

1996

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### Recommended Citation

Chase, Anthony. "Legal Guardians: Islamic Law, International Law, Human Rights Law, and the Salman Rushdie Affair." American University International Law Review 11, no. 3 (1996): 375-435.

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# LEGAL GUARDIANS: ISLAMIC LAW, INTERNATIONAL LAW, HUMAN RIGHTS LAW, AND THE SALMAN RUSHDIE AFFAIR

Anthony Chase\*

"When the word is important, the guardian of the word becomes important."

-Farrukh Dhondy

"Who will guard the guardians?"

## INTRODUCTION

Reactions to the Imam Khomeini's *fatwa*<sup>1</sup> on Salman Rushdie are a mirror reflecting observers' predilections and prejudices. For some, the *fatwa* is a case study of Islam's fierce intolerance. For others, the *fatwa*

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1. See CYRIL GLASSE, *THE CONCISE ENCYCLOPEDIA OF ISLAM* (1989) (defining the Islamic term *fatwa* as a "published opinion or decision regarding religious doctrine or law made by a recognized authority"). Khomeini's *fatwa*, issued on February 14, 1989, reads as follows:

To God we belong and to Him we shall return. I inform all zealous Muslims of the world that the author of *The Satanic Verses*—which has been compiled, printed, and published in opposition to Islam, the Prophet, and the Qur'an—and all those involved in its publication who were aware of its content are sentenced to death.

I call on all zealous Muslims to execute them quickly, wherever they may be found, so that no one else will dare to insult the sacred beliefs of Muslims. Whoever is killed on this path is a martyr. In addition, anyone who has access to the author of this book, but is not able to carry out his execution, should inform someone else so that the punishment may be executed.

Translation of *fatwa* provided by author.

is a response to the United States and Europe's cultural aggression, which holds nothing above ironic scorn and base insults.<sup>2</sup> Such high-pitched histrionics obscure some of the ambiguities and subtleties at the center of this affair. Perhaps it is not necessary to condemn Rushdie to death in order to condemn his book, nor is it necessary to condemn Islam in order to condemn Khomeini's *fatwa*. In the intricacies of this situation lie crisscrossing areas of shared interests and norms which, if explored, may erode notions that the Rushdie affair represents an inevitable clash, rather than a particular constellation of legal and political circumstance. It may also show, however, the latent potential which, given such a constellation of circumstance, can result in the eruption of particularly extreme interpretations of religious law which conflict and clash with other legal and political orders.

Equally fundamental is that this "constellation," however particular, may also tell us something about recurring—if usually less acute—tensions between spiritual and temporal orders of authority. One of the eternal questions of politics is how to reconcile a religious order's absolutes with complex temporal realities.<sup>3</sup> The Rushdie affair is a particularly interesting case study of this question, reflecting both domestic and international political tensions, each of which is sharpened by Iran's difficult relations with the international legal order. Both the Iranian Islamic and international legal orders share an ambiguous basis in natural and positive law which makes them internally quite intricate, and their interrelations all the more complex to reconcile. By extending

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2. See generally SACRILEGE VERSUS CIVILITY: MUSLIM PERSPECTIVES ON THE SATANIC VERSES AFFAIR chs. 3 & 4 (M.M. Ahsan & A.R. Kidawi eds., 1991) [hereinafter SACRILEGE VERSUS CIVILITY] (chronicling Western reaction to Khomeini's *fatwa* and providing arguments from a critical Muslim perspective regarding *The Satanic Verses*); THE RUSHDIE FILE ch. 5 (Lisa Appignanesi & Sara Maitland eds., 1990) (compiling reaction from all perspectives to the Rushdie affair); MUHAMMAD YAHYAA, AL-AYAAT AL-SHAYTAANIYA [The Satanic Verses] (1990) (offering a critical analysis of *The Satanic Verses*); ALI MAZRUI, THE SATANIC VERSES, OR A SATANIC NOVEL? (1989) (denouncing Rushdie and explaining Muslim sensitivity); SADIQ JALAL AL-AZM, DHIHNIIYYAT AL-TAHRIM [The Mental Taboo] (1992) (giving a balanced and penetrating analysis of the Rushdie affair); DANIEL EASTERMAN, NEW JERUSALEMS (1992) (collecting short pieces on Islam with a particular focus on the Rushdie affair); RICHARD WEBSTER, A BRIEF HISTORY OF BLASPHEMY (1990) (criticizing Western hypocrisy towards Muslims); MUNAWAR ANEES, THE KISS OF JUDAS: AFFAIRS OF A BROWN SAHIB (1989) (attacking Salman Rushdie).

3. See Said Amir Arjomand, *Religion and Constitutionalism in Western History and in Modern Iran and Pakistan*, in THE POLITICAL DIMENSION OF RELIGION 70 (1993) (reflecting on particular dimensions of this historic tension).

its reach into the "internal" politics of states, international human rights law adds yet another layer of complexity to the interplay between these two orders.

Unfortunately, the Rushdie affair is often reduced to strict dichotomies: Islam vs. the West; Islamic law vs. international law; cultural relativism vs. universal human rights; divine natural law vs. positive law; a religious order vs. a secular world; medieval laws vs. the right of free expression; the traditional vs. the modern; the community vs. the individual; the globalization of international structures vs. the fragmentation of cultural identities. Each of these dichotomies reduces great and complex traditions to their pale shadows. "Western" traditions, for example, are extremely diverse—including threads which are quite censorious—and are also informed by deeply religious roots, communitarian impulses, and non-Western sources. The contemporary Islamic world is, of course, very much a product of a religious tradition—conflicting and contested as it is—but it is also a product of diverse cultural contexts and continuing interactions with other orders of law and society. The complexities of these orders, their interactions, and even elements of hybridity, not only complicate looking at the Rushdie affair in terms of strict dichotomies, they also bring into question the notion that the secular international legal order and Islamic law are in opposition to each other. In fact, though distinct, it may well be that the Rushdie affair reveals their fundamental similarities as much as it does their differences. While these dichotomies frame any analysis of the Rushdie affair, it is only by deconstructing them that one can get to the heart of the issues they raise.<sup>4</sup>

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4. See, e.g., Ann E. Mayer, *Universal Versus Islamic Human Rights: A Clash of Cultures or a Clash With a Construct?*, 15 MICH. J. INT'L L. 307 (1994) [hereinafter *A Clash of Cultures*] (arguing that Islam is not static, but rather part of complex societies and perfectly able to incorporate human rights principles); M.H.A. Reisman, *Some Reflections on Human Rights and Clerical Claims to Political Power*, 19 YALE J. INT'L L. 509 (1994) (looking at whether religious groups that exercise their freedom of religion do so in violation of other of the secular world's human rights); Ann E. Mayer, *Religious Law and Legal Pluralism*, 12 CARDOZO L. REV. 1015 (1991) (examining the problems associated with adjusting the Islamic legacy to fit the context of modern state systems); Sarvenoz Bahar, *Khomeinism, The Islamic Republic of Iran, and International Law: The Relevance of Islamic Political Ideology*, 33 HARV. INT'L L. J. 145 (1992) (noting the tension between the global unification of technology, economy, and society, and the development of a more representative set of diverse global actors); ANN E. MAYER, *ISLAM AND HUMAN RIGHTS* (1991) (laying out the fundamental tensions between the two orders); M. Cherif Bassiouni, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice*

This affair raises the key issue of who has authority to speak and define law with legitimacy in the religious, political, and legal orders. Indeed, perhaps not coincidentally, this is also a central theme of Rushdie's novel, which irreverently asks if Islam's founding authority is based on an angel or a devil, a befuddled divinity or a corrupt man.<sup>5</sup> As the Rushdie affair shows, the spiritual and temporal orders' battle over authority is increasingly intersecting with the international order.<sup>6</sup>

Art is powerful competition to the power of the divine word. *The Satanic Verses* is easily perceived as an obscene and mocking insult which seeks to undermine the authority of Islam's founder and its founding text. Distrust of *The Satanic Verses*' form and style may well have contributed to the reactions that it produced.<sup>7</sup> What was perhaps

*System*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* (1982) (regarding the potential of an Islamic criminal justice system to practice and protect human rights principles); Bernard Lewis, *Behind the Rushdie Affair*, in *AMERICAN SCHOLAR* (1991) (seeing the essence of Rushdie's *fatwa* in Islamic notions of heresy).

5. See SALMAN RUSHDIE, *THE SATANIC VERSES* (1992).

6. Signs of official Jewish and Christian support for Muslim outrage at *The Satanic Verses*—albeit short of support for the death sentence itself—may be indicative of a broader tension between sacred and secularizing forces which extends beyond particular spiritual and temporal orders. The Chief Rabbis of both Israel and Britain, for example, each protested against the publication of *The Satanic Verses*. See LONDON TIMES, Mar. 9, 1989, in *THE RUSHDIE FILE*, *supra* note 2 (reporting British Chief Rabbi Jakobovits stated "we should not tolerate a form of denigration and ridicule which can only breed resentment to the point of hatred"); see also *Vatican: Newspaper Condemns Rushdie's Novel*, THE INDEPENDENT, Mar. 6, 1989 (noting the Vatican newspaper, *L'Osservatore Romano*, condemned *The Satanic Verses* as blasphemous). Even evangelist Billy Graham expressed his sympathy for British Muslim protests. THE GUARDIAN, June 2, 1989, in *THE RUSHDIE FILE*, *supra* note 2. On a different subject, the recent Cairo World Conference on Population and the preparatory meetings for the Beijing World Conference on Women showed a similarly broad and vigorous coalition of outlook among the major religions. Although religious orders may feel increasingly ostracized by mainstream orders of political and legal authority, these meetings indicated that nowhere in the world is religion (or "God") as dead a social force as some proclaim.

7. Distrust between art and religion is not new in the Islamic world. Sacralized poetry was intimately affiliated with the pre-Islamic order overturned by Muhammad, and has been looked upon ever since with suspicion. The Qur'an says "[a]s for poets, the erring follow them. Hast thou not seen how they stray in every valley. And how they say that which they do not." *Sura* 26:224-26, reprinted in AHMED ALI, *A-QUR'AN: A CONTEMPORARY TRANSLATION* (1988) (source of all Qur'anic cites for this article). This suspicion recognizes that poetry and art are powerful competition, to the power and force of the divine word. Of course, in a classic contradiction, the Qur'an, despite the fact that theologically it is inimitable and so is not, strictly speak-

more shocking to South Asian Muslims, who as a group had the most heated popular reaction to the book, was that *The Satanic Verses* was written by another South Asian Muslim, an insider and thus a perceived traitor.<sup>8</sup> What was shocking for Rushdie, the British Government, and much of the rest of the world was that Khomeini's *fatwa* broke the international legal order's established confines and the assumed borders between religious and secular law. It did this by arbitrarily claiming the authority to extend the enforcement jurisdiction of a putatively religious verdict into British domestic, secular jurisdiction.<sup>9</sup>

There are two fundamental issues in the Rushdie affair: Khomeini's *fatwa* and the more general outrage of many Muslims against *The Satanic Verses*. This outrage, though heated, most often distinguished between righteous anger and endorsement of the *fatwa*. This paper focuses on the *fatwa*. By examining its legitimacy in three different orders: the Islamic legal order, the secular international legal order, and the Iranian domestic political order, one can catch glimpses of some of the oppositions and similarities among these orders, as well as the intertwining and often contradictory undercurrents to this *fatwa*.

Within these different orders run a number of themes charged with political electricity which directly and indirectly inform the Rushdie affair. Particularly charged are questions of human rights challenges to the legitimacy of Khomeini's *fatwa*, which also raise the persistent mat-

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ing, a poetic model, is often described as the greatest work of poetry in the Arabic language. The Arabic/Islamic world has, in fact, produced a great heritage of poetry and other art in this Qur'anic and pre-Qur'anic tradition. Nonetheless, a suspicion of art forms and motifs outside of traditional Islamic modes remains. Malise Ruthven, somewhat simplistically, even goes so far as to suggest that although many books say rather hateful things about Islam, it was the novel form of *The Satanic Verses* which gave rise to the intense reactions surrounding the book. MALISE RUTHVEN, *A SATANIC AFFAIR: SALMAN RUSHDIE AND THE RAGE OF ISLAM* (1990).

8. One of the bitter ironies in the political and social context of Rushdie's situation is that Rushdie had been an outspoken critic of the West's cultural dominance. The fact that he has been so fiercely repudiated and taken as a representative of this cultural dominance speaks to the arrogance of an intellectual discourse which purports post-modernism, which claims to speak for an undifferentiated mass of people with whom it may be quite politically, intellectually, and spiritually disconnected. While this paper concerns the legal aspects of Khomeini's *fatwa*, one of the more fascinating aspects of the affair is the issue of group and individual identity. The affair gives a glimpse, paradoxically, of both the rigidity and kaleidoscope-like changeability of the definition of these identities.

9. See *infra* pp. 418-22 (comparing the enforcement of the *fatwa* with Great Britain's blasphemy laws which apply only to Christianity).

ter of cultural relativism. Can international law, and more specifically human rights law, pass judgment on a separate order of law which flows from an entirely different source—one based on the eternal truths of God's words, rather than the asserted natural rights of humankind? Within this well worn debate lies perhaps a more bitter and ultimately more important debate over hate speech. Can a community legitimately protect itself from communication it finds morally offensive? Can an individual indiscriminately abuse the sacred beliefs of others? In what way can a community, or in this case a state claiming to speak as a community, legitimately respond to such a perceived attack?

After sketching out these and other underlying themes to the Rushdie affair in a discursive, introductory fashion, a more systematic elaboration will follow of the place of Khomeini's *fatwa* in Islamic and international law, as seen in the context of Iranian domestic and international politics. As indicated, particular attention will be paid to human rights issues, communal libel, and cultural relativism.

## I. THEMES UNDERLYING THE RUSHDIE AFFAIR

### A. SPIRITUAL ORDER VS. TEMPORAL ORDER IN ISLAMIC LAW

The Rushdie affair, which culminated in Khomeini's *fatwa*, demonstrates first and foremost the ever-present tension between divine law absolutes and the political complexities and difficulties with which the real world obstructs the application of such law. Historically, spiritual orders have often attempted to maintain the appearance of aloofness from direct involvement in messy and compromising temporal realities. Nonetheless, the tension between these two interdependent orders, the spiritual and the temporal, existed in a variety of fashions throughout history. The shifting balances between these two orders are defined both by a competition for the power to translate moral and political arguments into law, and by a mutual need: the spiritual order for the ability of temporal rule to maintain its institutional position, and the temporal for the spiritual order to justify and morally legitimize (or, at the least, acquiesce to) its rule.

Prior to the Iranian revolution, Shi'a Islam was noted for its relatively accommodating attitude toward Iran's temporal ruling orders.<sup>10</sup> The Is-

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10. See SAID AMIR ARJOMAND, *THE SHADOW OF GOD AND THE HIDDEN IMAM: RELIGION, POLITICAL ORDER, AND SOCIETAL CHANGE IN SHI'ITE IRAN FROM THE BEGINNING TO 1890* (1984) (providing a history of Shi'ism and its political engagements). See generally MOOJAN MOMEN, *AN INTRODUCTION TO SHI'I ISLAM* (1985)

Islamic Republic of Iran's departure from this is a relatively rare (and, fifteen years after the revolution, still somewhat ambiguous) example of an attempt to mesh these two orders by translating a particular version of divine natural law into the temporal sphere.<sup>11</sup> Khomeini defined his political project as seeking a state in which "[t]he sole determining principle in a government . . . is divine law, law that is the expression of divine will, not the product of the human mind."<sup>12</sup> In other words, divine natural law will assert itself over secular, positive law and will govern through the insight of the *velayat-i faqih*, none other than Khomeini himself.<sup>13</sup>

This attempt to apply divine law directly, though ambiguous and partial, nevertheless created a tremendous degree of stress among these various orders. The Rushdie affair is just one symptom of the debris left when one man's insight into the divine order clashes with the plurality and complexity of real world legal and political orders. As demonstrated by the Rushdie affair, the most fundamental result of the meshing of these orders was that the Shi'a *ulama* in Iran were forced to abandon their traditional role as the guardian of the guardians—the moral check on arbitrary power.<sup>14</sup> With an identification of religious, legal, and political power in the same institution, who is left to guard the guardians from their own excesses?

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(presenting history of Shi'a Islam); HAMID DABASHI, *THEOLOGY OF DISCONTENT: THE IDEOLOGICAL FOUNDATION OF THE ISLAMIC REVOLUTION IN IRAN* (1993) (supplying an analysis of the different ideological modes present in the Iranian revolution); Nikki Keddie, *Religion and Rule in Iran: A Historical Perspective*, in *MIDDLE EAST INSIGHT* July-Aug. 1995 (providing a brief summary of Shi'ism in Iran); HASHIM MA'RUUF AL-HASANI, *AL-SHI'ISM BAYNA AL-ASHA'IRA WA-AL-MU'TAZILA* [Shi'ism between the Ash'arites and Mu'tazilites] (1978) (giving a history and analysis of Shi'ism); MUHAMMAD ISMAIL, *FIRAQ AL-SHI'A* [Shi'a Sects] (1995) (explaining the historical influence of different sects and ideologies on contemporary Shi'ism).

11. It is worth noting that the dominance of Iran's Shi'a hierarchy by figures committed to an apolitical role was reversed in the course of a generation by the secularizing excesses of the Shah, which instigated a radical reaction by the Shi'a leadership and all forces within Iranian society.

12. IMAM KHOMEINI, *ISLAM AND REVOLUTION* 330 (1985). Islamist politics, for all their diversity, generally share this divine natural law basis.

13. Sayyid Qotb, a leading theorist of political Islam states that "the sharia revealed in the Qur'an is the law of all times, because it is the witness of God—the law of religion made for man."

14. See MOMEN, *supra* note 10, at 191-93 (discussing the *ulama's* attitude towards political authority).



B. NATURAL VS. POSITIVE LAW IN INTERNATIONAL  
HUMAN RIGHTS TREATIES

Perhaps international human rights may serve as a guardian. Human rights law is based on an ill-defined philosophy combining natural law impulses with positive law enactments which seek, for their part, to check arbitrary power. This natural law impulse was first expressed in the Universal Declaration of Human Rights (UDHR)<sup>15</sup> and is a reflection both of the social contract philosophy of Rousseau and Locke's notion of the individual's autonomy from the state<sup>16</sup> first institutionalized in the United States.<sup>17</sup> This impulse has remained as human rights law has evolved, but it is sustained by different sources. Some see the foundation of human rights in Ciceronian right reason, i.e., the ability, through rational discourse, to find the analogues in other cultures which are the basis of universal law.<sup>18</sup> Others see their basis as flowing from religious conceptions, whether explicitly deistic in the sense that human beings have rights "endowed by their Creator," or more purely moral in the sense that religious values translate into rights. A natural rights basis for human rights is also found in Rawlsian theories of justice, in which principles of liberty and equality are balanced,<sup>19</sup> or in other variants on the liberal ideal which range from radical restrictions on the role of the

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15. G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948).

16. See David Weissbrodt, *An Introduction to the Sources of International Human Rights Law*, C 399 A.L.I.-A.B.A. 1 (1989) (citing various philosophical foundations for human rights theory).

17. See JEROME HUYLER, *LOCKE IN AMERICA: THE MORAL PHILOSOPHY OF THE FOUNDING ERA* 149-74 (1994) (discussing Locke's classic essay, *The True, Original, Extent and End of Civil Government*).

18. See Bassam Tibi, *Islamic Law, Human Rights, and Morality*, 16 HUM. RTS. Q. 297 (1994) (describing the conflict between human rights and Islam as "the conflict between a man(reason)-centered and a cosmological theocentric view"). "[T]here must be some grounds for universally valid comparisons that facilitate drawing general conclusions . . . . Comparisons on universal grounds and knowledge, as is the case with international human rights law, are acceptable and must be admitted." *Id.* at 294-95.

19. JOHN RAWLS, *A THEORY OF JUSTICE* (1971); see Jerome Shestack, *The Jurisprudence of Human Rights*, in *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 85-99 (1984) (discussing the various theoretical perspectives on human rights).

state,<sup>20</sup> to more egalitarian conceptions,<sup>21</sup> or conceptions based on the "super value" of dignity.<sup>22</sup>

With a coherent philosophy of human rights yet to emerge, the universality of human rights appears to be the rhetoric of a political project, rather than the expression of an established fact. This incoherence, however, should not mask the fact that what might be called a "shifting universality" has, in fact, solidified itself as people from various perspectives have come to see human rights as the common language by which their political and social ideals can gain force with general consensus on a number of rights. The great success of human rights has been the translation of the UDHR, a natural law declaration, into a series of interlocking positive law treaties and agreements binding on their signatories;<sup>23</sup> thereby, bridging the philosophical divide separating natural and positive law. This positivization of the natural law precepts of the UDHR is also the ultimate answer to cultural relativism. A solid core of human rights norms have reached a point where, with only a few exceptions, they are now universally accepted by treaty.<sup>24</sup> Explicit consent is not culturally relative.

The consent given these international agreements, however, is considered by many to be superficial, merely reflecting the international community's pressures on the elite and unrepresentative governments that have long held sway in much of the Third World. The universality of human rights, both as natural and positive law, continues to be challenged rhetorically in terms of a defensive and often unconvincing retreat into cultural relativism. More forcefully, the universality of human rights is challenged by competing divine natural law orders that refuse to submit to the proclaimed universalities of human rights. The Interna-

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20. See generally JOHN GRAY, *POST-LIBERALISM* (1993) (arguing that only a civil society can be the basis for maintaining liberty in a post-modern world).

21. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 150 (1977) (discussing egalitarian conceptions of human rights).

22. See MYRES S. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 368 (1988) (describing a conception of human rights that focuses on the dignity of men and women).

23. See Weissbrodt, *supra* note 16, at 7-10 (setting forth a concise history of the developments of international human rights law after World War II).

24. See *id.* at 10 (listing the following universal human rights as accepted by treaty: the protection of life, liberty and the security of the person; guarantees of freedom of expression, religion, association and movement; and freedom from slavery, arbitrary arrest, imprisonment without a fair trial, and invasions of privacy).

tional Covenant on Civil and Political Rights (ICCPR),<sup>25</sup> for example, enshrines protections of rights of free expression,<sup>26</sup> freedom of religion,<sup>27</sup> a fair trial,<sup>28</sup> and the right to life,<sup>29</sup> each within certain limitations. Iran is a signatory without reservation to this treaty,<sup>30</sup> and the Islamic Republic has reasserted its adherence. Despite this, in the Rushdie affair Iran would seem to be systematically and unapologetically violating its treaty obligations—against explicit Qur'anic edicts to respect treaties<sup>31</sup>—on the putative basis of fidelity to the *sharia's* higher law.

### C. INTERNATIONAL HUMAN RIGHTS LAW VS. ISLAMIC LAW

In exploring the Rushdie affair one finds that although both international human rights and Islamic law can have their excesses and points of conflict, they are by no means fundamentally incompatible. In fact, structurally, each system is rather diffuse and non-hierarchical, and each is constructed to compromise with the political and practical limits of applying law. Of course, in the give and take between the legal and the political, each order can sometimes overextend itself. The Rushdie case is an example of such an overextension—a particular case where laws apply outside the accepted, traditional limits to Iranian or Shi'a Islam's power—more than it is a case of fundamental incompatibility. As a legal-political order, Islam in fact has a long tradition of respecting norms of international coexistence.<sup>32</sup> In the long term, I would suggest that international and domestic pressure will ultimately help force the Islamic Republic of Iran to retreat from its current confrontational position and return to this tradition.

While the *fatwa* is perhaps an "overextension," one must also recognize that as a natural law order, Islam, like all religious orders, implicitly lends itself to absolutist interpretations which do not recognize political limits. A religion's institutional mediators between God and believers—in the case of Islam the relatively diffuse *ulama*—hold their power

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25. G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

26. *Id.* art. 19(2).

27. *Id.* art. 18(1).

28. *Id.* art. 14.

29. *Id.* art. 6.

30. See ICCPR, *supra* note 25. Iran signed the Covenant on April 4, 1968 and ratified it on June 24, 1975.

31. See *infra* p. 412 (discussing treaties in Islamic law).

32. See MAJID KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* (1955).

on the claim of specialized knowledge of eternal truths that lead to salvation.<sup>33</sup> Given a particular political context, there is always the latent possibility of absolutist interpretations which will move the faithful away from the norm of accepting plural national and international communities and towards accepting extremist xenophobia. Such extremes—even if not the norm—cannot be dismissed as a fluke, particularly given their current popular resonance. They are an implicit possibility in any natural law system in which one group can claim a monopoly on truth.

Thus, even if modes of international coexistence are embedded in positive law treaties, a natural law order—such as the Islamic Republic of Iran—will always have a degree of tension with such positivist, secular law. An order based on religious truths, when subject to extreme interpretations due to particular political contexts, can lead to dangerous, absolutist outcomes. Khomeini and his followers may be on Islam's historic fringe, but they still represent a very real possibility within the Islamic order.

Paradoxically, such an absolutist movement can be stimulated by an overextension, in its turn, by the human rights movement with its natural law basis. The absolutist rhetoric of universal rights can arouse a political backlash among those who have historical reasons to fear the universalizing goods of Europeans and Americans. The real danger of the human rights movement's reliance on an ideology of universal rights is that it has a polarizing effect: it raises mistrust and places local human rights activists in the politically uncomfortable position of siding with those "universal" values popularly identified with outside powers, rather than working with "indigenous," local traditions. However cliché and unfair the perception of such categories, it could well be that, tactically, universalizing language may have outlived its usefulness. At this point the universal vs. cultural particularities debate often obscures more than it illuminates.

In other words, the Islamic and international orders are broadly compatible, but there are particular points of conflict. If interpreted or imposed in a certain way, the Qur'an contains edicts in express contradiction with human rights norms.<sup>34</sup> In the normal course of attempting

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33. See GLASSE, *supra* note 1, at 407 (recognizing *ulama* as a scholars or authorities in the religious sciences). *Ulama*, in fact, is translated from the Arabic as "those with knowledge."

34. See *infra* pp. 395-96 (showing Islamic law has incontrovertible clashes in areas of nondiscrimination, in which both explicit Qur'anic verses and Islamic tradi-

to coexist in the international order, such points are usually finessed. However, there is always the implicit potential for extremist interpretations leading to confrontation and conflict. So, though there can be (and usually is) coexistence with a natural law order, this can never be absolutely secure.

Furthermore, at a certain point the attempt to push human rights norms as universal truths may be counterproductive, stimulating resistance and mobilizing opposition from competing natural law orders, instead of advancing the concretization of rights. With the positivization of human rights law, it may be more beneficial to attempt to move beyond the fruitless universalism vs. cultural relativism debate. By questioning each of the poles of this debate, one can perhaps consolidate the gains already made in human rights and expand them on the basis of cross-cultural consensus,<sup>35</sup> muting the language of universalism which carries with it the political baggage of the United States and Western European political dominance. The absolutes of natural law had an essential role in stimulating the enactment of human rights law; the full implementation of this law, however, may require a more carefully calibrated strategy of cooperation with other orders of law. In fact, human rights norms are sufficiently flexible that, in the main, and despite overheated rhetoric of cultural imperialism, they have no difficulty working with other orders of law.

A human right to freedom of life, religion, or expression clashing with the somewhat archaic use of Islamic norms of blasphemy or apostasy is not, in any case, the fundamental reason that the Rushdie affair is of such urgency. It is urgent because Iran is attempting to enforce its legal judgment outside of its prescriptive jurisdiction, against all norms of the current secular international legal order and Islamic law.<sup>36</sup> In terms of the *fatwa* threatening Rushdie's life, human rights—minus some

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tions are relatively uncontested).

35. See Abdullah A. An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES 19, 20 (Abdullah Ahmed An-Na'im ed., 1992) (maintaining that "observance of human rights standards can be improved through the enhancement of cultural legitimacy of those standards").

36. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1986) [hereinafter RESTATEMENT] (recognizing a state's jurisdiction to prescribe laws with respect to, among other things, conduct which takes place within its territory or conduct outside its territory which has a substantial effect within its territory).

tortured constructions—have little to say about attempting to restrict the right of free expression, life, or religion outside of a state's jurisdiction.

Human rights fundamentally regard the relation of a state to its own citizens and those who reside within its territorial jurisdiction.<sup>37</sup> Iran's attempts to enforce the judgment of the *fatwa*—despite the obvious lack of an extradition treaty for apostasy—are a violation of a much more fundamental notion of international law: the territorial integrity of states.<sup>38</sup> If one looks at the *fatwa* on Rushdie as a violation of the norms of the international order, it becomes an international relations issue in which one must gauge the political, horizontal reaction which Khomeini's *fatwa* stimulated within the international state system.

This is not to say that human rights are irrelevant. In the Rushdie affair, Iran arguably violated several human rights norms. As will be seen, perhaps the most interesting and difficult of these norms is the question of communal libel. Communal libel raises a paradox: has Iran violated Article 20 of the ICCPR through its incitement of violence against Rushdie, or can Iran, citing events in South Africa, India, Pakistan, and the United Kingdom, legitimately claim justification for the banning of *The Satanic Verses* on the basis of maintaining public order and, more broadly, protecting the sanctity of its religious-political community? Ideologies based on notions of ethnic, cultural, or religious purity may increasingly see blasphemous (or critical, depending on the perspective) speech as an attack, justifying retribution.<sup>39</sup> Before accepting a group right to proscribe "communal libel," it is necessary to seriously grapple with the implications of allowing groups to define acceptable speech. Which groups should do so? Who speaks for a group? Based on what criteria? How can one reconcile such a group right with the rights of individuals and other communities?

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37. See RICHARD BILDER, AN OVERVIEW IN GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3 (H. Hannum ed., 1984) (basing the human rights movement on a recognition that every state has an obligation to respect the rights of its citizens).

38. See LOUIS HENKIN, HOW NATIONS BEHAVE 18 (1968) (deeming internal sovereignty a fundamental principle of international law).

39. See NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 75-76 (1991) (identifying religious intolerance as a major cause of human rights violations).

#### D. THE POLITICAL SETTING IN IRAN AND THE FATWA'S IMPACT ON IRAN'S INTERNATIONAL RELATIONS

Outrage over *The Satanic Verses* came about at a moment of acute social conflict and political change.<sup>40</sup> The *fatwa* was issued after the book was banned in many countries, and after violent and deadly protests in Pakistan, India, and Britain.<sup>41</sup> In Iran, it came immediately after Khomeini, under intense domestic political pressure, agreed to the "bitter pill" of a ceasefire with Iraq, and at a time when the then-Speaker of the Parliament Rafsanjani, President Ali Khamenei, and successor-designate Ayatollah Montazeri were calling for moderation.<sup>42</sup> The debate over who was more revolutionary and who was more Islamic gained renewed vitality with the *fatwa*, a process that favored the radical factions<sup>43</sup> and Khomeini's apparent intention of revitalizing revolutionary fervor.<sup>44</sup>

The extraordinary ideological tumult of the Iranian revolution resulted in unprecedented formulations of Islam and Islamic politics. In the course of this tumult, a remarkable sense of Islamic revolutionary com-

40. See HUMAN RIGHTS WATCH, *GUARDIANS OF THOUGHT: LIMITS ON FREEDOM OF EXPRESSION IN IRAN* 86 (1993) (noting that Khomeini issued the *fatwa* under "peculiar political circumstances").

41. *Id.*

42. See *id.* at 114-16 (commenting on Iran's punishment of political opponents). It is also noted that Ayatollah Montazeri was dropped as designated successor because he failed to support the *fatwa*. *Id.* at 86 n.4.

43. *Id.* at 86.

44. See THE RUSHDIE FILE, *supra* note 2, at 186 (suggesting that accusations of heresy, blasphemy, sedition, and corruption are often raised by upholders of orthodoxy at such moments of political and social tension). The frequency of such tensions, however, calls into question their usefulness as a defining variable. Cf. *Galileo*, in 19 THE NEW ENCYCLOPEDIA BRITANNICA 638-39 (1995) (discussing the Roman Catholic Church's suppression of Galileo's discovery proving the Copernican Doctrine). Galileo's prosecution, for example, took place at the height of the battle in Europe between Protestantism and Catholicism, and this tension seemed to stimulate the Jesuit charge that Galileo's teachings "could have worse consequences on the established system of teaching than Luther and Calvin together." *Id.* While in 1616, Galileo had simply been told to neither "hold nor defend" his doctrine, in 1633 he was compelled to stand trial for "vehement suspicion of heresy" and ordered to recant by saying he "abjured, cursed, and detested" his past errors. Galileo added after his recantation, "e poi, se muove"—"and yet, it moves." *Id.* In deference to his age, the Pope (Urban) commuted his imprisonment to house arrest. *Id.* Like Rushdie, Galileo did have some sense of the tricky theological territory into which he had ventured, but neither he nor Rushdie foresaw the political maelstrom which would result.

munity was created, propelling Iranians to the sacrifices necessary for the Shah's overthrow. The creation of such an Islamic political community, however, relied on a radical "us" and "them" division of the world, the consequences of which Iran's political leadership has not been able to escape. With political legitimacy tied to the demonization of the "other," Iran has maintained a (politically convenient) stance of a beleaguered community at war with the world. The targeting of Rushdie is part of a general mode of strictly defining a putatively pure Islamic/Shi'a/Iranian community under attack from the outside—from "the West"—and forced to respond. This response is particularly virulent in the case of an accused blasphemer or apostate, such as Rushdie, a theoretical betrayer of the community.

The unfortunate results of this strict definition of a singular community opposed to all other communities points to the general dangers of group rights. Such rights, often based in rather regimented and/or romantic notions of community, tend to stifle members of the putatively "protected" community and promote the separation of this community from others with which it must interact. This can lead to internal abuses of the rights of dissenting individuals and communities, and external conflict. In the case of Iran, internally this manifests itself in the persecution of Bahai's and dissenting Muslims; externally, in its combative relations with regional neighbors and the international community.<sup>45</sup>

The *fatwa* is not just a product of a particular social and political context. It is also a stunning example of how law has a somewhat mystical permanence, in a manner which can have a lasting effect on international relations. Khomeini's *fatwa* took a passing event and made it a lasting albatross around Iran's relations with the non-Islamic world. Khomeini's successors have given every indication they would like to rid Iran of this impediment to better relations, but the fact that this opinion was justified with the weight of law—divine law, at that—has so far made this impossible.

In a sense, the chilling effect on Iran's international relations is somewhat curious. The fate of a literary author is certainly of no major importance to the Great Powers, especially one whose Third Worldist politics had never made him a close friend of the powers that be.<sup>46</sup>

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45. See IRAN AND THE INTERNATIONAL COMMUNITY 124 (Anoushiravan Ehteshami & Manshour Varosteb eds., 1991) (analyzing Iran's relations with other nations).

46. See DANIEL PIPES, THE RUSHDIE AFFAIR: THE NOVEL, THE AYATOLLAH AND THE WEST 41-43 (1990) (summarizing Rushdie's academic and literary achievements).



Nonetheless, Britain, the United States, the European Union, and Iran's regional neighbors have since had noticeably cool relations with Iran.<sup>47</sup> This is not only because of Rushdie, of course. Extraterritorial assassinations and the funding and arming of extremist political movements in other countries have also kept relations from developing beyond an unavoidable (though considerable) level of trade and diplomatic contact.

The coolness of relations is not due specifically to Rushdie or even to these other matters, but to what these matters signify more broadly: a lack of respect for the norms of the international order. Those of the realist school would have one believe that a matter which has little to do with national self-interest will not have an impact on a country's foreign policy.<sup>48</sup> The international reaction to Iran's transgressions of the norms of the international order, however, show that this order is more than the Hobbesian jungle the realists suggest. Although one cannot contend that the Rushdie affair is any country's highest priority, it is part of a pattern of Iranian action which has brought on the horizontal enforcement of the international community<sup>49</sup>—based solely on the interests of the norms of the international order itself, not exclusively on defined national interests.<sup>50</sup>

Beyond the specific "enforcement" actions taken by the international community, Iran's transgressions have also earned it a general mistrust from the United States and European foreign policy community.<sup>51</sup> This

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within British society).

47. See Anoushiravan Ehteshami, *Iran and the European Community*, in *IRAN AND THE INTERNATIONAL COMMUNITY* 61 (Anoushiravan Ehteshami & Manshour Varosteb eds., 1991) (discussing relations between the European Community and Iran). Economic interdependence was a catalyst for improvements in relations between the two entities but, despite expectations, Iran has not countermanded the *fatwa*, though it has announced it will not actively pursue Rushdie. *Id.* at 72.

48. See RAINO MALNES, *NATIONAL INTERESTS, MORALITY AND INTERNATIONAL LAW* 43 (1994) (examining the validity of the "absolute priority principle" which purports that a nation's primary national interests, such as national security and economic prosperity, come before all other concerns).

49. See Anthony D'Amato, *The Moral and Legal Basis for Sanctions*, 19 *FLETCHER FORUM OF WORLD AFFS.* 19 (1995) (discussing the enforcement capacity of the international order).

50. See Graham Fuller, Lecture at The Fletcher School of Law & Diplomacy (Apr. 18, 1995) (discussing the impact of Iran on the national interests of other nations). Of course, Iranian funding of opposition groups in other countries is, for those countries, a direct attack on their national interests. As Fuller points out, however, it is only in Lebanon that Iranian funding has been a major factor in another country's domestic politics—in this case, of course, it also has had serious ramifications on Israel's national interests. *Id.*

51. See Eric Hooglund, *The United States and Iran, 1981-89*, in *IRAN AND THE*

mistrust is expressed most bluntly in Samuel Huntington's *Clash of Civilizations?* thesis, which holds that a country such as Iran is inevitably opposed to the interests of the "West."<sup>52</sup> Though Huntington's thesis is crude and misleading, it does indicate the degree of mistrust Iran has earned, which undermines its interests.<sup>53</sup> Whether it be in relatively minor, immediate matters—such as the oil production deal with Conoco which was recently canceled due to United States pressure<sup>54</sup>—or matters of more long term significance—such as the refusal of the IMF to

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INTERNATIONAL COMMUNITY 31 (Anoushiravan Ehteshami & Manshour Varosteb eds., 1991) (outlining the Reagan Administration's policy toward Iran); see also ECONOMIST INTELLIGENCE UNIT (EIU) COUNTRY REPORTS, Iran, 11 (Feb. 19, 1996) [hereinafter EIU COUNTRY REPORTS]. The Report states that the *fatwa*:

continues to bedevil Iranian relations with the EU . . . Despite talks on the issue between Iranian and European foreign ministry officials in December [1995] the position remains unchanged. The Iranian government has given a pledge that it will not seek to pursue the death sentence issued against Mr. Rushdie, but refuses to give a written guarantee . . . The only possible resolution would be for a leading Iranian jurist, with the backing of the regime, to give a counter-judgement to the original *fatwa*. This is unlikely to happen in the foreseeable future.

*Id.*

52. See Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFFS. 22, 39 (1993) (contending that conflicts between civilizations will define international politics in the future). Huntington's claim is, in a sense, parallel to the universal rights/cultural relativism debate. *Id.* Huntington argues from the political right what some relativists argue from the political left: that cultural differences are fundamental to interactions in the international order. Are Muslims, in essence, different? Are Islamic states fundamentally opposed to the rest of the international order? Or does not historical experience show that states of the Muslim world are as diverse in their politics as any other region of the world, in a manner which defies classification by supposed Islamic essence? *Id.* at 41 (contrasting the Western concept of "universal civilization" with the "particularism" of many Asian cultures).

53. I would argue that a "clash" between culturally relative orders is contradicted by the historical norm of the Islamic world's complementary relationship with other legal/political orders. Extreme movements, such as that led by Khomeini, should not be exaggerated into signifying the entire Islamic world or Islamic history. See Anthony Chase, *Bridges Over Barricades: The Fallacies of Samuel Huntington's Clash of Civilizations?*, STANFORD J. INT'L AFF. (1994) (critiquing Huntington's *Clash of Civilizations?*).

54. See Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (1995) (prohibiting United States citizens from contracting to develop or finance the development of Iranian petroleum resources); see also Robert S. Greenberger, *Clinton Administration Blasts Dupont's Conoco Unit Over Oil Contract With Iran*, WALL ST. J., Mar. 8, 1995, at A5 (identifying the Administration's concerns that Conoco's contract was inconsistent with United States policy toward Iran).

extend requested loans—Iran's "rogue" status, earned in part and clearly symbolized by its *fatwa* on Rushdie, has harmed it greatly.

The price the international order has exacted from Iran, though perhaps insufficient, has had its effect on the domestic lives of Iranians<sup>55</sup> and, possibly, their rising political discontent. There are elements of the Iranian leadership, including President Rafsanjani, who would apparently like to reverse this ostracization in order to focus on improving Iran's economy. In fact, despite the entrenched position of radical supporters of an extremist line, there are indications of a continuing shift to pragmatism. A shift which seems to have been continued in the March 1996 elections.<sup>56</sup>

#### E. ART, RELIGION, POLITICS AND LAW

Lastly, touching on some of the above-mentioned points and by way of introducing the more elaborated section of this article, the Rushdie affair is an example of the intimate interrelationship among art, religion, politics, and law. The divine law sanction on book and author shows the force which religion can infuse in politics, both in the sense of the elite manipulations of a Khomeini and the heartfelt feeling of insult by millions of Muslims. Many Muslims took the book—with very little prompting—as an attack on their identity and culture's sacred roots, a testimonial to the power of religion and the intensity of feeling which a work of art can produce.<sup>57</sup>

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55. See *Iran: Tied Economy, Tied President*, ECONOMIST, July 16, 1994 (discussing the challenges facing the Iranian economy, especially its foreign debt); see also Scheherazade Danshku & Gillian Telt, *No Cause for Celebration: Iran's Economic Problems are Worsening*, FIN. TIMES, Feb. 28, 1995, at 16 (noting Iran's crisis, rising debt, and lack of investment).

56. See Milton Viorst, *Changing Iran: The Limits of Revolution*, 74 FOREIGN AFFS. 63 (1995) (noting that since the end of the Iran-Iraq war, there has been an increased questioning of the Islamic regime's legitimacy); see also Hushang Ansary, *Beyond the Great Satan: How the U.S. and Iran can Mend Their Rift*, WASH. POST, June 9, 1995, at C3 (commenting on the political discontent among numerous social groups, including the Shi'ite clergy, in Iran).

57. Cf. Russel Chandler, *25,000 Gather at Universal to Protest Film*, L.A. TIMES, Aug. 12, 1988, at A1 (recounting the widespread criticism aimed at Martin Scorsese's film *The Last Temptation of Christ*). In the movie, Scorsese depicts Satan as trying to tempt Christ off the cross with a vision in which he has a sexual encounter with Mary Magdalene and in which he lives the life of an ordinary man. Jay Carr, *Movie Review: The Last Temptation of Christ*, BOSTON GLOBE, Sept. 2, 1988, at 25.

If one questions the legitimacy of the *fatwa* in terms of the religious, legal and political orders, one cannot forget that these orders are quite entangled. An Islamic scholar's edict that the *fatwa* is illegitimate may have little popular resonance and, thereby, scant real world effect. Khomeini, though quite learned, was not considered a first-rate legal scholar by his colleagues. The political resonance of his message, however, earned him the stature of an Ayatollah, a Grand Ayatollah, and eventually, Imam—the highest legal and spiritual authority in Shi'a Islam. Law and politics separated from religion are enervated; any analysis must take account of their intimate connections.

## II. THE ISLAMIC LEGAL ORDER

### A. THE *FATWA'S* ABSOLUTIST DEFENDERS AND CRITICS

It is both condescending and counterproductive to condemn Khomeini's *fatwa* without even a nod toward understanding its basis in Islamic law and political context and the rage of those who feel they are the whipping post of Western military, political, and cultural power. Norman Stone, for example, in commenting on the *fatwa* explains with a very broad brush that "Islam is the religion, after all, of the ferocious Ayatollahs, of suicide-bombings and hostage taking; of the Afghan sects, who, no doubt, will soon be meting revenge on [sic] collaborators with the Soviets. Salman Rushdie has learned this, in a very hard way."<sup>58</sup> This sort of inflammatory rhetoric is an absurd misunderstanding of the real forces at work within the Islamic world. Even more inflammatory and counterproductive is the polemic published by Rushdie's friend Fay Weldon, whose generally offensive remarks include the fabricated claim of a Qur'anic verse saying "[w]hen the unbeliever holds out his hand, take it. But when he turns his back, slay him."<sup>59</sup> Weldon goes on to say that the Qur'an "gives weapons and strength to the thought-police—and the thought-police are easily set marching . . . You can build a decent society around the Bible . . . but the Koran? No."<sup>60</sup>

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58. Norman Stone, *We Need Russian Help Against Islam*, THE DAILY TELEGRAPH, Feb. 19, 1989, in SACRILEGE VERSUS CIVILITY, *supra* note 2, at 77.

59. FAY WELDON, SACRED COWS 7 (1989).

60. *Id.* Perhaps the most arrogant statement comes from a surprising source, Conor Cruise O'Brien in a May 1989 interview in *The London Times*. O'Brien states that "Muslim society looks profoundly repulsive . . . because it is repulsive . . . . At the heart of the matter is the Muslim family, an abominable institution . . . al-Afghani wrote 'Every Muslim is sick and his only remedy is in the Koran.' Unfortu-

Less silly, but perhaps more telling, the International Fellowship of Reconciliation, in a communication delivered to the ECOSOC Sub-Commission on Prevention of Discrimination and Protection of Minorities, claimed that "[t]he international community is entitled to an unequivocal clarification on the precise point [i.e., the validity of the *fatwa*] from the most authoritative Islamic bodies as to whether such rulings are binding today."<sup>61</sup> The demand for a ruling from some presumed authoritative Islamic body—one supposes a counterpart to the Vatican is imagined—displays a misunderstanding of the structures of Islamic law, in which authority is quite diffuse, with a deliberate shying away from the creation of "authoritative bodies."

On the other hand, an uncritical acceptance of Khomeini's *fatwa* as a legitimate expression of the Islamic legal tradition and existing Muslim political sentiment risks a reductionism as severe as that of those who refuse to take Islamic law seriously. There have been apologia for Khomeini's *fatwa* which underestimate the diversity and depth of the Islamic legal tradition, patronizing it with an assumption that Khomeini's edict represents the only face of a monolithic Islam and must be respected as such. John Allemang, for example, writes that denouncing threats and intimidation of Rushdie are a "definition of the right to protest [which] is just one more way in which Westerners would impose their values on the Islamic world . . . because religion embraces all decision-making in a traditional Moslem [sic] society, it becomes impossible to treat the writer's critical comments as anything other than an attack on the foundations of society."<sup>62</sup> This undifferentiated relativism ignores Islamic societies' diverse history—including long periods when the Islamic world was a bastion of tolerance—in favor of a clichéd "defense" of a putatively communitarian Islam. It presumes tolerance to be an exclusively American and European value, condescendingly assuming that the Islamic world has not and cannot share this value. This line of thought provides a good example of how defenders of group or community rights often do so on the basis of rigid, unchanging definitions of a

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nately the sickness gets worse the more the remedy is taken." RICHARD WEBSTER, A BRIEF HISTORY OF BLASPHEMY: LIBERALISM, CENSORSHIP AND *THE SATANIC VERSES* 43 (1990) (quoting Conor Cruise O'Brien and finding these comments contemptuous and racist).

61. U.N. Doc. E/CN.4/Sub.2/1993/NGO/1 ¶ 11.

62. John Allemang, *The Islamic World: Going Too Far*, reprinted in *THE RUSHDIE FILE*, *supra* note 2, at 216-17.

community, which do more violence to the vibrant realities of history and contemporary life than any outsiders "imposing their values."

Both forms of absolutists—defenders and critics of Rushdie—share an assumption that a monolithic Islam exists which either must be resisted or uncritically respected. In fact, Khomeini's position is somewhat novel in the history of the Islamic world and can be criticized from within the Islamic legal tradition. There are two essential novelties: one, the targeting of someone outside of the *dar al-Islam*;<sup>63</sup> and, two, the ambiguity in specifying the actual crime with which Rushdie is charged.<sup>64</sup> There is, indeed, a lively dialogue on this very subject in the Islamic world, with its wide diversity of scholars, schools of law, domestic legal systems, and social contexts. While *The Satanic Verses* is widely regarded as a vile insult, it is only in a relatively few areas that the reaction has been violent; most Muslims have shrugged off the book with equanimity, while some have even contested the legal basis of the *fatwa*.

It is, thus, productive to approach Khomeini's *fatwa* by respectfully acknowledging the contradictions within the tradition which forms its context. The Qur'an, for example, says "there is no compulsion in matters of faith."<sup>65</sup> While a *hadith*—a tradition of the Prophet—says "whomsoever changes religion, kill him".<sup>66</sup> Such contradictions, however startling, are inherent in any sprawling, living, tradition—one need only contrast the Old Testament's "eye for an eye"<sup>67</sup> injunction against the New Testament's "turn the other cheek,"<sup>68</sup> to understand that this is in no way limited to Islam.

63. See GLASSE, *supra* note 1, at 93 (defining *dar al-Islam* as referring to territories where Islam and Islamic law prevail).

64. *Fatwas* on literary authors seem to be a growth industry. A comparison to the *fatwa* on Taslima Nasrin, however, demonstrates the novelty of Khomeini's *fatwa*. Nasrin has been threatened with *fatwas* by different Bangladeshi *mullahs* who do not have the power to call in a state apparatus to enforce their legal judgments. In the Rushdie case, Khomeini's *fatwa* was an official expression of the centralized Iranian state, thus combining Islamic law legitimacy with old-fashioned government persecution of writers.

65. Sura 2:256, reprinted in ALI, *supra* note 7, at 45.

66. *Ahadith* citations refer to the authoritative compilations of Bukhari and others. For a useful collection regarding apostasy, one can consult SHEIK GAD HAQ AL-GAD HAQ, *FATAAWA ISLAAMIYYA FI AL-QADAAYAA AL-MU'AASAR* [Islamic *fatwas* on contemporary issues] 357-69 (1990).

67. Exodus 21:24 (King James) (stating "[e]ye for eye, tooth for tooth, hand for hand, foot for foot").

68. Matthew 5:39 (King James) (stating "[b]ut I say unto you, that ye resist not evil: but whosoever shall smite thee on thy right cheek turn to him the other also").

B. THE *FATWA*

To God we belong and to Him we shall return. I inform all zealous Muslims of the world that the author of *The Satanic Verses*—which has been compiled, printed, and published in opposition to Islam, the Prophet, and the Qur'an—and all those involved in its publication who were aware of its content are sentenced to death.

I call on all zealous Muslims to execute them quickly, wherever they may be found, so that no one else will dare to insult the sacred beliefs of Muslims. Whoever is killed on this path is a martyr. In addition, anyone who has access to the author of this book, but is not able to carry out his execution, should inform someone else so that the punishment may be executed.<sup>69</sup>

In looking at the *fatwa*, one must begin by defining some narrow points which remain vague on a first reading. The actual crime with which Rushdie is charged, for example, is not stated. Is the crime insult? Heresy? Blasphemy? Apostasy? Are the publishers of *The Satanic Verses* sentenced to death for the same reason or for a different crime? None of this is stated, making for a rather peculiar legal statement, particularly given the specificity which normally characterizes *fatwas*.<sup>70</sup>

Specifically, the *fatwa* only describes Rushdie as guilty of acting against Islam, which is not defined as a crime under Islamic law. The Islamic *sharia*<sup>71</sup> specifies five *hadd* crimes, which carry some form of obligatory punishment: adultery, false accusation of adultery, wine drinking, theft, and brigandage.<sup>72</sup> In addition, apostasy and rebellion are con-

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69. See *supra* note 1.

70. See Sadik J. Al-Azm, *Is the Fatwa a Fatwa?*, in FOR RUSHDIE: ESSAYS BY ARAB AND MUSLIM WRITERS IN DEFENSE OF FREE SPEECH 21-23 (1994) (interpreting Khomeini's *fatwa* as a judgement instead of a *fatwa* in the traditional sense). A *fatwa* is normally a response or solution to the problems which confront followers of the faith. *Id.* at 21. It usually tries "to avoid unnecessary injury to life, limb, property, family, [and] community . . . ." *Id.* See generally AL-AZM, *supra* note 2 (analyzing the Rushdie affair and the *fatwa*).

71. See THE SHORTER ENCYCLOPEDIA OF ISLAM (1953) (explaining that the *sharia* may be classed in "two main groups according to their subject: (1) regulations relating to worship and ritual duties; (2) regulations of a juridical and political nature"). These two classes are commonly referred to as 'ibaadaat and mu'aamalaat, respectively.

72. See generally THE ENCYCLOPEDIA OF ISLAM (1993) (describing *hadd* crimes as having a specific source in the Qur'an); Aly Aly Mansour, *Hudud Crimes*, in THE

sidered *hadd* crimes by many, if not most, Islamic jurists. The ambiguity in regard to apostasy is that, as will be seen, the punishment is not defined in the Qur'an, only the crime.

All other crimes, or crimes which cannot meet the high evidentiary requirements necessary for a *hadd* conviction,<sup>73</sup> are tried as *tazir* crimes.<sup>74</sup> *Tazir* crimes generally carry lesser penalties and accept the necessity of deference to the power and discretion of temporal rulers.<sup>75</sup> It may be that as Iran's head of state Khomeini was simply acting to enforce a *tazir* penalty, which is more open to discretionary interpretation. Khomeini and the Iranian Government, however, have said that the *fatwa* was a religious edict separate from Khomeini's political power. Thus, one would expect it to be bound by Islamic and Shi'a legal precedents.<sup>76</sup> In any case, as a *tazir* punishment is often defined as less than that of a *hadd*, it is not normally punishable by death.<sup>77</sup> There is a great diversity of opinion on exactly what the appropriate punishments

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ISLAMIC JUSTICE SYSTEM (1982) (describing *hadd* crimes); ANWAR AHMAD QADRI, ISLAMIC JURISPRUDENCE IN THE MODERN WORLD (1973) (providing references to *hadd* crimes).

73. See QADRI, *supra* note 72, at 272 (discussing proof requirements for *hadd* offenses). Islamic law rarely inflicted death as punishment for *hadd* offenses. *Id.* Death punishments for offenses against "public morality, decency and the like" also required proof offered by four male witnesses. *Id.*; see MATTHEW LIPPMANN ET AL., ISLAMIC CRIMINAL LAW AND PROCEDURE 65 (1988) (noting the debate among jurists over whether a defendant in a trial for a *hadd* offense has a right to counsel). Jurists, however, are in virtual agreement that such right to counsel exists for a defendant tried of a *tazir* offense. *Id.*

74. Ghauouti Benmelha, *Ta'azir Crimes*, in THE ISLAMIC CRIMINAL JUSTICE SYSTEM (1982) (discussing *tazir* crimes).

75. See Rudolf Peters, *Valuing Life: Equality and Equivalence of Human Beings in Islamic Criminal Law*, Lecture at The Netherlands Institute, Cairo, Egypt (Feb. 8, 1996) (stating that death for the taking of a life is accepted as a legitimate punishment in an Islamic legal system). This is not classed as *hadd*, but *jinayat* as its punishment is discretionary. The principle of the sanctity of life is not absolute, but is in tension with the notion of retribution which puts a relative value on an individual's life, depending on religion, gender, whether free or slave, embryonic or not.

76. See Kamal Kharazi, Ambassador of Iran to the United Nations, Statement at the Middle East Insight Breakfast Symposium in Washington, D.C., available in FEDERAL NEWS SERVICE, 1993 WL 94267646 (Apr. 30, 1993) [hereinafter Kharazi Statement] (stating that Khomeini issued the Rushdie *fatwa* not as the political leader of Iran, but as a high-ranking and well-respected Islamic scholar).

77. See ABDUR RAHIM, THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE 363 (1911) (indicating that the punishments for *tazir* offenses range from warnings and fines to corporal punishment and imprisonment).



are for *tazir* crimes. Abd Allah ibn Qudama, a Hanbali jurist from the 1200s, is fairly typical when he says that punishment for *tazir* "is by flogging, imprisonment and reprimand. It is not permissible to amputate any part of him, or to wound him, or to take his property."<sup>78</sup>

In a booklet released by the Iranian Mission to the United Nations, subtitled "A Brief on the Imam's Verdict: Its Legal Foundations," Rushdie's actual crime—which is certainly a legal foundation—is also quite elusive.<sup>79</sup> The pamphlet is more explicit than Khomeini's *fatwa* only in the following:

in the Rushdie instance, we have a blasphemous campaign at whose disposal are hundreds of western publishing houses which seek to circulate this book . . . . The whole affair goes beyond Rushdie's foul and filthy language, it is looming as an international plot premeditatively patronized by world Zionism and imperialism to smear the Prophet's image.<sup>80</sup>

In a later speech, Khomeini was again quite vague in his accusations against Rushdie, but also mentioned blasphemy as an issue: "the issue of *The Satanic Verses* is that it is a calculated move aimed at rooting out religion . . . . God wanted the blasphemous book of *The Satanic Verses* to be published now, so that the world of conceit, arrogance, and barbarism would bare its true face in its long held enmity to Islam."<sup>81</sup> If blasphemy is indeed the crime under Islamic legal norms, it would not justify a death sentence.<sup>82</sup> It would subject Rushdie to the death penalty only if used as proof of Rushdie's apostasy (*riddah*), a *hadd* crime which is punishable by death.<sup>83</sup> Rushdie's statement that "where there is no belief there is no blasphemy," is thus answered by insisting that Rushdie cannot so easily shrug off the bonds of religious community. Indeed, the Iranian Mission's pamphlet refers, without explanation,

78. Muwaffaq al-Din Abu Muhammad 'Abd Allah ibn Qudama (d 630 Hejira, 1231 CE), *al-Mughni*.

79. THE VERDICT OF ISLAM: SALMAN RUSHDIE'S *SATANIC VERSES*: A BRIEF ON THE IMAM'S VERDICT: ITS LEGAL FOUNDATIONS (pamphlet distributed by the Iranian Mission to the United Nations) [hereinafter THE VERDICT OF ISLAM] (photocopy on file in offices of AM. U. J. INT'L L. & POL'Y).

80. *Id.*

81. See THE RUSHDIE FILE, *supra* note 2, at 74 (providing the text of the Ayatollah Khomeini's Feb. 23, 1989 message).

82. See THE ENCYCLOPEDIA OF ISLAM (1993) (see entry *murtad*).

83. See LIPPMANN, *supra* note 73, at 85 (stating that "the death penalty should be inflicted only when one of three crimes is committed: (1) apostasy; (2) a deliberate homicide; and (3) an illicit sexual act, including sexual acts outside the institution of marriage").

to Rushdie as an apostate.<sup>84</sup> The Iranian Ambassador to the United Nations also explicitly confirmed that apostasy was the charge.<sup>85</sup> Thus, in order to make Rushdie's death sentence coherent within the constructs of the Islamic legal system, one must proceed in the convoluted manner of first construing Khomeini's *fatwa* as implicitly accusing Rushdie of blasphemy, which in turn serves as proof of apostasy, for which a sentence of death is admissible.

### 1. Blasphemy

While apostasy seems to be the legal charge against Rushdie, there is little doubt that the outrage over *The Satanic Verses* is based less on this precise charge and more in anger over blasphemous statements in *The Satanic Verses*. In Islamic law, blasphemy comes under two categories: *zindiqa* and *sabb al-rasul* (or *sabb an-nabi*). *Zindiqa* indicates free-thinking, atheism, or heresy which, if expressed publicly, is considered scandalous and menacing.<sup>86</sup> *Sabb al-rasul*, translated literally, means insult of the prophet, and is a matter taken extremely seriously in the Islamic world. In fact *sabb al-rasul* is, in terms of Islamic law, a more straightforward charge against Rushdie, though it is apostasy which the Iranian Government has settled on as the basis of Khomeini's *fatwa*. Any mockery of Muhammad or of Allah is considered blasphemous and it is this deeply felt sensitivity that explains the apparently widely held feelings of disgust for *The Satanic Verses* among Muslims. It is important to note, however, that the translation of the term blasphemy to *sabb al-rasul* is somewhat problematic. Muhammad is not divine, thus an attack on him is distinct from the English language's sense of the term and closer to an insult of the very fiber which holds the Islamic community together.

The Encyclopedia of Islam says of *zindiqa* that "the term is explained by its political character; it brands the heresy which imperils the Muslim state."<sup>87</sup> Heresy indicates a split from and attempt to subvert the community of believers. With the Islamic norm of the religious and political

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84. THE VERDICT OF ISLAM, *supra* note 79, at 3, 5.

85. Ambassador Kamal Kharazi, Statement at the Fletcher School of Diplomacy (Oct. 12, 1994) (transcript available in offices of AM. U. J. INT'L L. & POL'Y).

86. See GLASSE, *supra* note 1, at 433 (defining a *zindiqa* as a "freethinker, atheist . . . or heretic").

87. *Id.* Muslim society tolerates heresy and atheism so long as such beliefs are privately held. *Id.* Muslim society will, however, consider publicly-expressed heresy a "scandal and a menace to society," and punishable as such. *Id.*

community's close alignment, this has more than just an individual, religious significance. For a Muslim state, *zindiq* is also deeply political, indicating seditious religious teachings.<sup>88</sup> Because the legitimacy of the state is often deeply tied to Islam, an attack on religion is also an attack on the state.

There are echoes of *zindiq* in the Rushdie affair. Rushdie was bitterly attacked by South Asian Muslims because he was considered a traitor to the community.<sup>89</sup> One who had been a hero—not only successful and famous, but willing to stand up politically for South Asians—now joined those who mocked their culture and beliefs.<sup>90</sup> As previously mentioned, the political equation was somewhat more complicated in Iran, but it sprang from a similar sense that the individual literary and religious expression of Rushdie had a political aspect. This time, however, the attack was not just against the religious community, but against a religious community that had aligned its beliefs with those of the state. The reaction, thus, not only called for Rushdie's death, but brought the Iranian state's punitive apparatus to bear on its pursuit.

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88. BERNARD LEWIS, *ISLAM IN HISTORY: IDEAS, PEOPLE, AND EVENTS IN THE MIDDLE EAST* 285-87 (1993).

89. See William E. Smith, *The New Satans; As the West Wakes Up, Khomeini Confirms that the Real Fight is in Iran*, *TIME*, Mar. 6, 1989, at 36 (explaining that in the weeks following the issuance of the *fatwa*, 10,000 anti-Rushdie protestors rioted in Bombay, India, leaving 13 dead and over 70 wounded).

90. In a sense, this shock is paralleled by Rushdie's surprise at the real hurt caused by *The Satanic Verses*. His use of a vernacular of obscenity and deconstructive abuse in regard to Islam and Muhammad fostered a reaction that had very little to do with the substance of Rushdie's political critique of fundamentalism in *The Satanic Verses*. Most South Asian Muslim protesters in England, for example, have evinced no particular sympathy for Shi'ism or Khomeini, and few have endorsed the *fatwa*. See Salman Rushdie, Statement before the National Press Club in Washington, D.C., available in *FEDERAL NEWS SERVICE*, 1993 WL 947520 (Nov. 24, 1993) (noting lack of support of *fatwa* death sentence among the Muslim community in Britain). Nonetheless, their sense of being insulted by *The Satanic Verses* itself remains. This article, of course, is limiting itself to an analysis of the *fatwa*, but does not question the validity of the righteous anger which particular Muslims may feel toward the book and author. It is unfortunate—from both an ethical and tactical point of view—that protesting English Muslims have not made more of a point of distancing themselves from the *fatwa*. While sensitivity was demanded for Muslim concerns, little understanding was expressed of the complexity of issues of free speech, blasphemy, and individual rights. See Bhikhu Parekh, *The Rushdie Affair and the British Press*, in *THE SALMAN RUSHDIE CONTROVERSY IN INTERRELIGIOUS PERSPECTIVE* (1990) (providing a related discussion).

The difficulty in even pinning down the charge against Rushdie indicates the rather shaky ground on which the *fatwa* is based and explains the discomfort which Iranian officials have in explaining it.<sup>91</sup> This discomfort is increased by the procedural requirement of convening an Islamic tribunal and passing a verdict before the issuance of a death sentence.<sup>92</sup> A *hadd* offense must be proven to the point of *shubha*, or beyond doubt.<sup>93</sup> While a legal opinion such as a *fatwa* can be issued by any Islamic legal scholar (and contradicted by other Islamic scholars), a criminal judgment requires a more formal procedure.<sup>94</sup> Theoretically, the binding effect of a *fatwa* comes from its acceptance in the individual consciousness of members of the broader community. Realistically, it is based in affiliation with the punitive apparatus of a state. In regards to Rushdie, the *mufti* of Egypt's al-Azhar affirmed that no Muslim can be killed without a full and fair trial and that "[t]he court must ask for the writer to explain his intentions and not be limited by misreadings and misunderstandings."<sup>95</sup> The *mufti* added that if found guilty, Rushdie could seek forgiveness.<sup>96</sup>

## 2. Sunni vs. Shi'a Islam and the *fatwa*

The fact of an Egyptian Sunni *mufti* criticizing the *fatwa* of an Iranian Shi'a Ayatollah raises questions regarding Sunni-Shi'a relations. One of the peculiar facts about Khomeini's *fatwa* is that it attempts to bridge

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91. See Kharazi Statement, *supra* note 76 (responding to questions regarding the validity of Khomeini's *fatwa*); see also *Europe Defends Rushdie*, FIN. TIMES, June 8, 1995, at 1 (reporting statement of an Iranian reformer, Ayatollah Mohammed Yazdi, that the "*fatwa* against Rushdie is 'outside the legal system of Iran' and unenforceable by Iranian courts").

92. See *supra* notes 82-83 and accompanying text (explaining the procedural requirements prior to imposing a death sentence).

93. Muneer Ahmad, *Radicalism in Orthodoxy's Clothing: A Legal and Historical Analysis of Apostasy* 20 (1993) (Thesis, Harvard University).

94. See LOUIS MASSIGNON, *THE PASSION OF AL-HALLAJ* (1994) (referring to the trial of al-Hallaj, the great Sufi mystic who declared "I am God" in a defiant expression of the oneness of God's universe, which took a full 10 years to complete). Perhaps Khomeini's Islam is not traditional enough.

95. *Letter from Cairo*, THE GUARDIAN, Mar. 3, 1989, reprinted in THE RUSHDIE FILE, *supra* note 2.

96. *Id.*; see PIPES, *supra* note 46, at 93 (noting that critics of Khomeini's edict claimed that it violated Islamic law). Abdullah al-Mushidd, head of al-Azhar's Fatwa council insisted that "[w]e must try the author in a legal fashion for Islam does not accept killing as a legal instrument." *Id.*

the Sunni-Shi'a gap. The popular protest to which Khomeini reacted came from Sunni locales,<sup>97</sup> and in responding Khomeini seemed to hold himself out as a universal leader of Muslims. While it is not so peculiar that a Shi'a cleric would speak out on an issue of concern to Sunni Muslims, it is odd that he would conduct himself as an authority to all Muslims. Such conduct was most offensive to Sunni clerics, who were also affiliated with competing Muslim states such as Egypt, Saudi Arabia, and the Sudan.

In terms of law, however, Shi'a jurisprudence is not dramatically different than Sunni jurisprudence. Moojan Momen notes that "[i]n most of its legal and juristic forms and practices, Twelver Shi'ism was two centuries or more behind Sunni Islam and tended to follow the latter very closely."<sup>98</sup> The fundamental difference between the two groupings is the Shi'a investing of charismatic authority in a line of Imams<sup>99</sup> and the greater degree of formal hierarchization of the Shi'a *ulama*, which gives the Shi'a *ulama* a greater ability to institutionally mobilize behind particular religious-political "truths."<sup>100</sup> This helps explain Khomeini's ability to create a temporarily unified revolutionary Islamic community. After his ascent to power, Khomeini worked to further this institutionalization and hierarchization of the Iranian Shi'a *ulama* by melding the Iranian Government bureaucracy with the traditional clerisy. This underpinned Khomeini's rather unprecedented assertion of the right to speak on behalf of all Muslims, which runs counter to the decentralized organization of Islam's clerisy—particularly among Sunnis—with its focus on individual conscience rather than hierarchical edict as the basis for establishing religious authority.<sup>101</sup>

A more particular distinction between Shi'a and Sunni schools which is of relevance to this affair is the issue of whether an apostate can repent. Sunnis tend to allow such repentance, contrary to Shi'a practice,

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97. See Sheila Rule, *Iranians Protest Over Banned Book*, N.Y. TIMES, Feb. 16, 1989, at A1 (reporting violent protests by Muslims in India and Pakistan over the release of *The Satanic Verses*).

98. MOMEN, *supra* note 10, at 184.

99. *Id.*

100. See GLASSE, *supra* note 1, at 407 (stating that Shi'ite *ulamas* can make legal determinations and are a "more direct and independent political force than the *ulama* of the Sunni world").

101. See Arjomand, *supra* note 3, at 97 (emphasizing the fact that the "hierocratic" authority of the Shi'ite jurists was more firmly entrenched in Iran than in Sunni majority states such as Pakistan, thus facilitating Iran's transition in merging the religious and political orders of the state).

as expressed by Khomeini.<sup>102</sup> The Shi'a practice, however, is fraught with contradiction, as came to the surface rather dramatically when Ali Khamenei, then president of Iran, indicated three days after the original *fatwa* was issued that, if Rushdie repented, the *fatwa* could be lifted.<sup>103</sup> Khomeini immediately repudiated Khamenei's statement, saying that "[s]hould Salman Rushdie repent and become the most pious sage of all times, it still remains obligatory upon all the Muslims to devote their lives and possessions to the task of [ending Rushdie's life and] sending him to the lowest state of Hell."<sup>104</sup>

### 3. The Crime of Apostasy

This brings us back to another basic but essential issue: what is apostasy? According to which Islamic sources is apostasy a crime? What are the legal results which flow from apostasy? The apparently firm edict that "there will be no compulsion in religion" would indicate that apostasy is a matter between an individual and God, not determinable in an earthly legal order. The following two Qur'anic verses define apostasy, indicating that it calls for otherworldly punishment rather than earthly legal sanction:

Whosoever denies having once believed—unless he is forced to do so while his heart enjoys the peace of faith—and opens his mind to disbelief will suffer the wrath of God. Their punishment will be great . . . They will surely be losers in the life to come.<sup>105</sup>

Those who accept the faith, then disbelieve, then return to it, and deny once again and increase in disbelief, will not be forgiven by God or be guided by Him. Give tidings to the hypocrites that painful is their doom.<sup>106</sup>

The primary basis for the condemnation of apostates comes from *ahadith*,<sup>107</sup> most explicitly the above-quoted tradition that "whomsoever

102. KHOMEINI, PRACTICAL LAWS OF ISLAM (1983). See generally THE ENCYCLOPEDIA OF ISLAM (1993) (providing varied opinions of Islamic jurists on the issue).

103. William E. Smith, *The New Satans; As the West Wakes Up, Khomeini Confirms that the Real Fight is in Iran*, TIME, Mar. 6, 1989, at 36.

104. *Id.*

105. Sura 16:106-09, reprinted in ALI, *supra* note 7.

106. Sura 4:137-38, reprinted in ALI, *supra* note 7.

107. See THE ENCYCLOPEDIA OF ISLAM (1993) (defining *hadith* as a "[T]radition, being an account of what the Prophet said or did, or of his tacit approval of something said or done in his presence").

changes religion, kill him.”<sup>108</sup> Other *ahadith* evince a similar sentiment. For example: “[b]lood of any Muslim is unlawful, except for one of three, the married adulterer, life for a life, and the one who leaves his religion dividing the community.”<sup>109</sup>

It is worth noting that the *Sunna*<sup>110</sup>—made up of “valid” *ahadith*—is a source of law equivalent in religious force to the Qur’an. The Qur’an is not normally seen as superior to the *Sunna*, rather the two are seen as integral coequals that theoretically cannot contradict each other. Thus, Rushdie’s defenders point out that the Qur’anic *Suras* would deny the validity of a death sentence on an apostate. While Rushdie’s accusers would argue the traditional view that the Qur’an simply did not define the punishment, a gap duly filled by the *Sunna*.<sup>111</sup> The *Sunna* and long history confirm that, in purely Islamic legal terms, sentencing an apostate to death is legitimate.

Like *zindiq*, apostasy has clear political overtones. *Riddah*, or apostasy, literally means “turning away.” Islamic history tells of the “Apostasy Wars,” the fight against the secession of Arab tribes from Islam and the budding Islamic empire after Muhammad’s death.<sup>112</sup> Just as the Greek root of apostasy means “defection” or “revolt,”<sup>113</sup> *riddah* also has a clear implication of defection to an enemy camp, as it was believed Rushdie had done.

The difficulty is that by all evidence, including Khomeini’s *fatwa*, Rushdie was not sentenced (or even put on trial according to Islamic standards of procedure and evidence) for apostasy. This charge would seem to be an *ex post facto* rationalization by the Iranian Government.<sup>114</sup> In fact, Rushdie had publicly turned his back on Islam many years before,<sup>115</sup> without punishment or the threat thereof. He was even

108. See *supra* note 66.

109. See *supra* note 66.

110. See THE ENCYCLOPEDIA OF ISLAM (1993) (defining *Sunna*).

111. Ahmad, *supra* note 93, at 16.

112. A. RAHIM, ISLAMIC HISTORY 57-59 (1983); see ELIAS SHAUFI, HURUB AL-RIDDA [The Apostasy Wars] (1995) (discussing the history of the “Apostasy Wars”).

113. Kharazi Statement, *supra* note 76.

114. See *Rushdie Death Sentence*, THE DAILY TELEGRAPH, Feb. 10, 1990, at 4 (reporting Khomeini’s statement that Rushdie’s death sentence for blasphemy and apostasy remained in effect); see also Michael Parks, *Rushdie Sentence Stands*, L.A. TIMES, June 23, 1989, at 14 (providing the statement by Hashemi Rafsanjani, speaker of Iran’s parliament, that the *fatwa*’s charge of apostasy and sentence of death were still in force).

115. See Craig R. Whitney, *Rushdie Appeals for Muslim Tolerance of “Satanic*

awarded an Iranian Government literary prize for *Shame*, one of his earlier books.<sup>116</sup> As Khomeini's original *fatwa* indicates, the real motivation for the sentence seems to have been to politically capitalize on the attack on Islam embodied in *The Satanic Verses*. Certainly this is the only way to account for the inclusion in the broadly phrased death sentence of those who work for the various publishers of the book. The imprecision of the *fatwa* must have been deliberate, giving a legal cover to a political document. Khomeini was no village *mullah*, considering his learning and sophistication, there is no other explanation for the *fatwa*'s ambiguity.

#### 4. Reactions to the *Fatwa*

The *fatwa*, thus, can now be viewed as somewhat reckless, justifiable only in a rather tortured fashion.<sup>117</sup> In issuing it, Khomeini stretched the bounds of the Islamic legal order, making it a mere servant to his political projects and robbing it of its autonomy and integrity as moral natural law. In the form of a legal document, Khomeini's *fatwa* is, in essence, a political call to violence. This is not overly shocking, given that those with political or religious legal authority have always sought to use the other order for their own purposes. Khomeini's position as the ultimate authority in both the political and religious orders, however, made it easy for him to subvert each to his own purposes. His religious notions were unchecked by practical political considerations, and his political project was unchecked by a religious order concerned with maintaining the integrity of its traditions. The ultimate question of politics—who will guard the guardians—was left unanswered.

Whether the *fatwa* is sustainable is an open question. Domestically, the Islamic Republic is more flexible and more democratic than most outsiders would believe, and certainly there is no great outrage at a death sentence for one like Rushdie. The Rushdie affair is, however,

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*Verses*," N.Y. TIMES, Feb. 5, 1990, at C11 (revealing that Rushdie had not believed in any God since he was a young adolescent).

116. See Taheri, *The Man Who Sent Signals to Satan*, L.A. TIMES BOOK REVIEW, May 13, 1990, at 4 (indicating that *Shame* won the Ayatollah Beheshti Literary Prize in 1986). The Islamic Guidance, located in Tehran, translated and published Rushdie's first three novels. *Id.* It received the literary prize from Khomeini himself.

117. Another legal justification for the *fatwa* is that *The Satanic Verses* was an act of war against Islam. This would explain, at least in part, why Khomeini included the publishers of *The Satanic Verses* in the *fatwa*, but it is not an explanation which has been put forward by defenders of the *fatwa*.



emblematic of the fact that the concerns of the Shi'a clerics are no longer in synch with those of the broader population. The population may not disagree with the *fatwa* per se, but the precedence of religious issues over economics, to the point of generating economically detrimental international reactions, is increasingly problematic. There are reports, for example, that amid general economic decline and pressure for political reform, Khomeini's successors are having difficulty sustaining popular support for their rule.<sup>118</sup> The Economist Intelligence Unit states that "[d]emonstrations against food shortages and obvious public apathy at government-organized rallies indicate growing discontent throughout the country."<sup>119</sup> The report goes on to list violent clashes in different parts of Iran that have left at least one hundred people dead in the span of one year.<sup>120</sup>

Despite such reports, it is impossible to speculate with any authority on the future of the Islamic Republic. The rule of the clerics is on shakier ground than during their revolutionary heyday. But for now the clerics ideological legitimacy stands, bolstered by the institutional apparatus of the state.<sup>121</sup> Until this legitimacy falters, the *fatwa* which it supports (and which reciprocally supports it) will also stand. It is fair to say, however, that since taking power Iran's clerical ruling class has repeatedly faced the practical difficulties of realizing Khomeini's project of a divine natural law order on earth, be it in exporting its revolution, having to swallow the "bitter pill" of peace with the "satanic" Saddam Hussein,<sup>122</sup> failing entirely in fulfilling the economic promises of the

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118. See Charles P. Wallace, *Uncertain Political, Fiscal Outlook Ten Years After Revolution, Iran Still Deeply Divided*, L.A. TIMES, Feb. 1, 1989, at 1 (discussing political unrest since the revolution of 1979); Geneive Abdo, *Iranian Revolution Yield to Pragmatism—Mullahs Must Deal With Outside World, Restless Population*, CHI. TRIB., July 8, 1994, at 1 (assessing the current conflicts between Iran's religious rulers and the country's populace).

119. *Iran Political Scene*, ECONOMIST INTELLIGENCE UNIT COUNTRY REPORTS, (Aug. 11, 1994) [hereinafter *Iran Political Scene*].

120. *Id.*

121. See *Around the World*, DALLAS MORN. NEWS, Oct. 12, 1995, at A18 (recounting the testimony of senior C.I.A. official John Gannon before the Senate Banking Committee that the current Iranian regime, despite economic problems, had a firm grip of power in Iran and was expected to maintain it for at least the next three years).

122. See Robert Pear, *Khomeini Accepts "Poison" of Ending the War With Iraq*, N.Y. TIMES, July 21, 1988, at A1 (explaining that Khomeini found the cease-fire with Iraq particularly difficult to accept because it left Saddam Hussein in power, and it was a set-back for Khomeini's revolutionary model of expansion to other Islamic

revolution, or in transforming Iran into an ideal Islamic society. In the long term, the religious order may sacrifice its religious integrity and popular legitimacy as a result of these failures. This explains why many religious orders are hesitant to play too direct a role in the political sphere.

There is no doubt that the international legal order has already made Iran pay a certain price for having overstepped its bounds in the Rushdie affair, as well as in other incidents (i.e., extraterritorial assassinations of Iranian immigrants, arming of groups like Hizbollah). This price has affected the domestic lives of Iranians, and possibly contributed to their rising discontent. Mainly due to pressure from the United States, Iran has been subject to breaches in diplomatic relations,<sup>123</sup> bans on arm sales,<sup>124</sup> and most importantly, restrictions on trade<sup>125</sup> and a ban on IMF loans.<sup>126</sup> There are members of the Iranian leadership, including President Rafsanjani, who would apparently like to reverse this ostracization in order to focus on improving Iran's economy.<sup>127</sup> Ultimately, however, political and legal legitimacy are still tied to the charismatic authority of Khomeini, to which supporters of radicalism can appeal from their entrenched institutional positions.

Nonetheless, signs of a further shift to pragmatism are apparent in Ayatollah Khamenei's recent announcement that a *fatwa* of a senior jurist can be revoked after that jurist's death.<sup>128</sup> This statement was upheld by Iran's Council of Experts. The Economist Intelligence Unit Country Report speculates that "although Ayatollah Khamenei would

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states).

123. See Smith, *supra* note 89 (noting that countries of the European Union, Canada and Sweden withdrew their top-ranking diplomats from Tehran in protest of the Rushdie affair).

124. See *Trade Ban Aims to Stem Terror Cash*, THE DAILY TELEGRAPH, May 2, 1995, at 11 (reporting that the United States won an agreement among the G7 nations to ban arms sales and restrict the sale of nuclear technology to Iran).

125. See Robin Wright, *President Says He Will Ban Trade With Iran*, L.A. TIMES, May 1, 1995, at A1 (discussing President Clinton's trade sanction of April 30, 1995).

126. See Peter Waldman, *Turning Back: As Economy of Iran Worsens, Government Reverts to Hard Line Radical Clerics Who Oppose Market Reforms Regain Control Over Rafsanjani*, WALL ST. J., June 28, 1994, at A1 (stating that foreign governments are "wary" of guaranteeing loans to Iran, thereby forcing the nation to borrow from banks through short-term letters of credit).

127. See *Europe Defends Rushdie*, FIN. TIMES, June 8, 1995, at 1 (revealing that in February, 1995, Iran's ambassador to Denmark signed a document stating that Iran had not sent anyone to assassinate Salman Rushdie, nor would it do so in the future).

128. *Iran Political Scene*, *supra* note 119.

have some difficulty in justifying [a revocation of the *fatwa*] very soon, he might, with some preparation and help from the press, be able to frame a pragmatic argument in favour of repealing the judgment." In the meantime, Iran has publicly stated that it would not actively attempt to assassinate Rushdie.<sup>129</sup>

It is also noteworthy that Khamenei, who succeeded Khomeini as *velayat-e-faqih*<sup>130</sup>, was denied the highest religious designation of *maraj-e-taklid*<sup>131</sup>; and therefore, was unable to unite religious and political authority in the same manner as Khomeini.<sup>132</sup> This is part of an accelerating process in which Iran's political and religious leaders may be growing apart. Lamis Adoni, for example, reports "a growing trend . . . to limit the authority of the religious leaders over the political establishment."<sup>133</sup> Roy Mottahedeh paints a similar picture, but with a slightly different spin.<sup>134</sup> Mottahedeh explains that a section of the Shi'a religious elite is deliberately distancing itself from involvement in everyday Iranian politics.<sup>135</sup> This aloofness seems to indicate that this religious elite hopes to avoid the taint of an increasingly unpopular government.<sup>136</sup> It could be that the practical difficulties of merging religious and political institutions are leading to a re-emergence of the traditional split between the two.<sup>137</sup>

129. See EIU COUNTRY REPORT, *supra* note 51.

130. See Hamid Enayat, *Khomeini's Concept of Guardianship of the Jurisconsult, in ISLAM IN THE POLITICAL PROCESS* (1983) (defining *velayat-e-faqih*).

131. See GLASSE, *supra* note 1, at 259 (defining the term as the Grand Ayatollah or a religious authority of the first rank).

132. See Lamis Adoni, *Iranians Open Debate on Khomeini's Legacy*, CHRISTIAN SCI. MONITOR, Apr. 5, 1995, at 1 (discussing the political leaders, including Khamenei, who followed Khomeini). In a compromise, Khamenei was allowed the designation of Grand Ayatollah *outside* of Iran, but not within Iran. *Id.* The honor of such a designation is debatable.

133. *Id.* at 7.

134. Roy Mottahedeh, *The Islamic Movement: The Case for Democratic Inclusion*, in *CONTENTION* (1995).

135. *Id.* Mottahedeh attributes the denial of Ayatollah Khamenei's Grand Ayatollah designation to an attempt to distance the highest clergy from an emerging class of "political" clergy, i.e., the lower class of clergy who remain involved in day-to-day politics. *Id.*

136. See Adoni, *supra* note 132 (discussing possible theories for the religious elite's recent isolationism).

137. See Arjomand, *supra* note 3, at 49 (discussing the traditional separation between religious and political Islamic institutions). "It would not be an exaggeration to say that the contemporary clerical constitution-makers of Iran are the first established Muslim authorities to feel the urgent need to reconcile the fundamental concepts of

## 5. The Jurisdictional Issue

At the heart of Iran's international problems lies the question: on what basis could Khomeini claim jurisdiction over Salman Rushdie? This is perhaps the most controversial point of the Rushdie affair. Within Iran's domestic jurisdiction, banning Rushdie's book or even prosecuting him, frankly, would have received no more attention than other human rights violations of its type that occur in Iran. The Islamic Republic has censored many Iranian authors and even sentenced two to death (later commuted to imprisonment) for their writings.<sup>138</sup>

Rushdie and his publishers, however, are neither in the secular law jurisdiction of Iran, nor in the religious law jurisdiction of the *dar al-Islam*.<sup>139</sup> It is not clear on which of these jurisdictional bases Khomeini made his decision, is also not clear on what basis Khomeini could claim the right to extend the reach of his *fatwa* beyond the borders of either of these jurisdictions.<sup>140</sup> Traditionally, Islamic law does not claim universal jurisdiction. Muslims in the *dar al-Harb* are under the jurisdiction of their state of residence.

In fact, Islamic law recognizes the sovereign equality of Muslim and non-Muslim states.<sup>141</sup> Ibn Khaldun describes this sovereign equality as follows: "no [external] power can enforce its will upon an independent sovereign."<sup>142</sup> Hamidullah clarifies that "it is the right of a State to administer all of its internal and external affairs in such a way that it is neither controlled nor interfered with by a foreign power."<sup>143</sup> In terms

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the Greek science of politics with the Islamic sacred law (shari'a), as the public representation of transcendent justice in Islam." *Id.*

138. See M.M. Slaughter, *The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech*, 79 VA. L. REV. 153 (1993) (discussing the censorship of other Iranian authors).

139. See KHADDURI, *supra* note 32, at 155 (defining *dar al-Islam* as pertaining to the Muslim Community to which one belongs). Rushdie and his publishers resided in England. THE RUSHDIE FILE, *supra* note 2.

140. See Bahar, *supra* note 4, at 145 (recognizing how Islamic culture and politics have clashed with the existing world order and that the relationship between Khomeinism and international law is unclear).

141. See Bahar, *supra* note 4, at 190 (discussing the relation of an Islamic state to the international order).

142. MUHAMMAD HAMIDULLAH, *MUSLIM CONDUCT OF STATE* 126 (1977) (citing IBN-KHALDUN PROLEGOMENA).

143. *Id.* at 126. The Qur'anic basis of this attitude comes from *Suras* which imply that sovereignty is given by God and should not be overthrown by man: "O Lord of all dominions,/You give whom it pleases You the kingdom,/and You take away from

of a Muslim who lives in a foreign land, the individualistic focus of Islamic law enjoins that that person observe Islamic law wherever he is.<sup>144</sup> Nonetheless, "a sharp distinction is made between jurisdiction of a Muslim court and that of a foreign court over a Muslim, on the one hand, and moral obligations on the other; and they do not hold him responsible in a Muslim court for acts done in a foreign territory." According to a *hadith*, the Prophet prescribed that "[w]hoever commits murder or fornication or theft in the territory of the enemy and came [on that territory] with permission, . . . will not be tried for what he committed in enemy territory."<sup>145</sup>

Thus, Islamic legal traditions do not grant Khomeini legal jurisdiction over Rushdie. Similarly, in the secular international order, absent appropriate reciprocal extradition arrangements, which do not exist with the United Kingdom for a "crime" of Rushdie's sort, Iran does not have criminal enforcement jurisdiction over Rushdie.

Iran's Khorad 15 Foundation, a group linked with the Iranian Government, took steps to enforce the *fatwa* in other countries. The Foundation even offered a two million dollar bounty for the death of Rushdie.<sup>146</sup> This attempt to extend the *fatwa*'s reach moved the *fatwa* from a disturbing proclamation to an incitement to murder a citizen of another state. This violated the fundamental international legal order principles of the territorial integrity of states and limits on prescriptive jurisdiction,<sup>147</sup> and forced countermeasures by Britain, the United States, and some European countries.<sup>148</sup> Although there was clearly equivocation in these measures, they have harmed Iran's limping economy and its isolated foreign policy.<sup>149</sup> As a result, Rafsanjani faces a conundrum: to bolster public support, he needs more trade and aid with the United States

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whosoever You will;/You exalt whom You please and debase whom you will." *Sura* 3:26, reprinted in ALI, *supra* note 7.

144. See KHADDURI, *supra* note 32, at 147 (explaining that Muslim law binds individuals not territories; therefore, followers must adhere to the laws wherever they are).

145. *Id.* at 108 (quoting from *Sharh as-Siyar al-Kabir* by Sarakhsy).

146. See W.J. WEATHERBY, SALMAN RUSHDIE: SENTENCED TO DEATH 155 (1990) (describing the bounty offered by the Khorad 15 Foundation for Rushdie's death). The reward would drop to one million dollars if a non-Muslim accomplished the task. *Id.*

147. See RESTATEMENT, *supra* note 36, § 402(1) (limiting a state's jurisdiction to prescribe law to its own territory); U.N. CHARTER art. 39 (protecting nations from the "existence of any threat to the peace").

148. THE RUSHDIE LETTERS 130 (Steve MacDonough ed., 1993).

149. See *id.* at 134 (discussing the impact of the Rushdie affair on Iran's international and domestic situation).

and Europe, but to do so he must reign in radical domestic elements who in the past have enjoyed strong popular support and who maintain a strong institutional position within Iran.

The essentially political nature of the *fatwa* had another important consequence: it made many Islamic scholars feel uneasy with the verdict. The lack of a clearly expressed crime, lack of an official tribunal, disregard of Islamic procedural safeguards, disregard of the right to repentance, and overexpansion of its jurisdictional claim make the *fatwa*, at best, quite novel in terms of Islamic law, and at worst, illegitimate. The Iranian Ayatollah Gandjeih has termed it "essentially anti-religious and even inhuman."<sup>150</sup> The Organization of Islamic States carefully distanced itself from endorsing the death sentence before a full trial was held, as did the leading clerics of Egypt, Saudi Arabia and, perhaps most notably, Hasan al-Turabi of the Sudan.<sup>151</sup> Turabi is perhaps the world's prime exponent of politicized Islam, but one whose writings and speeches emphasize the theoretical necessity of coexistence with other political and religious orders—though the current controversies swirling around the Sudan tell a very different story. The Islamic legal norm of not extending its jurisdiction out of the *dar al-Islam* is a self-imposed limitation on its political order, one that reflects a recognition of Islam's inevitable coexistence with other societies.<sup>152</sup> Khomeini discarded this precedent, but it has since become increasingly clear that, in the long term, his deviance from Islamic norms is not sustainable.

### III. INTERNATIONAL LAW/HUMAN RIGHTS LAW

The reservations expressed about Khomeini's *fatwa* within the Islamic legal tradition raise the question of the legitimacy, in any legal order, of Iran's refusal to honor its treaty obligations by claiming the higher validity of divine law obligations.<sup>153</sup> In fact, according to a number of

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150. Ayatollah Djalal Gandjeih, *For Rushdie*, in FOR RUSHDIE 150 (1994).

151. See PIPES, *supra* note 46, at 133-34, 142-46 (discussing the various political positions taken on the *fatwa*). It should be noted that, while many criticized procedural aspects of the *fatwa*, relatively few criticized the call to ban *The Satanic Verses*. Of course, the assassination of the leader of the Islamic Sunni community of Brussels after he publicly questioned the religious validity of the *fatwa* may have had something to do with quelling dissent.

152. See KHADDURI, *supra* note 32, at 155 (discussing Islam's recognition of its jurisdictional limits).

153. See *id.* at 202 (explaining that Islamic law permit treaties and "it is not considered inconsistent with Islam's ultimate objective if a peace treaty is concluded

Qur'anic *Suras*, treaty obligations are a part of God's law, even above solidarity with fellow Muslim communities. For example, one Qur'anic *Sura* reads "[i]n case they ask for your help in the name of faith, you are duty bound to help them, except against a people with whom you have a treaty."<sup>154</sup>

There are other *Suras* and *ahadith* along similar lines,<sup>155</sup> and according to Majid Khadduri, "[t]he jurists' agreement, constituting an *ijma*, in addition to the early practice of the caliphs, rendered treaty-making an integral part of the *sharia*."<sup>156</sup> Khadduri adds that:

[o]nce the treaty is concluded Muslim authorities are strict in regard to the necessity of living up to its terms. The Qur'an urges the Muslims not to break oaths after making them . . . Thus the principle *pacta sunt servanda* is inherent in the conception of *aqd* [treaty] and is recognized by all Muslim jurist-theologians.<sup>157</sup>

As mentioned previously, Iran is a party, without reservation, to the ICCPR and seems to be in violation of one if not more of its articles.<sup>158</sup> Does Iran have the authority under the international legal order and the treaties to which it is a party to ban a book and sentence its author to death without a trial? Does Iran have the right to enforce such a judgment outside of its domestic legal sphere?

#### A. IRAN'S RESPONSIBILITY FOR CONSEQUENCES OF THE *FATWA*

The first question to pose in this regard is whether the Iranian Government is responsible for the legal results and any violations that flow from the *fatwa*. If a religious leader who has governmental powers issues a call for banning a book and a death sentence against the author, and also calls for the deaths of others who facilitate his work, is this a governmental act?

Clearly, Khomeini's pronouncements were treated as government policy, not matters of purely religious content. Of course, in the Islamic

with the enemy").

154. *Sura* 8:72, reprinted in ALI, *supra* note 7.

155. See *id.* at 9:4 (stating "[s]o announce to those who deny the truth the news of painful punishment, except those idolaters with whom you have a treaty, who have not failed you in the least, nor helped anyone against you. Fulfill your obligations to them during the term of the treaty").

156. KHADDURI, *supra* note 32, at 203.

157. *Id.* at 204.

158. ICCPR, *supra* note 25; see *infra* pp. 414-26 (describing the relevant articles of the ICCPR implicated by the *fatwa*).

Republic, the line between these two categories is indistinct. A proclamation by the President of Iran that the *fatwa* was irrevocable<sup>159</sup> and a reaffirmation of the *fatwa* by the Iranian Parliament<sup>160</sup> confirms that the government of Iran can be held internationally accountable for this action.

The international law of state responsibility also holds states answerable for the acts or omissions of their agents or organs.<sup>161</sup> If the Khorad 15 Foundation is effectively linked to parts of the Iranian Government and deemed its agent, then the Iranian Government can be held accountable for the foundation's offer of a two million dollar bounty for the killing of Rushdie. In fact, the Ayatollah Hassan Sanei, the personal representative of Ayatollah Khamenei, presides over the Foundation.<sup>162</sup> As a result of Sanei's position in the Foundation, Iranian state responsibility emerges from the Foundation's actions.

Even if the Khorad 15 Foundation is not acting as an agent of the Iranian Government, Iran is responsible for not prohibiting the Foundation's actions that contradict the state's positive law duty to ensure the rights guaranteed under the ICCPR. According to Donna Sullivan, "a state violates its affirmative duty [under the ICCPR] to ensure these rights if it does not: establish adequate legal protections against violations by its agents or by non-state actors; make good faith efforts to investigate violations when they occur and seek to punish those responsible; and to provide reparations to victims."<sup>163</sup> By this standard, and given that Iran has at least acquiesced to Khorad 15's actions, Iran can be held responsible for any violations committed by Khorad 15.

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159. See Carmel Bedford, *Fiction, Fact and the Fatwa*, in *THE RUSHDIE LETTERS*, *supra* note 148, at 48.

160. *Id.* at 178.

161. Donna Sullivan, *The Public/Private Distinction in International Human Rights Law*, in *WOMEN'S RIGHTS, HUMAN RIGHTS* 126-34 (Judy Peters & Andrea Wolper eds., 1995).

162. Statement by International Fellowship of Reconciliation before the ECOSOC Sub-Commission on Prevention of Discrimination and Protection of Minorities, Aug. 17, 1993.

163. Sullivan, *supra* note 161, at 130; see Asbjorn Eide, *Economic, Social, and Cultural Rights as Human Rights*, in *ECONOMIC SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 125-42 (A. Eide et al. eds., 1995) (providing more on the so-called "tri-partite structure" of ensuring human rights—respect, protect, assist and fulfill).



B. ARTICLE 19 OF THE INTERNATIONAL COVENANT  
ON CIVIL AND POLITICAL RIGHTS

Of the rights protected in the ICCPR, it is the right of free expression under Article 19 which the Rushdie affair puts most obviously in question.<sup>164</sup> Iran's ban on *The Satanic Verses* clearly violated Article 19's protection of "the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media."<sup>165</sup> There is, however, no absolute right to free speech. The right to free speech must be balanced against competing rights, such as the right to protection from libel or slander, the right to protection from immediate physical danger resulting from speech, the right to protection from obscenity, and the right not to hear speech that causes social strife. None of these limits are unique to the Islamic world.<sup>166</sup> The United States, in fact, is much more exceptional in its relatively absolutist position regarding free speech. Most other countries move the balance away from such a position toward greater protections of countervailing individual and community interests. These protections range from Canada's regulation of hate speech, to Germany's banning of certain ideological groups' speech, to Israel's prohibition on defamation of religious belief.<sup>167</sup>

Article 19 is a derogable right in "times of national emergency threatening to the life of the nation."<sup>168</sup> Limitations to Article 19 are based on respect of rights and reputations of others, and protection of "national security," "public order," "public health," and "morals."<sup>169</sup> Public order and morals are the strongest justification for Iran's ban on *The Satanic Verses*.

In terms of "public order," Iran can cite the violent reactions publication of the book aroused in the United Kingdom, India, and Pakistan as justification for the banning of *The Satanic Verses*.<sup>170</sup> *Prima facie*, the

164. ICCPR, *supra* note 25, art. 19(2).

165. *Id.*

166. See ODIO BENITO, HUMAN RIGHTS STUDIES SERIES NO. 2, ELIMINATION OF ALL FORMS OF INTOLERANCE AND DISCRIMINATION BASED ON RELIGION OR BELIEF para. 15 (1989) (stating that Czechoslovakia, Denmark, France, Iraq, Jordan, Madagascar, Mauritius, Panama, Portugal, Spain, Sudan, Sweden, and Syria have laws which prohibit the "defamation of a religion or belief, or of its members or leadership individually or collectively by ridicule or scorn, contempt or insulting language").

167. *Id.* at 144-45.

168. ICCPR, *supra* note 25, art. 4.

169. *Id.* art. 19(3).

170. See THE RUSHDIE FILE, *supra* note 2, at 66 (describing reactions to

possibility of riots in Iran could serve as a reasonable public order justification, given the precedent for significant disturbances in public order as a result of the book's publication.<sup>171</sup>

However, while an absolute consensus of what constitutes a threat to public order has yet to emerge from international decisions, the Siracusa Principles do provide a widely accepted definition. It states that "the expression 'public order (ordre public),' as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of the public order (ordre public)."<sup>172</sup>

By this definition, Iran's banning of *The Satanic Verses* is not justifiable under the public order limitation. While the book may have violently angered some, there is no reason to suspect (nor would Iran likely concede) that it presented a threat to the "functioning of society" or its fundamental principles. Moreover, beyond the banning, international law holds that the means used to restrict expression, when restriction is justifiable, must be proportionate to the threat.<sup>173</sup> The death sentence against Rushdie is a disproportionate response and, therefore, violates international law.

In terms of "morals" as a basis for restricting Rushdie's right of free expression, Iran also has a reasonable initial argument. *The Satanic Verses*, virtually by Rushdie's own admission, is in some sense an attack on Islam—and by extension, its moral system—as it is practiced in Iran, as well as much of the rest of the Islamic world. Rushdie states that *The Satanic Verses* "is, I profoundly hope, a work of radical dissent and questioning and re-imagining."<sup>174</sup>

Rushdie's "re-imaginings" are what are in question.<sup>175</sup> As Anne

Rushdie's book, including the deaths of five protestors in Pakistan).

171. See *id.* (examining the "mounting protests" over publication of *The Satanic Verses*).

172. *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* U.N. Doc. E/CN.4/1985/4, Annex ¶ 22 [hereinafter *Siracusa Principles*]. The Siracusa Principles include five conditions for a permissible restriction. The restriction must be: (1) in accordance with the law; (2) in the interest of a legitimate objective of general interest; (3) strictly necessary in a democratic society; (4) imposed without a less intrusive means available; and (5) not imposed arbitrarily. *Id.*

173. ICCPR, *supra* note 25, art. 19.

174. Salman Rushdie, *In Good Faith*, THE INDEPENDENT, Jan. 15, 1990, at 4.

175. See TIMOTHY BRENNAN, SALMAN RUSHDIE AND THE THIRD WORLD (1989) (contending that *The Satanic Verses* is conceived as "anti-Qur'an"). In *Is Nothing Sacred?*, Rushdie stated:

Laurent points out, "en imaginant une autre version de la naissance de l'Islam, Rushdie a attaqué les bases même de l'identité de son groupe."<sup>176</sup> These re-imaginings are made in an obscene, insulting vernacular. Rushdie's "dissent" refers to the Companions of the Prophet as "fucking clowns," identifies the Prophet's wives with whores, refers to the Prophet as "Mahound"—a medieval Christian expression denigrating Mohammed as an agent of the devil—and calls Mecca the city of "Jahilia," or ignorance.<sup>177</sup> This is somewhat different from a reasoned questioning of orthodoxy. It is part of a deliberate strategy to shock the values and beliefs central to Islamic morality. But is civility necessary to dissent? Clearly, the language of Article 19 allows space for expression which does not conform to a state or a community's norms—or else why have the right at all? The question is, how does one balance between the right to protect such moral norms from abuse and the right to freedom of expression, which explicitly includes artistic expression?

According to the Siracusa Principles, the limitation on grounds of public morals must demonstrate "that the limitation in question is essential to the maintenance of respect for fundamental values of the community."<sup>178</sup> Demonstrating that the publication of *The Satanic Verses* represents this level of a threat to the values of a 1,300 year-old religion is a questionable enterprise—certainly Islam has survived much worse! Nonetheless, human rights norms have to take account of legitimate protections of public morality. The Siracusa Principles recognize that "public morality varies over time and from one culture to another."<sup>179</sup> There is, thus, room for a margin of discretion for state parties.

One could, in fact, reasonably argue that *The Satanic Verses* was a legitimately felt attack on Islamic morality. While in Iran the *fatwa* was

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I have been asking myself [this question] throughout my life as a writer: Can the religious mentality survive outside of religious dogma and hierarchy? Which is to say: Can art be the third principle that mediates between the material and spiritual worlds; might it, by 'swallowing' both worlds, offer us something new—something that might even be called a secular definition of transcendence? I believe it can. I believe it must. And I believe that, at its best, it does.

Salman Rushdie, *Is Nothing Sacred?*, in IMAGINARY HOMELANDS 420 (1992).

176. Anne Laurent, *Le Passage dans les Œuvres de Salman Rushdie et Philip Roth*, PhD dissertation, Université de Paris VII ("In imagining another version of the birth of Islam, Rushdie attacked the foundations of the identity of his group").

177. RUSHDIE, *supra* note 5, at 359-94.

178. *Siracusa Principles*, *supra* note 172, ¶ 27.

179. *Id.*

a top down manipulation of political sentiment by Khomeini, the original outrage expressed in Pakistan and the United Kingdom appeared far more genuine.<sup>180</sup> Tariq Modood, for example, convincingly argues that in the United Kingdom:

all the religious zealots had to do was simply quote from SV [*Satanic Verses*] for anger, shame and hurt to be felt. It is important to be clear that SV was not objected to as an intellectual critique of their faith (libraries are full of those); for the average Muslim the vulgar language, the explicit sexual imagery, the attribution of lustful motives—without any evidence—to the holy Prophet was no more a contribution to literary discourse than pissing upon the Bible is a theological argument . . . The passion and intensity of the street demonstrations was a product of Barelvi [a South Asian Muslim grouping who were also at the center of the Pakistani rioting] devotionism, which normally even other Muslims think is excessive in the exalted status it confers on Muhammad.<sup>181</sup>

If it is sincerely believed that *The Satanic Verses* constitutes an attack on Islam, how can this be balanced against the right of free expression? While the threat to “public morals” does not seem to rise to the level justifying an Article 19(3) limitation, such an attack can also be viewed as a question of communal libel, based on the ICCPR’s Article 20.

#### C. ARTICLE 20 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Article 20 holds that “any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>182</sup> Demonstrating that Article 20 has real weight, the U.N. Human Rights Committee ruled inadmissible applications challenging convictions for racist or fascist speech in *M.A. v. Italy*<sup>183</sup> and *J R T and The W G Party v. Canada*.<sup>184</sup> In the wake of World War II, the main concern of Article 20’s drafters was to control offensive racial and religious forms of expression. A restriction of free

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180. See THE RUSHDIE FILE, *supra* note 2, at 68 (describing the protests in Pakistan and the United Kingdom).

181. Tariq Modood, *British Asian Muslims and the Rushdie Affair*, 60 POL. Q. 154 (1990).

182. ICCPR, *supra* note 25, art. 20.

183. *Report of the Human Rights Committee*, U.N. GAOR 39th Sess., Supp. 40, U.N. Doc. No. A/39/40, at 130.

184. *Report of the Human Rights Committee*, U.N. GAOR 38th Sess., Supp. 40, U.N. Doc. No. A/38/40, at 231.

expression based on hate speech or communal libel was deemed necessary for the general welfare.<sup>185</sup>

In addition to a limitation based on protecting "public order" or "morals," Iran could also claim the Article 20 obligation to prohibit communal libel. The definition of communal libel, however, remains elusive. Is communal libel inflammatory speech? Offensive novels? Blasphemy? Many Muslims demanded a ban of *The Satanic Verses* because of its insulting and blasphemous nature, constituting communal libel. From this perspective, tolerating such blasphemy would essentially sanction it, thereby inviting additional attacks. Iran is extremely sensitive to such perceived libel, given its political history and ideological predisposition to pose an absolute opposition between its self-defined version of Islamic community and all others. Perhaps more strongly, however, the United Kingdom's Muslim community—as with many diaspora communities—felt particularly beleaguered and attempted to deny Rushdie his right, in their mind, to libel their community from within.

### 1. The *Gay News* Case

Ironically, the United Kingdom itself, Rushdie's reluctant protector, still has a blasphemy law on its books. Under the blasphemy law, a successful prosecution took place in *Gay News v. United Kingdom*.<sup>186</sup> The arguments in this case, virtually identical to those made by Muslims in regard to *The Satanic Verses*, were applied by the United Kingdom's House of Lords, Britain's highest appellate court<sup>187</sup>, and accepted by the European Commission on Human Rights (ECHR).<sup>188</sup> The *Gay News* case was Britain's first prosecution for blasphemy in over fifty years. The case involved a poem published in *Gay News* magazine, which depicted Christ as homosexual, "well hung," and engaged in sex with a Roman centurion after his crucifixion.<sup>189</sup> On appeal, the House

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185. See General Comment No. 11 (Article 20), U.N. Doc. No. CCPR/C/21/Rev. 1, at 10 [hereinafter General Comment 11] (finding that racial or religious hatred and violence caused by incitement is contrary to the Charter 9 of the United Nations); see also International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, art. 4, 660 U.N.T.S. 195 (containing the most far-reaching hate speech restriction of any international instrument). Iran is not a signatory to CERD. *Id.*

186. 5 Eur. Ct. H.R. 123 (1983).

187. *Whitehouse v. Lemon*, 1979 App. Cas. 617 (defining a blasphemous libel as a "matter calculated to outrage the feeling of Christians").

188. *Gay News v. United Kingdom*, 5 Eur. Ct. H.R. 123 (1983).

189. James Kirkup, *The Love that Dares to Speak Its Name*, GAY NEWS, June

of Lords upheld the conviction. Interestingly, for a comparative perspective on *The Satanic Verses*, the decision held that a publication is blasphemous if it "contains any contemptuous reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, or the Bible or to the formularies of the Church of England. It is not blasphemous if . . . the publication is couched in decent and temperate language. The test to be applied is as to the manner."<sup>190</sup>

On appeal to the ECHR as a violation of Article 10 of the European Convention on Human Rights regarding free expression, the application was deemed inadmissible. "It [the ECHR] decided that the restriction imposed upon the applicant's freedom of expression was necessary under Article 10(2) for the protection of the rights of others. People had a right not to be offended in their religious feelings by publications."<sup>191</sup> The *Gay News* case seems to be in line with the Human Rights Committee's rulings sustaining the right to ban offensive forms of speech.<sup>192</sup>

Given the *Gay News* precedent, it seems that British Muslims had a good case for banning the exuberantly derogatory *The Satanic Verses*. In *R. v. Chief Metropolitan Stipendiary Magistrate ex parte Choudhury*, however, British courts affirmed that British law applied only to blasphemy against Christianity.<sup>193</sup> The allegations of blasphemous libel and seditious libel against Rushdie and his publisher were, therefore, summarily dismissed. The court held that even if it were free to extend the law to cover other religions, it would not do so as it would be impossible to set clear limits on such an extension.<sup>194</sup> The ECHR also refused the case, saying that the United Kingdom did not violate its obligation to protect the European Convention's rights without discrimination, and there was no positive obligation to protect Muslims from blasphemy.<sup>195</sup>

The *Gay News* and Rushdie cases show a clear double-standard. Upholding the protections against blasphemy for individual Christians and

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1976.

190. *Whitehouse*, 1979 App. Cas. at 661-65.

191. Kevin Boyle, *Religious Intolerance and the Incitement of Hatred*, in ARTICLE 19, STRIKING A BALANCE 67 (1992). It is worth noting that the religious discrimination inherent in an officially sanctioned national church, such as the Church of England, has never been considered a human rights violation.

192. See *supra* notes 204-07 and accompanying text.

193. 3 W.L.R. 986 (1990).

194. *Id.*

195. *Choudhury v. The United Kingdom*, Application No. 17439/1990, *reprinted in* 12 HUM. RTS. L.J. 172 (1991).

denying them to Muslims violates any reasonable interpretation of the norm of nondiscrimination. A more satisfactory solution is to apply the blasphemy law to all major religions, or (preferably) to abolish it altogether.

Unfortunately, this hypocrisy was quite apparent to many British Muslims and, politically, fed into a disaffection from British and European institutions. If courts—the forum for nonviolent resolution of conflicts—are only available on an unequal basis, it is difficult to fault aggrieved groups for taking their protest to the streets and engaging in provocative demonstrations designed to garner the maximum possible attention. Perhaps it is also not surprising that they would appeal to an outside power to intervene on their behalf, such as Iran in the Rushdie affair. This is an example of how the protection of one particular group's values—be they a majority or minority—can alienate other groups from engagement in civil and political society, and reinforce social division. This sort of alienation stimulates a reaction justifying the most inflexible notions of communal identity.

Even if the attempt to ban *The Satanic Verses* was not successful in the United Kingdom, based on the *Gay News* case, Iran has a fairly reasonable defense for its ban of the book as blasphemous due to its disparaging “manner” as well as the substance of its message. If the ECHR accepts state sanctions on blasphemy, and also accepts that such protections can be limited to a state's dominant group, Iran can argue that its ban is in compliance with even the most far-reaching human rights standards. Since the European system is commonly deemed the world's most progressive, Iran cannot reasonably be held to a higher standard.

This is a disquieting argument. Does Article 20 allow particular communities to ban the expression of those who transgress their self-defined notions of communal libel? If this ban is acceptable, are not punitive sanctions on the transgressor (as with individual libel) an obvious corollary? Which communities have a right to judge what constitutes such a transgression? In a pluralist world in which most individuals have multiple social identities, who will define such communities? A community's institutions? Its most vocal, unyielding members who reject cooperation with other communities? Who is to decide what “manner” constitutes blasphemy?<sup>196</sup>

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196. Mary Whitehouse, who brought suit in the *Gay News* case, had considerably keener sensitivities than most other British Christians. Nonetheless, she was recognized as representing the entire community.

Tariq Modood, an advocate of extending Britain's blasphemy law to all religions, says "the group which feels hurt is the ultimate arbiter of whether a hurt has taken place."<sup>197</sup> Thus, it follows that a group's most sensitive elements should have the right to call in state protection for its perceived "hurts." Leonard Levy succinctly responds to this logical extension of notions of communal libel that "if religion ever got the authority to decide what is blasphemous, freedom of expression would extend as far as the intolerance of sectarianism."<sup>198</sup> Levy goes on to say that "[w]hat the centuries have taught should not be abandoned out of respect for a minority religion or the feelings of its believers, any more than out of respect for a majority religion or the feelings of its believers."<sup>199</sup>

Granting such "protections" to defined communities institutionalizes division and gives power to those factions most attached to exclusive, singular social identities, rather than those who accept the reality of plural and diverse societies. This can result in a rigidification of communal identity to the ultimate detriment of a tolerant civil society, and the give and take necessary to free and democratic debate and discourse.

Empowering self-styled defenders of a community with extensive legal protections, thus, may be counterproductive. Legal protections lack the suppleness necessary to take account of the complexity of individual and communal identities as they interact in the political arena, which is the appropriate forum in which to mediate social conflicts. Inflexible legal fiats imposing community rights—such as protections from communal libel—value arbitrarily defined groups over the civic obligations of the individual, the foundation of civic and democratic life. Such community rights, thereby, work to reify group identities, repelling the multiple and shifting identities (including the individual self) that allow for the state to function as something other than a negotiation structure between pre-ordained communal groups.<sup>200</sup> Whether in "individualistic" or "communitarian" societies, individual responsibility and rights remain the foundation of healthy communities, as well as functioning civil societies and states.<sup>201</sup>

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197. Modood, *supra* note 181, at 284.

198. LEONARD LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED FROM MOSES TO SALMAN RUSHDIE* 564 (1993).

199. *Id.* at 565.

200. For example, the extensive regime of minority rights which existed in the former Yugoslavia.

201. All societies have some blend of individualistic and communitarian social aspects. The dichotomy of the "individualist West" and "communitarian" Third World



If free expression in a free society is to be meaningful, critical and even satirical speech must be accepted. States whose individuals and communities have different conceptions of right and wrong, appropriate and inappropriate, must allow for mutual tolerance. There are limits on free expression and such limits are quite necessary. Most fundamentally, explicit calls to violence are clearly unacceptable. The interpretation of Article 20's "incitement to discrimination, hostility or hatred," however, must be narrowly interpreted such that it does not enter the realm where any speech, or speaker, perceived as hurtful can be sanctioned. For legal and political reasons, the limits on speech must be narrow and well-defined if they are to be enforceable, and if they are not to cause more social chaos than they prevent.

## 2. Other International Cases Involving Articles 19 and 20

As a matter of law, and by a reading of Articles 19 and 20, blasphemy as an acceptable basis for banning a book must be rejected. While incitement is proscribed by Article 20, incitement is distinct from simple offense or hurt.<sup>202</sup> While "The Love that Dares Speak its Name"<sup>203</sup> or *The Satanic Verses* may be offensive, it is a perversion of Article 20 to call this incitement. A recent case considered by the European system involving blasphemy and hate speech indicates a movement toward this more circumscribed position.

*Jersild v. Denmark* concerned a Danish journalist convicted of disseminating racist statements by questioning and urging on members of a racist group in the course of a televised interview.<sup>204</sup> Given the "well-settled European Convention jurisprudence that anti-hate speech legislation is considered a permissible limitation on the right to freedom of expression,"<sup>205</sup> the court's judgment was eagerly anticipated. The court

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or Islamic world does not hold up to serious analysis. Even early students of the United States, like Tocqueville, noted its fundamental basis in intermediate social organizations. The American myth of the pure individual is just that, a myth. With its many immigrants and ethnic groups, the notion that some abstract "West" defines the United States—or any other country—is also a myth.

202. See OXFORD ENGLISH DICTIONARY 796-97 (2d ed. 1989) (defining "incitement" as "that which incites or rouses to action," indicating a strong and direct connection to actual deeds).

203. The poem that appeared in the *Gay News* magazine and gave rise to the *Gay News v. United Kingdom* case.

204. Eur. Ct. H.R., Case No. 36/1993/431/510 (1994), reprinted in 15 HUM. RTS. L. J. 361 (1994).

205. Stephanie Farrior, *Landmark 'Hate Speech' Case Decided by the European*

agreed with the Commission that Jersild's conviction violated his Article 10 freedom of expression, thereby imposing a clear limit on the reach of hate speech legislation.<sup>206</sup> Such European norms, of course, are not applicable to Iran, nor to the Rushdie affair. They do, however, indicate that the legal impulse behind international norms of hate speech legislation has not expanded as far as some advocates might like.<sup>207</sup>

As a matter of politics, such an extension of Article 20 can have dangerous consequences by acquiescing to, and even encouraging, a tyranny of the majority (if tied only to a state religion) or the balkanization of social groups if applied to arbitrarily defined minority communities. States and groups that emphasize hate speech often do so to advance particular political interests. By all evidence, group relations are not improved by such regulations, well-intentioned or not. As Sandra Colliver states:

hate speech laws either have been used to a substantial degree to suppress the rights of government critics and other minorities or else have been used arbitrarily or not at all . . . [They] do not seem to have improved underlying conditions of discrimination and hatred and, in some of the countries, may have justified inattention to those conditions.<sup>208</sup>

I would only add the possibility that such laws might also exacerbate hatred either through their discriminatory application or, more generally, by validating the right to deem another's speech and beliefs unacceptable, thereby creating a divisive chain reaction. British blasphemy laws clearly stirred a negative reaction by privileging one among a number of communities. Europe's hate speech codes have not stopped a rising tide

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*Court of Human Rights*, ACLU INT'L CIVIL LIBERTIES RPT., Mar. 1996 (citing *Glimmerveen v. Netherlands* and *X v. Federal Republic of Germany* as the European precedents for allowing restrictions on hate speech). See also *Otto Preminger Institut v. Austin*, in which the European Court of Human Rights overturned the European Commission of Human Rights and held that it was not a violation of freedom of expression for the state to seize and forfeit a film "in the public interest" due to its ridicule of Christianity. See 15 HUM. RTS. L. J. 372 (1994).

206. See *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) (1994), reprinted in 15 HUM. RTS. L. J. 361, 369 (1994). It should be noted, however, that the court seemed most concerned with free press and the fact that Jersild did not associate himself with the point-of-view of the interviewees. *Id.*

207. See *Wingrove v. United Kingdom*, Eur. Comm'n H.R., Application No. 17419/90 (finding admissible, without prejudging the merits, another blasphemy case involving the British film *Visions of Ecstasy*).

208. Sandra Colliver, *Hate Speech Laws: Do They Work?*, in ARTICLE 19, STRIKING A BALANCE 363 (1992).

of racist xenophobia. India's laws against inciting communal violence seem only to have stimulated more communal riots.<sup>209</sup> Finally, Iran's treatment of its minorities, despite (or, perhaps, partly because of) its active campaign to buffer itself from insulting expression, is senselessly bloody.<sup>210</sup>

Restrictions on expression which are justified using Article 20 must be based on direct incitement, not more far-reaching and ultimately counterproductive notions of "libeling" a community. Words can hurt and words do have consequences. Except at their extremes, however, such words are most effectively and appropriately sanctioned in the political sphere. Civil speech is a result of a tolerant civil and political culture which encourages restraint and politically sanctions offenders.

In the case of *The Satanic Verses*, the legitimacy of literary expression firmly within most countries'<sup>211</sup> boundaries of reasonable discourse, but regarded as communal libel by many Muslims and by Iran's government, ultimately becomes a question of cultural relativism. Are these two contrasting reactions reconcilable, or are they indicative of fundamentally clashing world views that are bound to conflict in the legal, political, and moral orders?

#### D. OTHER RELEVANT ARTICLES IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Before considering cultural relativism more fully, it is worth examining several other ICCPR articles and their implications, if any, for the Rushdie affair. The banning of *The Satanic Verses* is the Iranian Government's clearest human rights violation, although even this can be questioned given the above discussed consideration of Article 20's hate

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209. See Anthony Chase, "Pakistan or the Cemetery": Muslim Minority Rights in India, B.C. THIRD WORLD L.J. 16 (1996) (examining the targeting of Muslims in India and the efficacy of human rights or minority rights in providing protection from political scapegoating).

210. See *Final Report on the Situation of Human Rights in the Islamic Republic of Iran By the Special Representative of the Commission on Human Rights, Mr. Reynaldo Galindo Pohl*, U.N. Doc. E/CN.4/1993/41 [hereinafter *Final Report*] (giving details of persecution of Bahais and others in Iran). In regard to apostasy, Pohl reported that "the sports monthly *Farad* was banned on charges including apostasy after accusations that the magazine had insulted Islamic society for having published a caricature of a football player which allegedly resembled the late *Imam*." *Id.* The magazine's editorial chief, Mr. Nasser Arabha, and its designer were arrested and are reportedly awaiting trial. *Id.* The magazine's premises were burned by a mob. *Id.*

211. Including, within these countries, most non-Muslims and many Muslims.

speech prohibition. Beyond the book's banning, the *fatwa*'s death sentence remains a mere threat to a person outside of Iranian enforcement jurisdiction, which gives rise to some ambiguity as to whether it constitutes a violation of human rights.

One can also argue that by condemning Rushdie as an apostate, the *fatwa* violates his non-derogable rights of freedom of thought and religion under Article 18. In the U.N. Human Rights Committee General Comment on Article 18 it is specified that:

the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including, *inter alia*, the right to replace one's current religion or belief with another or to adopt atheistic views . . . . Article 18(2) bars coercions . . . including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations.<sup>212</sup>

The *fatwa*, and more generally the crime of apostasy, represent a gross violation of Article 18, which specifically safeguards the right to either convert to another religion or to atheism, and prohibits the use of coercive state action against apostates.

Similarly, Rushdie's Article 14 right to a fair trial has also been grossly violated. Furthermore, if Rushdie, or a person who facilitated the work of Rushdie, is murdered as a result of the *fatwa*'s death sentence,<sup>213</sup> the murder will constitute a violation of the Article 6 right to life if the assassin is an agent of the Iranian Government, or acts with the assurance that he or she can return to Iran and avoid sanction.

There are two difficulties that need to be confronted before making such sweeping condemnations of Iran. First, the term "threat," to which the Human Rights Committee refers as justifying an accusation of a human rights violation, even when an actual act violating such a right has not occurred,<sup>214</sup> must be defined. The language of the ICCPR indi-

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212. *Report of the Human Rights Committee*, U.N. GAOR, 48th Sess., U.N. Doc. No. A/48/40, Annex VI, General Comment No. 22, *Article 18*, at 208-09 [hereinafter General Comment 22].

213. See Bedford, *supra* note 159, at 66 (recounting that Rushdie's Japanese translator, Professor Hitoshi Igarashi, was stabbed to death on July 11, 1991). A spokesman for the Pakistan Association in Japan says "the murder was completely, 100 percent connected with the book . . . Today we have been congratulating each other. Everyone was really happy." *Id.*

214. See General Comment 22, *supra* note 212, at 209 (referring to Article 18(2) which bars coercion by acts and threats of force) (finding that coercion and threats of penal or physical force are enough for a violation).

cates that a violation occurs only when the prohibited act (i.e., the arbitrary taking of life, suspension of free expression . . . ) takes place.<sup>215</sup> There is nothing to indicate that a "threat" by itself constitutes a violation. As used in the General Comment, "threat" refers to an immediate threat in its reference to physical force (i.e., an immediate threat of torture). The reference to penal sanctions, however, is less immediate, and seems to go to the more general obligation to ensure rights. Thus, a law prohibiting a guaranteed right is a violation even though it remains a mere threat until the legal process has run its course. The law's existence is evidence of an intent or "threat" not to ensure the right and is therefore a violation in and of itself. Though the notion of "threat" appears ambiguous, in the Rushdie affair the judicial and extrajudicial threats made against Rushdie clearly show the intent not to ensure the rights guaranteed by the ICCPR.

#### E. THE PROBLEM OF JURISDICTION

The second difficulty in condemning Iran is one of jurisdiction. If human rights regard a state's domestic jurisdiction, not its interstate relations, how can the *fatwa* constitute a violation? Sian Lewis-Anthony argues that, in regard to hearing individual petitions,<sup>216</sup> the Human Rights Committee "has tended to adopt a broad interpretation of the territorial requirement, so that it will regard persons as victims who are not actually living within the territory of the State concerned at the time of the alleged violation." The Committee has stated that "subject to its jurisdiction" refers to the relationship between the individual and the state concerned, and not to the place where the violation occurred.<sup>217</sup> The state party thus has the obligation to maintain these rights in all of

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215. ICCPR, *supra* note 25, add. 4.

216. Under the Optional Protocol, which Iran has not adopted, an individual can submit petitions alleging human rights violations to the Human Rights Committee. The procedure does not extend the definitions of rights guaranteed in the ICCPR, but provides a procedure for implementing them. Struggling with the need to implement such rights, however, has compelled interpretations which more precisely define these rights; such definitions logically extend to the entire treaty.

217. Sian Lewis-Anthony, *Treaty-Based Procedures for Making Human Rights Complaints within the U.N. System*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 43 (1992) (referring to *Lopez Burgos v. Uruguay*, Communication No. 52/1979, reprinted in 1 Selected Decisions of the Human Rights Committee, U.N. Doc. No. CCPR/C/OP/1 (1985)).

its actions, whether internal or external, if it is claiming jurisdiction, as Iran is over Rushdie.

Realistically, however, this argument is a stretch if it asserts that human rights violations can be claimed for state actions which cross borders in any but the most particular cases. One soldier shooting a person in another country has not violated that person's human rights, he or she has committed a violation of the traditional law of nations which justifies reprisal and even war. Iran's actions, except for the Article 19 violation, are more simply seen not as a violation of the ICCPR—which as a human rights instrument deals fundamentally with actions of a government toward those subject to its jurisdiction—but under the more traditional principles of international law and its fundamental norms of territorial integrity of states and limits to enforcement jurisdiction.

The essential question is one of jurisdiction. Iran sought to extend its prescriptive and enforcement jurisdiction beyond the boundaries defined by international law. To call the *fatwa* a human rights violation could have unfortunate implications. Iran's violations of human rights (with the exception of the banning of *The Satanic Verses*) can only take place after a breach of territorial integrity. To speak of them in terms of human rights violations is to concede that Iran has jurisdiction to violate these rights. It does not. The principle of territorial integrity is fundamental and is expressed in many instruments, including the U.N. Charter's Article 2. The criteria for jurisdiction are concisely stated by Louis Henkin:

[w]hatever happens on the territory of a state is of that state's primary concern (the territorial principle). A state also has a significant interest in exercising jurisdiction over persons or things that possess its nationality (the nationality principle) and in protecting its nationals (the protective principle). And, finally, certain activities are so universally condemned that any state has an interest in exercising jurisdiction to combat them (the universal principle).<sup>218</sup>

The universal principle is limited to acts such as piracy, the slave trade, hijacking, genocide, war crimes, and terrorism.<sup>219</sup> The protective principle applies to "certain conduct outside a [state's] territory by persons not its nationals which is directed against the security of the state

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218. LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 823 (1987).

219. *But see* AL RUBIN, THE LAW OF PIRACY (1988) (arguing that the universal principle applies only to hijacking and, possibly, terrorism).

or a limited class of other state interests."<sup>220</sup> This is limited by a condition of "reasonableness." "A limited class of other interests" has been taken to mean crimes committed against the territorial integrity or political independence of that state.<sup>221</sup> Clearly, neither of these are relevant justifications for Iran.

The question remains of what to do about these violations of both treaty-obligated human rights within Iran, and of customary and treaty-based international law. The international distribution of power is such that the treaty monitoring body cannot—and was never intended to—enforce compliance with the ICCPR within Iran, despite its violations in the Rushdie affair, as well as in many other incidents. The Human Rights Commission has already established a Special Rapporteur on Iran. The Rapporteur has issued reports, but has had very little success in changing Iranian behavior, or in even gaining access to Iran.<sup>222</sup> Similarly, the Human Rights Committee has reviewed, somewhat critically, Iran's periodic reports. Most recently, the Human Rights Commission condemned Iran for its human rights violations.<sup>223</sup> This too, has had little immediate impact. Nonetheless, supplying information on the Rushdie case to the Special Rapporteur and the Committee as a way of building international pressure on Iran could have some long term effects. This is particularly the case given Iran's increasing acknowledgement of the necessity of ties to the rest of the world, and its statements that it sees no contradiction between human rights and Islamic law.<sup>224</sup>

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220. RESTATEMENT, *supra* note 36, § 402(3).

221. *Jurisdiction with Respect to Crime, Harvard Research in International Law*, 29 AJIL Supp. 437-47 (1935).

222. *Report on the Human Rights Situation in the Islamic Republic of Iran By the Special Representative of the Commission on Human Rights, Mr Reynaldo Galindo Pohl*, U.N. Doc. E/CN.4/23 (1987), revised by *Final Report*, *supra* note 210. A new rapporteur visited Iran in the fall of 1995.

223. *U.N. Rights Panel Declines to Censure China*, N.Y. TIMES, Mar. 9, 1995, at A5.

224. See U.N. Press Release, HR/3215 (quoting a statement by Iranian Ambassador Siroius Nasserri that "Iran felt that the Covenant and the Universal Declaration on Human Rights were compatible with Islam"); see also *A Clash of Cultures*, *supra* note 4 (providing details of Iran's rather ambiguous rhetorical relationship with the principles of human rights instruments).

## F. INTERNATIONAL IMPACT OF BREACHES OF TERRITORIAL INTEGRITY

Breaches of territorial integrity and its limits on enforcement jurisdiction, however, are clearly more fundamental violations of the international order's norms. It is these jurisdictional issues that have created the strongest response. One of Khomeini's goals was to isolate Iran as much as possible and rebuff its connections with the rest of the world. One can speculate that this was one of his motivations in issuing the *fatwa*; if it was, paradoxically it may have had the opposite result. The rest of the world cannot separate itself from this affair, if only for the simple reason that Rushdie is a citizen and resident of Britain, and has translators and publishers around the world who are also threatened in the *fatwa*. It is these violations and threatened violations that have brought on the traditional international enforcement mechanism, the powerful reciprocal response of members of the international community.

The various responses, though weaker than they would be if a vital interest was at stake, and if Iran did not represent strong trade potential, have had an effect. While in the short term they may have caused a backlash, the long term interest of Iran is to modify its practices in order to ease these continued economic and political pressures. In a sense, the international system, in a rather diffuse and uncoordinated manner, and only within its limited sphere, can "guard the guardians" by using the fruits of peaceful coexistence and commerce as a carrot and club to enforce its order. While the Rushdie affair may fade in importance, it still looms heavy over Iran's relations with the rest of the world. There is no doubt that, without it, these relations would be far smoother and more productive.

## IV. CULTURAL RELATIVISM

There is one additional human rights argument which can be made against Iran's actions in the Rushdie affair. While Iran can invoke Article 20 of the ICCPR as a justifying counterbalance to its Article 19 violation, Iran can also be accused of violating Article 20 by inciting violence against Rushdie based on religion. Khomeini's *fatwa* can logically be read as an incitement to hostility and violence based on "religious hatred." The General Comment on Article 20 specifies that this Article applies "whether such propaganda or advocacy has aims which are internal or external to the State concerned."<sup>225</sup> The actual deed in

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225. See General Comment 11, *supra* note 185, at 10.



question took place in Iran, indicating there is no jurisdictional barrier to its application. What makes the accusation of an Iranian violation of Article 20 a peculiar argument is that this article is directed against incitement of "discrimination, hostility, or violence" toward groups of people, not a single individual such as Rushdie.<sup>226</sup>

Such a hate speech argument also returns us to the question of cultural relativism.<sup>227</sup> Can non-Muslims really understand the anger a book such as *The Satanic Verses* can cause? If not, can it expect an Islamic legal system to conform to international norms? As earlier seen in Allemang's argument, some believe these two orders are distinct and irreconcilable.<sup>228</sup> An absolutist principle of cultural relativism, however, ignores the profound degree of interaction among societies. Only a very few isolated groups can realistically claim any sort of cultural purity. The Islamists of the Iranian revolution, for example, integrated socialist and republican (Islamic "Republic") elements into their ideologies at the same time that they vehemently decried the "West."<sup>229</sup> Cultural relativism also ignores the extreme diversity within civilizations. For example, Iranian Shi'as' religious practices are quite distinct from those of Sunnis in Morocco. In fact, even within Iran and Morocco, there are any number of cultural groups who share Islam as a faith, but still maintain the distinctiveness of their particular religious practices.

It is also true that for many Muslims around the world, the practice of Islam has been syncretic in that it has adopted elements from different schools of Islam, local cultural and religious practices, and other religions. The lack of a church hierarchy in Islam has encouraged this fragmentation, which once led to *muftis* of major schools and sects in most major cities, with individuals able to selectively choose which *mufti* might be most appropriately approached on a particular subject.

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226. ICCPR, *supra* note 25, art. 20(2).

227. Hate speech as a topic brings together legal concerns over individual and minority rights, cultural relativism, identity issues, and political issues of how to best craft a functioning civil society. Many of these issues have only been skirted in this article.

228. Allemang, *supra* note 62.

229. See DABASHI, *supra* note 10, at 7 (providing a history of the cultural and ideological intersections which informed the Iranian revolution). Ali Banuazizi notes that Islamic activists in Iran before the revolution used human rights language and arguments against the Shah's regime. Human rights only became "relative" once these activists came to power. Ali Banuazizi, *The Cultural Context of Human Rights and Civil Society in the Middle-East*, Lecture at The Fletcher School of Law and Diplomacy (Mar. 27, 1996).

Even within the various schools, there are distinct threads which permit different interpretations of the Qur'an and *Sunna*. In sum, there is no monolithic, pure Islamic tradition that is absolutely distinct from the diverse traditions which coexist within the international legal order. Indeed, there are many devout Muslims who see no contradiction between their faith and the struggle to incorporate human rights principles into the political systems in which they live.

On the other hand, some have used this fragmentation in the Islamic world to justify a principle of absolute universalism, i.e. that a particular thread of Islam is always reconcilable with international human rights law and, thus, there is no opposition between the two.<sup>230</sup> This too is impossible to sustain, particularly in the face of powerful sources and norms of legal authority which buttress themselves on the power of the divine word and its threat of damnation and promise of salvation. A reading of Islamic law that does not have resonance among a broad group of Muslims may well be an academically valid starting point for an alternate vision of the Islamic world. But although no society is static, and change in any direction is possible, such a human rights discourse supported by a lonely reading of Islamic law is not going to convince a believing Muslim, or a Muslim who believes in a particular cleric's authority to represent divine law, that a particular *fatwa* is illegitimate. The Islamic world may be diverse, but there are certain norms of authority and interpretation which are broadly shared. Certainly it is hard to sense the popular resonance of calls for radical reform, no matter how eloquently made.<sup>231</sup> A necessary prerequisite of a functioning legal order is that individuals accept its basic legitimacy and authority. For many Muslims, particularly within the Iranian domestic political sphere, neither the ICCPR nor a novel reading of Islamic law is competition for an Ayatollah's version of Islamic law.

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230. See Riffat Hassan, *On Human Rights and the Qur'anic Perspective*, J. ECUMENICAL STUD. 19 (1992) (stating that "the Qur'an is not biased against woman and does not discriminate against them . . . [b]ut [that] the interpretations by men have distorted the truth almost beyond recognition"). Male or female, it seems difficult not to recognize as discriminatory clear Qur'anic directives that men have twice the inheritance rights (*Sura* 4:11), an "edge" in legal standing (*Sura* 2:228) and twice the legal weight as witnesses (*Sura* 2:282).

231. See ABDULLAH AHMED AN-NA'IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* (Syracuse University Press 1990) (providing a brilliant analysis of contemporary Islamic law). John Voll's foreword says "this book provides the intellectual foundations for a total reinterpretation of nature and the meaning of Islamic law."

Only with the unequivocal secularization of divine origin legal systems would such contradictions be entirely effaced. Such an absolutist universalizing project will, as a matter of course, founder on the rocks of political resistance. Most dangerously, such a project can stimulate this resistance, benefiting those most intent on emphasizing political and cultural opposition.

The coexistence of a distinct system of Islamic law with general international law is more likely to succeed if the structural similarity and complementary nature of Islamic and international law are recognized. Though quite distinct, each has a diffuse, nonhierarchical character, and each, frankly, is partial and fragmented. Substantially, Islamic law is focused on instance law and matters of individual conscience, while neglecting comprehensive codifications of broader categories of law. The bulk of international law focuses on such broad areas as the Law of the Sea, laws of commercial transactions, or other far-reaching areas of regulation and "unavoidable cooperation" that have few counterparts in divine origin Islamic law.<sup>232</sup> Structurally, international legal norms have broad legal force, but in many instances this depends on interrelating, interacting, and working with domestic legal systems. Each order shares a fundamentally decentralized structure which is shown most clearly by the absence of a central, hierarchical enforcement system. This structural similarity and distinct substantive focus help reconcile international norms with much of Islamic law.

In addition, even when treating the same subjects, Islamic and international norms are more complementary than conflictual. First, the underpinnings of many Islamic norms—for example, norms of the bindingness of treaties or the right to self-defense—are quite similar to those of international law. Second, when not absolutely compatible with a domestic or international order, there are modes of accommodation in the Islamic system to reduce tension. An example is with the general acceptance of the territorial integrity of states in the *dar al-Harb* (and in the *dar al-Islam*, though this is more often challenged). Third, it is only with human rights law, which like Islamic law focuses on the individual, that the two orders have conflicted in any serious manner. The religious and legal norms of these two orders, however, allow for considerable ambiguity and interpretation, particularly given Islamic and international

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232. There are some, for example, the Islamic ban on usury and interest has had an impact—quite minor, in fact—on international (or, at least, interregional) commerce.

law's diffuse character, which allows a plurality of valid interpretations to happily coexist.<sup>233</sup>

Extreme readings, implicit in any natural law order, may arise which contradict the other's norms. In neither case, however, are such extremes in their respective legal tradition's mainstream. By working to emphasize complementary norms and to penalize these extremes when they arise, such extremes will be difficult to sustain, no matter how acute the political and social tensions from which they arise. Nonetheless, one must recognize that the potential for such extreme interpretations exists in any natural law order and that denying this possibility is both unrealistic and impractical. It is unrealistic in that it ignores the very real power of, for example, contemporary Islamist politics. It is impractical in that a rejection of religion's power will only tend to exacerbate the alienation and estrangement that fuel the most extreme of such movements. Coexistence will come only with a recognition of the differences which make such extreme interpretations possible, and a recognition that such differences are not insurmountable.

The universalism vs. cultural relativism debate is quite charged, but also somewhat sterile. In order to advance this debate, it may well be necessary to move beyond these categories, questioning the validity of each and hoping to create a new paradigm. The universal validity of international legal standards, for example, clearly has limits. While one may speak of a general consensus on the understanding of the content of a core of rights, even these rights are somewhat shifting. It is far from clear that such a general consensus is an expression of acceptance of fundamental natural rights, or simply the result of particular political projects which have had a remarkable degree of success, due to numerous factors.

Cultural relativism is perhaps even more questionable, serving as the meeting place of political apologists for oppressive state actions, and romantics longing to preserve cultures which no longer exist, and probably never have. Human rights apply to states. States are not cultures. For example, accepting for the sake of argument that a practice such as female genital mutilation is intrinsic to particular cultures, such a prac-

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233. As an example of this, one might note the analogous roles of *muftis* and publicists. Rather than a hierarchical court defining law, *muftis* and publicists each serve as diffuse interpreters (and creators) of law within their respective orders. Also, through *ijtihad* it is possible for *mujtahids* to follow equally valid procedures but attain different results. Even contradictory conclusions, however, are each considered literally true—a true pluralism within a supposedly narrow-minded theological system.

tice is not a state activity (unless it is practiced in state hospitals), and there is no sanction from human rights law for such practices.<sup>234</sup> Indigenous and minority cultures are, in fact, being oppressed and destroyed. Most often, however, it is states that are the destroyers and it is often human rights law which provides the only protection (admittedly insufficient) from the more blatant acts of cultural destruction. The universalist language of human rights is something of a bogeyman, conjuring up images of a far more ravenous creature than the rather limited, circumscribed body of rights which—beyond certain rhetoric—have actually been given effect by the international community. By seeking a language to express such rights without rhetorically posing a threat to cultural diversity, one will better succeed in pushing forward human rights while making clear the limits to its ambitions.

### CONCLUSION

A spiritual order's balance with temporal power is always delicate, but is one that has often been successfully negotiated such that religious law legitimates, anchors, and enriches a domestic legal order without dominating or perverting it. A spiritual order's balance with secular international law and human rights norms is also quite delicate. The merging of Iran's religious and political orders under Khomeini, for example, permitted a particularly extreme reading of Islamic law to gain unchecked power. This legal reading proceeded to challenge many of the established norms of the international order. In so doing, it illustrated the deep integration of religious motifs into contemporary law and politics. Religion can infuse law and politics with a resonance and power that cannot be ignored.

The Rushdie affair, however, is a case study of the difficulty of extending unchecked power amid the disciplinary realities of the international order. Iran's difficulties in maintaining its defiance of the international order show the slow but effective force of this order's reciprocal enforcement mechanism. Iran is feeling this pressure despite the fact that the international community has reacted in a rather half-hearted and unsympathetic manner to Rushdie's predicament. With more pressure from the international community, it is possible that Iran's difficulties will be transformed into substantial change in Iran, both in terms of Rushdie and, more unpredictably, the larger political scene.

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234. Although one could use the tripartite structure of respect, protect, assist and fulfill to argue for state responsibility.

The Rushdie affair is often seen as an example of the incompatibility of the Islamic and international legal orders. In fact, by giving Islamic law the respect of a close study of its legal precedents for Khomeini's *fatwa*, one can show that the *fatwa*'s legitimacy is questionable from within the Islamic legal tradition, in a manner that makes clear the compatibility of Islamic and international law. Any notion of an inevitable "clash" between these orders is contradicted by their cultural, legal, and political imbrications. The structural similarity between these two orders and their history of coexistence make a complementary relationship the norm. Such a norm, however, does not negate the ever present implicit potential for eruptions of tension and conflict between a religious natural law order and the positive, secular international order. The extraordinary complexity of the interaction between these orders is well illustrated by the Rushdie affair, which both embodies the potential for clash and conflict, and the necessity of emphasizing norms of coexistence and cooperation.