HUMAN RIGHTS QUARTERLY

Religious Minorities under Islamic Law and the Limits of Cultural Relativism

*Abdullahi A. An-Na'im**

Non-Muslim minorities within an Islamic state do not enjoy rights equal to those of the Muslim majority. Some apologist Muslim writers have tended to misrepresent *Shari'ah,* the historical religious law of the Muslims, in order to minimize the seriousness of discrimination against non-Muslims. Such an approach is futile not only because the misrepresentation can easily be exposed, but also because current public opinion is unwilling to tolerate any degree or form of discrimination on grounds of religion or belief. On a practical level, although most of the constitutions of modern Muslim states guarantee against religious discrimination, most of these constitutions also authorize the application of *Shari'ah.* As such, these constitutions sanction discrimination against religious minorities. This is inconsistent with the constitutions' own terms. The existence of such contradictions, and the underlying tensions they reflect, call for urgent and candid discussion of this problem. Moreover, the constitutions of some Muslim countries, such as Iran, have already openly approved of discrimination on grounds of religion.[1] If the current trend towards what is commonly known as Islamic fundamentalism continues, it may not be long before other Muslim countries follow suit.

It may therefore be appropriate to try to anticipate possible arguments which may be used to justify or rationalize the inferior status of religious minorities under *Shari'ah.* A direct fundamentalist approach may argue, for example, that Muslims are entitled to treat their own religious minorities in this way in accordance with the established norms of Islamic culture. By

* A draft of this article was prepared under a grant from the Ford Foundation and presented at the Seventh Annual International Human Rights Symposium and Research Conference, Columbia University, New York, on 12 June 1986.

1. The Constitution of the Islamic Republic of Iran, Articles 12 to 14, clearly authorizes discrimination on grounds of religion. A. P. Blaustein and G. H. Flanz, vol. VII, *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana Publications).

Human Rights Quarterly 9 (1987) 01–18

analogy to the national sovereignty argument raised by some countries against what they regard to be interference in their domestic affairs,[2] fundamentalist Muslims may claim Islamic sovereignty. Such argument, in my view, can no longer be used to rebut charges of human rights violations, at least in relation to basic universally accepted group and individual rights. In the same way that, for example, the status of the black majority is not the exclusive domestic concern of the Republic of South Africa, the status of religious minorities is not the exclusive concern of any national or cultural tradition. As we shall see below, this much has clearly been established by the international community.

To avoid confusing the issues, however, we must be clear on the proper role of cultural autonomy, emphasized in anthropological literature as cultural relativism, in relation to human rights. Otherwise, the legitimacy of cultural relativism will be abused to justify norms and policies in clear violation of the valid objectives of cultural relativism itself.

THE HUMAN RIGHTS CRISIS

Thirty-seven years after the adoption of the Universal Declaration of Human Rights in 1948, ten years after the coming into force of the human rights Covenants,[3] and despite the adoption of regional documents in three continents,[4] many observers are wondering whether these international and regional documents will ever achieve their purported objectives. Independent monitoring organizations such as Amnesty International and publications such as the Human Rights Internet Reporter continue to report massive and gross violations of human rights throughout the world. It is therefore imperative to investigate ways of resolving the present crisis and revitalize the international human rights movement.

---

2. The sovereignty argument in relation to human rights has come to be associated with the Soviet position. See, for example, F. Przetacznik, "The Socialist Concept of Human Rights: Its Philosophical Background and Political Justification," *Revue belge de droit International* 13 (1977): 238.
3. International Covenant on Economic, Social and Cultural Rights, *opened for signature* 19 December 1966, *entered into force* 3 January 1976, G.A. Res. 2200A, 21 GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316; International Covenant on Civil and Political Rights, *opened for signature* 19 December 1966, *entered into force* 23 March 1976, G.A. Res. 2200A, 21 GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).
4. The first of the regional documents was the European Convention for the Protection of Human Rights and Fundamental Freedoms, *signed* 4 November 1950, *entered into force* 3 September 1953, 213 U.N.T.S. 222 (1950). The next document was the American Convention on Human Rights, *signed* 22 November 1969, *entered into force* 18 July 1978, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/11.23, doc. 21, rev. 6 (English 1979). The latest is the African Charter on Human and Peoples' Rights, *adopted* 27 June 1981, O.A.S. Doc. CAB/LEG/67/3 rev. 5, *reprinted in* 21 I.L.M. 58 (1982). It came into force 21 October 1986. "Banjul Charter Comes into Force," *Human Rights Internet Reporter* 11 (Sept. 1986): 46.

At one level of analysis it may be argued that human rights advocates were too optimistic in assuming that the adoption of general standards formulated in terms of legally binding treaties would automatically transform state practice. The analogy between domestic law and international law may have been carried too far too soon. It takes more than normative formulation in terms of positive law, even in the domestic context, to achieve compliance. The international and regional documents have no doubt achieved some improvement in the situation. Beside developing consensus on, and awareness of, a set of standards for judging state practice, these documents have also greatly influenced the drafting of state constitutions, especially those of newly emerging states. To that extent, the international human rights standards have influenced the content and practice of civil liberties in these states.[5] But since massive violations continue to occur throughout the world, we need to look further at the necessary prerequisites for greater compliance with norms.

At a deeper level of analysis it would seem that culturally rooted norms stand the best chance of compliance. We would therefore need to enhance the legitimacy of the human rights standards by rooting them in the various cultural traditions of the world. This is necessary, in my view, not only for the tactical reason of denying violators the pretext of claiming that they need not comply with some of the international norms because these norms are alien and unrepresentative of their own cultural values, but also as a matter of principle. It is true that the pretext is often belied by the fact that these states have not only failed to advance their own cultural alternatives but also duplicated the same international standards in their own constitutions and regional documents. Nevertheless, I suggest that the implementation of the international human rights standards will improve if they can be shown to be the natural and legitimate evolution of the cultural tradition of the particular community.

Given their Western liberal origins and the actual historical development of the current international human rights standards, it may not be completely plausible to argue that these rights have existed in their precise present formulation within the cultural traditions of most historical civilizations.[6] The genesis of the same norms, I believe, can be found in almost all major cultural traditions. It may take some innovative reinterpretation of traditional norms to bring them into complete accord with the present

5. It is not assumed here that constitutional guarantees are fully observed in practice, but they certainly reflect, to some extent, political realities and the general perception of rights deserving formal protection. The very fact that the country's elites selected the rights of religious minorities to be safeguarded in the constitution is significant even if their practice does not conform to constitutional theory. Such guarantees also provide strong legal support for the demands of the beneficiaries, whether individuals or groups.
6. See Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of non-Western Conceptions of Human Rights," *American Political Science Review* 76 (1982): 303.

formulation of the international standards, but the essence of these standards is already present. This is particularly true of the Islamic tradition, as I have attempted to show elsewhere.[7]

Cultural considerations are also important in another sense. Given the dynamic and evolutionary nature of human rights, different cultural traditions may contribute positively by raising new areas of concern, adding more rights, and generally informing the interpretation and application of the accepted norms. This dynamic and evolutionary nature of human rights has already been demonstrated by the contribution of socialist and developing countries in relation to social, economic, and cultural rights.

The involvement of the various cultural traditions is, therefore, vital for developing existing rights, adding new ones, and informing their interpretation and application as well as improving compliance with international human rights standards. To emphasize the need for cultural contribution and legitimacy in this way, however, does not mean that we should concede the claim of extreme cultural relativism that there are no universal standards of human rights. To do so would defeat the purpose of cultural relativism itself, which seeks to uphold and protect the dignity and integrity of all human beings regardless of sex, race, religion, or belief.

CULTURAL RELATIVISM AND HUMAN RIGHTS

The insights of cultural relativism have made a positive contribution to intercultural understanding, mutual respect, tolerance, and cooperation between the peoples of the world.[8] Briefly stated, the cultural relativist position is that "[j]udgments are based on experience, and experience is interpreted by each individual in terms of his [or her] own enculturation."[9] This process of enculturation, i.e., the thorough socialization of the individual in accordance with the norms and values of his or her own culture, is a necessary and vital requisite for individual and collective survival and development. The resultant ethnocentricity, the belief that one's own way of life is to be preferred to all others, often degenerates into negative por-

7. See Abdullahi Ahmed El Naiem (now written An-Na'im), "A Modern Approach to Human Rights in Islam: Foundations and Implications for Africa," in C. E. Welch and R. I. Meltzer, *Human Rights and Development in Africa* (Albany: State University of New York Press, 1984).
8. The specific focus of this article does not permit dwelling on the concept of cultural relativism as such. For information on the subject, in addition to the writings of Professor Melville J. Herskovits cited in note 9 below, the reader may refer to the classic statement of the principle in Ruth Benedict, *Patterns of Culture* (Boston: Houghton Mifflin Co., 1934). For a very recent treatment of the topic see Marcus and Fischer, *Anthropology as Cultural Critique* (Chicago: University of Chicago Press, 1986).
9. Melville J. Herskovits, *Cultural Relativism, Perspectives in Cultural Pluralism,* ed. Frances Herskovits (New York: Random House, 1972), 15.

trayals and hostility towards alien cultures and a tendency to dominate and dictate to other people how they should live their lives.

Cultural relativism is primarily concerned with checking and correcting this tendency and cultivating mutual respect, tolerance, and cooperation through emphasizing the worth of many ways of life and affirming the values of each culture. As expressed by Professor Herskovits, one of the founders and leading proponents of cultural relativism, "to say that we have a right to expect conformity to the code of our day for ourselves does not imply that we need expect, much less impose, conformity to our code on persons who live by other codes."[10]

The cultural relativists are therefore opposed to claims of absolute criterion of values, i.e., that any given set of values should be the absolute criterion for judging the validity of the values of other cultures. This does not mean that they reject all universal criteria. The relativists do in fact accept universal systems, which are "those least common denominators to be extracted from the range of variation that all phenomena of the natural or cultural world manifest."[11] In this way, the cultural relativist position is clearly consistent with the emergence of universal standards, including universal standards of human rights.

Writing with reference to world peace, Herskovits suggested that the following four principles be advanced to shape attitudes and inform policy.

I. Recognition that different peoples often achieve identical ends by different means.

II. Identification of the functional unities that underlie the differences in form which are to be observed in different modes of belief and behavior found among the peoples of the world.

III. Clear definition of the values and goals of all parties so that each is aware of the values and goals of the other parties.

IV. Building on these differing patterns to achieve common ends, accepting the right of choice among peaceful alternatives for all people.[12]

The same principles, in my view, can be adapted to shape attitudes and inform policy in relation to human rights. The last clause of the fourth principle would, of course, be rephrased to read "accepting the right of all people to choose among alternatives equally respectful of human rights." The rights to life, liberty, and dignity for every individual person or group of people within each cultural setting are, I submit, universal norms accepted by all cultures. All cultures are entitled to a measure of freedom of choice as to how to safeguard these rights in the cultures' own context. At the same time, no culture, I suggest, should be allowed to violate these basic universal human rights.

---

10. Ibid., 33.
11. Ibid., 32, 55–59.
12. Ibid., 95–96.

Rights to life, liberty, and dignity are, of course, used in the generic sense because they have now been elaborated and formulated into several specific rights in the various international and regional documents as well as the national constitutions of most states. The least common denominators to be extracted from these sources can be taken to be the universal standards. Insofar as they reflect international agreement or consensus on a particular set of rights, these sources at least make a *prima facie* case for the existence of the minimum individual and collective human rights, say, of religious minorities. Making a *prima facie* case should suffice to shift the burden of proof from the proponents to the opponents of the universality of these rights. Before discussing the possible cultural relativist argument against the rights of religious minorities, it may be helpful to briefly state the universalist position.

THE UNIVERSAL RIGHTS OF RELIGIOUS MINORITIES

The general principle of the rights of members of religious minorities is to be found first in the guarantee against discrimination on grounds of religion or faith.[13] All the relevant international human rights documents and national constitutions consistently and explicitly provide for this fundamental principle. Article 55(c) of the United Nations Charter, a treaty binding all the Muslim countries of the world,[14] commits the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." All members of the United Nations, including the Muslim countries, pledge themselves by virtue of Article 56 of the Charter "to take joint and separate action in cooperation with the Organization [UN] for the achievement of the purposes set forth in Article 55."

The first major action taken in fulfillment of this pledge was the adoption of the Universal Declaration of Human Rights on 10 December 1948.[15] After reaffirming in Article 1 that "[a]ll human beings are born free and equal in dignity and rights," the Declaration proceeds to state the following fundamental principle in Article 2:

13. The international human rights documents, especially the earlier ones, tend to speak of the rights of the individual. The issue of individual versus collective rights is not relevant to the present discussion because the rights of members of religious groups include the right of the individual person to belong to and participate in the activities of the group.
14. The term Muslim country can be problematic. In this article the term refers to those countries with a clear Muslim majority even if the country does not identify itself as an Islamic state in the constitutional sense. All these countries are members of the United Nations and as such parties to its Charter as a treaty.
15. G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Declaration's extensive catalog of fundamental human rights is subject to the general limitations allowed by Articles 29 and 30 which are, themselves, consistent with the principle of nondiscrimination. Article 29(2) permits only those "limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." More significant for our purposes is the text of Article 30 which reads as follows:

> Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

The Universal Declaration of Human Rights was adopted by the unanimous agreement of the General Assembly of the United Nations with Saudi Arabia, South Africa, and the Soviet bloc abstaining. The Soviet bloc has since confirmed the Declaration in a number of international instruments,[16] while Saudi Arabia and South Africa continue to abstain. Far from derogating from the universality of the principles of the Declaration, the Saudi abstention, ostensibly based on Islamic religious grounds, in fact demonstrates the equal untenability of discrimination on grounds of either race, in the case of South Africa, or religion, in the case of Saudi Arabia.[17]

To reinforce the moral and political impact of the Universal Declaration, the General Assembly of the United Nations has since adopted several treaties, including the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights.[18] Both Covenants have been ratified by many Muslim countries. Article 2 of both Covenants states the fundamental nondiscrimination principle in legally binding terms.[19] In this way the principle of nondiscrimination on grounds of reli-

16. The U.S.S.R. and other East European countries have ratified the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* 21 December 1965, *entered into force* 4 January 1969, 660 U.N.T.S. 195 (1969); G.A. Res. 2106 A (XX), 20 U.N. GAOR Supp. (No. 4), U.N. Doc. A/6014 (1965), and the International Covenants, note 3 above. All three instruments adopted the Universal Declaration, note 15 above, in their preambles.
17. In other words, Saudi Arabia's allegedly Islamic abstention from joining the international comsensus on universal human rights standards is similar to South Africa's racist abstention.
18. International Covenants, note 3 above.
19. Ibid. Article 2(2) of the Covenant on Economic, Social and Cultural Rights binds states parties "to guarantee" while Article 2 of the Covenant on Civil and Political Rights binds the states parties "to respect and to ensure" the rights "enunciated" and "recognized" in the

gion has the sanction of legally binding international treaties. Since those Muslim countries which failed to ratify these Covenants have included in their own national constitutions the fundamental principle of nondiscrimination on grounds of religion, as we shall see below, it can safely be assumed that their failure to ratify was not intended to challenge the universality of this principle.

The second general source of the rights of members of religious minorities is to be found in Article 18 of both the Universal Declaration and the Covenant on Civil and Political Rights, namely the right of everyone to freedom of thought, conscience, and religion. In its more detailed formulation under the Covenant on Civil and Political Rights, the right "include[s] freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." The same Article also provides 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."

In debates over this Article since 1948, and debates over the more recent Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,[20] Muslim countries have concentrated on the difficulty they face in accepting the right to change one's religion.[21] But strict compliance with *Shari'ah,* the historical Muslim religious law, would raise difficulties with most components of the principle of freedom of religion and the rights of religious minorities.[22] It is, therefore, very significant that Muslim countries have elected to support the same principles of religious freedom and rights of religious minorities in their own national constitutions. The same principles have also received the support of those Muslim countries which are members of the Organization of African Unity, and have accepted Africa's own Charter on Human and

---

Covenants. The slight difference in the drafting of the two Articles seems to be due to the nature of the rights and has no significance to the principle of freedom from discrimination on grounds of religion. Because of the limitations in human and material resources necessary to implement state obligations under the Covenant on Economic, Social and Cultural Rights, the states parties were allowed by Article 2(1) to achieve progressively the full realization of these rights. This is, in my view, the reason behind the difference in formulation, which does not reflect on the substance of the fundamental principle of nondiscrimination on grounds of religion.

20. *Adopted* 18 January 1982, G.A. Res. 55, U.N. GAOR Supp. (No. 51), U.N. Doc. A/RES/36/55 (1982).
21. One difficulty facing Muslim countries is that it is a capital offense under Islamic law for a Muslim to repudiate his faith in Islam. See, for example, An-Na'im, "The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan," *Religion* 16 (1986): forthcoming.
22. Some of these difficulties will be discussed in the next section of this article. See further El Naiem, note 7 above, and Abdullahi An-Na'im, "The Elusive Islamic Constitution: The Sudanese Experience," *Orient* 26 (1985): 329.

Peoples' Rights.[23] Article 2 of this charter guarantees against discrimination on grounds of, *inter alia,* religion, while Article 8 safeguards freedom of conscience and religion.

Space does not permit full analysis of the relevant constitutional provisions. It is sufficient for our purposes here to note that the principles of nondiscrimination and religious freedom and the rights of religious minorities enjoy constitutional sanction in the vast majority of Muslim states today.[24] Since the modern Muslim world has expressed such support for the rights of religious minorities at both the national and international levels, can we accept this commitment at face value and consider the question settled once and for all? The answer is, unfortunately, in the negative because although the formal legal systems of these countries do not openly authorize discrimination on grounds of religion, such discrimination does in fact exist.[25] The question cannot be considered settled until it is settled at the Islamic cultural level. What are the Islamic cultural impediments to the full and effective safeguard of the rights of religious minorities and how can they be removed? Unless and until these rights are culturally rooted, formal commitment does not guarantee full compliance. Moreover, if the countercultural norms are allowed to remain valid and operative, they will undermine the existing formal commitment and threaten to eradicate its limited gains instead of enhancing and expanding the universal norms and informing their interpretation and application. In other words, current Islamic cultural relativism seems to threaten the two main positive features of cultural relativism indicated above.

Although cultural norms are a complex phenomenon that cannot be attributed to a single cause, the religious factor seems to be a major formative force. To the extent that it shapes and/or is shaped by other socioeconomic and political forces, religion can be one of the ways of understanding the dynamics of cultural norm formation and development. This is particularly true, I suggest, of Islamic cultures where religious norms pur-

23. African Charter, note 4 above. Egypt, Gambia, Guinea, Niger, Senegal, Sierra Leone, and Tunisia have fully ratified the Charter, while Mauritania, Somalia, Sudan, and Libya have signed but not yet ratified.

24. The wide ideological and political variety of the Muslim countries make systematic analysis and broad generalizations a lengthy and difficult process. To illustrate the commitment of these countries to the principles of nondiscrimination and religious freedom, reference may be made to the following examples: Algeria arts. 39 and 44; Guinea arts. 6 and 8; Indonesia art. 29; Jordan arts. 6, 14, and 15; Kuwait arts. 29 and 35; Mali arts. 6, 14, and 16; Mauritania arts. 1 and 2; Somalia arts. 6 and 31; Syria arts. 25(3) and 26. For English translations of these and other constitutions of Muslim countries see Blaustein and Flanz, note 1 above.

25. See Abdullahi An-Na'im, "Religious Freedom in Egypt: Under the Shadow of the Islamic *Dhimma* System," in *Religious Liberty and Human Rights in Nations and in Religions,* ed. Leonard Swidler (Philadelphia: Ecumenical Press, and New York: Hippocrene Books, 1986), 45, and Khalid Duran, "Religious Liberty and Human Rights in the Sudan," in ibid., 61.

port to have the binding force of positive legal principles and rules. To adopt a religio-legal approach is not to deny the validity of other approaches and analyses. Such an approach, however, is helpful, especially in the Mulsim context, because of the historic and contemporary role of Islam in these societies. It is, therefore, important to know not only what *Shari'ah* has to say on religious minorities, but also why the law was formulated in that way.

RELIGIOUS MINORITIES UNDER *SHARI'AH*

A cultural relativist argument for Islamic fundamentalism would start with the assumption that if the status of non-Muslims under *Shari'ah* is inferior, then this is the way it should be. It would be heretical for a Muslim who believes that *Shari'ah* is the final and ultimate formulation of the law of God to maintain that any aspect of that law is open to revision and reformulation by mere mortal and fallible human beings. To do so is to allow human beings to correct what God has decreed.

If this were the case, there would be very little, if anything, to be said to Muslims at the religious level. Fortunately, this is not the case, I suggest, because *Shari'ah* was not the totality of the word of God. As indicated by the way Islamic sources were interpreted to develop *Shari'ah,* it is obvious that *Shari'ah* is in fact no more than the understanding of the early Muslims of the sources of Islam.[26] That understanding, as will be shown below, must have been, and was in fact, influenced by the early Muslims' experience and perception of their world.

Given the then prevailing violent tribal rivalry and severe social and gender discrimination, the early Muslims in fact improved on contemporary practice by restricting non-gender discrimination to religion and reducing the severity of discrimination against women. To do that, the early jurists emphasized those aspects of the Islamic sources which justified and supported such religious discrimination. Those particular aspects were developed at a time when the fundamental sources of Islam, namely *Qur'ān* and *Sunnah,*[27] were specifically addressing the concrete problems of an Islamic state in seventh century Arabia.[28] As long as the problems persisted and the answers remained valid for the following centuries, it was natural and proper for *Shari'ah* to remain the way it was. Now that the problems have changed, and the historical answers ceased to be valid, I maintain,

26. For a general survey of the origins and development of *Shari'ah* see N. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964).
27. According to Muslim belief, the *Qur'ān* is the literal and final word of God while *Sunnah* is the record of what the Prophet is believed to have said and done.
28. The distinction between the different stages of Islam, and implications of that distinction for our present purposes, are explained in the text accompanying note 41 below.

new answers must be developed out of the *Qur'ān* and *Sunnah*. This would be the Islamic *Shari'ah* for today. Before indicating one way in which modern Muslims can build on this analysis to resolve the problem of the rights of religious minorities from within the Islamic context, let us first outline *Shari'ah*'s position on non-Muslim minorities.

Shari'ah classifies the subjects of an Islamic state into three main religious categories:[29] Muslims; People of the Book, being non-Muslims who believe in one of the heavenly revealed scriptures, mainly Christians and Jews; and Unbelievers, being non-Muslims who do not believe in one of the heavenly revealed scriptures. Muslim males are the only full citizens of an Islamic state.[30] People of the Book may be granted some rights of citizens if they submit to Muslim sovereignty under what is known as a compact of *dhimmh,* a charter of rights and duties with the Islamic state. Unbelievers are not even entitled to this option of limited citizenship except under temporary *āmān,* safe conduct.

The compact of *dhimmh* entitles the particular community of People of the Book to security of the person and property, freedom to practice their own religion, and a degree of internal community autonomy to conduct their personal private affairs in accordance with their religious law and customs. *Dhimmis,* members of these communities, may continue to enjoy these rights as long as they conform to the terms of their compact with the Muslim state. The most important constant feature of these compacts was the payment of *jizyh,* a poll-tax paid as tribute and symbol of submission to Muslim rule.[31]

According to the theory of *Shari'ah, dhimmis* are not allowed to participate in the public affairs of an Islamic state. They are not allowed to hold any position of authority over Muslims although Muslims may, and do, hold such positions over *dhimmis. Dhimmis* may practice their religion in private, but they are not allowed to proselytize or preach their faith in public. A *dhimmi* is allowed and even encouraged to embrace Islam while a Muslim may never abandon Islam.[32]

As to Unbelievers, *Shari'ah* does not contemplate their permanent resi-

29. The following survey is based on a variety of primary Arabic sources such as Abū Yūsuf, *Kitab al-Kharaj* (Cairo: *al-Matba'h al-Salafiyya,* 1382 *Hijri*) translated by A. Ben Shemesh as *Taxation in Islam,* vol. III (Leiden: E. J. Brill, 1969); Ibn Qayyim al-Jawẓīyah, *Aḥkam Ahl Al-Dhimmah* (Damascus: *Matba'h Jami'ah Dimashq,* 1961). For concise and accurate statement of *Shari'ah* rules for non-Muslims see generally M. Khadduri, *War and Peace in the Law of Islam* (Baltimore: The Johns Hopkins Press, 1955). See also generally H. A. R. Gibb and J. H. Kramers, Shorter *Encyclopaedia of Islam* (Leiden: E. J. Brill, 1953) s.v. *"Ahl al-Kitab,"* 16–17, *"Dhimma,"* 75–76, *"Dizya,"* 91–92, *"Kafir,"* 205–206, and *"Shirk,"* 542–544.
30. The further distinction between Muslim men and women, and its human rights implications, are not discussed in this article. On this issue see El Naiem, note 7 above.
31. See sources cited in note 29 above; Daniel C. Dennett, *Conversion and the Poll Tax in Early Islam* (Cambridge: Harvard University Press, 1950).
32. As indicated in note 21 above, it is a capital offense for a Muslim to convert to any other faith or otherwise repudiate his faith in Islam. A number of other legal consequences also

dence, let alone partial citizenship of an Islamic state. Unbelievers are to be killed on sight unless they are granted temporary *āmān,* safe conduct, by the Muslims.[33] If an Unbeliever is granted such *āmān,* then his or her rights and duties are determined by the terms of the *āmān.* Once it has lapsed or been revoked, they become *harbis,* at war with the Muslims. As such, they have no permanent and general sanctity of life or property.

When we apply these *Shari'ah* principles to a modern nation-state, such as the Sudan, we find that the human rights implications are very serious indeed. For the non-Muslim Sudanese, about one-third of the population, the immediate options are to become Muslims, *dhimmis* if they happen to be People of the Book, or become *harbis* to be killed on sight unless they are allowed temporary *āmān.*

If the *Shari'ah* legislation enacted in 1983–1984 is to be enforced strictly, Sudanese *dhimmis* would, therefore, be second-class citizens in their own country.[34] In exchange for the privilege of being defended by the Muslims, the *dhimmis* of the Sudan would be, legally speaking, disqualified from holding general executive or judicial office and denied full participation in the political process for the government of their own country. If *Shari'ah* legislation is enforced, "unbelievers" among the Sudanese would not be allowed even these "privileges" of partial citizenship.[35]

These modern implications of strict *Shari'ah* may be seen today in Khomeini's Iran which purports to be governed in accordance with these principles. The 1979 Constitution of the Islamic Republic of Iran reflects an

---

follow upon apostasy. See An-Na'im, "The Islamic Law of Apostasy," note 21 above, and Rudolph Peters and Gert J. J. De Vries, "Apostasy in Islam," *IVII Die Welt des Islams* (1976–1977), 1.

33. Chapter 9 verse 5 of the *Qur'ān* is translated by Abdullah Yusuf Ali in *The Holy Qur'ān* (Qatar National Printing Press, undated), 439, as follows:

> But when the forbidden months (the four months of Grace in the Arabic-Muslim calendar) are past, then fight and slay the Pagans wherever ye find them, and seize them, beleaguer them, and lie in wait for them in every stratagem (of war); but if they repent, and establish regular prayers and practise regular charity, then open the way for them: For God is Oft-Forgiving, Most Merciful.

Āmān or safe conduct was originally intended to be temporary, but as the Muslim domain expanded and it became necessary to accommodate communities of Unbelievers, the Muslims gradually relaxed the definition of *dhimmh* to include these communities. The strict *Shari'ah* rule, however, remains that only People of the Book, mainly Christians and Jews, may be offered a compact of *dhimmh.* See the *Qur'ān* chapter 9 verse 29. On Islamic juridicial controversy regarding the precise status of Unbelievers, see Al-Shāfi'ī, *Al-Risāla,* translated by Majid Khadduri as *Islamic Jurisprudence: Shāfi'ī's Risāla* (Baltimore: The Johns Hopkins Press, 1961), 58–59, 265–266; Al-Shaybānī, *Siyar,* translated by Majid Khadduri as *The Islamic Law of Nations: Shaybānī's Siyar* (Baltimore: The Johns Hopkins Press, 1966), 142–154, 224, 275–283; Muhammad Hamidullah, *The Muslim Conduct of State,* rev. 3d ed. (Lahore: Sh. M. Ashraf, 1953), 106–122, 322–331.

34. This is the strict implication of the application of *Shari'ah* as enacted into Sudanese law in 1983–1984. The enforcement of *Shari'ah* legislation, however, is being resisted by non-Muslim Sudanese, mainly in the southern part of the country.

35. Unbelievers are of course defined by *Shari'ah* regardless of how the individual or group regard their own religious belief. The criterion is not belief in God as such, but rather such belief as is acceptable to *Shari'ah.*

explicit view of these limitations from the particular *Shi'ah* sectarian perspective. Article 12 of the Constitution declares the *Twelvers Shi'ah* sect to be the official and dominant faith in Iran, but tolerates Muslims of other denominations. According to Article 13, Zoroastrians, Jews, and Christians are "recognized minorities who, *within the limits of the law,* are free to perform their own religious rites, and who, *in matters relating to their personal affairs and teachings,* may act in accordance with their religion."[36] Although the Constitution does not expressly say so, the obvious implication of these provisions is that nonrecognized minorities, including the *Bahá'ís* and other Unbelievers, are not even entitled to these rights.[37]

Article 14 of the Iranian Constitution does provide for the treatment of non-Muslims, presumably the "recognized minorities," in accordance with "the dictates of virtue and Islamic justice" and with "honor to their human rights." But the Article adds the sinister proviso that "[t]his principle will be applicable only to those who do not become involved *in conspiracies and activities which are anti-Islamic or are against the Islamic Republic of Iran.*"[38] Since it is up to the state to determine when a person is so involved, every non-Muslim risks being denied treatment in accordance with "virtue, Islamic justice and honor to human rights" at the discretion of the state.

These constitutional manifestations of *Shari'ah* are obviously radically inconsistent with the universal human rights of religious minorities outlined above. The Iranian Constitution may be more explicit, but the risk of similar radical inconsistency exists under all constitutions of Muslim countries, such as Algeria, Kuwait, Somalia, and Syria, which declare Islam to be the official religion of the state, and especially those that make *Shari'ah* "a main source of legislation."[39] The ambivalence of these constitutions is illustrated by the contradictory provision of Article 2 of the Constitution of Mauritania, for example, which states that "[t]he Muslim religion is the religion of the Mauritanian people. The Republic shall guarantee to all freedom of conscience and the right to practice their religion."[40] One may well wonder what the guarantee of liberty of conscience means when *Shari'ah,* the

36. Constitution of Iran, note 1 above. Emphasis added.
37. For documentation of the persecution of Bahá'ís in Iran see G. Nash, *Iran's Secret Pogrom, The Conspiracy to Wipe-Out the Bahá'ís* (Suffolk: Neville Spearman, 1982) and Douglas Martin, *The Persecution of the Bahá'ís of Iran, 1844–1984* (The Association of Bahá'í Studies, 1984). Although the Bahá'ís have been persecuted in Iran from the mid-nineteenth century, the motivation and justification of their persecution have always ostensibly been "Islamic" as they are regarded as apostates from Islam.
38. Constitution of Iran, note 1 above. Emphasis added.
39. See Article 3 of the Algerian Constitution and Article 3(a) of the Somali Constitution which make Islam the state religion. Article 2 of the Kuwaiti Constitution and Article 3 of the Syrian Constitution specifically provide that *Shari'ah* "is a main source of legislation." Blaustein and Flanz, note 1 above. The majority of the constitutions of Muslim countries make Islam the state religion, while some of them add the specific provision that *Shari'ah* is a main source of legislation.
40. A. J. Peaslee, *Constitutions of Nations,* vol. I (the Hague, Netherlands: Martinus Nijhoff, 1974), 503.

religious law of Islam that is constitutionally sanctioned as the religion of the people, severely restricts liberty of conscience and formally discriminates on grounds of religion.

In view of this extremely serious ambivalence, it becomes imperative that the precise implications of religious liberty and the rights of religious minorities be authoritatively discussed and settled within the Islamic tradition. The Muslims are not to be allowed to treat religious minorities in this way because they believe that their own religious law authorizes them to do so. Otherwise, we would have to accept not only similar mistreatment of Muslim minorities in non-Islamic states, but also the complete negation of all the achievements of the domestic civil liberties and international human rights movements. If this type of argument is allowed, all forms and degrees of human rights violations, including torture and even genocide, may be rationalized or justified with reference to alleged religious or cultural codes or norms.

Cultural relativism can never be allowed to go this far. This cannot be justified today even if the above-mentioned principles of *Shari'ah* represent Islam's final word on non-Muslims. I do not believe, moreover, that these principles of *Shari'ah* are Islam's final word. I do believe that Islamic *Shari'ah* can be reformed from the fundamental sources of Islam to fully accommodate and even contribute to the further development of the current universal standards. In the following section I outline one way in which *Shari'ah* can be brought into full accord with universal human rights.

AN APPROACH TO MODERN *SHARI'AH*

To identify the roots of discrimination against non-Muslims and other similar problems, and to pave the way to their solution, we need to emphasize the basic distinction between Islam itself, as derived from the totality of its sources, and the actual historical experience of the Muslims which tended to emphasize certain aspects of Islam. The experience of the Muslims, like that of any other people, was shaped by the operative economic, social, and political forces at any given point of Muslim history. These same forces, however, were influenced by, and in turn influenced, Muslim religious law, the *Shari'ah*. At a deeper level of analysis one should look at the dynamics of the interaction between these existentialistic factors and the formal law. This fascinating study is not, however, the subject of this article. It is nevertheless important to note for our purposes here the complexity and interdependence of these two sets of factors because in this process lie both the modern problem and its answer.

The systematic analysis of the nature and actual development of *Shari'ah* clearly establishes the obvious fact that *Shari'ah* is not the whole of

Islam but rather the early Muslims' understanding of the sources of Islam. The basic sources of Islam are the *Qur'ān* and *Sunnah* (the living example of the Prophet's own life in accordance with the *Qur'ān*). When we look more closely at the process by which these two basic sources were used to develop *Shari'ah* we find the following significant facts.

First, the *Qur'ān* itself was revealed in two distinct but overlapping stages, the earlier stage of Mecca between 610 and 622, and the latter stage of Medina between 622 and 632.[41] The existence of these two stages is beyond dispute because the text of the *Qur'ān* itself indicates which chapters and verses were revealed in Mecca and which were revealed in Medina. Also beyond dispute is the clear difference in the nature and content of the two sets of revelations. While the earlier texts tended to be of general religious and moral content, the latter texts were clearly more specific and legalistic. This difference in the nature and content of revelation reflects the difference in the nature of the Muslim society and the role of the Prophet in the two stages. Following the statement of the basic underlying religious and moral norms of the Mecca stage, the Prophet set about establishing the first Muslim political state in Medina. In this way the *Qur'ān* in theory, and the Prophet in practice, had to respond to the concrete realities of establishing an Islamic state in seventh century Arabia. This process did not need to exhaust the whole of the religious and moral principles of Islam as established in the Mecca stage.[42] Seen in this light, the Medina model of the Islamic state was obviously a specific model in response to a concrete situation.

The second significant fact is that while the text of the *Qur'ān* was largely recorded during the Prophet's own lifetime and finally and authoritatively written by the time of his third successor, the *Khaliffa* Osman,[43] the *Sunnah* was not recorded until well into the second and third centuries of Islam. Through an elaborate process of authentication and selection, Muslim jurists established what they believed to be the true *Sunnah* of the Prophet by the third century of Islam. The majority of Muslims today accept those records as valid, although controversy continues as to the au-

41. Mecca is the Prophet's hometown in western Arabia where he started to receive and preach the *Qur'ān*. As a result of continued and mounting persecution of his followers, culminating in a conspiracy to kill the Prophet himself, he migrated with his followers to Medina, another town in western Arabia, in 622.
42. *Ayat al-ahkam,* the verses employed to develop *Shari'ah,* do not exceed one hundred, or at most five hundred, out of a total of over six thousand verses in the *Qur'ān*. The difference in the number of legal verses is due to differences in the criteria employed in identifying these verses.
43. Parts of the texts of the *Qur'ān* were written during the Prophet's own lifetime, but most of it was memorized by the Muslims themselves. The record of the whole *Qur'ān,* prepared during the reign of Osman, the third *Khaliffa* or successor to the Prophet, is now accepted by all Muslims to be the authentic text of the *Qur'ān*.

thenticity of some marginal traditions.[44] The importance of noting this problem in relation to the second sacred source of Islam is not to raise doubt as to the authenticity of the recorded *Sunnah* but rather to appreciate that the process of authentication and selection itself must have been affected by the limitations of both the transmitters and the collectors.[45] The transmitters must have tended to remember those aspects of the *Sunnah* which they understood best while the collectors must have tended to accept those aspects which seemed to be confirmed by their own perception of Muslim reality. The understanding of the transmitters as well as the acceptance by the collectors were in this way influenced by their own experience and circumstances. It would, therefore, follow that we should understand the available texts of authentic *Sunnah* in light of the actual process of its authentication and collection.

The third significant fact is that the *Shari'ah,* as a body of positive law, was developed by Muslim jurists in the second and third century of Islam. The raw material out of which *Shari'ah* was constructed was not, therefore, the pure *Qur'ān* and *Sunnah,* but rather the *Qur'ān* and *Sunnah* as already understood and practiced by generations of Muslims. Muslims are now agreed that the sources of *Shari'ah* are not only the *Qur'ān* and *Sunnah,* but also include *ijmá',* consensus, and *qiās,* analogy. The *ijtihad,* independent juristic reasoning, of the leading companions of the Prophet and the early jurists, has thus become a formative force in the construction of *Shari'ah.*

To note these facts is not to imply that *Shari'ah,* as perceived in its own historical context, was distorted or misrepresented by the early jurists. On the contrary, it is my firm conviction that *Shari'ah* has developed in the only way it should, and could possibly, have developed in that historical context. *Shari'ah* is the law of Islam for the Muslim community and must, therefore, be stated and interpreted by the Muslims themselves. The early jurists, in my view, did an excellent job and succeeded in serving the needs and aspirations of their community for centuries. By the same token, however, it should be open to modern Muslim jurists to state and interpret the

44. Mainstream Muslims, commonly known as *Sunnis,* accept the records of leading *Sunnah* collectors such as Bukhari and Muslim, as the true text of the *Sunnah* of the Prophet. *Shi'ah* Muslims and the followers of minor and other largely extinct schools of Islamic jurisprudence tend to emphasize other collections of *Sunnah.*

45. The main collectors of *Sunnah,* the Prophet's words and deeds, were *ibn Hanbal,* who died in 855 A.D.; *Bukhari,* who died in 869; *Muslim,* who died in 874; *ibn Majah,* who died in 886; *Abu Dawd,* who died in 888; *Tormozi,* who died in 892; and *Nasa'y,* who died in 915. When we note that the Prophet, whose *Sunnah* these jurists recorded for the first time, died in 632 A.D., we can appreciate that what they collected and recorded existed as oral tradition for at least two hundred years. The jurists employed sophisticated techniques for checking the credibility of the transmitters of the oral tradition of *Sunnah* and corroborating their reports. The collectors rejected what they believed to have been fabricated or uncorroborated and classified what they did include in terms of their own criteria of the strength or weakness of the chain of reporting and other corroborative evidence.

law for their contemporaries even if such statement and interpretation were to be, in some respects, different from the inherited wisdom.

I say in some respects because I do not conceive of all aspects of *Shari'ah* as open to restatement and reinterpretation. Belief in the *Qur'ān* as the final and literal word of God and faith in the Prophet Mohammed as the final prophet remain the essential prerequisites of being a Muslim. The prescribed worship rituals such as prayer and fasting, known as the five pillars of Islam, remain valid and binding on every Muslim. What is open to restatement and reinterpretation, I submit, are the social and political aspects of *Shari'ah*. Since both the social and physical environments have changed enormously from the time *Shari'ah* was developed, the law must also change in response to new circumstances. The basic requirement of such law reform is that it must be based on Islam's fundamental sources, namely the *Qur'ān* and *Sunnah*. Otherwise, the proposed reforms would be secular and not religious.

In light of this analysis, my thesis in relation to religious minorities in the Muslim context is as follows:

1. The status of non-Muslim religious minorities under *Shari'ah* is not consistent with current universal standards of human rights.

2. The current state of affairs cannot be justified on claims of Islamic cultural relativism. Muslims are not free to treat their religious minorities as they please unless and until the Muslim cultural norms are consistent with the relevant universal standards.

3. It is not only possible, but also imperative, that the status of non-Muslims under *Shari'ah* be reformed from within the fundamental sources of Islam, namely the *Qur'ān* and *Sunnah*. Such reform would at once be both Islamic and fully consistent with universal human rights standards.

These propositions and the analysis on which they are based are founded on the work of the late Sudanese Muslim reformer *Ustadh* Mahmoud Mohammed Taha.[46] *Ustadh* Mahmoud suggested that the fundamental and universal message of Islam is to be found in the *Qur'ān* and *Sunnah* texts of the earlier stage of Mecca. According to this Muslim reformer,

46. *Ustadh* Mahmoud has written extensively in Arabic. The English translation of his main book, *The Second Message of Islam*, prepared by the present author, will be published by Syracuse University Press in the spring of 1987. *Ustadh* Mahmoud was executed by former President Nimieri of Sudan for his opposition of what he regarded to be premature and arbitrary application of *Shari'ah* in the Sudan in 1983–1984. *Ustadh* Mahmoud maintained that *Shari'ah* must be reformed along the lines he suggested before it can be applied today. On the circumstances of the trial and execution of *Ustadh* Mahmoud see An-Na'im, note 21 above.

those texts were not enacted into law and did not provide the basis of the first Islamic state of Medina because the concrete socioeconomic and political circumstances of seventh century Arabia did not permit their practical implementation. Those earlier sources, argued *Ustadh* Mahmoud, were not lost forever but rather postponed until such time as it would be possible to enact them into law. Citing *Qur'ānic* verses of the Meccan era which support complete freedom of choice and prohibit any degree of coercion of non-Muslims,[47] he concluded that the modern law of Islam, modern *Shari'ah,* should not authorize discrimination against non-Muslims in any degree, shape, or form. In this way, all citizens of a modern Islamic state must enjoy full rights of citizenship, regardless of religion or belief.

As far as one can see from the available Muslim literature, the specific nethodology proposed by *Ustadh* Mahmoud seems to be the most viable and effective way of achieving complete respect for the rights of religious minorities under Islamic law. Needless to say, one is equally open to accept any other methodology which is capable of achieving the same results. The object of modern Islamic law reform should be to remove all discrimination against non-Muslims and legally guarantee complete freedom of conscience and belief. Any reform methodology that can achieve this objective is welcome.

CONCLUSION

The international human rights movement has succeeded in establishing universal human rights standards for religious minorities based on moral as well as pragmatic arguments. Faced with these arguments, modern Muslim countries have had to participate in the formulation and adoption of these standards, not only at the international level, but also at the regional and national levels. Nevertheless, extremely serious tensions exist between these standards and the Muslims' historic religious law, *Shari'ah.* Since the Muslims cannot, and should not be allowed to, justify discrimination against and persecution of non-Muslims on the basis of Islamic cultural norms, the Muslims themselves must seek ways of reconciling *Shari'ah* with fundamental human rights.

The choice of the particular methodology for achieving this result must be left to the discretion of the Muslims themselves. A cultural relativist position on this aspect of the problem is, in my view, valid and acceptable. I would argue, however, that no cultural relativist argument may be allowed to justify derogation from the basic obligation to uphold and protect the full human rights of religious minorities, within the Islamic or any other cultural context.

47. Such verses include chapter 16 verse 125 and chapter 18 verse 29, *Qur'ān,* note 33 above.