# Public Reason, Reasonable Pluralism, and Religious Freedom: Re-Visiting the Criminalization of Apostasy in Pre-Modern Islamic Law

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*[10:99-100] Had your Lord willed, all the people on Earth would have believed. Will you then force the people to believe? No soul can truly believe, except by God's permission. For He places a curse upon those who refuse to engage their reason!* The Holy Qurʾān [10:-100][1]*

The penalty for apostasy, in Islamic law, is death. Islam is conceived as a polity, not just as a religious community. It follows therefore that apostasy is treason. It is a withdrawal, a denial of allegiance as well as of religious belief and loyalty. Any sustained and principled opposition to the existing regime or order almost inevitably involves such a withdrawal. Bernard Lewis[2]

O ne of the most persistent political challenges for multicultural societies is the crafting of a just democratic order that is at once inclusive and respectful of doctrinal diversity. The salient question for any pluralist society is how a state's political structures can ensure to protect the widely diverse and conflicting religious and philosophical doctrines of its citizenry, while simultaneously guaranteeing that such doctrines are held at bay from dictating the state's policies, political institutions, and the day-to-day affairs of its citizenry. As a cornerstone to this political project, the most fundamental and pressing rights to be guaranteed are the free exercise of religion and expression. Indeed, one of the greatest hindrances to social cooperation within the global arena today is what is perceived to be the

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1. Author's own translation.
2. Bernard Lewis, "Islamic Revolution," *The New York Review of Books* 34, no. 21/22 (Jan. 21, 1988), http://www.nybooks.com/articles/archives/1988/jan/21/islamic-revolution/?insrc=toc (accessed June 22, 2014).

inherent incompatibility between competing ethical and religious doctrines, such as with the longstanding tradition of Islamic law and the universal norms and desiderata of the international human rights regime.

This paper explores possible resolutions to the outstanding challenge of freedom of religion within the Islamic tradition, particularly as it pertains to the Islamic law of apostasy, which, at least theoretically, remains a potential obstacle for Islam's ability to successfully endorse the constitutional essentials of a democratic regime. In doing so, I engage the influential framework of Rawlsian political liberalism as a helpful theoretical point of departure. As Rawls suggests, in the crafting of an "overlapping consensus" on constitutional essentials, each "reasonable" comprehensive ethical doctrine must seek to justify its endorsement of the fair terms of social cooperation from within the resources of its own tradition. With this in mind, I engage pre-modern juristic perspectives on apostasy, exploring contemporary Muslim scholarly efforts that seek to re-evaluate its criminalization. In doing so, I focus exclusively on historically grounded arguments that eschew an emphasis on ahistorical hermeneutical strategies of reinterpreting scripture and that seek to remain faithful to the doctrinal commitments and the normative methodology of traditional Islamic jurisprudence. I conclude by illustrating how, as a number of scholars have amply shown, the discursive nature of the Islamic legal tradition and its indigenous interpretive tools offers Muslim intellectuals and reformers significant leeway for revoking the pre-modern punishment for apostasy via a form of legal reasoning that remains faithful to the normative methodology of traditional Islamic law, thereby simultaneously meeting the requirements of what may constitute as a "reasonable" comprehensive doctrine in Rawls's conception of political liberalism.

# Introduction

The topic of Muslim apostasy has remained a recurrent theme in the Western political imagination and public discourses on Islam and secular democracy ever since the 1989 *fatwa* against Salman Rushdie in the wake of *The Satanic Verses* controversy. The topic remains a salient challenge for contemporary Islam, with intermittent reminders from high-profile

cases in Muslim countries, such as Egypt[3] and Malaysia; and recently with the 2006 case of Abdul Rahman, an Afghan convert to Christianity who faced a possible death sentence before being offered asylum in Italy, and the 2014 case of Mariam Yahya Ibrahim Ishag, a Sudanese woman raised as a Christian by her mother and sentenced to death for apostatizing from her father's Muslim faith.[4] Such highly publicized cases have served to highlight the tensions between the substantive legal provisions of traditional Islamic law, on the one hand, and the modern norms of international human rights on the other. Can such an uneasy antagonism between different legal traditions and their competing normative values be accommodated within a constitutional democratic framework?

In proceeding to tackle this challenge with regards to the topic of apostasy, a discussion of Rawls's political conception of justice may serve as a promising point of departure. In his seminal and highly influential work *Political Liberalism,* Rawls sets out to boldly answer the following central concerns:

> How is it possible that deeply opposed though *reasonable* comprehensive doctrines may live together and all affirm the political conception of a constitutional regime? What is the structure and content of a political conception that can gain the support of such an overlapping consensus?[5]

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3. For an indepth examination of the high profile apostasy trial of prof. Nasr Hamid Abu Zayd in the 1990s and the politics of apostasy trials in the Egyptian legal system, see Baber Johansen, "Apostasy as Objective and Depersonalized Fact: Two Recent Egyptian Court Judgements," *Social Research* 70, no. 3 (Fall 2003).

4. Amin Tarzj, "Afghanistan: Apostasy Case Reveals Constitutional Contradictions," *Radio Free Europe / Radio Liberty*, March 22, 2006, http://www.rferl.org/content/article/1066970. html (accessed June 22, 2014); "Afghan convert arrives in Italy for asylum," *CNN World*, March 29, 2006, http://www.cnn.com/2006/WORLD/asiapcf/03/29/christian.convert/index. html (accessed June 22, 2014); "Sudan woman gets death sentence for apostasy," *Aljazeera*, May 17, 2014, http://www.aljazeera.com/news/middleeast/2014/05/sudan-woman-given-death-penalty-apostasy-20145159264775754.html (accessed June 20, 2014). In Maryam's case, though she has already been sentenced for apostasy by a Sudanese judge, it remains to be seen whether the sentence will go through due to mounting local and international pressure and her appeal process, which is currently under review.

5. John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), xviii. Emphasis is mine.

Rawls begins to answer these questions with a central assumption inherent to political liberalism itself—"for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime."[6] Thus, in order to ensure a wide acceptance within the context of a multicultural and pluralist society, Rawls must consciously define his political conception of justice as "freestanding," in that it is not derived from any commitments to a wider comprehensive doctrine.[7] His conception of justice is not to be regarded as a comprehensive vision of the "good"; rather, it is necessarily restricted to the political domain; although the individual is still regarded as a moral agent, "the kinds of rights and duties, and of the values considered, are more limited."[8]

It is also necessary to recall that Rawls's political vision is limited to including only such doctrines as are deemed to be "reasonable."[9] For Rawls, a "reasonable doctrine" is characterized by three seminal features:[10] (1) it is an exercise in "theoretical reason," in that it articulates a worldview that coherently and consistently covers the major religious, philosophical, and moral aspects of human life; (2) it is an exercise in "practical reason," in that it emphasizes certain values and attempts to balance them with one another when they conflict; and (3) it is "stable over time," in that, although not fixed and unchanging, it is "not subject to sudden and unexplained changes"' but, rather, it relies upon a normative tradition of thought and doctrine that evolves slowly and incrementally over time, "in light of what, from its point of view, it sees as good and sufficient reasons."

The third feature of "reasonableness" suggests that, for any doctrine to be considered reasonable, it must be characterized by a coherent system of thought that evolves on the basis of principled and thoughtful argumentation and that is internally consistent. In the context of the Islamic legal tradition,

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6. Rawls, *Political Liberalism*, xvi.

7. Rawls, *Political Liberalism,* xlii.

8. Rawls, *Political Liberalism,* xliii.

9. As he states with regard to other potential types of doctrines: "Of course, a society may contain unreasonable and irrational, and even mad, comprehensive doctrines. In their case the problem is to contain them so that they do not undermine the unity and justice of society" (Rawls, *Political Liberalism,* xvi–xvii).

10. Rawls, *Political Liberalism,* 59.

this would suggest that any attempts at internal reform must be rooted in a re-evaluation of sacred source-texts that works within the normative parameters of Islamic juristic methodology, using reasoned and plausible arguments that have the potential to gain wider currency amongst Muslims.

For Rawls, citizens are considered to be "reasonable" so long as they are capable of viewing each other as "free and equal citizens" who are capable of offering each other "fair terms of social cooperation" and are willing to act on them, provided that others also accept the same terms.[11] This definition suggests not all reasonable comprehensive doctrines need necessarily be liberal ones; the definition of reasonableness is left "deliberately loose"[12] and minimalist.

Thus, given the inclusiveness of Rawls's definition, the essential challenge is how to ensure that his political conception of justice is freely endorsed by a diversity of conflicting doctrines. For Rawls, it is insufficient to accept a democratic form of government as part of a *modus vivendi*; rather, more ambitiously, all reasonable comprehensive doctrines must be regarded as essentially compatible "for the right reasons" with his political conception of justice.[13] As such, in order to obtain an overlapping consensus on constitutional essentials in a society characterized by a reasonable pluralism, citizens must seek to engage in an inclusive mode of deliberation, namely what Rawls terms as "public reason." This entails a form of collaborative dialogue on constitutional essentials and matters of public justice that eschews the grounding of justifications in foundational metaphysical principles.[14] Through this limited mode of reasoning, citizens are capable of ideally affirming Rawls's political conception of justice, while simultaneously endorsing it from within their own respective traditions.[15]

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11. Rawls, *Political Liberalism,* xlii, 122ff.

12. Rawls, *Political Liberalism,* 59.

13. Rawls, *Political Liberalism,* xxxvii.

14. Muhammad H. Fadel, "Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law," *Chicago Journal of International Law* 8, no. 1 (2008): 3.

15. Rawls, *Political Liberalism,* xix. As Rawls points out, public reason is to be distinguished from "non-public" modes of reason, which are not to be confused with private modes of reasoning, which rather signify inaccessible modes of reasoning that are rooted in a specific comprehensive doctrine.

# Critiques of Political Liberalism

Though Rawls's theory of political liberalism has significantly contributed to discussions on democratic pluralism and freedom of religion, as several thinkers have pointed out, the theory is not without its problems. Many of Rawls's religious critics would take issue with the designation of his conception of "justice as fairness" as "free standing," arguing that his project is simply a modified version of secular liberal politics as usual. Even secular critics may hold that, contrary to his assertions, there is nothing "reasonable" about expecting everyone to argue in the same terms, "which just happens to be a slightly adjusted version of the same terms dictated by his comprehensive secular liberalism."[16]

Some, such as Jeffrey Stout, have serious reservations about Rawls's very conception of what is "reasonable." As Stout explains:

> to be *reasonable* is to accept the need for a social contract and to be willing to reason on the basis of it, at least when deliberating in the public forum . . . This definition implicitly imputes *unreasonableness* to everyone who opts out of the contractarian project, regardless of the reasons they might have for doing so.[17]

As Nicholas Wolterstorff and others argue, given that a fundamental tenet of liberal democracy is the ability of citizens to enjoy equal freedom in living their individual lives as they see fit, how can this be compatible with the moral restriction on discussing and deciding political issues as they see fit? Essentially, while the right to express freely one's religious commitments is fully guaranteed, this is not a right to be enjoyed in the political sphere, where the most important issues are resolved.[18]

In response to Rawls's definition of "reasonableness," Stout proffers a simpler, plausible alternative definition: "a person is reasonable in accepting or rejecting a commitment if he or she is 'epistemically entitled' to do so, and reasonable people are those who comport themselves in accord with their epistemic responsibilities."[19] Defined in this light, it would be epistemologically inconsistent to maintain that those who hold comprehensive doctrines are reasonable in this sense, while those who

16. Jeffrey Stout, *Democracy and Tradition* (Princeton: Princeton University Press, 2004), 76.
17. Stout, *Democracy and Tradition*, 67. Emphasis mine.
18. Stout, *Democracy and Tradition*, 68.
19. Stout, *Democracy and Tradition*, 68.

dissent from the social contract are unreasonable in the same sense. As he concludes, "There are sound epistemological reasons for rejecting the quest for a common basis, reasons rooted in the permissive notion of epistemic entitlement that lends plausibility to the doctrine of reasonable pluralism in the first place."[20]

Furthermore, Rawls's vision of politics remains explicitly contractarian in its assumption of a single relevant political community, failing to account for the plausibility of a politics of multiple communities as the natural concomitant of living in a pluralist society. Nicholas Wolterstorff summarizes what he regards as liberalism's misguided project:

> The liberal is not willing to live with a politics of multiple communities. He still wants communitarian politics. He is trying to discover, and to form, the relevant community. He thinks we need a shared political basis; he is trying to discover and nourish that basis.[21]

Thus, Wolterstorff calls for moving beyond Rawls's social contract model towards what he terms a "consocial" model of discursive sociality, which envisions several discursive political communities that are unhindered in their exchange of reasons within and across their own boundaries.[22]

Aside from these directed critiques, Abdul Aziz Sachedina argues that divorcing any conception of justice from its moral and metaphysical foundations is inherently problematic. Thus, as long as the cross-cultural applicability of the universal principles enshrined in human rights documents is not openly and sincerely addressed, conservative Muslim leaders will continue to espouse the tendency of moral relativism in denying the international human rights regime any claims to legitimacy; by detaching universal morality from any metaphysical foundational principles in their efforts to accommodate a diversity of religious traditions, human rights advocates and liberal thinkers may have unwittingly undermined the very universality of their project. As he explains, "Paradoxically, while the search for universality through secularization of human rights norms also paved the way for pluralistic sources of morality, it also led to their

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20. Stout, *Democracy and Tradition*, 68.
21. Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham, Maryland: Rowman & Littlefield Publishers, 1997), 109.
22. Audi and Wolterstorff, *Religion in the Public Square,* 114.

inevitable relativity."[23] The corrective to this unfortunate development is thus to openly acknowledge and to avoid shying away from an articulation of the link between the secular democratic values expressed in human rights documents and the eighteenth-century philosophies of the Enlightenment that emphasized the inherent attributes of the human person out of which they emerged.[24]

Despite these insightful critiques, Rawls's conception of public reason and his understanding of what may constitute a "reasonable doctrine" remain highly influential in liberal democratic theory as a theoretical response to the challenges of religious pluralism. Indeed, recourse to the model of public reason certainly has its advantages. Apart from taking seriously the normative parameters of the Islamic tradition, or any other ethical tradition for that matter, as its primary point of departure, thereby reflecting a generally more conciliatory approach towards religion, it also proffers a significant degree of flexibility by allowing ample room for significant doctrinal disagreement to exist, as will be shown below. As such, my exploration of public reason as a model of reconciliation is not reflective of any normative commitments to political liberalism but rather reflects the relative efficacy of this model within the liberal democratic framework in particular. Bearing these limitations in mind and acknowledging the theoretical possibility for other models of democratic cooperation, we now turn to an illustration of how public reason may be used, within the liberal political tradition more specifically, to mediate some of the outstanding tensions between the Islamic legal tradition and the international human rights regime.

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23. Abdulaziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford and New York: Oxford University Press, 2009), 10ff.

24. As such, the central challenge, as he sees it, is to foster such a cross-cultural discussion on metaphysical principles. The first step in this process is, thus, to construct a more inclusive theology that engages in a critical re-evaluation of Muslim theological resources in support of the foundational principle of the "inherency and inalienability of the rights that accrue to all humans as humans." Sachedina, *Islam and the Challenge of Human Rights*, 16.

## Public Reason As a Model of Reconciliation

Among those who have explored the potential for an Islamic endorsement of political liberalism,[25] Muhammad Fadel argues that the concept of public reason can serve as an ideal paradigm in resolving some of the outstanding tensions between the substantive aspects of Islamic law and modern human rights norms, if both sides agree to observe the limitations of this mode of reasoning in their political deliberations. Given Rawls's definition of "reasonableness" and the limits of public reason, Fadel assumes that any deviation from an equality norm by any adherent of a particular comprehensive doctrine, "so long as the deviation is voluntary and rational from the perspective of the concerned individual," ought not to raise any serious political concerns, "even if liberals might question the wisdom of such a choice."[26] As he explains:

> To the extent that such a deviation is driven by properly motivated religious observance, the human right to free exercise of religion also supports—and perhaps even requires—permitting such conduct, even if it results in inequality that would violate human rights norms were such conduct to be mandated by the state.[27]

Such a deviation ought to, in theory, be permitted, as long as it does not translate into the violation of the human rights of others and is "not the result of state-backed coercion."

In outlining how the tensions between Islamic law and international human rights law are to be resolved by an appeal to public reason, Fadel begins with a helpful classification of Islamic legal rulings that are potentially in conflict with public reason. The potentially problematic rulings are ordered into three categories, depending on their degree of conflict with public reason, as follows:

*1. Permissive rules:* these include the right to own slaves and the right of a man to marry more than one wife. Such rights do not raise a question of conscience for Muslims because Muslims are not obliged to invoke such

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25. Besides Fadel's work surveyed here, see Andrew F. March's insightful monograph on this topic: *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (Oxford: Oxford University Press, 2009).
26. Fadel, "Public Reason," 3.
27. Fadel, "Public Reason," 4.

rights, and their enjoyment may even be discouraged Islamically. As such, prohibiting them ought to raise no ethical concerns for Muslims.[28]

*2. Mandatory rules which could potentially be consistent with the requirements of public reason:* these include Islamic inheritance law, which is arguably consistent with the free exercise of religion so long as it is exercised through an act of voluntary consent, and Islamic laws that can be made consistent with the dictates of public reason through the revision of certain obsolete factual assumptions—these are largely based on pre-modern mores and views regarding the capacities of women, etc. that are non-theological in origin.[29]

*3. Mandatory rules that are morally repugnant to public reason:* among the relatively small handful of rulings under this category are rulings potentially discriminatory towards non-Muslim minorities[30] and the criminalization of apostasy.[31]

This classification helpfully compartmentalizes the potentially controversial rulings of Islamic substantive law from those that can be more readily redeemed through recourse to public reason. Of the three categories mentioned, apostasy laws fall under the most problematic category of rulings that are fundamentally irreconcilable with the dictates of public reason, as they constitute clear violations of the fundamental human rights of others. Given this fact, what are the available avenues for committed Muslims and human rights activists in overcoming what appears to be a fundamentally irreconcilable tension between this small category of Islamic substantive laws and the modern norms of international human rights?[32]

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28. Fadel, "Public Reason," 10–12.

29. Fadel, "Public Reason," 12–18.

30. While the wider topic of freedom of religion as it relates to the treatment of other religious minorities in Islamic law is beyond the scope of this paper, see the following favourable rendition offered by Tim Winter on Islamic law's capacity for accommodating "multiple public sanctities": Abdal Hakim Murad, "Quranic Truth and the Meaning of 'Dhimma,'" *Kalam Research & Media*, http://www.kalamresearch.com/publications.html (accessed November 26, 2010).

31. Fadel, "Public Reason," 18–19.

32. Fadel does not offer a detailed solution to the prominent example of apostasy, arguing instead that human rights advocates ought to avail themselves of the opening provided by modernist scholars who have attempted to re-evaluate its criminalization through a critical re-engagement of Islam's source-texts. See Fadel, "Public Reason," 19.

Theoretically, when disagreement is deemed to exist between Islamic substantive laws and human rights law, drawing back on the discursive tradition of the orthodox schools of law (the *madhāhib*)[33] in an appeal for more favourable rulings have served as a potentially constructive option. However, this recourse seems to be precluded when all of the schools appear to endorse a unanimous consensus (*ijmaʿ*) on a particular legal ruling. Failing this approach, Muslim scholars and human rights advocates have tended to favour a critical reengagement with the sacred source-texts in an attempt to rearticulate a universal vision of personhood and human dignity grounded in novel theological perspectives or the construction of a new hermeneutic.[34] While such an alternative approach may helpfully yield some novel insights, its legitimacy and appeal is weakened from a traditional Muslim perspective due to its departure from mainstream orthodoxy; the tendency to favour idiosyncratic readings of sacred scripture may be regarded by many as insufficiently representative of mainstream Muslim beliefs and commitments for it to constitute as an effective option. Not only is such an ahistorical account likely to be regarded by many as a devaluation of the longstanding traditions of Islamic substantive law (*fiqh*), legal methodology (*usūl*), and Qurʾānic exegesis (*tafsīr*), but also it is likely to run into problems from a Rawlsian perspective—if idiosyncratic epistemological considerations and divergent scriptural interpretations are given equal weight, Rawls's prerequisite of reasonableness, characterized by a comprehensive doctrine's ability to manifest a sense of coherent stability over time, may be called into question with regards to the Islamic tradition as a whole.

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33. While the Shīʿīte Jaʿfarī school of law is also briefly surveyed, this paper will primarily focus on the views of the four orthodox Sunnī schools of law, particularly in its discussion of Islamic legal methodology.

34. For a prominent example, see the academic discussion between Khaled Abou El Fadel and Mohammad H. Fadel ("Too Far from Tradition") in Khaled Abou el Fadel, *Islam and the Challenge of Democracy*, ed. Joshua Cohen and Deborah Chasman (Princeton: Princeton University Press, 2004), 2–46, 81–86. For other contemporary examples of critical theological arguments and novel attempts at a new Quranic hermeneutic in support of liberal democratic reform see Abdul Aziz Sachedina, *Islam and the Challenge of Human Rights* (Oxford: Oxford University Press, 2009); Abdullahi Ahmed An-Naim, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Syracuse, NY: Syracuse University Press, 1996); and Farid Esack, *Quran, Liberation, and Pluralism* (Oxford: Oneworld Publications, 1996).

What these considerations suggest is that the most likely strategy to garner the widest possible Muslim appeal in its support for liberal democratic ideals is a historically rooted approach that takes seriously the normative tradition of Islamic jurisprudence. Such an approach has the added advantage of drawing on the rich and longstanding history of Islamic jurisprudence as a discursive tradition and highlighting its ability to adapt to changing social contexts through the traditionally recognized process of independent legal reasoning (*ijtihād*). Accordingly, at this juncture, prior to delving into an analysis of pre-modern legal opinions on apostasy, it may be helpful to clarify a few assumptions concerning the traditionally accepted sources of Islamic law that have historically developed in the field of Islamic legal methodology.

The process of *ijtihād* in Sunni legal methodology has historically relied upon these four main sources of law: (1) the Qur'ān; (2) the normative Prophetic tradition (Sunna) and the Prophet Muhammad's transmitted reports (*ḥadīth*); (3) legal reasoning through analogical deduction (*qiyās*); and (4) the presence of unanimous scholarly consensus on any given legal ruling (*ijmaʿ*). An understanding of how each of these sources is to be engaged with is of crucial significance to how legal rulings are to be deduced and articulated. First, with regards to the Qur'ān, while creative and even critical interpretations of scripture are theoretically plausible, this paper makes the reasonable assumption that, in order for the interpretation of verses of legal import to hold wider currency amongst Muslims, such interpretations must be historically supported by the precedents established by the Prophet and the earliest generations of Muslims (*salaf*), or, at the very least, they must not openly conflict with any such precedents or established historical facts.

Second, with regards to the Sunna, jurists amongst the different schools of law traditionally adopted a diversity of approaches concerning the use of Prophetic *ḥadīth* reports in legal rulings and the rating of their authenticity, with the Ḥanbalī school being regarded as the most conservative and strict in its adherence to the *ḥadīth*.[35] This discussion is important to bear in

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35. These differences of opinion trace their origins to the earliest generations of Islam in the early debates between the *ahl al-ḥadīth* (school of *ḥadīth*) and *ahl al-raʾy* (school of free opinion), whereby the *ahl al-ḥadīth* maintained a stricter adherence to Prophetic traditions in their legal rulings, while the *ahl al-raʾy* more readily accepted independent legal opinions based on analogical reasoning (*qiyās*).

mind in the contemporary Muslim context, particularly with regards to the status of the major canonical collections of authentic (ṣaḥīh) ḥadīth, as it continues to remain a source of some contention amongst Muslim scholars and intellectuals; at one extreme, authentic Prophetic ḥadīths, particularly those from the two most popular collections of Bukhārī and Muslim, are accorded the status of revelation (waḥy) on par with the Qurʾān,[36] while at the other extreme, a trend amongst modernist thinkers increasingly challenges the ḥadīth collections as largely fabricated.[37] This range of perspectives has serious consequences for the development of substantive laws: if the authoritativeness of ḥadīth reports is argued to be on par with the Qurʾān, then they are to be regarded unquestionably as an independent source of extra-Qurʾānic legislation that is not subject to re-evaluation or criticism.

Third, this paper assumes that, although the four Sunni schools of law have traditionally placed a great degree of confidence in the authenticity of the *ṣaḥīḥ* collections—canonically authenticated works of *ḥadīth*—, a serious re-engagement with the field of *ḥadīth* criticism may help to re-evaluate the authoritativeness of traditions used to derive rulings that appear to conflict with modern human rights norms, particularly when such substantive laws are seen to have no authoritative basis in the Qurʾān. Such a stance suggests that, rather than being regarded as a potential source of extra-Qurʾānic rulings, the Prophetic Sunna can be better understood as a collection of normative precedents from the earliest generations of Islam that are to serve as an exemplary model of how the Qurʾān is to be lived and practiced for Muslims. Furthermore, I adopt the commonly held understanding that the normatively binding nature of legal precedents is to be restricted to the first three generations of Islam (the Salaf), suggesting that the legal opinions of later jurists (*fuqahāʾ*) are to be regarded as the informed opinions of legal specialists, which may theoretically be discarded for other legal opinions that are more amenable to contemporary understandings of justice.

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36. This view is widely shared by scholars of the Salafi movement today, which is loosely affiliated with the traditionalism of the Ḥanbalī school.

37. An example of this second trend can be found in the Qurʾānist movement (*ahl al-Qurʾān*), which espouses a highly critical perspective on the authoritativeness of Prophetic *ḥadīths*. See, for instance, the works of the influential Qurʾānist thinker Ahmad Subhi Mansour at http://www.ahl-alquran.com/.

As for the doctrine of scholarly consensus or *ijmaʿ*, I borrow from the views of the contemporary American Islamic scholar and Mālikī jurist Abdullah bin Ḥamid Ali and assume a restricted sense of the concept—namely, by limiting the scope of the doctrine's applicability to matters of consensual agreement that have been authoritatively established since the earliest generations of Islam or "what is known from the religion by immediate necessity" (*al-maʿlūm min al-dīn bil al-ḍarūra*).[38] As Ali convincingly argues in his extensive study on the topic of *ijmaʿ*, while consensus can serve as a unifying factor in the creation of a coherent body of law, "it can, and has been used constantly as a tool to suppress dissenting opinion even when that dissenting view has been, at times, valid," further noting, "most historical claims of unanimous consensus are subjective and circumscribed by the parameters within which claimants define this concept."[39] As such, the occurrence of authoritative *ijmaʿ* has been historically difficult to ascertain, as different scholars have applied a variety of subjective criteria in defining its scope and meaning.[40] In conclusion, he asserts that *ijmaʿ* has typically served to signify no more than a confirmation of majoritarian opinions, which have often times been used to suppress as heterodox dissenting opinions; he cites several historical examples of defecting legal opinions on controversial instances where consensus was

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38. Abdullah bin Hamid Ali, "Scholarly Consensus: Between Use & Misuse," *Lamppost Productions*, http://www.lamppostproductions.com/files/articles/Scholarly%20Consensus.pdf (accessed June 18 2014, 2014).

39. Ali, "Scholarly Consensus," 3.

40. For example, is consensus to be limited to legal authorities (*mujtahids*) of a particular era or ought it to also include lay scholars? Others have favoured limiting its scope to scholars deemed to be upright in character. Despite these disagreements, however, the most historically accepted definition of *ijmaʿ* has been the one provided by the twentieth-century Ḥanafī legal theorist ʿAbd al-Wahhāb Khallāf: "The agreement of all of the *mujtahid*s of the Muslims in a particular age coming after the death of the Messenger upon a scriptural ruling regarding a particular occurrence." Quoted in Ali, "Scholarly Consensus," 4. Defined in this manner, Khallaf has argued that binding consensus has never truly occurred, preferring to equate the term with the process of consultation (*shūra*), i.e. the agreement of scholars present at a particular time and place. Similarly, the twentieth-century scholar ʿAbd Al-Karim Zaydan has also argued that ever since the generation of the Prophet's Companions (*Ṣaḥāba*), when the Muslims community was united and the number of *mujtahids* was still small in number, consensus has no longer truly convened due to the rise in doctrinal disagreements that has inevitably emerged with the dispersion of the juristic class across Muslim lands. Ali, "Scholarly Consensus," 9–10.

deemed to have been convened. Interestingly, among the relevant examples he provides is the case of apostasy.[41] With these clarifications in mind, an analysis of pre-modern juridical opinions on apostasy is now in order.

## An Overview of Pre-modern Legal Rulings on Apostasy

Upon reviewing the pre-modern Muslim legal tradition's treatment of apostasy, one notices a near unanimous consistency amongst the four Sunni schools of law in apostasy's categorization as a crime necessitating capital punishment. Most pre-modern *fiqh* manuals include a section devoted exclusively to this crime,[42] categorizing the list of transgressions amounting to apostasy and discussing at length a host of legal opinions on related issues, of which the following are among the most prominent: (1) whether it was necessary to grant apostates the option to repent prior to their execution, and if so, how much time was to be allotted for their repentance; (2) whether apostates were to be subject to distinctive treatments depending on the status and heinousness of their infidelity; and (3) whether female apostates were to be spared the punishment of execution. The following section attempts to summarize in order the pre-modern juridical treatment of these themes.

Generally speaking, pre-modern juristic discourses on apostasy required a voluntary cessation of belief for punishment to take effect; the majority of jurists exempted from punishment individuals who were forced to embrace Islam under conditions of duress or who did not enter

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41. Ali, "Scholarly Consensus," 11–15.

42. For illustrative pre-modern juridical treatments of apostasy within the Ḥanafī and Ḥanbalī schools respectively, see: Burhān al-Dīn ʿAlī b. Abī Bakr al-Marghīnānī, *al-Hidāya, Sharḥ Bidāyat al-Mubtadiʾ*, ed. Muḥammad Muḥammad Qāmir and Ḥāfiẓ ʿĀshūr Ḥāfiẓ, *Kitāb al-Siyar: Bāb Aḥkām al-Murtaddīn* (Cairo: Dār al-Salām, 2000), 2:871–880; and ʿAbd Allah b. Aḥmad b. Muḥammad Ibn Qudāma, *Al-Kāfī fī Fiqh al-Imām Aḥmad b. Ḥanbal*, ed. Muḥammad Fāris and Masʿad ʿAbd al-Ḥamīd al-Saʿdanī (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1994), 4:59–66. For a more extensive treatment of the topic summarizing the views of the Mālikī school, see the compendium of Mālikī law ʿAbd Allāh b. ʿAbd al-Raḥmān Ibn Abī Zayd, *al-Nawādir wal Ziyādāt ʿala mā fi al-Mudawwana min Ghayrihā min al-Ummahāt*, ed. Muḥammad Ḥajjī (Beirut: Dār al-Gharb al-Islāmī, 1999), 14:490–556.

into it voluntarily, holding such considerations to nullify their apostasy.[43] Furthermore, discussions on the repentance of apostates prior to their execution were a standard theme in pre-modern *fiqh* manuals; unlike the typical *hudūd* penalties,[44] the penalty for apostasy was largely held to be revocable through the sincere act of repentance. As such, the jurists discussed at great lengths issues such as whether granting apostates the repentance option was to be legally mandated and the length of time that they were to be granted for repenting. While most jurists held the repentance option to be mandatory (*wājib*), Abū Ḥanīfa (d. 148 AH / 767 CE) and al-Marghīnānī (d. 593 AH / 1197 CE), among the Ḥanafī school, argued it was only desirable (*mustaḥabb*), as they accorded the apostate the status of a belligerent rebel (*ḥārbī*).[45]

A small minority of jurists from among the successor generation of the early Muslims (Tābiʿīs)—namely Ibrāhīm al-Nakhaʿī (d. 108 AH / 726 CE), Sufyān al-Thawrī (d. 161 AH / 778 CE), and Al-Hasan b. Hayy (d. 169 AH / 785 CE)—held the unconventional opinion that the door to repentance should continue to remain open, preferring to defer the execution of apostates indefinitely. This view appears to have also been shared by the tenth-century Ḥanafī jurist Abū al-Ḥasan al-Karkhī (d. 340 AH / 951 CE).[46] In addition, the famous twelfth century Ḥanafī jurist Al-Sarakhsī (d. 1106 CE) appears to have held a more explicitly lenient view by rejecting the death penalty altogether, holding that, although apostasy is a most grievous offense, its punishment is to be reserved for the hereafter, since it is primarily a matter between man and his Creator.[47] From among the other schools, the Mālikī jurist al-Bājī (d. 494 AH) and the renowned thirteenth/fourteenth-century Ḥanbalī Ibn Taymiyya (d. 1328 CE) also held that apostasy carries no prescribed penalty, and that it may only be punished under the discretionary

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43. Yohannan Friedmann, *Tolerance and Coercion in Islam* (New York: Cambridge University Press, 2003), 144.

44. *Ḥudūd* typically refers to corporeal punishments that are stipulated in Islamic law for particular criminal offences.

45. Friedmann, *Tolerance and Coercion in Islam,* 127.

46. Friedmann, *Tolerance and Coercion in Islam,* 129.

47. Abdullah Saeed and Hassan Saeed, *Freedom of Religion, Apostasy, and Islam* (Burlington: Ashgate Publishing Company, 2004), 85; Mohammad Hashim Kamali, *Freedom of Religion in Islam* (Cambridge: Islamic Texts Society. 2007), 93–94.

punishment of *taʿzīr*.[48] Such lenient views appear to have gained their support in the early precedents attributed to the second Caliph, ʿUmar b. al-Kaṭṭāb, who was said to have exhibited the Prophet's lenience in dealing with apostates; in at least two separate instances, he is reported to have expressed his displeasure upon being informed of the killing of certain apostates, stating that he would have chosen to imprison them instead.[49]

Despite this diversity of opinions, it appears that the lenient views on apostasy remained in the minority for the most part and were widely contested. As the thirteenth-century Ḥanbalī jurist Ibn Qudāma (d. 620 AH / 1223 CE) was quick to suggest, such opinions contradicted the Sunna and *ijmaʿ* on the issue,[50] which he argued is clearly reflected in the most widely cited *ḥadīth* on executing the apostate: "Whoever changes his religion, kill him" (*man baddala dīnahu faqtulūh*). As such, another minority of scholars favoured a more literal reading of the *ḥadīth*, which makes no reference to a legally binding option of repentance. For instance, the Tābiʿī scholars Ḥasan al-Baṣrī (d. 110 AH / 728 CE), Ṭāwūs b. Kaysān (d. 106 AH / 724 CE) and the *ahl al-ẓāhir* are reported to have held that the repentance option is unnecessary and that the apostate should be killed at once.[51]

For the most part, however, the majority of jurists rejected the either overly lenient view or the strict one, holding it mandatory to ask the apostate to repent prior to his execution. This view is widely attributed to the eponym of the Shāfiʿī school, Imam al-Shāfiʿī (d. 204 AH / 820 CE), and was also favoured by the Ḥanafī scholars Muḥammad al-Shaybānī (d. 189 AH/ 805 CE), one of the twin pillars of the Ḥanafī school, and al-Ṭaḥāwī (d. 321 AH / 925 CE).[52] The prevalent view on the "*man baddala . . .*" *ḥadīth* was that it should be read in conjunction with other *ḥadīth*s and precedents from the Prophet and the early Caliphs, which collectively appear to mandate the repentance option. For instance, the Mālikī jurist Ibn Abī Zayd (d. 386 AH / 996–997 CE) cites as evidence the example of the famous apostate ʿAbd Allāh b. Saʿd who repented and was forgiven by the Prophet.[53] Thus, for the

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48. Kamali, *Freedom of Religion in Islam,* 94.

49. Saeed and Saeed, *Freedom of Religion, Apostasy, and Islam,* 84–85; Friedmann, *Tolerance and Coercion in Islam,* 129.

50. Friedmann, *Tolerance and Coercion in Islam,* 129.

51. Friedmann, *Tolerance and Coercion in Islam,* 130–131.

52. Friedmann, *Tolerance and Coercion in Islam,* 130.

53. Ibn Abī Zayd, *al-Nawādir wa al-Ziyādāt,* 14:490.

most part, differences of opinion were mainly limited to the proper amount of time to be allotted for providing the apostate with the opportunity to repent and the manner in which the execution was to be carried out.[54] For example, the Shāfiʿī jurist Ibn Surayj (d. 235 CE / 849–850 AH) preferred that an apostate be beaten to death with a stick instead of a swift execution by the sword, as this would provide him with additional time to repent.

While most jurists agreed on the punishment for apostasy in general terms, many made legal distinctions depending on the nature of the act and the context under which it took place. Ibn ʿAbbās and the Tabiʿī jurists ʿAṭāʾ b. Abī Rabāḥ (d. 114–115 AH / 732 CE) and al-Layth b. Saʿd (d. 175 AH), along with some of al-Shafiʿī's associates, considered the repentance of an apostate who was born a Muslim (*man wulida ʿala l-fiṭra*) to be unacceptable.[55] Similarly, under Shīʿite law, repentance was deemed to be acceptable only for individuals who had previously converted to Islam, while the apostasy of those who were born Muslims could not to be revoked.[56] Furthermore, it appears that there was near unanimity amongst the jurists that insulting the Prophet (*sabb al-nabī*) constituted a particularly heinous display of apostasy, for which repentance was deemed to be unacceptable.[57]

One issue of contention amongst the jurists was the status of individuals who practiced their beliefs clandestinely while maintaining to be Muslims (*zanādiqa*). Unlike apostates who displayed their beliefs publicly, the sincerity of the *zanādiqa's* repentance was considered to be more difficult to ascertain, and they were to be regarded with extra suspicion. As such, several jurists argued that they are to be executed without the option of repenting. In a more lenient formulation of this view, the Ḥanbalī qāḍī Abū Yaʿlā (d. 458 AH) is reported to have suggested that once a *zindīq* makes an open confession of his true belief and is no longer secretive about it, he is

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54. Depending on the traditions cited or the discretional opinion of the jurist in question, some maintained that the apostate be asked to repent three times, while others argued that he is to be allowed a grace period of three days, one month, or three months (Friedmann, *Tolerance and Coercion in Islam*, 131).

55. Friedmann, *Tolerance and Coercion in Islam,* 134.

56. Rudolph Peters, *Crime and Punishment in Islamic Law* (Cambridge: Cambridge University Press), 65.

57. Peters, *Crime and Punishment in Islamic Law,* 65.

no longer to be considered a *zindīq*, and his repentance can, therefore, be accepted.[58]

While the stricter stance towards the *zanādiqa* appears to be the view expressed by the eponym of the Mālikī school, Imām Mālik b. Anas (d. 179 AH / 795 CE), in his authoritative *ḥadīth* collection *al-Muwaṭṭaʾ*,[59] Ibn Abī Zayd attributes a different opinion to Imām Mālik and the Mālikīs, indicating that they regarded the option of repentance as being equally applicable to all apostates, including the *zanādiqa*.[60] Similarly, Imām al-Shāfiʿī (d. 204 AH / 820 CE) categorically rejected any distinctive treatment of the *zanādiqa*, and according to the Ḥanbalī jurist al-Khallāl (d. 311 AH), the uniform treatment of all apostates was also the last and authoritative view known to be held by the eponym of the Ḥanbalī school, Imam Aḥmad b. Ḥanbal (d. 241 AH / 855 CE).[61] As for Abū Ḥanīfa, the famous Shāfiʿī jurist al-Māwardī (d. 450 AH / 1058 CE) noted two opposing views attributed to him, where he is reported to have both affirmed and denied the repentance option for the *zindīq*. According to Al-Māwardī, Abū Ḥanīfa was more likely to have held the latter view, and this is also the case with Abū Yūsuf (d. 182 AH / 798 CE), the second pillar of the Ḥanafī school, who initially supported the repentance option but later came to reject it, after noting that the *zanādiqa* tended to revert to their clandestine faith.[62]

With regards to the execution of female apostates, this continued to be a contentious topic amongst pre-modern jurists. Generally speaking, the Ḥanafī and Shīʿite schools of law held the view that only male apostates may be executed and that apostatizing females are to be imprisoned with recommendations for beating them until they repent; unlike the other schools, the Ḥanafī and Shīʿite traditions did not categorize apostasy as one of the *ḥudūd* crimes.[63] Jurists who supported the exemption of female

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58. Friedmann, *Tolerance and Coercion in Islam,* 140.

59. Mālik b. Anas, *al-Muwaṭṭaʾ*, ed. Muḥammad Fuʾād ʿAbd al-Bāqī (Beirut: Dār al-Kutub al-ʿIlmiyya), 464. In reference to the *ḥadīth* on killing the apostate, Imām Mālik comments that, in his opinion, the *zanādiqa* are to be killed because the truth of their repentance cannot be ascertained, as opposed to those who openly display their disbelief, for whom repentance may be considered.

60. Ibn Abī Zayd, *al-Nawādir wa al-Ziyādāt*, 14:491.

61. Friedmann, *Tolerance and Coercion in Islam,* 135.

62. Friedmann, *Tolerance and Coercion in Islam,* 141.

63. Peters, *Crime and Punishment in Islamic Law*, 65.

apostates from execution typically relied on traditions relating to the Prophet's general prohibition against the killing of women and children and Ibn ʿAbbās's insistence that women be imprisoned instead.[64]

This being the case, the majority of jurists, including the eponyms of their schools, supported Imam al-Shāfiʿī's strict position of categorically rejecting any distinctions between apostates based on gender or their religious status as *zanādiqa*, while mandating that they be given the option to repent prior to their execution.[65] This view appears to be directly motivated by al-Shāfiʿī's classification of apostasy as one of the *ḥudūd* punishments, which must, therefore, apply equally to men and women.[66] Those who favoured this position appealed to a more literal reading of the "*man baddala . . .*" *ḥadīth*, noting that it made no distinctions between men and women, and sought the support of other controversial *ḥadīths* in which the Prophet and Abū Bakr supposedly ordered the killing of female apostates.[67]

At this point, a closer look at Abū Ḥanīfa's views on the execution of women[68] may serve to clarify some of the justifications provided by the early jurists among the Salaf for the criminalization of apostasy. As the eponym of the Ḥanafi school and the leading opponent against the execution of female apostates, Abū Ḥanīfa supports a restricted understanding of the "*man baddala . . .*" *ḥadīth*, holding that it is primarily directed towards individuals who were potential enemy combatants (*ḥarbī*). Although from a grammatical perspective, the phrase appears to apply equally to both genders, he argues against an interpretation of the *ḥadīth* on the basis of its apparent (*ẓāhir*) meaning, as a strict interpretation of "whoever changes his religion" (*man baddala dīnuhu*) would problematically imply that any change

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64. Friedmann, *Tolerance and Coercion in Islam,* 136.

65. Friedmann, *Tolerance and Coercion in Islam,* 138–141. Al-Shāfiʿī's widely respected position on refusing to make any judgment calls or distinctions between apostates is attributable to the Prophetic *ḥadīth* stating: "I make my ruling only on the basis of the apparent: God takes care of the inner thoughts."

66. Al-Shāfiʿī debates the possibility of exempting the female apostaste from punishment, arguing that she may not be exempted as this punishment is like the *ḥudūd*, which are applied equally to both sexes without exception and are not be enforced on the basis of juridicial discretion. Muḥammad b. Idrīs al-Shāfiʿī, *Kitāb al-Umm*, ed. Rifʿat Fawzī ʿAbd al-Muṭṭalib (Mansoura: Dār al-Wafāʾ lil Ṭibāʿa wal Nashr wal Tawzīʿ, 2001), 2:578–579.

67. Friedmann, *Tolerance and Coercion in Islam*, 138.

68. Abū Ḥanīfa's views are succinctly summarized in Friedmann, *Tolerance and Coercion in Islam,* 136–137.

of religion is equally prohibited and punishable; such a literal reading would absurdly suggest that non-Muslims converting to other religions, or even to Islam, ought to be equally executed. Thus, Abū Ḥanīfa holds the *ḥadīth* to constitute an example of a "general formulation conveying a particular meaning" (*ʿāmmun laḥiqahu khusūs*), as the strictly semantic meaning is clearly not what is primarily intended. In this case, the word *dīn* (religion) is to be restricted to Islam, while the particle *man* is to refer exclusively to those who have the potential for fighting, implying that women, who are typically classified as non-combatants, are to be excluded from its scope. This would suggest that all the female apostates killed in the earliest days of Islam were executed in relation to their fighting against the Muslims, or for their active incitement of political violence.

Abū Ḥanīfa supports his arguments by discussing what he perceives to be the central reason for instituting the punishment for apostasy. As he suggests, though abandoning one's belief is a serious offense, it is a matter that remains ultimately between the individual and his Lord (*bayna al-ʿabd wa bayna Rabbihi*) and that is to be punished in the hereafter. This can be gleaned from the fact that the punishment for apostasy is characteristically different from the other *hudūd* punishments: while one can repent for apostasy and have his punishment waived, other *hudūd* punishments cannot be similarly revoked. On this basis, Abū Ḥanīfa cogently argues that the punishment for apostasy is intended more as a pre-emptive measure of legitimate public policy (*siyāsa mashrūʿā*) directed towards protecting the Muslim community against potentially belligerent rebels. It is for this very reason that the Prophet is regarded to have forbidden the killing of women, as they were not perceived to be potential enemy combatants.

As may be gleaned from this perspective on the reasons for instituting the punishment of apostasy, there is a potential argument to be made that the earliest Muslim perceptions of the criminalization of apostasy likely assumed it to be intertwined with notions of rebellion and political violence against the nascent Muslim community. Accordingly, a closer analysis of the Islamic source-texts behind these rulings may serve to critically elucidate the socio-political context and dynamics out of which the criminalization of apostasy came to be institutionalized.

# A Critical Re-evaluation of the Islamic Source-Texts

## 1) The Qur'ān

Upon reviewing the classical Islamic literature on apostasy, in contrast to the prolific discussions on the relevant *ḥadīth* literature, one notices a dearth of Qur'ānic engagements on the topic. Indeed, as the contemporary scholar Tāha Jābir ʿAlawāni has pointed out, while the Qur'ān repeatedly warns apostates of their divine punishment in the hereafter, it remains completely silent on the prescription of any worldly punishments. He lists what he views to be the relevant verses dealing with apostasy—namely, verses 2:217; 3:86, 90–91, 100, 106, 177; 4:137; 5:54; 16:106; 22:11; and 47:22—none of which discuss the killing of apostates.[69] Additionally, he quotes the following verses that unequivocally remind the Prophet that his sole duty is to warn and preach without compulsion, leaving the destiny of those who reject faith in the hands of God: 6:107, 10:99, 12:103, 13:40, 16:125, 23:117, 50:45, and 88:22.[70] Besides these verses, Muḥammad Munīr Idilbī identifies the following additional verses as further evidence of the Qur'ān's unequivocal support for the right to freely choose one's religious beliefs: 2:256; 6:66, 104; 10:108; 17:54; 18:29; 25:43; 39:15; 42:6; 76:29; and 109:6.[71] In particular, he highlights 2:217 as strong evidence that human beings are granted their entire life span as an opportunity to accept Islam.[72] This list of verses is by no means exhaustive, as Muhammad H. Kamali also notes the following verses indicating that faith is to remain a matter of personal belief: 3:20; 42:48; and 5:92, 99.[73] In a further illustrative example quoting verse 4:137 on the case of those who apostatize repeatedly, Kamali argues, "The text would hardly entertain the prospect of repeated belief and disbelief if death were to be the prescribed punishment for the initial act."[74]

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69. Taha Jabir ʿAlawānī, *Lā Ikrāha fil Dīn* (Cairo: Maktabat al-Shurūq al-Dawlīyah, 2003), 55–56.

70. ʿAlawānī, *Lā Ikrāha fil Dīn,* 61.

71. Muhammad Munīr Idilbī, *Qatl al-Murtadd: al-Jarīmah allati Ḥarramaha al-Islām* (Damascus: *Dār al-Awā'il*), 25–26, 49.

72. Idilbī, *Qatl al-Murtadd,* 76–77.

73. Kamali, *Freedom of Religion in Islam,* 103.

74. Kamali, *Freedom of Religion in Islam,* 97.

Among the verses advocating freedom of religion, the most widely cited appears to be verse 2:256, clearly mandating, "There shall be no compulsion in religion . . ." (*lā ikrāha fi al-dīn*). Despite such clear verses interspersed throughout the Qurʾān, several classical exegetes held that verses deemed to be permissive of religious belief have been abrogated and repealed by later verses revealed in Medina, most important of which is the so called "Verse of the Sword" (*āyat al-sayf*), verse 9:5, which, according to the most embellished estimates, came to abrogate over a hundred verses of the Qurʾān advocating freedom of religious belief.[75] Though the doctrine of abrogation (*naskh*) remains a regular theme in many classical works of Qurʾān exegesis and legal methodology, it has largely failed to gain a serious following amongst classical and modern jurists alike, owing in part to its controversial nature and the extensive disagreements over its scope and application. Indeed, as Kamali observes, there appears to be an emerging consensus amongst contemporary scholars that critically refutes this doctrine's problematic implications.[76] Thus, given the Qurʾān's seemingly favourable views towards freedom of religion, I now turn to an analysis of the controversial *ḥadīths* linked to the punishment of apostasy.

## 2) The Sunna

With regards to the Prophetic Sunna and its associated biographical literature (Sīra of the Prophet), one easily finds a host of conflicting reports centred around two major narratives, one suggesting hostility and intolerance towards acts of apostasy and the defamation of the Prophet, and the other highlighting a tradition that was highly tolerant of religious

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75. See, for instance, the following characteristic work of Qurʾānic exegesis by Ibn Juzay al-Kalbī (d. 471 AH), where he lists in his introduction no less than 114 verses advocating religious tolerance that he deems to have been permanently abrogated (*nusikhat*): Abī Qāsim Muḥammad b. Aḥmad Ibn Juzay al-Kalbī, *al-Tashīl li ʿUlūm al-Tanzīl*, ed. Muḥammad Sālim Hāshim (Beirut: Dār al-Kutub al-ʿIlmiyya, 1995), 1:15–16.

76. Kamali, *Freedom of Religion in Islam,* 88. For examples of modern Muslim scholarly works attempting to exhaustively refute the doctrine of *naskh*, see: ʿAbdul Ḥamīd Abū Sulaymān, *Towards an Islamic Theory of International Relations: New Directions for Methodology and Thought*, 2nd revised ed. (Herndon: International Institute of Islamic Thought, 1993); Aḥmad Ḥijāzī Saqqá, *Lā Naskh fīl-Qurʾān* (Cairo: Dār al-Fikr al-ʿArabī, n.d.); Israr Aḥmad Khan, *The Theory of Abrogation: A Critical Evaluation* (Kuala Lumpur: International Islamic University, 2006).

diversity. What is readily apparent from these conflicting narratives is their socially constructed nature; different *ḥadīths* and biographical accounts were emphasized and propagated by various scholars and traditionalists in the service of their competing objectives. As such, a critical examination of the controversial *ḥadīth* literature on the punishment of apostates is crucial in asserting the historical authoritativeness of the legal tradition's rulings, given the Qurʾān's unusual silence on the issue.[77]

The most widely cited *ḥadīth* on the killing of apostates is the famous "*man baddala . . .*" tradition. This *ḥadīth* can be found narrated as a solitary (*āḥād*) *ḥadīth* in most of the major canonical *saḥīḥ* collections on the authority of Ibn ʿAbbās, and the chain of transmission (*isnād*) is mainly narrated from him through his servant ʿIkrimah. Several scholars have pointed out that this narration is weak, given that ʿIkrimah's character was regarded by several early scholars to be suspect; Imām Mālik regarded him as unreliable and refused to narrate traditions from him, as he was accused of espousing extremist views associated with the violent sect of the Khawārij and was accused by several contemporaries of lying—including Ibn Ibn ʿAbbās's son, who accused him of lying about his father.[78] His suspicious character appears to also be the reason why Imām Muslim refused to compile his solitary narrations in his *saḥīḥ* collection.[79] This view is confirmed in S. A. Rahman's independent study that traces the *isnād* of the *ḥadīth,* finding it to be weak in transmission.[80] Given that this is an *āḥād ḥadīth*, Kamali has noted the opinion of Muhammad Shaltut, widely shared among Muslim

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77. An exhaustive analysis of all the relevant controversial traditions on apostasy is an ambitious matter that lies beyond the scope and objectives of this paper. I, thus, primarily limit my analysis to widely used *ḥadīths* from the canonical *saḥīḥ* collections, noting that while there certainly are very problematic traditions, most notably among the biographical literature associated with Ibn Ishāq, I take it to suffice that traditionalist Muslim scholars have noted much of these traditions for their weak chains of transmission and unreliability.

78. Akram Rida, *Al-Ridda wa al-Ḥurriyya al-Dīniyya* (n.p.: Dār al-Wafaʾ), 53–55. For more on the controversial character of ʿIkrimah, see Ahmad Subhi Mansour, *The Penalty of Apostasy: A Historical and Fundamental Study*, *Ahl al- Qurʾān*,

http://www.ahl-alquran.com/English/show_article.php?main_id=523 (accessed June 20, 2014).

79. Mansour, *The Penalty of Apostasy*.

80. Kamali, *Freedom of Religion in Islam,* 93.

scholars, that the prescribed *hudūd* punishments cannot be established on the basis of solitary *ḥadīths*.[81]

In addition to the "*man baddala . . .*" *ḥadīth*, jurists also typically relied on a second popular tradition narrated in slightly different renditions by Ibn Masʿūd, Ibn ʿAbbās, ʿUthmān b. ʿAffān, and the Prophet's wife ʿĀʾisha.[82] The *ḥadīth* is widely narrated with minor variations in the six canonical *saḥīḥ* collections as follows:

> The blood of a Muslim who professes that there is no god but God and that I am His Messenger is sacrosanct except in three cases: a married adulterer; a person who has killed another human being; and a person who has abandoned his religion, while splitting himself off from the community (*mufāriq lil jamāʿah*).[83]

The minor differences in the renditions of this *ḥadīth* indicate a level of personal discretion by the Prophet's Companions in the manner they chose to relay its meaning. For instance, in some versions, the phrase "*al-mufāriq lil jamāʿah*," suggesting political betrayal and potential hostility towards the Muslim community, is completely omitted. Perhaps more interestingly, in ʿĀʾisha's narration of this *ḥadīth*, she adds the crucial clarifying details, "and a man who leaves Islam and wages war against God . . . and His Messenger . . ." (*wa rajulun yakhruju min al-Islām fa yuḥārib Allahu . . . wa rasulahu . . .*). Thus, these minor variations likely suggest, at least for the Companions of the Prophet and the generations of the early Salaf, it may have been widely assumed that an apostate was understood to be an enemy combatant, an assumption held to be common knowledge that needn't always be verbally articulated. Given the communal and tribal nature of pre-modern society, where the concepts of secular individualism and freedom of religion were nonexistent and where religious and political identities were heavily intertwined, this is not an unreasonable assumption to hold.

Some scholars have also found problems with the authorities in the chains of transmission (*isnāds*) of this *ḥadīth*. In his critical study on apostasy, the controversial Qurʾānist scholar Ahmad Subḥī Mansour, for

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81. Kamali, *Freedom of Religion in Islam,* 94. For similar reasons, Muslim scholars are in general agreement that refusing to accept the authority of certain *āḥād* traditions with regard to creedal matters is an acceptable position that does not jeopardize one's theological beliefs.
82. For a list of the various versions of this *ḥadīth* within the *saḥīḥ* collections, see Rida, *Al-Ridda wa al-Ḥurriyya al-Dīniyya*, 68–73.
83. Narration of Muslim as it appears in Kamali, *Freedom of Religion in Islam,* 96.

instance, imputes this *ḥadīth* as having originated with al-Awzāʿī (d. 774 CE), whom he regards to have been politically motivated in helping the Abbasid Caliphate overcome potential rebels, citing evidence highlighting his unreliable and suspicious character. As Mansour notes with regard to the *isnād* provided by Muslim, each of the six reporters in the *isnād* has been historically declared to be suspicious by certain traditional authorities.[84] Some of these same problematic reporters are found in the chains of the other *saḥīḥ* collections as well.

Besides these two widely cited traditions, jurists found their evidence for the execution of apostates by relying on the Prophet's specific orders to kill the apostates ʿAbd Allāh b. Khaṭal and Miqyas b. Ṣubāba upon the conquest of Mecca. As Idilbī and ʿAlawānī have noted, however, both these apostates were wanted for murder: ʿAbd Allāh b. Khaṭal had killed an innocent Muslim; and Miqyas b. Ṣubāba had unlawfully stolen some blood money and killed a Christian, after which he fled for Mecca.[85] ʿAlawānī also lists several examples of Companions who had left Islam, noting that the only ones who were killed were wanted for having killed innocents.

Other jurists have historically relied on the precedent set by the first Caliph, Abu Bakr, in the so called "apostasy (*ridda*) wars" following the death of the Prophet, where a number of Arab tribes reneged on their religious obligations of paying the Zakat taxes due to the Caliph. These wars have been simplistically regarded by some as a clear sanction from the earliest generation of the Salaf for the killing of apostates. However,

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84. With regards to each of the reporters, Abu Bakr b. Abi Shayba was regarded by al-Ḥākim to be inaccurate and was regarded to be weak by Abu Bakr b. Abi Dawūd; Ḥafs b. Ghiyāth was accused by Abu Zarʾa of having a poor memory after serving as a judge for the Abbasids, while ʿAbd Allah b. Aḥmad's father noted him for his mistakes and Ibn Ḥayyan accused him of imagining traditions that were not reported by others; Abu Muʿāwiya was regarded by some traditionists to be an extremist, with Ibn Muʿīn holding that he reported unrecognized traditions, Abu Muʿāwiya al-Bajly accusing him of ignorance, and al-Aʾgly holding him to belong to the Murjeʿa sect, rendering his authority questionable; al-Aʿmash was accused by al-Ẕahabī of cheating, with Ibn Al-Mubārak and Jarīr b. ʿAbdul Ḥamīd accusing him of corrupting the tradition of Kufa, Aḥmad b. Ḥanbal noting too many contradictions in his reports and accusing him of falsely reporting from Anas, Ibn ul-Madanī accusing him of having a great deal of imagination, and Naysabūrī warning against taking reports from him; ʿAbd Allah Ibn Murra was accused of reporting false traditions by al-Zahabi; and Masrūq was considered to be weak by Naysabūrī. See Mansour, *The Penalty of Apostasy*, for the relevant primary sources.
85. ʿAlawāni, *Lā Ikrāha fī al-Dīn,* 71–76; Idilbī, *Qatl al-Murtadd,* 111.

an analysis of how the term *ridda* was employed by the Salaf reveals a more complex narrative. As al-Shāfiʿī's discussion of this major historical incident reveals, he was well aware that the term *ridda* was used to convey either the more widely used sense of recanting one's Islamic belief, or more generally, political disobedience and religious disobedience that may be classified as rebellion. Etymologically, the infinitive *irtidād* simply means to renounce or defect. The ambiguity in which the Salaf employed the term clearly led to some confusion and betrays the highly intertwined nature of political and religious loyalty in pre-modern Islamic society. Indeed, this confusion is readily apparent in al-Shāfiʿī's discussion of Abu Bakr's and ʿUmar b. al-Kaṭṭāb's differences of opinion on how the "*murtaddūn*" rebels in this instance were to be handled: while ʿUmar was of the opinion that their blood remained sacrosanct as they had not yet officially reneged on their faith, despite their disobedience of the Caliph, Abu Bakr was of the opinion that their transgression was serious enough in its violation of the public and religious order to warrant military intervention.[86]

Al-Shāfiʿī was not alone in noting this distinction between political rebellion and the theological rejection of Islam. In his reflection on the same historical incident, the fourteenth-century Mālikī jurist Ibn Farḥūn (d. 799 AH / 1397 CE) also clarifies that the rebellion of the "apostasy wars" was not based on primarily religious grounds, distinguishing between those who chose to deliberately disobey their religious obligations (*ahl al-ʿinād*) and those who rebelled out of a religious difference of opinion (*ahl al-taʾwīl*) with the Caliph.[87] As he explains, while either party may be legitimately fought on religious grounds, their captives may not be killed, as the primary

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86. Al-Shāfiʿī, *Kitāb al-Umm*, 5:516–517. Several Muslim scholars have pointed out that the conflict was not primarily over religious apostasy as conventionally understood and that the wars took place within a politically volatile context that went beyond the initial dispute over the Zakāt, with some of the rebelling tribes constituting a veritable political and military threat in their attempts to challenge the Caliphate of Abu Bakr. As Idilbī notes, for instance, according to the histories of Ibn Khaldūn and al-Ṭabarī, the "apostatizing" tribes of Banu Thubān and ʿAbas went as far as killing Muslims amongst their midst (Idilbī, *Qatl al-Murtadd,* 124–125). For a thorough treatment of this topic see Saeed and Saeed, *Freedom of Religion, Apostasy, and Islam,* 65; Mansour, *The Penalty of Apostasy*; and Idilbī, *Qatl al-Murtadd,* 119–142.

87. The *ahl al-taʾwil* (lit. "people of interpretation") were those who rebelled against Abu Bakr's enforcement of the Zakat out of their divergent interpretation of verse Q. 9:103, that the Zakat tax was only due to the Prophet when he was alive and was not a religious obligation that may be extended to any of his successors. Ibrāhīm b. ʿAlī b. Muḥammad Ibn Farḥūn, *Tabṣirat*

objective is to coerce them into religio-political compliance and not to mete out a religious punishment, since they have not committed theological apostasy in the usual sense of the term.[88]

Accordingly, in contrast to a reductionist narrative of religious intolerance, some Muslim scholars have relied on a substantial number of traditions highlighting the Prophet's religious tolerance and the ethos of non-compulsion in religion (see Q. verse 2:256). ʿAlawanī highlights the stories of the "hypocrites" and apostates during the Prophet's mission in Medina—most notorious of whom was ʿAbd Allah Ibn Ubayy—who were never killed by the Prophet. He further notes that some Muslims had apostatized after Muhammad narrated his nocturnal journey to Medina (*al-Miʿrāj*), none of whom were executed.[89] Kamali notes a specific *ḥadīth* in which a Bedouin man openly declared his apostasy and was left unharmed, providing other examples from the Sīra where the Prophet pardoned apostates, including ʿAbd Allāh b. Saʿd b. Abī Sarḥ, al-Ḥarth Ibn Suwayd, and an unknown group of Meccans. He also cites the example of the rebellious Khawārij during the Caliphate of ʿAli, who were left to express their disbelief openly.[90] As Idilbī further suggests, there appears to have been an *ijmaʿ* on apostasy amongst the early Companions, as Abu Bakr was known to have taken apostates as prisoners without executing them.[91]

These more favourable views on Islam's history of religious tolerance appear to be reflective of a wider revisionist trend amongst modern Muslim scholarship that is attempting to re-evaluate the historical authoritativeness of the punishment for apostasy in the Islamic legal tradition.

*al-Hukkām fī Uṣūl al-Aqḍiya wa Manāhij al-Ḥukkām*, ed. Jamāl Marʿashlī (Riyadh: Dār ʿAlam al-Kutub lil Ṭibāʿa wal Nashr wal Tawzīʿ, 2003), 2:209.

88. Ibn Farḥūn, *Tabṣirat al-Hukkām*, 2:210.

89. ʿAlawanī, *Lā Ikrāha fī al-Dīn*, 67–69.

90. Kamali, *Freedom of Religion in Islam*, 97–98, 196.

91. Idilbī, *Qatl al-Murtadd*, 134.

# Conclusion

As this study shows, despite its shortcomings, Rawls's concept of public reason can serve as a helpful framework in highlighting how some of the tensions between Islamic law and human rights norms may be bridged under a liberal democratic regime of reasonable pluralism. By taking the normative Islamic legal tradition seriously and highlighting its rich discursive legacy, a historical re-evaluation of the primary source-texts can offer a substantial opening in overcoming the controversies surrounding pre-modern understandings of apostasy in a manner that is consistent with the doctrinal beliefs and the normative practices of the tradition itself. Furthermore, by eschewing heterodox hermeneutical frameworks and relying exclusively on the resources of the tradition itself, it is argued that such an effort can better hope to gain wider recognition within the ambit of Islamic orthodoxy, while continuing to meet Rawls's standards on what constitutes a reasonable comprehensive doctrine. Indeed, such an effort can be regarded as one of several important attempts in the incremental march of internal reform towards greater tolerance for pluralism.

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