

**The Implications of *Fiqh al-Aqalliyyāt* (Jurisprudence of Minorities)
for the rights of non-Muslim Minorities in Muslim-Majority Countries**

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Introduction: When can non-Muslims be bound by Islamic Law?

Islamic law has shown concern with the rights and obligations of Muslims living outside the territory of an Islamic state virtually from the moment that the Prophet (S) established a city-state in Madina. The Qur'an, for example, stated that the Muslims of Madina did not have any *political* obligations toward Muslims who had not performed hijra, unless those Muslims sought their help on account of religious persecution. Even in that case, however, the Muslims of Madina were excused from such an obligation if they were bound by a treaty of peace to the tribe that was guilty of persecuting Muslims in their midst. (Qur'an, 8: 72).

Conversely, Islamic law was also concerned with the rights and obligations of non-Muslims living in the territory of an Islamic state, a concern that also began with the establishment of an Islamic state in Madina. Thus the Charter of Madina set out a system of mutual rights and obligations that bound the people of Madina together in certain common pursuits regardless of their religion, while reserving only particular obligations to those Madinese who were Muslims.¹ It is important to note in this regard that the Charter of Madina pre-dates the concept of *Dhimma* in consideration for payment of a tax, *jizya*, which is alluded to in *Surah al-Tawba*. (Qur'an, 9: 29).

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¹ Ali Bulaç, "The Medina Document," in *Liberal Islam: a Reader*, Charles Kurzman (New York: Oxford University Press, 1998), pp. 169-178.

Whether considering the obligations of Muslims in an Islamic state toward Muslims living in a non-Islamic state, or the obligations of non-Muslims to an Islamic state, Islamic law deemed the existence of a compact, or agreement, to be decisive. This distinction, i.e. between individuals who are governed by a compact and individuals who are simply governed by Islamic law on its own terms, gave rise to the historical conceptions of the *dār al-islām* and *dār al-ḥarb*, the former being a territory in which Islamic law applies of its own by virtue of the existence of a Muslim community possessing control over a certain territory with the ability to defend it against hostile invaders (*mana'a*). By virtue of a combination of their political independence and moral commitment to Islam, a legitimate basis is given to enforcing law against Muslims.¹

But what about non-Muslims who reside in that territory?

On what basis could Islamic law legitimately apply to them? While they could in principle enjoy the political benefits of residence in an Islamic state, they could not, because of their failure to be Muslims, share in its moral commitments, and accordingly, their commitments to following Islamic law were necessarily *political* rather than moral, meaning, their obligation to follow Islamic law was an incident to the terms of the political agreement they entered into with the Islamic state. To be clear, non-Muslims were morally obliged to obey Islamic law in the sense that God would hold them culpable for failing to adhere to Islam in general,² but we are concerned here with another issue: to what extent did Muslim jurists believe it legitimate to hold non-Muslims liable *in this world* for breaching the substantive obligations of Islamic law?

As evidenced by the controversies among Muslims jurists regarding the extent to which non-Muslims resident in an Islamic state were bound by the substantive rules of Islamic law, it was clear that non-Muslims were subject to only *some* rules of Islamic law, but not all. The general answer given by Muslim jurists was

¹ Mohammad Fadel, "International Law, Regional Developments: Islam," in *The Max Planck Encyclopedia of Public International Law* (www.mpepil.com), edited by ed. Dr. Frauke Lachenmann et al. (Oxford), p. 10.

² See Badr al-Dīn Muḥammad b. Bahādur b. 'Abdallāh al-Zarkashī, *al-Baḥr al-Muḥīṭ*, ed. By Muhammad Muhammad Tafir (Beirut: Dār al-Kutub al-'Ilmiyya, 2000), vol. 1, p. 36.

that non-Muslims could legitimately be expected to obey those rules of Islamic law which were not based exclusively on an assumption of belief in Islam. Accordingly, non-Muslims could not be held liable for failing to perform Islamic rituals. Likewise, the application of *ḥudūd* to non-Muslims was controversial: some, like Imām Mālik, exempted non-Muslims from the *ḥadd* of *zinā* (fornication and adultery) on the grounds that the main purpose of this *ḥadd* was repentance, and accordingly it would be nonsensical to apply it to someone who does not accept Islam as true. Others permitted applying the *ḥadd* of *zinā* to non-Muslims such as Christians and Jews on the grounds that adultery was forbidden to them under their own religions, and accordingly, they were being punished for conduct that they themselves held to be immoral pursuant to their own beliefs. As for ordinary criminal law – *ta‘zīr* – I know of no dispute that this body of law applied equally to non-Muslims and Muslims. So robust was the conviction that *ta‘zīr* applied to Muslims and non-Muslims alike that Imām Mālik, despite his argument that non-Muslims were not subject to the *ḥadd* for adultery, held they could be punished for adultery under the principle of *ta‘zīr*. Similarly, Imām Mālik treated the *ḥadd* punishments for *sariqa* and *ḥirāba* as forms of *ta‘zīr* in order to apply them to non-Muslims, arguing that these punishments are necessary for the protection of property and life, an interest binding both Muslims and non-Muslims. Likewise, civil law – property, contract and tort – applied equally to Muslims and non-Muslims although tort law, according to all the Sunnī madhhabs other than the Ḥanafīs, provided different levels of compensation in cases of wrongful death in cases where the victim was a non-Muslim.¹

I provide this brief background simply to point out that the question of the extent to which non-Muslims in an Islamic state are politically subject to Islamic law is a question that has preoccupied Muslim jurists from the earliest days of Muslim legal thinking, and Muslim jurists recognized that the application of Islamic law to non-Muslims required a different kind of justifica-

¹ Mohammad Fadel, “The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law,” 21, 1 *The Canadian Journal of Law & Jurisprudence* 5, 61-65 (2008).

tion than that justifying its application to Muslims. Application of Islamic law to Muslims was simply derivative of their acceptance of Islam as being true. For non-Muslims, the justification had to be more complex, and accordingly, Muslim jurists struggled in formulating principled limits to the application of Islamic law to non-Muslims. And while they generally proceeded to analyze this problem using a case-by-case method, it is clear that they sought out a rationale that would be legitimate from the perspective of non-Muslims. In other words, they articulated reasons for the application of Islamic law to non-Muslims which they thought non-Muslims could reasonably accept for their own reasons. Accordingly, non-Muslims could legitimately be expected to be subject to Islamic civil law because pursuant to those doctrines they receive the benefits of trade and protection from assault; they were exempt from Islamic ritual law because it would be absurd to ask someone to pray in a fashion whose format they subjectively reject as false; they were subject to the *ta'zīr* rules of Islamic criminal law because *ta'zīr* rules, unlike *ḥadd* rules, are based on the public interest, not solely the vindication of the claims of God, and thus does not imply any belief in Islam as such; and, they were exempt from Islamic requirements of marriage formation and dissolution since they had their own *beliefs* that governed the legitimacy of marriage formation and dissolution. In short, Islamic law strove to provide shared justifications for the application of Islamic law to non-Muslims in circumstances where shared belief in Islam could not provide the basis for legitimacy.

Muslims Living in Non-Muslim Territory, *Fiqh al-Aqalliyyāt* and Democratic Citizenship

Muslim jurists, just as they articulated theories for binding non-Muslims to a subset of the rules of Islamic law, also theorized the conditions under which Muslims could live in a non-Islamic state, or put differently, what were the conditions that rendered emigration from a non-Islamic state to an Islamic one obligatory. This too was a question that entered Muslim juristic discourse from the earliest days of Islam. As was the case with the question of the extent to which Islamic law could bind non-Muslims, so too Muslim jurists differed on the question regarding the conditions

on which a Muslim could live in a non-Islamic state. Some jurists articulated a strong rule prohibiting it outright, e.g. the Mālikīs, while others, e.g. the Ḥanafīs and the Shāfi‘īs, produced a more nuanced position which permitted Muslims to continue living in a non-Islamic state if certain minimum conditions were satisfied regarding the ability of Muslims resident there to manifest Islam (*izhār al-dīn*).

Muslim jurists conceptualized the legal basis on which Muslims would live in a non-Islamic state using concepts similar to that which they used in analyzing the relationship of non-Muslims to the Islamic state: because of the absence of shared belief, the relationship had to be set forth pursuant to the terms of an agreement (*‘aqd*). Just as the relationship of *dhimma* was contractual and included mandatory and permissive terms, so too the agreement of security pursuant to which Muslims could legitimately live in a non-Islamic state had to meet certain minimum conditions, i.e. the ability to manifest Islam, but it could go beyond that as well. In the pre-modern period, however, Muslim jurists were mainly concerned with ascertaining whether the minimum conditions for the security of Muslims and the practice of Islam were satisfied so that the Muslim community in question could remain where they were or whether they were under an obligation to **emigrate** to a territory more hospitable to the practice of Islam.¹

In the modern period this historical tradition for analyzing the status of Muslims living in non-Islamic territories has formed the basis of the *fiqh al-aqilliyyat* – the jurisprudence of Muslim minorities.² It is my belief that the doctrinal developments being articulated in the domain of the *fiqh al-aqilliyyat* – at least with regards to Muslim minorities living in democratic states – should be increasingly relevant to Muslims’ understandings of the rights of non-Muslims in Islamic states.

¹ Khaled Abou el Fadl, “Islamic Law and Muslim Minorities: the Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries,” 1,2 *Islamic Law and Society* (1994), pp. 141 – 187.

² See Andrew March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (New York: Oxford University Press, 2009).

At the outset it should be understood that the modern relationship of citizen is radically different than the relationship of security which dominated pre-modern Islamic conceptions of the relationship between Muslims and a non-Islamic state. In the latter relationship Muslims promised the non-Islamic state to refrain from violence and obey the non-Islamic states law in exchange for an undertaking by the non-Islamic state to recognize the inviolability of Muslims' religion, lives and property. So too, the contract of *dhimma* that Islamic law offered to non-Muslims is extremely circumscribed in scope relative to the modern conception of citizen: thus, pursuant to the relationship of *dhimma*, the Islamic state agreed to protect the non-Muslim for outside aggression as well as to grant her all the substantive protections of Islamic law internally in exchange for the *dhimmī*'s undertaking to obey Islamic law to the extent that it applied to him.¹ Because neither the Muslim living in a non-Islamic state nor a *dhimmī* living in an Islamic state had any political rights to participate in the government, however, the relationship described by pre-modern Muslim jurists of the Muslim to a non-Islamic state, and of a *dhimmī* to an Islamic state, resembles modern discussions of **alienage** more than it does citizenship.

The defining feature of citizenship is that it creates a relationship that is not only vertical in the sense that it is between the individual and the state, but also another horizontal relationship that extends to other citizens through a relationship of equality and shared responsibility for collective governance of the state. A Muslim living in a non-Islamic state pursuant to a grant of security, by way of contrast, was in a subordinate position relative to the legal order there. So too a *dhimmī* in the Islamic state was subordinate because he suffered numerous political disabilities: not only was a *dhimmī* ineligible for public office, but even in areas of civil law he suffered certain forms of inequality, at least according to some Muslim schools of law.

As a citizen of a non-Islamic state, however, the minority Muslim is now an equal and not only enjoys equal rights but is also bound by the same legal duties as those that apply to the non-Muslim majority. Likewise, the non-Muslim *dhimmī*, once he becomes a

¹ Fadel, *supra* note 2, pp. 12-13.

citizen of the Islamic state, is assumed to be in a position of equality with the majority Muslim population. Or, to put it differently, in a modern state, the concept of citizen is *non-sectarian*, and accordingly, rights and duties apply to all citizens simply by virtue of their status as citizens without regard to their religious beliefs.¹

It is the defining feature of democratic citizenship that because of the relationship of equality inherent in the idea of citizenship, laws must respect the equality of the citizens, with the consequence that laws, to be legitimate, must be of such character that they are capable of being justified to the citizens in terms they can understand and accept as individuals having an equal share of public sovereignty. Again, to contrast this feature of modern citizenship to the pre-modern relationship of protection, becoming a “citizen” of the non-Islamic state would have required the Muslim to abandon Islam, because in states such as Catholic Spain, Catholicism defined the state. Likewise, for a *dhimmī* to be an equal to a Muslim, he would have to abandon his religion and become a Muslim. In democratic citizenship, however, such requirements are deemed to be impermissible because it is believed that it is impossible to justify adherence to one religion on grounds that are consistent with the equality of the citizens, meaning, it is impossible for the state to provide compelling reasons that all citizens can accept to make them adhere to the same religion, unlike, for example, a law that regulates their secular well-being, as is the case with legislation pertaining to traffic laws or laws regulating the market.

¹ Humayun Kabir, the great, post-independence Indian Muslim politician observed that “In Muslim political thought . . . lawgivers had allowed for two kinds of situations, a situation in which there is a Muslim ruler and a large number of non-Muslim subjects and also the situation in which there is a non-Muslim ruler and Muslim subjects. But Muslim political thought had not provided for the situation which developed in India today, the situation in which *Muslims are citizens in a secular State*. In this situation, they are neither the sole rulers nor merely the ruled. We can put it another way and say that that they are the rulers and ruled simultaneously. . . . There are not merely ruled, but neither are they merely rulers. They are rulers and the ruled at the same. Further they are not rulers by themselves; they are rulers in association with people of many different religions.” Humayun Kabir, “Minorities in a Democracy.” *Liberal Islam*, supra note 1, p. 150.

Democracy then requires a basis for *shared* justification as a condition for laws to be legitimate. This condition – the need for shared justification – places limits on the kinds of laws democracies can legitimately promulgate. This desire for a shared basis of justification provides an important point of overlap between modern democratic conceptions of legitimacy and pre-modern Islamic conceptions of legitimacy. I have already discussed the limitations Muslim jurists placed on the application of Islamic law to non-Muslims and how that should be understood as a resolution of the problem of legitimacy: on what grounds is it legitimate to require non-Muslims to adhere to Islamic conceptions of justice? The answer Muslim jurists gave was that it is just to hold them to Islamic standards when those standards are comprehensible to them without regard to the truth of Islam. In a similar fashion democratic legislation is considered to be just – even as against the minority who rejected the legislation at issue – because it is limited to matters which all citizens can reasonably accept regardless of whether they profess the truth of certain controversial metaphysical doctrines, e.g. the truth of Christianity.

Accordingly, the possibility of democratic citizenship – rather than mere protection, i.e. alienage – presented Muslim communities living in democratic societies both new possibilities and new challenges. On the positive side of the ledger, the prospect of democratic citizenship offered them the possibility to share positively in the governance of their societies on a basis of equality with non-Muslim citizens. Democratic citizenship also made Muslims' position within non-Islamic states more secure: as citizens instead of aliens, they enjoyed inviolable rights that could not be compromised, e.g. they could not be deported. At the same time, however, their obligations to non-Islamic states would correspondingly increase: whereas under a regime of alienage they were freer to negotiate what specific commitments they would make to their host state, whether in terms of service in national armies or even the right to apply Islamic law to their family disputes (often times effected through doctrines of private international law), as citizens they would be treated as any other citizen and would only be entitled to exemptions from national law to the same extent as other non-Muslim citizens enjoyed such exemptions.

Muslim Reactions to the Demands of Democratic Citizenship

Because democratic citizenship is a richer relationship than the mere protection contemplated by Muslim jurists in the pre-modern period, whether Muslims could in good faith accept the offer of citizenship raised novel issues in Islamic law. These issues have occupied the attention of a good many Muslim jurists since the early part of the 20th century. The most fundamental issue is that of loyalty (*walā'*) to the non-Islamic state. It was certainly settled doctrine in the pre-modern period that a Muslim could not give *walā'* to a non-Islamic state, and that doing so was a virtual repudiation of Islam. On the other hand, in the pre-modern period states were not democratic, and many in fact were organized around adherence to a specific religion, e.g. Catholicism, or after the Reformation, a national church, e.g. The Church of England.¹

Given this reality, it is easy to understand why Muslim jurists would conclude that a Muslim who pledged loyalty to such a state necessarily repudiated Islam. That this should also be the case for democratic citizenship does not appear to be clear: a democratic state makes no *religious* demands on its citizens in the sense that it does not require citizens to profess one faith or even faith in general. Accordingly, and unlike the case of Hapsburg Spain, Muslims could become citizens and retain their adherence to Islam, at least in a *prima facie* sense. The pre-modern discourse, however, was concerned with more than just the ability to maintain the name of Islam; it also was desirous of protecting the dignity (*'izza*) of Muslims and Islam, and was concerned that by living in a non-Islamic state, a Muslim would subject himself to humiliation (*dhull*) because the legal system of the non-Islamic state would not protect his dignity. Finally, there was the concern that by living under the protection of a non-Islamic state, a Muslim would become subject to the “rules of infidelity”

¹ See generally, Andrew March, “Islamic Foundations for a Social Contract in Non-Muslim Liberal Democracies,” 101,2 *American Political Science Review*, pp. 235-252 (2007).

(*aḥkām al-kufr*), something that would entail both humiliation and injustice.

In analyzing whether it is permissible for Muslims to be citizens of democratic states, Muslim jurists writing in the field of *fiqh al-aqilliyyāt* have had to analyze these three issues in the light of two concerns: the first is determining what was the purpose (*al-maqṣūd*) of the various rules of Islamic substantive law which either prohibited or discouraged residence in non-Islamic states, and the second is determining the nature of kinds of claims democratic states can legitimately make upon Muslims, and whether a Muslim could accept those obligations consistently with his Islamic commitments. Starting with the first question, that of *walā'*, Muslim jurists developed a distinction between *walā'* as a political concept and *walā'* as a religious one. They argued that what Islam prohibits is expressing loyalty to falsehood.¹ Accordingly, a Muslim could not have loyalty to a Catholic State anymore than he could have loyalty to the Roman Catholic Church, because in both cases he would be endorsing falsehood.

Democratic constitutions, however, do not require loyalty in this sense. Rather than requiring loyalty to a specific religious doctrine, citizenship requires loyalty to a set of principles that are accepted as just and which form the basis of the state's legal system, most notably, its constitution. This kind of loyalty is acceptable because it does not contradict loyalty to Islam as a religious doctrine. In other words, loyalty to a system of law that is not derived from a false metaphysical doctrine but is instead limited to just principles of law does not require Muslims to reject their belief in Islam or their continued religious solidarity with the Muslim community and accordingly is consistent with Islamic commitments. So too the kind of love and affection that arise between Muslims and non-Muslims living together in a just society is also permitted because it is love and affection that is civic in nature and born of mutual cooperation for one another's welfare; it does not require or imply acceptance or recognition of the legitimacy of whatever false views non-Muslims hold about God.² The terms of democratic citizenship, however, do far more than simply allow

¹ Id. 249.

² Id. 250.

Muslims to be citizens without renouncing Islam. The inherent limits of legislation in a democratic state ensure that Muslims, at a minimum, will be permitted to fulfill certain fundamental Islamic obligations, specifically, the open fulfillment of the most fundamental ritual obligations of Islam (*al-sha'ā'ir*) as well as open teaching of Islamic doctrines to both Muslims and non-Muslims (*da'wa*).

Norms of democratic legitimacy are also responsive to Muslim concerns about dignity: because democratic states respect the norm of equality in legislation, Muslims can be assured that they will not be singled out for a set of specific norms intended to stigmatize them as separate from, and as less worthy than other non-Muslim citizens. Finally, democratic legislation does not result in Muslims' submission to *aḥkām al-kufr* because the rules governing a democratic state are the product of the deliberative assemblies of the citizens who apply their collective reasoning as citizens to questions of the public good, not questions of religious belief. Such assemblies therefore are not the equivalent of an ecclesiastical council promulgating rules for their followers pursuant to false religious doctrine. In other words, because democratic citizenship does not make claims on a Muslim that require him to repudiate Islam, whether explicitly or implicitly, pledging loyalty to a democratic state as embodied in the terms of democratic citizenship does not constitute a repudiation of Islam in a way that pledging loyalty to a Catholic regime or a Communist regime, for example, might.

Implicit in this theoretical justification of Muslim citizenship in democratic states is several assumptions. Perhaps the most fundamental is that Islam can not only survive, but flourish in a pluralist regime simply by virtue of its inherent appeal as a rational doctrine. Accordingly, a Muslim community in a democratic state will be able to pass on Islam to future generations by teaching them about Islam using methods of rational persuasion. The survival of the Muslim community in a democratic state therefore does not depend on the threat of coercive state sanctions to deter Muslims from exiting the community. Not only is the inherent appeal of Islamic teachings assumed to be sufficient to preserve the Muslim community over time, so too Muslim jurists assume

that they are sufficient to attract non-Muslims to Islam on condition that Muslims are in fact given a fair opportunity to present their beliefs to non-Muslim society, a condition guaranteed by democratic society. Second, Muslim jurists assume the existence of a certain kind of justice that is not derivative of religious conceptions, including Islamic conceptions, but instead can be derived from rational deliberation. This assumption is implicit in the justification of democratic politics as a legitimate kind of lawmaking in contrast to false claims of other religions which claim an ability to disclose the will of God to human beings, e.g. the Catholic Church. Yūsuf al-Qaradāwī, for instance, refers to such a non-sectarian conception of justice in a fatwa of his in which he explains how it is possible for Muslims to engage in *political cooperation* with non-Muslims despite the fact that non-Muslims entertain false beliefs about God.¹ Al-Qaradawi gives many reasons, some of which amount to explaining why difference in belief does not constitute an obstacle as such to political cooperation, but he also explains that it is the Muslims' love of justice (*qist*) which motivates them to cooperate productively with non-Muslims, despite the latter's adherence to false doctrines.²

While al-Qaradawi does not explain what he means by justice in that fatwa, it can safely be assumed that it must entail a form of justice that is autonomous of revelation, or else it would not form a common basis for cooperation with non-Muslims. At the same time, however, its autonomy from revelation does not mean that is repugnant to revelation. Rather, this system of non-sectarian, rational justice must in a certain sense be consistent with Islamic conceptions of justice or else Muslims could not appeal to it. What then would be the relationship of this autonomous version of justice to Islamic conceptions of justice that derive directly from our knowledge of God's will as revealed in the Qur'an and Sunna? It seems that the answer is that it *supplements* the non-sectarian conception of justice which is common to human beings regardless of their religious (or non-religious) commitments. In the first instance, this supplementary knowledge binds Muslims in their interactions with one another because they have shared

¹ Yūsuf al-Qaradāwī, 3 *Fatāwā Mu'āshira* (Beirut: al-Maktab al-Islami, 2003), pp. 189-191.

² *Ibid.*

knowledge of these additional (religious) obligations. Obviously, this includes such requirements of Islamic law as ritual law and rules regarding the etiquette of intra-Muslim personal relationships. Negatively, this places limits on the kinds of demands non-sectarian justice can make upon Muslims, in particular, it cannot claim to compel Muslims to disobey God.

What is significant about these arguments is that they go beyond narrow utilitarian-based justifications for Muslim citizenship in non-Islamic (but democratic) states. A utilitarian argument would run along the lines of the following: it is distasteful or even prohibited for Muslims to accept citizenship in a democratic state because it requires them not only to tolerate a non-Islamic state, but also to support it actively. Nevertheless, these harms are outweighed by the benefits accruing to Muslims from living in a democratic state, at least until such time as Muslims are present there in large enough numbers that would allow them to Islamize the host regimes' legal systems more thoroughly so as to make them more systematically compatible to Islamic substantive law. In other words, the kinds of justifications recently articulated by Muslim jurists in connection with the concept of *fiqh al-aqilliyāt* go well beyond a justification that rests on a conception of necessity that is, at least conceptually, only temporary and will be revised once the circumstances giving rise to the necessity (the minority condition) are resolved, i.e. Muslims become a majority of the population or otherwise obtain political power.

Non-Muslims in Modern Muslim-majority States

If democratic states fulfill a certain moral ideal of political society that is compatible with Islamic commitments in a non-contingent manner, however, the question arises as to whether the justifications for Islamic endorsement of democratic citizenship set out in the *fiqh al-aqilliyāt* discourse are not applicable to states with Muslim majorities? While Muslim states, as a matter of their national legal systems, have made much progress in creating legal systems based on equal citizenship, they can still be criticized for retaining substantial elements of sectarianism in their legal systems that are substantially inconsistent with the demo-

cratic ideal of *equal* citizenship. The most obvious traces of sectarianism in the legal systems of Muslim states are constitutional declarations that the state's religion is Islam, a statement that immediately gives the polity a sectarian character; other instances of *de jure* sectarianism in Muslim states include rules imposing religious tests for certain public offices, e.g. that the president or the prime minister must be Muslim; and, provisions in a state's constitution affirming that the Islamic Shari'a is "a" or "the" principal source of the state's legislation.

Less controversial, but still problematic, are the existence of sectarian-based personal status laws pursuant to which the applicable rules of family law are determined by the sectarian identity of the citizen rather than his status simply as citizen. (In other words, many Muslim states lack a law of personal status that applies to all of its citizens, and instead, applies different laws to its citizens depending on how the state classifies their sectarian identity.) While this is often times in conformity with the wishes of the non-Muslim minority, it can often be inconsistent with the equal citizenship rights of non-Muslims. Thus, a non-Muslim woman who otherwise cannot obtain a divorce because of her sectarian identity has an incentive to convert to Islam solely to obtain the benefit of a divorce, which might be immediate if her husband refuses to convert to Islam as well during her *'idda*, or deferred in the event of his conversion by petitioning for a judicial divorce as a Muslim woman. The ideals of equal citizenship in this circumstance would appear to require recognition of a right to a judicial divorce simply on the grounds of her status as a citizen without regard to her sectarian affiliation which, as a matter of her subjective belief, she may or may not accept.

Another way to understand this point is that the concept of equal citizenship requires a positive conception of toleration, not simply a negative one. While pre-modern Islamic law accepted a negative concept of toleration, meaning that it would allow non-Muslims to preserve many aspects of their ways of life even though Muslims believed them to be erroneous, Islamic law did not contemplate positive tolerance of non-Islamic ways of life in a manner that the views of non-Muslims in the Islamic state should be included in formulating the laws of the Islamic state. Another way of putting this is that under traditional Islamic conceptions of

toleration of non-Muslims, non-Muslims did not have any right to formulate the terms of the general rules of society, and to that extent, they were completely objects of the law rather than its subjects. This is evidenced by numerous rules of pre-modern Islamic law, e.g. the bar on non-Muslims serving as witnesses in court (*shuhūd*); the prohibition on non-Muslims being judges; and, the prohibition on Muslims serving as a policy-making minister (*wazīr tafwīd*). Even the right to grant security to a non-Muslim from a hostile state – a right guaranteed to even Muslim slaves, women and minors – was denied to non-Muslim *dhimmīs*.

The political marginalization of non-Muslims eventually led to severe problems in historical Islamic states such as the Ottoman Empire, most prominently in the form of a sectarian consciousness that allowed outside powers to manipulate one group against another to further its own imperialist interests, even leading to extension of the infamous capitulations to non-Muslims who were nominally citizens of Islamic states.¹ For this reason, one of the main objects of legal reform in the Ottoman Empire was to create a more unified legal system that would be in greater conformity with the ideal of equal citizenship with the goal of creating national solidarity that transcended sectarian affiliation, something that was deemed necessary if Islamic states were to resist (or liberate themselves from) imperialist encroachment. Throughout the 19th century, haltingly at first, and then more systematically, Muslim governments took steps to narrow the distinction between Muslims and non-Muslims in their legal systems. Mehmet ‘Ali Pasha in Egypt, for example, after introducing universal conscription quickly decided to impose that obligation on Egypt’s Christians as well as its Muslims. The Ottomans, through the Tanzimat reform, likewise enshrined legal equality for Muslims and non-Muslims throughout its territories and also began to require non-Muslims to serve in its armies.²

While the political reforms of the nineteenth and twentieth centuries were often driven by practical necessity and had a cer-

¹ Fadel, *supra* note 2 at p. 35 and pp 41-43.

² See, for example, Butrus Abu-Manneh, “The Islamic Roots of the Gulhane Rescript,” 34 *Die Welt des Islams* (1994), pp. 173-203.

tain ad hoc character to them, a more systematic approach to this problem of reconciling Islamic commitments to justice with a non-sectarian conception of justice was one of the driving factors behind the new Egyptian civil code. According to ‘Abd al-Razzāq al-Sanhūrī, Egypt could not be genuinely independent unless its legal system had an organic tie to its indigenous legal system, i.e. the Sharī‘a. At the same time, however, its legal system had to be modern and thus required a recasting of the substantive values of historical Islamic law that would make them workable for the needs of a modern Islamic state. Significantly, al-Sanhūrī believed that non-Muslim jurists were equally competent in working out the details of a modernized Islamic civil code. This was because, in al-Sanhūrī’s opinion, Islamic law was a universal legal system that had to be able to justify its rules to both Muslims and non-Muslims.¹

Its rules regarding the interactions of citizens, however, had to be revised to make them compatible with modern life, both substantively, and in terms of their justifications. One of the methodological innovations al-Sanhūrī introduced in the course of his attempt to develop a modern Islamic law code was the principle that, because Islamic law is universally valid, it was capable of adopting any principle of law that was not repugnant to its fundamental commitments. This principled accommodation of non-Muslims in the juristic project of a modern Islamic code is reminiscent of justifications offered by Muslim jurists as to why Muslims can accept the terms of democratic citizenship in good faith: because democratic commitments do not require Muslims to affirm articles of faith, for example, that are repugnant to Islam, its results are substantially equivalent to Islamic conceptions of justice. Al-Sanhūrī’s desire to include non-Muslims in his project of a renewed and modernized Islamic legal system, however, was also in his view good practical politics. He recognized the danger

¹ For more on Sanhūrī and his contributions to modern Islamic law, see Enid Hil, “The Place and Significance of Islamic Law in the Life and Work of ‘Abd al-Razzāq al-Sanhūrī, Egyptian Jurist and Scholar”, Parts I and II, 3,1 *Arab Law Quarterly* (1988), pp. 33-64 and 3,2 *Arab Law Quarterly* (1988), pp. 182-218 and ‘Amr Shalakany, “Between Identity and Distribution: Sanhūrī, Genealogy and the Will to Islamise, 8,2 *Islamic Law and Society*, pp. 201-244 (2001).

to national independence that alienated religious minorities posed, and accordingly, he believed that those elements within the Egyptian religious establishment who opposed full integration of the Copts into the structure of the Egyptian state were just as dangerous to the future of Islam as those Egyptian intellectuals who had become secularists in the mould of Kamal Attaturk.¹

Implications of *Fiqh al-Aqalliyyāt* for Non-Muslims in Muslim Majority States

Sanhūrī, despite his brilliance as a scholar of comparative law and his substantial expertise in Islamic law, in the final analysis lacked the Islamic scholarly credentials to carry the day, and as is well-known, there continues to be substantial controversy whether Sanhūrī's code is sufficiently Islamic. What is significant from the perspective of this paper, however, is that the current discourse of *fiqh al-aqalliyyāt* provides substantial normative justification for Sanhūrī's project of generating a modern system of Islamic law that is able to win the support of all citizens, whether or not Muslim. Just as Sanhūrī imagined an abstract body of substantive Islamic law that he described as universal and immutable but whose practical and detailed manifestations could change based on time and place, so too jurists involved in the practice of *fiqh al-aqalliyyāt* go beyond the particular historical rulings of Islamic law and try to derive from them abstract rules that allow them to argue that the principles protected by these abstract rules are in fact being satisfied by democratic principles.

So, the question naturally arises: if it is permissible to argue that the fundamental goals of Islam are met in a democratic society, why should democratic constitutions be limited to non-Muslim states? Isn't it the case that if Muslim-majority countries adopted legal orders that satisfied standards of democratic legitimacy that such polities would be equally capable to satisfy the requirements of Islam for a just order, if not more so? The concluding part of this Article will make the case that indeed, just as Muslim jurists

¹ See, for example, Nādiya al-Sanhūrī and Tawfīq al-Shāwī, *al-Sanhūrī min Khilāl Awrāqihī al-Shakhṣiyya* (Cairo: Dār al-Shurūq, 2002), pp. 134-135 and pp. 150-151.

have argued that democratic states satisfy the goals of Islam with respect to political organization, so too would a democratic legal order satisfy Muslims' obligations even in contexts where they are majorities.

The first step in making this case is that the distinction between the obligations of Muslims in a minority context and when they are in a majority context ought not to be relevant from the perspective of what Islam deems to be the minimum conditions required for a state to earn the political loyalty of Muslims. Giving too much weight to the empirical fact that Muslim minorities are politically weak at the present time reflects the continued influence of the juristic division of the world between *dār al-islām* and *dār al-ḥarb*, a classification that has come under increasing criticism by Muslim jurists in the post-World War II era. As Wahba al-Zuhaylī argued in his book *Islam and International Law*,¹ the fact that contemporary international law guarantees the most valuable rights in the eyes of Islam – namely, the right to preach Islam peacefully without active opposition by governments who are to take an officially neutral position vis-à-vis Islam – means that offensive jihad is no longer an Islamic requirement. He goes on to argue that the spread of norms of peaceful relations among states, religious freedom, the self-determination of peoples and the prohibition against aggressive war means that the world as become the equivalent of one territorial jurisdiction (*dār*), implying that law (at least public law) ought to be universal. Accordingly, what is significant to the *fiqh al-aqalliyyāt* arguments is not the numbers of Muslims in a given non-Islamic state, for if that were the case their obligations would vary depending on the percentage of Muslims in the general population; rather, what is significant is whether the legal order of the state itself guarantees the security of Muslims and guarantees their ability to practice, teach and call to Islam. Once those conditions are satisfied, Muslims are *Islamically* bound to maintain their ties of loyalty to that state even if they gain numbers and thus become politically more powerful.

The same argument applies to states in which Muslims comprise a majority of the population: if the state provides the same

¹ Wahba al-Zuhaylī, *al-'Alāqāt al-Duwaliyya fī al-Islām: Muqarana bi-l-Qanūn al-Dawlī al-Ḥadīth* (Beirut: Mu'assasat al-Risāla, 1981).

guarantees then the interests of Islam are sufficiently protected and there is no need for the state to be structured expressly as an instrumentality for the protection of Islam or Muslims. Just as Zuhayli argued that the need for offensive jihad has been rendered obsolete because of the realities of the post-World War II international order, namely, its protection of the independence and sovereignty of states, its commitments to human rights, and governments' neutrality with respect to Islam,¹ it would seem that the need to have a state dedicated to the protection of Islam would also be obsolete. Ironically, this argument is confirmed by various rules that in the pre-modern period prohibited non-Muslims from exercising power (*wilāya*) over Muslims.

The juristic assumption motivating this rule was that the non-Muslim would rule based on his or her own (false) conceptions of religion, not that he would be applying just law. This would imply that where a non-Muslim citizen is applying or enforcing the rules of what is a just legal system, the mere fact that its officials are non-Muslims does not transform the legal system into an unjust order. The fact that the disbelief of legal officials is not relevant to the justice of the non-Islamic legal order is obvious in the case of western democracies which despite the fact that the overwhelming majority of its political decision makers are not Muslim, the jurists who have developed the *fiqh al-aqalliyyāt* discourse have not allowed that fact to derogate from the normative justness of these countries' political and legal institutions. There is also pre-modern Islamic precedent in support of this approach: while al-Māwardī holds that non-Muslims are not eligible to serve as *wazīr tafwīd*, they are eligible to serve as *wazīr tanfīdh*. The reason is that the former exercises discretion in the name of the Muslim community, whereas the latter simply enforces rules that Muslims themselves have already made.

The same analysis applies to non-Muslim citizens of a democratic state: whether or not Muslims are majority or minority of that population, all legal officials are bound to enforce a law that applies to all citizens and that is the product of their collective deliberation. Such an official, whether he is a Christian, Jew, Hindu

¹ Fadel, *supra* note 2, pp. 46-48.

or Buddhist, is bound to apply this body of democratic law and is not permitted to apply his or her own religious conception of what is true or right. If such an official did so, it would constitute an *abuse* of power for which the law would provide a remedy. In short, a democratic state provides protections against the threat that non-Muslims would use their political power to discriminate against, dominate, or persecute Muslims. If that fact can be relied upon to legitimate Muslims' residence in democratic states in which they are the minority, it applies *a fortiori* to states where Muslims are the majority since **minoritarian** religious communities would be extremely concerned, from a practical perspective, to do anything that would suggest they wish to use their political power to oppress Muslims. In short, if we accept the conclusion of the emerging discourse of *fiqh al-aqalliyyāt* that democratic political life is sufficient to protect the interests of Islam and Muslims where they are a minority, then *a fortiori* it is sufficient to protect them in circumstances where they constitute the majority. In this latter situation they are even in less need of special privileges from the state to maintain the health of the Muslim community, teach Islamic doctrines, and call others to it.

Not only does consistent application of the principles espoused in the *fiqh al-aqalliyyāt* discourse require their application also to states in which Muslims form the majority, so too does prudent politics. Muslim-majority states should recognize that the existence of flourishing and prosperous Muslim communities in the developed world is in the interests of Muslim-majority countries. Yet, the failure of Muslim-majority countries to adhere to the equality requirements of democracy serves to undermine the ability of Muslim citizens of non-Muslim states to exercise fully their rights as citizens. Elements of those countries hostile to Islam and Muslims use the persistence of political discrimination against non-Muslims and rules criminalizing or penalizing civilly apostasy to argue that Muslims are not morally committed to the prevailing democratic order and therefore are not entitled to its protections. Even though such an argument reduces Muslims to a group rather than treating them as individuals, and as such represents a violation of democratic commitments to equality, this argument has gained and is continuing to gain traction, especially in Europe. Indeed, the European Court of Human

Rights in two decisions, *Refah Party v. Republic of Turkey*¹ and *Shahin v. Turkey*² has essentially taken the position that Islam is inherently anti-democratic and therefore governments are permitted to take steps to regulate it that would not be permissible with respect to other religions or associations. Recently, a prominent Oxford-based philosopher of law, John Finnis, has begun to make open calls for European governments to create incentives for Muslims to leave Europe, again based on the argument that Islam is inherently opposed to democratic politics.³

Public discussion of such policies, even if they are not adopted in the short-term, are extremely dangerous, not just for the long-term interests of Muslim communities living in the west, but also for international relations. To the extent that jurists like al-Zuḥaylī have argued that doctrines such as *dār al-ḥarb* and offensive jihad are obsolete, it was based on the notion that non-Islamic states are capable of treating their Muslim citizens with respect and equality. To the extent non-Muslim states adopt laws that are overtly hostile to Islam and Muslims, however, al-Zuḥaylī's argument concerning the secure place of Islam in today's world will appear less and less convincing to Muslims who might begin to listen to more radical voices.

Given the fact that the underlying logic of *fiqh al-aqalliyyāt*'s justification of democracy also applies to Muslim-majority states, and the importance of diffusing even the appearance of a conflict of civilizations, it appears critical that Muslim-majority states take decisive steps to incorporate their non-Muslim citizens into the decision making structure of their states in a manner consistent with democratic norms of equality. The Islamic movements in Muslim states too should make this one of their own priorities. Many individuals in Islamic movements have benefitted from the freedoms of liberal democracy; they should have the unique combination of theory and practice to carry the day against elements in

¹ *Refah Partisi (The Welfare Party) and Others v. Turkey*, nos. 41340/98, 41342/98, 41343/98 and 41344/98, CHR 2003-II – (13.2.03) (Feb. 13, 2003).

² *Layla Sahin v. Turkey*, no. 44774/98 (Nov. 10, 2005).

³ John Finnis, *Endorsing Discrimination Between Faiths: A Case of Extreme Speech?* at 12 (2008), available at <http://www.ssrn.com/abstract=1101522>.

the Islamic movement who would wish to continue, if not enhance, the marginalization of non-Muslims for the domestic politics of Muslim-majority states.

Conclusion

Islamic law, from the earliest days of the Prophet's (S) migration to Madina, has been careful to distinguish between the rules that are applicable in Muslim territory and non-Muslim territory. Islamic law permitted Muslims to live in non-Muslim territory provided certain conditions were met, specifically, that Muslims could manifest their religion. Conversely, Islamic law allowed non-Muslims to live permanently in Islamic territory as protected persons provided they agreed to abide by the non-religious elements of Islamic law. In the post-World War II era, with the spread of international law, human rights and global norms of governance, the rights of individual citizenship have supplanted the rights of communities. Accordingly, Muslims living outside of Islamic territory enjoy, theoretically at least, rights equal to those of their non-Muslim countrymen. In return, however, Muslims are expected to bear equally the duties of citizenship in the non-Muslim state. The new circumstances in which Muslim minorities find themselves, particularly in western democratic countries has given rise to a new juristic discourse known as *fiqh al-aqalliyyāt*. This body of jurisprudence has attempted to normalize the relationship of Muslim minorities as citizens to their states of citizenship, even though the majority of the population is non-Muslim. Significantly, jurists engaged in this discourse have stressed the fact that the array of rights guaranteed in democracies are sufficient to insure that Muslims can live there with honor and

dignity, and the right to manifest Islam, including, by calling others to it. On this basis, they have agreed that the presence of Muslim minorities as citizens of democratic states is religiously permissible. On the other hand, the same logic these jurists have used to legitimate the presence of Muslim citizens in non-Muslim countries implies that even in Muslim-majority situations, a democratic state that is religiously neutral, provided it is otherwise just, ought to be sufficient to protect the honor and dignity of Muslims, and their right to manifest Islam and call others to it. This calls into question the need for an explicitly Islamic state to protect Muslims' interests as Muslims. To the extent that we accept *fiqh al-aqalliyyāt* as representing a legitimate interpretation of the *Shari'a* for Muslims living as minorities, it would seem that Muslim majorities should also be required to treat non-Muslims with the same level of equality that they demand of non-Muslims when Muslims are the minority. Not only is this demand normatively just, at least in light of the claims of *fiqh al-aqalliyyāt*, it is also good policy: in today's interconnected world, which some jurists have said ought really be deemed one legal jurisdiction (*dār*), it undermines the security and well-being of Muslim minorities for Muslim majority jurisdictions to claim a right to subject non-Muslim minorities to discriminatory legislation – such as qualifications for public office or access to divorce – while demanding the Muslim minorities enjoy the same rights that their non-Muslim majority co-citizens enjoy. While this would represent a departure from the traditional logic of the relationship of *dhimma*, it would nevertheless be consistent with the higher goals (*maqāṣid*) of Islamic law which seeks to maintain peaceful co-existence with non-

Muslims who are prepared to live in peace and mutual respect with Islam.