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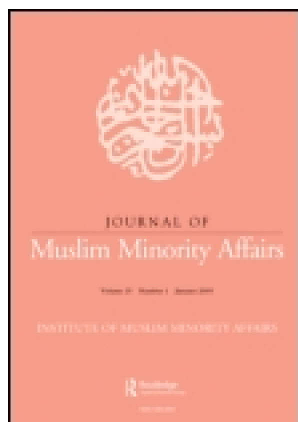

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The Legal Methodology of "*Fiqh al-Aqalliyyat*" and its Critics: An Analytical Study

TAUSEEF AHMAD PARRAY

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Abstract

"*Fiqh al-Aqalliyyat*"—the jurisprudence of Muslim minorities—is a legal doctrine introduced in the 1990s by Taha Jabir Al-Alwani and Yusuf Al-Qaradawi which asserts that Muslim minorities, especially those residing in the West, deserve a special new legal discipline to address their unique religious needs that differ from those of Muslims residing in Islamic countries. Developed as a means of assisting Muslim minorities in the West, it deals with problems Muslims face in countries where they are minorities and focuses more on devising exceptional rulings pertaining to their unique circumstances. In light of this, this paper attempts to assess this doctrine—its purpose and its methodology—with emphasis on the legal Islamic tools of *ijtihad* and *maslaha* whilst also shedding light on its limitations. It argues that while attempts are being made by scholars and writers to make it a successful tool for jurisprudence, it will take a few more years to assess whether "*fiqh al-aqalliyyat*" is effective in getting more members of Muslim minority societies to follow *shari'ah* such that it becomes a politically uniting force for Muslim communities in non-Muslim societies and most importantly, if it is effective in establishing an Islamic method that supports the peaceful coexistence of Muslims and non-Muslims within non-Muslim societies.

Introduction

Fiqh al-Aqalliyyat—the jurisprudence of Muslim minorities—is a legal doctrine asserting that Muslim minorities, especially those residing in the West, deserve a special new legal discipline to address their unique religious needs that differ from those of Muslims residing in Islamic countries. It was introduced in the 1990s by two prominent Muslim religious figures, Shaykh Dr. Taha Jabir al-Alwani of Virginia, and Shaykh Dr. Yusuf al-Qaradawi of Qatar. Developed as a means of assisting Muslim minorities in the West in practicing their faith, it deals with the problems Muslims face in countries where they are minorities (including India) and focuses more on special and exceptional rulings for those special circumstances. At the time, there were members of the American Muslim community who hesitated participating in American politics because it meant alliance with non-Muslims, division of the Muslim community and submission to a non-Islamic system of secular politics as well as giving up the hope of the United States becoming part of *dar al-Islam*. They consequently asked the Council for a fatwa. In his fatwa Al-Alwani dismissed these objections and argued that the American secular system was faith-neutral, not irreligious.[1] Al-Alwani coined the term fiqh al-aqalliyyat and used it for the first time in 1994 when the Fiqh Council of North America,

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under his presidency, issued a fatwa (legal opinion) allowing American Muslims to vote in American elections:

While Muslim minorities have lived under non-Islamic rule throughout Islamic history,[2] the immigration of Muslims to Europe and America over the last hundred years—particularly during the second half of the twentieth century—has created an unprecedented situation. Today, large Muslim communities live under non-Islamic Western rule and culture. Ahmad Rawi, chairman of the Union of Islamic Organizations in Europe (UIOE), estimates that approximately 15.84 million Muslims live in Western Europe and comprise 4.43% of its total population. In France alone, there are 5.5 million Muslims in a population of almost 56.6 million; in Germany, 3.2 million out of 79.1 million.[3] The Council on American Islamic Relations (CAIR) puts the number of Muslims in the United States at 6–7 million.[4] Other researchers, however, make more modest claims. According to Yvonne Yazbeck Haddad and Jane I. Smith, there are approximately 10 million Muslims in Western Europe—3 million in France, 2 million in Britain, and 2.5 million in Germany. As for North America, they estimate that there are about 6 million Muslims in the United States and a half million in Canada.[5] M. Khalid Masud—who regards *fiqh al-aqalliyat* a fast growing new subject that will impact the future of Muslims living in the West quite significantly—asserts that presently, more than one-third of the Muslim population of the world is living as minorities in non-Muslim countries. According to him, the situation has "posed challenges not only for the host countries but also for Muslims".[6] As per 2007 reports, according to the German Central Institute Islam Archive, the total number of Muslims in Europe in 2007 was about 53 million (7.2% of the total population), excluding Turkey. The total number of Muslims in the European Union in 2007 was about 16 million (3.2% of the total population).[7]

Ideally, Muslims live according to *shari'ah* (Islamic law) as embodied in fiqh (jurisprudence). Sheikh Muhammad Al-Mukhtar Al-Shinqiti, born in 1966 in the Islamic Republic of Mauritania and, Director of the Islamic Center of South Plains, Lubbock, Texas, states the following:

> Jurisprudence [*fiqh*] is different from *Shari'ah* [literally, 'way' or 'path'] in that sense: *Shari'ah* refers to the revealed religion as a whole, while jurisprudence refers to how the rules of Shari'ah are to be applied from the points of view of the jurists.[8]

Fiqh al-aqalliyyat, which deals with the daily problems that arise for millions of Muslim individuals living in the West, tries to reconcile conflicting practices with the culture and values of the host societies from within the framework of Islamic jurisprudence. Its goal is to reshape and reinterpret Islamic concepts such as "*dar al-islam*" (land of Islam) whilst not appearing to be a religious reform movement that breaches orthodoxy.

The Founders of *fiqh al-aqalliyyat*

The theory of *fiqh al-aqalliyyat* is most easily clarified by shedding light on its founders and muftis (jurists who issue *fatwas*) and their reasons for endorsing a special jurisprudence system for Muslim minorities, as well as their religious views regarding non-Muslim territory and their methodological tools. *Fiqh al-aqalliyyat* is based on two fundamental premises: the territorial principle of "*alamiyyat al-Islam*" (Islam as a global religion) and the juristic principle of "*maqasid al-shari'ah*" (ruling according to the intentions of Islamic law). The former provides the rationale for permitting the

very existence of permanent Muslim communities in non-Islamic lands whilst the latter enables the jurists of *fiqh al-aqalliyyat* to adapt the law to the necessities of Muslim communities in the West, which in practice means allowing legal leniencies so that these communities are able to develop.

The first writings on *fiqh al-aqalliyyat* were published in 2001. Since then powerful institutions and popular websites have developed which advocate and promote this doctrine. It was Dr. Taha Jabir al-Alwani who originally advanced the idea of *fiqh al-aqalliyyat*, which translates as "juristic interpretations specific to minorities" or simply as "the jurisprudence of Muslim minorities". Some source material may be found in the classical texts, but the concept of it as a distinct discipline does not exist. As such it is more suitable to speak of it as a "work in progress". Its main focus in Al-Alwani's view is to understand the situation of those Muslims who wish to live a *shari'ah*-oriented life under non-*shari'ah* systems of governance and to delineate those particular issues which pertain to their continuing existence in those lands. It is thus a "new name for an old area of jurisprudence" which used to be called "*fiqh al-nawazil*"—or "jurisprudence of momentous events"—a new name that signified a paradigm shift in some ways yet not a "blameworthy innovation". Al-Alwani serves as president of the Graduate School of Islamic and Social Sciences in Ashburn, Virginia (now part of the Cordoba University), and is the founder and former president of the Fiqh Council of North America. In 2001 he published in Arabic the booklet *Nazarat Ta'asisiyya fi Fiqh al-Aqalliyyat* ("Foundational Views in *Fiqh al-Aqalliyya*") on Islamonline.net in which he describes the basic outlines of his theory.[9]

Born in 1935 in Iraq, Al-Alwani studied at Al-Azhar University in Cairo, where he received his doctorate in 1973 in legal methodology or *usul al-fiqh* (Principles of Muslim jurisprudence). From 1963 to 1969, Al-Alwani served as a chaplain and lecturer in the field of Islamic Studies at the Iraqi Military Academy and from 1975 to 1985, he taught Islamic law at Al-Imam Muhammad Bin Sa'ud University in Riyadh, Saudi Arabia. He subsequently moved to the United States around 1985, where he engaged in a variety of intellectual activities. This remarkable transition was indicative of Al-Alwani's open attitude toward the West, which is reflected in his call for American Muslims to "take the best of American society". In 1988 he founded the *Fiqh* Council of North America, and in 1997 he participated in the founding of the European Council for Fatwa and Research, headed by the well-known Sheikh Yousuf al-Qaradawi from Qatar. These two councils, along with the Islamic *Fiqh* Academy in India, are connected to the Organization of Islamic Cooperation (OIC) through the International *Fiqh* Academy based in Jeddah. He is a member of the International *Fiqh* Council in Jeddah, which acts as a central authority for *fiqh* councils around the world, and is a subordinate to the Organization of the Islamic Cooperation. For many years Al-Alwani served as president of the Virginia-based International Institute of Islamic Thought, which now has branches all over the Muslim world.[10]

The co-founder of *fiqh al-aqalliyyat* is Shaykh Yusuf al-Qaradawi, a remarkable personality in the Islamic world who has written more than 100 books on a variety of Islamic subjects and is considered a leading figure of the international Muslim Brotherhood movement. In his *fatwas* he expresses support for violent acts against Israel and against Americans in Iraq. Al-Qaradawi made world-news headlines with his controversial visit to London where he announced the establishment of the International Council of Muslim Clerics ("ulema").[11]

Born on September 9, 1926, Al-Qaradawi is an Egyptian Islamic theologian. Al-Qaradawi studied at Al-Azhar University, where he received his doctorate in 1973 which he

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completed on zakat and its impact in solving social problems. He has also published more than 80 books, including *The Lawful and the Prohibited in Islam; Islam: The Future Civilization; Time in the life of the Muslim; Priorities of the Islamic Movement in the Coming Phas; Towards a Sound Awakening; The Status of Women in Islam;* and *Islamic Awakening: Between Rejection and Extremism*. In 1961 he moved to Qatar, where he developed and led various Islamic educational institutions. In 1997 Al-Qaradawi founded the European Council for Fatwa and Research (ECFR) for the purpose of providing Europe's Muslim minorities with Islamic legal guidance. In *Fiqh al-Aqalliyyat al-Muslima—Hayat al-Muslimin Wasat al-Mujtama'at al-Ukhra* ("Fiqh of Muslim Minorities—Life of Muslims in the Midst of Other Societies"), al-Qaradawi outlines the general legal rules for *fiqh al-aqalliyyat* and provides examples of its application. As a media personality, he regularly participates in a television show on the al-Jazeera network called "*Al-Shari'ah wal-Hayat*" ("Islamic Law and Life"). In addition to his own website, www.qaradawi.net, he takes part in running the important and popular website www.Islamonline.net.[12]

The Purposes

In *Nazarat Ta'asisiyya*, Al-Alwani describes the new, special circumstances of the large Muslim immigrant communities in many non-Muslim countries that justify the creation of a special system of jurisprudence. The need for such a special system arises from various dilemmas facing Muslims abroad that do not confront their co-religionists who live in Muslim countries. On a superficial level, there are problems concerning permitted food (*halal*) and eating with non-Muslims, the dates of holidays (the position of the moon), and marriage to non-Muslim women.[13] And on a deeper level, Muslims must deal with such questions as Islamic identity, the message of the Muslim in his new place of residence, his link to the Muslim *Ummah*—"nation" founded by the Prophet Muhammad (peace be upon him) in Medina and the future of Islam beyond its current borders.[14]

In these latter areas the dilemmas are of greater consequence. They include the need to override the Islamic obligation to emigrate (perform *hijra*) from any place ruled by "infidels" to a country ruled by Islam, the issue of community organization and enforcement of *shari'ah* on the Muslim communities, allegiance to the country of adoption (or birth if the Muslim was born there), requesting citizenship, exercising the right to vote and the considerations that should guide a Muslim in voting, and the conflict of interests when the adopted country is involved in a war with a Muslim country. A special branch of *fiqh* is therefore necessary to facilitate the relationship between the Muslim minority and the non-Muslim majority. It is also necessary to unify the Muslim communities and enhance their particular identities *vis-à-vis* the majority. In *Nazarat Ta'asisiyya* Al-Alwani devotes a chapter to what he calls "the great questions in this *fiqh*". Among these questions are: how should the *mufti* of a minority answer the following two questions: who are we and what do we want? What is the political regime under which the minority is living? Is it democratic, monarchic or military? What is the size of the minority for whom a jurisprudential study is desired in various respects, namely, the number of people in this minority cluster and their cultural, socio-economic and political status. What role do institutes, organizations or leaders play in the life of the minority? Do they shed more light on and emphasize their cultural identity? How will it be possible to develop joint activities between the majority and the minority? What levels should be taken into account in these aspects?[15]

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These questions clearly demonstrate that Al-Alwani views *fiqh al-aqalliyyat* not only as a simple system for answering personal questions in jurisprudence, but also as a framework for political and social interaction between the majority and the minority populations in non-Muslim lands, as well as within the Muslim minority itself.

Al-Qaradawi, meanwhile, emphasizes the fact that Muslims bear a message to non-Muslim nations and are obliged by their faith to spread Islam through *da'wah*, an important Islamic concept. Its original meaning is "call" or invitation to faith. In the Quran, it is applied to the call to the dead to rise from their tombs on the Day of Judgment. *Da'wah* also means an invitation to a meal with guests. In the religious sense da'wah is the invitation that God and the Prophets extend to the people to believe in Islam, the one "true" religion. Islam is the religion of all of the prophets and each prophet has his da'wah. The mission of Mohammed was to repeat the call and the invitation to the people of Mecca. According to the laws of *qital* (holy war), those who had not received the da'wah had to be invited to embrace Islam before the Muslims began the war.[16]

Al-Qaradawi links the growth of Muslim communities around the world with the general process of Islamic awakening that, according to his analysis, takes place in seven stages: (i) the stage of feeling identity, (ii) of arousal, (iii) of movement, (iv) of gathering, (v) of building, (vi) of settlement, and lastly (vii) of interaction. Al-Qaradawi claims that the seventh stage of this process—namely, the stage of interaction with non-Muslim society—has been reached. He contends that Muslim minorities are now standing on solid ground, proud of themselves, able to express their identity, protect their existence, and present their cultural message to humanity.[17]

The Legal Methodology of *fiqh al-aqalliyyat*

A Study of Ijtihad *and* Maslaha

The legal methodology of *shari'ah* consists of four sources of Islamic law: (1) the Qur'an, (2) *hadith/sunnah* or the Prophetic tradition (both constitute as the basic and primary sources of Islamic law, history and culture), (3) analogical deduction (*qiyas*), derived on the basis of the Qur' an and *sunnah*, and (4) consensus (*ijma')* of the jurists of each of the four schools of law (*madhahib*), which substantiates new rulings. In addition, the European Council for Fatwa and Research (ECFR) recognizes "other sources of legislation which are not entirely agreed upon", mainly public interest not based on text (*maslaha mursala*) and custom (*'urf*).[18]

Wael B. Hallaq in the last chapter of his book, "*A History of Islamic Legal Theories*" outlines the developments in Islamic legal methodology throughout the twentieth century and divides those occupying the middle ground into two main camps: religious utilitarian's and religious liberals. The goal of both groups is to reform legal theory in a manner that successfully synthesizes the basic religious values of Islam with substantive law able to address the needs of a modern changing society. Religious liberals differ from the utilitarianism in that they insist on creating a new methodology rather than merely adding juristic devices.[19]

Fiqh al-aqalliyyat is squarely in the utilitarian camp and the tradition of the *salafiyya*[20] movement of the Egyptian jurists Muhammad Abduh (d. 1905) and Rashid Rida (d. 1935). Rather than leaving the traditional legal methodology based on four sources, the ECFR added new devices, such as public interest as a source of law. Hallaq discusses, for example, the legal theory of the Egyptian ulitarian jurist Abd al-Wahhab Khallaf (d. 1956), who stressed that a sunnah applicable to an issue in the

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time of revelation is not binding on succeeding generations if it does not serve the public interest. Hallaq also cites Hasan Turabi of Sudan who argues that if reasoning based on texts produces extreme hardship, the public interest must be consulted.[21] The crucial question is, to what extent these newer secondary legal sources, such as public interest, prevail in *fiqh al-aqalliyyat* over the four traditional ones. Examining four of the legal tools and sources used by *fiqh al-aqalliyyat*—ijtihad, *maslaha* (public interest), *taysir* (making *fiqh* easy), and *'urf* (custom)—can shed light on the matter. An outline of each of these tools is provided, with emphasis on the tools of *Ijtihad* and *Maslaha*.

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Ijtihad

Ijtihad is an Arabic word that generally denotes the utmost effort, physical or mental, expended on a particular activity, and in technical legal connotation, denotes the thorough exertion of the jurists' mental faculty in finding a solution for a case of law. In Islamic thought, it is a legal concept that refers to an acceptable level of intellectual independence *vis-à-vis* religious rulings and to the right of a learned scholar to make rulings, not only on the basis of precedents, but also on his own understanding of the texts. Ijtihad is a technical term of Islamic law that describes the process of making a legal decision by independent interpretation of the legal sources, the Qur'an and the Sunnah. The opposite of *ijtihad* is *taqlid*, meaning "imitation". The word derives from the three-letter Arabic verbal root of *j-h-d* (*jahada*, "struggle"). *Ijtihad* is a method of legal reasoning that does not rely on the traditional schools of jurisprudence (*madhabs*).[22] According to Joseph Schacht, the right to exercise *ijtihad*—literally "effort" or "diligence"—was restricted after the tenth century (fourth century AH) and scholars are thus expected to rule on the basis of the other tools. This, according to him, resulted in the "closing of the gate of ijtihad". Hallaq, on the other hand, contends that the "gates of ijtihad" were never closed. Shaykh Aal Salaam on the other hand, in the answer to the question "Is it correct to declare that the gate of ijtihad has been closed?" asserts that the assumption that the school of *ijtihad* is no longer valid is incorrect. Rather this expression is not an "*ilmee*" expression and some of them even say that the gate of ijtihad was closed in the fourth Islamic century AH, some say in the fifth century AH. We say:

> do you not see?! Where is the gate of *ijtihaad* so that we can see it and uncover it and find out whether it is actually closed or not? Is there anything called 'the gate of *ijtihaad*'? No! There is however something called: 'the conditions of *ijtihaad*'… Ijtihaad does not have a 'gate' so whoever says 'the gate of *ijtihaad* is closed' or 'open' is mistaken.[23]

In the words of Wael Hallaq, what led to the perception that the gate of ijtihad had been closed was that:

> "By the beginning of the tenth century, the Sunni legal schools (madhhabs) of Islam had reached a level of development where all essential questions on matters of positive law had been addressed. The detailed elaboration of the judicial system by this time represented a legal stability…. This stability meant the continuity and the persistence of the legal tradition, where society accepted the broad lines of the law laid down by the early masters…
>
> This fact gave rise to the perception, prevalent among many Western scholars

> and modern Sunni Muslims alike, that the so-called 'gate of ijtihad' was closed at the beginning of the tenth century".[24]

Hallaq contends that there exists no evidence of such a closure either in the tenth century or thereafter, and there certainly was no consensus on it. To the contrary, evidence shows that the practice of ijtihad continued throughout the centuries, although on a smaller scale than before because of the stability the legal system has attained.[25]

In the words of Joseph Schacht:

> "…hence a consensus gradually established itself to the effect that from that time onwards no one could be deemed to have the necessary qualifications for independent reasoning in religious law, and that all future activity would have to be confined to the explanation, application, and, at the most, interpretation of the doctrine as it had been laid down once and for all".[26]

This theory has been put in question recently by Wael Hallaq, who writes that there was also always a minority that claimed that the closing of the door is wrong, and a properly qualified scholar must have the right to perform *ijtihad*, at all times, not only up until the four schools of law were established.[27]

From the beginning of the seventeenth century, many reformers—like Shah Wali Allah al-Dehlawi (d. 1762), Ibn Muammar (d. 1810), Muhammad Ibn Ali al-Shawkani (d. 1832), Muhammad Ibn Ali al-Sanusi (d. 1859), etc.—argued for the need to renew *ijtihad*. Their emphasis on the centrality of ijtihad amounted to a criticism on *taqlid*, which they deemed a heretical religious innovation when practiced by learned jurists. Concomitantly, during the nineteenth and early twentieth centuries, the reformist religious movements gained momentum against the backdrop of the massive introduction of European codes in place of shari'ah. Thus, in recent years Al-Alwani advocated the use of *ijtihad*, especially in cases where modern Western knowledge had to have been taken into consideration. Al-Alwani calls for the "Islamization of knowledge"; he wants to "Islamisize" such scientific fields as economics and medicine by finding links between modern science and the Qur'an, as well as the other traditional sources.

A reference to *ijtihad* appeared on Islamonline.net, for instance, when a group of muftis replied to a question about artificial insemination. Dr. Muzammil Siddiqi, former president of the Islamic Society of North America (ISNA), stated:

> Indeed, artificial insemination is one of the new issues on which Muslim scholars have recently done some *ijtihad* in the light of some basic principles and values of the Quran and *Sunna*. Artificial insemination for conceptual purpose is generally needed in the situation when the husband is not able to deposit his semen inside his wife's genital tract. This procedure is allowed in Islam as long as it is between legally married couples during the life of the husband. The jurists have emphasized that under the *sharia*, a wife is not allowed to receive the semen of her ex-husband after divorce or after his death.[28]

Al-Alwani's pronouncement on stocks and bonds is another example of ijtihad. He prohibits Muslims from dealing in bonds because he views bonds as a means of profiting from the forbidden practice of usury. He condones the buying and selling of stocks, however, because he considers it to be constructive business. Al-Alwani bases this ruling on the Qura'nic verse (2: 275)[29] —that reads: "Those who eat *riba*' (usury) will not stand (on the Day of Resurrection) except like the standing of a person beaten by *shaitan* (Satan) leading him to insanity. That is because they say: "Trading is only like

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riba' (usury)", whereas Allah has permitted trading and forbidden riba' (usury). So whosoever receives an admonition from his Lord and stops eating *riba'* (usury) shall not be punished for the past; his case is for Allah (to judge); but whoever returns [to *riba'* (usury), such are the dwellers of the Fire—they will abide therein". On that note, Al-Alwani states:

> Irreligious economists maintain that restricting interest could destroy the economy. The Quran, in a stand against this threat, claims that even when the devil threatens to impoverish a Muslim who does not charge interest, he is promised Allah's [future] blessing. Allah's promise has been confirmed empirically if one considers that investing in the stock [of product companies] is much more lucrative than purchasing bearer bonds [where the profit is from interest]. For example, according to data [provided by] Ibbotson Associates, a dollar invested in bearer bonds in 1926 is worth $33.73 today [1997]. In contrast a dollar invested in the New York stock market in 1926 is worth $1370.95 today.[30]

Al-Shinqiti also relied on *ijtihad* when asked if Muslims could hold governmental positions in non-Muslim countries. He based his answer on Qura'nic verse (12: 55) in which Yusuf (Joseph) asks the king of Egypt: "Set me over the store-houses of the land; I will indeed guard them with full knowledge (as a minister of finance in Egypt)". Al-Shinqiti compares Yusuf's working for the king of Egypt to the current situation of Muslims in the West in order to allow them to take governmental jobs. Tariq Ramadan makes the same analogy.[31] As noted by Wikipedia, Muslims living in the West are subject to secular laws of the state rather than Islamic law, and in this context "*ijtihad* becomes mainly a theoretical and ideological exercise without any legal force".[32]

Maslaha *(Public Interest)*

Maslaha—an important concept used to justify legal leniency in matters concerning Muslim minorities—generally denotes "welfare" and is used by the jurists to mean "general good" or "public interest". *Maslaha* ("public interest"), a concept in traditional Islamic Law, is invoked to prohibit or permit something on the basis of whether or not it serves the public's benefit or welfare. The concept is related to that of *Istislah*. While the meaning of maslaha is "public interest", the meaning of *istislah* is "to seek the best public interest". Public interest is regarded in *shari'ah* as a basis of law. According to necessity and particular circumstance, it consists of prohibiting or permitting a thing on the basis of whether or not it serves a "useful purpose" or maslaha. It can be defined as the establishment of legal principles recommended by reason of being advantageous.[33]

The jurists of different schools have used different Arabic words/terms to describe this phenomenon. Imam Malik calls it *al-maslaha al-mursala*, the public benefit/welfare; the Hanafis refer to it as *istihsan*, meaning equitable preference to find a just solution. The Hanbali scholars, Ibn Qudayma as well as the Maliki jurist Ibn Rushd also have occasionally used the term *istihsan*; Imam Ahmad ibn Hanbal calls it *istislah*, meaning seeking the best solution for the general interest of the Muslim community. Shafi's and the school of Imam Shafi, does not recognize *istislah* as a source. Nevertheless, they have employed *istidlal*—the process of seeking guidance, basis, and proof from the sources through deduction, though the dictionary meaning is merely "argumentation"—to achieve similar results by avoiding merely the application of strict *qiyas*.

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When a jurist applies this concept despite the lack of a textual basis for his decision, it is called *maslaha mursala*. In this case, the concept of public interest prevails over the four sources of Muslim legal methodology (*usul al-fiqh*). The classical scholar Abu Hamid al-Ghazali (d. 505/1111)—in whose writings maslaha appeared as a mature concept—stated that, in a wider context, *maslaha* represents the ultimate purpose of the *shari'ah* which is to maintain religion, life, offspring, reason and property. Anything which furthers their aims, he adds, is *maslaha*, and anything which runs contrary to them is *mafsada* ["injury", the antonym of *maslaha*]". Considering istihsan and istislah as imaginary (i.e. subjective) legal methods, he confirms the use of qiyas as a positive method of legal reasoning on the grounds that the achievement of *maslaha* is a necessity (*fi rutbat al-darurat*) and develops the doctrine of necessity (*darura*) as a means by which to realize the ultimate purpose of the *shari'ah*. Al-Ghazali divides maslaha into three categories: *al-darurat* (necessities), *alhajiyyat* (needs), and *al-tahsinat* (improvements). The first category of *darurat*, moreover, independently constitutes a basis for legal decision without the use of textual reference by means of *qiyas*, on the grounds that the maslaha of that description is the ultimate purpose of *shari'ah*. Khadduri subsequently argues that by al-Ghazali's time, *maslaha* had become a definite concept of law on the basis of which jurists could make legal decision. *Maslaha* was used in one sense by the Andalusian lawyer Abu Ishaq al-Shatibi (d. 790/1388), who focused on the motives behind the Islamic Law. Regarding questions related to God, *'ibadat*, humans should look to the Qur'an or the Sunnah for answers, but regarding the relationship between humans, *mu'amalat*, humans should look for the best public solution. Since societies change, al-Shatibi thought that the *mu'amalat* part of the Islamic Law also needed to change.[34]

Historically,[35] the first important case that used the idea of public interest as a basis for a legal decision took place at the time of the Caliph 'Umar (d. 644/12). He decreed that southern Iraq should become state land and that a land tax should be imposed, rather than leaving it as private property for the warriors. He argued that putting the land under state control would benefit the believers. This principle—though ably defended by some of its adherents, like Maliki jurist al-Shatibi and others—found no great supporters in an age in which ijtihad was discouraged and *taqlid* prevailed. However, in the modern age, the concept of maslaha has become the subject of an increasing interest among jurists who have sought legal reforms in order to meet the needs of the modern conditions of Islamic society. *Maslaha* has also been used by several Muslim reformers in recent centuries. Al-Wahhab (d. 1792) used maslaha in a few cases. The concept is more known to Islamic modernists. Among them, Muhammad Abduh is especially recognized for using the concept of maslaha as the basis for reconciling modern cultural values with the traditional moral code of Islamic law (shari'ah) in the late nineteenth century. Yet Rashid Rida (d. 1935) might be regarded as the most effective protagonist of the use of maslaha as a source for legal and political reform. In his treatise *al-Khilafa, aw al-imama al-uzma* ("The Caliphate or the Supreme Authority", Cairo: 1341), Rida tried to re-interpret the *shari'ah* on the basis of maslaha and *darura* as the expression of the public interest, whereas Al-Alwani openly calls for the elevation of *maslaha* in *fiqh*. In the introduction to *Maqasid al-Shari'ah*, the Shiite Sheikh 'Abd al-Jabbar al-Rifa'i refers to maslaha as an essential component in any legal deliberation and emphasizes that it should not be considered only as an additional tool to be used when all else fails:

> It has become common among the jurists that legal judgments are subject to interests of injuries [*mafsada*, the opposite of *maslaha*]. There cannot be

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> legislation without a foundation which represents its spirit and essence, until they said: the legal judgment revolves around the foundation for approval or disapproval, and where there is a foundation there is a legal judgment, and where the foundation disappears the legal judgment disappears.[36]

In the same introduction, al-Rifa'i offers more evidence of the important role *maslaha* has played in the history of Islamic jurisprudence.

Darura *(Necessity)*

A practical example of a *darura*-based fatwa in *fiqh al-aqalliyyat* may be found in al-Shinqiti's response to a Muslim couple's question about whether to adopt a child. In Islam, Western-style adoption does not exist, as the child continues to be viewed as the offspring of his or her biological father and bears his name. This principle is based on a Qura'nic verse that abolished pre-Islamic adoption (33: 5).[37] In the couple's country of residence, however, the law required that the child be officially registered with the name of the adopting parents. Al-Shinqiti's answer illustrates how "necessity" can at times prevail over a Qura'nic verse:

> As for giving the adopted child your last name, it is not allowed in principle, for the Quran says: "Call them (adopted sons) by (the names of) their fathers: that is more just with Allah" (33: 5). However, it is considered sometimes a case of *darura* (necessity), especially in non-Muslim countries, to give the adopted child your last name in order to avoid many legal complications. Therefore, some contemporary Muslim scholars have permitted giving the adopted child your last name in case of necessity.[38]

Another case in which the term "necessity" appears, deals with the burial of Muslims in a non-Muslim cemetery. Al-Qaradawi was asked, "What is the rule regarding the burial of a dead Muslim in a Christian cemetery when there is no Muslim cemetery, or there is a cemetery for Muslims, but it is far away from the family of the deceased and it is not easy for them to visit their dead as easily as they wish ?" He answered:

> There have been decisions based on Shari'ah rules regarding the case of the death of a Muslim, such as washing, wrapping and praying for him, and then burying him in a Muslim cemetery. Thus, Muslims have their own way of burying and preparing graves, by the manner of laying down [the deceased] and facing the *qiblah* [towards Makkah], and avoiding behaving like the polytheists, like those who live in luxury and the like.
>
> It is known that members of every religion have their cemeteries. Jews have their cemetery, Christians have their cemetery and pagans have their cemeteries. Therefore, it should not be a surprise that the Muslims also have their cemeteries. Every group of Muslims in non-Islamic countries should strive, with inner solidarity, to prepare separate cemeteries for Muslims, and to make an effort to convince those in charge to do so, if they can.
>
> If Muslims cannot maintain their own cemetery, at least they should have a special lot on one side of a Christian cemetery, where they may bury their dead.
>
> If neither [of these solutions] works for the Muslims, and a Muslim dies, they should transfer him to another city which has a Muslim cemetery, if possible, and if not, they should bury him in a Christian cemetery, if they can, in accordance with the rules of necessity.[39]

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Abdul Rehman I. Doi, regarding the *maslaha* and its importance with regard to Muslim minorities argues:

> Muslim minorities in non-Muslim lands will also have resort to juristic principles of *maslahah*, since the ruling power of their land operates a political system based on principles different from those that govern the running of an Islamic state, laid down by the Muslim jurists in such books as *Ahkam al-Sultaniyah* and many others.[40]

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Making *fiqh* Easy, following Custom and Changing Rulings

Besides *ijtihad, maslaha*, and *darura*, the three more concepts mainly related to the legal methodology of *fiqh al-aqaliyyat* are: *taysir al-fiqh* (making *fiqh* easy), *'urf* (custom), and changes in rulings according to time and place. In the next few pages, therefore, a brief outline/introduction of these concepts is also given.

*taysir al-fiqh (*Facilitating *Fiqh)*[41]

The concept of *taysir al-fiqh* (making *fiqh* easy)—a pivotal element in *fiqh al-aqalliyyat*—has been discussed by Al-Qaradawi at length in his work *taysir al-fiqh li-lmuslim al mu'asir fi daw' al-qur'an wal-sunna* ("Making *Fiqh* Easy for Contemporary Muslims in the light of Quran and Sunnah"). Divided into three main parts—"towards easy contemporary *fiqh*," "the methodology of easy *fiqh*", and "fiqh of knowledge"—the opening section, subdivided into two main chapters entitled "Making *fiqh* More Easily Understood" and "Making *fiqh* Easy in Practice and Implementation", describes and analyzes easy *fiqh*. The first chapter explains how *fiqh* can be made more comprehensible to Muslims who are burdened with daily tasks and, in the age of computers, flooded with information. Al-Qaradawi stresses his commitment to "Greater *fiqh*"—the view that *fiqh* encompasses all fields of life, as can be found in the ideology of the Muslim Brotherhood, and that the spirit of fiqh requires more than mere allegiance to precedents established in previous generations. The second chapter of *taysir al-fiqh* focuses on the rules of jurisprudence in different fields in a manner designed to enable Muslims to observe their religion more easily. Al-Qaradawi stresses that easy *fiqh* aspires neither to create a new Shari'ah nor to permit that which is forbidden. He quotes two sayings from the Prophet, however, that support giving *rukhsa* (concessions) for leniency based on the fact that not all Muslims are on the same religious level: "Allah would rather that concession be given on His behalf and hates to be disobeyed," and "Truly, Allah desires that His concessions be carried out [just] as He desires His injunctions to be observed". When confronted with a choice between strictness and leniency, al-Qaradawi calls for the latter and quotes a saying attributed to 'Aisha, the wife of the Prophet: "Allah's messenger never had to choose between two things without choosing the more lenient way if no transgression would take place". Al-Qaradawi points out, furthermore, that the jurisprudence of the generation of the Prophet's companions tended toward leniency rather than toward the strictness characteristic of the succeeding generations.

Al-Qaradawi supports leniency for members of Muslim minorities in non-Muslim lands because he views such groups, unlike Muslims living in Muslim countries, as being in a condition of weakness. He compares their situation to that of a sick person as opposed to a healthy one, or a traveler as opposed to permanent resident. The poor

should be treated more leniently than the rich, the needy more leniently than the non-needy and the handicapped more leniently than the able-bodied.

A good example of a lenient ruling given in order to help Muslims fit into the general non-Muslim society in which they live and work, can be found in a *fatwa* regarding dietary restrictions. The fatwa responded to this question: "As we are living in North America… sometimes we have to attend the business meetings/trainings and…there are different kinds of edibles that are available such as… cake, bread, pastries etc.… [C]an we eat these bakery products because we don't know the exact ingredients of these products? I have also heard that in some kinds of cakes/pastries they use wine too". Al-Shinqiti answered as follows:

> We don't have to dig deep in searching the exact ingredients of these products that are commonly known to be wine-free. Even if wine is used in production, and it has been chemically transformed, then it should no longer carry the same ruling of the prohibition as it cannot be called wine in that case. But if the wine is added to the flavor without being transformed, then it cannot be eaten.[42]

'urf *(Custom) and Changes in Rulings according to Time and Place*

Gideon Libson—in his book *Jewish and Islamic Law: A Comparative Study of Custom during the Geonic Period*—explores the historical development of the status of custom in Islamic law. He concludes:

> The formal status of custom, rejected in classical literature, re-emerged in post-classical and modern periods. This development reached its peak in the introductory articles of the *Mejelle* [Ottoman legal codex], several of which (arts. 36–45), devoted to custom, were culled from early and late *fiqh* literature; the consolidation of these articles in a single act of legislation reflects the evolution of custom in Islamic law from a material source toward recognition as a formal source.[43]

A classical scholar Ibn Qayyim al-Jawziyya (d. 1350/751), explains what custom is and writes at length about "the changing of the ruling with the changing of custom". He states that "legal rules in any country are made according to the custom of its inhabitants".[44] Following the lead of al-Jawziyya, al-Qaradawi devotes an entire chapter of *taysir al-fiqh* to changing *fiqh* in accordance with time and place. And in his work *fi fiqh al-aqalliyyat*, he draws attention to an example that al-Jawziyya cites of how a change of place resulted in a change of law: "The Prophet had forbidden amputation of arms [as a punishment for theft] during an attack". This divine law was cancelled in order to prevent "the failure or lateness of the Muslims while pursuing the infidels". In this case, a change of place led to the creation of a new and different legal ruling, and it was agreed that punishments could not to be carried out on enemy soil.[45] Al-Qaradawi points out the contemporary parallels to this situation:

> The greatest difference possible as a result of change of location is the difference between *dar al-Islam* and that which is not *dar al-Islam*. This is a deeper and wider difference than the difference between a city and a village, the settled and the nomads and the people of the north and the people of the south. That is so because *dar al-Islam*, with its limitations and deviations, helps the Muslim fulfill the commandments of Islam and to abstain from the prohibitions

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> in Islam, as opposed to being outside of *dar al-Islam* where this advantage does not exist.[46]

The Critics of *fiqh al-aqalliyyat*

Taha Jabir al-Alwani—the first to use the term *fiqh al-aqalliyat*—in his *fatwa* about Muslim participation in American secular politics in 1994 (as mentioned in the introduction above)—argued that the American secular system was faith neutral, not irreligious. He distinguished conditions in countries that have Muslim majorities from those where Muslims are in minority. The two contexts are quite different and entail different obligations:

> While Muslims in Muslim countries are obliged to uphold the Islamic law of their state, Muslim minorities in the United States are not required either by Islamic law or rationality to uphold Islamic symbols of faith in a secular state, except to the extent permissible within that state.[47]

This *fatwa* stirred a controversy among Muslim scholars. For instance, the Syrian Shaykh Saeed Ramadan al-Buti dismissed Alwani's call for the jurisprudence of minorities as a, "plot to divide Islam". Amongst other comments, as quoted by M. Khalid Masud, he stated:

> We were so pleased with the growing numbers of Muslims in the West, that we hoped that their adherence to Islam and their obedience to its codes will thaw the cold resistance of the deviating western civilization in the current of the Islamic civilization. But today the call to the Jurisprudence of Minorities warns us of a calamity contrary to our hopes. We are warned of thawing of the Islamic existence in the current of the deviating Western civilization and this type of jurisprudence guarantees this calamity.[48]

Responding to this criticism, Alwani explains that *fiqh al-aqalliyat* constitutes an autonomous jurisprudence, based on the principle of the relevance of the rule of *shari'ah* to the conditions and circumstances peculiar to a particular community and its place of residence. It requires information about local culture and expertise in social sciences, e.g. sociology, economics, political science, and international relations.

It is not part of the existing *fiqh*, which is a jurisprudence developed as case law. *Fiqh al-aqalliyat* is not a jurisprudence of expediency that looks for concessions. Alwani argues that the categories of *dar al-Islam* and *dar al-harb* are no longer relevant today. The Muslim presence, no matter where, should be considered permanent and dynamic.[49]

However, *fiqh al-aqalliyyat* receives two types of criticism from within the Muslim community. Some reject the entire concept of *fiqh al-aqalliyat*, that Muslims in the West should have a special system of *fiqh*, whilst others condemn specific lenient rulings of institutions that have adopted *fiqh al-aqalliyyat*. Not all members of the ECFR even initially agreed about *fiqh al-aqalliyyat*. Only in January 2004 did *fiqh al-aqalliyyat* become the official policy of the ECFR (resolution 12/5).[50]

Some have also criticized *fiqh al-aqalliyyat* as a means of illegitimately changing rulings to accommodate living in a non-Muslim environment. While the term itself is relatively new, the concept of certain religious rulings changing according to context and environment is not something novel to Islamic jurisprudence, as we have clearly shown. Having a category in *fiqh* that expressly relates to the concerns, questions, needs and difficulties

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that Muslims face as a minority—issues that are often not found in the traditional lands of Islam—should be seen as a specialization, and not a deviation.[51]

Masud, in his article, Islamic law and Muslim minorities, while criticizing and pointing out the shortcomings/challenges confronting it, writes:

> Obviously, advocates of *fiqh al-aqalliyat* have yet to answer some very complex questions. First, the term "minority" is quite problematic. Its semantic vagueness conjures up the concept of a sub-nation in a nation-state framework. Religious minority is even weaker than sub-nation or national minority because it is further divided into other aspects like language and culture. Second, the question of minority is very closely connected with other minority situations, e.g. non-Muslim and Muslim minorities in Muslim countries. Most often they are not perceived in the same fashion. Third, the situation of Muslim minorities in the western countries also differs from the Muslim minorities in non-western countries, e.g. India. It appears that minorities in these different situations have to develop different sets of jurisprudence, to the extent that the term "minority", in final analysis, becomes irrelevant.[52]

For Masud, *fiqh al-aqalliyat*, especially in the United States, has a further semantic connotation of civil rights. It implies "help and special treatment for a community left behind". Instead of absolute equality, it calls for differential equality and protection. This idea has been challenged in the US courts since 1989 and is losing sympathy with jurists. In the wake of the rising Islamophobia, discrimination and harassment of Muslims, and media prejudice, especially after the events of 11 September 2001 (or 9/11), there seems to be no sympathy for another civil rights movement. If the Muslims were forced to take this path, *fiqh al-aqalliyat* would not be there to help them because "it has been so far concerned only with solving problems of (and within) Islamic law. It has still to work out problems with the local laws". There is perhaps a need, argues Masud, for Muslim jurisprudence of citizenship in the framework of pluralism, in order to respond to the current political and legal challenges.[53]

A question asked (dated 8 Dec. 2003) on www.Islamonline.net neatly summarizes the debate between the proponents and critics of the concept:

> There is a scholarly difference nowadays as to *fiqh al-aqalliyyat* or the *fiqh* of Muslim minorities. Some scholars regard it as an innovation that manipulates Allah's religion, and some others consider it a lawful necessity. What is your point of view on that issue with special reference to the concept of *fiqh al-aqalliyyat* itself? What is the nature of the scholarly difference in that regard?[54]

The response by a group of muftis, including Al-Shinqiti, al-Alwani, Nur Abdullah, was the following: in countries where Muslims represent the minority and are not under the authority of Islamic governments, these populations face particular problems that must be addressed in order for their lives to run smoothly. The issues they face are totally unlike those that are in the Muslim countries and *Shari'ah* is key to providing solutions to these problems and in meeting new needs. *Fiqh al-aqalliyyat* neither transforms the basic principles of the religion nor changes the pillars of Islam. Those who live as members of a minority, for example, must continue to pray.

Al-Alwani states: '*Fiqh* of minorities is not to be regarded (only) as dealing with minor juristic issues. It is, rather, to be handled within the comprehensive outlook of jurisprudence that tackles all aspects of religion in the sense which the Prophet (pbuh) referred to when he (pbuh) said: "If Allah wants to do good to a person, He makes him comprehend

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the religion". Hence, it is important to consider the *fiqh* of minorities as a "considerable branch of jurisprudence in general in order to put it in its suitable framework, and in order to deal with the issues peculiar to the Muslims living in non-Muslim countries that have not been given certain rulings in sharìah". He adds that the *fiqh* of minorities is concerned with the legal rulings regarding the issues that concern the Muslim communities living in non-Muslim societies; and that whoever deals with *fiqh al-aqalliyyat* must be knowledgeable in the fields of sociology, economics, politics and international relations.[55]

The most serious criticism, however, is that *fiqh al-aqalliyyat* is "an innovation [*bidàh*] that manipulates Allah's religion". The word innovation refers to the Islamic term *bida'a*, which is usually considered bad or blameworthy.[56] One of the respondents, al-Shinqiti—who argues that there is nothing wrong in having jurisprudence that deals with the issues and conditions peculiar to the Muslim minorities in non-Muslim countries, and that we should take into account also that jurisprudence always takes into consideration the difference in the elements of time and place when it comes to prescribing rulings—dismissed this charge by downplaying the innovative nature of *fiqh al-aqalliyyat*:

> Thus, the *fiqh* of Muslim minorities is not an innovation. The earlier books of jurisprudence have tackled many rulings peculiar to the Muslims who live in countries that do not adopt Islam. It is only the term given to such rulings, i. e. '*fiqh* of Muslim minorities' that is innovated, and there is nothing wrong in changing terms.[57]

Given that al-Shinqiti allowed Western Muslim parents to change the name of their adopted son on the grounds of necessity, however, this claim is surely somewhat misleading. He is aware that *fiqh al-aqalliyyat* is not merely a title or name, but a theory that introduces new jurisprudential tools. Another major criticism not raised by the question that prompted the fatwa but implicit in the response is that *fiqh al-aqalliyyat* undermines the allegiance of Muslims in the West to the *ummah* because it obligates them to obey the laws of non-Muslims. This duty potentially subjects them to conflicts caused by dual allegiance. Shaykh Muhammad Nur Abdullah, President of the Islamic Society of North America (ISNA) and Member of the *Fiqh* Council of North America, refers to this criticism indirectly when he discusses the acceptability of voting:

> *Fiqh al-aqalliyyat* has arisen in request of Muslims' state of affairs as a minority in a non-Muslim country and not as a majority living in a Muslim country. … For example, voting for political parties in Muslim countries is completely different from non-Muslim countries, because in the former case, Muslims have Islamic parties as an option, whereas in the latter, they do not exist. In this case, some Muslims might get confused [and think] that this can go under the category of taking non-Muslims as patrons in a way that is not sanctioned by Islam.[58]

Under *fiqh al-aqalliyyat*, however, this matter may be interpreted in a different sense; namely, that Muslims should vote for the party which best serves their issues.

Conclusion

From the above discussion, it is safe to conclude that *fiqh al-aqalliyyat* was developed as a means of assisting Muslim minorities in the West, and deals with problems Muslims face in countries where they are minorities and concentrates more on special and exceptional

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rulings for those special circumstances by using some legal tools such as *ijtihad*, *maslaha*, *darura*, and *'urf*, with more emphasis on the first two. *Fiqh al-aqalliyyat*, on its own is a particular concept and idea. The very name "*aqalliyat*" refers to minorities, signifying a view propounded by the majority. The proponents of *fiqh al-aqalliyyat* define it as a non-violent movement that seeks to expand Islamic influence in the ways of *dawah;* they claim that it has a strong political dimension. It calls on Muslim minorities to interact with the non-Muslim majority. It allows Muslims to vote in elections, urges them to obey the law of the state, and strives to promote the economic security and social solidarity of Muslim minorities.[59] The main purpose of this doctrine is to provide jurists and leaders of Muslim minority communities with tools for giving rulings to their communities. The topics of legislation are not meant to include only matters of religious practice, due to the viewing of *shari'ah* as inclusive of all aspects of life. Muslim minority jurisprudence focuses especially on questions of the nature of political identity, such as participating in elections and serving in the army.[60]

Al-Alwani's intention in creating *fiqh al-aqalliyyat* was not only to found a system of jurisprudence, but also to give Muslim minorities a tool for increasing their internal social bonds and enhancing their political influence within the general public. The founders of *fiqh al-aqalliyyat* wish to establish institutions that become the exclusive legal authorities for Muslim minorities and thus unite the Muslim community politically. The European Council of Fatwa and Research (ECFR) of Al-Qaradawi is especially intent on achieving this goal.[61]

One of the main reasons for making *fiqh al-aqalliyyat* a somewhat lenient doctrine is to attract more Muslims within minority communities to follow Islamic Shari'ah, but it will take a few more years to assess whether *fiqh al-aqalliyyat* is successful in getting more members of the Muslim minorities to follow *shari'ah*, in becoming a politically uniting force for the Muslim minorities, and—most important—in establishing an Islamic method that supports the peaceful coexistence of Muslims and non-Muslims within non-Muslim societies.

Nevertheless, it cannot be also denied that attempts are being made by scholars and writers to make it successful. For example, in 2006 Muhammad Yasin Mazhar Siddiqui wrote "*The Prophet Muhammad—A Role Model for Muslim Minorities*".[62] In this book, the Makkan phase of the Prophet's life has been studied from the "vantage-point" of a minority, bringing into sharp relief the character of Islam in a minority context. It also seeks to draw lessons from these experiences for the Muslims minorities of the world. Upon studying the Prophet's life in this perspective, a role model can be gained for the Muslim minorities scattered in all parts of the world. This work—based on original Arabic sources—guides Muslims extensively on how to co-exist peacefully with non-Muslims. It examines insightfully how Islam was practiced in Makkah, how Muslims led their lives as migrants in Abyssinia and how Muslim minorities were treated by the Islamic State of Madinah. Siddiqui argues that this Makkan period should be the basis of fiqh for the Muslim minorities (*fiqh al-'aqliyyat*) and that Muslim minorities must see the role of the Prophet and the early Muslims in that period as a model for them to emulate.

It would be appropriate to conclude, with the following words of al-Alwani, in which he argues about the use of *fiqh al-aqalliyat* in the broad sense:

> We cannot include *Fiqh al-Aqaliyyat* in the meaning of *Fiqh* as it is now commonly understood: namely, applied branches of *Fiqh* (*Fiqh al-Furu'*). It is more appropriate to include it under Fiqh in the general sense, which includes

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all aspects of law in thought and practice…. This means [in this sense] that *Fiqh al-Aqaliyyat* is a *Fiqh* of quality, which facilitates the link between *Sharia* law and the conditions of the group and the place where it lives. Therefore, this is the *Fiqh* of a group confined to special conditions that is permitted to do what others are not permitted. Its discourse requires mastering some disciplines of social studies, especially sociology, economics, political science and international relations.[63]

NOTES

1. See, Muhammad Khalid Masud, 'Islamic Law and Muslim Minorities', *The International Institute for the Study of Islam in the Modern World (ISIM)* www.isim.nl, vol. 11, 2002, p. 17, http://www.isim.nl/files/newsl_11.pdf. Also (re)published/reprinted in *Dossier 27:* Islamic law and Muslim minorities, (an occasional publication of *Women Living under Muslim Law* (WLUML) www.wluml.org, London, UK, December 2005, pp. 61-64, http://www.wluml.org/node/503 (as accessed on 10 February, 2011). Throughout this paper references are given from the former (*ISIM*) version.
2. See, Khaled Abou El Fadl, 'Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the *Eleventh/Seventeenth* Centuries', in *Islamic Law and Society*, vol.1, no. 2, 1994, pp. 141-87; Basheer M. Nafi, 'Fatwa and War: On the Allegiance of the American Muslim Soldiers in the Aftermath of September 11', in *Islamic Law and Society*, vol. 11, no. 1, 2004, pp. 83-90.
3. Ahmad al-Rawi, 'Islam, Muslims and Islamic Activity in Europe: Reality, Obstacles and Hopes', http://www.islamonline.net/arabic/daawa/2003/12/ARTICLE05A.SHTML, as cited by Shammai Fisherman, '*Fiqh al-Aqalliyyat*: A Legal Theory for Muslim Minorities', Research Monographs on the Muslim World, Series No 1, Paper No 2, October 2006, pp. 1-18, *Center on Islam, Democracy, and the Future of the Muslim World*, Hudson Institute, Washington, DC. www.hudson.org. [hereafter cited as Fisherman, '*Fiqh al-Aqalliyyat*'].
4. Yvonne Yazbeck Haddad and Jane I. Smith, "Introduction", in Yvonne Yazbeck Haddad and Jane Idelman-Smith eds. *Muslim Minorities in the West Visible and Invisible*, Walnut Creek, California: Atamira Press, 2002, p. vi.
5. *Ibid.* See also Al-Rawi, "Islam, Muslims and Islamic Activity in Europe", *op. cit*.
6. Muhammad Khalid Masud, 'Fiqh Al-Aqalliyat: Toward Another Civil Rights Movement?', retrieved from http://www.maruf.org/?p=101 (as accessed on 12 February, 2011).
7. *Ibid.*
8. Retrieved from http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503547680 (as accessed on 12 February, 2011). *Shari'ah* (literally, "way" or "path"), is derived from the root '*Sharàa'* is the sacred law of Islam, derived from two primary sources of Islamic law: the divine revelations set forth in the Qur'an, and the example set by the Islamic Prophet Muhammad in the Sunnah. Fiqh jurisprudence interprets and extends the application of *Shari'ah* to questions not directly addressed in the primary sources by including secondary sources. These secondary sources usually include the consensus of the religious scholars embodied in *ijma*, and analogy from the Qur'an and Sunnah through *qiyas*. For details, see 'Shari'a', N. Cadler, in *Encyclopedia of Islam*, 2nd ed. [*EI*[2]] 12 vols. Leiden: E. J. Brill, 1960-2002, vol. ix, pp. 321-326; 'Law [Sharìah]: Legal Thought and Jurisprudence', N. Cadler, in John L. Esposito, ed. *Oxford Encyclopedia of Modern Islamic World* [*OEMIW*], 4 vols. New York: Oxford University Press, 1995, vol. II, pp. 450, 456.
9. Alexander Caeiro, "The European Council for Fatwa and Research," Paper presented at the Fourth Mediterranean Social and Political Research Meeting, Florence & Montecatini Terme, 19-23 March 2003, organized by the *Mediterranean Programme of the Robert Schuman Centre for Advanced Studies* at the European University institute, p.8. See also, H. A. Hellyer, *Muslims of Europe: The 'other' Europeans*, Edinburgh: Edinburgh University Press, 2009, p. 82; Fisherman, "*Fiqh al-Aqalliyyat*", *op. cit.;* Shaikh Nuh Ha Mim Keller, 'Which of the four orthodox *madhhabs* has the most developed *fiqh* for Muslims living as minorities?', 1995; http://www.masud.co.uk/ISLAM/nuh/fiqh.htm (as accessed on 12 February, 2011). Nuh Ha Mim Keller (b. 1954, in north-western United States) is American Muslim translator and specialist in Islamic Law. Al-Alwanis book has been retrieved from http://www.islamonline.net/arabic/contemporary/politic/2001/article1.shtml. This manuscript

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was also published as a chapter of his book *Maqasid al-Shari'ah*, Beirut: Dar al-Hadi, 2001. An English translation was published under the title *Towards a Fiqh for Minorities: Some Basic Reflections*, Occasional Paper Series, 10, International Institute for Islamic Thought (IIIT), London-Washington, 2003. Throughout this paper, this book is mentioned, in the text as well as in the references, in its abbreviated title as *Nazarat Ta'asisiyya*.

10. Biographical information is taken from different (internet) sources like: www.usc.edu/dept/MSA/law/alalwani_usulalFiqh/taha.html; www.weforum.org/site/knowledgenavigator.nsf/Content/Alalwani%20Taha%20Jabir, 21 July, 2002; See also Shammai Fisherman, 'Some Notes on Arabic Terminology as a Link Between Tariq Ramadan and Sheikh Dr. Taha Jabir al-Alwani, Founder of the Doctrine of "Muslim Minority Jurisprudence" (*Fiqh al-Aqaliyyat al-Muslimah*)', in *PRISM*, www.e-prism.org, p. 2, retrieved from www.e-prism.org/images/tariqfinal291203.doc (as accessed on 12 February, 2011).
11. The Middle East Media Research Institute (MEMRI), *Special Dispatch Series*—No. 794, 6 October 6 2004, http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP79404; MEMRI, *Special Report*—No. 30, 8 July 2004, http://memri.org/bin/articles.cgi?Page=archives&Area=sr&ID=SR3004; http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=1221&version=1&template_id=190&pare (as accessed on 12 February, 2011)
12. Biographical information is taken from his own website, http://www.qaradawi.net (as accessed on 12 February, 2011)
13. Al-Alwani, *Nazarat Ta'asisiyya*, Chapter 2, *op. cit.*
14. Ummah is an Arabic word meaning "community" or "nation". It is commonly used to mean either the collective nation of states or in the context of Islam, the word Ummah is used to mean the "Community of the Believers" (*ummat al-mu'minin*), and thus the whole Muslim world. For details, see 'Umma', F. M. Denny, *EI*[2], *op.cit.*, vol. x, pp. 859-63; 'Ummah', Ahmad S. Dallal, in *OEMIW*, *op.cit.*, vol. iv, pp. 267-270.
15. Al-Alwani, *Nazarat Ta'asisiyya*, Chapter 4, *op. cit.*
16. *Da'wah* or *Dawah* (usually the preaching of Islam) literally means "issuing a summons" or "making an invitation", being the active participle of a verb meaning variously "to summon" or "to invite". For details, see 'Da'wa', M. Canard, in *EI*[2], *op.cit.*, vol. ii, pp. 168-170; 'Dàwah', Paul E. Walker, in *OEMIW*, *op.cit.*, vol. I, pp. 343-346.
17. Yusuf al-Qaradawi, *Fi Fiqh al-Aqalliyyat al-Muslima—Hayat al-Muslimin Wasat al-Muitama'at al-Ukhra*, Cairo: Dar al-Suruq, 2001, p. 23.
18. http://www.e-cfr.org/eng/article.php?sid=47, as quoted in Fisherman, "*Fiqh al-Aqalliyyat*", *op. cit.* p. 7.
19. Wael Bahjat Hallaq, *A History of Islamic Legal Theories*, Cambridge: Cambridge University Press, 1997, pp. 213, 214, 231.
20. Salafiyya is a neo-orthodox brand of Islamic reformism, originating in the late nineteenth century and centered in Egypt; its aim was to regenerate Islam by returning to the tradition of represented by the "pious forefathers—*al-salaf alsalih*". For details, see 'Salafiyya', P. Shinar, *EI*[2], vol. viii, pp. 900-906; 'Islah', Aziz Ahmad, *EI*[2], *op. cit.*, vol. iv, pp. 141-171; and 'Salafiyya' in *OEMIW*, *op. cit.*, vol. III, pp. 463-469.
21. Hallaq, *A History of Islamic Legal Theories*, *op.cit.*, pp. 223, 229.
22. See 'Ijtihad', Hallaq, *op.cit.*, pp. 178-181.
23. Shaykh Mashhoor Hasan Aal Salaam, 'Is the Gate of Ijtihad Closed?', 2008, pp. 1-3, http://www.salafimanhaj.com/pdf/SalafiManhaj_DoorOfIjtihad.pdf (as accessed on 13 February, 2011); see also, Joseph Schacht, *An Introduction to Islamic Law*, Oxford: Clarendon Press, 1964, pp. 69-75; Wael B. Hallaq, "Was the Gate of Ijtihad Closed?", *International Journal of Middle East Studies* (*IJMES)*,vol. 16, 1984, pp. 3-41 [hereafter cited as Hallaq, *IJMES*].
24. Hallaq, *Ibid;* see also Ijtihad', Hallaq, *op. cit.* p.180.
25. *Ibid.*
26. Schacht, *An Introduction to Islamic Law, op. cit.*
27. See, Ijtihad', Hallaq, *op. cit.*, p. 180; Hallaq, *IJMES, op. cit.*
28. Retrieved from http://www.islamonline.net/fatwa/english/FatwaDisplay.asp?hFatwaID=76500, as quoted in Fisherman, "*Fiqh al-Aqalliyyat*", *op. cit.*, p. 8.
29. All the translations of the Qurànic verses are taken from Dr. Taqi ud din Hilali and Dr Muhammad Muhsin Khan, *Translations of the Meanings of the Noble Qur'an*, 15th Revised Ed., Ridayd: Darussalam Publishers and Distributors, 1996 (Summarized in One Volume).

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30. Taha Jabir Al-Alwani, “Ijtihad in the Regulation and Correction of Capital Markets”, *AAISS*, vol.14, no. 3, 1997, p. 54.
31. Retrieved from http://www.islamonline.net/livefatwa/english/Browse.asp?hGuestID=tK8q9Z; see also Tariq Ramadan, *Western Muslims and the Future of Islam*. New York: Oxford University Press, 2004, pp. 164, 247.
32. See ‘Ijtihad’, Hallaq, *op. cit.*, pp.178-181.
33. ‘Maslaha’, Madjid Khadduri, *EI*[2], *op. cit.*, vol. vi, pp. 738-739; ‘Maslahah’, Abdul Rehman I. Doi, in *OEMIW*, *op. cit.*, vol. III, pp. 63-65, esp. p. 63.
34. Al-Ghazali, *al-Mustafa*, Cairo: 1356 A.H., pp. 139-40; Abu Ishaq al-Shatibi, *al-Ìtisam*, Cairo: 1331 AH, as quoted in ‘Maslaha’, Khadduri, *op. cit.*, pp.738-739.
35. This whole passage has been taken from ‘Maslaha’, Khadduri, *ibid.*, p. 739.
36. Vide Fisherman, “*Fiqh al-Aqalliyyat*”, *op. cit.*, p. 9.
37. Schacht, *An Introduction to Islamic Law, op. cit.*, pp. 14 n1, 166.
38. http://www.islamonline.net/livefatwa/english/browse.asp?hGuestID=QIu5P2; as cited in Fisherman, “*Fiqh al-Aqalliyyat*”, *op. cit.*, p. 9
39. Al-Qaradawi, *Fi Fiqh al-Aqalliyyat*, *op. cit.*, p. 83.
40. Doi, ‘Maslahah’, *op. cit.*, p. 64.
41. This section is mainly based on two sources: the first part is taken from Al-Qaradawi, *Taysir al-Fiqh li-Muslim al-Mu’asir fi Daw’ al-Qur’an wal-Sunna*, Beirut: Muasasat al-Risala, 2000, esp. pp. 8, 17-18, 20-21, 28-29; and the *fatwa* of al-Shinqiti is taken from http://www.islamonline.net/livefatwa/english/Browse.asp?hGuestID=d3FM3e
42. http://www.islamonline.net/livefatwa/english/Browse.asp?hGuestID=d3FM3e, *vide*, Fisherman, “*Fiqh al-Aqalliyyat*”, *op. cit.*, p. 11.
43. Gideon Libson, *Jewish and Islamic Law: A Comparative Study of Custom During the Geonic Period*, Cambridge: Harvard University Press, 2003, p. 79. This book is Gideon Libson’s—Professor of Muslim Law, Jewish Law, and Comparative Jewish-Islamic Law in the Faculty of Law at the Hebrew University in Jerusalem and holder of the Frieda and Solomon B. Rosenzweig Chair in Law—highly original work on custom is the first attempt to present a comprehensive comparative study of Jewish-Islamic law on a particular topic during the early Middle Ages. His in-depth study of Islamic law—its sources, legal schools, and extensive legal literature—together with his expertise in the wide range of geonic and rabbinic literature enable him to determine the influence of Muslim practice on geonic custom. He shows conclusively how custom in both systems of law served as a conduit for the absorption of changes, thus helping to bridge the gap between the authoritative legal systems and the practical realities of the environment.
44. Ibn Qayyim al-Jawziyya, *I’lam al-Muwaqqi’in ‘An Rabb al-’Alamin*, Mecca: n.p., n.d., vol. 3, pp. 64-65.
45. *Ibid.*, p. 8; see also, Al-Qaradawi, *Fi Fiqh al-Aqalliyyat*, *op. cit.*, p. 51.
46. Al-Qaradawi, *ibid.*, p. 52.
47. See reference/note 1 above.
48. Al-Qaradawi, *Fiqh of Muslim Minorities*, Vol. I-II, 2002–3, www.bouti.com/ulamaa/bouti/bouti_monthly15.htm, June 2001, vide Masud, “Islamic Law and Muslim Minorities”, *op. cit.*
49. Vide Masud, *Ibid.*
50. Vide Fisherman, “*Fiqh al-Aqalliyyat*”, *op. cit.*, p. 12
51. For more details, see *Sinàatul Fatwa wa Fiqh al-Aqalliyat* by Shaykh Abdullah bin Bayyah, Dar al-Minhaj Publications, pp. 163-168, as quoted in Shazia Ahmad “The Top Six Mistakes in Usul” Part 5, January 18, 2011, retrieved from http://www.suhaibwebb.com/islam-studies/the-top-six-mistakes-in-usul-part-5, (accessed on 12 February, 2011).
52. Masud, “Islamic Law and Muslim Minorities” *op. cit.*, p. 17.
53. *Ibid.*
54. Retrieved from http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503547680 (as accessed on 12 February, 2011).
55. *Ibid.*
56. In modern religious discourse the meaning of the term *bidàh* (literally ‘innovation’) can be understood from the saying attributed to Prophet Muhammad (pbuh): ‘any manner or way which someone invents within this religion such that manners r way is not part of this religion is to be rejected’. Cf. ‘Bida’a’, Iftikhar Zaman, in *OEMIW*, *op. cit.* Vol. I, pp. 215-216.
57. Retrieved from http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503547680; also quoted in Hellyer, *Muslims of Europe, op. cit.* p. 82.

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58. *Ibid.*
59. Al-Alwani, *Nazarat Ta'asisiyya*, Chapter 1, *op. cit.*
60. Fisherman, "Some Notes on Arabic Terminology", *op. cit.*, pp.11-12.
61. Caeiro, "The European Council for Fatwa and Research", *op. cit.*, p. 2.
62. Muhammad Yasin Mazhar Siddiqui, *The Prophet Muhammad—A Role Model for Muslim Minorities*, trans. Abdur Raheem Kidwai, Markfield, Leicestershire: The Islamic Foundation, 2006. For further details, see my review of this book in *Journal of Humanity & Islam* (*JHI*), vol.1, no.1, April 2011, pp. 60-63. Available online at: http://www.hgpub.com/index_files/jhi/pdf2011/jhi.2231-7252.2011.0101.6063.6.pdf
63. Retrieved from http://www.islamonline.net/arabic/contemporary/politic/2001/article1.shtml; cited in Fisherman, "Some Notes on Arabic Terminology", *op.cit.*, p. 4.

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