

Islamic Law, International Relations, and Human Rights: Challenge and Response

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ISLAMIC LAW, INTERNATIONAL RELATIONS, AND HUMAN RIGHTS: CHALLENGE AND RESPONSE*

Abdullahi Ahmed An-Na'im †

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I. INTRODUCTION

When recently asked whether Chinese Muslims aspire to conduct all aspects of their public and private affairs in accordance with Islam, a distinguished Chinese Muslim scholar responded by saying that the Chinese Muslims live in *dar al-harb*,¹ the territory of war, and must therefore accept the status of a religious minority unable to assert its

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1. The theory of Islamic law did not accept permanent peace with the non-Muslim states. In accordance with this principle, the world is divided in terms of *dar al-Islam*, territory under Muslim rule, and *dar al-harb*, territory at war with the Muslims. See *infra* notes 37-40 and accompanying text.

full religious identity.² Conversely, a spokesperson for a non-Muslim minority living within *dar al-Islam*—an Islamic state ruled by *Shari'a*, Islamic religious law—would no doubt mention the restrictions and various civil limitations imposed on his or her community.³ Further, Muslim women would also be aware of gender-based limitations that the Islamic state imposes on them.⁴

Shari'a's strict classifications of territories in terms of *jihad*,⁵ and people in terms of religion and gender, are very much alive in the hearts and minds of Muslims and those non-Muslims with whom they interact. This Article argues that these principles of public *Shari'a*, as distinguished from private *Shari'a* of family law and devotional rites,⁶ are both morally indefensible and practically impossible to maintain today.

This Article discusses solutions to the drawbacks of historical *Shari'a* from a religious rather than secular perspective, because Muslims do not separate the religion of Islam from the law of Islam. The author submits, as a Muslim, that God communicates through the social and physical environment as well as through the *Qur'an*, His literal and final word, and through the *Sunna*, traditions of His final Prophet, Mohammed Ibn Abdillah.⁷ This Article contends that God's instructions must be understood and applied in light of all social and material phenomena He has manifested in the world. This religious perspective is important for several reasons.

First, Muslims are fully entitled to assert their Islamic identity and comply with their religious duty to apply Islamic law to every aspect of their public and private lives. This is a legitimate exercise of their substantive right to self-determination enshrined in the United

2. I do not have the permission of this Chinese scholar to identify him by name, or by reference to the occasion.

3. See D. MARTIN, *THE PERSECUTION OF THE BAHAI'S OF IRAN, 1844-1984* (1984); E. WATKIN, *A LONELY MINORITY, THE MODERN HISTORY OF EGYPT'S COPTS* (1963); Masriya, *A Christian Minority: The Copts in Egypt*, in 4 *CASE STUDIES ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, A WORLD SURVEY* 90 (W. Veenhoven ed. 1976) [hereinafter *WORLD SURVEY*]; Rondat, *Minorities in the Arab Orient Today*, in *MAN, STATE AND SOCIETY IN THE CONTEMPORARY MIDDLE EAST* 276 (J. Landau ed. 1972); see also B. YE'OR, *THE DHIMMI, JEWS AND CHRISTIANS UNDER ISLAM* (1985).

4. See, e.g., C. LUCA, *Discrimination in the Arab Middle East* in 1 *WORLD SURVEY*, *supra* note 3, at 213, 219-25.

5. The principle and implications of *jihad* are discussed *infra* notes 35-51 and accompanying text.

6. *Shari'a* is the Muslim comprehensive religious law derived from the basic sources, namely the *Qur'an*, the Muslim holy book, and *Sunna*, the traditions of the Prophet Mohammed. This Article is concerned only with certain public law aspects of *Shari'a*, such as questions of public international law, civil liberties, and human rights.

7. Belief in the *Qur'an* and Prophet Mohammed is the essence of the Muslim creed, but it has no validity for non-Muslims. Discussion of Islamic law must proceed along religious lines because the Muslims have no equivalent of the Western doctrine of separation of church and state.

Nations Charter⁸ and other relevant international documents and supported by modern national and international practice.⁹

Second, because *Shari'a* signifies the positive law of historical Islam, its general principles continue to bind and motivate Muslims.¹⁰ Therefore, passive non-assertion of *Shari'a*'s norms is unworkable because a significant number of Muslims advocate the immediate application of historical *Shari'a*.¹¹ The appeal of this movement makes it imperative that *Shari'a* be authoritatively reformed from within the Islamic traditions and in ways acceptable to Muslims themselves. Otherwise, such reform would lack legitimacy and practical viability.¹²

Third, although Muslims will not accept secular reforms to their religious law and practice, they have made some concessions to the demands of constitutionalism and the rule of law in national and international relations.¹³ Clearly, they are sensitive to tensions between inherited wisdom and the realities of the modern world. However,

8. Under the United Nations Charter, one of the purposes of the United Nations is "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." U.N. CHARTER art. 1, para. 2.

9. African Charter of Human and Peoples' Rights (Banjul Charter), Jan. 7-19, 1980, art. 20, OAU Doc. CAB/LEG/67/3/Rev. 1; International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) 52, U.N. Doc. A/6316; International Covenant on Economic Social and Cultural Rights, Dec. 16, 1966, art. 1, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) 49, U.N. Doc. A/6316. See generally A. COBBAN, *THE NATION STATE AND NATION SELF-DETERMINATION* (1970); D. GORDON, *SELF-DETERMINATION AND HISTORY IN THE THIRD WORLD* (1971); R. SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF DETERMINATION: A STUDY OF UNITED NATIONS PRACTICE* (1973); U. UMOZURIKE, *SELF-DETERMINATION IN INTERNATIONAL LAW* (1972).

10. See generally J. ESPOSITO, *VOICES OF RESURGENT ISLAM* (1983); G. JANSEN, *MILITANT ISLAM* (1979).

11. The Muslims have known periodic movements demanding the purification of the faith and the rigorous application of *Shari'a*. In the 19th century, these so-called Islamic "fundamentalist" movements included the *Maydiya* of the Sudan and the Fulani *jihad* of West Africa. See, e.g., M. HISKETT, *THE SWORD OF TRUTH: THE LIFE AND TIMES OF SHEHU USMAN DAN FADIO* (1973); P. HOLT, *THE MAHDIST STATE IN THE SUDAN, 1881-1898* (1958); Waldman, *The Fulani Jihad: A Reassessment*, 6 J. AFR. HIST. 333 (1956).

More recently, the movement of the Muslim Brothers, originating in Egypt in the 1920s, has vigorously advocated the immediate and total application of *Shari'a* for many years. On the ideology and organization of this movement, see R. MITCHELL, *THE SOCIETY OF THE MUSLIM BROTHERS* (1969).

The same demand is also voiced by a number of other groups and prominent individuals throughout the Muslim world. See generally *ISLAMIC RESURGENCE IN THE ARAB WORLD* (A. Dessouki ed. 1982); J. ESPOSITO, *supra* note 10; D. PIPES, *IN THE PATH OF GOD, ISLAM AND POLITICAL POWER* 124-42 (1983).

12. The Muslims feel a strong sense of religious duty to conduct all their public and private affairs in accordance with their divinely ordained law. The *Qur'an* describes those who fail to apply the law ordained by God as "unbelievers" and "wrong-doers." *Qur'an* 5:44-49 (R. Bell trans. 1937) [hereinafter *Qur'an*].

13. Khadduri, *Islam and the Modern Law of Nations*, 50 AM. J. INT'L L. 358 (1956); G. JANSEN, *supra* note 10, ch. 7; D. PIPES, *supra* note 11, at 52.

such concessions are limited and temporary because the division of loyalty between tradition, on the one hand, and a pressing sense of fairness and practicability, on the other hand, creates a dangerous ambivalence in Muslim attitudes and policies.¹⁴

To resolve this paradox and secure modern advances, modern Muslims must settle these tensions with reference to resources available within their own traditions. Otherwise, they will continue an unstable situation of subscribing to an unrealistic ideal of *Shari'a* while attempting to conduct their affairs in accordance with secular norms and institutions.

To summarize, this Article argues that, for Islamic states, smooth and successful transition to complete secularism is neither likely nor desirable because Muslims are obligated to live in accordance with Islamic law.¹⁵ Fulfilling that obligation by re-introducing historical *Shari'a* would be disastrous for international relations and human rights. This Article proposes that the Muslims' religious duty may be satisfied by applying a *modern* version of Islamic law that is consistent with peaceful international relations and respect for human rights. This modern version will be Islamic *Shari'a* because it will be derived from the fundamental sources of Islam, without being identical in every respect to historical *Shari'a*.

II. HISTORICAL *SHARI'A*: THE MEDINA MODEL OF THE ISLAMIC STATE

Shari'a is often mistakenly equated with Islam. In fact, it only represents the early Muslims' understanding of the two fundamental sources of Islam: the *Qur'an*, and the life-examples of the Prophet, the *Sunna*. A brief survey of *Shari'a*'s historical development demonstrates this preliminary proposition.¹⁶

The Prophet was born in Mecca, a commercial town in western Arabia, around 570 C.E.¹⁷ He started to receive the *Qur'an*, which Muslims believe to be the literal and final word of God, around 610.¹⁸ Continuous persecution, culminating in a plot to kill the Prophet, prompted him and his followers to migrate to Medina, another town in western Arabia, in 622.¹⁹ The growing Muslim community, in alli-

14. See D. PIPES, *supra* note 11, chs. 5-8. For a more sensitive and sympathetic analysis of the Muslim dilemma, see W. SMITH, *ISLAM IN MODERN HISTORY*, ch. 8 (1957).

15. *Qur'an*, *supra* note 12, at 4:65, 5:44-49, 24:51.

16. For surveys of the nature, sources, and development of *Shari'a* see, e.g., N. COULSON, *A HISTORY OF ISLAMIC LAW* (1964); J. SCHACT, *THE ORIGINS OF MUHAMMADANA JURISPRUDENCE* (1950).

17. See generally A. ALI, *THE SPIRIT OF ISLAM* chs. 1-10 (1922); T. ARNOLD, *THE PREACHING OF ISLAM* ch. 2 (1913).

18. See sources cited *supra* note 17.

19. See sources cited *supra* note 17.

ance with the sizable Jewish population of Medina, established the first Islamic state.²⁰

A written treaty between the two communities determined the relationships between the dominant Muslims and subordinate Jews of Medina.²¹ A similar treaty regulated the relationship between the Muslims and the Christians of Najran.²² These and other treaties concluded by the Prophet and his immediate successors, the *Khulaffa*,²³ became the basis of the *dhimma* system governing the status and rights of non-Muslim communities "tolerated" within the borders of the Muslim state.²⁴ Similar treaties concluded with alien powers became the basis of Muslim inter-communal relations, the equivalent of modern international law.²⁵

As the religious and political head of the Muslim state of Medina, the Prophet had the dual roles of prophet, continuing to receive revelation, and ruler, interpreting and applying revelation to all the public and private affairs of the community. His companions, and succeeding generations of Muslims, made no distinction between the two roles. Under the Medina model of the Muslim state, the religious head of the community combines all executive and judicial functions.

Early Muslim jurists purported to severely restrict the Islamic state's legislative function on the assumption that the law was divinely revealed. In fact, the *Qur'an* and *Sunna* did not provide a comprehensive system of law. The early *Khulaffa* and their provincial governors exercised legislative functions through *ijtihad*, creative independent juristic reasoning.²⁶ The theo-political *Khulaffa* consulted with the

20. See sources cited *supra* note 17.

21. The subordinate status of the Jewish community was signified by their submission to the Prophet's rule, or in modern terms, Muslim sovereignty. The Jews, however, were guaranteed equality before the law, security of person and property, and freedom of religion. For a translation of the text of that first treaty, see M. KHADDURI, *WAR AND PEACE IN THE LAW OF ISLAM* 206-09 (1979).

22. *Id.* at 179-80. The terms of the treaty signified the submission of this Christian community to the Muslim sovereignty.

23. *Id.* at 180.

24. The word *dhimma* literally means "honor" or "pledge." As a technical term of *Shari'a*, it means the pledge given by the Muslim ruler to certain non-Muslim communities. It secures their persons and property, and guarantees their right to worship and to conduct their personal affairs in accordance with their own religion and customs, in exchange for submission to Muslim sovereignty and payment of a poll tax (*jizyah*). See M. KHADDURI, *supra* note 21, at 175-220.

25. *Id.* at 42-48, 175-201.

26. The Prophet sanctioned *ijtihad*, or independent juristic reasoning, in the absence of clear and definite ruling in the *Qur'an* or *Sunna*. However, Muslim jurists came to agree that no fresh *ijtihad* was allowed after the tenth century. See Anderson, *Law as a Social Force in Islamic Culture and History*, 20 BULL. SCH. ORIENTAL & AFR. STUD. 13 (1957). For the view that *ijtihad* is still permissible, see Halla, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. MIDDLE EAST STUD. 3 (1984).

leading companions, but were not bound by their opinion.²⁷ To that extent, under the Medina model, the Muslim ruler combined all legislative, executive, and judicial functions. Although the Muslim ruler was theoretically bound by the *Qur'an* and *Sunna*, he was the ultimate judge of what those sources meant in any given situation. The actions of the *Khaliffa* (singular of *Khulaffa*) were limited by his conscience and piety, rather than by objective constitutional safeguards.²⁸

This concentration of religious and legal authority is the most telling criticism of public *Shari'a* in a modern context. The Medina model was the appropriate structure in its historical context. However, it was never intended to be the final model of an Islamic state.²⁹ After fourteen-hundred years, the need for safeguards such as separation of powers and an independent judiciary is evident.

The need for an effective limitation on the powers of modern government is beyond dispute. The Medina model of public *Shari'a*, however, fails to provide these vital safeguards. This Article will propose that adequate safeguards are possible within alternative models of the Islamic state. Although the alternative models are not entirely consistent with the Medina model, they are equally Islamic.

Muslim history itself clearly illustrates that the Medina model was workable only within its immediate historical context, the reign of the first four *Khulaffa*. With the assassination of the fourth *Khaliffa*, Ali, and the establishment of the Amawy and Abbasy dynasties, political pragmatism and expedience rather than public *Shari'a* governed Muslim public life.³⁰ The jurists continued to theorize, but it had little

27. The *Qur'an* requires consultation among the Muslims, but as the word *Shwra* itself means consultation (*Qur'an, supra* note 12, at 3:159, 42:38), these verses only support the right to give non-binding advice. *Id.* The Prophet and his successors did consult the Muslims and often accepted their advice, but they also retained the right to reject such advice and did in fact sometimes act against the advice of the vast majority of the Muslims. See, e.g., A. MUTWALY, *MABADI' NIZAM AL-HUKM FI AL-ISLAM* [PRINCIPLES OF THE SYSTEM OF GOVERNMENT IN ISLAM] 667-69 (1966).

28. Coulson, *The State and the Individual in Islamic Law*, 6 INT'L COMP. L.Q. 49 (1957). One commentator described this aspect of *Shari'a* as follows:

The Islamic state did not rest on any assumption that the public should act as a check restraining the ruler, even if he transgressed the sacred law In matters such as the interpretation of law and religion, the caliph [*Khaliffa*] was expected to consult the *'ulama* [scholars]. But if the caliph ignored the *'ulama's* advice or chose to act without it, they might warn him of evil consequences or pray that God might change his heart. Rarely did the *'ulama* even seek to influence the Caliph via public opinion.

M. KHADDURI, *POLITICAL TRENDS IN THE ARAB WORLD* 47 (1970).

29. See generally U. TAHA, *THE SECOND MESSAGE OF ISLAM* (1987).

30. For historical surveys of early Muslim public and political life and institutions, see generally A. ALI, *THE SPIRIT OF ISLAM* (1974); 1 T. HUSSEIN, *AL-FITNA AL KUBRA* [THE GREAT UPHEAVAL] (1959); 2 T. HUSSEIN, *AL-FITNA AL KUBRA* [THE GREAT UPHEAVAL] (1961); W. MUIR, *THE CALIPHATE, ITS RISE, DECLINE AND FALL* (1975) (providing extensive and authoritative treatment of the subject).

relationship to the actual state of affairs.³¹ State authorities tolerated the jurists because they did not pose a serious threat to political power and continued to expound public *Shari'a* as a theoretical ideal. In mutual appreciation of each other's limitations, the jurists and statesmen stayed apart.³²

This historical perspective provides valuable insights into the origins and nature of *Shari'a* and its applicability to a modern state. Although *Shari'a* is often represented as the only valid and necessary implication of the *Qur'an* and *Sunna*, the early jurists interpreted the meaning of those sources in the context of the prevailing socio-economic and political conditions.³³

Because of their exceptional intellectual and moral caliber, the early jurists were able to develop a sophisticated and flexible legal system that sustained the Muslim civilization for many centuries. For a long time, public *Shari'a* could adapt to changing conditions through its internal flexibility and variety of juristic opinions. This process, however, has now been exhausted, and public *Shari'a* is no longer capable of adequate response. The magnitude of change from the time of the formative era of public *Shari'a*, in the Middle East of the eighth to the tenth centuries, to twentieth century global, social, and political relations, is too much for *Shari'a* to handle.

Modern jurists must not confine Islam to *Shari'a*. This would unjustifiably condemn it to *Shari'a's* contextual limitations and deem it incapable of responding to changes in the physical and social environment that are, according to Muslim belief, willed and manifested by God Himself.

III. THE THEORY OF INTERNATIONAL RELATIONS IN *SHARI'A*

A. *JIHAD* AND ITS IMPLICATIONS

The early *Shari'a* model was consistent with its historical context and was a substantial improvement upon contemporary legal systems. However, certain assumptions and principles of *Shari'a* are diametrically opposed to those of modern international law and practice.³⁴

One such principle is the theory of *jihad*. *Jihad* emphasizes the Muslims' duty to propagate their faith through aggressive war if necessary, until the whole world embraces Islam or submits to Muslim

31. T. ARNOLD, *THE CALIPHATE* ch. 5 (1965).

32. See generally Coulson, *supra* note 28.

33. See sources cited *supra* note 11. But see U. TAHA, *supra* note 29.

34. Khadduri, *Islam and the Modern Law of Nations*, 50 AM. J. INT'L L. 358, 358 (1956).

sovereignty.³⁵ Under this theory, Muslims ought not recognize the territorial sovereignty of non-Muslim states with whom they deem themselves to be in a constant state of war. Muslim rulers may temporarily suspend active *jihad* to prepare better for the next confrontation, but such suspension should never be for too long. Some jurists specifically mention ten years as the maximum duration of suspension of active *jihad*.³⁶

In accordance with this theory the world is divided into *dar al-Islam*, territory subject to Muslim sovereignty, *dar al-sulh*, territory enjoying a peace treaty, and *dar al-harb*, territory at war with the Muslims.³⁷ Muslims determine the rights of individuals according to the territorial classification of their residence.³⁸ To avoid some of the negative consequences of classifying a territory as *dar al-harb*, Muslim jurists set very strict qualifications and insisted that they should be

35. Khadduri described the position of *Shari'a* accurately when he said:

But the *jihad* did not always mean war, since Islam's objective might be achieved by peaceful as well as violent means. Thus the *jihad* may be regarded as an intensive religious propaganda which took the form of a continuous process of warfare, psychological and political, no less than strictly military. From a legal viewpoint it meant a permanent state of war between Islam and enemy territory. But this state of war should not be construed as actual hostilities; it was rather equivalent, in Western legal terminology, to non-recognition. This, however, did not imply, as in the modern law of nations, the impossibility of initiating negotiations and concluding treaties, for such actions were considered neither to imply equality between the two contracting parties nor necessarily to possess a permanent character. The nearest equivalent, perhaps, to this situation is the recognition of insurgency which neither precludes an intention of later *de facto* or *de jure* recognition nor approval of the regime under insurgency; it merely means that an authority to enforce the law in a certain territory is needed under certain circumstances [citation omitted]. The Islamic state, in like manner, in entering into diplomatic negotiations with a non-Muslim state, did not intend to recognize that state, but merely to admit that a certain authority or authorities were needed in the *dar al-harb* so long as it remained beyond Muslim sovereignty.

Id. 359-60; see also Shihata, *Islamic Law and the World Community*, 4 HARV. INT'L L.J. 101, 107 (1962). For a documented summary of the doctrine of *jihad*, see M. KHADDURI, *supra* note 21, at 55-73.

36. LAW IN THE MIDDLE EAST 345 (M. Khadduri & H. Liebesny ed. 1955) [hereinafter LAW IN THE MIDDLE EAST]. The Shafi' School of Islamic jurisprudence set the ten-year maximum limit on suspension of *jihad* by analogy to the Hudaibiya treaty in which the Prophet agreed to postpone war with the polytheists of Mecca for ten years. For a translation of the text of this treaty, see M. KHADDURI, *supra* note 21, at 212. The Hanafi and Maliki Schools of Islamic jurisprudence argue that because that treaty was violated by the non-Muslim side within two years, and the Prophet retaliated by marching on Mecca and capturing it, the Hudaibiya treaty cannot be taken as precedent for suspension of *jihad* for ten years. According to this view, *jihad* should not be suspended except for the absolute necessity of settling Muslim internal differences or in the face of overwhelming enemy power. See Khadduri, *supra* note 21, at 134.

37. As Shihata explained, the original classification was in terms of territories of war and peace, *dar al-harb* and *dar al-Islam*. The intermediate category of *dar al-sulh* was devised by the jurists around the ninth century in recognition of the extended, if not indefinite, state of peace established by treaty. Shihata, *supra* note 35, at 107.

38. See, e.g., M. KHADDURI, *supra* note 21, at 147-201.

applied rigorously.³⁹ For example, Abu Hanifa set three conditions for designating a territory as *dar al-harb*: 1) that the law applied there be apparently non-Islamic; 2) that the territory border the Muslim world, creating an expectation of aggression; and 3) that no Muslim or *dhimmi* (a person protected by the Islamic state) is safe in such territory except by a special contract.⁴⁰

Some modern Muslim scholars dispute that *jihad* was aggressive, and argue that it was exclusively defensive war.⁴¹ They cite those verses of the *Qur'an* that authorize Muslims to repel aggression in defense of themselves and property.⁴² These scholars fail, however, to take account of verses of the *Qur'an* that suggest aggressive *jihad*.⁴³ *Sunna* and the actual practice of the early Muslims also support the idea of *jihad* as aggressive war.⁴⁴ These sources instruct the Muslims to initiate *jihad* by seeking out the unbelievers and offering them the choice to either embrace Islam, submit to Muslim rule in accordance with *Shari'a*, or fight.⁴⁵ If they should fight and are defeated, the victors may seize their property as spoils of war, and surviving men, women, and children may be taken as slaves.⁴⁶ These were the imperative consequences of *jihad* under *Shari'a* even when *jihad* was defensive war. Religious and historical evidence clearly shows *jihad* and its

39. Shihata, *supra* note 35, at 108.

40. Abu Zahrah, *Nazaria't Al-Harb Fi Al-Islam*, 14 REVUE EGYPTIENNE DU DROIT INT'L 1, 17 (1958). Khadduri states the Hanafi position in slightly different terms: "[F]irst, the law of the unbelievers is enforced; second, it becomes separated for *dar al-Islam* by non-Muslims territory; and third, no believer or *dhimmi* could safely reside in the territory." M. KHADDURI, *supra* note 21, at 156.

41. See, e.g., Abu Zahrah, *supra* note 40; M. SHALTUT, AL-ISLAM WA AL-'ALAGAT AL DAWLIA [ISLAM AND INTERNATIONAL RELATIONS] 38 (1951).

42. The *Qur'an* states "[I]f any make an attack upon you, make a like attack upon them; show piety towards Allah, and know that Allah is with those who show piety." *Qur'an*, *supra* note 12, at 2:190. The defensive dimension of *jihad* is not disputed here.

43. The *Qur'an* states: "When the sacred months have slipped away, slay the polytheists wherever ye find them, seize them, beset them, lie in ambush for them everywhere; if they repent, and establish the prayer and pay the Zakt, then set them free; For Allah is forgiving, compassionate." *Qur'an*, *supra* note 12, at 9:5.

Fight against those who do not believe in Allah nor in the Last Day, and do not make forbidden what Allah and his messengers have made forbidden, and do not practice the religion of truth, who have been given the Book [Christians and Jews], until they pay the *Jizya* off-hand, being subdued.

Id. at 9:29.

"Oh ye who have believed, fight the unbelievers who are near to you, and let them feel a rough temper in you, and know that Allah is with those who show piety." *Id.* at 9:124.

44. See M. KHADDURI, *supra* note 21, at 55-82.

45. These options were based on the explicit instructions given by the Prophet to army and detachment commanders. Because the object of *jihad* was to spread the faith and not material gain, Islam had to be offered first, and if accepted, the Muslims were not entitled to fight. If Islam was not accepted, then the second and third options would follow in accordance with *Shari'a*. See Shihata, *supra* note 35, at III.

46. M. KHADDURI, *supra* note 21, at 118-32.

consequences cannot be rationalized as exclusively defensive war.⁴⁷

Jihad is best seen as employing the prevailing method of conducting international relations for the superior purpose of propagating Islam and achieving what Muslims believed to be the just and enlightened rule of *Shari'a* over the conquered territory. Historically, *jihad* was a positive phenomenon because it humanized the practice of warfare in the Middle Ages. First, *Shari'a* prohibited the prevalent practice of using war for material gain or revenge.⁴⁸ Second, the Prophet and his companions, acting in accordance with the *Qur'an* and *Sunna*, laid down very specific and strict rules for honorable combat.⁴⁹

According to these rules, Muslims must first offer their foes the option of accepting Islam or submitting to Muslim sovereignty. In other words, there can be no *jihad* under *Shari'a* without a formal declaration of war following the enemy's rejection of Islam and of a status equal to that of Muslims or at least the status of a protected *dhimmi* community. Once they declare war, Muslims must never kill non-combatants, destroy property, or conduct war-like activities outside the battlefield. The *Qur'an* encourages peace and emphasizes the strict duty to observe treaties and covenants with the enemy.⁵⁰ *Shari'a* also protects aliens such as diplomats and international travelers who are allowed into Muslim territory under safe conduct.⁵¹

Subject to these limitations, *jihad* remains a fundamental obligation under *Shari'a*. There should be no permanent peace until the whole world submits to Muslim sovereignty. This aim clearly repudiates the most fundamental premise of the theory of modern international relations: peaceful coexistence of equal sovereign states.⁵²

B. THE MODERN THEORY OF INTERNATIONAL RELATIONS

After the *bellum justum*, the European equivalent of *jihad*,⁵³ the

47. For an account of the Muslim expansion, see J. GLUBB, *THE GREAT ARAB CONQUESTS* (1980).

48. *LAW IN THE MIDDLE EAST*, *supra* note 36, at 110.

49. M. HAMIDULLAH, *MUSLIM CONDUCT OF STATE* 204-08 (1953); M. KHADDURI, *supra* note 21, at 102-05.

50. *Qur'an*, *supra* note 12, at 4:90, 8:61. As the terms of these verses and the verses which sanction *jihad* to spread the faith clearly show, peace treaties are to be concluded on the Muslims' terms. See *supra* note 43. Ideally this would be when non-Muslims embrace Islam, or at least submit to Muslim rule. The Muslims may also conclude a peace treaty to gain time to strengthen themselves or settle internal differences. But once they do conclude a treaty, the Muslims are strictly bound by it until the other party repudiates it by clear violation. Shihata, *supra* note 35, at 112-13.

51. M. KHADDURI, *supra* note 21, at 162-69. It is interesting to note that the seizure of American diplomats in Iran in 1979 and recent abductions and assassinations in Lebanon of non-combatant aliens who enjoy safe-conduct (*aman*), violate *Shari'a* itself. Shihata, *supra* note 35, at 108-09.

52. U.N. CHARTER art. 2, paras. 1, 4.

53. I. WALKER, *A HISTORY OF THE LAW OF NATIONS* 300, 306-07 (1899).

European powers came to appreciate the need for peaceful coexistence among themselves and with non-European powers.⁵⁴ During the nineteenth century, the community of "civilized" nations was gradually extended to include the Muslims as represented by the Ottoman Empire.⁵⁵ Western European legal norms became the basis of international relations.⁵⁶

Although the Muslims and other peoples of the world initially joined the community of nations on Europe's own terms, they now challenge some of these norms as repugnant to international justice, the principles of equality of states, and national self-determination.⁵⁷ Some of these criticisms of traditional international law norms are valid. Certain aspects of international law must be renegotiated and improved to ensure world peace and the survival of world civilization.⁵⁸ This does not, however, justify *jihad*, which would repudiate the basic premise of sovereign equality and peaceful coexistence. The Islamic world must address the limitations of historic public *Shari'a* if it wishes to maintain world peace and stability. First, the Islamic nations must reassess the validity of *jihad* and whether the aggressive propagation of Islam by violence is viable in the modern world. Second, Muslims must question whether non-recognition of sovereign non-Muslim states and classification of them as *dar al-harb*, territories of war, can continue when peaceful coexistence is imperative. Given these aspects of public *Shari'a*, it is arguable that this system is both morally indefensible and practically untenable today.

Some contend that the Muslims have already abandoned these aspects of public *Shari'a* and accepted membership in the modern community of nations on the basis of the principles of peaceful coexistence and sovereign equality of all nations.⁵⁹ However, because these principles of *Shari'a* continue to influence Muslim attitudes and

54. *Id.*

55. For a brief survey of the process of assimilation, see Khadduri, *supra* note 34, at 360-72.

56. See generally I. WALKER, *supra* note 53.

57. See, e.g., H. Kelsen, *THE COMMUNIST THEORY OF LAW* 188 (1955); L. Oppenheim, *1 INTERNATIONAL LAW* 52 (8th ed. 1963); R. Schlesinger, *THE SOVIET LEGAL THEORY* 286 (2d ed. 1951).

58. C. Jenks, *THE COMMON LAW OF MANKIND* ch. 1 (1958). See generally P. Corbett, *LAW AND SOCIETY IN THE RELATIONS OF STATES* (1951); Q. Wright, *THE STRENGTHENING OF INTERNATIONAL LAW* (1959).

59. All Muslim countries are members of the United Nations and are bound by the U.N. Charter. R. Lillich & F. Newman, *INTERNATIONAL HUMAN RIGHTS* 66 (1976); Lauterpacht, *The International Protection of Human Rights*, 70 *RECUEIL DES COURS* 5, 24 (1947). The Charter states:

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace

U.N. CHARTER art. 1, para. 1; see also *id.* art. 1, para. 2.

practice today, the danger of Muslim repudiation of the basic premise of international law and peaceful coexistence remains.

IV. RESTRICTED HUMAN RIGHTS UNDER *SHARI'A*

Under *Shari'a* rule, some basic human rights are at serious risk.⁶⁰ Had Muslims not temporarily abandoned public *Shari'a* during secular rule, there would have been massive violations of the most basic human rights.⁶¹ Recent attempts to re-introduce public *Shari'a* in Iran and Pakistan provide horrific examples of persecution of religious minorities and violation of individual civil liberties.⁶² Islamic governments sometimes commit these atrocities in violation of *Shari'a* itself.⁶³ This transgression is due to a lack of institutionalized safeguards to ensure compliance with *Shari'a* limitations on the powers of rulers.⁶⁴ But even if *Shari'a* is observed, gross violations of human rights would still occur.

As explained below, *Shari'a* classifies all the subjects of an Islamic state in terms of gender and religion. At the top of the hierarchy are Muslim men, who enjoy the highest level of civil and political rights, followed by Muslim women and "tolerated" non-Muslim minorities.

60. The important question of the validity of moral and philosophical foundations of human rights is beyond the scope of this Article.

61. For example, it should be noted that slavery has been abolished in the Muslim world as a matter of secular law and not through the reform of the relevant rules of *Shari'a*. Despite the call to formally abolish slavery as a matter of *Shari'a* law, see A. ALI, *supra* note 17, at 267, abolition was achieved only through secular law.

In theory, there is nothing to prevent the re-establishment of slavery if *Shari'a* is the exclusive legal system. For *Shari'a*'s effort to improve the lot of the slaves, see M. KHAD-DURI, *supra* note 21, at 130-32. Nevertheless, slavery as such is not unlawful under *Shari'a*.

62. Documenting current human rights violations is problematic because of the scarcity of objective and verifiable information. Moreover, it is often difficult to distinguish between the various sociological and political causes in relation to a given country. The available information nevertheless provides support for the statement that certain human rights violations are at least closely associated with the application of *Shari'a* law in Iran and Pakistan. This is particularly true when the frequent incidence and gravity of such violations coincide with the move to apply *Shari'a* in these countries. See, e.g., AMNESTY INTERNATIONAL, LAW AND HUMAN RIGHTS IN THE ISLAMIC REPUBLIC OF IRAN: A REPORT COVERING THE EVENTS WITHIN THE SEVEN MONTHS PERIOD FOLLOWING THE REVOLUTION OF FEBRUARY 1979 (1980); AMNESTY INTERNATIONAL, DOCUMENTATION ON IRAN (1982); AMNESTY INTERNATIONAL, EVIDENCE OF TORTURE IN IRAN, (1984).

In relation to Pakistan, see AMNESTY INTERNATIONAL, THE ISLAMIC REPUBLIC OF PAKISTAN: AN AMNESTY INTERNATIONAL REPORT INCLUDING THE FINDINGS OF A MISSION TO PAKISTAN, 23 April-12 May 1976 (1977); AMNESTY INTERNATIONAL, SHORT REPORT OF AN AMNESTY INTERNATIONAL MISSION TO THE ISLAMIC REPUBLIC OF PAKISTAN, 20-25 January 1978 (1978).

63. The scope of the present Article does not permit a detailed discussion of the various sociological, political, and economic reasons why the Muslims are plagued by oppressive authoritarian regimes that exploit and manipulate *Shari'a* in this way. It is significant for the purposes of this Article to note that historical public *Shari'a* lends itself to such exploitation and manipulation.

64. See *supra* notes 23-31 and accompanying text.

Shari'a treats aliens who are admitted under temporary safe conduct (*aman*) under the terms of their license, unless their stay in the Muslim state is an extended one, whereupon they are treated as members of a tolerated non-Muslim community (*dhimmis*).⁶⁵ None of the subjects of a *Shari'a* state, including Muslim men, enjoy the full rights of a citizen in the modern sense of the term.⁶⁶

This Article now analyzes the human rights of various groups under the Muslim's historical development of *Shari'a* as positive law. As will be made clear, historical *Shari'a* did not provide for constitutional civil rights and safeguards limiting the power and discretion of its rulers. The *Qur'an* and *Sunna* do provide sources that support the development of constitutional safeguards today,⁶⁷ but these sources have yet to be developed into positive law.

A. MUSLIM MEN

Under traditional *Shari'a*, the Muslim male enjoyed full civil capacity, but his political rights fell short of modern standards. He had no effective voice in government because *Shari'a* did not provide for the popular election of rulers.⁶⁸ As evidenced by the history of the *Khulaffa*, the executive heads of state, *Shari'a* made no provision for

65. Shihata, *supra* note 35, at 108 (citing AL-MAWARDI, AL-AHKAM AL SULTANIYYA [THE PRINCIPLES OF GOVERNMENT] 252 (1853)).

66. Khadduri states:

Human Rights in Islam, as prescribed by the Divine Law [*Shari'a*], are privileges only of persons of full legal capacity. A person with full legal capacity is a living human of mature age, free, and of Moslem faith. It follows accordingly, that non-Moslems and slaves who lived in the Islamic states were only partially protected by law or had no legal capacity at all.

Khadduri, *Human Rights in Islam*, 243 ANNUALS 77, 79 (1946). This substantially true statement should be qualified in two ways. First, the rights of a Muslim male who enjoyed full capacity as prescribed by *Shari'a* do not exactly correspond to the full rights of a citizen in the modern sense of the term. Second, Muslim women did not enjoy civil and political rights equal to those of Muslim men. There is also a distinction between Islam and the "Divine law," by which I take Khadduri to be referring to *Shari'a*. An appreciation of the fact that *Shari'a* did not enact into positive law the whole of Islam is crucial to the reform methodology proposed at the end of this Article.

67. See generally Ishaque, *Al-Ahkam Al-Sultanivah: Law of Government in Islam*, 4 ISLAMIC STUD. 275 (1965); M. ASAD, PRINCIPLES OF STATE AND GOVERNMENT IN ISLAM (1966).

68. Popular elections were utterly unthinkable in the seventh century A.D., which is precisely the point. So long as the manner of succession of the first four *Khulaffa*, a mixture of selection by leading Muslims and direct appointment by the preceding *Khaliffa*, is taken as definitive and the most authoritative Islamic model, we cannot say that *Shari'a* provides for general elections on universal suffrage.

For the *Shi'a* sect of Islam, the office of *Khaliffa* (*Imam* in their terminology) is determined by direct descent from the Prophet and appointment by the preceding *Imam*. For the majority of *Shi'a*, known as Twelvers, now living mainly in Iran, there is no question of any election of the *Imam*. Note that these *Shi'a* believe that the current incumbent *Imam* is absent and expected to reappear soon.

On the majority *Sunni* and minority *Shi'a* views on the selection of the executive head of the state, see LAW IN THE MIDDLE EAST, *supra* note 36, chs. 1 and 5.

peaceful and orderly change of government.⁶⁹ Similarly, *Shari'a* provided no effective limitations on the powers of the ruler.⁷⁰

Islamic law, as developed by the early jurists, does allow Muslim male community leaders to advise the ruler, although they cannot compel him to comply.⁷¹ The ruler may impose criminal sanctions for dissent at his complete discretion.⁷² These sanctions dampen freedom of speech and create a sense of intellectual and political impotence.⁷³ Furthermore, if Muslim men express views that the ruler deems heretical, they may be put to death as apostates.⁷⁴

B. MUSLIM WOMEN AND NON-MUSLIMS

Women and tolerated communities of non-Muslims suffer more restrictions than Muslim men. *Shari'a* does not allow either group to advise the ruler or participate on equal terms with Muslim men in the public life of the Muslim state.

Shari'a treats women as the wards of men. As such, women lack the capacity to hold high-ranking general executive or judicial office.⁷⁵ While *Shari'a* achieved significant advances over contemporary practice in improving the status of women,⁷⁶ it generally inhibits women's

69. See sources cited *supra* note 30.

70. See sources cited *supra* note 28.

71. See sources cited *supra* note 28.

72. Islamic criminal law provides for a few specific offenses and punishments, *hudud* and *qasas*, and leaves the rest to the discretion of the ruler. See generally M. EL-AWA, PUNISHMENT IN ISLAMIC LAW (1982).

73. Khadduri states this aspect of the Muslim historical experience as follows:

While, in early Islam, Muslim public opinion was not inclined to support an *imam* [*Khaliffa*] who himself seemed to have departed from the law, the jurist-theologians seem to have gradually tended to support the authority of the *imam* against any element revolting against him. They upheld the theory that the *imam*, even if he committed an error, must be obeyed. The *Ash'aris* and almost all the latter *Sunni* jurists supported authority against dissension and argued that rebellion is worse than tyranny. To them once the *bay'a* (homage or fealty) was given to the new *imam* there was no legal way of taking it back. . . . Thus in practice the *imam* has the ultimate authority in the state, and he can invoke the *jihad* to enforce his commands. It follows that *baghi*, in the sense of dissension, would constitute the negation of the *imam's* authority; hence both the *imam* and his subject must oppose the dissenters in order to re-establish the unity of the *imamate* [leadership of the Muslim community].

M. KHADDURI, *supra* note 21, at 78-79.

74. See, e.g., Peters & DeVries, *Apostasy in Islam*, 17 DIE WELT DE ISLAMIS 1 (1976). For a modern application of this law in the Sudan in 1985, see An-Na'im, *The Islamic Law of Apostasy and its Modern Applicability: A Case from the Sudan*, 16 RELIGION 197 (1986).

75. See *Qur'an*, *supra* note 12, at 2:282; 4:34, 33:33, 33:53. For a general explanation of *wilaya*, the male guardianship over women, see SHORTER ENCYCLOPEDIA OF ISLAM 633 (H. Gibb & J. Kramers, eds. 1953) [hereinafter ENCYCLOPEDIA] (stating that the sovereign's power he holds or delegates is *willaya*. Holders of high or judicial office have a special *willaya*. Women are excluded from possessing either general or special *willaya*).

76. See A. ALI, *supra* note 17, at 255-57; P. HITTI, HISTORY OF THE ARAB 28 (1956); R. LEVY, THE SOCIAL STRUCTURE OF ISLAM 91-134 (1957); R. SMITH, KINSHIP AND MARRIAGE IN EARLY ARABIA 92-94 (1903).

participation in public life.⁷⁷

Non-Muslims suffer limitations on their access to public offices that exercise authority over Muslims because their allegiance to the Muslim state is in doubt. *Shari'a* allows them a degree of communal autonomy and power to conduct the private affairs of their religious community,⁷⁸ but they may not hold responsible office or join the military service of the Islamic state.⁷⁹ In exchange for being *dhimmis*, a tolerated community governed and defended by the Muslims, non-Muslims pay *jizya*, a personal poll-tax that signifies submission to Muslim rule and sovereignty.⁸⁰

Some modern Muslim scholars justify the payment of *jizya* because non-Muslims are exempt from military service and should therefore share in the cost of defending the realm.⁸¹ The truth of the matter, however, is that they are disqualified, and not merely exempt, from military service. Exemption implies request or at least the choice of the person excused. Non-Muslims have no choice in accepting the status of being defended by the Muslims in exchange for payment of *jizya*.⁸²

It must be emphasized that the object of critically noting all these limitations on the basic civil rights of Muslim men, women, and non-Muslims is not to doubt the validity of such limitations in their proper historical context. *Shari'a's* view of civil liberties compared favorably with civil rights under Roman and Persian law prevailing at the time. Rather, criticism and strong objection must be raised to any attempt to reintroduce historical public *Shari'a* today because it is inconsistent with prevailing human rights standards.

77. See Higgins, *Women in the Islamic Republic of Iran: Legal, Social, and Ideological Changes*, 10 SIGNS: J. WOMEN IN CULTURE & SOC'Y 477 (1985).

78. On the degree of internal autonomy allowed to *dhimmis*, see Goiten, *Minority Self-Rule and Government Control in Islam*, 31 STUD. ISLAMICA 101 (1970).

79. This restriction was done under charters granted by the Muslim state to its non-Muslim subjects called "compacts of *dhimma*." For samples of the terms of these charters, see M. KHADDURI, *supra* note 21, at 177-78; see also ENCYCLOPEDIA, *supra* note 75, at 16-17, 75-76.

80. The concept of *dhimma* is not, of course, a purely legal concept, but rather a social and political institution based on religio-legal principles. See A. TRITTON, *THE CALIPHS AND THEIR NON-MUSLIM SUBJECTS* (1970) (providing an extensive review of the institution and its implications throughout Muslim history).

81. M. HAMIDULLAH, *MUSLIM CONDUCT OF STATE* 244-45 (1968).

82. T. ARNOLD, *THE PREACHING OF ISLAM* (1913). Arnold gives several examples of Christian groups who were exempt from payment of *jizya* in exchange for serving in Muslim armies. *Id.* at 62-63. This occurrence was rather exceptional and contrary to the predominant practice. Such positive features of the historical Muslim experience should be emphasized and developed further into complete equality between the citizens of an Islamic state, regardless of sex or religion.

C. *SHARI'A* IN LIGHT OF MINIMUM HUMAN RIGHTS STANDARDS

While this Article criticizes historical public *Shari'a* as being inconsistent with prevailing human rights standards, it does not unqualifiedly endorse those standards that originated within the western liberal tradition.⁸³ As in the case of international law,⁸⁴ the emergence of the socialist and third world blocs has already had a significant impact in reformulating human rights standards.⁸⁵ Economic, social, cultural, and collective peoples' rights such as a right to development are increasingly finding expression in United Nations documents and in regional human rights instruments.⁸⁶ Claims of cultural relativism are gradually modifying the definition and implementation of human rights.

This line of development does not negate the validity of the objections raised against public *Shari'a*. Claims of cultural relativism, including allegiance to a religious legal system such as *Shari'a*, are limited by minimum standards of universal human rights.⁸⁷ For example, slavery and torture cannot be justified with reference to any set of prevailing social norms or traditional cultural standards. To concede the unlimited claims of an ideological or cultural tradition can lead to absurd and manifestly unjust results.

Discrimination on grounds of gender or religion is as objectionable as discrimination on grounds of race.⁸⁸ The Muslims condemn the racist policies of the Republic of South Africa, for example, while condoning discrimination on grounds of gender and religion under their own law. Furthermore, the modern nation state is based on the fundamental premise of equal rights and duties for all its citizens, which are

83. See F. DOWRICK, *HUMAN RIGHTS, PROBLEMS, PERSPECTIVES AND TEXTS* (1979); A. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* (1982); Minogue, *The History of the Idea of Human Rights*, in *THE HUMAN RIGHTS READER 3* (W. Laqueur & B. Rubin eds. 1978); Van Dervyver, *The Concept of Human Rights: Its History, Contents and Meaning*, in *ACTA JURIDICA* 10 (1979).

84. See *supra* notes 53-57 and accompanying text.

85. For a general survey of this process, see Henkin, *Rights: Here and There*, 81 *COLUM. L. REV.* 1582 (1981). For the Marxist perspective, see, e.g., Przetacznik, *The Socialist Concept of Human Rights: Its Philosophical Background and Political Justification*, 13 *REVUE BELGE DE DROIT INT'L* 238 (1977).

86. See generally International Covenant on Civil and Political Rights, *supra* note 9; International Covenant on Economic, Social and Cultural Rights, *supra* note 9; African Charter on Human and Peoples' Rights, *supra* note 9; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6.

87. See An-Na'im, *Religious Minorities under Islamic Law and the Limits of Cultural Relativism*, 9 *HUM. RTS. Q.* 1 (1987).

88. It is not being claimed here that current state practice is fully consistent with these standards. However, the effective prohibition of discrimination on grounds of race, gender, or religion is one of the objectives of the international human rights movement. A discussion of the moral and philosophical base of these standards is beyond the scope of this Article.

often enshrined in formal constitutional documents.⁸⁹ Thus a modern Islamic state cannot justify discrimination among its own citizens on grounds of gender or religion.

Muslim scholars do not justify such discrimination as a matter of principle.⁹⁰ Rather, Muslim writings are apologetic and uncritical.⁹¹ If the Muslims are seriously contemplating the application of an Islamic public law to replace or at least supplement the secular Western model they inherited from colonial rule, they must meet the challenge of modern international law and basic universal human rights.

V. SOLUTIONS FROM WITHIN ISLAM

A legitimate and lasting constitutional and legal order that can address modern international relations and domestic human rights must develop from within Islam. Although Muslims presently live with superficial patterns of western-style government, Muslim belief precludes a purely secular approach to law and state.⁹²

Therefore, the benefits of western secularism in the Muslim world are temporary. Islamic states lack native support for western governmental institutions because these institutions are perceived as purely secular and un-Islamic.⁹³ Furthermore, despite western-style constitutional safeguards and international obligations regarding human rights, massive violations continue to occur in the region.⁹⁴

The movement among some Muslim jurists to re-institute the Medina model of historical public *Shari'a* may be seen, in at least one sense, as a positive step. Islamic fundamentalism confronts Muslims with the implications of *Shari'a* in a modern context, and forces them to conceive of alternative Islamic responses.

It is impossible to reconcile every aspect of historical public *Shari'a* with the full range of domestic civil liberties and peaceful co-

89. Most modern Muslim countries have written constitutions that expressly guarantee equality before the law for all citizens. This is true not only of the secular Muslim states, but also of the states that purport to apply *Shari'a*. See CONST. OF THE ISLAMIC REPUBLIC OF IRAN art. 20; CONST. OF THE ISLAMIC REPUBLIC OF PAKISTAN arts. 25-27; CONST. OF THE REPUBLIC OF SUDAN art. 14. The Iranian constitution nevertheless makes provision for discrimination on grounds of religion. CONST. OF THE ISLAMIC REPUBLIC OF IRAN arts. 11-14. See generally CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Beaufort & G. Flanz ed. 1985).

90. Works such as S. Tabandeh, A MUSLIM COMMENTARY ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1970) are exceptional in this regard.

91. For a critical review of modern Muslim reformist movements see, for example, M. KERR, ISLAMIC REFORM (1966); FAZLUR RAHMAN, ISLAM, ch. 13 (1966); W. SMITH, ISLAM IN MODERN HISTORY (1957).

92. See sources cited *supra* note 11.

93. See sources cited *supra* note 11.

94. See generally sources cited *supra* note 3.

existence in the international sphere.⁹⁵

The best solution to the current Muslim dilemma of legitimizing peaceful coexistence and basic human rights from within Islam is based on the work of the late Sudanese Muslim reformer *Ustadh* Mahmoud Mohamed Taha.⁹⁶ According to Taha, public *Shari'a* did not enact the whole of Islam.⁹⁷ The jurists were working primarily on the model of the Medina state and speculating on the basis of their knowledge and understanding of the *Qur'an* and *Sunna*.⁹⁸ Both the Medina model and the jurists' understanding of the sources were bound to their historical context. One may find the modern model of an Islamic state in the broad principles of justice and equality contained in the *Qur'an* and *Sunna* of the earlier stage of Mecca before migration to Medina.⁹⁹

Taha's approach provides a framework for the discovery of solutions from within Islam. Such a model would emphasize that Islam suits *all* ages and places, not just its early historical context. Muslims must recall that the Prophet was a man of his time and for all times. In delivering the whole of the *Qur'an* and living up to its values, the Prophet faithfully executed his role as the Prophet of the universal and eternal message of Islam. Working out of the totality of Islam, the Prophet then constructed the best workable model and left the rest for the Muslims to develop and implement in light of their own needs and experience. Thus, Islam suits all ages and places by providing a flexible framework from which the right answers may be developed according to the demands of the times.

There are some major obstacles to instituting the framework this Article proposes. First, such changes require Muslims to encourage free discussion and tolerate political dissent. However, the prevailing attitudes inherited from *Shari'a* do not tolerate unorthodoxy or dissent.¹⁰⁰ Most Muslim scholars are either silent, in exile, or in prison.¹⁰¹ For example, Sheikh Ali Abdel Razig of Cairo's Al Azhar Islamic University suffered severe persecution after publication of his

95. See *supra* notes 16-82 and accompanying text.

96. All Taha's books are in Arabic. For a new English translation, see M. TAHA, *THE SECOND MESSAGE OF ISLAM* (A. An-Naim trans. 1987). For an explanation of some aspects of Taha's approach, see An-Na'im, *supra* note 74; An-Na'im, *The Elusive Islamic Constitution: The Sudanese Experience*, 26 *ORIENT* 329 (1985); El Naiem, *A Modern Approach to Human Rights in Islam: Foundations and Implications for Africa*, in *HUMAN RIGHTS AND DEVELOPMENT IN AFRICA* 75 (C. Welch & R. Meltzer eds. 1984).

97. See generally M. TAHA, *supra* note 29.

98. See sources cited *supra* notes 96-97.

99. See sources cited *supra* notes 96-97.

100. See *supra* notes 72-74 and accompanying text.

101. Miller, *The Embattled Arab Intellectuals*, N.Y. Times, June 9, 1985, § 6 (Magazine), at 6.

thesis on Islamic government.¹⁰² Islamic authorities banned his book, burned available copies, revoked the author's degree, and threatened him with execution as a heretic.¹⁰³

Similarly, *Ustadh* Mahmoud Mohammed Taha, whose work is central to the proposals in this Article, was executed in Khartoum on January 18, 1985.¹⁰⁴ The authorities burned his books and outlawed his movement.¹⁰⁵

VI. CONCLUSION

It is impossible to reconcile every aspect of public *Shari'a* as developed by the early Muslim jurists with civil liberties and peaceful international coexistence. Fortunately, to opt out of that version of public *Shari'a* is not to opt out of Islam itself. On the contrary, to insist on all aspects of historical public *Shari'a* today is tantamount to saying that Islam stands for repression and discrimination at home and aggression abroad.

In advocating international peaceful coexistence and respect for human rights at home and abroad, one is fully aware of the many problems Muslims have with these principles today. From the Muslim third world perspective, there are problems with international law and relations as defined and developed by western colonial powers. From the Muslim cultural perspective, there are problems with human rights as defined and developed by the western liberal tradition. Nevertheless, in these same standards we already have a very good beginning. Western dominance in both spheres has already been challenged and eroded by contributions from socialist and third world countries.¹⁰⁶ The Muslims must overcome their historical biases in order to participate and make their own original contributions to this process. What they should not do is sit back and watch passively, as they have been doing so far, or make the negative contribution of resurrecting historical public *Shari'a*. International peace, justice, and human rights have already been partially achieved through the Grace of God, and are to be enhanced and promoted through His Grace too. It is the paramount religious duty of all Muslims to participate in this ultimate act of worship.

102. A. RAZIG, *AL-ISLAM WA'USUL ALHUKM* [Islam and the Basis of Government] (1966).

103. *AL-ISLAM WA 'USUL AL HUKM* 5 (M. Haqi ed. 1966); A. HOURANI, *ARABIC THOUGHT IN THE LIBERAL AGE* 183-92 (1962); D. PIPES, *supra* note 11, at 122.

104. An-Na'im, *Detention Without Trial in the Sudan: The Use and Abuse of Legal Power*, 17 COLUM. HUM. RTS. L. REV. 159 (1986); Lesch, *The Fall of Numieri*, 1985 U. FIELD STAFF INT'L REP. 22.

105. See sources cited *supra* note 104.

106. See sources cited *supra* notes 83 and 85.

