

# **Rethinking Islamic Law for Minorities:**

## **Towards a Western-Muslim Identity**

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## Introduction

### Rethinking Islamic Law for Minorities: Towards a Western-Muslim Identity

*Jasser Auda*

This book presents rethinking attempts and critical revisions of ‘Islamic law for Muslim minorities’ (Arabic: *fiqh al-aqalliyat*), in the form of a number of articles that question and challenge some basic premises of that *fiqh*.

In this introductory chapter, a critique is presented for one basic premise of *fiqh al-aqalliyat*, which is the need of Muslim minorities for special rulings or law because they live in ‘non-Muslim land’. At the end of the chapter, the articles presented in the rest of the book will be outlined.

#### **A Different ‘Fiqh for Minorities’: On what basis?**

Technically, a ‘minority’ is a community that counts for less than 50% of a larger community. ‘Muslim Minorities’ are believed to comprise somewhere between 40 and 50 percent of Muslims worldwide.<sup>1</sup>

However, a quick look at the body of literature developed for *fiqh al-aqalliyat* shows that the basic consideration for ‘*aqalliyat*’ is not a matter of numbers. It is rather the issue of Muslims living in a non-Muslim ‘Country’,<sup>2</sup> ‘society’,<sup>3</sup> ‘context’,<sup>4</sup> ‘polity’,<sup>5</sup> or

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<sup>1</sup> Jasser Auda, “Islam.” In: *Encyclopedia of the Developing World*. New York: Routledge, 2005, and Omar Khalidi, “Muslim Minorities: Theory and Experience of Muslim Interaction in non-Muslim Societies”, in *Journal Institute of Muslim Minorities Affairs*, vol. x, no. 2, July, 1989, p. 426.

<sup>2</sup> Abdul Hadi Christian H. Hoffman, “Muslim Minorities in non-Muslim Countries”, paper presented in the 14<sup>th</sup> General Conference of the Supreme Council for Islamic Affairs on: “The Reality of Islam in a Changeable World”, Cairo, May 2002, p. 2.

<sup>3</sup> Rath, Jan, Penninx, Rinus, Groenendijk, Kees, and Meyer, Astrid, *Western Europe and its Islam*, Brill, Leiden, 2001, p.2.

<sup>4</sup> Abdul Hakim Murad, “British and Muslim”, a paper presented to a conference of British converts, September 1997, p. 3. <http://www.Geocities.com/islamicissues/britishmuslim.html>

<sup>5</sup> Muhammad Khalid Masud, “Being Muslim in a non-Muslim Polity: Three Alternative Models”, in *Journal Institute of Muslim Minorities Affairs*, vol. X, no. 1, January, 1989, p. 124.

under ‘non-Muslim rule’.<sup>6</sup> Thus, the ‘exceptional circumstance’ here are not about the number of Muslims but rather about how the country runs its ‘polity’, ‘system’, or ‘rule’, which could be labelled ‘non-Muslim’.

Therefore, the view of the political view of Muslims necessitated a special law or fiqh that is called fiqh al-aqalliyat, fiqh al-ghurbah (Islamic law for refuge), al-Madhab al-Urubi (European School of Law), European Shari’ah, or European Islam.<sup>7</sup>

However, questions that are typically raised under the ‘fiqh of minorities’ theme do not signify a clear relation with the above basic premise. Examples of such questions are whether or not it is lawful: to deal with banks, insurance companies, or mortgage; work in restaurants or supermarkets that sell wine or serve pork; to apply for citizenship from the ‘non-Muslim’ country of residence, especially if the oath of citizenship involves adherence to its monarchy, constitution, or military service; to participate in a ‘secular political system’ by joining a political party, support certain (non-Muslim) candidates, or run for elections; to greet non-Muslims, congratulate them on their festivals, or attend their weddings or funerals; to accept a marriage or divorce ceremony or court ruling from a non-Muslim judge or based on the ‘non-Muslim law’, and so on.<sup>8</sup>

In all of the above queries, one cannot see a clear link (from the juridical point of view) with the fact that the inquirer does or does not live in a ‘non-Muslim country’. In fact, all of these questions are valid everywhere in any case, however, the basic premise of a ‘non-Muslim country’ is not about a percentage of minority or majority – from the classic fiqh point of view.

If one re-visits the wide fiqhi literature looking for what makes a certain territory ‘Islamic’ to start with, one will realize that:

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<sup>6</sup> Jacques Waardenburg, “Normative Islam in Europe” in *Islamic Words: Individuals, Societies and Discourse in Contemporary European Islam*, Felice Dassetto [dir.], Maisonneuve & Larose, European Science Foundation, 2000, p. 55.

<sup>7</sup> For example: Yvonne Yazbeck Haddad, “The Challenge of Muslim Minorityness: the American Experience”, in W.A.R. Shadid & P.S. van Koningsveld (eds), *The Integration of Islam and Hinduism in Western Europe*, Kok Pharos, Kampen, NL, 1991, p. 135; Murad Wilfred Hoffman, “Muslims as Co-Citizens of the West, Rights, Duties & Prospects”, [interview], Islam-Online website, 25/05/2002, p. 3; Mathias Rohe, “The Formation of European Shari’ah”, a paper presented to the “Muslim Minority Societies in Europe International Workshop” in the University of Erfut, 2-3 March 2001; and Tariq Ramadan, *To be a European Muslim*, Leicester, The Islamic Foundation, 2000.

<sup>8</sup> Mahmoud al-Saify, *Fiqh for Muslim Minorities: a New Era for Islamic Jurisprudence*, MA Thesis, University of Leiden, 2004.

1. The criteria of ‘having a 50% +1 majority of Muslims’, regardless of whether the constitution states that it is a ‘secular country’, such as Turkey, whether the constitution does not define any specific religion for that country, such as Nigeria or Indonesia, whether the head of state is non-Muslim, such as Lebanon, or whether the Islamic rituals and acts of worship are not generally practiced, such as a number of former Soviet Union States – is not true. In fact, classic judicial sources clearly state that the issue of Muslims being a majority or a minority in a certain country is irrelevant to a land being a ‘Land of Islam’, and some other criteria are suggested instead.<sup>9</sup>
2. The other popular criteria, which was recently applied to a rural region of tribal Pakistan in an attempt to get it out of the ‘Land of War’ zone (!), is the application of the ‘Islamic’ criminal law (or *hudud*). However, I also did not find any explicit mention in any school of law that relates the ‘Islamicity of a state’ or the concept of the ‘Land of Islam’ specifically to the *hudud*.

### **What is the ‘Land of Islam’ or ‘Islamic Territory’?**

The question now is: What are the classic criteria for being outside the ‘Land of Islam’, or the ‘Islamic territory’, which fiqh al-aqalliyat is supposedly addressing?

The results of a survey, which I carried out on various Sunni, Shia, and Ibadi Schools of Law, could be summarised in the following five criteria.

1. A land where Islamic rules (*ahkam al-islam*) apply.<sup>10</sup>
2. A land where a Muslim ruler has control (*isteela*) over its affairs.<sup>11</sup>

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<sup>9</sup> For example: Al-Qummi Al-Naisaburi, Nizamuddin (d. 728 h). Tafsir Ghara’ib al-Qur’an, Dar al-Kutub al-Ilmiyyah, Beirut, 1996, vol.3, p.459, and Al-Bayhaqi, Ahmad Ibn Al-Hussein (d. 458 h). Sunan al-Bayhaqi al-Kubra, Dar al-Bazz, Mecca, 1994, vol.9, p.16.

<sup>10</sup> For example: Ibn Al-Qayyim, Shamsuddin (d. 751 h). Ahkam Ahl al-Dhimmah, Ramady/Ibn Hazm, Beirut, 1997, vol.2, p.728, Reda, Rashid. Fatawa, Compiled by: Salahuddin Al-Munajjid and Yusuf Khouri, Dar al-Kitab-al-Jadeed, Beirut, 1390 h, Al-Qummi Al-Naisaburi, Tafsir Ghara’ib al-Qur’an, vol.3, p.459, Al-Sarakhsi, Shamsuddin (d. 483 h). Dar Al-Marifa, Beirut, without date, vol.9, p. 182, and Al-Yunini, Qutbuddin (d. 726 h). Dhail Mir’at al-Zaman, Al-Turath, Amman, without date, vol.2, p.58.

<sup>11</sup> For example: Al-Mawardi, Ali Ibn Mohammad (d. 450 h) Al-Hawi al-Kabeer fi Fiqh Madhab al-Imam al-Shafie, Dar al-Kutub, Beirut, 1999, vol.14, p.267, Reda, Fatawa, Reda, Rashid. Al-Khilafah, Al-Zahraa, Cairo, without date, p.50, Al-Mawardi, Ali Ibn Mohammad (d. 450 h). Al-Ahkam al-Sultaniyah

3. A land of security (*al-amn*).<sup>12</sup>
4. A land where the practicing of public acts of worship (*sha`a`ir al-islam*) is allowed.<sup>13</sup>
5. A 'Land of Justice' (*dar al-`adl*).<sup>14</sup>

The following is a brief analysis of each of these concepts and their implications.

### The 'Land of Islamic Rulings'

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wal-Wilayat al-Diniyah, Dar al-Kutub al-Ilmiyah, Beirut, 1985, vol..1, p.22, Al-Mawsili, Abdullah (d. 683 h). Al-Ikhtiyah, Dar al-Kutub Al-Ilmiyah, Beirut, 2005, vol.4, p.178, and Al-Qummi Al-Naisaburi, vol.3, p.459.

<sup>12</sup> For example: Al-Bayhaqi, vol.9, p.16, Al-Kasani, Alauddin(d. 587 h). Bada`i` al-Sana`i` fi Tartib al-Shara`i`, Dar al-Kitab al-`Arabi, Beirut, 1982, vol.7, p.131, Al-Sarakhsi, vol.9, p. 182.

<sup>13</sup> For example: Ibn Taymiyah, Ahmad (d. 728 h). Al-Nubuwwat, Al-Matba`ah Al-Salafiyah, Cairo, 1386 h, vol.1, p.197, Al-Razi, Mohammad Ibn Omar (d. 606 h). Al-Mahsul, Jamiat Al-Imam, Riyad, 1400 h, vol.4. p.43, Al-Mawardi, Ali Ibn Mohammad (d. 450 h). Al-Ahkam al-Sultaniyah wal-Wilayat al-Diniyah, Dar al-Kutub al-Ilmiyah, Beirut, 1985, vol..1, p.275, Al-Nasa'i, Ahmad, (d. 303 h). Al-Jum`ah, Al-Turath, Amman, without date, p.10, Al-Kalabadhi Al-Bukhari, Abu-Bakr (d. 384 h). Bahr al-Fawa'id, Dar Al-Kutub Al-Ilmiyah, Beirut, 1999, vol.1, p.130, Al-Mawardi, Ali Ibn Mohammad (d. 450 h) Al-Hawi al-Kabeer fi Fiqh Madhab al-Imam al-Shafie, Dar al-Kutub, Beirut, 1999, vol.2, p.48, Ibn Al-Arabi, Abu BAKr (d 543 h). Ahkam al-Quran, Dar al-Fikr, Lebanon, vol.1, p.368, Ibn Al-Arabi, Abu BAKr (d 543 h). Ahkam al-Quran, Dar al-Fikr, Lebanon, vol.1, p.530, Al-Kasani, Alauddin(d. 587 h). Bada`i` al-Sana`i` fi Tartib al-Shara`i`, Dar al-Kitab al-`Arabi, Beirut, 1982, vol.7, p.113, Al-Razi, Mohammad Ibn Omar (d. 604 h). Al-Tafsir Al-Kabeer, Dar Al-Kutub Al-Ilmiyah, Beirut, vol.32, p.108, Al-Mawsili, Abdullah (d. 683 h). Al-Ikhtiyah, Dar al-Kutub Al-Ilmiyah, Beirut, 2005, vol.4, p.178, Al-Yunini, Qutbuddin (d. 726 h). Dhail Mir`at al-Zaman, Al-Turath, Amman, without date, vol.2, p.58, Ibn Taymiyah, Ahmad (d. 728 h). Kutub wa Rasa'il wa Fatawa, Maktabat Ibn Taymiyah, without date, vol.23, p.146, and Ibn Taymiyah, Kutub wa Rasa'il wa Fatawa, Maktabat Ibn Taymiyah, vol.28, p.408.

<sup>14</sup> For example: Ibn Taymiyah, Ahmad (d. 728 h). Kutub wa Rasa'il wa Fatawa, Maktabat Ibn Taymiyah, without date, vol.28, p.146, Reda, Al-Khilafah, p.50, 62, Al-Mawardi, Al-Ahkam al-Sultaniyah, vol.1, p.22, Al-Sarakhsi, Shamsuddin (d. 483 h). Al-Usul, Dar Al-Marifa, Beirut, without date, vol.9, p. 182, Al-Kasani, Alauddin(d. 587 h). Bada`i` al-Sana`i` fi Tartib al-Shara`i`, Dar al-Kitab al-`Arabi, Beirut, 1982, vol.7, p.80, Ibn Qudamah, Abdullah Al-Maqdisi (d. 620 h). Al-Mughni fi Fiqh al-Imam Ahmad, Dar Al-Fikr, Beirut, 1405 h, vol.9, p.14, Al-Nawawi, Muhammad (d. 676 h). Rawdat al-Talibin wa `Umdat al-Muftim, Al-Maktab Al-Islami, Beirut, 1405 h, vol.10, p.49, Al-Zar`i, Mohmmad Ibn Abu Bakr (d. 751h). Al-Jawab al-Kafi Liman Sa`al `an al-Dawa' al-Shafi, Dar al-Kutub Al-Ilmiyah, Beirut, 1405 h, vol.1, p.101, Ibn Abidin, Mohammad (d. 1252 h). Hashiyat Raddul-Mukhtar, Dar al-Fikr, Beirut, 2000, vol.4, p.45, Al-Alusi, Shihabuddin (d 1270 h). Ruh al-Ma`ani fi Tafsir al-Quran al-`Adheem, Dar Ihyaa al-Turath al-`Arabi, Beirut, without date, vol.18, p.91, Nizam, al-Sheikh. Al-Fatawa al-Hindiyyah, Dar al-Fikr, 1991, vol.2, p.179, Reda, Rashid. Al-Khilafah, Al-Zahraa, Cairo, without date, p.50.

A popular definition of the Land of Islam in classic sources is, ‘the land where the Islamic rulings apply’.<sup>15</sup> The question is: What are these ‘Islamic rulings’?

Without getting into a technical juridical analysis of analogy by legal ‘causes’ and ‘purposes’, a statute could be labelled ‘Islamic’ if it has two conditions:

1. The legal philosophy and purpose is to achieve the purpose and higher objectives of the Islamic Law (*maqasid al-shari`ah*) such as justice, freedom of choice, orderliness, and the preservation of faith/religion, soul/life, lineage/family, mind/intellect, dignity/honour, and wealth/property.<sup>16</sup>
2. Statutes shall not go against any fixed Islamic ruling. Defining what is ‘fixed’ and what is ‘variable’ is a complex question that I also attempted to answer elsewhere.<sup>17</sup>

In other words, a law is ‘Islamic’ if it is not ‘non-Islamic’! I had an interesting conversation with a Muslim brother from London who insisted that every law in the UK is ‘non-Islamic’. I asked: Why? He replied: Because the UK is outside the ‘Land of Islam’! And when I asked him to explain what he meant by that, he stated: Because the legislators are not Muslims! I asked: The laws that criminalise theft, killing, monopoly, bribery, abuse, and so on, aren’t these ‘Islamic laws’? He said: No, because the people proposed them are not Muslims. I replied: But that is irrelevant, isn’t it? He replied: No, because they did not have the right ‘intention’ (*niyyah*) when they proposed them. I asked: What do you think their intention was? He said: The achievement of justice, merely. I exclaimed: Isn’t justice an ‘Islamic’ intention?! He replied: No, because they applied justice because it served the material well-being of the people, not because it is ordained by God! I said: But the well-being of the people is exactly the purpose of God’s order to establish justice, isn’t it?! We failed to agree on whether the purpose of the Islamic law is justice, or ‘we apply the “Islamic law” anyway and justice will then emerge’!

In any case, given that the concept of law, in the *qanun* (legal statutes) sense, was not known in the Muslim-majority countries until late nineteenth century,<sup>18</sup> it is

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<sup>15</sup> For example: ref 1, 4, 5, 12, 32. Ibn Al-Qayyim, *Ahkam Ahl al-Dhimmah*, vol.2, p.728, Reda, *Fatawa, Al-Qummi Al-Naisaburi*, vol.3, p.459, Al-Sarakhsi, vol.9, p. 182, and Al-Yunini, *Dhail Mir’at al-Zaman*, vol.2, p.58.

<sup>16</sup> J. Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach*, International Institute of Islamic Thought (IIIT), London, 2008.

<sup>17</sup> J. Auda, *Fiqh al-Maqasid*, International Institute of Islamic Thought (IIIT), Virginia, 2006.

safe to assume that the ‘application of the Shariah in the legal system’, or ‘Shariah-compliant laws’, were definitely not part of the ‘Land of Islam’ classic interpretation. These concepts have a ‘post-colonial’ context, the analysis of which is beyond the scope of this article.

Thus, the ‘Islamic ruling’ (*ahkam al-islam*) were explained in several other senses, which the rest of this article will attempt to explain.

### **The ‘Land of a Muslim Ruler’**

To have a Muslim ruler in ‘control’ (*isteela*) over the affairs of a certain land is a criterion that some classic and contemporary scholars used for judging that a certain land is indeed a ‘Land of Islam’.<sup>19</sup> Al-Mawardi, for example, explicitly mentions that ‘when Muslims reside in and control a certain land, it becomes a Land of Islam’.<sup>20</sup>

However, this criterion is subject to a number of conditions to be valid, prime of which is the ability of Muslims to practice their religious obligations, a public feeling of security, and the application of justice. A Muslim ruler who fails to observe or work towards these obligations jeopardises the status of ‘Land of Islam’ of his jurisdiction. Sheikh Rashid Reda summarizes related opinions as follows:

Indeed, many countries that are governed by Muslim leaders are countries where one is forced against practicing his/her religion and cannot reveal everything he/she believes in or fulfils his/her practical Islamic obligations, especially enjoying good, forbidden evil, and the ability to criticise rulings that go against the Law. This land, according to some scholars, is a ‘Land of War’.

Thus, the existence of enough security and freedom to allow Muslims to practice religion is, juridically speaking, more essential than the religion of the ruler.

### **The ‘Land of Security’**

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<sup>18</sup> Rashid Reda, ‘Mujmal Al-Ahwal Al-Siyasiyah,’ *al-Urwah al-Wuthqa*, Feb. 29<sup>th</sup>, 1898 CE.

<sup>19</sup> For example: Al-Mawardi, *Al-Hawi al-Kabeer*, vol.14, p.267, Reda, *Fatawa*, Al-Qummi Al-Naisaburi, vol.3, p.459, and Al-Bayhaqi, *Sunan al-Bayhaqi*, vol.9, p.16.

<sup>20</sup> Al-Mawardi, *Al-Hawi al-Kabeer*, vol.14, p.267.



In fact, a number of Imams stated that security is the purpose (*maqsud*) of the Land of Islam versus Land of War classification, to start with, and not ‘Islam’ versus ‘non-Islam’ per se.

For example, Imam Abu Hanifa states:

The purpose (*maqsud*) of calling a certain land a ‘Land of Islam’ or a ‘land of disbelief (*kufri*)’ is not Islam versus *kufri*. It is security versus insecurity.<sup>21</sup>

In July 2008, I witnessed an interesting debate in Deoband, India, where a group of students from Dar al-Ulum University were asked: What do you think India is? Dar al-Harb or Dar al-Islam? At first, there was almost a consensus on the fact that India cannot be Dar al-Islam, since ‘Islam’ does not rule it since the days of the Moguls. One participant in the discussion exclaimed: But it cannot be Dar al-Harb either because there is no actual ‘war’ going on in India! Many students, however, thought that the ‘war on terror’ in India is actually a war on Islam, and thus it converts India into a Dar al-Harb. Some other students pointed out to the fact that Muslims in India do have the freedom, generally speaking, to practice their religion and they are generally ‘secure’, based on Imam Abu Hanifa’s statement above.

I was delighted when I learned that in April 2009, a group of Dar al-Ulum scholars issued a *fatwa* stating that India is not Dar al-Harb but rather Dar al-Amn (Land of Security), which is the purpose behind the classification anyway, as Abu Hanifa stated as well.

Mecca itself – according to Imam al-Bayhaqi for example – became a ‘Land of Islam’ after its ‘conquest’ only because of its newly found sense of security. He writes:

Mecca became a ‘Land of Islam’ and ‘land of security’ after its conquest because no one there was forced against his/her religion. Any other land is likewise if it acquires the same kind of security.<sup>22</sup>

It is clear from the classic definitions too that security itself is means to the end of freedom to practice the Islamic ‘public acts of worship’ (Arabic: *sha`a`ir al-islam*). Several scholars mentioned that a Muslims who have enough security and freedom to

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<sup>21</sup> Al-Kasani, *Bada`i` al-Sana`i`*, vol.7, p.131.

<sup>22</sup> Al-Bayhaqi, *Sunan al-Bayhaqi*, vol.9, p.16.

practice *sha`a`ir al-islam* actually live in a ‘Land of Islam’, even if they were minority. Al-Qummi Al-Naisaburi explains:

Muslims, even a minority, are prevailing over non-Muslims, even if they were a majority, if they are not prevented from practicing the public Islamic acts of worship (*sha`a`ir al-islam*).<sup>23</sup>

The next section elaborates on the Islamic public acts of worship, which appear to form a more basic criterion for judging a land to be a ‘Land of Islam’.

### **The ‘Land of Freedom to practice Islam’**

The majority of scholars and schools of Islamic law find this criterion to be the ‘true sign’ for a land to be a ‘Land of Islam’. Many of them refer to prophetic traditions that are interpreted to mean just that, such as related prophetic sayings about the importance of certain identifying acts, such as group prayers in the mosque, the call for prayer (*azan*), pilgrimage, the celebration of *Eid*, and so on. Al-Mawardi writes:

The public acts of worship (*sha`a`ir*) of Islam such as group prayers in mosques and call for prayers are the criteria by which the Prophet, peace be upon him, differentiated between the Land of Islam and the Land of Disbelief.<sup>24</sup>

Al-Razi writes:

If the Islamic acts of worship are evident in streets and public places, this certainly entails that Islam is dominant.<sup>25</sup>

Ibn Taymiyah writes:

The public acts of worship (*sh`a`ir*) of Islam are the true signs that a certain land is a Land of Islam.<sup>26</sup>

The ‘public acts of worship’ are defined to include a variety of Islamic rituals, which include one or more of the following, according to all different schools of law:

1. The five prayers.<sup>27</sup>

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<sup>23</sup> Al-Qummi Al-Naisaburi, *Tafsir Ghara`ib al-Qur`an*, vol.3, p.459.

<sup>24</sup> Al-Mawardi, *Al-Ahkam al-Sultaniyah*, vol.1, p.275.

<sup>25</sup> Al-Razi, *Al-Mahsul*, vol.4, p.43.

<sup>26</sup> Ibn Taymiyah, *Al-Nubuwat*, vol.1, p.197.

2. Calling for the prayers.<sup>28</sup>
3. Friday prayers.<sup>29</sup>
4. Fasting in Ramadan.<sup>30</sup>
5. Giving zakah charity.<sup>31</sup>
6. Pilgrimage.<sup>32</sup>
7. Ablution.<sup>33</sup>
8. *Eid* prayers.<sup>34</sup>
9. Reading the Quran.<sup>35</sup>
10. Circumcision.<sup>36</sup>
11. Sacrificing animals to feed the poor.<sup>37</sup>
12. Building mosques, and especially minarets.<sup>38</sup>
13. Greeting people with ‘peace be upon you’.<sup>39</sup>
14. Charitable endowments (*awaqaf*).<sup>40</sup>

But if we – objectively – assess various countries around the world based on Muslims’ freedom to practice the above specific Islamic acts of worship, and create some sort of ‘index’ for them, we will quickly realise that many European countries would perhaps score much higher than many Muslim-majority countries in that index!

### **The ‘Land of Justice’**

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<sup>27</sup> Al-Mawardi, *Al-Ahkam al-Sultaniyah*, vol.1, p.275, Ibn Al-Arabi, *Ahkam al-Quran*, vol.1, p.368, 530, Al-Razi, *Al-Tafsir*, vol.32, p.108, and Ibn Taymiyah, *Kutub wa Rasa’il*, vol.28, p.408.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Ibn Al-Arabi, *Ahkam al-Quran*, vol.1, p.530.

<sup>31</sup> Al-Razi, *Al-Tafsir*, vol.32, p.108.

<sup>32</sup> Al-Kalabadhi Al-Bukhari, *Bahr al-Fawa’id*, vol.1, p.130.

<sup>33</sup> *Ibid.*

<sup>34</sup> Al-Mawardi, *Al-Hawi al-Kabeer*, vol.2, p.48.

<sup>35</sup> Ibn Al-Arabi, *Ahkam al-Quran*, vol.1, p.368, and Ibn Taymiyah, *Kutub wa Rasa’il*, vol.28, p.408.

<sup>36</sup> Al-Kalabadhi Al-Bukhari, *Bahr al-Fawa’id*, vol.1, p.130.

<sup>37</sup> *Ibid.*, vol.23, p.146.

<sup>38</sup> *Ibid.*, vol.28, p.408, and Al-Yunini, *Dhail Mir’at al-Zaman*, vol.2, p.58.

<sup>39</sup> Al-Kasani, *Bada’i’ al-Sana’i’*, vol.7, p.113.

<sup>40</sup> Al-Yunini, *Dhail Mir’at al-Zaman*, vol.2, p.58.

This criterion, the achievement of justice, is so central in the Islamic in the Islamic concept of 'Land of Islam' to the extent that the 'land of justice' term interchangeably with the 'Land of Islam' term in numerous sources.<sup>41</sup>

Justice is the basis of all of the above criteria, according to Islamic jurists, and hence more fundamental in the Islamic principles and purposes. Thus, an 'Islamic leadership' that is not based on justice and is based on 'ethnic solidarity' (*'asabiyyah*) does not constitute a valid condition for the 'Land of Islam'. Rashid Reda, for example, writes:

The land of justice, which is the Land of Islam, is a land that has a true leader who establishes justice. This is contrary to the 'land of injustice and aggression', in which governorship is based on some Muslims' 'ethnic solidarity' (*'asabiyyah*), regardless of the establishment of the Islamic rulings.<sup>42</sup>

Al-Mawardi also stresses the importance of 'competence' and a 'good character' of the leader in the 'Land of Justice'. He writes:

People who are qualified to make decisions in the Land of Justice should choose a leader who possesses a good character and competent.<sup>43</sup>

Ibn Taymiyah holds the 'achievement of justice' in a state as most fundamental and deserving of God's support, even for a 'nation of disbelievers'. He writes:

In this life, people's situations uphold when justice prevails in their society even if they fall into various kinds of sins. However, people's situations do not uphold when injustice and lack of rights prevail in their society. That is why the saying goes: God upholds a state established on justice, even if it were a nation of disbelievers, and would not uphold a state established on injustice, even if it were a nation of Muslims. The other saying goes: This world lives with justice and disbelief, and does not live with injustice and Islam. The Prophet, peace be upon him, had said: 'No sin has a faster Divine punishment than the sin of

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<sup>41</sup> For example: Ibn Taymiyah, *Kutub wa Rasa'il*, vol.28, p.146, Reda, *Al-Khilafah*, p.50, 62, Al-Mawardi, *Al-Ahkam al-Sultaniyah*, vol.1, p.22, Al-Sarakhsi, *al-Usul*, vol.9, p. 182, Al-Kasani, *Bada'i' al-Sana'i'*, vol.7, p.80, Ibn Qudamah, *Al-Mughni*, vol.9, p.14, Al-Nawawi, *Rawdat al-Talibin*, vol.10, p.49, Al-Zar'i, *Al-Jawab al-Kafi*, vol.1, p.101, Ibn Abidin, *Hashiyat Raddul-Mukhtar*, vol.4, p.45, Al-Alusi, *Ruh al-Ma'ani*, vol.18, p.91, Nizam, *Al-Fatawa al-Hindiyah*, vol.2, p.179, and Reda, *Al-Khilafah*, p.50.

<sup>42</sup> Reda, *Ibid*.

<sup>43</sup> Al-Mawardi, *Ibid*.

injustice ...'. Thus, people of injustice fail in this life, even if they were to be forgiven in the hereafter. This is because justice is the universal law of things.<sup>44</sup>

Thus, to start with, the 'Land of Islam' versus the 'Land of War' is a false dichotomy, and a more realistic and 'logical' classification looks at not only the grey levels in between the black and white extremes, but various colours as well. In other words, the achievement of all the above criteria especially the three most fundamental, namely, security, freedom of practicing religion, and justice is relative, whether in Muslim-majority or Muslim-minority societies.

Therefore, and regardless of popular opinions, the country that is juridically worthy of being a 'Land of Islam', a 'Land of Security', or a 'Land of Justice' is the country that achieves a relatively high score on the criteria that are detailed above. The above judgement obviously requires a comprehensive and realistic survey of various countries in order to create a 'ranking' of some sort. However, a rough but very reasonable assessment of how many western and eastern Muslim-minority countries, perform on all of the above criteria, gives them a relatively high score on the 'Land of Islam' scale, and leave 'fiqh al-aqalliyat' without one of its basic premises!

## **Outline**

In the first article, Sheikh Taha Jabir al-Alwani offers some 'historical context' and 'essential questions' for the fiqh of minorities. The critical review he is presenting is summarised in his view of not considering the fiqh of minorities to be any different from the normal fiqh. Thus, when Sheikh Taha presented a historical review of the 'fiqh of minorities', he actually presented a historical review of fiqh itself, until recent times. He stated that the aim from his study is for Muslims to 'develop their identity shaped by the traditions, laws, and environment of their country of residence'. He then asks a number of questions related to the question of 'why', as well as the consideration of 'time and place' for any given fatwa. Dr. Taha's review is, thus, based on the purposes (maqasid) of the Islamic law and the historical and geographical dimensions of fiqhi opinions/edicts.

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<sup>44</sup> Ibn Taymiyah, *Ibid.*

Likewise, Grand Mufti Sheikh Mustafa Cerić starts by confirming that the issue of minority or majority is irrelevant in Islamic law, as long as Muslims could fulfil their religious duties. He stresses the fact that this view: ‘should not minimize the sincere efforts of our honourable Islamic scholars, such as Shaikh Yusuf Qaradawy, to search for genuine fiqh solutions for Muslims who have a minority status, particularly in the West’. Similar to Sheikh Taha’s proposal for Muslim identity, he writes that what Muslim minorities need is: ‘an alternative interpretation of Islam that will lead us to a cultural creativity that is recognizable as Islamic-European and European-Islamic’. He also stresses the importance of his approach in: ‘developing a peaceful relationship with our Christian and Jewish nationhood in Europe’.

Then, Dr. Mohamed Mestiri takes the above proposals a step further. He proposes that Islamic scholarship should depart from ‘fiqh of minorities’, which is tied to an immigrant’s mind, towards a ‘fiqh of citizenship’. The aim of this new fiqh is, ‘to integrate the philosophy of citizenship in the West to produce a new fiqh of Islamic citizenship in a plural sphere’, and ‘to bear witness to the principle of humanism, based on the equality of all human beings’. Hence, ‘the marginal, immigrant, and perceived incompatible status of Muslims can be changed to that of full citizens’. He also offers valuable juridical views that are based on a ‘culture of finality’ rather than a ‘culture of fatwas’.

Dr. Louay Safi takes Muslim minorities in the west, and especially American Muslims, further steps towards a ‘creative and transcendental mission’, in which ‘Muslims can provide an alternative model of society in which religion is reconciled with modern life’. For that to happen, however, Dr. Safi puts two conditions for Muslims to meet: (1) to liberate themselves from traditionalism by deepening the commitment to the universal values of Islam, and (2) to forge ahead with the necessary courage and confidence that the Islam they love and embrace has much to offer to the future of humanity.

Dr. Tahar Mahdi considers it an issue of ‘rights’ for Muslim minorities to be able to ‘examine the reasoning behind legal statutes and scriptural guidance so that they can issue new fatwa in response to new problems without remaining frozen in history’. In order to do that, Dr. Mahdi stresses the importance of ‘collegiate ijtihād’, ‘the adoption of the easy route (taysīr)’, the ‘recognition of people’s necessities’, ‘the evolution of

practice and tolerance of the non-practicing’, and especially ‘the integration of women in every aspect of life’, which he dealt with in detail.

Dr. Ihsan Yilmaz calls for enabling every member of Muslim minorities to ‘become his/her own mufti, or a micro-*mujtahid*, making sometimes swift decisions to solve a minor but sudden problem’. In order for such an *ijtihad* to avoid ‘post-modern fragmentation’, he suggests adopting the ‘reinterpretation of Islamic understanding’ that Fethullah Gülen and his movement offers. ‘By exercising *ijtihad* without flagging it as *ijtihad*, Gülen reinterprets Islamic understanding in tune with contemporary times and develops a new Muslim discourse that is based on: the synthesis of Islam and science; an acceptance of democracy as the best form of governance within the rule of law; raising the level of Islamic consciousness by indicating the connection between reason and revelation; and achieving this-worldly and other-worldly salvation within a free market and through quality education’.

In order for Islamic law in this volume to stay in touch with realities on the ground, especially in young Muslims’ lives, Dr. Soumaya Pernilla Ouis presents a social study on the marriage strategies among young Muslims in Europe. Based on her study, she concludes that ‘certain issues related to marriage and sexuality in *fiqh* need some re-thinking’. She raises several important questions, such as: What is marriage really about? What are the rights and duties of a marriage contract? Is it merely about sex, or is it about love, children, living together, or what? Why don’t today’s jurists emphasize that marriage as an individual choice and not a contract between families? How Islamic is strict gender segregation and on what texts is this idea based?, and other questions.

Although one could disagree with some of Dr. Ouis’s statements, one cannot help recognizing the importance of her questions, especially for the sake of Islamic ideals of justice and equality.

At the end of this volume, the text of a speech delivered by Charles Le Gai Eaton is included. As a western convert to Islam, Charles stressed the need for new *ijtihad* and new *fiqh* for Muslims who live in the west. This is especially significant for Muslim youth in the west, he affirms, who should be able to live Islam without compromising their needs and aspirations. He also highlights how important it is for Muslims to show how they are ‘rather nice people’, at least for the sake of *da‘wah* (spreading awareness of Islam)!

Finally, I would like to express that I am honoured to edit such a volume for such a remarkable group of contributors. My work in the editing process did not include writing style, which I left for each contributor to decide. However, in addition to the overall selection and ordering of papers, I reallocated some paragraphs, edited some references/citations, and added some titles and subtitles, with an aim to clarify and organize the presented material to the reader.

I pray that this volume on 're-thinking fiqh of minorities' contributes positively to all sides of the debate, by stressing the importance of the consideration of the Islamic ideals of universality, facilitation, and justice.



## Islamic Law for Minorities:

### Historical Context and Essential Questions

*Taha Jabir al-Alwani*

This conference on “Fiqh Today: Muslims as Minorities” is an excellent platform for the exchange of knowledge between the present participants and those who will be participating in various ways in the future.

The fiqh of minorities is a new field. When we look at its history, we find that the historians who wrote about this subject divided it into different periods, ranging from three to six stages.

The first stage was that of the Text (*marhalatu nāṣṣ*), which lasted from the beginning of Muhammad’s Prophethood until his death. The majority of Muslims have accepted that definition (*aṣr al-nāṣṣ*). However, the Shi‘ites hold another view. Although they agree with the date of commencement, they believe that the first stage ended with the concealment of the Twelve Imams (*al-ghayb al-kubr*). That makes a difference of 200 years.

During the second stage, that of the reading (*‘aṣr al-qirā’a*), the readers or reciters of the Ṣāhābah (*qurā’ al-Ṣāhābah*) were producing the fiqh when answering the questions put to them by the people. According to Ibn Hazm,<sup>45</sup> 165 members of the Ṣāhābah were fulfilling this role, and this estimate was supported by Ibn al-Qayyim.<sup>46</sup>

The third stage was that of the narration. By this time, the second generation of the Ṣāhābah were narrating the hadiths of the first and second stages to the people and applying their principles to answer questions of jurisprudence as required. This stage is thought to have begun around 40 ah and it continued until 93 ah. At that point, ‘Abd al-‘Azīz, the father of Caliph ‘Umar, asked the ‘ulamā’ to collect the hadiths and fatwas narrated by the readers of the Ṣāhābah and collate them into books. When ‘Umar became Caliph, he asked al-Zuhri and other scholars of a similar standard to complete the work and provide the main source of fiqh in response to the questions raised by the needs of the community.

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<sup>45</sup> Ibn Hazm, Ali, *Al-Ihkam Fi Usul Al-Ahkam*. 1st ed. Cairo: Dar al-Hadith, 1983.

<sup>46</sup> Ibn al-Qayyim, *Shamsuddin, I’lām al-Muwaqqi’in*, Edited by Taha Abdul Raouf Saad. Beirut: Dar Aljeel, 1973.

Following this period was the stage of the compilation of *uṣūl al-fiqh*, that is, the basic rules of fiqh. Some of the contemporary ‘ulamā’ were Ṭābi‘ā al-Ṭābi‘īn. They began to respond to the needs of the people in this field by producing fatwas and fiqh according to certain basic rules so as to help the community in finding solutions to the problems facing them. Among them were Imam Malik, Imam Abu Hanifah, followed by Shafi‘ī, al-Awza‘i, Ibn Abi Laylah, and Sufyan al-Thawri. They were all developing fiqh and issuing fatwas for the new events and questions appearing in the community. During this stage, fiqh included ‘*aqīdah*, ‘*ibādah*, *nikāh*, *sulūk sīr*, and *mu‘amalāt*, that is, faith, worship, marriage, conduct in relationships, business transactions, buying and selling, all family matters, ethics, and relations between Muslims and non-Muslims.

Then the ‘ulamā’ began to divided the general fiqh (*fiqh akbar*) into different categories. For example, they collected all the material relating to ‘*aqīdah* and classified it under the appropriate headings of *kalām*, *tawhīd*, ‘*aqīdah* science, or theology. The same method was applied to other parts of the general fiqh. The result was the following classification: comparative fiqh, fiqh of the Book of Allah and the Sunnah of the Prophet, fiqh of priorities, fiqh of ethics, fiqh of the inviolate and facts, fiqh of banking, fiqh of cause and effect, and fiqh of the concerns of women and children (*fiqh al-nisā* and *ahkām al-mawḥūd*).

With this body of knowledge, some of the ‘ulamā’ traveled to other parts of the world, where they encountered problems that they had not experienced in their Muslim society back home. In response to the new challenges, they developed the *fiqh al-nawāzil*, the fiqh of exceptional issues, which was based on the derivation of the *hukm* of Shari‘ah from the sources of fiqh. On that foundation the ‘ulamā’ then built what came to be known as *al-qawā‘id al-fiqhiyyah*, the rules of fiqh, according to which a *faqīh* would collect hundreds of issues and classify them under one rule or *qā‘idah*. Finally, there was *fiqh al-taghlīb*, where a *faqīh* would see different ways of issuing a fatwa or responding to a particular question, and would try to give more weight to one answer over another.

Since *fiqh al-nawāzil* stemmed from problems arising in a non-Muslim society, it could be linked with *fiqh al-aqaliyyāt* or the fiqh of minorities. However, the term was not used for various reasons. For instance, *nawāzil* is used to refer to exceptional circumstances which are not a regular occurrence and which happen when Muslims are living in a non-Muslim society. If a fatwa were based on that term, it would affect the psyche of the community. Therefore, it is preferable to use the term “fiqh of minorities,” which is applicable to various societies.

The fiqh of minorities is facing numerous challenges in both the Muslim world and continents such as North America and Europe, which include Muslim minorities. In the Muslim world, it is the common view that when we establish and develop the fiqh of minorities, we are trying to isolate local Muslim communities from the body of the Muslim Ummah; that we are giving them special treatment with special fiqh or fatwas to make it easy for them to avoid harm and hardship; or enabling them to avoid the commitment made by every Muslim in the Muslim world to fiqh or the Shari‘ah. Our answer is “No!” We are trying to help the local Muslim communities in Europe and North America, as well as Muslim minorities everywhere else in the world, to develop their identity shaped by the traditions, laws, and environment of their country of residence. It does not mean that they will isolate themselves from the body of the Ummah, but that they will protect themselves, their identity, their faith, and their commitment to Islam without neglecting the country or society in which they live. At the same time, our policy will show non-Muslims the advantages of an Islamic way of life.

Since we began to develop the fiqh of minorities, numerous issues have been discussed and the result has been some very solid fatwas in the light of the Book of Allah, the Sunnah of the Prophet, and the origins of the Shari‘ah. I hope that our contribution has helped local Muslim communities to thrive in non-Muslim societies.

However, even with the fiqh of minorities, we have begun to face other issues, such as that of the *hijāb* in France. That is a big test for us. I should also like to point out to my colleagues that this question cannot be settled by declaring that it is *harām* for Muslim women to remove the *hijāb* or that it is *wājib* for them to wear it. Indeed, it is good to show the French and other governments that Muslims are well aware of their rights and that they are ready to use any tool is available in the democratic countries to keep their rights and enjoy them. Nevertheless, at the same time, we, as jurists, need to examine other aspects of the issue.

I think that these types of problems need very thorough discussion and understanding. Perhaps we could ask fifty questions about them, such as: Who took this decision? Why? Why at that time and in that place? Why was it expressed in that way? Why did they ignore all the other Muslim countries but picked the two countries, Turkey and Tunisia, which had imposed a ban on the *hijāb*? However, we also need to understand why they took that view of the *hijāb*, why they ignored the freedom to worship or to adapt to any religion, and why they paid no attention to the commitment of their Muslim citizens. We need to study all those aspects before deciding on any direction. It

is not just a matter of saying yes or no, black or white. We need to acquire much more information and conduct a careful investigation, because this is a fiqh of minorities. If, for example, we tell the Muslims to disobey the government, what will happen to the Muslims themselves under national law? And if we tell them to obey the government, what will happen to their Muslim identity? To solve this problem, we need as many specialists, as many social scientists as possible to study it from A to Z, and to understand from every aspect everything related to it before the *faqīh* says yes or no. This is just one example. Tomorrow, perhaps, we will have to deal with another problem in another country.

In Britain, we already have a number of questions to consider. Do Muslims have the right to be employed in the security organizations, or follow the career of a soldier in the Army, even if they are going to fight against Muslims or occupy Muslim countries? These are extremely serious questions. It is not possible for one mufti or one group to answer them only from the fiqh point of view. That is why it is admirable that the Association of Muslim Social Scientists (AMSS) has organized a conference on the fiqh of minorities, because we need both Muslim and non-Muslim specialists to help us understand every aspect of these issues and every concept related to them before we can arrive at a fatwa. There are numerous issues to be faced both now and in the future. That is why we need this fiqh, so that we can develop it and build the *uṣūl*, the basics and pillars, to answer such questions and succeed in meeting these challenges.

## Towards a European-Islamic Identity

*Mustafa Cerić*

### **Introduction**

Let me say at the beginning that I do not believe in the Fiqh of Minority. The reason is that I do not accept to be treated as a halfway Muslim because I have political minority status. In the universal Ummah, I have majority status, for Prophet Muhammad granted me the full equality of my status wherever I live.

On the contrary, despite my political minority status, sometimes I am better able to fulfill my religious duties because I live in Europe than some of my fellow Muslims in the Muslim majority countries. For instance, many Muslims who live in the West have wealth and can afford to pay the *zakah* and perform the Hajj than many Muslims who have majority status in the East.

Of course, I am not naïve to say that we Muslims in Europe do not need the support of the Ummah of the center, especially after the failure of the European military forces, which are Christian, to protect the Muslim population in Srebrenice in 1995. That operation was backed by the clear resolution of the United Nations Security Council which stated that Srebrenice was a “safe zone”, that is, under the full protection of the international community.

Nevertheless, we Muslims here in Europe must take full responsibility, including our faith responsibility, before God, the Ummah, and Europe, in developing a peaceful relationship with our Christian and Jewish nationhood in Europe. This relationship should be based on our Islamic universal morality and our particular civil interests so that one day we might be of help to the universal Ummah.

I believe that it is now time that we in Europe offer a genuine and, if I may say, an alternative interpretation of Islam that will lead us to a cultural creativity that is recognizable as Islamic-European and European-Islamic. I do not see the difference between, let us say, Egyptian patriotism in the name of Islam, and European patriotism with an assumption of a strong Islamic identity. After all, Islam is more cosmopolitan than any other religion and, therefore, I dare to say that it is a crime to reduce it to the tribal, ethnic, cultural, regional, national, or professional level. Islam is like the sun with

countless rays, both visible and invisible, that bring blessings to all those who see it and love it as well as those who do not see it and hate it. Do you not realize that even those who hate Islam make a living from it, because they are paid to spread Islamophobia around the world. So, Islam is a blessing on them too, because, without Islam, they would have difficulty in earning their livelihood. There is no need to talk about those who live by Islam because they assert that they are its defenders. May God guide us all not to live from, but for Islam, because for that it is worthwhile to live at all.

The real enemy of Islam is neither the West nor the East, but our Muslim *jahl* or *jahiliyyah*. It is not by chance that Muslim historians have designated the time before Islam the era of *jahiliyyah*, rather than, please note, the era of either *kafiriyyah* or *shirkiyyah*. I completely trust the wisdom of our historians and their sense of realism. Our *jahl* or *jahiliyyah* is manifested today by the way in which we present Islam to the world not as a universal message, as it were, but as a tribal culture and national pride. Then we wonder why the Europeans do not appreciate the universal values of Islam, which are of great benefit to the whole of humanity. Rather, they see Islam, as we present it, as a specific culture from the East that has nothing to do with life in Europe. I believe that the West in general, and Europe in particular, are a place for Muslims to work out a universal world view that will bring the Ummah closer to itself as well as to the whole world.

My view of the Fiqh for the Muslim Minority, however, should not minimize the sincere efforts of our honorable Islamic scholars, such as Shaikh Yusuf Qaradawy, to search for genuine Fiqh solutions for Muslims who have a minority status, particularly in the West. That is why we in the West feel that we should do more to search for the Fiqh solutions that will both satisfy the sense of the continuity of our faith and enable the necessary changes in our understanding of the time and space in which we live.

Therefore, allow me not to discuss Fiqh Today in the concrete sense of the expression, but to offer you some of my reflections on the phenomenon of Islamic civilization and its possible ramifications both at the center and on the periphery of Islam, we here in Europe being, of course, on the periphery. My discussion is based on a paper presented at a conference on "Contemporary Islamic Syntheses" in Alexandria, Egypt in October 2003.

## **Islamic Civilization as a Wheel**

The phenomenon of the Islamic civilization may be seen as a wheel turning on the axis of a continuous divine message from the first man, Adam, to the last Messenger, Muhammad. This divine axis of the Islamic civilization has remained the same because it has the same meaning of the living spirit and because it is the same logic of the transcendental truth. The code of the axis is such that, although it moves the wheel in different directions, the Islamic civilization remains in the vicinity of the axis. The dynamics of the movement of the wheel are faster at its edge than at its center. The axis of the Islamic civilization is the divine gift, which unfolds itself in the continuity of life and history. The wheel of Islamic civilization is also the divine gift, although its movement is due to the human direction and speed.

Hence, the question is: Where will the wheel of the Islamic civilization go? And how fast will it move?

## **Freedom of Spirit and Strength of Mind**

Before dealing with these two questions, however, let me say that a civilization is more than urban comfort. A civilization, I believe, is an effort of the human spirit to balance the memory of the past with the memory of the future, to express the meaning of life, and to present the nature of the human soul in both its hopes and its fears. Indeed, civilization is the state of mind which Ibn Khaldun called the *'aṣabiyyah*, that is, the passion<sup>47</sup> for a decent human life as it progresses from one stage to the next with the purpose of self-actualization in history. Very important forces of the passion for human life are the freedom of the human spirit and the strength of the human mind.

## **Continuity and Change in Life and History**

The attribute “Islamic” to civilization should lead us to the notion of the coexistence of continuity and change in history and life.<sup>48</sup> That, I believe, is the crucial point whereby the course of the Islamic civilization has been determined in the past – its ability to

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1. “Passion” means a strong liking or desire for or devotion to an activity, object, or concept.
  2. According to John Lukacs, “history and life consist of the coexistence of continuity and change. Nothing vanishes entirely.” See, *At the End of an Age* (New Haven, CT, & London: Yale University Press, 2002), p.31.

comprehend the essential continuity of tradition with possible changes in history. It is, then, in this ever-demanding challenge that I see the real test for the future of the Islamic civilization in both its spiritual boldness and its intellectual creativity. In fact, the coexistence of continuity and change is the basis on which Islamic civilization achieved an unprecedented success in world history. Its strength lies in the notion of affirmative hiero-history<sup>49</sup> and the notion of the guilt-free origin of humankind.

### **Affirmative History**

The affirmative hiero-history comes as the most convincing proof that the Qur'an is the culmination of an inclusive Divine Message and that Prophet Muhammad was the universal Divine Messenger. In other words, the Revelation of the Qur'an does not come as a surprise, it does not break the rules of the God–humankind communication, and it does not begin from nowhere:

And before this was the Book of Moses as a guide and a mercy; and this Book affirms it in the Arabic tongue: to admonish the unjust, and as Glad Tidings to those who do right. (46:12)

God! There is no god but He – the Living, the Self-Subsisting, Eternal. It is He Who sent down to you in truth, the Book, affirming what went before it and He sent down the *Tawrāt* [the Law of Moses] and the *Injīl* [the Gospel of Jesus] before as a guide to humankind, and He sent down the Criterion of judgment between right and wrong. (3:1–3)

### **Prophet Muhammad as an Affirmer**

Consequently, Prophet Muhammad was not the first, but the last Messenger of God. History does not begin nor end with Muhammad. He was not a rebellious revolutionary who negated everything that came before him.<sup>50</sup> Prophet Muhammad was the

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3. The word “hiero-history” (Greek *hieros*: sacred) is the equivalent of *qiṣaṣ al-anbiyā'* (الأنبياء) (قصص) in Islamic literature.

4. Compare that with some recent revolutionary movements in the world, especially those of the Marxist-Leninist type, and see how destructive they have been in the name of change and fake progress. Even in some Muslim revolutionary movements, we notice the destructive force, which entirely



Messenger of God, who came not only to affirm all the good things which preceded him but also to teach people how to avoid the bad things in life and history from the experience of bygone people and nations.

Thus have We sent you amongst a people before whom [long since] have other peoples gone and passed away in order that you may rehearse to them what We send down to you by inspiration. Yet do they reject Him, the Most Gracious. Say: "He is my Lord! There is no god but Him! In Him is my trust, and to Him do I turn. (13:30)

### **Inclusive History**

The notion of affirmative history (or hiero-history) has enriched the Muslims with the idea of an inclusive approach to history<sup>51</sup> as a whole and, in turn, has freed Islamic history from an exclusive possession of it. Of course, the Muslims have taken their consequential role as the heirs of hiero-history very seriously. Nevertheless, they have never denied the role of the others, especially that of the People of the Book, namely, the Jews and the Christians.

### **The Holy Qur'an and Critique**

When reading the Holy Qur'an, a Muslim cannot but feel the presence of the People of the Book in almost every page. By the same token, Jews and Christians cannot read any relevant book of world history without recognition of the Muslim presence in all fields of human life.

It is true that the Qur'an criticizes some Jews and Christians, yet it does the same with some Muslims as well. I think that it is the Muslims' moral responsibility not to take advantage of the critique of others in the Holy Qur'an in order to cover the Muslims' own shortcomings. It is a fact that the Qur'an, as the Word of God, is almost unique in appreciating the goodness of people of other religions, especially the Jews and the Christians. Therefore, Muslims have a duty to implement the spirit of tolerance in the

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contradicts the spirit of Islam. The idea of *tajdid* (تجدید) is strange and does not correspond to the basic teachings of Islam, nor does it reflect the real purpose of the progress in Islamic civilization.

5. According to John Lukacs: "History is not social science but an unavoidable form of thought. That 'we live forward but we can only think backward' is true not only of the present (which is always a fleeting illusion) but of our entire view of the future: for even when we think of the future we do this by remembering it." See, *At the End of an Age*, p.53.

midst of religious pluralism. Here is one of the many verses in the Holy Qur'an that clearly indicate that duty:

Verily, those who have attained to faith [in this divine writ], as well as those who follow the Jewish faith, and the Christians, and the Sabians<sup>52</sup> – all who believe in God and the Last Day and do righteous deeds – shall have their reward with their Sustainer; and no fear need they have, and neither shall they grieve. (2:62)

### **Religious Pluralism**

Of course, it would be naïve to conclude that there are no differences between Islam and other religions, namely, Judaism and Christianity. The point here is not a vague notion of empty flattery or cheap religious propaganda. Rather, it is a sincere conviction based on the most important Islamic source that teaches Muslims how to cope with religious pluralism on their own and how to appreciate the fact that this world is not comprised of one religion or one nation. If God had wanted the whole world to be the same, He could have arranged it accordingly. However, He wanted the people of this world to be multiple in their religions and nations so that they might compete with one another in good deeds.

### **Competition in Good Deeds**

Competition in good deeds applies especially to these three world religions of the Book: Judaism, Christianity, and Islam. This concept stems not only from their claim to the similar heritage of the Book, but also from their heritage of a unique historical interaction that was unavoidable in the past and their historical responsibility that cannot be ignored in the future. It is precisely in that historical unavoidability of Judaism, Christianity, and Islam that I see hope, though also, I must say, I sense a kind of fear. My hope is based on the good heart of the majority, though very often silent in its goodness, of sincere Jews, Christians, and Muslims who seek their own peace in the similarity of these religions rather than conflict.

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6. According to Muhammad Asad: "The Sabians seem to have been a monotheistic religious group intermediate between Judaism and Christianity." See, *The Message of the Qur'an*, trans. & expl. Muhammad Asad (Gibraltar: Dar al-Andalus, 1984), p.14, n.49.

## **Similarity and Difference**

Unfortunately, there is a very loud minority in all three religions who see in the similarity of Judaism, Christianity, and Islam the very reason for conflict rather than peace. This attitude leads us almost to the conclusion that similarity, rather than difference, provokes conflict, whereas difference inspires respect. We are familiar with the history of acrimonious debates among similar, not different, religious groups, debates that have often turned into very violent conflicts. I have in mind some historical conflicts between the Sunnis and the Shi'a in Islam and between the Catholics and the Protestants in Christianity. I am sure that similar examples exist in Judaism as well.

The logic of this state of affairs is based on the false notion that to maintain the purity of my religion, a deep difference must be seen in the other who is similar to me, although, at the same time, his difference is not to be tolerated. That is, I believe, the real issue of the relationship between Judaism, Christianity, and Islam today. It is the similarity, not the difference in their spiritual roots; their hopes, not their fears of one another; and their justice to one another, not their oppression of one another.<sup>53</sup>

## **Cultural Interaction**

Should I remind you that the glorious era of the Islamic civilization was during its interaction with other civilizations? Isolation is strange to Islamic civilization because Prophet Muhammad was sent to the whole of humankind. Thus he was the witness over the world in the sense of bringing to it mercy rather than a curse.

It is clear, then, that the Muslims in the past knew how to interact with others who were both similar to and different from their faith and their expectations of life and history. They were guided by the strong belief in confirmation rather than denial, and the belief in participation rather than discrimination. Furthermore, they knew how to appreciate the different opinions amongst themselves while keeping in mind the same direction toward the glory of Islamic civilization as a common achievement of the whole Ummah.

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7. See my paper, "Judaism, Christianity, Islam: Hope or Fear of our Time," presented at the conference on "Beyond Violence: Religious Sources for Social Transformation," held at the University of Southern California on May 5-7, 2003.

## **Balancing Memories**

Since we are not children of the moment, we must be able to balance the memory of the past with the memory of the future. It is in dealing with this challenge that I see the difficulty in the Muslim present. In other words, Muslims have difficulty in freeing themselves from the guilt of some previous historical events, on the one hand, and in taking the risk of encouraging a fresh spirituality and creative intellectualism for the future, on the other.

## **We are Born Free**

Once again, should I remind you that the guilt-free origin of humankind is one of the most important ideas of the so-called modernity, which has led the world to a spiritual and intellectual advancement, that is, humanism and renaissance? The slogan “We are all born free and everyone is equal before God,” is the reaction to the notion that everyone is born with the sin of Adam and that some people are born as masters and other as slaves. It took Europe centuries and many bloody wars to overcome these two general ideas: that of predetermined guilt and that of preordained slavery.

I believe that one of the reasons why the Muslim world was in advance of the rest of the world was that Islam had freed humanity of that guilt and had set the stage of equal opportunity for all to show their historical merit.

## **Cultural Insecurity**

The current crisis of Islamic civilization may be seen in the Muslims’ lack of self-confidence, resulting from a cultural insecurity which appeared at the time of losing the belief in the human being’s freedom from guilt at birth and ignoring the belief in the equal opportunity for success in life and history. Consequently, generations of Muslims lost spiritual confidence and intellectual creativity. Instead, we have seen a kind of spiritual shyness that has led Islamic civilization into isolation, as well as an intellectual borrowing that would lead Islamic civilization into assimilation.

Here is a possible answer to the question: “Where will the wheel of Islamic civilization go?” “Or where should it go from here? To isolation or assimilation? Or will it make its way toward interaction and cooperation?”

## **Neither Isolation nor Assimilation, but Civilizational Cooperation**

Islamic civilization is not designed for either isolation or assimilation. It is designed for interaction and cooperation. However, to take that direction, Islamic civilization must reject the idea of historical guilt. It is being imposed nowadays upon the Muslims in the sense that the young generation must correct all the mistakes of the previous generations before it can think of correcting those of the immediate and long-term future of the Ummah.

In other words, the present generation should hold fast to the belief<sup>54</sup> of freedom from the past mistakes and so take responsibility for the future of the world not by isolation, nor by assimilation, but by equal cultural interaction and civilizational cooperation. The middle ground of historic interaction and rational cooperation is the right way out of the embarrassment of isolation and the risk of the assimilation of Islamic civilization.

### **Time for the Third Interaction**

It is now time for the third historic interaction of the Islamic civilization with the rest of the world, especially the Western world. It will follow the earlier interaction during the era of the spread of Islam and then the era of the great Islamic impact on both the spiritual and intellectual change in the West. This time, however, the situation is somewhat different, for the West does not feel the need to learn anything from the East as was the case in earlier times.

On the contrary, the West believes that the East should imitate the West in everything, even in its strange standard of morality, which contravenes human decency as well as human reproduction. Nevertheless, this situation should not discourage Muslims from interaction with the West, owing to the permanent interdependence between the two worlds – the West and the East – which did not begin yesterday and will not end tomorrow.

Let me now address the second question: How fast will the wheel of Islamic civilization move? As fast as its axis? Or as fast as its rim?

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8. According to John Lukacs, "After all, everything a man does depends on some kind of belief. He will speak or act in a certain way because he thinks that this kind of speaking or acting is better than another." See, *At the End of an Age*, p.88.

## The Center and the Periphery

First, however, is there a center of Islam? Yes, it does exist, though it cannot be identified as a geographical location, an economic product, or a political impact on global development. It is defined as a universal identity, the time–space Ka‘bah–Qiblah orientation, and the faith-based solidarity of Muslims all over the world. These rather abstract characteristics of the center of Islam will remain strong because the Message of the Qur’an is strong in its universality and its credibility for the salvation of humankind. The issue here, then, is not the obvious blessings of Heaven, but their use and misuse by humans. No one can deny the bliss of the time of the Prophet and no one can deny the glory of the caliphate, the might of the Ottomans or the transformative impact of modern Europe.... The caliphs and the sultans – at least some of them – deserve their fame.... And above all, the story of Muhammad (a.s.) and early followers has been a linchpin of Islamic identity for fourteen centuries.<sup>55</sup>

Yet, the view from the center leaves too many questions unanswered. Where did all those Muslims come from? Why did they develop a coherent culture or civilization while Europe, despite its Christian homogeneity, was so fractious and diverse?

The view from the center portrays Islamic history as an outgrowth from a single nucleus, a spreading inkblot labeled “the caliphate”. But what other than a political label held Islam together? And why did its political cohesion evaporate after little more than two centuries, never to reoccur?

The view from the edge holds out the possibility of addressing questions like these. It starts from the fact that most Muslims outside the Arabian peninsula are not the descendants of the Arabs.... Most of them learned about Islam after they entered the community, not before; and what they learned never assumed a homogeneous character, though from the fourteenth century on there was a strong impulse toward normative homogeneity.<sup>56</sup>

Furthermore, no one can deny the central role of the Arabs, Persians, and Turks in the mainstream history of Islamic civilization. However, nor can one ignore the fact that the heaviest burden of Islamic civilization during the nineteenth and twentieth centuries was

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9. Richard W. Bulliet, *Islam: The View from the Edge* (New York: Columbia University Press, 1994), p.7.

10. *Ibid.*, pp.7–8.

put on Arab shoulders. It is only recently that the edge or periphery<sup>57</sup> is beginning to emerge and to show some signs of rallying round the center, expecting it to produce an initiative to strengthen the internal relationship of the Ummah on a global level.

### **The Center Must Move Faster**

The periphery of Islam is becoming impatient to see practical action by the center. We need to ask whether the center is aware that it is really a center of Islam today, and whether it can translate the unique spiritual richness of Islam that is evident in the unity of faith, purpose, prayers, and destiny. The periphery of Islam cannot understand why the center is slow in addressing so many contemporary problems that appear on the road to the moral, political, and economic development of the Ummah. It is difficult to explain to the Internet service providers that the Muslims cannot determine the date of their 'Id in advance. It also difficult to explain to rational people that the global Muslim policy is still based on the rule that one member of the Ummah must lose so that the other may survive. It is hard for decent people to believe that the Muslims do not have a strategy for the global economy, which could reduce poverty and increase literacy among the Ummah. By all standards, the Muslims continue to suffer from these two social ills more than any other religious group in the world.

### **The Search for Syntheses**

I believe that today the Muslims have no choice but to accept that their future lies in their ability to synthesize their past with their future. This could unfold itself in the internal cooperation of all aspects of rich spiritual gifts and intellectual fruits as well as in the external interaction of all the possibilities of the advancement of human life that a positive human knowledge can offer to an individual and society.

### **Self-Respect and Mutual Trust**

In addition, Muslims today must acquire self-respect so that others will be inspired to respect them. Muslims must also know that today's world operates on the basis of mutual trust, which requires much more time for construction than for destruction.

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11. See, Ozay Mehmet, *Islamic Identity & Development: Studies of the Islamic Periphery* (London & New York: Routledge, 1990).

There are two fundamental principles of my faith, of which I am especially proud: the belief in the original freedom of human beings and the belief in the concept of their personal success.

Yes, Islam came and said: “Humans are born free without guilt, including that of their father, Adam, and their mother, Hawwa”.

And yes, Islam brought the concept of personal success in this world, which can lead us to salvation in the Hereafter: “You who believe should know that if you succeed in promoting the values of God, God will help you to be successful in this world by strengthening your feet on your way to salvation”.

I am bringing these two original concepts of Islam to inspire our youth to feel free from the guilt that is being imposed on them nowadays not only by those who promote Islamophobia in the West, but also by those who promote Islamomania in the East.

Finally, the following are specific and brief points I would like to add to outline a Muslim Syndrome, Non-Muslim Western Syndrome, and a Suggested Plan for Action.

### **Muslim Syndrome**

Majority

Superiority

Self-sufficiency

Historicity

### **Non-Muslim Western Syndrome**

Xenophobia

Denial

Cultural over-confidence

Anti-tradition

Islamophobia

### **Suggested Plan for Action**

Making a serious and honest diagnosis of the state of Muslims in Europe.

Proposing the ideal solution.

Designating the group that will implement the plan.

Defining the strategy that will take the plan from stages (1) to (2).



# **From the Fiqh of Minorities to the Fiqh of Citizenship: Challenges of Conceptualization and Implementation**

*Mohamed Mestiri*

## **Introduction**

Islam in the West continues to consider itself a factor of immigration, or even a minority element, despite its evolution in some European countries toward citizenship and even the status of a member of the majority. In Islamic ethical and legal heritage, the status of Islam as a minority was not visible, nor even conceivable. Islamic civilization represented the majority culture and the concept of minority was developed to integrate “the Others” into the Islamic citizenship system. The first Islamic constitution, called *ṣahīfah*, illustrated the Islamic perception of minorities not as private or marginal elements, but as part of the citizenship charter.

The new attempts of contemporary *ijtihād* to create a *fiqh* of minorities need to be based on the philosophy of citizenship in Islam so as to avoid “communalism” and “ghettoization.” In Western culture, the concept of integration is more powerful than the recognition of minority rights, except in the American model based on multiculturalism. Integration is a value conditioned by historical culture. Secularism and Judaeo-Christian culture could be regarded as the conditions for positive integration in Western citizenship. Respect for the majority is conditioned by respect for Western cultural identity. The authority of the majority is the result of the rule of democracy only within this cultural identity, for it could not base its legitimacy on an absolute citizenship.

Contemporary Islamic reflection on the status of Muslims in the West needs to integrate the philosophy of citizenship in the West to produce a new *fiqh* of Islamic citizenship in a plural sphere and under a non-Muslim government. A wide and dynamic debate in postmodern society has been instigated, to which contemporary Islamic thought could contribute, especially concerning the relationship between citizenship and religion, ethics, multiculturalism, and democracy.

The concept of minority needs to be evaluated and criticized in view of the new challenges posed by the dialog between civilizations and coexistence in a plural space. In addition, a critical Islamic approach to the concept of citizenship and its relationship with majority and minority status seems to be a prerequisite for the understanding of the

future of “Islamic citizenship” in the West and its implications for the religiosity and rights of Muslims.

The status of Muslims in the West begins to leave the unique dimension of immigration potential and move toward the new dimension of citizenship. With citizenship status, Islamic thought in the West becomes a partner, not a foreign factor, and it is in direct confrontation with the challenges of modernity. As a factor of civil peace and cultural and spiritual richness in the Western space, Islam needs to discuss its identity in the West with regard to the intellectual identity of the West. The Western space is founded on the principle of the neutrality of secularism, individual liberty, the nation state, and equality according to the law and the constitution. Could the “fiqh of minorities” represent a new concept capable of discussing Muslim citizenship in a modern space and under a modern system?

**The Concept of the “Fiqh of Minorities”:  
Democratic Majority/Influential Minority**

Democratic rule is based on the flexible and changeable position of minorities and a majority, which is alternation. It is therefore difficult to consider a static character in the concept of minorities. The status of minority is based more on a claim than a concept. In contemporary history, it represents a new period of consciousness of the rights of minorities, such as blacks, Jews, homosexuals, and women.

The democratic majority is the result of an influential minority having a hidden, though formidable power to pressurize, manipulate and generally lobby the rest of society. So the minority could be more influential – and therefore more powerful – than the majority. Minority status does not necessarily mean a position on the margin of society with reference to its new hidden and influential role. On the contrary, the minority could be the center and source of the power games. However, where the Muslim reality in the West is concerned, its quantitative minority status does not have a strong impact on the qualitative aspect, and so the quality of influence should be considered in any evaluation of Muslim communities. To the challenge of statistical studies of Muslims in the West, we need to add the challenge of studies examining the real impact of Islam on society by its institutions, leaders, networks, and projects, whether intellectual or social.

## **The Utopia of the Nation State**

The utopia of the nation state is not a negation of the juridical reality of national unity, as conceived by various European constitutions. Its main implication is the equality of all citizens under the law. Therefore, the regulator rule of diversity is secularism, not the rights of ethnic and religious minorities. The preservation of the rights of minorities is a necessary condition for national unity, for it also upholds the principles of justice and the equality of all citizens, whether they have minority or majority status. The application of justice and equality is not merely a principle but a condition for success. However, today there are some minorities whose lobbying is based on the ideology of reversing the rules of national unity in order to establish their rights as a judge of citizenship. The role of Muslim citizenship in the West is to bear witness to the principle of humanism, based on the equality of all human beings, with full respect for the rights of the minority and the majority. Therefore, the question of minority is to reinforce not the rivalry between the minority and the majority, but the application of equal rights within a national unity and in accordance with the national constitution.

## **A Multiethnic Nation and National Unity**

From the first immigration and discovery of the New World by Europeans, the model of the United States of America was founded on multiethnicity, with a European majority and African and Native American minorities. The bloody history of the enslavement of the minorities, their suffering, and their efforts to claim the recognition of their equal rights mark one of the longest struggles for liberation in the story of human civilization. The culture of preserving minority rights in the United States has therefore greater historical justification than in Europe. The multiethnic model of the United States is more compatible with integrating a minority than the different models of national unity in the history and culture of Europe. The multiethnic model could not be an alternative to that of national unity, for they are two different concepts and neither is able to represent the cross-ethnic reality and the cross-cultural aspirations of humanity. Islamic thought has to promote a humanistic concept of the future, based on the immigrant society. It needs to be cross-cultural and able to tackle the recognition of collective identities and its impact on coexistence in a plural world.

## **The Globalization Dimension**

Today, under globalization, power and challenge are no longer the duality of the minority and the majority, but the economic and information authority. According to the rules of democracy, a majority is still necessary for the legitimacy of political power, though it is not enough to guarantee a global influence on the whole of society. The economic factor is emerging as the main stake in politics, and even as a necessary condition for its emancipation. The powerful multinationals, both nationally and internationally, could be a demonstration of the impact of the liberal economic system on democracy. We are right to ponder the destiny of democracy and its dual rule by the majority and the minority, if the multinationals continue to decide the direction of peace and war and to impose their supervision of politics. Thus, under globalization, information becomes not only an inevitable arm of influence on public opinion but also a necessary condition for the expansion of the multinationals. The information war between the super-powerful multinationals is reducing the meaning of the representative majority of public opinion. Public opinion is now illustrated and manipulated more by information than by the representative majority. Within this new authority's emancipation of information, the status of the minority is not necessarily the weakest. On the contrary, it could be the most powerful and influential if allowed access to the power of information, and therefore to economic power, despite the rules requiring the alternation of the majority and the minority in a democracy.

## **The Cross-cultural Society**

The struggle of civil society against globalization's aim of standardization, and the increase in migrants and a migration society, lies in promoting and establishing a trans-cultural and cross-cultural world with multicultural sources of inspiration and the coexistence of different peoples. A cross-cultural society is a permanent evolution of the multicultural reality and totally contradicts the fiction of a mono-nation society. The distinction in the West between cultural identities, such as that of Islam, would not contradict an open cross-cultural society, for it is the identification of a cultural identity that is necessary for such a society to benefit from a plurality of richness. Modern societies are beginning to abandon the multicultural experience, with its implications of communalism and ghettoization of the collective identity. The establishment of a

collective Islamic identity in the West would not be in accordance with the multicultural model, which implies a minority status. However, a cross-cultural society would be sufficiently open-minded to recognize the humanistic and universal dimension of an Islamic identity. A peaceful future needs to be based on the recognition of differences between the Islamic and Western cultures in a new cross-cultural society, leading to the renewal of fiqh, especially in the definition of the status of Muslims in the West. A minority status is a real impediment to the concept of the Islamic testimony or *shahādah* in the plural space. Muslims must live as full partners, not as a minority, in the plural space of the cross-cultural society of the future.

### **Wrong Analogy**

The “fiqh of minorities” is founded on a wrong analogy with the marginal minority of exception, such as the homosexual minority. Islam in the West should be regarded as a minority only in the sense of the number of Muslims within the collective system, and that should not affect its role as a universal testimony. The main struggle of the “minority of exception” is the preservation of its rights. However, the status of Islam needs two orientations: claiming its rights, and presenting the spirit of a model and testimony for the whole of humanity.

It is also difficult to compare the minority status of Muslims with that of ethnic minorities such as blacks or Native Americans in the United States. The reality of the Muslim minority is multiethnic, not mono-ethnic, and it is dominated by a national population. In Islamic references, it is recommended to bear ethnic origins in mind so as to respect traditions within the practice of religion. However, ethnicity can be a serious handicap when it becomes associated with a particular religion.

Although many reports have raised the problem of racism confronted by Muslims in the West, the reason is more likely to be Islamophobia than the ethnic origins of the victims. Muslims in the West have had to live with the deep and painful memory of colonialism, crusades, and conflict between the Islamic and Western civilizations. The ethnic factor within the apparent racism could hide the discrimination against Islam in the West, which is based on differences of civilization. The challenge of the Muslim minority is to be recognized culturally as a factor of the richness of diversity, with its spiritual source and its long historical experience in the sciences, philosophy, and the arts. It is necessary to recognize the whole integrity of Islam in the plural space of citizenship so that the marginal, immigrant, and perceived incompatible status of

Muslims can be changed to that of full citizens. Therefore, any analogy between the Muslim minority and all other minorities based on ethnicity or an exception should be abandoned.

### **Citizenship and the Ummah**

The question of citizenship is still hampered by the question of the Ummah, the sacred universal meaning of collective identity in Islamic thought. "Group solidarity" (*'aṣabiyyah*) has been presented as the collective identity of nationality and citizenship, which is regarded as being in opposition to the faith community, that is, the Ummah. This view could explain the scarcity of Islamic literature, both classical and contemporary, on the question of citizenship.

The Muslim community in the West has taken a very long time to accept the membership of Western society. Even today, the literalist tendency in Islamic thought is to forbid the citizenship of Islam in the West. The Ummah is considered not only a religious pact but also a civil pact linking every Muslim throughout the world. The civil dimension of the Ummah, which is fed by the nostalgic memory of the Caliphate, hampers the emergence of the citizen status of Islam in the West. However, the civil status of the Ummah no longer exists, and the various institutions linking the Muslim world have only a limited role in coordination.

In the history of the migrations to both Abyssinia and Madinah, initiated and encouraged by the Prophet himself, nothing was expressed by him or in the Revelation to limit these two movements to occasional immigration status. On the contrary, the Muslims in Abyssinia and Madinah enjoyed the status of full citizenship. In Abyssinia, they were a minority in a Christian society and government. In Madinah, they achieved a compromise with the various tribes which had constituted the city's legacy and legitimacy before the immigration, with the system evolving toward an Islamic government.

The principle of immigration in Islamic civilization is based more on the spiritual aspect of the testimony and transmission of Islamic values than its civil dimension. The result of this culture is visible today in the widespread expansion and presentation of Muslim communities all over the world. However, the question of minority status seems to be influenced more by the fear of contradicting the Ummah pact in assuming a specific status of Muslims in the West, than the necessity to establish a status of full citizenship. Islam as a citizenship partner carries the implication of confronting modernity and

sharing the contemporary questions of identity and diversity. In these circumstances, the traditional approaches of the fiqh of minorities, based on a debate of heritage and fear without any serious consideration of the current reality, are unable to deal with the question of minorities in a plural citizenship and so to contribute more fully to the future debate.

### **The Juridical Dimension**

The juridical dimension of the status of Muslims in the West should not be the only or even the highest dimension, but a practical factor in a complex global process. The approach should begin with philosophy and theology, then move through the social sciences to define the strategic aspect of this status. The juridical dimension has been given a prominent place in contemporary Islamic literature and it is the most influential in the renewal of Islamic thought. As a result, the thinking Muslim minority in the West is influenced more by Islamic jurists, the *fuqahā'*, than by any other specialists.

In addition, the term “fiqh” has been reduced to its juridical dimension and no longer carries a global signification of the interpretation of the Sacred Text and the human reality. Nor does it have the meaning of Abu Hanifah’s concept of the greater fiqh (*fiqh akbar*), the science of the philosophical and theological fundamentals of Islamic thought. According to Abu Hanifah’s concept, the juridical dimension of fiqh is relegated to the lesser fiqh (*fiqh aṣghar*).

An obsession with the “culture of fatwas” in contrast to a “culture of finality” has been established in the Muslim mind. The question of how to practice the Shari‘ah has been transformed from a fundamental issue implying global renewal into a technical problem of performing the rituals of the Sacred Text. In every aspect of contemporary renewal – education, politics, society, economy, etc. – the juridical vision and its alternative have been dominant. Today, it is still difficult for the global and fundamental vision of renewal to convince and or even influence Islamic discourse. In addition, the deep disappointment and the perpetual feeling of oppression permeating the whole Ummah contribute to the juridical choice as the easiest and the least intellectually demanding.

The concept of the Muslim minority in the West needs to be liberated from the monopoly and narrowness of the *fuqahā'* and restored to the basis of the theological and philosophical vision of Islam. The social scientists, philosophers, and theologians of contemporary Islam should complement jurisprudence with the theoretical perspectives as well as the modern application. Jurisprudence is often viewed in the light of the

Islamic heritage of the well-known schools of law, and so the contemporary reality is accorded less importance than the main factor of heritage. That is why a knowledge of the social sciences is needed to confront the reality of the status of Muslims, rather than a mere exploration of the Islamic heritage.

Given the complexity of the position of Muslims in the West, the production of a new vision capable of confronting the reality and proposing new perspectives implies that the term “fiqh” should be replaced with “status” or “question.” The use of the term “minorities” also needs to be changed to “Muslim citizenship” in the West.

The phobia of Islamization experienced in some sectors of Western society is partly based on the phobia of minority status. It represents within the phobia a stage in the Islamization of the whole of society. The contribution of Islam in the evolution of modernity to its status of full citizenship could surpass the debate on the transformation of minority status into citizen status.

### **Challenges: Perspectives and Prospects**

The future of Muslim citizenship in the West depends on a serious examination of the pluralism problem and a commitment to its solution. It is necessary not only to conceptualize but also to promote the principle of pluralism in Islam by reviving the memory of its practice in the first migration to Abyssinia, in the government of Madinah, and in the multicultural system during the golden age of Islam until its end in Andalusia. The aim of this procedure is to contribute an original vision and model of Islamic pluralism to the richness of the contemporary plural space.

The Islamic contribution to contemporary plural citizenship should confront the increasing assertion of collective identity and its multiple universals in the face of globalization's attempts at uniformity and its single model of universal. Therefore, the unity of modernity should not hide the reality of contemporary diversity. The single universal leads toward uniformity and attempts at unifying the world. Identities could emerge as the highest expression of universal and humanism. The expression of identity is both internal and universal. The essence of the universal is diversity. Islamic identity ceased producing the universal when it ceased being contemporary. It is either historical, based on its heritage, or modernist with reference to the Westernized agenda. Islamic identity is quantitative rather than qualitative. It is based on a massive call (*da'wah*), though not necessarily with a creative message for humanity. We need to promote the culture of recognition in the face of the modern culture of uniformity



encouraged by globalization's single system, and in the face of intolerance, so that the promotion of the collective identity can be regulated and controlled.

The Islam of testimony needs to replace the Islam of propaganda, visible essentially in Islamization's view of the Western system and society, a culture dominated by monopoly and manipulation, within the Islamic culture of contemporary reform. A unique Islamic alternative versus a single modern alternative disturbs the character of objectivity and relativity necessary for the culture of testimony. The Islam of testimony means the participation of Muslims as citizens, with the positive implications of a civil and responsible Muslim attitude and behavior.

Muslims in a secular space need to review the questions of the application of the Shari'ah, the Islamic state, and Islam in the public arena. We need to abandon the slogan status of these concepts so as to deal with the challenges of the rights of Muslims under a non-Islamic system. Defining the relationship between religion and politics in Western society is necessary for Muslims to be accepted as full citizens under a secular system. It is strongly recommended that a theoretical and global examination be made of the fundamental concepts of the Shari'ah as the sacred law and its relationship with human law as an interpreted law. This examination should include their implementation, and a discussion of their relationship with a positive law, the secular state, public institutions, and public opinion. The visibility of Islam is confronting secularism not as it has been perceived in Arabic discourse as a conflict between the religious and the political, but as it has been conceived and experimented in Western society. Despite the differences between the French *laïcité* and other Western secular systems, the principles of neutrality and freedom of belief still characterize secularism in the West and impose the challenge of responsibility on Islamic status. We have to defend the equality with the other faiths regarding the constitutions of Western secularism, and to be able to prove the necessary autonomy in conceiving and living the status of Muslims in the West.

In the future, it will be necessary to avoid the increase in the culture of violence by controlling any tendency to a hostile reaction. Like any other phobia, Islamophobia has a strong capacity to provoke anger, hatred, and even violence. The hatred of Islamophobia generates hostility in its turn. Eradicating Islamophobia has to be achieved by eradicating ignorance, the origin of Islamophobia, and by intensifying the inter-religious and intercultural dialog. Contenting ourselves merely with citizenship, without careful consideration of education and dialog, could result in a defensive and

marginal status of Islam in the West and reduce the possibility of Muslims being recognized as full citizens.

The status of Muslims should no longer be regarded merely as a practical problem and confined to its juridical aspect (fiqh). We need to promote the fiqh of religion, the fundamental global philosophy of Islam by the application of different social sciences. We need to think of Islam as a philosophy, and also as a society and a civilization identity, by the use of political, social, economic, and educational methods and instruments.

The necessary renewal of the meaning of fiqh could produce an acceleration of ijtihad. This could apply especially to the Islamic alternative to modernity and new issues of post-modernity, and the liberation of the global mission of ijtihad from Islamic jurists (*fuqahā'*) to Muslim thinkers in all the aspects of ijtihad related to the renewal of the Islamic discourse.

The prospective agenda of Islam in the West needs to be aware of the question of pluralism and the challenge of globalization, the question of collective identity and the production of universals, and the question of recognition in the face of the dominant culture of tolerance and exception rules regarding minorities. Islamic thought has to join the movement of modernity's criticism to integrate these new questions on collective identity and a future cross-cultural society into its agenda and priorities if it wants to be considered for participation in the dialogue.

The "universal Ummah" needs to be discussed in the light of Muslim citizenship. From the utopia of the Ummah in contemporary Islamic discourse, we need to forge ahead with a new concept of the Ummah of testimony based on the Islamic geographical definition: "The whole earth is sacred and purified." The implication of this concept is the development of the culture of civil participation versus the rise of the culture of the closed community or ghettoization, and the negation of difference or hatred within the Muslim space.

The "fiqh of minorities" should be seen not as a strategic concept but as a stage of evolution from the status of immigration to that of citizenship.

Islam as a potential factor in the future agenda of peace and non-violence among humankind has to abandon its status of the victim and its dependency on the emotional debate, so as to contribute seriously to the destiny of human thought. The responsibility of philosophers and social scientists of contemporary Islam is essential and sensitive in changing the image of Islamic thought from its internal confines to embrace the whole

of humanity. It is the main condition for transforming the image of Islam as a minority within the modern system to a factor of critical and prospective contribution.

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# **The Creative Mission of Muslim Minorities in the West: Synthesizing the Ethos of Islam and Modernity**

*Louay M. Safi*

The fiqh of minorities is a concept born of the needs of Western Muslims who want to insure that they can apply the rules of the Shari‘ah (Islamic Law) in a predominately non-Muslim society. The notion itself underscores the new realization by an increasing number of these Muslims that they cannot adhere to the same fiqh rules adopted by their co-religionists in Muslim societies. As such, the “fiqh of minorities” reflects the views of the reformists who aspire to transcend traditional conceptions and practices.

Yet the need to transcend historical interpretations of Islamic Law is not specific to minorities, rather, it is a general need to transcend both the traditional Islamic and modern ethos. Although the modern ethos shares many of Islam’s ideals and values, it is in conflict with certain Islamic principles. This means that Muslim minorities in the West are forced by their peculiar experience and positioning to rethink both Islam and modernity, and to evaluate each by means of the other. The search for a fiqh of minorities provides a great opportunity to improve modern society by recalling the rich Islamic experience, and to enhance Islamic thought and practices by incorporating suitable aspects of modern life into Islam.

If the above evaluation of the conditions underlying the quest for the fiqh of minorities is correct, then the exercise goes far beyond the concerns and needs of minority groups to encompass those of modern humanity. This would immediately make the notion of the “fiqh of minorities” a misnomer. What the Muslim minorities in the West are confronting is simply the question of how to apply Islamic values to deal with emerging challenges that currently cannot be solved owing to the inadequacy of traditional Islam and modern thought.

## **Fiqh and Shari‘ah**

Fiqh has been defined by classical scholars as “the field of knowledge that is concerned with the actions of the faithful.” It is understood to represent the outcome of human endeavor to apply the rule of the Shari‘ah (Islamic Law) in a given social milieu.

The Shari'ah, on the other hand, denotes the precepts embodied in the Islamic Revelation. It is not simply a legal system, but rather a composite system of law and morality. That is, Islamic Law aspires to inform various aspects of human activities, not only those that may entail legal consequences.

Historically, actions and relationships are evaluated in accordance with a scale of five moral standards. According to the Shari'ah, an act may be classified as obligatory (*wajib*), recommended (*mandub*), permissible (*mubah*), reprehensible (*makruh*), or prohibited (*haram*). These five categories reflect the varying levels of moral requirements placed on human behavior by the Divine Will. Actions that fall in the first and fifth categories are strictly demanded, whereas those falling in the second and the fourth categories, around the neutral center of the scale, are less strictly demanded, and hence their violation, though discouraged, is not condemned. In other words, while individuals are obligated morally to follow the commands of the first and last categories – that is, the obligatory and prohibited – they are only encouraged to observe the commands of the second and fourth – that is, the recommended and the reprehensible.

It should be emphasized, however, that even the absolute commands of the law have essentially moral, or more accurately religious, implications, and thus are not necessarily under state sanction. For instance, the pilgrimage to Makkah once in a lifetime is obligatory (*wajib*) for every Muslim who is physically and financially capable of performing this duty. Yet the state, according to the *Shari'ah*, may claim no authority to compel the individual to fulfill this personal obligation.

Notwithstanding the inextricable association between law and morality in the Shari'ah, Muslim jurists conveniently differentiate between private and public morality – or, in the vocabulary of Islamic Law, *haq Allah* (rights of God) and *huquq al-'ibad* (rights of humans) – and hold that only the latter may be subject to legal sanctions. Private morality includes purely religious activities pertaining directly to the spiritual relationship between a human being and God, labeled *'ibadat* (services). Since *'ibadat*, or services, do not have, for the most part, any social consequences, the individual is answerable to God for fulfilling them, not to society. Public morality, on the other hand, encompasses those patterns of behavior that have social consequences, appropriately labeled *mu'amalat* (transactions). Because of the direct implications that *mu'amalat* have on society's ability to maintain public law and order, their regulation may be legally enforced by the state. The division of individual obligations and duties into categories of public and private is, none the less, more apparent than real, for, according to Islamic theory, all human activities, regardless of whether they are public or private,

are subject to ethical judgment, because all human beings are ultimately accountable to God for their actions.

Shari'ah law was historically developed by Muslim jurists, who applied human reasoning to revealed texts with the aim of creating a normative system capable of regulating individual actions and social interactions. Early jurists relied primarily on the Qur'an and the practices of the Prophet to elaborate the rules of the Shari'ah, a process known as *ijtihad* (intellectual exercise). In recognizing the imperative of rational mediation for understanding the rules of the Shari'ah, early jurists exerted a great deal of time and energy to define the grammar of interpreting the divine texts and the logic of reasoning behind their implications. The differences in methodological approaches led to the differentiation of the various schools of jurisprudence. Because the Qur'anic texts were given in a concrete form, whereby the Qur'an commented on the actions and interactions of the early Muslim community, and directed early Muslims in concrete situations, the jurists applied legal analogy (*qiyas*) to extend the application of the Qur'anic precepts to new cases. The *qiyas* technique, widely accepted by the schools of jurisprudence, requires the jurists to identify the efficient reason (*'illa*) of a specific Qur'anic statement, and to use this reason as the basis for extending the application of the Qur'anic precept to new cases. For example, early jurists extended the prohibition of wine to all intoxicating substances on the grounds that intoxication was the reason for the Qur'anic prohibition of wine. Early jurists also utilized the statements and actions of the Prophet and his Companions as a means of reaching a better understanding of the revealed texts. The practices of the Prophet and his Companions became known as the Sunnah and were recorded in the Hadith narrations. Early jurists did not think that the Sunnah had an authority independent of the Qur'an, and hence did not hesitate to reject a hadith narration whenever it clearly contradicted a Qur'anic statement.<sup>58</sup>

Ijtihad took a decisive turn when Muhammad bin Idris al-Shafi'i declared that the Sunnah was an inviolable source of law on a par with the Qur'an, and insisted that it enjoyed an independent authority.<sup>59</sup> Shafi'i confined *ijtihad* to legal analogy (*qiyas*), declaring all other legal reasoning to be arbitrary.<sup>60</sup> The restrictions on *ijtihad* were further increased by Ahmad bin Hanbal, who insisted that legal analogy was to be used

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<sup>58</sup> For further elaboration on this point, see Louay M. Safi, "Islamic Law and Society," *American Journal of Islamic Social Sciences*, vol.7, no.2 (Season?, year?), p.177.

<sup>59</sup> Muhammad bin Idris al-Shafi'i, *Al-Risala* (Beirut: Dar al-Kutub al-'Ilmiyyah, n.d.), pp.401–476.

<sup>60</sup> *Ibid.*, p.???

only as a last resort. He therefore required even a weak hadith to be given priority over legal analogy.<sup>61</sup> The other two major schools of jurisprudence of the Sunni branch of Islam,<sup>62</sup> the Hanafi and Maliki, were able to escape the severe restrictions on *ijtihad* imposed by the Shafi'i and Hanbali schools by employing the techniques of *istihsan* and *istislah* respectively. *Istihsan* meant that the jurist was not bound by the apparent reason of a particular rule, but could utilize other reasons of the Shari'ah whenever they were deemed more relevant. *Istislah*, on the other hand, allowed the jurist to base the rules of the Shari'ah on public interests and utility, rather than confining them to *'illah* (efficient reason).

The desire of Hanafi and Maliki jurists to overcome the literalist approach that equated *ijtihad* with *qiyas* (according to the Shafi'i), or with the linguistic explication of the Qur'an by reference to the Hadith (according to the Hanbali), inspired them to develop methods aimed at prioritizing the Shari'ah rules and principles. Methods such as *al-qaw'id al-fiqhiyyah* (juristic rules) or *al-maqasid al-shari'iyah* (Shari'ah purposes) aim at the systematization of the Shari'ah rules by eliminating internal contradiction, and constitute what is referred to today as the *maqasid* approach.

By its emphasis on meaning, reasoning, and purposes, the *maqasid* approach provides a powerful tool for reforming the historical Shari'ah, because it rejects the literal reading of statements, apart from their rationale, and insist that the rationale cannot contradict basic Islamic values. The definitive exposition of this approach can be found in the work of the Andalusian jurist Ibrahim bin Ishaq al-Shatibi, *Al-Muwafaqat*. The *maqasid* approach expounded by Shatibi can be summarized as follows:

1. The Shari'ah rules purport to promote human interests.
2. The Shari'ah consists of a hierarchy of rules, whereby the particular rules (*ahkam juz'iyah*) are subsumed under universal laws (*qwanin kulliyah*).
3. General rules must be modified to accommodate – whenever possible – particular rules.
4. Particular rules that contradict general rules should be rejected or ignored.
5. The various rules and laws of the Shari'ah are designed to achieve five general purposes: the protection of religion, life, reason, property, and progeny.

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<sup>61</sup> For the elaboration of the Hanbali principles of jurisprudence, see Ibn al-Qayim, *A'lam al-Muaqi'in* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1411/1991), vol. 1, pp.24–26.

<sup>62</sup> Shi'a jurists imposed far fewer restrictions on *ijtihad*.

## **The Purpose of the Shari‘ah**

Classical Muslim jurists (*fuqaha*) continued throughout the early centuries of Islam to explore the meaning and rationale of the various rules of the Shari‘ah. By the fourth century they realized that the Shari‘ah consisted of different *fiqhi* rules that aimed at protecting and promoting individual and collective human life. They identified the following five main purposes of the Shari‘ah: protection of religion, life, property, intellect, and progeny. The purposes of the Shari‘ah were essentially the creation of a normative order capable of enhancing human life and advancing the human condition.

The Qur’an presents its message to provide guidance to humanity by laying down criteria so that right (*haq*) may be distinguished from wrong (*batal*). By adhering to the rules of law, the Muslims can create a society superior both morally and materially to societies which fail to observe the revealed Will of God. The Shari‘ah, as a comprehensive moral and legal system, aspires to inform different aspects of human behavior to produce conformity with the Divine Law. Adherence to the rules and principles of the Shari‘ah not only brings individuals closer to God, the Qur’an stresses, but also facilitates the development of a just society in which individuals can achieve their potential, and in which prosperity is ensured for all. Islamic Law (Shari‘ah) is closely intertwined with religion, and both are considered expressions of God’s Will and Justice. However, whereas the aim of religion is to define and determine goals (justice or others), the function of law is to indicate the path (the term Shari‘ah indeed bears this meaning) by virtue of which God’s justice and other goals are realized.<sup>63</sup>

### **Two Notions of Law:**

#### **Legal Regulations in Islamic Tradition and Modern Society**

Modern society is the result of a systematic restructuring and reordering of society in accordance with a set of core values that define modern life. Max Weber (1864–1920), the eminent German sociologist, called this process rationalization. Although he admired rationalization, Weber was disturbed by its tendency to shrink the area of individual liberty and thereby cause a progressive loss of freedom. This loss, he observed, was the outcome of a rationalization that took the form of bureaucratic

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<sup>63</sup> Majid Khadduri, *The Islamic Concept of Justice* (Baltimore, MD: The Johns Hopkins University Press, 1984), p.135.



control. Although he considered bureaucracy to be the cornerstone of capitalist civilization and asserted that it brought a superior form of organization to society, he noted that it simultaneously transformed society into an enormous human machine in which everyone had to fit into a socially predetermined niche and perform a socially predesigned role. Clearly, this mechanical environment produced a tremendously increased efficiency, yet it also undermined individual freedom and turned society into an “iron cage.”

The overpowering modern state – the leviathan preached by Thomas Hobbes at the dawn of the Enlightenment but rejected by liberal democrats – is being reinvented by the neo-Hobbesians of the twenty-first century. This leviathan, which ensures security at the expense of individual freedom, already controls most developing countries and seems to be creeping slowly into Western democracies. The brutal September 11 attack on the United States, as well as other events, have underscored the vulnerability of American democracy to extreme restrictions on political freedom in the name of security. The passage of the Patriot Act by the US Congress in late 2001, despite the pervasive presence of provisions that undermine fundamental freedoms, displays the modern state’s propensity to acquire unbridled power.<sup>64</sup>

The most important aspect of this process is the modern state’s ability to use law as a tool to extend its control over civil society and regulate every facet of individual and collective life. Taking that power, or limiting it markedly, is the only way to prevent the modern state from turning into a leviathan. It is also the only way to prevent the use of Islamic Law (the Shari‘ah) as an instrument of persecution and control. It is ironic that the Shari‘ah, which historically strove to limit the state’s power, is being now used to make the state overpowering. This irony has its roots in the modern concept of state. For many Islamic reformers, an important landmark of reasserting Islamic values and identity is that Islamic Law should become state law. Those who insist on marrying the state with the Shari‘ah are completely unaware of the fact that legislation in historical Islam was a function of civil society rather than of the state.

Lawrence Rosen gives us an insight into this important fact in his *Anthropology of Justice: Law as Culture in Islamic Society*. While his work focuses on a Shari‘ah court in a small Moroccan town, it provides a wealth of information about the paradigm that

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<sup>64</sup> For an excellent commentary on the Patriot Act, see Nancy Chang, *Silencing Political Dissent: How the USA Patriot Act Undermines the Constitution* (New York: Center for Constitutional Rights, 2002).

guided the Islamic legal system in historical Muslim society. “[I]n the classical Islamic theory of state,” he remarks,

law and government were kept largely separate from one another. The state was seen not as an instrument for the application of law, nor were the courts, either through religious doctrine or a concept of the social good, envisioned as vehicles for economic redistribution or the construction of a particular political order. It was the duty of the political authorities to enforce the claims of God – even by maintaining their own courts for the punishment of specific crimes – but beyond that they were to insure that men could carry forth their own affairs without governmental interference.<sup>65</sup>

Rosen’s work shed light on another fact concerning the relationship of law and state in historical Islam, a fact often missed by both the advocates and opponents of an Islamically inspired state: In historical Islamic society, down to the Ottoman Empire, the community was the locus of law and morality. Judges were expected to enforce local norms and follow locally accepted interpretations of normative texts, not to superimpose on the community an abstract doctrine articulated by non-local or distant individuals. “[I]n Islamic Law,” he points out,

the [legal] concepts are measured against those cultural principles that allow people to return to the negotiation of their own arrangement. Its regularity is vertical, not horizontal: it seeks consistency with common-sense assumptions about humanity, not through the refinement of categories of its own creation. Islamic Law is a system of adjudication, of ethics, and of logic that finds its touchstone not in the perfecting of doctrine but in the standards of everyday life, and measured in this way it is enormously developed, integrated, logical, and successful.<sup>66</sup>

As a legal anthropologist, Rosen was more aware of how Islamic Law functioned on the societal level than among jurists. It seems he was not aware of the enormously elaborate and abstract science of Islamic jurisprudence. This fact should, of course, make us more intrigued by historical Muslim society’s ability to control legislation and adjudication, and to keep statesmen and jurists in check. Further, this fact speaks volumes about the vibrancy of civil society in historical Islam and should inspire contemporary scholars to reconsider the relationship between state and law. More specifically, I submit that the relationship between state, law, and society in historical Islam provides us with a cue for overcoming the “iron cage” of advanced modern society.

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<sup>65</sup> Lawrence Rosen, *Anthropology of Justice: Law as Culture in Islamic Society* (New York & Cambridge, UK: Cambridge University Press, 1998), p.61.

<sup>66</sup> Ibid.

This vital task requires forward thinking and a creative synthesis of the modern and the authentic. And therein lies the enormous challenge facing contemporary Islamic thought.

## **Communal Pluralism and the Making of Minorities**

In a diverse and heterogeneous society, one can recognize two types of minorities: ethnic and confessional. Ethnic minorities are subgroups distinguished from the dominant group by physiognomic, linguistic, or cultural characteristics. Confessional minorities, on the other hand, are subgroups distinguished by their values and ideologies, as well as the resulting practices. The classical Muslim world was divided into a multiplicity of confessional groups. Each confessional community was allowed to maintain its own code of law and an autonomous local administration run by local notables and religious leaders. This pattern of communal pluralism was later adopted by the Ottomans and continued to be the basic social organization in the Middle East until the collapse of the Ottoman Empire in 1919.

Communal pluralism has been criticized for its tendency to revert to hierarchy. Rodinson termed this pattern of social organization as “hierarchical pluralism,” since, despite their relative autonomy, confessional minorities were subordinated to the dominant Muslim majority.<sup>67</sup> Rodinson argues that under the communal system that prevailed in the Ottoman Empire (a similar system flourished in the Austro-Hungarian Empire), the central government was controlled by the Muslim majority. Yet he and other critics seem to forget that even under modern democratic systems, state institutions are usually run by members of the dominant social group. In those countries where the population is differentiated along religious lines (that is, India, Pakistan, or Israel) the dominant religious group tends to control state institutions. Likewise, countries where ethnicity is the basis of social differentiation (that is, Canada and England), the state is run for the most part by the ethnic majority. The difference between the communal and national systems, however, is that while in the latter the majority imposes its values and ideas on the rest of society, the former system protects its minorities from the majority’s ideological and moral encroachment.

However, the communal system that flourished under the Ottomans was not without its own problems. Yet the transformation from a multinational empire into a

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<sup>67</sup> Maxime Rodinson, as quoted in Birch, *ibid.*, p.6. [WHERE IS BIRCH??? – NOTE 10???

system of nation-states fashioned after the European model has proven to be disastrous. It is true that the Ottoman Empire's problems had become so large by the beginning of the twentieth century that one could hardly begin to imagine how they could be solved without dissolving the empire. Nevertheless, the creation of numerous nation-states out of the ruins of the Ottoman Empire did not solve the problems, but rather gave rise to a host of new problems that tended to exacerbate the ones already in existence.

In *The Making of the Modern Near East*, Yapp takes issue with the widely accepted description of the Ottoman Empire as the sick man of Europe. He argues that contrary to the claims of many Western historians, the Ottoman Empire was engaged in a process of profound reform. Yapp contends that some Western sources tend to perpetuate this image of the Ottomans for four reasons:

1. The Ottomans' image has been constructed mainly on biased information obtained from the archives of their enemies.
2. The Ottomans' history has been written by Christians who are either prejudiced against Islam or have little insight into the functioning of the Ottoman system.
3. Authors of books on the Middle East are committed to nationalism and liberalism and therefore have a negative view of multinational empires.
4. Those Europeans primarily responsible for giving the final blow to the Ottoman Empire wanted to believe that it was doomed to extinction anyway.<sup>68</sup>

It is beyond the scope of this paper to determine whether the Ottomans would have been able to reform their empire if the Allied forces had left them alone. Indeed, I tend to think that the Ottomans were already on an irreversible course toward dissolution.

## **The Modern State's Predicament on a Global Scale**

Modern political structures have a tendency to impose the social morality of the dominant political groups on the rest of society. The moralizing role of the state used to be confined to national societies. More recently, however, systematic and concerted efforts have been directed at imposing the social morality of modernist societies on the rest of the world. The moralizing role of the state is premised on two basic notions: the superiority of modern norms and the irrelevance of culture to human values and social institutions.

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<sup>68</sup> M. E. Yapp, *The Making of the Modern Near East* (London: Longman, 1987), p.93.

Two main positions can be clearly distinguished: absolute universalism and absolute relativism. The former holds that culture is irrelevant to the moral validity of human rights, while the latter insists that culture is the only source of moral validity.<sup>69</sup> Both positions fail to capture the full scope of the intercourse between culture and universal values, and both have been used to advance self-serving interests.

Absolute (or radical) cultural relativism cannot be theoretically maintained, given the fact that one can hardly find today a society that still maintains a homogenous culture. Besides, considering the dynamic nature of culture, no community can assert that the cultural tradition which it espouses is either eternally static, or does not participate in a cultural exchange with other societies. Absolute cultural relativism is often advanced by authoritarian regimes to block external criticism of the excessive use of power to silence internal opposition.

Absolute moral universalism, on the other hand, is oblivious to the fact that moral values and legal systems are the outcome of the rationalization of a specific charismatic vision or worldview.<sup>70</sup> Practically, radical universalism is often used by hegemonic cultures for imposing their morality on others, as Donnelly explains:

The dangers of the moral imperialism implied by radical universalism hardly need to be emphasized. Radical universalism is subject to other moral objections as well. Moral rules, including human rights, function within a moral community. Radical universalism requires a rigid hierarchical ordering of the multiple moral communities to which individuals and groups belong. In order to preserve complete universality for human rights, the radical universalist must give absolute priority to the demands of the cosmopolitan moral community over all other (“lower”) moral communities.<sup>71</sup>

The radicalism of the two positions summarized above can be avoided by recognizing that for legal reform to succeed, it must coincide with cultural reform. That is, one must recognize that culture is the only mediating milieu for restructuring individual and social consciousness so as to make it receptive to, and supportive of, international human rights. Yet even when cultural reform results in every society

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<sup>69</sup> See Ann Belinda S. Prais, “Human Rights as Cultural Practice,” *Human Rights Quarterly*, vol.1, no.18 (1996), p.288; also, Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press), pp.109–112.

<sup>70</sup> See Max Weber, *Economy and Society* (Berkeley, CA: University of California Press, 1978), vol.1, pp.1121–1156; also, Alasdair MacIntyre, *Whose Justice? Which Rationality?* (London: Duckworth), 1988.

<sup>71</sup> Donnelly, *Universal Human Rights*, p.110.

acknowledging the universal validity of human rights, a reasonable degree of cultural relativism must be allowed so the universal principles are interpreted according to the specific socio-political context of a society, and are brought to bear on the particular circumstances of the various communities.<sup>72</sup> An absolute universalism that ignores the essential role played by culture for the moral development of the individual suffers from “normative blindness” and is detrimental to both the dominant cosmopolitan culture and the indigenous cultures that it intends to reform. The devastating effects of the experimentations undertaken in Australia, Canada, and the United States to assimilate the aborigines illustrate the impossibility of achieving moral development independently of the cultural tradition to which an individual belongs. They also illustrate the arrogance of the developmentalist outlook that equates moral superiority with economic and technological advancement.

The devastating consequences of the “normative blindness” of absolute universalism advocated by numerous human rights scholars is not limited to non-Western traditions, but extend to the tradition of modernity itself. By attempting to globalize Western modernism in the name of international human rights, the West runs the risk of preventing, or at least delaying, the development of alternative cultural forms which could enrich the culture of modernity itself, and help it overcome some of the acute problems from which it currently suffers, including that of “normative blindness.” It seems, though, that for the latter problem to be overcome, a major reform in the dominant Western schools of jurisprudence is needed. As Richard Falk notes, neither in positivist nor in naturalist jurisprudence “does culture enter into the deliberative process of interpreting the meaning, justifying the applicability, and working for the implementation of human rights.”<sup>73</sup>

Proponents of absolute universalism premise their arguments on either of the following two presuppositions:

1. that the notion of culture – that is, a normative system supported by a set of values and beliefs commonly accepted by a group of people – is irrelevant to the debate on the meaning and desirability of human rights; or

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<sup>72</sup> See *ibid.*, pp.117–118; also, Abdullahi An-Na‘im, “Toward a Cultural Approach to Defining International Standards of Human Rights,” in Abdullahi An-Na‘im (ed.), *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (Philadelphia, PA: University of Pennsylvania Press, 1992), p.25.

<sup>73</sup> Richard Falk, “Cultural Foundation for the International Protection of Human Rights,” in Abdullahi An-Na‘im (ed.), *Human Rights in Cross Cultural Perspectives*, p.44.

2. that human rights are compatible with a set of moral values commonly shared by all cultures.

The first premise is erroneous, and contends that for the common values to be universally valid, a non-hegemonic cross-cultural dialog must take place among representatives of various moral communities.

Scholars who deny the relevance of culture to the human rights debate usually favor a unilinear view of history that equates moral with technical superiority. According to this view, human cultures form a continuum in which primitive cultures represent one extreme while modern culture represents the other. Primitive cultures are seen to be lacking not only in technology, but in morality as well. Primitive cultures are described as barbaric and savage, whereas modern culture is seen as refined and civilized. History, from a unilinear viewpoint, is nothing but the movement from the primitive to the modern, which forms the end of history.<sup>74</sup> The logical conclusion of the concept of history as modernization is that modern culture is the measure of all cultures. The problem with this concept, though, is that it fails to account for important historical events. The unilinear conception of history fails, for instance, to explain why the European culture was more vibrant and developed – politically, philosophically, and artistically – during the Roman civilization than in medieval times. From the modernization perspective, culture is not relevant to the debate on human rights because there is nothing for modern culture to learn from other cultures. Modern culture should set the standards for both moral and technical action, and then pass them on to less developed cultures.

This is in essence the conclusion of a leading advocate of radical universalism in a chapter published as part of an edited book entitled *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*. Taking exception to the idea of a cross-cultural consensus on human rights, Rhoda Haward writes:

In this chapter I have argued against the enterprise of surveying world cultures and religions in order to establish a consensus on human rights that would answer charges that such are a Western Creation.

To look for an anthropologically based consensus on the content of human rights is to miss the point. There may be aspects of agreement worth noting among what many societies take to be fundamental to a life of dignity and what the

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<sup>74</sup> The unilinear conception of history derives its intellectual force from Georg W.H. Hegel, *The Philosophy of History*, trans. J. Sibree (New York: Dover Publications, 1956).

modern notion of human rights includes as its content. The concept of human rights is not universal in origin, however; and it cannot be located in most societies.<sup>75</sup>

Granted that an elaborate set of rights, purporting to protect the individual against an excessive or arbitrary use of power by the state, was first articulated by the modern West, one should not dismiss cross-cultural consensus as irrelevant. Even if we were to assume that the West could learn nothing from non-Western cultures, a cross-cultural dialog would still be needed to understand the implications of applying a set of extremely abstract rights to various socio-political milieux. Such an understanding should help expand the margin of tolerance for cultural differences, and the appreciation of the complexity of cultural reform and the need to allow this process to run its natural course.<sup>76</sup>

In contemporary Muslim societies, a cultural reform aimed at liberating the individual from traditionalist interpretations of Islam is already under way. Reformers are appealing to the values and ethos embodied in the Islamic sources to restore the moral autonomy of the individual, and to develop an egalitarian political culture. The reform is therefore Islamic in nature and intent, and cannot be otherwise. All reform movements that have brought about profound cultural reform have been religious. The essentially secularist and individualistic modern West owes its genesis, as Weber reminded us in his *Protestant Ethic*, to the religious Reformation that took place in the Occident at the dawn of the modern West. The Orient should be allowed to undertake its own reformation, which would inevitably result in the reorientation and rationalization of the religious values and beliefs of the people of the Orient, and must hence take the form of a Confucian, Hindu, or Islamic Reformation.

## **The Creative and Transcendental Mission of Western Muslims**

The Muslim presence in the United States as a growing and vibrant community is quite recent, and it is still too early to tell in which direction this almost unprecedented experimentation is going. Regardless of that direction, however, the United States

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<sup>75</sup> Rhoda Haward, "Dignity, Community, and Human Rights," in Abdullahi An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives*, p.99.

<sup>76</sup> For an excellent discussion about the impact of social context on the implementation of human rights, see Daniel A. Bell, "The East Asian Challenge to Human Rights: Reflection on an East West Dialogue," *Human Rights Quarterly*, vol.1, no.18 (1996), pp.641-667.



provides a free, relatively speaking, environment for Islam to interact with modern society.

And here lies the tremendous responsibility, and possibly the historical meaning, of Muslim Americans. The question that we face today is twofold: can we do it and how? Can we reconcile modern practices and institutions with Islamic values and assumptions?

In the last two or three decades of the twentieth century, Muslim Americans displayed a great energy and marked ability to build communities and to reassert their Islamic commitments and identities. The vibrancy of the Muslim American community is manifested in the many Islamic centers, schools, and national organizations developed in the 1980s and 1990s. In many ways those efforts showed the Muslims' capability to adapt and catch up with the vibrant American society.

Although the September 11 tragedy complicated the life of Muslims in the West, it also brought Muslim Americans closer to achieving their historical role. The tragedy put American Muslims in the spotlight, and pushed them to the heart of the evolution of world history. Muslim Americans could no longer afford to speak only to themselves or to operate in the splendid isolation of the late twentieth century.

As American Muslims, we are faced with tremendous challenges, yet we also have unparalleled opportunities. We have the opportunity to give Islam a new expression, suitable to our age, that it had never had in recent years. We have also the opportunity to rescue modern society from its current predicaments.

Islamic traditionalism permeates our practices and thinking. Many of our customs and social habits are the continuation of historical practices. The core of the Islamic message consists of universal values and principles, as well as basic concepts and beliefs: justice, compassion, honesty, cooperation, equal dignity of human beings, respect for the religious and moral freedom of others, etc. Those values are abstract notions that can function only when they are given a specific interpretation. All interpretations are historically bound because they are provided by historically bound human beings.

Today, many of the social, economic, and political ideas that are learnt from works are not suited for today's and future society, because this ideas dealt with historical situations that were particular to past generations of Muslims. At the same time we live in a modern society that has emerged, and has been greatly influenced by the particular historical experience. At the heart of this experience is the process of secularization.

In ancient times, the secular and religious worlds were kept apart and thus operated under markedly different rules. The secular world adhered to the paradigm of power, in which domination and control were intrinsic values, and effectiveness served as an overarching criterion. The most eloquent expression of the purely secular rationale was captured in Machiavelli's *The Prince*. "The end justifies the means" was the guiding principle of the secular world.

The religious world was a world of sheer spirituality and utter goodness, one completely divorced from the secular world. Religious people were expected to eschew and shun secular injustice and corruption, avoid politics and remain aloof from the state, instead of confronting and overcoming such developments. The uneasy coexistence of the secular and religious, and their utter separation, is best captured in St. Augustine's *The City of God*. As one reads his attempt to isolate the "city of man" from the "city of God," one is compelled to conclude that the two can never intersect, and that the latter can only be experienced in a heavenly, rather than an earthly, mode of existence.

These two worlds were brought into a remarkable harmony for the first time under the principles of Islam. It was in the state of Madinah that we first encounter a clear example of a polity where universally proclaimed moral values formed the criteria of political judgment. Political leaders and statesmen were expected to recognize not only the value of efficiency, but also the values of justice, dignity, equality, and freedom. This important transformation was observed by Hegel (1770–1831), a leading European philosopher of history. In his *Philosophy of History*, Hegel recognized that the unity between the secular and spiritual took place in Islamic society and civilization long before it did so in the modern West:

We must therefore regard [the reconciliation between the secular and spiritual] as commencing rather in the enormous contrast between the spiritual, religious principles, and the barbarian Real World. For spirit as the consciousness of an inner world is, at the commencement, itself still in an abstract form. All that is secular is consequently given over to rudeness and capricious violence. The Mohammedan principle, the enlightenment of the oriental world, is the first to contravene this barbarism and caprice. We find it developing itself later and more rapidly than Christianity; for the latter needed eight centuries to grow up into a political form.<sup>77</sup>

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<sup>77</sup> Hegel, *Philosophy of History*, p.109.

The modern West followed the example of the historical Islamic world in demanding that holders of political power operate under a set of moral rules. However, since the modern West harmonized the secular and religious only nationally, the international realm was free to operate under the dynamics of power politics and secular rudeness. This failure was a source of the senseless violence that claimed well over 100 million war victims in the twentieth century, including over 80 million in two world wars. Recognizing the danger of keeping international politics under a purely secular evaluation, the United States led the effort that culminated in formalizing international law and creating the United Nations after the Second World War . Yet this effort was effectively undermined and compromised by political realists who enjoyed a disproportionate sway over American foreign policy and who were always ready to justify American violations of international covenants and treaties in the name of national security.

Ironically, contemporary Muslim societies have exceeded all others in decoupling the secular and the religious and now find themselves entangled in a crisis of legitimacy. Many Muslim regimes operate outside the realm of moral correctness and follow only the logic of power politics. Even more alarming is that this decoupling has penetrated the religiously inspired movements, which seem to succumb to the logic of power and are ready to employ amoral – even immoral – strategies in their fight against political corruption and oppression.

The decoupling of the secular and religio-moral spheres and the rise of political rudeness in Western democracy should be a source of concern. The strengthening of ultra-nationalist sentiments in Austria, Germany, and most recently in France, and the return of religious and ethnic profiling in the United States in the wake of September 11, are quite disturbing trends and point to a process of secular–moral decoupling.

It is worth noting that this process advances despite the religious reassertion occurring throughout the world. This is because the coupling and decoupling of the secular and the religious must be judged by whether moral values limit individual and collective behavior, and whether a profound commitment to moral principles restrain the political actions of social groups and group leaders. An exclusivist religious community that permits rudeness and capricious violence outside ethnic and religious bonds can be as brutal as – or even more brutal than – groups defined purely on the basis of secular criteria.

That has led to the resurgence of religion and its encroachment into the public sphere. Unfortunately, the religiosity that we hear expressed in the public sphere is the

bigoted and divisive variety, reminding us of that which prevailed in the pre-modern West. The recent attacks by Evangelical ministers, such as Robertson and Falwell, is indicative of the type of political desecularization that we are facing. It is evident that the attacks are political in nature and are a prelude to the violation of Muslim rights and to violence.

Muslims can provide an alternative model of society in which religion is reconciled with modern life. In so doing, Muslims can provide a new vision of how Islam can be lived in modern society to the full extent, and how religion can be reconciled with social living without relapsing into the medieval way of life.

For that to happen, however, Muslims need to meet two conditions. They need to liberate themselves from traditionalism by deepening the commitment to the universal values of Islam. They need to forge ahead with the necessary courage and confidence that the Islam they love and embrace has much to offer to future humanity.

# **The Rights of Minorities and Their Aims:**

## **The Rights of Citizenship**

*Tahar Mahdi*

### **The Definition of Minority**

The term “minority,” together with a precise definition of its identity in relation to the environment, such as a linguistic or religious minority, describes human groups who find themselves “marginalized.” They are smaller in numbers – allowing for exceptions – and at the same time they have a lower political, social or economic, and cultural status. The fact of being in a minority implies at the same time a minority in the legal and sociological sense<sup>78</sup>.

Pierre Georges

Although this definition appears simple, it clearly hides complex realities, sources of conflict, and sometimes bloody wars. Attempts at codifying this concept into international law go back a long way and have always run into sizable obstacles, even if a breakthrough was made by the United Nations in the autumn of 1992<sup>79</sup>. However, that is still not sufficient.

There are clearly religious minorities which, notably since the collapse of the Soviet Union, are a cause for concern. The war in Yugoslavia, just a stone’s throw from London, shows that nationalist fervor does not make way for cohabitation. The conflicts between the Serbs and the Kosovo’s could have been classified as the “return of the nation-states” and provoked the resurgence of the specter of another nationality issue, identical to that which caused two world wars. Yet, when the irrational overrides the analytical, “religious identity” is far from being an objective reality that is clearly defined. On the contrary, it is vague, as has been proved in so many cases, such as that of Islam in Europe and particularly in France.

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<sup>78</sup> Pierre Georges, *La Géopolitique des minorités* [The Geopolitics of Minorities] (Paris : Presses Academiques de France, 1984), p.5.

<sup>79</sup> Joseph Yacoub, *Minorités nationales et prolifération étatique* (Paris: 2000).

## **Islamic Law**

Islamic Law has a universal authority encompassing time, space, and the individual. It is, then, the law of life, humanity, and the universe. [In the Qur'an, God says:] "This day have I perfected your religion for you, completed my favor on you, and have chosen for you Islam as your religion"<sup>80</sup>. Following on from that, it can be observed that there are some important aspects of human life which are covered by Islamic Law, such as the individual, the family, the community, and the nation as well as international relations. It is equally noticeable that the flexibility of this Law is its most important characteristic, from the fact that it takes into consideration the reality of human beings in its aim to give concrete expression to their immediate interests, and their spiritual and material well-being: "Look for a blessed reward in what God has given you, but do not forget thy portion in this world"<sup>81</sup>. It must be known, likewise, that Islamic Law is humanist, that is to say, it supports all the knowledge consolidated by human society since the beginning of its epic journey through history. In other words, it is not opposed to anything that concerns human rights, even when it comes from the Other, the non-Muslim: "Truth is the aim of the Muslim: he will take it from wherever it comes"<sup>82</sup>.

## **The Aims and Characteristics of Minority Rights**

The so-called "minority" rights must have rules which justify all the attempts made in this direction. That is to say, when applying *ijtihād*, it is imperative that the time, space, and circumstances are taken into consideration. Consequently, it is out of the question that the minority imposes its laws on the majority. It should effectively live in a way that accords full respect to the constitutional laws and try to find solutions to any law that could infringe its rights. Before attempting to enumerate the aims and particulars of these rights, I ought to say a word to clarify one point. The majority of Muslims believe that Islamic Law is generally based on theology. Now, I think that is not the case and that this discipline – "law" – is part of worldly knowledge. Indeed, Islamic Law generally deals with issues of daily life down here, such as justice, crime, family law, education, politics, society, economics, etc. Over time and thanks to the

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<sup>80</sup> Koran (5:3)

<sup>81</sup> Koran (28:77).

<sup>82</sup> (Tirmidhi, chap. Science, 2611).

reflections of generations of jurists and scholars, this Islamic heritage has come to be established in every domain. I am certain that all legal statutes are implicitly or explicitly motivated (*ahkam mu'allalah bi illā zahirah aw khifiyyah*) and that these incentives contain the aims required by the legislators.

That is why I insist that each generation should make its own interpretation of the texts, which takes into account the circumstances of daily life. Therefore, we should read the texts and analyze them with our own eyes and minds and not with the eyes and minds of those who have passed away. That is why the Qur'an reminds us that our faculty of reason is capable of rational analysis and encourages us to use it in examining legal guidance and scriptural evidence. Nowadays, jurists who are dedicated to upholding minority rights must examine the reasoning behind legal statutes and scriptural guidance so that they can issue new fatwa in response to new problems without remaining frozen in history.

## **The Specification of Minority Rights**

1. To deal with all the problems of the European Muslim citizens according to the mercy of Islamic Law: "We have sent you as a mercy to the world"<sup>83</sup>. This implies respect for certain customs and practices foreign to Islam. The rule of customary usage (*'urf*) stands.
2. To issue every judgment based on an *ijtihad* that respects the circumstances of the Muslim's daily life in Europe as a citizen, rather than as a foreigner or an immigrant.
3. To take into account constitutional laws, the principles of democracy, and human rights.
4. To be fully based on the texts, interpreting them in a way that observes the fundamental changes in the customs and practices of European citizens with the aim of creating harmony rather than causing offense.
5. To pay greater attention to the texts of general importance, which give concrete expression to the aspirations of European Muslim citizens so as to allow them to contribute to society and to be actors not spectators.
6. To avoid importing spatio-temporal legal rulings (*fatwa*). That is to say, the ruling should be the product of current reality, not transplanted in space or time.

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<sup>83</sup> Koran (21:107)

7. To read about the Islamic heritage so as to draw inspiration from it, not to transfer it and make it part of our lives today.

8. Most of important of all is the preservation of the religious and cultural identity of European Muslims without, however, pushing them into isolation and detachment from their fellow European citizens so as to ensure an exchange at all levels of daily life.

### **The Aims of Minority Rights**

1. To preserve the religious and cultural character of the European Muslim citizens, which is achievable where Islam can be practiced without difficulty in non-Muslim societies.

2. To help these citizens to integrate positively into their new society, not by the erosion of their individuality but by their having a say in every aspect of life: politics, the economy, education, social issues, etc.

3. To contribute to presenting a new vision of an Islam that is dynamic, integrative, open, universal, and multicultural.

4. To combat isolationism and detachment as well as licentiousness and immorality so as to preserve the happy medium, which is more in keeping with the original nature of humankind.

5. To make Muslims aware of their responsibilities regarding what is happening in the world. To make them understand that the values of democracy are intrinsic to the spirit of Islam, and therefore, there is no contradiction between the two.

6. To stress the fact that the democratic path is the most appropriate means of showing the advantages of the universal humanist values of Islam.

7. To encourage European Muslim citizens to form themselves into associations, to establish their institutions, and take part in everything that is beneficial to the whole of their Western society.

8. To show them equally that according to Islamic theory, their homeland is where they live, enjoy rights, and carry out duties: “The Earth belongs to God; He bestows it to whom He wishes of his servants who do good deeds”<sup>84</sup>.

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<sup>84</sup> Koran (7:128.)



## The Prescriptive Rules of Minority Rights

### Collegiate Ijtihād

If they are to succeed, these rights must operate in the framework of a collegiate ijtihād which develops completely new doctrinal rulings, taking into account the changes that have taken place over the course of time. In effect, given the large number of new problems, jurists and specialists ought to bring new solutions. This was accepted by historical jurists since they considered that divergence stemmed from spatio-temporal difference, not from traditional evidence: “Differences are in space and time, not in authority and evidence.”<sup>85</sup> An example is the changes that Shafī‘ī made to his doctrines according to whether he applied them to Iraq or Egypt<sup>86</sup>. It is that renewal to which the Prophet referred when he said: “Every hundred years God will send to this community one who will renew its religion for it.”<sup>87</sup>

Besides this kind of deductive ijtihād, we are asking for a selective ijtihād which chooses from our Islamic heritage that which is compatible with contemporary life. No one has the right to impose on us fatwa issued for another era and another people. God did not command us to think with the minds of our dead ancestors. The Qur’an tells us: “The ears, the eyes, and the heart are all responsible for what humans undertake”<sup>88</sup>. Therefore, the renewal should be based on a new reading of the texts, which implies a new understanding so as to achieve a sound and sincere practice. That can be realized only with a collegiate ijtihād.

### The Adoption of the Easy Route (*taysīr*)

The Prophet inclined toward ease. [According to the Qur’an]: “God does not wish difficulty for you, but He wishes to purify you, to perfect his charity to you”<sup>89</sup>; “God wishes you to have ease, not difficulty”<sup>90</sup>; “God wishes to lighten your burden, for

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<sup>85</sup> Abu Zahra, in Abu Hanifa. P.

<sup>86</sup> *Ibidem*.

<sup>87</sup> Abû Dawûd, *malahim*, 3740.

<sup>88</sup> Koran (17:36).

<sup>89</sup> Koran 5:6

<sup>90</sup> Koran (2:185)

humankind has been created weak”<sup>91</sup>. This is the attitude of the Qur’an concerning doctrine and legislation.

In the attitude of the Prophet’s, we find a legislator of great awareness who took human nature into account. He asked Mu‘adh Ben Jabal and Abu Musa to make things easy, to simplify them, and introduce them gently so as not to drive people away<sup>92</sup>. The Companions also adopted the same attitude as that of the Prophet. Afterwards, as we moved further from the source, the *fuqahā’* added precautions that had nothing to do with the texts, until we reached what nowadays is called the “Islamic juridical heritage,” which is not appropriate in its entirety.

According to Ben Mas‘ūd, the Prophet cursed the pedants and fanatics three times [*halaka al-mutanatti’ūn, iyyākum wa al-ghulow fi al-dīn*]<sup>93</sup>. He challenged Mu‘adh over his lengthy prayers when he was the imam, telling him three times: “You are a trouble-maker!”<sup>94</sup>. He also criticized Ubayy ibn Ka‘b, telling him: “Whoever leads the prayers should lighten them.”<sup>95</sup>.

You all know the famous saying which goes: “True fiqh is the facility authorized by a scholar worthy of his faith; as for difficulty, it is the process followed by all the ignorant.”<sup>96</sup>.

### **Recognition of People’s Requirements and Necessities**

It is essential that these rights operate in a realistic framework that takes into consideration people’s frailty. I think that that is the basic rule of Islam itself, since it did not impose prohibitions or authorizations at one fell swoop. The recognition of necessities and giving requirements the most important status are conditions laid down in Islamic Law in general, which allows jurists of the rights of citizenship to take them into account.

In support of this stipulation is the following verse: “He who finds himself in a situation of necessity, without wishing to transgress, will be excused his sin, and God is Absolute, Merciful”<sup>97</sup>.

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<sup>91</sup> Koran (4:28

<sup>92</sup> Bukhârî, magâzî, 3998.

<sup>93</sup> Muslim, ilm, 4823.

<sup>94</sup> Bukhârî, azân, 664.

<sup>95</sup> Bukhârî, azân, 663.

<sup>96</sup> Unknown source.

We know that the Prophet lightened certain judgments to alleviate the situation and issued authorizations appropriate to the immediate requirements. An example is the case of Abd al-Rahman ibn Awf and Zubayr ibn Awwām, who were scratching their skin. Consequently, the Prophet allowed them to wear silk, despite the ban on silk for men.

### **The Evolution of Practice and Tolerance of the Non-Practicing**

Gradual implementation is a rule that cannot be ignored and should be respected in every kind of practice and religious observance. Avoiding the making of value judgments is a Qur'anic recommendation and was practiced by the Prophet.

Even the functioning of the universe respects this rule, since nature evolves unceasingly but gradually and conforms to precise stages. Humankind is the most striking example, for the fetus cannot escape these regular, steady stages of evolution. The biologists know a thing or two about that.

Islam forbade harmful things gradually. Wine was prohibited in three stages over nine months. At the beginning, the ritual prayer of two *rakaas* was imposed. Then it was increased for those at home and kept at the former level for travelers, according to 'Aishah.<sup>98</sup>

As for social, economic, or educational reform, it must be implemented within the law, while respecting others who do not have the same view of things as we do. What the Muslim citizen considers to be wrong can be seen by his European fellow-citizen to be right. Therefore, we should not impose our views, but always hold a dialog, discuss, and debate constructively: “and discuss it constructively with them.”<sup>99</sup>

Even within the Muslim community, there should be respect for the earlier rule. We have the example of the Islamic headscarf in France, which was rejected not only by the non-Muslim citizens, but equally by the non-practicing Muslim citizens, and sometimes even by the practicing Muslims. Therefore, it is a question of time and dialog. The headscarf is not really raising serious problems, provided that it does not lead to other restrictions on the French citizens who wear it.

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<sup>97</sup> Koran 2:173).

<sup>98</sup> Ahmad, ançâr, 25133.

<sup>99</sup> Koran 29:46.

## **Knowledge of Reality**

These rights will remain inadequate if they are not based on the study and analysis of the daily life of the European Muslim community in each country. Indeed, the jurist himself cannot aspire to know about life in the West in detail. The problem is aggravated when those who issue legal rulings (*fatwa*) come from abroad. They do not have a sufficient knowledge of the circumstances of Western life, and, consequently, their *fatwa* are flawed by such serious ignorance. That is why we insist on training jurists, educators, and imams here in Europe, instead of importing them from elsewhere.

The transformation of the fatwa is an unavoidable juridical rule recognized by all the Muslim jurists, ancient and modern. Therefore, before issuing whatever it may be, we must call upon the specialists which we need in the various fields. The analyses and studies of reality give jurists a clear idea of the problem to be tackled, and, consequently, the fatwa will be appropriate to the problem.

When experts' evaluations tell us that house purchase, the creation of businesses, and the establishment of economic projects help European Muslim citizens to emerge from economic stagnation and assure them of a certain level of social and financial prosperity, and that it can be done only with a bank loan, I cannot see why some *fuqahā'* continue to forbid that. They do not give any consideration to the rules of exception and necessity, cited above. They prefer the Muslim community to be sunk in poverty, delinquency, and state welfare, despite the existence of a solution, be it partial.

## **Concentration on the Group without Neglecting the Individual**

For minority rights to be beneficial and of wide interest, they must attach greater importance to the needs of the community. The preservation of its culture, religion, values, and cohesion should be the top priority. It is true that the ancient *salaf* attached greater importance to the needs of the individual. This was on account of the fact that the group was not in danger and its social, political, and economic cohesion was guaranteed by the various state institutions. Today, in contrast, it is the group that must prevail to consolidate the same goals as in the past.

The jurists who are currently dealing with minority rights should take into account not only the present state of the community but also its future and its aspirations, even

when that relies on some compromise in certain aspects of political and economic life especially. The Qur'an addresses the community of believers, even when it is a question of the individual: "O you who believe;" "O people." That is part of the plan to reinforce solidarity and mutual help within the group. It is important that scholars legislate for a better future within the concept of preserving the community, which, itself, preserves the individual.

The Qur'an says: "Verily, this Brotherhood of yours is a single Brotherhood, and I am your Lord and Cherisher: therefore serve Me (and no other)."<sup>100</sup> ; "The Believers are but a single Brotherhood: so make peace and reconciliation between your two (contending) brothers; and fear Allah, that ye may receive Mercy."<sup>101</sup>.

### **The Integration of Women in Every Aspect of Life**

I think that Islamic Law will continue to sink into serious stagnation under the influence of the deceptive interpretations by a few ridiculously formalist and dogmatic minds. And Islam will continue to descend, little by little, into a dangerous lethargy if enlightened minds do not react courageously and strongly at the beginning of the twenty-first century.

It is equally important that a feminist movement is initiated among the European Muslim citizens in reaction to the retrograde Puritanism, whose effect tends toward the increasingly strict seclusion of Muslim women at the time when the community has a greater need of them than ever.

The jurists and scholars should combine their efforts to launch an appeal for reform in every corner of Europe. They should preach a return to the social liberalism established in the early years of Islam, whose true principles have been totally blurred. We will see subsequently that this energetic feminist enthusiasm will bear fruit, God willing.

In contrast, Arab/Muslim women knew how to take advantage of the liberal-mindedness of the Muslim legislators in the early centuries of Islam. Indeed, from the early decades of the Hegirian era, the wide and effective participation of women enabled them to make a name for themselves alongside men in the social and cultural life of the Muslim community. 'Aishah, the daughter of the first Caliph and wife of the Prophet, must have been raised according to the new principles and achieved the aspirations of women. Before the age of 20, her profound learning made her one of the

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<sup>100</sup> Koran 21:92.

<sup>101</sup> Koran (10:1

most outstanding figures of the epoch. The leading Companions of the Prophet used to come to consult her on questions of jurisprudence, history, literature, and even medicine.

### **WOMEN AND SCIENCE**

Formerly, women's field of cultural influence was expanding more and more. Already, Umm al-Darda was giving public lectures in the Jerusalem Mosque, which were attended by Emir Umayyad Suleiman.

Shafi'ī, founder of one of the four leading schools of Islam, was the disciple of the famous Nufaysa, conference organizer in Cairo. Ibn Hajar al-Asqalany, one of the well-known imams in Islam, would have been trained, together with fifty of his co-disciples, at the school of 'Aishah al-Hanbaliyah, as well as that of Zaynab, author of treatises on law and Hadith.

In his biographies, Ibn Hajar refers to more than fifteen hundred women, among who are represented jurists and "scholars." Al-Sakhawy devoted a whole volume to the intellectual women of the ninth century AH, of whom several originated from Fez.

Al-Suyuti devoted his *Nuzhah* to the biography of 37 women poets. Ibn Asākir was the disciple of 81 scholar women (*'alimāt*).

Al-Zahaby preferred women as transmitters of hadith because, in his view, they were more scrupulous in their objectivity and scientific application than their male colleagues.

In every age, Muslim women have given proof of their intellectual efficacy. Some of the greatest figures in Islam, such as Ibn Khallikan, al-Baghdadi, al-Zamakhshari, Ibn Hajar, and others owe much of their scientific renown to their female contemporaries. According to Ibn al-Imad, the death of Umm al-Khayr, a great specialist in the Traditions of the Prophet, marked the decline in this science for a long time.

Unaydah's conferences brought together an audience of 500 people of both sexes. Ruqayyah, the grand-daughter of Ibn Mazrā, was considered – according to al-Şafadi – to be the most celebrated transmitter of Hadith in her time in Egypt, Syria, and Madinah. There were others specializing in the various branches of religious sciences and literature, such as: 'A'ishah of Damascus (grammarian and rhetoricist), 'A'ishah of Jerusalem (transmitter of Hadith and teacher), and al-Rudiyyah Bali, who knew by heart the *Kāmil* of Mubarrid and the *Nawādir* of al-Qāli.

Faṭimah, daughter of Jamāl al-Dīn al-Dimashqī, achieved degrees in education from most of the doctors of the seventh century AH in Syria, Hejaz, and Persia. Faṭimah of Samarkand was the author of numerous treatises on jurisprudence and Qur'anic

sciences, which achieved a brilliant success. In the tenth century AH, Fatima Qamirizān was in charge of two large institutes. Bint al-Sâyigh was a professor of medicine at the Mansuriyah Institute in Egypt. Shahdah Daynuriyyah, one of the leading lights of the twentieth century AC, published numerous works on theology and law. Examples abound in the other domains of thought and art. We cite only Asmā, who composed a poem in honor of al-Muwahid ‘Abd al-Mu’min, and Taqiyyah, author of epics and works inspired by Bacchus (the god of wine and the grapevine in Greek mythology).

‘Aishah al-Bahuniyyah, to whom we owe invaluable works on literature and jurisdiction, as well as a collection of learned legal rulings, was also responsible for rulings on administrative and philological topics and made forceful and helpful intercessions to the princes of her era.

There were innumerable female artistes in music and lyricism. Among them, hundreds of singers had aroused everyone’s admiration in all the Eastern capitals.

Women judges were already known in the marketplace during the time of ‘Umar, the second Caliph. An Abbasid majordomo used to hand down judgments one day per week.

Women were also admitted into the army, not only as nurses but as genuine combatants. The historian, Ibn al-Athīr,<sup>102</sup>(chap. Safiyyah) cited Şafiyyah as an example of heroism. Edward Gibb reported the gripping story of the women of Damascus, who, caught unawares by the enemy while their husbands were fighting far from the city, bravely defended themselves. They handled the logistical devices perfectly and cut down about thirty enemy soldiers with the use of sabers, lances, and arrows.<sup>103</sup>

In an episode during the celebrated Battle of Yarmuk, an army put together at the last minute imposed a humiliating defeat on an enemy battalion. Asmā, the daughter of Yazid, killed nine soldiers on her own. Elsewhere has been cited the case of several women who fought side by side with their husbands (among whom were the niece and sister of Prince Usama, at the time of the Crusades in Palestine). The example of Ghazalah, who put to flight the Ummayyad army of al-Hajjaj, has become proverbial.

### **WOMEN IN POLITICS**

The role of Muslim women in political life was no less important. Already, in 349 AH, Saty ascended the throne. That was the first time that an empress reigned at Baghdad. Later, Shajarat al-Durr had crowned at Cairo. In Mughal India of the

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<sup>102</sup> chap. Safiyyah

<sup>103</sup> Edward Gibb...

thirteenth century AC, Radiah became Queen of Delhi. She used to ride on horseback, completely unveiled.<sup>104</sup> [15] Turkan Khiatun ascended to the throne of Khurasan in the fourteenth century AC.<sup>105</sup> At the same time, the celebrated Tanzu had been reigning over Persia and Iraq. In the same century, Queen Dalshad enjoyed an extensive authority over the Iraqi provinces. It has been reported that during the Merinid era, a woman would have reigned at Tlemcen<sup>106</sup>.

### **WOMEN AND POETRY**

Literary salons had been established from the beginning in Arabia and elsewhere under the auspices of fashionable ladies, such as Sukaynah, grand-daughter of ‘Ali, the son-in-law of the Prophet. These salons, which gathered together the greatest poets of the epoch around certain well-read women, constituted genuine centers of cultural influence, which at the same time propagated the meaning of social refinement, literary taste, and artistic talent.

The celebrated poetess of Silvis<sup>107</sup>, who upheld debates on sensitive topics with her male contemporaries, complained, in a *qasīdah*, to the Muḥad, al-Manṣūr, about the administrative authorities of Silvis.

Each capital had its salon. During the ninth century of AH, there was the salon of al-Fadl in Baghdad, and that of Nazhūn and Walladah in Grenada. Ibn Jubair, an Andalusian historian of the twelfth century of AH, reported the participation of women in debates with men of letters. In his *Naḥḥ al-Ṭīb*, al-Maqqari devoted a long section to women’s poetry. According to him, the twenty-five poetesses that he mentioned held “a high position in the art of eloquence.” Grenada seems to have been the leading city of women’s literature. The blossoming of the female genius in the arts and literature was due to the widespread social freedom enjoyed by the women of Grenada<sup>108</sup>.

These fairly numerous lettered women excelled in the Arabic language. Some of them were renowned for their talent in calligraphy, such as Lubnah and Fatima (secretaries to al-Hakam II). Al-Marrakushi reported 170 female calligraphers in a

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<sup>104</sup> Ibn Battuta, Vol 2, p. 22. Cd. Arris computer 2000, Beirouth.

<sup>105</sup> Abu Al-Fida ismail Ibn Kathir, in *tarikḥ*, vol. 3, p. 148, Cd Arris computer 1997, Beiruth.

<sup>106</sup> We do not know her name because the historians’ hav not mentioned it.

<sup>107</sup> A small town near the south coast of Portugal.

<sup>108</sup> Cited by Dugat « ... » in *Revue d’Orient*, .....



single district of Cordoba. Since printing was not available, the art of calligraphy played an important role in the world of letters<sup>109</sup>.

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<sup>109</sup> The majority of the citations about women in this article is from the “La promotion de la femme sous l’égide de l’Islam” par Abdelaziz Benabdellah, Oumma.com mercredi 4 février 2004

# Micro-Mujtahids and Implementation of *Fiqh al-‘Aqalliyāt*

*Ihsan Yilmaz*

## Introduction

The Muslim definition of jurisprudence is knowledge of the practical rules of religion. Islam is a system of society, law, thought, and art— a civilization with religion as its unifying, and eventually dominating factor. In particular, family law issues have always been, to the Muslim mind, mental maps, cognitive frameworks, and a legal consciousness even more closely associated with religion than other legal matters, and therefore controlled by Islamic Law.

Thus, many Muslims in both Muslim and non-Muslim countries relate to Islamic law rather than to national legislation, especially in respect of marriage, divorce, inheritance, and other matters of property and business transactions. Some Islamic scholars have placed great emphasis on family and daily life, and not just on situations of dispute. In their view, absorption comes through mixed marriages, abandoning Muslim names, adopting permissive habits.

The continuing voluntary residence of Muslim minorities outside *dar al-Islam* has challenged the dichotomous exclusive concepts of *dar al-harb* and *dar al-Islam*. As a result, an understanding of *dar al-‘ahd* (domain of treaty, covenant), *dar al-amān* (domain of security), *dar al-ṣulh* (domain of truce), and *dar al-darūrah* (domain of necessity) in which they can practice their religion, maybe with difficulty but peacefully, has been created. Perhaps, in modern times, it is more precise to speak of *aṣr al-darurah* (time of necessity) instead of *dar-al darūrah*. For most Muslims, living under the conditions of *darūrah* has become the norm in the global village, where *darūrah* cannot be geographically defined, so the *Zeitgeist* for Muslims is a derivative of *darūrah*. The phenomenon of *darūrah* is not specific to non-Muslim countries, for the juggernauts of globalization, capitalism, secularization, and positivism are everywhere. Indeed, Zaki Badawi argues that Muslims are in a minority in even most

Muslim countries, since the concept of minority and majority in Islamic jurisprudence is related to the level of power to implement Shari‘ah in a given polity.<sup>110</sup>

### **Muslim Identity and the *Shari‘ah* in the English Context**

Religious groupings, particularly in the postmodern age, have emerged almost everywhere as a basis for denial of and resistance to assimilation. Together with ethnic minorities, they have been developing a variety of avoidance and resistance strategies. Moreover, as a reaction, they reassert their identities. A reconstruction of forms of community life has become a reality. As a result, a very diverse “postmodern” picture has emerged, in which one can easily identify the active resistance of these groups to the assimilative ambitions of the legal system. This postmodern phenomenon is clearly visible among British Muslims. Instead of assimilating or adapting along expected lines, they have rearranged their lives on their own terms.

In England, conflicts between English law and “unofficial” Islamic Law were usually seen as temporary and it was believed that ethnic minorities would soon learn and follow the law of the land. Indeed, some changes have come into existence in the Muslim socio-legal sphere, for the long interaction during urbanization and modernization have affected British Muslims' lives and identities.

However, even after many years, assimilationist assumptions about their demise have not become a social reality. Indeed, these laws and customs have frequently been the basis for the Muslims’ claim to distinctiveness, cohesion, and differential legal treatment.<sup>111</sup> The English legal system has already recognized some of the rules and regulations prevailing in ethnic minority communities.

The assumed “legal assimilation” of the Muslim ethnic minority could occur in three stages. During the first stage, Muslims might be ignorant of particular legal requirements and so customary practices would continue. During the second stage, they would learn to follow certain rules and requirements of the *lex loci* (local law). During the third stage, it might be argued that they would completely abandon Islamic Law and, in a rational progression, would adhere only to English law. However, evidence

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<sup>110</sup> Zaki Badawi, “New *Fiqh* for Minorities” (unpublished paper presented at the conference on “Muslims of Europe in the New Millennium,” Regent’s College, London, September 9–10, 2000).

<sup>111</sup> See I. Yilmaz, “Muslim Law in Britain: Reflections on the Socio-Legal Sphere and Differential Legal Treatment,” *Journal of the Institute of Muslim Minority Affairs* 20(2) (2000), pp.353-360.

does not suggest that this third stage has come into existence. The laws and customs of Muslims, among those of others, are still alive.

### **Ijtihad and *Tajdīd* in Times of Necessity (*‘aṣr al-darūrah*)**

The Shari‘ah is an essential and central part of a Muslim’s religion, for it is the core of the faith. Law in the Muslim understanding is a system of meanings and a cultural code for interpreting the world.<sup>112</sup> Islam “represents an order which governs all spheres of life, in which ... even the rules of protocol and etiquette are of a legal nature.”<sup>113</sup> Thus Muslim law must be conceived as a culture.<sup>114</sup> Consequently, questions of Muslim socio-cultural change, transformation, or renewal would inevitably arise during the discussions on ijtihad. Any new discourse or practice relating to these issues is directly or indirectly a result of a new ijtihad, and this does not have to be only in the field of “law,” as strictly defined and understood by the legal modernity.

Since the lack of recognition does not make Muslim law and legal pluralism disappear, the tools of ijtihad and *tajdīd* (renewal) maintain their relevance wherever Muslims live. That is why, especially after the decline of Muslim power and the triumph of the Western hegemony, Muslim advocates of renewal, reform,<sup>115</sup> and revival have argued for a return to the right to exercise ijtihad to facilitate reinterpretation and to renew the Islamic heritage.

Most of the responses in the late nineteenth and early twentieth centuries to the impact of the West on Muslim societies resulted in substantial attempts to reinterpret

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<sup>112</sup> Clifford Geertz, *Islam Observed* (New Haven, CT: Yale University Press, 1968); idem, *Interpretation of Cultures* (New York: Basic Books, 1973); idem, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York, Basic Books, 1983); Lawrence Rosen, *Bargaining for Reality: The Construction of Social Relations in a Muslim Community* (Chicago, IL: University of Chicago Press, 1984); idem, *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge, UK: Cambridge University Press, 1989).

<sup>113</sup> Murad Hoffman, *Islam: The Alternative* (Reading, Berks, UK: Garnet Publishing, 1993), 126; see also in detail, Joseph Schacht, *An Introduction to Islamic Law* (Oxford, UK: Clarendon Press, 1964); David Pearl & Werner F. Menski, *Muslim Family Law* (3<sup>rd</sup> edn., London: Sweet & Maxwell, 1998).

<sup>114</sup> Rosen, *Bargaining for Reality*; Rosen, *Anthropology of Justice*.

<sup>115</sup> Muslims are not happy with the term “reform” since it has connotations of the Christian Reformation, which was a radical departure from the past. They prefer the term “renewal” (*tajdīd*).

Islam to meet the changing circumstances of Muslim life.<sup>116</sup> The purpose of *ijtihad* is a return to a purified Islam by weeding out un-Islamic beliefs and practices that have infiltrated the law and life of Muslims.<sup>117</sup> For those modernists, revivalists, and activists, *ijtihad* was a prerequisite for the survival of Islam in a modern world.<sup>118</sup> They argued for the internal renewal by means of *ijtihad* and the selective adaptation (Islamization) of Western ideas and technology.<sup>119</sup>

### ***Takhayyur*: Surfing on the Inter-Madhab Net**

Classical Muslim jurisprudence has provided room for choosing minority interpretations or another *madhhab*'s view to resolve a particular problem under the heading of *takhayyur* or *takhyir* or *tarjih*. This means eclecticism, selection, or preference from among the opinions of the different schools of law or the views of individual scholars within the schools.<sup>120</sup> *Takhayyur* refers to the right of individual Muslims to select and follow the teaching of a *madhhab* other than their own.

Modern Muslim scholars are of the opinion that under *darūrah*, inter-*madhhab* surfing is permissible (*mubah*).<sup>121</sup> However, the majority emphasize that surfing is *mubah* only if *darūrah* exists.<sup>122</sup> Islamic Injunctions are largely dependent on the

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<sup>116</sup> John Esposito, *Islam: The Straight Path* (3<sup>rd</sup> edn., New York; Oxford, UK: Oxford University Press, 1998), p.125.

<sup>117</sup> *Ibid.*

<sup>118</sup> Knut S. Vikør, "The Development of *Ijtihad* and Islamic Reform," at [www.hf-fak.uib.no/institutter/smi/paj/Vikor.html](http://www.hf-fak.uib.no/institutter/smi/paj/Vikor.html) 1999.

<sup>119</sup> *Ibid.*

<sup>120</sup> Noel J. Coulson, *A History of Islamic Law* (Edinburgh, Scotland, UK: Edinburgh University Press, 1964), p.135.

<sup>121</sup> See, for instance, Faruk Beşer, *Fetvalar* [Fatwas] (İzmir: Nil, 1991), pp.8 & 10; Ahmet Kurucankhi Açı, 1998), p.8; Zekiyuddin Sa'ban, *İslam Hukuk İlminin Esaslari* [*Uşūl al-Fiqh*] (Ankara: Türkiye Diyanet Vakfı Yayınları, 1996), p.450; Hussain Hamid Hassan, *An Introduction to the Study of the Islamic Law* (Islamabad: International Islamic University, 1997), pp.345–347.

<sup>122</sup> Hayreddin Karaman, *İslam Hukuk Tarihi* (Istanbul: İz, 1999), pp.327–332; idem, "İslam Dünyasında Yeni İçtihad Teşebbüleri," in *Uluslararası Birinci İslam Araştırmaları Sempozyumu* (İzmir: Dokuz Eylül İlahiyat Fakültesi, 1985a), p.345; Vehbe Zuhayli, *İslam Fikhi Adisiklopedisi* [Encyclopedia of Islamic Fiqh] (Istanbul: Zaman, 1997), vol.1, pp.10–11, 53; Beşer, *Fetvalar*, pp.7, 8, 265, 266; Sa'ban, *İslam Hukuk İlminin Esaslari* pp.450, 451; Fethullah Gülen, *Fası İdan Fasıla I* (İzmir: Nil, 1995), pp.295–286, 288, 309.

conscience and psychology of individuals. In secular societies, where Islamic laws are not enforced by the state, this is even more so. Thus psychology is not a minor issue and must be fully taken into account, especially in inter-madhab surfing, when psychological equilibrium may be disturbed. The definition of *darūrah* is therefore of major importance here.

*Darūrah* is a comprehensive concept that covers all fiqh rulings.<sup>123</sup> This concept developed within Islamic jurisprudence to facilitate and allow for actions which are normally forbidden.<sup>124</sup> Its existence can lift a prohibition or a compulsory act. When there is *darūrah*, a mufti may issue a fatwa in accordance with the ruling of a given *Mujtahid* most suitable for the current circumstances.

To decide if *darūrah* exists is not arbitrary. There are certain limits and conditions to observe before making a decision.<sup>125</sup> If a vital interest needs to be protected, this situation is called *darūrah*. Vital interests as usually listed in *usul al-fiqh* literature may be related to the following: religion (*dīn*), person (*nafs*), offspring (*nasl*), property (*māl*), or reason (*‘aql*). In such contexts there is a well-known legal maxim: “Necessity lifts prohibition” (*al-darūrah tubihu al-mahzurāt*). A strict definition of *darūrah* allows that a primary necessity is an emergency, where one’s life or circumstance is threatened. An exception made to protect a “vital interest” cannot exceed the minimum necessary to obviate harm to that interest. If there is no permissible alternative, *darūrah* exists. The situation of *darūrah* must also exist at the present time; a possible future *darūrah* has no legal weight.<sup>126</sup>

The dissolution of *madhhab* boundaries justified by a modified understanding of *takhayyur* can be observed in the legislative attempts of some Muslim countries to modernize their societies by restructuring Muslim laws. The *takhayyur* right of individual Muslims was adopted in Muslim countries in draft legislation to justify the selection of one legal doctrine from among the divergent opinions of the four Sunni *madhāhib*, and it has been the most notable basis for reforms, especially in family law.<sup>127</sup> This use of *takhayyur* departs from the traditional understanding in which

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<sup>123</sup> Zuhayli, *Islam Fikhi Adsiklopedisi*, vol.4, p.326.

<sup>124</sup> Pearl and Menski, *Muslim Family Law*, p.64.

<sup>125</sup> See in detail, Zuhayli, *Islam Fikhi Adsiklopedisi*, vol.4, pp.326–330.

<sup>126</sup> Zuhayli, *Islam Fikhi Adsiklopedisi*, vol.4, p.327.

<sup>127</sup> Norman Anderson, *Law Reform in the Muslim World* (London: University of London/The Athlone Press, 1976), p.48; Pearl & Menski, *Muslim Family Law*, pp.19–20. The Ottoman Family Rights Law (OFRL) of 1917 is the first official Muslim law whose provisions were derived from Islamic law without

*takhayyur* was the right of the individual Muslim in a specific case and not that of a government in legislating changes for all Muslims.<sup>128</sup>

Preliminary observations and anecdotal evidence suggest that today both the official and the unofficial realms employ *takhayyur*. A close scrutiny of contemporary literature on Islamic jurisprudence and fiqh also shows many examples of *takhayyur*, of fatwas based on *takhayyur*, and suggestions for its usage.<sup>129</sup>

The inter-*madhhab* net is composed of and maintained by the following:

1. Intra-*madhhab* texts. These are traditional books of particular *madhāhib*, citing different views within the particular *madhhab*. For each issue, authors cite the views of different scholars of the same *madhhab* in turn, from the strongest to the weakest. For instance, for the Hanafi *madhhab*, the view of Abu Hanifah is cited first, then that of Abu Yusuf, followed by Muhammad al-Shaybani, Zufar, and others. The reader is advised to follow the strongest view, yet it is lawful to navigate across the intra-*madhhab* net by following the view of another. Any view can be selected. It is possible that in the near future these texts will be available on the Internet and CD-ROMs.
2. Inter-*madhhab* texts. These texts are formatted in the same way as those discussed above; however, here the views of the four major *madhāhib* on a given topic are cited for contrast and comparison. In some cases, they offer a fifth *madhhab*.<sup>130</sup> As with the intra-*madhhab* example, readers may navigate across the different

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conforming to any particular *madhhab*. In Pakistan, the Muslim Family Laws Ordinance (MFLO) of 1961 is another example. However, tension between traditionalists, who believe that the reforms militate against the basic tenets of Islam, and modernists continues regarding many legal issues. The MFLO is a particularly clear example of this controversy. The official law is widely perceived as being different from religious law and not accepted as the just law. This has led to “civil disobedience,” which has rendered the official law ineffective. There is, now, an observable gap between state law and popular practice. See, Ihsan Yilmaz, “Limits of Law: Reform in Muslim Family Law and Civil Disobedience in Pakistan,” in *Die Welt des Islams* (42) (2002).

<sup>128</sup> Occasionally the doctrine of one school or jurist is combined with another (*talfiq*). For the purposes of this study, I am not dealing with the amalgamation of *madhāhib* and hybridization. On this, see Rashid Rida, *Islam’da Birlik ve Fikih Mezhepleri*, trans. Ahmed Hamdi Akseki (Ankara: DIB, 1974).

<sup>129</sup> For the legitimacy of *takhayyur*, see Hayreddin Karaman, *Yeni Gelişmeler Karşısında İslam Hukuku* (Istanbul: Nesil, 1992), p.79; idem, *İslam Hukuk Tarihi*, pp.327–332, 339, 346, 341; Sa’ban, *İslam Hukuk İlminin Esasları*, p.443. In cyberspace, there are also frequently questions on *takhayyur*, see, for example, [http://sunnah.org/msaec/articles/madhhab\\_issues.htm](http://sunnah.org/msaec/articles/madhhab_issues.htm).

<sup>130</sup> Zuhayli, *İslam Fikhi Ansiklopedisi* is an example of this approach.

views by adopting one approach from one *madhhab* and another from another *madhhab*. Again, in the near future these texts are likely to be available in electronic form.<sup>131</sup>

3. New inter-*madhhab* fatwa books.<sup>132</sup> Contemporary Muslim thinkers are continuing the traditional attitude of considering legal diversity as a source of richness rather than a difficulty.<sup>133</sup> They reaffirm the traditional idea that dissension (*ikhtilaf*) is in fact a benefit to the Muslim community, demonstrating flexibility in the Shari‘ah. It is often reiterated that the diversity of *madhāhib* is a blessing.<sup>134</sup> Thus many scholars today, in their books on contemporary issues, give fatwas based on views of different *madhāhib*. Although they do mainly follow one particular *madhhab*, they employ *takhayyur* when necessary and thereby reach a conclusion on a given subject. In sum, although these authors use the abovementioned texts, they navigate on behalf of the reader and produce an answer. In some cases, they produce more than one answer and leave it to the individual to navigate across these reproduced fatwas.
4. Newspaper inter-*madhhab* fatwa columns. This is almost identical to the inter-*madhhab* fatwa books, but here the medium is a newspaper. For instance, a close look at some Turkish dailies, such as *Zaman*, *Yeni Şafak*, *Akit*, *Milli Gazete*, *Türkiye* and so on, shows that the attitude taken by the fiqh–fatwa columnists to *takhayyur* is positive and that they cite different views and opinions of *madhāhib* and scholars when dealing with a particular issue.
5. Radio and TV programs. In addition to newspapers and journals, with the advancement and spread of telecommunications, radio stations and television channels have their own muftis and question–answer programs. In Turkey a number of private TV channels broadcast such programs.<sup>135</sup>

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<sup>131</sup> See also, Hassan, *Islamic Law*, p.90.

<sup>132</sup> For examples of such books in Turkish, see Kurucan 1998; Beşer 1991.

<sup>133</sup> Beşer 1991, 10.

<sup>134</sup> Karaman, *Yeni Gelişmeler Karşısında İslam Hukuku*, p.80; Ebu’l Feth el-Beyanuni, *Ihtilaftan Rahmete* (Istanbul: Risale, 1989).

<sup>135</sup> See also, Brinkley Messick, “Media Muftis: Radio Fatwas in Yemen,” in Muhammad Khalid Masus et al. (eds.), *Islamic Legal Interpretation: Muftis and Their Fatwas* (Cambridge, MA; London: 1996), pp.310–320.



6. Inter-*madhhab* fatwas in cyberspace. This is no different from inter-*madhhab* fatwa books or newspaper columns, yet in this case cyberspace is the medium.<sup>136</sup> As Mandeville observes, “through various popular newsgroups and e-mail discussion lists, Muslims can solicit information about what ‘Islam’ says about any particular problem.”<sup>137</sup>

### **Micro-Mujtahids and Post-Modern Fragmentation**

In these times of *darūrah*, some young people have developed adaptive strategies to cope with the challenges of modern life. These young Muslims navigate at the *madhhab* level across unofficial Muslim law. The legal pluralism inherent in Islamic jurisprudence helps them to find answers to the dilemmas in their everyday lives. They select, eclectically and also pragmatically, a convenient answer from one of the mainstream, that is, Sunni *madhāhib*. By employing this kind of modern individual *takhayyur*, a Muslim “becomes his/her own mufti,”<sup>138</sup> or a micro-*mujtahid*, making sometimes swift decisions to solve a minor but sudden problem.

The question is no longer whether the gate of *ijtihad* is open or not but which types of *ijtihad* are necessary and which ones are to be followed. Many people and institutions claim a right to exercise *ijtihad* and indeed do practice it. Whether these are legitimate or not in the eyes of the people is another question. The problems of doctrinal authority, legitimacy, and postmodern fragmentation will still need to be dealt with.

As a result, one can observe many Muslims surfing on the inter-*madhhab* net. A Hanafi follows the Shafi‘i *madhhab* and combines the noon prayer with the afternoon one or the evening prayer with the night one.<sup>139</sup> Normally Hanafi law does not permit this. Or, surfing in the area of ablution is also possible:<sup>140</sup> according to al-Shafi‘i, if a man touches a woman, he is no longer clean, but if he bleeds, he still is. In the Hanafi *madhhab*, these two instances are diametrically opposite. Also, in the Hanafi *madhhab*,

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<sup>136</sup> For the effects of recent technologies on the transformation of Muslim concepts, see Peter Mandaville, “Digital Islam: Changing Boundaries of Religious Knowledge?”, at <http://isim.leidenuniv.nl/newsletter/2/isim/1.html>, 1999.

<sup>137</sup> Ibid.

<sup>138</sup> Murad, *Islam: The Alternative*.

<sup>139</sup> See for such permission, Türkiye Diyanet Vakfı (TDV), *Günümüz Meselelerine Fetvalar*, [Fatwas on Contemporary Problems] (Ankara: TDV, 1999), p.43.

<sup>140</sup> See for examples, [http://sunnah.org/msaec/articles/madhhab\\_issues.htm](http://sunnah.org/msaec/articles/madhhab_issues.htm).

when performing ablutions one has to wash one's feet completely, then if the person wears tight leather socks during the next 24 hours, it is enough that he touches these leather socks with a wet hand symbolically instead of washing his feet. In the Hanbali *madhhab*, one can do this with ordinary socks as well. It is thus not surprising to see some Hanafis taking advantage of this Hanbali view when they perform ablutions in non-Muslim environments where it is not convenient to wash the feet. A gold tooth or filling is not permitted under Hanafi law, so Muslims follow the Shafi'i view.<sup>141</sup> Regarding alcohol, although there is a consensus that drinking it is prohibited, its external usage is permitted by some Hanafi scholars.<sup>142</sup> Thus, surfers from other *madhhabs* usually benefit from this.<sup>143</sup> Regarding interest, Abu Hanifa and Muhammad al-Shaybani are of the view that in *dar al-harb*, it is permissible between a Muslim and a non-Muslim. Others oppose this opinion, so if an individual wants to accept interest, he follows the former view.<sup>144</sup> This is not an exhaustive list of examples. Moreover, with regard to individual surfing on the inter-*madhhab* net and micro-*mujtahids*, at this stage evidence is only suggestive but not compelling, and this area merits further research.

While some of these micro-*mujtahids* confine their rulings to the boundaries of the four *madhāhib*, many others assert that they can make their own interpretations directly from the Qur'an and Sunna.<sup>145</sup> It is even suggested that "in the absence of sanctioned information from recognized institutions, Muslims are increasingly taking religion into their own hands."<sup>146</sup> Thus, one frequently hears young Muslims say that one can now find all the necessary information on Qur'an and Hadith on CD-ROMs that even imams could not access.<sup>147</sup>

It is obvious that at the end of the day this approach will lead to millions of *madhāhib*<sup>148</sup> and there will be a postmodern fragmentation.<sup>149</sup> In traditional Islamic

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<sup>141</sup> Beşer, *Fetvalar* [Fatwas], p.180.

<sup>142</sup> Ibid., pp.183–187.

<sup>143</sup> See for examples, ibid., pp.192–193.

<sup>144</sup> Ibid., p.197.

<sup>145</sup> Murad, *Islam: The Alternative*.

<sup>146</sup> Mandaville, "Digital Islam."

<sup>147</sup> Ibid.; Abdul Azim Islahi, "Prerequisites for *ijtihad*: A Reappraisal," at <http://islamic-finance.net/research/ijtihad-islahi.html> 1999.

<sup>148</sup> Beşer, *Fetvalar*, [Fatwas], p.9.

jurisprudence, consensus (*ijmā'*) served as a brake on the vast array of individual interpretations of legal scholars and contributed to the creation of a largely fixed body of laws.<sup>150</sup> In *aşr al-darūrah*, there is a danger of postmodern fragmentation as individuals assert that they are *mujtahids* and act accordingly. In this context, a leading British Muslim scholar, Dr. Abdal-Hakim Murad of the University of Cambridge, strongly asserts that

with every Muslim now a proud *mujtahid*, and with *taqlid* dismissed as a sin rather than a humble and necessary virtue, the divergent views which caused such pain in our early history will surely break surface again. Instead of four *madhhabs* in harmony, we will have a billion *madhhabs* in bitter and self-righteous conflict.<sup>151</sup>

The leading fiqh expert of Turkey, Professor Hayreddin Karaman, points out another danger in that if there are no clear answers to contemporary questions, then Muslims might be confused and follow un-Islamic ways.<sup>152</sup> To prevent this, a new activity is required that will respect the tradition but will also satisfy the demands of Muslims in the postmodern age.

To prevent postmodern fragmentation but at the same time implement new changes and *ijtihad* without confronting problems of civil disobedience or lack of legitimacy, it seems that faith-based movement leaders with effective organizations to implement their ideas have a role to play. An example is Fethullah Gülen, who has found a wide audience for his ideas, which are described as reformative by some scholars.<sup>153</sup>

## **Ideas Implemented in the Public Sphere: Gülen and His Movement**

Fethullah Gülen is an Islamic scholar, thinker, writer, and poet. He was born in Erzurum, in the east of Turkey, in 1938. Although he did not receive any formal education after finishing elementary school, he was trained in the religious sciences informally by several

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<sup>149</sup> For a strong but informed critique of micro-*mujtahids*, see Murad, *Islam: The Alternative*. For another critique, see Sa'id al-Buti, at [http://sunnah.org/fiqh/buti\\_vs\\_salafi.htm](http://sunnah.org/fiqh/buti_vs_salafi.htm)

<sup>150</sup> Esposito, *Islam: The Straight Path*, p.83.

<sup>151</sup> Murad, *Islam: The Alternative*.

<sup>152</sup> Hayreddin Karaman, *İslamın Işığında Günümüzün Meseleleri* (Istanbul: Yeni Şafak 1996), p.536.

<sup>153</sup> Dale F. Eickelman, "Inside the Islamic Reformation," *Wilson Quarterly* 22(1) (1999), p.89.

Islamic scholars and spiritual Sufi masters. In 1958 he was awarded a state preacher's license and in the following years expanded his audience base. In his sermons and speeches he emphasized the pressing social issues of the times. He has inspired many people in Turkey to establish educational institutions that combine modern sciences with ethics and spirituality. His efforts have resulted in the emergence of the Gülen movement, a faith-based collectivity whose boundaries are extremely loose and difficult to specify. The movement depends on its members' recognition of Gülen's ideal cognitive *schemas* and the *Nur* (Light) doctrines.<sup>154</sup>

By exercising *ijtihad* without flagging it as *ijtihad*, Gülen reinterprets Islamic understanding in tune with contemporary times and develops a new Muslim discourse that is based on

the synthesis of Islam and science; an acceptance of democracy as the best form of governance within the rule of law; raising the level of Islamic consciousness by indicating the connection between reason and revelation; and, achieving this-worldly and other-worldly salvation within a free market and through quality education.<sup>155</sup>

In short, Gülen's interpretation of Islam seeks a compromise with the modern living world. He asserts that an understanding of secularism existed among the Seljuks and Ottomans: they employed *ijtihad* in worldly matters, and enacted laws and decrees to respond to the challenges of their times.<sup>156</sup>

Some of the elements, if not all, in Gülen's discourse may not be unique to him; there have been a number of Muslim intellectuals and *mujtahids* who have developed

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<sup>154</sup> Many root paradigms are recruited from Said Nursi's magnum opus, the written discourse of Bediuzzaman Said Nursi, who lived from 1876 to 1960 and authored several volumes of Qur'anic exegesis known as *Risale-i Nur Külliyyati* [The Epistles of Light], Uğur Kömeçoğlu, *A Sociologically Interpretive Approach to the Fethullah Gülen Community Movement* (Istanbul: Bosphorus University, 1997), pp.1–2; see also, Kömeçoğlu, "Kutsalile Kamusal: Fethullah Gülen Cemaat Hareketi," in Nilüfer Göle (ed.), *İslamın Kamusal Yüzleri* [Public Faces of Islam] (Istanbul: Metis, 2000), pp.148–194; for Nursi, see John Obert Voll, "Renewal and Reformation in the Mid-twentieth Century: Bediuzzaman Said Nursi and Religion in the 1950s," *The Muslim World*, 89(3–4) (1999), p.248; Serif Mardin, "Nurculuk," in John L. Esposito (ed.), *The Oxford Encyclopedia of the Modern Islamic World* (New York: Oxford University Press, 1995), vol.3, p.256; see also in detail, Serif Mardin, *Religion and Social Change in Modern Turkey: The Case of Bediuzzaman Said Nursi* (Albany, NY: State University of New York, 1989).

<sup>155</sup> Hakan Yavuz, "Cleansing Islam from the Public Sphere," *Journal of International Affairs* (Fall 2000); see also, Ebru Altınoğlu, *Fethullah Gülen's Perception of State and Society* (Istanbul: Bosphorus University, 1999), p.102.

<sup>156</sup> *Ibid.*

new ideas and understandings in the face of the challenges of modernity, without making concessions from the Islam of the past. Yet what makes Gülen unique is that as a leader he has successfully persuaded and mobilized many people – numbering a few million at the present time – to establish institutions and to put his discourse into practice in over 50 countries.

Given his strong influence on Turkish society in general and his followers in particular, Gülen’s ideas regarding legal pluralism, renewal, *takhayyur*, and *ijtihad* are likely to find an appeal and to have a chance of being implemented in the future. What follows is an outline of some of his ideas on these issues.

Gülen sees diversity and pluralism as a natural fact.<sup>157</sup> By referring to the Turkish Islam of the Seljuks and Ottomans and to their practice of religious pluralism, he underlines that a legally pluralist system existed during these times as well.<sup>158</sup> Gülen believes that there is a need for *ijtihad* in our age. He says that he respects the scholars of the past but also believes that *ijtihad* is a necessity: to freeze *ijtihad* means to freeze Islam, and imprison it in a given time and space. He argues that Islam is a dynamic and universal religion that encompasses all time and space, and renews itself in real life situations; it changes from one context to another, and *ijtihad* is a major tool for this. Nevertheless, he strongly affirms that sometimes the ideas about *ijtihad* are luxurious, for there are many more serious problems challenging Muslims, and that everybody could claim the title of *mujtahid* in today’s circumstances. He places a strong emphasis on raising and educating firm believers, and is of the opinion that it is important to raise individuals who meet the criteria of a *mujtahid*.<sup>159</sup>

Regarding *takhayyur*, Gülen believes that where there is *darūrah*, individuals can follow another *madhhab* by judging the situation according to their conscience, ensuring that *darūrah truly exists*. While opposing *talfiq*, Gülen argues that keeping *madhāhib* separate will always give people a chance to navigate across them if any problem arises.<sup>160</sup>

With regard to the definition of *darūrah*, Gülen underlines that an individual can deduce whether a particular situation is one of *darūrah* or not. Yet he goes on to say that if individuals are left to define *darūrah*, then there is a danger of arbitrariness, and

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<sup>157</sup> [www.fethullahGülen.org/articles/interfaith.html](http://www.fethullahGülen.org/articles/interfaith.html)

<sup>158</sup> [www.m-fGülen.org/ eserleri/kk/laiklik.htm](http://www.m-fGülen.org/ eserleri/kk/laiklik.htm)

<sup>159</sup> Author’s interview with Gülen ,27 March 2000, New York

<sup>160</sup> Ibid.

this could possibly be against the spirit of Shari‘ah, which states that believers should sometimes endure difficulty since life is essentially a test. Gülen emphasizes that in the name of public interest (*maşlahah*) and *darūrah*, people are inclined to follow the easiest option at all times;<sup>161</sup> if everything is permitted in the name of *darura*, then the essence of religion will disappear. He argues that if the earlier generations had given permission for everything and relaxed the requirements, then today there would be nothing left as far as religion is concerned.<sup>162</sup> Gülen suggests that a consultative body or a group of scholars can define specific situations of *darūrah* in detail, which individuals can use as guidelines.<sup>163</sup>

Gülen strongly advocates *ijtihād* committees.<sup>164</sup> He is of the opinion that it is no longer possible for individuals to be *mujtahids* on all matters (*mujtahid al-mutlaq*); *ijtihād* committees should perform this task instead. In Gülen’s view, it is quite possible that in future, people from all sorts of disciplines will meet in research centers and constitute *ijtihād* committees. He argues that these committees should consist of scholars from different subject areas who advise on particular issues. They should also use the latest technological advances of the age, including computers, cyberspace, CD-ROMs, and so on.<sup>165</sup>

To Gülen, even today some scholars can meet and try to answer some contemporary questions put to them. In future, he says, if more suitable *mujtahids* emerge, they can produce their own better solutions and *ijtihads*. For *ijtihād* committees, theology faculties could be suitable bases or the Directorate of Religious Affairs could establish such a committee or could develop its already existing fatwa committee into an *ijtihād* committee. The state can espouse one of these *ijtihads* and enact it. Muslims could then follow such enacted official law, since they are ordered to obey their rulers (*ulul amr*), as long as the latter act within the realm of Shari‘h and do not oppose its spirit. In Gülen’s view, states should establish these committees as a service to society, and he gives as an example the Directorate of Religious Affairs’ Higher Committee of

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<sup>161</sup> Ibid.; see also, Gülen, *Fasıldan Fasıla I* (Izmir: Nil, 1995), pp.285–286.

<sup>162</sup> Author’s interview with Gülen; see also Gülen, *Fasıldan Fasıla I*, pp.285–286.

<sup>163</sup> Author’s interview with Gülen. On psychology and warning of caution, see also Karaman, *İslam Hukuk Tarihi*, pp.327–332; Beşer, *Fetvalar*, pp.7, 8, 265; Sa’ban, *İslam Hukuk İlminin Esaslari*, pp.450, 451; Gülen, *Fasıldan Fasıla I*, pp.295–286, 288, 309.

<sup>164</sup> Gülen, *Fasıldan Fasıla I*, p.288.

<sup>165</sup> Author’s interview with Gülen.

Religious Affairs (HCRA). Yet if a state fails to do this, Muslims should employ civil *ijtihad*.<sup>166</sup>

## **Implementation of the New Discourse and Ijtihad in the Public Sphere**

Gülen's discourse is to be understood not only on a rhetorical level, for he encourages all his followers and sympathizers to realize his ideals and to put his discourse into practice. Although the exact number of Gülen's millions of followers and sympathizers is not known, it is agreed that it is the largest civil movement in the country.<sup>167</sup> He is now described as an opinion leader in Turkey.<sup>168</sup> Roughly every year in the print media, about 1,000 news items are reported on Gülen.<sup>169</sup> His biography, published in 1995, has entered its fiftieth edition. In newspapers he is at times referred to as the unofficial civil religious leader of Turkey.<sup>170</sup>

His movement is deemed to be moderate:

[It]can be considered “modern” in the sense that it espouses a world view centered around the self-reflexive and politically participant individual's ability to realize personal goals while adhering to a collective identity, and it seeks to shape local networks and institutions in relation to global discourses of democracy, human rights, and the market economy.<sup>171</sup>

The movement has a television network (Samanyolu TV) and two radio channels (Burç FM, Dünya FM) broadcasting in Europe, the Near East, Central Asia, and the Indian sub-continent; a daily newspaper, *Zaman*, with a circulation of 300,000 in Turkey, and is also published in 16 countries including Europe and the United States; a number of periodicals specializing in various fields; and a news agency (Cihan News Agency).

Gülen has also been successful in transforming and even revolutionizing the Muslim educational discourse by transforming it from its traditional form as practiced in the *madrasah* and Qur'anic literacy courses into the modern high school and university format. He has encouraged people to establish modern schools rather than

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<sup>166</sup> Ibid.

<sup>167</sup> Yahya Sadowski, “Book Review: Turkey Unveiled: Nicole and Hugh Pope,” at [www.turkeyupdate.com/tunveil.htm](http://www.turkeyupdate.com/tunveil.htm) 1999.

<sup>168</sup> Enis Berberoğlu, *Hürriyet*, August 10, 2000.

<sup>169</sup> See [www.m-fGülen.org](http://www.m-fGülen.org).

<sup>170</sup> Avni Özgürel, *Radikal*, March 2, 2001.

<sup>171</sup> Hakan Yavuz, “The Assassination of Collective Memory: The Case of Turkey,” *The Muslim World* 89(3–4) (1999), p.195.

traditional ones. Business people who follow Gülen's message are very active in education and have "built up a vast educational empire in over 50 countries."<sup>172</sup> People inspired by Gülen have established more than 500 elementary and secondary schools, of which almost 250 are outside Turkey, in Europe, the United States, the Central Asian republics,<sup>173</sup> Tanzania, Senegal, Nigeria, Russia, Japan, South Africa, Australia, and Cambodia; a number of language and computer courses; hospitals and health clinics; tutoring chains, six universities in Turkey and Central Asia; and almost 600 student hostels. The movement has also an Islamic bank (Asya Finans), and an insurance company. Some companies of the movement are in the music industry.

Modern sciences are taught in the schools operated by Gülen's followers. Another progressive aspect of the Gülen movement in the field of education is the raising of the educational standards of women. In the words of Yavuz,

A decade ago, this religious community was not even willing to allow their daughters to go to secondary or high schools. They preferred to send female students to the Qur'anic courses or the strictly female İmam Hatip schools. For years, Gülen publicly and privately encouraged the community to educate all their children regardless of gender. Today, there are many all-female schools and many of their graduates go on to universities.<sup>174</sup>

Gülen has changed the traditional tutoring practice of teaching by making available printed texts and audio-visual material.<sup>175</sup> Recently, the cyberspace has also come into play.<sup>176</sup> Moreover, millions of copies of these materials have been sold and distributed. The daily *Zaman* alone has distributed many of Gülen's books and audiocassettes, free of charge, to all its readers in several promotional campaigns. The movement's radio channels and TV station have been broadcasting Gülen's speeches and sermons as well. Gülen's media and publishing houses have been propagating and disseminating Gülen's discourse on several issues, such as science, modernity, democracy, secularism, dialog, modern education, etc., as well as his "ijtihad."

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<sup>172</sup> Nicole Pope, "An Ottoman Empire of the Mind," at [www.turkeyupdate.com/merv.htm](http://www.turkeyupdate.com/merv.htm) 1998.

<sup>173</sup> See for a list of some of these schools, Hakan Yavuz, "Towards an Islamic Liberalism?: The Nurcu Movement and Fethullah Gülen," in *The Middle East Journal* 53(4) (1999), p.599.

<sup>174</sup> Hakan Yavuz, "Societal Search for a New Contract: Fethullah Gülen, Virtue Party and the Kurds," *SAIS Review* (19)1 (1999), p.125.

<sup>175</sup> The transformation from one-to-one tutoring to text had already started with Nursi, see Mardin, *Religion and Social Change in Modern Turkey*. Gülen's movement has been using audio and video cassettes in addition to text.

<sup>176</sup> See for some examples, [pearls.org](http://pearls.org); [mf-Gülen.org](http://mf-Gülen.org), [fountainlink.com](http://fountainlink.com), [fethullahGülen.org](http://fethullahGülen.org), [dialoguesociety.org](http://dialoguesociety.org); [sizinti.com.tr](http://sizinti.com.tr); [yeniumit.com.tr](http://yeniumit.com.tr), etc.



*Zaman* also distributed 300,000 copies of an inter-*madhhab* text, Zuhayli's *Encyclopedia of Islamic Fiqh*, to the newspaper's subscribers free of charge.<sup>177</sup> In this work, the author cites the views of the four Sunni *madhāhib*. In some cases, he even cites the fifth *madhhab*.

Interfaith dialog all over the world is on the movement's agenda. In the countries where it operates, it either establishes interfaith organizations, associations, and societies or is in close contact with people of faith. In the schools that Gülen has encouraged his followers to establish, Muslims, Christians, Jews, Buddhists, Shamans, and others study together.<sup>178</sup> *Zaman* employs Jewish and Christian columnists, who contribute regularly.

The movement brings together scholars and intellectuals regardless of their ethnic, ideological, religious, and cultural backgrounds. The Journalists' and Writers' Foundation functions as a think-tank on related issues. The Abant Platform is a result of the attempt to find solutions to Turkey's problems regarding sensitive issues such as laicism, secularism, and religion. A new theology, as it were, has been created in the Abant Platform.

Gülen has also encouraged his sympathizers to work on contemporary issues such as genetic engineering, organ transplantation, music, art, modern theology, *tafsir*, Muslim-Christian dialog, and secularism, and possible Islamic responses to these issues.<sup>179</sup> The movement's publishing houses – Nil, Kaynak, TÖV, Truestar – have supported and published these works. Many of Gülen's followers publish papers and books and write Ph.D. theses on these very topics. New fatwa books are published by these publishing companies, too. The theology journal *Yeni Ümit* has been disseminating these ideas since the early 1990s. A new intelligentsia on the lines of Gülen's discourse has also been evolving.

In short, "Gülen is the engine behind the construction of a 'new' Islam in Turkey."<sup>180</sup> Even though there has not been any discussion of *ijtihad*, neo-*ijtihad* or *tajdid* within the movement, it is obvious that all these developments and activities are the results of Gülen's *ijtihads*, even though he would neither assert nor admit that they were so. Put differently, what he does can be labeled "ijtihad (and *tajdd*) by conduct."

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<sup>177</sup> Zuhayli, *İslam Fikhi Adsiklopedisi*.

<sup>178</sup> Author's interview with Cemal Uşşak (Istanbul, September 3, 2000).

<sup>179</sup> Author's interview with Gülen.

<sup>180</sup> Yavuz, "Societal Search for a New Contract," p.121.

People in his movement, believing that he is capable of reinterpreting Islam to respond to the necessities of the time, follow in his footsteps, put into practice his discourse, and realize his ideals.

### **Future Prospects: Neo-ijtihadh and Faith-based Movement Leaders**

Muslim legal pluralism is an everyday reality in both Muslim and non-Muslim societies. By surfing on the *inter-madhab* net, Muslims have successfully responded to the changing social and cultural contexts and have found solutions within Islam without abandoning their Muslim identity and law. Even though these surfers are not always psychologically comfortable with what they do, at least it helps them to feel that they are still operating within the limits of the Shari‘ah.

Modernists, revivalists and Muslim activists stress the dynamism, flexibility, and adaptability that characterized the early development of Islam. They argue for internal renewal through *ijtihadh* and selective adaptation (Islamization) of Western ideas and technology. Several Muslim scholars have sought to demonstrate a clearer understanding of the origins and development of Islamic law that provides grounds for ongoing reinterpretation and renewal to meet the needs of changing Muslim societies.

Esposito argues that even though earlier reformists and advocates of the new *ijtihadh* “attracted a circle of followers, these reformers were not succeeded by comparable charismatic figures, nor did they create effective organizations to continue and implement their ideas.”<sup>181</sup> It is for this reason that the role of intellectual leaders, especially the leaders of faith-based and faith-inspired movements, gains importance.

In the postmodern age, people are more inclined to be independent, to judge for themselves, and to select from different views. Thus, it seems that, from a sociological point of view, in the future, there will be a number of “competing’ fatwas and *ijtihads* in the “market’ and people will choose from them. Already, we see many people and institutions claiming a right to exercise *ijtihadh*. Whether these are legitimate in the eyes of the people has to be tested.

If a state makes *ijtihadh*, it could end in civil disobedience, as in the case of Pakistan. If the *ijtihadh* is civil, then some people will freely adopt it and some will not. However, at this point we encounter the problem of postmodern fragmentation as a result of the activities of postmodern Muslim surfers on the *inter-madhab* net and

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<sup>181</sup> Esposito, *Islam: The Straight Path*, p.145.

micro-*mujtahids*. In addition, in the light of Esposito's aforementioned remarks, it is more essential to implement new discourses and *ijtihad*s with effective organizations, followers and sympathizers, rather than to produce them.<sup>182</sup>

The leaders of faith-based and faith-inspired movements exercise or advocate *ijtihad* and, most importantly, they have the means to implement their ideas in the civil realm, even though in most cases they do not label or flag this as *ijtihad* or *tajdīd* for different reasons. Since people follow the leaders of these intellectual movements of their own free will, and nobody, including the state and its laws, forces them to do so, the *ijtihad* activity of the leader is in the domain of civil *ijtihad*. People will choose to follow it or not. However, it seems that in most cases they will follow it. The reason is simple: there is no coercion.

Before selecting the leader of a particular movement, people apply different criteria in their judgment of those leaders on the list, such as piety, appearance, honesty, knowledge, sincerity, and so on. Whether these criteria are relevant, scientific, or correct is not relevant because, in the mind of the individual, they are enough to legitimize a leader and his discourse and practice. Once the seekers of *ijtihad* are convinced that the leader of a particular movement is credible, then, as the new followers/sympathizers, they will put their trust in him and will follow him in all sorts of ways; the *ijtihad*s of the leader or the leader's attitude toward new *ijtihad*s are no exception.

The function of the leader of a faith-based movement in relation to *tajdīd* could present itself in three ways. First, the leader is a *mujtahid* himself and makes *ijtihad*. Second, he follows the *ijtihad*s of certain other individuals or institutions, and thereby, in a way, he legitimizes them. Third, the leader establishes an *ijtihad* committee, the *ijtihad*s of which will (may) be applied first by the leader and then by his followers. In this way, the fragmentation of the Muslim socio-legal sphere as a result of the activities of postmodern Muslim surfers and micro-*mujtahids* can be avoided while Muslim legal plurality and diversity are maintained.

Muslim legal pluralism, skillful legal navigators, surfers on the inter-*madhhab* net, and postmodern micro-*mujtahids* paving the way for possible socio-legal fragmentation will be part of our lives for years to come, and the challenge of the future will be to accommodate this reality within traditional Islamic jurisprudence. It is crystal

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<sup>182</sup> Ibid.

clear that at this point a new understanding and application of *ijtihad*, responding to and reflecting the *Zeitgeist*, will take place.<sup>183</sup>

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<sup>183</sup> See for a succinct summary of new *ijtihad* and *mujtahids* in the contemporary Muslim world, Karaman, “İslam Dünyasında Yeni İctihad Teşebbüsleri,” and *İslam Hukukunda İctihad*.

# **Marriage Strategies among Young Muslims in Europe**

*Soumaya Pernilla Ouis*

Sexual frustration, honor killings, and forced marriages seem to be problems associated with Muslims in the West, judging from media reports. However, we Muslims tend not to give appropriate attention to these very important and acute problems. Instead we continue to moralize about “bad Muslims” and Western sexual relations, perhaps in order to maintain a feeling of moral superiority over the decadent Others. In at least one sphere of human life Muslims do feel superior over the Westerners, and that is in the domain of sexual morality.

I believe that this Muslim Puritanism is something quite new in Islam, and judging from written sources of previous Muslim civilizations, one can conclude there was a much more open attitude to sexual matters, namely, that sexuality was something that could be debated openly. Islamic erotic literature was also witness to this attitude. I am pleased to see that so many of you have come to join this session and thus contribute to a great Islamic tradition of an open discussion on sexuality.

Some months ago, I initiated a research project on “Marriage strategies among young Muslims” in association with the Centre of Islamic Studies at the School of Oriental and African Studies, University of London. My aim was to focus on issues related to sexuality such as honor violence and forced marriages. However, one of my first observations after interviewing young Muslims was that the major problem they are facing today is actually that of finding a suitable partner in the first place and getting married. I will therefore in this presentation focus on that problem and discuss firstly, a marriage typology, secondly, some new strategies for meeting a partner, and thirdly, which is the main point, certain issues related to marriage and sexuality in fiqh that need some re-thinking, particularly for a minority population. This presentation is not about the research project in itself, but rather an inquiry into marital matters.

So, why is it so difficult for Muslims to get married these days? I would say that most young Muslims who have grown up in Europe no longer accept the traditional mode of arranged marriages. Then, is the problem just an outcome of increasing individualism and adopting the Western lifestyle? This is not quite true, because the traditional arranged marriages have not been replaced with the “Western way” of finding a partner either, that is, going out, dancing, drinking, etc. Most young Muslims do not approve of that way either. Furthermore, the so-called Islamic fora seem to be very gender

segregated. As a consequence, many Muslims today feel it is almost impossible to find a suitable partner.

In the little research produced on marriages among Muslim groups, I have found the typology of forced, arranged, and love marriages. It is true, and strategically important and politically correct as well, to point out that not all arranged marriages are forced marriages and therefore these two categories should be separated. However, we have to bear in mind that also the opposite is true, namely, that all forced marriages are arranged marriages. Marriages among Muslims seem to be based more on negotiations between parents and the extended family on the one hand and the children on the other, than between the two individuals who are getting married. Therefore, I think marriages could be classified in relation to these negotiations into a polarity between the individual's will/choice and the collective's will/choice.

We can relate this model to the question of *whose* will and interests determine the choice of marriage partner. If there is a complete clash, we will have a forced marriage, which is against the will of the individual. Note: there has not been an "all of a sudden" rise in forced marriages, rather an expression of increased individualism, the empowerment of the individual to say "no", or express his/her will – a sign of increased modernization and individualism, which is paradoxical.

In between, there is a "gray zone," in which we can place the arranged marriages, based on negotiations, though they can be more or less with the consent of the individual. Problem: can the will of the individual be independent of the collective? The children may lose their families if they pursue their own will against that of the collective. Many informants have said that what they believed to be their own will at the time, seemed to be purely the will of their family in retrospect.

If the marriage is based on a purely individual choice, we may call this a "love marriage," although I still argue that this is a silly category. I believe that people marry for all sorts of reasons such as economics, security, status, and convenience. However, in the Western society only love is accepted as a legitimate motive for marriage. I would say that we can conclude that some marriages more than others are based on the will of the individual, yet every one of us is a part of society and is thus influenced by the collective norms. A totally independent, autonomous, free will is an illusion stemming from the Enlightenment and that has to be problematized.

As mentioned earlier I have done a number of interviews with young Muslims and other people participating in the newly emerging Muslim dating industry. Based on these interviews, the prime concern in choosing a good spouse is considered to be his/her

religiousness. I have asked about the Islamic gender roles and how the ideal Muslim husband/wife should be (though I will leave this discussion for now). Most said that, apart from religion, family and ethnic background, education and love mattered, but that none of these factors was sufficient alone as a motive for marrying. In my analysis this so-called *Islamic marriage* encompasses values from *both* the traditional and the Western domain. Thus the Islamic marriage, as a negotiated arranged marriage, is somehow bridging the gap between tradition and modernity in a sense and Islamization thus reconciles this conflict. Both the traditional and the Western modes of marrying are rejected. Instead, a specific Islamic structure is emerging, that is, a way out of these two, a culturally accepted modernization perhaps, though not complete linear Westernization.

### **Traditional**

Consent of parents

Moral and religious values

Break with “un-Islamic” traditions

(e.g. forced marriages)

“Halal-setting”

### **Modern**

Individual choice

Love

This is theoretically a model of marrying that works for young Muslims today, a model that enables a successful negotiation between the individual contra the collective. Islam provides the legitimization for individual choice in those negotiations. However, most Islamic environments are gender segregated, and although most young Muslims are willing to marry outside their small family/tribal/ethnic group, in practice there is a huge problem of finding a spouse.

This leads me to my second point of this presentation: what to do? When I have explained the title of my project, I have been met with laughter and the comment: “We Muslims do not have any strategy for marrying at all, that’s the problem.” I repeat, although the group from which to select a partner has theoretically become larger, there is still the *practical* problem of how to meet the people in this category.

Most interviewees expressed that they felt that the best and most secure way to find someone to marry was to ask friends about it in a sort of personal networking, a way in which it was considered acceptable even for women to express their wish to get married. In this networking, married couples have a key function, for they can transfer information over the gender barriers, so to speak. This kind of networking also

functions in the Islamic organizations. Further, some people had met, and in some cases, fallen in love, in such Islamic fora, though they also said that the gender segregation in Islamic contexts was an obstacle to finding a partner. Muslim professionals stated that they found it extremely difficult to find time to “look around” for a partner, and most people felt that it was only the time spent at university that gave them a realistic opportunity to find a spouse.

However, many have turned to various kinds of matrimonial bureau, on the Internet and elsewhere, for creative and innovative ways to meet. This is perhaps a way of meeting that does not specifically apply only to Muslims, but also to all groups in society. Some felt that this was degrading in some ways, and an expression of “desperation.” However, those participating in this activity defended it, pointing out that it was a “halal-alternative.” Although inserting an advertisement was considered embarrassing and exposing one to the risk of revealing one’s true identity, it is a method that is gaining more and more interest and success for many. I have met people who have fallen in love by e-mail contact, yet there are also people who have had very negative and disappointing experiences from this kind of contacts.

Another new option is speed dating and other similar types of dating or introduction. The organizers say that they try to create a “halal setting” for such meetings. The halal setting is achieved by some kind of surveillance, such as by an imam or an intermediary, and/or by not allowing direct one-to-one contact. Instead, people meet in small mixed groups.

In my understanding, all these initiatives are innovative and admirable and I see nothing wrong with them. If we believe in the Prophetic saying that “marriage is half the religion” and that marriage is an important part of the Sunnah, then we must accept that all efforts to help Muslims to get married are good. The increasing loneliness of many Muslims living involuntarily single lives must be tackled as a distinct Muslim problem. It could be argued that the problem is partly due to the Westernization and that young Muslims are being “spoilt,” having far too high expectations by looking for perfection in the other. Nevertheless, the problem is also partly due to some of the so-called Islamic rulings on gender relations, rulings that in my understanding are not Divine but a human product. I suggest that we need some re-thinking in the field of fiqh when it comes to marital issues. I will raise five points in relation to marriage in a minority fiqh. What is marriage really about? What are the rights and duties of this contract? The early Islamic jurists explained marriage in economic/mercantile terms, saying rather explicitly that the woman sells her “sexuality” to her husband in return for his supporting her



financially. Because of this legal status of the marriage contract, the man was entitled to control his wife's movements and so on, for she should always be available for sex whenever he wanted it. Sexual refusal by the woman was classified as *nushūz*, a term that later on by the way came to include all female opposition to men. Although we may feel uncomfortable about such a description of a marriage today, this is how the early Islamic jurists saw it. If we want this to be different, then the first challenge for fiqh today is to state exactly what kind of a social contract a marriage actually is. Is it about sex, love, children, living together, or what? We need to reconsider the premises for the marriage contract altogether, and to question the meaning of the term *nushūz*. I think it would then be possible, for instance, to accuse a husband of rape within marriage, something that is almost impossible under the present Islamic rulings, where it is said that a woman cannot deny her husband sex.

Jurists today must emphasize that marriage is an individual choice and that *both* parties must give their consent in order for a marriage to be valid. Marriage is *not* a contract between families. There are, as we all know, hadiths supporting this obvious notion. We have to be strong in our position to condemn forced marriages as both un-Islamic and illegal. The same goes for violence in the name of honor. There is no excuse whatsoever to deviate from this stance, and the principle of individual choice must be enforced in our community. It is outrageous that forced marriages and honor violence are still happening among Muslims today. However, what is worse, in my opinion, is the silence among Muslim scholars. We ought to be very upset and angry when Islam is exploited for injustice. Furthermore, related to the issue of forced marriages and honor violence, is that of child marriages. In general, one has to be at least 18 years old to be allowed to marry in Europe and I think we need to adopt this age as an Islamic rule as well. We live in a different society than earlier generations, and we cannot expect our children today to be mature enough to make their own decision to marry before the age of 18. This also affects our credibility in the Western majority society, as well as of the relevance of children's rights.

We should also question the practice of strict gender segregation. How Islamic is it really and on what texts is this idea based? I think we should accept mixed gender meetings. I urge Muslim scholars to give their "blessings" to various types of dating. This would be an important mark of "halal." I would even go so far as to suggest that one has to accept meetings in the public space between a man and a woman who are interested in each other. Furthermore, what is so very wrong and un-Islamic about falling in love before marrying? Are we not human? Even the Prophet himself was

attracted to women before marrying them, such as in the case of Zainab, and allowed an emotional attachment to develop before marriage. Our only limitation is that we as Muslims do not accept sexual relations before marriage, a rule which is based on the human right to security and commitment. However, I would insist that it is an Islamic right to be able to fall in love before marriage, and as long meetings are within the public space, I see no problem with that. Many of my informants have said that one may acquire a bad reputation if seen with an unrelated member of the opposite sex. Nevertheless, I must remind everyone that unless four reliable Muslim adults have witnessed a sexual act, it is a great sin and a shameful deed to spread libel and slander.

We should re-examine the ruling that Muslim women are not allowed to marry non-Muslims. However, it is a trend that more and more Muslim women are marrying non-Muslims and I think here we need some rethinking of fiqh to allow such marriages. The textual foundation in the Holy Scripture for that rule is very weak and is open to reinterpretation. Verse 60:10 is actually about not forcing believing women to go back to their unbelieving husbands after the migration, yet the choice was still the women's. Religion at that time was about political affiliation, whereas today religion is a matter of personal choice. We cannot as Muslims maintain the idea that women are the weaker sex; most women are strong enough to keep their Islamic identity in this society. The European Fatwa Council accepted recently a Muslim female convert to remain married to her non-Muslim husband. Furthermore, I think we need to ask ourselves *why* Muslim women want to marry non-Muslims. I would not put the blame on them; rather, I would say that this is a result of their earlier disappointing experiences with Muslim men.

We have also to accept that not every marriage is about having children and the social project of living together as a family. Marriage can actually only be about legalizing a sexual relationship. Although I know that it is very controversial of me to suggest this, we must realize that our lifestyle in the West is different. Sexuality is a beautiful part of the Divine creation, and Muslims are supposed to express their sexuality within the institution of marriage. (Qur'an, 30:21, *taskunu ileiha*, translated as "rest with them," does not imply "dwelling," for it does not say *taskunu ma'aha*, but rather a psychological concept of being in a state of "peace of mind.") Within Shi'a Islam, the temporary marriage, *mut'ah*, is allowed, and although I am aware of the arguments presented by Sunni Muslims against it, I think it can be a useful basis for rethinking marriage in Islam. Marriage is a contract between two parties, a mutual agreement regarding what is to be expected from each other. What I am suggesting is that we ought to have a more flexible view of marriage: Marriage does not necessarily need to entail

living together, having children together, or even being together for the rest of one's life. The Prophet and his Companions frequently married and divorced, and there was no stigmatization on divorcees as we have today. Perhaps we must change toward a more relaxed way of understanding the institution of marriage as in earliest days of Islam. We have to allow ourselves to fail in our marriages, and to be given a chance to try again in a more dynamic marriage pattern.

Finally, I know that many of you brothers and sisters may be upset by what I am suggesting, and reject it, accusing me of Western liberalism, though I am not so sure about that. I believe that Muslims during colonization adopted the colonizers' view of sexuality, which was the Christian, Western, and rather hostile view that considered spirituality and sexual pleasures to be incompatible. This may have been a defense against the accusations of sexual decadence directed towards Muslims within the discourse of Orientalism. In summary, I am suggesting that an open and liberal attitude to sex has been a part of the earliest Islamic history and that it is time that we regain that aspect of our great tradition.

## **New Fiqh for Minorities: For the Sake of our Youth**

*Charles Le Gai Eaton*

Brothers and sisters in Islam, friends, al-salām ‘alaykum.

I must say that I feel rather the “odd man out” on this occasion, an amateur among professionals, because I am in no sense a *faqih*, an academic or a scholar. I am simply a Muslim who rejoices in his religion and is deeply worried about the young people, that is, the young Muslims in the West, and about their future.

As I see it, this conference and its theme have above all a bearing upon the future of these young people. That makes it extremely important and extremely necessary. However, if we are going to consider what they can be given as a framework for their lives, which will keep them good Muslims and at the same time preserve all that is of value, then we should go ahead with it, because it seems to me that conditions for Muslims living in the West are worsening very fast.

Now this has happened particularly, of course, since 9/11, although I think it was happening already. Hardly a day passes when I do not see something in the Press that suggests a growing hostility to Muslims in Western countries. It was only four or five days ago when I saw that the Danes, of all people, the most liberal of people, are now trying to impose strict rules upon imams: they must not preach anything that is contrary to the “values” of the Danish people and Danish culture. I have also noticed that women are not to be allowed to wear the hijab.

There are countless examples. One which I thought was most interesting came up this morning as I was reading the *Sunday Times* over breakfast. This was an article by a very well-known, liberal journalist. Of course he welcomed immigrants, he welcomed people from a different culture living in this country. Nevertheless, he added significantly that, of course if they were welcome here, then they had a responsibility to integrate with our culture, with British culture. Now “integrate” is a very tricky word, which tends to mean

different things to different people. “Integrate” can very easily mean abandoning your own identity and merging with the various identities of the host communities, or whatever you like to call them. Another small danger signal, I thought.

There is also a marked return to nationalism. A few years ago, when we all expected to be integrated soon into Europe, the idea of the sovereign nation, the idea of patriotism, these, as aspects of citizenship, were tending to be undervalued. Recently, I have noticed an increasing tendency among people wanting to say, “No, we want to hold on to our national and cultural identity.” Again, in France, we see signs of this in the whole business of forbidding schoolgirls to wear *hijab*. So how are we to equip the young of the world as they are growing up? How far do they have to compromise with the host culture, or the world in which they find themselves living?

Now there is one question that does not seem to be asked very often. If you raise that whole question about integrating with the culture, you have to add: which culture and when? The Prophet foresaw an age when time would accelerate at a vertiginous rate. We see this today. Since I always like to strike a personal note, let me make a point here from my own life, from my ancestry. Believe it or not, my grandfather, not my great-grandfather, my grandfather on my father’s side was born in the early nineteenth century almost exactly two hundred years ago. When he was a young man, the only means of transport on land was by horse, as it had been for thousands of years, and the only means of transport by sea was by sail, as it had been for thousands of years. So that is just three lifetimes. Let us consider some of the changes that have taken place within that period.

Now we see change, particularly technological change. However, psychological change tends to be influenced very much by technological change, which we see accelerating at such a rate that we wonder where it will lead. I have sometimes quoted the French philosopher, Gustave Thibon who compared modern civilization to an express train, travelling faster and faster. With every mile the comforts increase, and it is more and more easy to relax on this nice modern train. However, he says, one thing is missing, and that is a button, an “alert button” to stop the train before it runs into the buffers or the abyss. Now that may be a gloomy view. Nevertheless, things cannot continue as they are. Those compromises which may be necessary on the part of the Muslims with

this culture, with this civilization, are strictly limited by the certainty that this culture, this civilization cannot continue for long in anything like its present form.

Now there is one more thing concerning our host communities, which I suppose is a useful term. When Muslims began to come to the West, people thought, “Well, this is just another funny religion, and religion doesn’t matter very much, so we will welcome them, although they are from a different culture, but that’s that.” They did not realize that Islam and the claims that it makes upon us are something more than religious in the private sense, the sense of private piety. Islam is a civilization, battered, very battered, but at the very least the remnants of a great civilization, which has been guarded and kept safe to some extent by the framework of fiqh.

Now I like to make a distinction, which not everybody makes, between Shari‘ah and fiqh. To me, Shari‘ah is from God and fiqh is from men, however great those men. It is important not to confuse the two, or join them as if they were the same thing. Fiqh is a product of the legal mind and some of us find the legal mind rather tiresome: every “t” has to be crossed, every “i” has to be dotted, and every loophole closed. Remember: it is often through loopholes that fresh air enters the room. At the time of the Prophet, there were many loopholes – provided, I believe, by the Mercy of God – which gave a certain flexibility to the rules of human conduct. Then our *fuqaha* arrived and they did a wonderful job in preserving Islam for a thousand years. Nevertheless, the legal mind was always there and sometimes, as I said, it was tiresome.

Let me give you some examples:

Some years ago, I was asked to check the English translation of a major book on fiqh. One of the first questions that I came across was that of purity for the purposes of ablution, namely, the purity of a well. Now that is obviously affected if an animal falls into the well. The author, a learned jurist was greatly concerned about the size of the animal in relation to the water in the well, and how big the animal had to be to pollute it. I can imagine, somehow, an old man, sitting up late at night with an oil lamp burning, and thinking, “What have I left out?” You see, that is the lawyer’s obsession: “What have I left out?” He has dealt with the question of frogs falling into the well, and he suddenly thinks that in this wonderful world of ours there might be a skinless frog. Of course, a

skinless frog would decay more quickly than a normal one, so he must deal with that point. Well, that is what I call “petty attention.”

The other example is the question of being mounted on your camel when it is time for prayers. Of course, you must dismount unless there is danger nearby, in which case you can pray nodding on the camel. The lawyer points out that other than in these circumstances, the rider must dismount. Then he considers the rider who is too lazy to dismount from his camel. Well, we will deal with him: he must go through all the motions of prayer on the back of the camel. A dear friend of mine, who at the time was the Imam of the Regent’s Park Mosque, stood on a chair and tried to see how one would pray on the hump of a camel. Again, it is this trivial attention to detail.

Now, of course, the great question, the question in which you are interested, is that of ijtiḥād, which is devising, if necessary, a simplified fiqh for Muslim minorities in the West. However, as we all know, to perform ijtiḥād in principle, one must have qualifications which are rare even among good Muslims. Therefore, I am afraid that to some extent the standards have to be reduced, because today all standards are reduced. none the less, what has to be avoided is the private ijtiḥād of this individual or that one, making up his rules inevitably to suit his own convenience. However, it is a very, very difficult task, because if we rely on the consensus of the community, I am afraid that the answer is: there is no consensus. There is no consensus here amongst British Muslims; there is no consensus amongst the Muslim Ummah, so that is not a great help in applying ijtiḥād,

Then, of course, there is the question of analogy. Again, so much has happened since the time of the Prophet that analogy becomes more and more difficult. The connection between the actions of the Prophet and the actions that we perform today is virtually broken. Can you devise an Islamic method of parking based on the way the Prophet tethered his camel? Much more important, however – and this is something that affects the Muslim Ummah as a whole, although obviously the Muslim minority is at the forefront – is the question of technological and scientific developments. What is the proper Islamic attitude to genetic engineering? Now that is an absolute stumper, because where can we turn for clear-cut advice? For so many centuries Muslims felt that they could receive firm, conclusive advice on almost any problem. Here we are on the horns

of this appalling dilemma, and all we can fall back upon really is the spirit of Islam in as far as we can absorb it by studying the Qur'an and the Sunnah,

This, finally, is the yardstick. If we are filled with love for Islam, with the feeling for Islam – and I am talking about an inner feeling – then there is some possibility that we can make valid judgments in this sort of context. Nevertheless, it is unlikely that we will agree,

Here I come to an area of great importance. We are, I believe, a quarrelsome people. We love nothing more than to quarrel about questions of religion, which totally drains the strength of the well-being of the community. We simply cannot afford it. This sort of fierce argument and dispute, often about minor points, is a luxury that we can no longer afford if we hope to be a community that figures for something in the lives of the countries within which we find ourselves. There is, therefore, a simple rule which I believe that Muslims must adopt, that is, simply to “agree to disagree.”

You see, I have asked so often why there is all this quarreling and disagreement. I remember a story told to me by a friend of mine, an elderly Indian Muslim, at the Regent's Park Mosque. He remembered as a boy living in an area of India where Muslims and Hindus lived very peacefully together. Of course, this was long before Partition and so on.

He said: “I always enjoyed going to Hindu households when invited as a boy, because they talked about fun things, and I didn't really like going to Muslim households because all they did was argue about religion,” and that, of course, for a school boy was extremely boring.

Now, I think one reason for this is that our faith – Islam – is based upon particular certainties: the certainty that the Qur'an is an integral Revelation; the certainty of the mission of the Prophet; the certainty that he is the last Prophet; the certainty that there had been prophets before him from the beginning of time, and so on. These are a few definite statements with which we agree or we are not Muslims. I believe that this sense of certainty, this sense of being able to say “this and this and this” has leaked into private opinions. When someone believes something very firmly, or very strongly – although it may not be based upon the Qur'an and so on – he/she is convinced that this



is the truth. That conviction often adheres to cultural practices and it is cultural beliefs that again tend to divide the community.

Whatever happens concerning the consideration of a fiqh for minorities, it must certainly be flexible or else young Muslims will be driven away. We have to be practical: we have to face facts in a Western environment, a doubting, questioning environment. Young Muslims are not prepared to be held in an absolute vice. They will rebel – and they do, as many, many, many of you know. They rebel in the face of their fathers. Insh'Allah, they may come back later on. The 18-year-olds, the 19-year-olds are tempted by the pub and what have you. Sometimes the parents do not understand the problems which their children face, and which cause them to abandon their religion. That is why flexibility is necessary,

So that is why I was fascinated when I arrived later in the morning to hear a discussion in progress about *mutta'*. It reminded me immediately of a very tiresome and irritating evening about three to four years ago, when I was in Los Angeles and had to give a talk to the Muslim students' Islamic Society. As with all proper conferences or organizations we started late, very late, and we were running later and later. Then the students wanted to take me out to dinner and all the restaurants were closed, and so on. Anyway, three of these boys drove me back to my hotel, by which time, after a thirteen hour flight the previous day, I was almost dead on my feet.

They said, "Could we just – there's a private matter we want to talk about – could we just come in for five minutes?" My heart sank because I knew what they wanted to talk about. They came in and sat on my bed. Of course, the question was about sex: in short, here we are, we are accepted by fellow students as Americans. This, of course, was before 9/11. I am not sure if they could say the same today. None the less, they were accepted by their fellow students and expected to have affairs and so on.

Nevertheless, the point that one young lady made during that questioning just recently struck me very forcibly. It was about making it easier for Muslim women to divorce. That is, of course, where the whole question of the position of women in Islam is so important if we are considering a fiqh for minorities. Indeed, it is one of the essential aspects.

I shall just mention one final point. Many of the early jurists were very severe on the Muslims who emigrated from what was said to be the *Dar al-Islam* to the *Dar al-Harb*. No doubt they were right, because they foresaw that the children of these emigrants might not adhere to Islam. However, emigration for the purposes of *da'wah* were always approved and must be approved. As normal Muslims, most of us cannot go out to perform *da'wah* work necessarily. Nevertheless, there is one type of *da'wah* that every Muslim in Britain, France, and America can perform, and that is to set an example of kindness, decency, and friendliness. People will say: "Well, these Muslims are really not so bad. We were told they were so disagreeable, so unfriendly, so unpleasant, but those I have met are really rather nice people." Believe me, that is the best *da'wah*!