Western Democracy and Islamic Tradition: The Application of Shari'a in a Modern World

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INTRODUCTION

While most scholars would agree that minimal human rights standards exist, the correct implementation of such standards is a topic of hot debate. In light of recent international conflicts, the relationship between religion and human rights, and in particular Islam and human rights, is a pressing topic. Some political commentators favor applying Western human rights principles on a universal scale; however, using this singular view to determine
which rights deserve primary focus may impinge upon other fundamental societal rights.

The better view is to allow each community, including those that are Muslim, to build upon its inherent moral base, rather than to impose outside morals that may or may not reflect the popular consensus. Nearly all successful assertions of human rights are achieved because of struggles from within, not from without. Admittedly, allowing religious discourse into political debate may have a tendency to politicize religious thought. Nevertheless, the international community can mitigate this tendency by opening a forum for all religious views.

For most Muslims, Islam is a religion that allows and requires free speech, democratic participation, and tolerance. Several notable

1. See, e.g., Michael G. Peletz, Islamic Modern: Religious Courts and Cultural Politics in Malaysia 3 (2002) (claiming that Malaysian Islamic courts play a key role both in defining Islam's role in modern society and in creating a proving ground for ongoing struggles concerning ethnic groups, religious communities, social classes, and political parties). Peletz characterizes Islam in Malaysia as quite pluralistic. Id. at 6.


4. See id. at 19; see also Gamal M. Badr, A Survey of Islamic International Law, in Religion and International Law 95, 99 (Mark W. Janis & Carolyn Evans eds., 1999) (arguing that Islam may reinforce Western ideals by emphasizing higher ethics and the concept that an individual's own efforts are more important than the individual's membership in a select group, or the individual's reliance on another's supreme sacrifice). Badr maintains that Islamic laws have contributed to international law in ways implicating human rights, for instance, in the practice of treating aliens as individuals rather than as subjects or foreign nationals. Id. He further contends that "[c]ontemporary Islamic legal thought has no trouble subscribing to all current principles of international law"
nations, including Israel, India, Malaysia, and Nigeria, create a balance between religious group rights and other rights by allowing religious communities to govern certain affairs of their members. In such countries, religious law governs only in areas of personal and family law, such as marriage, divorce, and inheritance, where individuals consider their right to religious autonomy and privacy paramount.

The success of these legal systems is mixed. As an outsider in these countries, my personal perception of such a government organization seems a poor baseline for determining any such scheme's effectiveness. Nevertheless, outsiders have exerted considerable influence on the world view of these legal systems, especially in the Muslim world. For instance, in the decision Refah Partisi (The Welfare Party) and Others v. Turkey, the European Court of Human Rights suggested that a system in which Islamic religious courts adjudicated personal issues for Muslims in an Islamic country could never be consistent with democracy or the protection of basic human rights.

This case left open an important question of whether Islamic religious courts do in fact adequately protect basic human rights. An even more important question, however, especially as Muslims throughout the world attempt to exercise their rights to religious freedom and self-determination, is whether Islam is even compatible with international conceptions of human rights. While the Western world is enamored with individual rights, much of the rest of the

and may actually "enrich international law with its own contributions." Id. at 100-01.


6. See id.

7. See Refah Partisi (The Welfare Party) and Others v. Turkey, 35 Eur. Ct. H.R. 56 (2001) (holding that that the Turkish Party was justified in dissolving an Islamic political party whose aims were inconsistent with a democratic society), aff'd 13 Feb. 2003, available at 2001 WL 1819833. The court found that the legal system proposed by Refah would actually unfairly separate citizens based on their religious beliefs. Id. at 85-86.
world, including the Islamic world, appears to value group rights more than individual rights. \(^8\)

To determine how a system of Islamic religious courts would fare with regard to rights protection, the first inquiry must be to determine what sort of rights are worthy of protecting. Thus, Part I of this paper considers the notions of individual and group rights, in particular focusing on the compatibility of Islamic notions of rights with Western views. Following this initial analysis, Part II looks at some of the problems inherent in systems where religious law governs religious adherents, focusing on Israel as a case study. Part III considers the particular difficulties with the application of the Islamic law of Shari‘a in a predominately Muslim country. Part IV concludes that, while difficulties are inherent in any system where religious law governs, the answers to reconciling religion and human rights must be found within religion rather than without. Considering the diverse views of Muslims on the compatibility of Islam with international human rights, the best solution to incorporating Islam in democracy appears to be to create a forum for debate both inside and outside the religion.

I. THE BALANCE OF GROUP AND INDIVIDUAL RIGHTS IN A RELIGIOUS COURT SYSTEM

A. THE BALANCE OF RIGHTS

One difficulty in marrying Islamic ideals with Western notions of democracy is that Western and Islamic societies possess somewhat differing notions of what constitutes core human rights. \(^9\) Under a simplistic, general view, one can categorize human rights into two

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8. See Donna E. Arzt, Heroes or Heretics: Religious Dissidents Under Islamic Law, 14 Wis. Int’l L.J. 349, 371 (1996) (discussing the difference between the importance of individualism in Western culture and the emphasis on community welfare in Islamic societies).

9. See Muhammad Tal‘at Al-Ghunaimi, Justice and Human Rights in Islam, in JUSTICE AND HUMAN RIGHTS IN ISLAMIC LAW 1, 5-6 (Gerald E. Lampe ed., 1997) (comparing major Western human rights treaties with Islamic human rights instruments and explaining that in the West, human rights only benefit the inhabitants of those countries that are parties to international conventions, whereas Islamic law extends the benefits to all humankind).
classes: individual rights and group rights. Individual rights include those that protect a person's individual autonomy and freedom, such as freedom of expression, freedom of conscience, and freedom to engage in ordinary occupations of life. Group rights are those that protect a set of people, such as the right to self-determination and the rights of minority groups. Although, as one can readily imagine, these rights are inextricably linked to each other, general governmental trends emerge based on which type of right a given community emphasizes.  

For instance, Western democratic models tend to align themselves with a strong belief in the importance of individual rights, seeing such rights as being "inherent in man's existence." Some Western commentators explain that a society can only truly realize human rights through a liberal democracy that emphasizes the rights of the individual. On the other hand, under a traditional Islamic model, the primary purpose of human rights is collective— that of benefiting all of mankind. Thus, individual rights are tied to the individual duties to society as a whole.

The Islamic concept of rights should not seem foreign even to Western individualists, however. While individual rights may be central to Western society, it is well understood that a person may only exercise his or her individual rights to the extent that the exercise of those rights does not impinge upon the individual rights

10. See Arzt, supra note 8, at 371-72 (explaining that because Islam places great emphasis on community, dissent is often considered contrary to the Islamic faith).


12. See Lisa Anderson, Islam and Human Rights: Is There a Right to Be Wrong?, in Under Siege: Islam and Democracy, supra note 2, at 41, 48 (arguing that human rights and democracy are "inextricably linked" and that only democracy, which "assumes self-governing individuals," fosters the exchange of information and free expression).

13. See Al-Ghunaimi, supra note 9, at 6 (comparing Western and Islamic conceptions of human rights and noting that under the Islamic model "the benefit of human rights protections extend to all humankind.")

14. See id. (discussing the reciprocal process whereby the state and individual owe human rights and human duties to each other, respectively).
of others. Furthermore, the realization of individual rights, even in
Western culture, occurs only as individuals relate to their society and
surroundings.\textsuperscript{15}

A society cannot achieve justice by neglecting to take account of
both models of human rights.\textsuperscript{16} However, no perfect recipe exists for
mixing the two. Somewhere between the overemphasis of either
group or individual rights exists an area of permissible regulation
where a society can achieve justice, despite differences in the precise
balance. The goal should be for each nation to find a balance
between individual and group interests that reflects its own particular
morality.

A nation seeking the protection of human rights will never be
successful unless it takes into account its own unique values and
culture – its morality. In any society, "[p]ower is sustained only on a
moral basis."\textsuperscript{17} Building government upon the prevailing morality
opens the door for constitutionalism and stability.\textsuperscript{18} The public

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\item \textsuperscript{15} See James Crawford, The Right of Self-Determination in International Law: Its Development and Future, in PEOPLE'S RIGHTS 7, 8 (Philip Alston ed., 2001) (explaining the international law tradition that individuals “exist neither in a pure vacuum nor in a pure flux, but in a society”).
\item \textsuperscript{16} See Muhammad Fathi Al-Dirini, Justice in the Islamic Shari'a, in JUSTICE AND HUMAN RIGHTS IN ISLAMIC LAW, supra note 9, at 43, 44 (asserting that the overemphasis of either group rights or individual rights to the exclusion and detriment of the other results in a loss of justice). A society emphasizing an individual’s personal rights without considering the impact of that individual’s rights on society as a whole will succumb to selectivity and factionalism. \textit{Id.} A society neglecting individual rights in favor of group rights will lose its ability to provide justice for individuals. \textit{Id.} The better way to conceive of individual and group rights is to recognize their interrelation. Thus, individuals exercising their individual rights have a duty to respect the interests of others, regardless of whether they are other individuals or society at large. \textit{Id.} Because public and private interests are inextricably tied to one another, neither right can take precedent. \textit{Id.} Islamic scholars who seek to illustrate how Islam can protect individual rights while still protecting the public interest rely upon this conception. \textit{Id.}
\item \textsuperscript{17} Noor ul-Amin Leghari, The Concept of Justice and Human Rights in Islam, in JUSTICE AND HUMAN RIGHTS IN ISLAMIC LAW, supra note 9, at 51, 52.
\item \textsuperscript{18} See \textit{id.} (discussing Plato’s placement of “the good” at the top of his hierarchy of ideas and explaining that power gained using immoral, unjust means “cannot be maintained over time and is consequently contrary to the evolution of society”); see also JOHN R. ROWAN, CONFLICTS OF RIGHTS: MORAL THEORY AND SOCIAL POLICY IMPLICATIONS 5 (1999) (explaining that societies that consider
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morality, or "what is right and proper," informs positive law, which enforces what is right to the extent it bears upon an individual's relationship to society. In the ideal sense, then, when tension between law and morals does occur in a democratic government, public opinion can step in to urge changes and bring the law more in line with the current prevailing morals.

A government that allows public morals to inform positive laws adheres more closely to international law notions of human rights than a government that imposes morality from above. Human dignity requires personal moral choice. For instance, although the classic Western model protects individual choice even when group interests do not benefit from that choice, individual choice often expresses itself through the group efforts of political parties and other interest groups. Group desires inform democratic freedoms. Likewise, in the non-Western world, only by drawing upon its own particular background and circumstances can any nation determine how best to balance group and individual rights.

themselves enlightened have a tendency to find their constitutions "morally justified").

19. Leghari, supra note 17, at 52.

20. See ROWAN, supra note 18, at 5 (discussing the philosophical relationship between morality and law and asserting "that which is morally required . . . should inform that which is legally required").

21. See id. (arguing that the United States adopted Fourteenth Amendment of the United States Constitution in large part because of the moral belief that the Constitution, as previously written, failed to adequately protect individual rights).

22. See ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 160 (3d ed. 1999) (stating that international human rights law is based on the idea that "individuals are the best judges of their own interests, because individuals ultimately have greater insight into what they need to be happy than do any other persons or institutions").

23. See id. (declaring that part of human dignity and self-respect is founded upon freedom of choice, which is a fundamental right).

24. See id. (stating that international law favors the protecting individual choice over group or institutional choice, even though the expression of choice may be occur through a collective forum).
B. RIGHTS IN ISLAM

"[T]he human rights movement has met with a mixed and sometimes hostile reaction in the Muslim world." Human rights under Islam are founded on a long history of traditions and religious practices and only sometimes correspond to contemporary Western notions of human rights. Thus, nations who wish to integrate Islamic ideals into their modern democratic governments may find themselves at an intersection between apparently contrary policies. Often human rights under international norms and human rights under Islam are reconcilable, but a tension persists and requires both the international community and Muslim nations to reconsider whether their particular paradigms reflect their actual beliefs.

As the foregoing overview of rights suggests, a society is likely to be more effective in discovering a working balance between group and individual rights if it draws the balance from its own unique morality. One difficulty with combining Islamic values with Western rights terminology is that those who attempt to do so often try to effect change by placing Western terminology onto existing Islamic traditions, rather than creating a new human rights terminology.

25. David L. Neal & Ashraful Hasan, Distinctions Between Muslims and Dhimmis: The Human Rights of Non-Muslims Under Islamic Law, in HUMAN RIGHTS DILEMMAS IN CONTEMPORARY TIMES: ISSUES AND ANSWERS 9, 10 n.4 (Ashraful Hasan ed., 1998) (noting that some jurists believe Islamic law is incompatible with international law and the Universal Declaration on Human Rights while others argue that because no agreement exists among Muslims, nothing precludes them from adopting international norms).

26. See id. at 10–11 (asserting that Islamic traditions and religious beliefs provide for a "rich network of rights" under Islamic law, which occasionally reflects the rights identified by contemporary international law).

27. See id. at 11 (stating that due to certain conceptual tensions between Islamic law and international law, the dilemma underlying the incorporation of Islamic principles into the modern nation-state is difficult to resolve). This problem has existed since the inception of the Universal Declaration on Human Rights. Id.

28. See id. at 11–12 (arguing that the international community must "consider what Islamic laws and Muslim nations define as rights, be they human, political, or social," and the Muslim community must "reflect on whether current interpretations of Islamic law remain true to the universality of the Prophet’s message and whether Islamic law can learn and draw from the norms and standards of international human rights").
derived from Islam. While it is certainly possible that traditionally Western notions of democracy can be compatible with Islamic principles, a system of rights governance will last only if based upon the prevailing morals of the people it governs. Thus, Islamic scholars would be better off examining their own morals, rather than merely studying Western notions of democracy. This section considers the importance of rights and the role of the state under an Islamic model.

While the premise of modern Western democracy is an assumption that self-governing individuals are a “necessary, though not sufficient, condition for the basic institutions of liberal democratic politics,” Islam begins with the premise that individuals have obligations to each other, without which individual rights are unachievable. Individual and group rights are capable of mutually reinforcing each other; a person can fulfill his or her duty to protect the rights of others without undermining his or her individual rights.

This relationship between rights and duties under Islam stems from the idea that human rights are a divine endowment mankind has

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29. See Mayer, supra note 22, at 62 (describing the confusion Islamic human rights scholars encounter while dealing with Western-derived notions of human rights). Mayer explains that these scholars “have no sure grasp of what the concerns of human rights really are.” Id.

30. It should be noted that the use of the word “Western” to describe a particular strand of democracy is by no means intended to convey the impression that other viable strands of democracy do not, or cannot, exist.

31. See Anderson, supra note 12, at 48 (indicating that in the West the concept of democracy has assumed “self-governing individuals”).

32. See id. (noting hypocrisy in the fact that “[m]any political movements and actors in the Islamic world today describe themselves as democrats, while repudiating human rights”).

33. Id. Anderson suggests that “these premises... are not consistent with liberal democracy.” Id. Nevertheless, she admits that “other monotheistic traditions, including Roman Catholicism,” share such premises. Id.

34. See Leghari, supra note 17, at 61 (indicating the codependent nature of both fulfilling responsibilities towards others and maintaining individual rights under the Islamic model).

35. See id. (“Undue insistence on one at the cost of the other very often upsets the delicate balance so necessary in social morality.”).
possessed since its creation. However, at the time of their creation, human beings received not only these rights, but also “a code of social conduct which contained a clear concept of... obligations.”

Included in this code of conduct is the duty for Muslims to represent “justice in its noblest form” by showing compassion and concern for all people. If this “right of Allah” conflicts with an individual’s private interests, the public good and the welfare of others take precedence.

Because rights are a divine investiture, the state can neither grant nor remove such rights; consequently, it may only protect and enforce them. The state possesses no greater authority than the individuals it governs and is merely a “coexistent recipient of divine injunctions.” The state’s goal is to prioritize the public interest, while infringing upon individual rights as little as possible. Each

36. See id. at 54–55 (discussing the idea that human rights are conferred on an individual “on the basis of his inclusion in the universal brotherhood of mankind”); see also id. at 56 (“Since sovereignty in Islam belongs to Almighty Allah, fundamental rights emanate from Him.... The State has neither the unilateral authority to award these rights nor the jurisdiction to abrogate, amend, or suspend them.”).

37. Id. at 54; see also id. at 54, 61 (citing the Qur’an 2:31–33 relating to issues of morality).


39. See id. (outlining the ways in which the Shari’a classifies public duties, including the duty to show regard for public interest).

40. Id.

41. See id. (describing the general hierarchy of public over individual interest established when individual rights collide with public duties); see also, Anderson, supra note 12, at 47–48 (indicating the precedence the group or family takes over the individual’s desires).

42. See Leghari, supra note 17, at 54–55 (noting that because human rights are conferred to an individual at birth, they are considered inalienable and thus the state cannot revoke them). Such a concept should not be entirely foreign to Western notions of fundamental rights and natural justice. See, e.g., Ruston, supra note 14, at 23–24 (discussing the Western understanding of basic human rights and explaining that its foundation rests in the idea that such rights are bestowed upon “every people on earth” since all were created in the image of God).

43. Leghari, supra note 17, at 56.

44. See Al-Dirini, supra note 16, at 44 (“It is obvious, however, that in balancing interests, the State will inevitably give first priority to the public interest, while abrogating the interest of the individual to the least extent possible.”).
Muslim has the duty to assist the state in the realization of both types of rights.  

In Islam, no dichotomy exists between law, morality, and human rights. Thus, in an ideal Islamic state, "justice" is more than "an abstract and philosophical intellectual concept"; it is a goal reached through legislation and other rules that "promote the moral and material needs of society." Additionally, justice turns on whether an act corresponds to or contradicts with the tenets of Islam. God has perfect knowledge and wisdom; thus, divine revelation is viewed as a more reliable source of knowledge than fallible human reason. Laws "are rooted in compelling social reason and aim at the achievement of a basic, collective good and the welfare of human beings."

Despite this reliance on morality in Islamic society, whether an Islamic state is necessary to "the establishment of a coherent relationship among religion, ethics and law to achieve justice" is debatable. While the popular belief is that Muslims require such a state, some scholars argue that a theocratic Islamic regime is unnecessary and would even be contrary to notions of Islamic justice and law. In many instances, attempts at Islamic theocracies have

45. See id. at 48 (outlining the necessary balance between individual rights and public duties in Shari'a law).

46. See Liaquat Ali Siddiqui, The Conception of Justice: Western and Islamic, in JUSTICE AND HUMAN RIGHTS IN ISLAMIC LAW, supra note 9, at 23, 41 (indicating that in Islam, rather than dividing law, morality, and rights into separate categories, the "theory of justice explains everything in the light of one divine scheme").

47. Al-Dirini, supra note 16, at 44.

48. See Siddiqui, supra note 46, at 29 ("Allah, the Almighty, is the supreme law-giver in Islam . . . . Therefore, His direction is bound to be just, although we do or do not realise the meaning and purpose of these directions by our limited knowledge.").

49. See id. at 41 (citing QUR'AN 2:32 and explaining why the Islamic conception of justice cannot distinguish law, morality, and rights from one another).


51. Id. at 67.

52. See id. (arguing that while "justice" in Islam is a religious or ethical value, a society that is subject to legislation or governance by the clergy cannot realize
resulted in fewer individual freedoms not because of a failing of Islam itself, but because allegedly devout leaders have placed their personal, individual rights above the good of the community.

In any case, for the community to follow divine revelation requires someone must determine what constitutes revelation and how to interpret revelation received – thus, the development of the various schools of Islam and the diversity in how different Islamic countries interpret the balance between law and morality.53 This heterogeneity merely evidences the ability of Muslims to engage in a religious discourse. Applying human rights norms under Islamic law depends on human reason and the ability for Islam to incorporate traditional ideals into the modern public ethic.54

In fact, Islam shares several ideals with Western notions of justice, including human dignity, fundamental human rights, ideas of natural justice, and the rule of law.55 Even though the Western, developed world appears to currently protect individual rights more effectively than the Islamic world, one could argue that this protection is not due to the human rights interpretations of Western countries but due to the stability of the constitutional regimes of those particular countries.56

that value). Islam stresses “the establishment of a coherent relationship among religion, ethics and [positive] law to achieve justice.” Id.


54. See id. at 78 (“Application of concepts of Islam displays different manifestations in different societies and remains valid for every society and age”); cf. ROBERT W. HEFNER, CIVIL ISLAM: MUSLIMS AND DEMOCRATIZATION IN INDONESIA 9 (2000) (discussing the influence of congregational Christianity on the development of Western democracy).

55. See Siddiqui, supra note 46, at 41–42 (comparing and contrasting Western and Islamic conceptions of justice); see also Bardakoglu, supra note 50, at 69 (“It may be asserted that the principles of natural law, as developed throughout the ages, forming the basis of legal thought in the Western world, is in harmony with the general principles of Islamic religion.”).

56. See Leghari, supra note 17, at 58 (citing the American constitutional structure as one example of a constitutional regime that has successfully fought for the preservation of individual rights).
In any case, Islamic countries will only be able to achieve democracy by examining their notions of morality and incorporating those notions into a system that protects the rights of both groups and individuals.\textsuperscript{57} Even Muslim democrats that do not desire an Islamic state "insist that society involves more than autonomous individuals[;] ... [it involves the kind of] democracy that encourages citizens to respect the rights of others as well as to cherish their own."\textsuperscript{58}

II. RELIGIOUS COURTS IN THE NON-MUSLIM WORLD

In countries where Islam is not the prevalent religion, the use of religious law to govern the personal affairs of religious adherents has had mixed success.\textsuperscript{59} One recurring problem in such countries is that by granting religious groups the autonomy to govern the personal affairs of their members, religious coercion that infringes upon the citizens' individual rights is a likely outcome.\textsuperscript{60} While religious groups argue that their right to self-determination necessitates allowing them to establish their own systems of law with regard to personal status issues, some members of the community may feel forced to live up to religious standards in which they do not fully believe.\textsuperscript{61}

An illustrative example is Israel, where religious courts have existed since Ottoman times and religious tribunals adjudicate

\textsuperscript{57} See Hefner, supra note 54, at 13 (noting that even a "real-and-existing democracy must always find ways to accommodate social as well as individual goods").

\textsuperscript{58} Id.


\textsuperscript{60} See Ariel Rosen-Zvi, Family and Inheritance Law, in INTRODUCTION TO THE LAW OF ISRAEL 75, 101 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995) (discussing the role of religion in the family law arena in Israel).

\textsuperscript{61} See infra Part III.C for a further discussion of conversion in Islam (explaining that while this problem seems to have a clear answer – allow conversion - in faiths such as Islam some adherents find such a course of action unacceptable).
personal matters. In Israel, not all religious communities are even recognized by the State or have independent religious tribunals. Except in limited circumstances, non-believers and those who do not belong to a recognized religious group suffer hardships in matters of personal status because no secular law exists regarding marriages, no secular officials have authority to perform marriages, and civil courts have little or no jurisdiction over marriage and divorce.

Second, and even more important, inequities may arise even within particular religious communities. For instance, in Israel, members of non-Orthodox sects of Judaism in particular oppose the power of Jewish rabbinical courts because they are controlled by the Orthodox Jewish community, despite the fact that Judaism in Israel is very heterogeneous when contrasted to other Israeli religions. Additionally, non-religious Jews resent being subject to the


63. See Ruth Lapidoth, Freedom of Religion and of Conscience in Israel, 47 Cath. U. L. Rev. 441, 462 (1998) (discussing the "recognized" and "unrecognized" religious communities in Israel). The recognized religious communities include Islam, Eastern Orthodox, Latin Catholic, Gregorian Armenian, Armenian Catholic, Syrian Catholic, Chaldean Uniate, Greek Catholic-Melkite, Maronite, Syrian Orthodox, Druze, Episcopal-Evangelical, and Baha'i. Id. Notable excluded communities include Christian Monophysites, Protestant-Lutherans, Baptists, and Quakers, as well as other religions that form a part of the Jewish community. Id.

64. See id. at 464 (noting the disadvantages to non-believers and members of unrecognized religious groups)

65. See id. (stating that while the Jewish population in Israel is quite heterogeneous, the State of Israel has "in fact given the Orthodox movement a monopoly over official activities, namely the registration of marriages and jurisdiction in matters of personal status [which] has engendered resentment from members of other movements").

66. See id. at 463–64 (discussing some of the issues that have caused controversy in the state of Israel); see also Strong, supra note 59, at 156 ("Because the Orthodox have traditionally controlled the rabbinical courts, they have been able to impose their version of Judaism on Israel almost uniformly, despite the fact that Orthodox Judaism is not the majority Jewish denomination in Israel.")
rabbinical courts’ exclusive authority in certain issues, “consider[ing] it a case of religious coercion.”

Depth of belief has no part in a person’s being subject to the jurisdiction of a religious court. For example, regardless of their status as true believers, agnostics, or atheists, Jewish courts pass judgment on ethnic Jews. Because civil court jurisdiction in matters of marriage and divorce exists only in rare circumstances, individuals must go through the religious system to establish a family unit. Although Israeli Jews may still leave Israel to be married, thus avoiding Orthodox requirements, doing so imposes a heavy financial burden that conflicts with the fundamental right to establish a family. Additionally, if a matter concerning personal status arises in a civil case before a civil court with jurisdiction, that court will apply religious law rather than civil law.

Israel attempts to protect its citizens from overreaching religious courts by providing a right to appeal, both within and without the religious court system. First, a party may appeal decisions to higher

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67. Lapidoth, supra note 63, at 463.
68. See, e.g., Strong, supra note 59, at 139 (stating that “[r]abbinical courts exercise exclusive jurisdiction over all Jews and apply Halachic law, regardless of whether the persons before them practice or believe in the tenets of Judaism.”).
69. See Steiner & Alston, supra note 62, at 495 (explaining that even secular, non-believing Jews and Muslims in Israel must be married under the relevant religious law).
70. See Strong, supra note 59, at 139 (commenting that religious courts have exclusive jurisdiction over issues of marriage and divorce as well as concurrent jurisdiction with civil courts regarding other matters of personal status). However, because Israeli law allows members of non-recognized religious communities to obtain a divorce in the civil courts, the law results in the “absurdity” that members of unrecognized religious groups, such as Protestants, may only marry in Israel under the laws of another religious group (usually Protestants are married by Catholic priests), but they may still dissolve their marriages in the civil courts. Id.; see also Rosen-Zvi, supra note 60, at 101 (noting that civil courts are unsure of what law to apply to those persons who are not members of recognized religious communities).
71. See Strong, supra note 59, at 156–57 (highlighting the challenges of trying to avoid Orthodox rites).
72. See Steiner & Alston, supra note 62, at 495 (noting that religious law often takes precedence over civil law in matters regarding personal status).
73. See Moe, supra note 3, at 7–8 (discussing the proposed pluralistic legal system in Turkey). Nevertheless, non-religious Jews would probably find this
Second, a party may also appeal religious court decisions to the High Court of Justice ("High Court").\textsuperscript{75} Although the High Court's power of review is confined statutorily to reviewing jurisdictional issues, it also reviews violations of natural law principles, procedural rules, and judicial trust and ethics principles that apply to civil law judges. The High Court may also review the religious court's disregard of laws which the High Court has interpreted to specifically apply to religious courts.\textsuperscript{76}

However, errors in applying religious law are not appealable in civil courts and the High Court "usually refrains from intervening pursuant to its restriction policy concerning review of judgments of specific professional tribunals."\textsuperscript{77} Thus, the portion of a religious group with control and influence in appointing religious judges, which in the case of Judaism is the Orthodox Jewish population, may control the path of the law.\textsuperscript{78}

\textsuperscript{74} See Stephens, supra note 62, at 5 (noting that both the Muslim and Rabbinic court systems have established courts of appeal, while among the Christian courts only the Greek Orthodox system has an established appellate court system); see also SHIMON SHETREET, JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY 106-07 (1994) (stating that the Rabbinical Court of Appeals was somewhat controversial, at least at the time of its establishment, among Orthodox Jews, who believed that Rabbinical Court decisions should be final).

\textsuperscript{75} See SHETREET, supra note 74, at 106 (discussing the appellate procedures of the religious courts in Israel).

\textsuperscript{76} See Rosen-Zvi, supra note 60, at 90 (commenting on judicial control over the religious courts in Israel).

\textsuperscript{77} SHETREET, supra note 74, at 106; see also Stephens, supra note 62, at 6 (stating that "religious courts can control their decisions because there is no appeal to civil courts for an error in the application of religious law.").

\textsuperscript{78} See Stephens, supra note 62, at 6-7 (indicating that the influence of Orthodox Judaism results in difficulties for other Jewish groups similar to those experienced by Israelis unaffiliated with any religious group). For instance, the Orthodox Jewish courts have prohibited marriages with members of other Jewish communities, even though such restricted communities are recognized as Jews by all other members of the faith. Id.
This system may coerce individuals into adhering to religious views that they do not espouse. While allowing religious tribunals to determine matters of personal status for those within their fold arguably grants such religious groups autonomy to create a religious environment, in reality, for the Jewish population, the religious sect with the most power effectively determines the meaning of the religion for all adherents. Thus, Orthodox Jews, who have a monopoly on Rabbinical law, can effectively “impose halachic principles on all Jews within the State of Israel, whether they personally believe in Orthodox Judaism or not.”

Furthermore, such coercion seems to serve no effective purpose other than to allow Orthodox Jews the ability to fulfill their perceived “religious responsibility to nonreligious Jews.” The majority suggests that infringing upon the rights of minority groups “is necessary to protect the morals of the State or the religious character of the nation.” However, those Jews who are devout and wish to be part of the community will conform to religious rules by choice, not needing secular, civil retribution to ensure conformance. It appears the only remaining reason for requiring status questions, such as marriage, to be determined under Rabbinical law is to “coerce non-Orthodox Jews into behaving in accordance with the Halacha.” Such reasoning is contrary to fundamental freedom of religion principles that should exist in any democracy.

Thus, the religious court system as it currently exists in Israel may actually hinder, rather than aid, religious autonomy by requiring minority religious groups to take part in the larger group’s collective

79. Strong, supra note 59, at 158.
80. Id.
81. Id. at 197. Such a view suggests that “the moral and religious sensibilities of their citizens are harmed by knowing that others are acting in an immoral manner.” Id.
82. See id. at 158 (noting that religious Jews will act in accordance with religious tenants by choice).
83. Id.
84. See Steiner & Alston, supra note 62, at 493 (stating that the State of Israel guarantees freedom of religion and democracy).
morals rather than following their own consciences. Discrimination results from such a system despite the attempt to create “separate but equal religio-legal systems within the State” because, unless they want to experience burdens on their religious practice, individuals may only belong to recognized religions.

One could argue that the majority should simply establish opportunities “for dissenters to exit the culture.” Nevertheless, aside from “divid[ing] the nation by segregating it into discrete religious territories,” such an attempt would be pragmatically unreasonable. Religious observance is as varied as the individual. To truly grant freedom of religion every individual needs an automatic right to opt out of the religious court system. Creating such a right would undermine the very reasons for the religious court system in the first place.

Even assuming that a society could implement a system in which religious groups could not exert undue political coercion and influence, social coercion will still exist in religiously-dominated nations. For instance, in India’s Shah Bano case, a husband abruptly divorced his wife of forty years. The Court awarded the

85. See id. at 495 (noting that religious courts have exclusive jurisdiction over citizens regardless of religious affiliation).
86. Strong, supra note 59, at 197.
87. Id. at 198.
88. Id.
89. See id. (suggesting that if the majority provided the dissenters with a form of escape, it would further divide the nation resulting in inherent instability and violence between the groups).
90. See id. (realizing that those with religious preferences different from those of the prevailing majority should have the option of exiting the current systems).
91. See Strong, supra note 59, at 197 (implying that secularism further divides nations and will ultimately lead to internal instability and violence).
92. Admittedly, it may be difficult to eliminate such social coercion, and a discussion of such elimination may be beyond the scope of this paper. Nevertheless, a system where people are divided on religious grounds may tend to reinforce differences that are difficult to overcome when compared to the geographical divisions that occur in most democratic societies.
93. See Moe, supra note 3, at 8 (summarizing the facts and holding of the Shah Bano case); see also Madhavi Sunder, Piercing the Veil, 112 YALE L.J. 1399, 1427-28 (2003) (discussing the controversy surrounding the case because it
wife alimony and her husband appealed to India’s Supreme Court, alleging that he was not obligated to pay because he fulfilled his duties under Muslim Personal Law. In 1985, the Supreme Court of India affirmed the lower court’s ruling by relying on “a provision of the Criminal Procedure Code stipulating ‘the maintenance of wife, children and parents.’”

Nevertheless, after the Court decided Shah Bano, the ruling political party, the Congress Party, introduced the 1986 Muslim Women (Protection of Rights in Divorce) Act, that in effect reversed the Supreme Court’s judgment by requiring “a divorced Muslim women’s former husband only to return the Mahr and pay maintenance during the period of iddat.” Thus, despite the Supreme Court’s attempt to protect the wife’s individual rights, the cultural norms of the majority regarding maintenance prevailed in the end.

III. RELIGIOUS COURTS IN THE MUSLIM WORLD

While tensions between group and individual rights clearly exist in any system of religious courts, this tension is even more apparent in

contradicted previous lower court rulings affirming a husband’s right to support his ex-wife for only three months after the divorce).

94. See Moe, supra note 3, at 8-9 (demonstrating the conflict between Muslim and secular law in India); see also Sunder, supra note 93, at 1427 (noting that the Hindu judge in the Shah Bano case expressly rejected Muslim law in his ruling).

95. Moe, supra note 3, at 9.

96. See HENRY J. STEINER & PHILIP ALSTON, supra note 62, at 509 (asserting that the Congress Party was motivated by its conclusion “that the judgment was a political liability for it”). The passage of this act in fact intensified rather than resolved the problems created by the Shah Bano judgment. The Indian government continues the process of drafting a uniform civil code covering these matters to satisfy feminists and progressives, while the Hindu political right has also pressed on the issue of a uniform civil code for its own political reasons. Leaders of the Hindu right talked of the offensive stand of the Muslim community which opposed the Shah Bano judgment, and argued that the uniform civil code was a vital means of protecting the national sovereignty.

Id.

97. See id. at 510 (emphasizing the importance and often controlling value of cultural norms over codified law).
the Islamic world. As discussed above, Islam strongly emphasizes the duties of members towards society, rather than the individual rights members gain from society. As a result, a danger exists that individuals will not achieve the full realization of individual rights.

In particular, there is a risk of state mistreatment with respect to the non-Muslims and Muslims who wish to convert away from the Muslim faith. This section discusses the Islamic law of Shari’a and addresses each of these potential problems.

A. BACKGROUND: THE LAW OF SHARI’A

Before moving to the broader issues of whether a system of Islamic religious courts could adequately protect human rights, it is important to consider what law would govern in such courts. The Shari’a, the Islamic law derived from the Qur’an and the Prophet Muhammad’s example, is broadly defined as “the Way of the Muslims in the sense of the divine law and the proper ordering of society on earth.” It provides guidelines for external and secular acts involving the community, as well as both individual and group religious acts, such as worship, almsgiving, and acts involving the other pillars of the Islamic faith. Thus, the Shari’a embodies the

98. See supra notes 12-15 (describing the often conflicting definitions of human rights in Western and Islamic cultures).

99. See Al-Ghunaimi, supra note 9, at 6 (emphasizing that the primary purpose of human rights is to benefit society as a whole).

100. See id. (realizing that nations will compromise individual rights if it benefits the state as a whole).


102. FREDERICK MATHEWSON DENNY, AN INTRODUCTION TO ISLAM 231 (2d ed. 1994). Denny defines this “way” as the method and creed of Muslims and explains that the Qur’an describes Shari’a as “enjoining the right and forbidding the wrong.” Id.

103. See id. at 201 (stressing that Islamic law is internalized within the community and is not the product of legal specialists). “[T]o conceive of Islamic law, or rather the Shari’a, strictly in terms of professionalism would be to miss the peculiar quality of the popular Islamic passion for obedience to God’s commands.” Id.
Qur'an as a "framework of reference for all individual and collective behaviours."104

In one sense, the concepts in the Shari'a appear static.105 The Shari'a is derived from divine sources, which are discovered rather than created.106 Under traditional Islamic views, no manmade law may come into conflict with, or supersede, Islamic precepts.107 Thus, under traditional notions, Shari'a law was "unquestionably supreme" in all areas in which it governed.108


105. See Refah Partisi (The Welfare Party) and Others v. Turkey, 35 Eur. Ct. H.R. 56, 87 (2001) (holding that any system of law based on Shari'a would be incompatible with democracy because the Shari'a "intervenes in all spheres of private and public life in accordance with religious precepts" and "is stable and invariable."), aff'd 13 Feb. 2003, available at 2001 WL 1819833. In 2001, the European Court of Human Rights appeared to espouse this view that the Shari'a "faithfully reflects the dogmas and divine rules laid down by religion." Id. "Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it." Id.; see also Moe, supra note 3, at 11. The Court also noted that the Shari'a’s views on penal law and the status of women would come into conflict with the European Court:

It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on Shari’a, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.

Refah Partisi, 35 Eur. Ct. H.R. at 87. However, according to Christian Moe, many Muslims would agree that while the Shari’a may be “stable and invariable,” it is so “in a certain ideal, abstract sense” that distinguishes it from civic law. Moe, supra note 3, at 13. The Refah Court did not distinguish between the various interpretations of Shari’a in articulating its holding, thus suggesting its own misunderstanding of the breadth of Muslim thought. Id. at 10. In addition, the Court’s holding “ignore[d] the diverse interpretation of these concepts by Muslims.” Id. at 1.

106. See Mayer, supra note 101, at 1022 (emphasizing that Islamic law derives from divine sources and that rather than legislate, Muslim rulers defer to the divine law).

107. See id. at 1023 (noting that the ruler may have quasi-legislative powers only to implement or supplement the Shari’a law, which is ultimately supreme).

108. See id. (emphasizing that Islamic legal history provides no guidance for Muslims seeking to reconcile conflicts between secular and religious laws); see
Human agency, however, plays an important role in interpreting the divine sources underlying the Shari'a. Modern interpretations of the Shari'a and its application in Islamic politics vary greatly. For instance, with regard to the appropriateness of a modern Islamic state, some Muslims rely on the concept that Islam is both religion and state to rationalize its harsh and coercive tactics, while others point out that compulsion in religion is an abomination under the Qur'an, which "knows no such concept of an 'Islamic' state, least of all one with the coercive powers of a modern leviathan." Thus, an appeal to the Qur'an appears insufficient to settle current problems.

Furthermore, many varying interpretations among Muslims are based not upon interpretation, but rather upon the divergent cultures of those who are reading the scripture. In fact, many who espouse abandoning Western notions and returning to a system of Islamic law appear to receive motivation from nationalism as much as, if not

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**also** Badr, *supra* note 4, at 98 (stating that Islamic law rejects the concept of sovereignty and does not consider the state as an entity).

109. See Mayer, *supra* note 101, at 1022 (reiterating that Islamic Law derives from divine sources and interpreting existing law is the role of the rulemakers).

110. See, e.g., TIMOTHY D. SISK, ISLAM AND DEMOCRACY: RELIGION, POLITICS, AND POWER IN THE MIDDLE EAST 38-39 (1992) (summarizing specifically the various approaches in Algeria and emphasizing the diversity of opinion among Islamist movement groups); see also Anderson, *supra* note 12, at 41-42 (emphasizing the widespread skepticism and distrust of the Western human rights agenda in the middle east).

111. See HEFNER, *supra* note 54, at 12 (noting that some modern Muslim activists believe dissolving boundaries between private and public states will facilitate the enforcement of the "high standards of Muslim morality").

112. *Id.* (addressing concerns that "concentrating power in [religious] rulers' hands... only increases the likelihood that Islam's high ideals will be subordinated to vulgar political intrigues"). Thus, a power grab will only end "by degrading religion itself." *Id.*

113. See *id.* (implying that the Qur'an lacks the scope to cover modern issues).

114. See, e.g., SISK, *supra* note 110, at 38 (discussing Islamic groups in Algeria that are implementing democratic programs, as opposed to the more militant character of former groups); see also MAYER, *supra* note 22, at 156 (recognizing that "human rights violations that seem at first blush to be tied to the Islamic tradition often turn out upon closer inspection to be intertwined with local politics.").
more than, religion.\textsuperscript{115} Thus, some scholars believe that modern Muslims must rethink "the application of legal rules in various Qur’anic verses."\textsuperscript{116}

Nevertheless, whether Muslims are able to or should neglect their juristic precedent is controversial.\textsuperscript{117} Although Muslims have looked to differing schools of law or jurists at various times, they still considered challenging the jurists’ interpretations of the Shari’a as unthinkable.\textsuperscript{118} However, some Muslims suggest that a change in the law of Shari’a might be possible through judicial review where judges exercise \textit{ijtihad}, or reasoning.\textsuperscript{119}

\section*{B. The Potential for Inequality}

Although current events would have one think otherwise, Islam’s toleration for adherents of other faiths is at least as favorable as the Western world’s historical treatment of non-Christian minorities.\textsuperscript{120}

\begin{itemize}
  \item \textsuperscript{115} See Mayer, \textit{supra} note 22, at 183 (suggesting that the motivation behind campaigns rejecting Western domination and reinstating Islamic law is both nationalist and religious).
  \item \textsuperscript{116} \textit{Id.} at 137. For instance, Muslim feminists view restrictions on women’s rights as “cultural traditions disguised as religious precepts.” \textit{Id.} at 101; see also \textit{id.} at 98 (explaining that Muslim feminists “place the blame for what they see as distortions of the original, authentic Islam on male interpreters of the Islamic sources who had vested interests in the preservation of patriarchal privilege”). “By and large Iranian and Saudi women who challenge their governments’ treatment of women do not reject Islam and often expressly reject Western values.” Neal & Hasan, \textit{supra} note 25, at 10 n.3.
  \item \textsuperscript{117} See Mayer, \textit{supra} note 22, at 98 (discussing modern interpretations of cultural traditions such as the inferior treatment of women). Some feminists reject certain juristic traditions which they view as full of male bias. \textit{Id.} at 101.
  \item \textsuperscript{118} See \textit{id.} at 98 (acknowledging Muslim reliance on the legal guidance of these juristic treatises).
  \item \textsuperscript{119} See Mohammad Hashim Kamali, \textit{Appellate Review and Judicial Independence in Islamic Law}, in \textit{ISLAM AND PUBLIC LAW: CLASSIC AND CONTEMPORARY STUDIES}, \textit{supra} note 104, at 49, 50-51 (indicating that while some Muslim scholars believe the Shari’a does not provide for appellate review of a judge’s opinion, other Muslim scholars believe appellate review is possible under Islamic law). Judicial review may also serve to “enhance[] public confidence and credibility in court decisions.” \textit{Id.} at 63.
  \item \textsuperscript{120} See Mayer, \textit{supra} note 101, at 1024 (explaining that historically Islam permitted non-Muslims living in areas under Muslim control to continue their chosen laws and religion).
\end{itemize}
The Qur'an provides that no compulsion should exist in religion;\(^1\) rather, it holds that God will judge between believers and non-believers at the final judgment.\(^2\)

During the period of Islamic conquest, the Islamic state faced the problem of how to treat non-Muslims in their conquered territories.\(^3\) It solved the problem by setting up the legal system of *dhimma*.\(^4\) The *dhimmis*, who included monotheists such as Jews and Christians, but not pagans,\(^5\) were allowed to practice their religions and follow their own community laws, "as long as they accepted a politically subordinate, tributary status."\(^6\) In cases where non-Muslim law conflicted with the Shari'a, Islamic law controlled.\(^7\)

Under the *dhimma* system, it was understood that non-Muslims possessed neither political nor legal equality with Muslims.\(^8\) However, in modern times the use of a system of separation based

\(^{121}\) See Al-Ghunaimi, supra note 9, at 9-10 (discussing the Qur'an's mandate that all persons in the Islamic state have freedom of thought and religion).

\(^{122}\) See id. at 11 (citing the Qur'an 22:17 that "God will judge between those who believe and the Jews, the Sabians, Christians and the Magians and the idolaters, on the Day of Judgment.").

\(^{123}\) See id. at 10-11 (describing the system of *dhimma*, a legal concept which permitted the conquered peoples to continue practicing their own religions). Such peoples were known as *dhimmis*. Id.

\(^{124}\) See id. (noting that the origin of *dhimma* comes from the historical concept of *jihad* which believes that in war all property and inhabitants taken become part of Islam); see also Neal & Hasan, supra note 25, at 18 (explaining that the *dhimmi* is a pledge by Muslims to respect the person and property of the non-Muslims).

\(^{125}\) See Mayer, supra note 22, at 135 (maintaining that historically polytheists and unbelievers had to embrace Islam or accept death); see also Al-Ghunaimi, supra note 9, at 11 (noting that the *dhimmis* did not include pagans).

\(^{126}\) Mayer, supra note 101, at 1024 (stating that prior to the dissipation of intercommunal relations in the twentieth century, large Christian and Jewish communities existed in many areas of the Middle East controlled by Muslim rule); see also Neal & Hasan, supra note 25, at 18-19 (contending that traditional Islamic Law requires that Muslims treat the non-Muslim *dhimmis* with the same level of respect that a full citizen would receive).

\(^{127}\) See Mayer, supra note 101, at 1024 (noting that Islamic law also controlled non-Muslims in matters affecting the interests of Muslims or the Muslim community).

\(^{128}\) See id. (explaining that although the Islamic state protected the rights of non-Muslims, they could never be true equals and would always maintain a politically subordinate status).
upon religious beliefs might reinforce the historical inequalities between non-Muslims and Muslims by suggesting that a person's righteousness can create a basis for unequal treatment. The negative result of such separation could be that non-Muslims would not attain equal standing in an Islamic country employing a system of differentiation based on religion. For instance, some Muslim countries mandate that the political leader must be Muslim. Even assuming such a constitutional provision protects the autonomy of the Muslim community, it also serves as a reminder to non-Muslims that the value of their leadership skills and other qualities is less than that of a Muslim.

A primary goal of Islam is to transcend material distinctions, such as race and politics, and to create an Islamic community that brings all people, equal before God, together in a community founded upon God. This goal may bring unity within the Muslim community, but it also alienates non-Muslims. "Islamic law attempts to compensate for this disharmony by developing over time a precise

129. See Gamil Mohammed El-Gindy, The Shura and Human Rights in Islamic Law: The Relevance of Democracy, in THE RULE OF LAW IN THE MIDDLE EAST AND THE ISLAMIC WORLD: HUMAN RIGHTS AND THE JUDICIAL PROCESS 164, 166 (Eugene Cotran & Mai Yamani eds., 2000) (arguing that while Islamic law grants equal protection to all persons, freedom of thought, right to express oneself, and political rights, the Prophet acknowledged that Islam could accord people different treatment based upon their righteousness).

130. See Neal & Hasan, supra note 25, at 19-20 (explaining that although the Qur'an and Sunnah provide certain rights to dhimmis, Islam determined the status of non-Muslims according to their obligations as dhimmis and their religious orientation).

131. See, e.g., IRAN CONST. ch. IX, § 1, art. 115; MALAY CONST. art. 34; SAUDI ARABIA CONST. arts. 1, 6 (setting forth the requirements to hold political office).

132. See MAYER, supra note 22, at 91 (discussing an interpretation of the Shari'a that excluded non-Muslims and women from taking public office or employment because they lacked the requisite qualifications of such positions).

133. See Neal & Hasan, supra note 25, at 23 (citing the QUR'AN 2:213, 10:19, 49:13, which explains that the distinguishing feature of an Islamic community is its "single unwavering foundation: Allah" and that the goal of this bringing together is to create a "focus for a social order around which a community can be formed and through which justice can be realized").

134. See id. at 23–24 (observing that Islam recognizes the alienation inherent in its definition of community and attempts to compensate for it by incorporating non-Muslims into the affairs of state).
relationship between the Muslim state and *dhimmi* communities drawn from both the sources of Islamic law and the assimilation of local, traditional practices.¹³⁵ Arguably, the Shari’a actually favors the inclusion of non-Muslims in state affairs by providing guidelines to reinforce ties between Muslims and non-Muslims.¹³⁶

While under classical conceptions of the Shari’a, Muslims and non-Muslims share the same civil rights, including the right to life, property, and religion, distinctions occur in political administration and other affairs.¹³⁷ For instance, Shari’a law requires Muslims to militarily protect non-Muslim citizens in exchange for the payment of a special tax.¹³⁸ In addition, non-Muslims may trade and consume wine and pork, outlawed by Islamic law, although they may not do so openly.¹³⁹ Nevertheless, “Islam is very much built on a principle of human equality; and in nearly every respect, a *dhimmi*’s legal capacity is intended to match that of a Muslim peer.”¹⁴⁰

Thus, whether an Islamic nation could create an environment where all people are truly equal, both by the law and by cultural norms, regardless of religious affiliation or gender, depends on how the country interprets the Shari’a.¹⁴¹ Western notions of equality and equal protection are somewhat of a foreign concept to Islam.¹⁴² For those Muslims wishing to uphold traditional hierarchical systems,

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¹³⁵. *Id.* at 24.

¹³⁶. *See id.* (discussing the QUR’AN 60:8, which discusses showing kindness and justice to those of other religions, as one of the bases for improving relations between Muslims and non-Muslims).

¹³⁷. *See id.* at 25–26 (explaining that while non-Muslims engage in matters of state, the ultimate head of state must be Muslim).

¹³⁸. *See MAYER, supra* note 22, at 135 (examining the *jizya*, a special capitation tax that Islam required the *dhimmis* to pay for military protection and in lieu of military service).

¹³⁹. *See Neal & Hasan, supra* note 25, at 31–32 (explaining that the limitation on public consumption is based on concerns that these displays might encourage believers to apostatize).

¹⁴⁰. *Id.* at 32–33.

¹⁴¹. *See id.* at 47 (maintaining that Islamic law provides rules for both the required and recommended treatment of the *dhimmis*; therefore, their actual treatment depends upon the interpretation and application of the laws).

¹⁴². *See MAYER, supra* note 22, at 89 (mentioning that Islamic law does not have a constitutional counterpart to the principal of equal protection).
equality means simply that Shari'a law should apply equally to all persons within an established category, regardless of their classification.\textsuperscript{143} Thus, the law treated all male Muslims equally, and all male non-Muslims equally.\textsuperscript{144} This interpretation of equality assumes "that it is possible to have equal protection under a law that itself mandates unequal treatment."\textsuperscript{145}

On the other hand, many liberal Muslims suggest that a differentiation based on faith only applies when standing individually before God and forms no basis for any civil inequities.\textsuperscript{146} They point out that the passage allowing such differentiation "is of questionable authenticity . . . 'because it is inconsistent with the many Qur'anic verses that call for tolerance.'\textsuperscript{147} Furthermore, many liberal Muslims assert that the Qur'an permits anyone to participate in \textit{shura}, or community consultation, regardless of religious affiliation or gender.\textsuperscript{148}

\textsuperscript{143} See id. (explaining that when Muslims initially encountered the concept of equal protection, they generally believed that Shari'a law did not discriminate if those persons in the same categories received equal legal treatment, even if that treatment was not the equivalent of the other group).

\textsuperscript{144} See id. (noting that this equality does not mean that Muslims and non-Muslims receive the same legal rights or even that both groups receive similar treatment).

\textsuperscript{145} Id. 89-90 (analyzing the Arabic version of the Universal Islamic Declaration of Human Rights which purports to grant all people equality under the Shari'a law and concluding that the Universal Islamic Declaration of Human Rights does not provide equal protection that complies with international standards because it relies upon pre-modern formulations, which include discriminatory provisions).

\textsuperscript{146} See SISK, supra note 110, at 20 ("The fundamental inequality between believers and infidels is an inequality before God and not one that implies an inequality in civic rights and duties."). This group argues that inequities would run contrary to the Qur'anic mandate of tolerance. Id. Additionally, such passages as the one that states that those who change their religion should be killed have been found by such liberal Muslims to be of questionable authenticity. Id. Rather, Muslims are specifically directed "to be tolerant of other religious beliefs" and "non-Muslims will be judged by God" alone. Id.

\textsuperscript{147} Id. (citing Muhammad Faour, a peace fellow at the United States Institute of Peace and a professor of sociology at the American University of Beirut).

\textsuperscript{148} See El-Gindy, supra note 129, at 166 (explaining that the Qur'an does not mandate any qualifications for participation in \textit{shura}). Further, no provision in the Qur'an or Sunna excludes the participation of women in \textit{shura}. Id. According to
Finally, liberal scholars argue that at a minimum Islamic practice can change to accommodate the needs of the time, even if doctrine cannot.¹⁴⁹ In the ancient world, practical applications changed to evolve with community needs.¹⁵⁰ For instance, *dhimmis* originally consisted of only those who believed in only one God and the Holy Book; Islam still labeled members of all other religious groups as either polytheists or unbelievers and were forced to either convert to Islam or face a penalty of death.¹⁵¹ However, original practices adjusted when Islam spread to the East, to allow Muslims to co-exist peacefully with Hindus and others.¹⁵² The distinctions between Muslims and non-Muslims again decreased in the 1800s as secular nationalism became a political force in the Muslim world.¹⁵³ The evolution of Islam’s increasing tolerance for non-Muslims suggests that Muslims may be able to find room for international notions regarding equal protection within the strictures of Islam.¹⁵⁴ Finding a basis for democracy may mean looking past the Shari’a to the core doctrines upon which the Shari’a rests.¹⁵⁵ Some of the “original

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¹⁴⁹ See Neal & Hasan, *supra* note 25, at 13 (noting that reinterpretations of Islamic precepts and constitutionalism removed many of the legal inequalities that existed in the past and aided in extending universal human rights to all citizens).

¹⁵⁰ See MAYER, *supra* note 22, at 135 (explaining that early Islamic rulers developed the system of *dhimmis* because numerous conquered Christians and Jews refused to embrace Islam).

¹⁵¹ See id. (observing that pre-modern Shari’a doctrine tolerated the Christian and Jewish religions, but refused to accept other faiths).

¹⁵² See id. (relating that the old practice of presenting conquered non-Muslims with acceptance of Islam or death adjusted in order for peoples to co-exist).

¹⁵³ See id. at 136 (stating that in many ways non-Muslims gained the same citizen rights as Muslims). Mayer further explains that in today’s society, the waning of secular nationalism coupled with the increased influence of Islam as political ideology has caused issues regarding the status of non-Muslims to resurface. Id.

¹⁵⁴ See id. at 136–37 (asserting that the ideology that Islam and the tenets of human rights law should be in harmony led some Muslims to embrace the possibility that “full equality for all citizens is compatible with Islam”).

¹⁵⁵ See MAYER, *supra* note 22, at 137 (observing various interpretations of Islamic law which demonstrate that Islam may allow for absolute equality of Muslims and non-Muslims). As an example, the teachings of Mahmud Muhammad Taha, distinguished between Qur’anic verses meant to govern the early Islamic
sources and examples from early Islamic history . . . demonstrate the tolerant and egalitarian strains that have from the beginning constituted important components of the Islamic tradition."\textsuperscript{156}

A final reason many Muslims support protection for non-Muslims is that Islamization has the potential to affect Muslims as much as non-Muslims.\textsuperscript{157} Muslims who espouse ideas contrary to "the version of Islam endorsed by governments and allied religious establishments" may be "reclassified as non-Muslims or heretics."\textsuperscript{158} Thus, while some modern Islamists may argue for a reinstatement of the Shari'a rules governing \textit{dhimmi} status, the fact remains that many Islamic nations have adopted constitutions reflecting international human rights values as well as modern notions of citizenship that prohibit discrimination based on religion.\textsuperscript{159} "Proponents of Islamization who demand the adoption of Islamic forms of government and the imposition of laws discriminating against non-Muslims have to combat other political factions inside their own societies that favor respecting modern norms . . . ."\textsuperscript{160}

\textsuperscript{156} Id. at 136-37 (setting forth an approach to Islam that creates agreement with international law by suppressing or discarding aspects of the Shari'a that cause disharmony). One such example may be that Shari'a restrictions keeping non-Muslims from holding high political offices no longer apply in the current world, which could not have been envisioned by medieval Islamic theorists. \textit{Id.}

\textsuperscript{157} See MAYER, \textit{supra} note 22, at 134 (explaining that Muslims in the majority may regard other Muslims whose beliefs are in the minority, also termed "dissidents" and "nonconformists," as non-Muslims).

\textsuperscript{158} Id. Such Muslims holding minority views have the same interest in protecting non-Muslims because they could find themselves facing similar treatment. \textit{Id.}

\textsuperscript{159} See \textit{id.} at 133 (stating that Muslim countries adopted Western constitutional models prohibiting discrimination on the basis of religion).

\textsuperscript{160} Id.
C. THE ABILITY TO CONVERT

While Muslims have historically shown tolerance towards differences within their own ranks, one well-known, but often misunderstood, attribute of Islam is its discouragement of, and penalty for, conversion to other faiths. If Shari’a law were to govern in an Islamic country, a notable concern would be whether Muslims would have the ability to convert to other faiths and take advantage of another faith’s set of personal laws.

Even Muslims who believe in equality and tolerance between believers and non-believers have a much more difficult time accepting the right of a Muslim to convert from Islam to another faith. This difficulty stems from the importance of individual and group duties to others and society. An Islamic community has a duty to protect its members from harm, including apostasy. Because “Islam is the one true way to Paradise, it is, as a practical matter, in the Muslim’s best interests not to apostatize, and it is compassionate of him or her to prevent fellow Muslims from falling away.” Thus, the moral duty Muslims owe each other supercedes...

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161. See Mayer, supra note 101, at 1023-24 (explaining that pre-modern Islam tolerated different interpretations of Islam, and Muslims could choose for themselves which school of thought to follow, even if that school contradicted the current political leader’s preference).

162. See Tahir Mahmood, Islamic Law and State Legislation on Religious Conversion in India, in ISLAM AND PUBLIC LAW: CLASSIC AND CONTEMPORARY STUDIES, supra note 104, at 159, 185 (noting that Islam is not the only religion to discourage conversion, either through institutional or cultural pressures). For instance, the Hindu Code in India contains many inducements to keep Hindus, Buddhists, Jains, and Sikhs from converting to other religions, such as Islam or Christianity. Id.

163. See Neal & Hasan, supra note 25, at 43 (commenting that apostasy is an offense to Allah and the state).

164. See id. at 43-44 (explaining that “[a]postasy also has political implications since the state is to be founded on Islamic principles, if not Islamic law. In many ways the state as a practical matter is dependent on the individual’s membership in Islam to maintain its internal cohesiveness.”).

165. See id. at 44 (noting that apostasy is a “serious offense” even in more lenient states and that a “legal stigma” remains when anyone encourages another to leave the Faith).

166. Id. at 45.
any earthly notion of individual freedom. Muslims who are fortunate enough to have been blessed by their religion may not choose to convert, and non-Muslims may not proselytize among Muslims.

Nevertheless, the meaning and consequences of apostasy under Shari'a are not entirely clear. On the religious side, apostasy refers to the act of "turning from Islam after being a Muslim." It may "occur[] either through words or deeds which put an end to one's adherence to Islam, such as the rejection of fundamental principles of faith." A system relying on Shari'a law that imposes punishments for such a change of religious faith appears to depart from the generally recognized fundamental right to freedom of religion. Nevertheless, some Muslims argue that freedom of religion involves the freedom to have a religion, not freedom from religion. Thus,

167. See id. (affirming that this prevention of conversion constitutes a transcendent moral duty which is of greater importance than "earthly rights").

168. See Neal & Hasan, supra note 25, at 42-43 (explaining that allowing non-Muslims to co-exist with Muslims gives them the chance to convert to Islam); see also Mayer, supra note 101, at 1025 (observing that Islamic communities encouraged conversion to Islam but punished conversions from Islam); Carolyn Evans, Religious Freedom in European Human Rights Law: The Search for a Guiding Conception, in RELIGION AND INTERNATIONAL LAW, supra note 4, at 385, 386 (describing the related issues that arose in the debates surrounding the adoption of the Universal Declaration and International Covenant on Civil and Political Rights). But see Neal & Hasan, supra note 25, at 42-43 (declaring that despite Islam's tolerance for those of other faiths, such "tolerance by no means indicates harmony or philosophical acquiescence to the incongruities between Islam and dhimmi religions, no matter how sympathetic Islam may be."). See generally supra Part III.B (discussing that when the prohibition of apostasy by Muslims becomes a legal mandate, it may further the differentiation between non-Muslims and Muslims as it suggests that Islam is superior to other religions). Regardless of what any religious adherent may personally feel about his or her religion, when this feeling of superiority becomes part of law, it has a high likelihood of resulting in discrimination. Part III.B.

169. Muhammad Abu-Hassan, Islamic Criminal Law, in JUSTICE AND HUMAN RIGHTS IN ISLAMIC LAW, supra note 9, at 79, 85.

170. Id.

171. See Arzt, supra note 8, at 373 (describing freedom of religion as encompassing "not only the freedom to hold theistic beliefs but also the freedom to hold non-theistic beliefs as well as the freedom to change one's religion or belief, all without coercion or discrimination"). According to Arzt, under traditional Islamic law, any rebuff or refusal of Islamic law was tantamount to a criticism of the faith. Id.
Muslims' right to hold and practice their religion includes the right to prohibit apostasy from their faith and to secure their community.

Apostasy may exist not only in a religious form, but also as an act against Islam as a state. Turning against the Islamic state, when set up as a political entity, could have political repercussions of destabilizing the political regime and destroying cohesiveness. According to some modern scholars, the Qur'an's emphasis is on the latter form of apostasy—that which threatens political integrity—rather than merely religious unbelief. Thus, it is possible that only apostasy as a political crime is punishable criminally.

The latter view appears to have support in the Qur'an, which mandates that no compulsion should exist in religion and reserves judgment to God at the last day. Arguably, Qur'anic punishments for apostasy only apply to those who actually "boycott the community... and challenge its legitimate leadership," rather than

172. See Neal & Hasan, supra note 25, at 43 (noting that apostasy has political implications in a state founded on Islamic principles).

173. See id. at 43–44 (commenting that an Islamic state, as a political entity, relies on membership in Islam to maintain itself).

174. See id. at 44 (stating that the Qur'an's concern for apostasy lies with the "political threat of religious unbelief"); see also QUR'AN 9:29 (ordering followers of Islam to "fight those who believe not in Allah").

175. See Abu-Hassan, supra note 169, at 85 (distinguishing between religious and political apostasy and explaining that the criminal punishment for apostasy might only apply to political apostasy, which is a generally punishable constitutional violation).

176. See QUR'AN 2:256 (The Presidency of Islamic Researches, IFTA, Call and Guidance) (explaining the Qur'an verse "There shall be no compulsion in religion" to mean that compulsion and religious belief are not compatible concepts because the element of faith in religion is meaningless if by force); see also Al-Ghunaimi, supra note 9, at 9 (noting the existence of freedom of thought and religion in Islam granted by the Qur'an).

177. See Al-Ghunaimi, supra note 9, at 9–10 (asserting that one may use force in only two instances: to warn enemies and to establish order); see also QUR'AN 10:99 (stating, "Are you going to compel the people to believe, except by God's dispensation?") The Qur'an also states, "Surely the believers and the Jews, Nazareans (Christians) and the Sabians, whosoever believes in God and the Last Day, and whosoever does right, shall have his reward with his Lord and will neither have fear nor regret." Id. at 2:62. Nevertheless, it seems likely that some Islamic states might rationalize their use of force against Muslim apostates and non-believers as a means to keep order.
to those who simply convert away from Islam. The traditional death penalty for apostasy notably does not exist in the Qur’an and is only evidenced from examples from the Prophet Muhammad’s life. This penalty could have been established merely to protect the public order. Thus, conceivably, religious freedom under the Qur’an is similar to Western notions of religious freedom.

Muslims themselves may have a personal interest in allowing apostasy because criminalizing apostasy may create difficulties for “Muslims who adhere to doctrines that are out of keeping with whatever standard of orthodoxy is currently being espoused by powerful Islamic institutions or governments pursuing Islamization.” Although traditionally Islam tolerated varying views of Islamic theology and law, modern governments advocating Islamization often espouse only one strand of Islam. If a regime’s ideology and legitimacy become tied to only one version of the faith, Muslims who do not follow the prevailing view are likely to be found to be apostates. Thus, criminalizing apostasy may not only keep Muslims from converting to other faiths, but also may keep

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178. MOHAMMAD HASHIM KAMALI, ISLAMIC LAW IN MALAYSIA: ISSUES AND DEVELOPMENTS 215 (2000) (noting that one must do more than merely convert away from Islam to receive severe punishment); see also MAYER, supra note 22, at 158 (according to one scholar, Muhammad only applied the death penalty to apostasy “when the act of apostasy from Islam was linked to an act of political betrayal of the community.

179. See MAYER, supra note 22, at 157-58 (noting that the traditional rules on apostasy come from incidents in Muhammad’s life and other historical events that can be interpreted in a variety of ways; no Qur’anic verse requires an earthly penalty for apostasy).

180. See Neal & Hasan, supra note 25, at 43-44 (asserting that an Islamic state depends on membership to maintain cohesiveness).

181. See MAYER, supra note 22, at 136, 157 (observing that many Muslims favor reform of or abandonment of the apostasy penalty in order to embrace a religious freedom and accord with international law).

182. Id. at 151.

183. See id. (distinguishing the differing views and degrees of toleration of old and modern Islamic law).

184. See id. (asserting that Muslims who follow views or interpretations not currently being espoused by the government of an Islamic institution can also find themselves in difficulty).
them from developing their own faith within the framework of Islam.185

Nevertheless, even if an Islamic state were to allow conversion, extreme cultural pressure exists to continue on in the Islamic faith. The case of NorAishah Bokhari in Malaysia, a state operating under Islamic law, is a recent example. In 1997, Ms. Bokhari renounced Islam so she could marry a Roman Catholic.186 The Islamic constituency of Malaysia reacted by publishing and circulating approximately 100,000 posters that urged Bokhari to return to the fold and pushed the government through the news media to arrest Muslim apostates.187 After Bokhari’s family located her and succeeded in bringing her home, she again disappeared. This time, she wrote to her attorney asking him to appeal her right to choose her religion to the Supreme Court.188 The Islamic community reacted by seeking to draft a law to prevent apostasy.189

In one sense, such cultural coercion suggests that the prevailing Malaysian law did not reflect the public sentiment. However, at the time of this article, the Islamic community has not gained enough political momentum to push the bill through.190 In any case, cultural coercion is an unfortunate residual to any system that attempts to

185. See id. at 151, 156 (“From a penalty designed to secure inclusion within the Islamic fold, apostasy had been transformed into a means of excluding believing Muslims from their place in the community.”); see also Neal & Hasan, supra note 25, at 44 (stating that “Islamic law’s prohibition against apostasy quickly triggers human rights concerns, though more so for Muslims than for dhimmis... Presumably, one may compare Islam and a dhimmi religion as long as the comparison does not provoke apostasy; but if that is true, one could then argue that the likelihood of any authentic dialectic is questionable at best.”).

186. KAMALI, ISLAMIC LAW IN MALAYSIA, supra note 178, at 203 (nothing that NoirAishah renounced Islam and left her parents’ home to live with the family of her fiancé).

187. See id. at 204 (reporting that the Islamic party used its official newspaper to pressure the government to use the Internal Security Act to arrest apostates).

188. See id. at 206 (providing a detailed explanation of NorAishah’s request to choose her own religion).

189. Id.

190. But see supra notes 93-97 and accompanying text (discussing the reaction to the case of Shah Bano in India).
modernize. Despite such cultural forces, an Islamic state implementing a system of Shari’a could at least guard against institutional coercion by allowing individuals freedom to change religious preferences. Such an institutional framework might assist in overcoming other forms of coercion.

CONCLUSION

As noted in the previous section, Islamic tenets are not necessarily incompatible with the protection of both individual and group rights. It appears likely that an Islamic state might best achieve the democratic protection of human rights by encouraging religious adherents of all faiths to adhere more devoutly to their own principles. Furthermore, the democratic protection of human rights will also be achieved by allowing differences of opinion regarding religious principles into the public debate, rather than removing all religious traditions from the public arena. “If we are to understand anything at all about what has happened in the past and is happening today in the Muslim world, we must appreciate the universality and centrality of religion as a factor in the lives of the Muslim peoples.”

191. See Moe, supra note 3, at 9-10 (noting that religious communities may reformulate their laws to accommodate human rights in the modern nation-state).

192. But see id. at 9 (recognizing that as a practical matter, however, the considerable pressure that a religious community may exact on its members to retain their religious allegiance limits the freedom to change one’s religion, particularly in Islam because of its apostasy ban).

193. See Wael B. Hallaq, “Muslim Rage” and Islamic Law, 54 HASTINGS L.J. 1705, 1710 (2003) (observing that Islamic law operated outside of state and government influence with great success until the middle of the nineteenth century when conventional scholars relegated Islamic law to the status of a relic of the past incapable of change); see also Jackson, supra note 53, at 105 (noting that an Islamic state is perfectly capable of recognizing that some of its citizens are not Muslim and that their rights grow out of a different tradition than that of the majority Muslim population).

194. See Hallaq, supra note 193, at 1718-19 (finding the roots of modern legal conflict in the disconnection between religion and government in Muslim communities).

195. ABDULLAHI AHMED AN-NA’IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW 3 (1990). Islam’s role in the major social and political movements of modern Muslim history is due to the religion’s interconnectedness with its followers’ identities. Id.
A final example is worth noting; in India, religious law governs personal affairs and the Constitution of India provides for all people, among other things, the positive guarantees of equality, freedom of conscience and belief, and freedom of religious practice and propagation. Conversion is allowed both to and from Islam, and the consequence of conversion is that a person is subject to a new set of religious laws. A person can easily convert without providing evidence to any civil authority of any depth of belief or even knowledge of the basic tenets of his or her new faith.

The Muslim personal law in India is the only law to allow a man to have more than one wife; thus, non-Muslim men frequently convert to Islam so they can marry again without having to go through the cumbersome process of divorce. While this practice initially seems unethical and unfair to the first wife, were Indian courts to apply Qur’anic principles in determining whether such a convert could marry a second wife, the courts would likely find that this practice directly contradicts Islamic mandates. In Islam, a man may only marry more than one wife if he can treat them all with equity, but if he cannot treat them with equity, then he may only have one wife. Because a man converting to Islam solely to marry again presumably would not have the desire to treat his first, unwanted wife with the same respect and love as the second wife, such a man could be prohibited from this practice simply by applying the tenets of his new “faith.” Thus, while the notion of converting

196. See Mahmood, supra note 162, at 161 n. 7 (citing INDIA CONST. arts. 14, 25, 26).
197. See id. at 179 (explaining the effect of conversion from Islam in India).
198. See id. at 176 (stating that “conversion to Islam is technically based on the convert’s claim”).
199. See id. at 189–90 (describing one basis for fraudulent or “sham” conversions to Islam).
200. See QUR’AN 4:3 (providing that the unrestricted number of wives during the “Times of Ignorance” was to be strictly limited to a maximum of four wives, but still requiring that the husband be able to treat all wives equally); see also Al-Ghunaimi, supra note 9, at 3 (stating that “if a husband is unable to achieve justice between his wives, he is allowed to marry only one woman.”).
201. See Al-Ghunaimi, supra note 9, at 3–4 (noting that the Qur’an recognizes the inherent difficulty of being just to two wives and maintaining that there is no polygamy in Islam).
to Islam merely to obtain a second, more desirable wife would appear at first to be contrary to concepts of fairness, Islam itself contains a solution to the difficulty. 202

As previously explained, a successful society must be based on the morality inherent in it, rather than on externally imposed morals that may or may not reflect the popular consensus. 203 Like all states, an Islamic state seeking to implement a system of religious law could implement safeguards to protect the human rights of all its citizens, including appellate review of cases decided under religious law and a strong policy of equal protection. 204 Regardless of how an Islamic state chooses to structure its government, any process of reform will only be successful if Muslims are allowed to be Muslims and to retain their core ideals. 205 The final realization of human rights in the Islamic world may not occur overnight, but even the Prophet Muhammad recognized social reform as an achievable, but gradual, goal. 206


203. Supra Part I.A. For instance, one commentator notes that Malaysian Islamic courts play a key role in defining Islam’s role in modern society, as well as providing ground for debate for ongoing struggles concerning ethnic groups, religious communities, social classes, and political parties. See Peletz, supra note 1, at 3 (recognizing the need to look within Malaysia’s cultural, social, and political system to create a coherent moral framework); see also id. at 6 (noting that the legal system in Malaysia is pluralistic and embodies three major traditions of law: customary law, national (statutory) law, and Islamic law, which is relevant to Malays and all other Muslims in a limited range of affairs).

204. See Moe, supra note 3, at 7–8 (addressing arguments for a move away from state-centered fundamentalism that exclusively interprets religion towards a civil society that appreciates freedom of conscience).

205. See id. at 22 (propositioning that Muslims will only be able to have an authentic exercise of their religion if they are guaranteed human rights and democratic freedoms).

206. See Neal & Hasan, supra note 25, at 38 (discussing the Prophet’s preference for gradual social reform rather than the use of revolutionary methods and his efforts to improve the status of slaves and ultimate intention of emancipation).