

ISLAMIC LAW AND MUSLIM MINORITIES:
THE JURISTIC DISCOURSE ON MUSLIM
MINORITIES FROM THE SECOND/EIGHTH TO THE
ELEVENTH/SEVENTEENTH CENTURIES

KHALED ABOU EL FADL *

(Princeton, New Jersey)

Abstract

This essay examines the juristic discourse on Muslim minorities from the second/eighth century to the eleventh/seventeenth century with regard to (1) whether or not Muslims may reside in non-Muslim territory and under what circumstances; (2) the relationship of these Muslims to *dār al-Islām*; and (3) the ethical and legal duties that these Muslims owe to the Shari'a and to their host non-Muslim polity.

The juristic discussions on legality of residence in non-Muslim territory in the first Islamic centuries were cryptic and ambiguous. Systematic juristic positions developed only after the sixth/twelfth century as a response to historical challenges. The various positions adopted by the jurists were a function of historical specificity and reflected a dynamic process of legal development.

In theory, the position of Muslim minorities residing in non-Muslim territory is problematic because of the traditional dichotomy between *dār al-Islām* and *dār al-ḥarb*. In practice, the persistent existence of Muslim minorities residing outside *dār al-Islām* challenged this dichotomous view. The linguistic dichotomy between *dār al-Islām* and *dār al-ḥarb* obscures a much more complex historical reality. The juristic discourse on the issue was not dogmatic and does not lend itself to essentialist positions.

THE STATUS OF Muslim minorities residing in non-Muslim territory has been the subject of juristic debate at least since the second/eighth century. The position of these Muslims has been problematic for a variety of historical and doctrinal reasons. It has often been argued that a just life is possible only if lived under the guidance of the Shari'a which, in turn, is possible only if there is an Islamic polity dedicated to the application of the Shari'a. That is to say, a just life is

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possible for a Muslim only if lived in an Islamic polity that dutifully applies the Shari'a. Consequently, a certain dichotomy results. On the one hand, there is the abode of Islam (*dār al-Islām*) where it is possible to live an ethical life under the guidance of the Shari'a. On the other hand, there is the abode of unbelief (*dār al-kufr*, *dār al-ḥarb* or *dār al-shirk*) where the Shari'a is not applied, and Islamic justice does not prevail.¹ The historical reasons for this dichotomous language, and what it actually means is a multifaceted matter. But ultimately this dichotomous view is largely theory, and theory is often harshly tested by history. As often occurs, the precise lines delineated by theory or religious dogma are blurred by the trials of history. The history of the juristic discourse on the problem of Muslim minorities is the history of an attempt to reconcile the demands of theory with the challenges of history.

Several writers have argued that because of this dichotomous position, the "Muslim worldview" is insular and exclusive. Bernard Lewis asserted that in Islamic thought "[j]ust as there is only one God in heaven, so there can be only one sovereign and one law on earth," that is, the sovereignty of *dār al-Islām* and the law of Shari'a.² The lands of Islam are superior to lands where Islam does not prevail, and even if the non-Muslim world is temporarily tolerated, ultimately it must be converted to Islam through *jihād*.³ The existence of Muslim minorities voluntarily residing in non-Muslim territory complicates this issue and raises questions as to the significance of the purported Islamic worldview. If the position of Muslim minorities is the exception to this worldview, it is often the case that the exception is much more worthy of study than the rule. The material reviewed in this essay suggests that the linguistic dichotomy, *dār al-Islām* versus *dār al-ḥarb* obscures a much more complex historical reality.

In this essay I will review the pre-modern juristic discourse on Muslim minorities, emphasizing the main issues of contention and debate within this juristic tradition. My objective is to call attention to the complexities of this field of research and to raise issues deserving of further exploration. For centuries large Muslim populations lived in

¹ Throughout this essay I will use the Arabic term *dār al-Islām* in the sense of "the land of Islam" and *dār al-ḥarb* in the sense of the "lands of non-Muslims."

² Bernard Lewis, *Discovery of Europe* (New York and London: Norton and Co., 1982), 61.

³ Daniel Pipes, *In the Path of God: Islam and Political Power* (New York: Basic Books Inc., 1983), 70-88; Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore and London: John Hopkins Press, 1955), 62-66.

non-Muslim territories, and a study of the juristic reaction to this historical fact may lead to a better understanding of the linguistic dichotomy between *dār al-Islām* and *dār al-ḥarb*.

Because this field of research remains largely undeveloped, I will survey the pre-modern juridical literature on three main issues from the second/eighth century to the eleventh/seventeenth century: (1) whether or not Muslims may reside in non-Muslim territory and under what circumstances; (2) the relationship of these Muslims to *dār al-Islām*; and (3) how Islamic law applies or is to be applied by these Muslims. At issue are the ethical and legal duties that these Muslims owe to the Shari‘a and to their host polity. Some concepts discussed here, such as *hijra*, were used in Muslim sectarian debates and as oppositional doctrines to Muslim rulers. This aspect of the study, which requires separate treatment, will not be dealt with here.

I will argue that systematic juristic positions on the issue of Muslim minorities developed after the sixth/twelfth century and that the varied juridical positions were a function of historical specificity. The reaction of different jurists reflected a dynamic process by which doctrinal sources, legal precedents, juristic methodologies and historical reality interacted to produce diverse results.

1. *Where May Muslims Reside?*

The Early Positions

The Prophet established a city-state after emigrating to Medina in 10/622. The Qur’ān, especially after the pact of Hudaibiyya (628-630), emphasized the principle that all Muslims are obliged to perform migration (*hijra*) to the Prophet.⁴ Significantly, before the Prophet emigrated to Medina, a group of Muslims escaped persecution in Mecca by seeking sanctuary in Abyssinia, a Christian state (615-622). Hence the idea of performing *hijra* to escape persecution and to propagate the faith was established at an early date.⁵

⁴ See Q. 8:72, Q. 4:89 and Q. 4:100. Unless otherwise indicated, all translations of the Qur’ān are from Ahmed Ali, *Al-Qur’ān* (Princeton: Princeton University Press, 1988). Slight changes have been made to reflect my understanding of the original.

⁵ On the centrality of *hijra* in Muslim theology, see Montgomery Watt, “Hidjra”, *Encyclopaedia of Islam*, 2nd ed., vol. 3 (1971), 366-67; Muhammad Khalid Masud, “Shehu Usman Dan Fodio’s Restatement of the Doctrine of *Hijrah*,” *Islamic Studies*, 25:1 (1986), 56-77; idem, “The Obligation of *Hijra* in Islamic Law,” in *Muslim Travellers*, ed. Dale Eickelman and James Piscatori (Berkeley and Los Angeles: University of California Press, 1990), 29-32; idem,

Complementing these historical precedents were three Qur'ānic injunctions which instructed not only Muslims but also Jews and Christians to govern themselves by what God had decreed for each of them. Q. 5:44 reads, "Those who do not judge by God's revelations are infidels indeed."⁶ Additionally, Q. 5:5 calls upon Muslims not to ally themselves with Christians or Jews: "O believers, do not hold Jews and Christians as your allies. They are allies of one another and anyone who makes them his allies is surely one of them; and God does not guide the unjust." Finally, Q. 4:97-100 calls upon Muslims to escape oppression by migrating in the cause of God:

As for those whose souls are taken by the angels (at death) while in a state of injustice against themselves, they will be asked by the angels: "What state were you in?" They will answer: "We were oppressed in the land." And the angels will say: "Was not God's earth large enough for you to migrate?". . . But those who are helpless, men, women and children, who can neither contrive a plan nor do they know the way, may well hope for the mercy of God; and God is full of mercy and grace. Whosoever migrates in the cause of God will find many places of refuge and abundance on the earth.⁷

These three injunctions did not necessarily lead to a consistent result. What did the Qur'ān mean by those who "were oppressed," and is *oppression* synonymous with living in non-Muslim lands? What if a Muslim encounters oppression in an Islamic land and the only haven is non-Islamic territory; in that case, what becomes of the injunction not to take Christians and Jews as allies? And how is one to govern by what God has decreed if one escapes to non-Muslim territory?

Adding to the complexity of the problem are several *ḥadīths* that forbade Muslims from living in the lands of unbelief. One such *ḥadīth* states: "Whoever associates with an infidel and lives with him, he is like him." Other *ḥadīths* state that hijra is an ongoing obligation. For instance, the Prophet is reported to have said, "The hijra will not come to an end as long as the infidels are fought." Inconsistently, however, other *ḥadīths* assert that the duty of hijra ended with the conquest of Mecca.⁸

"Being a Muslim in a Non-Muslim Polity," *Journal of the Institute of Muslim Minority Affairs*, 10:1 (Jan. 1989), 120.

⁶ Also see Q. 5:49. For Jews, see Q. 5:44-45; for Christians, see Q. 5:47-48.

⁷ Q. 4:97-100.

⁸ See Abū Zakariyyā' al-Nawawī, *al-Majmū' Sharḥ al-Muḥadhdhab* (Beirut: Dār al-Fikr, n.d.), vol. 19, 262-63. For a discussion of these *ḥadīths*, see Masud, "Obligation," 33-34; Wilfred Madelung, "Has the Hijra Come to an End?," *La Revue Des Etudes Islamiques*, LIV (1986), 227.

The issues raised by the historical and doctrinal precedents were not only of theoretical significance. The concept of hijra played a role both in the internal political struggles of the early Islamic state⁹ and in matters relating to foreign policy. Since the second/eighth century, significant Muslim populations have resided in non-Muslim territories, especially in coastal India and China. In the late Umayyad period, Muslims reportedly fled the tyranny of al-Hajjāj b. Yūsuf (41-95/661-714) by taking refuge in Malabar, India. During the reign of al-Mahdī (158-169/775-785) and Harūn al-Rashīd (170-193/786-809), Muslim lands were lost to non-Muslim rule.¹⁰ In the fifth/eleventh century, large Muslim populations came under non-Muslim rule in Messina and Sicily. The problem of how to treat Muslims who reside in non-Muslim territory became particularly urgent in the seventh/thirteenth century, when vast Muslim territory was conquered in the East by Mongols and in the West by Christians.¹¹

These historical challenges elicited a variety of responses from Muslim jurists. Some jurists argued that Islam and *dār al-Islām* are inseparable and that Muslims therefore may not reside in non-Muslim lands under any circumstance. Other jurists conceived of hijra as a dynamic concept that requires Muslims to be in a constant search for lands in which they can attain greater religious fulfilment; some of these jurists argued that it may be recommended or even obligatory for a Muslim to reside among unbelievers.

The early jurists addressed the issue of a non-Muslim who converted to Islam while in non-Muslim territory. Should that person now migrate to *dār al-Islām*? One might expect Sunni jurists who were accustomed to the formal association of the polity with Islam to demand that such a person immediately migrate to *dār al-Islām*.¹² But examination of the historical progression of juridical thought on the issue suggests that such an assertion should be qualified.

⁹ Ibid.

¹⁰ See Husayn Mu'nis (trans. and ed.), "*Asnā al-matājir fī bayān ahkām man ghalaba 'alā waṭanihi al-Naṣārā wa lam yuhājir*," *Revista del Instituto Egipcio de Estudio Islamicos en Madrid*, V (1957), 135-36. See also Muḥammad Hamīdullah, "Ex-Territorial Capitulations in Favour of Muslims in Classical Times," *The Islamic Review*, 38 (1950), 33-35; idem, *The Muslim Conduct of State* (7th ed., Lahore: Muhammad Ashraf, 1977), 121-29.

¹¹ See Bernard Lewis, *Political Language of Islam* (Chicago: University of Chicago Press, 1988), 104-05.

¹² See Bernard Lewis, "Legal and Historical Reflections on the Position of Muslim Populations under Non-Muslim Rule," *Journal of the Institute of Muslim Minority Affairs*, 13:1 (Jan. 1992), 6. I am grateful to Professor Lewis for providing me with a copy of this essay prior to its publication.

The early Hanafī jurist, al-Shaybānī (d. 189/804), reports that the duty to migrate to the land of Islam (*ard al-Islām*) after conversion was abrogated at the time of the Prophet. Those who convert but do not migrate to *dār al-Islām* are like the nomads (*a'rāb*) who accepted Islam but refused to join the Prophet in Medina. Although they are Muslims, they are not allowed to share in the spoils of war.¹³ However, al-Shaybānī reports on the authority of Abū Yūsuf (d. 182/798-99) that Abū Ḥanifa (d. 150/768) disapproved of Muslims residing in non-Muslim territory.¹⁴

Early Mālikī jurists were less equivocal. Saḥnūn (d. 240/854) reports that Mālik (d. 179/796) strongly disapproved of Muslims traveling to the lands of non-believers for purposes of trade because they might become subject to the laws of unbelievers.¹⁵ The operative legal cause in Mālik's view is that Muslims will be forced to submit to non-Muslim law, an issue that later became a crux of legal discussions. It is also reported that Mālik discouraged people from residing in territory in which the Companions of the Prophet are vilified. This is taken by later Mālikī jurists to mean that residence in lands of widespread sin is not allowed.¹⁶

Al-Shāfi'ī (d. 204/819-20) chose a very different approach. He argued that even after the establishment of the Islamic state in Medina, 'Abdallāh b. 'Abbās (a Companion of the Prophet) and others were allowed to reside in Mecca (then a non-Muslim territory).

¹³ Abū Bakr al-Sarakhsī, *Sharḥ al-Siyar al-Kabīr*, ed. S. al-Munajjid (Cairo: Ma'had al-Makhtūṭāt, 1971), vol. I, 94 (a commentary on a work attributed to al-Shaybānī entitled *al-Siyar al-Kabīr* – hereinafter “al-Shaybānī”). Writing many years after al-Shaybānī, Abū Bakr al-Sarakhsī explained that although the duty to migrate was abrogated, most jurists recommended that the nomads migrate to Medina so that they might learn their religion; but if these nomads could learn their religious duties in their tribal residence, there was no reason for them to migrate. See *al-Mabsūṭ* (Beirut: Dār al-Ma'rifa, 1986), vol. 10, 94-95. Although lawbooks cite the example of the nomads residing outside of Medina as if it were a politically neutral issue, this was a bitterly contested domestic issue in the Umayyad period (see Madelung, “*Hijra*”). The political debates concerning who is an emigré (*muhājir*) and who is entitled to spoils of war (*fiya'*) had little to do at that early stage with Muslims residing in non-Muslim territory. See also Abū al-Ḥasan al-Māwardī, *al-Aḥkām al-Sulṭāniyya* (Beirut: Dār al-Kutub al-'Ilmiyya, 1985), 163-64.

¹⁴ Abū 'Abd Allah al-Shaybānī, *The Islamic Law of Nations: Shaybānī's Siyar*, trans. Majid Khadduri (Maryland: The John Hopkins Press, 1966), 187; al-Shaybānī reiterates this view in his *al-Radd 'alā Siyar al-Awzā'i*, ed. Abū al-Wafā' al-Afghānī (Beirut: Dār al-Kutub al-'Ilmiyya, n.d.), 124.

¹⁵ Abū Sa'id Saḥnūn, *al-Mudawwana al-Kubrā* (Cairo: Dar al-Fikr, n.d.), vol. 3, 278.

¹⁶ Abū Bakr Ibn al-'Arabī, *Aḥkām al-Qur'ān*, ed. 'Alī Muḥammad al-Bajāwī, (Cairo: Dār Iḥyā' al-Kutub al-'Arabiyya, 1957), vol. 1, 484.

Additionally, the Prophet allowed nomadic tribes that converted to Islam to remain outside the domains of the lands of Islam. The Prophet, according to al-Shāfi'ī, would not have given these people a choice of residence if it was sinful for them to retain their independence. Consequently, Muslims who convert in non-Muslim lands may reside there *unless* these Muslims fear enticement away from Islam (*idhā lam yakhāfū'l-ḥimāta fī'l-dīn.*)¹⁷

By the end of the third/ninth century, several unrefined notions had emerged. Mālik's view that Muslims should never be subject to non-Muslim law entailed a hostility to Muslims leaving the territories of Islam even for the purpose of trade. The Ḥanafīs did not oppose sojourns for the purpose of trade, although they discouraged permanent residence by Muslims in the territory of non-Muslims. For al-Shāfi'ī, who focused on the threat of losing one's religious beliefs, each case turned on its specific circumstances.

Al-Ṭabarī (d. 310/923), the founder of a shortlived school of law, discussed several other operative causes that subsequently were developed and systematized. In commenting on the Qur'ānic verses regarding the duty to migrate from the lands of oppression (see above), he states that at the time of the Prophet those who failed to join the Islamic state in Medina were considered infidels, although this rule was abrogated prior to the Prophet's death. Al-Ṭabarī explains that these Qur'ānic verses refer to a specific group of people who converted to Islam but refused to join the Prophet in Medina, preferring to stay in Mecca. The Prophet required them to migrate to Medina because they were unable to worship freely in Mecca. Hence, the operative cause (*'illat al-ḥukm*) is the inability to practice Islam. But al-Ṭabarī also mentions that it is improper for a Muslim to prefer the territory of unbelievers over Islamic lands, and he argues that the group of Muslims specifically addressed by the Qur'ānic verses was culpable for contributing to the strength of unbelievers who were fighting the Prophet at the time (*takthīr sawād al-kuffār*).¹⁸

¹⁷ Abū 'Abd Allah al-Shāfi'ī, *al-Umm*, ed. Muḥammad al-Najjār (Beirut: Dār al-Ma'rifa, n.d.), vol. 4, 161.

¹⁸ Abū Ja'far al-Ṭabarī, *Jāmi' al-Bayān* (Beirut: Dār al-Ma'rifa, 1986), vol. 4, 147-51. Al-Ṭabarī records several conflicting reports regarding what motivated this Muslim group to refuse to join the Prophet. In addition to Ṭabarī, see also Abū al-Qāsim al-Zamakhsharī, *al-Kashshāf* (Beirut: Dār al-Ma'rifa, n.d.), vol. 1, 292-93; Abū al-Fida' Ibn Kathīr, *Tafsīr Ibn Kathīr* (Cairo: Dār al-Khīr, 1988), vol. 1, 513-15; Maḥmūd al-Ālūsī, *Rūḥ al-Ma'ānī* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1985), vol. 5, 125-26; Abū Ja'far b. al-Ḥasan al-Ṭūsī, *Tafsīr al-Tibyān*, ed. Aḥmad al-Amin and Aḥmad Qasīr (Najaf: Maktabat al-Amin, n.d.), vol. 3, 302-

Shī'ī books on *ḥadīth* add a further dimension to the early discussions. They cite the traditions cited by Sunnis in which the Prophet is reported to have condemned any Muslim residing among non-Muslims;¹⁹ and they cite the case discussed by the Ḥanafīs and the Shāfi'īs relating to the nomads who did not join the Prophet after the hijra to Medina. But early Shī'ī jurists reportedly disapproved of Muslims residing among nomads because this was bound to lead to ignorance. Residence in an area in which access to jurists is difficult is dangerous to one's level of knowledge.²⁰ But when someone reportedly asked Ja'far al-Ṣādiq (the sixth Imām, d. 148/765) if he would die an unbeliever if he entered the lands of unbelief, al-Ṣādiq suggested that he might in fact be able to better serve Islam in non-Muslim territory.²¹

Although the Shī'ī jurists consider the nomads mentioned in the *ḥadīth* to be Muslims, they advise that residing amongst them is improper. Hence residing amongst Muslims is not in itself always sufficient. The quality or the type of Muslim residence is also a material issue. The question treated by Shī'ī jurists is: Is migration required from lands that are formally Islamic but in which people indulge in widespread sin (*ma'āṣi*)? Possibly, early Shī'ī jurists representing an oppositional movement were more interested in substantive questions of justice, corruption and knowledge than in the formal categorization of the territory.²² Interestingly, later Shī'ī jurists are equivocal in their response to the question of whether Muslims should migrate from lands of widespread sin.

In the first four centuries, Muslim jurists manifested a degree of ambivalence toward the problem of Muslims residing in non-Muslim territories. Such Muslim minorities are not specifically mentioned in

03; Fakhr al-Dīn al-Rāzī, *al-Tafsīr al-Kabīr* (Beirut: Dār al-Kutub al-'Ilmiyya, 1990), vol. 2, 12.

¹⁹ See, for example, Abū Ja'far al-Kulaynī al-Rāzī, *al-Kāfī*, ed. 'Alī al-Ghaffārī, (Tehran: Dār al-Kutub al-Islāmiyya, 1377-79/1957-59), vol. 5, 43; Muḥammad Bāqir al-Majlisī, *Malādh al-Akhyār*, ed. Mahdī al-Rajā'ī (Qum: Maktabat Āyyat Allāh al-Mar'āshī, 1406/1986), vol. 9, 402.

²⁰ See Muḥammad al-Hurr al-'Āmilī, *Wasā'il al-Shī'a*, ed. Ahmad al-Rabbānī al-Shirāzī (Beirut: Dār Ihyā' al-Turāth al-'Arabī, n.d.), vol 11, 75-76. On the political implications of this argument, see Madelung, "Hijra".

²¹ Al-'Āmilī, *Wasā'il*, 77. However al-Ṣādiq is also reported to have said, "The true expatriate (*al-gharīb*) is he who resides in the land of unbelief (*dār al-shirk*)." This statement does not necessarily signify disapproval (*ibid.*, 76).

²² See Bernard Lewis, *Islam and the West* (New York and Oxford: Oxford University Press, 1993), 45, 155-65; Hossein Modarressi, *Crisis and Consolidation in the Formative Period of Shi'ite Islam* (Princeton: Darwin Press, 1993), 3-18.

early legal texts. Despite the wealth of reports and concepts, the discussions are often cryptic and impressionistic. This ambivalence continued well into the fifth/eleventh century.²³ The Andalusian Zāhiri jurist, Ibn Ḥazm (d. 456/1064), viewed with disfavor Muslims who entered non-Muslim territory, even for the purpose of trade, if entry entailed being subject to non-Muslim law. The Ḥanafī jurist, al-Sarakhsī (d. 483/1090-91), on the other hand, insisted that trading with non-Muslims is a necessity for the sake of public welfare, but that a Muslim should not sell weapons to non-Muslims. The duty to migrate, according to al-Sarakhsī, had lapsed. Although hijra had been necessary at the time of the Prophet so that Muslims might learn their religion, the present situation, al-Sarakhsī argues, is very different. Although al-Sarakhsī does not explain whether or not Muslims can learn their religion in non-Muslim lands, he states that a Muslim should not reside permanently in non-Muslim lands and should not bear offspring there. There are two main reasons for this: His children might acquire the mannerisms of non-Muslims; and they are at risk of becoming enslaved by non-Muslims.²⁴

The Mālikī position in the fifth/eleventh century had not become completely uncompromising. Writing before the fall of Toledo in 1085, the leading Andalusian Mālikī jurist, Ibn ‘Abd al-Barr al-Qurṭubī (d. 463/1071), a student of Ibn Ḥazm, argued that it is generally forbidden for a Muslim to reside in non-Muslim territory, but that a Muslim may reside there temporarily if he or she is safe and hopes to prevail over the non-believers.²⁵ The fall of Toledo marked the beginning of a series

²³ The Shi‘i jurists: ‘Abd al-‘Aziz b. al-Barrāj al-Ṭarabulsī (d. 481/1088), *al-Muhadhdhab* (Tehran: Mu’assasat al-Nashr al-Islāmī, 1406), vol.1, 311 (although he elaborates on certain laws pertaining to Muslims in non-Muslim lands, al-Ṭarabulsī does not discuss *wujūb al-hijra* or the legality of Muslim residence in non-Muslim territory); al-Ṭūsī (d. 460/1067), *Tafsīr*, vol. 3, 302-03, does not mention *wujūb al-hijra* in the context of the Qur’anic verse on migration; without mentioning *wujūb al-hijra*, Abū ‘Alī al-Ṭabrisī (d. 548/1154), *Majma’ al-Bayān* (Beirut: Dār Maktabat al-Ḥayāh, 1986), vol. 3, 151, cites a report to the effect that if sin is widespread in a land one should leave it. The Sunni jurist, Abū Maṣṣūr al-Tamīmī al-Baghdādi (d. 463/1072), *Kitāb Uṣūl al-Dīn* (Beirut: Dār al-Hilāl, 1980), 154-55, cites the opinions of those who argue that Islamic territories in which Muslims espouse heretical opinions are in fact *dār Kufr*, but he does not mention the issue of residence (*iqāma*) in such territories.

²⁴ Abū Muḥammad al-Qurṭubī al-Zāhiri Ibn Ḥazm, *al-Muḥallā*, ed. Ahmad Shākir (Cairo: Dār al-Turāth, n.d.), vol. 7, 349; al-Sarakhsī, *al-Mabsūt*, vol. 10, 6-7, 74, 92.

²⁵ Yūsuf b. ‘Abd al-Barr al-Nimri al-Qurṭubī, *al-Kāfi fī Fiqh Ahl al-Madīna al-Mālikī* (Beirut: Dār al-Kutub al-‘Ilmiyya, 1987), 210.

of defeats for Muslims in al-Andalus,²⁶ following which the position of Mālikī jurists became increasingly strict.

Perhaps the most significant opinion emanating from the fifth/eleventh century is that of the Shāfi'ī jurist, al-Māwardī (d. 450/1058), who is reported to have said, "If [a Muslim] is able to manifest [his] religion in one of the unbelievers' countries, this country becomes a part of *dār al-Islām*. Hence, residing in it is better than migrating because it is hoped that others will convert to Islam [through him]."²⁷ Al-Māwardī adds a new dimension to the problem. First, residence in a non-Muslim territory may actually be preferable to migration. Second, the question of what is *dār al-Islām* comes into focus. Sometimes the liberties accorded to a Muslim in territory outside the geographical domain of Islam will impact upon the classification of the territory in which this Muslim resides. This opinion became a distinctive mark of the Shāfi'ī school.

By the sixth/twelfth century, vast Muslim populations had come under non-Muslim rule. While this was not a novel situation the scale was quite unprecedented, and several centuries would pass before the law schools fully developed and systematized their responses. Initially, the schools appear to have been overwhelmed and often resorted to claiming consensus where none existed. They struggled to develop a consistent doctrine that would take account of the many reasons that a Muslim might find himself or herself in non-Muslim lands: A person might sojourn to non-Muslim territory for the purpose of trade; a non-Muslim living in *dār al-ḥarb* might convert to Islam; or Muslim territory might be conquered by non-Muslims. Additionally, the jurists tried to account for the sectarian divisions within the Islamic Empire. It seems that different jurists were addressing different scenarios in their expositions without specifically indicating the issue they had in mind.

The most notable reaction to the problem of hijra in the sixth/twelfth century came from Mālikī jurists. Ibn Rushd (the grandfather, d. 520/1122), who was primarily concerned with the problem of Muslims living in or visiting *dār al-ḥarb*, was uncompromising in his response. Building upon the early judgments of Mālik b. Anas, he states, in a legal opinion (*fatwā*), that it is strictly prohibited for a Muslim to enter or live in *dār al-ḥarb*. Trade also is prohibited if it means sojourning in *dār al-ḥarb*, although it is allowed if non-Muslims enter *dār al-*

²⁶ Anwar Chejne, *Muslim Spain: Its History and Culture* (Minneapolis: The University of Minnesota Press, 1974), 67.

²⁷ Al-Nawawī, *al-Majmū'*, vol. 19, 264.

Islām. The main problem, according to Ibn Rushd, is that a Muslim entering *dār al-ḥarb* will subject himself or herself to non-Muslim law, something only an unethical and corrupt Muslim would accept. Consequently, such Muslims are generally of suspect credibility, their testimony in court cannot be accepted, and they cannot be allowed to lead prayer.²⁸ Ibn Rushd's *fatwā* probably was a direct response to the loss of Muslim territory in the Iberian peninsula. In fact, he advises Muslims that if lost territory is restored to Islam, they may return and reestablish residence in their former homeland.²⁹

Although Ibn Rushd was the foremost Mālikī jurist of his time, his attitude did not represent the unanimous view of his school. When another Mālikī jurist, al-Māzarī (d. 536/1141), was asked if the decisions of judges appointed by non-Muslim authorities in Sicily are legally recognizable in Muslim territory, he responded in the affirmative. Al-Māzarī conceded that a Muslim should not be allowed to reside in non-Muslim territory under the best of circumstances. But such residence does not necessarily undermine a Muslim's credibility, either because such a Muslim might have no choice in the matter, or because his refusal to migrate might be based upon an erroneous interpretation (*ta'wīl*) of the validity of residence in non-Muslim territory. More importantly, if a Muslim resides in non-Muslim territory with the aim of eventually restoring the lost territory to Islam, or dedicates himself or herself to bringing the Islamic message to non-Muslims, then his or her residence is legal. Moreover, as a practical necessity, Muslims residing in non-Muslim territories need their own judges to adjudicate conflicts and resolve disputes. That these judges are appointed by non-Muslims is regrettable but necessary. Here al-Māzarī focuses on the motive of the resident and the idea of necessity. The resident's motive, which is to spread Islam, and the practical necessity of having Muslim judges, although appointed by non-Muslims, preserves the credibility of such residents.³⁰ By implication,

²⁸ Abū al-Walid Muḥammad b. Aḥmad Ibn Rushd, *al-Muqaddimāt al-Mumahhidāt*, ed. Muḥammad Ḥujjī (Beirut: Dār al-Gharb al-Islāmī, 1988), vol. 2, 151-54; idem, *al-Bayān wa'l-Tahsil*, ed. Muḥammad Ḥujjī (Beirut: Dār al-Gharb al-Islāmī, 1988), vol. 4, 170-71.

²⁹ Ibn Rushd, *al-Muqaddimāt*, vol 2, 153.

³⁰ Al-Māzarī's *fatwā* is recorded in Aḥmad al-Wansharīsī, *al-Mi'yār*, ed. Muḥammad Ḥājj (Beirut: Dār al-Gharb al-Islāmī, 1981), vol. 2, 133-34. On al-Māzarī and his *fatwā*, see Abdel Majid Turki, "Consultation juridique d'al-Imam al-Māzarī sur le cas des musulmans vivant en Sicile sous l'autorité des Normands," *Mélanges de L'Université Saint-Joseph*, 50:2 (1984); Ḥusayn Mu'nīs, "Asnā"; and Ḥassan Ḥussni 'Abd al-Wahhāb, *al-Imām al-Māzarī* (Tunis, 1955).

residing under non-Muslim sovereignty is not always unethical. If a Muslim mistakenly thinks that his or her residence is justified then his or her ethical status is preserved. In other words, although residence itself may be morally wrong, the residing Muslim remains an ethical person.

Other jurists of the sixth/twelfth century, notably from the Shāfi'i and Shi'i schools, argued that a Muslim is permitted to reside in non-Muslim lands if he or she is able to manifest his or her religion, but that hijra from non-Muslim territory is obligatory if a person fears the loss of religion (*khashiyya an yuftana fi dīnihi*).³¹

Several jurists extended their discussions of hijra beyond the dichotomy between *dār al-Islām*, and *dār al-ḥarb*. They insisted that a Muslim should leave any territory in which corruption is widespread or in which a Muslim is not physically secure. Therefore, one should migrate to places where one can attain greater religious fulfillment and physical safety. This view may have been a natural extension of the early reports regarding the Muslim emigrants to Abyssinia who reportedly fled from oppression in Mecca, and of the reports regarding the nomads of Arabia. More important, it was a direct result of the internal theological and political divisions that plagued the Islamic Empire. By the third/ninth century, the Mu'tazila, Zaydiya and Khawārij schools developed well-formulated doctrines requiring hijra from lands formally ruled by Muslim rulers. Shi'i jurists distinguished between *dār al-imān* (the abode of true faith) and *dār al-Islām*. Qualitatively, *dār al-Islām* could be equivalent to *dār al-kufr* if corrupt beliefs and practices are widespread, but in the absence of the abode of true faith Muslims may continue to reside in corrupt territories as long as they can practice their religion.³² From the perspective of these

For another *fatwā* that relies on the logic of necessity, see al-Wansharisi, *al-Mi'yār*, vol. 10, 135.

³¹ An opinion of al-Baghawī (d. 510/1117) is cited in al-Nawawī, *al-Majmū'*, vol. 19, 264; see also Abū 'Abd Allāh b. Idrīs al-'Ijlī al-Hillī (d. 598/1202), *al-Sarā'ir: al-Hāwī li-Tahrīr al-Fatāwī*, in *Silsilat al-Yanābi' al-Fiqhiyya*, ed. 'Alī Aṣghar Murwārid (Beirut: Dār al-Turāth, 1990), vol. on Jihād, 183. The phrase, "manifesting one's religion" became an established legal term between the sixth/twelfth and the seventh/thirteenth centuries. Several sixth/twelfth century Ḥanafī jurists discuss the laws that apply to Muslims living in non-Muslim lands without commenting on the legality of hijra or residence in such lands. See 'Alā' al-Dīn al-Kāsānī (d. 587/1191), *Badā'i' al-Ṣanā'i'* (Beirut: Dār al-Kutub al-'Ilmiyya, 1986), vol. 7, 105; Abū al-Ḥasan al-Farghānī al-Marghinānī (d. 593/1196-97), *al-Hidāya* (Cairo: Mustafā al-Bābī al-Ḥalabī, n.d.), vol. 2, 152-53.

³² Al-Nu'mān al-Mufīd (d. 413/1022), *Awā'il al-Maqālāt*, ed. Shaykh al-Islām al-Zanjānī (Qum: Maktabat al-Dawzi, n.d.), 70-71; see Muḥammad b. Muḥammad Bāqir al-Najafī (d. 1266/1850), *Jawāhir al-Kalām*, ed. Muḥammad

oppositional groups, a just life is not necessarily achieved in a territory that formally espouses Islam. Rather one must engage in a constant search for a just land and for physical safety or one must migrate to territory under Muslim control.³³ As noted earlier, the role hijra played in the internal political conflicts in Islamic history is outside the scope of this essay. Suffice it to say that this debate has been the subject of continuous juridical discussion up to and including the late nineteenth and early twentieth centuries.

The Developed Positions

Well-formulated, recognizable schools of thought on the problem of Muslims in non-Muslim territory emerge only after the sixth/twelfth century. As always, these schools of thought manifest a richness of diversity and many minor variations. Each school adopted a cohesive position which it applied, at times, with compulsive rigidity.

The Mālikī school adopted an uncompromising position. A Muslim should never reside in non-Muslim territory, primarily because he or

al-Ākhūndī (Tehran: Dār al-Kutub al-Islāmiyya, 1378), vol. 21, 34-38; see also Ann K. Lambton, *State and Government in Medieval Islam* (Oxford: Oxford University Press, 1981), 30, 261.

³³ Abū al-Ḥasan al-Ash'arī (d. 324/936), *Maqālāt al-Islāmiyyin*, ed. Muḥammad 'Abd al-Ḥamid (Beirut: al-Maktaba al-'Aṣriyya, 1990), vol. 2, 154-55; 'Abd al-Rahmān al-Badawī, *Madhāhib al-Islāmiyyin* (Beirut: Dār al-'Ilm li'l-Malāyyin, 1971), 324-27. On Zaydī thought, see Riḍwān al-Sayyid, "al-Dār wa'l-hijra wa-ahkāmuhumā 'inda Ibn al-Murtadā," *al-Ijtihād*, 12 (1991). For pre-modern juridical discussions, see the Hanbali jurist, Maṣū' al-Buhūti (d. 1051/1641), *Kashshāf al-Qinā'*, ed. Hilāl Muṣṭafā Hilāl (Beirut: Dār al-Fikr, 1982), vol. 5, 44 (migration from the land of sin is not required). Shāfi'i jurists: Muḥammad al-Shirbīni al-Khatīb (d. 977/1569-70), *Mughnī al-Muhtāj* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1958), vol. 4, 239 (migration from the land of sin is required, and a Muslim always should migrate to the land in which he or she best can worship); Shihāb al-Dīn and Shaykh 'Umīrah, *Ḥāshiyat Qalwūbi wa-'Umīrah 'alā al-Minhāj* (Cairo: Dār Ihyā' al-Kutub al-'Arabiyya, n.d.), vol. 3, 227 (reporting different opinions). Mālikis: Abū 'Abd Allāh al-Qurtubī (d. 671/1273), *al-Jāmi' li-Ahkām al-Qur'ān* (Cairo: Dār al-Kutub al-'Arabiyya, 1967), vol. 5, 346-47, 349 (reporting different opinions); Ibn 'Arabī (d. 543/1148) sets out six different categories of hijra in his *Ahkām*, vol. 1, 484-86, including leaving non-Muslim territory, but he also explains that a person should migrate from areas in which his or her money or person is not secure, and from places of widespread corruption, even if this territory is formally a part of *dār al-Islām*. Zaydis: Ibn Muḥammad al-Shawkāni (d. 1250/1834), *Nayl al-Awṭār* (Cairo: Dār al-Hadīth, n.d.), vol. 8, 27 (reporting and discussing different opinions). Shi'is: al-Ṭabrisī, *Majma'*, vol. 3, 151 does not mention the duty to leave non-Muslim territory, limiting himself to reporting that one should leave the land of corruption. The Mu'tazili, al-Zamakhsharī (d. 538/1144), *al-Kashshāf*, vol. 1, 292-93, states that although the duty to migrate (*wājib al-hijra*) had been abrogated, one should migrate to lands in which one may attain greater religious fulfilment.

she will be subject to non-Muslim laws. If a person cannot leave due to physical or economic circumstances, then residence is excusable. Once the impediment is removed, that person must leave immediately. This position is best represented in two famous *fatwās* of al-Wansharīsī (d. 914/1508)³⁴ in which doctrinal problems combine with social, political and cultural considerations to produce a resounding condemnation of Muslims who accepted Mudejar status in al-Andalus.

The first *fatwā* deals with Mudejars who left al-Andalus for North Africa and who subsequently encountered financial difficulties. Consequently, they regretted their hijra and mocked Muslim North Africa, claiming that the Christian land from which they came was superior. "Hijra," they mocked, "should really be from here [North Africa] to there [the Christian territory]." The questioner asks the suggestive question: "What do you think of these people?" Al-Wansharīsī begins his response in a detached, scholarly manner, arguing that hijra from non-Muslim territory is an absolute duty. After reviewing the conflicting doctrinal sources, he concludes that the conflict is only apparent and that all the evidence leads to a single conclusion. Al-Wansharīsī rejects the argument that corruption had become widespread and that all lands therefore are equal in status. The territory of Islam, even if unjust, is superior to non-Muslim territory, even if just.³⁵ Apparently al-Wansharīsī believed that formal association with Islam is an ultimate moral value that outweighs any consideration of substantive justice.

Al-Wansharīsī next argues that it is immaterial whether or not the territory in question was originally a Muslim land. Some have argued that there is a material difference between a Muslim who finds himself or herself in land that historically has been non-Muslim and land that used to be Muslim but was conquered by non-Muslims. Although al-Wansharīsī dismisses this argument as a distinction without a difference, other jurists argued that conquered Muslim territory generally remains Muslim territory despite non-Muslim rule.³⁶

³⁴ On this *fatwā*, see Husayn Mu'nīs, "Asnā," and L.P. Harvey, *Islamic Spain: 1250 to 1500* (Chicago: University of Chicago Press, 1990), 56-63.

³⁵ Al-Wansharīsī is responding here to a practical concern expressed by jurists who argued that the material issue is safety and justice and that if corruption spreads, there is no duty to migrate because all lands become equal in status. See, for example, al-Shirbinī, *Mughnī*, vol. 4, 239.

³⁶ The argument that conquered territory remains Muslim as long as the laws of Islam are applied is a typical Ḥanafī position (see below).

After finishing his scholarly exposition, al-Wansharisī reveals the essentially political nature of this issue. He condemns in the strongest possible terms those who mock the Muslim lands of Islam. How could anyone say Christian territory is superior! Such a claim reveals the hypocritical and immoral nature of people who lack any appreciation or judgment. How could anyone prefer the company of non-Muslims over Muslims? The intensity of the competition between Christians and Muslims and the deep sense of humiliation that al-Wansharisī feels is evident in his emotional language.³⁷

The social and political considerations that preoccupied al-Wansharisī are even more apparent in the second *fatwā*. The question, which originated from Marbella subsequent to its conquest in the late 1400's,³⁸ mentions the case of a man who remained in that town in order to search for his missing brother. Although the brother was never found, the man continued to reside in Marbella because his unique skills made him an effective liaison between the Christian authorities and the resident Muslims. He interceded on the behalf of the Muslims, acting as their spokesperson and advocate. Although he was free to leave, he remained because the Muslims were poor and needed his services.³⁹

Al-Wansharisī responds unequivocally that the man must leave Marbella immediately, basing his response on what he believes to be historical precedent. He argues that anyone who resides in non-Muslim territory, even for lofty purposes, exposes himself to subjugation and degradation. History demonstrates, al-Wansharisī continues, that Christian authorities cannot be trusted to honor their pacts with Muslims. Those who investigate history will find that Christian authorities invariably violated their treaties and exploited Muslims. Even if their kings observed their treaties, their agents and lords nevertheless exploited Muslims. Further, history shows that Christians have never respected the honor of Muslim women, and that Muslim women end up marrying Christian men, an act strictly prohibited by Islamic law. Even if mature adults do not lose their religion, experience shows that children suffer a different fate. Like the Muslims of Avila, al-Wansharisī continues, Muslims will lose their mastery over the Arabic language and will be influenced by Christian mores, habits and fashions. Christian authorities consistently impose unfair taxes on

³⁷ Al-Wansharisī, *al-Mi'yār*, vol. 2, 121-24, 130-32.

³⁸ See Harvey, *Islamic Spain*, 56.

³⁹ Al-Wansharisī, *al-Mi'yār*, vol. 2, 137.

Muslims, and Muslims do not have the opportunity to question or resist these levies. Regardless of deceptive appearances, Muslims inevitably are reduced to subjugation and invariably end up losing their culture and religion.⁴⁰

Al-Wansharīsī's rhetorical strategy here is to invoke fears of betrayal. He assumes that it is impossible for Muslims to practice or "manifest their religion" in Christian territory.⁴¹ But inasmuch as al-Wansharīsī bases himself on an essentially empirical argument, it is legitimate to ask, What if Muslims can in fact "manifest their religion" in a particular non-Muslim land? Al-Wansharīsī probably would respond that the doctrinal sources would still forbid such a residence.

The fact remains, however, that the Mālikī position, which predominated in al-Andalus and Sicily, was heavily influenced by its own historical experience. As noted earlier, even the Andalusian Zāhiri jurist, Ibn Ḥazm, was hostile to residence in non-Muslim territory. Significantly, the Egyptian Mālikī jurist, al-'Adawī (d. 1189/1775), reflects his own environment in not reiterating the polemics of his West North African brethren. Rather, he says only that if a Muslim becomes subject to the laws of the unbelievers, he should migrate; if that Muslim does not migrate, he or she is considered a sinner, not an apostate.⁴² Another Egyptian Mālikī jurist, al-Ṣawī (d. 1241/1825), adopts a typically Ḥanafī position (see below) in arguing that conquered Muslim territory remains Muslim despite non-Muslim sovereignty, as long as the laws of Islam, as applied to Muslims, remain respected; hence migration is not necessary from such territory.⁴³ Moreover, while the most prominent Mālikī jurists exhibited a rigid hostility to residence in non-Muslim territory, it seems that this issue was contested within the Mālikī school. The Mālikī jurist, 'Ubaydallāh al-Maghrāwī al-Wahrānī, for example, issued a *fatwā* in 909-10/1504 in which he advised the Muslims of Granada on how to practice their religion in complete secrecy in order to avoid persecution.

⁴⁰ Ibid., vol. 2, 140-41. Hanna Kassis, "Muslim Revival in Spain in the Fifth/Eleventh Century," *Der Islam*, 67:1 (1990), 78-110, contains information on the concerns that might have affected al-Wansharīsī. The risk of apostasy and assimilation was very real, and many Muslims responded to this threat by a return to orthodoxy. See also Jamil Abun-Nasr, *A History of the Maghrib in the Islamic Period* (Cambridge: Cambridge University Press, 1987), 142-43.

⁴¹ Al-Wansharīsī, vol. 2, 132.

⁴² 'Alī al-Ṣa'īdī al-'Adawī, *Hāshiya 'alā Kifāyat al-Ṭālib al-Rabbānī* (Cairo: Mustafā al-Bābī al-Ḥalabī, 1952), vol. 2, 4.

⁴³ Aḥmad al-Mālikī al-Ṣawī, *Bulghat al-Sālik* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1952), vol. 1, 361.

Al-Wahrānī did not advise these oppressed Muslims to migrate; indeed he did not even mention the word *hijra*, although migration must have been an obvious choice considering that these Muslims were unable freely to practice their religion.⁴⁴

Unlike the majority of Mālikī jurists, the jurists of the other Islamic schools for the most part were unwilling to assume, as a matter of law, that Muslims invariably will be unable to practice their religion in non-Muslim lands. Although the non-Mālikī jurists considered the ability to practice Islam to be a central factual determination, they did not explain how the determination was to be made. Perhaps they expected that the decision would follow some guidelines but be made largely on a case-by-case basis. Be that as it may, the Ḥanbalī and Ja'fari schools adopt similar approaches, while the Shāfi'ī and Ḥanafī schools pursue different methodologies of inquiry while reaching similar results.

The Ḥanbalīs and Ja'farīs argue that if Muslims can practice their religion in non-Muslim territory, provided they are secure from harm and do not fear the loss of their religion, migration is not obligatory. Even if all such conditions are fulfilled, the jurists still recommend migration so that the Muslims will not contribute to the material wealth and strength of the unbelievers. If Muslims suffer from some physical or financial hardship, they are excused from migration in all circumstances until such hardship is removed.⁴⁵

Unfortunately, these jurists do not specify what they mean by the phrase, "able to manifest or practice religion." Muslim jurists use a

⁴⁴ This *fatwā* is reproduced and translated in L.P. Harvey, "Crypto-Islam in 16th-Century Spain," *Actas del Primer Congreso de estudios arabes E Islamicos* (Madrid, 1964). That the issue remained contentious even within the Mālikī school is reflected in a *fatwā* issued by Shaykh Abū 'Abd Allāh 'Ulaysh (of Moroccan ancestry, but born and lived in Egypt, where he died in 1299/1882). See his *Faṭḥ al-'Alay al-Mālik* (Cairo: Muṣṭafā al-Bābi al-Ḥalabī, 1958), vol. 1, 375-89.

⁴⁵ Ḥanbalī jurists: Muwaffaq al-Dīn Ibn Qudāma (d. 620/1223-4) *al-Mughnī* (Beirut: Dar al-Kutub al-'Ilmiyya, n.d.), vol. 10, 380-82; al-Buhūtī (d. 1051/1641), *Kashshāf al-Qinā'*, vol. 5, 43-44. Shi'ī jurists: Abū al-Qāsim al-Muḥaqqiq al-Ḥillī (d. 676/1277), *Sharā'ī' al-Islām fī Masā'il al-Ḥalāl wa'l-Ḥarām* (Beirut: Dār al-Aḍwā', 1983), vol. 1, 308; Ibn Sa'id al-Hudhālī (d. 689/1290), *Jāmi' al-Sharā'ī'*, in *Silsilat al-Yanābi'*, 236; Muḥammad b. Makki al-'Amilī, al-Shahīd al-Awwal (d. 786/1384), *al-Lum'a al-Dimashqiyya*, ed. al-Sayyid Muḥammad Kalantar (Najaf: Jāmi'at al-Najaf al-Dīniyya, 1398), vol. 2, 383; Fakhr al-Muḥaqqiqin al-Ḥillī (d. 771/1370), *Idāh al-Fawā'id* (Qum: Mu'assasat Ismā'iliyyān, 1387), vol. 1, 352; al-Najafī, *Jawāhir*, vol. 21, 34-38. For the Zaydī position, see Ahmad b. Yahyā b. al-Murtadā (d. 840/1437), *Kitāb al-Baḥr al-Zakhār* (Cairo: Dār al-Kitāb al-Islāmī, 1949), vol. 6, 469.

variety of expressions to refer to this idea;⁴⁶ but do they mean an ability to perform acts of worship such as prayer or fasting, or perhaps the ability to apply the laws of Islam in their totality? The distinction is important because while it might be feasible to pray or fast in non-Muslim lands, it is far more difficult to apply Islamic criminal, commercial and personal status laws.

Muslim minorities in different ages and localities often enjoyed a semi-autonomous status. Frequently, they had their own judges and governors who managed their affairs and applied some Islamic laws. The variations in practice were so numerous that it is impossible to take account of all of them in a single generalized statement.⁴⁷ Bernard Lewis has argued that Muslim jurists envisaged a kind of communal autonomy similar to that given to non-Muslims (*dhimmīs*) in Muslim lands. According to this view, “manifesting” Islam means applying the Islamic laws of personal status as well as other laws considered integral to the Shari‘a.⁴⁸

Although this argument makes good historical sense, the language used by the jurists does not admit any definitive conclusion. Some jurists — mostly Ḥanafīs — specify that “manifesting Islam” means the manifestation or application of Islamic laws;⁴⁹ other Ḥanafī jurists specify that a Muslim judge should be appointed and that Muslims should demand a Muslim governor.⁵⁰ The problem, however, is that the Ḥanafī school maintains that if a locality has a Muslim judge and

⁴⁶ Expressions used include “*iqāmat amr al-dīn*,” “*izhār al-dīn*,” “*izhār sharā’i’ al-Islām*,” and “*al-qiyam bi-wājibāt al-Islām*.”

⁴⁷ See, for example, Ivor Wilks, “The Position of Muslims in Metropolitan Ashanti in the Early Nineteenth Century,” in *Islam in Tropical Africa*, ed. I.M. Lewis (2nd ed., Bloomington and London: International African Institute, 1980), 144-65; Hamidullah, *The Muslim Conduct*, 121-28; idem, “Ex-territorial Capitulations,” 33-35; Joseph O’Callaghan, “Mudejars of Castile and Portugal in the Twelfth and Thirteenth Century,” in *Muslims Under Latin Rule 1100-1300*, ed. James M. Powell (Princeton: Princeton University Press, 1990), 11-56; Robert I. Burns, “Muslims in the Thirteenth Century Realms of Aragon: Interaction and Reaction,” in *Muslims Under Latin Rule*, 57-102; Mark D. Meyerson, *The Muslims of Valencia in the Age of Fernando and Isabel* (Berkeley and Los Angeles: University of California, 1991), 184-224; L.P. Harvey, *Islamic Spain*, 56-63; Robert I. Burns, *Islam Under the Crusaders* (Princeton: Princeton University Press, 1973), esp. 223-70.

⁴⁸ B. Lewis, “Reflections,” 10, 12.

⁴⁹ See, for example, Kamāl al-Dīn Ibn al-Humām (d. 861/1456-57), *Faṭḥ al-Qadīr* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1970), vol. 7, 131.

⁵⁰ Muḥammad Amin Ibn ‘Ābidīn (d. 1252/1836-37), *Radd al-Muhtār* (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 1987), vol. 3, 252-53; *Al-Fatāwā al-Hindiyya* (seventeenth century, also called *al-Fatāwā al-‘Ālamgiriyya*) [Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, n.d.], vol. 6, 311.

applies Islamic laws, then it is considered a part of *dār al-Islām* and not *dār al-kufr*. Other jurists, mostly Shāfi'ī and Ḥanbalī, speak in terms of "duties of religion" (*wājibāt al-dīn*) or in terms of wherever "worship" (*'ibāda*) is possible. *Wājibāt al-dīn* or *'ibāda* commonly refers to *'ibādāt* and not *mu'āmalāt*, that is, acts of private worship such as prayer and fasting and not commercial or criminal laws.⁵¹ Shī'ī jurists often refer to "religious rites" (*sha'a'ir al-dīn*), explaining that *sha'a'ir* are like prayer and fasting.⁵² In fact, there is no consensus among jurists with regard to the level of freedom necessary for Muslims in non-Muslim territory. Perhaps the vagueness of their expressions on this point indicates that the jurists did not wish to articulate a fixed, unnegotiable rule that might be difficult to apply to specific situations, especially situations in which Muslim territory is occupied by non-Muslims.

Like the Ḥanbalī and Ja'farī jurists, Shāfi'ī and Ḥanafī jurists were concerned about freedom to practice Islam in non-Muslim territory, but they reached conclusions very different from those reached by other schools. According to these two schools, continued residence in non-Muslim territory might at times be either recommended or obligatory. They reached this conclusion partly because their conception of *dār al-Islām* was less precise and consequently more flexible. Under certain circumstances, although ultimate sovereignty in a particular territory might belong to non-Muslims, this territory nevertheless may be treated as a part of *dār al-Islām*.

We have already encountered this position in its rudimentary form in al-Māwardī's opinion from the fifth/eleventh century. The best introduction to this position in its developed form may be found in two hitherto unstudied Shāfi'ī *fatwās* issued by al-Ramlī (d. 1004/1595-96) and Ibn Ḥajar al-Haytamī (d. 974/1566-67). Both were prominent Shāfi'ī jurists who lived in Egypt (although al-Haytamī died in Mecca). Al-Ramlī, who was given the title *al-Shāfi'ī al-Ṣaghīr* and who reached the rank of *muftī* of Egypt, was asked about Muslims living in one of the Andalusian countries called Aragon, as follows:

⁵¹ Al-Shirbīnī al-Khaṭīb, *Mughnī*, vol. 4, 239 focuses on *'ibāda*; Ibn Qudāma, *al-Mughnī*, vol. 10, 381, and 513-15, uses the term *wājibāt*. Some jurists mention *iqāmat al-dīn*, which probably signifies "to fulfil the obligations of religion." See, for example, Ibn Kathīr, *Tafsīr*, vol. 1, 427; Abū al-Barakāt al-Nasafī (d. 710/1310-11), *Madārik al-Tanzīl wa-Haqā'iq al-Ta'wil* (Beirut: Dār al-Qalam, 1989), vol. 1, 342.

⁵² Al-Muḥaqqiq al-Hillī, *Sharā'ī*, vol. 1, 308; al-Makki al-Āmīlī, *al-Lum'a*, vol. 2, 383; Fakhr al-Hillī, *Idāh*, vol. 1, 352.

They [the Muslims] are under the authority of a Christian king who takes from them land taxes in proportion to [what these lands] produce. Otherwise he has not committed any injustice against them either in their monies or persons. They have mosques in which they pray and they [are also allowed to] fast during the month of Ramadan. They [the Muslims] also give alms and ransom captives from the hands of Christians. They publicly apply the laws of Islam (*hudūd al-Islām*) and they openly manifest the fundamentals of Islam (*yuzhirūnā qawā'id al-Islām*), and the Christians do not interfere with any of their religious acts. They [the Muslims] pray in their sermons for Muslim sultans without specifying a particular name and they ask God to make them [the sultans] victorious and to destroy their enemies. Despite this, they are fearful that they are sinning by continuing to reside in non-Muslim lands. Is hijra obligatory upon them although they are able to manifest their religion, considering that they have no guarantee against [eventually] being forced to apostacize, may God forbid, or that the laws of Christians would be applied to them? Alternatively, they may be immune from all of this considering their present [favorable] situation . . .⁵³

While describing a very favorable situation and a general sense of security, the *mustaftī* betrays a sense of insecurity and distrust. According to the questioner, there are no guarantees that the present situation will continue indefinitely. Al-Ramlī, citing the precedent of a Companion who was allowed to reside in non-Muslim Mecca, replies that these Muslims do not have to emigrate because they can manifest their religion. He then argues that it is *not allowed* for them to leave because their residence might be the mechanism by which Islam could spread. Significantly, al-Ramlī contends that the area in which they reside is part of *dār al-Islām* and that if they left, it would revert to being *dār al-kufr*. The long period during which Muslims have been able to enjoy their religious freedoms creates the presumption that they will be safe from forced conversion or oppression in the future.⁵⁴

In the second *fatwā*, Ibn Ḥajar is asked about a Christian who converted to Islam and sought the protection of Muslims in Malibar. If the Muslims granted him protection and refused to return him to the Christians, they would have to leave their homes in order to avoid the oppressive repercussions that would follow. Ibn Ḥajar responds that if sheltering that convert entailed Muslims being forced to abandon their

⁵³ Shams al-Din al-Ramlī, *Fatāwā al-Ramlī*, on the margin of Aḥmad b. Muḥammad Ibn Ḥajar al-Haytamī, *al-Fatāwā al-Kubrā al-Fiqhiyya* (Beirut: Dār al-Kutub al-‘Ilmiyya, n.d.), vol. 4, 52-53.

⁵⁴ Ibid.

homes, then they should not afford him protection. This reasoning is significant. Ibn Ḥajar maintains that these Muslims should remain in their non-Muslim homeland and not migrate, despite the fact that they could not fulfil their obligations toward other Muslims.⁵⁵

These two *fatwās*, particularly the first, raise the elusive issue of what is *dār al-Islām*. Although scholars often have claimed that Islamic law divides the world into two basic categories, *dār al-Islām* and *dār al-ḥarb* (alternatively, *dār al-kufr* or *dār al-shirk*), these two categories do not reflect the complexity of Islamic thought on the issue. Muslim jurists did attempt to find a way to distinguish between the jurisdiction of Muslims and non-Muslims, but they could not agree on a definition of *dār al-Islām* or on the number of categories into which the world is divided. Consequently, the classification of territories in Islamic law is laden with ambiguity.⁵⁶

Despite the ambiguity, these classifications are juridically significant because if a territory is considered legally a part of *dār al-Islām*, hijra is not necessary except in the case in which corruption is widespread and, further, the *madhhab* considers corruption to be an operative factor. For the Ḥanafīs, a territory may be ruled and controlled by non-Muslims and yet still be classified as a part of *dār al-Islām*. According to the Ḥanafī school, a territory is considered to be part of *dār al-Islām* if the laws of Islam are applied. However, a territory that previously was a part of *dār al-Islām* and was conquered by non-Muslims does not become a part of *dār al-kufr* unless three

⁵⁵ Ibid., vol. 4, 249.

⁵⁶ This issue requires separate monographic treatment. Al-Baghdādi, *Uṣūl*, 270, discusses the terms *dār al-Islām*, *dār al-īmān*, *dār al-shirk*, *dār al-fisq*, and *dār al-kufr*; al-Ash'arī, *Maqālāt*, 154, discusses six different positions on *dār al-Islām*; the Ibādī Kharijī Khamis al-Shaqaṣī al-Rustāī, *Manhaj al-Tālibin wa-Balāgh al-Rāghibin*, ed. Sālim b. Sulaymān al-Ḥārithī (Cairo: Muṣṭafā al-Bābi al-Ḥalabī, 1979), discusses six positions on *dār al-Islām*, mentioning the terms *dār al-khilāf*, *dār al-'adl*, *dār al-ikhtilāf*, *dār al-nifāq*, and *dār ahl al-iqrār*. The Zaydī jurist, al-Murtaḍā, in his *Kitāb al-Baḥr*, vol. 6, 468-69, adds the terms *dār al-waqf* and *dār al-īmān*. Al-Makki al-'Amilī, *al-Lum'a*, vol. 2, 383, mentions *bilād al-khilāf*. Jurists also disagreed on the status of a particular territory. See, for example, *al-Fatāwā al-Hindiyya*, vol. 6, 310; Taqī al-Dīn Ibn Taymiyya, *al-Fatāwā al-Kubrā*, ed. Muḥammad 'Atā' and Muṣṭafā 'Atā' (Cairo: Dār al-Rayyān, 1988), vol. 3, 532-33. Shāfi'ī, Ḥanafī, and even Ḥanbalī jurists often speak of *dār al-hudna* or *dār al-muwāda'a*. See, for example, al-Kāsānī, *Badā'i'*, vol. 7, 109; *al-Fatāwā al-Hindiyya*, vol. 2, 197; al-Buhūti, *Kashshāf*, vol. 5, 96; and al-Shāfi'ī, *al-Umm*, vol. 4, 182. For a modern discussion of the issue, see Rashīd Riḍā, *al-Fatāwā*, ed. Ṣalāh al-Dīn al-Munajjid and Yūsuf Qāf Khūrī (Beirut: Dār al-Kitāb al-Jadīd, 1971), vol. 1, 372, vol. 5, 1966-67, vol. 6, 2302 and 2589.

conditions are fulfilled: The laws of non-Muslims are applied; the conquered territory is separated from the rest of *dār al-Islām* by non-Muslim territory; and no Muslim or *dhimmi* enjoys the protections provided by the previous government (*āminan bi'l-amāni al-awwal*).⁵⁷ According to this view, territories conquered by Christians or Mongols remain Muslim territory as long as prayer is allowed or as long as Muslim judges remain in office. In fact, in the opinion of some Ḥanafī jurists, as long as a single Muslim law is in force such territory remains a part of *dār al-Islām*. This meant not only that Muslims were under no obligation to emigrate but also were encouraged to stay if they could do so safely.⁵⁸ As to territory that is legally considered *dār al-kufr*, Muslims do not have a duty to emigrate but are recommended to do so.⁵⁹

Shāfi'ī jurists went further than their Ḥanafī counterparts, maintaining that conquered Muslim territory never reverts to the status of *dār al-kufr*. Conquered Muslim territory is *dār al-kufr* in appearance only, not in law. Whether or not a Muslim may continue to reside in such territory depends on whether he or she can contribute to its Islamization. The Shāfi'ī position, as noted, developed in stages but it seems to have become well-formulated by the tenth/sixteenth century.⁶⁰

Shāfi'ī jurists start out by stating that whether non-Muslim territory is considered *dār al-kufr* in appearance (that is, conquered Muslim territory) or in law, it is preferable that Muslims migrate even if they are able to manifest their religion. Migration is preferable because these Muslims might unwittingly add to the strength of non-Muslims and they also run the risk of becoming oppressed. But such migration is not mandatory because the Muslims are able freely to practice their religion. If these Muslims hope that by residing among non-Muslims they might contribute to the spread of Islam, then it is preferable that they *not* migrate. If Muslims are autonomous and can maintain a degree of independence (*qadirū 'alā al-imtinā' wa al-i'tizāl* — literally, *imtinā'* means self-protection and *i'tizāl* means segregation), then it is *obligatory* upon them to continue to reside in the non-Muslim

⁵⁷ Ibn 'Ābidin, *Radd*, vol. 3, 252; al-Kāsānī, *Badā'i'*, vol. 7, 130-31 (where safety is the key issue and not the laws of Islam).

⁵⁸ *Al-Fatāwā al-Hindiyya*, vol. 2, 232, 311-12; vol. 3, 584 (with reference to the Mongols); Ibn 'Ābidin, *Radd*, vol. 3, 252-53.

⁵⁹ Ibn al-Humām, *Fath*, vol. 5, 445.

⁶⁰ Jurists writing a century earlier did not manifest the same sophistication. See Abū Ishāq al-Firūzābādhi al-Shirāzi, *al-Muḥadhdhab* (Cairo: Muṣṭafā al-Bābi al-Ḥalabī, 1971), vol. 2, 290.

territory because the area in which they reside is, in reality, a part of *dār al-Islām*. Shāfi'ī jurists do not explain what is meant by *autonomy* or *independence*.

In summary, the late Shāfi'ī position holds that migration may be recommended, not recommended, or even prohibited, depending on the degree of freedom and autonomy a Muslim enjoys in non-Muslim territory. Objective factors, such as autonomy, determine whether a particular territory is legally a part of *dār al-Islām*. For the most part, however, subjective factors, such as the hope of spreading Islam, determine whether one has a duty to migrate. Migration is obligatory only if a Muslim fears enticement away from religion; even then, a Muslim is excused if there is financial or physical hardship, such as poor health, or if he or she fears the dangers of travel.⁶¹

The picture that emerges from this review does not lend itself to essentialist positions. The response of most jurists in the early centuries of Islam was cryptic and ambivalent. Early jurists recommended that a Muslim should reside among Muslims in a place in which religion could be learned and practiced. But those who chose to reside in non-Muslim territory were not necessarily considered to be immoral or un-Islamic. Subsequently, historical circumstances forced most Mālikī jurists to adopt an absolute and uncompromising position. As Muslim territory came under siege and vast Muslim populations were threatened, most Mālikī jurists responded by demanding that all Muslims make a clear and decisive choice in favor of Muslim lands. Theological doctrines combined with political polemics because, for most Mālikīs, choosing to reside in a non-Muslim land was a religious and ethical decision as much as a political one. Muslim lands, Islam and a moral life, became inseparable. Making the political decision to favor non-Muslim territory is the ultimate unethical act.

Ḥanbalī and Shī'ī jurists, who were not involved in this particular dilemma to the same extent as the Mālikīs, adopted a compromise position. They conceded that a good, ethical Muslim might prefer to reside among non-Muslims. But lest this admission be understood as a

⁶¹ Shams al-Dīn al-Manūfi al-Ramlī, *Nihāyat al-Muhtāj* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1967), vol. 8, 82; al-Shirbīnī, *Mughnī*, vol. 4, 239; Qalwūbī and 'Umīra, *Hāshiyat*, vol. 3, 226-27. Shāfi'ī jurists also contend that a Muslim should constantly search for lands in which he or she can perfect his or her religious practice. This means that a Muslim should migrate from a Muslim territory in which corruption is widespread. Al-Shirbīnī (*ibid.*) asserts that if all territories become equally corrupt, as was the case in his time, the duty to migrate drops entirely.

political concession, Ḥanbalī jurists, in particular, maintained the superiority of Muslim territory even under the worst of conditions.

Ḥanafī and Shāfi‘ī jurists in the seventh/thirteenth century confronted a harsh reality similar to the one confronted by the Mālikīs as Muslim territory came under siege by Christians and Mongols. Unlike the Mālikīs, the Ḥanafīs and Shāfi‘īs predominated in areas that were closer to the heartland of Islamic territory, and their response was more sophisticated and discriminating. They distinguished between Islam and the territory of Islam. Islam could exist in non-Muslim territory and, at times, it is morally imperative for Muslims to maintain Islam in foreign lands. But they refused to admit that territory conquered by non-Muslims necessarily becomes un-Islamic. As befits great legal minds, their response was, “it depends.”

The doctrine of hijra continued to play a dynamic role in religious and political polemics, undergoing subtle changes, often with revolutionary consequences. One thread that runs through the fabric of juristic discussion is the tension between Islam as a universal moral imperative and Islam as a territorially based political identity. The tension is perhaps unavoidable, and the solutions worked out by Muslim jurists are neither uniform nor dogmatic.

In order to better understand the dynamics of this tension, we must consider a different issue. What is the relationship of these Muslims to the Islamic polity? Does the Islamic polity accept Muslims who reside in non-Muslim territory as its own or reject them as outsiders? If one argues that these Muslims are apostates, for example, one way to examine the intensity of the disassociation is to ask, Are they treated as Muslims by the Islamic polity or are they completely excluded? A response to this last question sheds light on the nature of the tension and on the extent to which, for Muslims, questions of theology intermingle with questions of political identity.

2. Relation to the Islamic Polity

The issue here is two-fold: Is a Muslim residing in non-Muslim territory still considered a member of the Islamic community? And to what extent is that person’s life or property inviolable? The first question is not simply a matter of political allegiance, but of theology. Are Muslims considered a single community regardless of residence? The second is mostly a question of law. To what degree do the laws of Islam extend extraterritorial protections to Muslims? This question

commonly arises in the context of non-Muslim territory conquered by Muslims, and whether Muslims found in these territories are to be treated as unbelievers or as Muslims. If they are treated as unbelievers, under certain circumstances, these Muslims may be enslaved and their property may be confiscated.

With regard to the first question, the vast majority of Muslim jurists dutifully affirm that all Muslims belong to a single community (*umma wāḥida*) regardless of their residence. Even the Ḥanafī school, which emphasizes the notion of territoriality, methodically insists that wherever Muslims reside they belong to *dār al-Islām*.⁶²

The inviolability (*‘iṣma*) of a person’s life or property is a different matter. Inviolability is a legal category, not a theological or moral one. The essential question is, What is the source of a Muslim’s inviolability? Two alternative views emerge. Inviolability stems either from the simple fact of being a Muslim or from the protection (*ḥirz*) that a Muslim territory provides. In other words, inviolability is grounded either in religion or territory.⁶³

The Ḥanafīs argue that inviolability stems from the protection that Muslim territory is able to afford its residents. But they distinguish between what they call *‘isma muqawwima* and *‘isma mu’aththima*. The first is legal, the second, moral inviolability. A Muslim residing in non-Muslim lands enjoys moral inviolability but not necessarily legal inviolability. For example, if a Muslim kills another Muslim in non-Muslim territory, he or she is not held criminally liable in Islamic courts. The killer is, however, a sinner and is held accountable by God in the Hereafter. The Ḥanafī jurists justify this view, in part, on the ground that Islamic courts lack jurisdiction over extra-territorial crimes even if those crimes are committed against Muslims. Some jurists add that a Muslim who resides among non-Muslims and unwittingly contributes to their strength lacks full inviolability. Other jurists argue that by leaving the security and protection (*ḥirz*) of Muslim lands, a

⁶² See, for example, al-Sarakhsī, *al-Mabsūṭ*, vol. 10, 61; Shams al-Dīn Ibn Qayyim (d. 751/1350-51), *Aḥkām Ahl al-Dhimma*, ed. Ṣubḥī Ṣāliḥ (Beirut: Dār al-‘Ilm li’l-Malāyīn, 1983), vol. 1, 367.

⁶³ On the issue of *‘iṣma*, see Baber Johansen, “Der *‘isma*-Begriff im hanafitischen Recht,” in *La signification du Bas Moyen Age dans l’Histoire et la Culture du Monde Musulman* (Aix-en-Provence: Union Européenne des Arabisants et Islamisants, 1976), 89-108; Johann Krčmarik, “Beiträge zur Beleuchtung des islamitischen Strafrechts, mit Rücksicht auf Theorie und Praxis in der Türkei,” *Zeitschrift der deutschen morgenländischen Gesellschaft*, 58 (1904), 87-90, 333, 340-41, primarily a study of Ibn ‘Ābidīn.

Muslim waives part of his or her inviolability.⁶⁴ The Ḥanafī jurist, al-Zayla‘ī (d. 743/1343), asserts that the real source of moral inviolability is humanness and not religion (*lā nusallimu anna aṣl al-‘iṣmati bi’l-Islām bal bi-kawnihi ādamiyyā*). Muslim territory affords protection to Muslims and *dhimmīs* residing in it but cannot afford protection to Muslims residing elsewhere.⁶⁵ Hence, according to the Ḥanafīs, although morally a part of the Islamic community, and although morally inviolable, a Muslim in non-Muslim territory does not enjoy legal inviolability. The prosecution of murder involves intricate jurisdictional problems. The Ḥanafīs extend their analysis of inviolability to situations that do not involve jurisdictional problems, as, for example, the situation of non-Muslim territory conquered by Muslims in which resident Muslims are found. In this situation, Ḥanafīs distinguish between three possible cases. If Muslims conquer non-Muslim territory and find Muslims living there, then their persons are inviolable and they cannot be killed or enslaved. Their minor children are granted the same immunity because legally a minor belongs to the religion of its parents. Movable property is immune from confiscation since it is protected by possession. However, a non-Muslim wife, non-Muslim adult children, and immovable property are not immune: The wife and adult child are responsible for their own religious association; immovable property legally belongs to the territory in which it is found.

The second case involves non-Muslims who convert to Islam while in non-Muslim lands and then migrate to *dār al-Islām*, leaving behind family and property. If subsequently their homeland is conquered by Muslims, then their minor children are immune but their spouses and adult children are not. Any property not in a person’s possession at the time is not immune.

The third case is like the second except that the act of conversion takes place in Muslim territory: A person travels to the land of Islam and then converts. If that person’s homeland subsequently is conquered by Muslims, any family, property or money that he or she left behind in *dār al-kufr* is not immune. The distinction between the second and third case is hypertechnical, but it reveals the extent to which Ḥanafīs emphasize territoriality. In the first and second cases,

⁶⁴ Ibn al-Humām, *Fatḥ*, vol. 6, 20; Kāsānī, *Badā’i’*, vol.7, 105; Ibn ‘Ābidīn, *Radd*, vol. 3, 248; Sarakhsī, *al-Mabsūt*, vol. 10, 90; *al-Fatāwā al-Hindiyya*, vol. 2, 232-33.

⁶⁵ ‘Uthmān b. ‘Alī al-Zayla‘ī, *Tabyīn al-Haqā’iq Sharḥ Kanz al-Daqā’iq* (Cairo: Dār al-Kitāb al-Islāmī, n.d.), vol. 3, 268.

the fact that the act of conversion took place in non-Muslim lands allowed inviolability to extend, unhampered, to minor children and to movable property in possession, either actual or vicarious. In the third case, the fact that the act of conversion took place in the land of Islam while the minor children were in a non-Muslim land prevented the extension or the flow of immunity because of the difference in jurisdictions.⁶⁶

The Shāfi'is insist that a Muslim is protected regardless of where he, his minor children and his property are located. Muslims do not compromise their inviolability by residing in non-Muslim territory, and it is irrelevant whether or not they are separated physically from their children or property. Indeed, Ibn Ḥajar al-Haytamī asserts that if Muslims reside in *dār al-ḥarb*, the territory itself must be under the protection of the Muslim polity. In other words, a Muslim polity is obligated to defend and protect non-Muslim territory that hosts Muslims. This view may be attributable to the fact that under certain circumstances the territory in which Muslims reside is considered a part of *dār al-Islām*.⁶⁷

The Shāfi'is introduce an interesting variation on the issue of inviolability. According to them, if a Muslim murders another Muslim in non-Muslim territory, an Islamic court has the jurisdictional power to hold the offender liable. Nevertheless, the Shāfi'is argue that because Muslims living in non-Muslim territory often adopt the appearances and mannerisms of non-Muslims, Muslims might not be able to distinguish between a non-Muslim and a Muslim. Consequently, if a Muslim kills another person, being fully aware of the fact that the victim is a Muslim, full liability applies in an Islamic court. But if the offender was under the mistaken impression that the victim was a non-Muslim, only atonement applies in a Muslim jurisdiction.⁶⁸

⁶⁶ *Al-Fatāwā al-Hindiyya*, vol. 3, 585-86; Ibn 'Ābidin, *Radd*, vol. 3, 252 (Ibn 'Ābidin disagrees with the ruling on minor children in the third case); Ibn Qudāma, *al-Mughnī*, vol. 10, 475-76; Murtaḍā, *Kitāb al-Bahr*, vol. 6, 409-10. One must keep in mind that for the Ḥanafis, *dār al-Islām* is not necessarily ruled and controlled by Muslims. This is important because the classification of territory as *dār al-Islām* extends immunity to vast Muslim populations who otherwise live under non-Muslim rule.

⁶⁷ Abū al-'Abbās Shihāb al-Dīn Ibn Ḥajar al-Haytamī, *Fath al-Jawād* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1971), vol. 2, 2, 346; Shāfi'ī, *al-Umm*, vol. 4, 278 (see vol. 7, 361-62, 367-68 for Shāfi'ī's refutation of the Ḥanafī position). Like the Shāfi'īs, the Ḥanbalis and Zāhirīs extend full immunity to a Muslim regardless of residence. See Ibn Qudāma, *al-Mughnī*, vol.10, 475-76; Ibn Ḥazm, *al-Muḥalla*, vol. 7, 309.

⁶⁸ Al-Shāfi'ī, *al-Umm*, vol. 6, 35. For the same view from a Ḥanbali jurist,

The Ja'fari and Zaydi schools adopt an intermediate position. Generally, both schools insist that Islam and not territory is the real source of inviolability. If a Muslim is found in non-Muslim territory, or if a person converts to Islam and then migrates, leaving family behind, his or her minor children and movable property are all inviolable. Adult children and spouses have an independent status and do not derive protection from the legal status of another member of the family. Immovable property in a non-Muslim territory is not protected because its status derives from its location, not from its ownership. Additionally, full liability attaches to the murder of a Muslim in non-Muslim lands exactly as if he or she had been killed in *dār al-Islām*.⁶⁹

Perhaps the most interesting case is that of the Mālikīs, whose response to the matter of inviolability is as equivocal and confusing as their response to Muslims who refuse to migrate. This confusion is reflected in the fact that jurists from other schools who attempt to describe the Mālikī position reach contradictory results.⁷⁰

The Mālikīs agree that in the case of murder the offender is liable in a Muslim tribunal regardless of where the crime occurred. The confusion arises over the inviolability of persons and property. Al-Wansharīsī reports that Mālik agreed with Abū Ḥanīfa that legal inviolability stems from territorial protection, not from Islam.⁷¹ But Ibn Rushd "the grandson" (that is, Averroes d. 595/1198) reports that Mālik argued that the person is protected by Islam but that Islam does not protect property; that is to say, Mālik differentiated between the inviolability of the person and the inviolability of property. The person is protected by Islam; property is protected by territorial jurisdiction.⁷² But al-Wansharīsī claims that this distinction was made by another

see Ibn Qayyim, *Aḥkām*, vol. 1, 367.

⁶⁹ Al-Tarābulusī, *al-Muhadhdhab*, vol. 1, 311; Jamāl al-Dīn Miqdād al-Suyūri al-Ḥillī, *al-Tanqīḥ al-Rā'i*, ed. Al-Sayyid 'Abd al-Latīf Kuhkamārī (Qum: Maktabat Āyyat Allāh al-'Azamī al-Mar'ashī, 1404), vol. 1, 588; al-Majlisī, *Malādh al-Akhyār*, vol. 9, 401-02; al-Murtaḍā, *Kitāb al-Baḥr*, vol. 6, 409-10. The Zaydis differ with the Ja'faris on a minor point: If a non-Muslim enters *dār al-Islām* and then converts there, his or her minor children are protected, but movable and immovable property are not protected.

⁷⁰ In his *Kitāb al-Baḥr*, vol. 6, 410, the Zaydi jurist al-Murtaḍā states that Mālikīs believe that if a person converts in *dār al-Islām* leaving children and property in *dār al-ḥarb*, the children or property have no immunity. In his *al-Mughnī*, vol. 10, 420-21, the Ḥanbalī jurist, Ibn Qudāma, attributes the opposite opinion to the Mālikīs.

⁷¹ Al-Wansharīsī, *al-Mi'yār*, vol. 2, 128

⁷² Abū al-Walīd Muḥammad b. Aḥmad b. Muḥammad b. Aḥmad Ibn Rushd, *Bidāyat al-Mujtahid fī Nihāyat al-Muqtaṣid* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1981), vol 1, 400.

Mālikī jurist, Ibn al-‘Arabī (d. 543/1148).⁷³ Ibn Rushd’s own view, regardless of Mālik’s position, is that both the person and property are protected by Islām.⁷⁴

Clearly, the Mālikīs were divided on the issue. Ibn al-‘Arabī, himself, complains that this is an obstinate issue that has not been dealt with systematically by Mālikī jurists.⁷⁵ The dilemma results from the fact that, because of their jurisdictional theory, early Mālikī jurists were inclined to extend inviolability to all Muslims, whereas late Mālikī jurists disliked Muslims who refused to migrate. The solution worked out by some Mālikī jurists writing after the ninth/fifteenth century was particularly innovative. These jurists argued that even if the persons and properties of Muslims residing in non-Muslim lands are, in fact, inviolable, this is only a partial consideration. By residing in a non-Muslim territory, these Muslims become similar to criminal or illegitimate rebels (*muḥāribūn*).⁷⁶ While inviolable as Muslims, their illegal residence compromises their status. Consequently, if these Muslims physically assist non-Muslims, they may be killed legitimately. If these Muslims extend financial assistance to non-Muslims, their property may be confiscated. And for the sake of their children, the latter may be enslaved so that they may be rescued from the custody of their parents and taken back to the lands of Islam, where they can be raised properly as Muslims. Al-Wansharīsī addresses this view while discussing the Mudejars who refused to leave Barcelona after it fell to Christians. Immediately after explaining this subject, he launches into a tirade against the Mudejars who, for economic reasons, preferred non-Muslim lands.⁷⁷

One of the fields of Islamic law that may yield insight into the perception and treatment of Muslim minorities by Muslims residing in *dār al-Islām* is that of ritual. Muslim jurists often discuss whether rebels (*bughāt*) or brigands (*ḥarbīs*) may be treated as Muslims upon death (that is, whether the corpse should be washed, blessed through

⁷³ Al-Wansharīsī, *al-Mi‘yār*, vol. 2, 128.

⁷⁴ Ibn Rushd, *Bidāya*, vol. 1, 400.

⁷⁵ This opinion recorded in al-Wansharīsī, *al-Mi‘yār*, vol. 2, 128.

⁷⁶ See Khaled Abou El Fadl, “*Aḥkām al-Bughāt*: Irregular Warfare and the Law of Rebellion in Islam,” in *Cross, Crescent and Sword*, ed. James T. Johnson and John Kelsay (Westport, C.T.: Greenwood Press, 1990); Joel L. Kraemer, “Apostates, Rebels and Brigands,” *Israel Oriental Studies*, 10 (1980), 34-73.

⁷⁷ See al-Wansharīsī, *al-Mi‘yār*, vol. 2, 129-30; ‘Ulaysh, *Faṭḥ*, vol. 2, 380-81. For a similar, less polemical view of a Shi‘ī jurist, see Abū Ṣalāḥ Taqī al-Dīn al-Ḥalabī, *al-Kāfi fi l-Fiqh*, in *Silsilat al-Yanābi‘*, 38.

prayer and buried in Muslim cemeteries).⁷⁸ But the jurists say little about the status of Muslim minorities in this regard, e.g., may such Muslims be buried in Muslim cemeteries in *dār al-Islām* if they desire? Muslim jurists often do comment on a situation in which a person of unknown identity is found dead among non-Muslims. May that person be buried as a Muslim after the proper rituals have been performed? The Ḥanbalī jurist, Ibn Qudāma, argued that if the corpse is found in *dār al-Islām* the presumption is that this person is a Muslim; but if the corpse is found in *dār al-kufr* the presumption is the opposite. Ḥanafī jurists generally agreed that the presumption is linked to the territory, but they add that if a corpse found in non-Muslim territory has the appearance of a Muslim then the person should be buried as a Muslim. The Mālikī, Ibn Rushd “the grandfather,” asserted that regardless of the territory, the corpse of an infant is presumed to be Muslim but that of an adult is presumed to be non-Muslim. Some jurists, from various schools, argued that one must consider the religious composition of the population in which the corpse is found; if the majority are Muslims, then the corpse is Muslim. Shāfi‘ī jurists maintained that regardless of the circumstances the corpse must be treated as Muslim. Even if one suspects that only one corpse out of 100 is Muslim, all 100 must be buried as Muslims.⁷⁹ But such comments are scarce and scattered. Perhaps Muslim jurists who did not prohibit residence in non-Muslim territory considered this matter to be a non-issue, and since all schools affirmed the moral inviolability of all Muslims, it followed that Muslim jurists assumed that a Muslim residing in non-Muslim territory should be sent to the Hereafter with the proper rituals as long as his or her religious identity was known. In any case, the relation between rituals and Muslim minorities deserves greater exploration in order to better understand the juristic positions on religion and territorial sovereignty.

In summary, all schools claimed that a bond unites Muslims wherever they may be and all schools affirm a Muslim’s moral inviolability. The Ḥanafīs were not opposed to Muslims residing in non-Muslim territory; but for them territory, not Islam, was the source of inviolability. The Shāfi‘īs were more receptive to the idea of

⁷⁸ See, for example, Ibn Qudāma, *al-Mughnī*, vol. 10, 61-66; Kraemer, “Apostates.”

⁷⁹ Ibn Qudāma, *al-Mughnī*, vol. 2, 406; Abū Muḥammad b. Aḥmad al-‘Ayyinī, *al-Bināya fī Sharḥ al-Hidāya* (Beirut: Dār al-Fikr, 1990), vol. 3, 280; Ibn Rushd, *al-Bayān*, vol. 2, 258; al-Nawawī, *al-Majmū’*, vol. 5, 258-59.

Muslims residing in non-Muslim territory, insisting that Islam is the source of inviolability in all its forms. Although Muslims morally and legally belong to one community, that does not mean they must all reside within the same political jurisdiction. The Ḥanbalis and Zāhirīs discouraged Muslims from residing in non-Muslim territory but accorded inviolability to Muslims who disregarded the moral imperative to reside among Muslims. While concurring with the Ḥanbalī and Zāhirī view, the Shī'īs maintained that immovable property is not protected because inviolability emanates from the classification of immovable property according to territory, not according to religion. Although the Mālikīs were compelled to affirm the moral imperative rendering a Muslim inviolable, some managed to affirm the principle and yet simultaneously undermine it.

The specific positions adopted by the jurists defy a single, comprehensive explanation. Muslim jurists responded to different historical challenges in different ways, and they responded to the same historical challenges in a diverse and innovative fashion. Moral, political and legal imperatives interacted in a complex and elusive manner. Religious dogma yielded to political reality as much as to self-perpetuating legalistic criteria. Essentialist and dogmatic conclusions fail to capture the dynamics of Islamic jurisprudence. Islamic law frequently distinguishes between a moral rule and a legal rule, and the fact that Muslim jurists insist on the unity of all Muslims at the theological and moral level does not entail that all legal rules must follow accordingly. The divergence between the moral imperative and the legal rule points to the tensions that permeate a legal system that emanates from a universal theology.

Having examined the relationship between Muslim minorities and the Islamic polity, we now turn to the relationship between Muslim minorities and Islamic law. This inquiry is essential for an understanding of the relationship between non-resident Muslims and Islam. To what extent are these Muslims bound by Islamic law? How should they conduct themselves in non-Muslim lands? If Islamic law does apply to them does it apply as a moral imperative or does it have jurisdictional force? Although the responses to these questions tend to vary according to the school of thought, there is considerable consensus.

3. *Islamic law and Muslim Minorities*

The extent to which Islamic law is applicable to Muslims in non-Muslim states and the permissibility of residing in such states are interrelated issues. Many jurists made the permissibility of such residence contingent on the ability to practice Islam, without specifying the extent to which Islam must be manifested or practiced. Clearly, Islamic legal precepts do have a certain degree of universal applicability. Ḥanafī jurists assert that Muslims residing among non-Muslims should establish congregational prayers, especially the Friday weekly prayers (*Jum'ā* prayers), and the prayer after the month of Ramadan and the new year's prayer (*'Īd* prayers), and should demand the appointment of Muslim judges and governors.⁸⁰ But the issue was complicated by the question of what is *dār al-Islām*. For example, the very acts recommended by these jurists might transform territory from *dār al-ḥarb* to *dār al-Islām*.⁸¹ Despite the legal classification ascribed to a particular territory, certain political realities remained. Even if a territory ruled by non-Muslims is classified as a part of *dār al-Islām*, the fact remains that the coercive power of the Islamic sovereign is absent. Hence, who is expected to apply Islamic law to these Muslims? If an Islamic polity exists, does it have coercive power over Muslims outside its territory? In other words, assuming that Islamic law is applicable to all Muslims, regardless of their place of residence, to what extent does an Islamic polity have jurisdiction over these Muslims? And what is the status of the laws of the host non-Muslim state? To what extent are Muslims obligated to obey the laws of their host state and what defines the terms of their conduct?

Al-Shāfi'ī asserted unequivocally that the obligations and laws of Islam remain applicable regardless of the categorization of the territory:

There is no difference between *dār al-ḥarb* and *dār al-Islām* as to the laws that God has decreed to His people because God says . . . [The Prophet has expounded certain laws] and he did not except those who are in *dār al-Islām* or *dār al-ḥarb*. He [the Prophet] has not exempted any of his people from any of his decrees, and he did not permit them anything that was forbidden in *dār al-ḥarb*. What we are saying is consistent with the Qur'ān and Sunna, and it is what rational people

⁸⁰ Ibn 'Ābidīn, *Radd*, vol. 3, 253; *al-Fatāwā al-Hindiyya*, vol. 6, 311.

⁸¹ See al-Kāsānī *Badā'i'*, vol. 7, 130; Ibn 'Ābidīn, *Radd*, vol. 3, 252; *al-Fatāwā al-Hindiyya*, vol. 6, 311.

can understand and agree on. What is allowed in *bilād al-Islām* is allowed in *bilād al-kufr*, and what is forbidden in *bilād al-Islām* is also forbidden in *dār al-kufr*. So whoever commits an infraction is subject to the punishment that God has decreed and [his presence in] *bilād al-kufr* does not exempt him from anything.⁸²

Shāfi‘ī, Ḥanbalī and Mālīkī jurists often make similar statements, that is, Islamic law applies to Muslims with equal force wherever their residence.⁸³ According to most schools, not only does Islamic law apply as a moral imperative, but also the Islamic polity has enforcement jurisdiction. Consequently, if a Muslim fornicates, steals, murders, consumes alcohol, or transgresses any other Islamic norm, the Islamic polity has extraterritorial jurisdiction over the infraction, and that Muslim may be punished by the Islamic polity although the offense did not occur in *dār al-Islām*.⁸⁴ According to the Shāfi‘ī jurist al-Shīrāzī (d. 817/1414-15), “because the prohibitions are the same in both territories, there is no reason for the penalties to be different in any sense.”⁸⁵

But Shāfi‘ī jurists permit an exception in the case of a Muslim residing in non-Muslim territory who claims ignorance of the law as an excuse. If a Muslim commits, say, adultery, in his or her non-Muslim residence, and if that Muslim claims that he or she did not know that this is prohibited by Islamic law, that Muslim is exempted from punishment, but only if this is a first offence. The underlying idea here is that the level of Islamic knowledge in non-Muslim lands might be so poor that Muslims would be ignorant of the basic prohibitions, and it would be unfair to hold these Muslims to the normal standards of Islamic conduct.⁸⁶

The main dissenters, as might be expected, are the Ḥanafīs, for whom in the case of *most* infractions, the prohibitions of Islamic law apply without distinction. Hence adultery, theft, murder, defamation (*qadhf*) and the consumption of alcohol are prohibited in *dār al-ḥarb* as well as in *dār al-Islām*. But this prohibition is merely a moral imperative; a person committing any of these offences in a non-Muslim territory is liable only before God in the Hereafter. Islamic

⁸² Al-Shāfi‘ī, *al-Umm*, vol. 7, 354-55; see also al-Shīrāzī, *al-Muhadhdhab*, vol. 2, 310; al-Nawawī, *al-Majmū‘*, vol. 19, 338.

⁸³ Ibn Qudāma, *al-Mughnī*, vol. 10, 162; Saḥnūn, *al-Mudawwana*, vol. 4, 425.

⁸⁴ Ibid.

⁸⁵ Al-Shīrāzī, *al-Muhadhdhab*, vol. 2, 310.

⁸⁶ Al-Shāfi‘ī, *al-Umm*, vol. 6, 35.

courts have no jurisdiction over crimes committed outside of Islamic territory and consequently may not punish extraterritorial crimes.⁸⁷

What is significant about the Ḥanafī position is the argument that particular Islamic legal prohibitions or laws do not apply outside the territory of Islam. Ḥanafī jurists argue that a Muslim residing in a non-Muslim territory may deal in usury (*ribā*) with non-Muslims, may sell or buy prohibited substances such as alcohol, pork or an animal killed by Islamically unacceptable means such as suffocation or clubbing (*mayta*), and may engage in gambling or questionable financial dealings such as insurance schemes and the like — on the condition that such transactions are legal under the laws of the host territory and that the transactions are between a Muslim and a non-Muslim.⁸⁸ (Al-Kāsānī adds that such transactions are permitted in *dār al-ḥarb* between one Muslim and another).⁸⁹ Although the reasons offered for this rule are varied, the most salient justification holds that the source of inviolability for money and property is territory. Non-Muslim property, especially abroad, is not protected by Islamic law. Consequently, a Muslim may take the money and property of a non-Muslim in non-Muslim territory by any means as long as he or she does so with the consent of the sovereign in the host territory. That is, as long as the non-Muslim polity does not outlaw such transactions, Islamic law will not intervene in order to protect the monies of non-Muslims from what Islamic law considers to be exploitation.⁹⁰ Regardless of the justification, according to Ḥanafī jurists, a Muslim does not incur liability for these acts either in this life or the Hereafter.

The other schools reject both the rule and its justification. The Islamic prohibitions regarding financial transactions are unaltered in non-Muslim territory. Some jurists insist that Islamic law should intervene to make the money of non-Muslims inviolable as far as a Muslim is concerned.⁹¹ Although most Islamic schools formally

⁸⁷ Al-Shaybānī, *al-Siyar*, vol. 5, 1851; al-Kāsānī, *Badā'i*, vol. 7, 132; Ibn 'Ābidīn, *Radd*, vol. 3, 248. The Ḥanafī jurist Abū Yūsuf strongly dissents from the Ḥanafī position.

⁸⁸ Al-Shaybānī, *al-Siyar*, vol. 4, 1486-90, 1492; vol. 5, 1884; al-Kāsānī, *Badā'i*, vol. 7, 132; Ibn 'Ābidīn, *Radd*, vol. 3, 247, 249-250; al-Sarakhsī, *al-Mabsūṭ*, vol. 10, 21-22; *al-Fatāwā al-Hindiyya*, vol. 2, 227. Abū Yūsuf once again dissents from the Ḥanafī position.

⁸⁹ Al-Kāsānī, *Badā'i*, vol. 7, 132.

⁹⁰ Ibid. The rule also was justified as a means to spite non-Muslims (see al-Sarakhsī, *al-Mabsūṭ*, vol. 10, 21-22) and as a means to accommodate the ignorance of Muslims residing in *dār al-ḥarb* as to the prohibitions of Islamic law (Kāsānī, *Badā'i*, vol. 7, 132). Neither view gained wide support.

⁹¹ Al-Shāfi'ī, *al-Umm*, vol. 7, 358-59; Buhūti, *Kashshāf*, vol. 5, 108. See

refused to relax the obligations imposed by Islamic law, some concessions were made. The very fact that a Muslim is allowed to reside in non-Muslim territory entails a concession. Such a Muslim is forced to pay taxes and to contribute to the economic power of a non-Muslim polity. Additionally, Islamic obligations cannot be fulfilled since a Muslim cannot assist or aid the Islamic polity, as, for example, through the performance of *jihād*. Despite the formal insistence on the applicability of Islamic law in its totality, in reality many particulars of Islamic law cannot be enforced in a non-Muslim territory. By permitting Muslims to reside in a non-Muslim territory, Muslim jurists were making a *de facto* compromise, while formally insisting on the universal applicability of Islamic law.

This discussion brings into focus two practical questions. First, how should Muslims conduct their affairs in a non-Muslim polity, that is, what are their obligations and duties toward their place of residence and what defines the terms of the *de facto* compromise? Second, what happens if corruption is so widespread that an ideal Islamic life is not possible anywhere?⁹² Muslim jurists assumed that a Muslim sojourning or residing in non-Muslim territory will do so under an agreement of safe-conduct (*amān*), according to which a Muslim is promised protection and in return he or she promises not to take action that is detrimental to the host state and to obey the commands of the host state. All jurists agree that a Muslim must abide by the terms of the *amān*. Consequently, a Muslim may not commit acts of treachery, betrayal, deceit or fraud, and may not violate the honor or property of non-Muslims. A Muslim must fulfil contractual obligations, pay off debts and not defraud or deceive a party to a financial transaction.⁹³

also al-Shaybānī, *al-Radd*, 96; Ibn Qudāma, *al-Mughnī*, vol. 4, 162; Ibn Rushd, *al-Muqaddimāt*, vol. 2, 10-11; Sahnūn, *al-Mudawwana*, vol. 3, 279. As noted, there are other areas in which different rules apply in different territories. The Ḥanafis argue that if a woman converts to Islam and migrates to *dār al-Islām*, her marriage to a non-Muslim becomes null and void, but she is not required to observe the waiting-period (*'idda*). Al-Shāfi'i disagrees, asserting that a waiting-period is necessary whether or not she migrates to *dār al-Islām* (*al-Umm*, vol. 7, 359); for a disagreement on whether a difference in residence between spouses necessarily results in voiding the marriage, see Ibn Qayyim, *Aḥkām*, vol. 1, 363-72.

⁹² We already have commented on the second question in the section on hijra. Some jurists argued that if all lands become equally corrupt, it makes no difference where a Muslim resides (see al-Shirbīnī, *Mughnī*, vol. 4, 239). Here we deal with the issue from the perspective of the extent to which Islamic obligations are altered by widespread corruption.

⁹³ On *amān*, see Julius Hatschek, *Der Musta'min* (Berlin und Leipzig: Walter de Gruyter Co., 1919).

The existence of an explicit *amān* is irrelevant because it is implied by the grant of permission to reside or enter non-Muslim territory. If the host non-Muslim government violates its obligations, as, for example, by usurping the property of a Muslim, then the promissory relationship is voided. A Muslim, however, may not resort to fraud or treachery unless the government or one of its agents clearly defaults on its promise of protection. Therefore, the violation of a Muslim's person or property by a private individual does not abrogate the *amān* and the obligations remain intact.⁹⁴ A *fatwā* issued by a Shāfi'ī jurist, Ibn Ḥajar al-'Asqalānī, is illustrative:

He was asked about the unbelievers (*kuffār*) of Malibar who regularly assist Muslims and administer the laws of Islam among them [the Muslims] because the prosperity of their [the unbelievers'] country is provided for by Muslims. But no covenant or agreement has been [expressly] entered into between the two groups. The Muslims are their subjects and they reside in their countries, and Muslims pay taxes and other levies to them. Firstly, do [these] unbelievers belong to *dār al-ḥarb* (*ḥarbiyyūn*)? And may one accept usury when dealing with them and cheat them in measures and weights [in the sale of grain and similar substances]?

Ibn Ḥajar responded: "The aforementioned unbelievers are *ḥarbiyyūn*. Nevertheless one may neither accept usury from them nor cheat them in measures and weights."⁹⁵

This *fatwā* elicits the question: What if a Muslim ignores the covenant and commits any of the acts mentioned above? The vast majority of jurists hold that there are two major consequences. First, the Muslim incurs an onerous sin, and second, if that Muslim enters Muslim territory, a Muslim polity has jurisdiction to force him or her to compensate the victims. For instance, if the violation involves a refusal to pay a debt, a Muslim polity has the power of compulsion and may enforce payment. Ḥanbalī and Shī'ī jurists, who are particularly vigilant about this, argue that the Muslim polity should either hand over the compensation to a representative in Muslim territory or, alternatively, send it by means of an emissary to the non-Muslim polity.⁹⁶

⁹⁴ Al-Shaybānī, *al-Siyar*, vol. 2, 507-11; vol. 4, 1486; al-Marghīnānī, *al-Hidāya*, vol. 2, 152; Ibn al-Humām, *Fath*, vol. 6, 17; al-Shīrāzī, *al-Muhadhḥab*, vol. 2, 338; al-Nawawī, *al-Majmū'*, vol. 19, 453; Abū Yahyā Zakariyyā' al-Anṣārī, *Fath* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1948), vol. 2, 177; al-Buhūti, *Kashshāf*, vol. 5, 108-09; Ibn 'Ābidīn, *Radd*, vol. 3, 247; al-Sarakhsī, *al-Mabsūṭ*, vol. 10, 65, 95-96; Ibn Qudāma, *al-Mughnī*, vol. 10, 515-16; *al-Fatāwā al-Hindiyya*, vol. 2, 232; al-Shāfi'ī, *al-Umm*, vol. 4, 248.

⁹⁵ Ibn Ḥajar, *al-Fatāwā*, vol. 4, 245-46.

⁹⁶ Buhūti, *Kashshāf*, vol. 5, 108; al-Ḥillī, *Īḍāḥ*, vol. 1, 379; al-Ṭarābulṣī, *al-*

Once again the primary dissenters are the Ḥanafīs, who agree that stealing, cheating, deceiving, defrauding and the like, committed in violation of an *amān*, are immoral and sinful, but hold that, for the most part, a Muslim polity has no jurisdiction over such acts if they are committed outside its own territory. If, for instance, a Muslim refuses to repay a debt or usurps property in non-Muslim territory and then escapes to *dār al-Islām*, that Muslim should be advised to return the money if he or she wishes to avoid incurring a sin. Nonetheless, the Muslim polity has no power of compulsion. An exception is made in the case of a Muslim who obtains an *amān* before leaving the territory of Islam or obtains an *amān* through official avenues. Here the *amān* is obtained under the color of authority, and it is the official weight of the Muslim state that permitted the Muslim to obtain the *amān* in the first place. Consequently, it is as if the Muslim polity, itself, vowed not to commit any illegality. In this case, the Muslim polity does have jurisdiction to compel a Muslim to live up to his or her obligation.

The Ḥanafīs also make an exception in the case of non-payment of debt or other acts of treachery between one Muslim and another in a non-Muslim territory. Here the Islamic polity does have enforcement jurisdiction because both parties to the conflict have already accepted the laws of Islam and, therefore, are bound by it. Since what the Ḥanafīs call *iltizām aḥkām al-Sharī'a* (that is, the binding nature of Islamic law), exists for both parties at the time of the infraction, jurisdiction is invested in the Muslim polity.⁹⁷

As with many other legal issues, the Ḥanafīs are preoccupied with territorial and jurisdictional intricacies and prepared to disengage moral obligations from legal consequences. Although this is by no means uncommon in Islamic jurisprudence it is a prominent feature of the Ḥanafī school. When it comes to Muslims in non-Muslim territory, there is a set of normative values that apply only at the private level. In the jargon of modern day jurists, while Muslim jurists claim a broad

Muḥadḥab, vol.1, 311; al-Ḥillī, *Sharā'i*, vol.1, 315; Jamāl al-Dīn al-Muṭaḥḥar al-Ḥillī (al-'Allāma), *Qawā'id al-Aḥkām*, in *Silsilat al-Yanābi'*, 257. On the other schools, see al-Shirāzī, *al-Muḥadḥab*, vol. 2, 338; al-Nawawī, *al-Majmū'*, vol. 19, 453; Ibn Qudāma, *al-Mughnī*, vol.10, 515-16.

⁹⁷ Al-Shaybānī, *al-Siyar*, vol. 4, 1117-20, 1125, 1276-79 and vol. 5, 1880, 1884-85; al-Marghīnānī, *al-Hidāya*, vol. 2, 152-53; Ibn al-Humām, *Fath*, vol. 6, 17-19; al-Kāsānī, *Badā'i*, vol. 7, 132-33; Ibn 'Abidin, *Radd*, vol. 3, 248; al-Sarakhsī, *al-Mabsūṭ*, vol.10, 61, 95-96; *al-Fatāwā al-Hindiyya*, vol. 2, 232-33. (The Ḥanafīs have other hypertechnical exceptions; see *ibid.*)

jurisdiction to prescribe, they admit of a more limited jurisdiction to enforce.

Nonetheless, Muslim jurists do not explain what Muslims are to do in case of a conflict between the laws of the non-Muslim territory and Islamic law. There is an obvious tension between the general statements on the universal applicability of Islamic law and the statements on the law of *amān*. We already have observed in the *fatwā* of Ibn Ḥajar that although Muslims were unable to fully execute their religious obligations they were not required to migrate. We also noted that Muslim jurists do not specify the extent to which Islam must be “manifested” in non-Muslim territory for residence there to be legal. Perhaps the evasiveness of Muslim jurists on the issue of a conflict between the demands of Islamic law and the demands of the *amān* indicates that the only real issue to be decided is residence. Once Muslims were allowed to reside in non-Muslim territory, practical compromises were inevitable, and Muslim jurists may have realized that any attempt to control or regulate behavior was bound to be ignored by Muslim minorities living in different historical situations.

As we observed in the case of hijra, not all principles can be reduced to a clear legal injunction. Rather, there are many gray areas in which acts are disfavored or recommended. This is particularly relevant to the integration of a Muslim residing in non-Muslim territory with the society in which he or she lives. It is one thing to require Muslims to live a moral life in non-Muslim territory, and quite another to permit them to fully integrate with their host societies. Some jurists, like al-Wansharīsī, who insist on migration, reject any degree of integration. Other jurists strongly advise Muslims to demand that non-Muslim authorities give Muslims their own judges and governors, that is, limited integration. But Muslim jurists generally are not explicit on the subject of integration nor are they decisive on matters that would necessarily lead to increased integration. It is obvious that Muslim jurists disapprove of full integration, and one senses their view that a Muslim should retain an independent identity as well as some form of separate existence.

Muslim jurists often state that marrying a scriptuary woman in *dār al-ḥarb* is disfavored (*makrūh*), although not prohibited. Marriage with non-Muslims in non-Muslim territory, they argue, ultimately will lead to certain dangers such as slavery, the oppression of children who grow up unprotected by *dār al-Islām*, and the loss of Islamic identity among children whose mother will teach them the habits and mores of

non-Muslims.⁹⁸ As a further safeguard against integration, some jurists advise Muslims to maintain a distinctive appearance.⁹⁹

Perhaps the most significant issue relating to integration is that of military cooperation between resident Muslims and the host polity. As a general rule, Muslims should not contribute to the military strength of non-Muslims. Muslims residing in non-Muslim territory should remain neutral in any military conflict engaged in by their host polity, especially if it involves other Muslims. The primary reason for this position is that if resident Muslims support other Muslims in conflict with the host non-Muslim polity that would constitute a betrayal of their *amān*, which is strictly forbidden. If the non-Muslim territory is attacked, resident Muslims should remain neutral unless they fear for their lives or for their homes, in which case they may join in defense of the territory.¹⁰⁰

The theme that emerges from the juristic discourse on this issue is that Muslims should maintain a separate identity. Even Ḥanafī jurists, who invariably focus on territorial affiliation, refuse to consider Muslims in non-Muslim territory as entirely outside the reach of Islamic moral and legal imperatives. The laws of the host territory must be observed because of the *amān*, and even the sacred duty of *jihād* is suspended. But the jurists do not specify the extent to which Islamic moral and legal obligations may be compromised in case of a conflict. Had they rejected all compromises, Muslim residence in non-Muslim territory would have been impossible.

Significantly, Islamic jurisprudence developed several mechanisms and concepts that facilitate and sanction compromise, such as duress (*ikrāh*), necessity (*darūra*), and public welfare (*maṣlaḥa*).¹⁰¹ As noted earlier, the Mālikī jurist, al-Wahrānī (d. 909-10/1504), issued a *fatwā* in which, relying primarily on the logic of duress and necessity, he advised the Muslims of Granada how to practice their religion in secrecy. In the *fatwā*, he specified how prayers, ablutions and fasting

⁹⁸ Al-Shaybānī, *al-Siyar*, vol. 5, 1838; al-Sarakhsī, *al-Mabsūt*, vol. 10, 965; Ibn Qudāma, *al-Mughnī*, vol.10, 511-12; al-Shāfi‘ī, *al-Umm*, vol. 4, 266.

⁹⁹ *Al-Fatāwā al-Hindiyya*, vol. 6, 311.

¹⁰⁰ Al-Shaybānī, *al-Radd*, 193; al-Shaybānī, *al-Siyar*, vol. 4, 1294; Ibn al-Humām, *Fath*, vol. 6, 18; al-Sarakhsī, *al-Mabsūt*, vol. 10, 97-98; *al-Fatāwā al-Hindiyya*, vol. 2, 233. Al-Shaybānī and al-Sarakhsī specify that in situations of military confrontation, Muslims residing in non-Muslim territory must formally and publicly renounce their *amān* and fight to liberate Muslim soldiers who have been captured and enslaved.

¹⁰¹ See Khaled Abou El Fadl, "The Common and Islamic Law of Duress," *Arab Law Quarterly*, 6:2 (1991), 121-59.

could be performed while avoiding detection. For example, one might substitute discrete up-and-down movements of the head for prostration and kneeling in prayer, and one might perform any one of five daily prayers whenever possible, instead of at its allotted time. Al-Wahrānī also advised that if compelled to do so, Muslims might consume alcohol and pork and deal in usury.¹⁰² Unfortunately, not many of these *fatwās* are extant, and it is not known if a *fatwā* such as al-Wahrānī's is representative.

Muslim jurists commonly discuss a hypothetical case, similar to the factual situation confronted by al-Wahrānī, in which corruption becomes so widespread (*'umūm al-fasād* or *idhā ṭabaqa al-ḥarām*) that transactions become tainted by some degree of Islamically unacceptable defect. For example, oppression might become so widespread that one would not know if property bought or sold originally had been illegally usurped. Alternatively, financial transactions might involve usury or other prohibited dealings. In that case, it is not possible for Muslims to live according to the dictates of Islamic law without suffering material harm. An example often offered by the jurists is that of a Muslim unable to purchase a residence without engaging in prohibited financial dealings; that Muslim may either purchase the house and violate Islamic law or observe Islamic law and not purchase the house. Al-Juwaynī (d. 478/1085) notes that this is more or less the situation in his own age. Because the refusal of Muslims to compromise eventually will lead to their weakening and destruction, compromises are permitted and, at times, required. Muslim territories and homes, al-Juwaynī argues, will be taken over by non-Muslims as they lose the ability to defend themselves. Under these circumstances, one may engage in prohibited transactions not only to satisfy "necessities" (*darūriyyāt*) but also "needs" (*ḥājīyyāt*).¹⁰³ Al-Juwaynī adds that Muslims should migrate to better lands, if they are able to do so. But if the large size of the Muslim population makes migration difficult, then they must not wait passively for their situation to improve; rather they must meet their needs and maintain their strength.¹⁰⁴

¹⁰² Cited in L.P. Harvey, "Crypto-Islam," 174-77.

¹⁰³ The distinction between "necessities" and "needs" is a major issue in Islamic jurisprudence. Generally, "necessities" are considered to be the basics of life such as food, water and shelter, whereas "needs" encompass education and good health. See Subḥī Mahmassani, *The Philosophy of Jurisprudence in Islam*, trans. F. Ziadeh (Malaysia: Penerbitan Hizbi, 1987), 152-56.

¹⁰⁴ See Abū al-Ma'ālī 'Abd al-Mālik al-Juwaynī (Imām al-Ḥaramayn),

There is a certain degree of confident pragmatism (and idealism) in this line of thinking. Surprisingly, although the issue of widespread corruption is of direct relevance to Muslims in non-Muslim territories, one does not find it discussed in this context in classical works on Islamic law. If the issue of widespread corruption was a factor in the jurists' analysis of the conditions of Muslims residing in non-Muslim territories, then it will be found in the *fatwā* literature, which remains largely unexplored.¹⁰⁵

Conclusion

As noted at the outset, Islamic dogma contributes to a recurring tension within Muslim societies. Because of the historical experience of the Prophet in Medina, a degree of territorial insularity became an integral part of Islamic ideology. From a pragmatic point of view, the tendency to insist on a *dār* that belongs to Islam made sense. How else could a Muslim fulfil the ethical and legal dictates of Islam unless an Islamic sovereign existed? Yet Islam purports to be a universal message to humankind, suitable for every one and every age. The resulting tension, which is by no means unique, manifests itself in many areas of Islamic law and history, as in the case studied here.

Although people may try to live in accordance with a religious dogma, they always will interpret it in ways that are socially and culturally specific. Historical challenges and developments could force the followers of a once secure and confident dogma to reexamine their ethical and legal principles. The fact that increasing numbers of Muslims were coming under non-Muslim tutelage was one such historical challenge. The Islamic response developed over a long span

Ghiyāth al-Umam, ed. 'Abd al-'Azīm al-Dīb (Cairo: al-Maktabāt al-Kubrā, 1401), 475-522, particularly 476, 486, and 488. See also Abū Hāmid al-Ghazālī (d. 505/1111), *Shifā' al-Ghalīl*, ed. Ḥamad al-Kabīs (Baghdad: Maṭba'at al-Irshād, 1971), 245-46; Abū Ishāq al-Shāṭibi (d. 790/1388), *al-I'tisām*, ed. Ahmad 'Abd al-Shāfi (Beirut: Dār al-Kutub al-'Ilmiyya, 1988), vol. 2, 361; Abū Muḥammad 'Izz al-Dīn b. 'Abd al-Salām al-Salāmi (d. 660/1262), *Qawā'id al-Ahkām*, ed. Ṭahā 'Abd al-Ra'ūf Sa'd (Beirut: Dār al-Jil, 1980), 188.

¹⁰⁵ Shams al-Dīn Ibn Qayyim, *I'lām al-Muwaqqi'in*, ed. Ṭahā 'Abd al-Ra'ūf Sa'd (Beirut: Dār al-Jil, 1973), vol. 2, 161 relies on the logic of public welfare in permitting certain forms of usury. Relying on the logic of necessity, Ridā argues that Muslims should be able to maintain their financial strength by dealing in financial transactions that are Islamically questionable (*al-Fatāwā*, vol. 5, 1918-19). See also Jamil b. Mubārak, *Nazariyyat al-Darūra al-Shar'iyya* (Cairo: Dār al-Wafā', 1988), 354-460; Abdur Raḥmān Doi, "Duties and Responsibilities of Muslims in Non-Muslim States: A Point of View," *Journal of the Institute of Muslim Minority Affairs*, 8:1 (Jan. 1987), 47-53.

of time, changing, adapting and, at times, becoming defiant and uncompromising.

Notwithstanding the variety of responses and reactions that we have discussed, the fact remains that our inquiry remains inadequate. Most of the available sources are written from the perspective of Muslim jurists residing in *dār al-Islām* who pass judgment on those in *dār al-kufr*. Even in the *fatwā* literature, whereas the questions emanate from Muslims residing in *dār al-kufr*, the responses are issued by *mufītīs* living in *dār al-Islām*.

From the *fatwās* of ‘Ulaysh, al-Wansharīsī, Ibn Ḥajar and al-Ramlī, we learn of an unrepresented side in the discussion. These texts refer to a debate between those who chose to stay and those who chose to migrate. Unfortunately, the arguments and solutions worked out by the residents of *dār al-kufr* are not preserved in the standard Islamic sources. The surviving sources manifest a certain ambivalence toward Muslims in non-Muslim lands — toward their dilemmas, their literature and their arguments. Rules and principles are worked out by jurists in an unequal, disparate and disjointed fashion. For instance, the Shāfi‘ī and Ḥanafī discussion of hijra is more systematic than that of the other schools. But even these two schools make no attempt to deduce guiding principles and systematic ethical standards that would address the problem in its totality. Often the casuistic methodology pursued by the jurists is inconsistent with the general, and sometimes, universal, character of the solutions they propose. This results in many ambiguities and poses a special problem deserving careful study. Perhaps the tensions and the historical challenges proved overwhelming for jurists who served as the protectors of the Shari‘a. Perhaps equivocation and ambivalence were adopted deliberately so as not to undermine the moral position of fellow Muslims subject to non-Muslim rule, or so as not to impose burdensome restrictions on Muslim minorities living a very specific and particular social reality. Further research is needed to shed light on these speculations.

My objective in this essay has been to call attention to this field of research and to point out the major issues of debate and contention. I have argued that fully developed positions were articulated only after the sixth/twelfth century in the aftermath of the Christian invasions in the West and the Mongol invasions in the East. In my view, the positions of the different schools should be viewed as historical responses to historical challenges. One discerns several tendencies within the juridical tradition. To paraphrase the language of contemporary

lawyers, some classical jurists, most notably Shī'is, Ḥanbalis and Shāfi'is, were inclined toward universality both at the theological and jurisdictional level. For them, Islam and *dār al-Islām* are not synonymous; if Muslims are able to practice their religion in a territory, they may reside in it regardless of the formal categorization of the territory. However these Muslim minorities are subject to the universal enforcement jurisdiction of *dār al-Islām*.

Most Mālikī jurists were inclined toward territoriality but only at the theological level. Islam can exist only in territory formally ruled by Muslims. The formal categorization of the territory is the definitive factor determining the legality of residence. Ḥanafī jurists were territorially inclined as well but in a very different sense: The territory of Islam is the source of inviolability and jurisdiction, but that does not mean that Islam can exist only in the territory of Islam. Although *dār al-Islām* is the source of jurisdictional power and sovereignty, the territory of Islam is not synonymous with Islam.

Why did the Ḥanafīs insist that former Muslim territories remained a part of *dār al-Islām* despite the fact that Muslim power and sovereignty were missing? The fact that Shāfi'ī jurists reached a similar position leads one to believe that this was a direct response to the Mongol invasion of the Muslim heartland. In fact, some Ḥanafī sources specify that territories conquered by Mongols remain Muslim.¹⁰⁶ Even the Ḥanbalī Ibn Taymiyya (d. 728/1327-28) puzzled over the status of one such territory, concluding that it is neither *dār al-Islām* nor *dār al-ḥarb*, but "something in between."¹⁰⁷

Despite the historical progression of the juridical positions on hijra, one observes very little development of the issue of the universal applicability of Islamic law and the inviolability of Muslim minorities. The statements made by jurists in the third/ninth century are repeated nearly verbatim six centuries later. This may be due to the fact that the only real issue to be decided is migration. If the legality of residence in non-Muslim territory is admitted, all other issues are secondary.

In order to highlight the differences between the schools, I selected several subjects and compared the position of each school on that issue. A systematic study of the premises and logic of each school on the conceptions of *dār*, power, and *'iṣma* is bound to shed light on

¹⁰⁶ *Al-Fatāwā al-Hindiyya*, vol. 2, 232, 311-12, vol. 3, 584; Ibn 'Ābidin, *Radd*, vol. 3, 252-53.

¹⁰⁷ Ibn Taymiyya, *al-Fatāwā*, vol. 3, 532-33.

several significant issues.¹⁰⁸ Such an approach would clarify the extent to which specific decisions articulated by jurists are a function of systematic theoretical conceptions, reactions to historical challenges, or the result of casuistic thinking. Further, because the relationship between each jurist and the power structure in his locality is likely to have influenced his positions and understandings, the social and political context within which each jurist lived needs to be analyzed. Each jurist reacted not only to the theoretical premises of his school but also to domestic and foreign circumstances. Therefore, one should ask: Were jurists who enjoyed a closer relation to the power structure more inclined to be concerned with issues of safety, stability and the official hegemony of the Shari'a while those who were distant or opposed the power structure were more concerned with questions of religious purity and social justice? Did the social and political position of each jurist incline him to be less or more accommodating toward Muslim minorities who, intentionally or not, might challenge the authority of the rulers of *dār al-Islām*? These and other issues await a systematic monographic treatment.

The issue of hijra continues to engage Islamic thinking. The questions that confronted the Muslims of al-Andalus and Sicily in the sixth/twelfth century confronted other Muslims centuries later. When Bosnia-Herzegovina came under Austrian control, a Bosnian official wrote to Rashīd Riḍā (1865-1935) complaining that an Ottoman jurist had told the Bosnians that they must all migrate to Muslim territory. Riḍā wrote a scathing attack of the Ottoman jurist, insisting that Bosnians should remain in their homeland.¹⁰⁹ The idea of hijra continued to develop in the colonial age, serving as an ideology of resistance and opposition to colonial powers, and, later, as an ideology of rebellion against indigenous Muslim governments, as in the case of the followers of Sayyid Quṭb.¹¹⁰ The power of the idea of

¹⁰⁸ For an example of such studies, see Baber Johansen, "The Claims of Men and the Claims of God - The Limits of Government Authority in Hanafite Law," in *Pluriformiteit en Verdeling van de macht in het midden-oosten*, ed. C.M. Moor (Nijmegen: M.O.I. - Publicaties, 1980), 60-104; idem, "Der- 'isma."

¹⁰⁹ Riḍā, *al-Fatāwā*, vol. 2, 773-78. On hijra, see also Maḥmūd Shaltūt, *al-Fatāwā* (Cairo: Dār al-Shurūq, 1980), 430-34.

¹¹⁰ See John O. Voll, "Mahdi's Concept and Use of Hijrah," *Islamic Studies*, 26:1 (1987), 31-42; Masud, "Shehu,"; idem, "Obligation"; idem, "Being a Muslim"; 'Uthmān Ibn Fūdī (Dan Fodio), *Bayān Wujūb al-Hijra 'alā al-'Ibād*, trans. and ed. F.H. El Masri (Khartoum: Khartoum University Press, 1978). See also Ivor Wilks, "The Position," esp. 148-52; M.G. Smith, "The Jihad of Shehu Dan Fodio: Some Problems," in *Islam in Tropical Africa*, ed. I.M. Lewis (2nd ed., Bloomington and London: International African Institute, 1980); Rudolph Peters,

migration in Islamic thought often produced mass movements, sometimes with tragic consequences, as evidenced by the infamous migration of Indian Muslims to Afghanistan in 1920.¹¹¹

Despite the intense debates on hijra and despite the fact that about one-third of all Muslims live in non-Muslim countries,¹¹² the ambivalence characteristic of the pre-modern age continues. Few modern Muslims attempt to deal with ethical or legal principles that should guide the behavior of Muslims residing in non-Muslim territory. Few modern scholars have attempted to maintain and develop the traditional discourse on the affiliation and inviolability of Muslim minorities.

Early in this century, Rashīd Riḍā was asked if a Muslim in Lebanon may rent a room in a hotel that sells alcohol. Riḍā first argued that Lebanon and Syria were not then a part of *dār al-Islām*. Building on the pre-modern discourse, Riḍā argued that the Islamic civil law does not apply to Muslims residing in non-Muslim territory. Muslim minorities are bound only by the laws pertaining to acts of worship (*'ibādāt*). Consequently, a Muslim in such a situation may rent the room and deal in usury or other questionable financial transactions. Relying on the logic of necessity and the arguments advanced by al-Juwaynī, Riḍā argued that Muslims must be able to protect their interests in non-Muslim territory in order to maintain their financial strength, and, hence, to defend themselves against possible oppression.¹¹³

Riḍā drew on Ḥanafī jurisprudence and the principle of necessity to prioritize Islamic goals and resolve inherent conflicts. But discussions such as this are very rare in the modern age.¹¹⁴ The realities of

Islam and Colonialism: The Doctrine of Jihad in Modern History (The Hague: Mouton, 1979). On Sayyid Qutb and hijra, see Gilles Kepel, *Muslim Extremism in Egypt*, trans. J. Rothschild (Berkeley and Los Angeles: University of California Press, 1986).

¹¹¹ Gail Minault, *The Khilafat Movement* (New York: Columbia University Press, 1982); M. Naem Qureshi, "The 'Ulama of British India and Hijrat," *Modern Asian Studies*, 13:1 (1979), 41-59.

¹¹² M. Ali Kettani, *Muslim Minorities in the World Today* (London: Mansell Publishing, 1986), 18.

¹¹³ Riḍā, *al-Fatāwā*, vol. 5, 1918-19. On depositing funds in banks in a non-Muslim country, see also idem, vol. 2, 406-08 and vol. 4, 1521-22. Riḍā vehemently opposed Muslims accepting French citizenship or joining non-Muslim armies (vol. 7, 1750-59). The problem of citizenship in Tunisia and Algeria was debated intensely in the colonial age. See Rudolph Peters and Gert De Vries, "Apostasy in Islam," *Die Welt des Islams*, 17 (1976-77), 1-4, 12.

¹¹⁴ For examples, see Doi, "Duties and Responsibilities"; and see the comments on this article in *Journal of the Institute of Muslim Minority Affairs*,

nationalism and secularism, which have added new dimensions to the problem, seem to have confounded modern Islamic discourse. In addition to the traditional questions and issues, new questions arose that exasperated the tensions already permeating Islamic doctrines. To what extent should Muslim minorities participate in the political processes of a secular state? To what extent do Muslims compromise their safety by refusing to do so? To what extent do they compromise Islamic ethics by becoming active participants? And to what extent do they risk social integration, assimilation, and loss of identity?¹¹⁵

The traditional criteria worked out by earlier generations of Muslim jurists pose difficult questions for the modern age, when the application of Muslim personal or family law in a secular state has become a difficult matter.¹¹⁶ Seemingly private acts such as wearing Islamic attire have proven to be problematic in a secular democracy.¹¹⁷ More intricate legal problems may arise from discreet discrimination against those dressed as Muslims, and practicing polygamy may result in a criminal conviction or deportation.

In this essay, I have reviewed pre-modern responses to pre-modern challenges. Although law and ethics do not always correlate in Islamic

vol. 8:2 (1987), 249-51, 252-53; 254-58; vol. 9:1 (1988), 186-89; see also Yvonne Yazbeck Haddad (ed.), *The Muslims of America* (Oxford: Oxford University Press, 1991).

¹¹⁵ See Mukhlis S. Balbale, "Islam in a Secular Democracy: Challenging Traditionalist Critiques of Muslim Political Participation in America", Senior Thesis, The Dept. of Gov., Harvard College, 1992; Steven A. Johnson, "Political Activity of Muslims in the U.S.," in Haddad, *Muslims*.

¹¹⁶ See P.A. Buttar, "Muslim Personal law in Western Countries: The Case of Australia," *Journal of the Institute of Muslim Minority Affairs*, 6 (1985), 271-82; Lucy Carroll, "Muslim Minorities and Legal Questions in Australia: A Rejoinder," *Journal of the Institute of Muslim Minority Affairs*, 7 (1986), 35-66; Michael O. Mastura, "The Status of Muslim Personal Law in Selected Non-Muslim Countries," *Journal of the Institute of Muslim Minority Affairs*, 6 (1985), 114-26; David Pearl, *A Textbook on Muslim Personal Law* (2nd ed., Kent: Croom Helm, 1987), 207-34.

¹¹⁷ See *U.S. v. Board of Education of School District of Philadelphia*, 911 F.2d 882 (3rd Cir. 1990) [a Muslim woman fired for wearing the veil or *hijab* in a public school]; *Abdush-Shahid v. N.Y. State Narcotic Addiction Control Com.*, 34 N.Y. 2d 538, 354 N.Y.S. 2d 102, 309 N.E. 2d 813 (1974) [a Muslim drug counselor fired for wearing Islamic garb]; see also *In Re A.C.*, 573 A.2d 1235 (D.C. App. 1990) [a Muslim woman argues that a forced caesarean violates her understanding of Islamic ethics]. Of the many cases in which Muslim prisoners claim that their religious rights have been denied, see, for example, *O'Lone v. Estate of Shabazz* 482 U.S. 342 (1987); see also Kathleen M. Moore, "Al-Mughtaribun: Law and the Transformation of Muslim Life in North America," Ph.D. thesis, University of Massachusetts (1992). On the application of the Shari'a in Israel, see Aharon Layish, *Women and Islamic Law in a Non-Muslim State* (Jerusalem: Israel Universities Press, 1975).

jurisprudence, legal solutions imply ethical choices. The rulings and decisions of pre-modern Muslim jurists will not necessarily resolve the dilemmas facing modern Muslim minorities. They do, however, provide examples of ethical choices made in response to particular historical challenges. Whether the choices of the past will inform the discourse of the present is for Muslims to explore.¹¹⁸

¹¹⁸ On the problem of minorities and participation, power, ethno-politics and identity, see Ted Gurr (ed.), *Minorities at Risk* (Washington D.C.: U.S. Institute of Peace Press, 1993); Geoff Dench, *Minorities in the Open Society: Prisoners of Ambivalence* (London: Routledge and Kegan Paul, 1986); J.R. Rudolph and R.J. Thompson (eds.), *Ethnoterritorial Politics, Policy and the Western World* (Boulder: Lynne Rienner, 1989); Donald L. Horwitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985); Joseph V. Montville (ed.), *Conflict and Peacemaking in Multiethnic Societies* (Lexington: Lexington Books, 1990); Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990).