

Apostasy in Islam and the Freedom of Religion in International Law

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28 October 2009

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* The author would like to thank Sheikh Ahmed Youssef of the ACT Muslim Reference Group and the Jewish-Christian-Muslim Interfaith Forum, particularly for his help with the Arabic, and to Mrs Salwah Kirk for her help and patience with general editing and proofreading. All references to the Qur'an are to Yusuf Ali, A., *The Holy Qur'an (Translation and Commentary)* Ouloom Al Qur'an (Damascus, 1980). All errors and omissions remain the author's responsibility.

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Introduction

This paper examines the issue of apostasy in Islam and under the *Shari'a* and how this understanding can be reconciled with the practical operation of such an understanding for Muslim minorities under 'the freedom of religion' provisions under international law and ultimately under a freedom of religion provision in a putative Bill of Rights.

Apostasy is a question of law under the *Shari'a*. In examining apostasy under the *Shari'a*, relevant sources of *Shari'a* law and *Shari'a* concepts are first identified, particularly from a perspective of apostasy.

Submitting to God, i.e. becoming a Muslim, is a free unilateral, acceptance of the Muslim Covenant by proclamation of the *shahada*.¹ Apostasy is the free, unilateral

¹ The declaration of faith is called the *shahada* and constitutes the dual declarations (*shahadatain*) that (i) there is but One God: Izzeddin Ibrahim and Denys Johnson-Davies, *Forty Hadith Qudsi* (1991), 74, and (ii) the acceptance of the apostleship of Mohamed: Izzeddin Ibrahim and Denys Johnson-Davies, *Forty Hadith Qudsi* (1991), 130. A person must recite the *shahada* (bear witness) in the presence of two Muslim witnesses, in order formally to convert to Islam.

The *shahada* in Islam is: لا إله إلا الله محمد رسول الله "I testify that there is no god but God and I testify that Muhammad is the Messenger of God." In Shi'i Islam sometimes a third declaration reinforcing the centrality of the position of Imam Ali is added to the declaration [علي ولي الله]: Shahid, N Shah, *Islamic Terms Dictionary: Alim Software Version 4.5* (1996).

In contemporary terms, Muslims are defined at least as those who may legitimately, i.e. at the discretion of the Custodians of the Holy Sites, visit the Kaba to perform the hajj (pilgrimage), and generally includes Sunni and Shi'i Muslims. See generally:

<http://www.saudiembassy.net/Travel/hajj.as> [18 May 2006]. but broadly includes anyone who has voluntarily made the two declarations. It is noted in secular societies that a 'Muslim' generally self-identifies as such with no formal requirement vis-à-vis the 'two declarations'. Javad Nurbakhsh, *Traditions of the Prophet* (1981), 65, notes that against this low threshold for becoming or remaining a Muslim however, the Qur'an asks those who would be Muslims to do so wholeheartedly and develop spiritually to the higher grade inter alia that of a believer (*mu'min*) and is a key distinction both in law and in theology:

- (1) a Muslim (*aslamna*) – One who performs the outward acts of the five pillars of Islam;
- (2) A believer (*amana*) – A Muslim who has belief in the angels, books, Prophets etc; and

repudiation of the *shahada*. This understanding of apostasy broadly is common to many religions. Problems arise with the legal consequences that may still attach to apostasy under some Schools of Islamic law, which in some cases appear to mandate the death penalty for apostasy. If correct, they are thus potentially problematic vis-à-vis not only under a Bill of Rights but also under the general law in Australia, particularly if some Muslims sought to intimidate 'apostates' or to try to implement 'their interpretation' of *Shari'a* on apostates in Australia.

This paper examines apostasy under the *Shari'a* and whether the Qur'an and *sunna*² or other texts support capital punishment and first requires examining the definition and meaning of what constitutes apostasy in the context of the Qur'an and the *sunna*.

The paper concludes that while apostasy is a grave crime under Islamic law, its prescribed punishment is reserved for the Hereafter and therefore, that temporal authorities do not have jurisdiction over apostasy *per se*. This view, however, is not universally agreed upon.

Shari'a notions on apostasy are also sometimes characterised as incompatible with international law on the freedom of religion,³ and thus an Australian Bill of Rights

(3) *ihsan* (the highest form of worship: The act of a believer who lives as if she or he sees God.

The Qur'an also refers to the various states of the soul as *nafsul amara*: Qur'an 12:53, *nafsul lawama*: Qur'an 72:2, and *nafsul mutmahinna*: Qur'an 89:27 but these categories of 'souls' do not have a direct (temporal) legal significance. The Qur'an rejects the 'partial acceptance' of Islam: Qur'an 2:85.

² For a definition of *sunna* see p5.

³ Article 18 *Universal Declaration of Human Rights 1948 General Assembly resolution 217 A (III) 10 December 1948*. (hereinafter UDHR) ; Article 18 *International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. entered into force Mar. 2, 1976*. (hereinafter ICCPR)

which as discussed, in broad terms reflects international norms on the subject, which as stated here is broad and unhelpful as it conflates several related issues and therefore needs to be analysed further. Those freely accepting Islam, unilaterally undertake wholeheartedly to enter Islam, including specifically the clause never to renounce the faith. This is a contractual issue and is not controversial if the contract is entered into freely. Problems do occur however, when children who are 'born and raised' as Muslim and are then refused the right to freely adopt another faith or renounce the faith 'given' to them by their parents, a parental right under international law.⁴

Sources of Islamic law

There are four major sources of Islamic law in both the *Sunnā*⁵ and *Shi'ī*⁶ branches of Islam.⁷ These are the Qur'an, the *sunna* (or traditions which are compiled as collections of *hadith*⁸), *ijma'* (consensus) and *qiyas* (analogy). The first two sources are the independent sources and *ijma'* and *qiyas* the dependent sources.⁹ There is broad acceptance of the use of the independent sources in formulating

⁴ Article 13(3) *International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27* (hereinafter ICESCR).

⁵ For a general discussion of these traditional sources of Islamic law; See Wegner., J. R., 'Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmudic Counterparts' *The American Journal of Legal History* [Vol. XXVI 1982], 49 referring to Muhammad ibn-Idris al-Shafie'i *Kitaab al Risaala fi Usul al Fiqh (Treatise on the Roots of Jurisprudence)* (Egypt 0815-0820) Bulaaq Edition.

⁶ Reza, S. A. Translator, *Nahjul Balagha: Peak of Eloquence, Sermons Letters and Sayings of Imam Ali ibn Abu Talib*, (1986), vii "These four principles (under Shi'i Islam are), the Qur'an, traditions of the Prophet and imams, consensus and reason", and differ slightly from Sunni Islam in theory (and although the examination of which is beyond the scope of this paper) not in practice.

⁷ For a broader discussion of the four sources of Islamic law see for example Weeramantry. C. G, *Islamic Jurisprudence: An International Perspective*, (1988), 30-45.

⁸ *Hadith* literally means speech or story; however, in the context of Islamic law it means 'traditions that are traced back to the Prophet (or to an Imam in the case of *Shi'i* Islam) via a chain of named narrators': Tabatba'i H. M., *Kharaj in Islamic Law* (1983), 86.

See generally: Azami, M. M., *Studies in Early Hadith Literature*, (1978).

law.¹⁰ The independent sources of Islamic law survive as text (*nass* نص).¹¹ El-Fadl disputes the 'erroneous views' of Schacht and other orientalists who assert that text only became important in Islamic law through the efforts of al-Shafi'i, the eponym of the Shafi'i School, and states that the 'centrality of the text from the very inception of Islamic legal history has been adequately demonstrated in the literature'.¹² The sources are now described briefly.

The Independent Sources

Qur'an

To Muslims the Qur'an is the literal revealed word of God,¹³ is the *Grundnorm* or ultimate and primary source of Islamic law,¹⁴ views not challengeable by Muslims.¹⁵ The Qur'an describes itself as God's eternal law,¹⁶ free from all contradiction,¹⁷

⁹ Weeramantry. C. G., *Islamic Jurisprudence: An International Perspective*, (1988), 31.

¹⁰ Weeramantry. C. G., *Islamic Jurisprudence: An International Perspective*, (1988), 41. the author also discusses (ibid, 41) for example relevant issues such as the 'closing of the doors of *ijtihad* (ie the exercise of *quiyas*)' by *Sunni* scholars.

¹¹ *Kurshid Bibi v Muhammad Amin* (1967) 1 Pakistan Legal Decisions 97, 106 per Rahman S. A, Fazle-Akbar, Hamoodur Rahman, Mohammed Yaqub Ali and Mahmood S.A., JJ. The Arabic term for 'text' is نص (*nass*). Ian Edge (ed), *Islamic Law and Legal Theory*. The International Library of Essays in Law & Legal Theory (1996).

¹² Khaleed Abou El-Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (2001), 34.

¹³ Qur'an (46; 2).

¹⁴ Imran Ahsan Khan Nyazee, *The Methodology of Ijtihad* (2002), 38.

¹⁵ Qur'an 5:47; Sami Zubaida, *Law and Power in the Islamic World* (2003), 10; Shaheen Sardar Ali and Javaid Rehman, 'The Concept of Jihad in Islamic International Law' (2005) 10 *Journal of Conflict & Security Law* 321, 324; Noel J Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (1969), 4. On the other hand, Patricia Crone and Michael Cook, *Hagarism: The Making of the Islamic World* (1977), viii state that:

[There is] no hard evidence for the existence of the Koran in any form before the last decade of the seventh century [...]

Though they do admit (*ibid. vii*) that this is 'a minority view' this work is 'by infidels for infidels [...] which Muslims should have no difficulty rejecting'.

¹⁶ Bernard G Weiss, *The Spirit of Islamic Law* (1998), 62.

¹⁷ Qur'an 4:82.

protected for eternity,¹⁸ and containing no error or doubt.¹⁹ Those who dispute the Divine origin of the Qur'an are challenged to an objective challenge.²⁰ The view on the Qur'an adopted here is the almost universal view that the historical authenticity of the content of the Qur'an through the times is 'beyond doubt'.²¹ The Qur'an is not a book of law *per se*. Jurists agree that about 500 verses have legal content²² and they form the legal framework.²³ All other sources of Islamic law must ultimately find their validity in the Qur'an.²⁴

Interpretation of the Qur'an

¹⁸ Qur'an 15:9.

¹⁹ Qur'an 10:37.

²⁰ Qur'an 2:23; Quran 17:88.

²¹ Cherif Bassiouni and Gamal M Badr, 'The Shari'ah: Sources, Interpretation, and Rule-Making' (2002) 1 *UCLA Journal of Islamic and Near Eastern Law* 135, 148. There are a minority of scholars, including some who question issues such as the Muslim versions related to the first dates of the earliest written accounts of the Qur'an : Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (2008), 78.

²² The question of how a legal maxim is defined is a crucial question: see generally for example Wael B Hallaq, *A History of Islamic Legal Theories* (1997), 3; Sami Zubaida, *Law and Power in the Islamic World* (2003), 12; Muhammad Baqir As-Sadr, *Lessons in Islamic Jurisprudence* (2005), 1; Wael B Hallaq, *The Origins and Evolution of Islamic Law* (2005), 21; Chibli Mallat, 'From Islamic to Middle Eastern Law: A Restatement of the Field (Part I)' (2003) 51 *American Journal of Comparative Law* 699, 719.

²³ While 500 verses in a total of about 6,600 verses in the Qur'an may appear a relatively smaller percentage that given to other subjects such as faith, the Day of Judgment etc the actual impact of the legal verses is disproportionately higher for at least two reasons. There is no repetition of subject matter in the legal verses and the length of the legal verse on the average is significantly longer. See generally Wael B Hallaq, *The Origins and Evolution of Islamic Law* (2005), 21; Chibli Mallat, 'From Islamic to Middle Eastern Law: A Restatement of the Field (Part I)' (2003) 51 *American Journal of Comparative Law* 699, 720, points out that the Qur'an has a higher percentage content of law than the Pentateuch.

²⁴ Qur'an 5:47. On the other hand, Patricia Crone and Michael Cook, *Hagarism: The Making of the Islamic World* (1977), viii state that:

[There is] no hard evidence for the existence of the Koran in any form before the last decade of the seventh century [...]

Though the authors do admit (*ibid. vii*) that this is 'a minority view' and further (*ibid.*) that: this work is 'by infidels for infidels [...]' and that Muslims should have no difficulty rejecting'.

There is consensus that the Qur'an will be interpreted according to its most obvious meaning.²⁵ According to Islamic legal theory, discovery of law is both necessary and permissible but must be based on and guided by the eternal and unchanging principles as codified in the Qur'an,²⁶ and within the framework of the *sunna*.²⁷

Although Islamic Law claims Divine origins, it does not claim to be descended wholly 'ready made'. Its development explicitly requires human agency,²⁸ inter alia through the agency of jurists/scholars²⁹ who 'discover' and clarify the law. Therefore, although according to the Qur'an apostasy is not a temporal crime³⁰ this is not the whole picture, as many Muslims do not appear to accept the Qur'anic view alone on this issue, and is a legitimate perspective as discussed below.

An example of Qur'anic interpretation, in the light of the *sunna*, is as follows: The Qur'an includes some strict, general prohibitions such as inter alia the explicit and

²⁵ Ahmad Hassan, *The Doctrine of Ijma' in Islam: A Study of the Juridical Principle of Consensus* (2002), 4.

²⁶ The Qur'an states in 25:33 that Qur'an is itself its own best guide, (*ahsana tafsiir*).

²⁷ Qur'an 10:59; Qur'an 42:21.

²⁸ There is a tradition from the time of the fourth Orthodox Caliph, Imam Ali when a fundamentalist group denied the ability of the Caliph to judge, stating instead that it was only the Qur'an that could judge between people and that there should be a 'No rule save God's rule'. It is reported that the Caliph Ali then placed a written copy of the Qur'an between the litigants and spoke to the Qur'an instructing it to judge between the litigants. When the Qur'an did not speak, he remained silent until the litigants became quite perplexed and told him that the Qur'an would not speak. To this Imam Ali responded; "The Qur'an is a book that only speaks through the mouths of men". The text in quotes was extracted from Taha Jabir Al-Alwani, *Towards a fiqh for Minorities* (2003), 15. Another expression of the Divine will according to the Qur'an is the *sunnat of Allah*: (Qur'an 33:38; Qur'an 35:43; Qur'an 40:85; Qur'an 43:23; Qur'an 17:77, *sunnatuna*, Our *sunna*, that is to say God's 'way'): Van Nispen Tot Sevenaer, *Activité Humaine et Agir de Dieu: Le Concept de 'Sunan de Dieu' dans le commentaire coranique du Manaar* (1996). The Qur'an states that God's signs (*ayat Allah*) are everywhere, in nature and in life: Qur'an 88:17-20, and are signs through which humanity can learn.

²⁹ See Javad Nurbakhsh, *Traditions of the Prophet* (1981), 50.

³⁰ Qur'an 3:90; 4:89; 4:137; 63:3. The key point is that even though the Qur'an recognises vacillating faith as a fact of life, which in the Qur'anic view is ipso facto for material or worldly reasons, it prescribes no temporal punishment. If a death sentence is prescribed for the first 'change of heart', then clearly, one will not have the option of vacillating faith. A counter argument is that the apostatising in this case may be

unconditional prohibition in dealing in usury (*riba*).³¹ In the Prophet's *sunna* however, the prohibition on usury is 'softened', by permitting *salam* contracts,³² a form of pre-Islamic usurious contract, creating an exception to aleatory transactions, moderating an otherwise absolute prohibition.³³ That is, the Prophet clarified the absolute prohibition, arguably in the light of the Qur'anic principle that God does not wish to make things difficult for humanity³⁴ and together with legal 'necessity' provides a legal basis for taking a broader more purposive approach to interpretation with regards to what is permitted for the smooth running of society. On the other hand, it is noted that the Prophet construed criminal provisions narrowly and strictly,³⁵ and it is in *this* context that apostasy must be considered

Interpretation of criminal law under which apostasy is considered in Islam,³⁶ is always a vexed and complex issue because as with all criminal laws, the Shari'a criminal law severely affects the rights of individuals.³⁷ Against this harshness, the

private/internal to an individual and the text of the Qur'an does not appear to limit the more general meaning.

³¹ Qur'an 2:275.

³² Wael B Hallaq, *A History of Islamic Legal Theories* (1997), 177,178. For a description of *salam* contracts see: Ahmad-ibn Naqib Al-Misri, *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law* (1994), 400; Muhammad Al-Mughirah al-Bukhari, *The Translations of the Meaning of Sahih al-Bukhari Vol. 3* (1976), 243-249. the book of *al-salam* (كتاب السلم). For a discussion on the prohibition of aleatory transactions see Joseph Schacht, *An Introduction to Islamic Law* (1975), 147. The Qur'an 2:219, Qur'an 5:90-91 also prohibits gambling and games of chance.

³³ Qur'an 2:143; The Qur'an describes the Prophet's community as *ummatan wasatan* or the mid-most community, i.e. one avoiding the extremes.

³⁴ Qur'an 2:185.

³⁵ Abd-el-Malek al-Saleh, 'The Right of the Individual to Personal Security in Islam' in C Bassiouni (ed) *The Islamic Criminal Justice System* (1982), 74.

³⁶ David F. Forte, 'Apostasy and Blasphemy in Pakistan' 10 *Conn J Int'l L* 27.

³⁷ D. C. Pearce and R. S. Geddes, *Statutory Interpretation in Australia* (6th ed, 2006); Cherif Bassiouni (ed), *The Islamic Criminal Justice System* (1982), xvii; A. Q Oudah Shaheed, *Criminal Law of Islam Volume 1* (2000), 7; Cherif Bassiouni, 'Death as a Penalty in the Shari'a The Death Penalty: Condemned' (2000) *International Commission of Jurists* 65-84; N J Coulson, 'Doctrine and Practice in Islamic Law: One Aspect of the Problem' in I Edge (ed) *Islamic Law and Legal Theory* (1996), 425; Noel J Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (1969).

Qur'an provides legal protection such as the use of exacting rules of evidence³⁸ and prophetic practices that criminal provisions are construed narrowly and in favour of the accused, a notion known to the law generally, including to the common-law.³⁹ On the other hand, in the case of apostasy, the interpretation of the Qur'an in the light of the *sunna* and the jurisprudence has broadened and 'hardened' the scope of the applicable law and the class of people who can be punished, and as stated, appears contrary both to the spirit and the letter of the *Shari'a*.⁴⁰

The Centrality of the Qur'an to Islamic Law

The central concept of 'free will' is now discussed by examining the crucial role of free will in the Qur'an, *sunna* and the *Shari'a*. The Qur'an, which is the ultimate source of Islamic law and theology, is a key to understanding the concept of free will and this involves a preliminary identification of the purpose of the Qur'an itself. The Qur'an states that its object and purpose includes: (i) explaining the reason for creation; (ii) guiding the righteous⁴¹ to the 'right path'⁴²; (iii) and regulating society.⁴³ These purposes are now briefly examined from a broader context of the 'spirit' of the *Shari'a* and will help contextualise serious *Shari'a* crimes, including apostasy.

³⁸ Khaleed Abou El-Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (2001), 62.

³⁹ For *Shari'a* authority please see above p9, text at note 35. Under Australian law His Honour concedes that it has become a rule of last resort. *Beckwith v The Queen* (1976) 135 CLR 569, 576 per Gibbs J.

⁴⁰ Wael B Hallaq, *Law and Legal Theory in Classical and Medieval Islam* (1994), XI 85, the view adopted by the overwhelming majority of Muslims is of the supremacy of the Qur'an over the *sunna*.

⁴¹ This appears to be *prima facie* problematic as one may reasonably state that it is the 'unrighteous' that need guidance. In this context 'righteousness' appears to be defined as those who innately or intuitively believe in God and who sincerely (and not necessarily within a religious' context) ask God to guide them to the solutions to the perplexing questions of life. See however, the Qur'anic definition of 'righteousness' below 58n.

⁴² Qur'an 1:5.

⁴³ Qur'an 25:1 describes the Qur'an as 'the criterion' by which action must be measured, clearly regarding it as a regulatory framework.

(i) To explain the reason for Creation

The Qur'an states that humans were created for worship.⁴⁴ To this end the Qur'an invites them freely,⁴⁵ and wholeheartedly⁴⁶ to enter into a binding Covenant⁴⁷ which when performed with the right intention, discharges their obligations.⁴⁸ In return for sincere fulfilment of the Covenant, God promises a reward beyond human imagination.⁴⁹ The *Shari'a* guides and aids Muslims to satisfactory performance of the Covenant.

Worship in Islam is a very broad term, specific discussion of which is outside the scope of this paper.⁵⁰ The *Shari'a* identifies the elements of the Covenant and of the concomitant acts of worship to enable humanity 'successfully' to discharge these obligations.

(ii) To guide to the 'right path'

Another related key aim of the Qur'an, and thus the *Shari'a*, is to guide humanity to the 'right path'⁵¹ and to right action.⁵² The Qur'an is 'The Criterion',⁵³ making clear in plain (Arabic) language,⁵⁴ right thought and action in all circumstances⁵⁵ and for

⁴⁴ Qur'an 51:56. The Qur'an 2:30 also states that human beings are created for worship and that they will be (future tense) God's representatives (*khalifa*) on earth.

⁴⁵ Qur'an 2:286.

⁴⁶ Qur'an 2:208.

⁴⁷ Qur'an 16:91.

⁴⁸ Qur'an 36:61.

⁴⁹ For example Qur'an 36:55.

⁵⁰ In addition to what is commonly regarded as prayer and worship in a formal sense, Muslim worship includes performing good acts (*'amal hasanaat*) and avoiding sinful acts or transgressions (*khaati'a*).

⁵¹ Qur'an 1:5.: The 'right path' or *siraat al-moustaqueem* الصِّرَاطِ الْمُسْتَقِيمِ. This 'straight path' is conceptually important to the Muslim.

⁵² Qur'an 17:9; Qur'an 28:56 .

⁵³ Qur'an 25:1.

⁵⁴ Qur'an 12:2; Qur'an 13:37.

⁵⁵ Qur'an 2:40; Qur'an 16:91; Qur'an 48:10.

all time.⁵⁶ This guidance explicitly identifies the nature and legal content of all prohibited acts, including apostasy. While the Qur'an does not provide for a temporal punishment for apostasy *per se*, it is condemned and provides for the most severe punishment in the Hereafter.⁵⁷

The Qur'an is a guide for all those who prepossess the quality of righteousness.⁵⁸

The Qur'an describes the people of *taqwa* as those possessing attributes and performing acts beyond what is usually and superficially passed off as righteousness (*birr* بَرّ)⁵⁹ and elaborates in the following terms:⁶⁰

It is not righteousness [بَر] that ye turn your faces toward East or West,⁶¹ but it is righteousness to believe in God and the Last Day and the Angels⁶² and the Book and the Messengers; to spend of your substance out of love for Him for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer and practice regular charity; to fulfil the contracts which you have made; and

⁵⁶ Qur'an 15:9 (*Hafizuun*).

⁵⁷ Qur'an 25:27.

⁵⁸ Righteousness, بَرّ *birr* includes *taqwa* تقوى: eg Qur'an 2:2. The term '*hudal lil moutaqueen*' (للمتقين) i.e. the Qur'an is a guide to those who possess *taqwa* تقوى or words to this effect appear 79 times in the Qur'an indicating the centrality of the term *taqwa* تقوى as a technical term in Islamic law. In E W Lane, *Arabic English Lexicon Volume 1* (1984). the word *taqwa* (تقوى) is used to describe one who is guarded, alert, cautious and has a reverential fear of God. To these qualities, as described in Lane, the Qur'anic definition adds the quality of goodness/righteousness, *birr* بَرّ.; The Qur'an notes that all humans possess a soul : Qur'an 91:7 and further that discernment allows the soul to recognise "enlightenment as to its wrong (the word used for 'wrong' is *fujur* فجور) and its right (the word used for 'right' is *taqwa* تقوى) : Qur'an 91:8. The term *fujur* فجور is employed to describe as those who live immorally etc : Milton J Cowan (ed), *The Hans Wehr Dictionary of Modern Written Arabic* (1980), 697.

⁵⁹ E W Lane, *Arabic English Lexicon Volume 1* (1984) describes those possessing *birr* بَرّ as those who are good, kind, gentle obedient and as well as obedient to his or her creator بَرّ خالقه .

⁶⁰ Qur'an 2:177.

⁶¹ That is, facing Mecca during ritual prayer.

⁶² Belief in the Angels is common to all the surviving Abrahamic faiths. In the Islamic tradition angels (الملائكة) are not possessed of free-will. Note that Satan in Islam is a *djinn* and not a fallen angel. See generally the transcripts of ABC Radio National Programme *Encounter* of 5 November 2006. <http://www.abc.net.au/rn/encounter/stories/2006/1771984.htm> [Accessed 6 November 2006].

to be firm and patient in pain (or suffering) and adversity and throughout all periods of panic. Such are the people of truth, the people possessing *taqwa*.

(iii) To regulate society according to Qur'anic criteria

The Qur'an states that humans are God's vicegerent on earth⁶³ and that it is the moral and legal framework by which this vicegerent shall regulate their societies.⁶⁴

An ideal society according to the Qur'an inter alia is one which enables all people to hear the message of the Prophet, and to receive the invitation to enter into the Covenant, but each individual must be allowed to accept or reject the Covenant, freely.⁶⁵ However, it reminds humanity of its voluntary acceptance of free will⁶⁶ which is discussed below, and informs the meaning of apostasy in Islam.

All Muslims are expected to live as best as they can in accordance with the Covenant. Breach⁶⁷ or repudiation⁶⁸ of Covenant responsibilities may have serious repercussions in this world and according to the Qur'an, *certainly* in the next.⁶⁹ For 'others', i.e. those who have rejected or not entered into a Covenant, Muslims are to say 'to you, your way of life and to me, mine',⁷⁰ but otherwise should not in any way interfere with their private lives. Muslims may, and indeed should, invite them

⁶³ Qur'an 2:30.

⁶⁴ Qur'an 25:1 and see above text at n43.

⁶⁵ Qur'an 2:256 ('*la ikraha fil deen*') which is translated as 'there is no compulsion in religion'. The reason for calling people to faith is not so much that they will follow, because none can save from Satan's misguidance but God; Qur'an 2:38, but that those who are punished in the end are only the most obdurate; Qur'an 23:99-100, who will claim that, if they were warned, they would have believed. Qur'an 23:99-107.

⁶⁶ Qur'an 4:97-98; Ahmad-ibn Naqib Al-Misri, *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law* (1994), 3.

⁶⁷ Qur'an 2:27.

⁶⁸ Qur'an 5:21; Qur'an 5:54; Qur'an 2:217.

⁶⁹ Qur'an 2:27; Qur'an 33:15; Qur'an 13:25 (those who renounce their Covenant are cursed).

⁷⁰ Qur'an 109:6.

to Islam but this must be done in the best and most gracious manner.⁷¹ There must be no coercion in matters of faith⁷² and the sacred objects of non-Muslims should not be reviled.⁷³ Those who enter Islam should do so wholeheartedly⁷⁴ and, cognisant of the laws on apostasy⁷⁵ (unless conversion was under duress),⁷⁶ are eternally bound. This is the understanding of apostasy that underpins the criminalising of apostasy and is discussed more fully below. However, God who is severe in punishment⁷⁷ is also most merciful,⁷⁸ beneficent,⁷⁹ and forgiving,⁸⁰ and has promised that mercy shall prevail,⁸¹ and further, reserves the absolute right to forgive anyone who may fall short of the discharge of their obligations.⁸² Therefore, issues such as apostasy, the intention of which is not always clear (and as discussed below sometimes imputed for political reasons⁸³) which cannot fully or fairly be resolved by humans, are best left to the Hereafter, particularly as in Islam 'worship', the matter primarily affected by apostasy, is a matter for God alone.

⁷¹ Qur'an 16:125.

⁷² Qur'an 2:256.

⁷³ Qur'an 6:108.

⁷⁴ Qur'an 2:208.

⁷⁵ Aly Aly Mansour, 'Hudud Crimes' in C Bassiouni (ed) *The Islamic Criminal Justice System* (1982), 197. There is no difference of opinion among Muslims that the penalty for apostasy in the Hereafter is extremely severe. See also Qur'an 3:90; Qur'an 4:137 and Qur'an 63:3.

⁷⁶ Qur'an 16:106; Taha Jabir al-Alwani, *Ijthihad* (1993), 12.

⁷⁷ Qur'an 59:4.

⁷⁸ The Arabic word (الرَّحْمَان) *Al-Rahman* (the Merciful, which is a synonym for God, as (صِدْقَةٌ مَبَالِغَةٌ) i.e. in the superlative) appears 57 times in the Qur'an.

⁷⁹ The Arabic word (الرَّحِيم) *Al-Raheem* (the Beneficent, which is a synonym for God) appears 95 times in the Qur'an.

⁸⁰ The Arabic word (الْغَفُورُ) *Al-Ghafour* (the Forgiving, which is a synonym for God) appears 91 times in the Qur'an, 71 times in the nominative and 20 times in the accusative.

⁸¹ Izzeddin Ibrahim and Denys Johnson-Davies, *Forty Hadith Qudsi* (1991), 40; Ibrahim M Kunna, *110 Ahadith Qudsi* (2006), 21.

⁸² Izzeddin Ibrahim and Denys Johnson-Davies, *Forty Hadith Qudsi* (1991), 122.

⁸³ See n289 below.

Sunna

The *sunna* is based on the acts and sayings of the Prophet. The Prophet was the ideal Muslim and his acts as Prophet⁸⁴ contextualise the Qur'an and are normative custom.⁸⁵ They are captured in texts that have been transmitted down from the Prophet.⁸⁶ The term *sunna* was used in a legal context, by the Prophet and the early caliphs.⁸⁷ The Qur'an states that 'whoever obeys the apostle obeys God'⁸⁸ and arguably provides a legal basis for the binding nature of the *sunna*.

There is some divergence on what actually constitutes the *sunna*.⁸⁹ For example, al-Shafi'i considered the acts of the Prophet only as the *sunna*,⁹⁰ and authoritative traditions only were binding,⁹¹ while Malik bin Anas (the eponym of the Maliki

⁸⁴ Some Muslims further distinguish his acts depending upon the capacity in which the Prophet was acting: See generally Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach* (2008), 81-83.

⁸⁵ See for example the English translation of the (Turkish) *Mecelle*: Mohd Daud Bakar (ed), *The Mejelle: Being an English Translation of Majallah El-Ahkam-I-Adliya and A Complete Code of Islamic Civil Law* (2001). ; Michael Cook, *Forbidding Wrong in Islam* (2003), 109.

⁸⁶ Taha Jabir al-Alwani, *Source Methodology in Islamic Jurisprudence* (2003), 5.

⁸⁷ M M al-Azami, *Studies in Early Hadith Literature With a Critical Edition of Some Early Texts* (1978), 249 esp. n7. The authenticity of individual *hadith* is a major issue in the study of the *Shari'a* although the discussion of this particular problem is beyond the scope of this paper.

⁸⁸ Qur'an 4:80; C G Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988), 34; Wael B Hallaq, *Law and Legal Theory in Classical and Medieval Islam* (1994), XI . 80. See also note 44 which refers to Qur'an 4:65; Qur'an 24:63; Qur'an 4:80, (and also Qur'an 4:59; Qur'an 5: 92: Qur'an 59:7. Wegner., J. R., 'Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and Their Talmudic Counterparts' The American Journal of Legal History [Vol. XXVI 1982], 50 quoting Al-Shafie'i Muhammad ibn-Idris *Kitaab al Risaala fi Usul al Fiqh (Treatise on the Roots of Jurisprudence)* (Egypt 0815-0820) Bulaaq Edition Volume 6, 206 ; M Akron, *Islam d'Hier et d'Aujourd'hui: Presentation De La Risala De Chafi'i* (1984), 68.

⁸⁹ Sunni Muslims refer to the *al-sitta* (the six) collections: Bukhari, Muslim, Abu Daoud, Tirmidhi, al-Nisa'i and the Al-Muwatta' Imam Malik. Shi'i Muslims refer to the al-kutub al-arba (the four books): al-Kaafi by al-Kulaini (d. 329 . A. H.), *Man la yahduruhu 'l-Faqih* by Muhammad b. Ali b. Hussain (d. 381 A.H), *al-tahdhiib and al-istibsar* by al-Tusi (d. 460 A.H.): See generally Ayatollah M B al-Sadr, *Principles of Islamic Jurisprudence According to Shi'i Law* (2003), 33.

⁹⁰ Mansour H Mansour, *The Maliki School of Law: Spread and Domination in North and West Africa 8th to 14th Centuries CE* (1995), 4.

⁹¹ Muhammed ibn al-Hasan al-Shaybani, *The Islamic Law of Nations Shaybani's Siyar* (1966), 24.

School) considered that the actions of the Prophet's early companions⁹² formed part of the *sunna*.⁹³ The *Jafiri* School, named after its eponym Jafer as-Sadiq, include the acts and sayings of the Prophet⁹⁴ and the pronouncements and actions attributed to the Imams.⁹⁵

It is the view of Zubaida that:⁹⁶

In reality *hadith* is the primary canonical source of *fiqh*. Rules contained in the Qur'an, however few or many, cover a limited area of social and economic life. *Sunna*, and particularly *hadith*, are considered decisive sources in interpreting and generalizing Qur'anic rules.

There are several collections or compendiums of *hadith* or *sunna*.⁹⁷ The word *sahih* (literally sound or truthful) attaches to some Sunni collections.⁹⁸ However,

⁹² Khaleed Abou El-Fadl, *Rebellion & Violence in Islamic Law* (2001), 34-61.

⁹³ Mansour H Mansour, *The Maliki School of Law: Spread and Domination in North and West Africa 8th to 14th Centuries CE* (1995), 4; Authorship of books attributed to the eponyms do not necessarily mean that the books were in fact written by the eponyms. Many of the books attributed to the eponyms were notes taken in seminars which were later written up by students (and whose content was then confirmed by the eponyms) and therefore arguably reflect selectively, issues subjectively important to the student (author) : Sami Zubaida, *Law and Power in the Islamic World* (2003), 20.

⁹⁴ Jamila Hussain, *Islamic law and Society : An Introduction* (1999), 28.

⁹⁵ H. M. Tabataba'i, *Kharaj in Islamic Law* (1983), 86; Sami Zubaida, *Law and Power in the Islamic World* (2003), 76; Majid Khadduri, *War and Peace in the Law of Islam* (1955), 41.

⁹⁶ Sami Zubaida, *Law and Power in the Islamic World* (2003), 29.

⁹⁷ Weeramantry. C. G., *Islamic Jurisprudence: An International Perspective*, MacMillan Press (London, 1988) at 34. Sunni Muslims often refer to the six books / collections of (Bukahari, Muslim, Tirmidhi, Nisai, Abu Daud and Ibn Majah and *Shi'i* Muslims often refer to the collections of al-Kafi and al-Wasa'il. *Shi'i* Muslims also refer to those collections of hadith compiled by the scholars Kulayni d 328/940; Ibn Babuya, d 380/991 and Tusi, d 460/1068, al-Hurr al-'Amili, d 1110/1699: Chibli Mallat, 'From Islamic to Middle Eastern Law: A Restatement of the Field (Part I)' (2003) 51 *American Journal of Comparative Law* 699, 723.

⁹⁸ See Encyclopaedia of Islam (EI Entry) for *sahih*; EI states that:

Traditional collections entitled *al-Djami al-sahih* are the canonical collections by al-Bukhari (d 256/870), Muslim b. al-Hadjdadj (d 261/875) and al-Tirmidhi (d 279/892 [q.v.]). Those of al-Bukhari and al-Muslim are, furthermore, generally referred to as "the two *sahihs*".

Shi'i schools may not recognise the authenticity of Sunni collections of *hadith* and *vice versa*.⁹⁹ The use of *hadith* as a source of law has not always been non-contentious¹⁰⁰ although it is at present a settled matter.¹⁰¹ Further, the Qur'an instructs the Prophet to judge between disputing people,¹⁰² and for the people to obey the Prophet,¹⁰³ and gives binding legal effect to his judgments.¹⁰⁴

The Dependent Sources

There are several different dependent sources, or descriptively described as the disputed sources¹⁰⁵ of law referred to in the literature¹⁰⁶ and the Schools rank them differently.¹⁰⁷ The dependent sources used in this paper are *idjma* (consensus), *quyas* (analogy) (which are broadly recognised) and because of its particular relevance to this paper, *darura* (necessity).

The relevant dependent *Shari'a* sources are now very briefly examined in turn.

***Idjma* (Consensus)**

Hassan notes that the use of the term *idjma* 'gained momentum in its technical form, emerging as an authoritative force, with the emergence of disagreement in

⁹⁹ C G Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988), 47.

¹⁰⁰ Wael B Hallaq, *The Origins and Evolution of Islamic Law* (2005), 48-50.

¹⁰¹ There are, broadly speaking several categories of *hadith* including: (1) sound (*sahih*) (2) weak (*daif*) (3) strange (*gharib*) and (4) fabricated (*mawdu'*) (5) isolated (*khobar wahid*) and (6) widespread (*tawatur*): Norman Calder, *Studies in Early Muslim Jurisprudence* (1993), 224.

¹⁰² Qur'an 4:105; Qur'an 2:213, Qur'an 5:48.

¹⁰³ Qur'an 24:56; Qur'an 4:80.

¹⁰⁴ Qur'an 24:54.

¹⁰⁵ Taha Jabir al-Alwani, *Source Methodology in Islamic Jurisprudence* (2003), 4; Taha Jabir Al-Alwani, *Towards a fiqh for Minorities* (2003), 19.

¹⁰⁶ Cherif Bassiouni, 'Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System' in C Bassiouni (ed) *The Islamic Criminal Justice System* (1982), 9.

¹⁰⁷ Cherif Bassiouni and Gamal M Badr, 'The Shari'a: Sources, Interpretation, and Rule-Making' (2002) 1 *UCLA Journal of Islamic and Near Eastern Law* 135, 140. The authors refer to the non-independent sources as 'supplemental sources'.

Islam¹⁰⁸ in about the ninth century. *Idjma* became a generally accepted source of law, or perhaps more accurately a methodology for validating law, and did so paradoxically through a process of *idjma*. Al-Shafi'i is attributed as saying that *idjma*'s validity was based in the Qur'an.¹⁰⁹ Shi'i Islam is 'ambiguous' on the use of *idjma*¹¹⁰ and 'accepts *idjma* only if the Imam takes part in it',¹¹¹ as only the Imam¹¹² has final legal authority.

Disagreement (*ikhtilaaf*) on religious matters is not prohibited except on certain fundamental matters (*usul*)¹¹³ i.e. where the Qur'an or the *sunna* are clear. The Prophet also said 'difference of opinion is a boon to my community'.¹¹⁴ A practical manifestation of this acceptance of difference and, although perhaps not harmonious, co-existence is the participation of the various Schools at the *hajj* pilgrimage in Mecca. Another example is the coexistence of orthodoxy (the exact meaning of which changed over time) and some heterodoxies of the time.¹¹⁵

¹⁰⁸ Ahmad Hassan, *The Doctrine of Ijma' in Islam: A Study of the Juridical Principle of Consensus* (2002), 7.

¹⁰⁹ Qur'an 4:115. While the majority of the scholars note that this view was attributed to al-Shafi'i well after his death (Ahmad Hassan, *The Doctrine of Ijma' in Islam: A Study of the Juridical Principle of Consensus* (2002), 40.) they did not go on to dispute the assertion that *idjma*'s validity was rooted in the Qur'an.

¹¹⁰ Sami Zubaida, *Law and Power in the Islamic World* (2003), 14.

¹¹¹ Majid Khadduri, *War and Peace in the Law of Islam* (1955), 41. This Shi'i interpretation of *idjma* (although more specific because of the coincidence of the opinion of the Imam) nonetheless still falls within the general definition of *idjma*.

¹¹² The Shi'i Muslim schools refer to the 12th (hidden) Imam's occultation (*satr*) or disappearance (*ghaiba*): H. A. R. Gibb and J. H. Kramers (eds), *Concise Encyclopaedia of Islam* (4th ed, 2001), 166. In this paper, this disappearance is taken to mean that the religious opinion of a the preeminent Imam of the time, the *taqlid-e-marja*, can possibly validly substitute for the hidden Imam. It is noted that this matter is not settled.

¹¹³ Muhammad ibn Idris al-Shafi'i, *Treatise on the Foundations of Islamic Jurisprudence* (2nd ed, 1961), 333-352.

¹¹⁴ Edna Boyle-Lewicki, 'Need World's Collide: The Hudud Crimes of Islamic Law and International Human Rights' (2000) 13 *New York International Law Review* 43, 62; Ahmad Hassan, *The Doctrine of Ijma' in Islam: A Study of the Juridical Principle of Consensus* (2002), 18.

¹¹⁵ Sami Zubaida, *Law and Power in the Islamic World* (2003), 104.

Traditionally, however, classical jurists have been reluctant to accept the *idjma* of scholars, and particularly of those on a State's payroll, as they are susceptible to the influence of power.¹¹⁶ Al-Shafi'i 'did not validate the consensus of,¹¹⁷ and almost rejected the *idjma* of scholars,¹¹⁸ arguably for the same reason, but later settled on the position that the *idjma* of the masses was preferable.¹¹⁹ However, the lack of representative governments in many Muslim majority states means it is likely that the *idjma* of the governments is limited to and thus only reflects the *idjma* of those in power.¹²⁰ However, *idjma* that develops over a long period of time,¹²¹ such as the Qur'anic prohibition on grape-wine (which through consensus became a general prohibition on narcotics, alcoholic drinks and stupefying substances generally) now constitutes normative rules which are widely, and one could even say unanimously, accepted as law, even though consensus emerged during a historical period in which transport and communication technologies were somewhat less sophisticated.

Two useful and practical tests in ascertaining, identifying the existence of, or promoting the crystallisation of *idjma* are that: 'the Prophet said (a) the *umma* will

¹¹⁶ Ahmad Hassan, *The Doctrine of Ijma' in Islam: A Study of the Juridical Principle of Consensus* (2002), 28; According to Mamdouh Habib with Julia Collingwood, *My Story: the tale of a terrorist who wasn't* (2008), 20. Imams employed in Australian mosques '[...] often had little education and were ignorant'.

¹¹⁷ Ahmad Hasan, 'Al-Shafi's Role in the Development of Islamic Jurisprudence' in I Edge (ed) *Islamic Law and Legal Theory* (1996), 415.

¹¹⁸ Ahmad Hassan, *The Doctrine of Ijma' in Islam: A Study of the Juridical Principle of Consensus* (2002), vi.

¹¹⁹ Ahmad Hasan, 'Al-Shafi's Role in the Development of Islamic Jurisprudence' in I Edge (ed) *Islamic Law and Legal Theory* (1996), 414; Mohd. Hameedullah Khan, *The Schools of Islamic Jurisprudence: A Comparative Study* (2nd ed, 1997), 40.

¹²⁰ For a brief discussion on the issue of state payments to *ulema* see Bernard K Freamon, 'Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History' (2003) 27 *Fordham International Law Journal* 299, 352.

¹²¹ H. A. R. Gibb, *Modern Trends in Islam* (1947), 11.

never (unanimously) agree on something that is wrong¹²² (b) but, if in doubt, Muslims should side with the overwhelming majority.¹²³ Deference to Islamic maxims is a matter of faith rather than of law. However, the Prophet's words reflect an acknowledgement that, while reasonable people may differ, it is extremely unlikely that consensus will emerge on something which is manifestly wrong. On the other hand, and cognisant of the problematic nature of these subjective determinations on issues not clearly wrong, the lay person is encouraged to side with the overwhelming majority.¹²⁴ In this context it is noted that there is not an overwhelming majority opinion on the issue of the death penalty for apostasy *per se*.

Qiyas (Analogy)

Qiyas is the Islamic legal term for analogical reasoning, and as with *idjma* is more a methodology than a 'source'.¹²⁵ *Qiyas* is arguably similar to reasoning by analogy in the common law. *Qiyas* is recognised by the four surviving Sunni schools¹²⁶ although historically the Hanbali School did so reluctantly,¹²⁷ and it was

¹²² Georges F Hourani, 'The Basis of Authority of Consensus in Sunnite Islam' in I Edge (ed) *Islamic Law and Legal Theory* (1996), 155; Hunt Janin and Andre Kahlmeyer, *Islamic Law: The Sharia from Muhammad's Time to the Present* (2007), 20.

¹²³ Wael B Hallaq, *Authority, Continuity and Change in Islamic Law* (2001), 80, 127, 207; Georges F Hourani, 'The Basis of Authority of Consensus in Sunnite Islam' in I Edge (ed) *Islamic Law and Legal Theory* (1996), 161; Hunt Janin and Andre Kahlmeyer, *Islamic Law: The Sharia from Muhammad's Time to the Present* (2007), 21.

¹²⁴ However, the meaning of 'overwhelming majority' has not been judicially determined; it must mean that it excludes a simple majority.

¹²⁵ Wael B Hallaq, *Law and Legal Theory in Classical and Medieval Islam* (1994), II 286.

¹²⁶ Bernard G Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi* (1992), 23.

¹²⁷ Wael B Hallaq, *Law and Legal Theory in Classical and Medieval Islam* (1994), VII 597. One of the Qur'anic reasons for the reluctance by Muslims for the acceptance of *qiyas* stems from the Qur'an itself where, when God asked *Iblis* (i.e. Satan, a *djinn* who at the time was not yet 'fallen') to bow to Adam, Satan responded "I am better than he, You created me from fire and him from clay" (Qur'an 2:34; Qur'an 7:11, emphasis added), thus arguably using analogy to arrive at a decision which in effect gave Satan a plausible reason for disobeying God's command. A problem here however is the basic assumption /

rejected as a source of law by the Zahiri School.¹²⁸ In time however, the Zahiri School became extinct and the latter followers of the Hanbali School 'were to ignore their eponym's dislike for *quyas*'.¹²⁹ The Jafiri or *ithna ashari* Shi'i schools also did not recognise the validity of *quyas*,¹³⁰ replacing it with *ra'y* (personal opinion)¹³¹ and rational intuition ('*aqf*').¹³² Rational intuition or reason was also accepted by the orthodox Caliphs as a source of law.¹³³ Abu Hanifa, a student of the eponym of the Jafiri School,¹³⁴ recognised the validity of both *ra'y* and *quyas*¹³⁵ and the Hanafi were described as the school of *quyas*.¹³⁶ The methodology of *quyas*¹³⁷ is illustrated by the way in which the absolute prohibition of grape wine in the Qur'an¹³⁸ was extended to other alcoholic drinks.¹³⁹

rationale ('*illa* علة) that fire is 'better' than earth, reminding the proponents of *quyas* to be careful of the assumptions on which *quyas* is based.

¹²⁸ Ahmad Zaki Hammad, *Islamic Law: Understanding Juristic Preferences* (1992), 35.

¹²⁹ Wael B Hallaq, *Law and Legal Theory in Classical and Medieval Islam* (1994), VII 598.

¹³⁰ See generally C G Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988), 42 for examples of the difference between the *Shi'i* and *Sunni* sects on the issue *quyas*,, particularly of the differences of opinion on 'shutting and reopening the doors of *ijtihaad*'. *Ibid*, 186 defines *ijtihaad* as 'the general process of endeavour to comprehend divine law'. Hunt Janin and Andre Kahlmeyer, *Islamic Law: The Sharia from Muhammad's Time to the Present* (2007), 67 discuss the difference in *Shi'i* and *Sunni* Muslim views on *ijtihaad*.

¹³¹ [رأى] *ra'y* or personal opinion was adopted as a source of law by all four orthodox Caliphs: Majid Khadduri, *War and Peace in the Law of Islam* (1955), 28. In time however, *hadith* of the Prophet emerged as more authoritative over *ra'y* alone: Sami Zubaida, *Law and Power in the Islamic World* (2003), 21.

¹³² Bernard G Weiss, *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi* (1992), 23; Bernard G Weiss, 'Interpretation in Islamic Law: The Theory of *Ijthihad*' (1978) 26 *American Journal of Comparative Law* 199, 211.

¹³³ Majid Khadduri, *War and Peace in the Law of Islam* (1955), 28.

¹³⁴ Shibli Numani, *Imam Abu Hanifah* (1995), 24.

¹³⁵ Muhammed ibn al-Hasan al-Shaybani, *The Islamic Law of Nations Shaybani's Siyar* (1966), 25.

¹³⁶ *Ibid*. 50.

¹³⁷ For the elements and examples of the application of elements of *quyas* see Wael B Hallaq, *A History of Islamic Legal Theories* (1997), 83, 85.

¹³⁸ Qur'an 2:219.

¹³⁹ Muhammad Al-Mughirah al-Bukhari, *The Translations of the Meaning of Sahih al-Bukhari Vol. 7* (1976), 341.

Darura (necessity)

There is a fundamental question whether necessity is a general source of law under Islamic law or whether it should be characterised as 'special dispensation' in extenuating circumstances. Necessity can be characterised as a justification for the temporary suspension of relevant laws for the duration of an exigency.¹⁴⁰ For convenience, however, it is considered a minor source of law.

The principle that necessity provides a general temporary exception is explicitly sanctioned by the Qur'an,¹⁴¹ as long as there is no intention wilfully to disobey God.¹⁴² The use of necessity by *individuals* in individual exigencies is not contentious.¹⁴³ Thus apostasy done under duress will not draw any legal consequences.

¹⁴⁰ The doctrine of necessity is clearly a part of international law and although the scope and the extent to which necessity may be invoked remain, the fundamental principle itself is uncontroversial: Théodore Christakis, 'Nécessité n'a pas de loi? La nécessité en droit international' (Le papier a été présenté au Colloque en Grenoble: la nécessité en droit international, Grenoble, 2007).

¹⁴¹ Qur'an 2:173: Qur'an 6:119: Qur'an 6:145: Qur'an 16:115.

¹⁴² Qur'an 2:173.

¹⁴³ Bernard G Weiss, 'Interpretation in Islamic Law: The Theory of Ijthihad' (1978) 26 *American Journal of Comparative Law* 199, 204 explains that:

If a man cannot achieve absolute knowledge of God's commandments, he may rely on his own learned judgment regarding what God requires. Accordingly, Sunni jurisprudence affirms the principle that considered opinion is binding in matters of law: *al-zannu wajibu'littibaa' fi'l-shar*.

In fact, the correct and timely use of concessions of all forms, including those concessions available through necessity in the practice of faith by an individual is lauded: Ali Muhammad As-Sallaabee, *The Biography of Aby Bakr As-Siddeeq* (2007), 165. The reason for considering this behaviour meritorious is because it shows the modesty of the human in acknowledging his or her frailty.

Key Terms that Circumscribe the Notion of Apostasy in Islam

Apostates are only one category of people described in the Qur'an. In examining the concept of apostasy and its legal consequences, it is necessary first to examine other key categories of people, their legal obligations and the importance that the Qur'an attaches to such categorisation. Some of these important categories are now identified and discussed.

What is Islam? Who is a Muslim?

The word Islam derives from the Arabic root (سلم peace) and means 'to submit'.¹⁴⁴ All Qur'anic Prophets urged humanity to submit to God's Will¹⁴⁵ and by this definition they all taught Islam, and their followers therefore became Muslims, or 'those who submit'. For clarity however, the Qur'an variously refers to the followers of the earlier Prophets as Jews, Christians or the People of Noah.

In this paper Islam is the religion taught by the Prophet Mohammed, contained in the Muslim Covenant and his follower, a Muslim.¹⁴⁶ The Qur'an states that, God chose the name 'Muslim' to describe the followers of the Prophet Mohamed.¹⁴⁷ The Qur'an however makes a key distinction between a Muslim, who merely

¹⁴⁴ In a Qur'anic context 'to submit' is to submit to the Will of the One True God. There is a distinction between Muslim (one who has submitted to God's will: Rodolphe J. A. De Seife, *The Shar'ia: An Introduction to the Law of Islam* (1993), 50.) and a *mu'min* (one who believes) as discussed *infra*. See also Qur'an 49:14:

The desert Arabs say "We believe." Say "You have no faith; but ye (only) say 'We have submitted our wills to God.' For not yet has Faith entered your hearts.

¹⁴⁵ Qur'an 40:75; Qur'an 4:164.

¹⁴⁶ Qur'an 22:78. The word '*muslim*' [which derives from the same root as Islam [i.e. سلم] in Arabic is masculine, singular. In its general English usage the word covers both the male and the female, i.e. *muslim* (m.s) and *muslima* (f.s). The plural used in this paper is the anglicised plural 'Muslims' and will be used to represent the Arabic, *muslimeen* (m.p) and *muslimaat* (f.p). Further, the term Sunni (Muslim or Islam) used in this paper refers to the four major recognised Sunni schools. The term Shi'i (Muslim or Islam) refers to the *Jafiri* or Twelver and the two other recognised *Shi'i* schools. The generic English term 'Muslim' as used here includes Sunni and Shi'i, male and female Muslims.

submits, and a *mu'min*, who truly believes, and this distinction has significant legal implications. The Qur'an describes a believer inter alia as one possessing the 'inner' quality of *taqwa* described above.¹⁴⁸

To become a Muslim, one consciously and freely has to make the 'two declarations', cognisant that this act formally enters one into a binding Covenant with God.¹⁴⁹ The Covenant imposes binding obligations. The main obligation of interest in this paper is a key term of the Covenant, that having freely accepted it, one may never repudiate the Covenant.¹⁵⁰ That is, while acceptance of the Muslim Covenant is voluntary,¹⁵¹ once adopted, it is unilaterally binding, as with any other unilateral contract,.

Muslims Collectively: The *Umma*

Muslims collectively are called the *umma*, or the Muslim community,¹⁵² which, according to the Qur'an, forms a single entity¹⁵³ of believing men and believing women who are friends/protectors of each other and who command good and forbid evil.¹⁵⁴ The Qur'an describes the *umma* as the mid-most community, i.e.

¹⁴⁷ Qur'an 22:78.

¹⁴⁸ Qur'an 42:37-39.

¹⁴⁹ See n1.

¹⁵⁰ Qur'an 49:14.

¹⁵¹ Qur'an 2:256.

¹⁵² Qur'an 2:143; Qur'an 22:41.

¹⁵³ Qur'an 49:10;

Ibrahim Abdulla al-Marzouqi, *Human Rights in Islamic Law* (2nd ed, 2001), 521, Article 2 *Constitution of Medina*; Noel J Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (1969), 21 asserts that:
Islamic political theory rested on the idea of a universal Muslim community or *umma* [...]

¹⁵⁴ Qur'an 42:37-39; Qur'an 3:104 includes the relevant phrase, *يأمرون بالمعروف وينهون عن المنكر*, 'ya'muru_na bil ma'ru_fi wa yanhauna 'anil munkar' which is translated as 'commanding right and

one that avoids the extremes, *because* it is upright and equitable.¹⁵⁵ The *Sunna* notes further, that Islam ‘is easy [and consequently], that the *umma* is against extremism of any form’.¹⁵⁶ As An-Naim notes however, the *umma* is not a ‘State’.¹⁵⁷

The *umma* comprises two broad classes; Muslim and *dhimmi*.¹⁵⁸ Lands in which Muslims hold political power are sometimes referred to as *dar al-Islam*¹⁵⁹ and the rest of the world is divided between *dar al-sulh* (treaty partners)¹⁶⁰ and *dar al-harb* (land of war).¹⁶¹ The terminology is archaic but is sometimes still employed and for this reason examined briefly below.¹⁶²

forbidding wrong’. For an in-depth analysis of this command see Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (2001).

¹⁵⁵ Qur’an 2:143. (وس ط) *wa sa tha*, midmost). Ahmad Hassan, *The Doctrine of Ijma' in Islam: A Study of the Juridical Principle of Consensus* (2002), 40.

¹⁵⁶ Noel J Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (1969); Muhammad Al-Mughirah al-Bukhari, *The Translations of the Meaning of Sahih al-Bukhari Vol. 1* (1976), 34. The notion that “Islam is easy” derives from a prophetic *hadith*, for example that “God intends facility and ease for you”

[يريد الله بكم اليسر ولا يريد بكم العسر]: Mohammad Hashim Kamali, *Equity and Fairness in Islam* (2005), 24.

¹⁵⁷ According to Abdullahi Ahmed An-Na’im, *Islam and the Secular State: Negotiating the Future of Shari`a* (2008), 271.

¹⁵⁸ N Shah Shahid, *Islamic Terms Dictionary* (1996). A ‘*dhimmi*’ is defined as a non-Muslim living under the protection of a Muslim ruler; Patricia Crone and Michael Cook, *Hagarism: The Making of the Islamic World* (1977), 7 describe the Jewish community in Medina as part of the *umma*.

¹⁵⁹ The terms *dar al-Islam* (the land of peace) and *dar al-harb* (the land of war) were coined later than the term *umma*. Note that the term *umma* is based on the language of both the Qur’an and the *hadith* of the Prophet. While not discounting non-Qur’anic/hadith terminology, it is noted that in coining the term *dar al-Islam* jurists must have meant to distinguish the term from the meaning of *umma*.

¹⁶⁰ Majid Khadduri, *War and Peace in the Law of Islam* (1955), 144.

¹⁶¹ H. A. R. Gibb and J. H. Kramers (eds), *Concise Encyclopaedia of Islam* (4th ed, 2001), 68.

¹⁶² This terminology of *dar al-Islam* and *dar al-harb* is quite anachronistic but is nonetheless retained here as it is still used, although perhaps less frequently. In questioning the appropriateness of the terms *dar al-Islam* and *dar al-harb*. Taha Jabir al-Alwani, *Ijthihad* (1993), 28. rightly points out:

[Muslim states’] almost total dependence on others [thus making war with the West quite impractical and states further] that most of the Muslims who settled in the West did so because, in their own countries, they were deprived of their civil liberties and freedoms, security and human rights. People could not – and cannot –, in certain cases even organise congregational *salah* [prayer]. And it often happens that when one or two or a group of people sit together in a mosque to read some Qur’an they are accused of belonging to a clandestine movement [...]

The political union of Muslims ceased in around 750 AD and was never fully restored.¹⁶³ Ford posits that this worldview of a 'unitary theocratic state [which has been succeeded by] multiple fractious states [has] exacerbated a radical bifurcation in Islam between sacred law and secular law'¹⁶⁴. However, in spite of the break-up of the political union,¹⁶⁵ Muslims sometimes still refer to the term *umma* in aspirational terms.¹⁶⁶ The idealised Muslim nostalgia for a 'golden age', now long past, often takes a sterilised view of history.

Dar al-Islam - The Domain of Peace

In a geographical sense, *dar al-Islam* comprises the lands ruled by notionally Muslim rulers, ideally, where the *Shari'a* is the law of the land and justice prevails. The *umma* is not necessarily identical with *dar al-Islam*, as Islam accepts that Muslims will live in minority situations. Muslims living as minorities are also legitimately part of the *umma*.¹⁶⁷

¹⁶³ Rudolph Peters, *Jihad in Classical and Modern Islam* (1996), 5.

¹⁶⁴ Christopher. A. Ford, 'Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis' (1995) 30 *Texas International Law Journal* 499, 500.

¹⁶⁵ Rudolph Peters, *Jihad in Classical and Modern Islam* (1996), 5.

¹⁶⁶ Please refer for example to: Resolutions On General, Statutory And Organisational Matters Adopted By The Twenty-Fifth Session Of The Islamic Conference Of Foreign Ministers (Session For A Better Future For The Peoples of The Islamic *Umma*) Doha, State of Qatar, 17-19 Dhul Quida, 1418H 15-17 March, 1998. <http://www.oic-un.org/25icfm/25org.htm> [Accessed 11 May 2007]; Khaled Ali Beydoun, 'Dar Al-Islam Meets "Islam as Civilization": An Alignment Of Politico-Theoretical Fundamentalisms And The Geopolitical Realism Of This Worldview' (2004 -2005) 4 *UCLA Journal of Islamic and Near Eastern Law* 143, 146, however, refers to this phenomenon as 'token kinship'. This view that the concept of an *umma* was a convenient political ploy is given some credence and supported by Yaroslav Trofimov, *The Seige of Mecca: The Forgotten Uprising in Islam's Holiest Shrine* (2007), 21:

Nasser's idea of secular Arab nationalism, which viewed Saudi Arabia as a feudal relic that should dissolve into a single pan-Arab state sharing oil riches equally among all its citizens, presented a mortal danger to al-Saud. There was only one alternative to this pan-Arab dream – the idea of a global Islamic nation, the *ummah*.

¹⁶⁷ As happened from the very early history of the Muslims, a small part of the Muslim community in Mecca (where they were also a minority) sought sanctuary from Meccan persecution in the Christian

Another meaning of *dar al-Islam* that one can construct from the Qur'an is one that lends meaning not so much to a geographical entity but rather a state of spiritual attainment. In this context the (major) *jihad*, which is mandatory on all Muslims,¹⁶⁸ aims primarily at the taming the animal soul (*nafs al-ammara*).¹⁶⁹ The *Shari'a* provides a path and a discipline by which this animal soul can tame itself.¹⁷⁰ The greater *jihad* properly undertaken begins to elevate the soul to a point of spiritual development where a soul questions its own *raison d'être*, and becomes *nafs al-lawama*,¹⁷¹ a self-reproaching soul. As further spiritual development occurs the soul reaches the point of peace and satisfaction (*nafs al-mutmainna*¹⁷²). When souls reach this point of spiritual development they will not want, nor create, mischief and will be at peace. Hence the term *dar al-Islam* (the abode of peace) when viewed from this perspective is not confined geographically but is a collective of (disparate) souls at peace with themselves, their surroundings and their Creator and who recognise each other with mutual affection.¹⁷³ Therefore, when a soul has exerted itself to the utmost and likewise encouraged others to do so, so that every soul of *dar al-harb*, which by definition is at war with, and wrongs itself,¹⁷⁴ may come to be at peace and ipso facto become part of *dar al-Islam*. The better view therefore, is that *dar al-Islam* is where a soul can practise faith freely and without hindrance, exercise its God given right to free will, irrespective of the actual religious persuasion of the leader of or the prevailing orthodoxy of the geographical area in question. Conversely *dar al-harb* is where Muslims (and others) are

Empire of Abyssinia, a practice approved by the Prophet: Adil Salahi, *Muhammad: Man and the Prophet* (2002), 123.

¹⁶⁸ Qur'an 25:52.

¹⁶⁹ Qur'an 12:53.

¹⁷⁰ Qur'an 31:18; Qur'an 25:63.

¹⁷¹ Qur'an 75:2.

¹⁷² Qur'an 89:27.

¹⁷³ Qur'an 8:62-63.

persecuted or are unable to practise or reject faith openly even if that entity is notionally ruled by a Muslim.¹⁷⁵

Other Qur'anic Classes of People

In addition to Muslims and *dhimmis*,¹⁷⁶ the Qur'an inter alia refers to believers, Prophets,¹⁷⁷ followers of the previous Prophets¹⁷⁸ (or Scriptuaries¹⁷⁹), disbelievers (*kafir*), polytheists (*mushrik*), hypocrites (*munafik*) etc. These are all categories that apply to the two species endowed with free will (1) the *djinn*, genies¹⁸⁰ and (2) *ins(an)*, humanity. The significance of these categories is now addressed briefly. In practice, the *djinn* are of no particular significance.¹⁸¹ This multiplicity, particularly of religious traditions, leads to the recognition by Islam of a plurality of legal traditions and has a direct bearing on apostasy. This view of religious legal plurality may prima facie be viewed as uncritical acceptance but is in principle no different from the legal plurality that exists within the European Union or more broadly the UN.

Dhimmis may follow their own respective Covenants.¹⁸² Historically there was some fluidity in practice, as for example Christians sometimes followed Muslim

¹⁷⁴ Qur'an 7:23.

¹⁷⁵ Majid Khadduri, *War and Peace in the Law of Islam* (1955), 158.

¹⁷⁶ N Shah Shahid, *Islamic Terms Dictionary* (1996). A '*dhimmi*' is defined as a non-Muslim living under the protection of a Muslim ruler. Patricia Crone and Michael Cook, *Hagarism: The Making of the Islamic World* (1977), 7 describe the Jewish community in Medina as part of the *umma*.

¹⁷⁷ The Qur'an 10:47, refers Prophets as sent to every people. Of these the Quran only names 25 Prophets.

¹⁷⁸ Qur'an 2:62; Qur'an 5:69.

¹⁷⁹ That is: *ahl al-kitab* or literally the people of the book.

¹⁸⁰ See for example Qur'an 51:56:

'*djinn* and *insaan* (people) were created only for worship' [...].

¹⁸¹ The *djinn* and their antics are an almost inseparable part of the lives of people of some Muslim societies, see generally William Dalrymple, *City of Djinn: A Year in Delhi* (1994).

¹⁸² Qur'an 5:48.

legal schools in Sufi circles without formally adopting the Muslim Covenant.¹⁸³ Further, in practice, customs (*adaat*) of peoples other than Scriptuaries were also allowed to coexist with Islam.¹⁸⁴

Muslims, ‘Heresy’ and Hypocrisy

There does not appear to be either a *Shari’a* or etymological connection between the concepts of Muslim and heresy.¹⁸⁵ The use of arabicised words and concepts such as ‘heresy’¹⁸⁶ require clarification and elucidation for legitimate use in a *Shari’a* context. The Qur’anic phrase used to describe those who ‘submit’ but will not submit *wholeheartedly* is that they ‘will not believe’.¹⁸⁷ That is, while failure to submit wholeheartedly prevents one from reaching the higher station of a ‘believer’, one’s previous standing as a Muslim nonetheless remains.¹⁸⁸ Further, the Qur’an refers to errant Muslims as *fasik, or violators of Islamic law*,¹⁸⁹ and juxtaposes the spiritual attainment of a believer against that of a *fasik*.¹⁹⁰ That is, it is not easy to displace the status of a person as a ‘Muslim’. The significance of these distinctions is that the Qur’an reserves the true knowledge of what is in people’s hearts to the Creator and that judgment on matters of ‘submission’ and ‘faith’ should find no

¹⁸³ Idris Shah, *The Sufis* (1964), 132.

¹⁸⁴ Qur’an 18:90 – 92. (The example of the Prophet Zul Quarnain permitting the people to remain in their natural or indigenous state); See also generally: M. B. Hooker, *Adat Laws in Modern Malaya: Land Tenure, Traditional Government and Religion* (1972); Ibrahim Abdulla al-Marzouqi, *Human Rights in Islamic Law* (2nd ed, 2001), 523.

¹⁸⁵ E W Lane, *Arabic English Lexicon Volume 2* (1984), 2397; The term *fasik* appears to go to a person’s actions (ie one might think/believe that adultery is forbidden under religious law but does so anyway) while a heresy goes to belief, ie one does not consider/believe such action to be wrong whether or not one does or does not engage in adultery.

¹⁸⁶ Milton J Cowan (ed), *The Hans Wehr Dictionary of Modern Written Arabic* (1980). See هرطقة *heresy*.

¹⁸⁷ The Arabic لا يؤمنون is rendered into English as “(they) will not believe”.

¹⁸⁸ Qur’an 49:14.

¹⁸⁹ E W Lane, *Arabic English Lexicon Volume 2* (1984), 2621.

¹⁹⁰ Qur’an 32:18:

Are believers no better than the rebellious or wicked? They are not equal.

temporal jurisdiction. This is a significant issue in the legal consideration of apostasy.

The Qur'an defines 'those who say that they believe in God and the last day but are 'not at all believers'¹⁹¹ as hypocrites.¹⁹² Again, the Qur'an juxtaposes and contrasts the absence of spiritual attainment of a hypocrite with that of a believer and not to that of a 'Muslim'.¹⁹³ Thus theologically, while a hypocrite cannot ipso facto be considered a believer, nonetheless can claim to be a 'Muslim'.¹⁹⁴ However, individual believers and hypocrites are known (with certainty) only to God.¹⁹⁵ That is, while some of their acts may show hypocrites as such, it is not a matter that humans can decide upon with any degree of certainty,¹⁹⁶ and thus while both apostasy and hypocrisy are serious *Shari'a* crimes they must remain outside temporal jurisdiction.¹⁹⁷

Takfir

The issue of who is or is not recognised as 'a Muslim' can in cases become a problematic practical temporal issue.¹⁹⁸ This is because some Muslims seek to classify others as heretics/non-Muslims/apostates for various reasons.¹⁹⁹ One

¹⁹¹ Qur'an 2:8.

¹⁹² Qur'an 12:08, 33n.

¹⁹³ Qur'an 2:8.

¹⁹⁴ The practice of the Prophet was to leave "hypocrites" free to their activities as was the case of the 'king' of the hypocrites, Abdullah ibn Ubayy and his followers. Adil Salahi, *Muhammad: Man and the Prophet* (2002), 310.

¹⁹⁵ Qur'an 29:11.

¹⁹⁶ Qur'an 9:69.

¹⁹⁷ Adil Salahi, *Muhammad: Man and the Prophet* (2002), 310.

¹⁹⁸ It is not surprising that the contemporary *ulama* of Pakistan could not agree on the definition of a Muslim, not because the Pakistanis suddenly discovered a gaping hole that had eluded scholars for 1400 years but precisely because of the 'political nature' of these determinations: Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (2006), 50.

¹⁹⁹ See for example, Brynjar Lia, *Architect of Global Jihad: The Life of al-Qaida Strategist Abu Mus'ab al-Suri* (2007), 159.

reason is because fighting 'heretics' is religiously more acceptable and this remains true in the contemporary world as it was in the past.²⁰⁰ The declaration that a person is a non-Muslim is done by a process called *takfir*,²⁰¹ and although theologically strongly discouraged,²⁰² is not uncommon.²⁰³ This process of *takfir* goes back in Islamic history to quarrels between governments and their opponents.²⁰⁴ Bin Laden for example declares the Saudi government as apostate based on Qur'an 5:44²⁰⁵ '[because in his view the Saudis] don't apply the *Shari'a*,²⁰⁶ although Saudi Arabia's claim that *Shari'a* is the law of the land is not generally disputed.²⁰⁷ There is an almost universal consensus among Muslims that the Saudis and other Muslim rulers are Muslims. The importance of this somewhat

²⁰⁰ Rudolph Peters, *Jihad in Classical and Modern Islam* (1996), 5. As a contemporary use of *takfir*, Mustafa Qadri, 'Al-Qaeda, our kin', *The Canberra Times* (Canberra), 17 January 2009, B7, reports from an interview of a Taliban leader in Pakistan, in reference to the 54 people killed at the Marriott Hotel bombing in Islamabad in September 2008 where many Muslims were also killed. The leader the author referred to as Mulla Noor Allam responded: "We are only killing the hypocrites, they are not Muslims."

²⁰¹ Lane defines *takfir* as the process of declaring someone a disbeliever (*kafir*) because he veiled or covered something E W Lane, *Arabic English Lexicon Volume 2* (1984), 2620, which in this context is the covering of the 'truth'. Lane also describes *takfir* as the process by which you annul ones sins by doing something good نكفر الذنب E W Lane, *Arabic English Lexicon Volume 2* (1984), 2620, which is the annulling of the 'sin of the rejection of Islam' by the good deed of 'excommunicating the person in question'.

²⁰² E W Lane, *Arabic English Lexicon Volume 2* (1984), 2620. This process is discouraged and is captured in the Arabic saying quoted in Lane which states "Don't classify as a disbeliever anyone who turns to your direction of prayer (i.e. another Muslim)" [لا تكفر احدا من اهل قبلك].

²⁰³ Other examples include the declaration of Egyptian novelist Naguib Mahfouz or British/Indian author Salman Rushdie, as apostates; For a description of the *takfiri* ideology see Robert Baer, *The Devil We Know: Dealing With the New Iranian Superpower* (2009), 123-124.

²⁰⁴ Rudolph Peters, *Jihad in Classical and Modern Islam* (1996), 7. See also the discussion of Muslims Collectively: The *Umma infra*, 24.

²⁰⁵ Qur'an 5:44:

[...] If any do fail to judge by (the light of) what God hath revealed they are (no better than) unbelievers.

²⁰⁶ Rosalind Gwynne, *Al-Qa'ida and al-Qur'an: The "Tafsir" of Usamah bin Ladin* (2001). <web.utk.edu/~warda/bin_ladin_and_quran.htm>, 6 December 2004. 13-14. During the Iraqi invasion of Kuwait however, when Saudi Arabia itself feared that it might have also been overrun by Saddam Hussein's regime, Bin Laden offered to mobilise his forces to defend the Saudi Government and to evict the Iraqis from Kuwait: Sally Neighbour, *In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia* (2004), 64.

²⁰⁷ Bin Laden therefore, arguably means that the Saudi government does not in his subjective view apply the *Shari'a* in its entirety. On Bin Laden's analysis and conclusion the vast majority of Muslim governments would be classified as *murtad* (apostate).

low threshold for (becoming and) remaining a Muslim is that the presumption in favour of the validity of the claim 'of being Muslim' is not easily displaced and is an important issue in the 'declaration' of individuals as apostates.

Wahhabis and Neo-Salafis

*Wahhabism*²⁰⁸ is one of the more puritanical contemporary strains of Islam.²⁰⁹ Individuals in wealthy Arab nations have at times used their political power and wealth for funding it, indirectly through 'charities'²¹⁰ and directly through support for groups such as the Taliban.²¹¹ *Wahhabism's* legitimacy in Saudi Arabia is enhanced by the UK's 'close',²¹² the US's 'special relationship',²¹³ and Saudi

²⁰⁸ Daryl Champion, *The Paradoxical Kingdom: Saudi Arabia and the Momentum of Reform* (2003), 26n; Khaleed Abou El-Fadl, 'Muslim Minorities and Self-Restraint In Liberal Democracies' (1996) 29 *Loyola of Los Angeles Law Review* 1525, 1527. describes the emergence and relationship between the two groups as: [contemporary schools] such as the *Wahhabis* of Saudi Arabia and the synchronist school of the *Salafis*.

²⁰⁹ Khaleed Abou El-Fadl, *The Great Theft: Wrestling Islam from the Extremists* (2005), 95.

²¹⁰ CRD Report For Congress, *Saudi Arabia Terrorist Funding Issues*, Report No RL32499, Library of Congress (2004), 2. Saudi Arabia denied this claim [see CRD Report For Congress, *Saudi Arabia Terrorist Funding Issues*, Report No RL32499, Library of Congress (2004), footnote 7. The 9/11 Commission Report, *Final Report of the National Commission on Terrorist Attacks upon the United States Authorized Edition*, (2004), 171. 'found no evidence that the Saudi government as institution [...] funded Al Qaeda'. [Emphasis added].

²¹¹ The Taliban were recognised as the legitimate government of Afghanistan only by three pro-Western governments, Saudi Arabia, Pakistan and the United Arab Emirates; see {, *QAAH OF 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) [2004] FCA 1448 para. 26 per Dowsett J. The 19th/20th Centuries have evolved some puritanical strains of Islam such as the *wahhabi* which at times appear utterly to disrespect other faiths and traditions. This was evident in the destruction of the Bamiyan Statues in Afghanistan by the Taliban:

<http://www.endex.com/gf/buildings/liberty/worldstatues/.%5CBamiyan%5Cbamiyan.htm> [18 May 2006]. The Qur'an requires Muslims not to revile the sacred icons of other religious traditions. Qur'an 6:108: Clearly many in the Taliban were not so arrogant as to consider that they had hit upon a 'truth' that had eluded the best of their forbearers. According to Luke Harding, 'How the Buddha got his Wounds', *The Guardian* (London), Saturday 3 March 2001):

In July 1999 Mullah Omar [The leader of the Taliban] issued a decree that said the Bamiyan Buddha should be preserved. There were, he pointed out, no Buddhists left in Afghanistan to worship them.

The Taliban used the situation to demonstrate its anger and highlight the world's hypocrisy towards Afghanistan's starving children: Sahar Kassaimah, *Afghani Ambassador Speaks At USC* (2001) <<http://www.islam-online.net/english/news/2001-03/13/article12.shtml>>, 25 May 2006.

²¹² David Leigh and Rob Evans, 'National interest' halts arms corruption inquiry', *The Guardian* (London), Friday 15 December 2006.

Arabia's dependence on this support.²¹⁴ There is thus a perception in the Muslim world that while on one hand condemning 'Islamic fundamentalism', in practice the US and its allies favour *Wahhabism* although this support is based on a practical rather than on an ideological basis.²¹⁵

Wahhabism universalised the particular Bedouin culture, initially of the Nejd, but was later developed to include a broader Arab culture, its adherents now claiming to represent 'true Islam'.²¹⁶ The Encyclopaedia of Islam refers to this process as the 'Arabisation' of Islam. The *Wahhabi* now tend to call themselves *salafi* and the two terms, once quite distinct and different, have since the 1970's have come to be used synonymously.²¹⁷

El-Fadl notes that *salafi* groups take a very selective, abusive and restrictive view of the Hanbali School, one that opportunistically concentrates on sections of the works of some great Hanbali scholars but arguably for pragmatic reasons ignore other great Hanbali scholars such as ibn 'Aqil and al-Tufi,²¹⁸ rendering *salafi* legal opinions somewhat unbalanced. Bin Laden particularly favours the works of Ibn Taymiyyah²¹⁹ and ibn Qudama who are both great Hanbali scholars.²²⁰ This idiosyncratic use of 'methodology' has allowed the *salafi* selectively to ignore

²¹³ Daryl Champion, *The Paradoxical Kingdom: Saudi Arabia and the Momentum of Reform* (2003), 281 n275.

²¹⁴ Sami Zubaida, *Law and Power in the Islamic World* (2003), 155; James Risen, *State of War: The Secret History of the CIA and the Bush Administration* (2006), 173, describes the US view of Saudi support for terrorism as being 'in denial'.

²¹⁵ Anthony M Cordesman, *Saudi Arabia: Guarding the Desert Kingdom* (1997), 194-196.

²¹⁶ Khaleed Abou El-Fadl, *The Great Theft: Wrestling Islam from the Extremists* (2005), 52.

²¹⁷ Ibid. 75, 79.

²¹⁸ Ibid. 152.

²¹⁹ Bruce Lawrence (ed), *Messages to the World: The Statements of Osama Bin Laden* (2005), 5, footnote 7.

²²⁰ Ibid., 60-61, particularly 8n.

Islamic precedent. Further, this opportunistic use of law has sometimes resulted in the justification of cruel methods for killing not only but principally Muslims, including children, who were first, and illegitimately,²²¹ declared heretics or apostates.²²²

Disbelievers

A disbeliever (*kafir*²²³) is an individual who has 'seen the truth' but is unwilling to enter into a Covenant. Notwithstanding the reasons, those who have not accepted the Qur'anic Covenant are not bound by its specific terms. In this case, the Prophet's practice was, when necessary, to subject an accused to the individual's own law by judges of that tradition.

Now that the key Qur'anic categories of people have been identified, the significance of these categories with respect to the law of apostasy is examined through the analytical framework of the *Shari'a* view of humanity's *raison d'être*, the answers which lie in the concept of free will and the obligation of worship.

²²¹ Under the *Shari'a*, legal responsibility does not attach until a child has reached the age of discernment, which can vary according to the schools. For example Shi'i Muslims are classified as 'heretic' by the Wahhabi, on the one hand, while on the other hand according to Bernard K Freamon, 'Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History' (2003) 27 *Fordham International Law Journal* 299, 360:

those Wahhabis who now advocate self-annihilatory violence have appropriated the theology and methodology of these behaviours from the Shi'a.

²²² Khaleed Abou El-Fadl, *The Great Theft: Wrestling Islam from the Extremists* (2005), 55.

²²³ The word *kafir* literally means one who has covered the truth. The triliteral forming the word (ك ف ر) *kafara* means to cover. In addition to the rejecters of Islam there are also rejecters or *kafirs* from among the People of the Book (Jews and Christians etc): Qur'an 98:6.

The Centrality of Free Will and Law to the *Shari'a*

The centrality of law to Islam is often acknowledged.²²⁴ However, the following short analysis attempts to demonstrate the centrality of free will to Islam from a *theological* perspective and is crucial to the broader understanding of apostasy.

When David, a Prophet in the Islamic tradition, asked God:²²⁵

“O Lord! Why did you cause creation to come into being?” God replied “I was a hidden treasure and I wanted to be Known, so I created creation”

Thus God said ‘Be’²²⁶ and the universe (used here as a synonym for creation) began to establish over ‘six days’.²²⁷ To be ‘Known’ however, it appears required an un-coerced recognition by a self-aware and free willed being.²²⁸ To this end the Qur'an relates how ‘free will’ was offered to every created specie in turn,²²⁹ but foolishly and unjustly to itself,²³⁰ was accepted by humanity (and the *djinn*).²³¹ Thus each soul is bound by its ancient acceptance and recognition of God’s

²²⁴ Sami Zubaida, *Law and Power in the Islamic World* (2003), ii; Wael B Hallaq, 'The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse' (2002) 2 *UCLA Journal of Islamic and Near Eastern Law* 1, 1; Joseph Schacht, *An Introduction to Islamic Law* (1975), 1.

²²⁵ Javad Nurbakhsh, *Traditions of the Prophet* (1981), 13.

²²⁶ Qur'an 36:82. In the Qur'an however the word ‘BE’ (*kun*, كُن) is a continuing command (i.e. the imperfect tense) and Muslims refer to our present life as being between (بين) the ك (the ‘b’, the α , the start) and the ى (the ‘e’, the ω , the end). Genesis 1:1 – Genesis 2:25.

²²⁷ The Qur'an 70:54 states that a ‘day’ in God’s reckoning is several [50,000] thousand years on the human time scale: Qur'an 70:4.

²²⁸ Qur'an 7:172 and footnote:

When thy Lord drew forth from the children of Adam, from their loins their descendants, and made them testify concerning themselves (saying): "Am I not your Lord (who cherishes and sustains you)?" They said: "Yea! We do testify!" (This) lest ye should say on the Day of Judgment: 'Of this we were never mindful.'

²²⁹ Qur'an 33:72.

We did indeed offer the Trust (or choice) to the Heavens and the Earth and the Mountains: but they refused to undertake it being afraid thereof: but man undertook it; he was indeed unjust and foolish.

²³⁰ Ibid.

²³¹ Qur'an 7:30.

overlordship.²³² Both species were forewarned of the horrific consequences of failure and the ecstatic joys of the ‘correct’ use of free will. From this theological perspective which underpins the *Shari’a* law, apostasy is not a reasonable option because each soul, having individually spoken with God, ipso facto cannot legitimately deny God,²³³ but similarly, for obvious reasons, is only justiciable by God. This life is not the end but the start of a process. In order to ‘test’ the use of human free will, humanity is sent down to Earth, born as children with no memory of pre-birth. God sends Prophets however inter alia to remind humanity of its acceptance of free will and that each individual will be judged on the Day of Judgment.

Thus, some unspecified time later, ‘human history’ begins. The obligations related to the correct use of free will, the ultimate object of which is freely to recognise the Creator, is a key object of human life on Earth.²³⁴ To this end, life on earth is the ‘test’ where each individual is allocated a sojourn with the infrastructure necessary (*rizq*)²³⁵ to discharge his or her individual obligations and in doing so to recognise God as Creator.

²³² Qur'an 7:172.

²³³ The Qur'an in several places uses the word (or related word) *mukarabun* [المقربون] to who draw close (to God): e.g. Qur'an 83:28 to describe success and describes this as a *fawzul azim* “supreme achievement” [فضلاً من ربك. ذلك هو الفوز العظيم]: Qur'an 44:58. On the other hand it promises (in many places) a painful chastisement for those who deny or reject the “Truth”.

²³⁴ Qur'an 7:172.

²³⁵ *rizq* is a word used to describe a very complex Qur'anic concept and includes all human sustenance and includes food etc. The Qur'an states that every creature has its *rizq*/sustenance allocated. Qur'an 11:6:
There is no moving creature on earth but its sustenance depends on
God: He knows the time and place of its temporary deposit: all is in a
clear Record.

See also Qur'an 15:20; Qur'an 17:31; Qur'an 29:60 Qur'an 51:58.

Individual obligations which discharge this ancient acceptance of free will are formally articulated in the Covenant of each Prophet and enable an individual to achieve this 'ultimate' goal. Thus a believer choosing to follow Prophets Moses or Abraham will adhere to the Mosaic or Abrahamic Covenant.²³⁶ The Qur'anic reference to a Covenant is similar in function, although perhaps not in content, to the Biblical Covenants.²³⁷ 'Correct' performance against the Covenant of any Prophet leads to 'success'.²³⁸ Human history as we know it will end on the Day of Judgment, when every human is judged as against their individual Covenant obligations and the individual's success or failure publicly proclaimed.²³⁹

Free Will

In the beginning there were, broadly speaking, two types of Covenant established. The first Covenant constitutes the immutable physical laws of nature to which every part of creation is subject, containing laws which bind absolutely but separately.²⁴⁰ It is essential to sustain life in a form that can appear independent of a Sustaining Being. This 'infrastructure' is necessary for the life of each soul in its physical form,²⁴¹ and ipso facto is not judged.²⁴²

²³⁶ Qur'an 2:93.

²³⁷ Genesis 9:1-7 for example God's Covenant with the Prophet Noah and his followers.

²³⁸ Qur'an 2:62, which is repeated at Qur'an 5:69, states:

Those who believe (in the Qur'an) and those who follow the Jewish (Scriptures) and the Christians and the Sabians and who believe in God and the last day and work righteousness shall have their reward with their Lord; on them shall be no fear nor shall they grieve.

²³⁹ Qur'an 36:51.

²⁴⁰ What is meant by 'separately' is that each genus is bound by law but is bound differently but absolutely. For example, most fish will not survive when exposed to air for long periods but such exposure alone will not kill a bird although both species needs air to survive.

²⁴¹ Although the soul in Arabic is always feminine, humanity (and the other species with souls) in its earthly form comprise both genders.

²⁴² That is, while a person is questioned by God about how they used their resources, they are not questioned about the air they used or the gravity that held them in place on earth etc.

The second, is a Covenant of a Prophet that is freely adopted and requires performance inter alia in the form of one sagely exercising 'choice'. Each free-willed individual independently decides the extent of their own (moral) performance based on a free recognition of the Creator. The Qur'an further states that God, in mercy, sent revelation through Prophets to warn, to remind and to invite humanity towards fulfilling the binding obligations resulting from its ancient decision to accept free will. Thus, for Muslims, the *Shari'a* of the Prophet, and in its various manifestations, of all Prophets, is the law *necessary* to lead an individual to the 'right way', with respect to the use of free will.

The Omnipotent God who is outside time,²⁴³ by definition knows all outcomes, and this concept is sometimes referred to as *qada wa qadr* (قضاء و قدر).²⁴⁴ Earthly life however, is given to humanity freely to play out its individual decisions so that judgment is fair, is accepted as fair by every individual, and will be an identical outcome for each individual no matter how many times this 'experiment' is repeated. While nothing turns on this point, it appears to strike a chord with the sentiment one often hears that; 'If I had my life over I would probably make the same choices'.

In 'acting out' free will, humans will interact with the rest of creation. This interaction creates the opportunity for doing both good and wrong. In dealing with

²⁴³ Qur'an 103:1-3. Time is a 'created thing' in Islam and 'time' as we know it, will end on the Day of Judgment.

²⁴⁴ Sami Zubaida, *Law and Power in the Islamic World* (2003), 24. This term (*qada wa qadr* قضاء و قدر) is sometimes translated as predestination although as a concept predestination is prima facie inconsistent with free-will and thus clearly inconsistent with the notion of a just God: Qur'an 41:46. The phrase *qada wa qadr* قضاء و قدر does not appear in the Qur'an as such but is a concept synthesised from two other concepts. The word *qada* (قضاء) appears at Qur'an 2:117; Qur'an 3:47 and Qur'an 19:35.

'crimes/wrongs', there is a well known axiom in Islam that God will forgive unstintingly of 'crimes/wrongs' against God²⁴⁵ although 'crimes/wrongs' committed against others must be settled as between them.²⁴⁶ Crimes against persons, when proven, may be punished according to the law or forgiven by the injured party (or their legal representative).²⁴⁷ Apostasy is a crime against God, thus can only be forgiven or punished by God and as required by the Qur'an, does not find temporal jurisdiction.

What is Apostasy in Islam?

Apostasy is the renunciation of faith. Some key questions associated with apostasy under the *Shari'a* are: What does apostasy mean in practice? How is it established and, unless renunciation is done by the individual while free from duress, who is competent to declare apostasy?

As discussed, on becoming a Muslim one undertakes to do so wholeheartedly, consciously and freely, and thereby undertakes not ever to renounce the faith.²⁴⁸

As Covenant obligations inhere on becoming a Muslim, the question becomes:

²⁴⁵ This is demonstrated in the Qur'an by the superlative attributes of God, '*al-Rahman*' and '*al-Raheem*' the most compassionate and the most merciful. The 114 Chapters (except Chapter 9) of the Qur'an start with the formula including these two attributes. A specific discussion of why Chapter 9 is an exception is outside the scope of this paper. The *Shari'a* recognises the sometimes human desire for vengeance but urges individuals to overcome this primal desire by offering, in the Islamic view a significantly better 'exchange', for forgoing the substantive right of revenge in the form of an 'eye for an eye' type retribution.

²⁴⁶ See for example Khaleed Abou El-Fadl, 'Islam and the Challenge of Democratic Commitment' (2003) 27 *Fordham International Law Journal* 4, 51.

²⁴⁷ Qur'an 17:33:

However, although the injured party has a right to redress, forgiveness will win a handsome reward from God.

Forgiveness expiates that wrong and the defendant will not be answerable for that particular wrong on the Day of Judgment.

²⁴⁸ See n150.

Other than for the explicit, un-coerced rejection of faith, what level of breach of the Covenant constitutes 'renunciation'?

Gwynne presents the view of the great Hanbali scholar al-Qurtubi that even if a Muslim commits a major sin (*kabirah*), she or he does not become a disbeliever.²⁴⁹ The vast majority of contemporary Muslims would consider al-Qurtubi's views correct.²⁵⁰ To this end the mere existence of the *Shari'a* concept of *kabirah* or a 'major sin', which constitutes a breach or neglect of a major Covenant obligation such as prayer, fasting or avoiding adultery, clearly distinguishes such breach from renunciation, and explicitly means that the person in breach is nonetheless a Muslim and not an apostate. There appears to be a consensus among Muslims that only free renunciation of belief in God or the apostleship of Mohamed makes one an apostate.

Freedom of Religion: Problems with the Practical Expression of Apostasy

Laws

The problems of apostasy in Islam do not spring from the concept itself, as all Abrahamic faiths are cognisant of the issue. Each faith also reserves the right to exclude apostates from their communions. That is, the problem arises under the *Shari'a* not so much with the term in the Covenant that requires the surrender of the right of renunciation but that some Muslims believe that apostates must be put to death, discussed below. Such a penalty is in conflict with international human rights norms since human rights instruments such as the UDHR, the ICCPR and the ICESCR provide for the freedom of religion, and is certainly problematic in

²⁴⁹ Rosalind Gwynne, *Al-Qa'ida and al-Qur'an: The "Tafsir" of Usamah bin Ladin* (2001) <web.utk.edu/~warda/bin_ladin_and_quran.htm>, 6 December 2004, 14-15.
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Australia where such a 'penalty' would reasonably be construed as a death threat. However, it is the conflation of the two issues that is arguably the source of the controversy. It is the death 'sentence' that is problematic. There is no requirement in the international norms that an apostate must continue to receive the privileges of faith within the communion in question or be free from social ostracism.

However, there are further consequences that can arise from the variations in the application of Islamic law and the blurring of lines between Islamic law and for example, *adaat*,²⁵¹ in South-East Asia. There appears to be belief in non-Malay communities that a Muslim can never convert from Islam. The term used by non-Malays in the archipelago for conversion to Islam is *masuk Melayu*.²⁵² This belief in the nexus between Malay culture and Islam must be very strong, as even in secular Singapore, where Islamic law will not apply, and where adherence to the fundamentals of Islam is quite variable, apostasy among Malays is said to be unknown.²⁵³ In Malaysia for example, it is impossible for a Malay to convert to another religion, not because of laws against apostasy, but for reasons of definition. The Malaysian Constitution defines Malays as being Muslim.²⁵⁴ Thus if a person who was once Malay renounces Islam, then she or he ceases to be Muslim and *ipso facto* ceases to be Malay in the meaning of the Malaysian Constitution. On the other hand, *adaat* is protected by Article I(1) of the

²⁵⁰ Anne Elizabeth Mayer, 'Islam and the State' (1991) 12 *Cardozo Law Review* 1015, 1026.

²⁵¹ *Adaat* is Malay customary law. For the relationship between *adat* and Islam see Ellen., R. F. *Social Theory, Ethnography and the Understanding of Practical Islam in South-East Asia* in Hooker., M. B., Ed. *Islam in South-East Asia* (1988), 64.

²⁵² Ellen., R. F. *Social Theory, Ethnography and the Understanding of Practical Islam in South-East Asia* in Hooker., M. B., Ed. *Islam in South-East Asia* (1988), 56. *Masuk Melayu* literally means "to become a Malay" and strictly the term for conversion should be *masuk Islam* or to enter into Islam.

²⁵³ Ellen., R. F. *Social Theory, Ethnography and the Understanding of Practical Islam in South-East Asia* in Hooker., M. B., Ed. *Islam in South-East Asia* (1988), 57.

²⁵⁴ Article 160 Constitution of the Federation of Malaysia.

*Declaration of the Principles of International Cultural Co-operation*²⁵⁵ which recognises the value of various traditional cultural practices and may qualify *adaat*, including the version of *Shari'a* that forms part of *adaat*, for separate protection, although arguably with few legal consequences under international law.

The Australian Constitution for example does not have a freedom of religion provision although in practice Australians appear to enjoy freedom of religion including the public expressions of that faith. Countries such as France have some limits on the free expression of faith. Debates in Australia have also canvassed issues such as the banning the *niqab* (face covering) for Muslim women although the majority of Australian politicians have not been willing to publicly entertain such a ban. This absence of protection in law for the freedoms, or against curtailing freedoms, as the case may be, do not appear to be viewed as contrary to international law on the freedom of religion. Therefore, 'freedom of religion' under international law is not absolute and does appear to concede limits particularly when they conflict with domestic norms such as secularism or *adaat*.

It is noted at this point, however, that it would be both unnecessary and patronising to suggest that a sane adult cannot freely enter into a unilaterally binding contract even if it means that he or she is eternally bound. Marriage under some faiths require a lifetime commitment,²⁵⁶ and while controversial, is not considered immoral or unlawful when entered into freely. As with marriage however, while people respect cultural practices, the autonomy of an individual to chose a spouse is

²⁵⁵ Adopted at the general conference of UNESCO 14th Session in Paris on 4 November 1996. (1) Each culture has a dignity and value which must be respected and preserved.

²⁵⁶ That is, in the context of a marriage until 'death do us part'.

recognised under international law,²⁵⁷ and the free adoption of a religion can be seen as analogous to marriage in the context of an individual's personal autonomy.

There are however problems associated with people deemed Muslims by others, such as with children by parents, which can be problematic if the 'Muslim child' when grown up then decides to renounce the faith. That is, the children of Muslim parents 'raised' as Muslims but who have not had the option to chose freely is a source of problems. Further, a problem arises in that international norms give parents the 'right' unconditionally to raise their children according to their own faiths.²⁵⁸ Islam caters for this problem by requiring each individual to make their own choice. A Muslim is also bound to enquire into any obligation or duty before acceptance,²⁵⁹ and there is a presumption in the Qur'an that a Muslim is cognisant of the Qur'anic warnings with respect to apostasy.

The eponyms required their followers to understand and deliberately accept or reject a School's legal opinion, including those on apostasy, as human legal opinions. Abu Hanifa, made this a specific condition for those using his methodology.²⁶⁰ According to some Muslim scholars, there is a general obligation on a Muslim to enquire²⁶¹ whether a legal opinion 'contains God's decree only or

²⁵⁷ Article 16(2) UDHR.

²⁵⁸ Art. 13(3) ICESCR.

²⁵⁹ See *ittiba'* or the duty to enquire below.

²⁶⁰ Charles Adams, 'Abu Hanifa' in I Edge (ed) *Islamic Law and Legal Theory* (1996), 381. This requirement is compatible with individual responsibility and accountability because a decision to follow a particular School's ruling on a matter is an individual decision. Humans are however, specifically commanded not to blindly follow the faith of their 'fathers': Qur'an 43:22-25.

²⁶¹ This enquiry is clearly only mandatory to the extent of the individual's knowledge and ability. See for example Qur'an 2:33; Qur'an 2:286.

includes human opinion'.²⁶² In the latter case, the Muslim is obliged to consult another independent specialist (*ittiba'*).²⁶³

This raises two further central issues which are now discussed and are (a) What is the status of a person who did not voluntarily declare the *shahada* and (b) whether the death penalty is mandated for apostasy under the *Shari'a*.

'Apostasy' by those raised as Muslims

The Prophet stated that all humans were born in *fitra*, i.e. born as 'Muslims',²⁶⁴ with a natural inclination to submit to God and is arguably a residual effect of our ancient recognition of God's authority, and it is the parents or society who 'change' a child's natural inclination.²⁶⁵ On this argument therefore, every non-Muslim should be put to the sword because their individual apostasy is clearly apparent, a position for which there is no Qur'anic, *sunna* or jurisprudential support. Therefore the argument that children born into 'Muslim' families are Muslims through *fitra* is only partly valid as the Prophet conceded the possibility that children will follow their parents faith (Islam or otherwise) as opposed to adopting the Covenant

²⁶² Rudolph Peters, 'Idjtihad and Taqlid in 18th and 19th Century Islam' (1980) 20 *Die Welt des Islams, New Ser.*, 131, 140.

²⁶³ Ibid; Yaroslav Trofimov, *The Seige of Mecca: The Forgotten Uprising in Islam's Holiest Shrine* (2007), 38.

²⁶⁴ The word 'Muslim' is used here in the broadest sense as discussed *infra*, i.e. as one submitting to God and believing in the Last Day [and not restricted to the more common use as that of a follower of the Prophet.] It is for this reasons that some Muslim converts/reverts use the word Revert, i.e. meaning that they have reverted to their original faith, here again clearly admitting that there was a period of apostasy (during which they 'should', in the view of some Muslims, have been killed).

²⁶⁵ On the other hand, Shaheen Sardar Ali and Javaid Rehman, 'The Concept of Jihad in Islamic International Law' (2005) 10 *Journal of Conflict & Security Law* 321, 336, note that the 'death penalty view' is supported on the basis of the Prophetic saying "He who changes his religion must be killed". Hanafis interpret this ('he') to mean that the death penalty is applicable only for males who apostatise: Ahmad-ibn Naqib Al-Misri, *Reliance of the Traveller: A Classic Manual of Islamic Sacred Law* (1994), 595. As noted however, the Arabic masculine encompasses the feminine *prima facie* which makes the *hanafi* interpretation problematic. Further, such a strict construction must mean that the words ascribed to

independently. Islam does not permit such blind faith,²⁶⁶ for the abrogation of free will.

This raises the specific question of whether a Muslim may change his or her religion. The short answer is yes, a Muslim man or woman may change his or her religion,²⁶⁷ although as mentioned the Qur'an promises a severe punishment in the Hereafter. In practice, it appears that in the 'stricter' Muslims states,²⁶⁸ Qur'an 2:256 is interpreted as follows: reversion from Islam is allowed if the original 'conversion' to Islam was effected by force only (i.e. by compulsion). Some Muslim states have codified the right to follow a religion of one's choice.²⁶⁹ However, this right of a person to convert away from Islam is not without its temporal consequences in some expressions of Islamic law or in domestic law, as is the case of Malaysia. However, the right to waive 'future rights' with respect to religion, or re-marriage, does not appear problematic as a matter of law.

The Death Penalty: For Apostasy or Treason?

Apostasy is a *hudud* crime under the *Shari'a*.²⁷⁰ *Hudud* is a class of *Shari'a* crime that carries a 'fixed' punishments.²⁷¹ In this context it means fixed by God and must

the Prophet when strictly interpreted must mean that any male who converts to Islam must also be killed, a position clearly not supported in history.

²⁶⁶ Qur'an 43:22-24.

²⁶⁷ Qur'an 2:256.

²⁶⁸ See the example on Malays above n254.

²⁶⁹ E.g. The Constitution of the Federation of Malaysia. Article 11(1); "Every person has the right to profess and practice his religion and ... to propagate it".

²⁷⁰ Qur'an 4:89.

²⁷¹ Sayed Hassan Amin, *Islamic Law in the Contemporary World* (1985), 28. While the punishments are fixed and often severe, in addition to the strict rules of evidence discussed *infra*, there are several excuses that help reduce or mitigate the impact of the severity. For example Boyle-Lewicki refers to the allowances made for stealing food in poverty, considering alcohol consumption as a sickness etc: Edna Boyle-Lewicki, 'Need World's Collide: The Hudud Crimes of Islamic Law and International Human Rights' (2000) 13 *New Page* 45

mean that human agency cannot alter these fixed punishments including extending such punishments to other classes of crimes. This view is supported by the *Hanafi* view²⁷² that the punishment for consuming grape wine, the only intoxicant explicitly prohibited in the Qur'an, applies to a person intoxicated by grape wine *only* and not analogised intoxicants²⁷³ and is the better view in keeping 'God's punishments' separate. The requisite standard of proof for *hudud* crimes is 'certain' (i.e. beyond doubt).²⁷⁴ While non-Muslims (including apostates) are entitled to receive the protection of the *Shari'a* they are not subject to some *hudud* punishments including say for adultery²⁷⁵ which draws the death penalty, or if someone is involuntarily declared a non-Muslim they cannot ipso facto be subject to *hudud*. The death sentence generally is an unacceptable option in the international plane, although it is still on the statute books in many States including in industrialised States such as the US and Japan.

York International Law Review 43, 72; For example while drug use is prohibited in Islam, drug use is also considered a sickness and is treated as such and *hudud* punishments are suspended. Dr Norman Swan, *The Health Report: Female drug users in Iran* (17 December 2007 2007) The Health Report Radio ABC Radio National Australia.

²⁷² The Hanafi Islamic School is the largest school in contemporary Islam.

²⁷³ Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (2008), 25.

²⁷⁴ Some Malikis permit the use of circumstantial evidence (such as pregnancy) with respect to *zina*: Noel J Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (1969), 62, this however is a minority view in conflict with the Qur'an and should therefore not be considered persuasive.

After a due process of law, the *Shari'a* prescribes capital punishment for a certain fixed number of crimes: (Qur'an 17:33) but appears to reserve the death penalty exclusively for some *hudud* and *quisas* offences, arguably because the Qur'anic posits that God alone grants life and deals death: Qur'an 3:156.

²⁷⁵ Matthew Ross Lippman, Seán McConville and Mordechai Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction* (1988), 60. A *hadd* punishment is by definition, 'God's right': J Tanzil-ur-Rahman, *Islamic Criminal Laws (Part-I Hudud)* (1982), 35, and arguably therefore, should not apply to those not voluntarily bound by the Muslim Covenant and thus, should not suffer a sanction for breach of a Covenant obligation or for a Covenant crime.

In part, the death penalty for apostasy continues from Biblical tradition²⁷⁶ as crimes and punishments not specifically abrogated by the Qur'an or the *sunna* are therefore still in force.²⁷⁷ While death for apostasy or blasphemy is no longer part of the Canon law, it is in the view of some²⁷⁸ still part of Islamic law as it was not explicitly abrogated in the Qur'an or the *sunna*, and here arguably lies another source of the controversy.²⁷⁹ It is a further *Shari'a* requirement however that a person must be aware of the punishment for a particular *hadd* crime when committed, for the punishment to be enforceable.²⁸⁰ Therefore children who 'chose Islam' for parental pressure but who are not independently aware of its unilaterally and eternally binding nature, cannot be subject to any punishment. Clearly the subjective knowledge of the child will be a relevant factor in each case.

Apostasy is a Qur'anic crime, although the Qur'an does not provide for a temporal punishment for apostasy alone²⁸¹ but instead warns of a severe punishment in the Hereafter.²⁸² Further, the Schools agree on 'death penalty' only for men, and not

²⁷⁶ Death penalty for apostasy is prescribed in the Old Testament: Deuteronomy:13:6-9; and the death penalty for blasphemy is prescribed in Leviticus 24:16; 1 Timothy 4:1-3; Hebrews 3:12.

²⁷⁷ Edna Boyle-Lewicki, 'Need World's Collide: The Hudud Crimes of Islamic Law and International Human Rights' (2000) 13 *New York International Law Review* 43, 61. For the political use of apostasy prosecutions see below. The authority for the proposition that revealed law (prior to the Qur'an) continues to be valid unless specifically abrogated is called *istidlal* in the Shafi'i School: Mohd. Hameedullah Khan, *The Schools of Islamic Jurisprudence: A Comparative Study* (2nd ed, 1997), 103.

²⁷⁸ For a survey of various historical and contemporary opinions on the subject please refer generally to: S. A Rahman, *Punishment of Apostasy in Islam* (1996).

²⁷⁹ The discussion of the Qur'anic concept of abrogation itself is a separate issue which is outside the scope of this paper.

²⁸⁰ Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (2008), 22.

²⁸¹ Qur'an 2:217; 5:54; 47:25. Those who apostatise and then fight against Muslims however may be fought: Qur'an 4:89.

²⁸² Qur'an 3:90; 4:89; 4:137; 63:3. The key point is that even though the Qur'an recognises vacillating faith as a fact of life, which in the Qur'anic view is ipso facto for material or worldly reasons, it prescribes no temporal punishment. If a death sentence is prescribed for the first 'change of heart', then clearly, one will not have the option of vacillating faith. A counter argument is that the apostatising in this case may be within/private/internal to an individual the text of the Qur'an does not appear to limit the more general meaning.

for women apostates,²⁸³ which *must* mean at least that it is not the 'apostasy' *per se* that draws the death penalty. This interpretation supports the view that God reserves the penalty for apostasy *in* the Hereafter.²⁸⁴ Al Awzaa'y, who was a great scholar and a contemporary of Abu Hanifa, was of the view that both men and women ought to be left alone, but only if there 'is no plot to take over the State' (i.e. treason),²⁸⁵ and in the analysis of this paper the better view.

In this context, the *sunna*, which is consistent with the Qur'an,²⁸⁶ reserves the death penalty for those who apostatised and treasonously fought against the Muslims.²⁸⁷ The *sunna* of the Prophet in the overwhelming majority of cases was to pardon even treason.²⁸⁸

The death penalty for apostasy is also problematic because of the unprincipled and instrumental reasons for bringing on charges and accusations of apostasy against individuals,²⁸⁹ for example, for political reasons. It is a charge that is difficult to

²⁸³ Shaheen Sardar Ali and Javaid Rehman, 'The Concept of Jihad in Islamic International Law' (2005) 10 *Journal of Conflict & Security Law* 321, 336.

²⁸⁴ Bowker, J., *What Muslims Believe* (1998), 96; see also Qur'an 7:62-63.

²⁸⁵ Bowker, J., *What Muslims Believe* (1998), 96.

²⁸⁶ Qur'an 4:89.

²⁸⁷ Adil Salahi, *Muhammad: Man and the Prophet* (2002), 603-632; The Hanafi School and Shi'i Schools do not consider apostasy a *hadd* offence: Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (2008), 25. Even in the contemporary situation apostasy *per se* is not punished by death, and while not commenting on the accuracy of the facts of the situation, the following is a case in point as shown from the quote 'Somali extremists behead seven for 'abandoning Islam', *Hong Kong Sunday Morning Post* (Hong Kong), 12 July 2009, 8. (emphasis added):

Somali Islamist fighters have beheaded seven prisoners accused of abandoning the Muslim faith and spying for the government in the largest mass execution since the militants were pushed from power.

²⁸⁸ The Prophet said that apostates are with certainty known only to God. Since apostasy is a crime against God, it must mean that, the Prophet pardoned treason and not apostasy. There are other *hadith* that make it clear that the Prophet was aware of existence the hypocrites (such as Abdulah ibn Ubay) but did not act against them.

²⁸⁹ Some prominent Muslims accused of apostasy include Abu Hanifa (d 150/767); Ahmed ibn Hanbal; Al-Husayn b. Mansur al-Hallaj (d309/922); Abu al-Husayn al-Nuri (d295/907); Abu al-'Abbas al-Sufi;

defend. There is also a view that the evidence and rationale for the death penalty for apostasy by some contemporary scholars such as Maududi (d. 1979) 'is farfetched'²⁹⁰. The Prophet also stated that 'We make judgments on the basis of what is apparent, and God takes charge of hidden things'.²⁹¹ One may make the point that apostasy is sometimes indeed apparent. However, in the final analysis, the Prophet said that the worst of all (false) gods worshiped by people is 'our self-love'²⁹², and is a clearly a matter that is not always apparent, but at any rate, even when apparent is not punished even though this polytheism clearly puts one outside the fold of Islam and is the ultimate crime in Islam

Conclusion

Apostasy is a grave crime in Islam and 'Muslim' apostates fall outside the faith as do apostates in other Abrahamic faiths. For self-declared apostates this is not controversial as they enjoy the right of renouncing the faith and may do so both secretly, in a way that can never be justiciable by temporal authorities, and in most

Abu Hamid Muhammad al-Ghazali (d.505/1111); Ibn Hazm (d.456/1064); Muhy al-Din b. Arabi (d.638/1240) and Ibn Taymiyyah (d.728/1328) among others: Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (2006), 30. An interesting contemporary example of the political nature of the charge of apostasy is that of Salman Rushdie, who was declared an apostate and sentenced to death by Ayatollah Khomeini because he defamed the family of the Prophet in his writings. On the other hand, Tariq Ali, a self-confessed atheist and 'cultural Muslim': Tariq Ali, *The Clash of Fundamentalisms: Crusades, Jihads and Modernity* (2002), 22. – and also a well known and respected high-profile author and commentator – is quite rightly left unmolested. In recent history (19th-21st centuries) both Muslims and Orientalists have been involved in this project of selective use of Islam. See for example Wael B Hallaq, 'The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse' (2002) 2 *UCLA Journal of Islamic and Near Eastern Law* 1, 2. For political prosecutions using apostasy as a charge see Edna Boyle-Lewicki, 'Need World's Collide: The Hudud Crimes of Islamic Law and International Human Rights' (2000) 13 *New York International Law Review* 43, 61. On the other side of apostasy is the issue of conversion for convenience and is documented by Yaroslav Trofimov, *The Seige of Mecca: The Forgotten Uprising in Islam's Holiest Shrine* (2007), 91, 173, 195.

²⁹⁰ Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy and Islam* (2006), 57.

²⁹¹ Bernard G Weiss, *The Spirit of Islamic Law* (1998), 652.

²⁹² W H T Gairdner, 'The Niche for Lights' (1980), 57-161, 151.

places,²⁹³ also by giving open expression to their renunciation. Such renunciation must have some social consequences although the key legal impediments of specific concern are (a) a possible conflict with international norms on the freedom of religion and (b) the possible death penalty that may attach in the view of some Schools.

Those who accept Islam voluntarily should be aware that non-renunciation is a term of their new faith. A matter of personal autonomy for adults, this is not controversial. For those raised by their parents 'as Muslims' the penal consequences of renunciation can apply only if they freely accepted the faith with knowledge of the terms of the Covenant including the obligation not to renounce the faith. For those who were unaware of the specific terms, *Shari'a* law holds no punishment but is a matter that varies in each individual case depending upon the subjective level of the individual's knowledge.

The most problematic aspect of apostasy in Islam is the death penalty, a view supported by some *Shari'a* scholars. It was argued in this paper that only those who freely accept the Muslim Covenant are bound by its specific terms and further that the Qur'an and *sunna* provide no temporal jurisdiction over apostasy *per se*. *Shari'a* punishment can therefore only legitimately apply only to those who apostatise, then fight against Muslims and subsequently are found guilty by a judge acting in accordance with the *Shari'a*. Even in these instances the death penalty is not mandatory, as was shown by the Prophet.

²⁹³ See n289 above.

On this analysis, the *Shari'a* does not conflict directly with international law. Freedom 'to choose' must also include the right unilaterally to elect to be forever bound. The parents' right under international law to raise a child in their faith is conceded but clashes with the *Shari'a's* obligation that each person must individually and freely choose to exercise their free will according to a Covenant. Again *Shari'a* norms and international norms can be interpreted in a manner that is not inconsistent. That is, that parents may raise their children in a faith, but for Muslims, the ultimate decision to be eternally bound must remain an individual decision as required by the *Shari'a*.

In the final analysis, Muslims should permit free thought and expression as required under the *Shari'a* as it is only the free expression of one's faith that will satisfy the ancient undertaking given by each human soul to their Creator and is a matter utterly beyond human jurisdiction, competence and perception. It is in this spirit that Muslims of all Schools in Australia should interpret freedom of religion provisions under a Bill of Rights.