented. However, in order to quell international condemnation, the Iranian government has allowed Baha’i youths to attend institutes of higher learning. This is so long as they do not “flaunt their beliefs.”

Zabihullah Mahrami, a Baha’i adherent, converted to Islam during a period of intense Islamic persecution in order to avoid losing his job as a mid-

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68 See BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP’T OF STATE, THE 2001 ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM: IRAN (2001), available at http://www.uscirf.gov/dos01Pages/irf_iran.php3 (last visited Apr. 1, 2003) (stating, “In response to the Special Rapporteur’s concerns with regard to the lack of official recognition of the Baha’i Faith, government officials stated that the Baha’is ‘are not a religious minority, but a political organization which was associated with the Shah’s regime, is against the Iranian Revolution and engages in espionage activities.’”).


70 International Covenant on Civil and Political Rights, art. 18(2), 999 U.N.T.S. 171 (“No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”).

71 See HUMAN RIGHTS WATCH, supra note 66. (quoting Abdelfattah Amor, the U.N. Special Rapporteur, on the Question of Religious Intolerance).
level provincial government official. He returned to Baha'ism during a period of abatement in persecution. In 1995, he was charged with apostasy and insulting Islam. Although apostasy did not exist as a crime under the Iranian penal code at that time, he was convicted based on the legal exegesis of the Ayatollah and sentenced to death. His family was deemed ineligible to inherit his property because they were also Baha'is. Because his property could not legitimately be devised, it was seized by the state. On appeal, the Iranian Supreme Court referred the matter back to the Revolutionary court, where the new charge of espionage was added. He was eventually convicted and sentenced to death.

2. The Salman Rushdie Affair

Probably the most infamous case of apostate persecution was that of Salman Rushdie. In 1989, Rushdie published The Satanic Verses, a postmodern satire of Islam and the Prophet Mohammed. In the novel, Rushdie portrayed Mohammed in a pejorative manner, ridiculed Shiite adherents, attacked the shari'ah, slandered Allah, and called into question the legitimacy of the Islamic faith. The response by the Islamic world was immediate and unfavorable.

There were riotous protests in many Islamic countries. The book was banned in Qatar, Indonesia, Malaysia, Saudi Arabia, Egypt, Pakistan, Somalia, Bangladesh, South Africa, and the Sudan. Five people were killed during a massive protest in Pakistan. Twelve people were killed in a similar riot in Bombay.

The Ayatollah Khomeini, Iran's political leader and Shiite mujtahid,
declared that Rushdie was guilty of apostasy and issued a fatwa commanding the author’s execution by Muslims worldwide. The fatwa was not only issued against Rushdie, but also against every person who had been involved the publication of *The Satanic Verses*. Interestingly, the fatwa issued by Khomeini did not offer Rushdie an opportunity to recant and return to Islam, as is customary in most similar situations. Khomeini considered *The Satanic Verses* not only to be a profession of apostasy on the part of Rushdie, but also an attack upon the foundation of Islam itself, the penalty for which was death without an opportunity to rescind and repent.

Khomeini’s fatwa was ill received by many, even within the Islamic community. Sunni scholars disagreed with Khomeini’s interpretation of the Islamic law governing the situation. Although Rushdie’s book was almost universally considered to be blasphemous and a clear expression of apostasy by the author, Sunni scholars believed that Islamic law required that Rushdie be given an opportunity to recant, thus vitiating the death warrant. Abdullah Al-Ahdal, a Belgian Islamic scholar and theologian, expressed his opposition to the fatwa issued against Rushdie on these grounds. Islamic extremists subsequently assassinated him.

British officials took Rushdie into protective custody. Iran subsequently broke off diplomatic relations with Great Britain over the matter. Khomeini died in 1989, therefore making the possibility of rescission of the fatwa impossible. A substantial bounty was placed on Rushdie’s head, and he went into hiding. Although the bounty has since been cancelled, the fatwa still stands to this day. Rushdie now lives in New York City, protected at all times by armed guards.

(Defining mujtahid as “a person who has been certified as capable of interpreting religious law”).

See generally Slaughter, supra note 37. See Owen Dunn, *The Fatwa on Salman Rushdie*, at http://www.chiark.greenend.org.uk/~owend/interests/islam/fatwa.html (last visited Mar. 21, 2003) (“The author of *The Satanic Verses*, a text written, edited, and published against Islam, against the Prophet of Islam, and against the Koran, along with all the editors and publishers aware of its contents, are condemned to capital punishment. I call on all valiant Muslims wherever they may be in the world to execute this sentence without delay, so that no one henceforth will dare insult the sacred beliefs of the Muslims.”).

See Slaughter, supra note 37, at 176, but see also Forte, supra note 61, at 46 (stating that unlike Sunni, Shiite jurisprudence generally does not allow apostates who were born Muslim to recant).

See id., supra note 37, at 176.

See id.

See id.


See Slaughter, supra note 37, at 158.

See id. at 159.

B. Examples from Other Islamic States

Although Pakistan does not have a law officially outlawing apostasy, the country’s criminal prohibition of blasphemy is used as its functional equivalent. Apostates are said to deny the fundamental truth of the words of the Prophet. This is said to be blasphemous and is punished as such. Ninety-seven percent of Pakistan’s population is Muslim and seventy-seven percent are Sunni with the majority following the Hanafi line of Sunni jurisprudence. The Hanafi school is more flexible in its assessment of blasphemy, labeling it a ta’azir crime for which the punishment is mostly a matter left to judicial and prosecutorial discretion. Despite this flexibility, the crime of blasphemy is often punished by death in Pakistani courts.

In the Sudan, charges of apostasy have been used as a political tool for eliminating outspoken opposition. Mohmoud Mohamed Taha, the leader of a Sudanese opposition political party, was executed by the Sudanese government after being charged with apostasy in January of 1985. Christians have also been crucified in the Sudan for apostasy.

V. REMOVING THE VEIL BY REOPENING THE GATE

The Holy Scriptures must be reopened to interpretation, if the shari'ah is ever to come into harmony with international human rights norms. One of the juristic maxims that is universal across all schools and sects of Islam is that the law must be flexible to avoid injustice. The Qur’anic verse, “God intends every facility for you,” has been interpreted to require flexibility in the

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95 See Forte, supra note 61, at 49.
96 See id.
97 See NASIR, supra note 15, at 265 (discussing the various schools of Islamic jurisprudence under the Sunni branch of Islam and stating that Pakistan ascribes to the Hanafi school).
98 See Forte, supra note 61, at 48.
100 See University of Minnesota Human Rights Resource Center, Islamic Inquiry Squares (2002), at http://www1.umn.edu/humanrts/edumats/hrsqures/islamic.htm#Mahmoud (last visited Apr. 1, 2003) (“Mohamed Taha was executed at the age of 76 because of his renewal thinking and interpreting of the holy book Qur’an. He was hanged publicly on Jan 18th, 1985 in Khartoum, Sudan during the dictator Numeri regime.”).
102 See NASIR, supra note 15, at 31.
application of the law. The closing of al-ijtihad in the tenth century has stifled progress, and has hindered the incorporation of human rights into the shari’ah. Some Islamic scholars have contemplated the possibility of a neo-ijtihad, when theological and jurisprudential inquiries would resume.

This would allow nations following the shari’ah to adopt the human rights and fundamental freedoms that exist in most parts of the world. This seems particularly possible because the gate of interpretation was closed by scholarly fiat, and not as a result of any Qur’anic mandate.

If al-ijtihad were to be resumed, it is possible that reinterpretation of the Sunna could eliminate the death penalty as an acceptable punishment for apostasy. The Qur’an does not require that apostates be put to death. This penalty has been incorporated into the shari’ah through interpretation of the Hadith. Some Islamic scholars, beginning with Joseph Schacht, have questioned the authenticity of much of the Hadith. Schacht produced evidence that many of the traditions of the Prophet recorded in the Hadith are apocryphal. If Schacht’s views are correct, a fundamental rethinking of the shari’ah is possible, and human rights norms can enter into Islamic law by means of scholarly reinterpretation of the Holy Scriptures. Hudad specificity complicates adjusting shari’ah law penalties with respect to some offenses. For most hudad crimes, the penalty is thought to be explicitly prescribed; therefore, there is little room for interpretation. However, death is not explicitly prescribed as a punishment for apostasy within the Qur’an. This penalty is interpreted from stories in the Hadith. It is a reasonable interpretation of these sources to say that apostates were intended to face punishment in the afterlife, and not on earth. The Qur’anic mandate that there is to be no compulsion in religion stands for the proposition that people should not be compelled into Islam. The natural extension of this verse seems to imply that people should not be forced to remain in Islam against their will. Islam means submission to the will of God. Forcing one to remain Muslim in name and action only when their conscience and beliefs lie elsewhere is offensive to the very tenets of the Islamic faith.

Even if al-ijtihad is resumed and some shari’ah law penalties are changed, problems with the wholesale transplantation of human rights principles into the shari’ah still exist. The law is a living organism, and legal principles cannot always be readily transferred from one system to another. Some scholars have likened the transfer of legal principles from one legal system to another to

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104 See generally JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW (Clarendon Press 1984).
105 See Forte, supra note 61, at 44 (citing S.A. RAHMAN, THE PUNISHMENT OF APOSTASY IN ISLAM 9-86 (1972)).
organ transplantation. One cannot expect to transplant a legal concept from one legal system to another as easily as one would transfer a muffler from car to car. Successful integration of legal concepts depends on a myriad of specific factors including economic, social, geographic, and historical considerations. The general ambivalence toward the West that exists in many Islamic states greatly complicates any transplantation of Western legal conventions. However, universally accepted concepts of basic human rights are so important that derogations cannot be permitted on grounds of xenophobia or cultural relativism.

VI. REDEFINING HUMAN RIGHTS

Even if neo-ijtihad is not undertaken and Islam is not made to conform to human rights, it is still possible to achieve the same result by making human rights conform to Islam. The problem that poses the greatest difficulty for the full integration of human rights norms into Islamic law stems from Islam’s prioritization of the community and man's duties to God over all else. In Islam, no rights are said to exist other than those provided by God. The idea that there are some rights that exist that are created by man and not God is inconsistent with some of the basic tenets of the Islamic faith.

Islam’s rejection of humanism does not have to render the transplantation of international human rights concepts into Islamic law impossible. Although Islam is possibly incompatible with the notion of inalienable human rights not provided in the Holy Scriptures, it is still possible to achieve the results of these rights through redefinition. Allowing treaty obligations to place substantive limitations on the ability of an Islamic government to employ certain modes or degrees of punishment is not a violation of the fundamental precepts of the Islamic faith. Therefore, the issue is not transplantation, but modification and integration.

The incompatibility of human rights requirements and Islamic law stems from one understanding about the nature of human rights. The idea that humans possess some rights that derive from natural law and are not given directly by God does conflict with the Islamic notion of God as the sole rights-provider. However, human rights can be understood in a different way to avoid this conflict. “Human rights” need not be considered rights owned by man against

108 See Foreword to The Universal Islamic Declaration of Human Rights, Sept. 19, 1981 (“Human rights in Islam are firmly rooted in the belief that God, and God alone, is the Law Giver and the Source of all human rights”).
the rest of the world. They could be redefined as substantive limitations placed on the power of the government. Man would not be seen as owning these protections; rather the government would have merely agreed to limit its own power to punish certain offenses and utilize certain modes of punishment. Islamic states would not impose punishments that violate human rights out of agreement, not because there exist some basic human rights that are not provided by God. This method of achieving human rights objectives would not violate the central tenets of Islam.

Of course, this argument is subject to attack on the grounds that the government of an Islamic state is required to punish acts in accordance with Islamic law. However, it is not forbidden for Islamic states to enter into international agreements with other states. The beginning of the first Islamic state resulted from the Medina Constitution, in which Mohammed entered into agreements with other tribes in order to provide for collective security and form a united front against invaders from Mecca. Compromises in Islamic dogma were made in order to adjust to take into account the competing interest of all treaty members. Similar compromises should be undertaken to enable shari'ah law nations to come into conformity with the rest of the world in terms of their observance of basic human rights principles.

VII. CONCLUSION

There is a veil over the eyes of Sunni Islamic scholars that was cast by the closing of the gate of interpretation during the tenth century A.D. The official disallowance of further reinterpretation of the Holy Scriptures has stifled Islamic jurisprudential development. The possibility of being accused of blasphemy or apostasy has had a chilling effect on scholarly investigation. The current period, where scholastic inquiry can be met with a death sentence, can be likened to the Dark Age of Europe, when social development stagnated, and classical learning and investigation were not undertaken. The period of enlightenment known as al-ijtihad must be resumed in order to allow nations imposing shari'ah law to unify with the rest of the world in respect to the observance of basic human rights. The penalization of apostasy under the shari'ah violates modern conceptions of fundamental human rights. The inability to reinterpret the shari'ah has made the full integration of human rights principles impossible. The gate of interpretation must be reopened to allow changes to the shari'ah to

be made. Flexibility is one of the universal juristic maxims of Islamic law. The early history of Islam is marked by responsive adaptation to the exigencies of the time. The exigencies of modern day require Islam to conform to ubiquitous notions of the most fundamental human rights. By either reopening the Holy Scriptures to further interpretation, or redefining "human rights" to conform to Islam, the Islamic world could put an end to these judicially imposed human rights violations and begin to remove itself from the dark ages in which it has existed for the last thousand years.