The Congruity of Islamic Modernist Legal Thought: The Case of Muslim Minority *Fiqh*

Kamal Hussain

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Kamal Hussain

Abstract:

In recent decades with Muslim global migration patterns, modernist Islamic thought has extended to the relatively new context of large numbers of Muslims living in non-Muslim countries. This thesis views this as a continuation of modernist thought which deserves to be evaluated in its own right with regard to its aims, methodology and findings. This study observes continuities and discontinuities with modern thought and classical *fiqh*. I aim to analyse a selection of primary sources on particular chosen topics, in relation to contemporary socio-political developments as well as internal consistency and the history of Islamic *fiqh*.

Muslim minority *fiqh* is a relatively new phenomenon in Islamic legal history. This new development of modernist thought needs to be evaluated in its own right such that its aims, content, and nature can be understood in its totality as a body of opinions and rules which display both continuity and discontinuity in relation to modernist thought and *fiqh*. I examine the work of selected minority *fiqh* scholars, including al-Qaraḍāwī, ʿAbdallāh Bin Bayya and ʿAbdallāh b. Yūsuf al-Judayʿ to name but a few.

The claim to authenticity in terms of upholding the fundamentals of religion is a key assertion of modernist thought. It does not opt for modernism for its own sake but rather consonance with the times is seen as an abiding facet of Islam which has been lost as intellectual rigidity set in.

I aim to critically assess the modernist response, as represented by minority *fiqh*, to the challenges and questions of modernity. There is also a need to assess the contribution and impact minority *fiqh* has made not only to the needs of the Muslim minority communities in the West, but also to their involvement and engagement with the wider non-Muslim society.

Acknowledgements

All Praise to Allah, by whose Mercy and Beneficence this thesis has been completed. The journey has been long and arduous and could never have reached its destination without the help of Allah (swt). The Prophet Muhammad (saw) said: 'Whoever does not thank people has not thanked Allah.' (Sunan Abū Dāwūd 4811)

With this in mind, I wish to thank Dr Katherine Zebiri, my principal supervisor, whose *ṣabr* and patience with me have been indefatigable as I laboured through the chapters while juggling another law degree and then a legal career at the same time. Her critical but constructive advice and help were indispensable in completing this thesis.

I also wish to express my immense gratitude to Professor Abdel Haleem, whom I consider my mentor. He was my tutor during my B.A. and M.A. and then supervised the final year of the thesis submission. Without his feedback and support, I would not have been able to pass the final furlong of this journey. He was the person who first planted the idea in me to pursue a life of academia in Islamic studies (whose wisdom I did not fully appreciate at first) but came to grasp with the passage of time, culminating with the current thesis. I will always be grateful for his help, advice, and knowledge I gained from him.

I wish to acknowledge and thank Dr. Safaruk Chowdhury, my close brother in faith. I am indebted to him for his hard work proofreading the thesis. Without that, the thesis presentation would not be what it is today. I owe him a deep gratitude for his help and contribution. I also wish to thank other friends and family who motivated me with their words of encouragement, which has meant a lot to me. May Allah bless them all.

My family is at the core of who I am and whatever I have achieved. Firstly, I dedicate this thesis to my late parents for the most treasured thing they could have given me, their *du'ās* and supplication to Allah. This journey, and many other endeavours I have undertaken, has been possible only due to the patient support of my dear wife Jesmin Aktar and my beloved children Zahra, Tāhir, Jareer, Shaymā, and son-in-law George 'Abd al-Rahmān. I especially wish to express my love and appreciation for Shaymā (my youngest daughter), who acted as an examiner and prepped me for the viva. I want to mention my grandson, Idrīs (nearly one), whose advent has filled me with happiness and pride and made the anxiousness of the final stretch of the thesis submission all the more bearable.

Finally, I would be remiss not to mention Omar Johnstone, who was there at the beginning of my life as a young student of knowledge, who inspired me and motivated me to study the Dīn and, which left such an indelible mark on me. I was a lost teenager; I found him sitting in the mosque one day many years ago and asked if he would teach me Arabic. He took me under his wing and taught me Arabic, Qur'ān, *ḥadīth* and much more. He set me off on the path of knowledge and advised me to enrol at SOAS and study under Professor Abdel Haleem. He was and is my older brother in faith, and I thank him and Allah for that brotherhood.

The Congruity of Islamic Modernist Legal Thought:

The Case of Muslim Minority *Fiqh*

Kamal Hussain

Introduction

Ever since the rapid destabilisation of the Ottoman rule in the 18th century and the ascendancy of Europe, Muslims scholars, intellectuals and writers have been attempting to contend with modernity and its implications vis-à-vis their religion. So, in the first wave during the 19th century and into the 20th century we saw the likes of Jamāl al-Dīn al-Afghānī (1838-1897), Muḥammad ʿAbduh (1850-1905), Qāsim Amīn (1863- 1908), Rashīd Riḍā (1865-1935) in the Middle East and Sir Sayyid Aḥmad Khan (1817-1898), Chiragh Ali (1844-1895), Sir Muhammad Iqbal (1877- 1938) and others in South Asia attempting to make sense of the modern world and its implication on Muslims and articulate a response in tune with the times.

This continued throughout the 20th century where we also saw the fundamentalist reaction[1] to modernism through the writings of Sayyid Quṭb (1906-1966), Abū Aʿlā al-Mawdūdī (1903-1979), Morteza Motahhari (1919- 1979) and others. The debate raged amongst them as to the *aṣāla* or authenticity of this modern articulation of the religion; is it true to the original premises and postulations of religion or has it strayed and lost its soul to modernity? The discussion and debate at that time was conducted mostly around the issues that presented themselves during the course of the history of Muslim experience with issues posed modernity; traditional education or rational sciences and the reform of education systems, politics and the form of government, democracy, human rights, status of women and other lifestyle issues whether in terms of dress, customs or behaviour.[2] The discussion tended to be transnational in nature, in the context of a declining Muslim world and its relationship to an

[1] Bayram, Aydin, *Modernity and the Fragmentation of the Muslim Community in Response: Mapping Modernist, Reformist and Traditionalist Responses*, https://www.academia.edu/24872359/Modernity_and_the_Fragmentation_of_the_Muslim_Community_in_Response_Mapping_Modernist_Reformist_and_Traditionalist_Responses, p. 88.

[2] Parray, Tauseef Ahmad , *Islamic Modernist and Reformist Thought: A Study of the Contribution of Sir Sayyid and Muhammad Iqbal*, https://www.semanticscholar.org/paper/Islamic-Modernist-and-Reformist-Thought%3A-A-Study-of-Parray/e5deef1879eefd0ad50fc05aec5948feb7c84418.

ascending West and its culture and civilisation.[3] Despite the diversity of the discourse the resultant divergent taxonomy of various scholars, the broad representation of their legal discourse was modernist, even those classed as Islamist.[4]

Today, this debate is very much alive, however alongside the original discourse it has shifted to another dimension. This is where Muslims face the challenges of modernity not only in their native countries as was the case before, but in Europe and America. One look at the demography of countries in the West shows a rising trend of Muslims emigrating to these countries due to economic, educational and security reasons. The issues arising this time are sometimes new to these Muslim expatriate communities as well as the same debates and issues of the past century. What does it mean for a Muslim to be citizen in the West? To what degree should he/she participate in the political process of the host country? What does it mean to be part of an *'umma'* and its relationship to the being a citizen in a country whose foreign policy is dictated by their own national interest and maybe contrary to the interest of Muslims worldwide? How does a Muslim deal with questions of dress, employment, business, schooling, and *halāl* food? Do women have a role in the public life? What is the Muslim attitude to advances in medicine and technology? To answer these and many other questions a 'new *fiqh*' or what's known as the '*fiqh* of Muslim minorities (*fiqh al-aqalliyāt al-muslima)*'[5] has been posited by scholars such as Ṭāhā Jābir al-ʿAlwānī and Yūsuf al-Qaraḍāwī and others.

The underlining thesis of this approach has been to draw on Islam's intellectual and jurisprudential flexibility in accommodating new challenges and dilemmas. However, at the same time it has sought to provide these answers within and in accordance with its fundamental and enduring religious principles to remain rooted to what it perceives is the core and essence of the Islamic religion. The discourse of minority *fiqh* has a direct impact on how Muslims adapt to living in a non-Muslim country and how they reconcile the requirements of their religion with the requirements of their residence in the West and it is for this reason minority *fiqh* deserves closer academic scrutiny.

[3] Aydin, *Modernity and the Fragmentation,* p.74.
[4] Aydin, *Modernity and the Fragmentation*, p. 98.
[5] Henceforth referred to in this thesis as minority *fiqh*

Aims and Objectives of the Research

One of the primary aims of this thesis is to assess the legal congruity of minority *fiqh*. As a body of *fiqh* it invariably has three dimensions which we propose to study:

1. Its understanding of the subject matter of study (*tanqīḥ al-manāt*) such that the source text is connected to the context,
2. Its jurisprudence and process of derivation (*istinbāṭ*) based on its legal approach and methodology and,
3. Its application and efficacy (*al-taṭbīq wa-l-faʿāliyya*) in realising its explicit or implicit objectives.

Minority *fiqh*, being a modern development, asserts that it has developed a law that is adapted to the current context, derived from original and authentic principles, and realises certain aims. What this study seeks to do is ascertain the congruity of its legal thought in respect to the three dimensions mentioned above. How sound is its understanding of the current context? Is its derivation principled and does the idea enjoy a realistic prospect of success in achieving the aims it has set itself? Legal faithfulness intrinsically requires internal and external congruity which must be tested via scrutiny of its process of derivation (*istinbāṭ*).

As for the methodology employed in assessing legal congruity, as is the case with the thesis, it will be to compare their peripheral conclusions with the Major Sources such as the Qur'ān and Sunna and global principles (*adilla kulliyya*) they espouse to establish the *aṣāla* or authenticity of their propositions. As regards testing adaptation to the context and its efficacy, the approach I will be following is mainly sociological. The discipline of Islamic law, in its modern practise and as advocated by minority *fiqh*, may need to rely on other disciplines to aid comprehension of social trends and intellectual currents, especially when the subject matter is complex and multi-layered. This is not a new phenomenon, jurists in the past, like Fakhr al-Dīn al-Rāzī and Abū Ḥāmid al-Ghazzālī, where known for their expertise and use of logic, philosophy, and medicine in their legal discourse. In the present case, with a subject like identity and citizenship, sociological studies and the political science are a useful resource in measuring scriptural and contextual adaptation and efficacy of Muslim models of integration. Thus, the study of this subject will span the disciplines of Islamic jurisprudence, sociology, and political science. Finally, for the sake of practicality and brevity, the remit of study will be in the British context, which is perhaps one of the promising case studies for

any model of integration, Islamic or otherwise, given the diverse ethnic and religious groupings that reside in that country and the multicultural race relations agenda followed by governments in the past and the current integrationist policies of recent governments.

Essentially the current research has three fundamental aims:

a) To describe the aims, substance, and form of minority *fiqh.*
b) To undertake an evaluation of congruity and,
c) To assess efficacy of minority *fiqh* in realising its stated goals.

Below is a discussion of these aims:

The Aims, Substance, and Form of Minority Fiqh:

Critical analysis of resurgent modernist thought especially its legal form seems extended to period of Maḥmūd Shaltūt and others and has been restricted to Muslim world, but today that thought has been further developed in the context of Muslims living in non-Muslim countries. This new development of modernist thought needs to be described and studied such that its aims, shape and form can be understood in its totality as body of opinions and rules which, although it derives from past modernist thinking, but at the same time is distinct from what has come before.

Evaluation of Congruity:

The claim to authenticity in terms of upholding the fundamentals of religion is a key assertion of modernist thought. It does not opt for modernism for its sake but rather consonance with the times is an abiding facet of Islam which has been lost to its adherents as decline and intellectual rigidity set in. In this respect there is a need to assess critically the modernist response to the challenges and questions of modernity not in the sense of right or wrong, for that will depend on the individual's own intellectual inclinations and persuasions, but from the perspective of congruity and its own internal harmony between its elemental suppositions and their application to issues. So, for example, when minority *fiqh* utilises the legal principles of the 'original permission', 'necessity as determinant of law', *maqāṣid* (aims) of the *Sharīʿa*, public interest or the expandable nature of Islamic law to all times and places;

one needs to scrutinise to what extent these have been accurately and faithfully understood and applied by minority *fiqh* scholars as well as those who initially enunciated them in the classical era of *fiqh*. Similarly in the theological premises, such as the supremacy of God's Law – how has this concept been reconciled in respect of political participation and recourse to secular man-made processes of government? The study of minority *fiqh* harmony or the detection of disharmony whether in its own internal legal logic or as compared with classical sources provides us with a better understanding of the thinking, evolution, and trajectory of modernist *fiqh* as represented in its newest chapter in the Western context.

Assessment of the Efficacy of Minority Fiqh in realising its Stated Goals:

In addition to testing internal congruity there is a need to assess the extent to which minority *fiqh* has realised it goals whether strategic or legal. In what way does minority *fiqh* corpus enhance Muslim engagement and participation such that they contribute to societal progress and harmony and to what extent does the new *fiqh* articulate a convincing and positive presentation of this contribution?

The thesis will also consider the impact of this *fiqh*. To what extent have Muslims embraced or likely to embrace this thinking in their socio-political activities and relationships? What have been the responses to this discourse from various quarters whether sympathetic or critical? Also, what impact has this discourse and its practical manifestation by Muslims had on sections of the host society from government to the wider society in terms of the way in which they are perceived. Furthermore, the need to understand the contribution of minority *fiqh* is further emphasised by the political context of the 'war on terror' post 9/11 and the Prevent strategy adopted by the UK government during the Blair premiership and beyond. These are just some of the questions relating to impact and contribution the present research will consider.

Research Methods and Approach

In outlining the essence and nature of minority *fiqh* reliance will be on a discourse analysis of primary sources of minority *fiqh*, and secondary sources which touch upon this topic to describe the shape and form of minority *fiqh* purely as an explanatory account.

With regards to the question of testing congruity the existing approach to date has been just descriptive or fundamentalist in nature where the criteria for judgment has been their own respective ideological and ontological assumptions of what Islam is. In this respect it is difficult for an outsider to this debate to comment except as a descriptive account or to discern any external influence. In fact, much of the analysis of modernism and its fundamentalist critique have been in this vein. I believe there needs to be a more introspective approach which tests the intellectual consistency of these paradigms from the standpoint of their own reference points. All approaches in resurgent Islam, whether modernist or fundamentalist, seek to give legitimacy and authenticity to their contribution by referencing their thoughts to what they assert are essentially Islamic principles and standpoints. The purpose of my study will be to discern the harmony or disharmony in the referencing of their thoughts to these standpoints. Assessing the congruity of their thoughts with the principles espoused will be via recourse to the original sources, assessing how they were viewed historically, how they are viewed now and the resultant implications of how they are applied. This is a more constructive and fruitful method of assessing authenticity (*aṣāla*). So rather than testing if a particular conceptual or legal trend was true to religion as that is beset with subjectivity, we will consider how authentic it was to its own thoughts and principles, for internal consistency can be appreciated by adherents and non-adherents of any given thought, modernist or otherwise.

In respect to assessing the contribution of minority *fiqh* to social cohesion and perceptions, this will be done by first analysing exactly what the intellectual contribution is to the existing reality. In other words, what are the new or developed thoughts and vision which can potentially have an impact on how Muslims view the way forward. Also, to what extent have the legal rulings been consonant with the conceptual orientation? Have they been a practical catalyst for social harmony and engagement or a restraining factor? Finally, the ultimate test of the impact and influence of minority *fiqh* will be a study of the response to minority *fiqh* ideas and legal rulings first, from the various sectors of the Muslim community and second from the wider non-Muslim society. There will be an analysis of the reception and opposition to minority *fiqh* from various quarters to assess the extent to which it has shaped, influenced, or entrenched the Muslim view of life in the West.

Thesis Map

Although minority *fiqh* addresses a multitude of issues, the present study focuses on those topics which best represents the minority *fiqh* aims, methodology and concerns and allows us to draw conclusions as to its congruity and efficacy. With that in mind the thesis chapters have arranged based on the following topics:

Chapter 1 (The Phenomenon of Minority *Fiqh*) aims to introduce the phenomenon of minority *fiqh* from its modernist origins. It will discuss the background of the key proponents of minority *fiqh* and discuss their seminal works which are treated as primary sources in this study. The chapter will also outline the main features, goals, and premises of minority *fiqh* by which congruity and other aims of this research will be assessed in the ensuing chapters. The chapter will discuss some key secondary sources relevant to the study of minority *fiqh*.

Chapter 2 (The Legal Philosophy of Minority *Fiqh*) will engage in an in-depth study of the legal philosophy and jurisprudential principles by which minority *fiqh* scholars approach various issues faced by Muslims in the West. There will be comparative study of the minority *fiqh* legal principles and the classical understanding to assess the modernist development of these principles and their understanding in the Western context. The chapter will end with a study of the minority *fiqh* application of these principles on the issue of home purchases via interest bearing loans. We shall analyse the extent to which it was able to maintain *aṣāla* and congruity while seeking to realise of economic progress for Muslim minorities.

Chapter 3 (Citizenship and Identity) deals with one of the core aims of minority *fiqh* which is the positive integration of Muslims in their host nations in the West. It tackles the difficult issues of loyalty, belonging, citizenship and the nation state considering the classical *fiqh* and theological concepts of *dār al-Islām* (land of Islam), *dār al-kufr* (land of disbelief), *umma*, *al-walā' wa-l-barā'* (association and disassociation) and how minority *fiqh* in its modernist reincarnation in the West has navigated these ideas and ideals. In doing so we will analyse congruity between its principles and the application from a legal standpoint and draw conclusions as to the *aṣāla* (authenticity to its own legal principles). The chapter will also consider the efficacy of its proposals in realising its aim of integration and civil engagement.

Chapter 4 (Political Participation) is a natural progression from the previous chapter on belonging and identity to the issue of actively participating in the democratic systems and processes in the western countries. The chapter addresses the theological premises of minority *fiqh* in respect of God being the ultimate Law Giver and how that belief is navigated with the secular democratic doctrine of popular sovereignty. The chapter engages more than one principle, theology on one hand and on the other hand the need to integrate and seek the rights of the Muslim minority and to protect their interests. The chapter will explore the implications for congruity and efficacy in realising its goals.

Chapter 5 (*Sharīʿa* and Domestic Law): as with the previous chapter, this will consider co-existence of *Sharīʿa* and traditional *fiqh* in family law and personal status matters as they pertain to national domestic law. The chapter will start with the issue of navigating the belief in the supremacy of God's law with the need to make recourse to secular courts for resolution of family law matters such as divorce and child custody. Thereafter, the chapter will consider the extent to which a civil court judgement is binding or legitimate in *Sharī'a* law. In addition to the courts there is a question of the adoption of positions within Islamic law which run counter to host country values or their laws; what is the jurisprudential approach minority *fiqh* utilises to adopt such rules considering its own legal methodology and aim of bringing ease and facilitation. Finally, we will consider the minority *fiqh* promotion of *Sharīʿa* courts as solution and consider the extent these have realised minority *fiqh* goal of integration and their reception by government and wider society.

Chapter 6 (Convert Marriages) deals with the internal struggle and tension among minority *fiqh* scholars to follow their legal approach and arrive at fresh *ijtihād* and bring ease and seek the public interest (*maṣlaḥa*) versus the pull of traditional premises which are of a sensitive and normative nature amongst general the Ulema, past and present. The chapter will delve into the detailed jurisprudential debates amongst minority *fiqh* scholars and analyse the way legal arguments are posed even though they all claim to follow the same legal methodology. We will assess the extent to which each side is following that legal methodology or adhering to a traditional approach and the reasons for doing so. This topic engages a number of minority *fiqh* issues that are subject of our study such as congruity between legal methodology and application, the bringing of ease and the possible latent force of traditionalism still extent within modernist *fiqh* in general and minority *fiqh* specifically.

Chapter 7 (Commercial Transactions) deals with the red lines established in traditional *fiqh* such as *ribā* and *gharar* in commercial transactions and a domestic law that legitimizes, protects, and enforces those prohibitions. This is one of the challenges of modernist *fiqh*, the challenge of co-existing and navigating rules in the commercial life which are the hallmarks of the free market system. We shall see how minority *fiqh* attempts to do this in the issue of buying and trading in shares whether with stock companies or with derivatives in the futures markets. We will assess to what extent minority *fiqh* scholars were willing to challenge traditional positions to facilitate economic and business activity by Muslim minorities.

We will conclude the thesis with our conclusions in respect of the aims of this study and the results gleaned from an analysis of the legal methodology and its application on various representative topics.

Chapter 1

The Phenomenon of Minority *Fiqh*

Introduction: The Emergence of Minority *Fiqh*

Muslim residence in a non-Muslim land is not a new phenomenon to Islamic Law. Indeed, one finds mention of laws pertaining to such domicile scattered unevenly within the pages of classical juristic works. However, such treatment was brief and circumstantially limited and understandably since Muslim migration to the West, especially labour migrants from the 1950's onwards[6], is different in respect to its magnitude, scope and nature from what historians have recorded in previous eras and centuries. In the past, Muslim presence in *dār al-ḥarb* was either due to sojourns for the purpose of trade, conversion of non-Muslim residents of *dār al-ḥarb* or a Muslim land was conquered by non-Muslims and these categories have been dealt with by the jurists. However today we have Muslims making the West their home. Bernard Lewis described the situation as, *"*a mass migration – a reverse hijra – of ordinary people seeking a new life among the unbelievers is an entirely new phenomenon which poses new and major problems. The debate on these problems has only just begun."[7]

The current presence of Muslims in Western countries whether in number, their attitude or challenges is an unprecedented phenomenon in history and so is the legal discourse and response to this, both representing new phenomena.[8] According to the Pew Research Centre think tank "From mid-2010 to mid-2016 alone, the share of Muslims in Europe rose more than 1 percentage point, from 3.8% to 4.9% (from 19.5 million to 25.8 million). By 2050, the share of the continent's population that is Muslim could more than double, rising to 11.2% or more."[9] In the United States 'there are about 3.45 million Muslims of all ages in the U.S., or about 1.1% of the U.S. population.'[10] Based on their surveys they project 10% of all

[6] https://www.bbvaopenmind.com/en/articles/muslims-in-europe-the-construction-of-a-problem/
[7] Lewis, Bernard, "Legal and Historical Reflections on the Position of Populations under Non-Muslim Rule", *Journal Institute of Muslim Minority Affairs*, vol. 13, no. 1, January 1992, p. 13. For example, of early thinking on this issue see Abdur Rahman Doi's "Duties and Responsibilities of Muslims in Non-Muslim States: A point of View," or Kalim Siddiqi's view "A Muslim Agenda for Britain: Some Reflections", *New Community*, vol. 17, no. 3, 1991, pp. 467-75.
[8] Fishman, Shammai, *Fiqh al-Aqalliyyat: A Legal Theory for Muslim Minorities*, https://www.hudson.org/research/9795-fiqh-al-aqalliyyat-a-legal-theory-for-muslim-minorities, p. 1.
[9] https://www.pewresearch.org/fact-tank/2017/11/29/5-facts-about-the-muslim-population-in-europe/.
[10] https://www.pewresearch.org/fact-tank/2017/08/09/muslims-and-islam-key-findings-in-the-u-s-and-around-the-world/.

Europeans will be Muslims by 2050.[11] Some have argued the expected rise of Muslim migration is overstated[12], but regardless of the exact number the rise and the dynamics of this increase are significant even from a conservative measure. These rises and projections for the future have had social and government policy implications in terms of national security and integration.[13]

In recognition of this new dimension and even anticipation of what was to come, prominent Muslim scholars have sought to develop a new branch of law, termed 'minority *fiqh*', which deals with the myriad of issues and problems faced by Muslims residing in non-Muslim populated countries. They attempted to bring the miscellany of past juristic discussions and modern contributions together into a defined branch of law. The proponents of this new discipline like Ṭāhā Jābir al-ʿAlwānī, Yūsuf al-Qaraḍāwī and ʿAbdallāh Bin Bayya, and others have been highly influential in setting the ball rolling in this new legal discourse.

The issues touched upon by minority *fiqh* are rather eclectic in nature, spanning the full ambit of normal jurisprudential discussions with some new additions as well. So, in one page you might find a discussion on the ruling on women leading the prayer in another the ruling on cloning and use of synthetic alcohols. However, the most salient of these topics, which represents the ethos and provides direction to the diverse legal problems discussed under the rubric of minority *fiqh*, is the question of identity and citizenship. How are Muslims to define their residence in the West in terms of their self-perception and identity? What does it mean to be a Muslim living in say Britain, France or America whilst also being a member of the *'umma'*? Is there a contradiction or is co-existence possible without a price to be paid in religious terms? In tackling the question of identity and citizenship - or the nature of Muslim belonging in the West in general - Muslims scholars have had to cover within their discourse many topics. Old terms have been scrutinised such as the concept of *dār al-islām* and *dār al-kufr*, while new terms have been introduced to replace the old juristic discourse. Also, new ideas have had to be appraised considering current scriptural and juristic thinking; ideas such as nationalism and the concept of citizenship. They have also tried to tackle the thorny and sensitive issues such as loyalty and identity from a contextual and pragmatic perspective. The result has been a modern neo-*ijtihādic* conception of Muslim inhabitancy in the West.

[11] https://www.pewresearch.org/fact-tank/2015/04/15/europe-projected-to-retain-its-christian-majority-but-religious-minorities-will-grow/.
[12] https://www.bbvaopenmind.com/en/articles/muslims-in-europe-the-construction-of-a-problem/.
[13] https://jcpa.org/article/migration-from-the-muslim-world-to-the-west-its-most-recent-trends-and-effects/.

The Key Proponents of Minority *Fiqh* & their Works

Although most of the proponents of minority *fiqh* hail from the reformist-Islamist spectrum their legal tradition however can be counted amongst the broader modernist bracket. As such the study of minority *fiqh* is a study of a variety of modernist law and cannot be separated from its antecedents and roots of 19th century modernism. The minority *fiqh* legal literature can be described as the most recent manifestation of modernist legal discourse developed for Muslims living in the West. However, questions of *aṣāla*, the aims, concerns, preoccupations, challenges, and critiques of 19th century modernism has carried through and permeated the 21st century minority *fiqh*. Every *fiqh*, whether traditional or modernist, has its premises, features and influence of the historical context in which it is developed, and these are distinguishable and discernible. This new western chapter of modernist legal thought deserves to be studied in the context of the evolution and development of theses discourses and the subject of the present study.

The number of scholars and contributors to the minority *fiqh* discourse, are quite numerous (at least more than 30 contributors in the ECFR).[14] However, in this section there will be a brief discussion of the background of the founders and key proponents to gain an idea of the dominant strand of legal thought permeating the body of minority *fiqh*. We will also consider their writings which forms the primary sources of this study. As our focus is modernist *fiqh* we have selected to focus on the scholars affiliated with the European Council of Fatwa and Research (ECFR) although we will of course analyse and discuss the views of others in the respective chapters.

Ṭāhā Jābir al-ʿAlwānī

Foremost amongst the key figures of minority *fiqh*, especially from a framework and theoretical standpoint, is Ṭāhā Jābir al-ʿAlwānī.[15] He is credited as being the architect and originator for the idea of a modernist legal framework dealing with the challenges and issues of Muslims residing in the West.[16] Al-ʿAlwānī, born 1935 of Iraqi origin, studied in Al-Azhar and obtained an MA and then a PhD in *Uṣūl al-Fiqh* in 1973. After graduation he spent 6

[14] https://www.e-cfr.org/blog/category/%d8%a7%d9%84%d8%a3%d8%b9%d8%b6%d8%a7%d8%a1/
See also a list of contributors in Yūsuf al-Qaraḍāwī's "Qarārat Wa Fatāwā" in *al-Majallat al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2002), p. 17.

[15] Al-ʿAlwānī passed away on 4th March 2016. See https://iiit.org/en/sheikh-taha-jabir-al-al-ʿAlwānī-passes-away/.

[16] Parray, Tauseef Ahmad, "The Legal Methodology of '*Fiqh al-Aqalliyyāt*' and its Critics: An Analytical Study", *Journal of Muslim Minority Affairs*, vol. 32, 2012, p. 3.

years as an Imam and Islamic studies lecturer at the Iraqi Military Academy and then subsequently spent a decade (from 1975 to 1985) as a lecturer in Islamic Law in Saudi Arabia at the Imam Muhammad Bin Saʿud University.[17] Around 1985 he migrated to the USA.[18] He participated in a number of *fiqh* institutions such as the International *Fiqh* Council in Jeddah and was a chairman of the Fiqh Council of North America which he himself founded.[19] He was also the president of the International Institute of Islamic Thought (IIIT) for a number of years. His résumé is rooted in all matters relating to Islamic Law and as someone who lives in the West, he was well placed to establish a new genre of *fiqh* in the Western context. According to Tauseef Ahmad Parray, al-ʿAlwānī first used the term '*fiqh al-aqalliyya*' in 1994 in a *fatwā* (legal opinion) issued by the Fiqh Council of North America in the relation to Muslim political participation in the US elections.[20] His first written piece on this subject was a booklet published on Islamonline.net in 2001 under the heading *Naẓarāt Ta'assisiyya Fī Fiqh al-Aqalliyyāt* (Foundational views in Minority Fiqh).[21] This was later translated and published by IIIT in English in 2003 entitled *Towards A Fiqh for Minorities. Some Basic Reflections*. The booklet sets out the reality of Muslims in the West his view of the challenges and problems they faced in the current era and posited that a distinct and fresh *fiqh* was required for Muslims living in the West. In the booklet al-ʿAlwānī defined minority *fiqh* in the following way:

> *Fiqh* for minorities is a specific discipline which takes into account the relationship between the religious ruling and the conditions of the community and the location where it exists. It is a *fiqh* that applies to a specific group of people living under particular conditions with special needs that may not be appropriate for other communities.[22]

This definition was a reasonable summation of how minority *fiqh* came to be understood by the rest of the minority *fiqh* scholars, although there were those who disagreed in aspects of

[17] Fishman, *Fiqh al-Aqalliyyat*, p. 2.
[18] Majid, Khalida, "Taha Jabir Al-Al-ʿAlwānī: A Study of His Views on Ethics of Disagreement in Islam", *Journal of Religion and Health*, vol. 56, No. 1, February 2017, p. 47. There seems to be some discrepancy as to when he exactly migrated as Dina Taha states he moved there in the 1970's. Taha, Dina, *Muslim Minorities in the West: Between Fiqh of Minorities and Integration*, https://www.researchgate net/publication/281757741_Muslim_Minorities_in_the_West_Between_Fiqh_of_Minorities_and_Integration, p. 18.
[19] Dina, *Muslim Minorities in the West*, p. 18.
[20] Ahmad , "The Legal Methodology of '*Fiqh al-Aqalliyyat*'", p. 3.
[21] Fishman, *Fiqh al-Aqalliyyat*, p. 2.
[22] Al-ʿAlwānī, Ṭāhā Jābir, *Towards A Fiqh For Minorities: Some Basic Reflections* (Virginia: International Institute of Islamic Thought, 2003), p. 3.

his approach to *ijtihād* and terminology.[23] In addition to defining minority *fiqh*, al-ʿAlwānī not only identified the changes in Muslim demography and dynamics of their presence but also recognised the inadequacy of the traditional *fiqh* and set about providing a comprehensive theoretical framework for a new *fiqh* for minorities.[24] Al-ʿAlwānī's *Naẓarāt Ta'assisiyya Fī Fiqh al-Aqalliyyāt* was a foundational piece, not only in respect of the nascent and early offering in modernist *fiqh* in this field but it set the philosophical and theoretical stage for much of the literature that was to follow. As such his work is an important primary source for the theoretical underpinnings of minority *fiqh.*

Yūsuf al-Qaraḍāwī

Yūsuf al-Qaraḍāwī is considered a co-founder of this new *fiqh*. Before engaging in the minority *fiqh* discourse, he was already one of the most respected, well known and perhaps most influential jurist in the Muslim world. Al-Qaraḍāwī was born in Egypt and gained his doctorate in 1973 from Al-Azhar University entitled *al-Zakāt wa Atharuhā Fī Ḥill al Mashākil al-Ijtimāʿiyya* (Zakah and Its Effect on Solving Social Problems). His later work *Fiqh al Zakāt, Dirāsa Muqārana li-Aḥkāmihā wa Falsafatihā fī Ḍaw' al-Qur'ān wa-l-Sunna* (Fiqh al-Zakah. A Comparative Study of Zakah, Regulations and Philosophy in the Light of Qur'ān and Sunna) was largely based on his 1973 PhD thesis.[25] Al-Qaraḍāwī is a prolific writer and has authored more than 100 works on various aspects of *fiqh* and *uṣūl al-fiqh* relating to modern problems and challenges. He reached millions of viewers in the Muslim world and beyond due to his participation in the *Sharīʿa wa-l-Ḥayāt* ('*Sharīʿa* and Life') programme aired by the Qatari based Al-Jazeera channel. He moved to Qatar in 1961 and in 1997 established the European Council of Fatwa and Research (ECFR) in Dublin, Ireland. The sole aim of the ECFR was to bring scholars from the West and Muslim world together to provide a body of legal rulings and guidance for the issues faced by Muslim minorities in the West.[26] Al-Qaraḍāwī's notable work in this field, and the second most significance primary source, is his book *Fī Fiqh al-Aqalliyāt al-Muslima: Ḥayāt al-Muslimīn Wasaṭ al-Mujtamaʿāt al-Ukhrā* (The Law of Muslim Minorities: Life of Muslims in Other Societies), published by

[23] Al-Nashmī, ʿAjīl, "al-Taʿliqāt ʿalā Baḥth 'Madkhal ilā Uṣūl wa Fiqh al-Aqalliyāt' li-Ustādh Daktūr Ṭāhā Jābir Al ʿAlwānī," in *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-al-Buḥūth* **(**Dublin, 2005), pp. 22-23.
[24] There was also short article by al-ʿAlwānī summarising the key ideas under the heading of "Islamic Law of Minorities: Historical Context and Essential Questions". See Auda, Jasser, ed. *Rethinking Islamic Law for Minorities: Towards a Western-Muslim Identity*, https://www.jasserauda net/new/pdf/kamil_*fiqh*_alaqalliyaat.pdf.
[25] Abdullah, Luqman Haji, "Al-Qaraḍāwī's Juristic Perspectives On Zakah of Agricultural Wealth as Reflected in His *Fiqh Al-Zakah*," *Journal of Emerging Economies and Islamic Research*, vol. 1, no. 3, 2013, p. 2.
[26] Fishman, *Fiqh al-Aqalliyyat*, p. 2.

Dār al-Shurūq in 2001. In this book, al-Qaraḍāwī sets out the need for a minority *fiqh*, its aims and principles as well as his legal methodology and application on various topics raised by Muslim minorities on his visit to Europe. Al-Qaraḍāwī not only sets out a substantial justification and elaboration of the theoretical and jurisprudential basis[27] of minority *fiqh* but unlike al-ʿAlwānī, he also demonstrated the application on a variety of topics, much of which has then been reproduced in the ECFR journals.

ʿAbdallāh Bin Bayya

ʿAbdallāh Bin Bayya, born 1935, is Mauritanian scholar and politician well recognised across the Muslim word and also in the West. Whilst al-ʿAlwānī and al-Qaraḍāwī come from a similar reformist background, Bin Bayya is perceived as a traditional jurist from the Mālikī school of thought. Despite the traditional scholarly background Bin Bayya was and still is immersed in Middle East political affairs. His biography on his office website[28] lists a number of ministerial posts held by him, such as: First Minister for Islamic Affairs and Education, Minister of Justice and Official Holder of the Seals, Minister of State for human Resources – with the position of Deputy Prime Minister. He has also assumed a number of roles in the Mauritanian judiciary and justice ministry such as a Judge at the High Court of the Islamic Republic of Mauritania, Head of *Sharīʿa* Affairs at the Ministry of Justice and Deputy president of the Court of Appeal. He is a member of the Counsel of Jurists affiliated to the Organisation of Islamic Conference (OIC), Jeddah and a member of the European Council of Research and Fatwa (ECFR). He was also a founding participant in the 'Forum for Promoting Peace in Muslim Societies'.[29]

In respect of his legal methodology, he has an outlook and approach in *fiqh* that is not dissimilar to his reformist counter parts. He also is willing to break from past rulings and coming from a Mālikī legal mindset relies on a *maqāṣid* and public interest (*maṣlaḥa*) based approach though his conclusions at times differ, especially if they are of political nature.[30]

[27] Al-Qaraḍāwī, Yūsuf, *Fī Fiqh al-Aqalliyāt al-Muslima: Ḥayāt al-Muslimīn Wasaṭ al-Mujtamaʿāt al-Ukhrā* (Dār al-Shurūq, 2001). This part of the book was also published in the ECFR journal; see, "al-Mushkilāt al-Fiqhiyya li-l-Aqalliyāt al-Muslima fī-l-Gharb" in *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftāʾ wa-l-Buḥūth* **(**Dublin, 2002), pp. 17-74.
[28] https://binbayyah net/english/bio/.
[29] Helmy, Y, "From Islamic Modernism to Theorizing Authoritarianism: Bin Bayyah and the Politicization of the Maqasid Discourse", *American Journal of Islam and Society*, vol. 38, no. 3-4, 2002, p. 51.
[30] Helmy, "From Islamic Modernism", p. 54.

His major work on minority *fiqh*, *Ṣināʿat al-Fatwā wa Fiqh al-Aqalliyyāt* [31], like the other notable minority *fiqh* scholars, sets out the legal methodology and its application of on the customary topics discussed within the minority *fiqh* literature. In this work he comments on the existing *fatwās* of the ECFR with which is mostly in agreement though he also voices his dissent in some matters.[32] His work, whether in the form of this book or the parts reproduced in his the ECFR journals are an important primary resource for the study of this new body of literature.

Other Minority Fiqh Contributors

The above three scholars are foundational and highly influential members of the ECFR, but many others have substantially contributed to the field of minority *Fiqh*, most are members of the ECFR and a few without affiliation. Other notable scholars are like the late Fayṣal Mawlāwī[33], a Lebanese scholar born in Tripoli and former Secretary-General[34] of the Muslim Brotherhood in Lebanon. He has written important articles on topics such as Muslim political participation[35], female convert marriages to non-Muslim spouses[36], legitimacy of civil court judgements on divorce[37] and other topics. Another notable ECFR contributor is ʿAbd al-Majīd al-Najjār from Tunisia and graduate of Al-Azhar University. He has written booklet on citizenship and politics[38] and some articles on the legal methodology[39] of minority *fiqh*. ʿAjīl Jāsim al-Nashmī is another ECFR contributor. He is a Kuwaiti scholar who obtained a PhD in *Fiqh* the university of Al-Azhar and taught *Sharīʿa* at the University of Kuwait. He is a ECFR member and has written extensively on the ruling on share companies [40] and has

[31] Bin Bayya, Abdullāh, *Ṣināʿat al-Fatwā wa Fiqh al-Aqalliyāt* (Al-Muwatta' Centre, 2018), p. 609. *Also available at* http://www.saaid net/book/9/2033.doc (last visited 26/02/2022).
[32] Bin Bayya, *Sinaʿat al-Fatwa*, p. 339 on the issue of whether need (*ḥāja*) alone can permit usury. He insists it cannot permit it contrary to the position of other minority *fiqh* scholars.
[33] https://www.al-qaradawi.net/node/3059.
[34] https://www.ikhwanweb.com/article.php?id=2327.
[35] Mawlāwī, Fayṣal, "Participation by Current Islamic Movements", C:\Documents and Settings\me\Desktop\minority fiqh politicalpart\mushaqrika mawlawi htm (accessed 10/8/2007).
[36] Mawlāwī, Fayṣal, "Islām al-Mar'a wa Baqā Zawjihā ʿalā Dīnihi", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2003), pp. 249-304.
[37] https://www.ikhwanwiki.com/index.php?title and Mawlāwī, Fayṣal, "Ḥukm al-Talāq Sadir ʿan Qadin Ghayr Muslim", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2001), pp. 75-78.
[38] https://www.e-cfr.org/blog/2014/11/23/.
[39] Al-Najjār, ʿAbd al-Majid, "Nahwa Minhāj Uṣūl li-Fiqh al-Aqalliyāt", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* **(**Dublin, 2003), pp. 43-59 and Al-Najjār, ʿAbdul Majid**,** "Ma'ālat al-Afʿāl wa Atharuhā Fī Fiqh al-Aqalliyāt", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* **(**Dublin, 2004), pp. 149-200.
[40] Al-Nashmī, ʿAjīl, "al-Ḥuqūq al-Ma'nawiyya wa Aḥkām Naskhuhā", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* **(**Dublin, 2002), pp. 105-106. See also his "al-Taʿāmul wa-l-Mushāraka Fī Sharikat

written a rebuttal[41] of al-ʿAlwānī's seminal booklet on minority *fiqh*[42]. Another prominent ECFR member is ʿAbdallāh bin Yūsuf al-Judayʿ. He is originally from Iraq, born in Basra and now a British citizen living in the UK based in Leeds[43]. He heads the Juday' Centre for Research and Consultancy in Leeds, United Kingdom.[44] Al-Judayʿ holds a PhD in Islamic Economics and an MA in Islamic Studies, he is also considered a founding member of the ECFR where he served as its General Secretary from 1998-2000.[45] Al-Judayʿ has written in-depth articles on several topics which have been published in the ECFR journals. Perhaps his most significant piece is the *fatwā* on females converts marriage to a non-Muslim spouse where he took on the orthodox view which deemed the contract to be invalid.[46] All of these scholars as members of the ECFR and have made significant contributions to the minority *fiqh* literature, sometimes in agreement with the majority view and at times with dissenting views.

Some of the ideas set out by the above scholars, especially as they relate to Muslim identity and integration, have then been adopted (in part), critiqued and refined by other contributors to the subject like Tariq Ramadan, Dilwar Hussain and others, though not affiliated with the ECFR but are connected with the Islamic Foundation in Leicester.[47] Although they are not jurists or 'Shaykhs' but as thinkers and academics they have made meaningful contributions which are deserving of consideration. Their focus is on identity, citizenship and political participation and they rarely dwell on detailed jurisprudential questions. The most significant contributor amongst these is Tariq Ramadan whose works *To Be a European Muslim: A Study of Islamic Sources in the European Context*[48] and *Western Muslims and the Future of Islam*[49] are important intellectual contributions to the subject of identity and belonging. Ramadan departs from the minority *fiqh* vision of integration as he disagrees with the very

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Aṣl Nashātihā Ḥalāl illā Annahā Taʿāmul bi-l-Ḥarām", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* **(**Dublin, 2005), pp. 105, 128-140.

[41] Al-Nashmī, "al-Taʿlīqāt", pp. 22-23.

[42] Al-ʿAlwānī, *Towards A Fiqh For Minorities.*

[43] https://www.leedsgrandmosque.com/about/our-team/sheikh-abdullah-al-judai.

[44] https://www.cilecenter.org/about-us/our-team/sheikh-dr-abdullah-al-judai.

[45] https://www.e-cfr.org/blog/2018/12/16/european-council-fatwa-research/.

[46] Al-Judayʿ, ʿAbdallāh, "Islam al-Mar'a wa Baqā' Zawjihā ʿalā Dīnihi", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2003), pp. 15-195.

[47] Ramadan was a lecturer at the Markfield Institute in Leicester and a number of his seminal works were published by the Islamic Foundation. https://islamism news/news-in-brief/gioruk-muslim-brotherhood-behind-muslim-civil-society-report-launched-in-british-parliament/ This is also the case for Dilwar Hussain, see https://www.emel.com/article?id=9&a_id=1832

[48] Ramadan, Tariq, *To Be a European Muslim: A Study of Islamic Sources in the European Context* (Leicester**:** Islamic Foundation, 1999).

[49] Ramadan, Tariq, *Western Muslims and the Future of Islam* (Oxford**:** Oxford University Press, 2004).

idea of 'minority *fiqh*' because it depicts Muslims as a minority when in fact, they share, according to him the majoritarian values of Western nations. He rejects the binary division of the world into a *dār al-islām* (Muslim homeland) and *dār al-kufr* (homeland of disbelief) and proposes a new category called *dār al-shahāda* (land of testimony).[50] Despite his terminological and discursive disagreement his contribution shares the same modernist legal philosophy and approach as the minority *fiqh* scholars. Therefore, Ramadan's disagreement is a semantic difference which cannot separate him from the modernist legal tradition. His contribution is not an academic critique or study of minority *fiqh*, he acts as a participant who has proposed ideas drawn from minority *fiqh*, largely following their legal methodology and for that reason his contribution should be classed as a primary source.

From the Muslim world the PhD Thesis by Khālid ʿAbd al-Qādir entitled *Fiqh al-Aqalliyāt al-Muslima*[51], is a substantial work from a traditional perspective. His work covers an array of topics, from *ṭahāra* (purification), rituals, food and financial matters to issues relating to non-Muslims such as permissibility of blood transfusions from non-Muslims and burials of Muslims in non-Muslim graveyards. The work reads like a classical *fiqh* book and does not seem to offer anything original by way of legal argumentation or philosophy. He critiques some of the minority *fiqh* positions such as the purchase of home via interest bearing loans, however his traditional approach is outside of the modernist legal tradition which is the focus of this study.

Formation, Function & Publications of the ECFR

Another key proponent, in the form of an institution, is the European Council of Fatwa and Research (ECFR). The ECFR was established in March 1997 in London by the Federation of Islamic Organisations in Europe (FIOE),[52] an umbrella organisation for many Muslims organizations in Europe. The FIOE set up the ECFR as the religious guidance wing in addition to its other branches in the field of media, Muslim women's engagement and youth and student organisations.[53] After its first official meeting in 1997 Sarajevo the ECFR had its

[50] Ramadan, *Western Muslims*, p. 69.
[51] ʿAbd al-Qādir, Khalid, *Fiqh al-Aqalliyāt al-Muslima* (Dār al-Īmān, 1998).
[52] Caeiro, Alexandre, "The Making of the Fatwa: The Production of Islamic Legal Expertise in Europe, *Archives de sciences sociales des religions*, 56e Année, No. 155 (juillet-septembre 2011), p. 82.
[53] Khan, Adil Hussain, "Creating the Image of European Islam: The European Council for Fatwa and Research and Ireland", in Nielson, Jorgan ed. *Muslim Political Participation in Europe* (Edinburgh: Edinburgh University Press, 2013), p. 220.

second meeting in October 1998 in Dublin, Ireland where it moved its headquarters in the same year[54]

The aim of the ECFR was in line with the general aims set out by the minority *fiqh* scholars, namely religious guidance of various issues facing them, protecting identity, and furthering integration.[55] The ECFR was headed by al-Qaraḍāwī as its chair. Al-Judayʿ[56] was its secretary general until he was replaced by Ḥussayn Ḥalāwa in 2000.[57]

As mentioned previously the members exceed 30 contributors. Most of them reside in Europe and North America, however the many of the influential and key members reside in the Muslim world such as al-Qaraḍāwī and Bin Bayya or some originate from there like al-ʿAlwānī and al-Judayʿ and then subsequently domiciled in the West. This is even though the ECFR rules require those issuing rulings to be 'a resident of the European continent.'[58] The members of the ECFR are the key contributors to the minority *fiqh* jurisprudence and they are the ones who have developed this body of legal literature.

The process of the ECFR in arriving at a resolution is based on collective *ijtihād* and the use of non-jurist expertise and fields of knowledge. Al-ʿAlwānī had argued in his writings that *ijtihād* in the modern age required knowledge of various disciplines outside of *fiqh* and as such "…practitioners of this *fiqh* will need a wider acquaintance with several social sciences disciplines, especially sociology, economics, political science and international relations."[59] He also advocated the use of experts who would assist the scholar in the deliberative process. In a question related to economics for example he expected "an economist, a legal expert and a religious jurist" to work jointly and in collaboration.[60] Thus, writings of the ECFR in topics such as the issue of cloning[61] or determining the prayer time in countries in the northern hemisphere[62] reflect recourse to and aid of knowledge outside of the field of *fiqh* and *uṣūl*.

[54] Khan, Adil Hussain, "Creating the Image of European Islam", p. 225.
[55] Caeiro, "The Making of the Fatwa", p. 82.
[56] https://www.e-cfr.org/blog/2018/12/16/european-council-fatwa-research/.
[57] Caeiro, "The Making of the Fatwa", p. 83.
[58] Caeiro, "The Making of the Fatwa", p. 85.
[59] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. 3.
[60] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. 34.
[61] Ḥawārī, Muḥammad, "al-Istinsākh al-Basharī Bayn Thawra al-ʿIlmiyya wa-l-Ḍawābit al-Fiqhiyya", in *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2003), pp. 209-254.
[62] Ḥawārī, Muḥammad, "Mawāqīt al-Ṣalāh Bayn ʿUlamā' al-Sharīʿa wa-l-Falaq", in *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2004), pp. 359-452.

In respect of the deliberative process, questions are received from various quarters from Muslims living in Europe. These questions are debated in sessions, a draft is produced and debated further, objections noted and incorporated until an agreement is reached though this does not have to be unanimous.[63] Dissent is permitted and dissenting opinions in the form of articles rebutting the ECFR adopted position is published in the ECFR journals. Perhaps the best example of dissent was the views of a number of scholars, such as Fayṣal Mawlāwī and others who went against al-Qaraḍāwī and al-Judayʿ who permitted female converts to remain in marriage to their non-Muslim spouses. These scholars wrote long rebuttals which were published in the ECFR journals alongside the opposing view. Sometimes this has not happened, as in the case of those who opposed the *fatwā* allowing houses purchases with interest bearing loans leading to the resignation of some members.[64] The problem with the process is that due to disagreements on issues among the members there are multiple opinions and the ECFR is not always speaking with once voice.[65]

Since its inception the ECFR has been issuing *fatwās* and guidance in the respective meetings where papers are submitted by members and then published on its website[66], journals[67] and books.[68] The ECFR writings also draw on past writings of their own members as well the established *fiqh* councils in the Muslim world such as the Muslim World League's Islamic *Fiqh* Council based in Mecca and the *Fiqh* Academy of the OIC (Organisation of the Islamic Conference) based in Jedda.[69] The ECFR members are prolific and established participants in these organisations and their writings sometimes overlap the issues or questions discussed in the Western context.[70]

The key resources of the ECFR are its published journals (now in its 24th edition)[71] which contains its outcomes, *fatwās* and decisions. They also contain key articles in the various topics, where a disagreement has taken place the opposing view and their writings are

[63] Caeiro, "The Making of the Fatwa", p. 93.
[64] Caeiro, "The making of the Fatwa", p. 93.
[65] Caeiro, "The Making of the Fatwa", p. 97.
[66] https://www.e-cfr.org/blog/category.
[67] https://www.e-cfr.org/blog/category.
[68] https://www.e-cfr.org/blog/category/bissued/.
[69] Caeiro, "The Making of the Fatwa", p. 93.
[70] This is clearly seen on the subject of buying and trading in shares and derivatives which has been much discussed in major *fiqh* councils and the reasonings and rulings have been brought into the western context. See Bin Bayya, 'Abdallāh, "Fiqh al-Bursa", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2002), pp. 213-235.
[71] https://www.e-cfr.org/blog/2018/04/18/.

published alongside the leading and adopted view of the ECFR. Another resource is the books and booklets published by the ECFR. These booklets tend to be in one broad subject matter with each booklet discussing some aspect of that subject matter. For example, on the topic of Islamic politics (*siyāsa sharʿiyya*), the ECFR published 14 booklets on various issues related to Islamic politics and politics in general.[72] Alongside the seminal works of minority *fiqh* scholars, the journals, and booklets of the ECFR form the primary sources of the present study. After identifying the key proponents and primary sources of minority *fiqh*, we shall now turn to broad themes and ideas contained within these sources.

Definition, Taxonomy & Conceptualisation of Minority *Fiqh*

The origins of minority *fiqh* is modernist in terms of its core ideas and philosophy. As such the idea of *ijtihād* and its practice by minority *fiqh* has to be understood with the modernist historical backdrop in mind. M.A Zaki Badawi, who wrote the introduction to al-ʿAlwānī's seminal work *Towards a Fiqh for Minorities* acknowledged the roots of new *ijtihād* advocated by the author and stated: "The call for a new *ijtihād* goes back to the nineteenth century with Al-Afghānī and 'Abduh's Salafiyya project."[73] The aims and methodology of minority *fiqh* can be seen as an adjunct or extension of that project.

Modernism and the Question of Aṣāla

To embark on a discussion of the goals and features minority *fiqh* it is necessary to define modernism and also to study other related terms for the purpose of context and clarity. Here we shall consider the scholarly contributions in defining modernism, exploring its origins and its linkage to the issue of *aṣāla*. Arriving at a workable definition is a perilous task, as describing a group of people by a single term is fraught with difficulties involving possible scholarly bias and differing perspectives. According to Curtis C. Connell:

> Even scholars of Islam have a difficult time deciding what to call the various followers of Islam. The terms *political Islam, Islamism, traditional Islam, radical Islam, Wahhabism, Salafism, militant Islam, Islamic movement, and moderate Islam*

[72] https://www.e-cfr.org/blog/category.
[73] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. IX.

> are all pregnant with meaning. The bias of each author becomes quite apparent when investigating the different scholarly perspectives.[74]

However, a practical definition is nevertheless required in order to evaluate, compare, and contrast ideas. In arriving at a reasonably accurate definition, we will focus primarily on the aims, broad features and in particular the legal methodology of minority *fiqh* as the present research seeks to study its legal approach, whilst recognising there maybe overlap and intersection with other terms.

According to Tauseef Ahmad Parray modernism is "a movement to reconcile Islamic faith with modern values such as democracy, rights, nationalism, rationality, science, equality and progress…"[75] As to the reason for its emergence he states modernism "…emerged in the 19th century as a response to European colonialism….thus Islamic Modernism began as a response of Muslim intellectuals to European modernity"[76] Islamic modernism aims were based on their analysis of the problem as they saw it and represented an attempt to reconcile the past, Islam's normative ideals with modernity. According to Parray:

> The blame for the backwardness and plight of the Muslim community was credited to the Ulema's static sanctification of Islam's classical or medieval formulations and their resistance to change; so Islamic modernists wished to produce a new synthesis of Islam with modern science.[77]

This reconciliation of tradition with modernity has been the subject of much study by scholars and academics like Malcolm Kerr[78], Mohamed Ibrahim Khalil[79], Parray and others. They have studied and analysed the thought and contribution of the main protagonists of modernism such as Jamāl al-Dīn al-Afghānī (1838-1897), Muḥammad ʿAbduh (1850-1905), Qāsim Amīn (1863- 1908), Rashīd Riḍā (1865-1935) in the Arab world and Sir Sayyid

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[74] Connell, Curtis C., "Understanding Islam and Its Impact on Latin America" Report Air University Press (2005), p. 3. Also see Shepard, William E., "Islam and Ideology: Towards a Typology", *International Journal of Middle East Studies*, 1987, Vol. 19, No. 3 (Aug., 1987), p. 207.
[75] Parray, *Islamic Modernist and Reformist Thought*, p. 79.
[76] Parray, *Islamic Modernist and Reformist Thought*, p. 79.
[77] Parray, *Islamic Modernist and Reformist Thought*, p. 82.
[78] Kerr, Malcolm H., *Islamic Reform: The Political and Legal Theories of Muhammad ʿAbduh and Rashid Rida* (Berkeley: University of California Press, 1966).
[79] Khalil, Mohamed Ibrahim, "Islam and the Challenges of Modernity", *Georgetown Journal of International Affairs*, vol. 5, No.1 (Winter/Spring 2004), pp. 97-104.

Ahmad Khan (1817-1898), Chiragh Ali (1844-1895), Sir Muhammad Iqbal (1877-1938) in South Asia.

Islamic modernism did not renounce traditional ideals, rather it, according to Parray, "asserted the need to "reinterpret and reapply" the principles and ideals of Islam to formulate new responses to the political, scientific, and cultural challenges of the West and of modern life."[80] This point has been reiterated by scholars such as William E. Shepard, Mansoor Moaddel and others. Shepard, for example, argued that 'Modernism may be said to attempt to combine Islamic authenticity with adherence to the "tried and proven" models for development drawn from the West.'[81] Its commitment to *aṣāla* (authenticity) was a key feature of Islamic modernism. Mansoor Moaddel explained how modernists devised exegetical and philosophical methodologies to maintain *aṣāla*:

> For such modernist thinkers as Sayyid Jamal ud-Din al-Afghani (1839-97) and Muhammad Abduh (1849-1905), the orthodox approach to Islamic theology and its teachings on social issues could not face up to the challenges of modernity and rationalist discourse. At the same time, these Muslim thinkers wanted to avoid the charge of disloyalty to Islam. They, therefore, devise a method of Qur'ānic exegesis and the rationalization of religious dogma that enabled them to respond to the criticisms of the Westernizers and the missionaries, while remaining committed to the basic Islamic tenets.[82]

Modernists appropriated aspects of traditional *fiqh* and *uṣūl al-fiqh* to develop a legal and exegetical methodology to realise their goals whilst maintaining *aṣāla* (authenticity). The origins of this approach are described by Uriya Shavit in the following way:

> The roots of *wasaṭiyya* (the centrist, or harmonizing middle ground, approach) are located in the works of Muḥammad ʿAbduh (d. 1905) and Muḥammad Rashīd Riḍā (d. 1935). The word signifies a worldview shared by modern scholars and jurists who advocate similar sets of ideas about society, politics, and religious law. It is identified

[80] Parray, *Islamic Modernist and Reformist Thought*, p. 80.
[81] Shepard, "Islam and Ideology", p. 325.
[82] Moaddel, Mansoor, "Religion and Women: Islamic Modernism versus Fundamentalism", *Journal for the Scientific Study of Religion*, 1998, Vol. 37, No. 1 (Mar., 1998), p. 120

> with several Egyptian scholars, including the above-mentioned al-Qaradāwī; Muḥammad al-Ghazālī (d. 1996).[83]

Here Shavit traces the roots of the legal methodology of al-Qaraḍāwī, one of the founding scholars of Muslim minority *fiqh* to the approach and thinking of the likes of Muḥammad ʻAbduh and Rashīd Riḍā. The constituent elements of this approach[84] according to Shavit are the flexibility of law, the bringing of ease (*taysīr*), an emphasis on the legal principles of *maṣlaḥa* (public interest) and *ḍarūra* (necessity) and the need for *da'wa* (proselytisation of Islam); all topics we shall elaborate and analyse further in this thesis.

Thus, the reference to the principles and ideals to meet modern challenges is the process of *asāla* or rooting the new *ijtihād* in the fundamental principles. In this respect they are different to the secularists who sought to adopt values and ideals of the West without regards to compliance with those ideals and were willing to dispense with them for the sake of modernity. Islamic modernism, although closer to traditionalism than secularism, is yet different as traditionalism refuses to adapt to or accommodate modernity whilst maintaining the integrity of its ideals and positions.

Islamic modernism was a new phenomenon of the 19th century, and its reach has now gone beyond the Muslim world and manifested itself in many contexts whether in the religious sphere, politics or even in geopolitics. In South Asia more recent examples are figures such as Abū al-Aʿlā al-Mawdūdī (1903–1979) and Fazlur Rahman (1919–1988) whilst in the Arab world the ideas of modernism are represented by Hassān ʿAbdallāh Turābī (1932 – 2016), Yūsuf al-Qaraḍāwī (1903-2022), Rachid Ghannouchi, and others. Such personalities are not monolithic and assume a place in a spectrum of modernist ideas and differ sometimes on critical issues but come under the general ambit of modernism due to the common aim of synthesising Islamic ideals with ideas of western progress.

Islamic modernism has now manifested in the West where Muslims have to deal with their own challenges presented by modernity (whilst also navigating traditionalism within their communities) as they not only face western values and ideals but live in a society which also

[83] Shavi, Uriya, "The Wasaṭī and Salafī Approaches to the Religious Law of Muslim Minorities", *Islamic Law and Society*, 2012, Vol. 19, No. 4, p. 420.
[84] Shavi, "The Wasaṭī and Salafī Approaches", pp. 421, 425 and 426.

believes in and lives by these ideals in their law, governance, and systems. The response to this new challenge is the *fiqh* of minorities and whilst the challenges are not the same, the questions and issues are similar in nature.

Navigating secularism, democracy, western laws, belonging and citizenship and the rights of women are but a few examples of the challenges faced by minorities. While answers may not always be new the questions are novel as the context of the relative power and position and interests of Muslims in the West is different. Scholars, such as al-Qaraḍāwī[85] and Ghannouchi[86] who played a significant role in the religious and political affairs of the Middle East and remain personalities of influence in that region, went onto contribute to the minority *fiqh* chapter of modernism in the West. So, the connection between the Middle East modernism and minority *fiqh* in not only united in aims or legal methodology only but also present in the personalities themselves.

Islamism, Fundamentalism & Traditionalism

Terms such as Islamism and fundamentalism are loosely associated and can have relevance to modernism with the occurrence of some overlap and therefore these usages deserve some attention. Compared to Islamism, modernism is distinct in some respects, but not all. The overlap occurs because distinct varieties of modernism and Islamism exist, and both converge at some points and diverge in others. According to William E. Shepard there are various types of modernism and what he calls "radical Islamism"[87] still contains modern elements: "In spite of its conscious stress on authenticity, however, radical Islamism is still very modern and accepts much that is borrowed from the West. In some ways this is hardly surprising since it arose primarily as a reaction against Westernizing trends, and reactions commonly take on some of the characteristics of what they react against".[88]

[85] Warren, David H., *Rivals in the Gulf: Yusuf al-Qaradawi, Abdullah Bin Bayyah, and the Qatar–UAE Contest Over the Arab Spring and the Gulf Crisis* (London and New York: Routledge, 2021), pp. 286–289.
[86] https://www.wilsoncenter.org/article/rachid-ghannouchis-thought-career.
[87] Here is Shepard's definition: 'By "radical Islamism" I mean the orientation of many of those called "fundamentalists." This type is especially well represented by Abū al-Aʿlā al-Mawdūdī and the later writings of Sayyid Qutb,' "Islam and Ideology", p. 314.
[88] Shepard, "Islam and Ideology", p. 315.

Contrasting with modernism is the notion of Islamic traditionalism which also difficult to define as it comes in various forms depending on the location and region.[89] Apart from such disparities, William A. Graham has provided a generalised definition: "To speak about Islamic traditionalism is normally to speak about the widespread Muslim emphasis upon the primary, dual authority of the revelations of the Qur'ān and the tradition or practice (Sunna) ascribed to the Prophet and the first few generations of Muslims (the "pious forebears," *as-salaf*)."[90] Building on this he arrives at a further comprehensive definition of traditionalism:

> the long-standing, overt predilection in diverse strands of Islamic life for recourse to previous authorities, above all the Prophet and Companions, but also later figures (whether an Abū Ḥanīfa, Jalāl al-Dīn Rūmī, Shaykh Walī Allāh al-Dihlawī, or Ibn ʿAbd al-Wahhāb) who are perceived as having revived (*jaddada*), reformed (*aṣlaḥa*), or preserved (*ḥafiẓa*) the vision and norms of true, pristine Islam, and thus as being in continuity and connection with the original community, or *umma*.[91]

He also highlights additional features such as the reliance on and usage of *isnād*[92] and the *ijāza*[93] system to transmit traditional religious knowledge via the scholars from one generation to another as markers of traditionalism.[94] Another feature, which modernists assert, is the charge that traditionalism suffers from rigidity (*jumūd*) though the accuracy of such an assertion has been questioned by some.[95] Traditionalism has also been defined in terms of its alleged inadequate response to the rise and threat of the ascendancy of the West whether due to its rejection of or adaptation of Western influences.[96] From this perspective modernists, Islamists and fundamentalist will all lay claim to certain elements traditionalism such as reliance on early sources and authorities and reject other aspects. What makes them distinct is their particular critique of traditionalism and especially the contribution they feel is missing, required, or posited in terms of the Islamic philosophy and discourse in the modern age, a point we shall elaborate further below.

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[89] Graham, William A. "Traditionalism in Islam: An Essay in Interpretation", *The Journal of Interdisciplinary History*, Winter, 1993, Vol. 23, No. 3, pp. 495-496.
[90] Graham, "Traditionalism in Islam", p. 500.
[91] Graham, "Traditionalism in Islam", p. 500.
[92] Graham, "Traditionalism in Islam", p. 501.
[93] Graham, "Traditionalism in Islam", p. 511.
[94] Graham, "Traditionalism in Islam", pp. 509-510.
[95] Shepard, "Islam and Ideology", p. 318.
[96] Shepard, "Islam and Ideology", p. 319

Islamism (or sometimes referred to as "political Islam"[97]) is, according to Shepard, primarily related to "a political religious world view that aims to bring about Islamic governance in Muslim countries and has 'a tendency to view Islam as an ideology".[98] According to Thomas Volk the intellectual foundations of Islamism were laid down by reformist thinkers such as al-Afghānī and ʿAbduh.[99] Islamism as a political project is generally seen by some scholars as belonging to "a wave of Islamist revivalism". [100]

According to Fuller:

> An Islamist is anyone who believes that the Koran and the Hadith (traditions of the Prophet's life, actions, and words) contain important principles about Muslim governance and society, and who tries to implement these principles in some way. This definition embraces a broad spectrum that includes both radical and moderate, violent, and peaceful, traditional, and modern, democratic, and antidemocratic.[101]

In respect of the aims of Islamists Kurzman states: "Islamists seek to regain the righteousness of the early years of Islam and implement the rule of *sharīʿa*... either by using the state to enforce it as the law of the land or by convincing Muslims to abide by these norms of their own accord."[102] Islamists are not monolithic and can include fundamentalists also as acknowledged by Fuller:

> Islamism also includes fundamentalist views (literalist, narrow, intolerant) but does not equate with it. If we are to understand the long-term issues of Islamism and democracy, we need to look at both "good" Islamists (from the viewpoint of Western policy makers) as well as the "bad." There is an ongoing struggle among them[103]

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[97] Ayoob, Mohammed, "Political Islam: Image and Reality, World Policy Journal", Vol. 21, No. 3 (Fall, 2004), p. 1.
[98] Shepard, "Islam and Ideology", p. 308.
[99] Volk, Thomas, *Islam – Islamism: Clarification for turbulent times* (Konrad Adenauer Stiftung, 2015), p. 4.
[100] Gaub, Florence, "Islamism and Islamists: A very short introduction", European Union Institute for Security Studies (EUISS) (2014), p. 1.
[101] Fuller, Graham E., ISLAMISTS IN THE ARAB WORLD:: THE DANCE AROUND DEMOCRACY, Carnegie Endowment for International Peace (2004), p. 3.
[102] Kurzman, Charles, "Bin Laden and Other Thoroughly Modern Muslims", *Contexts* 2002 1: 13, p. 17. https://journals.sagepub.com/doi/abs/10.1525/ctx.2002.1.4.13.
[103] Fuller, "Islamists in the Arab World", p. 3.

Disagreement exists as to how these groups are to be classed. For example, Kurzman makes a distinction between Islamists and traditionalists such as the Taliban where the former has modern roots and outlooks on certain issues such as individual rights and equality.[104] Fuller views the Taliban as Islamists whereas Kurzman considers them to be traditionalists. So, the critical defining aspect of Islamism is its political aim or politicisation of religion whereas the modernist issues relate to legal methodology or reconciliation with issues of modernity. Some Islamist use violence to achieve their goals whereas others seek to exploit the democratic process.[105] Notwithstanding the taxonomical difficulties, the essential element of Islamism is the political restitution of Islamic governance which is not the priority of every modernist.

Islamic fundamentalism also overlaps in some respects with both with modernism and Islamism, except that it emphasises a stricter understanding and adherence to religious rules. Fundamentalists tend to view modernists as apologists due to their perceived religious compromises to accommodate modernity[106]. According to Shireen T. Hunter:

> Generally, "fundamentalism" is defined as orthodoxy in matters of faith and the application of religious rules in a pure and undiluted form. Islamic fundamentalists are truly fundamentalist in this sense…[107]

Some varieties of fundamentalism "advocates a highly politicized and ideologized version of Islam"[108] and so some do not see a distinction between it and Islamism. They also seem to share similar goals of ending "the Muslim world's state of dependency by eradicating Western and Soviet influence,"[109] and viewed in some discourses in the West as "archaic and barbaric age."[110] Similar to Islamism, fundamentalism traces its roots to the revivalist[111] modernists like al-Afghānī and those who was followed him, according to Hunter, by "such figures as Hassan al-Banna, Sayed Mohammad Quṭb, and Mawlana al-Mawdūdī . They were

[104] Kurzman, "Bin Laden and Other Thoroughly Modern Muslims", p. 17.
[105] Fuller, "Islamists in the Arab World", p. 9.
[106] Shepard, "Islam and Ideology", p. 317.
[107] Hunter, Shireen T. Hunter, "Islamic Fundamentalism: What It Really Is and Why It Frightens the West?, *SAIS Review*, Volume 6, Number 1 (Winter-Spring 1986), p. 191.
[108] Hunter, "Islamic Fundamentalism", pp. 190-191.

[110] Moallem, Minoo, "Whose Fundamentalism?", *Meridians*, 2002, Vol. 2, No. 2 (2002), p.298.
[111] Esposito, John L, Islamic Fundamentalism, SIDIC Periodical XXXII - 1999/3 Fundamentalism and Extremism. Challenge for the 21st century (Pages 12-19)
https://www.notredamedesion.org/en/dialogue_docsebc0 html?a=3b&id=16

responding to the growing contacts between the West and the Muslim world and to the West's increasing economic, political, and cultural penetration of Islamic countries." [112] Both also call for a return to the *Sharīʿa* and are seen as a reaction to western hegemony and culture.[113] Fundamentalism differs from modernism in terms of the context in which it arose. According to Moaddel fundamentalism was born of "a cultural environment dominated by the state ideology: Islamic fundamentalism emerged in such countries as Egypt, Iran, and Syria following military coups that effectively ended the existing pluralistic politics."[114]

Despite the existence of certain commonalities between modernism and Islamism and fundamentalism; modernism stands out in respect of its desire to reconcile modernity via a particular legal methodology which is not shared by all Islamists or fundamentalists though a number of such groups identify[115] themselves with the reformist or revivalist modernist project.

Conceptualizing Minority Fiqh within the Framework of Modernist Thought

Given that terminological overlap and conflation abound in defining modernism and related terminologies, how is it to be defined and how is Muslim minority *fiqh* to conceptualised, and how best to categorise it contextually? As already noted, it is not feasible that one can arrive at a completely unassailable definition. Some taxonomical compromises are unavoidable in reaching a workable definition which encompasses most of the salient determinative features whilst recognizing inconsistencies along the peripheries. Unsurprisingly, difficulties also arise when conceiving minority *fiqh* as a body of Islamic law and its contributors in the modernist tradition. One could argue that the minority *fiqh* literature contains elements of modernism, Islamism, fundamentalism and even traditionalism, however determining its categorisation inevitably turns on the question of emphasis and what is deemed as an essential element and ethos of modernism.

[112] Hunter, "Islamic Fundamentalism", p. 196
[113] Anderson, Norman, "Islamic Law Today the Background to Islamic Fundamentalism", *Arab Law Quarterly*, Nov., 1987, Vol. 2, No. 4 (Nov., 1987), p. 350.
[114] Moaddel, "Religion and Women", p. 214. See also Esposito, "Islamic Fundamentalism".
[115] Leiken, Robert S. and Steven Brooke, "The Moderate Muslim Brotherhood", *Foreign Affairs*, (Mar. - Apr., 2007), p. 112.

Drawing on the above discussions, and for the purpose of this thesis, one can define *modernism as the attempt at navigation of modernity and its challenges via a free ijtihād unfettered by past jurisprudence, and yet rooted and legitimated by it, which employs a distinct, flexible and adaptive legal methodology characterised by the usage and prominence given to context sensitive goals, aims (maqāṣid), bringing of ease (taysīr), and recourse to public interest (maṣlaḥa), and general principles (al-qawāʿid al-fiqhiyya). The proponents of this legal methodology seek to source its key elements within the Islamic tradition so as to legitimise and assert its authenticity (aṣāla).* Such a definition is posited based on the distillation of its key elements described in the foregoing analysis of modernism. We shall explore below how this definition fares when conceptualising minority *fiqh* as an idea, its literature, its scholars, and the central features that constitute the minority *fiqh* approach and methodology within the modernist context. In this regard our approach to its conceptualisation will be to understand how it considers modern challenges and to assess the nature of the legal discourse as per elements of the definition of modernism outlined above.

In respect of modern challenges, the minority *fiqh* stance and approach towards contemporary issues is clearly modernist in outlook; the *fiqh* does not thoughtlessly regurgitate the traditional *fiqh* but recognises that modern problems require fresh *ijtihād* which may require dispensing with presumed traditional legal certainty, especially if warranted by its goals. They maintain that modernity poses problems which are unique to this age, especially issues relating to the Muslim minorities' presence in the West. This renders the classical *fiqh* responses as inadequate, in their view, and speaks to their modernist credentials. The term minority *fiqh* itself is a modern usage[116] although many of the issues addressed within it are also addressed in the classical *fiqh* literature. Minority *fiqh* scholars are at pains to stress they are not going beyond the traditional *fiqh* as a way to emphasise the *aṣāla*[117], however the characterisation of minority *fiqh* as modernist cannot be precluded because they make reference to the Islamic classical legal heritage, which itself is a modernist claim[118]. The topic selection of minority *fiqh* and the issues its addresses also indicate its modernist nature, as they relate to completely new phenomena, such as the issue of political participation and citizenship in the West. Some topics have vestiges in the traditional *fiqh* like the recourse to

[116] Bin Bayya, *Ṣinā'at al-Fatwā*, p.251
[117] Bin Bayya, *Ṣinā'at al-Fatwā*, p.254
[118] Moaddel, "Religion and Women", p. 120.

Sharī'a councils and some issues like female convert marriages are reopened though deemed completely settled in traditional *fiqh*.

The most significant and easily discernible factor in determining minority *fiqh* as modernist is its legal methodology. Other categories of scholars such as traditionalists and fundamentalists also addressed modern questions[119], however their legal methodology is markedly different to the modernist approach. Minority *fiqh* utilises a legal methodology that comprises of key *wasatī* elements such as the duty of proselytising (*daʿwa*), the need to promote *taysīr* (facilitation) via the general principles, that rules change with the times, and the use of *maṣlaḥa* and *maqāṣid*. These elements are clearly visible in the treatment of various topics in the ECFR literature. According to Uriya Shavit such an approach is at the heart of the formation of the ECFR:

> The *wasatï* approach to *fiqh al-aqalliyyãt* was institutionalized by the formation, on March 29, 1997, of the Dublin-based European Council for *Fatwā* and Research (*al-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth*), at the initiative of the Federation of Islamic Organizations in Europe. While a majority of the Councils members are based in Europe, al-Qaraḍāwī is at the helm (his deputy, a Lebanon-based Islamist, Fayṣal al-Mawlāwī, died in 2011)[120]

In conclusion, minority *fiqh* literature has been categorised as part of the modernist legal thought because it largely incapsulates key elements of modernism and employs them in its legal discourse.

Turning to the ECFR members themselves, although the membership of the ECHR exceeds 30, the thesis focuses principally on the writings of Ṭāhā Jabir al-ʿAlwānī, al-Qaraḍāwī, and Bin Bayya, not only because they share the goals and legal methodology of minority *fiqh* but also due the fact that they are the most influential and their writings represent the seminal works on the key issues of minority *fiqh*. As noted in their biographies above, the first two scholars are very similar in terms of their Azharite roots, jurisprudential approach, and conception of minority *fiqh* in terms of it goals for Muslim minorities in the West. As for Bin

[119] Shepard, "Islam and Ideology", p. 318.
[120] Shavi, "The Wasaṭī and Salafī Approaches", p. 431.

Bayya, he subscribes to most of the minority *fiqh* core elements in terms of its goals[121] and legal principles such as reliance on bringing ease, change of rules by the times, rules of necessity and others[122] though he stipulated that new solutions must find authority in traditional authorities.[123] Although Bin Bayya could be viewed as an outlier as an ostensibly traditionalist Mālikī scholar, however due to his espousal of key minority *fiqh* goals and legal methodology, his contributions have merited inclusion in this study. Where other members of the ECHR - scholars such as Fayṣal Mawlāwī, ʿAjīl al-Nashmī, ʿAbdallāh bin Yūsuf al-Judayʿ and others - have made significant contributions whether by expanding or even challenging minority *fiqh* positions, an analysis of their writing have been included where relevant.

Goals & Legal Principles of Minority *Fiqh*

Goals of Minority Fiqh

Although minority *fiqh* addresses a variety of divergent issues the variation is underpinned by thematic overlap, goals and methodological commonality and considerations. These broader jurisprudential principles and approaches, which are intertwined and interrelated to the goals, do not have to be gleaned inductively from the *fiqh* itself but are set out by the key founders of minority *fiqh* with the necessary justifications for a Western Muslim minority existence. The methods and legal principles are inseparable from the goals as each element serves a wider purpose which is understood from a negotiation of the universal principles and their application to current trends. As such study of these elements should not be in isolation but be contextual both with reference to modernist genealogy of minority *fiqh* but also the traditional vestiges that still reside within the *fiqh*.

The navigation of modernity and tradition via a set of principles and goals is the way modernist *fiqh* in the past and now minority *fiqh* discourse seeks to establish authenticity (*aṣāla*) to the fundamentals of religion. Any study of a body of jurisprudence, especially one that lays claim to novelty and exigency of the present time, must include the premises, and aims on which it is based to assess its congruity and efficacy. A corollary of realising the letter assessments is an account and analysis of these macro considerations as they relate to

[121] Bin Bayya, *Ṣinā'at al-Fatwā*, p.255 and p.257
[122] Bin Bayya, *Ṣinā'at al-Fatwā*, p.253 and pp. 263-283
[123] Bin Bayya, *Ṣinā'at al-Fatwā*, p.259.

legal methodology to which we shall now attend in introductory form and substantially in the various subject areas in the ensuing chapters of this thesis.

Al-ʿAlwānī sees the presence of Muslim minority from the standpoint of weakness as a minority but also from the potential that the West affords them in terms of their rights. The new *fiqh* should facilitate a relationship of kindness and justice with the wider non-Muslim population. Also, the Muslim minority should fulfil their role as 'raised nation' to be the 'best nation ever raised for mankind'[124] which is understood to mean their duty to convey the message of Islam to others. Al-ʿAlwānī requires the *fiqh* to assist integration and good relations while at the same time the Muslim community must preserve its faith and invite others to it. Al-ʿAlwānī's primary concern is not ease and facilitation for its sake but the *fiqh* must serve the purpose of protecting "minorities as representative models or examples of Muslim society in the countries in which they live. It is the *fiqh* of model communities, elites, and a rigorous, rather than frivolous or concessionary, approach."[125] The new *fiqh* will seek good relations and integration but will not accept assimilation and loss of religious values and identity.

Echoing the above, the goals of minority *fiqh* have been set out by al-Qaraḍāwī[126] in his *Fī Fiqh al-Aqalliyāt al-Muslima*[127] and in the following year reproduced in the first edition of the Journal of the ECFR.[128] According to al-Qaraḍāwī, the new *fiqh* of minorities should have the following aims for Muslim minorities[129]:

1. Muslim minorities should be assisted such that they can lead a comfortable life in the West without religious or temporal hardship.
2. They should be helped to protect and preserve their essential Islamic identity and personality.
3. Enable the Muslim community to fulfil their duty of conveying the universal message of Islam.
4. Help them to be flexible and open such that they do not isolate from the rest of society and are able to engage positively.

[124] This is part of a verse (no 110) from chapter Āli Imran quoted by Al-ʿAlwānī.
[125] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, pp. 3-4.
[126] ʿAbd al-Majīd Najjār has also set out similar goals. See https://islamonline net/archive.
[127] Al-Qaraḍāwī, *Fī Fiqh al-Aqalliyāt*, p. 34.
[128] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p. 46.
[129] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p. 46-47.

5. Contribute to their culturing and engender awareness so they can protect all their rights and freedoms whether religious, cultural, social, economic, or political as per the national constitution.
6. Assist them to fulfil their religious, cultural, and social rights without hindrance.
7. Answer the questions posed by the Muslim minorities and find solutions to their problems.

The above aims acknowledge and are sensitive to the position and plight of Muslim communities and revolve around facilitating a strong and integrating Muslim presence, as a legal jurisprudential support to remove obstacles to living in the West and achieving their rights and freedoms protected under domestic law. Both scholars highlight the universal[130] nature and message of Islam, which has no border or territory, and the duty of Muslim minorities to convey that message to the host nation.

Similar to the above conception of the goals of minority *fiqh*, Bin Bayya also emphasises the need to protect "the religious life of Muslim minorities on the level of the individual and the community," and spread the Islamic Call to the non-Muslim majority. He supports positive integration and rejects isolation and assimilation and calls for the establishment of a body for jurisprudence governing the relationship of Muslim minorities with others on a cultural and global level.[131]

Ijtihād

Much like Muḥammad ʿAbduh in the Arab world or Sir Sayyid Ahmad Khan from Southeast Asia who called for the opening of the gates of *ijtihād*[132] and a rejection of *taqlīd* (blind following) and embracing of modernity via a reinterpretation of Islam, signifying that the traditional account was not sacrosanct, and recourse had to be made to the primary texts, minority *fiqh* advocated a similar approach. So, while the *Sharī'a* at its core was immutable and constant, *fiqh* in contrast was the knowledge of God's Law based on the *interpretation* of *fuqahā* (jurists) which is a product of human endeavour, fallible, time sensitive and open to accommodation or rejection by later generations.

[130] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. 4.
[131] Bin Bayya, *Ṣināʿat al-Fatwā*, p. 257.
[132] Parray, "Islamic Modernist and Reformist Thought", pp. 82-83.

In applying this approach, minority *fiqh*'s starting point is that the dynamics of the Muslim presence in the West is unprecedented in nature, volume and consequence and therefore the traditional *fiqh* cannot, and was never intended, to cater for the needs and challenges of Muslims in Europe or America.[133] This invariably means that questions, which might have been discussed substantively in the past and deemed settled are no longer unimpeachable and must now be subject to scrutiny and *ijtihād*. This calls for the need for a fresh *ijtihād* and the shunning of *taqlīd* (imitation) of past opinions and schools of thought. Al-ʿAlwānī exemplified the above approach when he said the questions asked of the modern jurist (*faqīh*) needs to be "redefined".[134] So instead of preoccupation with past concerns such as whether Muslims can live in the West and participate in their political life, concerns which originate from a reality that no longer exists. Today the question should focus on what their role in the current reality should be where Muslims live in countries in the West which afford them religious and political rights as citizens?[135] Should Muslims 'relinquish' these rights or seek an accommodation based on fresh *ijtihād*? Al-ʿAlwānī believed the classical *fiqh* and its *uṣūl* (principles of derivation) is wholly unequipped to address the modern issues and so a new methodology of *ijtihād* was required where the primary sources are approached in a contextual manner.[136] The role of the classical *fiqh* for al-ʿAlwānī is to serve us a guide and wealth of knowledge to inform a better understanding but not one that is followed literally or dogmatically.[137]

Al-Qaraḍāwī looks at the problems that Muslims face in the West as new problems even though some of these issues, such as the issue of Muslim residence in non-Muslim countries, have been discussed in the traditional *fiqh* literature. The new context of the Muslim presence converts these issues into new problems that require a "sound contemporary *ijtihad*"[138] and was the reason for the formation of the European Council of Fatwa & Research (ECFR).[139] For al-Qaraḍāwī such an *ijtihād* can be of two types: selective (*tarjīḥī*), in the sense that an opinion is adopted from the rich jurisprudential heritage on the basis of it achieving the aims

[133] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. xv.
[134] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. 4.
[135] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, pp. 5-6.
[136] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. 9.
[137] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. 7.
[138] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p.53. Al-Qaraḍāwī stated that after visiting Muslims in Europe, America, and Far East for more than a quarter of a century he noticed their questions related to their residence and their particular situation living as a Muslim minority. These required responses and so there had to be some initiative from the scholars of *Sharī'a*. See al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", pp. 36-37.
[139] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p. 43.

(*maqāṣid*) of the *Sharī'a* and the interests of people.[140] The process of selection is not haphazard, it is determined by a balanced consideration of all opinions, evidences and their effects and consequences.[141] Secondly, where there is an absence of guidance in the traditional *fiqh* for completely novel matter, then the *ijtihād* must invariably be original and innovative (*ibdāʿī*) where recourse is made to the primary texts directly without regard to the traditional *fiqh* literature.[142] On the general need for *ijtihād* both al-ʿAlwānī and al-Qaraḍāwī have similar and overlapping stances.

On the sources of the new *fiqh*, minority *fiqh* is in complete agreement with the normative and theological stance that the primary sources must be the Qur'ān and Sunna. The details of what this means is not agreed amongst the traditional scholars of *uṣūl al-fiqh* (principles of Islamic jurisprudence), however the elaboration of minority *fiqh* again reflects their modernist approach to *fiqh* and *ijtihād*. In referring to these primary sources the minority *fiqh* scholar reserves the right to directly approach these sources and utilise and interpret them without being bound to any past scholar or school of thought. Al-ʿAlwānī for example elucidates his approach to Qur'ān and advocates what he calls a "combined reading" where "key principles" of the Qur'ān are understood considering the physical world and vice versa.[143] On the role of Sunna, he assigns it a secondary subordinate status which supports and clarifies the Qur'ān but can never override or supersede it.[144]

Al-Qaraḍāwī, like al-ʿAlwānī, also cites the primacy of the Qur'ān and Sunna as a source for *fiqh*. He compares the Qur'ān to the idea of constitution, a supreme higher law under which all other rules must be subservient and concordant.[145] This is different to the Sunna which contains aspects which may or may not have legislative value. So, a ruling for example cannot be established from weak (*ḍaʿīf*) narrations or the authenticity or interpretation may be disputed if they are in conflict with the Qur'ān. As such the Sunna plays a subservient and subsidiary role as compared to the Qur'ān.[146] As for the *ʿijmā* (consensus) and *qiyās* (juristic analogy) which are normatively accepted as sources for *fiqh* akin to the Qur'ān and Sunna, al-

[140] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p. 53.
[141] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p. 54.
[142] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p. 54.
[143] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. 15. See also p. 20 where he sets out a list of methodological principles by which the Qur'ān should be studied.
[144] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. 19.
[145] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p. 49.
[146] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p. 51.

Qaraḍāwī accepts these as sources notionally but points out that the practise and application are disputed due to various factors.[147] As regards the other disputed or minor sources such as *maṣlaḥa mursala* (public interest), *istiḥsān* (juristic preference), *sharʿ min qablinā* (the law of past prophets) and many others, both al-ʿAlwānī and al-Qaraḍāwī agree that they are not binding but are to be used and benefitted from[148] as long they support and do not contradict the Qur'ān.[149]

Bin Bayya, in his *Ṣināʿat al-Fatwā*, embarks on the explaining his methodology of *ijtihād* for minority *fiqh* by discussing the *fatwā* production or craft (*sināʿa*) and its processes in terms of the primary sources used by the Companions of the Prophet and then the nature of *fatwā* (legal rulings) production by the schools of thought and the secondary sources relied open by them and the benefit we can derive from these today. Like the above scholars he does not view minority *fiqh* to be new but part of the general *fiqh*[150]. He cites the main principles of minority *fiqh*, like the others, as requirements to facilitate ease and remove hardship and that the *fatwā* will change according to the times. He explains the legitimacy and nature of the general principle of *ḍarūra* (necessity), *ḥāja* (need) and *ʿurf* (custom).[151]

In respect of the practice of *ijtihād* Bin Bayya outlines three types: Firstly, a new *ijtihād* in a completely novel matter which is arrived at via an analogy (*qiyās*) based on the primary sources of the Qur'ān and Sunna. Second, an *ijtihād* that is arrived at by ascertaining the reality of a previous ruling and applying that on a new matter which falls within the scope of that reality and finally an *ijtihād* which is selected from the previous *ijtihāds* because it serves a *maṣlaḥa* or public interest in the current circumstances even though that opinion was deemed weak in the past. Bin Bayya is less audacious than the first two scholars and admits his preference is the third type which essentially is selecting a past opinion which suits the times and so a form of *talfīq* (not restricting oneself to single school of thought.). Though Bin Bayya is willing to countenance completely new *ijtihāds*, his focus on past *ijtihād* means his discussions appear to be part of the traditional *fiqh* discourse though some of his conclusions are far from traditional. Bin Bayya, by citing these principles as the main evidence for

[147] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p. 51.
[148] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p. 52.
[149] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. 19.
[150] Bin Bayya, *Ṣināʿat al-Fatwā*, p. 25.
[151] Bin Bayya, *Ṣināʿat al-Fatwā*, pp. 265, 277 and 350.

minority *fiqh* and the precedence he affords to them, his methodology is arguably modernist in approach like the first two scholars.

The ambit of minority *fiqh* is wide according to al-ʿAlwānī and to be understood in an expansive sense. It is not like a typical chapter in *fiqh* such as *ṣalāh* (prayer) or *zakāh* (alms), rather it encompasses the general understanding of religion and "covers all theological and practical branches of Islamic law and jurisprudence".[152] He likens the use of the word *fiqh* as used by Abū Ḥanīfa to his work *Fiqh al-Akbar* or the greater *fiqh* which addresses theological matters of *Sunni* Creed. This is perhaps because the subject area of minority *fiqh* is expansive, covering numerous subjects and cannot be defined under the normal customary chapters of traditional *fiqh* books. Al-Qaraḍāwī also recognises that a Muslim community needs more than *fiqh*, such as spiritual and moral guidance. However, for him the new *fiqh* is part of the general *fiqh* though it has its features and subject matters. He cites the classification of new areas of *fiqh* such as the medical *fiqh*, the *fiqh* of economy and political *fiqh*. He asks why then can we not have a *fiqh* of minorities which brings together diverse issues and subject matters under the umbrella of a minority *fiqh*.[153] Similar to al-Qaraḍāwī and Bin Bayya, ʿAjīl al-Nashmī another minority *fiqh* scholar, rejected al-ʿAlwānī's broad classification of minority *fiqh* which he considered should be part of the wider *fiqh* and even disagreed with the use of the nomenclature '*fiqh* of minorities' because the *fiqh* or ruling relates to actions and not the state of being a minority.[154] This is perhaps a redundant debate as the content and focus of minority *fiqh* is not debated and as all these scholars participated in the discussing the core legal issues of minority *fiqh* and were in broad agreement as to their importance.

Facilitation of Muslim Identity and Integration

As mentioned above minority *fiqh* aims to facilitate a Muslim presence that can live by Islamic values and at the same time protects their rights and freedoms.[155] Part of that facilitation however may involve addressing what are construed as legal and theological obstacles to Muslim integration and positive engagement. For example, the traditional ideas of belonging and residence as understood under the terms of *dār al-Islām* (land of Islam) or

[152] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. 3.
[153] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p. 52.
[154] Al-Nashmī, "al-Taʿlīqāt", pp. 22-23.
[155] Caeiro, "The Making of the Fatwa", p. 82.

dār al-kufr or *dār al-ḥarb* (land of disbelief and war) and which were classically applied to non-Muslim lands present several problems and dilemmas. First is the question of Muslims maintaining a permanent residence in a non-Muslim land which was generally declared unlawful in traditional *fiqh*. Secondly how is such nomenclature to be reconciled with the requirement of loyalty to the country in which one resides, and can one really be a citizen of a nation that has a different religion or even fight for that nation as part of their national army? Thirdly, if Muslims are to seek their rights through the political process, to what extent can they engage with man-made secular processes and systems of government when Muslim theology requires the belief in the supremacy of God's law? Furthermore, where there is conflict or dispute in their transactions with other Muslims, they are required to resolve their issues based on *Sharīʿa*, but in certain cases this will not be possible or involve hardship, disadvantage, and difficulty, or require Muslims to refer to domestic law and courts for resolution of their matters. In the matter of a divorce for example, can Muslims make recourse to civil court judgement, and will that judgement be valid in the eyes of the *Sharīʿa*?

Most of these issues are conceptual and theological whilst others are purely related to traditional legal rulings (*fatwā*) in what are classed as the *muʿamalāt* (transactions) whether social or commercial. Issues such as female converts marriages to non-Muslims or the buying of stocks and shares or even buying a home with a usurious mortgage all present themselves as obstacles of a different nature. They effect the interest of Muslims such as the causing hardship for female converts and creating a disincentive for them to convert or remain within the fold of Islam or they are a bar to economic engagement of Muslims where they cannot complete on par with their non-Muslim counterparts.

In each of these matters the traditional *fiqh* and theological positions stand as impediments to integration and facilitation. As we shall see in the course of this thesis, how minority *fiqh* tackled these issues is guided by its wider goals and the way it found ways to distinguish, qualify or set aside traditional *fiqh* prescriptions and stances and formulate its own new *ijtihād*.

Legal Principles of Leniency & Accommodation

A hallmark of 20th century modernist legal discourse in setting aside, distinguishing, or qualifying traditional rulings to meet the challenges of the day was the focus and utilisation of *maqāṣid* and *maṣlaḥa* goals-based *ijtihād*. The modernist discourse is represented by a class of thinkers and scholars Wael Hallaq described as "religious utilitarian"[156] and the minority *fiqh*'s legal approach fits neatly into that bracket. According to Shammai Fishman:

> Fiqh al-aqalliyyat is squarely in the utilitarian camp and the tradition of the salafiyya movement of the Egyptian jurists Muḥammad Abduh (d.1905) and Rashid Rida (d.1935). Rather than leaving the traditional legal methodology based on four sources, the ECFR added new devices, such as public interest as a source of law.[157]

Minority *fiqh* having admitted these sources assume the status of "minor"[158] or "disputed"[159] sources compared to the Qur'ān, Sunna, *ijmāʿ* (consensus) and *qiyās* (juristic analogy), nevertheless granted them independent and sometimes arguably overriding status in the practise and derivation of rules. In the pursuit of the goals of Muslim minorities, minority *fiqh* is willing to disregard the traditional *fiqh* and countenance compromises, concessions, or circumvention of positions it has itself espoused due to the needs of the Muslim minority and the need to facilitate its wider aims and interests. *Maqāṣid* (goals) and *maṣlaḥa* (public interest) were invoked in various issues, matters traditionalists would argue are settled, such as minority *fiqh* citing allowing convert women to remain married to their non-Muslim spouses or the public interest in permitting Muslims to vote in secular general elections.

Minority *fiqh* mindset in studying any new issue faced by Muslim monitories which is claimed to have been settled by traditional *fiqh* is to argue that rulings must be appraised based on current realities and challenges and not the old realities on which these ruling were based.[160] It is a principle of minority *fiqh* that rulings will change with time and place and the

[156] Hallaq, Wael B, *A History of Islamic Legal Theories*, (Cambridge: Cambridge University Press, 1997), p. 214.
[157] Fishman, *Fiqh al-Aqalliyyat*, p. 7.
[158] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. 19.
[159] Al-Qaraḍāwī, "al-Mushkilāt al-*Fiqh*iyya", p. 52.
[160] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. 21.

custom *(ʿurf*) of the time.[161] As such any part *fatwā* is to be adopted, rejected or qualified based on the concerns felt in the present day.[162]

Similar to Muḥammad ʿAbduh and Rashīd Riḍā[163], minority *fiqh* supports *talfīq*[164] *or takhayyur*[165], the practice of not limiting oneself to a single school of thought but selecting rulings from various schools of thought (*madhhabs*) in order to arrive at a ruling that will serve minority *fiqh* goals.[166] The selection of views from a variety of *madhhabs* can be seen in issue of convert marries and issue of *kafā'a* which give authority to male guardians over and above females right to choose in respect of marriage, *wilayah* (guardianship) and *ʿaḍl* (prevention of marriage).

Sometimes the goals and legal principles of minority *fiqh* converge. This is especially the case with the desire for leniency and the bringing of ease in legal rulings. Minority *fiqh* aims to make life and livelihood of Muslims in the West bearable and not hardship due to past restrictive rulings. The principle of *taysīr* (bringing ease) is apt as it requires the scholar to have regard to the matter of attaining ease and avoiding hardship when giving rulings on issues faced by Muslims in the West.

The practice of *taysīr* usually involves the use of general principles in finding an exception (*istithnā'*) or a dispensation (*rukhṣa*) from an established rule that causes hardship.[167] The use of and wide reliance on general legal principles (*qawāʿid fiqhiyya kulliyya*) is another independent legal principle of minority *fiqh*.[168] The principle of '*ḍarūra*' (necessity) and '*ḥāja*' (need) are perhaps the most oft used in issues ranging from buying homes, company shares, to following the civil divorce procedure in Western courts.

Al-ʿAlwānī played a seminal role setting out the need and legal thinking required for a new *fiqh* for minorities. His most consequential contribution was to establish the doctrinal

[161] Al-Qaraḍāwī, "al-Mushkilāt al-*Fiqh*iyya", p. 64.
[162] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, pp. 22-23. Also see al-Qaraḍāwī, "al-Mushkilāt al-*Fiqh*iyya", pp. 58 and 80.
[163] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, p. viii.
[164] https://www.oxfordreference.com/view/10.1093/oi/authority.20110803101951568.
[165] Hallaq, *A History of Islamic Legal Theories*, p. 210.
[166] Albrecht, Sarah, *Dār al-Islam Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West*, (Leiden: Brill: 2018), pp. 214-215.
[167] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p. 61.
[168] Al-Qaraḍāwī, "al-Mushkilāt al-Fiqhiyya", p. 55.

framework of minority *fiqh* whilst al-Qaraḍāwī affirmed and extended the theory and demonstrated the application of this doctrine via his legal rulings on various topics.

A Review of Secondary Sources

We have so far considered the primary sources of minority *fiqh* and discussed some key ideas and themes contained within the primary sources. The nature of this topic has attracted the attention of academics from a sociological, political, and legal standpoint, the latter being the focus of this study though the other aspects are relevant depending on the subject matter.

Some have written about history of Muslims in the UK, and their integration in the UK and engagement with the political process and policy of multiculturalism. The writings of Humayun Ansari[169], Iftikhar Malik[170], Yvonne Haddad[171], Tariq Modood[172], Ziauddin Sardar[173], Wasif Shadid[174], and Timothy Peace[175] are a few examples of those who have written in this field. Their writings are useful in giving an understanding of the dynamics of Muslim integration, their self-perception, diverse nature of the Muslim communities, government policy and relationship with the wider society.

In terms of the articles that have focused on minority *fiqh* and its legal methodology, a noteworthy example is the article of Shammai Fishman entitled *Fiqh al-Aqalliyyat: A Legal Theory for Muslim Minorities,*[176] which is a good account of the key founders, themes, and features of the legal theory. The author correctly identifies the *fiqh* to be part of the modernist legal tradition and discusses the key issues such as the nature of the West (whether it is *dār al-ḥarb*), the role and use of *ijtihād*, *maṣlaḥa* (public interest) and *taysīr* (ease and facilitation) in minority *fiqh*. The discussion of the legal theory is largely descriptive and devoid of significant analytical content. The work also does not analyse the application of these principles in any substantial way. Tauseef Ahmad Parray's article entitled *The Legal*

[169] Ansari, Humayun, *The Infidel Within: Muslims in Britain Since 1800* (London: Hurst, 2004).
[170] Malik, Iftikhar Haider, *Islam and Modernity: Muslims in Europe and the United States* (Pluto Press, 2004).
[171] Haddad, Yvonne Yazbeck & Smith, Jane I. (eds.), *Muslim Minorities in the West: Visible and Invisible*, **(**Walnut Creek, CA: Altamira Press, 2002). Haddad, Yvonne (ed.), *Muslims in the West. From Sojourners to Citizens*, (New York: Oxford University Press, 2002).
[172] Modood, Tariq, *Multiculturalism, Muslims and Citizenship: A European Approach* **(**Routledge, 2005).
[173] Sardar, Ziauddin (ed.), *Muslim Minorities in the West* (Grey Seal, 1995).
[174] Shadid, W & Koningsveld, P.S. Van (eds.), *Political Participation and Identities of Muslims in non-Muslim States* **(**Kampen, The Netherlands: Kok Pharos, 1996).
[175] Peace, Timothy, *Muslims and Political Participation in Britain* (Routledge, 2020).
[176] Fishman, *Fiqh al-Aqalliyyat*.

Methodology of 'Fiqh al-Aqalliyyat' and its Critics: An Analytical Study[177], is similar to Fishman and the analysis is also restricted to the key proponents and features and a recognition of its modernist roots without an evaluation of the application of these principles.

Dina Taha's articles *Muslim Minorities in the West: Between Fiqh of Minorities and Integration*[178] and *Fiqh of Minorities and the integration of Muslim Minorities in the West*[179], are better in this regard as she considers the application. In the former article she also introduces and discusses the key proponents, themes of integration and legal theories of minority *fiqh* and attempts to study the application in two areas: *Islām al-zawja* (the marriage of the female convert to a non-Muslim spouse) and interest-based mortgages. Her discussion is a brief overview of the various opinions and her conclusions dwell on the extent to which minority *fiqh* has provided a new original *ijtihād*. On these both issues she observes that minority *fiqh* scholars of the ECFR rules on the permissibility of both by justification on a traditional basis such as finding traditional opinions which support the modern view or making recourse to *ḍarūra* (necessity).

Her view in conclusion is that the "*fiqh* of minorities has, to a large extent but not entirely succeeded in providing a new original *ijtihād*."[180] She asserts this conclusion by considering the background of the scholars and how these affect their legal methodology and approach. She states that minority *fiqh* scholars, based on their background, can be grouped in four categories: first those that are "literalist or traditionalist scholars" whom she does not consider true minority *fiqh* scholars as they have nothing original to offer by way of *ijtihād*. Second, are the "international institution" scholars like ECFR scholars who "avoid challenging the fundamental sources and premises of traditional *fiqh*" and espouse "short term and temporary solutions" justified based on the concept of *ḍarūra*. The third category are what she calls "adaptational scholars" like al-ʿAlwānī who have had "direct experience and involvement in the West" and adopt a different "justificatory approach" to empower Muslims in integration and preserving their identity. Finally, the fourth category are the "partnership scholars" like Tariq Ramadan who are born in the West and so view "Muslims

[177] Parray, "The Legal Methodology".
[178] Taha, "Muslim Minorities in the West".
[179] Taha, Dina, "Fiqh of Minorities and the Integration of Muslim Minorities in the West", The IISES International Interdisciplinary Conference – April 2012.
[180] Taha, "Muslim Minorities in the West, p. 35.

as Westerners, citizens and partners in society.". For this category the integration is an end rather than a means as is the case with the second and third category.[181]

While these categorisations are useful and have some merit, they do not fit the categories as neatly as presented on further scrutiny. For example, all categories of scholars maintain that must be based on and not contradict the primary sources. The level to which and the way they navigate this is perhaps more to do with their legal approach and less to do with where they were born or reside. The ECFR scholars have not justified the permissibility of convert marriages to non-Muslims based on *ḍarūra*, rather they have completed rejected the traditional premise. The fact that they found support for it in some opinions in tradition which itself is an act of reinterpretation. Al-Judayʿ, who resides in the UK, wrote the most extensive piece on convert marriages argues by reinterpreting tradition. Al-ʿAlwānī did not write a detailed *fatwā* on this subject and so it is difficult to draw any concrete conclusions from citing broader issues of ease as Ibn Juday' also cites *maṣlaḥa* as a factor in the process of *ijtihād*. On the question of houses purchases based on interest bearing loans the justification of *ḍarūra* is due to their reliance on general evidence (*adilla kulliya*) which al-ʿAlwānī also advocates. That some distinguished *ribā* (usury) prohibited by *Sharī'a* and argue this is different to interest as practised in the West is more a result of their legal methodology than the question of residence as we find Muslim scholars residing in the Muslim world holding that view also.[182] Therefore residence is of lesser significance than legal methodology which perhaps should been afforded more critical attention.

Another scholar who specialises in Islamic law and whose writings have a direct relevance to the topics of minority *fiqh* is Khaled Abou El Fadl[183]. El Fadl is not only an academic but has traditional training in in *fiqh* and legal theory (*uṣūl al-fiqh*). His article *Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries*[184] is one of the most detailed review of the concept of *dār al-Islām* and its various permutations amongst the classical jurist's extent in the academic

[181] Taha, "Muslim Minorities in the West, pp. 33-34.
[182] Visser, Hans, *Islamic Finance: Principles and Practice* (Edward Elger Publishing, 2010), p. 33.
[183] Dr. Khaled Abou El Fadl is an acclaimed scholar of Islamic law and advocate of human rights who obtained his PhD in Islamic Law from Princeton University, USA and currently is a Professor of Law at the UCLA School of Law where he teaches. See https://law.ucla.edu/faculty/faculty-profiles/khaled-m-abou-el-fadl
[184] Abou El Fadl, Khalid, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," *Islamic Law and Society*, vol. 1, no. 2, 1994, pp. 141-187.

sphere at the time of its publication. His work presents the nuances of how these terms arose and were used by the classical scholars in their respective historical contents and as such invaluable for analysing the minority *fiqh* scholars' treatment of the same subject in the modern context. Also, his writings on democracy and the notion of authority, legitimacy and human agency and the supremacy of Gods Law are important contributions in understanding minority *fiqh* discourse in the political field. For example, his article entitled *Islam and the Challenge of Democracy*[185] explored the idea of Gods Law and human agency in legislation and *ijtihād* which is relevant to the study of how minority *fiqh* reconciles such matters in the context of national domestic law and politics.

[185] Abou El Fadl, Khalid, "Islam and the Challenge of Democracy", *Boston Review*, April/May 2003 Issue.

Chapter 2

Legal Philosophy of Minority *Fiqh*

Introduction

Islamic legal schools rely upon foundations and principles (*uṣūl*) by which they derive their detailed rulings (*aḥkām*). Minority *fiqh*, although not a *madhhab* like the classical schools such as the Hanafīs, Mālikīs and others, it's *fiqh* and legal principles have discernible features and direction. The general evidence (*adilla ijmāliyya*) of law, such as the Qur'ān, Sunna and *ijmā'* (consensus) and *qiyās* (juristic analogy) are all upheld by minority *fiqh* scholars as they come from *Sunni* school backgrounds, mainly from the Shāfiʿī and the Mālikī schools of thought. As such there is no difference as to the primary sources of law and except in their details. They have not bound themselves to the positions of their respective schools and have been willing to adopt independent positions.

However, the commonality observed can be classed as a legal philosophy, with scholars who attempted to reconcile religion with modernity, following a goals and objective based approach to the religious legal texts (*nuṣūṣ*). The attempt to reconcile and bring congruent legal foundations to effectively address problems is not a new endeavour. In the past Abū Isḥāq al-Shāṭibī (720 – 790 A.H.) an Andalusian jurist from the Māliki school sought to bring congruence in *usūl al-fiqh* with his work *al-Muwāfaqāt fī Uṣūl al-Sharīʿa* ('Congruences in the foundations of Islamic Law').[186] In that work he sought to reconcile the conceptual disputes around the goals (*maqāṣid*) and their legitimacy and usage in deriving rules. al-Shāṭibī's search for congruity worked on many levels, from the harmonisation of disputes of jurists on foundational matters to harmony between the general evidences (*adilla kulliya*) and the specific evidences (*adilla juz'iyya*). Al-Shāṭibī focused on the *uṣūl* (foundations) as a means liberate the practise of Islamic jurisprudence from the rigidity, stagnation and hair-splitting that had that had beset it in his day.[187]

Today the aim for modernist *fiqh* is to devise a bespoke set of legal principles, that is rooted in tradition but not beholden to it, which has the propensity to bring solutions to modern day problems. The argument of minority *fiqh* scholars is that modern problems require a dynamic

[186] Henceforth will be referred to as *al-Muwāfaqāt*.
[187] Ishak, Muhammad S. Ifwat, "The Principle of Considering Ma'ālāt in Islamic Rules: Do Ends Justify Means?", *International Journal of Islamic Thought*, vol. 14: (Dec), 2018, p. 55.

approach to legal texts whereas excessive literalism of traditional schools leads to rigidity and ineffective solutions. What is required is a methodology which allows the different varieties of textual interpretation to be matched with the multiplicity of questions Muslims minorities face living in the West. It is asserted that the nature of the subject matter at hand, the problems, and predicaments of the Muslim experience in the West, is unprecedented and therefore can only be addressed via a juristic dynamism.

The minority *fiqh* legal foundations are based on a set of goals and principles underpinned by a view about the aims of priorities of the Muslim community which seeks to protect its identity and engage positively with wider society. One can summarise the main pillars of their legal thought as follows:

a) The legal premise of minority *fiqh* and the case for a bespoke approach.
b) A view about the flexibility of the *Sharī'a.*
c) Focus on a Goals (*maqāṣid*) based approach.
d) The usage of general legal principles (*qawāʿid fiqhiyya*).

The first relates to the rationale for the general legal approach and the jurisprudential principles which will play a significant role in the process of deriving rules (*istinbāṭ*). These principles can be grouped under the heading of *ma'ālāt al-afʿāl* (the consequences of actions). The second is the idea that *Sharī'a* as understood in traditional *fiqh* is not fixed and subject to change based on new realities presented before a jurist. The third point is about the guiding role *maqāṣid* (aims) has in the determining rulings on matters while the fourth relates to the usage of general principles and their application as per their parameters (*ḍawābiṭ*).

These roots of these pillars are not unique and stem from classical positions on legal theory and principles, however their modernist appropriation and utilisation in the Western context is the subject of the present study. This chapter will outline the classical understanding of these subject matters as minority *fiqh* claims to be an extension of the existent strands of past classical legal thinking and does not contravene the fundamentals. This will involve a detailed analysis to appreciate what these strands are and to what extent these have been revised by minority *fiqh* scholars. These revisions or modernist applications of the classical positions will be studied to assess congruity or the lack thereof between the classical and the modernist usage.

In addition to this, the chapter will consider the legal congruity between its own principles and application on pressing sensitive issues. In so doing we will consider the controversial *fatwā* of the European Council of *Fatwa* and Research (ECFR) in permitting interest bearing loans for the purchase of residential homes. This *fatwā*, notwithstanding the novelty of the outcome, more significantly opens a window to the operation of the legal approach of minority *fiqh* as it encapsulates and engages most, if not all, the pillars of the minority *fiqh* legal philosophy and legal principles. How minority *fiqh* navigates its classical roots, with its modernist usage in this issue allows us to draw conclusions as to its internal congruity. The focus in this case study will not be the *fiqh* itself but an analysis of the process of derivation (*istinbāṭ*) and the jurisprudential tools deployed by minority *fiqh* scholars in arriving at the *fatwā*.

Section I: The Legal Premise of Minority *Fiqh*

Muslim Minorities under Secular Law

Much of the minority *fiqh* legal premise is determined by the view of the situation of Muslim minorities in the West. Perhaps the most detailed articulation of the legal ethos based on this analysis was presented by ʿAbd al-Majīd al-Najjār, a prominent member of the ECFR. Al-Najjār wrote two articles published in the ECFR journals which established the legal premise and the justification for it. In the first article entitled *Naḥwa Minhāj Uṣūl li-Fiqh al-Aqalliyāt* (Towards a Jurisprudential Methodology for the *fiqh* of Minorities) he sets out, diachronically, the reality that the period of Muslim history where *ijtihād* had flourished. During this period Muslims lived under what he called the "authority of religion" (*sultān al din*) which organised the social order.[188] They lived under a polity which managed the affaires of the *umma* based on the *Sharī'a*. However, later when Muslims found themselves living under a non-Muslim power, such as the fall of Andalusia, that era was characterised by weak *ijtihād* which led to blind imitation (*taqlīd*) and rigidity. As such the legal thought of that era "was not able to deal with this new phenomenon from a comprehensive jurisprudential basis" and so the response was a repetition of *"old partial ijtihād"*.[189] He likens the recording of *fiqh* related to minorities to the recording of *uṣūl al-fiqh* (principles of jurisprudence) which came after the *fiqh* (jurisprudence) and so the foundation of a minority *fiqh* is yet to be established. Therefore, al-Najjār calls for a *ta'ṣīl* or establishing foundations

[188] Al-Najjār, ʿAbd al-Majīd, "Naḥwa Minhāj", p. 46.
[189] Al-Najjār, "Naḥwa Minhāj", p. 47.

or principles from which such a *fiqh* will arise and be developed.[190] He states such as an endeavour must start from the premise that Muslims now live under the authority of secular law.[191] So the loss of power and authority is a dynamic that must factor into the development of the legal principles (*uṣūl*) and then the law (*fiqh*).

In respect of the relationship between the traditional *fiqh* and the new *fiqh* that is to be developed, al-Najjār argues that it should not be severed from its traditional roots or the "general methodology of *uṣūl al-fiqh*". The *fiqh* should not be partial but consider holistically the aspirations of the Muslim minorities dealing with all aspects of their life, not just a narrow focus on the rituals.[192] As covered in chapter one, al-Najjār, reiterates the goals of this new *fiqh* as mentioned by others, namely the protection of the religious life of minorities and introduction of the Islamic faith to non-Muslims.

In addition to the goals al-Najjār outlines the juristic principles on which minority *fiqh* should be based. These principles, he argued, must be comprehensive to afford maximum benefit and impact to Muslim minorities. By way of example, he cites a series of legal principles which he believes are sufficiently expansive to achieve these criteria and they are[193]:

a) The principle of *ma'ālāt al-afʿāl* (the consequences of actions).
b) The principle of *al-ḍarūrāt tubīḥu al-maḥẓūrāt* (need permits the prohibited).
c) The principle of balance (*muwāzana*) between the benefits (*maṣāliḥ*) and harms (*mafāsid*).
d) Other subsidiary principles such as ʿ*umūm al balwā* (widespread unavoidable harm) and *yajūz fī al-intihā' mā lā yajūz fi-l-ibtidā'* (that which is not permitted in the beginning is permitted in the end) which he groups into one definition in the following way: 'That which cannot be changed is permitted'.

He believes such a premise will allow for the development of a legal philosophy from which a wide and comprehensive body of *fiqh* can be developed. This point is further developed in his second article discussed below.

[190] Al-Najjār "Naḥwa Minhāj", p. 49.
[191] Al-Najjār, "Naḥwa Minhāj", p. 49.
[192] Al-Najjār, "Naḥwa Minhāj", pp. 50 and 58.
[193] Al-Najjār, "Naḥwa Minhāj", pp. 59-63.

Recourse to Ma'ālāt al-afʿāl (the consequences of actions)

In another article entitled *Ma'ālāt al-Afʿāl wa Atharuhā Fī Fiqh al-Aqalliyāt*[194] (The Principle of Consequences of Actions and its Impact on the Fiqh of Minorities), al-Najjār expands on the principle of *ma'ālāt al-afʿāl* (the consequences of actions) and affords it a central position in minority *fiqh* legal philosophy. In this piece he provides a detailed justification for the use of this principle and the rules regulating its use.

This principle in essence is about the consideration of consequences of actions or inaction in terms of their benefit (*maṣlaḥa* [195]) or harm (*mafsada*[196]) that might accrue. The principle is associated with al-Shāṭibī to developed and expanded the concept in his *al-Muwāfaqāt* where he defined it in the following way:

> Examination of the *ma'ālāt* (consequence) of actions is acknowledged and intended according to *Sharīʿa* (Islamic law), whether these actions are lawful or unlawful. Thus, the *mujtahid* (those who has the ability to conduct *ijtihād* process) will only judge an action carried out by individuals, either by action or omission, after examining the consequences of this action: it may be that it is initiated in order to bring about some *maṣlaḥa* or prevent some *mafsada* but it results in the opposite of what was intended, or it may not have been initiated in order to cause *mafsada* or prevent *maṣlaḥa*, but it has resulted in the opposite of this action.[197]

The principle was used by scholars before al-Shāṭibī, scholars such as al-Juwaynī (419-478 AH), Abū Ḥāmid al-Ghazzālī (450-505 AH) and al-ʿIzz b. ʿAbd al-Salām (577-660 AH) though not in the extensive form espoused by him.[198] Al-Najjār states that such terminology was not frequently used by scholars before him though the substance was commonly found in other principles that they employed such as *sadd al-dharā'iʿ* (blocking the means), *istiḥsān* (juristic preference), *ḥiyāl* (legal devices) and *murāʿāt al-khilāf* (consideration if differences).[199] All of these principles involved going beyond the rigour of the law due to considerations of equity, fairness or to avoid a harmful or unjust outcome. For example, the

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[194] Al-Najjār, "Ma'ālāt al-Afʿāl", pp. 149-187. Al-ʿArabī al-Bichrī, a member of the ECFR, has written a similar article on the same subject as al-Najjār though not as detailed. See al-Bichrī, "Munṭaliqāt li-Fiqh al-Aqalliyāt", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2004), pp. 204-216.
[195] *maṣlaḥa* is variously translated as a benefit, interest or public interest.
[196] *Mafsada* is translated as harm or evil.
[197] Translation and quote from Ifwat, "The Principle of Considering Ma'ālāt", p. 53. The original quote and discussion are in al-Shāṭibī, *al-Muwāfaqāt fi Uṣūl al-Aḥkām* (al-Maṭbaʿa al-Salafiyya, 1922), 5:78-177.
[198] Ifwat, "The Principle of Considering Ma'alat", p. 53.
[199] Al-Najjār, "Ma'ālāt al-Afʿāl", p. 153.

Ḥanafīs and Mālikīs are known to utilise the principle of *istiḥsān* where a clear result of an analogy (*qiyās*) or text maybe departed from in order to realise a benefit or repel a harm. The ability to depart from an established rule allowed for accommodation on changing realities. According to Mohammad Hashim Kamali the principle *of istiḥsān* "has played a prominent role in the adaptation of Islamic law to the changing needs of society. It has provided Islamic law with the necessary means with which to encourage flexibility and growth."[200]

In this vain al-Najjār's advocacy for the usage of *ma'ālāt al-afʿāl* stems from his assertion that the situation of Muslims living as minorities under secular law is complex state of affairs and therefore only an expansive and far reaching principle can offer meaningful solutions.[201] Given the complex and specific situation of Muslim minorities, al-Najjār states the application of the general rules of *Sharī'a* will result in a conflict with the aims behind those rules and "therefore the principle of *ma'ālāt al-afʿāl* has an important derivational role in the *fiqh* of Muslim minorities."[202] The specificities of Muslim minorities, for which al-Najjār provides a long list, such as the relative legal, social and political weakness[203] compared to the wider society is what justifies a departure from general rules so as not to conflict with the *maqāṣid* of the *Sharī'a* or the goals and aims of minority *fiqh*.

Al-Najjār maintains that the usage of *ma'ālāt al-afʿāl* by minority *fiqh* is rooted in the traditional *fiqh* thereby asserting the *asāla* (authenticity) of the new *fiqh*. He states:

> the *fiqh* of minorities is not separate from general Islamic *fiqh*. Its sources (*maṣādir*) and principles (*usūl*) do not go beyond the sources and principles of (the general Islamic *fiqh*). Rather, it is one of its branches and shares the same sources and principles though it is based on the specific situation of minorities, aiming to provide bespoke solutions within the framework of Islamic law and its principles and seeking to benefit from it and build on and develop it in regard to the issue at hand [204]

However, it is clear from the way al-Najjār and other minority *fiqh* scholars have defined and utilised *ma'ālāt al-afʿāl*, that their application is broader than the vast majority of classical scholars, with the possible exception of al-Shāṭibī. Al-Najjār for example would include the

[200] Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991), p. 246.
[201] Al-Najjār, "Ma'ālāt al-Afʿāl", p. 150.
[202] Al-Najjār, "Ma'ālāt al-Afʿāl", p. 150.
[203] Al-Najjār, "Ma'ālāt al-Afʿāl", pp. 180-196.
[204] Al-Najjār, "Ma'ālāt al-Afʿāl", p. 178.

principles of *maqāṣid*, *maṣālīḥ mursala*, *ḍarūra* and *ḥāja* and others[205] as part of *ma'ālāt al-afʿāl* and so the minority *fiqh* usage is closest to the usage of al-Shāṭibī than any group scholars preceding him.

To what extent there is congruity with the position of classical *fiqh* will be the subject of the remainder of this chapter where the focus will be on three key areas of scope and flexibility of law, the *maqāṣid* approach and the usage of general principles. All of these come within the ambit of *ma'ālāt al-afʿāl* as defined minority *fiqh* scholars and are a representative sample within the new *fiqh*.

Section II: Scope and Flexibility of Law

Comprehensiveness of the Sharī'a

Minority *fiqh* sought to discover modern and effective solutions for new problems faced by Muslim minorities in the Western context. This required that they adopt a position as to how they understood the *Sharī'a* would address new issues and their resolution. In this regard minority *fiqh* emphasised the flexibility of the *Sharī'a* which allowed a broad scope and therefore accommodation of contemporary issues. This at its essence is a conception about the nature of *Sharī'a* and how it encompasses new realities. Classical Muslim jurists approached the question of the *Sharīʿa*'s ability to encompass new issues and realities from a theological and *usūli* perspective. As a starting point the *Sharī'a* is deemed to be complete:

'*Today I have perfected your religion for you, and have completed My favor upon you, and have approved for you Islam as religion.'*[206]

Therefore, it follows that the *Shariʿa* cannot be silent over a matter. According to al-Shāfiʿī (as quoted by al-Juwaynī): 'We know definitely (*qaṭʿan*) that there can be no matter without the ruling of Allah the Exalted.'[207] Al-Ghazzali also states: "We believe it is impossible for an incident to be devoid of a ruling from Allah the Exalted. The religion has been completed and the revelation has come to a stop. But that was not until the religion had been perfected."[208] Al-Shawkānī, an *uṣūlī* scholar of the 19th century stated:

[205] See discussion of other legal principles included under *ma'ālāt al-af'āl* by al-Bichrī, , "Munṭaliqāt", pp. 204-216.
[206] The Qur'ān 3:19.
[207] Fa'ūr, Maḥmūd ʿAbd al-Hādī, *al-Maqāṣid ʿinda al-Imām al-Shāṭibī* (Beirut, 2006), p. 105.
[208] Ḥassān, Ḥusayn Ḥāmid, *Naẓariyyāt al-Maṣllaḥa Fī al-Fiqh al-Islāmī* (Maktabat al-Mutanabbī, 1981), quoted in p. 437.

> This is answered by what we stated before that God informed this *umma* that religion has been perfected for her and by what the Messenger of God stated that he has left this umma on the clear matter whose night is like its day. Then it is not unclear to any rational and correct mind and with sound understanding that the general import of the texts, its absolute meanings (*muṭlaqāt*) and the specific texts are enough for any incident that occurs by clarifying it whether it is known or unknown. [209]

This discussion arose in the context of the controversy over the legitimacy of the principle of *al-maṣlaḥa al-mursala* (unrestricted benefit), whether the *munāsaba gharība* (an unsupported isolated causal link) of a description can be without textual authority or even if it is *mualā'im* (suitable) can then serve as a basis of ratiocination (*ʿilla*). The Ḥanafī's argued that the *munāsib* (causal link) must be based on text (*naṣṣ*) and the general aims of the *Sharī'a* are not enough to function as *ʿilla* (legal effective cause) of a particular matter. Those who took the *munāsib* (causal link) as a basis for ratiocination argued that without resorting to this type of derivation one will not be able ensure that no incident passes without a ruling of Allah on it, which is a theological standpoint impacting on the jurisprudence. The Ḥanafī's responded by arguing that where a textual authority cannot be found then that matter would come under the rule of general permissibility.[210]

Al-Juwaynī who took the former view states: "The imams of the past did not miss a single incident from the ruling of Allah in their numerous issues and *fatwās*…we know they (may Allah be pleased with them) derived rulings devoid of a specific text by extending to incidents..."[211] Here al-Juwaynī is arguing that the derivation of rules by references of an incident to comprehensive meanings of texts was the practise of the companions of the Prophet, who gave many rulings for which a specific *naṣṣ* (text) cannot be found. The Ḥanafī's have responded by stating that such a conclusion is not supported by a textual basis. Ibn Humam al-Iskandari al-Ḥanafī stated:

> This type is *al-maṣāliḥ al-mursala* and we opt to reject it since there is no evidence of accreditation (*dalīl al-iʿtibār*) which is legal evidence. They say then many incidents will be missed (i.e., without the ruling of Allah being passed on it.) We say we reject such a result (*mulāzama*) (i.e., that without considering the *maṣlaḥa mursala* then this

[209] Ḥasan, ʿAbd al-Karīm, *al-Masāliḥ al-Mursala* (Beirut, 1995), p. 86, footnote 1.
[210] *al-aṣl fī al-ashyā' ibāḥa mā lam yarid dalīl al-taḥrīm* (The origin of things is permissibility in the absence of an evidence of prohibition).
[211] Fa'ūr, *al-Maqāṣid*, p. 106.

> would necessitate that an incident passes without a *ḥukm* of Allah. This is because the general import of texts (*ʿumūmāt*) and analogies (*aqyisa*) are comprehensive and in the absence of such referents then every specific matter comes under the rule of original permissibility (*al-ibāḥa al-aṣliyya*).[212]

Another Ḥanafī scholar Muḥibb Allāh b. ʿAbd al-Shakūr stated:

> If the description is not known from one of the consideration of the *mulā'im* then it is *gharīb* (i.e., devoid of textual authority), and this is called *maṣālīḥ al murslaha* and it is a proof for Mālik but the majority (*jumhūr*) prefer to reject it. For us, there is no *dalīl* without accreditation even if it accords with the dictates of the mind. They say: firstly, if it is not accepted then the incidents will be devoid (of the rule of Allah), we say we do not accept such a conclusion as the general import of the texts (*ʿumūmāt*) and the analogies (*aqyisa*) are general and the matter that is not caught by them is caught by permissibility. Secondly the Companions used to consider the *masāliḥ*, we say they considered where they found the matter had been accredited either by its type or genus.[213]

As we can see from the above discussion, the classical scholars did not approach this matter from the perspective of flexibility of the law and adaptation to reality. Rather their approach was that the religion is complete and the *Sharī'a* being all encompassing has given a ruling for every matter and so the problem for them was *how* to bring new realities under the ambit of the text. The concern has not been the question of rigidity and adaptability but the question of the legitimate process of finding a ruling. They differed over subsidiary sources such as *maṣlaḥa mursala* or *istiḥsān* as to their legitimacy as a source from which to derive rulings in the absence of a clear text (*naṣṣ*).

Flexibility and Adaptability according to Minority fiqh

Minority *fiqh* scholars are not the first to claim that *Sharī'a* encapsulates means and instruments of adaptation and flexibility. Those from the revivalist tradition following the thought of Muḥammad ʿAbduh, al-Afghānī, and Rashīd Riḍā, have asserted that the *Sharī'a* can address modern problems due to its ability to adapt to differing situations. However, this

[212] ʿAbd al-Karīm, *al-Masāliḥ al-Mursala*, p. 78.
[213] ʿAbd al-Karīm, *al-Masāliḥ al-Mursala*, p. 73. His citation is *Fawatiḥ al-Raḥamūt bi-Sharḥ Musallam al-Thabūt*, printed on the margins of al-Ghazzālī's *al-Mustaṣfā*, 2:266.

assertion is not uniformly understood and should be seen as a spectrum of thought. In this section we wish to assess the position minority *fiqh* occupies in that spectrum.

The first clear expression of this principle with that wording can be seen in the Ottoman Courts Manual (*al-Majalla al-Aḥkam al-ʿAdliyya*) though its meaning is said to be expressed by the likes of Shihāb Dīn al-Qarāfī (d.1285), Ibn Qayyim al-Jawziyya (d.1350), al-Shāṭibī (d.1388) and Ibn ʿĀbidīn (d.1836).

Modernist scholars generally and minority scholars in particular, while referencing this classical scholarship, have established the flexibility of law by highlighting the distinction between the Fixed (*thawābit*) and the Changing (*mutaghayyarāt*) aspects of the *Sharī'a*.[214] This has been expressed in various ways such as the distinction between the *ʿibādāt* and the *muʿāmalāt*, between the definite (*qaṭʿī*) and the speculative (*ẓannī*) or even between *Sharī'a* and *fiqh*.[215] All such expressions show one thing; that the law is susceptible to change and not static.

Al-Qaraḍāwī lists in his *Fiqh al-Aqalliyāt*[216] the key legal foundations of minority *fiqh* which seeks to address and adapt to modern realities. First on his list, "no *fiqh* without strong contemporary *ijtihād*" by which he means the need for modern and fresh *ijtihād* and not an imitative approach (*taqlīdī*) to modern problems. The traditional approach to problems has been to rearticulate or some would say recycle *fatwā*s and legal edicts, whereas minority *fiqh* holds that matters old and especially new, requires the jurist to look at the source texts from a contemporary perspective. In addition to this al-Qaraḍāwī mentions the need to approach matters not just from *juz'i* partial perspective but from the angle of *Sharī'a* principles, whether as *dalīl ʿāmm* or *dalīl kullī* (general or comprehensive).

Point three in his legal premise of minority *fiqh* is 'Attention to understanding the modern life' and here he focuses on the fact that sound *ijtihād* cannot be made unless the object of *ijtihād* is appreciated fully. He quotes Ibn Qayyim's statement in *Iʿlām al-Muwaqqiʿīn*:

> The *mufti* or the judge is unable to give legal edicts (*fatwā*) and judgements in truth unless he possesses two types of understanding: the understanding of the reality (*al-wāqiʿ*) and comprehension of it and deriving knowledge of the reality of what has

[214] معالم الوسطية الإسلامية)7(الموازنة بين الثوابت والمتغيرات | موقع الشيخ يوسف القرضاوي, https://www.al-qaradawi.net/node/2294.
[215] الثوابت والمتغيرات في الشريعة الإسلامية https://elibrary mediu.edu.my/books/2015/MEDIU01696.pdf, p. 7.
[216] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, pp. 40-60, chapter heading 'Pillars of the *fiqh* of minorities.'

> occurred by way of indications, signs such that he encompasses it in knowledge, and the second type where he understands the duty in respect of that reality, and this is understanding the judgment of Allah which He has passed in His Book, or on the tongue of His Messenger regarding this reality and then he applied one over the other. The one who exerts his effort in that he will receive either two or one reward.[217]

Al-Qaraḍāwī also mentions that the *fiqh* must focus on the interest of the collective or community and not just the individual needs. In point 5 he concentrates on the methodology of ease and removal of hardship as that is one of the global aims of the *Sharī'a*, to remove hardship and bring about ease. Therefore, the *faqīh* or jurist should not opt for the strictest interpretation of a text such that it causes unwarranted hardship. In support of this he gives examples of how the Companions of the Prophet used to incline towards ease when issuing rules and verdicts. Another aspect of the flexibility of the *Sharī'a* is the 'adherence to the way of gradualism'[218] Here he mentions the oft cited example of the gradual prohibition of wine and the concept that an edict should not be passed without consideration of a person's ability to apply the rules, rather rules should be introduced incrementally to facilitate application. Point 8 in the pillars of minority *fiqh*[219] is that the *fiqh* should not be unrealistic in its expectation and nor should it be oblivious of human requirements and need. Here the general principle of *al-ḍarūra tubīḥu al-maḥẓurāt* (necessity permits the prohibited matters) is invoked to show that where rules lead to danger to life or limb then the rules are to be suspended. For example, al-Qaraḍāwī cites the example of where the Prophet declined to rebuild the *Kaʿba* on the foundation of Abraham because the new Muslims would find it testing in their faith and may revert back to their old religion. The Prophet not wishing to place them in this difficult situation said to his wife ʿĀ'isha: "Had your people not just come out our of the era of ignorance then I would have built the Kaʿba on the foundations of Ibrahim."[220] Finally in al-Qaraḍāwī concludes his list of minority *fiqh* pillars with 'freeing oneself from the sectarianism.'[221] This is required for an unfettered *ijtihād* to address the new issues Muslims face living in a western environment.

[217] Quoted in al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 44.
[218] Al-Qaraḍāwī *Fiqh al-Aqalliyāt*, p. 53.
[219] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 55.
[220] Quoted in al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 56.
[221] Al-Qaraḍāwī *Fiqh al-Aqalliyāt*, p. 57.

The above analysis indicates to us that minority *fiqh* distinguishes itself from traditional *fiqh* by its ability to adapt to new realities and situation. The question is exactly how this is done and what it entails. This is what we shall consider below.

Principle of 'Change of Rule with Change of Time and Place'

A principle which is oft cited by minority *fiqh* scholars is the assertion that the *Sharī'a* rule 'changes with time and place.'. This expression is not cited as a general, comprehensive, and encompassing principle (*dalīl kullī* or *dalīl ʿāmm*) amongst the classical scholars such as the principle *al-ḍarūra tubīḥu al-maḥẓurāt*. The meaning of the change of rules by times and places or reference to it may be found in *usūlī* or *fiqhī* works in the context of *ʿurf* (custom), however the issue is whether classical scholars shared the same intent and usage as minority scholars.

By way of background, the classical scholars used the term *taḥqīq al-manāt* (verification of the ratio or anchor point)[222] to refer to the reality or ratio to which a ruling pertained. The aim is to identity that ration or basis and disregard those descriptions extraneous to it and may or may not apply to analogical deduction (*qiyās*).[223] So, the prohibition of *khamr* (wine) as a rule pertains to a reality without which the rule cannot be applied. Most scholars (apart from a majority of proponents of the Ḥanafī school who hail from Kufa and Basra) ascertain (*taḥqīq*) the reality out of a number of possibilities as wine has more than one description (*awṣāf*) such as its fragrance, colour, taste, and intoxication. By scrutinising the *awṣāf* they have concluded it is intoxication which is the basis (*manāt*) of the rule of prohibition and therefore all types of intoxicants are prohibited regardless of quantity – large or small- and whether a person becomes inebriated or not.[224] They have understood intoxication here as a description (*waṣf*) of *khamr*. Most Ḥanafī jurists have applied the description (*waṣf*) of *khamr* to beverages only deriving from grapes juice. So, drinks such as *nabīdh'* which are of a non-grape source such as barley and honey where deemed permitted until the point of intoxication, after which they would be prohibited. Whereas a beverage sourced from grape

[222] Awang, Mohd Badrol, "The Concept of Tahqiq Al-Manat and its Suitability as a Method of Reasoning in the Judicial Process", *World Applied Sciences Journal* 35, no. 9, 2017, 1758-1763. See also al-Shawkānī, Muḥammad, *Irshād al-Fuhūl ilā Taḥqīq al-Ḥaqq min ʿIlm al-Uṣūl* (Cairo, 1992), 2:203.
[223] Badrol, "The Concept of Tahqiq Al-Manat", p. 1761.
[224] Deuraseh, Nurdeen, "Is Imbibing Al-Khamr (Intoxicating Drink) for Medical Purposes Permissible by Islamic Law?" *Arab Law Quarterly*, Vol. 18, No. 3/4 (2003), pp. 355-364, 358

juice is *ḥarām* regardless of the inebriated or otherwise status of the consumer as they understood *khamr* by definition to refer to grapes juice derived beverages.[225]

In this sense *taḥqīq al-manāt* is another expression for isolating the *ʿilla* (effective cause) of a rule or also known as the process of *al-sabr wa-al-taqsīm* (testing and division)[226] where the extraneous or irrelevant aspects are ruled out.

Al-Āmidī states: "Since the effective cause is linked to its *ḥukm* and *manāt* then the scrutiny and *ijtihād* in this matter relates to ascertaining the *manāt* (*tanqīḥ al-manāt*), isolating the *manāt* (*tanqīḥ al-manāt*) and extracting the *manāt* (*takhrīj al-manāt*).[227] Of course al-Āmidī in all three processes is taking about the identification of the effective cause (*ʿilla*). We shall say more about the last two processes of deriving the *ʿilla* in due course.

Those who rejected the view that all rulings (*aḥkām)* are reasoned with an effective cause utilised *taḥqīq al-manāt* in the sense of establishing whether the reality of a thing applies to the reality of a particular rule. In other words, did a particular rule come for a certain reality or not. For example, the *manāt* of wine (*khamr)* is intoxication (for most schools of law), when asked to give a ruling for a particular drink the process of verification (*taḥqīq*) for these scholars is to ascertain whether that drink is an intoxicant or not.

Does the principle entail that rules change even though the basis (*manāt*) of that original rule has remained? What has changed is the era in which we live though the *manāt* is constant. This is the central question that needs further exploration in respect of the understanding the minority *fiqh* scholars followed in their legislative process. For the classical scholars the change of *manāt* did not change the rule in the sense that the rule that came for a *manāt* will always remain if that *manāt* remains constant and only the change of *manāt* can warrant a change of rule.

Now turning to the minority *fiqh* scholars, according to al-Qaraḍāwī the principle of 'rules changing by time, place and *'urf* (custom)' is one of the pillars of minority *fiqh*.[228] He cites several examples where jurists in the past have changed their opinion due to changing traditions and the state of the people. He also attributes this principle to scholars like Ibn

[225] For detailed study of the positions of Ḥanafī scholars on *khamr* and *nabīdh* and the evolution of the *fiqh* on this issue see Sheikh, M and Islam, T. "Islam, Alcohol, and Identity: Towards a Critical Muslim Studies Approach", ReOrient, 3 (2018), pp. 185-211.
[226] al-Shawkānī, *Irshād al-Fuhūl*, 1:179.
[227] Al-Āmidī, Sayf al-Dīn, *al-Iḥkam fī Uṣūl al-Aḥkām*, 3:264.
[228] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 50.

Qayyim, al-Qarāfī and Ibn ʿĀbidīn and for the latter quotes from him directly. The issue here is what did these jurists intend and what is asserted by minority *fiqh* scholars? In respect to Ibn ʿĀbidīn we will examine a few quotes which are cited in support of the above principle. According to one quote of Ibn ʿĀbidīn:

> The juristic cases are either established [or proved] on the basis of a direct text (*ṣarīḥ al-naṣṣ*) … or on the basis of *ijithād and ra'y* (juristic reasoning). In most of the cases the *mujtahid* (jurisconsultant) develops his legal arguments and judgements on the basis of the ʿ*urf* (social custom) of his time such that if he was living in a different time he would make a different legal ruling It is precisely for this reason that they [the classical scholars] said, while discussing the conditions and qualifications required in *ijtihād*, that he [the *mujtahid*] must be well versed in the local customs and habits (ʿ*ādāt*) of the people. Thus, many laws change according to changing times (*bi-iktlilāf zamān*) such that if law was allowed to remain the same as it was in the first case this would cause great difficulty and harm to the people (*al-mashaqqa wa-l-ḍarar*), and this would be a violation of the universal principles of the Sharī'a which was based on the need to make things light and easy (*takhfīf wa taysīr*).[229]

Here Ibn ʿĀbidīn referencing the change of ʿ*urf* determining the *Sharī'a* rules, is not treating *'urf* as an independent source but utilising it as a basis to understand the application of rules connected to it. According to Maḥmūd Abd Hādi Faūr ʿ*urf* (custom) is of two types: a customary practise which has been permitted by the Lawgiver and secondly those whose basis is in the divine rules, but its bases (*manāt*) are understood in light of the ʿ*urf*. To illustrate this, he cites the Prophetic *ḥadīth:* "Modesty (*ḥayā*) is a branch of *Īmān*."[230] The *Sharī'a* rule in respect of the requirement of modesty has been established in this *ḥadīth* but what constitutes modesty is subjective its determination is left to the community or era in question. So, for a man to walk with his head uncovered maybe a sign of lack of modesty in one era but perfectly acceptable in another. However, if a particular matter has been forbidden then regardless of what the people perceive the rule does not change. So, exposure of any part of the ʿ*awra* (private areas of the body) is prohibited even if this becomes the norm in another era. A similar example cited by Fa'ūr is the requirement for a husband to provide a suitable maintenance (*nafaqa*) to his wife. Customarily what is regarded normal

[229] This is a more complete quote taken from Michael Mumisa's article with his translation. see https://conservativemuslimforum.org/wp-content/uploads/2018/10/Does-Islam-allow-British-Muslims-to-vote-2013.pdf, p. 5.
[230] Fa'ūr, *al-Maqāṣid*, p. 266.

and suitable would be subject to the time and place. A washing machine classed a luxury item in the past is now a basic necessity.[231] Or for example the prohibition of men imitating women and vice versa as per the *ḥadīth*: It was narrated that Abū Hurayra (may Allah be pleased with him) said: The Messenger of God cursed the man who wears women's clothing and the woman who wears men's clothing.[232] As a premise any clothing which covers the *ʿawra* is permitted for men and women, however if a particular item of clothing is considered particular to gender by a given society then that item would be prohibited for the opposite gender. This is an example where the operation of the rule depends on the perceptions of society, but the origin of the rule is the text (*naṣṣ)*. These are all examples of when the rule is affected by the customary reality. This flexibility is tied to *ʿurf* in classical usage, though minority *fiqh* seems to be extending its scope far wider than originally intended.

Another common reference for the source of this principle is the *Majalla*, the Ottoman Courts Manual which in article 39 states: 'It is an accepted fact that rules vary with the change in the times.' Those who cite this reference fail to mention that the context of this provision is connected to *ʿurf* and the interaction between *ʿurf* and the operation of the law. In other words that rules that change are only in the context of custom and convention, hence, the articles before and after it all come in the context of custom.[233] Article 36 establishes custom as an arbitrator, article 37 establishes that public usage in terms of language is a proof and must be abided by and article 38 states that what is deemed not possible by custom is deemed impossible in reality and then article 39 states: 'It is an accepted fact that rules vary with the change in the times.'[234] The article after it, article 40 states that the literal meaning is abandoned in the presence of a customary meaning. Therefore, this whole section is about the custom and its use in applying the *Sharī'a* rule. Indeed, a number of areas of law such as sale contracts, oaths, divorce, and emancipation will engage the custom of the people in applying the *Sharī'a* rule. In these areas it is the wordings, usage and practice that are considered in

[231] The prohibition of drawing attention to their femininity (*tabarruj*) by women is another example.
[232] Narrated by Abū Dawūd (no. 4098).
[233] See http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20(Civil%20Law).pdf under PART II. MAXIMS OF ISLAMIC JURISPRUDENCE, see below clauses 36 to 40:
36. Custom is an arbitrator; that is to say, custom, whether public or private, may be invoked to justify the giving of judgement.
37. Public usage is conclusive evidence and action must be taken in accordance therewith.
38. A thing which it is customary to regard as impossible is considered to be impossible in fact.
39. It is an accepted fact that the terms of law vary with the change in the times.
40. In the presence of custom no regard is paid to the literal meaning of a thing.
[234] There are other principles which are all in the same vein:

applying the *Sharī'a* rules.[235] However, rules that do not relate to custom do not change and are constant.[236] This what the commentator of the *Majalla*, ʿAlī Ḥaydar Effendi stated in his *Durar al-Ḥukkām fī Sharḥ Majallāt al-Aḥkām* under his commentary on article 39 of the *Majalla*:

> The rules which change by time are those rules based on custom and tradition, because by change of time the needs of people change and based on this change the customs and traditions change and by the change of customs and traditions the rules change as we clarified above, this is contrary to the rules that are based on the *Sharī'a* evidences which are not based on customs and traditions which do not change…[237]

Ali Haydar then provides some examples where rules based on *Sharī'a* do not change such as the punishment of premeditated murder and rules about sale of property which are affected by custom and convention.

Others have commented on the issue of *ʿurf* and how it interacts with rulings and in the circumstantial (*waḍʿī*) rules. ʿAbd al-Raḥmān Zaydī in his *al-Ijtihād bi Taḥqīq al-Manāt wa Sulṭānihi* affirmed the use of this principle but restricted it to the field of *ʿurf* and means (*wasā'il*) and explicated its *ḍawābiṭ* (parameters). In conclusion he states:

> the change of *fatwā* and rulings according to the change of time does not mean change in the rules themselves. Rather the change is in accordance with the *waḍʿī* rules such as the *asbāb* (cause), *shurūṭ* (conditions), *mawāniʿ* (preventor of rule), *rukhaṣ* (dispensations) and *ʿazā'im* (default rule).[238]

From this perspective one notes that the change is not to the rules but due to the absence or presence of the circumstantial rules (*aḥkām waḍʿiyya*) which are themselves *Sharī'a* rules. Zaydi quotes several contemporary specialists in Islamic contract law who mention similar points about the usage of *ʿurf*. For example, he quotes Muṣṭafā Aḥmad al-Zarqā who stated:

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[235] See quote by Ibn Qayyim about how rules change due to customary differences in the usage and meaning of words. https://www.islamweb net/amp/ar/library/index.php?page=bookcontents&flag=1&ID=331&bk_no=34

[236] What can be said about article 39 can be said about many other principles relating to custom such as *al maʿrūf ʿurfan ka-l-mashrūṭ sharṭan*, in other words custom is like a condition in a contract. This not in the absence of *naṣṣ*, as the *naṣṣ* has allowed people to make permissible stipulations but *ʿurf* operates in terms of determining the manner of a condition being stipulated. The reliance and course of dealing of a people in a certain transaction, i.e., a custom is considered a condition as it is implied in the contract without express provisions.

[237] *Durar al-Ḥukkām fī Sharḥ Majallāt al-Aḥkām, article 39.*

[238] Zaydī, ʿAbd al-Raḥmān, *al-Ijtihād bi-Taḥqīq al-Manāt wa Sulṭānihi* (Cairo: Dār al-Ḥadīth, 2005), p. 414.

> The change of rules is nothing but the change of means and ways to the aim of the Sharī'a. Indeed, these means, and ways by and large have not been fixed by the Islamic Sharī'a and but have been left unrestricted for the people to choose in every era in terms of what is more beneficial for productive organisation and solution.[239]

He also cites Wahba Muṣṭafa al-Zuḥaylī:

> It is to be noted that the change of rules due to *ʿurf* is mostly based on consideration of need and *maṣlaḥa* and to repel difficulty and hardship with the aim of facilitating the performance of the Sharī'a obligations. The reality is the change is not from the essence of the *ʿurf* itself but rather it is to apply the idea of *al-maṣlaḥa al-mursala*.[240]

Returning to Ibn ʿĀbidīn, we have other quotes which show that the change of rule is not only due to custom but to removal of hardship and considerations of necessity (*ḍarūra*). Following are two quotes:

> Many rules change due to the change of the customs a people or for a necessity (*ḍarūra*) or due to the declining moral standards of people of a certain era (*fasād ahl al-zamān*). For had the rule remained as it was then that would entail hardship (*mashaqqa*) and harm (*ḍarar*) to the people and would contravene the *Sharī'a* principles based on facilitation and ease, removal of hardship and corruption. That is why we see the founding scholars of the *madhhabs* going against what had been written by the *mujtahid* (the imam of that *madhhab*) in various issues based on the reality of their time, and whilst knowing that had the former reality been the same in their time then they would have taken the same opinions as in the past and adopted the principles of his school (*madhhab*).[241]

In a similar manner to al-Qaraḍāwī, Bin Bayya has quoted the following from Ibn ʿĀbidīn:

> It has been commonly transmitted that that our imam Abū Ḥanīfa, Abū Yūsuf and Muḥammad took the view that hiring for the purpose conducting devotional acts (*ṭāʿāt*) is void (*bāṭil*) but scholars came after them who are experts in *ḥadīth* extraction and authentication (*takhrīj*) and preponderance (*tarjīḥ*) and gave legal verdicts stating that such hiring is correct (*ṣaḥīḥ*) in respect to teaching Qur'ān due to

[239] Zaydī, *al-Ijtihād*, p. 414.
[240] Zaydī, *al-Ijtihād*, p. 414.
[241] *Majmūʿat Rasā'il Ibn ʿĀbidīn*, 2:125 quoted by al-Qaraḍāwī in *Fiqh al-Aqalliyāt*, p. 52.

necessity (*ḍarūra*). Teachers in the past used to get stipends from the state treasury (*bayt al-māl*) which had now stopped. If hiring is not permitted and a wage is not taken, then (knowledge) of the Qur'ān would be lost and this would be a loss to the religion as teachers needs earnings to live on. So, scholars after them as before, gave legal verdicts stating the correcting (*ṣiḥḥa*) of hiring in giving the *adhān* and leading the prayers because they are from the emblems of the religion. They permitted hiring for such purposes based on necessity (*ḍarūra*). What the later scholars gave these legal verdicts knowing that had Abū Ḥanīfa and his students lived in their era, they would have given the same verdict and retracted from their original opinions.[242]

Again, Ibn ʿĀbidīn is not advocating that a text (*naṣṣ)* is disregarded without making recourse to another *naṣṣ* which fits the relevant *manāt*. In this case the rule of necessity and lifting of hardship are both *Sharī'a* principles based on *naṣṣ* and bound by perimeters (*ḍawābiṭ*). Whether to take a *kullī* or *ʿāmm* (general or comprehensive) principle at expense of a partial (*juz'ī)* rule can be disputed, but the need to refer to a text (*naṣṣ*) is agreed and in principle this in consonance with the classical jurists. As for the decline in the moral standards of people, this is to do with relaxing the threshold of certain rules due to the reality and this again is based on the *manāt* of *naṣṣ* itself and not contrary to text (*naṣṣ)*. For example, the fact that Abū Ḥanīfa permitted the testimony of a person whose trustworthiness (*ʿadāla*) has not been verified i.e., of unknown status as to his reliability (*mastūr al-ḥāl*) but not so during the time of his two students Abū Yūsuf and Muḥammad, due to moral decline in the society. This is not a change in the rule but in the verification (*taḥqīq*) of the rule in the reality. In other words, reliability (*ʿadāla*) is still a condition for witness, but its means of verification may differ depending on the situation. In respect to the question of hiring for purpose of undertaking devotional acts, the scholars have not changed their view that hiring is not permissible as the *naṣṣ* for that still exists, but the rule of necessity or the *ḥāja* which takes the position of a necessity takes precedence here. The knowledge of Qur'ān and its transmission from generation to generation is a clear *ḍarūra* which would permit the prohibited matter as per the well-known *Sharī'a* principle. That why the rule still continues in circumstances where such a necessity (*ḍarūra)* does not exist as in the case of asking a Qur'ān reciter (*qāri'*) to recite for sake of reward for the dead.

[242] *Radd al-Muḥtār* of Ibn ʿĀbidīn, quoted by Bin Bayya, *Ṣinā'at al-Fatwā*, p. 35.

Fayṣal Mawlāwī discussed the tension or relationship between text and changing realities in his article on prayer times in the West under the sub-heading 'Infallible texts and the changing reality.' He affirms the immutability of the divine sources but states that realities however change and there needs to be a certain interaction or interconnection between reality and text so rulings can be found for new realities from limited texts. Mawlāwī admits that this interrelationship does lead to a "type of influence of the reality on the texts"[243] and the identifies two situations when this arises:

a) When the reality determines which of the two texts should be selected as one texts accords more with a particular reality than another text such as the issue of the relationship between Muslims and non-Muslims. The reality of war requires rules to do with war and reality of covenants or truce require rules relating to them.
b) The realty will sometimes require a particular text to be suspended due to a necessity, need or a rule needs to lighten, or a hardship removed. [244]

Mawlāwī then proceeds to give a number of similar examples, like al-Qaraḍāwī and Bin Bayya, when a text can be suspended due to other considerations such as the greater harm (*ḍarar*), removal of a hardship or absence of an effective cause (*ʿilla).*[245]

For example:

a) The Qur'ān suspends the operation of specific *naṣṣ* in a state necessity (*ḍarūra*) such as the eating of carrion, blood, and pork under compulsion.
b) The Prophet forbade the *ḥadd* penalty for theft in battle.
c) Combining of prayers as removal of hardship
d) ʿUmar b. al-Khaṭṭāb's suspension of certain texts such as on winning hearts via payments of alms (*mu'allafū qulūbuhim),* penalty of theft division of land opened by Muslims.

If we scrutinise each example, we will find that recourse has always been made to a *naṣṣ*, albeit at the expense of another. In none of these examples can one say that a *naṣṣ* was not

[243] Mawlawī, Fayṣal "Mawāqīt al-Fajr wa-l-ʿIshā' fī-l-Manāṭiq al-Fāqida li-l-ʿAlāmāt al-Sharʿiyya", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2004), p. 346.
[244] This is essentially a discussion of *ḍarūra* and its variants which will be considered fully under general principles in section III.
[245] Mawlawī, "Mawaqīt al-Fajr", p. 350-354.

followed for the ruling. The suspension of prohibited matters in case of necessity is established on well-established definitive *naṣṣ* in the Qur'ān and Mawlāwī quotes the relevant verses himself.[246] As for the suspension of the *ḥadd* punishment of theft due to the narration in Abū Dawud that the Prophet: 'forbade that hands should be amputated in battle' and gain this *ḥadīth* has been quoted by Mawlāwī himself. This is the same case for combining the prayers and Umar's decision to suspend certain texts and indeed the alternative texts have all been cited by Mawlāwī. Further to this are the conditions given by Mawlāwī for suspending text which all indicate that none of these are at the expense of a text, as one text is suspended due to another text which accords with the reality in question.[247]

Bin Bayya, a key proponent of minority *Fiqh*, has discussed this principle in his *Ṣināʿat al-Fatwā*, as one of the foundations of minority *fiqh*. Like al-Qaraḍāwī he focuses on the changes in *fatwā*s of companions and jurists (both early and later) to show that rules change in accordance with social change. However, he adds one key point which is worth mentioning and that is that the principle is not to be taken in an absolute sense. He states:

> It is a principle not to be taken absolutely. Not all of the rules are affected by the change of times; the obligation of prayer, fasting, *zakāt*, *hajj*, kindness to parents and many rules from the transactions (*muʿāmalāt*), marriage, likewise the definite prohibitions such as aggression against person, property honour and the committing of indecent acts whether public or private, misappropriating people's property such as deception and defrauding, prohibited marriage contracts and sale contracts which contain usury or excessive uncertainty or *jihāla*; none of these things can be permitted unless by the necessities (*ḍarūrāt*) which permit the prohibited matters.[248]

We can see from the above quotes that what the scholars meant by change of time and place related to the customary (*ʿurfī*) aspects of the *Sharī'a* rules i.e., when the divine rules themselves give room for customary definition. This is not a change of the rules but relates to the application of the same rule changing realities. The other perspective in which this matter was approached was the facilitation of *Sharī'a* rules where legitimate circumstantial (*waḍ'ī)* rules exists such as the presence of a dispensation (*rukhṣa)* or the absence of a cause (*sabab)* which will entail the absence of the rule. Those who looked at this from a public interest point of view did not say the rule has changed or that an established rule should be dispensed

[246] Mawlawī, "Mawaqīt al-Fajr", p. 350.
[247] Mawlawī, "Mawaqīt al-Fajr", pp. 355-356.
[248] Bin Bayya, *Ṣināʿat al-Fatwā*, p. 34.

with because of *maṣlaḥa*, rather the matter is more complex and nuanced as we shall see below. The basis of seeking the interests (*maṣāliḥ*) is in the absence of clear textual authority and this is not the same as asserting the rule must change by the time and place. However, some modernist scholars such as Michael Mumisa, as we shall see below, and others understand the change in terms of the rules themselves even though the bases or realities (*manātāt*) of the rules (*aḥkām)* have not changed. Where does minority *fiqh* stand in all of this? The above discussion shows that in theory at least that change of rule by time and place is in keeping with the traditional understanding on the subject even though some scholars such as al-Qaraḍāwī, may have extended the principle, beyond its remit of *ʿurf*. However, Mawlāwī and Bin Bayya have both shown in their treatment of this subject the limitations of this principle and contexts in which this principle is to be applied and expanded on the permitters (*ḍawābiṭ*) by which they are to be applied. What this means in practice is a separate discussion as we shall see in the ensuing sections of this chapter.

Section II: *Maqāṣid* and the Purpose of Law

The subject of *Maqāṣid al-Shariʿa* (the objectives of Islamic Law) is inextricably linked to the principle of *maṣlaḥa mursala* (considerations of public interest) and the basis of seeking the effective cause (*ʿilla*) in every rule (*ḥukm*). However, the *maqāṣid* have a wider application beyond analogy (*qiyās)* or the adducing of an interest in the absence of clear text (*istidlāl al-mursal*) in respect to textual interpretation.[249]Therefore, both topics will be considered separately while noting the overlap and interconnection. The *maqāṣid* cast an overarching light on the derivation of rules in general and not just within specific topics in the fundamentals (*uṣūl*) of *Sharī'a*. In the sections below we wish to consider the treatment of *maqāṣid* in classical scholarship, discern any development in modernist scholarship in general and amongst the minority *fiqh* scholars in particular and thereby assess congruity or its lack thereof.

249 The utility of *maqāṣid* was that they could act as a broader guide to the process of *ijtihād*, even if they were not treated as effective causes. The *mujtahid* or jurist needs to have a global perspective over the *Sharīʿa* in order to aid him to appreciate the details, a point made by a number for classical scholars. For example, al-Juwaynī stated: "The one who is not aware of the reality of aims of the orders and prohibitions then he will not have an insight into how the *Sharīʿa* is legislated.' (*Burhān*, 1:295). Taqī al-Dīn al-Subkī said: "One of the conditions of the *mujtahid* is the ability to follow the aims of the *Sharīʿa*".' *Ibhāj*, 1:8-9.

What are the Maqāṣid?

The Maqāṣid Approach in Traditional Jurisprudence

The *maqāṣid* approach originated from the discussion around the effective cause (ʿ*illa*) and its extendibility via certain types of analogy (*qiyās)*. It was this aspect of analogy (*qiyās*) that gave birth to the idea of the *maqāṣid*. A key question was could a common generic description be suitable for ratiocination in the absence of a proper description or consideration (*waṣf munāsib*) or one of the recognized textual paths of determining (*masālik*) of the effective cause (ʿ*illa*). Those who answered in the affirmative argued that the *Sharī'a* is reasoned (*muʿallal*) and therefore, it is up to *mujtahid* to discover the divine reason for the ruling in question.

Perhaps the first one to discuss the subject of *maqāṣid* in a form familiar to those who studied this subject al-Juwaynī. In his book *al-Burhān fī Uṣūl al-Fiqh* he divided the effective causes (ʿ*ilal*) into 5 categories. The categories of *ḍarūāt* (necessities), *ḥājāt* (needs) and *taḥsīnāt* (embellishments) became the standard which others further elaborated and built on by the likes of al-Ghazzālī and al-Shāṭibī. The significance of these categories was to set out the subject areas in which analogy can take place and the prioritization of the effective causes. Al-Ghazzālī later divided the *ḍarūrāt* into 5 categories such as the protection of religion, life, property, the mind, and lineage. Others such as Fakhr al-Dīn al-Rāzī, al-Qarāfī al-ʿIzz b. ʿAbd al-Salām further elaborated on this in respective various works.

According to Maḥmūd ʿAbd al-Hādī Fa'ūr, a researcher of the legal thought of al-Shāṭibī, one of the driving factors in the elaborating of the idea of *maqāṣid* by the Shāfiʿīs and Mālikīs was the need to respond to the Ḥanafī onslaught on the use of *maṣlaḥa* by these schools. The idea of *maqāṣid* came to shore up and justify its use in analogy as its referent was not isolated descriptions (*awṣāf)* of certain *ḥukm*s but the totality of the *Sharī'a*.[250] The defence of the use of the *munāsib* (suitable or proper attribute) led to the following articulation: The *Sharī'a* has come for the benefit (*maṣlaḥa*) of man. This benefit then is categorized into the five *maqāṣid* or aims of the *Sharī'a* which are the protection of: religion, life, mind, lineage, and property. So, if the *Sharī'a* as a whole seeks these aims then, it is concluded, that they must be the effective (ʿ*illa*) of the individual rules (*aḥkām*). This is also established from an inductive

[250] Fa'ūr, *al-Maqāṣid*, p. 39-40.

scrutiny (*istiqrā'*) of the rules[251] which show that they seek these aims. So, upon scrutiny one can see this from the results, the *ḥikma*s and *ʿilla*s contained within the text that these aims are sought. Thus, it is concluded that the aim (*maqṣad*) and benefit (*maṣlaḥa*) of the *Sharī'a* can act as effectives causes by which to derive rules.[252]

Although al-Shāṭibī's contribution to the subject of *maqāṣid* is considered part of the classical approach to *Sharī'a*, it is unique in its methodology and deserves separate treatment. According to Fa'ūr, it seems al-Shāṭibī was attempting to reconcile conflicting positions around the use of *istiṣlāḥ* (finding a public interest).[253] This was the recourse to a *maṣlaḥa* unsupported by a clear text, a source termed as *maṣlaḥa mursala*. For the Ḥanafīs the *istiṣlāḥ* is rejected as it is not supported by text whereas *istiḥsān* (justice preference) which they advocated was (based on the strongest of two evidences). They argued that the *maqāṣid* cannot form evidence for the purpose of ratiocination as it is a *khiyāl* (an imagination) or a *hūsāt al-ʿaql* (folly of the mind).[254] Al-Shāṭibī attempted to show that the *maqāṣid* were definitive (*qaṭʿī*) and as such can form an encompassing evidence (*dalīl kullī*) in its own right which contrary to what the Mālikīs had followed in the process of deriving rules via *istiṣlāḥ* or *maṣlaḥa mursala*.[255] The debate around *istiṣlāḥ* hinged around whether the *munāsib* (an attribute) can be considered a legitimate path (*maslak*) to discovering the *ʿilla*.[256] The Ḥanafīs argued that the *munāsib* should not be presumed to exist but there needs to an indication in the text and called the usage of such descriptions devoid of effect (*ghayr ta'thīr*) as mere imagination (*ikhāla*) without any evidential value. al-Shāṭibī tried to bridge that gap and reconcile both demands; the basis of rules as reasoned (*muʿallal)* and the *munāsib* to be established in more sound footing then the arbitrary way it was hitherto being used by the Mālikīs.

Al-Shāṭibī's response was a new methodology to establish the evidence for the *munāsib* which was via the use of the inductive process (*istiqrā'*).[257] The concept of deriving the *maqāṣid* through scrutiny is not new but the conclusion of al-Shāṭibī that it yielded positive and definitive knowledge was new and unprecedented. Through this process the study of

[251] Raysūnī, Aḥmad, *Imām al-Shāṭibī's Theory of the Higher Objectives and Intents of Islamic Law* (Virginia: International Institute of Islamic Thought, 2005), pp. 281 and 283.
[252] Fa'ūr, *al-Maqāṣid*, p. 39-40.
[253] Fa'ūr, *al-Maqāṣid*, p. 42.
[254] Fa'ūr, *al-Maqāṣid*, p. 109.
[255] Fa'ūr, *al-Maqāṣid*, p. 489.
[256] ʿAbd al-Karīm, *al-Maṣāliḥ al-Mursala*, pp. 77-79.
[257] Fa'ūr, *al-Maqāṣid*, p.484.

individual rules and their categorisation established for al-Shāṭibī, with certainly, that the *maqāṣid* can be used as *ʻilla* for matters where no partial (*juzʼī*) text can be found. Indeed, for al-Shāṭibī this was nothing but a new defence of Mālik's *istdlāl al-mursal* and the recourse to *maṣlaḥa mursala*. According to al-Shāṭibī:

> Every *Sharīʼa* basis for which there is no specific *naṣṣ* and is consistent (*mulāʼim*) with the practise of the *Sharīʼa* and its meaning is taken from the evidence is correct as a basis for and referent (for ratiocination) since that basis by the totality of its evidence is definite (*maqṭūʿ bihi*). This is because the evidence does not have to be definite on their own in isolation without being taken as a whole as mentioned above. That is unfeasible and comes under the category of *istidlāl al-mursal* on which Mālik and Shāfiʼī relied upon.'[258]

Al-Shāṭibī was very careful to argue that the *maṣlaḥa* which realises the *maqāṣid* is one based text and not the mind. He did not see *maṣlaḥa* as a pure benefit as defined by the masses but what the *Sharīʼa* as a whole intended as expressed in the *maqāṣid*. In the scholastic (*kalāmī*) issue of *taqbīḥ* and *taḥsīn* (intelligibility of good and evil) he followed the Ashʿarite doctrine and stressed that the mind has no role in determining the *maṣlaḥa*. In his introductory premises in *al-Muwāfaqāt* he explained the role of the mind in respect of the text to be:

> The rational evidences, if they are used they are employed built on the textual evidences (*adilla samʿiyya*) or specify the means to them, or establishing their basis (*manāt*), but they are not independent proofs, because the scrutiny here is a *Sharīʼa* matter and the mind is not a lawgiver as clarified in the science of *Kalām*.'[259] In his *Iʿtiṣām* he further elaborated on this point: 'The interests (*maṣāliḥ*) obtained by the Sharīʼa and the harms (*mafāsid*) that are repelled are considered from the perspective of how the life of this world should be established for the life is to come and not from the perspective of the whim of people in achieving the ordinary interests or repelling their customary harms….the *Sharīʼa* has come to take the *mukallafīn* (legal responsible) away from the motives of their whims until they become servants of Allah…[260]

[258] Al-Shāṭibī, *al-Muwāfaqāt*, p. 16.
[259] Al-Shāṭibī, *al-Muwāfaqāt*, p. 13.
[260] ʿAbd al-Karīm, *al-Maṣāliḥ al-Mursala*, pp. 113-114.

Al-Shāṭibī believed that the partial (*juz'ī*) rules serve to facilitate the realisation of the *maqāṣid* and hence there is no question of abandoning the *Sharī'a* rules in favour of a particular application of the *maqāṣid* on a certain matter. Regarding the relationship of the *aḥkām* to the *maqāṣid* al-Shāṭibī stated:

> if they (the interests) were set out such that their arrangement can be violated or their rules abandoned, the…. They would not have been legislated…however the *Sharī'a* intends that they remain as interests absolutely. They must remain as they are in that manner always, in their totality and generally in all types of duties (laid down by Shariʿa), *mukallafīn* (those legally responsible) and in all states. This how we find the matter to be, all praises be unto God.[261]

Al-Shāṭibī took the view that if there is clash between the partial evidence (*juz'i*) and the *maqāṣid* then the *maqāṣid* should take precedence. On the other hand, he also insisted that such a clash is unfeasible given that the aims (*maqāṣid*) or comprehensive evidences (*dalīl kullī*) have been derived from the individual (*juz'ī*) evidences and hence any apparent contradiction should be reconciled and both actioned (*ʿamal*).[262] In the event that this is not possible then and only then does the *maqāṣid* take precedence, in other words the *qaṭʿī* takes precedence over the *ẓannī*.

Public Interest (Maṣlaḥa Mursala)

The *maṣlaḥa mursala* is a classical subsidiary principle in *uṣūl al-fiqh*. The use of this principle in the past was for matters not addressed by the *Sharī'a* or new issues that arose. As such it was not a fundamental source such as the four agreed upon sources of law, namely the Qur'ān, Sunna, *ijmā'* and *qiyās*. Most of the *Sharī'a* derives from these but the detailed aspects have required the use of *maṣāliḥ mursala* to find a ruling.

In respect defining *maṣlaḥa murslaha* it is the "consideration of the genus of an attribute in the genus of rules"[263] The attribute referred to here is the *maṣlaḥa* which is the common attribute that can be discerned in genus of rules. In other words, there is no specific text (*shahāda muʿayyana*) for the *maṣlaḥa* in question, but it is discerned in collection of rules. So, the unrestricted interest (*maṣlaḥa murslaha)* is the attribute which the *Sharī'a* has not

[261] Al-Shāṭibī, *al-Muwāfaqāt*, 2:25.
[262] Al-Shāṭibī states: "If by *istiqrā'* a *kullī* principle has been established and then the text brings a *juz'ī* which conflicts with that principle then one must reconcile both of them (*jamʿ*).' *al-Muwāfaqāt*, 3:2.
[263] *Iʿtibar jins al-waṣf fī jins al-ahkām* or *al-jins fī al-jins*

attested to its recognition (*iʿtibār*) and or its abolition (*ilghā*) and therefore no specific single text exists and identified via the agreed upon modes (*masālik*) of determining the *ʻillah*. However, what determines and allows for an attribute to be suitable for analogy is the concept of *munāsaba*. The *munāsaba* is the causal relationship between rule (*ḥukm)* and the description (*waṣf*) for which there is a text (*naṣṣ)*: namely the *ʿilla* (effective cause).[264] The classical scholars have noted that for a legitimate *Sharī'a ʿilla* the *munāsaba* or the causal attribute must exist and hence the same condition should be applied when connecting a matter to the *maqāṣid* where there is no clear text. Al-Shawkānī stated the *munāsib:* "is the pillar on which analogy relies."[265]

As for the proper attribute (*munāsaba*) in the use of *maqāṣid* and *maṣāliḥ* it is the causal relationship between a rule (*ḥukm)* and a description (*wasf*) for which there is no clear text (*naṣṣ)* but is congruent and harmonious with the unrestricted interests (*maṣāliḥ)*. The *jins* or genus here is that the new matter which lacks a clear text comes under one of the categories of the *maqāṣid*.[266] Therefore, the specific matter (*ʿayn)* is not mentioned in the text, but its genus (*jins*) comes under the comprehensive evidence (*dalīl kullī)*. For example, compilation the Qur'ān is not mentioned specifically in the text, but its genus (*jins*) of the *maqṣad* of protecting the religion (*dīn*) and therefore it is a *maṣlaḥa* that is permitted or even obligatory depending on the *ḍarūra* or *ḥājjiya* of the *maṣlaḥa* in question. Another example is the application of the *ḥadd* of *qadhf* (defamation) on the one who drinks. There is no specific *ḥadd* punishment of defamation (*qadhf)* for drinking wine, but since it is likely that a person who is intoxicated will engage in defamation then the *hadd* punishment of defamation can be applied on such a person.[267]

The proper attribute (*munāsib)* is what the classical scholars referred to as the *maṣlaḥa*. According to the classical scholars the interests (*maṣāliḥ)* must realize the objectives (*maqāṣid)* of *Sharī'a*. According to al-Khawārizmī: "What is intended by *maṣlaḥa* is the preservation of the aim of the Sharī'a by repelling the harm from creation."[268] Al-Ghazzālī was one of those classical scholars who clearly articulated the meaning of *maṣlaḥa*:

> As for *maṣlaḥa,* it means to gain the benefit and repel the harm but that is not what we mean. Indeed, acquiring the benefit and repelling the harm are the aims of creation

[264] ʿAbd al-Karīm, *al-Maṣāliḥ al-Mursala,* pp. 51-54.
[265] al-Shawkānī, *Irshād al-Fuḥūl*, 2:182. Transliteration: *hiya ʿumdat kitāb al-qiyās.*
[266] ʿAbd al-Karīm, *al-Maṣāliḥ al-Mursala,* p.53.
[267] ʿAbd al-Karīm, *al-Maṣāliḥ al-Mursala*, p.62.
[268] Quoted by al-Shawkānī, *Irshād al-Fuḥūl*, 2:174.

> and the good of the people in obtaining their goals. However, that is not what we mean by *maṣlaḥa*. What we mean is the preservation of the aim of the *Sharī'a* and the aim of the Sharī'a for humankind is five: to protect their religion, lives, mind, lineage, and property.[269]

The debate that raged amongst the classical scholars was whether the *munāsib* on its own served as an effective cause (*ʿilla*), that it was one of the modes (*masālik)* of identifying the *'illa* or whether the *munāsaba* was a mere condition amongst the many other conditions (*shurūt)* laid down for the *'illa*.[270] This is important because all the scholars agreed that the *'illa* had to be a legitimate *Sharī'a ''ʿilla* based on the text.[271] This is because the *''ʿilla* is the evidence (*dalīl)* which allowed the extension of the rule (*ḥukm*) to the new matter. For this rule to be a *Shariʿa* rule (*ḥukm shar'i*), it must be taken from the speech (*khiṭāb*) of the legislator as the definition of *a Sharī'a* rule is the speech of the legislator relating to man's actions.

The Parameters (ḍawābiṭ) of Maṣlaḥa Mursala

The *maṣlaḥa* according to general *Sunni* classical scholarship is determined or guided by the text (*naṣṣ)* and not pure ration. This derives from the theological discussions about the minds ability to decide good and bad (*taqbīḥ wa taḥsīn*). The Ashʿarīs generally took the view that only the lawgiver can determine the good (*ḥusn*) or bad (*qubḥ*) and the Muʿtazila were at the other extreme maintaining that the human mind can decide both matters while the Māturīdīs assumed a middle position. Al-Shāṭibī the main proponent of the *maqāṣid* approach was distinctly of 'Ash'ari persuasion and in various places in the *al-Muwāfaqāt* he has expressed this view,[272] and this was the general view of the *uṣūlī* scholars. That is way *maṣlaḥa* as *ʿilla* must be in conformity (*munāsib*) with the general practise and direction of the Law to be established by the Lawgiver.

Those who followed this method of ascribing effective causes to rules placed parameters for this process. They said the *Sharī'a* must either acknowledge the *maṣlaḥa* or a text must not

[269] Al-Ghazzālī, Abū Ḥāmid, *al-Mustaṣfā min ʿIlm al-Uṣūl* (Cairo: Sharikat al-Ṭibaʿa al-Fanniyya al-Muttaḥida, 1970), p. 286.
[270] Fa'ūr, *al-Maqāṣid*, pp. 39-43.
[271] Fa'ūr, *al-Maqāṣid*, p. 59.
[272] Bin Bayya, *'Alāqāt Maqāṣid al-Sharīʿa bi-Uṣūl al-Fiqh*, (2006), pp. 51-52.

explicitly cancel it or there should be no text which stops us from considering its benefit. Hence, they divided the benefits (*maṣāliḥ*) into three types[273]:

i. The cancelled interest (*Maṣlaḥa mulghā*).
ii. The recognised interest (*Maṣlaḥa muʿtabara*).
iii. The unrestricted interest (*Maṣlaḥa murslaha*).

The first category is where the interest (*maṣlaḥa)* is cancelled by the text. So, when the text enjoined fighting for the defence of Muslim lands, which entails the loss of life contradicting the aim or *maṣlaḥa* of preserving life, this *maṣlaḥa* is cancelled because of the text. However, *Sharī'a* rules (*ahkām*s) which entail a benefit (*maṣlaḥa*) fall under the second category where their benefit is acknowledged (*mu'tabara*) by the *Sharī'a*. For example, the *maṣlaḥa* or aim in the prohibition of drinking alcohol is acknowledged (*muʿtabar*) because its prohibition has an evidence (*dalīl)*. As for the third category, the unrestricted interest (*maṣāliḥ mursala),* this is where there is no specific evidence (*dalīl)* for the action so its benefit has not been cancelled or acknowledged. However, this action will come under the comprehensive evidence (*dalīl kullī*), which are the five aims (*maqāṣid*) of the *Sharī'a*. If it realizes one of the aims of the *Sharī'a* then that is the *maṣlaḥa* of the action and on that basis the action would be legitimized. This is because the aims are treated as effective causes (*ʿillas*), so if an action fulfils the aim, then it is legitimate. Advocates of this view cite the example of when the Sahabah compiled the Qur'ān. They say although there is no specific evidence (*dalīl)* for that action, it fulfils the *maṣlaḥa* of preserving the religion and so the action is obligatory. This is because the action fulfils the effective cause (*ʿilla),* which is the preservation of the religion. Since the *maqāṣid* have been arrived at through inductive scrutiny (*istiqrā'*) of the texts, they serve as the comprehensive evidence (*dalīl kulli*) for actions which lack specific evidence (*dalīl*).[274]

A pertinent discussion amongst contemporary scholars is the question of whether a *maṣlaḥa* can override a text (*naṣṣ)*?[275] Those who argue that the *maṣlaḥa* takes precedence base it on,

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[273] ʿAbd al-Karīm, *al-Masāliḥ al-Mursala*, p. 76 and p.129. .Ḥassān, Ḥusayn Ḥāmid, *Naẓariyyāt al-Maṣllaḥa Fī al-Fiqh al-Islāmī* (Maktabat al-Mutanabbī, 1981), pp.15-16. Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991), p. 267. See كتاب أصول الفقه الذي لا يسع الفقيه جهله, https://shamela.ws/book/36379/204. These three categories have been invoked by minority *fiqh* scholars themselves when they wanted to show a maṣlaḥa was invalid, see See Abū Fāris, "Athar Islām", p. 347.
[274] ʿAbd al-Karīm, *al-Masāliḥ al-Mursala*, pp. 62-65.
[275] Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991), pp. 275-280.

amongst other things, the various opinions ascribed to Mālik known for adopting *istiṣlāḥ* (finding a public interest) as a methodology in jurisprudence (*uṣūl)* which have overridden a text (*naṣṣ)* or singular (*āḥād)* transmissions. Some have said this has happened in the form of specification (*takhṣīṣ*) of an *fard* (element) of a general text (*ʿāmm*) while the rest of the elements (*afrād)* still apply whilst others have argued that, and the text is completely suspended whether that is a verse of Qur'ān, consensus (*ijmāʿ*) or analogy (*qiyās)*. Although there are many others, common examples are opinion such as non-obligation to suckle (*riḍāʿa*) by woman of high standing, the guarantee of artisans (*taḍmīn al-ṣunnāʿ*) or the imprisonment and beating of those accused of theft are cited to show that Mālik's departure from a text (*naṣṣ*) in preference of a *maṣlaḥa*.[276]

This opinion has been challenged by several contemporary scholars like Muḥammad Saʿīd Ramaḍān al-Būṭī[277], Ḥusayn Ḥāmid Ḥassān and others. Their opposition to this view is premised on several points; firstly, such an assertion that a *maṣlaḥa* can override text is the view of Najm Dīn al-Ṭūfī whose stance has been rejected by all the scholars let alone the Mālikis. Even al-Ṭūfī himself considered his methodology to be fundamentally different to that of Mālik as the following quote demonstrates: "Know that this method (of derivation) we have mentioned is not the same the view of *al-maṣāliḥ al-mursala* as followed by Mālik, but it is much more far reaching than that."[278] The text (*naṣṣ*) which al-Ṭūfī permitted to be specified by a *maṣlaḥa* can be speculative (*ẓannī*) or definite (*qaṭʿī*), though he excluded the *Ḥudūd* (mandatory punishments). For Mālik the *maṣlaḥa* is the attribute which is concordant (*mulā'im*) and not isolated (*gharīb*) and hence one cannot reconcile this position with al-Ṭūfī's standpoint. Second, if one were to scrutinise the above examples one would find that the *maṣlaḥa* that Mālik supposedly permitted to override a text (*naṣṣ*) is the a concordant interest (*mulā'im maṣlaḥa)*[279] and therefore it is a question of one text (*naṣṣ*) overriding another text (*naṣṣ)* and not a mere isolated interest (*maṣlaḥa*) which is what the aforementioned contemporary scholars where arguing when they asserted Mālik preferred *maṣlaḥa* over a text (*naṣṣ*).[280] Finally, to accept such a stance defies the meaning of *maṣlaḥa*

[276] ʿAbd al-Karīm, *al-Masāliḥ al-Mursala,* p. 90.
[277] Al-Būṭī, Muḥammad Saʿīd Ramaḍān, *Ḍawābiṭ al-Maṣlaḥa fī al-Sharīʿa al-Islāmiyya* (Beirut: Dār al-Fikr, 2005), p. 202.
[278] Ḥassān, *Naẓariyyāt al-Maṣlaḥa,* p. 113.
[279] Where several texts have indicated the *maṣlaḥa*. The concordance is not isolated but has a number of textual supports indicting the *maṣlaḥa*.
[280] In other cases, the issue is not even, according to Ḥassān, to do with a *maṣlaḥa* clashing with another *naṣṣ* (not related to *maṣlaḥa*), *ijmāʿ*, *qiyās* or extraction of the *manāt* of a text by *ijtihād.* Ḥassān, *Naẓariyyāt al-Maṣlaḥa,* p. 114.

mursala, which is that that there is no *shahāda* (text) which annuls the *maṣlaḥa*. The *naṣṣ* which is to be overridden by a *maṣlaḥa* is itself indicative of the annulment or the *maṣlaḥa* and therefore how can it be cancelled by a mere *maṣlaḥa* for which there is no text (*naṣṣ).* As for preferring a *maṣlaḥa* over the singular (*āḥād*) transmissions, Mālik's methodology allows for the apparent meaning (*ẓāhir*) of the Qur'ān, consensus (*ijmā'*) of people of Madinah and a definitive concordant interest (*qaṭ'ī mulā'im maṣlaḥa)* to override singular (*āḥād*) narrations but not by an isolated interest (*maṣlaḥa gharība*).[281]

The Maqāṣid Approach of Modernist Reformers

In the modern era the use of *maṣlaḥa* and the call for its use alongside the *maqāṣid* as a fundamental principle that pervades the law is a new phenomenon. Both concepts are inextricably linked and so are their modern usage. Both represent a corollary branch of the principle of *qiyās,* though important they were always secondary and subservient to the primary sources. The factors that brought their usage to the fore and gave them almost primary status was the dynamism they afforded in dealing with modern questions away from the dogma of the past. This point has been noted and elaborated upon by a number of contemporary academics. As Felicitas Opwis, an expert in modernist Islamic legal theory explains:

> The prominence that the reformers of the late nineteenth and early twentieth centuries gave to this hitherto subsidiary legal principle was a logical consequence of their focus on the scriptures and their insistence that there was no contradiction between revelation and reason…(the) medieval scholars adhered largely to the Ashʿarī dogma that the human intellect is unable to grasp God's reasons for laying down rulings (except by indicants given in scripture) and rejected the principle of causality in God's law, modern reformers were not so shy.[282]

This novel approach to *maqāṣid* and its associated problems have been aptly described by Opwis and therefore worth quoting in full:

> The current discussions on the *maqāṣid al-Sharī'a* also indicate a change in scholarly perception of the sources of the divine law. Although the Qur'ān and the Prophetic hadith's status as the primary sources of law are, with few exceptions, not questioned,

[281] Al-Būṭī, *Ḍawābiṭ al-Maṣlaḥa* p. 203.
[282] Opwis, Felicitas, "Changes in Modern Islamic Legal Theory: Reform or Reformation?", *An Islamic Reformation?*, ed. Browers, Michaelle (Lexington Books, 2004), pp. 42-43.

> Consensus and Analogy are losing ground. Turning toward the purposes of the law as guiding criteria enhances the function of *maṣlaḥa* in the procedures of law-finding. Should such a trend continue, one may see more explicit redefinitions of the sources of law, redefinitions that will include *maṣlaḥa* next to the Qur'ān and hadith. It then might very well be that *maṣlaḥa* as the reification of God's legislative intent will become the primary source of law-finding whenever the authoritative texts do not explicitly resolve a legal situation. Although this would afford jurists more flexibility to address the changed environment of the modern world and would enable them to find solutions to unprecedented situations by relating them to the objectives of the divine law, the lack of agreement on how to define *maṣlaḥa* in concrete terms and its relationship to the textually explicit rulings of the Qur'ān and Sunna leave it open to much controversy and misuse in the name of the divine intent.[283]

She notes here how the modern usage is in effect is making *maqāṣid* an independent source of law, contrary to classical approach where it was related to the subsidiary sources. She also notes how the subjectivity of determining what constitutes *maṣlaḥa* lays open the possibility of "misuse in the name of the divine intent".

Muhammed Khalid Masud, who is an expert on the legal theory of al-Shāṭibī, explained the reason for the promotion of *maṣlaḥa* by the modernist scholars:

> Usually *maṣlaḥa* was treated as *al-maṣāliḥ al-mursala* as an extra principle to the four sources. It was in the nineteenth century that the concept of *maṣlaḥa* as an independent principle re-emerged….with the expansion of the magnitude of social change affecting all departments of life utilitarian philosophies became popular. The movement of modernism in Islam searched in Islamic tradition for a principle that would help the grapple with changing conditions. They found in *maṣlaḥa* such a concept. Naturally therefore, more attention was paid to the study of this concept in modern times than ever before.[284]

Historically, this new trend in the use of *maṣlaḥa* and *maqāṣid* was initiated by Muḥammad ʿAbduh and the modernists in the 19th century. The approach was appropriately described by Barbara Freyer Stowasser:

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[283] Opwis, Felicitas**,** "New Trends in Islamic Legal Theory: Maqāṣid al-Sharīʿa as a New Source of Law?" *Die Welt des Islams*, vol. 57, Issue 1, 2017, pp. 30-31.
[284] Masud, Muhammed Khalid, *Shatibi's Philosophy of Islamic Law* (Delhi: Kitab Bhavan: 1998), p. 67.

> To ‘Abduh and the modernists who followed him, then, ʿ*ibādāt* do not admit of interpretive change while the *mu’āmalāt* allow for, indeed require, interpretation and adaptation by each generation of Muslims in light of the practical needs of their age. Because modern Islamic societies differ from the seventh century *umma*, time-specific laws are thus no longer applicable but need a fresh legal interpretation (*ijtihād*). What matters is to safeguard ‘the public good’ (*al-maṣlaḥa al-ʿāmma*) in terms of the Muslim communal moral spirituality. The methodology here involved has been termed the discovery of the ‘spirit’ (“vales,” objectives, “rationes legis”) behind the literal meaning of the text.[285]

Basheer M. Nafi who wrote about the life and thoughts of the Ibn ʿĀshūr, who was influenced by the ideas of ʿAbduh, stated:

> the early generations of Arab-Islamic reformists, the *maqāṣid* theory provided a new route for developing an Islamic legal outlook that is more responsive to modern developments in Islamic societies. The assumption that legal opinions should be linked to general purposes allows for a bigger role for reason in the *fiqhī* process and gives the modern jurist the freedom to revise and dissent from traditional *fiqhī* opinions.[286]

Nafi took the view that *maqāṣid* gave the modern scholar a juristic justification to depart from tradition view which did not suit the times. In fact, according to Nafi, Ibn ʿĀshūr considered the *maqāṣid* as a measure ‘against which the validity of *fiqhī* opinions can be weighed.[287]

Historically the *maqāṣid* approach as defined by al-Shāṭibī did not gain any wide following. His approach should not be confused *maṣlaḥa mursala* though they are inextricably linked, and the latter predates the former. What the Mālikis and others followed was that the effective cause (ʿ*illa*) should be a suitable and proper (*munāsib mulā’im)*, in other words a number of specific texts had to yield a specific effective cause (ʿ*illa)* for a specific rule (*ḥukm*) which then was extended via analogy (*qiyās*), this is not the same with the *maqāṣid*

[285] Stowasser, Barbara Freyer, *Women in the Qur’ān, Traditions and Interpretation* (New York and Oxford: Oxford University Press, 1994), p. 132.
[286] Nafi, Basheer M., “Ṭāhir Ibn ʿĀshūr: The Career and Thought of a Modern Reformist ʿĀlim, with Special Reference to His Work of Tafsīr”, *Journal of Qur’ānic Studies*, vol. 7, 2005, p. 16.
[287] Nafi, “Ṭāhir Ibn ʿĀshūr”, p. 16.

approach which is much broader. However, modernist writers such as Ibn ʿĀshūr[288], Aḥmad Raysūnī[289], and Jasser Auda[290] and others have articulated a case for its paramount use in Islamic law which did not exist to the extent advocated by them amongst the classical scholars and this approach, as we shall see shortly, has been adopted by the many of the minority *fiqh* scholars.[291]

A key question that arises in the context of the modernist discussion of *maqāṣid* is what happens when there is a conflict (*ta'arud*) between the encompassing evidence (*kullī*) and the partial evidence (*juz'īʿ*? For al-Shāṭibī, the former always took precedence.[292] This is not a position countenanced by any classical scholar and the general view has been that the specific evidence (*dalīl*) takes precedence over an analogy (*qiyās)* or a *maṣlaḥa* which are weaker evidentially in the face of a verse from Qur'ān or a sound *ḥadīth*. Al-Shāṭibī on the other hand was consistent with *uṣūlī* principles as the encompassing evidences (*kulliyyāt*) are definite (*qaṭʿī*). Since they are derived from an inductive scrutiny of all the texts (*nuṣūṣ)* and they should in theory be stronger than a single text (*naṣṣ)*. This point is largely hypothetical as no example of *taʿāruḍ* has been cited by al-Shāṭibī.[293] Also, al-Shāṭibī thought it unlikely there would be clash as the *kulliyyāt* derive and originate from the partial texts (*juz'iyyāt*) and therefore how can such a clash arise in practice?[294]

Some contemporary modernists, having adopted al-Shāṭibī's approach, argued the expansive and adaptive nature of *Sharī'a* entails that the *maqāṣid* can be overriding. Writers such Jasser Auda, Tariq Ramadan and Michael Mumisa have stressed the dominance of the *kulliyāt* over the *juz'iyyāt* and went beyond what al-Shāṭibī had posited. One of the clear developments amongst modernist scholars is broadening of the existing *maqāṣid* as well as additions to them. So, the protection of lineage been extended to 'care of the family' or protection of the mind has come to include 'propagation of scientific thinking'.[295] Ibn ʿĀshūr went against the

[288] Ibn ʿĀshūr, al-Ṭāhir, *Maqāṣid al-Sharīʿa al-Islāmiyya* (Tunis: al-Dār al-Tūnisiyya, 1972).
[289] Raysūnī, Aḥmad, *al-Fikr al-Maqāṣidī: Qawāʿiduh wa-Fawā'iduh* (Jarīdat al-Zamān, 1999) and idem, *al-Maqāṣid ʿinda al-Imām al-Shāṭibī* and *Imām al-Shāṭibī's Theory of the Higher Objectives.*
[290] Auda, Jasser, *Maqāṣid al-Sharīʿa as Philosophy of Islamic Law* (Virginia: International Institute of Islamic Thought, 2008).
[291] Nafi, "Ṭāhir Ibn ʿĀshūr", p. 16.
[292] ʿAbd al-Karīm, *al-Masāliḥ al-Mursala*, p. 111.
[293] Fa'ūr, *al-Maqāṣid*, p.527.
[294] Fa'ūr, *al-Maqāṣid*, pp. 331-334 and 483-484.
[295] Auda, *Maqāṣid al-Sharīʿa*, p. 248.

literal approach[296] of the traditional ulama and advocated a universal[297] reading of the *maqāṣid* [298] and added further categories of *maqāṣid*.[299]

By way of example, in an article on the question of voting in the British elections Michael Mumisa[300], as is customary for modernist scholars who address cites two principles; original permissibility (*al-aṣl fī-l-ashyā' ibāḥa*) and the fact that the *Sharīʿa* must change with time and place. Mumisa does not elaborate which of the two possible meaning he intends when referring to the principle of change. His application of this principle on the subject of voting and indicates the difference of era with different needs and therefore this general observation determines the legislative process regardless of the specific reality (*manāt*) in question. He states for example that the encompassing or comprehensive evidences (*kulliyyāt*) of the *Sharī'a* such as protection of life and property are fulfilled by the UK government and therefore the question of the *Ḥadd* punishment becomes redundant in this situation. In other words, it is not the specific basis (*manāt)* of the *Ḥadd* punishment but the global objectives of the *Sharī'a*. In support of the principle of change of rules by change of time and place Mumisa quotes several examples from the classical texts.

Michael Mumisa cites two examples of this from al-Shāṭibī's *al-Muwāfaqāt*. In the following quote we have the example of the Prophet giving different answers to the same question to different people:

> The Prophet was once asked regarding the most meritorious deed and his answer was, 'belief in God'… 'followed by striving in the path of God'… 'and finally pilgrimage (*ḥajj*).' He was then asked the same question by a different person and his answer was 'first prying in the right time'… 'followed by obedience to one's parents'… 'and finally striving in the path of God.'[301]

[296] Kamali, Mohammad Hashim, "Maqāṣid al-Sharīʿa: The Objectives of Islamic Law,", *Islamic Studies*, vol. 38, no. 2, 1999, p. 196.
[297] This broad universal reading can be seen in ECRR writings also, see al-Najjār, ʿAbd al-Majīd, "Maqāṣid al-Sharīʿa fī Aḥkām al-Usra", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2005), pp. 64-102.
[298] Firdaus, Mohamad Anang, "The Maqasid Thought of Ibn ʿAshur and Development of Interdisciplinary Islamic Studies: Searching for the Correlation of the Concept", https://eudl.eu/pdf/10.4108/eai.11-11-2020.2308298.
[299] Ibn ʿĀshūr, *Maqāṣid al-Sharīʿa*, pp. 247-336.
[300] Michael Mumisa is a writer, academic, and broadcaster and Cambridge Special Livingstone Scholar at Trinity Hall, University of Cambridge. Although he is not a member of the ECFR, he follows a modernist *maqāṣid* legal approach to contemporary *fiqh* issues faced by Muslims in the West.
[301] Translation by Michael Mumisa in https://conservativemuslimforum.org/wp-content/uploads/2018/10/Does-Islam-allow-British-Muslims-to-vote-2013.pdf, p. 5.

Mumisa also quotes a verse from the Qur'ān where different punishments are prescribed for the same crime but the choice of which one to execute is left to the ruler of the day:

> *'*The punishment of those who wage war against Allah and His Messenger and strive with might and main for mischief through the land *is: execution,* **or** *crucifixion,* **or** *the cutting off of hands and feet from opposite sides,* **or** *exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter. '*[302]

The two examples cited above by Mumisa from al-Shāṭibī's *al-Muwāfaqāt* upon scrutiny do not actually indicate the rules have changed. For example, Ibn Ḥajar al-ʻAsqalānī (d. 852 AH) has commented on this phenomenon in the *ḥadīth* where the Prophet would give different answers to the same question, and he has concluded that this is due to the different needs and responsibilities of the people asking the question.[303] So, when a young man asked about kissing in Ramadan gave one answer but when an elderly person asked the same question a different answer was given.[304] As for the verse about highway robbery the different rules contained are all *Sharī'a* rules in themselves and cannot be substituted for any other rule. The option does not come due to change in the fundamental reality of highway robbery, but it is in line with the basic philosophy of the penal code, which is deterrence, and so the severity of the rule will change depending on the severity of the crime and what the ruler feels is necessary to deter such crimes. This does not mean a completely different punishment can be applied but the option is restricted to the options granted in the text.

The Maqāṣid Approach in Minority Fiqh

The minority *fiqh* scholars have generally upheld the indispensability of knowledge of *maqāṣid al-Sharī'a* in deriving *Sharīʿa* rules. This is not surprising that key figures like al-Qaraḍāwī, Mawlāwī and Bin Bayya come from backgrounds which place the *maqāṣid* at the centre of the process of juristic derivation (*istinbāṭ*).[305] Al-Qaraḍāwī and Mawlāwī are

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[302] Qur'ān 5:33. See https://conservativemuslimforum.org/wp-content/uploads/2018/10/Does-Islam-allow-British-Muslims-to-vote-2013.pdf, p. 6.

[303] https://www.ikhwanonline.com/article/27821, here is the quote from Ibn Ḥajar from his *Fatḥ al-Bārī*, vol. 2, p. 13:
إنه لا اختلافَ بين هذه الأحاديث؛ لأن الجواب اختلف لاختلاف أحوال السائلين، بأن أَعلَم- صلى الله عليه وعلى آله وصحبه وسلم- كلَّ قومٍ بما يحتاجون إليه، أو بما لهم فيه رغبة، أو بما هو لائقٌ بهم، أو كان الاختلاف باختلاف الأوقات، بأن يكون العمل في ذلك الوقت أفضل منه في غيره

[304] https://fiqh.islamonline.net/en/kissing-ones-spouse-while-fasting/

[305] Fishman, *Fiqh al-Aqalliyyat*, p. 7.

inarguably modernist in their jurisprudential leanings and Bin Bayya as a seasoned Māliki scholar, are all predisposed to the *maqāṣid* approach.[306]

In respect to the foundation of the *maqāṣid* approach which states that all rules by default are reasoned and not that they are susceptible to be reasoned by ratiocination. This is upheld by the key figures of the ECFR. Fayṣal Mawlāwī has clarified this position in a research piece on determining the prayer times for '*Isha* (night prayer) and *fajr* (dawn prayer). Under the subtitle of *'The default position in Law is ratiocination,'*[307] he quotes scholars both classical and contemporary stating ratiocination as the default position in *Sharī'a*. In the same chapter he also explains the indispensability of *maqāṣid* to the derivation process.[308]

This is their general approach to *Sharī'a* regardless of the subject area of *fiqh*. With regards to minority *fiqh* specifically, the need to adhere and consider the necessities (*ḍarūrat*) and the removal of hardship are constant themes both in their introductory principles of minority *fiqh* and their individual treatment of particular topics under the rubric of minority *fiqh*.

Al-Qaraḍāwī states the methodology of facilitation and ease is a pillar of minority *fiqh* and places it as fifth on his list of foundational principles though most of his other pillars are in a similar vein. Under point five "Adopting the method of facilitation' He states that the 'companions adopted the method of ease and facilitation because they found this to be the methodology of the Qur'ān."[309] He then cites the dispensations (*rukhaṣ*) and verses about God wishing to bring ease and not hardship, amongst other things, as evidence of this principle. Even the change of time and place, in point six, is part of this facilitation as the scholar looks to the customs (*ʿurf*) to see where changes to the existing law can be made to bring ease and remove hardship. In point 7 "adhering to the gradual way," he makes the point that *Sharī'a* rules should be given and followed gradually so that it is not cause of hardship for the people such that they cannot follow the rule due to the circumstances of the time.[310] And finally in point 8 he emphasises the need to consider the necessities (*ḍarūrāt*) and needs (*hājāt*) of the people in giving opinions.[311] All of these points have the aims (*maqāṣid)* as their backdrop in one way or another and it is clear that the *maqāṣid* approach is thread that underlines the various legal opinions he has given.

[306] See chapter 2 where the modernist elements and approach of these scholars has been discussed in detail.
[307] Mawlāwī, "Mawaqīt al-Fajr", p. 337.
[308] Mawlāwī, "Mawaqīt al-Fajr", p. 345.
[309] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 48.
[310] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 53.
[311] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 55.

Bin Bayya in his *Ṣināʿat al-Fatwā* has listed the following principles as the most prominent for minority *fiqh*[312]:

a) The principle of facilitation and removal of hardship.
b) The change of *fatwā* by change of time.
c) The need taking the place of a necessity.
d) Custom.
e) Consideration the consequences (*maʾālāt al-afʿāl*).
f) The Muslim community taking the position of the judge.

If we scrutinise each one of these principles, we will find that ease, facilitation, *maṣlaḥa* and removal of hardship as a permeating feature. All these aspects are the hallmarks of the contemporary *maqāṣid* approach which considers the bringing of ease and realisation of benefit (*maṣlaḥa*) as a paramount aim of the law. We have already discussed a, b, c and d above, but with regards e and consideration of the consequences, this principle is inextricably linked to achieving a benefit and deterring a harm and therefore to the *maqāṣid*. The aim of the principle is to consider not just the action (which must be permissible in origin) but more importantly the consequence which in turn is measures according to the standard of interest (*maṣlaḥa*) and harm (*mafsada*). Bin Bayya quotes al-Shāṭibī's explanation of this principle which is premised on realising the *maqāṣid* as represented in the particular interest (*maṣlaḥa*) that should be achieved and the *mafsada* to be avoided and concluded: "Thus the companions understood the aim of the *Sharīʾa* and the *maqāṣid* are the meanings which are considered the wisdom/rational (*ḥikma*) and the aims of legislation and so their actions were conducted on this basis."[313] As for the principle or allowance for a Muslim community living in a non-Muslim land to assume the responsibilities of a judge or a Muslim ruler, this itself a departure from the normal rule that judges must be appointed by a legitimate Muslim authority. All rules except the *ḥudūd* and homicide can be administered by the mutual consent of Muslims as that is matter of necessity for them to fulfil their legitimate interests. Bin Bayya concludes that 'we have selected a collection of principles by which the jurist (*faqīh*) addresses the issues of minority *fiqh* and they are principles whose foundation is facilitation and removal of hardship with their controlling rules (*ḍawābiṭ*) and conditions (*shurūṭ*).'[314] In respect to

[312] Bin Bayya, *Ṣināʿat al-Fatwā*, pp. 265-350.
[313] Bin Bayya, *Ṣināʿat al-Fatwā*, p. 34.
[314] Bin Bayya, *Ṣināʿat al-Fatwā*, p. 80.

examples where *Maqāṣid* approach has a significant impact on the outcome of rulings Bin Bayya has cited some in his *ʿAlāqāt Maqāṣid al-Sharī'a bi Uṣūl al-Fiqh*[315] such as;

a) the question of what happens to the marriage contract of those women who convert to the Islamic faith while their spouses are still not Muslim.
b) voting in elections in the West.
c) the purchase of residential property via usurious loans.
d) certain types of transactions (*muʿāmalāt*).
e) greeting non-Muslims and participating in their festivals

At this stage although the minority *fiqh* scholars took a uniform view as a body under the ECFR, but there where dissenting voices on certain matters. On the question of Muslim convert women remaining married to non-Muslim spouses, Muḥammad ʿAbd al-Qādir Fāris and others rejected the ruling (*fatwā*) generally and specifically on the particular use of public interest (*maṣlaḥa*) in this subject. Responding to ʿAbdallāh al-Judayʿ's argument[316] that *maṣlaḥa* strengthens his view that separation is devoid of *maṣlaḥa* he concluded in a manner that was the standard response of traditional scholarship; that the rule itself contains the *maṣlaḥa*[317] This traditional perspective on the public interests (*maṣāliḥ*) is conspicuously absent from the minority *fiqh* discourse, which the that the rule from which an exception is sought is either preventing a harm (*maḍarra*) for the community or realising a public interest (*maṣlaḥa)*. The disproportionate attention to the dispensation (*rukhṣa*) is taking away and distracting awareness of the contribution of the default rule (*ʿazīma)* in realising the interest of Muslim minorities.

Now how congruous is the minority *fiqh* position in relation to *maqāṣid* and the classical scholarship to which they refer to show antecedents of their legal philosophy and thought? From the above discussion it seems that scholars, both early (*salaf)* and the later (*khalaf*) did employ legal principles to bring ease and facilitation, but this did not define their *fiqh* in the way the way that it does with minority *fiqh*. The traditional *fiqh* considered these as minor subsidiary sources whereas the manner of application by some minority *fiqh* scholars seems to indicate that it is not only an independent source but even one that overrides the primary sources in a way that classical scholarship would not countenance. Therefore, the ruling of

[315] Bin Bayya, *ʿAlāqāt Maqāṣid al-Sharīʿa bi-Uṣūl al-Fiqh*, pp. 156-7.
[316] Al-Judayʿ, "Islām al-Mar'a", p. 184.
[317] Fāris, "Islām al-Mar'a", pp. 387-8

permissibility granted to almost every single matter investigated suggests a particular emphasis for ease and facilitation that classical scholarship did not share. This difference is not problematic per se, but the issue is appreciating that minority *fiqh* is not a continuation of the *maqāṣid* approach as practised by its classical proponents, but part of the modernist expression and articulation of *maqāṣid* with implications for its claim to *aṣāla* (authenticity) to traditional principles.

Section III: The General legal principles (*al-qawāʿid al-fiqhiyya*)

Role of general principles

The general principles play a significant role in derivation of rules in minority *fiqh* and therefore requires separate treatment. General *fiqhī* principles are *Sharī'a* evidence like a verse of the Qur'ān or a *ḥadīth*. What makes them a principle is their applicability to a large number of issues in one subject or diverse issues spanning different subjects[318] which is clear from the definition of legal maxims accepted by most scholars: "A predominantly valid legal determination (*ḥukm atharī*) that applies to most of its particular cases (*juz'iyyāt*) so that their legal determinations will be known from it.'[319] No jurist, whether classical or contemporary, can attempt to derive rules without knowledge of the general principles. Legal principles were referred to as *al-qawāʿid al-fiqhiyya* (legal principles) and from the 8th century discussed within legal texts[320] under the title of *al-ashbāh wa-l-naẓā'ir* (similarities and similitudes).[321]

Al-Qaraḍāwī has placed the knowledge of general principles as the second pillar of minority *fiqh*.[322] Bin Bayya has listed the most important principles and entered extensive discussion on explaining them. Such usage in the derivation of rules is not new as general principles have always been indispensable for the jurist. However, what is interesting is the focus and selection of the principles as the key ones on which minority *fiqh* relies. As noted above a common thread between the principles applied is the aim of removing hardship and bringing ease and facilitation. General principles rooted in the notion of *ma'ālāt af'āl* (the

[318] Taqī al-Ḥakīm, al-Sayyid Muḥammad, *al-Qawāʿid al-ʿĀmma fī al-Fiqh al-Muqārin* (Beirut, 2001), p. 17. See also Musa, Khadiga, "Legal Maxims as a Genre of Islamic Law: Origins, Development and Significance of *Al-Qawāʿid al-Fiqhiyya*", *Islamic Law and Society*, vol. 21, No. 4, 2014, p. 325.
[319] Musa, "Legal Maxims", p. 331.
[320] Mohammed, Khaleel, "The Islamic Law Maxims", *Islamic Studies*, vol. 44, No. 2, 2005, p. 198.
[321] Musa, "Legal Maxims", p. 331.
[322] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, pp. 42-44.

consequences of actions) and *maqāṣid* [323]which allow a minority *fiqh* jurist to set aside tradition rulings derived from partial evidence and consider the specificities and needs of Muslim minorities, play a central role in minority *fiqh* legal discourse.

According to Mohammad Hashim Kamali:

> Legal maxims are theoretical abstractions in the form, usually, of short epithetical statements that are expressive, often in a few words, of the goals and objectives of *Sharī'a*. They consist mainly of statements of principles that are derived from the detailed reading of the rules of *fiqh* on various themes.[324]

Although legal maxims number in their hundreds and one single maxim can spawn a multitude of diverse principles[325], minority *fiqh* scholars have relied upon certain principles more than others in finding resolution to difficult problems, especially those that come under the rubric of *ma'ālāt af'āl* (the consequences of actions). This is due to the flexibility they afford in realisation the goals of minority *fiqh* and finding solutions to problems that are specific to Muslim minorities in the West.

Examples of the prominent principles utilised by minority *fiqh* are the maxims of necessity (*ḍarūra*) and need (*ḥāja*) or where the latter assumes the position of the former in particular circumstances. The juristic utilisation of these legal instruments epitomizes the ethos of the minority *fiqh* legal discourse.[326] It is for this reason that we wish to study these principles as understood by key minority *fiqh* scholars and asses the question of congruity with the classical position and as well the internal congruity between its conception by minority *fiqh* scholars and its application to particular issues.

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[323] Kamali, Mohammad Hashim, "Legal Maxims and Other Genres of Literature in Islamic Jurisprudence", *Arab Law Quarterly*, vol. 20, No. 1, 2006, p. 77.
[324] Kamali, "Legal Maxims, p. 80.
[325] For example, the principle of *lā ḍarar wa lā dirār* (no causing of harm or reciprocation of harm), is the source of many permutations of this principle such as *akhaff al ḍararayn* or *al-ḍarar lā yuzāl bi mithlihi* (harm is not repelled by its like) or *al-darar al-ashadd yuzal bi-l-darar al-akhaff* (Greater injury should be prevented by committing lesser injury). See Zakariyah, Luqman, "Legal Maxims and Islamic Financial Transactions: A Case Study of Mortgage Contracts and the Dilemma for Muslims in Britain", *Arab Law Quarterly*, vol. 26, No. 3, 2012, pp. 255-285.
[326] There are other principles worth studying such as the Principle of Silence and Original Permission (*al-aṣl fī al-ibāḥa*) or *ʿumūm al balwā* (the unavoidable widespread affliction). These we shall look at in other chapters as applied to particular issues. However, rule of *ḍarūra* is useful for understanding the legal philosophy of minority *fiqh* which the aim in this chapter.

The Principle of Necessity (ḍarūra) & Need (ḥāja)

The most extensive treatment of these principles has been undertaken by Bin Bayya in an article[327] submitted to the European Council of Fatwa and Research and reproduced in his *Ṣināʿat al-Fatwā.*[328] A careful study of his breakdown of this topic reveals how minority *fiqh* views the tension between established rulings and their conflicting modern realities and it reconciles the two in line with its principle of removing hardship and bringing ease. In his treatment of this subject, he addressed the practise by minority *fiqh* scholars of referring to necessity (*ḍarūra*) and need (*ḥāja*) in respect of their limits in application and its *ḍawābiṭ* (controlling rules). We will also consider the views of ʿAjīl al-Nashmī as his discussion of this topic reflects the revisionist trend. In addition to understanding the principle as understood by Bin Bayya and others we wish to evaluate its application on the purchase of residential homes.

Bin Bayya set about his exposition of this subject by first explaining the definition of the relevant terms *ḍarūra*, *ḥāja* and other related terms. In this he followed the method of al-Qarāfī in identifying the key differences (*furūq*) and distinguishing aspects of each term in order to specify their exact meanings.

He explained that *ḍarūra*, apart from its lexical meaning, has three usages[329]:

a) A narrow juristic meaning.
b) Wide juristic meaning.
c) *Uṣūlī* meaning.

The first is the customary meaning of necessity (*ḍarūra*), which is the dispensation from prohibited matters such as wine, pork on the basis that it will lead to death or illness or fear of such matters of extreme hardship. This form is what is normally associated with the concept of *ḍarūra*, which permits the definite prohibitions due to fear of loss of life or limbs.[330]

As for the wider meaning, this includes the *ḥāja* referring to the need which has a lower threshold of necessity than the *ḍarūra*. Common example for this is the fact that the

[327] Bin Bayya, "*Farq bayn al ḍarūra wa al ḥāja*", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftāʾ wa-l-Buḥūth* (Dublin, 2004), p.93-143.
[328] Bin Bayya, *Ṣināʾat al-Fatwā*, pp.285-288.
[329] Bin Bayya, *Ṣināʾat al-Fatwā*, pp.285-288.
[330] Bin Bayya, *Ṣināʾat al-Fatwā*, p.288.

insignificant or small *gharar* (uncertainty in contracts) is permitted due to need. *Ḥāja* will be addressed in detail below.[331]

As for the third meaning, it is the usage of the *uṣūlī* scholars (legal theoreticians) like al-Juwaynī, al-Ghazzālī and al-Shāṭibī etc. It is used in the context of the *maqāṣid* (goals) to refer those *maṣāliḥ* (interests) without which life would not be possible, as opposed to the needs (*ḥājāt)* without which life would be possible but difficult. Each category above has its conditions before they can be applied to any given reality.[332]

With regards to *ḥāja* it has both a foundational (*uṣūlī*) meaning and a juristic meaning and each has its *ḍawābiṭ* which seem to have been ignored or not acknowledged by other minority *fiqh* scholars.

In its foundational (*uṣūlī*) meaning, and this is where the principle "need takes the rule of necessity"[333] applies, refers to the need of society. Most scholars took the opinion that such a need does not suspend any rules as opposed to the *ḍarūra* which does.[334] However, he goes on to show that in practise the various schools of thought applied the rule of *ḥāja* according to their own juristic principles. The Mālikis made recourse to *istiṣlāḥ* (finding a public interest) in order to specify a default rule (*ʿazīma*) with *ḥāja* (which itself is a *maṣlaḥa*). The Ḥanafīs for their part resorted to *istiḥsān* (juristic preference) to apply a need (*ḥāja*) as an exception to the general rule. Bin Bayya surmises that a person might ask "how can a need (*ḥāja)* specify (*takhṣīṣ*) whilst not being the linguistic modes of specification that are found in the texts, the Book (Qur'ān), Sunna and others such as *ijmā'* (consensus) and the two types of implicit meanings[335] and analogy (*qiyās*)?". The answer according to Bin Bayya is that the issues in which such specification is possible, and as can be discerned from the various examples where it has been applied by the scholars, is where the general import of the text is weak. So, in other words where there is clash between *ḥāja* which is a *maṣlaḥa* and a weak general import the *ḥāja* prevails in rare forms (*nawādir al-suwar*).[336]

[331] Bin Bayya, *Ṣinā'at al-Fatwā*, p.289.
[332] Bin Bayya, *Ṣinā'at al-Fatwā*, p.291.
[333] Expressed in Arabic as *tanzīl al-hāja manzilat al-ḍarūra*
[334] Bin Bayya, *Ṣinā'at al-Fatwā*, p. 43.
[335] Here he is referring to *mafhūm al-mukhālafa* and *mafhūm al-muwāfaqa*, which are well known types of *mafhūm* found in *uṣūl al-fiqh* under the subject of the *dalālāt*.
[336] Bin Bayya, *Ṣinā'at al-Fatwā*, pp.300-315.

The rule of *ḥāja* before Bin Bayya has been used without much exploration of its limits[337] and this has been reflected in the *fatwā* relating to taking out usurious loans to purchase residential homes. The *fatwā* of the European Council of Fatwa and Research made recourse to *ḥāja* and indicated that need on its own was sufficient to permit usury. Bin Bayya rejected this contention and embarked on explaining the principle in detail though in the end also came to the same conclusion that usurious loans are permitted based on *ḥāja* and satisfaction of its conditions.[338]

As for the *ḥāja* in juristic (*fiqhī*) meaning, it arises from extending the meaning of *ḍarūra* due to the generality of the evidence which command that hardship should be removed. Whilst the use of *istiṣlāḥ* (finding a public interest) and *istiḥsān* (juristic preference) in the above examples are from the category of analogy (*qiyās)*, *ḥāja* in the juristic meaning is derived from the verbal evidence (*adilla lafẓiyya*) referring to semantic meanings derived from the Qur'ān and Sunna. It is applied in the same way that *ḍarūra* is applies, which is that it is specific to a person and the permit is not general to all people, as opposed to the *uṣūlī* application of *ḥāja*. Also, it is to be invoked as long as the *ḥāja* (need) exists (*tuqaddar bi qadrihā*) and not a moment longer than is required.[339]

In addition to the above *ḍawābiṭ* Bin Bayya states that *ḥāja* can be applied where the prohibition is of a medium level (*wasiṭ*) and not high such as the prohibition of usuary. Prohibited matters either relate to matters prohibited in origin due to their *maḍarra* (harm) or to the means (*wasā'il*) which led to a *maḍarra* (harm). Matters which are prohibited in origin are at the higher level and cannot be overridden by *ḥāja* whereas those of a medium level, like in the case of contractual uncertainty (*gharar)*[340], exception can be made. Thus, *ḥāja* is applied in the means and in areas where the degree of prohibition is not high.

In conclusion the *ḥāja* which overrides an accepted prohibition in *Sharī'a* is where, in the *uṣūlī* sense, when the general import is weak and not clear- so this would not permit matters which are clearly forbidden, and this is known that principles of *istiḥsān* and *istiṣlāḥ* cannot override clear definitive texts unless an interest (*maṣlaḥa)* is itself established in the text (*naṣṣ*) in a definitive manner. In the juristic usage of need (*ḥāja*) overrides a known prohibition when the prohibition is of a lower degree. *Ribā* (usury) however is considered one

[337] Bin Bayya, *Ṣinā'at al-Fatwā*, p. 55.
[338] Bin Bayya, *Ṣinā'at al-Fatwā*, p.339.
[339] Bin Bayya, *Ṣinā'at al-Fatwā*, p.313.
[340] Bin Bayya, *Ṣinā'at al-Fatwā*, p.53.

of the highest levels in terms of prohibition and therefore, according to Bin Bayya, a need (*ḥāja*) on its own cannot permit it.[341]

Minority Fiqh Usage of Juristic Principles on the Ruling on Interest Based Mortgages

The principle of *ḍarūra* and *ḥāja* taking the rule of *ḍarūra* is the central evidence used to permit the taking out of interest-bearing loans to purchase residential homes by the European Council of *Fatwa* and Research.[342] In fact, the *fatwā* engages most of the goals and legal principles espoused by the minority *fiqh* scholars and discussed above in this chapter and therefore is represents a panoply issues and questions surrounding the nature of minority *fiqh* legal philosophy and practice. This *fatwā* is possibly the most audacious position held by the ECFR displaying its modernist credentials and its internal tensions with tradition and modernity. The *fatwā* was supported by the main minority *fiqh* scholars such as al-Qaraḍāwī, al-Arabi al-Bichrī, Bin Bayya and others though there were a few dissenting voices from inside and outside the ECFR. One of the most detailed arguments for this *fatwā* was written by al-Qaraḍāwī in a chapter in his book entitled 'the purchasing of residential homes in the West via banks'[343].

The ECFR scholars generally took a strong stance on the prohibition of usury (*ribā*) and they reiterated this point in their *fatwā* on this question. In the very first point of their ruling, they state:

> the council underscores the fact the Umma has agreed on the prohibition of *ribā*, that it is from the grave and destructive sins against which Allah and His Messenger have declared war. The council also highlights the ruling of the Islamic *fiqh* councils which have declared bank interest as prohibited usury.[344]

How were they able to take such a bold step even though it flies in the face of their normative juristic practice? Al-Qaraḍāwī for instance mentioned how for nearly 20 years he had been strongly opposing the purchase of homes via bank interest due to the prohibition of *ribā*.[345] What has changed his mind? The answer most probably lies, not just in the openness to revise past mistakenly held views, but the influence on the legal thinking by the goals of minority *fiqh* which seeks to embolden and empower Muslim minorities and not leave them

[341] Bin Bayya, *Ṣinā'at al-Fatwā*, p.303.
[342] The full text of the *fatwā* is reproduced by al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, pp. 174-179.
[343] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 154.
[344] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 175.
[345] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 154

in a weak and disadvantaged position in relation to the wider society. Muslims living in the West must have the stability of owning their own homes, so that they can choose to live close to each other and in proximity to mosques, Islamic schools, and centres. Such weakness and instability in turn will adversely affect the community's ability to carry out another objective recognised by minority *fiqh* scholars, namely the invitation of the wider society to the message of Islam.[346] Al-Bichrī, in his article entitled 'the purchasing of homes via bank loans' wrote: "how can this minority community fulfil its duty of conveying its message when it cannot avail itself of the first of its means, namely stability? Where a person lives his whole life as a traveller…"[347] He goes on to state: "the ownership of a home is from the necessities of the community in order to protect its religious and ethical affaires and to organise its social and economic matters and remain psychologically stable so that it can truly be an effective part of society."[348] Here we see a clear impact of the principles of *ma'ālāt af'āl* (the consequences of actions) and the *maqāṣid* based approach.

The premise of the ECFR *fatwā* is that a house is a necessity (*ḍarūra*) and a house which is appropriate in terms of its location and size is what removes hardship and therefore such a suitable house is a *ḥāja* and would assume the status of a necessity.[349] So, following the above principle of *ḍarūra* and *ḥāja* usurious loans, which in origin are prohibited, would become permissible to take out in order to fulfil the necessity or need of purchasing a suitable house.[350] Al-Bichrī expanded on these two concepts from a *maqāṣid* perspective. He acknowledges that *ribā* is strictly forbidden though he distinguishes between usury which is taken as the primary object of prohibition while the giving of *ribā* is prohibited to forbid the means (*wasa'il*) to the primary object. In respect to possessing a place to reside in he asserts that a home is a recognised public interest (*maṣlaḥa muʿtabara*) as per the verse: '*And Allah has made your homes a place to rest.*'[351] He justified home purchase as a necessity in the West from the perspective that it 'realises the preservation of the religion, life, honour and wealth.'[352] He further elaborated on the descriptions (*muwāṣifāt*) which realise the protection of religion (*hifẓ al dīn*) and lists two keys points: firstly a home which allows a Muslims to choose a good neighbour, live close to amenities and institutions which allow for the upbringing of the family such as a mosque or an Islamic school. Secondly, a home

[346] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 176-77.
[347] Al-Bichrī, "Munṭaliqāt li-Fiqh al-Aqalliyāt", p. 167.
[348] Al-Bichrī, "Munṭaliqāt li-Fiqh al-Aqalliyāt", p. 167.
[349] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 176.
[350] Reproduced in Bin Bayya, *Ṣinā'at al-Fatwā*, p. 57.
[351] Qur'ān, al-Naḥl, verse 80.
[352] Al-Bichrī, "Munṭaliqāt li-Fiqh al-Aqalliyāt", p. 165.

sufficiently spacious for the whole family which affords suitable and secure living conditions according to the national standards of the host country, so they enjoy a measure of stability and not be socially disadvantaged.[353]

The above approach clearly in keeping with al-Shāṭibī's logic and methodology. Here the public interest (*maṣlaḥa*) is recognised textually (*muʿtabara*) and then the *manāt* or reality by way of descriptions (*muwasifat*) are shown to realise the *maqāṣid* by way of *tahqīq al manāt* (verification of the ratio or anchor point). The home is the *maṣlaḥa* (public interest) and the certain attributes of that home are its descriptions (*muwāṣifāt*) which realise the goal (*maqṣad*) of protecting religion (*hifẓ al-dīn*). Therefore, such a home with such descriptions is a necessity and since this can be largely achieve via purchase of a home (as opposed to renting), then the purchase itself becomes a necessity (*ḍarūra*). Al-Bichrī builds on this premise to conclude:

> since it has been established that purchasing a home is a necessity and it becomes impossible for a Muslim to realise that without an interest-bearing loan – which is a general and temporary necessity for a Muslim residing in a non-Muslim land, then it is permitted to engage in such dealings because the necessity (*ḍarūra*) and need (*ḥāja*) for a loan removes sin due to compulsion.[354]

Al-Bichrī asks since the principle of 'necessities permit the prohibited matters' (*al-ḍarūrāt tubīḥ al-maḥẓurāt*) permit the prohibited matters for individual cases so what of the situation of purchasing a home to realise the necessity of protecting the religion (*hifẓ al-dīn*) which is a public necessity? [355]

After arguing from the perspective of *ḍarūra*, al-Bichrī, makes the case from *ḥāja*: since the need to possess a suitable home encompasses Muslims generally it ceases to be a mere need and assumes the position of a *ḍarūra*. Also dealing with interest in the West comes under the principle of *ʿumūm al-balwā* (widespread unavoidable harm) as it is unavoidable. He quotes extensively from al-Shāṭibī to show how he understood the *ḥāja* to become a necessity if it

[353] Al-Bichrī, "Munṭaliqāt li-Fiqh al-Aqalliyāt", pp. 165-66.
[354] A-Bichrī, al-'Arabi, "Shira al-Buyut 'an Tariq al-Banki" *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbi li-l-Ifta' wa-l-Buhuth* (Dublin, 2005)., p. 169.
[355] A-Bichrī, "Shira al-Buyut 'an Tariq al-Banki", p. 169.

becomes difficult to avoid.[356] Once it assumes the position of a necessity, the prohibition can be dispensed with on this basis.

Al-Bichrī also considers the prohibition of *ribā* to be specifiable by a public interest. He considers the rule of *ḥāja* as an example of where the *Sharī'a* specified general evidence of prohibition due to a need, common examples being the permissibility of forward sale (*salam*) contracts, loans, renting and sharecropping which are contrary to the dictates of analogy on the basis that they fulfil a need of the people.[357] He cites Mālik's specification of a general text by a public interest on the basis of *istiḥsān* (juristic preference). He also mentions al-Shāṭibī's argument that the consequence of actions (*ma'ālāt af'āl*) may specify a general prohibition on the basis that a ruling may lead to a greater harm (*mafsada*), over and above the *maṣlaḥa* envisaged within the original ruling. Al-Bichrī posits that the above approach is rooted in tradition, he contends these jurists such as Mālik and al-Shāṭibī were "followers and not innovators"[358], thereby implying that minority *fiqh* scholars are to be similarly categorised as they also follow the same approach.

By way of application of the above rules, al-Bichrī states that a situation in the West where a person is forced to rent, paying more money over his or her lifetime than if that that person had taken a bank loan and then not being able to leave that home to his children, is contrary to the intent of the prohibition. The prohibition of *ribā* aims to prevent the evil or harm of financial exploitation, injustice, and unlawful consumption of others wealth, however by prohibiting the purchase of homes via bank loans leads to a consequence where Muslims lose out financially, which runs counter to the prohibition. Therefore, in order avoid this consequence (*ma'āl*) and to satisfy a need (*ḥāja*), al-Bichrī concludes that the general prohibition can be specified and interest-bearing loans to purchase homes declared permissible on that basis.

The ECFR stressed that it was mindful of the *ḍawābiṭ* (parameters) under which the *ḍarūra* principle can be used such the condition that the permission is only to the extent the necessity is met.[359] This would mean that the purchase can only be for residential purposes, and not

[356] A-Bichrī, "Shira al-Buyut 'an Tariq al-Banki", p. 170-71.
[357] A-Bichrī, "Shira al-Buyut 'an Tariq al-Banki", p. 172.
[358] A-Bichrī,"Munṭaliqāt li-Fiqh al-Aqalliyāt", p. 172.
[359] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 176.

commercial and only allowable for the first primary home and if there are no other available permissible alternatives.[360]

Notwithstanding the above disclaimer, one of the glaring omissions in al-Qaraḍāwī and al-Bichrī's legal reasoning (*ijtihād*) is a proper and detailed consideration of whether the alternative to bank loans, namely renting (*ijāra*), is an evil or harm which can suspend the default prohibition of *ribā* which minority *fiqh* categorically accepts.[361] The minority *fiqh fatwā* also explicitly states mortgages are permitted in the absence of alternatives such cash purchases or via Islamic finance such as *murābaḥa*.[362] Renting, which is available to the public, and in fact utilised by a significant portion[363] of the wider society – not just Muslims – is not classed as a viable alternative. Renting is considered a *mafsada* purely based on its comparison to bank loans. A Muslim living in the West is better off in the long term to take a mortgage, rather than rent a property and therefore the rule of *ḍarūra* and *ḥāja* can still be invoked to permit mortgages. Renting is deemed not to be a viable alternative in the West as it conflicts with the aims of the *Sharī'a* and fails to avoid the harmful consequences identified by *Sharī'a* such as the loss of wealth.

The minority *fiqh* advocates of mortgages do no deny that renting can satisfy the necessity and need for a home, as in fact Muslim in the West are largely doing so by way of renting. The question is does the relative loss of wealth via renting as compared to taking a bank loan sufficient grounds to discount renting as a legitimate alternative? Can some prohibited transactions be permitted purely on the basis they are more profitable than permitted transactions? Put this way, it seems absurd to argue that transactions can be permitted purely on relative profitability. The repercussions of such a logic would necessarily entail that interest bearing business loans would be permitted to grow a business, compared to a business which does not take a loan and must seek other means of investment. Minority *fiqh* has not gone to the extent of permitting such loans. The critical point the *fatwā* misses to acknowledge is that renting is for a benefit which is the usufruct (*manfaʿa*) and therefore there is no loss to the person who rents. The person derives the benefit of shelter and enjoyment of the home in return for making monthly payments. Relatively speaking mortgages yield greater benefit in the long run, however this is only in compassion between two transactions and not on the merit or demerit of the transaction itself. The loss of wealth is

[360] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 175-76.
[361] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 175.
[362] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 175.
[363] https://www.ethnicity-facts-figures.service.gov.uk/housing/owning-and-renting/home-ownership/latest.

not due to renting, this argument is only advanced because it is less favourable to mortgages. Had renting been devoid of any consideration in the countervalues and not satisfied the *ḍarūra* or *ḥāja* need and then one might argue a comparative assessment can be advanced, otherwise it is difficult to see any credible legal justification for dismissing renting as a genuine alternative. Further to this, housing support is provided to citizens in the West to lesser or greater extent. In the UK context, the government provides social housing[364] with comparably affordable rents and financial assistance in the form of housing benefit[365] for those on low incomes. Minority *fiqh* makes a strong case for a home being a *ḍarūra* and a reasonable case that a suitable home close to mosques and Islamic schools is a need, however it fails to show, from a legal perspective, that renting is not a viable alternative.

Although the ECFR issued its *fatwā* permitting house purchases via bank loans, some members of the ECFR and some significant non ECFR voices raised their concerns and disagreement. Al-Nashmī, a member of the ECFR argued against the use of the *ḍarūra* principle to permit interest bearing loans on the basis that usuary can only be permitted on the basis of a *ḍarūra* and not a *ḥāja*. This point has been similarly stated by Ṣalah al-Ṣawi, a non ECFR member, in a long refutation of the ECFR position. According to al-Nashmī and Sawi, *ḍarūra* entails the fear of loss of life or limb and the extant of what is permitted is according to the extent of the necessity, both of which do not exist with respect of buying home with mortgages. As for the *ḥāja*, it has a particular usage and its ruling is not the same as the ruling of necessity otherwise why make a distinction between *ḍarūra* and *ḥāja*?[366] For example, al-Nashmī cites the example of a prohibited food which would be permitted due to a *ḍarūra* but not due to a *ḥāja*. He points out that the classical scholars permitted *ḥāja* to be treated as a *ḍarūra* in contracts contrary to analogical reasoning (*qiyās*) where the "pressing need of the people regarding their livelihood and dealings cannot be lifted, and that without the permission, severe difficulty arises."[367] So where there is an overriding benefit or repelling of a harm, such considerations determine of a prohibited matter is allowed. This is only in certain contracts, like *ijāra* (leasing), *juʿāla* (commission) and *ḥawāla* (debt transfer), contrary to the dictates of *qiyās* (analogy) or due to the presence of uncertainty (*gharar*) for the sake of removing hardship and attaining an overriding benefit. This is different to the case

[364] https://www.gov.uk/council-housing.
[365] https://www.gov.uk/housing-benefit.
[366] Al-Nashmī's *fatwā* is reproduced in al-Ṣāwī, Ṣalāḥ, "A Polite Reconsideration of the Fatwa Permitting Interest-Based Mortgages for Buying Homes in Western Societies", https://unity1.files.wordpress.com/2009/06/analysis-of-*fatwa*s-on-mortgages.pdf, p. 74.
[367] See al-Sāwī, "A Polite Reconsideration", p. 74.

of *ribā* which is definitely prohibited in *Sharīʿa* and therefore subject to the rules of *ḍarūra* and not *ḥāja*.

Bin Bayya's view of this matter, especially in light of his discussion on the conditions of *ḥāja*, is that by the juristic definition of *ḥāja* it would not be possible to allow usury as the prohibition of *ribā* is of a high degree. Nor would it be possible to allow such loan under the *uṣūlī* meaning as the prohibition of usury is clear and definite and cannot be considered as a weak general import (*ʿumūm ḍaʿīf*). However, a *ḥāja* can according to the Mālikīs outweigh a weak opinion providing the conditions of such preponderance are satisfied.[368] These conditions are the following:

a) Acting upon a weak opinion must refer to a *ḍarūra.*
b) The opinion should not be very weak.
c) The weak opinion must be ascribed to a scholar known for his knowledge and piety[369]

Bin Bayya states that the legal justification of *ḥāja* is that it removes a hardship and brings ease, and, in this sense, it is common to the *ḍarūra*. Following this line of reasoning Bin Bayya argues that the taking of usurious loans to by homes is permitted, not by the *uṣūlī* or the juristic usage of *ḥāja*, but due to the overweighing nature of the *ḥāja* in taking a weak opinion. So, Bin Bayya considers the *fatwā* given by European Council of *Fatwa* and Research as weak, but he permits its adoption as it removes hardship and brings ease.[370]

Bin Bayya has gone to great lengths to regulate the principle of *ḍarūra* and *ḥāja* which most of the minority *fiqh* scholars have been utilising without insufficient care for its conditions stipulated by the classical scholars. His discussion shows how relaxed minority *fiqh* scholars have become in understanding general principles where they have extended it beyond its limits and applied it without regard for its conditions. However, can we say his understanding of outweighing the *ḥāja* is premised on the traditional understanding? Can a *ḥāja* be used to adopt a weak opinion which has disregarded its own conditions and has contravened a prohibition of the highest order? Bin Bayya here is referring to the Māliki practise of selecting a weak opinion based on *maṣlaḥa*, known as *jarayān al-ʿamal* (the continuous

[368] Bin Bayya, *Ṣināʾat al-Fatwā*, p. 60.
[369] Bin Bayya, *Ṣināʾat al-Fatwā*, pp. 53-54.
[370] Bin Bayya, *Ṣināʾat al-Fatwā*, p. 339

action).[371]. The principle of *jarayān al-ʿamal*[372] is a principle followed by later Mālikī scholars as earlier works do not mention the principle. However, Bin Bayya's application on these issues raises further questions. The Mālikis permitted a *rājiḥ* or well-known preponderant opinion to be left for an opinion which is weaker (*marjūḥ*) due to a *maṣlaḥa*. The question arises whether an opinion in Bin Bayya's view which has been arrived at disregarding its own conditions on a prohibition of the highest level, would such an opinion considered not be considered a very weak ruling? Furthermore, the principle of removal of hardship is based seeking the *maṣlaḥa* and this operates only when the hardship has not been annulled (*mulghā*) by *Sharīʿa*. The prohibition of usury is a clear abolishment of any benefit that can be derived from it. Also, the *ḥāja* as defined by the classical scholars and as accepted by Bin Bayya is one which leads to intense hardship. Bin Bayya did not enquire whether such intense hardship would exist given that *Sharīʿa* compliant products do exist, such as *mushāraka* (profit loss sharing contract) and *murābaḥa*[373], not to mention the option of renting. Bin Bayya has criticised his minority *fiqh* colleagues for not applying the principle of *ḥāja* with its conditions but he himself failed to discuss the applicability of *jarayān al-ʿamal* on this matter.

The ECFR *fatwā* mentions other evidence such as the Ḥanafī position which allows Muslim to take usury from non-Muslim in *dār al-ḥarb*[374], which has been met with much criticism from members of the ECFR itself[375] and scholars outside it[376]. The Ḥanafī argument had been originally advanced by Muṣṭafā al-Zarqā, a well renowned Syrian jurist in the Middle East[377], to permit the purchase of home via bank loans. Al-Zarqā noted that the Ḥanafīs permitted the taking of *ribā* by Muslim in *dār al-ḥarb* because the wealth of non-believers was not protected as Muslims were supposed to be in a state of war with non-Muslims in such a

[371] Bin Bayya, *Ṣināʾat al-Fatwā*, pp. 28 and 74 contains a detailed discussion. See also https://themuslimfaculty.org/5-importance-malik

[372] One of the evidences for *jarayān al-ʿamal* is that Mālik preferred the continuous actions of the people of Madinah which conflicted with evidences he had. Later Mālikīs made analogy between this and their situation where they find that in another country a practise has become established following an opinion, they would leave their opinion which is stronger and follow the weaker opinion due to *maṣlaḥa*.

[373] https://www.footanstey.com/our-insights/articles-news/islamic-jurisprudence-the-law-of-contracts-and-natural-justice/#:~:text=Common%20types%20of%20contracts%20in%20Islam&text=Musharakah%20and%20mudarabah%20are%20long,loss%20sharing%20between%20the%20parties.

[374] Al-Bichrī, "Munṭaliqāt li-Fiqh al-Aqalliyāt", p. 175.

[375] The *fatwā* was opposed by al-Nashmī, Suhaib Ḥasan and Dr Barazi, all of whom were members of the ECFR.

[376] Outside the ECFR Dr Ṣalāḥ al-Sāwī is a notable scholar who wrote a detailed refutation of the ECFR *fatwā*. See his "A Polite Reconsideration" already cited.

[377] https://www.arabnews.com/node/212596.

situation. The Ḥanafī position assumes that Muslims living in a non-Muslim land are not obligated to live by the general civil, financial and political rules of *Sharīʿa*, of which *ribā* is a part, though they are obliged to adhere to the individual matters such as the rituals, dietary regulations and clothing.[378] Al-Zarqā argued that even though the permission was for "taking *ribā"*, it was permitted to "pay *ribā*" in the form of a repayment of a bank loan because the effective cause was the Muslims 'gaining wealth' by "taking *ribā*". Al-Zarqā argued that renting in the long run decreases the wealth of Muslims relative to "paying *ribā*" via repayment of a bank loan and therefore the payment of *ribā* in this stance should be permitted.[379] Al-Qaraḍāwī, having rejected this *fatwā* for many years, revised his views and adopted it in the context of the minority *fiqh fatwā* on this issue.[380]. He highlighted the fact that the Ḥanafī school was recognised school. He also asserted that other scholars also held this view, not just Abū Ḥanīfa. Early jurists such as Ibrāhīm al-Nakhaʿī and Sufyān al-Thawrī. He states the view has also been transmitted by Abū Jaʿfar Ṭaḥāwī, Zufar, Aḥmad ʿUthmanī and al-Sarkhasī.[381] He also pointed out taking *ribā* is the original prohibition is that is what is intended by the prohibition whereas the giving is *ribā* in the form of bank loans is prohibited in terms of the means (*wasā'il*) applying the principle of *sadd al-dharā'iʿ* (blocking the means) and therefore carrying a lessor severity which is allowable as a need (*ḥāja*).[382] The adoption of the Ḥanafī position is a clear example of *takhayyur* or selecting the views of past schools because it meets a modern need or requirement. The irony of choosing a *fatwā* imbedding in the notion of *dār al-ḥarb*, rejected by minority *fiqh* scholars precisely because it did not realise the aims of integration or fit with the reality of current Muslim minorities in the West was not lost on those who critiqued this position. Sawi, who wrote a detailed refutation the al-Zarqā's reinterpretation of the Ḥanafī position, pointed out the implications of adopting the Ḥanafī position as a similar argument can be made to allow Muslims to sell 'carrion, wine and pork' as that will potentially increase the wealth of Muslims.[383] However, al-Qaraḍāwī has acknowledged, this argument is not central evidence, rather it is cited as a support for the main evidence which is the legal maxim of *ḍarūra* or the *ḥāja* which assumes the position of *ḍarūra*.[384] Despite this, the fact that the minority *fiqh fatwā* was willing to cite a past position based on the idea that Muslims are at war with non-

[378] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 177.
[379] See the full text of al-Zarqā's *fatwā* reproduced by al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 166.
[380] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 178.
[381] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 170.
[382] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 179.
[383] al-Sāwī, "A Polite Reconsideration", p. 785.
[384] Al-Qaraḍāwī, *Fiqh al-Aqalliyāt*, p. 172.

Muslims[385] to support a *fatwā* that would bolster one aim of minority *fiqh*, namely stability, while undermining another, namely integration, is an example of the lack of internal congruity.

Conclusion

Since its inception modernist legal thought, especially in respect of its presentation, interpretation, usage of legal principles and approaches, has had to deal with the question of its authenticity and faithfulness (*aṣāla*) to the essential principles of religion as they relate to modernity and the new questions modernity throws up. Did minority *fiqh* manage to retain consonance with the past principles while dealing with the modern? Has it maintained internal harmony between its principles and application? Minority *fiqh* attempted to address modern issues in a dynamic context sensitive manner which facilitated accommodation of change and meeting the challenges faced by Muslim minorities, rather than the default ruling of prohibition, which was the penchant of traditional Islam. Due to their unorthodox rulings, minority *fiqh* scholars, have been charged with being defensive, apologetic, and even capitulating to modernity from those outside the ECFR. Saudi based scholars such as Muḥammad Ṣāliḥ al-Munajjid and ʿAdnān b. ʿAlī Riḍā b. Muḥammad al-Naḥwī were highly critical of the minority *fiqh* methodology and deemed it invalid as was Syrian scholar Ramaḍān al-Būṭī.[386]

Minority *fiqh* justified the abandonment of established rules whilst maintaining the claim of *aṣāla* by adopting principles from the classical legal literature, which allow for the flexibility and adaptability, such as the change of rule by time and place, *maqāṣid, maṣlaḥa mursala*, *ḍarūra, ḥāja* or as al-Najjār had classed under the rubric of *ma'ālāt af'āl* (the consequences of actions). Al-Najjār argued that these principles stem from the idea of aims, and consequences and a such are best suited to provide answers for the complicated Western context of Muslim minorities after the loss of their authority and the dominance of secular law and legal systems.

The ability to accommodate new realities required a fundamental view as to the nature of *Sharīʿa* and its expansiveness and scope. Our study has shown that the principle of change with time and place was of limited application in the field of *'urf* (custom) due to the relationship between certain rules and the restricted remit in which the classical scholars

[385] As representing by premising the *fatwā* on the notion of *dār al-ḥarb*.
[386] Albrecht, *Dār al-Islam*, pp. 131-132.

utilised them. Minority *fiqh* cited this association between rules and custom and expounded it to a general principle about the nature of *Sharīʿa* itself. The limited usage of *ʿurf* resulted in rules remaining stable and constant and not subject to change except when the basic reality (*manāt*) changed. No one disputed that rules change according to the change of the basic reality (*manāt)*, whether via the process of verification or ratiocination and as a general statement it is congruent with classical understanding. However, minority *fiqh* scholars emphasised this principle to assert that established rules should be open to revision and so the question will invariably turn to and depend on the application. The significance of the theoretical position and focus on it is one of orientation and attitude of minority *fiqh* to *Sharīʿa* rather than the uncontroversial statement that rules change by change of reality. The relationship between law and fact is a fundamental feature of jurisprudence. So, although in theory any rule can change if its *manāt* changes, but in practise we are asked to question established rules because we live in a different era or region, and this is a departure from the traditional approach.

The inherent suggestion is that realities have changed to the extent that old rules must be revised. This is the bone of contention and the subject of study in the upcoming chapters. Here we have engaged in comparative study of legal foundations between the classical and the modernist to understand the rationale behind the citation of a principle or rule by classical scholars and that of minority scholars and the assess extent to which they accord with each other in respect of congruity. One example of divergence is that the motivations and ethos of classical scholars are not necessarily the same as that of minority *fiqh* scholars in respect of a principle as each is approaching it with a different purpose. Classical scholars' interest in *ʿurf* was to appreciate the application of *ʿurf* as they related rules which are textually amenable to custom so as not to cause unnecessary hardship, whilst the minority scholars who included all rules within their scope of discussion, whether they related to *ʿurf* or not, invoked it to set aside established rules to bring ease and facilitation. This is in line with the general modernist approach towards past established rules and though set apart from the traditional approach.

The focus on change and accommodation is a constant theme throughout the legal discourse of minority *fiqh*. The *maqāṣid* approach, which includes the principles of *maṣāliḥ mursala* or *istidlāl al-mursal* (the finding of an unrestricted public interest), is another example of a methodology adopted by minority *fiqh* to revise old rulings and establish new ones. The position of classical scholars was that established rules must remain while new rulings must be found only for new realities devoid of a clear *naṣṣ* via the principle of silence (*sukūt*) or

analogy. Those who focused on analogy expounded the idea of *maqāṣid* and *maṣlaḥa* as way to address new realities. They did this without the suggestion that established rules were deemed outmoded in the absence of a detailed consideration of the reality (*manāt*) to which the rule appertained. Their propensity to accept change was tempered with greater rigour and cautiousness. Al-Shāṭibī, who was to the *maqāṣid* what al-Shāfiʿī was to *uṣūl al-fiqh* was not known for any radical departure from the generally accepted rules of his day.[387] Moreover, al-Shāṭibī was known as a voice of conservatism and opposed what he viewed as innovation (*bidʿa*) and set this out in his other well-known work *al-Iʿtiṣām*.[388]

Minority *fiqh*'s adoption of al-Shāṭibī's approach represented an ethos of setting aside established rules via *maqāṣid* and the *maṣāliḥ* and sometimes disregarding the *ḍawābiṭ* (controlling rules) of these rules which al-Shāṭibī did not countenance or do in practise. So once again, the issue is not the simple citation of rules and principles but the ethos and aims behind the adoption of an approach. Removing hardship and bringing ease was the refrain of all scholars inclined to the *maqāṣid* approach, but the ethos behind the usage and application of *maqāṣid* between the classical and modernist approaches are not necessarily congruent. In theory minority *fiqh*, as a modernist *fiqh* is closest to the al-Shāṭibī approach, however their practise of making *maqāṣid* a primary source in *uṣūl* as opposed to a subsidiary basis indicates its further departure from classical hierarchy of the sources of *Sharīʿa* law. This is not unique to minority *fiqh* and is a general feature of 19th century modernist legal thinking as observed by academics such as Opwis, Masud and others. For minority *fiqh* scholars the motivation behind this approach was the realisation of the broader aims of minority *fiqh* which act as guiding principles for its legal approach and philosophy.

The general principles – especially those which come under the overarching principle of *maʾālāt afʿāl* (the consequences of actions) and the *maqāṣid* approach – have been keenly adopted by minority *fiqh* as they also facilitate the encompassing of new realities. Of these, the principle of *ḍarūra* and the *ḥāja* which assumes the position of a *ḍarūra* are oft used by minority *fiqh* scholars. As with the previous principles, the usage of *ḍarūra* and *ḥāja* by minority *fiqh* scholars are subject to the same ethos and orientation of setting aside old rulings for new ones.

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[387] Fa'ūr, *al-Maqāṣid*, p. 536. As for the examples of by Muhammed Khalid Masud of al-Shāṭibī's *fatwā*s which 'give more weight to public interest and common good than the strict adherence to the law,' none of these rules radically depart of the existing rules in the way modernist scholars have envisaged. Masud, *Shatibi's Philosophy of Islamic Law*, p.105.

[388] *al-Iʿtiṣām* (Beirut**:** Dār al-Kutub al-ʿIlmiyya, 1988).

Although minority *fiqh* discourse is dominated by this ethos, this does not mean the usage and invocation of these principles are accepted without question or qualification amongst the members of the ECFR. Indeed, Bin Bayya, al-Nashmī and others have drawn attention to the limits and conditions of the principles and criticised the way other senior ECFR members have applied these principles. As stated earlier, the issue is not the explication of rules; the key factor is the ethos behind the usage of these principles and the way they are applied. The present study reveals that minority *fiqh* exposition of these principles is congruent with the classical articulation, especially with al-Shāṭibī's approach but incongruent in respect of the ethos and application.

Perhaps the best demonstration of that is the ECFR ruling on buying homes with interest bearing bank loans. Eager to realise the overall aim of Muslim community integration and empower them to convey the message of Islam they, adduced arguments in favour without a proper regard for legitimate alternatives, such as renting and likely misapplied the principle of *ḍarūra* and *ḥāja* as pointed out by dissenting voices inside and outside of the ECFR. They have even adduced the Ḥanafī school's ruling as supporting evidence on the permissibility of *ribā* in *dār al-ḥarb* despite the obvious inconsistency with their view that Muslims are an integral and integrated part of society.

Prima facie, the minority *fiqh* legal arguments in favour of mortgages is rooted in tradition, whether that is the Ḥanafī or Mālikī *fiqh* or even al-Shāṭibī's unconventional approach. However, the significant difference being that the minority *fiqh* scholars where willing to exercise discretion in selecting (*takhayyur*) opinions from those legal schools and approaches that would better respond to the needs of Muslims in the West bringing ease and facilitation considering the broader aims and goals as identified by the minority *fiqh* scholars. Though this would be congruent with the minority *fiqh* legal principles and broad aims, however, as some of the members of the ECFR have pointed out, the advocates of this *fatwā* in favour of mortgages have incorrectly and inaccurately sought legitimacy from the traditional opinions by misreading or misapplying their principles and not adhering to their parameters (*ḍawābiṭ*). This suggests that minority *fiqh* and its usage of legal principles are discordant in practice.

Finally, the minority *fiqh* scholars' constant references to traditional schools, opinions, principles, and personalities such as Abū Ḥanīfa, Mālik and al-Shāṭibī highlights their desire to find new solutions while maintaining *aṣāla* (authenticity to classical principles). In their legal discourse one observes the constant tension between meeting the needs of people with

the need to maintain authenticity (*aṣāla*) as if they are competing forces. The dissenting voices within minority *fiqh* epitomises that internal tension. The internal debate it seems is not with tradition as much is it is a debate amongst minority *fiqh* scholars themselves about their own legal consistency. In the final assessment, it seems needs and goals give way to modern rulings while the dissenting voices who also seek authenticity give the impression that *aṣāla* has been compromised. In the case of mortgages, officially a new verdict has been declared by setting aside an old ruling, but that internal tension over *aṣāla* remains unresolved.

Chapter 3

Identity and Citizenship

Introduction

The question of identity and citizenship lies at the heart of minority *fiqh* objectives for the Muslim minorities. One of the key goals is the preservation of religion and positive engagement and integration into the host nation.[389] That being the aim is easily stated whist the navigation of various issues, whether theological, legal, or political, that stand as obstacles are complex and intractable. These issues can be seen on two levels: jurisprudential and philosophical-political though the jurisprudential pervades the latter also. For example, the way in which classical scholars divided the world into *dār al-islām* and *dār al ḥarb* which is a binary territorial paradigm (*dār* paradigm) and their general legal aversion to Muslims living in non-Muslim lands presented a particular problem in the minds of minority *fiqh* scholars. How can Muslim integrate in lands where historically they have been forbidden to reside in and viewed within the prism of warfare and treaties? This question has been addressed by minority *fiqh* with a jurisprudential response. As for the second category, these relate to deeper questions about identity, loyalty, values, and citizenship which have dimensions beyond jurisprudence and relate to ideas, values, and nature of belonging either from Muslim self-perception or how they are viewed by the host nation and inter-perceptions that exist.

This chapter aims study the way in which minority *fiqh* scholars or academics such as Tariq Ramadan who adopted their approach, addressed their issues, and draw conclusions in respect of legal congruity, *aṣāla* (authenticity) and efficacy in realising minority *fiqh* goals. We will begin by considering the *dār* paradigm as held by classical scholars and the reasons minority *fiqh* scholars cited to disregard and distinguish past terminologies from the contemporary reality inhabited by Muslim minorities in the West. We will consider the arguments used to justify Muslim residence in Western countries. Thereafter we will examine the modern conception of citizenship and how minority *fiqh* envisages Muslims can embrace, exhibit, and discharge the duties of citizenship whilst reconciling the potential differences that might arise. Finally, from the conceptual aspect we will move to the philosophical and political

[389] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, pp. 3-4.

issue of belonging in the British context and examine efficacy of the integrationist proposals of minority *fiqh* and the prospects and possibilities for such integration.

Section I. The *Dār* Paradigm

The *dār* paradigm is the traditional model employed by classical scholars to define the relationship between Muslims and non-Muslim political sovereign entities and as such it falls under the Muslim Law of international relations.[390] This is perhaps best illustrated by the fact that the most ubiquitous mention of the terms *dār al-islām* and *dār al-ḥarb* are to be found in what are known as the *siyar* or *maghāzi* literature or under the section of *jihād* in *fiqh* books.[391] The term *jihād* is understood by some modern day writers in the limited sense of war only but jurists classified under it the wider rules of international relations, hence they included the rules regarding treaties, ceasefire, asylum and international trade under this heading. Part of these is the rules of the *dār al-ḥarb*, *dār al-islām*, *dār ʿahd* etc, i.e., the different entities between which there will be different relationship based on a judgement of their reality. One aspect which comes under this whole framework of international relations is the question of whether a Muslim citizen of *dār al-islām* can reside in non-Muslim countries i.e., *dār al-kufr* or *dār al-ḥarb*. It is worth adding that some Muslims scholars either discouraged or even forbade Muslims living in non-Muslim lands[392] whilst others were more relaxed about the matter. Muslim classical jurists discussed the presence of Muslims in non-Muslim lands in two contexts: firstly, those individual Muslims who travelled to lands classed as *dār al-kufr* or *dār al-ḥarb* for the purpose of trade or diplomatic missions or found themselves as prisoners of war. Second, when Muslim territory came under the rule of non-

[390] Al-Shaybānī, Abū ʿAbd Allāh, *The Islamic Law of Nations: Shaybānī's Siyar***,** Khadduri, Majid (trans.), (Maryland: The John Hopkins Press, 1966**)** and al-Wansharīsī, Aḥmad ibn Yaḥyā, *al-Miʾyār al-Muʿrib wa-al-Jāmiʿ al-Mughrib ʿan Fatāwā Ahl Ifriqīyya wa-al-Andalus wa-al-Maghrib* (al-Ribat: Wizārat al-Awqāf wa-al-Shu'ūn al-Islāmiyya, 1981-1983); al-Shāfiʿī, Muḥammad ibn Idrīs**,** *al-Umm* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1993) and Saḥnūn, Abū Saʿīd**,** *al-Mudawwana al-Kubrā* (Cairo: Dār al-Fikr, n.d.), vol. 3. Modern writers have also followed this line of classification. Al-Zuḥayli, Wahba, *Athar al-Ḥarb fī-l-Fiqh al-Islāmī* (Damascus: Dār al-Fikr, 1962); Khadduri, Majid**,** *War and Peace in the Law of Islam* (The John Hopkins Press, 1955), and the PhD thesis by Muḥammad Khayr Ḥaykal, *al-Jihād wa-l-Qitāl fī Siyāsa al-sharʿiyya* (Beirut, 1993).

[391] However, the terms *dār al-islām* and *dār al-kufr* are also used in a theological context but it enjoys limited usage. See al-Ashʿari, ʿAlī ibn Ismāʿīl, *Maqālāt al-Islāmiyyīn*, ed. Muḥammad ʿAbd Ḥamīd (Beirut: al-Maktaba al-ʿAṣriyya, 1990), p. 154.

[392] The Mālikī position was the most prohibitive. See al-Wanshārīsī, *al-Miʿyār al-Muʿrib*, whilst some of the Shāfi'is were on the other side of the spectrum where they preferred Muslim residence in *dār al ḥarb* as long as they served the Muslim interest. See Nawawi's citation of al-Māwardī's view in *al-Majmūʿ Sharḥ al-Muhadhdhab*, (Beirut: Dār al-Fikr, 1925), 19:246.

Muslim rulers due to conquests. An example of this is the Muslim populations in Sicily and Spain in the 11th century to the beginning of the 17th century.[393]

This division of the world into Muslim and non-Muslim and the disfavour of scholars upon those who reside in *dār al-ḥarb* meant that Muslims viewed *dār al-islām* as their lands whilst *dār al-ḥarb* was viewed as the land of foreigners or the even the enemy. Naturally in the pre-Ottoman era and to an extent during and post-World War I colonial period such a view was not questioned as it accorded with the reality where Muslim had their own homelands. However, after the World War II as Muslims began to migrate to countries in the West seeking economic betterment and gaining citizenship, this idea seemed to clash with old ruling restricting Muslim residence in non-Muslim lands. Muslims increasing were beginning to feel at home in these countries and links back home were gradually diminishing in quantity and intensity especially with the second and third generation Muslims. Given this reality how are Muslims residing in the West to view the laws and principles laid down by preceding generations? Clearly there seemed to be a contradiction between the old vision of Muslims countries as being home and now the countries in the west where Muslims had established new roots. This problem required an answer.

The early discussion of the status of Muslim colonial territories can be seen in the responses given by Rashīd Riḍā in his *Al-Manār*. Riḍā did not demand that Muslims should migrate from non-Muslim countries and even permitted Russian Muslims to participate in the Russo-Japanese of 1904.[394]

Perhaps the earliest minority *fiqh* scholar to address a revision of the *dār* paradigm was Fayṣal Mawlāwī. In his *al-Usus al-Sharʿiyya li-l-ʿAlāqāt Bayn al-Muslimīn wa-Ghayr al-Muslimīn,* he argued that the notion of a *dār al-ḥarb* is an anachronistic concept in this day and age. He argued that the conditions used by jurists to define *dār al-ḥarb* cannot be applied to a situation where there is greater security for Muslims in non-Muslim countries than Muslim populated countries.[395] As an alternative he suggested that such countries be known as *dār daʿwa* i.e., the 'land of invitation' and classed them as *dār ʿahd* (land of treaty)[396]. The above idea was further echoed by Manna' Qattan who also suggested that non-Muslim

[393] Shadid and Koningsveld, *Political Participation,* p. 91-92
[394] Ryad, U. "A Prelude to Fiqh al-Aqalliyyat: Rashid Rida's Fatwas to Muslims under non-Muslim Rule" in- *Between Spaces Christian And Muslim Minorities In Transition In Europe And The Middle East,* p. 242.
[395] Mawlāwī, Fayṣal, *al-Usus al-Sharʿiyya li-l-ʿAlāqāt Bayn al-Muslimīn wa-Ghayr al-Muslimīn,* (Dār al-Irshād al-Islāmiyya, 1987), pp. 104-105.
[396] Mawlāwī, Fayṣal, *al-Muslim Muwāṭinan fī Urubba* (International Union for Muslim Scholars) https://palstinebooks.blogspot.com, p. 93.

countries should be designated as *dār ʿahd* ('land of treaty') due to their treaty and relations with Muslim countries.[397] Al-Qaraḍāwī has also given his approval of the use of the term *dār ʿahd* (land of treaty) for countries in the West.[398] Ṭāhā Jabir al-ʿAlwānī affirmed the above views and considered *dār al-ḥarb* and *dār al-islām* as 'superfluous' and counterproductive to integration and nature of Muslim residence in the West.[399] Finally Tariq Ramadan, building on these discussions, went one step further by arguing that even the term *dār ʿahd* is misplaced since it is premised on the *dār* paradigm.[400] The notion of the *dār* he contends is of dubious legal provenance, an irrelevant geographic description that belongs in the past and impedes social cohesion because it gives a confrontational vision. For these reasons he dismisses the paradigm altogether. Instead, he has offered his own term, *dār shahāda*, or the world of testimony, to describe the 'West'.[401]

The following points are a summary of their reasons for rejecting the *dār* paradigm :

1. The terms *dār al-islām* and *dār al-ḥarb* are legal conventions, the product of jurists, and not authentically attributable to the sources.[402]
2. The *dār* paradigm is an antiquated idea, a geopolitical term relevant to the time in which it was formulated.[403]
3. The notion of a *dār* is inherently confrontational and hence impedes integration.[404]
4. The old concept of *dār al-ḥarb* creates a problem for Muslims residence in the West which is widespread and a fact of life now. This idea is outdated and hence has no impact on the legality of Muslim residence in the West.[405]

Below is an analysis of each of these points in terms of to what extent they are congruent with the context, maintain their *authenticity* in following the primary textual sources and to what extent such ideas are likely to further the aim of integration.

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[397] Al-Qaṭṭān, Mannāʿ, *Iqāmat al-Muslim fi Balad Ghayr Islamī* (Paris: Islamic Foundation for Information, 1993).
[398] Shadid and Koningsveld, *Political Participation*, p. 95.
[399] Al-ʿAlwānī, *Towards A Fiqh For Minorities*, pp. xv and 28.
[400] Ramadan, *Western Muslims*, p. 67.
[401] Ramadan, *Western Muslims*, p. 73.
[402] Ramadan, *Western Muslims*, p. 63. Ṣalāḥ Sulṭān, *Radd ʿalā Muftī Miṣr*, where he states: "it is a late juristic, no Sharī'a term, which should not be followed and is unsupported by any explicit texts or authentic ḥadīths,' p. 2.
[403] Ramadan, *Western Muslims*, pp. 66 and 69.
[404] Al-ʿAlwānī, Ṭāhā Jābir, "Madkhal ilā Fiqh al-Aqalliyāt", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-al-Buḥūth* (Dublin, 2005), pp. 90-91.
[405] Ramadan, *Western Muslims*, pp. 66 and 69.

Legal Provenance of the Dār

It has been asserted by minority *fiqh* scholars that the *dār* paradigm is a product of jurists and has no textual basis. Dr. Ṣalāḥ Sulṭān[406], a member of the ECFR and the founder of the American Centre for Islamic Research argued the term did not exist in the Islamic *fiqh* in beginning of Islam, rather it came much later. He states that it is a later juristic convention and not a *Sharīʿa* term. He further argues that the term is unsupported by any explicit texts or authentic *ḥadīths*.[407] According to Fayṣal Mawlāwī: "The division between *dār al-islām* and *dār al-kufr*, or *dār al ḥarb*, is not grounded on any canonical basis. It is rather [the product of] an *ijtihād* (an interpretive effort) of the jurists to describe the condition of the Muslims and to specify [Islamic] legal rules. It is, thereby, subject to a specific historical context."[408]

In the above the following points are raised:

1. The *dār* is a legal convention and not a *Sharīʿa* term.
2. There is no explicit mention of the term in the sources.
3. The term was a later introduction to Islamic law.

These objections seem somewhat disingenuous since they would equally apply to minority *fiqh*, or any branch of *fiqh*, whether classical or modern and would not establish any substantial point other than to say the terms are subject to new *ijtihād* if proven to be weak. There is a case for arguing that the *dār* is not *Sharīʿa* term, like *ṣalāh* (prayer) and *zakāh*, however that does not mean that as a legal convention it is unattributable to the sources. There are many terms coined by jurists to give description to a reality found in the text. For example, the words *mukallaf*[409], *mandūb*[410], *ʿaqīda*[411], *fāsid*[412], *qiyās*[413], *ʿilla*[414], *ijmāʿ*[415] etc. are all legal conventions, not mentioned explicitly anywhere in the sources but their meanings are well rooted in the text. Also, lack of explicit mention in the text means very little to the

[406] https://www.cilecenter.org/about-us/our-team/dr-salah-sultan
[407] Sulṭān, Ṣalāḥ, *Hiwār wa Tarjīḥ wa Radd ʿalā Fatwā Muftī Miṣr*, https://www.e-cfr.org/blog/2020/10/27/. p. 2. See also Albrecht, *Dār al-Islām*, p. 367.
[408] Quoted cited in Albrecht, *Dār al-Islām*, p. 115.
[409] Legally liable.
[410] A recommended duty as opposed to one that is obligatory.
[411] Creed or belief.
[412] An invalid or voidable contract or stipulation.
[413] Juristic analogy.
[414] Effective cause.
[415] Consensus on a *sharīʿa* ruling.

student of law given that *fiqh* is distinguished from *Sharīʿa* precisely because it is generally not mentioned in the explicit meaning (*manṭūq)* of the text but in its implicit meaning (*mafhūm*). Minority *fiqh* classed as *fiqh* because it is based on speculative inference (*dalāla ẓanniyya),* otherwise no such *fiqh* would have the room to arise. It is the speculative nature of the texts which give rise to the proliferation of *fiqh*. In the same vein the assertion that the term came late in the history Islamic law only serves to indicate that one might not be bound to follow it if disproved but that does not disqualify it, just as minority *fiqh* cannot be disqualified for being a 21st century innovation in Islamic law. Despite the usual refrain that no evidence exists, there seems to be no appetite to actually directly address the evidence which the jurists relied upon to establish their case. One *ḥadīth* in question is the oft cited narration of Sulaymān Burayda quoted here in full:

> When the Messenger of Allah appointed anyone as leader of an army or detachment, he would especially exhort him to fear Allah and to be good to the Muslims who were with him. He would say: Fight in the name of Allah and in the cause of Allah. Fight against those who do not believe in Allah. Fight but do not embezzle the spoils, do not break your pledge, do not mutilate (the dead) bodies, and do not kill the children. When you meet enemies who are polytheists, invite them to three courses of action. If they respond to any one of these, you also accept it and restrain yourself from doing them any harm. Invite them to (accept) Islam; if they respond to you, accept it from them and desist from fighting against them. **Then invite them to migrate from their dār to the *dār* of *Muhājirs* and inform them that, if they do so, they shall have all the privileges and obligations of the *Muhājirs*.** If they refuse to migrate, tell them that they will have the status of Bedouin Muslims and will be subjected to the Commands of Allah like other Muslims…[416]

The above *ḥadīth* implicitly make the point that Madinah, described as *dār* of the *Muhājirs* (immigrants), is different from other *dārs*. It affords its inhabitants, due to its rule, the rights and privileges given by Islam to the *Muhājirs*. This *ḥadīth* does not state *dār al-muhājirīn* is a requirement[417] but that it is legitimate, i.e., an entity which is governed by Muslim rule affording its citizens, whether Muslims or non-Muslims certain rights and privileges. Those who live outside it, whether Muslims or non-Muslim will not enjoy the rights and privileges

[416] *Ṣaḥīḥ* of Muslim (no. 4294).
[417] Minority *fiqh* scholars have cited many other evidence which indicate that ruling and governance should follow the *Sharīʿa*. See Mawlāwī, "Participation by Current Islamic Movements", C:\Documents and Settings\me\Desktop\minority fiqh politicalpart\mushaqrika mawlawi htm (accessed 10/8/2007).

afforded by the state but will still be subject to the command of God by virtue of being Muslims. It also implicitly mentions the issue of security, as affording right and privileges to residents of a polity is to ensure their security. Similarly, we can understand the letter Khālid b. Walīd wrote to the people of Hira which states:

> I have granted (the people of Hira) that any of their elderly who is unable to work, afflicted by a plague, or became poor such that his co-religionists give him alms, then his *jizya* will be waived and he and his family will be provided for from the Bayt al-Māl of the Muslims as long as he lives in the *dār al-hijra* and *dār al-islām*. If they leave the *dār* of the *Muhājirs,* the *dār al-islām,* then the Muslims are not obliged to maintain his family.[418]

The *dār al-islām* is where its inhabitants are looked after by the laws of that land. This is a Muslim land, as opposed to the non-Muslim land where the laws of Islam are absent (*dār al-kufr* or *dār al-ḥarb*). Hence al-Kasānī the author of *Badā'iʿ al-Ṣanā'iʿ* states: "There is no disagreement amongst our scholars (i.e., the Ḥanafīs) that *dār al-kufr* becomes *dār al-islām* by the dominance of the laws of Islam."[419] In fact there are many other evidences one can cite which presupposes the existence of a rudimentary *dār al-islām* and *dār al-ḥarb* without which such texts make no sense and remain of devoid any application. This is because these verses are not addressed to individuals but state entities. For example, *'And if they incline towards peace, you also incline towards it.'*[420] This verse is not addressing individuals, but the Prophet Muhammed as the leader of the community for Muslims in Madinah, that he should make peace with those powers who wish peace, as the Prophet did when he concluded the treaty of *Hudaybiyya* with Quraysh. In fact, most of the rules pertaining to international law presumes the existence of a sovereign Muslim entity, i.e., *dār al-islām*, which has relationship with nations and states which are *dār al-kufr* i.e., non-Muslim states. Finally, that there were, and will be, different types of sovereign political entities, irrespective of the designation one prefers, is a fact of human history. That Islamic law would describe such entities from its own perspective is not a remarkable development.

[418] Abū Yūsuf, *Kitāb al-Kharāj*, (1886), pp. 155-156.
[419] Al-Kasānī, *Badā'iʿ al-Ṣanā'iʿ fī Tartīb al-Sharā'iʿ* (Beirut, 1997), 7:130.
[420] Qur'ān 8:61.

An Antiquated Concept?

Minority *fiqh* has dismissed the *dār* paradigm as an antiquated idea. This assertion is made based on two reasons: Firstly: It was a geographical or geopolitical term relevant to the time in which it was formulated. Ramadan states:

> The concepts of *dār al-islām*, *dār al-ḥarb*, and *dār al-ʿahd* were not described in the Qur'ān or in the Hadith. In fact, they constituted a human attempt, at a moment in history, to describe the world and to provide the Muslim community with a geopolitical scheme that appropriate to the reality of the time. This reality has completely changed.'[421] Second: The conditions of the *dār* are out of date and inapplicable. For example, the condition of security (*amān*) does not make sense today because Muslims have more security in the West than even in some Muslim countries. If living by Islam is to be the criteria then surely the countries in the West should be described as Muslim, which would be an absurd suggestion as would be the suggestion that Muslim countries now should be described as *dār al-ḥarb* because they do not exhibit the perfect form of the legal system required by the Islamic religion.[422]

With regards to the first point, one needs to appreciate that the *dār* paradigm as a legal term maybe applied in certain time in history, but its principles are valid whether or not they apply to a certain reality. Law seems to have been confused with international geopolitics. The *dār* paradigm should not be equated with the paradigms of political scientists who speak of unipolar, by-polar or statist paradigms. The *dār* paradigm is a legal paradigm with its own logic i.e., it is law, and not political analysis, and informs on how things should be and how they are not i.e., it is *prescriptive* whilst paradigms of political scientists deal with how things are and how they will be i.e., it is *descriptive* and observational. The two should not be confused. The *dār* paradigm, whether one agrees with the use of the terms or not, refer to types of state entities in relation to the Muslims. Those states with whom Muslims have a treaty are called *dār al-ʿahd* and those states with whom the Muslims may be potentially at war are called *dār al-ḥarb ḥukman*. As for states which are in occupation of Muslim countries or are invading a Muslim country, they are called *dār al-ḥarb fi ʿlan*. Where the Muslims are at war with a usurping entity and they make a temporary truce or ceasefire, that known as *dār*

[421] Ramadan, *Western Muslims*, p. 69.
[422] Mawlāwī, *al-Usus al-Shar'iyya*, p. 104.

hudna or *ṣulḥ*. A cursory look at the Middle East today indicates that all the above realities do exist. War, peace, treaties, and ceasefires are the facts of international relations whether in the past, present and will be so in the foreseeable future. Therefore, the Islamic law of international relations, of which *dār al-islām* and *dār al-ḥarb* is a part, continues to have relevance. As for the inconsistency of the conditions, these arise due to misunderstanding or misconstruing of what the jurists have said. Let us analyse the views of the Ḥanafīs school which is referred to as the source of this confusion. The Ḥanafī school is unanimously agreed as to what makes a land *dār al-islām*: al-Kasānī states: *"*There is no disagreement amongst our scholars (i.e., the Ḥanafīs) that *dār al-kufr* becomes *dār al-islām* by the dominance of the laws of Islam."[423] In this respect they would be agreed that the West is not *dār al-islām* due to the obvious absence of the Islamic legal system. The dispute however was in respect to when *dār al-islām* becomes *dār al-kufr*. According to Abū Ḥanīfa a *dār al-islām* will become *dār al-kufr* when three conditions exist:[424]

1. Non-Muslim laws are applied.
2. The conquered land borders the non-Muslim lands.
3. There remains no Muslim or *dhimmi* who enjoys security (*amān*) from the original security i.e., security of the Muslims.

However, Abū Yūsuf and Muḥammad differed and said: that the land becomes *dār al-kufr* by the application of non-Muslim laws.[425] We note from this discussion that they are not referring to lands which were never Muslim in the first place, such as the Western countries. Hence the presence of security in a non-Muslim land which was never *dār al-islām* will not come under the above conditions. Thus, no confusion exists with regards to the application of the condition of *amān* with regards to the West; they are not *dār al-islām* by virtue of the security provided to Muslims because they were never originally *dār al-islām* in the first place.

As for the lands which were once *dār al-islām* and then came under non-Muslim rule or occupation. Such countries would become *dār al-kufr* when the laws become non-Muslim according to Abū Yūsuf and Muḥammad al-Shaybānī. In respect of Abū Ḥanīfa's position, it is not clear what he meant by security. Did he mean authority i.e., that the country is still

[423] Al-Kasānī, *Badā'iʿ al-Ṣanā'iʿ*, 7:130.
[424] Al-Kasānī, *Badā'iʿ al-Ṣanā'iʿ*, 7:130.
[425] Al-Kasānī, *Badā'iʿ al-Ṣanā'iʿ*, 7:130.

ruled by a Muslim ruler, but the laws are of non-Muslims. Was he concerned that if conquered land were to be declared *dār al-kufr* then Muslim would have to emigrate, such a mass exodus would leave them completely in the hands of the conquerors?[426] It seems that the expression 'the original security i.e., security of the Muslims,' indicates he was referring to authority and not just individual safety. It maybe that he was reluctant to pronounce a former *dār al-islām* as *dār al-kufr* without setting more stringent conditions for what would be necessary to become *dār al-islām*. In any case, later the Ḥanafīs argued that lands conquered by non-Muslims, as in the past by Christians or the Mongols, would remain *dār al-islām* as long as Muslims were able to practise their religion.[427] This however was in respect to conquered lands and not lands which were never *dār al-islām*.[428] The point is also made that following the classical definition the Muslim populated countries would be considered *dār al-ḥarb* due to the absence of the Islamic rule. This presumes that the *dār* paradigm is monolithic. In fact, the *dār* paradigm is made of independent and interrelated parts. The absence of one part does not mean the absence or irrelevance of the other. Also, the fact that it does not exist does not make it any less relevant if the law prescribes it. So, the absence of *dār al-baghī*[429], an area of *dār al-islām* where a section of the population has rebelled against the legitimate ruler, does not make this discussion irrelevant just as the study of *hudud* and penal system is not irrelevant simply because they do not exist.

The Language of Confrontation

Minority *fiqh* scholars objected to the *dār* paradigm because they felt it was inherently confrontational and impedes integration. Al-ʿAlwānī states:

> Our jurists who coined the term *dār al-ḥarb* did not live at a time of global unity in which we live, rather they lived in separate islands between which there were no co-existence. Thus, the *fiqh* of war dominated their thinking due to the requirements of

[426] Khaled Abou El Fadl states the reason for the Ḥanafī and Shāfiʿī relaxed positions regarding conquered countries was the Mongol invasion of the eastern part of the Abbasid Caliphate in the thirteenth century. Both schools were strong in that region and wanted Muslims to remain in those conquered lands. See his "Legal Debates on Muslim Minorities: Between Rejection and Accommodation", *Journal of Religious Ethics*, vol. 22, no. 1, 1994, p. 139.
[427] Ibn ʿĀbidīn, *Radd al-Muḥtār*, 4:75.
[428] As for the views of Ibn ʿĀbidīn and al-Māwardī, that being allowed to practice Islam makes a land *dār al-islām*, these views are rejected by Minority *fiqh* scholars, hence it is unnecessary to enter into a detailed discussion of these views. See Sulṭān, *Ḥiwār*, p. 3.
[429] Al-Zuḥaylī, *Athar al-Ḥarb fī-l-Fiqh al-Islāmī* (Damascus: Dār al-Fikr, 1962), p. 153.

> their reality. What we need today is to build the '*fiqh* of co-existence' in a different reality in magnitude and nature.[430]

Here al-ʿAlwānī seems to be conflating the law of international relations with inter community relations of Muslim minorities with their host nations. The dialogue of Muslims with non-Muslims in western societies is different to legal discourse that takes place amongst Muslims jurists. Such a legal discourse is not concerned with how it will be received by the public. Admittedly this law may not be justiciable in a court of law as *Sharīʿa* law in its totality, especially the law of international relations, is not applied in Muslim countries in the post-colonial period. However, the discussion of jurists is do not fall within the realm of public relations although how such matters are presented may have a bearing. The *dār* paradigm, as a legal discourse in terms of its content and substance is unconcerned by its reception by non-lawyers. Therefore, inter community dialogue will, and should, naturally be taken as distinct from other types of discourse. That dialogue, inevitably, must be contextual because it is presumed that non-Muslims generally may not be aware of the full context of an Islamic ruling. However, the ruling will remain, but its style of delivery and exposition should consider the knowledge and understanding of the recipients of the dialogue. Moreover, the situation of the individual citizen living in a non-Muslim country should not be confused with the relations between nations. When a non-Muslim country unlawfully commits aggression against a Muslim country, it is *dār al-ḥarb fiʿlan* (de facto land of war) for the Muslims who are being attacked in that country. It is not *dār al-ḥarb* (land of war) for the Muslim citizen living in a non-Muslim country which is committing the aggression. This is because by being a citizen he is bound by the law of the country in which he resides. Professor M.A.S. Abdel Haleem of the School of Oriental and African Studies (SOAS) invoked this rule when reports emerged during the American attack on Afghanistan in 2001 that some British Muslims had gone there to fight the British forces.[431] In the past when the Muslims of Malibar asked Ibn Ḥājar ʿAsqalānī[432] and Ibn Ḥājar Haythamī[433], on two different occasions about obeying the law of their non-Muslim rulers, both gave the reply that they need to obey the laws of their host country. Al-ʿAlwānī asserts the classical scholars developed the *dār* paradigm based on a particular reality faced by Muslim nations in their

[430] Al-ʿAlwānī, *Fi Fiqh al-Aqalliya*, p. 17.
[431] http://news.bbc.co.uk/1/hi/uk/1634517.stm.
[432] Khalid Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," *Islamic Law and Society*, vol. 1, no. 2, 1994, p. 176.
[433] Abou El Fadl, "Legal Debates", p. 147.

respective eras, however, fails to engage in a nuanced and detailed analysis of those realities and assess their applicability. Instead, the notion is dismissed simply because it was developed in a different era.

As for the question of Muslims committing violence against fellow citizens, this is not due to the *dār* paradigm per se. The Jihadi movement as represented by al-Qaida and ISIS legitimizes violence against civilians due to a misreading of the rules of *dār al-ḥarb* and is rejected by the vast majority of reputable global Muslim scholarship, which includes the minority *fiqh* scholars.[434] The jurists mentioned that a Muslim citizen even in *dār al-ḥarb* is obliged to follow the law of his host country. The only time they allowed a citizen to break his adherence to the law is when the host government violates his rights of citizenship. Even in this situation the jurists mentioned that it is not allowed for Muslims to harm women and children.[435] Muslims who violate the rights of fellow citizens in a non-Muslim country are liable to be punished by the Muslim polity if they were to travel there.[436] Finally what about the term *dār al-ḥarb*, does its usage show that the stance of *dār al-islām* towards other states is belligerent? Wahba al-Zuḥaylī has argued that the term *dār al-ḥarb* is only to be used in a state of war and not as a default position. The fact that the absence of security (*amān*) turns the *dār* into an abode of war indicates that the term is used only when *dār al-islām* is attacked.[437]

Muslim integration in non-Muslim countries is the pressing need and hence minority *fiqh*, as a *fiqh* of co-existence, is a timely contribution to the field of Islamic law. However, it is not an either-or situation. Such a *fiqh* of co-existence can be in harmony with the *fiqh* of international relations because they are two different subjects. One might even argue that minority *fiqh* can be classed as a branch of Muslim international law. However, the fact that a point of law may be misunderstood by non-Muslims is not a reason for revising it. Otherwise, following the same logic the *ḥudūd*, *jihād*, polygamy etc and many other aspects of *Sharīʿa* law which are highly misunderstood and misrepresented by some non-Muslims and media outlets would have to be denounced as the product of jurists. What is arguably required here

[434] Badawī, Jamāl, "ʿAlāqat al-Muslim bi-Ghayr al-Muslim", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftāʾ wa-al-Buḥūth* (Dublin, 2005), p. 91. Also see https://www.e-cfr.org/blog/2017/11/04/26th-ordinary-session-european-council-fatwa-research/ , https://www.eumuslims.org/en/media-centre/press-releases/statement-european-council-fatwa-and-research, https://www.npr.org/2014/09/25/351277631/prominent-muslim-sheikh-issues-fatwa-against-isis-violence and https://imamsonline.com/shaykh-abdallah-bin-bayyahs-fatwa-against-isis/.
[435] Al-Kasānī, *Badāʾiʿ al-Ṣanāʾiʿ*, 7:101.
[436] Abou El Fadl, "Islamic Law and Muslim Minorities", p. 176.
[437] Al-Zuḥaylī, *Athar al-Ḥarb*, p. 156.

is to keep the legal and inter-community dialogue separate. When explaining matters of law to non-lawyers, the style should be contextual and not legal. Just as minority *fiqh* scholars in the past have explained concepts like *jihād*[438] and *ḥudūd* contextually, it is also possible to give a contextual explanation of the *dār* paradigm.

The New Terminology

The new terms introduced by minority *fiqh* scholars requires some evaluation. Their approach has been a mixture of classical usage and modern terminology, as form of *takhayyur* (selecting the views of past schools) such as the usage of *dār ʿahd*.[439] Sarah Albrecht considers the minority *fiqh* usage of new terminology as an affirmation of the 'enduring significance and the adaptability of those geo-religious boundaries up to the 21st century'.[440] As for a comparison of the terms, Mawlāwī's *dār daʿwa* and Ramadan's *dār shahāda* are similar in the sense that they expressed a Muslim citizen's view of his/her residence in the West. Both are a welcome contribution as terms because they give the vision of co-existence and engagement with the host society. This is necessary because the *dār* paradigm lacks a vision for Muslims residents in western lands who have chosen to live there as their home, and not merely a place of trade as was the case in the past. In this sense the new terms complement and fill a lacuna in the law. However, they cannot be a replacement for the *dār* paradigm as they do not relate to the Muslim law of international relations, although their authors intended them to be so. The *dār* of *daʿwa* model is silent about international relations as is the case with *dār shahāda* both of which are premised on the recognition of a unipolar status quo.

Manna' Qattan's *dār ʿahd* (land of treaty) on the other hand attempts to addresses the relation between nations but like the traditional *dār* paradigm lacks a vision of the Muslim resident in the west. This is because it is from the traditional model, the Shāfiʿī version, where the world is divided into *dār al-islām*, *dār al-ḥarb* and *dār ʿahd/ṣulḥ*.[441] However, the problem with Qattan's description is that it is not accurate in describing the countries in the West. A model, which incorporates the various realities on the ground accurately whilst at the same time gives a vision for a Muslim citizen facilitating co-existence and co-living is perhaps a more congruent view. Thus, the west or east is not simply *dār ʿahd*, but the picture is more

[438] See Ramadan, *Islam, the West*, p. 59 where Ramadan engages in a responsible and contextual discussion of the concept of *jihād*.
[439] Albrecht, *Dār al-Islām*, p. 214.
[440] Albrecht, *Dār al-Islām*, p. 217.
[441] Al-Zuḥaylī, *Athar al-Ḥarb*, pp. 158-9.

variegated. There needs to be revised application of the *dār* paradigm considering the international relations are not static but in gradual flux. We do not live in medieval times when east was fighting west. Today the relationship between Muslim countries and non-Muslim countries are more complex. The West is not a monolithic whole[442] and perhaps never was. Thus, some states will be belligerent (*ḥarbī ḥukman*) or warring (*ḥarbī fiʿlan*) due to their declaration of war and aggression against a Muslim country whilst others maybe in a state of truce (*muwādaʿa*) but the vast majority will be *dār ʿahd* (land of treaty) due to the peaceful relations between them and Muslim countries.[443] However, all the time this is unconnected to the Muslim citizen living in the particular non-Muslim state, because his vision of the society in which lives will be to engage, participate and contribute. In this respect, one can cite the Muslim *hijra* to Abyssinia during the time of the Prophet. The problem with this model however is that the Muslims went as asylum seekers intending to return as soon as it was safe to do so but the Muslims in the West are citizens who have taken permanent residence.

What about term *dār al-islām*? The term *dār al-islām* is a description of a certain reality. It is a description of a land or territory where the authority of Islam exists. The term *dār* is a reference to the nature of the rule, both due to the text[444] and reason. In this respect, the population is of secondary consequence. The primary factor in defining the nature of a territory or country is its rule and not its population. Hence, apartheid rule in South Africa was a description of that country although most of its population rejected apartheid. The dictatorship of Saddam, for example, was still a dictatorship even though few wanted him as ruler. In the same vein is the occupation of Iraq, it is occupied rule regardless of the wishes of its inhabitants. Therefore, the jurists were correct in including the rule as a condition for *dār al-islām*. As for security, Islamic law like any other legal tradition does not permit occupation by foreign powers of the territory of its inhabitants. Therefore, the security needs to remain in the hands of the Muslims to be an independent, sovereign *dār al-islām*. The security here is authority and security of society as a whole and not personal safety of individuals. This is because individual safety or insecurity does not indicate the nature of the rule has changed. Isolated abuse of power and misrule is a fact of governance, but it does not change the nature of the governance unless it is widespread. Therefore, when the government is unable to

[442] During the invasion of Iraq for example some of the most vocal opponents were in the West.
[443] In today's globalized world it would be rare to find a non-Muslim country which does not have a relationship with a Muslim country. However, in the rare event that it exists such a country may be designated rather superfluously as *dār al-kufr*, i.e. a non-Muslim country.
[444] See the discussion of the ḥadīth of Sulaymān ibn Burayda above.

protect society at large then we can say its lacks sovereignty and is unable to provide security for its citizens.

As for the Muslim populated countries today, should they be designated as *dār al-islām*? If we follow the above definition few can claim to be *dār al-islām* due to the absence or misapplication of the Islamic legal system. They are certainly not *dār al-ḥarb* as Muslims are forbidden to fight amongst themselves. Nor can they be *dār al-kufr* since the lands take the rule of *dār al-islām*, which is that if attacked the Muslims have a religious duty which would not be the case for *dār al-kufr* which had never been *dār al-islām*, like Makkah for example, which explains why the Shāfiʿīs still considered occupied Muslim land as *dār al-islām* even though the rule and security has changed hands[445]. The situation of Muslims today is not analogous to the situation of Muslims living under the authority of Quraysh. This leads us to the conclusion that the Muslim countries presently could fall under a new category, which one might describe as *dār al-Muslimīn* i.e. the Muslim land or Muslim country, a common usage which now has terminological significance, i.e. the land belongs to Muslims in terms of security and territorial ownership, taking the rules of *dār al-islām* which obliges the Muslims to defend it, but the rule and governance does not belong to Islam. Although the *dār* paradigm is still relevant in respect to its fundamental principles. However, it requires revision, redefinition, and reapplication in light of current circumstances. It also required addition in terms of providing a vision for co-living for Muslim citizens in non-Muslim countries.

The Question of Residence

The *dār* paradigm also raises questions in terms of Muslim residence in the West. In the past most jurists either forbade residence because they deemed there to be a general state of war between Muslim and non-Muslim lands[446] or allowed it only under certain circumstances, which again is a problem for integration if Muslims are to view their residence as temporary. The minority *fiqh* scholars, by dismissing the *dār* paradigm, did not have to contend with the harsh views of the jurists regarding Muslim residence amongst non-Muslims. Instead, they have adopted the view of certain Shāfiʿī scholars who stated that residence permitted for the

[445] For Shāfiʿīs, conquered land were non-Muslim in appearance but legally it is still Islamic land. See Abou El Fadl, "Legal Debates on Muslim Minorities", p. 140.
[446] Fishman, *Fiqh al-Aqalliyyat*, p. 7 and March, Andrew F., "Sources of Moral Obligation to non-Muslims in the 'Jurisprudence of Muslim Minorities' (Fiqh al-aqalliyyat) Discourse", *Islamic Law and Society*, vol. 16, No. 1, 2009, p. 42.

purposes of spreading Islam (*da'wa*).[447] Al-ʿAlwānī quotes Abū Bakr al-Shāshī al-Qaffāl who refers to Muslims as "*ummat al-daʿwa*" (the nation of the call) and argued that the world be divided into *dār Islam* and *dār daʿwa*. Al-ʿAlwānī concluded that the West was to be considered a land of the Call and therefore residence is justified for that purpose.[448] This represents the case and tendency of minority *fiqh* scholars who would reject a majority view and opt for sometimes obscure or even ambiguous views which accord with their wider stated goals for the community.

In this case it was possible to engage in an independent consideration of the textual evidence and conclude that the obligation to make *hijra* is not *dār* specific.[449] The Qur'ānic verse relating to question of *hijra* has come in a general manner and not restricted to the concept of migration from one *dār* to another:

> Verily! As for those whom the angels take (in death) while they are wronging themselves (as they stayed among the disbelievers even though emigration was obligatory for them), they (angels) say (to them): "In what (condition) were you?" They reply: "**We were weak and oppressed on earth."** They (angels) say: **"Was not the earth of Allah spacious enough for you to emigrate therein?"** Such men will find their abode in Hell - What an evil destination! Except the weak ones among men, women and children who cannot devise a plan, nor are they able to direct their way. For these there is hope that Allah will forgive them, and a is Ever Oft Pardoning, Oft-Forgiving. He who emigrates (from his home) in the Cause of Allah, will find on earth many dwelling places and plenty to live by. And whosoever leaves his home as an emigrant unto Allah and His Messenger, and death overtakes him, his reward is then surely incumbent upon Allah. And Allah is Ever Of Forgiving, Most Merciful.[450]

Although the context of this verse was that some Muslims in Makkah (*dār al-ḥarb*) stayed behind and did not make *hijra* to Madinah (*dār al-islām*)[451], however its wording is general

[447] March, "Sources of Moral Obligation", p. 70.
[448] Fishman, *Fiqh al-Aqalliyyat*, p. 5.
[449] One short ECFR *fatwā* addressed the question of residence and permitted it based on textual authority of verses 97-100 of chapter 4 of Qur'ān and other historical examples of *hijra* to Abyssinia and Makkah. However, it failed to draw the implication that the non- *dār* specific nature of these texts do not nullify for the traditional *dār* paradigm or Muslim integration and hence dismissal was not warranted. The two subjects are unconnected and should not be conflated as minority *fiqh* scholars have done. See European Council for Fatwa and Research First Collection of Fatwas, Translated by Anas Osama Altikriti, p. 15.
[450] Qur'ān 4:97-100
[451] See al-Qurṭubī, *Jāmiʿ al-Bayān li-Aḥkām al-Qur'ān* (London: Dār al-Taqwa, 2003), 5:346 for a discussion of the *sabab nuzūl* of the verse.

so the juristic principle *al-ʿibra bi-l-ʿumum* ('consideration is given to the generality of expression') applies. So 'oppressed in the earth' refers to Makkah but its application is to the whole world. Similarly, when the Angels say, "*Was not the earth of Allah spacious enough for you to emigrate therein?*", it refers to Madinah; however, its application is to the world because the actual word used is 'earth'. The historical context is of two *dārs*, *dār al-islām* and *dār al-kufr*, but the application is general.[452] The ruling (*ḥukm*) on *hijra* is implicitly reasoned (*maʿlul dalālatan*) and therefore it is subject to ratiocination. The reason for the obligation of hijra is the inability to live by Islam. Wherever it is impossible to live by Islam it is obligatory to migrate. The divergent meaning (*mafhūm al-mukhālafa*) is that where it is possible to live by Islam it is not obligatory to migrate. Muslim scholars differed as to what living by Islam meant. Some took a very strict view and said it means living under the laws of Islam, such as the Mālikī's, like al-Wansharīsī in particular, while others accepted that just fulfilling one's individual obligations was enough. The latter view perhaps has the greater merit as it is well established that companions of the Prophet, like Nuʿaym al-Naḥḥām was allowed by the Prophet to stay in Makkah even though it was under the authority of Quryash.[453]

As for the *ḥadīths* which mention residence amongst non-Muslims is not allowed should be understood in light of the above *āyah*:

1. 'Whoever lives with a polytheist and stays with him, he is one of them.'[454]
2. 'I am free from those who live amongst the polytheists.'[455]
3. 'There is no *hijra* after *fatḥ* (the conquest of Makkah).'[456]

The first and the second *ḥadīths* refer to the question of state jurisdiction. The Muslim polity is not obliged to protect the safety of those who choose to live outside *dār al-islām* and not that it is forbidden to live outside *dār al-islām*. As for the last *ḥadīth*, refers to the Muslims in Makkah who were obliged to make *hijra* due to being persecuted for their religion. After the

[452] That is why some scholars said hijra should be made from one area of *dār al-islām* to another if corruption has spread there. For instance, it is reported that Malik disapproved of those Muslims who resided in a land where the predecessors (*salaf*) were vilified.' See al-Wansharīsī, *al-Miʿyār al-Muʿrib*, p. 157.
[453] See Ibn Qudāma, *al-Mughnī*, 10:515, for full text of the *ḥadīth* in question. Al-ʿAbbās was actually instructed by the prophet to remain in Makkah when he said: 'You're staying in Makkah is better'. See al-Shirbīnī, *Mughnī al-Muḥtāj bi-Sharḥ al-Minhāj* (1994), 4:239.
[454] Tirmidhī, no. 1605, 4/156.
[455] Abū Dāwūd, no. 2787, 3/122.
[456] Bukhārī, no. 1971, 190.

conquest of Makkah this was no longer necessary, hence there is no *hijra* after a land becomes *dār al-islām* though the propensity for *hijra* to exist in the future remained.

Also, the severity or leniency of the ruling on *hijra* depended on the understanding and circumstances of the time. One cannot make analogy to the past but must approach the matter anew. This is not because the rule outlined above has changed but because the reality (*manāt*) of the rule has changed. This seems to be approach of Mawlāwī who justified Muslim residence in the West on the basis that Muslims can practise their religion.[457] In this regard the following quote of Khalid Abou El Fadl is instructive:

> Responses of Muslims jurists to the question of the permissibility of Muslim residence in non-Muslim territories in this period frequently depended on the geographic location of the jurists, as well as on their perceptions of the relations between Muslim and non-Muslim polities.[458]

In the eastern part of the Abbasid empire which were conquered by the Mongols, the Ḥanafīs and Shāfiʿīs not only permitted the Muslims to remain, but they also encouraged them. While the Mālikī jurists understood the reality differently. Their response to conquest of Muslim land, such as the Iberian Peninsula, in particular was that Muslim should migrate to *dār al-islām* and not remain in the conquered land. When the Mudejars of Spain refused to migrate to *dār al-islām* (North Africa) after Spain came under Christian rule, the Māliki stance became harsher due to their perception of the reality, as we can see exemplified by the response of al-Wansharīsī (d.1508).[459] While Mālikī jurists who had contact with the Mudejar plight were more lenient as they understood the situation differently in some respects. Al-Mawwāq, who was the chief *qāḍī* of Granada during the time when the Christians were besieging his city, whist affirming that migration or *hijra* is the greatest duty, allowed a Mudejar to assess his situation. If his presence is better than he should choose the lesser of two evils, a view is which is far from what al-Wansharīsī would have countenanced.[460] However, this related to the variation in the reality (*manāt*) of the rule and not the substance of the rule. As for the Muslim who lived in lands not conquered by non-Muslim, the scholars were generally indifferent because they did not feel there was a threat to the Muslims residing

[457] Mawlāwī, *al-Muslim Muwāṭinan*, p. 16.
[458] Abou El Fadl "Legal Debates", p. 130.
[459] al-Wansharīsī, *al-Miʿyār al-Muʿrib*.
[460] Miller, A. Kathryn, "Muslim Minorities and the Obligation to Emigrate to the Islamic Territory: Two Fatwas from the Fifteenth-Century Granada," *Islamic Law and Society*, vol. 7, no. 2, 2000, p. 273.

there or to the interest of the Muslim polity. Bernard Lewis summed up the point well when he said:

> Muslim discussion of these matters were concerned almost exclusively with Christendom, seen as the House of War par excellence. The jurists were much less worried about the colonies of Muslim merchants established from early times in India, in China and in other parts of Asia and Africa. These were, so to speak, religiously neutral zones, offering no threat to Islam in either the religious or political sense.[461]

Thus, the ruling on *hijra* was not *dār* specific though historically it was expectedly so. Applying the condition of living by Islam Muslims in the West, and in Britain, in particular are able to practise their religious duties relatively uninhibited. Some have raised the question that the new anti-terror laws discriminate against Muslims and curtail their freedom to speak.[462] This, however, is restricted to individual cases, which need to be studied on their own merits and cannot be generalised to include the whole community who are able to fulfil their religious responsibilities. It was possible for minority *fiqh* to engage with the *dār* paradigm and conclude the issue of residence without dismissal of the paradigm as a whole. The issue here seems to be less with legal argumentation and more to do with the optics of the notion of *dār al-ḥarb* which seems to have affected the minority *fiqh* discourse.

Section II. Nature of Citizenship

The reality today is that most of the Muslim migrants who travelled to countries in the West are citizens, so the question now is not its legitimacy but defining its nature. Ramadan refers to the notion of *ʿahd* which been discussed by jurists in the past.[463] However his usage seems to differ in the sense that he goes beyond requirement of abiding by the law on which jurists are agreed. Rather he equates adherence to the law as loyalty which is an interesting proposition which we shall investigate further in this section.

[461] Lewis, "Legal and Historical Reflections", p. 7.
[462] Tufyal Choudhury and Helen Fenwick , The impact of counter-terrorism measures on Muslim communities, (Durham University: 2001) https://www.equalityhumanrights.com/sites/default/files/research-report-72-the-impact-of-counter-terrorism-measures-on-muslim-communities.pdf, p83.
[463] Ramadan, *Western Muslims*, pp. 91-92.

Notion of al- Amān and Citizenship

Citizenship is a new philosophy for Islamic scholarship.[464] This is not surprising given that in history Muslims had their own notions of membership of the Islamic polity. Muslims permanently residing in *dār al-islām* were automatically members of the *umma* and the state whilst non-Muslim members of *dār al-islām* were known as people of the covenant or *ahl al-dhimma*. Also, even if Muslims wanted to take the notion of citizenship from the West they could not have because it did not exist. Europe in the 7th century was under papal and monarchical rule whilst the two powers, the Byzantine and Persian empires, did not have a membership which corresponds to what we know today as citizenship. What the Muslims had was an idea called the notion of *al-amān* (covenant) or *al-ʿahd (*treaty or agreement*)*.[465] This was actually an extension of Muslim contract law to the relationship between the ruler and the ones to whom he gives protection and safe passage. It is more akin to the modern notion of asylum; travel visa or work permits granted to aliens seeking entry to a country. It was not meant to be a fixed notion because it reflected the nature of international relations at the time: the existence of *dār al-islām* and the *dār al-kufr* and the cross migrations between the two were temporary. That is why non-Muslims coming to *dār al-ḥarb* were came under *amān*, the same condition under which a Muslim would go to *dār al-ḥarb*. A Muslim going to *dār al-ḥarb* in those days was no more a citizen than a non-Muslim coming to *dār al-islām*. Today however the situation is different, Muslim are not just coming to the west under the protection of the governments but seeking domicile as citizens. So, this begs the question, who or what is a citizen?

According to Graziella Bertocchi and Chiara Strozzi:

> Citizenship is the legal institution that designates full membership in a state and the associated rights and duties. It provides benefits such as the right to vote, better employment opportunities, the ability to travel without restrictions, legal protection in case of criminal charges, and the possibility of obtaining a visa for a relative.[466]

[464] Salam, A. Nawaf, "The Emergence of Citizenship in Islamdom", *Arab Law Quarterly*, vol 12, 1997, p. 144.
[465] The following verses from the Qur'ān are cited as evidence for the concept of *amān*: *'And fulfil every covenant. Verily, the covenant will be questions about.'* (17:34) and *'Fulfill the covenant of God when you have covenanted.'* (16:91) There are some *ḥadīth* to which reference is made: "The Muslims conduct themselves according to the conditions they have agreed." (al-Bukhārī).
[466] Graziella Bertocchi and Chiara Strozzi, "The Evolution of Citizenship: Economic and Institutional Determinants", *The Journal of Law & Economics*, vol. 53, No. 1, February 2010, p. 96

The word citizen comes from the Latin word *civitas* having its early beginning in Greek city states between 700-600 BC.[467] The Greek conception of a citizen was one who had stake in the ruling and governance of the polity. According to Aristotle: "There is nothing more that characterises a complete citizen than having a share in the judicial and executive part of the government."[468] Modern citizenship has captured that essence of involvement and active participation and presents itself in a more egalitarian form but its nature, apart from that essence, is debated and deferent thinkers have varying concepts depending on their intellectual persuasions. However, there is one debate we wish to focus on because it is pertinent to our study. Is citizenship coterminous with nationalism or are they two separate notions? Liberal nationalists like David Miller have argued that without nationalism citizenship is an empty word[469] and therefore called for cultural nationalism. Ramadan also seems to follow this line of thinking, possibly influenced by his residence in France and the French assimilationist version[470] of civic nation, calls for a citizenship based on a form of cultural nationalism. For Ramadan, the ideal citizen, who is not just law abiding but is an active participant in society sharing the same national identity and values. The questionable aspect in all of this, bearing in mind all the points mentioned above, is that active participation is intertwined with nationalism. One might argue in the case of Muslims in Britain, not only is this unrealistic, but also unnecessary. In Britain, the model followed historically and until now has been 'pragmatic'[471] where difference has been accommodated. Ramadan's version is exclusive, for those who do not feel they do not share fundamental values, they have no place in his notion of citizenship. The problem of any theory of citizenship is to explain "why a group of people are willing to cooperate with each other to solve common problems when there are real incentives not to do so and to free-ride on the efforts of others."[472] Ramadan has tried to give the incentive by emphasising a common British identity and the requirements of the text. Such a proposition is unnecessary as there are other drivers and factors which encourage people to sacrifice for the sake of others such as religion, class, gender etc.[473] Although the notion of *amān* historically had restricted

[467] Pattie, Charles, Seyd, Patrick and Whiteley, Paul, *Citizenship in Britain: Values, Participation and Democracy* (Cambridge: Cambridge University Press, 2004), p. 5.
[468] Clark, Paul Barry, *Citizenship* (Pluto Press, 1994), p. 40.
[469] Miller, David, "Citizenship and Pluralism", *Political Studies*, vol. XLIII, pp. 432-50.
[470] Silverman, M., *Deconstructing the Nation: Immigration, Racism and Citizenship in Modern France* (Routledge, 1992), p. 33.
[471] Bryant, Christopher G.A., "Citizenship, National Identity and the Accommodation of Difference: Reflections on the German, French, Dutch and British Cases", *New Community*, vol 23, 1997, p. 166.
[472] Pattie, Seyd and Whiteley, *Citizenship in Britain*, p. 18.
[473] Faulks, Keith, *Citizenship* (Routledge, 2000), p. 37.

meaning, it is open to some flexibility. This is because it is based on the concept of ʿ*ahd*, a contractual agreement, which means it is flexible and can reflect the time and situation in which they live. Muslim contract law leaves the matter of the nature of the agreement (ʿ*ahd*) up to the people themselves providing they do not agree to a stipulation which contradicts the sources. For example, the *ḥadīth*, relevant to the idea of ʿ*ahd*, states:

> All agreements are permitted amongst Muslims except the agreement which permits a prohibited thing or prohibits that which is permitted. The Muslims abide by the conditions they have agreed except the conditions which stipulate a prohibited matter or permit something prohibited.[474]

This is general rule regarding contracts. As al-Khaṭṭabī commenting on this *ḥadīth* said: "This is in respect to permitted conditions and not ones which are invalid. This is generally what has been commanded with regards to contracts."[475] This means they can agree conditions that suit them and must abide by them in their conduct. Thus, perhaps a more realistic notion of citizenship can be developed where Muslims can maintain their integrity and still feel part of the wider society in which they will be active participants driven by the dictates of their religion.

The basis of citizenship and whether it should be due to the place of birth (*jus soli) or* blood relationship i.e., descent (*jus Sanguinis*) or a mixture of both has been variously adopted by Western countries.[476] The modern notion of citizenship, in the UK context, is not intrinsically coterminous with nationality but mainly a legal relationship with the state as a stakeholder. This is indicated by the citizenship rules themselves. Though citizenship, in the UK, had in the past generally derived from the place of birth, *jus soli*[477] (while the common foundation in Europe of that of *jus sanguinis),* this is not the only medium of acquiring citizenship. UK nationality law incorporates both premises to some degree.[478] After the British Nationality Act 1981 came into force on 1 January 1983, British citizenship was granted via one's parents, which is an example of *jus Sanguinis*. However, the UK *naturalisation* laws allow a

[474] Abū Dawud, *Sunan*, no. 3120.
[475] Al-Aẓīmabādī, *ʿAwn al-Maʿbūd Sharḥ Sunan Abī Dāwūd*, under *ḥadīth* no. 3120.
[476] Scott, James Brown, "Nationality: Jus Soli or Jus Sanguinis", *The American Journal of International Law*, Jan., 1930, vol. 24, No. 1, Jan., 1930, pp. 58-64 and Slater, Avery, "JUS SANGUINIS, JUS SOLI: WEST GERMAN CITIZENSHIP LAW AND THE MELODRAMA OF THE GUEST WORKER IN FASSBINDER'S ANGST ESSEN SEELE AUF", *Cultural Critique*, vol. 86, Winter 2014, pp. 92-118.
[477] https://www.britannica.com/topic/jus-soli
[478] Bertocchi and Strozzi, "The Evolution of Citizenship", p. 102. Also see https://www.expatica.com/uk/moving/visas/british-citizenship-1028671/

person to become citizen of a state even though that person was not born there or descended from a person with settled status via other legal routes[479] providing certain tests and conditions are met, such the 'Life in the UK test'[480], English language test[481] and a 5 year minimum residency requirement[482] that applicants must satisfy to show they have sufficient knowledge of the UK and its language. Therefore, attachment to the land or people is not a basic requirement as the above tests are not a strong indication of common values or culture as knowledge does not necessarily equate to adoption of the said culture.

Today, states are nation states externally in terms of their international relationships, but it is debatable to what extent they are nation states internally, especially in the case of the UK as exemplified by the Britishness debate.[483] European nations, such a Germany[484], have reformed their nationality laws allowing naturalization of foreign nationals[485] and various countries allowing dual nationality.[486] Hence, in the UK one can be British citizen but also be an Egyptian national indicating there is no exclusivity to being British as multiple identities and nationalities are recognized. Indeed, this is inevitable in the current globalized world with mass migration and immigration. The nations state as known in theory perhaps never truly existed[487], but the trend towards globalization has meant that states are further from this model than ever before.

Andrew F. March, in his article *Liberal Citizenship and the Search for an Overlapping Consensus* considers the aspects or hurdles that minority *Fiqh* needed to overcome in order to establish a version of citizenship that would be acceptable in western liberal societies.[488] As regards the question of loyalty in respect to following the law of the country with which one has an agreed by way of citizenship, it agreed amongst mainstream scholars (apart from a very small minority of Jihadists), whether in the past or present, of whatever school of

[479] Other routes such as marriage, adoption, refugee status and other routes. See https://www.expatica.com/uk/moving/visas/british-citizenship-1028671/
[480] https://www.gov.uk/english-language.
[481] https://www.gov.uk/english-language.
[482] https://www.gov.uk/apply-citizenship-indefinite-leave-to-remain.
[483] Derragui Hiba Khedidja, "The Britishness Debate and its Significance for Multiculturalism in Britain", https://aleph.edinum.org/2081.
[484] Bertocchi and Strozzi, "The Evolution of Citizenship", p. 102.
[485] Street, Alex, "My Child will be a Citizen: Intergenerational Motives for Naturalization", *World Politics*, vol. 66, No. 2, April 2014, p. 268.
[486] https://www.apply.eu/passport/.
[487] Faulks, *Citizenship*, p. 37.
[488] March, F. Andrew, "Liberal Citizenship and the Search for an Overlapping Consensus: The Case of Muslim Minorities," *Philosophy & Public Affairs*, vol. 34, No. 4, Autumn, 2006, p. 373.

thought, that according to the above *ḥadīth* Muslims are bound by the law of the land as long as it does not require them to do something which conflicts which their religious duties and obligations.[489] As such loyalty to the nation and its laws is part of the loyalty to the *Sharīʿa* and this an argument Ramadan has made also. Despite what is happening, in terms of the concerns for public safety due to so called Islamic terrorism, this is a matter well established in Islamic law that Muslims cannot violate the agreements they have entered into.

Those ultra-Salafist or Jihadists scholars who opposed any form of Muslim integration have cited the principle of *al-walā' wa-l-barā'* (loyalty and disassociation)[490] as evidence that Muslims are obliged disassociate themselves from non-Muslims and not show any loyalty towards them. Fayṣal Mawlāwī has discussed this idea in detail has shown that the terms have specific meanings that do not apply to the question of integration and Muslims taking citizenship in Western countries. Mawlāwī points out that the loyalty shown to Non-Muslims which is forbidden is loyalty to disbelief[491] or loyalty to non-Muslims is in a state of war between Muslims and non-Muslims, which case loyalty could amount to apostacy.[492] This is not applicable to living in peace and cooperation with non-Muslims, which is not only permitted but required by rules and values contained within the *Sharīʿa*, such as the recognition of other religions[493], just treatment of non-Muslims[494] and moral obligation and cooperation in dealings with them.[495] The minority *fiqh* scholars envisaged that there could be situations when a Muslim's religious obligations may clash with a domestic law of the host country. Mawlāwī took the view that a Muslim must abide by his religious obligation and face the legal consequences and clarify this is due to the need to adhere to one's religious convictions.[496] And those who abide by a domestic law that contravenes religious law will be a "sinful in the sight of Allah and will be considered a person forced or under compulsion and so will attain Allah's forgiveness."[497]

[489] March, "Sources of Moral Obligation", p. 57.
[490] https://islamqa.info/en/answers/337640/the-concept-of-loyalty-and-disavowal-al-wala-wal-bara-and-its-importance.
[491] Mawlāwī, *al-Muslim Muwāṭinan*, p. 20.
[492] Mawlāwī, *al-Muslim Muwāṭinan*, p. 26.
[493] Mawlāwī, *al-Muslim Muwāṭinan*, p. 29.
[494] Mawlāwī, *al-Muslim Muwāṭinan*, p. 30.
[495] Mawlāwī, *al-Muslim Muwāṭinan*, p. 30-31.
[496] Mawlāwī, *al-Muslim Muwāṭinan*, p. 66.
[497] Mawlāwī, *al-Muslim Muwāṭinan*, p. 66.

According to Mawlāwī citizenship is more than a mere legal relationship which permits Muslim to reside in a non-Muslim country. A Muslim citizen of Europe has duties[498] which fall under three categories: religious obligations, when religious obligations clash with legal obligations and duty of military service. In respect of the first, a Muslim is obliged by his religion to convey the message of Islam to non-Muslims, to fight corruption and work for the betterment of the host society but at the same time protect the Islamic identity.[499] As for the second category, Mawlāwī notes the clash between religious obligation and domestic law is not unique to non-Muslim countries as certain Muslim countries have banned the wearing of the hijab also.[500] In such a situation a Muslim should try and find a legal exemption and in the absence of that he is permitted to abide by domestic law on the basis of necessity as an exceptional rule.[501] On the last category of the duty of military service in non-Muslim countries Mawlāwī took the view that it will be permissible as the duty to fulfil the national duty is itself permissible and even required. Defence of the country and its people is a national duty and hence the *Sharīʿa* permits a Muslim to discharge this duty.[502] Where this matter becomes problematic and controversial is when a Muslim serves in an army which is committing an act of aggression against another country, especially a Muslim country. Mawlāwī was clear that a Muslim is not allowed to participate in the national army when it is the aggressor against any country whether Muslim or non-Muslim, and especially when the other country is a Muslim country.[503] Al-Qaraḍāwī on the other hand, not only permitted military service in a defensive capacity[504], but allowed Muslims to serve in a non-Muslim army against fellow Muslims as long as they were in a non-combatant position.[505] He justified this on the basis that refusal to do so would "pose a threat to the Muslim community and also disrupt the course of *daʿwa*".[506] This argument is clearly based on the *maṣlaḥa* and lesser of evils justification and we discussed in chapter 2 on legal philosophy, minority *fiqh* scholars would allow their primary goals for the community inform which is a higher *maṣlaḥa* and a lesser evil.

[498] Along with the obligations and duties of citizenship, Mawlāwī also cites what he believes are the rights of Muslim citizenship, rights such as political participation which is discussed in chapter 4 of this thesis. Mawlāwī, *al-Muslim Muwāṭinan*, p. 75.
[499] Mawlāwī, *al-Muslim Muwāṭinan*, pp. 68-69
[500] Mawlāwī, *al-Muslim Muwāṭinan*, pp. 69.
[501] Mawlāwī, *al-Muslim Muwāṭinan*, pp. 70.
[502] Mawlāwī, *al-Muslim Muwāṭinan*, pp. 71-72.
[503] Mawlāwī, *al-Muslim Muwāṭinan*, pp. 72
[504] https://*fiqh*.islamonline net/en/should-a-muslim-serve-in-the-us-army/.
[505] March, "Sources of Moral Obligation", p. 71.
[506] Quoted March, "Sources of Moral Obligation", p. 71.

Andrew F. March in his article entitled *Sources of Moral Obligation to non-Muslims in the 'Jurisprudence of Muslim Minorities*[507] discussed the various approaches of minority *fiqh* scholars to question of loyalty, citizenship, and integration, namely, textual, contractarian, *maṣlaḥa*/*maqāṣid* based reasoning to arrive at or justify their conclusions for Muslim integration in Western countries. The textual basis is the consideration of primary texts from the Qur'ān and Sunna, while the contrarian approach was based on the notion that Muslims in the West enjoy the privileges or citizenship due to the *amān* (security) provided by the host country which means Muslims must obey the law. The *maṣlaḥa* or *maqāṣid* approach is the assessment of benefit and harms and necessity which informs the course of action. For each category he engaged in a problematisation of the issues by showing how classical scholarship held various positions which can easily run counter to minority *fiqh* conclusions. However, the fourth approach, which March called the 'comprehensive-qualitative' that focused on the role of *daʿwa* (call to Islam) and the integration justified on its basis is what he believed was the "most noteworthy methodological and substantive contribution of *fiqh al-aqalliyyāt*."[508] This is because *da'wa* is understood and presented by minority *fiqh* scholars in such a manner that engages Muslims emotionally, morally and engenders solidarity with fellow non-Muslim citizens such that it is the closest to a modern liberal conception of citizenship.[509] For example, *da'wa* requires recognition, good will and respect for the person being called to, as Mawlāwī put it: "Can you call someone [to Islam] while harbouring feelings of hatred towards him?! Or making plans to fight him? Under such conditions can you call him with wisdom and good-willed warning [*al-mawʿiẓat al-ḥasana*?]"[510] Mawlāwī states that the love for non-Muslim which is forbidden is that of their non-Islamic beliefs and not of the human being who a Muslim can love on the basis of their humanity regardless of their faith.[511] March states:

> citizenship is not limited to legal residence and loyalty in wartime but makes demands beyond obeying just laws. Intrinsic to citizenship in any society is an attitude of solidarity with fellow citizens. Intrinsic to citizenship in a religiously and ethically

[507] March, "Sources of Moral Obligation".
[508] March, "Sources of Moral Obligation", p. 70.
[509] March, "Sources of Moral Obligation", pp. 80-81
[510] Quoted in March, "Sources of Moral Obligation", p. 77.
[511] Mawlāwī, *al-Muslim Muwāṭinan*, p. 87. Mawlāwī terms this as *ḥubb fiṭrī* or innate human love

diverse society is an attitude of recognition of fellow citizens across deep moral and metaphysical divides.[512]

For March, *daʿwa* discourse presented by minority *fiqh* scholars such as Mawlāwī, Bin Bayya and al-Qaraḍāwī in the context of citizenship attempts 'to provide an Islamic foundation for a relatively thick and rich relationship of moral obligation and solidarity with non-Muslims.'[513] In other words, minority *fiqh* sought to find a deeper meaning of citizenship (beyond a contractarian approach) which approximated to the western model of citizenship. In doing so they have adopted, rejected, or ignored classical views and innovated in line with their objective to facilitate Muslim integration.

A Consonance of Values?

Tariq Ramadan does not view citizenship only in terms of rights and responsibilities but on shared values.[514] The values he refers to are not respect, fair play and tolerance which no would question but democracy, rule of law, equality, social justice etc Such ideas in the past have been accepted by Muslim scholars with qualifications but Ramadan does not go down that line. He sees no difference between Western and Islamic values and where differences arise, they are due to misguided practise and not differences in essence. In this section will be assessing if there is a complete consonance of values or whether are only similarities with differences. The following is a brief discussion of two ideas which all western liberal societies are based:

1. Democracy
2. Secularism

Democracy is about realising transparency, legitimate rule, rule of law, accountability etc and the Muslims traditions agrees with all these. However, the philosophy and the methods by

[512] March, "Sources of Moral Obligation", p. 74.
[513] March, "Sources of Moral Obligation", p. 92.
[514] In an interview with Amina Chaudary of *The Islamic Monthly* (TIM) on August 11, 2014, he stated:

> As Western Muslims and American Muslims, we need to understand that the values and principles we promote are not only Muslim values. American Muslims live in a country where justice, dignity, freedom and equality are essential values. The Muslim contribution to the future of America is to not only speak out as Muslims, but to also speak out as citizens in the name of our common values. Our main contribution is to reconcile the American society with its own values, those that are not in contradiction to Islam. We have a duty of consistency. https://www.theislamicmonthly.com/tariq-ramadan-my-absence-would-certainly-be-the-most-powerful-speech-i-have-ever-given-at-isna/.

which these are realised are not necessarily the same. In the western version all of these are achieved by granting sovereignty to the people. In the liberal tradition for example, with its focus on liberty and individual freedom, the locus of sovereignty is the individual.[515] According to Barry Holden a "liberal democrat can only make sense of the notion of the people making a decision where there is freedom...[to] make whatever decision they wish."[516] Thus, popular sovereignty means the people have an unfettered right to determine their destiny as they please. When we discus parliamentary sovereignty for example there are certain parallels with *shūrā* and yet there are important differences. According to A. V. Dicey;

> The principle of parliamentary sovereignty means neither more or less than this, namely that Parliament has, under English constitution, the right to make or unmake any law whatever, and further that no person or body id recognized by the law of England as having the right to override or set aside the legislation of Parliament.[517]

Thus, this notion of parliamentary supremacy allows parliament to 'make or unmake any law' and recognizes no other body above it. According to Christian Joppke:

> pragmatism, aversion to fixed first principles, and balanced empirical reasoning have characterised British democracy for centuries. …sovereignty is firmly and unequivocally invested in Parliament, which knows no constitutional limits to its law-making powers.[518]

Whilst *shūrā* is a consultative and legislative body but clearly its remit is greatly limited by the belief that God is the lawgiver or *shāriʿ* in the language of *uṣūl al-fiqh*. It has limits to what it can legislate and is subject to a higher legislative authority. Some have attempted to reconcile both by arguing that the *de jure* sovereignty is with God, but the *de facto* sovereignty has been granted to man by God.[519] Such arguments are a strained exercise because it is clear from the above discussion that the locus of both *de jure* sovereignty and de facto sovereignty lies with the people and not God. It is more realistic to say *shūrā* and democracy are different in their philosophy but similar in their aims, which is to promote transparency in rule and avoid despotism.

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[515] This is a brief treatment of the subject. For a detailed discussion on democracy see chapter 4 in the context of political participation
[516] Holden. B, *Understanding Liberal Democracy* (London: Harvester Wheatsheaf, 1993), p. 25
[517] Dicey, A.V., *The Law of the Constitution* (1885), p. 37.
[518] Joppke, Christian, *Immigration and the Nation State*, p. 103.
[519] Khan. M, "The Priority of Politics", *Boston Review*, 2003.

According to Massimo Campanini democracy is a foreign idea that was "imported with other Western ideals and political practices, such as "liberal ism", between the 19th and the 20th Centuries."[520] Campanini acknowledges the inherent clash between a democratic society with the idea of a Muslim *umma*. He states:

> The main concept that seems to be irreducible to democracy is that of the umma, the community of believers bound together by faith and religious profession. For if somebody is not a believer, he or she cannot be full part of the community, whereas modern democracy is above any religious affiliation.[521]

Campanini states certain Muslim scholars[522], such as Ḥassan Turābī, who tried to present an Islamic version of democracy on the basis that elements of democracy share features of the idea of *shūrā* (consultation).[523] However, such an attempt seeks to find similarities but ignores core and inherent contradictory aspects discussed above. This is why Fauzi M. al-Najjār in his study of Islam and modern democracy concluded that the only way reconciliation can take place via a fundamental change within Islam's basic principles.[524]

The idea of secularism like democracy is contested in academia[525] with varying theories being posited around the details though still containing an uncontested essence. The evolution and development of secularism can be seen in the contributors to the subject throughout history. From the early history St Augustine's writings are significant in setting out the distinction and boundary between Church and State, in particular; between the Catholic

[520] Campanini, Massimo, "Democracy in the Islamic Political Concept", *Oriente Moderno*, Nuova serie, Anno 24 (85), Nr. 2/3, STUDI IN MEMORIA DI PIER GIOVANNI DONINI, 2005, p. 343.
[521] Massimo, "Democracy in the Islamic Political Concept", p. 345
[522] Along with Turabi another scholar who sought it reconcile Islamic ideas in a similar vein is Rachid Ghannouchi, see Jawad, Nazek, "Democracy in Modern Islamic Thought," *British Journal of Middle Eastern Studies*, vol. 40, No. 3, July 2013, pp. 324-339.
Published by: Taylor & Francis, Ltd
[523] Campanini, "Democracy in the Islamic Political Concept", p. 349. See also Alam, Mansoor, "Islam and Secularism", *Pakistan Horizon*, vol. 66, No. 3, July 2013, pp. 37-49, published by Pakistan Institute of International Affairs.
[524] He stated: "Islam has very little in common with modem democracy. doubtful whether the world of Islam can become democratic without undergoing a serious reformation of its basic principles." See Al-Najjar, Fauzi M., "Islam and Modern Democracy", *The Review of Politics*, vol. 20, No. 2, Apr., 1958, p. 175.
[525] The idea is also contested amongst Muslim secularists. See Topal, Semiha, "Everybody Wants Secularism—But Which One? Contesting Definitions of Secularism in Contemporary Turkey", *International Journal of Politics, Culture, and Society*, vol. 25, No. 1/3, September 2012, pp. 1-14. See also Ozler, Hayrettin and Yildirim, Ergun, "Islam and Democracy: A False Dichotomy", *Insight Turkey*, vol. 10, No. 3, 2008, pp. 87-99 and Ozcan, S. A., "The Role of Political Islam in Tunisia's Democratization Process: Towards a New Pattern of Secularization?", *Insight Turkey*, Vol. 20, No. 1, Winter 2018, pp. 209-226.

Church and the Roman state.[526] In the 1840 we saw the contribution of George Jacob Holyoake who was not content with mere free thought and criticism of religious institutions, such as the established Anglican Church but led a movement calling for ethical and political change based on his view of secularism. In modern political thought thinkers such as Baruch Spinoza, John Lock and Immanuel Kant further developed the nature and connection between religion and politics, each distancing the polity from religion in their respective ways. Contemporary exposition of secularism by the likes of John Rawls, Jurgan Habermas and Charles Taylor defended the case and their version for secularism in the current era with various justifications. While there is a general acceptance that religion cannot form the exclusive political temporal authority there is disagreement as to the nature and limit of the role religion can have within the political sphere. Contemporary scholarship is not uniform in their accommodation of religion, some advocated the classical strict separation of Church and state while more critical voices such as Charles Taylor acknowledged secularism is rooted in "Latin Christendom."[527]

As regards the core and essence of secularism, according to Modood and Kastoryano:

> the universality of secularism lies in the principle of equality according to which there is no domination of one religion – the majority, therefore, the national – over other religions in a de facto Minority situation. Hence the assumption of state neutrality in respect of religion. The state does not have a view about any of the religions in society but insures the freedom to individuals to practise (or not) their religion.[528]

Secularism is about rejecting the rules based on the superstition of religion - that anything not subject to the empirical investigation of man is a superstition and religious belief which cannot be the basis of rules regulating public life of society. The reason for its institution is unique to the Christian experience in Europe, i.e., to the exploitation of people by the use and domination of religion.[529] Thus, the political philosophers of the Enlightenment argued that religion should be distanced from the public, where only empirical considerations decide matters of law and administration. According George Jacob Holyoake secularism is "a form of opinion which concerns itself only with questions, the issues of which can be tested by the

[526] Scherer, Matthew, "Secularism", *The Encyclopedia of Political Thought,* First Edition. Ed. by Michael T. Gibbons (John Wiley & Sons, Ltd, 2015), p. 5.
[527] Scherer, "Secularism", p. 10.
[528] Modood, Tariq and Kastoryano, Riva, "Secularism and the Accommodation of Muslims in Europe", in *Multiculturalism, Muslims and Citizenship: A European Approach*, ed. Tariq Modood, p. 168.
[529] Scherer, "Secularism", pp. 2 and 3.

experience of this life".[530] Also according to him, "Secularism is a code of duty pertaining to this life founded on considerations purely human, and intended mainly for those who find theology indefinite or inadequate, unreliable or unbelievable"[531] Clearly this is different from a religion which historically has not recognized a public-private divide in its polity.

According to Campanini democracy and secularism are inseparable and at odds with traditional Islam:

> A very controversial issue as regards democracy is secularism. Are democracy and secularism so intertwined that we cannot think of one without the other? Does secularism impose a democratic political system and does democracy have secularism as its founding principle? The answer seems to be positive in Western political thought whose development in modern times, from Machiavelli to Locke to John Stuart Mill, developed the concepts of democracy and freedom on the basis of a clear distinction between the religious and the political sphere, the first private, the second public.[532]

Perhaps the best summation of secularism is by Matthew Scherer whose entry of the discussion of secularism in *The Encyclopedia of Political Thought* defined it in the following way:

> Secularism constrains religion to a sphere of private and individual belief, construed as the domain of conscience, thus clearing the way for the governance of public life by mechanisms devoid of religious origins and intentions, such as rational deliberation, competition of interests, and instrumental reason. It is both an ideological and an institutional formation that emerged within Europe and its colonies as the result of a process of secularization itself roughly coextensive with the modern age and culminating in the separation of church and state.[533]

The key elements in Scherer's definition which go to the core of secularism is the constraining of 'religion to the sphere of private and individual belief' and the 'clearing the way for the governance of public life by mechanisms devoid of religious origins and intentions' is contrary to normative understanding of Islamic *Sharīʿa* law and how it operates.

[530] Holyoake, George Jacob, *English Secularism*, p. 60.
[531] Holyoake, *English Secularism*, p. 35
[532] Campanini, "Democracy in the Islamic Political Concept", p. 345.
[533] Scherer, "Secularism", p. 1.

The *Sharīʿa* does not make a private public distinction and nor can governance and the deliberative process be separated from religious origins. This is the view of classical scholars and the view of minority *fiqh* scholars themselves.[534] Ramadan acknowledges that "it happens that residents or citizens of Western countries find themselves obliged to take part in transactions forbidden by their religion."[535] In such cases he urges the scholars to consider these on a case-by-case basis and consider the *maṣlaḥa* or necessity and come or a resolution. He does not dwell on what the resolution could be or what happens when a reconciliation cannot be found.[536]

Muslim secularists[537] such as Abdullahi Ahmed An-Na'im[538], Muḥammad Abdul Muqtedār Khan[539] and others[540] have claimed that secularism can be reconciled with Islam according to their reading of the religion, however the interpretation is rejected by mainstream Muslim scholarship. The Muslim world after the first world war with the demise of the Ottoman and the rise of Mustafa Kemal Ataturk to power and the independence of the Arab states in the post-colonial era saw secular nation states with varying degrees of religious accommodation though they were bound to face difficulties due to the contradiction with western definition of secularism and those who opposed it.[541] Indeed, those Islamist groups that engaged with

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[534] Mawlāwī, "Participation by Current Islamic Movements".
[535] Ramadan, *Western Muslims*, p. 99.
[536] Ramadan, *Western Muslims*, p. 99.
[537] Campanini lists the key Muslim secularists in the Arab world, he states:

> The noble father of secularism in the Arab and Islamic world can be considered perhaps 'Ali 'Abd al-Raziq who in his book (published in 1925) al-Islam wa usul al-hukm (Islam and the fundaments of power has clearly argued for the necessity to separate religion from politics, denying the political extension of religion and vindicating a true dimension of politics for modern Arab and Islamic thought. Abd al-Raziq's message is still alive in many prominent contemporary Muslim intellectuals, such as the Syrian Sadiq Galil al-'Azm, the Egyptian Fuad Zakariyy, the Moroccan Abdou Filaly-Ansari or another Syrian, Bassam Tibi (and many others I cannot cite here). Their stances are far from being coherent or convincing, however, "Democracy in the Islamic Political Concept", p. 345.

[538] See *Islam and the Secular State* by Abdullahi Ahmed An-Naʿim. See also https://en.unesco.org/courier/2019-1/abdullahi-ahmed-naim-human-rights-secular-state-and-sharia-today.
[539] Khan, Muqtedar, "The Priority of Politics", *Boston Review*, April/ May 2003 Issue <http://bostonreview.net/BR28.2/khan.html>(Accessed December 2005), p. 4.
[540] Early Muslim proponents of secularism were Farah Antoun (d.1922), Lutfi al-Sayyid (d.1923) and Shaykh 'Ali 'Abd al-Raziq (d.1966) from Al-Azhar university. See Kamali, Mohammad Hashim, file:///C:/Users/44795/Downloads/Civilian_Democratic_Dimensions.pdf, p. 2.
[541] Keddie, Nikki R., "Secularism & Its Discontents," *Daedalus*, vol. 132, No. 3, 2003 and "On Secularism & Religion", Summer, 2003, p. 30. Hallaq gives the following analysis of the reasons for why secularism could not take root in the Muslim world:

> In fact, this project of secularization had already been adopted and tried during the first three quarters of the twentieth century. But the project, to judge by the overwhelming evidence, has proven to be largely unsuccessful, this evidence being, among other phenomena, the failure of Naṣṣerism and

secular politics after the Arab spring such as Ennahda in Tunisia, did so as a matter of strategy, did not adopt secularism as a matter of theology.[542] Despite the accommodation of religion which the practice secularism in the West also accepts to a limited degree does not afford Islamic law the wide jurisdiction that classical scholars and minority *fiqh* scholars deem it to have. Wael Hallaq, an expert on Islamic Law, due to this inherent contradiction has posited in his *The Impossible State,* the incompatibility of the modern nation state and its institutions with Islam.[543] According to Joseph J. Kaminski:

> It is *not* that Muslims are inherently incapable of creating and operating a fair and representative Islamic political system due to their own personal shortcomings. Rather, it is that such a system simply is not possible under the current nation-state model, a model that has been unwaveringly hostile to such a mode of politics ever emerging at so many different levels. Muslims must think beyond the oppressive imagined boundaries of the modern nation-state if they are ever to reclaim *ummatic* agency.[544]

The above discussion is not an exhaustive discussion of the subject, clearly much complexity surrounds these matters. However, a basic outline has been given to demonstrate that there are similarities in the aims, but the means are not necessarily the same. Therefore, to argue that citizenship is based on a consonance of values does not reflect the context and as such is unrealistic with diminished prospect of realizing the aim of integration. Minority *fiqh* scholars engage in selective focus and embracing of some aspects of western liberal ideals to the exclusion of the other depending on their aims and goals. While coexistence might be possible but will a rejection of the core and acceptance of the peripheries or aspects be acceptable to wider society? There are two sides to this equation, one is the Muslim articulation of its belonging and an evaluation of its congruity based on its legal, theological,

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socialism and the subsequent rise of Islamism after the 1960s.' see The Impossible State: Islam, Politics, and Modernity's Moral Predicament (Columbia University Press: 2012), p. 12.

[542] The leader of Ennahda, Rachid al-Ghannouchi (who was a member of the ECFR), justified its political involvement and assumption of power on the assumption that the Treaty of Madinah was pluralistic where citizenship was the basis of the polity and not religion. March, *Caliphate of Man*, pp. 212–13. According to Ovamir Anjum, "This secularist reading may have been driven by political expediency rather than any evidence-based reasoning, but it must be evaluated nonetheless on scholarly grounds. Not only does this reading bear no resemblance to fact, it flies in the face of the entirety of normative Islamic legal theory (*uṣūl al-fiqh*).2 https://yaqeeninstitute.org/read/paper/the-constitution-of-medina-translation-commentary-and-meaning-today#a55.

[543] Hallaq, *The Impossible State*, pp. 49-50.

[544] Kaminski, Joseph J., Irredeemable Failure: The Modern Nation-State as a Nullifier of Ummatic Unity, https://ummatics.org/2022/12/14/irredeemable-failure-the-modern-nation-state-as-a-nullifier-of-ummatic-unity/, p. 23.

and philosophical principles, but the other is the reception by wider society and its political elites. Weather there can be what Andrew March called an 'overlapping consensus'[545] is as critical as any Muslim propositions of how they wish to belong. In the context of the UK and Britishness, can Muslims carve a belonging that will be acceptable and efficacious, it is to this issue we shall devote the rest of this chapter.

Section III. Dilemma of Belonging: *Real or Imagined?*

Another topic relevant to the question of identity is the subject of nationalism and national identity. Previously, this topic which has been discussed in the context of the Muslim world where the modernist reaction to it has been negative due to its perceived contradiction with the idea of a universal Umma. However, Ramadan contends the two things are different and hence there is no contradiction. For him to say 'Muslim' refers to 'who' and 'British' refers to 'how' which are two different questions.[546] Therefore, there is no dilemma and Muslims should not feel inhibited from adopting a national identity. Ramadan does not view nationality only in a legal sense where there is civil allegiance to a state as synonymous with the term citizen, but it is deeper belonging where one shares a common culture, language, and history. The form of nationalism Ramadan is calling not only for a civic nationalism, which is essentially a legal tie, but also for a quasi-ethnic nationalism. Thus, a shared language and history, though obviously not ethnic descent, are elements on which he wishes to see the new British identity being built.[547] Building on Ramadan's discussion Delwar Hussain has sought to provide evidence from the sources that Islam is in harmony nationalism.[548] He concludes that the adoption of Britishness has already happened because the second and third generations view Britain as home.

In this section we will be considering the following points:

1. Historically was there a dilemma for belonging?
2. The nature of the *umma* identity.
3. The legal appreciation of nationalism.
4. Adoption of Britishness, how realistic is it?

[545] March, "Liberal Citizenship", p. 373.
[546] Ramadan, *To be a European Muslim***,** p. 163.
[547] Ramadan, *Western Muslims*, p. 165.
[548] One point interesting to note is that both writers speak of nationalism in all but name. Perhaps this is because of the negative attitude some Muslims have towards it.

Nation or Umma: is there a Dilemma?

To answer this question, one needs to appreciate the historical dimension and backdrop in respect of two key ideas: nationalism and the idea of a Muslim *umma*. Modern nationalism and nation states are a 19th century creation, the antecedents of which can be traced back to the writings of Rousseau with its modern conception taking shape in Germanic Prussia.[549] The modern notion of nationalism advocated the formation and preservation of political sovereign entities based on ethnic, linguistic, and territorial grounds. The *umma*, when referring to the Muslim *umma*, however is a universal belonging crossing the boundaries of language, colour, ethnicity, or history. It is abstract and yet practical in its significance. The word *umma* has a multiplicity of meanings depending on source and context one is referring to. After a study of the usage of the word *umma* in the Qur'ān in the Makkan and Madinan period Katrin A. Jomaa makes the following observation:

> The core of the Islamic umma is the Muslim umma. I mean by Islamic umma the umma that includes Muslims, Jews, Christians, and others yet is founded based on Islamic ethics. The Islamic umma is multireligious and is legally pluralistic. The Muslim umma, on the other hand, represents the umma united by one book and follows one *sharīʿah*, that of the *Qurʾān*. The Muslim umma forms the nucleus from which the Islamic umma grows, which is inclusive and pluralistic in character and has a global potential.[550]

Jomaa recognises that the Muslim *umma*, which is what we are presently concerned with, is united by its belief in the *Sharīʿa* and the Qur'ān. However, she argues that the *umma* in a general sense, as used in the religious texts, can refer to all nations regardless of religion. However, she fails to note that linguistic usage is not the same as the question of how Muslims identify themselves or what symbolism they choose to attach to the term when one speaks of belonging from a theological and jurisprudential sense. Jomaa seems to be making the argument that the idea of a Muslim *umma* united by their faith first and foremost is a modern concept and attributes it to Sayyid Quṭb. She states: *"*From the modern period, Quṭb defines the *umma* ideologically as a universal concept. According to Quṭb, the *umma* represents a group of believers irrespective of their race, gender, colour, and nationality. He

[549] Safi, Louay, "Nationalism and the Multinational State", *American Journal of Islamic Social Sciences*, Vol 8, 1991, p. 2.
[550] Jomaa, Katrin A., *Umma: A New Paradigm for a Global World* (Albany: State University of New York, 2021), p. 129.

believes that the Qurʾānic view of the umma is based on belief rather than materialistic considerations."[551] Here Quṭb is clearly speaking of the Muslim *umma* and not the variety of usages in the Qur'ān which he himself notes and acknowledges in his exegesis of the Qur'ān.

Jomaa also commits a similar error when analysing the treaty of Madinah were she emphasis aspects to the exclusion of others. Ovamir Anjum has observed the tendentious reading of the treaty by some contemporary writers in his article entitled *The Constitution of Medina: Translation, Commentary, and Meaning Today*. He states: "The common misrepresentations of the document rely on crucial omissions, favouring what is most convenient today over a commitment to an authentic grasp of the Sunna."[552] Jumaa opts to focus on the aspect of inclusivity in the treaty as being pluralistic nature, she says:

> The Medina Constitution describes an inclusive umma receptive to any human being who is willing to be affiliated with its inclusive values. That inclusive umma does not eliminate religious, cultural, or political diversity but acknowledges them as respected choices with meriting consequences. The constitution, with its principles and values, represents the foundation that unites the diverse communities of the umma into one shared body, *umma wāḥida*. The decrees reflect different kinds of pluralism. Religious pluralism is manifested by inclusion of Muslims and Jews within the umma, each community following its own religion and Law.[553]

While she acknowledges the treaty of Madinah contains a decree which represents the *umma* as a political body, [554] she minimises this point by focusing on the relationship with the non-Muslim party to the treaty. According to Ovamir Anjum, who provides more of a balanced view, the "most central concern of the Kitab is the community of the Believers, the *umma*, its mission, and its political, religious, and social unity, and its peaceful coexistence with its non-Muslim neighbours."[555] He recognises the political entity of Muslims as represented by the *umma* as well as the question of "peaceful coexistence with its non-Muslim neighbours".[556] He refers to the opening clauses of the treaty which establish "the *umma* as a religious and

[551] Jomaa, *Umma: A New Paradigm* p. 54. Also see Sayyid Quṭb, *Fi Zilal al-Qur'ān*, 1:113.
[552] Anjum, Ovamir, "The "Constitution" of Medina: Translation, Commentary, and Meaning Today", https://yaqeeninstitute.org/read/paper/the-constitution-of-medina-translation-commentary-and-meaning-today.
[553] Jomaa, *Umma: A New Paradigm* p. 170.
[554] According to Jomaa: *'Decree 14 emphasizes collaboration of the believers to protect and defend each other as a united umma against any threat.*' Jomaa, *Umma: A New Paradigm* p. 149.
[555] Anjum, "The "Constitution" of Medina".
[556] Anjum, "The "Constitution" of Medina".

political community," *umma* here being the Muslim *umma*.[557] Anjum notes the variety of meanings the word *umma* has, however in the context of the treaty of Madinah he observes: 'However, (iii) in this document, the Prophet defines the *umma* in the way that becomes the primary meaning of the term for all time, in accordance with the Qur'ānic verses that were revealed about this time: "O you who believe… You are the best *umma*…" (3:102-110) and "Thus we have made you the middlemost/best *umma*…" (2:143).'[558] He further states: "If the Kitāb is to be taken as a coherent document, the community (*umma*) on which the Medinan order is built must mean the community of the Believers"[559] contrary to Jomaa's assertion that "Religion, as in *Sharīʿa*, is not a unifying element in the formation of the *umma* in Medina because each group was given independence in practicing its own Religion."[560]

Historically another representation of the idea of *umma* is its connection to the historical caliphate. According to Scott Morrison the "clearest political expression of the umma is the Caliphate."[561] Historically as well the idea of *umma* was identified with the Caliphate because it represented Muslim unity and hence the Caliphs themselves invoked this connection for various their ends. The Abbasid Caliphs for instance, states Morrison, invoked the "symbols of the umma and Islamic umma"[562] when the empire was in a state of dissolution towards its end. The remnants of the past are still felt today. Reza Pankhurst, in his work entitled *The Inevitable Caliphate?*, commenting on the connection between the concept of the Caliphate and the *umma* states: "Indeed, the caliphate is based on the idea of the unity of the Muslim Umma under a single leader, and the belief that the basis of this rule should be Islamic."[563] In addition to Pankhurst, the symbolism of the historical caliphate via the idea of *umma* is also explored by other experts in the field such as Mark Wegner and Mona Hassan.'[564] The latter in her work *Longing for the Lost Caliphate: A Transregional History* cites classical scholars who almost unanimously held that the *umma* is obliged to be united by an caliph.[565] Hassan

[557] See clause one as translated by Ovamir Anjum which describes the 'believers': '§2. They are one people to the exclusion of all other people (*innahum umma wāḥida min dūn al-nās*),' Anjum, "The "Constitution" of Medina".
[558] Anjum, "The "Constitution" of Medina".
[559] Anjum, "The "Constitution" of Medina".
[560] Jomaa, *Umma: A New Paradigm* p. 171.
[561] Morrison, Scott, "The Genealogy and Contemporary Significance of the Islamic *Umma*," *Islamic Culture*, Vol. LXXV, 2001, p. 5.
[562] Morrison, "The Genealogy and Contemporary Significance of the Islamic *Umma*," p. 4.
[563] Pankhurst, Reza, *The Inevitable Caliphate?* (Hurst and Oxford University Press, 2013), p. 210
[564] Pankhurst, *The Inevitable Caliphate?* p. 34.
[565] See the following:

describes the situation, as perceived by Hassan Banna, following the abolishment of the caliphate in 1924:

> The Turks, he lamented, had recently abolished the caliphate in 1924, thereby leaving the global Muslim community bereft of its traditional source of political and religious leadership— even if the venerable institution's reach had dwindled to the level of potent symbolism. And a wave of moral dissolution was overwhelming the intellectual trends, social venues, and institutions of Cairo, where he was studying.[566]

She further stated:

> In the early twentieth century, Muslims around the world actively imagined ways to retain and reconfigure the caliphate that had so potently symbolized that interconnected discursive community or *umma*.[567]

According to Abdullah al-Ahsan:

> The institution of the caliphate, as the ever more dispersed Islamic community, has been crucial to the *umma's* continuity at various points in Islamic history. Although the caliphate was formally abolished early this century in the aftermath of the fall of the Ottoman rule, it remains an important background element in contemporary thinking about the *umma*.[568]

After praising God and praying for peace on His prophets, the manuscript opens with a reminder of the obligation to appoint a leader for the Muslim community. al-Dhahabī notes: Sunnis ("The people of the prophetic way"), Muʿtazilites, Murji'ites, Khārijites, and Shī'īs [all] agree upon the necessity (*wujūb*) of the imamate and that it is obligatory (fard) upon the Muslim community (umma) to follow a just leader (*inqiyād ilā imām ʿadl*). The only exception is the Najadāt among the Kharijites who say that the imamate is not necessary and that people only need to give each other their rights, and this statement is null and void (*sāqiṭ*).' Quoted in Hassan, *Mona, Longing for the Lost Caliphate: A Transregional History* (New Jersey: Princeton University Press, 2016), p. 116.

[566] Hassan, *Longing for the Lost Caliphate*, p. 253
[567] Hassan, *Longing for the Lost Caliphate*, p. 194.
[568] al-Ahsan, Abdullah, *Umma or Nation? Identity Crisis in Contemporary Muslim Society* (Leicester: The Islamic Foundation, 1992), pp. 9-10.

As for the influence of nationalism, whether Turkish or Arab, it came very late, although nationalist historians have tried to retrospectively project Arab and Turkish nationalism[569] early into history. However, revisionist historians, such as Zeine N. Zeine, have questioned this and dated the emergence of Arab nationalism as a later phenomenon.[570] "For almost four centuries," states Louay Safi:

> Muslim Arabs and Turks were bound together under the banner of Islam. Throughout this period, the question of Arab nationalism was never an issue. Although Arabs were aware of the fact that they were ethnically different from the Turks, they had never considered a specifically Arab nationalism as a political doctrine or a basis for political organisation.'[571]

After the abolition of the Ottoman Sultanate and the Arab nation states that were created from the Ottoman Empire after World War I, it was natural that there would be a tension between the past and the new state structures and the political philosophies on which they were founded. This tension has been well documented by various writers such as Abdullah al-Ahsan in his *Umma or Nation? Identity Crisis in Contemporary Muslim Society*[572] or Tahir Amin in his work entitled *Nationalism and Internationalism in Liberalism, Marxism and Islam.*[573]

One major source of this tension was the new basis of international relations between Muslim states, the idea of national interest. Nation states by nature act based on the national interest regardless of any religious concerns unless it effects the nation in some way. During post-independence and in recent times we have seen how the national interest has conflicted with the perceived *umma* interest. The presence of the OIC (Organisation of Islamic Cooperation) is a living example of this dilemma where national interest competes and clashes with the *umma* interest, which is why it from its inception it had little prospect of success.[574] Given

[569] This type of tendentious nationalistic historiography was not restricted to Arabs and Turks. The same applies to Greek, Serb and other nationalisms which were supposed to have had their early proto origins in the Balkans under Ottoman rule.
[570] See Zeine, N., *Emergence of Arab Nationalism* (Beirut, 1966).
[571] Safi, "Nationalism and the Multinational State", pp. 11-12.
[572] al-Ahsan, *Umma or Nation*. See his case study of this tension in three new nation states of that time: Turkey, Egypt, and Pakistan, pp. 73-101.
[573] Amin, Tahir, *Nationalism and Internationalism in Liberalism, Marxism and Islam* (Virginia: International Institute of Islamic Thought, 1991).
[574] al-Ahsan, *Umma or Nation?*, p. 122.

this historical background, it should not come as a surprise that Muslims living in the West might find Western nationalisms problematic given that they are still coming to terms with their own versions from their countries of origin.

In the face of this historical background Ramadan, Delwar Hussain and others who have tried to reconcile national identity with the *umma* identity, it is odd that they have failed to even mention the historical associations of the concept of *umma*. To reconcile two concepts with political ramifications they have sought to depoliticise one, name the *umma*, by omission. A realistic approach, in addition to the scriptural analysis, should not ignore the historical aspect because it is one of the elements impacting on identity.

The Umma Dynamic

The *umma* is a dynamic vision of belonging and unity premised on beliefs and ideas which finds different expression determined by the connection of a particular reality with the prescriptions of the text. Ramadan and Hussain argue that the *umma* is only a religious unity based on faith[575], however they seem to miss a crucial aspect of the *umma* which is that it is dynamic, i.e., that its expression evolves according to circumstances as they relate to the prescriptions of the text. Before we go further into its propensity for dynamic expression let us first consider the starting point of the notion of *umma*; what does it mean as in its abstract sense, given that it is an abstraction in origin? Etymologically the word may possibly derive from the noun *'umm'*[576] or mother, signifying the source of identification. The Qur'ānic usage clarifies the nature of identification as being one based on thoughts, i.e., matters 'elected'[577] and not embodied physically by consideration of colour, language, or race. *'Mankind were but one community (umma), then they came to hold divergent views.'*[578] The unity that Mankind had was based on beliefs, over which they then split and divided. In the similar vein is the following verse: *'Nay! They say: We found our fathers following a certain way (umma), and we guide ourselves by their footsteps.'*[579] In other words we found our forefathers upon a certain belief and way, for which the Qur'ān uses the word *umma*. The word *umma* in addition to identification and belonging on ideas gives the notion of unity and unified purpose. *'And when he (Moses) arrived at the well of Madyan, he found there a group*

[575] Ramadan, *Western Muslims*, pp. 86-93.
[576] See Faruqi, Maysam J., "Umma: The Orientalists and the Quranic Concept of Identity", *Journal of Islamic Studies*, vol. 16, no. 1, 2005, p. 23. There are other views of the etymology of *umma*. Some have argued that it refers to tribes. This chapter will deliberately leave that discussion out for the sake of brevity.
[577] Faruqi, "Umma", p. 18.
[578] Qur'ān 10:19.
[579] Qur'ān 43:22.

of men (umma) watering their flocks.'[580] Here the group of men were unified by an activity and purpose. The religious *umma* however is unified their belief as that is its premise.[581] Thus, an *umma* is faith or idea-based community unified by its premise. As an abstraction, and as part of its nature, it serves a vision and source of identification for its membership. As a vision it can exist on many levels, and hence it is dynamic. Politically it finds expression as a unified authority, socially it means brotherhood, economically it means help and support of one's co-religionists, and theologically it means a people of one *milla* (religious community). The word *umma* can only be appreciated in its expansive meaning when one understands its multidimensional nature; that of vision, expression, and practise. It is dynamic because the reality will determine what it means to an individual in each circumstance. The starting point of *umma* is the faith-based unity, but that is only the beginning. What allows *umma* to take different shades of meaning is that the nature of the unity has been left open for the text to define. For example, Muslims praying together in congregation, black, white, rich, poor, educated, uneducated etc count for nothing, as they are unified. It is an expression of the *umma* and their brotherhood. However, the fact that they follow different schools of thought in their prayer is not disunity or contrary to brotherhood. Why? Because the regulator of the expression of *umma* and brotherhood is the sources, which state that this is acceptable.

Politically, the *umma* vision historically attached itself to the Caliphate and that was one of its expressions in history. Today, the expression may be different according to political philosophy and nature of societal organisation that Muslims derive from a modern reading of the text. However, whatever, the outcome, it will fit into the abstraction and vision of the *umma* and the *umma* will be invoked for its legitimacy. Economically, for example we can say the international Muslim charity organisations like the Islamic Red Crescent are an expression of *umma*, as people donate due to their concern for the *umma's* poverty or plight. This connection is not contrived but predicated by its nature and requirements of the sources. With the advent of globalisation Muslims are finding it easier to connect to this vision though not at the same pace and extent.[582]

Legal Legitimacy of Nationalism

[580] Qur'ān 28:23.
[581] See al-Ahsan, *Umma or Nation?*, p. 45 for a discussion of the Qur'ānic usage of the word *'umma'*.
[582] Schmidt, "The Transnational Umma – Myth or Reality? Examples from the Western Diasporas".

The above is a conceptual approach to the subject of nationalism and the *umma*. Delwar Hussain, in *British Muslims between Assimilation and Segregation*[583], sought to extend and give Ramadan's point's legal credence by citing evidence from the sources which permit adoption of nationalism. In this regard he advances the following arguments[584] some of which are textual, and others are observations of people's contradictory attitudes and behaviour:

1. He cites verses from the Qur'ān mentioning how Prophets were sent to their *qawm* or brethren even though their people had belied them. He equates the words *qawm, waṭan, akh* and *shaʿb* mentioned in the sources with the modern notion of nationalism.
2. The Prophet Mohammed's love Makkah, his birthplace.
3. The situation of English reverts.
4. Contradictory behaviour of Muslims, British identity is a problem acceptable when it refers to Muslim countries. For example, no one objects when we refer to a Muslim from India as Indian Muslim.
5. There are those who say they object to being British and yet they feel quite at home in Britain and choose to live here rather than go back to the Muslim countries there is relatively less security.

Before we discuss the above points, it is worth outlining a basic definition of modern nationalism. Nationalism is a philosophy which brings together the ethnic identity into a political entity, hence the conflation of words 'nation' and 'state' to describe such a national entity. Noted historians of nationalist history and philosophy have defined nationalism in this sense. According to Ernest Gellner: *"*Nationalism is primarily a political principle, which holds that the political and the national unit should be congruent."[585] A similar definition is given also by John Hutchinson: "Modern Nationalism puts forward a theory of political legitimacy whereby the political and ethnic boundaries must coincide, and state institutions must represent ethnic values."[586]

[583] Hussain, Delwar, "British Muslim Identity," in (eds.), *British Muslims Between Assimilation and Segregation: Historical, Legal and Social Realities,* Seddon, Muhammad Siddique et al. (Leicester: The Islamic Foundation, 2004), pp. 99-100.
[584] Hussain, Delwar, "British Muslim Identity," (Leicester: The Islamic Foundation, 2004), pp. 99-100. I have only cited those I believe are the most significant.
[585] Gellner, Ernest, *Nations and Nationalism* (Oxford, 1983), p. 1.
[586] Hutchinson, John, *Modern Nationalism* (Fontana Press, 1994), p. 16.

And Elie Kedourie explained the philosophy in the following words:

> The doctrine (of nationalism) holds that humanity is naturally divided in to nations, that nations are known by certain characteristics which can be ascertained, and that the only legitimate type of government is national self government.'[587]

Also, Bihkhu Parekh states

> National identity refers not – as the nationalists argue – to a mysterious national soul, substance or spirit but to the way a polity is constituted, and includes such things as its deepest tendencies, dispositions, values, ideals and ways of thought.'[588]

From the above it is clear that nationalism involves the fusion of the ethnic identity with the political community. Is this congruous with the concept of an *umma* whose political manifestation, as discussed above, is not based on ethnicity, colour, language but religion and faith? Delwar Hussain constantly confuses the ethnic tie, which the sources allow and sanction, with the nationalist-political philosophy.[589] Thus love of land, people, language, culture are all permissible if they do not take precedence over the religious affiliation. The Prophet loved Makkah as his birthplace but established a polity in Madinah and made the *Ansar* his own. In fact, the Covenant or Treaty of Madinah established the *Muhājirs* and the *Ansar*, as one people or nation, brought together by faith and excluded the Makkan Quraysh who were of the same ethnicity.[590] This however was different from the Prophets of old who were sent to their ethnic community or *qawm*. They did not establish nationalist political entities and how could they have, the idea did not exist then. It strained attempts at back projection of modern ideas into an ethnic past is what led to historians like Benedict Anderson to speak of national identities as "imagined identities"[591] or as an "invented tradition" according to Eric Hobsbawm.[592]

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[587] Kedourie, Elie, *Nationalism* (Blackwell, 1993), p. 1.
[588] Parekh, Bihkhu, "The Concept of National Identity", *New Community*, vol 21, 1995, p. 267.
[589] Sometimes this confusion can be discerned in the same sentence: 'Islam does not give much importance nationalistic identities; on the contrary it frowns upon those who divide themselves up on this basis, rather than unite around the common bond of faith. However, this does not mean that a Muslim cannot hold a piece of land dear to his or her heart and even identify with that territory, state or country.' Hussain, Delwar, "British Muslim Identity," in (eds.), *British Muslims Between Assimilation and Segregation: Historical, Legal and Social Realities*, Seddon, Muhammad Siddique et al. (Leicester: The Islamic Foundation, 2004), pp. 99-100.
[590] The text states: 'One people to the exclusion of others' (*ummatan wāḥidatan min dūn al-nās*). See Ibn Hisham, *al-Sira al-Nabawiyya*, ed. 'Abd al-Salam Harun (Kuwait, 1979), p. 124.
[591] Anderson, Benedict, *Imagined Communities*, rev edn. (London: Verso, 1991), p. 65.
[592] Hobsbawm, Eric ed, *The Invention of Tradition* (Cambridge, 1983), pp. 13-14.

Adopting 'Britishness'

In addition to the historical, conceptual, and textual consideration of the subject of nationalism it is necessary to assess to extent to which the adoption of a nationalist identity by Muslim citizens living in a non-Muslim country is feasible. As we said before, one test of the congruity of a legal thought is its efficacy in realising its objectives. The aim of Ramadan and Hussain's discourse is to facilitate the adoption of the host country's national identity. How realistic is this prospect? As a case study Britain is perhaps the best place to start given that at one time it was hailed as an example *par excellence* of a successful nation state,[593] though now its nationalism is arguably weaker[594] compared to that of Germany and France. The people of the British Isles, with strong and different ethnic nationalities are themselves going through an identity crisis. The Britain of today, now that the days of the British empire for many are but a distant memory, after accession to the EU and further European integration and the relentless march of globalisation, had witnessed a dilution in national identity and even confusion.[595] The backlash of British Euroscepticism has its roots in the decline of the British empire.[596] Further dilution has taken place due to things like the Welsh and Scottish devolution raising the West Lothian Question where MP's of devolved regions can vote in matters that only effect England but English MP's cannot do the same in respect of Scotland, Wales and Northern Ireland.

Just what does it mean to be British today?[597] One might argue that the regional identities, such as the English identity, are more distinct[598] than the national identity and engulf British identity.[599] Indeed, the decline of nationalism is wider phenomenon in the western liberal societies. Even those liberal nationalist sociologists like David Miller, who advocate cultural nationalism in Britain, accept that there is a general decline in confidence[600]: "if a lingering, very often non-religious, Protestantism is one component of current British identity, then other components of have taken a severe bruising in the post-cold war period, to the point

[593] Greenfeld, L., *Nationalism: Five Road to Modernity* (Cambridge, 1992).
[594] Anthony Heath, Bridget Taylor, Lindsay Brook and Alison Park, "British National Sentiment," *British Journal of Political Science*, vol. 29, No. 1, Jan., 1999, p. 173.
[595] Akala, "The Great British Contradiction", *RSA Journal*, vol. 164, No. 2, 2018, p. 18.
[596] Corbett, Steve, "The Social Consequences of Brexit for the UK and Europe: Euroscepticism, Populism, Nationalism, and Societal Division", *The International Journal of Social Quality*, vol. 6, No. 1, Summer 2016, p. 13.
[597] This was the question raised in the Fabian society conference on British identity.
[598] Kumar, Krishan, "Nation and Empire: English and British National Identity in Comparative Perspective, Theory and Society", vol. 29, No. 5, Oct., 2000, p. 593.
[599] Kumar, Krishan, *The Making of the English National Identity* (Cambridge: Cambridge University Press, 2003), p. 593
[600] Miller, David, *On Identity* (Oxford, 1995), p. 157.

where many Britons may wonder whether there is anything distinctly valuable left in British identity at all."[601] He goes on to say "the post war experience of people in Britain has directly undermined the main elements out of which British identity was originally constructed. This accounts for the confused feelings that many experience when asked what it means to them to be British. On the other hand, there is a strong sense that the British do have a separate identity…on the other hand it is far from clear what this separate identity is supposed to consist in."[602] And whatever notion of Britishness people have has sometime has had the opposite effect of being exclusionary, a point made by the Runnymede Trust Report on 'Islamophobia' in Britain back in 1996.[603] In Britain today there is a wide recognition now, especially after the outrages of 7/7 that there was a need to define Britishness, but so far nothing concrete has emerged[604] and some have pointed to the futility of doing so and compared it to like 'painting wind'[605]. New Labour Politicians have attempted to renew Britishness[606] and have offered only sound bite solutions like Gordon Brown's prescriptive suggestion of a national identity celebration day[607] or Tony Blair's vague 'qualities' of Britishness which every nation worth its name will claim to have.[608] Conservative party politicians, promoting their own form of English nationalism[609], have also compounded the alienation which charges of racism due to their immigration policies, especially the case of Windrush scandal in 2017 when Commonwealth citizens in their hundreds, from the 'Windrush' generation, had been unlawfully[610] detained, deported and denied legal rights.[611] Some have despaired with the phenomenon of Britishness and could not see it as having any meaningful presence due to its past. According to Theodore Koditschek:

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[601] Miller, *On Identity*, p. 170.
[602] Miller, *On Identity*, p. 172.
[603] Runnymede Trust, "Islamophobia: A Challenge for Us All", p. 1.
[604] The Fabian Society's conference of the Future of Britishness represented only a beginning and a recognition that something needs to be done. See http://www.fabian-society.org.uk/press_office/newssearch.asp?newsID=520.
[605] https://www.bbc.co.uk/news/uk-17218635.
[606] Kim, Nam-Kook, "The End of Britain?: Challenges from Devolution, European Integration, and Multiculturalism", *Journal of International and Area Studies*, vol. 12, No. 1, June 2005, p. 75.
[607] http://news.bbc.co.uk/1/hi/uk_politics/4611682.stm.
[608] "Few would disagree with the qualities that go towards that British identity…Qualities of creativity built on tolerance, openness and adaptability, work and self improvement, strong communities and families and fair play, rights and responsibilities and an outward looking approach to the world that all flow from our unique island geography and history." http://news.bbc.co.uk/1/hi/uk_politics/693591.stm.
[609] Kim, "The End of Britain?", p. 75.
[610] https://www.theguardian.com/uk-news/2021/dec/16/windrush-high-court-rules-claimants-human-rights-breached-by-home-office.
[611] Akala, "The Great British Contradiction", p. 20

> Britishness is a fascinating social, cultural, and political phenomenon which has commanded the stage of world history for three centuries. Nevertheless, I suspect that its day may soon be done. particular form of nationalism seems simply too burdened down aggressive, imperialistic, and class-divided history to offer solutions increasingly globalized, democratic, and multicultural age.[612]

Further compounding the problem, in addition to lack of a clear or even semi clear British identity, is the question of how Muslims in Britain perceive how they are perceived by the wider society and the West at large. It is well established in sociological studies of identity that the nature of belonging is situational and relational. Identity formation is not something that happens only within from an internal stimulus, but it is something that is affected from the outside. It is not just supported by similarity and familiarity; it is also given life by dissimilarity and difference. In fact, one might say they are two sides of the same coin. In this respect, the perception of Muslims that they are victimised by western governments has given greater definition to the Muslims identity of Bengali and Pakistani Asians in particular. Indeed, it was domestic and international events which sparked the new global awareness of Muslim in Britain. As Humayun Ansari put it:

> made to feel different and excluded, many British Muslims, especially the youth, found a valuable resource and alternative forms of identification in 'religion'…the projection of this new identification grew in response to the local. National and global issues in which Islam was seen as to be the centre-stage…[613]

Sociologists like Iftikhar Malik echoed similar views when he discussed the impact of George Bush and Tony Blair's foreign policy: "Though leaders like George Bush and Tony Blair tried to allay Muslims fears by rejecting the notion that the war on terror was the expression of a clash of civilisations, common Muslims perceptions considered the campaign against terror to be inherently anti-Muslim."[614] These events have placed the ethnic or national component of a Muslim's identity in the back seat and brought a more self-aware global Muslim identity to the fore, especially after 9/11.[615]

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[612] Koditschek, Theodore, "The Making of British Nationality", *Victorian Studies*, vol. 44, No. 3, Spring, 2002, p. 396.
[613] Ansari, *The Infidel Within*, p. 9.
[614] Malik, Iftikhar, "Muslims in Britain: Multiculturalism and the Emerging Discourse," p. 93.
[615] Hussein, Delwar, "The Impact of 9/11 on the British Muslim Identity", p. 128.

In last decade or so developments in the UK government policy towards security and integration has had an indelible impact on Muslims consciousness of belonging in the UK. One significant policy change has been the move away, at least in rhetoric and political discourse from multiculturalism due to a fear that it has allowed or fostered an environment where communities are alienated from the values of the wider society leading to deterioration of social cohesion.

Richard T. Ashcroft and Mark Bevir have defined multiculturalism in the following way:

> multiculturalism" is simply the opposite of cultural homogeneity. In concrete terms, however, "multiculturalism" evokes a series of discourses regarding the appropriate way to respond to cultural and other forms of difference. These debates cover a wide variety of topics, including appropriate modes of dress, land rights, anti-racism, religious freedom, court procedure, immigration, language and educational policy, the scope of human rights, and even the basic structure and aims of the polis.[616]

In the UK context our focus is on the way minority communities and their deference has been accommodated by the British government. In respect of the history of multiculturalism, it first emerged as a "distinct phenomenon" in the UK in the mid 1940's.[617] The decolonisation that followed 1945 saw post-war governments seeking to maintain influence as head of the Commonwealth via accommodation of Commonwealth subjects via immigration reform. This resulted in a two-pronged approach where domestically an integrationist policy, as opposed to an assimilationist one, was followed by governments whilst maintaining a robust immigration controls externally.[618] During the Thatcher years and despite her anti-immigration rhetoric the dual policy since 1924 was largely maintained. When New labour came to the political scene in 1997 the affected the course of multiculturalism via the policy of devolution and rearticulated civic participation. However, this policy was tested various events such as the 9/11 attack and the wars of Afghanistan and Iraq that followed, not to mention the domestic acts of violence such as the 7/7 bombing in London, leading to an assimilationist approach, via the passing of anti-terror legislation and passing of tough immigration rules, that was carried through from New Labour by Conservative Cameron,

[616] Richard T. Ashcroft and Mark Bevir, "What is "Postwar Multiculturalism in Theory and Practice?" in *Multiculturalism in the British Commonwealth*, Chapter Title: (Berkley: University of California Press, 2019), p. 1.
[617] Ashcroft and Bevir, "British Multiculturalism after Empire: Immigration, Nationality, and Citizenship" in *Multiculturalism in the British Commonwealth*.
[618] Ashcroft and Bevir, "British Multiculturalism", p. 29

May and Johnson and government and beyond till present. The approach was bolstered further in 2015 when David Cameron won a second term and declared: "For too long, we have been a passively tolerant society, saying to our citizens: as long as you obey the law, we will leave you alone. It's often meant we have stood neutral between different values. And that's helped foster a narrative of extremism and grievance… This Government will conclusively turn the page on this failed approach. As the party of one nation, we will govern as one nation, and bring our country together. That means actively promoting certain values."[619] Despite these changes some have argued that multiculturism in the UK is still a "demographic fact"[620]. The detractors however have pointed out that such a shift has actually increased the alienation. Although the direction of travel in policy terms is against multiculturalism some, and they are a minority, question the current notion of integration and wish that multiculturalism was not banished to the dust heap and say the emphasis on 'extremism' which is used as reason for the policy change is misplaced.[621] The problem of violent extremism cannot be laid at the door of multiculturalism and integration sounds too much like assimilation. The central question for them is that as long as communities are law abiding and respect core values of human rights then than diverse cultural values should be either tolerated or celebrated.

Baroness Sayeeda Warsi highlights that the political establishment and the press, guided by an ideological position to only engage positively a certain groups of Muslims and not others, has led sections of the Muslims community to be considered as the 'other' and as such this has hampered integration and led to mutual disengagement.[622] Other indicators of a less tolerant society for some commentators is the way the UK government has addressed the Syrian refugee crises.[623] Due to the humanitarian situation in Syrian following the civil war that broke out after the 'Arab Spring' many Syrians have turned to Europe for refuge. Whilst in Germany the Angela Merkel's government has welcomed a million refugees the UK Tory government has only admitted an extremely modest 10,000.[624] This was after public opinion was said to have softened after pictures of a Syrian toddler, Alan Kurdi, washed up on a

[619] Quoted in Ashcroft and Bevir, "British Multiculturalism", p. 35
[620] Ashcroft and Bevir, "British Multiculturalism", p. 39.
[621] Muslim Council of Britain (MCB), "Our Shared British Future
Muslims and Integration in the UK", http://www.mcb.org.uk/wp content/uploads/2018/03/Our-Shared-British-Future-Report_Integration-14-March-2018.pdf#page=3&zoom=auto,-158,136; Published in 2018 by the Muslim Council of Britain, p. 12.
[622] Muslim Council of Britain (MCB), "Our Shared British Future", p. 10.
[623] https://www.independent.co.uk/news/world/politics/world-welcoming-migrant-countries-least-most-uk-refugee-crisis-us-australia-eastern-europe-a7908766 html
[624] "Where have the UK's 10,000 Syrian refugees gone?", https://www.bbc.co.uk/news/uk-43826163

beach in Turkey in September 2015. According to Amnesty International the asylum prospects for Syrian refugees even after the media coverage of Alan Kurdi's tragic death has not improved.[625] Another factor which has arguably led to greater alienation of the Muslim community is the governments terrorism legislation and the Prevent strategy. The Government's prevent strategy sought to prevent extremism and but gave defined the term in such a way that it would disproportionately affect Muslims who had nothing to do with violent extremism.[626] Extremism was defined:

> as a vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs. We also include in our definition of extremism calls for the death of members of our armed forces, whether in this country or overseas.[627]

This definition was too broad and couple with legislative force was bound cause further alienation and anxiety amongst many among the Muslim community. A case in point, and without going into the long history of UK anti-terrorism legislation, was the Counter-Terrorism and Security Act of 2015 which received the Royal Assent on 12 February 2015. This act in its bill form caused many in the Muslim community to worry that it will criminalize normative and conservative Muslim beliefs as 'extreme'. The Prevent program which hitherto was a government policy was via the Act given a statutory status. It was the statutory embodiment of what David Cameron during his tenure termed as "Muscular Liberalism" in his speech to the Munich Security conference 2011.[628] The tough language at the time and the legislation that followed was perceived by many to target non only violent Jahidists but also conservative Muslims who abhor violence of any kind but wished to live a conservative Muslim lifestyle as others do in the Jewish community.[629]

Adding to this is the actual decisions and judgements of the Home Office, which apply the terrorism legislation, which some have charged as discriminatory. For example, at the time of writing this theses, Shamima Begum a 19-year-old girl from Bethnal Green who left to join Isis in Syria when she was 15, and who, living in a refugee camp in February 2019 wanted to come back to the UK with her new-born baby. The then Home Office minister Sajid Javed

[625] https://www.independent.co.uk/voices/syrian-refugees-libya-two-years-alan-kurdis-death-a7925616 html.
[626] http://www.irr.org.uk/news/will-the-governments-counter-extremism-programme-criminalise-dissent/
[627] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97976/prevent-strategy-review.pdf page 6.
[628] https://www.gov.uk/government/speeches/pms-speech-at-munich-security-conference.
[629] http://www.irr.org.uk/news/will-the-governments-counter-extremism-programme-criminalise-dissent/.

took the decision if revoking her British citizenship and made no efforts to help return her child, which was a British citizen. This led some to argue that the revocation was discriminatory as it disproportionately affects Asians and others to criticize that fact that the government seems to have washed its hands from responsibility to its citizens after the child died shortly after it was born due to the poor conditions at the refugee camp. At the time of writing the matter of her return is a subject of appeal and adjudication by the Special Immigration Appeals Commission (SIAC).[630] Such harsh decisions may well be supported by the wider public but do little assuage the concerns of some Muslims who feel they are treated like second class citizens.

British society is more overtly against immigration and difference and the success of Brexit in the 2015 referendum is a sign of that. Although questions of sovereignty, wage deflation (rightly or wrongly) and other ideas were strong motivations for Brexit, it cannot be denied that a desire to have less immigration to stem the influx of a foreign culture played a significant part, at least for a large minority of the British public.[631] The departure from the EU sees a return[632] to a British nationalism or perhaps more accurately English nationalism[633] but not of a kind that inclusive of ethnic or religious minorities, [634] and driven by issues of race and economics. According to Steve Corbett:

> While undoubtedly the populist Eurosceptic discourses that articulated English nationalist values drew on strands of xenophobia and gave license to an increase in

[630] https://www.theguardian.com/uk-news/2022/nov/24/desensitised-ex-is-followers-remain-threats-shamima-begum-hearing-told

[631] https://www.theguardian.com/uk-news/2018/sep/17/four-in-10-people-think-multiculturalism-undermines-british-culture-immigration

[632] Leonardo, Scuira, "Brexit Beyond Borders: Beginning of the EU Collapse and Return to Nationalism", *Journal of International Affairs*, vol. 70, No. 2, The End of International Cooperation? Summer 2017, pp. 109-123.

[633] Corbett, Steve, "The Social Consequences of Brexit for the UK and Europe: Euroscepticism, Populism, Nationalism, and Societal Division," *The International Journal of Social Quality*, Vol. 6, No. 1, Summer 2016, p. 13.

[634] Michael Dunning and Jason Hughes, "Power, Habitus, and National Character, Historical Social Research" / *Historische Sozialforschung*, vol. 45, No. 1 (171), Special Issue: Emotion, Authority, and National Character, 2020, p. 266. According to these authors:

> Similar arguments concerning the relationship between the loss of status among the white working class, their sense of betrayal and neglect by the traditional left, and their backlash against multiculturalism generally, and Islam specifically, are advanced inter alia by writers such as Ware (2008), Kenney (2012), Lone and Silvery (2014), Mackenzie (2016), and Pilkington (2016). To these we could add numerous others, including, for example, Gidron and Hall (2017), who analyse how the loss of status of low skilled labour had, somewhat paradoxically, become compounded by greater equality for women, eroding the sense of masculine sources of esteem and value that were associated with traditional manual work.

Also see Corbett, "The Social Consequences of Brexit", p. 21.

> racist language and actions, it is important to recognize that this may also have been driven by poor levels of social quality in the UK; including lack of well-paid and secure jobs, and poor working conditions, the breakdown of communities, and the sense of dislocation, loss of direction, and disenfranchisement in a political and economic system that has created many victims.[635]

British society is more divided, and perhaps it was always like this, the difference being now that one side has found its voice politically, but the question is how do and how will Muslims fit into this divided mosaic? The rising anti-immigration sentiment or lurch to the 'right' in Europe[636] and America does not mean that society has gone to the right of the political spectrum but there is an undeniable resurgence and normalisation of right-wing politics. Society is divided and perhaps this division to an extent was always there, but Brexit has shone a light, so the fractures are more visible. Over emphasis on the fringe, whether by Muslim scholars and organisations or by the authorities, runs risk of alienating the silent majority of Muslims who denounce violent extremism and wish to get on with their lives in a peaceful and law-abiding manner. The focus on the minority who advocate violence should be to deal with their heterodox violent ideas and not seek or seem to undermine normative rules contained in the *fiqh* of the four schools of thought. It should be highlighted that the '*fiqh*' espoused by ISIS and their like are far from mainstream and therefore they should be singled out and general brush should not be used tarring mainstream Muslims. Mainstem youth need 'buy in' in terms of education and jobs and progress in this respect will have greater impact in grounding and cohesion then treating them as potential threats to national security. As Sir Peter Fahy stated: "So, let us not focus on confronting extremism. Let us focus on promoting diversity and cohesion, creating safe spaces for honest discussion about our fears and prejudices and our concerns about the practices and beliefs of other cultures."[637]

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[635] Corbett, "The Social Consequences of Brexit", p. 26.

[636] According to Corbett,

> Moreover, the Brexit vote reflects a wider emerging problem in Europe: the possible resurgence of the populist far right, emboldened by UKIP's success in the UK. This is pertinent given that Euroscepticism is not just a British phenomenon (Leconte 2010.' "The Social Consequences of Brexit, p. 28. Corbett also states: "The Brexit vote has also revealed stark divisions within British society, for which the EU referendum provided the opportunity for a popular revolt by "the people" against both elites and minorities."

[637] Muslim Council of Britain, "Our Shared British Future", p. 14.

Today a clear and meaningful British Muslim identity is yet to come to fruition amongst the wider Muslim communities.[638] We can see its nascent beginnings; policy turns and social attitudes towards integration and immigration that impacted or impeded its development and no doubt over time Muslims will express in some clearer form their belonging to a country they have made their home. However, it will have to be premised on a real negotiation and recognition of difference after the British society at large has concluded its own self-perception.

Conclusion

Reverting to the original aims of this thesis, what conclusions can we come to in terms of the congruity of minority *fiqh*? It seems in that in their legitimate desire to bring reconciliation and engagement between Muslims and non-Muslims after a turbulent past have compromised internal harmony of their legal thought and its application on reality. The focus on the *dār* paradigm is perhaps misplaced as that issue is of little concern to normal everyday Muslims living in the West. As one author put it*:*

> for the majority of men who came to work in low paid sectors of western markets from the late 1950's onwards, the most common justification for their migration was economic necessity. Debates about the status of migrants in Islamic law were, therefore, never uppermost in their minds.[639]

For the generations that followed a large majority did not see a contradiction between seeing Britain has home while having an ethnic belonging based on where they parents migrated from. Ties to Bangladesh, Pakistan, Turkey, Egypt, Morocco remain while UK is their place of permanent residence. The legal notion of a *dār* as envisaged by classical scholars did not inform on how they saw their belonging. There were however a relatively very small minority who are of a Jihadist persuasion such as Al-Qaida and then later ISIS who

[638] The statistics available so far are few and far between and even contradictory to warrant any confidence. An ICM survey for the BBC Radio 4, 24 December 2002 indicted that that they felt very or fairly patriotic. Coming not long after 9/11 in an atmosphere of fear one cannot be sure to what extent these statistic really represent the situation on the ground. On the other hand a recent survey by Channel 4, presented in a program by Jon Snow gave a different picture of the reality. It seems claims by multiculturalists like Bhikhu Parekh, that Muslims have fully integrated, are more reflection of their desire for vindication of the multicultural experiment than a true representation of the situation on the ground. See Parekh, Bhikhu, "Europe, Liberalism and the 'Muslim Question'", p. 182.

[639] McLaughlin, SM, *Researching Muslim Minorities in Britain*, p. 178.

advocated violence on the basis that Western countries were *dār al ḥarb*, however their indiscriminate violence runs contrary to all the classical scholars understanding of the *dār* paradigm and limits and rules of *jihād*. A far more productive way of addressing their aberrant mindset was to address their justifications of wanton violence than to dismiss a paradigm in its totality because some have overstepped the mark.[640] Misuse, abuse and misreading of established legal terms and concepts have and will always exist and the way to address these issues is to explain where and how this has happened. This is more likely to be affective then further misreading or dismissal which will only act as a validation in the mind of a Jihadist. Furthermore, there is a case to argue that for many Jihadists, although they are using and abusing Islamic legal terminology their root motivations maybe more political and legal arguments only justify what they already hold.[641] Others such as Hizb ut-Tahrir who embrace the *dār* paradigm and consider the restoration of a Caliphate as their raison d'être completely reject the violence perpetrated by Al-Qaida and Isis which indicates that it is possible to be an advocate of the *dār* paradigm, live peacefully in the West in a law abiding manner whilst having strong political and religious views but without committing acts of violence.[642]

Only a few people justify isolation and violence from a reading of the text which conflicts with the understanding the jurists who espoused the *dār* paradigm in the first place. To remove what they viewed as 'baggage' of the past they have brought inconsistencies in their legal thinking. This does not mean however the rest of minority *fiqh* is incongruous. In other areas of minority *fiqh* law there is coherence and consistency, but in the area of identity they have tried to reconcile the patently irreconcilable and hence incongruity has occurred.

Regarding identity and belonging, the thrust of Ramadan's argument has been the facilitation of Muslim engagement and contribution. Such aims are important and necessary, but the problem is not the aim but the means. His mode of argumentation seems forced and tendentious and his approach procrustean that such a discourse may lead to people throw the baby out with the bath water because the proposition either sounds too assimilationist to many Muslims or too good to be true for some non-Muslims. To say there is no substantive

[640] http://binbayyah net/english/fatwa-response-to-isis/. Bin Bayya here addresses the various justifications used to carry out acts of violence and none of them list the belief in the *dār* paradigm.
[641] According to Arun Kundnani, 'Religious ideology provides a vocabulary and a cohering identity but politics provides the impetus', in "A Decade Lost: Rethinking Radicalisation and Extremism", http://www.claystone.org.uk/wp-content/uploads/2015/01/Claystone-rethinking-radicalisation.pdf p. 25.
[642] https://www.theguardian.com/australia-news/2015/feb/20/hizb-ut-tahrir-insists-it-rejects-violence-following-abbotts-desperate-accusation.

difference between Islam and the West sounds good, but it does not make for a serious program of integration where Muslims from different walks and persuasions can come aboard and build a working model of co-existence. Its exclusivity due to its lack of realism is what makes it impractical. In this respect the minority *fiqh* scholars were more attuned to the reality by naming the new jurisprudence as the Law of Minorities, recognizing that Muslims are a distinct community in their own right.

The reality in Britain is that there is a multiplicity of identities[643], of varying intensity depending on the individual. This difference needs to be recognized, not denied, and then engaged with such that a balance is struck between social cohesion and sectional difference. So, the first hurdle that needs to be passed is the recognition of difference and the need for mutual compromise. Only after this has been achieved can we move onto the second debate; how can the western and Islamic traditions come to compromise and coexistence. The third debate after this will be where will the lines be drawn? Where and how will we compromise? We can only advance to such questions when our starting point is rooted in recognition of the facts on the ground. This is a matter policy makers in Britain and in the west in general need to 'factor in' in their integration strategy. As Vincent Cable puts it: "Most of these issues can be resolved by recognising that many people enjoy a multiple identity; Britishness is one of several."[644] He goes on to conclude:

> …the recognition of multiple identities should inform a practical approach to policy and politics which seeks robust, positive responses to globalisation in ways that make the politics of identity inclusive, open and mainstream. This will be challenging for politicians and citizens alike, but it is necessary. Politics as usual is not an adequate response to the deep changes we have already seen, or to those that we can confidently expect.[645]

However, it seems politicians have not accommodated or adjusted to the multiple identities on the ground but have sought to intensify what some might argue is an assimilationist policy with its Prevent programme and anti-terror legislation thereby causing further alienation and simmering discontent. Policy makers, the media and wider society will need to revaluate their actions and consider to what extent they have helped or hindered Muslim belonging as the current trajectory is not yielding the social cohesion that everyone desires.

[643] https://www ft.com/content/f04a5904-f015-11e7-ac08-07c3086a2625.
[644] https://www.demos.co.uk/files/multipleidentities.pdf 52
[645] https://www.demos.co.uk/files/multipleidentities.pdf p.66.

Thus, the preservation of legal congruity requires the approach to be realistic, where there is a meeting of minds halfway. There needs to be recognition of difference and then compromise and accommodation by both sides in policy terms and attitudes. A model for integration is only likely to work when it rooted in reality and mutual recognition and not strained standpoints.

Chapter 4:

Political Participation

Introduction:

The question of Muslim engagement in a non-Muslim national framework is not unique to the Muslim experience in Europe but has troubled thinkers in Muslim countries especially since independent nation secular nation states arose in the post-colonial era from the eighteenth century to the twentieth century.[646] The aftermath of western colonial rule saw systems of government and constitutions based on republican and parliamentary ideals causing some quarters, especially those of conservative Salafist or Islamist persuasion to question the role and remit of Muslim participation and the issue of power sharing. Underpinning these tensions were questions of identity, sovereignty, religious authority, and navigation of religious ideals with western political values resulting a particular Muslim legal discourse.

This discourse around politics, authority, identity, rights, and remit of engagement has continued in the European experience of Muslim migration and residence as communities attempt to define a belonging and make their presence felt in the political sphere.[647] Amongst these layers of issues, Muslim residence in the West raised the question of their rights and the community or communities' interests (as social homogeneity is not a given) which Muslims increasingly began to seek by engaging in the political process.

This has been bolstered in some part by the minority *fiqh* scholars who have given a legal ruling permitting political participation with relatively limited qualifications, though it has to be acknowledged that Muslim political engagement in Europe predates their legal verdicts around this issue. Indeed, studies suggest that political engagement and the motivations and justifications for political participation is a complex matter and not solely attributable to minority *fiqh* or purely jurisprudential considerations. Social, historical, and cultural factors

[646] Kamali, Mohammad Hashim, Civilian and Democratic Dimensions of Governance in Islam, file:///C:/Users/44795/Downloads/Civilian_Democratic_Dimensions.pdf., Tamīmi, ʿAzzām "Mushārakat al-Islāmiyyīn fi-l-Sulṭa" (BM Freedom, 1994), p13, Huwaidi, Fahmi, Islam wa Democratiya, (Markaz al Ahram lil Tarjama wan nashr:1993).
[647] Nielson, (ed.), *Muslim Political Participation in Europe*, p.102, p.215 and p.277.

also played their part.[648] However, minority *fiqh* in terms of its legal contribution is worthy of study in its own right for the insights it may give on modernist legal philosophy and its development and is therefore the focus in this chapter.[649]

Perhaps the most contentious aspect of political participation, especially amongst some young Muslims, has been the question of voting and participating in the general election. The source of the tension amongst Islamist circles at least has been how these issues have been hitherto treated in the Muslims countries before they arrived in the European context. The Islamist discourse was premised on the centrality of divine sovereignty whether expressed in Mawdudian terms of *ḥākimiyya* or simply the supremacy of God's Law verses Man's law. The constitutions of most Muslim countries paid some deference or reference to *Sharīʿa* such that new laws should not be in contravention and so the question of engagement for many pertained to practise and actuality of the political process rather than the legal construction of the constitution. Western liberal democracies however posed a different level of challenge as their constitutions, written or otherwise, expressly placed legislative authority within the jurisdiction of society, not to any spiritual hierarchy or authority. As a result, voting and elections could not be legitimated without some qualification and navigation of past discourses.

Our aim in this thesis is to study the legal response provided by minority *fiqh* scholars in this regard in order to assess the congruity of this *fiqh* with their original postulates. In assessing congruity in respect of political participation, two areas are fundamental to this issue:

1. The notion of democracy and the extent to which the essence and procedures of democracy are in consonance with the Islamic principles espoused by minority *fiqh* scholars. Indeed, some scholars have forbidden participation simply on the basis that democracy is an alien concept to Islam. It is, therefore, necessary to engage with the question of compatibility or the lack thereof of democracy with certain principles of Islamic law and theology as advocated by minority *fiqh* scholars.

2. Rulings relating to the actual participation in democratic institutions and procedures by voting for political parties in elections.

[648] See various articles which details the historical and particular dynamics of Muslim political engagement in a number of European countries such as Britain, France, Germany, Belgium and other countries Nielson, (ed.), *Muslim Political Participation in Europe*.

[649] Political participation also engages questions of loyalty and identity which we have addressed in chapter 3 on citizenship and identity. Here we shall focus on the *fiqhi* treatment of political participation.

In investigating the first question, we will consider the essential components of democracy and compare that with the principles that minority *fiqh* already holds as fundamental law and consider the scholarly negotiation at play. The question of democracy and its compatibility with Islamic ideals has not been the preserve of minority *fiqh* only but has been the subject of debate and discussion in contemporary Islamic scholarship in general and so we shall be casting discussion wider than minority *Fiqh* to see how and where it sits in the broader mosaic. Thereafter we shall proceed to consider the various legal ruling and their evidence presented to permit participation and asses their congruity. In doing so we will not restrict ourselves to minority *fiqh fatwā*s but consider others who have contributed to this legal discourse. Such a study will allow us to assess how minority *fiqh* has tried to maintain *aṣāla* or faithfulness to its principles while at the same time navigating the challenges and needs of modernity, in more specifically the needs and interests of minority Muslims. The reconciliation between principle and reality will also cast a light on its thought progression or evolution and its capacity of flexibility and compromise.

Section I: Islam & Democracy

Minority *fiqh* scholars such as al-Qaraḍāwī, Dr ʿIsām Aḥmad al-Bashīr and Fayṣal Mawlāwī[650] consider not only democracy permissible, but it is an intrinsic part[651] of the Muslim religion. This accommodation of democracy by minority *fiqh* scholars is a continuation of the modernist approach to this issue.[652] Al-Qaraḍāwī in his work *Min Fiqh al-Dawla fī al-Islām* states that 'the content of Democracy is congruous with Islam' and that the "real meaning of democracy is that people must choose their ruler by themselves, no ruler or regime is forced upon them without their full consent.[653] They must have the right to bring

[650] According to Mawlāwī democracy is about 'opposition to despotism' and therefore on that basis does not contradict Islamic values. See Mawlāwī, *al-Muslim Muwāṭinan* (International Union for Muslim Scholars), https://palstinebooks.blogspot.com, p. 81.
[651] For a full list of those who took a similar stance towards democracy, see Kamali, Mohammad Hashim, file:///C:/Users/44795/Downloads/Civilian_Democratic_Dimensions.pdf, p. 2.
[652] Tamimi, Azzam S. "Democracy in Islamic Political Thought", https://d-nb.info/1107773776/34, pp. 1-4.
[653] http://www.bayanelislam net/Suspicion.aspx?id=01-05-0044 and https://www.al-qaradawi net/node/3775. See also Rahman, Hafijur, TOWARD A WISE POLITICAL FIQH: THE PERCEPTION OF STATE IN THE POLITICAL THOUGHT OF YUSUF AL-QARADAWI, https://dergipark.org.tr/tr/download/article-file/1304994

their rulers to account if he commits a mistake. Moreover, they must have the right to depose him and choose a new ruler if he goes astray. People must not be led against their will to advocate economic, social, or political trends and programmes that they are not satisfied with." On the other hand, al-Qaraḍāwī also maintains "that 'sovereignty (*ḥākimiyya*) for Allah is originally an Islamic idea which has been confirmed by all of the scholars of Islamic jurisprudence in their discussions of the *Sharīʿa* rule and the *ḥākim* (lawgiver). They all agreed that the *ḥākim* is God and the Prophet Muḥammad is the conveyor of that law. So, it is God almighty that orders and forbids, allows, and prohibits, judges, and legislates."[654] The question that arises here is the notion of sovereignty for God compatible with the notion of democracy in the West or is such a premise mutually antithetical? This is what we shall be attempting to evaluate with regards to congruity.

According to al-Bashīr:

> The essence of democracy – far from the academic definitions and terminologies – means the people freedom to choose who will rule them and administer their affaires, that a ruler should not be imposed on them whom they do not want and nor should a system be imposed which the people do not desire. They have the right to account the ruler when he errs and the right to remove or change him when deviates and that he cannot forcible impose economic, social, political, or cultural policies which the people do not approve or recognise.[655]

Notwithstanding the unwarranted dismissal of academic contributions to the subject, one can see from the definition provided by the writer where the people choose the system and policies, this itself can present certain theological problems and inconsistencies as we shall see from the discussion below. However, it should be noted that al-Qaraḍāwī and al-Bashīr were speaking of democracy as an idea as defined by themselves and not in terms of its practice in Western liberal democracies.

When Mawlāwī, another key minority *fiqh* scholar, was asked whether an Islamic State can be described as democratic he had the following to say:

> One crucial difference between the Islamic state and a democratic one is that under the democratic state people can choose for themselves any laws to abide by. In an

[654] Al-Qaraḍāwī, Yūsuf, *Min Fiqh al-Dawla fī al-Islām* (Dār al-Shurūq, 1997), p. 140.
[655] Al-Bashīr, ʿIṣām, "Shūrā fī Siyāq al-Ta'ṣīl wa-l-Muʿaṣira", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-al-Buḥūth* (Dublin, 2004), p. 266.

> Islamic state, people are bound to abide by the decisive rulings of *Sharīʿa*. It is for this that we cannot describe the Islamic state as being democratic.[656]

Thus, we can see the legitimacy of democracy depends on how it is defined and for this reason it is necessary to consider this question in greater detail as we attempt to do below.

Definition of Democracy

The implied assertion of those who advocate an accommodation of democracy in Muslim discourse is that the definition of democracy is "essentially a contested concept,"[657] and therefore there is flexibility in the way that democracy could be understood such that one can define religion and democracy in ways that allow their compatibility. The validly of this assertion requires scrutiny, if such terms are so nebulous as to admit reconciliation in the fundamentals, then the question of incompatibility would need not arise. If one peruses the definitions posited by various authorities about democracy, we find the dispute is regards to the peripheries or edges of the concept and not necessarily its essence. This is understandable and even expected as most political concepts are contested in terms of where they begin and where they end but their basic and essential elements enjoy greater agreement.

With regards to democracy, Barry Holden, the author of *Understanding Liberal Democracy* asserts: "There is in fact almost universal agreement about the definition – and hence the meaning – of the term, although there is a great deal of disagreement about many other things to do with democracy."[658] He goes onto provide an exact definition: "The definition can be made more precise – or more illuminating – by elaborating on the relevant notion of government or rule and assuming that a crucial element in such a notion is the idea of making

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[656] See http://www.islamonline net/servlet/Satellite?pagename=IslamOnline-English Ask_Scholar/FatwaE/FatwaE&cid=1119503545934. When asked for his view regarding the permissibility of political parties he had this to say about democracy:

> As for the true concept of democracy, it is not our main concern. We, Muslims believe in pluralism and political freedom as part and parcel of Islamic teachings. It is worth stressing here that we accept the articles and the principles of democracy that cope with the teachings of Islam and reject those principles that are non-Islamic. Our main reference is Islam when deciding whether to accept or reject any new ideology. See http://www.islamonline net/servlet/Satellite?c=FatwaE&cid=1119503545626&pagename=IslamOnline-English-Ask_Scholar%2FASELayout.

[657] El-Effendi, Abdelwahab, Democracy an Islam, https://www.oxfordbibliographies.com/display/document/obo-9780195390155/obo-9780195390155-0018.xml, see also Kurki, Milja, Democracy and conceptual contestability: reconsidering conceptions of democracy in democracy promotion, http://pure.aber.ac.uk/ws/files/173810/Democracy%20and%20conceptual%20contestability_CADAIR.pdf

[658] Holden. B, *Understanding Liberal Democracy* (Philip Allan, 1988), p. 4.

and implementing decisions.[659]" He continues, "a democracy is a political system in which the whole people, positively or negatively, make, and entitled to make, the basic determining decisions on important matters of public policy."[660] Even scholars like Anthony Arblaster who upheld W.B Gallie's contention that the concept of democracy is contested, also admitted that 'democracy', like 'freedom' or 'equality', is, in fact "a term with a single thread of meaning lying beneath all the varied uses and interpretations which have been made of the term. That core meaning is general and vague enough to make variations possible but not so vague as to permit any meaning whatsoever placed on the word."[661]

Arblaster also points to one of the core meanings, however contested:

> At the root of all definitions of democracy, however refined and complex, lies the idea of popular power, of a situation in which power, and perhaps authority too rests with the people. That power or authority is usually thought of as being political, and it often therefore takes the form of an idea of popular sovereignty – the people as the ultimate political authority. But it need not be exclusively political.[662]

Arblaster is correct to point out that discussions around democracy do not have centre around the political ramifications of the term but where it is invoked in a political context the idea of popular sovereignty is at its heart. Thus, democracy at its very core is about power resting with the people and in the modern democratic context it refers to 'popular sovereignty' in its widest possible meaning. This is the common understanding of democracy, and it is the underlying meaning in most definitions of democracy.[663] This meaning as we shall see below can be further gleaned from the historical origins of the term itself.

Origins of Democracy

Athens, or Sparta, depending on your point of view is the archetypal model of modern democracy. Pericles, the Athenian philosopher, and advocate of democracy, in his funeral

[659] Holden, *Understanding Liberal Democracy*, p. 5.
[660] Holden, *Understanding Liberal Democracy*, p. 5.
[661] Arblaster. Anthony, *Democracy* (Milton Keynes: Open University Press, 2002), p. 9.
[662] Arblaster, *Democracy*, p. 9.
[663] For example, one author writes "Democracy is a transliteration of the Greek *demokratia*, which means government by the people, the right of all to decide what are matters of general concern and what shall be done about them," See Cranston, Maurice, *A Glossary of Political Terms*, (The Bodley Head, 1966), p. 26. Or a situation where "the people of a country deciding for themselves the contents of the laws that organise and regulate their political association," see Alder, John, *Constitutional and Administrative Law*, (Palgrave, 2005), p. 26, or "Democracy indeed is often characterised as a political system in which the people are sovereign, or in which there is popular sovereignty." Holden. *Understanding Liberal Democracy*, p. 6.

oration stated: "Our constitution is called a democracy because power is in the hands not of a minority but of the whole of the people."[664] But what was the nature of this power? The Greek philosophers believed in the power of reason to open the world to true understanding and believed that man must take an interest in politics due to the virtue of his reason.[665] According to Aristotle, even though he personally was critical of democracy, stated that in a democracy "the multitude must be sovereign, and whatever the majority decides is final and constitutes justice.2[666] Thus, according to Held, "the demos held sovereign power, that is, supreme authority, to engage in legislative and judicial functions."[667] "It was," says Arblaster, 'the concrete embodiment of the principle of popular sovereignty; not that people choosing a government every four or five or seven years, but the people continuously governing themselves from month to month and year to year.'[668] Thus, the common thread in all of this is that the people are the source of sovereignty and legislative power. Since sovereignty is a central concept to democracy, we shall explore this further below.

Sovereignty

Sovereignty as a Western term and usage is deeply imbedded in its history. What is its connection to democracy and what does it mean or signify? Without a proper consideration of this question, one cannot make an accurate comparison between the sovereignty of God as understood in Islamic theology and the sovereignty of the people in western political philosophy. This requires a study of the evolution of the concept of sovereignty to avoid superficiality.[669]

The concept of sovereignty originates from the sixteenth and seventeenth centuries when transnational institutions, such as the Catholic Church and Holy Roman Empire, waned in power giving rise to the emergence of European monarchs who laid claim supreme power under the claim of divine right of kings, justified under the new notion of sovereignty. This

[664] Quoted in Held, *Models of Democracy* (Polity Press, 2005), p. 13.
[665] Thus, according to Watkins, "Plato believed in the supreme importance of reason in the conduct of human affairs, his discouragement with the current state of Athenian politics brought him to the conclusion that the number of people capable of true knowledge was extremely limited." See Watkins, Fredrick, *The Political Tradition of the West* (Harvard University Press, 1962), p. 107.
[666] Quoted in Held, *Models of Democracy*, p. 19.
[667] Held, *Models of Democracy*, p. 17.
[668] Arblaster, *Democracy*, p. 18.
[669] El-Effendi warns that "Social scientists have a dangerous tendency to take such theological concepts as 'the rule of God' at face value and then run away with them – projecting for example simplistic contrasts with the political concept of 'the rule of man." See El-Effendi, Abdelwahab, "The Elusive Reformation," in *Islam and Democracy in the Middle East*, Eds. L. Diamond, M.F. Platter and D. Brumberg (John Hopkins University Press, 2002), p. 252.

notion was absolutist and increasingly secular giving the monarch control over the church and state.

> In my person alone,' claimed Louis XV,' resides the sovereign power, and it is from me alone that the courts hold their existence and authority…for it is to me exclusively that the legislative power belongs.[670]

One of the most influential architects of this notion of sovereignty was Jean Bodin (1530-1596) who believed that sovereignty was indivisible, and its basic characteristic was that it conferred on the ruler the legislative power. According to Church, for Bodin "sovereignty and the power to make law were all but synonymous."[671] This is not surprising as Bodin himself stated that "the first and chief mark of a sovereign prince to be of power to give laws to all his subjects in general, and to every one of them in particular…without consent of any other greater, equal or lesser than himself."[672]

The absolutism of his notion of sovereignty did recognise that, inter alia, the Will of God had to be respected and not that one can enforce it in case of its violation. This should not however be taken to mean that respect of the Will of God means anything like the Muslim notion of *Sharīʿa* or the duty of the ruler to establish the rules of the religion. Indeed, Christianity from its very inception accepted two authorities; that of the church whose occupation was the realisation of the Kingdom of God and of the state, the secular temporal order. For Bodin and those who came after, the problem was the duality of political power and its abuse by the ecclesiastical authority, which was the cause of the Reformation and subsequent move towards secularisation. The sovereign, in the secular sphere always had the legislative power even before the Reformation, but what was demanded now was the unification of the church and the state under one secular power. This unity still recognised religion, but it was dispossessed of political power. Hence, although we find Bodin or even Locke referring to divine Will or natural law as a limit to the exercise of sovereignty, it had little effect in limiting the monarch's temporal sovereignty. As Allen eloquently puts it:

> Bodin believed in the divine right of Kings but only in the sense in which almost every one of his time believed in it. God created all things; but sovereignty and sovereign were, to Bodin, were created by no special act of God. Sovereignty to his

[670] Quoted in Held, *Models of Democracy*, p. 71.
[671] Quoted in Vincent, Andrew, *Theories of the State*, (Oxford, 1987), p. 53.
[672] Salmon, J.H.M., "The Legacy of Jean Bodin," in *History of Political Thought*, vol. 17, No.4, 1996, p. 503.

> was of man's creation; it arose from the nature of man and of human needs and aspirations. You can eliminate from Bodin's Republic all his references to God, and to Princes as the lieutenants of God, and the whole structure will stand unaltered.[673]

Indeed, the whole notion of natural law, that is God's will be apprehended by reason, was proposed to avoid the civil wars and bloodshed unleashed by the Calvinist monarchomachs (king killers) due to religious differences. Religion was wreaking havoc; Europe realised the need to resort to a more secular and tolerant order in order to unify and maintain the peace. The divisive nature of religion during the Reformation was resolved by stating that only that expression of God's which was mandated by nature should limit sovereignty and nothing else, and of course later for men like Grotuis (1583-1645) human reason was deemed supreme in determining natural law. According to Watkins "When sectarian differences made it impossible to secure substantial agreement with regard to the content of religious revelation, natural law was left as the only available bond of social unity."[674] The legal concept of sovereignty where the sovereign's command is law was established by John Austin. According to Austin "Every positive law or every law simply and strictly so-called, is set, directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme."[675]

Thomas Hobbes (1588-1679) also advocated an absolute ruler, the Leviathan, as a means to avoid the bloodshed ensuing from religious conflict. According to Manent "Hobbes in order to confront the theologico-political problem, posited a hypothetical individual who preceded…the two obediences - the obedience to human law and to divine law. Through him Hobbes reconstructs the legitimate state finally delivered from conflict between the civil and religious powers."[676] Hobbes introduced the concept of a hypothetical 'state of nature' preceding religion where man, as an evil selfish being who lived free of religion and law fearing death and destruction surrendered their natural freedom, enters into a social contract thereby creating an absolute sovereign whose legitimacy is no longer the divine right but the consent of the people themselves. Rousseau says regarding Hobbes: "Of all Christian authors, the philosopher Hobbes is the only one who correctly saw the evil and the remedy, who dared to propose the reunification of the two heads of the eagle, and the complete return to political

[673] Allen, *Political Thought in the Sixteenth Century* (Methuen, 1941), pp. 415-416.
[674] Watkins, Fredrick, *The Political Tradition of the West* (Cambridge, MA: Harvard University Press, 1962), p. 81.
[675] Quoted in Appadorai, A., *The Substance of Politics*, (Oxford University Press, 1942), p. 49.
[676] Manent, P., *An Intellectual History of Liberalism*, Trans. Rebecca Balinski, (New Jersey: Princeton University Press, 1996), p. 73.

unity, without which no state or government will ever be well constituted."[677] Hobbes understood liberty as "the absence of external impediments."[678] His notion of sovereignty is absolute and unlike Bodin before him or Locke who came after was not subject to the Devine Will. In his understanding of sovereignty, the monarch or Leviathan is a representative of the people: "The People rules in all Governments, for even in Monarchies the People Commands; for the People wills by the will of one man."[679]

John Locke whose ideas were a precursor to the ideas of liberalism and democracy advocated a similar contractarian philosophy as Hobbes but with greater emphasis on individual liberty, especially as it pertained to the enjoyment of property. He did not believe the ruler's sovereignty was absolute to the extent that people cannot rebel if he violates natural law or the divine will. Locke's natural law according to some scholars is binding by divine will and for others it can be binding independent of divine will.[680] Whatever the case maybe the law must be rational for it to be natural law and the ruler is the sovereign over civil affairs. Locke's ideas came in the backdrop of the Glorious Revolution of 1688, after Bill of Rights, which made the sovereignty of the Parliament supreme over the monarch.

Jean-Jacques Rousseau was probably made the most empathic articulation of the people's sovereignty. Like his predecessors he believed man lived a state of nature but upon the creation of a sovereign the tyranny does not end. This is because the sovereign may now still enslave the people by the practice of sovereignty. So, the problem for Rousseau was how does man maintain a sovereign ruler and yet remain free where his sovereignty is not violated, a problem famously incapsulated by him when he said:

> Man was born free but everywhere he is in chains. How does he ensure his freedom, the right to follow his will and not the will of others by which he will become enslaved. How does he 'find a form of association which will defend the person and goods of each member with the collective force of all, and under which each individual, while uniting himself with others…remains as free as before.[681]

[677] Manent, *An Intellectual History of Liberalism*, p. 68.
[678] Hobbes, *Leviathan*, Ch. 14, Para 1.
[679] Quoted in *Rethinking the Foundations of Modern Political Thought*, in A. Brett and James Tully with H. Hamilton-Bleakley eds, (Cambridge, 2006), p. 254.
[680] Ward, W. Randall, "Divine Will, Natural Law and the Voluntarism/Intellectualism Debate in Locke," in *History of Political Thought*, vol. 16, No 2, 1995, p. 208.
[681] Rousseau, Jean Jacques, *The Social Contract*, (London: 1895), p. 60.

The solution for Rousseau was contained and expressed in the idea of the "General Will" or what is termed as popular sovereignty, which reflects the collective will of the people. This 'will' is not to do with the individual wills and their desires but the collective will of what is for the common good and legislation derives from this General Will. Rousseau did not believe in representative democracy, he believed "the state, to be legitimate, must legislate by means of universal participatory democracy. Therefore, every citizen has the right to take part in making laws which he has to obey."[682] As for the basis of laws: "The sovereign's only act is the making of law…and law is only proper or just to the extent that it comes from the rational or general will."[683] Rousseau believed that the General Will cannot be wrong: "When the contrary opinion to mine prevails, that proves nothing except that I was mistaken, and what I thought to be the general will was not. If my private will had prevailed, I would have done something other than what I wanted. It is then that I would not have been free."[684] All must submit to the General Will as only the collective view is what can determine what is truly best for the individual: "Whosoever refuses to obey the general will shall be constrained to do so by the entire body, which means only that he will be forced to be free."[685]

Thus, we can see the evolutionary stages the notion of sovereignty underwent to conclude with the Will of the People having begun recognizing and being subject to the Divine Will. Hobbes, Locke, and Rousseau all wanted to 'abolish religion's political power' but the issue was a question of how best to do it. Hobbes made the ruler the supreme and absolute, though for Locke and Rousseau this will still allow religion to retain political power.[686] Locke solved the problem by maintaining that the sovereign can be removed by rebellion of the people and Rousseau advocated the idea of the General Will, i.e., popular sovereignty, crystallizing the terms of the social contract even more clearly. Thus, the notion of sovereignty is a child of the western historical experience; it was conceived and then nurtured and matured into what we call popular sovereignty as the basis of modern representative democracy which saw its first practical manifestation in the French Revolution and its Lockian expression in the American Revolution.

[682] Beran, Harry, *The Consent Theory of Political Obligation*, p. 43.
[683] Sorenson, L.R, "Rousseau's Liberalism," in *History of Political Thought*, vol. 11, No. 3, 1990, p. 443.
[684] Rousseau, *The Social Contract*, IV, 2:111.
[685] Rousseau, *The Social Contract*, p. 141.
[686] Manent, *An Intellectual History of Liberalism*, p. 37.

Nature of Devine Dominion

The question arises now is to what extent is popular sovereignty, which states that the Will or sovereignty of the people is supreme, congruous with the idea in Islamic theology that God's Will is sovereign? Expressed in those terms, even the advocates of a redefined Islamic democracy themselves acknowledge the conceptual divergences, make distinctions, and accept that the western notion is incompatible with the notion of God's sovereign as envisaged in Islam: "This concept of sovereignty, logically, implies a multiplicity of authorities; a multiplicity of wills; and different rules and judgements. The nature and meaning of this sovereignty is not the sovereignty that was envisaged by Islam. In Islamic Law, sovereign is the characteristic of the divine whose rule is immediate, and whose commands, as in the Qur'ān, embody the law and constitution of the nation and state."[687]

Various reformulations that have been attempted to reconcile two different sets of ideas of the Islamic and western political traditions.[688] It is questionable whether this terminological exercise is a genuine accommodation of democracy or if these definitions divest democracy of its essence and integrity. Referring to Al-Mawdūdī 's reconciliation Zeenath Kauser made an apt point:

> His attempt as reformulation of democracy on Islamic principles can neither be justified…It cannot be justified because after the reformulation of democracy as Islamic democracy, there is nothing left to say 'democracy' in Islam because his concepts of sovereignty for Allah and the vicegerency of man give a death- blow to the central concept of democracy – popular sovereignty.[689]

The reformulation of democracy suggests that the processes of democracy and ideas underpinning them, such as the right to vote, elections, representation can exist independently of its essence and that these processes can realize goals and purposes different to the notion on which they are premised. Such appropriation relegates the foundational idea as inconsequential or even completely extraneous to the means by which it is realized. The

[687] Khatab, Sayed and Bouma, D. Gary, eds, *Democracy in Islam* (Routledge, 2007), p. 14.
[688] According to Kamali: 'It is not an exaggeration to conclude that an Islamic system of government is substantially concurrent with the essentials of a democratic order, notwithstanding the differences which may exist in the detailed approaches of the two traditions towards those objectives.' For a full list of those who took a similar stance towards democracy, see Kamali, Mohammad Hashim, file:///C:/Users/44795/Downloads/Civilian_Democratic_Dimensions.pdf, p. 14.
[689] Kauser, Zeenath, "Mawdudi on Democracy: A Critical Appreciation," in *The Islamic Quarterly*, vol. XLVII, No.4, 2003, p. 322.

ramification of whether this conceptual separation is possible impacts on how engagement with such a process can be justified. We will see later how this informs the *fiqhī* discourse.

The idea of popular sovereignty which seems to be at odds with the belief in God as the lawgiver or *Shāriʿ* or *ḥākim* established in the books of Islamic jurisprudence has proved to be an intractable issue for many who have sought reconciliation or accommodation. In addressing this issue some contemporary scholars have tried to understand God's sovereignty as an overarching principle which is realized, not by the minutia of law and judicial decrees, but through the values that democracy embodies which are essentially Islamic values.

Khaled Abou El Fadl in his article entitled *Islam and the Challenge of Democracy*[690] discussed the tension between the idea of God Law and how man chooses to interpret that Law are not necessarily one and the same thing and not without historical controversy. Indeed, he points out that a superficial understanding of the concept can be seen even from the time of the emergence of *Khawārij* who opposed ʿAlī b. Abī Ṭālib, the then Caliph, because he agreed to refer to arbitration. The Khawārij who went by the slogan *'lā ḥukma ʿilla li-illāh'* meaning 'there is no dominion than that of God' rebelled against ʿAlī because arbitration with human beings is contrary to the rule of God. Clearly the Companions of the Prophet whether they supported ʿAlī or Muʿāwiya had a more nuanced understanding of the belief. ʿAlī reported responded to their slogan, 'a true statement but by which falsehood is intended (*qawlun ḥaqq yurādu bihi al-bāṭil*).' Abou El Fadl by citing this incident wanted to demonstrate that whilst it is correct that God is sovereign as a belief or ideal, the operation of that sovereignty by man is contested in terms of its manner and validity. In other words, human agency cannot be avoided, it will be open to dispute and interpretation and should be addressed in terms of how it can achieve democratic ideals and processes which are rooted in Islamic values. El Fadl's conclusion however is to maintain that the democratic legislative process must respect the fact that "Gods Law is given prior to human action" and respect that priority.[691] In other words El Fadl is willing to concede that the notion of God's law has symbolic function which must be respected in the process of law making.

For M A Muqtedar Khan, who wrote a response to El Fadl's article, this was still within the fundamentalist discourse and claims that El Fadl, "begins his easy as political philosopher and ends it as an ayatollah laying down the edict – You can have democracy but only as long

[690] Abou El Fadl, "Islam and the Challenge of Democracy", *Boston Review*, (April/May 2003 Issue).
[691] Abou El Fadl, "Islam and the Challenge of Democracy", *Boston Review*, (April/May 2003 Issue), p. 15.

as people are sovereign and *Sharīʿa* is not violated."[692] Khan also accepts sovereignty belongs to God but that 'has been delegated in the form of human agency'. The notion that God is sovereign is de jure, but de facto sovereignty is human whether in an Islamic polity or a democracy. In the Islamic jurisprudential context, it is the people who have to interpret what the law should be whether they intend to find the divine will, or the peoples will. This not dissimilar to Abou El Fadl's position but there is one significant difference. Both focus on human agency as a way to reconcile popular sovereignty with God's sovereignty but while Abou El Fadl requires the law-making process to respect divine sovereignty, Khan requires that the democratic legislative process is free from any religious constraints as "the imposition of law is against the spirit of Islam. God wants free submission."[693]

In Abou El Fadl's view or for even al-Mawdūdī, the exercise of human agency is the process of either discovering or respecting God's law whilst Khan widens that process to include completely non-religious considerations which may even conflict with well-established and normative religious laws and values. This is possible for Khan because people should be able to choose whether to follow religion or not in the public and private realm. Expressed in those terms Khan exposes himself to the charge that he is advocating a secular view of the role of religious law as the public private divide is perhaps the essence of secularism which most scholars are not willing to countenance.

This is the tradition, current nature, and trajectory of liberal democracies in the West but how consistent are these approaches with Muslim theology, law and history? It is safe to say that such a position is an outlier when compared to the spectrum of views on the topic. Essentially it strikes at the notion and nature of *ijtihād* in Muslim thought and jurisprudence– which is the human agency element in the de facto sovereignty of man. Khan is in effect is asking Muslim scholarship to accept that either *ijtihād* cannot be the only means of legislation or that *ijtihād* does not require a religious base. *ijtihād* in its essence is the discovery of divine law however flawed due to the operation of human agency in its processes. This goal or premise is not disputed in classical or modern Islamic jurisprudential discourse. Indeed, there is an argument or debate to be had about the role of specific texts versus *maqāṣid*, but this does not detract from the stated goal of finding a ruling premised and dictated by *Sharīʿa*. To say that law must be free of this process is untenable normatively speaking and contrary to

[692] Khan, Muqtedar, "The Priority of Politics", *Boston Review*, (April/ May 2003 Issue) <http://bostonreview.net/BR28.2/khan.html>(Acces sed December 2005), p. 1.
[693] Khan, "The Priority of Politics", p. 4.

any notion that God is sovereign. Khan's proposition seems logically strained, inherently contradictory and begs the question why he would even seek a reconciliation as God's sovereignty is effectively redundant in his conceptualization of human agency. The ideas of popular and divine sovereignty and the issues that they represent form a backdrop and inform the discussion of Muslim political engagement with democratic institutions and procedures as we shall now see below.

Section II: Political Participation

Introduction

Muslim political participation is a wide term which can encompass several aspects such as voting, membership of a political party, standing as an independent or party candidate or even power sharing in government. The subject of Muslim participation first appeared in the context of Islamic political groups engaging in the political process in Muslim countries. The legality of such action was not settled amongst those espousing the cause of political Islam. Even those who permitted such involvement, such as al-Qaraḍāwī did so as an exception to the general rule of prohibition and placed strict conditions.[694] Others, like Rachid Ghannouchi, who was perhaps less stringent also accepted that the default position was prohibition but permitted it on balance of the potential benefit that can be achieved in contrast with the potential harm.[695] The difficulty for them was the contradiction of seeking Islamic rule whilst engaging in a non- Islamic government. The jurisprudential solution was to consider participation as a special exception to the general rule in the pursuit of the greater interest (*maṣlaḥa*) outweighing the existent harm. Given this context one can see why Muslim political participation might present even greater difficulty for some people as the default position of prohibition is acknowledged and did not follow *maqāṣid* (goals) based approach in *fiqh*.

It was Jādd al-Ḥaqq ʿAlī Jādd al-Ḥaqq, the Shaykh of Al-Azhar, who first addressed this issue from the perspective of Muslims living in the West when Muslims in Copenhagen, Denmark, requested rulings for the following matters;

1. Permissibility of joining Danish secular and Christian parties
2. Voting for such parties

[694] al-Qaraḍāwī, *Min Fiqh al-Dawla*, pp. 184-185.
[695] Tamīmi, ʿAzzām "Mushārakat al-Islāmiyyīn fi-l-Sulṭa" (BM Freedom, 1994).

3. Entering into alliance with these parties

The Shaykh's response was the following:

> there is no objection for a Muslim to join, individually or together with other Muslims, any of the officially recognized parties, in spite of their secular or Christian character, as long as they do not touch upon the Islamic creed or the fundamental interests of the Muslims…. It is equally permissible for all Muslims in any country to cast their votes for a party without alliance with it, and to seek help from it in order to realize and protect Muslim interests and to defend the lawful rights given to them. Muslims, in Denmark or any other country of the world, should follow the legal ways in order to have a voice safeguarding their interests.[696]

Thus, Muslims are allowed to participate providing such parties do not harm the Creed or interests of Muslims. The focus in this *fatwā* was the facilitation of the protection of Muslim minority interests, a common theme of many *fatwā* that were to follow this ruling. This seems to be a more relaxed rule than what we have been used to in the context of Muslim countries. Perhaps the thinking was that the minority status of Muslims living in a foreign environment with less rights and advantages compared to the host nation would justify a degree of leniency in the matter.

With the advent of minority *fiqh*,[697] the above position with a rights-based legitimation was reiterated but with ever stronger calls for further Muslim participation as Muslims populations grew in the West. Now, for some the discourses needed to shift from permission due to necessity but to a duty for which a Muslim will be culpable for his or her neglect. Al-ʿAlwānī, the chairman of the North American Fiqh Council stated the following regarding the question of Muslim participation in the American elections:

> it is the duty of American Muslims to participate constructively in the political process, if only to protect their rights, and give support to views and causes they favour. Their participation may also improve the quality of information disseminated

[696] Quoted in Shadid, W. and P.S. van Koningsveld (Eds.), *Intercultural Relations and Religious Authorities: Muslims in the European Union* (Leuven, Peeters), pp. 156-157.
[697] Other contributors such as Dr Jamal Badawi, Azzam Tamimi, Tariq Ramadan, Delwar Hussain and Michael Mumisa have adopted and repeated the positions and legal arguments of al-ʿAlwānī and al-Qaraḍāwī. Some scholars not associated with the minority *fiqh* tradition have also permitted voting in the West, such as Salmān al-ʿAwda, Muḥammad al-Munajjid and Muhammad ibn Adam al-Kawthari though there may be differences on other aspects of political participation.

about Islam. We call this participation a "duty" because we do not consider it merely a "right" that can be abandoned or a "permission" which can be ignored. It falls into the category of safeguarding of necessities and ensuring the betterment of the Muslim community in this country.[698]

It is worth pondering on why minority *fiqh* scholars were not resorting to the default position first and then citing the exception, as has been the case with political participation in Muslim countries. One reason may be that the cause of disagreement of Muslim political participation in the Muslim countries related to ruling or power sharing, i.e., where Islamic political parties would enter government either as coalitions or form a government outright but still function and rule under the existing non-Islamic legislative and constitutional arrangements. This invariably would bring them under the charge of administering government according to the non-Islamic set up while seeking to bring about reform. This was addressed by minority *fiqh* scholars by acknowledging the default position first and overcoming the bar via a legal circumvention. This situation however does not exist for Muslim minorities living in the West. It was not envisaged that Muslims would form coalitions let alone form a government due to their minority status. Political participation in the West was consigned to voting, joining certain parties, or maybe becoming part of the legislature or rarely included within the executive. Such matter was arguably less onerous and hence perhaps explains why they merited such a cursory treatment.

Also, the emphasis on duty, by al-ʿAlwānī at least, is again perhaps driven by the fact that Muslim community being a minority needed greater protection and as such greater engagement of its members. Al-ʿAlwānī justifies the categorization of political participation as a duty because it realizes the "safeguarding of necessities and ensuring the betterment of the Muslim community in this country." This seems to suggest that al-ʿAlwānī understood that the community could not afford to be neutral or indifferent about participation, which all the ruling of permissibility would allow for, but there needed to be stress on engagement for the interest of the community as a whole. This approach indicates that minority *fiqh* was not looking this issue purely from legalistic perspective but considering the future interests and consequences for Muslim minorities.

[698] Al-ʿAlwānī, "The Participation of Muslims in the American Political System", http://w.w.w.amconline.org/fatwa/.

Power Sharing

The two main minority *fiqh* scholars, al-Qaraḍāwī[699] and Mawlāwī, both maintain that participation in a non-Islamic system is prohibited due to the many verses which prohibit ruling by other than what God has revealed. According Mawlāwī:

> There is no doubt that in origin it is prohibited to share power in government which rules other than the Law of God. This is due to the general import of the texts which described the one who does not rule by what God has revealed with disbelief, oppression, and transgression….and because sovereignty must be for only God: *'The command (or the judgement) is for none but Allah. He has commanded that you worship none but Him.'* (12:40).[700]

However, he then proceeds to assert that in exceptional cases it is permitted. The following are some of the key textual evidences quoted by al-Qaraḍāwī and Mawlāwī to support of the view that power sharing is permitted[701]:

1. Removing the evil and injustice according to capability.
2. The lesser of two evils.
3. The Necessities permit the prohibited matters.
4. The law of gradualism.
5. The example of the Prophet Yūsuf who according to chapter twelve of the Qur'ān was place in charge of the store houses by the king. It is stated that Yūsuf assumed a post in a non-Islamic system and therefore it is permitted to do so.
6. The example of the Negus whose non-Islamic rule was accepted by the Prophet.
7. By way of supporting arguments the *fatwā*s of Ibn Taymiyya and al-ʿIzz b. ʿAbd al-Salām are mentioned.

The first 4 evidence are different legal expressions of the single concept of *ḍarūra*, the idea that in a situation of compulsion the prohibited matter is permitted only to the extent that it

[699] al-Qaraḍāwī, *Min Fiqh al-Dawla*, pp. 184-185.
[700] Mawlāwī, "Participation by Current Islamic Movements", https://www.ikhwanwiki.com/index.php?title=%D8%A7%D9%84%D9%85%D8%B4%D8%A7%D8%B1%D9%83%D8%A9_%D9%81%D9%8A_%D8%A7%D9%84%D8%AD%D9%83%D9%85

[701] المشاركة في الحكمhttps://www.ikhwanwiki.com/index.php?title=%D8%A7%D9%84%D9%85%D8%B4%D8%A7%D8%B1%D9%83%D8%A9_%D9%81%D9%8A_%D8%A7%D9%84%D8%AD%D9%83%D9%85

satisfies a necessity that either the specific texts of the *Sharīʿa* have recognised or by extension for some scholars those necessities that can be justified under the goals or *maqāṣid* of the *Sharīʿa*. The notion of *ḍarūra* in Islamic law is broad category that can manifest in a variety of circumstances and therefore many legal maxims have been derived reflecting those situations. The recourse to these maxims here by the minority *fiqh* scholars indicates that they believe in origin they are dealing with a prohibited matter which is permitted due to necessity (*ḍarūra*) and this is consistent with their prohibition of power sharing in a non-Islamic government as a default position premised on the belief that God is sovereign.

Evidence 5 and 6 are examples of where one assumes the al-Qaraḍāwī and Mawlāwī understood to be case of *ḍarūra* given that the default position described above, whilst evidence 7 relates historical legal edicts during the rule of the Mongols where a Muslim ruler or judge faced the option of either remaining or leaving his post to a non-Muslim ruler who will cause greater harm. The invocation of *ḍarūra* as a legal maxim has foundation is classical *fiqh* and historical precedent. However, the application of this principle is governed by certain conditions and parameters (*ḍawābiṭ*) which we shall explore further in the context of voting by Muslim minorities in the West.

Ruling on Voting and Elections

Power sharing can have relevance to Muslim participation as members of the executive branch in Western nations, however by far the most expansive is the issue of voting as that engages Muslim communities at a whole. Despite this, the question of voting has received only a brief discussion by the minority *fiqh* scholars of the European Council of Fatwa and Research compared to the space and time afforded to other topics they have addressed. Indeed, when the following question was put to the European Council of Fatwa and Research: "Is it permitted to a Muslim to participate in local elections in Europe or to promote a non-Muslim party which does not realize the interest of the Muslims?" They gave an uncustomary short reply to a question that one expects would be a key topic in minority *fiqh*:

> This is a matter to be assessed by the Islamic foundations and associations. If they are of the opinion that the interest of the Muslims can only be realized by such a participation then there is no objection against it, on the condition that this does not

imply a greater concession from the part of the Muslims than the advantage they enjoy [thereby].[702]

The response, as seen in the past rulings on power sharing in Muslim countries, reflects a continuity in approach in respect of the focus on protecting Muslim interests and *maṣlaḥa* based justification, however no detailed argumentation is presented. Also noticeable is that fact that mention of the default position of prohibition is omitted or the wider theological considerations present in past treatment of these type of issues. This could be either because they do not believe the default position exists in this case as it relates to elections and not power sharing or that they chose not to engage in this question in the context of political participation in the West for some unstated reason.

Mawlāwī touched on this topic at greater length in his book *al-Muslim Muwāṭinan fī Urubba*[703] where he justified political participation on the basis that it will allow the call to Islam and achievement of the Muslim community interests.[704] He also listed and responded to several objections of those who oppose Muslim political participation[705]:

1. Political participation is tantamount to acceptance of non-Islamic laws.
2. Political participation contradicts the concept of *al-walā' wa-l-barā'* (association and disassociation).
3. A Muslim is obliged to work towards the application of *Sharīʿa* and not participate in the application of non-Islamic laws.
4. Political participation helps non-Muslims and harms Muslims.
5. Political participation will take place under the auspices of secularism.
6. Political participation will take place 'under the shade of democracy' which is a system of disbelief.

Although Mawlāwī's list is substantial, his treatment of each objection is rather brief and cursory, failing to fully address important aspects relating to the objection. On the first point he states secular laws are of two types; either they are in conformity with Islamic law in

[702] *Al-Majlis al-Urubbī*, Fatwā No. 42.
[703] Mawlāwī, *al-Muslim Muwāṭinan*, p. 75.
[704] Mawlāwī, *al-Muslim Muwāṭinan*, p. 76.
[705] Mawlāwī, *al-Muslim Muwāṭinan*, pp. 77-81

which case Muslim can accept those; and laws which contradict Islamic laws. In the case of the latter, he says Muslims should strive to change them through legal means which is the right of every citizen.[706] However, Mawlāwī did not address how the issue of voting for candidates whose manifesto's will invariably contain non-Islamic policy proposals can constitute an implied acceptance. This would be part of the intent of the objection. In respect of the second point, Mawlāwī states the 'disassociation' of non-Islamic laws can be accomplished by a Muslim MP when he expresses disapproval of the said law.[707] Again, Mawlāwī fails to address the issue of voting for a non-Muslim MP (who may be sympathetic to Muslim causes) but nevertheless is likely do no such thing. On the third point, Mawlāwī states political work cannot be restricted to the aim of applying Islamic laws in Western countries as there could be other attainable aims such as availing themselves of the freedom to call others to Islam.[708] Here Mawlāwī focuses on the aim of political work and does not address the issue of applying non-Islamic laws which is the point at issue in the objection. The fourth objection relates to the perceived *maṣlaḥa* or benefit of political participation and asserts that it is harmful to Muslim interests.[709] Instead of addressing this benefit-harm question, Mawlāwī's response is that cooperating with non-Muslims is permitted which completely misses the point of the objection. The fifth and sixth points argue that participation in a non-Islamic secular democratic system is impermissible because the system is contrary to Islam. In response Mawlāwī asserts that whilst secularism, in terms of separating "religion from the state" is "an ideology that contradicts Islam"[710], nevertheless Muslims are required to seek their rights. He states that in any event secularism was a solution the West made recourse to free itself of religious sectarianism and clerical rule, something Muslims in Europe need not oppose as it is not their concern. This response is reasonable and answers the concerns of those who make this objection. With regards to western democracy Mawlāwī states that it is about preventing despotism, protecting human rights, ensuring that there is strong, independent public and judicial oversight over the executive. He states these are all "issues that Islam calls for".[711] Mawlāwī's limiting of the meaning of democracy is clear in his question to the objectors; "If democracy for those who originated it is the rule of the people) against authoritarianism, then why do we turn that into

[706] Mawlāwī, *al-Muslim Muwāṭinan*, p. 77.
[707] Mawlāwī, *al-Muslim Muwāṭinan*, p. 78.
[708] Mawlāwī, *al-Muslim Muwāṭinan*, p. 79.
[709] Mawlāwī, *al-Muslim Muwāṭinan*, pp. 79-80.
[710] Mawlāwī, *al-Muslim Muwāṭinan*, p. 82.
[711] Mawlāwī, *al-Muslim Muwāṭinan*, p. 81.

rule of the people against the rule of God and then prohibit it on that basis?."[712] It is surprising that Mawlāwī makes this argument given that elsewhere he distinguishes between Western democracy and a form of democracy which is acceptable in Islam as regards an Islamic polity.[713] Mawlāwī is not the only who has presented democracy in this limited manner, al-Qaraḍāwī, Rachid Ghannouchi and many other modernist scholars have represented democracy in a qualified way.[714]

In the UK context we see various proponents of political participation attempting to build on the ECFR approach and provide further legal elaboration. We shall consider these perspectives and touch on the *fiqh* also to analyses legal consistency or congruity. During the UK 2010 elections Haytham al-Haddad[715] whose thinking is largely aligned with minority *fiqh* approach on political participation set out a number of points for his view that voting is not only permitted but may also be an obligation whilst challenging the opposing narratives and arguments against voting by certain elements within the Muslim community.[716]

Firstly[717], he states that those who forbid voting do not appreciate that voting does not entail legislation as what one is doing is selecting "the best individual amongst a number of candidates within an already-established system imposed upon them and which they are unable to change within the immediate future." Second, he mentions that there is lack of appreciation that "voting for a candidate or party who rules according to man-made law does not necessitate approval or acceptance for his method...." Thirdly, he mentions that unity is an obligation upon Muslims and they should show unity by voting together on the issues that concern them, to support this he cites the verse in the Qur'ān [3:103] *'And hold fast, all of you together, to the Rope of Allah (i.e. this Qur'ān or the guidance of Allah), and be not divided among yourselves),'* and the tradition of the Prophet, peace be upon him, "Adhere to the *jamā'a* (community), and avoid division, for Satan is closer to the lone individual and is

[712] Mawlāwī, *al-Muslim Muwāṭinan*, p. 82.
[713] According to Mawlāwī: "One crucial difference between the Islamic state and a democratic one is that under the democratic state people can choose for themselves any laws to abide by. In an Islamic state, people are bound to abide by the decisive rulings of Sharīʿa. It is for this that we cannot describe the Islamic state as being democratic." See http://www.islamonline net/servlet/Satellite?pagename=IslamOnline-English.
[714] Kamali, Mohammad Hashim, file:///C:/Users/44795/Downloads/Civilian_Democratic_Dimensions.pdf, p. 11.
[715] Haytham al-Haddad is not affiliated to the ECFR but the Chair of the Fatwa Committee for The Islamic Council of Europe (ICE). He has been critical of various minority *fiqh* positions, however on the issue of voting his views are in line with minority *fiqh* stance of voting specifically and political participation in general. https://iceurope.org/advisor/about-us/our-advisers/haitham-al-haddad/.
[716] "The Ruling on the Participation by Muslims in the Political Life of the West" Issued by *Hizb ut-Tahrir* – Europe in 2003. https://www.hizb.org.uk/wp-content/uploads/2015/04/eu-Political-participation-English.pdf.
[717] All four points can be accessed on: C:\Documents and Settings\me\Desktop\minority *fiqh* politicalpart\MPACUK - Leading Salafi Scholar Tells Muslims They Must Vote.html.

far from a group. Whoever seeks the expanse of Paradise should stick to the *jamāʿa*." (al-Tirmidhī).' Finally, he mentions that:

> Voting itself is not obligatory or recommended according to Islamic law, rather the aim behind it is to achieve the greatest benefit for Muslims or avoiding evil. This cannot be achieved unless the Muslims agree on one voice or one strategy by which they can influence other parties. If this is missing, then they will have no weight and no such influence. So, if this is the case, the whole objective in voting is lost and there is then no benefit in participating in voting.[718]

This argument whilst agreeing with past *fatwās* premised on securing Muslim benefits and interest does not explicitly focus on the question of *ḍarūra* or *maṣlaḥa* or at least he is equivocal about the matter. He seems to be arguing that the prohibitory default position does not exist because voting is not an act of legislation or approval of man-made systems which means the sovereignty of God is not undermined and therefore invocation of *ḍarūra* is unnecessary. This is a departure from the approach of al-Qaraḍāwī and Mawlāwī.

On the issue of what voting entails Haddad's arguments seem to lack an accurate understanding of how elections work in liberal democracies. By distinguishing voting from legislation, he is able to avoid accepting the default position and therefore having to make recourse to *ḍarūra*. However, is voting completely unconnected to legislation? When voting for a MP from a secular political party it is arguable that one is facilitating legislation in two ways: Firstly; it is by the vote of a constituency member that a candidate becomes an MP and therefore the argument can be made that this leads to something prohibited falling under the legal principle of: 'The means to a prohibition is itself prohibited' (*al-wasīla ilā ḥarām muḥarrama*) or 'blocking the means' (*sadd al-dharāʾiʿ).*[719] This point seems not to have been addressed.

In his second point, Haddad states that "that 'voting for a candidate or party who rules according to man-made law does not necessitate approval or acceptance for his method." This does not agree with the reality of the voting and representation; voting is an endorsement of the MP's proposals some of which may be what a voter desired but others he or she may not desire. This question has been left unanswered. In respect of the third point, all scholars would agree that unity is obligatory as a general principle, but not at the expense of valid

[718] https://iceurope.org/advisor/about-us/our-advisers/haitham-al-haddad/.
[719] Fa'ūr, *al-Maqāṣid*, p. 266.

legal objections or disagreement regarding partial evidence (*adilla juz'iyya*) and so to cite unity as blanket evidence lacks juristic rigor.

We shall now consider *maṣlaḥa*, *ḍarūra* and its derivative principle of lessor of two of two evils in some detail. Underlying many of the rulings permitting political participation is the principle of public interest (*maṣlaḥa*)[720]. Some have argued that the *maṣlaḥa* of voting for non-Islamic parties outweighs consideration of specific evidence which may be construed to prohibit such an action. According to Michael Mumisa:

> Unfortunately, due to the development of legalism in Islam, the focus has shifted from the *kulliyyāt* to the *juz'iyyāt*. Under correct interpretations of law in Islam, the change, and the modification of *juz'iyyāt* is acceptable in order to meet social change as long as such change does not undermine the *kulliyyāt*. Therefore, any political and legal system that fulfils the *kulliyyāt* is acceptable and considered as fulfilling the requirements of the *Sharīʿa*. The question is, does the British and political systems fulfil the *kulliyyāt* as required under Islam? It is my opinion that the British legal and political systems as they stand at the moment meet the goals of the *Sharīʿa*.[721]

Setting aside the question of whether British legal and political systems fulfil the *kulliyyāt* of the *Sharīʿa* (which in itself is highly contestable and problematic), it is difficult to see how the contention can be justified that the *kulliyyāt* can override the *juz'iyyāt* if the *juz'iyyāt*, such as the default position which is deemed to be a definitive matter or even itself part of the *kulliyyāt*. This is especially the case given that the *kulliyat*, for most scholars, do not enjoy suspensory powers, as they are a reflection of the overall direction of the *juziyyat*. It is well established in amongst the scholars of *uṣūl al-fiqh* that the *kulliyyāt* in terms of the *maṣāliḥ* they represent are divided into three types:[722]

1. Recognized interests; those interests which the law has upheld.
2. Cancelled interest: those interests which the law has forbidden.
3. Unrestricted interests: those interests which have not been explicitly permitted for forbidden by the texts.

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[720] A fuller treatment of the subject of *maṣlaḥa* based approach can be found in the chapter 2 entitled Legal Philosophy of Minority *Fiqh*. The discussion here will be limited to merely demonstrating the key points relevant to political participation.

[721] Mumisa, Michael, "Muslims in Britain and the Elections: What does the Sharī'a Say?", p. 3.

[722] Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991), p. 267. See كتاب أصول الفقه الذي لا يسع الفقيه جهله, https://shamela.ws/book/36379/204

The question of public interest is not as relevant if it is the case that this is matter of dispute and both sides have evidence to advance their point. Most scholars accepted the principle of *maṣlaḥa* provided it was matter for which no evidence can be found either way, in which case the interest will be *muṭlaqa*, free from a prohibition or a permissibility.

Another underlying oft used principle in the context of legitimising voting is the *'lesser of two evils.'*[723] This principle is a subset of the general rules of the legal maxim of *ḍarūra* or dire necessity. This is the case when faced with two undesirable options the *Sharīʿa* permits one to opt for the lesser of the two based on whatever serves the religion, *maṣlaḥa* or need of the community. This along with *maṣlaḥa* is another key principle used to permit voting in a secular system. When applied to the political context the argument is as follows: in a two-party system where both major parties are secular with manifestos which invariably will contain some elements that conflict with *Sharīʿa* but the result that one of them will win is a certainty then between those two 'evils' one must choose the option that is lesser of the two. It is argued there is an element of compulsion here as one of the two outcome is inevitable and so the Muslim voter must choose the less detrimental option from the standpoint of religion. Haytham Haddad who described this scenario in his *fatwā* on voting but did not cite the lessor of two evils principle, seems to be alluding to it in all but name when he argues that inaction is actually still considered voting or tantamount to voting.[724]

Prima facie, there may seem to be a contradiction between the *maṣlaḥa* and two evil principle, however the point of reconciliation seems to be that whilst the *maṣlaḥa* premise seeks to realise a benefit to the community, the use of the lessor of two evils argument seeks to avert a greater harm to the community. In that respect there is coherence but at the same time there is an implicit admission that voting carries some religious disapprobation albeit of a lesser nature due to the dilemma a person finds himself in. That recourse is made to this principle bears an implicit acknowledgement that voting entails some prohibited matter, and the voter is forced to choose the letter of the two harms. One can plausibly object to the idea

[723] GUIDANCE TO MUSLIMS IN BRITAIN FROM THE SCHOLARS OF ISLAM, Islamic Forum Europe, https://www.islamiqate.com/3771/what-are-the-scholars-views-muslims-voting-elections-the-west#, https://www.scribd.com/document/317026946/The-Lesser-of-Two-Evils-in-Voting-in-a-Democracy,, https://islamqa.org/hanafi/daruliftaa-birmingham/20270/voting-in-islam/, https://adobeacrobat.app.link/Mhhs4GmNsxb, https://www.islamweb.net/en/fatwa/394321/, https://iceurope.org/fatwa-is-voting-really-haram/, https://www.islam21c.com/islamic-law/848-misconceptions-of-the-principle-the-lesser-of-two-ev

[724] Haddad, Haytham, Fatwā: "Is Voting Really Haram?" Fri 19-May-17 (22 Shaban 1438), https://iceurope.org/fatwa-is-voting-really-haram/.

that any compulsion is faced in a legal sense as the requirements of *ḍarūra* have not been satisfied in the case of voting. The principle of *ḍarūra*, from which the two evils position originates, strictly requires that the evil faced endangers life or limb or there a credible threat to life or limb.[725] Further to this, the 'lessor harm' should also be clear, however politics is fraught with uncertainty and opinion in terms of outcomes such that Muslim voters may have different views of what exactly the lesser evil is. In the UK context scholars who advocate voting do not provide any guidance as to what the lesser evil is and this maybe because the matter is not clear, or they are aware that endorsements will lead to further confusion and disagreement or even controversy. Furthermore, the harm or evil should have some proximity to the individual such that it effects a particular and specific individual who has to make this choice and not to be argued in the abstract. These points of criticism originate in the classical *fiqh* in respect of *ḍarūra*, however the contemporary use of the *ḍarūra* or its subset of lesser of two evils do not seem to take these on board. This raises questions about consistency and congruity with foundational principles and a lack of rigour which are indicative of a deeper tension between principles and how they are applied in the modern context.

Another perspective is that of Muhammad Ibn Adam who is a Ḥanafī *muftī* at Dārul Iftaa, Leicester, UK. He has taken the view that voting in western democracies is a form of testimony or attestation of a candidate. He argues that voting is a non-religious matter:

> The process of voting in non-Muslim democratic countries is not based on religious ideologies neither are elections won and lost on the basis of religion. As such, a candidate that stands up in an election does not promise to implement the laws of Islam or any other religion for that matter.[726]

By this one assumes he means voting is secular. Such an understanding misses the difficulty posed by the notion that secular policies are being voted in by religious people. Indeed, to say voting has nothing to do with religion is the objection that his detractors would raise as its now possible to have a candidate who stands on a platform of policies that may or may not be contrary to religious values. The secularity is what allows for such a situation to arise. To

[725] الفرق بين الضرورة والحاجة مع بعض التطبيقات المعاصرة |المجلس الأوروبي للإفتاء والبحوث https://www.e-cfr.org/blog/2020/11/11/%D8%A7%D9%84%D9%81%D8%B1%D9%82-%D8%A8%D9%8A%D9%86-%D8%A7%D9%84%D8%B6%D8%B1%D9%88%D8%B1%D8%A9-%D9%88%D8%A7%D9%84%D8%AD%D8%A7%D8%AC%D8%A9-%D8%A8%D8%B9%D8%B6-%D8%A7%D9%84%D8%AA%D8%B7%D8%A8%D9%8A%D9%82/

[726] https://islamqa.org/hanafi/daruliftaa/7681/is-voting-permitted-in-islam/.

vote is to support the candidate with a set of policies, some favourable to Muslim interest whilst others may not be.

Having said the voting is a non-religious matter he accepts the views of candidates would be contrary to Islamic teachings:

> In a situation where there is no worthy candidate (as in non-Muslim countries, where at least the ideologies and beliefs of the relevant parties are contrary to the teachings of Islam), then the vote should be given to the one who is the better and more trustworthy than the other candidates.[727]

It is difficult to see how the views of the candidate would not affect policies or the role such a candidate would play once elected. In the face if this it is also difficult to see how voting on the determinant basis of 'trustworthiness' would resolve this question. Although the *muftī* has not articulated the position as clearly as others, he seems to be implicitly arguing that voting to achieve Muslim rights is an inescapable necessity in the legal *ḍarūra* sense. This is not dissimilar to other view advocating the permissibility of voting that we had discussed so far.

The proponents of voting have not rigorously engaged with the conditions and qualifications in the classical *fiqh* for invoking *ḍarūra* which gives the impression that they wish to force through an opinion by citing scholarly authority alone because of the need felt for Muslim political participation. Also, their reluctance to engage with the potential options and advise on who and why Muslims should vote and demonstrating how the *fiqh* applies shows a lack of concern for those qualifications.

It may have been possible to demonstrate to the more conservative elements within the Muslim community that it is permissible to vote in the western political system if a detailed and thorough case by case approach was followed. Those who oppose a blanket permission to engage in voting also accept the principle of *ḍarūra* and the lesser of two evils, a better presentation of the legal arguments which take in their concerns could potentially have found a wider audience as the difference is not over the legitimacy of the legal principles but their application.

[727] https://islamqa.org/hanafi/daruliftaa/7681/is-voting-permitted-in-islam/.

Political Participation of British Muslims

Apart from the jurisprudential debates around participation, what has been the response of Muslims in the UK? What is their level of engagement and what are the drivers of their participation? Salima Bouyarden considered these issues in her article "Political Participation of European Muslims in France and the United Kingdom"[728] and argued that Muslim political participation has undergone an evolution and concludes that the effect of the religious dimension is less than what one might assume it be. She states that early Muslim settlement, especially with the arrival of Muslim immigrant workers post World War II, was characterised by sense of community as their initial links was with those who came from the same village or kinship networks. This invariably meant that their politics was shaped by this sense of community. Added to this was influence of mosques and mosque imams who at times would guide their congregations as to voting preferences. Although religion was in the mix, the community relationships held sway in terms of voting practices.[729] Bouyarden notes that a new pattern of Muslim political participation is represented by a greater political awareness and a large number, in the case of the UK, 76.4% those asked in a survey of 200 participants[730], stating that they vote.[731] For British Muslims factors that influenced them most according to the same survey was family and friends first, secondly social events and religious figures coming at third place.[732] At fourth place came social networks with media personalities coming last. Other considerations were to present a better image of Muslims in the backdrop of Muslim terrorists and the desire to influence international foreign policy issues.[733] Bouyarden also suggests that the survey evidence shows that the phenomenon of the 'Muslim vote' maybe advanced by the likes of the Labour Party, but such a block vote in the mind of Muslims does not exist. She states that 69.2% percent of British Muslims when asked if they identify with being part of a Muslim vote said "no".[734]

The clearest example of Muslim participation resembling something of a block vote on foreign policy issues was when Respect Party came to the fore in 2004 and achieved electoral successes in the borough of Tower Hamlets in London and with the election of George

[728] Bouyarden, Salima, "Political Participation of European Muslims in France and the United Kingdom", in Nielson, *Muslim Political Participation in Europe*, pp. 102-125.
[729] Bouyarden, "Political Participation of European Muslims", p. 107.
[730] Bouyarden, "Political Participation of European Muslims", p. 121, see footnote 9.
[731] Bouyarden, "Political Participation of European Muslims", p. 109
[732] Bouyarden, "Political Participation of European Muslims", p. 109.
[733] Bouyarden, "Political Participation of European Muslims", p. 110.
[734] Bouyarden, "Political Participation of European Muslims", p. 116.

Galloway as Member of Parliament first in 2005 in Bethnal Green and Bow and then in 2012 in Bradford[735]. This was an alliance of leftist and Islamist elements which shared common foreign policy grievances.[736] However, this was short lived as Galloway lost his seat to Labour Party candidates and the Respect Party influence waned suffering from internal schisms[737] and then finally ended with its voluntarily deregistered in August 2016.

It is clear from the above that religious considerations played a part though they were not the primary drivers. This perhaps explains why even though minority *fiqh* scholars failed to make a cogent congruent legal case for voting, the motivators of voting for many Muslims were social and family considerations and to demonstrate their inclusion in UK society. No doubt the minority *fiqh* support for voting would have reinformed their desire to participate, they were not however determinant. The overriding consideration for many Muslims was the issues they felt were important to them, issues of an international nature such as the Iraq War, or community solidarity and need demonstrate they are part of the society in which they live.[738] This is partly positive for minority *fiqh* scholars as Muslims were engaging and integrating politically, but not necessarily completely on the terms they would have preferred such as Muslims representing a block vote in support of Islamic issues with the aim of calling (*da'wa*) others to Islam. It is safe to conclude that Muslims were already on a trajectory of increased political participation regardless of minority *fiqh* involvement.

Conclusion

The history of modernist *fiqh* as per Muslim political participation and its reconciliation with fundamental Islamic postulates has involved some redefinition and reworking of western terms and ideas. Minority *fiqh* in particular upholds two basic premises for the subject of political participation:

1. Sovereignty is for God.
2. Impermissibility of ruling by other than Islam.

[735] Peace, Timothy, "Muslims and Electoral Politics in Britain: The Case of the Respect Party", in Nielson, *Muslim Political Participation in Europe*, p. 317.
[736] Benedek, Eran, "At Issue: Britain's Respect Party: The Leftist-Islamist Alliance and Its Attitude toward Israel", *Jewish Political Studies Review*, vol. 19, No. 3/4 (Fall 2007), p. 163.
[737] Especially with the resignation of Salma Yaqoob in September 2012. https://www.theguardian.com/politics/2012/sep/12/salma-yaqoob-quits-respect-leader.
[738] Bouyarden, Salima, "Political Participation of European Muslims in France and the United Kingdom", in Nielson, Jorgan ed. *Muslim Political Participation in Europe* (Edinburgh: Edinburgh University Press, 2013), p. 120.

The subsequent *fiqh* that followed attempted to maintain congruity with both these foundational points. For example, democracy was understood only in a procedural sense as a mechanism to elect the leader and those who would govern, while the difficult issue of popular sovereignty, which contradicted divine sovereignty was claimed to be a western expression of democracy and not intrinsic to democracy itself. As we have seen from our study of democracy and popular sovereignty, these ideas are inseparable both conceptually and historically and the fact that a re-definition was required alludes to this even more. The reason for such reformulation relates to a wider question of how modernist *fiqh* navigated modernity and the challenges of modernity. The conceptual disharmony speaks to the need to have harmony with a West that saw despotism and authoritarianism as a backward era in premodern history. While most evaded the notion of popular sovereignty and sought conceptual consistency in reformulations, some academics attempted to take on the idea of popular sovereignty and sought to reconcile it with divine dominion by focusing on human agency as the source of popular sovereignty. Both attempts seem strained and perhaps even unnecessary leading to a worse outcome. The conservative and more radical elements reject this position as pandering to an alien idea and whilst many in the West do not view this reformulation are truly democratic, but rather as a convenient camouflage for their extreme views and tendencies.

Apart from the philosophical-theological questions and the difficulties they posed, the prospect of Muslim engagement in Muslim countries with a political system and process which was premised on secular governance required another level of accommodation. In the case of power sharing minority *fiqh* scholars have upheld the default position of God's sovereignty while making recourse to *ḍarūra* and public interest (*maṣlaḥa*) to allow political participation to the extent that Islamic interests can be realized.

In terms of Muslim engagement with the political process in non-Muslim countries via voting in elections we see that the approach of minority *fiqh* has evolved to grant a blanket permission and even religious prescription relying on textual generalities and the need to seek rights and interest without sufficient examination of the *fiqhī* legal qualifications to ensure congruity with its own legal tradition. The premise seems to be on *ḍarūra* and public interest, though it is not explicitly stated, and a keen desire to secure Muslim minority interests. In doing so claims have been made about the notion of voting and the electoral process in the West which defy a sound basis in understanding the reality of political system and processes

in liberal democracies. As we saw with reformulations with respect to democracy and popular sovereignty, the reworking of how voting in the West was presented maybe due the recognition that the Muslims as a minority could not afford to disengage from the process and weaken themselves further. In terms of the jurisprudential justification, again we see recourse, by some, to the principle of *ḍarūra* which is an implicit acknowledgment of a temporary deviation from the default position or rule. It is not unreasonable to assume that the default rule here does not favour voting for secular parties or candidates, but the allowance is for a greater benefit and that namely is the betterment and interest of the Muslim minority community.

The notion of *ḍarūra* allows the suspension of default rules providing certain conditions and qualifications are met, scholars who argued on the basis of necessary did not entertain or explore if these conditions have been met and seem to have by passed this issue altogether. The invocation of *ḍarūra* to navigate difficult issues has precedent in classical *fiqh* and in this regard minority *fiqh* has followed a well-trodden jurisprudential path. Despite the reworking of liberal democratic ideas and processes minority *fiqh* has either implicitly or explicitly upheld fundamental theological beliefs such as the supremacy of divine sovereignty over secular law. However, where we see some incongruity is with the application of these principles to legitimize engagement in secular politics for the greater good of the Muslim community. Interests or *maṣlaḥa* based *fiqh*, at least as practiced by minority *fiqh*, seems to lack rigor and this leniency is perhaps to a large part attributable to the desire not to allow Muslim minority interests to be alienated or compromised by giving strict prohibitory legal prescriptions. As we see with this topics and other issues, minority *fiqh* attempted to play a delicate balancing act; on the one hand affirming strict theological positions whilst allowing flexibility for Muslims to engage in western political processes so as not to be disadvantaged in terms of their short- and long-term interests. In doing so, minority *fiqh* may have partially compromised congruity with classical *fiqh* and its practices but maintained internal congruity in terms of its own legal methodology of espousing a *fiqh* (jurisprudence) that is relevant and flexible in the modern era.

Despite legal incongruity, UK Muslims have largely engaged with the political process for a variety of reasons which are not exclusively religious in nature. The impact of minority *fiqh* may have been a confirmatory role for a trend in favour of voting which predated minority *fiqh* contributions to this issue.

Chapter 5

Minority *Fiqh* & Domestic Law

Introduction

Islamic law as a legal system for well over a millennium existed under its own state structure. However, since post-colonial times and the modernisation movement and law reform in the Middle East the question of how Islamic law can co-exist under the new secular framework has been the subject of discussion and debate amongst diverse Muslim trends and groupings.[739] Some have taken the route of calling for an overhaul of the secular system and restitution of a complete Islamic order whilst others have maintained that only elements of Islamic law, such as personal status, should be retained.[740] The reality on the ground is that most Muslim states have modernised and reformed the legal systems but retained and generally incorporated Islamic law of personal status, albeit after some modification, whilst less than a handful apply aspects of the penal code as well. The subject continues to be one of contention and debate especially after the 'Arab Spring' the rise of Islamic parties to power and discussion around 'civil state' and the role of religion and the polity. The discussion is no less relevant after the emergence of ISIS or Da'esh and its self-styled 'Caliphate' in parts of Syria and Iraq and then its demise following the intervention of Russia in the Syrian civil war in September 2015.

In the UK context the relationship between Islamic law under a secular host nation came into public consciousness when Rowan Williams, the former archbishop of Canterbury sparked a public controversy by urging "*a* constructive accommodation with some aspects of Muslim law"[741]. The archbishop of course was not calling for the implantation of *Sharīʿa* law in the UK, but the reaction indicated the tension between Islamic law and domestic law, at least in the minds of some of the public and various commentators.

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[739] https://www.britannica.com/topic/Shariah/Reform-of-sharia-law

[740] NAQVI , SYED ALI RAZA , MODERN REFORMS IN MUSLIM FAMILY LAWS — A GENERAL STUDY
:Islamic Studies , DECEMBER 1974, Vol. 13, No. 4 (DECEMBER 1974), pp. 235-252
Published by: Islamic Research Institute, International Islamic University, Islamabad

[741] http://news.bbc.co.uk/1/hi/uk/7239283.stm and see here for full text of his speech on this topic https://www.theguardian.com/uk/2008/feb/07/religion.world2.

UK[742] Muslims enjoy the stability and rights the law affords but also face barriers or at least contradictions when it comes to personal status law and other matters which do not have the same patronage as in Muslim countries. This gives rise to the question of how Muslims are to live by and resolve a multiplicity of issues according to their faith whilst living under a secular liberal legal framework. This is a pressing issue affecting Muslim communities throughout the country and needs some clarity. Previously, devout Muslims have tried to satisfy the requirements of both, in almost parallel existences, and could not see any form of reconciliation or meeting point between the two. Amongst the various Muslim responses' minority *Fiqh* has entered this sphere and articulated a legal response in line with its aim to make the practice of religion relevant and adapted to current changes and for the furtherance of social cohesion.[743]

In this thesis we wish to analyse minority *fiqh* to understand its development and nature as part of the modernist legal tradition whilst asking some wider questions as to the effect and results of this *fiqh* and clarify the relationship between Islamic law and domestic law. By domestic law we mean the UK national law. We will consider the coexistence of aspects of Islamic law under English law as they pertain to personal status and family law. Where are the points of reconciliation and compromise? What is the nature of the coexistence and extent of any compromise and is there any complementarity between *fiqh* and positive law?

Part of the broader aim of this thesis is to consider the contribution of minority *fiqh* in a practical and real setting in respect of application, reception and impact. As we shall see the practical manifestation of the solution offered by minority *fiqh* scholars in the area of personal status is the rise of *Sharīʿa* councils operating under the ambit of government legislation. We wish to consider their justification under *Sharīʿa*, the limits, questions of enforceability, issues arising in wider society, government, media, and implications for integration, the overlap between personal freedom and religious freedom and where the line has been drawn.

In addressing the above, we shall be looking at three key issues; the extent to which Muslims can have recourse to secular law, the impact on personal status and how it might be practiced

[742] This chapter will focus on the UK experience as a case study. The author is a solicitor of the Senior Courts of England and Wales with experience acting for Muslims in a family law context and advising on matters of Islamic law.
[743] Al-Qaraḍāwī, Yūsuf, "al-Mushkilāt al-Fiqhiyya li-l-Aqalliyāt al-Muslima fī-l-Gharb", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-al-Buḥūth* (Dublin, 2002), p. 39.

within a domestic law context and the role, function and reception of *Sharīʿa* councils with a special focus on the UK context.

Section I: Sharīʿa Law & Recourse to Secular Law

Islamic law or *fiqh* is a body of law developed over centuries, so how does it reconcile its existence with the law of England and Wales which is also the result of centuries of development via the common law? By way of background:

> The common law is the law declared by judges, derived from custom and precedent. It originated with the legal reforms of King Henry II in the 12th century and was called "common" because it applied equally across the whole country. The doctrine of binding precedent, whereby courts follow and apply the principles declared in previous cases decided by more senior courts, known as "courts of record", is also known by the Latin expression "stare decisis".[744]

As such the common law being a judge made law is secular law. Given this, how does Islamic law relate to the host legal system from an intellectual and legal standpoint?

Firstly, we should point out that the discussion should not be confused with the issue of abiding by the law of the land. Minority *fiqh* considers Muslims living in the UK to be citizens and under a covenant or *ʿahd* and as such they must not contravene the law of the land.[745] However, minority *fiqh* scholars who are considered *fuqahā'* (juristic consultants) will always give primacy to *Sharīʿa* over secular law, especially scholars such as al-Qaraḍāwī who come from Islamist trends which espouse the idea of *ḥākimiyya* (supremacy of the sovereignty of God). Regardless of whether this issue is couched in such politically loaded terms or not, all will accept that Muslim Islamic law will defend the supremacy of *Sharīʿa*, notionally at least.

The issue requiring clarification is a Muslim citizen's recourse to the secular law in a non-Muslim society. Muḥammad al-ʿAmrānī in "The Muslim Family in the West; between Islamic Legislation and Secular Law"[746] has perhaps articulated the fullest response to this issue. In his endeavour to establish a clear conception of what 'recourse to *Sharīʿa*' means, al-ʿAmrānī divides Muslims into four categories:

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[744] https://www.iclr.co.uk/knowledge/topics/the-english-legal-system/
[745] We have discussed this issue at length in chapter 3 on 'Identity and Citizenship'.
[746] Al-ʿAmrānī, Muḥammad, "al-Usra al-Muslima fī-l-Gharb bayna al-Tashrīʿ al-Islāmī wa-l-Qawānīn al-Waḍʿiyya", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-al-Buḥūth* (Dublin, 2005) pp. 173-227.

i. Muslims who refuse to make recourse to *Sharīʿa.*
ii. Muslims who are 'bedazzled' by modern secular law.
iii. Muslims who are unaware of the distinction between *Sharīʿa* and other laws.
iv. Muslims who wish to refer to Islamic law but cannot find a court that will pass a *Sharīʿa* judgment.

In respect of the first category, al-ʿAmrānī lays the foundation by stressing the supremacy of *Sharīʿa* law over secular law; he cites the following verse as clear proof:

> *Have you seen those (hypocrites) who claim that they believe in that which has been sent down to you, and that which was sent down before you, and they wish to go for judgment (in their disputes) to the Tāghūt (false judges, etc.) while they have been ordered to reject them. But Shaitan (Satan) wishes to lead them far astray.*[747]

He cites various verses and quotes from the jurists to show that a Muslim is obliged to refer to the commands and prohibitions of God only and rejection may be tantamount to disbelief.[748]

The second category are those who have lost the tie with their religion and have been seduced by western society and fallen into the 'trap of the secular propaganda'. According to al-ʿAmrānī, such Muslims are in the minority as most Muslims are compelled to make recourse to western law because they have no other option and cannot see how they can change the situation.[749]

The third category are those that are ignorant of Islamic law and are to be viewed leniently given that they live in non-Muslim societies where the judiciary seem to function much better and more efficiently than their counterparts in the Muslim countries. Al-ʿAmrānī does not attach any blame to them for making recourse to non-Muslim courts to resolve their disputes and seek their rights, but they are not excused for not learning about their religion especially in this modern age.[750]

The fourth category, and this is the main subject of study, is that of a Muslim who wants to make recourse to *Sharīʿa* but cannot do so due to the absence of *Sharīʿa* courts. Such a

[747] Qur'ān 4:60. In fact al-ʿAmrānī, quotes verses 60-65 but we have quoted verse 60 for the sake of brevity.
[748] Al-ʿAmrānī, does not go as far as to declare rejection of Sharīʿa as blasphemy but tentatively suggest that it is a sin, "al-Usra al-Muslima", p. 182.
[749] Al-ʿAmrānī, "al-Usra al-Muslima", p. 186.
[750] Al-ʿAmrānī, "al-Usra al-Muslima", p. 189.

person cannot, according to al-ʿAmrānī, take the law in terms of the penalties and punishments into his own hands as that is the sole prerogative of the Caliph and his appointees. So, can such a Muslim approach the non-Muslim courts for resolution of his matters and will the judgment of the court be binding? The default answer according to al-ʿAmrānī is that it is not permitted for a Muslim to refer a non-Muslim judge but states there can be exceptions depending on the following subject areas:

a) Financial transactions
b) Marriage and *ḥudūd*

In the former al-ʿAmrānī, is willing to countenance reference to non-Islamic courts as financial transactions tend to be of a non-religious nature while marriage and the *ḥudūd* are deeply imbedded in religious beliefs and values and cannot be adjudicated by a non-Muslim. To support his view al-ʿAmrānī cites the example of the Ḥanafī *madhhab* which allows Muslims living in *dār al-ḥarb* to refer to a non-Muslim ruler in event of a dispute.[751] He also cites the case of Muslims in the Prophet's era who fled to Abyssinia and sought refuge with a Christian ruler and put forward their case for asylum when Quraysh sent a delegation to bring them back. In the area of marriage and divorce al-ʿAmrānī does not accept an open-ended permission but states it is allowed only in exceptional cases, which we shall look at in their respective sections below.[752]

However, referring to non-Muslim judges is not an ideal situation and so al-ʿAmrānī proposes Muslim arbitration or *Sharīʿa* Councils as a way out of this dilemma.[753] The option of such councils is the preferred solution of minority *fiqh* and practically this is the option Muslim women generally make recourse to in divorce cases. However, having pointed to this as a solution, minority *fiqh* failed to give guidelines as to how such bodies should be administered. The administration of such councils and the *fiqh* has resulted in complaints mainly by women due to the lack of thought as to how the management can be more context sensitive.

The inevitable interrelationship between both legal system and the need to understand how cooperation might occur has led al-ʿAmrānī to attempt to outline where they might converge and depart. His aim seems to be to show that there is much commonality between both legal

[751] Al-ʿAmrānī, "al-Usra al-Muslima", p. 193.
[752] Al-ʿAmrānī, "al-Usra al-Muslima", p. 193.
[753] Al-ʿAmrānī, "al-Usra al-Muslima", p. 203.

systems. Al-ʿAmrānī states that both legal systems have the overall aim of seeking the *maṣlaḥa* good or wellbeing of people and hence it is expected there will be a general agreement with some exceptions.[754] Commenting on the family law area, which is the focus of his study, al-ʿAmrānī points out many commonalities such as the prohibited marriage categories and this he says is largely due to the common monotheistic origins of Muslim and western societies. Even though Europe and America, commonly referred to as the West, follow a secular approach to law and governance but their mores and laws are, according to al-ʿAmrānī, still informed by their Christian heritage which has many legal and value-based parallels with the Muslim heritage. It is not a surprise that secular law, while upholding individual freedom, still bans incest and marriage between those of close affinity. Such bans are not exactly akin to the preventers' (*māniʿ*) of marriage (*nasab*[755], *musāḥara*[756] and *ridāʿ*[757]) in Islamic law but western law is not agreed on where to draw the line at every instance either. The key point for al-ʿAmrānī is that the secular? prohibited degrees are in broad agreement with *Sharīʿa* and that is due to the common religious heritage.

One suspects the effect of making this point is not so much for legal or practical significance but to establish that not everything in secular law is 'godless' or without religious sanction or values. Al-ʿAmrānī concedes that there are areas which are at complete odds with Islamic law, and these relate to adoption and extra marital relationships which are prohibited by *Sharīʿa* but protected by secular law. He says this is because of the separate preoccupations of the respective legal system; one is concerned with individual freedom and hence allows cohabitation before marriage and the other is concerned with the impact on society or what is termed as the 'right of God'.[758] Al-ʿAmrānī has chosen to focus on some stark differences, and this might give rise to the perception that, apart from some major divergences, most aspects of both traditions are similar in nature. This attempt at approximation however may not be as achievable in other areas of family law, outside of the prohibited degrees, areas such as marital rights, divorce, custody etc, if one were to scrutinize the significant differences. A broader view here might yield a more mixed picture where in generalities there is approximation but with many divergences in the details which are potentially as significant as the generalities.

[754] Al-ʿAmrānī, "al-Usra al-Muslima", p. 207.
[755] Lineage.
[756] *Musāḥara* is the prohibited marriage due to prohibited degrees of affinity.
[757] Refers to suckling which also prohibits marriage to a child which has been suckled in its infancy.
[758] Al-ʿAmrānī, "al-Usra al-Muslima", pp. 208 and 214.

This attempt at approximation is similar to the wider reformulation of the meaning of 'God's Law' or *ḥākimiyya* that we can see in the Middle East by groups following the modernist approach. In Egypt and Tunisia, the Islamic groups, who espouse political Islam, are calling for a civil state which recognizes and accommodates existing western laws and practices.[759] In Turkey the ruling party AKP, coming from the old Refa party, openly accepts a secular constitution as one that is consistent with religion. In the past such groups had been hard line in their demands but having faced a real prospect of governance they are willing to follow a more relaxed view of what it means to follow 'God's Law'. Minority *fiqh* scholars, many of whom come from that tradition, are willing to find exceptions and approximations with secular law also in the western context given Muslims have no option but to live under a secular system.

In terms of the focus area, minority *fiqh* concentrates on personal status because that affects people in their daily lives and has greater manoeuvrability within the existing legal framework. Also, it is an area in which most people would take the initiative to ask for legal rulings without which there would be a qualitative effect on their lives. Financial matters, as acknowledged by minority *fiqh*, are less obviously religious and people tend not to consider *fiqhī* matters unless it is clearly prohibited such as in the case of usury. Although Islamic law on financial contracts is in fact detailed and can potentially have a bearing on most contracts.

Similarly, when it comes to criminal law, minority *fiqh* steers completely away from this area and this perhaps indicates the realism of minority *fiqh*. There is a limit to accommodation or approximation and where it comes to areas which are not negotiable or with little 'wriggle room', minority *fiqh* has opted to remain silent and resorted to the *ḍarūra* principle.

In criminal law, the limitations are understandable but minority *fiqh* has perhaps overused the *fiqh* of exceptions where more creativity was what was required. In the area of buying houses and insurance minority *fiqh* has yielded to the law as it stands and permitted interest-based loans and insurance due to *ḥāja* (need) when in fact it could have looked and highlighted existing alternatives like diminishing *mushāraka* and *takāful* as credible *Sharī'a* compliant alternatives.[760] It could be that such projects require substantial funds and government backing and so were kept outside the scope of minority *fiqh*. Even so minority *fiqh* scholars

[759] See also Ozler and Yildirim, "Islam and Democracy", pp. 87-99 and Özkan, "The Role of Political Islam", pp. 209-226.

[760] Bin Bayya does mention *takāful* as an alternative to insurance but there is no great appetite to push for these alternatives. https://ketabonline.com/ar/books/13917/read?part=1&page=2&index=4316187

who see themselves at the forefront of legal thinking could have embraced long-term thinking and devised possible financial models that could be incorporated within the current law and regulations.

Another question linked to this issue is the extent to which Muslims can undertake duties that are of judicial nature typically considered within the realms of courts and governments, Bin Bayya in his *Ṣinā'at al-Fatwā* approached this issue by looking at the classical legal verdicts on situations in past centuries when Muslims found themselves living under non-Muslim jurisdictions. Bin Bayya states that Islamic centres are best placed to assume the position of judge to resolve disputes amongst Muslims providing it is permitted by the law of the land.[761] He cites extensively from his own legal tradition, the Mālikī *madhhab*, whose scholars allow the Muslim community or people of upright character (*'udūl*) to assume the position of the Muslim ruler when that ruler is absent.[762] The justification for this is that the authority to dispense justice and application of rules lies with Muslim community which effects this by appointing a ruler, but when the ruler is absent then that responsibility reverts to them or resides with them and therefore, they are able to discharge that duty in the absence of a state or government institution.[763] Bin Bayya finds support for this principle amongst other schools of law from the Ḥanbalī's and Ḥanafīs. Whilst the classical scholars gave a wider scope[764] to Muslim community or its representatives, Bin Bayya restricts this to only 'certain disputes' conscious that any such right cannot override or subvert the role of domestic laws and courts.[765] The discussion and difference in classical *fiqh* were to what extent can the community assume the role of the ruler. In the western context the answer is simple; Muslims can engage in matters of a judicial nature to the extent that the law of the land allows it.

The question of making recourse to secular law is a huge philosophical obstacle at least on a theoretical level for minority *fiqh* scholars, though the average Muslim may not have given it much thought. Without reconciling the supremacy of *Sharī'a* and its need to coexist under a superior law, Muslims cannot expect to engage in any form of legal interaction or hybridization to meet their needs. Minority *fiqh* has sought to take the stigma out of secular law by highlighting a shared religious origin with legal affects in actual laws. This has made the prospect of approximation and engagement real and plausible. By considering the intent

[761] Bin Bayya, *Ṣinā'at al-Fatwā*, pp. 386
[762] Bin Bayya, *Ṣinā'at al-Fatwā*, pp. 377
[763] Bin Bayya, *Ṣinā'at al-Fatwā*, pp. 381
[764] Bin Bayya, *Ṣinā'at al-Fatwā*, pp. 382
[765] Bin Bayya, *Ṣinā'at al-Fatwā*, pp. 383

of the one making recourse to secular law it was possible to find excuses or mitigating reasons for those who do so out of ignorance or necessity as this issue has been a sensitive topic in the past. Further to this, minority *fiqh* has sought to give religious effect to judgment of non-Muslim courts, a topic we shall consider in detail shortly. One can see that the aim behind the discourse, as with other areas minority *fiqh* has dealt with, is to facilitate the Muslim presence in the West in a way that reconciles their values with the prevailing social and legal circumstances. This is the *maqṣad* or goal of minority *fiqh* which can be discerned from the legal discourse of exceptions to general rules.

Section II: Personal Status & Family Law

It is typical of the post-colonial situation and era of modernization that personal status law was retained in Muslim countries. In the West this issue has engrossed the Muslim mind more than any other aspect of Islamic law as personal status effects the daily life since it has been entrenched as tradition for centuries.

Minority *fiqh* scholars have emphasized the importance of maintaining the integrity of the family and protection of its goals and aims (*maqāṣid*). In terms of the practice of Islamic personal status rules how should that transfer in the Western environment? Should there be a wholesale substitution of the rules as they were in certain Muslim countries or is there room for evolution or adoption of rulings that are in consonance with the host country. Some schools of law allow minor marriages – that is illegal in Western countries and hence no one is proposing the importation of such rules, these exist in the books of Islamic jurisprudence but do exist in some Muslim countries.[766] However, there is a range of rules that exist among the main schools of law that lend themselves to a 'host centric' interpretation and approximation with social norms, domestic laws, and values. Minority *fiqh* scholars have opted for rulings which are either in harmony or not in direct conflict with domestic law and consistent with social trends and attitudes of the host country.

One subject that exemplifies the above is the issue of equality or equivalence (*kafā'a*) in marriage, where we can see a disparity between what is in legal texts and the social attitudes on the ground. Fayṣal Mawlāwī in his article entitled *al-Kafā'a fī-l-Nikāḥ* (Equivalence in

[766] Baderin, Mashood, Marriage of Minors under Islamic Law: Between Classical Jurisprudence and Modern Legislative Reforms – Part 1, https://lawsblog.london.ac.uk/2018/04/23/marriage-of-minors-under-islamic-law-between-classical-jurisprudence-and-modern-legislative-reforms-part-1/

Marriage)[767] addressed this question seeking to bring the *fiqh* in line with reality. *Kafā'a* is the requirement of equivalence between the spouses in certain matters and specifically it is about women marrying those who are equivalent or suited to them.[768] Where this is not the case the marriage could potentially be invalid or dissolved at the discretion of the *walī* (guardian). The factors that serve as examples of equivalence are disputed as well as the legal effect on the marriage contract. That the groom should possess good religious character (*dīn*) is generally accepted whilst matters such as lineage (*nasab*), wealth (*māl*) and trade/profession (*ḥirfa*) has varying degrees of acceptability amongst the schools of thought, and some have rejected it altogether. The effects of these are also disputed, some of the Ḥanafīs say the absence of a match or equivalence where the *walī* has not consented renders the marriage contract incorrect (*ghayr sahīh*) whilst others believed equivalence is a *sharṭ luzūm* or a condition necessary for the contract to be binding and as such the non-consenting *walī* has the right to seek the dissolution (*faskh*) of such a marriage.[769]

Mawlāwī considers the evidence for and against the factors of equivalence and concludes that the strongest position is that of character and religiosity as the texts (*nuṣūṣ*) support it and a consensus exists on it.[770] On the question of their effect on the contract Mawlāwī does not believe the Islamic evidence justify taking equivalence as a condition for the soundness of a contract (*siḥḥat al-ʿaqd*) and therefore the contract is valid from the start. However, can the *walī* who has not consented to marriage due to the lack of equivalence seek its dissolution? Mawlāwī states those who took that view linked that to social customs and trends as that would indicate the presence or lack of equivalence in marriage. From this perspective Mawlāwī notes that customs have changed greatly in Muslim and non-Muslim countries. For many, considerations of lineage are not what they used to be in the past, one's trade or profession is not an issue as long as it is *ḥalāl* (lawful). Also, a third of all Muslims live as minorities in non-Muslim countries who are affected by trends in host countries where inter-ethnic marriages are widespread rendering lineage insignificant.[771]

All these factors led Mawlāwī to conclude that factors of equivalence should be restricted to good character and religiosity and even these factors are only advisory (*tawjīhī*) and do not affect the marriage contract in terms of their correctness (*ṣihha*) or bindingness / vitiation

[767] Mawlāwī, Fayṣal, "al-Kafā'a fī-l-Nikāḥ", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-al-Buḥūth* (Dublin, 2005), p. 251.
[768] Mawlāwī, "al-Kafā'a fī-l-Nikāḥ", p.258.
[769] Mawlāwī, "al-Kafā'a fī-l-Nikāḥ", pp. 258-260
[770] Mawlāwī, "al-Kafā'a fī-l-Nikāḥ", pp. 270-271.
[771] Mawlāwī, "al-Kafā'a fī-l-Nikāḥ", p. 270.

(*luzūm*). This view is the position of the Mālikī school and Mawlāwī prefers this view as it is in most harmony with the social norms of the day.[772] In addition to this, the consent of the woman is already a condition necessary for the contract to be sound (*ṣaḥīḥ*) and the consent of the *walī* is required for the contract to be binding (*luzūm*), this satisfies the goal of organising the marital life and therefore the *kafā'a* is redundant from this perspective.

Mawlāwī then turns to the subject of marriage contracts in non-Muslim countries what effect *kafā'a* will have on such contracts. According to Mawlāwī, where a contract is based on the Islamic laws of one of the Muslim countries then then the issue of equivalence will follow existing laws. Where the marriage contract is customary and not based on domestic law then equivalence is advisory as discussed above. If, however the marriage contract between Muslims is based on the domestic civil law then no question of equivalence will arise as such a notion does not exist in secular domestic laws. The parties in that case will have to consider questions of equivalence when they agree to marry.[773] It is probable that Mawlāwī, given his aims-based approach, is motivated to such a conclusion not only by jurisprudential consideration but also because it is in harmony with social trends and domestic legal realities in Western countries.

Other topics related to the issue of *kafā'a* which give authority to male guardians over and above females right to choose in respect of marriage and also can have legal and social ramifications is the notion of *wilāya* (guardianship) and *ʿaḍl* (prevention of marriage). Al-Khammār al-Bakkālī in his article entitled *ʿAḍl al-Walī fī Bilād al-Gharb* (Prevention of Marriage in the Western Countries)[774] addresses the various *fiqh* positions on the subject and settles on rulings which are in least disharmony with the western legal and social context.

The notion of *wilāya* is where the father of a bride (or anyone else for that matter who has the right of *wilaya* such as a grandfather or brother) has the final decision as to whether the bride can marry a suitor. In the West where personal freedom is much prized as a social value al-Bakkālī acknowledges that this can cause confusion and pose problems for Muslims leading to doubt over the validity or suitability of such a notion in modern times resulting in the recourse to non-Islamic laws.[775]

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[772] Mawlāwī, "al-Kafā'a fī-l-Nikāḥ", p.269.
[773] Mawlāwī, "al-Kafā'a fī-l-Nikāḥ", p.271-272
[774] Al-Bakkālī, Khammār, "ʿAḍl al-Walī fī Bilād al-Gharb", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-al-Buḥūth* (Dublin, 2005), pp. 321-388.
[775] Al-Bakkālī, "ʿAḍl al-Walī fī Bilād al-Gharb", p. 323.

So how does al-Bakkālī deal with this apparent contradiction between Muslim tradition and the host society, its laws, and values? First, al-Bakkālī discusses the different views of the scholars on this subject. He discusses at some length the different types of *wilāya*, their ruling, differences around them and their applicability to the current situation. For example, on *wilāyat al-ijbār* (guardianship of compulsion) where the guardian can conclude a marriage of a bride without her consent or permission, he states this is only in respect to minors and most Muslim countries have banned this practice anyway and therefore not much needs to be said about this issue.[776]

However, what is generally practiced is the form of guardianship where the bride[777] requires the consent of her guardian. This is the majority view of scholars who regarded such consent to be a condition of validity (*sharṭ ṣiḥḥa*) of a marriage contract and while others even considered it to be a pillar or essential contractual element (*rukn*).[778] Only Abū Ḥanīfa and some others took the view that marriage without the guardian's consent would be permitted. Al-Bakkāli also points out that many contemporary scholars take the view that such consent is either a pillar or a condition at the very least.[779] Al-Bakkālī cites the key textual evidence against the requirement of consent but fails to provide a view of his own or at least an appraisal of the evidence. Instead, he quotes the decision[780] of the European Council for Fatwa and Research (ECFR) which recognized the majority *fiqh* position but concluded that marriage without the consent of the guardian would be permitted. The tendency to follow the minority view indicates the desire of minority *fiqh* scholars not to go against the tide of social values and legal realities underscoring their judicial pragmatism.[781]

On the subject of *ʿaḍl* we can see the trend of mitigating any clash with social and legal norms. *ʿAḍl* or prevention refers to the situation when a guardian without legitimate grounds withholds consent to the potential bride even though the suitor is suitable (*kuf'*). The basis for this is the following verse: *'When you divorce women and they have completed their waiting term do not hinder (lā taʿdulūhunna) them from marrying other men if they have agreed to this in a fair manner.'* (2:232). The legal effect in such a case would be that the guardian would lose his right and the responsibility would fall to the next one in line such as a brother

[776] Al-Bakkālī, "ʿAḍl al-Walī fī Bilād al-Gharb", p. 353.
[777] This is the case where the bride is a virgin and not a divorcee as there is some dispute there the latter still requires the consent of her guardian.
[778] Al-Bakkālī, "ʿAḍl al-Walī fī Bilād al-Gharb", p. 338.
[779] Al-Bakkālī, "ʿAḍl al-Walī fī Bilād al-Gharb", p. 345.
[780] Al-Bakkālī, "ʿAḍl al-Walī fī Bilād al-Gharb", p. 346.
[781] Al-Bakkālī, "ʿAḍl al-Walī fī Bilād al-Gharb", p. 348.

or uncle. However, what exactly constitutes grounds to say *ʿaḍl* has occurred is the subject of scholarly disagreement. Al-Bakkāli explains that although the scholars all agreed a guardian cannot withhold consent unjustifiably, they differed on two issues: the category of *kufu'* to be considered and the level of dowry (*mahr*) is that is acceptable.[782] On the issue of *kufu'* al-Bakkālī does not elaborate which opinion he follows. As we have seen above the category of *kufu'* can range from possession of a good character to having wealth comparable to the wife. This is a critical issue as a wide interpretation gives the guardian greater powers of legitimate refusal. Scholars also disagreed about the requisite *mahr* before a guardian can prevent a marriage from taking place. Some argued that the *mahr* should be *mahr al-mithl*[783] or greater and some said less than the *mahr al-mithl* is sufficient. Al-Bakkāli took the view that *mahr al-mithl* would be required.[784] In this respect al-Bakkāli has taken a moderate view in *fiqh* without resorting to any extremes.

The above is a legal discussion of the subject but what are motivations for addressing it in the first place? It seems the reason al-Bakkālī addresses the issue of *ʿaḍl* extensively because it will act as counterbalance to the power of the guardian who not only needs to seek consent of the bride but also must not withhold his consent when a suitor is found. Al-Bakkālī recognizes and discusses the abuse of the guardianship responsibility within the Muslim community and the negative consequences resulting from it.[785] He cites the view of some guardian fathers who think that their daughters' view or wishes are of no value or consequence. She has no option but to yield to the father's wishes or not marry. Some fathers not only ignore their daughters' wishes but also disregard the opinion of the mother. Then there is the practice of some fathers who are willing to delay their daughter's marriage for financial gain. For example, where the daughter is on a well-paid salary and the father does not want this revenue coming to the family to stop in marriage. Despite highly suitable marriage proposals, the father refuses to let his daughter marry. Also, some fathers want their daughters to marry a cousin or someone from their own tribe or village and refuse to accept anyone outside the wider family or tribal fold. Al-Bakkāli mentions that this has caused girls to flee the family or even marry regardless of their fathers' wishes. Some have turned to social services or non-Muslims or even fallen victim to 'indecent and corrupt' lifestyles.[786] Al-Bakkāli believes the solution to this unlawful practice of *ʿaḍl* is to increase knowledge of

[782] Al-Bakkālī, "ʿAḍl al-Walī fī Bilād al-Gharb", p. 365.
[783] The dowry which is customarily received by similar brides of the same social position.
[784] Al-Bakkālī, "ʿAḍl al-Walī fī Bilād al-Gharb", p. 371.
[785] Al-Bakkālī, "ʿAḍl al-Walī fī Bilād al-Gharb", p. 371.
[786] Al-Bakkālī, "ʿAḍl al-Walī fī Bilād al-Gharb", p. 377.

the Islamic rules. He also proposes the recourse to domestic laws which grant rights to females intended for their protection, with the caveat that resorting to such laws should not contradict the *Sharīʿa*.

Al-Bakkāli believes mosques and community centres also have a role to play here. Such places can create awareness of the Islamic rules and facilitate the adherence to the *Sharīʿa*.[787] Al-Bakkālī states these institutions can conduct the *nikāḥ* or Islamic marriage (providing the civil marriage has been concluded first) if the father, upon being contacted by the mosque or centre still insists on refusing to grant consent without legitimate grounds. For the long term al-Bakkāli proposes that Muslims establish arbitration councils which are legally sanctioned in domestic law and whose decisions have legal effect via the civil courts to deal with disputes arising from the practice of *ʿaḍl*.[788] We can see from the above that al-Bakkāli has sought to place women's rights on a level that accords with social trends and proposed ways in which domestic law can be utilized for resolution of issues and advancement of those rights.

Is the Ruling of Divorce by a non-Muslim Judge recognized in Sharīʿa Law?

We have discussed ways in which Islamic law can coexist or approximate with domestic secular law. However, can secular law in the form of a judicial determination be regarded as legitimate and effective in Islamic law? The starting point for this is, as Bin Bayya elucidates, that a non-Muslim is not allowed to be a judge or a ruler and this a unanimous view and by extension recourse to a non-Muslim judge should not be permitted either.[789] However, Muslims living in the West will find themselves in circumstances where they have no option but make recourse to a civil judge. This situation can arise when spouses who have registered their marriage under civil law wish to divorce and have no alternative but to obtain a civil divorce to terminate their marriage.

It is generally accepted that such a situation is one of *ḍarūra* or necessity and therefore it would be permissible to follow the civil divorce procedure. Once a civil decree has been obtained most scholars have said that an Islamic divorce would still be required in order for the woman to remarry, as judgement of the court is not recognized from an Islamic legal perspective. Minority *fiqh* scholars such as Mawlāwī however have gone against this

[787] Al-Bakkālī, "ʿAḍl al-Walī fī Bilād al-Gharb", p. 381.
[788] Al-Bakkālī, "ʿAḍl al-Walī fī Bilād al-Gharb", p. 382.
[789] Bin Bayya, *Ṣinā'at al-Fatwā*, p. 383 and p.490.

consensus and expounded the view that the pronouncement of divorce by a non-Muslim judge should be binding.[790] Mawlāwī bases his argument on the premise that by virtue of registering a civil marriage the husband has implicitly assigned (*tafwīḍ*) his right to the court.[791] The concept of *tafwid* or *tawkil* is known. It is acceptable in traditional *fiqh* for the husband to assign that right to his wife. A basic condition of assignment of any right is consent. According to Mawlāwī the husband has conceded or forgone his right implicitly when he registered a civil marriage which can only be terminated via a civil court.[792]

Mawlāwī argues the same point from a contractual perspective. A civil marriage which fulfils the basic conditions of an Islamic marriage is itself binding, as well as any permissible condition attached to it. In the case of a civil marriage the contract stipulates that both parties refer to a civil judge in obtaining a divorce. Therefore, the reference to a civil judge would be contractually obligatory.[793] There has been of course opposition to this view.

Shaykh Haytham Haddad, in the UK, has issued a *fatwā* denouncing the above position and stated that judgements of divorce from non-Muslim judges are not valid and a Muslim woman would not be free to remarry having obtained such a divorce.[794] He cites the default position that the basic requirement to give judgments is for the judge to be a Muslim. Non-Muslim judges' decisions are not recognized in *Sharīʿa*. As for the argument of *tawkīl* or delegation, he insisted that for this to be valid the act of delegation has to be clear and explicit and rejects the idea that an implicit delegation would be valid.[795]

Bin Bayya, who seems sceptical of the minority *fiqh* position, but recognized Muslims were in a state of *ḍarūra*, argued that the solution was to give retroactive effect to civil court judgment via *Sharīʿa* councils which should uphold the decisions of the civil courts.[796] In fact, and in practice there is no evidence that Muslims have adopted the minority *fiqh*

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[790] https://www.ikhwanwiki.com/index.php?title

[791] حكم تطليق القاضي غير المسلم, https://www.e-cfr.org/blog/2014/01/31/%d8%ad%d9%83%d9%85-%d8%aa%d8%b7%d9%84%d9%8a%d9%82-%d8%a7%d9%84%d9%82%d8%a7%d8%b6%d9%8a-%d8%ba%d9%8a%d8%b1-%d8%a7%d9%84%d9%85%d8%b3%d9%84%d9%85-2/

[792] حكم تطليق القاضي غير المسلم, https://www.e-cfr.org/blog/2014/01/31/%d8%ad%d9%83%d9%85-%d8%aa%d8%b7%d9%84%d9%8a%d9%82-%d8%a7%d9%84%d9%82%d8%a7%d8%b6%d9%8a-%d8%ba%d9%8a%d8%b1-%d8%a7%d9%84%d9%85%d8%b3%d9%84%d9%85-2/

[793] حكم تطليق القاضي غير المسلم, https://www.e-cfr.org/blog/2014/01/31/%d8%ad%d9%83%d9%85-%d8%aa%d8%b7%d9%84%d9%8a%d9%82-%d8%a7%d9%84%d9%82%d8%a7%d8%b6%d9%8a-%d8%ba%d9%8a%d8%b1-%d8%a7%d9%84%d9%85%d8%b3%d9%84%d9%85-2/

[794] https://iceurope.org/fatwa-a-civil-divorce-is-not-a-valid-islamic-divorce/

[795] Other scholars such as Mufti Ebrahim Desai have rejected that delegation or deputization has taken place as such an assertion 'against the reality of the function of the judge' in the UK context. https://islamqa.org/hanafi/askimam/102561.

[796] Bin Bayya, *Ṣinā'at al-Fatwā*, p.387

positions and have invariably resorted to *Sharī'a* councils to pronounce dissolution of a marriage and for their part *Sharīʿa* courts, in UK at least, where a decree absolute has been granted have granted a dissolution as a matter of formality.

Section III: *Sharīʿa* Councils: Obstacles to Integration?

The minority *fiqh* scholars have advocated the role of *Sharīʿa* councils as a means to resolve personal status issues while being in conformity with domestic law. They see *Sharīʿa* councils as facilitating integration and avoiding a clash between *Sharīʿa* law and domestic law. In the UK the question of whether they promote integration or impede integration is a subject of much academic interest. In the following we shall address the claim for the need for *Sharīʿa* councils, discuss the issues of concern and evaluate to what extent they realize the aims of minority *fiqh* scholars.

Marriage in *Sharīʿa* is a religious matter with its own rules and stipulations for when a marriage has been validly concluded. This is also the case for divorce. Sometimes these rules and conditions are at odds with the UK domestic law. Also, we have the issue of the legitimacy of secular judicial authority in settling matters which are inherently religious.

According to Jörgen Nielsen, the clash is not so much between God's Law and secular law but around who can legitimately pronounce judgements on religious issues.[797] Most Muslims whether devout or not would not accept a marriage as validly concluded without a *nikāh* regardless of its registration under UK law. The same applies to divorce, a decree absolute from a family court would not be considered a valid divorce by most Muslims. This has serious repercussions as a person cohabiting without a *nikāh* would be considered engaging in an immoral premarital relationship even if the marriage was registered at the marriage registry. This carries with it religious as well as social stigma and purely from a spiritual and moral perspective a marriage without *nikāh* is not considered a marriage at all.

Similarly, a woman who has not been divorced through one of the religious means of divorce such as a pronounce of *talāq* from the man or a mutually negotiated *khulʿ* or a dissolution (*faskh*) of marriage then she is not free to remarry and any marriage without an Islamic

[797] Nielsen, Jorgen S., *United Kingdom An Early Discussion on Islamic Family Law in the English Jurisdiction*, (Leiden University Press, 2013), p. 79, *Applying Shariah In the West*, ed. by Maurits S. Berger (Leiden University Press, 2013), p. 88.

divorce can lead to accusation of adultery and the children from such marriage would be deemed to be illegitimate. In the eyes of the law, she may be divorced and free to marry but not so in the eyes of the Muslim community.

This predicament as some have observed has led Muslims to marry twice and divorce twice according to the secular and religious whereby, they have formed a hybrid practice which Werner F. Menski called '*inglizi shariat'*.[798] Then there is the problem of 'limping marriages' where a woman has obtained a decree absolute form the civil court, but the husband is unwilling to give a pronouncement of *ṭalāq*. The man can go on to marry (as *Sharīʿa* allows more than one wife) but the woman in the absence of a *ṭalāq* cannot remarry in the eyes of *Sharīʿa* even though the domestic law states she is free to marry.[799] These are just a few predicaments that Muslims, especially Muslim women, find themselves in which gives rise to the need for a religious body that can deal with the requirements for an Islamic marriage and divorce. There are other issues such as mediation, child custody issues and inheritance but the largest share of the problems have been around marriage and divorce.[800] There are also issues outside of personal status that deal with probate, Islamic finance, and commercial transactions. Muslims in the UK have attempted to address these issues via the use of *Sharīʿa* councils.

Archbishop Rowan Williams suggested that the best way to address these issues was through what he called "constructive accommodation". He recognizes that legal pluralism is a reality and to ignore it at the civil domestic level could impede integration by forcing conservative Muslims to choose between "cultural loyalty or state loyalty". Such a situation would lead to practices going underground, whereas accommodation would be amenable to transparency and regulation. Williams however was conscious that this accommodation had its limits and was not a "blank cheque" and where aspects of *Sharīʿa* law impinged on the rights and liberties of women then domestic law would prevail.[801]

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[798] Werner F. Menski, *Angrezi Sharia: Plural Arrangements in Family Law by Muslims in Britain* (London: School of Oriental and Asian Studies, 1993). Yilmaz, Ihsan "Muslim Alternative Dispute Resolution and Neo-*Ijtihad* in England", *Alternatives: Turkish Journal of International Relations*, 2003, p. 127.
[799] Yilmaz, "Muslim Alternative Dispute Resolution", p. 131.
[800] There also issues outside of personal status that deal with probate, Islamic finance and commercial transactions, however the focus of this study will concentrate on family law and more specially on marriage and divorce.
[801] Shah, Prakash, "A Reflection on the Shari'a Debate in Britain", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1733529, pp. 76-77.

Due to this need we saw the rise in numbers of *Sharīʿa* councils, mostly based in mosques or Muslim cultural centres. According to a UK government independent review by Professor Mona Siddiqui published in February 2018 the exact numbers are not known but "academic and anecdotal estimates vary from 30 to 85,"[802] in England and Wales whilst none existed in Scotland according to the report.

Following Rowan Williams' interventions on this subject in 2008 there have been a number of academics, think tanks and human rights organizations reacting to the presence of *Sharīʿa* councils. They assert that *Sharīʿa* councils are discriminatory towards women, that they will lead to cultural separatism and effectively sanction a parallel legal system which runs roughshod over justice, equality and the rule of law.

Prior to Rowan Williams some voices have been less critical and in fact argued that *Sharīʿa* councils did not seek to rival domestic law and others like Ihsan Yilmaz even welcomed the legal pluralism and the development of a 'new *ijtihād*'.[803] Samia Bano who in 2007 published a study of the stages and processes of certain *Sharīʿa* councils in the UK by observing their proceedings, argued that the empirical data did not support that claim that Muslims wanted to formalize principles of *Sharīʿa* law within domestic law.[804] She accepts that women have been often marginalized due to 'religious and socio-cultural terms of reference' but they have not always accepted the values that underpin such terms of reference. Their recourse to *Sharīʿa* councils is pragmatic and utilitarian, simply to obtain the Muslim divorce which they need for social and religious reasons.[805] She believes that *Sharīʿa* councils occupy a middle space between Muslim community values and domestic law where the 'diasporic experience' has a stake in both. In another study some years later in 2012 she surveyed 30 *Sharīʿa* councils and concluded that these councils did not "seek to replace civil law in matters of law" and "sought to complement the existing legal system rather than replace civil law in marriage and divorce".[806] However that study also acknowledged that more research was

[802] https://www.gov.uk/government/publications/applying-sharia-law-in-england-and-wales-independent-review, p. 10.
[803] Yilmaz, "Muslim Alternative Dispute Resolution", p. 133.
[804] "Law, Social Justice & Global Development," https://warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/bano/bano.pdf, p. 21.
[805] "Law, Social Justice & Global Development", p. 22.
[806] "An Exploratory Study of Shariah Councils in England with Respect to Family Law" (University of Reading 2012), https://eprints.soas.ac.uk/22075/1/An_exploratory_study_of_Shariah_councils_in_England_with_respect_to_family_law_.pdf p. 26.

needed as user perceptions and experience was not looked at and had to be explored in depth to formulate firmer conclusions on the subject.

In 2009 the 'centre right' think tank Civitas published a paper entitled *Sharia Law or 'One for All'?* by Denis MacEoin. In its foreword written by Neil Addison, a practicing barrister, argues that the mediation as practiced by Muslim Arbitration Tribunals (MAT) was in effect carrying out arbitration in the guise of mediation. He argues mediation is about helping the parties to find common ground and arbitration is a "form of trial before a 'judge' who is not appointed by the state but is instead agreed by the parties."[807] The Arbitration Act 1996 does not allow arbitration in matters of divorce or childcare. He argues since *Sharīʿa* principles are at odds with UK law and are not about finding common ground and because the parties feel pressured to agree certain outcomes that are compliant with *Sharīʿa* then the mediation is actually tantamount to arbitration which is unlawful. Where such 'mediated' agreements or consent orders are upheld by domestic courts then this has led him to suggest that *Sharīʿa* law has been given recognition by civil law.[808]

For example, in cases relating to childcare civil law requires that the best interests of the child are considered. However *Sharīʿa* laws in his view do not adhere to this requirement and so a mediated agreement on child custody which is then upheld by the civil courts is actually an arbitration and enforcement of a *Sharīʿa* judgement which is contrary to s6 (1) of Human Rights Act 1998 which makes it unlawful for public authorities to act in a way that is incompatible with Convention rights.[809] The editor of the paper, David G. Green, was even more unreserved in his critique of *Sharīʿa* Council claims that they are "in practice part of an institutionalized atmosphere of intimidation, backed by the ultimate sanction of a death threat."[810]

As for the author, MacEoin, he argues that the Muslim community is on a fundamentalist extremist trajectory[811] and *Sharīʿa* councils are born of this trend. He views the presence of *Sharīʿa* council as contrary to the liberal foundations of Western nations and a danger to the values underpinning these societies. He asserts that the people who preside over *Sharīʿa* councils and the movements from which such people hail, follow a narrow and literalist

[807] MacEoin, Denis, "Sharia Law or One Law for All", https://www.civitas.org.uk/pdf/ShariaLawOrOneLawForAll.pdf, p. x.
[808] MacEoin, "Sharia Law or One Law for All", p. xi.
[809] MacEoin, "Sharia Law or One Law for All", p. xiv.
[810] MacEoin, "Sharia Law or One Law for All", p. 5.
[811] MacEoin, "Sharia Law or One Law for All", p. 12.

interpretation of Islam, which is not amenable to change or reform. He points to the Wahhabi, Muslim brotherhood and Deobandi influences of such groups and personalities.[812] He concludes *Sharīʿa* councils, and their values represent a fifth column in society and for such puritanical legalism to receive any kind of sanction or recognition in civil domestic law or the judicial process would constitute a danger to society's stability, undermine the rule of law and impede the integration of minorities. He acknowledges that attempts were made to reform aspects of Muslim marriage and divorce which is the mainstay of what *Sharīʿa* councils deal with on a daily basis, but these have been unsuccessful in his view. For example, the Muslim Marriage Institute proposed a model Muslim Marriage Contract which gave the wife an automatic right of divorce, but the initiative which was endorsed by respected Muslim institutions still failed to get traction due to the opposition of certain Muslim clerics.[813]

MacEoin does not believe there is reason to hope that reform would be possible and those who call for reform cannot always be trusted. He mentions the ECFR (European Council for Fatwa and Research) and its scholars such as al-ʿAlwānī and al-Qaraḍāwī and points to their *salafī,* intolerant roots and *fiqhī* positions despite their claim to reformist Islam.[814] MacEoin does not believe such endeavours will lead to social cohesion. He correctly identifies that there are aspects of *Sharīʿa* law whether in terms of substantive law or principles that do not accord with liberalism, but it could be equally argued that his idealistic all or nothing approach will damage social cohesion and prove to be counterproductive leading to even further intrenchment of conservative and exclusivist trends among the Muslim community in the UK.[815]

Apart from his objections from an ideological standpoint, he also believes *Sharīʿa* councils are guilty of discrimination and committing acts of coercion against women. He also goes to the extent of charging *Sharīʿa* councils of giving rulings that are illegal or flouting human rights legislation. He cites various religious rulings which he claims are illegal as an argument to say that recognition of any role for *Sharīʿa* councils in domestic law will compromise national law.[816] For example he cites the *fatwā* prohibiting a Muslim woman from marrying a non-Muslim man which she can do legally in domestic law. The obvious

[812] MacEoin, "Sharia Law or One Law for All", p. 29.
[813] MacEoin, "Sharia Law or One Law for All", p. 44.
[814] MacEoin, "Sharia Law or One Law for All", pp. 60-61
[815] MacEoin, "Sharia Law or One Law for All", p. 64.
[816] MacEoin, "Sharia Law or One Law for All", pp. 70-71. In particular see his appendix which a summary of online fatwas which the author says are illegal.

point he has failed to take into account is that such *fatwās* are not legally binding, they are not enforced by the *Sharīʿa* councils and nor are such contraventions punished. Other religions like Judaism and Christianity have within their moral teachings and laws, injunctions that prohibit certain practices such as adultery and give dietary restrictions though they are lawful in domestic law. This contradiction between religion and domestic law by that fact alone does not undermine the liberal nature of the nation and its institutions as domestic law and its protections are supreme.

In the same vein as the above Civitas publication, One law for All (an equality campaign group) published a paper in 2010 entitled *Sharīʿa Law in Britain. A Threat to one Law for All & Equal Rights*. The main thrust of the paper is that *Sharīʿa* Law is not compatible with Human Rights law and therefore *Sharīʿa* councils which are guided by *Sharīʿa* law are discriminatory, unjust and constitute a parallel legal system.[817] The paper recommends that Muslim Arbitration Tribunals and *Sharīʿa* councils be challenged in court on grounds that their discriminatory practices contravene section 6 of the Human Rights Act 1988 which states that everyone is entitled to fair hearing by an 'impartial tribunal.' It is argued that alleged discrimination against women means these councils are not impartial. They also recommended that the Arbitration Act 1996 be amended to exclude religious arbitration.

The paper, like the Civitas publication, ignores the fact that these bodies have no executive power. Even *Sharīʿa* councils will admit that if aspects of *Sharīʿa* law do not accord with secular liberal values, but the law has not made such a practice unlawful then it is fully within the rights of citizens to resolve marital disputes and dissolve their *nikāḥ* according to their religious values. Otherwise, that could contravene another human right, the right to believe and practice their faith. Rowan Williams understood the need for a balance between rights. He also objected to wholesale incorporation of *Sharīʿa* law but recognized ignoring minority religious rights is likely to have the unintended consequence of undermining social cohesion.

Due to the controversy over this issue the then Home Secretary Theresa May launched an independent review on 26 May 2016. This review was chaired by Professor Mona Siddiqui and was published in February 2018. The review aimed to understand, among other things, the role of groups and *Sharīʿa* councils and their treatment of women with a view to make recommendations pertaining to their findings. The review collected written and oral evidence

[817] Namazie, Maryam, (Spokesperson), "Law in Britain: A Threat to One Law for All and Equal Rights", *One Law for All*, June 2010, https://onelawforall.org.uk/new-report-sharia-law-in-britain-a-threat-to-one-law-for-all-and-equal-rights/, p. 22.

from a diverse interested party. The review considered evidence from 'users of *Sharīʿa* councils, women's rights groups, academics and lawyers.'

After considering the role and practices of *Sharīʿa* councils either in terms of arbitration or mediation, the review came to a pragmatic solution. It tried to be fair and acknowledged that there was evidence of good practice as well as bad and found that, based on the evidence, *Sharīʿa* councils were 'fulfilling a need in some Muslim communities.'[818] Muslim women who have a religious *nikāh* have no option but to make recourse to *Sharīʿa* councils to obtain a divorce where the husband has refused to give a *ṭalāq*. To ban *Sharīʿa* councils would not address that very real need of some Muslim women who based on their religious conviction will not feel free to remarry without that pronouncement of dissolution from a *Sharīʿa* council. The review therefore sought to mitigate the potential discrimination and mistreatment of women by proposing three recommendations[819]:

1. Amendment to the Matrimonial Causes Act 1973 requiring that civil marriages are 'conducted before or at the same time as the Islamic marriage ceremony. This would give women legal protection and allow them to have recourse to the civil system to resolve their matrimonial matters as well as result in the prohibition of informal polygamy. Another consequence would be that in divorce proceedings for example where decree absolute has been obtained in the family court then in practice most *Sharīʿa* councils will readily grant an Islamic divorce.
2. Building understanding and awareness of women's rights in UK law especially as they pertain to marriage and divorce though awareness campaigns via NGOs and women's groups. The application of the first recommendation will depend on the success of the second recommendation.
3. Regulation of *Sharīʿa* councils. The review noted that this could be either through the adoption of 'a system of uniform self-regulation', or state sponsored system of regulation and the provision of an enforcement agency similar to OSFTED. In conclusion it proposed the 'creation of a body by the state with a code of practice for *Sharī'a* councils to accept and implement.'

[818] https://www.gov.uk/government/publications/applying-sharia-law-in-england-and-wales-independent-review, p. 23.
[819] https://www.gov.uk/government/publications/applying-sharia-law-in-england-and-wales-independent-review, pp. 17-21.

The approach of the review, though there were dissenting views, was to allow for the regulated servicing of the need while at the same time bringing about changes that would gradually result in decreasing use of *Sharīʿa* council in the long term. This gradual approach is set apart from the outright ban of *Sharīʿa* councils by the political right. The authors of the review feared that a blanket ban might lead to these councils going 'underground'[820] and make it more difficult to detect abuse and discrimination and therefore preferred realism and pragmatism to the ideological approach of right-wing voices and think tanks.

Another argument on the theme of need for *Sharīʿa* councils was made by Julie Billaud who explained the need in spiritual and ethical terms[821]. Billaud accepts that *Sharīʿa* councils may be born of and part of the 'global Muslim revival', however the users, who are mainly women, resort to them for moral reasons. Muslim women who believe their faith and morality dictates that their marriages and divorce be conducted according to their religion are not motivated by extremism or because they have been radicalized but they seek a moral space to resolve their marital issues. The *Sharīʿa* councils represent such a space and to deprive them of this is to deny them an 'ethical Muslim Life'.

In August 2020 Civitas published a substantial paper about unregistered marriages entitled "Fallen Through the Cracks"[822] by Emma Webb who has a background as a researcher in Muslim extremism and radicalization. The paper, very much like the earlier Civitas paper before it, takes the view that *Sharī'a* councils 'perpetuate the abuse and discrimination' suffered by women.[823] This paper differed from the previous Civitas paper in that it was based on interviews with Muslim women who related their experience of *Sharīʿa* councils. The report considered the problems of unregistered marriages, marital captivity, child custody and safeguarding and financial exploitation. For each issue case studies with women were cited whose accounts seem to confirm the problems highlighted. One cannot be sure however how representative these accounts are or if their experiences are limited instances of abuse. The report has an extensive discussion on the previous attempts at legislative reform and considers various options and approaches proposed as possible solutions and then makes

[820] [820] https://www.gov.uk/government/publications/applying-sharia-law-in-england-and-wales-independent-review, p.23.
[821] Billuard, Julie, "Ethics and Effects of British Shariah Councils: A Simple Way of Getting to Paradise", https://www.researchgate net/publication/287938954_Ethics_and_affects_in_British_Sharia_councils_A_simple_way_of_getting_to_paradise.
[822] Webb, Emma, "Fallen Through the Cracks", https://civitas.org.uk/content/files/A-Fallen-through-the-cracks.pdf.
[823] Webb, "Fallen Through the Cracks", p. xii.

some recommendations of its own which largely echo the recommendations of the Independent Review into the application of Sharia Law in England and Wales (2018) discussed above.

Amra Bone, who is a panel member on the Birmingham *Sharīʿa* Council as well as having an academic background in Islamic Sciences, proposed a 'new paradigm'[824] to deal with the claims of parallel legal system and discrimination against women. Bone argues that the legislative reform suggested by the government's Independent Review (2018) will not adequately resolve the problems they are designed to address. For example, the proposal that as matter of law a *nikāḥ* must be simultaneously registered may not work and be unenforceable as Muslims do not believe in a priesthood and nor do they believe a mosque is necessary to conduct a *nikāḥ*. One could see how this matter can go off the radar where the *nikāḥ* is conducted in people's homes by friends and relatives. Also, the expectation that mandatory registration of *nikāḥ* would render *Sharīʿa* Councils obsolete in the future is also ignoring the fact that most Muslim scholars do not consider a decree absolute from a civil court to be recognized divorce for religious purposes as well.[825] In addition to the practical consideration, mandatory registration, ironically, is likely to be viewed as discriminatory itself. Why must Muslims by force of law have to register a union when those who choose to live and cohabit together are not required to do the same? Can one discrimination be resolved by another discrimination? Also, the legislative approach assumes that Muslim women in Britain 'fit a crude stereotype' and all want or need their *nikāḥ* to be registered. Muslim women who work, run their own business or owned property before their *nikāḥ* may well feel that it is not in their interest to register their *nikāḥ* which will impact property rights in the event of divorce.[826]

Instead, Bone proposes a *nikāḥ* contract drafted in such way that it meets the fundamental requirements of Islamic law but at the same time addresses the concerns people have with unregistered relationships in the UK context. This *nikāḥ* union or contract will meet religious requirements as well as being secular in nature as it would be in harmony with civil domestic

[824] Bone, Amra, "Islamic Marriage and Divorce in the United Kingdom: The Case for a New Paradigm," https://www.ibnrushdcentre.org/wp-content/uploads/2020/07/Islamic-Marriage-and-Divorce-in-the-United-Kingdom-The-Case-for-a-New-Paradigm-1.pdf.
[825] Bone, "Islamic Marriage and Divorce", p. 4.
[826] Bone, "Islamic Marriage and Divorce" p. 5.

law and so theoretically non-Muslims could opt for such a contract.[827] The essential features of her proposal are the following:

1. A provision in the contract allowing 'restricted polygyny under exceptional circumstances.
2. The contract will give women the option to give a unilateral divorce.
3. The contract is available to Muslims and Non-Muslims.
4. Women who have acquired wealth before their nikāḥ can include a provision to protect that wealth.
5. Dissolution of marriage can be immediate and not constrained by time as the case in civil law.
6. Integration of UK legal systems with Muslim scholarship.

These proposals, though well meaning, contain several lacunas and potentially create more problems than they solve. Permission of polygyny even under 'special circumstances' will be completely unacceptable to many and open to the charge of discrimination as this right is only afforded to men. Nor will this provision assuage the fears of those who argue that incorporation of aspects of *Sharīʿa* law will undermine liberal values of equality and rule of law and represents a parallel legal system. Although the right of women to give unilateral divorce and dissolution of the *nikāḥ* without time restrains would be welcome but to be effective in English law would entail undermining and contradiction of existing civil law. Further to this, how will the protection of wealth provision work? Will there be an overhaul of the existing law on financial remedies or is the new proposal an adjunct to domestic law? The lack of detail in key areas means it is not exactly clear how the proposition will work in practice.

On the question of reception, will Muslims welcome this 'new paradigm' and what success traction might it receive? How many Muslim men are willing to grant a unilateral right of divorce to their prospective wives? It is even questionable if this 'new paradigm' is actually novel as there have been attempts in the past to propose *nikāḥ* contracts that gave women more rights, but these never took off due to opposition from certain quarters in the Muslim community.[828] If recent history is anything to go by, it is unlikely these proposals will find acceptability amongst Muslims and it is doubtful whether the government, think tanks and

[827] Bone, "Islamic Marriage and Divorce" p. 13.
[828] Maceoin, "Sharia Law or One Law for All", p. 44.

human rights groups would accept this as a secular proposal or would countenance Muslim scholars to have a role in the judicial process. It is quite possible that it will satisfy neither, for government it is still incorporation of religion in civil law and for certain Muslims the contract is too secular to be a valid *nikāḥ*.

Conclusion

The debate around *Sharīʿa* law as it relates to the domestic legislation is one that originates from the Muslim world and the issues that arose for Muslim minorities in the West are echoes of the same predicament. Just as the secularization and law reform that took place in Muslim countries in the post-colonial period provoked questions about what it means for Muslims live and abide by the *Sharīʿa*, this issue became more acute in the West, the heartland of the secular liberal tradition and legal system. There was a great theological obstacle in the minds of Muslims, that secular law was the opposite to *Sharīʿa* law and yet there was a very real need to engage with the legal system to function and live in society and achieve one's rights. As we saw above, minority *fiqh* scholars sought to balance the theological with the practical by highlighting a commonality with the Christian heritage imbedded within the western legal system. They qualified the theological standpoint by making a distinction between the matters that are transactional and universal with those issues that are intrinsically religious such as family law matters. Even the issues that were religious could have some overlap with the civil law as both are rooted in the desire to protect life, property, and dignity. Although a closer scrutiny of the details may lay bare the unfeasibility of the argument of commonality the mere recognition that the supremacy of *Sharīʿa* was not absolute in practice and open to a nuanced appreciation allowed for greater exploration and coexistence.

On the details of Islamic personal status law, we have seen in the discussion of *kafā'a* and *ʿaḍl* how Muslim scholars were willing to go beyond a single *madhhab* and look at the diverse opinions and present a view of the rules that are in most harmony with domestic civil law and the host values. The minority *fiqh* scholars could have adopted a view on these subjects that would be construed by western minds as backward, discriminatory, and potentially illegal. However, in keeping with their aim of seeking a cohesive Muslim existence they selected those views that would cause least concern and greatest tolerance. In so doing it is legitimate to ask to what extent minority *fiqh* maintains *aṣāla* (authenticity) in their principles and goals. The minority *fiqh* scholars would argue that by remaining within

the recognized schools of law, they have not strayed beyond normative legal tradition but allowed *Sharīʿa* to find a practical and genuine relevance to the lives of Muslims who are looking for solutions and not obstructive pronouncements.

It is correct to say that the two legal philosophies converge at certain points but the approach of minority *fiqh* scholars may have blurred the line between adaptation and adoption. While values-based legal commonalities do exist, the divergences can frustrate each other's objects. Perhaps it is in recognition of that fact that minority *fiqh* scholars have legitimized and encouraged the establishment and use of *Sharīʿa* councils where Muslims seek to self-regulate according to their faith whilst accepting that domestic law must prevail. They did not see a contradiction with integration, as Muslims were obliged to be law abiding and would need to refer to domestic courts for resolution of most of their issues. Even in personal status law, they took the bold step of accepting a decree of divorce by civil courts as binding from a religious standpoint.

For a time, the proposition that Muslims could have *Sharīʿa* councils and yet be integrated within their societies and its legal norms seemed plausible and acceptable among certain quarters. However, as we saw in the UK experience, there was a backlash, especially amongst the right wing think tanks and human rights and women's organizations who expressed strong vocal opposition. They charged *Sharīʿa* councils with discrimination and highlighted the trends and values that show why Muslims refer to them and pointed to this as a clear sign of the danger to social cohesion. They proposed various legislative solutions which the UK Conservative government has not adopted largely due to practical and pragmatic considerations. The difficulty the government is encountering is that there are no easy solutions. If they enacted legislation proposed by the Independent Review, this might prove to be counterproductive and generate further tensions within the Muslim community. In the meantime, Muslims will continue to use *Sharīʿa* councils for resolution of their family and divorce matters within the ambit of the civil domestic law which was what the minority *fiqh* scholars had proposed. If *Sharīʿa* councils are able to self-regulate and effectively address the abuses, then there is a distinct possibility that the minority *fiqh* vision of Muslims living under domestic law whilst seeking religious sanction for their marriages and divorce may well be accepted as a model for social cohesion in the UK and dispel the fears and concerns of those on the political right.

Chapter 6

Ruling on Female Convert Marriages to Non-Muslims

Introduction

The rate of conversion to the Muslim faith is one of the highest in the UK and two-thirds of converts to Islam over the last 10 years were women.[829] This fact has thrown up realities or questions which had been thought settled since early times. According to the established position of the major schools of law, Muslims cannot marry non-Muslims with the exception being that a Muslim man can marry women from the Christian and Jewish faiths, although no such exception is made for a Muslim woman. The traditional Muslim law states a Muslim woman is not permitted to marry a non-Muslim man irrespective of whether the non-Muslim is from what is termed as 'the people of the Book' or any other faith. This is a matter of consensus not only among jurists of the traditional schools but also with the minority *fiqh* scholars.[830] However, certain realities on the ground in western nations and the changing Muslim demographics has sparked a discussion about the applicability of these rules to particular situations.

An issue that has come to the fore for minority *fiqh* scholars is the question of those women who convert to Islam while their husbands remain outside the Muslim faith. The common scenario is that of a woman who may have been happily married for many years and had children together before converting and after the conversion the relationship is still strong and subsisting. The non-Muslim husband is accommodating of his wife's new faith and has no intention of using any coercion or force and wants the marital relationship to continue. As we have stated, traditional *fiqh* does not recognize a woman's marital relationship as legally valid unless the husband converts to Islam. Traditional jurists broadly understood a Muslim woman married to a non-Muslim as something endangering her faith in some way[831] and thus contrary to the interest or *maṣlaḥa* of Islam and family members. The concern in the current context is that prohibiting such marriages may lead some women to not embracing the faith fearing the break-up of her family. It is argued that this is contrary to the notion of *maṣlaḥa*

[829] See http://faith-matters.org/press/222-islam-converts-mainly-women and http://www.independent.co.uk/news/uk/home-news/the-islamification-of-britain-record-numbers-embrace-muslim-faith-2175178.html.
[830] Al-Qaraḍāwī, *Fiqh al-Aqalliyyāt*, p. 95.
[831] See http://eng.dar-alifta.org/foreign/ViewFatwa.aspx?ID=6167&text=non-muslim.

and should be classed instead as a *maḍārra* because potential converts would be turned away from religion due to the adverse consequences to their family life. This presents a dilemma and challenge for those wishing to tailor Islamic rulings to a Muslim minority context.

Most converts are women but the number of those already married with children are not known, though it is expected invariably there will be a significant number who would find themselves in the above predicament. Since there is no current statistical or sociological data on the numbers of married convert women facing this dilemma in the West, accurate judgements cannot be made as to the extent, however it is clear the issue is a real problem faced by convert women based on the anecdotal experiences recounted by al-Qaraḍāwī, Juday' and others and as we shall see in their writings shortly. The issues faced by such women can also be seen from online *fatwā* databases where questions are posted to scholars for a response.[832] The issue of convert or interfaith marriages is a wider discussion which has its respective circumstances and challenges across the Muslim world.[833] However, since minority *fiqh*'s aim is to address the issue faced by Muslim minorities in non-Muslim countries, we shall focus our research on the western experience and the resultant *fiqh* surrounding the question.

The issue is undoubtedly complex with, on the one hand, an alleged scholarly consensus (*ijmāʿ*) regarding the legal rulings and on the other a critical question for the Muslim community and its converts. For this reason, minority *fiqh* scholars have expended much time and attention on it compared to other issues related to women and their family and social life. The response of the minority *fiqh* scholars has been a mixed one with a few going against the traditional or pre-modern legal precedence as the tension between the need for a modern answer and risk of going against this precedence is quite apparent from their discussions on this subject. This tension is of important academic interest, as examining it would throw light on how minority *fiqh* grapples with its stated aims and legal principles in the face of a real community need for presentation of context-sensitive jurisprudential solutions. In addition, the response of minority *fiqh* scholars needs to be assessed in light of the broader backdrop of women's rights, modernity and 'westernization' and the traditionalist or Islamist reaction to change. minority *fiqh* is not separate from the broader question of the discourse on gender in

[832] For example, https://islamqa.info/en/answers/3408/stories-of-women-who-became-muslim-and-left-their-non-muslim-husbands or https://www.searchforbeauty.org/2016/05/01/on-christian-men-marrying-muslim-women-updated/.
[833] https://www.loc.gov/law/help/marriage/prohibition-of-interfaith-marriage.pdf.

the colonial and post-colonial era and the scholars' responses will be informed by that wider context. Therefore, for the above reasons, a whole chapter has been devoted to this rather specialized subject to evaluate the *fiqh* and its efficacy in relation to real problems faced by Muslim communities and the wider background of gender discourse. To do this, I have chosen to focus on three particular scholars, with reference to others as appropriate as they have presented the most detailed treatments and cover both ends of the spectrum (for and against) on the issue of convert marriages: al-Qaraḍāwī, al-Judayʿ and Mawlāwī[834]

Section I: Yūsuf Al-Qaraḍāwī

Diversity of views

The initial response to this question came from al-Qaraḍāwī in an answer to a question about this scenario. Al-Qaraḍāwī admitted that for many years he himself has given the traditional response of impermissibility[835]. He recalls how at a conference in America some 40 years ago, Dr Hassan Turābī was roundly criticized for going against the consensus (*ijmāʿ*) for allowing such marriages.[836] However, having come across a discussion by Ibn Qayyim in his work *Aḥkām Ahl al-Dhimma* transmitting no less than nine views on the subject, had made him realize the matter was not as settled as he had thought and deserved further scrutiny. It was on an analysis of the various views set out by Ibn Qayyim that al-Qaraḍāwī formed his revised view and therefore it is worth briefly listing some of the salient views for the sake of background information:

1. The woman waits, if she chooses, for the husband to embrace Islam even though that may take years. It is reported that 'Umar b. al-Khattab gave the option to a women whether to separate or to reside with the husband. Once the husband embraces Islam then the marriage and marital relationship will continue.
2. The husband has greater right to her (in respect of conjugal relationship) if she dies having not left the place where he resided. This is reported to be the view of 'Ali b. Abi Talib.
3. Both spouses continue in their marriage until and unless the authorities (a judge or the head of state) separate them.

[834] Short biography of all these scholars have been provided in chapter 1.
[835] Al-Qaraḍāwī, *Fiqh al-Aqalliyyāt*, p. 105.
[836] See the view of Dr Hassan Turabi in an interview with the *Asharq Al-Awsat* newspaper, https://eng-archive.aawsat.com/theaawsat/features/asharq-al-awsat-interviews-sudanese-islamist-leader-dr-hassan-turabi.

4. The woman will reside with her husband, but conjugal relations will not be permitted. Here the husband still has a responsibility to provide residence and maintenance, but sexual intercourse is not permitted.

The Fatwā of ʿUmar

Ibn Qayyim took the first view of immediate annulment to be very weak as he thought it contradicted the views of the Prophet's Companions. As for ʿUmar b. al-Khaṭṭāb giving an option, this indicates that such marriage is permitted (*hāl jawāz*) and not one where annulment is inevitable (*ḥāl luzūm*). This is how ʿUmar's decisions were interpreted as sometimes he gave the option to the woman and at other times, he ordered a separation. In support of this, the example is cited where the Prophet returned his own daughter to Abū al-'Abbas who had embraced Islam 6 years after the original marriage contract. The point about the permissibility of the contract made by Ibn Qayyim as opposed to its mandatory separation (*luzūm*) is the "secret or essence of the issue"[837] according to al-Qaraḍāwī and brings together and reconciles the various evidences used for and against by the jurists (*fuqahā'*).

The Verses of al-Baqara[838] *and al-Mumtaḥina*[839] .

The key evidence cited by those who argue that immediate separation (*furqa*) must take place centre around the following verses:

> *And do not marry Al-Mushrikāt (idolatresses, etc.) till they believe (worship Allah Alone). And indeed, a slave woman who believes is better than a (free) Mushrika (idolatress, etc.), even though she pleases you. And give not (your daughters) in marriage to Al-Mushrikūn till they believe (in Allah Alone).'* [2: 221].

> *O you who believe! When believing women come to you as emigrants, examine them, Allah knows best as to their Faith, then if you ascertain that they are true believers, send them not back to the disbelievers, they are not lawful (wives) for the disbelievers nor are the disbelievers lawful (husbands) for them. But give the disbelievers that (amount of money) which they have spent (as their Mahr) to them. And there will be no sin on you to marry them if you have paid their Mahr to them. Likewise hold not*

[837] Al-Qaraḍāwī, *Fiqh al-Aqalliyyāt*, p. 112.
[838] Qur'ān 2:221.
[839] Qur'ān 60:10.

> *the disbelieving women as wives, and ask for (the return of) that which you have spent (as Mahr) and let them (the disbelievers, etc.) ask back for that which they have spent. That is the Judgement of Allah. He judges between you. And Allah is All-Knowing, All-Wise.* [60:10].

In respect of the first verse al-Qaraḍāwī does not dwell on it except to mention in passing that it only refers to initiation of the marriage contract and not its continuance following conversion of one of the spouses.[840] He fails to cite this verse under the heading in his article 'Evidences of those who say Separation must be Immediate' even though the verse from the chapter of *al-Baqara* is used by such people to show that sexual relations between such spouses is prohibited.

As for verse 10 of chapter *al-Mumtahina*, al-Qaraḍāwī explains that the backdrop of this verse is the treaty of Ḥudaybiyya where the Prophet Muḥammad agreed that any persons fleeing from each other's control will be returned. In the case of women, however, the Prophet made an exception stating that it did not include women who were fleeing from Makkah. The above verse states that any women who came to Madinah seeking refuge would be granted leave if upon examination they were proven to be Muslims. Any women deemed to be a Muslim would be granted refuge and would not be sent back to their polytheist husbands. The expression in the verse *'they are not lawful (wives) for the disbelievers nor are the disbelievers lawful (husbands) for them'* and *'hold not the disbelieving women as wives'* is generally taken to mean the prohibition of Muslim women marrying or being married to non-Muslims and therefore in such situation an immediate separation is required. The example of ʿUmar b. al-Khaṭṭāb is commonly cited, who. it is reported divorced his wives in Makkah (who were polytheists at the time) following the revelation of this verse. Others have argued that the verse does not indicate separation per se, rather the prohibition relates to returning believing women to the disbelievers in Makkah. Believing women are not lawful for disbelievers but this does not mean, according to al-Qaraḍāwī separation or that they cannot wait for their husbands to embrace Islam in which case they can continue their marriage. As for the part of the verse which says: *'hold not the disbelieving women as wives'*, according to al-Qaraḍāwī it does mean not continuing in the marriage relationship but also allows for the man to wait for her to embrace Islam in which case the marital relationship will resume by the original marriage contract.

[840] Al-Qaraḍāwī, "Islām al-Mar'a", p. 440.

The key point that al-Qaraḍāwī argues is that at no time did the above verses dissolve or invalidate the marriage contract. Having established the contract is still valid, the next question al-Qaraḍāwī asks is whether the marital relationship can continue and for how long during or after the waiting period (*ʿidda*). Al-Qaraḍāwī's approach is conciliatory such that an interpretation of the above verse should allow the accommodation of all evidence rather than the rejection of some and the acceptance of others. In this vein, he quotes at length from Ibn al-Qayyim who argued the case for the contract continuing but without the right of conjugal relationship and this is by considering all evidence available from the practice of the Prophet and statements of the Companions.[841]

Following the legal edicts of Companions

Following on from this approach, al-Qaraḍāwī embarks on a study of the edicts and rulings of the Companions and Followers (*tābiʿīn*) and arrives at a view different to that of Ibn Qayyim and Ibn Taymiyya. Al-Qaraḍāwī criticizes them for not following through with this approach and not taking the views of companions fully into account.[842] For example, there is a narration where ʿUmar b. al-Khaṭṭāb gave an option for the women to either separate and reside with (*aqāmat ʿalayhi*) the non-Muslim husband which is interpreted by Ibn Qayyim to mean 'waiting' for the husband to embrace Islam, it does not mean cohabitation is permitted. Al-Qaraḍāwī argues that a *ẓāhir* (literal) reading of 'reside with' must include cohabitation. This is further supported by the clear statement reported from ʿAlī b Abī Ṭālib: "The husband has greater right to her as long as she dies not leaving the place where he resides". Also cited are statements of the Followers like ʿĀmir b. Sharhabil al-Shaʿbī and Ibrāhīm al-Nakhaʿī who said: "They shall reside (together) based on their (initial) marriage."[843]

The above interpretation that al-Qaraḍāwī offers to verse 10 of the chapter of *al-Mumtaḥina* was, according to him, the view of ʿAlī b Abī Ṭālib who was alluding to the fact that believing women who migrate to Madinah should not be sent back to their non-Muslim husbands due to fear for their new faith. However, those who convert to Islam and choose to remain in Makkah are allowed to reside with their husbands and continue in their marital life. When we analyse this view, it is difficult to see how al-Qaraḍāwī manages to credibly reconcile all evidences in the way that he set out to do or in the way Ibn Taymiyya and Ibn

[841] Al-Qaraḍāwī, *Fiqh al-Aqalliyyāt*, p. 105.
[842] Al-Qaraḍāwī, *Fiqh al-Aqalliyyāt*, p. 119.
[843] Al-Qaraḍāwī, *Fiqh al-Aqalliyyāt*, pp. 118-9.

Qayyim had attempted to do. Ibn Taymiyya and Ibn Qayim opened the line of inquiry and al-Qaraḍāwī went further by restricting the import of verse 10 without investigating why Ibn Taymiyya and Ibn Qayim stopped short of allowing conjugal relations. For the above two scholars, the prohibition in verse 10 related to conjugal rights of cohabitation and did not affect the validity of the marriage contract, al-Qaraḍāwī on the other hand took the view that if the contract is valid then all its effects continue which include cohabitation and this is consistent, he argued, with the view of certain Companions. Reconciling all the evidence is not an easy task, especially in a complex subject such as this where conflicting evidence and views abound. However, as we shall see later, al-Qaraḍāwī's resolution has generated a number of problems which he has left unanswered[844]. While Ibn Qayyim's reconciliation seems to have greater merit as it accepts that conjugal relations are prohibited due to the evidences which indicate *furqa* but at the same time upholds the validity of the contract because certain evidences allowed the spouses to reside together. Al-Qaraḍāwī however cannot accept it is feasible that a husband and wife would live together but conjugal relations would not be allowed, which for him is impractical and unrealistic. For al-Qaraḍāwī a far better and effective solution in meeting the needs of new Muslims is the view of 'Ali b Abi Talib which allows conjugal relations providing the wife resides in the country where the husband is domiciled. This reasoning is arguably conjecture lacking a strong evidential base and requires that the evidence obliging separation are disregarded. This is not a holistic view of the evidence and nor does it satisfactorily reconcile all the seemingly conflicting evidence as reconciliation is desirable and rejection is a last resort according to a well-known maxim of jurisprudence.

Based on the selection of those views that do not automatically invalidate the contract between a Muslim convert and a non-Muslims, al-Qaraḍāwī concludes that three possibilities[845] can arise as a resolution to the problems Muslims face in the West:

a) The husband has marital right such as conjugal relationship as long as the wife does not leave the country of her husband.
b) The convert wife has an option whether to remain married or not.
c) Both spouses are to remain married as long as the authorities have not passed a judicial order of separation.

[844] Such as the views of companions and followers who clearly took the view that the contract is automatically invalid or that the separation must be executed by the judge (*qāḍī*).
[845] Al-Qaraḍāwī, *Fiqh al-Aqalliyyāt*, p. 122.

All three positions are, according to al-Qaraḍāwī, derived from sayings of Companions and Followers. As we shall see later, all these views are the subject of much dispute and controversy in terms of the authenticity of the reports and the intent of those who held them. Nevertheless, although al-Qaraḍāwī's contribution to this subject is somewhat introductory and the real significance is the fact that a senior scholar of contemporary times tackled it directly and went against the perceived legal consensus.

Section II: Abdullah Ibn Yusuf Juday'

Perhaps the most substantial discussion of this issue from the revisionist angle is the study of ʿAbdallāh al-Judayʿ, first submitted to the ECFR and then subsequently included in the 2003 edition of the minority *fiqh* journal of *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth*. Similar to al-Qaraḍāwī, al-Judayʿ felt the inadequacy of existing rulings which did not cater for the particular dilemma in which women converts found themselves in the West. The old ruling of impermissibility contradicted the aims of *Shari'a* and may even repel those wishing to enter the Muslim fold.[846] Al-Judayʿ felt this problem even more living in the West where he witnessed such problems first hand and therefore set about looking at the issue afresh. Al-Judayʿ's approach is more systematic and thorough following a historical approach where the original rule is established and then an attempt is made to trace the evolution of the rule whether amongst the Companions, the Followers or the major *fiqh* schools. His study also attempts to bring together all the available material on the subject by way of *ḥadīth* and *āthār*[847] which then are rigorously scrutinized to assess authenticity. His work combines the *uṣūlī* approach of a *mujtahid* with the rigorous appraisal of the *isnād* of a *ḥadīth* master.

Background of Verse 10 of al-Mumtaḥina

In accordance with his systematic approach, al-Juday' begins by considering the cause of revelation (*sabab nuzūl*) of verse 10.[848] He looks at numerous narrations surrounding the circumstances in which the verse was revealed and concludes that it is specifically about a convert woman who flees for the sake of her religion from Makkah which had a treaty with Madinah for a cessation of war. This particular situation required a specific ruling to protect women who lived amongst warring combatants and wanted to preserve her new religion by

[846] Al-Judayʿ, "Islām al-Mar'a", p. 16.
[847] Views and statements of the Companions.
[848] Al-Judayʿ, "Islām al-Mar'a", p. 21.

fleeing to Makkah. The general import of the clauses of the Ḥudaybiyya treaty included women but due to this scenario believing women were deemed to be an exception to the general rule. This is the background of the verse, at no time did the Prophet say and nor did the Companions understand that the marriage between such people had been annulled by mere difference in religion. Rather, the verse came with a particular ruling to protect those believing women fleeing for their religion. Indeed, the fact that some Companions, but not all, divorced their polytheist wives in Makkah indicates that there was no automatic annulment of the marriage contract.[849]

Al-Juday' is open to the fact that the verse may mean what he has alluded to as well as the traditional view that believing women should not be returned to unbelievers, which one is stronger is dependent on the juristic reasoning (*istidlāl*) over the evidences as a whole.[850] Juday' first points out and rejects the notion that a scholarly consensus (*ijmāʿ*) has taken place[851] on the traditionally held view or that the religious texts yield a definitive invalidation of such marriages. The lack of consensus is proven by the plethora of views on this issue from the earliest times to the established schools of thought and must reflect the absence of an explicit text or injunction in the legal sources.[852] The only matter the text is unequivocal about is the prohibition of initiating marriage between a Muslim and non-Muslim (barring the permission of marriage to the 'people of the Book'). As for continuing a contract after the conversion of one of the spouses, the text cited is open to different interpretations based on the language,[853] circumstances of revelation (*asbāb nuzūl*)[854] and practice of the Prophet[855] and the Companions.[856]

The Original Rule & Practice

In considering a broader thematic approach, Juday' affirms the original rule that difference in religion was not a factor in the validity of marriage.[857] The rule before the verse in question and indeed long before the *Sharīʿa* as brought by Prophet Muḥammad had been to recognize marriages regardless of the difference of religion. The example of the wives of Lut and

[849] Al-Judayʿ, "Islām al-Mar'a", p. 34.
[850] Al-Judayʿ, "Islām al-Mar'a", p. 46.
[851] Al-Judayʿ, "Islām al-Mar'a", pp. 151, 176 and 195.
[852] Al-Judayʿ, "Islām al-Mar'a", p. 129.
[853] Al-Judayʿ, "Islām al-Mar'a", p. 36.
[854] Al-Judayʿ, "Islām al-Mar'a", p. 21.
[855] Al-Judayʿ, "Islām al-Mar'a", p. 47.
[856] Al-Judayʿ, "Islām al-Mar'a", p. 102.
[857] Al-Judayʿ, "Islām al-Mar'a", p. 50.

Pharaoh are given to show that these marriages were recognized as they were referred to as their '*imra'a*' (women) in the Qur'ān.[858] al-Judayʿ cited the *Sharīʿa* principle which states: 'the law before ours is a law for us so long as it had not been abrogated.' Further to this, the example of the *Anṣār* is cited after the second pledge of al-'Aqaba where seventy of the Aws and Khazraj tribes embraced Islam before their wives who joined the fold of the new religion after return of their husbands to Madinah. They continued as spouses based on their original marriage.[859]

In respect to verse 10, what was the practice before its revelation? Juday' cites two historical examples to show that such marriages continued without the requirement of separation or annulment. First the story[860] of Umm al-Faḍl Lubāba bint al-Ḥārith the wife of al-ʿAbbās b. ʿAb al-Muṭṭalib the uncle of the Prophet. Umm al-Faḍl had resided with al-ʿAbbās who had not embraced Islam at the time. It is reported that ʿAbdallāh the son of al-ʿAbbas said: "I and my mother were amongst those that could not immigrate, I was a child, and my mother was from the women (who could not migrate)."[861] al-Judayʿ asserts this means she had embraced Islam whilst her husband was still a polytheist.

The second story[862] is that of Zaynab the daughter of the Prophet who had resided with her husband Abū al-ʿĀṣ b. al-Rabīʿ who was a disbeliever whilst she herself was a Muslim. Abū al-ʿĀṣ was taken prisoner at Badr and released by the Prophet on Zaynab's request on condition that she be allowed to return to Madinah. Abū al-ʿĀṣ accepted and it was not until 6 years later that Abū al-ʿĀṣ became a Muslim and the Prophet returned Zaynab to him. There are some narrations which state that this was with a new contract and others which state it was on the original *nikāḥ* (marriage contract). Al-Judayʿ sifts through all the narrations and their *isnāds* and concludes that she was returned with the original contract thereby establishing that the marriage contract was still valid despite the difference of religion. There are conflicting narrations; some state that Zaynab was returned without a new contract whilst others state a new contract was required. al-Judayʿ devotes some attention to the *isnāds* to establish that the authentic narration is that of Ibn ʿAbbās which states: "The Messenger of

[858] Al-Judayʿ, "Islām al-Mar'a", p. 49. Qur'ān 66:10-11.
[859] Al-Judayʿ, "Islām al-Mar'a", p. 50.
[860] Al-Judayʿ, "Islām al-Mar'a", p. 54.
[861] Al-Judayʿ, "Islām al-Mar'a", p. 53.
[862] Al-Judayʿ, "Islām al-Mar'a", p. 55.

God returned his daughter Zaynab to her husband Abū al-ʿĀṣ b. Rabīʿ with the first contract (of marriage) and did not renew a thing (i.e., the old contract)".[863]

Juday's authentication and rejection of the contrary narrations is not challenged by the opposing side but the dispute, as we shall see later is over the meaning of the Ibn ʿAbbās' narration.[864] Al-Judayʿ also attempts to show that Prophet had returned Zaynab to Abū al-ʿĀṣ after 6 years, this means it was after the revelation of verse 10 of *al-Mumtaḥina*. The import of the verse could not have meant automatic dissolution of the marriage contract as Zaynab had continued in marriage to Abū al-ʿĀṣ notwithstanding verse 10. This, according to al-Judayʿ must mean the verse was not about marriage contract per se but about the protection of those living with those who the Muslims were at war. Indeed, the two verses after verse 10 indicate that the cutting of links with disbelievers was not due to their disbelief only but because of a state of war and the issue was a question of *al-walā' wa-l-barā* (association and disassociation)'[865] and not permissibility of marriage. Therefore, what verse 10 prohibited was for women migrating for their faith should be returned to unbelievers who were in a state of war with Muslims. Where a state of war does not exist, there is no effect on the marriage contract as can been seen with the example of the wife of al-ʿAbbās and the wife of Abū al-ʿĀṣ.[866]

Harmony between the Relevant Verses and Practice?

Al-Judayʿ seeks to bring harmony between those seemingly contradictory evidences. One verse which had been claimed to be clear in its probation of marriage on the basis of difference of religion is verse 221 of the chapter of *al-Baqara*:

> *'And do not marry Al-Mushrikāt (idolatresses, etc.) till they believe (worship Allah Alone). And indeed a slave woman who believes is better than a (free) Mushrika (idolatress, etc.), even though she pleases you. And give not (your daughters) in marriage to Al-Mushrikūn till they believe (in Allah Alone).'*

[863] Al-Judayʿ, "Islām al-Mar'a", p. 66.
[864] Al-Judayʿ, "Islām al-Mar'a", pp. 66-81.
[865] It refers to the Qur'ānic requirement for Muslims to associate with other believers and to disassociate with disbelievers. It is understood in the context of state of war between Muslims and a non-Muslim entity though some have understood it more generally.
[866] Al-Judayʿ, "Islām al-Mar'a", p. 90.

According to al-Judayʿ, the prohibition of a Muslim marrying a polytheist woman is explicit in the language of this verse.[867] How can this be reconciled with verse 10 of *al-Mumtaḥina*? According to al-Judayʿ the verse in chapter of *al-Baqara* deals with a separate matter i.e., the prohibition of entering into marriage with non-Muslims and not with continuing the marriages[868] indicated by the use of the verb '*tunkiḥu*' ([do not] marry off). The use of the form IV of the verb in Arabic (as opposed to form I *tankiḥu* in the previous line,) alludes to the initiation of marriage and does not relate to those who are already married before becoming Muslims and whose marriage is recognized by the rule of *istiṣḥāb* (keeping the original rule).[869] Those who took this verse to prohibit the continuation of marriage as well as the initiation understood the verse to prohibit the marriage contract and sexual intercourse. Al-Judayʿ rejects this interpretation on the basis of the verb form used which indicates the initiation of the marriage contract and not its continuity.

Having considered the relevant verses, *ḥadīth* and incidents during the lifetime of the Prophet al-Judayʿ, moves on to consider the transmitted views (*āthār*) of the Companions and the Followers.[870] The three key views of the Companions are that of ʿUmar b. al-Khaṭṭāb, ʿAlī b Abī Ṭālib and ʿAbdallāh b. ʿAbbās. With the exception of ʿAbdallāh b. ʿAbbās the views of the first two have already been mentioned and al-Judayʿ takes a similar interpretation to al-Qaraḍāwī. Both these cases are consistent with verse 10 of *al-Mumtaḥina* in the sense they relate to a husband who is not a combatant (*muḥārib*) and both envisage the contract to move from *lāzim* (where contractual effects are mandatory) to *jā'iz* (where the woman has an option to continue with the contract). ʿAbdallāh b. ʿAbbās is reported to have said: "Both spouses are separated, Islam shall prevail, and nothing shall prevail over it."[871] This according to Juday' does not indicate an automatic dissolution of the contract and it is difficult to establish, he contends, a ruling from such a statement given that it was ʿAbdallāh b. ʿAbbās himself who narrated the story of Zaynab. Al-Judayʿ argues that none of these views are tantamount to annulment of the contract due to the difference in religion and is entirely consistent with verse 10 of *al-Mumtaḥina*.[872]

[867] Al-Judayʿ, "Islām al-Mar'a", p. 95.
[868] Al-Qaraḍāwī makes a similar point citing the Sharia principle *'that which is pardonable in continuance is not pardonable in initiation'*. *Fiqh al-Aqalliyyāt*, p. 121.
[869] Al-Judayʿ, "Islām al-Mar'a", p. 98.
[870] Al-Judayʿ, "Islām al-Mar'a", pp.102-128.
[871] Al-Judayʿ, "Islām al-Mar'a", p. 111.
[872] Al-Judayʿ, "Islām al-Mar'a", p. 112-114

As for the views of the Followers, they consist according to al-Judayʿ of two approaches: either separation should take place due to difference of religion, or it should only take place in cases where there is a difference of residence. The latter view allows for the contract to continue where both spouses reside in the same place. This is not very different to the view of the established schools which saw separation was required either due to difference of religion (*dīn*) or where there is a difference in the land of residence (*dār*)[873]. The Ḥanafīs[874] based it on the status of land of residence (*dār)* while the Mālikīs, Shāfiʿīs and Ḥanbalīs based it on religion with differences in the details in respect of the waiting period (*ʿidda*), consummation and precedence in embracing Islam.[875] After this, Juday' expounds the views of other independent scholars which are mainly on the above lines with some divergences.[876] Copiously citing every single view with its different permutations is not necessarily relevant to proving his view that such marriages are permissible as the common thread between all of them is that at some point some separation should take place. One gets a sense that the reason for presenting meticulously all the views in this manner is to show, as did al-Qaraḍāwī, the diversity of the views; namely that the issue is not a settled matter let alone being an issue of consensus (*ijmāʿ*).

Section III: Fayṣal Mawlāwī

Despite the detail and depth of the revisionist position of al-Judayʿ, the response from the other minority *fiqh* scholars has been a strong rejection of the view that a Muslim woman continue in a marriage with a non-Muslim regardless of the particular circumstance of Muslim converts in the West. Apart from Mawlāwī, three other minority *fiqh* scholars[877] have written substantial responses rejecting the view of al-Qaraḍāwī and al-Judayʿ, although the total number in opposition is six. The most significant of these have been from Fayṣal Mawlāwī, ʿAbdallāh al-Zubayr ʿAbd al-Raḥmān Ṣāliḥ, Muḥammad ʿAbd al-Qādir Abū Fāris, the latter being the most vehement in his opposition while Ṣāliḥ seems to act as a bridge

[873] The land of residence referred to is *dār al-ḥarb* i.e. the land or nation with which the Muslim are in actual or state of war.
[874] The Ḥanafīs did not permit such marriages in a Muslim land (*dār al-islām*) either. They require the man to be offered to embrace Islam and should he refuse to do so then the judge will order a separation. See Abū Fāris, Muḥammad ʿAbd al-Qādir, "Athar Islām Aḥad al-Zawjayn fī-l-Nikāḥ," *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-al-Buḥūth* (Dublin, 2003), p. 336.
[875] Al-Judayʿ, "Islām al-Mar'a", pp.140-143.
[876] Al-Judayʿ, "Islām al-Mar'a", pp.144-148.
[877] They are Nihat ʿAbd al-Quddūs, Muḥammad ʿAbd al-Qādir Abū Fāris and ʿAbdallāh al-Zubayr ʿAbd al-Raḥmān Ṣāliḥ. It is interesting that Bin Bayya did not present a paper on this himself. He has mentioned it in one of his writings but did not give his own view. See Bin Bayya, *Ṣināʿat al-Fatwā*, p. 108.

between the two points of view. We shall consider the discussion of Mawlāwī as it is most representative of the opposing view with reference to Abū Fāris where a distinct and novel point has been made to the discussion rather than mere reiteration of the same views.

Traditional Perspective

Mawlāwī begins by setting out how he understands the issue before embarking on any kind of refutation of the specific points raised by al-Qaraḍāwī and al-Judayʿ though he, as do all others on the opposing side, focuses on al-Judayʿ's article (probably due to al-Judayʿ's piece being more detailed and comprehensive[878]). The key point for Mawlāwī is that the two verses which deal with this issue, namely verse 221 of chapter of *al-Baqara* and verse 10 of *al-Mumtaḥina*, should be taken in their general import. Verse 221 of chapter of *al-Baqara* prohibits marriage with polytheists whether men or women and generality of the expression should be taken to mean all former contracts of marriage as well as any future marriage contracts. Mawlāwī dismisses al-Qaraḍāwī's recourse to the principle that 'continuation is easier than beginning' or 'what is forgiven in continuation is not forgiven in the beginning' by saying that the usage of such principles is restricted to certain financial transactions and cannot be generalized to include the marriage contract.[879]

As for verse 10 of *al-Mumtaḥina*, Mawlāwī agrees that the cause of revelation is that of convert women fleeing their non-Muslim husbands but the legal reason (ʿ*illa*) for not returning them is not due to the status of the land but due to difference in religion. The general wording *'they are not lawful (wives) (ḥillun) for the disbelievers'* indicates prohibition of all past and current marriage contracts while the expression *'nor are the disbelievers lawful (yaḥillūna)(husbands) for them'* is especially in reference to new contracts as it is verbal sentence as opposed to being a nominal sentence in the first part due to the use of the verb *yaḥillūna*.[880] This verse, although dealing with a particular situation, is, according to Mawlāwī, in complete harmony with verse 221 of *al-Baqara*. The former prohibits marriage to non-Muslims and the verse in *al-Mumtaḥina* comes to confirm this in reference to a particular incident of convert women fleeing to Madinah.[881] Even the wider context of *al-*

[878] Or possibly, because al-Judayʿ being junior to al-Qaraḍāwī is an easier target to be critical about. The strong language used by Abū Fāris against al-Judayʿ, one cannot imagine being used against al-Qaraḍāwī even though al-Qaraḍāwī's article is weaker compared to the work of al-Judayʿ.
[879] Mawlāwī, "Islām al-Mar'a", p. 254.
[880] Mawlāwī, "Islām al-Mar'a", p. 257.
[881] Abū Fāris takes the view that the initial rule of separation (*furqa*) came in verse 10 of *al-Mumtaḥina* and not verse 221 of *al-Baqara*. See Abū Fāris, "Athar Islām", p. 368.

walā' wa-l-barā' (loyalty and disassociation) and state of war in *al-Mumtaḥina*, which al-Judayʿ cites, cannot be analogized to marital relationships; social relationships involving war and peace cannot be compared to the marital relationship as both have their own particular rules.[882] Abū Fāris raises the point that it is wrong to describe Makkah as warring as the Muslims were bound by the treaty of Ḥudaybiyya at the time of revelation of verse of *al-Mumtahina*. The relationship was one of treaty (*ʿahd*), not war and so the background of war cannot form an effective cause (*ʿilla*) for the rule of separation.[883]

Verses in Light of Practice

Having established the correct import, as he sees it, of the two aforementioned verses, Mawlāwī moves on to address the various arguments and evidence posed by al-Judayʿ[884] to show that these verses do not invalidate marriage between a convert and a non-Muslim which had been contracted before the conversion. In respect of the original rule of permissibility of marriage between non-Muslims and between believers and non-believers, for instance Pharaoh and Āsiya, Mawlāwī points out that this has been abrogated by verse 221 of *al-Baqara*. Indeed, the principle itself envisages that prior laws can and will be abrogated.[885] Marriage between non-Muslims continue to be valid but not between Muslims and non-Muslims which is a different issue altogether. As for the practice of Muslims before the *hijra* (migration to Madinah) where marriage contracts between Muslims and non-Muslims were considered valid, Mawlāwī insists that these practices preceded the relevant verses of *al-Baqara* and *al-Mumtaḥina*. al-Judayʿ argues that the practice continued after migration and after the verses in question citing the example of Umm al-Faḍl and Zaynab who both were married to non-Muslims and continued married after the *hijra*. Responding to the first example, Mawlāwī argues that Umm al-Faḍl, by her own admission, was weak and oppressed (*mustaḍaʿfa*) living in Makkah and therefore this was a legal excuse for her and so such an example cannot be generalized. Abū Fāris states that according to Ibn Ḥājar al-ʿAsqalānī and a narration in the *Musnad* of Aḥmad b. Ḥanbal, that al-ʿAbbās had become Muslim on the day of the battle of Badr *before* the verse in *al-Mumtaḥina*. Thus, the prohibition in *al-Mumtaḥina* came after both spouses were Muslim and therefore this example cannot be

[882] Mawlāwī, "Islām al-Mar'a", p. 259.
[883] Abū Fāris, "Athar Islām", p. 368.
[884] Abū Fāris, "Athar Islām", p. 282.
[885] The principle is 'The law before is a law for us as long as it has not been abrogated.'

adduced as evidence.[886] Zaynab on the other hand was separated from her husband; he was in Makkah, and she was in Madinah, whilst the verses in *al-Baqara* and *al-Mumtaḥina* were being revealed. The narrations quoted by al-Judayʿ himself and authenticated by him mention that after he embraced Islam she was 'returned' (*radd*) to him. Mawlāwī asked if separation (*furqa*) had not occurred why was the term 'returned' (*radd*) used? Abū Fāris makes the same point about the use of the word 'returned' but adds that their living together as spouses was *before* the verse of *al-Mumtaḥina*, a fact accepted by al-Judayʿ himself.[887] On the contrary Mawlāwī cites examples of the practice of companions after the verses in *al-Baqara* and *al-Mumtaḥina* where the difference in religion was a cause of separation (*furqa*).[888] Two narrations are cited by Mawlāwī where one spouse follows the other in embracing Islam and coming to Madinah, in each case the Prophet returned (*radd*) the wife to the husband. The key issue of contention for Juday' will be the meaning of *radd* (return) which he takes in its linguistic ordinary meaning whereas Mawlāwī gives it a *fiqhī* juristic meaning where a wife is returned after a legal separation (*furqa*). Juday', which is uncharacteristic of his in-depth style, does not dwell on the usage of *radd* and assumes it to be in its ordinary sense. This is a fundamental point of difference, and it ought to have been addressed by al-Judayʿ[889] for the sake of comprehensive treatment which Juday' is known for.

ʿAbdallāh Zubayr Ṣāliḥ in his paper generally maintained the traditional view though was open to the predicament in which convert women find themselves and sought to find a middle ground where the traditional requirement of separation is acknowledged but at the same time tried to find a conditional solution to the problem.[890] He follows a reconciliatory approach towards the evidence and tries to distinguish the Zaynab account from the contemporary reality on factual grounds. When Abū al-ʿĀṣ arrived in Madinah under the protection of Zaynab he came as one submitting to the authority of the Prophet, the de facto ruler of Madinah.[891] In respect of the person himself the Prophet had confirmed his honesty and loyalty whilst the faith of Zaynab is unparalleled compared to the women of today who

[886] Abū Fāris, "Athar Islām", p. 358.
[887] Abū Fāris, "Athar Islām", p. 358.
[888] Mawlāwī, "Islām al-Mar'a", pp. 287-288.
[889] Even if al-Judayʿ's article was written before Mawlāwī wrote his, one would have expected him to anticipate that such a point would be inevitably raised.
[890] Salih, Abdullah Zubayr Abdul Rahman, "Ḥukm Baqā' Man Aslamat Maʿa Zawjihā alladhī Lam Yuslim fī Ḍaw' al-Kitāb wa-l-Sunna wa Aqwāl al-Ṣahāba wa-l-ʿUlamā'", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2003), p. 232.
[891] Ṣāliḥ, Ḥukm Baqā' Man Aslamat", p. 224.

embrace Islam in the West. Therefore, all these factors distinguish the story of Zaynab with today's reality such that an analogy (*qiyās*) is not possible.[892]

Mawlāwī contests Juday's interpretation of verse in *al-Mumtahina* to mean it is prohibited for a warring disbeliever husband to have control over a Muslim woman but if she wishes the marriage will continue because the woman has the option and separation is not mandatory. The reason for this is that the verse clearly states the relationship is not valid (*ḥilliya*)[893] which must indicate it is mandatory to end the previous marriage contract. The example of Zaynab does not indicate the old contract continued but that it was in state of suspension due to the effective separation of the spouses.[894] Juday' interpreted Umar's decision to divorce his polytheist wives in Makkah as mandatory as they were under the control and authority of a warring entity, but the wife had no obligation to end the marriage. According to Mawlāwī where the husband is Muslim and his spouse is a polytheist, the husband is obliged to divorce his wife. The effect of the prohibition in the verse is not automatic and so where the wife is a Muslim and the husband is a non-Muslim, then the wife must seek separation (*furqa*) or annulment (*faskh*) via a judge or those authorized to affect a separation or annulment of the contract.[895] Abū Fāris goes as far as to challenge al-Judayʿto cite one example following the revelation of verse '*hold not the disbelieving women as wives'*[896] where a "Muslim kept a disbelieving wife or a Muslim women remained married to a disbelieving man."[897] Abū Fāris rejects the reasoning Juday' gives for the above part quotation on grounds that fear of her religion for a women living under warring authority does not comply with the condition that an effective cause (*ʿilla*) must be apparent (*ẓāhir*) and constant (*munḍabiṭ*). 'Fear for one's religion' is subjective and fluctuates from person to person and as such cannot constitute an effective cause and it is better to describes it as a wisdom (*ḥikma*) behind the rule and not as

[892] Ṣāliḥ, Ḥukm Baqā' Man Aslamat", pp. 224-5. Ṣāliḥ quotes a number of other examples of marriages where it seems a convert woman continued in marriage with non-Muslim husband, but he accepts none of them as a proof either by distinguishing their facts from current reality or showing that separation did occur. See Ibid. pp.219-223.
[893] Mawlāwī, "Islām al-Mar'a", p. 287. *'they are not lawful (wives) for the disbelievers nor are the disbelievers lawful (husbands) for them'* this part of verse 10 in *al-Mumataḥina* indicates to Mawlāwī that the relationship is prohibited and as such the contract must be brought to an end. Another indication is that in the same verse the command to return the dowry to the non-Muslim husband which would not have been commanded had there not been a requirement to end the contract.
[894] Mawlāwī, "Islām al-Mar'a", p. 288.
[838] Mawlāwī, "Islām al-Mar'a", p. 289.
[896] Qur'ān 60:10. This is a quotation of part of that verse.
[897] Abū Fāris, "Athar Islām", pp. 351 and 354.

an *ʿilla*. The description of disbelief (*kufr*) however is, according to Abū Fāris, apparent and constant and this is the true reason behind the prohibition.[898]

Is there a Consensus (ijmāʿ)?

On the question of whether a consensus (*ijmāʿ*) exists for the prohibition of converts continuing marriage with non-Muslims, Mawlāwī asserts that it does indeed exist in respect of the need for separation[899] even though there may be a difference as to how and when the contract is annulled.[900] Juday's long list of views on this issue do not reflect a difference on the question of whether conjugal relationships can take place or not. On some level, there is agreement that separation should occur as can been seen with the view of Ibn Qayyim and his teacher Ibn Taymiyya who allowed the contract to continue but prohibited sexual relations, which accords with the consensus on the need for separation. Mawlāwī dismisses[901] the narration attributed to ʿAlī b Abī Ṭālib allowing sexual relations as long as the non-Muslim woman resides with her husband in a Muslim land on the basis of its meaning (*matn*) which contradicts the generally accepted principle that the rule of *dhimma* (non-Muslims living under Muslim authority) does not allow contravention of the *Sharīʿa* rules. Besides it is known that there have been many false attributions to 'Ali in the past due to his status as a scholar amongst the companions. Furthermore, the Shia who are ever ready to accept narrations from 'Ali that go against the view of the rest of the companions do not quote this narration or cite this view in their Jaʿfarī *fiqh*.[902] Mawlāwī might have considered an alternative approach of reconciling this statement instead of rejecting it. The Ḥanafī's have understood this statement as well as the opinion of 'Umar b. al-Khattab allowing women to reside with the disbelieving husband to mean during the *ʿidda* period. Thus, the marital relationship will continue until the offer to embrace Islam is made to the husband and he refuses during the *ʿidda* period.[903] Also a clearer statement of this view can be found amongst

[898] Abū Fāris, "Athar Islām", p. 352.
[899] This is where there is a cessation of conjugal relations, and one spouse is removed from the marital home.
[900] Mawlāwī, "Islām al-Mar'a", pp. 265-266.
[901] Mawlāwī, "Islām al-Mar'a", p. 266.
[902] Mawlāwī, "Islām al-Mar'a", pp. 268-269.
[903] For instance, Abū Bakr al-Jaṣṣāṣ stated:

> Our scholars have said; if both have a covenant (*zimmi*) then separation does not take place until the husband is asked to embrace Islam and if he refuses to do so then they will be separated. They (the scholars said) if they are both from *dār al ḥarb* and the woman become Muslim then she remains his wife as long as she has not passed three menstrual cycles.'

Followers such as ʿAṭāʾ b. Abī Rabāḥ and Mujāhid b. Jabr al-Makhzūmī who said: "If he becomes Muslim and while she is in her *ʿidda* then he has greater right to her." Both of these narrations incidentally have been quoted by al-Judayʿ and authenticated by him.[904]

The view attributed to ʿUmar that he gave the option for a convert woman to 'reside' with her husband does not undermine the consensus as the expression 'reside', according to Mawlāwī, means to stay with and wait to see if the husband becomes Muslim. This is the interpretation taken by Ibn Qayyim himself when he cited this view. On this issue, Abū Fāris was much more emotive in his criticism of al-Judayʿ's interpretation saying "The author (al-Judayʿ) has taken a view which no jurist or scholar has taken before: that a non-Muslim should live with her and have intercourse with her and she will uncover in front of him and bear his children while she is a Muslim and he is on his disbelief, transgression, sins and hostility to Allah and his Messenger."[905] ʿAbdallāh Ṣāliḥ states that two views are attributed to ʿUmar. He cites three narrations which show 'Umar ordered separation and others which allowed the wife to reside with the husband. The former, he believes, is the default position of separation and the latter is a particular legal ruling for particular circumstances and cannot be generalized. Salih does not believe a contradiction exists and where one is forced to outweigh (*tarjīḥ*) and choose then the ruling of separation is preferred as it agrees with the default position (*aṣl*) as no jurist "will hesitate to give precedence to that which agrees with the default position and reject that which goes against it."[906] Ṣāliḥ in the end permits a woman to remain with her husband with certain conditions; if she insists on continuing the relationship and there is a fear that she will not embrace Islam otherwise.[907] This is only permitted by applying the rule of necessity (*ḍarūra*) and not a general permissibility which is the position of al-Qaraḍāwī and al-Judayʿ. Mawlāwī also rejects the attribution to certain Followers like al-Shaʿbī and al-Nakhaʿī on the same basis of rejecting the attributions to ʿAlī. Others have suggested interpretations which are consistent with the default position of separation. ʿAbdallāh Ṣāliḥ

See for quote in ʿAbd al-Quddūs, Nihat, "Islām al-Mar'a wa Baqā' Zawjihā ʿalā Dīnihi", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2003), p. 419. al-Judayʿ will of course argue that there is no mention of *ʿidda* by ʿAṭāʾ or Mujāhid. However, the issue is that considering them to be uttered in the context of *ʿidda* is consistent with the vast majority of other views and evidences. Another quote from al-Shāfiʿī: "If the woman embraces Islam before the husband, separation will take place once *ʿidda* expires' and states that is the sole practice (*sunna*) of the Prophet". See "Islām al-Mar'a," p. 230. And Ibn Shubrama: "In the time of God's Messenger a man would embrace Islam before his wife and vice versa. Whoever embraced Islam before the expiration of the *ʿidda* then his wife remains with him and if he embraces Islam after the expiration of the '*ʿidda* then no contract of marriage (*nikāḥ*) exists." "Islām al-Mar'a," p. 236.

[904] See Al-Judayʿ, "Islām al-Mar'a", pp. 119 and 121 for the quotes.

[905] Abū Fāris, "Athar Islām", p. 371.

[906] Ṣāliḥ, Ḥukm Baqā' Man Aslamat", pp. 228-9.

[907] Ṣāliḥ, Ḥukm Baqā' Man Aslamat", p. 238.

again tries to reconcile the statement of the Followers. In one quote, al-Shaʿbī accepted the spouses to reside together and in another he states separation should occur if the man refuses to embrace Islam. The reconciliation, for Ṣāliḥ, must be that al-Shaʿbī meant the spouses can live together if the husband embraces Islam.[908] Barring these exceptions, the rest of the views, according to Mawlāwī and Ṣāliḥ, whether that of the Companions, Followers or the schools of law all agree that some form of separation must occur. In any case the definition of consensus is that it should occur in a particular era or period without having to be continuous. Mawlāwī points out that after the dissenting views there has been unanimous agreement in subsequent eras that some form of separation must occur.[909]

Is the text Definitive (qaṭʿī) or Speculative (ẓannī)?

The normal practice in modernist *fiqh* discourse when introducing a view which goes against the settled view is to show the matter is not settled, either because of the diversity of views that existed in the past or to show that the legal sources are open to difference of opinion and *ijithād*. Thus, it would not come as a surprise that Juday' would try and show that the matter was disputed by early authorities and the textual evidence is involved, with conflicting meanings and multiple layers. Mawlāwī himself, who is no stranger to this discourse was asked the question: is there a definitive text and then answers in the affirmative. The relevant verses of *al-Baqara* and *al-Mumtaḥina* are 'completely clear' and any view to the contrary is an unsound interpretation.[910] What the verses in question have in essence prohibited is the marital relationship with all its effects regardless of whether the contract is initiated or continued. Mawlāwī stated the text is *'completely clear'* but stopped short of saying it is 'definitive' as the implication of the former is that a contrary view would be recognized as *ijtihād*, albeit a weak and flawed one but the latter would be completely rejected. *Ijithād* can take place only in the absence of definitive text and any interpretation in the face of a definitive text is to be rejected altogether. Abū Faris has no hesitation in declaring that the verse 10 of *al-Mumtaḥina* is definitive, especially where it states: *'they are not lawful (wives) for the disbelievers nor are the disbelievers lawful (husbands) for them'* and *'hold not the disbelieving women as wives'.* He states, *'the verse is definitive in requiring separation but speculative in respect of when a spouse can return and resume marital life.'*[911] Even though

[908] Ṣāliḥ, Ḥukm Baqā' Man Aslamat", p. 236.
[909] Mawlāwī, "Islām al-Mar'a", p. 227.
[910] Mawlāwī, "Islām al-Mar'a", p. 249.
[911] Abū Fāris, "Athar Islām", p. 395.

he acknowledges that the vast majority of the *Sharīʿa* rules are derived from speculative textual import, however, in this case, the prohibition of sexual relations and invalidity of contract are contained in definite textual meaning. Verse 221 of *al-Baqara* however is not definite in its textual import as it does not specifically relate to the question at hand. This does not contradict Mawlāwī's position that this verse is "completely clear" as the evidential burden in terms of clarity is lower than the classification of definitive meaning.

A problematic aspect here is defining which category of 'disbeliever' the verse 10 of *al-Mumtahina* is referring to. From an apparent reading of the verse the meaning is general, but the background of the verse can lend itself to an interpretation that restricts it to those who are warring combatants (*muḥārib*) though even this point is disputed as the relations between Quraysh in Makkah and the Muslims in Makkah was not of war but treaty due to the agreement of Ḥudaybiyya. Can circumstantial background of a verse affect its interpretation? The answer according to the specialists of *uṣūl al-fiqh* is that it depends; at times the generality of the expression is considered and not the specific cause but at other times the rationale behind a rule can have restricting or generalizing effect on the interpretation or there may be some indication in the text itself which shows that the ruling is cause specific. This is the nub of the hermeneutical dilemma the minority *fiqh* scholars are grappling with. Those who tried to restrict the general meaning of 'disbeliever' by the revelatory occurrence have not demonstrated clearly from the *ratio legis* or textual indications any credible justifications to limit or specify the general expression. The act of *takhṣīṣ* or specification of an established *ʿamm* or general expression is itself an enunciation of law (*tashrīʿ*) which must be evidentially justified and mere reliance on the background of revelation is not enough as a limiting factor.

Assessing Public Interest (maṣlaḥa)

On the question of what serves the public interest, al-Judayʿ argued that forced separation would discourage converts and thus in his view be detrimental to the interests of religion. Mawlāwī addresses this question by reminding al-Judayʿ that the vast majority of Muslim scholars have agreed that the *Sharīʿa* injunctions themselves are what constitute a public interest and the matter is not left to be intellectually ascertained. He points to the fact that the

rationale of *maṣlaḥa* as posited by al-Judayʿ conflicts with many other established rules.[912] If encouragement of conversion to Islam validated invalid contracts. what would we say to a recent female convert who was married to a relative who is prohibited from marrying due to affinity or it was proven that the spouse was prohibited by suckling? Would the *Sharīʿa* injunctions have to be changed here? The point maybe valid but al-Judayʿ may well argue that such examples do not apply as these marriages are invalid in the first instance whilst the marriage of the convert was valid prior to conversion. Perhaps a better example, as cited by Mawlāwī, is that of the apostate whose marriage prior to his apostasy was valid; would such a contract be allowed to persist in order to maintain the stability of the family? To be fair to al-Judayʿ his argument is not solely based on *maṣlaḥa* and but on a re-reading of the textual evidences, his reference to *maṣlaḥa* was only a guide to understand textual evidences, which is an approach most scholars would accept. However, attempting to establish a *maṣlaḥa* from a textual perspective can and has, as in this case, descended to an exercise in polemic and strong language. Abū Fāris accuses al-Judayʿ of holding "an aberrant view" and "disrespecting" and "belittling" the *Sharīʿa* ruling and the scholars at large[913] for suggesting the rule of separation will "drive people away from God's religion"[914] when perhaps all he was doing was question a rule in light of the higher goals (*maqāṣid*) of the *Sharīʿa*.

Another approach in assessing *maṣlaḥa* is to appraise what is actually in the *maṣlaḥa* of converts. In this vein, Mawlāwī disagrees that a female convert will be placed in a significantly disadvantaged position as she has alternatives either to marry another Muslim, to wait until her husband becomes a Muslims, and in the meantime financial assistance will be afforded to that person by the state.[915] Mawlāwī turns the argument on its head and cites the example of Zaynab who was in loving relationship with her non-Muslim husband and yet she separated from him and was allowed to return once he had become a Muslim. Assessing the *maṣlaḥa* of separation, Mawlāwī states there is no harm caused to the children as they will continue to see the father though admittedly it may be painful for the mother. However, the mother will have the opportunity to bring up the children according to her religion which would not be the case had they shared the home with a non-Muslim father. In any case the

[912] Abū Fāris cites the three categories of *maṣlaḥa*; open, accredited, cancelled and the *maṣlaḥa* of permitting such marriages falls in the latter category as it conflicts with verse 10 of *al-Mumtahina*. See Abū Fāris, "Athar Islām", p. 347.
[913] Abū Fāris, "Athar Islām", p. 348.
[914] Al-Judayʿ, "Islām al-Mar'a", p. 2.
[915] Mawlāwī, "Islām al-Mar'a", p.291

separation will enable the children to understand the difference and value the Muslim faith above other non-Muslim faiths.[916]

Section IV: Tension between tradition and reformism in Minority *Fiqh*?

This topic, convert marriages, is perhaps one of the best examples of tension between the reforming tendency of minority *fiqh* and the traditional element within it. Despite the various views that existed in the early period of Islam on this issue, the view of allowing a Muslim to continue in marriage to a non-Muslim was unheard of amongst traditionally minded contemporary scholars barring a few exceptions[917] until respected scholars such as al-Qaraḍāwī voiced it in recent times. It is worth noting though that there are a number of scholars and academics loosely termed as "progressives" who also held the view that interfaith marriages were permissible. Key names are the likes of Khaled Abou El Fadl,[918] Khaleel Mohammad,[919] Asma Lamrabet[920] and others.[921] Minority *fiqh* scholars have made no reference[922] to these voices and sought to argue their respective case based on their own juristic approaches, though it has to be said there is not a large difference between the textual arguments cited by the reformist minority *fiqh* scholars and the progressives except when the discussions broadens out on general gender based hermeneutics. Not only is this issue going against an established or evident scholarly consensus but at the same time it is a sensitive and emotive cultural question for many, scholars included. Al-Qaraḍāwī himself alludes to the difficulty for scholars when he states: "This is a great ease (i.e. view that the marriage [nikāḥ] is still valid) for new Muslim women even though it is hard for the people of knowledge as it goes against what they are familiar with and have inherited…"[923] Minority *fiqh* however on the whole is reformist in its legal thinking and philosophy and not afraid to challenge traditionally held views, so it comes with some surprise that when al-Qaraḍāwī and al-Judayʿ

[916] Mawlāwī, "Islām al-Mar'a", p. 291-292
[917] Such as Dr Ḥassan Turābī. https://eng-archive.aawsat.com/theaawsat/features/asharq-al-awsat-interviews-sudanese-islamist-leader-dr-hassan-turabi.
[918] https://www.searchforbeauty.org/2016/05/01/on-christian-men-marrying-muslim-women-updated/.
[919] https://www.youtube.com/watch?v=2Kcp2W9V3C4.
[920] http://www.asma-lamrabet.com/articles/what-does-the-qur-an-say-about-the-interfaith-marriage/.
[921] https://www huffingtonpost.ca/junaid-jahangir/muslim-women-marriage_b_15472982 html?guccounter=1.
[922] Here is a rare example of a traditionally minded scholar addressing the progressive view: http://yusufabduljobbar.com/why-muslim-women-cannot-marry-non-muslim-men/ This was in response to a blogger of a progressive persuasion: https://orbala.net/2017/08/01/the-quran-does-not-prohibit-womens-marriage-to-people-of-the-book-and-other-facts-about-interfaith-marriage-in-islam/
[923] Al-Qaraḍāwī, Yūsuf, "Islām al-Mar'a Dūna Zawjihā, Yufarraq Baynahumā", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2003), p. 440.

raised the possibility that such marriages may be permissible from a legal standpoint, the opposition was strong, loud and antagonistic although every much as detailed and scholarly. A total of six scholars wrote about it, dismissing the new view. One wonders if this issue touched a raw nerve and was too much for the sensibilities of those who on any other issue would take a modernist-reformist stance. One could envisage that this level of detailed rebuttal would exist for other minority *fiqh* questions such as usurious mortgages or voting for secular parties, but they are noticeably absent. On this issue however the reformer became a traditionalist and deployed all the scholarly erudition it can muster to counter it. However, reformist the composition of minority *fiqh* scholars might be it seems it still has its 'sacred cows.'

The discussion over women's rights in the last century or with the emergence more recently of the notion and debate around 'Islamic feminism'[924] in the face of westernization has been to show that women are not subjugated by men and have freedoms and equal rights like men but while maintaining the ethical requirements of religion.[925] The discussion over women's rights has also had to show that the best defence against western culture was the return and revival of an Islamic culture which is free from the excesses of tradition. How does minority *fiqh* in respect of the topic of this chapter fare in terms of these wider discussions? The attitude of the minority *fiqh* scholars, whether reformist or those maintaining the traditional opinion of separation, has been to look at this issue from the prism of *maṣlaḥa* and overall aims (*maqāṣid*) of the *Sharīʿa* rather than the rights of women or any notions of emancipation of women from regressive social or cultural attitudes. The discourse is not about women's rights or equal rights but of the need to facilitate conversions by removing barriers or to advocate separation as a way to protect the woman and her children from the undue influence of her non-Muslim husband. Perhaps the reason for this is that both sides of the debate recognize that a female convert marriage to a non-Muslim is problematic in essence with one side giving the allowance to such marriages in favour of the higher goal or *maṣlaḥa* of facilitating female conversions to Islam. Therefore, they did not view this situation as one of equality or freedom from oppression but what serves the needs of new converts and serves the *maqāṣid* of *Sharīʿa*.

Conclusion

[924] https://en.qantara.de/content/womens-rights-in-islam-can-feminism-be-islamic.
[925] http://etheses.lse.ac.uk/2452/1/U615401.pdf.

On the nature of legal reasoning, al-Qaraḍāwī and Juday' have followed a well-trodden path in minority *fiqh* legal methodology; first showing that this is not a settled matter as diverse views existed and so is open to *ijtihād*, and then they considered the contemporary reality and the public interest and utility, and thereafter in that light they approached the hermeneutics and evaluation of past opinions to produce a legal opinion that is consistent with current needs and trends. This was done in a comprehensive manner by al-Qaraḍāwī and Juday' but the need to adhere to tradition by their fellow minority *fiqh* scholars proved to be stronger than the desire for reform. So, the response was equally detailed and nuanced, and interesting to see how scholars claiming to follow the same jurisprudential methodology deployed their legal arguments to reaffirm the traditional view. Both tried to reconcile and accommodate the conflicting evidence and opinions though the reformist position laid more emphasis on the possible circumstances around the evidence, while the advocates of the traditional position of separation chose to rely on the general import of the evidence. Where one draws the line is much about one's attitude towards the plight of convert women as it is about juristic approach and hence fraught with greater levels of subjectivity.

From a *maṣlaḥa* perspective, the concern of those who permit convert marriages was the protection of women in terms of their religion such that they avoid the dilemma of either rejecting religion or rejecting their non-Muslim husbands. Those who opposed convert marriages because it is contrary to the classical consensus have had the same concern. They feared that if such female converts continued in a marriage to a non-Muslim, they might be forced to leave their religion, or their children will not grow up as Muslims. Both wished to avoid the same outcome but advocated two diametrically opposing rulings to achieve it. The question of what constitutes or realizes a *maṣlaḥa* is a subjective matter as arguments. For example, one can argue for a convert marriage to be permissible because forced separation would harm the children and deprive them of a family life which may in turn cause them to be distanced from their religion or indeed the opposite could also be argued. On this question, it seems the reformist view has a better appreciation of reality as women currently have greater rights and autonomy both in law and by social attitudes. It is unlikely that a non-Muslim husband would wield the same influence over a Muslim wife as a non-Muslim spouse did in centuries past. In this liberal age, one can argue that a non-Muslim spouse would not only accept but celebrate the diversity. That being said, the counter to this is if such considerations are to be accepted then the door is open to question other established rules in marriage and divorce and so where would this end? It seems the majority of the

minority *fiqh* scholars, for fear of opening the legal 'flood gates', did not wish would proceed down this path.

Perhaps, out of all the minority *fiqh* contributors ʿAbdallāh Ṣāliḥ's reconciliatory approach, where allowance is given based on *ḍarūra,* realizes the needs of the convert community whilst maintaining *maṣlaḥa* and is in keeping with the approach of minority *fiqh* scholars in other issues. Ṣāliḥ recognizes that the evidence points to *furqa* or separation, therefore that *aṣl* (default rule)[926] needs to be respected but at the same time one needs to be cognizant of the very real dilemma Muslim female converts find themselves in. By permitting it conditionally[927] he has resorted to a path of circumvention minority *fiqh* scholars have followed in the past when they faced a legal 'wall' by the customary recourse to *ḍarūra*. In evaluating minority *fiqh's* congruity with its legal principles we can conclude that that they achieved this at least partially. As with any modern legal philosophy, the principles will comprise of the old as well as the new to maintain *aṣāla* (authenticity) especially when it is of a religious nature. Minority *fiqh* attempted to engage in a reality sensitive *ijtihād,* which is one of its core aims but failed to deliver a conclusive unified response as it was thwarted by a latent traditionalism that felt it was one step too far.

Finally, in respect of the effect, it is an open question as to how many Muslim convert women have made recourse to the new *fatwā*. In the absence of any statistics or sociological case studies one cannot make a finding on the reality, one assumes some may take advantage of it though the social stigma and opposition around the subject will undoubtedly deter many others. The key benefit for convert women is that at least an option has been placed by scholars of some standing. In the past the answer to the question of continuing a convert marriage was an emphatic no, whereas now the contemporary scholarly consensus has been broken and an alternative view has been articulated.

[926] Ṣāliḥ, Ḥukm Baqā' Man Aslamat", pp. 212 and 229.
[927] Ṣāliḥ, Ḥukm Baqā' Man Aslamat", pp. 238-239.

Chapter 7
Islamic Commercial Transactions

Introduction

The study of any body of jurisprudence reveals not only its solutions to a legal problem but also its underlying premise, challenges, attitudes, red lines, and compromises. This is especially the case in the subject of Islamic financial transactions which is part of the *muʿāmalāt*; a wide term encompassing sales, employment to marriage and divorce. We have seen other areas such as the Islamic social rules which have to operate within domestic laws though there is some room for flexibility via the *Sharīʿa* councils. However, in the Western economic context the challenge is greater due to the nature of the Western economy. The modern economy is premised and built on credit, the supply of credit, complex financial instruments and the protection of assets and interest via the insurance industry. The aims of such an economy; growth and profit may seem the obvious objectives of any rational economy, Islamic or otherwise, however closer scrutiny reveals areas of ambiguity if not a parting of the way when we come to the Islamic verdicts on various financial instruments, structures and contracts that are devised to realise these aims.

Two rulings or prohibitions in Islamic Law that are always in the mind of Muslim scholars when dealing with Islamic financial transactions and cannot deferred or avoided due their ubiquitous presence is that of *ribā* (usury) and *gharar* (uncertainty). These by no means are the only causes that invalidate a contract or make it voidable[928] but they have an all-pervading nature and particular relevance to the study at hand. They are of general consideration in all financial contracts let alone in the context of liberal capitalist economy, and this is the context in which Islamic law must operate, where interest is an all pervasive and indispensable element. The same can be said of *gharar* as the free-market economy is dependent on insurance and complex contractual arrangements and company structures that seem on first glance to be a far cry from the models one encounters in Islamic law.

Islamic law, as a rule, rejects *ribā* and uncertainty in contracts and also provides further rules of conditionality as to the structure of contracts. *Ribā* and its use in whatever guise is

[928] There are other factors which may pertain to the asl (element) of the contract which are of an intrinsic nature such as the subject matter being prohibited in the first place. However, it is the extrinsic causes like *ribā* and *gharar* that play a central role in any discussion on Islamic financial transactions.

prohibited and Muslims scholars are unanimous in their total rejection though it is the modus operandi in a capitalist economy. *Gharar* on the other hand, i.e., prohibition of uncertainty is not unique to Islamic law and can be said to be an objective in all legal systems. However, the level of uncertainly deemed acceptable in affecting a valid contract is the bone of contention. In addition to the above two red lines is the prohibition of gambling (*qimār*) and its applicability to the speculative practices in modern trade on the exchange markets. Islamic law, like *ribā*, has a zero tolerance to gambling and its application has been extended to modes of trade that would not be seen as gambling in the proper sense. All trade involves some risk and can be loosely termed a gamble if the risk is perceived to be high but the definition in Islamic law has a broader import.

With this in view how do Muslims in the West engage with issues to do with trade, investment, employment etc? Can they purchase shares in companies that deal with interest? Is it permissible to take out insurance policies that contain, for most scholars, a clear element of *gharar* which renders it an impermissible contract? Can Muslims take conventional loans to purchase homes for the purpose of residence? And what of the Islamic finance options such as *mushāraka* and *murābaḥa*, do they offer authentic Islamic alternatives Muslims can have confidence in? These and many other questions have been addressed by the minority *fiqh* scholars with varying conclusions. However, and perhaps as interesting as the actual conclusions are the underlying reasoning's, attitudes, and approaches as they grapple with principles of a western economic system that makes coexistence highly problematic and difficult. The answers, in their detail, are no means uniform or unanimous but do reveal the intellectual and legal processes at work. In examining the jurisprudential processes at play one can describe, discern, and analyse the common features of minority *fiqh* and as well as note any departures or reworking of the principles espoused in their legal philosophy. Has contemporary *fiqh* provided effective solutions for commerce, trade and finance whilst maintaining internal legal integrity or are the compromises too onerous to make the claim of *aṣāla* unjustified? This is in relation to internal congruence but what about the practical challenges such as enabling a Muslim to realise his or her financial and business needs in an effective and *Sharīʿa* compliant way?

In short, the present study is not or can be an exhaustive study of Islamic finance[929] and commercial rules as a whole, the aim is to discern the internal and external congruence of minority *fiqh* responses to the field of financial transactions.

In this chapter we will analyse the following areas in respect of the minority *fiqh* contribution;

i. Red lines of *Ribā*, *gharar* and *qimār/maysir* in Islamic contract law
ii. Trading on stock market: share companies
iii. Trading in Derivatives & the Futures Market

These areas are only a partial representation of the subject areas discussed under the rubric of Islamic finance. Our study will focus on them as minority *fiqh* has restricted itself to these as issues. We will consider the way in which minority *fiqh* scholars have addressed the above questions in light of established red lines in *Sharīʿa* and draw conclusions as to the internal and external dynamics of their legal methodology. We will assess to what extent minority *fiqh* scholars were willing to overcome their red lines to facilitate economic and business activity by Muslim minorities.

Section I: The Red Lines

Ribā

In assessing any new or modern transaction one needs to consider the extrinsic causes[930], as opposed to the intrinsic causes relating to formality that invalidate a contract. High on that list is the prohibition of *ribā* or usury, not least as the prohibition is said to be decisively established in normative Islamic *fiqh*. Whilst *gharar* is generally accepted to be prohibited notwithstanding the dispute about the reality but the prohibition of *ribā* is deemed to be clear and emphatic and enjoying the status of axiomatic knowledge.[931]

Ribā in essence and in its basic definition is an increase on the principal. The Qur'ān in more than one place[932] prohibits this increase or *ribā* in no uncertain terms:

[929] Hence, we will only focus on aspects touched on and addressed by minority *fiqh* scholars such as trading on stock market, shares, futures, options, mortgages and not enter the wider discussion on Islamic finance
[930] Mansuri, Muhammad Tahir, *Islamic Law of Contracts and Business Transactions* (Shari'a Academy, 2001), p. 116.
[931] The prohibition of *ribā* is categorised as an issue that is known of necessity (*maʿulima min al-dīn bi-l-ḍarūra*).
[932] Qur'ān 2:276-280, 3:130, 4:161 and 30:39.

> *Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, "Trade is [just] like interest." But Allah has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah . But whoever returns to [dealing in interest or usury] - those are the companions of the Fire; they will abide eternally therein.'* (2:275)

The *ḥadīth* literature is equally emphatic in its condemnation: From Jābir who said: "The Messenger of Allah cursed the one who charges *ribā*, he who gives it; the one who records it; and the two witnesses…"[933]

It is due to the emphatic nature of the prohibition that Muslims scholars tread carefully and are willing to declare a contract or transaction invalid where there is even a fear or suspicion of *ribā* let alone its clear occurrence. However, the application of classical *fiqh* on contemporary commercial transaction is not uniform or agreed upon. Even conventional interest, as we shall see, have been legitimated by some though it is a minority view. What this shows is that the application is not always as clear cut as the general condemnation of *ribā*. These difficulties in application are not purely because of complex modern trading practises but are also rooted in the interpretation of textual authority. *Ribā* has been classically divided into two types[934]:

i. *Ribā al-Nasī'a*

ii. *Ribā al-Faḍl*

The former relates to the interest prohibited in the Qur'ān which is the increase on the principal. The word *nasī'a* refers to the increase because of the delayed payment.[935] In other words this description accords with a standard loan where the original plus increase on the loan is paid on completion. This type of usury is considered by many to be of the type that was prevalent amongst the pre-Islamic Arabs of *jāhiliyya*.[936] Others have said the form of

[933] Bukhārī, *kitāb al-buyūʿ*, https://hadithportal.com/index.php?show=bab&bab_id=1282&chapter_id=34&book=33&sub_idBab=0&f=1259&e=1371

[934] Increase on its own does not constitute *ribā* as any form of trade and commercial transactions involve increase or difference in the counter values. Which increase is considered *ribā* in *Shari'a* is determined by the source texts and hence the classification of *ribā* as *nasī'a* and *faḍl*. See al-Nabhānī, Taqī al-Dīn, *Niẓām al Iqtisādī fī al-Islām* (Beirut: Dār al Umma, 2004), pp. 258-259.

[935] Abū Zahra, Muḥammad, *al-Buḥūth fī al-Ribā* (Dār al Fikr al-ʿArabī, n.d), p. 19.

[936] It is termed as the *ribā* of *jāhiliyya* and has been cited in the *ḥadīth*. see Abū Zahra, *al-Buhuth fī al-Ribā*, p. 19.

ribā is not restricted and more than one variety of *ribā* existed at that period.[937] Despite its authority being Qur'ān some have qualified the prohibition. Some have argued that the prohibition relates to exorbitant nature of the *ribā* and cannot be compared to commercial interest which has social and commercial benefit[938] and not exploitative like the former. Others made a distinction between loans taken for the purpose of consumption (*istihlāk*) and for those taken to capitalise (*istighlāl*) and increase productivity. They argue the practise of the Arabs in pre-Islamic times was to take loans for their own use and consumption and not to increase productivity as we see in modern times.[939] By that reasoning business loans will be permitted as it's not for individual consumption and use. According to A.L.M Gafoor one factor in an inflation compensation which would not be considered *ribā*.[940] Some took the view that interested received by depositors from conventional banks is a form of profit dividend and not *ribā*.[941]Most scholars rejected these distinctions and qualification though they do show that the perceived consensus has its detractors. The minority *fiqh* scholars like the mainstream scholars have not accepted any radical or novel exceptions and as such it is the standard understanding that will be used when referring to the prohibition of *ribā*.[942]

The question of *ribā* and its features and detection in transactions is a normal activity of the *mujtahid* jurist who specialises in transactions. In this regard it is the second category *ribā al-faḍl* which is pertains to sales that involved the attention of the scholars than merely increase on principal.[943]This category is more than simple compensation for money borrowed (though it includes it) but relates to the increase that may result from different items being exchanged or due to delay in exchange. The authority for this category of *ribā* is the Sunna and the following *ḥadīth* (with its variants) is the source text on this issue:

ʿUbāda b. al-Ṣāmit reported Allah's Messenger as saying: "Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt, like for like

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[937] Ayub, Muhammad, *Understanding Islamic Finance* (Wiley, 2010), p. 49.
[938] Ayub, *Understanding Islamic Finance*, p. 50.
[939] Abū Zahra, *al-Buhuth fī al-Ribā*, p.23 and 33. Abū Zahra has argued the opposite practise was true that Arab traders would normally take loans for the sake of commerce and not for personal use and beside the reference is general and would include both varieties. See p. 23 of his book.
[940] Dinc, Yusuf, Compensation of Inflation on Lending Transactions in Islamic Economics: Islamic Price Index Offer, *Proceedings of the Fifth European Academic Research Conference on Global Business, Economics, Finance and Banking (EAR16Turkey Conference) ISBN: 978-1-943579-44-0 Istanbul-Turkey. 15-17 December, 2016. Paper ID: 1645*, p.9.
[941] Visser, Hans, *Islamic Finance: Principles and Practice*, (Edward Elger Publishing, 2010), p. 33.
[942] This understanding takes the meaning to be expansive and the ambiguity is further reason for wide application while contemporary distinctions seek to restrict., See Vogel, Frank E., *Islamic Law and Finance* (Leiden: Brill, 2006), p. 73.
[943] Vogel, *Islamic Law and Finance*, p. 74.

and equal for equal, payment being made hand to hand. If these classes differ, then sell as you wish if payment is made hand to hand.'[944]

It is generally understood by scholars[945] that this *ḥadīth* requires all exchanges between the aforementioned six *ribawī* categories to be on the spot 'hand to hand' and in equal amounts where the exchange is for a single type. Unequal exchanges and equal exchanges which are not on the spot are deemed usurious. Thus, this category contains prohibitions against two aspects delay (*nasī'a*) and excess (*faḍl*). The prohibited categories and exchanges then have been extended further by legal schools based on what they identified to be the effective cause (*ʿilla*).[946]The Shāfiʿīs take the view that effective cause to be the currency value (*thamaniyya*) and the food value (*ṭaʿm*) and hence anything exchanged sharing these descriptions will be subject to the requirement of an on-the-spot exchange and equal amount if both are of the same type. The Mālikīs qualify the food value to mean basic non-perishable food stuff like wheat and barley as opposed to vegetables that cannot be stored for a long time.[947] The Mālikīs also further qualify the *thamaniyya* (unit of value) to extend anything that can function as a currency and medium of exchange (*ṣarf*) and hence can extend to modern currency whereas the Shafi's limit the *thamaniyya* to gold and silver only.[948]The Ḥanafīs identify the conditions of equal exchange i.e. weight or volume as the effective cause regardless of the item. If there is disparity of weight or volume for a single item or if two different items share the same description i.e., weight or volume that constitutes *ribā*. If both counter values have different descriptions where one is measures by weight and the other is measured by volume, then that would not be *ribā*. There is unanimity that for an exchange to be classed as *ribā* there must be a single effective cause in both counter values.[949]The Ḥanbali view, unsurprisingly, based on the different attributions to Ahmed b. Ḥanbal, ranges from something akin to the Ḥanafī view that measure or weight constitutes the *ʿilla* for *ribā* to the

[944] *Ṣaḥīḥ* of Muslim, no. 3853, Book of transactions.
[945] It is reported that Ibn ʿAbbās was unaware of a prohibition of *ribā al-faḍl*, see Abū Zahra, *al-Buhuth fī al-Ribā*, p. 51.
[946] On the Ẓāhirīs restricted the *ribawī* categories to those items mentioned in the hadith, see Abū Zahra, *al-Buhuth fi al-Riba*, p.52. From the contemporary scholars Taqi al-Dīn al-Nabhānī following similar line rejected any occurrence of *ʿilla* in the six *ribawī* items saying that as nouns and not *waṣf* they cannot be extended. See al-Nabhānī, *Niẓām al Iqtiṣādī*, pp. 259-262.
[947] Mansuri, *Islamic Law of Contracts and Business Transactions*, p. 129.
[948] Mansuri, *Islamic Law of Contracts and Business Transactions*, p. 129.
[949] Vogel, *Islamic Law and Finance*, p. 75. Vogel mentions exceptions to this point as well, see footnote 11, p. 75. See also Ayub, *Understanding Islamic Finance*, p. 52.

Shāfiʿī and Mālikī view that *thamaniyya* is *ʿilla* for gold/silver while foodstuff is the *ʿilla* for the remaining four categories.[950]

The rationale behind the prohibition of *ribā al-nasī'a* and *ribā al-faḍl*, amongst other things, revolves around considerations of business ethics[951], fairness, protection of people's wealth and prevention of exploitation of the poor by the rich[952] though this view has not gone unchallenged. [953] According to Cattelan the prohibition relates to the notion of rights and equity and justice as ordained by God.[954] It is stated that *ribā* has no benefit whatsoever regardless whether it is minimal or exorbitant and hence the zero tolerance policy.[955]With respect to *ribā al-faḍl* some have expressed scepticism as to the detectability of a rationale for its prohibition.[956] Muḥammad Abū Zahra states the reason for prohibition of excess (*faḍl*) in the exchange of gold and silver is to close the door to true *ribā* i.e. *ribā al-nasī'a* the difference between the two being the nature of the contract itself.[957]One is an increase on the principal borrowed while the other relates to sale of one precious metal for another. As for prohibition of exchange of foodstuff Abū Zahra states the reason clearly, in his view, is the prevention of hoarding. Foodstuff is susceptible to hoarding because a farmer who trades in dates for example may hoard good quality produce and not sell until he can exchange realize higher volume of inferior dates in exchange for his quality dates. This leads Abū Zahra to the second reason which is to promote the purchase of such items with money will lead to greater economic activity.[958]

Mahmoud El Gamal states that contemporary scholars in trying to adhere to contractual formality in respect of nominate contracts have not considered what *ribā* means in the modern world.[959] He claims such forms are cited but not actually followed and products are more expensive in the end. He makes an interesting point that early scholars had advantage of adopting Roman and other legal norms, but later scholars are beholden to what the early

[950] Mansuri, *Islamic Law of Contracts and Business Transactions*, p. 130.
[951] Ayub, *Understanding Islamic Finance*, pp. 54-55.
[952] Mansuri, *Islamic Law of Contracts and Business Transactions*, pp. 126-128.
[953] Visser, *Islamic Finance*, pp. 37-38.
[954] Cattelan, Valentino (ed), *Islamic Finance in Europe* (Edward Elger Publishing, 2013) and idem, "From the Concept of Haqq to the Prohibitions of riba, gharar and maysir in Islamic Finance", *International Journal of Monetary Economics and Finance*, vol. 2, Nos. 3/4, 2009, p. 396.
[955] Abū Zahra, *al-Buhuth fī al-Ribā*, p. 45.
[956] Visser, *Islamic Finance*, p. 35.
[957] Abū Zahra, *al-Buhuth fī al-Ribā*, p. 46. Mansuri makes similar point, see Mansuri, *Islamic Law of Contracts and Business Transactions*, p. 128.
[958] Abū Zahra, *al-Buhuth fī al-Ribā*, p. 57.
[959] El-Gamal, Mahmoud A., *Islamic Finance: Law, Economics and Practice* (Cambridge, 2009), pp. 24-25.

scholars came with to deal with issues of their own time.[960] Contemporary scholars in his view follow broadly two approaches. Those who try to Islamise western transactions and practices citing the nominate contracts but straying from the classical definition of these contracts and the other approach (the minimalist approach) which allows insurance and other transactions (which according to the former approach contains *ribā* and *gharar*) with some modifications.[961] He argues it is better to accept they were for their time and follow the spirit of Islamic law and develop products that are more effective and competitive and a key example of which how he treats the subject of *ribā* as it relates to interest charged by banks.

In his work he tries to demonstrate that interest is not necessarily *ribā*. He enters into a discussion about Ibn Rushd's point that equality in value of things ensures equity/fairness.[962] Inequality leads to inequity and unfairness in transactions and that is *ribā*. However, in credit sales the mark up is interest and not *ribā*. Instead of calling that profit (which is limitless), he says this should be called interest which is in turn determined by the interest rate. El Gamal seems to be arguing the point that interest is not necessarily *ribā* if it not exorbitant and unfair.

The reason why *ribā* is forbidden because it is "trading in credit (*ribā*) and trading in risk (*gharar*)".[963] In other words making money out of credit and risk is what is forbidden. So, if a loan interest is not exorbitant then this is not *ribā* as it reflects an equal value. The is the same as risk or *gharar* in *salam* contracts is which is permissible because of the benefits and the value. Islamic law is paternalistic on certain issues e.g., *ribā* and *gharar*. To avoid injustice and misappropriation of wealth certain practices forbidden outright. But where there is need and benefit such as in *salam* contracts the prohibition is lifted.[964] This is the spirit of Islamic law which he believed contemporary scholars are failing to take consider when dealing with the modern economy.

As evident from the above the subject of *ribā* though described as an indisputable prohibition has qualifications and sub qualifications especially in the *ribā* related to sales contracts (*buyū'*). Despite the differences perhaps there is an essential element which all can agree with respect to the definition of *ribā* and that is that it is profiting without a risk that is beyond the risk of losing money. In other words, getting something for nothing, which is unjust and

[960] El-Gamal, *Islamic Finance*, p. 56.
[961] El-Gamal, *Islamic Finance*, p. 152.
[962] El-Gamal, *Islamic Finance*, p. 52.
[963] El-Gamal, *Islamic Finance*, p. 47.
[964] El-Gamal, *Islamic Finance*, p. 48.

constitutes illegitimately consuming the wealth of people (*akl amwāl al-nās bi-l-bāṭil).*[965] Whereas a sale is not *ribā* because the profit is for more than the price paid for a thing. E.g., when person buys from farmer to sell in the market. It is more than the price he paid the farmer because he transported the goods to market i.e., he added value. Or for example someone who buys raw materials for a certain price and then sells. It is his effort plus the price when he resells and so the profit is not *ribā*.

Another way to look at the subject from the viewpoint of risk is that *ribā* is when risk is only in the creditor giving the money and not in the venture. However, if the person giving the money shares the risk in the venture via *muḍāraba* or *mushāraka* then it is not *ribā*.

We have set out the key types of *ribā*[966] and the pertinent issues surrounding the definition of *ribā* as well as the aims and purpose of its prohibition. We shall see in due course how minority *fiqh* navigates this terrain when giving its ruling on modern instruments of trade and commerce.

Gharar

Gharar, after *ribā*, is the second major prohibition in contracts in Islamic law[967]. The word *gharar* has been variously rendered in English; 'ambiguity, uncertainty, risk, hazard'. Precisely what it means in practice is a complex affair as it affects most elements of an Islamic contract. One of the principal authorities for the prohibition of *gharar* is the *ḥadīth*:

Jaʿfar ibn Abī Waḥshīya reported from Yūsuf ibn Māhil, from Ḥakīm ibn Hizām [who said]: 'I asked the Prophet: O Messenger of Allah! A man comes to me and asks me to sell him what is not with me, so I sell him [what he wants] and then buy the goods for him in the market [and deliver]. And the Prophet said: sell not what is not with you.'[968]

[965] Expression deriving from Quran: chapter 2, verse 188

[966] There are other types of contracts that are deemed usurious by most scholars such as *bayʿ al-ʿīna*, *bayʿ al-wafā'* and *bayʿ hattā wa ta'ajjal*. Although all these types of transaction find support from classical scholars, albeit in the minority, we have not sought to address these as they are relevant to the wider Islamic finance debate and not the particular areas we seek to analyse in the present study. For further discussion see Mansuri, *Islamic Law of Contracts and Business Transactions*, pp. 131-134.

[967] It is worth noting that *ribā* does not necessarily invalidate a contract while the presence of *gharar* is an extrinsic cause of contractual invalidity (*buṭlān*) or vitiation (*fasād*).

[968] Reported by Abū Dawud, *Sunan*, Eng. Trans. Ahmad Hasan, 3 vols, (Lahore: Ashraf Press, 1984), vol. 3, *kitāb al-buyūʿ*. See Kamali, Mohammad Hashim, *Islamic Commercial Law: An Analysis of Futures and Options* (Cambridge: Islamic Texts Society, 2000), p. 112.

Based on this narration and other *ḥadīth* scholars have attempted to define *gharar*. According to al-Sarakhsī it is a contract where the "consequence of a transaction remains unknown".[969] Ibn Ḥazm defines it as a sale where "the purchaser does not know what he has bought, and the seller does not know what he has sold" or it is according to Ibn ʿĀbidīn "uncertainty about the existence of the subject matter of the sale".[970] According to Ibn Qayyim *gharar* takes place where the "vendor is not in a position to hand over to the buyer whether the subject matter exists or not."[971] In essence it the uncertainty and risk involved in a transaction leading to unfair advantage or misappropriation of another's money is what constitutes *gharar*. That is why gambling (*qimār*) involving pure chance is probably the clearest and most undisputed example of *gharar* while disagreement or nuance has arisen in the lesser forms of risk and uncertainty.

These definitions establish key features of *gharar* such as the risk, deliverability (*maqdūr al-taslīm*), the non-existence of the subject matter (*bayʿ al-maʿdūm*), possession before sale (*qabd/taqabud*), material ignorance (*jahāla al-fāḥisha*) and others. In essence *gharar* relates to an indefinable element in the transaction and should not be confused with wilful deception and fraud which are forbidden in their own right[972]. These features may not exist and do not have to all coexist at the same time to constitute *gharar*.[973]For example one maybe aware of the characteristics of the subject matter, such as the purchase of a runaway camel but its deliverability is questionable and so the contract would be void for presence of *gharar*. Whilst the smallest amount of *ribā* or even fear of it can lead to its rejection this is not the case with *gharar*.[974] Scholars distinguish between *gharar al-qalīl/yasīr* which is negligible or unavoidable and *gharar al-kathīr* which is significant or excessive.[975] This qualification further applies to the features of *gharar*, such as *jahāla* or ignorance of the attributes of the subject matter. The Ḥanafīs school for example stated the *jahāla* in respect of the object of the sale must be *jahāla fāḥisha*, a major ignorance and not minor.[976]

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[969] Mansuri, *Islamic Law of Contracts and Business Transactions*, p. 93.
[970] Mansuri, *Islamic Law of Contracts and Business Transactions*, p. 93.
[971] All of these definitions have been cited by Mansuri, see Mansuri, *Islamic Law of Contracts and Business Transactions*, p. 93.
[972] Kettel, Brian, *Islamic Capital Markets* (Brian Kettel, 2009), p. 104.
[973] al-Zuḥaylī, Wahba, *Financial Transactions in Islamic Jurisprudence*, trans. M. A. El-Gamal (Beirut: Dār al-Fikr, 2003), 1:109.
[974] Al-Saati, Abdul-Rahim, "The Permissible *Gharar* (Risk) in Classical Islamic Jurisprudence", *Journal of King Abdulaziz University: Islamic Economics*, vol. 16, No. 2, 2003, p. 15.
[975] Ayub, *Understanding Islamic Finance*, p. 58.
[976]al-Zuḥaylī, *Financial Transactions*, 1:104.

Contemporary scholars have analysed the *fiqh* and identified and listed the occurrence of unacceptable *gharar* in many aspects of the contractual process[977] while others have looked at it from the economic perspective.[978] Our aim here is to clarify the nature of the discussion surrounding *gharar*. As with the example of *ribā*, although *gharar* is unanimously accepted as unlawful its details are not always agreed upon. For example, a single contract with two sales or the *ʿarbūn* earnest money transaction are both cited as examples of contracts that involve *gharar* and yet there are scholars, albeit in a minority, who have permitted such transactions based on other textual authority[979]. In the modern context insurance policies are generally deemed to contain excessive *gharar*[980] though Muṣṭafā al-Zarqā has taken the minority view that they are permitted.[981]

Some have argued that the concept of Misrepresentation in the sense of fraud as expounded in English Law is a better rendition than the way it has been hitherto discussed.[982] English law, as with all legal systems, seek to avoid ambiguity in contracts, but a certain amount of risk is tolerated or even encouraged to stimulate and encourage economic activity. Indeed, in Islamic law risk of loss must go hand in hand with profit and gain[983]. Although risk taking and entrepreneurship is part and parcel of commercial reality, how far that translates into viable *Sharīʿa* compliant transactions and commercial instruments is the question at hand. In the liberal free market system, the line is drawn, generally speaking, by its self-professed aim of liberalising the economy, and this is beyond what one might countenance with Islamic law. This poses a challenge to the modern scholar who wishes to promote Muslim participation and engagement within a free market system.

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977 Mansuri, *Islamic Law of Contracts and Business Transactions*, pp. 94-95.
978 See "An Economic Explication of the Prohibition of *Gharar* in Classical Islamic Jurisprudence", http://www.ruf rice.edu/~elgamal/files/*gharar*.pdf and Suzuki, Yasushi, "A Post-Keynesian perspective on Islamic prohibition of *Gharar*", www.emeraldinsight.com/1753-8394 htm.
979 Mansuri, *Islamic Law of Contracts and Business Transactions*, p. 96.
980 Abdullah, Atikullah Hj, "The Elements of *Qimar* (wagering) and *Gharar* (uncertainty) in the Contract of Insurance Revisited", *Journal of Islamic Economics, Banking and Finance*, vol. 9, 90 No. 2, Apr - Jun 2013, p. 98.
981 Ahmad, Wan Marhaini Wan, "Some Issues of *Gharar* (Uncertainty) in Insurance", *Jumal Syariah*, vol. 10, 2, 2002, p. 62.
982 Khanfer, A, "A Critical Analysis of the Concept of *Gharar* in Islamic Financial Contracts: Different Perspective," *Journal of Economic Cooperation and Development*, vol. 37, 1, 2016, p. 6.
983 The principle *al-kharāj bi-l-ḍamān* (liability for loss accompanies gain) or *al-ghurm bi al-ghunm* or "gain is justified with risk" indicate the acceptance of risk and uncertainty that entails economic activity. See http://www.thestar.com.my/Opinion/Columnists/IKIM-Views/Profile/Articles/2014/02/25/The-concept-of-no-risk-no-gain-in-Islamic-finance/.

Qimār and Maysir (games of chance):

Contemporary scholars in the field of Islamic finance sometimes speak of gambling (*qimār*) in the same breath as *gharar* due to their interconnection[984]. However, the relevance as we shall see shortly perhaps closer to the concept of market speculation.

Qimār or *maysir* ordinarily refers to gambling. The Qur'ān categorically forbade such practices in the following verse:

> *'O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone alters [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful. Satan only wants to cause between you animosity and hatred through intoxicants and gambling and to avert you from the remembrance of Allah and from prayer. So will you not desist?*[985]'

Maysir is the "easily available wealth or acquisition of wealth by chance, whether or not it deprives the other's right"[986]whilst *Qimār* is the game of chance. In one sense gambling can be classed as a type of *gharar* because the result of the gamble is not known.[987]

The above are just some, but not all, prohibitions in contract law and means of ownership. There are other restrictions such as hoarding/monopoly (*iḥtikār*), price fixing (*tasʿīr*), various types of fraud such as deception by concealing a defect in a contract' subject (*tadlīs*) which is a form of *gharar*, excessive profiteering (*ghubn fāḥish*), coercion negating consent of a contracting party (*ikrāh*), price inflation via false bidding (*najsh/tanājush*), proceeds of theft (*sariqa*), bribery (*rashwa*) or prostitution (*bigha*) sale of prohibited things such as alcohol or pork.[988] However, we shall focus on *ribā*, *gharar* and *maysir* as they have particular relevance to the areas we wish to analyse.

Section II: Dealing with Share Companies

The share companies that dominate the market are a permanent fixture of a capitalist economy. Such companies seek to raise capital via the floating of shares on the stock exchange and seek to make profit through trade and investment. Western companies will use all legal means at their disposal and will invariably deal in interest-based contracts and deals

[984] Visser, *Islamic Finance*, p. 45. Also see Vogel, *Islamic Law and Finance*, p. 87.
[985] Qur'ān 2:90-91.
[986] Ayub, *Understanding Islamic Finance*, p. 61.
[987] Ayub, *Understanding Islamic Finance*, pp. 61-2.
[988] Mansuri, *Islamic Law of Contracts and Business Transactions*, pp. 143-161.

that could be described as containing *gharar*. Such companies operate not only in the West but internationally within the global economy which facilitates such transactions. In this context can Muslims purchase shares on the stock exchange and have dealings with such companies?

Rulings of Two International Fiqh Academies

This is a question that has been raised in the Muslim countries before being discussed within the minority *fiqh* scholarship. The International Islamic Fiqh Academy (*majmaʿ fiqh al-Islāmi al-duwalī*) under the auspices of the OIC and the Muslim World League (*rābiṭa al-ʿālam al-Islāmī*) both (bearing the same name) looked into this matter and issued rulings on various aspects. It is worth looking at their findings as the minority *fiqh* scholars have used these rulings as a starting point, some have adhered to the findings whilst others have criticised some aspects and extended permissibility to aspects disallowed by both academies.

International Islamic Fiqh Academy (OIC)[989]

In respect of purchasing shares, the academy which is based in Jeddah took the view that though permitted in origin shares which primarily relates to dealing with interest, manufacture of products that are outlawed by *Sharīʿa* or trading in such good; these would be unanimously considered to be prohibited. Likewise, the academy also prohibited taking shares in companies which occasionally dealt with prohibited things such as interest and the like though their primary business activities may be permitted.[990] Providing the company did not deal in prohibited matters then most aspect of the share company system such as under writing, stock splitting, share certificates etc are permitted with the exception of special shares class. This is because the special shares effectively guarantee the capital or share of the profit at the point of liquidation.[991]

The academy also disallowed the purchasing of shares by means that involve interest, such as taking an interest-based loan or a promise from a broker to loan shares as it constitutes sale of shares by one who does not own them. Other than these exceptions the normal trading of shares is permitted.[992]

[989] Only the salient rulings will be covered though the rulings covered much more ground than what is entertained here.
[990] Bin Bayya, "Fiqh al-Bursa", p. 222.
[991] Bin Bayya, "Fiqh al-Bursa", p. 223.
[992] Bin Bayya, "Fiqh al-Bursa", p. 223.

With respect to futures options; this is a contract where a buyer has the right to buy a share at a specified price at a specified time. The academy declares them to be prohibited in *Sharīʿa* because such contracts do not come within the any known contract categories in *Sharīʿa* and do not constitute a property, benefit, or proprietary right.[993]

The academy also considered modes of dealing in commodities (*sulʿ*) and currencies (*ʿumla*) in the regulated markets. Where commodities and currencies are bought and sold with deferring of both counter values, such means are prohibited as well as the differed sale where the product is sold before possession (*qabḍ*).

International Islamic Fiqh Academy (Muslim World League)[994]

The Makkah based academy initially observed the positives and negatives of the stock market before discussing the rules. The academy recognized the positive role played by financial markets by establishing a permanent market to facilitate trade, raise capital and pricing of shares. On the negative side the academy observed that much of the trading via futures contracts do not represent a true sale or purchase due to the lack of reciprocal exchange (*taqābuḍ*) which is required by the *Sharīʿa* between parties to a contract.[995] Other problems relate to the hoarding of shares and price determined by factors such as false speculation beyond demand and supply.

With the above in mind the academy refused to give a general ruling and opted to consider each aspect separately. The academy accepted the permissibility of trading in traditional stocks as the commodity is present and existent in the ownership of the seller on the proviso that the contract does not involve any of the usual prohibited matters such as interest. The academy declared all types of bonds and gilts as impermissible as they involve interest. Futures contracts in their various forms were not permissible because they contravened the *ḥadīth*: "Do not sell what you do not own." alluding to the *gharar* aspect of such transactions. The Academy rejected the comparison of futures contacts with the Salam contract in *Sharīʿa* and distinguished it on the following grounds:[996]

a) In futures contracts the price is deferred whilst in a *salam* contract the price must be paid at the point of contract (*majlis al-ʿaqd*)

[993] Bin Bayya, "Fiqh al-Bursa", p. 225.
[994] Bin Bayya, "Fiqh al-Bursa", p. 227.
[995] Bin Bayya, "Fiqh al-Bursa", p. 227.
[996] Bin Bayya, "Fiqh al-Bursa", p. 230.

b) The futures contract involves a transfer of goods but speculation over prices in order make a profit and this is akin to gambling (*muqāmira*) whilst in the *salam* contract goods cannot be sold on until it has been delivered and it is in the possession of the buyer.

The academy finally advised the authorities in Muslim countries not to allow stock markets in their respective countries to trade freely in prohibited contracts but to oblige them to follow permissible means and practices. In respect of share companies and banks whose basic aims are permissible but engage in some prohibited activities the academy, like the Jeddah based academy, in its 14th session held in Makkah on 20 Sha'ban 1415H (21 January 1995) held that "It is unlawful for a Muslim to buy shares of companies and banks if some of their dealings are involved in usury and the buyer knows it." They went on to state that should a person discover that the company deals with usury then he is obliged to leave that company.[997]

Section III: Minority *Fiqh* and the Stock Market

Minority *Fiqh* scholars have built on the research and opinions expressed by the above two international *fiqh* academies and sought to provide answers faced by Muslim minorities living in the West wishing to engage in trade and investment. This may be either by buying shares in companies or trading in shares on the stock market. Minority *fiqh* scholars taking into account the circumstances of Muslim have widened the trading possibilities whilst maintaining the prohibition on dealings involving interest and other prohibited matters. Some have even considered the possibility of trading derivatives; options and futures in the futures market which is highly controversial. In what follows we shall consider their contribution regards to shares companies and financial derivatives.

Share Companies with Permissible Object

Share companies have a fundamental object and engage various transactions and practices to realise that object. Where the object of that company is prohibited such as with a conventional interest-bearing bank, casino or brewery than buying shares or dealing with such companies is unanimously prohibited. However, what happens when the object is permitted, such as company providing energy or telecommunication services but then must, due to the prevailing laws or competitive reality, engage in some practices which are not

[997] http://themwl.org/downloads/resolutions-of-islamic-*fiqh*-council-2.pdf, see p. 105 of pdf and p. 367 of the said document.

permissible? As we have noted previously the International Islamic Fiqh Academy (OIC) had disallowed engagement with such companies on the basis that partial engagement in usurious transactions it is still considered dealing in *ribā*.

Dr ʿAjīl Jāsim al-Nashmī

In the Western context it is expected that companies with permissible objects will find the transactional terrain even more difficult to navigate due to interest related or dependent practices a company must engage in to go about its business. Can there be a dispensation for those wishing to deal with them in Western countries? From the minority *fiqh* perspective al-Nashmī has looked precisely into this issue. According to al-Nashmī dealing with share companies, whose principal work is permitted but nevertheless on an operational level engages in some prohibited practices and transactions, may be permitted in certain circumstances but not as a general rule. His study can be divided into two parts; first consideration of the evidence which allow such dealings and then the correct ruling on these dealings.

Before embarking on the appraisal of the legal arguments al-Nashmī points out the distinction between dealing (*muʿāmala*)[998] and participating (*mushākara*) with share companies, the first deals with transactions with companies whose capital is mostly from *halāl* sources which most scholars say is allowed while participation (*mushāraka*) is about holding shares in such companies. Those who say that holding shares is permitted use the same evidence for saying dealing (*muʿāmala*) is allowed but while scholars generally accept dealing is permissible, but they do differ on the latter and al-Nashmī wants us to keep this distinction in mind.

On the matter of buying shares of companies based on an allowable premise trading in prohibited matters several scholars have held that it is permissible despite the rulings of prohibition by the Makkah and Jeddah based *fiqh* academies. For example, scholars such as Taqi Usmani and ʿAbdallāh b. Sulaymān, Muḥammad Abū Zahra, Wahba al-Zuḥaylī to name but a few have held that opinion. To add to that list ʿAlī Muḥyī al-Dīn Qaradāghī, who occupied seats as member the *Fiqh* Academy as well as being vice president of the ECFR,

[998] See Bin Bayya's two articles on both aspects of *mushāraka* and *muʿāmala* in session 7, vol. 1 of the Jeddah based academy on pp. 413 and 423.

held the view that participation (*mushāraka*) is permitted under certain circumstances with caveats.[999]

Al-Nashmī begins the first part of his study and engages the legal principles and arguments[1000] of those who argue that it is permissible to purchase shares of companies whose activities are permitted in origin but has some prohibited dealings. Below is a list of the said legal principles:[1001]

1. It is permissible as a subordinate that which is not permissible to be a principle.[1002]
2. The public need (*ḥāja*) assumes the position of the Necessary matter (*ḍarūra*).
3. The mixing of a prohibited part with a larger permissible part.
4. The majority takes the ruling of the whole.
5. The principle of general affliction and the removal of hardship.

It is Permissible as a Subordinate that which is not Permissible to be a Principle

This principle hinges on the fact that some things are legally inseparable at the point of sale and can only be sold together as the subordinate is prohibited from being sold without its principle due to *gharar* or some other consideration. For example, a farmer selling pregnant cattle (principle) cannot sell the foetus (subordinate) on its own which is prohibited but must sell both. In the context of shares, it is argued that that shares containing profit generated by some usurious transactions are a minor or negligible part of a company which in its aims and practices are largely permitted. So, in this case the shares are subordinate aspect of greater function of the company (being the principle) which is permitted. It follows then that the subordinate will take the same rule as the principle and therefore the purchase of such shares is permitted as the company as a whole is permitted.[1003]

Al-Nashmī does not accept this argument and points to the applicability of the legal maxim to the issue of shares. He states that the intent being allowing the sale of the subordinate is that it is inseparable from the principle and since the principle is permitted then the subordinate is

[999] "Aswāq al-Māliyya fī Mīzān al-Fiqh al-Islāmī", p. 109.
[1000] These principles, reproduced by al-Nashmī, where originally listed by al-Qaradāghī in his article "Aswāq al-Māliyya fī Mīzān al-Fiqh al-Islāmī", session 7, vol. 1 of the Jeddah based academy.
[1001] Al-Nashmī, ʿAjīl, "al-Bura: al-Taʿāmul wa-l-Mushāraka Fī Sharikat Aṣl Nāshatihā Ḥalāl 'illa Annahā Taʿāmul bi-l-Ḥarām", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2005), pp.105-120.
[1002] This seems to be a branch of 'The subordinate follows the principle' (*al-tābiʿ tābiʿ*), see *A Treasury of Sacred Maxims* by Shahrul Hussain, (Kube Publishing Ltd, 2016), p. 145.
[1003] Al-Nashmī, "al-Ḥuqūq al-Maʿnawiyya", pp. 105-106.

permitted which is not the case with shares. In the exampleٰ above it is the cattle that one wishes to buy and not the foetus and since the sale of cattle is permitted then so are its subordinate aspects. This, he says, is not the case with shares where the intent behind the shares is profit, some of which has accrued from interest bearing transactions. Both the principle and the subordinate must be permitted in origin, and the inseparability is of two permitted matters. However, the profit, which if for arguments sake is accepted as the subordinate, would be prohibited because its principle is the usurious loan which is not permitted. How can the subordinate be permitted when it comes to shares and profit when the principle itself is not permitted? The debate here seems to be about whether one can fit the company structures within the prism of this legal maxim.[1004]

For al-Nashmī it does not fit, and the application of the principle will lead to a negative answer as the *asl,* or principle is the usurious loan and not the permissible functions of the company. Those who permit the purchase of such shares follow a more liberal application of the principle while al-Nashmī prefers to look at the traditional intent and usage of the principle and applies it more narrowly. Al-Nashmī's view perhaps has greater merit in this regard as the issue here is about the purchase and disposal of shares. Also, the subordinate and principle have to be identified within that scope and to look at the company as a whole and to argue some prohibited aspects are allowed because they are considered subordinate is to stray from the legal maxim which requires both elements to be permissible in origin.

The Public Need (ḥāja) assumes the Position of the Necessary Matter (ḍarūra)

The above maxim lowers the threshold by which something impermissible becomes permissible due to public interest (*maṣlaḥa*) considerations. The common example given is that of ʿ*āriyya* transactions where a concession was granted such that dry dates can be exchanged with fresh dates due to the public need.[1005] Such transactions would normally be forbidden due to element of *ribā* when exchanging two different types of items but allowed in this instance due to the peoples need (*ḥāja*). In respect of shares the argument is that the sale and exchange of shares is required by individuals and states alike. People are in need to invest their money via the purchase of shares and a prohibition would cause hardship. In the same token, states may find they have to resort to usurious banks to finance their public projects if they are not permitted invest the nation's wealth. Al-Nashmī accepts the legal

[1004] Al-Nashmī, ʿAjīl, "al-Bura: al-Taʿāmul wa-l-Mushāraka Fī Sharikat Aṣl Nāshatihā Ḥalāl ʻilla Annahā Taʿāmul bi-l-Ḥarām", p.106.
[1005] Ṣāḥīḥ of Muslim, Volume: The Book of Transactions (*Kitāb al-Buyūʿ*), *ḥadīth* no: 3678.

principle as one that is unanimous amongst scholars but rejects that it applies to companies that have usurious dealings.[1006] He highlights the fact that the origin of the principle is one of *ḍarūra* based on the Prophetic *ḥadīth* 'there is no harm (*ḍarar*) or reciprocation of harm.'[1007] This therefore means that the principle of *ḥāja* will revert to the logic and conditions by which *ḍarūra* operates. One such condition or constraint (*ḍābiṭ*) is that permission of the unlawful matter must be proportionate to the need. So, a person fearing death due to starvation is permitted to eat something unlawful only to the extent that it will save his life and anything exceeding the need will fall back to the *asl* which is prohibition.[1008] It follows therefore that a hungry person who does not fear death cannot indulge in things which are clearly *ḥarām* just because he needs it. This means that prohibited matters which are in the realms of *ijtihād*, speculative (*ẓannī*) or secure a *maṣlaḥa* or repel a *mafsada* may be permitted due to need (*ḥāja*) but where they are clearly established as *ḥarām*, such prohibitions cannot be lifted without the proportionality test set by the principle of *ḍarūra*. In other words, since usury is from one of the highest categories of prohibitions the principle of *ḍarūra* may lift the unlawfulness based on proportionality but the principle of *ḥāja* cannot.[1009] The need to buy shares in companies that deal with *ribā* may be generally felt but it is nevertheless one that is invalid and conflicts with the text which prohibits usury.[1010] Furthermore, the reality today, according to al-Nashmī, is not where the prohibition has become so widespread that people have no other lawful options. He argues there even in non-Muslim countries there are many lawful alternatives, and those lawful avenues are greater in Muslim countries.[1011]

Al-Nashmī then turned to the argument which says that *Sharīʿa* has permitted the loaning of bread and dough with increased return which is a form of usury during the time of the Prophet and that was due to need *ḥāja* and therefore need will permit shares in companies dealing with usury. Again, al-Nashmī distinguishes such shares which are bought with the aim of profit and are not a need while such practise of loaning bread and dough was permitted by the Prophet as no increase was intended and there was real *ḍarūra* or exigency

[1006] Al-Nashmī, ʿAjīl, "al-Bura: al-Taʿāmul wa-l-Mushāraka Fī Sharikat Aṣl Nāshatihā Ḥalāl 'illa Annahā Taʿāmul bi-l-Ḥarām", p.108.
[1007] *ḥadīth* no. 32, 40 of al-Nawawī, *https://sunnah.com/nawawi40:32*.
[1008] Al-Nashmī, ʿAjīl, "al-Bura: al-Taʿāmul wa-l-Mushāraka Fī Sharikat Aṣl Nāshatihā Ḥalāl 'illa Annahā Taʿāmul bi-l-Ḥarām", p.109.
[1009] Al-Nashmī, "al-Ḥuqūq al-Maʿnawiyya", pp. 111-112.
[1010] Al-Nashmī, ʿAjīl, "al-Bura: al-Taʿāmul wa-l-Mushāraka Fī Sharikat Aṣl Nāshatihā Ḥalāl 'illa Annahā Taʿāmul bi-l-Ḥarām", pp.111-112.
[1011] Al-Nashmī, ʿAjīl, "al-Bura: al-Taʿāmul wa-l-Mushāraka Fī Sharikat Aṣl Nāshatihā Ḥalāl 'illa Annahā Taʿāmul bi-l-Ḥarām", p.114.

for the practise at the time. Al-Nashmī also gave short thrift to those who argued that the type of usury companies engage in are for the purpose of capitalisation and increase of productivity in the economy and not consumer usury the latter being prohibited. Al-Nashmī's response was the need for Muslims today to invest their money in their own countries and not to place it in the hands of foreign conglomerates.[1012]

The mixing of a prohibited part with a larger permissible part

This principle states that where *halāl* funds mix which money which is *haram*, such as the proceeds of theft, gambling or usury and the prohibited element is considerably small in comparison to the *ḥalāl* element then it is permitted to have dealings with such funds.[1013] This is on the proviso that the *ḥarām* elements do not exceed in the *ḥalāl* element in quantum. It is argued that dealing with shares is to be understood in this vein. Al-Nashmī combines this principle with the one that follows due to their similarity and addresses the arguments under that heading.

The Majority takes the Ruling of the Whole

This principle considers the majority element to determine the ruling. If the majority part of something is *ḥarām* then only that case a ruling of prohibition with be declared, otherwise the ruling of permissibility will be maintained. The argument about shares is that where most shares are permitted then the fact that some are not, this does not prevent a person from dealing with shares. In analysing this application al-Nashmī refers to the principles cited by the scholars to show that in most cases prohibition is preferred.[1014] In origin where the *ḥalāl* is mixed with the *ḥarām* then the ruling is one of prohibition. This can arise in a number of ways. Where that *ḥalāl* and *ḥarām* are mixed, and one can separate or distinguish then one must leave the *ḥarām*. If both are mixed and not distinguishable, it is safer to take prohibition over permissibility. In certain cases where the majority is *ḥalāl* and the minority is *ḥarām* and both are inseparable then the majority might be *ḥalāl* but this is exceptional.[1015] In most cases the prohibition is preferred preventing a *mafsada* is better than seeking a *maṣlaḥa*. One

[1012] Al-Nashmī, "al-Ḥuqūq al-Maʿnawiyya", p. 114.
[1013] Al-Nashmī, ʿAjīl, "al-Bura: al-Taʿāmul wa-l-Mushāraka Fī Sharikat Aṣl Nāshatihā Ḥalāl 'illa Annahā Taʿāmul bi-l-Ḥarām", p.114.
[1014] Al-Nashmī, ʿAjīl, "al-Bura: al-Taʿāmul wa-l-Mushāraka Fī Sharikat Aṣl Nāshatihā Ḥalāl 'illa Annahā Taʿāmul bi-l-Ḥarām", pp.116-119.
[1015] Al-Nashmī, ʿAjīl, "al-Bura: al-Taʿāmul wa-l-Mushāraka Fī Sharikat Aṣl Nāshatihā Ḥalāl 'illa Annahā Taʿāmul bi-l-Ḥarām", p.117.

understands from this that al-Nashmī does not believe this principle establishes a general permissibility for shares as cannot be separated and distinguished.

Widespread Affliction and Removal of Hardship (ḥaraj)

The origins of the principle of 'widespread affliction' derives from the more overarching principle of *raf' al-ḥaraj* (removing the hardship). The idea behind the principle is where a *ḥarām* has become so widespread in society that it cannot be avoided then it may become permissible.[1016] Those who allow dealings with modern share companies argue that their widespread presence justifies their permissibility. Al-Nashmī denies the principle has any applicability to share companies.[1017] He argues the principle is to be applied in cases where the *ḥarām* matter is so widespread as to be unavoidable. He cites examples where rulings have been given to this effect such as the leftover water of cats being permissible as their domesticity and interaction with humans means its unavoidable or prayer with negligible amount of impurity is valid as absolute purity is impossible. This, for him, is not the case with usury which is not so widespread as to be unavoidable. In order to explain the notion of whether *ribā* is unavoidable he discusses two scenarios: when something contains majority *halāl* and rest *ḥarām* whether or not both are distinguishable and when the merit content is *haram*, and the remainder is permissible.[1018] He argues that in both cases scholarly position historically has been to either forbid or discourage from people engaging in such transactions unless the *ḥarām* element can be distinguished and separated. Out of the range of views he opts for the position of *karāha* (matter which is discouraged) as a precaution (*iḥtiyāṭ*) due to the doubt (*shubha*) surrounding it and as an act of piety (*wariʿ*).[1019]

The Ruling on Shareholding in Companies which Occasionally Deal with Ribā

After rebutting evidence cited by those who believe buying shares in companies dealing with interest by showing their inapplicability al-Nashmī moves on to the positively elaborating on the ruling itself.[1020] The focus on the evidence was useful to show the evidential over-reach resorted to by scholars but the ruling on partnership or shareholding needs elucidation. Al-Nashmī divides the issue into a few broader categories and concludes with a final position on the issue. He begins by affirming that trade and partnerships are permissible in Islamic law

[1016] Al-Nashmī, ʿAjīl, "al-Bura: al-Taʿāmul wa-l-Mushāraka Fī Sharikat Aṣl Nāshatihā Ḥalāl 'illa Annahā Taʿāmul bi-l-Ḥarām", p.120.
[1017] Al-Nashmī, "al-Ḥuqūq al-Maʿnawiyya", p. 121.
[1018] Al-Nashmī, "al-Ḥuqūq al-Maʿnawiyya", p. 122.
[1019] Al-Nashmī, "al-Ḥuqūq al-Maʿnawiyya", p. 122.
[1020] Al-Nashmī, "al-Ḥuqūq al-Maʿnawiyya", p. 128.

are things that realise important goals in *Sharīʿa* not least in the modern context when such matters are indispensable for nations growth, industry, and productivity. The collective partnership is one of the most important sources of Muslim strength which al-Nashmī considers a collective duty (*wājib kifā'ī*), if not an individual obligation. Then al-Nashmī considers the reality of a share certificate, its categorisation into normal and special shares with their various conditions and what type of revenues a shareholder can expect to receive based on the type of share. Shares, he notes, are all equal in value and facilitate a vote count at an AGM (annual general meeting) and profit share distribution and in general affords the shareholder rights to profits and votes as well having the capacity to be exchanged.

Al-Nashmī recognises the importance of shares to the economy. Shares are a means of finance and raising capital from many small shareholders contributing to the growth of a state economy. Also, the limited liability of companies allows individuals to invest knowing their personal assets are protected. And finally, the relatively easy ability to exchange and dispose of shares means that it excels other modes of investment.[1021] Al-Nashmī then considers the business activities of companies. He states that share companies as a means of finance lends itself to diverse activities in order to make profit. Although a company maybe of one type of its activities are general diverse. A company which produces paper in its factories may itself hold shares in other companies which deal with interest or possess private of government bonds, take out loans and insurance its assets.[1022] After considering these features of a share company al-Nashmī turns to the actual ruling on buying shares in companies dealing with interest. Al-Nashmī keeps his focus on companies that are owned by non-Muslims as that is the case with the large corporations which hold Muslim capital by of shares. To answer this question, he first addresses ruling on Muslims forming partnerships with non-Muslims as discussed by the jurists. He cites the various views and concludes the following[1023]:

i. Whether a Muslim can form such partnerships can be either prohibition or disliked (*karāha*) because of the fear that partnership with a non-Muslim may lead to prohibited dealings involving interest.
ii. If a Muslim has already formed a partnership with a non-Muslim and has become involved in a interest bearing transaction then he must become free of the interest

[1021] Al-Nashmī, "al-Ḥuqūq al-Maʿnawiyya", p. 130.
[1022] Al-Nashmī, "al-Ḥuqūq al-Maʿnawiyya", p. 131.
[1023] Al-Nashmī, "al-Ḥuqūq al-Maʿnawiyya", p. 135.

element and if he knows that a non-Muslim deals with interest then to initiate a partnership would be prohibited.

iii. A partnership is a form of agency (*wakāla*) and so the agent and his appointee are both responsible for each other and any prohibited transaction by any one of them would make both responsible and liable.

iv. Entering into a contract with a non-Muslim which stipulates the payment of interest whether in writing or verbally would make such a contract irregular and voidable (*fāsid*) from the outset.

v. The partnership of a Muslim with a non-Muslim in usurious contract would render the contract voidable (*fāsid*) even if the usurious element was small as the amount of interest inconsequential.

Al-Nashmī cites the argument, made by some, that a shareholder cannot be held responsible for everything a company does as the shareholder by himself does not have the power affect the course of the company. Al-Nashmī responds by drawing attention to the description of a shareholder as a partner and therefore the above points still apply. Al-Nashmī then concludes emphatically that it is prohibited for a Muslim individual or company to engage in activities of such companies whether directly or indirectly while they deal with interest. This is because it is taken as given that such companies with give and receives interest and this is the normal course of dealings.[1024]

After citing his opinion on the matter, al-Nashmī makes some additional points. He states to engage in such companies would contradict the goal of Islamic companies which is to provide a real and credible Islamic alternative and would mean they would not be in contention. Furthermore, holding shares in such companies would not yield any direct growth or development to Muslim countries but on the contrary weaken them even further and lead to capital flight and non-Muslim companies would be utilizing Muslim capital in building their own prosperity and not benefitting Muslim countries. Finally, there exists a disparity in the goals of share ownership as the Islamic methodology is to make a profit by the production of things beneficial to society whereas the aim for share companies, in addition to increasing revenue and dividends for its shareholders is to raise the market value of its share capital. The focus on share value has meant rumours about a company's prospects, and other factors would affect the price leading to investors, who have no intention of owning the company

[1024] Al-Nashmī, "al-Ḥuqūq al-Maʿnawiyya", p. 137.

and making it profitable, speculating on the stock markets by buying and selling shares. The investment of money is to accrue profit by the company and not mere speculation over the share price. For al-Nashmī this crosses the Islamic limits and as such both share an inherent contradiction in their goals.

Al-Nashmī concludes his discussion of this subject buy quoting the full text judgment of the Jeddah based International Fiqh Council which stated that "in origin it is prohibited to hold shares in companies which deal with unlawful things such as interest even if their fundamental activities are legitimate."[1025]

The minority *fiqh* scholars like al-Nashmī and Bin Bayya have taken a more restrictive position and have not shown flexibility on the ruling. Minority *fiqh* aims to facilitate Muslim engagement with the West whether its social, judicial or in this case economic. However, it seems the prohibition of *ribā* is a hurdle they have not been able to legally navigate. It seems strange given that a ruling was found, which managed the issue of *ribā*, in the case of individuals purchases home via conventional mortgages. However, it could be that the minority *fiqh* scholars, whether consciously or subconsciously where making a distinction between individuals who are at the mercy of the laws under which they live and Muslim companies which have greater power and money backing them up. Also, another consideration could be that Islamic finance and companies are themselves part of a larger project and vision to show the efficacy of Islamic principles and therefore cannot afford to compromise those principles, whereas Muslims as individuals and communities who are trying to live as Muslims whilst seeking their interest within the western free market system should be shown greater leniency and accommodation.

A Strategic Approach

According to Muḥammad al-Nūrī, another minority *fiqh* contributor to this debate, the discussion around this issue is overly focused on *fiqhī* preoccupation with finding dispensation and allowances from the prohibitive rulings in respect of dealing with shares. He suggests that before the *fiqh* one should have strategic outlook and consider the reality of Muslims in the West and their priorities and how they can further contribute to the wider society. He states that the practise of seeking permits (*tarkhīṣ*) alone will not lead to the 'positive and aware integration' that is required to meet the desired aim of settled residence

[1025] Al-Nashmī, "al-Ḥuqūq al-Maʿnawiyya", pp. 139-40.

for Muslims in the West.[1026] Permits and dispensation may help individuals but will not make the 'Islamic plan/project/agenda' part of the domestic life. By way of example, he points to the Jewish community and other ethnic groupings which have established themselves in the UK. The Jewish community could have, he argues, permitted the slaughtered meat of non-Jews, as some Muslims have done with respect of *ḥalāl* meat, however instead of going down this line they have retained their distinctiveness and built an economic infrastructure which is considered a principle source of finance and investment.[1027] He further argues that the questions that need to be asked must follow a grasp of the economic priorities of Muslims in the West after considering the answers already given.

In respect of the reality on the ground he states there is youth presence which has turned to their religion as reaction to the societal crisis in European capitals of social inequality, unemployment, drugs, and lack of social justice. He also states there is migrant presence which is competent and qualified though there is high unemployment especially amongst the youth.

Section IV: Trading in the Futures Market

Derivatives: Room for Manoeuvre?

Perhaps the most controversial of the various trading instruments are what are known as financial derivatives. According to Muhammad Ayub a group of "products such as interest-rate swaps, stock options and futures, currency futures etc. are called derivatives i.e. instruments derived from the expected future performance of the respective underlying assets."[1028] Scholars generally, whether *fiqh* academies or otherwise, have taken the view that derivatives in their various forms are impermissible due to the *gharar* and chance (*maysir*) element and the delay in the counter values (*ʿiwaḍ*) or that they do not fall under known and permitted contract template. However, some scholars like Bin Bayya in respect of futures contracts have countenanced some room for manoeuvre albeit with restrictions while others such as Mohammad Hashim Kamali has been more ambitious. Each have considered the prohibitive arguments and legal hurdles cited by the consensus view and suggested a way in which future contracts can be distinguished or exempted from the general prohibition. The

[1026] Al-Nūrī, Muhammad, "Fiqh al-Bursa Bayn al-Jā'iz wa-l-Maṭlūb", *al-Majalla al-ʿIlmiyya li-l-Majlis al-Urubbī li-l-Iftā' wa-l-Buḥūth* (Dublin, 2005), p. 144.
[1027] Al-Nūrī, "Fiqh al-Bursa", p. 144.
[1028] http://islamicfinanceandbanking.blogspot.co.uk/2010/02/derivatives-and-islamic-finance html.

subject of derivatives is too large to address in a single chapter and hence we shall focus on discussion of futures contract amongst the minority *fiqh* scholars.

Bin Bayya and Futures Contracts (al-mustaqbalayāt)

We have already stated that scholars from the two international *fiqh* academies have generally held the view that financial derivatives are impermissible due to several reasons. However, Bin Bayya has looked at the rulings and reasonings given from the perspective of the Mālikī school, that school from which he hails, and observed that that there may be cases when a futures contract might be permissible. A futures contract is defined as "an agreement to buy or sell a specific amount of a commodity or financial instrument at a particular price on a stipulated final date."[1029] In light of that reality Bin Bayya identifies three key points raised by scholars to declare futures as unlawful:

1. It is unlawful to sell that which one does not possess (*qabḍ*). It is argued that futures contracts or debt instruments that involve the sale of a commodity at a stipulated later date which is not in the possession of the seller and therefore such transactions cannot be lawful.

2. The delay of counter values of unlawful in Islamic law. The sale of commodities in a futures contact involve the delay of payment and delivery of the commodity later and therefore futures fall foul of this rule.

3. The contract must be for commodity or usufruct (*manfaʿa*) which is owned or possessed. However, the sale of option, which is classed an instrument and not a commodity cannot be the subject of a contract and as such does not fit into any of the known nominate contracts recognised in *Sharīʿa*.

On these key areas Bin Bayya makes his own observation which are not in line which the views published by the *Fiqh* academies.

The Absence of Qabḍ

Bin Bayya respectfully disagrees with the *fiqh* academy and states that the sale of a debt instrument in relation to petrol, iron, or copper, where the raw materials at the point of contract are not possessed by the seller, are in fact valid contracts according to the Mālikī and Awzāʿī schools. He cites in detail the Mālikī position that the sale of debt instruments, known

[1029] Bin Bayya, "Fiqh al-Bursa", pp. 231-232.

as *bay' al-dayn* are permissible as the material is not foodstuff. Mālik construed the *ḥadīth* which purport to say that one should not sell without having possession (*qabḍ*) to refer to food stuff due to the narration 'whoever buys foodstuff should not sell until he has possession of it.' Whilst al-Shāfiʿī and al-Thawrī took the requirement of *qabḍ* as general and foodstuff as an exception, Mālik understood the foodstuff to be subject matter of the prohibition of selling without *qabḍ*. This means anything other than food stuff can be sold without *qabḍ* and such a contract can also be sold as a debt as *qabḍ* is not a requirement. Bin Bayya argues that a ruling for minorities in the West should according to the more relaxed Mālikī view as that brings accommodates their needs and is based on the principle of facilitation of ease.[1030]

Delay of Counter Values (*taʿjil al-badalayn*)

The most common form of futures involves the delay of counter values (*ʿiwaḍ*) where the price and delivery of a commodity is stipulated later then when the contract was concluded. The *fiqh* academies have given a blanket prohibition on such transactions and have not entertained any exceptions. Bin Bayya on the other hand states one should not have such a rigid approach as some contracts in *Sharīʿa* where the counter values are delayed are in fact valid according to certain scholars. For example, a baker who provides a continuous service can be paid at the end of the month for providing bread during that month. Here the delivery and price are both delayed, and such practices are allowed also in the *istiṣnāʿ* contracts where for example a person will pay a tailor after he has manufactured the garment. Bin Bayya accepts that most scholars hold the view that a *salam* contract where both counter values are delayed is prohibited. However, Bin Bayya argues the prohibition is not stated in the *Qur'ān* and Sunna, rather the issue is about the assessing whether there is *gharar* (uncertainty) or not as that is the *'ʿilla* of affect cause behind the prohibition. The *ḥadīth* which says, 'The one makes an advance payment (for fruits or grains to be delivered later) should pay for known measure and known weight.'[1031] The *ʿilla* (effective cause) for not selling without specifying the weight or delivery is *gharar*. Bin Bayya argues the *ḥadīth* can equally apply to debts as it does with payment is the effective cause is the uncertainty (*gharar)*. The delay of delivery is a debt and so the delay of payment and the *ʿilla* of *gharar* can be removed then the delay of both can be permissible based on need of people. In the futures market the sale is guaranteed by a third party which ensures that each party can attain its rights and so the *gharar* is removed. Bin Bayya therefore concludes that futures contracts may be possible if it is

[1030] Bin Bayya, "Fiqh al-Bursa", pp. 231-232.
[1031] Bin Bayya, "Fiqh al-Bursa", p. 220.

considered as a type of *salam* contract due to the need of people. He does not seem to be giving blanket permission by opening the possibility that such contracts may be permissible as a variety of *salam* due to the removal of the *gharar*.

The Contractual Subject Matter not being for a Commodity/Wealth

The Jeddah based *fiqh* academy has proscribed the exchange of options. They have defined options as the receipt of compensation for an obligation to sell or purchase a defined matter at a specified price during a specified time or period of time. Such contracts are impermissible according to the academy because they do not conform to the nominate contracts and are not based on wealth or commodity for which one can be compensated for.[1032] Upon closer scrutiny Bin Bayya believes this issue comes under the category of '*taʿlīq al luzūm*' or suspension of contractual affects which the Mālikīs have discussed. For example, a person will sell something on condition that the sale will not be concluded until payment has been made and this is permitted.[1033] He cites examples where Mālikīs have allowed compensation for certain contracts which are similar to an option. For example, he cites Ibn Rushd who stated:

> a person who is offering to sell some goods says to another who is offering to sell the same good; do not sell and I will give you a dinar, then that is permitted, and the *dinār* is due whether a person bought or not. Even if he said do not sell and I will give you the some if by way of partnership and that is allowed also.[1034]

Bin Bayya offers another example where it is accepted that it is not allowed to sell fish in the sea due to *gharar*, but it is allowed to sell fishing rights. The right here is not a *māl* (property) but a *manfaʿa* (benefit) or the original itself i.e., the fish is a *mal* and therefore the right can be sold. Bin Bayya concludes from the peripheral rules (*furūʿ)* of the Mālikī school that the right to do something or leave can both be sold due to a realisable public interest (*maṣlaḥa).* From this he concludes that possibility for options to be sold or bought on the stock market in a manner that is consistent with the *Sharīʿa*.

Bin Bayya stressed that his views are not meant to be taken as a *fatwā* or legal edict but as ideas submitted for further consideration by the other members of the European Council for

[1032] Bin Bayya, "Fiqh al-Bursa", p. 225.
[1033] Bin Bayya, "Fiqh al-Bursa", p. 220.
[1034] Bin Bayya, "Fiqh al-Bursa", p. 234.

Fatwa & Research.[1035] He recognises that much more research needs to be done in this field and proposes areas[1036] that require scholarly attention. However, in looking at the stock trading he follows less stringent methodology of looking to ruling within a school, in this case the Māliki school which allow trading in various derivative instruments as that realises the public interest (*maṣlaḥa)* and need of those living as minorities in Western countries.

Mohammad Hashim Kamali on Futures

Kamali has considered these two subjects in his depth work[1037] and concluded that there is much more room for manoeuvre than envisaged by the *fiqh* council and traditional *'ulamā* in general. He states that those who have addressed this issue, and he singles out the international *fiqh* councils of Makkah and Jeddah, have recognise the need and benefit of such contracts but failed to deliver when the final verdict was given. He believes the reason for that is that these scholars have not been able to break out from the 'madhhabite' *taqlīd* mould and based their views on past ruling of the schools of *fiqh* rather than undertaking fresh *ijtihād*.[1038] This adherence or *taqlīd* has caused them to ignore the nuance and detail of these contracts which are varied and cannot be treated in a blanket fashion. A detailed consideration of the variety and difference with an independent view towards the text and the traditional schools of law and how it interacts with this variegated reality would have yielded in more positive and practical solutions rather than a crude block to any engagement.

Before engaging with legal discourse around futures contracts Kamali devotes a whole section of his work on the reality of futures, its origins, history, their function and purpose, the various types, futures exchange and clearing house and its practise in the Muslim world in the futures markets in Alexandria and Kuala Lumpur.[1039] He engages in a detailed study of the reality because he feels either it's not appreciated or the details are not taken into account when the final legal verdict is given as much hinges on the reality and how it relates to the textual bars and permits. His study outlines the classical *fiqh* hurdles to futures contracts gaining *Sharīʿa* compliancy and tackles them one by one in the ensuing chapters. He devotes a complete chapter to the scholarly discussions around each issue and then makes his

[1035] Bin Bayya, "Fiqh al-Bursa", p. 236.
[1036] Bin Bayya, "Fiqh al-Bursa", p. 236.
[1037] Kamali, Mohammad Hashim, *Islamic Commercial Law: An Analysis of Futures and Options* (Cambridge: Islamic Texts Society, 2000).
[1038] Kamali, *Islamic Commercial Law*, pp. xviii and 166.
[1039] Kamali, *Islamic Commercial Law*, pp. 1-49.

conclusions which he then applies on the issue of futures and options. He begins by discussing the *Sharīʿa* perspectives on commercial transaction and cites the issue of nominate contracts which are restrictive and do not allow new transaction models. He cites the example of the Ẓāhirī school at one end of the spectrum which holds that the default position in contracts is one of prohibition unless a clear text grants permission with the Hanbali's on the other end allowing for diversity as long as the conditions and subject matter do not contradict the *Sharīʿa*. The Ḥanafī and Shāfiʿī which hold an intermediate position.[1040] After citing the opinion of the schools of *fiqh* he states that he favours the Hanbali position which is relaxed about any departure from contractual precedents. He then moves onto one of the major hurdles in respect of the charge that futures contracts involve unacceptable level of *gharar* (uncertainty). As with others he mentions that scholars did not consider *gharar* impermissible per se, but it is a question of degree, extent and the prevailing circumstances of the time and assessed on the conditions of what constitutes *gharar*. The scholars were not in agreement on the details and classification though the broad thrust was the excessive risk, speculation and ignorance of the material aspects of contracts.[1041] The key issue of Kamali is there is a level of relativity in assessing the extent of *gharar* and the point is even more relevant with advent of new modes of transactions in futures market and the information technology used to limit the uncertainty, which means the nature of the *gharar* is complex[1042] and requires a bespoke response.

With respect to contractual considerations such as the subject matter of contract, deliverability and *qabḍ* and how they relate to the futures market, Kamali devotes the ensuing chapters to these to explore the possibilities. On the subject matter, it is generally agreed by scholars that the *bayʿ al-maʿdūm* where the object of sale is non-existent is null and void. However, the *Sharīʿa* has made exceptions such as in *salam* and *istiṣnāʿ* contracts and scholars have added others to the list via their respective *ijtihāds*.[1043] Ibn Taymiyya for example has held that the key question is not the existence or otherwise of the object of sale but rather it is about unlawful possession and gambling.[1044] Where the subject matter does not exist at the time of contract but will be available in the future, these contracts have been permitted by a minority of scholars with various caveats. In the case of futures Kamali takes

[1040] Kamali, *Islamic Commercial Law*, pp. 75-76.
[1041] Kamali, *Islamic Commercial Law*, pp. xviii and 96.
[1042] Kamali, *Islamic Commercial Law*, p. 97.
[1043] Kamali, *Islamic Commercial Law*, p. 100.
[1044] Kamali, *Islamic Commercial Law*, p. 100.

the view that the availability and as such delivery is guaranteed by the clearing house therefore the non-existence at the time of contract should not render it invalid.

Another condition relating to the subject matter is one should have knowledge of its essence, quantity and value and the ignorance (*al-jahāla al-fāḥisha*) of which would render the contract as invalid. Where the issue relates to the object of sale being not seen but described scholars have had differing views. The issue here again is about whether *gharar* exists if the reality of what is being sold is not precisely and known (*bayʿ al-ghā'ib)*. The majority have allowed the *bay' al-gha'ib* providing certain conditions are met which seek to eliminate or reduce the uncertainty.[1045] Kamali has noted that with futures contracts that at the time of contract the description of the underlying commodity is available.[1046]

On the question of deliverability (*maqdūr al-taslīm*) of the subject matter, Kamali, after setting out the general view that it is an essential requirement, turns to a detailed analyse of the *ḥadīth* which is considered as the standard authority on the question. The *ḥadīth* 'Sell not what is not with you'[1047] is deemed to contradict the futures selling where the seller "does not own the subject matter and normally sells the commodity prior to purchasing it"[1048]. Such short selling seems to be at loggerheads with the requirements of the above *ḥadīth*. Kamali first raises the questions around its authenticity showing it is not a settled matter and points out that the same applies to its interpretation. The legal value could be an absolute prohibition (*taḥrīm*), an abomination (*karāhiyya*) or guidance only (*irshād*). Given that the wording is not accompanied by warning then it is reasonable to conclude the legal value is less than a total ban (*taḥrīm*).[1049] Moreover, even if one takes it to mean a total ban, on the question of futures, given the fact that the clearing house guarantees the delivery then the jurisprudence around this *ḥadīth* does not pose a problem.[1050]

Apart from the question of the existence of the subject matter discussed so far, is the issue of *qabḍ* or the notion that a commodity should not be sold until it is in the seller's possession. The basis of this ruling has been several *ḥadīth* which purports to say food stuffs should not

[1045] Al-Dhareer, Siddiq Mohammad Al-Ameen, "Al-Gharar in Contracts and its Effects on Contemporary Transaction", Eminent Scholars' Lecture Series (ISLAMIC RESEARCH AND TRAINING INSTITUTE, 1997), No. 16, pp. 58 and 61.
[1046] Kamali, *Islamic Commercial Law*, p. 102.
[1047] Kamali, *Islamic Commercial Law*, p. 111.
[1048] Kamali, *Islamic Commercial Law*, p. 110.
[1049] Kamali, *Islamic Commercial Law*, p. 111.
[1050] Kamali, *Islamic Commercial Law*, p. 115.

be sold unless it has been received.[1051] The scholarly discussion around this *ḥadīth* has focuses on the type of goods that the concept of *qabḍ* applies to with the rationale that the lack of possession, especially one that is perishable such as foodstuffs, before a sale leads to uncertainty over deliverability. As such scholars have agreed that foodstuff is a clear subject matter of the prohibition in the *ḥadīth* but did not agree when it comes to non-perishable goods. The Mālikīs restricted it to foodstuffs and the Ẓāhirīs go one step further by saying it only applies to wheat and palm oil. Following the Mālikī view Kamali states that that *qabḍ* is not a requirement in futures that trade in non-food stuffs such cotton, rubber, and tin. Where the trading deals foodstuffs the measures and weights are standardized and packaged and delivered accordingly following a pre-determined process. This means the rationale, behind the notion of *qabḍ*, does not apply to futures as the fear and uncertainty over deliverability is minimized. Kamali also notes that delivery in futures trading is secondary as actual delivery taken place only 2% of the time.

The above deals with the sale of the physical objects (*bayʿ al-ʿayn*), but most transactions on the futures market deal with the sale of debts (*dayn*) where buyer sells his obligation to buy or vice versa to another via the clearing house as a means of offsetting the transaction. This is akin to what jurists call *bayʿ al-dayn* or *bayʿ al-kāli' bi-l-kāli'* which scholars have forbidden to varying degrees due to the *gharar* involved or the existence of *ribā*. So, a person who sells a debt to a third party cannot guarantee he can deliver as the debt is owed leading to uncertainty over delivery and hence constitutes a *gharar*. Where one debt is sold for another debt, this could lead to usury if one party has a financial advantage over another. Kamali rejects the claim of an *ijmā'* (scholarly consensus) on the prohibition of sale of debts because of the exact definition is not agreed and nor is the application. As to the *ḥadīth* which says the Prophet 'forbade the *bayʿ al-kāli' bi-l-kāli'*, this *ḥadīth* cannot be considered sound according to Kamali[1052] and he cites several classical scholars to prove his point. Kamali also notes the exceptions to the rule where the sale of certain debts has been permitted by the jurists either when it is to the debtor himself but not to a third party or while others have permitted the sale of debts to third parties also. In short Kamali rejects that any evidence exists prohibiting *bayʿ al-dayn* so the doctrine of original permissibility must apply.[1053] Now turning to the offsetting transactions that take place via the clearing house where a buyer sells the obligation to buy to the clearing house and thereby discharges his debt. Kamali argues this process, whilst it is the

[1051] Kamali, *Islamic Commercial Law*, p. 115.
[1052] Kamali, *Islamic Commercial Law*, p. 128.
[1053] Kamali, *Islamic Commercial Law*, p. 129.

sale of a debt or debt clearance which in essence is permitted, is legitimate because it does not involve any *gharar* or *ribā*. The sale of the debt is between two parties, the seller, and the clearing house who both accept their obligations, and the terms of the sale are mutually agreed, and the clearing house guarantees the delivery and payment with no unlawful gain or profit without risk and liability for loss.[1054]

Kamali then turns to the question of deferred sales in *Sharīʿa* since it has a direct relevant to the futures trading. He recognises that the general attitude of scholars of their desire for contracts to have immediate effect without delay in the counter values.[1055] The reason for this is the nature of a contract is the exchange of values and any delay in that runs contrary to what a contract is and the pitfalls of delay such as uncertainty and *gharar* in deliverability and possibility of unlawful gain and hence *ribā* accruing to one of the parties. However, the desire of immediacy is tempered with commercial reality and necessity. Notwithstanding the general approach Kamali highlights is the diversity of scholarly views where the delay of counter values whether one or both, beyond the *salam* and *istiṣnāʿ* contracts, were countenanced and accepted with additional conditions and safeguards to avoid *gharar* and *ribā*.[1056] Kamali also considers the modern legislative practise in Muslim countries and concludes that they have gone beyond the conventions of *Sharīʿa* and have even allowed contracts where the object of sale is non-existent.[1057]

Kamali then returns to the subject of deferred liability transactions and finds authority for its general lawfulness from verse 282 of *al-Baqara* which is known as the *āyah al-Mudāyana* (verse of debt contracts). He defines the word *dayn* mentioned in the verse as referring to "a deferment either in the payment price or in the delivery of an object"[1058] as opposed to *ʿayn* transactions which are on spot sales. The history of commercial transactions of the Arabs at the time indicates that various transactions were in practice where one of the counter values was deferred. The verse requires a *dayn* or 'deferred liability' to be written down whilst spot sales are exempted thereby providing a distinction. He acknowledges that jurists have confined the deferred liability to deferment in only one of the counter values and more specifically *salam* transactions based on reports found in the Qur'ān exegesis material. However, Kamali points to the likes of Fakhr al-Rāzī, al-Shāfiʿī and others who understood

[1054] Kamali, *Islamic Commercial Law*, p. 130.
[1055] Kamali, *Islamic Commercial Law*, p. 131.
[1056] Kamali, *Islamic Commercial Law*, pp. 131-136.
[1057] Kamali, *Islamic Commercial Law*, p. 137.
[1058] Kamali, *Islamic Commercial Law*, p. 140.

the deferred liability more generally and can include other varieties.[1059] Kamali concludes that the Qur'ān did not restrict the meaning and in the absence of strong evidence one should accept deferred liability contracts are permissible proving there is no *gharar* or *ribā*.

Finally, Kamali turns to the question of market speculation involved in futures dealing and addresses the charge that it is gambling (*qimār*) and even non-Muslim commentators have described it as akin to a casino. It has been argued by those who forbid futures trading that it is tantamount to gambling as the profit or hedging to cover or mitigate loss derives from speculators who buy or sell futures based on their assessment of future market trends or probabilities. Some point to the harm futures speculation has caused in the past by way of violent price fluctuations. Kamali disputes this and distinguishes futures speculation. He says futures speculation is more akin to commercial risk taking which is normal and even a requisite aspect of lawful investment and trade.[1060] No business transaction can be devoid of risk; the question is if the risk being taken is one that fits within the definition of gambling and the games of chance which the *Sharīʿa* forbids. Kamali defines gambling as the "creation of a risk for the sake of a risk"[1061] In a gambling situation the risk is staged or created in a combative nature where each party is attempting to appropriate the money of another by chance. Kamali likens it to duelling where instead of murder by mutual consent it is "robbery by mutual agreement".[1062] This kind of activity has no benefit to society and is contrary to the higher values of cooperation and brotherhood. So, the question now; is the futures investor or speculator engaging in commercial risk taking or actually a gambler? Kamali argues that though the motivation of a gambler and speculator is the same, which is that they wish to gain profits by taking significant risks, futures market provides a system where such risks can be taken by speculators. The aim of the risk is not to deprive others but has a productive use, which is the redistribution of price risk and protection of one's trade. The risk is not created or staged but exists and the risk management is rational, and the forecasting is based on evidence and knowledge of the market.[1063] There is no combative set up in futures dealings and the person trading in futures will not know his counterpart and the loss or gain in not instant but realized some months later and the gain of an investor is not necessarily equivalent to the loss of his counterpart. The harm of volatile price changes due to speculation is historically rare and largely controlled by regulatory penalties and legislation.

[1059] Kamali, *Islamic Commercial Law*, pp. 141-142.
[1060] Kamali, *Islamic Commercial Law*, p. 156.
[1061] Kamali, *Islamic Commercial Law*, p. 147.
[1062] Kamali, *Islamic Commercial Law*, p. 151.
[1063] Kamali, *Islamic Commercial Law*, pp. 148-149.

For these reasons Kamali considers the risks engaged in futures trading of a commercial nature and so the profit should be deemed lawful.[1064]

Kamali's bespoke and tailored response is that futures contracts can be considered lawful and compliant with the contractual rules and conditions though others strongly disagree.[1065] But those who have differed have made no reference to Kamali's work[1066] and not addressed his distinction of futures trading from the *Sharīʿa* red lines or *gharar* and *qimār*. Kamali has tried to go beyond the citing of general *Sharīʿa* principles or red lines to show that on inspection checks and balances can and do exist to limit or mitigate the existence of *gharar*.[1067] His study and approach is useful for other areas of financial transaction the nature of contracts and how they are concluded evolve due to technology and the internet[1068].

Conclusion:

The stock market operates in liberal free market system and so the navigation of various financial instruments was always expected to be a tall order for Muslim scholars. As with any other subject they had set out the perimeters and red lines, such as *ribā*, *gharar*. Achieving a reasonable level of faithfulness to these perimeters would ensure that the old question of *aṣāla* has been maintained. Muslim scholars wished to deal with modern financial challenges but at the same time remaining true to the soul and spirit of the *Sharīʿa*. The balancing act was extremely complicated and precarious as too strict an adherence might render the solutions unrealistic and impractical and act as a legal block against economic engagement. On the other hand, straying from the principles for the sake of meeting Muslim commercial needs could render the legal endeavour futile and pointless. In this chapter we have only considered their treatment of shares and financial derivatives and found minority *fiqh* scholars were not willing to stray far from the red lines or find exemptions to do so.

In the issue of dealing with and buying shares of companies whose object was forbidden such a casino or brewery, the international *fiqh* academies declared that as impermissible.

[1064] Kamali, *Islamic Commercial Law*, p. 143.
[1065] Razali Haron, "Gharar and Mispricing of Equity Warrants. Malaysian Evidence", Islamic Banking and Finance 2014, Conference Paper ID 182, p. 9.
[1066] Some have mentioned his work but without any substantial consideration of his points, see Mihajat, Muhammad Iman Sastra, "Contemporary Practice, Riba, Gharar and Maysir In Islamic Finance and Banking", *International Journal of Islamic Management and Business*, vol. 2, No. 2, August 2016, p. 12.
[1067] Nordin, Nadhirah & others, **'**Gharar in Forward and Futures Contracts?', *Mediterranean Journal of Social Sciences*, vol 6, No 2, March 2015, p. 440. The authors in this article have argued like Kamali that in futures contracts elements of *gharar* are minimized via the clearing house which acts as a regulatory body.
[1068] Razali, Siti Salwan, "Online contracts and Issues of Gharar and Uncertainty", *IIUM Law Journal* vol. 16, no. 1, 2008, p. 60.

Attention was also given to those companies with permissible object but had to engage with some interest-based transactions as normal progression of the business. After a detailed study the broad conclusion of the international *fiqh* academies was that engaging with such companies was also forbidden though there were dissenting views. The arena left for manoeuvre was companies that had permissible object and had no dealings with interest whether fundamental or incidental. This seemed to be the consensus view of the *fiqh* academies who were catering for business and entrepreneurs in the Muslim world and where the aim is show an alternative workable Islamic financial model. Minority *fiqh* scholars who also hold seats on the *fiqh* academies, have a different audience and the pressure is greater to provide an easier playing field for Muslim minorities as they do not have Muslim government or institutions to support them. On the question of shares the minority *fiqh* scholars did not detract from the consensus view and simply reiterated the views of the *fiqh* academies.

However, on the question of derivatives, whilst *fiqh* academy position was even more harsh, only Bin Bayya from the minority *fiqh* scholars seemed to countenance engagement with futures and options trading. One might ask why most scholars were so inflexible?

According to Kamali[1069] the scholars have not been able to free themselves from the stranglehold of *taqlīd*. Minority *fiqh* for its part failed to undertake independent meaningful *ijihād* but offered responses which did not depart from the old prescriptions and not did it espouse new and relevant solutions. One has to doubt whether the minority *fiqh* position was due to a *taqlid* mentality. The calculus for minority *fiqh* scholarship seems to have been that a deviation from established prohibition of *ribā* and *gharar* is not warranted due to the circumstances of the Muslim community. The business community is seen as having greater leverage than the individuals and as such they would be required to follow the strict rules. While individuals need added assistance and a greater relaxation of the rules. On this occasion, minority *fiqh* scholars did not feel, in their estimation, the situation warranted a departure from the red lines and so opted maintain *aṣāla* (authenticity).

Bin Bayya attempted to open a path. No doubt the fact that futures contracts related to *gharar* and not *ribā*, made it easier for him question the prevailing view. The red lines have gradients. *Ribā* is a non-negotiable definitive unlawful matter while *gharar* is an *ijtihād* and open to evaluation as to its amount and where the risks of *gharar* can be mitigated. However, Bin Bayya, and by his own admission, only broached the possibility that futures and option

[1069] Kamali, *Islamic Commercial Law*, p. 166.

may be permitted but he stopped short of saying which types are allowed and even admitted that he was not issuing a *fatwā* for people to follow. It is also noteworthy that Bin Bayya and other minority *fiqh* scholars who discussed this issue did not once mention Kamali's work which generally predates their writings.

In the end it seems the minority *fiqh* scholars were unable or unwilling to put any concrete solutions people could follow. The arguments that had any force were those that echoed the position of the *fiqh* academies whilst the views expressed by Bin Bayya were at best tentative. His arguments focused on the exceptions found in his school, the Māliki jurisprudence, he did not make recourse to *ḥāja* we saw with home purchases via conventional loans. Ultimately a call was made that the need did not justify legal circumvention of established rules.

Thesis Conclusion

The phenomenon of minority *fiqh* became a prospective reality due to the convergence of several historical and demographic developments from the 18th century onwards. From the destabilisation and then the collapse of the Ottoman empire and the concurrent ascendancy of Europe and the West through the era of the renaissance and enlightenment and then through industrial and technological revolutions and now globalisation, In the Muslim world this challenge of modernity was met by the modernist legal thought. The issues of the day such as education, liberal values, science, role of women, authority, unity and governance and a whole host of other issues posed by Western culture and civilization brought to the forefront by a de facto Western colonisation of Muslim lands and as well all intellectual impact on the Muslim scholars and intelligentsia, were addressed by modernist thought via a mixture of rejection and accommodation. A significant part of the modernist thought was its legal thought developed by its proponents from ʿAbduh, Riḍā and then to al-Qaraḍāwī and Mawlāwī. As Muslims migrated and settled in Western countries taking with them the same issues and generating new questions due to their presence such as belonging and loyalty; this set the stage for the *fiqh* of minorities. The same voices contributed to this new chapter of modernist discourse as well new ones such as Ramadan and others.

After describing the aims, substance, and form of minority *fiqh*, this thesis has sought to explore and undertake the following: an evaluation of the *aṣāla* (authenticity) of minority *fiqh* via a study of its congruity or lack thereof and investigate and discern the reasons behind any harmony or inconsistency and where relevant and appropriate to assess efficacy of the minority *fiqh* contribution in realising its stated goals.

Turning to the issue of *aṣāla,* at the heart of the modernist discourse was the question and need to maintain congruity and continuity whilst addressing the required inevitable departure from the past. How to balance the normativity of religion and tradition with the need to find answers to modern questions such that Muslims could progress and yet maintain *aṣāla* (authenticity) to fundamental principles and tenets of Islamic law, culture, theology, and civilisation. The dynamics and the manner of mediation of the meeting of these two civilisations by minority *fiqh* scholars as represented in the question of congruity has been the primary focus of this thesis as their jurisprudential responses hold the potential to unlock and reveal answers to this question.

Although minority *fiqh* addressed a myriad of issues our present study focused on the subjects which are significant not only in terms of their novelty to the Muslim predicament in the West but also relate to congruity, authenticity, and efficacy. After a descriptive analysis of minority *fiqh* proponents, works and objectives we chose to study the legal philosophy before embarking on a detailed application on various subject matters. The minority *fiqh* legal approach is continuation of legal discourse deployed to respond to the issues arising in Muslim countries. The case for the modernist legal discourse was given greater impetus and justification by the new reality of Muslim residence under secular law as expounded by ʿAbd Majīd al-Najjār and other minority *fiqh* scholars. This became the premise for rooting the new *fiqh* under the rubric of the principle of *maʾālāt al-afʿāl* (the consequences of actions) and subsequent legal principles that ensued from this overarching principle. The legal philosophy was based on flexibility, leniency and accommodation of current reality justified by practice of jurists in giving *fatwā*, rule-fact relationship, and juristic usage of *ʻurf* (custom). Therefore, the adoption of the al-Shāṭibīan model of goals (*maqāṣid*) and interest (*maṣlaḥa*) based legal justification (*istidlāl*) was a natural consequence as well as the heavy reliance on general juristic principles (*qawāʿid fiqhiyya)* such as *ḍarūra* and *ḥāja* which themselves originated from the goals based *fiqh*. Minority *fiqh* followed the ethos of change and adaptation. This is a matter of continuity as the Muslim world modernism also broadly followed this approach. However, a detailed study of their exposition of this approach by key proponents of minority *fiqh* indicates a deviation from the scope and regulatory rules (*ḍawābiṭ*) which effect and regulate the application. This was especially discernible in the way minority *fiqh* permitted interest-based loans for home purchases where general principles were accepted in theory but broadened beyond their scope and then applied disregarding basic parameters. Such a deviation is incongruous with juristic practice and basic prescriptions about the prohibition of usury. The departure was pointed out by dissenting voices from minority *fiqh* scholars themselves. What explains the bold departure is the goals of minority *fiqh* itself such as positioning the Muslim community as an integrated and empowered community in a wider non-Muslim society.

The above goals were clearly on display in the minority *fiqh* discussion on Muslim residence, citizenship, loyalty and belonging. This subject required navigation of past territorial paradigms and conditions of residence in a non-Muslim country including self-perceptions of belonging. Minority *fiqh* side stepped the juristic terminology and opted for aspects that suited their wider integrationist goals. So, terms such as *dār al-kufr* and *dār al-ḥarb* were

dismissed with questionable juristic justification giving the impression that the determinant factor was the optics of such terms rather than an actual legal impact on residence or belonging. Our study of this question has shown that such incongruity was unnecessary as minority *fiqh* goals were justifiable within the classical *dār* paradigm. The issue of citizenship and loyalty are dealt with in a reasonably congruent manner with traditional *fiqh* by requiring adherence to the law of the land due to a covenant of security (*amān*) by taking citizenship. However, points of departure were the cultural approximation or consonance of values and ideas as posited by Ramadan; ideas such as democracy, secularism, and nationalism. Minority *fiqh* laid a particular emphasis on *da'wa* (though this requirement has a traditional base), they proposed a form of proselytism, which contained meanings of compassion and solidarity with the host society. In the UK context, as a legal endeavour the minority *fiqh* vision of integration is one that is constrained and shaped by 'on the ground' political and policy facts. The British government's perceived broad-brush response to the security threat of violent Muslims groups which seems to have had an alienating and counterproductive affect also impacts integration and Muslim perceptions of belonging. The Muslim community is law abiding and seeks positive engagement, to what extent this translates into a feeling of belonging is too early to say as they rely on the variability and vicissitudes of public policy and its reception by Muslims, and this is regardless of the minority *fiqh* articulation of their integrationist vision which is susceptible mixed ambivalent efficacy.

Muslim minorities engagement with wider society would invariably include the prospect of their participation in the political process. The difficulty minority *fiqh* scholars faced was the need to reconcile the liberal ideas and values which underpinned the political system. In the context of the West, and the UK in particular, the idea of democracy and a democratic system with its premise of popular sovereignty posed a problem for minority *fiqh* scholars who upheld the normative Islamic belief in the sovereignty of God. Minority *fiqh* recognised that closing the door on Muslim participation in the electoral process would potentially marginalise and endanger the community's interest and the goals of minority *fiqh*. The resolution that minority *fiqh* scholars reached was a forced and arguably unjustified reworking of the definition of democracy such that any contradiction with normative Islamic theology was eliminated. Other scholars who followed the minority *fiqh* approach made recourse to necessity (*ḍarūra)*, public interest (*maṣlaḥa*) and lesser of two evils without proper regard or adherence to conditions on which their application depends. The minority *fiqh* discourse in this issue is abound with incongruity whether in respect of their

reconciliation of western ideas or incoherence of their juristic arguments and the misapplication of principles invoked to justify participation. In terms of efficacy, this is where minority *fiqh* can claim some success, as Muslims have largely embraced the permission to engage with the political process and the Muslim vote is factor and part of the political equation in UK politics.

Whilst political participation engaged the idea of democracy the question of making recourse to domestic law involved Muslim interaction with secular law, legislation, and courts. While minority *fiqh* scholars where amenable to accommodating democracy via a redefinition, this equivocation did not carry through to secularism which they clearly denounced as contrary to Islamic theology and law. Given this, how do they address the need of Muslim minorities to make recourse to secular courts and legislation, especially in family law matters? In respect to personal adherence minority *fiqh* scholars have advocated those views amongst the Islamic schools of thought that accord with the national law such as in the issue of *wilāya* (guardianship) and equality or equivalence (*kafa'a*) in marriage. This is in keeping with their jurisprudential approach of selecting past views which bring ease and harmony with the wider society laws and values. In respect of seeking secular judicial resolution, minority *fiqh* scholars were open to allow such recourse on the basis that much of secular law, due its Christian heritage, broadly speaking did not contradict Islamic law. In the case of judicial pronouncement of divorce, recourse to courts was permitted due to a *ḍarūra* (though an Islamic *ṭalāq* was still required), Mawlāwī however permitted it on the basis that there was an implied delegation of the judge and was contractually required due to the marriage contract. This latter view is widely rejected by Muslim scholars and instead *Sharīʿa* councils have been proposed as a solution to meet the need. In this regard minority *fiqh* has largely maintained legal congruity though the difficulty has been the question of meeting its integration goals. Whether *Sharīʿa* councils impede or facilitate integration turns on the issue of efficacy. *Sharīʿa* councils in the UK have caused controversy, especially amongst the political right who argued such institutions are based on discriminatory anti-western values and practises. The government response has been pragmatic. Recognising both the utility of *Sharīʿa* councils as well as incidence of malpractice, they have voiced the need for legislative oversight but to date have not acted on recommendations from their own internal report. It seems for the forceable future Muslims will continue to utilise *Sharīʿa* councils and society at large has not voiced any opposition other than those on the right wing of politics. *Sharīʿa*

councils are the preferred solution of minority *fiqh* scholars and judging by the Muslim community dependence on them, once cannot envisage a change in their utilisation.

Minority *fiqh* reluctance to depart from traditional positions in family law matters could not be more evident than in their debates around the permissibility of convert marriages. On this issue we see the minority *fiqh* scholars' position being split in 3 directions; those who refused to depart from the traditional position which prohibited female converts continuing in marriage to their non-Muslim spouses, those who allowed it as a matter of original permissibility based on public interest (*maṣlaḥa*) and those who assumed the traditional minority *fiqh* position of allowing it based on necessity (*ḍarūra)* whilst recognizing the default rule of impermissibility. For those that allowed it, despite their deviation from the presumed consensus (*'ijmā*), their legal argumentation was largely in keeping with minority *fiqh* legal approach of revaluating past positions and textual interpretation in light of current needs and circumstances. It was radical in that it challenged the consensus view and would not countenance the prohibition existed in the first place. The middle ground of citing necessity (*ḍarūra*) as a justification was a conciliatory approach with one foot in both camps, which is the norm for minority *fiqh* and perhaps their 'comfort zone'. However, this discussion is not least interesting and perhaps revealing about the way in which the dissent was argued by scholars such as Mawlāwī who himself is known for radical departures from tradition. Mawlāwī made a very traditional case and attempted to show the incongruity of the legal arguments advanced by al-Qaraḍāwī and al-Juday', his rebuttal seemed to dispense with the minority *fiqh* legal philosophy and approaches which he himself has deployed in other issues. The tension between these two spectrums at times seemed to go beyond judicial and scholarly debate and bordered on emotion, indicating the sensitivity of the topic which possibly formed a red line that a significant number minority *fiqh* scholars did not wish to cross. Their debate was instructive in showing the limits of their openness to change, accommodation of the times and willingness to use the minority *fiqh* legal methodology.

We can observe a replication of the above scenario on the issue of shareholding in companies, in particular companies which have a permissible object but engage in other prohibited practices in the course of their dealings or they have usurious dealings incidental to their core business activities. These questions have been addressed by various *fiqh* academies in the Muslim world and the general ruling, rather unsurprisingly, has been one of prohibition. One might be forgiven to expect that minority *fiqh* which aims to bring ease and facilitation for Muslim communities would be less exacting. In fact when al-Qaradāghī, who

was a vice president of the ECFR, using the minority *fiqh* legal approach attempted to allow such practices by cited various general legal principles, al-Nashmī embarked on a refutation of each point showing either the misconstruction or misapplication of every cited principle. The debate had the hallmarks of one that was being conducted between a minority *fiqh* scholar and a traditional scholar whereas the reality was they were both members of the ECFR. Indeed, the prevailing view amongst the senior ECFR members was that of prohibition. This contradiction in the usage of legal methodology amongst ECFR members again indicates, as we saw in the issue convert marriages, that minority *fiqh* has red lines which it will not cross unless absolutely necessary and dealings with usuary is one of them. It is correct that they managed to find a solution for interest-based home purchases, but the stakes in that issue were perhaps perceived to be higher. Individuals and families, wishing to settle and integrate in the West, needed added protection and facilitation, whereas entrepreneurs and companies which enjoyed a relatively stronger position should not benefit from such leniency. This being the view on shares on existing business, it is perhaps a forgone conclusion that futures contracts and financial derivatives would be resoundingly declared impermissible by minority *fiqh* scholars. Bin Bayya in this case was the lone voice from the ECFR who aired the possibility that futures contracts might be possible with certain caveats. Bin Bayya broached his view tentatively, requesting only that others consider the proposition. Before Bin Bayya, Kamali had made a comprehensive case for Muslim engagement with the futures market. It does not seem there were any positive respondents for either of their contributions in this field. This again underscores a common dynamic amongst minority *fiqh* scholars, if the stakes are high enough and the harm to Muslim minority communities is sufficiently onerous, then – only then – will minority *fiqh* challenge traditional premises despite being methodologically equipped to do so. It is a question of will rather than jurisprudential means. The points of departure discussed above have been in areas relating to the empowerment of Muslim minorities, such as the question of identity, political participation, and home purchases though there were significant dissent from amongst their own ranks. In respect of family law minority *fiqh* has maintained a conservative approach though some minority *fiqh* scholars attempted to break the mould.

Minority *fiqh* is largely congruent in theory but less so in practice in the areas of empowerment of the Muslim minorities due to the tension between its premises, goals and need for effective solutions. Minority scholars themselves were conscious of the need to maintain congruity and sought to premise their departure in tradition and classical

jurisprudential discourse in an attempt to safeguard *aṣāla* (authenticity). At times they achieved this ostensibly and perhaps even superficially engaging in substantive compromises, while reserving their judicial conservatism to sensitive issues relating to family law and usury. What the future hold for minority *fiqh* is yet to be seen as number of the key proponents, such as Mawlāwī and al-Qaraḍāwī have passed away and the other influential figures remaining are senior in age, with the possible exception of Juday' who has demonstrated his willingness to push the jurisprudential bar. A new generation is yet to emerge and contribute to the development of legal discourse and put their stamp on the evolution of minority *fiqh*, and modernist legal thought in general.

Glossary[1070]

ʿ*adl*: justice. upright and just

ʿ*aḍl*: prevention of marriage.

ʿ*adāla*: trustworthiness or probity

adilla (pl. of *dalīl*): proofs, evidences, indications.

adilla ijmāliyya: general or global evidence

adillah kulliya: general evidence

aḥad: solitary *ḥadīth*, report by a single person or by odd individuals.

ahādīth (pl. of *ḥadīth*): narratives and reports of the deeds and sayings of the Prophet.

aḥkām (pl. of *ḥukm*): laws, values and ordinances.

ahliyya: legal capacity.

ʿ*amal*: act, practice, precedent.

amān: security

ʿ*āmm*: general, unspecified.

amr (pl. *awāmir, umūr*): command, matter, affair.

ʿ*aql*: intellect, rationality, reason.

arkān (pl. of *rukn*): pillars, essential requirements.

aṣāla: authenticity or predication to legal principles

aṣl: root, origin, source.

athar (pl. of *āthār*): lit. impact, trace, vestige; also deeds and precedents of the Companions of the Prophet.

āya (pl. *āyāt*): lit. sign, indication; a section of the Qur'ānic text often referred to as a 'verse'.

ʿ*azīma*: strict or unmodified law which remains in its original rigour due to the absence of mitigating factors.

bāṭil: null and void.

[1070] Some of the glossary terms and meanings have been sourced from the work of M. H. Kamali. See Kamali, Mohammad Hashim, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 1991), pp 401-406. The remainder have been translated by the thesis author.

bayān: explanation, clarification.

dalāla: meaning, implication.

dalīl: proof, indication, evidence.

dalīl al-iʿtibar: evidence of accreditation

dalīl kullī: encompassing principle or evidence.

dalāla al-naṣṣ: inferred or implied meaning of a given text.

dār ʿahd: land of treaty

dār al-Islām: land or abode of Islam

dār al-kufr: land of disbelief

dār al-ḥarb: land of war

ḍarūra (pl. *ḍarūrāt*): necessity

ḍawābiṭ: parameters

faqīh (pl. *fuqahā'*): jurist, one who is learned in *fiqh*.

farʿ: lit. a branch or a sub-division, and (in the context of *qiyās*) a new case.

farḍ: obligatory, obligation.

farḍ ʿayn: personal obligation.

farḍ kafā'ī: collective obligation.

fāsid: corrupt, void, deficient (as opposed to *bāṭil*, which is null and void).

furūʿ (pl. *farʿ*): branches or subsidiaries, such as in *furūʿ al-fiqh*, that is, the 'branches of *fiqh*', as opposed to its roots and sources (*uṣūl al-fiqh*).

gharar: uncertainty in contracts

ḥadd (pl. *ḥudūd*): lit. limit, prescribed penalty.

ḥajj: the once-in-a-lifetime- obligation of the pilgrimage to the holy Kaʿba.

ḥāja: need.

ḥākimiyya: the supremacy of God's Law verses secular law

haqīqi: real, original, literal (as opposed to metaphorical).

ḥaqq Allāh: right of God, or public right.

ḥaqq al-ʿabd (also *ḥaqq al-ādamī*): Right of Man, or private right

hijra: The Prophet's migration from Mecca to Medina, signifying the beginning of the Islamic calendar.

hirāba: highway robbery

ḥisba: lit. computation or checking, but commonly used in reference to what is known as *amr bi-l-maʿrūf wa-l-nahy ʿan al-munkar*, that is, 'promotion of good and prevention of evil'.

ḥujiyya: producing the necessary proof/authority to validate a rule or concept.

ḥukm (pl. *aḥkām*) as in *ḥukm sharʿī*: law, value, or ruling of Shariah.

al-ḥukm al-taklīfī: defining law, law which defines rights and obligations. Also expounding the conditions, exceptions, and qualifications thereof.

al-ḥukm al-waḍʿī: declaratory law, that is, law which regulates the proper implementation of

ʿibārat al-naṣṣ: explicit meaning of a given text which is borne out by its words.

ʿidda: the waiting period following dissolution of marriage by death or divorce.

iftār: breaking the fast.

*ʿijmāʿ***:** consensus of opinion.

ijtihād: lit. 'exertion', and technically the effort a jurist makes in order to deduce the law, which is not self-evident, from its sources.

ikhtilāf: juristic disagreement.

ʿilla: effective cause, or *ratio legis*, of a particular ruling.

iqtidā al-naṣṣ: the required meaning of a given text.

ishārat al-naṣṣ: an alluded meaning that can be detected in a given text.

ʿiṣma: infallibility, immunity from making errors.

istidlāl: juristic reasoning

istidlāl al-mursal: the finding or adducing of an unrestricted public interest.

istiḥsān: to deem something good, juristic preference.

istiqrā': inductive scrutiny

istisḥāb: presumption of continuity or presuming continuation of the status quo ante.

istiṣlāḥ: consideration of public interest.

istinbāṭ: inference, deducing a somewhat hidden meaning from a given text.

jarayān al-ʿamal: the continuous religious action or practice (of the people of Medinah).

jihād: holy struggle.

jumhūr: dominant majority.

juz'ī: partial evidence or rule

kaffāra (pl. *kaffārāt*): penance, expiation.

kalām: lit. speech, but often used as abbreviation for *ʿilm al- kalām*, that is, 'theology' and dogmatics.

karāha (or *karāhiyya*): abhorrence, abomination.

khabar: news, report; also, a synonym for *ḥadīth*.

khafī hidden, obscure; also refers to a category of unclear words.

khāss: specific, a word or a text which conveys a specific meaning.

al-Khulafā' al-Rāshidūn: the rightly guided Caliphs; the first Four Caliphs of Islam.

kitābiya: female follower of a non-Islamic revelation.

madhhab (pl. *madhāhib*): juristic/theological school.

kulliyyāt: encompassing evidences.

luzūm: bindingness or vitiation

mafqūd: a missing person of unknown whereabouts.

mafsada: a harm or evil or contrary to the considerations of public interest

mafhūm al-mukhālafa: divergent meaning, an interpretation which diverges from the obvious meaning of a given text.

maʿālāt al-afʿāl: the consequences of actions

majāzī: metaphorical, figurative.

makrūh: abominable, reprehensible.

mandūb: commendable.

māniʿ: hindrance, obstacle.

mansūkh: abrogated, repealed.

maqāṣid: (pl. of *maqsūd*): goals and objectives.

mashhūr: well-known, widespread.

maṣlaḥa: considerations of public interest.

maslak: legitimate path to discovering the effective cause.

al-maṣlaḥa al-murslaha: unrestricted benefit

mastūr al-ḥāl: unknown status as to a narrator's reliability

mawḍūʿ (pl. *mawḍūʿāt*): fabricated, forged.

muʿāmalāt: transactions

mubāḥ: permissible.

muḍāraba : partnership contract where one party provides the capital as the investor and the other party provides the labour.

mufassar: explained, clarified.

muhāraba: highway robbery.

mukallaf: a competent person who is in full possession of his faculties.

mukhtaṣar: abridgement, summary, esp. of juristic manuals composed for mnemonic and teaching purposes.

muḥkam: perspicuous, a word or a text conveying a firm and unequivocal meaning.

mujmal: ambivalent, ambiguous, referring to a category of unclear words.

mujtahid: jurist who derives rules from the original sources through a process of *ijtihād*

mulā'im: suitable or consistent with the practise of the *Sharīʿa*

munāsib: appropriate, in harmony with the basic purpose of the law.

munāsaba gharība: an unsupported isolated causal link

muqayyad: confined, qualified.

murābaḥa: an Islamic finance contract where the seller and buyer agree to the cost and markup of an asset.

mursal: ‘discontinued' or ‘disconnected’ *ḥadīth*, esp. at the level of a Companion.

mushāraka: a joint partnership contract where the profit and loss are shared.

mushkil: difficult; also refers to a category of unclear words.

mushtarak: homonym, a word or phrase imparting more than one meaning.

musnad: *ḥadīth* with a continuous chain of transmitters.

mutashābih: intricate, unintelligible, referring to a word or a text whose meaning is totally unclear.

muṭlaq: absolute, unqualified.

nahy: prohibition.

naqlī: transmitted, as e.g., in 'transmitted proofs' which are to be distinguished from 'rational proofs'.

naskh: abrogation, repeal.

nāsikh: the abrogator, as opposed to the *mansūkh* (abrogated).

naṣṣ: a clear injunction, an explicit textual ruling.

nikāḥ: marriage contract.

nuṣūṣ (pl. of *naṣṣ*): clear textual rulings.

qadhf: slanderous accusation.

qādhif: slanderous accuser.

qāḍī: judge.

qaṭʿī: definitive, decisive, free of speculative content.

al-qawāʿid al-fiqhiyya al-kulliyya: general legal principles

qisās: just retaliation.

qiyās: juristic analogy

rajm: stoning to death.

riwāya: narration, transmission.

rukhṣa: concession or concessionary law, that is, law which is modified due to the presence of mitigating factors.

rukn: pillar, essential ingredient.

sabab (pl. *asbāb*): cause, means of obtaining something.

sabab nuzūl: cause of revelation

sabr wa al-taqsīm: testing and division

sadd al-dharā'iʿ: blocking the means.

ṣahīh: valid, authentic.

ṣalāh: obligatory prayers.

sanad: basis, proof, authority.

sharīʿa: Islamic Law or body of Islamic Jurisprudence

sharṭ (pl. *shurūṭ*): condition.

shūra: consultation.

shurb: wine-drinking.

taḥlīl: an intervening marriage contracted for the sole purpose of legalising remarriage between a divorced couple.

taḥsīn wa taqbīḥ: intelligibility of good and evil

takhṣīṣ: specification of a general text

taʿarrud: conflict between evidences

takhayyur: the practice of not limiting oneself to a single school of thought.

taḥrīm: prohibition or rendering something into *ḥarām*.

taʿdiya: transferability.

taḥsīnāt: embellishments

taʿlīl: ratiocination, search for the effective cause of a ruling.

talfīq: not restricting oneself to single school of thought.

taʿjīl al-badalayn: Delay of counter values

taʿlīq al luzūm: suspension of contractual affects

ta'wīl: allegorical interpretation.

tawkīl: delegation

taysīr: ease and facilitation

taʿzīr: deterrence, discretionary penalty determined by the *qādi*.

takhṣīṣ: specifying the general.

taklīf: liability, obligation.

ṭalāq: divorce initiated by the husband.

taʿlīq al luzūm: suspension of contractual affects

tahqīq al-manāṭ: verification of the ratio or anchor point

tanqīḥ al-manāṭ: isolating the definite cause.

takhrīj al-manāṭ: extracting the grounds of the divine ruling.

taqiyya: concealment of one's views to escape persecution.

taqlīd: imitation, following the views and opinions of others.

thamaniyya: currency value

taqābuḍ: reciprocal exchange

tashrīʿ: legislation.

tarjīḥ: preponderance of evidence

tawātur: continuous recurrence, continuous testimony.

tayammum: ablution with clean sand/earth in the event no water may be found.

tazkiya: compurgation, testing the reliability of a witness, cross-examination.

thaman: the purchase price.

ʿumūm al balwā: widespread unavoidable harm

ulū al-amr: persons in authority and in charge of community affairs.

umma: The Faith-community of Islam.

ʿurf: custom

uṣūl al-fiqh: principles of Islamic jurisprudence

uṣūlī: a scholar in the principles of Islamic jurisprudence

uṣūl al-qānūn: modern jurisprudence.

waḍʿī: circumstantial rules

waḥy: divine revelation.

wājib: obligatory, often synonymous with *fard*.

wājib ʿaynī: personal obligation.

wājib kafā'ī: collective obligation of the entire community.

al-walā' wa-l-barā': association and disassociation

walī: guardian.

waqf: charitable endowment.

waṣf (pl. *awṣāf*): quality, attribute, adjective.

waṣf munāsib: proper description or consideration

wilāya (also *walāyāt*): authority, guardianship (of minors and lunatics).

wuḍū': ablution with clear water.

wujūb: obligation, rendering something obligatory.

ẓann: speculation, doubt, conjecture.

ẓannī: speculative, doubtful.

ẓāhir: manifest, apparent.

zinā: adultery, fornication.

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