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The American University in Cairo
School of Global Affairs and Public Policy

MUSLIM MINORITIES IN THE WEST:
BETWEEN *FIQH* OF MINORITIES AND INTEGRATION

A Thesis Submitted to the
Department of Law

in partial fulfillment of the requirements for the degree of
Master of Arts in International Human Rights Law

By
Dina M. Taha

June 2012

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MUSLIM MINORITIES IN THE WEST:
BETWEEN *FIQH* OF MINORITIES AND INTEGRATION

Dina M. Taha

Supervised by Professor Gianluca Parolin

ABSTRACT

Fiqh of minorities is a specific framework/perspective of the general *Fiqh* that looks with one eye at the objectives and principles of *Shari'a*, and the other eye to consider the reality of Muslim minorities in cases that will, usually, only arise in the situation where Muslims constitute a minority. *Fiqh* of minority is, arguably, based on the premises that Muslim existence in non-Muslim communities, should promote a civilizational dialogue between the Islamic culture and other cultures. This paper argues that *Fiqh* of minorities' scholars attempt to provide legal opinions and solutions for Muslim minorities in the West in order for them to fulfill their role as both good Muslims and good citizens, i.e. positive integration as they define it. The paper asks whether the cultural background of the scholar—Western/non-Western—impacts the nature of these solutions. The paper argues that *Fiqh* of minorities can provide two types of solutions a long-term one, for a permanent Muslim presence in the West, and a Short-term—exceptional—one, for a temporary presence. The first suggests that we are dealing with full citizens and members of the society who happen to be Muslims in religion, while the second assumes that Muslims' natural and ultimate residence is in a Muslim majority country. Both types of solutions are reflected on the nature of the compromise *Fiqh* of minorities' scholars, who in turn are affected by their own cultural backgrounds, provide to solve "the good Muslim, Good citizen equation"—i.e. whether they are perceived as "Western Muslims" or "a Muslim minority in the West".

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I- Introduction

What does a Muslim do when he or she has to follow the secular rules of a non-Muslim country that contradict his or her obligations to *Sharī'a*? When is a Muslim marriage legitimate? How does divorce take place? What governs child custody? What happens when a woman converts to Islam but her husband does not? Immigrant Muslims face similar and many other issues while trying to live as both responsible citizens and committed Muslims. The most crucial issue; however, has to do with the validity and permissibility of Muslims, especially immigrants, residing in a non-Muslim community and whether it is acceptable in Islamic *Sharī'a*, and if so then under which conditions. Even more, what about obtaining the nationality of an “infidel” country and thus obtaining the right to vote as well as political participation in a non-Muslim regime. This entails the duty of obligatory army recruitment which is usually not a problem unless there is a confrontation with another Muslim country.

The increasing Muslim presence in non-Muslim countries, made a group of Muslim scholars reach the conclusion that Innovation and compromise are key concepts for Muslims trying to live Islamic lives in the context of a Judeo-Christian country. Hence they introduced the Islamic jurisprudence of Muslim minorities [hereinafter *Fiqh* of minorities]. *Fiqh* of minorities is based on the premise that Muslim existence in non-Muslim communities, promotes dialogue among civilizations between the Islamic culture and other cultures. That is not to say that *Fiqh* of minorities is a “new” *Fiqh*; rather it is a specific framework/perspective of the general *Fiqh* that looks at the objectives and principles of *Sharī'a*, relative to the reality of Muslim minorities in cases that usually only arise in situations where Muslims constitute a minority. *Fiqh* of minorities' have been subjected to significant criticism, however, its advocates state that the purpose of this *Fiqh* is not to recreate Islam, *Sharī'a*, or even *Fiqh*; rather it is a specialized modernist perspective of the general *Fiqh* that governs how a jurist might work within the flexibility of the religion to best apply it to a set of particular circumstances.¹

Although the early scholars did not recognize this *Fiqh*, in terms of its title, due to the absence of such phenomenon in the past, it does not mean its principles and objectives have not always

¹ See, Nash'at *Fiqh* al-aqalliyyât wa Ilaqatoh Bisa'ir Furu' al-*Fiqh*, available at: <http://www.islamweb.net/verdict/index.php?page=showverdict&Option=VerdictId&Id=72660> (last visited Mar. 23, 2012) [translated in the origin of *Fiqh* or minorities and its relationship to other branches of *Fiqh*].

been there. However, what modern scholars attempted to do is to reorganize and rearticulate these principles and objectives based on a special philosophical perspective that thoroughly considers the Western modern context where Muslims minorities live, as well as valuing the importance of the existence and coexistence in non-Muslim countries. Hence, *Fiqh* of minorities turns into a tool in the hands of the scholars and *Muftis* to respond to these special conditions in a way that reflects the fundamental principles of *Sharī'a*: protection of one's faith and identity through preserving *Maslaha* or public interest.

This paper argues that *Fiqh* of minorities' scholars attempt to provide legal opinions and solutions for Muslim minorities in the West in order for them to fulfill their role as both good Muslims and good citizens, i.e. positive integration as they define it. The paper asks whether the cultural background of the scholar—Western/non-Western—impacts the nature of these solutions. The paper argues that *Fiqh* of minorities can provide two types of solutions a long-term one, for a permanent Muslim presence in the West, and a Short-term—exceptional—one, for a temporary presence. The first suggests that we are dealing with full citizens and members of the society who happen to be Muslims in religion, while the second assumes that Muslims' natural and ultimate residence is in a Muslim majority country. Both types of solutions are reflected on the nature of the compromise *Fiqh* of minorities' scholars, who in turn are affected by their own cultural backgrounds, provide to solve “the good Muslim, Good citizen equation”—i.e. whether they are perceived as “Western Muslims” or “a Muslim minority in the West”.

This study focuses on the “immigrant” element within the Muslim minority in particular. It specifically focuses on the application of *Fiqh* of minorities in the West. The reason for that goes back to considerable attention Muslim scholars have paid to these regions and the relation between Islam and the West. Although the latter raises more questions than offering answers, it lies outside of the scope of this study. The study is concerned with the specific relation between *Fiqh* of minorities and the phenomenon of the integration of such minorities. It asks the question of whether the latter *Fiqh* actually takes into account the conditions under which Muslim minorities live. Such issues are highly essential for both: Islamic faith and identity, and thus affect the minority's integration process in the society. The paper proposes that *Fiqh* of minorities introduces a new paradigm using the notion of *Umma*, and its related concepts, to establish religious basis and justifications for Muslims' positive integration in their society. Such

paradigm does not only reflect the commitment to the *Umma* message, but also signifies the importance of all individuals practicing their own rights and fulfilling their own duties. The paper accordingly examines the impact of the context from which *Fiqh* of minorities' advocates' come—Western, non-Western, hybrid and so forth—on the final outcome of the legal opinion adopted. It highlights certain trends of thought in looking to an issue facing Muslim minorities.

Chapter one starts by asking the question of whether the immigration to a non-Muslim country is permissible in the first place. It then moves to over viewing the methodological and contextual reasons that encouraged advocates of *Fiqh* of minorities to introduce it. Chapter two is dedicated to *Fiqh* of minorities' theory which proposes a unique interpretation of *Shari'a* in an attempt to allow it to fulfill its purpose in the lives of Muslim minorities who are exposed to unique circumstances. Chapter three centers on how *Fiqh* of minorities theorizes for the Muslim presence in a way that enables fulfilling the "*Umma* message" through responding to and embracing modern concepts like citizenship and secularism, which pose restrictions and are rarely convinced with divine laws. It also exposes to different scholars' perspectives regarding the nature of the relation between *Fiqh* of minorities on one side, and the Muslim identity, integration and loyalty on the other. The final chapter tries to apply the previous theory and aspirations of *Fiqh* of minorities' advocates, specifically, regarding the role this *Fiqh* can play in the process of integration. The focus will be on two case studies: interest-based Mortgage and *Islâm al-zawja*. The study concludes by evaluating the status and role of *Fiqh* of minorities in its relation with integration through identifying the discrepancies among different scholars in perceiving such relation.

II- Muslim minorities' need for a special *Fiqh*

Fiqh Al-Aqalliyat or the jurisprudence of Muslim minorities [hereinafter *Fiqh* of minorities], is a legal doctrine introduced in the 1990s. This doctrine asserts that Muslim minorities, especially those residing in the West, “deserve a special new legal discipline to address their unique religious needs, which differ from those of Muslims residing in Islamic countries.”² In this chapter, we will start with an overview of both the classical and modern scholars' views and discrepancies on the position of *Sharī'a* regarding residency in a non-Muslim country. The latter will explore the methodological and practical reasons that encouraged advocates of *Fiqh* of minorities to introduce it. The chapter will then highlight several examples of the main jurisprudential issues and concerns that arise in the context of a Muslim minority living in a non-Muslim-ruled society. The chapter concludes by pointing out the main criticism the new discipline has received.

A- Arguments for and against *Hijra* to non-Muslim countries

Muslims, by virtue of their commitment to Islam, are expected to follow its moral imperatives as manifested in *Sharī'a*.³ Scholars, whether classical or modern, for or against *Fiqh* of minorities, seek evidence from *Sharī'a* to support their arguments. The mainstream traditional *Fiqh* tends to favor the opinion that while Muslims generally should not reside in non-Muslim ruled territories, it is allowed in certain cases, for instance: their inability to migrate to Muslim territories; the objective of restoring Muslim rule like in Sicily; or to spread the message of Islam.⁴ The term *Hijra* or immigration has been interpreted by classical Islamic scholars in different ways. Some went to favor that the only reason justifying *Hijra* as an obligation is to strengthen the Muslim community in its early days and in similar situations. Other scholars were more elaborate, such as *Ibn al-'arabī*, who defined six situations resulting in *Hijra*. Three of these situations involve compulsory *Hijra* like in the case of Injustice or lawlessness; the remaining three involve recommended *Hijra* which includes “physical persecution, disease or financial

² Shammai Fishman, *Fiqh al-Aqalliyat: A Legal Theory for Muslim Minorities* –Center on Islam, Democracy and the future of the Muslim world, Seiers No. 1, Paper No. 2, October 2006, at 5.

³ Hisham A. Hellyer, *Minorities, Muslims and Sharī'a: Some Reflections on Islamic Law and Muslims without Political Power*, 18 ISLAM AND CHRISTIAN-MUSLIM RELATIONS Muslim 85, 89 (2007).

⁴ *Id.* at 88.

insecurity.”⁵ A third group of scholars showed more tolerance towards the idea of residency in a non-Muslim countries and emphasized that if Muslims were able to practice their religion then it is considered within *Dâr al-islâm* as long as this country does not revert into *Dâr al-harb*.⁶

Thus, modern Islamic scholars mostly agree with what the classical scholars have to say regarding the conditions under which a Muslim gains permission to migrate. Nevertheless, scholars advocating *Fiqh* of minorities like Qaradâwî, add a modern dimension to their opinion by stating that currently many non-Muslim countries provide a liberal atmosphere in which freedom of choice, expression and practice are guaranteed. These countries like in Europe and North America, more or less, take a neutral position against religion. Qaradâwî, hence, finds it permissible for Muslims to migrate to such countries provided two conditions are met. The occurrence of a legitimate objective like searching for a job and making a living, and that such residency will not harm one’s faith and practice of religion.⁷

Fiqh of minorities’ scholars have taken a further step towards justifying the Muslims residency in a non-Muslim country in general and in the West in particular. They cite the Emigration to Abyssinia—now Ethiopia—during the early days of Islam, when a group of Muslims took refuge there to preserve their faith.⁸ They respond to criticism, that such incidents took place when Muslims were in a weak stage, by confirming that some Muslims preferred to stay there even after Prophet Muhammad’s *Hijra* to Madina and the establishment of the state of Islam. Thus, Muslims are allowed to stay in a non-Muslim country and cannot be forced to leave as long as their faith is safe.⁹ They draw several conclusions from this incident: first, that Muslims can and have to plan for their presence as being permanent and plan accordingly; second, that Muslims should not limit themselves with traditional terminology that was not mentioned in Qur’ân like *Dâr al-islâm*, Land of Islam, and *Dâr al-harb*, Land of War, or *Dâr al-Kufr*, Land of infidelity. Rather they should embrace the idea of the universality of Islam. Third, Muslims share the duty of participating in the social and political life of their new community for various purposes

⁵ *Id.* at 89.

⁶ *Id.*

⁷ YUSUF AL QARADÂWÎ, AL WATAN WAL MUWATANA FI DAWU’ AL OSOUL AL AQADIYYA WAL MAQÂSID AL SHAR’IYYA 63-67, Cairo, Dar Al-Shorouq (2010)[translated in the country and citizenship in lights of Islamic fundamentals and Sharî’a purposes].

⁸ Tâha Jâbir Al-’Alwânî, *Toward a Fiqh for minorities*, in MUSLIMS’ PLACE IN THE AMERICAN PUBLIC SQUARE: HOPES, FEARS, AND ASPIRATIONS 28-29, (Zahid H. Bukhari et al. eds., Altamira Press) (2004).

⁹ QARADÂWÎ, *supra* note 7, at 69.

including: defending their rights, supporting their brothers and sisters in Islam, and fulfilling the universal message of Islam.¹⁰ Thus, *Fiqh* of minorities does not only rationalize the permissibility of Muslim presence in non-Muslim countries, Rather it asserts it is an obligation towards their religion and their country provided the mentioned conditions are met.¹¹

B- Methodological and contextual reasons for Fiqh of minorities

The disagreements among early scholars, modern scholars and *Fiqh* of minority scholars in the case of Muslim presence in a non-Muslim country shows that many Islamic scholars sometimes rely heavily on examples from the past that do not really match contemporary reality. This complicates the situation of Muslim minorities even more. Thus, an important conclusion made by a few researchers is that “Innovation and compromise are key concepts for Muslims trying to live Islamic lives in the context of a Judeo-Christian country.”¹² That is when the calls of the establishment of a specialized Islamic jurisprudential discipline started to get louder. Though they confirm that the traditional “inherited” *Fiqh* is the foundation and the main guideline,¹³ *Fiqh* of minorities’ scholars justify the need for an allegedly new discipline by proposing both methodological and contextual rationales.

In terms of methodology, Tâha Jâbir Al-‘Alwânî elaborates that concepts like *Dâr al-islâm* versus *Darul or Harb*, *Jizya*–Poll Tax, rights of women, *Jihâd* and other similar concepts create misconceptions, raise questions and promote stereotypes that need to be correctly approached and put in proper context. He argues that classical jurists did not classify the sources of Islamic *Sharî‘a* in a way that facilitates the deduction of rulings that respond to contemporary issues. In addition most jurists ignore the notion of the universality of Islam as one of the determinants to rulings and its importance in reflecting modern relation between Muslims and non-Muslims. The traditional *Fiqh*, formulated in the early decades of Islam, was necessarily affected by topics and discourses which were associated with the historical and geographical circumstances that prevailed at that time.¹⁴

¹⁰ ASHRAF ABDUL ‘AATI AL-MIMI, *FIQH AL-AQALLIYYÂT AL MUSLIMA BAYN AL NATHARIYYA WAL TATBIQ* 252-253, Dar Al-Kalima (2008).

¹¹ QARADÂWÎ, *supra* note 7, at 77.

¹² *Id.*

¹³ AL-MIMI, *supra* note 10, at 87.

¹⁴ ‘Alwânî, *supra* note 8, at 8.

On the other hand, when it comes to contextual reasons, 'Alwânî counts a number of modern phenomena that in his mind call for a new specialized discipline. First, the phenomenon of seeking justice and refuge in a non-Muslim land did not exist in the early days of *Fiqh*. Second, the modern concept of citizenship entails political and geographic, rather than religio-cultural connotations. Third, the supremacy of international law, which obliges states to protect and apply justice to immigrants, is also new to traditional *Fiqh*. Fourth, the rationale of power at the early scholars' time was based on conflict and empires knowing no frontiers, unlike the modern diplomatic and soft power predominance. Finally, globalization and the close cultural interaction urges for a *Fiqh* of coexistence that "suits our world in spirit and in form."¹⁵

Abd al-Majîd al-Najjâr further elaborates on the contextual reasons proposed by 'Alwânî by referring to some distinctive characteristics and factors that separate Muslim minorities in the West from the rest of Muslims. In his view, the reason for the increasing attention to Muslim minorities goes back to three factors.¹⁶ First, the general vulnerability of Muslim minorities that can be traced back to psychological vulnerability due to cultural and social estrangement or in some cases even inferiority. In addition, there are other forms of vulnerability such as political, economic and social, which are shared among many minority groups. Second, the legal abidance that characterizes these new modern communities usually does not allow any type of personal practices or rights outside the frame of law. Thus, Muslim minorities find themselves in various occasions obliged to follow the secular rules of the country that might contradict with *Sharî'a* or less severely with cultural traditions. Third, there is a cultural pressure whereby Muslims may tend to live in an entirely new and different community with a totally different value system in all aspects of interaction. This unfamiliar environment subjects the original culture to pressure and conflict, which can lead to problems of assimilation and isolation. The final factor Najjâr refers to as the civilizational linkage or partnership whereby Muslim minorities carry the responsibility of delivering the Islamic cultural heritage and message to these communities. Najjâr argues that such factors challenge many of the premises of the earlier *Fiqh*. For instance, that they are not subjected to *Sharî'a* law which is the main foundation of classic *Fiqh* and thus

¹⁵ *Id.* at 8-9.

¹⁶ NADIA MAHMOUD MUSTAFA, *FIQH AL-AQALLIYYÂT AL-MUSLIMA BAYNA FIQH AL IMDIMAJ (AL-MOWATANA) WA FIQH AL- IN'EZAL: QIRA'A SIYASIYA FI WAQI' AL MUSLIMEEN FI OUROBBA* 28, available at: www.e-cfr.org/ar/bo/35.doc [translated in *Fiqh of Muslim Minorities between Fiqh of integration and Fiqh of isolation: Political examination of the Muslim reality in Europe*].

require a new type of *Ijtihâd* or interpretation.¹⁷ Although Tariq Ramadan disagrees with the assumption of the “Muslim weakness” proposed by Najjâr, he agrees with him that *Dâr al-islâm* and *Dâr al-harb* do not apply in today’s world.¹⁸ He also supports the argument that the entire classical *Fiqh* is based on the fact of Muslims being the majority.¹⁹

While *Fiqh al-Nawâzil*—jurisprudence of new occurrences—is part of the general *Fiqh*, it still deals with partial issues which do not properly respond to major societal issues. Hence, a new discipline is needed to respond to both occasional and day-to-day issues and, more importantly, issues that found for the presence of the Muslim minorities in such communities, its purposes and conditions.²⁰

C- Responsible citizens or committed Muslims

Immigrant Muslims face many issues while trying to live as both responsible citizens and committed Muslims. In education, for instance, many Muslim families are concerned about the experience their children are likely have in public schools, including the quality of education or the influence of their, likely non-Muslim, peers concerning mainly drugs, crime and premarital sex.²¹ For these reasons, many Muslims tend to believe that an Islamic system of education suites their children better.

Another obvious aspect has to do with controversial issues regarding finance and economics which can be a problem for Muslims dealing with non-Muslim banking and economic system. Whether the money a Muslim earns from a bank is *Harâm*—unlawful—or not, is a huge issue among Muslim minorities. The level of flexibility of interpretations of Islamic *Sharî’a* regarding this matter vary. Conflict often arises when the issue of interest—arguably a form of the unlawful usury in Islam—affects Muslims through, for instance, interest-based mortgages in buying property, or whether their money, saved in banks, is going to be invested in alcohol, pornography and other questionable industries. To avoid such concerns, Muslims seek

¹⁷ ABD AL-MAJÏD AL-NAJJÂR, *FIQH AL MUWATANA LIL MUSLIMEEN FI ORUBBA* 190-187, available at <http://www.moslimonline.com/download.php?id=204> (Last visited Feb. 10, 2012).

¹⁸ Hellyer, *supra* note 3, at 11.

¹⁹ Shammai Fishman, *Some Notes on Arabic Terminology as a Link Between Tariq Ramadan and Sheikh Dr. Tâha Jâbir Al-’Alwânî, Founder of the Doctrine of "Muslim Minority Jurisprudence" (Fiqh al-aqalliyyât al-Muslimah)*, available at: www.e-prism.org/images/tariqfinal291203.doc (Last visited Feb. 10, 2012).

²⁰ NAJJÂR, *supra* note 17, at 99-102.

²¹ JANE I. SMITH, *ISLAM IN AMERICA* 156 (Columbia University press) (2010).

alternative solutions through avenues such as investment clubs,²² *Murâbaha*,²³ and others. Though some extreme voices argue that the “American *Umma*” must have its own treasury, most of the inclinations are to find middle ground solutions within the existing economy.²⁴

Another common issue is concerned with Nutrition and Health. Probably the obvious concern among Muslims is the prohibition of certain nutritional habits such as pork and alcohol. Recently more attention has been given to the proper ritual slaughter of edible animals known as *Hâlal* food.²⁵ *Hâlal* food has gained more popularity with time. However, the impact of nutritional habits prevails other occasions when some Muslims, for instance, refuse to attend ceremonies or events that serve alcoholic beverages. Some simply abstain from drinking alcohol itself leaving others to make their own decisions. The issue of whether a Muslim may work in a place that serves alcohol is forbidden or not is another controversial issue. Here again responses differ, ranging from conditional acceptance to utter rejection.²⁶

Socializing and holidays, whether Islamic or not, is another area of concern to Muslim minorities. A Muslim woman clarified “we celebrate Christmas for two reasons, it is important to get involved with the American society, and if you don’t celebrate . . . to me really you are telling those people you are not part of American society.”²⁷ On the other hand, some Muslims tend to see the Fourth of July as a chance to affirm their civic participation and engagement with the society. Similarly, Halloween to most of them seems rather harmless as well.²⁸

In addition to problems concerning education, economics, nutrition and holidays, personal problems must be considered as well. Most of the personal problems that face Muslims have to do with their attempt to balance the requirements of their faith with expectations of American society. Examples of such problems include whether a Muslim should accept a gift from a non-

²² *Id.* at 166.

²³ A concept found in Islamic finance that governs a contract between a bank and its client, by which the bank purchases goods and then sells them to the client at a cost that includes a profit margin. The contract requires specific installment payments to the bank. This arrangement allows the bank to avoid charging interest, which is forbidden under some interpretations of Islamic law. For more information See, Webster's New World Finance and Investment Dictionary, available at: <http://www.credoreference.com.library.aucegypt.edu:2048/entry/wileywnfid/murabaha> (Last visited May, 12, 2012).

²⁴ See generally, SMITH, *supra* note 21, at 166-167.

²⁵ *Id.*

²⁶ *Id.* at 169.

²⁷ SELCUK R. SIRIN & MICHELLE FINE, MUSLIM AMERICAN YOUTH: UNDERSTANDING HYPHENATED IDENTITIES THROUGH MULTIPLE METHODS 170 (New York University Press) (2008).

²⁸ *Id.*

Muslim, or attend funerals, weddings and other forms of events of non-Muslims. Relating to that are the family law issues especially marriage to non-Muslims, conversion, and adoption must also be dealt with.

The most crucial issue, however, has to do with the validity and permissibility of Muslims, especially immigrants, residing in a non-Muslim community at all and whether it is acceptable in Islamic *Sharī'a* and under which conditions. Obtaining the nationality of such an "infidel" country and thus possessing the right of voting and political participation in a non-Muslim regime and the duty of obligatory army recruitment especially when there is a confrontation with another Muslim country must all be considered.

Now that we have covered the reasons behind the calls for a new discipline of *Fiqh* and consolidated it by examples of jurisprudential issues that face Muslims as minorities we turn to the criticism that has been directed to such a called-for discipline.

D- Criticism: Fiqh of minorities... an innovation?

Fiqh of minorities defends the necessity and not just the permissibility, of Muslims residing in a non-Muslim country. This point has been subjected to considerable criticism. For instance, scholars, like sheikh Mohamed Saeed Ramadan al-Buti, are utterly against the concept of a new discipline for minorities. Buti believes it is merely a plot to divide Islam and a means to manipulate divine *Sharī'a*.²⁹ Proponents argue that *Fiqh* of minorities is a reflection of a mentality dominated by the Western capitalist ideology and its utilitarian solutions.³⁰ He emphasizes that immigration from *Dâr al-Kufr* is an obligation on Muslims and he supports his argument with some Qur'anic verses.³¹ He further contends that because of *Fiqh* of minorities, Muslim minorities are in fact assimilating in these non-Muslim communities and adopting their traditions and life-styles that contradict with Islamic faith and *Sharī'a*. What

²⁹ Mohammad Saeed Ramadan Al Buti, *Fiqh Al Aqalyyat Ahdath Wasa'el Al Tala'ob be din Ellah*, available at: <http://www.ummah.com/forum/archive/index.php/t-45686.html> (Last visited Feb. 10, 2012)[translated in *Fiqh* of minorities the latest tool to manipulate religion].

³⁰ *Fiqh al Aqalyyat (Fiqh of minorities) A Jurisprudence to Assimilation (Draft)*, available at: <http://www.ummah.com/forum/archive/index.php/t-20319.html?s=0d886ae8ccabb842c7857b2ac93c82ab> (Last visited Feb. 10, 2012).

³¹ For instance "When angels take the souls of those who die in sin against their souls, they say: "In what -plight- were ye?" They reply: "Weak and oppressed were we in the earth." They say: "Was not the earth of Allâh spacious enough for you to move yourselves away -From evil-?" Such men will find their abode in Hell, - What an evil refuge!'" (Qur'an 4:97)

Fiqh of minorities is doing, in his point of view, is giving this unacceptable life style an Islamic cover and justification.³²

Asif Khan, on the other hand, is more systematic in his criticism. He identifies two main categories of criticism to the pillars of *Fiqh* of minorities. First, he refutes the need for a new specialized *Fiqh* for minorities in the first place as traditional *Fiqh* includes all answers without the need to commit *Harâm*—forbidden. Second, he refutes the justifications and means for public participation and integration provided by *Fiqh* of minorities' scholars. In his view, issues facing Muslim minorities are complex but are not unique; they are common problems among Muslims across the world.³³

Regarding the needs for a new *Fiqh*, he responds to the claim that *Sharī'a* has stayed silent on some issues especially new ones. He bases his argument on the verse “*And We have sent down to you the Book—the Qur'ân—as an exposition of everything, a guidance, a mercy, and glad tidings of those who have submitted for those who have submitted themselves to Allâh.*”³⁴ As for the claim that Islam changes from time to time and from place to place he asserts that the laws that are subjected to change are not the *Sharī'a* ones, rather what is meant are the laws based on customs, habit—*Urf*—and Juristic opinions—*Ra'y*—that were based on the prevailing opinions at the time. He finally responds to the concept of reworking the question in a way that reflects reality and need. He refers to it as a pragmatic manipulative method that will eventually lead to evil—*Munkar*.³⁵

In his second category of criticism where he criticizes the pillars of political participation and integration claimed by advocates of *Fiqh* of minorities, he refutes the validity of some evidences provided to justify civic and social engagement. For instance he challenges the definition of *Maslaha*—benefit—in the assumption that one of the *Maqâsid*—purposes—of *Sharī'a* is “benefit”—which is a central pillar to *Fiqh* of minorities. He explains that *Maqâsid* are the results and not the reasons for *Sharī'a* rules. Thus, the wisdom and the *Maqâsid* of the *Sharī'a* rule are aims sought by the law giver—*Allâh* and consequently are insufficient for justifying a certain action.³⁶

³² Buti, *supra* note 29.

³³ ASIF KHAN, *THE FIQH OF MINORITIES – THE NEW FIQH TO SUBVERT ISLAM 4* (Dawud Masieh ed., Delux Printers London) (2004).

³⁴ Qur'ân 16:89.

³⁵ KHAN, *supra* note 33, at16.

³⁶ *See generally, Id.* at 28-30.

Citizenship is another core concept in the theory of *Fiqh* of minorities that is challenged by Khan, where he argues that it cannot, as defined by *Fiqh* of minorities' scholars, serve as a justification for political participation because by subjecting to rules and laws entailed in citizenship we are making it a source of legislation that takes precedence over *Sharī'a*. This contradicts the core of Islam.³⁷

Criticism to *Fiqh* of minorities' theory is directed towards its premises, methodology and even purposes—integration included. Advocates of *Fiqh* of minorities respond by refuting that the latter is anything but *Bid'a*—innovation—because early *Fiqh* writings are filled with rulings of Muslims living in *Dâr al-harb*. Thus, even though the terminology *Fiqh* of minorities is new, it serves more as an organizational tool to modern scholars using mainly classic rules and methodologies. They also emphasize not to confuse *Sharī'a* and *Fiqh*. Relating to the issue of citizenship raised by Khan, Nadia Mustafa, on the other side, summarizes the main issue *Fiqh* of minorities tries to resolve to be: identifying the position of religion between citizenship and identity.³⁸ Here, comes the role of *Fiqh* of minorities with its philosophy and objectives. The next chapter explores what exactly *Fiqh* of minorities is and what it is comprised of. It also provides answers to the points of criticism raised in this chapter.

³⁷ *Id.* at 33.

³⁸ MUSTAFA, *supra* note 16, at 51.

III- Theoretical Framework of *Fiqh* of Minorities

This chapter is dedicated to *Fiqh* of minorities' theory which proposes a unique interpretation of *Sharī'a* in an attempt to fulfill its purpose in the lives of Muslim minorities who are exposed to unique circumstances. Islamic law is understood in two forms, *Sharī'a* and *Fiqh*. *Sharī'a* relates to the primary sources of Islamic law and is drawn from both *Qur'ân* and *Sunna*—the Prophets traditions. However, when specific issues arise that are not directly covered in the two latter sources, one is to use reason to deduce the principles on how *Sharī'a* would apply and this process is called *Ijtihâd*, which literally means “to exert oneself.”³⁹ *Fiqh*, on the other side, means intelligence. It represents the actual laws deduced to form *Sharī'a*, and thus, it covers all legal issues concerning religious, political, civil and criminal matters, as well as other aspects of life.⁴⁰ These laws of *Fiqh* can change depending on the circumstances, whereas the principles of *Sharī'a* are considered monolithic and constant.

Fiqh can be understood as the process of deducing and applying the principles of *Sharī'a*. The process of *Fiqh* is divided into two parts. *Usûl al-Fiqh*, or the roots, which is the methodology and interpretation principles used in determining the law; and *Furû' al-Fiqh*, or the branches, which is the practice of law and deals with the actual decisions or verdicts—*Fatâwâ*, reached by applying *Usûl al-Fiqh*.⁴¹ Hence, Tâha Jâbir Al-'Alwânî introduces the need for *Fiqh* of minorities by arguing that the special circumstances of Muslim minorities has to be put into consideration,

[T]he idea that the Muslim Jurist must relate the general Islamic jurisprudence to the specific circumstances of a specific community, living in specific circumstances where what is suitable for them may not be suitable for others . . . jurist must not only have a strong background in Islamic sciences, but must also be well versed in the sociology, economics, politics, and international relations relating to that community . . . [the purpose of *Fiqh* of minorities is not to] recreate Islam, rather it is a set of methodologies that govern how a jurist would work within the flexibility of the religion to best apply it to particular circumstances.⁴² [Emphasis added]

Thus, *Fiqh* of minorities not only concerned with Islamic studies but other areas of knowledge important to understanding the characteristics and the pressing needs of the society in order to

³⁹ Donald Brown, *A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a-based Arbitration*, 32 N.C. J. INT'L L. & COM. REG. 495, 516 (2007).

⁴⁰ *Id.*

⁴¹ *Id.* at 517.

⁴² KHAN, *supra* note 33, at 6.

issue a verdict that responds to the objectives of the Islamic *Sharī'a* in its solutions for the Muslim minorities as well.

A- Position and Sources of Fiqh of minorities

Fiqh of minorities does not mean that it is the *Fiqh* of minor issues—a mere branch of general *Fiqh*. Rather it should come under the science of *Fiqh* in its general sense and thus covers all theological and practical branches of Islamic jurisprudence.⁴³ *Fiqh* of minorities is a qualitative jurisprudence that relates the *Sharī'a* ruling to the conditions and the context of the group. It is still part of the general *Fiqh* but has special characteristics, topics, and issues of concern. Most of these are known in classic jurisprudence but under different scattered titles.⁴⁴ These special topics focus specifically on issues affecting Muslim minorities who endeavor both to preserve their faith and their identity and interact with their society at the same time. It is a similar category to *Usûl al-Fiqh–Fiqh* of foundations, *Fiqh al-Awlawiyyât–priorities*, *Fiqh al-Muwâzanât–contrasts*, *Fiqh al-Wâqi'–reality* and *Fiqh al-Nawâzil–New occurrences*.⁴⁵

Particularly, 'Alwânî argues that originally, *Fiqh* of minorities was an evolution of *Fiqh al-Nawâzil* that dealt with brand new issues. However, he points out that the new discipline tries to overcome the temporary and negative impressions and connotations *Fiqh al-Nawâzil* leaves.⁴⁶ The methodological and contextual reasons, mentioned in chapter one, encouraged *Fiqh* of minorities' scholars and affiliated institutions, like the European council for fatwa and research [hereinafter ECFR], to start the process of developing a methodology for this new discipline. Their aim was not only to create a simple system of answering personal questions in jurisprudence but a framework for political and social interaction between Muslims and non-Muslims as well.

ECFR agrees with *Fiqh* of minorities' advocates on using the authentic classical sources of *Sharī'a* as the basis of their theory and framework,⁴⁷ but in an innovative and specialized manner.

⁴³ Alwânî, *supra* note 8, at 6.

⁴⁴ AL-MIMI, *supra* note 10, at 80.

⁴⁵ Alwânî, *supra* note 8, at 16.

⁴⁶ Personal Interview with Taha Jabir al-'Alwânî, Qordoba center for research and studies, Cairo (Feb 2, 2012) [hereinafter 'Alwânî interview] (refer to the annex).

⁴⁷ Fishman, *supra* note 2, at 5

Moreover, they acknowledge the supremacy of the *Qur'ân* as the main source.⁴⁸ 'Alwânî explains that *Qur'ân* is considered the foundational source for all other sources, including early scholars' *Ijtihâd*, and consequently should be the original source of all rules and verdicts.⁴⁹ *Sunna*, in turn, is the explanatory source of *Qur'ân* that can only be interpreted and understood in light of the latter.⁵⁰ 'Alwânî believes that no tradition can be tracked to the Prophet unless it has an origin in the *Qur'ân*.⁵¹ As for the classic jurisprudential opinions, they are considered supporting or complementary sources that should not be ignored nor viewed as a restraint.⁵² *Fiqh* of minorities' advocates depends frequently on certain tools found in the traditional *Fiqh* methodology, namely, *Ijtihâd*, *Maslaha*—public interest or benefit, *Taysîr*—Making *Fiqh* easy, and 'Urf—custom.⁵³

The purpose of *Fiqh* of minorities is not to recreate Islam, *Sharî'a*, or even *Fiqh* ; rather it is a specialized modernist perspective of the general *Fiqh* that governs how a jurist may work within the flexibility of the religion to best apply it to a set of particular circumstances.⁵⁴ Although the early scholars did not recognize this *Fiqh* as such due to the absence of such phenomenon in the past, it does not mean its principles and objectives have not always been there. However, what modern scholars have attempted to do is to reorganize and rearticulate these principles and objectives based on a special philosophical perspective that thoroughly considers the Western modern context where Muslims minorities live, as well as valuing the importance of the existence and coexistence in non-Muslim countries. Hence, *Fiqh* of minorities turns into a tool in the hands of the scholars and *Muftîs* or jurists to respond to these special conditions in a way that reflects the fundamental principles of *Sharî'a*: protection of one's faith/identity through preserving *Maslaha*. An important prerequisite for the *Fiqh* of minorities' scholar is to be more

⁴⁸ See YUSUF AL-QARADÂWÎ, *Fi Fiqh AL AQALYYAT AL MUSLIMAH, HAYAT AL MUSLIMIN WASAT AL MUJTIMA'AT AL UKHRA* 39, Cairo, Dar Al- Shorouq (2001) [translated in the *Fiqh* of Muslim Minorities, the life of Muslims in other communities]; and 'Alwânî, *supra* note 8, at 12.

⁴⁹ Tâha Jâbir Al-'Alwânî, *Madkhal Ila Fiqh al-Aqalyyat*, available at: <http://www.dahsha.com/old/viewarticle.php?id=27332> (Last visited Feb. 10, 2012).

⁵⁰ See QARADÂWÎ, *supra* note 48, at 39 and *id*.

⁵¹ *Id*.

⁵² AL-MIMI, *supra* note 10, at 84.

⁵³ Fishman, *supra* note 2, at 8.

⁵⁴ See, Nash'at *Fiqh* al-aqalliyât wa Ilaqatoh Bisa'ir Furu' al-Fiqh, available at:

<http://www.islamweb.net/verdict/index.php?page=showverdict&Option=VerdictId&Id=72660> (Last visited May, 12, 2012) [translated in the origin of *Fiqh* or minorities and its relationship to other branches of *Fiqh*].

specialized in the areas of social sciences and economics and their sciences while extracting the appropriate opinions and verdicts from the general *Fiqh*.

Most concepts and issues of *Fiqh* of minorities have always existed within *Sharī'a* and general *Fiqh* but lack the necessary organization, details and renovation in the process of *Ijtihād* that is required to appropriately answer to the targeted phenomenon. This reflects the view that *Sharī'a* is suitable for every time and place while verdict is subject to change. The resulting Verdicts from *Fiqh* of minorities, however, are not necessarily exclusive to the case of minorities and can be applied to other cases but on different bases and reasons. The reason it is labeled as *Fiqh* of minorities goes back to “the reason” why the scholar has issued this Verdict—which is argued to be the philosophy of integration that entails both *Da'wa* and preserving the identity. The latter requires the scholar to be an expert in real life issues and circumstances faced by Muslims and not just abstractions.

B- Objectives of *Fiqh* of minorities

Advocates of *Fiqh* of minorities recognize the importance of preserving Islamic faith and identity while endorsing Muslim minorities' presence in non-Muslim communities. As noted in chapter one they contend that such presence is an obligation and not just permissible. Reasons of the nature of such presence can be interpreted from the objectives of *Fiqh* of minorities pointed out by different scholars. Qaradâwî, for instance, sets objectives that include supporting Muslim minorities and facilitating their living within the Islamic framework while making life easier on them; helping to preserve the core of Islamic identity with its unique culture, values traditions and concepts and educating such minority about its rights and duties in its new society; providing flexibility, guided openness, and interaction with other members of society, which consequently encourages positive contribution within such society, without the previously mention isolation or assimilation; and answering to the special circumstances and problems in a non-Muslim society in an attempt to alleviate difficulty.⁵⁵ Thus, the objectives, as set by Qaradâwî,⁵⁶ revolve around supporting and empowering Muslims, preserving identity, facilitating living within *Sharī'a* framework, delivering the message of Islam, whether cultural or

⁵⁵ QARADÂWÎ, *supra* note 48, at 34-35.

⁵⁶ Copied by others; See, AL-MIMI, *supra* note10, at 81-82.

religious–*Da'wa*—directly or indirectly, and finally promoting a positive interaction and coexistence through educating Muslim minorities about their rights and duties as citizens.

Recalling the methodological and contextual reasons that lead to calls for a new discipline, *Fiqh* of minorities is designed to respond to such reasons. Methodologically, it tries to resolve the conflict between the culture and values of host societies from within the framework of Islamic jurisprudence. It aims at reshaping and reinterpreting engrained Islamic concepts such as *Dâr al-islâm* and *Dâr al-Kufr*.⁵⁷ On the other hand, Contextually, as Najjâr states, the reason why the ECFR, which adopts *Fiqh* of minorities as a policy, was established is to provide a guide for Muslim minorities for their own, as well as their community's benefit in order for them to serve as a role model.⁵⁸

Thus, one can count common objectives and intentions among scholars of *Fiqh* of minorities. The first is attracting more Muslims to follow *Sharî'a* instead of assimilating and losing both faith and identity. Second, it is not only a jurisprudential legal system, but a tool for increasing social bonds and political influence and even unity among Muslim minorities within their non-Muslim society. Third, it tries to establish a platform for peaceful coexistence with non-Muslims through providing effective solutions to reconcile Islam with the secularist West without moving outside the boundaries of *Sharî'a*.⁵⁹ This last objective reflects the concept of *Shahâda* or witnessing whereby Muslims are obliged to serve as role models within their community wherever that is. Such *Shahâda* is the flip coin of the concept of *Da'wa*—propagating the message of Islam,⁶⁰ which will be discussed later in more detail.

C- Characteristics of *Fiqh* of minorities

The reason for identifying the characteristics of *Fiqh* of minorities is to lay down the regulations and criteria that control the process of *Ijtihâd*—an integral element to the framework of *Fiqh* of minorities. Qaradâwî asserts that in order for it to fulfill its objectives; *Fiqh* of minorities must be characterized by linking and balancing the general principles and foundations of traditional *Fiqh* at one hand and the contemporary issues and problems on the others; reflecting the

⁵⁷ Fishman, *supra* note 2, at 1.

⁵⁸ NAJJÂR, *supra* note 10, at 3.

⁵⁹ Fishman, *supra* note 2, at 14.

⁶⁰ Salah Sultan, *Methodological Regulations for the Fiqh of Muslim Minorities*, available at: <http://islamicstudies.islammessage.com/Article.aspx?aid=308> (Last visited Feb. 10, 2012).

universality of the Islamic belief, law and the current social realities, where it tries to provide solutions for the latter from within the Islamic legal framework as not to contradict the proper Islamic faith; Third, Balancing between partial *Sharī'a* texts and general objectives of *Sharī'a*, i.e. returns the branches to its roots and bypasses the particularities to the collective; Fourth, Recognizes that *Fatwa*–religious verdict–varies according to time, place, traditions and circumstances, a thing that cannot apply more in the case of Muslim minorities in modern era; and Finally, valuing the idea that one should balance between his/her distinct cultural and religious identity on one side and integrating, influencing and communicating with his/her current society on the other.⁶¹

The process of *Ijtihād* in *Fiqh* of minorities' framework is based on two main premises that can be extrapolated from the preceding characteristics: universality of Islam–*'Alamiyyat al-Islām*– and the objectives of *Sharī'a*–*Maqâsid al-Sharī'a*.⁶² The first premise reflects the idea that Islam is a global religion. This definition carries implicit messages one of which is linked to the Muslim *Umma* and the future of Islam beyond the current borders.⁶³ This message does not necessarily imply the direct message of spreading the faith in the same sense of the missionaries. Rather it is more reflected in the indirect message of turning into a role model–*Shahâda*–for humanity and for their community. Such concept of universality stresses on the fact that verdict changes from time to time and from place to another, which is a core characteristic in *Fiqh* of minorities. It also reflects the necessity of one's responsibility towards his or her community in all aspects whether political, economic or social as long as they preserve and add to their Muslim-Western identity. Salah Sultan states that “the *Ijtihād* in the field of *Fiqh* of Muslim Minorities must emphasize the Muslim's role in reforming his or her country and community rather than being limited to the *Fiqh* of protection against temptations and tribulations,”⁶⁴ otherwise it will not achieve “the whole message of Islam nor the entire role entitled for Muslims [which is] to benefit oneself . . . and to prove oneself useful to his community or country whether it was good or bad.”⁶⁵

⁶¹ *Id.*

⁶² Fishman, *supra* note 2, at 2.

⁶³ *Id.* at 3.

⁶⁴ Sultan, *supra* note 60.

⁶⁵ *Id.*

The second premise which recognizes *Maqâsid al-Sharî'a* or the ultimate intentions of *Sharî'a* will not take place without combining the understanding of revealed text with reality–context– as well as acquiring a true knowledge of *Sharî'a*. Such is achieved only through recognizing certain methodological principles. 'Alwânî stresses on specific characteristics necessary for *Fiqh* of minorities in order for it to fulfill the intended *Maqâsid*: unveiling the structural unity of Qur'ân by reading it in contrast to the physical universe; studying very closely the complicated aspects of the lives of people from which the issues and problems of Muslim minorities arise; and most importantly to recognize that the inherited *Fiqh* from classic scholars is not always an adequate reference for verdict in matters of minorities. "It does however, contain precedents of Verdicts and legislations than can be applied and referred to for determining approaches and methodologies as appropriate.⁶⁶ Qaradâwî concurs by differentiating between selective *Ijtihâd*– where modern scholars pick and choose from the inherited *Ijtihâd* and opinions the best that respond to the context as well as the *Maqâsid*; and creative *Ijtihâd*–that mostly deals with new occurrences that are almost impossible to find answers for in inherited *Fiqh*.⁶⁷ While the notion of '*Alamiyyat al-Islâm* sets justifications and foundations for the permanent Muslim presence in a non-Muslim regime,⁶⁸ the other notion of *Maqâsid al-Sharî'a* enables jurists to adapt integral concepts such as *Darûra*–necessity, *Taysîr*–leniency, and *Maslaha*–benefit–to *Fiqh* of minorities. The significance and implications of such concepts will become apparent when we turn to the application of *Fiqh* of minorities in the final chapter.

D- Principles and Foundations of Fiqh of minorities

Fiqh of minorities' jurists must consider certain factors when formulating a legal opinion. First, the field of *Fiqh* should depend on modernist *Ijtihâd*, which responds to objectives and purposes of *Sharî'a*. Here, Qaradâwî identifies two types of *Ijtihâd*: selective and creative.⁶⁹ Second, depending and putting into consideration the general rules of Islamic law. Most importantly: matters are to be considered in light of their objectives; harm should be removed; customary usage is the determining factor; the presence of difficulty requires that allowances be made to facilitate matters; what is established with certainty is not removed by doubt; what is necessary

⁶⁶ 'Alwânî, *supra* note 8, at 12.

⁶⁷ QARADÂWÎ, *supra* note 48, at 43.

⁶⁸ Fishman, *supra* note 2, at 2.

⁶⁹ QARADÂWÎ, *supra* note 48, at 40.

to achieve an obligation is obligatory; what leads to Harâm is also Harâm; and the Lesser of the two evils.⁷⁰ Najjâr pays extra attention to the rule that matters are to be determined by their objectives.⁷¹ The ultimate purpose of identifying such jurisprudential rules is to fulfill *Maqqasid* which are the deduced meanings and consequential objectives attempted to be accomplished by the jurisprudential rules found in sources of *Sharî'a*. All of this tracks back to the ultimate objective of achieving monotheism or the oneness of *Allâh* along with fulfilling *Maslaha* of Muslims.⁷²

The thirds consideration is that jurists must put into consideration the jurisprudence of current reality–*Fiqh al-Wâqi'*. This implies factual not just theoretical observation of the conditions, its necessities and obligations.⁷³ Here the principle that a verdict varies according to time, place, and circumstances is essential. Moreover, *Fiqh* of minorities, in applying the concept of *Wâqi'*–reality, adopts the vision of the importance of peaceful coexistence between Muslims and non-Muslims in their shared community. Muslims are obliged in Qur'ân to involve and interact with people of other faiths. The nature of such interaction revolves around two interrelated concepts: being a role model and *Da'wa*.⁷⁴ Such approach evolves eventually into fulfilling the idea of citizenship and its entailed rights and duties.⁷⁵

Fourth, is to focus on the jurisprudence of the group not merely individuals. In other words, focus on the identity as a group that shares common characteristics, issues and situations on regular basis.⁷⁶ Thus, bypassing the mere principle of *al-Darûrât Tubîh al-Mahzûrât*–necessities allow the Prohibited–[hereinafter the principle of *Darûra*] which implies that the derived verdict is a temporary license into establishing a permanent Islamic presence.⁷⁷ Fifth, is to adopt a methodology of *Taysîr* or facilitation and the tendency to ease up on Muslims.⁷⁸ Based on the aforementioned principle which indicates that the presence of difficulty requires that allowances be made to facilitate matters, *Fiqh* of minorities' advocates adopt such methodology

⁷⁰ For further details See, General Principles of Islamic Law & Their Practical Applications for Medicine, available at: <http://islamtoday.com/artshow-385-3398.htm> (Last visited Nov. 13, 2011).

⁷¹ NAJJÂR, *supra* note 17, at 147.

⁷² AL-MIMI, *supra* note 10, at 121.

⁷³ *Id.* at 199.

⁷⁴ AL-MIMI, *supra* note 10, at 227.

⁷⁵ *Id.* at 237.

⁷⁶ QARADÂWÎ, *supra* note 48, at.

⁷⁷ 'Alwânî interview, *supra* note 46.

⁷⁸ *Id.* at 40-45.

in perceiving reality and interpreting verdicts. Such principle is the flip coin of the principle of *Darûra*. *Fiqh* of minorities responds to criticism by identifying what exactly is meant by *Darûra* or difficulty and when such principles apply. Scholars differentiate between bearable and unbearable difficulty.⁷⁹ They also set very tight conditions under which the principle of *Darûra* applies. They also identify how this principle is applied according to different circumstances.⁸⁰

The notion of *Taysîr* leads necessarily to the sixth concept which implies gradualism not just an Islamic principle but a universal characteristic. The special conditions Muslim minorities are in calls for such gradualism.⁸¹ Finally, in addition to *Fiqh al-Wâqi'*, *Fiqh* of minorities puts into consideration other types of *Fiqh*, namely,⁸² *Fiqh al-Muwâzanât*—balancing between good, less good, evil and most evil while applying jurisprudential rules and principles in reality; and *Fiqh al-Awlawiyyât*—arranging issues based on their priority while trying to reach a verdict.

In conclusion, *Fiqh* of minorities is viewed by its founders and defenders not merely as a simple system for answering personal questions in jurisprudence, but as a *Sharî'a*-based framework for political and social interaction between Muslim minorities and non-Muslim majority.⁸³ Thus, based on this branch of *Fiqh*, when a question is raised, its practitioners need to identify the special circumstances and put it in a logical and scientific framework that takes into consideration the background of the query, the inquirer, the underlying social factors and the essential objectives of Islamic law.⁸⁴ Hence, the issue depends a lot on “how to phrase the questions accurately so as to elicit appropriate and correct answers . . . [in addition to] highlight[ing] the elements that shape the question.”⁸⁵

Accordingly, a question that asks about the possibility of Muslim minorities' participation in the political life of a host non-Muslim country/legal system should be rephrased and restructured to question Islam's view regarding a group of Muslims who find themselves living among a non-Muslim majority whose system allows them to practice their faith and moreover, participate in public life. Should such a minority reject such an opportunity for fear of assimilation or

⁷⁹ AL-MIMI, *supra* note 10, at 284.

⁸⁰ For further details see, *Id.* at 90.

⁸¹ QARADÂWÎ, *supra* note 48, at 55.

⁸² AL-MIMI, *supra* note 10, at 319.

⁸³ Fishman, *supra* note 2, at 3.

⁸⁴ Alwânî, *supra* note 8, at 21-21.

⁸⁵ *Id.* at 12.

influence? The question when phrased this way reflects a sense of responsibility instead of merely seeking a license to justify a negative situation.⁸⁶

Finally, any legislation whether divine or secular has its impact on its own culture. Similarly, “culture stems from *Fiqh* and the laws that govern society.”⁸⁷ The following chapter explores the how *Fiqh* of minorities’ advocates and scholars view the role it can play in the lives of Muslim minorities and whether it serves the purpose of integration while preserving Muslim’s cultural and religious identity.

⁸⁶ *Id.* at 13.

⁸⁷ *Id.* at 31.

IV- *Fiqh* of Minorities and Integration

Because of the all-encompassing nature of *Shari'a* in Muslims' lives, scholars have always strove to respond to Muslim minorities' issues in terms of special cases and emergencies which required *Rukhas* and *Darûra*—Licenses and necessity situations.⁸⁸ This perspective promotes a temporary conception to the situation of such minorities which has led many to doubt the ability of Muslims to integrate into non-Muslim societies. It was not until the emergence of *Fiqh* of minorities in its modern interpretation and analysis did scholars start to theorize for Muslims as permanent citizens with rights and duties in their hosting community. In other words, it was the beginning of an era of theorizing for a *Western Islam* not just a series of exceptional verdicts and licenses with regards to the temporary presence in a non-Muslim community. It does not contradict with the fact that Muslims all over the world belong to the Islamic *Umma* and are committed to its civilizational and religious purpose.

The focus of this chapter centers on how *Fiqh* of minorities theorizes the Muslim presence in a way that enables fulfilling this "*Umma* message" through responding to and embracing modern concepts like citizenship and secularism, which pose restrictions and are rarely supportive of divine laws. The argument in this paper is that *Fiqh* of minorities introduces a new paradigm using the notion of *Umma*, and its related concepts, to establish religious basis and justifications for Muslims' positive integration in their society. Such paradigm does not only reflect the commitment to the *Umma* message, but also signifies the importance of all individuals practicing their own rights and fulfilling their own duties. However, In order to analyze how *Fiqh* of minorities' advocates view the role of this *Umma* in the context of Muslim minorities, specifically in the area of integration, we have to determine first what these scholars meant by integration. We will then move to exploring different academic and theoretical contributions regarding the relation between *Fiqh* of minorities and the concepts of integration, loyalty and citizenship.

⁸⁸NAJJAR, *supra* note 17, at 131.

A- Integration

Integration is often identified as a healthy middle ground between total assimilation and total isolation. It is the positive interaction and contribution with the new society by which the immigrant cultural identity constitutes an addition to the whole society and has no significant impact on the immigrant's sense of belonging to his or her new society. That is to say that Integration is positive for both the immigrant and the society than assimilation and isolation, as the immigrant participates in the new culture while maintaining his/her own cultural identity.⁸⁹ Concepts of adaptation and absorption within the new society, requires the cultural integration process to be accomplished as a two-way process: from the immigrants' perspective and from the immigrant-receiving societies' perspective.

Advocates of *Fiqh* of minorities share a similar definition of integration to the one above. Qaradâwî recognizes that Muslim minorities are part of the Islamic *Umma* and at the same time part of their society. Thus, both sides should be considered and balanced. When tracking the objectives of *Fiqh* of minorities, he counts preserving the core or the identity of the Islamic personality as an objective. It is followed by the objective of guided openness that rejects isolation and assimilation, where Muslim minorities are obliged to fulfill their roles and responsibilities in their community in the best way.⁹⁰ While introducing the concept of civilizational partnership between Muslims and non-Muslims, Najjâr maps for the definition of integration. For individuals to create a community there has to be a level of integration between them, which represents the interaction among them that leads to psychological, social, economic, and political homogeneity. They have to share common interests and common conception regarding their legal systems and social rules as well. Such integration does not imply producing exact copies of individuals, rather differences among individuals enriches the community. Positive integration is accomplished when they share a common goal of developing and benefiting their community as well as declaring allegiance to such entity. He adds that if Muslim minorities lived a true Islamic life and fulfilled the *Umma* objectives they should be contributing to their community and its value system.⁹¹ 'Alwânî, on the other side, introduces

⁸⁹ THE FACTS: INTEGRATION OF IMMIGRATION 1, http://www.energyofanation.org/sites/25e1f498-741c-478a-8a08-aa486d8533a5/uploads/integration_of_immigrants.pdf (Last visited May, 12, 2012).

⁹⁰ QARADÂWÎ, *supra* note 48, at 36-37.

⁹¹ NAJJÂR, *supra* note 17, at 39-40.

the concept of peaceful coexistence; Muslims should not withdraw from proactive interaction with the environment he or she lives in. otherwise it would be a contradiction to the principles advanced by Qur'ân⁹² that calls for affirmative and constructive engagement.⁹³

Noting how *Fiqh* of minorities' scholars have defined integration, one can conclude that they view positive integration as comprising two main factors: preserving the identity and promoting a responsible citizenship, which in turn entails responsibilities, rights and duties towards the community. Citizenship, in turn, is a "voluntary bond joined within national horizons and ruled by a constitution."⁹⁴ Such bond is strengthened by feelings of allegiance, mutual recognition and tolerance among the society's members regardless of their differences or origins.

Before we explore and analyze how *Fiqh* of minorities' advocates view the relation between the latter *Fiqh* , integration and, consequently, its entailed concepts—relation with non-Muslims, citizenship, and loyalty, we will explore briefly the work of two intellectuals, Nadia Mustafa⁹⁵ and Andrew March.⁹⁶ Both provide an essential foundation for the relation between the proposed *Umma* concept, *Fiqh* of minorities and where the positions of integration and citizenship are found between them.

B- Fiqh of minorities and integration: between Da'wa and Umma

While March suggests a reading where the concept of *Da'wa* is the main link justifying the relation between *Fiqh* of minorities and integration, Nadia Mustafa adopts a wider view. She considers *Da'wa* as one of the main pillars forming the nature and the message of the Islamic *Umma*. In this paper's view, her idea responds to the latter relation in a more comprehensive way than March.

⁹² (Qur'ân 42:39) ("And those who avenge themselves when tyranny is incurred upon them help and defend themselves").

⁹³ Alwânî, *supra* note8, at 15.

⁹⁴ Andrew F. March, *Sources of Moral Obligation to non-Muslims in the Jurisprudence of Muslim Minorities (Fiqh al-Aqalyyat)* Discourse 48, 16 ISLAMIC LAW AND SOCIETY 34, 48 (2009).

⁹⁵ Nadia Mustafa, Director of the Center for Research and Policy Studies program and the supervisor of the dialogue of civilizations center, faculty of economics and political science, Cairo University.

⁹⁶ Andrew F. March, Department of Political Science, Yale University.

1- March and the concept of *Da'wa*

His main argument contends that *Fiqh* of minorities is an attempt to provide an Islamic foundation for a moral obligation and solidarity with non-Muslims. The reasons behind the need for revisiting the nature of moral relations with non-Muslims goes back to two main factors: the global trends towards equality in citizenship and human rights; and the large scale of migration of Muslims to the West which increased interaction and subjected Muslims to Western legal system. He states that the main basis for theorizing *Fiqh* of minorities is the concept of *Da'wa* or proselytism.⁹⁷ He identifies three main sources that justify moral obligation to non-Muslims: *Sharī'a* Text; legitimate contracts; and public interest—*Maslaha*. He concludes that the concept of *Da'wa* finds basis in these three sources and that:

Along with contract, *Da'wa* is the core Islamic concept at the heart of the project to theorize the legitimacy of permanent Muslim citizenship in non-Muslim liberal democracies. . . It allows scholars who might otherwise be skeptical about voluntary integration into a non-Muslim culture . . . to proclaim life in the West to be not only permissible, but also spiritually meaningful and beneficial to the Islamic movement.⁹⁸

He interprets the notion of citizenship by elaborating the importance of attitudes of solidarity among fellow citizens which cannot take place except through recognition. The same modern definition entails a reciprocal relationship between individuals living within geographic borders that do not necessarily share decent, religion or even collective memory, but so share same rights and duties. It is “a voluntary bond joined within national horizons and ruled by a constitution.”⁹⁹ *Da'wa*, which represents the basic justification of relation with non-Muslims in Islamic jurisprudence, shares in its theory factors of recognition, tolerance, and voluntary bond through its meta-ethical approach and communication with non-Muslims. Moreover, “*Da'wa* is not merely motivated by the aim of winning adherents to one’s way of life, but rather by a desire to extend a good to others unconditionally.”¹⁰⁰ March goes on to explore the characteristic of Islamic *Da'wa* and how they respond to the concept of recognitions which is essential to citizenship and thus integration. He suggests that *Fiqh* of minorities, by elaborating on *Da'wa*, attempts to go beyond the importance of contract to create a thicker form of obligation towards non-Muslims which involves recognition to non-Muslims and contributing to

⁹⁷ March, *supra* note 94, at 39.

⁹⁸ *Id.* at 36.

⁹⁹ *Id.* at 48.

¹⁰⁰ *Id.* at 49.

their well-being. The higher aim of *Da'wa* is, in turn, Mercy upon all mankind, Muslim or non-Muslim. In Mawlawi's words, ". . . there can and must be affection and love towards a person whom you wish to call to God."¹⁰¹ Other scholars elaborate that *Da'wa* does not take place only through direct call to God, it includes also another factor: *Shahâda*.

According to March, *Da'wa*, through its values of good will, transparency, honesty, sincerity, reason, freedom of choice, non-coercion, patience, openness to getting to know the other and respect for all, leads to recognition which creates the mutual bonds required for a full citizenship and thus, opens the door to integration. For him *Da'wa* is the common theme among all *Fiqh* of minorities' scholars and, thus, integration serves as a means to fulfill it.

2- Mustafa and the Umma

The term *Umma*, though differing from the modern definition, is commonly translated as "nation". It is used by Islamists to refer to a body comprises of all Muslims wherever they may be.¹⁰² Nadia Mustafa defines the *Umma* as a group of people who share belonging and allegiance to a common perception to life and seek its promotion and serving its purposes.¹⁰³ In this sense, *Umma* is a civilizational doctrinal entity that is not bound to time and place. The role of this *Umma* as defined by Mustafa *as*: promoting the presence of such entity in reality to be able to fulfill the other two purposes; empowering Muslims and the Islamic belief system or doctrine; and encouraging positive interaction to promote this religio-cultural way of life—*Da'wa*—.¹⁰⁴

In any society, whether Muslim or non-Muslim, Muslims tend to view their *Umma* as designed to lead humanity from darkness to light in all possible senses,¹⁰⁵ to lead it towards a better humanity and a better world, she quotes the Qur'anic verse "you were the best nation ever raised for mankind".¹⁰⁶ This means that the role of Muslims is not confined to the *Umma* followers or geographically restricted within Muslim-majority land. The very concept of *Umma* indicates no restriction to particular human group or geographical location. The modern Islamic

¹⁰¹ *Id.* at 57.

¹⁰² Fishman, *supra* note 19 , at 4.

¹⁰³ NADYA MUSTAFA, ISHKALIYYAT AL BAHTH WAL TADREES FI 'ILM AL 'ILAQAT AL DAWLIYYA MIN MANZOUR HADARY MUQARAN 56-57 , available at: <http://www.ccps-egypt.com/upload/633874919539532625.pdf> (Last visited May 12, 2012).

¹⁰⁴ *Id.* at 56.

¹⁰⁵ Alwânî, *supra* note 8, at 14.

¹⁰⁶ Qur'ân 3:110.

scholars, specifically *Fiqh* of minorities' advocates, disagree with some points in classic jurisprudence, and refer to the notion of *Dâr al-islâm*—in contrast to *Dâr al-Kufr* or *Dâr al-harb*, to denote any place where “Muslims can live in peace and security, even if he lives among non-Muslim minority.”¹⁰⁷ They support their view by a set of arguments, most important of which is the emigration to Abyssinia mentioned in chapter one.

The grounds on which *Fiqh* of minorities' scholars have tried to articulate the modern reasons and importance of the Islamic presence in non-Muslim societies are based primarily on the previous perception of *Umma*. Their justification of the importance of Muslims presence and engagement in their new society is organized along three main axes: the Universalist nature of the Islamic message engrained in its creed and *Sharî'a*; to protect Muslims and to support them morally and practically in these societies.¹⁰⁸ And to promote a civilizational dialogue between Islamic and other civilizations,¹⁰⁹ which is the core idea of *Da'wa*. These previous axes reflect the core pillars of the role and the message of the *Umma* identified by Mustafa. In this sense, Muslim minorities do not just represent a quantitative power that has merely transferred from one place to another; rather their existence in these communities signifies a cultural and a civilizational symbol that goes along with the universalistic nature of the concept of *Umma*.

Thus, the *Umma* argument provides a bigger context than the *Da'wa* one, where the latter is reflected as one of the pillars of the Islamic *Umma*, as well as one of its objectives. Such context would turn integration from a means to an end in itself especially that *Fiqh* of minorities was originally designed to theorize for a permanent presence and the creation of a genuine European Muslim. The coming section tests both March's and *Nadia's* arguments by exploring advocates of *Fiqh* of minorities' views on integration and its entailed concepts, namely the relation with non-Muslims, loyalty, and citizenship in lights of both *Umma* and *Da'wa*.

C- Contributors to *Fiqh* of minorities' theory and integration

The notion of integration entails other concepts: the relations with non-Muslims, citizenship, and loyalty—national loyalty as opposed to *Umma* loyalty. In this section we will analyze how

¹⁰⁷ Alwânî, *supra* note 8, at 15.

¹⁰⁸ MUSTAFA, *supra* note 16, at 31.

¹⁰⁹ *Id.*

different scholars articulated the position of integration within the *Fiqh* of minorities' framework, and relating them to the previously introduced *Da'wa* and *Umma* perspectives.

1- 'Alwânî

Tâha Jâbir Al-'Alwânî is widely recognized as the founder of *Fiqh* of minorities. He studied '*Usûl al-Fiqh* at Al-Azhar University and migrated to the United States in the 1970s. He ended up as the founder and former chairman of the *Fiqh* Council of North America.¹¹⁰ He asserts that the concept of *Fiqh* of minorities did not come about in vacuum; rather it reflects tens of cases he was exposed to in his interaction with Muslim minorities whether in Europe or the United States.¹¹¹ In a personal interview, 'Alwânî details how the original reason behind *Fiqh* of minorities was not how to integrate or incorporate Muslims within the community because they already had the potential for total assimilation due to their lack of religious awareness and the consolidation of the concepts of followership. Rather, the aim was to preserve a proper identity that does not lead to a "schizophrenic personality" when it comes to who they are and what their purpose or role towards their Umma and community are. Culture is an integral factor of shaping a society and, thus, the aim of *Fiqh* of minorities is to "purify" what Muslims take from their original countries, to avoid negative characteristics engrained in such societies, and carry their positive contribution and potential with them to their new society. The main distinction between *Fiqh* of minorities and general *Fiqh* in 'Alwânî's view is the aim to establish and theorize for a "permanent" Islamic presence in the west, by creating a paradigm shift from the *Fiqh* of a temporary license into a *Fiqh* of permanent context. Such presence would serve as a fundamental component of the Western community because Islamic speech is universal and the civilizational and religious message of the oneness of Allâh has to reach all areas of the world.¹¹²

In theorizing for such a presence, 'Alwânî explores, first, for the nature of the relation between Muslims and non-Muslims, and second, the necessity of a proactive engagement with society. He notes that one of the main principles of *Fiqh* of minorities is to determine the nature of interaction between Muslim minority and other non-Muslim majorities' and how it should be like. A number of methods, means and tools assist different branches of *Fiqh*, including *Fiqh* of

¹¹⁰ Fishman, *supra* note 2, at 3.

¹¹¹ 'Alwânî, *supra* note 49.

¹¹² 'Alwânî interview, *supra* note 46.

minorities. Among these methods is to go back to the general verses and principles of the main sources of *Sharī'a*: *Qur'ân* and *Sunna* putting into account the higher objectives of *Sharī'a* as well as the context of the Muslim minority. One of these verses that are considered by 'Alwânî, as well as most *Fiqh* of minorities' founders, as a fundamental rule in Muslims relations with others states that:

God does not forbid you to be kind and equitable to those who have neither fought you on account of your religion nor driven you from your homes. God loves the equitable. But God only forbids you to be allies with those who have fought you because of your religion and driven you from your homes and abetted others to do so. Those that make friends with them are wrongdoers.¹¹³

According to scholarly interpretations, "this verse permits associations with those who have not declared war against the Muslims and allows kindness towards them, even though they might not be allies."¹¹⁴ ¹¹⁵ *Fiqh* of minorities takes the principle of these two verses into consideration when establishing the moral and legal foundations upon which Muslim minorities should deal with other non-Muslim majorities. All developments, situations and verdicts are judged according to this principle.¹¹⁶ Moreover, he cites the Qur'ânic verse "best nation ever raised for mankind,"¹¹⁷ to clarify the leading role Muslims should be taking. This implies that the Muslim nation—*Umma*—was raised for the benefit of all mankind and "should be sharing this benefit with other human societies."¹¹⁸ 'Alwânî refutes the misconception of *Dâr al-islâm* and *Dâr al-harb* stating that *Dâr al-islâm* is wherever Muslims enjoy peace and security and more importantly the cultural and religious message of Islam should not be hindered by boundaries.¹¹⁹ Although 'Alwânî does not expose directly to the issue of citizenship, one can withdraw from his previous analysis on *Dâr al-islâm* that *Fiqh* of minorities views any place where Muslims can practice his or her faith as the abode, the home, or the land of Islam.

This previous thought on where *Dâr al-islâm* lies is completed by his idea concerning the obligation and the responsibility towards public participation. 'Alwânî's vision was articulated in

¹¹³ Qur'ân 60:8-9.

¹¹⁴ 'Alwânî, *supra* note 8, at 14.

¹¹⁵ Although there have been arguments that this verse has been abrogated, the majority of interpretations argue otherwise that this verse applies to all non-muslims who didn't antagonize muslims or show hostility to their religion declare war against them. See, Qurtuby's *Al Jami' li Ahkam Al Qur'ân*, available at: http://www.islamweb.net/newlibrary/display_book.php?flag=1&bk_no=48&surano=60&ayano=8 (Last visited Jan 12, 2011).

¹¹⁶ *Id.*

¹¹⁷ Qur'ân 3:110

¹¹⁸ 'Alwânî, *supra* note 8, at 14.

¹¹⁹ *Id.* at 15.

his suggestion to redefine the question posed in front of jurists from Muslim minorities individuals. Redefining the question would reflect reality in all its facets and turn the answer from a negative license to a positive responsibility towards the Muslim community as well as the Western community.¹²⁰ He views interaction and constructive engagement within the community as based on two principles: standing up for oneself and forbearance. The first states that Muslims should under no circumstances accept an inferior position, thus any negativity or lack of interaction with one's community are against core Islamic principles.¹²¹ The second entails that even if positive engagement required some compromises in areas that do not contradict the core creed of Islam; integration is still acceptable, given the positive nature and the role of the Muslim *Umma*.¹²²

2- Qaradâwî

Yusuf al-Qaradâwî also studied at *Al-Azhar* University and in 1997 he founded the European Council for *Fatwa* and Research [ECFR] for the purpose of providing Muslim minorities in Europe with Islamic legal guidance.¹²³ It was not until later in the last decade that the ECFR, eventually, adopted *Fiqh* of minorities as its general policy. Qaradâwî realizes that Muslim minorities are part of the Muslim *Umma* on one hand and of their current community on the other. He stresses the importance of balancing these two aspects of a Muslim's belonging and identity and that *Fiqh* of minorities should consider them while exploring Muslim minorities' issues.¹²⁴ Furthermore, he distinguishes between different connotations—faith, geographic, political and social—of the concept of *Umma* in his analysis to the definition, all of which has different impact on the idea of citizenship. For Qaradâwî, *Umma* does not contradict with having multiple loyalties, belongings and identities. On the other side, the concept of citizenship itself is a

¹²⁰ For instance, check his example of political participation mentioned earlier.

¹²¹ Tâha Jâbir Al-'Alwânî, *Natharat Ta'sisiyya Fi Fiqh Al-Aqalyyat*, available at: <http://islamselect.net/mat/59471> (Last visited Feb. 2, 2012).

¹²² Alwânî cites *Ibn Taymiya* in establishing this principle where the latter mentions that "Muslims are required to do their best to cope with the situation. Those who assume office with the intention of pleasing God and serving the objectives of Islam and the interests of the people to the best of their ability, and who try their best to prevent wrong-doing, will not be penalized for what they could not achieve. It is far better that food people are in office than bad ones."

¹²³ Fishman, *supra* note 1.

¹²⁴ QARADÂWÎ, *supra* note 48, at 34.

neutral concept that carries no ideological significance whether religious or secular; it is a flexible notion that is shaped and adapted based on preference and need.¹²⁵

For Qaradâwî, though the concept of citizenship is new, it was recognized by the prophet in the *Madina* statement—the constitution of the first Islamic state—that recognized residents who belonged to different religions and tribes. The philosophy of the *Madina* statement was based on peaceful coexistence and mutual support among the citizens of this state regardless of their differences.¹²⁶ The only bond among them was their loyalty to their state which responds to the previous definition of citizenship as a “voluntary bond joined within national horizons and ruled by a constitution”.¹²⁷ Qaradâwî builds on the issue of citizenship and integration by establishing for the necessity of Muslim presence in non-Muslim communities. The reasons for such presence are classified into three main categories: the universalistic nature of the message of the Islamic *Umma*; supporting and empowering Muslim minorities in such countries through allowing them to live a proper Islamic life, preserving their identity, and guiding them through interaction and integration; and participating in the development of humankind in general and their community specifically through educating Muslim minorities on their rights and freedoms as well as on their duties.¹²⁸ Moreover, for Qaradâwî, the term “Islamic state” does not mean it includes those who belong to the Islamic faith only, rather it reflects the majority and legal system.¹²⁹ Thus, Qaradâwî refutes the dichotomy of *Dâr al-islâm* and *Dâr al-harb* and prefers the notion “out of *Dâr al-islâm*.”¹³⁰

Qaradâwî posits that it is currently impossible to undo the Islamic presence in the West as Muslims have been involved in all aspects of life, political, economic and social. However, when it comes to their identity, he stresses that the concept of integration entails the values of diversity and exchange that lead to enriching the society.¹³¹ The idea of citizenship allows for a Muslim a peaceful coexistence with the Western community. It also entails having the same rights and duties of other individuals in the community—which adds to the ideas of empowering

¹²⁵ *Id.* at 47.

¹²⁶ QARADÂWÎ, *supra* note 7, at 25.

¹²⁷ March, *supra* note 94, at 81.

¹²⁸ QARADÂWÎ, *supra* note 48, at 35-37.

¹²⁹ QARADÂWÎ, *supra* note 7, at 32.

¹³⁰ QARADÂWÎ, *supra* note 48, at 35.

¹³¹ QARADÂWÎ, *supra* note 7, at 83.

Muslim minorities as well as making positive contribution. The first generation Muslim immigrants, Qaradâwî argues, show more attachment to their countries of origin. Thus, the ECFR has always urged Muslim minorities for integration. In fact it has called it an obligation for Muslim minorities to positively integrate and interact with their community. Furthermore, they have to strive for the service and the development of their communities while preserving their faith, values and moral system that are core to their Islamic belief system. Only through preserving the proper identity, can Muslim minorities integrate and contribute positively in the Western communities. Qaradâwî calls this vision the tough equation: commitment without isolation, integration without assimilation.¹³²

3- Najjâr

Abd al-Majîd al-Najjâr is a Tunisian scholar and another graduate of Al-Azhar University, who is also a member of the ECFR. In the introduction to his book “*Fiqh of citizenship*”, he denotes that the role of contemporary verdict is to preserve the Islamic identity of the Muslim presence in the West on one side, and to turn this presence into a role model to all people which will also, hopefully, lead to resolving European local issues and participate in the development of these communities on the other. The latter vision turns Muslim minorities into contributors and not mere consumers. Like ‘Alwânî and Qaradâwî, Najjâr emphasizes the permanent nature of Muslim minorities that *Fiqh of minorities* strives to preserve.¹³³ Moreover, he identifies the role of *Fiqh of minorities* as a legal framework that responds to issues in front of Muslim minorities as “citizens” and members of a Western community and not just as Muslims. While initially, Muslim immigrants had short-term objectives that centered mainly on economic, social and political realms, with time they have evolved into the long-term objective of settlement or *Tawtîn*. *Fiqh of minorities*, in Najjâr’s view, is an adequate tool to respond to the permanent presence of Muslim minorities and answers philosophical questions such as their role in the West in light of their settlement project.¹³⁴

He introduces the concept of civilizational partnership between Muslims and non-Muslims where both cooperate to contribute to and promote their own society. The logic of this concept

¹³² *Id.* at 79-84.

¹³³ NAJJÂR, *supra* note 17, at 5.

¹³⁴ *Id.* at 24.

entails that, given the current quantitative and qualitative existence of Muslims as a minority—especially those who have become full citizens, in non-Muslim countries, that requires a fundamental change in their role in the community. The basic argument here is that while the Muslim existence in non-Muslim communities—especially the West—can be of benefit specifically in the areas of science and administration for instance, such presence, at the same time can contribute to the promotion of the community culture in areas such as family cohesion and violence.¹³⁵ That is to say, this argument opposes the theory of the clash of civilization¹³⁶ and creates a culture of dialogue and common contribution. Such “cultural partnership” plays, arguably, a pivotal role in the positive integration of Muslim minorities.¹³⁷ Cultural partnership becomes an objective for Muslim minorities it will lead eventually to integration whereby Muslims have to be interactive actors in the community in order to add value.¹³⁸

The core of the civilizational partnership reflects the essence of the modern concept of social contract which requires agreeing on working in the community’s best interest.¹³⁹ Such a social contract is the practical interpretation of both: loyalty and citizenship. Najjâr finds for the latter an Islamic justification that centers on two main reasons: first, fulfilling their role as good citizens which is also part of the Islamic belief, regardless of the secular notion of the social contract; and second, and more importantly in his view, to serve as a role model which fulfills Muslims’ original purpose in life which is the duty of *Da’wa*. His definition of *Da’wa* bypasses the direct preaching that aims at converting non-Muslims to Islam. Rather he calls it *Da’wa Li-mâ Fih Maslaha* or the call and working for what leads to benefit or public interest.¹⁴⁰ Thus, Najjâr views the role of *Fiqh* of minorities as facilitating living an Islamic life in a non-Islamic-rule context, and to interacting with their community positively guided by their Islamic identity. Such interaction would lead eventually to the development of this community especially through

¹³⁵ See generally, *id.*

¹³⁶ For more information, see, SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS, available at: <http://www.polsci.wvu.edu/faculty/hauser/PS103/Readings/HuntingtonClashOfCivilizationsForAffSummer93.pdf> (Last visited May 12, 2012).

¹³⁷ See, QARADĀWĪ, *supra* note 48 at 188-191 [he mentioned proposed solutions suggested by Abdul Sattar Abu Ghodda for the mortgage issue in the Muslim countries. Many of these solutions could be adapted to the economic system to overcome the side effects of the interest-based systems.

¹³⁸ NAJJĀR, *supra* note 17, at 42.

¹³⁹ *Id.* at 25.

¹⁴⁰ *Id.* at 6.

offering ethical, cultural and spiritual Islamic values, which is an essential dimension of the concept of *Da'wa* which he proposes.¹⁴¹

The concept of civilizational partnership, introduced by Najjâr, in addition to emphasizing on the idea of social contract, bases foundations for both: citizenship and integration. At first he provides evidence for the nature of the relationship that should take place between Muslims and non-Muslims by citing two Qur'anic verses:

O mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another. . .¹⁴²

Thus We have made you [true Muslims - real believers of Islamic Monotheism, true followers of Prophet Muhammad and his Sunnah—legal ways—], a Wasat—just—and the best—nation, that you be witnesses over mankind and the Messenger—Muhammad—be a witness over you.¹⁴³

The first verse responds to the nature of the relationship between Muslims and non-Muslims which is based on knowing one another and interacting. The speech in this verse is directed to *all* humankind, and not just Muslims. The second verse mentions *Shahâda*. To Najjâr, *Shahâda* is the core of *Da'wa*, where Muslims have to deliver their message of good and benefit—whether moral or physical, to all humankind. This also entails cooperation with all people, whether Muslims or non-Muslims, on what is common interest and good, and to unite and fight, whether with Muslims or non-Muslims, against evil.¹⁴⁴ The latter is the essence of definition of *positive* integration: cooperation and interaction to fulfill the mutual interest of the community.¹⁴⁵

4- Bin Bayya

Abdulla Bin Bayya is a Mauritanian scholar currently teaching at King *Faysal* University in Saudi Arabia. He has not theorizes as much as the previous scholars concerning the reasons behind Muslims presence in non-Muslim countries. Rather he deals with it as the status-quo where “Muslim minorities face strong challenges on an individual level as they try to lead an Islamic life among an environment that adopts a materialistic philosophy,”¹⁴⁶ thus a special *Fiqh* is needed to respond to their special circumstances. He identifies four main objectives. The first is called

¹⁴¹ *Id.* at 54.

¹⁴² Qur'ân 49:13.

¹⁴³ Qur'ân 2:143.

¹⁴⁴ NAJJÂR, *supra* note 17, at 27.

¹⁴⁵ *Id.* at 80.

¹⁴⁶ ABDULLA BIN BAYYA, SINA'ATUL FATWA WA FIQH AL-AQALLIYYÂT, available at: www.saaid.net/book/9/2033.doc (Last visited Feb. 10, 2012).

the general objective and protecting the religious life of Muslim minorities; the second is the propagation of the message of Islam, “leading to a gradual establishment of Islam in the communities where they live”; the third is establishing rules of coexistence with non-Muslims; the last is moving from an individual to collective stage in *Fiqh* rules when dealing with issues of Muslim minorities.¹⁴⁷ Unlike the previous scholars, Bin Bayya shares a narrow view of the concept of *Da’wa*. He confines only converting other non-Muslims. However, similar to the previous scholars, *Bin Bayya* is concerned with both preserving the identity and establishing bases for a healthy Muslim interaction with the community.

5- Ramadan

Tariq Ramadan is a Swiss Islamic intellectual and preacher. Though his family is originally from Egypt, he was born in Switzerland where he lived his entire life. Currently, he is Professor of Contemporary Islamic Studies at Oxford University.¹⁴⁸ Unlike the others, he is not a *Fiqh* scholar. That is why he does not delve into the theory of *Fiqh* of minorities. Rather his arguments center on Muslim identity in the West and how Islamic *Fiqh* can serve it.

In his book: *Western Muslims and the Future of Europe*, Ramadan talks about “Western Muslims” and not “Muslim minorities in the west”. He promotes a new Muslim identity arguing that contemporary Muslims are succeeding in finding harmony between their faith and their Western context. His goal is to create an *independent Western Islam* anchored not in the traditions of Islamic countries, but in the reality of the West.¹⁴⁹ This is where his connection with *Fiqh* of minorities begins as he supports a “fresh reading of Islamic sources, interpreting them for a Western context and demonstrating how a new understanding of universal Islamic principles can open the door to integration into Western societies.”¹⁵⁰ He, however, challenges the term “*Fiqh* of minorities” and believes it should be rethought because, in his view, Muslims should not think of themselves as a minority, but rather as citizens and partners in their own society.¹⁵¹

¹⁴⁷ *Id.*

¹⁴⁸ For more information in Tariq Ramadan, See, <http://www.tariqramadan.com/Elements-de-biographie,014.html?lang=fr> (Last visited May 12, 2012).

¹⁴⁹ TARIQ RAMADAN, *WESTERN MUSLIMS AND THE FUTURE OF ISLAM* 3, (Oxford University press)(2004).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 82.

He challenges three main misconceptions or “staging posts” with regards to the Muslim presence in the west: the dualist approach, minority mindset and thinking, and the integration in the sense of adaptation. The dualist approach refers to the idea that Muslims continue to perceive themselves as “the other” which will naturally end with *Fiqh al-Rukhas–Fiqh of licenses*—that consolidates the temporary nature of the Muslim presence in such communities.¹⁵² He even criticizes Qaradâwî’s conception of dealing with Western societies as “other societies” because the normal place for Muslims is the Muslim-majority societies. He believes that *Sharî’a* teaches Muslims to integrate anything that is not contradict its core. This, for him, includes all dimensions of life—legal, social, and cultural, which Muslims should consider their own.¹⁵³

He redefines the role of the *Umma* to reflect the “universal message of Islam directed to human intelligence toward the quest for justice.”¹⁵⁴ Western Muslims, thus, can benefit from the new framework of *Fiqh* of minorities—regardless of his disagreement with some of its premises. Muslims share the duty of studying their society and to working for justice and against any form of injustice with their fellow citizens.¹⁵⁵

Ramadan links the idea of loyalty and *Umma* in a unique way. The value of monotheism in Islam gives rise to a specific way of life and interprets every action in a common way. This perception is the heart of Muslims’ sense of belonging to the *Umma*.¹⁵⁶ Muslims ultimate loyalty belongs to God, not countries or ideologies; therefore, they should be models of honesty, justice and loyalty.¹⁵⁷ Given that contracts—in this case Ramadan refers specifically to social contracts—determine one’s status, rights and duties and guides his or her interaction, Muslims do not have the right to break such a contract unilaterally. Thus, loyalty has no exceptions, because to be a Muslim means to be entrusted with a pledge—*Amâna*.¹⁵⁸ Thus, if a clear conflict of terms of reference between *Sharî’a* and Western secular law occurs, “a specific study should be carried out by Muslim jurists to determine, by formulating a legal opinion—Verdict—. . . that might

¹⁵² *Id.* at 68.

¹⁵³ *Id.* at 68-69.

¹⁵⁴ *Id.* at 176.

¹⁵⁵ *Id.* at 177-178.

¹⁵⁶ *Id.* at 101.

¹⁵⁷ *Id.* at 107.

¹⁵⁸ *Id.* at 107-108.

provide the Muslim with a satisfying solution, both as a practicing believer and as a resident and/or citizen.”¹⁵⁹

Thus, Ramadan sees no contradiction between being a Muslim and having loyalty to *Umma* on the one side and being a European and having loyalty to your country on the other since loyalty should not be to an Islamic culture that is affiliated to an Islamic nation. That is why he encourages building an independent Islamic European culture and identity. However, not to undermine the influence and the importance of the Islamic *Umma*, Tariq Ramadan posits that one of the advantages of such integration is empowering Muslim minorities all over the world.

D- Concluding remarks: Umma, integration, and Fiqh of minorities

After reviewing different contributions on how *Fiqh* of minorities respond to the issues of citizenship and integration, we note the following:

First, the need for a special case for the existence of Muslims as a minority has to be framed in a wider collective and more cultural way. It cannot be limited only to religious rituals; rather, it supersedes this one dimension of the Islamic belief system to embrace all sorts of social, political and economic interactions, whether among Muslims themselves or between Muslims and non-Muslims in the same community. Nadia Mustafa argues that the issues facing Muslim minorities, especially in the West, can be traced back to the following three dimensions: the relationship between Islam and secularism, the relation between *Shari'a* and national legislations, and the issue of dual loyalty–religion, civilization and/or culture versus national and civil allegiance.¹⁶⁰ She contends, that socio-political issues remain the most important compared to other religio-cultural factors.¹⁶¹ She summarizes the main issue in the question of the position of religion between citizenship and identity,¹⁶² culminating in the role of *Fiqh* of minorities.

Second, the objectives common among all mentioned scholars of *Fiqh* of minorities are: to protect the Muslim identity and religious practices; to recognize and become involved in the Western legal and social system as full citizens with rights and duties; and to serve as a role model that fulfills the core of the Islamic message of the *Umma*. Thus, the real question *Fiqh* of

¹⁵⁹ *Id.* at 110-111.

¹⁶⁰ MUSTAFA, *supra* note 16, at 41.

¹⁶¹ *Id.* at 51.

¹⁶² *Id.*

minorities advocates are concerned with is not whether Muslim minorities should integrate or not. Rather, it is *how* they should integrate and what the necessary conditions required for a positive integration that is beneficial for both the Muslim and his or her community are. In other words, this *Fiqh*, while attempting to accomplish the mission of integration and preserving the Muslim identity, treats the Muslim not only as a Muslim with religious ritualistic obligations, but also as a member in a society and, more importantly, as a law abiding citizen in a modern society with rights and obligations.

Third, in its principles and methodology, *Fiqh* of minorities is designed to respond to the issue of Muslim minorities' integration in a non-Muslim community, which is why it requires the scholar to master the knowledge of the actual circumstances and factors facing Muslim minorities. However, one is to question the relation between the success of such *Fiqh*, in practice, and the numbers of Muslims welcoming the concept of this *Fiqh*.

The final chapter applies the previous theory and aspirations of *Fiqh* of minorities' advocates regarding the role such *Fiqh* can play in the process of integration to two case studies: interest-based Mortgage and *Islâm al-zawja*.

V- Chapter Four: *Fiqh* of Minorities in Application

This chapter applies the theories and aspirations of different *Fiqh* of minorities' scholars articulated in chapters two and three to reality and measure their validity. The focus will be on two case studies: *Islâm al-zawja* and interest-based mortgage.

A- *Islâm al-zawja*

The widespread modern rule regarding the conversion of the wife to Islam while her husband is still a non-Muslim—the case known in *Fiqh* as *Islâm al-zawja*—is clear. The modern legal opinion on interfaith marriage states that “Interfaith marriages are prohibited, except in the case of a Muslim male marrying a scriptural female—*Kitâbiyyah*.”¹⁶³ Despite different articulations and criticisms of this rule, our concern here is not the validity or the basis of this rule; rather, it is

¹⁶³ Gianluca Paolo Parolin, *Interfaith Marriage and Muslim Communities in Scotland: A Hybrid Legal Solution?* 1, (HKU Diversity Conference, April 2011).

how *Fiqh* of minorities—given its principles and objectives, deals with the issue of *Islâm al-zawja* and whether it has a significant impact on integration.¹⁶⁴

While most Islamic schools agree that a Muslim wife cannot remain married to a non-Muslim husband, *Fiqh* of minorities scholars like Qaradâwî addresses the issue in a broader manner while introducing this *Fiqh*. Though similar efforts, like the ECFR verdict, have tried to suggest alternatives, most of them have treated the issue as an exception, or an attempt to get a license. This is a fundamental difference with *Fiqh* of minorities that bypasses the mere individual verdict for a standard framework comprising clear principles and objectives. In other words, *Fiqh* of minorities is not just concerned with *what* the final verdict is but rather *how* and *why* this verdict was reached, which is, arguably, determined largely by this *Fiqh's* philosophy of the importance of integration.

The ECFR periodical—*al-Majalla al-Ilmiyya*—announced in one of its issues, dedicated particularly to the case of *Islâm al-zawja*, that due to the different opinions on this matter, it could not reach one definite verdict. Instead, it stated the majority opinion while mentioning the opposing ones as well. The final verdict was that the wife is not allowed to stay with her husband after the three months of *Iddah*—her waiting period after divorce—and even if they do not divorce they must be separated. Thus, there are no marital rights and obligations on the wife's side. The verdict concludes by noting some scholarly opinions which allow full marriage with full rights and obligations including sexual relationship under the condition that it does not harm or affect her faith and that she strives for his conversion no matter how long it takes. That is, not to push females away from converting.

In the same issue of *Al Majalla al Ilmiyya*, the first article by Joudai, explores whether the objectives of the Islamic faith—given the context and the reasons, are accomplished by separating a wife from her family and husband and reaches a similar conclusion as Qaradâwî's seen later: the act of conversion gives the woman the option and not the obligation to ask for separation.¹⁶⁵ The second article by Zoubair proposes that though the standard rule is separation there are conditions—like the wife's insistence on staying with her husband,

¹⁶⁴ *Id.* at 10.

¹⁶⁵ See generally, Abdulla Ibn al-Joudai, *Islam Al Mar'aa Wa Baqaa' Zawjaha Ala Deeneh* [The conversion of the woman without her husband], AL MAJALLA AL ILMIYYA LIL MAJLIS AL ORUBBI LIL IFTA' [the scientific Magazine of ECFR], Jan. 2003, at 13-197.

preserving her faith and so forth. Under such conditions if fulfilled, the marriage is permitted to be sustained.¹⁶⁶ The third article by Faisal reaches the conclusion of separation as well; the only case where temporary marital rights and obligations are sustained is during the period between the termination of the marriage contract and the actual divorce. Given that the process may take a significant period of time, sexual and marital needs, thus, lie under the category of *Darûra*.¹⁶⁷ The fourth article by Fares, on the contrary, criticizes any argument that promotes sustaining the marriage. In his opinion, the case here is the annulment of both physical separation as well as contractual divorce.¹⁶⁸ The fifth article by Kouddous states that though there is a consensus on the principle of separation, there is a lack of consensus when it comes to when exactly separation takes place, and what the form of such separation is—just physical or contractual as well. He concludes that it is a termination of the contract after the three months of *Iddah* and that the wife should seek termination even through court.¹⁶⁹

With the exception of *Faisal* who to some extent considers reality and the resulting *Darûra* of the physical needs, the rest of the opinions here are separated from the demands of reality and are very much immersed in jurisprudential discourse. Even when Joudai refers to objectives of *Sharî'a*, he does not identify clearly those objectives and their relation to the reality of Muslim minorities. Their opinions are mostly quoting and seeking evidence in classical jurisprudential opinions with no original *Ijtihâd* whatsoever. By examining how *Fiqh* of minorities' scholars perceive the case of *Islâm al-zawja*, this section identifies how the latter *Fiqh* proposes real *Ijtihâd* that, more importantly, truly considers Muslim minorities' situation.

Qaradâwî—as one of the advocates of *Fiqh* of minorities—points out that many women might be willing to convert but the separation rule hinders them. He starts his argument by mentioning

¹⁶⁶ Abdulla Zoubair Saleh, *Hokm Baqaa' Man Aslamat Ma'a Zawjaha Alathi Lam yoslem* [The verdict on the woman who converts while her husband does not], AL MAJALLA AL ILMIYYA LIL MAJLIS AL ORUBBI LIL IFTA' [The Scientific Magazine of ECFR], Jan. 2003, at 207-242.

¹⁶⁷ Faysal Mawlawy, *Islam Al Mar'aa Wa Baqaa' Zawjaha Ala Deeneh* [the conversion of the woman without her husband], AL MAJALLA AL ILMIYYA LIL MAJLIS AL ORUBBI LIL IFTA' [The scientific Magazine of ECFR], Jan. 2003, at 243-308.

¹⁶⁸ Mohamed Abdul Qadir Abu Faris, *Athar Islam Ahad Al tarafayn Fil Nikah*, [The impact of the conversion of one spouse on the marriage], AL MAJALLA AL ILMIYYA LIL MAJLIS AL ORUBBI LIL IFTA' [The scientific Magazine of ECFR], Jan. 2003, at 309-401.

¹⁶⁹ Nehat Abdul kouddous, *Islam Al Mar'aa Wa Baqaa' Zawjaha Ala Deeneh* [The conversion of the woman without her husband], AL MAJALLA AL ILMIYYA LIL MAJLIS AL ORUBBI LIL IFTA' [the scientific Magazine of ECFR], Jan. 2003, at 409- 420.

nine opinions found in the traditional *Fiqh*, articulated namely by Ibn al-Qayyim,¹⁷⁰ regarding the matter of *Islam al Zawja*.¹⁷¹ The first five opinions call for the immediate or the eventual separation between spouses. While the second group of opinions, which will be discussed, favor the maintenance of the marriage contract. The sixth opinion confirms that the woman has the choice of waiting and hoping for her husband's conversion even if it takes years—based on the narrative of *Umar* who gave a converting woman the choice of staying with or leaving her still-Christian husband.¹⁷² This was the opinion favored and adopted by Ibn al-Qayyim. The seventh opinion, establishes the principle that husband, even if non-Muslim, is more worthy of his wife, condition that she does not leave her home country and performed Hijra—based on *Ali's* narrative. The eighth opinion proclaims that the marriage contract is maintained as long as they were not separated by the *Imâm* or the judge. The final opinion provides that she continues to be his wife with all rights and duties except for the sexual relationship.

Qaradâwî criticizes Ibn al-Qayyim for not considering the whole nine opinions while focusing on and adopting the sixth opinion where a woman can stay with her husband, wait and strive for his conversion but with *no* sexual relationship.¹⁷³ Qaradâwî denotes a significant practical problem with such an opinion: the physical needs. That is why he turns to reconsidering and reinterpreting the Qur'anic text while consolidating it with the seventh opinion of *Ali*. In his analysis, the verse is directed to Muslim women who have converted, left their husbands and performed *Hijra*. The order here is for Muslims not to return them—the newly Muslim women—to their non-Muslim husbands in this particular case. He adds another condition; by examining the context of this verse it was meant in the period when the husbands were from a group of people explicitly at war with Muslims.¹⁷⁴ Recalling the need of new converts to stay with their husbands and families in non-Muslim environments, especially if they are hoping for their conversion, Qaradâwî infers that it is possible that 'Alî based his opinion on such a rationale and perspective to the verse. He also responds to the opinions that call for strict immediate separation by stating that the evidence from *Qur'ân* and *Sunna* were taken out of context and misinterpreted. Such opinions, in his view, are against the narratives as they were not adopted

¹⁷⁰ For more information on Ibn al-Qayyim, See, <http://www.ibnalqayem.com/> (Last visited May 12, 2012).

¹⁷¹ QARADÂWÎ, *supra* note 48, at 108-120.

¹⁷² *Id.* at 118.

¹⁷³ *Id.* at 119-120.

¹⁷⁴ Qaradâwî, *supra* note 48, at 124.

by the Prophet's companions.¹⁷⁵ Thus, noting how Qaradâwî developed his argument and based on his classification, this case reflects as both selective and creative *Ijtihâd*.

Qaradâwî concludes by highlighting three considerate opinions on which scholars and *Muftîs* can rely on to respond to the issue of *Islâm al-zawja* in a non-Muslim community in order to overcome the resulting social dilemmas. The first is that of 'Alî who stated that the husband enjoys protection and, thus, the advantage of keeping her since she is originally his wife under the condition that she does not leave her town or place of residence—and does not migrate whether to *Dâr al-islâm* or other. The second opinion is Umar's where he asserts that when women convert the judge either terminates directly or not, giving the women the opportunity to choose between staying with her husband or terminating the marriage. The final opinion is al-Zahry's whereby the marriage continues as long as there is no verdict or judgment that separates them. Unlike the known case where a Muslim man is only allowed to marry a scriptural woman, in the case of *Islâm al-zawja*, scholars consider the marriage of a Muslim—converting—woman from a non-Muslim man in general, whether scriptural or not. This evidence is found in different narratives used by scholars like that of *Umar*, 'Alî and Zainab the daughter of Muhammad himself who was married to a “non-scriptural” non-Muslim.¹⁷⁶ However, this is not to be confused with marriage to a communist or an apostate—even if legally a Muslim. While Qaradâwî's verdict is clear on the prohibition of marrying the latter in the first place, one might wonder whether *Islâm al-zawja* verdict includes maintaining the marriage contract with a communist or an apostate husband, who, according to Qaradâwî's verdict should be penalized.¹⁷⁷

Qaradâwî concludes his argument with several points. First, there is no definite text, nor is there a consensus that addresses this issue clearly. Second, the mere act of conversion though allowing annulment does not entail the automatic annulment of the marriage. Finally, Qaradâwî bypasses Ibn al-Qayyim's favored opinion, which although does not call for separation, bars the physical marital relationship. His interpretation of the Qur'anic text concludes that the marriage contract and its entailed marital rights can be maintained. This includes the sexual relationship since it is a necessity for good companionship between spouses—a fundamental value in Islamic

¹⁷⁵ *Id.* at 118-124.

¹⁷⁶ *Id.*

¹⁷⁷ Refer to his verdict on the marriage of a Muslim woman from a communist, Qaradâwî, *supra* note 48, at 89.

philosophy, given that she can preserve her faith and practice. The act of conversion, thus, merely turns the contract from binding to optional.

Qaradâwî contends that such case can be generalized on Muslims all over the world; however, he stresses that Muslim minorities deserve it more given their circumstances.¹⁷⁸ On the contrary, Ahmad al-Rawi, chairman of the Union of Islamic Organizations in Europe, strictly limits this verdict to the European context where “the woman is respected and this is crucial.”¹⁷⁹ ‘Alwânî provides an interesting point of view on the objectives of *Sharî’a*. He notes that one of the fundamental purposes of Islam is *l’âmâr* or construction.¹⁸⁰ If we prevent a woman from staying with her husband after her conversion, Islam would contradict the concept of construction and nurturing in Islam. Rather, in such cases, Islam would be the direct reason for a family collapse.¹⁸¹ Moreover, by valuing the importance of the family by a wife staying with her husband, *Fiqh* of minorities does not only value the principles of *Taysîr* and responds to reality when it comes to Muslim minorities and the ideal nature of relationship with non-Muslims, it also considers the social interest represented in preserving the family unit, which signifies an important Islamic value. This idea relates directly to *Najjâr’s* concept of *cultural partnership* and how Muslims should positively contribute to their community.

The next case requires more creativity when it comes to *Ijtihâd* due to the lack of both: sufficient evidence from inherited tradition and explicit rules in the text.

B- interest-based mortgage

The general rule is that *Ribâ* or usury is forbidden—*Harâm*—based on evidence from *Qur’ân*, *Sunna*, and the Islamic scholar’s consensus. *Riba*, as defined in the encyclopedia of Islam, literally means “increase” and is technically used by Islamic scholars to reflect “any unjustified increase of capital for which no compensation is given.”¹⁸² Such definition, according to many

¹⁷⁸ Personal interview with sheikh Yusuf al-Qaradâwî, Cairo (Jan. 23, 2012) [hereinafter Qaradâwî interview] (refer to the annex).

¹⁷⁹ Fishman, *supra* note 2, at 12.

¹⁸⁰ Could also mean reclamation, development and nurturing.

¹⁸¹ Qaradâwî interview, *supra* note 178.

¹⁸² J. Schacht "Ribâ" *Encyclopaedia of Islam, Second Edition*, (P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel; and W.P. Heinrichs, eds.), (Brill, 2012), available at: http://www.brillonline.nl.library.aucegypt.edu:2048/subscriber/entry?entry=islam_COM-0918 (Last visited March 3, 2011).

scholars, applies to the interest-based mortgage.¹⁸³ For instance, the Islamic research academy reached the verdict that any interest on any type of loan is considered prohibited *Ribâ* regardless of the amount or any categorization attempt. Other institutions of higher Islamic status like the Academy of Muslim World League, the Second Conference of Islamic Banks and Organization Islamic Conference support similar legal opinions.¹⁸⁴

Some significant attempts, however, such as Abdul Razzâk al-Sanhûrî,¹⁸⁵ and his contemporary ‘Alî Gom’aa,¹⁸⁶ have tried to draw some distinctions. For instance, *Al-Sanhûrî* categorizes *Ribâ*—usury—into *Ribâ Fadl*,¹⁸⁷ *Ribâ Nasî’a*,¹⁸⁸ *Ribâ Jâhiliyya*,¹⁸⁹ and *Ribâ Qardh*.¹⁹⁰ Although he asserts that all four kinds are prohibited in Islam, one is the worst of them all—*Ribâ al-Jâhiliyya*—when a person does not pay his due after the stipulated time and the seller increases the price. This type resembles the modern concept of “compound interest”¹⁹¹ which should be utterly prohibited under any circumstances. Sanhûrî states that other types of *Ribâ* are prohibited as well but in terms of techniques and practices and not in principles. That is to say that other than *Ribâ al-Jâhiliyya*, that was explicitly prohibited in *Qur’ân*, followed by *Sunna*, the other types of *Ribâ* were—correctly—developed and clarified by scholars and jurists to overcome any potential misunderstandings. While this makes these types of *Ribâ* originally *Harâm*—prohibited, it opens the door for license and exceptions.¹⁹² In Sanhûrî’s definition, the “need” is justified here by the

¹⁸³ QARADÂWÎ, *supra* note 48, at 169.

¹⁸⁴ See generally, Fawa’id al-Bonouk Hiya al-Ribâ al-Harâm, *available at*: <http://www.Qaradâwî.net/library/70.html> (Last visited March 6, 2012).

¹⁸⁵ 1895-1971

¹⁸⁶ See, ‘Alî Gom’aa’s verdict on Riba, *available at*: www.youtube.com/watch?v=u8vJcFICmqE (Last visited Feb. 11, 2012).

¹⁸⁷ *Ribâ al-fadl* “literally [a] profit or [a]surplus obtained by exchanging or selling commodities of superior value over other commodities given), i.e. the form of *Ribâ* in which an excess or increase is paid in a direct exchange of commodities, from hand to hand, without any time extensions. Ziaul Haqqi, *The Nature of Ribâ al-Nasî’a and Ribâ al-Fadl*, 21 ISLAMIC STUDIES 21, 19-38 (1982).

¹⁸⁸ *Ribâ Nasî’a* means that “*Ribâ* was rather in loans and credits and not in exchanges/sales. Thus it creates profit or increase whether it is borrowed by a producer or a consumer, used by them or not.” *Id.* at 31.

¹⁸⁹ *Ribâ Jâhiliyya* literally means “pre-Islamic usury, according to which if a debt was not repaid at the proper time the amount due was increased.” ETIENNE RENAUD, *THE ISLAMIC BANKS*, *available at*:

http://www.oikonomia.it/pages/2003/2003_febbraio/pdf/studi_1.pdf (Last visited May 12, 2012).

¹⁹⁰ Unlike *Ribâ Jâhiliyya*, *Ribâ Qardh* is imposed from the beginning and not after the proper time. Hassan O. Ahmad, *Shariah contracts in Islamic Banking and finance*, *available at*: <http://www.slideshare.net/Annie05/shariah-contracts-islamic-banking-presentation> (Last visited May 12, 2012).

¹⁹¹ The difference between simple interest and compound interest is that compound interest generates interest on interest, whereas simple interest does not. An Introduction to the Mathematics of Money 13-43 (2007), *available at*: http://www.springerlink.com.library.aucegypt.edu:2048/content/?k=doi%3a%2210.1007%2F978-0-387-68111-5_2%22 (Last visited May 12, 2012).

¹⁹² He doesn’t use the term *Darûra*.

givens of the current capitalist global economic system as well as the “collective” and not “individual” interests. Sanhûrî interestingly notes that the validity of applying any of these types of *Ribâ* is associated with the specific circumstances and the economic system. Thus if, for instance, socialism eventually prevailed as the global economic doctrine, the nature of the previous “need” should be reevaluated and the formerly allowed *Ribâ* might be prohibited again.¹⁹³

How different scholars measure and reinterpret the rules of *Ribâ* in the case of interest-based mortgage in non-Muslim societies and economic systems from the lens of *Fiqh* of minorities. The following covers different contributions by scholars from different backgrounds regarding this issue.

1- Al-Haidary

A verdict regarding borrowing money with interest for the purpose of education in a non-Muslim country was answered by Hamad *Bin Ibrahim Al-Haidary*¹⁹⁴ as follows:¹⁹⁵

Question: I am a male who lives in Sweden. My question is: whether a Muslim is allowed to borrow money for the purpose of education, noting that the educational system here in Sweden especially university, required that the borrower should return money plus interest after graduation and finding a job?

Answer: A Muslim is not allowed to borrow interest money neither for education nor for any other purpose, whether the loan is provided by the government or other entity, because this counts as Usury–Riba, as one takes the loan in cash and returns the money more than the originally received debt. The previous case is the typical Ribâ that is determined unjust by Allâh. Be aware my brother that you are in a Land of Test–Dar Ibtilla’, your need for education through such means is a test for your faith. So if you choose to favor what your heart desires over Allâh’s satisfaction then you are following the road of seduction, which might degrade you in Judgment day. And if you favored Allâh’s satisfaction, He will compensate you sooner or later. “And for those who fear Allâh, He—ever—prepares a way out”,¹⁹⁶ so fear God and he will reward you.¹⁹⁷

This is a case where a Muslim living in a non-Muslim country faces an interest-based economic system. Thus, in order for him to be involved in any economic activities whatsoever, he has to deal with this system. The verdict, however, came from traditional Islamic jurisprudence that

¹⁹³ ABD AL-RAZZÂQ AHMAD AL-SANHÛRÎ, MASÂDIR AL-HAQQ FÎ AL-FIQH AL-ISLÂMÎ : DIRÂSAH MUQÂRANAHIYAH BI-AL-FIQH AL-GHARBÎ 269-271, (The high institute for Arabic studies, Cairo) (1954-1959).

¹⁹⁴ Faculty member of Imam Mohamed Bin Saud Islamic University.

¹⁹⁵ See, *Fatwa on Interest-based bank loan for the purpose of Education*, available at: <http://www.islamport.com/d/2/ftw/1/26/2130.html> (Last visited Feb. 12, 2012).

¹⁹⁶ Qur’ân 65:2

¹⁹⁷ See also, Qaradâwî, *supra* note 48, at 165.

depended mainly on the scholar's consensus on, first, a certain rigid definition of what *Ribâ* or usury, and second, on the prohibition of usury in its different forms including interest. Whether the mortgage is for buying a house, a car or for education the rules and the standards are constant. The following explores how advocates of *Fiqh* of minorities, on the other hand, perceive and answer questions regarding interest-based mortgage in a non-Muslim system.

2- ECFR and SSANA

The European council for fatwa and research—ECFR—as well as the *Sharî'a* Scholars Association of North America [hereinafter SSANA] have issued a verdict on this regard. Both concluded that usury and its different forms like mortgage are prohibited in Islam and that both councils encourage Muslims in a non-Muslim society to promote *Hâlal* alternatives such as Islamic banking. However, if such alternatives are not currently available, “in case of need and lack of availability of other contracts that are *Sharî'a* acceptable, people living in non-Muslim societies may buy their residence house on mortgage, but not commercial properties and not without needs.”¹⁹⁸ The basis of this verdict go back to the rule of *Darûra*, that necessity allows the prohibited, which in turn is subject to many conditions in order to be applicable.¹⁹⁹ The verdict rationalizes that otherwise it would create a huge obstacle for Muslims living in a non-Muslim country given that shelter is a necessity for a decent life. Second, the opinion of Abû Hanîfa which states that Muslims are not responsible for changing economic and political rules in non-Muslim countries, and their subsequent economic vulnerability which contradicts with the objectives of *Sharî'a*.²⁰⁰

3- 'Alwânî

He begins by noting how much Western economic circumstances are fundamentally different from Muslim countries' economic systems. Thus such a different system should be subjected to a different set of jurisprudential rules. The industrial revolution had a significant impact on the society, thus, the jurist must be aware of the culture of mass-production that prevails in the advanced Western systems. 'Alwânî argues that the philosophy of usury is not found in the

¹⁹⁸ FATWA ON MORTGAGE, http://monzer.kahf.com/fatawa/2000-2002/FATAWA_MORTGAGE.pdf 11 (Last visited Dec. 2, 2011).

¹⁹⁹ For more information on *Da'wabî* (regulations) of *Darûra*, See AL-MIMMI, *supra* note 10, at 476-477.

²⁰⁰ QARADĀWĪ, *supra* note 48, at 177.

Western mentality. Interest is associated with the concept of inflation. It is unjust to borrow a certain amount of money and return it after a certain period of time with a lower normative value. Thus, the main purpose of the interest, which is correlated to the economic cycle, is to maintain the value of the money qualitatively and not just quantitatively. So for him the unlawful *Ribâ* in Islam is not interest by its Western definition.²⁰¹

For 'Alwânî, the role of *Fiqh* of minorities here is not to extract *Fiqh* rules and principles like *Darûra* or *Maslaha* to justify an originally unlawful activity. Rather, *Fiqh* of minorities exercises one of its fundamental characteristics by studying reality thoroughly and relating *Sharî'a* to context. In such case, the rule of illegitimacy of *Ribâ* is non-applicable in the first place as the economic system is dealing with a totally different economic activity with different conditions and implications.

4- Ramadan

It is important to note, before we resume, that unlike the previous scholars, Ramadan is not a jurist, he is not a jurisprudential scholar, and thus, he does not discuss legal theory of *Ribâ* as much as providing real life alternatives. Hence, unlike 'Alwânî, Ramadan views interest as one form of *Ribâ* and is, thus, utterly unlawful—*Harâm*. Any economic exchange that does not reflect equality and simultaneity is considered *Riba*.²⁰² In other words, any activity that increases the value of the good without performing any service is a form of *Riba*.²⁰³ He contends that the prohibition of *Ribâ* in the Islamic economic model has a moral dimension that values justice and solidarity. This same model urges, rather obliges, Muslims to search for other models that respect and comply with the reasons of such prohibition. "We must think of a global alternative, and local projects must be implemented with the idea of leaving the system to the extent possible and not affirming it through blindness, incompetence, or laziness."²⁰⁴

Ramadan views the previous verdict of ECFR and SSANA as a short-term solution that reflects a temporary situation. *Darûra* and dealing with non-Muslim countries as *Dâr al-Kufr*, do not serve

²⁰¹ 'Alwânî interview, *supra* note 46.

²⁰² RAMADAN, *supra* note 140, at 200.

²⁰³ *Id.* at 201.

²⁰⁴ *Id.* at 203.

the purposes of citizenship and permanent presence of Muslim minorities. He emphasizes his point by elaborating on the importance of developing foundational solutions

What Muslims in the West are in painful need of today is a global approach that would make it possible for them not only to live but also to develop a spirit of economic initiative and creativity capable of putting forward concrete alternatives. . . Constant ad hoc solutions and adaptations are methods that, as we have said, affirm the dominant system of speculation and interest more than they resist it. Our ethics require us to commit ourselves to an in depth and radical resistance.²⁰⁵

His solution revolves around Western Muslims creating their own economic structure in the Western landscape and thus moving towards economic and financial autonomy. Thus, *Fiqh* 's role in solving similar issues has to be "dynamic, ongoing, refined and constantly elaborative over the years."²⁰⁶ This process of, specifically, legal integration will eventually lead to a comprehensive *Fiqh* for the West and not for minorities, that will not only supersedes influences of majority Islamic thought, but the Western legal and legislative systems as well.²⁰⁷

C- Towards a Fatwa: Main Elements of Fiqh of Minorities' Methodology

From the previous discussions, different scholars view the issues of interest-based mortgage and *Islâm al-zawja* from a variety of perspectives. They provide different, and sometimes conflicting, solutions and legal opinions. At the same time, in the case of *Islâm al-zawja*, much hesitation on the part of scholars, especially those affiliated with the ECFR have been noticed. Such hesitation leads to a lack of consensus. There are two levels of disagreement that lead to such fragmentation. The first level has to do with the permissibility of the action in the first place—keeping the marriage contract or not, allowing interest-based mortgage or not. The second level relates to the reasons constituting the justification for the permissibility of such activity—whether *Darûra*, *Maslaha*, civilizational partnership or different system with different rules. However, in spite of all these differences such discrepancies, one can identify five main elements in the *Fiqh* of minorities' methodology that help respond to this particular question, regardless of the fact that Scholars might disagree on the way they combine or prioritize these elements.

²⁰⁵ *Id.* at 206.

²⁰⁶ *Id.* at 114.

²⁰⁷ *Id.*

In the case at hand, the first element starts by thoroughly studying the context of the matter in question and its prevailing dimension. So in terms of interest-based mortgage, *Fiqh* of minorities considers the advantages and the disadvantages of owning a house in a non-Muslim system. For instance, it counts economic advantage like the benefits of investment, which is not an option if they rent instead. There are also the non-economic advantages like the quality and the environment of the place, as well as the independence, the future security and the settlement that are not provided by the rent.²⁰⁸ It is present in the ECFR and SSANA Verdict, but it is more obvious, particularly in 'Alwânî's opinion. The same thing takes place with adopting the *I'mâr* perspective and the resulting deconstruction of the family.

Recalling 'Alwânî's concept of redefining the question—in the *Istiftâ'* process—the second element is to formulate an accurate question in a proper manner that expresses the reality of the Muslim community there, and more importantly, that reflects the higher objectives of Islamic *Sharî'a*. So in the case of *Islâm al-zawja* the question is whether a married woman converted before or without her husband, whether they both love and respect each other and they might have children. Separation in this case would be not just an obstacle to her conversion but rather a reason for the deconstruction of a family which is against the purposes of Islam.

Similarly, in the second case at hand the main sub-questions to the general question of mortgage in a non-Muslim community are:²⁰⁹ first, whether this case fulfills the conditions of unlawful *Riba*; whether the contract between the individual and the bank is a pure interest-based contract or whether it lies under the heading of a deferred sales contract where by the property—or any other article—is replaced with money between the contractors—since the rules of *Ribâ* apply only on virtual money where you buy money and return it back for more of its original value? Second, whether this interest-based mortgage fulfills the Islamic objective of protecting Muslims money and property? Third, whether owning a property through this mean is a requirement for fulfilling the fundamental Islamic rule of Maslaha or general interest of Muslims? Are there other reasonable and realistic economic alternatives for the process of buying such property?

²⁰⁸ QARADÂWÎ, *supra* note 48, at 159-160.

²⁰⁹ *Id.* at 160-161.

This very last question brings us to the third element regarding the existence of other *Shari'a*-compliant alternatives like Islamic *Murâbaha*.²¹⁰ Such an alternative is not always available in non-Muslim countries; moreover, it does not resolve the issue of property ownership as initially one has to pay down payments of around 30% of the value of the property. Also Islamic banking does not have long-term financing for more than five years unlike the normal banks which might finance for up to 30 years.²¹¹ Such a dilemma represents the flip coin of a fundamental objective of *Fiqh* of minorities which is the previously discussed *Darûra*. It is, however, viewed differently by Ramadan who looks at searching for alternatives as an obligation. He agrees with 'Alwânî that the long-term dependence on concepts like *Darûra* challenges the core of the permanent presence of the Muslim in the West.²¹²

The fourth element, after other alternative cease to be available, is to search within the classic opinions of *Fiqh* itself for a foundation that allows and explains such activity, even if not aligned with scholarly consensus. For instance, *Sheikh* Mustafa al-Zarka was one of the first scholars who allowed interest-based mortgages in non-Muslim economic systems, given the appropriate conditions. He based his verdict on the logic of the *Hanafi madhhab*, which although not in accordance with the general scholarly consensus, is worth considering and responds better to the given needs and circumstances.²¹³ He, however, stressed that such verdict is not applicable in *Dâr al-islâm*.²¹⁴

The opinion of Abû Hanîfa, founder of *Hanafi madhhab*, one of the four *maqâhib*—legal schools—of Sunni Islam, that if a Muslim is allowed peacefully in *Dâr al-harb*, then it is permissible for him to interact using their own economic system, even if forbidden generally in *Dâr al-islâm* like usury. Although Abû Hanîfa allowed the taking of usury from non-Muslims and not the other way around, based on the principle of *Maslaha*—to safeguard the Islamic higher objective of preserving the money of Muslims, this view has been revised by the modern scholars of *Fiqh* of minorities, which brings us to the fifth element of the *Fiqh* of minorities' methodology.²¹⁵ Such

²¹⁰ A Contract, whereby the seller declares the profit he made on the good sold. In Islamic finance the term is used for sales contracts, whereby the bank is selling against deferred payment (*Bai' Muajjal*) and declared profit rate.

²¹¹ QARADÂWÎ, *supra* note 48, at 158-159.

²¹² 'Alwânî interview, *supra* note 46.

²¹³ QARADÂWÎ, *supra* note 48, at 165.

²¹⁴ *Id.*

²¹⁵ See, Fatawa of al-Zarka, QARADÂWÎ, *supra* note 48.

element prevails better in the case of Islâm al-zawja. Qaradâwî, as elaborated, identified nine different opinions regarding the matter and eventually chose the one that responds best to the posed question, even if not the most popular choice among them.

In the fifth and final element, the jurist reorganizes the facts and implications of the issue to identify its objectives and how it relates to the Muslim minorities context. This takes place when there are no previous jurisprudential opinions—a brand new incident—or to support the case at hand and cover it with the *Fiqh* of minorities philosophy of integration. The *Hanafi madhhab's* rule, which allows taking Ribâ from non-Muslims only and prohibits giving it, was based on the higher *Shari'a* objective of preserving the money of the Muslims. *Fiqh* of minorities develop this idea and takes it a step forward—applying *Fiqh* of minorities *Ijtihâd* and main principles. Hence, in buying an essential property, taking the loan and paying the mortgage fulfills the objective of preserving the money of Muslims even more than taking it—taking into consideration the advantages mentioned in the first element. So based on the *Shari'a* principle that matters are to be determined by their objectives, mortgage is a better use of Muslim money than rent.²¹⁶

Recognizing the context from which the scholar come—Western, non-Western, hybrid and so forth—one can highlight certain strains of thought when looking to an issue facing Muslim minorities. These trends can be categorized into four main approaches or categories of scholars.

The first category is the “literalist or traditionalist scholars” who are mostly local scholars and cannot be considered *Fiqh* of minorities’ scholars. They look at the presence of Muslim minorities in the West as an unsatisfactory exception where surviving the foreign system reflects a divine test. Thus, no compromises, adaptations or reinterpretation may be considered. Such thought leans towards the isolation of Muslims. A significant number of its promoters are from Muslim-majority countries and have not been exposed to Western or non-Muslim communities’ experiences.

The second category includes the “international institution scholars”, like the ECFR, who are mostly international scholars, most of whom are from Muslim-majority countries either entirely or originally. Those scholars share a concern with the issues facing Muslim minorities. They

²¹⁶ QARADÂWÎ, *supra* note 48, at 167.

understand the importance of Muslim presence in the west, and are avoiding challenging the fundamental sources and premises of traditional *Fiqh*. Instead, they adopt a method of reinterpretation and specialized *Ijtihâd* based on these fundamentals. They promote the importance of integration; however, many their premises and verdicts serve as a short-term and a temporary solution that does not necessarily respond to the essence of integration. Most of them, implicitly believe that the eventual normal place for Muslims to be is in an Islamic-ruled society. Thus, their approach is based on survival reflected in the concept of *Darûra* which implies dealing with an exceptional short-term situation.

The third category includes the “adaptational scholars”, like ‘Alwânî, who are also international scholars and mostly have a direct experience and involvement with the west. Their exposure to both, the issues facing Muslims and the Western system lead to adopt an approach that tries to justify and explain how Muslim minorities are nor particularly different from the rest of their community. Rather the community itself entails different context, different rules and, consequently, different Verdicts. Thus, their work is based on attempts to fit Muslims within the society. Their aim is integration that fulfills the purpose of empowering Muslims, preserving their identity as part of the *Umma* message. Thus for them integration is mostly a means to an end.

The fourth and the last category are the “partnership scholars”, like Ramadan, who were originally born in the West. They include intellectuals who are not necessarily legal theorists—*Fuqahâ’*—so are less interested on whether, for instance, mortgage is allowed or not. They view Muslims as Westerners, citizens and partners in the society, not minorities. They, hence, stress on the importance of bypassing short-term solutions to imposing convenient solutions based on the system of their society. They, view integration and citizenship as “inevitable” ends in themselves—as well as a means for other purposes of the *Umma*. Their approach is based on the desire to make one’s own society fit him or her and not the other way around.

The two case studies examined in this paper raise some important issues. One is whether it is time for scholars coming from Muslim majorities to leave the floor to “Western-Muslim” scholars who have clear and direct exposure and comprehension of the Western society. This raises a question regarding the nature of impact such change would make on the end result of *Ijtihâd* when it comes to Muslim minorities jurisprudential issues. The second question is

whether *Fiqh* of minorities is still a project that lacks coherence and consistency among scholars and needs to be developed and institutionalized on wider scales and in a manner that pushes the boundaries of *Ijtihâd*. For instance, although Qaradâwî reaches a “creative *Ijtihâd*” opinion he still feels the need to “justify” it with evidence from traditional *Fiqh*. This is understandable in this case, where evidence was available in the first place. However, concerns arise when no clear evidence in the tradition is found and hence an *Ijtihâd* that utterly depends on the texts and the objectives that are drawn from it is needed. The third and final question is whether *Fiqh* of minorities has to develop tools and discourses to address the receiving communities of the West themselves. For in dilemmas like the discrepancy between the Islamic legal system and the Western legal systems, in areas like perception to gender inequality for instance, scholars must search for common rationale and understandable explanations that deliver the message of cultural relativity and are valid.

VI- Conclusion:

Fiqh of minority scholars articulate the importance of the Islamic presence in non-Muslim societies in a unique way. Their objective is to help those who are searching for a healthy middle ground between being a dedicated Muslim and a loyal citizen. That is to say that, Muslim scholars advocating for *Fiqh* of minorities, are also, intentionally or unintentionally, advocating for the universality of the religious, cultural and developmental message of Islam, as well as promoting the notions of citizenship and positive integration. Thus, the real question *Fiqh* of minorities advocates are concerned with is not whether Muslim minorities should integrate or not. Rather, it is *how* they should integrate and what the necessary conditions required are for a positive integration that is beneficial for both the Muslim and his community. In other words, This *Fiqh* , while attempting to accomplish the mission of integration and preserving the Muslim identity, treats the Muslim not only as a Muslim with religious ritualistic obligations, but also as a member of a society and, more importantly, as a law abiding citizen in a modern society with rights and obligations. Such a context would turn integration from a mere means to an end in itself especially that *Fiqh* of minorities is “theoretically” designed to theorize for a permanent presence and the creation of a genuine “Western Muslim”.

As we have noticed, different Muslim scholars view the nature and the function of *Fiqh* of minorities from different perspectives. One can note that the scholars’ different backgrounds—Western/non-Western—impact their perceptions of the role of a Muslim in the West. On one side, scholars like ‘Alwânî and Ramadan—adaptation and partnership scholars, who either lived their entire life or most of it in these Western societies, highly appreciate the intrinsic value of citizenship. For instance Ramadan rejects the notion “minorities” and insists on Western Muslims or citizens. On the other side, Qaradâwî, Najjâr and Bin Bayya—international institutions scholars—view integration as a mere tool for other purposes, whether intentionally or unintentionally. Bin Bayya, does not even consider the concept of citizenship and still justifies *Fiqh* of minorities as a tool to respond to crucial—day to day—issues of Muslim minorities. Najjâr focuses on the concept of *Da’wa* and being a role model for the ultimate purpose of propagating the religious and civilizational message of Islam. Qaradâwî, though calls for a permanent presence, implicitly believing that the eventual and the normal place for Muslims to be is where the Muslim majorities are. He, thus, still perceives Muslim minorities’ issues in

terms of temporality—which is reflected in him using *Darûra* and similar concepts as a basis for a Verdict.²¹⁷

Such variation of backgrounds, and consequently perspectives, has several implications. First, the nature of the solution offered within the framework of *Fiqh* of minorities: long-term solutions which reflect permanent presence perception, versus short-term solutions which reflect a temporary presence perception. Second, the identity and role of Muslim minorities—promoting a “Western Muslims” identity; versus preserving the Muslim minorities’ identity occasionally residing in the West. On one side, the study has shown that *more* Western scholars tend to skew towards long term jurisprudential solutions as they believe in theorizing for a “permanent presence” of “Western Muslims”. On the other hand *less* Western scholars still theorize short-term solutions for Muslim minorities, temporarily residing in a non-Muslim society. Third, the latter—Western/non-Western dichotomy—is directly proportional to the nature of the relationship between *Ijtihâd* and tradition, in other words, abiding directly or indirectly to classic scholars’ jurisprudence. For example, one can notice the obvious gender inequality that highlights the methodology and *Ijtihâd* in case like *Islâm al-zawja* for instance. Qaradâwî contends that it is difficult for Muslim scholars to recognize legal opinions similar to *Islâm al-zawja* because it is contrary to what they have been used to and have inherited from the “traditional jurisprudential culture”. He, thus, encourages seeking “new” solutions while taking the latter into consideration to overcome the effects of this cultural influence. Ramadan also addresses this point by pointing out that specialists in *Usûl al-Fiqh*—foundations of laws and jurisprudence—are themselves “immersed in a cultural milieu and a society that influence the way they proceed . . . [which] shapes their mind and their way of looking at the Qur’ân and the world.”²¹⁸

Hence, one can say that *Fiqh* of minorities has, to a large extent but not entirely, succeeded in providing a new original *Ijtihâd*. At one level, one can trace innovation and *Ijtihâd* in encouraging women to convert through not putting them in an either-or situation, encouraging them to

²¹⁷ Half of the members of the ECFR are from the European continent and half are from the Arabian Peninsula, Northern Africa or Northern America. This is a breach of the internal rules of the ECFR, as members not residing in Europe “must not constitute more than 25% of the total members of the Council at any one time.” ECFR CONSTITUTION, § 8–5–, available at: http://www.euro-muslim.com/En_u_Foundation_Details.aspx?News_ID=343 (Last visited Feb. 11, 2012).

²¹⁸ Ramadan, *supra* note 140, at 140.

strive for their husbands' conversion, and while considering the essentiality of both sexual and emotional relationships on the one side and preserving the unity of the family on the other. However, on another level, when it comes to the receiving community and its legal system, in which Muslim minorities are living and interacting, *Fiqh* of minorities pays less attention to this community's dynamics and value system. For example, there is obvious gender inequality, from the Western value system perspective, that highlights the methodology and *Ijtihād* whether of traditional *Fiqh* or even *Fiqh* of minorities. This idea of the discrepancies between Western and Islamic culture and value systems makes us go back to Qaradâwî and Ramadan's remarks on the still-persistent predicament of challenging the "inherited jurisprudential culture."

The findings of this paper leave us with several thoughts. First, despite the discrepancies among scholars—which turn *Fiqh* of minorities into a means/tool or an end—it is, at the end of the day, a mere medium to the central notions forming integration, which are the attitudes, impressions and collective consciousness towards this integration that are either reflected or influenced by this medium. Without them, no integration is possible. Second, while *Fiqh* of minorities is designed to respond, in the general sense, to Muslim minorities' attitudes towards integration, it hardly has any impact on the attitudes towards them from the receiving society. Finally, one is to wonder whether the amount of success of such *Fiqh*, in practice, is yet to be determined by the amount of Muslims welcoming the concept of this *Fiqh*. That is to say that, whether, in reality, the increase of Muslim minorities' awareness and adoption of such methodology/perspective of *Fiqh* will have an eventual impact on the tendency towards a positive integration or not.

At the end of the day, *Fiqh* of minorities' desired impact on Muslim minorities' integration in their non-Muslim societies will only be effective when the attention shifts from developing a Western *Fiqh* for Muslim minorities to developing Western Muslim scholars who will be more capable of developing tools and discourses to address the western culture and value system in a way that fulfills the essence of the role of *Fiqh* of minorities especially when it comes to integration and the role of the *Umma*.

VII- Annex

أولاً: مقتطف من مقابلة مع الشيخ يوسف القرضاوي

مقدمة الشيخ:

أهم شيء أن يعيش الإنسان بالاسلام، أن يعيش مسلماً و كيف يكون ذلك؟ إذا تحقق الاسلام بفرائضه و أحكامه و اخلاقه. فأهم هدف لفقهاء الأقليات هو أن يعرف المسلم ما هو الاسلام و ما هي الاحكام الخاصة به و هذا المسلم باعتباره يعيش في مجتمع غير مسلم له احكامه التي تختلف عن أحكام من يعيشون داخل بلاد الاسلام. فالمسلم في هذه البلاد لابد أن يعرف ما المطلوب منه، و ما الذي رفع عنه.. هذا الأمر مقدم على الدعوة: أن تعيش مسلماً سواء في شخصك أو مع من حولك.

س: في كتابك حول فقه الأقليات قمت بالإشارة في القسم الخاص باهداف فقه الأقليات لتأصيل ضرورة الوجود الإسلامي في البلاد غير الإسلامية.. فمثلاً أشرت إلى واجب دعم المسلمين هناك، و التعريف بالاسلام و المشاركة الإيجابية.. فما تعليقك؟

ج: أهم شيء، و هو مقدم على بقية الأهداف، هو أن يعين فقه الأقليات الجماعات المسلمة على أن تحيا بالاسلام، "اتق الله حيثما شئت" فالاسلام معك أينما كنت، " والله المشرق و المغرب فإينما تولوا فثم وجه الله"

س: يوجد نوعين من أنواع النقد الموجه لفقهاء الأقليات.. الأول يرى أن فيه تحريف و تلاعب بشرع الله، و الآخر يرى أن فقه الأقليات لم يأت في الحقيقة بشيء جديد، و أن كل ما ورد فيه من أحكام موجودة بالفعل في الفقه العام الأصلي.. فما ردك على هاتين النقطتين؟

ج: الدور الأساسي لفقهاء الأقليات انه دور تنظيمي حيث يرتب الأحكام و الأصول بحيث يسهل على المفتي استخراج الأحكام منها. ففقهاء الأقليات جزء من الفقه العام، يستعمل نفس الأدلة و لكن ينزلها حسب واقعها. فالمسلم هناك له ظروف خاصة، يجب أن نرى هل تستوجب أن ننقل أم نخفف عليه، و في الغالب يكون تخفيفاً حيث أنه يعيش في بلاد لا تعينه على الإسلام. إذاً يجب أن نعرف و نستخدم هذه المخففات حتى يقوى ويتمكن بعد ذلك من الدعوة.

إن الدعوة أمر هام تجب فيه مراعاة طباع و ظروف الناس الذين نقوم بدعوتهم. فالمسلم هناك مطالب أن يعرف الأحكام و ملابساتها التي تخفف عليه من جانب، و تلزمه بأشياء من جانب آخر، و هي مطالب تختلف عن تلك المطلوبة من مجتمعات الأغلبية المسلمة.

س: قمت بتقسيم الاجتهاد في فقه الأقليات الى اجتهاد انشائي و انتقائي.. فما الفرق بينهما؟

ج: الأمر له ضوابط حيث تقوم باختيار الرأي الذي نراه أصح.. لذلك لا يؤخذ بأي رأي، وإنما بالرأي الأقوى حسب الأدلة، سواء النصية كالكتاب والسنة أو غيرها. لانه في بعض الاحيان يكون الناس في حاجة لهذا الرأي والذي يقوم بحل مشكلات...

س: سأحاول أن أكون أكثر تحديداً في السؤال.. على سبيل المثال في حالة إسلام الزوجة وبقاء زوجها على دينه .. هذه فتوى تستند الى الاجتهاد الانتقائي.. هل الفتوى هنا خاصة بالأقليات أم على الإطلاق؟

ج: هو حكم على الإطلاق .. وأخذنا بالرأي الذي يجيز للرجل أن يبقى مع امرأته استناداً إلى رأي عمر و على-ض-. وهو جائز التطبيق في أي دولة حتى في مصر إذا اختارت الزوجة أن تبقى مع زوجها.

س: إذا ما هو الفرق بين فقه الأقليات والفقه العام إذا كانت نفس الأحكام تطبق؟

ج: هناك أحكام للجميع وأخرى خاصة بالأقليات. فإن كان في حالة الأقليات يكون تطبيقه أولى لأنهم أحوج إلى هذا الرأي من غيرهم ولكن ليس بالضرورة أن تكون الأحكام كلها خاصة بالأقليات.

س: هل ينطبق مثال ربا البنوك لشراء مساكن على الفقه المختص بالأقليات فقط ولا يجوز تطبيقه في العموم؟

ج: نعم

س: هذا بالنسبة للانتقائي.. فماذا عن الفقه الإنشائي؟ وهناك نقد يستند إلى حديث وارد عن الرسول-ص-: "إن الله عز وجل قد فرض فروضاً فلا تضيعوها وحرمة حرمت فلا تنتهكوها وحد حدوداً فلا تعتدوها وسكت عن أشياء غير نسيان فلا تبحثوا عنها"، فما رد فضيلتكم؟

ج: هذا الحديث لا يقف ضد الاجتهاد. فالاجتهاد له أدلة كثيرة، فيجب أن يكون من المصادر المعروفة مثل القرآن والسنة وتشريع الماضين، والمصالح المرسلة، والعرف، والقياس، والإجماع. فالأمور إذاً تتبع منهجية وليست مرسلة، والاجتهاد ليس مرتبب بالزمان فهو صالح في أي زمان أن يستنبط منه ما يصلح للمسلمين. وفي كل زمن كان هناك ناس تجتهد اجتهادات كثيرة. هناك رسالة للامام السيوطي بعنوان "الرد على من أخلد إلى الأرض وأنكر أن الاجتهاد في كل عصر فرض". دعا الامام في هذه الرسالة للاجتهاد ودلل على ذلك بسير المجتهدين السابقين.

س: مبدأ المصلحة والضرورات تبيح المحظورات .. هناك من يشير إلى انه الوجه الآخر لعملة وجهها الأول الغاية تبرر الوسيلة.. فما ردكم؟

ج: عندنا في الاسلام الغاية لا تبرر الوسيلة. هناك محرمات وهناك أشياء ضرورية. فالضرورات تبيح المحظورات- المحرمات-. وقد قسم العلماء الأمر إلى ثلاثة أمور:-1-أمور ضرورية كالأكل و الشرب و النوم؛-2-أمور حاجية يمكن أن يعيش بدونها ولكن بمشقة؛-3-أمور تحسينية وهي الكماليات.

الضرورات المشار إليها في الأمر الأول هي التي تبيح المحظورات فمثلاً شخص في حاجة إلى عملية جراحية حرجية، فيجوز له أن يأخذ ربا ولكن بضوابط، فيجب أن نقدر الضرورة بقدرها فإذا احتاج إلى مائة جنية يأخذ بقدر المائة جنية فقط وهكذا. فالآية تقول "فمن اضطر غير باغ ولا عاد فلا إثم عليه". الباغ المتطلع إلى الشهوة من هذا الأمر والعاد أي من يعدو على قدر الضرورة.

س: بالنسبة لمعضلة الولاء المزدوج بين الولاء للأمة والولاء للدولة التي يقيم فيها المسلم.. خصوصاً فيما يرتبط بأداء الخدمة العسكرية لاسيما إذا أدت إلى مواجهات عسكرية مع دولة إسلامية؟

ج: هذه فتوى خاصة أفتوا بها أثناء الحرب على الإرهاب بعد أحداث 11 سبتمبر، بأن هناك مسلمين كثيرين في الجيش الأمريكي وإذا خرجوا منه جميعا سيتسبب ذلك في مشكلة كبيرة لهم.. وقد وافقت لهم على هذا الطرف الخاص بشرط أن يحاولوا قدر الإمكان ألا يبدأوا بالقتال... فأيضاً لها ضوابط

لقد قمت بتناول قضية المواطنة والولاء المزدوج في كتاب بعنوان الوطن والمواطنة، يمكنك الرجوع إليه للمزيد من التفاصيل. وأذكر فيه أن الدار في الإسلام تعبر عن مفهوم الوطن بالمعنى الحديث، إذ يجوز التعامل من منطلق المواطنة ويكون هناك انتماء للوطن وأخوة وطنية وقومية. و على هذا الأساس يتعامل المسلمون مع غيرهم.

س: كيف ترى أثر فقه الأقليات في اندماج المسلمين في المجتمعات غير المسلمة؟

ج: نحن دائما ندعو المسلمين إلى ضرورة اندماجهم على أن لا يذوبوا في المجتمع. اندماج بلا ذوبان. فيعيشوا في المجتمع ويؤثروا فيه ويحتفظوا بهويتهم وعقيدتهم وعباداتهم ومكارم أخلاقهم. فدعوة الناس للاندماج لا تعني أن تترك العقيدة بل أن نعمل سوياً لخدمة المجتمع.

س: د. طه جابر العلواني يؤكد أن وجود المسلمين هناك ليس فقط مباح وإنما هو فرض عليهم أن يقيموا ويندمجوا هناك.. فما هو تعليقك؟

ج: الوجود الاسلامي ضروري في الغرب ويجب أن يكون له تأثير. فهدفه الأساسي أن يحمي المسلمين الداخلين في الإسلام والقادمين لهم والمسلمين الأصليين في البلاد حتى يتعلموا الاسلام الصحيح ويعانوا عليه ويقوموا بدور الدعاة للإسلام. هذه هي مهمة الوجود الاسلامي الذي بقي و يستمر و ينتشر و يزداد.

س: ما هو وضع فقه الأقليات في خريطة الفقه العام؟ هل هو فرع أم باب أم أمر آخر؟

ج: هو فقه قام به مجموعة من المسلمين يشابه في تصنيفه على سبيل المثال فقه المرأة المسلمة. فهو باب من الأبواب يختص بجماعة من المسلمين تعيش خارج دار الإسلام. فيقدم هذا الفقه ما يتعلق بهم حتى يبسر على العلماء لكي لا يستهلكوا وقتاً ومجهوداً للبحث في الكتب والمراجع الخاصة بالأحكام والأصول.. هذا الفقه به أمور تقتصر على

الأقليات فقط مثل فوائد البنوك للمسكن ولكن أمور أخرى يشترك فيها عموم المسلمين كافة ولكن الأقليات أولى بتطبيقها مثل إسلام الزوجة.

ثانياً: مقتطف من مقابلة مع د. طه جابر العلواني

مقدمة حول المؤثرات على الفقيه

أنا كفقيه عندما اتحدث عن فقه الأقليات قد أتأثر بأشياء عديدة ولكن لا ينبغي أن أخرج عن الأصول والقواعد التي تجعل من القرآن الكريم المصدر المنشئ لكل حكم شرعي و لا مصدر عندنا للأحكام إلا القرآن وحده. فهو المصدر المنشئ للأحكام والكاشف عنها. و أما السنة النبوية فهي تابعة له و تدور في فلكه دوران التابع للمتبوع و دوران المطبق للنظرية. فالقرآن يعطينا نظرية و السنة تعطينا منهج للتطبيق. و هما مصدران متعاضان لا ينفك أي منهما عن الآخر ، فلكل سنة ثابتة أصل في القرآن المجيد تستند إليه، و آيات القرآن المجيد يتلوها رسول الله بعد تلقيه لها و يعلمها للناس و يزيكهم بها و بذلك يتابع عليه الصلاة و السلام حركة الآيات في واقع الناس لتزكيتهم و تطهيرهم و الارتقاء بهم. و ما غير ذلك فإنه اجتهادات علماء لا تلزم الإسلام بشئ على الإطلاق، فلا يلزم الإسلام إلا الدليل الصادر من الكتاب و تطبيقاته من السنة النبوية.

فالفقيه ينبغي أن تكون العلاقة عنده واضحة بأن "إن الحكم إلا لله" -و إن مع الاستثناء في اللغة تفيد الحصر و القصر-. فليس لأحد حق التشريع إلا الله وحده...

س: إذا فما هو تصنيفكم لدور الاجتهاد؟

ج: دور الاجتهاد هو التلقي. أن تتلقى النص مع فهم الواقع فهماً جيداً بحيث ننزل هذا الحكم على هذا الواقع بما يناسبه. فالاجتهاد يقوم على ركنين: الأول دراسة النص-text-استنباط و استدلالاً؛ ثم معرفة الواقع. و في عصرنا هذا يقوم الفقيه بصياغة مشكلات الواقع ليلقي بها أسئلة على النص. و هناك قواعد و ضوابط للتفسير و التأويل فليست حراً أن أقول ما أريد... "هل عندكم من سلطان بهذا" ... "و لا تقولوا لما تصف ألسنتكم الكذب هذا حلال و هذا حرام". فالاجتهاد حالة عقلية و نفسية- و ليست حرفة - للأمة كلها، بحيث لا يكون فيها من يقبل ما لا برهان عليه و ما لم ينزل الله به سلطاناً.

س: نعود إلى فقه الأقليات.. كيف بدأت الفكره؟

ج: أنا فيما أعلم- أول من كتب في هذا الأمر، و قد كان المتقدمون يكتبون في فقه النوازل. و قد كتبتُه بفلسفة معينة و باعتباري مواطناً أمريكياً تعرض عليّ عشرات المسائل يومياً و التقيت بالمسلمين في كثير من أنحاء العالم. لم يكن الغرض في الأصل هو كيفية ادماج أقليات المسلمين فيغيرهم، حيث أن عندهم أصلاً استعداد للتقليد و التبعية و الذوبان

بحكم بينتهم الأصلية نجم عن العيش في التقليد قرونًا... فنحن على استعداد أن نذوب في أي مجتمع أو ثقافة. فقد ورثنا فكرة التقليد-imitation- في مقابل فكرة الاجتهاد الذي يمكن تصنيفه أنه تفكيرٌ إبداعيٌّ يقوم به عالم مؤهل في علوم الدين و اللغة لاستنباط حكم و استدلال بنص على حكم. و القرآن يحث على الاجتهاد في عدة مناسبات.

س: فما هي إذاً الدواعي التي أدت إلى تأسيس فقه الأقليات؟

ج: عندما كنت في أمريكا لاحظت قدوم ثلاث موجات للهجرة المسلمة. و قد ذابت هذه الموجات تماماً في المجتمع الأمريكي و أصبحوا أمريكيان قلباً و قالباً. الاسلام انتشر في جنوب شرق آسيا و غيرها من خلال التجارة، و نحن الآن في أمريكا منا الاساتذة و الطلاب و الأطباء و المهندسون فنعد كوادر المجتمع و قلة من المسلمين هناك هم الفقراء و يجب أن نستغل هذا الوضع الاجتماعي الجيد بشكل أفضل. فغرض فقه الأقليات الأساسي هو أن نمنع الموجة الرابعة من الذوبان مثل سابقتها، فنعطي للمسلم و المسلمة شخصيتهم المستقلة من خلال فقه لا يجعلهم يعيشون حالة من انقسام الشخصية بحيث تكون عندهم شخصيتين متناقضتين: مواطن أمريكي و انسان مسلم.

الغرض الثاني من فقه الأقليات هو أن نحول بين المسلم و بين أن ينقل ما في البيئات المسلمة من مظاهر التخلف و الانحراف الى بيئة الأقليات المسلمة في الغرب لأننا نريد منه أن ينقل أحسن ما لديه و أن يتجاهل أسوأ ما لديه ليكون داعيةً بسلوكه المستقيم للإسلام.. كيف؟ أي فقه له علاقته بالثقافة العامة، فهو أحد الأركان المؤسسة لتلك الثقافة. فالثقافة تعطي مدخلات لفقه بأسئلتها و في نفس الوقت يؤدي اتباع إجابات الفقيه الي سلوكيات تتحول إلى ثقافة فيما بعد و هذه الثقافة تحركنا بقصد و بغير قصد. هذه العلاقة الجدلية بين الفقه و الثقافة وثيقة، فالفقه الإسلامي صنع في عصور الانتاج و التوزيع و الاستهلاك فيها كانت خاضعة لمقاييس المجتمعات الزراعية لا الصناعية. فالفقيه عندما ينقل هذا الفقه إلى البيئة الصناعية و هو خاضع لنفس التصور القديم سوف يصطدم بفتاواه حتماً في الواقع.

على سبيل المثال في حالة الـmortgage افتهى العلماء التقليديون بحرمة، أما أنا فقد كنت أرى فيه أمراً مغايراً لمفهوم الربا في القرآن و تطبيقاته في السنة. و ذلك يخرج كثير من أنواع المعاملات من دوائر الربا المحرم، فالنظام الاقتصادي الأمريكي يقوم بتقدير ثمن المنزل ثم يحسب عمره الافتراضي و يحاول أن يجعل ربحه أعلى قليلاً من سعر الفائدة في البنوك...

س: هل يعني ذلك أن فتوى جواز الـ mortgage تستند على فكرة أنه ليس ربا من حيث الأساس أم أنها لدواعي الضرورة؟

ج: لا، أنا أصلاً حين أدرس بعناية النظام الأمريكي و فلسفته لا أجد حققة ربا القرآن و السنة موجودة فيه، لأن الفكرة في زيادة الفائدة في البنك و إنقاصها مرتبطة بالتضخم (inflation) فعلى سبيل المثال إذا اقتضت منك مائة جنيه و كانت تساوي حينها جراماً من ذهب، و الآن هذه المائة جنيه أصبحت قيمتها تساوي نصف جرام ذهب فقط فالهدف

يصبح أن أرد لك القيمة الأصلية للمبلغ التي تمكنت من شراء جرام الذهب. إذاً يصبح هدف فائدة البنوك أن تحتفظ لك بقيمة نقودك كما هي، و تحميها من آثار التضخم لا أن تحقق ربحاً على قرض يكون بمثابة ثمن للزمن الذي لا يملكه الإنسان و ليس له أن يتجر فيه

س: و لكن كيف يكون حكم كهذا مختلفاً عن بلاد المسلمين؟

ج: أنا لا أراه مختلفاً لكن الفقيه هنا في المشرق لا يفهم إلا هذه اللغة و لا يزال يؤمن بمصطلحات مثل دار الحرب فإذا قمت بتعميم الأمر فسوف يقوم بمعارضتي و قد يتهمني أنني أفتي بما يخالف رأي الجماعة أو الإجماع.

الدورة الاقتصادية الغربية و ارتباطها بفكرة التضخم تجعل على سبيل المثال هذا القلم اليوم ثمنه جنيه، غداً يصبح جنياً و نصف ... فماذا أفعل كي أنصفك؟ أقوم بزيادة القيمة الشرائية للجنيه الخاص بك بحيث أجعله متماشياً مع أسعار السوق و الدورة الاقتصادية.

س: لماذا أشرت إذاً إلى أن الإباحة تكون في حالة الضرورة؟

ج: أنا لا أرى أنها تكون في حالة الضرورة فقط. فدورة الاقتصاد الغربي مختلفة عن تلك الموجودة في البلاد الإسلامية. فعندنا في الشرق هنا لا توجد دورة اقتصادية فهو نظام اقتصادي غير متقدم. و عندما يأتي عالم من هذه البيئة و يريد أن يفرض هذه الثقافة على مجتمع متقدم فهو بذلك يضعف الأقليات المسلمة و يعمل على إفقارها. هدفي أن أعلمهم أن فائدة البنك ليست هي ربا الدين، و أن البنك عندما أقرضني، لأن عنده دورة اقتصادية، يجعل المال يعمل مع الوقت و الانتاج و التوزيع و الاستهلاك و لا يفصل مكون عن الآخر.

س: هل يمكن أن نفسر ذلك أن فقه الأقليات يتجاوز كونه فقهاً للإستثنائات و لكنه يتمحصر في قضايا و خصائص الواقع أمامه ليخرج بفتاوى متناسبة معه بفكر الغرب و ليس بثقافة الدول الإسلامية؟

ج: أجل، فعلى سبيل المثال عندما يسألني العراقي هل أدخل الانتخابات في ظل الاحتلال الأمريكي للبلاد أقول له لا. في حين أنه عندما يأتي المسلم الأمريكي و يسألني هل يدخل الانتخابات فأجيبه أن يجب عليه أن يدخل و قد أوصيه بأن يعطي صوته لفلان بالتحديد لأننا تناقشنا معه حول بعض القضايا و التسهيلات الخاصة بالمواطنين المسلمين و التزم و وافق العمل على تحقيقها. فهذه فتوى و هذه فتوى إلا أن هذا لا يعد فقه دين و لكنه يسمى فقه تدوين، و فقه التدوين هو فقه تطبيق الدين فأنا بشر لي ظروف في كيف أستجيب لهذه الظروف و أربط الدين بواقعي بحيث أتقرب إلى الله من خلاله... و ذلك هو فقه التدوين.

فعلى سبيل المثال عندما تسألني فتاه فرنسية مسلمة اجبرت على خلع الحجاب في المدرسة ماذا تفعل؟ الفتوى التقليدية سنتصحها إما أن تترك البلد أو أن تمكث في المنزل و تتزوج. أما أنا فأصحها بخلعه داخل المدرسة و ارتدائه ثانية عند

خروجها إلى أن يقضي الله أمراً كان مفعولاً. ففقه الأقليات هدفه المحافظة على الشخصية الإسلامية في الغرب أولاً و من أجل دعوة غير المسلمين إلى التأثر بالإسلام و قبوله ثانياً.

س: ماذا عن دور الأمة الإسلامية و رسالتها؟ كيف تربطها بفقه الأقليات؟

ج: أنا أقول للمسلم كن نموذجاً لغيرك و تلك هي-الدعوة الصامتة-فمصر على سبيل المثال لم تفتح بالعسكر و إنما فتحت بمدينة الفسطاط التي قام ببنائها المسلمون لتكون مثلاً و قدوة و كانت سبباً كبيراً في دخول عدد كبير من المصريين في الإسلام.

س: كيف يفسر أو يؤصل فقه الأقليات للوجود الإسلامي في المجتمعات غير المسلمة؟

ج: الواقع يقول: إنّ الهدف الحقيقي و الأصلي لإقامة هذا العدد من المسلمين هناك يرجع إلى أسباب سياسية و اقتصادية و اجتماعية و قلما يكون هدفهم هو الدعوة. ففقه الأقليات يحاول أن يتعامل مع هذا الأمر الواقع و يستفيد منه أقصى إستفادة. فقد وجدنا مسلمين هناك نريد أن نحافظ على هويتهم الإسلامية و نحميهم من الذوبان، فنقول: عش في الغرب إن شئت و لكن عش كمسلاً غربياً فلا تخن البلد الذي تعيش فيه و أحبه مثلما أحببت وطنك الأصلي. فمادمت تملك حرية العبادة و التدين فهي أرضك و أرض الله. و نحن هنا نسعى إلى أن ننفذ ما يمكن إنقاذه.

س: هل هذا معناه أن الهدف الأساسي من فقه الأقليات هو حفظ الدين؟

ج: حفظ الهوية... و الدين مصدر من مصادرها. فنحن نريد أن نؤصل للوجود الإسلامي حيث لا يكون وجوداً طارئاً و إنما يكون وجوداً دائماً مستقراً يشكل جزءاً من المجتمع الغربي. لأن المسلم يحمل خطاباً عالمياً، فإلهنا أمرنا بإيصال "إله إلا الله" إلى كل بقاع الأرض. فالإسلام قائم على ثلاثة دعائم و هي المقصد الأساسي منه: 1-التوحيد: أي تحقيق وحدانية الألوهية و العبادة لله وحده؛ 2-الأمة: أي تشكيل أمة تكون نموذجاً يهتدي الناس به لتقوم بواجب-الشهادة-؛ 3-الدعوة: أي إيصال القرآن لكل ركن من أركان الأرض

س: ما هو المقصود بالنموذج؟

ج: أنا أريد أمة تدعو إلى الله على بصيرة، خير أمة أخرجت للناس تأمر بالمعروف و تنهى عن المنكر و تؤمن بالله قائمة على فكري الخيرية و الإخراج و تقوم على واجب الشهادة. فالإنسانية في حاجة إلى الأمة الإسلامية القائمة لله هدفها تحقيق رسالة الله بشكل ما في ظرف ما.

س: تحدثنا عن حالة الـ mortgage و كيف تستجيب لظروف الغرب و نظامه الاقتصادي... فماذا عن حالة إسلام الزوجة؟ هل هي أيضاً مختصة بالغرب أم على المسلمين كافة؟

ج: الإسلام جاء ليحرم البيوت لا ليخربها. إذا طبقنا الفقه التقليدي يصبح الأمر في نظر الغرب أن الإسلام يساوي خراب بيت، و أنك إيتها المرأة إذا دخلت في الإسلام سيخرب بيتك. فلا بد من معالجة هذا الأمر، و قد تناولنا هذا الموضوع و عرضنا وجهة نظرنا شكل مستفيض. و قد ذهب المجلس الأوروبي إلى مثل ما ذهبنا إليه فارجعي إلى ذلك. و إن كان هذا الحكم يمكن تطبيقه على الأكثرية أيضاً فهو بالأصل انتج للأقلية و قد بينا الضوابط فيه مثل أن لا يضيق عليها زوجها في دينها و أن تكون هي نفسها راغبة في البقاء معه، فارجعي إلى ذلك كله وادرسه لتتبيني حقيقة الفتوى و أدلتها.

س: ما هي الخصائص المختلفة في فقه الأقليات التي تجعله قادراً على التعامل مع قضايا الأقليات أفضل أو بشكل مختلف عن الفقه العام التقليدي؟

ج: فقه الأقليات فيه ملاحظة للمجتمع الغربي و انظمته. إلى جانب فلسفة الرغبة في توطين الإسلام هناك و الخروج من فكرة الوجود الطارئ للمسلمين هناك الى كونه وجود مستمر. فالاندماج لا يعني أن أزيل الحواجز بحيث أصبح نسخة نمطية من الأمريكي العادي. و إنما هو الاندماج الإيجابي في أن يعيش المسلم بإسلامه و هويته الإسلامية و لكن في مجتمعه الغربي و هي بالضرورة تكون هوية مختلفة عن هوية المسلمين في مجتمعات الأغلبية. فأنا أقول له عش هناك و وطن الإسلام معك. و عش به و فيه و ادع إليه سواك بسلوكك و حسن إسلامك و تصرفك.

س: أخيراً، كيف ترى موقع فقه الأقليات على خريطة الفقه العام؟

ج: هو عبارة عن تطوير لفقه النوازل الذي عرفه فقهاء جيداً منذ القدم، إلا أن مفهوم النوازل يفرض حالة من الشعور بالدونية و السلبية و التوقيت. و الغرض ليس فصل المسلمين في الغرب عن باقي المسلمين كما يتهمه الداعين للأخذ به في تلك البيئات ، و إن وجود المسلمين في الغرب يعد ميزة يجب أن يستفيدوا منها و لا أريد أن يتعاملوا مع الأمر على أنه استثناء أو ضرورة—فأنا موجود هناك باختيارى.. كيف يكون وجودي ضرورة؟—لكنه أمر يقبله الإسلام من حيث الأساس لاختلاف الظروف و بالتالي الأحكام. و الإسلام أولاً و آخرأ دين و خطاب عالمي، مهمتنا أن نعيش و أن نحمله للأرض كلها و كل من يعيش فيها و عليها، و الله أعلم.

Translation of interviews (adapted)

First: an excerpt from an interview with Sheikh Yusuf al-Qaradâwî

Introduction by the Sheikh:

That a man lives by Islam, this is the most important thing, to live as a Muslim. And how can this be fulfilled? If Islam was established through its provisions and morals. The main goal of the *Fiqh* of minorities is to know what Islam is, and what its special provisions are, and this Muslim living in a non-Muslim society has provisions that differ from the provisions of those living within the Islamic countries. Muslim in this country must know what is required from him and what is he is released from. This matter is a priority that comes before inviting: to live as a Muslim either in yourself or with those around you

Q: in your book about jurisprudence of minorities you pointed out in the section concerned with its objectives to the need to consolidate the presence of Muslims in non-Muslim country... For example, you pointed out to the importance of supporting the Muslims there, and the introducing or acquainting with Islam and positive participation. What is your comment?

A: the most important thing, that comes before the rest of the goals, is to help minority Muslim groups to live in Islam, "Beware of God where ever you are" Islam will be with you wherever you are, " And to Allah belong the east and the west, so wherever you turn yourselves or your faces there is the Face of Allah"

Q: there are two types of criticism of the jurisprudence of minorities ... the first one think that there is distortion and manipulation with God law, and the other believes that the jurisprudence of minorities did not really bring anything new, and that all its provisions are already in the literature of the original jurisprudence. What is your response to these points?

A: the primary role of the jurisprudence of minorities is an organizational role where provisions and assets are arranged so that it's easier for the jurisprudent to extract provisions from it. Jurisprudence of minorities is a part of general *Fiqh* , using the same evidence but inflicted by its own reality. Muslim there has special circumstances, and we must think if it require to mitigate or ease it for him or to overburden him ,and usually we ease it for him as he lives in a country

that doesn't help him with Islam. We should know and use these buffers or mitigations till he get strong enough and can then be able to invite.

Inviting is an important issue and must consider the circumstances and temperaments of the people whom we invite. Muslim there must know the provisions and circumstances which mitigate on one side, and force him to do something on the other side it to another, and is the required demands differ from those of Muslim majority societies.

Q: you have divide judgment in jurisprudence of minorities into constructive and selective judgment ... What is the difference?

A: The issue has its controls where we choose the view which we see it as the most right one ... So we don't take any opinion, but the strongest opinion according to evidences, whether textual like Qur'an and Sunna or others kinds of evidence. Because sometimes people are in need of this opinion that resolves problems...

Q: I will try to be more specific. For example, in the case of a wife who became a Muslim and her husband still adopt another religion ... This opinion based on the selective case ... is the opinion here is especial for minorities or for all?

A: It's for all ... And we take the view which allows the man to remain with his wife according to Omar and Ali. The application is admissible in any State, even in Egypt if the wife chose to remain with her husband.

Q: so, what is the difference between minority jurisprudence and General jurisprudence if the same provisions are applied?

A: there are provisions for all, and others concerned with minorities. If they are to be applied first in the case of minorities because they need this opinion more than the others but not necessarily all provisions for minorities.

Q: does the example of the banks usury apply to buying homes on the jurisprudence of minorities only and may not be applied in the Commons (issues)?

A: Yes

Q: this for the selective ... What about the constructive jurisprudence? There is a criticism based on an interview Ward on the Messenger (peace be upon him): "God Almighty had

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imposed prescriptions, so don't lose destroy them and forbid others, so don't violate them and assigned certain limits, so don't transgress them and didn't mention so other things, not forgetting them, so do not search for (contemplate) them", what your kind reply?

A: this hadeeth does not stand against the judgment. So judgment has many considerable evidences, it must be from known sources such as the Qur'an and the Sunnah and the ancient legislation and common interests, custom, measurement, and unanimity. (So the matters follow a systematic track and not haphazard and judgment is not linked to time as it is valid for anytime that Muslims can conclude from it what works for Muslims. And at all times there were many people striving for judgments. There is a message from Imam Al-suyooti titled " response (refutation) to those who succumb and denied that judgment is a must (imposition) at all times" the Imam called for practicing judgment, demonstrated by the conduct of the ancient.

Q: the principle of "interest and that necessity permit prohibitions. There are some people who indicate that this is the other side of a coin, the other side of it says that the end justifies the means. What is your response?

A: what we have in Islam is that, the goal does not justify the means. There are forbidden things and there are necessary things. Necessities permit prohibitions. Scientists have divided it into three things: (1) essential as eating and drinking and sleeping; (2) things needed, can live without but laboriously; (3): improvement things i.e. luxurious.

Requirements referred to in the first item are the ones that permit prohibitions for example: a person in need of a critical surgery, it may take usury but with controls, you should appreciate the necessity of it if he needs a hundred pounds he should only take this hundred pounds and so on. The verse says " But if one is forced by necessity, without willful disobedience, nor transgressing due limits,- then is he guiltless. "The disobedient willingly, forward-looking for lust in this subject, and the transgressor is the one who goes beyond the limits of necessity.

Q: for the dilemma of dual loyalty, loyalty to the nation and loyalty to the State where Muslim lives in... Especially in connection with the performance of military service, particularly if it led to military clashes with Islamic State?

A: this is a special Fatwa (opinion) they give it as an advisory opinion in the course of the war on terrorism after September 11, that there were many Muslims in US Army and if discharged all,

will cause them a big trouble ... I agreed on this special circumstance, provided that they try as far as possible not to start fighting ... It also has its controls (limits).

I've addressed the issue of citizenship and dual loyalty in a book entitled home and citizenship, you can refer to for more details. I remember that the *Dar* (residence) in Islam expresses the modern concept of home; you may conduct according to citizenship and have affiliation with home, beside national and nationalistic brotherhood. And on this basis Muslims can deal with others.

Q: How do you see the impact of the jurisprudence of minorities on the integration of Muslims in non-Muslim societies?

A: we always invite Muslims that they need integration but they don't melt into society; Integration without melting. They live in the society and have their influence but retain their identity and beliefs and rectitude and integrity. Inviting people to integrate does not mean leaving faith but to work together to serve the community.

Q: Taha Jabir 'Alwânî confirms that the presence of Muslims there is not only permissible but is a must; they must reside and get integrated there. What is your comment?

A: Islamic presence is necessary in the West and must have an impact. Its main objective is to protect Muslims entering in Islam and those coming to them and the country's indigenous Muslims in order to learn Islam properly and helped on it and serve as advocates for Islam. This is the task of the Islamic presence that remained, continued, spread and grow.

Q: what is the status of the jurisprudence of minorities in General jurisprudence map? Is it a branch, a section, or something else?

A: it is the jurisprudence done by a group of Muslims, it resemble for example, *Fiqh* of Muslim women as a matter of classification. It is a chapter concerned with a group of Muslims living outside the Home of Islam. This jurisprudence provides what is related for them to make it easier for scholars to save time and effort while searching in the books and references concerned with provisions and assets... This *Fiqh* contains subjects related only to minorities just like banks interests for housing, and other subjects involving all Muslims but first applied for such minorities e.g. a wife becoming a Muslim.

Second: excerpt from an interview with Taha Jabir al 'Alwânî.

Introduction on different influences on jurists

as a jurisprudent, when I talk about jurisprudence of minorities I may get influenced by many things, but I should not break the rules that make Quran the source establishing every provision, it is the only source of provisions, the Qur'an is the source establishing provisions and revealing them. As for the Sunnah, it follows it, moves in orbit round it like a planet orbiting the sun. it is the same for that who applies a theory. Qur'an gives a theory (a basis), and Sunnah gives us an approach to the application. And both of them are mutually reinforcing sources, inseparable from each other, every established Sunnah has a fixed basis in the Qur'an, and the Glorious Quran verses recited by the Messenger of God after receiving it and teaching them to people to purify and take them into a higher standard, anything else is nothing but a diligent work of scholars, only recommendations Islam is not obliged by any of them, Islam is only committed by the evidences emerging from the Quran and their applications in the Sunnah.

The scholar should reckon only on one bias that "the command is for none but Allah" command is (exclusively) only to God ". Only God alone has the right to legislate...

Q: If so what is your rating of the role of *Ijtihâd*?

A: the role of *Ijtihâd* is to receive; To receive a text with a good understanding of reality (present situation), so as to apply this provision to actual situation using what is suitable for it. So any judgment is based on two pillars: the first is to study the text as a matter of elicitation and inference, second is to understand the reality;. And in our time the jurisprudent formulates the actual problems in the form of questions interrogating the text. And there are rules and controls for interpretation and explanation, as I'm not free to say what I want ... "No warrant have ye for this " ... " But say not - for any false thing that your tongues may put forth." So judgment is a mental and psychological situation—it's not a job-for the whole nation, so as no one in the nation accepts anything that has no proof, something that Allah did not warrant or authorized.

Q: back to the jurisprudence of minorities ... How did the idea start?

A: As far as I know I'm the first one who wrote about this theme, the preceding used to write about jurisprudence of the new (unfamiliar) situations. For me I wrote in it following a certain

philosophy. Being an American citizen subjected to dozens of questions every day and I have met with Muslims from different parts of the world. the purpose, originally, was not how to integrate Muslims minorities with others convert them, since they have been already ready or susceptible to imitation, dependency and melting by virtue of their original environment as they live as imitators for centuries. We are ready to dissolve in any society or culture. We've inherited the idea of (imitation) versus the idea of *Ijtihâd*, which could be classified as creative thinking practiced by a qualified scholar both in language and religion sciences to develop a judgment and reference to it by a text to justify an inference. the Quran urges us to practice *Ijtihâd* on several occasions.

Q: so what are the reasons which led to the founding of the jurisprudence of minorities?

A: when I was in America I noticed the arrival of three waves of migration. These waves have melted completely in American society and become American by Heart and soul. Islam spread in Southeast Asia and other through trade, and we are now in America as professors, students, doctors. and engineers, we are cadres of the society and a few Muslims there are poor and we must use this good social status in a better way. A basic purpose of the jurisprudence of minorities is to prevent the fourth wave from melting, like its predecessors, by giving Muslims both male and female their independent personality through jurisprudence that does not make them live a State of schizophrenia, to have two contradictory personalities: an American citizen and a Muslim person.

The second purpose of the jurisprudence of minorities is to prevent Muslims from conveying manifestations of underdevelopment and deviation to the Muslim minorities' societies in the West, because we want Muslim to convey his best and ignore the worst behavior has to be an advocate of Islam through his righteous behavior... How? Any jurisprudence has its relationship with the general culture, it is one of the founding pillars of that culture.as culture gives inputs to the jurisprudence through its questions, and at the same time following the jurist's answers will turn into behaviors which will turn into culture. This culture moves us whether deliberately or unintentionally. This dialectic relationship between jurisprudence and culture is so intimate, Islamic jurisprudence was set in times when production, distribution and consumption had been subject to industrial societies standards not farming societies ones. When the jurisprudence

scholar conveys this to the industrial environment and he is still subject to the same old scenario, inevitably his advisory opinion will confront or collide with the reality.

For example, in case of the (mortgage), traditional scholars made their judgment that it is forbidden. for me, I see it different from the concept of usury in Quran and its applications in Sunnah. And this takes many types of transactions out of the circle of banned usury; the American economic system assesses the home price, and then calculates its virtual age and tries to make the profit slightly higher than the interest rate in the banks...

Q: does this mean that an advisory opinion that the mortgage is not forbidden is based on the idea that, basically, it's not usury or it's a matter of necessity?

A: No, from the beginning when I study carefully the American system and its philosophy I don't find usury as mentioned in the Qur'an and Sunnah does really exist, because the idea of increasing and decreasing interest in the banks is inflation-linked, for example: if I took a loan of one hundred pounds from you and at that time it was equal to one gram of gold, and now the value of this hundred pound equals half gram of gold, so the aim is to give you back the original value of the money that makes you able to buy a gram of gold. So, the objective of the of banks interest is to maintain the value of your money as it was, and protect it from the effects of inflation and not profit on loan as a price for the time man do not own and he is not allowed to buy and sell it or to trade in it.

Q: but how could a provision like this be different from that in Muslim countries?

A: I don't see it different but jurists here in the east doesn't understand this language and still believes in terms such as Dâr al-harb, so if I circulate this he will oppose me and may accuse me that I'm issuing fatwa against or in contravention with the opinion of the whole community or unanimous view.

Western economic cycle and its association with the idea of inflation makes, for example, this pen today price one pound, but tomorrow it will be one pound and half ... What do I do in order to be fair to you? I increase the purchasing power of your pound so keeping it in line with market prices and the economic cycle.

Q: so why did you say that allowance only in case of necessity?

A: I don't see that it's only in case of necessity. The Western economy cycle differs from those in Islamic countries. Here in the East there is no such economic cycle as it is not an advanced economic system. And when a scholar comes to this environment and wants to impose this culture to advanced society he, in this behavior, is weakening the Muslim minorities and leading to their impoverishment. My goal is to let them know that bank interest was not the usury of the loan, and that when the bank loaned me money, having an economic cycle, the bank makes money works with time, production, distribution and consumption and does not separate any component from the other component.

Q: Can that mean that *Fiqh* of minorities bypasses the idea of exceptions to come up with verdicts that suites the west with its ideologies and culture?

A: Yes, for example when an Iraqi asks me whether he should vote in the elections under an American occupation I would tell him not to. While if an America Muslim asks whether he should vote in the American elections I would urge him to and I would recommend certain candidates who showed cooperation with the Muslim community.

Q: what about the role of the *Umma* and its message? And how do you associate it to *Fiqh* of minorities?

A: I always tell Muslims to become a model for other; this is called the silent Da'wa. Egypt for example was not conquered by war but by the City of Fustat that was built by Muslims to be a model and was the biggest reason for a lot of conversion.

Q: How does *Fiqh* of minorities establish for a Muslim presence in non-Muslim communities?

A: reality implies that the real target for Muslims residing in the west goes back to political, economic and social reasons; it's rarely the purpose of Da'wa that pushes them. *Fiqh* of minorities tries to deal with this fact and make the utmost use out of it. We found Muslims over there so we try to work on preserving their identity and protect them from total assimilation.

Q: Does that mean that the main reason behind *Fiqh* of Minorities is to preserve religion or faith?

A: preserving the identity is the main reason and religion is one of its elements. We want to establish the Muslim presence in the west so that it is more than just a temporary presence, but

a presence that forms part of the community because the Islamic message is universal. Islam depends on three main pillars: Unitarianism, *Umma* and Da'wa.

Q: we discussed the issue of mortgage and how it responds to the western context and its economic system, what about the case of Islam al-Zawja? And is it a case limited to the west only or an issue that can be applied anywhere even in Muslim countries?

A: Islam came to protect families not to push them to collapse. If we applied traditional *Fiqh* to this case, the west would view Islam as a destructor of the family. Thus Islam has to deal with this issue with sensitivity. While this case can be applied on the majority as well, it was originally modeled for the minorities in non-Muslim countries.

Q: what are the special characteristics in *Fiqh* of minorities that makes it more qualified in dealing with minorities' issues?

A: *Fiqh* of minorities observes the Western community and its system. Integration doesn't mean to remove all the borders whatsoever and become an identical copy of a stereotypical American. We care about a positive integration where a Muslims lives with his faith and identity in his western society.

Q: Finally, where do you see *Fiqh* of minority in the map of *Fiqh* in its general sense?

A: *Fiqh* of minorities is a modernization to *Fiqh* al-Nawazil that was known in traditional *Fiqh*. However, the term "Nawazil" implies a temporary situation and leaves an inferior and a negative impression. The main objective is to avoid separation between Muslims and the rest of the Muslim community in the rest of the world. Rather we are trying to take advantage of the Muslim presence in the west. Islam at the end of the day is a Universal religion and message our mission is to deliver it to the whole world. God Knows best.