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RAFIK HARIRI CENTER
FOR THE MIDDLE EAST



Islam and Human Rights

Key Issues for Our Times

Authored by Elie Abouaoun, Harith Hasan Al-Qarawee,
Moataz El Fegier, Mohammad Fadel, Omar Iharchane,
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Cover photo: Reuters/Ammar Awad. A Palestinian man prays inside al-Aqsa Mosque, the third holiest shrine in Islam, May 2017.

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Foreword

Geneive Abdo

Shortly after the first revolution in Egypt in 2011, I traveled to Cairo, a city of collapsing buildings and horrific traffic, even by Middle East standards, and the place where the famous author Najib Mahfouz championed the aging Alley of Midaq (*Zooqaaq al Midaq*) and its teeming cafes in the 1950s and placed it on the map of world literature. It is a vibrant city where I once lived and have visited over the course of thirty years. I traveled there specifically to speak with Salafists, the once-obscure Islamists who have gained notoriety after the Egyptian military's imprisonment and brutal crackdown against the Muslim Brotherhood, a movement that is both misunderstood and perpetually maligned. I asked one young, highly educated Salafist leader to describe his mission. "We want to redefine how Islam is understood and practiced. This is the gift of the revolution."

This statement reveals much about what has followed since the Arab uprisings began in 2011, and it raises questions that the present publication attempts to address: How can Islam be interpreted in the modern day, and what is the basis for this interpretation? Should the focus be the majority of legal regulations or codes that later became known as sharia, which reflect an enormous body of scholarly collections and competing exegeses of the Prophet Mohammed's sayings and actions in all their complexities? And whose Islam is it, the Islam proclaimed by the Islamic State of Iraq and al-Sham (ISIS)? The Salafists? The Muslim Brotherhood? Or those authoritarian states still left standing?

The region is engulfed in wars, conflicts, and religious extremism. So how can we possibly understand the true, underlying causes of the ongoing conflicts that will likely last for at least a generation? For some in the West, this question is almost irrelevant. "There is a consensus on 'Islam' as a kind of scapegoat for everything we do not like about the world's new political, social, and economic patterns. For the right, Islam represents barbarism; for the left, medieval theocracy; for the center, a kind of distasteful exoticism. In all camps, however, there is agreement that even though little enough is known about the Islamic world there is not much approved there." These were Edward Said's words in 1981—words that are at least as pertinent today as when he wrote them.

The conflict to which Said refers—known in contemporary shorthand as "Islam versus the West"—is more misunderstood, more dangerous, and based on more falsehoods than perhaps any time in modern history. The following pages are an attempt to contribute to a better understanding of a faith that is complicated, perpetually in a state of reinterpretation, and therefore, vulnerable to misunderstanding by outsiders.

Since the Revelation in the seventh century (CE) and the subsequent emergence of a distinct community of believers, Islam—its law, doctrine, and practice—has been subject to competing interpretations, adaptations, and understandings. In more recent times, beginning in the nineteenth century, much of this same energy was devoted to defining the faith within the context of "modernity" imposed by Western colonial and economic power. Today, in the aftermath of the Arab rebellions, many of the old constraints on religious debate in the form of dictatorial regimes, ossified religious institutions, or geopolitical proxy wars, have been undermined or dismantled altogether. Space for religious contestation within Islam has perhaps never been greater. This has its advantages as well as its downsides. What we might call the "democratization" of religion allows many more players—and particularly non-state actors—to claim to be authorities at interpreting the faith. This development fortunately deprives authoritarian states and their state-sanctioned religious institutions the monopoly they once had on the religious message and how it was disseminated.

However, as a result, religious discourse in the Muslim world has reached a fevered pitch, with the loudest, most extreme voices taking center stage and grabbing headlines, dominating social media, and generally garnering the attention of both the immediate region and the world. This threatens to transform the contemporary idea of Islam into a global monolithic "brand"—inherently violent, anti-woman, anti-democratic, and implacably opposed to international norms of human rights and the rule of law. Here, then, is the Islam of ISIS, al-Qaeda, and similar extremist movements; but, it is also the Islam of the faith's most virulent critics, whether xenophobic populists, Christian fundamentalists, or secularist intellectuals. Together, in a symbiotic yet poisonous relationship, these

two extremes have come to dominate popular conceptions of Islam and what it means to be a Muslim in the world today.

The present work, *Islam and Human Rights: Key Issues for Our Times*, takes an altogether different approach. By presenting the reader with a range of contemporary thinking on the most pressing issues facing Muslims today, including questions of democracy, free expression, human rights, gender rights, minority rights, and the notions of legitimate governance, this volume reflects new thinking on these issues. The focus of the analysis is sharia, which literally means a way to the watering place or path in order to seek salvation. As the following pages will explain in detail, sharia means different things to many Muslims, posing an even greater challenge to non-Muslims eager to grasp the meaning and dynamics of this vital religious and social debate.

Islam's foundational texts, the Quran and the *Sunna*, or lived example of the Prophet Mohammed, each have a complex, intertwined relationship to sharia as understood and practiced by 1.8 billion Muslims worldwide—almost one quarter of the world's population. The Quran itself, as recorded and standardized in the years after the death of the Prophet, includes only a single direct mention in God's injunction to Mohammed: "Thus we put you on the right way (*shariatan*) of religion. So follow it and follow not the whimsical desire (*hawa*) of those who have no knowledge" (45:18).

The majority of legal regulations or codes, known as sharia, consist of an enormous body of scholarly collections and competing exegeses of the Prophet's sayings and actions as head of the nascent Muslim community of believers, or *ummah*. As with all prophetic religions after the death of their founding figure, the understanding and application of religious law devolves to scholars, clerics, and bureaucrats—none of whom enjoy the Prophet's access to divine inspiration or guidance in addressing novel situations or social and political change. The result is a wide range of interpretations, readings, and claims—each asserting exclusive standing as religious truth. Non-Muslims are no less immune to this problem than believers themselves, as seen in populist movements in parts of the United States, where members demand protection from imagined forced imposition of sharia law by the tiny minority Muslim populations.

In other words, what is attributed to sharia is in fact often based on false understandings. And even for Muslims, the challenge is daunting: One can find justification in the Islamic texts for more radical applications of Islamic law, which only begs the question—should such interpretations be applicable in the modern world, given the fact that sharia and modernity are not inherently compatible?

This is the question the following pages, written by leading legal scholars and political scientists, will answer. The first essay advances the argument that Sunni Islam provides fertile theological grounds for democratic self-governance, attributes rarely associated with the faith. The second essay clarifies what constitutes blasphemy and how authoritarian states and non-state actors have manipulated legal traditions to invoke accusations of blasphemy, which carries severe punishments, for political reasons. Essay three examines the evolution in thinking among some Sunni and Shia scholars before and after the Arab uprisings and reveals how wars, in some cases, have inspired a more radical reading of Islamic law. Essay four insists that Islamic laws and traditions do not condone the mistreatment of religious minorities, including Christians, Shia Muslims, and others. The abuses toward these minorities in recent years, the authors argue, are the result of political expediency, not Islamic practice. Essay five demonstrates that Islamic law and women's rights are not incompatible, but rather women's rights could be enhanced by Islamic law, not hindered by it, if the law were applied appropriately. The final contribution argues that sharia does not have to be incompatible with international norms as established by institutions such as the United Nations.

This collection of works should be used as an objective reference for states and non-state actors as these issues continue to be at the forefront of debates, while conflicts intensify in a most fascinating part of the world that sadly is unraveling.

Sunni Islam and Self-Government

Mohammad Fadel

The relationship between contemporary understandings of Islam and recognizably democratic norms is one of the most pressing issues in the modern Muslim world. Much of the political and social tension in the Middle East today revolves around the notion—widely accepted throughout the region and in the West—that the two are fundamentally incompatible. This is not necessarily the case. As this paper will demonstrate, Sunni Islam, relieved of the burdens of history and religious obscurantism, provides ample space for the exercise of self-government within a legitimate religious context.

The connection of revealed religion to good governance generally, and to democracy in particular, is a question well-known in political philosophy. Indeed, one of the distinct contributions of Muslim philosophers to political thought was to theorize the relationship of prophecy to politics. Moreover, Islamic contributions in this field were almost certainly later adopted by Enlightenment-era political philosophers and theologians, such as Baruch Spinoza, who deployed the idea of the prophet as the ideal human legislator able to translate philosophical insights into the common tongue as a strategy for reconciling revealed religion and philosophy.

Nevertheless, the relationship of religion to political philosophy has generally been a troubled one since the days of the Enlightenment, with political philosophers such as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau all trying to confine the role of religion in order to preserve the autonomy of the political domain and ensure a place for political judgment. The long Enlightenment tradition of suspicion of religion in the public sphere finally manifested itself politically in the constitution of the United States. For the first time, a state established itself without explicitly incorporating a specific religion as its foundation. The French Revolution then reinforced the secular breakthrough in the political domain. Contrary to the United States' constitutional experiment in secular self-government, the French Revolution introduced a regime that was not only independent of religion, but one that was also expressly anti-clerical. While French secularism sought to protect the state from religion, unlike the Americans, they did not complement the state's

independence from religion by recognizing a parallel guarantee limiting the state's power over religion.

Given this historical background and the reality that modern European and American democracy emerged in large part from a struggle against religion, it is no surprise that the political classes in Europe and North America have a visceral reaction against religiously based political movements in the Arab and Muslim worlds. This blanket hostility, however, is based on a gross oversimplification of the relationship of religion to democracy, not only in European and American histories, but also for its possibilities in the Arab and Muslim-majority worlds. One significant problem non-Muslim observers face when trying to understand the relationship of Islam to politics is the absence of clear denominations in the Muslim world of a type that would be familiar to Europeans and North Americans. As a consequence, there is a great risk of reducing diverse movements, which are often antagonistic toward one another, into the one broad, frightening catch-all category of "political Islam." This reductionism is harmful for any true understanding of contemporary developments in the Arab and Muslim-majority worlds with respect to religion and politics. It also represents a grave distortion of the genealogy of democracy in Europe and North America, where it is indisputable that certain religious reforms, especially the egalitarianism of the Reformation, played crucial roles in preparing the ground for democratic self-government and, eventually, liberal democracy.

When we lump all Islamic political movements into one basket, we preclude ourselves from seeing the democratic potential of various religious movements. This paper will attempt to summarize an argument for why Sunni Islam provides especially fertile theological and moral grounds for democratic self-government. Additionally, it will attempt to distinguish Sunni political theology from various competitors, not only from Shia Islam, but also movements that are nominally Sunni but do not share the fundamental theological and moral premises that I believe are constitutive of historical orthodox Sunnism's approach to politics and religion.

One can find, broadly speaking, three main trends in Islamic history toward religion and politics. The first

trend, which can be labeled “Imami Shi’ism,” is based on the premise that after the death of the Prophet Mohammed, God designated certain people to lead the community by virtue of some special access they had to God’s will. The most important of these groups are the Twelver Shia, so-called because they recognize that there were twelve infallible successors to the Prophet, known as imams. The last of these infallible imams disappeared in the last quarter of the ninth century of the Common Era. According to Twelver beliefs, the last imam, known as al-Imam al-Mahdi, is a messianic figure who will reappear at the end of time to restore a regime of perfect justice. For the Shia, all purely human government is illegitimate insofar as it usurps the Imams’ right to rule.

The continued salience of the idea of the infallible imam in contemporary Twelver Shi’ism, combined with the pressing political demands of modernity, however, led Shia clerics in the twentieth century to attempt to reconcile their theological commitment to the rule of the infallible imam to increasing demands for popular sovereignty. This movement eventually culminated in the late Ayatollah Khomeini’s theory of the “Government of the Jurisprudent (*wilayat al-faqih*).” Under this theory, the Iranian people exercise popular sovereignty, but only under the supervision of the leading Shia cleric of the day (the “supreme leader”). The supreme leader is understood to be the representative of the infallible imams, and accordingly, has the power to override the popularly-elected branches of the Iranian state.

Despite the heroic efforts of Iranian reformists, the dual character of the Iranian regime has meant in practice that the clerical establishment, represented by the supreme leader, has been able to exert ultimate control over the affairs of the Iranian state and marginalize its representative institutions. Even some nominally Sunni political movements, however, have adopted an approach to religion and politics that is similar to the Shia theory of divine choice inasmuch as they believe that a particular person, usually a Sufi saint, or the like, is intrinsically deserving to lead the community based on the special knowledge of divine law that this person is believed to possess. Historical examples of messianic models of political authority in the Sunni world would include the Muwahhidun in the twelfth century Maghreb, the Mahdi in the Sudan in the nineteenth century, and the Moroccan Mohammed al-Kattani at the beginning of the twentieth century. Such a model of religious and political authority represents the fusion of the religious and the political, which Enlightenment political philosophy argued was

destructive, and which is believed to be incompatible with democratic self-rule.

The second trend, which can be called egalitarian puritanism, is similar to the first tendency in that it locates the legitimacy of political rule in the most morally upright person in the community, and is associated historically with groups in the Muslim world known as the “Khawarij.” The name Khawarij literally means secessionists, and refers to a group of Muslims who initially seceded from the Muslim community, accusing them of having committed apostasy based on charges that the community had not been faithful to divine law. It differs from the previous tendency insofar as its egalitarianism means both that political leadership is open to everyone in the community, and that it is possible for everyone to hold the political leader accountable, as knowledge of divine law is shared in common among all members of the community. The puritanism of this sect, however, meant that it did not tolerate sin. Accordingly, their demand for the rule of the most virtuous, combined with their casual willingness to declare other Muslims apostates if they failed to discharge what was believed to be the religious duty to correct, and if need be, overthrow rulers who failed to live up to this demanding standard, rendered such communities too unstable to sustain democratic self-governance except on an extremely small scale. Such movements historically were only able to rule successfully in relatively isolated and marginal regions of the Muslim world, such as Oman and southern parts of Algeria, and even in those two cases, only in the greatly moderated form of Kharijism known as Ibadism.

It is not unusual in the Arab Middle East to hear detractors of political Islam condemn Islamists as modern day Khawarij. In most cases, such charges can be dismissed as hyperbolic, but the charge is accurate when it comes to the so-called Islamic State of Iraq and al-Sham (ISIS). Like the earliest Khawarij, they brook no dissent when it comes to matters of religion and political leadership, adopting a Manichean us-versus-them political theology, whereby any Muslim who does not join their cause is automatically deemed to be an apostate and, therefore, may be killed without restraint. Media attention to violent attacks by ISIS on Western targets, as well as its strong anti-Western discourse, obscures the fact that Muslims who do not share the movement’s views are the most common targets of its deadly rage.

The third trend of politics and religion was what came to be known as Sunnism. Unlike either of its competitors, it rejected the notion that political legitimacy was predicated on the rule of the most



Then-Egyptian President Mohammed Morsi during his first visit to Europe in September 2012.
Photo credit: European External Action Service.

virtuous. Instead, political legitimacy was rooted in the community's choice of its leader; however, the leader that it chose, while not required to be the most virtuous of the community, needed to possess an adequate degree of virtue. This "adequate" degree of virtue is best understood in the Sunni concept of integrity (*adala*), where a person discharges his obligations to God and his fellow man, while on the other hand asserting his own rights, but not demanding more than what he or she is owed in dealings with others. Instead of extraordinary virtue underwriting the political order of the Sunnis, it was the integrity of the average person that was crucial, it being understood that each and every person had the potential to acquire the virtue of integrity and thus was able to play an active role in public life. Like the puritanical Khawarij, the Sunnis were egalitarian in their conception of the law and the ability of every person to know and follow it. Unlike them, however, they had a capacious view of forgiveness such that sin did not result in the need to purge the community of the sinner.

Instead of placing their hopes in a divinely selected leader, or a person of superhuman moral virtue, Sunnis

instead opted for a view of political leadership that was rooted in accountability before the law. Beginning from the theological premise that human equality means that no one has an inherent right to command his or her fellows or demand their obedience, they adopted the position that obedience is justifiable only via the mediation of just law. Just law, moreover, was not only a substantive question; it also entailed questions of procedure, specifically the requirement that the person administering the law and purporting to apply it, potentially coercively, have the proper authority to do so. The authority pursuant to which Sunni jurists justified government was not, again, the superior virtue of the ruler, but rather that the ruler had been properly delegated to his or her office on behalf of the Muslim community, and thus was acting on the community's behalf, not their own.

The notion that legitimate authority arises only through delegation from the community lies at the heart of the theory of the caliphate. The distinctive feature of Sunni political theology, then, is that the community *chooses* its leader. Public power flows from the community to the caliph, who in turn distributes it via a series of

delegations to other public officials, each of whom only has authority to act in accordance with the terms of their appointment. Because of this structure of authority, public officials in the Sunni conception were understood to be *representatives* of the Muslim public. This had several consequences. First, it placed limitations on who could be selected to serve as a public official. Insofar as public officials are legally understood to be agents, it makes sense that the principal—in this case, the Muslim community—would insist that the public official meet certain minimal conditions (*shurut*) that the officeholder must meet in order to assume the responsibilities of the particular office. Such conditions, unlike, for example, the rules of prayer, cannot be understood as rules about religious devotion, but are rather expressions of what the community deems to be part of its own rational good. In other words, it is an expression of self-government, a rule made by the political community for its own good.

Second, because the ideal of government was based on a representative ideal, it imported the norms of the principal-agent relationship to structure the relationship between ruler and ruled. Insofar as the ruled were a principal and the ruler an agent, the ideal of the rule of law governed their relationship and limited the authority of each party. For example, in principal-agency law, the principal has no authority to appoint an agent to commit an unlawful act. Accordingly, public officials have no authority to command action in violation of Islamic law. This principle was vindicated in numerous rules of Islamic law that held government officials personally liable for their illegal conduct. Indeed, the principle “no obedience in sin” was a foundational element of Sunni public law, such that “following orders” was not a valid defense if the public official, for example, knew that the command was clearly illegal. Conversely, because the caliph and by extension all public officials are duly authorized agents of the public, their lawful commands are, as the great Hanafi jurist Abu Bakr al-Kasani pointed out, the commands of the Muslim community, not that of mere individuals. It logically follows from that principle that individual members of the community owe a duty to obey their commands, insofar as principals are always bound by the lawful actions of their agents, even as they remain free to ignore the commands of individuals who may have de facto power, but lack de jure authority.

The principal-agent relationship between the ruler and the ruled also placed important limitations on the power of the ruler. Not only could public officials not command flagrantly illegal acts, they were also limited

to acting within the sphere of delegation. Accordingly, their authority was limited to public interests; they had no authority to interfere in the private interests of the people, who retained full authority over such matters, because the contract establishing the caliphate only delegates to the caliph authority over public affairs. (On the other hand, by the establishment of this contract, individuals divest themselves of any authority to enforce public interests, and so vigilantism is outlawed.) Public officials are not only limited by the terms of their appointment, because they are agents of the public; they are required, just as all agents are so required, to exercise the discretion vested in them solely for the benefit of the principal, i.e., the political community.

As a result, commands of public officials, in order to be lawful, had to meet several tests: first, they could not command something manifestly illegal, such as killing someone without a lawful judgment; second, the public official had to have proper jurisdiction over the subject matter of the command; and third, the command had to further the rational good of the community. Accordingly, arbitrary and capricious commands were unlawful, even if they were not sinful; commands that lacked a jurisdictional basis were invalid even if they were wise; and, venal commands intended to enrich the officeholder, or otherwise intended to further their personal interests, were void.

One could object, however, that what has been sketched, while describing a *constitutional* order based on an ideal of rule of law, does not contemplate the possibility of self-government, meaning that the political community has a right to make rules for the conduct of its own collective affairs. Rather, what is suggested is that while Sunnis established as a matter of ideal theory, a representative form of constitutional government pursuant to which the legitimacy of governmental action is determined by reference to law, this alone is not sufficient to justify a system of self-government if the law that regulates the relationship of the political community to their agents is predetermined by revelation, or over-determined by revelation, such that no space remains for political judgment as opposed to the theological activity of determining God’s law.

This objection would have merit if it were the case that public officials were not permitted to legislate except in accordance with the rules of Islamic law—rules that are determined, at least theoretically, wholly by interpretation of sources believed to disclose God’s will. In fact, however, Sunni jurists did not believe that public officials were bound to the rules of Islamic law as set out in the positive doctrines of the jurists. In other

words, public officials were legitimately authorized to make morally binding laws even in circumstances where revealed law provided a norm. Accordingly, a ruler's command that was deemed appropriately connected to the public good, rationally connected to the public welfare, within the delegated authority of the ruler, and did not command the commission of a sin, was *morally* binding upon the individual members of the community, even if revelation itself did not oblige the conduct subject to the ruler's affirmative command or negative prohibition.

Islamic history is replete with examples of jurists recognizing a moral duty to obey the command of rulers that went beyond the commands of religion, including decrees imposing maximum prices on commodities during times of scarcity (although many jurists believed that it was an interference in the private property rights of merchants), or anti-tobacco campaigns during the Ottoman era when public authorities attempted to clamp down on smoking in public (but probably without much success). Rulers, then, were entitled to restrict, or even prohibit outright, activities that were otherwise tolerated in revealed law; so too, they could encourage or even command the performance of actions that revelation left to the personal discretion of individuals, provided, in both cases, that the command met the other constitutional requirements related to the public good, authority, and rationality.

Accordingly, Sunni constitutional theory, while bounded by certain preemptory norms of divine law that cannot be breached, nevertheless leaves ample room for non-theological, and distinctly *political*, deliberation about the public good. Furthermore, given the moral salience of the principal-agent relationship in Sunni thought regarding the legitimacy of the state, it is from there not too far of a conceptual leap to democracy as the best mechanism available for the effective realization of the principal-agent relationship in affairs of state.

To the extent that Islamist groups believe they have an inherent right to rule based on, for example, superior knowledge or virtue—the Taliban would be a good example—they are acting outside the mainstream historical Sunni political tradition that grounds political legitimacy in the community's choice of its leader. On the other hand, groups such as Ennahda in Tunisia and the Muslim Brotherhood in Egypt embrace the principle that legitimate political authority can arise only through the choice of the governed. To that extent, they can be viewed as extensions of the historical Sunni political tradition, and even if they are not *liberal* democrats, they are legitimately understood

as endorsing democratic governance for moral, and not just strategic, reasons.

Understanding the moral basis for Sunni constitutional law is also important for resolving the tension between contemporary demands among many Muslims for substantive reform of Islamic law, while at the same time making Islamic law the basis of legality in Muslim-majority states within a general framework of democracy. Using the principal-agent model described above, it is possible to comprehend divine law as understood by the jurists to represent the basic law of a Muslim-majority society that applies in the absence of law, which is produced pursuant to a constitutionally legitimate deliberative process. In those areas of law in which no preemptory norm exists, the public is legitimately entitled to deliberate about what rule most furthers its public good, and when it adopts such a rule, it acquires its morally binding status not because it is a “true” or “correct” or “best” approximation of divine will, but rather because it represents the good-faith efforts of the public's representatives to pursue the public good using means that do not contravene divine law. Regulation of laws governing the family, such as whether to permit polygamy, and if so, subject to what conditions, could be broadly resolved by reference to the public good, and determined democratically, rather than through debates about the proper interpretation of revelation. Such decisions, provided they are the product of a legitimate constitutional process, would be morally binding despite the fact that they cannot be plausibly derived from revelation alone.

To conclude, religion is a suspect category in Enlightenment and post-Enlightenment Western political philosophy, because it is commonly believed that religious concerns or convictions tyrannically intrude into the domain of the political, thereby making politics impossible. This essay makes clear that such an assumption is not true for all religious convictions, whether in Islam or Christianity. The Sunni tradition of Islam, because of various theological assumptions, is particularly amenable to democratic governance. Accordingly, outside observers should be cautious in automatically concluding that the involvement of religious parties in politics is necessarily adverse to democratization; rather, the potential for a religious movement to contribute to democratic self-rule can only be determined on a case-by-case basis, and at least in the case of Sunni movements that broadly endorse the political theology described in this essay, there is good reason to be hopeful that their participation in politics will accelerate democratization, not undermine it.

Taking Beliefs to Court

Blasphemy, Heresy, and Freedom of Expression under Islamic Law

Moataz El Fegier

The notion of blasphemy in Islam stands at the intersection of religion and politics. The comingling of the two undermines its meaning as a theological concept by introducing extraneous factors into what is traditionally a matter for religious scholars and jurists. At the same time, the all-too-common use of blasphemy allegations in the public arena often serves as a weapon against political opposition and outright dissent. The net result is to reinforce the power and influence of the ruling elites at the expense of reformist movements, both in the Street and the Mosque.

For decades, freedom of creativity, freedom of religion, the rights of religious minorities, and academic freedom have been jeopardized by the arbitrary use of blasphemy and heresy laws in many Muslim states. In recent high-profile cases, Saudi Arabia punished blogger and human rights defender Raef Badawi with fifty lashes as the first round of a penalty of one thousand lashes and a ten year-imprisonment for challenging the official religious authorities;¹ Egypt sentenced blogger Kareem Ashraf to three years in prison on charges of blasphemy.² In December 2008, more than one hundred renowned Arab writers, novelists, poets, and human rights defenders appealed to Arab and Muslim governments to refrain from using religion as a pretext to infringe on academic freedom, freedom of artistic creativity, and religious freedom.³ Their petition coincided with the relentless efforts by Muslim states under the umbrella of the Organisation of Islamic Cooperation (OIC) to defend blasphemy laws at international human rights fora.⁴

The rise of Islamophobia and violence against Muslims in the West over the last decade has been a source of legitimate concerns for Muslims all over the world. However, putting limitations on freedom of expression and religious freedom is not an appropriate response, according to the signatories to the petition who are well aware of the serious consequences of taking beliefs and thoughts to court in the name of protecting religion or religious sensibilities.

This debate has been renewed in the Middle East following the Arab uprisings over the past six years, along with the rise of Islamist and conservative forces in local and regional Arab politics. This paper addresses the use of law to curtail religious debate, Islamic and state legal reform, and critical religious thought in Arab states. It also argues for the harmonization between Islamic law and freedom of expression as a priority for the development of tolerant and inclusive discourse amid ongoing efforts to confront extremist Islamists.

Blasphemy and Heresy under Sharia

In classical Islamic jurisprudence (*fiqh*), rulings related to blasphemy (*sab*) and heresy (*zandaqa*) are usually found under the heading of apostasy. The understanding of both terms has been fluid in the writing of Muslim jurists, and the expansion of their scope was influenced by political, theological, and sectarian tensions within Muslim society during the first century of Islam. Blasphemy was first defined as the use of foul language with regard to God and the Prophet Mohammed. Its meaning gradually expanded to encompass many other religious figures. The term heretic (*zindiq*) is used in Islamic legal literature to describe a person whose teaching poses a danger to the Muslim community. Certain acts and beliefs constitute heresy according to Muslim jurists, but the lists of these acts have not been clearly defined and has shown “a tendency to grow from century to century.”⁵ For example, the denial of a legal matter subject to consensus may amount to an act of heresy or apostasy.⁶

1 “Saudi Blogger Received First 50 Lashes of Sentence for Insulting Islam,” *Guardian*, January 10, 2015, <https://www.theguardian.com/world/2015/jan/09/saudi-blogger-first-lashes-raif-badawi>.

2 Roy Greenslade, “Egyptian Student Jailed for Proclaiming That He is an Atheist,” *Guardian*, January 13, 2015, <https://www.theguardian.com/media/greenslade/2015/jan/13/egyptian-student-jailed-for-proclaiming-that-he-is-an-atheist>.

3 Cairo Institute for Human Rights Studies, “A Petition by Arab Intellectuals and Human Rights NGOs on Religion and Freedom of Expression in the Arab World,” *Arab Network for Human Rights Information*, April 12, 2008, www.anhri.net/egypt/cihrs/2008/pr1204-2.shtml.

4 Leonard A. Leo and Felice D. Gaer, “Protecting Religions from ‘Defamation’: A Threat to Universal Human Rights Standards,” *Harvard Journal of Law and Public Policy* 34 (2015): 769-784.

5 Baber Johansen, “Apostasy as Objective and Depersonalised Fact: Two Recent Egyptian Court Judgments,” *Social Research*, 70 (2003): 692.

6 B.W. Hallaq, *Shari’a: History, Practice, Transformations* (New

Most classical jurists viewed blasphemy and heresy as grave offenses punishable by death. Non-Muslims cannot be accused of heresy, but according to many jurists, they are punished by death if they commit outright blasphemy. Nevertheless, Muslim jurists disagree as to whether repentance is sufficient to remove the penalty. The offenses of apostasy, blasphemy, and heresy are generally seen as interconnected. The commission of blasphemy or heresy can lead to the charge of apostasy. According to this view, a Muslim can be declared an apostate after the commission of certain deeds or the utterance of words of unbelief. Thus, the perpetration of blasphemy and heresy can amount to apostasy.⁷ In this view, apostasy can be claimed and established by others even though the accused denies his or her conversion from Islam. “Apostasy thus becomes a de-personalised objective fact without any relation to the intentions of the individuals concerned.”⁸

Reform of blasphemy and heresy laws is intertwined with Muslims’ views on religious freedom. Since the beginning of the twentieth century, Muslim scholars have drawn on differences among traditional jurists to revisit Islamic law on apostasy. The prevalent trend among those scholars today is to define apostasy in association with the commission of other crimes against the state, with the penalty for apostasy and blasphemy to be set by rulers based on circumstances.⁹ These types of punishments are known as *tazir* punishments, which is defined as the “discretionary punishment to be applied for crimes and offenses for which there are neither fixed punishments (*hudud*) or retribution (*al-qisas*).”¹⁰

Blasphemy continues to be a crime punished by imprisonment in most Arab countries. Moreover, some scholars do not define these crimes in a clear and precise manner, leaving the door open for interpretation. For example, although the prominent Muslim jurist Yusuf al-Qaradawi held that there is no consensus among Muslim scholars on the death penalty for apostates, he calls for punishing those who “spread temptation in Muslim society” by propagating apostasy by means of written or verbal words. According to al-Qaradawi, this type of apostasy is a hard apostasy (*ridda mughalaza*), an act that amounts to fighting God and the Prophet Mohammed.

Clearly, this notion of apostasy is, by definition, in conflict with freedom of expression and religious freedom, for it represses what can be declared by the state to be dangerous ideas or thoughts.

As a result, Muslim reformers, atheists, and members of religious minorities become vulnerable to persecution. As stated by the Sudanese reformer Abdullahi An-Na'im, “the risks of manipulation and abuse [of concepts like apostasy, heresy, and blasphemy] tend to diminish the possibilities for legitimate theological and jurisprudential reflection and development within any Islamic society.”¹¹ Thus, al-Qaradawi has held that the British novelist of Indian origin, Salman Rushdie, committed hard apostasy in his 1988 novel *The Satanic Verses*.¹² And in contemporary Iran, the religious charge of fighting against God, which can be broadly interpreted and result in the death penalty, is invoked to silence political opponents of the clerical regime.

Offenses against Islam in Arab Legal Jurisdictions

Pluralism of theological and jurisprudential views is inevitable in the development of religious knowledge. Using force and coercion to protect certain views was a source of hatred, war, and violence in the worlds of Islam and Christianity. In Europe, from the seventeenth century onward, proponents of religious tolerance and freedom of religion and expression were reacting in large part to the divisive and bloody consequences of persecution and exclusion practiced by different religious sects. The conclusion that “religious differences could not be definitely resolved was conducive to toleration.”¹³ Today in the Muslim region, the monopoly of religious truth by state institutions or religious groups has fueled sectarian violence and religious polarization. While the prohibition or criminalization of blasphemy is found in many legal jurisdictions, including in some Western countries, it is in the Muslim world today where the number of victims of these laws is high, the type of punishment is harsh, and the scope of the prohibition and criminalization is vast.¹⁴

York: Cambridge University Press, 2009), 319.

7 Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (Aldershot: Ashgate, 2004), 36-40.

8 Johansen, “Apostasy as Objective and Depersonalised Fact: Two Recent Egyptian Court Judgments.”

9 Mahsood Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003), 118-125.

10 The punishment for homicide and injuries.

11 Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Massachusetts: Harvard University Press, 2008), 121-122.

12 Yusuf Al-Qaradawi, *Jarimat al-Ridda* (Cairo: Wihba, 2005).

13 Perez Zagorin, *How the Idea of Religious Toleration Came to the West* (Princeton University Press, 2013), 260. See also Greg Forster, *John Locke's Politics of Moral Consensus* (Cambridge: Cambridge University Press, 2005).

14 Angelina E. Theodorou, “Which Countries Still Outlaw Apostasy and Blasphemy?” Pew Research Center, last updated July 29, 2016, <http://www.pewresearch.org/fact-tank/2016/07/29/which-countries-still-outlaw-apostasy-and-blasphemy/>.



Ensaf Haidar, the wife of jailed activist Raif Badawi, holding a picture of her husband while accepting the 2015 Sakharov Prize for Freedom of Thought on his behalf in Strasbourg, France on December 16, 2015.
Photo credit: European Parliament.

While most Arab states treat blasphemy as punishable by imprisonment, some allow for corporal punishment such as flogging. A blasphemy conviction could also stand as evidence of apostasy, which can be punishable by death. At certain historical moments, the application of blasphemy law is seen as part of a compromise between political rulers and the religious establishment or conservative social and political forces. This compromise can also extend to other recognized religious communities. On several occasions, leaders of the Orthodox Christian Church in Egypt pressured the state to prosecute religious dissidents or censor artistic work.¹⁵ To be sure, it is not only Islamist or religious forces that defend the application of blasphemy laws. In many situations, liberal and leftist actors concede to the conservative view to maintain their own political interests and

constituency. The application of blasphemy and heresy laws, then, cannot be seen in isolation from the wider political context and the structure of power in Muslim societies. According to the Egyptian Initiative for Personal Rights, the rise of blasphemy cases in the post-Mubarak era coincided with times of high political and religious polarization in society, particularly the increasing tensions between Islamist and non-Islamist political forces.¹⁶

Blasphemy and heresy legislation obstructs open and inclusive intellectual deliberation about religion. Cases from the Arab region demonstrate that these laws have been mostly used to curtail the critical discussion of religion or to shield religious authority from criticism. New interpretations of the Quran or *Sunna* (the lived example of the Prophet Mohammed), or even critical views on the inclusion of Islamic law in the constitution, can be considered blasphemous. In Sudan, the Muslim thinker Mahmoud Mohammed Taha

15 Johanna Pink, "The Concept of Freedom of Belief and Its Boundaries in Egypt: The Jehovah's Witnesses and the Baha'i Faith Between Established Religions and an Authoritarian State," *Culture and Religion* 6 (2010): 135-160. See also Yasmine El-Rashidi, "They Don't Love this Movie," *Al-Ahram*, 2004, <http://weekly.ahram.org.eg/Archive/2004/699/eg7.htm>.

16 "Hissar al-Tafkir," Egyptian Initiative for Personal Rights, September 11, 2013, <http://www.eipr.org/pressrelease/2013/09/11/1817>.

was publicly executed in 1985, following a criminal trial for his revisionist doctrines on Islam. Taha's views were perceived as threatening the foundations of the Islamist regime in Sudan.¹⁷ The 1995 apostasy case against the Egyptian scholar Nasr Hamid Abu Zayd is also one of the most famous heresy trials in the Arab region. The court held that Abu Zayd's published views on the development of the Quran and jurisprudence proved his apostasy.¹⁸ While this tough route has not been repeated by the authorities, taking critical religious views to the courts has been common in Egypt.

Egyptian courts hold in many cases that blasphemy law protects the fundamental doctrines of Abrahamic religions and safeguards society from temptation and turbulence. The courts do not censor certain provocative views to protect public order and social harmony, but rather to protect specific understandings of religion and dismiss others, even where there are no grounds that the expression of these views would disturb public order. In December 2015, researcher and television host Islam Behery was sentenced to one year in prison after his TV program criticized traditional Islamic law methods and treaties. In April 2016, Kuwaiti women's rights defender and philosophy professor Shaikha Binjasim was charged with blasphemy and humiliating the religion of the state for having declared in a television interview that the constitution of Kuwait stands above the Quran and sharia.

Not only do blasphemy laws protect religious dogmas, these laws also shield powerful religious authorities from accountability and muzzle pro-democracy activists, journalists, and human rights defenders. Saudi blogger and activist Raif Badawi, who was convicted on charges including "apostasy"; "insulting Muslims' sanctities"; "ridiculing Islamic religious figures"; and "producing what would disturb public order, religious values, and morals" had been involved for years in critical discussions of the Wahhabi interpretation of Islam and the powers of religious authorities in Saudi Arabia.¹⁹ In Egypt, while under the rule of the Muslim Brotherhood, journalists and writers known for their criticism of Al-Azhar, the traditional center of Sunni learning, were targeted with charges of blasphemy,

and renowned opponents of Islamism including journalists and artists also were accused of blasphemy.

Members of religious minorities also have been prosecuted under blasphemy laws in Egypt, Algeria, Saudi Arabia, and Iran. The religious doctrines of the Shia, the Baha'iyya, and the Ahmadiyya are often considered blasphemous to Sunni Islam by Egypt's courts. Selectivity is an inherent problem in blasphemy laws in many states, where they often protect the dominant faiths or sects. For example, most blasphemy cases in Egypt from 2011 to 2013 targeted those persons who commented on Islam and Muslim authority figures; many of the accused persons in these cases were Christians.²⁰

Blasphemy laws can also fuel terrorism and violence. The hard-liner view, which advocates for the death penalty or other strict criminal or civil penalties for the perpetrators of blasphemy and heresy, provides a theological and ideological cover for violence committed in the name of protecting Islam's integrity. In his research on the interconnectedness of blasphemy laws and acts of terrorism, legal scholar Amjad Mahmood Khan concluded: "Nations that criminalize blasphemy tend to foster an environment where terrorism is more prevalent, legitimized, and insidious."²¹ Acts of violence committed by vigilantes or terrorists against intellectuals, activists, members of religious minorities, and journalists have been observed since the 1990s in Egypt, Jordan, and other Muslim-majority states such as Pakistan, Nigeria, Indonesia, and Bangladesh.²²

Overcoming the Dilemma

To limit the impact of blasphemy laws on freedom of expression, some commentators propose sharper distinctions be drawn between critical—and legitimate—engagement with religious doctrines and gratuitous insult of a specific faith or its followers. The European Court of Human Rights (ECHR) has taken this approach by holding that states are not in violation of freedom of expression when they restrict offensive attacks on religions.²³ The court established

17 Abdullahi Ahmed An-Na'im, "The Islamic Law of Apostasy and Its Modern Applicability: A Case from Sudan," *Religion* 16 (1986): 197-224.

18 Fauzi M. Najjar, "Islamic Fundamentalism and the Intellectuals: The Case of Nasr Hamid Abu Zayd," *British Journal of Middle Eastern Studies* 27 (2000): 77-200.

19 On this case, see Elham Manea, "In the Name of Culture and Religion: The Political Function of Blasphemy in Islamic States," *Islam and Christian-Muslim Relations* 27 (2016): 117-127.

20 "Hissar al-Tafkir." Egyptian Initiative for Personal Rights.

21 Amjad Mahmood Khan, "How Anti-Blasphemy Laws Engender Terrorism," *Harvard International Law Journal* 65 (2015).

22 Paul Marshal and Nina Shea, *Silence: How Apostasy and Blasphemy Codes are Choking Freedom Worldwide* (New York: Oxford University Press, 2011), 259-288; see also a recent report by Front Line Defenders on Bangladesh: Frontline Defenders, "Victims Blaming," 2016, https://www.frontlinedefenders.org/sites/default/files/front_line_defenders_bangladesh_report_final_16_november_2016.pdf.

23 See "Otto-Preminger-Institut v. Austria," European Court of Human Rights, September 20, 1994 and "Nigel Wingrove v. UK," European Court of Human Rights, November 25, 1996.

“This shift is needed for a peaceful management of religious diversity. . .”

a distinction between provocative opinions that can be tolerated and abusive attacks on religion that can be restricted.²⁴ Meanwhile, the court held that religious people “must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.”²⁵

Although this distinction made by the ECHR leaves wide space for critical engagement with religions,²⁶ it favors, in practice, the dominant doctrines and curtails the ability of critics or atheists to challenge them. It is also difficult to clearly define what can be considered “abusive attacks.” These concerns were upheld in 2005 by the dissenting opinion of three judges in the case of *I.A. v. Turkey*, stating that: “The time has perhaps come to ‘revisit’ this case-law, which in our view seems to place too much emphasis on conformism or uniformity of thought and to reflect an overcautious and timid conception of freedom of the press.”²⁷ European resistance to continued efforts made by Muslim-majority states to develop an international legal framework against the defamation of religion reveals a growing European consensus that the legal prohibition against blasphemy is not compatible with freedom of expression.²⁸

Thus, an alternative proposal to safeguard an inclusive conception of freedom of expression without ignoring the concerns of believers is to shift the debate from the application of ambiguous and arbitrary blasphemy laws to the prohibition of hatred that constitutes incitement to discrimination, hostility, or violence against members of religious communities; however, the application of hate speech legislation is not straightforward and continues to be a source of heated debate in legal scholarship.

Such an approach takes as its primary concern the protection of individuals and religious communities, rather than religious doctrines per se. In April 2012, an Egyptian court moved closer to this reasoning in a blasphemy case filed by an Islamist lawyer against the movie star Adel Imam and five other prominent film directors and scriptwriters. The court dismissed the charge and argued that blasphemy laws do not protect religious feelings or shield religions or religious figures from critique, but rather that the acts of blasphemy to be penalized are those accompanied by intent to harm national unity, public order, and societal peace.²⁹ The reasoning of this court stands out as exceptional in the case law, but it does indicate that some Egyptian judges are attempting to open up some space for freedom of expression.

This shift is needed for a peaceful management of religious diversity and would serve all religious communities far better than existing blasphemy laws, which effectively protect the dominant religious beliefs. Thus, responding to views that can be considered by some religious people as blasphemous or heretical but do not reach the threatening threshold of hate speech, should be left to peaceful intellectual interactions and deliberations within civil society. Religious people and institutions are entitled under freedom of expression to counter arguments made by their critics and, in turn, to criticize their opponents. Prosecution and tough penalties are not the only possible approaches under Islamic criminal law. Blasphemy has been seen increasingly as the realm of civil judges, yet the religious establishment can respond to contemptuous or insulting speeches through admonition (*al-wa’z*) or reprimand (*al-tawbikh*).³⁰

Al-wa’z and *al-tawbikh* are both legitimate under Islamic legal traditions and compatible with the practice of freedom of expression, which necessarily comprises disagreement, refutation, and debate within society. This would be a more constructive way to settle disagreement rather than the current practice of persecution and censorship, and would ultimately protect the rights of all, including dominant religious and social communities that may one day find themselves excluded from power.

24 “*I.A. v. Turkey*,” para. 24-28.

25 Ibid, para. 47.

26 See “*Aydin Tatlav v. Turkey*,” European Court of Human Rights, May 2, 2006. In this case, the Court found that Article 10 of the ECHR was breached by Turkey when a Turkish writer was punished for his criticism of Islam. The Court held that his views could shock Muslims but they contain no abusive attack on sacred symbols.

27 See “Joint Dissenting Opinion of Judges Costa,” Cabral Barreto and Jungwiert, in *I.A. v. Turkey*, 9.

28 L. Langer, *Religious Offence and Human Rights: The Implication of Defamation of Religions* (Cambridge: Cambridge University Press, 2014).

29 See “*Asran Mansur v. Adel Imam and others*,” Al-‘Ajuza Primary Court of Misdemeanour, Case No. 529/2012, April 26, 2012.

30 On the different possible types of *ta’zir* punishment, see Mohammed S. El-Awa, *Punishment in Islamic Law* (Plainfield: American Trust Publications), 100-108.

Religious Leaders and the Sunni-Shia Divide in the Middle East

Harith Hasan Al-Qarawee

It is widely argued that the Sunni-Shia divide has become the main rift in today's Middle East. In countries such as Iraq, Syria, Yemen, Lebanon, and Bahrain, political alignments between local groups and regional powers have been mostly fashioned along sectarian lines. Militant groups, as well as religious speakers, appear ever less hesitant to employ sectarian language and narratives in their efforts to mobilize public support and to delegitimize their opponents. The Arabic word for sectarianism, *ta'ifiyya*, has become a constant presence—even overused and widely abused—in research papers and political commentaries on regional conflicts. Notwithstanding some valid criticism directed at the gross simplification surrounding the notion of sectarianism,³¹ its overuse indicates both the urgency and relative novelty of this phenomenon.

The invasion of Iraq in 2003 boosted sectarian narratives that had long simmered quietly in the background by facilitating the rise of Iranian-backed Islamist Shia parties in a major Arab country and by further politicizing and validating sectarian categories as frames of reference. In addition, the migration of jihadist groups to Iraq and their embrace of an overt strategy to deepen Sunni-Shia hostility was instrumental in this process, which accelerated after the outbreak of civil war in Syria.

In this context, it is important to ask how Sunni and Shia religious leaders and jurists address the current Sunni-Shia schism, given that the thriving sectarian narratives that have come to dominate today's political and intellectual spheres often resort to theological and religious arguments to frame the conflict with the sectarian "Other." Defining features of these narratives include casting this Other as both inherently hostile and homogeneous in belief and practice in questioning its devotion to the "true" Islam, divergently defined. This, at times, leads outside observers to confuse Islamic history with an ahistorical, essentialist reading of the past.³²

Therefore, looking at how the faith's ostensible guardians, that is, the prominent Shia and Sunni clerics, or *ulama*, approach this issue can help decipher the extent to which this sectarian divide is actually about religion. Here it is important to note that Muslim *ulama* are religious figures interpreting the faith and deriving legal and moral rules from Islamic sources, as well as societal actors operating within a sociopolitical structure that influences and largely shapes their attitudes. It should be emphasized that the main purpose of this paper is not to delve into the long history of theological and legal controversy between Sunni and Shia scholars. Instead, it seeks to examine the opinions expressed by those religious leaders, as representatives of their religious communities, and to stress the current transformative context in which those opinions are conveyed.

This paper surveys fatwas and statements dealing with the current Sunni-Shia schism from three Sunni *ulama* (Abdul Aziz ibn Abdullah Al ash-Sheikh, Yusuf al-Qaradawi, and Abdul-Malik al-Saadi) and three Shia *ulama* (Ali al-Sistani, Kazim al-Hairi, and Muhammed al-Yaqubi). The sample has been chosen to include some of the most senior Sunni and Shia *ulama* who are still alive and reflect the diversity of legal and political orientations within Muslim clerical circles. There were two reasons behind the over-representation of Iraqi-based or Iraqi-born *ulama* (four out of six): first, Iraq has been central in the "sectarianization" process during the last two decades; and, second, the author is Iraqi and is currently undertaking research on Iraqi clerical authority, which provided him with better knowledge of—and access to—Iraq's politico-religious scene.

Sunni Ulama

Abdul Aziz ibn Abdullah Al ash-Sheikh

Abdul Aziz ash-Sheikh, the grand mufti of Saudi Arabia and the head of the Permanent Committee

31 Usama Makdisi. "The Mythology of the Sectarian Middle East" (Center for the Middle East, Rice University, Houston, Texas, 2017).

32 This includes an argument repeatedly made by former President Barack Obama that the war in Iraq and Syria is "rooted

in conflicts that date back millennia." See: Fred Hiatt, "Obama's fatal fatalism in the Middle East," *Washington Post*, May 22, 2016, https://www.washingtonpost.com/opinions/obamas-fatal-fatalism-in-the-middle-east/2016/05/22/962d7e28-1e99-11e6-8c7b-6931e66333e7_story.html?utm_term=.3d33ed81ae90.

Map 1. Shi'ism in the Middle East and Neighboring Countries



Sources: CIA Factbook and Strategic Studies Institute.

for Islamic Research and Fatwas, has regularly expressed disapproval of some practices attributed to Shia Muslims, such as conducting pilgrimages to the shrines of their imams or the vilification of the Prophet Mohammed's companions. Conveying the Wahhabi principles that dominate religious institutions in Saudi Arabia, al-Sheikh considers such practices polytheist and heretical. In one example, he responded to a question on the idolization of shrines by "Muslims in some countries" by describing this as *shirk* (polytheism) identical to that practiced by the Prophet Mohammed's own tribe before Islam.³³ While this label could be extended to some practices conducted by Sufi Sunnis as well, other principles of Shi'ism, such as believing in the infallibility of the Shia imams, have also been criticized by al-Sheikh as un-Islamic.³⁴ More recently, in a reaction to criticism of the Saudi management of pilgrimage by Ali Khamenei, the Iranian supreme leader, al-Sheikh described

the Iranians as non-Muslims who held centuries-old animosity toward Sunni Muslims.³⁵

Notwithstanding those harsh criticisms, the mufti has been careful not to generalize his judgment to include all Shia and, in fact, he rarely uses the term "Shia" without adding a qualification. Like his predecessors among high-ranking Saudi *ulama*, such as Abdul Aziz Bin Baz³⁶ and Muhammed Bin Uthaymeen,³⁷ al-Sheikh distinguishes among various Shia groups, and he has directed most of his accusations of polytheism and heresy toward the "*Rafida*," or rejectionists, a term frequently used by Salafi clerics to refer to hardline Shias, who adopt heterodox beliefs such as claiming that the Quran is incomplete or distorted and that Ali Bin Abi Talib and his descendants were infallible and divinely guided. However, given that the latter belief is very common among Shia *ulama* and that the term *Rafida* has not been used by any Shia group for self-identification, its frequent use by Wahhabi clerics appears to be part of a discursive strategy to evade direct reference to the existing Shia communities. By condemning beliefs and practices without explicitly attaching them to an existing community, Wahhabi *ulama* avoid the indiscriminate excommunication of all Shias who represent a majority in Iraq, Iran, and

33 "Ruling on the Circumambulating of the Graves and Shrines and Approaching Them," Mufti of Saudi Arabia, accessed April 15, 2017, <https://www.mufti.af.org.sa/ar/content/%D8%AD%D9%83%D9%85-%D8%A7%D9%84%D8%B7%D9%88%D8%A7%D9%81-%D8%AD%D9%88%D9%84-%D8%A7%D9%84%D9%82%D8%A8%D9%88%D8%B1-%D9%88%D8%A7%D9%84%D8%A3%D8%B6%D8%B1%D8%AD%D8%A9-%D9%88%D8%A7%D9%84%D8%AA%D9%82%D8%B1%D8%A8-%D8%A5%D9%84%D9%8A%D9%87%D8%A7>.

34 "Reply by His Eminence the Mufti to a Rafidi who accused him of insulting the Prophet Mohammed's family." YouTube, 03:01, December 20, 2013. <https://www.youtube.com/watch?v=dIHkMV-Zz4s>.

35 "The Mufti of Saudi Arabia: Iranians are not Muslims," BBC Arabic, September 6, 2016, http://www.bbc.com/arabic/middleeast/2016/09/160906_saudi_iran_mufti_hajj.

36 "Multaqa Ahl al-Hadeeth," accessed April 15, 2017, <http://www.ahlalhdeeth.com/vb/showthread.php?t=6878>.

37 Sheikh Mohammed Bin Ethemen, "Are Rafida Apostates?" YouTube, 01:19, April 10, 2012, <https://www.youtube.com/watch?v=XTWxFUXWge0>.

Bahrain and account for 10 to 15 percent of the Saudi population. Labeling beliefs and practices, rather than communities as un-Islamic has helped Wahhabi *ulama* meet the Salafi legal norms in their definition of “Muslim-ness” while simultaneously adapting to the political necessities of the Saudi Kingdom.

This can also be linked to the struggle of the Wahhabi establishment with Salafi-jihadist groups such as al-Qaeda and the Islamic State of Iraq and al-Sham (ISIS). Al-Sheikh has repeatedly denounced these groups for many reasons, including the ease with which they excommunicate other Muslims.³⁸ Even further, he has strongly condemned an attack that targeted a Shia mosque in Saudi Arabia, describing it as “a criminal deliberate act whose perpetrators seek to widen the gap between the sons of our homeland.”³⁹ His warning against *fitna*—a word with a long religious pedigree often translated as “disorder” or “sedition”—caused by such groups sometimes extends to other countries such as Iraq, as exemplified in his call on Iraqis to be united, shy away from internal divisions, and focus on rebuilding their country.⁴⁰

However, despite the rhetorical ambiguities, there is clearly a gap between how the Wahhabi establishment view Shia from a theological and legal perspective, and its politically conditioned attitude. Abdul Aziz Bin Baz plainly said that convergence between Sunnis and *Rafida* is impossible⁴¹ and, based on his criticism of Shia beliefs and practices, al-Sheikh seems to share this conviction. Thus, his conciliatory statements appear to be dictated by his role as an establishment figure who works in a government-sponsored entity and, therefore, has to consider the state’s policies and priorities when dealing with political issues and their implications.

38 “Important and urgent proclamation by the Mufti to all Muslims,” Al-Sakeena, June 13, 2010, <http://www.assakina.com/fatwa/fatwa2/5278.html>; Website of the Saudi Mufti, accessed April 15, 2017, <https://www.mufti.af.org.sa/ar/content/%D8%AE%D8%B7%D8%B1-%D9%85%D9%86%D9%87%D8%AC-%D8%A7%D9%84%D8%A%D9%83%D9%81%D9%8A%D8%B1-%D9%88%D9%85%D8%A7%D9%8A%D8%AC%D8%B1%D9%87-%D9%85%D9%86-%D8%A7%D9%84%D8%A7%D8%B9%D8%AA%D8%AF%D8%A7%D8%A1-%D8%B9%D9%84%D9%89-%D8%A7%D9%84%D8%A3%D9%86%D9%81%D8%B3-%D8%A7%D9%84%D9%85%D8%B9%D8%B5%D9%88%D9%85%D8%A9>.

39 “The Saudi Mufti warns of the danger of ‘fitna’ after an attack at a Shi’a mosque in the east of Saudi Arabia,” *France 24*, May 24, 2015.

40 “Fatwas by His Eminence the Grand Mufti of the Kingdom of Saudi Arabia Abdul Aziz ash-Sheikh on the Majd Channel,” YouTube, 44:39, August 22, 2014, <https://www.youtube.com/watch?v=jF5H9r1BskY>.

41 “Mulataqa Ahl al-Hadeeth,” February 3, 2015, <http://www.ahlalhodeeth.com/vb/showthread.php?t=6878>.

Yusuf al-Qaradawi

A decade or so ago, Yusuf al-Qaradawi, the Doha-based head of the International Union of Muslim Scholars and former member of the Muslim Brotherhood, was less inclined than the Wahhabi *ulama* to spurn the Shia. Although he did not hide his disapproval of some Shia principles and practices, he stated that differences between Sunnis and Shias were centered on the ancillaries of the faith rather than its fundamentals.⁴² In one of his speeches, al-Qaradawi said that his efforts to bridge the gap between Sunnis and Shia were conditional on the commitment of Shia scholars to stop the vilification by their followers of the Prophet Mohammed’s companions, to abandon the claim that the Quran was distorted, and to discontinue attempts to spread Shi’ism in Sunni-majority countries.⁴³

Al-Qaradawi’s attitudes toward Sunni-Shia relations have changed over time, primarily because of the political situation in Iraq and Syria. The Syrian conflict in particular has been a turning point in the making of his view on sectarian relations. He publicly admitted that he wrongfully called for convergence with the Shia and mistakenly opposed the attitudes of Saudi religious scholars toward them. He went so far as to state that the Shia *ulama* and leaders fooled him and took advantage of his goodwill to advance their regional agenda against Sunni countries.⁴⁴ The substantial shift in al-Qaradawi’s perspective toward Sunni-Shia rapprochement seems to be primarily dictated by the regional sectarian polarization rather than by deep religious conviction of irreconcilability of Sunnism with Shi’ism. The heightening sectarian divide made it less possible for Sunni *ulama* with large constituencies to promote a discourse of convergence, especially when their political views and alignments further limited such possibility.

Abdul Malik al-Saadi

A similar kind of transformation occurred in the thinking of the prominent Iraqi Sunni Islamic scholar

42 “Al-Qaradawi responds to the Shi’a ‘ulama and rejects the accusation of sectarianism,” Al Jazeera, accessed April 15, 2015, <http://www.aljazeera.net/news/arabic/2008/9/18/%D8%A7%D9%84%D9%82%D8%B1%D8%B6%D8%A7%D9%88%D9%8A-%D9%8A%D8%B1%D8%AF-%D8%B9%D9%84%D9%89-%D8%B9%D9%84%D9%85%D8%A7%D8%A1-%D8%B4%D9%8A%D8%B9%D8%A9-%D9%88%D9%8A%D9%86%D9%81%D9%8A-%D8%AA%D9%87%D9%85-%D8%A7%D9%84%D8%B7%D8%A7%D8%A6%D9%81%D9%8A%D8%A9>.

43 Al-Qaradawi (lecture in Egypt), accessed April 15, 2017, <https://www.youtube.com/watch?v=PsPZqrVx26M>.

44 This statement was part of a speech given by al-Qaradawi in a conference organized in Doha to declare solidarity with the Syrian people, “Al-Qaradawi: The Shia fooled me, the ‘Party of the Devil’ fooled me.” YouTube, 02:29, February 18, 2017, <https://www.youtube.com/watch?v=vE3cKq1qpXk>.

Abdul Malik al-Saadi, who emerged recently as one of the leaders of the anti-government protests that took place in the Sunni provinces prior to the invasion of those provinces by ISIS. Al-Saadi had a tolerant religious and legal view of Shi'ism, but the political conflicts in Iraq since 2003 have overshadowed—and sometimes influenced—this judgment. In a speech in December 2012, al-Saadi said that he considered himself a Shia, seeing no fundamental difference between Shi'ism and Sunnism, for both recognize the Quran and the *Sunna* (the lived example of the Prophet Mohammed) as their major religious sources and both hold great respect and veneration for the Prophet's family. However, in his response to members of his community who criticized this statement, he emphasized that by no means had he referred to the extreme "Safavid" beliefs such as the vilification of the Prophet's companions or the worship of shrines.⁴⁵ The derogatory term Safavid, in direct reference to Iran and its Shia allies, is more common than the term Rafida in the opposing Iraqi Sunni discourse. This perhaps reflects the priorities of Iraqi Sunni leaders—except the most radical elements who sought to emphasize the disparity between an Arab Shi'ism—which al-Saadi praised, and an alien, anti-Arab one often identified with Iran. The characteristics he attributed to Safavid Shi'ism may resonate with the differentiation made by the Grand Mufti of Saudi Arabia between the *Rafida* and other Shia sects, but al-Saadi was also critical of what he described as "Salafi extremism" and its tendency to ostracize other schools of thought.⁴⁶

Al-Saadi grew more critical of the Shia-dominated government in Iraq because of its abuses and discrimination toward Sunni citizens, which according to him was motivated by sectarian hatred and Iranian influence. He issued several statements condemning the government and Shia militias, calling on the Sunni world to intervene to save Iraqi Sunnis. In addition, he argued that a transnational Shia alliance led by Iran and composed of Iraqi Shia militias; Syrian President Bashar al-Assad; Hezbollah in Lebanon; and the Houthis in Yemen has been working to weaken Sunni Muslims in the region.⁴⁷

“... [A]l-Sistani embraced a conciliatory approach, emphasizing Islamic unity and considering that theological and historical disputes between Sunnis and Shia were matters that should be exclusively discussed among religious and legal experts. . . .”

Al-Saadi's statements after the fall of Mosul to ISIS had been suspicious of the dominant narrative that, according to him, was centered on ISIS instead of recognizing that what happened was part of a Sunni revolution in which ISIS represented no more than a small faction.⁴⁸ Later on, he became critical of some of ISIS's actions, such as the demolition of shrine mosques in Mosul, offering a legal interpretation that challenged the extremist view of ISIS on this issue.⁴⁹ However, his ideological disagreements with ISIS did not significantly change his political stance that came to see the rise of ISIS as an outcome of the government's sectarianism and the aggression of the Shia militias. Thus, he issued a statement reproaching the Shia *ulama* in Najaf for their failure to condemn those abuses and for further empowering the Shia militias, in response to a fatwa issued in June 2014, by the Grand Shia Cleric Ali al-Sistani (see below), calling on volunteers to join security forces in the fight against ISIS.⁵⁰

Shia Ulama

Ayatollah Ali al-Sistani

The Najaf-based cleric, Ayatollah Ali al-Sistani, is the highest-ranking Shia religious authority in Iraq and the world today. His involvement in political and public affairs was often limited to moral guidance,

45 Abdul Malik al-Saadi, "Clarification by Sheikh Abdul Malik al-Saadi on his comments about the protestors," *Al-Omah al-Wasat* accessed April 15, 2017, <http://www.alomah-alwasat.com/newsMore.php?id=263>.

46 Abdul Malik al-Saadi, "Opinion at the Chechnya conference," *Al-Omah al-Wasat*, September 4, 2016, <http://www.alomah-alwasat.com/newsMore.php?id=270>.

47 Abdul Malik al-Saadi, "Declaration Number 42: Steadfastness and patience will be followed by victory," *Al-Omah al-Wasat*, May 9, 2014, <http://www.alomah-alwasat.com/newsMore.php?id=194>; and "Remembering the martyred Sheikh Abdullah Sheikh Hamd and denouncing the actions of the militias in Iraq," *Al-Omah al-Wasat*, February 27, 2015, <http://www.alomah-alwasat.com/newsMore.php?id=239>.

48 Abdul Malik al-Saadi, "Declaration Number 47," *Al-Omah al-Wasat*, June 27, 2014, <http://www.alomah-alwasat.com/newsMore.php?id=211>.

49 Abdul Malik al-Saadi, "Declaration Number 50: On the bombing the Mosque of Prophet Yusuf and other mosques," *Al-Omah al-Wasat*, July 26, 2014, <http://www.alomah-alwasat.com/newsMore.php?id=217>.

50 Abdul Malik al-Saadi, "Declaration Number 46," *Al-Omah al-Wasat*, June 17, 2014, <http://www.alomah-alwasat.com/newsMore.php?id=207>.

although his rare direct interventions have been effective, as with his insistence on the writing of the Iraqi constitution by an elected assembly and his role in unseating former Prime Minister Nuri al-Maliki. Regarding the Sunni-Shia divide, al-Sistani embraced a conciliatory approach, emphasizing Islamic unity and considering that theological and historical disputes between Sunnis and Shia were matters that should be exclusively discussed among religious and legal experts with scholarly manners and in academic platforms rather than public outlets.⁵¹

While continuing to make his legal rules based on Shia jurisprudence, in his role as a social leader, al-Sistani has sought to avoid sectarian language and to encourage tolerance and coexistence. When sectarian violence rose to its highest levels in Baghdad after the 2006 attack at the Golden Mosque—a Shia shrine—in Samarra, al-Sistani urged “Iraqis from all religions and sects” to refrain from random acts of revenge, condemning those who targeted civilians and were “deterred neither by their religion nor by their belonging to the humanity.”⁵²

His June 2014 fatwa, which followed ISIS’s invasion of Mosul and the group’s threat to march on Baghdad and Shia holy cities, has been instrumental in restoring public morale and mobilizing thousands of Shia in the war against ISIS.⁵³ The fatwa was criticized for creating cover for abuses by Shia militias against Sunni civilians and empowering these Iranian-backed forces. Responding to this criticism, al-Sistani distanced himself from the abusive elements and issued a long statement of instructions to the fighters, asserting the need to follow strictly the Islamic and moral rules of combat and to avoid abuses and violations of the rights of civilians. He frequently urged volunteers and paramilitary groups to work under the authority of the Iraqi state.⁵⁴

As a Shia jurist, al-Sistani must address the concerns of his followers in Iraq and the region while being careful to do so without provoking hard feelings grounded in sectarian tensions. His statements on regional issues

often employ a neutral and cautious language that refrains from divisive connotations, as evidenced by his call on the Saudi government not to execute the Shia dissident Sheikh Nimr al-Nimr, or his letter of condolences to the Shia community, written in Saudi Arabic, after the execution. Those statements lacked the politically loaded language that was employed by other Shia clerics, such as Kazim al-Hairi (see below).⁵⁵ Of course, the non-sectarian rhetoric of al-Sistani results not only from his goodwill, but reflects a strategic stance to distinguish his authority from that of the supreme leader in Iran. As the senior traditionalist authority in Shia Islam, free from domination by the cleric-led state in Tehran, al-Sistani has an interest in sustaining his autonomy and his own network of representatives, schools, charities, resources, and followers. By resisting full subordination to the Iranian model and its geopolitical projections, including the increasingly sectarian alliances backed by Tehran, al-Sistani has been defending this independence and the authority embodied in it.

Kazim al-Hairi

The Iran-based jurist Kazim al-Hairi is one of the few top-ranking clerics of Iraqi origin who has adopted the theory of the General Mandate of the Jurist (*wilayat al-faqih*), the model of supreme clerical authority governing Iran following the 1979 Islamic Revolution. As such, he has been more politically engaged and his attitudes often reflect the pro-Iranian cadre of hard-liners in Shia clerical politics. As a former member of the Dawa party and an associate of Muhammed Baqir al-Sadr, who was executed by Saddam Hussein in 1980, al-Hairi has been a fierce opponent of Saddam Hussein and the Baath Party. This background explains his misgivings toward “reconciliation” projects in Iraq and of US intentions. From the early days after the fall of Saddam Hussein, al-Hairi has adopted a rigid position, urging his followers to take on the responsibility of killing senior members of the Baath Party and those who collaborated with the former regime or sought to reorganize the party again.⁵⁶ This fatwa underlined the clear differences between his approach and that of al-Sistani who, in those days, warned against individual acts of revenge and urged people to leave this responsibility to the legitimate courts.⁵⁷

51 Ayatollah al-Sistani, “Statement regarding Islamic unity and renouncing sectarianism,” accessed April 15, 2017, <http://www.sistani.org/arabic/statement/1504/>.

52 Ayatollah al-Sistani, “Statement to the people of Iraq regarding sectarianism,” July 18, 2006, accessed April 15, 2017, <http://www.sistani.org/arabic/statement/1499/>.

53 Ayatollah al-Sistani, “Friday sermon of al-Sistani’s representative in Karbala, Sheikh Abd al-Mahdi al-Karbala’i,” accessed April 15, 2017, <http://www.sistani.org/arabic/archive/24918/>.

54 Ayatollah al-Sistani, “Instructions and guidance to fighters in the fields of jihad,” accessed April 15, 2017, <http://www.sistani.org/arabic/archive/25034/>.

55 Ayatollah al-Sistani, “Condolences for the martyrdom of families in Qatif,” accessed April 15, 2017, <http://www.sistani.org/arabic/statement/25218/>.

56 Ayatollah Kazem al-Hairi, “Statement regarding the wasting of blood by Baathists in Iraq,” accessed April 17, 2017, <http://www.alhaeri.org/main.php?id=1#statements>.

57 Hamid al-Khaffaf, *Statements of Sayyid al-Sistani on the Iraqi questions: Sixth edition* (Beirut: Dari al-Mu’rikh al-Arabi, 2015), 28-29.

Al-Hairi avoids explicit sectarian language, but his view of Shi'ism as the rightful and "victimized" faith is present throughout his jurisprudence and public statements. Rather than speak of a Sunni-Shia divide, he presents a confrontation between the United States and its regional allies, most notably Saudi Arabia and its Sunni allies, on the one hand; and the Islamic resistance, with the Shia factions as its genuine representatives, on the other. Al-Hairi considers projects to address Sunni grievances in Iraq as a US-led conspiracy to divide the country and weaken the Islamic resistance. For example, he issued a statement condemning US-sponsored attempts to form Sunni national guard units in Iraq and to dismantle the Shia militias, considering them part of a project aiming to perpetuate US dominance in the country.⁵⁸

"[Al-Yaqubi's] critics considered the law a step toward the institutionalization of the sectarian divide in Iraq and the accompanying de-secularization of the legal system."

Al-Hairi's identification with the pro-Iran camp can also be seen in his statements concerning other regional issues. For example, he strongly condemned the execution of Sheikh Nimr al-Nimr, viewing it as part of Saudi policy to "annihilate the followers of the Prophet's family [the Shia] ... and to compensate for Saudi losses in Syria, Yemen, Bahrain, Iraq, and other Muslim countries, as well as the latest defeats of ISIS."⁵⁹ Similarly, he issued other statements condemning Saudi "aggression" in Yemen⁶⁰ and support for the Bahraini regime, policies that al-Hairi described as "sectarian."⁶¹ In contrast to al-Sistani's largely "quietist"

and reserved approach, al-Hairi could be seen as the Shia equivalent of al-Qaradawi and Saadi by virtue of his highlighting of the political aspects of conflicts and adopting the narrative of one side in the ongoing conflict in Iraq and the region.

Muhammed al-Yaqubi

Najaf-based jurist Muhammed Musa al-Yaqubi was a student and disciple of Grand Ayatollah Mohammed Mohammed Sadeq al-Sadr, the activist founder of the Sadrist movement, led today by his son Muqtada al-Sadr. Like his tutor, al-Yaqubi considers himself a genuine Iraqi and Arab who, unlike al-Sistani and al-Hairi, was born in Iraq and spent his entire life in the country. In his attitudes, he stands somewhere between the aforementioned *ulama*: like al-Hairi, he was a supporter of the involvement and leadership of jurists in the political arena, but he differed from him by not fully endorsing the Iranian policy in Iraq. In 2003, al-Yaqubi formed a political party, named al-Fadila, which maintained a presence in the parliament and local governments.

Reacting to the 2006 sectarian violence in Iraq, al-Yaqubi expressed a Shia-centric view, blaming Sunni groups for the violence and killings. In one of his speeches in 2006, he described the Iraq civil war as a sectarian struggle waged by one side. Uncritically adopting this one-sided view, he rebuked Sunni tribes for providing the "murderers" with safe havens from which they launched their attacks against Shia civilians. In an implicit reference to al-Sistani, he criticized senior Shia jurists in Najaf for not reacting to this aggression "under the pretext of not being dragged into a sectarian war, which in the end encouraged Sunni extremists to ally with Saddamists in the war to annihilate Shias."⁶² While condemning "sectarian cleansing" by Sunni extremists, he advised the Shia-dominated government and allied forces to implement a demographic change by constructing housing compounds for poor Shia families in areas around Baghdad to cut the access of Sunni extremists to the capital.⁶³

Al-Yaqubi seems to have backed away from some of the positions he espoused during times of intense sectarian violence, only to focus on another project of a religious nature. In 2013, he instructed his own political party to propose a new law for personal affairs based on Shia jurisprudence; this was known as the Jafari Personal Affairs Law. In his view, the law aimed at providing Iraqi Shia who adhered to their

58 Ayatollah Kazem al-Hairi, "Statement regarding the dividing and weakening of Iraq," accessed April 17, 2017, <http://www.alhaeri.org/main.php?id=47#statements>; <http://www.alhaeri.org/main.php?id=41#statements>.

59 Ayatollah Kazem al-Hairi, "Statement on the crime of the beheading of Sheikh Nimr al-Nimr," accessed April 17, 2017, <http://www.alhaeri.org/main.php?id=46#statements>.

60 Ayatollah Kazem al-Hairi, "Statement on Saudi Arabia's assault on Yemen," accessed April 17, 2017, <http://www.alhaeri.org/main.php?id=37#statements>.

61 Ayatollah Kazem al-Hairi, "Statement on the injustice and persecution in Bahrain," accessed April 17, 2017, <http://www.alhaeri.org/main.php?id=30#statements>.

62 Muhammed al-Yaqubi, *Political Statements* (Najaf: Dar al-Sadiqin, 2014), 349.

63 Ibid., 354.

religious traditions with tools to practice their personal affairs in keeping with their beliefs and religious doctrine.⁶⁴ His critics considered the law a step toward the institutionalization of the sectarian divide in Iraq and the accompanying de-secularization of the legal system. The law did not pass the parliament, primarily because it was not endorsed by al-Sistani and other senior clerics in Najaf, a stance that al-Yaqubi publicly criticized as unjustified.⁶⁵ His positions seemed to have been largely motivated by the pursuit of a broader constituency, a trait common among mid-ranking jurists seeking to enhance their support and standing through the adoption of radical, populist positions.

Conclusions

This paper has examined the attitudes of six Muslim jurists toward the current Sunni-Shia divide in the Middle East. Although this sample was far from exhaustive or inclusive of the full theological or clerical spectrum, it provides a general picture of prevalent attitudes and the contexts that shape them. This brief survey, then, leans toward confirmation of a historical pattern in Sunni-Shia relations, according to which the Sunni *ulama*, who consider themselves representatives of mainstream Islam, have been more explicit in questioning Shia beliefs and practices than the Shia have been in questioning Sunni beliefs and practices. However, it can be concluded that the theological and legal differences play a limited role, compared to political disputes, in shaping the views of jurists toward the ongoing sectarian tension.

64 Ibid., 692-693.

65 Ibid., 688.

In most cases, regional and sectarian politics have constructed jurists' perceptions of the other sect, leading them to abandon calls for sectarian convergence, to highlight the boundaries with the other (al-Qaradawi), or to reproduce existing narratives of the conflict (al-Hairi, al-Yaqubi, and al-Saadi). Additionally, for the most part, these senior jurists tend to shy away from an unequivocal, derogatory reference to the other sect and, instead, stress the disparity between a party within the other sect that is fully hostile and irreconcilable, and whose religious beliefs are intertwined with its political project, and the rest of the members who are either manipulated by this party or have been passive in this conflict.

Nevertheless, it should also be noted that despite this growing polarization along sectarian lines among Muslim *ulama*, the nuanced differences within each sect suggests that a non-confrontational approach is still possible should the dynamics of regional geopolitics change in the future. In this respect, al-Sistani's insistence on not addressing theological and legal differences in public platforms and al-Sheikh's criticism of hard-line Salafism, which inspires violence against Saudi Shia, offer a less antagonistic handling of sectarian relations and differences. Despite the considerable dissimilarity between al-Sistani and al-Sheikh in their evaluations of the theological basis of the Sunni-Shia schism, their criticisms of the most radical tendencies within their communities could serve as a counter-discourse, however heterogeneous its premises, to the prevailing narratives in the region.

Rights of Non-Muslims in the Middle East

Imad Salamey and Elie Abouaoun

The early centuries of Islam were characterized—in theory and often in practice—by the relatively enlightened treatment of major religious minorities, a practice later institutionalized in large multiethnic, multiconfessional empires under Muslim rule. Yet, developments in the modern Muslim world have failed to keep pace with contemporary understandings of minority rights and freedom of worship. Today, non-Muslims across the Middle East are subject to political, economic, and social discrimination, as well as the very real dangers of outright repression and violence.

This phenomenon is driven by both the predominant emphasis on conservative readings of religious law and events on the ground as well as social tensions released by the so-called Arab Spring protests. Together, limitations on political and social expression under the region's many autocrats, who have been wary of alienating the majority of Muslims, as well as widespread acceptance of restrictive readings of sharia law, have made the notion of equality between Muslims and non-Muslims a distant prospect at best.

At the root of the problem lies a complex tension between antagonism toward, and coexistence with, “nonbelievers,” beginning with the revealed text of the Quran itself. It is this very complexity when faced with the limitations of human understanding of God's will that is reflected to this day in the debate over the treatment of religious minorities.

For example, the Quran's so-called sword verses call on Muslims to slay “idolaters wherever you find them” (9:5) and to attack those Christians, Jews, and Zoroastrians who ignore the sacred teachings or otherwise flout God (9:29). Elsewhere, the Quran clearly stresses peaceful coexistence among faiths, the right of believers to form treaties with non-Muslims, and detailed rules for Muslims living in predominantly non-Muslim societies, culminating in the declaration: “There can be no compulsion in religion” (2:256).

Despite centuries of debate and learned commentary by Muslim scholars and jurists, the tension between these two tendencies has never been fully resolved. Modern critics of Islam, particularly in the West,

commonly invoke the “sword verses” while overlooking the admonition in this very same section of the Quran to protect those idolaters who seek refuge, as well as other, more conciliatory verses. Defenders of the faith take the opposite approach.

The effects of this stalemate are particularly acute as the Middle East experiences a renewal of sectarian violence, raising a number of key questions that we will examine in this paper. To what extent can Islamic sharia and religious practices be held responsible for the subjugation and violation of the rights of non-Muslims in Muslim-majority states? Do these practices contradict or, alternatively, complement human rights and the promotion of diversity? And what of other influences—political expediency, economic competition, and social practices—that also shape communal relations?

In practical terms, the rapid spread, beginning in the late seventh century of the Common Era (CE), of Muslim influence and power across a region dotted by different religious, linguistic, and ethnic groups required some sort of unified approach, and early Islamic legal theory grouped non-Muslims into several categories.⁶⁶ Most relevant here is *ahl al-kitab*, or “People of the Book,” that is, those who possess a revealed scripture, a category that includes Jews and Christians, and, generally, Zoroastrians, who are among the world's oldest religious communities with approximately 2.5 million followers living mostly in Iran and India. They are considered “protected people” or members of the *ahl al-dhimma*.

Specific interpretations of how to treat the *ahl al-dhimma*, however, vary among the different schools of Islamic jurisprudence, or *fiqh*. According to the Hanafi school of thought, it is permitted for an Islamic state to contract with non-Muslim “Arab” *dhimma* irrespective of their religions and beliefs. As for non-Arabs, the

66 “*Ahl al-Harb*” (of war) are inhabitants of areas under infidels’ rule. “*Ahl al-Ahd*” (of covenant), or the people who reside under Muslim rule, are further sub-categorized into three classifications: “*Ahl al-Hudna*,” or “people of the truce,” are those who sign a peace treaty with Muslims after being defeated in war, “*Al-Musta'minun*,” or people who received guarantee of safety, and *Ahl-Al-Kitab*.



Displaced residents from the minority Yazidi sect, fleeing violence from ISIS forces in Sinjar town, walk towards the Syrian border, on the outskirts of Sinjar mountain, near the Syrian border with Iraq, August 11, 2014.
Photo credit: Reuters/Rodi Said.

dhimma designation is exclusive to Jews, Christians, and Zoroastrians. Whereas, in the Maliki school of thought, the *dhimma* can be contracted with any non-Muslim regardless of ethnic or religious affiliation, the Shafi'i school restricts the *dhimma* to Christians, Jews, and people belonging to religions similar to Zoroastrianism regardless of ethnicity. According to the Hanbali school, *dhimma* is only provided to Christians, Jews, and Zoroastrians.

Still, the general outlines are the same for all schools. Members of the *ahl al-dhimma* were required to pay the poll tax, or *jizya*, in return for security of their person and property, the freedom to practice their faith, and a certain degree of autonomy within their community to conduct personal affairs based on their religious laws and customs.⁶⁷

Dhimmis had the right to litigate most of their legal affairs in special courts as long as their cases did not

cross religious boundaries, involve capital crimes, or threaten public order and security. However, a *dhimmi* was not allowed to give evidence against a Muslim before a court and was forced to purchase Muslim witnesses at great expense.⁶⁸ Even more so, the language used by the court privileged the social status of men and Muslims over women and non-Muslims.⁶⁹

There were other major restrictions as well. These groups had to consent to limitations on their freedom of religious expression.⁷⁰ Such practices were seen as enabling conversion, which was not tolerated, especially among Muslims.⁷¹ All major community

67 Anver M. Emon, "Religious Minorities and Islamic Law: Accommodation and the Limits of Tolerance," *Islamic Law and International Human Rights Law* (2012): 323-343.

68 Ye'or Bat et al., *The Dhimmi: Jews and Christians Under Islam* (Norwalk, CT, United States: Fairleigh Dickinson University Press, US, 1985).

69 Wael B Hallaq, *An Introduction to Islamic Law* (Cambridge, UK: Cambridge University Press, 2009).

70 Yohanan Friedmann, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (Cambridge: Cambridge University Press, 2003).

71 Jessica A. Coope, "Religious and Cultural Conversion to Islam in Ninth-Century Umayyad Córdoba," *Journal of World History* 4 (1993).

decisions had to remain within the boundaries set by the Muslim authorities.⁷²

Non-Muslims were in essence “separate but unequal,” allowed to pursue their faith and practices within narrow boundaries that never challenged Muslim dominance. Thus, these practices underscored the superior position of Muslims in all aspects of public life and emphasized, even exaggerated, differences between faith communities, neither of which provides much of a basis for modern standards of equality under the law.

The later Ottoman Empire, which stretched from the Balkans to North Africa and the Middle East, refined this system into a framework of cooperation between the central authorities and the empire’s large minority populations. Each group, or *millet*, under religious authorities appointed by the caliphate, exercised its own jurisdiction over religious conduct in marriage, divorce, custody, inheritance, culture, and education. During the decline of the empire, the Ottomans went further to recognize a form of equality among religious communities.⁷³

The breakup of the Ottoman Empire following World War I, the subsequent colonization of the Middle East by European powers, and the later rise of independent Arab nations had serious ramifications for the relations between the dominant Muslims and non-Muslim minority communities. The old *dhimmi* system no longer applied, but little accommodation was reached to replace it, with the arguable exception of the controversial power-sharing system in Lebanon under the influence of the pro-Christian French.

The experience of empire left a lasting mark on the relations of Islam to non-Muslims. Political rule required the development of a sophisticated juridical regime with detailed and codified laws to be applied throughout the land. As the empire was a patchwork of cultures, each with its own notions of morality and distinct value systems, the religious deliberations often favored local custom. This tended to reinforce the preservation of local traditions while simultaneously introducing considerable diversity into the application of Islamic law.⁷⁴

The result of the Umayyad and Ottoman experiences is an accumulation of diverse and complex legal traditions that evolved over time to favor modest interpretations of Islamic codes and the accommodation of communal diversity. The debate continues today as to whether there is a susceptibility in Muslim-majority states to incorporate secular or un-Islamic codes to sharia-inspired laws and practices. Several Muslim-majority states have successfully separated state from religion, such as Turkey, Malaysia, Indonesia, and Tunisia. Moderate Muslim religious scholars attempted to make distinctions between religion (*ad-Din*) in the private sphere and the state (*ad-Dawla*) in the public one, arguing that *ad-Dawla* encompasses diverse and contradictory opinions deliberated for the public good. Scholars such as the Shia cleric Mohammed Hassan al-Amin, who is vocal in his opposition to the Iranian theocratic system of supreme clerical rule (*wilayat al-faqih*), have suggested that the state should not be constrained by religious requirements.

“Non-Muslims were in essence ‘separate but unequal,’ allowed to pursue their faith and practices within narrow boundaries that never challenged Muslim dominance.”

Clearly, there is room within Islamic legal tradition—at least in theory—to address contemporary concerns with minority rights, chiefly through the exercise of accepted jurisprudential techniques such as *qiyas*, or deductive analogy, and *ijmaa*, or consensus. Rather than take refuge in narrow readings of sharia, governments and nongovernmental groups must debate and consider adapting and implementing local practice and laws to international legal rights standards. Countries such as Malaysia have made substantial efforts to harmonize sharia-inspired policies with the principles of human rights conventions.

It is not sufficient, however, to attribute the challenges ahead solely to Islam—or to specific interpretations of sharia—for political, social, and cultural factors must also be taken into account. After all, the rights of non-Muslims have been ignored historically by both sharia-inspired regimes and secular autocracies. Concerns for

72 Louay M. Safi, “Human Rights and Islamic Legal Reform,” *Human Rights Forum*, (Spring 2001), Vol. 18, No. 2, pp. 32-59.

73 Sara Barbieri, “Ottoman Millet System and National-Cultural Autonomy. A Distance Dialogue” (University of Bologna, March 2013).

74 “A Concise Summary of the Evolution of Islamic Law (Sharia) From its Inception to the Present” (University of Pennsylvania, 2012), <http://www.upenn.edu/emeritus/IslamicLaw.pdf>.

“state security” often trump the legitimate interests of religious minorities in the rulings of today’s Muslim jurists. Seldom do Muslim jurists address policy concerns or promote the inclusion of religious minorities in meaningful power-sharing positions, often out of concern for “state security.” However, these jurists fail to understand that, although security and stability are important political goals, they can never be achieved at the expense of rights or freedoms, or the highest standards of accountability and rule of law, but should instead contribute to bringing different communities together to cooperate and take joint actions in order to accomplish their goals.

A brief survey of some major Muslim-majority states reveals the degree to which religious, political, and social factors are intertwined when it comes to non-Muslim minorities throughout the Arab Middle East.

Egypt

While Arab nationalism has attempted to ease religious differences in Egypt by proclaiming shared communal interests—nationalization of foreign companies, the redistribution of land ownership, repelling foreign threats and confronting “Zionists”—the divide between the Muslim-majority and Coptic Christian minority (Copts) persists.

The move from the Ottoman *millet* system toward a national unification project is to blame, as well as the widespread perception of preferential treatment of non-Muslims by the colonial powers. Such “preferential” practices were eliminated by the Free Officer’s coup in 1952, and the Copts were subsequently underrepresented in the government of President Gamal Abdul Nasser. Moreover, despite their secular claims, Egyptian nationalists have repeatedly emphasized Islamic laws and education in their drive to forge a unified national culture. The presence in Cairo of Al-Azhar, the traditional center of Sunni learning, has impelled political leaders to seek religious support and sanction for their rule from the clerics, further strengthening ties between Muslim institutions and the state.

Not surprisingly, then, Egypt’s brand of nationalism failed to undermine religious mobilization and communal peculiarities. Nationalist leaders, such as President Anwar al-Sadat, long exploited this religious divide for political gains, and nationalist regimes were ruthless in suppressing non-Muslim protests.

Tensions that boiled over after the Arab Spring protests both under Islamist President Mohammed Morsi or secular President Abdel Fattah al-Sisi perpetuated the challenges for Christians, and neither president

translated their statements of unity into actual policies that would make a difference in how Christians are treated in Egypt.

Iraq

For centuries, communal diversity has been a salient feature of life in Mesopotamia and modern-day Iraq, home to Shias, Sunnis, Kurds, Turkmen, Chaldean, Assyrians, Yazidis, Armenians, Mandeans, Shabakis, and Circassians among others. Under Saddam Hussein, non-Muslims enjoyed a relative degree of freedom, and, unlike in Egypt, the regime moved to curb the influence of the largest religious institutions, chiefly the Shia center of learning in the city of Najaf, whose leaders were often repressed and even assassinated.

Still, non-Muslim minorities fared even worse, often under special scrutiny from authorities, and prevented from performing public masses or offering television programming. Political activities were also limited to activities that supported the ruling establishment. The fall of President Saddam Hussein in 2003, characterized by a rise of pan-Islamist influence as well as a security vacuum, led to widespread discrimination, eviction, and violent campaigns against non-Muslims.

Iraqi Christians have been targeted violently and some have been held for ransom, actions often framed as justified by alleged Christian support for the US invasion. Reports have surfaced that Christians have been forced to convert to Islam or confront grave consequences. In 2004, al-Qaeda bombed five churches in Baghdad within thirty minutes, intensifying the tension between Christians and Muslims.

Attacks on churches and kidnappings of Christian religious figures continued throughout the following years in a coordinated attempt to “cleanse” Iraq’s non-Muslims. Christians were also targeted for selling alcohol. After 2014, in Mosul, Islamic State of Iraq and al-Sham (ISIS) scholars issued a fatwa, or religious edict, requiring all girls, regardless of their faith, to wear a veil when attending school. As a result, the Christian minority has seen its numbers declining amid rising Islamic radicalism and violent reprisals against non-Muslims.

The Yazidi minority has also faced its share of discrimination and persecution. Maligned for their heterodox beliefs as “devil worshipers,” the Yazidis have experienced a significant number of attacks over the years in various places in Iraq, leading to widespread displacement and deaths. They have been bombed, shot, beheaded, and harassed solely for not being Muslim. Political repression has accompanied this violence. During the 2005 elections, for example,

Yazidis were systematically blocked from voting by purposefully insufficient supplies of ballots or buses for transportation to polling places. Although there have been attacks on Muslim places of worship as well, the attacks on minorities have been particularly devastating due to the small size of these non-Muslim communities. Some Yazidi towns have even been depopulated and many have perished in extermination campaigns orchestrated by ISIS, which claims religious sanction and historical precedent for practices that enslave non-Muslims and enforce the poll tax, among other practices.

Syria

Most Syrians are Arab Sunni Muslims—perhaps two-thirds of the population. Syrian Arab sectarian minorities include Alawites (the community from which the ruling Assad family springs), Christians, Druze, and Shia Muslims (mainly Twelvers and Ismailis). Ethnic minorities include Assyrian and Armenian Christians and Kurdish and Turkmen Sunni Muslims. A tiny handful of Jews reportedly remains in Syria. It is worth noting that statistics reflecting sects and ethnicity have not appeared in Syrian censuses since 1970.

Modern, post-Ottoman Syria has generally (with post-1948 Jews being the obvious exception) been a place where tolerance has been the rule. But sectarianism has always been a fact of political life. During the mandate period, France recruited minorities (particularly Alawites) to the local military. After independence in 1946, the military intervened repeatedly in politics, and senior Alawite officers were drawn increasingly to the Baath Party, which seized power in 1963. Hafez al-Assad (the father of the current president, Bashar al-Assad) seized power in 1970. He built a regime that proclaimed the virtues of secularism, but was deeply rooted in the Alawite-dominated security and intelligence services.

Important parts of the Assad ruling formula have been to recruit minorities to its side by claiming to be a protector, to co-opt the largely Sunni Muslim business community, and to preempt problems with the Arab Sunni majority by building mosques and claiming Islamic orthodoxy for the Alawite minority. Syria's anti-Palestinian and (initially) pro-Maronite intervention in Lebanon in the mid-1970s stimulated anti-regime violence on the part of the outlawed Muslim Brotherhood. Some of that violence was explicitly anti-Alawite. The uprising was put down in large measure by a regime massacre in Hama in 1982.

President Bashar al-Assad inherited from his father a stable system featuring minority support and

a quiescent majority, many of whose members hoped that the young president would institute reforms leading to economic prosperity and gradual democratization. Over time those hopes eroded. Many of the best and brightest of Syria's youth—particularly those with means, many of whom from minority (especially Christian) communities—left the country for greener pastures. The flight of minorities (especially Christians) from Syria is not a new development.

Since 2011, internal warfare in Syria has taken a dramatic toll on all Syrians. In terms of civilians killed, injured, detained, tortured, displaced, and besieged, the overwhelming price has been paid by Arab Sunni Muslims living in rebel-controlled areas. From the beginning of the initially peaceful and non-sectarian uprising in March 2011, the regime has adhered to a political survival strategy of collective punishment and mass homicide. With a revived collective, anti-Alawite memory, some Arab Sunni Muslim Syrians on the receiving end of regime violence processed matters in sectarian terms and have reacted accordingly, even though there is an Arab Sunni Muslim component of regime support that remains important.

Although the mainstream, political Syrian opposition to the regime (led by the Syrian National Coalition and the High Negotiations Committee) condemns sectarianism and includes figures from Syrian minorities of all stripes, anti-regime gunmen with sectarian agendas and plentiful resources have recruited successfully. ISIS has largely avoided direct combat with the regime and its external supporters (Iran and Russia), but has pursued a genocidal agenda against minorities in those parts of eastern Syria where it has dominated. Sectarian armed groups that have mounted combat operations against the regime (including the al-Qaeda-affiliated Nusra Front), have attacked Syrian Shia, Alawites, and Christians. The combination of Assad's collective punishment (falling as it does mainly on Arab Sunni Muslims) and the reactions it has produced have increased minority fears and tightened minority adherence to the Assad regime in areas where the regime dominates.

The presence of ISIS and al-Qaeda in Syria boosts the Iranian-Lebanese Hezbollah narrative of supporting the Assad regime to fight *takfiri* (those who seek to define, identify, and kill apostates). Non-sectarian armed groups opposing the regime are losing both the resource war and the narrative battle to al-Qaeda (with which they alternately collaborate and fight) and to ISIS (which seeks to neutralize all opposition to Assad to confront Syrians with a binary choice between it and the regime).

The Assad regime's kinetic reaction to peaceful protest provided an opportunity for some regional powers to militarize the uprising and opened the door to violent sectarianism. This has been the essence of the regime's survival strategy. By focusing air attacks and ground sieges on populations overwhelmingly Arab Sunni Muslim, the regime has, in effect, invited retaliation against non-Muslims, which in turn threatens their continued presence in Syria. The Nusra Front has abducted Christian clergy members, including taking hostages of Orthodox nuns in the western Syrian town of Maaloula. In 2013, Aleppo's Archbishop Gregorius Yohanna Ibrahim of the Syriac Orthodox Church, Bishop Boulos Yazigi of the Greek Orthodox Church, and Italian Jesuit Father Paolo Dall'Oglio were kidnapped. In 2014, Father Hanna Jallouf, a Syrian Catholic priest, along with twenty of his parishioners were abducted by Islamist extremists believed to be affiliated with al-Qaeda's Syrian branch.

Syria's internal war is not reducible to clear, easily defined sectarian lines. Although the core of the Assad regime is Alawite and the overwhelming majority of the opposition (armed and not) is Arab Sunni Muslim, Alawites may be found in the opposition and Arab Sunni Muslims are present in the Assad regime and its government. Even though the regime's strategy of binding minorities to it has largely succeeded, Christians and figures from other minorities may be found in the opposition.

Still, over six years of war often featuring the deliberate targeting of civilians have put Syria's tradition of tolerance and its pride in diversity to the test. The majority (Arab Sunni Muslims) have borne the greatest burden and suffered (by far) the highest price. But the toll on minorities has likewise been high, and their anxieties over what the future may hold for them in Syria have increased.

Lebanon

Lebanese Christians—chiefly Maronites, but also Orthodox and other sects—have long represented a sizable community with high levels of political participation and economic success. Nevertheless, the Christians have witnessed their numbers steadily decline. Statistics show that the Christian to Muslim population has decreased from a ratio of approximately 50:55 percent in 1932 to approximately 35:40 percent in 2016. This decline may be attributed to many factors but can mostly be associated with migration to the “Christian West,” civil war, and disadvantageous demographic growth; however, the prevailing attitude among Muslims that associates the Christian presence with Western colonial influence is also a factor.

Following the 1975 civil war fought mainly between Muslims and Christians, the Taif Agreement of 1989 reduced the Christians' mandated representation in the National Parliament from a ratio of 55:45 to an even 50:50 split with Muslims. At the same time, it stripped the Christian community of reserved powers vested in the office of the president. Lebanese Christians remain vulnerable to declining power and presence as Muslims maintain numeric advantage and faster population growth while preserving access to weapons and the use of violence outside of state jurisdictions.

As with the Arab-Israeli conflict, the civil war in Syria has also had profound effect on the demographic balance in the country. Palestinian refugees, mostly Sunni Muslims, have strengthened their political and military presence over the years and played a principle role in the Lebanese civil war, siding with the Muslims against the Christians. The more recent wave of Syrian refugees, primarily Sunni Muslims, have reinforced long-standing fears that Christians will be permanently displaced and reduced to subordinate status within a Muslim-majority state.

“State support for human rights . . . remains among the fundamental requisites that help preserve sectarian and ethnic plurality in a region that is far from monolithic.”

Conclusion

State support for human rights, including those requiring the protection of belief and worship, remains among the fundamental requisites that help preserve sectarian and ethnic plurality in a region that is far from monolithic. International enforcement mechanisms to reward or penalize states' practices may need to expand to include conditional loans, development funds, favorable trade, investment, and security cooperation. Monitoring and reporting of state policies and practices must include parallel approaches involving nongovernmental local and international organizations. Non-Muslim faith-based groups should be involved in order to assure a balanced assessment. The US government and the United Nations should take on leading roles to strengthen human rights monitoring, reporting, and incentivization strategies.

The deteriorating security situation in the Arab region, especially in the Levant countries, calls for immediate actions. Thus far, US actions have been targeting select extremist groups, such as ISIS, while leaving aside other factions including Kurdish or Iranian-backed organizations in Iraq and Syria, who have committed wide-scale atrocities. Such a US policy may feed into the cause of Sunni extremism that portrays the United States as the leading crusader, thereby increasing the vulnerability of indigenous non-Muslim groups.

Lasting policy interventions must include supporting and expanding the dialogue between religious schools of jurisprudence (*fiqh*), the state, and human rights advocates to unwind scriptural sources of tensions between Muslims and non-Muslims. Such dialogue must inject and consolidate the proposition that Islamic principles advocate compassion and plurality as demonstrated through various Quranic injunctions. Sources of tensions must be moderated and interpreted in a new light.

While not necessarily advocating secularism, communitarian protectionism may need to include

political guarantees such as those implemented by the Lebanese, Irish, and Belgian models to ensure groups share in power and strengthen the position of minorities overall. In any political arrangement in Syria, Yemen, Iraq, and Egypt, for instance, non-Muslim organizations must be assured quotas in parliamentary seats and “affirmative action” in public and private offices.

Various mechanisms can also be enforced when it comes to non-state armed actors. International practices have been advanced to include groups signing informal agreements on the rule of engagement and abiding by a code of conduct, such as those promoted by the nongovernmental organization Geneva Call. These initiatives must include protections for non-Muslims. Organizations that have pioneered such engagements with non-state armed actors must to be encouraged and supported. At the same time, the United States must maintain efforts to penalize groups violating the rights of non-Muslims, including listing them on terrorist watch lists, expanding international alliances around the issue, and broadening cooperation on punitive measures.

Women's Rights in Islamic Law

The Immutable and the Mutable

Asma T. Uddin

There is a widespread stereotype that Islamic law, sharia, and women's rights are inherently in conflict. It is an assumption held by virtually everyone, from seasoned anti-Muslim activists⁷⁵ commenting on the faith from the outside to intra-community women's rights activists.⁷⁶ The former blame Islam itself and consider the problem intractable; the latter find space in Islamic law for change, even as they consider the current application of the law problematic. Muslim-majority states commonly cement the idea that Islamic law and women's rights are in conflict by, for example, invoking religious law in reservations⁷⁷ to international standards for women's rights, such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).⁷⁸

While it is undeniable that some Muslim-majority states and individual Muslim scholars have interpreted the foundational sources of Islamic law, that is, the Quran and *hadith*, in highly restrictive ways to limit women's rights, other Islamic legal scholars have found plenty of room for more expansive interpretations. In fact, Islamic law is not the insurmountable hurdle to gender equality it is commonly made out to be. Rather, it can be used as an effective vehicle for advancing women's rights.

This paper will use the example of Islamic divorce and inheritance practices to first look at how traditional scholars have understood provisions in Islamic law that treat women unequally. In particular, it will consider

the scholarly approach of differentiating those aspects of Islamic teaching subject to reinterpretation and change and those that are not. It will then consider the 2004 family law reforms in Morocco as an example of how this distinction—between the mutable and immutable aspects of the faith—can create changes on the ground. This paper concludes by advocating a similar approach in countries that continue to apply restrictive interpretations of sharia.

Islamic Law and Women's Rights: Possibilities for Progress

Modern scholars studying human rights within the framework of Islamic law have pointed out the presence of an implicit hierarchy of rights.⁷⁹ The Quran is the “source book of Islamic values” and specifies two levels of prescriptions.⁸⁰ The first, and highest, level lays out broad Quranic ideals that must be realized by Muslims in all times and places. It includes the *ibadaat*, or religious duties owed to God. The second, lower level of prescriptions includes the *muamalaat*, or specific socioeconomic regulations that respond to particular socioeconomic realities.

In the religious duties of *ibadaat*, the Quran explicitly lays out the equality of men and women. In Chapter 9, the Quran states:

The believing men and believing women are allies of one another. They enjoin what is right and forbid what is wrong and establish prayer and give *zakah* (alms) and obey Allah and His Messenger. Those—Allah will have mercy upon them. Indeed, Allah is Exalted in Might and Wise. Allah has promised the believing men and believing women gardens beneath which rivers flow, wherein they abide eternally, and pleasant dwellings in gardens of perpetual residence; but

75 Immanuel Al-Manteeqi, “A Woman Under Sharia: 8 Reasons Why Islamic Law Endangers Women,” Counter Jihad, September 6, 2016, <https://counterjihad.com/women>.

76 See, e.g., Women's Islamic Initiative in Spirituality and Equality, Resources, <http://www.wisemuslimwomen.org/resources/> (“the women of WISE . . . declare gender equality . . . an intrinsic part of the Islamic faith”), and Musawah, About Us, <http://www.musawah.org/about-musawah> (“We believe that equality and justice in the Muslim family are necessary and possible”).

77 Ann Elizabeth Mayer, “Islamic Reservations to Human Rights Conventions: A Critical Assessment,” *Recht van de Islam* 15 (1998), 25-45, http://www.verenigingrimo.nl/wp/wp-content/uploads/recht15_mayer.pdf.

78 Amnesty International, “A Fact Sheet on CEDAW: Treaty for the Rights of Women,” (describing CEDAW as “the most comprehensive international agreement on the basic human rights of women”), last accessed May 30, 2017, https://amnestyusa.org/sites/default/files/pdfs/cedaw_fact_sheet.pdf.

79 Shaheen Sardar Ali, *Conceptualising Islamic Law, CEDAW and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of Application of CEDAW in Bangladesh, India and Pakistan* (New Delhi: UNIFEM-South Asia Regional Office, 2006), 14. Available at: http://www2.unwomen.org/-/media/field%20office%20eseasia/docs/publications/2015/southasia/reportstudies/05_human%20rights/complete-study%20pdf.ashx.

80 Ibid.

The United Nations estimates that 5,000 honor killings occur each year
Most take place in North Africa, the Middle East, and South Asia
Average age of victim is 23
Women make up 93 percent of those killed
Family members often kill the victim
297 Pakistani women killed in 2016
26 Jordanian women killed in 2016

Sources: USA Today, HRW, CNN.

approval from Allah is greater. It is that which is the great attainment (9:71-72).⁸¹

Beyond the spiritual realm, the Quran also mandates gender equity in particular areas of human rights. For example, both men and women have complete control over their earnings. Verse 3:195 states: “And their Lord responded to them, ‘Never will I allow to be lost the work of [any] worker among you, whether male or female; you are of one another.’”

In contrast, duties falling in the *muamalaat* category make very clear distinctions between the status and treatment of men and women. Verse 4:11 on inheritance rights mandates, “for the male, what is equal to the share of two females.” Furthermore, a verse on in-court testimony about financial transactions states, “bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses—so that if one of the women errs, then the other can remind her (2:282).”

As Shaheen Sardar Ali explains in her study of women’s rights in Islam,⁸² some scholars have interpreted the *muamalaat*’s unequal treatment of women as a temporary means meant to respond to, and ultimately to change, existing conditions gradually. She uses N. Hevener’s classification of international women’s rights instruments to explain the significance of these various levels of Quranic reforms.⁸³ Hevener lays out three stages, or categories, of women’s rights progress: protective; corrective; and non-discriminatory. The first category of rights includes paternalistic measures meant to protect women generally as vulnerable citizens of society. The second category corrects

specific, prevailing injustices. The third category is the only one that does not distinguish women as a separate group in need of special rights; instead, it sees men and women as equals and requires that legal provisions treat men and women the same.

Hevener’s categories help explain the different nature of rights accorded women in the Quran.⁸⁴ The non-discriminatory category achieves full equality, similar to the *ibadaat*, which presupposes men and women’s complete equality in dignity and worth. The *muamalaat*, in turn, includes protective and corrective measures that can presumably change according to context. Measures once needed to protect women in particular societies may not be applicable in modern times, when women are not vulnerable in the same ways. Similarly, measures meant to correct specific injustices in pre-Islamic Arabia (a culture denounced in the Quran as completely ignorant) may not be relevant in a context where those injustices do not exist.

The evidence for this theory is clear. The Quran refers to several practices that are very specific to the context and times in which it was revealed. It addresses, for example, the pre-Islamic Arab practice of female infanticide, warning, “Indeed, their killing is ever a great sin” (17:31). It also offers an expansion of a woman’s rights in the case of divorce by overturning traditional bans, also from pre-Islamic times, on the woman from ever remarrying (33:4). Approached in this way, each of these can be viewed as a corrective measure designed to do away with specific oppressive practices.

Hevener’s concept of protective/corrective categories of rights can also be used to understand more complex sets of rights, such as divorce and inheritance. In Islamic law, the man has the unilateral right to divorce his wife by proclaiming the words “I divorce you” three times. A woman is not given the same unilateral

⁸¹ All verses from the Quran cited in this essay are based on the translations from <https://quran.com>. For this specific verse, please see <https://quran.com/9/71-72/>.

⁸² Ali, *Conceptualising Islamic Law*, 16.

⁸³ Ibid.

⁸⁴ Ibid.



Two women in downtown Istanbul, April 2007. Photo credit: Chris Schuepp/Flickr.

right to divorce and instead has to convince a court of law that her marriage is irretrievably broken—a special process termed *khula*. While the processes are patently unequal, scholars have reasoned that Islam’s introduction of the *khula* process is itself a corrective measure, giving women far greater autonomy in marriage than they had before.⁸⁵

Similarly, the Quranic inheritance schema, which grants a man twice the share given to a woman, is nonetheless protective because it seeks to “ensure to women a basic minimum share, recognizing the reality that they will always be a class of persons in need of protection.”⁸⁶ In the society to which the Quran was revealed, and even today, women have not achieved economic parity with men; the Quran recognizes this economic vulnerability and supports women through its mandatory inheritance share. And this mandatory provision also corrects the pre-Islamic practice of wholly excluding women from any inheritance whatsoever.⁸⁷

⁸⁵ Ibid., 32.

⁸⁶ Ibid., 29.

⁸⁷ Ibid., 28.

Despite these protective and corrective functions of the Quranic framework, it is, of course, lacking as are all rights falling outside Hevener’s non-discriminatory category. The fact remains that the woman receives half the share of the man, and while there may be mitigating factors (Muslim men have to use their wealth to provide for the women in their families whereas women do not owe men a reciprocal duty), and workarounds (a grantor may execute a gift deed giving all of his or her wealth to a female heir), this inequality persists. Similarly, *khula* may have taken women a step forward and provided protection in an oppressive culture, but it does not yield full equality.

These provisions, like other protective and/or corrective rights that are part of the *muamalaat*, provide space for progress through new interpretations, because they are tied to particular socioeconomic circumstances. As those conditions change, so can the legal provisions. Some states have recognized this mutability of particular women’s rights and used that flexibility to introduce change.

Case study: 2004 Mudawana Reforms

Morocco is widely recognized as one of the more progressive Muslim-majority states. Its cultural identity is diverse and complex. Europeans consider it “Oriental,” whereas Arabs call Morocco *al-Maghrib al-Aqsa* (“the far West”) and view it as unambiguously Western.⁸⁸ Individual Moroccan cultural identity is similarly nuanced. The vast majority of Moroccans are Muslims. For many Moroccan Muslim women, it is of paramount importance that even though they advocate for options outside traditional Moroccan life, these options should be firmly grounded in Islamic law and values.⁸⁹

The 2004 reforms to the Moroccan family law code, or *Mudawana*, reflect precisely this two-pronged approach, for they are grounded in both modernization and Islamic law. The flexibility of Islamic law on women’s rights makes this approach possible because it separates the immutable from the mutable, premising reform on changing socioeconomic circumstances.

In the reforms, substantive change was implemented in laws pertaining to marriage, polygamy, divorce, child custody, and inheritance. Some provisions previously serving the protective and/or corrective functions have been made non-discriminatory. In the area of divorce, the husband no longer has the right to a unilateral decree. Now, like the wife, he has to subject his complaint to judicial review and receive the court’s permission to divorce his spouse.⁹⁰ The reforms also reinforce a woman’s right to divorce through *khula* by broadening the evidentiary rules—women can introduce evidence more liberally, and even have the court depose witnesses.⁹¹

In the area of inheritance, the reforms do not go as far. While the inheritance laws cannot be categorized as “non-discriminatory,” they do now further buttress a protective function. This is a clear sign that reform within an accepted and acceptable Islamic context is possible. For example, whereas the pre-reform code gave only the grandchildren from a deceased son the right to inherit from the grandparent’s estate, this right is now extended to the grandchildren from a deceased daughter as well, putting her heirs on an equal footing.⁹²

Clearly, the 2004 reforms did not achieve full equality in many areas of the family code, but they did achieve very real progress. Morocco’s success stands in stark contrast to other Muslim-majority states that use Islamic law to limit, not advance, women’s rights.

“Morocco’s success stands in stark contrast to other Muslim-majority states that use Islamic law to limit, not advance, women’s rights.”

Islamic law as a cover for discriminatory laws: A path forward

Many states have laws on the books that do not accord protection to women in the fullest scope envisioned by international standards. After all, states can enter reservations to any international treaty to which they are a signatory in order to modify or exclude the legal effect of that treaty. It is telling, then, that more reservations have been entered to CEDAW than any other human rights treaty. Among the states that have entered such reservations, many but by no means all are Muslim-majority. Historically, these latter states have based their reservations on purported conflict with Islamic law.⁹³ Such a stance, invariably presented in general terms that key elements of CEDAW were inapplicable to the extent they conflict with sharia, suggests that the state was “powerless to alter laws deriving from the text of Divine Revelation and the accounts of the Prophet Muhammad.”⁹⁴

As we have seen, this leaves unchallenged traditionalist readings of sharia and, in doing so, ignores avenues of religious interpretation that could create space within Islam for greater rights for women. If Islamic law is seen as beyond human interpretation, that is, as a set of absolutes rather than dependent on particular circumstances, it will remain unchallenged, regardless of how inadequate the provisions become in the context of Muslims’ lived experiences. In many cases, as Ann Mayer’s research suggests, reservations to CEDAW drawing on Islamic law tend to be a cover for states wanting to protect discriminatory domestic policies that, in fact, have no connection to sharia.⁹⁵ In others, however, there are actual foundations in Islamic

88 John Hursh, “Advancing Women’s Rights Through Islamic Law: The Example of Morocco,” *Berkeley Journal of Gender*, September 29, 2012, *Law & Justice*, 257.

89 Ibid.

90 Ibid., 264.

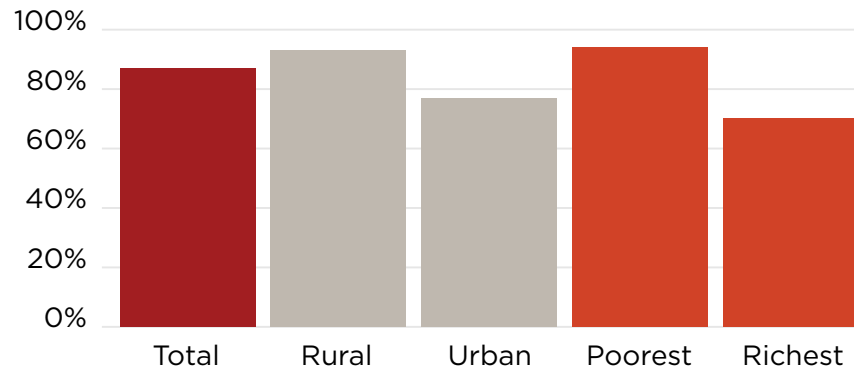
91 Ibid.

92 Ibid., 266.

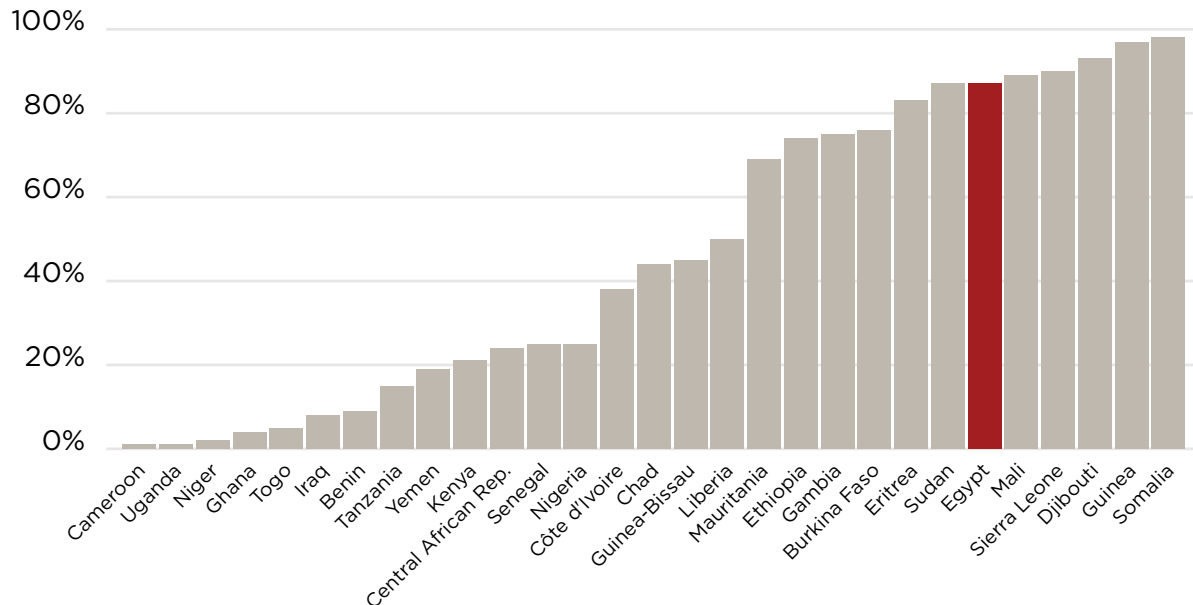
93 Mayer, “Islamic Reservations to Human Rights Conventions,” 44.

94 Ibid., 28.

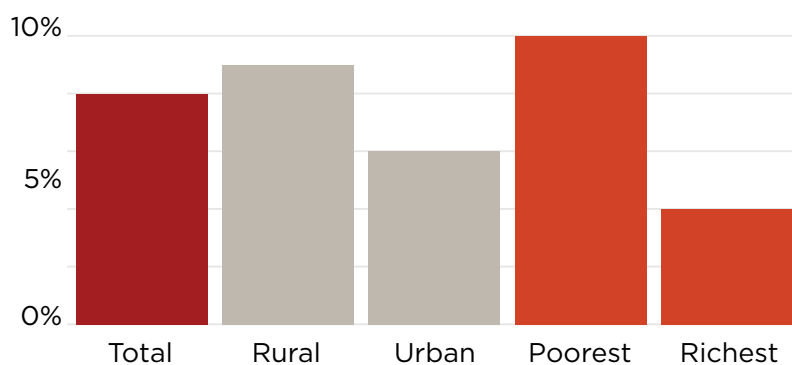
95 Ibid., 29-30.

Figure 1. Female genital mutilation in Egypt

Sources: UNICEF Health Issues Survey (2015).

Figure 2. Percentage of girls and women aged 15 to 49 years who have undergone female genital mutilation/cutting.

Sources: DHS, MICS, Population and Health Survey, RISKESDAS and Welfare Monitoring Survey, 2004-2015.

Figure 3. Female genital mutilation in Iraq

Sources: MICS 2011.

law for the reservations, and the solution there lies in interpreting and applying that law differently.

For example, if we look once again at inheritance and divorce rights, Libya, the United Arab Emirates, and Tunisia have all entered reservations to CEDAW to limit its impact on Islamic law-based inheritance rules. Libya's reservation reads: "Article 2 of the Convention shall be implemented with due regard for the peremptory norms of the Islamic sharia relating to determination of the inheritance portions of the estate of a deceased person, whether female or male."⁹⁶

And on domestic provisions related to the dissolution of marriage, several other Muslim-majority states have insisted on preserving the husband's right to unilateral divorce. In fact, Egypt has explicitly noted the unequal process in its reservation: "The *sharia* therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband."⁹⁷ This unequal divorce process is reflected in Egyptian domestic laws.⁹⁸

The approach of such states to Islamic law is one of taking its traditionalist reading at face value, regardless

of its dependency on particular socioeconomic circumstances and its impaired applicability in modern conditions. Muslim human rights groups working on Islamic law issues have argued precisely this point,⁹⁹ and their actions are bearing fruit in that at least some states have acknowledged that their discriminatory laws are not necessarily required by sharia.¹⁰⁰ This represents a significant first step toward creating new space within Islamic law and practice for women's rights, for it recasts the problem as social and political in nature and thus sidesteps claims of the immutability of established religious teachings.

States and non-state actors that violate women's rights in the name of Islamic law—such as Egypt, Syria, and the other states listed above who have entered CEDAW reservations—should, at a minimum, refrain from presenting sharia as immutable and using it as a cover for their own sociopolitical motives. And to effectively chart a path forward, state violators should interpret Islamic law in broader, more complex ways with an eye toward modern socioeconomic realities. Finally, outside critics of Islamic societies should avoid falling into the same trap and instead reframe the question of women's rights not as the "fault" of a retrograde faith but as symptoms of many of the same social, political, and economic problems that plague much of the rest of the world today.

96 United Nations Women, "Declarations, Reservations and Objections to CEDAW," last accessed May 30, 2017, <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>.

97 Ibid.

98 Canada: Immigration and Refugee Board of Canada, "Egypt: Process for applying for divorce for women who were married in the Muslim community, including laws, difficulties and obstacles (2004–December 2013)," December 23, 2013, EGY104705.FE, last accessed May 30, 2017, <http://www.refworld.org/docid/53c4d6a74.html>.

99 Sisters in Islam, "CEDAW and Muslim Family Laws: In Search of Common Ground," 2011, 38, http://www.musawah.org/sites/default/files/CEDAWMFLReport2012Edition_1.pdf.

100 Mayer, "Islamic Reservations to Human Rights Conventions," 44.

The Multiple Layers of Freedom of Belief and Apostasy

Islam, History, and Politics

Omar Iharchane and Driss Maghraoui

Apostasy as a Multilayered Phenomenon

One of the major challenges facing the Muslim world today is how to accommodate contemporary human rights principles within an Islamic worldview and without falling into a false choice between traditionalist approaches to sharia and liberal alternatives drawn from secular discourse. It is this very trap that we need to avoid when discussing issues such as human rights, gender equality, and—of particular relevance here—freedom of belief and apostasy.

Given the deeply held traditionalist views on the capital crime of apostasy, which claim sanction in the Quran and the Sunna, it is difficult to make the case for the abolition of apostasy on the basis of secular discourse without first grounding it in an Islamic field of reference. Still, differences of opinion, whether the result of ideological positioning or competing understandings of religious beliefs, are not unique to Muslim societies. Thus, we need to consider the fact that the question of freedom of religion, like a number of other issues of human rights, is also political and social in nature.

This paper looks at the notion of apostasy as the interplay of history, Islamic jurisprudence, and politics, and it deals critically with these concepts as they appear in both international conventions and Islamic texts. Our central argument is that there is no inherent contradiction between the local, or “particularist,” and the international, or “universalist,” notions of freedom of religion. To encourage freedom of choice while avoiding these ideological and discursive dichotomies, we argue for a rethinking of Islamic texts. The goal here is to produce a new discourse of rights from a syncretic relation between local meanings and practices and universal ideals. This means locating universal principles from within Islamic texts, histories, and experiences—something that has been eclipsed in the dominant narrative.

Muslims commonly argue that sharia provides for all sorts of rights regardless of ethnic or religious identity. Still, a certain defensive tone emerges when discussion

shifts to freedom of religion, with frequent reference made to the historical respect within Islam for the so-called People of the Book (*ahl al-kitab*), religious communities with a shared scripture, chiefly Jews, Christians, and at times Zoroastrians. While this line of argument has an historical basis, it must be noted that non-Muslims were nonetheless subject to restrictions within a traditionalist interpretation of sharia despite Islam’s capacity to promote humanist values. This is particularly the case when the historical actuality of specific verses of the Quran, and the context into which each was situated, are ignored.

Apparent discrepancies among the central religious texts, the Quran and the *Sunna*, are a source of ambiguity and conflicting interpretation, as are competing readings of sharia by the various schools of jurisprudence (*madhabs*) and among individual Muslim scholars. Such ambiguity may concern everyday matters of practice—prayers, fasting—or may involve broader issues, such as apostasy, with implications for individual rights. For our purpose here, the multiplicity of readings of the same religious texts and the elasticity of their interpretations can be used to uncover human rights principles from within the Islamic field of reference. After all, Islam has a rich history of addressing and coming to terms with societal realities. Finally, we will touch on the influential role of the nation-state, in particular, the ways in which the state, its political and social actors, also shape this debate.

Freedom of Belief in International Human Rights Discourse

Following the Second World War, various states made major efforts to establish basic principles of human rights. Freedom of religion and the rights of religious minorities were fundamental to human rights law. The Universal Declaration of Human Rights in 1948 and the International Covenant on Civil and Political Rights in 1966 contained very specific references to freedom of religion. Other conventions generally reflect similar principles.

All of these texts agree on the right to choose one's beliefs, as well as the right to change them. They insist on freedom of worship and the right to publicly express one's beliefs, they reject any form of discrimination on the basis of religion, and they prohibit the advocacy of religious hatred. The provisions insist that individuals should not be compelled to profess a belief.

In parallel, there are a number of exceptions to the principle of freedom of belief laid out in international agreements. For example, national laws can be restrictive factors. It is also permissible to restrict freedom of belief when public order and safety are at risk, or when this right interferes with public values or with the fundamental rights and freedoms of others.

Finally, there is the crucial matter of the realization of such rights, a problem to which the Western world is by no means immune. For Muslim youth in countries such as France or Britain, social, economic, and political realities have resulted in some forms of disenchantment. This alienation from the mainstream European society, when combined with discriminatory practices in housing and employment, is not only counter to the established European human rights principles but has become a major source of radicalization. The rise of right-wing populism has given credence to the disillusionment among Muslims about the secular discourse on human rights.

Freedom of Belief and the Islamic Context

There is nothing inherent about Islam that makes the issue of freedom of religion problematic, although the prevailing, more conservative tendency, unleashed in the wake of the Arab protests, the US-led war in Iraq, and the Syrian civil war, highlights many difficulties for the foreseeable future. Historically, other religions imposed the death penalty and other harsh punishments for apostasy. Contrary to the common notion of "jihad of the sword," the rapid success of conquering Muslim states was largely based on the principle of religious tolerance and the establishment of a more egalitarian society, especially toward fellow People of the Book.

The treatment of non-Muslims often depended on the ruler and circumstances of the Muslim empire, yet in comparison with the Christian West, the Muslim world in its different phases practiced a significant measure of religious tolerance. So, it is fair to say that the Muslim heritage endowed non-Muslims with rights unknown in Europe during the times of the Prophet Mohammed and the Muslim empires.

Other than the concept of *ahl al-kitab*, the principle of *aman* (protection) was also evoked under sharia. The promise of *aman* made it possible for non-Muslims to enjoy security and property rights as residents within *dar al-Islam*, the abode of Islam. Under the later Ottoman *millet* system, Christian and Jewish minorities in eastern and central Europe benefitted from *aman*. While religious minorities were not always tolerated, the Ottomans generally managed to make room for freedom and autonomy in civil and religious affairs.

"There is nothing inherent about Islam that makes the issue of freedom of religion problematic. . ."

The debate on apostasy among Muslims (expressed in the Quran in 2:217; 3:90–91; 8:55–56; 9:11–2; 16:106) has to be situated within its specific historical context and not seen as permanent legal truth. Apostasy thus defined involves "turning away from Islam" or "breaking ties with Islam." Most traditionalist scholars agree on the principle that once a person becomes a Muslim, he or she is not allowed to change religion. They argue that apostasy is contrary to Islam's communitarian principle and undermines social cohesion. It is, in short, as an act of treason and rebellion and should be punishable by death. Traditionalist Islamic scholars often invoke the following *hadith* in support of this position: the Prophet Mohammed said, "It is not permissible to spill the blood of a Muslim except in three [instances]: the married person who commits adultery, a life for a life, and the one who forsakes his religion and separates from the community" (al-Bukhari; Muslim).

It was, however, only after Mohammed's death that the so-called "apostate wars" (*hurub al-riddah*) were launched against those seen as rebels by the Prophet's companions. Thus, it is a form of *ijtihad* that led to the famous saying, "You shall kill those who change their (Islamic) religion," as narrated by al-Bukhari. As the Prophet's companions unanimously agreed to kill the rebels as apostates, a number of *ulama* began to consider apostasy a capital crime. Today, the conflation of religious difference within Islam—for example the Shia-Sunni split—with treason against the Muslim community as a whole has again moved to the fore, and it is not unusual for sectarian rivals to label one another "apostates" or "non-Muslims."

With the exception of actual cases of a betrayal against the political *ummah* (similar to treason in the modern sense), more moderate scholars believe punishment is left to God in the afterlife, in line with this oft-cited verse: “This is the truth from your Lord; let him who will, believe, and let him who will, disbelieve” (18:30). The Quran clearly ascribes penalties that are less harsh than a number of Islamic legal codes backed by conservative scholars.

More importantly, we can find in the Quran ample evidence that tolerance vis-à-vis people of different faiths is a central Islamic principle. The Quran regularly refers to the idea that God is the creator of all peoples, with diverse cultures and views: “If the Lord had willed, He would have made humankind into a single nation, but they will not cease to be diverse. . . . And for this Allah created them” (11:118–119). The Quran gives many guarantees to the exercise of freedom of belief, starting with the foundational notion, “There is no compulsion in religion” (2:256). There are about two hundred instances in which the Quran explicitly guarantees this right.

When we do a close reading of various Quranic verses, we find ways in which apostasy could be reconceived from an Islamic point of view. Apostasy is referred to thirteen times in the Quran. Throughout, it is left to God to apply punishment in the hereafter and is not a matter for adjudication here on earth. One notable example (there are many others) reads: “And whoever desires other than Islam as religion—never will it be accepted from him, and he, in the hereafter, will be among the losers” (3:85).

Reference to the examples set by the Prophet Mohammed is another way to counter conservative scholars. Generally speaking, Mohammed’s duty was to transmit God’s word, rather than to enforce God’s will: “We have not sent you, [O Mohammed], over them as a guardian; upon you is only [the duty of] notification” (42:48). Multiple verses make freedom of belief an unconditional right, and there is no explicit worldly punishment found in the Quran for those not following the word of God.

Divisions among contemporary religious scholars over apostasy reflect varying approaches to both the historical context of past practices and to the distinction, outlined above, between the exercise of individual freedom and direct challenge to the state, as in the early *ridda* (apostasy) wars and in today’s sectarian strife. The harsh treatment of apostates was part of a legal framework that may have been appropriate to a particular historical situation, but it

cannot be viewed as an inalterable principle of Islamic law.

Freedom of Belief between “Universality” and “Specificity”

The advent of modernity and the phenomena of a centralized state meant a major challenge to religion and religious actors: not only did religion have to be regulated but competing moral codes had to be renegotiated in the public sphere. The imposed realities of European colonialism resulted in major epistemological breaks within the Muslim elite by presenting competing idioms and concepts of identity, history, knowledge, and most importantly for us here, scripture. These were literally cataclysmic developments that put Islamic scholars on the defensive. Ever since, modernity has presented Muslims with a paradox: while it offers significant possibilities and technical and material benefits, it simultaneously represents existential challenges.

Many among the elite were able to find ways to agree on universal values, at least on the intellectual and philosophical level, but these approaches failed in the face of everyday life and in the thinking of conservative scholars and average individuals. After all, societies may not be predisposed to accept “universal” values as they are, and these notions easily become subject to such factors as time, place, and the power relationships among major players seeking to apply them.

The unwillingness of different Arab states to implement the principle of freedom of belief is often justified by reference to religious specificity, and reservations generally center on those clauses in international conventions that are seen as imprinted with “Western values.” Thus, in the matter of apostasy, Arab states invoke an ideological divide said to exist between “Islamic values” and “universal rights.”

Further complicating the issue is the historical interrelationship between religious minorities and European colonial rule, modernization, and the subsequent rise of nationalist movements. Western states used protection of different religious communities as a strategy for expanding their influence in the Middle East and North Africa. The question of religious minorities, and indirectly the issue of apostasy, thus became clothed in the language of Western imperialism.

Following World War II, Muslim states did not hesitate to label the principles of human rights as part of a “Western imprint.” For example, Saudi Arabia and Pakistan objected to a clause in the 1948 Declaration of Human Rights, which calls for freedom of conscience



Students from Peshawar University protest to condemn the killing of Abdul Wali Khan university student Mashal Khan, after he was accused of blasphemy, during a protest in Peshawar, Pakistan April 19, 2017.
Photo credit: Reuters/Rodi Said.

and the right to change one's religion. This was seen to violate the sharia ban on Muslims converting to another religion.

Opposition also reflected widely held sentiment that institutions such as the United Nations were part of a system of Western global control. Autocratic Arab states found it useful to argue that such values were imposed via the control mechanisms of the international decision-making processes in various international organizations.

From our vantage point today, it is no longer sustainable to reject such principle rights based on claims of cultural specificity, because doing so essentially creates a false barrier between Islam and universal human values. This reasoning is particularly erroneous when used to justify authoritarianism and maintain tribalism and tradition to the detriment of modernity, transparency, and democratization. We need therefore to be alert to the fact that autocratic states exploit seeming ideological dichotomies between "universality" and "specificity," "tradition"

and "modernity," and "Islamic ideals" and "universal ideals" as if there were no way to harmonize them. In fact, the use of *ijtihad* can facilitate their coexistence and uncover their syncretic relationships.

Apostasy and the Modern Arab Conventions

Regional, Arab, and Muslim human rights conventions have legislated on apostasy. In 1981, the Universal Islamic Declaration of Human Rights was adopted in Paris and declared that no human being shall suffer disadvantage or discrimination based on race, color, sex, origin, or language. What was very clearly absent was reference to religion. A later section of the declaration calls for the protection of religious rights of non-Muslims based on the Quranic principle, "There is no compulsion in religion." It gives minorities the right to use their own laws in civil and personal matters. But the concept of equal treatment of religions is not unambiguously stated.

In 1990, the Cairo Declaration on Human Rights in Islam stated in its first article that there should be no discrimination based on religion; while article 18 stresses the importance of religious security. Still, article 10 introduces some ambiguity on the right to change belief, as do other articles that tie rights and freedoms to the provisions of Islamic law or assert that sharia is the only source for interpreting the declaration itself.

In a similar vein, the Arab Charter on Human Rights, which provides in its preamble a reference to international human rights principles, also invokes the Cairo Declaration. Article 25 states that minorities should not be deprived of their right to exercise their culture, their own language, or to practice the teachings of their religion. However, giving such rights to minorities may not reflect the public will, particularly when there are no constitutional guarantees or limits on legislative authority. Article 43 openly states that provisions of the charter remain subject to the domestic laws of the signatory states.

Taken together most of the modern Arab and Islamic human rights conventions leave room for ambiguity in interpretation and the extent to which they apply only to the three monotheistic religions, to all other non-Muslim believers, or to those who change their faith. Further, priority is given to Islamic law in case of conflict with international conventions without addressing the inconsistencies and varying interpretations noted above. As a result, understanding and enforcement of this right varies from one Arab country to another. Finally, the principle of freedom of religion that is stated in any given Arab constitution may be restricted by separate organic laws.

Freedom of Belief: The Moroccan Case

The constitutional reforms in Morocco, brought about by the 2011 Arab rebellions, make a useful case study. Compared with the rest of the Arab world, Morocco (like Tunisia) stands out as relatively open and can potentially serve as an example of a “progressive” constitution that also incorporates religion. This trend is supported by dynamic debate among civil society actors within the public sphere.

We selected Morocco for several reasons, chief among them is the fact that Morocco’s geographic proximity to Europe has shaped the country’s status as a partner with the European Union since 2008. Other factors include the presence of a Jewish community and the king’s role as the “*amir al-mu’minin*” (commander of the faithful). As stipulated in the constitution, the notion of the “faithful” includes Muslims and

non-Muslims. Because of its religious reforms, the Moroccan state is often presented as an example of progressive Islamic jurisprudence. In comparison to a number of other states in the region, Morocco is seen as promoting tolerance and interfaith dialogue.

Morocco witnessed its own wave of uprisings in 2011, and the subsequent call for reforms by the February Twentieth movement sparked public demands for greater religious freedom in the new constitution. More specifically, there was a call to change article 220 of the penal code, commonly known as the “destabilization of the Muslim creed” clause. The Arab Spring was a determining factor for putting forward a constitutional agenda around religious freedom. But equally important was the fact that in 2004, Morocco witnessed an important change in the *moudawana*, or civil codes, pertaining to matters of marriage and divorce. These changes established that reform of sharia laws is possible and that sharia was not, in fact, part of an unchanging “sacred field.”

Some religious scholars objected to the inclusion of freedom of religion in the constitution, as did the Party of Justice and Development, and the effort eventually failed. It became clear during public debate that purely religious considerations were largely absent. Instead, debate was overshadowed by excessive politicization, political bargaining, media agitation, and electoral calculations that played on emotional discourse and oversimplification.

Among the most important of the political objections was the charge that Morocco was mainly seeking to respond to international pressure. Critics argued that it was a matter of sovereignty and that the West should not be putting pressure on Morocco over human rights concerns, especially when it comes to the issue of freedom of conscience. Finally, religious scholars such as Ahmad Raissouni argued that including freedom of religion in the new constitution would threaten the Islamic identity of the state and the principle of the “commander of the faithful” as the cornerstone of the Moroccan political system.

In 2017, the Islamic Council reviewed its position on apostasy and concluded that it should be seen as an individual act and thus not punished by death except when part of an act of high treason. The changing position of the *ulama* is revealing in at least two ways: the new rulings demonstrated *ijtihad* at work and established that legal statements inspired by sharia are not set in stone and can evolve.

Constitutional reform by itself is not enough, for there exists the danger that rights identified in the

constitution could be undermined by restrictive organic laws. For example, freedom of the press is clearly stated, but a separate law dictates organization and control of public means of communication. The right to submit motions on legislation is granted to citizens, but an organic law determines the conditions and modalities under which that right can be exercised.¹⁰¹ Despite the establishment of a Constitutional Court then, the actual protection of freedoms is not guaranteed.

Finally, the language in the constitution's preamble is ambiguous and presents several problems in regard to international conventions. The principles of the constitution include the protection and promotion of measures for human rights and international humanitarian law "in their indivisibility and universality." But the constitution does not establish the supremacy of international treaties over domestic law, which means that the protection of human rights including the freedom of worship is not guaranteed.

Adopting the Principle of Freedom of Religion: Conclusions and Recommendations

The principles of freedom of religion and individual rights remain controversial issues, and regional states have made little real progress toward the establishment of accountability, citizenship rights, the rule of the law, and freedom of speech—all of which are essential to freedom of religion. As this paper has argued, religious texts are open to different interpretations. If left to conservative and traditionalist scholars, Islam can be used to advance discrimination toward those of different faiths. Yet, universal principles of freedom of religion and rights of religious minorities and sharia are by no means inherently contradictory or incompatible.

Informed by human rights principles, a rethinking of Islamic texts to contemplate concepts of rights, religious freedoms, pluralism, and popular sovereignty can contribute to the construction of a political culture that can accommodate different religious, political, and ideological tendencies.

The violations of the rights of individuals or the limits that might be set on the principles of freedom of religion are political in nature and they reflect the constitutional ambiguities and inconsistencies embedded in regional constitutions. It is therefore only through the political will of Arab states that Islamic law can evolve in a way that is conducive to all sorts of individual rights, including freedom of worship.

It is recommended that the principle of freedom of belief should be adopted in a gradual way and without the discourses of the "hard-liners," whether in their religious or secular terms. Constitutional amendments on freedom of belief are not sufficient, unless accompanied by other legislation drawn from parliaments that truly represent popular sovereignty.

This paper concludes with a plea that the political leaders in the region need to appreciate the common good and political benefits that come with the promotion of individual rights. It should be made clear that the lack of adoption of freedom of belief has had many negative effects associated with inheritance laws, marriage, burial practices, sites of worship, and so on. It is therefore beneficial for the state because it involves a number of issues that have direct implications for social cohesion, mutual recognition, and coexistence. The principle should also be applied to believers of the same religion who belong to different doctrines, such as the Shia in Sunni-majority states and vice versa. Unless these kinds of issues are solved, sectarian strife and identity politics, which constitute a major challenge to the modernizing state, may follow.

¹⁰¹ Madani, Mohamed, Driss Maghraoui, and Saloua Zerhouni, *The 2011 Moroccan Constitution: A Critical Analysis*, International Institute for Democracy and Electoral Assistance, 2012, http://www.constitutionnet.org/files/the_2011_moroccan_constitution_english.pdf.

Glossary

adala

Integrity; alternatively, justice.

Ahl al-Kitab

“People of the Book,” i.e., those considered by Muslims to be adherents to the Abrahamic tradition of monotheism, generally used to refer to Christians and Jews, and sometimes Zoroastrians and Sabians.

Alawis (not to be confused with Alevis)

A sect of Islam, the name of which literally means “those who follow the teachings of Ali,” the cousin and son-in-law of the Prophet Mohammed; however, the sect is only loosely related to Shi’ism. Since breaking off from Shi’ism over one thousand years ago, the association of Alawis with Shi’ism is a modern phenomenon linked to political dynamics in the region and in Syria in particular. Alawis were largely oppressed during the Ottoman era, and it was during the late Syrian President Hafez al-Assad’s accession to power that Alawis entered the fold of the symbolic Muslim community in general, and Shia Islam politically. Alawis compose 12 percent of the population of Syria, where the ruling inner circle of Bashar al-Assad is composed largely of Assad’s Alawi community.

al-Mahdi

The “Guided One,” al-Mahdi is a religious, messianic figure believed by most Muslims to arrive near the end of times to restore justice and redemption to humankind. Shia Muslims, particularly Twelver/Jafari Shia, believe he is the hidden Twelfth Imam; al-Mahdi is more of a foundational aspect of majority Twelver sect of the Shia faith than he is for Sunnis.

al-wa’z

Admonition.

al-Tawbikh

To reprimand.

dar al-Islam

Literally meaning the “House of Islam,” it is the notion that there is a realm of sovereignty of Islamic law in a given jurisdiction. This concept became complicated with globalization as well as the worldwide migration of Muslims, which dovetailed with the spread of nation-states and modern understandings of citizenship. The colonial era sparked the debate within the Islamic scholarly community (*ulama*) as to what constitutes and who belongs within *dar al-Islam*, as opposed to *dar al-Harb* (House of War).

dawla

Referring to the “state” or “nation.”

dhimma

Literally meaning “protected,” this term refers to non-Muslims in an Islamic state.

din

The “faith,” i.e., Islam.

fiqh

Jurisprudence, or the legal framework in Islam. Sunni Islam, for instance, has four major schools of *fiqh*: Shafi'i; Hanbali; Maliki; and Hanafi. Within the largest constituency of Shia Islam, Twelver or Imami Shi'ism, Jafaris, Ismailis, Alawis, Alevi, and Zaidis each have their own jurists with distinct schools of thought.

Geneva Call

An independent forum launched in 2000 that works to promote respect for international law among armed non-state actors worldwide.

Hadith

The recorded recollections of the Prophet Mohammed's sayings, stories, and teachings. *Hadith* is the cornerstone of the *Sunna*, which is largely viewed by Sunni Muslims as a proper blueprint for practicing Islam, all of which is based on the Prophet Mohammed's example.

hudud

Fixed punishments under Islamic law as interpreted, they are intended to deter future crime against God and one's fellow man.

ijmaa

A consensus by Muslim jurists or scholars on a religious issue, which can serve as a precedent for future cases. Schools of thought differ on the relevance of the community's opinion in *ijmaa* in the realm of scholarship, though it is generally Sunni Islam which incorporates *ijmaa* as one of the four pillars of Islamic law, playing a role when the Quran and Sunnah appear to offer no answer.

ijtihad

The fourth pillar of Sunni jurisprudence, this term refers to reasoning and deduction based on logic, precedent, context, and legal experience. *Ijtihad* can also refer to the reasoning undertaken by the average Muslim, as opposed to a trained Islamic jurist.

Imam

A term referring most often to the individual leading a Muslim prayer. It is, however, also used as a title of leadership, notably in Shi'ism; Ali bin abi Talib, the cousin and son-in-law of the Prophet Mohammed, was referred to as "Imam Ali," as was each successive leader of Shia Muslims. Twelver (also known as Jafari, or *Ithna-Ashari*) Shi'ism, for instance, is formed around the belief in the "twelve" Imams, all successors of the Prophet Mohammed. Imams in this tradition have a closer relationship with God than the average person; thus, the Imam's word carries more weight. Twelver Shia believe that the Twelfth Imam, al-Mahdi, is currently in hiding; they await his return.

ibadat

The religious duties prescribed by God in Islam, such as prayer, charity, and fasting.

Islamism

Also known as "political Islam," it is the belief that Islam should be the basis or starting point for the laws and administration of the state.

jizya

A head tax levied upon *dhimmi*s living within an Islamic state that serves to fulfill their duties to the state as non-Muslims and guarantees their protection.

Khawarij (or Kharijites)

At times referred to as the first sect in Muslim history, the Khawarij emerged in the seventh century, not long after the death of the Prophet Mohammed, as a literalist class of Muslims who believed in a "pure" Muslim community and used violent means to achieve this end. The Khawarij are responsible for the death of Mohammed's cousin

and son-in-law, Ali, who was also the last of the four “Rightly Guided” Caliphs. They believed Ali was not zealous enough in his faith, as Ali pursued diplomacy to end the war between his supporters and the supporters to the claim of Muawiya bin Abi Sufyan (Muawiya I), the governor of Damascus and eventual founder of the Umayyad dynasty. In contemporary terms, the Islamic State of Iraq and al-Sham (ISIS) is often compared to the Khawarij.

khula (or *khul*)

In Arabic, this term means “removal,” and refers to divorce initiated by a woman, where the woman is entitled not to offer a reason to compensate the husband financially.

madhab

Schools of thought/jurisprudence; for instance, Hanafi, Hanbali, Maliki, and Shafi’i schools in Sunni Islam, and the Jafari/Twelver, Zaidi, and Ibadi schools in Shia Islam.

muamalat

Under Islamic law, *muamalat* involve inter-personal, civil, and commercial dealings, as well as the rights held by all parties. *Muamalat* are the second pillar of Islamic law, following *ibadat*, which is viewed as the worship and duties owed to God.

Muslim Brotherhood

Established in Egypt in the late 1920s as a response to colonialism and Western secularism, the Muslim Brotherhood is a movement that sought to reform society by promoting its conservative brand of Islamic jurisprudence on social, religious, and political affairs. The traditional focus of the Brotherhood was the provision of social services and education, an approach that, along with appealing to conservative, middle- and lower-class citizens, grew its support base. Beginning in the late 1930s, the Brotherhood sought to pursue its aims through participation in the political arena, and since then it has faced decades of suppression, and has at times resorted to organized violence. Syrian President Hafez al-Assad defeated a Syrian Brotherhood-led rebellion in the early 1980s by bombing the town of Hama, a response which infamously claimed at least 30,000 lives.

In Egypt, following the Arab Spring protests, which deposed Egyptian President Hosni Mubarak, the Brotherhood won the presidential and parliamentary elections, only to be deposed by a military coup in 2013. The Brotherhood served as a catalytic force in the Sunni revival of the twentieth century, and Brotherhood scholar Sayyid Qutb is often regarded as the person most responsible for the intellectual foundation for Sunni political violence practiced by actors such as al-Qaeda. The Brotherhood model has been emulated with varying degrees of similarity and influence by the international Brotherhood leadership in countries across the Arab Middle East and North Africa as well as in Turkey.

millet (Turkish)

Millet under the Ottoman Empire were *Ahl al-Kitab*, mainly Christians and Jews, who lived semi-autonomously among Muslim-majority populations within the Empire, but were responsible for their own social and civic administration. *Millet* paid a head tax not dissimilar to the *jizya* tax paid by *dhimmis* in the Umayyad and Abbassid dynasties.

Mufti

A Muslim leader with the legal authority and stature to offer a fatwa, or legal interpretation on Islamic scripture and affairs. “Mufti,” such as “Grand Mufti,” is also a title bestowed by a head of state or ruler designating the scholar as the chief Islamic leader of a country, city, or region.

qisas (retribution)

Retribution for cardinal crimes such as murder, unintentional manslaughter, or the infliction of serious injury.

qiyas

One of the four pillars in Sunni Muslim jurisprudence, *qiyas* is reasoning based on deductive analogy, precedent, and logic.

quietist (or quietism)

Referring to the involvement of religion in political affairs, quietist Islamic scholars are those known to advocate for the withdrawal of religious figures from politics. In Shia Islam, Ayatollah Ali al-Sistani is often regarded as a quietist.

Rafida (or Rawafid)

Literally describing “those who refuse,” *Rafida* is the derogatory term used by certain Sunni Muslims to describe Shia or Muslims of other sects who are viewed as those who rejected the “true” faith and leadership of the first three Rightly Guided Caliphs, Abu Bakr, Omar, and Othman.

ridda

Apostasy, or leaving the Muslim faith and body politic. The term specifically refers to Muslims who leave Islam. Those Muslims who have committed *ridda* are considered *murtad*.

sab

Referring to the act of committing blasphemy or the blasphemous insult of Islam, God, or Islam’s core tenets and figures, such as the Prophet Mohammed.

Salafi

Salafism describes an ultra-conservative brand of Islam that seeks to emulate the salaf, or the predecessors, the generations of Muslims who lived closest to the Prophet Mohammed. This view, which favored the Quran and hadith as sources of Islamic law, rather than reasoning, consensus, and contextual jurisprudence, has existed since Islam’s earliest days, but gained traction in the fourteenth century with the work of the scholar Ibn Taymiyya and later on in the eighteenth and nineteenth centuries as a response to Western colonialism and cultural influences. The general worldview of Salafism has broadly produced different iterations, such as the puritanical Wahhabism in Saudi Arabia, and the more modernist Salafism as it exists in Egypt and other Arab societies.

Safavid

Referring to the Safavid Dynasty, which ruled Persia from 1502–1736 CE with Shia Islam rather than Sunni Islam. The term “safawi” is used in a derogatory manner by certain Sunni Muslims to liken Shia and Shia rulers to the non-Sunni reign of the Safavids.

sharia

Islamic law.

shirk

The act of associating any being with God. The term was often directed toward pagans, especially during Islam’s formative chapters. Those committing *shirk* or considered enemies of Islam were referred to as *mushrikoon*.

shurut

In Arabic, this term refers to the conditions or stipulations of legal decisions or contracts.

Sunna/Sunnah

The teaching and examples of the Prophet Mohammed, canonized in the collection of *hadith*, or the recollections of Mohammed’s companions and family members of his stories, sayings, and examples in social and religious affairs. *Sunna* refers to the living memory of Mohammed, the idealized person and exemplar for mankind for most Muslims (especially Sunni Muslims), as well as the teachings and precedents of Mohammed the prophet and political leader. *Sunna* is the second pillar of Sunni Muslim jurisprudence.

ta’ifiyya

Sectarianism.

tazir (punishments)

Punishments for offenses left to the discretion of a judge, religious scholars, or the scholarly class.

ulama

Scholars or the scholarly class.

Wahhabi

A literalist, ultraorthodox Sunni school of thought, Wahhabism was founded by Mohammed ibn Abd al-Wahhab in the eighteenth century and adopted by the government of Saudi Arabia as its official sect. Wahhabism preaches a return to a more “pure” version of Islam. Saudi oil money has allowed for the export of Wahhabism around the world; wahhabism is viewed as a gateway narrative for more hard-liner, violent ideologies such as those espoused by al-Qaeda.

wilayat al-faqih (or, in Farsi, *vilayat-i faqih*)

Known as the “mandate of the jurist,” *wilayat al-faqih* became a central tenet of the Shia Muslim world during Ayatollah Ali Khomeini’s accession to power in Iran. Emphasizing the supreme role of Islamic scholars in lawmaking and governance, *wilayat al-faqih* is crucial in the Islamic Republic of Iran.

zandaqah

Heresy or the act of heresy.

zindiq

Heretic.

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