

The Boundaries of Religious Liberty
in Islamic Law

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I. Introduction

When religion anchors a system of government, then what status does that government grant to individuals outside of the faith? More importantly, what freedom do those inside of the faith tradition have to abandon such traditions? When a holy book remains the foundation of the law, which principles taught in the holy book apply to every individual member of the polity regardless of faith, and which principles only pertain to the faithful? Answering these questions crafts the boundaries of religious liberty in classical Islamic law. As explained in *Islamic Law and Constitutions*, an Oxford Online Handbook, "... liberals and leftists worry that constitutional ideas [such as the freedom of religion] lose their content as they are grafted onto religious roots."¹ Surely such "constitutional ideas" are not devoid of "content" under Sharia, but are merely subject to limitations.² However, limiting the exercise of constitutional rights is not an unusual practice for any modern government. Admittedly, even secular democracies limit fundamental freedoms. For example, in France, girls may not wear the Muslim veil to school,³ and in the U.S, a person whose faith teaches polygamy may not legally practice it.⁴ Possibly, a system of governance rooted in religion, such as Sharia, places stricter bounds on religious liberty and other "constitutional ideas" than would a secular democracy.⁵ However, a Muslim polity does not necessary imply a social order devoid of religious liberty and the freedom of conscience. Sharia grants religious liberty subject to certain limitations. Determining the boundaries of religious liberty in Sharia relies on three main principles: (1) the principle of the

¹ Nathan J. Brown & Mara Revkin, *Islamic Law and Constitutions*, in THE OXFORD HANDBOOKS OF ISLAMIC LAW, OXFORD HANDBOOKS ONLINE 1, 11 (Anver M. Emon & Rumeen Ahmed eds., Nov. 2015).

² See *id.*

³ S.P., *Why the French are so strict about Islamic head coverings*, THE ECONOMIST EXPLAINS (July 7, 2014), <https://www.economist.com/blogs/economist-explains/2014/07/economist-explains-2>.

⁴ Barbara Bradley Hagerty, *Some Muslims in U.S. Quietly Engage in Polygamy*, NPR, RELIGION (May 27, 2008, 12:49 AM), <https://www.npr.org/templates/story/story.php?storyId=90857818>.

⁵ Brown & Revkin, *supra* note 1, at 11.

freedom of conscience as taught in the Qur'an and Sunnah, (2) the status of the dhimmi⁶ in Islamic law, and (3) the complicated jurisprudence surrounding apostasy. Examining these three areas of Sharia reveals that a rule of law based on a faith such as Islam still contains room for the fundamental freedoms of religion and of conscience. Depending on interpretations given to sacred text, such as the Qur'an and the Sunnah, the freedom of religion under Sharia might prove to be as robust as the freedom of religion granted in secular democracies.

II. The freedom of conscience or belief as taught in the Qur'an, the foundational source of Islamic law

Qur'anic texts are of prime importance in determining the rules of Sharia.⁷ Such texts overrule and supersede all other texts found in Islam, including the Sunnah and the writings of Muslim religious scholars called the 'ulama.⁸ However, not all verses in the Qur'an pertain to legal obligations.⁹ Most Qur'anic text provides only council to Muslims seeking to live a more pious life.¹⁰ Scholars sometimes debate whether certain verses rise above the level of moral obligations, and instead present affirmative legal duties.¹¹ By implication, when examining Qur'anic verses, jurists and scholars must first establish whether the Qur'anic text presents a justiciable claim.¹²

The key Qur'anic verse proving that the Sharia permits religious liberty reads "Let there be no compulsion in religion: Truth stands out clear from Error."¹³ A contemporary scholar of Sharia, Mohammad Hashim Kamali explains how this verse pertains to law and not merely to

⁶ Dhimmi rules in traditional Islamic societies governed the "treatment of non-Muslim permanent residents in Muslim lands," or in other words, people of other faith traditions living in the Caliphate. ANVER M. EMON, RELIGIOUS PLURALISM AND ISLAMIC LAW: DHIMMIS AND OTHERS IN THE EMPIRE OF LAW 2 (Anver M. Emon et al. eds., 1st ed. 2012).

⁷ See MOHAMMAD HASHIM KAMALI, SHAR'IAH LAW: AN INTRODUCTION 19-20 (2008).

⁸ See *id.*

⁹ See *id.* at 17.

¹⁰ See *id.* at 19.

¹¹ See *id.* at 20.

¹² See *id.*

¹³ THE QUR'AN (Yusufali 2:256), <http://cmje.usc.edu/religious-texts/quran/> [hereinafter QUR'AN].

religious council.¹⁴ Kamali points out that this passage originates in Medina, when Islamic law was the system of government.¹⁵ By implication, this verse explains more than council, but an affirmative legal right. Furthermore, the verse reads as a command, starting with the word “[l]et,” implying that noncompliance with directive that “there be no compulsion in religion” is not an option.¹⁶ Thus, an Islamic state in harmony with Sharia cannot compel belief in religion without disobeying this Qur’anic command.

Other Qur’anic texts reinforce the notion of religious liberty. Sura 10 verse 99 reads “If it had been thy Lord’s will, they would all have believed, - all who are on earth! Wilt thou then compel mankind, against their will, to believe!”¹⁷ This verse implies that Allah did not want to “compel” any to believe in the Prophet and in his Message.¹⁸ Kamali points out that this text is from the Meccan period, before Islam was a system of government.¹⁹ Thus, this verse may not qualify as justiciable under Sharia.

However, the two Qur’anic passages seem to compliment and reinforce each other and also to reinforce the idea that religion cannot be compelled even at the hands of the ruler of state. Lack of compulsion implies certain religious liberty or a freedom to follow the dictates of one’s own conscience without fear. In these verses, Islam and Sharia exhibit great tolerance for other faith traditions, even while asserting the primacy of Qur’anic texts.

Furthermore, the Qur’an’s teachings overlap with other faith traditions. Mention of prophets such as Noah in the Qur’an, show Islam’s acceptance of Judeo-Christian religions or “people of the book.”²⁰ For example, a passage in the Qur’an attributed to Noah reinforces the

¹⁴ MOHAMMAD HASHIM KAMALI, FREEDOM OF EXPRESSION IN ISLAM 88 (Revised ed. 1997).

¹⁵ *Id.*

¹⁶ QUR’AN (Yusufali 2:256).

¹⁷ QUR’AN (Yusufali 10:99).

¹⁸ *Id.*

¹⁹ KAMALI *supra* note 14, at 88.

²⁰ EMON *supra* note 6, at 66-67.

idea that religion cannot be a forced matter, and that the individual must be free to choose Islam.²¹ In the Qur'an, Noah teaches, 'O my people! See ye if (it be that) I have a Clear Sign from my Lord, and that He hath sent Mercy unto me from His own presence, but that the Mercy hath been obscured from your sight? Shall we compel you to accept it when ye are averse to it?'²² When the people of a community refuse to believe in the faith, the leader or the prophet, (in this case Noah), clearly teaches that he does not have the authority to "compel" or force them to accept the truthfulness of the faith.²³

Other Qur'anic passages also express the right of a Prophet to teach and to persuade but never to compel. Sura 88, verses 21-22 read "Therefore do thou (O Prophet) give admonition, for thou art one to admonish. Thou are not one to manage (men's) affairs."²⁴ These verses imply the duty a prophet has to teach and to exhort but not the right to compel an individual to profess the faith.²⁵ Only God, or Allah, has a right to punish those who choose to disbelieve.²⁶ As it states in the following passages, "But if any turn away and reject Allah- Allah will punish him with a mighty punishment. For to Us will be their return. Then it will be for Us to call them to account."²⁷ If the Prophet, if Mohammed, according to the Qur'an, cannot rightfully compel a man to believe in Islam, then surely a government based on Sharia may not compel belief. The Qur'an as the ultimate source of Sharia seems to dictate some form of religious liberty, or freedom of conscience, and the notion that leaders in Islam and prophets may not compel individuals to be Muslim, even if they live in a Muslim polity.²⁸

²¹ QUR'AN (Yusufali 11:28).

²² *Id.*

²³ *Id.*

²⁴ QUR'AN (Yusufali 88: 21-22).

²⁵ *See id.*

²⁶ *See id.*

²⁷ QUR'AN (Yusufali 88: 23-26).

²⁸ *See KAMALI supra* note 7 at 19-20.

Kamali shows how Muslim rulers such as Caliphs understood the application of Qur’anic verses such as “Let there be no compulsion in religion: Truth stands out clear from Error.”²⁹ As Kamali points, “Caliph ‘Umar b. al-Khattab- meets a Christian woman and asks her to become Muslim, but she does not convert. Afterwards the Caliph states, ‘O my Lord, I did not mean to compel her, as I know that there must be no compulsion in religion. . . . ‘ Caliph ‘Umar understood that only God could change hearts and minds in matters of religion and not fellow men.”³⁰ In fact, as Kamali points out, the Qur’an validates the ability to propagate religion through sound reasoning and argument and not through coercion.³¹ He cites the Qur’anic verse, “Invite (all) to the Way of thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious. . . .”³² Kamali argues that the “norms of Sharia” as expressed by the Qur’an and by early Muslim leaders, the Caliphs, support the notion of religious liberty.³³

These Qur’anic verses clearly seem to teach that in a polity ruled by Islamic law, not all members of the community have to be Muslim, and certainly those individuals outside the faith should not be compelled to believe. Undoubtedly, religious liberty has a place in Sharia, as compulsion is not compatible with belief in Islam. However, this freedom does have limits. So, how do those that profess other faiths practice their religion inside a Muslim polity? The status of the dhimmi³⁴ in Islamic law answers this question and helps to elucidate the boundaries of religious liberty in Islamic law.

²⁹ QUR’AN (Yusufali 2:256). See KAMALI *supra* note 14 at 92.

³⁰ See KAMALI *supra* note 14 at 92.

³¹ See *id.* at 103.

³² QUR’AN (Yusufali 16:125).

³³ See KAMALI *supra* note 14 at 92.

³⁴ See EMON *supra* note 6.

III. The dhimmi in the Qur'an and in the Sunnah: what are the limits of the freedom of religion and of conscience in Islamic law for Non-Muslims?

A. The Qur'anic text describes the place of non-believers in Muslim society.

The Qur'an references other faith traditions such as Christians and Jews, as "people of the book."³⁵ One verse even promises believing Christians and Jews eternal rewards. "Those who believe (in the Qur'an), and those who follow the Jewish (scriptures), and the Christians and the Sabians,- any who believe in Allah and the Last Day, and work righteousness, shall have their reward with their Lord; on them shall be no fear, nor shall they grieve."³⁶ This verse as well as other Qur'anic verses seem to point to a certain affinity between Christians and Muslims and Jews, regardless of their acceptance of the Qur'an as scripture.³⁷ Allowing space for those other faith traditions in the Qur'an itself surely implies that the Muslim polity should create spaces for non-believers such as Christians and Jews.

Other verses suggest that Muslims should protect non-believers in their communities. The Qur'an teaches, "If one amongst the Pagans ask thee for asylum, grant it to him, so that he may hear the word of Allah; and then escort him to where he can be secure."³⁸ The word pagan may describe an individual of any background, and even may be interpreted to include an individual who practices no religion. At the time the Qur'an was written, many "pagans" of Mecca fought and even killed in battle early followers of Muhammad.³⁹ Regardless of the persecution experienced, this text shows how Muslims should be merciful to others and "grant" "asylum" to any man or woman who asks for it, even including those who once fought against

³⁵ EMON *supra* note 6, at 66-67.

³⁶ QUR'AN (Yusufali 2:62).

³⁷ *See id.*

³⁸ QUR'AN (Yusufali 9:6).

³⁹ The Battle of Badr was fought in Arabia during the lifetime of Muhammad. In this battle, Muslims fought Meccans and beat them with the help of Allah. *See* QUR'AN (Al Imran 3:123-125). *See also* Battle of Badr, QUR'AN (Al-Anfal 8).

Islam.⁴⁰ The concept of asylum implies a freedom from bodily harm or threat to bodily harm, and the ability to live peaceably in a new community. The verse explains that asylum seekers may be taught truth, but, by only mentioning teaching, the passage implies and supports other Qur’anic texts that prohibit force or compulsion of belief.⁴¹

Furthermore, the Qur’an explains that if the unbeliever does not fight against the Muslim polity or drive those who profess Islam out of their homes, then Muslims should be kind and just in their dealings with those outside their faith community. It states, “Allah forbids you not, with regard to those who fight you not for (your) Faith nor drive you out of your homes, from dealing kindly and justly with them: for Allah loveth those who are just.”⁴² Although the Qur’an teaches that a Muslim might defend himself by force, this force is limited and may not be arbitrarily used.⁴³ Islam forbids harming a person who poses no threat, but instead teaches that principles of kindness and of justice apply to benevolent unbelievers.⁴⁴ The notions of just dealing with and protection for the unbeliever is further emphasized in the Qur’an 8:72-74.⁴⁵ Failing to protect unbelievers and believers alike results in “tumult and oppression on earth, and great mischief.”⁴⁶

⁴⁰ QUR’AN (Yusufali 9:6).

⁴¹ *See id.*

⁴² QUR’AN (Yusufali 60:8).

⁴³ QUR’AN (Yusufali 22:39).

⁴⁴ *See* QUR’AN (Yusufali 60:8).

⁴⁵ “Those who believed, and adopted exile, and fought for the Faith, with their property and their persons, in the cause of Allah, as well as those who gave (them) asylum and aid,- these are (all) friends and protectors, one of another. As to those who believed but came not into exile, ye owe no duty of protection to them until they come into exile; but if they seek your aid in religion, it is your duty to help them, except against a people with whom ye have a treaty of mutual alliance. And (remember) Allah seeth all that ye do. The Unbelievers are protectors, one of another: Unless ye do this, (protect each other), there would be tumult and oppression on earth, and great mischief. Those who believe, and adopt exile, and fight for the Faith, in the cause of Allah as well as those who give (them) asylum and aid,- these are (all) in very truth the Believers: for them is the forgiveness of sins and a provision most generous.” QUR’AN (Yusufali 8:72-74).

⁴⁶ QUR’AN (Yusufali 8:73).

B. The payment of the jizya

However, such protected status granted to unbelievers in a Muslim polity is not without cost. In order to guarantee protection of non-Muslims, the unbeliever must pay a tax or jizya. Such tax is also mentioned in the Qur'an, the ultimate source of Sharia.⁴⁷ The Qur'an explains, "Fight those who believe not in Allah nor in the Last Day, nor hold that forbidden which hath been forbidden by Allah and His Messenger, nor acknowledge the religion of Truth, (even if they are) of the People of the Book, until they pay the Jizya with willing submission, and feel themselves subdued."⁴⁸ This verse seems to imply that not all unbelievers are protected in the Muslim polity.⁴⁹ An unbeliever might pose a threat to Islam, especially if they are openly hostile to Islam. This verse seems to suggest that the way to know if a non-believer, even a "person of the Book," poses no threat to the society is through the payment of a tax, a Jizya, which shows a willingness of this non-believer to abide by the rules of the Muslim polity.⁵⁰

The Sunnah also speak of the Jizya, but in terms of non-Muslims with which Muhammad was at war.⁵¹ Sahih Muslim (19:4294) explains that when the non-believers are in open rebellion or fighting against the Muslim polity, then, in order to end the hostilities, a hadith explains "If they refuse to accept Islam, demand from them the Jizya. If they agree to pay, accept it from them and hold off your hands."⁵² This hadith as well as others detail the tensions in Medina between Muslims and unbelievers.⁵³ Sharia allowed Muslims the authority to fight to protect themselves, their property, and their families, but also emphasized a way to make peace and co-

⁴⁷ See KAMALI *supra* note 7 at 19-20.

⁴⁸ QUR'AN (Yusufali 9:29).

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See THE SUNNAH (Sahih Muslim 19:4294), <http://cmje.usc.edu/religious-texts/hadith/muslim/> [hereinafter Muslim].

⁵² *Id.*

⁵³ See *id.*

exist with unbelievers. Devout Muslims should even protect such unbelievers if they are willing to submit to the rules of the Muslim polity and to pay the jizya.

The history of the jizya becomes more complex in reference to the Jewish tribes with which Muhammad interacted. Some Sunnah shows that Jews in particular gained protection and favor with Muhammad and other Sunnah point out a darker history, where Muhammad is said to be responsible for the massacre of several hundred Jews for a seemingly unfounded reason.

C. The establishment of the Constitution of Medina and the treatment of the Jews at the time of Muhammed.

Around 623 A.D., shortly after Muhammad arrived in Medina from Mecca, he drafted the “Compact” or “Constitution” of Medina.⁵⁴ This document established peace between Muslims and other groups living in Medina and helped to establish an alliance between the various tribes living in the area and the growing members of the Muslim faith.⁵⁵ The Sunnah mention three tribes of Jews, the Banu Qaynuqa, Banu Nadir, and the Banu Qurayza.

The Banu Qaynuqa lived in Medina at the time of Muhammad.⁵⁶ This tribe had an alliance with Muhammad through the “Constitution” of Medina.⁵⁷ Hostilities erupting between the Banu Qaynuqa and Muhammad’s followers tested their alliance.⁵⁸ After a successful siege, the Banu Qaynuqa surrendered unconditionally, and Muhammad forced them to leave Medina.⁵⁹ Hadith justified this action because the tribe had declared “war”⁶⁰ on Muslims by saying “O Muhammad, you seem to think that we are your people. Do not deceive yourself because you

⁵⁴ See Tarek Fatah, *The Jew is Not my Enemy: Unveiling the Myths that Fuel Muslim Anti-Semitism* 132 (2010). See also Wael B. Hallaq, *The Impossible State: Islam, Politics, and Modernity’s Moral Predicament* 171 (2013) (explaining endnote 7 on page x of the introduction).

⁵⁵ See *id.*

⁵⁶ See ISHAQ, *SIRAT RASUL ALLAH (THE LIFE OF MUHAMMAD)* 363 (A. Guillaume trans., Oxford University Press 13th ed. 1998).

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ See *id.*

encountered a people with no knowledge of war and got the better of them; for by God if we fight you, you will find that we are real men!”⁶¹ According to hadith, Muhammad allowed these tribes, protected under the “Constitution” of Medina, to coexist peacefully as long as they did not fight against Islam.⁶²

A second Arabian Jewish tribe, the Banu Nadir, lived near Medina.⁶³ They did not intervene when Muhammed expelled the Banu Qaynuqa, and enjoyed the benefits of the Constitution of Medina.⁶⁴ However, they eventually turned against Muhammed and challenged him as leader of Medina.⁶⁵ As a result, Muhammed laid siege to them, ordered them to surrender, and forced them to leave Medina.⁶⁶ After expulsion and in collaboration with the Quraysh, the Banu Nadir laid siege to Medina in 627 A.D. in what became known as the Battle of the Trench.⁶⁷

A third Jewish tribe, the Banu Qurayza, allegedly experienced a much worse fate than the Banu Qaynuqa and the Banu Nadir, even absent a record of them openly rebelling against Muhammed. Legend from the ninth century explains that the Prophet massacred between 600 and 900 Jews belonging to the Banu Qurayza tribe.⁶⁸ Meccan forces besieged Medina in 627 for 20 days, and only two local Jewish tribes openly allied with the Meccan forces.⁶⁹ The Banu Qurayza were among the Jewish tribes that maintained their neutrality during the armed conflict.⁷⁰ The Meccans eventually retreated, but according to writings in Muhammad’s

⁶¹ *Id.*

⁶² *See id.*

⁶³ *See Banu al-Nadir*, THE OXFORD DICTIONARY OF ISLAM, OXFORD ISLAMIC STUDIES ONLINE (John L. Esposito, Ed.), <http://www.oxfordislamicstudies.com/article/opr/t125/e291> (last visited on Nov. 21, 2017).

⁶⁴ *See Banu Nadir*, Wikipedia, https://en.wikipedia.org/wiki/Banu_Nadir#cite_note-stillman13-13 (citing NORMAN STILLMAN, THE JEWS OF ARAB LANDS: A HISTORY AND SOURCE BOOK 13 (Jewish Publication Society of America, 1979)).

⁶⁵ *See Banu al-Nadir supra* note 63.

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See TAREK FATAH, THE JEW IS NOT MY ENEMY, supra* note 54 at 130.

⁶⁹ *See id.* at 132-33.

⁷⁰ *Id.* at 132-33.

biography, *Sirat Rasul Allah* or *The Life of God's Messenger*, written a hundred years after Muhammad's death, Jews had manipulated enemies of the Prophet, the Meccans, to fight against Muhammad.⁷¹ According to *Sirat*, the Banu Qurayza plotted against Muhammad, and thus, they deserved to die.⁷² The account of the massacre concludes with the words "These proceedings [the slaughter of the Jews] continued until the Apostle of Allah – may Allah bless him and grant him peace – had finished them [the Banu Qurayza Jews] off."⁷³

However, as Tarek Fatah points out in his book, *The Jew is Not my Enemy*, there are many flaws and inconsistencies attributable to this account.⁷⁴ He explains that the Qur'an itself does not mention the massacre, that no original manuscripts of the *Sira* exist, and that the account was written at a time when "the great-grandson of the pagan Meccans who had fought Muhammad . . . [had] taken over the reins of Islam."⁷⁵ Other parts of the *Sira*, according to Fatah, discredit it as a valid source by claiming that Muhammad prophesied and thus condoned territorial conquests of the caliphs.⁷⁶ Furthermore, Fatah found no physical proof of the scene of the massacre in Arabia; he found no trace of a trench created for the bodies of the Jewish victims.⁷⁷ Fatah also found no similar Jewish texts describing the massacre when the Jewish people were known to keep records of violent acts committed against them and to pass those records down.⁷⁸ Fatah explains, "It is inconceivable that a people [the Jews] with such a deep sense of their history, who would document the story of nine hundred dead Jews of Masada in the year 73, would have no record of a slaughter of nine hundred Jews six hundred years later."⁷⁹

⁷¹ See *id.* at 133.

⁷² See *id.*

⁷³ *Id.* at 141.

⁷⁴ See TAREK FATAH, *THE JEW IS NOT MY ENEMY*, *supra* note 54 at 133-34.

⁷⁵ *Id.*

⁷⁶ See *id.* at 136.

⁷⁷ See *id.* at 153-55.

⁷⁸ See *id.* at 156-160.

⁷⁹ TAREK FATAH, *THE JEW IS NOT MY ENEMY*, *supra* note 54 at 158.

Fatah points out that the Qur'an only mentions a battle where some people of the Jewish faith lost their lives, but makes no mention of a Jewish massacre.⁸⁰ Fatah explains that the hadith relating to the Sira and the massacre should have no real weight in the Islamic understanding of the Jewish faith.⁸¹

For all these reasons, and using *ijtihad*⁸², or independent human reasoning, to mark the boundaries of proper Islamic law regarding non-Muslims, even Jews, the story of the "Constitution" of Medina should hold more weight than the story of the Banu Qurayza Jews. In the Qur'an and in the Sunnah, the "people of the book"⁸³ might be misguided or even denied salvation and accountable to Allah for their rejection of Islam. Regardless, the Qur'an does not seem to justify unprovoked destruction or genocidal intent against non-Muslims. Non-believers may not fight against Islam or they risk expulsion from the community. Jews, Christians, and non-believers have a place in the Islamic polity, if they submit to the rulers of that polity. Even if unable to possess unfettered freedom in the exercise of their beliefs, they might enjoy protection and free association in exchange for the payment of the *jizya*.

D. What is the status of the dhimmi in a Muslim polity?

Dhimmi status and the rules and regulations imposed on dhimmi manifest the contours of religious liberty for non-Muslims living in a Muslim polity. Dhimmi rules apply to more than Jewish communities, but also to Christian, to Zoroastrian, and to Pagan belief systems. Anver M. Emon lays out in his book, *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law*, certain rules, such as the *jizya*, that regulated non-Muslim residents of Muslim

⁸⁰ See *id.* at 156.

⁸¹ See *id.* at 133-173.

⁸² *Ijtihad* literally means "self-exertion." Kamali describes it as "independent reasoning usually by a qualified person (i.e. *mujtahid*) in order to deduce the juridical ruling of an issue from the source materials of the Shari'ah." KAMALI *supra* note 14, at 320.

⁸³ EMON *supra* note 6, at 66-67.

polities.⁸⁴ In this book, he describes the ‘aqd al-dhimma or the contract of protection granted to non-Muslims.⁸⁵ Emon lays out many of the boundaries of inheritance, of property, of gifts, and of bequests that limited dhimmis or non-believers residing in Muslim polities.⁸⁶ Many of these limitations were not specifically spelled out in the Qur’an or Sunnah, but were the result of the reasoning of jurists or *usul al-fiqh* (jurisprudence).⁸⁷ *Ijtihad* or independent human reasoning allowed jurists to make laws in regards to the dhimmis’ rights in a Muslim polity.⁸⁸

E. Examples of rules regarding dhimmis

One example of dhimmi rules deals with the right that the non-Muslim had to erect new religious structures, simply maintain currently existing places of worship, or even the right of the Muslim polity to destroy religious structures belonging to non-Muslims.⁸⁹ Emon explains that “In regions where the land was cultivated by Muslims (e.g. *amsar al-islam*), such as Basra and Kufa, dhimmis were not allowed to build new places of worship. . . . If the land came under Muslim suzerainty by military conquest against the dhimmis, the dhimmis could not erect new religious buildings, and jurists debated whether old ones could remain or be refurbished.”⁹⁰ Emon cites some jurists who “required old religious buildings that remained after conquest to be destroyed.”⁹¹ He contrasts this view with the view of the Hanafis, who allowed existing religious buildings to remain.⁹²

⁸⁴ Emon *supra* note 6 at 99. Emon states, “the *jizya* can be understood as a legal instrument that facilitates the inclusion of the dhimmi in the Muslim polity, as well as a political tool of social stratification and revenue generation.”

⁸⁵ *Id.* at 79.

⁸⁶ *See generally id.*

⁸⁷ *See id.* at 87-164.

⁸⁸ *See id.*

⁸⁹ *See Emon supra* note 6 at 119-123.

⁹⁰ *Id.* at 120.

⁹¹ *Id.*

⁹² *See id.* at 120-21.

Then, Emon explores whether conquered peoples, dhimmis, may ever build new houses of worship. According to one jurist, “The Hanbali Ibn Qudama held that in cases where Muslims retain sovereignty of the land and the dhimmis only pay the jizya, one must look to the terms of the treaty to determine whether the dhimmis have the liberty to erect new religious buildings.”⁹³ In contrast to the Hanbali scholar, a Maliki scholar, al-Qarafi, determined that even if allowed to build new structures by treaty, if dhimmis paid a land tax, then they could only build new religious structures in land where no Muslims lived.⁹⁴ In a third viewpoint, if the dhimmis held both political authority as well as paid the land tax, then they could erect new structures for religious purposes as well as maintain existing ones.⁹⁵

As illustrated by these examples, these rules regarding the boundaries of the exercise of religion by dhimmis are complex and jurist dependent. The religious liberty granted to dhimmis in a Muslim polity would depend on the jurist’s school to which their Muslim ruler belonged. Furthermore, dhimmi status would depend on what juristic viewpoint the ruler adopted. The complexities of dhimmi rules are definitely not governed by *ijma*⁹⁶, or consensus, but are the subject of *ijtihad*, or human reasoning.

Many different viewpoints might harmonize with the teachings of the Qur’an and Sunnah concerning the status of individuals living in Muslim society who have not adopted belief in Islam and in the Messenger. The Qur’an and Sunnah specify the payment of the Jizya, but these foundational sources of Sharia leave little guidance on the more technical aspects of the law such as the erection of new religious buildings or the maintenance of existing structures. Legal scholars or *mujtahid* must use *ijtihad* as it is informed by custom or *urf* in order to explain

⁹³ *Id.* at 121.

⁹⁴ See EMON *supra* note 6 at 121.

⁹⁵ See *id.*

⁹⁶ Kamali describes *Ijma* as the “[g]eneral consensus of jurists and scholars concerning a juridical matter.” KAMALI *supra* note 14, at 320.

particular rules and regulations regarding the dhimmis in their communities. The dhimmis have a right to live and to exist, but the exercise of their religion is limited under classical understandings of Islamic law.

IV. Apostasy: Is the treatment of a Muslim who denies the faith a crime or freedom of conscience according to the Sharia?

Sharia teaches through the Qur'an that "There shall be no compulsion in religion."⁹⁷ Sharia based polities understand that the Sharia grants religious liberty to Jews, Christians, and others non-Muslims who coexist peacefully in a Muslim polity, who do not fight against Islam, who pay the jiyza, and who follow the dhimmi rules proscribed by their Muslim ruler. These concepts in Sharia law do not fully address the rights of religious liberty granted to Muslims, whether born into or converted to the faith. Understanding apostasy, or the freedom and ability to leave Islam, underscores the boundaries of religious liberty exercised by Muslims.

A. What does the Qur'an teach us about apostasy?

The Qur'an does mention the consequences of denying the faith, but all of these consequences bear fruit in the eternities.⁹⁸ For example, the Qur'an states, "And leave Me (alone to deal with) those in possession of the good things of life, who (yet), deny the Truth; and bear with them for a little while."⁹⁹ In the Qur'an, Allah alone may punish apostates. The Qur'an also explains,

"They swear by Allah that they said nothing (evil), but indeed they uttered blasphemy, and they did it after accepting Islam; and they meditated a plot which they were unable to carry out: this revenge of theirs was (their) only return for the bounty which Allah and His Messenger had enriched them! If they repent, it will be best for them; but if they turn back (to their evil ways), Allah will punish them with a grievous penalty in this life and in the Hereafter: They shall have none on earth to protect or help them."¹⁰⁰

⁹⁷ QUR'AN (Yusufali 2:256).

⁹⁸ KAMALI *supra* note 14, at 93.

⁹⁹ QUR'AN (Yusufali 73:11).

¹⁰⁰ QUR'AN (Yusufali 9:74).

This verse applies to those who reject Islam while also “meditat[ing] a plot,” implying that these deniers of the faith also sought some sort of act of rebellion against Islam.¹⁰¹ The verse does not seem to address those who only deny Islam but who do not act out in open rebellion.¹⁰² Also, even when deniers or apostates plot against Islam, the verse allows these persons a space for repentance.¹⁰³ Undoubtedly, being allowed to repent implies that the Sharia does not support the punishment of the death penalty immediately after apostasy, because automatically killing the apostate offers him no space for repentance. The verse ends by explaining that Allah will punish those who deny the faith “in this life and in the Hereafter.”¹⁰⁴ If only Allah may punish the unrepentant apostate in this life, then may Allah do so through men on earth? Usul al-fiqh attempts to answer this question, and far from ijma or consensus, different jurists hold different opinions on punishments for apostasy. Furthermore, each school and jurist relies on different and conflicting hadith dealing with the complicated questions surrounding apostasy

B. Do the Sunnah support the notion that apostasy is punishable by death?

Some schools of Islamic law categorize apostasy, because it is explicitly mentioned in the Qur’an, as a hudud crime.¹⁰⁵ These schools advocate the punishment of death for apostasy, and rely heavily on hadith for this determination.¹⁰⁶ However, the Qur’an is silent on the punishment of death for apostasy.¹⁰⁷ Other schools find apostasy only a Tazir offense.¹⁰⁸ Lastly, some more progressive jurists have determined that mere apostasy is not a crime punishable on earth, but only judged in the eternities.¹⁰⁹ These jurists assert that apostasy, to be punishable on earth, must

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See* MOHAMED S. EL-AWA, PUNISHMENT IN ISLAMIC LAW: A COMPARATIVE STUDY 52 (1982).

¹⁰⁶ *See id.*

¹⁰⁷ KAMALI *supra* note 14, at 93.

¹⁰⁸ *See* EL-AWA *supra* note 105 at 52.

¹⁰⁹ KAMALI *supra* note 14, at 94.

be accompanied by some actual act of rebellion or fighting against Islam, in order to be punished by Islamic criminal laws.¹¹⁰

Some Sunnah proscribe death as a punishment for apostasy. Others preach tolerance for the apostate and a space for repentance and mercy. However, all agree that apostasy is a sin. Sahih Bukhari, in Book 84 on Apostates, explains many sayings of the Prophet concerning those who leave the faith.¹¹¹ As explained by Abu Bakra, the Prophet Muhammad once said,

The biggest of the great sins are: To join others in worship with Allah, to be undutiful to one's parents, and to give a false witness." He repeated it thrice, or said, "...a false statement," and kept on repeating that warning till we wished he would stop saying it.¹¹²

This hadith shows that the Prophet considered leaving Islam or "join[ing] others in worship" a great sin, but the hadith suggests no earthly punishment attaches to this sin.¹¹³

Another hadith similarly categorizes apostasy as a sin, but does not suggest any punishment for the apostate. As Abdullah bin Amr explains,

A Bedouin came to the Prophet and said, "O Allah's Apostle! What are the biggest sins?: The Prophet said, "To join others in worship with Allah." The Bedouin said, "What is next?" The Prophet said, "To be undutiful to one's parents." The Bedouin said "What is next?" The Prophet said "To take an oath 'Al-Ghamus.'" The Bedouin said, "What is an oath 'Al-Ghamus'?" The Prophet said, "The false oath through which one deprives a Muslim of his property (unjustly)."¹¹⁴

Other hadith suggest punishment for doing evil or sinning after becoming Muslim, but this same hadith makes no mention of what punishment should be ascribed to what sin or "evil," or who should be responsible for punishing the "evil."¹¹⁵ As Ibn Mas'ud narrates,

A man said, "O Allah's Apostle! Shall we be punished for what we did in the Pre-Islamic Period of ignorance?" The Prophet said, "Whoever does good in Islam

¹¹⁰ *Id.* at 95.

¹¹¹ See THE SUNNAH (Sahih Bukhari 84), <http://cmje.usc.edu/religious-texts/hadith/muslim/> [hereinafter Bukhari].

¹¹² Bukhari 84: 54.

¹¹³ *Id.*

¹¹⁴ Bukhari 84:55.

¹¹⁵ Bukhari 84:56.

will not be punished for what he did in the Pre-Islamic Period of ignorance and whoever does evil in Islam will be punished for his former and later (bad deeds)."¹¹⁶

However, there are hadith that suggest quite severe punishments for those who denied Islam after once receiving it. Ikrima describes,

Some Zanadiqa (atheists) were brought to 'Ali and he burnt them. The news of this event, reached Ibn 'Abbas who said, "If I had been in his place, I would not have burnt them, as Allah's Apostle forbade it, saying, 'Do not punish anybody with Allah's punishment (fire).' I would have killed them according to the statement of Allah's Apostle, 'Whoever changed his Islamic religion, then kill him.'"¹¹⁷

In a similar account, Abu Burda explains,

Abu Musa said, "I came to the Prophet along with two men (from the tribe) of Ash'ariyin, one on my right and the other on my left, while Allah's Apostle was brushing his teeth (with a Siwak), and both men asked him for some employment. The Prophet said, 'O Abu Musa (O 'Abdullah bin Qais!).' I said, 'By Him Who sent you with the Truth, these two men did not tell me what was in their hearts and I did not feel (realize) that they were seeking employment.' As if I were looking now at his Siwak being drawn to a corner under his lips, and he said, 'We never (or, we do not) appoint for our affairs anyone who seeks to be employed. But O Abu Musa! (or 'Abdullah bin Qais!) Go to Yemen.'" The Prophet then sent Mu'adh bin Jabal after him and when Mu'adh reached him, he spread out a cushion for him and requested him to get down (and sit on the cushion). Behold: There was a fettered man beside Abu Muisa. Mu'adh asked, "Who is this (man)?" Abu Muisa said, "He was a Jew and became a Muslim and then reverted back to Judaism." Then Abu Muisa requested Mu'adh to sit down but Mu'adh said, "I will not sit down till he has been killed. This is the judgment of Allah and His Apostle (for such cases) and repeated it thrice. Then Abu Musa ordered that the man be killed, and he was killed. Abu Musa added, "Then we discussed the night prayers and one of us said, 'I pray and sleep, and I hope that Allah will reward me for my sleep as well as for my prayers.'"¹¹⁸

However, these hadith do not explain all the details surrounding the apostasy, but only describe the punishment the apostates received, i.e. the death penalty. It is possible these individuals did more than just deny the faith, but also acted in open rebellion. As Kamali

¹¹⁶ *Id.*

¹¹⁷ Bukhari 84:57.

¹¹⁸ Bukhari 84:58.

explains, “Mahmassani has observed that the death penalty was meant to apply, not to simple acts of apostasy from Islam, but when apostasy was linked to an act of political betrayal of the community.”¹¹⁹ These hadith must be reconciled with Qur’anic teaches against the use of compulsion in religion, and with the idea that Apostasy absent open rebellion seems to be a crime only punishable in the hereafter.¹²⁰

At the time of these hadith, many who left Islam also openly fought against Islam, and threatened the life and property of Muslims.¹²¹ For this reason, the Prophet revealed in the Qur’an that Muslims were allowed to fight or use force against those who threatened them materially or physically, (as revealed in the Qur’anic verses surrounding the Battle of Badr).¹²² If the apostates described in these hadith did act in open rebellion, then using qiyas,¹²³ or analogy, the death penalty could be justified. The Qur’an supports the legitimacy of the Battle of Badr, in which others acting in open rebellion met a similar fate.¹²⁴ Furthermore, in each of these hadith a Companion, and not the Prophet himself, order the death penalty for these apostates.

One hadith does suggest that the prophet proclaimed that one should “kill whoever changes his religion.”¹²⁵ But as Kamali explains, this is a solitary hadith and S.A. Rahman discovers problems and weaknesses in its transmission in his book *The Punishment of Apostasy in Islam*.¹²⁶ If this hadith stands alone, and it comes from unreliable sources, then these facts in conjunction with other Sunnah and Qur’anic verses

¹¹⁹ KAMALI *supra* note 14, at 95.

¹²⁰ *See id.*

¹²¹ *See id.* at 98.

¹²² *See* QUR’AN *supra* note 39.

¹²³ Kamali defines qiyas as “[a]nalogical reasoning aimed at extending a giving ruling of the Qur’an and Sunnah to a new case, on grounds of an effective cause common to both the new and the original case.” KAMALI *supra* note 14, at 326.

¹²⁴ *See* QUR’AN *supra* note 39.

¹²⁵ KAMALI *supra* note 14, at 93.

¹²⁶ *See id.*

that call for “no compulsion” and the exercise of mercy, undermine the legitimacy of this hadith as a source of Sharia.¹²⁷

Another hadith links an act, open rebellion at the Battle of Badr, with denial of the faith and explains the connection between this act and a subsequent act of betrayal and the desire to kill the betrayer.¹²⁸ Here the punishment for apostasy seems to attach because of the act of open rebellion and betrayal. As the hadith explains,

Abu 'Abdur-Rahman and Hibban bin 'Atiyya had a dispute. Abu 'Abdur-Rahman said to Hibban, "You know what made your companions (i.e. Ali) dare to shed blood." Hibban said, "Come on! What is that?" 'Abdur-Rahman said, "Something I heard him saying." The other said, "What was it?" 'AbdurRahman said, "'Ali said, Allah's Apostle sent for me, Az-Zubair and Abu Marthad, and all of us were cavalry men, and said, 'Proceed to Raudat-Hajj (Abu Salama said that Abu 'Awana called it like this, i.e., Hajj where there is a woman carrying a letter from Hatib bin Abi Balta'a to the pagans (of Mecca). So bring that letter to me.' So we proceeded riding on our horses till we overtook her at the same place of which Allah's Apostle had told us. She was traveling on her camel. In that letter Hatib had written to the Meccans about the proposed attached of Allah's Apostle against them. We asked her, "Where is the letter which is with you?" She replied, 'I haven't got any letter.' So we made her camel kneel down and searched her luggage, but we did not find anything. My two companions said, 'We do not think that she has got a letter.' I said, 'We know that Allah's Apostle has not told a lie.'"

Then 'Ali took an oath saying, "By Him by Whom one should swear! You shall either bring out the letter or we shall strip off your clothes." She then stretched out her hand for her girdle (round her waist) and brought out the paper (letter). They took the letter to Allah's Apostle. 'Umar said, "O Allah's Apostle! (Hatib) has betrayed Allah, His Apostle and the believers; let me chop off his neck!" Allah's Apostle said, "O Hatib! What obliged you to do what you have done?" Hatib replied, "O Allah's Apostle! Why (for what reason) should I not believe in Allah and His Apostle? But I intended to do the (Mecca) people a favor by virtue of which my family and property may be protected as there is none of your companions but has some of his people (relatives) whom Allah urges to protect his family and property." The Prophet said, "He has said the truth; therefore, do not say anything to him except good." 'Umar again said, "O Allah's Apostle! He has betrayed Allah, His Apostle and the believers; let me chop his neck off!" The Prophet said, "Isn't he from those who fought the battle of Badr? And what do you know, Allah might have looked at them (Badr warriors) and said (to them), 'Do

¹²⁷ See *id.*

¹²⁸ Bukhari 84:72.

what you like, for I have granted you Paradise?' " On that, 'Umar's eyes became flooded with tears and he said, "Allah and His Apostle know best."¹²⁹

As Kamali explains, “the death penalty was not meant to apply to a simple change of faith but to punish acts such as treason, joining forces with the enemy, and sedition.”¹³⁰ Reading the hadith above in light of Kamali’s understanding seems to support the idea that apostasy must be aggravated by an act in order to be punished, and, in this hadith, the act of rebellion, such as fighting against Muslims at the Battle of Badr, justifies the killing of those who betray Islam.

Some hadith describe the consequences of hypocrisy and denial of the faith to a Muslim. Ali relates,

Whenever I tell you a narration from Allah's Apostle, by Allah, I would rather fall down from the sky than ascribe a false statement to him, but if I tell you something between me and you (not a Hadith) then it was indeed a trick (i.e., I may say things just to cheat my enemy). No doubt I heard Allah's Apostle saying, "During the last days there will appear some young foolish people who will say the best words but their faith will not go beyond their throats (i.e. they will have no faith) and will go out from (leave) their religion as an arrow goes out of the game. So, where-ever you find them, kill them, for who-ever kills them shall have reward on the Day of Resurrection."¹³¹

This hadith seems clearly to suggest that a Muslim should kill apostates, or those who abandon “their religion as an arrow goes out of the game.”¹³² It even suggests rewards for those who kill apostates.¹³³ This hadith standing alone might show an intolerance for a Muslim who wants to leave his faith.

However, the same expression, “as an arrow goes out of the game,” is used in other hadith citing a particular case of an apostate and his fate.¹³⁴ In this hadith, the Prophet seems to condone punishment for an individual who also questioned his

¹²⁹ *Id.*

¹³⁰ KAMALI *supra* note 14, at 95.

¹³¹ Bukhari 84:64.

¹³² *Id.*

¹³³ *See id.*

¹³⁴ Bukhari 84:67.

“distribution of alms,” and did more than just quietly leave the faith.¹³⁵ This particular apostate acted in rebellion as the hadith explains,

Narrated Abu Sa'id:

While the Prophet was distributing (something, 'Abdullah bin Dhil Khawaisira At-Tamimi came and said, "Be just, O Allah's Apostle!" The Prophet said, "Woe to you ! Who would be just if I were not?" 'Umar bin Al-Khattab said, "Allow me to cut off his neck ! " The Prophet said, " Leave him, for he has companions, and if you compare your prayers with their prayers and your fasting with theirs, you will look down upon your prayers and fasting, in comparison to theirs. Yet they will go out of the religion as an arrow darts through the game's body in which case, if the Qudhath of the arrow is examined, nothing will be found on it, and when its Nasl is examined, nothing will be found on it; and then its Nadiyi is examined, nothing will be found on it. The arrow has been too fast to be smeared by dung and blood. The sign by which these people will be recognized will be a man whose one hand (or breast) will be like the breast of a woman (or like a moving piece of flesh). These people will appear when there will be differences among the people (Muslims)." Abu Sa'id added: I testify that I heard this from the Prophet and also testify that 'Ali killed those people while I was with him. The man with the description given by the Prophet was brought to 'Ali. The following Verses were revealed in connection with that very person (i.e., 'Abdullah bin Dhil-Khawaisira At-Tarnimi): 'And among them are men who accuse you (O Muhammad) in the matter of (the distribution of) the alms.'¹³⁶

This hadith also seems to be lacking in context and detail to understand why Ali punished the apostates by killing them.¹³⁷ Maybe, the apostates' acts amounted to more than a “simple change of faith.”¹³⁸

In order to reconcile these two hadith with others that suggest mercy, maybe the people described by the hadith did more than leave Islam, but actually undermined the Islamic law, and acted in open rebellion as “an arrow darts through the game’s body.”¹³⁹ The violent image of an arrow seems to suggest that the type of apostasy described

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *See id.*

¹³⁸ KAMALI *supra* note 14, at 95.

¹³⁹ *See generally id.*

happened quickly and could describe more than apostasy alone, but also some act of violence against Islam. Also, in this hadith, a Companion immediately suggests he should “cut off his neck,” and the Prophet responds “Leave him, for he has companions.”¹⁴⁰ Even with the violent image of the apostasy, the Prophet still seems to call for restraint at first.¹⁴¹ Nonetheless, Muhammed ultimately seems to condone the killing of the apostate individual in this particular hadith.¹⁴²

In other hadith, the prophet encourages restraint and tolerance for those who deny the faith and even curse Islam.¹⁴³ As Aisha narrates,

A group of Jews asked permission to visit the Prophet (and when they were admitted) they said, "As-Samu 'Alaika (Death be upon you)." I said (to them), "But death and the curse of Allah be upon you!" The Prophet said, "O 'Aisha! Allah is kind and lenient and likes that one should be kind and lenient in all matters." I said, "Haven't you heard what they said?" He said, "I said (to them), 'Wa 'Alaikum (and upon you)."¹⁴⁴

Another account confirms the hadith related by Aisha.¹⁴⁵ As Ibn Umar explains, Allah's Apostle said, "When the Jews greet anyone of you they say: 'Sam'Alaika (death be upon you); so you should say; 'Wa 'Alaika (and upon you).'"¹⁴⁶ Both of these hadith emphasize kindness and “lenien[cy] in all matters,” and seem to suggest that in order to be true to Islam and the teachings of the Prophet, one should not condone the use of violence or force belief or obedience even when others act in unkind ways.¹⁴⁷ As a hadith narrated by Abdullah explains, “As if I am looking at the Prophet while he was speaking about one of the

¹⁴⁰ Bukhari 84:67.

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ Bukhari 84:61.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.*

¹⁴⁶ Bukhari 84:62.

¹⁴⁷ Bukhari 84:61.

prophets whose people have beaten and wounded him, and he was wiping the blood off his face and saying, ‘O Lord! Forgive my people as they do not know.’”¹⁴⁸ Kamali explains that “The Prophet did not treat apostasy as a proscribed offence (hadd), but, on the contrary, pardoned many individuals who had embraced Islam, then renounced it, and then embraced it again.”¹⁴⁹ Among these individuals, Kamali lists Abd Allah ibn Abi Sarh, and al-Harith ibn Suwayd.¹⁵⁰ Kamali explains that the Ibn Taymiyyah shows the Companions reached a consensus that most of the Arabs who apostatized and then later returned to the faith “were left unharmed and not a single one of them was killed because of their renunciation of Islam.”¹⁵¹ These hadith and others emphasize mercy and forgiveness even when another commits a wrong, even if that wrong involves apostasy.

C. The mixed opinions of jurists concerning the “crime” of apostasy

Ultimately the hadith must also support the teachings of the Qur’an as the ultimate source of Sharia. As Selim el-Awa explains “there is an urgent need to reinterpret the principles of the Qur’an and Sunnah” as they pertain to apostasy.¹⁵² If one adopts the notion that apostasy alone is not punishable by anyone but Allah, as the Qur’an teaches, then how do some Sunnah advocate for the death penalty in the case of apostasy? Furthermore, these Sunnah must not contradict other Sunnah that call for mercy. Using ijtiḥad and qiyas, these Sunnah and Qur’anic verses do not contradict each other, if apostasy must also be accompanied by some open act of rebellion in order to be punishable as a crime. Also, with apostasy, a time for repentance must be granted, and a

¹⁴⁸ Bukhari 84:63.

¹⁴⁹ KAMALI *supra* note 14, at 98.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 95.

Muslim sovereign should show mercy whenever he can in order to follow the example of the Prophet who showed mercy, and spared the lives of many of the apostates of his day.

Jurists definitely have not reached *ijma*, or consensus, about the teachings of the Qur'an and the Sunnah regarding Apostasy.¹⁵³ If apostasy rises to the level of a crime, jurists still disagree as to whether this crime qualifies as a *hudud* or as a *tazir* offence.¹⁵⁴ The Hanafi jurist, Shams al-Din Al-Sarakhsi does not think that apostasy would “qualify for temporal punishment.”¹⁵⁵ Ihrahim al-Nakha’I and Sufyan al-Thawri both thought “the apostate should be re-invited to Islam, but should never be condemned to death.”¹⁵⁶ These jurists understood the importance of providing a time for the apostate to repent.¹⁵⁷ The Maliki jurist, al-Baji comes to a similar conclusion, that apostasy as a sin should “carr[y] no prescribed penalty (*hadd*), and that such a sin may only be punished under the discretionary punishment of *ta’zir*.”¹⁵⁸

Other jurists justify holy war or *jihad* against apostates, and think that Qur’anic passages that call for “no compulsion in religion,” have been abrogated by later passages calling for *jihad*.¹⁵⁹ These jurists rely on the hadith already mentioned which says “Whoever changes his religion, kill him.”¹⁶⁰ In examining this hadith, these jurists rely upon the imperative grammar used in the expression “kill him,” and see death as a required punishment for apostasy.¹⁶¹ However, even those jurists who see this hadith as

¹⁵³ See *id.* at 93-94.

¹⁵⁴ KAMALI *supra* note 14, at 93-94.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 93.

¹⁵⁷ See *id.*

¹⁵⁸ *Id.* at 94.

¹⁵⁹ KAMALI *supra* note 14, at 92.

¹⁶⁰ See EL-AWA *supra* note 105 at 53; KAMALI *supra* note 14, at 93.

¹⁶¹ See EL-AWA *supra* note 105 at 52.

support for the use of the death penalty as a punishment for the crime of apostasy, still think the hadith must be subject to limitations in order to remain valid.¹⁶² For example, surely the act of a Jew converting to Islam does not warrant the death penalty for apostasy because the Jewish individual “changed his religion.”¹⁶³ Some see this hadith as only applying to those who leave Islam, and the Hanafi school limits the hadith further to mean that only men leaving Islam qualify for such a severe corporeal punishment.¹⁶⁴

In any case of apostasy, according to the Islamic principle of *maslahah mursalah*, or considerations of public interest, a punishment for an act is only justified if it protects society from some sort of harm.¹⁶⁵ If a Muslim denies Islam, this act does not harm society unless such apostates also openly rebel against the Muslim polity.¹⁶⁶ El-Awa suggests that for this reason Hanafi jurists write that “an apostate could not be punished for mere unbelief, but to prevent the mischief of war’ which follows his rejection of Islam.”¹⁶⁷

While *Usul al-Fiqh* shows most jurists recognize apostasy as a crime, many do not classify it as a *hudud* crime, but see it only as a *Taz’ir* offence, and therefore not punishable by death.¹⁶⁸ Furthermore, the understanding of apostasy as a crime seems to attach in most cases to those who also commit some sort of act of open rebellion in conjunction with renouncing the faith. If the Qur’anic teaching that “there should be no compulsion in religion” applies to those inside the Muslim faith as it does to those outside of the faith tradition, then it seems like

¹⁶² *Id.* at 52-53.

¹⁶³ *Id.* at 53.

¹⁶⁴ *Id.*

¹⁶⁵ See EL-AWA *supra* note 105 at 48; KAMALI *supra* note 14, at 324.

¹⁶⁶ See EL-AWA *supra* note 105 at 63-64.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 55.

Muslims under Sharia should also have a right to change their religion or their faith.¹⁶⁹ Thus, Muslims, living under Sharia, may leave Islam, as long as they do not fight against Islam.

Understandings of apostasy depend on the particular school of Sharia to which a Muslim belongs. Each school limits a Muslim's freedom of religion in distinct ways. Ultimately, the most persuasive and coherent understanding of apostasy in Sharia accords with the teachings of the Qur'an, the unalterable source of Islamic law. This approach to Sharia grants Muslims the freedom of conscience, denies compulsion in religion, and extends mercy to those who leave the faith, letting their fates rest in the hands of Allah, the ultimate Judge in the Hereafter.

V. Conclusion

The teachings found in the Sharia seem to support that some freedom of religion exists in classical Islamic law, but that freedom is not unlimited. The contours of that freedom are bound by laws regarding the dhimmi and the understanding of apostasy in Muslim society. In other words, in Muslim polities non-Muslims seem to have more freedom of belief than Muslims, unless the polity accepts apostasy as a crime only punishable in the next life, and do not categorize apostasy as a hudud offense. Ultimately, any political structure based on religion will need to place boundaries on those who disagree with their religious faith in order to maintain a certain sense of order and legitimacy. Islamic law must deal with the challenge of reconciling a jurisprudence based on a faith tradition with the understanding that "no compulsion" can be maintained in religion. Those who do not profess Islam, must not be seen as fighting against Islam. If the Muslim polity perceives the unbeliever as undermining the faith in any way, then the unbeliever might threaten the very legitimacy of the Muslim polity. He will appear to

¹⁶⁹ QUR'AN (Yusufali 2:256).

jeopardize the safety established by the Sharia based social order. The question remains, how religiously free can a member of a religiously organized polity be? Does Islamic law compel religious observance to a certain moral order through its jurisprudence, or does it merely articulate a universal understanding of right and wrong that legitimately could apply to all humanity regardless of their particular faith tradition? If the latter is true, then Sharia poses no substantial threat to the exercise of the fundamental freedom of religion.