

NOTE

TURNING AWAY FROM ISLAM IN IRAQ: A CONJECTURE AS TO HOW THE NEW IRAQ WILL TREAT MUSLIM APOSTATES

I. APOSTASY IN A LAND OF FAITH: AN INTRODUCTION

Can freedom of religion be reconciled with death for apostasy? The 2006 Constitution of Iraq binds the new Iraqi state to upholding both the freedom of religion and the principles of Islam, which includes capital punishment for leaving Islam according to many scholars. In resolving this seeming collision of ideological commitments, the new Iraq will have to answer fundamental questions about its national direction and identity.

Both the future of Iraq and the issue of apostasy raise highly contentious questions; questions which are overlapping, interconnected, and charged by the ferocity of current events in both Iraq and the Middle East at large. This Note will attempt to cross through these questions of Islamic, human rights, and constitutional law, and join them together through a comparative perspective on the practices of other Muslim nations in the Middle East and the Arab World. Part I will introduce the scope of and the basis for the questions herein addressed; Part II will provide a definition of apostasy as a crime in Islamic law, and then classify the theoretical conceptions of apostasy as held by jurists and scholars; Part III will then survey the actual policies and measures Middle Eastern states have taken with regard to apostasy from Islam; Part IV will assess which countries' experiences can be effectively compared with this new Iraq, evaluating the basis of their legal, institutional, and societal affinity with Iraq; Part V will synthesize the patterns and distinctions developed and make a reasoned conjecture as to how the new Iraq will treat its Muslim apostates in criminal, civil, and administrative matters; Part VI will conclude the Note with a global summary and final thoughts on the issue of apostasy in both Iraq and Islam.

This first Part will chart the conceptual course of the Note, explaining (A) the gravamen of the conflict in question; (B) the practical relevance of examining it; (C) the method of examination; and (D) the limits of that examination.

A. *Constitutions, Conflicts, and Questions*

Amidst the blood, chaos, and courage that has characterized the United States occupation of Iraq since 2003, Iraqis have begun to rebuild their nation. The adoption and finalization of Iraq's current constitution in 2006, a product of great political wrangling and concessions, is arguably the cornerstone event of Iraq's national reconstruction process. Yet this constitution has not escaped the complications of the country it seeks to guide. Although the issues of ethnic identity, federalism, and democracy the Iraqi Constitution addresses are several and vigorously debated, it is the question of religion that has played out most dramatically within Iraq as well as in its image abroad. The quixotic view of some in the Bush Administration that Iraq, the cradle of Islam's Golden Age, would be remodeled over night into a bulwark of secular democracy for the rest of the Middle East has not been realized.¹ Rather, the Iraqi Constitution has articulated a different view of the nation's future, one best viewed as an unclear compromise between Iraqis' historic commitment to Islam, and the democratic values that the American administration aimed to impart. The following provisions of the Iraqi Constitution capture the essence of this compromise:

*Islam is the official religion of the State and is a foundation source of legislation.*²

No law may be enacted that contradicts the *established provisions of Islam*[.]³

No law may be enacted that contradicts the *principles of democracy*.⁴

1. See Michael Rubin, *Talking Turkey*, NATIONAL REVIEW ONLINE, Aug. 6, 2004, <http://www.nationalreview.com/rubin/rubin200408060839.asp> (relating how former Secretary of State Colin Powell held up Turkey as a model for Iraqi governance).

2. IRAQ CONST. art. 2, § 1. Unless otherwise noted, the author is responsible for all translations from Arabic and French language sources. Arabic sources have been transliterated according to the United States Library of Congress Romanization rules, with the exceptions that *tā-marbūta* has always been rendered as "a" rather than "ah" or "at," and case endings have only been noted for Quranic or Prophetic text. Preference has been given to the anglicized versions of Arabic words and names where they have entered common use, or are readily searchable in English (for example, the "Quran" as opposed to *al-Qur'ān*, "Gomaa" as opposed to *Juma'*). Furthermore, Arabic words have been pluralized by adding an "s" rather than using the Arabic plural forms, except where the plural form predominates (for example, '*ulamā'*' rather than '*ālīms*'). All constitutions cited were found at <http://confinder.richmond.edu> unless otherwise noted. Citations to the Iraqi Constitution in this Note have been borrowed from the prevailing English translation for the sake of consistency with English language scholarship, though alternative translations of specific clauses have been proposed where appropriate. All citations to the Quran have been borrowed from THE GLORIOUS QURAN: ARABIC TEXT AND ENGLISH RENDERING (Mohammad M. Pickthall trans., 10th rev. ed. 1994) [hereinafter QURAN].

3. IRAQ CONST. art. 2, § 1, cl. A (emphasis added).

4. *Id.* art. 2, § 1, cl. B (emphasis added).

No law may be enacted that contradicts the *rights and basic freedoms* stipulated in this Constitution.⁵

This Constitution guarantees the *Islamic identity* of the majority of the Iraqi people and guarantees the full religious rights to freedom of religious belief and practice of all . . .⁶

The State shall guarantee protection of the individual from . . . *religious coercion*.⁷

Each individual shall have the freedom of thought, conscience, and *belief*.⁸

Just where Iraq will draw the line between mosque and state remains an elusive question. These provisions offer syllogisms which would lead to paradoxical or conflicting obligations, many of which have already been identified in legal scholarship.⁹ Several commentators have tried in turn to resolve, or at least explain these possible contradictions, approaching them broadly and aiming at the more general role Islam will assume in Iraq.¹⁰ This Note, however, will attempt to understand this potential conflict of ideologies narrowly, by looking at one specific issue where Islamic orthodoxy and the Western conception of democratic rights pull in opposite directions—the question of apostasy.

B. *Islam, Apostasy, and Iraq*

Colloquially, many Muslims believe that apostasy from Islam is punishable by death, though this does not mean they actually act upon, endorse, or condone the view.¹¹ All human rights scholars believe that

5. *Id.* art. 2, § 1, cl. C (emphasis added).

6. *Id.* art. 2, § 2 (emphasis added).

7. *Id.* art. 37, § 2 (emphasis added).

8. *Id.* art. 42 (emphasis added).

9. See Mohamed Y. Mattar, *Unresolved Questions in the Bill of Rights of the New Iraqi Constitution: How Will the Clash Between “Human Rights” and “Islamic Law” Be Reconciled in Future Legislative Enactments and Judicial Interpretations?*, 30 *FORDHAM INT’L L.J.* 126, 142-43 (2006).

10. See generally Intisar A. Rabb, “*We the Jurists*”: *Islamic Constitutionalism in Iraq*, 10 *U. PA. J. CONST. L.* 527 (2008) (investigating the Iraqi Constitution, descriptive models of Islamic constitutionalism, and their applications to Iraqi family law); Kristen A. Stilt, *Islamic Law and the Remaking of the Iraqi Legal System*, 36 *GEO. WASH. INT’L L. REV.* 695 (2004) (investigating the extent to which Turkey, Iran, and Egypt could provide interpretive models regarding the role that Islamic law may play in the new Iraqi legal system, as framed by the Interim Constitution).

11. When the Grand Mufti of Egypt, Dr. Ali Gomaa, ruled that apostates should not be executed simply for leaving Islam, discussed *infra* Part II.C.2, “many of his co-religionists were . . . scandalized by his conclusion” and “shocked that the question could even be asked.” *In Death’s Shadow*, *ECONOMIST*, July 26, 2008, at 30. The uproar of discussion that followed his decision underlines just how widely capital punishment for apostasy has been assumed to be part of Islam. A recent survey of British Muslims age sixteen and over concluded that thirty-one percent

killing someone on the basis of their choice of religion, or punishing them in any way on account thereof, is incompatible with the right to religious freedom.¹² In espousing both Islam and freedom of religion, then, the Iraqi Constitution seems to have assumed conflicting obligations.¹³

This Note will focus on the issue of apostasy as one point on the ideological fault line between “Islamic values” and “universal rights” that runs through many questions now facing Iraq. How a nominally religious state treats the issue of apostasy can be held up as a litmus test for the scope of religious freedom it affords, and religious freedom is in many ways driving the broader discourse on tolerance and pluralism in Iraq. Apostasy is an issue over which Islam has seen little derogation for most of its history, yet recent debate has begun to challenge the established doctrine with new vigor, and thus the question of apostasy is now a dynamic point on that ideological fault line.¹⁴

Of course it is fair to ask whether apostasy is even an issue for a people beleaguered by the more immediate threats of political uncertainty, economic penury, and rampant insecurity. Some commentators have suggested that, if anything, Iraqis are more likely to

“personally agree . . . [t]hat Muslim conversion is forbidden and punishable by death”; fifty-seven percent of participants disagreed, while twelve percent did not know or refused answer. MUNIRA MIRZA ET AL., POLICY EXCHANGE, LIVING APART TOGETHER: BRITISH MUSLIMS AND THE PARADOX OF MULTICULTURALISM 47 (2007), available at http://www.policyexchange.org.uk/assets/Living_Apart_Together_text.PDF.

12. “The position of both the [International Covenant on Civil and Political Rights (“ICCPR”)] Human Rights Committee and the Special Rapporteur [on religious intolerance] towards the compatibility of apostasy with United Nations instruments is straightforward. . . . the conversion of Muslims to another religion should not give rise to any kind of pressure, restriction, or deprivation of freedom. . . .” PAUL M. TAYLOR, FREEDOM OF RELIGION: UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 53 (2005). Islamic extremists also agree that the two commitments are incompatible; al-Qaeda has declared democracy “blasphemous” because, inter alia, it imposes “no limit on apostasy . . . since the Constitution declares freedom of religion” as well as the “abolition of jihad against apostates.” THE AL QAEDA READER 135 (Raymond Ibrahim, ed. & trans., 2007).

13. See NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 108 (2002) (identifying the execution of apostates as “the most oft-cited example” of objections to Islamic constitutional orders); see also Mattar, *supra* note 9, at 143 (identifying apostasy as an unresolved question in the new Iraqi Constitution).

14. See ABDULLAH SAEED & HASSAN SAEED, FREEDOM OF RELIGION, APOSTASY AND ISLAM 1 (2004) (noting that “several high-profile cases of apostasy have emerged in Muslim societies and made headlines in the international media. . . [leading] Muslims . . . to look at the question of apostasy and its place in a modern Muslim society”).

respond to the widespread violence in their country by holding evermore tightly to their religion.¹⁵

Yet so much of that violence is a direct product of the questions that apostasy raises in Islam. The practice of *takfir*—the branding of others as infidels—has been an ideological underpinning of the terrorism and sectarian killings in Iraq. Consider also what Iraqis will do once this violence subsides: Those non-Muslim Iraqis who adopted Islam to escape persecution may wish to return to their former faiths,¹⁶ and those Muslim Iraqis who adopted Christianity to escape the hardships they currently endure as refugees¹⁷ may one day wish to return to Iraq.¹⁸ As Iraq moves beyond the war and occupation, thinkers of all positions will wish to debate the meaning of Islam and the role it should play in their society, and they will wish to have that debate without being punished as heretics, blasphemers, infidels, or apostates.

C. Comparison, Reflection, and Prediction

The conclusion of this Note is only a conjecture, but the intent is to make it as reasoned as possible. Conjectures depart from a process of comparison, often one as simple as comparing the past to the present and extrapolating the trajectory of the future. Yet the new Iraq is, to the hopes of all, a radically new Iraq, and the most obvious source of comparison—Iraq's own legal history—cannot fully address the

15. See Stephen Townley, *Mosque and State in Iraq's New Constitution*, 34 DENV. J. INT'L L. & POL'Y 197, 220 (2006) (arguing that “[s]ince insecurity prompts individuals to join together, there are few lone dissenters [from Islam] at large”).

16. Indeed, the Vatican has recently taken up this issue with Muslim leaders. See Rachel Donadio, *Catholic and Muslim Leaders Pledge to Improve Relations*, N.Y. TIMES, Nov. 7, 2008 at A14 (noting that apostasy was one of the “thorniest questions” dealt with by a recent Catholic-Muslim seminar, a question colored by the number of forced conversions to Islam in Iraq).

17. The Refugee Crisis in Iraq Act provides persecuted religious minorities in Iraq with a specific track for resettlement in the United States. Refugee Crisis in Iraq Act, S. 1651, 110th Cong. § 4(a)(4) (2007). Although this track only applies to religious minorities with close family in the United States, it is not unheard of for Iraqi Muslims to (nominally) convert to Christianity so as to take advantage of a perceived preference for Christian refugees, or likewise, to avoid a perceived bias against Muslims.

18. By mid-2007, over two million Iraqis had fled their country since the 2003 invasion. UNITED NATIONS HIGH COMM’N ON REFUGEES, STATISTICS ON DISPLACED IRAQIS AROUND THE WORLD (2007), available at <http://www.unhcr.org/cgi-bin/texis/vtx/iraq?page=statistics>. Syria and Jordan have received approximately ninety percent of these refugees, with Egypt, Iran, and Lebanon receiving tens of thousands as well. *Id.* The vast majority of these refugees face exceptional alienation, destitution, and desperation. See generally HUMAN RIGHTS WATCH, THE SILENT TREATMENT: FLEEING IRAQ, SURVIVING IN JORDAN, available at <http://www.hrw.org/reports/2006/jordan1106/> (detailing the hardships endured by Iraqi refugees in Jordan); see also Morton Abramowitz et al., Op-Ed, *A ‘Surge’ for Refugees*, N.Y. TIMES, Apr. 22, 2008, at A27 (underlining the need for a robust American response to the Iraqi refugee crisis).

unprecedented issues the country now faces. Iraq's legal order, from its Constitution to its governing officials, is as fundamentally changed as its societal order. Indeed, the words with which Nazir Qabbani lamented the 1985 war in Lebanon, that "[h]istory is a river that never flows backwards,"¹⁹ today sound penned for the 2003 war in Iraq, the paradigmatic land of history and rivers. In order to suggest where the current of events may take Iraq, it will be necessary to look to the experience of other nations which can be compared with her.

The process of founding a new Iraqi state out of the rubble and smoke of the American invasion has been, from its inception in Washington to its bloody undertaking in Baghdad, a process of comparisons. All the players on this stage have sought to vindicate and sell their positions on the basis of prior players on the world stage, be they Jefferson, Hammurabi, or Mohammed.²⁰ The same holds for the more practical works of forming the Iraqi government, with the examples of others being held up as workable models for Iraq. The fact is, however, that there is no single mold for Iraq, either in its history or outside its borders. This Note will not suggest an all-weather model for Iraq's legal issues; rather, it will attempt to identify where Iraq is most likely to approach the practices of similar countries in relation to the issue of apostasy.

Each of the major steps in this Note will be a comparison at its core. The first step will consist of a generalized narrative of the concept of apostasy in Islam, which will then be followed by a discussion of the polyvalence of views on its criminality in the Shariah. A survey of state practices will then describe the possible array of policies Iraq might adopt towards its apostates, and the factors that will need to precede any such policy. The final comparison will be telescopic and in two stages: It will first search broadly through the Middle East for those countries which could provide the most relevant model for Iraq, and then it will apply and evaluate that model to the current Iraqi context.

D. Time, Space, and Limits

Although there are forty-four predominately Muslim states in the world,²¹ this Note only looks at those twenty-one states, in addition to

19. FOUAD AJAMI, *THE DREAM PALACE OF THE ARABS* 113 (1999).

20. For a description of the American-engineered conference of Iraqi exiles in December 2002 which allegorizes the range of ambitions various factions held for a post-Saddam Iraq, see GEORGE PACKER, *THE ASSASSINS' GATE* 88-99 (2006).

21. "Predominately Muslim" is defined as a country whose population is more than fifty percent Muslim, relying on the determinations made by Tad Stahnke and Robert Blitt. See Tad Stahnke & Robert C. Blitt, *The Religion-State Relationship and the Right to Freedom of Religion or*

Iraq, which fall within the so-called “Greater Middle East,” that is, the geo-cultural region ranging from Mauritania in the west, to Pakistan and Afghanistan in the east, and bounded by Turkey in the north and Sudan in the south.²² Though the term “Middle East” has been artfully criticized,²³ it is used here simply as a rhetorical expedient for the area studied, an area bounded by the strength of its geographic, cultural, ethnic, and political ties to Iraq. Concededly, these judgments become arbitrary at some point, but this is an unavoidable consequence of framing such a study. The intent here has been to cast a wide but manageable analytical net, and what that net fails to catch is a valid point of criticism.

Certainly any discussion of Islam must also acknowledge the religion’s nearly one and a half millennia of continuity; indeed, the central precept of Islam’s “universality” demands as much.²⁴ Nevertheless, the temporal extent of this study must also be limited. Except where classical Islamic doctrine serves as a foundational material, or where surviving cultural-societal influences remain influential, this inquiry only looks back to events of the past quarter century or so. To the extent it looks forward, as a prediction, this Note aims at an indeterminate period in the future when Iraq has recaptured the necessary modicum of stability and investment in its governmental processes that allow formal law to be a deciding force in the lives of its citizens.

Finally, the Note is limited by what it does *not* investigate. In particular, it does not address the looming question of federalism in the new Iraqi state, and simply assumes that a constitutional answer on the question of apostasy will be the national answer. Likewise, it does not address the full depths of the differences between or within the Sunni,

Belief: A Comparative Textual Analysis of the Constitutions of Predominately Muslim Countries, 36 GEO. J. INT’L L. 947, 954 (2005).

22. Mauritania, while considered by some to be more “African” than “Middle Eastern” has been included because of its strong social-linguistic affiliation with the Arab world and consequent membership in the Arab League. Although Djibouti and Comoros are also members of the Arab League, and Arabic is the *lingua franca* of Chad, these countries’ respective external cultural-political relations are principally “African” in character, and their ties to “Middle Eastern” states (beyond their direct neighbors) are attenuated at best, though the author concedes that this is a debatable conclusion. The Palestinian Territories, Western Sahara, and Somalia have not been included in the analysis because of the uncertainty over their statehood. Thus the twenty-one states are: Afghanistan, Algeria, Bahrain, Egypt, Iran, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates, and Yemen.

23. See PETER MANSFIELD, A HISTORY OF THE MIDDLE EAST 1 (1991) (pointing out the Eurocentric connotations of the phrase “the Middle East”).

24. The belief that Islam is universal in time and space is central to its ideological conclusions, a point touched upon in the discussion of *thawābit*, *infra* Part V.B.1.

Shia, Kurdish, and other groups that make up Iraq, generalizing their positions. Both shortcomings are rightly open to challenge.

E. Summary I: Questions, Themes, and Considerations

The future of Iraq is unclear. Its Constitution embodies the nascent country's aspirations, but reveals the many forces competing beneath them. Two of the titan forces in Iraq's national dialogue are the roles of Islam and Rights, and this Constitution endeavors to uphold both.²⁵ Can it, and if so how will it? The issue of apostasy will be used to seek a small, but responsive answer to that question, and there is reason to believe that the issue may very well be forced to the fore in the near future. The bold newness of this Iraq, however, means that its past is no longer a true compass for its future, and to make a prediction on the issue of apostasy, and by extension Iraq itself, it will be necessary to look to the experiences of those countries comparable to her. This will be done widely at first, to understand the range of outcomes, then narrowly, to assess which of those outcomes is the most likely. The field will be limited to twenty-one countries of the Muslim Middle East, and focused on the area's contemporary history. The following Part will start that process by defining the shape and color of apostasy from Islam.

II. A CRIME AGAINST GOD AS CONCEIVED OF BY MEN

The question of how Iraq will reconcile its obligations to both the provisions of Islam and the freedom of religion *vis-à-vis* apostasy is itself subject to several threshold questions. The first is whether apostasy is indeed an "established provision" of Islam; this Part will show that apostasy is in fact a crime in all schools of Islamic jurisprudence. It will further provide a generalized description of the substantive points that are common to them. This Part will go on to analyze the Shariah crime of apostasy through the lens of Western criminal law terminology as a means of capturing the elements of the offense concisely. The theoretical justifications for punishing apostasy are then addressed, both to demonstrate the divergence of thought amongst Muslim thinkers, as well as to show how the Shariah prohibition could be limited in scope by the Iraqi court. Finally, the criminalization of apostasy will be scrutinized in light of international human rights principles on the freedom of religion. This Part will conclude that there is indeed a *prima facie* conflict between the Shariah punishment of apostasy and the freedom of religion as countenanced by international human rights norms.

25. See *supra* Part I.A-B.

A. Apostasy in Classical Islamic Jurisprudence

Translation is an unfortunate but necessary evil, and the best one can hope for is to mitigate the loss of context and cultural legacy that inevitably results when one concept is removed from its native surroundings and represented in the trappings of another language. Use of the English word “apostasy” to represent the concept embodied by the Arabic synonyms *ridda* and *irtidād* is no exception.²⁶ Whereas the English word “apostasy” draws its origins from Greek words for “standing” and “away,”²⁷ *ridda* and *irtidād* are wholly Arabic in origin and rooted in a semantic family expressing ideas of “return” and “go[ing] back.”²⁸ In their narrow sense, *ridda* and *irtidād* convey an immediate connotation of “retrogression” and “rever[sion].”²⁹ Though anecdotal, it is nevertheless noteworthy that the word “apostasy” goes unrecognized by many literate, native English speakers, whereas *ridda* and *irtidād* are almost always understood by Arabic speakers, literate or otherwise.

As terms of art in the Shariah, *ridda* and *irtidād* describe both a “turning away from” Islam and a “turning back” to that which Islam has denounced, a denial of what Muslims necessarily view as the revealed truth of God. The words *ridda* and *irtidād* were first tied to the concept of apostasy from Islam by the following verses of the Quran:

Lo! those who turn back [*irtadda*] after the guidance hath been manifested unto them, Satan hath seduced them, and He giveth them the rein.³⁰

And whose becometh a renegade [*yartadid*] and dieth in his disbelief: such are they whose works have fallen both in the world and the Hereafter. Such are rightful owners of the Fire: they will abide therein.³¹

At least ten other verses in the Quran warn disbelievers of the damnation they face,³² and these have also been cited as justification for

26. For a critique of using “apostasy” to express *ridda* and *irtidād*, see Posting of Haider Ala Hamoudi to Islamic Law in Our Times, <http://muslimlawprof.org/2008/06/12/fasfda.aspx> (June 12, 2008, 21:33 EST).

27. 1 OXFORD ENGLISH DICTIONARY 556 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989).

28. HANS WEHR, A DICTIONARY OF MODERN WRITTEN ARABIC 386 (J. Milton Cowan ed., 4th ed. 1994).

29. *Id.* at 387.

30. QURAN, *supra* note 2, at 47:25.

31. *Id.* at 2:217; *see also* Matter, *supra* note 9, at 143 n.108 (identifying this as a Quranic justification for punishing apostasy).

32. ṬAḤA JĀBAR AL-‘ALWĀNĪ, *LĀ IKRĀHA FĪ AL-DĪN: ISHKĀLĪYA AL-RIDDA WA AL-MURTADDĪN MIN ṢADR AL-ISLĀM ḤATTĀ AL-YAWM* [THERE IS NO COMPULSION IN RELIGION: THE

the punishment of apostasy.³³ All schools of Islamic jurisprudence have concluded on the basis of these verses that apostasy is a punishable offense, and their only divergence lies in how they classify it within their respective penal schemes.³⁴ The majority of schools hold that apostasy is one of the *ḥudūd* crimes,³⁵ a category which constitutes the highest echelon of offense in Islamic law. As their Arabic name implies, the *ḥudūd* represent divinely ordained “limits,” the transgression of which is to be punished as explicitly specified in the Quran.³⁶ As the highest and most eternal authority, God himself, has ruled upon them, the *ḥudūd* crimes lay in a plane beyond Shariah offenses punished under the *ta‘zīr*³⁷ or *qiṣās*³⁸ theories. As a consequence, institution of the *ḥudūd* crimes is considered one of the most inviolable aspects of Islamic criminal law,³⁹ and their reinstatement may be viewed as “the test for Islamic revival.”⁴⁰ Even though the Hanafī and Shia schools of jurisprudence punish apostasy as a *ta‘zīr* rather than a *ḥudūd* offense, they nevertheless require that convicted apostates be executed.⁴¹

Yet nowhere does the Quran actually prescribe an *earthly* punishment for apostates. Rather, classical Islamic jurists justified the

CHARACTERIZATION OF APOSTASY AND APOSTATES SINCE THE BEGINNING OF ISLAM] 55-56 (2003).

33. The language of these verses can be particularly damning: “Lo! those who disbelieve, and die while they are disbelievers; on them is the curse of Allah and of angels and men combined . . .” QURAN, *supra* note 2, at 2:161. “As for those who disbelieve, lo! if all that is in the earth were theirs, and as much again therewith, to ransom them from the doom on the Day of Resurrection, it would not be accepted from them. Theirs will be a painful doom.” *Id.* at 5:36. The latter is cited as the basis for criminalizing apostasy in Aly Aly Mansour, *Hudud Crimes, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 195, 197 (M. Cherif Bassiouni ed., 1982).

34. SAEED & SAEED, *supra* note 14, at 56.

35. RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY* 64-65 (2005) (noting that the Hanbali, Malaki, and Shafī schools consider apostasy a *ḥadd*, while the Hanafī and Shia punish it as a *ta‘zīr* offense). The other generally accepted *ḥudūd* offenses are: theft, adultery, slanderous accusation, banditry, and the consumption of alcohol, for which various forms of corporeal punishment and execution are prescribed. *Id.* at 53-54.

36. *Id.* at 53.

37. The *ta‘zīr* offenses are those for which punishment is left to the judge’s discretion, rather than being prescribed by the Quran as in the case of the *ḥudūd*. *Id.* at 65.

38. *Qiṣās* stands for the principle of just retaliation, also known as the *lex talionis* or, more biblically, as an eye for an eye. M. Cherif Bassiouni, *Qesas Crimes, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM*, *supra* note 33, at 203, 203. Closely related to *qiṣās* is the principle of *diya*, or bloodmoney; in cases of manslaughter, wrongful death, or where the victim is of an inferior status to the killer, the accused may only be required to pay financial compensation. PETERS, *supra* note 35, at 49.

39. GEORGE N. SFEIR, *MODERNIZATION OF THE LAW IN ARAB STATES: AN INVESTIGATION INTO CURRENT CIVIL CRIMINAL AND CONSTITUTIONAL LAW IN THE ARAB WORLD* 124-25 (1998).

40. *Id.* at 125.

41. PETERS, *supra* note 35, at 64.

execution of apostates by relying on the *ḥadīth*, or “sayings,” of the Prophet,⁴² a source of Islamic law inferior only to the Quran.⁴³ The *ḥadīth* in question appears to be, on its face, a clear directive to execute apostates: “kill him who changes his religion.”⁴⁴ And thus Shariah jurists have considered apostasy a capital offense for nearly 1500 years. From the bloody “Apostasy Wars” of the early Caliphate,⁴⁵ to the slaughter of some 20,000 Baha’is in the nineteenth century,⁴⁶ this *ḥadīth* has provided political and religious leaders with a pretext for executing dissidents.⁴⁷

B. *The Elements of Apostasy*

A discussion of apostasy as a criminal offense requires discussion of its elements, which despite some divergence between the major schools⁴⁸ on the specifics, remain consistent on the whole. While the modern Western concepts of criminal law do not describe the full

42. SAEED & SAEED, *supra* note 14, at 58-59; WEHR, *supra* note 28, at 109 (defining *ḥadīth*).

43. Islamic scholars distinguish between the Quran, which is the divine and incontrovertible word of God, and the *sunna*, the examples of Mohammed such as his *ḥadīth*, which only illustrate the Quran’s meaning. M. Cherif Bassiouni & Gamal M. Badr, *The Shari’ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E. L. 135, 150-51 (2002). A given *ḥadīth* is thus a secondary source of law that must be in conformity with the Quran, and as a threshold matter, it must be an authentic account of Mohammed’s words and actions. *Id.* at 152. Each of the schools of jurisprudence has developed its particular rules for evaluating the authenticity of a *ḥadīth*. *Id.*

44. The language of this *ḥadīth* (*man baddala dīnahu fa-iqtulūhu* in the original Arabic) is unambiguous, and a general agreement exists that it is *ṣaḥīḥ*, that is, authentic. Khālid bin Mansūr al-Darīs, *Quwa’ad al-nizām al-siyāsī fī al-islām* [The Foundations of the Political System of Islam], in AL-NIZĀM AL-SIYĀSĪ FĪ AL-ISLĀM [The Political System of Islam] 134, 160 (2d ed. 2006). *But see* SAEED & SAEED, *supra* note 14, at 59 (agreeing that the *ḥadīth* is authentic but arguing that a literal interpretation would mean that converts to Islam should also be killed).

45. Fred M. Donner, *Muhammed and the Caliphate*, in OXFORD HISTORY OF ISLAM 1, 11 (John L. Esposito ed., 1999).

46. Donna E. Arzt, *Heroes or Heretics: Religious Dissidents Under Islamic Law*, 14 WIS. INT’L L.J. 349, 416 (1996).

47. Even professedly non-Islamist regimes have seen the crime of apostasy as means of eliminating dissidents. Dr. al-’Alwānī describes how the Iraqi Baath under Abd al-Salam ‘Arif sought to have over 5000 members of the Communist opposition declared apostates so it could execute them with a veneer of religious legitimacy. AL-’ALWĀNĪ, *supra* note 32, at 40-46.

48. There are four major schools of Sunni jurisprudence: Hanafī, which is the most widespread due to Ottoman rule; Hanbali, which is viewed as the most conservative and remains the school of choice for the Wahhabists; Malaki, which is prevalent in North Africa and Sudan; Shafī, which has a strong following in Egypt and dominates in parts of Southeast Asia. The Shia schools are divided into several groups, though differences between them are noticeably smaller. Jafari Twelver is the school officially adopted by Iran, though the Zaydi school has many adherents amongst Shia elsewhere. *See generally* MOHAMMAD HASHIM KAMALI, SHARI’AH LAW: AN INTRODUCTION 68-92 (2008).

nuances of the Islamic conception of apostasy, they do frame the offense in a readily accessible manner.

The actus reus of apostasy begins with an act, either in word or deed, that rejects or denigrates the core beliefs of Islam. What constitutes the “core beliefs” of Islam varies between the schools of jurisprudence, but a repudiation of any of Islam’s “five pillars” (ritual prayer, the Ramadan fast, the *zakāa* alms tax, the pilgrimage to Mecca, and the recitation of the *shahāda*), or the prophethood of Mohammed, is clearly the kind of breach of faith contemplated by *ridda*.⁴⁹ Conversion to another religion is per se an act of apostasy.⁵⁰ What is not considered an act of apostasy, however, is the commission of other offenses proscribed by Islam; thus while a murderer has violated the Shariah, he is not necessarily an apostate.⁵¹

The mens rea of *ridda* is manifest in two areas. First, the accused must have demonstrated a specific intent to turn away from Islam; one cannot be punished if acting out of ignorance, jest, duress, or insanity.⁵² With regards to minority status, however, only the Sha’fi school has ruled that minors cannot, as a matter of law, knowingly apostatize from Islam; thus the execution of a minor apostate is doctrinally possible in the other *madhabs*.⁵³ Second, the accused is afforded an opportunity to repent, though this opportunity is qualified.⁵⁴ The period of time afforded is but a few days, and some schools hold that this period is not mandatory.⁵⁵ No repentance is extended to those who dishonor the Prophet Mohammed, however.⁵⁶

49. SAEED & SAEED, *supra* note 14, at 36-37. Classical jurists have produced voluminous lists of actions which would constitute acts of apostasy, some of which include denying that God intended Islam “to be the religion followed by the entire world,” defacing a copy of the Quran or stepping on it, or engaging in sorcery. *Id.* at 45-46. Even “uttering . . . ‘in the name of God’ while raising a glass of wine” has been considered an act of apostasy. PETERS, *supra* note 36, at 65.

50. SAEED & SAEED, *supra* note 14, at 36.

51. This must be so, otherwise every violation of Islamic law would be a capital offense. The severity of punishment for apostasy may appear as anomalous under the Shariah. When a murder is intentional and retribution is demanded, it is punished as a *qiṣāṣ* crime; otherwise it is punished as a *ta’zīr*. PETERS, *supra* note 35, at 39. Under many circumstances a Muslim who commits murder might only be forced to pay bloodmoney rather than be executed. *Id.* In fact, a Muslim who murders cannot be executed if his victim is a non-Muslim. *Id.* at 40. Yet, hypothetically, a Muslim who criticizes Mohammed could be executed for either blasphemy or apostasy. Moreover, a Muslim who drinks alcohol is to be flogged under the Shariah, while that same individual is to be executed if he asserts that the Shariah does not prohibit drinking. *Id.* at 64.

52. SAEED & SAEED, *supra* note 14, at 51.

53. *Id.* at 52.

54. *Id.* at 54.

55. *Id.*

56. *Id.* at 55.

One must obviously be Muslim to apostatize from Islam. How one first came to be a Muslim is of passing concern however, though some schools provide converts to Islam with a marginally greater opportunity to repent than those born into the faith.⁵⁷ Punishment is also dependant on gender; in a dubious effort to treat women more leniently, female apostates are not executed, but rather imprisoned and flogged at regular intervals until they repent.⁵⁸

It is often noted that the severity of Shariah punishments is tempered to some degree by the stringent evidentiary standards required to apply them.⁵⁹ A case of adultery, for example, requires that four witnesses testify to seeing the illicit intercourse occur before the adulterers will be stoned to death;⁶⁰ considering that adultery generally takes place outside the public eye, this *hadd* is rarely applied. However the evidentiary threshold is far lower for apostasy—only two witnesses need testify⁶¹—and the open and notorious nature of the offense basically assures that this threshold will be met in any case. Thus there is little procedural impediment to punishing an unrepentant apostate under the Shariah.

The concept of apostasy in Islam largely subsumes the related concepts of blasphemy⁶² and heresy⁶³ as well. The latter two are somewhat ill-defined in Arabic and Islam,⁶⁴ and in most cases they are wielded as a single club against unbelievers and dissenters. One western scholar has suggested that blasphemy is simply apostasy by word,⁶⁵ at

57. PETERS, *supra* note 35, at 65.

58. SAEED & SAEED, *supra* note 14, at 52. *See also* sources cited *infra* note 79.

59. *See generally* Man'amoun M. Salama, *General Principles of Criminal Evidence in Islamic Jurisprudence*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM, *supra* note 33, at 109-22.

60. PETERS, *supra* note 35, at 60-61; *see also* YUSUF AL-QARADAWI, THE LAWFUL AND THE PROHIBITED IN ISLAM 326 (Kamal El-Helbawy et al. trans., Saeed Int'l 2000) (1960).

61. SAEED & SAEED, *supra* note 14, at 52.

62. The closest equivalent in the Shariah is *sabb al-nabī* or *sabb al-rasūl* (literally, “insulting the Prophet”). Most jurists hold that insulting Mohammed, as well as God or his angels, is an act punishable by death. SAEED & SAEED, *supra* note 14, at 37-39. The majority also treat *sabb al-nabī* as an automatic act of apostasy. *Id.* at 38. No opportunity for repentance is afforded to those who insult Mohammed “[s]ince the Prophet is not alive today, forgiving the offender is simply not possible.” *Id.* at 39.

63. Two offenses in the Shariah, *zandaqa* and *nifāq*, encompass heresy in Islam. Hans Wehr translated *zandaqa* as “atheism” and *zindīq* as “freethinker.” WEHR, *supra* note 28, at 445. Abdullah and Hassan Saeed remark that interpretations of the term vary significantly amongst jurists, but the essence of *zandaqa* is the spreading of heretical viewpoints. SAEED & SAEED, *supra* note 14, at 39. Rudolf Peters has described the term *zindīq* as simply an apostate who continues to present himself or herself as a Muslim. *See* PETERS, *supra* note 35, at 65. Peters’s view demonstrates the substantial overlap of *zandaqa* with *nifāq*, the latter being best understood as impiety that rises to the level of hypocrisy. SAEED & SAEED, *supra* note 14, at 41.

64. SAEED & SAEED, *supra* note 14, at 37.

65. Arzt, *supra* note 46, at 374 n.99.

least one Muslim jurisprudent has succeeded in uniting all three concepts into one offense;⁶⁶ and at least one apostate has actually done all of them in one go.⁶⁷ Recent actions of the Pakistani parliament, however, suggest that these three offenses are distinct in Islam. Despite the draconian blasphemy laws which carry the force of capital punishment,⁶⁸ some Pakistani lawmakers felt that their national laws were unable to adequately “protect . . . the state religion of Pakistan and the Muslim faith.”⁶⁹ In May of 2007 members of Pakistan’s Islamic coalition, the Muttahida Majjils-e-Amal, submitted a bill that criminalized apostasy specifically, mandating the execution of offenders.⁷⁰

Despite this definitional issue within Islam, this study focuses on the narrower idea of apostasy, that is, renunciation of Islam. It does, however, make references to cases that are more rightly thought of as blasphemy or heresy when such is illustrative of the broader forces at work.

C. *Apostasy and Contemporary Muslim Thinkers*

Today’s ‘*ulamā*’, the clerical class of Islam and the scions of Islamic jurisprudence, continue to hold that apostasy is a punishable offense. No figure in Islamic thought has called for an unequivocal abolition of all penalties for an act of apostasy. Where the ‘*ulamā*’ differ lies only in how they interpret the Quran’s verses on religious freedom and the lone *ḥadīth* that underpins the entire argument for executing apostates.

66. *Al-ridda wa al-irtidād* [Apostasy], <http://istefta.alhakeem.com/ajwebbeh/amaeh/48.htm> (last visited Apr. 15, 2009). The Shia cleric, Grand Ayatollah Sayyid Mohammad Saeed al-Hakim has given the following opinion: “*Question*: What is the understanding of apostasy [*al-ridda wa al-irtidād*] in Islam? *Answer*: Apostasy [*al-irtidād*] is a Muslim’s leaving Islam, by rejecting either the essentials of Islam, or one of its pronounced obligations to the point that it is a denial of God or the Prophet.” *Id.*

67. See Anh Nga Longva, *The Apostasy Law of Kuwait and the Liberal Predicament*, 14 CULTURAL DYNAMICS 257, 261-62 (2002). Robert Husayn Ali, also called Husayn Ali Qambar, a Kuwaiti convert to the Evangelical Church, made equivocal remonstrations of Islam after apostasy proceeding against him had begun. *Id.*; see also *infra* text accompanying note 217.

68. See generally David F. Forte, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT’L L. 27 (1994) (analyzing how Pakistan’s blasphemy laws have been used to stifle religious minorities and Muslim dissenters, including apostates).

69. Apostasy Act, 2006 (Pak.), available at <http://www.thepersecution.org/50years/apostasybill.html> (providing English translation of proposed Act).

70. *Id.*; see also Bill Bowder, *Christians in Pakistan Fear Future*, CHURCH TIMES (U.K.), May 18, 2007, at 7.

1. A Crime of Status

The majority of contemporary Islamic authorities hold to some form of the classical prohibition against apostasy.⁷¹ One of the most unreserved advocates of capital punishment for apostates was the late Sheikh Mohammed al-Ghazali, Mufti of Egypt and a prominent figure in the Muslim Brotherhood. When prominent secularist Farag Fouda was murdered by members of *al-Gamā'a al-Islāmīya*,⁷² al-Ghazali testified in their defense, arguing that Fouda got what he deserved.⁷³ Before a court of law, Sheikh Ghazali asserted that "anyone who openly resisted the full imposition of Islamic law was an apostate who should be killed either by the government or by devout individuals."⁷⁴

The most influential Shia scholars also continue to adhere to the classical jurisprudence on apostasy. Grand Ayatollah Khomeini clearly endorsed the death penalty for apostates when he issued the now infamous death warrant for Indian writer Salman Rushdie in 1989.⁷⁵ Ayatollah Ali Khameni continued the institutional support for killing apostates when he renewed his predecessor's *fatwa* in 2007.⁷⁶ Ayatollah Seyyid Ali al-Husseini al-Sistani, a *mujtahid* of international repute and perhaps "the most powerful man in Iraq,"⁷⁷ has taken a clear stance on the consequences of apostasy:

Question: What is your pronouncement on apostates specifically?

Answer: An apostate is one who leaves Islam and chooses unbelief.

There are two types: *fiṭrī* [Muslim by birth] and *mallī* [Muslim by

71. SAEED & SAEED, *supra* note 14, at 88.

72. *Al-Gamā'a al-Islāmīya*, or the "Islamic Group," formed in Egypt during the 1970s, openly espoused the use of violence for its Islamist ends. See Malika Zeghal, *Religion and Politics in Egypt: The Ulama of al-Azhar, Radical Islam, and the State (1952-94)*, 31 INT'L J. OF MIDDLE E. STUD. 371, 391-95 (1999). The group's spiritual leader and former Azharite scholar, Sheikh Omar Abd al-Rahman, was acquitted of conspiring to assassinate Egyptian president Anwar Sadat. *Id.* at 392. He was later convicted for his role in conspiring to bomb United States targets, and is currently in United States federal prison. Joseph P. Fried, *Sheik Sentenced to Life in Prison in Bombing Plot*, N.Y. TIMES, Jan. 18, 1996, at A1. *Al-Gamā'a al-Islāmīya* has been deemed a terrorist organization by the United States. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, FOREIGN TERRORIST ORGANIZATIONS (2008), <http://www.state.gov/s/ct/rls/fs/08/103392.htm> (last visited Mar. 9, 2009).

73. AL-'ALWĀNĪ, *supra* note 32, at 8-9.

74. Douglas Jehl, *Mohammed al-Ghazali, 78, an Egyptian Cleric and Scholar*, N.Y. TIMES, Mar. 14, 1996, at D21.

75. Sheila Rule, *Khomeini Urges Muslims to Kill Author of Novel*, N.Y. TIMES, Feb. 15, 1989, at A1.

76. *Irān tatamassik bi-fatwā al-khamīnī bi-hadr dām salmān rushdī* [Iran Renews Khomeini's Death Warrant for Salman Rushdie], ALJAZEERA, June 24, 2007, http://www.aljazeera.net/NR/exeres/E7C1665B-16C4-435B-96C2-04AB84550B3D.htm?wbc_purpose=basic.

77. Rod Norland & Babak Dehghanpisheh, *What Sistani Wants*, NEWSWEEK, Feb. 14, 2005, at 26.

conversion] The punishment for the *fiṭrī* is that he is killed immediately, separated from his wife at the moment of his apostasy, and his marriage annulled without a divorce The assets he had at the time of his apostasy are divided among his inheritors after the payment of his debts As for the *mallī* apostate, his fate is the same as the *fiṭrī*, except that he may repent; if not he is killed This is if the apostate is a man; as for a female apostate, she is not killed She is to be imprisoned, set upon and beaten at the hours of prayer until she repents, and if she repents it is accepted. There is no difference here whether the female apostate is a *mallī* or a *fiṭrī*.⁷⁸

These '*ulamā*' hold to what can only be described as the "status offense" conception of apostasy.⁷⁹ If an individual was Muslim and has become non-Muslim, he or she is guilty; the only act involved is willfully manifesting that change in status. For them, turning away from Islam is tantamount to turning against it.

2. A Crime of Sedition

Although the status offense view has prevailed among both Sunni and Shia Muslims, it is being challenged. Dr. Ali Gomaa, the Grand Mufti of Egypt and a leading authority of the Shafi school, has been held up by some western observers as a jurist now breaking with the orthodox view of Islamic apostasy.⁸⁰ This is half correct. Dr. Gomaa has indeed argued that the Quran guarantees religious freedom, basing his conclusion on the following verses: "[u]nto you your religion, and unto me my religion";⁸¹ "[t]hen whosoever will, let him believe, and whosoever will, let him disbelieve";⁸² and "[t]here is no compulsion in religion."⁸³ Even though rejection of Islam is a sin punishable by God,

78. *al-Isi'la wa al-Ajwaba >> al-Irtidād (3)* [Questions and Answers: Apostasy (3)], OFFICIAL WEBSITE OF GRAND AYATOLLAH SISTANI, <http://sistani.org/local.php?modules=nav&nid=5&cid=28> (last visited Feb. 27, 2009).

79. *Id.* Abdullah and Hassan Saeed refer to this as the "pre-Modern" view of apostasy. SAEED & SAEED, *supra* note 14, at 88. The doctrine was challenged by scholars as early as the eighth century, and in this sense an "offense" based categorization is more accurate. See Interview by Ehsan Masood et al. with Tariq Ramadan, in PROSPECT MAG. (U.K.), July 2006, available at http://www.prospect-magazine.co.uk/article_details.php?id=7571.

80. *In Death's Shadow*, *supra* note 11, at 30; see also Shiraz Maher, *When Muslims Become Christians*, BBC NEWS, Apr. 21, 2008, http://news.bbc.co.uk/2/hi/uk_news/magazine/7355515.stm (stating that "Egypt's Grand Mufti, Ali Gomaa, unequivocally told the *Washington Post* that the death penalty for apostasy simply no longer applies").

81. QURAN, *supra* note 2, at 109:6.

82. *Id.* at 18:29.

83. *Id.* at 2:256.

Dr. Gomaa believes that Muslims need only fear that punishment; while on Earth, a Muslim may leave his religion or choose another.⁸⁴

What must be noted, however, is that Dr. Gomaa qualified this right of choice with the following:

If the case in question is one of merely rejecting faith, then there is no worldly punishment. If, however, the crime of undermining the foundations of the society is added to the sin of apostasy, then the case must be referred to a judicial system whose role is to protect the integrity of the society.⁸⁵

Dr. Gomaa's statement to *Newsweek* fanned a debate which had ignited months earlier when he ruled that Coptic Christians who convert to Islam and then return to Christianity are "apostates with regards to the jurisprudence [*fiqh*] . . . but their civil rights are an issue for the state and the social services . . ." ⁸⁶ He insisted that the role of religious authorities is to make a determination as to the individual's status, but that the state should act in accordance with the individual's legal rights.⁸⁷ Much of the clamor hoped to elicit the view of Sheikh Mohammed Sayyid Tantawi, the Grand Sheikh of al-Azhar and arguably the most influential figure in Sunni Islam. Although he has said that "Islam doesn't need apostates,"⁸⁸ Tantawi has avoided either affirming or contradicting Gomaa's position,⁸⁹ a fact which can only be seen as his tacit agreement with it. A leading Egyptian newspaper affirmed this inference, paraphrasing the Sheikh's views as that apostates should be "left alone" unless they "pose a threat or belittle Islam."⁹⁰ Both Gomaa and Tantawi seem to be echoing a predecessor to both, Sheikh Mahmud

84. Posting of Ali Gomaa to On Faith: Muslims Speak Out Blog, http://newsweek.washingtonpost.com/onfaith/muslims_speak_out/2007/07/sheikh_ali_gomah.html (July 21, 2007).

85. *Id.*

86. *Muftī maṣr yaḥsim al-jadl ḥawl masīḥīyīn a'atnaqū al-islām thumma irtaddū* [The Mufti of Egypt Settles the Debate over Christians Who Embraced Islam then Apostatized], ALARABIYA.NET, May 13, 2007, <http://www.alarabiya.net/articles/2007/05/13/34393.html>.

87. *Id.*

88. *Shiykh al-azhar: al-islām liya bi-hāja ilá al-murtaddīn* [The Sheik of al-Azhar: Islam Does Not Need Apostates], AHL AL-QURAN [International Quranic Center], Aug. 30, 2007, http://www.ahl-alquran.com/arabic/show_news.php?main_id=458.

89. *Id.*; see also Ahmad al-Baḥārī, *Qaḥī'a taqṭa' al-murtadd . . . wa taqṭa' abūhu* [Apostates Are Cast Out . . . and So Are Their Fathers] ELMASSRY NEWSPAPER (Austl.), Aug. 17, 2007, <http://www.elmassry.com/articals.php?id=967> (noting that Dr. Tantawi refused to comment on the Shariah punishment for apostasy or the affair around Mohammed Ahmed Hegazy's apostasy).

90. Nashwa Abdel-Tawab, "Whosoever Will, Let Him Disbelieve," AL-AHRAM WEEKLY (Egypt), Aug. 15, 2007, available at <http://weekly.ahram.org.eg/2007/857/eg9.htm>.

Shalut of al-Azhar, who some fifty years earlier announced that unbelief alone could not be punished.⁹¹

The view expressed by Dr. Gomaa and like-minded *'ulamā'* only considers apostasy from Islam a crime when it spreads sedition [*fitna*] against Islamic society.⁹² This narrows the scope of the offense but fails to abolish it. Under this "sedition" analogy, "quiet" apostates would not be prosecuted, though vociferous apostates could be. An open repudiation of Islam by a prominent individual could be construed as "undermining the foundations" of the Muslim society he or she is part of, and questioning the axiomatic principles of Islam could be portrayed as an attack upon it.⁹³ At a time when embassies are burned for cartoons,⁹⁴ teachers are imprisoned for teddy bears,⁹⁵ fiction is answered with arson,⁹⁶ and mobs continue the refrain of "death for Salman Rushdie,"⁹⁷ even indirect expression could be thrown back as a direct attack on Islam.

91. SAEED & SAEED, *supra* note 14, at 95.

92. See Ebrahim Moosa, *The Dilemma of Islamic Rights Schemes*, 15 J.L. & RELIGION 185, 201 & n.40 (2000) (suggesting that eight other notable Islamic scholars subscribe to the view that apostasy is a political, rather than religious, crime). The implication is, however, that these scholars are still a minority amongst their peers. Of the eight cited, Dr. Hassan Turabi is one of the most enigmatic; he has decried capital punishment for apostates, yet he failed to intervene on Mohammed Taha's behalf, though it was arguably within his power to do so. See AL-'ALWĀNI, *supra* note 32, at 7; see also George Packer, *Letter from Sudan: The Moderate Martyr*, NEW YORKER, Sept. 11, 2006, at 61, 65 ("I asked a number of people . . . about the role that Turabi might have played in Taha's death. 'Turabi killed him' was the blunt verdict . . .").

93. The Nasr Abu Zeyd affair is an oft-cited example of how criticism or reevaluation of traditional Islamic doctrine can be portrayed as heresy, and by extension, apostasy. See *infra* notes 207-11.

94. *Embassies Burn in Cartoon Protest*, BBC NEWS, Feb. 4, 2006, http://news.bbc.co.uk/1/hi/world/middle_east/4681294.stm. The Danish and Norwegian embassies in Damascus were set ablaze after a Danish newspaper, JYLLANDS-POSTEN, published caricatures that portrayed Mohammed as a terrorist. *Id.*

95. *Sudan Demo over Jailed UK Teacher*, BBC NEWS, Nov. 30, 2007, <http://news.bbc.co.uk/2/hi/africa/7121025.stm>. Fifty-four year-old Gillian Gibbons, a British citizen and non-Muslim, was jailed by Sudanese authorities for allowing her primary school pupils to name a teddy bear "Mohammed." *Id.* Some protesters allegedly felt that her jail sentence (ultimately reduced to a few days thanks to British diplomatic efforts) was insufficient and that she should have been executed. *Id.*

96. Sarah Lyall, *Home of Publisher of Book on Muhammad is Burned*, N.Y. TIMES, Sept. 29, 2008, at A6. The London home of Mr. Martin Rynja, then publisher of *The Jewel of Medina*, was firebombed. The book, a fictional account of one of Mohammed's wives, had not yet been published. *Id.*

97. *Bākistān taḥtaj ladā bṛiṭānīya li-takrīm salmān rushdī* [Pakistan Protests Britain's Knighthing of Salman Rushdie], ALJAZEERA NEWS, June 27, 2007, <http://www.aljazeera.net/News/archive/archive?ArchiveId=1061230>. Pakistani officials denounced the knighting of Salman Rushdie as damaging to relations between the West and Islam; Pakistani demonstrators demanded death for both Rushdie and Britain. *Id.*

Indeed, some scholars have understood “threat” in almost Orwellian terms, such that apostasy from Islam is nearly a *thoughtcrime*. One such scholar is Dr. Yousef al-Qaradawi, a cleric well known to both Arab television viewers and the British and American governments, which have refused him entry.⁹⁸ Although he has written that “open revolt” against the *umma* is an element of the crime of apostasy,⁹⁹ Dr. Qaradawi has defined the term “revolt” itself quite openly. Impiety alone is an “intellectual apostasy,” according to Dr. Qaradawi, and the “criminals” who spread its “ruthless and relentless effects” are like “malignant tumors” in minds of Muslims.¹⁰⁰ These *munaḥiqīn* are even more dangerous to the *umma* than open apostates, and dutiful Muslims must “launch a war against such a hidden enemy.”¹⁰¹ Indeed, Dr. Qaradawi has exhorted Muslims “to combat apostasy in all its forms . . . giving it no chance to pervade the Muslim world.”¹⁰² But does he support the execution of apostates simply for changing their religion? When asked whether apostates *must* be killed, Dr. Qaradawi responded: “No, I say [killing] is necessary in some cases of apostasy, such as apostasy that causes sedition and threatens society. As for ‘regular’ apostasy . . . maybe.”¹⁰³ Whether Dr. Qaradawi is prevaricating or playing the line, his answer shows how this view of apostasy can be manipulated by both the conservatives and the liberalizers in Islam.

Although Dr. Gomaa is perceived as more of a liberalizer than other ‘*ulamā*’ such as Dr. Qaradawi, he still agrees that apostasy from Islam is a sin. Furthermore, he also agrees with them that where an individual’s choice conflicts with society, society should win:

98. *Muslim Cleric Not Allowed into UK*, BBC NEWS, Feb. 7, 2008, http://news.bbc.co.uk/2/hi/uk_news/7232398.stm (noting that Qaradawi is banned from entering the United States as well). Characterization of Dr. Qaradawi’s views depends on one’s own; British Members of Parliament have labeled him a supporter of terrorism, yet he is a regular presence in mainstream Arab media venues, like *Aljazeera*. For his own part, Dr. Qaradawi considers himself a moderate. See *Ḥaywār muftūh: al-khitāb al-dīnī wa al-‘alāqa ma’ al-gharab* [Open Discussion: Religious Dialogue and the Relationship with the West], http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=3579&version=1&template_id=211&parent_id=16 (last visited Mar. 18, 2009) (Dr. Qaradawi stating: “I’ve spent the past twenty years of my life calling people to what’s now become known as the moderate Islamic movement . . .”) (providing a transcript of the *Aljazeera* broadcast).

99. AL-QARADAWI, *supra* note 60, at 326.

100. IslamOnline.net—Ask The Scholar, Fatwa on Intellectual Apostasy, Mar. 24, 2003, http://www.islamonline.net/servlet/Satellite?cid=1119503545098&pagename=IslamOnline-English-Ask_Scholar%2FFatwaE%2FFatwaE.

101. *Id.*

102. Abdel-Tawab, *supra* note 90.

103. *Al-Ḥurrīya al-dīniya wa al-fikrīya* [Religious and Intellectual Freedom], ALJAZEERA.NET, Jan. 2, 2005, <http://www.aljazeera.net/channel/archive/archive?ArchiveId=113763#L3>.

Penalizing this sedition may be at odds with some conceptions of freedom that would go so far as to ensure people the freedom to destroy the society in which they live. This is a freedom that we do not allow since preservation of the society takes precedence over personal freedoms.¹⁰⁴

For Islamic scholars, Islam is inextricably woven into the society of Muslim nations, and there is an imperative to maintain that interdependence. By treating apostasy as sedition, rather than a status offense, this minority of scholars seem to be seeking a new compromise between the demands of individual Muslims and those of Muslim society, a compromise aimed at preserving the Islamic identity of Muslim societies in a world that is increasingly defined in terms of universal human rights.¹⁰⁵

3. A Crime at All?

Viewed from a *realpolitik* standpoint, the apostasy debate among Islamic authorities is about what level of control they can, and should, exercise in order to preserve the Muslim character of their communities. Though the *'ulamā'* are where many practicing Muslims look for guidance regarding the meaning and requirements of Islam, academic scholars of history, law, and philosophy also contribute to the understanding of the Shariah. On the issue of apostasy, many prominent Muslim scholars of criminal law and human rights, such as M. Cherif Bassiouni and Abdullah an-Na'im, have criticized the punishment of apostates as either the product of flawed reasoning or as simply inconsistent with broader norms.¹⁰⁶ Their scholarship suggests how the Islamic reasoning behind the "crime" of apostasy could be overcome with Islamic arguments, arguments that the Iraqi Federal Supreme Court could in turn use to resolve a conflict between the Shariah and freedom of religion.

Professor Bassiouni has asserted that "[a] Muslim's conversion to Christianity is not a crime punishable by death under Islamic law" despite the fact that "there is long-established doctrine that apostasy is punishable by death."¹⁰⁷ He has argued that the execution of apostates is

104. Posting of Ali Goma, *supra* note 84.

105. The pull between individual and group rights is a central question in the discussion of freedom under Islamic rights schemes. See Arzt, *supra* note 46, at 371-72 (noting that "[a]s in other religious systems . . . Islamic 'rights' are actually corollaries of duties owed to God and other persons," which may be viewed as consequently subordinating the recognition of the individual's own rights).

106. See *infra* text accompanying notes 107-14.

107. M. Cherif Bassiouni, *Leaving Islam Is not a Capital Crime*, CHI. TRIB., Apr. 2, 2006, at C9.

premised on a disregard for the apposite verses of the Quran and a misinterpretation of the relevant *ḥadīth*.¹⁰⁸ When Mohammed ordered the execution of an apostate, Professor Bassiouni posits, he did so at a time of war. The apostate's rejection of Islam was a defection to the enemy, a political rather than religious act—it was high treason.¹⁰⁹ Tariq Ramadan has likewise maintained that only an act of treason was at issue, pointing out that “[m]any around the Prophet changed religions. But he never did anything against them.”¹¹⁰

Although Bassiouni and Ramadan interpret the *ḥadīth* as punishing political treason, and therefore *not* religious apostasy, the possibility remains of viewing this *ḥadīth* the other way around, that apostasy is punishable when it amounts to “treason of Islam.” Treason in this sense would require an overt attack on the Muslim community, or defection to its enemies at a time of war.¹¹¹ Contrast this with the analogy to sedition, where actions merely viewed as subverting the authority of the religious establishment or spreading dissent within the Muslim community could rise to the level of a capital offense in the Shariah. Thus, under Dr. Gomaa's view, a Socrates-figure could be executed on the pretext of his impiety, while scholars adhering to the narrower treason view could only condemn the Benedict Arnolds of the Muslim world, those who have joined forces at war with the Muslim world.

The distinction between the treason and sedition analogies has been rare in both the religious and academic discourse on apostasy. In fact it may even undercut liberal arguments, to the extent that proponents of the status-offense analogy simply retort that apostasy is a *de facto* act of treason.¹¹² Some Muslim scholars have taken to the debate by joining hermeneutics with human rights and concluding that the execution of apostates is untenable in a modern conception of Islam. Professor an-Na‘im in particular has argued that the Quran explicitly guarantees

108. *Id.* (Professor Bassiouni specifically cites to verses 2:256 and 2:136 of the QURAN).

109. *Id.*

110. See Interview by Ehsan Masood et al. with Tariq Ramadan, *supra* note 79. The Iraqi-born and Azhar-trained scholar Dr. Ṭaha Jābar al-‘Alwāni has noted several such examples and has pointed out that the cases where Mohammed did authorize the execution of someone who had rejected Islam, it was on the basis of some other crime committed, not apostasy. AL-‘ALWĀNI, *supra* note 32, at 69-76.

111. See BLACK'S LAW DICTIONARY 1388 (8th ed. 2004) (“The difference between *sedition* and *treason* is that the former is committed by preliminary steps, while the latter entails some overt act for carrying out the plan.”).

112. See bin Manṣūr, *supra* note 44, at 160 (“[B]ut a Muslim is not permitted to leave Islam, as provided in the sound *ḥadīth* ‘kill him who changes his religion.’ Apostasy from Islam is tantamount to high treason [*al-khiyāna al-‘azmā*], which the state punishes with execution.”).

freedom of religion,¹¹³ and that this guarantee not only precludes criminal punishment for apostasy, but also the imposition of civil penalties: “To remove all constitutional and human rights objections, the legal concept of apostasy and all its civil and criminal consequences must be abolished.”¹¹⁴

D. *Apostasy and Contemporary International Law*

Professor an-Na'im's view draws on an established body of human rights norms. The contours of international law clearly protect choosing one's religious convictions and clearly reject being convicted for one's religion. The Universal Declaration of Human Rights (“UDHR”) explicitly provides every individual the “freedom to change his religion or belief.”¹¹⁵ The ICCPR likewise guarantees the right to adopt a belief of one's choosing.¹¹⁶ Though the ICCPR does hold that the right to manifest one's religious beliefs may not compromise “public safety, order, . . . or morals,”¹¹⁷ this provision, if considered globally, cannot lend itself to the interpretation that overt conversion to a religion is an affront to public welfare.¹¹⁸ Indeed, such a view would be at war with the purpose of Article 18(2), which states that “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”¹¹⁹ Cultural relativism, as many have argued, is irrelevant to such fundamental points of individual identity.¹²⁰

113. ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 109 (1990).

114. *Id.*; see also *infra* Part III.C (discussing the civil penalties that often accompany apostasy from Islam).

115. Universal Declaration of Human Rights, art. 18, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

116. International Covenant on Civil and Political Rights art. 18, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 172, 178.

117. *Id.*

118. And yet “public order” has been interpreted to prevent choice of religion. See *infra* Part III.A-B for a discussion of criminal penalties for religious activity premised on upholding “public order”; see also *infra* Part V.B.4 for a discussion of how the “public order” doctrine may apply to apostates in Iraq.

119. International Covenant on Civil and Political Rights, *supra* note 116, at art. 18, 999 U.N.T.S. at 178.

120. See, e.g., Arzt, *supra* note 46, at 363-66. Cultural relativism has been defined as an approach to rights which “posits that culture is the source of validity of rules and that, since cultures vary, rules that are valid within one culture will not necessarily be valid in others.” Ann Elizabeth Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash with a Construct?*, 15 MICH. J. INT'L L. 307, 382 (1994). As a consequence, “cultural relativists are inclined to claim that pressing for the universality of human rights . . . involves a failure to respect the diversity of cultures.” *Id.*

Iraq and fourteen of the twenty-one other states considered in this Note are signatories to the ICCPR,¹²¹ yet none has effectively guaranteed its citizens a free and unfettered choice of religion.¹²² The broader question, however, is whether these states have actually expressed an intention to provide that freedom. Saudi Arabia has objected to the religious freedom provisions of the UDHR,¹²³ and Egypt, generally viewed as one of the more liberal states in the Middle East, made a declaration in deference to the Shariah when it joined the ICCPR.¹²⁴ The very idea that the faith of Islam and the law of human rights are incompatible has been fiercely debated, debunked, and demonstrated in turn by political leaders and scholars, secular and clerical.¹²⁵ Efforts to articulate an “Islamic” conception of human rights have resulted in statements such as the Universal Islamic Declaration on Human Rights of 1981 (“UIDHR”),¹²⁶ as well as the 1990 Cairo Declaration of Human Rights in Islam (“Cairo Declaration”), which has largely overshadowed its predecessors.¹²⁷ In adopting its revised Charter on Human Rights in 2004, the Arab League has attempted to reconcile both the Islamic and universalist conceptions of human rights, by “having regard to” the Cairo Declaration and “reaffirming the principles” of the UIDHR and the ICCPR.¹²⁸

121. Afghanistan, Algeria, Egypt, Iran, Jordan, Kuwait, Lebanon, Libya, Morocco, Sudan, Syria, Tunisia, Turkey, and Yemen. See Stahnke & Blitt, *supra* note 21, at 1005-09, 1016, 1018.

122. See *infra* Part III. Although Turkey is committed to a secular government, several Turkish apostates have been the targets of non-state violence. Though Turkish authorities have prosecuted such cases, the threat of vigilantism remains. See *infra* note 241.

123. See Mayer, *supra* note 120, at 322.

124. In joining the ICCPR, Egypt made the following declaration: “Taking into consideration the provisions of the Islamic Shariah and the fact that they do not conflict with the text annexed to the instrument, we accept, support, and ratify it.” Stahnke & Blitt, *supra* note 21, at 1005 n.156 (quoting the reservations made by Egypt when it ratified the ICCPR on Jan. 14, 1982).

125. For a detailed treatment of this debate, see generally Mayer, *supra* note 120 (comparing universal human rights and Islamic human rights).

126. Universal Islamic Declaration of Human Rights, Sept. 19, 1981, *available at* <http://www.alhewar.com/ISLAMDECL.html>.

127. An English translation of the Cairo Declaration is provided in UN GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (June 9, 1993) [hereinafter Cairo Declaration]. The Cairo Declaration is a product of the Organization of the Islamic Conference, an international organization composed of the world’s Muslim nations. See Mayer, *supra* note 120, at 327. As such, it has effectively superseded prior, non-governmental formulations of “Islamic” rights. *Id.* Professor Mayer has described the Cairo Declaration as “an Islamic countermodel of human rights,” which falls short of actually capturing the essence of Islamic teachings as values. *Id.*

128. League of Arab States, Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 INT’L HUM. RTS. REP. 893, 894 (2005) [hereinafter Arab Charter].

On the issue of religious freedom, neither the UIDHR nor the Cairo Declaration grants Muslims the freedom to leave Islam.¹²⁹ Indeed, the Cairo Declaration unabashedly embraces religion as a legitimate basis for discrimination.¹³⁰ The failure to affirmatively protect religious converts amounts to legal “exposure,” for as Professor Elizabeth Ann Mayer has noted, “[i]n context, the lack of protection afforded for religious freedom accommodates condemnations and executions for apostasy.”¹³¹ Publications of the Organization of the Islamic Conference even iterate that the death penalty for apostasy is an obvious fact of Islam,¹³² lending credence to Mayer’s observation. Whether states committed to these declarations could adopt a position toward apostasy like that of Professor an-Na‘im seems a dubious hope at best. However, the text of the Arab Charter on Human Rights may be a sign otherwise.¹³³ Newly born and silent so far, Arab states party to the

129. The UIDHR provides:

Every person has the right to express his thoughts and beliefs so long as he remains within the limits prescribed by the Law. No one, however, is entitled to disseminate falsehood or to circulate reports which may outrage public decency, or to indulge in slander, innuendo or to cast defamatory aspersions on other persons.

Universal Islamic Declaration of Human Rights, *supra* note 126, at art. XII(a). “No one shall hold in contempt or ridicule the religious beliefs of others or incite public hostility against them; respect for the religious feelings of others is obligatory on all Muslims.” *Id.* at art. XII(e). “Every person has the right to freedom of conscience and worship in accordance with his religious beliefs.” *Id.* at art. XIII. In comparison, the Cairo Declaration is far clearer *vis à vis* the conversion of Muslims: “Islam is the religion of unspoiled nature. It is prohibited to exercise any form of compulsion on man . . . in order to convert him to another religion or to atheism.” Cairo Declaration, *supra* note 127, at art. 10.

130. “All human beings are God’s subjects . . . no one has superiority over another *except on the basis of piety* . . .” Cairo Declaration, *supra* note 127, at art. 1(b) (emphasis added).

131. Mayer, *supra* note 120, at 334.

132. See Org. of the Islamic Conference, Cultural & Soc. Affairs Dep’t, *Islamophobia Observatory Monthly Bulletin*, Mar. 2008, at 1(c), available at www.oic-oci.org/english/article/MB_Dec-08.pdf (Commenting on the recently formed “Council of Ex-Muslims in Britain.” The bulletin states that “[i]t takes nerve to start an organisation for people who have rejected Islam. In Islamic law, apostasy is punishable by death.”); see also Org. of the Islamic Conference, *Declaration on the Rights and Care of the Child in Islam*, at art. VIII, Annex I to Res. 16/7-C(IS) (Dec. 15, 1994) (resulting from the Cultural and Islamic Affairs Seventh Islamic Summit Conference) (“While Islam guarantees Man’s freedom to voluntarily adopt Islam without compulsion, it prohibits apostasy of a Muslim afterwards, in view of the fact that Islam is the Seal of Religions and, therefore, the Islamic society is committed to ensuring that the sons of Muslims preserve their Islamic nature and Creed and to protecting them against attempts to force them to relinquish their religion.”).

133. “Each State . . . undertakes to ensure to all individuals . . . the rights and freedoms set forth herein, without distinction on grounds of . . . religious belief, opinion, [or] thought . . .” Arab Charter, *supra* note 128, at art. 3(a). “Everyone has the right to freedom of thought, conscience and religion. No restrictions may be imposed on the exercise of such freedoms except as provided for by law.” *Id.* at art. 30(a).

The freedom to manifest one’s religion or beliefs . . . shall be subject only to such limitations as are prescribed by law and are necessary in a tolerant society that respects

Charter will have to wait before the Charter's impact on religious freedom can be understood.¹³⁴

E. Summary II: Four Interpretations, No Answer

The debate over apostasy in Islam is bounded by four corners. The punishment of apostasy is a veritable shibboleth amongst the conservative authorities of Islam, and it is their view that has longest echoed in the mosques and minds of commonplace Muslims. Their conception—the predominant conception—defines apostasy as a status offense with but a few affirmative defenses for duress or mistake.¹³⁵ Other Muslim jurists have interpreted the Shariah to hold that apostasy is only punishable when it constitutes a transgression against Muslim society, as an act of sedition.¹³⁶ This latter view has been considered a break with Islamic orthodoxy, yet the actual practice of Muslim countries largely conforms to this view, as will be discussed in the following Part. The “high treason” understanding of *ridda* is not always distinguished from the former view, though it treats apostasy as even more limited in scope than the sedition view.¹³⁷ A fourth view is held by many non-clerical scholars who argue that, if either international human rights law¹³⁸ or the imperative that “there is no compulsion in religion”¹³⁹ is to be respected, apostasy from Islam simply cannot be penalized. Save Turkey, however, no Middle Eastern state has convincingly embraced this fourth view.

A trend is discernable amongst these views, and the tide seems to be turning, however slowly, against the criminalization of apostasy in Islam. The jurisprudential limiting, within the lines of doctrinal hermeneutics, is bending to more liberal currents in Muslim societies, even at a time when Islam is said to be strongly reasserting itself elsewhere. Perhaps this is simply the proverbial pendulum effect, and

human rights and freedoms to protect public safety, public order, public health or morals or the fundamental rights and freedoms of others.

Id. at art. 30(b). “Nothing in this Charter may be construed or interpreted as impairing the rights and freedoms protected by the domestic laws of the States parties or those set forth in the international and regional human rights instruments which the States parties have adopted . . .” *Id.* at art. 43.

134. Seven states—Algeria, Bahrain, Jordan, Libya, Palestine, Syria, and the United Arab Emirates—have ratified the Arab Charter. *Arab Charter of Human Rights: Written in 1994, It is Enforced in 2008*, ALKARAMA, Mar. 21, 2008, available at http://en.alkarama.org/index.php?option=com_content&view=article&catid=17%3Acommuniqu&id=72%3Aarab-charter-on-human-rights-written-in-1994-it-is-enforced-in-2008&Itemid=197.

135. *See supra* Part II.C.1.

136. *See supra* Part II.C.2.

137. *See supra* Part II.C.3.

138. *See supra* Part II.D.

139. QURAN, *supra* note 2, at 2:256; *see also infra* text accompanying notes 439-40.

figures like Dr. Goma'a are seeing the extremism of certain Islamic movements in Egypt of the 1990s, as well as that of the al-Qaeda of this decade, as a threat to their own stewardship over the faith, a loosening of control due to the zeal of men like his predecessor, al-Ghazali. In any case, the dialogue over, and demand for, human rights is growing noisy in the Middle East, and many see it as the precursor to a major cultural shift in these societies.¹⁴⁰ The apostasy issue has become a *chevalle de bataille* for both ends of the spectrum—an obvious target for liberalizers, and one that, if conceded, could catalyze erosion of the established Islamic order.

For Iraq, then, this is a debate upon which fundamental elements of its identity may hang. Iraq could conceivably espouse any of these four views. This could mean a solidification of Islamic conservatism, a step towards liberalizing Islam, or a departure from Islam all together. But what would be the practical consequences of affirming either, that is, what could Iraqi apostates expect? To arrive at that question, this Note will first look at the range of practices in the Greater Middle East, as both an indicator of what stances these states have taken, as well as a way of identifying the possibilities that the new Iraqi state would realistically consider.

III. PUNISHING APOSTASY: A COMPARATIVE SURVEY

This Part will survey how the twenty-one nation-states considered have put the four views of apostasy in Islam into practice, and the extent to which the rationalizations and limitations on the offense are accounted for in the lives of Muslims throughout the Middle East. Its purpose is to illustrate the range of state practices that Muslim apostates in Iraq could conceivably face. Broadly speaking, these states have either: (A) prescribed specific punishments for apostasy; (B) punished apostasy under the guise of other crimes; (C) enforced civil penalties on apostates; or (D) failed to adequately protect apostates from vigilante punishment.

A. *Direct Criminal Punishment for Apostasy*

Of the twenty-one states surveyed, at least eight continue to maintain the death penalty for apostasy: Afghanistan,¹⁴¹ Iran,¹⁴²

140. SAEED & SAEED, *supra* note 14, at 114.

141. DEP'T OF STATE, 110TH CONG., ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM 2006, S. PRt. 110-32, 1st Sess., at 667 (2007) [hereinafter INT'L RELIGIOUS FREEDOM 2006] (reporting that no law expressly prohibits apostasy from Islam, but the role of Shariah in the Afghan legal system leaves the issue "subject to legal interpretation").

Mauritania,¹⁴³ Pakistan,¹⁴⁴ Qatar,¹⁴⁵ Saudi Arabia,¹⁴⁶ Sudan,¹⁴⁷ and Yemen.¹⁴⁸ Each of these countries has either adopted written laws requiring the state to prosecute suspected apostates and to execute those

142. *Id.* at 566. Executions of Iranian apostates have been premised on the Shariah, rather than codified law. *See infra* Part III.A.1.

143. The law of Mauritania reads:

Any Muslim guilty of the crime of apostasy, either by word, or by open and obvious action, will be offered an opportunity to repent within three days. If he does not repent within this time, he will be condemned to death as an apostate and his property will be confiscated by the Public Treasury. . . . Anyone guilty of the crime of apostasy (*Zendagha*) [that is, *zandaqa* or “heresy”] will be, unless he repents beforehand, sentenced to death. Any Muslim adult who refuses to follow ritual prayer [persistently] . . . will be sentenced to death. If he does not acknowledge the obligation of [ritual] prayer, he will be punished for apostasy

Law No. 83-162 of July 9, 1983, *Journal Officiel de la République Islamique de Mauritanie* [Official Gazette of Mauritania], Feb. 28, 1984, title IV, art. 306. The American State Department has pointed out, however, that “there [are] no reports of societal or governmental attempts to punish . . . the small number of known converts from Islam” INT’L RELIGIOUS FREEDOM 2006, *supra* note 141, at 73.

144. Pakistan’s anti-blasphemy laws carry the death penalty; although executions have yet to be carried out under them, blasphemy charges are regularly brought. INT’L RELIGIOUS FREEDOM 2006, *supra* note 141, at 732-33, 737. Pakistan’s anti-blasphemy laws serve as a *de facto* law against apostasy. *See generally* Forte, *supra* note 68.

145. INT’L RELIGIOUS FREEDOM 2006, *supra* note 141, at 634 (reporting that apostasy “is technically a capital offense; however since . . . 1971 there has been no recorded execution or other punishment for such a crime”).

146. *See infra* note 152. Executions of Saudi apostates have been premised on the Shariah, rather than codified law.

147. *Muwād al-qānūn al-janā’ī li-sanna 1991* [Sections of the 1991 Penal Code], *RA’ĪSA QUWĀT AL-SHURṬA* [SUDANESE POLICE DIRECTORATE], <http://sudanpolice.gov.sd/Claws.php> (quoting SUDAN PENAL CODE § 126 (1991)). The American State Department notes that apostasy “is punishable by death in the North. In practice, however, this penalty was rarely carried out.” INT’L RELIGIOUS FREEDOM 2006, *supra* note 141, at 110. The report also notes, however, that criminalization of apostasy is an “effective[] limit[ation to] Christian missionary activities in the [North].” *Id.*

148. INT’L RELIGIOUS FREEDOM 2006, *supra* note 141, at 662-63 (reporting that “the Government interprets [apostasy] as a crime punishable by death”). It is unclear whether Kuwaiti or Libyan law would actually permit direct criminal punishment for apostasy, let alone execution. The State Department has reported that in Kuwait “[t]here are laws against blasphemy, apostasy, and proselytizing. While the number of incidents to which these laws apply is limited, the Government actively enforces them.” BUREAU OF DEMOCRACY, HUM. RTS., & LAB., U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, KUWAIT, *available at* <http://www.state.gov/g/drl/rls/irf/2008/108486.htm>. However, during the highly publicized Qambar case, discussed *infra* notes 215-17, a Kuwaiti judge declared that killing an apostate would be illegal. Longva, *supra* note 67, at 262. The enactment of *ḥudūd* laws in the early 1970s in Libya suggests at first blush that apostasy could be punished; however, apostasy was explicitly left out of these laws, keeping with Malaki doctrine that apostasy is a *ta’zīr* offense. *See* Rudolph Peters, *The Islamization of Criminal Law: A Comparative Analysis*, 34 *DIE WELT DES ISLAMIS* 246, 255-56 (1994). In fact no law prohibits conversion from Islam, and an air of relative religious tolerance pervades Libya. INT’L RELIGIOUS FREEDOM 2006, *supra* note 141, at 623.

convicted, or has executed its citizens for apostasy *sine legis*.¹⁴⁹ Of course the disparity between the existence of these laws and the frequency with which they are applied must be noted; in the past twenty-five years, only a handful of individuals convicted of apostasy have actually been executed.

1. Disbelief and Death: Executions of Apostates

Mahmoud Mohammed Taha, a Sudanese Islamic reformer, was hanged after being condemned for apostasy in 1985.¹⁵⁰ Five years later, an Iranian who renounced Islam to become a Christian pastor was executed by his government in 1990.¹⁵¹ A Shia citizen of the Kingdom of Saudi Arabia was branded an apostate and beheaded in 1992.¹⁵² A few years later, an Iranian who had left Baha'ism for Islam, only to return to his original faith, was condemned in 1996.¹⁵³ An international outcry led to the commuting of his death sentence, but he nevertheless died while languishing in prison.¹⁵⁴ Even as recently as this year, Saudi Arabia condemned a man to death for blasphemy and upheld his sentence on appeal.¹⁵⁵

149. *Legis* here being understood as written law; where absent, the Shariah is invoked as the justification for execution.

150. Packer, *supra* note 92, at 61.

151. Alasdiar Palmer, *Hanged for Being a Christian in Iran*, TELEGRAPH (U.K.), Oct. 11, 2008, available at <http://www.telegraph.co.uk/news/worldnews/middleeast/iran/3179465/Hanged-for-being-a-Christian-in-Iran.html>. Reverend Hossien Soodmand was hanged for his conversion to Christianity thirty years prior, a decision he made at the age of thirteen. *Id.* The Shariah was the basis for his sentence, not enacted law. *Id.* A draft bill was overwhelmingly passed by the Iranian parliament in September 2008, which seeks to codify Shariah punishments, including death for apostates. *Id.* Iran's dubious step towards greater legality is unlikely to be missed by Mr. Soodmand's son, Ramtin, who is at the time of writing is imprisoned without charge, presumably on account of his own Christian faith. *Id.*

152. Mayer, *supra* note 120, at 358 n. 217 (citing AMNESTY INTERNATIONAL, SAUDI ARABIA: AN UPSURGE IN PUBLIC EXECUTIONS 6 (1993)).

153. HUMAN RIGHTS WATCH, 1997 REPORT ON RELIGIOUS MINORITIES: THE BAHAI COMMUNITY (1997), available at <http://www.hrw.org/reports/1997/iran/Iran-05.htm>. The report also notes that over 200 Baha'is were executed in the first six years of the Islamic Revolution. *Id.*; see also David A. Jordan, Note, *The Dark Ages of Islam: Ijtihad, Apostasy, and Human Rights in Contemporary Islamic Jurisprudence*, 9 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 55, 64-65 (2003).

154. U.S. Dep't of State, U.S. Condemns Iran's Persecution of Bahai Religious Prisoner, Dec. 23, 2005, <http://www.america.gov/st/washfile-english/2005/December/20051231142830ndjblehs0.2781793.html>.

155. BUREAU OF DEMOCRACY, HUM. RTS., & LAB., U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, SAUDI ARABIA, available at <http://www.state.gov/g/drl/rls/irf/2008/108492.htm> (reporting that Sabri Bogday, a Turkish citizen, was condemned for blaspheming God and Mohammed; he was convicted on March 31, 2008, and his appeal was quashed on May 1, 2008).

There are of course a substantial number of apostasy convictions that are overturned, pardoned, or commuted to a lesser sentence. Just this year, Sayed Parwiz Kambakhsh, an Afghan journalist was sentenced to death for blasphemy; his conviction was commuted to twenty years in prison on the grounds of judicial impropriety and insufficient evidence.¹⁵⁶ Mr. Kambakhsh's case harkened back to the widely publicized affair of another Afghan, Abdul Rahman, who was condemned in 2006 for converting to Christianity.¹⁵⁷ His death sentence was only avoided through the contrivance that he was "insane" and therefore unfit for criminal punishment, a compromise which was the result of exceptional international pressure exerted on the Karzai government.¹⁵⁸ Only a few years earlier, Mohammed Omer Haji, a Somali living in Yemen, similarly avoided execution for his conversion to Christianity after his situation was reported in the international press.¹⁵⁹ Both Rahman and Haji were awarded asylum in Christian nations immediately after their reprieves were granted, a fact that can only highlight the greater vulnerability of converts to religions with less powerful state supporters, like Baha'ism.

There is nothing surprising that few apostates are tried, convicted, or executed. Simply put, it seems martyrs are few and far between, and most people would rather hold their religious reservations privately than risk being killed for them. It may also be that the Muslim citizens of these countries are fully satisfied with their respective brands of Islam and have no interest in questioning their core doctrines or adopting different faiths, though no qualitative data exists to establish this. Moreover, if apostasy is held to be a crime, it must be acknowledged as a "victimless" one—there is no "victim"—and thus the retributive and restorative justifications for punishment are absent.

156. Abdul Waheed Wafa, *No Death Sentence for Afghan Journalist*, N.Y. TIMES, Oct. 22, 2008, at A12 (noting that Kambakhsh's death sentence for blasphemy was overturned on appeal); see also Abdul Waheed Wafa & Carlotta Gall, *Court Upholds Afghan Journalist's 20-Year Jail Term for Blasphemy*, N.Y. TIMES, Mar. 12, 2009, at A6 (noting that his commuted sentence of twenty years was upheld by a tribunal deliberation, rather than an open hearing, of the Afghan Supreme Court).

157. See Anver M. Emon, *On the Pope, Cartoons, and Apostates: Shari'a 2006*, 22 J. L. & RELIGION 303, 317 (2006).

158. *Id.* at 319. There was no clinical diagnosis of Abdul Rahman, and the inference left after his trial may be that any Afghan leaving Islam must be crazy. *Id.*

159. Barbara G. Baker, *Freed Somali Christian Arrives in New Zealand*, CHRISTIANITY TODAY, Sept. 1, 2000, <http://www.christianitytoday.com/ct/2000/septemberweb-only/36.0.html> (describing Haji's conversion, imprisonment, impending trial for apostasy, and ultimate resettlement in New Zealand).

2. Rhetoric and Reality

The handful of apostates executed in the Greater Middle East suggests that even those countries whose religious and political figures propound a “status offense” view of apostasy nevertheless prosecute only those cases with a strong element of treason or sedition. However much of Taha’s revisionist views of Islam cleaved from established doctrine, most commentators believe he was executed for his criticism of the Nimeri regime.¹⁶⁰ Evidence suggests that Saudi Arabia was more concerned about quelling Shia ferment than the condemned man’s views.¹⁶¹ In Iran, of course, conversions to Christianity are likely to be viewed suspiciously, given the forfeiture of freedoms that apostasy necessarily means; to the state security apparatus it may smell of collusion with powers hostile to the Islamic Revolution.¹⁶² Thus Dr. Gomaa’s sedition analogy, if contentious in discussion, is the *de facto* practice of Islamic states.¹⁶³

The states that have overtly criminalized apostasy are in a general sense the most “Islamic,” yet other threads also tie them together. First, their populations are not only Muslim, but homogenously so; to concede but small minorities, the Saudis are Hanbali Sunnis, Afghans are Hanafi Sunnis, the riverine Arabs ruling Sudan are Malaki Sunnis, the Iranians are Jafari Shias.¹⁶⁴ Thus apostasy is anathema to the dominant conception of society, not just a prevalent conception of it. Second, these states require that experts in Islamic jurisprudence sit on their highest judicial bench.¹⁶⁵ On the first point, Iraq diverges with its unique religious pluralism, a fact that has been at the center of bloodshed but could be a force for tolerance in the future.¹⁶⁶ On the second point, however, Iraq joins these countries, as it is constitutionally required to sit experts in Islamic law on its Federal Supreme Court, along with civil law-trained judges.¹⁶⁷ How this will play out remains a question mark that will be returned to in Parts IV and V.

160. See Packer, *supra* note 92, at 61-65.

161. See, e.g., Mayer, *supra* note 120, at 358 (noting the case of another Saudi Arabian Shia beheaded for apostasy and blasphemy).

162. See *infra* Part III.C for a description of the civil penalties attendant on apostasy.

163. See *supra* notes 80-97 and accompanying text.

164. Yemen would be an exception to this pattern, however.

165. See *infra* Part IV.B.1.

166. See *infra* Part IV.C.

167. IRAQ CONST. art 92, § 2. See also *infra* Part IV.B.1 for a discussion of the Iraqi judiciary.

B. Indirect Criminal Punishment for Apostasy

Even if the majority of Middle Eastern states do not officially punish apostasy, it does not follow, however, that they do not punish apostates. Many Arab states maintain laws that penalize acts perceived as offensive to religious sensibilities, and these are often invoked as a justification for prosecuting or otherwise pursuing Muslims who leave Islam. Section 372 of the Iraqi Penal Code,¹⁶⁸ which remains in force today, is a typical example of such laws.¹⁶⁹ On its face, this law and others like it protect all religions, yet equality of protection may be wanting in practice.¹⁷⁰ Disgruntled minorities, Muslim dissidents, and, of course, apostates, are all more likely to offend Muslim majoritarian sensibilities and to be prosecuted for it. Moreover, apostates may be subject to penalties under laws proscribing proselytism, which are nearly universal in the Middle East.¹⁷¹

1. Punishment for Attacking Religion

Egypt, so often the center of debate in the Arab world, has staged many indirect prosecutions of apostasy. Several individuals have been convicted for “[d]espising Heavenly [r]eligions,”¹⁷² with the writers Alaa Hamid and Salaheddin Mohsen providing two prominent examples.¹⁷³ Yet even this legal pretext for prosecution has been ignored in some cases, with some Muslim apostates like Bahaa al-Din al-Akkad having been detained without trial for extended periods of time. Formerly an

168. IRAQ PENAL CODE § 372 (1969). This paragraph provides: “Any one . . . (1) who attacks the creed of a religious sect [*tā’ifa*] or defames [*haqr*] its rites/practices . . . or (5) who publicly insults a symbol or a person that is an object of sanctification, worship or reverence for a religious sect” shall be punished accordingly. *Id.*

169. For another example, see EGYPT PENAL CODE tit. II, ch. II, § 98(f) [*madda 98 (waw)*] (1937), which prescribes six-months to five-years imprisonment for anyone who “uses religion to spread . . . extremist thoughts that propagate sedition, denigration, or contempt for one of the heavenly religions or sects thereof, or that threaten national unity or societal harmony.” *Id.*

170. See Ibrahim Habib, *The Use and Abuse of Egyptian Penal Code 98 H*, FREE COPTS, Sept. 20, 2007, http://freecopts.net/english/index.php?option=com_content&task=view&id=653&Itemid=9.

171. See *infra* Part III.B.2.

172. EGYPT PENAL CODE tit. II, ch. II, § 98(f). In practice, this only seems to apply to denigration of Islam. See Habib, *supra* note 170.

173. *Suspended Sentence for Egyptian ‘Blasphemer,’* BBC NEWS, July 8, 2000, http://news.bbc.co.uk/1/hi/world/middle_east/825306.stm. It is interesting to note that Hamid, the first convicted, received eight years in prison, while Mohsen only received a commuted six month sentence. *Id.* The disparity in sentencing may have been the court’s attempt to avoid making a *cause célèbre* out of Mohsen. *Id.*

Egyptian imam, al-Akkad allegedly converted to Christianity.¹⁷⁴ He was later arrested and threatened with indefinite detention unless he divulged the names of other Muslim apostates.¹⁷⁵ It was not until 2007, after two years of intermittent extralegal confinement, having never been formally charged, that al-Akkad finally received counsel, a hearing, and his release.¹⁷⁶ A look at the State Department's list of the imputed converts and blasphemers who have been punished by the Egyptian state over the past few years,¹⁷⁷ whether judicially or extra-judicially,¹⁷⁸ dispels any notion that Hamid, Mohsen, or al-Akkad are isolated cases.

The discriminatory application of laws like Article 98(f) is hard to refute when remarks such as "the New Testament is a forgery" and "Jews are the sons of pigs and apes" pass heedlessly before Egyptian authorities.¹⁷⁹ Other states have even discarded the pretense of equal protection entirely; the Penal Code of Algeria, for example, punishes any

174. Advocates for the Persecuted, *Former Muslim Sheikh Imprisoned for Insulting Islam Freed*, May 24, 2007, <http://www.advocatesforthepersecuted.org/resources/newsfiles/1206sheikinprison.html>.

175. *Id.*

176. *Id.*

177. BUREAU OF DEMOCRACY, HUM. RTS., & LAB., U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, EGYPT, <http://www.state.gov/g/drl/rls/irf/2008/108481.htm> (describing five cases of individuals charged with denigrating Islam, and noting that "there were occasional reports that police persecuted converts from Islam to Christianity").

178. See HUMAN RIGHTS WATCH, PROHIBITED IDENTITIES: STATE INTERFERENCE WITH RELIGIOUS FREEDOM 56-57 (Nov. 2007) (describing the ordeal of Mustafa al-Sharqawi, a convert to Christianity, who was detained for ten months and tortured for a "possible violation of Penal Code Article 98(f)"); Maggie Michael, *Threats Force Egyptian Convert to Hide*, U.S.A. TODAY, Aug. 11, 2007, available at http://www.usatoday.com/news/topstories/2007-08-11-2472276768_x.htm (describing a convert to Christianity who was tortured by police and detained for three months without charge, then made the target of death threats by Islamist clerics).

179. See *Egyptian Scholars Debate Arab and Israeli Curricula*, MEMRITV.ORG, Clip No. 829, Jul. 28, 2005, http://www.memritv.org/clip_transcript/en/829.htm (transcribing the concerns of Dr. Kamal Mughith, expressed on the satellite television channel Dream 2: "I believe that our Arabic language books greatly discriminate between Muslims and Christians in Egypt. . . . How can it be that in the 9th grade we talk about the Koran being the true book of Allah, whereas the New Testament is Allah's book that was forged, and Muslim and Christian children are supposed to discuss such things?"); see also *Egyptian Cleric Muhammad Hussein Ya'qoub: The Jews Are the Enemies of Muslims Regardless of the Occupation of Palestine*, MEMRITV.ORG, Clip No. 2042, Jan. 17, 2009, http://www.memritv.org/clip_transcript/en/2042.htm (transcribing statements made on the Egypt-based satellite television channel al-Rahma, in which a cleric proclaimed that: "You must believe that we will fight, defeat, and annihilate them, until not a single Jew remains on the face of the Earth. . . . As for you Jews . . . [t]he curse of Allah upon you, whose ancestors were apes and pigs. . . . Oh Allah, bring Your wrath, punishment, and torment down upon them. Allah, we pray that you transform them again, and make the Muslims rejoice again in seeing them as apes and pigs. You pigs of the earth!").

denigration of Islam with three to five years in prison,¹⁸⁰ yet classifies the defamation of those following other religions as a misdemeanor.¹⁸¹

2. Punishment for Spreading Religion

Mention of Algeria opens discussion of the discriminatory use of anti-proselytism laws. The dialogue of religious freedom in Algeria has been colored in recent years by a fear of proselytism, with the presence of Christian missionaries being described as a danger to national security and society, a view couched in the language of conspiracy theories and *agents provocateurs*.¹⁸² In 2006, the government responded to the perceived threat by enacting a law that establishes stiff penalties for anyone exercising “an unauthorized creed.”¹⁸³ Both Catholic and Protestant churches have opposed the law, and decried it as a restriction on their right to worship.¹⁸⁴ The High Islamic Council (“HIC”), the national body charged with “encouraging and promoting ‘Ijtihad,’” or Islamic jurisprudence, in Algeria,¹⁸⁵ has asserted, however, that

180. ALG. PENAL CODE art. 144 bis 2. “Anyone who insults the Prophet and the messengers of God, or denigrates the creed or precepts of Islam, through writing, drawing, declaration, or any other means” will receive three to five years in prison, and/or a fine. *Id.*

181. *Id.* at art. 298-298 bis.

Any defamation directed at one or more persons belonging to an ethnic or confessional group [*madhhabīya (ar.)/philosophique (fr.)*], or a recognized religion, will be punished with a term of imprisonment ranging from one (1) month to one (1) year, and/or a fine . . . where the goal is to incite hatred among citizens or residents.

Id. at art. 298.

Any insult directed at one or more persons belonging to an ethnic or confessional group, or a recognized religion, will be punished with a term of imprisonment ranging from five (5) days to six (6) months, and/or a fine

Id. at art. 298 bis.

182. An article quoting Dr. al-Sheikh can be found in English at *Algeria Muslim Body Slams Christian Evangelists*, ARAB TIMES, June 2, 2008, at 9 (noting statements of the President of the High Islamic Council, Dr. Abu Amrane Chikh, in which he brands Evangelical proselytism as a form of neo-colonialism and accuses Evangelicals and journalists of conspiring to “sow discord” in Algeria). A transcript of the cited interview is available in Arabic at the official HIC website. *Ḥadīth raʿīs al-majlis al-islāmī al-ʿalā al-daktūr abū ʿamrān al-shaykh maʿ yawmīya al-khabr*, June 2, 2008, [Discussion with the President of the High Islamic Council, Dr. Abu Amrane al-Chikh and El-Khabar Daily], <http://www.hci.dz/Liquaa-Sahafa-25.htm>.

183. Law No. 06-03 of Feb. 28, 2006, Journal Officiel de la République Algérienne Démocratique et Populaire [Official Gazette of Algeria], Mar. 1, 2006. “Whoever incites, constrains, or uses means of seduction while attempting to convert a Muslim to another religion, or uses educational or health establishments . . . or training centers, or any other establishment or financial means . . . [or] produces, posts, or distributes print or audio-visual material, or any other means that aims to waiver the faith of a Muslim” will be punished “with two to five years imprisonment and a fine.” *Id.* at art. 11, §§ 1-2.

184. Amir Akef, *Algérie: les pressions contre des chrétiens se multiplient* [Algeria: The Pressure Against Christians Increases], LE MONDE (Fr.), May 28, 2008, at 4.

185. ALG. CONST. art. 171 (amended 1996), available at <http://www.joradp.dz/HFR/Consti.htm>.

Christians are free to practice their religion, but that “Islam cannot accept these people coming here and insulting our Prophet and faith, using denigration and defamation, taking advantage of the hardships of certain youths to convert them, promising them visas”¹⁸⁶ Irrespective of what problems Evangelical missions may be causing, it is difficult to understand how the prosecution of Algerian converts themselves,¹⁸⁷ rather than the alleged calumniators of Islam, actually furthers such a policy. Instead, the application only seems to be focused on deterring apostasy. The fact that the HIC has not denounced the traditional Shariah punishment for apostasy¹⁸⁸ is of further concern to Algerian apostates, who are likely to be wary of vigilante attacks and unsure of what protection their government would provide.

Arguably, Algeria has been more possessed by the effects of European colonization, and more wracked by the attempt to reconcile or extirpate them than any other Arab nation. The long-seated animus between Francophiles and Arabizers, and its bloody consequences, may very well be inflamed by the idea of Christian missionaries corrupting the Islamic identity of the nation and pillaging its moral wealth.¹⁸⁹ Yet however particular Algeria’s history may be, every country in this study save Lebanon and, curiously, Pakistan, either enforces laws against proselytism, or punishes it off the books.¹⁹⁰ These laws are applied

186. *Entretien du Président du Haut Conseil Islamique avec “El Watan” Quotidien d’Alger* [The President of the High Islamic Council’s Interview with the Algiers Daily “El Watan”], Feb. 4, 2008, <http://www.hci.dz/Liquaa-Sahafa-23.htm>.

187. Akef, *supra* note 184 (reporting the trial of Habiba Kouider, a school teacher charged with practicing an unauthorized religion; the prosecutor requested three years imprisonment); *Christian Converts’ Trial Opens in Algeria*, ARAB TIMES, June 26, 2008, at 9 (reporting the “retrial” of two converts to Christianity who had been convicted *in absentia* of praying in the wrong place); *Quatre Chrétiens Condamnés en Algérie* [Four Christians Found Guilty in Algeria], LE FIGARO (Fr.), June 3, 2008, <http://www.lefigaro.fr/international/2008/06/03/01003-20080603ARTFIG00482-quatre-chretiens-condamnes-en-algerie.php> (reporting that four converts to Christianity were given prison sentences up to six months).

188. *Entretien du Président du Haut Conseil Islamique avec “El Watan” Quotidien d’Alger*, *supra* note 186.

189. See SAEED & SAEED, *supra* note 14, at 119 (noting that for Muslim societies “[l]eaving Islam, particularly for Christianity . . . brings back melancholy memories of . . . the defeat of the Muslims at the hands of European colonial powers; the colonial period; the collaboration of Muslims with the colonizers; the massive proselytizing efforts of the missionaries”); see also Salwa Ismail, *Confronting the Other: Identity, Culture, Politics, and Conservative Islamism in Egypt*, 30 INT’L J. OF MIDDLE E. STUD. 199, 204 (1998) (analyzing conservative Islamist discourse and finding that its “narrative of confrontation with the Other” frames proselytism as part of a broader “intellectual invasion” and assault on Islam).

190. BUREAU OF DEMOCRACY, HUM. RTS., & LAB., U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, LEBANON, <http://www.state.gov/g/drl/rls/irf/2008/108487.htm> (noting that, although “[t]here are no legal barriers to proselytizing . . . traditional attitudes of the clerical establishment strongly discourage such activity”); BUREAU OF DEMOCRACY, HUM. RTS., & LAB., U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, PAKISTAN,

uniquely against non-Muslims, as there is seemingly no recognition that encouragement to join Islam could be painted in the pejorative label of proselytism—a double standard which the UIDHR and the Cairo Declaration effectively embraced.¹⁹¹

C. Civil Penalties for Apostasy

Criminal penalties are not the only deterrents to choosing one's religion in the Middle East. In those countries which apply the Shariah in matters of personal status, that is, family and probate law, conversion from Islam is nothing short of "civil death."¹⁹² This idea of "civil death" encompasses both the intangible stigma incurred by rejecting the values of a conservative majority, a stigma which can manifest itself in all levels of discrimination and social ostracism,¹⁹³ but also the loss of more tangible and discreet legal rights. The revocation of an apostate's legal rights is predicated on various dictates of the Shariah: a Muslim man may only marry women from the Abrahamic religions;¹⁹⁴ a Muslim woman may only marry a Muslim man;¹⁹⁵ inheritance shall not pass from a Muslim to a non-Muslim;¹⁹⁶ a child must follow the "better religion" of the parents (Islam where either is Muslim).¹⁹⁷ Thus a declared apostate's marriage may be voided,¹⁹⁸ his inheritance rights dissolved,¹⁹⁹ and his parentage denied.²⁰⁰ Moreover, an apostate may also have to pay for his spiritual choice by forfeiting his material wealth.²⁰¹

<http://www.state.gov/g/drl/rls/irf/2008/108505.htm> (noting that "Missionaries (except Ahmadis) operate in the country and can proselytize, as long as there is no preaching against Islam and the missionaries acknowledge they are not Muslim").

191. Mayer, *supra* note 120, at 334-35.

192. Arzt, *supra* note 46, at 376.

193. See SAEED & SAEED, *supra* note 14, at 119 (concluding that "[d]esertion of Islam therefore means dishonour and disgrace to the community").

194. JAMAL J. NASIR, THE ISLAMIC LAW OF PERSONAL STATUS, in 23 ARAB AND ISLAMIC LAW SERIES 70 (Mark S.W. Hoyle ed., 3d ed. 2002).

195. *Id.* at 69-70.

196. *Id.* at 206.

197. *Id.* at 165.

198. *Id.* at 134.

199. *Id.* at 206.

200. *Id.* at 164-65.

201. Abdullahi Ahmed An-Na'im, *Islamic Foundations of Religious Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 337, 352 (John Witte, Jr. & Johan D. van der Vyver eds., 1996); see also SAEED & SAEED, *supra* note 14, at 53 (noting that where an apostate repents, some jurists have held that he cannot reclaim the property he initially forfeited).

1. Uncivil Actions: Forced Divorces and Denied Inheritances

Islamist groups have exploited the civil implications of apostasy; starting in the late 1980s, several high-profile and outspoken Muslims were called before personal status courts to answer allegations of apostasy, filed not by their spouses or family members, but by Islamists who took umbrage to their expressed views. These otherwise unimplicated third parties were found to have standing,²⁰² and these cases quickly became a frightening assault on secularists, Muslim dissenters, and converts from Islam alike.

Toujan al-Faisal, who eventually won a seat in the Jordanian Parliament, was once a target of members of the Islamic establishment, who sought to force her into divorce.²⁰³ Their ire, provoked by her criticism of certain Islamic practices, led to a Shariah Court pronouncing her an apostate, a charge which was subsequently nullified by government intervention.²⁰⁴ Although Mrs. al-Faisal went on to become Jordan's first female member of parliament, she was later convicted for allegedly "defaming the judiciary and offending the religious sentiment."²⁰⁵ After serving 100 days of her sentence, Mrs. al-Faisal was given an amnesty by King Abdullah.²⁰⁶

In 1995, the marriage of Egyptian academic Nasr Abu Zeyd was dissolved by an apostasy action.²⁰⁷ Abu Zeyd's writings had challenged doctrinal interpretations of Islam, and conservative colleagues at Cairo University responded by orchestrating a fervent legal campaign to have

202. This is one of the most troubling aspects of such cases. Standing was granted to third parties under the Hanafi doctrine of *hisba*, which authorizes concerned Muslims to bring actions against anyone in violation of the Shariah. Obviously the juridical problems this creates are legion, and following the Abu Zeyd affair, Egypt formally restricted the use of *hisba* to the public prosecutor's office. Kilian Bälz, *Submitting Faith to Judicial Scrutiny through the Family Trial: The "Abu Zayd Case,"* 37 *DIE WELT DES ISLAMIS* 135, 141 (1997) [hereinafter Bälz, *Submitting Faith*]. Nevertheless, judges have circumvented this in some cases by expanding the definition of aggrieved party to include religious authorities. See Kilian Bälz, *Human Rights, the Rule of Law and the Construction of Tradition: The Egyptian Supreme Administrative Court and Female Circumcision (Appeal no. 5257/43, 28 December 1997),* in *THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD* 35, 37-38 (Eugene Cotran & Mai Yamani eds., 2000) [hereinafter Bälz, *Human Rights*]. Egypt is not the only country to come to this solution; Yemen has also limited the use of *hisba* to the public prosecutor. Najeeb Shamiry, *The Rule of Law in Yemen: Uniting North and South,* in *THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD, supra*, at 107, 118.

203. "I will not be silenced," *AL-AHRAM WEEKLY* (Egypt), July 4, 2002, <http://weekly.ahram.org.eg/2002/593/re7.htm>.

204. *Id.*

205. *Id.*

206. *Id.*

207. See AJAMI, *supra* note 19, at 212-20 (describing the campaign against Abu Zeyd, its background, and its context).

him declared an apostate.²⁰⁸ Over several heated years, the case wended through the ranks of the Egyptian judicial system, with the state ultimately agreeing that Abu Zeyd was an apostate and dissolving his marriage.²⁰⁹ The case is viewed by many as a pivotal moment in the ideological struggle between Egypt's secularists and Islamists.²¹⁰ For legal scholars specifically, it represents a marked example of growing deference to, or incorporation of, Islam in Egyptian jurisprudence. The fact that Abu Zeyd vigorously asserted his adherence to Islam throughout the ordeal added nothing to his defense, and according to one commentator this was, ironically, "the noose around his neck."²¹¹

The invasion by self-appointed guardians of the faith into the private lives of the faithful has stirred considerable criticism by many Muslims, and arguably a backlash has followed. The most recent attempt to "civilly execute" a prominent intellectual ended in the case being thrown out. An Egyptian court held that "there was no case to answer" against Nawal Saadawi, a political activist, feminist, and prolific writer.²¹² Saadawi held to Islam and walked free, but the case against her also served as a warning.²¹³

No such quarter has been given to those who leave Islam and expressly adopt a new faith, however. One of the most publicized attacks on an unrepentant convert fell against Kuwaiti citizen Hussein Ali Qambar.²¹⁴ Two years prior to his 1996 trial, Qambar had eschewed his Shia upbringing, adopted the name Robert, and joined the Evangelical Church; a group of conservative Muslims succeeded in having him declared an apostate before a Kuwaiti Shariah court.²¹⁵ Like Abu Zeyd, Qambar quickly fled his country after the judgment.²¹⁶

208. Abu Zeyd's own chronicle of the ordeal can be found in NASR HAMID ABU ZEYD, *AL-TAFKĪR FĪ ZAMAN AL-TAKFĪR: DADD AL-JAHL WA AL-ZAYF WA AL-KHURĀFA* [Thought in the Age of Apostasy: Against Ignorance, Falsehood, and Superstition] (1995).

209. AJAMI, *supra* note 19, at 212-13. Abu Zeyd subsequently left Egypt for the Netherlands, where he received an academic appointment at Leiden University. *Id.* at 212.

210. *Id.*

211. Maurits S. Berger, *Apostasy and Public Policy in Contemporary Egypt: An Evaluation of Recent Cases from Egypt's Highest Courts*, 25 HUM. RTS. Q. 720, 732 (2003).

212. *No Compromise*, BBC NEWS, Oct. 26, 2001, <http://news.bbc.co.uk/2/hi/programmes/correspondent/1619902.stm>.

213. *Id.*

214. Longva, *supra* note 67, at 261-62.

215. *Id.* Qambar's conversion came to light during a custody dispute with his estranged wife. *Id.* at 262. The case generated significant media coverage in Kuwait, and several behind-the-scenes attempts were made to return Qambar to the fold of Islam, including offers to pay his personal debts. *Id.*

216. *Id.* Qambar apparently recanted his conversion in the public media and returned to Kuwait some time after the affair subsided; according to Kuwaiti media, he "now lives in full possession of his rights." *Id.*

Like Qambar, Muslim converts to other religions continue to be subject to “civil executions” in those countries which do not provide criminal penalties explicitly for apostasy,²¹⁷ most notably in Jordan,²¹⁸ Algeria,²¹⁹ and Egypt. Reports also suggest that the same was true in Iraq before the 2003 invasion.²²⁰

2. Documentation Denied: A Choice Between Religion or Identity

Those who leave Islam may also be denied government-issued identification cards and related documents on account of their apostasy, a penalty which effectively precludes them from the most basic aspects of civic life, such as maintaining a bank account, purchasing real estate, educating themselves and their children, receiving social services, getting a job, or even traveling abroad in order to meet those necessities elsewhere.²²¹ The extent of this public deprivation on account of private choices has sparked a firestorm of litigation in Egypt’s courts over recent years, with hundreds of Christians²²² who had once converted to Islam now wishing to have their return to Christianity recognized by the government.²²³ Until 2008, these men and women who entered Islam “in

217. Qambar was never charged criminally, though there is uncertainty over whether he could have been. The judge presiding over the apostasy case reportedly declared that killing Qambar would be a crime. *Id.* However, he also stated that while the Kuwaiti penal code did not proscribe apostasy, *ridda* remained an offense under Islamic law. AMNESTY INT’L, KUWAIT: HUSSEIN QAMBAR ‘ALI: DEATH THREATS 2 (1996), available at <http://asiapacific.amnesty.org/library/Index/ENGMD170051996?open&of=ENG-KWT>.

218. INT’L RELIGIOUS FREEDOM 2006, *supra* note 141, at 610 (reporting that a convert to Christianity was “striped [sic] . . . of his civil rights”); BUREAU OF DEMOCRACY, HUM. RTS., & LAB., U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, JORDAN, <http://www.state.gov/g/drl/rls/irf/2008/108485.htm> (reporting that converts to Christianity were also stripped of civil rights).

219. *Un juge algérien accuse un ressortissant d’apostasie à Chlef* [An Algerian Judge Accuses a National of Apostasy in Chlef], EL-KHABAR (Alg.), Nov. 16, 2006, available at <http://www.mediarabe.info/spip.php?article84> (stating that a French national was adjudged to be an apostate and denying his inheritance).

220. DEP’T OF STATE, 107TH CONG., ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM 2001, 1st Sess. 439 (2001), available at <http://www.state.gov/g/drl/rls/irf/2001/5693.htm> (“Assyrian religious organizations have claimed that the Government applies apostasy laws in a discriminatory fashion. Assyrians are permitted to convert to Islam, whereas Muslims are forbidden to convert to Christianity.”).

221. HUMAN RIGHTS WATCH, *supra* note 178, at 2-3.

222. As of 2007, there were at least 211 cases within the Egyptian administrative courts system. *Id.* at 9.

223. One explanation for the number of Copts who convert to Islam and then quickly return to Christianity is the relative impossibility of divorce under canonical law, and the absolute ease with which a man can divorce his wife in Islam. Thus, some Coptic men convert to Islam for the sole purpose of divorcing their wives. See *Masu’ul bi-al-kanāsa al-maṣrīya yuṭālib bi-mu’aqāba ‘al-murtaddīn* “an al-maṣṭhīya [Officials of the Egyptian Church Call for the Punishment of “Apostates” from Christianity], ALARABIYA.NET, Jan. 27, 2008, <http://www.alarabiya.net/articles/2008/01/27/44811.html>. Al-Azhar has not found this to be the kind

the blink of an eye”²²⁴ were left with the choice of maintaining their Muslim status, and thus remaining subject to the Shariah personal status courts, or foregoing those basic civic necessities which require an identification card. The Egyptian judiciary finally held in favor of Copts wishing to return to their faith,²²⁵ but this only seemed possible with the voiced assent of the country’s Grand Mufti, Dr. Ali Gomaa, who held this to be a matter for the state and not the mosque.²²⁶ Moreover, that legal ruling must translate into practical action; Egyptian Copts have long complained about the inability to reverse forced conversions, a practice which has never been sanctioned by Islam.²²⁷

Of course allowing Copts to return to Christianity is only a timid step towards a credible sense of religious freedom; Egypt’s courts continue to prevent *fiṭrī* Muslims, that is, those born into Islam, from converting out of it.²²⁸ Far more alarming, however, are the efforts of private actors to prevent *fiṭrī* Muslims from leaving Islam, with not only intolerant fanatics or brimstone clerics leveling death threats,²²⁹ but even members of the Egyptian bar advocating for the death of Muslim apostates.²³⁰

D. Non-State Persecution for Apostasy

Indeed, vigilante violence may present a far greater threat to apostates than state punishment or penalties. The belief that an apostate is *persona non grata* persists throughout much of the Greater Middle

of “compulsion” which allows exit from Islam, and has declared that such individuals “deserve application of the punishment determined by the Shariah.” *Id.* The al-Azhar *fatwa* conspicuously failed to define what that punishment is, however. *Id.* Note also, as the article’s title suggests, that Coptic leaders have reacted to what they perceive as Islam’s double standard, and some have demanded that Christian apostates be punished like those who leave Islam. *Id.*

224. HUMAN RIGHTS WATCH, *supra* note 178, at 56. The report details the alacrity and ease with which conversions to Islam are processed by Egypt’s administrative services, in stark contrast to conversions out of Islam.

225. Nadim Audi, *Egyptian Court Allows Return to Christianity*, N.Y. TIMES, Feb. 11, 2008, at A11.

226. *Mufī maṣr*, *supra* note 86.

227. Richard Engel, *Copts Crusade to Bring Back Converted Girls*, 1 INDEP. COPT, Nov. 2006, at 4 (describing the practice, in contravention of Egyptian law, whereby Muslim men induce Christian girls to convert to Islam, marry them, then deny the minors’ families access to their daughters on the grounds that a Christian cannot have guardianship over a Muslim).

228. Audi, *supra* note 225.

229. See, e.g., Michael, *supra* note 178 (noting how death threats have forced Mohammed Hegazy into hiding since seeking to have official recognition of his affiliation with Christianity).

230. *Egypt: Islamic Lawyers Urge Death Sentence for Convert*, COMPASS DIRECT NEWS, Feb. 26, 2009, <http://www.compassdirect.org/en/display.php?page=news&lang=en&length=long&id=5826> (noting how lawyers opposing Maher al-Gohary’s action to compel state recognition of his conversion have argued—in court—that he should be executed).

East; extremists invoke it as a justification for murder and militancy,²³¹ and activists understand it as the risk of speaking out.²³² Several of the most influential Islamic jurists, such as Mohammed al-Ghazali and Ayatollah al-Khomeini have exhorted faithful Muslims to take matters into their own hands where governments are unwilling to shield the “integrity” of Islam from apostasy.²³³ They hold that apostates are not entitled to protection under Islamic law, and that therefore no punishment shall be applied for killing them.²³⁴ Further, the apostasy of a Muslim represents a threat to Islamic society, which all good Muslims must protect. If adopted, such beliefs suggest that a devout Muslim is not only free to kill an apostate but that he is bound to do so.

1. A License to Kill: Targeting those who Dissent

Over the past twenty-five years, Islamic vigilantes have murdered far more apostates and imputed apostates than Islamic regimes have executed. The targets of self-appointed “defenders of the faith” are often dissident intellectuals. Indian writer Salman Rushdie became the object of a death warrant in 1989, which offered a reward and amnesty to anyone, Muslim or not, who killed him.²³⁵ The theologian Abdullah al-Adhal opposed the Rushdie *fatwa* and was murdered for doing so the same year.²³⁶ Egyptian activist Farag Fouda was gunned down in 1992

231. Syed Saleem Shahzad, *Takfirism: A Messianic Ideology*, LE MONDE DIPLOMATIQUE (Fr.), July 2007, at 2, available at <http://mondediplo.com/2007/07/03takfirism>.

232. See “*I will not be silenced*,” *supra* note 203.

233. See *supra* notes 99-104 and accompanying text. Other ‘*ulamā*’ have walked a fine line between encouraging vigilantes and insisting on official channels. Yusef al-Qaradawi, for example, has stated that apostates should only be executed pursuant to due process under the Shariah. QARADAWI, *supra* note 60, at 327; see also *al-Hurrīya*, *supra* note 103. However, his repeated insistence that ordinary Muslims “must combat apostasy” only seems to undermine any insistence on due process. *al-Hurrīya*, *supra* note 103.

234. Rudolf Peters notes that “[k]illing a person is . . . allowed [under the Shariah] if he lacks legal protection . . . as in the case of apostates . . . or of unbelievers residing outside the territory of Islam. Killing an apostate, therefore, is not homicide” PETERS, *supra* note 35, at 38. He further notes that the only punishment applicable to one who kills an apostate or a non-*dhimmī*, that is, a non-protected, infidel is “only a discretionary punishment for obstructing the proper procedure to be followed.” *Id.* Non-Muslims living under Muslim rule were historically given the choice between conversion to Islam, or paying *jizya*, a tributary tax, in exchange for protection. Jane I. Smith, *Islam and Christendom*, in OXFORD HISTORY OF ISLAM, *supra* note 45, at 305, 307. Those submitting to the latter were known as *dhimmī*. *Id.* The conditions imposed upon *dhimmīs* have ranged from minor restrictions to outright persecution throughout the course of Islamic history. *Id.* at 308-09.

235. For Rushdie’s own view on this, see Salman Rushdie, Op-Ed., *The Struggle for the Soul of Islam*, N.Y. TIMES, July 11, 1993, at E19 (arguing that “what is happening in the Muslim world today must be seen as a witch hunt of exceptional proportions”).

236. Paul L. Montgomery, *Liberal Muslim Is Killed in Brussels Mosque*, N.Y. TIMES, Mar. 30, 1989, at A7.

for his outspoken rejection of Islamism.²³⁷ Algerian writer Tahar Djaout was slain by Islamic militants in 1993,²³⁸ and his murder was followed just a few months later by that of poet and fellow Algerian Youssef Sebti.²³⁹ Egyptian icon and Nobel Prize winning author Naguib Mahfouz was severely crippled in 1994 when a man tried to murder him in the name of Islam.²⁴⁰ And just a year before the attempt on Mahfouz, a group of Islamist zealots incinerated a hotel hosting secular intellectuals, burning over forty people to death.²⁴¹ Astoundingly, none of these victims had actually renounced Islam or adopted another religion; it was the perceived iconoclasm, or simple unorthodoxy, of their views that made them apostates in the eyes of self-righteous killers.

2. Insurgency, Terrorism, and *Takfīr*: Targeting Everyone but “Us”

High profile intellectuals are not only targets of vigilante violence; *takfīrī* terrorism has taken the lives of countless quiet individuals. Acts of terrorism in Mauritania, Morocco, Algeria, Egypt, Jordan, Saudi Arabia, Yemen, Pakistan, and Afghanistan have caused the deaths of thousands of Muslim citizens over the past ten years. Iraq, of course, has borne innumerable bombings, massacres, and mass murders, its officials and civilians falling in the name of extremist interpretations of Islam. Those who perpetrate this brand of indiscriminate slaughter attempt to justify their acts as purging Islam from false believers and protecting it from infidel domination. The practice of this supremacist ideology is known in Arabic as *takfīr*.

The word *takfīr* is best rendered in English as “branding someone an apostate,” or “accusing someone of unbelief.”²⁴² As a practice, *takfīr* has been used to rationalize individualized assaults, such as the murder of Farag Fouda or the forced divorce of Abu Zeyd, along with acts of indiscriminate violence, such as the bombings of Sharm el-Sheikh and Dahab.²⁴³ This later exploitation, the blanket branding of groups as apostates, is now the *sine qua non* of Islamic terrorists. The “*takfīr* doctrine” goes beyond the classical elements of apostasy and holds that

237. AJAMI, *supra* note 19, at 205.

238. Tahar Djaout; *Writer*, 39, N.Y. TIMES, June 14, 1993, at B9.

239. Algerian Poet Slain in Muslim Militant Area, N.Y. TIMES, Dec. 9, 1993, at A5.

240. Egypt Hangs 2 Militants For Attack on Author, N.Y. TIMES, Mar. 30, 1995, at A7.

241. 40 Killed in a Turkish Hotel Set Afire by Muslim Militants, N.Y. TIMES, July 3, 1993, at 4L.

242. The author’s own translation. Wehr defined *takfīr* as a “charge of unbelief.” WEHR, *supra* note 28, at 975.

243. Jailan Halawi, *Suspects Killed in Shoot Out*, AL-AHRAM WEEKLY (Egypt), May 4, 2006, <http://weekly.ahram.org.eg/2006/793/eg2.htm>.

“the failure to join the[ir] jihad is tantamount to apostasy, and is thus punishable by death.”²⁴⁴ Thus *takfīr* is the puritanical Islamist’s own ultimatum of “either you are with us or you are with [them].”²⁴⁵

Extremists have resorted to *takfīr* for the purpose of usurping control over Islamic ideology, and their first target has been the existing Muslim establishment.²⁴⁶ At one point or another, terrorists and insurgent groups have decried most of the governments in the Middle East as “apostate regimes,”²⁴⁷ from secular Turkey²⁴⁸ to the custodian of Mecca itself, the Kingdom of Saudi Arabia.²⁴⁹ In Iraq, al-Qaeda purported its blind slaughter of civilians to be a battle against both the “apostate lackeys” of the American occupation, and the “heretical Shia.”²⁵⁰ In the aftermath, if it is yet an aftermath, Iraq’s leaders have sought to eradicate *takfīr* from the national dialogue. To this end the Iraqi Constitution expressly forbids *takfīr*, both in its Preamble and Article 7,²⁵¹ a point of legal significance that will be elaborated on in Part V.

E. Summary III: Punishment, Penalties, and Persecution

The penalties for apostasy in the Muslim Middle East rank amongst the most burdensome, invidious, and *final* penalties within these countries’ collective criminal law schemes. Yet the Middle East is a region, not a monolith, and trends are discernable amongst loosely

244. Hassan I. Mneimneh, *The New Intra-Arab Cultural Space in Form and Content: The Debates over an American “Letter,”* in THE ISLAM/WEST DEBATE: DOCUMENTS FROM A GLOBAL DEBATE ON TERRORISM, U.S. POLICY, AND THE MIDDLE EAST 199, 208 (David Blankenhorn et al. eds., 2005).

245. Elizabeth Bumiller, *Bush Pledges Attack on Afghanistan Unless It Surrenders Bin Laden Now; He Creates Cabinet Post for Security*, N.Y. TIMES, Sept. 21, 2001 at A1 (quoting President Bush’s address: “Every nation, in every region, now has a decision to make. . . . Either you are with us, or you are with the terrorists.”).

246. Shahzad, *supra* note 231.

247. Al-Qaeda has propounded the view that “[t]he current rulers of Muslim countries who govern without the *sharia* of Allah are apostate infidels. It is obligatory to overthrow them, to wage *jihad* against them” THE AL QAEDA READER, *supra* note 12, at 122. This conceivably encompasses all current Muslim nations, as even Saudi Arabia has been found to be insufficiently Islamic by al-Qaeda. *Id.* at 101. Baathist Iraq was, of course, one of the regimes al-Qaeda denounced as apostate. See *Leaked Report Rejects Iraqi al-Qaeda Link*, BBC NEWS, Feb. 5, 2003, <http://news.bbc.co.uk/1/hi/uk/2727471.stm>.

248. Sebnem Arsu, *Islamic Head Scarves at Issue in Killing of Judge in Turkey*, N.Y. TIMES, May 18, 2006, at A10.

249. Rashid Abou-Alsamh, *Saudis Arrest 208 in a Sweep to Head Off Terrorist Attacks*, N.Y. TIMES, Nov. 29, 2007, at A19.

250. See Shahzad, *supra* note 231 (noting the Sunni takfirist condemnation of Shiism).

251. IRAQ CONST. prmb. (“Accusations of being infidels [*takfīr*], and terrorism did not stop us from marching forward to build a nation of law.”); *Id.* at art. 7, § 1 (“Any entity or program that adopts . . . *takfīr* . . . under any name whatsoever, shall be prohibited.”).

similar states. Those nations which combine a strong political commitment to Islam and a comparatively weak commitment to internationalist conceptions of human rights, such as Saudi Arabia, Iran, Sudan, Afghanistan, Pakistan, and Yemen, execute their Muslim apostates, or at least contend that they will. Even if executions are rare in these countries, the proscription remains. This proscription even bleeds into those states which do not execute apostates, but continue to subject them to harsh criminal treatment, either under the color of facially neutral laws, or without the color of law at all. These states, such as Algeria, Jordan, Egypt, and Morocco, have pasts checkered by colonialism, authoritarianism, and strong popular Islamic currents. Iraq would, at first glance, belong to this group. It seems beyond question that Iraq will also belong to the near totality of states which punish apostates through the deprivation of certain civil liberties. The only exception to this group is secular Turkey, which even at this stage seems an erroneous model for Iraq. Indeed, what countries could provide a comparable and analyzable model for the new Iraq? Is one even possible? Part IV will address these questions.

IV. A SEARCH FOR SIMILARITY WITH A SINGULAR NATION

This Part uses a comparative approach to determine which of the previous categories of state practice Iraq is most likely to follow. It looks to forecast, through the lens of other countries' experiences, how Iraq might ultimately resolve the *prima facie* contradiction that the question of apostasy raises for its Constitution. Although no country can be considered a predictor for Iraq, this Part will use regional comparison in order to lay the bounds of speculation as closely as possible to the Iraqi situation. After answering why a comparison should be done at all, the second and more foundational question bifurcates: Which countries should be compared and why?

The methodology guiding this Note originates from Alan Watson's view that a comparative analysis must be rooted in and centered on the "relationship between systems of law."²⁵² It branches out from Watson's view, however, to the extent that the study's purpose is predictive and not merely comparative. Thus the idea that the nature of the relationships should be limited to either the "historical"²⁵³ or ephemeral "inner"²⁵⁴ connections, as Watson describes, is inadequate here. The central

252. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 7 (2d ed. 1993).

253. *Id.*

254. *Id.* at 8.

question in this Note is the resolution of a point of law, and as such the guiding relationships of the study must cross through this point, meaning that the foundational laws and their interpretive mechanisms rest at the heart of the inquiry. Broadly speaking, these are indeed products of the historical and inner characters of the legal systems pondered, yet here the texts and their interpreters are the conceptual anchors needed to fix the analysis and to allow the sea of historical and societal intercourse between the systems to be appreciated in its rightful place. With this in mind, the relationships between the new Iraqi legal system and those of the study countries have been seized along the following three axes: (A) legal relevance; (B) structural relevance; and (C) societal relevance.

A. *Legal Relevance to Iraq*

The legal rules and principles with which Muslim nations justify their stances on apostasy are the starting point for a comparative inquiry. This sub-Part discusses the comparability of the sources of law that bear upon the issue in Iraq and in the other states of the Greater Middle East, beginning with the constitutional contours, then the national law, and finally considering the role of international law.

1. Constitutional Frameworks

For all but a few of the countries considered, a written constitution is the authority from which individual rights are derived, and to which national criminal and civil laws are subordinate. This is the case for Iraq. For those two countries without written constitutions, Islamic sources have been pronounced as the highest law; either the Shariah for Saudi Arabia,²⁵⁵ or the Quran itself in Libya.²⁵⁶ Even certain nations with written constitutions, such as Iran,²⁵⁷ have framed their constitutions as a law subservient to the will of God, in whom each state's sovereignty is invested. However this is not the case for most Middle Eastern countries, which like Iraq, posit the justification of the state in its citizenry. The exception to this, of course, remains the kingdoms of the Arabian

255. The Saudi "Basic Law" functions as the Kingdom's constitution. BROWN, *supra* note 13, at 60. The Basic Law is an instrument whose primary purpose is to solidify the monarchy's control, but it makes "numerous references not simply to Islam but to the Islamic *shari'a*; if there were any limitations on political authority implied in the document, they could only be found there." *Id.*

256. A declaration issued in 1977, eight years after Qadhafi's revolution, functions as Libya's constitution; it proclaims that the Quran is the country's constitution. *Id.* at 86. Yet, as Qadhafi has "emphatically rejected much Islamic jurisprudence . . . that proclamation carried little meaning." *Id.*

257. IRAN CONST. art. 2, § 1 ("The Islamic Republic is a system based on belief in . . . the One God . . . His exclusive sovereignty . . . and the necessity of submission to his commands . . .").

peninsula and Morocco, where sovereignty rests in the hands of the monarchy.²⁵⁸

The source of sovereignty is an issue that traverses all three axes of comparative relevance, and serves as the ideal starting point, underpinning the constitutional framework within which the issue of apostasy must be resolved. Specifically, the rights granted within these frameworks make up the next tier of legal relevance to Iraq. The provisions of the Iraqi Constitution operating on this point have already been introduced: The study countries have been considered for how closely their substantive rights and source of law provisions mirror those of Iraq, namely:

1. Is Islam recognized as the State religion? Which sect? How is Islam referenced in the preamble? To what extent are other religions recognized?
2. Is Islam mentioned as *a* source or *the* source of legislation?
3. Does the constitution prohibit laws repugnant to Islam? How extensively does it define Islam?
4. Does the constitution prohibit any law repugnant to principles of democracy or human rights? How extensively does it define these?
5. What role is accorded to international law?
6. Are certain substantive areas of law required to be governed by the Sharia?
7. Does the constitution impose affirmative “Islamic” duties on its citizens?
8. To what extent, if any, does the constitution provide for freedom of religion? Is it limited to non-discrimination, the ability to practice privately, or does it openly permit conversion?
9. Are the freedoms of belief and expression provisions qualified by a need to conform to public morality and/or security?
10. What interpretive principles are specified in the constitution?

These questions structured what was an ultimately holistic assessment of comparability. Overall, a strong argument can be made that the current constitution of Algeria demonstrates the closest parallels with that of the new Iraq. Like most other states in this study,²⁵⁹ Algeria has proclaimed Islam as its official religion.²⁶⁰ Unlike all others, but like Iraq, Algeria has incorporated so-called “repugnancy clauses” which

258. See BROWN, *supra* note 13, at 46-66.

259. The exceptions are Lebanon, Sudan, Syria, and Turkey. See Stahnke & Blitt, *supra* note 21, at 985, 988, 1000, 1004.

260. ALG. CONST. art. 2.

forbid the institutionalization of practices that conflict with Islam,²⁶¹ as well as constitutional amendments that conflict with either the democratic²⁶² or Islamic character of the state,²⁶³ or the rights of its citizens.²⁶⁴ This departs from the Article 2 clauses²⁶⁵ of the Iraqi Constitution only insofar as it is limited to amendments, and thus not enacted law. Nevertheless, how Algeria has defined these three criteria—Islam, democracy, and individual rights—has obvious comparative value for Iraq.

The majority of Middle Eastern constitutions either fail to explicitly grant freedom of religion,²⁶⁶ restrict it along dogmatic lines,²⁶⁷ or constrain an otherwise full guarantee with the language of “public order,” “public morality,” or “the customs observed in the country.”²⁶⁸ Egypt, for its part, seemingly grants unrestricted freedom of belief and religion, yet this has been judicially bridled, notably in apostasy cases, by the doctrine of “public policy.”²⁶⁹ Algeria and Morocco stipulate unqualified constitutional rights to “opinion” and “worship,”²⁷⁰ though like Egypt, this is wanting in practice.²⁷¹

261. *Id.* at art. 9.

262. *Id.* at art. 178, § 2.

263. *Id.* at art. 178, § 3.

264. *Id.* at art. 178, § 5.

265. IRAQ CONST. art. 2 (guaranteeing that “no law may be enacted that contradicts the established provisions of Islam . . . principles of democracy. . . [or] the rights and basic freedoms stipulated in this Constitution”). For a discussion of these clauses in light of the Transitional Administrative Law (“TAL”) and the constitutions of other Arab nations, see Rabb, *supra* note 10, at 534-41.

266. Neither Mauritania nor Saudi Arabia grants freedom of religion or freedom of thought. See Stahnke & Blitt, *supra* note 21, at 1008, 1014. The Algerian, Kuwaiti, and Yemeni constitutions only guarantee freedom of conscience, thought, or belief, but they do not expressly guarantee freedom of religion. *Id.* at 1005, 1007, 1008.

267. Iran only recognizes Judaism, Christianity, and Zoroastrianism in addition to Islam, and the rights of these minorities are limited by law. IRAN CONST. art. 13.

268. They are: Afghanistan, Bahrain, Jordan, Lebanon, Libya, Oman, Pakistan, Qatar, Sudan, Syria, Tunisia, and the United Arab Emirates. See Stahnke & Blitt, *supra* note 21, at 1005, 1007-09, 1016.

269. See Berger, *supra* note 211, at 725.

270. ALG. CONST. art. 36 (declaring that “the freedom of conscience and the freedom of opinion are inviolable”); MOROCCO CONST. art. 6 (“The state shall guarantee freedom of worship for all.”); *Id.* at art. 9(b) (“The constitution shall guarantee . . . freedom of opinion, of expression in all its forms . . .”).

271. See HUMAN RIGHTS WATCH, *supra* note 178, at 12 (calling on the Egyptian government to “[a]dopt laws and other appropriate measures to fulfill the international legal obligation to uphold the rights of all individuals against discrimination, including on the basis of religion and belief”); see also HUMAN RIGHTS WATCH, EGYPT: VIOLATIONS OF RELIGIOUS BELIEF AND EXPRESSION OF THE CHRISTIAN MINORITY 33 (1994) (calling on the Egyptian government to “[e]nd arbitrary arrest and detention of Egyptian Christians for peaceful exercise of freedom of expression and association”); BUREAU OF DEMOCRACY, HUM. RTS., & LAB., U.S. DEP’T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, MOROCCO, <http://www.state.gov/>

In comparison, the Iraqi Constitution is distinguished by both Article 2, which guarantees “the full religious rights to freedom of religious belief and practice of all individuals,”²⁷² and by Article 42, which holds that “[e]ach individual shall have the freedom of thought, conscience, and belief.”²⁷³ Most striking, however, is that unlike Article 38, which grants freedom of expression, Article 42 itself is *not* encumbered by the interest of “public order and morality.”²⁷⁴ Nor is Article 41, which guarantees the freedom to practice religious rites. At first glance, this suggests a rejection of the ubiquitous “public protection” standard that other nations have exploited to dissuade conversion from Islam.²⁷⁵

The final point of consideration that should be discussed here is the extent to which the state constitutions mandate, permit, or forbid the use of the Shariah in forming legislation. Much commentary has attempted to unravel the Iraqi Constitution’s affirmation that “Islam is . . . a foundation source of legislation.”²⁷⁶ A starting point for that endeavor must recognize that five other Middle Eastern countries have similar constitutional provisions for either the Shariah²⁷⁷ or *fiqh*.²⁷⁸ In all such formulations, the most crucial word is whether the indefinite article “a” controls the incorporation of Islamic law, rather than the definite “the.” Iraq only requires the Shariah to be *a* source of legislation. Until 1980, the same could have described the Egyptian Constitution, but as a concession to increasingly assertive Islamists, then President Sadat had Article 2 of the Egyptian Constitution amended to read “the principles of

g/drl/rls/irf/2008/108489.htm (noting that, while “[t]he Government continues to encourage tolerance, respect, and dialogue among religious groups,” criminal penalties may be imposed on “anyone who employs incitements to shake the faith of a Muslim or to convert him to another religion” . . . [a]ny attempt to induce a Muslim to convert is illegal”); see also the discussion of Algerian law, *supra*, notes 180-88.

272. IRAQ CONST. art. 2, § 2.

273. *Id.* at art. 42.

274. *Id.* at art. 38 (“The State shall guarantee in a way that does not violate public order and morality: [f]reedom of expression . . . [and] [f]reedom of assembly . . .”).

275. Yet Article 46 does permit the legislature to restrict the individual rights therein granted so far as they “do not violate the essence of the right.” *Id.* at art. 46. Nonetheless, the difference between Article 38 on one hand, and Articles 42 and 43 on the other, provides an argument for exception.

276. *Id.* at art. 2, § 1 (emphasis added). For a textual analysis of the similarly worded Iraqi Interim Constitution with the Egyptian, Turkish, and Iranian constitutions, see generally Stilt, *supra* note 10.

277. BAHR. CONST. art. 2; KUWAIT CONST. art. 2; SUDAN CONST. art. 65; U.A.E. CONST. art. 7.

278. SYRIA CONST. art. 3, § 2.

the Islamic *shari'a* are the prime source of legislation.”²⁷⁹ The practical differences between “a” and “the” in a prescriptive provision may be great or none at all.²⁸⁰ Likewise, the difference between making Islam a source of legislation as opposed to the Shariah may indeed be minimal,²⁸¹ but the existence of a constitutional statement to either effect provides an important basis for comparison. The constitutions of Algeria, Morocco, and Tunisia are unfortunately silent on this question.²⁸²

2. Substantive Law Frameworks

Though the question of apostasy is ultimately framed in terms of constitutional rights, the character of national laws subordinate to the constitution also plays an essential role in drawing a workable legal relationship. The substantive criminal laws are of evident value, though a survey of the entire substantive law of a country reveals its broadest patterns and the sources of law it generally relies on. The two predominant legal traditions operating in the Middle East are the Roman Civil and the Islamic; the common law, despite expansive British occupation in the Greater Middle East, has left only a passing mark in the region.

Most law in the Middle East derives from codes drafted in the civil law tradition.²⁸³ In its narrow form, then, the comparative question is really one of how much a given system draws from Islamic law. The relative “Islamic-ness” of a system can be described in roughly-hewn degrees deviating from a pure civil law system; Turkey serves as the most “civil” of the systems considered here.²⁸⁴ “Mildly” Islamic legal systems incorporate concepts from the Shariah into certain elements of their civil codes, but all give the Shariah, or codified distillations of it, primacy in matters of personal status (family and inheritance law). The personal status courts are where the issue of apostasy will most

279. See BROWN, *supra* note 13, at 181. Egypt is joined by Iran, Pakistan, Oman, Qatar, Saudi Arabia, Yemen, and, by inference, Libya, as countries requiring that the Shariah be the leading source for legislation. See Stahnke & Blitt, *supra* note 21, at 982, 986-88, 993.

280. See BROWN, *supra* note 13, at 181.

281. For a nuanced argument that there is no practical difference in this context between the Shariah and Islam, see Rabb, *supra* note 10, at 539-41.

282. See Stahnke & Blitt, *supra* note 21, at 981, 985, 988.

283. NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* 2 (1997).

284. S.H. AMIN, *MIDDLE EAST LEGAL SYSTEMS* 382 (1985) (describing Turkey’s legal secularization, and noting that “Turkey can now be considered as a typical Civil law jurisdiction”).

frequently surface in such a legal system, with the Egyptian experience serving as a prime example.²⁸⁵

A greater degree of legal Islamization is found amongst the self-proclaimed Islamic states,²⁸⁶ and others such as Sudan, Libya and the Gulf Kingdoms, which have either retained or reintroduced use of the Shariah not only in matters of personal status, but also finance, intellectual property, and criminal justice.²⁸⁷ The latter is for many the crown of an Islamized legal landscape, and most of the aforementioned countries either draw upon Shariah criminal law directly, or have codified elements of it. Iran is arguably one degree beyond these states, having constitutionalized a principle of governance wholly unique to Shia theology, that of *veleyat e-fiqh*.²⁸⁸

Iraq's pre-2003 laws, which remain largely unchanged at present, are decidedly civil law in form and substance.²⁸⁹ The adoption of a French-inspired civil law system, despite its British colonial legacy, is in fact the result of the powerful influence of an Arab neighbor, Egypt. Before the ascent of the Gulf oil-garchies, Egypt was the preeminent center of thought in the Arab world, and this was particularly true in the field of law. Legal development flourished in Egypt during the nineteenth and early twentieth centuries, the result of an institutional pluralism that extended over a hundred years. Egypt's legal system was divided into "Local Courts," which resolved disputes between Egyptians through Shariah and customary law, and "Mixed Courts" which adjudicated cases involving non-Egyptians (that is, Europeans) through an amalgam of civil and common law.²⁹⁰ The ultimate fusion of these courts in 1949 gave birth to the Egyptian legal approach, which tempered the foreign edges of its borrowed Roman civil law tradition with the Islamic legacy of its people.²⁹¹ Whether a cause or an effect, the

285. See Berger, *supra* note 211, at 721.

286. Afghanistan, Bahrain, Iran, Mauritania, Oman, Pakistan, Saudi Arabia, and Yemen. See Stahnke & Blitt, *supra* note 21, at 955.

287. See generally Peters, *supra* note 148 (describing the re-Islamization of penal law in Libya, Pakistan, Iran, and Sudan, and noting that Islamist legislation predominately focuses on criminal law and the prohibition of usury).

288. Persianization of the Arabic *waliya al-faqih*, meaning "the rule of the jurispudent," the political theory embodied in the national leadership of the Grand Ayatollah. See HEINZ HALM, *THE SHI'ITES: A SHORT HISTORY* 142 (Allison Brown trans., Markus Weiner Pub. 2007) (2005).

289. See AMIN, *supra* note 284, at 178-79 (underlining that, while the Iraqi legal system is a unique product of the Islamic, common, and civil law traditions, it is today "a full member of the family of Civil Law tradition").

290. See BROWN, *supra* note 283, at 53-54. The mixed courts were established in 1876, though were predated by an accumulation of diplomatic "capitulations" that allowed the representatives of various European governments to try their own citizens, rather than leave them to the Egyptian judicial mechanisms. *Id.*

291. *Id.* at 61.

litigious nature of Egyptian society fleshed out and animated this system with cases and commentary,²⁹² making Egypt an obvious point of reference for the wave of newly independent Arab states in the 1950s and 1960s who wanted to modernize their legal systems while retaining a sense of national character.²⁹³

Iraq was one of the first countries to turn to the Egyptian example. The man who penned the Egyptian Civil Code, Abd al-Razzaq al-Sanhuri, a Sorbonne-trained jurist and a preeminent influence in modern Arab law, became the principal author of Iraq's as well. The Iraqi code Sanhuri created readily reveals its Franco-Egyptian roots, but he took deliberate efforts to afford Islam a greater role, owing to the unique imprint Baghdad, Najaf, Kuffa, and other Iraqi centers of Islamic learning have exerted on the country's societal fabric. This is evident in both the code's substantive provisions and its interpretive principles.²⁹⁴

This early and formative connection with Egypt also brought Iraq into greater commune with the legal cultures of other predominately Franco-Egyptian style civil law countries in the Middle East, namely Algeria, Jordan, Lebanon, Morocco, Syria, and Tunisia. Their shared approach to civil law is likewise mirrored in the broad similarity of their criminal law, as none of these countries' penal laws refer directly to the Shariah, and none officially penalize apostasy.²⁹⁵ Yet as discussed in Part III, many have penal provisions that often allow the imprisonment of apostates or religious minorities, where they are subject to beatings, degradation, and deprivation.

Though its criminal law is decidedly more secular than that of many other Middle Eastern states, Iraq has a history of dealing with dissent harshly. Any denunciation or deception of the Baath party,²⁹⁶ or a seeming espousal of Zionism,²⁹⁷ was a capital offense in Iraq, and an

292. With a national rate of nearly one new court case per household per year, "Egyptians are as litigious, if not more so, than Americans." *Id.* at 190. Professor Brown attributes Egyptians' litigiousness to low court fees, an abundance of attorneys, substantive rights favoring certain classes, and an array of procedural motions that allow litigants to delay trial almost perpetually. *Id.* at 189-95.

293. *See id.* at 130.

294. *See* Dan E. Stigall, *From Baton Rouge to Baghdad: A Comparative Overview of the Iraqi Civil Code*, 65 LA. L. REV. 131, 132 (2004). Where the code is silent on a point of law, the Iraqi judge is to look to custom first, secondly to general principles of Shariah consistent with the Code, and lastly to equity. *Id.* at 140.

295. The French abolished the practice of Shariah criminal law in their colonies and replaced with their own code, imparting a shared civil law legacy in the penal laws of these countries which has remained largely intact. *See* PETERS, *supra* note 35, at 104. Ottoman penal law governed Jordan during the British mandate, though now its criminal law is largely derived from the Syrian code. AMIN, *supra* note 284, at 253, 260.

296. IRAQ PENAL CODE § 200 (1969).

297. *Id.* § 201(i).

insult to the president²⁹⁸ or “the Arab community”²⁹⁹ was punishable by several years in prison. This was the result of unfettered dictatorship, and while it is certainly hoped that such oppression will never return, the impact of that severity may outlast the system that created it. How this may affect the new Iraq is uncertain; it is a legacy that may be washed out by the movement of a democratic society weary of totalitarianism and bloodshed, or it may be resurrected in a new guise by heavy handed leaders attempting to bring a fractured nation into submission. This is perhaps more societal than legal, but the precedent of legal severity in Iraq creates some point of comparison with the other “execution” states like Saudi Arabia, Iran, Sudan, and Yemen.³⁰⁰

3. International Law Framework

The posture of international law has already been discussed, but how that posture is received at the national level must also be considered. Of course, the implementation of human rights treaties by many Middle Eastern countries has left a record that is unsatisfying to some and deplorable to others.³⁰¹ A belief persists that the normative effects of treaty membership can be powerful when taken in the long term.³⁰²

Iraq, for its part, is constitutionally bound to “respect its international obligations,”³⁰³ and this would certainly include current treaty obligations.³⁰⁴ Since 1971, Iraq has been a party to the ICCPR, a membership it shares with all but a few Middle Eastern states.³⁰⁵ Whether Iraq will take a monist or dualist approach to its international agreements remains an unresolved question, which may fall to its judicial actors.

298. *Id.* § 225.

299. *Id.* § 202.

300. *See supra* Part III.

301. *See Stahnke & Blitt, supra* note 21, at 966-67 (finding that the only Middle Eastern constitutions that “compared favorably” with international standards on the freedom of religion were the now-superseded Transitional Administrative Law of Iraq and Turkey).

302. Jeremy Julian Sarkin, Distinguished Visiting Professor, Hofstra Law Sch., Beyond Guantanamo Panel Discussion at Hofstra Law School (Oct. 27, 2008).

303. IRAQ CONST. art. 8.

304. *See* Ashley S. Deeks & Matthew D. Burton, *Iraq’s Constitution: A Drafting History*, 40 CORNELL INT’L L.J. 1, 34 (2007). This view is confirmed by the drafting negotiations, though as noted by Deeks and Burton, Iraq can later change its treaty obligations through withdrawal. *Id.*

305. Iraq ratified the ICCPR on January 25, 1971. International Covenant on Civil and Political Rights, *supra* note 116, 999 U.N.T.S. at 172. The non-parties are: Bahrain, Mauritania, Oman, Pakistan, Qatar, Saudi Arabia, and the United Arab Emirates. *See Stahnke & Blitt, supra* note 21, at 1005, 1008-09, 1014.

B. Structural Relevance to Iraq

This Part now looks at who interprets the law within the broadest conception of the legal system. The label of apostate can have far extending consequences in Muslim societies, and certainly the executive branches of Middle Eastern nations adjudicate on issues touching apostates. This discussion will nevertheless disregard the executive role. Furthermore, it has built in legislative actions as a “sliding assumption” to the analysis. The focus will consequently fall on the judiciary as the interpreters of the law, and ultimately, the enforcers of the constitution. Who exercises the judicial functions of the nation is a central point of debate in countries applying the Shariah alongside codified law: To what extent do state judges decide Shariah law, and to what extent do clerical opinions influence the outcome of cases in the courtroom? It is a shifting balance amongst these nation, and one upon which the pronouncement on apostasy ultimately hangs. Thus this Part considers the judiciaries, jurisprudents, and balance of adjudicatory responsibilities between them that characterize legal systems of the region, with the goal of identifying which experiences are most germane to predicting Iraq’s own balance.

1. The Judiciary

Judges in Iraq are “deeply, deeply formalistic” says Haider Ala Hamoudi, an American law professor of Iraqi extraction.³⁰⁶ They are also unequivocally civil law in their training and background.³⁰⁷ Iraqi courts are run inquisitorially as one would expect in Continental systems,³⁰⁸ and a Baghdad judge would feel more at home inside a Paris trial chamber than a Kabul courthouse. Hamoudi describes judges that craft their decisions from a strict palette of positive law, eschewing reference to principles of either Islamic or natural law except where the written law is silent.³⁰⁹ Even then, their grounding as judges in a civil law tradition guides them far more than their personal religious affiliation; when asked how a Baghdad judge may have ruled on an issue during the Abbasid period, a frank and pious judge replied “I don’t know . . . I’m not a Hanafi Abbasid judge. I’m an Iraqi judge.”³¹⁰

306. Posting of Haider Ala Hamoudi to Islamic Law in Our Times, <http://muslimlawprof.org/2008/08/08/rizgar.asp> (Aug. 15, 2008, 18:01 EST) [hereinafter Hamoudi].

307. See Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 FLA. J. INT’L L. 1, 21 (2006).

308. *Id.* at 32.

309. Hamoudi, *supra* note 306.

310. *Id.*

Contrast this to a judge in Afghanistan,³¹¹ who is bound to apply Hanafi *fiqh* where the statutory language is silent,³¹² or his Saudi, Pakistani, or Iranian counterparts who reckon with their doctrinal interpretations of the Shariah as would a common law judge, pouring through the precedents of influential *mujtahids* and distilling the rule of law to apply.³¹³ Inductive reasoning and analogy are really the essence of *ijtihad*, or Islamic jurisprudence. The process of divining the Shariah is one of extracting the meaning of the Quran by triangulating its verses, and building upon this with the *sunna*, or examples, of the Prophet Mohammed.³¹⁴ This is almost anathema for civil law trained judges like those of Iraq, who adhere closely to the Romano-French paradigm of using deductive logic and teleological analysis to decide cases.³¹⁵ This fundamental difference between the civil law judge and his Islamic counterpart is crucial, one that transcends personal religious conviction. Here, at least, training trumps denomination.

Hamoudi is not the only commentator to stress this distinction for Middle Eastern judges. Lama Abu-Odeh has emphasized the centrality of the civil law tradition to Jordanian legal professionals,³¹⁶ while Nathan Brown and Clark Lombardi have underlined the secular training of the Muslim Egyptian judge.³¹⁷ The separation and distinction between the *hakim*, or state judge, and the *qadi*, or Shariah judge, has been an

311. For the views of an Afghan judge on law reform and arguments in favor of the use of Shariah in Afghanistan's legal system, see *Afghan Judge Hashimi Discusses Legal Reform in Afghanistan*, July 21, 2008, <http://www.america.gov/st/washfile-english/2008/July/20080721130845eafas8.115786e-02.html>.

312. AFG. CONST. art. 130.

313. For an interesting discussion of this parallel, see Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Use of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67, 87-93 (2006) (noting, inter alia, the kindred approach to jurisprudence shared by Justice Antonin Scalia and Malik Ibn Anas, founder of the Malaki school).

314. See generally Bassiouni & Badr, *supra* note 43 (describing the sources of law in the Shariah, and the processes by which rulings are made).

315. Hamoudi, *supra* note 306; see also Jean Louis Goutal, *Characteristics of Judicial Style in France, England, and the U.S.A.*, 24 AM. J. OF COMP. L. 43, 45 (1976) (comparing the types of reasoning used by civil and common law judges, and noting French judges' almost exclusive reliance on deductive reasoning).

316. Lama Abu-Odeh, *The Politics of (Mis)Recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 792 (2004) (noting how the study of Islamic Law is peripheral to education in Jordan's civil law system).

317. Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379, 385 (2006) (noting that "[Egyptian] [j]udges have a very different training than traditional Islamic religious scholars," a training reflected in the Egyptian Supreme Constitutional Court's ("SCC's") commitment to "liberal constitutionalism").

official institution in Iraq for over eighty years.³¹⁸ Thus, insofar as the inquiry concerns judges themselves, it is limited to those cut from civil law cloth, and the Iraqi judge is most likely to find kindred company amongst his parallels from the Maghreb, Egypt, and Turkey, rather than with the *qāḍīs* of Afghanistan or the Arabian Peninsula.

A constitutional conflict is at the heart of the apostasy question, and the ultimate arbiter will be, or at least *should be*, the Federal Supreme Court (“FSC”) of Iraq. As opposed to a French-inspired constitutional court with the power of abstract review,³¹⁹ the FSC is closer in design to the United States Supreme Court, which can only rule on those controversies of law brought before it.³²⁰ Yet, in marked departure from either model, or those of other Arab civil law systems, the new Iraqi Constitution mandates that “experts in Islamic jurisprudence” will sit on the bench of the FSC alongside “judges” and “jurists of the law.”³²¹ The proportion and means of appointment are to be determined by law.³²² At the time of this Note’s writing, judges are seated on the FSC pursuant to the provisions established under the TAL.³²³ The TAL did not address the issue of expertise in Islamic law, however, and the Iraqi parliament has yet to take it up; just how Islamic the FSC will be remains a question mark.³²⁴

The character of the current FSC retains the kind of formalist, civil law style judges Hamoudi described, if one takes the example of Chief Justice Medhat Mahmoud. This is perhaps due to the role the Supreme Judicial Council (“SJC”) plays in screening the appointees.³²⁵ And even

318. Medhat Mahmoud, *The Judicial System in Iraq: Facts and Prospects* 12 (2004) (submitted to the Iraqi Judicial Forum held in Amman, Jordan, Oct. 2-4, 2004) available at www1.worldbank.org/publicsector/legal/iraq/1.doc. The difference was explicitly recognized in the Kingdom of Iraq’s Constitution of 1925. IRAQ CONST. art. 77 (1925).

319. Several attempts by Shia negotiators to introduce an organ capable of abstract constitutional review were rejected. See Deeks & Burton, *supra* note 304, at 45-50.

320. *Id.* at 46.

321. IRAQ CONST. art. 92, § 2.

322. *Id.*

323. See *Lamḥa ‘an al-mahkama al-itihādīya al-‘aliyā* [Overview of the Federal Supreme Court], <http://iraqijudicature.org/federal/fedral%20cv.htm> (last visited Feb. 27, 2009). The law in question is the Decree 30 of 2005, *al-Waqā‘i‘ al-‘irāqīya* [Official Gazette of Iraq], Mar. 17, 2005, p. 12 (law of the Federal Supreme Court) [hereinafter FSC Decree].

324. BUREAU OF DEMOCRACY, HUM. RTS., & LAB., U.S. DEP’T OF STATE, INT’L RELIGIOUS FREEDOM REPORT 2008, IRAQ, <http://2001-2009.state.gov/g/drl/rls/irf/2008/108483.htm> (last visited Feb. 25, 2009) [hereinafter INT’L RELIGIOUS FREEDOM REPORT 2008, IRAQ].

325. The SJC is the body responsible for nominating candidates to the FSC, from which the Presidential Counsel appoints the justices. FSC Decree, *supra* note 323, at art. 3. The SJC is composed of civil law trained judges, who are conceivably reluctant to cede their role and tradition to Islamic jurists. See Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 FORDHAM L. REV. 883, 917 (2006). This

if the experts of Islamic jurisprudence are thinkers more in the mould of M. Cherif Bassiouni than Ayatollah al-Sistani, the insistence that expertise in Islamic law have a voting voice in constitutional issues is telling of the direction intended for Iraq. This is a subtle but important departure from the liberal, secular justices of the SCC. Although Egyptian “neo-traditionalists” would argue that only the *‘ulamā’*—those clerics steeped in classical Islamic legal training—can expound on Islamic law,³²⁶ the broad acceptance of the SCC’s jurisprudence demonstrates that secularly trained judges can strike a workable compromise between Islam and liberalism.³²⁷ The jurisprudence of the Egyptian SCC may thus offer the Iraqi FSC a point of reference for giving one voice to its mixed bench.

This “mixed bench” also distinguishes Iraq from other constitutional judiciaries that are “split.” The existence of Pakistan’s Federal Shariah Court is the strongest example, being a peer in power to the Supreme Court on issues of Islamic law, which are many in Pakistan’s highly Islamized legislation.³²⁸ Algeria presents a far more attenuated example of a split authority. The presidentially established HIC is a “consultative” agency, whose intentions are to harmonize interpretations of Islam in Algeria in a non-judicial or at least quasi-judicial manner.³²⁹ Of these three models, the Iraqi model of incorporating Islam into the state judicial power is the most restrictive of Islam, at least at first glance. Decisions in the FSC are by simple

process, as opposed to having the Shia majority National Assembly vet them, was viewed as favorable to maintaining a secular-leaning court. *Id.*

326. Professors Lombardi and Brown define neo-traditional movements as “movements asserting that the authority to interpret *shari‘a* is confined to classically trained scholars.” Lombardi & Brown, *supra* note 317, at 407. They also note that the drafters of Article 2, the constitutional provision that integrated Islamic law into Egyptian constitutional jurisprudence, may have “inclined towards neo-traditionalism and thus assumed that Article 2 required the state to conform to al-Azhar’s interpretation of Islamic law.” *Id.* at 407-08.

327. Finding that the SCC’s jurisprudence makes a meaningful contribution to Islamic law as well as Egyptian law, Lombardi and Brown have concluded that “the justices of the SCC have proposed a theory of Islamic legal interpretation that marries the national commitment to Islamic law with the Court’s commitment to liberal constitutionalism.” *Id.* at 385. This marriage requires the Egyptian state to promulgate laws that are “(1) consistent with universally applicable scriptural rules of Islamic *shari‘a*, and (2) they must advance the goals of the *shari‘a*.” *Id.* at 418. This approach echoes the theories of Rashid Rida, which Lombardi and Brown have classified as “utilitarian neo-*ijtihad*.” *Id.* at 408. Rida posited that, where there are “no ‘universal’ rulings on point, an Islamic state must order people to act in a way that reason suggests will advance human welfare.” *Id.* at 408-09.

328. See Forte, *supra* note 68, at 37 (summarizing the institution of the Pakistan Federal Shariah Court and noting that “[o]nly the constitution itself remained outside” of its jurisdiction).

329. The HIC is charged with, inter alia, “encouraging and promoting *ijtihad*.” ALG. CONST. art. 171.

majority,³³⁰ and the established cadre of civil law judges is likely to retain that majority.³³¹ While the Algerian Constitution does not give decisional power to the HIC,³³² the body can still hold constitutional decisions to a voiced dissent.³³³ The Pakistani approach of parallel courts is, of course, one of the most Islamized systems in the Middle East short of those of Saudi Arabia and Iran.³³⁴

The collateral effects of war are a final wildcard to consider when comparing Iraqi judges to their civil law Arab counterparts. In many respects, what was once a homogenous judiciary has been torn asunder: the effects of de-Baathification and American reprogramming of Iraqi judges,³³⁵ the sea change in politics from socialist tyranny to sectarian populism and from a unitary government to a federal one; the countless assassinations of judges over the past five years;³³⁶ the stronger assertions of parochialism, tribalism, and ethnic identity; the exodus of many of the most qualified Iraqi professionals; the influx of world media; and the ruptures in education and the rise of a new youth in the judiciary—all are elements whose effects cannot be calculated here. Perhaps the closest comparison that can be drawn, if a close one can be drawn at all, is with the Algerian judiciary which emerged out of chaos in the 1990s.

2. The Jurisprudents

What quickly distinguishes the Iraqi legal system from those of the other Arab Muslim countries that have adopted the civil law model is the presence of a powerful, assertive, non-state competitor for judicial power—the *marja'īya*. This loosely-affiliated network of Shia theologians and jurisprudents is viewed by Shias as the sole authority

330. FSC Decree, *supra* note 323, at p. 13.

331. *But see* Posting of Haider Ala Hamoudi to Islamic Law in Our Times, *Fundamental Misunderstandings of Law and Islam in Iraq*, <http://muslimlawprof.org/2008/09/29/shariah.aspx> (Sep. 29, 2008, 08:29 EST) (arguing that the Shia drafters intended the Islamic law experts to be the only members of the bench resolving the questions of Islamic law and its compatibility, and that other legal issues would remain in the hands of Iraq's traditional judges).

332. *See* BROWN, *supra* note 13, at 75 (noting that the HIC “lacks the mandate and the independence . . . to serve as an effective check on the authority of the other political bodies”; it likewise lacks direct powers over Algeria's judicial bodies).

333. The HIC has this power pursuant to its objective of promoting *ijtihād*, and its capacity to opine on religious questions submitted to it. ALG. CONST. art. 171.

334. Forte, *supra* note 68, at 36-37.

335. The difficulties of purging Baathist ideology from the judiciary have been legion, largely because “after decades of Baathist rule in Iraq, Baath Party judges were the only ones with judicial experience.” Frank, *supra* note 307, at 16.

336. *See 5 Judges Attacked in Baghdad – Judiciary Source*, ASWAT AL-IRAQ, Jun. 30, 2008, available at <http://en.aswataliraq.infor/?p=84145> (reporting that over twenty judges were assassinated between 2004 and 2006).

on Islamic law.³³⁷ The term *marji'* indicates a religious authority to whom one refers for guidance on matters of Islamic import,³³⁸ with the most prominent example in Iraq being Ayatollah al-Sistani.³³⁹ The term *marja'īya* refers to such scholars collectively, as an institution, the "authority" for adherents to the Shia faith.³⁴⁰ The inner workings of the *marja'īya* are shifting, shadowy, and loosely hierarchical,³⁴¹ having organizational parallels to a guild or academic association. Its outer significance to Iraqi Shias is quite clear and constant: The *marja'īya* interprets God's divine law on earth.³⁴²

The *marja'īya* operates out of Najaf, the Shia holy city, but its influence penetrates deeply into Iran, and vice versa. Indeed, to its followers, the *marja'īya* is above national boundaries.³⁴³ Yet for most of Iraq's modern history, and in stark contrast to that of Iran, the *marja'īya* has remained subordinate to successive Iraqi governments. Under the Saddam Hussein regime, leading figures within the *marja'īya* were the objects of gross persecution.³⁴⁴ This has all changed since 2003, however. The Iraqi opposition parties which were most strongly affiliated with the *marja'īya*, namely the Supreme Islamic Iraqi Council and to a lesser extent the Islamic Dawa Party, have since taken the reins of government in Iraq, an Iraq which they shaped in large part as drafters of the Constitution.³⁴⁵ While the *marja'īya* acknowledges that it is not a viable alternative to the new government,³⁴⁶ its influence in the lives of individual Iraqis may be on the ascendance,³⁴⁷ and consequently, its

337. Haider Ala Hamoudi, *You Say You Want a Revolution: Interpretive Communities and the Origins of Islamic Finance*, 48 VA. J. INT'L L. 249, 254 (2008).

338. WEHR, *supra* note 28, at 380.

339. Nordland & Dehghanpisheh, *supra* note 77, at 26.

340. WEHR, *supra* note 28, at 380.

341. Hamoudi, *supra* note 337, at 255.

342. *Id.* at 254-55. Note however, that the *mujtahids* of the *marja'īya* make no doctrinal pretense as to being closer to God than their followers. They are but fallible scholars of the Shariah, distilling it from infallible sources: the Quran and the examples of Mohammed, Fatima, and the Twelve Shia Imams. See HALM, *supra* note 288, at 30-34.

343. Haider Ala Hamoudi, *Money Laundering Amidst Mortars: Legislative Process and State Authority in Post-Invasion Iraq*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 523, 538 (2007).

344. JOYCE N. WILEY, *THE ISLAMIC MOVEMENT OF IRAQI SHI'AS* 45-66 (1992).

345. Note, however, that the results of Iraq's most recent provincial elections suggest a political shift away from the parties relying on largely religious platforms. Alissa J. Rubin, *Secular Parties and Premier Ahead in Iraq*, N.Y. TIMES, Feb. 2, 2009, at A1.

346. Hamoudi, *supra* note 343, at 538.

347. Saleem al-Wazzan, *Clerics on Politics and Cola!*, NIQASH (Iraq), Oct. 9, 2008, available at <http://www.niqash.net/content.php?contentTypeID=74&id=2311&lang=0> (last visited Feb. 27, 2009).

influence in the collective decisions of the Iraqi government may increase as well.³⁴⁸

The role of the *marja'īya* is thus one of the central questions of the new Iraq, striking to the very heart of sectarian tensions between the Shia majority and the Sunni and Kurdish minorities, as well as the supremacy of the new government itself. For the purposes of this Note, however, only a narrowed aspect of that question is addressed; namely, to what extent can the judicial organs of the new Iraqi state rule on matters of Islamic law? Hamoudi insists the answer is none at all,³⁴⁹ yet much of the current scholarship has either presumed or concluded that the state will.³⁵⁰ For an Iraqi apostate, of course, this is more than an academic debate.

While the *marja'īya* is the core of Iran's theocracy, the Islamist triumph in Iran must be excluded from comparison with the non-governmental *marja'īya* in Iraq. Simply put, the Iranian clerics *are* their government, while the Iraqi clerics remain outside of theirs.³⁵¹ The Wahhabist institutions of Saudi Arabia, which have long held a powerful hand in government, cannot be considered a guide for the future of Iraq's *marja'īya*.³⁵² Nor do Algeria or Pakistan provide appropriate visions for Iraq's clerics, having institutionalized the role of their own clerical classes in various governmental organs. Instead, the closest parallel to Iraq's *marja'īya* in the Muslim Middle East is al-Azhar, the

348. An oft-cited example of the *marja'īya's* political authority is Sistani's insistence on elections before the permanent Constitution was written, despite the American administration's intentions to do otherwise: "Sistani . . . was the most revered man in Iraq, even though he was an Iranian and not a candidate [in the 2005 elections] for anything. . . . [O]n election day—the question was whether to vote for Sistani or Allawi." PACKER, *supra* note 20, at 431. Sistani's consent to the Status of Forces agreement was also viewed as pivotal. Campbell Robertson & Stephen Farrell, *Pact, Approved in Iraq, Sets Time for U.S. Pullout*, N.Y. TIMES, Nov. 17, 2008, at A1.

349. Posting of Haider Ala Hamoudi to Opinio Juris, <http://opiniojuris.org/2008/06/19/shiism-and-the-viability-of-the-new-iraq/> (June 19, 2008, 18:11 EST).

350. See Feldman & Martinez, *supra* note 325, at 904 (arguing that Article 2 of the Iraqi Constitution would allow the FSC to strike down legislation incompatible with Islam, thus presupposing its ability to determine what "Islam" is); see also Rabb, *supra* note 10, at 569-72, 579 (concluding that Iraq will adopt a "coordinate constitutionalism" approach towards Islamic law, with the judiciary relying on the opinions of Islamic jurists as a residual source, and the legislature receiving them as part of the political process).

351. The *marja'īya* apparently intends to remain independent of the Iraqi government. See Hamoudi, *supra* note 343, at 538.

352. "The Saudi *ulama* occupy a prominent position within the state's political elite, unparalleled in any state in the contemporary Sunni Muslim World. The muftis, the most distinguished members of the religious hierarchy, particularly enjoy power and authority never dreamed of by their peers in other Muslim countries." Joseph Nevo, *Religion and National Identity in Saudi Arabia*, 34 MIDDLE E. STUD. 34, 41 (1998). Though the relationship between Wahhabism and the House of Saud is complex and shifting, Wahhabism has served as the defining talisman of Saudi government and national identity. See *id.* The same simply cannot be said for Iraqi Shism.

preeminent center for Sunni scholarship, which has been viewed as both an extension and opponent of the Egyptian government.³⁵³

More structured and formal than the *marja'īya*, the Cairo based university and institution of al-Azhar has been a focal point of Islamic legal studies for all four orthodox schools, not only for Egypt, but also for Sunni nations at large, an institution that has served as a historic citadel of Sunni scholarship.³⁵⁴ Yet Egypt's early steps towards a more western legal system in the late nineteenth century coincided with a dissolution of al-Azhar's institutional unity and a waning of its societal and political influence,³⁵⁵ which ultimately bottomed under Nasser's revolution.³⁵⁶ Although al-Azhar began reasserting itself under Sadat, in step with the broader politicized Islamist constituencies in Egypt, and has continued to show greater independence under Mubarak,³⁵⁷ al-Azhar still remains under the Egyptian government by all accounts.³⁵⁸ In this sense the *marja'īya* and al-Azhar differ; the relationship of al-Azhar with the Egyptian government has been one of antagonistic cooperation, accommodation and *détente*, whereas the *marja'īya* had only known the outright exclusion, containment, and oppression of Iraqi regimes prior to 2003.

Nevertheless, the courts of Egypt offer a valuable point of reflection for Iraq. Although the jurists have assented to the judiciary's ability to interpret Islamic law, the Egyptian courts may have been pulled closer towards Islamic conservatism in the process.³⁵⁹ There were certainly doubts as to whether Islamists, or Egyptian society as a whole,

353. AJAMI, *supra* note 19, at 204 (describing al-Azhar as the "leading center of Islamic learning and jurisprudence" of Egypt).

354. *Id.*

355. See Lombardi & Brown, *supra* note 317, at 388 (noting that the Europeanization of Egypt's legal system largely excluded Islamic jurists, and "[a]fter 1882, Islamic legal norms remained operative . . . primarily in matters of personal status"); see also Zeghal, *supra* note 72, at 373 (describing a common view that al-Azhar has been "entrenched in a political and intellectual retreat from the modernizing spheres of society since Muhammad Ali's century").

356. Zeghal, *supra* note 72, at 374-75 (describing how Nasser brought "the ulema to heel" in pursuit of a state-controlled monopoly on religion).

357. See generally Tamir Moustafa, *Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt*, 32 INT'L J. OF MIDDLE E. STUD. 3 (2000) (analyzing the symbiosis between al-Azhar and the Egyptian government, and concluding that al-Azhar's bargaining power with the government has risen as a result of the Islamist violence of the 1990s).

358. AJAMI, *supra* note 19, at 204 (describing the state's dominance over al-Azhar and the political Islamists, but acknowledging that it has "not come on the cheap").

359. See Berger, *supra* note 211, at 739 (concluding that while Egypt's courts have adopted a conservative position towards Islamic law, they "have not become more Islamic, but they have been confronted with more 'Islamic' cases than before"). But see Lombardi & Brown, *supra* note 317, at 435 (concluding that SCC's approach to Islamic law has allowed it to "pursue a liberal interpretation of the *shari'a*").

would accept the rulings of secular judges on Islamic law,³⁶⁰ yet it is now a *fait accompli*, one accepted and even exploited by Islamists at that.³⁶¹ Would Iraq's FSC be as successful in expounding upon or reinterpreting Islamic law? Compelling arguments support both sides of that question, and Part V will begin by addressing them.

C. Societal Relevance to Iraq

Philosophers and jurists may differ as to where "law" divides from "society," but the debate takes for granted that at some point the two words represent the same thing. This Note also takes for granted that the composition and currents of a society color and carry its law, sometimes gently and sometimes forcefully. Society is an amorphous yet inextricable factor in all legal questions, and the question of apostasy, which thrusts into play some of modern Muslim society's most contested issues, is certainly no exception. The societal element, then, is one of the most pervasive in drawing a comparative conclusion.

The most critical factor of societal relevance with regard to apostasy is the presence of religious minorities. Iraq is all but unique in its confessional composition; its population is, *grosso modo*, sixty-five percent Shia, thirty-five percent Sunni, with the remainder composed of Christian, Yazedi, Zoroastrian, Sabeian, and Baha'i followers.³⁶² Aside from Bahrain,³⁶³ Iraq is the only country to have this particular balance of pluralism, though a comparison between these two is uneasy on structural grounds.³⁶⁴ On the other hand, Lebanon is the paragon of religious pluralism in the Middle East, and certainly its sectarian struggles are a point of reference for Iraqis.³⁶⁵ Egypt's small but vociferous Coptic population has kept the issue of religious tolerance in that country's national dialogue, and gives a possible account of how Iraq's significantly smaller Christian minority might assert itself on the

360. Lombardi & Brown, *supra* note 317, at 407 (noting that Article 2 may have been drafted with the neo-traditionalist assumption that al-Azhar would determine the provision of Islamic law as they relate to the Egyptian Constitution, but concluding that any such assumption yielded with little resistance to the SCC's rulings on Islamic law).

361. *Id.* at 435.

362. CENT. INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK 2008, at 304 (2007).

363. Bahrain is roughly three-quarters Shia, one quarter Sunni, but it is the latter who dominate political life. *See id.* at 52.

364. The chief obstacles to comparing Iraq with Bahrain lay in the difference between their governmental systems (republican versus monarchical) and the disparity in population, which influence the production and interpretation of laws.

365. Lebanon is approximately sixty percent Muslim and forty percent Christian. *Id.* at 360. Lebanon recognizes seventeen religious sects. *Id.*

question of apostasy.³⁶⁶ The context of Syria, with its Sunni majority but substantial Alawite, Druze, and Christian minorities,³⁶⁷ could also be instructive, though the necessary sources and analysis have been wanting. The absence of a marked plurality of religions, however, strongly militates against a predictive comparison with Iraq. Mauritania, Morocco, Libya, the countries of the Arabian Peninsula, Afghanistan, and Pakistan, are almost homogeneously Sunni Muslim, and their small Shia, Ahmedi, or Baha'i populations lack any meaningful political representation.

A subsequent factor considered is the degree of shared sources of tradition and historic intercourse with Iraq. For millennia Iraq was a nation between empires, a confluence of Persian, Turkish, and Arab legacies which continue to manifest themselves in the ethnic identities of individuals and the colloquial Arabic of the nation.³⁶⁸ Closely related is the Islamic inheritance that Iraq has given to and received from its neighbors. The predominance of Hanafi *fiqh* amongst Sunni Iraqis is a reminder of both Iraq's early preeminence as the capital of scholarship in the Muslim world and its period under Ottoman rule,³⁶⁹ and the bonds between the Shia of Iraq and Iran date back over thirteen centuries.³⁷⁰

The third lens through which societal relevance can be compared is the similarity of political patterns. Iraq's modern history has been dominated by the Baath and its socialist, secularist ideology, despite deeply religious undercurrents in the country's political space. Since 2003, Iraq's political and societal discourse has been dominated by four principle points: the erasure of a single party state, the first pangs of democracy, the resurgence of religion, and the eruption of violence. This immediately harkens back to the Algeria of the early 1990s, itself defined by those same four corners.³⁷¹ While those parallels deserve to be expounded upon in depth, it is enough here to say they highly favor comparison. A more attenuated, lower-pitched similarity can also be

366. See the discussion of apostasy laws and the reactions of Egyptian Copts *supra* Part III. C.

367. Collectively they make up one quarter of Syria's population. CENT. INTELLIGENCE AGENCY, *supra* note 362, at 604.

368. Iraq's legal history is likewise imprinted by successive centuries of Sunni, Shia, Ottoman, and British rule, which have shaped to varying degrees its current legal system. See AMIN, *supra* note 284, at 160-69.

369. *Id.* at 162 (noting that Abu Hanifa founded his *madhhab* in Kufa, Iraq); see also Hashim Kamali, *Law and Society: The Interplay of Revelation and Reason in the Shariah*, in OXFORD HISTORY OF ISLAM, *supra* note 45, at 107, 113 (noting that the Ottomans' adoption of Hanafi *fiqh* contributed to its being the most widely followed school of Islamic jurisprudence).

370. HALM, *supra* note 288, at 170.

371. See generally MARTIN EVANS & JOHN PHILLIPS, ALGERIA: ANGER OF THE DISPOSED (2007) (giving a detailed account of Algeria's independence, transition from authoritarianism to democracy, and the resulting descent into strife during the 1990s).

seen with Egypt on the points of a growing democracy, a louder Islam, and high-profile acts of violence. Conversely, the Baath's continuing reign in Syria is more a talisman for where Iraq was, rather than where it will be.

D. Summary IV: A Rough Look at the New Iraq

Where an issue of comparative law is an issue of constitutional rights, the obvious starting point is in the constitutions themselves. On this basis alone, many of the Middle East's extremes can be ruled out; Turkey's fervent commitment to secularism is no more applicable to Iraq than Iran's fervent commitment to Islamism.³⁷² This also rules out a meaningful comparison with those countries like Saudi Arabia and Libya which lack written, unified constitutions.³⁷³ A more detailed parsing of the grants of freedom of religion and the protections for Islam also eliminates speciously close-fits, like the Constitution of Afghanistan, which evinces similar freedoms but makes far stronger obligations to Islam.³⁷⁴

The constitutions examined are of course embedded within larger national legal systems, and a survey of these systems begets a general classification of approaches in the Middle East. Iraq falls into a group of systems which are predominately civil law in genesis and form, but which have nonetheless incorporated substantive elements of Islamic law. Algeria, Egypt, Jordan, and Lebanon join Iraq in this tradition. These countries also reflect a shared structural organization, favoring civil law trained judges as the principal purveyors of justice, who cede a limited role to Islamic jurists in the matters of family and inheritance law.³⁷⁵ This contrasts with Pakistan, which has adopted several constitutional provisions mirroring those of Iraq, yet has entrusted them to a significantly different judicial structure.³⁷⁶

Broad societal considerations have played the final role in selecting a comparative model. North Africa and the Levant have shown patterns in their national politics, cultures, and experiences that are remarkably familiar to this new Iraq. While Morocco has been considered as a

372. See Stilt, *supra* note 10, at 754 (concluding that neither Turkey or Iran could serve as effective models for the new Iraqi legal system).

373. See *supra* notes 255-56.

374. The Afghan Constitution, like that of Iraq, posits Islam as the state religion and holds that no law may contravene the provisions of Islam. AFG. CONST. arts. 1, 3. Unlike Iraq, however, its grant of religious freedom is directly qualified "within the bounds of law," and moreover, it speaks with a greater specificity as to how the Shariah is to be applied in Afghani law. *Id.* at arts. 2, 130.

375. See *supra* Part IV.A.2 and Part IV.B.1.

376. See *supra* Part IV.B.1.

comparative model for Iraq,³⁷⁷ Algeria's turbulent past offers a far more vivid analogy to Iraq's turbulent present. Lebanon would likewise provide a fecund ground for comparison, but the paucity of scholarship on its legal system hinders this. On the other hand, the legal system of Egypt has been a focal point of research and commentary, and its historic and contemporary influence in Arab legal affairs is without parallel. Egypt further offers an axis of reflection that leans toward a legalistic, litigious culture, with a stable regime but a shifting populace, and from the vantage of this Note, it balances well with the Algerian experience. The next Part will therefore explore how Iraq will deal with the issue of apostasy by triangulating its largely untested legal framework with the experiences of Algeria and Egypt.

V. A CONJECTURE AS TO THE FUTURE OF IRAQI APOSTATES

Both within the Arab world and the world at large, the legal landscape of this new Iraq is distinct and uncharted. Large questions remain at all corners, and while this Part will focus on how the FSC might resolve this composite question of Islamic and constitutional law, it remains couched in the language of a conjecture amidst the field of open questions that currently characterize Iraq.

The tentative conclusion of Part IV that Iraqi apostates will face hardships comparable to those of Algeria and Egypt will be tested in its details. This test will take three broad steps. The first step will propose a reason why the FSC would rule on a hypothetical case of apostasy, and contrast this with the Egyptian experience. The second step will examine possible interpretations of the Constitution's various provisions relating to freedom of religion and the protection of Islam. The theoretical conceptions discussed in Part II will be applied in tandem with the comparative lessons learned in Part IV. The third and final step will be applying the interpretation of those articles to the criminal and civil categories of punishment illustrated in Part III. The result will be a comprehensive projection of the kinds of challenges apostates from Islam can expect to face in the new Iraq.

A. *Who Shall Rule? A Threshold Question*

It is almost taken as a given that the Constitution's final arbiter, the FSC, would rule on any conflict between the Iraqi Constitution and Islamic law. Yet that assumption is open to debate, and there is scholarship suggesting that the FSC would refuse to hear a case of

377. See Rabb, *supra* note 10, at 572-77.

apostasy even if it implicated constitutional rights: Since its creation the FSC has not ruled on any issues of law requiring interpretation of the Shariah.³⁷⁸ Hamoudi attributes this to the court's unwillingness to enter into the purview of the *marja'īya*, whom Iraq's Shia majority holds to be the sole body capable of distilling divine law.³⁷⁹ By all accounts, Iraq remains a tinderbox of religious tensions, and in the pervading climate of violence, a cautious approach may be the only way that the FSC can build its legitimacy amongst all factions.

The FSC's long-term legitimacy, however, lies in fulfilling its mandate, which includes reconciling the political and religious rights of Iraqi citizens. Iraq's minorities—Sunnis, Kurds, Assyrians, and others—realize that protection from a Shia majority legislature lies in an objective, assertive court, and they are pushing for this.³⁸⁰ Neither the Sunni Arabs nor the Kurds object to a state entity construing Islamic law; Iraqi Sunni Muslims have entrusted state figures with the application of Islamic law since at least the Baath party's reign, and the Kurds have been the most secularly-leaning of Iraq's major factions.³⁸¹

Thus the final balance of authority over Islamic law will be a political compromise between Iraq's minorities and its Shia majority. The main contention of the Shia is epistemological; in their view, the authority to deduce Islamic law through *ijtihād* “belongs exclusively to the *marja'īya*.”³⁸² Hamoudi has argued that the belief in the exclusivity of the '*ulamā*' over Islamic law is far stronger amongst Shias than Sunni Arabs, and the acquiescence of Egypt's Islamic clergy to judicial construction of Islamic law was only possible in light of al-Azhar's want of independence and prestige, and that such an outcome would be “absolutely impossible in Iraq.”³⁸³ Yet scholars such as Nathan Brown have argued that “the debate in Iraq is at best fairly hazy on who is

378. Posting of Haider Ala Hamoudi to *Opinio Juris*, *supra* note 349. This may also be due to the understandable reluctance of Iraqi civil society to embrace litigation as the driving mechanism; legality and the rule of law were never the hallmark of the former regime, and the previous five years of chaos have made reliance on informal mechanisms the *mode de vie* for most Iraqis. Hamoudi has elsewhere underlined the Iraqi preference for using non-legal means of regulation and conflict resolution. Hamoudi, *supra* note 343, at 537.

379. See Posting of Haider Ala Hamoudi to *Opinio Juris*, *supra* note 349; see also Deeks & Burton, *supra* note 304, at 51 (describing the insistence of Shia negotiators that the Shariah could only be interpreted by experts).

380. See Deeks & Burton, *supra* note 304, at 51; see also Posting of Haider Ala Hamoudi to *Opinio Juris*, *supra* note 349.

381. See generally Deeks & Burton, *supra* note 304 (iterating the general secularist tendencies of the Kurds during the drafting of the Iraqi Constitution).

382. Hamoudi, *supra* note 343, at 539.

383. *Id.*

authorized to speak for [the] Shariah.”³⁸⁴ No doubt much of the haziness is a product of the political reality; a unified Iraq needs compromise and accommodation. However reluctantly, dogma will have to cede to deals if Iraq’s majority wants to preside over the entirety. The most recent provincial elections suggest that Iraqi voters are coming to this conclusion themselves, with the more secular and centrist parties gaining in influence.³⁸⁵

The deal to be hammered out must include a role for the FSC in reconciling the competing interests of Islam and constitutional rights where they arise. This is an essential demand of the Kurds, and a highly desired check on Shiism by the Sunnis. In return, the court will not be able to reinvent established Islamic doctrine in the way that Egypt’s SCC has. Furthermore, the concern that only an expert can pronounce on Islamic law should be abated when one is actually seated on the FSC bench, as Article 92 requires.³⁸⁶ Thus the composition of the court itself will reflect compromise. These points—resolving rights versus Islam conflicts, limited review of Islamic law, and the presence of Islamic experts on the FSC—are the major premises upon which the court will exercise jurisdiction over controversies between Islamic and secular law, and they make up the undercurrents of the following discussion.

B. *The Horizon of Iraqi Constitutionalism*

The issue of apostasy could come before the FSC in two ways.³⁸⁷ First, the court could be petitioned to strike down a law which punishes apostates or otherwise deters them from leaving Islam *de jure* or *de facto*. Such an attack would be grounded in Article 42’s grant of religious freedom,³⁸⁸ and on Article 2’s provision that no law may abrogate a freedom stipulated in the Constitution.³⁸⁹ Conversely, a law

384. Nathan J. Brown, *Debating Islam in Post-Baathist Iraq*, CARNEGIE ENDOWMENT FOR INT’L PEACE, Mar. 2005, at 3.

385. See Rubin, *supra* note 345, at A1.

386. IRAQ CONST. art. 92, § 2.

387. Of course other ways are conceivable. Consider a defendant who seeks to justify murder on the ground that the victim had been deemed an apostate by a competent Islamic authority. Several countries provide criminal defenses to those acting under the guise of either “honor” or an Islamic right. See Bälz, *Human Rights*, *supra* note 202, at 40 (noting that Article 7 of the Egyptian penal code holds that “exercising a right based on the shari’a does not constitute a criminal offense”). Though there is no reference to religion, a defendant’s “honorable motives” may be considered as a mitigating or exculpatory circumstance in the Iraqi criminal code. IRAQ PENAL CODE § 168(1) (1969). An Iraqi defendant in such a case might argue that carrying out a *fatwa* condemning an apostate was an act of honor, thus forcing the Court to evaluate the issue of apostasy in the context of state law.

388. IRAQ CONST. art. 42.

389. *Id.* at art. 2, § 1, cl. C.

that removed barriers to apostasy, or otherwise facilitated leaving Islam, might be challenged under Article 2 as being either repugnant to Islam³⁹⁰ or against the “Islamic identity of the majority.”³⁹¹

The following discussion will attempt to use the perspectives gathered from Parts II, III, and IV to propose how the FSC might interpret the various constitutional provisions that bear upon the question of apostasy from Islam. One provision that has been intentionally avoided is the Iraqi Constitution’s equal protection clause,³⁹² this has been done for reasons of space and scholarly uncertainty, and where necessary it will simply be assumed to protect religious minorities as it sets out to do. Nevertheless, from a general perspective it seems likely that the Iraqi court will be obliged to take a noticeably different interpretation of Islam and rights from that seen in Egypt.

1. Article 2: Repugnancy to the Established Provisions of Islam

The most actionable of the Iraqi Constitution’s protections of Islam is Article 2, section 1, clause A, which holds that “[n]o law may be enacted that contradicts the established provisions of Islam.”³⁹³ Known as a “repugnancy clause” in constitutional parlance,³⁹⁴ this provision places a negative duty on the legislature. What, however, are these “established provisions of Islam,”³⁹⁵ or *thawābit aḥkām al-islām*? Though the words are familiar individually, taken together they suggest a novel concept in Arabic legal terminology.³⁹⁶

The Arabic noun *aḥkām* goes deeper than “provisions,” and suggests “rulings,” “judgments,” and “regulations” as well.³⁹⁷ This would seem to limit the use of Islam to its legal elements and character,³⁹⁸ as opposed to the religion as a whole, though that may not be the only interpretation.³⁹⁹ Notwithstanding, a look at the modifying noun *thawābit* helps to narrow the phrase. *Thawābit* means that which is “invariable,” “fixed,” or “resolved,”⁴⁰⁰ and has been characterized in the

390. *Id.* at art. 2, § 1, cl. A.

391. *Id.* at art. 2, § 2.

392. *Id.* at art. 14.

393. *Id.* at art. 2, § 1, cl. A.

394. See Deeks & Burton, *supra* note 304, at 11.

395. This is the English translation of the provision that has become the most widely referred. See *supra* note 3. However, “the invariable rulings of Islam” would, in the author’s opinion, more accurately convey the original Arabic. See Lombardi & Brown, *supra* note 317, at 382 n.3 (translating the provision as “the fixed rulings of Islamic law”).

396. See Rabb, *supra* note 10, at 541.

397. WEHR, *supra* note 28, at 229; see also Rabb, *supra* note 10, at 538.

398. Rabb, *supra* note 10, at 538.

399. *Id.*

400. WEHR, *supra* note 28, at 120.

context of Islamic law as that which is “constant for all Muslims, at all times, in all places.”⁴⁰¹ Provisions developed through juristic consensus, or *ijmāʿ*, would classify as *thawābit*, as would the *hudūd* and *taʿzīr* crimes.⁴⁰² Together, the two limiters suggest a concept more expansive than the Shariah, which is narrowly defined as the divinely revealed law, and suggests a broader, shared corpus of Islamic jurisprudence between the uncontroverted Shariah and the particularized *fiqh* of the various schools. In any case, *thawābit aḥkām al-islām* certainly seems to include Islam’s prohibition on apostasy, which is a judgment or regulation in any sense, and a feature of all schools of jurisprudence to one degree or another.⁴⁰³

The real question is which conception of apostasy would the court find as being “invariable”: the analogies to a status offense, sedition, or treason? A look at Iraq’s jurisprudence prior to 2003 gives no guidance; references to the Shariah are cursory and conclusory, and fail to show what methodology was used to ascertain the content of Islamic law.⁴⁰⁴ Thus the FSC’s potential test is an issue of pure conjecture. Nevertheless, Hamoudi has suggested that it will not be a simple search for consensus amongst the *madhabs*, or schools of jurisprudence.⁴⁰⁵ His argument is supported by the Constitution’s implicit rejection of Article 2’s predecessor in the Interim Constitution, which read that “no law that contradicts the *universally agreed upon tenets* of Islam [*thawābit al-*

401. Stilt, *supra* note 10, at 743 & n.234 (citing to Ali Gomaa, *al-Thābit wa al-mutaghayyir fī al-sharīʿa al-islāmīya* [The Unchanging and the Changing in the Shariah], 7 AL-MANĀR AL-JADĪD [THE NEW MINARET] 46 (1999)).

402. *Id.* at 744. Note that the acceptance of *ijmāʿ* as a method of ascertaining the Shariah is almost exclusively Sunni; as a minority sect, consensus would likely prove prejudicial to Shia theology, and Halm offers this as a pragmatic reason why Shia jurists have largely forsaken *ijmāʿ*. HALM, *supra* note 288, at 100.

403. See Deeks & Burton, *supra* note 304, at 14 (reporting the opposition of secularists to the term, for fear that it could include *fatwas*, as well as the opposition of Sunni Islamists, for fear that the only “rulings” it would incorporate would be those of Shia jurists); see also Posting of Haider Ala Hamoudi to Opinio Juris, *supra* note 349 (arguing that *aḥkām* would include the juristic opinions of the *marjaʿīya*). By extension, this would then include Ayatollah al-Sistani’s proscription of apostasy.

404. Consider the following decision by the Iraqi Court of Cassation. See *Mahkama al-tamayyiz* [Court of Cassation], No. 201, Dec. 25, 1976, available at <http://www.iraqja.org/qanoun2/teahkam.php?id=22>. Petitioner was born into a Christian household, but converted to Islam as a minor. After reaching the age of majority, she returned to Christianity and married a Christian man, but the local civil status bureau refused to recognize the marriage. The Court of Cassation ordered the bureau to treat the marriage as valid on the grounds that “the Shariah ruling in this situation holds that . . . if a minor converts to Islam following his father, he is permitted to turn back [*riḍḍa*] to his former religion provided he meets the conditions of majority and sound mental state.” *Id.* The decision made no reference as to how the Court actually adduced that principle.

405. Posting of Haider Ala Hamoudi to Opinio Juris, *supra* note 349.

islām al-mujmu‘a ‘alayhā] may be enacted.”⁴⁰⁶ This language strongly suggested that a consensus between the Sunni and Shia *madhabs* was needed in order for a point of law to qualify as a protected principle of Islam.⁴⁰⁷ That it was conspicuously dropped from the current Constitution suggests that the implied test was disfavored as well.

Yet this “consensus of the schools” test seems to be the only way in which a secular court could adduce the content of Islam’s “established provisions” without engaging in that process of *ijtihād* that Shia reserve for their ‘*ulamā*’. The court would not assess the soundness of *ḥadīth*, scour through medieval treatises, or expound upon the divine meaning of the Quran. Rather, it would treat the rulings of the various *madhabs* in a way that parallels the approach of United States courts to foreign law; that is, as an issue of law dealt with like an issue of fact, looking at the interpretations which Islamic scholars have propounded and only evaluating the strength of consensus.⁴⁰⁸ Indeed, such a process seems little different from that which every pious Muslim does when choosing a *marj‘a* to follow: he compares and selects. A pluralistic Iraq cannot subscribe to a single theologian, however, and so it will have to subscribe to what is common to a plurality of theologians.

Iraq’s Islamic pluralism, which is singular in its proportions and size,⁴⁰⁹ is also the reason why the lessons of other countries, such as Algeria or Egypt, simply cannot apply here. Even though each has struggled to find a balance between the judge and the jurist, Iraq must balance between sects as well; in such a case, secular judges might be the most acceptable arbiters. For the Iraqi jurists themselves, this is not so great an invasion into their realm as it may sound. The ‘*ulamā*’ remain in the picture, continuing to apply the various methods of each orthodox school to novel problems, while the FSC would simply assess their *convergence*. Such an arrangement would dodge the criticisms of Iraq’s 1959 Personal Status Law, namely that its codification of Shariah extirpated the *marja‘īya* from its traditional role and filled it with state judges,⁴¹⁰ and would likewise enfranchise the

406. See Stilt, *supra* note 10, at 743-45 (discussing Article 7 of the Iraqi Interim Constitution).

407. *Id.*

408. See generally Nat’l Group for Comm’ns & Computers, Ltd. v. Lucent Tech. Int’l Inc., 331 F. Supp. 2d 290 (D.N.J. 2004) (ascertaining the content of Saudi Arabian contract law, which is almost entirely derived from the Shariah, through the study of treatises and the testimony of expert witnesses).

409. Bahrain is the only other country in the Middle East to have a similar balance of Sunni and Shia, though for reasons discussed above, it would not offer the best overall basis for comparison. See *supra* note 363-64 and accompanying text.

410. Brown, *supra* note 384, at 5.

followers of all Muslim sects that the core aspects of their creeds are represented.

The only reasonable alternative would be splitting the mixed bench, and reserving all questions of Islamic law to the “experts in Islamic jurisprudence” sitting on the FSC. As mentioned earlier, Hamoudi suggests this was the intent of the drafters.⁴¹¹ However, its danger is twofold. The first danger is conceptual; such a division defeats the purpose of having a single, polyvalent organ to resolve the manifold issues in the Constitution. Total deference to colleagues who are experts in Islamic law might allow for more erudite interpretations of what Islamic law is, but it would do nothing to resolve the far knottier issue of a conflict between the document’s provisions and Islamic law. The second danger is practical; based on population and politics, the FSC’s Islamic law experts are more likely to be from the Shia majority.⁴¹² Thus any test would be more inclined to favor jurisprudence of the Shia and marginalize that of the Sunnis, or it would at least invite such a perception. Certainly a perception of Shia dominance would destroy the Court’s legitimacy amongst the Sunnis and Kurds, who are currently its strongest supporters, and it would further undermine the spirit of accommodation and tolerance upon which the Iraqi government’s own legitimacy rests. The approach of splitting the bench between experts in Islamic and secular law is likely to cause more harm than good.

It goes without saying how important the test applied could be in the issue of apostasy. Under the consensus test, only that to which all scholars can agree would be considered an “established provision.” The most liberal of the orthodox understandings of Islam would thus prevail, which would mean Dr. Gomaa’s narrowed view of apostasy as a crime of sedition. Under the split bench approach, likely to produce a Shia-leaning test, conservative views would be far more likely to prevail, and Ayatollah al-Sistani’s view of apostasy as a status crime could become Iraq’s view. Holding to the belief that a “consensus of the schools” test is the most viable option for the court, it then follows that the FSC would more readily adopt the theory that apostasy from Islam is a crime only insofar as it sows sedition in Islamic society.

2. Article 2: Islam as a Foundation Source of Legislation

Article 2, section 1 also deals with Islam, though this clause functions in a fundamentally different and far less enforceable manner

411. Posting of Haider Ala Hamoudi to *Opinio Juris*, *supra* note 349.

412. See Deeks & Burton, *supra* note 304, at 51 (recounting the Shia negotiators overt interest in assuring a place for Islamic expertise on the FSC).

than clause A. Article 2, section 1 states that “Islam is the official religion of the State and is a foundation source of legislation.”⁴¹³ The second half of the clause creates at most a duty to *consider* Islam in lawmaking, as opposed to a restrictive duty like that of Article 2, section 1, clause A.⁴¹⁴ The difficulty of enforcing this is obvious, and it has been suggested that it may only be a “symbolic gesture, honoring the central importance of Islam to the lives of many Iraqis.”⁴¹⁵

Such an understanding seems the most appropriate if considered in light of Egypt’s constitutional history. From 1970 to 1980, Article 2 of the Egyptian Constitution held that “the principles of the Islamic *shari’a* are a chief source . . . of legislation.”⁴¹⁶ Under growing Islamist demands, President Sadat orchestrated a simple *coup de grace* to Article 2, making Islam “the chief source of legislation.”⁴¹⁷ Before this change, Egypt’s courts had not entertained challenges to laws on the ground that they violated Article 2. Yet shortly after their 1980 victory in changing the text of the Constitution, Islamists began seeking victories in its jurisprudence.⁴¹⁸ Use of the definite article “the” set a hierarchy of values and gave the provision the teeth and claws it needed to be enforceable. The Islamists finally had a colorable constitutional weapon, and it is only with this “the” that they forced the SCC to develop a test for the validity of laws based on Islamic principles.⁴¹⁹

The point, then, is that the difference between “a” source and “the” source is decisive. This clause of Article 2 is unlikely to be used to strike down laws as un-Islamic, and challengers will have to rely on the repugnancy clause of Article 2, section 1, clause A. This further means that the FSC is more restrained in the way it can construct its Islamic compatibility test, as clause A is seemingly limited only to what the “established provisions” of Islam are, and not necessarily what the legislature can do to further them.

413. IRAQ CONST. art. 2, § 1.

414. See Deeks & Burton, *supra* note 304, at 10 (“[T]he provision does not impose actual obligations on future legislatures or on the Federal Supreme Court. It is descriptive rather than prescriptive.”).

415. *Id.* at 11.

416. See Lombardi & Brown, *supra* note 317, at 390.

417. *Id.*

418. *Id.* at 393.

419. *Id.* at 390. The SCC’s test holds that the Egyptian state must develop laws that are “consistent with the universally applicable scriptural rules of Islamic *shari’a*” and that “advance the goals of the *shari’a*.” *Id.* at 418. Professors Lombardi and Brown view the test as one having a “broad rhetorical appeal” on account of its groundings in the traditional theory of *siyāsa al-sharī’iyya*, as well as a progressive character, in that it has been adopted by a “progressive court” in service of progressive ideals. *Id.* at 435.

3. Article 2: Preserving the Islamic Character of the Majority

The indefiniteness of the previous clause of Article 2 is likewise an issue for its final clause, which states that “this Constitution guarantees the Islamic identity of the majority . . . and the full religious rights to freedom of religious belief and practice of all individuals such as Christians, Yazidis, and Mandaean Sabians.”⁴²⁰ The clause is clear only in its vagueness, and perhaps because of this it has received little mention. The potential legal meaning of “Islamic identity” is simply too nebulous to discern here; perhaps it means the ensemble of “established provisions,” perhaps it is a broader sphere of Islamic values, or perhaps it is merely symbolic. In any case, the openness only seems capable of affording Islam room to expand in Iraq’s constitutional jurisprudence.

The corresponding half is just as perplexing: It grants full freedom to individuals, yet describes them in collective terms. This seems to leave open the fundamental question of individual versus group rights which is at the eye of the storm between Islamic and Universal rights ideologies. It also seems to limit religious belief to *belief*, as opposed to unbelief or atheism.⁴²¹ In that light, the combination of both halves could conceivably provide a constitutional justification, even a directive, for preventing apostasy. Permitting flight from Islam would be permitting an attack on Iraq’s Islamic identity, and the state would have to take reasonable measures to prevent that.⁴²² In this sense, it would not invade the rights of non-Muslims, it would only preclude Muslims from joining them in their minority faiths.

4. Article 42: Freedom of Religion

Article 42 of the Iraqi Constitution states that “each individual shall have the freedom of thought, conscience, and belief.”⁴²³ It is remarkable in that, unlike Article 38 which grants freedom of expression, it is not directly encumbered by “public order and morality.”⁴²⁴ This does not, however, prevent the Iraqi court from reading such a limitation into that freedom. Article 46 allows for the restriction of constitutional rights so long as this “does not violate the essence of the right or freedom.”⁴²⁵ Like the high courts of other Arab nations, the FSC could hold that freedom of religion does not, in its essence, permit disruption of society,

420. IRAQ CONST. art. 2, § 2.

421. *Id.*

422. See Bälz, *Submitting Faith*, *supra* note 202, at 150 (summarizing the Egyptian Court of Cassation’s view that “[a]n ‘attack on Islam’ . . . equates with an attack on the foundations of the state. Such activity, therefore, is not protected under the Constitution”).

423. IRAQ CONST. art. 42.

424. *Id.*

425. *Id.* at art. 46.

and then continue that the apostasy of a Muslim is a threat to society *per se*. This is essentially the logic of the Egyptian courts, which have saddled their Constitution's grant of religious freedom⁴²⁶ with the doctrine of *al-nizām al-'āmm*, or "public policy."⁴²⁷

This would, however, contravene Iraq's obligations under the ICCPR, which it is bound to uphold under Article 8 of its Constitution.⁴²⁸ As noted earlier, the ICCPR holds the freedom of conscience and belief to be inviolable and beyond restrictions that may be deemed necessary for public order or morality.⁴²⁹ Although Egypt is also a party to the ICCPR, it is bound only under the declaration that it does not abrogate the Shariah.⁴³⁰ Iraq has made no such reservation, however, and theoretically it could only use the aegis of public order to constrain the *manifestation* of religious practice. Iraq, then, *should* espouse a more expansive conception of religious freedom than Egypt.

5. Article 2: Repugnancy to the Principles of Democracy

An alternative argument might be made that Article 2, section 1, clause B, which states that "no law that contradicts the principles of democracy may be established,"⁴³¹ also protects religious freedom.⁴³² The premise would be that the freedom to choose one's belief system is a core principle of democracy, an idea that would meet with little resistance in the United States.⁴³³ Yet despite the pretensions of some that the United States is the world's licensed purveyor of democracy,⁴³⁴

426. EGYPT CONST. art. 46, available at http://www.egypt.gov.eg/english/laws/constitution/chp_three/part_one.aspx (declaring that "the State shall guarantee the freedom of belief and the practice of religious rites").

427. Berger, *supra* note 211, at 725, 733.

428. See *supra* notes 302-03 and accompanying text.

429. See International Covenant on Civil and Political Rights, *supra* note 116, at art. 18, § 2 ("No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."); *c.f. id.* at art. 18, § 3 ("Freedom to manifest one's religion *may be subject only to* such limitations as . . . are necessary to protect public safety, order, health, morals, or the fundamental rights and freedoms of others." (emphasis added)).

430. See *supra* note 124.

431. IRAQ CONST. art. 2, § 1, cl. B.

432. See Deeks & Burton, *supra* note 304, at 15 (venturing that Shia negotiators may have been objecting to the "principles of democracy" repugnancy clause on the grounds that it represented a rival ideology to Islam).

433. See U.S. DEP'T OF STATE, FREEDOM OF RELIGION (2008), <http://www.america.gov/st/democracy-english/2008/May/20080609220143eaifas0.9669001.html> (asserting that "[g]enuine democracies recognize that . . . a key role of government is to protect religious choice, even in cases where the state sanctions a particular religious faith").

434. Seemingly in reference to the invasion of Iraq, former President George W. Bush exclaimed "we have lit a fire . . . it warms those who feel its power, it burns those who fight its progress, and one day this untamed fire of freedom will reach the darkest corners of our world." *Bush Pledges to Spread Democracy*, CNN.COM, Jan. 20, 2005, <http://www.cnn.com/>

many in the Middle East have adopted an alternative conception of democracy, one that focuses on procedural rights, that is, access to the instrumentalities of representative government.⁴³⁵ This proceduralist view of democracy suits those seeking to construct rights schemes derived from Islam but buttressed by the legitimacy of public approval,⁴³⁶ and this seems to be a guiding intention of at least the Constitution's Shia drafters.⁴³⁷ Certainly the language of Article 2 evinces a proceduralist understanding, treating democracy separately from both Islam and rights and echoing Algeria's constitutional formulation.⁴³⁸ Even though some Iraqis are arguing that democracy is an integrated system of individual rights that includes freedom of religion,⁴³⁹ and that freedom is itself the basis of religion,⁴⁴⁰ their Supreme Court could find that the Constitution requires the opposite approach.

6. Article 7: The Prohibition of *Takfir*

Article 7 of the Iraqi Constitution is unique to the world, a legal artifact of the bloodshed and destruction which overshadowed the document's birth. The Article reads: "Any entity or program that adopts, incites, facilitates, glorifies, promotes, or justifies racism or terrorism or accusations of being an infidel [*takfir*] . . . under any name whatsoever, shall be prohibited. Such entities may not be part of political pluralism in Iraq. This shall be regulated by law."⁴⁴¹

How far will this prohibition of *takfir* protect apostates? It certainly forbids the terroristic use of *takfir* that has been the ideological mantra of

2005/ALLPOLITICS/01/20/bush.speech/index.html. President Bush did not specify whether he was referring to the fires burning in Falluja, Basra, or Baghdad.

435. See Rabb, *supra* note 10, at 560-66 (describing the views of Abdolkarim Soroush and Khaled Abou El Fadl on procedural democracy and Islamic governance).

436. *Id.* at 560.

437. Deeks & Burton, *supra* note 304, at 15.

438. See the discussion of Algeria's Constitution, *supra* notes 259-75.

439. See Hassan Hanafi, *Sharūṭ al-dimuqrāfiya* [The Conditions for Democracy], AZZAMAN.COM (Iraq), Feb. 15, 2008, <http://www.azzaman.com/index.asp?fname=2008%5C02%5C02-15%5C779.htm&storytime> (arguing that democracy requires a culture of individual rights to thrive, and inter alia, "the individual's freedom of opinion, a respect for the views of others without accusations of apostasy or treason").

440. See *Iyād jamāl al-dīn yad'ū al-shī'aa li-rafq̄ al-khamīnī kamā rafaq̄ū abā bakr* [Iyad Jamal ad-Deen Calls Upon the Shia to Reject Khomeini Like They Rejected Abu Bakr], ALARABIYA.NET, Dec. 13, 2007, <http://www.alarabiya.net/articles/2007/12/13/42899.html> (summarizing a televised interview with Iraqi Prime Minister and prominent Shia leader Iyad Jamal ad-Deen in which he emphasized that religion is a matter of personal choice, and that a state which protects personal freedom is better suited to protect religious devotion as well, rather than one which attempts to preserve religious devotion through coercive policies).

441. IRAQ CONST. art. 7.

al-Qaeda, Ansar al-Sunna, and like-minded Islamist groups fueling Iraq's chaos. Yet it is less certain if Article 7 would protect apostates, blasphemers, or heretics from the institutional use of *takfīr*, that is, "official" pronouncements of unbelief, or what one might call "excommunication" from Islam. The first difficulty lies in defining what an "official" pronouncement is. No central authority exists for any *madhhab*, let alone a pope-like figure for Islam at large; the authority of a juristic ruling is a function of the jurist's reputation for scholarship.⁴⁴²

The subtext to the fierce debate over *takfīr* in the Muslim world is this question of legitimacy: Who is competent to issue rulings on Islam? While the jurisprudence of Tantawi and al-Sistani remains at the heart of established Islamic doctrine, extremists like *al-Gamā'a al-Islāmīya*'s Omar Abd al-Rahman and al-Qaeda's Iyman al-Zawahiri continue to have support in certain Islamist corners.⁴⁴³ To what extent can militant upstarts assert clerical power? One of the most impressive congregations of Islamic scholars convened in Amman in 2005 to draw the limits.⁴⁴⁴ They issued what constitutes a major *ijmā'*, or universal consensus, against the use of *takfīr* by defining the bedrock elements of being a Muslim: Anyone who meets those elements is a Muslim and thus "immune" to *takfīr*.⁴⁴⁵

The Amman Message is not a categorical rejection of *takfīr*, however. The leading signatories, jurists like Tantawi, Qaradawi, Sistani, and Khamenei, have all sanctioned pronouncements of apostasy.⁴⁴⁶ Rather, their Message is an attempt to halt the McCarthyism that has wracked Islam for decades and solidify the control of the faith's traditional scholars. Thus if the Amman Message is taken as the definitive understanding of *takfīr*, Article 7 will only protect those Muslims meeting its theological minimums: adherence to the five pillars of Islam, acknowledgement of the faith's "self-evident" tenets, and

442. The *madhabs* now followed by modern scholars were also each a product of its founder's personal authority, and his "scholarly, intellectually compelling, and convincing logic . . . and recognized piety," rather than hard political power behind it. Bassiouni & Badr, *supra* note 43, at 172.

443. The line between conservative and extremist Islamism is a shifting one. See Zeghal, *Religion*, *supra* note 72, at 391 (noting how Abd al-Rahman, formerly one of al-Azhar's '*ulamā'*' was disowned by the institution after condemning the Egyptian government).

444. Mahmoud al Abed, *Clerics Forbid Takfir*, JORDAN TIMES, July 7, 2005, <http://www.jordanembassyus.org/07072005001.htm>.

445. The Amman Message: Summary, July 2005, <http://www.ammanmessage.com> (last visited Feb. 27, 2009).

446. See *supra* Part II.C.1.

adoption of a recognized *madhhab*.⁴⁴⁷ Those Islamists who lack sufficient acumen and recognition in the Muslim community would be barred from accusing others of apostasy, but “excommunication” by notable scholars will remain a possible exercise of religious authority where a Muslim renounces those basic tenets of the faith.

7. Article 37, Section 2: Protection from Religious Coercion

Section 2 of Article 37 guarantees Iraqi citizens protection from religious coercion, an imperative which would, at first blush, preclude the Iraqi state from penalizing individuals for leaving Islam.⁴⁴⁸ Indeed, from the vantage of prevailing human rights norms, this provision obligates Iraq to allow its citizens to enter or leave a religion without the specter of execution, imprisonment, the dissolution of his or her family, or the denial of a legal identity. Moreover, as an affirmative obligation Article 37 would require Iraq to shield apostates from vigilante assassination or invidious discrimination, rather than turning a blind eye to either. The operative term of the section, however, is an uncertain hinge; the word *ikrāh*, “coercion,”⁴⁴⁹ is a term of art in both Iraqi,⁴⁵⁰ international,⁴⁵¹ and Islamic law,⁴⁵² and the fact that the Constitution’s drafters choose *ikrāh* over other words suggests that they intended to draw from this existing well of legal meaning.⁴⁵³

447. The Three Points of the Amman Message, July 2005, http://ammanmessage.com/index.php?option=com_content&task=view&id=91&Itemid=74 (last visited Mar. 6, 2009).

448. IRAQ CONST. art. 37, § 2 (“The State shall guarantee protection of the individual from intellectual, political, and religious coercion [*ikrāh*].”); *see also id.* at art. 37, § 1, cl. C (“All forms of psychological and physical torture and inhumane treatment are prohibited. Any confession made under force [*bi-al-ikrāh*], threat, or torture shall not be relied on . . .”).

449. The word *ikrāh* itself originates from a family of words associated with “hate,” “disgust,” and “revilement.” *See WEHR, supra* note 28, at 963-64.

450. IRAQ PENAL CODE § 62 (1969) (establishing a duress [*ikrāh*] defense from criminal liability).

451. Article 18, section 2 of the ICCPR states that “[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.” International Covenant on Civil and Political Rights art. 18, § 2, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 172, 178. Though not an authentic version of the Convention, the translation adopted by United Nations Children’s Fund translates coercion as [*ikrāh*]. *Al-‘ahd al-dawlī al-khāṣṣ bi-al-ḥuqūq al-madinīya al-siyāsīya* [International Covenant on Civil and Political Rights], *available at* www.unicef.org/arabic/why/files/ccpr_arabic.pdf (last visited Apr. 30, 2009); *see also* Convention on the Rights of the Child, art. 34, Nov. 20, 1989, 1577 U.N.T.S. 3, 12, 55 (authentic in Arabic and English and equating “coercion” with *ikrāh*).

452. PETERS, *supra* note 35, at 23-24 (describing the affirmative defense of duress [*ikrāh*] available in Islamic criminal law).

453. Though possessing subtly different meanings from *ikrāh*, the words *ijbār*, *irghām*, or *quhra* could have conceivably been used to express “compulsion” or “coercion” if the drafters had wanted a jurisprudential *tabula rasa*. *See WEHR, supra* note 28, at 133, 403, 929. The Arabic version of the Convention Against Torture, for example, equates *irghām* with the gerund

In the specific context of apostasy, *ikrāh* immediately harkens to the Quranic declaration *lā ikrāha fī al-dīn*, that is, that “there is no compulsion in religion.”⁴⁵⁴ Classical scholars and modern conservatives have always reconciled this principle with the death penalty for apostasy by contending that it only applies one way: No one may be coerced into *entering* Islam.⁴⁵⁵ That one may be executed for *leaving* Islam is not, to conservative jurists, inconsistent or tautological.⁴⁵⁶ But as discussed in Part II, a diverse core of scholars, such as Gomaa, Bassiouni, An-Na’im, Ramadan, and al-‘Alwānī, have challenged both the validity and reasoning of this classical doctrine, and their critique may offer the FSC a sound path for harmonizing the Iraqi, international, and Islamic legal interpretations of *ikrāh* into a single doctrine. This new doctrine could turn out to be the single greatest protection for Iraqis who choose to leave Islam.

C. Summary V: The Face of Apostasy Law in Iraq

As a conjecture, and not a crystal ball prediction, this Note can only aim at what is a host of moving targets. Some of the analyses may miss, for as always, the devil is in the details and certainly not all of them can be had in a study taken at such a distance. The use of the verb tense “will” in the following portrait of apostasy law in newly developing Iraq, then, is more of a rhetorical tool rather than an indicator of certainty.

1. Civil Penalties for Apostasy in Iraq

It seems unlikely that the Iraqi Constitution could be interpreted so as to remove all civil barriers to leaving Islam. The civil penalties are, by and large, imposed through personal status actions, currently governed by Iraq’s 1958 Code of Personal Status, which is essentially a statutory amalgamation of Islamic family law.⁴⁵⁷ An effort to repeal the Code, which would have returned the power over family law to Islamic jurists, failed in 2004, and this suggests that it will remain the law for the foreseeable future.⁴⁵⁸ What this means for Iraqis who renounce Islam openly, then, is that they still could be forcibly divorced from their

“coercing.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art.1, s. 1, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85, 100, 114 (authentic in Arabic and English).

454. QURAN, *supra* note 2, at 2:256.

455. AL-‘ALWĀNĪ, *supra* note 32, at 7.

456. *Id.*

457. Brown, *supra* note 384, at 5.

458. *Id.*

spouses and denied inheritance rights, though before civil law judges, rather than Islamic jurists. That may present some small consolation when the alternative is considered, but in this respect, Iraqi apostates will face the same general situation as in Egypt or Algeria.

Where Iraq may well depart from countries like Egypt, Algeria, or Jordan, is when cases like those against Nasr Abu Zeyd or Toujan al-Faisal are raised. Muslims who are summoned before a personal status court to answer accusations of apostasy would have a colorable argument that the anti-*takfīr* clause of Article 7 protects them from this kind of civic indignity. That protection is only likely to be extended, however, to cases where the accuser is not an established *‘ālim*, or clerical authority.

The denial of identification documents will also be a concern in Iraq. Despite widespread knowledge that sectarian death squads have relied on national identification cards to single out their victims, the Ministry of the Interior continues to print the holder's religious affiliation on this essential document.⁴⁵⁹ Perhaps the example of other Arab states may encourage Iraq to erase religious affiliation from identity documents,⁴⁶⁰ yet at the moment there is scant reason to believe that the Iraqi bureaucracy will be more willing than its Egyptian counterpart to recognize religious conversion out of Islam. The issuance of a handful of national IDs to Iraqi Baha'is last year was an encouraging development,⁴⁶¹ but one that remains overshadowed by the inability of those Baha'is who previously registered as Muslim to benefit from the same recognition.⁴⁶²

2. Criminal Penalties for Apostasy in Iraq

Proselytism will be explicitly controlled in the new Iraq as it is throughout the near entirety of the Middle East. Efforts by non-Muslims to attract converts would easily be construed as harmful to the "Islamic identity of the majority,"⁴⁶³ and the religious freedom granted in the Constitution does not include an overt right to propagate one's beliefs. The right to manifest religious belief, protected under several articles, will likely bow to the need to preserve public order and morality,

459. INT'L RELIGIOUS FREEDOM REPORT 2008, IRAQ, *supra* note 324.

460. *Lebanon 'moves right way' on ID*, BBC NEWS, Feb. 24, 2009, http://news.bbc.co.uk/2/hi/middle_east/7906125.stm (noting that during Lebanon's sectarian civil wars national IDs were akin to "death warrants," and that the Lebanese government has recently allowed its citizens to withhold disclosure of their religious affiliation on IDs).

461. INT'L RELIGIOUS FREEDOM REPORT 2008, IRAQ, *supra* note 324.

462. *Id.*

463. *See* IRAQ CONST. art. 2, § 2.

perhaps under jurisprudence echoing Egypt's doctrine of *al-nizām al-'āmm*.

Iraq currently has a facially-neutral law that punishes acts harmful to religious sentiment.⁴⁶⁴ Whether it will apply that law even-handedly is first and foremost a question of the rule of law in Iraq. Criticisms of, or dissent from, Islam may fall subject to greater police scrutiny than criticism of other faiths. In any case, however, the Iraqi Constitution will only provide a narrow religious space. The judiciary would be hard pressed to accept that a “quiet” apostasy endangers the Islamic identity of the majority, and given the growing divide amongst leading *mujtahids*, it is likely that the FSC would conclude that the status-offense conception of apostasy is no longer an “established provision of Islam.”⁴⁶⁵

An outward and unrepentant repudiation of Islam that gathers controversy or challenges Islamic teachings could, however, be deemed seditious, and all Islamic jurists hold that “seditious apostasy” should be punished. As discussed above, the doctrine of “public order” would be used to overcome the otherwise unrestricted grant of religious freedom, as well as the more textually-constrained right to free speech. Concededly, the occurrence of such a case would be improbable, if for no other reason than prosecution of a vigorous Muslim dissenter would publicize his views, and possibly justify his reason for dissent in the first place. A court seeking to uphold punishment for apostasy would also have to interpret Article 37's prohibition of religious coercion very narrowly and in deference to the classical Shariah understanding, a precedent it may be unwilling to set for other reasons. A more liberal court, however, could absolve an apostate under Article 37, and this may very well be the chief constitutional protection for Iraqis who make their own choices of creed. The Article 7 prohibition of *takfīr* could also protect Iraqis but under more limited circumstances.

Whether the FSC will allow direct punishment of apostasy ultimately rests on the nature of its judges, which at present, constitute a secularly-leaning bench. At most, only indirect punishment of the kind enforced in Algeria and Egypt could be condoned by the FSC, and as Iraq has neither the entanglements with Evangelical proselytism of the former, nor the proportionally large Christian population of the latter, such cases will be fewer, and the political pressure to create special laws weaker.

464. IRAQ PENAL CODE § 372 (1969).

465. See IRAQ CONST. art. 2, § 2, cl. A.

However, were the law requiring experts in Islamic jurisprudence to be established, and the FSC's bench shifted towards a conservative Islamic orientation, the protections of Articles 7, 37, and 42 could be atrophied to the point of allowing "seditious apostates" to be punished. If this were accepted, then capital punishment could be a possibility. Sedition against the state has been a capital crime in Iraq since time immemorial, and execution remains broadly accepted as a legitimate punishment.⁴⁶⁶ Where the state has adopted an official religion and undertaken to maintain its predominance in the national identity, Islamists will argue that sedition against the state religion is therefore sedition against the state itself. No cleric, Sunni or Shia, has yet asserted that, where sedition against the *umma* is established, an apostate should nevertheless *not* be executed. The possibility of an apostate being executed in Iraq for his apostasy is thus a possibility, but one distanced by degrees of improbability—the improbability of such a law being enacted, the improbability of the FSC upholding it, and the improbability of "seditious" apostasy occurring.

The real threat to the lives of Muslim apostates in Iraq will be private vigilantes and extremist organizations, a reality already known to Algerian and Egyptian intellectuals. Article 37 seemingly commits the state to protecting its citizens from this threat, but in a country seemingly defined in the world's eye by its insecurity, the ability to do so may be wanting for some time. Faced with an inability to protect individuals from non-state actors, the Iraqi state might even consider adopting anti-apostasy laws so as to undercut Islamist arguments for private enforcement of the Shariah. Such a strategy could play out several ways: The state might protect apostates by claiming to be investigating them, thereby abating extremists' calls for punishment; the state might prosecute a few apostates to appease larger demands of extremists; or the state might create a vehicle by which extremist sympathizers can persecute apostates through state authority. At this point, any of these possibilities is conceivable in Iraq, yet whether enacted as means of delegitimizing non-state violence, or legitimizing a state Islamization policy, the passage of any law against apostasy would be an undeniable sign of extremist ascendancy.

466. See Tāriq Ḥarb, 'Aqūba salb al-ḥayāa fī al-niẓām al-qānūnī al-'irāqī bayn al-ītrā' wa al-hajā' [The Death Penalty in the Iraqi Legal System: Between Praise and Derision], <http://www.iraqijudicature.org/judicial%20sheet%20202/research/tareq%20harb.htm> (last visited Apr. 20, 2009).

VI. ON CONSCIENCE AND CONDEMNATION: FINAL WORDS

That a man could be compelled to forfeit his property, marriage, liberty, or life on the basis of his spiritual convictions is a doctrine of coercion that cannot stand alongside international principles of human rights. Though Islamic jurisprudence has long punished apostates for repudiating Islam, and states from Mauritania to Afghanistan still condone penalties for apostasy, several minds in the Muslim world have argued forcefully that this need not be so. Indeed, they have argued that Islam requires the opposite: freedom of religious choice, and that above all, “there is no compulsion in religion.” Their reflections show that Iraq, a nation at a new dawn, need not choose between Islamic values and human rights; rather, it need only choose between the strictures of the past and the norms of today. This bridge over the issue of apostasy may very well be one which, when taken broadly, allows Iraq to realize the delicate harmony its Constitution seeks between faith and freedom.

*Timothy G. Burroughs**

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