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Expert Submission to the Special Rapporteur on Freedom of Religion or Belief: Report to the United Nations General Assembly on Eliminating Intolerance and Discrimination Based on Religion or Belief and the Achievement of Sustainable Development Goal 16 (SDG 16)

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CH-1211 Geneva 10
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Submission by Dr Amna Nazir¹ of the BCU Centre for Human Rights, School of Law, Birmingham City University, UK

¹ Associate Director, Centre for Human Rights, School of Law, Birmingham City University, 4 Cardigan Street, Birmingham, UK, B4 7BD. Email: amna.nazir@bcu.ac.uk. Dr Nazir is dually qualified as a Scholar of International Human Rights Law and Islamic Law. She holds a British Research Council funded PhD, Islamic seminary (Alimiyyah) degree, and an Editorship at Harvard Law School's Program in Islamic Law.

I. General Remarks

1. This submission provides observations and recommendations for an enlightened interpretation of apostasy in Islamic law that deconstructs the notion that it is a capital crime and demonstrates the legitimacy of freedom of religion or belief in Islam.
2. **Part II** of this submission will present (a) an overview of Islamic law; (b) the religious basis for the criminalization of apostasy as a capital crime; and (c) an alternative interpretation in light of Muslim jurists' views on the issue.
3. This interpretation can be used to remove apostasy as a capital crime in Muslim jurisdictions and promote the fundamental right of freedom of religion or belief.
4. **Part III** of this submission will consider the apostasy laws in Sudan with a specific focus on the case of Meriam Ibrahim. This will be placed in the context of Islamic law, with reference to **Part II**, and the relevant international law namely Articles 6 and 18 of the International Covenant on Civil and Political Rights (ICCPR).
5. **Part IV** offers concluding remarks and recommendations.

II. Islamic Law and Apostasy

a. *The Foundation of Islamic Law*

6. Sharia² is an overarching concept inclusive of legal and non-legal rulings. Fiqh is the discipline where scholars have attempted to interpret the Sharia, i.e the Qur'an (the word of God) and the Sunnah (sayings, actions and tacit approvals of the Prophet Muhammad), to derive rulings.
7. Sharia is the divine whereas fiqh is man-made, it is the human attempt to interpret the divine. These interpretive discourses have crystallised into various schools of thought known as *madhāhib*, the four main Sunni schools being Ḥanafī, Mālikī, Shāfi'ī, and Ḥanbalī which were named after their eponyms. These four schools of thought and their varying interpretations are attributed to different understandings of fiqh.
8. Islamic law categorises penal law into three types of crime: *ḥudūd*, *qiṣās* and *ta'zīr*.³
9. *Ḥudūd* (singular *ḥadd*) literally means 'limits' which have been defined by jurists as offenses whose punishments are fixed and are God's right.⁴
10. The Qur'an discusses '*ḥudūd Allah*' (limits of God) cautioning Muslims against transgressing them or approaching them.⁵ *Ḥudūd* in the context of designating particular crimes do not appear in the Qur'an, but rather have been characterised by the juristic formulations of fiqh. Ibn Taymiyyah (d. 728H/1328) noted that the

² Arabic terms are italicized and transliterated except when the word in question has an accepted English spelling such as 'Qur'an', 'Sunnah', 'Hadith' and 'fiqh'. All other Arabic terms are italicized and transliterated according to the International Journal of Middle East Studies (IJMES).

³ See Abdul Qadir Oudeh, *Criminal Law of Islam* (S Zakir Aijaz tr, Kitab Bhavan 1999); Muhammad Abu Zahrah, *al-Jarima wa al-Uquba fi al-Fiqh al-Islami* (Dār al-Fikr al-Arabi, n.d).

⁴ *ibid.*

⁵ See Qur'an, 2:187.

identification of crimes, their definitions and corresponding punishments, were the result of human reasoning rather than from scripture.⁶ Contemporary Islamic scholar, Jonathan Brown, has observed that ‘early Muslim jurists probably inherited the concept of a category of crimes called *Hudūd* from references to it made by the Prophet (peace be upon him) and the early generations of Muslims.’⁷

11. The *hudūd* offences include adultery/fornication (*zinā*), accusing someone of fornication (*qadhf*), consuming intoxicants (*shurb al-khamr*), some types of theft (*sariqa*), armed robbery/banditry (*hirāba*), and apostasy (*ridda*).
12. Of these *hudūd* offences, three have been interpreted to incur the death penalty. They are adultery, apostasy and banditry. Apostasy is the focus of this discussion.

b. Apostasy as a Capital Crime: The Religious Basis

13. In all four classical schools, the punishment for apostasy is death as illustrated in their fiqh literature. However, Mohammad Kamali notes that ‘despite the remarkable consistency that one finds on this point, the issue of punishment by death for apostasy is controversial, and various opinions have been recorded on the matter ever since the early days of Islam’.⁸
14. Moreover, the manner in which the term apostasy was used and interpreted in the early days of Islam suggests a separation between apostasy *simpliciter* and political apostasy akin to treason or warfare. In agreement with this, Brown has argued that ‘[t]he way that the early Muslim community seems to have understood apostasy differs strikingly from the decisive rulings of the later schools of law’.⁹
15. The Qur’an’s emphasis on freedom of religion¹⁰ is *prima facie* incompatible with a criminalisation of apostasy. The term for apostasy is used only twice in the Qur’an, in 2:217 and 5:54.¹¹ A return to unbelief after belief is explicitly mentioned in both verses yet neither stipulate death as the punishment for return to disbelief.
16. After assessing all the commentaries by the classical exegetes on these verses of apostasy, Declan O’ Sullivan notes that what becomes apparent is that none of them indicate or make any reference to the death penalty as a fitting punishment for apostasy, or that such a ruling is derived from these verses.¹²
17. Shaikh Abdur Rahman, the retired Chief Justice of Pakistan, argues that the mere act of apostasy does not necessitate the death penalty because ‘in the early years of Islam, the fact that persons who defected from the religion also joined the enemy

⁶ Jonathan AC Brown, *Stoning and Hand Cutting: Understanding the Hudud and the Shariah in Islam* (Yaqeen Institute for Islamic Research 2017) 5.

⁷ *ibid.*

⁸ Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Islamic Texts Society 1997) 213.

⁹ Jonathan AC Brown, ‘The Issue of Apostasy in Islam’ (Yaqeen Institute for Islamic Research 2017) 14.

¹⁰ See eg 22:17; 2:256; 109:1-6; 88:22-24; 10:99-100; 18:29.

¹¹ Taha Jabir Alalwani also cites a number of other verses he believes serve to expound the essence of apostasy: 3:86; 3:90; 3:91; 3:98; 3:106; 3:177; 4:137; 16:106; 22:11; 47:32. See Alalwani, *Apostasy in Islam* (International Institute of Islamic Thought 2011) 25-27.

¹² See Declan O Sullivan, *Punishing Apostasy: The Case of Islam and Shari’a Law Re-considered* (DPhil thesis, Durham University 2003) for a comprehensive assessment of the verses dealing with apostasy; SA Rahman, *Punishment of Apostasy in Islam* (2nd edn, Kitab Bhavan 2006) 54.

groups, may have obscured the distinction between peaceful renegades and apostates who actively opposed the faithful'.¹³

18. Whilst the Qur'an is largely silent on the death penalty for apostasy, the punishment takes root in three main Hadiths (prophetic narrations). However, these must be read holistically in light of other Hadiths, for example the narration which permits the death penalty for "the one who reverts from Islam (apostate) and leaves the community".¹⁴
19. This Hadith has been narrated with minor variations which seem to qualify what is meant by a person who has abandoned his religion. In some versions, such as above, the apostate is qualified with the phrase *al-mufāriq li-l-jamā'a* (the one who forsakes the community)¹⁵ which suggests hostility and political betrayal. In another version, the one who 'makes war on God and His Messenger' (*yuhārib Allāh wa rasūlahu*) is added.¹⁶
20. Scholars have also made references to the practice of the Prophet to demonstrate that apostasy *simpliciter* was not a death penalty offence.¹⁷ Moreover, Ibn al-Ṭallā' (d. 497/1104) observes that no reliable instance is reported where the Prophet executed anyone for apostasy.¹⁸

c. An Alternative Interpretation

21. Some scholars have compared the apostasy denounced in Hadith literature as analogous to the offence of high treason, thus differentiating between 'political apostasy' and 'religious apostasy'.¹⁹ Early Muslim jurists were concerned with the public element of apostasy and its ramifications for maintaining political order. Notable Hanafī jurists such as al-Sarakshī (d. 490H/1096), Ibn al-Humām (d. 861H/1457) and Ibn al-Sā'ātī (d. 694H/1295) discussed apostasy in their writings on interstate politics (*kitāb al-siyar*) and not criminal punishments.²⁰
22. Al-Sarakshī favoured the ruling of Abū Ḥanīfa that female apostates are exempt from the death penalty and are to be imprisoned until they repent. He relied on narrations wherein female apostates were killed only when they were enemy combatants or inciting war against the Muslims.²¹ What becomes evident here is

¹³ Rahman (n 11) 45.

¹⁴ al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, no. 6878; Ibn al-Ḥajjāj, *Ṣaḥīḥ Muslim*, no. 1676.

¹⁵ This is narrated from Ibn Mas'ūd. The main narrations of this Hadith all have the wording *al-tārik li-dīnihi al-mufāriq li-l-jamā'a* or *al-mufāriq li-dīnihi al-tārik al-jamā'a*. Some narrations of this Hadith that are both less reliable and less common instead contain the wording 'for unbelief after Islam' and 'for apostasy after Islam.'

¹⁶ This is narrated from 'Ā'isha. See eg, al-Sijistānī, *Sunan Abī Dāwūd*, no. 4355; al-Nasā'ī, *Sunan al-Nasā'ī*, no. 4048.

¹⁷ See eg Yohanan Friedmann, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (CUP 2003) 125-26; Mohammad Hashim Kamali, 'Freedom of Religion in Islamic Law' (1992) 21 *Capital University Law Review* 63, 74; Alalwani (n 10) 42-67; Rahman (n 11) 63.

¹⁸ Muḥammad b. Faraj al-Qurtūbī Ibn al-Ṭallā', *Aqḍiyat Rasūl Allāh* (also known as *al-Aḥkām*) (Fāris Fathī Ibrāhīm ed, Dār Ibn al-Haytham 1426/2006) 24.

¹⁹ Alalwani (n 10) 97-116.

²⁰ Jonathan Brown (n 8) 12.

²¹ Muḥammad b. Aḥmad Shams al-Dīn al-Sarakhsī, *al-Mabsūṭ* (Dār al-Ma'rifa n.d) 10:110.

that although al-Sarakshī held apostasy as a capital offence, it was linked to the meaning of apostasy as a political act, not mere renunciation of faith.

23. In agreement with this is the widely cited opinion of Ibn al-Humām who argued that:

It is necessary to punish apostasy with death in order to avert the evil of war, not as punishment for the act of unbelief, its punishment [disbelief] is greater and with Allah, Most High. This [punishment of death] is specifically for *him who comes with war* and is a man; this is because the Prophet prohibited killing women.²²

This is a significant statement which is in harmony with the letter and spirit of the Qur'an, demonstrating that mere apostasy does not incur a death sentence.

24. The Mālikī jurist Abū al-Walīd al-Bājī (d. 474/1081) noted that apostasy is 'a sin for which there is no *ḥadd* punishment'.²³ Other prominent Islamic jurists such as Ibrāhīm al-Nakha'ī (d. 96/717) and Sufyān al-Thawrī (d. 161/778) held that the apostate should be given the opportunity to repent forever (*yustatābu abadan*)²⁴ or in another version, as long as there is hope for his repentance (*yu'ajjal mā rujiyat tawbatuhu*).²⁵ It is likely that al-Nakha'ī meant a repeat apostate is to be given a chance to repent each time.²⁶

25. Maḥmūd Shaltūt, Shaykh al-Azhar (d.1963) further argued that the death penalty for apostasy is based on solitary Hadith and *ḥudūd* cannot be established with them.²⁷

26. The way in which Muslim jurists have described apostasy showed that it was understood as a threat to political order. Some jurists have considered apostasy to fall within the remit of *ta'zīr* and thus at the State's discretion to punish.²⁸

27. There is also considerable scope for the punishment for political apostasy to be arbitrarily applied, and for political opposition members to be unfairly tried and cruelly put to death.

28. Furthermore, there is no evidence that the death penalty is a deterrent for either religious apostasy or political apostasy. It is thus an ineffective implementation of *ḥadd* punishment. The death penalty does not contribute to maintaining nor improving the social and political lives of Muslims.

²² Ibn al-Humām, *Sharḥ Faḥ al-Qadīr 'alā al-Hidāya Sharḥ Bidāya al-Mubtadī* (Dār al-Kutub al-'Ilmiyya 1424/2003) 6:68 (emphasis added).

²³ Abū al-Walīd Sulaymān b. Khalaf al-Bājī, *al-Muntaqā Sharḥ Muwaṭṭa' al-Imām Mālik* (2nd edn, Dār al-Kitāb al-Islāmī n.d) 5:282.

²⁴ al-Ṣan'ānī, *Muṣannaḥ*, 10:166; al-Bayhaqī, *al-Sunan al-Kubrā*, 8:197; Nazwī, *Muṣannaḥ*, 11:190; Ibn Qudāma, *al-Mughnī*, 12:268; al-'Aynī, *al-Bināya fī Sharḥ al-Hidāya*, 7:268; Ibn Ḥazm, *al-Muḥallā*, 11:191; al-Nawawī, *al-Majmu' Sharḥ al-Muḥadhdhab*, 21:66.

²⁵ Ibn Taymiyya, *al-Ṣarīm al-Maslūl 'alā Shātim al-Rasūl* (Muḥammad Muḥyi al-Dīn 'Abd al-Ḥamīd ed, Maktaba al-Tāj 1960) 321.

²⁶ al-Sarakshī, *Sharḥ Kitāb al-Siyar al-Kabīr* (Dār al-Kutub al-'Ilmiyya 1417/1997) 5:166-67; Brown (n 19) 14.

²⁷ Maḥmūd Shaltūt, *al-Islām: Aqīda wa Sharī'a* (Matbabi' Dār al-Qalam n.d) 292-93.

²⁸ Mohamed S El-Awa, *Punishment in Islamic Law* (American Trust Publications 1993) 55.

III. Sudan, Apostasy and the Case of Meriam Ibrahim

29. Sudan is a Muslim-majority State. Under the 2005 Interim National Constitution (INC), three Articles refer explicitly to Islam. Article 5(1) identifies that '[n]ationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Islamic Sharia and the consensus of the people.' Article 156(d) calls on judges and law enforcement agencies to observe 'the long-established Sharia principle that non-Muslims are not subject to prescribed penalties and therefore remitted penalties shall apply according to law'. Finally, under Article 157(1)(b), the Non-Muslim Rights Commission must ensure that 'Non-Muslims are not adversely affected by the application of the Sharia law in the National Capital'. This contradicts the position of non-Muslims in the Criminal Act 1991 which does not make such a distinction.
30. Article 36 of the INC maintains the sovereign right to impose the death penalty with apostasy specifically addressed as a capital crime in Sudan's Criminal Act 1991.²⁹ The case of Sudanese citizen Meriam Ibrahim demonstrates this law in practice.
31. On 15 May 2014, Meriam Ibrahim was sentenced to death for apostasy pursuant to Article 126 of the Sudanese Criminal Act. The case received widespread media coverage and international outcry with the UN Independent Expert receiving numerous complaints about the case.³⁰ The defence petition held that Meriam's personal faith and beliefs had been misrepresented. In September 2013, a man claiming to be Meriam's brother informed the authorities that she was a Muslim and as such was cohabiting illegally with a Christian man (whom she had in fact married). It is only then that the authorities became aware of the Ibrahim family. The Al-Haj Yousef Criminal Court pronounced her church marriage invalid due to her Muslim faith and upbringing, which was built upon the court testimonies of several family members. She was provided with an ultimatum of recanting her faith within three days or face sentence of death. Meriam affirmed her Christian faith declaring she had never committed apostasy and was subsequently sentenced. The defence argued that Meriam had been a devout Christian and met her husband, Daniel Wani, whilst a practising Christian. The Court of Appeal overturned the conviction on 23 June and Meriam was released from prison.³¹
32. According to the UN Independent Expert, Mashood A Baderin, 'the Court of Appeal's ruling overturning the decision of the lower court in this case is commendable in the interest of justice from the perspective of both Islamic law and

²⁹ Article 126(1) states: 'Whoever propagates the renunciation of Islam or publicly renounces it by explicit words or an act of definitive indication is said to commit the offence of Riddah (apostasy); (2) Whoever commits apostasy shall be asked to repent within a period decided by the court and if he insisted on his apostasy and was not a new convert he shall be punished with death; (3) Punishment for apostasy lapses if the apostate refrained from apostasy before the execution'.

³⁰ Human Rights Council, Report of the Independent Expert on the Situation of Human Rights in the Sudan: Mashood A Baderin (4 September 2014) UN Doc A/HRC/27/69, paras 29, 43.

³¹ See 'Sudan: Death Penalty Pronounced in Apostasy Case' (FIDH, 20 May 2014) <www.fidh.org/en/region/Africa/sudan/15355-sudan-death-penalty-pronounced-in-apostasy-case>.

that of international human rights'.³² He also noted that in Sudan's second periodic submission to the Human Rights Committee on the implementation of the ICCPR, the State expressed that the Act does not criminalise conversion from Islam 'but only the manifestation of such conversion if such manifestation affects public safety'.³³

33. This interpretation was supported by Court of Appeal judge, Osman Atigani Mahmoud, who quashed the conviction observing that:

Sudanese law does not criminalise the abstract offence of apostasy unless it is combined with manifestation and propagation. This view is adopted by those who believe that the offence of apostasy applies only to apostates who fight against Islam. The Sudanese law only criminalises the conduct of fighter apostate and not the Muslim who only changed his religion.³⁴

34. Mahmoud held that in order to prove the apostasy charge, Meriam would need to have 'stated that she is Muslim and that she propagates or publicly promotes the renunciation of the creed of Islam'.³⁵ Nevertheless, Meriam's acquittal was in fact a result of her being deemed mentally unfit, by a majority of two to one, as identified by stakeholders in Sudan's Universal Periodic Review.³⁶ Meriam's case demonstrated a lack of appropriate judicial training in Sudan, particularly at the lower bench of the judiciary.

35. Not only was Meriam's case at odds with Islamic law but a clear violation of international law. Article 18 of the ICCPR safeguards freedom of religion and the General Comment No. 22 states that Article 18 'does not permit any limitations whatsoever on the freedom of thought and conscience or to have or adopt a religion or belief of one's choice'.³⁷ The Special Rapporteur on Freedom of Religion or Belief affirmed these rights are 'fundamental to a democratic society and individual self-fulfilment and are foundational to the enjoyment of human rights'.³⁸

36. The criminalisation of apostasy in this context and, if found guilty, the imposition of the death penalty is a clear violation of freedom of religion as well as the right to life pursuant to Article 6 of the ICCPR.

³² Human Rights Council, Report of the Independent Expert on the Situation of Human Rights in the Sudan: Mashood A Baderin (4 September 2014) UN Doc A/HRC/27/69, para 43.

³³ *ibid* para 44; Human Rights Committee, 'Second Periodic Reports of States Parties due in 1992: Sudan' (13 March 1997) UN Doc CCPR/C/75/Add.2, para 127.

³⁴ Unofficial translation of Appeal Court Judgement of 23 June 2014, Abrar Alhadi Mohammed Abdallah and Others Trial (on file with author).

³⁵ *ibid*.

³⁶ JS7 UPR Submission, para 9 available at <www.upr-info.org/sites/default/files/document/sudan/session_25_-_may_2016/js7_upr25_sdn_e_main.pdf>. See also UNHRC, 'Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(b) of the Annex to Human Rights Council Resolution 5/1 and paragraph 5 of the annex to Council Resolution 16/21: Sudan' (19 February 2016) UN Doc A/HRC/WG.6/25/SDN/3, para 51.

³⁷ Human Rights Committee, General Comment No. 22 on the Freedom of Thought, Conscience and Religion (30 July 1993) UN Doc CCPR/C/21/Rev.1/Add.4, para 3.

³⁸ Human Rights Council, Report of the Special Rapporteur on the Freedom of Religion or Belief (5 March 2019) UN Doc A/HRC/40/58, para 55.

37. The Human Rights Committee has emphasised that the death penalty cannot be applied as a sanction against conduct whose very criminalization violates the Covenant, including apostasy.³⁹

IV. Concluding Remarks

38. The criminalisation of apostasy in Islamic law is at clear odds with the concept of freedom of religion or belief. Moreover, the punishment for the offence, the death penalty, rests on questionable jurisprudential grounds due to the variance and ambiguity in the source-texts of Islamic law.

39. There is a distinction between apostasy *simpliciter* and political apostasy. It should be noted that premodern Muslim jurists who endorsed the death penalty for apostasy were writing from a specific socio-political context. The intent and context of apostasy laws would be lost in a modern application due to being superimposed onto quite different structures of law and governance. Geopolitics have radically shifted from the premodern period to the modern era of globalisation.

40. It is therefore entirely plausible that the death penalty is predicated on the political element of apostasy which is tied with hostility and war. Insisting on the death penalty for the apostate demonstrates a lack of critical awareness since the notion of apostasy is often employed by political and religious authorities to curtail freedom of religion.

41. Muslim states which criminalise apostasy must be urged to uphold the right to freedom of religion and belief without discrimination, in accordance to both Islamic law and international law. There needs to be adequate judicial training provided at all stages of the judiciary to prevent violation(s) of this fundamental right.

42. The decriminalisation of apostasy would signal a very significant step in the promotion of freedom of religion or belief within Muslim states.

Submitted by:



Dr Amna Nazir

Associate Director at the BCU Centre for Human Rights

³⁹ Human Rights Committee, General Comment No. 36 on the Right to Life (3 September 2019) UN Doc CCPR/C/GC/36, para 36.