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RETHINKING ISLAMIC JURISPRUDENCE FOR MUSLIM MINORITIES IN THE WEST

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RETHINKING ISLAMIC JURISPRUDENCE FOR MUSLIM MINORITIES IN THE WEST

by

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Thesis

Presented to the Faculty of the Graduate School of

The University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

Master of Arts

The University of Texas at Austin

August 2015

Abstract

RETHINKING ISLAMIC JURISPRUDENCE FOR MUSLIM MINORITIES IN THE WEST

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The University of Texas at Austin, 2015

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Abstract:

Fiqh al-Aqalliyyat is a new branch of *fiqh* that attempts to address contemporary realities experienced by Muslim minorities and the objectives/principles of Islamic jurisprudence. This paper describes the essential methodological principles of *fiqh al-aqalliyat*, and examines how scholars of *fiqh al-aqalliyyat* apply these principles to the unique issues faced by Muslim minorities. The legal opinions of minority *fiqh* scholars show that Muslim minorities can be both good Muslims and good citizens. This thesis also considers whether or not the juristic methodology and topics of *fiqh al-aqalliyyat* are in fact unique. The paper argues that indeed there are significant differences between *fiqh al-aqalliyyat* and traditional Sunni Islamic law.

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Introduction

Today, more than one third of the world's Muslims reside in non-Muslim countries, especially in Western countries.[1] In the second half of the 20th century, the presence of Muslims in non-Muslim majority societies became formidable due to mass migration of Muslims to various countries, notably Western countries.[2] The number of Muslims in Europe increased from almost zero to approximately 6 million between 1950 and 1990,[3] and it reached about 15 million by 2012.[4] Due to the challenges these Muslims face in regard to religious life in the West, a considerable number of them seek fatwas in a non-Muslim setting, so that they can live in accordance with the principles of Islam in a non-Muslim setting.

When legal rulings are issued without acknowledging the realities of the social setting in which Western Muslims live, it is virtually inevitable that those rulings effect constant paradoxes in their daily lives. For instance, between 2001 and 2009, more than 3500 Muslims in the US military were deployed to Iraq and Afghanistan.[5] Not all of them served as military translators or cultural advisers. Some also had to engage in combat against Muslim enemies in the two Muslim countries. The issue of Muslim participation

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1 Parray, Tauseef Ahmad. 2012. "The Legal Methodology of "Fiqh Al-Aqalliyyat" and its Critics: an Analytical
2 Browers, Michaelle. 2014. "Minorities in Islam/Muslims as minorities". *Contemporary Islam : Dynamics of Muslim Life.* 8 (3): 211-215.
3Peach, Ceri, and Günther Glebe. 1995. "Muslim minorities in western Europe". *Ethnic and Racial Studies.* 18: 26-45.
4 Benton, Meghan, and Anne Nielsen. "Integrating Europe's Muslim Minorities: Public Anxieties, Policy Responses." Migrationpolicy.org. May 10, 2013. Accessed August 2, 2015
5 Elliott, Andrea. "Complications Grow for Muslims Serving in U.S. Military." *International New York Times*, November 8, 2009. Accessed August 2, 2015.

in a war against Muslims has presented a challenge to some American soldiers, the reason being that Muslims, from a religious point of view, are prohibited to fight against their fellow brothers and sisters. On the other hand, Muslims' refusal to join the military service might give rise to onlookers' the suspicion of American Muslims' disloyalty to their country, which might be harmful not only to Muslim soldiers, but also to American Muslim communities. A fatwa by Dr. 'Ali Gum'a, the former grand mufti of Egypt, on this issue illustrates how the legal rulings of non-Western jurists can pose a paradox to Western Muslims. With regard to the permissibility of Muslims' participation in a war against other Muslims, Dr. Guma' issued a fatwa that absolutely prohibits Muslims from participation, no matter what the circumstances. He went as far as to say that if a Muslim intentionally fights against other Muslims, his blood is "permissible" to other Muslims.[6] In other words, Muslims are allowed to kill him along with other non-Muslim enemies. Needless to say, this fatwa creates a difficult dilemma for Muslims serving in the Western militaries. This thesis asks this question, then: Is it not possible to find effective solutions in Islamic law to the unique religious-legal issues that Western Muslims face?

Some scholars of Islamic law present *Fiqh al-Aqalliyyat*[7] as an area of Islamic law that provides practical solutions for Western Muslim's contemporary religious problems. Jabir al-Alwani, one of the first writers on the subject, explains that the term, *aqalliyyat*, denotes Muslim minorities "living in non-Muslim lands, especially in the

6 Bar, Shmuel. 2006. *Warrant for terror: fatwās of radical Islam and the duty of jihad*. Lanham, Md: Rowman & Littlefield. P.91

7 In this study, I use the terms *fiqh al-aqalliyyat* and minority *fiqh* interchangeably.

West".[8] Al-Alwani translates the term *fiqh al-aqalliyyat* as "Islamic jurisprudence relating to Muslim minorities."[9] The concept of *fiqh al-aqalliyyat* was introduced for the first time by al-Alwani when, as the chairman of the Fiqh Council of North America in 1998, he explained the permissibility of American Muslims' participation in political life according to Islamic law.[10] Al-Alwani made an explicit statement in his fatwa that American Muslims' participation in elections was a duty rather than an option, for their engagement with politics could promote the American Muslims' rights, and protect the needs of Muslim communities in the United States. Al-Alwani also underlined the necessity of a reformulated legal theory that can facilitate Muslims' integration into the modern and changing world. He argued that legal opinions rendered by scholars of the minority *fiqh* scholars are helpful to Muslim life in the West, since the ultimate goal of the legal framework used by these scholars is to enable Muslims to foster their societal relationships without severing ties with the traditional legal heritage. Al-Alwani's fresh approach to Muslim minorities' religious concerns inspired considerable curiosity and scholarly inquiry around the world, from both Sunni and Shi'i scholars.[11]

This thesis will explore significant objectives, sources, and applications of *fiqh al-aqalliyyat.* Minority *fiqh* is a mere branch of the general *fiqh* just like the *fiqh* of medicine or the *fiqh* of economics. It has certain subjects and objectives like other branches of the general *fiqh*. It focuses on the religious issues of Muslim minorities. It aims to provide legal solutions for the religious and legal situation of Muslim minorities, and aims to

8 ' 'Alwānī, Ṭāhā Jābir Fayyāḍ. 2003. *Towards a fiqh for minorities: some basic reflections*. London: International Institute of Islamic Thought. P.v

9 'Alwānī, Ṭāhā Jābir Fayyāḍ. 2003. P.34

10 Karman, Karen-Lise Johansen. 2008. Rethinking Islamic jurisprudence for Muslim minorities: the politics and the work of contemporary fatwa councils. (PhD. diss., University of Aarhus, 2008) P. 44

11 Matsuyama Yohei. 2010. "Fiqh al-Aqalliyat: development, advocates and social meaning". Annals of Japan Association for Middle East studies. No.(26-2): 33-55.

provide legal solutions for the religious problems of those communities within the framework of the maxims and rules of *Shari'ah*. With the aim of achieving its objectives, scholars of the minority *fiqh* make use of some controversial methods such as selective *fatwa (takhayyur*), collective ijtihad *(ijtihad al-jamai'),* unrestricted public interest *(maslaha mursalah),* and contextual analysis.*(fiqh al-waqi')*. Along with the primary sources of Islamic law, minority *fiqh* scholars also draw upon some controversial sources like the fatwas of the Prophet's Companions, which was not widely acknowledged as a source of Islamic law among the traditional jurists of the major Sunni legal schools. By recognizing the fatwas of the companions as a source of Islamic law, scholars of *fiqh al-aqalliyyat* indicated that they are not bound by doctrines of a specific traditional Sunni legal school.

This thesis will also discuss the question of the uniqueness of minority *fiqh*. Both Yusuf al-Qaradawi and and Taha Jabir al-Alwani called for the establishment of a new area of Islamic law with a new juristic methodology and with a special focus on Muslim minorities. The legal methodology of the new *fiqh* stresses the need for a new *ijtihad* that is not circumscribed by the inherited *fiqh* legacy. In spite of usefulness of the classical *fiqh,* al-Alwani argues, it has some elements that are inapplicable and/or irrelevant to the contemporary modern life, since the socio-political context in which the classical *fiqh* developed was quite different from that of today's world. The concepts of *dar al-harb* and *dar al-Islam* are two examples to the partial irrelevancy of the classical *fiqh.* I will explain in Chapter Three how the two concepts are irrelevant in the contemporary world. The methodology of the new *fiqh* contains some characteristics that differentiate it from the classical *fiqh.* The fact that advocates of minority fiqh prefer some sources of Islamic

law over others that were preferred by the classical jurists demonstrates that minority *fiqh* has a distinctive juristic methodology. It is one of goals of this thesis to explore how and to what extent this new area of *fiqh* is unique and different from the classical *fiqh*.

THESIS MAP

Chapter One aims to provide a general overview of *fiqh al-aqalliyyat.* It introduces the objectives and key figures of *fiqh al-aqalliyyat*. It also offers a literature review of significant sources in this field, written in English and Arabic. Chapter Two outlines the minority *fiqh*'s methodology's essential juridical tools. Since the concept of *ijtihad* has a crucial importance to the *fiqh al-aqalliyyat*, the chapter identifies the concept and gives a brief historical background for *ijtihad*. Then, the chapter elaborates the four significant juristic tools that are frequently employed by scholars of minority *fiqh* to practice *ijtihad*. These methods, named above, are selective *fatwa (takhayyur),* collective *ijtihad (ijtihad al-jamai'),* unrestricted public interest *(maslaha mursalah),* and contextual analysis *(fiqh al-waqi')*.

Chapter Three demonstrates how three scholars, Jabir al-Alwani, Yusuf al-Qaradawi and Tariq Ramadan, tackled particular questions, using the aforementioned juristic methods and sources. These questions cover topics of permanent residency in a non-Muslim-majority country, interest-based mortgage, inheritance from a non-Muslim relative, and the continuance marriage between a converting wife and her non-Muslim husband *(Islam al-Zawja)*. My treatment of these topics does not draw from the work of the three scholars equally, for the three scholars have differing interests. For instance, Chapter Three gives voice to Tariq Ramadan alongside the other two scholars in regard to

the topic of permanent residency in a non-Muslim-majority country while it omits Ramadan on the topic of inheritance from a non-Muslim relative, a topic on which he is silent. Chapter Three, therefore, aims to present the available viewpoints of al-Qaradawi, al-Alwani, and Ramadan concerning the four selected topics, and to demonstrate how they put into practice the methodology of minority *fiqh*.

Chapter Four discusses whether the *fiqh al-aqalliyyat* is really unique in terms of its methodology, subject. According to some critics of the *fiqh al-aqalliyyat*, this *fiqh* is a "new name for an old area that used to be called as *fiqh al-nawazil* (*fiqh* of unprecedented incidents)."[12] This chapter explores what differences and similarities exist between the two concepts, *fiqh al-aqalliyyat* and *fiqh al-nawazil*. This chapter also examines the uniqueness of *fiqh al-aqalliyyat*'s legal methodology by comparing it to Islamic juridicial methods and sources frequently used by reformist Muslim jurists to codify Islamic law within various countries in the last two centuries. Muslim jurists in favor of the codification of Islamic law, such as Muhammad Abduh (d. 1905) and Ahmad Shakir (d. 1958), acknowledged the need for *Ijtihad* to adapt Islamic law to changing circumstances,[13] just as scholars of the minority *fiqh* stressed the same need. It is intriguing that legal tools and sources used by advocates of the codification to practice *ijtihad* prevail in the methodology of the minority *fiqh*. Chapter Four examines whether or not the subject and the methodology of the minority *fiqh* were adopted by Muslim jurists in medieval and modern times prior to the establishment of the minority *fiqh*. This

12 Parray, Tauseef Ahmad. 2012.

13 Elgawhary, Tarek A. 2014. Restructuring Islamic law: the opinions of the 'ulama' towards codification of personal status law in Egypt. Dissertation Abstracts International. 76-04. (Thesis (Ph.D.)--Princeton University, 2014) P. 80

study shows that *fiqh al-aqalliyyat* is a new *fiqh* in comparison to *fiqh al-nawazil*. There are crucial distinctions between the two concepts. However, the study also shows that proponents of *fiqh al-aqalliyyat* are not forerunners of the aforementioned juristic techniques; *takhayyur, collective ijtihad* and *maslaha.* In the last two centuries, other Muslim jurists used these techniques in order to achieve legal reforms in Islamic law.

Chapter One - Key Terms and Key Figures

INTRODUCTION

This chapter begins with definition of two key terms, *fiqh* and *aqalliyyat*. It also defines *Shari'ah* and explains how *Shari'ah* is different from *fiqh.* Then, the chapter continues with introduction of several figures key to the development of *fiqh al-aqalliyyat*: Taha Jabir al-Alwani, Yusuf al-Qaradawi and Tariq Ramadan. The chapter concludes with a literature review of five significant sources written on *fiqh al-aqalliyyat*.

KEY TERMS: *FIQH* AND *AQALLIYYAT*

The term *fiqh* literally means "understanding, knowledge and intelligence."[14] It is primarily concerned with understanding of the Divine law. As stated by Norman Calder, "all efforts to elaborate details of the law, to state specific norms, to justify them by reference to revelation, to debate them, or to write books or treatises on the law are examples of *fiqh*."[15] Scholars of *fiqh* seek to demonstrate how legal rules in the Quran and the Sunnah are supposed to be applied in the daily lives of Muslims. Hence, *fiqh* is the product of the human reason that endeavors to comprehend and interpret the Divine law, *Shari'ah*.

Advocates of the minority *fiqh* emphasize the distinction between *Shar'iah* and *fiqh*, referring to the ability of *fiqh* to renew and adjust itself according to the

14 Goldziher, I.; Schacht, J.; J. Schacht. "Fiḳh." *Encyclopaedia of Islam, Second Edition*. Edited by: P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs. Brill Online, 2015. Reference. University of Texas at Austin. http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/fikh-SIM_2364 (accessed July 28, 2015)

15 Calder, Norman , Joseph A. Kéchichian, Farhat J. Ziadeh, Abdulaziz Sachedina, Jocelyn Hendrickson, Ann Elizabeth Mayer and Intisar A. Rabb. "Law." In *The Oxford Encyclopedia of the Islamic World*. *Oxford Islamic Studies Online*, http://www.oxfordislamicstudies.com/article/opr/t236/e0473 (accessed Aug 3, 2015).

circumstances under in which it is applied. *Shari'ah*, meaning literally "the straight path,"[16] refers to the set of principles and guidelines that is stated in the two main sources of Islamic law, the Quran and the Sunnah. *Shari'ah* is "the Divine law"[17] that was revealed to the Prophet Muhammad and was practiced by him. It remains unchanged today. In contrast to *Shari'ah*, which as the revealed law is fixed and immutable, *fiqh* is subject to change according to circumstances and time, since it mainly consists of interpretations and deductions that are open to debate.[18] In making a distinction between *Shari'ah* and *fiqh*, proponents of *fiqh al-aqalliyyat* oppose the argument that Islamic law is rigid and static, or even immutable. Instead, they argue that when necessary, Muslim minorities can benefit from the flexibility of *fiqh* in their own context.

Aqalliyyat literally means "minorities". Al-Alwani defines the term "minority" as a group or groups of state subjects of a racial, lingual or religious affiliation different from that of the majority population."[19] A minority group is one that is subordinate to a dominant group or groups financially, socially or politically regardless of the size of the latter. According to al-Alwani, lack of power, especially political power, rather than the smallness of number is the chief characteristic of a minority group. In his introduction to al-Alwani's book, *Towards a Fiqh for Minorities,* Muhammad Zaki Badawi (d.2006), a leading Muslim scholar resident in Britain, points out that legislative authority of a community is a decisive factor in determining whether a community is majority or minority. Minority communities are underrepresented in the government, and they do not

16 Philips, Abu Ameenah Bilaal. 1995. *Evolution of Fiqh: Islamic law & the madhhabs = Tārikh al-madhāhib al-fiqhīyah*. Riyadh, Saudi Arabia: International Islamic Pub. House. P. 12

17 Esposito, John L., and Natana J. DeLong-Bas. 2004. *Women in Muslim family law*. Syracuse, NY: Syracuse Univ. Press p. 130-131

18 Esposito, John L. 1999. *The Oxford history of Islam*. New York, N.Y.: Oxford University Press. p.108

19 Alwānī, Ṭāhā Jābir Fayyāḍ. 2003. *Towards a fiqh for minorities: some basic reflections*. London: International Institute of Islamic Thought. P:2

wield legislative influence. Then, the term, *aqalliyyat,* in *fiqh al-aqalliyyat* refers to Muslims living as minorities without influential political and/or legislative power in non-Muslim countries.

THE OBJECTIVES OF *FIQH AL-AQALLIYYAT*

There are two main objectives of *fiqh al-aqalliyyat*: one, to preserve the religious life and Muslim identity of Muslim minorities through the facilitation of a more applicable *fiqh*; two, to support Muslim minorities' efforts to convey the message of Islam to their fellow citizens. The two objectives are combined in the following legal maxim: '*al-taysīr fī al-fatwā wa al- tabshīr fī al-daʿwa'* (facilitation in the issuance of rulings and propagation of Islam through proselytizing).[20]

In order to achieve the first objective, the preservation of Muslim identity, scholars of minority *fiqh,* broadly speaking, provide Muslim minorities with comparatively lenient legal rulings that enable them to integrate into their societies without losing their Muslim identities. Stringent legal opinions based on medieval juristic discourses may lead Muslim minorities to be faced with dilemma of choosing between the Muslim identity and isolation from society. The issue of celebrating non-Muslim holidays, like Christmas, is one example of how fatwas may create such a dilemma for Muslim minorities. Fatwas from earlier *fiqh* manuals prohibit Muslims from participating in Christmas celebrations, reasoning that Muslims must distance themselves from any social environment that is not strictly Islamic. These fatwas prohibit Muslims from

[20] Shavit, Uriya. 2012. "The Wasati and Salafī Approaches to the Religious Law of Muslim Minorities". *Islamic Law and Society.* 19 (4): 416-457.

congratulating Christians on their holidays, as well. However, the central position of Christmas in the Western life makes it almost impossible for Muslim minorities living in the West to disconnect themselves from entire range of events related to Christmas. Accordingly, Muslim jurists of *fiqh al-aqalliyyat* permit Western Muslims to congratulate their fellow citizens, and to exchange gifts with them on their holidays.[21] The jurists base the decision on the Qur'anic verse, 60:8-9, which commands Muslims to distinguish non-Muslims who fight against Muslims and non-Muslims who co-exist peacefully with Muslims. According to scholars of *fiqh al-aqalliyyat*, Muslim minorities are not allowed to sing religious songs along with non-Muslim compatriots, or to participate in Christmas plays. Yet, the lenient fatwas means that they do not have to completely isolate themselves from their societies entirely during to the Christmas season thanks to existence of more lenient fatwas. In this way, Muslims should be able to protect their Muslim identity, and achieve social integration in non-Muslim lands. Al-Qaradawi summarizes this objective as follows: "preserving identity without isolation and integrating without dissolution" (*muhāfazatun bilā inghilāq wa indimājun bilā dhawbān*).[22]

The second main objective of *fiqh al-aqalliyyat* is to promote the spread of Islam through *da'wah* in non-Muslim lands. *Da'wah* is to call non-Muslims to the universal message of Islam. In the Qur'an, *da'wah* is described as a religious obligation for all Muslims.[23] Proponents of *fiqh al-aqalliyyat* argue that Muslim presence in non-Muslim

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21 Shavit, Uriya. 2012.

22 Qaraḍāwī, Yūsuf al-. 2001. *Fī fiqh al-aqallīyāt al-muslima: ḥayāt al-muslimīn wasṭa 'l-muğtama'āt uẖrā*. al-Qāhira: Dār aš-Šurūq. p.35

23 Wield, Nina. "Dawa and The Islamist Revival in The West." *HUDSON INSTITUTE Center on Islam, Democracy, and the Future of the Muslim World* 9 (2009): 120-51. *Hudson Institute*. Web. (accessed July 25, 2015.)

countries should be seen as an opportunity for the conduct of *da'wah*. This viewpoint encourages Western Muslims to reside among non-Muslims, which is different from the traditional viewpoint. Traditional Muslim jurists in medieval times held the idea that Muslim minorities would better migrate from non-Muslim territories to Muslim territories.[24] Each committed member of minority Muslim communities must make effort to convey the universal message of Islam to their fellow citizens in the local language/s.[25] While expounding "the duties of Muslims living in the West", al-Qaradawi pointed out

> Muslims in the West ought to be sincere callers to their religion. They should keep in mind that calling others to Islam is not only restricted to scholars and Sheikhs, but it goes far to encompass every committed Muslim. As we see scholars and Sheikhs delivering khutbas and lectures, writing books to defend Islam, it is no wonder to find lay Muslims practicing da`wah while employing wisdom and fair exhortation.[26]

In short, *da'wah* is a religious duty for all Muslims, including Muslims living in non-Muslim lands. The minority *fiqh* helps Muslim minorities fulfill this duty by establishing appropriate rules of coexistence with non-Muslims in their societies, and more fundamentally, by legitimizing their presence and residence in a non-Muslim society. Although different scholars of *fiqh* of minorities have identified other objectives, these two objectives are espoused by most of proponents of *fiqh* of minorities.

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[24] El Fadl, Khaled Abou. 1994. "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries".*Islamic Law and Society.* 1 (2): 141-187.

[25] Qaraḍāwī, Yūsuf. 2003. *Fiqh of Muslim minorities: contentious issues & recommended solutions*. Cairo: al-Falah Foundation for Translation. P. 6

[26] Yūsuf al-Qaraḍāwī, "Duties of Muslims living in the West," IslamOnline.net, May 7, 2006

KEY FIGURES OF *FIQH AL-AQALLIYYAT*

Taha Jabir al-Alwani

Taha Jabir al-Alwani, born in Iraq in 1935, studied at al-Azhar University where he was awarded his MA and PhD in Usul al-Fiqh in 1968 and 1973 respectively.[27] Upon completing his studies, he taught Islamic law at Imam Muhammad Ibn Sa'ud University in Riyadh for ten years. During his residence in Saudi Arabia, he attended several international conferences that increased his awareness of Muslim minorities' concerns, notably those of Muslims living in the West. Consequently, he became convinced that the theoretical foundations of Islamic law as well as its practical application was in need of adjustment to the unique context of Muslim minorities.[28]

Following the establishment of the International Institute of Islamic Thought (IIIT) in Virginia in 1977, he migrated to United States in 1983, and he founded Fiqh Council of North America in 1988, and the Graduate School of Islamic and Social Sciences (GSISS) in 1996. Through these institutions, he expressed his legal opinions on the religious issues Western Muslims experienced. He lectured on *fiqh al-aqalliyyat* during his supervision for the program to train Muslim chaplains for the American military force in GSISS, which was the first American institution approved by the Pentagon for the training of Muslim chaplains.[29] He is also generally known as the first

27 Hassan, Said Fares Ahmed. 2011. *Reaching from within: establishing a new Islamic jurisprudence for Muslim minorities in the West (the discourse of fiqh al-aqalliyyāt)*. Thesis (Ph. D)--UCLA, 2011. P.166
28 Shammai Fishman, 2003 ""Some Notes on Arabic Terminology as a Link between Tariq Ramadan and Sheikh Dr. Taha Jabir al-'Alwanl, Founder of the Doctrine Of "Muslim Minority Jurisprudence" (Fiqh Al-Aqalliyyat Al-Muslimah)," PRISM
29 Heffelfinger, Christopher. 2011. *Radical Islam in America: Salafism's journey from Arabia to the West*. Washington, D.C.: Potomac Books. P.137

jurist to use the term, *fiqh al-aqalliyyat*.[30] The translation of his book on *fiqh al-aqalliyyat*, *Towards a Fiqh for Minorities*, was published in 2003. His activities in the last few decades prove that he has been one of the leading figures in *fiqh* of minorities.

With regard to the contribution of al-Alwani to the establishment of minority *fiqh,* Shammai Fishman states in his article on *fiqh al-aqalliyyat*:

> Traditionally, the entire Muslim legal system is based on the Muslims being a ruling majority. Creating a jurisprudence doctrine for Muslims who are a minority is a complex challenge to begin with. Many Muslims have written theoretical works on the subject of the minorities, many have started institutions. The uniqueness of al-Alwani's enterprise was in mastering both fields. He did not only initiate these legal institutions, but he created "Muslim Minority Jurisprudence" as a theoretical doctrine upon which these bodies will base their actions and form their legal opinions.[31]

As summarized in the quote, al-Alwani made both theoretical and practical contributions to the discourse of *fiqh al-aqalliyyat*. I will examine some of his decisions in this thesis.

Yusuf al-Qaradawi

Born in Egypt on September 9, 1926, Yusuf al-Qaradawi is currently one of the most important and respected Muslim jurists of Sunni Islam today.[32] He studied Islamic theology at al-Azhar University where he obtained a PhD degree in 1973 with his dissertation, "*Zakat (charity) and Its Effect on Solving Social Problems*."[33] In addition to his more than one hundred works translated into different languages, his international

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30Matsuyama Yohei. 2010. "Fiqh al-Aqalliyat: development, advocates and social meaning". *Annals of Japan Association for Middle East studies.* No.(26-2): 33-55.

31 Fishman Shammai, 2003

32 Bowering, Gerhard, Richard Bulliet, David Cook, Patricia Crone, Roxanne L. Euben, Khaled Fahmy, Frank Griffel, et al. 2012. *The Princeton Encyclopedia of Islamic Political Thought*. Princeton, N.J.: Princeton University Press. P. 444

33 Akyeampong, Emmanuel Kwaku, and Henry Louis Gates. 2012. *Dictionary of African biography*. Oxford: Oxford University Press. Vol.5 p. 147

fame has been supported by the popular religious talk show on the Qatari-based satellite television channel al-Jazeera, *Sharia and Life*, having more than 40 million viewers worldwide.[34] Between 1977 and 1990, he served as the dean of the Faculty of Shari'ah and Islamic Studies at the University of Qatar.[35] In 1949, after the assassination of the Egyptian Prime Minister Mahmoud Fahmi by the Muslim Brotherhood movement in 1948, al-Qaradawi, a disciple of the Muslim Brotherhood's founder Hasan al-Banna, was arrested owing to his involvement in the movement.[36] Contrary to a widely held view that al-Qaradawi was an intellectual leader of the Muslim Brotherhood, he twice (in 1976 and 2004) rejected the Brotherhood's offers to hold its leadership position, and in 1997 he announced his independence from any Egyptian-based organization, including the Muslim Brotherhood.[37]

Al-Qaradawi's scholarly interest in legal issues pertaining to Muslim minorities began a few decades before the introduction of *fiqh* of minorities as a new doctrine.[38] Upon the request of the General Department of Islamic Culture at al-Azhar University in 1960, he participated in a project that prepared books introducing Islam and Islamic law to Muslim minorities and non-Muslims in the West.[39] Al-Qaradawi did not begin to engage with the unique religious needs of Muslim minorities in his works until his visits to Muslim communities in non-Muslim majority countries in the 1970s.[40] In response to the increase in questions posed by Western Muslims in the 1980s and 1990s, al-Qaradawi

34 Fischbach, Michael R. 2008. *Biographical Encyclopedia of the Modern Middle East and North Africa*. Detroit: Gale Group. P. 632
35Akyeampong, Emmanuel Kwaku, and Henry Louis Gates. 2012. *Dictionary of African biography*. Oxford: Oxford University Press. Vol. 5 p.146
36 Akyeampong, Emmanuel Kwaku, and Henry Louis Gates. 2012. Vol. 5 p.147
37 Karman, Karen-Lise Johansen. 2008 p.45
38 Tottoli, Roberto. 2015. Routledge handbook of Islam in the West. P.365
39 Hassan, Said Fares Ahmed. 2011. P.114
40 Tottoli, Roberto. 2015. P.366

concentrated on finding suitable answers to these questions, using his *wasati* (middle way) approach to Islamic law.[41] This approach strikes a balance between the unchanging tenets of Islam and realities of the modern times. In 2001 he published his book entitled *Fiqh al-Aqalliyyat al-Muslima* in which he systematically expounded *fiqh al-aqalliyyat* from his perspective. His contributions to the discourse of *fiqh al-aqalliyyat* put him into a central position in this topic.

Tariq Ramadan

Tariq Ramadan, the grandson of Hasan al-Banna, was born in Switzerland on August 26, 1962. He completed his PhD. in Islamic Studies at the University of Geneva with a dissertation on the theology of Hasan al-Banna.[42] He serves as advisor on religious issues for the European Union. Unlike the first two scholars who are well trained in Islamic law, Tariq Ramadan, a Professor of Contemporary Islamic Studies at Oxford University, is not an Islamic law scholar. Therefore, his arguments on legal issues of this trend focus almost solely on the function of Islamic law in the formation of Western Muslims' identity.[43]

Ramadan challenges the term *fiqh al-aqalliyyat*.[44] He argues that the term carries some negative connotations. From his perspective, the term implies that the presence of Muslim minorities in the West is abnormal. Muslim minorities must migrate to Muslim-majority countries. According to Ramadan, the special focus given to the minority status

41 Hassan, Said Fares Ahmed. 2011. P. 116
42 Carle, Robert. 2011. "Tariq Ramadan and the Quest for a Moderate Islam".*Society.* 48 (1): 58-69.
43 Dina M. Taha . 2012 "Muslim Minorities in The West: Between Fiqh of Minorities and Integration" Thesis, The American University in Cairo, 2012, p. 36
44 March, Andrew F. 2014. "Are Secularism and Neutrality Attractive to Religious Minorities?: Islamic discussions of Western Secularism in the Jurisprudence of Muslim Minorities (Fiqh Al-Aqalliyyat) : Discourse". *Constitutional Secularism in an Age of Religious Revival.* 283-307

of Western Muslims rather than a focus on the concept of citizenship has harmful repercussions on the Western Muslims, since mentality of "minority", he claims, makes it difficult for them to fully integrate in their societies. For example, Ramadan states:

> It is in the very name of the universality of my principles that my conscience is summoned to respect diversity and the relative, and that is why, even in the West (especially in the West), we have not to think of our presence in terms of "minority." What seems to be a given of our thinking: "the Muslim minority," "the law of minorities" (*fiqh al-aqalliyyat*), must, I believe, be rethought…In his book On Law and the Jurisprudence of Muslim Minorities, Yusuf al-Qardawi adds a telling subtitle: The Life of Muslims in Other Societies. In his mind, Western societies are "other societies" because the societies normal for Muslims are Muslim-majority societies. But this is no longer the case, and what were once thought of as some kind of "diasporas" are so no longer. There is no longer a place of origin from which Muslims are "exiled" or "distanced," and "naturalized," "converted" Muslims--"Western Muslims"-- at home, and should not only say so, but feel so[45]

He claims that like the dualistic division of the world into *dar al-harb* and *dar al-Islam*, the mentality of being "a minority" should be considered as a passing stage only, for the current conditions of Muslims in the West are strikingly different from the conditions they have had four to five decades ago, when the first generation of Muslim immigrants have found themselves in a totally new environment. Perhaps, most of the Muslim immigrants arrived to the Western countries with the idea of returning to their Muslim-majority countries in the future. They found themselves as strangers, on the margins in their societies. However, their descendants were born in the Western societies and became a part of their societies. They were already "at home." They were not a minority group in the sense of being foreign to their societies. They had both Muslim and

45 Ramadan, Tariq. 2004. *Western Muslims and the future of Islam*. Oxford: Oxford University Press. p.53

Western identities.[46] Due to the mentioned reasons, Ramadan challenged the term, *minority fiqh.* To my best knowledge, Ramadan does not provide any alternative name for this *fiqh*.

Ramadan acknowledges the importance of minority *fiqh* jurists' efforts to establish a new *fiqh* for Muslim minorities. He stresses the need for a new juristic methodology in the contemporary world. This methodology must include juristic source and techniques of the collective *ijtihad*, selective *ijtihad* (*takhayyur*), *maslaha*[47] and contextual analysis (*fiqh al-waqi'*).[48] Furthermore, he has written a preface and commentary on the first fatwa collection of The European Council for Fatwa Research (ECFR), which was founded by al-Qaradawi and al-Alwani in 1997.[49] In the preface, he points out that Islamic law is not static; rather it is a dynamic set of rules. Members of the ECFR uphold this perspective with their *ijtihads* and *fatwas*. It is clear that Ramadan's understanding of Islamic legal theory corresponds closely to the methodology of the minority *fiqh*.

These three scholars are highly influential among Muslims throughout Western Muslims. All of them made significant contributions to the discourse of *fiqh al-aqalliyyat* through their academic works, lectures and religious institutions. Now, I return to some essential academic studies written on *fiqh al-aqalliyyat.*

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46 Ramadan, Tariq. 1999. *To be a European Muslim: a study of Islamic sources in the European context*. Leicester, UK: Islamic Foundation. P. 130

47 Ramadan, Tariq. 1999. P.91-97

48 Ramadan, Tariq. 2009. *Radical reform: Islamic ethics and liberation*. Oxford: Oxford University Press. P. 101

49 Caeiro A. 2010. "The power of european fatwas: The minority fiqh project and the making of an Islamic counterpublic". *International Journal of Middle East Studies*.42 (3): 435-449.

LITERATURE REVIEW

Bibliographical studies on the subject of *fiqh al-aqalliyyat* by various scholars of the last two decades confirm that this subject has been a relatively neglected area of study due to a number of reasons.[50] It is true that after the dramatic increase in the presence of Muslims in the West, the subject of Muslim minorities has drawn a considerable scholarly attention, bringing the concerns of Muslim minorities into the focus.[51] However, bibliographical studies on Muslim minorities show us that Western scholars, generally speaking, have tended to address the problems and experiences encountered by Muslim minorities from social and political perspectives rather than an Islamic law perspective. Consequently, there has been a little focus on the methodology and the application of *fiqh al-aqalliyyat* in their works on Muslim minorities.

In fact, *fiqh al-aqalliyyat* is a new field in Islamic law, and its methodology differs from the methodology of traditional Islamic law in complex ways. Thus, the complexity and the newness of the field appear to be two reasons why the relevant material is scarce. Even though there are some articles and book chapters that deal with fatwas on specific topics, those publications do not provide an in-depth juristic analysis. As for published sources that cover juristic opinions on a variety of topics alongside their juridicial elucidation, they are seriously deficient. The fact that some of the most important relevant writings are in Arabic is another hurdle for non-Arabist researchers. Aside from translations of some essential sources on the methodology and/or application

50 Alexandre Caeiro's *Fiqh al-Aqalliyyat* in Oxford Bibliographies is very useful source. Also, two dissertations provide literature reviews on the subject.

51 Ho, Wai-Yip. 2013. *Islam and China's Hong Kong: ethnic identity, Muslim networks, and the new Silk Road.* London ; New York : Routledge, Taylor & Francis Group p. 24

of *fiqh al-aqalliyyat,* there is virtually no work written on the subject in English before 2005. Among the translated works, al-Alwani's *Towards a Fiqh For Minorities,* the EFCR's *Fatwa Collections,* and partial translation of al-Qaradawi's *Fi Fiqh al-Aqalliyyat al-Islamiyyah* are primary sources.

The term itself, *fiqh al-aqalliyyat,* may be another factor that results in scarcity of relevant material. In other words, some scholars who embrace the methodology of *fiqh al-aqalliyyat* have used different names for this type of *fiqh* like *fiqh nawazi*l instead of *fiqh al-aqalliyyat* in their writings. For instance, Dr. Muhammad Yusri Ibrahim's book, *Fiqh al-Nawazil lil Aqalliyyati al-Muslimah* is an invaluable source for researchers interested in *fiqh al-aqalliyyat.*[52] It is a two-volume book that developed from his doctoral dissertation written at al-Azhar University. The book provides detailed information on the concept of Muslim minorities and their current status in non-Muslim majority countries. Additionally, it elaborates major characteristics of Islamic jurisprudence for Muslim minorities, and it includes discussions of issues ranging from interfaith marriage to interest-based transactions. Along with fatwas given by scholars in favor of *fiqh al-aqalliyyat*, the author presents contradictory fatwas with their proofs from sources of Islamic law. Then, he expresses his own preference among the issued fatwas for the topic. Overall, it is one of the primary sources on the subject. However, the writer does not use the phrase, *fiqh al-aqalliyyat*, in the title of his book, because, in contrast to al-Qaradawi and al-Alwani, he does not deem it a suitable name for the new Islamic

52 Ibrāhīm, Muḥammad Yusrī. 2012. *Fiqh al-nawāzil li-al-aqalliyyāt al-muslima: ta'ṣīlan wa-taṭbīqan 1, 1*. Fiqh Al-Nawāzil Li-Al-Aqalliyyāt Al-Muslima. al-Qāhira: Dār al-Yusr.

jurisprudence. Thus, researchers need to pay scrupulous attention to the relevant domain, lest some of the significant sources do not escape their notice.

In this literature review, I will introduce four sources that significantly contribute to the discourse on *fiqh al-aqalliyyat* and that are distinguished by the novelty of the writers' approaches and/or their critical analysis of fatwas on various topics. These books are al-Qaradawi's *Fi Fiqh al-Aqalliyyat al-Muslimah*, al-Alwani's *Towards A Fiqh For Minorities,* Karen-Lise Johansen Karman's PhD dissertation, *Rethinking Islamic Jurisprudence For Muslim Minorities,* and Said Fares Hassan's *Fiqh al-Aqalliyyat: History, Development and History.* I will also introduce Khalid ‘Abd al-Qadir's *Fiqh al-Aqalliyyat al-Muslimah*. It is clear that ‘Abd al-Qadir does not embrace some aspects of the minority *fiqh’*s methodology. I included his work in my literature review though, since it is the first work that systematically presents legal positions of various schools on issues of Muslim minorities. It may be considered a precursor to the sources named above.

Khalid Abdul Qadir: Fiqh al-Aqalliyyat al-Muslimah

As alluded to above, the concept of *fiqh al-aqalliyyat* was introduced by al-Alwani to the public in 1998, even though the concept had begun to circle among scholars of Fiqh Council of North America a little earlier in the early 1990s.[53] However, apart from some published fatwas, there was no independent source on legal issues of Muslim minorities as of 1998. For this reason, ‘Abd al-Qadir’s work is considered as the first independent book in this regard.

53 Fishman, Shammai. 2006.

The importance of ‘Abd al-Qadir’s book lies especially in the systematic presentation of the legal positions of the major Sunni schools of law and jurists. This enables readers to see fatwas of traditional Muslim jurists on most of the matters that are relevant to Muslim minorities, as well as on matters that are equally relevant to other Muslims. Namely, it is a compendium of legal rulings for both Muslim minorities and Muslim majorities, and it is organized like other classical *fiqh* manuals with the exception that the first chapter is about international relations instead of purification, *tahara*. The book goes on to chapters on purification, rituals, family law, and food. Then, the book closes with sections on financial transaction and everyday activities. In matters of purification and rituals, he discusses cleanliness of dogs, permissibility of prayer in churches and temples, blood transfusion from non-Muslims, permissibility of non-Muslims to touch and to read *al-Mushaf*, burying Muslims in non-Muslim graveyards, and giving *zakah* to non-Muslims. These topics are discussed in addition to many other general legal topics relevant to both Muslim minorities and Muslim majorities. In the following chapters, he deals with interest based transactions in non-Muslim lands, employment of non-Muslims to build a mosque, status of meat hunted or slaughtered by non-Muslims, Islamic greeting to non-Muslims, celebrating non-Muslims on their religious festivals, Muslim participation in funerals of non-Muslims, and residence and citizenship in a non-Muslim country.

A close reading of his fatwas demonstrates that Khalid does not go beyond the mere reiteration of the common traditional classical Islamic view, which heavily relies on *taqlid* rather than *ijtihad*. In other words, he is not preoccupied with a new methodology for Muslim minorities. Rather, he brings to light the earlier fatwas on matters Muslim

minorities seek answers for. In his introduction, ‘Abd al-Qadir criticizes some of the new *ijtihad*s practiced by scholars of the *fiqh al-aqalliyyat*, like the permissibility of Muslim a female convert to stay with her husband, because this *ijtihad*, he affirms, stands in stark contrast to fatwas of four legal schools of thought. For example, he disapproves of interest-based transactions in non-Muslim majority countries, as well as in Muslim majority countries on the basis that the majority of Muslim jurists (*jumhur)* have considered interest-based dealings illegitimate regardless of the dominant religion in a country. Furthermore, Khalid comes to conclusion that it is entirely prohibited to be proud of being a citizen in a non-Muslim ruled country, even if a person is allowed to migrate and stay there out of necessity.

The work was written as a Master Thesis at the School of Awzai, Bairut, in 1994 under a different title, *Al-Ahkam al-Shariyyah li-Muslimi al-Bilad Ghayr al-Islamiyyah "Legal Rulings Pertaining to Muslims Living in non-Muslim Territories*".[54] In his dissertation on *fiqh al-aqalliyyat,* Said Fares Hassan argues that the change of title occurred after the introduction of the term “*fiqh al-aqalliyyat”* to the public.[55] Nevertheless, the first title reflects more properly the content of the book and traditional stance of the author than the latter title, for the writer underlines the necessity to deduct new rulings, *ahkam,* from the Islamic legal heritage for Muslim minorities rather than formulating a new Muslim jurisprudence like *fiqh al-aqalliyyat*.

Overall, Khalid's book serves as a significant reference for those interested in *fiqh* of minorities*,* for the book gives the chance to find most of the legal questions raised by

54 Hassan, Said Fares Ahmed. 2011. P. 228
55 Hassan, Said Fares Ahmed. 2011. P.229

Muslim minorities and to see fatwas given by traditional Muslim jurists in response to these questions.

Yusuf al-Qaradawi: *Fi Fiqh al-Aqalliyyat al-Muslimah*

Al-Qaradawi's monograph, *fi fiqh al-Muslimah* is the first real contribution to the discourse of *fiqh al-aqalliyyat*, in which he explicates the methodology of this *fiqh*, and demonstrates its applicability to daily lives of Muslim minorities. The book was first published in Arabic in 2001. Then, a part of the book was translated into English in 2003. The second chapter in the book expounds sources, methods, distinctive characteristics, central themes and necessity of this *fiqh*.[56] Al-Qaradawi asserts that the primary sources of this *fiqh* are the Qur'an, the Sunnah, *Ijma'*, and *al-Waqi'* (the context). Alongside the reaffirmation that clear and definitive (*qat'i*) injunctions in the Qur'an, the Sunnah and the *Ijma'* are beyond the area of *ijtihad*, al-Qaradawi asserts that competent Muslim jurists can practice *ijtihad* on rulings whose evidence in the primary sources is speculative (*zanni)* in either its meaning (*dalalah*) or authenticity (*thubut*). He is of the opinion that social, political, and economic changes make it necessary for qualified Muslim jurists to practice *ijtihad* in the modern world. He affirms that a *mujtahid* can also draw on legal opinions of the Companions and the Successors as s/he can benefit from rulings of the four legal schools of thought. Additionally, he points out that like Islamic finance, Islamic bioethics, and Islamic family law, this field of Islamic law is also concerned with one specific topic: religious issues of Muslim minorities.

[56] Qaraḍāwī, Yūsuf al-. 2001. p. 30

After describing the methodology of minority *fiqh*, al-Qaradawi provides, in the following chapter, examples of its application on issues ranging from delay of the Friday prayer's time to interest-based mortgage loans. In particular, discussions on the mortgage loans and the permissibility of a Muslim female convert to remain married to her husband constitute about one-third of the monograph. While he utilizes legal opinions of the Hanafi school with regard to the mortgage loans, he benefits from legal opinions of the Companions and the Successors, notably the caliph Umar, the caliph Ali and al-Zuhri, to form the basis for his ruling on validity of the Muslim female convert's marriage. Needless to say, *darurah* (necessity) and *taysir* (leniency) are among the key principles employed by al-Qaradawi for these topics. Al-Qaradawi also provides exposition of contradictory fatwas given by various individual scholars and fatwa councils on the mentioned two topics, attempting to show weak points of their arguments. This chapter also encompasses topics such as inheritance from a non-Muslim relative, abandonment of the ritual slaughter when it may result in epidemic diseases, the consumption of pork-derived ingredients, and of ingredients made with alcohol or extracted by using alcohol. After clarifying that these topics are in the area of *ijtihad*, he explains how he reaches his new rulings, some of which are considerably different from legal opinions of the traditional Muslim jurists.

Taha Jabir al-Alwani: Towards a *Fiqh* For Minorities

This text is a mini-monograph first published under the title *Fi Fiqh al-Aqalliyyat* in Arabic in 2000.[57] Then, Ashur A. Shamis translated it into English in 2003. In the book, al-Alwani explicates the reasons necessitating development of a new methodology of Islamic jurisprudence and the major principles of this new methodology. Al-Alwani claims that the need for new *fiqh* formulations with a "fresh juristic vision" has become urgent especially since the tragedy of 9/11, when both anti-Muslim sentiments and interest of non-Muslims in Islam increased rapidly. According to al-Alwani, the classical Muslim *fiqh* rests on the premise that the condition of Muslim minorities living in non-Muslim lands is 'transient' and unusual. Hence, says al-Alwani, "the classical and medieval jurists ignored the need for a systematic formulation of the status of Muslims as minorities" in Islamic law.[58] Available fatwas on the topic were mainly intended to keep Muslims separated from non-Muslims. Al-Alwani argues accordingly that the classical *fiqh* is not designed to achieve the successful integration of Muslims into their non-Muslim majority societies. Moreover, this *fiqh* is, generally speaking, incapable of responding intelligently and appropriately to non-Muslims' misconceptions and negative stereotypes about Islam in the contemporary world, just as it is inadequate to meeting the religious needs of Muslim minorities. Al-Alwani also points out that shortcomings in the inherited *fiqh* are, however, quite understandable since the corpus of Islamic

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57 Bowen, John R. 2010. *Can Islam be French?: pluralism and pragmatism in a secularist state*. Princeton ; Oxford: Princeton University Press. P. 209

58 Alwānī, Ṭāhā Jābir Fayyāḍ. 2003 p. ix
Rahman, Mahbubur. "The Case for the "Fiqh of Muslim Minorities"" The Message International. January 12, 2011. Accessed March 5, 2015. http://messageinternational.org/the-case-for-the-"fiqh-of-muslim-minorities"/.

jurisprudence is human product that was formulated in vastly different socio-economic and political conditions.

Al-Alwani calls for a revival of *ijtihad* regarding the legal matters of Muslim minorities. He maintains that "our pioneering jurists bequeathed to us a golden rule which states: the changing of rulings should not be censured by the change of time."[59] To support this point, al-Alwani illustrates how the Prophet, and some of his companions, and other prominent Muslim jurists changed their legal opinions due to changing circumstances of time and space.[60] For instance, as a response to changing conditions, the caliph Umar refused to give a portion of zakat to *muallafat al-qulub* whose right to zakat had been explicitly stated in the Qur'an. Similarly, the Prophet prohibited visiting graves during a period of time, when people were still likely to ask help from the dead and even to worship them. However, later he permitted Muslims to visit graves, when he was sure that Muslims would not fall into wrong actions that were against Islamic belief system. He said "I had prohibited visiting graves for you. From now on you can visit graves".[61]

As for how the tools and sources of the *ijtihad* are to be employed, al-Alwani posits that the Qur'an must come first among the other sources. All other sources, including the Sunnah, are complimentary sources that elaborate the rulings and principles of the Qur'an. They must be understood in the light of the Qur'an. Al-Alwani expresses strong opposition to the practice of *taqlid,* which elevates the rulings of earlier jurists to

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[59] Alwānī, Ṭāhā Jābir Fayyāḍ. 2003 p.7
[60] Alwānī, Ṭāhā Jābir Fayyāḍ. 2003 p. 7
[61] Muslim, Janaiz, 106

the status of Qur'anic verses.[62] Al-Alwani insists on the authoritative primacy and supremacy of the *Qur'anic* text. For example, al-Alwani argues that Muslim jurists do not need to subscribe to the traditional binary vision of the world, which is neither derived from the Qur'an nor applicable in our current world. Rather, the Qur'an lays down the general principle on the issue, stating that

> God does not forbid you to be kind and equitable to those who have neither fought you on account of your religion nor driven you from your homes. God loves the equitable. But God only forbids you to be allies with those who have fought you because of your religion and driven you from your homes and abetted others to do so. Those that make friends with them are wrongdoers. (al-Mumtahanah: 8-9)

In reference to this verse, al-Alwani contends that Islam does not prevent Muslims from becoming part of the fabric of their respective non-Muslim majority societies unless the non-Muslims in their societies declare war upon them, or show hostility towards them on account of their religion. His understanding of this verse also indicates that he rejects the abrogation of this verse and other peaceful *Quranic* verses with sword verses promoting military attacks against non-Muslims until the superiority of Islam is acknowledged. Furthermore, al-Alwani advocates the combined reading of the Qur'an and the Universe, stating that the practice of *ijtihad* requires jurists to comprehend the underlying social factors and conditions in which Muslim minorities live. To this end,

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62 The statement of Ubaidullah al-Karkhī, a leading Hanafi jurist in the 10th century, is a typical example of this understanding. Al-Karkhi states: "every Qur'anic verse that goes against the opinion of our school shall be deemed liable to interpretation or altogether abrogated"
Dabūsī, 'Abdallāh Ibn-'Umar ad-, 'Ubaidallāh Ibn-al-Ḥusain al- Karḫī, and 'Umar Ibn-Muḥammad an- Nasafī. 1971. *Ta'sīs an-naẓar. wa-ma'ahū Risālat Abi-'l-Ḥasan al-Karḫī fi 'l-uṣūl allatī 'alaihā madār furū' al-Ḥanafīya, ma'a šawāhidihā wa-naẓā'irihā li-Abī-Ḥafṣ 'Umar an-Nasafī*. Al-Qāhira: Zakarīyā 'Alī Yūsuf. P. 116
The Arabic sentence given below is al-Karkhi's original statement. The translation is mine.

. الْأَصْلُ: أَنَّ كُلَّ آيَةٍ تُخَالِفُ قَوْلَ أَصْحَابِنَا فَإِنَّها تُحْمَلُ عَلَى النَّسْخِ أَوْ عَلَى التَّرْجِيْحِ.وَالْأَوْلَى أَنْ تُحْمَلَ عَلَى التَّأْوِيْلِ مِنْ جِهَةِ التَّوْفِيْقِ.

Muslim scholars must be equipped with the necessary training in the social and natural sciences so that they can issue legal opinions that address the conditions of the real world rather than simply the world described in earlier textual sources. Given the tremendous expansion of scientific knowledge, it is improbable for a single jurist to excel at all religious and modern sciences. Therefore, collaboration between scholars of Islamic law and scholars of modern sciences is needed for a proper understanding and implementation of *Shari'ah*. Those who are expert in the natural, social and humanistic sciences can help the traditionally trained jurists to actualize *Shari'ah*'s objectives (*maqasid)* in today's world. Al-Alwani's book gives a useful summary of his original vision of a new *fiqh* and juristic methodology.

Karen-Lise Johansen Karman: Rethinking Islamic Jurisprudence For Muslim Minorities

This is the first comprehensive study on the topic in English. It is a PhD. dissertation submitted to the University of Aarhus in 2008. This study is important because it is one of the few studies, which carries out a detailed survey of contemporary *fiqh* councils in conjunction with the major figures of *fiqh al-aqalliyyat.* The first part of the dissertation surveys the history of juristic discourse on the status and religious obligations of Muslim minorities from the 7th century to the present, and introduces essential concepts such as *ifta* (act of issuing a legal opinion by an authoritative consultant[63]), Muslim minorities, and *fiqh al-aqalliyyat.* This part summarizes how Muslim jurists have defined the status and obligations of Muslim minorities living in

63 Esposito, John L. 2003. *The Oxford dictionary of Islam*. New York: Oxford University Press. P. 132

non-Muslim lands. It presents an overview of fatwas given by numerous Muslim jurists in medieval and modern times in response to questions of Muslim minorities. However, her study does not discuss how medieval fatwa literature on the topic differs from the contemporary relevant fatwas. The second part of her dissertation examines three significant *fatwa* institutions that currently address the concerns of Muslim minorities: the European Council for Fatwa and Research, the Fiqh Council of North America, and the Islamic Research Academy of al-Azhar. Karman's study presents the historical backgrounds, structures, practices and impacts of these three institutions. I think that her assessment of these institutions' success in achieving their goals since their establishment gives a valuable analysis of the institutions. The third part of her dissertation then provides "textual analysis" of selective fatwas issued by the three institutions, with a focus on matters of relations between Muslims and non-Muslims, Muslim political participation and rituals (*ibadat*). As the first and one of the few comprehensive English sources on minority *fiqh,* Kamran's book is an important attempt to fill the gap in the literature of *fiqh al-aqalliyyat*.

Said Fares Ahmed Hassan: *Fiqh al-Aqalliyyat*: History, Development and Progress.

This book, published in 2013, is a shorter version of Hassan's 2011 UCLA dissertation entitled *Reaching from Within: establishing a new Islamic jurisprudence for Muslim minorities in the West*. Along with the same content of book, his dissertation provides an additional chapter in which he introduces seven essential studies that have made notable contributions to the discourse of minority *fiqh*. Whereas the literature review in the first chapter of his dissertation presents a summary of numerous studies that examine the socio-cultural and political status of Muslim minorities, the additional

chapter in the dissertation shifts the focus onto fatwa analysis of Muslim jurists and their view of *fiqh al-aqalliyyat*.

In his book, Hassan identifies three key trends related to internal debate among Muslim minorities living in the West that are attempting to find a balance between their religious commitment and their civic identity as citizens of non-Muslim majority states. He names these trends, "the puritan literalist trend", "the traditionalist trend", and "the renewal trend". Hassan summarizes main points of these trends as follows:

> The puritan-literalist trend continues to look at present- day Muslim immigrants through the lens of medieval jurisprudence, ignoring the contextual realities that led medieval jurists to take such positions. This trend argues that Muslim immigrants should not reside outside the abode of Islam without a legitimate reason…The traditionalist trend argues that the legal rulings pertaining to Muslim minorities, especially in modern-day conditions, require exceptional rules that are to be maintained as long as they are in the minority. The renewal trend asserts the need for a new category of jurisprudence and a new methodology that generates a framework of objectives, characteristics, and fundamentals of a minority-based *fiqh,* which is to be known as *fiqh al-aqalliyyat.*[64]

Alongside the analysis of the three trends' background, development and current conditions of the three trends, Hassan specifically concentrates on the discourse of the minority *fiqh* sustained by scholars of the renewal trend. Unlike most of other studies that are limited to specific fatwas and case studies, Hassan's book provides a historical background to *fiqh al-aqalliyyat* that is closely related to legal precedents in the history of Islamic law. He asserts that virtually no scholarly attention has been given to historical development of the doctrine's principles, foundations and origins, which can be traced back to as early as the early centuries of Islam. Additionally, Hassan presents a

[64] Hassan, Said Fares Ahmed. 2011. p. 5

comprehensive review of fatwas issued by scholars of al-Azhar, ECFR and the Fiqh Council of North America.

These four authors, Yusuf al-Qaradawi, Taha Jabir al-Alwani, Karen-Lise Johansen Karman, and Said Fares Ahmed Hassan have made significant contributions to the discourse of *fiqh al-aqalliyyat*, especially considering the inadequate number of sources on the topic. Nevertheless, it seems that none of these studies systematically expounds how the concept of *fiqh al-aqalliyyat* differs from *fiqh al-nawazil* or the traditional *fiqh* literature. Without answering *this* question, it is hard to prove the argument that a new juristic methodology is necessary for legal issues of Muslim minorities. The necessity for a new juristic methodology for minorities sounds plausible, provided that the methodology of *fiqh al-aqalliyyat* lays out new principles and methods that can resolve obstacles standing in the way of Muslims' integration into their societies in ways that the traditional methodology of *fiqh al-nawazil* cannot. I will point to some major differences between the two concepts in Chapter Four.

CONCLUSION

In this chapter, I introduced the three key figures and some essential sources of *fiqh al-aqalliyyat* as well as objectives of *fiqh al-aqalliyyat*. In the next chapter, I discuss a key element of the methodology of *fiqh al-aqalliyyat*: the concept of *ijtihad.* I also analyze which juridical sources and methods scholars of minority *fiqh* frequently employ to practice *ijtihad.*

Chapter Two - The Concept of *Ijtihad* and Juristic Sources of *Fiqh Al-Aqalliyyat*

INTRODUCTION

In this chapter, I begin to discuss the practice of *ijtihad,* which has a central role in the methodology of *fiqh al-aqalliyyat*. The practice of *ijtihad* enables scholars of the minority *fiqh* to issue fatwas regulating Muslim minorities' lives in a way that achieve the primary objectives of this *fiqh*. After giving the definition of *ijtihad*, I provide a brief historical background of essential sources of *ijtihad* and the concept of *ijtihad* to show changes the practice of *ijtihad* has undergone over the course of Islamic history. Then, I expound main juristic methods scholars of *fiqh* of minorities employ when they exercise *ijtihad.*

THE CONCEPT OF *IJTIHAD*

The definition of *ijtihad* has undergone various changes throughout Islamic legal history.[65] Abū ʿAbdullāh Muhammad ibn Idrīs al-Shāfīʿī (d. 820)[66], the founder of Shafi' school of law, was one of Islamic legal theory's (*Usul al-Fiqh*) earliest scholars to refer to *ijtihad*.[67] In his work *al Risala*, he considers *ijtihad* to be the same thing as *qiyas*.[68] About three centuries later, Imam al-Ghazali and Ibn Shirazi argued that the meaning of

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65 Campo, Juan Eduardo. 2009. *Encyclopedia of Islam*. New York: Facts On File. entry: Ijtihad p.346

66 Calder, Norman , Joseph A. Kéchichian, Farhat J. Ziadeh, Abdulaziz Sachedina, Jocelyn Hendrickson, Ann Elizabeth Mayer and Intisar A. Rabb. "Law." In *The Oxford Encyclopedia of the Islamic World*. *Oxford Islamic Studies Online*, Vol. 3 p. 235

67 Karaman, Hayreddin. 1975. *İslam hukukunda ictihad*. Ankara: [Diyanet İşleri Başkanlığı]. p.16

68 Albarghouthi, A. (2013). *Interpreting on the fault lines: Ijtihad and religious interpretation among muslim academics and community leaders in north america.* (Order No. NR94198, Wilfrid Laurier University (Canada)). *ProQuest Dissertations and Theses*. P.29

ijtihad is broader than *qiyas*.[69] According to al-Ghazali, *ijtihad* contains all methods of inquiry in addition to *qiyas* that seeks to discern rules of Islamic law on matters that are not explicitly stated in the Quran and the Sunnah. Introducing yet another perspective, some Muslim thinkers in the colonial/postcolonial period such as Muhammad Iqbal and Muhammad Abduh deemed *ijtihad* another name for intellectual and social reform for Islam.[70] These differences in the definition of *ijtihad* point to historical variation in Muslim jurists' understanding of *ijtihad*. Of all definitions, that of Hallaq seems the most comprehensive. He states:

> As conceived by classical Muslim jurists, *ijtihad* is the exertion of mental energy in the search for a legal opinion to the extent that the faculties of the jurist become incapable of further effort. In other words, *ijtihad* is the maximum effort expended by the jurist to master and apply the principles and rules of *usul al-fiqh* (legal theory) for the purpose of discovering God's laws.[71]

According this definition, *ijtihad* is a considerable mental effort to comprehend God's laws, and there are specific rules and principles Muslim jurists need to follow when they practice *ijtihad.* These rules and principles are formulated by *usul al-fiqh,* which is *"*the science of sources and methods of the Islamic law." *Usul al fiqh* functions as guidelines for jurists to regulate *ijtihad*. Following a brief historical background of some essential sources of *ijtihad* and the concept of *ijtihad*, I examine four fundamental juristic tools of the minority *fiqh* in this chapter.

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[69] Albarghouthi, A. (2013). P.32

[70] Martin, Richard C. 2004. *Encyclopedia of Islam and the Muslim world*. New York: Macmillan Reference USA, Vol.1 p.344

[71] Hallaq, Wael B. 2011. "Was the Gate of Ijtihād closed?" *Islamic Law.* 3: 3-47.

HISTORICAL BACKGROUND OF *IJTIHAD* AND IMPORTANT SOURCES OF *IJTIHAD*

In his book, *A History of Islamic Legal Theories*, Hallaq traces the history of Islamic legal theory from its inception to the 20th century. In his opening chapter, he deals with the formative period in Islamic law, which covers the first three centuries of Islam. Unlike legal historians' the traditional classification, which divides the development of Islamic legal history into six major periods according to significant events,[72] Hallaq presents a centennial division of the legal history.[73]

When discussing sources of Islamic law in the first century of Islam, he argues that the Quran has held primary importance among sources of Islamic law since the life of the Prophet. According to Hallaq, there were two sources of Islamic law in the first century of Islam: the Quran and pre-Islamic Arab customary law. The theory of abrogation also came into existence in relation to the Quran in this period. As for the recognition of the Sunnah as a source of Islamic law, Hallaq defends a position against modern Western scholarship's prevailing view that most of the legal hadiths were historical fabrications formed centuries after the death of the Prophet[74], a view espoused in particular by Ignaz Goldhizer and Joseph Schacht.[75] However, Hallaq's position is also distinguished from the traditional Sunni view of Islamic law, which regards the Sunnah

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[72] Esposito, John L. 1999. *The Oxford history of Islam*. New York, N.Y.: Oxford University Press. 114
Zarqā', Muṣṭafá Aḥmad. 1967. *Al-madẖal al-fiqhī al-'ām: al-fiqh al-islāmī fī ṯawbih al-ğadīd Vol. 1.* . Dimašq: Dār al-fikr.
Ḫuḍarī, Muḥammad al-. 1339. *Ta'rīḫ at-tašrī' al-islāmī*. Kairo: Dār iḥyā', al- kutub al- arabīya.
Ekinci, Ekrem Buğra. 2006. *İslâm hukuku tarihi*. İstanbul: Arı Sanat Yayınevi

[73] Hallaq, Wael B. 1997. *Islamic legal theories: an introduction to Sunni usul al-fiqh*. Cambridge: Cambridge University Press. p. 16

[74] Powers, David. 2010. "Wael B. Hallaq on the Origins of Islamic Law: A Review Essay".*Islamic Law and Society*. 17 (1): 126-157.

[75] Motzki, Harald. 2002. *The origins of Islamic jurisprudence: Meccan fiqh before the classical schools*. Leiden: Brill. p xi, 10

as an available legal source from the time of the Prophet onward[76]. Instead, he adopts a middle position by claiming that the Prophetic Sunnah which had existed since the beginning of Islam only began to be regarded as a source of Islamic law in the 60s (A.H.)/720s.[77]

As mentioned by Hallaq in his first chapter, Islamic jurisprudence began to appear at the beginning of the second century of Islamic history (A.H.). In the second half of this century, Muslim jurists conceived *istihsan* (juristic preference) as a valid method in Islamic law and *ijma* (consensus) as an authoritative source for the same. [78] Similarly, Imam Shafi'i began to use *qiyas* as a technical term for the first time at the end of the second century, despite the fact that at the beginning of this century, the method of *qiyas* was already known under various other names.[79] As the earliest extant work on *usul al-fiqh*, Imam Shafii's *al-Risala* points to authority of the Sunnah, and introduces the concepts of *qiyas* and *ijtihad*. However, it is clear that Hallaq does not consider *al-Risala* to be the first work on *usul al fiqh*, as he does not regard Imam Shafi'i as the architect of Islamic jurisprudence. Rather, he states that Shafi'i made contributions to the establishment of Islamic jurisprudence. This does not mean that Shafii was the first Muslim jurist who formulated *usul al-fiqh* as a legal methodology. Indeed, Hallaq asserts that research indicates that the science of *usul fiqh* did notcomplete its formation until the

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[76] Dutton, Yasin. 1999. *The origins of Islamic law: the Qur'an, the Muwaṭṭa' and Madinan 'Amal*. Surrey, England: Curzon. P.1
Souaiaia, Ahmed E. 2011. "On the Sources of Islamic Law and Practices". *Islamic Law.* 1: 62-84

[77] Hallaq, Wael B. 2005. *The origins and evolution of Islamic law*. Cambridge, UK: Cambridge University Press. p. 56

[78] Hallaq, Wael B. 1997 p.31

[79] Hallaq, Wael B. 2005. P. 114-5

beginning of fourth century in which *usul al fiqh* took an "organically structured" form that consisted of organically interdependent and interconnected components such as epistemology, consensus, legal language, consensus, and *qiyas*.[80]

According to many scholars, the 4th/10th century was the period in which four prominent "doctrinal schools", (*madhhab*s), reached their mature stages,[81] and Muslim jurists began to show a tendency toward *taqlid* over *ijtihad*.[82] What is more, from the fourth century onward, the notion that the gate of *ijtihad* was closed took hold; this notion grew in popularity among Muslims jurists until the twentieth century[83]. Sectarianism among the members of various doctrinal schools prevented many jurists from drawing on the rulings and principles of other doctrinal schools.[84] Yet more recently, contact with Western modernity and colonialism have propelled Muslim jurists to question the appropriateness of *taqlid* and unquestioned sectarian adherence to a *madhhab.* I will touch on the reason behind this debate briefly in the section of *the codification of Islamic law.* This skepticism has been expressed in international conferences such as the first Conference of the Academy of Islamic Research that was held in Egypt in 1964. Eighty-two Muslim jurists from 40 different countries in this conference arrived at a decision that the gate of *ijtihad* is still open for qualified Muslim jurists and it is completely

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80 Hallaq, Wael. 2004. "Was al-Shafi'i the master architect of Islamic jurisprudence?" *The Formation of Islamic Law*. 257-275.

81 Hallaq, Wael B. 2005. 167

82 Ibn Khaldūn. 1902. *al-Muqaddimah*. [Al-Qāhirah]: Al-Maṭba'ah al-Amīrīyah bi-Būlāq. p.426
Ibn Ḥazm, 'Alī ibn Aḥmad, and Muḥammad Aḥmad 'Abd al-'Azīz. 1978. *al-Iḥkām fī uṣūl al-aḥkām*. [Cairo]: Maktabat 'Āṭif Vol.6 p.142

83 Esposito, John L. 1999 p. 115

84 Karaman, Hayreddin. 1975, p.203

permissible – and even recommended -- to use the fatwas of all Islamic law schools without any strict adherence to any one school of law, when necessary.[85]

SIGNIFICANT METHODS OF *FIQH AL AQALLIYYAT*

The methodology of *fiqh al-aqalliyyat* hinges on certain juristic techniques and sources. These methods and sources play key roles in issuance of fatwas that are in harmony with the objectives of minority *fiqh.* I will examine four juristic methods on which al-Qaradawi[86], Jabir al-Alwani[87] and Tariq Ramadan[88] lay great emphasis. These methods are *takhayyur* (selective *ijtihad*), *ijtihad al-jama'i* (the collective *ijtihad*), *maslaha mursala* (unrestricted public interest), and *fiqh al-waqi'* (contextual analysis).

Takhayyur (Selective *Ijtihad*)

Takhayyur literally means "selection". There are two types of *takhayyur*[89]. The first type of *takhayyur* is "the eclectic selection of legal opinions both from within and without the school with the aim of accommodating the changing conditions of modern Muslim societies."[90] Using this juristic method, a Muslim jurist affiliated with a specific school of law can select a legal opinion from other schools of law, when s/he gives a fatwa. This type of *takhayyur* has been widely employed by modernist Muslim scholars

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85 Majma' al-Buḥūth al-Islāmīyah. 1964. *The first conference of the Academy of Islamic Research*. P.14

86 Qaraḍāwī, Yūsuf. 2001. *Fī fiqh al-aqallīyāt al-Muslimah: ḥayāt al-Muslimīn wasaṭ al-mujtama'āt al-ukhrá*. al-Qāhirah: Dār al-Shurūq. 24

87 Alwānī, Ṭāhā Jābir Fayyāḍ. 2003. *Towards a fiqh for minorities: some basic reflections*. London: International Institute of Islamic Thought. P.17

88 Ramadan, Tariq. 2004. *Western Muslims and the future of Islam*. Oxford: Oxford University Press. p.37

89 Kamali, Mohammad Hashim. 2008. *Shari'ah law: an introduction*. Oxford: Oneworld. P.95

90 Esposito, John L. 2009. *The Oxford encyclopedia of the Islamic world*. New York, N.Y.: Oxford University Press. Vol. 5 p. 327

as an effective method to carry out Islamic legal reform in ways meant to address changing circumstances in modern Muslim societies. For instance, the waiting period for a Muslim wife whose husband goes missing is ninety years according to the Hanafi school while this period is just four years according to the Hanbali school. In the Dissolution of Muslim Marriages Acts, 1939 in India, Muslim jurists embraced the opinion of the Hanbali school by using the method of *takhayyur*. In the last two century, *takhayyur* became an essential juristic tool among reformist jurists to achieve necessary and desired legal reforms. Scholars of *fiqh al-aqalliyyat* also adopted this juristic method in their methodology.

The second type of *takhayyur*[91] is the practice of combining the legal opinions from different schools of law to create a new ruling.[92] This practice does not only enable jurists to draw on a single opinion outside their schools of Islamic law, but it also authorizes the jurists to create a new legal opinion by combining multiple rulings in a single decision. One example of this practice comes from the 1958 Moroccan Family Code, known as the *Mudawwana* (collection). Article 49 in the first chapter of the Code describes the circumstances under which repudiation (unilateral divorce by the husband) is invalid. Article 49 states that " Repudiation pronounced by one who is blind drunk, who acts under compulsion, or who is uncontrollably or violently angry, is without

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[91] This method is also called *talfiq*, but I presented it here as a variation of takhayyur in order to give an easier explanation of *takhayyur*. It is also mentioned as a variation of takhayyur in various sources.

[92] Ibrahim, Ahmed Fekry, and Felicitas M Opwis. 2011. *School Boundaries and Social Utility in Islamic Law: The Theory and Practice of Talfiq and Tatabbu' Al-Rukhas in Egypt*. P.32

effect."[93] This article illustrates a combination of legal rulings represented by different schools of law in a specific topic, repudiation. According to article 49, the husband's repudiation is rendered ineffective, when the husband is completely intoxicated, or uncontrollably angry, or acts under compulsion. Although the Moroccan government enacted the code based on mainly Maliki School of Islamic family law,[94] it has characteristics of other major schools of law, as well. None of the major Sunni schools of law approves this article in its entirety. In order to limit the husband's right to unilaterally declare his wife divorced, the Moroccan reformers resorted to the practice of combining legal opinions of other legal schools as well as Maliki school of law. For example, the provision on the ineffectiveness of a divorce in a state of uncontrollable anger is attributed to the Hanafites[95], while the provision, a repudiation pronounced by the husband who under duress is ineffective, is attributed to the Malikites.[96] Although examples of this type of *takhayyur* are less than those of the first type of *takhayyur*, it is still regarded as an important juristic method among scholars of *fiqh al-aqalliyyat*

Minority *fiqh* scholars who adopt the practice of *takhayyur* point out that any ruling derived from this method should not contradict the consensus of the

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93 Anderson, Norman. 1958. "Reforms in family law in Morocco". *Journal of African Law*. 3 (3): 147-159.

94 Welchman, Lynn. 2004. *Women's rights and Islamic family law: perspectives on reform*. London, UK: Zed Books. P. 269

95 Anderson, Norman. 1958.

96 Intoxication as a reason to invalidate repudiation is contrary to the dominant doctrines of the Hanafi, Shafi'i and the Maliki schools of law. Yet it represents legal opinions of later jurists in the Maliki school of law

Companions.[97] The practice described in the following quotation is an example of *takhayyur* that does conflict with the consensus of the Companions.

> A person marries his daughter off with no guardian (*walī*), according to the Ḥanafī school, no witnesses according to the Mālikī school and no dowry according to the Shāfi'ī school, turning marriage into fornication.[98]

As indicated in the quotation, each school of law offers different leniencies in rulings related to marriage. For example, a lack of dowry is permissible in Shafi'i legal school, and lack of witness is allowed in Maliki legal school. However, these dispensations are sometimes requirements for a valid marriage in other legal schools. Accordingly, when a person combines leniencies of all legal schools to form a new ruling, it becomes a ruling that is in opposition to all legal schools.[99]

It is clear that al-Qaradawi, al-Alwani and Ramadan consider *takhayyur* as an effective legal method to address the needs of Muslims in the West. It helps Muslim jurists provide solutions to concerns and questions of Western Muslims without going outside the framework of Islamic legal heritage. Jabir al-Alwani states that the purpose of *fiqh al-aqalliyyat* is not to "recreate Islam, rather it is a set of methodologies that govern how a jurist would work within the flexibility of the religion to best apply it to particular

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97 Al-Qaradawi,Yusuf, 2013 Ikhtilaf al-Eimmah wa Hukm al-Taqlidihim. Accessed August 6, 2015.
Bānī, Muḥammad Sa'īd. 1981. *'Umdat al-taḥqīq fī al-taqlīd wa-al-talfīq: wa-huwa farīdah wajīzat al-mabná*. Bayrūt: al-Maktab al-Islāmī. 213

98 Samhūdī, 'Alī ibn 'Abd Allāh, and Abū Ḥamzah Anwar ibn Abī Bakr al-Shaykhī Dāghistānī. 2011. *al-'Iqd al-farīd fī aḥkām al-taqlīd*. Jiddah: Dār al-Minhāj.

99 Similar to *takhayyur*, the method of *talfiq* has been in practice since pre-modern times. Nevertheless, Ahmed Fekry Ibrahim argues that the term "*talfiq*" has evolved in modern times to include the meanings of both *takhayyur* and *talfiq*. Therefore, sometimes confusion over the meaning of the term occurs, especially in works written by Western scholars in the modern period.

circumstances."[100] To this end, it seems that the practice of *takhayyur* serves modern Muslim minorities well.

Al-Ijtihad al-Jama'i (Collective *Ijtihad*)

Collective *ijtihad* is defined as "the consensus of more than one *mujtahid* or jurist on a certain Shari'ah rule, into which all had put their efforts to derive the ruling from the relevant sources."[101] Like many modernist jurists, scholars of *fiqh al-aqalliyyat* underscore the necessity of the collective *ijtihad*. Al-Qaradawi states "the *ijtihad* that is needed in this era is *al-ijtihadi al-jama'i--ijtihad* as a collective reasoning of the community."[102] Proponents of collective *ijtihad* give numerous reasons why the collective *ijtihad* is supposed to be instituted. First, this type of *ijtihad* is in harmony with the Quranic principle of consultation, *al-shura*. The Quran encourages Muslims to conduct their affairs through consultation. (42:28) Secondly, the emerging problems and issues of modern life require "collaboration of various scholars from various fields in order to render practical relevant fatwas."[103] Indeed, It is difficult, perhaps impossible, for a Muslim jurist to provide satisfactory answers to questions pertaining to all aspects of contemporary life. In addition to comprehensive knowledge of the four legal schools' perspective on each topic, a Muslims jurist would also have to be an expert in various other sciences, including the fields of business, medicine and sociology, in order to issue

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100 Al-Alwani, Taha Jabir. "Fiqh of the Muslim Minorities - Dr. Taha Jabir Al-Alwani." The Message of Islam. Accessed August 6, 2015.

101 Hasan, A. 2003. "An Introduction to Collective Ijtihad (Ijtihad Jama`i): Concept and Applications". *The American Journal of Islamic Social Sciences.* 20: 26-49.

102 Black, E. Ann, Hossein Esmaeili, and Nadirsyah Hosen. 2013. *Modern perspectives on Islamic law*. P.101

103 Hassan, Said Fares Ahmed. 2011 p.250

an adequate ruling on any legal issue. Additionally, many scholars think that the legal decisions of a collective body might be superior to individual verdicts, even though they might not be equal to classical consensus in terms of their authority.[104] For the proponents of collective *ijtihad*, the effort to establish a body of Muslim jurists is a major step forward for establishing *ijma*' in the contemporary world. With the purpose of gaining the aforementioned benefits of a collective body of jurists, some scholars of *fiqh* of minorities, including al-Qaradawi and al-Alwani have established the *European Council for Fatwa and Research* (hereinafter ECFR).

The ECFR, established in London, has held meetings once or twice a year since 1997.[105] The Council has about thirty scholars, the majority of whom live in the Western nations. The Council states its objectives as follows:

> The objective of this Council is to promote a uniform Fatwa in Europe and to prevent controversy and intellectual conflicts regarding the respective issues wherever possible. In its endeavor to achieve this objective, the Council will use means of consultation and joint research as well as group Ijtihad, which has today become an Islamic obligation and necessity.[106]

The Council considers group *ijtihad* (collective *ijtihad*) as an Islamic obligation and necessity. Given the amount of confused people due to an explosion of fatwas issued by individual jurists,[107] the need for collective *ijtihad* becomes clearer. Because of its importance, the concept of collective *ijtihad* has a significant place in the methodology of *fiqh al-aqalliyyat.*

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104 Hasan, A. 2003.

105 Caeiro, Alexandre. 2011. "The making of the fatwa". *Archives De Sciences Sociales Des Religions.* (155): 81-100.

106 *European Council for Fatwa and Research: first collection of Fatwas*. 1999. Cairo: Islamic p.21

107 Antoun, Richard T. 2008. *Understanding fundamentalism: Christian, Islamic and Jewish movements*. Lanham [etc.]: Rowman & Littlefield. P.142

***Maslaha Mursalah* or *Istislah* (Unrestricted Public Interest)**

Literally, *maslaha* means public interest, benefit, well-being and welfare.[108] In contrast to *mafsadah*, which means a source or cause of harm for humanity, *maslaha* refers to a source or cause of something beneficial for humanity.[109] As for the term *maslaha mursalah,* it is a juristic method in Islamic jurisprudence. In the literature of Islamic jurisprudence, *istislah* and *maslaha mursala* are used interchangeably. *Maslaha mursalah* refers to "unrestricted public interest in the sense of its not having been regulated by the Lawgiver insofar as no textual authority can be found on its validity or otherwise."[110]

Maslaha mursalah is generally mentioned in conjunction with the objectives of *Shari'ah* because *maslaha* is harmonious with the objectives of Shari'ah. According to many scholars, there are three levels of objectives that *Shari'ah* aims to fulfill[111]: the necessities (*daruriyyat*), the complementary requirements (*hajiyyat*), and the embellishments (*tahsiniyyat*). From the viewpoint of legitimacy, there are three types of *maslaha*: a) *maslaha mu'tabarah* (accredited *maslaha*), b) *maslaha mulghah* (invalidated maslaha), and c) *maslaha mursalah* (unrestricted *maslaha*). The first type of *maslaha* is upheld by the Quran and the Sunnah, whereas the second one is nullified directly or indirectly by the two main sources of Islamic law. In contrast to these two, *maslaha mursalah* refers to "unrestricted public interest in the sense of its not having been

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108 Opwis, Felicitas. 2005. "Maslaha in Contemporary Islamic Legal Theory". *Islamic Law and Society.* 12 (2): 182-223.

109 Opwis, Felicitas. 2010. *Maṣlaḥa and the purpose of the law: Islamic discourse on legal change from the 4th/10th to 8th/14th century*. Leiden [etc.]: Brill.. p. 1

110 Kamali, Mohammad Hashim. 2003 p.235

111 Kamali, Mohammad Hashim. 2003 p.235

regulated by the Law giver insofar as no textual authority can be found on its validity or otherwise."[112] Additionally, some scholars like Imam al-Shatibi acknowledged *maslaha mursalah* as an independent source of Islamic law.

Imam al-Ghazali and Imam al-Shatibi are two central figures whose works on the concept of *maslaha* are deemed seminal as their thoughts on the concept seems to have paramount importance on how later scholars of *fiqh al-aqalliyyat* understand and apply *maslaha*. Thus, I describe the approaches of these two scholars in brief. While the term "*maslaha*" is found in extant literature dating back to the second century of Islam, the concept of *maslaha* was first defined as a source of Islamic legal theory in the fifth century of Islam.[113] Al-Ghazali, considered the first Muslim scholar who identified *maslaha* as a source of law, asserted that the only type of valid *maslaha* is *maslaha mu'tabarah*, which is clearly supported by the texts. In addition, it is clear according to al-Ghazali that any *maslaha* nullified by the texts is invalid. He did not consider *maslaha mursalah* and *maslaha mursalah* valid unless they were means to preserve the necessary objectives of *Shari'ah*, that is, religion, life, intellect, progeny and property. He gives an example of a valid *maslaha* in his book,

> If unbelievers shield themselves with a group of Muslim captives, to attack this shield means killing innocent Muslims… If Muslim attack is withheld, the unbelievers advance and conquer the territory of Islam. In this case it is permissible to argue that even if Muslims do not attack, the lives of the Muslim captives are not safe. The unbelievers, once they conquer the territory, will rout out all Muslims. If such is the case, then it is necessary to save the whole of the Muslim Community rather than to save a part of it. This would be the reasoning which is acceptable, as it refers to the above three qualifications. It is daruri

[112] Kamali, Mohammad Hashim. 2003 p.235

[113] Opwis, Felicitas. 2005.

> because it consists of preserving one of the five principles, i .e protection of life. It is qati because it is definitely known that this way the lives of the Muslim community will be safe. It is kulli, because it takes into consideration the whole of the community, not a part of it.[114]

Thus, there are two types of valid *maslaha* in al-Ghazali's view: *maslaha mu'tabarah* and *maslaha mulghah/mursalah* at the level of "necessity." The quotation above demonstrates that killing innocent Muslims is something clearly prohibited by the Quran and the Sunnah. However, in order to protect the lives of Muslim community as a whole, al-Ghazali argues by way of *maslaha mulghah* that it is permissible to kill the captive Muslims. Additionally, both Imam al-Ghazali and Imam al-Shatibi are in agreement on the validity of *maslaha mulghah* when binding objectives of the Shari'ah are in danger.

In contrast to al-Ghazali, al-Shatibi did not limit the consideration of *maslaha* to the two types I mentioned. He also acknowledged *maslaha mursala* as an independent source that could be used to fulfill all levels of *Shari'ah* objectives. Al-Shatibi cites ten examples that demonstrate how the companions of the Prophet made use of *maslaha mursa*la as an independent source of Islamic law, such as for the collection of Quran, the establishment of prisons and the use of currency. According to al-Shatibi, the motive behind these practices of the companions is not any concrete indicant (*dalīl*) in the Quran or the Sunnah, but rather the public interest secured by these practices. However, al-Shatibi affirms that some matters in Islamic law are off limits to the consideration of

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[114] Masud, Muhammad Khalid. 1973. *Shāṭibī's philosophy of Islamic law an analytical study of Shāṭibī's concept of maṣlaḥa in relation to his doctrine of maqāṣid al-sharī'a with particular reference to the problem of the adaptability of Islamic legal theory to social change*. Thesis (Ph. D.)--McGill University, 1973. P.259

maslaha mursalah, because these topics are clear-cut injunctions and/or beyond what human intellect can discern. Accordingly, rituals (*ibadat*), capital punishments (*hudud*), penances (*kaffarat*), and the fixed entitlements in inheritance (*fara'id*) are outside the framework in which the principle of *maslaha* can be employed.[115]

Yusuf al-Qaradawi embraces al-Shatibi's approach to the principle of *maslaha*. In relation to *fiqh al-aqalliyyat*, this implies that *both maslaha mulgha* at the level of necessity and *maslaha mursalah* at all levels of the Shariah's objectives are valid and can be taken into consideration as a source of Islamic law. Pertaining to *maslaha mulghah*, al-Qaradawi strongly emphasizes that the texts cannot be suspended by virtue of a *maslaha* unless the *maslaha* in question is essential to preserve a binding objectives of the Sharia at the *daruriyyat* level. He affirms that a specious *maslaha* (*maslaha wahmiyyah*) cannot abrogate a ruling whose evidence is definitive (*qat'i*) in both its meaning and authenticity, and it is impossible that a definitive scriptural ruling contradicts a genuine *maslahah* (*maslaha haqiqiyya*).[116] *Maslaha mursalah* at any level of the *Shari'ah*'s objectives can be used as a source of Islamic law as it does in legal opinions pertaining to photography and watching TV. As a matter of fact, the permissibility of photography and watching TV originates from the public interest, since the texts remain silent on the two issues. In spite of a hadith that seemingly indicates impermissibility of them, al-Qaradawi

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[115] Shāṭibī, Ibrāhīm ibn Mūsá, and Muḥammad Mahdī Sharīf. 2012. *Kitab al-I'tisam = Kitāb al-i'tiṣām*. Beirut: Dar al-Kotob al-Ilmiyah. P.314

[116] Qaraḍāwī, Yūsuf al-. 2000. P.76

supports the view that the *maslaha* related to the two issues is genuine, and it legitimizes photography and watching TV.[117]

***Fiqh al-Waqi'* (Contextual Analysis)**

Yusuf al-Qaradawi,[118] Jabir al-Alwani,[119] and Tariq Ramadan[120] all insist that jurists must consider not only the Qur'an and Sunnah, but also human and social contexts when they perform *ijtihad*. Experimental and social sciences have played an increasingly significant role in understanding these contexts. Since it is virtually impossible for an individual to excel at all sciences necessary for *ijtihad*, al-Qaradawi, al-Alwani and Ramadan emphasize that jurists need "the context scholars"[121] who help the jurist grasp the scientific and/or social context more fully. More importantly, the context scholars are influential in deciding whether a *maslaha* is at the rank of necessity, complementarity or embellishment, because they know the ethics of their fields better than the religious specialists do. For example, contemporary jurists' decisions on smoking and interest-based mortgage are deeply dependent on the commentary of doctors, sociologists and economists, who can determine much more precisely on how much harm smoking causes to human health or on how important it is to own a house. The decision about whether a matter is really one of necessity, or merely a complimentary may change definitive

117 Qaraḍāwī, Yūsuf al-. 2006 p.76
118 Qaraḍāwī, Yūsuf. 2001 p.44
119 Karman, Karen-Lise Johansen. 2008. P. 52
120 Ramadan, Tariq. 2009. *Radical reform: Islamic ethics and liberation*. Oxford: Oxford University Press. P.100
121 Ramadan, Tariq. 2009. P.127

scriptural prohibitions into permissions. For example, Sheikh Muhammad Al-Mukhtar Al-Shinqiti writes:

> As for giving the adopted child your last name, it is not allowed in principle, for the Quran says: "Call them (adopted sons) by (the names of) their fathers: that is more just with Allah" (33: 5). However, it is considered sometimes a case of *darurah* (necessity), especially in non-Muslim countries, to give the adopted child your last name in order to avoid many legal complications. Therefore, some contemporary Muslim scholars have permitted giving the adopted child your last name in case of necessity.[122]

In consideration of necessity, jurists allow adoptive parents to give adopted children their family names. The jurists come to this decision on the basis of the context scholars' commentaries on this issue.

As mentioned in the subsection of *maslaha mursalah*, *hudud* penalties (capital punishments in Islamic law) are regarded among immutable areas in Islamic law, because they are stated clearly in the Quran and the Sunnah. However, rulings in relation to *hudud* can be suspended when social circumstances change. Tariq Ramadan's moratorium on *hudud* is an example of this:

> When the text is *qat'i,* there still is an *ijtihad* as to the way it is going to be implemented. So there is *ijtihad* as I put it in my last book, *Radical Reform,* there is a double way to deal with *ijtihad*: *ijtihad fahm al-nass,* and *ijtihad tatbiq al-nass 'ala alwaqi'* which is really an important point here…Many people were telling me you are undermining the essence of *qat'i* and *qat'iyyat al-nass,* and I said no, I am not disputing *qat'iyyat al-nass,* I am disputing *tatbiq al-nass al-qat'i fi al-waqi' al-mu'ayyan.* For example 'Umar ibn al-Khattab decided not to implement the al *nass al-qat'i, " wa al-sariq wa al-sariqah faqta'u aydiyahuma",* that you have to cut the hands of the thieves, men and women. Despite the fact that the *nass* is *qat'i,* he thought that circumstances for the punishment were not convenient. So there are many levels here, it is quite complex."[123]

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122 Parray, T.A. 2012.

123 Since the original quote was taken from a phone interview, it needed to some corrections, and I tried to restate some sentences of Ramadan without changing his main points.

Tariq Ramadan does not discard traditional interpretations concerning *hudud* penalties. Rather, he points out that implementation of an explicit scriptural command necessitates consideration of the context as well as the texts. In my opinion, the principle of *fiqh al-waqi'* is quite similar to the principle of *maslaha*, especially in the matters pertaining to "necessity." However, the participation of scientists from social and experimental sciences into decision issue legal rulings appears as a distinguishing characteristic of *fiqh al-waqi'*.

CONCLUSION

The practice of *ijtihad* is an essential element of the methodology of *fiqh al-aqalliyyat.* Muslim jurists' approach to the concept of *ijtihad* determines how they deduce their legal opinions from sources of Islamic law. Due to its importance, first I provided a brief overview the concept, and then I introduced some of the fundamental juristic tools of *fiqh al-aqalliyyat*'s methodology. In the next chapter, I will give four examples of how the three scholars of minority *fiqh* applied juristic tools.

Chapter Three - Juristic Methodology in Application

INTRODUCTION

In this chapter, I analyze the legal opinions of the three scholars, al-Qaradawi, al-Alwani and Ramadan, on four different questions that have received ample attention in the field of *fiqh al-aqalliyat*: (1) the permissibility of a Muslim's permanent residency in a non-Muslim country, (2) the permissibility of a woman to remain married to her non-Muslim husband should she convert, (3) the permissibility of interest-based mortgage loans, and (4) and the permissibility of a Muslim inheriting from a non-Muslim relative.

PERMANENT RESIDENCY IN A NON-MUSLIM COUNTRY

The question of whether a Muslim can reside in a non-Muslim-majority country has been a topic of juristic debate since the 8th century.[124] The question is crucial since it is foundational to many other issues such as whether it is permissible "to adopt the nationality of a non-Muslim-majority state, to participate actively in its political life, to perform military service in its army, and to accept the prevailing (secular) rules of its system of family law."[125] In addition, some scholars of classical Islamic law have debated whether it is obligatory for a convert to Islam in non-Muslim-majority country to

[124] El Fadl, Khaled Abou. 1994.

[125] W. Shadid & P.S. van Koningsveld *Political Participation and Identities of Muslims in non-Muslim States.* Kok Pharos, 1996, p. 84-115

immigrate to a Muslim-majority country. Of all these topics, I limit my examination to the permissibility of Muslims' permanent residence in non-Muslim countries.

The origin of this debate lies in a binary view of the world, namely the classical division of the world into abode of Islam (*Dar al-Islam*) and abode of war (*Dar al-harb*). Interestingly, these concepts are not to be found belong to the Quran, or the Sunnah.[126] Rather, the political and social contexts of jurists who lived during the medieval period were heavily influential on the development of this categorization. For instance, the conquest of Sicily and Granada by non-Muslims affected Maliki scholars, especially on the issue.[127] After the fall of Granada, the fatwas of the Maliki jurist al-Wansharisi (d.1508) declared that Muslim residence in a non-Muslim territory was not permissible, even if the non-Muslim territory was just, and the Muslim territory was unjust. While medieval jurists agreed on this binary division of the world, the lack of a clear-cut reference to this division in the Qur'an and the Sunnah led later Muslim jurists to reach different definitions of these terms and to offer different legal opinions. As an illustration of this diversity, Hanbali scholars defined *dar al-Islam* as a territory whose government and law system were Islamic; whereas Abu Hanifa, the eponym of the Hanafi school of law, identified *dar al-Islam* as a territory in which Muslims were safe and experience freedom of religion.[128] According to Abu Hanife's definition, many non-Muslim countries fall into *dar al-Islam* category while many Muslim majority countries are

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[126] Ramadan, Tariq. 2004. p.64

[127] Rafeek, M. M. M. 2012. *Fiqh al-Aqalliyyat (jurisprudence for minorities) and the problems of contemporary Muslim minorities of Britain from the perspective of Islamic jurisprudence*. University of Portsmouth. P. 254

[128] Al-Dawoody, Ahmed. 2011 p.93

regarded as *dar al-harb* since Muslims in these countries are not able to practice their religions freely. For example, women wearing headscarves could not attend universities in Turkey until few years ago due to the ban religious attire in the nation's political and educational institutions, but they could enjoy this freedom of religious expression in the United States of America. Among the juristic opinions on this issue, Abu Hanife's approach seems more suitable for Muslim minorities in the West.

Al-Qaradawi and Ramadan embrace Abu Hanifa's criterion of safety in their consideration of a territory being *dar al-Islam*.[129] Accordingly, they maintain that it is permissible for Western Muslims' permanent residence in Western countries poses no inherent religious problem. Ramadan states:

> The *ulama'* of the Hanafi school put their emphasis on the very specific situation of practising Muslims by asking whether they are in security or not. Thus, according to them, as stated by as- Sarakhsi, the evidence that we are in the abode of Islam is when the Muslims are safe and feel no fear because of their Religion. For this school, it is a question of security and protection and not a strict question of Islam and *kufr*…Thus, the abode of Europe appears as a space within which Muslims can live in security – according to the definition of the Hanafi *ulama'* – with some fundamental rights both acquired and protected. As a minority in a non-Muslim environment they are able to practice and to respect the more important rulings of the Islamic teaching.[130]

Ramadan argues that the classical Islamic worldview does not rely on the Qur'an or the Sunnah. The wide diversity in legal opinions of the medieval jurists proves this argument. Yet, a contemporary Islamic perspective of the world can draw on the legal opinon of Abu Hanifa.

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[129] Ramadan, Tariq. 2004. P.63
Qaraḍāwī, Yūsuf. 2009. *Fiqh al-jihād: dirāsah muqāranah li-aḥkāmih wa-falsafatih fī ḍaw' al-Qur'ān wa-al-Sunnah*. al-Qāhirah: Maktabat Wahbah. Vol.2 PP: 900

[130] Ramadan, Tariq. 1999. P. 125 and 140

Al-Qaradawi and Ramadan also encourage such Muslims to adopt the intention of staying since such intention is necessary to perceive these countries as their real home and to integrate into mainstream society.[131] The principle of *takhayyur* plays a significant role in the two scholars' choice in regard to Muslims' residence in Western countries. The principle enables scholars to provide a solution for Western Muslims without being in conflict with the traditional legal doctrines. What is more, the collective opinion of scholars in the ECFR and Tariq Ramadan have made their case on this issue so clearly and strongly that most Western Muslims are convinced that it is permissible to live in a non-Muslim majority country.

Also, the principles of *maslaha* and the present realities of globalization have provided a broader perspective that has influenced contemporary Muslim jurists' decision about whether or not Muslims can live permanently in Western countries. As long as Muslims can protect their religious identity, it is clear that many Western countries provide a better life to their citizens than the majority of Muslim countries. In his book, *Fiqh al-Nawazil*, Muhammad Yusri Ibrahim discusses arguments of Muslims jurists in regard to the permissibility of a Muslim's permanent residence in a non-Muslim majority country. He points out that *maslaha* (the common good) is one of the reasons why some scholars like al-Qaradawi allows Muslims to live in Western countries. These scholars believe that many of the Western countries offer their citizens a higher standard of living, quality of life including a better democratic system of government, freedoms of religion

[131] Ibrāhīm, Muḥammad Yusrī. 2012. P.1090

and speech. These are beneficial for Muslims. Also, these closely correspond to some purposes of *Shariah,* the preservation of religion, life, and property.

Both the principle of *takhayyur* and *maslaha* are essential in arriving at the decision that Muslim minorities are allowed to reside permanently in a non-Muslim majority country.

INTERFAITH MARRIAGE AND *ISLAM AL-ZAWJAH*

In consequence of pluralistic nature of many societies in the modern world, interfaith marriages has reached to about 40 percent of all marriages in some countries.[132] It is a hot topic for Muslims as well as followers of other religions. Similar to Judaism and Christianity, Islam has specific regulations on interfaith marriage.[133] As reported by *tafsir* works, initially two Quranic verses were revealed about marriage with non-Muslims:

> Don't marry unbelieving women until they believe: a slave woman who believes is better than unbelieving woman, even though she allure you. Nor marry (your girls) to unbelievers until they believe (Baqara 221)

> O ye who believe! When believing women come unto you as fugitives, examine them. Allah is Best Aware of their faith. Then, if ye know them for true believers, send them not back unto the disbelievers. They are not lawful for the disbelievers, nor are the disbelievers lawful for them. And give the disbelievers that which they have spent (upon them). And it is no sin for you to marry such women when ye have given them their dues. And hold not to the ties of disbelieving women (Mumtahana 10)

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132 Riley, Naomi Schaefer. 2013. *'Til faith do us part: how interfaith marriage is transforming America*. Oxford, [England]: Oxford University Press. p.212

133 Ponzetti, James J. 2003. *International encyclopedia of marriage and family*. New York: Macmillan Reference USA. P.907

These Quranic verses banned both Muslim men and women from getting married with non-Muslims. However, another Quranic verse that was revealed after the two verses specified (*takhsis*) the general prohibition (*amm*) by permitting Muslim men to get married with scriptuary (Christian and Jewish) women.[134] Nevertheless, throughout the history of Islam, Muslim jurists restricted this permission with some conditions. For example, if these women express hostility towards Islam, or they are not chaste, Muslim men are not allowed to get married with them.[135] As for marriage of a Muslim woman with a non-Muslim man, traditional Islamic law scholars have asserted that it is prohibited by the Quran, the Sunna and *Ijma*.[136] Tariq Ramadan and members of the ECFR do not state anything in contradiction with this idea. In other words, marriage between a Muslim woman and a non-Muslim man is proscribed and invalid according to all scholars of the Council and Tariq Ramadan.[137]

I will discuss how al-Qaradawi, al-Alwani and another member of the ECFR, Abdullah Ibn Yusuf al-Judai have found alternative solution to this complicated issue. In traditional Sunni law, this topic is also the verdicts of the four legal schools' scholars on this issue vary from immediate separation to separation after *iddah* (waiting period after

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134 Qurṭubī, Muḥammad ibn Aḥmad, and Aisha Abdurrahman Bewley. 2003. *Tafsir al-Qurtubi: classical commentary of the Holy Qur'an*. London: Dar al-Taqwa. Chapter Baqara verse: 221

135 Qaraḍāwī, Yūsuf. 2001 p.95

136 Zuḥaylī, Wahba Muṣṭafā al-. 1996. *al-Fiqh al-Islāmī wa-adillatuhu: al-šāmil li-al-adilla al-šar'iyya wa-al-ārā' al-maḏhabiyya wa-ahamm al-naẓariyyātal-fiqhiyya wa-taḥqīq al-aḥādīṯ al-Nabawiyya wa-taḵrīğuhā wa-fahrasat alifbā'iyya li-al-mawḍu'āt wa-ahamm al-masā'il al-fiqhiyya 6,*
In general, one hadith is stated as basis for the prohibition. "We marry scriptuary women, they do not marry ours." 'Aẓīmābādī,, Muḥammad Shams Al-Ḥaqq,. "'Awn Al-ma'būd: Sharḥ Sunan Abī Dāwūd." Library Islam Web Net. 1995. Accessed August 7, 2015.

137 *European Council for Fatwa and Research: first collection of Fatwas*. 1999. Cairo: Islamic. P. 27

divorce).[138] Despite these minor differences, the consensus the four Sunni schools is that if she converts, she is supposed to leave her husband and children in spite of her happy marriage.

This was a question discussed extensively by members of the ECFR in annual meetings of the Council between 1999-2002. Notwithstanding dissensions in the Council, al-Qaradawi, al-Alwani and al-Judai issued a fatwa allowing the wife to remain married with full rights as long as she was free to practice her religion. They arrived at their decision based on some of the companions and the followers' verdicts.[139] First, al-Qaradawi draws on Ibn Qayyim al-Jawziyya work, *Ahkam Ahl al-Dhimma,* that refers to the existence of diversity on this issue in contrast to the widespread belief that there is a consensus on necessity of spouses' separation after the wife becomes Muslim. Ibn Qayyim points out that there are nine different legal opinions for this specific circumstance. Along with scholars who are in favor of immediate separation, there are also scholars who allow a wife in this situation to remain married to her husband. In addition to work of Ibn Qayyim, al-Qaradawi examines some other sources such as the *Muṣannaf* of Ibn Abi Shayba, the *Muṣannaf* of Abdul al-Razzaq, and *Sunan Al Kubra* of al-Bayhaqi. According to all these sources, the Caliph Ali, the Caliph Omar, Ibrāhīm al-Nakhaʿī**,** Imam al-Sha'bi, and Imam Zuhri affirmed that the wife has the choice to stay with her husband without any need to renew their marriage or to leave her husband unless

138 Ibrāhīm, Muḥammad Yusrī. 2012. p. 941
139 Dina M. Taha . 2012 p.43

governmental authority in their country would require their separation due to a pressing reason.[140]

Accordingly, al-Qaradawi and al-Judai, a council member from England, asserted in the annual meeting of the Council in 2000 as follows:

a) There is no definitive evidence in the main sources of Islamic law on this issue
b) There is no consensus on this matter
c) Marriage of spouses is still valid after the wife changes her religion. Therefore, they don't need to renew their marriage.
d) Religion of the wife doesn't require them to get separated, but it provides the woman with an option to annul the marriage at her will as long as she has freedom to practice her religion comfortably in the family.[141]

The decision of the scholars who allow the converted wife to stay with her husband is especially demonstrative of the principles of *takhayyur* and *maslaha*. It is likely frightening for a woman in such a situation to contemplate leaving her husband and children after years of happy marriage. Al-Qaradawi points out that this may prevent women who are willing to become Muslim from changing their religion, which is in opposition to objectives of the *Shari'ah*. Thus, firstly, the principle of *maslaha* serves as a motivation for juristic efforts to seek a solution to the problem of women in such situations. Secondly, the principle of *takhayyur* provides the scholars with richness of legal opinions in Islamic legal heritage on this issue. In spite of lack of consensus among all members of the Council, some scholars in the Council chose the ruling of the companions.

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[140] Qaraḍāwī, Yūsuf. 2001. *Fī fiqh al-aqallīyāt al-Muslimah: ḥayāt al-Muslimīn wasaṭ al-mujtama'āt al-ukhrá*. al-Qāhirah: Dār al-Shurūq p. 117

[141] Qaraḍāwī, Yūsuf. 2001. P.124

INTEREST-BASED MORTGAGE LOAN

Riba (usury or interest)[142] has been banned explicitly in Quran and Sunna as one of the major prohibitions in Islamic finance.[143] There are eight Quranic verses in regard to *riba*[144], and the proscription of *riba* in Quran took place in four stages.[145] Notwithstanding unclarity in meaning and scope of the Quranic term *riba*, it is certain that the type of usury practiced in pre-Islamic Arabian societies (*riba al-jahiliyya*) is a prohibited form of *riba*. The context of the *riba*-related Quranic verses are about debts rather than sale transactions. [146] In this type of usury (*riba al-jahiliyya*), if a debt is not paid on the maturity date, the lender offers a delay in return for increase in the principal. As for hadiths on *riba*, they are mainly on sale transactions, and they are more clear in comparison with *riba*-related verses in the Qur'an.

There are two main types of interest in classical Islamic jurisprudence: 1) *Riba al-nasiah* or *riba al-qur'an; and* 2) *riba al-fadl* or *riba al-hadith.* The first one "occurs through deferment of payments"[147] and *riba al-jahiliyyah* is the worst of this type of interest. The second one refers to "an unfair exchange of goods of a superior or inferior

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142 Vogel, Frank E., and Samuel L. Hayes. 1998. *Islamic law and finance: religion, risk, and return*. Boston, Mass: Kluwer Law International. P.71

143 Vicary Abdullah, Daud, and Keon Chee. 2013. *Islamic finance: why it makes sense (for you)*. P. 24

144 Leaman, Oliver. 2006. *The Qur'an: an encyclopedia*. London: Routledge p.543

145 Kettell, Brian. 2010. *Frequently asked questions in Islamic finance*. Hoboken, NJ: Wiley. p 100

146 Saeed, Abdullah. 1999. *Islamic banking and interest: a study of the prohibition of riba and its contemporary interpretation*. Leiden: E.J. Brill. p.33

147 El-Gamal, Mahmoud A. 2006. *Islamic finance: law, economics, and practice*. Cambridge [UK]: Cambridge University Press. p.201

quality for goods of an inferior or superior quality respectively." [148] This form of *riba* is mentioned in the hadith literature, and it takes place especially in sale transactions in today's world.[149]

The question as to whether prohibition for *riba* applies to all forms of interest is controversial among modern Muslim jurists. Some modernists such as Fazlur Rahman, Muhammad Abduh and Rashid Ridha had tendency to distinguish between usury and interest, simple interest and compound interest, loan for consumption and investment, nominal interest and real interest, borrower as individual and institution. However, most of the modern scholars did not agree with these differentiations.[150] Ramadan and ECFR members, including al-Qaradawi and al-Alwani, generally hold the view that any type of interest is unlawful in Islam. At the beginning of its verdict on the question, the Council starts with a clear approach to *riba:*

> The Council stresses what had been agreed upon by the Muslim *Umma* that usury is forbidden. It is a major sin and is one the seven gravest ones. Those who commit it are considered as being waging war against Allah (swt) and His Prophet (ppbuh). In this vein, the Council supports what has been decided by *Fiqh* Councils throughout the Muslim World that bank interests are usury[151].

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148 Karim, Shafiel A. 2011. *Riba-free models of money, banking, and insurance components of the Islamic moral economy*. California State University, Long Beach.. p:24

149 Kettell, Brian. 2010. P.250

150 Saeed, Abdullah. 1999. P.42

151 Tikrītī, Anas Usāma al-, Šākir Nāṣif al- 'Ubaydī, and Yūsuf 'Abd Allāh al- Qaraḍāwī. 2002. *Fatwas of European Council for Fatwa and Research*. Cairo: Islamic INC. Publishing & Distribution (Dār al-Tawzī' wa-al-Našr al-Islāmiyya). P.45

The verdict continues with encouragement to seek Islamic alternatives such as *Murabaha* (sale at a profit) or other ways that are compliant with the principles of Islamic law before they resort to interest-based mortgage loans. Then, it states:

> If all the above suggestions are unavailable, the Council, in the light of evidence and juristic considerations, see no harm in buying mortgaged houses if the following restrictions are strictly observed:
> a) The house to be bought must be for the buyer and his household.
> b) The buyer must not have another house .
> c) The buyer must not have any surplus of assets that can help him buy a house by means other than mortgage.

The members of the ECFR draw on two juristic principles to arrive at the legal opinion: the principles of *takhayyur* and necessity. The members select the legal opinion of some Hanafi scholars on the issue. The verdict declares:

> The juristic verdict which claims that it is permissible for Muslims to trade with usury and other invalid contracts in countries other than Islamic countries. This opinion is held by a number of renowned scholars such Abu-Hanifah, his colleague Muhammad Al-Shaybani, Sufayn Al-Thawri, Ibrahim Al-Nakha'i, and according to one opinion of Ahmad Ibn Hanbal which was declared as true by Ibn Taymiah, according to some Hanbalite sources. It is also the declared opinion of the Hanafi school of jurisprudence.

The verdict also indicates that *maslaha* at the rank of necessity may turn an explicit prohibition into permissible as long the necessity remains. The verdict explains this as follows:

> Undoubtedly, accommodation is necessary for individuals as well as families. Rented houses do not fulfill all that the Muslim normally needs. They do not give him the sense of security, as he or she keeps paying towards rent for long periods of time. The tenant might be asked to evacuate their rented accommodation for reasons like size of the family, or the number of guests whom visit. When getting older or have his or her benefit suspended they might even be thrown out of the house. Buying one's own house discharges Muslims from all these discomforts and helps them settle closer to mosques, Islamic centers or schools as it helps

> them build up their smaller Muslim community within host countries where families get to know each other and work to establish their cultural identity .
> Buying an own house also helps the Muslim family to modify it to accommodate their social and religious needs. Besides all these individual benefits, it helps the Muslim community, being a minority, to free themselves from the financial pressure that renting accommodation often causes, and focus their attention to the call to Islam and help the host community wherever possible and permissible. This cannot in fact be possible if the Muslim family works all the time just to pay towards the costs of their rented accommodations as well as their living costs .

The verdict indicates that ownership of a house must be deemed a necessity. This seems a highly subjective consideration, since people clearly can live in a rented apartment. Al-Qaradawi and al-Alwani assert that the decision as to whether ownership of a house is a necessity belongs to sociologists and other related scientists rather than Muslim jurists.

The members of ECFR allow Muslim minorities to own house through interest-based mortgages loans. Along with the principle of *maslaha*, the scholars of the Council also rely on legal opinion of Abu Hanifa, which claims that the ban on interest does not apply in non-Muslim countries.[152]

INHERITANCE FROM A NON-MUSLIM

According to Sunni inheritance law, one is entitled to inheritance from a deceased Muslim man or woman on two grounds: blood relationship (consanguinity) and/or marriage.[153] There are three classes of consanguineous heirs: the Quranic heirs, residual

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[152] Qaraḍāwī, Yūsuf. 2001 p. 109

[153] There is a consensus on these two grounds among scholars of the four legal schools. However, wala (relationship by contract of alliance) is another reason for inheritance right, which is claimed by scholars of Hanafi legal school. Karaman, Hayreddin. 1974. *Mukayeseli İslâm hukuku*. İstanbul: İrfan Yayınevi. Vol.2
Okur, Kasif H. "Islam Hukukunda Miras Engeli Olarak Musluman ve Gayrimuslim Arasindaki Din Ayriligi." *Din Bilimleri Akdemik Arastirma Dergisi* 3 (2007): 95-120. Accessed August 9, 2015.

heirs and distant kindred heirs.[154] Fixed fractional shares are designated for the Quranic heirs in three Quranic verses.[155] The Quranic heirs comprise 12 categories, which are mostly female individuals who were excluded in inheritance law of pre-Islamic Arab societies.[156] Residuals (*asaba*), another class of heirs through consanguinity, signify both the female agnatic heirs and the male agnatic heirs (male relatives on the paternal side). Residuals inherit the remainder of the estate after the Quranic heirs take their portions. In the absence of the first two classes of heirs, the estate goes to another class of heirs, distant kindred. These are called *Dhawul-Arham,* and they refer to uterine heirs.

In classical inheritance law, there are four reasons whereby an heir loses his/her right of inheritance: intentional and unjustifiable homicide, slavery, difference of religion and difference of domicile.[157] I will examine the impediment of difference of religion. This rule stipulates that a non-Muslim cannot inherit from a Muslim[158], nor can a Muslim inherit from a non-Muslim[159]. This ruling is derived from one hadith in *Sahih al-Bukhari*:

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154 Black, E. Ann, Hossein Esmaeili, and Nadirsyah Hosen. 2013. *Modern perspectives on Islamic law*. P.202

155 Powers, David Stephan. "Inheritance." *Encyclopaedia of the Qur'an*. Ed. Jane Dammen McAuliffe. Vol. 2. Leiden, The Netherlands: Brill Academic Publishers, 2002. 518-526. *Gale Virtual Reference Library*. Web. 8 May 2014. Chapter 4:11-12 and 176

156 Black, E. Ann, Hossein Esmaeili, and Nadirsyah Hosen. 2013 p.203

157 Hussain, A., and Abdul Ahad. 2005. *The Islāmic law of succession*. Riyadh: Darussalam. P.61

158 Ibn Rushd states that jurist had consensus on this part of the sentence (a non-Muslim cannot inherit from a Muslim).
Ibn Rušd, Muḥammad b. Aḥmad, Imran Ahsan Khan Nyazee, and Muhammad Abdul-Rauf. 2000. *The distinguished jurist's primer Vol. II. Vol. II*. The Distinguished Jurist's Primer. [Doha, Qatar]: Centre for Muslim Contribution to Civilization. p: 430

159 Most of the jurist share this view (nor can a Muslim inherit from a non-Muslim)
Qaraḍāwī, Yūsuf. 2001 p. 127

"A Muslim cannot be the heir of a disbeliever, nor can a disbeliever be the heir of a Muslim."[160]

Despite the traditional *fiqh* on this point as well as the literal reading of the *ḥadīth*, the ECFR has issued a fatwa that allows especially Western Muslims to inherit from their non-Muslim relatives. Scholars in the Council asserted that some of the companions and the followers such as Muadh Ibn Jabal, Muʿāwiyah ibn ʾAbī Sufyān and Saʿid Ibn Al-Musayyib were of this opinion, as Ibn Taymiyyah and his student Ibn Qayyim Al Jawziyya pointed out in their works.[161] Similar to the questiones mentioned above, the ECFR members made use of *takhayyur* for this case in order to provide Western Muslims with an alternative legal opinion from the inherited Islamic law.

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[160] In his article cited on the previous page, Dr. Kasif Hamdi Okur refers to the sources below.
Shafiî, el-Ümm, c. IV, s. 2-3; Cessas, Ahkam, c. II, s. 101; Serahsi, Mebsut, c. XXX, s. 30; İbn Kudame, Muğni, c. VII, s. 166; İbn Kayyim el-Cevziyye, Ahkâmu ehli'z-zimme, Beyrut 1994, c. II, s. 462.
In addition, al Qaradawi mentions another hadith along with this one as a secondary important hadith in hadith literature.

[161] Qaraḍāwī, Yūsuf. 2001 p. 129

CONCLUSION

I examined the legal opinions of the three scholars on the aforementioned four questions. Clearly, they did not share the same opinions for each question. For example, Ramadan did not hold that it is permissible to take interest-based mortgage loans for buying a home, because he believed that ownership of a house is not genuine necessity in spite of his belief that *istislah* is a significant juristic tool. The analysis of these scholars' legal opinions demonstrates that the principles of *takhayyur*, *istislah* and *fiqh al-waqi'* are central in the process of issuing a fatwa. Since more than one jurist arrived at the same the legal opinions, clearly the scholars to some extent implemented the principle of collective *ijtihad,* as well. In the next chapter, I will discuss the uniqueness of *fiqh al-aqalliyyat* in terms of its methodology, topics and its scholars perspectives on the issues of Muslim minorities.

Chapter Four - The Uniqueness of *Fiqh al-Aqalliyyat*

INTRODUCTION

This chapter deals with the question of whether *fiqh al-aqalliyyat* is different from traditional Sunni Islamic law. The word "traditional" here signifies the Islamic legal methodologies developed in the first few centuries after the rise of Islam that resulted in the major Sunni schools of law. The establishment of a new *fiqh* for Muslim minorities is a central theme in the discourse of *fiqh al-aqalliyyat.* The newness of *fiqh* here mainly refers to its topic, methodology and the worldview of contemporary Muslim jurists as opposed to that of their predecessors. As will be seen below, Muslim jurists' perception of the world affects how they approach the sources of Islamic law. In this chapter, I will examine the following questions: Is minority *fiqh* unique in terms of its topics and methodology? If so, what are key differences between this *fiqh* and traditional Sunni Islamic law? How much influence does the worldview of Muslim jurists have in producing legal rulings that lead Muslim minorities to integrate into or isolate themselves from non-Muslim societies? Both the profundity of these questions and the shortage of relevant sources in English necessitated that I narrow the field of research. As I result, I have chosen two areas of Islamic law to discuss, *fiqh al-nawazil* and modern Islamic law codes.

The reason why I have chosen *fiqh al-nawazil* as one of the two areas of Islamic law in this chapter is to question the validity of the argument that there is already an area of the traditional Islamic law that deals with Muslim minorities' issues. For some scholars, like Nuh Ha Mim Keller, *fiqh al-aqalliyyat* is just a new name for an old area of Islamic jurisprudence.[162] According to these scholars, a considerable percentage of historical Muslim populations historically did live as minorities in non-Muslim lands, including Messina Sicily, coastal India and China from the second Islamic century until the modern period.[163] The unprecedented legal issues Muslim minorities encountered became the subject of juristic debate, and were thereby already being dealt with in the classical works of Islamic jurisprudence under different titles like *fiqh al-nawazil*. Thus, creating a new *fiqh*, like *fiqh al-aqalliyyat*, for the purpose of finding solutions to the questions of today's Muslim minorities is unnecessary. I, however, will counter the validity of this argument by presenting three key characteristics of *fiqh al-nawazil*. These characteristics are different from some of the main characteristics of *fiqh al-aqalliyyat*.

The second main theme of this chapter is modern Islamic law codes. I have chosen to focus on this theme in this Chapter due to affinities between the methodology of minority *fiqh* and the legal methodology that reformist Muslim jurists, like Muhammad Abduh (d. 1905) and Ahmad Shakir (d. 1958), employed to codify Islamic law in the last two centuries. Certain juristic devices, such as collective *ijtihad,*

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162 Keller, Nuh Ha Mim. "Which of the Four Orthodox Madhhabs Has the Most Developed Fiqh for Muslims Living as Minorities?" Masud.co.uk. 1995. Accessed August 6, 2015.

163 Fadl, Khaled Abou El. 1994. "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries".*Islamic Law and Society.* 1 (2).

takhayyur, and *maslaha,* became popular among reformist scholars in the nineteenth century,[164] as they came to be essential juristic tools at the hand of advocates of *fiqh al-aqalliyyat*. The resemblance between the two methodologies, the methodology of minority *fiqh* and the methodology of modern Islamic law codes, disproves the argument that the methodology of *fiqh al-aqalliyyat* is new. These juridical methods are very similar to the methods underscored by scholars of the minority *fiqh*. Indeed, scholars who supported the codification of Islamic law were the predecessors of scholars of *fiqh al-aqalliyyat* in implementing these methods to achieve necessary legal reforms in their times. I will expound later in this chapter.

FIQH AL-NAWAZIL

Nawazil denotes "certain incidents, religious, social, or political, that befall on Muslims and about which there are no explicit judgments in the Qur'an and Sunnah.*"*[165] As for *fiqh al-nawazil*, it is translated as "the jurisprudence of unprecedented events."[166] Among the four major legal schools of Sunni Islam, the Hanafi and the Maliki schools produced a notably voluminous *nawazil* literature throughout the history of Islam.[167] While the term "*nawazil*" was adopted in particular by scholars of the Maliki school to name their writings on such unprecedented issues, other terms such as *al-Fatawa, al-*

164 Anderson, J. N. D. 1976. *Law reform in the Muslim world*. London: Athlone Press. P.34-82
165 Hassan, Said Fares Ahmed. 2011. P.4
166 Hellyer, H. A. 2010. *Muslims of Europe the 'other' Europeans*. Edinburgh: Edinburgh Univ. Press p. 81
167 Hellyer, H. A. 2010. P.81

Waqia, al-Qadiyya wa al-Ahqam, and *al-Hawadith* are found in the titles of similar books in the other schools of Islamic jurisprudence.[168]

Fiqh al-Nawazil began to appear as an autonomous and independent area in the Islamic law literature after the beginning of the fourth Islamic century, when the major Sunni schools of law had to a very large extent completed their formation. By the beginning of the fourth Islamic century, Muslim jurists had articulated the principles and methods of their own legal schools in the major classical works (*Ummuhat al-Kutub*).[169] In order to issue fatwas for new legal questions, medieval Muslim jurists employed the principles and juristic methods of their own legal schools, which is the method of *takhrij*. *Fiqh al-Nawazil* came into existence as a result of the need to develop fatwas for new legal situations to which Muslim jurists could not find answers in the earlier sources of their schools of thought.

The method of *takhrij* is one of the main characteristics of *fiqh al-nawazil*. The practice of *takhrij* involves producing new rulings on the new situations by employing the principles and methods laid out by the founders of the four major schools of Islamic jurisprudence. The fact that scholars of *fiqh al-nawazil* extensively relied on the method of *takhrij* indicates that they were loath to transgress the boundaries of their own legal schools, an inflexibility which is heavily criticized by proponents of minority *fiqh*.

168 Ibrāhīm, Muḥammad Yusrī. 2012. *Fiqh al-nawāzil lil-aqallīyāt al-Muslimah ta'ṣilan wa-taṭbīqan: risālah jāmi'īyah*. al-Qāhirah: Dār al-Yusr. P.30
169 Ḥajjī, Muḥammad. 1999. *Naẓarāt fī al-nawāzil al-fiqhīyah*. [Rabat]: al-Jam'īyah al-Maghribīyah lil-Ta'līf wa-al-Tarjamah wa-al-Nashr. p.30

Advocates of minority *fiqh* clearly affirm that adherence to a particular *madhhab* is at odds with the methodology of *fiqh al-aqalliyyat*.[170]

The second main characteristic of *fiqh al-nawazil* is medieval Muslim jurists' attitude toward the land of disbelief (*dar al-kufr*). From the traditional legal perspective, the presence of Muslims in the land of disbelief is an exceptional situation, and transitional. As a result, medieval Muslim jurists required that Muslims must emigrate from non-Muslim territories to Muslim territories.[171] This legal position had a significant influence on jurists' fatwas. A review of the given fatwas in the literature of *fiqh al-nawazil* demonstrates the hard-line approach of numerous medieval Muslim jurists to the question of Muslim immigration to non-Muslim lands. These jurists held that it was obligatory for Muslims to return to Muslim territories, since voluntary residence in non-Muslim areas was religiously unacceptable. Some of them went as far as to say that a Muslim who remained in a non-Muslim territory of his own volition was not a member of the Muslim community any longer, and was considered an enemy of the Muslim community. The legal ruling of Abd Allah al-Waryagli (d.1489), a leading jurist of Fez, on the status of Muslims preferring to stay in Christian-ruled Iberia is an illustrative

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[170] Qaraḍāwī, Yūsuf al-. 2001. P.57
Alwānī, Ṭāhā Jābir Fayyāḍ. 2003. P.4
Ramadan, Tariq. 1999. P.96

[171] Even though some scholars, like Imam Shafii, allowed Muslims to live dar al-harb if they had the freedom to practice their religion, Medieval jurists, generally speaking, did not recommend to stay in a non-Muslim territory, which is in contrast to the objectives of *fiqh al-aqalliyyat*. Uriya Shavit states that "Al-Qaradawi went so far as to state that, considering Islam's universal mission, on the one hand, and the West's current leadership of the world, on the other, Muslims must have a presence in the West and spread Islam there. Thus, if there had been no Muslim presence in the Western world, such a presence would have had to be created (al-Qaradawi 2007: 33)."

example of this. In his response to a question regarding the status of these Muslims, al-Waryagli, states:

> Oh questioner, you have committed a serious error by calling them ‘‘our Muslim brothers.’’ Rather, they are our enemies, and the enemies of the religion, May God frustrate their efforts and block their good fortune. They are the brothers, and supporters of the infidels, May God strengthen the Muslims against them and enable their swords to [strike] their necks and the necks of the infidels whose group they have joined, and to whose side they have gone. Peace be upon you, Oh questioner, but not upon them.[172]

This jurist deems these people unworthy of being called Muslim, thus negating of their immunity from a Muslim attack on their lives, properties and families. He asserts without any hesitation that those Muslims minorities who choose to remain in Christian Iberia deserve to be killed at the hands of Muslims if war breaks out between the two states. This ruling shows that some Muslim jurists regarded a Muslim's voluntary residence in a non-Muslim land as tantamount to apostasy. In addition to prohibiting Muslim residency in infidel lands, some Muslims jurists even disallowed Muslims from entering into non-Muslim controlled territories for trade or any other reason. For example, al-Wansharisi disapproved of engaging in trade and business with a non-Muslim state on the basis that the trade might strengthen the power of the non-Muslim state in a way that could be used against Muslims in the future.[173] Clearly, *fiqh al-nawazil* was built on the premise that the conditions experienced by Muslim minorities were

172Hendrickson J. 2011.

173 Jocelyn N. Hendrickson. “The Islamic Obligation to Emigrate: Al-Wansharīsī’s Asnā al-matājir Reconsidered.” PhD. Dissertation. (Emory University, 2009) p.148

unexpected and transient, and that Muslims were supposed to migrate to Muslim majority lands whenever possible.[174]

The scope of *fiqh al-nawazil* literature is another characteristic that needs to be discussed. The literature of *fiqh al-nawazil* covers topics relevant to both Muslim minorities and Muslim majorities. As defined by Muhammad Amin Ibn Abidin (d. 1836), *fiqh al-nawazil* encompasses "any new incidents about which jurists could not find rulings in the major sources of their legal schools."[175] Ibn Abidin's definition demonstrates that this area of *fiqh* is not limited to issues related to exclusively Muslim minorities. *Fiqh al-nawazil* may address acts of ritual worship (*ibadat*), civil transactions (*muamelat*), criminal law (*hudud*) or international affairs in regard both to Muslim minorities and to Muslims living in Muslim territories. Although in the relevant chapters of *nawazil* literature, fatwas concerning relations between Muslims and non-Muslims, or obligations of Muslims in a non-Muslim territory,[176] may be unearthed, substantial parts of the books are meant to give answers to general *fiqh* questions, rather than to the questions of Muslim minorities. In fact, the full body of *fiqh al-nawazil* gave scant attention to the issues of Muslim-minorities. Therefore, I think that the literature of *fiqh al-nawazil* is not rich enough to enlighten today's scholars who are interested specifically in legal questions pertaining to Muslim-minorities.

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174 Hellyer, H. A. 2010. P.94-98

175 Ibn ʻĀbidīn, Muḥammad Amīn ibn ʻUmar. 1987. *Radd al-muḥtār ʻalá al-Durr al-mukhtār: ḥāshiyat ibn ʻĀbidīn*. Bayrūt: Dār Aḥyāʾ al-Turāth al-ʻArabī. Vol. 1 50 The translation is mine
Hallaq, Wael B. 2005. *Authority, continuity, and change in Islamic law*. Cambridge [u.a.]: Cambridge Univ. Press. P. 48

176 Hendrickson J. 2011. "Muslim Legal Responses to Portuguese Occupation in Late Fifteenth-Century North Africa". *Journal of Spanish Cultural Studies.* 12 (3): 309-325.

The topics germane to the issues encountered by Muslim minorities are not covered in the sources of *fiqh al-nawazil* as a distinct category, but are instead discussed under different headings in various sources.[177] In others words, scholars who are interested in the jurisprudence of Muslim minorities first need to make enormous scholarly effort first, to unearth legal opinions related exclusively to Muslim minorities in these sources, and then make the relevant material systematically available to others.

The three essential characteristics of *fiqh al-nawazil* demonstrate that there are substantial differences between the two types of *fiqh, fiqh al-nawazil* and *fiqh al-aqalliyyat.* Contrary to the jurists of *fiqh al-nawazil,* scholars of *fiqh al-aqalliyyat* seek to find solutions to questions specifically relevant to Muslim-minorities without adhering to any particular *madhhab.*

> I have not confined myself to any one of the several schools of jurisprudence (madhahib, singular madhab) prevalent in the Islamic world, for the truth is not the monopoly of any one school. The leading scholars of these schools never claimed that they were infallible; they were, in fact, researchers who sought to know the truth. If they erred in a ruling they will have a reward, while if they were correct, their reward will be twice as great. Said Imam Malik, "The word of any person other than the Prophet (peace be on him) is sometimes accepted and sometimes rejected. " And Imam Shafi'i commented, "My opinion is correct with the possibof its being in error. An opinion different from mine is in error with the possibility of its being correct."While it is not worthy of a Muslim scholar who is capable of comparing and choosing to tie himself to a single school of jurisprudence or to submit to the opinion of a particular jurist, he must give weight to arguments and proofs. The jurist with strong arguments and a valid proof deserves to be followed, while the one with weak arguments and incorrect proofs should be rejected, regardless of who he is. On this point, Imam 'Ali says, "Truth is not to be learned on the basis of authorities. Learn the truth and then you will know who the truthful ones are."[178]

177 Parray, Tauseef Ahmad. 2012.

178 Qaraḍāwī, Yūsuf. 2011. *The lawful and the prohibited in Islam*. London: Dar Al Taqwa Ltd. P.xiii

Furthermore, scholars of *fiqh al-aqalliyyat* promote the idea that Muslim-minorities should reside permanently in non-Muslim countries, and integrate into their societies. Advocates of minority *fiqh,* notably Ramadan, al-Qaradawi and al-Alwani, argue that medieval Muslim jurists' attitude toward the land of disbelief is not applicable today. In today's globalized world, educated people cannot disregard the necessity of diversity, pluralism and coexistence among people of different traditions, cultures and races. The legal opinions of Muslims jurists who do not take this fact into account are not compatible with reality. Millions of immigrant Muslims and their progeny are living as citizens in non-Muslims majority countries, and they are very unlikely to migrate from these countries to Muslim majority countries simply because their societies do not share the same religious values with them. In his book, *Fiqh for Minorities*, al-Alwani points to this situation. He says:

> In recent decades, Muslims have settled in many countries outside Islam's historic and geographic sphere. Within these countries, which have witnessed a growth in the spread of Islam, Muslims are facing new situations that raise many issues far beyond the limited personal ones such as halal food, the sighting of the new moon, or marriage to non-Muslim women. The debate has now turned to greater and much more profound issues relating to Muslim identity, the role of Muslims in their new homeland, their relationship to the world of Muslim community, the future of Islam outside its present borders and how it may go forward to establish its universality in all parts of the globe.
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> Some may have tried to view these issues as arising out of expediency or the product of exceptional circumstances, forgetting that this approach is extremely narrow and limited. It cannot deal with problems relating to the building of strong minority.[179]

179 'Alwānī, Ṭāhā Jābir Fayyāḍ. 2003 p. 6-7

According to al-Alwani, the methodology of traditional Islamic jurisprudence, albeit useful, is not sufficient to provide legal answers that reflect the openness of Islam to progress and development in the modern world, and its ability to adapt to changing circumstances. Al-Alwani argues that fatwas issued by non-Western Muslim scholars adhering to only texts of classical Islamic jurisprudence may cause Western Muslims to live in social isolation.

MODERN ISLAMIC LAW CODES

The legal methodology used to codify Islamic law in the modern period has similarities with the methodology of minority *fiqh.* In this section, first I will introduce the concept of codification and provide a history of Islamic law's codification, with emphasis on the juristic methods used to draw up the Ottoman civil code of 1876, known as the *Majalla,* and the Family Rights Law of 1917. Both of the codes clearly exemplify how Muslim jurists utilized the methods of *takhayyur*, collective *ijtihad*, *istislah,* and *fiqh al-waqi'* in codification of Islamic law in the last two centuries. The similarities between the methodology of minority *fiqh* and the methodology used by Muslim jurists in the modern period to codify Islamic law indicate that the minority *fiqh* methodology is not totally unique.

Tarek Elgawhary defines the codification of Islamic law as "the process by which the various rulings of the Sharīʿah (*al-aḥkām al-Sharīʿah*) of a particular subject matter (property, tort, family law, etc.) are collected and restated in a succinct manner to form a

legal code that has full effect within a given political jurisdiction."[180] According to this definition, legal codification is both a collection and a restatement of existing rulings, which is different from a legal consolidation in which existing rulings are simply brought together without restatement in a single source to make them more accessible. Moreover, restatement signifies that the only restated and enacted rulings relating to a particular topic can function as the binding and official version of Islamic law in a particular state, while all other rulings germane to the particular topic are simply outlawed. Therefore, legal codification tends to eliminate the plurality of legal opinions, selecting only one or some of the legal opinions in a single case.

The first known attempt to codify rulings of Islamic law was made by Ibn Muqaffa (d.759), a famous scholar and political advisor during the period of the Abbasid Caliph Mansūr. Ibn Muqaffa proposed that the Caliph codify existing rulings to preclude the legal chaos that he felt ensued from the great variety of legal opinions given by many, not only four, leading Muslim jurists in the formative period of Islamic law.[181] Although the Qur'an, the Sunnah, *ijma'*, *qiyas* and *istihsan* were the major sources of the legal system, many controversial issues existed, which resulted in judges making different, and sometimes opposing decisions. Ibn Muqaffa asserted that the Caliph should be the supreme legal authority to promulgate binding laws on contentious subjects, with the aim of formulating a uniform and official version of Islamic law, which judges could then

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[180] Elgawhary, Tarek A. "Codification of Law." In *The [Oxford] Encyclopedia of Islam and Law*. *Oxford Islamic Studies Online*, http://www.oxfordislamicstudies.com/article/opr/t349/e0033 (accessed 06-Apr-2015).

[181] Elgawhary, Tarek A. 2014. *Restructuring Islamic law: the opinions of the 'ulama' towards codification of personal status law in Egypt*. Dissertation Abstracts International. 76-04. Thesis (Ph.D.)--Princeton University, 2014 P. 16

follow in their courts. He stated:

> And one problem of these two Islamic States (Kufa and Basra) and other provinces to which *Amīr al-Mu'minīn* has to give his deep thought is that of the divergence of opinion on Islamic Law, which has now reached such proportions that it is no longer possible to close our eyes to it… If *Amīr al-Mu'minīn* would like it, the answer could be; that *Amīr al-Mu'minīn* issue a decree that all decisions and judgments so far passed be compiled in the form of a book and placed before *Amīr al-Mu'minīn*, and every sect must attach with it all the arguments which support their viewpoint, duly based on reasoning and authoritative references. *Amīr al-Mu'minīn* may thereafter review the whole record, and give his own judgment in each case, and restrain the law courts from contravention thereof. In this way all the scattered decisions and judgments – covering a variety of subjects of all shades – shall assume the form of a regular, written code of law, free of errors. Accordingly, all Islamic States shall come to be governed by a uniform legal system. It is hoped that Allah Almighty shall bring about a consensus of the *Ummah* on the opinion and verdict of *Amīr al-Mu'minīn*.[182]

Despite the fact that Caliph Mansur at first rejected, Ibn Muqaffa's proposal in its original form, he later requested that Imam Malik prepare a compendium of Islamic law in accordance with the latter's school of law so that the compendium could be binding as a judicial reference for all Muslims. However, Imam Malik turned down Mansur's request, just as he rejected a similar request made by Caliph Harūn al-Rashid, saying that "the followers of each sect find solace in following their respective Imams and jurists, and are best left to themselves."[183]

Faced with the challenges brought by increasing Western impact in the modern era (eighteenth century CE onward), Muslim empires deeply felt the need to modernize their

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182 Zanki, Najmaldeen K. Kareem. "Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars." July 1, 2014. Accessed April 6, 2015. http://www.ijhssnet.com/journals/Vol 4 No 9 1 July 2014/15.pdf.

183 Iṣlāḥī, Amīn Aḥsan, and S. A. Rauf. 1979. *Islamic law: concept and codification*. Lahore: Islamic Publications. P.90

legal institutions, as well as military, financial, social and political institutions.[184] In addition to the external political and religious-cultural threat of Western Europe, internal crises such as moral, intellectual and economic decline in Muslim societies also prompted Muslim empires to enact reforms so as to adapt themselves to changing circumstances in the modern world.[185] With regard to legal reforms in the last two centuries, modernist Muslims called for the opening of the gate of *ijtihad*, the codification of Islamic rulings (*taqnin*), the replacement of Islamic rulings with Western codes in some legal subjects, and the transfer of the *fuqaha*'s legislative authority to a state institution.[186] Areas of Islamic law that seems outdated and incompatible with the needs of Muslims in the modern world were simply replaced with Western legal codes, notably in Muslim states pressured by the Western colonial powers.[187] Consequently, many Muslim nations restricted the application of Islamic law to the area of Muslim family law, while in other areas of Islamic law, they adopted Western legal codes or they mixed Islamic law with Western law. In a sense, this constituted the "secularization" of *Shari'ah*, and it drew strong criticism from many Muslim scholars.[188] Although such legal reforms took multiple forms in various regions and varying time periods, the codification of Islamic law was commonly experienced by most Muslim states in the last two centuries. This

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184 Esposito, John L. 2011. *Islam: the straight path*. New York: Oxford University Press. P. 184

185 Hunter, Shireen. 2009. *Reformist voices of Islam mediating Islam and modernity*. Armonk, N.Y: M.E. Sharpe. P.6

186 Peters, Rudolph, and P. J. Bearman. 2014. *The Ashgate research companion to Islamic law*. Farnham, Surrey, England [etc.]: Ashgate. P. 224

187 Norman Calder, Joseph A. Kéchichian, Farhat J. Ziadeh, Abdulaziz Sachedina, Jocelyn Hendrickson, Ann Elizabeth Mayer, Joseph A. Kéchichian, Intisar A. Rabb, and Intisar A. Rabb. 2009. *Law*. Oxford University Press.

188 Layish, Aharon. 2004. "The Transformation of the Sharīʿa from Jurists' Law to Statutory Law in the Contemporary Muslim World". *Die Welt Des Islams.* 44 (1): 85-113.

indicates the importance of the codification process in the reform of Islamic law.[189]

In the course of the nineteenth century, following the colonization of most Muslim nations by Western powers, codification of Islamic law began to be used as an effective and widespread means of legal reforms in Islamic law.[190] Numerous countries, such as Egypt, Iran, British India, French North Africa and Algeria, carried out the codification project. Yet, it was the Ottoman *Majalla* that became the first and very important official codification of Islamic law in the modern Muslim world.[191.] The codification of many areas of Islamic civil code, along with the family law, in *the Majalla* signified that the Ottoman Empire was being governed according to Islamic law.

The full name of the *Majalla* is *Majallat al-Ahkam al-'Adliyyah,* or "the book of rules of justice."[192] In 1870, the Ottoman government formed a committee of top ranking scholars under the supervision of Ahmed Cevdet Pasha (d.1895) who was the minister of justice in 1870s. The *Majalla*, written in Turkish, was promulgated between 1870 and 1877. Along with an introduction that includes ninety-nine legal maxims derived from Islamic legal tradition, the *Majalla* is comprised of 16 chapters concerned with "sales (*buyu*'); hire and lease (*icarah*); guaranty (*kefale*); transfer of debts (*havalah*); pledge (*rahn*); deposit (*amanah*); gift (*hiba*); usurpation and property damage (*gasp ve itlaf*); interdiction, duress, and pre-emption (*hacr, iqrah* and *şhuf'ah*); partnership (*shirkah*);

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189 Peters, Rudolph, and P. J. Bearman. 2014. P.223

190 Elgawhary, Tarek A. . "Codification of Law."

191 Norman Calder, Joseph A. Kéchichian, Farhat J. Ziadeh, Abdulaziz Sachedina, Jocelyn Hendrickson, Ann Elizabeth Mayer, Joseph A. Kéchichian, and Intisar A. Rabb. 2009. *Law*. Oxford University Press.

192 Elgariani, Fawzy Shaban, and R. Gleave. 2012. *Al-qawa'id al-fiqhiyyah (Islamic legal maxims): concept, functions, history, classifications and application to contemporary medical issues*. Thesis (Ph.D.)--University of Exeter, 2012. P. 20

agency (*wakalah*); settlement and full discharge (*sulh* and *ibra*); acknowledgment (*iqrar)*; lawsuit (*da'wa*); evidence and oaths (*bayyinat* and *tahlif*); and courts and judgeship (*qadha*)".[193] As seen, it covers all areas of the civil code with the exclusion of family law, which was later codified in 1917 under the title of *The Ottoman Family Rights Law.* The *Majalla* was prepared exclusively according to the Hanafi school of law, and it remained as the official civil law of the Ottoman Empire for about fifty years. After the collapse of the Ottoman Empire, some Arab countries such Syria, Kuwait, Jordan and Iraq continued to apply it for decades.

The Ottoman Family Rights Law of 1917 was the first codified family law of *Shari'ah* in the modern Muslim world. In fact, the Ottoman government had intended to codify Muslim family law as a part of *the Majalla* earlier. However, efforts were not sufficient to complete the codification of Muslim family law, and it was delayed until 1917. The 1917 code was applied in the civil courts of the Ottoman Empire for two years, while some other Middle Eastern countries enforced it until the middle of the twentieth century. In contrast to *the Majalla,* the sources of the 1917 code were not restricted to the rulings of Hanafi treaties. Rather, it also incorporated the rulings of the other three schools of law in order to make the legal code more compatible with the Ottoman Empire's diverse populations and local expectations and practices.[194]

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[193] Erdem, S. (2009). Mecelle (Medjelle). In G. Ágoston & B. Masters, *Facts on File Library of World History*. *Encyclopedia of the Ottoman Empire* (pp. 355-357). New York: Facts on File.

[194] Elgawhary, Tarek A. . "Codification of Law." (accessed 06-Apr-2015).

Takhayyur, al-ijtihad al-Jama'i, and *maslaha* appear as the mainstay of juristic methods employed within the legal codifications of Islamic law. *Takhayyur*, it has been practiced in various ways in different Muslim nations. For instance, the committee of *the Majalla* made use of the principle of *takhayyur* within the Hanafi school of law, sometimes selecting a less authoritative and less dominant legal opinion from the Hanafi sources on the basis that the legal opinion seemed the most appropriate for the welfare of Muslim community and for the contemporary world. As known, there is a hierarchical taxonomy among sources of Hanafi law. Of these sources, the works of *zahir al-riwayah,* compiled by Muhammad al-Shaybani, contain doctrines of Abu Hanifa, Abu Yusuf and al-Shaybani; and they have the highest authority in comparison to the works of *al-nawadir* and the works of *al-nawazil*.[195] Not only were fatwas of the three prominent Hanafi scholars, Abu Hanifa, Abu Yusuf and al-Shaybani, included in *the Majalla*, but the fatwas of less authoritative Hanafi scholars like Zufar were also selected for the civil code[196] The Ottoman Family Rights Law of 1917 included many fatwas from the other three Sunni schools of law. For example, the committee of the Ottoman Family Rights Law embraced the opinion of Imam Shafii in the article that imposes a restriction to

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195 Ibn 'Ābidīn, Muḥammad Amīn ibn 'Umar. 1987. Vol. 1 p.50

196 Article 692 is example of this. The fatwa is based on the legal opinion of Ibn Zufar
692. In the case of a restricted contract for the transfer of a debt, the transferor loses his right to claim on account of the subject matter of the transfer. The transferee is under no obligation whatsoever to give the subject matter of the transfer to the transferor. If he does so, he is liable to make good any loss resulting therefrom. Upon making good, such loss, he has a right of recourse against the transferor. If the transferor dies before making payment, his debts being greater than the value of his estate, the other creditors have no right to touch the subject matter of the transfer
Karahasanoğlu, Cihan Osmanağaoğlu. "The Implementation of the Ottoman Civil Code (Mecelle) and Its Significance in Turkish Legal History." April 1, 2011. Accessed April 7, 2015. http://dergiler.ankara.edu.tr/dergiler/19/1682/17939.pdf.

prevent mentally incapacitated persons from getting married.[197] Similarly, the committee chose the ruling of Imam Hanbal in article 38, which states that "if a woman stipulates in her marriage contract that her husband shall not marry another wife and that, should he do so, then either she herself or this other wife will be divorced, the contract is valid and the stipulation recognized."[198] Moreover, in 1926, the Egyptian committee practiced an *ijtihad* on polygamy, reinterpreting the texts according to the needs of the contemporary society and the public interest, *maslaha*, but without being contradictory to main principles of *Shari'ah*. As a result of their *ijtihad,* the Committee decided that polygamy should be banned on the ground that the average man cannot do justice to his wives, which is a Qur'anic requirement for the practice of polygamy.[199] The principle of *takhayyur* is one of the significant juristic methods used by modern reformers to prepare the two Islamic law codes.

As recognized by Aznan Hasan, since the promulgation of the Ottoman Civil Code, the legal codification efforts of Muslim nations were often witness to the practice of the collective *ijtihad*.[200] In other words, these codifications were carried out by a group of scholars instead of an individual Muslim jurist. For example, in 1915, the Minister of Justice in Egypt formed a committee consisting of secular-trained lawyers and Muslim jurists. The committee was assigned to codify legal rulings on Personal Status Law.

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197 Türkiye Diyanet Vakfı. 1998. *Türkiye Diyanet Vakfı İslam ansiklopedisi 18. P. 314*
198 Anderson, J. N. D. 1976. P.41
199 Anderson, J. N. D. 1976. P.62
200 Hasan, A. 2003.

Similarly, in the 1950s, Morocco followed suit by establishing a committee on the codification of personal status law.[201] The codification of Islamic law resulted in the transfer of legislative authority from individual Muslim jurists and state appointed judges (*qadis*) to the state. As known, *fiqh,* as man-made jurisprudence, has a discursive nature. Jurists articulated divergent and sometimes contradictory views on the same subjects that fell within the purview of *ijtihad*. Before codification that instructed q*adhis* to employ only rulings enacted by the state, *qadhis,* ie competent judicial authorities, used to possess the legislative authority to the extent that they could interpret sources of Islamic law. They could make decisions at their own discretion in the Sharia courts, by choosing one of the various legal opinions, or even practicing *ijtihad.* However, legal codification placed new restrictions on the discretion of the *qadhis* by obliging them to follow particular legal opinions instead of others.[202] The legislative authority passed from appointed individual judges to group of Islamic law scholars. This promoted collective *ijtihad* in modern times, which is one of the main similarities between minority *fiqh'*s methodology and the juristic methodology used for the codification of Islamic law in the modern times.

In the era of nation-states, Muslim jurists, broadly speaking, found themselves compelled to carry out legal reforms in Islamic law. The codification of Islamic law

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201 Welchman, Lynn. 2004. *Women's rights and Islamic family law: perspectives on reform*. London, UK: Zed Books. P.33
Elgawhary, Tarek A. . "Codification of Law." (accessed 06-Apr-2015).

202 Peters, Rudolph. 2002. "From Jurists' Law to Statute Law or What Happens When the Shari'a is Codified". *Mediterranean Politics.* 7 (3): 82-95.

emerged as a response to the need for the legal reform. Among various juristic techniques, in particular, *takhayyur*, the collective *ijtihad* and *maslaha* became essential juristic tools to codify Islamic law. These techniques are the same with those emphasized by scholars of *fiqh al-aqalliyyat*. The similarity of the techniques undermines the view that the methodology of *fiqh al-aqalliyyat* is new or unique.

CONCLUSION

In this chapter, I have tried to address the question of the uniqueness of *fiqh al-aqalliyyat* by discussing two relevant areas of Islamic law: *fiqh al-nawazil* and modern Islamic legal codes. In comparison to *fiqh al-nawazil*, *fiqh al-aqalliyyat* portrays a very new area of Islamic jurisprudence. Its newness manifests itself in various ways. However, although there are significant differences between *fiqh al-nawazil* and *fiqh al-aqalliyyat*, it is inaccurate to argue that the methodology of the minority *fiqh* is entirely unprecedented. This is because minority *fiqh* has a forerunner in reformist jurisprudence of the modern era, and scholars of *fiqh al-aqalliyyat* relied on many of the same juridical devices to achieve their goals. Both the modernist reformers and scholars of minority *fiqh* have endorsed the practice of *ijtihad* in the face of changing circumstances. They also both emphasize particular juristic techniques to practice *ijtihad*. Hence, *fiqh al-aqalliyyat* appears to be new in terms of its choice of topics interest and approach to the social

integration of Muslim minorities with their societies, yet may also be regarded as a continuation of the modern reformist trend in terms of juristic methods and sources. [203]

[203] Verskin, Alan. 2013. *Oppressed in the land?: fatwas on Muslims living under non-Muslim rule from the Middle Ages to the present*. Princeton [N.J.]: Markus Wiener Publishers. P.113
Christiane Timmerman, Johan Leman, Barbara Segaert, H. Roos, and Ryad, U. 2009. *A Prelude to Fiqh al-Aqalliyyât: Rashîd Ridâ's Fatwâs to Muslims under non-Muslim Rule*. , 239 - 270 (2009). P.I.E. Peter Lang.

Conclusion

Fiqh al-aqalliyyat has grown out of the need for the establishment of a well-defined new *fiqh* for Muslim minorities. Following the considerable increase of the Muslim population in the Western nations, a group of scholars called for a new *fiqh*, which would help Muslim minorities to preserve their Muslim identity and to live in harmony with their societies in a way that allows them successfully convey the universal message of Islam to their fellow citizens. For most Muslim minorities, the old question of whether Muslims can live in non-Muslim societies turned into the question of how Muslims can best live with non-Muslims in non-Muslim societies. With the aim of giving more satisfactory and practical answers to the question, proponents of *fiqh al-aqalliyyat*, in particular al-Alwani, al-Qaradawi, and Ramadan, underscored some juristic principles. The comparative analysis of the three scholars views on the methodology of minority *fiqh* indicates that *takhayyur*, collective *ijtihad*, contextual analysis and *istislah* are the principal juristic methods for *fiqh al-aqalliyyat*. The application of these methods yields issuance of fatwas that are compatible with the objectives of minority *fiqh.*

The methodological framework of *fiqh al-aqalliyyat* partially justifies the claim that it is a new and unique *fiqh.* Characteristics of the framework show us that minority *fiqh* clearly differentiates itself from *fiqh al-nawazil* in some ways. First, it is new in terms of its topical range. The prime interest of *fiqh al-aqalliyyat* is to find practical solutions especially for Muslim minorities' legal dilemmas. It confines itself to the realm

of Muslim minorities. Secondly, the process of issuing a fatwa in this *fiqh* is also different from that of *fiqh al-nawazil*, for advocates of the minority *fiqh* do not limit themselves to adherence to a specific *madhhab.* Minority *fiqh* scholars' primary sources are the Qur'an, and the objectives of *Shari'ah,*[204] while those *fiqh al-nawazil*' scholars relied upon the legal literature handed down from the founders of their own legal schools to themselves. Lastly, according to scholars of minority *fiqh*, the presence of Muslims outside Muslim lands is not a temporary, exceptional, and/or abnormal situation. Indeed, scholars of minority *fiqh* recommend Muslims to reside in the West, especially for the purpose of *da'wah*.[205] Al-Alwani argues that although *fiqh al-nawazil* - as a part of the traditional Islamic jurisprudence - is an useful source, it is necessary to develop a new legal methodology through which Muslim jurists can issue fatwas that address the need of Muslims minorities to establish communities with strong Muslim identity, without contradicting the underlying values and social factors of the contexts in which Muslim minorities live.

This study demonstrates that the methodological framework of *fiqh al-aqalliyyat* bears a close resemblance to the juristic methodology used to codify Islamic law in the last two centuries. Both minority *fiqh* scholars and scholars of the modern codification adopt the same approach to traditional Islamic jurisprudence. The scholars of the both methodologies practice *ijtihad* by taking certain legal methods selectively in order to meet the changing needs of Muslims. Also they employ, in particular, the four methods I

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204 'Alwānī, Ṭāhā Jābir Fayyāḍ. 2003. P.7

205 Tottoli, Roberto. 2015. P. 369

have discussed in Chapter Two, the juristic methods *of takhayyur, istislah, al-ijtihad al-jama'i* and *fiqh al-waqi'*. This study suggests that the methodology of the minority *fiqh,* for the most part, appears to be a continuation of the modernist juristic methodology that was developed in the two last centuries.

Finally, the juridical methodology of *fiqh al-aqalliyyat* needs further clarification. Clarification is needed particularly in methods of *ijtihad*. Due to limited scope of this thesis, I did not discuss the details of disagreements between supporters of *fiqh al-aqalliyyat*. Despite minority *fiqh*'s scholars' broad agreement on the core principles and objectives of *fiqh al-aqalliyyat*, they hold differing views with regard to the practice of *ijtihad*. For instance, unlike al-Qaradawi and Ramadan, al-Alwani does not regard the Sunnah as a binding source of legislation.[206] He believes the Sunnah illustrates how the *Qur'anic ahkam* (commandments and prohibitions in the Qur'an) may be applied; yet he does not regard it as a legal source based upon which Muslim jurists should issue fatwas. Again, unlike al-Qaradawi and Ramadan, Al-Alwani does not consider *asbab al-nuzul* and *al-nasikh wa al-mansukh* as sources, either.[207] As to be expected, his approach to these traditional sources has drawn criticism from various scholars. I hope that in the near future, scholars of *fiqh al-aqalliyyat* lay out their view of the methodological framework in detail within their works in a way that facilitate researchers to understand it more easily.

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[206] Taha Jabir al-' AlwanT, "Mafhum al-Wahy fi al-Qur'an," *Al-Masar* 6 (2005): 183.
[207] Hassan, Said Fares Ahmed. 2011. P. 184

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