Contemporary Discourse

On Jurisdiction of Islamic Law On The Muslims Living In Western Countries: An Analytical Study

Dissertation Submitted for Fulfilment of Requirements of PhD in Sharīʿah (Islamic Law and Jurisprudence)

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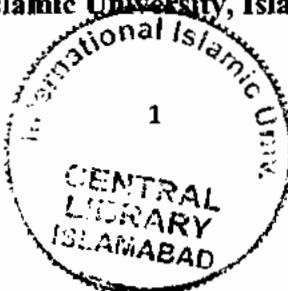
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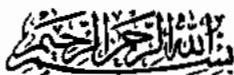
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It is certified that Ms. Tahira Ifraq, student of PhD Shariah (Islamic Law and Jurisprudence), Reg. No.38-FSL/PhDIJ/S13, Faculty of Shariah and Law, International Islamic University, Islamabad has completed her thesis titled **"Contemporary Discourse on Jurisdiction of Islamic Law on the Muslim Living in Western Countries: An Analytical Study"** under my supervision.

During the research work, she remained in touch with me and worked diligently. She carried out her research work under my instructions and supervision. I forwarded her thesis for its submission and evaluation for the award of PhD Shariah (Islamic Law and Jurisprudence) degree from International Islamic University, Islamabad.

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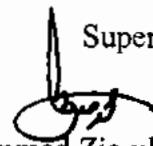
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TITLE OF THESIS:

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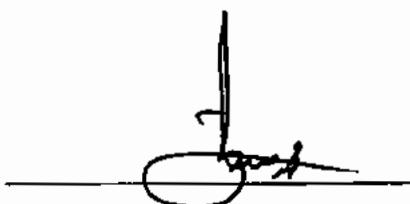
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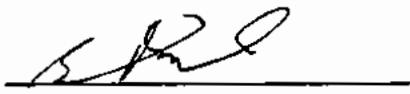
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I, Tahira Ifraq, Reg. No. 38-FSL/Ph.DIJ/S13 hereby declare that this dissertation title "**Contemporary Discourse on Jurisdiction of Islamic Law on the Muslims Living in Western Countries: An Analytical Study**" is my original effort and has never been presented in any other institution for any academic degree.

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Abstract

The religious obligation to follow Islamic law in all situations has generated debate among the scholars of each period of Islam till today regarding the jurisdiction of Islamic Law on the Muslims residing in non-Muslim lands as minorities. Many jurists particularly classical are of the view that a legitimate Islamic life is possible only within an Islamic state. But the contemporary scholars are of the view that the application of Islamic law on the Muslims inhabiting in non-Muslim territories will be possible through the use of legal pluralism and conflicts arising from its application could be dealt through the methods of conflict of laws.

The current debate on the jurisdiction of Islamic law in western countries is focused on issues such as, Muslims' contribution in the political activities and Public sphere, their social integration without compromising on religious identity and prospects of application of Sharī'ah rules and its challenges are demanding fresh answers. The conflict between Muslim family laws and family laws of the migrated land is also in search of new reconciliatory approaches. Moreover, the confusion regarding the balance between religious and citizenship obligations is also needed to be resolved. The research will address these issues and will try to assess whether these issues could be addressed under the classical parameters of Sharī'ah or new parameters are needed to be proposed.

The research design proceeds with the introduction and importance of the issue. It also includes historical background of the issue. It is followed by statement of the problem which also includes the questions that the researcher tried to respond in the research. The aims of the research and its methodology are presented in the third and fourth part of the proposal. The issue under discussion is very vast, therefore, the limitations of the research

are mentioned in the proposal. The detailed literature review is also a part of the proposal. It not only highlights important previous researches on the issue but also points out the gap for which this research is going to be conducted. The outlines of this research are divided into eight chapters and each chapter includes data, discussion, analysis and other details of the issues that are being discussed in it.In the conclusion outcome of the research has been mentioned moreover some recommendations have also been suggested for future discourse. The research is annexed with list of bibliography, list of Quranic verses, list of Hadiths, list of important terminologies and list of cases.

Acknowledgement

Translation, Transliteration and Dates

Transliteration is the conversion of a text from one language to another. In transliteration, each character of the source language is given a specific character in the targeted language. In almost all transliteration policies diacritical marks are used. It is customary to transliterate the works of those languages that do not use the Latin alphabet. These languages include Arabic, Persian, Urdu, Chinese, Hebrew, Japanese, Russian and other living languages as well as ancient languages such as Greek and Sanskrit. There is no universally accepted uniform policy for transliteration. Many universities, libraries, research journals and publishing firms have devised and used their own formulae. Some popular transliteration policies are of American Library Association (ALA), Library of Congress (LC), International Journal of Middle East Studies, Arab Law Quarterly, Encyclopedia of Islam, etc. This thesis focuses on the transliteration policy of Islamic Studies (a research journal), which has been devised by Islamic Research Institute, International Islamic University, Islamabad. Arabic terms are transliterated and italicized except in cases where they have come into general use. In the use of Arabic titles the names of the authors, books and publishers are always transliterated. However, if the authors publish in English language or any other European languages, the author has adopted the spellings commonly used in English (e.g., instead of Ṭāriq Ramaḍān Tariq Ramadan has been used).While using terminologies, the famous style developed by well-known authors is adopted in this thesis (For example dār al-Islām, Sharī'ah, *Uṣūl* ect. are used). Usually translations from Arabic or Urdu sources are of the scholar, if otherwise then it is mentioned in the text. Usually the translation of Holy Qurān by Abdullah Yūsuf

'Ali has been used unless otherwise is mentioned. All dates in this study are given according to the Islamic and Gregorian calendar.

CHAPTER NO. 1

CHAPTER NO. 1

INTRODUCTION TO RESEARCH

The first chapter of thesis is actually the introduction of the research. It starts with the historical background of the research. The statement of the thesis and research problem is stated in the second part of the chapter. The research is an effort to answer certain questions on the Islamic jurisdiction over the Western Muslims. These questions are also laid down in this part of the chapter. Moreover, the objectives of the research are also defined in it. A combination of classical as well as contemporary methods have been used in the thesis. A brief introduction of these methods is in the third part of the introduction. Limitation of research is also stated in this section. A further elaboration of discourse analysis is included in third chapter. Fourth part of the research is about the literature review. It not only highlights relevant literature but also identifies the gap for which this research may contribute.

1-Introduction and Significance of the Research

1.1-Historical Background

Generally Muslim jurists claim that Islamic law regulates actions and conduct of Muslims, irrespective of territorial boundaries. The whole structure of Islamic law was evolved in such a way that Muslims could regulate their lives in this world. The Islamic legal system is based on divine revelation, considered valid, perpetual, irrevocable and binding on all Muslims irrespective of their geographical or territorial locations.[1] The

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[1] N.J. Coulson, *A History of Islamic Law* (UK: Edinburgh University Press, 1964), 75-85.

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Qurān, Sunnah and Ijmā'are considered primary sources while analogy or Qiyās is one of

the secondary sources.[2] These sources were and still are in fact gateways of development

of legal thoughts in Islamic tradition. The great Muslim jurists developed schools of law

or systems of interpretations. The most famous schools of thought are the Hanafī, Mālikī,

Shāfi'ī, Hanbalī and Ja'farī. These jurists have developed their own methodologies of

derivation of legal ruling and helped the legal development. But unfortunately, due to

lack of contemporary ijtihād it is facing stagnation. If we deeply observe the historical

growth of Islamic law, it is quite evident that Sharī'ah laws were broad, flexible and

versatile in its initial stages but by the passage of time due to many reasons they are

presented as restricted, rigid and stagnant.[3]

Regardless of its paramount aim, earthly purpose is to help an individual to live a

legitimate way of life. Along with domestic or internal affairs Islamic law also regulates

the conduct of the Muslims in International discourse. It enjoins its followers to a

constant struggle for the well-being of entire humanity and Islamic piety and charity is

not limited to Muslims only, as Al- Qurān[4] says:

> "O ye who believe! Violate not the sanctity of the Symbols of Allah, or of the
>
> sacred month, or of the animals brought for sacrifice, nor the garlands that mark
>
> out such animals, nor the people resorting to the sacred house, seeking of the
>
> bounty and good pleasure of their Lord. but when ye are Clear of the sacred
>
> precincts and of pilgrim garb, ye may hunt and let not the hatred of some people

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[2]See for details, 'Abd al-'Azīz al-Bukhārī, *Kashf al-Asrār*, Vol.3. 360; Āmidī, *Al-Ihkām fī Usūl al-Ahkām*, Vol.1, 140; al-Sarakhsī, *Kitāb al-uṣūl*, Vol.2, 149-74;Vesey-Fitzgerald, "Nature and Sources of the Sharī'ah," in *Law in the Middle East, Origin and Development* of Islamic law, ed. Majīd Khaddūrī and Herbert J Liebesny (Washington D.C: The Middle East Institute, 1995) 85-97.

[3]Vesey-Fitzgerald, "Nature and Sources of the Sharī'ah," 85-97.

[4]The Quranic translation of Abdullah Yūsuf 'Ali has been used in the thesis.

In (once) shutting you out of the sacred Mosque lead you to transgression (and

hostility on your part)."[5]

1.2-Significance of the Issue

Islamic legal theories have twofold purpose from its inception. They determined the

mechanism and obligations of Islamic government and lead the people for the situations

in which there is no such government. Islamic law recognizes the existence of

independent non-Muslim states having a Muslim minority as their citizens. In this regard

a non-Muslim state is free to make laws for its Muslim citizens. A Muslim state has no

right to interfere on behalf of her co-religionists.[6]

Islamic history has presented various examples of the Muslims living in non-Muslim

territories. But the situation as it is presented today was never before in Islamic history. A

strong occupation of appreciable Muslim majority in western, central and northern

Europe is comparably a new paradox. Millions of Muslims deliberately adopted to be

minorities in Europe. This is a new challenge for Muslims both in the societies where

they live as minority or majority. The classical concept of Islamic territory and Muslim

Ummah constitute many challenges for contemporary Muslims residing in non-Muslim

territories. The migration of Muslims to North America and Europe started during the

colonialization. During 1960s, Muslims used to worship in houses and other

unconventional places arranged by a small community of followers. The traveling Imams

have strong impact on the spiritual nourishment of these migrated Muslims. Initially

these Imams were not settled and used to travel between their homelands and migration

destinations. Increasingly, restrictive immigration laws implemented between 1947 and

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[5]Al- Qurān 5:2.
[6]Muhammad Hamīdullah, *The Muslim Conduct of State* (Lahore: Sheikh Muhammad Ashraf, 1977), 130.

1980 were instrumental in the arrival of migrants from Pakistan, Morocco, Bangladesh, Kenya, Malaysia and other Islamic origins who benefited from family union policies to join their spouses and already settled relatives in Europe, particularly in Britain. The influx of migrations during 1970s and 1980s saw a growing construction of Muslim worship places, cultural centers, and Muslim neighborhood[7] in various parts of Europe and North America.

The effectiveness of Islamic law within the jurisdiction of a Muslim state is beyond any doubt. However, its jurisdiction on the Muslims living in non-Muslim countries as minority is debatable question among classical as well as contemporary scholars. No doubt Muslims are bound to follow Islamic law, wherever they are but to what extent? This is a question that has generated debate among scholars from the early period of Islam till today. Khaled Abou El Fadl has identified that the status of Muslim minorities is challenging due to many historical and doctrinal reasons. Many jurists, particularly classical are of the view that a legitimate Islamic life is possible only within an Islamic state. It means that at one side there is an Islamic territory and on the other side there is non-Muslim territory. He points out that a variety of reactions are available in Muslim legal history to this dichotomy.[8]

The writings of the Muslim jurists on political issues were affected due to changing political and social circumstances. On one hand they theorized ideal rule in accordance with divine guidance and on the other hand they discussed the new realisms that were not fit into the ideal conceptions. This is the reason of differences of their opinions on various

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[7] Philip Lewis, *Islamic Britain* (London: Edinburg University Press, 1994), 52.
[8] Khaled Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," Journal of *Islamic Law and Society*, 1, No. 2 (1994): 141-187.

issues.[9] The differences among scholars of all ages regarding the meaning of Sharī'ah are also reflecting the challenge of conceptualization of Sharī'ah in a complicated situation which sometimes creates misunderstandings. Generally, Sharī'ah applies to legal rulings regarding rituals and communal matters of human life. These rulings regulate the actions of the Muslims on religious matters such as faith, prayer, pilgrimage, fasting and alms-giving etc. It also guides the Muslims in social and financial contracts as well as in penal laws. Muslims' observation of the Sharī'ah ruling regarding prayer, fasting etc., usually does not create any serious problem in non-Muslim societies. However, when the Sharī'ah is understood as regulator of personal status, family, inheritance and punishments, then it creates serious challenges for Muslims and others in the Western societies.

The interaction of Muslims in non-Muslim societies creates many challenges for them in terms of cultures, laws and ethics. It may create barriers between them and their host societies and push them into isolation or it may result into loss of their identity in an extreme situation. The historical view that Muslims stay in West or North America temporarily for work or educational purposes is appeared to be false. Now the Muslims are permanent residents of Europe and USA and they have started defining their identity and status in new exotic societies. The major problems of Muslims in the west do not emerge from their belief or their religious needs. The real cause of problems in new societies is their backwardness in high tech skills and unemployment. The real challenge in front of them is to contribute and assimilate in their new societies while protecting

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[9]BustamiKhir, "Who Applies Islamic Law in Non-Muslim Countries? A Study of the Sunni Principle of the Governance of the Scholars (wilāyah al-'ulmā')," *Journal of Muslim Minority Affairs* 27. No. 1(April 2007).

their spiritual and ethnic identity. They have to be responsible law-abiding citizens to

fulfill their obligation of immigration and have to be good Muslims while observing

Islamic rituals, ethics and values. There are many differences and conflicts among

Muslims which have nothing to do with their faith. The Muslim communities in West are

still Turkish, Arab, Asian or Bosnian. One can easily find many mosques and Islamic

centers where only Muslims of a certain ethnic background usually come for worship.

Another challenge for them is that many of them like to obey Islamic legal rulings and

local legal orders at the same time, that are sometimes inconformity with each other.

For many years Muslim leadership in West is trying to clarify their opinion on the issues

in which they find contradictions in local legal and Islamic religious norms. Some of

them intend to approach theological sources for finding appropriate solutions for such

conflicts. Another issue important to the identity of the Muslims in the West is that many

Muslims are not practicing Muslims but insisting on their Islamic identity. Others are

following Sufi mystic beliefs and many find their survival in fiqh (Islamic

Jurisprudence). Another emerging phenomenon is that many Muslims like to be

identified as European or American Muslims, instead of Muslims of their ancestor's land.

It is crucial for them to follow the Sharī'ah within the legal framework of Western

societies.

This description has pointed out some of the aspects of current debate about these

Muslims of Western communities. This debate is also indicating the new dimensions

which were never before. The history of Islamic Jurisprudence is evident that Muslim

jurists have realized the presence of a variable element in the life and tried to settle it

sometimes through reconstruction approaches. With the expansion of the Islamic territory

many other local cultures and customs became part of Islamic Civilization. This led them

to realize about the variations in rulings to be implemented in different places. This

feature differentiates revealed sources from human sources, the former sources are

eternal, while the latter are contemporary, which may be changed.

2-Statement of the Research Problem and Objectives of Research

2.1- Research/Thesis Statement (Research Problem)

Current debate on the jurisdiction of Islamic law in western countries is affected due to

the contemporary political, social and economic realities. The issues such as Muslims'

contribution in the political activities and Public sphere, their social integration without

compromising on religious identity and prospects of application of Sharī'ah rules and its

challenges are demanding fresh answers. The conflict between Muslim family laws and

family laws of the migrated land is also in search of new reconciliatory approaches.

Moreover, the matter of balance between religious and citizenship obligations also need

to be resolved. The research will address these issues and will try to assess whether these

issues could be addressed under the classical parameters of Sharī'ah or new parameters

need to be proposed.

2.2-Research Questions

The proposed study and the thesis statement revolved around questions such as: What

are the main issues that are discussed in the current discourse on the Jurisdiction of

Sharī'ah law in non-Muslim societies? How this debate is affected due to the

contemporary social, economic and political realities. Would the classical parameters of

'dār-al-Islām' and 'dār al-ḥarb' are still valid? What type of challenges to the Muslim communities in non-Muslim societies are parts of this discourse? How this discourse is gagging relationship of Muslims with their new homeland and their origin of migration? How the contemporary scholars deal with the issue of application of Sharī'ah on the personal matters of Muslims living in non-Muslim societies? Which ways could be used for the regulation of Muslims' relations with their religious fellows and other citizens of their new homeland? Is there any possibility of assimilation of Muslims in their new homelands whose traditions and cultural values are influenced from other religions? How Muslims can keep their Islamic identity in the societies which are religious plural? These and other similar questions are needed to be discussed in this research. Do territories ruled by non-Muslims on principle lie outside the realm of dār al-Islām?

Are they per se part of dār al-ḥarb, or how else can they be classified from an Islamic legal perspective?

Under what conditions is it permissible for Muslims to reside in such territories, and how far does life under non-Muslim rule change their obligations to God?

In other words, are Islamic norms as embodied in the Sharī'ah territorially bound or are they extraterritorial in nature?

Are Muslims living outside Muslim territory thus outside the scope of Sharī'ah, or do they require a specific interpretation of Islamic norms?

2.3-Objectives of the Research

On the basis of the above statement the research is aimed to:

1-Contribute in the efforts of contextualization of Islamic law through the current debate

on the Jurisdiction of Muslims living in non-Muslim countries.

2-Elaborate historical evolution of Muslim communities and their effectiveness in the West.

3-Explore various dimensions of current discourse on the Jurisdiction of Islamic law in western countries.

4- Describe various dimensions of current debate about political contribution of Muslims in western countries.

5- Evaluate the challenges that Muslims are facing for application of religious laws in the personal matters in their new destinations.

6-Asses the implications of classical parameters of 'dār al-Islām' 'dār al-ḥarb' and on the Muslim citizens of western countries.

7-Evaluate the relationship of Muslims with their new homeland and their origin of migration with respect to implementation of Sharī'ah rulings in their collective lives.

8-Identify the ways of regulation of Muslim relations with their religious fellows and other citizens of their new homelands in the Western countries.

9-Explain the possibility of Muslim's social integration while maintaining balance between religious and citizenship obligations in western countries.

10-Study the possibilities and limits of assimilation of Muslims in non-Muslim societies without compromising on their religious and cultural values.

11-Discuss the pluralist role of Islamic law and suggest how conflicts due to the use of Islamic Law in the West can be dealt through the contemporary methods of conflict of laws.

3-The Outline of the Thesis

The thesis contains nine chapters. First chapter 'Introduction of the research' includes historical background, significance of the research, thesis statement, questions of the research, and objectives of the research, methodology, limitation and literature review. The gaps of the literature are also identified. The introduction of the research provides an overview of what the research is about. The second chapter 'Fundamental Concepts of Sharī'ah' is the foundational chapter of research. The fundamental concepts of Sharī'ah and law that have been used in the process of investigation of this study are included in this foundational chapter. The first part of the chapter discusses basic concepts, such as Islamic legal traditions, Western legal traditions, Western thoughts and Islamic legal thoughts. The second part consists upon elements of Sharī'ah which includes conception of Sharī'ah, it's emergence, it's revealed and rational sources. After that the role of reason in evolution of Islamic law has been discussed in detail. Jurists' opinions on reason and revelation and rational methods of investigation that have been used in various discourses related to Sharī'ah law have also been discussed in the chapter. At the end, the chapter describes Fiqh al-Aqalliyyāt which is an emerging branch of Sharī'ah.

Third chapter 'Discourse Analysis, jurisdiction in law and Scholars Involved in the Debate on the role of Sharī'ah in west'of the thesis explains meaning, ways, role and functions of 'discourse analysis.' It also describes the ways in which this study has used discourse analysis. A detailed discussion related to concepts of jurisdiction and its various dimensions are also included in the 3rd chapter. An overview of the scholars who have contributed in the discourse related to the validity of Sharī'ah is discussed in the last section of this thesis. The fourth chapter studies various dimensions of concept of dār and

territoriality among Muslim scholars. It begins with emergence of Islamic state and society, then the classical discussion on the notion of dār al-Islām and dār al-ḥarb are explained. The approaches that have been adopted by contemporary scholars to contextualize the classical debate is also part of this chapter.

The fifth chapter **'Emergence of Muslim Communities in Non-Muslim Countries'** starts with discussion on the concept of *Hijrah* and its contribution in creation of Muslim communities throughout the world. Muslims' interaction with non-Muslim societies in early period of Islam is also discussed in the chapter. It then is followed by a detailed discussion on the Muslim emigrations during colonial period. The matter related to religious life of Western Muslims are also discussed in the last section of the chapter. The sixth chapter **'The Role of Sharī'ah in Family Affairs of the Western Muslims'** explores effectiveness of Islamic law in regulation of the family matters of the Muslims in the West. The chapter proceeds with discussion on the religious liberty in Western legal frameworks. It is followed by the description of Western family laws in the 2nd part of the chapter. The doctrine of conflict of laws in Western jurisprudence is also included in the chapter. The third part discusses doctrine of conflict of laws in Islamic jurisprudence. The concluding part describes the effects of conflict of family laws on Western Muslims. The seventh chapter **"Debate on Legal Pluralism and its value for Muslims in the West"** proceeds with discussion on the basic concepts related to legal pluralism in modern legal thoughts. It consists upon description of pluralism, its importance and challenges to its realization in modern nation states. The mechanism of interaction between various legal systems is also discussed in this part of the chapter. The second portion of the chapter is trying to trace the relationship of legal pluralism and

Islamic jurisprudence. It determines the capacity of Sharī'ah law to interact with other legal systems. The internal legal pluralism of Islamic law is discussed in this part of the study. The possible contribution of Islamic law in Western pluralistic environment is discussed in the third part of the study.

The eighth chapter **"Discourse Analysis of Debate on Assimilations and Integration of Muslims in the Western Societies"** analyses debate, related to assimilation and integration of Western Muslim. The conceptual part of the chapter proceeds with discussion on the conceptions related to assimilation and integration. The importance of multiculturalism as an alternative of integration is also included in the study. The concept of nation state and need of integrations is also part of the section of research. One major discussion of the cahpter is about role of religion in national integrations. In the last section of the chapter dār al-Shahādah is proposed as alternative of integration and assimilation for the Muslims in the West. The outcome of thesis is presented in the last chapter "**Conclusion & Recommendations**".

4-Research Methodology and Limitations

4.1- Methodology of Research in the Thesis

This research examines various writings of classical and contemporary Muslim scholars on the jurisdiction of Islamic Law outside the geographical boundaries of the Islamic State. The theories of Islamic jurisprudence regarding the jurisdiction of Sharī'ah are evolving and diverging frameworks are available on this issue. These theories and frameworks need to be contrasted to assess their appropriateness, strengths and weaknesses. Therefore, a variety of the comparative research methods from classical methodologies of Sharī'ah and contemporary socio-legal methods in combination with

the approaches of discourse analysis are being used to complete various components of

this research. Some important methods that have been used in the research are as under:

1- Since the first component of the research is focused on search of the fundamental

concepts of Sharī'ah and views of Muslim jurists regarding the jurisdiction of Islamic law

on Muslims in non-Muslim societies; therefore the Islamic methods such as Istadlāl

(deduction), Istiqrā' (induction) and Qiyās (Analogy) have been used for interpretation,

explanation, elaboration and derivation of rulings from sacred Islamic texts. The rules

and principles of Sharī'ah and opinions of the Muslim jurists regarding this issue have

been extracted and quoted from Islamic jurisprudence with the use of methods such as

Tanqīh al-manāt (the procedure of filtration of the exact report of the ruling), Takhrīj al-

manāt (the application and extracting of the ruling) and Tahqīq al-manāt (the methods of

verification of facts and identification of the true ruling).

2- To describe and use historical practices of Sharī'ah regarding jurisdiction of Islamic

law Manhaj'Aqalī (Rational Methodology), Manhaj Naqlī (Textual Methodology), and

Manhaj Tajrabī (Experimental Methodology) is used wherever it was deemed necessary.

3- Since this research is related to the Muslims residing in non-Muslim countries and

their contribution in the political, social and family matters therefore, social sciences

methods such as historical methods, descriptive methods, and philosophical methods

have also been applied.

4- The legal aspects of social, economic or political problems that Muslims are facing in

the Western courtiers are dealt through socio-legal methods. Pure legal methods have

also been used to discover, explain, examine, analyze and present in a systematic way the

concepts, doctrines, and theories of assimilation, citizenship and legal obligations.

5- The techniques of quantitative research have been used to determine the nature extent, adequacy or inadequacy of existing laws and to see the need for change, or to see the efficacy of law and to offer solutions to reduce tensions and remove clashes between Muslims and the societies in which they are living. The legal methods are used as instruments of control and reform to suggest changes in the domestic as well as international legislation.

6- The study is generally classified into the discourse analysis, therefore, various methods of discourse analysis are applied in the research. In this regard a detailed discussion about discourse analysis and nature of discourse analysis used in research is separately included. Methods of empirical research have been applied where research required analysis of numerical data.

7- The case study methods have been applied where it was required.

4.2-Limitation of the Research

This contemporary discourse on the jurisdiction of Islamic law has many dimensions and various overlapping discourses in which the contemporary scholars' writings are available. The analysis of all these dimensions and various discourses in one research is not possible. Therefore, as per proposal of the thesis the research would be limited to the issues such as contemporary concepts of jurisdiction and classical descriptions of territoriality under the title of dār, legitimacy of residence of Muslims in non-Muslim rule, political contribution of Muslims in Western countries, their social integration and the application of Sharī'ah laws in their family matters. The term western world is

subjective in nature and does not have confined definition. It most commonly includes part of Europe, North America, Canada Australia and New Zealand.[10] In the same meaning this term is used in this research proposal.

5-Literature Review

The issue of jurisdiction of Islamic law on the Muslims living in non-Muslim societies is not a new phenomenon. It is as old as the Islamic history. Fortunately this issue has been addressed comprehensively by the classical Muslim jurists but it is scattered in different classical books. Muslim scholars such as Hasan al-Basarī, Abū Yūsuf,[11] Muhammad Ibn al-Hasan al-Shaybānī,[12] Al-Awzā'ī,[13] Ibn Qudāmah,[14] Ibn Qayyīm al-Jawziyyah,[15] Ibn Zanjawayhi,[16] Al-Sarakhsī,[17] Jalāl al-Dīn al-Suyūtī,[18] Ibn Hazm[19] have explicitly touched the topic in their treatises.

As far as contemporary literature is concerned, many learned scholars have made attempts to discuss this issue and explored the depth, width and intensity of the issue.

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[10] See for details: William D. D. Cunningham, *An Essay on Western Civilization in Its Economic Aspects*(Cambridge University Historical Series)(Cambridge: Cambridge University Press,1898), 220; Caltron J.H Hayas, *Christianity and Western Civilization* (Palo Alto: Stanford University Press, 1953), 2; Horst Hutter, *Shaping the Future: Nietzsche's New Regime of the Soul And Its Ascetic Practices* (Newyork: University of New York Press, 2004), 111; Fred Reinhard Dallmayr, *Dialogue Among Civilizations, Some Exemplary Voices* (New York: Palgrave Macmillion, 2004).

[11] Abū Yūsuf, *Kitāb al-Kharāj* (Cairo, n.d).

[12] Al-Shaybānī, *Kitāb al-Siyar al-kabīr* (Cairo: 1957).

[13] Abū Yūsuf, *Al-Radd 'alā Siyar al-Awzā'ī* (Cairo: 1938).

[14] Ibn Qudāmah, *Al-Mughnī* (Riyādh: Maktabah Riyādh al-Hadīthah, 1928); *Al-Sharh al-Kabīr* (Beirut: Dār al-Fikr, 1404/1984).

[15] Ibn Qayyīm al-Jawziyyah, *Ahkām ahl al-dhimmah* (Beirut: Maktabah al-'Asriyyah, 2009).

[16] Hamid Ibn Mukhlid Ibn Zanjawayhi, *Kitāb al-Amwāl* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2006).

[17] Al-Sarakhsī, *Al-Mabsūt* (Beirut: Dār al-Ma'rifah, 1398/1978); *Sharh Kitāb al-Siyar al-Kabīr*, Commentary with al-*Shaybānī, Kitāb al-Siyar al-Kabīr* (Cairo: 1916 and 1957).

[18] Al-Suyutī, *Al-Ashbāh wa al-Nazā'ir fī Qawā'id wa Furū' fiqh al-Shāfi'iyyah* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1940).

[19] Ibn Hazm, *Kitāb al-Muhallah*, edited by Ahmad Muhammad Shākir (Beirut: Dār al-Āfāq al-Jadidah, n.d).

Some of the famous Muslim scholars of the day like Yūsuf Qaradāwī[20], Ismā'īl Rājī al

Fārūqī, Hossein Nasr, Ahmed Abū Sulaymān, Abdul Aziz Sachedina, Majīd Khuddūrī,

Sāleh al Munajjid, Mahmut Aydin, Ihsan Yilmaz, Khaled Abou El Fadl, Tariq Ramadan,

Zafar Ishāq Ansārī, Muhammad Khalid Mas'ūd, Syed Jalāl-ud-Dīn 'Umrī and Shabbīr

Akhtar have dealt with the modern connotations of the issue.

Those among Muslim scholars who advocate fresh look to past to deal with the issue are

An-Na'īm, Mahmoud M. Ayoub, Mohamed Talbi, Nurcholish Madjid and FaridEsack,

few names in the long line. Western scholars' writings on this issue are included among

others: John Hick, W. Cantwell Smith, Paul K. Knitter, Toynbee, Panikker, Ernest

Hocking, Huston Smith, Kraemer, Kellenberger, Richard K. Khuri, Brierly, Proctor J.

Harris, Glyn Richards, Alan Race, David Mulan, and Jane I. Smith etc.

Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities

from the Second/Eighth to the Eleventh/Seventeenth Centuries and *Legal Debates on*

Muslim Minorities: Between Rejection and Accommodation by Khaled Abou El Fadl[21]

These articles address the issue of status and obligations of Muslim minorities and

present the diverse views of different school of thoughts in this regard.

Some of the contemporary books on the issues discuss various dimensions of Islamic law

for its application on the Muslims living in non-Muslim societies. Muhammad

Muslehuddin in his book *Philosophy of Islamic Law and the Orientalists*, discussed

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[20]Yūsuf Qaradāwī, *Fī fiqh al-aqallīyāt al-Muslimah : ḥayāt al-Muslimīn wasaṭ al-mujtama'āt al-ukhra* (Cairo:Dār al-Shurūq, 2001); *al-Aqalliyyāt ad-dīnīyah wa-l-ḥall al-Islāmī* (Cairo: Maktabah Wahba, 1996); *Min fiqh al-dawlah fī al-Islām : makānatuhā ma'ālimuhā ṭabī'atuhā, mawqifuhā min al-dīmuqrāṭīyah wa-al-ta'addudīyah wa-al-mar'ah wa-ghayr al-Muslimīn* (Cairo: Dār al-Shurūq, 1997).

[21]Khaled Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," *Islamic Law and Society*, 1:2 (1994), 141-187; "Legal Debates on Muslim Minorities: Between Rejection and Accommodation," *The Journal of Religious Ethics*, 22, No. 1(1994): 127-162.

distinctive features of Islamic law which made it possible to apply it on non-Muslim societies. He identified ability of Islamic Law which made it possible for it to be contextualized in the non-Muslim societies. Mohammad Tallat Ghumani in his book *The Muslim Conception of International Law and Western Approach*, not only discusses the evolvement of Muslim International law, but also identifies the adaptation and adoption that has been carried out in the detailed rulings of this law due to its interaction with non-Muslim societies. Afzal Iqbal in his book *Diplomacy in Early Islam* discusses the capacity of Islamic law for its interaction with other legal systems. He also highlights that how International legal norms are accepted in Sharīʿah. Muhammad Hamīdullah in his famous book *The Muslim Conduct of State*[22] briefly discusses the issues related to jurisdiction and Muslim minorities; their rights and responsibilities in foreign lands. While in *The First Written Constitution of the World*[23] he discusses the evolution of the constitutionalism in Islamic legal thoughts. He also pointed out that how Islamic legal system can interact and co-exist with other legal systems on the basis of the principles of the constitutionalism. In his compilation *Sharīʿah Today: Essays on Contemporary Issues and Debates in Muslim Societies*[24] Muhammad Khalid Masʿūd presents an overview and analysis of the debate over Sharīʿah in recent years. This book provides a critical and contextual understanding of the present debates and raises questions about the future of Sharīʿah in the present globalized world. In another book *Locating the Sharīʿah Legal Fluidity in Theory, History and Practice*[25] which is edited by Sohaira Z.M.

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[22] Muhammad Hamīdullah, *Muslim Conduct of State* (Lahore: Sh. Muhammad Ashraf, 1945).

[23] Muhammad Hamīdullah, *The First Written Constitution in the World; an Important Document of the Time of the Holy Prophet* (Lahore, Pakistan: Sh. Muhammad Ashraif, 1968).

[24] Muhammad Khalid Masʿūd, *Sharīʿah Today Essays on Contemporary Issues and Debates in Muslim Societies* (Islamabad: National Book Foundation, 2003).

[25] Sohaira Siddiqui, *Locating the Sharīʿah. Legal Fluidity in Theory, History and Practice*, Hardcover, Serie: Studies in Islamic Law and Society, Band: 48 (Brill, 2019),

Siddiqui, the learned contributors provide study of Islamic law in classical and contemporary eras and highlight the concerns related to the study as well.

The research titled as *Muslim Minorities and the Obligation to Emigrate to Islamic Territory: Two Fatawas from Fifteenth-Century Granada*[26] by Kathryn A. Miller, discusses the rights and obligations of Muslim minorities under Christian rule, specifically in the light of Maliki school.

Islam, the West and the Challenges of Modernity[27] by Tariq Ramadan discusses modernity and differentiates between modernization and westernization, and considers it a natural phenomenon. This book is comprehensively reviewed by Ibrahim M. Abū-Rabī.[28] In his another work *Western Muslims and the Future of Islam*[29] he suggests few approaches for building Muslims' identity and status in the west and to get their all types of rights from west in this present era. Bernard Lewis in his book *Islam and the West*[30] broadly discusses Islam in Europe, European Muslims; their historical background and legal status in non-Muslim lands. He discusses past and present retorts and reactions of Muslims as well. Mariella Ourghi in *Tariq Ramadan: From a Mere Co-Existence to an Authentic Contribution of Europe's Muslims*[31] elaborates Tariq Ramadan's notion of dār al-shahāda. Author not only describes the philosophy behind this new concept but

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http://gen.lib.rus.ec/book/index.php?md5=dfc1520192be7096acd0077e7e48b410.

[26]Kathryn A. Miller,"Muslim Minorities and the Obligation to Emigrate to Islamic Territory: Two fatwās from Fifteenth-Century Granada," *Islamic Law and Society*, 7, No. 2 (2000) : 256-288.

[27] Tariq Ramadan, *Islam, the West and the Challenges of Modernity* (Markfield, Leicester: The Islamic Foundation, 2009).

[28] Tariq Ramadan, "Islam, the West and the Challenges of Modernity," Review by Ibrahim M. Abu-Rabī *Islamic Studies*, 41, No. 3 (Autumn 2002): 507-515.

[29] Ramadan, *Western Muslims and the Future of Islam*.

[30] Lewis, *Islam and the West*.

[31] Mariella Ourghi, "Tariq Ramadan: From a Mere Co-Existence to an Authentic Contribution of Europe's Muslims," *Journal of Religion in Europe*, 3, no. 2 (June 1, 2010): 285–309, https://doi.org/10.1163/187489210X501545.

also emphasizes its importance for Muslim minorities.

Dār al-Islam /dār al-ḥarb Territories, People, Identities,[32] edited by Giovanna Calasso
and Giuliano Lancioni is another useful book in which learned contributors elucidate the
ideology, perceptions, concepts and practical implications related to the notion of dār al-
Islam and dār al-ḥarb. A book ***Naẓariyyah al-Qaḍā' al-Sharʿī Khārij Diyār al-Islām***
Tā'ṣīlān wa Tnzīlān (Taṭbīqāt 'la ba'ḍ Ahkām al-Tfrīq al-Qaḍā'ī fī Biriṭāniyā)[33] by
Sālim Abdul Salām Shaykhī discusses the Islamic rulings related to the family dispute
resolutions between spouses outside the Islamic territory in the absence of jurisdiction of
Islamic law and Islamic courts. It also debates the ideology behind the legal authority of
Islamic scholars of Sharīʿah councils in dealing legal disputes in Europe and elaborates
how Muslim minorities are getting legal assistance from them under European laws.
Taqsīm al-Maʿmūrah fī al-Fiqh al-Islāmī wa Athruhu fī al-Wāqi[34] by Abdullah bin
Yūsūf al-Judaī' is another important contemporary book which presents the classical
debate related to the division of world into dār and its relevance in modern times. It also
indicates the effects of that division on rulings of Sharīʿah. Similarly, ***Al-Qarārāt wa al-***
Fatāwa al-Ṣādirah 'an al-Majlis al-Ūrūbbī lil Iftā' wa al-Buḥūth (1998-2010);[35] ***Fiqh***
al-Mawāṭinah lil Muslimīn fī Ūrūbbā;[36] ***Towards a Fiqh for Muslim Minorities Some***
Basic Reflections[37] and ***The Legal Methodology of "Fiqh al-Aqalliyyāt" and its Critics:***

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[32] Giovanna Calasso and Giuliano Lancioni, *Dār Al-Islām / Dār Al-Ḥarb: Territories, People, Identities,*
Bilingual edition (Leiden ; Boston: Brill Academic Pub, 2017).

[33] Sālim Abdul Salām Shaykhī, *Naẓariyyah al-Qaḍā' al-Sharʿī Khārij Diyār al-Islām Tā'ṣīlān wa Tnzīlān*
(Taṭbīqāt 'la ba'ḍ Ahkām al-Tfrīq al-Qaḍā'ī fī Biriṭāniyā) (Egypt: Dār al-Kalimah lil Nashar wa al-Tawzī',
2017).

[34] Abdullah bin Yūsūf al-Judaī', *Taqsīm al-Maʿmūrah fī al-Fiqh al-Islāmī wa Athruhu fī al-Wāqi'*(Dublin:
Mu'asasah al-Rayyān lil Ṭibā'ah wa al-Nashar wa al-Tawzī', 2008).

[35] Abdullah bin Yūsūf al-Judaī', *Al-Qarārāt wa al-Fatāwa al-Ṣādirah 'an al-Majlis al-Ūrūbbī lil Iftā' wa*
al-Buḥūth (1998-2010) (Dublin: Mu'asasah al-Rayyān lil Ṭibā'ah wa al-Nashar wa al-Tawzī', 2013).

[36] Abdul Majīd al-Najjār, *Fiqh al-Mawāṭinah lil Muslimīn fī Ūrūbbā* (Al-Majlis al-Ūrūbbī lil iftā', 2009).

[37] Ṭāhā Jābir Fayyāḍ 'Alwānī and A. A. Shamis, *Towards a Fiqh for Minorities: Some Basic Reflections*

An Analytical Study[38] are among those contributions that specifically addresses the

problems and challenges faced by the Muslim minorities in west.

In *Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws*[39]

Andrea Büchler describes legal pluralism, cultural and religious diversities in perspective

of family laws of European countries. Another author Khaled Ali Beydoun in his article

Dār al-Islām meets "Islam as civilization": An Alignment of Politico-Theoretical

Fundamentalism and the Geopolitical Realism of this Worldview[40], points out how true

Islamic ideology has been mutilated by few Islamic states under adamant application of

Islamic law and resulted into besmirch of Islam globally. Mathias Rohe in his article

Application of Sharīʿah Rules in Europe: Scope and Limits[41], discusses the challenges

faced by Muslims living in Europe in amassing European legal orders and their religious

obligations and to maintain balance between them for amiable existence. Similarly, *Legal*

Pluralism between Islam and the Nation-state: Romantic Medievalism or Pragmatic

Modernity[42] by Sherman A. Jackson, is a very useful article in this respect, which

discusses legal pluralism. *Legal Pluralism and the Study of Sharīʿah Courts*[43] by Ido

Shahar is another worth mentioning work in which legal pluralism is discussed in the

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(UK : The International Institute of Islamic Thought, 2010).

[38] Tauseef Ahmad Parray, "The Legal Methodology of ' Fiqh al-Aqalliyyāt'and Its Critics: An Analytical Study," *Journal of Muslim Minority Affairs*, 32, no. 1 (March 2012): 88–107, https://doi.org/10.1080/13602004.2012.665624.

[39] Büchler, *Islamic Law in Europe?*

[40] Khaled 'Ali Beydoun, "Dār al-Islām meets "Islam as civilization": An Alignment of Politico-Theoretical Fundamentalism and the Geopolitical Realism of this Worldview," *4 UCLA J. Islamic & Near E. L.* 143 2004-2005 at http://heinonline.org accessed May 17 20:15:59 2014.

[41] Mathias Rohe, "Application of Sharīʿah Rules in Europe: Scope and Limits," *Die Welt des Islams, New Series, Sharīʿah in Europe*, 44, no.3 (2004): 323-350.

[42] Sherman A.Jackson, "Legal Pluralism between Islam and the Nation-State: Romantic Medievalism or pragmatic Modernity," *Fordham International law Journal*, 30, no.1 (2006)

[43] IdoShahar, "Legal Pluralism and the study of Sharia's Courts," *Islamic Law and Society*, 15(2008): 112-141.

context of Sharī'ah courts. David Bonderman [44] in his research article titled

Modernization and Changing Perceptions of Islamic Law addresses the issue of

modernization and need for reforms in Muslim world.

Aharon Layish [45] in his research article titled *The Transformation of the Sharia from*

Jurist's Law to Statutory Law in the Contemporary Muslim World, addresses the issue

of juristic influence on Islamic law and need of reopening the doors of ijtihad and

codification of Sharī'ah to fulfil the requirement of modern society. Mohammed

Arkoun [46] in his article titled *Rethinking Islam Today,* emphasizes on the need of new

thinking on Islam from the perspective of religion without being misled by political

events and also comprehensively discusses the misconceptions about Islam which have

changed its real picture. Manoucher Parvin and Maurie Sommer in their article *Dar al-*

Islam: The Evolution of Muslim Territoriality and its Implications for Conflict

Resolution in the Middle East,[47] address the topic of expansion of Muslim territory and

its effects in the context of conflict resolution's concepts and mechanisms.

Another author **Ira M. Lapidus**[48] in his research article discusses the issue of need for

reforms in the modern capitalist economies; revival and renewal of the original structure

to response the contemporary problems. Samira Haj [49] in her book titled *Reconfiguring*

Islamic Tradition, Reform, Rationality and Modernity has thrown light on the issues

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[44] David Bonderman, "Modernization and changing perceptions of Islamic law," *Harvard Law Review*, 81, no.6 (Apr, 1968): 1169-1193.

[45] AharonLayish, "The Transformation of the Sharia from the Jurists Law to Statutory Law in the Contemporary Muslim World," *Die Welt Des Islam's, new series,* 44, no.1 (2004): 85-113.

[46] Mohammed Arkoun, "Rethinking Islam Today," *Annals of the American Academy of Political and Social Science,* 588 (Jul., 2003): 18-39.

[47] Manoucher Parvin and Maurie Sommer, "Dār Al-Islām: The Evolution of Muslim Territoriality and Its Implications for Conflict Resolution in the Middle East," *International Journal of Middle East Studies,*11, no. 1 (February 1980): 1–21, https://doi.org/10.1017/S0020743800000246.

[48] Ira M.Lapidus, "Islamic Revival and Modernity: The Contemporary Movements and the historical Paradigms," *Journal of the Economic and Social History of the Orient,* 40, No. 4 (1997): 444-460.

[49] Samira Haj, *Reconfiguring Islamic Tradition, Reform, Rationality and Modernity* (California: Stanford University Press, 2009).

like how image of Islam has been distorted by orients; their understanding of Islam, adoption of European concept of moderation by Muslim world, the fundamentals of revivalism and liberalism in Islamic perspective. The article titled *Stability and Change in Islamic Law*[50] by Herbert J. Liebesny provides the details of the avenues of stability and changeability in Islamic law while taking into account the very nature of this legal system.

The Spirit of Reform in Islam[51] by Hassan Saab is a very useful article, as he has presented the real phenomenon of reform in Islam that is different from adoption of foreign legal systems or changing whole structure of the original. This article also suggests the ways of contextualization of Islamic legal thoughts in divergent cultural settings. Ralph W. Brauer in his article *Boundaries and Frontiers in Medieval Muslim Geography*[52] attempted to present the conceptions related to the political boarders and frontiers of Islamic realm in geography of medieval Muslims.

There are many other past and present researches over this issue like *The Renaissance of Islam by William Thomson*[53]*; Was the Gate of Ijtihad Closed? by Wael B. Hallaq*[54]*; Islamism, Islamic Reformism and the Public Stigmatization of Muslims: A Study of Muslim Discourses in France*[55] *by Frank Peter; A Critical Analysis of the Role of Ijtihad in Legal Reforms in the Muslim World by Rachel Anne Codd*[56]*; Who will Speak*

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[50] Herbert J. Liebesny, "Stability and Change in Islamic law," *Middle East journal*, 21, No.1 (1967): 16-34.

[51] Hassan Saab, "The Spirit of Reform in Islam," *Islamic Studies*, l.2, No.1 (1963): 17-39.

[52] Ralph W. Brauer, "Boundaries and Frontiers in Medieval Muslim Geography," *Transactions of the American Philosophical Society*, 85, no. 6 (1995): 1–73, https://doi.org/10.2307/1006658.

[53] William Thomson, "The Renascence of Islam," *The Harvard Theological Review*, 30, No.2 (1937): 51-63.

[54] Wael B.Hallaq, "Was the Gate of Ijtihad Closed?," *International Journal of Middle East Studies*, 16, No.1 (1984): 3-41.

[55] Frank Peter, "Islamism, Islamic Reformism and the Public Stigmatization of Muslims: A study of Muslim Discourses in France," *OrienteModerno*, 86, No.3 (2006): 443-460.

[56] Rachel Anne Codd, "A Critical Analysis of the Role of Ijtihād in Legal Reforms in the Muslim World,"

for Islam? by John L. Espositio and Dalia Mogahed[57].

In the presence of this material, the current research is aimed to collect, address and analyze the data pertinent to the issue of contemporary discourse on jurisdiction of Islamic law on the Muslims living in Western countries. The research will contribute in the efforts of evolution of Islamic law to address the new realities of the life. It will also evaluate the nature, reasons and effects of the contemporary debate on the Muslims in the Western countries.

The introduction of the research states the need of Islamic law for the Muslims, irrespective of their area of residence. It is also stated that this is a jurist law, as it was not implemented by any state legislation. The diverse opinions of Muslim jurists are derived from the basic sources or framed with the use of secondary sources construct the main structure of this law. This law not only regulates municipal affairs of the Muslims but also guide them in their international dealings. The ways and limits of cooperation with non-Muslim individuals and societies are also included in the scope of Islamic law. This law accepts not only the independent non-Muslim states but also allowed Muslims to reside in it as their citizens. The effectiveness of Islamic law within the jurisdiction of a Muslim state is beyond any doubt. However, its jurisdiction on the Muslims living in non-Muslim countries as minority is debatable question among classical as well as contemporary scholars. These questions have generated debate about the value of Islamic law for the Muslims in the West. Due to this flexibility of Islamic law to address the new situations and circumstances, many contemporary Muslim scholars have suggested

Arab Law Quarterly,14,no.2 (1999): 112-131

[57] John Esposito and Dalia Mogahed, "Who will Speak for Islam?," *World Policy Journal*, 25, No. 3 (2008): 47-57.

reconstruction of Islamic thought to have contemporary look on the issues that are faced by the Muslims living as majority in Muslim societies or minority in non-Muslim societies. In consideration of this background, the problem of the research is stated as, how Muslims can create balance between their religious obligations and citizenship responsibilities. Moreover, it also states that how conflict between both can be managed. It also highlights other issues that serve as the cornerstone of the current debate, such as implementation of Muslim family laws and integration of Muslims in the western societies. The limitation of research and the objectives of research are also framed to facilitate the investigation in the light of its research statement. The introduction of the research also informs that a combination of classical as well as contemporary social science methods have been used in the research. Important literature on the issues covered in this research has also been reviewed in this introductory part of the research. Ranging from the classical books to the books and articles of the contemporary scholars has been discussed in a way to identify any gap, if it exits.

This research is a humble effort of the scholar who has tried her best to discuss every important dimension of the research. The topic of research is vast and due to several constraints, the researcher was bound to address only limited matters as laid down in her research plan. Every valuable and appreciable matter of the research is due to the mercy and kindness of Almighty God and guidance of my teachers, particularly my supervisor. The weaknesses of this research are on the part of the work of the researcher and she is ready to overcome them. All suggestions for the improvement of the research are always welcome.

Islamabad: May 30, 2020   **Tahira Ifraq**

CHAPTER NO. 2

FUNDAMENTAL CONCEPTS OF SHARĪ'AH

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FUNDAMENTAL CONCEPTS OF SHARĪ'AH

1***

Since this research is a humble effort to evaluate the possible role of Sharī'ah in regulating the conduct of the Muslims in West. Therefore, it will be appropriate that in the foundational chapters of the research fundamental concepts of Sharī'ah and Law should be briefly discussed. The discussion will be helpful to understand the meanings in which various conceptions related to Sharī'ah have been used in this thesis. The chapter proceeds with discussion on the basic concepts of Sharī'ah and Law, such as Islamic and Western traditions, Western and Islamic legal thoughts. The second part describes foundational element of the Sharī'ah which includes conception of Sharī'ah, its emergence and revealed and rational sources that have been used to articulate Sharī'ah rulings. It is followed by a detailed discussion on the role of reason in evolution of Islamic law. Then various opinions of jurists on reason and revelation and rational methods of investigation that have been used in various discourses related to Sharī'ah law have also been discussed in the chapter. The last part of the chapter deals with Fiqh al-Aqalliyyāt. It describes the concept and sheds light on the significance of this emerging branch of Sharī'ah.

1-Basic Concepts of Sharī'ah and Law

1.1-Concept of Tradition and Legal Thought

The discussion of this research is concentrated on Islamic and Western legal traditions. It

is therefore proceeded with the conceptual description of a tradition and legal thoughts. In literal sense the tradition is used in the meaning of age to age transference of practices or faiths, or conveyance of reality from one age to another. Tradition is a framework which leads from history to the future. In the opinion of H. Patrick Glenn, it is a configuration of ethnic and societal facts that are carried from the past into the present. Any tradition can become a large and great tradition because of its capacity of 'reconciling among various views.'[2] A tradition cannot be immune from changes as it cannot be closed. It is important to note that both continuity and change are integral parts of legal and textual traditions.[3] Eric Hobsbawm in his thesis 'inventing tradition' tries to undermine the notion of tradition through assertion that nationalism is instrumental in invention of traditions which involves anthems and images.[4] It seems that he ignores the difference between invented traditions and 'genuine traditions' as the Western and Islamic legal traditions are neither 'recent' nor they are founded on 'uniform' perception of communal life. They are pragmatically valid and enthusiastically alive, yet not devoid of routine confrontations of influence and existence which all traditions have to encounter.[5]

1.2-Concept of (al-Sharī'ah) Islamic Legal Tradition

Islamic legal tradition is articulated in al-Sharī'ah al-Islāmiyyah which is described as a divine Law that is revealed on Prophet Muhammad (peace be on him).[6] Islam is one of

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[2] H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 4th ed. (New York: Oxford University Press, 2010), p. 13-14.

[3] Krygier, "Law as Tradition," 137–62.

[4] E. J. Hobsbawm and T. O. Ranger, *The Invention of Tradition*, Canto ed. (Cambridge; New York: Cambridge University Press, 1992), 01–13.

[5] David B Goldman, *Globalisation and the Western Legal Tradition: Recurring Patterns of Law and Authority* (Cambridge, UK; New York: Cambridge University Press, 2007), p. 7–8, http://dx.doi.org/10.1017/CBO9780511619557.

[6] It is part of Islamic tradition, that the name of Prophet must be accompanied with the 'God's blessing and salutation be upon him'; hence, where the name of Prophet is mentioned in this study, it may be regarded as acknowledged that it is pursued by the same respect.

the largest contemporary religious traditions and over one billion human beings are its

adherents. World of Islam incorporates states with majority Muslim population from

North Africa to Southeast Asia. Significant number of Muslims are also found in the non-

Muslim states including Western Europe and North America. It is concentrated upon the

diversity of practices and customs adherent by Muslims around the globe.[7] This religious

tradition was originated in seventh century Arabia. All prophets were followers of Allah

and Islam is not the only religion sermonized by the Prophet Muḥammad (peace be on

him) but all the true prophets of God such as Abraham (A.S), Noah (A.S), Jacob (A.S),

Joseph (A.S), Moses (A.S), and Jesus (A.S) and their believers conveyed the same

message.[8] Al-Qurān as a locus *classicus* to be viewed in this regard, Allah says:

> "To every one of you we have appointed a right way and an open road. If God had
>
> willed, He would have made you one community".[9]

Most commentators opined that this verse was revealed about the book of Law bestowed

upon Moses (A.S), Jesus (A.S) and Muḥammad (peace be on him). Muslim thinkers

mostly argue that the fundamental beliefs stand identical, certain laws (Sharī'ah) imposed

on the Jews, the Christians and the Muslims were diverse. It means that the Sharī'ah is

Islamic response to the diversity of legal systems which is represented in Christianity as

Hodos, in Judaism as Halakah and in Chinese religion as Tao.[10] A legal system is

working in a society to maintain the social order among its members as a regulator. The

Islamic ideal life is described in religion and Sharī'ah as its law leads to attain this ideal

life. The concept of Sharī'ah technically includes pure law and other spiritual, political,

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[7] Binder, "Islamic Tradition and Politics," 250; Borelli, *Handbook for Interreligious Dialogue.*
[8] Nasr, *Ideals and Realities of Islam*, 84–88.
[9] Al-Qurān 5:48
[10] Leonard J. Swidler, *Toward a Universal Theology of Religion*, Faith Meets Faith (Maryknoll, N.Y.: Orbis Books, 1987), p. 12.

ethical and religious areas similar to western perceptions. [11]   Sharīa'h, along with identifying religious obligation also provides authority similar to law. Due to the importance of Sharī'ah, Imām Shāfi'ī ranked it higher than a recommendatory prayer. [12] It is an acknowledgement of changing situations of place and time by Islam. Sharī'ah can plainly be defined as a body of rules and principles, deduced from al-Qurān and the Sunnah of Prophet Muhammad (peace be on him) for organizing the spiritual and worldly deeds of Muslims in their relationship with God, with each other and with non-Muslims.[13]

1.3- The Concept of Western Legal Tradition

The 'Western legal tradition' is one of the conceptual challenges of modern jurisprudence. This phrase is used by Harold J. Berman under sub title 'the formation of the Western legal tradition' he argued that 'Western legal traditions' carry a set of specific attributes. The terminology 'West' is used to identify Western Europe and in its colonial extensions such as United States of America, Canada, Australia and New Zealand. The 'West' is also used as alternative of 'Europe' and Unite States. In spite of geographically separation from the continent, England is also part of this description. The countries such as France, the Netherlands, Germany, Luxembourg, Switzerland, Belgium, Spain and Italy are included in European purview. Although Judaism, Greek philosophy, and Roman legal system developed outside this purview but became part of Western heritage via approval, acceptance, conversion and settlement.[14] This legal tradition is outcome of the Western cultural achievements which rooted in Roman law, Hebrew

[11] Hassan, 1982, p. 66.

[12] Majīd Khaddūrī and others, *Islamic Jurisprudence: Shāfi'ī's Risālah* (Johns Hopkins Press, 1961), 3.

[13] Zahraa, "Characteristic Features of Islamic Law," 169; Zarqā', *al-Madkhal al-fiqhī al-'āmm.*

[14] Harold J. (Harold Joseph) Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983), 4; R. C. van Caenegem, *An Historical Introduction to Western Constitutional Law* (Cambridge; New York, N.Y: Cambridge University Press, 1995); Goldman, *Globalisation and the Western Legal Tradition*, 43.

theology and Greek philosophy. All these elements settled and combined in everyday life and reasoning and reshaped today's 'West'.

1.4- Concept of Legal Thought

Legal thought is an outcome of the human needs in a society. The early social grouping was changed into communal life as the sum of the simple rules. The customs, and later the laws, developed in such a complicated way that it became sources of confusion in legal system of a state. That confusion was badly affecting the progress of the societies and particularly due to scientific advancement it became intolerable. The need for jurisprudence emerged from this confusion as merely the knowledge of many rules and law was not sufficient to deal this situation. This advancement in the jurisprudence contributed in the evolution of legal thoughts so that fundamental principles of law can be explained in a coherent legal system for provision of justice.[15] The body of practices, norms, rules and regulations of every society to regulate its conduct is called the legal system which extends through time. The significance of this legal system is determined on the patterns of legal reasoning and justification that develop in a society. These patterns themselves constitute against the background of historically shifting political and moral concerns. They also provide the conditions of their intelligibility. All this work in the evolution of legal theories. These theories are used to evaluate legal concepts in the context of various doctrines. These doctrines shape important concepts of a legal system such as 'law', 'right', 'power' and so on. It also reflects the changing beliefs of a society about the political order. For instance, the notion of 'right' in a feudal society guided by a

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[15] Guy Carleton Lee, *Historical Jurisprudence: An Introduction to the Systematic Study of the Development of Law*, 19th-Century Legal Treatises; No. 77763-77768 (New York: Macmillan, 1900), 01, http://nrs.harvard.edu/urn-3:HUL.FIG:005307312.

divine legal tradition will differ in essential respects from the same concept held within

the mercantile capitalism tradition.[16] Therefore, the evolution of legal thought is closely

linked with the development of legal theories, as their essence is reflected into it.

2-Sharī'ah as Manifestation of Islamic Legal Thoughts

2.1-Concept of Sharī'ah

In literal meaning Sharī'ah [17] is a way to the watering-place to pursue satisfaction. It is an

endless source of water which is used by human for people to fulfill their thirst. A

reservoir of water rivers for the use of humans and beasts.[18] In the linguistic terms

Sharī'ah is a source of guidance. The Islamic laws are as important for regulation of

human conduct as water is the essential for life. The term was used to mean the law made

by God, because He made it apparent and clear *(Cf.* the Latin words *lux* and *lex,* the

English *light* and *right* and the German *Licht* and *Recht)* or because that law is as

necessary for the life of the faithful as a source of water is necessary for the life of all

living things.[19] Along with marriage or divorce, Sharī'ah laws cover almost every single

action that is accomplished individually or collectively.[20] The word has been used in al-

Qurān as the opposite of *hawa* (mischievous impulse). Allah says:

"Then we put Thee on the (right) way of religion: so follow Thou that (Way), and follow

not the desires of those who know not".[21] In an explanation this verse, 'Abdullah Yusuf

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[16] Sean Coyle, *From Positivism to Idealism: A Study of the Moral Dimensions of Legality,* Applied Legal Philosophy (Aldershot, England; Burlington, VT: Ashgate, 2007), 19.

[17] The terms Islamic law and Sharīah are used in this chapter as alternative terms. However, in terminological sense both terminologies have not the same meaning as the Sharī'ah has wider meninges than Islamic Law (Zahraa, 2003, p. 218).

[18] Khadduri and others, *Islamic Jurisprudence,* p. 3.

[19] Omar, "Reasoning In Islamic Law: Part One," 155.

[20] Kamali, *Shari'ah Law,* 2.

[21] Al-Qurān 45:18.

Ali' says: In this verse the word 'Sharī'ah is expressed as a proper and just way of religion, in an excellent manner nevertheless broader than the mere legal system, which were lately revealed in Madanī time.[22] Since Sharīah at the period of revelation of this verse did not stand as a law code, and the reference of al-Qurān is also towards its verbatim meanings.[23]

2.2-The Emergence of Sharī'ah Law

The origin of Sharī'ah is divine and its aims are transcendent. Due to this reason the obligations that are emerging from it are treated as obligations to God unlike to that entails in law to the state. Therefore, a simple use of terminology of law will result into the restriction of the scope of Sharī'ah law. This does not mean that obligations of Sharī'ah cannot be enforced by the government. The ruler is vicegerent who is executing the authority of God in accordance with the parameters laid down by Allah Almighty.[24] The subject that deals with the methods of deduction of laws from texts, its categorization, comprehension and application is known as *Uṣūl al-Fiqh*. This term is divided into two components: *Uṣūl* and *Fiqh*. These two parts are described severally and then joined.[25] *Uṣūl al-Fiqh* allowed Muslim scholars to attain enough skill for validation and attestation of fundamental and secondary sources.[26] The term *fiqh* is used literally in the meaning of 'comprehension' and 'judgement'. According to this observation the phrase *fiqh* and *fahm* are identical. It indicates general understanding of Islam. In these

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[22] Ali 1965, 2/1359.

[23] Kamali, *Sharī'ah Law*, 3.

[24] Edward Omer Moad, "A Path to the Oasis: 'Sharīah' and Reason in Islamic Moral Epistemology," *International Journal for Philosophy of Religion* 62, no. 3 (2007): 139.

[25] Imran Ahsan Khan Nyazee, *Islamic Jurisprudence: Uṣūl al-Fiqh*, Islamic Law and Jurisprudence Series; No. 3 (Islamabad: International Institute of Islamic Thought: Islamic Research Institute, 2000), 17–18.

[26] Zahraa, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research," 216.

meanings this word has been used in many verses of al-Qurān. Allah Almighty says:

> "This is from thee" (o Prophet) say: "All things are from Allah." but what hath
>
> come to these people that they fail to understand a single fact."[27]

In another verse Allah Almighty says:

> "They have hearts wherewith they understand not, eyes wherewith they see not,
>
> and ears wherewith they Hear not."[28]

The term *fiqh* was also used in the meaning of *'ilm*. These terminologies were segregated and refined with the inception and development of specialization of law and tradition. In early days along with legal issues theological issues were also included in this terminology.[29] Abū Ḥanīfah identified *fiqh* as: 'A person's knowledge of his rights and duties.'[30] Later on Shāfi'i described this term technically as 'It is the knowledge of legal rules (aḥkām) of Sharī'ah, related to conduct, that have been extracted from their specific evidences.'[31] On the same way Al-Ghazzālī (d. 505/1111) described it as 'knowledge of the Sharī'ah rules which have been constructed to qualify the acts of the duty. While in his opinion *Usūl al-Fiqh* is the 'source of these rules [aḥkām] and the indication of the methods to identify rules as a whole, instead of detailed view.'[32]

The use of the methodologies of *Uṣūl al-Fiqh* is culminated into the end product that is called *fiqh*. Since Al-Qurān contains all disciplines, it was the duty of learned scholars and thinkers to articulate orders of Allah that straightly or otherwise, in a consolidated configuration were related to the settlement of disputes in an Islamic society. This

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[27] Al-Qurān 4:78.
[28] Al-Qurān 7:179.
[29] Ahmad Hasan, *the Early Development of Islamic Jurisprudence* (Islamic Research Institute (Pakistan)); No. 17 (Islamabad: Islamic Research Institute, 1970), 4.
[30] Muḥammad ibn Bahādur or Zarkashī, *al-Baḥr al-muḥīṭ fī uṣūl al-fiqh*, al-Ṭab'ah 1 (al-Kuwayt: Wizārat al-Awqāf wa-al-Shu'ūn al-Islāmiyyah, 1992), 21.
[31] Zuḥaylī, *Uṣūl al-fiqh*.
[32] Ghazzālī, *al-Mustaṣfā min 'ilm al-uṣūl*, 1995, 303-304.

independent science of spotting the 'jurisprudential' unit of the Sharī'ah is called 'fiqh,'

the normative methodology of Islamic sciences can be called Islamic jurisprudence.[33] In

spite of closed relationship between both; yet the two are separate disciplines. The latter

is related to the understanding of comprehensive rulings of Islamic law in its many

disciplines, and the former is applied in the deduction of such rules from their sources.

2.3-Revealed and Rational Sources of Sharī'ah

To understand the connection amid logic and revelation, first comprehend the authorities

of Islamic law or Sharī'ah. In Islamic law, the phrase dalīl (pl. adillah) is used to denote

source or authority, which means guide. In terminological sense it is a valid source which

originate an obligation.[34] Its meaning is also parallel to the term Uṣūl al-aḥkām (The roots

of the aḥkām) and al- maṣādir al-Sharī'ah li al-aḥkām (authentic origin of aḥkām).[35]

Prophet Muḥammad (Peace be on him) was born in Mecca, when the Christian debate

about revelation and reason silenced the Hellenistic paganism in Alexandria and Antioch.

Those who follow in the footsteps of the Prophet Muḥammad (peace be on him) were the

masters of the old intellectual centers of the Near East during a century. The scene was

thus set for a renewal of the old argument, with revelation however now not based on the

verities of the Bible but the verses of the Al-Qurān, the last revelation that is reveled on

Prophet Muḥammad (peace be on him). Al-Qurān in literal meaning is used for 'reading'

or 'recitation.' It is described as 'a book comprising the speech of Allāh in Arabic,

revealed to the Prophet Muḥammad (peace be on him) and conveyed through

uninterrupted proof, or *tawātur*. It is an evidence of the Prophet-hood of Muḥammad

(peace be on him), fundamental source of the Sharī'ah and authentic command for

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[33] Hassan, "The Sources of Islamic Law." 66.
[34] Āmidī. *al-Iḥkām fī uṣūl al-aḥkām*, 1/159.
[35] Nyazee, *Islamic Jurisprudence*, 144.

believers. Al-Qurān contains evident revelation (*wahī zahīr*), described as the Allah's

command that is transferred to the Prophet Muḥammad (peace be on him) via an angel

Gabriel (A.S) word by word.[36] The Islamic claim for the revelation is made in Al-Qurān

analogous to one established in the Bible. Prophet Muḥammad (peace be on him) is held

by Muslims with superior devotion but Jews or Christians could not give such respect to

any prophet. However, in spite of that he owns the status of a Prophet not more than that.

Moreover, principally prerequisite and rules are submission to the law instead of fidelity

and affection to the soul.[37] At this stage Islam was presented as continuity of faith of

Abraham and it was reporting a pure form of Judaism and Christianity which was

corrupted by the followers of these two religious' traditions. The faith related

developments in Makkah were formed around the Hanafiyyah of Abraham.[38] Moreover

during his initial thirteen years of Prophet-hood in Makkah, He concentrated more on the

essence of faith and moral values. Enactment of legal rules was not priority during this

period therefore the Makkan verses are brief and powerful in their demand for the

morality of the addressees. The contents of these verses are related to cautions on the

corruption. It condemned the worship of idols. These verses particularly indicated the

tyrannical outlook of the Arabs before Islam, concerning the weak segments of the

society such as poor, widows and needy persons. The issues such as moral responsibility,

the relation between the universe and man, right and wrong, the day of judgement and

spiritual attentiveness etc. were discussed in these Makkan verses. The objective of the

revelation at this stage was urging the human beings to modify their roads of life to an

ethical way. Few elementary rules related to ceremonial prayers, religious ceremonies,

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[36] Zia-ul-Haq, "Muslims' Participation in Interfaith Dialogue," September 22. 2014, 622.
[37] Guillaume, 1924, 63.
[38] Hallaq, *The Origins and Evolution of Islamic Law.* 19.

justice, alms giving and care of widows and orphans were also revealed in Makkah. These verses also highlighted the basic tents of faith while describing history of religiosity and scheme of God for the guidance of human kind.

After migration to Medina, Prophet Muḥammad (Peace be on him) interacted with Jews and initially tried to have good relationship with them. He entered into Mīsāq al-Madīnah with them for that purpose. But these good relations were not sustained because of their dubious attitude towards the message of Prophet Muḥammad (Peace be on him). After a short period, friendly relations between Muslims and Jews were detreated. Due to this hostile situation, Prophet Muḥammad (Peace be on him) began to change certain rituals that Muslims were sharing with Jews. The Ka'bah was declared as the sacred shrine of Islam instead of Jerusalem. It was identified as the correct place of Abraham the Ḥanīf. The majority of rulings that later became part of Sharī'ah was revealed in Medina after the Hijjrah of Prophet Muḥammad (Peace be on him) to it from Makkah. The revelation of Al-Qurān in early 626 AD reflected guidelines for new Islamic society, the nation. This community was proficient of holding a legal tradition similar to other monotheistic laws but distinct from them. Al-Qurān states:

> "To Thee we sent the Scripture In truth, confirming the Scripture that came before it, and guarding it In safety: so judge between them by what Allah hath revealed, and follow not their vain desires, diverging from the truth that hath come to thee. to Each among you have we prescribed a law and an open way. if Allah had so willed, He would have made you a single people, but (his plan is) to test you In what He hath given you: so strive As In a race In all virtues. the goal of you all is to Allah. It is He that will Show you the truth of the matters in which ye

dispute."[39]

It is important to note here that this verse has used word 'minhāj' (the Law) in the meaning of normative way which is alike the Hebraic term 'minhāg'. These verses mark the beginning of substantive legislation further than substances of ritual through revelation.[40] In the years 5/626 and afterwards bulk of the substantive rulings revealed when a divergent set of law solely for Muslims was perceived in the earliest. This was the time when al-Qurān started to reveal a list of rulings related to problems stating eating pork to larceny. This surah also referred the Jews and Christians and their sacred texts.[41] Jurists are not agreed on the exact number of legal verses (āyāt al-aḥkām) because of different criteria for the classification of Qurānic verses. Some were ready to extract a law from a historical verse, or even from a story in the Qurān, while some seeking for legal verses largely in a legal framework only. Another reason for their differences over the number of legal rulings is difference on the principles of interpretation, which leads to different conclusions. Legal verses of the Qurān are used as the base of jurisprudence of the Qurān or fiqh al-Qurān.[42] Traditionally five hundred legal verses are counted in al-Qurān.[43] Goitein has observed that weight of these verses is larger than the number as unlike to other verses the tendency of literal or thematic repetition is absent in these verses. Another important fact that needs to be mentioned is the size of the verses based on law, which is double or even triple than the rest of the verses. Because of these reasons Goitein concluded that al-Qurān consists of legal material like Torah that

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[39] Al-Qurān 5:48.
[40] Hallaq, *The Origins and Evolution of Islamic Law*.21.
[41] Al-Qurān 5:43-47.
[42] Kamali, *Shari'ah Law*, 3–13.
[43] Hallaq, *The Origins and Evolution of Islamic Law*.21.

generally identified as 'the Law.'[44] The discourse on the number of legal verses however should not lead to the conclusion that legal rules can be derived only from legal verses. Imām Al-Shawkānī while discussing limits of Ijtihād explained that a learned scholar and mujtahid, in process of ijtihād can derive a rule of law from any verse in al-Qurān.[45]

Hallaq observed that the concluding period of Qurānic revelation indicates a calculated trend concerning lawgiving, as a way to establish the distinctness and exclusivity of the emerging faith. He is of the view that the theme of revealed legislation nurtured progressively higher so that Ummah can establish its distinction from non-Muslim communities. Most of the legal verses were revealed in response to a problem or a situation that accrued in reality so these rulings were addressing realities of the life. therefore it has a positivist nature. This reason leads to Muslim jurists to use the terminology everyday decrees (al-āhkām al-'amaliyyah), associated to the person's deeds. The Arab Bedouins' were involved in gambling. They along with Christians were also indulged in consumption of alcohol. These exercises were rejected by the new and highly ethical religious rulings through putting limitations or outright prohibitions. The zakāh was reinforced to protect the rights of poor and deprived segments of the society. The steps such as fixing of penalties and maintenance centrally controlled alms-tax, contributed in the reconstruction of the community an Ummah independent of tribal affiliation. The worshipping stuff, for instance salāh, zakāh, fasting, hajj, sadaqāt, taking of vows and penalties (kaffārāt) are discussed in almost 140 verses. Almost seventy verses are related to issues of family laws such as marriage, divorce, etc. Another seventy verses contain rulings related to commercial matters. The rulings related to punishments

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[44] Goitein, "The Birth-Hour of Muslim Law?"
[45] Shawkānī, *Irshād al-fuhūl ilá tahqīq 'ilm al-uṣūl*, 2/206.

on crimes such as killing, theft, robbery, defamatory accusation and adultery articulated

in other thirty verses. Other issues such as equality, justice, proof, consultation and the

duties and rights of subjects are counted in other thirty verses. About ten verses are on

economic issues concerning rights of workers and relationship between rich and poor.[46]

The Qurānic legislation on inheritance, instead of tribal affiliation, declared the family

members only inheritors. Along with the powerful status of man, revealed legislation

granting wives and daughters substantial rights. The financial security to the women was

enhanced through the Qurānic enactment. Her status was further strengthened by giving

the daughter a portion equivalent to one half of the portion of her brother in inheritance.

The financial independence of wives was enforced through rulings such as rights of

dowry. It was further clarified that the property owned by her would continue to stay with

her, without any prerogative of her husband over it.[47] Many novel rules related to

marriage and divorce were introduced through divine commandments. Restrictions on

number of marriages, imposing principle of 'iddah on the instance of divorce, while

awaiting period of three menstrual rounds levied on divorced women and in case of

pregnancy, birth of the child, postponed irrevocable dissolution and provide option of

reconciliation during 'iddah were some of them. Some other Qurānic reforms regarding

the marriage were related to prohibition of marriage within prohibited degree of kin for

instance mother, daughter, sister, aunt, niece, foster-mother, foster-sister, mother-in-law,

step-daughter or daughter-in-law. The marriage with two sisters at the same time was also

declared prohibited. Muslim males were allowed to tie the knot with the females of

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[46] Hallaq, *The Origins and Evolution of Islamic Law.*, 22; Kamali, *Shari'ah Law*, 20; Maḥmūd Shaltūt, *al-Islām 'aqīdah wa-sharī'ah*, al-Ṭab'ah 3. (Cairo: Dār al-Qalam, 1966), 250.
[47] Al-Qurān 4:19.

Scriptures irrespective of their conversion to Islam.[48] The Qurānic enactment also covered rituals, domestic law, trade and fiscal matters. Hallaq observed that the Qurānic rulings clearly contributed to the framework of a fundamental legal configuration within a short period. The articulation of al-Qurān law exclusively for the Muslims is demonstrating the legal thrust of Muhammad's (Peace be on him) mission.[49]

The second source of Sharī'ah law is Sunnah. This terminology is applied on the observances of the Prophet Muhammad (peace be on him). The words of the Prophet are divinely inspired as God has said in al-Qurān:

"nor does He say (aught) of (his own) desire."[50]

It is indicted in several places in Al-Qurān that all the observances of the Prophet (peace be on him) are meant to establish a binding proof of Sharī'ah. The compliance to the orders of Prophet (peace be on him) is declared as an obligation on the Muslims at various places in the al-Qurān. It is obligatory on the Muslims to obey His decisions and supremacy without query like al-Qurān says:

"Whoever obeys the Messenger verily obeys God." (4:80) "Whatever the Messenger gives you, take it and whatever he forbids you, avoid it."[51]

Al-Ghazālī elucidates that God has commanded in al-Qurān that sayings of the Prophet (peace be on him) also constitutes divine revelations. He divided revelation into two types; first type of revelation (Wahī) is recited (matlū) and included in al-Qurān while the second type of revelation (Wahī) is contained in the Sunnah. The precepts of the Prophet (peace be on him) are evidences for one who has directly listened it from Him. The other

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[48] Al-Qurān 2:237, 65:1–6; 2:233, 2:230.
[49] Hallaq, *The Origins and Evolution of Islamic Law.* 24.
[50] Al-Qurān 53:3.
[51] Al-Qurān 59:7.

Muslims who have acknowledged words of the Prophet (peace be on him) via oral or inscribed narrations need verification of the authenticity of these reports as it could have conveyed to us through continuous testimony (mutawātir), or solitary reports (āhād).[52] The Sunnah has various classifications such as classification on the bases of ahkām, transmission and channels. As per transmissions Sunnah is divided into Mutawātir, Mashhūr and Āhād, while on the bases of channels of ahkām Sunnah is divided into *al-Sunnah al-qawliyyah, al-Sunnah al-fi'liyyah* and *al-Sunnah al taqrīriyyah*.[53] The written reports about the practices and sayings of Prophet Muhammad (Peace be on him) are named as āhādīth. It was collected by numerous renowned writers and measured as the second main domain for tracing Islamic law.[54]

All decrees of the Prophet (peace be on him), particularly that match with the Qurān and verify its subjects, form compulsory law,[55] and the Sunnah being the foundation of Sharī'ah is able to contribute in three possibilities. First of all, it may just go over and explain a directive that is contained in the verses of Al-Qurān. A major part of the Sunnah is of this category. All hadīth related to matters of faith such as five pillars of the faith, the rights of parents, and respect for the property of others, murder, larceny and untrue evidence, etc., generally reassert the Qurānic rules on these topics.[56] In addition, the Sunnah could elaborate and explain the rulings that are mentioned in abstracted form in al-Qurān or it needs further clarification. The Qurānic rules that are ambivalent (mujmal), absolute (mutlaq), or general ('āmm) are clarified through Sunnah, therefore

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[52] Ghazzālī, *al-Mustasfá fī 'ilm al-usūl*, 104.
[53] Kamali, *Shari'ah Law*, 24–25.
[54] Hassan, "The Sources of Islamic Law."pp. 66.
[55] 'Abd al-Azīz bīn Abd al-Salām bīn Abī al-Qasīm al sulamī 'Izz al-Dīn, *Qawā'id al-Ahkām fī Masālih al Anām* (Cairo, Egypt: Maktabah al Kūliyāt Al Azhārīyyah, 1991), 5.
[56] Al-mawsū'ah, *Al-Mawsū'ah al-Fīqhīyyā al-Kūwatīa*, 1/130.

the Sunnah is also serving as a tool for explaining and interpreting the Qurān. The largest bulk of the Sunnah is of this variety and is an integral to understand the rulings of the Qurān. The third category of the rulings of Sunnah is, where al-Qurān is quiet and these principles are originated in the Sunnah itself, therefore it is denoted as instituting Sunnah (al Sunnah al-mu'assisah). Such type of rulings constitute an independent source of Sharī'ah.[57]

One should not understand from the legislation based on al-Qurān and al- Sunnah that there was no other legal tradition or customary laws in Arabia in pre-Islamic period. Hallaq is of the opinion that Prophet Muḥammad (Peace be on him) was critical about the indigenous communal and ethical atmosphere but was aware that it's highly engrained in the customs of Arabia. Like a great ḥakam (arbitrator), he could not have changed entirely the customary laws by which he used to perform his function as ḥakam in Pre Prophethood period. He is of the opinion that revealed laws of al-Qurān displayed an affinity to ordain a divergent law for the Muslims but it also maintained connection with the past.[58] This claim is verified in both al-Qurān and the constitution of Medina. Muslim jurists were mindful about its legal and religious inferences for centuries. At the last of 19th century Wellhausen drew the concentration of jurists in the West towards this authentic document from the Prophetic period. The orientalists such as Goldziher, Gil, Serjeant, Goto, U. Rubin and J. B. Simonsen have analyzed several features of this document. Muhammad Hamidullah is leading many scholars who have examined this document. His research in this regard has highest impression on Muslims and non-

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[57] Kamali, *Shari'ah Law*, 24–25.
[58] Hallaq, 2004, 24.

Muslims, as he normally uses terms of political science in his analysis[59] Mīsāq al-Madīnah, which headed the Magna Carta by numerous eras, was described by Hamidullah, as a first inscribed constitution, enacted by a ruler to regulate internal and external affairs.[60] Lecker also emphasized on the significance of this document as it has many implications for Sharī'ah related to matters such as constitutional rights, minority rights, interfaith relations and freedom of religion. The document has also contributed in the shaping of concepts of an Islamic state and Islamic political theory.

The place of Qiyās as a primary source is controversial as some considered it secondary source and others do not considered it as a source altogether.[61] The rational sources of Islamic law such as Qiyās, istiḥsān, maṣlaḥah mursalah, sadd al-dharī'ah and istiṣḥāb al-ḥāl 'urf are specifying the significance of the reason in the legal method of deducting ḥukm. Thus, *qiyās* is the assigning of the *ḥukm* taken from transmitted evidence to a set of facts about which there is no expressed provision in the transmitted evidences. This is a mental process. The acceptance of *qiyās* like a valid method of rationale is supported from the transmitted proofs, the Qurān as well as the *Sunnah*. In short, the transmitted sources themselves identify the modes of legal reasoning that may be accepted as valid and persuasive proofs.

The process of application of techniques of reasoning is called Ijtihād.[62] In terminology it means striving efforts of a mujtahid (one who carries out ijtihād) in order to derive the directions of Shari'ah on specific problems from the bases. Formulation of these

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[59] Lecker, 2004, 1.
[60] Hamīdullah, 1968, 115.
[61] Zarqā', *al-Madkhal al-fiqhī al-'āmm*.
[62] Nyazee, *Islamic Jurisprudence*, 213.

principles need a certain amount of consistent struggle since they require explanation.[63]

The existence of rationality is also evident in Sharī'ah because it recognizes and tolerates

disagreement in the juristic issues. As the Sharī'ah law was supposed to be completed

with chief features of divinity of root, thorough extensive in essence and supple.

Similarly, the divine sources produce structure that plans the broad dogmas and

principles and in some situations exhaustive directives from which the body of the

complete Islamic rules can be produced; rested on genuine behavior of man, as variability

designs a crucial tradition, stressed by the divine sources and acknowledged by the

jurists.[64]

3-Role of Reason in the Evaluation of Islamic Legal Thought

3.1-Juristic Views on Reason and Revelation

Both revelation and reason did an essential job in articulation of the rulings of Sharī'ah

law. In general discourse about the nature of Sharī'ah law it is presumed that this is a

rigid revealed law in which there is no role for reason. [65] Abu Hamid al-Ghazzālī

criticized those who relied entirely on rationale or revelation. 'Oh how one falls short and

trails behind in misguided paths when one does not bring together these differences of

reason and revelation!' he writes, 'For reason is like healthy sight that has no ailments or

flaws, and the Qurān is like the sun that shines abroad.'[66] He has not only identified the

classification of sciences on the basis of reason and revelation but also explained

relations between both. In his opinion purely rational sciences are arithmetic, geometry,

etc. while religious sciences such as *Hadīth* and tafsīr are based on the tradition. In spite

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[63] Kamali, *Shari'ah Law*, 25.
[64] Qaradāwī, *Madkhal li-dirāsāt al-sharī'ah al-Islāmīyah*, 7–10; Zarqā'. *al-Madkhal al-fiqhī al-'āmm*, 2.
[65] Moad. "A Path to the Oasis: 'Sharī'ah' and Reason in Islamic Moral Epistemology."
[66] Al-Ghazzālī, *al-Iqtiṣād fī al-i'tiqād*, 115.

of this difference both contribute together in formation of Sharī'ah. In his view the noblest knowledge emerged as the combination of reason and tradition in Sharī'ah. The fiqh and its usūl consist upon excellent part of the tradition and reason.[67]

Being the primary source for the Aḥkām of Allah the position of reason and rationalism in Islam can be determined on the basis of arguments from al-Qurān. Rational arguments and language of feelings are integral part of the Qurānic discourse. The language of reason is aimed at intellect while the language of feelings is aimed at heart. Muslim jurists have been trying to determine the place of reason and rationalism in presence of revelation which is the main source of Islam. They discussed the questions that if any one follow the path of reason and seldom falls into error, will he be acquitted or not by Allah? Moreover, if anyone is not able to act in accordance with the ruling of reason, does he meet punishment? The answers of these questions explain the view of al-Qurān regarding reason and rationalism. The authority and importance of reason is identified in various verses of al-Qurān as it is reported:

> "For the worst of beasts in the sight of Allah are the deaf and the dumb, - those who understand not".[68]

These verses are addressing those who are not listening to truth, or those who hear it but do not admit it verbally. The ears which are listening but are unable to understand are deaf. The tongue which is uttering nonsense is dumb. The tawhīd which means belief on One God is not only usually explained on the basis of revelation but this belief is also elaborated in the terms of logic and human are invited to use their ratiocination for its acceptance as it is declared:

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[67] Ghazzālī. al-Mustasfā fī 'ilm al-uṣūl, 6.
[68] Al-Qurān 8:22.

"No soul can believe, except by the will of Allah, and He will place doubt (or obscurity) on those who will not understand."[69]

As per Islamic belief revelation is direct form of communication in which the commands of God are conveyed through the Prophets, while reason is also granted by God to every human being so that he can understand and apply the divine command with the use of reason. According to al-Qurān, those who are not using rationale in affairs of faith and deeds are ignorant:

"Many are the Jinns and men we have made for Hell: They have hearts wherewith they understand not, eyes wherewith they see not, and ears wherewith they hear not. They are like cattle, - nay more misguided: for They are heedless (of warning)."[70]

These verses described that the faculties of reason and perception are existing with every human being but he sometimes consciously declines to utilize them. Qurānic verses stress that everyone is accountable for the use, misuse, or non-use of the faculties accorded to his capacity.[71]

"And pursue not that of which Thou hast no knowledge; for every act of hearing, or of seeing or of (feeling in) the heart will be enquired into (on the Day of Reckoning)."[72]

This verse is talking about importance of Knowledge. It insists upon acceptance of 'ilm whether definitive (qat'ī) or conjectural (ẓannī) attained via depending on some proof or back (sanad). The verse also indicates the possibility of accountability if the parts of body

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[69] Al-Qurān 10:100.
[70] Al-Qurān 7:179.
[71] Hamid Fauzi, "Implementing Islamic Law within a Modern Constitutional Framework: Challenges and Problems in Contemporary Malaysia," 40; Omar, "Reasoning In Islamic Law: Part One," 159.
[72] Al-Qurān 17:37.

for exercising reason such as lessening, sighting and feeling are not used properly.[73]

The Qurān stresses on accepting the authority of the reason as many of its statements demanded rational argumentation for proving the claims:

"And they say: "None shall enter Paradise unless He be a Jew or a Christian." those are their (vain) desires. say: "Produce your proof if ye are truthful."[74]

In another verse the existence of the necessary being is proved through reason:

"If there were, in the heavens and the earth, other gods besides Allah, there would have been confusion in both! but glory to Allah, the Lord of the Throne: (High is He) above what They attribute to Him!."[75]

In mentioning various facts, the arguments in the Qurān are presented on the bases of causes and its effects. This way of argumentation in al-Qurān leads to shedding of light on the authority of reason.

"Verily never will Allah change the condition of a people until they change it themselves (with their own souls). but when (once) Allah willeth a people's punishment, there can be no turning it back, nor will They find, besides him, any to protect."[76]

This verse clarify that all ends depend on the Will of God but this is not imposed in an outside to their action, determination and will. This change will be subject to an effective change in their social and moral values. Moreover, the ways of performing their individual duties will also have effect on any change.[77] The Qurānic methodology of

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[73] Al-Baiḍāwī, 1418AH, p. 3/255).
[74] Qurān 02:111.
[75] Al Qurān 21:22.
[76] Al-Qurān 13:11.
[77] Ayatullah Murtadha Mutahhari, "Approaches to the Understanding of the Qurān, Characteristics and Uniqueness of the Qur'an, Language of the Qurān, Reason and the Heart in the Qurān.." *Understanding the Uniqueness of the Qurān* 1, no. 1–3 (n.d.): 25.

fluctuation in the status of nations and cultural heritages is based on a uniform system which governs the fates of the nations. It also reminds that if the circumstances of a nation are similar to the conditions prevalent in a nation of the past, the same consequences will repeat for us:

> "How many populations have we destroyed, which were given to wrong- doing? They tumbled down on their roofs. And how many wells are lying idle and neglected, and castles lofty and well-built? Do they not travel through the land, so that their hearts (and minds) may thus learn wisdom and their ears may thus learn to hear? Truly it is not their eyes that are blind, but their hearts which are in their breasts."[78]

These verses affirm that the law of cause and effect is evidence of authority of reason in Islam.

Al-Qurān has mentioned the ḥikmah (purpose) of its rulings particularly in the mu'āmalāt at several places. The Qurānic process of ta'līl (ratiocination) is based on exercise of faculty of reason. It urges knowledgeable persons to enquire and investigate the facts to draw rational conclusions. The rulings related to 'ibādāt are not determined on the basis of ta'līl but outside this area the Sharī'ah encourages enquiry and investigation to draw rules. Ratiocination in the Qurān indicates that the rulings of Sharī'ah are not applied to realize certain benefits and objectives and it is not imposed for mere conformity. This also informs that if a ruling no longer safeguards its objective and reason, it needs to be switched to appropriate substitute. Blindly following the opinions of religious leaders is not permissible in Islamic theology as al-Qurān condemned the previous tendencies against the danger of following who wrongfully usurp the power of decreeing what is

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[78] Al-Qurān 22:45-46.

permissible (halāl) and what is forbidden (harām) as al-Qurān says:

> "They take their priests and their anchorites to be their Lords In derogation of Allah, and (They take as their Lord) Christ the son of Mary; yet They were commanded to worship but one Allah. There is no god but He. Praise and glory to him: (far is He) from having the partners they associate (with Him)."[79]

No-one is relieved of the duty of assessing critically the views of others in order to make his personal decision whether to accept or reject such views. A well-known dictum of Abū- Hanīfah confirms this view: 'this knowledge of ours is (based on) our opinion (rā'y): but we are ready to accept any better opinion of anyone else.'[80]

No doubt that the fundamental teachings of Islam are based on revelation but its understanding is human and not in the ownership of any individual or batch of individuals. As Abdullah Yousef Ali observed: 'The mere idea of a separate order of priesthood to stand between God and man and to be the repository of God's secrets is derogatory to the goodness and all-prevailing grace of God'[81]. Islam recommends that the Muslims should concentrate freely to form their own perceptions, without any domination of formers (salaf), clerics (ahbār) or despotism (istibdād). This all is needed so that free thinking should be well organized for good purpose, as there is no use in chaotic or aimless thinking. It is the reason which forced us to understand the nature of humanity and asked for cultivation of good human relationships.

The rulings of the Sharī'ah are logical and meant to be obeyed by the wise human beings having the ability of comprehending connotations, purposes, backgrounds, situations and context of the rulings. Fair-minded individuals should obey their parents, but within the

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[79] Al-Qurān 09:31.
[80] Omar, 1997, 160.
[81] Omar, 1997, 160.

limits prescribed by Islam. A common man blessed with the faculty of rationale, should be able to understand that a particular intellectual is true or a malefactor. Wise individuals should follow the dominant but within the limits prescribed by Allah. On the other hand, there is nothing to be gained from friction and disorder resulting from reckless and irresponsible disobedience:

"And fear tumult or oppression, which affecteth not in particular (only) those of you who do wrong: and know that Allah is strict in punishment."[82]

The people who devote themselves to the study of the religion should guard themselves against the danger of fanaticism and all other forms of excess. Islam is a balanced religion and there should not be any extravagance in the compliance of its teachings. Muslims are either negligent and careless about the application of their religion or very strict about the literal compliance of their understandings without considering any other bribability. The truth lies in between these two positions. It is quite evident that the excesses of the fanatics are out of context, whether in respect of time, as when they merely reflect a nostalgia to relive the past, or place, as when such excesses are intended to be practiced in non-Muslim countries. The fanatics do not accept even to consider the opinions of others, however faithful and well-founded those opinions may be. It is almost a universal practice among the fanatics to accuse any person who has the courage to express a different view, of being a disbeliever or a renegade. Besides, the fanatics, in order to impress others by appearing as the most devoted believers, tend to select and adopt the most difficult views and solutions.

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[82] Al-Qurān 08:25.

The Sunnah of the Prophet (Peace be on him), similar to al-Qurān has also many examples related to the importance of reason and rationality. According to a report, the Prophet (Peace be on him) directed the Muslim army not to perform the afternoon prayer prior to hit the tribe of Banī Qurayzah. [83] Some complied literal connotation and postponed the worship till reaching destination while others understood its basic purpose and that is to be hurry to reach there while they carried out the worship as per routine. The tradition stated that one of the groups followed the letter of the command and the other compiled the rationale of the directive. Prophet Muḥammad (peace be on him) agreed on the courses of action of both the groups.[84] Many Muslim jurists such as Al-Shāṭibī are of the opinion that the rulings of Sharī'ah related to civil and cultural dealings (mu'āmalāt wa 'ādāt) are based on maṣāliḥ or benefits. The maṣāliḥ can be base for legislation, therefore the Sharī'ah may forbid something being against the benefit; similarly it may permit the same when it secures a benefit. Many examples of this are already available in Sharī'ah rulings. Due to the fear of usury (ribā), deferred sale of dirham for dinar is forbidden, but a loan for a certain period is permitted. In both the causes of similar nature two different rulings are given because it obtains a profit (delay is detrimental in one way and advantages in the other). Moreover, according to the rules, fresh dates could not be bartered for parched dates due to the possible presence of ambiguity (gharar) and interest (ribā) but the Prophet Muḥammad (peace be on him) permitted it by way of sale because of the needs of the people.[85] This type of rulings of Sharī'ah are indicating its capacity to interact on the grounds of reason.[86]

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[83] Muhammad b.Ismā'īl al-Bukhārī. *Ṣaḥīḥ al-Bukhārī* (Beirut: Dār Ibn kathīr, 1981), Hadīth No.4119.
[84] Kamali, 2010, 57.
[85] Shāṭibī, *al-Muwāfaqāt fī uṣūl al-Sharī'ah*, II/305.
[86] Kamali, 2010, 55.

The methodology of abrogation of rulings is also proving that rulings can be suspended or replaced with suitable alternatives because the 'illah or rationale desired it due to the change in the circumstances. During the life time of Prophet many examples are found in the change of rulings and abrogation of rules. Events are also found in the precedent of companions of Prophet Muḥammad (peace be on him) where Sharī'ah rulings were suspended or changed due to change in the circumstances. Ḥadd punishment was suspended during famine by the caliph 'Umar b. al-Khaṭṭāb (May Allah be pleased with him). He also discontinued diffusion of cultivated terrestrial to Muslim combatants in Iraq in spite that Qurānic directives allowed them to have as battle proceeds. One category of eligible of shares of zakah as per al-Qurān[87] is the mū'allafat al-qulūb (non-Muslim who supports Muslims). The Qurānic assigned share for them was discontinued by the caliph on the ground that now Muslims are so strong that they are no longer in need of their support. These examples show that the Caliph departed from the literal sense of the Qurān to its general purpose in harmony with the spirit of the Qurān purely on rational grounds.[88]

It is described in al-Qurān that Allah has sent Prophet Muḥammad (peace be on him) as his mercy for the universe. Allah says:

"we sent Thee not, but As a Mercy for all creatures."[89]

Being a mercy (raḥmah) his prophet hood is justified for the human beings as he endorses benefit to the humans and prevent them from harm. 'There are variety of views amid intellectuals about the comprehension of ta'līl but majority maintains that the Sharī'ah is innately logical as its objectives is to secure the benefits of the people. This is the reason

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[87] Al-Qurān 9:60.
[88] Zaydān, 2015, 55; 'Izz al-Dīn, 1991, 1/5.
[89] Al-Qurān 21:107.

that logic of averting enmity and bitterness amid human beings and intervention with the

commemoration of Allah is behind the rulings such as forbiddance of wine and

gambling.[90] Similarly the rationale of prevention of accumulation of capital amid the

affluents, is behind the imposition of alms and charities.[91] Due to such type of numerous

instances of ta'līl or rationalism in the sources of Sharī'ah, the Shāfi'ī jurist 'Izz al-Dīn

'Abd al-Salām (d. 1261) observed that majority of worldly well-beings (maṣlaḥah) and

harms (mufāsīd) are known to human beings through reason and rational. He said that

they are bound to understand it before revelation. He feels that rationale behind the

existence of Sharī'ah is acquiring advantages for the human kind and 'ulamā' have not

contrasted this. He observed that divinely oriented legal systems and rationalists are

agreed on the need of protection of life, wealth and honor. Moreover, they agreed on

achieving the best of the best from actions and saying.[92]

During the period of Holy Prophet (peace be on him), the revelation was continued and

he was there to fix the meanings of the text through divine guidance. His *Sahābah*

employed analogical reasoning in many events, without alluring in its details. They did

not speak of ratiocination, causation or 'illah, as juridical concepts or beyond the

incidental and cursory levels of investigation. Due to availability of the recently revealed

text they denoted the connotations (ma'ānī) instead of effective causes or 'illah of the

laws.[93] As a legal concept, analogy and the 'illah were developed in later periods. Later

on, during the application of various methodologies of ijtihād, the jurists have variety of

approaches towards broader or rational meanings of the text for its utilization in the

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[90] Al-Qurān 5:91.
[91] Al-Qurān 57:7.
[92] 'Izz al-Dīn. 1991, 1/05.
[93] Al-Mawsū'ah, 1404, 1/26.

process of derivation of ḥukam. In this process majority of the jurists have searched effective causes and validated analogy in articulation of rulings. However contrary to this position of majority, Ẓāhirī School insisted on literalism and stressed on close adherence to the text. All discussion of the cause, rationale and objective of the lawgiver is irrelevant in their opinion as the text is sufficient for them. One the bases of attitude towards rationale of the law, the Muslim jurists are classified into Arbāb al-ma'āni or semanticists while the other group which is proponents of literalism is called Arbāb al-Ẓāhir or literalists. Semanticists or Arbāb al-ma'āni are further divided into two camps, one of which tended to go towards the spirit and objective of the law and tried to penetrate into its philosophy and rationale instead of the meaning of words. This group is close to a well-known scholastic orientation which is named as Ahl al-rā'y. The other group of the semanticists which can be named as Ahl al-Hadīth consider limited role of ratiocination in the Sharī'ah. These groups accepted analogy and searched for resemblances and their effective causes, yet they differed on the wider scope of the rational enquiry in the determination of laws.[94]

These two tendencies of semanticists' feature to the notable historical academic assimilation of Ahl al-rā'y and Ahl al-ḥadīth. Both these traditional tendencies were competing and affecting each other in early centuries of compilation of Islamic Law. However massive collection and documentation of ḥadīth in mid-ninth century gave upper hand to Ahl al-ḥadīth. The Ahl al-Rā'y were more diligent in search of a textual evidence for their stances and a conversion of stress upon the range of their dependency on rā'y initiated to evolve.[95]

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[94] Kamali, 2010, 55–57.
[95] Al-Qaṭṭān, 2001, 289.

Many famous companions of the Prophet (peace be on him) looked towards legal rulings through their rational conclusion such as 'Ā'ishah(May Allah be pleased with her), 'Umar b. al-Khaṭṭāb (May Allah be pleased with him), 'Ali b. Abū Ṭālib(May Allah be pleased with him),'Abd Allah Ibn Mas'ūd(May Allah be pleased with him), Zayd Ibn Thābit(May Allah be pleased with him), 'Abd Allah Ibn 'Abbās(May Allah be pleased with him) and many others. The seven famous jurists of Madinah, especially Ibn al-Musayyīb, Masrūq, 'Alqamah, al-Zuhrī and then also Abū Ḥanīfah, Ibn Abī Laylā, al-Awzā'ī, al-Shāfi'ī, al-Muzanī and many other prominent scholars have also manifested inclination toward reason, opinion (rā'y) and ta'līl, but they remained away from involving in inconsistent views. The second group of rationalists attempted to narrow the extent of their dependence on rā'y comprised of companion Abū al-Dardā', 'Abd Allah b. 'Umar, and then Ibn Sīrīn, Aḥmad b. Hanbal and numerous other, this catalogue is just an uneven assessment of the inclination not for the purpose of keen observation. Soon after an era came in which narrow outlook started to lose track and left only few defenders of it, even after the inception of absolute imitation and taqlīd.[96]

The ahl al-Ẓāhir headed by Dāwūd al Ẓāhirī (d. 885) and Ibn Ḥazm, were stuck to the apparent text. In their view the Sharī'ah is a set of rulings which needed to be understood in the text. The search for rationale of the laws will lead towards speculative thought. It will be contrary to the intention of the lawgiver. According to them, extent of ijtihād, is comprehension and explanation of the expressions of revelation. Regardless of the prominent contribution towards knowledge and a big heritage of genuine ijtihad of few of their intellectuals, like Ibn Ḥazm al-Ẓāhirī, the Ẓāhirī School ultimately relinquished its

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[96] Al-Mawsū'ah, 1404, 1/34-38).

basis and vanished throughout the ages.[97]

The place of reason and rational in Islamic tradition can be traced in the humanism in classical Islam. George Maqdisī has a tremendous contribution in this branch of study through his valuable books such as 'the Rise of Humanism in Classical Islam' and 'the Christian West, Ibn 'Aqīl: Religion and Culture in Classical Islam' and 'the Rise of Colleges: Institutions of Learning in Islam and the West.' In these studies, he has tried to answer the questions such as what? Who? When? Where? How? and particularly why? in Islamic and Western intellectual traditions. The scholasticism in Islamic tradition emerged as the result of intellectual debate between rationalist Mu'tazilis and positivists Ash'arite on the theories of natural law and positivist law in Sharī'ah .[98] The disagreement between both the theological schools in their jurisprudential debates revolved around the role of reason and revelation in articulation of a legal text. This debate was about the issues such as:

1-the problem of determination of good and evil (al-taḥsīn wa al-taqbīḥ)

2-the relation between reason and revelation (al- 'aql wa al-shar ')

3-the qualification of deeds prior to the revelation (ḥukm al-af'āl qabl warūd al-shar ');

4-prohibtion and permission (al-ḥaz wa al ibāhah)

5-the imposition of responsibility or obligation beyond one's capacity (taklīf mā lā yuṭāq) and

6-the imposition of legal obligations on the non-existence (mas'alah al-ma 'dūm)[99]

Makdisī has named the legal tradition of relying upon scriptural text as positive. From

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[97] Al-mawsū'ah, 1404, 1/36-43; Kamali, 2010, 57.

[98] George Maqdisī, *The Rise of Humanism in Classical Islam and the Christian West: With Special Reference to Scholasticism* (Edinburgh: Edinburgh University Press, 1990), 3–5.

[99] Ibid, 4.

this Emon adopted Positivist for those who gave primacy to the text, and rejected a

foundational role for reason in law or theology against the speculative rationalist

Mu'tazilis whom he has named naturists.[100] The Mu'tazilites rationalists advocated a

naturalist thesis to use of reason through objectivity and normative authority. On the

other hand, the Ash'arites, opposed Mu'tazilite naturalism while claiming that the latter

involved human reason to the detriment obedience to revelation. Their positivist position

was based on the view that divine obligations have to be established on the biases of

express scriptural text for authority. This underlying tension between these two schools

of thought is clearly evident in their arguments about natural law. The legal debate

between both the schools is focused on the hypothesis of possible role of human reason

by which individuals can determine the divine law? If yes then on which foundation and

which fashion it can be used? Moreover, in presence of the scriptures such as the Qurān

and the hadīth, how reason can fit into the ontological and epistemic picture of

determining divine obligations?[101] Qādi Abū Bakar al-Baqālanī is of the opinion that

reason and rational is a kind of obligatory knowledge which tells us about permissible

possibilities and impossibilities. Only reasonable persons can have this knowledge. It

appears that he considered it prerequisite of knowledge.[102]

The leading naturalist Mu'tazilite jurist Abū Bakr al-Jaṣṣāṣ (d. 370/981) is of the opinion

that rationale can be a root of divine duty. He opined that genuine moralities, founded on

a purpose and normative perception of nature supplies basis for universal and precisely

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[100] Anver M. Emon, "Natural Law and Natural Rights in Islamic Law," *Journal of Law and Religion*,20, no. 2 (2004): 351, doi:10.2307/4144668; George Maqdisī, *The Rise of Humanism in Classical Islam and the Christian West: With Special Reference to Scholasticism* (Edinburgh: Edinburgh University Press, 1990), 3–5
[101] Emon, 2004, 354
[102] Abū al-Ma'ālī 'Abd al-Malik b. 'Abd Allāh b. Yusuf al-Jūwaynī, *al-Burhān fī Uṣūl al-Fiqh*, 1st ed. (Bayrūt: Dār al-Kūtub al-'Ilmiyya, 1997), 1/9

determined ethics. He is of the opinion that Allah has created all creation for the betterment of mankind. Taking evidence from the verses of al-Quran, he ascertained that God left nature at the disposition of mankind, therefore it can be utilized for the benefits of humans because this is one of the objectives of Allah's creation. Naturalists like al-Jaṣṣāṣ were not interested in the calculus of the greatest good. Rather, they utilized nature to base their calculation in what they trusted to be an intent creation, which also contained the normativity of the destiny. This expression of this naturalism is demonstrated through concepts such as the good (hasan) and evil (qubh, qabīh), and the ruling on an act prior to the existence of revelation (min qabla wurud al-shar').[103]

Imām Ghazzālī is of the opinion that knowledge can be divided into categories such as (1) reason based knowledge that cannot be obtained through revelation, (2) the knowledge based on revelation that cannot be learned through reason and (3) the knowledge that can be learned either by reason or by revelation. The existence of the world and what is going on in it we learn through reason. The knowledge about Allah almighty, his creation, wahī (revelation), the Day of Judgment and reward or punishment on the basis of good or bad deeds can be sought only through revelation. What we can learn both through reason and revelation includes oneness of Allah, the creation of movement and needs of the people etc.[104] Positivist jurists such as Abū Hāmid al-Ghazzālī still recognized that at times a jurist must utilize his discretion to arrive at a law of God. Positivist jurists admitted that the Sharī'ah can address all situations.[105] It does not mean that there is an answer for every given legal issue on the basis of sacred text, but rather its inclusiveness bestows directions in the essence of the law which can be used

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[103] Jaṣṣāṣ, 1994, 2/95-110.
[104] Al-Ghazzālī, al-Iqtiṣād fī al-i'tiqād, 116.
[105] Al-Jūwaynī, 1997, 2.

by the intellectual to settle a new issue. Jurist like al-Ghazzālī adopted a soft naturalism

by declaring normative quality of nature in the commandments of scriptures. For them

nature is not only an objective ground for rational analysis, but also a normative

foundation of obligatory actions which is determined by the scripture.[106]

Imām Ghazzālī explains the relationship between revelation and reason in an excellent

way in the discussion related to sources of rulings where he considered reason (aqal) and

istiṣhāb (continuity) as the fourth source (dalīl) of aḥkām.[107] He distinguishes its role

before the revelation and after the revelation and states that the rulings of Sharī'ah have

been established through revelation and it could not be realized through reason but reason

can be a source of exemptions from the obligations in pre-revelation period. It can also be

a source of removing difficulties of the people prior to the arrival of the Prophets.

Moreover, it can also guide us how to seek guidance in pre-revelation period, but this

guidance has to be verified after the revelation for its continuity. He is of the opinion that

aḥkām can either be establishing an obligation or negating it. The realization of ḥukm is

not possible through reason. However, it can used to negate certain actions, if its negation

or limit is not known through revelation. In this regard he has examples such as that we

learned the obligation of five prayers through revelation but the prohibition of sixth

obligatory prayer is based on the logic as it is not known through the statement of the

Prophet. The same is in the obligation of fasting of Ramaḍān and its non-obligation in

other months.[108]

Scholars such as Kevin Reinhart not only discussed the role of revelation and reason on

the formation of legal traditions but also tried to trace the ethical questions about pre-

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[106] Emon, 2004, 352.
[107] Ghazzālī, al-Mustasfā fī 'ilm al-uṣūl, 159.
[108] Ghazzālī, 159.

revelation societies which were in natural state. He is of the opinion that this hypothetical was an indirect way for jurists to contend with a situation that was too difficult to deal with directly, therefore they debated the issue in the abstracted and counterfactual form.[109] Anver M. Emona is of the opinion that this was not a hypothetical situation and it was not a difficult question about some fictional situation where no revelation existed. They were in fact using this theory to justify the use of juristic discretion to address the situations which were not covered by scriptures. He identified that pre-modern jurists argued these situations either by declaring it supposedly allowed, supposedly forbidden, or in a form of standstill.[110] The opinion of Imām al-Jūwaynī (d. 478/1085) is classical example of it who acknowledged that the issues that were addressed by fatwas and decision of learned companions of Prophet Muḥammad (Peace be on him) were much more and unlimited than the issues that were covered by the texts (al-mansūsāt). They had not stopped in giving their legal opinion on an issue only on the ground that text is not available in it.[111]

Mu'tazilite Jurist al-Jaṣṣās argued that all acts in creation is presumptively permissible (ibāhah). While infusing nature, which is reflected in purposeful normativity with a divine, he gave legal value of permissibility to all acts that are not covered by the sacred text. He considered nature both the 'is' and the 'ought' as it is reflecting the divine will. In this way he moved from objective reality of the nature to its normative assessment. He is of the view that the acts that are not covered by the scripture are subject to rational evaluation. In his view some acts may reflect universal values of obligation and prohibition, whereas others may be defined as permissible on the basis of its

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[109] Reinhart, *Before Revelation*, 4–5.
[110] Emon, "Natural Law and Natural Rights in Islamic Law," 355.
[111] Al-Jūwaynī, *Al-Burhān fī Usūl al-Fiqh* (Qatar: Dār al-wafā', 2008), Vol.2, 13.

circumstances. He argues that where there is no scripture, some acts may be determined by reason of universally obligatory (wajib) such as believe in Allah (Īmān), being grateful to one's help, and following justice (insāf). Similarly, other conducts may be deemed as prohibited which are universally considered bad, like scepticism and persecution. He mentions about this: '(with the deed familiar prior to revelation) is that which is inherently evil (qabīh li nafsihi) and forbidden, and which does not shift and modify from its position (hālihi). Along with unchangeable obligatory or prohibited acts based on reason he also identifies third category of acts which have to be determined allowed, forbidden, or obligatory owing to the advantages and injuries coming from those deeds.[112] The above mentioned thesis of al-Jaṣṣās is supported by Abu al-Hasan al-Basrī who argued that all acts are supposedly allowed considering there is no hint or proof of any foul in it. He is of the opinion that the acts of subject of Law (Mukallaf) based on reason are of two types good (hasan) or evil (qabīh) [113]

Al-Jaṣṣāṣ discussed the essential character of an act which either resulted into the benefit or harms. In his opinion the approval of an act is subject to the objective reality that it poses. His opinion shows he takes his inquiry about the nature of an act into an empirical and objective reality. The philosophy of benefit and harm that is reflected in the terminologies that are used by him such as manāfi', naf'a, adrār, darar are reflecting his empirical observations. Anver M. Emon observed that the thesis of al-Jaṣṣāṣ also reflect a normative reality. He used these terms to satisfy human needs and infuse nature with normativity. In this way he tried to assert a natural teleology. He concludes that the opinion of al- Jaṣṣāṣ reflects not only an empirical reality but also a normative one, given

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[112] Jaṣṣāṣ, 1994, 2/100
[113] Baṣrī, al-Basri, 2/315-316.

the divine imprint on creation.[114] Mu'tazilites converted an empirical observation into a normative one through giving the role to nature and reason in the creation of obligation or prohibition of acts. In this they change 'is' into an 'ought' and combined fact and value. Their position is criticized by Ash'arites and other positivists who denied that nature is either determinative or normative. In their view the nature does not always pose maṣlaḥah. Moreover, one cannot change from an inquiry into empirical nature and assume that it necessarily implies or carries any normative value.

Among the Malikite-Ash'arite positivist jurist Shihāb al-Din Al-Qarāfī (d. 684/1285), criticized the point of view that reason is a basis for establishing obligation, as it is reported that Mu'tazilite naturalists considered reason to be a basis for establishing obligation. Many Positivist-Ash'arite assumed that in Mu'tazilite thought obligation is based on 'aql without any reference or regard to the divine. Al-Qarāfī is of the view that Mu'tazilite empowered reason in a way that presupposed a certain theology of God variant from the Positivists such as the Ash'arites. According to Al-Qarāfī, the Mu'tazilites and Positivists both accepted that obligation comes from God. But Mu'tazilites went one step farther and asserted that clear wisdom obligates people to avoid corruption and to achieve benefits as this wisdom is also granted by God. According to Al-Qarāfī, debate between both the groups is about the question; whether reason can make the move from empirically assessing a beneficial or harmful act to asserting that Allah has actually ordained a particular duty or forbiddance. According to him Mu'tazilites argued that substance of God's obligations and prohibitions can be understood from the reason as believing the theological maxim that God is knowledgeable powerful, and perfect. The Mu'tazilites, on the bases of general good held

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[114] Emon. "Natural Law and Natural Rights in Islamic Law," 357.

that one can shift from pragmatic inquiries of advantages and sufferings to the ascertainment of divine duty. Al-Qarāfī illustrated this process by showing how the naturalists structured acts and deeds in five heads of value or the al-aḥkām al-khamsah. These five categories are the basic divisions by which pre-modern Muslim jurists of all legal and theological affiliations determined the value of acts, whether as obligatory (wājib), recommended (mandūb), permissible (mubāh), reprehensible (makrūh), or prohibited (Harām).[115]

The Andalusian jurist Ibn Hazm (d. 456/1063) has discussed the issue in a specific chapter which deals with the role of reason and nature on creation of obligation and prohibition before the revelation. He concludes the debate among naturists and positivists and stated that Allah creates cravings in humans that may pave the way toward misconduct and crime. But Allah forbids all bad deeds for human beings through scripture. Ibn Hazm's point was that one cannot construct a teleological argument relying on natural creation, in this case human dispositions, thereby render decisions on what is obligatory and what is prohibited.[116] [117] Imām Al-Jūwaynī is of the view that the worldly and religious matters have to be taken according to the rules and principles and not on the basis of normative determinations of moral value.[118]

Abū Hāmid al-Ghazzālī from the Shāfi'ite is of the opinion that in reported rulings reason cannot be relied upon for obligation or prohibition. But it could have been beneficial for creation of rulings in pre-revelation period. After giving several examples

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[115] Ahmad ibn Idrīs Qarāfī, *Nafā'is al-uṣūl fī sharh al-Mahṣūl* (Makkah al-Mukarramah, al-Mamlakah al-'Arabīyah al-Sa'ūdīyah: Maktabat Nizār Muṣṭafā al-Bāz, 1997), 2/135-200.

[116] Ibn Hazm, *al-Ihkām fī uṣūl al-ahkām*. 1/155.

[117] Emon, "Natural Law and Natural Rights in Islamic Law," 360–61.

[118] 'Abd al-Malik ibn 'Abd Allāh Imām al-Haramayn al-Juwaynī, *al-Ghiyāthī: ghiyāth al-umam fī iltiyāth al-ẓulam*, (Cairo: Maktabah Imām al-Haramayn , 1401), 85.

he identified that reason cannot contribute in creation of obligations in acts, however, it may be helpful in creation of prohibition if the revelation is not arrived or available in any prohibited act.[119] Abū Ishāq al-Shīrāzī (d. 476/1083) mentions numerous opinions on the benefit of things in pre-revelation situation. He reported from Ash'arites such as Abū 'Alī al-Tabrī that it would be the state of waqaf neither prohibited nor permissible. The Shāfi'ites such as Abū Al-Abbas and Abū Ashāq are of the view that it will be optional. Mu'tazilites from Basra are of the opinion that if any one consider it permissible, he can possess it and use it. After quoting these opinions he concludes that first opinion which reflects neither prohibited nor permissible is correct.[120]

Al-Jūwaynī (d. 478/1085) is of the opinion that we cannot deny that avoiding danger (ijtināb al-mahlakah) and initiating well is demanded by the rationality and its denial is unreasonable. The ability to give ethical perceptions is an inbuilt faculty of humans, or haqq al- Ādamiyyīn as mentioned by him. However, he clarified that making moral judgment is distinct from inquiring what is obligatory or prohibited in the sense of Allah's determinations (Allah) as the value of an act determined by God is different from the determination of a human. God's determination does not depend on a rational approval of harm or benefit. In other words, God does not legislate in the light of any rational calculus. Rather, relying on a divine command ethical model, he asserted that whether a determination by God is good or bad, and hence obligatory or prohibited is dependent solely on the fact that God has ordained suffering or reward for those deeds. Human beings cannot assess such divinely established matters by a logical scrutiny of

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[119] Ghazzālī, *al-Mustasfā min 'ilm al-usūl* (Bayrūt: Dār Ihyā' al-Tārīkh al-'Arabī : Mu'assasat al-Tārīkh al-'Arabī, 1993), 159.
[120] Abū Ishāq Ibrāhīm ibn 'Alī ibn Yūsuf Fīrūzābādī al-Shīrāzī, *Sharh al-Luma' fī usūl al-fiqh* (Bayrūt: Dār-al-Kutab al-'Ilmiyyah, 2003), 122.

damages and profits as God is beyond such mundane affairs. This does not indicate human incapacity to ascertain right and awful. But they can only do so in those areas not already addressed by God.[121] Furthermore, their determinations are not tantamount to God's will since God has not made a decision in these areas.[122]

3.2-Rational Methods of Investigation in Islamic Law

Methodology is identical to any procedure used in any process for finding ways to overwhelm a campaign. It tells us how to prepare various methods and tools in order to be used in sequence for convenience and clearance.[123] So, is the case of methods and techniques of Islamic law which tell; where to get data from? What data should be collected? and how much to be collected? These methods can be qualitative or quantitative. The selection of the methods depends on the nature and type of research.[124]

Islamic terminology for research 'Manhaj' is derived from the Qurānic verse 5:48. It is to be noted here that this verse has used word 'minhāj' (the Law) in the meaning of normative way which is a cognate of the Hebraic word 'minhāg'.[125] In the literal meaning, this terminology is used for a 'clear way or pathway'. As a terminology for investigation and discovery in Sharī'ah it indicates a batch of common principles that are observed by the analysts of Sharī'ah for collection, organizing and analysis of many theories, data and material in to gain ideal outcomes.[126] Manhaj can be divided into Tilqā'ī (voluntary) and Ta'ammulī (prudent or cautious). Tilqā'ī Manhaj is a

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[121] Al-Jūwaynī, *Al-Burhān fī Usūl al-Fiqh* (Qatar: Dār al-wafā', 2008), Vol.1, 10.

[122] Emon, "Natural Law and Natural Rights in Islamic Law," 362.

[123] Zahrā, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research," 224.

[124] Henn, *Short Introduction to Social Research*, 19–50.

[125] Hallaq, *The Origins and Evolution of Islamic Law*, 21.

[126] Zahrā, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research," 226.

methodology that is granted by nature to all human beings and they use it in their daily life. It is Ta'ammulī Manhaj, which is mostly similar to an organized research. This type of Manhaj can be further classified into; (1) general Ta'ammulī and (2) special Ta'ammulī. General Ta'ammulī methodology can be either Manhaj Aqalī or Manhaj Naqalī. Manhaj Tajrabī is also its sub category.[127]

As it has been discussed earlier, the sources of Sharī'ah law are divided into reveled and rational. Process for formation of legal running from the revealed sources is carried out through Manhaj Naqlī or textual methodology while Manhaj Aqalī or rational methodology is used for legislation based on rational sources. Manhaj Naqlī is used to examine, understand and determine meanings of the all forms of transmitted texts. The knowledge of the forms of text and understanding of the types of the ḥadīth is the core use of this methodology. A jurist cannot articulate rulings from the ḥadīth without understanding of usūl al-ḥadīth, types of ḥadīth and classification of its literature.[128]

Manhaj Naqlī or rational methodology is aimed at detecting a rational foundation for specific development. It is also used for evaluation of evolving human thoughts. Prior to Muslims this methodology was used by the Greeks, therefore, it is claimed that the use of this methodology in Muslim thoughts is due to the influence of Greek philosophy. In the natural process of adoption and adaptation Islamic civilization learn many things from other heritages such as Greek, Roman, Indian Chinese and Chaldeans. At first instance Muslims learned from these civilizations in various fields of natural and human sciences which were not based on revelation and were not against their beliefs. This was particularly true in perspective of science of nature as classical cosmological sciences

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[127] Al-Nīshār, *Manāhāj al-Bahath indā Mūfakrī al-Islam*, 284.
[128] Muḥammad ibn Aḥmad Sarakhsī, *Uṣūl al-Sarakhsī* (Bayrūt: Dār al-Ma'ārif, 1372), 1/333; Shāṭibī, *al-Muwāfaqāt fi uṣūl al-Sharī'ah*, 4/294.

predominately had used to elaborate the union of nature and hence was in accordance with Islam's wisdom. During the encounter with these civilizations the Muslims adopted more or less elements of natural sciences from all the ancient civilizations. They updated these sciences and united them into a new entity which had to evolve over the centuries. Later on, these sciences became fragment of Islamic heritage and integrated into the fundamental composition of Islam which was derived from the revelation itself.[129] In this process of upgradation of ancient sciences, the Muslim Jurists had set an equal rational procedure fit for Islamic research. The Islamic logical procedure is predominately consisting of methods of Al-Istiqrā' and Al-Qiyās. Al-Istiqrā' process is based on the utilization of observation in order to discover original relation amid two or more phenomenon. This method required that the observation should cover all factual details so that the user of this method can seek all relevant information for his derivation. This method is divided into two categories i.e., istiqrā' tāmm and istiqrā' nāqis. Istiqrā' tāmm is aimed on comprehensive and all-inclusive observation while Istiqrā' nāqis covered most of the facts in the observation process. Methods such as tajrabah and mushāhadah are also used in the execution of process of Istiqrā'.[130]

Ramadān al-Būṭī observed that the knowledge that is obtained through the application of derivation methods is based on the imaginations of unknown things through past or present estimations. In this method results are calculated on the basis of available facts. These estimated results provide us variant results which are moving from more authentic

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[129] A. J. (Arthur John) Arberry, *Aspects of Islamic Civilization, as Depicted in the Original Texts,* (London: Gallen and Unwin, 1964), 10–14; Seyyed Hossein Nasr, *Science and Civilization in Islam* (Cambridge: Harvard University Press, 1968), 30–35.

[130] Muhammad Zia ul Haq, "Validity of Classical Methodologies of Sharī'ah in Modern Age: An Analysis." *Pakistan Journal of Islamic Reserch* 6, no. 2010 (2010): 21; Zahrā, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research," 227–28.

to less authentic. The authenticity of these results is dependent on the reason-based conditions which are important for any optimum result. Due to this, the jurists have split the outcomes into three classes. The first class is al-luzūm al-bayyān bil- ma'nā al-khāṣ (attached with special meaning) while the second class is al-luzūm al-bayyān bil- ma'nā al-'āmm (attached with general meaning). The third class of this conclusion is al-luzūm ghair al-bayyān (without attachment of any meaning). The most creditable knowledge is based on al-luzūm al-bayyān bil- ma'nā al-khāṣ. The next degree of credibility is with the knowledge which is based on al-luzūm al-bayyān bil- ma'nā al-'āmm and least creditable knowledge is that based on al-luzūm ghair al-bayyān.[131]

The second rational method in Islamic thought is al-qiyās, which in literal meaning is used for estimating or quantifying the mass, extent or standard of an article. Al-qiyās is also applicable for comparison to indicate parity or resemblance amid two objects. In the dialect of Usūl, al-qiyās it is the augmentation of a Sharī'ah verdict from genuine problem (aṣl or maqīs 'alayh) to a new event (Far') as of alike effective cause ('Illah) in both the situations. Through the method of al-qiyās, the original ruling which is based on the Qurān or the Sunnah or ijmā'is extended to the new case. In spite that jurists treated ruling extracted through Qiyās as an extension of an existing law but it guides toward a new law on a new case. [132] Al-qiyās as a method is developed by the Muslim jurists so that laws in new matters remain within the framework of sources of Islamic Law as new injunctions are also founded on the 'Illah (causes) which are already brought into light

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[131] Muḥammad Sa'īd Ramaḍān Būṭī, *Min al-fikr wa-al-qalb: fuṣūl min al-naqd fī al-'ulūm wa-al-ijtimā' wa-al-ādāb*, Ṭab'ah jadīdah. (Damascus: Maktabāt al-Fārābī, 1973), 81–83; Zahrā, "Unique Islamic Law Methodology and the Validity of Modern Legal and Social Science Research Methods for Islamic Research," 227–28; Zia ul Haq, "Validity of Classical Methodologies of Sharī'ah in Modern Age: An Analysis,"20–21 .

[132] Zarqā', *al-Madkhal al-fiqhī al-'āmm*, 1/68-70.

through this framework. The qiyās is used where diversion form al-Qurān, Sunnah or ijmā'were not attainable. This is a prime rationale for authenticity of Qiyās. Qiyās is a logical method but in this method personal opinion (Rā'y) is maintained subservient to sacred text. As a rational method it means that the Sharī'ah observe few objectives (Maqāṣid) that are in accordance with human rationality.[133] It is fair to consider here that in fīqh the use of al-qiyās is specifically for legal purpose while as a research method it used to apply on Islamic research in general as well as to the facts and phenomenon outside religious belief. A researcher through the utilization of qiyās will attain creditable information related to undetermined things formed on cause and effect and structured dictate of the world.[134]

Majority of the jurists have divided qiyās into probable (ẓannī) and definitive (qaṭ'ī). While Ḥanafīs classify it into qiyās zāhir (manifest analogy) and qiyās khafī (concealed analogy). The qiyās is a method which justifies the provision of rulings in the case where no textual running is available to handle the new situation. The utilization of this method is based on the presumption that a solution exists in Sharī'ah for every new situation. This method is helpful to extend the law from limited texts to new causes through legal reasoning. The analogy that is carried out in qiyās is strictly based on the underlying cause or 'illah. In this regard the jurists have identified methods for identification of causes of aḥkām in the texts. These causes are called *masālik al-'illah* or the methods of discovering the underlying cause. These methods include the text (naṣṣ) of al-Qurān or Sunnah. Ijmā' is also included in these methods as a third source of Islamic Law. The methods for performing rationale on the basis of text (naṣṣ) are takhrīj al-manāṭ

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[133] Sarakhsī, *Uṣūl al-Sarakhsī*, 2/149-160.
[134] Muḥammad Sa'id Ramaḍān Al-Būṭī, *Kubrā Al- Yaqīniyyāt Al-Kawniyyah* (Damascus: Dār Al-Fikar, 1998), 43–44.

(derivation of 'Illah), taḥqīq al-manāṭ (discovering the cause in the new cause) and tanqīh al-manāṭ (identification of cause).[135]

4- Fiqh al-Aqalliyyāt

4.1-Intorduction of the Terminology

Fiqh al-Aqalliyyāt is comparatively new extension of fiqh. The term minority suggests power and authority instead of number, with a distinct cultural, religious and ethnic affiliation from the rest of the society, furthermore legal, administrative and political control of a community determine its status as minority or majority in a state.[136] This special branch and new branch of Sharī'ah law was proposed by Shaykh Ṭāhā Jābir Fayyāḍ 'Alwānī and Shaykh Yūsuf al-Qaradāwī. They are of the view that this legal dogma will help Muslims in West not only to observe their faith, but also to confront problems related to integration and assimilation in an Islamic perspective. Fiqh Aqalliyyāt focuses on exceptional rulings that are useful in special circumstances in which Muslims of the West live. It is founded on the territorial principle of "'ālamiyyah al-Islam" (Islam as a global religion) and the juristic rule of "Maqasīd al-Sharī'ah." The minorities throughout the human history always remain concerned about protection of their civil and political rights and distinct identity. There is a group[137] of Muslim jurists

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[135] Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad, Pakistan: Islamic Research Institute, 2016), 213-228,306-307.

[136] Ṭāhā Jābir Fayyāḍ 'Alwānī and A. A. Shamis, *Towards a Fiqh for Minorities: Some Basic Reflections* (UK: The International Institute of Islamic Thought, 2010), 10-11.

[137] Due to the influence of native idea many immigrant Muslims in United States and Europe were reluctant to take part in politics. They have the fear of prevailing strong perceptions Muslims participation may lead to union with infidels. Muslim community was worried that it would ultimately lead us to the acceptance of non-Islamic system of secular politics. They demanded fatwā from Council about this issue. Al-Alwānī discussed these objections in his fatwā by claiming that the American political system was secular and impartial, but it does not mean that it necessarily irreligious. In 1994 Al-Alwānī created the term fiqh al-aqalliyyāt. And invited experts for collective ijtihād from numerous areas of social science to contribute in producing new doctrines, concepts and understandings. The philosophy of fiqh al-aqalliyyāt can be

who are in favor of special fiqh to address the issues of Muslim minorities all over the world. The term "Fiqh for minorities" has been used for this different branch owing to some hindrances and restrictions exclusively faced by Muslim minorities need rulings based on legal rationale.[138]

4.2- Need and Significance of Fiqh al-Aqalliyyāt

In early period of Islam, Muslims were free to move in Muslim territories, they usually stayed for shorter period of time.[139] Even many Muslims had migrated to non-Muslim lands and established their authority and rule there, but many other also survived in places where Muslim rule ceased to exist. Therefore, few native Muslim converts lived in non-Muslim societies, despite of the pivotal differences between them and non-Muslim communities.[140] Those who were forced to live there evolved a distinct Islamic culture, in contrast to other communities, since they were under obligation to follow precepts of Islam, due to the fact new culture might have the shades of host society, but it was the possible outcome of inevitable integration, due to the fear of being perished by the culture of the host society.[141]

In the past Muslim minorities individually used to seek help from Muslim jurists about

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elucidated by studying the faith related opinions of its initiators and fatwa issuing jurists and their logics and their operational gears for validating a special jurisprudence scheme for Muslim minorities. See for details; Yūsuf al-Qaradāwī,*Fiqh of Muslim Minorities, Contentious Issues and Recommended Solutions* (Egypt:Al-Falāh Foundation , 2003); Tauseef Ahmad Parray, "The Legal Methodology of "Fiqh al-Aqalliyyāt" and its Critics: An Analytical Study," *Journal of Muslim Minority Affairs*, 32:1(2012): 88-107, available at http://dx.doi.org/10.1080/13602004.2012.665624; Rethinking Islamic Law for Minorities: Towards a Western-Muslim Identity, Edited and Introduction by Jasser Auda, at https://www.jasserauda.net%2Fnew%2Fpdf%2Fkamil_fiqh_alaqalliyaat.pdf&usg=AOvVaw37XwM5WAJ x-utfHQMfSjPb ;Uriya Shavit, *Sharī'ah and Muslim Minorities: The Wasatī and Salafī Approaches to Fiqh al-Aqalliyyāt al-Muslimah* (UK: Oxford University Press, 2015); Adis Duderija, and Halim Rane, *Islam and Muslims in the West: Major Issues and Debates* (Cham: Palgrave Macmillan,2019), at https://doi.org/10.1007/978-3-319-92510-3

[138] Ṭāhā Jābir Fayyāḍ 'Alwānī and A. A. Shamis, *Towards a Fiqh for Minorities: Some Basic Reflections* (UK : The International Institute of Islamic Thought, 2010), 10-11.
[139] Ibid.
[140] Ibid.
[141] Ibid, 34-38.

their day to day life problems, and Muslim jurists from all over the world had

undoubtedly realized the challenges faced by Muslim minorities and helped them by

issuing fatwas based on general principles of Sharī'ah and suitable to their time and

space. But now the situation has changed altogether, as Muslims are permanently settled

in non-Muslim territories, and a strong need for a separate fiqh is realized since rulings

for crisis or emergency as previously sought by jurists no more sufficient for Muslim

minorities, due to the changed realities of present-day communities of Muslims. Living

in a society which is not based on Islam, influenced by secular and other phenomena's

difficult to isolate themselves while living there.[142] They could mark for worship and

moralities but other social,[143] legal economic, political, educational aspects are never to

be isolated. Living in an alien system undoubtedly creating gap between the origin of

Muslims and non-Muslims. Now third and fourth Muslim generation is not referring to

their origin, might assimilate completely in west.[144] The realities of present-day Muslim

minorities are different, their motives of emigration are to search for prosperous future

and permanent settlement in western countries, which could not be achieved without

integration into an alien society but religious and cultural identities require to be

safeguarded, can never be compromised at any cost. Developing a separate or special fiqh

for Muslim minorities who are living in non-Muslim territories require a particular

approach to correctly deal with the issues faced by the Muslim minorities with the aim of

protecting them as an example for others rather giving them concession or relaxation. For

answering the questions of minorities' legal expert must be well acquainted with the

location, cultural and social structure of the land where they live as minority. This would

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[142] Ibid.
[143] Ibid.
[144] Ibid.

enable traditional legal experts, jurists and contemporary social scientists can jointly contribute, coordinate and work for the development of this fiqh. Furthermore, the approach of fiqh councils of reproduction of earlier fatwas in modern language do not serve the purpose, original interpretation in answer to the question of minorities is required which is beyond the effects of fiqh of emergency or crises.[145]

When problems arise from any field of human life, experts from all relevant fields may be asked to study both religious and social sides of the problems. That could be more practical and beneficial than fiqh councils which normally are restricted to Sharī'ah specialists.[146]

The data presented in the thesis reveals that tradition is a framework which leads the transfer of traditional culture and thought from one age to another age or from past and present to future. The traditions could be explored or reinvented. The accuracy and the authenticity of the tradition is dependent on the methods that are used in its rearticulating and recovery. The Western and Islamic legal traditions are not developed on 'uniform' notions of the societies; however, both are authentic, old and valid as in spite of various challenges both are not only able to sustain but also have the capacity to encounter other traditions. Islamic legal tradition is found in the conceptions and rulings of Sharī'ah law which is ordained on the revelation revealed on Prophet (peace be on him). It is lawful pragmatic set of injunctions, some of them are timeless and conclusive, while others have the capacity to change to accommodate changeable elements of life. The Western legal thought has developed on the bases of religious thought of Judaism and Christianity and in various periods it has evolved due to the influence of many factors such as Greek

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[145] Ibid.
[146] Ibid.

philosophy, Roman legal system. It is usually followed in North America and Europe but not limited to these territorial boundaries. The rulings of Sharī'ah are articulated in fiqh and its methodology is described in *Uṣūl al-Fīqh.* Both the notions took legal shape after the process of evaluation and advancement of legal thinking in various Muslim societies. The sources of Islamic law are classified into various types such as basic and secondary sources or revealed or rational sources. The verses of al-Qurān indicate the diversity of legal systems and inform that Prophet Muḥammad (peace be on him) received revelations similar to the Jews and Christians. The Qurānic revelation followed gradual approach. Throughout the life of the Prophet (peace be on him) in both Makkah and Medina piecemeal approach of revelation which is named as *tadarruj* was followed. Before the enactment and enforcement of decisive legal rulings the people were prepared for compliance. The al-Qurān rulings were effective to transformation of individuals from the tribal alignment to the Islamic sphere, where they would have equal prestige based on religious and moral principles in this new community of faithfuls. Muslim jurists are agreed upon that the Sunnah is second source of legal rulings related to ḥalāl (lawful) and ḥarām (prohibited). The authority and authenticity of Sunnah as a proof for derivation of rulings is supported by al-Qurān. Along with al-Qurān and al-Sunnah, majority of Muslim jurists also considered Ijmā'and Qiyās as third and fourth primary source of Islamic Law owing to its highly credible features. The elaboration of the source supplies and extracting a law from them is named as Ijtihād. It may consist upon a juristic opinion on the ruling of Sharī'ah on a particular matter. The revelation ended with the departure of the Prophet Muḥammad (peace be on him), therefore ijtihād became the main tool of explaining the revelation and its application to the emerging conditions. The basic

sources of Sharī'ah are divine and premier founding sources, hence treated as highest authority and assumed devoid of faults, unlike human base that are mostly imperfect. The secondary sources based on human reason are subject to the approval of its basic sources and if a ruling opposes a section in the main sources the latter carry the day. It can be perceived that the primary sources of Islamic Law are extensive. This unique system is distinct but not necessarily different from contemporary legal systems. It includes constitutional rules and principles, special laws with constant applicability, case-laws, and instance-law. The largest part of Islamic law is rule-law, whereas instance-law constitutes a very small part. Difficult cases are handled by using different methods and normally they are lesser in number than regular cases. The discussion shows that Muslim naturists and positivist jurists have tried to determine the role of both revelation and reason in articulation of the rulings of Sharī'ah. They agreed that divinity is the main source of legislations but they differ on the role of reason and rationality. Some considered it only a tool for understanding revelation and others included it in the catalogue of sources of Islamic law to be used in absence of text. They also debated on the role of reason and nature in creation of obligation and prohibition in pre-revelation period. They also identified hypothetical situations in which no revelation was in hand to regulate the conduct of the human beings and only possibility was use of reason to distinguish right from the wrong. Muslim jurists and scholars have always been trying their best to produce credible rulings through the use of concrete Islamic methodologies for extracting evidence from Islamic primary sources. On the bases of these methodologies they formulate strong arguments in support of their juristic derivation. The last part of the chapter suggests that contemporary Sharī'ah in the West and North

America can be demonstrated through Fiqh al-Aqalliyyāt. The structure of Islamic legal system is flexible, broad and comprehensive which has a capacity to accept new things apart from the previously recognized elements. If the question is new and requires fresh ijtihad then it would be exposed to assumption, discussion and modification. Hence, special fiqh for Muslim minorities must be established. It should have the capacity to address the questions related to the issuance and execution of fatwa by an authorized person or organization. The specification of society or community for whom fatwa should be issued require to be addressed properly under this special fiqh. But without proper understanding and participation of the public in this project, desired result can never be achieved.

The chapter provides foundational data regarding basic concept that laid downed framework for investigation. It proceeds with the concepts of Sharī'ah, it narrates ages old experience of Muslim Jurist for conducting the Ijtihād. It also describes Western legal heritage. The chapter also discusses basic concepts such as *al-Fiqh* Uṣūl *al-Fiqh, fahm*, and *'ilm*. The categorization of sources of Islamic law has also been described and discussed in this chapter. The basic sources of Sharī'ah such as Al-Qur'ān, Sunnah, Ijmā'and qiyās have been discussed in the chapter. It also sheds light on the secondary sources of Islamic law, such as   *istiḥsān* , the opinion of a Companion, *maṣlaḥah mursalah* jurisprudential interest, *sadd al-dharī'ah, istiṣḥāb al-ḥāl,* 'urf (custom) and scriptures of previous Prophets. Various methods of Ijtihād have also been described in this chapter. The rulings of Islamic law are outcome of the use of revealed and rational sources. The mechanisms that were used by Muslim jurists in application of these sources have also been elaborated with the support of juristic views. The use of rational methods

in Islamic law shows its capacity to interact with new situation to find appropriate rulings

for it. These methods also highlight the possibility of positivism in Islamic Legal

thoughts. They also guide us on the importance of observance in every day human life.

The last part of the chapter discusses the emerging branch of Islamic law which is named

as Fiqh al-Aqalliyyāt. This discussion shows how this new branch of legal reasoning can

create mechanism for paradigm shift about the role of Muslims living in non-Muslim

societies. This new branch can provide an opportunity for revisiting of classical

conception of territoriality. Moreover, it may extend new interpretations, so that Western

Muslims can live a life in accordance with their religious obligations and citizenship

responsibilities.

CHAPTER NO. 3

DISCOURSE ANALYSIS, JURISDICTION IN LAW AND SCHOLARS INVOLVED IN THE DEBATE ON THE ROLE OF SHARĪ‘AH IN WEST

CHAPTER NO. 3

DISCOURSE ANALYSIS, JURISDICTION IN LAW AND SCHOLARS INVOLVED IN THE DEBATE ON THE ROLE OF SHARĪ'AH IN WEST

This chapter begins with explanation of the notion of discourse analysis. The construction of meanings and its role in the discursive activity is also included in this section of the chapter. The issues related to role of language in the discourse, significance of recourse analysis and various approaches of it are also discussed in this section. It is followed by description of the ways in which this study has used discourse analysis. Since this study is analyzing jurisdiction of Islamic law on the matters of Muslims in the West, therefore, a detailed discussion related to concepts of jurisdiction in legal thoughts has been included in the 3rd part of this chapter. Entomology of various terminological jurisdiction, various types of jurisdiction and significance of jurisdiction in contemporary studies have been discussed in this section. The fourth part of the chapter provides an overview of the scholars, who have contributed in this debate. The discussion comprises upon introduction and contribution of some of the important contemporary scholars such as Muftī Muhammad 'Abduhu, Muhammad Rashīd Ridā, Dr. Muhammad Hamīdullah, Majīd Khaddūrī, Allama Yūsuf al-Qaradāwī, Prof. Tariq Ramadan, Dr. Khaled Abou El Fadl, Wahbah Mustafā al-Zuhaylī, Muhammad Khalid Mas'ūd and Abdullahi Ahmed An-Na'īm. A brief conclusion of the discussion is found at the end of the chapter.

1-Notion of Discourse Analysis

1.1-Conception of Discourse

Discourses is plural of 'discourse,' which means language-in-use or branches of language similarly to stories and conversations. It is to be noted that discourses are not confined to language only but language plus 'other stuff.' In modern urban societies that are equipped technologies, we can experience numerous Discourses.[1] A preliminary definition of the discourse could be a particular way or aspect of talking and writing about the understanding of the word.[2] It has been developing as a fashionable term to use at least from one decade. The notion has become ambiguous without any specific meaning. It is being used in various meanings and in variety of contexts.[3] These utterances are used in various social domains of such as 'political discourse' and 'medical discourse. 'Discourse analysis' is the investigation of these forms and linguistic genres. This commonly understood definition may not be much helpful in comprehensive understanding of what exactly is discourse? More developed methods and theories of discourse analysis are needed to clarify what are discourses? Who is work? And what are appropriate ways to understand and analyze it? In reality discourse analysis is not possible while relying on any one approach. It requires a series of multidisciplinary methods that can be applied during the studies of variety of social domains. Different perspectives of various issues suggest competing approaches to show the appropriateness of the 'discourse' and 'discourse analyses. A preliminary definition of the discourse could be a particular way

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[1] Gee, *An Introduction to Discourse Analysis - Theory and Method*, 17.
[2] Marianne W. Jorgensen and Dr Louise J. Phillips, *Discourse Analysis as Theory and Method*, 1st ed. (SagePublicationsLtd,2002),1,
http://gen.lib.rus.ec/book/index.php?md5=c21360ed6c75f0e8b869a9679e745769.
[3] Ibid.

or aspect of talking and writing aboutthe understanding of the world.[4] Foucault is of the view that a variety of theories and disciplines are using notions of 'discourse' and 'genre' during academic debates and dialogue in social research.[5] These concepts are particularly used in theology and religious studies, legal studies, media studies, cultural studies, film theory and so on.[6] These concepts are also used across theories and disciplines for bringing gap and bridging them on the one focuses the dialogue.[7]

1.2- Discursive Activity for Construction of Meanings

A discourse can be a continuous engagement through history. It can be presented in intervals. It can be static at one place or it can be moved from here to there. Discourse can be for shorter period or it can be for a while longer. Discourse analysis demands that your action must be similar enough to other recognizable performances. Recognizability is an essential character of a discourse even if it is unlike enough from what has already been before. It can be simultaneously transformable changeable.[8]

Discourses are always surrounded by various social institutions and workplaces such as buildings, classrooms and laboratories. These usually involve variety of "props" like magazines, books and newspapers. Use of various sort of technologies is also a part of discourse. Discourses also involve various types of actions and tools such as needles for sewing circles, birds for bird watchers and basketball courts for basketball players. The process of discourse also involves thinking of all the words, deeds, objects, symbols, clothes and machines that are required for pull off right way at the right place and

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[4] Jorgensen and Phillips, *Discourse Analysis as Theory and Method*, 1.
[5] See for details, Foucault, M., *The Archaeology of Knowledge* (New York: Pantheon, 1972).
[6] See for details, Fiske, J., *Television Culture* (London: Routledge, 1987); Silverstone, R. (1999) Why Study the Media? (London: Sage, 1999).
[7] Fairclough, *Analysing Discourse*, 26.
[8] Gee, *An Introduction to Discourse Analysis - Theory and Method*, 18.

appropriate time. Sometimes engaging with social and political issues is also effective in the discourse. Our involvement in the discourses is time bound but they themselves existed before our engagement into it and exist even if we exit from the discourse. In discourse, our deeds and words conduct conversations with each other through history.

1.3-The Role of Language in Discourses

Magical properties are part of majority of languages. A language is not just meaningful words. Its role is more in manifestation of facts and determination of meanings. Process of speaking or writing is not only creation of situation and context but also crafting arguments to fit in a particular situation and in a specific context. Through language we mold our words to address a particular situation or context. The world of activities such as meetings of the committees and functions of the institutions are also created around us through written and spoken languages. Workings of history and culture show that usually we do this in more or less routine ways. Due to this routine matter we treat these activities as exist apart from language. Nevertheless, these institutions and activities have to be regularly and actively rebuilt in present and future. This whole process is reflection of power of language that is used for transformation, change and the inaction in our lives.[9] The process of speaking and writing is actually construction of construct or composition of or six areas of the reality of our world: 1.The value and meaning of various features of the quantifiable world; 2.Various types of activities are also built through language. The informal talks and formal talks of the meeting are examples of these activities; 3. Relationships and identities are also built through language. 4. The Political actions such as determination of social goods; 5. Semiotics (knowledge of

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[9] Ibid, 11.

various forms of language and symbolism) and 6. Connections.[10]

Another function of the language is articulation of facts through specific environment and historical circumstances. The evaluation, understanding and exploration of knowledge is a discursive activity. A discourse not only formulate stories and practices but it also builds relations between knowledge and power. Our knowledge is described and defined through discourse. A discourse also tells us how to speak about an object of knowledge. It is a source of inspiration for putting ideas into practice. In our environment we have many different, intersecting and overlapping discourses. The competing sets of stories and practices are also emerged from the discourse. Foucault is of the view that nothing is outside the meaning of discourse. In each period, there are many socially forms and limits of discursive formations.[11] The discourses are institutionalized and controlled through various questions such as: What is say able? What is conserved? What has to be disappeared? What has to be circulated and repeated? What has to be remembered? What is validated? What has to be recognized? What has to be dismissed? Whether it is possible to talk about? What is transformed from other cultures? What has to be reactivated? What is or our past? What will be our future? What is appropriate? And who will have access to which type of discourses at which time and place?[12]One important way of discourse analysis is critical discourse analysis. It also evaluates relations between ideologies and power which are expressed in language.[13] Close evaluation of language in texts is also part of critical discourse analysis. In this particular linguistic phenomenon

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[10] Ibid, 12.

[11] Barbara Kamler and Pat Thomson, *Helping Doctoral Students Write: Pedagogies for Supervision* (London; New York: Routledge, 2006), 11.

[12] Kamler and Thomson, 11.

[13] Paul Baker, Costas Gabrielatos, and Tony McEnery, *Discourse Analysis and Media Attitudes: The Representation of Islam in the British Press* (CambridgeUniversityPress.2013),20, http://gen.lib.rus.ec/book/index.php?md5=17fbbf1d6e911c10e4e6eaa527012ba0.

choice of word, structure, sentences implication, metaphor and argumentation strategy are presented in a particular para or stance. This linguistic analysis is not limited to literature and language but it is multidisciplinary and can be found in various fields of studies[14] including critical linguistics.[15] The focus of critical discourse analysis is on such grammatical systems that are related to personal and social need.

A combination of linguistic analysis with a reflection of various contexts is found in critical discourse analysis. In process of critical discourse analysis interpretations and explanations are interrogated from various social, political and historical contexts. In this analysis present and past events are used to explain through certain patterns. In using this pattern anyone can easily try to distort the historical fact if all aspects of the past events are not reported properly. One example of such linguistic patterns is of representation that is found in discussions related to al-Islām. In this discourse some patrons are found while others are not.[16] In reporting of the two important events of recent past 9/11 attacks of 2001 in USA and 7/7 attacks on the London transport of 2005 in the British newspapers are examples where some aspects of al-Islām are reported and others are not. As a result of both incidents a large amount of 'spikes' related to Islam and Muslims appeared in the newspaper stories. This reporting may have not reported all dimensions of the issue but nevertheless it resulted into general increase in interest on Islam and Islamic Studies. In such case of critical discourse sometimes historical analysis is presented before engaging the current situation. One example of it is that whenever anything related to Muslims is

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[14] R.Wodak and Meyer,"Critical discourse analysis: history, agenda, theory and methodology," in *Methods of Critical Discourse Analysis*, ed. R. Wodak and M. Meyer (London: Sage, 2009), 1–33.
[15] See for details, R. Fowler, B. Hodge,G. Kress, and Tony Trew, *Language and Control* (London: Routledge & Kegan Paul, 1979).
[16] Baker, Gabrielatos, and McEnery, *Discourse Analysis and Media Attitudes* (Cambridge: Cambridge University Press, 2013), 20–21.

discussed in media, it starts with tracing the history of immigration in United Kingdom particularly from Pakistan and Bangladesh. This type of discourse informs that Muslim immigrants came to the UK after the end of World War II. As a result of this migration a sizeable 'British Muslim community', emerged. This past is stated to link the past to discuss overall political situation. This broader political context evaluates the role of Labour Party which ruled UK from 1997 till 2010. The policies of the Labour Party on asylum seekers, multiculturalism, immigration, and other cultural sensitivity issues were often treated too 'soft' by the right-wing press. These examples show how various contexts are likely to contribute in the formation of a discourse.[17]

1.4-Utitilty of Discourse Analysis

The linguistic conception of 'discourse analysis' is used to analyze relations between statements and sentences on the micro level.[18] The analysis of the methods used by people in mental schemata to understand narratives is also found in discourse analysis.[19] There can be various ways for the possible applications of discourse analysis. It can work as a framework for evaluation of national identity. Through this we can understand national identities. It also informs us about the consequences of the division of the world into nation states have. Another analysis could be evaluation of the ways through which knowledge is carried in the mass media. Similarly, the implications for questions of democracy and power could be topic of research in discourse analysis. In this type of research, it is evaluated that how the claims to expert knowledge contested and

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[17] Baker, Gabrielatos, and McEnery, *Discourse Analysis and Media Attitudes.* 21.

[18] G. Brown and G. Yule, *Discourse Analysis* (Cambridge: Cambridge University Press, 1983); R.H. Brown, "Reconstructing Social Theory after the postmodern critique," in *After Postmodernism: Reconstructing Ideology Critique,* ed. H.W. Simons and M. Billig (London: Sage Publications, 1994).

[19] T. Van Dijk, ed., "Introduction," in *Discourse as Structure and Process: A Multidisciplinary Introduction* (London: Sage, 1997), Vol. 1; T. Van Dijk and W. Kintch, *Strategies of Discourse Comprehension* (London: Academic Press, 1983).

constructed in the media and how these competing claims are 'consumed' by the users of the media? In this type of discourse analysis struggle between competing claims related to knowledge could be understood and explored empirically. This type of research can show how different discourses represent different ways of understanding. This discourse can also identify differences of understanding among 'expert' and 'layperson'.[20]

1.5-Approaches of Discourse Analysis

The above discussed approaches show that how discourse analysis contribute in understanding of interaction between certain key entities such as 'language' and 'the subject'. The aim of carrying out critical research for investigation and analyses of the power relations in society are also understood through these approaches. Such approaches are also useful to formulate normative perspectives which identify possibilities for social change. The approaches show that each perspective has a variety of distinctive philosophical and theoretical grounds, including particular understandings of critique, discourse and social practice. They also inform about particular methods, aims and focal points of empirical analysis.[21] There is no doubt that discourse analysis can be useful to all areas of research but it cannot be applicable in all kinds of theoretical framework. Moreover, its application is not possible if a method of analysis is detached[22] from its methodological and theoretical foundations. Each approach to discourse analysis is not just a method for data analysis but a complete package for methodological and theoretical whole. This package has many components such as (1) Philosophical properties such as ontological and epistemological regarding the role of language in the social settings, (2)

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[20] Jorgensen and Phillips, *Discourse Analysis as Theory and Method*, 2.

[21] Jorgensen and Phillips, 2.

[22] Ibid, 03.

theoretical models, (3) methodological framework related research domain, (4) and particular techniques that can be applied for analysis. The methods and theory are entangled in discourse analysis, therefore, a researcher must accept the basic philosophical grounds, he can use discourse analysis as method of their empirical research. As it has been stated that contents of each approach of the discourse analysis form as an integral whole and it is possible for a researcher to create his own package from various discourse analytical perspectives. Such type of combinations is not only allowed but also appreciated in many formulations of the discourse analysis. This combination is important as a broader understanding of different perspectives offer different forms of the knowledge about a phenomenon. Multi perspectival task is different from an eclecticism that is carried on with mishmash of different approaches without realization of seriousness of their relations with each other. In this approach a coherent framework is constructed because it is crucial to cognizant philosophical, methodological and theoretical differences and similarities in these approaches.[23] A wide range of innovative theories of society and culture are discussed [24] under the umbrella of social construction and discourse analysis is one of the most widely used theories.[25]

2-The Use of Discourse Analysis in this Research

The analysis in the research is basically legal. Therefore, some of the details of the discourse that have been included in the study are described in below discussions.

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[23] Ibid, 4.

[24] For discussions of the philosophical foundations of social constructionism see: A. Collier, *Critical Realism* (London: Verso, 1994); F. Collin, *Social Reality* (London: Routledge, 1997).

[25] K. Gergen, "The social constructionist movement in modern social psychology," *American Psychologist*, 40, no.3 (1985): 266–75; K. Gergen, *The Saturated Self* (New York: Basic Books, 1991); K. Gergen, *Realities and Relationships: Soundings in Social Construction* (Cambridge, MA: Harvard University Press, 1994); K. Gergen, "The limits of pure critique," in *After Postmodernism: Reconstructing Ideology Critique*, ed. H.W. Simons and M. Billig (London: Sage Publications, 1994).

2.1-Islamic Legal Discourse

Extremely specific use of language with particular habits to discuss matters related to law is called legal discourse.[26] The legal texts are varied from the internal and external characteristics of other types of writings. The diversity of law is reflected in variety of texts. This kind of scripts are clearly different from the language that we use on our day to day dealings. The understanding of style of legal language can be helpful to understand this special model of the text. The realization of this unique type of manuscript is helpful to understand the functions of legal discourse.[27] The functions, features and structures of various legal writings are contributing into the evolution of different genres of the legal texts on the basis of variety of criterion. The evaluation of genres of legal writings contribute to the inclusive realization and formulation of legal discourse, particularly in legal texts. This study aims at an overall preview and analysis of genres of legal writings of Islamic Law. During this process specific features of classical nasūs and criteria of its construction into genres of Islamic Law will also be discussed.[28] Therefore, the Islamic legal discourse means not only to its legal dimension in the narrow sense of the word, but to its broader meaning, including also the wider religious, ethical, and practical dimensions of the Sharī'ah .[29]

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[26] See for detailed discussions on the issue, Estrella M. Duran, "Discourse, Grammar and Professional Discourse Analysis: The Function of Conditional Structures in Legal Writing", in *Researching Language and the Law: Textual Features and Translation Issues*, ed. D. S Giammoni and C Frade (Bern: International Academic Publishers,2010);John Gibbons, ed., *Language and the Law* (London and New York: Longman1994); Jorge J.E Gracia, *A Theory of Textuality :The Logic and Epistemology* (New York: State University of New York Press,1995); Peter Goodrich, *Legal Discourse* (Houndmills: Macmillan,1992); Stanislaw Gozdz-Roszkowski, *Patterns of Linguistic Variation in American Legal English: A Corpus-Based Study* (Bern: Peter Lang, 2011).

[27] Jana Chrenkova, "Theoretical background on discourse, professional discourse and discourse analysis,"Academia,https://www.academia.edu/38016386/Theoretical_background_on_discourse_professio nal_discourse_and_discourse_analysis

[28] Berūkštienė, "Legal Discourse Recognized: Genres of Legal Texts," 01.

[29] Sarah Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on*

2.2-Framework of Enquiry

The study presents views, opinions and rulings of classical Muslim jurists as well as contemporary scholars from Islamic and western world and analyzes, and discusses the manifold ways in which contemporary intellectual and academic discourse on Muslims in the West is going on. Another issue is related to the interpretation of the Sharī'ah for Muslims in the West. The study elaborates that the ways in which scholars, intellectuals, and activists redraw territorial boundaries are closely correlated with how they negotiate the applicability of the Sharī'ah . The creation of Muslim religious authority in the West and identity is also included in the study. While this research mainly concentrates on a discourse among contemporary scholars, researchers and intellectuals but it is not confined to the analysis of a recent scholarship but takes into account the larger discursive historical contexts in which classical authors frame and articulate their views. On the assumption that current discussions about how and where to locate dār al-Islām are to be understood as contributions to the centuries-long Islamic legal discourse on territoriality.

2.3-The Nature of Discourse in the Study

The discourse among contemporary authors on the various concepts of territories is framed by tracing the historical precedents. Moreover, the discourse attempts to identify the continuities and changes in the legal opinion that occurred during various phases of the history. The research is also trying to understand how religious authority is negotiated among contemporary researchers. The research also sheds light on the question of 'where is dār al-Islām?' which is not only explored in scholarly circles but also asked by

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Muslims in the West (London; Boston: Brill, 2018), 01.

ordinary Muslims. While the aim of this analysis is neither to measure the impact of this Islamic legal debate on the everyday life of Muslims in the West, nor to provide a detailed account of how it is covered in the media. This study illustrates how contemporary Islamic legal debates are intertwined with popular discourses and how they find their way into, and are popularized by mass media.

While this study focuses primarily on a debate among contemporary scholars, it is not restricted to the analysis of a recent scholarly controversy, but also takes into account the larger discursive circumstances in which these authors frame and articulate their views. On the supposition that present debate about how and where to locate dār al-Islām are to be understood as contributions to the centuries-long Islamic legal discourse on territoriality. Fundamentally this is a legal study, but it also has other dimensions such as historical, as it has tried to trace the repercussions of this debate in the wider public arena. This research aims to illustrate how contemporary Islamic legal discourses are entangled with popular western debates and how they find their social political and economic effectiveness.

3-The Concept of Jurisdiction in Legal Thoughts[30]

3.1-Etymology of Jurisdiction

Jurisdiction is usually discussed as a methodological issue or a practical obstacle to be removed before a judicial or administrative authority has to implement a law within its judicial boundaries.[31] The concept of jurisdiction[32] is related with facts such as law,

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[30] Imre Anthony Csabafi, *The Concept of State Jurisdiction in International Space Law: A Study in the Progressive Development of Space Law in the United Nations*, 1st ed. (Springer Netherlands, 1971), 49, http://gen.lib.rus.ec/book/index.php?md5=24c62173bf98fb6151815a92ed62cab1.

[31] Farmer, "Territorial Jurisdiction and Criminalization," 225.

power and authority to use the power derived from a particular law. It includes the authority and use of law as determinations within a legal framework of a particular legal system. Emile Benveniste has described composition and etymology of jurisdiction. 'The Latin *juris-dictio* links the Latin noun *ius* with the verb *dictio*. Ius is usually translated as 'law', and refers to the adjectival situation of conforming to law (iustus). Linked to the verb *dicere* – the saying or speech of law – *ius* becomes performative (and adverbial).[33] The term 'jurisdiction' combines jus (or juris) and dicere (or diction), which is translated as 'the statement of the law or power to determine the right.'[34] These terms that provide composition of jurisdiction were part of the procedure of the Roman court where *ius* and *dicere* were attached to the bureau of the *iu-dex*, who was responsible to state the law while *juris-dictio* was used to speaking of the law. The terminology of jurisdiction is also related to several questions related to the inauguration of law, value of it, its articulation and validity. Various notions related to the authority of law are engendered through jurisdiction.[35]

The terminology is the outcome of formulation of Paulus '*Extra territorium jus dicenti impune non paretur. Idem est et si supra jurisdictionem suam velit jus dicere*' that has

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[32] From classical legal scholars to many contemporary scholars have tried to explain the notion of Jurisdiction. Some important sources on it are: Alexander Marie Stuyt (auth.), *The General Principles of Law as Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction: Proefschrift Ter Verkrijging van Den Graad van Doctor in de Rechtsgeleerdheid Aan de Rijksuniversiteit Te Leiden, Op Gezag van Den Rector Magnificus Dr. B. G. Escher, Hoogleeraar in de Faculteit Der Wis-En Natuurkunde, Publiek Te Verdedigen Op Woensdag 3 April 1946, Des Namiddags Te 3 Uur*, 1st ed. (Springer Netherlands, 1946); L.F.L Oppenheim, *International Law: A Treatise*, ed. Lauterpacht (London, 1955), 325-334, 594-606; G.Schwarzenberger, *The Inductive Approach to International Law* (London, 1965) and *International Law as Applied by International Courts and Tribunals* (London, 1968), Vols. I-II.;Csabafi, *The Concept of State Jurisdiction in International Space Law*; Joseph H. Beale, "The Jurisdiction of a Sovereign State," *Harvard Law Review*, 36, no. 3(January 1923): 241, doi:10.2307/1329779.

[33] Benveniste and Lallot, *Indo-European Language and Society*, 391.

[34] S Sucharitkul, "International Terrorism and the Problem of Jurisdiction," *Syracuse Journal of International Law and Commerce*, 14, no.141 (1987):155–6.

[35] McVeigh, *Jurisprudence of Jurisdiction*, 04.

influenced the evolution of the doctrine. This notion in Italy turned into concept *'statu tum non ligat nisi subditos'* during 1200 A.D. Jurisdiction refused unlimited authority of lex fori: 'statutum non ligat forensem'. Bartolus and Meijers during 14th and 15th centuries elaborated external and internal territorial effects of statutory jurisdiction. Bodin advanced the notion of sovereignty as internal authority and extra limitation of authority in 16th century. During the same period Bertrand d' Argentre distinguished between jurisdiction (*omnis enim potestas extra fines potestatis attributae aut propriae private est persona, et finitae potestatis fin ita jurisdictio et cognitio; ideo et statuta extra territoria sua sine usu sunt*) and potestas (It was an administrative authority that was practiced in roman cities). He separated both the authorities on the bases of statute theory. The concept of jurisdiction is funded on the notion of territory. It is further elaborated by principles of non-interfering in the domestic matters of the states and codes of sovereign equality. The advancement in concepts of territoriality and sovereignty further contributed in the development of notion of jurisdiction in seventeenth century. It was further advanced through the *theory of statue* and maxim *Huber-Storyan maxim* until became an established theory in nineteenth century.[36]

3.2-Terminological Definition of Jurisdiction

Public international law is related to rules and regulations that emerged as a result of specific legislation, while private international law linked a certain legal system.[37] Another matter related to jurisdiction is its link with the criminal law that is usually

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[36] Csabafi (auth.), *The Concept of State Jurisdiction in International Space Law*, 49–50.

[37] Cedric Ryngaert, *Jurisdiction in International Law*, 2. ed, Oxford Monographs in International Law (Oxford University Press, 2015), 11; F. A. Mann, *The Doctrine of Jurisdiction in International Law* (111 Hague Recueil I, 1964), 28.

misunderstood or ignored.[38]

Mr. Justice Holmes observed in McDonald v. Mabee (243 U.S. 90 [1916]) that the ultimate basis of jurisdiction is 'physical power.' Similarly, he associated jurisdiction with 'authority' in the case (Wedding v. Meyler) (192 U.S. 573, 584 (1904). In United States' official explanation, the term is used in the meaning of 'capacity of State.'[39] Mann described it as 'States' right to exercise certain powers.[40]

Every aspect of jurisdiction contributed into articulation of terminological meanings of the 'Jurisdiction.' As a symbol of power this notion has been explained as 'the power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court.'[41] In consideration of above discussions the jurisdiction is defined in various dimensions such as legislative jurisdiction, judicial jurisdiction and applicable jurisdiction. In the meaning of legislative jurisdiction, it can be described as 'the authority to affect legal interests-to prescribe rules of law'. In procedural law the judicial jurisdiction is related to adjudicate legal questions. This type of jurisdiction is responsible for judging disputes between private persons and parties. The matters related to persons who are being tried for criminal law offences are also dealt through this jurisdiction.[42] It is important to resolve the issue of limits of the court before a lawsuit is filed. State courts have jurisdiction over matters within that state, and various types of

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[38] Farmer, "Territorial Jurisdiction and Criminalization," 225.

[39] The American Law Institute's Official Draft of Foreign Relations Law of the United States, 1962 (hereinafter referred to as Draft Restatement, (1962).

[40] F. A. Mann, "The Doctrine of Jurisdiction in International Law," 111 Hague Recueil (I, 1964) 9-162 (1966).

[41] Beale, "The Jurisdiction of a Sovereign State," 241.

[42] "Judicial Jurisdiction," Insee, October13, 2016, https://www.insee.fr/en/metadonnees/definition/c1847 visited on February 23, 2020.

courts have authority over lawsuits involving various matters.[43] Enforcement jurisdiction is named to the jurisdiction that is used to enforce decisions of the courts.[44] The authority of a state to examine, prosecute, detain, punish, or implement the law against people living within its boundaries or aboard on a ship or aircraft having its nationality is described through this jurisdiction.[45] This exercise over persons and property by a State essentially includes action in the national domain through its legislature, police force and courts.[46] The definition of the term, its scope and nature fluctuate according to the situation in which it has to be used. For example, the internal law of United States describes notions of jurisdiction in the terms of the articles of the constitutions of United States related to the delegation of authority. Its description and application within United States also depends on the nature of legal issue, eather it relates to the federal or the state domain. Various states of United States are also varying on the notion and scope of jurisdiction.[47]

In International Law this terminology is explained as 'State jurisdiction, in public international law it means the right of a State to regulate or affect by legislative, executive or judicial measures, the rights of persons, property, acts or events with respect to matters not exclusively of domestic concern.[48] It is further defined as a set of principles defining the capacity of states in their reciprocated relations.[49] International law consider

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[43] *Dictionary.Com*, s.v. "judicial jurisdiction," https://dictionary.law.com/Default.aspx?selected=1070 visited on February 23, 2020.

[44] Harris, *Cases and Materials on International Law*, 264.

[45] Christopher L. Blakesley, "United States Jurisdiction over Extraterritorial Crime," *The Journal of Criminal Law and Criminology* (1973) 73, no. 3 (1982): 1109, doi: 10.2307/1143188.

[46] Dixon, McCorquodale, and Williams, *Cases & Materials on International Law*, 281.

[47] Blakesley, "United States Jurisdiction over Extraterritorial Crime," 1109.

[48] F. A. Mann, "The Doctrine of Jurisdiction in International Law", 111 Hague Recueil (I, 1964) 9-162 (1966);Csabafi, *The Concept of State Jurisdiction in International Space Law*, 1971, 50.

[49] O'Sullivan, *Universal Jurisdiction in International Criminal Law*, 78.

it as a right of the state to execute with 'certain of its powers' related to the enforcement of legal codes or 'to affect the rights of persons'.[50] It designates the 'authority to affect legal interests: to prescribe rules of law, to adjudicate legal questions and to enforce the judgments judicially made'.[51] In International law, this notion is also varied from regulating the jurisdiction of judicial bodies within domestic law. In International law it is sum of external abilities of the state stemming from sovereignty. It has been often linked with 'sovereignty' and 'imperium'[52] as it is a consequence or outcome of sovereignty.[53] The competences of this terminology is based upon the maxim *par in parem non habet imperium*. It describes that a state is supreme domestically, but cannot interfere in the affairs of other states.[54] Jurisdiction is an integral and essential characteristic of the sovereignty of a state. Through this a state is exercising such a power that can modify or form or finish legal obligations and legal relationship. It may be attained by various methods such as judicial action, legislation or by executive orders.[55] However, it has to be noted that a county can use this absolute right within its territorial limits. Any exception in this regard must be derived through implicit or express permission.[56] While the state may legislate within its internal law, this freedom, as an attribute of sovereignty, depends upon 'the overriding question of entitlement'. Therefore, if a country obtains jurisdiction outside its sovereign limits, it will be against the sovereignty of other countries.[57] This is the reason that the expansion of a state's sovereignty is more complicated than its territorial limits.

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[50] Mann, 15.

[51] Blakesley, "United States Jurisdiction over Extraterritorial Crime," 1109.

[52] I Brownlie, *Principles of Public International Law* (Oxford University Press Oxford. 2008), 299.

[53] Mann, 20.

[54] O'Sullivan, *Universal Jurisdiction in International Criminal Law*, 79.

[55] Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge University Press, 2003), 281.

[56] Schooner Exchange v McFaddon (1812) 7 Cranch 116, 136.

[57] O'Sullivan, *Universal Jurisdiction in International Criminal Law*, 79.

The above-mentioned discussion clears that the expansion of jurisdiction of a state is a 'relative concept'. While a state within its domestic law can delimit it through 'a unilateral act' but its validity will be contingent upon international law.[58] State's internal supremacy and International law's restrictions are two components of the descriptions of jurisdiction in criminal matters. It shows the international aspect of the domestic criminal procedure[59] or the municipal law's sphere of the criminal laws related to temporal, geographical and material matters.[60] The study of Mann's 'higher' law shows that criminal jurisdiction is primarily delimited under principles of customary law of international nature. Along with that such multilateral treaties that govern matters related to particular international offences also allows the states to exercise criminal jurisdiction as per their internal laws.[61] Unlike the field of civil and commercial law,[62] there is no overall convention that describes and specifies jurisdiction related to crimes.[63] The debate surrounding the derivation of doctrines related to jurisdiction is ambiguous. Therefore, any conclusion of permission or prohibition to the claim of a state to jurisdiction can be controversial. The rule of law here seems to be effective 'to regulate relations between these co-existing independent communities or with a view to the achievement of common aims.'[64]

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[58] O'Sullivan, *Universal Jurisdiction in International Criminal Law*, 80; Anglo-Norwegian Fisheries Case (1951) ICJ Rep 116.

[59] I Cameron, *The Protective Principle of International Criminal Law* (Dartmouth Aldershot, 1994), 11.

[60] G Schwarzenberger, *International Law* (London: Stevens and Sons, 1957), Vol.1, 255 (rejecting international criminal law 'in any true sense').

[61] RS Clark "Offences of International Concern: Multilateral State treaty practice in the Forty Years since Nuremberg,"*Nordic Journal of International Law*,57(1988):49

[62] See Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (adopted 30 October 2007) OJ L 339.

[63] See "Harvard Research on International Law, Draft Convention on Jurisdiction with Respect to Crime," *American Journal of International Law Supplement*, 29(1935): 439.

[64] Case of the SS Lotus (France v Turkey) (1927) PCIJ Ser. A No 10, 18 and 42 (Dissent of Judge Weiss) and 59 (Judge Nyholm).

The legal basis for domestic jurisdiction provided by International law provides are: (1) Territory; (2) nationality; (3) the protective principle and (4) the principle of universality.[65] Moreover, the State jurisdiction can be classified into: (1) territorial, (2) quasi-territorial and (3) personal.[66] It may also be divided into two complementary elements: (i) jurisdiction to prescribe,[67] (legislative jurisdiction) and (ii) jurisdiction to enforce.[68] The various classification of state jurisdiction, its types and its various elements made it convenient to select appropriate rules for easy use.

3.3-Territorial Jurisdiction[69]

Storyan maxim territorial jurisdiction states that each State has exclusive jurisdiction over persons, things, property and legal transactions that are carried out within its territorial domain. It also includes the extraterritorial actions of such persons.[70] The territorial limits consist upon *terra firma*, the superjacent airspace and the adjacent territorial sea. However, a third state may not be able to use territorial jurisdiction within the territory of a country. Each country can regulate the conduct of its inhabitants irrespective of where they are. This type of jurisdiction is not absolute because it is used in terms of certain limitations prescribed by international law upon states. It is rules of International law that

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[65] McDougal, Lasswell and Vlasic listed in the following principles: active personality, 699; act of state, 644-648; nationality, 647, 691, 695-696, 699-703; passive personality, 647, 693, 699-700, 700n; territoriality, 647, 692, 694, 698-699, 703, 717; protective principle, 647, 700; universality, 647, 701; impact territoriality, 647. See McDougal, Lasswell, Vlasic & Smith, "The Enjoyment and Acquisition of Resources in Outer Space," 3 U. Pen. L. Rev. 521-529 (1963). See also: Johnson, *Bases of International Jurisdiction* (Report of International Law Conference, David Davies Memorial Institute O'f InternatiO'nal Studies, 1962), 32-33.

[66] See generally, Ch. Rousseau, "Principes de droit international public," *93 Hague Recueil* (1958), 369, at 394-395. Bin Cheng, "Crimes on Board Aircraft," *12 C.L.P. 177* (1959); "Inter Astra Silent Leges? - A Prolegomenon to Jural Cartography," *18 Glim* (Michaelmas, 1961).

[67] See Draft Restatement, (1962), O'Connell, 655 et seq.

[68] Draft Restatement, (1962), O'Connell.

[69] Csabafi (auth.), *The Concept of State Jurisdiction in International Space Law*, 51.

[70] Starke, 207-238, Brierly, 222-243, Oppenheim. 325-334, Christol, 418-420. Schwarzenberger, 186, 292-253. Jenks, 236 et seq.

extends partial or whole immunity to foreign States, heads of the States, diplomats and international institutions from the state's jurisdiction. Such type of actions are called 'exterritoriality.'

The terminology is indicating relationship between territoriality and jurisdiction as a metaphor. The major constructive element of this notion is a set of rules that regulate the conduct of government in exercising this. As discussed earlier, the jurisdiction is evolved from notions of national territory and sovereignty. Both notions are the sources of codes that control the exercise of territorial jurisdiction. Thus, this concept is formed through the element of territoriality in the conception of sovereignty and rules related to national appropriation. This notion is continuously evolving and now its limits to use of space territory is explored. As such the territorial *jurisdiction* is not applied to space activities. The Space Treaty through Article II and the Declaration of Legal Principles proposed the principle of national appropriation from outer space and celestial authorities. In short, International law regulates the exercise of territorial jurisdiction with respect to the space activities. The rules of jurisdiction will be applicable in their traditional circumstances, unless a subsequent international legislation related to principles of use of space supersedes them. However, a country may use territorial jurisdiction influencing outer space from its territory on earth.[71]

The development of special rules for regulating the exercise of jurisdiction in outer space is emerging from the contemporary advancement in space technologies and travels. As per customarily international law the limits of State territory are extended to the sea, airspace, ports, ships and aircraft flying as career of national flag of a particular country. Territorial seas are included in the exclusive jurisdiction of the coastal states. Vessels

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[71] Csabafi, *The Concept of State Jurisdiction in International Space Law*, 51.

belonging to third States can have the right of innocent passage through the waters of a

national maritime belt, but innocent overflight for foreign aircraft is not allowed in

national air space. The status of the foreign space crafts and their crew will be same on

over territorial waters as on land territory. However, Articles 19-22 of the Convention on

the Territorial Sea and Contiguous Zone, enacted at Geneva on April 28, 1958, apply

some restrictions on the coastal States in exercise of its jurisdictional authority.

Accordingly, a coastal State is not allowed to arrest anyone or conduct any investigation.

However, this state will have exception in case of (1) if the crime effect to the coastal

State; or (2) if the crime is of a nature that disturbs the harmony of the coastal sate.

3.4-Quasi Territorial Jurisdiction

Cheng defines the term as the sum total of the authority of a country regarding vessels,

aircrafts and spacecraft. Quasi territorial jurisdiction is different from personal

jurisdiction, as it extends not only to the craft under discussing but also to all humans and

things on board. It also includes the onboard activities of the persons.[72] Ships career flag

of a particular country are subject to the jurisdiction of that country.[73] The Geneva

Convention on the High Seas established the rule that the State can exercise its

jurisdiction on the vessel bearing its flag. This convention refutes the verdict of the

Permanent Court of International Justice in The Lotus Case (1927). Criminal proceedings

can be initiated before the relevant court either of the flag State or of the State of

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[72] See Report of the Legal Sub-Committee on the Work of its Seventh Session (4-28 June 1968) to the Committee on the Peaceful Uses of Outer Space. U.N. Doc. AI AC. 105/45 (July 11, 1968) at 3-91.

[73] Le Louis (1817), 2 Dods. 210, the Antelope (1825), 10 Wheaton 66. See also the dissenting opinion of Judge Moreno Quintana in Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation, I.C.J. Reports (1960) p. 178. The Lotus Case (1927), P.C.U. Series A. No. 10 p. 25.

nationality. [74] Jurisdiction on the sea is linked with the maritime flag with two conditions: (1) jurisdiction is not jurisdiction over the high seas as such, but only over persons and things. Secondly, men-of-war of all nations have the right under.

3.5-Significance of Jurisdiction in Contemporary Legal Thoughts

If it likes between action and event, jurisdiction makes a brief appearance in relation to questions of sovereignty and of space. It contributes to the evaluation of law in general or divests law altogether for the fields of international relations and political geography. Since the nineteenth century, it reflects the explanation of law in terms of social and not legal existence, state centered or otherwise. [75]

In the discussion of moral authority, jurisdiction is considered as an expression of value, or as a phase towards value. Such approaches are not in accordance with the questions such as 'why law?' or 'why this law?'. The description of jurisdiction as moral authority is also against the questions related to form of law and its authority. Therefore, jurisprudence has to be linked with phraseology or speech of law. It has to be linked with the process of jurisdiction as a metaphysics of law and past of the institutions that bring legal life. [76] However, tying questions of jurisdiction to traditional thinking of law has a drawback. Our present may be regarded as modern, ultra-modern or postmodern, is not able to be structured completely in a legal or an ethical form. [77] Therefore, we need a form of investigation that can link the authorization of law to its objectives. [78] Many feel that

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[74] Article 11 of the High Seas Geneva Convention.
[75] McVeigh, *Jurisprudence of Jurisdiction*, 03–04; also see Kriegal, B, *The State and the Rule of Law*, trans M LePain, (Princeton, NJ: Princeton University Press, 2001).
[76] Ibid, 4.
[77] T Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (Oxford: Clarendon, 1997)
[78] P Goodrich, *Law and the Courts of Love: Literature and Minor Jurisprudences* (London: Routledge, 1996).

failure to pay attention to the difficulties of escaping from the metaphysics of law ensures only its repetition.[79]

Another matter has to be taken into consideration that the institutional histories of Western law have been written in terms of jurisdiction. The jurisdiction was also central to the Roman protocols of government as much as it was linked to the medieval temporal relations of church and state and to the advance of the contemporary nation-state. Similarly, the notion of jurisdiction is related to the common law and its history is history of jurisdiction. Holdsworth in his famous 16 volumes History of English Law devoted much of his time to discuss the issues of those of common law, such as Stannary, Forestry, ecclesiastical law and so on. Similarly, common law's 'legal ordering of British colonization and other imperial projects were in many ways' issues of jurisdiction because the authority of the imperial and common laws was proclaimed in the colonies. With the evolution of International law, writings on international jurisdictions are recent add-ons to this field. The discussions of the histories of jurisdiction is not lacking substantive criticism but it further needs the language of analysis of jurisdiction. Ethical arguments about the moral value of universal jurisdiction on Hague Convention on Jurisdiction and Judgments have been developed but the discourse analysis of jurisdiction itself is still limited. [80] Questions related to jurisdiction are frequently merged with authority of law and its delimitation within legal doctrine, or as in the case of private

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[79] H-G Gadamer, *Truth and Method* (London: Sheed and Ward, 1979), 494; G Rose, *Dialectic of Nihilism: Post-structuralism and the Law* (Oxford: Blackwell, 1984), 3; J Derrida, "Psyche: Invention of the other," in *Reading de Man Reading*, ed. L Waters and W Godzich (Minnesota, MN: University of Minnesota Press, 1989).

[80] S. Macedo, ed., *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia, PA: University of Pennsylvania Press, 2003).

international law.[81] The emergence of the technologies of law is the outcome of this

situation. The technologies are contribution in recognition and enforcement of judgments.

In all this, the charisma of jurisdiction is as a toll that is often ignored and staging and

representation of law as a work of figuration is lost. The claim that the technologies of

law do more than describe legal actions should raise no controversy within legal thought.

Jurisdiction as a process involves the acts of the authorization of law, the construction of

legal meaning and the identifying of what is able to be part of law. The devises of law

such as categorization of persons, places, things, and events. The procedures of issuance

of summons, conducting hearing, decision and sentence are also linked to the jurisdiction.

The forensic concerns of argument and proof are also connected to this concept. The

analysis of the artefactual character of law has more recently been found in the domains

of anthropology, sociology and cultural studies. These characteristics are also addressed

through jurisdiction. Jurisdiction is linking sovereignty with territory and land, as this

link is studied in terms of techniques of endorsement and grounding. Jurisdictional

practice establishes links to life, event and place through procedures of codification and

articulation of law. The law is instituted through jurisdiction. The occupation of a place

and its use is correlated to this notion. In all this, of course, the long discourses of

jurisprudence have disputed the representation and manner of being subject to a

jurisdiction. The elaboration of how instruments give voice to law has been one of the

tasks of jurisprudence.[82] The idiom of jurisdiction can be understood in terms of the

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[81] M. Whincop and M. Keyes, *Policy and Pragmatism in the Conflict of Laws* (Dartmouth, VT: Ashgate, 2001).
[82] P. Goodrich and Y. Hachamovitch, "Time out of mind: An introduction to the semiotics of common law," in *Dangerous Supplements: Resistance and Renewal in Jurisprudence*, ed. P Fitzpatrick (London: Pluto Press,1991)

interpretation and judgment of institutional meaning.[83]

3.6-Use of Jurisdiction in this Study

On the one hand it deals with international law and conflicts of laws. In this case various aspects of both public international law and private international law have come under discussion throughout the discourse of the studies. Moreover, various issues related to domestic laws are also included in discussion while analyzing validity of Sharī'ah law for the Muslims of west in their personal matters. The study discusses territorial jurisdiction during the analysis of classical concepts related to territoriality and its cotemporary application. The possible role of Sharī'ah in the public sphere of the Western countries is also discussed within the parameters of jurisdiction.

4-Contemporary Scholars involved in discourse on Territoriality and Muslim Minorities in an Islamic Perspective

As mentioned earlier the debate on the issues related to Muslim minority communities continued for centuries. Classical Muslim jurists during the formative period of Islamic law contributed in this debate through their juristic derivations reported in classical treatise. The opinions of the classical jurists were evolved to meet the challenges of their time. Almost all major classical jurists derived their argumentation from verses of al-Qurān and Sunnah of Holy Prophet (peace be on him) but the circumstances for which they gave their expert opinions were varied. Due to this variation various point of views emerged. These views are serving as foundation stones for the contemporary scholars to articulate their opinions. The significance of the issue forces contemporary scholars to contribute in the debate and give their input. Many Muslim and non-Muslim scholars

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[83] McVeigh, *Jurisprudence of Jurisdiction*, 4–5.

contributed in this debate. The details of some of these scholars have been given in this

part of the study.

4.1-Muḥammad'Abduhu[84]

[84] A Muslim scholar, founder of the Egyptian Muslim modernist school, also recognized as *al-ustādh al-Aīmān*. He got *'ālim* degree in 1877 from al-Azhar University, Cairo, his interest in religion, philosophy and politics activated under the affect and inspiration of *Jamāl al-Dīn al-Afghānī*. He became editor of the government's official gazette and struggled against Anglo-French political encroachment and insisted upon social and religious reforms and assisted in publishing of journal *al-'Urwat al-wuthqā*. He taught in an Islamic college of Beirut for three years. He started judicial career in 1888 in Egypt and continued till his death. He served as a judge in the National Courts of First Instance, Court of Appeal, then became *muftī* of Egypt, while executing implementation of Islamic law he approved many reforms and gave several recommendations to private petitioners in this regard, as well. He also served in Legislative Council, learnt French and seek an interest in European thought. Risālah-al-Tawhīd (1897) and the journal al-Manār (1897) are his prominent works, his most important work "Commentary on Qurān" left unfinished due to death, latter on revised and completed by Muḥammad Rashīd Riḍā. He had contributed with great number of articles in the official gazette and *al-Urwat al-wuthqā*, his most significant writings include 'Abduhu. M. (1874) *Risālah al-wāridah (Treatise of Mystical Inspirations)*, Cairo; *Hāshiyyah 'ala sharh al-Dawwānī li al-'aqā'id al-'adudīyyah (Gloss on Dawwani's Commentary on the Sentences of 'Adud al-Dīn al-Aījī)*, Cairo; *Risālah al-tawhid (The Theology of Unity)*, Cairo, trans. I. Musa'ad and K. Cragg, *The Theology of Unity* (London: George Allen & Unwin, 1966). (One of 'Abduhu's major works on philosophical theology; al-*Islām wa-'l-nasraniyya ma'a al-'ilm wa 'l-madaniyya (Islam and Christianity in Relation to Science and Civilization)*, Cairo; 'Abduhu, M. and Riḍā. M.R. (1927-36) *Tafsīr al-Qurān al-hakīm (Commentary on the Wise Qurān)*, Cairo; *Al-Islām wa-al-Nasrāniyyah mā al-'Ilm wa-al-Madaniyah* (1902); and Islam and a Rebuttal to Its Critics, 17 volume co-edited work on Arabic philosophy; *Tafsīr al-Qurān al-Hakīm* (1927-1935)12 volumes, leading studies on 'Abduhu in English include C. C. Adams, *Islam and Modernism in Egypt* (1933); Uthman Amin, *Muhammad 'Abduhu* (trans. 1953); and Malcolm H. Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad Abduh and Rashid Rida* (1966). Relevant but more general are J. M. Ahmed, *The Intellectual Origins of Egyptian Nationalism* (1960); Nadav Safran, *Egypt in Search of Political Community* (1961); and Albert Hourani, *Arabic Thought in the Liberal Age* (1962), *A History of Islamic Philosophy* (1970); Muhammad Abduh, *Risalat al-Waridat* (Treatise on Mystic Inspirations), Cairo, 1874; *Hashiyah ala Sharh al-Aqaid al-Adudiyyah* (Gloss on the Commentary of *al-Aqaid*), Cairo, 1876; *Risalat al-Tauhid* (Treatise on Monotheism), Cairo, 1897; *Sharh Kitab al-Basair al-Nasiriyyah fi Ilm al-Mantiq* (Commentary on the Book of al-Sawī on Logic) (Cairo, 1898); *Taqrīr fī Islāh al-Mahākim al-Sharī'ah* (Report on the Reform of the *Sharī'ah* Courts)(Cairo,1900); (Islam and Christianity and their respective attitudes towards Science and Civilization), Cairo, 1902; *Tafsir Sūrah al-'Asr* (Commentary on chapter 103 of the Qurān) (Cairo, 1903); *Tafsīr Sūrah al-Fātihah* (Commentary on the opening chapter of the Quran) (Cairo, 1905); *Tafsīr Juz Ammah* (Commentary on the last 37 chapters of the Qurān) (Cairo, 1904); *Tarīkh al-Ustadh al-Imām* (History of the Master and Guide), 2 Vols., Cairo, 1908, Vol. I, Vol. II, 1931 (containing articles and essays by 'Abduhu); Max Horten, "Mohammed 'Abduhu, sein Leben und seine theologisch-philosophische Gedankenwelt," in *Beitrage zur Kenntnis des Orients*, t. 13 and 14 (Halle, 1916); Goldziher, *Richtungen der islamischen Koranauslegung* (Leiden, 1920); Bernard Michel and Sheikh Moustapha Abdel Razik, *Sheikh Mohammed 'Abduhu, Rissālah al-Tawhīd* (Paris, 1925); Ahmad al-Shayeb, *Muhammad 'Abduhu* (Alexandria, 1929); Charles Admas, *Islam and Modernism in Egypt* (London, 1933); J. Schacht, "Muhammad Abduh," in *Encyclopedia of Islam*, Vol. III; Muhammad al-Bahay, *Muhammad 'Abduhu, Erziehungsmethode zum Nationalbewusstsein* (Hamburg, 1936); *al-Fikr al-Islāmī* (Cairo, 1957); Osman Amin, *Muhammad 'Abduhu, Essai sur ses idees philosophiques et religieuses* (Cairo, 1944); Muhammad 'Abduhu (Cairo, 1945); *Radd al-Fikr al-Misrī* (Cairo, 1955); Mustafā Abd al-Razīq, *Muhammad 'Abduhu* (Cairo, 1946); *Tamhīd li Tarīkh al-Falsafah al-Islāmiyyah* (Cairo, 1944); *al-Imām al-Shāfi'ī* (Cairo, 1945); *Failasuf al-Arab wal-Muallim al-Thanī* (Cairo, 1945); *al-Dīn wal-Wahī*

Muḥammad 'Abduhu (1849-1905) was a profound Muslim jurist and an enlightened reformer who worked for revival and restoration of Islamic thought in 19th century.[85] As *muftī* (jurisconsult) of Egypt, he was opposed by traditional religious leadership. On the basis of his studies and experience, he suggested reforms and reconstruction in various fields in Muslim societies to make these societies compatible with modernity. He suggested reforms in application of Islamic law and educational system through reinterpretation of concepts and doctrines of al-Islām. 'Abduhu tried to establish conformity between reason and revelation in theology and rejected imperceptive following of traditional dogmas and customs and laid stress on returning to primary sources of Islam, since only way out for revitalizing and restoration of Islamic pride and hence paved the path for their possible assimilation in modern culture. He preferred reason, equity and literal text of Qurān over inflexible scholarly interpretation of Islamic law, and appeared to be a designer of modern Islamic reformation. He held progressive

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wal-Islām (Cairo, 1945); *Min Āthār Musṭafā Abd al-Razīq* (Posthumous collected essays, published with an introduction by Ali Abd al-Razīq) (Cairo. 1957); Kadri Kalajy, *Muhammad 'Abduhu Baṭal al-Thawrah al-- Fikriyyah fī al-Islām* (Beirut, 1948); Alī Sami al-Nashar, *Nuzhat al-Fikr al-Islāmī* (Cairo, 1954); Qasim Amin, *Tahrīr al-Mar'ah* (Cairo, 1902); *Les Egyptiens* (Cairo, 1894); *al-Mar'at al-Jadīdah* (Cairo, 1904); Ahmad Khaki, *Qasim Amin* (Cairo, 1956); Laoust, *L'evolution de la condition sociale de la femme musulmane en Egypte, et en Afrique Francaise*, No. 3, 1935; *Le Califat dans la Doctrine de Rashīd Ridā* (Beirut, 1938); Jomier, *Le Commentaire Coranique du Manar*(Paris, 1954); Rashīd Ridā, *al-Khilāfah* (Cairo, 1922); *al-Manār* (a monthly journal), Cairo, 1898; *Tafsir al-Manar*, Cairo, 1900. See for details "Muhammad 'Abduhu ibn Hasan Khayr Allah." Encyclopedia of World Biography. . *Encyclopedia.com.* 9 Aug. 2019 https://www.encyclopedia.com; Muḥammad 'Abduhu Egyptian scholar and jurist, Written by Malcolm H. Kerr Last Updated: Jul 8, 2019 https://www.britannica.com/biography/Muhammad-Abduh; "Muhammad 'Abduhu." The Columbia Encyclopedia, 6th ed. *Encyclopedia.com.* 9 Aug. 2019 <https://www.encyclopedia.com>. http://apastyle.apa.org/; "Muḥammad 'Abduh." The Concise Oxford Dictionary of World Religions. . *Encyclopedia.com.* 9 Aug. 2019 https://www.encyclopedia.com.
[85] Muhammad 'Abduhu ibn Hasan Khayr Allah." Encyclopedia of World Biography, *Encyclopedia.com.* 9 Aug. 2019 https://www.encyclopedia.com; Muḥammad 'Abduhu Egyptian scholar and jurist, Written by Malcolm H. Kerr Last Updated: Jul 8, 2019 https://www.britannica.com/biography/Muhammad-Abduh; Z İbrahim Kalın, Salim Aydu. The Oxford Encyclopedia of Philosophy, Science, and Technology in ..., (New York: Oxford university press, 2014) Volume1, 2-5.

reformist opinions and prescribed a way forward for it. [86]

He studied Islamic philosophy but opposed the traditional instructing method of *Taqlīd*.[87] He attempted to open the avenues for new ijtihad to meet the challenges posed by modernity and progress and to bridge the gap between present and past scenarios. He asserts that Islam deals with every aspect of a Muslim's life. In his opinion, abandoning ijtihad and pursuing *Taqlīd* is basic reason of decay of Muslim societies. Muslim scholars were proceeding with traditional past methodologies in present modern age to maintain compatibility to basic sources. He suggests that Muslim scholars must go for interpretation of the texts in present modern context so that they can move towards progress and development.[88] He further asserts that there is no rivalry between Islam and science. Scientific development and technologies should be adopted by Muslims as they themselves contributed in its development in past. He added that legal system is crucial for development of any country, hence law should be updated according to the requirement of time and space. He is of the view that Western influence could be

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[86] See for details *Contemporary Islam* (Edinburgh, 1965); and particularly, Zakī Badawī's *The Reformers of Egypt: A Critique of Al-Afghānī, 'Abduhu and Ridhā* (London, 1978). For critical evaluation, see Elie Kedourie's *Afghānī and 'Abduhu: An Essay on Religious Unbelief and Political Activism in Modern Islam* (London, 1966); "Muḥammad 'Abduh." The Concise Oxford Dictionary of World Religions. . *Encyclopedia.com.* 9 Aug. 2019 <https://www.encyclopedia.com>; "Muhammad 'Abduhu ibn Hasan Khayr Allah." Encyclopedia of World Biography. *Encyclopedia.com.* (August 9, 2019).https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/muhammad-abduh-ibn-hasan-khayr-allah

[87] See for details "Muhammad Abduh ibn Hasan Khayr Allah." Encyclopedia of World Biography. . *Encyclopedia.com.* 9 Aug. 2019 https://www.encyclopedia.com; Muḥammad 'Abduh Egyptian scholar and jurist, Written by Malcolm H. Kerr Last Updated: Jul 8, 2019 https://www.britannica.com/biography/Muhammad-Abduh; "Muhammad Abduh." The Columbia Encyclopedia, 6th ed.. . *Encyclopedia.com.* 9 Aug. 2019 <https://www.encyclopedia.com>. http://apastyle.apa.org/; "Muḥammad 'Abduh." The Concise Oxford Dictionary of World Religions. . *Encyclopedia.com.* 9 Aug. 2019 <https://www.encyclopedia.com>

[88] Ibid.

curtailed by adopting modernist and reformist approaches without compromising on religious identity.[89]

4.2-Muḥammad Rashīd Riḍā

Muḥammad Rashīd b. 'Alī Riḍā b. Muḥammad Shams al-Dīn b. Muḥammad Bahā' al-Dīn b. Munla 'Alī Khalīfah[90], was a distinguished religious scholar during the early period of twentieth century in Muslim world. He was born on September 27, 1865 in Kalamūn, a town near Tripoli.[91] He earned so much prominence among other scholars due to proposing of reform, relinquishing taqlīd and demonstrating compatibility of Islam with modernity and diversity.[92]

Rashīd Riḍā[93] witnessed the era of western influence, termination of caliphate and

[89] See for details *Contemporary Islam* (Edinburgh, 1965); and particularly, Zakī Badawī's *The Reformers of Egypt: A Critique of Al-Afghānī, 'Abduhu and Riḍhā* (London, 1978). For critical evaluation, see Elie Kedourie's *Afghānī and 'Abduhu: An Essay on Religious Unbelief and Political Activism in Modern Islam* (London, 1966); "Muḥammad 'Abduh,"The Concise Oxford Dictionary of World Religions, *Encyclopedia.com,* https://www.encyclopedia.com; "Muhammad Abduh ibn Hasan Khayr Allah." Encyclopedia of World Biography, *Encyclopedia.com* https://www.encyclopedia.com; Muḥammad 'Abduh Egyptian scholar and jurist, Written by Malcolm H. Kerr https://www.britannica.com/biography/Muhammad-Abduh; Z İbrahim Kalın, Salim Aydu, *The Oxford Encyclopedia of Philosophy, Science, and Technology,* Volume 1(New York: Oxford university press, 2014), 2-5.

[90] Ziriklī, Khayr al-Dīn al-'Ālam (Beirut: Dār al-'Ilm lil-Malayin, n.d), vol. 6,126; W. Ende, "Rashīd Riḍā," in *The Encyclopedia of Islam* (Leiden: E. J. Brill, 1995), 448.

[91] W. Ende, "Rashīd Riḍā", in *Encyclopedia of Islam,* ed. P. Bearman, Th. Bianquis, C.E. Bosworth, E. van Donzel, W.P. Heinrichs. Consulted online on 09 August 2019 http://dx.doi.org/10.1163/1573-3912_islam_SIM_6240, first published online: 2012, First print edition: ISBN: 9789004161214, 1960-2007.

[92] Abdel-Khalik, Umar Ryad, "Islam and Mission: A Research Paper on a Fatwā by Rashīd Riḍā on Missionary Activities," (Unpublished paper submitted to the Seminar "Islam and the West: Their Mutual Relation as Reflected in Fatwa Literature, Leiden, 2000), 3.

[93] Muhammad Rashīd Riḍā(1865-1935) studied Qurān, Arabic writing, and elements of arithmetic from *Kutab*/Qur'anic School of his village, then learnt Arabic grammar, math, the basics of geography, *'aqīdah,* Islamic rituals, and Turkish language from *Rushdiyyah* National Primary School in Tripoli afterwards he joined *al-Madrasah al-Wataniyyah al-Islamiyyah,* and liked and considered it better than the previous one due to Arabic subjects, his interest was in religion, logic, mathematics, and philosophy and got inspired and influenced by the ideas of al-Afghānī and 'Abduhu. His published work include: *Tafsīr al-Qurān al-Hakīm* known as *Tafsīr al-Manār* [The commentary on the Qur'an which 'Abduhu began but did not complete beyond *sūrah* al-Nisā', verse 125. Riḍā continued up to *sūrah* Yūsuf, verse 100]; *Al-Tafsir al-Mukhtasar al-Mufīd* This was intended as a summary of the former work, which was begun by Riḍā and published by Muhammad Ahmad Kan'ān and Zuhayr al-Shawish as *Muhktasar Tafsīr al-Manār,* 3 vols, Beirut-

transformation of Arab and Muslim world. He emphasized on the preservation of Muslim

identity and culture at the time of turbulence.[94] Although Riḍā's concepts were believed

to be an extension of 'Abduh's[95] thought, since both of them favored the reform and

revitalization of Islamic traditions with special emphasis on its compatibility with

modernity, change and diversity. He contends that Islamic dogmas should be re-

interpreted rationally, blind *Taqlīd* must be discouraged. He asserts that reform[96] in

religious and educational system is necessary that could be attained by learning and

adopting new skills and technologies.[97] He, being an honored successor, published an

ample biography of 'Abduh' after his death in 1905 and started to complete the remaining

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Damascus, 1984; *Al-Manār Journal* [The first volume was published in 1315A.H. [1898], the second section of the last volume (volume 35) was published and distributed after his death on 29th Rabi' II, 1354/1935]; *Tarīkh al-Ustāz al-Imām al-Shaykh Muhammad 'Abduhu* [A biography of his teacher published in three volumes]; *Nidā' lil Jins al-Latīf* or *Huqūq al-Mar'ah fī al-Islam* ["A Call to the Fair Sex" or "Women's Rights in Islam"]. This was translated into many languages; *Al-Wahī al-Muhammadī* [This provides rational and historical proofs indicating that the Qurān is a Divine Revelation]; Tarjamah al-Qur'an wa mā fīhā min Mafāsid wa Manfa'ah al-Islām (Cairo:Matbū'āt al-Manār,1344/1926); *Dhikr al-Mawlid al-Nabawī* [This includes a summary of the Prophet's biography and the foundations of Islam]; *Al-Wahdah al-Islamiiyyah* [Islamic Unity]. The major part of this work was first published under the title *Muhawarāt al-Muslih wa al-Muqallid* ["Debates between the Reformer and the Imitator"]; *Yusr al-Islām wa Usūl al-Tashrī' al-'āmm* ["The Accommodating Spirit of Islam and the Sources of General Jurisprudence"] published in 1928; *Al-Khilāfah wa al-Imāmah al-'Uzmā* ["The Caliphate and the Greater Imamate"]; *Al-Sunnah wa al-Sharī'ah* ["The Prophetic Tradition and Islamic Law"]; *Al-Muslimūn wa al-Qibt* ["Muslims and the Copts"]; *Al-Wahhābiyyūn wa al-Hijāz* ["The Wahhabites and the Hijaz"]; *Al-Manār wa al-Azhār* ["Al-Manār and al-Azhar"] see for details Ibidem; Hasīb al-Samirra'i, Rashīd Riḍā al-Mufassir, (Baghdad:Dār al-Risalah lil-Tibā'ah, , 1397/1977), 283; Hourani, Albert, Arabic Thought in the Liberal Age: 1789-1939, (New York :Oxford University Press,1962), 226; Ziriklī, Khayr al-Dīn al-'Alam (Beirut: Dār al-'Ilm lil-Malayin, n.d), vol. 6,126; W. Ende, "Rashīd Riḍā," in *The Encyclopedia of Islam* (Leiden: E. J. Brill,1995),448.

[94] Shakīb Arslān, *Al-Sayyīd Muhammad Rashid Rida aw Aikhā' Arba'īna Sanah* (Damascus: Matba'ah Ibn Zaydūn, 1937), 277.

[95] When Muhammad 'Abduhu visited Tripoli in 1894, Riḍā received him and accompanied 'Abduhu during this visit, he then migrated to Cairo became his close student, he explained during his first meeting with 'Abduhu, about his aim of publishing a journal dealing with Islamic reform, *Al-Manār*, the first issue of this journal appeared on March 1898. See for details Muhammad Ahmad Darniqah, Al-Sayyīd Muhammad Rashīd Riḍā Islāhatuhu al-Ijtimā'iyyah wa al-Dīniyyah (Beirut, 1989),27; Abdel-Khalik, Umar Ryad, "Islam and Mission: A Research Paper on a Fatwā by Rashīd Riḍā on Missionary Activities"(Unpublished paper submitted to the Seminar "Islam and the West: Their Mutual Relation as Reflected in Fatwa Literature, Leiden, 2000), 3.

[96] M Kerr, "Rashīd Riḍā and Islamic Legal Reform: An Ideological Analysis," *The Muslim World*, 50, no.2 (1960):101.

[97] Emad Eldin Shahin, "Muhammad Rashīd Riḍā's Perspectives on the West as reflected in Al-Manār," *The Muslim World*, 79, no.2 (1989):113.

work[98] of his leader. *Al-Manār* dealt with variety of subjects, but mainly focused on religious and social reform of Muslim nation and assisted in demonstrating a systematic doctrine of Islamic law and politics.[99] *Al-Manār* also undoubtedly provides functional source of information about crucial events of the Muslim World for the period of nearly forty years.[100]

4.3-Muhammad Hamīdullah (1908-2001)

Dr. Muhammad Hamīdullah (1908-2001) was one of the famous Muslim scholars who contributed in presentation of Islamic law on the patron of contemporary international law. He was born on February 19, 1908 at Hyderabad, Deccan of India. Owing to his truthfulness, sincerity, honesty, altruistic approach and literary contributions Muḥammad could righty be called Imām Ghazzālī, and Shah Walīullah of modern times. Due to his extra ordinary work in the field of Islamic international law, he is entitled to be called new founder and complier of contemporary Islamic international law on the footsteps of Imām Muḥammad bin Hassan al Shaybānī.[101] He[102] got F.A, B.A, LLB and M.A degrees

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[98] He also started to complete the commentary of the Qurān which 'Abduhu had begun. His career in Cairo was almost entirely devoted to the publication of his journal *Al-Manār*, which continued to appear for a few years after his death.

[99] M Kerr, *Islamic Reform* (California: University of California Press, 1966), 153.

[100] Ayman Shabana, "Rashīd Ridā's Fatwā on Apostasy" (Unpublished paper submitted to the Seminar "Islam and the West: Their Mutual Relation as Reflected in Fatwa Literature. Leiden, 1999), 3.

[101] Mahmood Ahmad Ghāzī, "Ulūm-e-Islāmīah myn Doctor Muhammad Hamīd Ullah kī Khidmāt ('amūmī Jā'izah)," *Fikr-o-Nazr*, 40-41, no: 1, 4 (2003): 81-91.

[102] He has written more than 150 books: *The Muslim Conduct of State: Being a Treatise on Siyar (Siyar), General Introduction* (1941, 1953), *The First Written Constitution in the World* (1941, 1975 and 1986), *Islamic Notion of Conflict of Laws* (1945), *Die Rezeption Europaischen Rechts in Haiderabad* (1953), *Le "Livre des genenalogies" [D'al-Baladuriy by al-Baladuri]* (1954), *Introduction to Islam* (1957), *Le Saint Coran: Traduction et commentaire de Muhammad Hamīdullah avec la collaboration de M. Leturmy* (from 1959 onwards), *Muhammad Ibn Ishāq, the Biographer of the Holy Prophet(Peace be on him)* (Pakistan Historical Society) (1967), *Introduction to Islam* (1969), *Muhammad Rasūlullah: A Concise Survey of the Life and Work of the Founder of Islam* (1979), *Islam: A General Picture* (1980), *Islam, Philosophy and Science: Four Public Lectures Organized By Unesco June 1980* (editor) (1981), *Why Fast?: Spiritual & Temporal Study of Fast in Islam (Centre Culturel Islamique Paris Series)* (1982), *The Prophet's*

from Osmania University (India), D.Phil from Bonn University (Germany) in 1933 and D.Litt. from Sorbonne University, Paris, France in 1935. He served as a Lecturer in Department of Islamic Studies at Osmania University, India (1935-1948). He worked in the law department (1945-1948) and contributed in the preparation of Objectives Resolution of Pakistan (1949). Muḥammad Hamīdullah conducted research at Sorbonne University and French National Centre for Scientific Research, Paris (1948-1969). He has written and compiled over 150 books, plus 1000 research papers approximately. Although he has written on different fields of Islamic sciences but his areas of special interest were *Sīrah* of Prophet (peace be on him), history of Hadīth and International law of Islam. His work in English, French and Urdu won global admiration. He not only translated Western thoughts but also evaluated it critically. His book 'Muslim Conduct of State', originally based on thesis of his M.A from Osmania University, presents a revised and renewed edition of Islamic international law. He has written about historical wars, Mīthāq al-Madīnah, first written constitution, rules for non-Muslim minorities. He has introduced new dimensions of Islamic international law, that were not given due consideration in the classical books. He particularly initiated debate on the modern notions such as private International law and conflict of laws. The data on these issues was not found in an organized manner under one field of knowledge in Islamic tradition, rather it was scattered in many branches. He has tried to collect that scattered material, compiled it systematically and presented it in an established doctrinal form. He asserts

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Establishing a State and his Succession (1988), *The Prophet of Islam: Prophet of Migration* (1989), *Kur'ân-ı Kerîm tarihi: Bir deneme (Ilmi eserler)* (1991), *Battlefields of the Prophet Muhammad* (1992), *Emergence of Islam* (1993), *Islam in a Nutshell* (1996), *The Life and Work of the Prophet of Islam* (1998).

that social and individual life of every Muslim should be influenced by Islamic law, therefore, a Muslim has to follow the commands of Islam but to the extent of freedom given to him by the state in which he is residing. He is of the view that commission of any crime in an infidel territory does not come under the jurisdiction of court of Muslim land and vis a vis. Although Islam intends that its rulings should be compliance by all Muslims, but owing to the lack of legal capacity, in any issue, a Muslim might not be the subject to Sharī'ah in a non-Muslim state. He suggests that the Muslims of non-Muslim states are subject to the law of their residence and within that freedom provided by the non-Muslim state, they can implement Sharī'ah rulings. He is of the view that in case of war between Muslim and non-Muslim states, the Muslim citizens of non-Muslim states are not under obligation to help their Muslim brothers. He gives examples of many Muslim communities found in early period of Islam, residing in secular territories and following the rules of Islam there, but it always depended on the attitude of the governments towards Muslim citizens and length of freedom provided to them by the governments. He contends that they were subject to the laws of their state of residence too.[103]

4.4-Majīd Khaddūrī

Majīd Khaddūrī (1908–2007) was born in Mosul in northern Iraq in 1908, he studied in Lebanon at the famous American University of Beirut (AUB) and got B.A degree in 1932. He had his Ph.D degree in Political Science and International Law from the University of Chicago. He served for more than 30 years at Johns Hopkins University's School of Advanced International Studies (SAIS) in Washington, DC. This institution

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[103] Muhammad Zia-ul-Haq, "Bain al-aqwāmī Islāmī Qānūn Doctor Muhammad Hamīd Ullah kī Tahrīrūn kē Tanāzur myn," *Fikr-o-Nazr*, 40-41, no: 1, 4 (2003): 207-270.

remained his intellectual home and where he served as professor of Middle East studies from 1949 to 1970 and director of the SAIS Center for Middle East Studies for 20 years from 1960 to 1980. His academic title between 1970 and 1980 was Distinguished Research Professor. [104] He is of the view that in Islam rights of individuals are not separated from interests of community. He asserted that code of Islam progressed from Arab customs. Through the enlargement of Muslim land many native customs and traditions of the invaded lands had been accepted in Islamic tradition. He is of the view that the Arabs before Islam were following customary laws, but they were lacking political unity. Emergence of Islam effected it. Divine law, he added, predate state and society to understand that purpose of state is to enforce law. Therefore, even without the authority of a state, Muslims are bound to follow the Sharī'ah. Islamic law believes in the theory of universal state and recognizes only its own state like ancient Rome and Medieval Christendom. This view considers that all humanity is one nation and must be ruled by one law and one ruler. According to him division of world into two zones; the

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[104] He has authored 16 books, many dozens of major articles and 29 essays in books and encyclopedias, including the *Encyclopedia Britannica*. His books on Islamic law, Middle Eastern politics and modern Middle Eastern history have become highly credible sources in their field. His latest book, *The Gulf War*, was written and published when Professor Khadduri was in his mid-80s, His published work as an author includes *Modern Libya: A Study in Political Development* (June 1963), *Political Trends in the Arab World: The Role of Ideas and Ideals in Politics* (January 1970), *Arab Contemporaries: The Role of Personalities in Politics* (June 1973), *War and Peace in the Law of Islam* (June 1977), *Socialist Iraq: A Study in Iraqi Politics since 1968* (January 1978), *Independent Iraq, Nineteen Thirty-Two to Nineteen Fifty-Eight: A Study in Iraqi Politics* (June 1980), *Arab Personalities in Politics* (April 1981), *Law in the Middle East: Origin and Development of Islamic Law* (editor Herbert J. Liebesny) (October 1982), *Political Trends in the Arab World: The Role of Ideas and Ideals* (June 1983), *The Arab Gulf States: Steps Toward Political Participation* (with John Peterson) (February 1988), *The Gulf War: The Origins and Implications of the Iraq-Iran Conflict* (May 1988), *War in the Gulf, 1990-91: The Iraq-Kuwait Conflict and Its Implications* (with Edmund Ghareeb) (August 2001), *The Islamic Conception of Justice* (February 2002); as an editor *The Islamic Law of Nations: Shaybānī's Siyar* (February 2002) *Al-Shafi'i's Risala: Treatise on the Foundations of Islamic Jurisprudence*, see for details *Washington Report on Middle East Affairs,* July 1996, pg.23, Personality Professor Majid Khadduri *By Andrew I. Killgore* at https://www.wrmea.org/1996-july/personality-professor-majid-khadduri.html (accessed July 26, 2019).

land of Muslims (dār al-al-Islām) and land of combat (dār al-ḥarb) is for administrative purposes. Theoretically, Muslims require to strive to implement Sharī'ah all over the globe. He explains that the Islamic law of peace, is non-permanent and only applicable till the whole world comes under Islamic sovereignty. He argues further that Islamic international law revitalized with the growth of Ottoman Empire (A.D.1300). Since Ottoman rulers used to issue orders and decrees enforceable by law which ultimately played an important part in progress of Islamic legal structure in conformity to the new circumstances of the Muslim world. These circumstances helped the rulers to effectively manage their relations with Christian states of Eastern Europe. He contends that secularization of foreign relations for a state is crucial as inclusion of religious elements in international politics of states historically proved harmful. System of international law mainly works with customs and conventions and must be growing with needs of nations. Muslims, however, are well acquainted with the need of modern international and foreign relations. Secular approach in foreign affairs has been adopted by all Muslim states. He concludes that modern law of nations can be grown and benefited with the help of rulings of Sharī'ah.[105]

4.5-Yūsuf al-Qaraḍāwī

Yūsuf al-Qaraḍāwī is among the highest recognized and profound Egyptian Islamic thinkers and scholars. He was born in 1926 in Egypt. He graduated from Al-Azhar University in Cairo and received diploma in Arabic language and Literature in 1958, Master's degree in Qurānic Studies in 1962. He obtained his Ph.D degree from Al-Azhar

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[105] Majid Khadduri, 'Islam and the Modern Law of Nations, *The American Journal of International Law*, Vol. 50, No. 2 (Apr., 1956), pp. 358-372 Published by: Cambridge University Press
Stable URL: https://www.jstor.org/stable/2194954, Accessed: 25-07-2019 09:36 UTC

in 1973. During his academic career he served at important positions and worked on the

boards of many organizations.[106] Besides that, he has vast experience in the field of

da'wah and considered it as an authority in Islamic 'aqīdah (belief) and Sharī'ah. Al-

Qaraḍāwī has published more than 120 books[107] and dozens of articles. He is one of the

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[106] Yūsuf al-Qaraḍāwī has founded the Faculty of Sharī'ah and Islamic Studies at the University of Qatar and served as its founding dean in 197. He also served as Chairman of the Scientific Council of Islamic Universities and Higher Institutions in Algeria from 1990–91. He also served as the director of the *Sīrah* and Sunnah Center at Qatar University in Doha. He is also a member of the Al-Azhar Islamic Research Council and the founder and chairman of the International Union of Muslim Scholars.

[107] Yūsuf al-Qaraḍāwī's books include: *The Lawful and the Prohibited in Islam* and *Islam: The Future Civilization*. His work includes: *Ghayr al-Muslimīn fī al-mujtana' al-Islāmi*. (Cairo: Maktabāt Wahbah. 1977) *Ayna al-khalal*. (Cairo: Dār al-Ṣaḥwah. 1985); *Awāmil al-sa'ah wa-al-murūnah fī al-sharī'ah al-Islāmīyah*. (Cairo: Dār al-Ṣaḥwah. 1985); *Al-'Ibādah fī al-Islām. (Cairo. Maktabāt Wahbah. 1985);Al-Nās wa-al-ḥaqq* (Cairo: Maktabāt Wahbah. 1986); *Bay' al-murābaḥah lil-āmir bi-al-shirā' ka-mā tujrīhi al-maṣārif al-Islāmīyah : dirāsah fī ḍaw' al-nuṣūṣ wa-al-qawā'id al-shar'īyah*. (Cairo: Maktabāt Wahbah. 1987); *Al-Īmān wa-al-ḥayāh*. (Cairo: Maktabāt Wahbah. 1990);. *Malāmih al-mujtama' al-Muslim alladhī nanshuduh*. (Cairo: Maktabāt Wahbah. 1993); *Dawr al-qiyam wa-al-akhlāq fī al-iqtiṣād al-Islāmi*. (Cairo: Maktabāt Wahbah. 1995); *Fī fiqh al-awlawīyāt: dirāsah jadīdah fī ḍaw' al-Qurān wa-al-sunnah*. (Cairo: Maktabāt Wahbah. 1995); *Al-Islām wa-al-fann*. (Cairo: Maktabāt Wahbah. 1996); *Al-Aqallīyāt ad-dīnīya wa-l-hall al-islāmi*. (Cairo: Maktabāt Wahbah. 1996); *Al-Mubashshirāt bi-intiṣār al-Islām* (Cairo: Maktabāt Wahbah. 1996); *Min fiqh al-dawlah fī al-Islām . makānatuhā-- ma'ālimuhā-- ṭabī'atuhā, mawqifuhā min al-dīmuqrāṭīyah wa-al-ta'addudīyah wa-al-mar'ah wa-ghayr al-Muslimīn* (Cairo: Dār al-Shurūq. 1997); *Al-Ṣaḥwah al-Islāmīyah wa-humūm al-waṭan al-'Arabi*.(Cairo: Dār al-Shurūq. 1998); *Thaqāfatunā bayna al-infitāḥ wa-al-inghilāq* (Cairo: Dār al-Shurūq. 2000) ; *Al-Īmān bi-al-qadar* (Beirut: Mu'assasah al-Risālah Nāshirūn. 2001); *Fī fiqh al-aqallīyāt al-Muslimah : ḥayāt al-Muslimīn wasaṭ al-mujtama'āt al-ukhra* (Cairo: Dār al-Shurūq. 2001); *Ri'āyat al-bī'ah fī sharī'at al-Islām* (Cairo: Dār al-Shurūq. 2001); *Al-Sunnah wa-al-bid'ah*. (Cairo: Maktabāt Wahbah. 2003); *Fī wadā' al-a'lām* (Beirut: Dār al-Fikr. 2003); *Al-Islām alladhī nad'ū ilayh* (Cairo: Maktabāt Wahbah. 2004); *Al-Ṣaḥwah al-Islāmīyah: bayna al-āmāl wa-al-maḥādhīr*. (Cairo: Maktabāt Wahbah. 2004); *Mi'at su'āl 'an al-ḥajj wa-al-'umrah wa-al-uḍhiyah wa-al-'īdayn*. (Cairo: Maktabāt Wahbah. 2004); *Al-Islām wa-'l-'unf: naẓarāt ta'ṣīlīya* (Cairo: Dār al-Shurūq. 2005); *Naḥnu wa-al-Gharb : as'ilah shā'ikah wa-ajwibah ḥāsimah*. (Cairo: Dār al-Tawzī' wa-al-Nashr al-Islāmīyah. 2006); *Al-Islām kamā nu'minu bihī ḍawābiṭ wa-malāmih*. (Cairo: Dār Nahḍat Miṣr li-ṭ-Ṭibā'a wa'n-Nashr wa-'t-Tauzi. 2006); *Dirāsah fī fiqh maqāṣid al-sharī'ah: bayna al-maqāṣid al-kullīyah wa-al-nuṣūṣ al-juz'īyah*. (Cairo: Dār al-Shurūq. 2006); *Kayfa nata'āmalu ma'a al-Qurān al-'Aẓīm* (Cairo: Dār al-Shurūq. 2006); *Al-Dīn wa-al-siyāsah : ta'ṣīl wa-radd shubuhāt* (Cairo: Dār al-Shurūq. 2007); *Fiqh al-Jihād: Dirāsah Muqāranah li-Aḥkāmih wa Falsafatih fī Ḍaw' al-Qur'ān wa al-Sunnah* (Cairo: Maktabat Wahbah. 2009); *Al-Wara' wa-al-zuhd*. (Cairo: Maktabāt Wahbah. 2010); *Fiqh al-wasaṭīyah al-Islāmīyah wa-al-tajdīd: ma'ālim wa-manārāt* Cairo: Dār al-Shurūq. 2010; *Ḥayāt al-mar'ah al-Muslimah: fī iṭār al-ḥudūd al-shar'īyah* (Cairo: Maktabat Wahbah. 2011); *al-Sunnah wa-muwājahat ḥamalāt al-tashkīk*. (Cairo: Maktabāt Wahbah. 2011). Due to the importance of his work some of selected works have been translated into English which include: *Islam: Modern Fatwas on Issues of Women and the Family* (Fatāwā Mu'āsarah fī Shu'ūn al-Mar'ah wa al-Usrah) (Algeria: Dār al-Shihāb,1987); *Auspices of the Ultimate Victory of Islam*, Doha (1996); *The lawful and the prohibited in Islam (al-Halāl wal-harām fī al-Islām)* (Indianapolis, IN, USA: American Trust Publications. 1999); *The desired Muslim generation* (Riyadh: International Islamic Publishing House. 1999); *Non-Muslims in the Islamic society. Indianapolis* (Ind., USA: American Trust Publications. 1985); *Priorities of the Islamic movement in the coming phase* (Cairo: al-Dār. 1992); *Fiqh al-zakah : A comparative Study : The rules, regulations and philosophy of Zakat in the light of the Qurān and Sunnah* (London: Dār Al Taqwa. 1999); *Contemporary Fatāwā:*

contemporary scholars whose expert opinion is sought and followed on contemporary issues. In recognition of his outstanding contributions he has been awarded many international Awards.[108] Although his literary contributions cover almost every area of Islamic sciences but the issues related to Muslim minorities in the West are very prominent in his writings. He states that Islam is found everywhere in the globe and Muslims are found on every continent of the earth. Due to living in different domains and territories challenges faced by them are also varied. He is of the view that in spite of variety of differences and variety of territories they are bound to follow Islamic principles as long as they have the capacity to observe Islamic obligations, prohibitions and options. He derived his opinion from the verses of al-Qurān which sates:

> "Allah belongs the East and West, Face of Allah is everywhere, wherever you
>
> twirl yourselves or your faces."[109]

Contrary to traditionalist, Yūsuf al-Qaraḍāwī is aware of importance of realities of life, time and space. In processing of juristic opinions and in pronouncement of *Fatāwā*s he gives due importance to the changeability aspects of life. Asserts that a *Fatāwā* is not

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Current issues in Islamic fiqh (Newark, NJ: Islamic Book Service. 1999) *Time in the life of a Muslim* (London: Ta-Ha. 2000); *Sincerity: The Essential Quality* (MAS Publications,2006); *Approaching the Sunnah: comprehension & controversy* (London Washington D.C: International Institute of Islamic Thought. 2007); *Islamic awakening between Rejection and Extremism. Kuala Lumpur Herndon, Va: Islamic Book Trust (The International Institute of Islamic Thought. 2010); Islam: an introduction. Kuala Lumpur, Malaysia*: (Islamic Book Trust. 2010) *Economic security in al-Islām* (Kuala Lumpur: Dār Al Wahi Publication. 2010).

[108] His awards include: The Islamic Development Bank (IDB) Prize in Islamic Economics, 1991; King Faisal International Prize for Islamic Studies,1994; Sultan Hassanal Bolkiah (Sultan of Brunei) Award for Islamic Jurisprudence,1997; Sultān Al Owais Award for Cultural & Scientific Achievements.1998-1999; Dubai International Holy Quran Award for Islamic Personality of the Year 2000; The State Acknowledgement Award for contributions in the field of Islamic Studies from the Government of Qatar, 2008, Tokoh Ma'al Hijrah (Hijrah of the Prophet(Peace be on him)) by the Malaysian Government.2009, The *State Merit Prize for Islamic Studies* was issued by the Ministry of Culture, Arts and Heritage of Qatar on 3 November 2009. He is also honored as trustee of the Oxford Centre for Islamic Studies and Chairman of the International Union of Muslim Scholars.

[109] Al-Qurān 2:115.

customarily applicable to every individual without sensible investigation of his condition and environment.[110] He has discussed the status of non-Muslim minorities, then explored the issues related to them and gives his opinions in the light of contemporary circumstances. He is of the view that Muslim minorities should be dealt separately, in a distinct branch of *fiqh*, based on vibrant characteristics of Sharī'ah. He thinks that Muslim minorities are not in a position to implement Islamic principles, as it is possible for the Muslims in the Muslim countries. Moreover, they are bound to follow the laws of the countries where they are living. He is one of the scholars who have suggested discovery of fiqh as fiqh al-Aqlliyyāt. He believes that *fiqh* for Muslim minorities is just a section of general *fiqh*, covers specific areas and fields. He suggests for reconstruction of the specialized field which was discussed by early jurists only precisely owing to the irrelevancy of the world scenario of their time. Muslim minorities are very important as they are not only the part of Muslim ummah but also part of non-Muslim societies. They need to maintain both statuses. He is of the view that to address contemporary challenges many new branches of fiqh have been emerged such as economic, medical and political fiqh. Although these new branches of fiqh lack coherence and sufficiency in description but founded basis in the classical fiqh. He states that this experience provides sufficient rationale to develop branch of fiqh for Muslims in non-Muslim communities. He argues that territorialities have been changed and Muslims need to retain considerable presence in the West to spread the message of Islam to non-believers. He sees opportunity for Muslims in the powerful West to capture the world economy and administer their culture. He shows legitimacy of the Muslims' residence in the West. He argues that in the light of

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[110]Yūsuf al-Qaraḍāwī, *Fiqh of Muslim Minorities Contentions Issues and recommended solutions* (Egypt: Al-falāh Foundation, 2003), 1-150; Fiqh al-Aqalliyyāt al-Muslimah, hayāt al-Muslimīn wast al-mujtama'āt al-ukhra (Cairo: Dār al-shurūq, 2001); Fiqh al-Aqalliyyāt al-Muslimah (Cairo: Dār al-shurūq, 2002-3).

Qurānic teaching, living of Muslims in the non-Muslim societies is not questionable because prophethood of the Holy Prophet (peace be on him) was not limited to a certain area but it was for all the humanity.[111] He is of the view that Muslim migrants are mean of conveying message of Islam to the non-Muslims. Fiqh of minorities will support the Muslim-minorities to fulfil their moral and legal obligations. It will also be helpful for them to regulate their lives according to the principles of al-Islām. Through this, they will be able to find answers for their day to day problems. Another additional benefit of fiqh al-Aqlliyyāt will be restart of Ijtihād. Through this Muslims of non-Muslim communities will get awareness about their rights. This will also help them to know how-to live-in accordance with law. It will also pave the way for their integration without compromising on their religious identity. These Muslims will be able to convey the message of Allah to their non-Muslim fellow citizens as Almighty Allah says:

> "This is my way of inviting towards Allah, on the basis of evidences that can be
> seen with one's eyes, I and whoever follow me."[112]

The approach of al-Qaradāwī towards Islamic law is balanced and adaptable by contemporary experts. It is to be noted here that his opinions are widely acceptable in Muslim and non-Muslim world. He has contributed in increasing the discussions on the issues of Muslim minorities, particularly in the West. Undoubtedly his opinions dominate and are widely accepted as authority for Muslim minorities.[113]

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[111] Al-Qurān 21: 107; 25:1.
[112] Al-Qurān 12: 108.
[113] S. F. Hassan, "Yūsuf al-Qaradāwī: An Ideologue for Muslim Minorities" in *Fiqh al-Aqalliyyāt, History, Development, and Progress* (US: Palgrave Macmillan, 2013), 57-58.

4.6-Tariq Ramadan

Tariq Ramadan was born on August 26, 1962 in Egypt. He is a Swiss Muslim academician, philosopher, and profound writer on Islamicus. He has also served until recently as Professor of Contemporary Islamic Studies at the Oxford University,[114] through his academic contribution has tried to reread bases of al-Islām.[115] Being a person from the European background he feels that his understanding is a first step towards interpretation of al-Islām in the context of European Muslims. In his view, Western Muslims are very important in the current global scenario as they will be able to contribute in the progress of al-Islām. He realized that Muslims in West have to face many challenges to make balance between their state and social responsibilities and religious obligations. On the one hand they are bound to reflect their faith, values, principles and identity within a secularized society and on the other hand they have to live in liberal democracies. Islam is a universal religion and its fundamental principles are suitable to accommodate the historical and geographical changes. It has the values that

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[114] Tariq Ramadan has served many important academic positions in various renowned institutions of the West. He worked as Senior Research Fellow and member of Governing Body at St Antony's College (University of Oxford) and Senior Research Fellow at Do shisha University (Kyoto, Japan). His other assignments include Visiting Professor at the College of Islamic Studies, Hammād Bin Khalīfah University (Doha, Qatar); Director of the Research Centre for Islamic Legislation and Ethics (CILE) (Doha, Qatar), President of the think tank European Muslim Network (EMN) in Brussels and a member of the International Union of Muslim Scholars. He holds an MA in Philosophy and French literature and Ph.D in Arabic and Islamic Studies from the University of Geneva. In Cairo, Egypt he received one-on-one intensive training in classic Islamic scholarship from Al-Azhar University scholars (Ijāzat teaching license in seven disciplines). Through his writings and lectures Tariq has widely contributed to the debate on the issues of Muslims in the West and Islamic revival in the Muslim world. His research interests include the issues of Islamic legislation, politics, ethics, Sufism and the Islamic contemporary challenges in both the Muslim-majority countries and the West. He is active at both academic and grassroots levels, lecturing extensively throughout the world on theology, ethics, social justice, and interfaith as well as intercultural dialogue.

[115] His latest work available in English language include : *Islam: The Essentials* (Pelican Series, Penguin, 2017); *The Arab Awakening: Islam and the New Middle East* (Penguin, 2012); *The Quest for Meaning: Developing a Philosophy of Pluralism* (Penguin 2010); *What I Believe* (OUP, 2009); *Radical Reform: Islamic Ethics and Liberation* (Oxford University Press,2009); *In the Footsteps of the Prophet: Lessons from the Life of Muhammad* (Oxford University Press, 2007); and *Western Muslims and the Future of Islam* (Oxford University Press, 2005). *For more details see TARIQ RAMADAN "Biography"* at https://tariqramadan.com/english/.

give weightage to religious, cultural and ethnic diversities. He asserts that universality of

al-Islām is helpful for the Muslims to adjust in Western societies.[116] He contends that

Qurān, Sunnah and other sources of Islamic law are equipped to provide guidance for the

Western Muslims if understood in Western context. He fears less in challenging certain

definitions and categorizations of Sharī'ah which in his opinion are used to exclude

Western Muslims from the jurisdiction of al-Islām. He suggests useful new perspectives

for methodological reforms in Islamic learning. He believes in addressing new issues and

challenges that are being faced by Muslim communities in West. He is of the view that

social, political, economic, educational, cultural and spiritual areas of Western Muslims'

life need special attention from Muslim researchers. He observes that young Muslims in

West want to live in peace and harmony with other humans in the Western societies who

are practicing other faiths and cultures.[117] He identifies that a silent revolution in Muslim

youth in West is on way. He asserts that young English, German, French, Canadian and

American Muslims are trying to establish a Muslim identity that ensures their non-

Muslim fellow citizens sincerity, respect and dignity. He is trying to identify that after the

settlement of Muslims in West, a new shape of European and American al-Islām is

emerging. It is outfitting in the culture of Europe and America, but rooted in Islamic

spirituality and moral values. In his view modern al-Islām can contribute in the progress

of Western civilizations. The globalization has generated intense awareness of the

identity. He suggests that we need to change the popular perception that al-Islām and

West are on war with each other. This perception is more dangerous for the interests of

the Western Muslims. Muslims under this perception instead of looking more open,

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[116] Tariq Ramadan, *Western Muslims and the Future of Islam* (New York, Oxford: University Press, 2004), 3-7.

[117] Ibid.

pluralistic and rational are being marginalized. This situation also sometimes resulted in

isolation of the Muslims intellectually and socially. He advanced debate that can help the

Muslims not only to understand contemporary realities but also ensures them process of

restructuring and assimilation into a conducive environment.[118] He is of the view that

many principles of the West which lead to assimilation are noble, fair and civilized. It is

possible for the Muslims to accept it rationally, technically, administratively, and

financially. He also discussed the question of integration of Muslims in the West and

states that there is no harm in the integration which protects Muslims' integrity, freedom

of conscience and rights of worship. In his view, integration is not excluding widespread

ideologies of al-Islām, rather it will lead Muslims to investigate and learn the approach of

Islamic principles to accept and reject diversity and other's faiths. He is of the view that

Muslims must get out from the exclusiveness and they should consider themselves as the

integral part of the Western societies.[119] He suggests that the Muslim minorities or the

law of Muslim minorities needs to be revisited. He insists that we lack distinguished

ulamā' who are originally western. He said, we need to maintain a link between Muslims

of East and West but Western Muslims have to think independently as their hearts and

minds are free. He is against the colonialist approach of various governments to keep

Muslims divided in old and new. He realized that political insecurity, islamophobia and

social discrimination against the Muslims is spreading in the West after the terrorist

incidents such as 9/11. He suggests that Western Muslims must realize their

responsibilities. They need to engage themselves in all the areas of life as the things are

in their hands either to get and make use of them or to stay at margins permanently. He is

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[118] See for details: Tariq Ramadan, *Western Muslims and the Future of Islam*; *Islam, the West and the Challenges of Modernity* (Leicester: Islamic Foundation, 2001).
[119] Ibid.

of the view that Muslims in the West must understand the structure of their Western

societies and fully participate in their progress. In his opinion with realization of social

responsibility and through positive contributions Muslims can raise voices against all

types of discriminations, injustices and violation of rights. The creation of real

partnership beyond their own community will give political strength and Muslims will

not only get what they deserve but also could successfully build their effective role in the

modern era and West too.[120]

4.7-Wahbah Mustafā al-Zuḥaylī

Wahbah al-Zuḥaylī (1932-2016) was a great contemporary scholar and jurist from

Syria.[121] He introduced many legal concepts of Sharī'ah and tried to trace compatibility

between rulings of Islamic law and International law.[122] He has tried to address the

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[120] Tariq Ramadan, Western Muslims and the Future of Islam, 224-226.

[121] Zuhaylī (1932 – 2015) was born in the Syrian and graduated in 1956 from Al-Azhar University. He received a master's degree in law from Cairo University's College of Law in 1959 and got his doctorate with honors in law with a major in Islamic Sharī'ah in 1963. His thesis was 'The Influences of War on Islamic Jurisprudence.' This comparative study has included the opinions of eight schools of Islamic law and secular International law. He was chairman department of Islamic jurisprudence in the College of Shariah at Damascus University. He is a signatory of important contemporary declaration such as the Amman Message and A Common Word documents. He served at Damascus University as a professor from1963-1975. He had taught both Sharī'ah and law in the university. His specialization includes but not limited to Islamic law, Islamic legal philosophy, and comparative legal systems. He also served as a visiting professor at the faculty of law at University of Benghazi in Libya (1972–1974), the faculty of sharia law at the University of the United Arab Emirates (1984–1989), the University of Khartoum, Sudan, and the Islamic University of Riyadh. He was a member of the Royal Society for Research on Islamic Civilization of al-Bayt Foundation in Amman Jordan as well as many other worldwide Islamic legal bodies including the Syrian Majis al-'Ifta, Islamic Fiqh Academy in Jeddah, Saudi Arabia and the Islamic Fiqh Academies of the United States, India, and Sudan. He was also Chairman of the Research Institute for Islamic Financial Institutions. He also served as an Islamic legal consultant to Islamic financial companies and institutions including the International Islamic Bank.

122 Al- Zuḥaylī thoroughly discussed the questions of war and peace in Islam in his doctoral study which was later on published under the title Āthār al-Harb fī al-Fiqh al-Islāmī and in his other well-known book on, al 'Alāqāt al-Duwaliyyah fī al-Islām. He has published numerous articles on the topic of relations amid Muslims and infidels. Few of them have published in an edited work, Mu'āmalāt Ghayr al-Muslimīn fī al-

contemporary and framed relations between a nation state and its subjects. [123] He considered values such as tolerance peace and harmony completely Islamic and suggested its use by Muslims and others in interpersonal and inter-sate relations.[124] Apart from the other areas of Islamic law, he particularly addressed the issues such as war, peace, jihad and Muslims' relations with others. He described these notions in such a way which removed many prevailing misconceptions of these notions. He rejected the old approach of demarcation of world into two Dār al-Islām and Dār al-Harb because this division was not part of ultimate rulings of the Sharī'ah. In his opinion, it was suggested as temporary settlement of the issues in particular periods of the Islamic history. [125] Furthermore, he has disapproved such division being an indicator of the permanent state of conflict and enmity among Muslims and others.[126] Al-Zuhaylī stated that Islamic law recognizes the existence of other non-Muslim lands. His derivations are different from the classical jurists such as Ibn Qudāmah on minimum annual obligation of conducting jihad at least on the rationale of jizyah which is to be paid once a year. The classical jurists are of the opinion that collection of Jizyah can be suspended if Muslim states are frail or any other justified impediments are existing. They agreed that in such situations

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Islām.

[123] Mansoori, "The Questions of War and Peace in Contemporary Islamic Legal Discourse."

[124] Wahbah al-Zuhaylī has written numerous books on Islamic law and other laws. Many of his work is translated into English. He has inscribed over one hundred and sixty books. Which include: Āthār al-Harb fī al-Fiqh al-Islāmī: Dirāsah Muqārin ("The Influences of War in Islamic Jurisprudence: A comparative study"). It has been translated into French; al-Fiqh al-Islāmī wa Adilatahu ("Islamic Jurisprudence and its Proofs"); Usūl al-Fiqh al-Islāmī ("The Roots of Islamic Jurisprudence"); al-Fiqh al-Shāfi'ī al-Muyassir ("Easy Shāfi'ī Islamic Jurisprudence"); al-Fiqh al-Islāmī 'ala Madhhab al-Mālikī ("Islamic Jurisprudence according to the Mālikī madhhab"); Financial Transactions in Islamic Jurisprudence, a detailed two volume treatise on modern Islamic business law; al-'Alāqāt al-Duwaliyyah fī al-Islām ("International Relations in Islam"), a detailed treatise on Islamic international law; al-Huqūq al-Insān fī al-Fiqh al-Islāmī bil-Ishtirāk ma' al-Ākhirīn ("Human Rights in Islamic Jurisprudence concerning dealings with others").

[125] Al-Khatīb al-Shirbīnī, *Mughnī al-Muhtāj*, 4: 260.

[126] Al-Zuhaylī, *al 'Alāqāt al-Duwaliyyah fī al-Islam*, 116.

short-term peace treaty can be made with infidels.[127]

Al-Zuhaylī supported the idea of Dār al-'Ahd (territory of covenant and peaceful agreement) and explained in a logical fashion for the formation of diplomatic relationships with non-Muslim countries. He stated that the idea of dār al-'Ahd is also proposed by Imām al-Shāfi'ī.[128] According to him dār al- 'Ahd is an independent land in the present milieu, and comprise of all the countries. On the basis of this opinion he has endorsed the charter of the United Nations for achieving global harmony.[129] He further opined while discussing the responsibilities of an Islamic land that it must respect the geographical borders of other countries. He believes in the universality of Islam as a faith that endorses justice, fairness, veracity and liberty for all mankind.[130] He contends that Islam approves the presence of those non-Muslim lands which opt neutral stances.[131] He asserted that during early period of Islam war was permissible with those infidels only who were hostile against Muslims.[132] Hence neutrality and impartiality of the countries must be honored and acknowledged by the Muslim state.[133] He stressed on peaceful co-existence of all nations because all the states belong to one family unit with diverse communities.[134] In his opinion, Islamic state can use force only in unexpected and emergency situations and not otherwise.

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[127] Ibn Qudāmah, *al-Mughnī*, 13:10.

[128] Al-Māwardī, *al-Ahkām al-Sultāniyyah*, 133.

[129] *Āthār al-Harb fī al-Fiqh al-Islamī*, 159; Muhammad Hamidullah, *al-Wathā'iq al-Siyāsiyyah lil Ahd al-Nabawī wa al-Kilāfah al-Rāshidah* (Cairo: Lajnat al-Ta'līf wal-Tarjamah wal-Nashr, 1956), 111-112.

[130] Mansoori, "The Questions of War and Peace in Contemporary Islamic Legal Discourse."

[131] Al-Zuhaylī, *al-'Alāqāt al-Duwaliyyah fī al-Islam*, 18,104,184.

[132] Ibid.

[133] Al-Zuhaylī, *Āthār al-Harb fī al-Fiqh al-Islāmī*, 90.

[134] Mansoori, "The Questions of War and Peace in Contemporary Islamic Legal Discourse."

4.8-Khaled Abou El Fadl

Khaled Abou El Fadl is a distinguished professor of law and noticeable contemporary

intellectual in the field of Islam, Islamic law and jurisprudence. He was born in 1963 in

Kuwait.[135] His intellectual contribution is recognized and admired in the intellectual

circles globally.[136] He is serving in the academic boards and literary bodies of many

reputed educational institutions.[137] He is one of the most publishing scholars and his

research is widely quoted in academic writings.[138] His work has been translated into

numerous languages including Persian, Arabic, French, Dutch, Norwegian, Japanese,

Ethiopian, Russian and others.[139]

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[135] Khaled Abou El Fadl did B.A in Political Science (1986) from Yale University, a J.D. from the University of Pennsylvania Law School (1989), and an M.A and Ph.D. in Islamic law from Princeton University (1999). His main areas of specialization are Islamic law, Jurisprudence, legal system, Islam, human rights and security. Presently he is serving in UCLA School of Law (since 1998).

[136] He has received University of Oslo Human Rights Award, the Leo and Lisl Eitinger Prize in 2007. Furthermore, he was named as a Carnegie Scholar in Islamic Law in 2005. He also served in U.S. Commission for International Religious Freedom, Human Rights Watch, and the advisory board of Middle East Watch (part of Human Rights Watch). He has regular attachment with human rights organizations such as Amnesty International and the Lawyers' Committee for Human Rights (Human Rights First). He is engaged as an expert in a wide variety of cases involving human rights, terrorism, political asylum, and international and commercial laws among others. In 2005 he was listed as one of Law Dragon's *Top 500 Lawyers in the Nation*.

[137] He is founding advisory board member of the *UCLA Journal of Islamic and Near Eastern Law (JINEL)*, and served as the member of many journals such as *Political Theology*, the *Journal of Religious Ethics*, the *Journal of Islamic Law and Society*, the *Journal of Islamic Law and Culture*, and *Hawa: Journal of Women of Middle East and the Islamic World*. He also served as advisory board member for the University of Adelaide Research Unit for the Study of Society, Law and Religion (RUSSLR) in Australia; the Carnegie Corporation of New York's Islam Initiative Publications Project; the Harvard Press Series on Islamic Law; and the *Journal of Islamic Studies* Islamic Research Institute, International Islamic University, Islamabad.

[138] His work published in shape of books include: *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Rowman & Littlefield Publishers, Inc, Release, 2014); *The Search for Beauty in Islam: Conference of the Books* (Rowman & Littlefield Publishers, Inc, 2006); *The Great Theft: Wrestling Islam from the Extremists* (San Francisco: Harper, 2005); *Islam and the Challenge of Democracy* (Princeton University Press, 2004); *The Place of Tolerance in Islam* (Beacon Press, 2002); *And God Knows the Soldiers: The Authoritative and Authoritarian in Islamic Discourses* (UPA/Rowman and Littlefield, 2001); *Speaking in God's Name: Islamic law, Authority and Women* (One world Press, Oxford, 2001); *Rebellion and Violence in Islamic Law* (Cambridge University Press, 2001).

[139] He has written dozens of research papers and Chapters in the books. Some of them are as under: "Conceptualizing Shari'ah in the Modern State", 56 *Villanova Law Review* 4 (2012); "The Language of the Age: Shari'ah and Natural Justice in the Egyptian Revolution" in: *Law in the Aftermath of the Egyptian Revolution of 25 January* (Harvard International Law Journal online, April 25, 2011); "The Centrality of Shari'ah to Government and Constitutionalism in Islam" in: *Constitutionalism in Islamic Countries:*

He is of the view that the definition of "Muslim territory" needs to determine in the contemporary context. Moreover, it has to be accepted that classical concepts related to dār (territoriality) are not Qurānic and classical Islamic sources do not deal with it explicitly.[140] At doctrinal level these differences of opinions become more prominent. For instance, even the term "Islam" denotes different meanings among various schools of al-Islām. Shī'ī and Mu'tazilī, perceived that the "land of true faith" (dār al-īmān) or "true justice" (dār al-adl) is different from land of formal Islam. While some jurists named it "land of corruption" (dār al-fīsq) or "of hypocrisy" (dār al-nīfāq) where Islām is implemented as a formality. Others considered the land which is neither Islamic nor non-Islamic as (dār al-waqf, dār al-īkhtīlāt, and dār al-īkhtīlāf). He insists that due to lack of clarity in determining true Islamic territory, many jurists preferred to stay at a place providing protection and liberty to practice faith, instead of migration to "dār al-Islām."

Between Upheaval and Continuity (eds. Rainer Grote /Tilmann Röder, Oxford University Press, 2011); "Fascism Triumphant?" *Political Theology* 10, no. 4 (2009), pp. 577–581; "Islamic Authority" in: *New Directions in Islamic Thought: Exploring Reform and Muslim Tradition* (eds. Kari Vogt, Lena Miller and Christian Moe, London: I.B. Tauris, 2009); "Islamic Law, Human Rights and Neo-Colonialism" in: *Oxford Amnesty Lectures 2006: The 'War on Terror'* (eds. Chris Miller, Manchester University Press, 2009); "The Unique and International and the Imperative of Discourse", 8 *Chicago Journal of International Law*, pp. 43–57 (2007); "Forward" in: *In Inside the Gender Jihad: Women's Reform in Islam* by Amina Wadud. Oxford: Oneworld Publications, 2006, pp. vii–xiv; "Islam and Violence: Our Forgotten Legacy" in: *Islam in Transition* (eds. John Donohue and John Esposito. New York, NY: Oxford University Press. 2006, pp. 460–464); "The Crusader", *Boston Review* 28, no. 2 (March/April 2006); "The Place of Ethical Obligations in Islamic Law", *UCLA Journal of Islamic and Near Eastern Law*, no. 4 (2005): pp. 1–40; "Introduction" in: *With God on our Side: Politics and Theology of the War on Terrorism*, London: Amal Press, 2005, pp. xli–xlv; "A distinctly Islamic View of Human Rights: Does it exist and is it compatible with the Universal Declaration of Human Rights?", Vol. 27, No. 2, Center for Strategic and International Studies (CSIS) 27, 2005; "Islam and the Challenge of Democratic Commitment", in: *Does Human Rights Need God?* (eds. Elizabeth M. Bucar and Barbra Barnett. Wm. B. Eerdmans Publishing Co., Cambridge, U.K., 2005, pp. 58–103); *Encyclopedia of Religion and Nature*, s.v. "Dogs in the Islamic Tradition and Nature." New York: Continuum International, 2005; "Speaking, Killing and Loving in God's Name", *The Hedgehog Review* 6, no. 1 (Spring 2004); "The Death Penalty, Mercy and Islam: A Call for Retrospection" in: *A Call for Reckoning: Religion and the Death Penalty* (eds. Erik C. Owens, John D. Carlson & Eric P. Elshtain. Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 2004, pp. 73–105); "Islam and the Challenge of Democratic Commitment", *Fordham International Law Journal* 27, no. 1 (December 2003): pp. 4–71; "9/11 and the Muslim Transformation", in: *September 11: A Transformative Moment? Culture, Religion and Politics in an Age of Uncertainty* (edited by Mary Dudziak. Duke University Press, 2003, pp. 70–111). A complete list of his articles and books chapters is available at: UCLA Law, Faculty profiles: Khaled M. Abou El Fadl At https://law.ucla.edu/faculty/faculty-profiles/khaled-m-abou-el-fadl/
[140]Khalid Abou al-Fadl, 'Legal debates on Muslim minorities,' 142.

Incomprehensible and somehow confusing definitions of terminologies is a challenge for determining the status and obligations of Muslim minorities. This might be the reason of vast majority of Muslims are living in non-Muslim territories throughout the history. He sees another reason for this non viability of comprehensive and coherent demarcation of Islamic territory.[141] It is evident from the history that during the first four centuries of Islam the questions regarding obligations to migrate for Muslim minorities were purely hypothetical. The real situation emerged in 12th century when Muslim jurists found that many Muslim territories that have been taken over by non-Muslims. In this new situation the supremacy of Muslims was challenged. At this stage, the schools of Islamic law started to readjust in the new situation. They had been grown enough and established credibility to address such types of issues. After analysis of the opinions of jurists Khaled Abou El Fadl observed that the opinions of the classical Muslim jurists were not purely theoretical but they were highly depended on the other factors such as the geographical area or place of residence of jurist and his own opinion about relationships of Islamic and infidel lands.[142] In the Western parts of the Islamic Empires Mālikī school was prevailing, therefore, the jurists of this school were opposing the residence of the Muslims outside the territory of Islām. Jurists such as Ibn Rushd has given clear verdict for prohibition of entering into non-Muslim land even for trade related matters. He is of the view that act of continuing residence under the unbelievers' sovereignty is unfair and deceitful and should be treated as untrustworthy. He is of the view that the testimony in the court of law must not be allowed of a person who is accused of this act. According to Mālikī, Muslims can reside in such territories only after successfully regaining their lost

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[141] Ibid.
[142] Khaled Abou El El Fadl, "Legal Debates on Muslim Minorities: Between Rejection and Accommodation on JSTOR," *The Journal of Religious Ethics* 22, no. 01 (Spring 1994): 127–62.

area. When Muslims lost territory at Iberian Peninsula, Ibn Rushd insisted upon Muslims' prompt migration to Muslim land. Contrary to Ibn Rushd Mālikī and Ḥanbalī schools adopted middle position. The Shāfi'ī and Ḥanafī jurists, suggested new parameters for dealing with the issue of Muslim minorities.[143] Many Mālikī jurists opposed Muslims' residence in non-Muslim land like Ibn Rushd, but some of them such as 'Abd al-Barr al-Qurtubī (d. 1071) did not consider it illegal to reside temporarily in non-Muslim rule provided that Muslims are safe there. Al-Imām al-Māzarī (d. 1141) was against the concept of declaring those who opt not to migrate as untrustworthy. He insists that their motives need to be understood. If they are intended to inhabit in infidel land to promote Islam or to strive for restoration of lost land then these are valid and acceptable reasons. However, he agreed that ideally Muslims should stay at Muslim territory. Hanbalī and Shī'ī jurists contended that if the Muslims are free to follow their faith, even then it is better for them to reside in Islamic territory but it is not obligatory upon them. Khaled Abou El Fadl after mentioning these opinions states that their opinions were based on the reasoning that migration to Muslim land would protect them from possible mal-treatment from non-Muslims rulers. It will also strengthen the Islamic land. Hanbalī and Shī'ī jurists did not explicitly provide length and limit of freedom to practice religion, however they had no worry about the loss of religious identity of Muslims in non-Muslim lands. For Muslims it is necessary to satisfy the requirement that they be able "to practice or manifest" Islam. In spite of difference of opinion on the issue among Shāfi'ī and Ḥanafī jurist's it is to be remembered that their opinions were constructed in post Mongols occupation of Eastern Islamic Empire in thirteen century. Early Ḥanafī jurists allowed temporary stay in non-Muslim land for trade or diplomatic purposes. However, they were

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[143] Ibid.

not recommended to allow permanent residence and having children in non-Muslim

lands. Later Ḥanafī jurist Abū 'Abd Allah al-Shaybānī (d. 804) stated that there is no duty

or legal obligation to migrate to Muslim land. Majority of Ḥanafī jurists conveyed

displeasure to reside permanently in infidel territory due to apprehension of probable

difficulties but not imposed legal duty to migrate and remained reluctant to discuss it

exhaustively. Abū Bakr al-Sarakhsī (d. 1090-91) contended that duty to migrate has been

abrogated due to necessary interaction with non-Muslims for trade and other purposes but

he was concerned about children born and brought up in such environment. The Hanafīs

after the analysis of prevailing situation that time asserted that if believers are protected

and allowed to follow their religion, in infidels' occupied land, the lost land would still be

considered Muslim territory. Some jurists even argued that if any Muslim law is stand

imposed there, area would be considered Muslim land. But if the invaded territory is

separated from Muslim-territory, protection given to Muslim and Dhimmīs under the

previously done agreement has been taken and laws of non-believers have been enforced

then it will be considered non-Muslim land. According to Hanafī opinions it is not

obligatory for Muslims to migrate, even advocated to stay there if safety and freedom of

faith have provided but in case area is considered legally non-Muslim territory then it is

recommended to migrate to Muslim land, but still not obligatory upon them. The Shāfi'ī

jurists regarded migration most desirable, but not obligatory for Muslim living in non-

Muslim land peacefully with religious freedom, due to fear of unjust treatment by non-

believers or could cause possible increase in strength of non-Muslim land though

unconsciously by Muslims. The Shāfi'ī jurists contended that Muslim territory can never

become non-Muslim land technically, just by non-Muslims' invasion though apparently

ruled by non-believers and should not be disowned by Muslims effortlessly, if Muslims are in a position to propagate Islam and its mission safely, then it is favorable to stay over there and in an advance scenario if Muslims get opportunity of self-rule, then Shāfi'ī verdict is against migration instead from that area. Al-Māwardī (d. 1058) asserted that grant of freedom to practice religion, makes the non-Muslim land part of Islamic-land and staying there is more desirable than migrating. Reasoning behind Shāfi'ī verdict was propagation of Islamic mission that could better be accomplished by staying there, if Muslims enjoy freedom to practice their religion since Shams al-Dīn al-Manūfī al-Ramlī (d. 1596-97), advised the Muslims of Aragon not to migrate, though they were under Christian subjection with no formal protection from forced conversion to Christianity and had to pay taxes but free to practice religion. Another jurist Ibn Hajar al-Haytamī (d. 1566-67) was asked about the circumstances of Muslims of Malibar, who were under legal obligation to not to protect any Christian converted to Islam, in violation they would be deported. Ibn Hajar contended that Muslims should not provide protection to Christian converts to avoid possible consequences in violation of legal obligation and did not consider migration preferable. However, many early jurists like Abu Ja'far al-Tabarī was in consensus with al- Shāfi'ī argued about the stay in infidel territory if they are free to follow religion but it would be illegitimate if they choose non-Muslim land over Muslim land and it would in result increase strength of non-Muslims who were at war with the Prophet. He asserts that no unanimity of opinions are found among traditional and contemporary intellectuals about the role of Islamic code, status and obligations of Muslim communities in infidel states, but with the help of these debates and discussions possible solutions and way out could be drawn to deal with the modern challenges faced

by Muslim minorities in west.

4.9-Abdullahi Ahmed An-Na'īm

Abdullahi Ahmed An-Na'īm is Sudanese Muslim scholar and thinker, his ideas and

notions are predominately impressed by the Islamic reform movement of Mahmoud

Muhammad Tāhā[144]. Ahmed An-Na'īm[145] asserts that there is no difference between

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[144] Mahmoud Mohammed Tāhā (1909 – 1985) was a renowned Sudanese religious scholar, due to his controversial ideas and concepts about Islam, eventually beheaded by Sudanese court under apostasy charges at the age of 76. His work include: *The Second Message of Islam*; *The Middle East Problem* (Mushkilāt Al-sharq Al-Awsat); *This is my Path* (Qul Hadhā Sabīlī); *Mohammed's Path* (Tarīq Mohammad); *The Message of Prayer* (Risalat Al-salat); *The Challenge Facing the Arabs* (Al-Tahaddi Al-ladhi Yuwagihuhu Al-Arab), for details see Lichtenthäler, Gerhard. "Mahmud Muhammad Tāhā: Sudanese Martyr, Mystic and Muslim Reformer". Institute of Islamic Studies. Evangelical Alliance of Germany, Austria. Switzerland. Retrieved 30 July 2014; an-Na'īm, Abudullahi Ahmed (Winter 1988). "Mahmud Muhammed Tāhā and the Crisis in Islamic Law Reform" (PDF). Journal of Ecumenical Studies. 25 (1). Retrieved 30 July 2019.

[145] Abdullahi Ahmed An-Na'īm born in Sudan in 1946, received degree, of LLB (Hons) from University of Khartoum, Sudan in 1970, LLB (Hons) and Diploma in Criminology from University of Cambridge, England in 1973 and PhD (Law) from University of Edinburgh, Scotland in 1976, presently Charles Howard Candler Professor of Law at Emory Law, associated professor in the Emory College of Arts and Sciences, and senior fellow of the Center for the Study of Law and Religion of Emory University. His areas of specialization are Islamic law, law, religion, human rights, international and comparative law, and areas of research are mainly constitutionalism, secularism, Islam and politics. His writings include: *What Is an American Muslim?* (Oxford University Press, 2014); *Muslims and Global Justice* (University of Pennsylvania Press, 2011); *Islam and the Secular State: Negotiating the Future of Shari'a.* (Harvard University Press, 2010); "Complementary, Not Competing, Claims of Law and Religion: An Islamic Perspective," 39 *Pepperdine Law Review* 1231 (2013); "Globalization and Jurisprudence: An Isalmic Law Perspective," 54 *Emory Law Journal* 25 (2005); "Human Rights in the Arab World: A Regional Perspective," 23 *Human Rights Quarterly* 701 (2001); "The Interdisciplinarity of Human Rights," in *The Cambridge Companion to Human Rights Law*, edited by Conor Gearty and Costas Douzinas (Cambridge, UK: Cambridge University Press, 2012), 97; "Islam and Human Rights: Beyond the Universality Debate," 94 *American Society of International Law Proceedings* 95 (2000);"Universality of Human Rights: Mediating Paradox to Enhance Practice," in Midrag Jovanovic and Ivana Krstic, editors, *Human Rights Today – 60 Years of the Universal Declaration*, Eleven International Publishing: The Netherlands, 2010, pp. 29-50; "'European Islam or Islamic Europe': The Secular State for Negotiating Pluralism," in Marie-Claire Foblets and Jean-Yves Carlier, editors, *Islam & Europe: Crises are Challenges*, Leuven University Press, 2010, pp. 85-107; "Transcending Imperialism: Human Value and Global Citizenship", *The Tanner Lectures on Human Values*, Delivered at the University of California, Berkeley, March 8-10. 2010; "The Compatibility Dialect: Mediationg the Legitimate Coexistence of Islamic Law and State Law", *The Modern Law Review*, Vol. 73, No. 1, January 2010, pp. 1-29; "Abdullahi An-Na'im's Philosophy on Islam and Human Rights," in Mashood A. Baderin, editor, *Islam and Human Rights: Selected Essays of Abdullahi An-Na'īm*, Farnham: Ashgate, 2010, pp. xiii-xxxix; "*Islam and Secular State* Book Review," *International Journal for Arab Studies*, Vol. 1, No. 1, July 2010, pp. 324-325; "Chapter 12 – Islam and Secularism." in L. Cady and E. Hurd, editors, *Comparative Secularisms in a Global Age*, Palgrave Macmillan, 2010, pp. 217-285; "Chapter 13 – Beyond *Dhimmihood*: Citizenship and Human Rights," in Robert W. Hefner, editor, *The New Cambridge History of Islam*, Cambridge University Press, pp. 314-33; "Islam and the

Islamic and western societies. He states that different values of people are creating

misunderstandings, therefore, interconnection between the people should be encouraged

on human grounds so that people could collaborate beyond cultural boundaries.[146] He

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Secular State: Framework for the Christian-Muslim Relations," *Islamochristiana*, Vol. 35, 2009, pp. 157-169; "Constitutional Law Symposium: Global Perspectives on Religion, the State, and Constitutionalism: Article: Religion, the State, and Constitutionalism in Islamic and Comparative Perspectives", *Drake Law Review*, Vol. 57, Summer 2009, pp. 829-844; "Self Determination and Unity: The Case of Sudan,"(with Francis Deng), *Law and Policy*, Vol. 18, 1997, pp. 199-223; "The Contingent Universality of Human Rights: The Case of Freedom of Expression in African and Islamic Contexts," *Emory International Law Review*, Vol. 10, No. 3, 1997, pp. 29-66; "Islamic Foundations of Religious Human Rights," in John Witte, Jr., and Johan D. van der Vyver, editors, *Religious Human Rights in Global Perspectives: Religious Perspectives*, The Hague, Boston, London: Martinus Nijhoff Publishers, 1996, pp. 337-359; "Toward an Islamic Hermeneutics for Human Rights," in Abdullahi A. An-Na'īm et al., editors, *Human Rights and Religious Values*, Grand Rapids, Michigan, USA: William B. Eerdmans Publishing Company, 1995, pp. 229-242; "Cultural Transformation and Normative Consensus on the Best Interest of the Child," *International Journal of Law and the Family*, Vol. 8, 1994, pp. 62-81. Also published in Philip Alston, editor, *The Best Interest of the Child: Reconciling Culture and Human Rights*. Oxford: UNICEF, Clarendon Press, 1994, pp. 62-81; "Eritrean Independence and African Constitutionalism: A Sudanese Perspective," in Amare Takle, editor, *Eritrea and Ethiopia: From Conflict to Cooperation*, Lawrenceville, NJ, USA: The Red Sea Press, 1994, pp. Chapter 7; "State Responsibility Under International Human Rights Law to Change Religious and Customary Law," in Rebecca J. Cook, editor, *Human Rights of Women: National and International Perspectives*, Philadelphia, Pennsylvania, USA: University of Pennsylvania Press, 1994, Chapter 7; "What Do We Mean by Universal?" *Index on Censorship*, Sept./Oct., 1994. pp. 120-28; "The National Question, Secession and Constitutionalism: The Mediation of Competing Claims to Self-Determination," in Stanley N. Katz, Doug Greenberg and Steve Wheatley, editors, *Constitutionalism & Democracy: Transition in the Contemporary World*, New York: Oxford University Press, 1993, pp. 105-25; "Constitutional Discourse and the Civil War in the Sudan," in M. W Daly and Ahmad Alawad Sikainga, editors, *Civil War in the Sudan*, London: British Academic Press, 1993; "Civil Rights in the Islamic Constitutional Traditions: Shared Ideals and Divergent Regimes," *The John Marshall Law Review*, Vol. 25, No. 2, 1992, pp. 267-93; "Cross-Cultural Support for Equitable Participation in Sub-Saharan Africa," in Kathleen E. Mahoney and Paul J. Mahoney, editors, *Human Rights in the Twenty-First Century: Global Challenge*, Dordrecht, Boston, London: Martinus Nijhoff, 1992, pp. 133-148; "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment," in Abdullahi A. An-Na'īm, editor, *Human Rights in Cross-Cultural Perspectives*, Philadelphia, PA: University of Pennsylvania Press, 1992, pp. 19-43; "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives," *Harvard Human Rights Journal*, Vol. 3, 1990, pp. 13-52; "Problems of Universal Cultural Legitimacy for Human Rights,"in Abdullahi An-Na'īm and F. M. Deng, editors, *Human Rights in Africa: Cross-Cultural Perspectives*. Washington, D.C., USA: The Brookings Institution, 1990, pp. 331-67; "Islamic Ambivalence to Political Violence: Islamic Law and International Terrorism," *German Yearbook of International Law*, Vol. 31, 1988, pp. 307-336; "Mahmud Muhammad Taha and the Crisis in Islamic Law Reform: Implications for Interreligious Relations," *Journal of Ecumenical Studies*, Vol. 25, No. 1, Philadelphia, PA: Temple University, 1988, pp. 1-21; "Religious Minorities under Islamic Law and the Limits of Cultural Relativism," *Human Rights Quarterly*, Vol. 9, No. 1, 1987, pp. 1-18; "The Islamic Law of Apostasy and its Modern Applicability: A Case from The Sudan," *Religion*, Vol. 16, 1986, pp. 197-223. See for details EMORY: LAW, Faculty profiles, Abdullahi Ahmed An-Na'īm, Charles Howard Candler Professor of Law, at http://law.emory.edu/faculty-and-scholarship/faculty-profiles/annaim-profile.html

[146] ABDULLAH AHMED AN-NA'ĪM at https://scholarblogs.emory.edu/aannaim/ (accessed July1, 2019).

believes that Sharī'ah as a normative system of Islam can never be enforced by state or political authority. In his view concepts related to an Islamic country are confused, incomprehensive and archaeologically wrong. Sharī'ah rules and principles may become basis for national legislation, yet enactment and implementation of its codes through government bodies at all times have been done by non-religious codes. He is of the view that legal issues faced by Muslims now a days have definite answers but if one tries to find concrete and systematic codes particularly dealing with it, such perspective is not correct, although principles are there but remained unattainable by jurists. He believes that it is a challenge to comprehend the aspect of Sharī'ah alone on its footings instead of American or European methodologies. Sharī'ah's one aspect is lawyer's law and other is social and political nature which makes it difficult to understand and acknowledge.[147]

He argued the Sharī'ah and its role in the economies, political regimes, social institutions, and legal systems of present Islamic societies, from the perspective of relationship between Sharī'ah by way of faith based normative structure and the legal system of the modern "territorial" secular nation. Nevertheless, he is clear about influence of Sharī'ah on Muslims, and they considered it source of social, political, personal and state law and administration of justice, no matter it is formally adopted in a country or not. He believes that Sharī'ah is not practiced anywhere in the world at state level, despite of the fact many countries claim to be Islamic states. As the Muslims are not unanimous about interpretation and practicing of Sharī'ah, that's why it is important to take into account this reality to understand the relationship between Islamic code and national legislation.

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[147] Abdullahi Ahmed An-Na'īm, "Sharī'ah in the Secular State: A Paradox of Separation and Conflation", in The Law Applied Contextualizing the Islamic Shari'ah, ed. Peri Bearman Wolfhart Heinrichs Bernard G. Weiss (London: I.B. Tauris & Co Ltd, 2008), 321-340.

He argued that Sharī'ah is also "less than law," since it requires enforcement with the involvement of parliamentary, juridical, and executive structures of the country, and it involves human efforts not divine command. Due to the change in international political system and European model of state, role of state has changed altogether, as state governs every aspect of its citizen's life.[148] He contends that enforcement of Sharī'ah through state requires selection of agreed upon interpretations of Sharī'ah that will ultimately result into less true Sharī'ah based law. Moreover, discretionary powers available for judges and administrators implicit through the ancient essence of Sharī'ah renders the entire structure autocratic and unstable. He further claims that Sharī'ah in its present state is not compatible with modern legal system due to its inbuilt unclarity and ambiguity. Conflict between the concept of divine Sharī'ah and secular features of contemporary Muslim societies is major issue to be dealt while conducting comparative study of Sharī'ah in relation to modern state law.

He contended[149] that realities of world's political system have affected the role and application of Sharī'ah principles globally, although Muslims accepted the authority of Sharī'ah over themselves. But due to the incompatibility of Sharī'ah principles with the contemporary legal systems, western codes and legal system proved to be more effective for Muslim communities. Moreover, many reforms were introduced in Ottoman law[150] and the Ottoman Majallah, after official enactment, considered supreme authority, majorly based on Hanafi school of law in European structure, known as the Civil Code of

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[148] Ibid.

[149] Ibid.

[150] The reforms introduced into Ottoman law a Commercial Code of 1850, a Penal Code of 1858, a Commercial Procedure of 1879, a Code of Civil Procedure of 1880, and a Code of Maritime Commerce, following the European civil law model of attempting a comprehensive enactment of all relevant rules. Although Sharī'ah jurisdiction was significantly displaced in these fields, an attempt was still made to retain some elements of it.

1876. It was easy and applicable for jurists and litigants and one of the reasons of its popularity was its provisions from other sources than Hanafi school and its enforcement by the state. Which opened the door for more subsequent reforms in the selection of sources in Islamic and Western statutory notions, that finally became irreversible and then prospered through the efforts of an Egyptian scholar Abd al-Razzāq al-Sanhūrī [151] (d. 1971). He argued further that due to the complexity and diversity of Sharī'ah principles since evolved through the centuries, make it impossible to apply directly in present scenario. It need to be drafted and enacted on European legal structures and concepts. Construction of Islamic societies under the European model states, transformed political, social and economic relations of the world states, since Muslim countries living under national constitutional administrations and legal systems. These irrevocable conversions likewise influence the position of Muslim communities inhabiting in Western Europe and North America.

While discussing the future relationship between Sharī'ah and state law, he requires institutional segregation of Islam and country although relationship between Islam and government is genuine. State needs to sustain neutral position for all religions, that of course reckon secular apparently but in fact relationship between state and religion does not govern with the firm rules of separation or integration they are always subject to contextual arrangements. Once the codes of Islam are applied at state level with the official designation of God's decreed law, it would become difficult to make any changes in its practical application and state institutions would eventually fail to provide freedom

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[151] The pragmatic approach of al-Sanhūrī was founded on the view that Sharī'ah could not be reintroduced in its totality, or applied without strong adaptation to the needs of modern Islamic societies. He used this approach in drafting the Egyptian Civil Code of 1948, the Iraqi Code of 1951, the Libyan Code of 1953, and the Kuwaiti Code and Commercial Law of 1960/1. In all cases, al-Sanhūrī was brought in by an autocratic government to draft a comprehensive code that was "enacted" into law without public debate.

and social justice to individuals as promised by Islam. He asserted that the question of severance of country from faith could only be resolved by practical approach because theorical framework would not be enough for intense analysis. Moreover, contemporary territorial state is neither interested to implement Sharī'ah as a statutory code or administrative scheme, nor to construe its dogmas and overall rules for Muslim inhabitants. But these rules might be adopted as a foundation of law or public scheme in the context of constitutional and natural rights of all nationals devoid of religious prejudice. He proposed that administrative strategy and lawgiving essentially be founded on communal rationale that are acceptable generally for public regardless of their religious affiliation. He defined secularism with a public role of religion to negotiate and encourage fruitful discourses within a religious community to stimulate human rights and constitutionalism. Sharī'ah principles need to be given opportunity to perform their positive part other than the spheres of law and public policy.[152]

He argued that citizenship should be acknowledged with territory and founded on the principles of humanity as per the Preamble of the United Nations' Universal Declaration of Human Rights where religion, gender and ethnicity do not matter, that encourage effective political participation of all members of society. He contends that there is a need of creative Islamic reforms, that are of course not compatible with the idea of a Muslim country despite the fact, the very concept is so powerful and considered an ideal for Muslims and when a concept survives as an ideal in one's mind, possibility to reach to it also exists. In case of creation of an ideal Islamic state Muslim could try to attain their

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[152] Abdullahi Ahmed An-Na'īm, "Sharī'ah in the Secular State: A Paradox of Separation and Conflation", in The Law Applied Contextualizing the Islamic Shari'a, ed. Peri Bearman Wolfhart Heinrichs Bernard G. Weiss (London: I.B. Tauris & Co Ltd, 2008), 321-340.

ideal without comprehending its logic and meaning and that would result into grave

consequences for humanity. So, ideal Islamic state is an illusion and Muslims should

welcome constitutionalism and democracy as substructure of a state and involve

themselves in its practical application. There is a need to stop even the growth of doctrine

of an ideal Muslim land, since it will give rise to many other worthless debates related to

political, social and commercial life of individuals, which will ultimately push Muslim

societies in stagnation. He further contended that these ineffective debates are real reason

behind social, political and economic instability of contemporary Muslim societies.[153]

4.10- Muhammad Khalid Mas'ūd

Muhammad Khalid Mas'ūd[154] argues that Sharī'ah should not be translated as Islamic

law since the scope and meanings of Sharī'ah are broad and extensive but the law on the

other hand can be jurists or state law, etc., although attempts had been made by some

modern Muslim jurists to disparate it from the tag of mere law by defining Sharī'ah as

divine, revealed and binding law, that ultimately not only hided its premise in the social

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[153]Abdullahi Ahmed An-Na'īm, "Sharī'ah in the Secular State: A Paradox of Separation and Conflation", in *The Law Applied Contextualizing the Islamic Sharī'ah*, ed. Peri Bearman Wolfhart Heinrichs Bernard G. Weiss (London: I.B. Tauris & Co Ltd, 2008), 321-340.

[154] He is an M.A, Ph.D (McGill University, 1973) presently an adhoc Judge of the Sharīat Appellate Bench, Supreme Court of Pakistan, formally held the following positions in Pakistan and abroad: Director General, Islamic research institute, International Islamic University, Islamabad; Chairman Council of Islamic Ideology, Government of Pakistan, Islamabad; Professor and Academic Director of ISIM, Leiden, the Netherlands; Senior Lecturer Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria, Nigeria; Distinguished Professor, Faculty of Law, International Islamic University, Kuala Lumpur, Malaysia; and Visiting Professor College de France, Paris. His major literary work is on Islamic Law, Contemporary issues and trends in the Muslim Societies, some of his publications are: *Shātibī's Philosophy of Islamic Law (1995), Iqbal's Reconstruction of ijtihād (1995), Islamic Legal Interpretation: The Muftīs and their Fatwas*, Co-edited with Brinkley Messick and David Powers (Harvard, 1996), (Editor) *Islamic Laws and Women in the Modern World* (1996), (Editor) *Travelers in Faith, Studies on Tablighī Jamā'at* (Brill, 2000), *Mafahīm-i-Qurān*, Urdu translation of T.Izutsu's *Ethical Terms in the Qurān* (2005) *Dispensing Justice in Islam, Qādīs and their Judgements*, Co-edited with David S. Powers and Ruud Peters (Brill, 2006) ; (Editor) *Athhārwīn Sadī 'Isawī myn Barri Saghīr myn Islamī Fikr kē Rahnumā in Urdu* (IRI, 2008), *Islam and Modernity, an Introduction to key issues and debates*, Co-edited with Armando Salvatore and Martin Van Bruinessen (University of Edinburgh Press, 2009), and *Nuqūshe Tagore* (Faīsalābād: Mithāl, 2012).

norms but also subverted the struggles of jurists for transporting the statutory rules adjacent to communal rules and to make Islamic law acceptable for the masses. He further argues that Sharī'ah as a law of land is being debated for couple of centuries, and it has been intensified by emergence of Muslim countries and reached to west by settlement of Muslim minorities in Europe and America, due to the underlying clash amid legal and social rules, the debate of Sharī'ah as state code has gone through many aggressive public processions for adoption and rejection of Sharī'ah as law of the state in last few decades. He asserted modernity has created conflicts and contradictions in Muslim legal norms that need to be resolved although "reform Sharī'ah" strives have been initiated by some governments but could not gain success due to inbuilt contradictions between local moral norms and reformed law. He argues that extreme Islamist and extreme secularist approaches have worsen this contemporary debate and complicated the terms "Sharī'ah " and "norm", the center point of reference is normativity of Sharī'ah for both; but one is emphasizing on it and other is denying, without accepting the possibility of existence of normative basis elsewhere, law requires concrete solutions and need to be practical but morality in political context mean ideal and no change is acceptable in divine law, historically Muslim rulers had implemented many laws for administration of justice by reversing divine laws, then doctrine of Siyāsah was developed to maintain balance between various legislative and normative commands prevailing in communities of believers. He argues further when communal standards were incorporated in Sharī'ah they happened to be measured as godly and followed by contradictions, factually Islamic scholars attempted to evolve legal concepts to remove these contradictions, they remained connected with the masses and social norms have

been taken into consideration while interpreting laws, for example principles of necessity,

expediency, preventive measures, emergency situation, public good, etc., invoked to

negotiate the conflict between law and social norm but unfortunately these dogmas

lacked regularization as norms in the legal theory. He does not refer Muslim modernists

whose views are generally rejected as they defend modernity, west and believe that

Sharī'ah is adaptable to modernity. Instead, he mentioned three great Muslim scholars

i.e., Abū Ishāq al-Shātibī[155], Shah Walīullah (d.1762)[156] and Ibn 'Ābidīn[157] (d.1836), due

to their neutral literary contributions, and they all have found not only a close connection

between legal norm and social norm but also considered social norms a significant source

of Sharī'ah . He believes that legal system should be acceptable for masses that could

only be achieved by public involvement in law making/reforming in Muslim societies.

Structuring Islamic law is not the task of specialists of the field only, but general public

from every section of the society raise their voices on legal issues. Likewise Muslim

minorities are emerging new dimensions of Sharī'ah and fiqh and many contemporary

Muslim scholars' writings depict the restoration of the classical Muslim jurists' concept

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[155] Abū Ishāq al-Shātibī (d. 1388) was fourteen century Spanish Jurist from Nasrid Granada, developed Maslahah principle as the basis of the doctrine of objectives of Sharī'ah to deal with socio-economic and other challenges, his doctrine of Maqāsid is famous and influencing modern Muslim legal thought since it provides an exit where traditional Islamic legal theories create deadlock, see for details, Muhammad Khalid Masud, *Shātibī's Philosophy of Islamic Law* (Islamabad: Islamic Research institute, 1995); Abū Ishāq al-Shātibī, *Al-Mūwāfaqāt fi Usūl al- Sharī'ah*(Beirut: Dār al-Ma'rifah, 1975), 1:24; Muhammad Khalid Mas'ūd, *Shari'h Today* (Islamabad: National Book Foundation, 2013), 107-114.

[156] He was an eighteenth century Indian scholar from Delhi during Mughal rule, presented comprehensive analysis of the nature and concept of Sharī'ah in historical and social context and explained prophecy and revelation of Divine laws as a process of reform and also elucidated the theory of evolution of society in four stages and asserted that evolution of laws primarily happen with the help of social norms,, see for details, Shah Walīullah, *Hujjatullah Al-Bālighah* (Lahore: Maktaba Salafiyyah), 1:4; Muhammad Khalid Masud, *Shari'h Today* (Islamabad: National Book Foundation, 2013), 107-114.

[157] He was nineteenth century Hanafī scholar from ottoman Damascus, a short treatise on "Urf" or custom and its position in Islamic law by explaining the validity of custom as a source of Islamic laws has been written by him and he also differentiated between Sharī'ah text and Jurist law, and rejected only those customs which were completely contradictory but not otherwise and in case of conflict between jurist law and custom, custom prevailed,, see for details, Ibn 'Ābidīn, *Nashr al-Urf fi bina' ba'd al-ahkām 'ala al-'Urf* (Damascus: Ma'arif, 1883); Muhammad Khalid Mas'ūd, *Sharī'ah Today* (Islamabad: National Book Foundation, 2013), 107-114.

of close interaction amid legislative and communal rules in Islam. He emphasizes on the realization of the importance of social norms for working legal system. Since legal norms are deeply rooted in social norms and social norms accept change not fixed, due to the reason Sharī'ah had to constantly deal with changing social norms, then it would result in incorporation of these changes to the text of law but now it has become more challenging due to the change in modern social and political systems. So, there is a need to make deliberate demarcation in legal and religious objectives, to protect Sharī'ah from decreasing it to mere religious rituals. He also emphasizes on the need and importance of public sphere due to globalization, and without taking it to consideration social construction of Islamic law would not become possible. While discussing the situation of Muslim minorities and *fiqh al-Aqalliyyāt*, he argues that the term minority is not clear due to inclusion of many further division like sub-national, national and religious minority, and not exclusively used for Muslim minority. Moreover, Muslim minorities in west are different from other areas which require different sets of jurisprudence. He argues further that *fiqh al-Aqalliyyāt* concerns with the solution of problems within Islamic law and about dealing with local laws.Hence therefore, Islamic jurisprudence of citizenship in pluralist structure is need of time to address contemporary political and legal challenges faced by Muslim minorities all over the world. On the matter of contemporary debates on Sharī'ah, he asserted that these debates are not exclusive for Muslim states but reached to South Africa, Britain, Canada and America, as the world has globalized where neither Muslims nor non-Muslims live in isolation, and Sharī'ah became a matter of concern for them as well, for the enforcement of Sharī'ah as a modern viable legal system, global context can't be overruled. He[158] further argues that the issues,

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[158] Muhammad Khalid Masud, *Sharī'ah Today* (Islamabad: National Book Foundation, 2013), 69-76.

like current epistemological crisis about new interpretation of Sharī'ah, contemporary countries and perpetual abode of believers in infidel states put up the questions about jurisdiction of Sharī'ah on Muslims. The structure of modern states, judiciary and executive is different from the concept of Islamic state, and judiciary and executive hence constitute many challenges for it. Questions about Sharī'ah reform and what constitute Sharī'ah, how Sharī'ah respond to globalize world, how to deal in situation of pluralist societies, how to respond to international laws, conventions and treaties, and many more, insist fresh debates. Sharī'ah must be the part of curricula and syllabi of world universities and Islamic law must be taught analytically with emphasis on history, sources, methods of law and jurisprudence by taking into consideration globalized world context.

The chapter deals with the issues related to methodology of the thesis. It elaborates concepts such as discourse analysis and jurisdiction as both are core to the methodology and limits of this thesis. The analyses of the data in the chapter reveals that the discourse is a specific way or aspect of communication. It involves talking, writing and understanding of the text and words. This concept is used to indicate various formation of scientific and academic writings. It is also used in various debates and conversations. The 'discourse' is demonstrating the general idea that is structured in a particular language, which is used by the people in their proclamations. The discourses are considered through concepts such as 'What' and 'Who'. Placing language, beliefs, symbols, values, objects, action, interaction, places and tools together in a particular way for a particular construction of a particular identity or to demonstrate a particular activity is also named

as discourse. It is a critical approach that clutches the social practice around a language. In discourse many different talk and forms of text can be considered for analysis. For example, the discursive construction of national identity in British history as described in the textbooks could be one focus of the analysis. Another possibility is that one can try to explore the national identity through interaction between people belonging to different ethnicity in an organizational setting such as a workplace. The discussion related to discourse analysis also indicates the framework in which this research is using the techniques of discourse analysis. Morover the chapter also discussed scholars who participated in this debate which include Muḥammad 'Abduhu his student Muḥammad Rashīd Riḍā, Dr. Muhammad Hamīdullah, Majīd Khaddūrī, Allama Yūsuf al-Qaraḍāwī, Tariq Ramadan, Wahbah al-Zuḥaylī, Khaled Abou El Fadl, Abdullah Ahmed An-Na'īm and Muhammad Khalid Mas'ūd.

CHAPTER NO. 4

THE CLASSICAL AND CONTEMPORARY ISLAMIC LEGAL DISCOURSE ON THE NOTION OF DĀR (TERRITORIALITY)

CHAPTER NO. 4
THE CLASSICAL AND CONTEMPORARY ISLAMIC LEGAL DISCOURSE ON THE NOTION OF DĀR (TERRITORIALITY)

The chapter focuses on the evolution of various dimensions of the debate on concept of Dār and teritrality among Muslim Jurists, theologians and social scientists. It begins with discussion on the emergence of Islamic state and society, then the classical discussion on the notion of Dār al-Islām and Dār al-ḥarb are explained. The chapter also discusses the approaches that have been adopted by Western scholars to contextualize the classical debate. This section of research is an effort to describe territorial borders and their principled inferences in the light of views of varied schools of jurisprudence in Islamic law. The biggest contemporary challenge of this debate is to classify these countries within the territorial paradigm that had shaped Islamic legal discourse over the centuries. These migrated Muslims are trying to contribute to their new countries without compromising on their identity and faith-based values. In the result of the migration and living of many Muslims residing under non-Muslim rule, many new questions added to this discourse. Some questions are: are these notions of Middle Ages still valid in the age of national state? Do the territories governed by non-Muslims lie outside dār al-Islām? Are the Muslims of non-Muslim rule part of dār al-ḥarb? How else can they be classified from an Islamic legal perspective? Can they be considered part of dār al-'Ahad? Are Western countries to be considered dār al-ḥarb, or can be categorized as portion of dār al-Islām? or do they constitute a third type of territory? To what extent are these traditional categories of any relevance at all in a world of modern territorial states that has become?

1-Emergence of Islamic State and Society

The existence of states in human history is as ancient as human beings themselves. Moreover, the essential functions of the states had not been changed. No doubt, methods of governing the modern states have been changed and now sophisticated state craft require complicated skills, but the basic functions of executing the authority are almost centuries old. The origin of the state authority and its limits are under discussion of scholars throughout the history of human societies. Some of them traced this authority from the will of political entities, other are trying to trace it from divinity.[1]

Much of the misunderstanding is due to failure of scholars to differentiate various terms such as state, government and community as they are interchangeably used to describe Islamic perspective.[2] The need for living a common life is root of a community. Its focus is communal social life. The laws of the cosmos, physical, biological, and psychological are created and used for facilitation of living together. This type of communal living contributes the construction of shared characteristics, manners, cultures and modes of communication.[3] While the state is a political entity having a designated higher authority heading the organized ways of imposing its power on the members of the community. The state can be created or eradicated, however society may be transformed but cannot be eliminated.[4]

Keeping difference between community and state in mind, it would be appropriate to suggest a social revolution founded upon the rational footing of faith in monotheism,

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[1] Muhammad Hamīdullah, *Muslim Conduct of State* (Lahore: Sh. Muhammad Ashraf, 1945), 73.

[2] Ahmed, "The Classical Muslim State," 83.

[3] MacIver, *Community: A Sociological Study*, 22.

[4] Ahmed, "The Classical Muslim State," 83.

instituted by Islam in the tribal community which was established on the basis of affinity

and governed by tribal laws.[5] Before the beginning of the Prophethood of Muhammad

(peace be on him) the available political institution in Arabian Peninsula was tribe. In

theory, it was basically a group based on blood and kinship. Injury done from outside to a

member was considered violation against the whole tribe and any member of the tribe

was eligible to take revenge of it.[6] Several tribes might take an oath and form a

confederation for a limited purpose such as defending or fighting against a similar alley

of tribes. In spite of difference in kith and kin an individual or a family might for

practical purposes change the membership of a tribe. For strengthening or changing tribal

alignments Arabs used to have various traditions in pre-Islamic period. They used to

make tribal confederations through halīf. The change of belongingness with a tribe was

possible through the tradition of protected neighborhood jār or mawlā (a client). Like

political organization, social organization and protection was also revolved around a

tribe. The life was tolerable for a man only with the membership of a sovereign and

independent political entity i.e., tribe. However, this attachment demanded supreme

loyalty of its members. The pre-Islamic Arabs do have limited information about the

Byzantine, Abyssinian, and Persian empires. They also have some idea of kingship which

was not liked by them.[7] There was no legal code for controlling the actions of individuals

and functions of the tribes. Their actions were regulated by customs or the practice of

their ancestors called Sunna. The authority was traced from the customary practices of

the ancestors which were regarded as precedent for formulation of public opinions. The

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[5]Watt, *Muhammad at Medina*, 239–48.

[6] Bertram Thomas, *The Arabs: The Life Story of a People Who Have Left Their Deep Impress on World* (London: Thorton Butterworth Ltd, 1937), 125.

[7] Watt, *Muhammad at Medina*, 238–39.

tribal Majlis was its outward symbol and its sole instrument.[8]

Pre-Islamic Arabs were accumulation of sovereign tribes paying fidelity to tribal heads and gods. They faced lawlessness. Islam changed this situation and reconstructed them into a new union based on faith and not on kinship.[9] After migration to Medina the foundation of that community had placed. The Qurān describes this community as nation, its members as the mu'minūn (believers) and Islam as a doctrine of this community. Some of the relevant verses of the Qurān are as under:

"Mankind were one community. Allah sent unto them Prophets as bearers of good tidings and as warners?"[10]

"Thus We have appointed you a middle nation that ye may be witnesses against mankind. and that the Messenger may be a witness against you. And We appointed the Qiblah which ye formerly observed only that We might know him who followeth the Messenger, from him who turneth on his heek."[11]

"And we have sundered them in the earth as separate nations. Some of them are righteous and some far from that."[12]

Present era of nation states the term 'nation' is used in the meaning of a sizable form of people combined by familiar ancestry, culture, history, or language, residing in a specific country   or   territory.   The   Cambridge   Dictionary   defined   it   as 'a country, especially when thought of large group of people living in

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[8] Bernard Lewis, *The Arabs in History* (USA: Oxford University Press, 2002), 25., http://gen.lib.rus.ec/book/index.php?md5=3b92f36fe3f89df97cf6a360ff6c4711.
[9] Ahmed, "The Classical Muslim State," 85.
[10] Al-Qurān 2: 213
[11] Al-Qurān 2: 143.
[12] Al-Qurān 7: 168.

one area with their own government, language, traditions,   etc'. [13]   Merriam   Webster

dictionary defined it as (1) "a community of people composed of one or

more nationalities and possessing a more or less defined territory and government or

(2) a territorial division containing a body of people of one or more nationalities and

usually characterized by relatively large size and independent status."[14]

The Arabic equivalent to the term 'nation' is not one. However, 'nation' being a phrase of

politics interpreted as qawm in contemporary Arabic. But this term in the Holy Qurān

does not use the meaning of 'nation' as it is in its modern sense. Rather Al-Qurān used it

sometimes in the meaning of group and usually apply in replacement of ummah. The

word Ummah is operated in Qurān in the perception of face-based community. [15]

Montgomery Watt has tried to detect the development of the idea of the ummah. He is of

the view that this term is used for the community which accepts the messenger and his

message. The first article of the Constitution of Medina is that the Muslims of Quraysh

and Yathrib (Medina) and their partners constitute one ummah and with the success of

Muslim community in Medina, the phrase ummah happened to be more and more

confined to a faith-based community.[16] The Islamic concept of community originates

from a concept that all humanity was a sole community comprising upon the progeny of

Adam. The further characteristic of this concept was its ethical basis which differentiates

a righteous community from an awful one, as the Qurān says:

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[13] *The Cambridge Dictionary*, s.v. "nation," https://dictionary.cambridge.org/dictionary/english/nation visited on April17, 2020.
[14] *Merriam Webster dictionary*, s.v. "nation," https://www.merriam-webster.com/dictionary/snation visited on April17, 2020.
[15] Ahmed, "The Classical Muslim State," 84.
[16] Montgomery Watt, "Ideal Factors in the origin of Islam," *The Islamic Quarterly* 11. No. 3 (October. 1955): 161-74.

"Ye are the best community that hath been raised up for mankind. Ye enjoin right conduct and forbid indecency: and ye believe in Allah."[17]

The membership of this community is not restricted on kith and kin. Complete surrender to Allah by anyone makes himself entitled for this membership: Allah says:

"Our Lord! and make us submissive unto Thee of our seed a nation (community) submissive unto Thee, and show us our ways of worship, and relent toward us."[18]

The concept of Ummah brought important changes in the society. Instead of blood, the faith became the source of the social bond. The pre-Islamic badges of nationality such as tribe, god and cult were abundant. The formation of the new ummah was based on an identity grounded in the religious directive of Prophet Muhammad (peace be on him) rather than in traditional tribalism.

The authority was transferred from public opinion to God, who deliberated it through Muhammad as His Apostle. This change constructs the future of Islam and Muslim political thought. The conception of ummah on one hand was a political reality which replaced tribalism and on the other side it was construction of a face-based community which was headed by Muhammad as its spiritual as well as political leader. [19] This dualism is inherent in Islamic society. In the nascent Muslim community religion had to be expressed and systematized through political institution as no other way was possible as the concept of political authority was external and inacceptable for the triable Arabs.[20]

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[17] Al-Qurān 3:110.
[18] Al-Qurān 2:128.
[19] Jonathan P Berkey, *The Formation of Islam: Religion and Society in the Near East, 600-1800* (Cambridge; New York: Cambridge University Press, 2003), 69.
[20] Lewis, *The Arabs in History*, 41.

After achieving sovereignty, authority and land, that community developed into a state. In the transformation of community into a state-community, some of the islamically admissible pre-Islamic institutions, and common-sense methods were used.[21] The concept of Dār was of that kind which was later on used to define territorial jurisdiction of the Islamic state.

Montgomery Watt after mentioning various events of the life of Prophet Muhammad (peace be on him) after Hijrah and adoption of Mīsāq al-Madīnah, describes the formation of his administration. Muhammad's administrative appointments tell the nature and extent of his authority. It was based on a system of allies who were obeying his orders. Although the men whom he assigned various duties were not former officials of an impersonal state but they were showing complete compliance to his orders. They probably worked more by persuasion than by coercion. During the lifetime of Holy Prophet (peace be on him) his personal influence was cemented and it held the administrative structure together. Watt concludes that structure was more firmly constructed than appeared and less dependent on his presence. The later events proved that it was ably advanced as the administration of an empire.[22]

Jonathan P. Berkey while discussing the formation of the Ummah observed that Prophet Muhammad (peace be on him) controlled a state whose borders covered whole of the Arabian Peninsula with significant central authority which was unknown for the Arabs in the past. He concludes that the message of the Prophet (peace be on him) prepared the platform for logical reasoning which has designed Islam's confrontation with Judaism,

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[21] Ahmed, "The Classical Muslim State," 86.

[22] Watt, *Muhammad at Medina*, 238.

Christianity, and the other religions of the Near East, and thus entitled Islam to be the successor of lost ancient civilization.[23] During the lifetime of Prophet Muhammad (peace be on him), the question of political headship of the society was not existing, as he himself was its originator and spiritual and temporal chief. After the death of the Prophet Muhammad (peace be on him), this question raised, since the Prophet (peace be on him) had not clarified the issue of his succession. He left this matter to be decided by the community according to their reasonable approach.[24] The community had understood this responsibility and after discussions selected their head as the successor of the Holy Prophet (peace be on him) with consensus. This is how this early state-community evolved into a state.[25]

Legally and technically the meanings of classical concepts Dār al-Islām and contemporary Islamic states are not same, as both evolved in separate historical environment. However, modern scholars have generally considered both to be equivalent to denote Muslim lands in classical and post nation state world. Particularly during the process of application of classical rules of Fiqh related to Dār al-Islam on to the contemporary Muslim nation states through contextualization they used both the notions in the similar meanings.[26] It is beyond the scope of this research to compare these concepts. As far as the present research is concerned, both the terms may have been used interchangeably for the sake of convenience.

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[23] Berkey, *The Formation of Islam: Religion and Society in the Near East, 600-1800*, 69.

[24] Anwar Chejne. *Succession to the Rule in Islam* (Lahore. 1960), 25; Muhammad Nazeer Kaka Khel, "Succession to Rule in Early Islam," *Islamic Studies*, 24, No.1 (spring 1985): 13-26.

[25] Ahmed, "The Classical Muslim State," 86.

[26] Muhammad Mushtaq Ahmad, "The Notions of Dār Al-Harb and Dār al-Islām in Islamic Jurisprudence with Special Reference to the Hanafī School," *Islamic Studies*,47, no. 01 (2008): 9.

2-Debate on Classical Notions of Dār al-Islām and Dār al-Harb

The territorial boundary fix and identify the limit of the land in which persons, groups, or societies use their controls. The 'boundary' draws limits of one's property from another and thus makes it possible for the landlord or the renter (in some cases, manager or operator) to enjoy benefits of the property.[27]

The ancient civilizations were aware of the importance of defining boundaries.[28] Upon mirroring Western natural legal philosophy, one can find similar notion in an ultimate creation which is described by Saint Augustine in 'City of God.'[29] The need for demarcation of agricultural plots washed away by the frequent floods in the Nile delta apparently prompted the Egyptians, as early as 2000 B.C., to develop what came to be known later (at around 550 B.C.) as Pythagorean geometry.[30] The existence of territorial boundaries is necessary condition for the promotion of economic and social activities.[31]

During the age of nation states the defining territorial boundaries and jurisdiction of states is not difficult. However, this task will become difficult if we will attempt to reach in the perspectives of moral and religious teachings. Will it be possible to evaluate the situation of territorial boundaries in the nation-state's era on ethical values, which are described as 'the learning of right, virtue and good in worldly matters of human life.[32]

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[27]M. Raquibuz Zaman, "Islamic Perspectives on Territorial Boundaries and Autonomy," 80.

[28] Khaled Ali Beydoun, "Dār Al-Islām Meets 'Islam as Civilization': An Alignment of Politico-Theoretical Fundamentals and the Geopolitical Realism of This Worldview," *UCLA Journal of Islamic & Near Eastern Law*, 04 (2005): 148.

[29] Hippo and Bettenson, *City of God*.

[30] The Pythagorean theorem of geometry was apparently known by the Egyptians as early as 2000 B.C, even though the record of its clear-cut deductive proof dates back only to the time of Pythagoras, around 550 B.C. See James R. Newman, ed., *The Harper Encyclopedia of Science* (New York: Harper & Row, 1967).

[31] "Islamic Perspectives on Territorial Boundaries and Autonomy," 81.

[32] William S. Sahakian and Mable Lewis Sahakian, *Realms of Philosophy* (Cambridge, Massachusetts:

The concepts of dār al-Islām, dār al-ḥarb and dār al-ʻAhad were used by the Muslim jurists to explore the nature of various types of territories and to extend the jurisdiction of Islamic Law in them in terms of juridical texts.[33] Contemporary studies are trying to define these conceptions within juridico-political learnings, primarily in the units related to jihad.[34] Another issue in these notions is that they are not described separately. Giovanna Calasso observes that classical Arabic dictionaries instead of treating these notions together have treated the two phrases within the more general framework of the different Islamic categories.[35] The further discussion in these regards is presented in the separate definitions of these concepts.

Catchwords such as fatwā ("death fatwā") and Sharīʻah ("creeping sharīʻah") – to be imbued with negative and threatening connotations. Generally identified with the so-called "Muslim world," dār al-Islām is often presented as a monolithic bloc that poses a potential threat to the "Western world," which is accordingly identified with dār al-ḥarb, the object of Muslim aggression and invasion. Whether implicitly or explicitly, these territorial notions are frequently used to draw the symbolic demarcation lines between 'us' and 'them,' between 'Western civilization' and 'Islam.' While presented as an innately 'Islamic' conception of the world, this notion of diametrically opposed "worlds" is, paradoxically not only in harmony with the dualist views of some Islamist groups,

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Schenkman Publishing Company, Inc, 1965), 75.

[33] Giovanna Calasso and Giuliano Lancioni, *Dār Al-Islam / Dar Al-Ḥarb: Territories, People, Identities*, Bilingual edition (Leiden; Boston: Brill Academic Pub, 2017), 02.

[34] Majid Khadduri and Herbert J. Liebesny, *Law in the Middle East Vol 1: Origin and Development of Islamic Law* (Washington, D.C: The Middle East Institute, 1955), http://gen.lib.rus.ec/book/index.php?md5=c9b44577c54ccc989dad3c3d1ec9cfcb; Ann K. S. Lambton, *State and Government in Medieval Islam*, 1st ed., London Oriental Series (Routledge, 2002), http://gen.lib.rus.ec/book/index.php?md5=61c511023c1d543ec680a62113091548; Patricia Crone, *Medieval Islamic Political Thought*, New Edinburgh Islamic Surveys (Edinburgh: Edinburgh University Press, 2006); Wael B. Hallaq, *Sharīʻah: Theory, Practice, Transformations* (Cambridge, UK; New York: Cambridge University Press, 2009).

[35] Calasso and Lancioni, *Dār Al-Islam / Dār Al-Ḥarb*, 02.

such as the self-proclaimed 'Islamic State,' but also with the 'clash of civilizations'
predicted by Samuel Huntington and his followers.[36] In Arabic, this territorial division is
nowadays commonly referred to as the 'Islamic division of the world' (al-taqsīm al-
Islāmī li al-maʿmūrah), the 'Islamic conception of the world' (al-taṣawwūr al-Islāmī li al-
maʿmūrah), the 'Islamic world-view' or "Weltanschauung" (ru'yah al-ʿālam al-
Islāmiyyah), or the 'Islamic legal geography' (al-jughrāfiyah al-fiqhiyyah li al-ʿālam).[37]

2.1- The Lexical as well as Terminological Concepts of Dār

The concepts related to territoriality in Islamic tradition were originated from the pre-
Islamic concept of dār which was used to describe limits. Therefore, it will be appropriate
to define dār in literal as well as terminological meanings before description of its allied
terminologies. In lexical meanings dār is used to describe various notions such as place
which is combination of building and open area.[38] The terminology is also used in Al-
Qurān in the same meaning as it has stated:

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[36] Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West*, 04.

[37] An overview of this terminology can be found in *Islāmiyyah al-Maʿrifah*, 12, no. 45 (2006), a special issue entitled Ru'yah al-ʿālam fī al-manẓūr al-Islāmī ("Worldview from the Islamic Perspective"); see in particular the following articles: Yāsir Luṭfī al-ʿAlī, "Al-Jughrāfiyā al-fiqhiyya li-l-ʿālam min ṣūrat al-tārīkh ilā ṣūrat al-wāqiʿ al-muʿāṣir"; Fāṭima Kassāb, "Al-Ru'yah al-muʿāṣirah li-al-taqsīm al-Islāmī li-al-maʿmūra: murājaʿa li-baʿḍ al-adabiyyāt"; ʿAbd al-Raḥmān al-Ḥājj, "AlManẓūr al-fiqhī wal-taqsīm al-qurānī li-al-maʿmūrah"; ʿAbd Allāh Ibrāhīm Zayd al-Kīlānī, "Al-Ru'yah al-Islāmiyyah li al-ʿālam wa-atharuhā fī taḥdīd al-siyāsa al-khārijiyyah"; and Fatḥī Ḥasan Milkāwī, "'Ru'yah al-ʿālam' ʿind al-Islāmiyyīn." Some also refer to it as "Islamic legal divisions" (al-taqsīmāt al-fiqhiyyah) or simply as the "division of the world" (taqsīm al-ʿālam, taqsīm al-maʿmūrah). See ʿAbd Allāh bin Bayyah, "Al-fuqahāʾ wa-taqsīm al-ʿālam: Al-Sharīʿah wa al-ḥayāt 11.04.2010,"http://www.aljazeera.net/programs/pages/742dbbe1-5702-40d7-b6f5-82f7d126d1dd (accessed September 4, 2017); and ʿAbd Allāh al-Juday', Taqsīm al-maʿmūrah fī al-fiqh al-Islāmī wa-atharuhu fī al-wāqiʿ (Dublin: ecfr, 2007), https://www.e-cfr.org/ category/bissued (accessed September 7, 2017).

[38] Muhammad ibn Mukarram Ibn Manẓūr, *Lisān al-ʿArab* (Bayrūt: Dār Sadir, 1955), 4/495.; *Al-Qāmūs al-Muḥīṭ*, 2:32; Muhammad bin Muhammad al-Murtaḍa Al-Zabīdī , *Tāj al-ʿArūs min Jawahir al-Qāmūs*, edited by Group of Scholars (Dār al-Hadyah), 11:319-320.

{فَأَخَذَتْهُمُ الرَّجْفَةُ فَأَصْبَحُوا فِي دَارِهِمْ جَاثِمِينَ } [39]

Imām Ragib explained that dār is house with its boundary walls which is covering it.

"الدار المنزل اعتباراً بدورانها الذي لها بالحائط "

Sabiya has used this terminology in the meaning of al-balad البلد or county as he has reported this dār as a blessing to the country and its meanings are similar to dār.[40] This terminology is used in this meaning in Al-Qurān as it is stated:

{وَالَّذِينَ تبووزا الدَّار وَالإِيمَان} [41]

It is reported that dār in this verse is used in the meaning of Medina of Prophet (peace be on him). This terminology is also used in the meaning of Qabīlah. The terminology is found to be used in the meaning of territory in the Hadith is reported as:

[42] أَمَرَ رسولُ الله ـ صلى الله عليه وسلم ـ بِبناء المَساجِدِ فِي الدُّورِ وأن تَنَظَّفَ وتُطَيَّبَ

This terminology is used for a house or lodging places. In traditional Arabic setting, bayt and dār are most commonly two words used to designate a dwelling place. However, both the terminologies are etymologically different. Bayt is an enclosed dwelling, where one may pass the night; whereas dār from the root dāra is used to describe a space that is encircled by panels, barriers, buildings, or tents usually in shape of a circle. Historically, there is a tendency among Muslim dwellings to arrange around a central space that was

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[39] Al-Qurān 7: 78.
[40] Al-Zabīdī, *Tāj al-'Arūs*, 11:320.
[41] Al-Qurān 59:9.
[42] Abū Dāwūd, Sulaymān b. Ash'ath al-Sajīstānī , Al-*Sunan*,edited by Shūab Al Arnaūt, Muhammad Kamīl (Beirut : Dār al-Kutab al-'Ilmiyyah, 2009/1430), Hadīth No.455,1:342.

used to the park the shepherd's flock, for the purpose of shelter and protection from the enemies. Similarly, the courtyards of non-nomadic families were protecting them from inquisitive strangers.[43] Dār refers to boundary which can be used in the meaning of 'border,' 'limit,' 'bound,' 'confine' 'end,' and 'frontier.'[44]

In its early days, after migration to Medina, Prophet Muhammad (Peace be on him) constructed his house as his family residence and as an assembly place for followers of Islam. The essential feature of this dār was the courtyard surrounded by walls. It was alongside the wall on one side while rooms that were used by Prophet's wives were on the other side. This house was serving as the residence of the Prophet (Peace be on him) Prayer place and shelter from the sun and rains for the Muslims.[45]

After migration and construction of first Islamic state in Medina, the traditional concept of dār was developed into dār al-Islām and dār al-ḥarb to describe the boundaries of the state and jurisdiction of its law i.e., Sharī'ah. These concepts were used in Islamic political and legal thoughts to distinguish territories in terms of implementation of Sharī'ah Law. Hence dār al-Islam is a land where rulings of Sharī'ah are observed. This is a land of Muslims and protected non-Muslims. Whereas, the land of non-Muslims in which Islamic law did not apply was classified as dār al-harb.[46] The further description of these concepts is discussed below.

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[43] B. Lewis, Charles Pellat, and Joseph Schacht, eds., *Encyclopedia of Islam*, vol. II (Leiden: E. J. Brill, 1991), 113.Article 'Dār' by G. Marcais.

[44] M. Raquibuz Zaman, "Islamic Perspectives on Territorial Boundaries and Autonomy," in *Islamic Political Ethics: Civil Society, Pluralism, and Conflict*, 80.

[45] *Encyclopedia of Islam*, vol. II: 113.

[46] Campo, *Encyclopedia of Islam*, 182.

2.2- The Lexical as well as Terminological Meanings of Dār al-Islām

Ḥanafīs have defined Dār al-Islām as: 'the territory in which Islamic rules are applicable.'

Imam Abū Ḥanīfah added that Dār al-Islām is a territory in which its inhabitant Muslims

and non-Muslims live in peace without any fear.[47] Imām al-Sarakhsī has elaborated this

definition and says that: Dār al-Islām is that land which is under the authority of Muslims

and its symbol is that they live in it with peace.'[48] Malīkīs also considered territory with

compliance of Islamic rules as Dār al-Islām.[49] Some Shāfi'īs have used this terminology

to denote the territory which is under the rule of Muslims even though the non-Muslim

citizens of the Islamic state are residing there.[50] Imām Shīrāzī of Shāfi'iyyah has used

terminology of Bilād al-Islām or Bilād al-Muslimīn to describe the doctrine of Dār al-

Islām.[51] Ẓāhirī scholars describe that Dār al-Islām is a land where Islamic authority is

dominated and this authority is responsible for implementation of its rule; as long as this

authority is prevailing that territory will be treated as Dār al-Islām.[52] Among the

contemporary scholars Wahbah Zuḥaylī has defined Dār al-Islām as a country that is

governed by the authority vested in it by Muslims. In that state the power for do and not

to do is rested with Muslims.[53] Another contemporary scholar 'Abd al-Qādir 'Awdah has

defined that Dār al-Islām is constituent of the states in which Islamic rules are dominating

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[47] Abū Bakr b. Mas'ūd (d.587AH) Al-Kāsānī, *Badā'ī al-Ṣanā'i' fī Tartīb al-Sharā'i'* (Beirut: Dār al-Kutub al-'ilmiyyah, 1986), 07:131.

[48] Abū Bakar Muhammad b. Ahmed b. Abī Sahl Al-Sarakhsī, *Sharh Kitāb Al-Siyar al-Kabīr* (http://www.alwarraq.com, n.d.), 01:395.

[49] Abū Al-Walīd Muhammad bin Ahmed Ibn Rushd, *Al-Muqaddimāt Al-Mumahidāt*, ed. Muhammad Hajī (Beirut: Dār al-Garb al-Islamī, 1988), 1:341.

[50] Abdul Aziz bin Mabrūk Al Ahmadī, *Ikhtilāf Al Dārayn wa Āthārahu Fi Ahkām al-Sharī'ah al-Islamiyyah* (Medina: Al Jamiya al-Islamiya, 2004).

[51] Abū Isḥāq Ibrāhīm ibn 'Alī ibn Yūsuf Al-Shīrāzī, *Al-Muhadhdhab Fī Fiqh al-Imām Al-Shāfi'ī* (Beirut: Dār al-Kutub al-'Ilmiyyah, n.d.), 03:270.

[52] Abū Muḥammad 'Abd Allāh ibn Sa'īd (d.456/1064) Ibn Ḥazm al-Andalusī, *Al-Muḥallā* (Beirut: Dār Al-Fikar, n.d.), 07:311.

[53] Wahbah Zuḥaylī, *Al 'Alāqāt Al-Dawliyyah Fī al-Islām* (Damascus, Syria: Dār-Maktabī, 2000), 53.

or its Muslim inhabitants dominating Islamic rules.[54]

The territories of Dār al-Islām reached at its peak during the Abbasid caliphate (10th century) and its authority spread over the area beyond four thousand miles from the Atlantic coasts of Spain and northwest Africa in the west to the eastern borderlands of Iran and Afghanistan.[55]

The variety of definition of dār al-Islām and dār al-ḥarb is reflecting the plurality of the views on the territoriality.[56] Zāhirī Jurist defined dār al-Islām as the territory which is under the Islamic rule and is governed by Islamic laws and rulings of Sharī'ah.[57] Imām al-Shawkānī described it as the territory in which the obligations and prohibitions are carried out by the Muslims and not by the non-Muslims. He further described that the non-Muslim citizens of this territory can have their visibility in this territory as long as they are subordinate to the Islamic authority in Muslim cities.[58] Contemporary scholar Abū Zahrah is of the opinion that dār al-Islām is a country which is under the government of the Muslims and its authority is rested with the Muslims.[59]

The [60] pre-Islamic theories of nomadism and urbanism also contributed in the development of doctrine of dār al-Islām, since Islam developed with the expansion of Arab culture and civilization. Likewise, Precepts of Islam were completely based on Qurān and Sunnah initially, but its development as an Islamic law was result of extrinsic

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[54] Al Ahmadī. *Ikhtilāf al-Dārayn wa Āthārahu fī Ahkām al-Sharī'ah al-Islāmiyyah,* 6.
[55] Campo, *Encyclopedia of Islam*, 182.
[56] Muhammad 'Amīm al-Ihsān Al-Majaddadī, *Al-Tra'rīfāt al-Fiqhiyyah* (Beruit: Dār al-Kutub al-'Ilmiyyah, 1986/1424), 93.
[57] *Al-Muhallā*, 13/140.
[58] Muhammad bin 'Alī al-Shawkānī, *Al-Sayl al-Jarrār al-Mutadaffiq 'ala hada'iq al-Azhār* (UK: Turāth, 2013), 4/575.
[59] Abū Zahrah, *Al 'Alāqāt al-dawliyyah fī al-Islām* (Cairo: Dār al-Fikr al-'Arabī, 1995), 53.
[60] Parvin and Sommer, "Dar Al-Islam," 10.

circumstances and challenges. The expansion of Islamic territoriality, just like any other territorial system must be contemplated as a consequence of historical events.[61]

Inspired by the pre-Islamic tradition of Banū or Dār the converting to Islam was described as aslama or *dakhala fī al-Islām'*. This action entails crossing a threshold to become part of a particular community of the Muslims. The expression dakhala fī is commonly used in genealogist terminology to indicate the "entrance" into a clan of external elements, usually belonging to a lesser clan.[62] Moreover, concept of Jihad and Hijrah also contributed in the evolution of the notion of dār as Hijrah was described as moving away from idolatry and oppression to *dār al hijrah* i.e., watershed of Islam. The old sources described that conversion to Islam initially was not only change of faith but was also moving from one territory to another.

This movement which is named hijrah, brought the idea of frontier that implied in the dār al-Islām / dār al-ḥarb dichotomy. The regular use of dār al-Islām / dār al-ḥarb binomial was taken from second half of the eighth century.[63] A connection which can also be perceived in a passage of Abū Yūsuf's (d. 182/798) Kitāb al-Kharāj, where the author dealing with the issue of jizyah reports the decisions of Khālid b. al-Walīd concerning the inhabitants of al-Ḥijrah.[64]

Apparently, Abū Yūsuf used the expressions dār al-Islām in the meaning of dār al-hijrah. It appears that the concept of dār al-Islām was an extension of what was conceived as dār

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[61] See Charles Ghequiere Fenwick, *International Law* (New York: Appleton-Century-Crofts, 1948), 105.
[62] Giovanna Calasso and Giuliano Lancioni, eds., "Constructing and Deconstructing the Dār Al-Islām / Dār al-Ḥarb Opposition: Between Sources and Studies," in *Dar Al-Islam / Dar Al-Harb: Territories, People, Identities*, Bilingual edition (Leiden; Boston: Brill Academic Pub, 2017), 20.
[63] Ibid, 27–28.
[64] Abū Yūsuf, *Kitāb Al-Kharāj*, 68.

al-hijrah.[65] In spite of numerous occurrences of the verb hājara in the Qurān, the term

hijrah, like the lexes dār al-Islām and dār al-ḥarb or al-kufr, is not found in the Qurān. It

is not necessarily related to jihād. Perhaps it is to this original journey of the Prophet

Muhammad (Peace be on him) and Muslims from Mecca to Yathrib. In the beginning of

Islamic history, the representation of the two dār were none other than Mecca and

Medina and Holy Prophet (Peace be on him) declared Medina 'the first abode of the

Muslim community'.

The latter jurists derived this notion from this first dār al-Islām. Imām Sarakhsī (the

fifth/eleventh century Hanafī jurist): "fal-madīnah innamā kāna lahā ḥukm dār al-Islām

dhalika al-waqt ḥīna kāna rasūlullāhi maʿal-muslimīn fīhā," "only the city of Medina had

indeed the legal status of dār al-Islām, when the Messenger of God was there with the

Muslims."[66]

We should also consider the possibility that the two notions did not originate

simultaneously and that the idea of dār al-kufr or dār al-ḥarb could have preceded that of

dār al-Islām, understood in its global and all-embracing meaning, as found in

second/eighth–third/ninth-century legal texts. As for the different ways Muslim jurists

conceived the two notions, depending on their personality—or territoriality of law

orientation, they necessarily also affected the way the boundary which ideally lies

between the two dārs was construed. Is it a frontier, based on religious belonging, as

would appear from the choice of the word Islam as the identifying element of one of the

two entities? Is it a boundary between spheres of political and juridical dominion, which

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[65] Calasso and Lancioni, "Constructing and Deconstructing the Dār al-Islām / Dār al-Ḥarb Opposition: Between Sources and Studies," 27.

[66] Muhammad b. Ahmad b. Abī Sahl Abū Bakr al-Sarakhsī, *Kitāb al-Mabsūṭ* (Beirut: Dār al-Maʿrifah, 2009), Vol.10, 18

as such cannot be stepped over by Islamic laws, or a boundary which can be crossed—

and thus in some way ignored—by virtue of their personal character? Actually, if

frontiers and frontier lands are explicitly mentioned by geographers āfāq, ḥudūd, tukhūm,

thughūr[67]as well as in treatises on the merits of jihād, in juridical texts they are mainly

evoked through the verbs dakhala and kharaja, "to go in" and "to go out"—with reference

to dār al-Islām and dār al-ḥarb—which draw a close web of movements across the

frontier between an "inside" and an "outside", having legal consequences which

evaluated and regulated in a different way according to the jurist's orientation, lies at the

basis of juridical casuistry.[68]

During early periods of Islam, jurisdiction of the Islamic state was huge and extensive

owing to that fact concept of dār al-Islām was firm, genuine and approach based, since

Islamic state was a mean to promote Islamic faith with the expansion of Muslim territory.

As the cooperation of the state with religion and political authority, qualify it to gain

more power over other nations.[69]

The discussions related to the concept of dār al- Islām is not limited to books of fiqh. It

has been found in various type of sources not only juridical texts, but also Hadīths and,

besides travelogues, geographical and historiographical works as well as Arabic lexicons.

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[67] Michael Bonner, "The Naming of the Frontier: 'Awāṣim, Thughūr, and the Arab Geographers," *Bulletin of the School of Oriental and African Studies*, 57, no. 1 (1994): 17–24, and, for a more extensive treatment of the topic, Ralph W. Brauer, "Boundaries and Frontiers in Medieval Muslim Geography," *Transactions of the American Philosophical Society*, 85, no. 6 (1995): 1–73. A section of this work is dedicated to internal frontiers: despite the breakup of the caliphate empire and the formation of numerous independent states "that in turn entailed the establishment between them of numerous 'internal boundaries'" (p. 9), the author points out that in travelers' writings he has encountered "no reports of borders control in connection with overland travel anywhere within the Islamic realm" (p. 34).

[68] Calasso and Lancioni, "Constructing and Deconstructing the Dār al-Islām / Dār al-Ḥarb Opposition: Between Sources and Studies," 29.

[69] Abū Zayd 'Abd al-Raḥmān ibn Muḥammad Ibn Khaldūn, *The Muqaddimah: An Introduction to history*, trans. Franz Rosenthal (New York: Pantheon Books, 1958), I, 295.

Therefore, this dual classification of the world elaborated by classical Muslim jurists yet still is used in modern times, should be reassessed, leaving out some categorization resulting from an overgeneralized reading, so as to let new questions arise, choosing new vantage points. Perhaps, it may seem pointless to look for the presence of these two terms, created by a jurist's mind, in geographical texts, and predictable to find that they rarely occur, but it is interesting to compare their terminology with that of jurists, particularly when the works considered are those of tenth-century Muslim geographers, who deliberately limit themselves to describing Islamic lands.[70] Muqaddasī explicitly states that he will focus on the "kingdom of Islam" (*mamlakah al-Islām*), ignoring "the kingdoms of the infidels" (mamlakah al-kuffār), for neither did he travel to those regions, nor does he believe they are worth talking about.[71]

Muslim jurists gave their rulings from the formative period of Islamic law about Muslim's relations with the non-Muslims within dār al-Islām and outside. But Muhammad b. Hassan al-Shaybānī was the pioneer who regulated the affairs of Muslims with non-Muslims of combatant land or whom the believers had made treaties.[72] He comprehensively examined and consolidated the most pressing areas of Islamic international law, through such topics as 'The Conduct of the Army in Enemy Territory,' 'The Spoil of War,' 'On the Intercourse between the Territory of Islam (Dār al-Islām) and the Territory of War,' 'Peace Treaties,' 'On Amān (Safe-Conduct),' 'Apostasy,

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[70] Calasso and Lancioni, "Constructing and Deconstructing the Dār Al-Islām / Dār al-Ḥarb Opposition: Between Sources and Studies," 24.

[71] Muḥammad b. Aḥmad al-Muqaddasī, *Aḥsan al-taqāsīm fī ma 'rifat al-aqālīm*, ed. Michael Johan de Goeje, 2nd ed. (Leiden: Brill, 1906, 9.

[72] Muḥammad Ibn al-Ḥasan al-Shaybānī, *The Islamic Law of Nations: Shaybānī's Siyar*, trans. Majīd Khaddūrī (Baltimore: Johns Hopkins University Press, 2001).

Dissension and Highway Robbery,' and 'Taxation.' [73] The Shaybānī's focus on transnational treaties, political relations and war amid Muslim and non-Muslim world are main areas of interest for modern learning.[74]

The Siyar is branch of Islamic Law (fiqh) which describes foreign policy and geopolitical worldview on the terms of Dār al-Islam/Dār al-Harb. Many of the rulings of this discipline are still good law and comport with the nation-state world order. However, the worrying phenomenon is that some fundamentalist organizations are trying to institutionally implement these rulings under a revisionist medieval worldview. This contemporarily inappropriate contradiction has been adopted by fundamentalists and neo-fundamentalists alike, who are not willing to work within the nation-state framework. Islamic legal pluralism, further extended in 19th and 20th centuries by foreign sociopolitical and economic ideologies that penetrated in, proliferated in new and eclectic Islam. Some of these Islamic ideas hyphenated with these foreign ideologies, while others advocated political fundamentalism[75] as the vehicle for reestablishing a 'true Islamic society.'[76]

Unity of human origin is emphasized in Islamic faith theology and law, as its evidence is found in al-Qurān, Allah says:

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[73] Ibid, 57.

[74] Beydoun, "Dār Al-Islam Meets 'Islam as Civilization': An Alignment of Politico-Theoretical Fundamentals and the Geopolitical Realism of This Worldview," 152.

[75] American Islamic Congress, Teacher's Guide on Islam & Sept. 11th, available at http://www.aicongress.org/teachersguide 1.html: Since the fall of the Ottoman Empire in the early 20th century, many Muslims have lamented the loss of a unified Muslim polity and longed for the reestablishment of a world empire. Some have organized movements with the imposition of a Muslim world order as their end goal. In recent years, there have been numerous such movements, some but not all adopting a strategy of armed struggle.

[76] Olivier Roy, Neo-Fundamentalism 1 (2001) ("The movement's founding fathers are Hassan al-Bannā (1906-1949), Abū al 'Alā Mawdūdī, and among the Shī'as, Bāqir al-Sadr, 'Alī Sharīatī, and Rūhullah Khumīnī.").

"O mankind! We created you from a single [pair] of a male and a female, and made you into nations and tribes, that you may know each other [not that you may despise each other]. Verily the most honored of you in the sight of God is he who is the most righteous of you. And God has full knowledge and is well acquainted with all things."[77]

Islamic thought refers Muslim community as ummah and all Muslims, regardless of their regional, ethnic, lingual and cultural differences considered an ummah. National boundaries, unlike personal territorial boundaries was not known at the formative period of Islam territorial nationalism, which emphasize on national attributes is the outcome of Christendom-Europe.[78]

From the beginning of the Islamic state, safeguarding the unity of Muslims has been one of the prime concerns of the Muslim scholars, even after the division of Muslim state into many independent political states. Historically, all Muslim chiefs joined together to secure central power of Khalīfah, when first Caliph Abu Bakr (May Allah be pleased with him), had to announce war against rebel Bedouin tribes in Arabia. But in later years after the assassination of the third caliph 'Uthmān (May Allah be pleased with him), and appointment of 'Alī (May Allah be pleased with him), caused confrontation and segregation within the initial Muslim community. But when Umayyad dynasty managed to rule, they focused on the unity of Muslims and center which kept the ummah united for a century.[79]

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[77] Al-Qurān 49:13.

[78] Iqbal, *The Reconstruction of Religious Thought in Islam*, 141.

[79] 'Abdul Hamīd A. Abū Sulaymān, *The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought* (Herndon, Va.: International Institute of Islamic Thought, 1987), 29.

The central power of the Muslim state was very important due to the reason Muslim jurists were asked to favor and back the central authority by their teachings. Early political philosophers like Abū Yūsuf (d. 798), al-Baghdādī (d. 1037), al-Māwardī (d. 1058), and Abu Ya'lā (d. 1065), emphasized upon the social amalgamation of the Muslims which would be workable in case of political and legal unity. Moreover, for the protection of unity as an ummah and nation, Muslims often had to accept the regimes of unjust sovereigns.[80]

The strain amid political power and legal power for administration and legislation yielded during Umayyad regime and pursued around medieval period. Further development of the growth of Islamic law was severely affected since the Muslim Jurists of Abbasid dynasty in order to avert political interference of the ruler had reduced legal restructuring, which ultimately, made Islamic law unfeasible and non-viable in administrative or constitutional affairs.

Literary work of Muslim intellectual of middle ages still used to exemplify Islamic precepts although the world's realities have been changed altogether. Doctrine of state, floated by great Muslim scholar and thinker Al-Māwardī had influenced Muslims' political reasoning till the colonial invasion in Muslim territories in 18th and 19th centuries. In that crucial situation a great Muslim political activist Jamāl al-Dīn al-Afghānī (d. 1897) asked Muslims to act vigilantly to reverse Western development toward Muslim areas, for this purpose he laid stress upon Muslims to study science and reasoning and to reconstruct the Islamic ideals of middle ages to fulfil the requirements of

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[80] Manzrūddin Ahmed, *Islamic Political System in the Modern Age: Theory and Practice* (Karachi: Sa'ad Publications, 1983), 73.

present era. His exclamation ultimately, restored the idea of one nation, while he realized

the need of constitutional governments to curb western influence but detested nationalism

founded on race, language, or culture as it would ultimately turn into secularism,

although he had perceived the growth of nation-states era, but he was desirous for the

prosperity and unity of Muslim ummah. His theories were reflected in the literary

writings of other modern Muslim thinkers, for instance Sayyid Ahmad Khan of India (d.

1898) and Muhammad 'Abduhu of Egypt (d. 1905).[81] Such political doctrines of these

contemporary Muslim thinkers still boom and vibrate in Muslim world, while

establishment of genuine secular national state for Muslims lack defense from Muslim

scholars, rather they still criticize and condemn secularization of Turkey by Mustafa

Kemal Ataturk.[82]

Some Muslim intellectuals of present era have also endeavored like their predecessors, to

adapt and adjust Islamic precepts in accordance with the current political scenarios. The

idea of one nation or ummah, according to Islamic scholars is still applicable for the

contemporary Islamic countries through adoption of fundamental principles of Islam for

serving their people on equal footing regardless of their religious affiliation and maintain

relationship with other states on the basis of diplomatic relations, international pacts,

covenants and treaties, as the examples set by the Prophet Muhammad (peace be on him)

himself and the second caliph Umar, following the defeat of Egypt, also validated the

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[81] Beydoun, "Dār Al-Islam Meets 'Islam as Civilization':An Alignment of Politico-Theoretical Fundamentals and the Geopolitical Realism of This Worldview," 89.

[82] See Faḍl al-Rahmān, *Islam & Modernity : Transformation of an Intellectual Tradition* (Chicago: University of Chicago Press, 1982); Faḍl al-Rahmān, *Islam* (Chicago: University of Chicago Press, 1979); W. Montgomery Watt, *Islamic Philosophy and Theology* (Edinburgh: Edinburgh University Press, 1962), http://gen.lib.rus.ec/book/index.php?md5=30ae46556d7054c2ceb60296a5f6dbfa.; See also W. Montgomery Watt, *Islamic Political Thought* (Edinburgh: Edinburgh University Press, 1968).

treaty with non-Muslims.[83]

James Piscatori states that "over time authoritative Muslim writers have come to elaborate a new 'consensus of speech' which argues that the territorial state is a natural and even worthy institution, with the acceptance of the nation-state model by the whole world during the 20th century, the modern states have to enforce the 'reformatory program which Islam has given for the betterment of mankind'.[84]

The Islamic worldview from its inception accepted the presence of non-Muslim societies, whether residing with Muslims in Dār al-Islām or outside Islamic lands. When they were living under the autonomy of Islamic state their rights were protected, for instance Jews and Christian communities had been granted protection under the provisions of the Constitution of Medina by Prophet (peace be on him), furthermore they were enjoying the status of independent and autonomous section of society in Arabia during that time. Minorities that were secured and protected by the Ottoman Turks were known as millet.[85] The phrase *Millet* or *millah* can also be used for a religious society, and Islamic society nevertheless consists of Christian, Jewish, Zoroastrian, Saba'iyyīn, Buddhist, and Hindu religious minorities, in addition to Muslims. Ismā'īl al-Fārūqī states, "Islamic jurisprudence equally recognizes those people who opt for non-religious identification provided they have a legacy of laws (even if secular) by which they wish to order their lives. The only group which may be barred from membership is that whose law is anti-peace. Islamic jurisprudence thus enables one to affirm today that any group claiming

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[83] Ann K. S. Lambton, *State and Government in Medieval Islam* (New York: Oxford University Press, 1981). 203.

[84] Lambton, *State and Government in Medieval Islam*, 203.

[85] See W. Montgomery Watt, *The Majesty That Was Islam* (London: Sidgwick and Jackson, 1974), 46–49.

itself to be a millah on whatever grounds is entitled to membership."[86]

Protection and development of one's life, independence, prosperity and contentment require borders and limits, likewise Islam inspires Muslims to earn money, land and other pursuits of life, but within the limits prescribed by Allah. All human beings are equal shareholders in all resources created by Allah for this world and mere differences of origin, culture, language, morality, norm and religion do not enjoin us to capture or assign every profitable to some particular group or community. The non-Muslim minorities residing within the Islamic state rightfully deserve to be given the protection of all their fundamental rights and interests, since they come under the liability of Muslim state and Muslim society as well. Admirable situation is that where every individual regardless of his faith or nationality could move from one place to another but development of nation states, international laws, politics and many other factors restricting the liberty of human's movement.[87]

2.3-The Concept of Dār al-Ḥarb

The doctrine of Dār al-Ḥarb (the Land of War) is conventional idea of Sharī'ah related to Islamic Law of Nations. Al-Qurān directs to join Jihād for the sake of peace under the rule of Islam[88]. Al-Qurān has not classified the world into territories such as the faith of Islam reign (dār al-Islām), perpetual threat of a war (dār al-Ḥarb), or covered by agreements (dār al-'ahd, dār al-Ṣulḥ). The idea of dār al-ḥarb is traced back to the Medina period of the Holy Prophet (Peace be on him) particularly his practices to deal with the territories bordering the lands of Islām or dār al-Islām. He sent his envoys and

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[86] Abū Sulaymān, *Towards an Islamic Theory of International Relations: New Directions for Methodology and Thought* (Herndon: The International Institute of Islamic Thought, 1994), 25–26.
[87] "Islamic Perspectives on Territorial Boundaries and Autonomy." 98.
[88] Al-Qurān 9: 38-58, 87: 9, 5.

ambassadors to these states, communities and tribes while recognizing their sovereignty and inviting them to embrace Islam.[89] Later on when wars of Muslims started with these non-Muslim neighbors, they were denoted ḥarbī or ahl al-ḥarb. Consequently, the classical sources of Islamic law elaborated and described that those nonbelievers who declined to convert to Islam after being properly invited by the believers come under the category of combatant, against whom war is permissible by following the rules mentioned in Al-Qurān.[90] Originally, enforcement of Islamic law and safety of Muslims and dhimmis in any territory determine the status of the land as abode of Islām or abode of war, since historically many monarchs of dār al-ḥarb were anarchist and agitators.

2.4-The Concept of Dār al-'Ahd or Dār al-Muwāda'ah

As per classical understanding Dār al-'Ahd or Dār al-Muwāda'ah is the outcome of a peace treaty which resulted into halt of a fight amid Muslims and their enemies. As a consequence of this, Dār al-Ḥarb is changed into Dār al-'Ahd. The term Muwāda'ah is used to denote the peace pact conducted amid Muslims and non-Muslims through negotiation and settlement on certain conditions. The nature of this treaty can be temporary for a certain period or permanent. According to the opinion of the Ḥanafī jurists, the time duration in such a pact is not obligatory. Through the conditions of such covenant the Ahl al-Muwāda'ah are sanctioned safeguard of their rights as they are entitled of 'iṣmah.[91] According to some Muslim jurists, Dār al-'Ahd was regarded a provisional or interum land amid Dār al-Islām and the Dār al-Ḥarb. It is also named as dār al-Muwāda'ah or dār al-Sulḥ. Imām Shāfi'ī has named such type of territory as Bilād

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[89] Muhammad b.Ismā'īl al-Bukhārī, *Ṣaḥīḥ al-Bukhārī* (Beirut: Dār Ibn kathīr, 1981), kitāb al-Jihād wa al-Siyar, Hadīth No.2936, 2937 and kitāb al-Maghāzī, Hadīth No. 4392.

[90] Al-Qurān 9:29.

[91] Abū Bakr Muḥammad b. Aḥmad ibn Abī Sahl (483d.) al-Sarakhsī, *Al-Mabsūṭ* (Beirut: Dār al-Fikr, 2000), 10:94-100; Al-Kāsānī, *Badā'ī al-Ṣanā'i' fī Tartīb al-Sharā'i'*, 07:131.

ahl Ṣulh.[92] Yayā b. Ādam and Māwardī have reported many examples of such type of territories in initial periods of expansion of Muslim state.[93] Māwardī is of the view that the lands which are acquired by Muslims through agreement is called Dār al-Ahd. In such type of territories the ownership is left to their previous owners with the payment of tax. But violation of any term of covenant turned their land into Dār al-Ḥarb.[94]

In spite of disagreement of classical jurists on the nature of Dār al-'Ahd, its existence is undeniable reality of Islamic history. Abū Ḥanīfah, however, insisted that territorial division can only be through Dār al-Islām and Dār al-Ḥarb. He does recognizes validity of peace agreement but reluctant to give legal status of Dār al-'Ahd, as in his opinion can be entertained only as rebels.[95]

In the formative period of Islām, another type of territory or land was recognized under the doctrine held by Imām Shāfi'ī. Under Mu'āwiyah the prince of Armenia entered into agreements of peace with the Muslims, with the aim of protection of their autonomous rule, in return for the payment of Kharāj. The medieval territorial concepts related to sovereignty are polarized and redefined, based on the changing historical realities. A House of Truce (dār al-ṣulḥ) acknowledged by Shāfi'ī scholars, where harmonious terms with non-Muslim states were permitted on condition of payments of taxes to Muslim sovereigns by them. Similarly, some Muslim jurists instructed inhabitants of the lands that Muslims lost to enemies to either fight for regaining of their land or migrated to dār al Islām. Jurists of Mālikī School suggested this for Muslims of Andalusia which had

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[92] Muhammad b. Idrīs Shāfi'ī, *Kitāb Al-Umm* (Beirut: Dār al-Marif'a, 1990), 4/192.
[93] Yaḥyā b. Ādam d.202 AH, *Kitāb Al-Kharāj*, ed. Abū Al-Ashbāl Ahmed Muhammad Shakīr (Beirut, Lebanon: Dār al-Ma'arif'a, Not dated), 40–50; Abū al-Hassan Al ī b. Muhammad b. Habīb Māwardī, *Al-Ahkām Al-Sūltanīa Wa al-Wilāyāt al-Dīniya*, ed. Ahmed Jād (Cairo, Egypt: Dār Al-Hadīth, 2006), 258.
[94] Māwardī, *Al-Ahkām Al-Sūltanīa Wa al-Wilāyāt al-Dīniya*, 258.
[95] Lewis, Pellat, and Schacht, *Encyclopedia of Islam*, II:116.

been invaded by the Christian forces.[96] The same view was expressed by some of the leaders of resistance movements in colonial India. The movement of Tarīqah-i-Muhammad (Muhammadan Path) headed by Sayyid Ahmad Barīlwī (d. 1831) was also of that view.[97] Some jurists, opined that the safety of life and freedom to practice their religion if provided to Muslims by any state, then they could welcome that rule and contemplate themselves still be in dār al-Islam.[98]

Similarly, more particular evidence on such lands is available in the conducts of Ottoman Caliphs. They used particular types of agreements named as 'ahdnāmahs for extending the type of status of dar al-Ahd to the territory of tributary Christian princes on the condition of obedience and payment of annual tax (kharāj). In return theses territories were provided peace and security by the Sultan's 'ahdnāmahs. In such type of treaties, it was usually specified that the dependent state under obligation to follow the list of friend and enemy states of treaty state. In return they were ensured peace, protection from enemies, liberty of religion, laws and customs etc.[99]

As per Islamic law, a person as a faithful is ma'ṣūm (protected) irrespective of his residence. However, 'iṣmah under domestic law is legally granted to those who come within the territorial jurisdiction of the Dār al-Islām disregarding of their faith.[100] In the case of Dār al-Muwāda'ah, some jurisdiction in kind of 'iṣmah might be allowed for Dār al-Muwāda'ah and its inhabitants in line with the stipulations of the peace treaty.

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[96]This is a Spanish terminology equivalent to the English re-conquest. That is used to describe   historical medieval campaigns of Spain and Portugal to recapture their territory from the Muslims (Moors), who had conquered in the eighth Centaury   most of the Iberian Peninsula.
See: https://www.britannica.com/event/Reconquista on 22-03-2020.
[97] Campo, *Encyclopedia of Islam*, 182.
[98] Campo, 182.
[99] Lewis, Pellat, and Schacht, *Encyclopedia of Islam*, II:116; Hamīdullah, *Muslim Conduct of State*.
[100]Ahmad, "The Notions of Dār Al-Harb and Dār al-Islām in Islamic Jurisprudence with Special Reference to the Hanfī School," 9.

2.5-The Changes in the Status of Dār

Like the notion of dār, its state is not static and one dār can be changed into another category. Dār al-Islām can be converted into dār al-ḥarb or dār al-ḥarb can be changed into dār al-Islām. Similarly, dār al-ḥarb can be changed into dār al-Kufr, dār al-Muwāda'ah or dār al-'Ahd. According to Imām Abū Ḥanīfah, a territory of the dār al-Islām. can possibly be converted into dār al-ḥarb, if it is reconquered by non-Muslims with following three conditions (i) if Islamic law is replaced by non-Muslim laws; (2) or it has formed alliance with dār al-ḥarb; (3) or protections afforded to Muslims and their non-Muslim dhimmis have extinct.[101] Imam Abū Yusuf says that dār al-Kufr will exist with the existence of its rules. Imam al-Kasānī holds opinion that dār al-Islām is linked with Islām and dār al-Kufr is linked with Kufr. However, Abū Ḥanīfah ditched dār with Islām and Kufr and attached it with peace and fear. He is of the view that any place where Muslims feel peace and live comfortably is dār al-Islām for them and any place where they have fear and insecurity for them that place is dār al-Kufr. Imām Abū Ḥanīfah has the opinion that rulings regarding dār are not dependent of Islām and Kufr. but are dependent on fear and peace for Muslims. If they feel security and peace in a territory, it will be treated for them as dār al-Islam and if they feel fear and danger then this territory will be considered as dār al-kufr.[102]

The aforementioned conditions are crucial as some hold opinion that application of even one rule of Islamic law in any territory is enough for rendering it house of Islām. The terminology dār al-Kufr is also used to describe dār al-Ḥarb. When a country of non-

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[101] Muhammad Amīn Ibn 'Umar ibn Al-'Āziz (d.1252/1837) Ibn 'Abidīn, *Radd al-Muḥtār 'alā al-Durr al-Mukhtār* (Beirut: Dār Al-Fīkr, 1992), 04:176.

[102] Al-Kāsānī, *Badā'ī al-Ṣanā'i' fī Tartīb al-Sharā'i'*, 07:130-131.

believers was entered into state of war with Muslims it was changed from dār al-Kufr to

dār al Ḥarb.[103] Conversely, a peace treaty with Dār al-Islām converts its status to Dār al-

Muwāda'ah or Dār al-'Ahd.There is a similarity between the definition of the abode of

war and conviction of jihād, both have been amended due to the international political

condition of the Muslim states. Similarly, the idea of unfriendly relations with other

countries has been revised by the Islamic states.[104]

3-Contemporary Western Approaches on Dār al-Islām and Dār al-Ḥarb

Sarah Albrecht in her remarkable research 'Dār al-Islām Revisited: Territoriality in

Contemporary Islamic Legal Discourse on Muslims in the West', has studied in-depth

various western approaches to the Dār al-Islām and its allied concepts. She states that the

classical concepts are used to define Muslim/non-Muslim relations within jihadi

perspective. She observes that these terminologies are among the catchwords along with

other terminologies, such as Fatwah and Sharī'ah in the western media. These

terminologies ring a bell of the interested public and many of them consider them as

threatening connotations.[105] Through such notions they are trying to prove the idea of

clash of civilizations between Islam and West predicted by Samuel Huntington.[106] As a

result, on the one hand, many Western people have no idea about Islam's contributions to

European civilization and academic and on the other hand conspiracy theories about its

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[103] Ahmad, "The Notions of Dār Al-Ḥarb and Dār al-Islām in Islamic Jurisprudence with Special Reference to the Ḥanfī School," 9.

[104] Snouck Hurgronje, "The Holy war made in Germany,"in Verspreide Geschriften, iii (New York, 1915) 257.

[105]Sarah Albrecht, Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West (London: Boston: Brill, 2018), 04; Albrecht Sarah, "Relocating Dār Al-Islām," in Locating the Sharī'a. Legal Fluidity in Theory. History and Practice, ed. Sohaira Z.M Siddiqui, Hardcover, Serie: Studies in Islamic Law and Society, Band: 48 (Leiden : Bosten: Brill, 2019).

[106] Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order (New York: Touchstone, 1996).

civilization have been widely propagated.[107] In this environment of distrust, even literary

contributions, such as Samuel Huntington's[108] 'The Clash of Civilizations',[109] Francis

Fukuyama's[110] 'The End of History and the Last Man'[111] and Felipe Fernandez

Armesto's[112] 'Millennium'[113] are seen as fragment of an international conspiracy in

opposition to Islām from the 'bludgeon-Islam-out-of-existence' school of thought.[114]

Extremism and islamophobia in West and USA can be seen in many academic and media

outlets. One example of this anti-Islamic rhetoric is most popular on anti-Muslim website

jihadwatch.org. The section 'Islam 101,' of this website defined dār al-Islām in distorted

manner as under:

> "It is incumbent on dār al-Islam to make war upon dār al-harb until such
>
> time that all nations submit to the will of Allah and accept Sharia law.
>
> Islam's message to the non-Muslim world is the same now as it was in the
>
> time of Muhammad and throughout history: submit or be conquered. The
>
> only times since Muhammad when dār al-Islam was not actively at war
>
> with dār al-harb were when the Muslim world was too weak or divided to

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[107] Muhammad Zia ul Haq, "Muslims' Participation in Interfaith Dialogue: Challenges and Prospects," *Journal of Ecumenical Studies*, 49, no. 04 (Fall 2014): 636.

[108] Samuel Phillips Huntington (1927–2008) was an influential conservative political scientist whose works covered multiple sub-fields of political science. He gained wider prominence through his *Clash of Civilizations* thesis of a post-Cold War new world order.

[109] Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Touchstone, 1996).

[110] Yoshihiro Francis Fukuyama (born 1952) an American political scientist and political economist who is famous for his theory of worldwide spread of liberal democracies and free market capitalism of the West.

[111] Francis Fukuyama, *The End of History and the Last Man* (New York: Avon, 1993).

[112] Felipe Fernández-Armesto (born 1950) is a British historian and author of several popular works of history.

[113] Felipe Fernandez-Armesto, *Millennium: A History of the Last Thousand Years* (New York: Scribner, 1995).

[114] The holders of this thought treat Islam as a dark force in the history, and Muslims treat this theory as a conspiracy against them.
See: Akbar S. Ahmed, "America and the Challenge of Islam," *The Hedgehog Review* (Spring 2003): 21-22.

make war effectively. For the past few hundred years, the Muslim world has been too politically fragmented and technologically inferior to pose a major threat to the West. But that is changing." [115]

Sarah after quoting abovementioned text observes that this text is presenting threatening posture and advancing an everlasting conflict among Muslims and nonbelievers. She felt that by ignoring the various description of Muslim and non-Muslim relations, this opinion misrepresents the doctrines of dār al-Islām and dār al-ḥarb as the allegedly static and unchangeable doctrine. Illustration on Islamic legal terminology, she presents perpetuates widespread fear-laden stereotypes of Muslims and Islam. She observes that such obsolete depictions of Islamic notions are, however, not limited to popular anti-Muslim propaganda, but can also be found in the Western academia on Fīqh and its history. [116] Bernard Lewis is one of such examples. He explains Jihād as timeless obligation to convert people to Islām or at least subjugate them to the Islamic state. He further states:

> "Until that happens, the world is divided into two: the House of Islam (dār al-Islām), where Muslims rule and the law of Islam prevails; and the House of War (dār al-Ḥarb) comprising the rest of the world. Between the two there is a morally necessary, legally and religiously obligatory state of war, until the final and inevitable triumph of Islam over unbelief. According to the law books, this state of war could be interrupted, when expedient, by an armistice or truce of limited

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[115] Gregory M. Davis, "Islam 101," http://www.jihadwatch.org/islam-101 (accessed September 4, 2017).
[116] Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West*, 05.

duration. It could not be terminated by a peace, but only by a final victory." [117]

More than two decades later, in 2012, in an interview with an online magazine the Islamic monthly, Lewis reiterated that the tussle of Islām and the West is in fact "From the Muslim point of view, it is between the Dār al-Islām and the Dār al-Ḥarb. He mentioned that present West is Dār al-Ḥarb, in accordance with classical classification. [118]

Tilman Nagel[119] has influence on right-wing populist anti-Muslim discourse. He ponders that the nature of Muslim/non-Muslim relations has to be understood under this principle, while stating:

> "The "territory of Islam" is in confrontation with the so-called "territory of war";
> the latter includes all countries around the globe which are not yet subject to the
> sharī'ah. The absolute truth claim of Islam finds expression in this juristic
> construct, just as the conviction that Islamic proselytization (al-da'wa) is
> ultimately a military endeavor (kriegerisches Geschäft)." [120]

Nagel while neglecting whole historical debate on the issue insists that this irreconcilable division is based on Qurān (9:29) and until today this command has not been refuted in Islamic Jurisprudence. He claimed territorial paradigm in Islamic Law is unchanged. He claims that this situation untimely gives legitimacy to Muslims in the non-Muslim states to violate laws of these countries. He perceived that being the citizen of Dār al-Ḥarb they

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[117] Lewis, *The Political Language of Islam*, 73.
[118] Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West*, 05.
[119] A German Orientalist and Professor Emeritus at the University of Göttingen Tilman Nagel was born in 1942. He is author of numerous books on Islam and recognized as one of the world's leading experts in Islamic Studies, particularly theology.
[120] Tilman Nagel, *Das islamische Recht: Eine Einführung* (Westhofen: wva Skulima, 2001), 104, 111.

are not under obligation to obey its law and it may be justified for them to show Islamic solidarity.[121]

Commenting on the views of Nagel, Sarah identifies that he dismissed all diversified opinions related to these concepts and without any substance accused the western Muslim immigrants for trying to undermine Western constitutional democracies. He claimed that this behavior of them is sectioned by the rulings of Islamic Law. His hostility can be seen through his efforts to apply medieval terminologies on the contemporary situations, while referring Muslims living in non-Muslim countries as 'musta'minūn'. Through applying this medieval terminology, he declared western states as 'host countries' for them.[122]

Summing up the view of Lewis and Nagel, Sarah feels that both the prominent scholars are trying to reconstruct technical terms of dār al-Islām and dār al-harb into somewhat ideological terminologies. Through anachronistic and politicized approaches, they misrepresent Islamic legal debates of territoriality.[123]

On the footstep of Lewis and Nagel, German Orientalist Hans Kruse emphasized that the categorization of the globe into dār al-Islām and dār al-harb is the result of the 'perpetual hostility between Muslims and unbelievers.' [124] Similarly, Hiroyuki Yanagihashi, Professor of Islamic Studies at the University of Tokyo, claims:

> "by definition, Islamic territory (dār al-Islām) is ruled by the Muslim community
>
> (al-ummah al-muslimah). This community is at least latently in conflict with other

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[121] Ibid, 102-103.

[122] Ibid, 102-103.

[123] Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West*, 07.

[124]Hans Kruse, Islamische Völkerrechtslehre: Der Staatsvertrag bei den Hanefiten des 5./6. Jahrhunderts d. H. (11./12. Jh. n. Chr.), 2nd ed. (Bochum: Studienverlag Dr. N. Brockmeyer, 1979), 57.

religious communities outside or inside Islamic territory."[125]

Sarah, after evaluating various approaches to understand dār al-Islām and Dār al-Ḥarb concludes that due to the significance of the notions many other authors draw a historical picture of the notions without considering the diversity of definitions that have developed over the centuries. Some simply identify dār al-Islām with the 'Islamic state.'[126] Others insist to reconstruct contemporary meanings on the basis of rich diversity of definitions of dār al-Islām over the course of history.[127]

Legal expert Gamal M. Badr[128] draws attention towards the fact that historical Islamic world has passed through various changing worldviews which can be classified into (1) the era of evolution, (2) the era of interconnection and (3) the era of harmony.[129] During the age of expansion Islām promotes the idea of attracting the globe toward the latest religion of universal vocation. During this period Muslim jurists advanced a theory which declares the whole world outside the territory of Islām was termed as 'dār al-ḥarb' and hostility was declared normalcy of its relation with the land of Islām. This worldview allowed peace treaty but not for more than 10 years. This period of expansion that lasted over a century culminated on the conclusion that the aim of conveying Islām to the whole

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[125] Hiroyuki Yanagihashi, "Solidarity in an Islamic Society: "Aṣaba, Family, and the Community," in *The Concept of Territory in Islamic Law and Thought,* ed. Hiroyuki Yanagihashi (London, New York: Kegan Paul, 2000), 51-67.

[126] M. Ali Kettani, *Muslim Minorities in the World Today* (London: Mansell, 1986), 258.

[127] Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West,* 08.

[128] Mr.Gamal M. Badr has served as judge of the Supreme Court of Algeria. He has also served as Professor of Islamic Law at New York University. Previously he also served as Deputy Director Codification division of UN.

[129] Gamal M. Badr, "A Survey of Islamic International Law," *Proceedings of the Annual Meeting (American Society of International Law)* 7 (1982): 56.

world is not attainable. [130]

The 2nd stage of interaction started with the realization that the jihād must continue but for the defense of the Islamic country against the unbelievers who threatened the solidarity of the Islamic country that was allowed in age of expansion mere fact of disbelief now required other justifications to be legalized. The dichotomy of dār al-Islām and dār al-ḥarb was restored with tripartite severance of the world into dār al-Islām and dār al-ḥarb and dār al-sūlh. Muslim jurists imposed new juridical formulations of dār al-sūlh to address the new ground reality of age of interaction. The idea of permanent hostility was gradually losing its strength to entertain the friendly relations through peace treaties.[131]

Badr identified that three major events from thirteen to sixteen centuries i.e., the culmination of the Crusades, the Reconquista [132] of Spain and advancement of the Ottomans in Europe unfolded new age of co-existence for the Muslim world. The age of the interaction gradually ended with this new age of coexistence. The Christian West and the Ottoman Muslim of East remained rivals for too long and finally realized that no one will be able to crush the other. Therefore, they need to coexist through normal relationship of indefinite peace. The age of co-existence also coincided with formative stage of international law. The ground realities of this age forced the Muslim jurists to abandon the idea of permanent hostility and peace became norm. At this stage Muslim jurists realized that peace treaties not remained for determined time period. The peace treatise dated January 28, 1292, between Mameluke Sultan of Egypt and Syria, al-Ashraf

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[130] Badr, 56-57.
[131] Ibid, 57.
[132] Reconquista is a period in which the territory of medieval Spain and Portugal of the Iberian Peninsula was recapture from the Muslims as a result of campaigns by Christian states in the early 8th century.

Khalīl, and Don Jaime II, James the Just, King of Aragon, on his account and on account of two rulers of the Kingdoms of Castile and Leon and Portugal are early examples of the permanent peace treaties. The Franco-Ottoman treaty of 1535 and similar nature of peace treaty of Ottoman with England signed on 1580 are other examples of permanent peace treatise among Muslims and non-Muslims. Thus, Egypt and later Turkey, the leading Islamic powers of those days started to participate in the process of common law through forming political associations with European states. The two Qurānic based fundamentals i.e., the sanctity of contracts and treatise and the regulation of reciprocal treatment can serve as the common grounds for various legal systems to contribute in global peace.[133] He stressed that Muslim jurists should endeavor to spread the better understanding of Islamic legal system all over the world,[134] since bona fide comprehension of Islamic law is need of time.[135]

Establishment of a society required stability and identity which cannot be ensured without demarking the boundaries. Societies need order and structure to fully utilize their potentials. This is the reason that defining territorial boundaries is necessary in terms of religions or nation states. In the absence of territorial boundaries, civilized societies cannot be constructed. It is difficult to imagine what the nature of human civilization would have been where there is no order or structure in socioeconomic relations between various groups of people. The origins and evolution of concepts of dār al-Islām and dār al-ḥarb are expressed through variety of diverse definitions. Islamic law usually explains territorial jurisdiction within the framework of dār al-Islām, dār al-ḥarb and dār al-'Ahad.

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[133] Gamal Moursi Badr, "Islamic Law: Its Relation to Other Legal Systems," *The American Journal of Comparative Law* 26, no. 2 (1978): 187, doi: 10.2307/839667.
[134] Badr, "A Survey of Islamic International Law," 61.
[135] Badr, 61.

Muslim jurists used these notions to explore the territories for the purpose of extension of the jurisdiction of Islamic Law. The Islamic legal tradition of classifying the world into geo-religious territories has attracted wide attention in Western academic and popular discourses about Islām. Thus, dār al-Islām and dār al-ḥarb – popularly translated as "house of Islam" and "house of war" – have entered the canon of Arabic terms frequently used in popular (and populist) debate about Islām. Commonly mentioned in the context of Muslim/non-Muslim relations and jihad, these concepts seem to ring a bell with the interested public. While they are, as it is common in popular discourse, rarely defined or contextualized, they often appear – like other political terminologies to attract the attention of masses through media. Dār al-Islām is defined as the territory which is dominated by the Muslims. It is governed by Islamic laws and Muslims are living peacefully in it. While dār al-ḥarb is the territory which is not administered by Muslims. It is the territory in which enemies are dominated. Along with these two fundamental concepts classical jurists have also dār al-'Ahd and dār al-ṣulḥ. Some jurists, opined that the safety of life and freedom to practice their religion if provided to Muslims by any state then they could welcome that rule and contemplate themselves still be in dār al-Islam. Although the classical notion of dār al-Islam and the dār al-ḥarb is no more available due to change in international scenario and development of nation-state concept, but still these rulings are holding an important place in Islamic legal theory, and used frequently in Muslim political diction.

The classification of the world into geo-religious borders such dār al-Islām and dār al-ḥarb are among the issues that are discussed among western academic, political and media circles. Sarah has pointed out many illusions that create misperceptions and

misunderstandings about Islām and Muslims in West, particularly in Western Europe. One of these illusions is that 'Muslim world' or dār al-Islām is often described as a uniform bloc ready for aggression and invasion while West or dār al-ḥarb is treating them as a potential threat to them. Such type of circumstances is providing an opportunity for those who are interested in promotion of 'us' and 'them' mindset to advance clash and tension between 'Western and Islamic Civilization. Apparently, these views are used to ignore mainstream Islām and considered radicals and fundamentalists such as the self-proclaimed "Islamic State' as the normative Islām. On the other hand, the situation is helping the extremists and exclusivists in Muslim societies to use 'them and us' mentality for hijacking Islam and killing the innocent people in the name of religion. Their actions cannot be justified or legitimized by Islamic theology, but the outcomes and effects of their deeds will be disastrous for Islām and Muslims. This situation is further deuterated by the opinion of scholars such as Bernard Lewis who believes in permanent hostility. Evaluating his opinion, Sarah feels that Lewis gave this opinion without considering many other important factors which are necessary to understand this notion such as origins, evolution and diversity of definitions. He took one opinion which states that Muslims and non-Muslims are in permanent state of war and put it as normative Islamic legal view. His assertion is without any historical context and an effort to suggest understanding of this dichotomy as a stagnant, unalterable paradigm that is not affected by historical developments. Tilman Nagel claims that the notions of dār al-Islām and dār al-ḥarb are reflecting the 'principle of everlasting hostility'. The views of Nagel are articulating an unbridgeable divide between 'us' and 'them,' declaring the Muslim 'other' a potential threat to West. The similar views are also expressed by other scholars such as

German Orientalist Hans Kruse and Japanese Hiroyuki Yanagihashi. Contrary to these opinions which portrait dār al-Islām and dār al-ḥarb as static and unchangeable doctrines Gamal M. Badr linked construction of rulings of Islamic law with the circumstances in which it was articulated. He is of the view that Islamic world moved from the era of evolution to the era of harmony through era of interconnection. In all these stages of history Muslim jurist gave ruling that were suitable for the worldview of that period. He concludes that Islamic states of today are vital and dynamic topics of international law. According to him in innovative development of universal international order, Islam can play relevant and useful role.

The chapter is an effort to address the contemporary questions about the notion of dār. The data of the chapter not only analyze conception diversity of various dār related concepts, such as dār al-Islām, dār al-ḥarb and dār al-'Ahad, but also clarifies that these concepts are not static and historically they are elaborated in the context of the age. The research suggests that these are not timeless demarcations which must be followed by the Muslims in all ages. The analysis of the chapter also shows that like Muslims many Western scholars also have the tendency of following literalist approach so that they can demonstrate that Islamic law cannot suggest any workable framework for the Muslims in the West. Within these extremist views a sizable number of classical and contemporary scholars are available to suggest reconstructionist approaches, so that rulings of Islamic law can contribute in the individual and collective lives of the Western Muslims.

CHAPTER NO. 5

EMERGENCE OF MUSLIM COMMUNITIES IN

NON-MUSLIM COUNTRIES

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This chapter describes the emergence of Muslim communities in non-Muslim countries and attempts to evaluate the current situation in the light of historical background and classical discourses over the issue. Therefore, it will be appropriate to discuss classical concepts related to migration and past and present emergence of Muslims in west. The chapter proceeds with the topic of *Hijrah* and its significance in establishment of Muslim communities around the globe. The second part describes Muslims' interaction with non-Muslim societies in early periods of Islamic history. It then follows by a detailed discussion on the Muslim emigrations during colonial period. Reasons behind the contemporary migrations of the Muslims towards west and religious life of the migrant Muslims have been discussed in the last part of the chapter.

1-Hijrah and its Significance in Establishment of Muslim Communities

1.1-Concept of Hijrah

Generally, this terminology is used to describe the exodus of Prophet Muhammad (peace be upon him) from Mecca to Yathrib in year 622. Lexically, *hijrah* is used in various meanings such as separation, abandonment. It is also used for the meaning of leaving from a place to another. The term *hijrah* is from the root, h-j-r which is describing the action of cutting oneself off from friendly relations.[1] The use of the terminology in Al-Qurān is reflecting variety of meanings. One of its meanings is 'to cut someone off from

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[1] Muhammad al-Faruqe, "Emigration," in *Encyclopaedia of the Qurān*, ed. Dammen McAuliffe, vol. 02 (Leiden : Bosten: Brill, 2002), 02:18.

friendly association.'[2] It is also used in the meaning of 'to avoid association with'.[3] As

Allah says in Al-Qurān:

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[2] Al-Qurān 4:34-38.
[3] Al-Qurān 73:10.

"Thus, the husband should abandon his disobedient wife alone in the conjugal bed to make her see reason".[4] Another use of the word is in the meaning of fleeing from or opposite meaning of connectivity.[5] "And the believer must flee from the abomination"[6].The terminology is also mentioned in the meaning of ending mutual friendly relationship. Traditionally it is used in the meaning of 'flight' but its true sense is 'cracking of the ties of relationship or alliance'.[7] The term is frequently employed to describe the datum of escaping from the land ruled through the non-believers to connect the society of Muslims.[8] Immigration or hijrah was manifested among the Muslim community since its beginning. It is reported that Prophet Muhammad (peace be on him) directed few believers of al-Habashah /Abyssinia for their protection from torments of the people of Mecca.[9] The hijrah to Abyssinia was so much successful that this area was given special status in Islamic history. It was the only territory that continued ally with Islamic State as dār al-Ḥiyād.[10] The migration to Abyssinia is named as first hijrah in Islamic history. The details of this event have been mentioned and reported in various sources of history, Sīrah and Ḥadīth by intellectuals, for instance Ibn Isḥāq, al-Ṭabarī, al-Nasā ī, Ibn Sa'd, Ibn Kathīr, and al-Balādhurī. The accurate number of immigrants to Abyssinia is not known. Various numbers have been

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[4] Al-Qurān 04:34.

[5] Muhammad ibn Mukarram Ibn Manzur, Liāsn Al 'Arab, First (Beirut: Dār Sadīr, n.d.), 5:250.

[6] Al-Qurān 74:05.

[7] Clifford Edmund Bosworth, ed., The Encyclopaedia of Islam: H-Iram (New Edition), vol. 03 (Leiden, London: E.K Brill & Luzac & Co, 1986), 3:366.

[8] Sami A. Aldeeb Abu-Sahlieh, "The Islamic Conception of Migration," International Migration Review 30, no. 1 (1996): 37., doi:10.2307/2547457.

[9] Muhammad Hamidullah, Majmu'āt al-Wathā'iq al-Siyassiyyah Lil- 'Ahd al-Nabawī Wal-Khilāfah al-Rāshidah (Beirut: Dār al-nafa'is, 1985). 100.

[10] A non-Islamic land that was recognized as a sovereign state without having concluded a truce with the Muslims, for several centuries.

reported by various historians. Al-Ṭabarī mentioned that 82 Muslims migrated to al-Ḥabashah while Ibn Saʻd reported higher figure of 116.[11] In this famous historical event (615–622 CE), the Christian king the Negus (al-Najāshī) agreed to extend refuge to those Muslims who were persecuted by the Meccans. He not only welcomed them but also protected them and allowed them to freely practice their faith in his kingdom.[12] This first emigration of Islamic history took place on the directive of Holy Prophet (peace be on him).

After various efforts to find an appropriate place for establishing Islamic society, including al-Ṭā'if, Prophet Muhammad (peace be on him) was usefully able to negotiate with the major Arab tribes in Medina through their representatives an agreement at the place of al-ʻAqabah during the hajj of 622. This agreement is famous as bayʻat al-ḥarb or the pledge of war. Through this agreement these tribes were agreed to provide shelter to the Muslims in Medina and defended him by force if required. Before his journey Prophet Muhammad (peace be on him) encouraged his Meccan followers to migrate to Medina. Consequently, about seventy of his followers traveled in small parties. Prophet Muhammad (peace be on him) and his closest companion Abū Bakr with their families left Makkah to wait for the divine direction for their travel.[13]

1.2-The Event of Hijrah of Prophet Muhammad (peace be on him)

The journey of Prophet Muhammad (peace be on him) from Makkah towards Yathrib is an important historical event of Islam. It is named as Hijrah and performs a diverse and significant part in Muslim law, archive, culture, thought and civilization. The details of this historical event are reported by many companions and recorded in many authentic

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[11] Al-Faruqe, "Emigration," 02:18-23.
[12] Haggai Erlich, *Ethiopia and The Middle East* (London: Lynne Rienner Publisher, 1994), 16.
[13] Ibid, 03:366.

early sources of Islam. These sources report various dates of this event that happened in year 622 such as May 31, 622, June 28, 622, September 23, 622 and November 11, 622. The differences in the reporting dates is due to calculation of this event on the bases of pre-Islamic calendars as the Islamic calendar later started from the year of Hijrah. Majority of reports state the day of departure as Monday and some reports say, that it was Tuesday when Prophet (peace be on him) moved for Medina.[14] The Islamic sources based on tawātur reports revealed that the journey of the Prophet (peace be on him) was not directly to Medina. From Mecca he left for a grotto in the climb of Thawr then remained around for few days prior to advancing towards Medina. F.M Shamsi after analysis of various reports containing details of hijrah has prepared chronological order of the journey of the Prophet (peace be on him). According to which he started his journey from Medina on Thursday (1st day of Hijrah). His first stopover was at Thawr grotto from Friday to Sunday. Then he departed on Monday (5th day of Hijrah) walked through camp of Umm Ma'bad' on Tuesday and reached around Yathrib by 12th dawn of Hijrah. He stayed at Qubā' for four days prior to his arrival to Medina. The first visit of Prophet (peace be on him) of Medina was on Friday (16th dawn of Hijrah). He stayed in Qubā' for 14 day's from 12 to 25th day of Hijrah. He finally moved to the house of Abū Ayyūb's on Monday 26th day of Hijrah.[15] This historical event marks the commencement of the Islamic calendar.

1.3-Debate among Scholars Regarding Obligation of Migration to Islamic Land

The debate on the classification of the world based on territories is narrowly interrelated

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[14] F.A Shamsi has collected details of this event from various sources in depth and provided related information for the credible sources. See: F.A Shamsi, "The Date of Hijrah (I)," *Islamic Studies* 23, no. 3 (1984): 189-190.

[15] Ibid, 217; F.A. Shamsi, "The Date of Hijrah (II)," *Islamic Studies* 23, no. 4 (1984): 289.

to the question of permission of residence in a particular land or to migrate (hijrah) to dār al-Islam. The question 'where Muslims can reside?' is as old as the concepts related to dār. This question is followed by another question related to the conditions in which it is legitimate for a Muslim to abode in infidels' majority countries. As the opinions of scholars are varied on territoriality in Islamic perspectives, similarly diversity of views are found on the answers of these questions. These views represent the trends in the Islamic thought on the issue developed to address the matter in accidence with the local challenges. The parameters that have been used by scholars of Islam and Islamic legal experts, from the epoch of Prophet Muhammad (peace be on him) till today are not limited to the question of rule of the political authority, but also involve a variety of aspects that may declare dwelling in a particular area permissible, prohibited or optional.[16]

It appears to be one of the most important obligations of the Muslims to migrate to Medina afterward the Hijrah of Holy Prophet (peace be on him) to this new center of the Muslim community. In spite of clear instructions of the Holy Prophet (peace be on him), some Muslims stayed in Mecca while practicing secretly their faith. After hijrah to migrate to the land of Islām was condition of embracing Islam. Due to the restriction of participation in the battle, contrary to the forces of Muslims, few were murdered. By hinting at that awful incident, Al-Qurān urged the Meccan believers to connect to the newly established society in Medina in these words:

"As for those whose souls are taken by the angels (at death) while they are in a

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[16] Sarah Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West* (London; Boston: Brill, 2018), 63–64.

state of injustice against themselves, they will be asked by the angels: "What state were you in?" They will answer: "We were oppressed in the land." And the angels will say: "Was not God's earth large enough for you to migrate?" [...] Whosoever leaves his country in the cause of God will find many places of refuge and abundance on the earth."[17]

This verse asks Muslims to escape from oppression without stipulating the nature of oppression. The direction to flee from oppression in this verse is without identifying any particular regime. This general command instructs the Muslims to stay wherever they do not suffer any cruelty. In these verses, it was not obligatory for the Muslims to migrate to Abyssinia or to return to Medina after the journey of the Prophet Muhammad (peace be on him) toward Yathrib.[18]

These Qurānic verses (Q 8:72, 4:89, and 4:100) along with some other verses[19] declare general obligation on Muslims to leave infidel's territory and join newly established community of Muslims in Medina. However, the nomads who converted to Islam but were not interested to settle in Medina were allowed to stay in their territories. It was commanded to every Muslim living in territory of infidels to join the Muslim community, if it is possible for them to do so. These verses indicate that this migration was necessary to protect them from persecution. Their migration gave strength to Muslims and weakened the infidels. This is the reason that phrases such as believer, migrant and striver in the path of Allah have been used together in the Qurān.[20] Those who immigrated towards Medina were named muhājirīn, while their hosts who greeted them were named

[17] Al-Qur'ān 04:97-99.
[18] Sarah Albrecht, *Dār Al-Islām Revisited,* 70.
[19] Al-Qurān 04:100; 9:20.
[20] Al-Qurān 02:218; 8:72, 74, 75; 8:20; 16:110.

ansār. Due to their specifications for each other, Allah Almighty himself, through the directives of Qur'ān, created an association between the immigrants and those who provided them shelter. However, such association was not allowed with Muslims who have not migrated until they had not done it. It was also directed that if these non-migrated Muslims seek help in matters related to faith, then it will be the obligation of the believers to aid them, if it is not forbidden by any treaty.[21] The Muslim muhājirīn had abandoned all their belongings back in Makkah. They also broke all links (including family) with the infidels[22] they needed to be managed by the other fellows of the society. To strengthen ties among the various members of the community and resolve financial problems, the rich were urged to help the poor.[23] Holy Prophet (peace be on him) also introduced a legal framework for social reconstruction of the post migration Medina through *mīthāq-al-madīnah* agreement between the immigrants and the ansār among the Muslims and Jews living in Medina.[24] Muslims were prohibited to take associates from non-believers except they quit their accommodations in the path of Allah.[25] Through the new communal system financially weakened were provided finical incentives. A part of war's spoil was given to the immigrants, and they were placed before the residents.[26] Through post hijrah steps, Prophet (peace be on him) established a fraternity between all Muslims.[27] This included application of inheritance rights as prescribed by Al-Qurān based on next of kin.[28] Till the conquest of Makkah, migration to the land of Islam was

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[21] Al-Qurān 08:72.
[22] Al-Qurān 09:23.
[23] Al-Qurān 24:22.
[24] Hamīdullah, *Majmu'at al-Wathā'iq al-Siyassiyyah Lil- 'Ahd al-Nabawī Wal-Khilāfah al-Rāshidah*, 59.; Abu-Sahlieh, "The Islamic Conception of Migration," 38-39.
[25] Al-Qurān 4:89.
[26] Al-Qurān 59:8-10.
[27] Al-Qurān 49:10; 3:103; 9:11.
[28] Al-Qurān 33:6.

implicit condition of embracing Islam and new converts were bound to undertake a pact to migrate to the Muslim community.[29] Prophet (peace be on him) abandoned the obligation of immigration after Mecca was conquered by Muslims in 630.This obligation however was replaced with promising to contribute in the war.

[30](فَقَالَ النَّبِيُّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ يَوْمَ افْتَتَحَ مَكَّةَ: «لاَ هِجْرَةَ، وَلَكِنْ جِهَادٌ وَنِيَّةٌ)

In another hadīth Prophet (peace be on him) quoted as saying: "**Emigration will not abolish until repentance abolishes,**" or "**till the sun shall grow from its place of setting.**"[31]

When Prophet Muhammad (peace be on him) had assumed authority in Medina and founded a state in which Muslims were provided with new signs of unity, such as oneness of God, one last Prophethood and one center of worship. After taking important strategic and administrative steps to assure safety and security, he directed to the emigrants of Abyssinia to return to Medina, but did not force them to do so. The scholars such as Khaddūrī have derived reason of special treatment with Abyssinia from the Hadīth and its classical interpretation. According to him two factors are behind this unique position. First, from a strategic point of view, Abyssinia was unassailable due to its geographical place, territorial location and its physical conditions. Second, from a doctrinal epact it is stated that Prophet (peace be on him) has given several favorable remarks about the

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[29] Muhammad al-Faruqe. "Emigration," *Encyclopedia of the Qurān*, ed. Jane Dammen McAuliffe. vol. 2, (Leiden, Boston: Brill, 2002); Abou El Fadl, "Islamic Law and Muslim Minorities," 143–147; Abou El Fadl, "Striking a Balance: Islamic Legal Discourse on Muslim Minorities," 50; March, *Islam and Liberal Citizenship*, 166–167

[30] Ahmed b. Ali al-'Asqalānī Ibn Ḥajar, *Fatḥ Al-Bārī Sharḥ Saḥīḥ al-Bukhārī* (Beirut: Dār al-Ma'arifah, 1379AH), 4:47, Hadīth No. 1834.

[31] Abū Dā'ūd, *Sunan* (Egypt: Dār al-Kutub al-'Ilmiyyah, 1935), Hadīth No.2479

straightforwardness, bravery, and integrity of the Abyssinians. [32] Another reason for considering Abyssinia impregnable was a warning of Holy Prophet (peace be on him) against an attack on their land because as reported by Abū al-Ḥasan Muḥammad b. ʿAbd al-Hādī: "Ethiopia's roughness and the mountains and rugged valleys and sea that lies between it and the Muslims". [33] Muslim Jurist-theologian determined the status of Ethiopia on the basis of many other *Ḥadīth* and *āthārs*. Many sayings in favor of Abyssinia are conveyed by Prophet Muḥammad (peace be on him). In one of oft-quoted *Ḥadīths* he is reported to say: **"Leave the Abyssinians alone, so long as they leave you alone."[34]**

Before the conquest of Makkah, hijrah was described as immigration from Makkah and adjacent territories to Medina. After the conquest this migration was no longer required. It is reported that when Mujashāʿb. Masʿūd embraced Islam, he requested to the Prophet Muḥammad (peace be on him) to take his pledge for hijrah. At this occasion the Prophet (peace be on him) said that after the takeover of Makkah hijrah is not required. [35] However, the question of migration and its related debates continued to be relevant from the first hijrah of the Prophet (peace be on him) till today. In early centuries of Islam and middle ages the issue was considered for those who embraced Islamic faith and lived in the areas of non-believers or in the areas of the Muslims that were occupied by the non-Muslims. During the colonial period when majority of Muslim land was controlled by the

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[32] Majīd Khaddūrī, *War and Peace in the Law of Islam* (Baltimore: The Johns Hopkins Press, 1955), 256-257; Sarah Albrecht, *Dār Al-Islām Revisited*. 62.

[33] Majīd Khaddūrī quoted this in his *War and Peace in the Law of Islam* from Nasā'ī, *Sunan* with Sayūṭī commentary and Abū al-Ḥasan glosses (Cairo, A.H.1312), Vol. II, 65; see also: Sarah Albrecht, *Dār Al-Islām Revisited*. 62.

[34] Abū Dā'ūd.*Sunan* (Cairo,1935),Vol. IV, Ḥadīth No.4302 ; Al-Nasā'ī, *Sunan* (Egypt: Dār al-Kutub al-'Ilmiyyah,1980), Ḥadīth No.3176

[35] Ibn Ḥajar al-'Asqalānī, *Fath al-Bārī Sharh Saḥīḥ al-Bukhārī* (Beirut: Dār al-Maʿarafa, 1379), Ḥadīth No.1834.

colonial powers, the issue took many new dimensions and new interpretations for dār al-Islam and dār al-ḥarb emerged. After migration of Muslims to Europe and USA, new Muslim minorities emerged in various different Western lands. When their situation was assessed through the binoculars of classical interpretations of dār al-Islam, dār al-ḥarb, dār al-ahad and hijrah, a renewed discourse in the issue emerged particularly among scholars living in the West. During the Umayyad Caliphate (661 and 750) two new interpretations of hijrah became prominent. According to one understanding hijrah was considered as a movement from rural mode of living to urban mode of living.[36] Many commentators of the Qur'ān, used the terminologies Muhājir and 'Arābī as opposing terms.[37] According to the doctrine of Azārika[38] sect of Khawārij territories that is not in their control are part of dār al-Kufr and migration to their campus is obligatory. Their doctrine was based on considering all those Muslims as unbelievers (takfīr) who had not made the hijrah to them[39]

1.4-The Evolving Positions of Jurists on the Obligation of Migration

Abou El Fadl has evaluated opinions of the classical legal experts on the question of obligation of emigration to Muslim land. He explored variety of the opinions from the first five Islamic centuries and concludes that their positions are not unsystematic on the issue. He further elaborates:

"Well-formulated, recognizable schools of thought on the problem of Muslims in

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[36] Ibn Khaldun (Muqaddimah, Translation Rosenthal, vol. I, London, 1968, pp. 255-6) refers to Hajjāj b. Yūsuf reproaching Salamah b. al-Akwaʻon going back to desert.

[37] Abū Jaʻfar al-Tabarī (Cairo: Dār al-Maʻārif), p. 77 refers to Mujāhid, Qatādah, 'Akramah, Ḥasan, Ibn 'Abbās and others who maintained that Muslims at the Prophet's death were of the following three categories: (1) Muhājir (2) Ansār (3) 'Arab Bedouin who accepted Islam but did not migrate).

[38] Azārika is one of the famous groups of the Khawārij. The founder of this group was Nāfiʻ b. al-Azraḳ al-Ḥanafī al-Ḥaẓalī. He was the first who contested Khawārij ideology and supported more cruelty against opponents.

[39] R. Rubinacci, "Azāriḳa," *The Encyclopedia of Islam* (Leiden: E.J. Brill, 1986), Vol. I: 811.

non-Muslim territory emerged only after the sixth/twelfth century. As always, these schools of thought manifest a richness of diversity and many minor variations. Each school adopted a cohesive position which it applied, at times, with compulsive rigidity."[40]

The focus of these early scholars from the various schools of legal thought was the obligation of migration of the converted Muslims who resides in non-Muslim territories. Unlike to the other matters the scholars of one legal tradition were not on the same page. It is reported from Imām Abū Ḥanīfah that staying in non-Muslim territories is not approved and emigration from non-Muslim territory to Islamic rule is obligatory. While a denial of this obligation is reported from al-Shaybānī. In spite of this ambiguity among the Ḥanafī jurists, generally they discouraged permanent stay in non-Muslim rule. However, they do allow temporary residence for diplomatic or business purposes. The Mālikī scholars seem to be on one page on the issue, as scholars such as Imām Mālik b. Anas (d. 796), Imām Saḥnūn b. Saʿīd al-Tanūkhī (d. 854), had already prohibited Muslims to permanently stay or travel to the non-Muslim territories. They opine that residence in infidel rule may force them to obey non-Islamic laws. However, some later Mālikī intellectuals for instance Ibn ʿAbd al-Barr al-Qurṭubī (d. 1071) permitted temporary stays of Muslims as long as they feel safe and hoped to dominate over non-Muslims in future.[41] Contrary to these opinions, Imām al-Shāfiʿī is of the view that Muslims are permitted to stay in non-Muslim area until they: "did not fear enticement away from [their] religion" (idhā lam yakhfā ʾū al-fitna fī l-dīn). He argues that the nature

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[40] Khaled Abou El Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries," *Islamic Law and Society* 1, no. 2 (1994): 153, doi: 10.2307/3399332.

[41] Ibid, 149; Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West*, 65.

of this obligation of hijra to Islamic land has to be decided individually on case to case

basis.[42] Similar to the general views of Ḥanafī and Mālikī, majority of Shīʻah scholars

opposed residence of Muslim in non-Muslim territories. In their opinion, it is feared that

in such situation Muslims may not be able to obtain expertise in religious matters.

However, similar to the opinion of Imām al-Shāfiʻī, famous Shīʻah Imām Jaʻfar al-Ṣādiq

(d.765) stated that Muslims could live in any territory where they will have access to

justice and knowledge.[43] Legal experts of Islamic jurisprudence who allowed believers to

inhabit in non-believers' territories (permanently or temporarily) generally maintained

that this permission is with the condition of provision of security or safe-conduct through

(amān). In this regard formal treatise are not necessary but implicit permission to reside

in that land may be sufficient.[44]

The political and strategic situation of the Muslim territories changed after the loss of

Muslim territories in favor of Mongols in the East and Christian in the West after 11th

century. After the conquest of vast Islamic territory by the non-Muslim territories, the

question of residence in occupied territories became more pressing. It was new

phenomenon in the Islamic Civilization in which large Muslim populations were forced

to reside in non-Muslim rule. The situation contributed in the development of systematic

but more rigid juristic positions on the matter. Muslims lost their authority to apply

Islamic law after their territories were detached from dār al-Islam. Majority of Mālikī

jurists responded to the loss of Islamic lands of Iberia through endorsing a resolute and

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[42] Al-Shāfiʻī in Kitāb al-Umm, 147.

[43] Fadl, "Islamic Law and Muslim Minorities," 145-149; Khaled Abou El Fadl, "Striking a Balance: Islamic Legal Discourse on Muslim Minorities," in *Muslims on the Americanization Path?*, ed. Yvonne Yazbeck Haddad and John l. Esposito (Oxford : New York: Oxford University Press, 2000), 50-51.

[44] See Abou El Fadl, "Islamic Law and Muslim Minorities," 175–176; March, Islam and Liberal Citizenship, 185–186; Khadduri, War and Peace in the Law of Islam, 163–173; Albrecht, *Dār Al-Islām Revisited*, 66.

rigid position. Thy adopted an uncompromising position post-11th century famous Mālikī

jurists, such as Ibn Rushd (d. 1126), Abū Bakr Ibn al-'Arabī (d. 1148) and Sufi Muḥyī al-

Dīn Ibn al-'Arabī (d. 1240), instructed the Muslim residence of the conquered land to

emigrate to Muslim lands. They even commanded termination of temporary trade visits.[45]

When Marbella lost in 1445, large quantity of believers were forced to convert into

Christianity. To address this situation Aḥmad b. Yaḥyā al-Wansharīsī (d. 1508) issued a

fatwa in which he repeated the obligation to Hijrah. He was of the view that Muslims in

new subordinate positions will not be able to live in accordance with Islamic teachings:

> 'dwelling among the unbelievers, other than those who are protected and humbled
>
> peoples (*ahl al-dhimmah wa al-ṣaghār*), is not permitted and is not allowed for so
>
> much as an hour of a day. This is because of the filth, dirt, and religious and
>
> worldly corruption which is ever-present [among them].'[46]

Mālikī jurists such as Abū 'Abd Allah Muḥammad al-Māzarī (d. 1141) assumed that

decision of the Muslim to inhabit in the land of non-believers was not necessarily

unethical as it might result from an erroneous interpretation. He further elaborated that

Muslims may reside in non-believers territories if they work for renaissance of Islamic

rule or preaching of Islam.[47] In contrast to harsh position, certain Mālikīs marinated of

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[45] See Abou El Fadl, "Islamic Law and Muslim Minorities," 148; and Abu-Sahlieh, "The Islamic Conception of Migration," 44–45; Verskin, Islamic Law and the Crisis of the Reconquista: Miller "Muslim Minorities and the Obligation to Emigrate to Islamic Territory: Two fatwās from Fifteenth-Century Granada; Albrecht, *Dār Al-Islām Revisited,* 66.

[46] Aḥmad b. Yaḥyā al-Wansharīsī, *Al-Mi'yār al-mu'rib wa-l-jāmi' al-mughrib 'an fatāwā ahl Ifrīqiya wa-l-Andalus wa-l-Maghrib* (Rabat: Wizārat al-Awqāf wa-l-Shu'ūn al-Islāmiyyah, 1981), vol. 2, 137–141 is quoted in English translation in Verskin, Oppressed in the Land, 22.See also Abou El Fadl, "Islamic Law and Muslim Minorities," 154–156.

[47] Ibid, 151; Andrew F. March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus*, Hardcover (Oxford University Press, USA, 2009), 107; Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West*, 67.

pragmatism. Mālikī scholar Aḥmad b. Abī Jum'a al-Maghrāwī al-Wahrānī (d. 1511) after

the city had fallen into the hands of the Christians issued a fatwa for the Muslims in

Granada. He advised them to profess their faith secretly if they want to stay in Granada.

He also permitted them to say prayers other than fixed timings. He even allowed them to

ignore the usual kneeling and prostration. He also gave them concessions in consuming

pork and alcohol or to exercise usury if it can be useful for them to avoid arrest.[48] After

quoting from the fatwā of Al-Wahrānī, El Fadl questioned the extant and preventiveness

of these fatāwā.[49]

In response of new situations after the Mongols conquered East of Islamic land and

occupation of Andalusia, Ḥanafī and Shāfi'ī jurists redefined their views on the question

of residing in infidel land. Unlike most Mālikī jurists, they argued that Islam must exist in

the territories that had been lost by the Muslims. They maintained that these territories

are not part of dār al-kufr, therefore, it is not obligatory for the Muslims to emigrate from

these territories. The majority of Shāfi'ī jurists such as al-Māwardī maintained that such

occupied territories remained dār al-Islam, considering some Muslims are residing

around. He suggested that Muslims should continue to stay there. He observed:

"settling in such a country is preferable to moving away from it as others would be likely

to convert to Islam [through him]."[50]

Other Shāfi'ī jurists such as al-Nawawī', Ibn Ḥajar al-'Asqalānī and Shihāb al-Dīn Abū

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[48] Cited in L.P. Harvey,"Crypto-Islam," 174-77; Albrecht, *Dār Al-Islām Revisited* 70.

[49] El Fadl, "Islamic Law and Muslim Minorities," 181.

[50] This opinion is reported by: Ibn Ḥajar al-'Asqalānī, Aḥmad b. 'Alī *Fath al-bārī* (Cairo: Al-Bābī al-Ḥalabī, 1959)' 7: 230.

al-'Abbās Aḥmad al-Ramlī (d. 1550) endorsed the opinion of al-Māwardī.[51] Al-Nawawī'

further advanced the idea and said:

> "If one hopes that, by remaining, Islam might spread in his place of residence,
>
> then it is obligatory for him to reside there and not migrate, and also if it is hoped
>
> that Islam might prevail there in the future."[52]

In reply to a question related to the situation of Muslims after the Reconquista, al-Ramlī

contended that this territory is dār al-Islam because of their residence therein and it is not

obligatory upon them to emigrate as they were demonstrating their religion through their

services in new situation. He reminds the Muslims that Prophet Muhammad (peace be on

him) already permitted Muslims to abode in infidel's land if it would encourage others to

embrace Islam. However, he concludes that this territory will be changed in to dār al-ḥarb

if Muslims were to leave it.[53]

Al-Shāfi'ī jurists further maintained that a territory lost by Muslims will certainly not

return to dār al-kufr because this land is apparently dār al-kufr but not legally. But

continuation of Muslims abode in that land will be contingent on their subscription for its

Islamization. They have the opinion that if Muslims have the fear of losing al-Islam or

oppression then it will be preferable for them to migrate. Those believers if feel that their

stay amid infidels can be resulted in the propagation of Islam, at that point it's better not

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[51] Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West*, 68.

[52] Muḥyī al-Dīn Abū Zakariyyā al-Nawawī, *Al-Majmū' sharḥ al-Muhadhdhab* (Beirut: Dār al-Fikr, 2000), 22, 5.

[53] Shams al-Dīn al-Ramlī, *Fatāwā, on the margin of Aḥmad b. Muḥammad b. Hajar al-Haytamī, al-Fatāwā al-kubrā al-fiqhiyyah* (Cairo: 'Abd al-Ḥamīd Aḥmad al-Ḥanafī, 1938), 4:52–54, quoted in English translation in Verskin, Oppressed in the Land, 31–33; Abou El Fadl, "Islamic Law and Muslim Minorities," 159–160; Shams al-Dīn al-Ramlī, *Nihāyah al-muḥtāj ilā sharḥ al-Minhāj al-fiqh 'alā madhhab al-Imām al-Shāfi'ī* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1993), 8: 82; Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West*, 68.

to emigrate. If they have the opportunity to maintain autonomous and independent position (*qādirū 'alā al-imtinā' wa al-i'tizāl*) then living in non-Muslim territory will be obligatory on them.[54] Abou El Fadl has identified other aspects of al-Shāfi'ī jurists who maintained that a Muslim should always struggle for a territory land in which he or she can profess his faith freely. This means that a Muslim should also leave a widespread corrupt land of Muslims. He quoted opinion of Imām Al-Shirbīnī which states that in case of spread of corruption in all territories, obligation to migrate drops altogether.[55] The latter al-Shāfi'ī maintained that emigration can be recommendatory, not recommendatory or prohibited subject to the situation that are faced by the Muslims in the occupied territories. The Shāfi'ī jurist Abū al-Ma'ālī al-Juwaynī (d. 1085), is of the view that if possible for believers they ought to travel to improved places but this obligation did not apply if it is not possible for the large population to migrate. In such type of situations instead of waiting for improved situation they must work to maintain their power and meet their needs.[56]

The opinions of the al-Shāfi'ī jurist were developed in phases. The contribution of jurists of the tenth/sixteenth century is considered well-formulated. Abou El Fadl is of the opinion that the juristic writing of fifth century were not manifesting the same refinement.[57]

The position of Ḥanafīs is different from both the Mālikīs and al-Shāfi'ī s. Unlike

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[54] Shams al-Dīn al-Manūfī al-Ramlī, *Nihāyah al-Muḥtāj* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1967), vol. 8, 82; Al-Shirbīnī, *Mughnī*, vol. 4, 239; Abou El Fadl, "Islamic Law and Muslim Minorities," 163.

[55] Al-Shirbīnī, *Mughnī*, vol. 4, 239; Abou El Fadl, "Islamic Law and Muslim Minorities," 163.

[56] See Abu al-Ma'ali 'Abd al-Malik al-Juwaynī (Imām al-Haramayn), Ghiyāth al-Umam, ed. 'Abd al-'Azīm al-Dīb (Cairo: al-Maktabat al-Kubra, 1401), 475-522, particularly 476, 486, and 488; Abou El Fadl, "Islamic Law and Muslim Minorities," 181 and Albrecht, *Dār Al-Islām Revisited*, 69.

[57] Abū Isḥāq al-Fīrūzābādhī al-Shīrāzī, *al-Muhadhab* (Cairo: Muṣṭafā al-Bābī al-Ḥalabī, 1971), vol. 2, 290.

Mālikīs, they allowed to stay in the territory that came under the non-Islamic rule. Similarly, unlike al-Shāfiʿīs they are not declaring it obligatory to stay in such land. Ḥanafī jurists such as al-Kāsānī and Ibn ʿĀbidīn asked Muslims not to leave these areas considering that they are capable to live peacefully and follow their faith.[58] Hanafis are of the view that an area that is governed through non-believers can even so be considered equally a portion of dār al-Islam as long as Sharīʿah laws are applicable there. They further stated that a part of Muslim territory will not change automatically into dār al-Kufr merely on its capturing via infidels. To become dār al-Kufr a territory needed to fulfil three conditions.(i)The rulings of infidels are implemented; (ii) The occupied area is parted from all other Islamic territory; (iii) The protection extended by previous Islamic government to the subjects of Islamic State (Muslim or dhimmī) had been withdrawn (āminan bil-amāni al-awwal).[59] The jurists having this view maintained that the areas that are occupied by Mongols or Christians are Islamic territories as long as Muslims are allowed to say prayers and their disputes are resolved by the Muslim judges. Some Ḥanafī jurists went to say that a territory will remain a part of dār al-Islam even if one law of Islam is executed there. As a consequence of this juristic position Muslims were under no obligation to emigrate and were encouraged to stay there if they feel safe.[60]

Ḥanbalī and Shīʿī jurists have assumed a compromising view as they had not faced a dilemma to the extent of the Mālikī. They state that a practicing Muslim may desire to

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[58] See al-Kāsānī, Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ,7:130; and Abou El Fadl, "Islamic Law and Muslim Minorities," 159, 162, 172; Albrecht, Dār Al-Islām Revisited, 68.

[59] Ibn ʾĀbidīn, Radd, vol. 3, 252; al-Kāsānī, Badāʾiʿ, vol. 7, 130-31; Abou El Fadl, "Islamic Law and Muslim Minorities," 162.

[60] Reported by Abou El Fadl from Al-Fatāwā al-Hindīyyah, vol. 2, 232, 311-12; vol. 3, 584 (with reference to the Mongols); Ibn ʾĀbidīn. Radd, vol. 3, 252-53.

live in a non-Muslims community. But this permission will be treated as a political favor.

However, Ḥanbalī jurists particularly stressed on the superiority of Muslim land even in

worst conditions and discouraged Muslims to live in the territory that is classified as dār

al-ḥarb.[61] Shī'ī jurists were basically not worried with the legal status of lands. They are

concerned with the issue of residence of Muslims in a territory whose inhabitants are

indulged in sin (ma'āṣī), even if this land is officially classified dār al-al-Islam.[62]

The reason for adopting intermediatory position by Ḥanbalī and Shī'ī jurists was that they

had confronted with the occupation to lesser extent of the Mālikī, Ḥanafī and al-Shāfi'ī

jurists of the 5th/13th century. Similarly, Mālikīs faced a strict reality of occupation of

Muslim territory by Christians and Mongols. But the territorial circumstances were not

same for the Mālikī, Ḥanafī and al-Shāfi'ī jurists. Both Ḥanafī and al-Shāfi'ī jurists

belonged to the regions that were attached to main Muslim land. This effected their

reaction which became extra refined and discerning. They differentiate amid Islam and

lands of Islam. So, they reached to the conclusion that Islam could exist in any territory

even if it is non-Muslim. They further stated that it's morally imperative for believers to

uphold Islam in infidel lands. Moreover, they declined to accept that land occupied via

infidels essentially changed into non-Muslim land.[63]

The issue of *Hijrah* is continually engaging Islamic rational. The enquiries which were

valid for Muslims of Andalusia and Sicily during 6th/12th century confronted Muslims of

other lands in various periods. On the occupation of the Bosnia-Herzegovina by Austrian,

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[61] Abou El Fadl, "Islamic Law and Muslim Minorities," 159, 162, 172; Steven Gertz, "Permission to Stay in 'Enemy' Territory? Ḥanbalī juristic thinking on whether Muslims must emigrate from non-Muslim lands," *The Muslim World*, no. 103 (2013); Albrecht, *Dār Al-Islām Revisited*, 69.
[62] Albrecht. *Dār Al-Islām Revisited*, 68-69.
[63] Fadl, "Islamic Law and Muslim Minorities," 164.

a representor from Bosnia contacted to Rashīd Riḍā (1865-1935) and told that an intellectual from Ottoman had asked the Muslims of Bosnia to migrate to Muslim territory. Riḍā asked them to reject the juristic opinion from the Ottoman jurist and suggested them to stay in their homeland.[64] The conception of *Hijrah* served as symbol of resistance and rebellion during the colonial period. It encouraged mass movements such as the migration of the Indian Muslims to Afghanistan 1920.[65]

Through this exploration of the past may lead to advance the discourse related to the subject of Muslim communities in the Western world to new dimensions.[66]

2-Emergence of Muslim Communities in Non-Muslim Countries during Early Islamic Centuries

Migration[67] is a difficult concept to define, as it is related to people who move for different reasons across different areas. A migrant can be a person who moves to another city or town within a nation; a refugee who crosses an international border to escape religious or political persecution; a jobseeker who moves to another country for better economic opportunities; a slave who is forcibly moved; or a person displaced by war or natural disaster. Demographers lack a single, operational definition for migration because it occurs under different conditions.[68] The common definition of human migration limits

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

[65] See John O. Voll, "Mahdi's Concept and Use of Hijrah," Islamic Studies, 26:1 (1987), 31-42; Masud, "Shehu Usuman Dan Fodio's Restatement of the Doctrine of Hijrah."; Rudoph Peters, *Islam and Colonialism: The Doctrine of Jihād in Modern History* (The Hague: Mouton, 1979). Gilles Kepel, *Muslim Extremism in Egypt*, trans. J. Rothschild (Berkeley and Los Angeles: University of California Press 1986).

[66] Fadl, "Islamic Law and Muslim Minorities," 180-187.

[67] "Migration." International Encyclopedia of the Social Sciences. . *Encyclopedia.com.* (October 26, 2018). https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/migration-1

[68] Ibid.

the term to permanent change of residence (conventionally, for at least one year), so as to distinguish it from commuting and other more frequent but temporary movements.[69] Human migrations have been fundamental to the broad sweep of human history and have themselves changed in basic ways over the epochs. Many of these historical migrations have by no means been the morally uplifting experiences depicted in mythologies of heroic conquerors, explorers, and pioneers; rather they frequently have been characterized by violence, destruction, bondage, mass mortality, and genocide—in other words, by human suffering of profound magnitudes.[70] Human history shows that human populations have migrated for religious, political, economic, and financial and for many other reasons from one locality to another, sometime voluntary sometime involuntary, in groups or individually and continued in modern globalized world too but the causes might have changed.

2.1-Muslims' Interaction with Non-Muslim Societies in Early Periods of Islamic History

Islam is one and universal, and fundamental principles of Islam are applicable on all Muslims regardless of their place of residence, but evolution, transformation and adaptation to various social and cultural environments are permitted. Muslims in the West have been established in new societies and those desire to remain faithful to the principles of Islam, they must face the challenges of their time and society.

A Muslim group migrated to Christian State Abyssinia in 615, before Prophet's (peace be on him) migration to Medina and considered first ever migration in the history of Islam

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[69] "Migration". Population Biology and Anthropology. *Encyclopedia Britannica*. (October10, 2018). https://www.britannica.com/science/population-biology-and-anthropology/Migration#ref60665
[70] Ibid.

towards non- Muslim state. Hence the aim of performing hijrah was to avoid tyranny and maltreatment and to preach Islam at this early stage.[71] Allah Almighty says:

"Indeed, those who have believed and emigrated and fought with their wealth and lives in the cause of Allah and those who gave shelter and aided - they are allies of one another. But those who believed and did not emigrate - for you there is no guardianship of them until they emigrate. And if they seek help of you for the religion, then you must help, except against a people between yourselves and whom is a treaty. And Allah is seeing of what you do"[72]

"They wish you would disbelieve as they disbelieved so you would be alike. So do not take from among them allies until they emigrate for the cause of Allah. But if they turn away, then seize them and kill them wherever you find them and take not from among them any ally or helper"[73]

"Indeed, those whom the angels take [in death] while wronging themselves - [the angels] will say, "In what [condition] were you?" They will say, "We were oppressed in the land." The angels will say, "Was not the earth of Allah spacious [enough] for you to emigrate therein?" For those, their refuge is Hell - and evil it is as a destination"[74]

"Except for the oppressed among men, women and children who cannot devise a

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[71] Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eighth to the Eleventh/Seventeenth Centuries Author(s): Khaled Abou El Fadl Source: Islamic Law and Society, Vol. 1, No. 2 (1994), pp. 141-187.

[72] Al-Qurān 8:72.

[73] Al-Qurān 4:89.

[74] Al-Qurān 4:97.

plan nor are they directed to a way "[75]

"For those it is expected that Allah will pardon them, and Allah is ever Pardoning and Forgiving"[76]

"And whoever emigrates for the cause of Allah will find on the earth many [alternative] locations and abundance. And whoever leaves his home as an emigrant to Allah and His Messenger and then death overtakes him - his reward has already become incumbent upon Allah. And Allah is ever forgiving and Merciful"[77]

The Prophet (peace be on him) with his *saḥābah* set a dynamic example by establishing their own state in Medina. Subsequent to Prophet's (peace be on him) demise in 632, the Muslim community immediately built an empire which instinctively caused conflict amid believers and non-believers, and due to safety and freedom to practice religion many jurists insisted upon living in Muslim majority areas only.[78] When these verses related to migration were revealed there were hardly any Muslim state situated on earth, then how a reference could possibly be made to migration to Muslim land, similarly other opinions assert that the obligation to migrate over through the takeover of Makkah and argue that

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[75] Al-Qurān 4:98.
[76] Al-Qurān 4:99.
[77] Al-Qurān 4:100.

[78] Montgomery Watt, "Hijrah," *Encyclopedia of Islam*, 2nd ed. (Leiden: N. J. Brill,1971); M Naeem Qureshi, "The 'Ulamā' of British India and Hijrat," *Modern Asian Studies* 13,1(1979): 4; Muhammad Khālid Mas'ūd,"Shehu Usuman Dan Fodio's Restatement of the Doctrine of Hijrah." *Islamic Studies* 25,1(1986): 56-77; "Being a Muslim in a Non-Muslim Polity," *Journal of the Institute of Muslim Minority Affairs,*10,No.1 (January,1989): 118-28; "The Obligation of Hijrah in Islamic Law," In *Muslim Travelers*, ed. Dale Eickelman and James Piscatori (Berkeley and Los Angeles: University of California Press, 1990), 29-42; Ibn Fudi, *'Uthman [Dan Fodio] Bayān Wujūb al-Hijrah 'alā al-'Ibād*, Edited and translated by F. H. El Masri (Sudan: Khartūm University Press, 1978).

it is better to live under a ruler who is just no matter Muslim or non-Muslim. Similarly,

descriptions are available about few nomads who embraced Islam while declined to enter

into Prophet's (peace be on him) state in Medina. Similarly there were cases of Muslims

who opted to stay in Makkah and refused to migrate to Medina.[79]The Qurānic verses and

traditions about migration were used by many groups in certain political and theological

contexts in early period of Islam, for instance, the obligation to migrate to Muslim

territory used by the Umayyad rulers for mobilizing political support. Moreover, distinct

juridical discussions one may find with reference to historical context of every era.[80]

There were hardly any discussions of Muslim jurists about Muslims residing in infidel

states, in the course of initial 400 years of Islamic records, rather Jurists discussed it

hypothetical case, but when massive Muslim land from east were invaded by Mongols

and from west via Christians in 13th centennial, then it became a question of discussion

for Jurists. Notable Muslim inhabitants had lived in infidel lands, particularly in India and

China later in eighth century and Muslims allegedly took refuge in India to escape from

the cruelty of the Muslim ruler al-Hajjāj bin Yūsuf during Umayyad time.[81] In 1100 CE,

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[79] Abū Zakarīyyah al-Nawawī, *Al-Majmū' Sharh al-Muhadhab* (Beirut: Dār al-Fikr,n.d), 19:262-63; Abū Dāwūd Al-Sijistānī, *Sunan Abū Dāwūd* (Cairo: Dār al-Hadīth, 1988),Volume: 3:3-4; 'Alā al-Dīn al-Hindī, *Kanz al-'Ummāl* (Beirut: Mu'assasat al-Risalah,1985), volume:16:654-55.

[80] Muhammad Hamīdullah, "Ex-Territorial Capitulations in Favour of Muslims in Classical Times," *The Islamic Review*, 38 (January, 1950): 33-35; *The Muslim Conduct of State* (Lahore, 1977), 121-29; Bernard Lewis, *Political Language of Islam* (Chicago: University of Chicago Press, 1988), 104-5; Husayn Mu'nis, ed. and trans."*Asnā al-matajir fi bayān ahkām man ghalaba 'alā watanihī al- Nasārā wa lam yuhājir"* (Revista del Instituto Egipcio de Estudio Eslamicos en Madrid, 1957), 5:135-36.

[81] Abū Ja'far al-Tabarī, *Jāmi' al-Bayān* (Beirut: Dār al-M'ārifah, 1986), volume: 4:147-51; Abū al-Qāsim al-Zamakhsharī, *Al-Kashshāf* (Beirut: Dār al-M'ārifah), Volume: 1:292-93; Abū al-Fida Ibn Kathīr, *Tafsīr Ibn Kathīr* (Cairo: Dār al-Khair, 1988), volume:1:513-15; Mahmud al-Ālūsī, Ruh al-Ma'ānī (Beirut: Dār Ihyā' al-Turāth al- 'Arabī,1985), Volume:5:125-26: Abū Ja'far b. al-Hasan al-Tusī, Tafsīr al-Tibyān edited by A. Amin and A. Qasir (Najaf, Iraq: Maktabāt al-Amīn), volume: 3:302-3.

when huge Muslim inhabitants became victim of infidel supremacy in Messina and Sicily, then issue related to the status of Muslim minorities highlighted. Arab Muslim conquerors conquered vast areas of the east Mediterranean during 634 CE and 641 CE, afterward occupied the Christian province of Egypt and abolished Zoroastrian Sassanid Empire amid 633 CE and 651 CE, then dominated Christian North Africa and Christian Spain by 721 AD. Muslim army in 725 AD had traversed Pyrenees and acquired southern France, Carcassonne and Nimes. Muslim conquerors did not kill indigenous populations and left them in majority, but ultimately converted entire population from Christianity to Islam, although at that time it was not difficult for Muslims to live with Jews or Christians. In 759 AD, the Christian Carolingian king expelled Muslims from South France and sent them to Spain, concurrently Christian empires who managed to escape from invasion of Muslim soldiers in North Spain were slowly moving towards Iberian Peninsula. Christian empires had suppressed the Muslims of south and Al-Andalus by 1100. By 1252 Granada, was the only Muslim kingdom there but it was also occupied in 1492 by finishing 700 years rule of Muslims in Spain. Great number of Muslims however, remained in Spain but left Islam and turned toward Christian faith, while many other immigrated to North Africa.

Christians living in Western Europe had been asked by Pope Urban II in 1095AD, to move for a militant journey toward Constantinople to safeguard East Roman Monarch from Muslim attackers and to occupy Jerusalem, they remained successful in invading Mediterranean and forming the Realm of Jerusalem, Tripoli, Edessa and Antioch. While Christians in the east were defeated by the Muslims from 1299 onward due to the fast expansion of Ottoman territory via capturing Byzantine, Bulgarian, Serbian,

Constantinople and Eastern Roman Realms. The Ottoman deeply penetrated in South-Eastern Europe during1453 to 1683 by defeating the Albanians, Bosnians and Kosovar, then they occupied Buda and Pest in Hungary, amid 1593 and 1676. Downfall of ottomans started from 1700s onwards, by the loss of vast land in south Eastern Europe, due to the chains of insurgencies and battles, only Rumelia left under the control of the Ottoman Empire till 1912. Due to these historical facts, Spain and Eastern European states are against Muslim immigrants of past Ottoman territory, since these states were facing Muslims for seven hundred years and could hardly manage to escape after great sacrifices.

3-Emergence of Muslim Communities in USA, Europe and other Western Territories

3.1- Early Migrations of Muslims to Western Countries

Man is freely proceeding due to migration from one corner to another corner of the world. Many reasons such as better future, employment, wars, studies and poverty are behind this massive contemporary wave of migration. Migration has affected culture, life style and habits of the indignant people who sometimes feel threatened. The migrants are bringing with them their faiths and religious traditions too. In this situation aloofness, estrangement and alienation are no more practical attitudes. The casing of remoteness, which previously had delivered protection to diverse faith societies, is currently no more available. This is the dilemma of modern man, however this situation persuasively guides towards negotiation amid people of diverse beliefs.

This situation has affected Muslims as well. Many Muslims migrated to the West. In

many cases it is their third generation which is living in West and USA, but like people of other faiths there are still challenges in their integration. On one hand they feel threatened due to the impact of the West on the new generation and on the other hand the host societies are worried about their role in these societies due to problems of integration. This dilemma is also faced by the followers of other faiths but in lesser degree. The problems and obstacles that are creating impediments in the productive and positive role of the immigrants in host societies should be understood, identified and discussed for better answers.

Muslims presence in West is not a new thing since Muslims invaded and ruled Europe i.e., Sicily, Northern Mediterranean shores, Pyrenees and Iberian Peninsula for seven hundred years and Muslim rule ended in Spain with the decline of last Muslim rule of Granada in 1492.[82] Ottomans defeated the Greeks in Eastern Mediterranean and occupied Constantinople and Balkan. Balkan territory achieved freedom after First World War and before collapse of Ottoman Empire. Currently, European native Muslim population includes Bosnian, Albanians and Kosovars.[83]

European Muslims include[84] native Muslims chiefly in Bosnia, Albania and Kosovo, who have affiliation with Islam originally while survived there for many hundred years, innate minority in Romania and Bulgaria, ancient Tatar Muslim inhabitants in Poland and Crimea, for instance in France there are some seventy thousand North African students, traders of Muslim states, Muslims who arrived effortlessly like Commonwealth inhabitants in England, Algerians in France or Surinamese and Indonesians in Holland,

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[82] Bichara Khader, "Muslims in Europe: The Construction of a "Problem", in *The Search for Europe Contrasting Approaches* (Eu: BBVA, 2015), 304.
[83] Ibid.
[84] Ibid.

Muslims who arrived to Western Europe, in 1950s to1960s as worker, born European Muslims to migrant parents, asylum pursuers and exiles. On the whole there are some twenty three million Muslims residing in 28 European countries, three fourth of European population through naturalization or birth by including some two million Muslims arrived unlawfully and still not formally allowed. It constitutes overall twenty five million Muslims, nearly five percent of the whole European population.[85] Islam reached to mediaeval Europe through the doorway of Spain in 711 AD and left unique and rich history there. During centuries between 711 to 1502 Muslim Arab conquerors not only introduced new religion but also new culture, civilized life, poetry, philosophy, art and science to Europe.[86] When Muslims reached Spain, Catholic Christianity was firmly established. No other religion was allowed to practice and enforce and laws were promulgated and enforced to ensure the full implementation of Catholic Christianity. The clergy, bishops, chief ecclesiastics sat in the national councils to fix the affairs of state, election and expulsion of king. They were using their laws to oppress and victimize the Jews since they formed sizeable community in Spain. Due to the suffering of cruelties, Jews not only generously greeted Muslim conquerors but opened the gates of town for them. Christian slaves first converted to Islam due to ill-treatment and extreme suppression under Christian rule then lower to middle classes converted to Islam.[87] Christians 'culture and literature were below standard and had worked as a stimulant for their conversion to Islam. Muslims remained tolerant towards Christians which resulted into expansion of Islam throughout the Europe. Christians were enjoying freedom under

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[85] Ibid.
[86] Thomas Walker Arnold, *The Preaching Of Islam: A History of the Propagation of the Muslim Faith* (Westminster: Archibald Constable and, 1896), 112,113.
[87] Ibid, 114,115.

Muslim rule and were allowed to even build new churches.[88]

Presently 5-8 million Muslims including immigrants are residing in America. In the 17th-18th centuries many West African Muslims were vended into bondage in Trans-Atlantic bondsman trade in America, this business had been initiated by the Portuguese during 15th century, but shortly dominated by British traders and finally ended in 19th century.[89] It included not only lower classes but royal classes of Muslims too.[90] The Muslim existence was remarkably sensed during 19th century in Bahia, Brazil by active participation of Hausa Muslims in slave revolts[91] as it was tough for these Muslim slaves to preserve and transfer their belief to the succeeding generation in Africa. Islam reached to America later on while could not touch a lot African Americans. In late 19th century low number of Muslims migrated from Ottoman areas to America till that time Islam's existence within the African American community was just symbolic. At that time many groups of African Americans were busy in "Black Religion" episode beyond religious

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[88] Ibid, 116.

[89] Abdin Chande, "Islam in the African American Community: Negotiating between Black Nationalism and Historical Islam," *Islamic Research Institute, International Islamic University, Islamabad* Islamic Studies 47:2 (2008): 221–41.

[90] Ibrahima Jallo [d. 1828] from Guinea,who was sent back to Africa only to die upon arrival, See, for details, Terry Alford, Prince among Slaves: The True Story of an African Prince Sold into Slavery in the American South (New York: Oxford University Press, 1986); John Franklin Jameson, "Autobiography of Omar Ibn Said, Slave in North Carolina, 1831," The American Historical Review, 30 (July 1925), 787-795; A.D. Austin, African Muslims in Antebellum America: A Sourcebook (New York: Garland, 1984); A.D. Austin, African Muslims in the New World: A Sourcebook for Cultural Historians (Boston: Garland, 1981); Sylviane Diouf, Servants of Allah: African Muslims Enslaved in the Americas (New York: New York University Press, 1998); the first recorded Muslim presence was in 1527 when Estevan (d. 1539), a black Moroccan guide and interpreter, arrived in Florida from Spain.3 He came with the Panfilo de Narvaez (d. 1528) expedition and for over a decade explored the areas of the southwest before venturing into present-day New Mexico and Arizona in 1539 and died at the hands of the Zuni Indians, see for details, Daniel Panger, Black Ulysses (Athens: Ohio University Press, 1982); Clyde-Ahmed Winters, "Afro-American Muslims from Slavery to Freedom," Islamic Studies, 17: 4 (1978), 187-205; and Richard Brent Turner, Islam in the African-American Experience (Bloomington and Indianopolis: Indiana University Press, 1997), 11-12.

[91] Abdin Chande, "Islam in the African American Community: Negotiating between Black Nationalism and Historical Islam."; Joao Jose Reis, Slave Rebellion in Brazil: The Muslim Slave Uprising of1835 in Bahia, tr. Arthur Brakel (Baltimore: The Johns Hopkins University Press, 1993).

attachments.[92] The creation of Nation of Islam in early 20th century was evidently dominated by the Marcus Garvey movement's instructions on character refinement and black pride, and Booker T. Washington's (d. 1915) concepts of communal reform,[93] till 1930 Wallace Fard Muhammad was propagating memorandum of optimism to American black men and afterwards Elijah Muhammad became the leader of the movement from 1933 onward.[94] They condemned eating pork and drinking alcohol and launched cafeterias beside other businesses to stimulate and boost black's trades. Factually, creation of NOI was an outcome of maltreatment experienced by the black peoples in society, and Islam provided them with alternative, an equal status like white people; similarly, it also provided a remedy to a society suffering from ailment of prejudices and discriminations on the basis of race and tempted poor, captives and activists of various black's movements.[95] Major modification of NOI[96] to Mainstream Islam took place after 1965

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[92] Under the umbrella of Black Nationalism many persona and social reformation movements were initiated like Marcus Garvey [d. 1940] movement of the 1920s, where Muslims found a mean to express their opinions about Islam, see for details, Edmund David Cronon, Black Moses: The Story of Marcus Garvey (Milwaukee: University of Wisconsin, 1955); Sherman Jackson, Islam and the Blackamerican: Looking Towards the Third Resurrection (Oxford: Oxford University Press, 2005), 4.

[93] Moorish Science Temple movement of Noble Drew AH (d. 1929) instructed pride of race and claimed that African Americans were descendants of an "Asiatic race" known as the Moors

[94] Video interview of Imam W.D. Muhammad ("Mainstream Islam") by Nazir Khan of the Islamic Information Service (IIS), Altadena, California [1985?]. See also, W. D. Mohammad, An African American Genesis (Illinois: MACA Publications, 1986) and Al-Islam Unity and Leadership (Chicago: U.W. Mohammed, 1991).

[95] See, E.U. Essien-Udom, Black Nationalism: A Search for An Identity in America (Chicago: University of Chicago Press, 1962); Martha F. Lee, The Nation of Islam: An American Millenerian Movement, Studies in Religion and Society, vol. 21 (Lewiston, NY: Edwin Mellen Press, 1988); Eric Lincoln, The Black Muslims in America (Boston: The Beacon Press, 1961); Elijah Muhammad, Message to the Blackman in America (Newport News, VA: United Brothers Communications Systems, [1965] 1992); Malcolm X with Alex Haley, The Autobiography of Malcolm X (New York: Ballantine, 1973).

[96] In 1975, after the death of Elijah Muhammad, his son Wallace Muhammad, had been started questioned over the dogma of movement and insisted to be moved toward the direction of mainstream Islam, the demand for universal, larger and inclusive Islam was growing faster as a result, Wallace Muhammad acquired the mainstream Islam but it divided NOI into two groups, other group was established by Minister Louis Farrakhan after leaving Wallace Muhammad's American Muslim Community, despite their conceptual disagreements however, there remained committed to affirm black experience. See for details, L.H. Mamiya, "From Black Muslim to Bilalian: The Evolution of a Movement," Journal of the Scientific Study of Religion, 21 (1982), 138-152; Clifton Marsh, From Black Muslims to Muslims: The Transition from Separatism to Islam, 1930-1980 (Metuchen, NJ: Scarecrow Publishers, 1984); Video interview of

with the Immigrations from Middle East, India and Pakistan, these immigrant Muslims

had increased the number of native American-born Muslims, included African-

Americans and white converts.[97] There were many other movements like Dār-al-Islam

movement started in 1960,[98] Hanafī movement[99] and Sufī groups inaugurated by Muslim

immigrants.

3.2- Muslims' Migrations to Western Territories during the Colonial Period

Muslims stayed in West in capacities of militias, war captives, or envoys till the end of

18th century. Since Muslims' faith did not inspire them to move there, while Europe was

also not welcoming for them. Christians of Europe on the contrary were free to visit and

settle in Muslim territories. But a drastic transformation originated in 19th century with

the Muslim youth short journeys toward Europe for education. The increasing numbers of

young Muslim students, diplomats, political figures and work seekers from India, Turkey,

Iran, Tunisia, Egypt and Maghreb not only got chance to explore but also lived in west,

then to exactly perceive the civilization and establishments of Europe. While through the

acquaintance of their tongues, Europeans' science, philosophy and other literary works

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Imam W.D. Muhammad ("Mainstream Islam") by Nazir Khan of the Islamic Information Service (US), Altadena, California [1985]; L.H. Mamiya, "Minister Louis Farrakhan and the Final Call" in Earle Waugh, et al., eds. The Muslim Community in North America (Edmonton: University of Alberta Press, 1983).

[97] Islamic centres, mosques and national organizations like ISNA (Islamic Society of North America), ICNA (Islamic Circle of North America), etc., are mostly funded by rich Muslim immigrants.

[98] It was initiated by Imam Yahya Abdul Karim in New York City in 1970 but the movement entered into another stag when Pakistani Shaikh Mubārak Ali Jīlānī attracted some African American Muslims from the poorer areas of the city toward Sufī mysticism who came to the mosque for Zikr ceremonies. soon Sheikh Mubārak Ali's established Jamā't al-Fuqrā' (1980) dominated Dār al-Islām at Masjid Yāsīn, ultimately Dār-al-Islām divided into two smaller mosques within the New York city, see for details, Robert Dannin, *Black Pilgrimage to Islam* (Oxford: Oxford University Press, 2002), 74-78; R.M. Mukhtar Curtis, "The Formation of the Dār al-Islām Movement" in Yvonne Yazbeck Haddad and Jane Idleman Smith, Muslim Communities in North America (Albany, NY: State University of New York, 1994), 51-74, especially 58-65.

[99] It was established in 1968 in New York by Hamas Abdul Khālis and by 1970s had relocated its Hanafī Madhhab Center to Washington DC, see Kereem Abdul Jabbar with Peter Knobler, Giant Steps: The Autobiography of Kareem Abdul-Jabbar (NY: Bantam Books, 1983).

are no more beyond the access of Muslims.[100] Furthermore, through the formation and production of press and journals in eastern languages have opened prospects for them to keep an eye on happenings of Islamic countries, then to argue such events by theoretical and philosophical means and ultimately aid in arrival of a fresh wave of immigrants to the West.[101] This continued until today.

Before 1960s there were no significant Muslim population present in Europe except past Yugoslavia and trivial region of Turkey, but owing to different reasons they have gathered in Europe and number reached to twenty six million according to pew research, mostly were in France, Germany, Italy and the United Kingdom in 2016 onwards. The Muslim inhabitants of France mostly hailed from North African countries like Algeria, Morocco and Tunisia, since more than ten lac Christians of Europe had been seized and vended into bondage by Berbers over the Muslim territory and were welcomed by France as cheap labour in 1960 and 1970.[102] Initially they were men but latter on allowed to bring families, and ultimately caused increase in Muslim population, currently in France they are six to eight million. The Muslim residents of Germany are primarily origin from south eastern Turkey, as a result of a treaty between West Germany and Turkey for Gastarbeiters in 1961, now their population is about six to eight million in Germany. The majority Muslims of Britain are from India, Pakistan and Bangladesh, which were induced to become laborers in specific cities in 1960 and 1970. Their population increased efficaciously with the State's permission of family reunions and currently it's

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[100] Bernard Lewis, *Faith and Power: Religion and Politics in the Middle East* (Oxford university Press: 2010) p. 23.
[101] Ibid.

[102] **Tristan Fischer, Europe Has Unique Problems With Muslim Immigration. Here's why**. (May 16, 2018 Africa and Syria) https://www.linkedin.com/pulse/europe-has-unique-problems-muslim-immigration-heres-why-fischer

about five to seven million in the UK.

4- Contemporary Immigration of Muslims to Western Countries

No doubt that migration from eastern to western countries and vice versa continued for centuries but for last two centuries this migration is usually from the developing countries to the developed countries particularly west. 'West' generally denotes Europe beside territories of substantial European arrangements, predominantly North America, Australia then New Zealand.[103] Recently the same phenomena of migrations can also be seen in Asia where new immigrant destinations are developing such as Japan, Malaysia, Singapore and Hong Kong. People are also moving to oil rich Middle Eastern countries but they are unable to settle there permanently, therefore this study will be confined on the areas where immigrants are settling permanently. The immigrants were welcomed in industrially developed countries as cheap labor and it was not feared that they will settle in their host countries permanently. Later on many took refuge in the developed countries due to wars and terrorism in their countries of birth. Up to seventies the migrants were living in developed countries without their families with the intention that they will return to their motherland. So majority of them were living alone without families. After eighties, the immigrants decided to settle permanently. This is particularly true for the Muslims. The lawful settlement in the United States has increased after the statutory reforms of 1965, and is currently reached to the level of ten lac each year, by denoting it a nation of migrants.[104] Historically, it was the Europe particularly England, France and

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[103] The definition is geographical and historical rather than cultural, See *Islam and the West: Annual Report on the State of Dialogue 2008* (Switzerland: World Economic Forum Community of West and Islam Dialogue (C-100), 2008), 10.

[104] R. Stephen Warner, 'Religion and New (Post-1965) Immigrants: Some Principles Drawn from Field Research,' *Journal of American Studies*, Vol. 41, No. 2/3, Globalization, Transnationalism, and The End of the American Century (Summer/Fall, 2000), 267.

Spain from where the immigrants were coming to settle in United Sates. However, after the reforms of 1965 the émigrés arrived from states of Latin America, the Caribbean, East and South Asia, Middle East and Africa, apart from Europe. Presently, migrants from Ireland, Poland, ex-Soviet and Yugoslavia states are also coming to USA. People who migrated to the United States amid 1985 to 1990, merely thirteen percent of them were born in Europe, Canada, Australia, or New Zealand. The fresh settlement is rightly worldwide unlike earlier.[105]

The religious life of the immigrants was observed as:

> Anyone who arrives to this land is supposed to surrender nearly everything he had brought with him from the "old country" - his language, his nationality, his manner of life - and would adopt the ways of his new home. Within broad limits, however, his becoming an American did not involve his abandoning the old religion in favor of some Native American substitute. Quite the contrary, not only was he expected to retain his old religion, as he was not expected to retain his old language or nationality, but such was the shape of America that it was largely in and through his religion that he, or rather his children and grandchildren, found an identifiable place in American life. To a great extent, today's immigrants also find their place in American society through their own religion, although, as we shall see below, immigrants do not simply "retain" their religion as regards its institutional structure.[106]

Modern residents of American culture have justified their place with their own faith.

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[105] Ibid, 268.

[106] Herberg, Will, *Protestant, Catholic, Jew: An Essay in American Religious Sociology* (New York: Garden City,. 2nd ed, 1960), 27-28; R. Stephen Warner, 'Religion and New (Post-1965) Immigrants: Some Principles Drawn from Field Research.'271.

Along with religious life the immigration has also an impact on cultural life. It is one of the important facts which imply and accelerate a change of cultures, reflected also on space and cultural globalization. This growth suggests social modification by the diffusion of traditional methods and items, transported through the public culture and the worldwide cultural diligence.[107] Besides, the global flows of concepts symbols, things, and wealth augment. While the former phenomenon basically 'works' towards uniformity of cultures across the world, the latter, by contrast, implies their diversification, at least at the first stage of the newcomers' arrival. Both of them amplify cultural change in the societies involved that includes the (re)constructions of landscapes. The cultural implications of international migrations entail, among others, the (re)constructions of landscapes 'that are culture before they are nature.' Thus, cultural change accelerated by migrations constitutes a meta-context for the studies on spatial implications of migration, and a relevant subject - matter for landscape studies. The impact of migration on the cultures is outside the scope of this study. However, there is an important connection amid culture and faith, and their significance for each other.

The data presented in this chapter indicates that deep analysis of various positions that have been taken by various scholars, on the issue of Muslims' migration to Muslim land from infidel lands are heavily influenced from the political situation of the place and time. Hence may not be considered essential. Doctrine of hijrah is not static. Its role in political and religious discourses would be dynamic and will continue to go through subtle changes which may have innovatory significances. The clash may be inevitable, yet the suggested keys by legal experts of Islamic law are not even doctrinaire. Similarly

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[107] Krystyna Romaniszyn, 'The Cultural Implications of International Migrations,' *Polish Sociological Review*, No. 146 (2004):141.

methodical analysis of the grounds then reasoning of various jurists upon such concept is needed, so that it can be evaluated that how much theoretical and historical challenges effected these views. The local power structure and socio-political context also influenced the understanding and position of each jurist. The opinions of the classical jurists of pre-modern period would not decide the predicaments of Muslim circles in the West. However, theses opinions may provide them opportunity to adopt from the variety of ethical choices that emerged in response of different historical challenges. This investigation of past may lead to advance the discourse related to the Muslim communities in the West to new scopes.

Human migration has affected culture, lifestyle and habits of the indignant people. The migrants are bringing with them their faiths and religious traditions. Historically migration continued for centuries from east to west and vice versa but for last two centuries this migration is primarily from the developing countries to the developed countries for the search of bright future and employment. Muslims' presence in the west is not a new phenomenon, they lived there for centuries. But Muslims being religious minority like other minorities are affected from this situation. Many Muslim migrants' third and fourth generations are living in West and USA but like people of other faiths they are still facing challenges in integration. One of their potential fears is negative impact of the Western culture on the new generation. Another important challenge for them is determination of and their role in these alien societies due to problems of integration. This dilemma is also faced by the followers of other faiths but in lesser degree. The problems and obstacles that are creating impediments in the productive and positive role of the immigrants in host societies need to be determined and addressed for

its solutions in an appropriate framework.

CHAPTER NO. 6

THE ROLE OF SHARĪ'AH IN FAMILY AFFAIRS OF

THE WESTERN MUSLIMS

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Contrary to various other dimensions of Sharī'ah, Muslim family laws are not only prominent but also majority of these laws are still practically valid and complied by the Muslims in Muslim and non-Muslim countries. This law is still regulating the personal and family affairs of the Muslims inhabiting in West. Therefore, it will be appropriate to discuss how Western legal frameworks deal with religious liberties and faith-based laws and how it effects the Muslims in the West. The nature of guidance that are sought from Sharī'ah law by Western Muslims and its interaction with Western family laws is also part of the current debate of validity of Sharī'ah for the Muslims in the West which is included in this part of the study.

1-Religious Liberty in Western Legal Frameworks

Any type of prejudice on account of faith is banned in European Convention on Human Rights. It affords prerogative to liberty of perception, moral and faith and contemplated to be one of the fundamental units of a democratic society, as they govern human conduct and assist person's identity development. It not only effect the identity and believes of the believers but it is also not irrelevant for the nonbelievers.[1] Right of religious freedom is not unlimited, certain law, objectives and proportion based restrictions are imposed. In few cases this right is restricted especially when freedom of others need to be secured from undue influence. Freedom to change religion is given in Article 9 of European

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[1] Andrea Büchler, *Islamic Law in Europe: Legal Pluralism and Its Limits in European Family Laws* (Farnham, Surrey, England ; Burlington, Vt: Ashgate, 2011).14.

Convention on Human Rights.[2] Professing any religion or believe is person's private matter but freedom of religion essentially includes public and private demonstration of one's believes, through worship, teaching, practice, application and compliance. Muslim community is obliged to follow Islamic law rules to design their family lives and European law is not an authority in this regard for them, and as per the rules of freedom of religion, they can rightfully follow their religion. The court decided that religion only extents to individuals' personal life and it has not come under the ambit of right to freedom of religion, due to its wide upshots, and freedom of religion must strictly be reduced to individual's matter.[3] In Islam, Islamic law governs every area of a person's life. Rights of ethnic minorities are also protected by many international agreements due to collective rights content. For instance article 27 of the International Covenant on Civil and Political Rights[4] or article 5 of the Framework Convention for the Protection of National Minorities, enacted by the Council of Europe in 1995,[5] provide protection of culture and identity to the minorities. There are significant human rights features related to cultural status as the idea of law in Islam is based on religion and if faith is taken by way of a central fragment of traditional individuality, clash amid laws, culture, then between freedom and parity, may possibility ascend, hence need to be resolved.[6] The law on the other hand is heavily based on the culture of society and in fact represents the social, cultural and political circumstances of that area from the time it evolves.

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[2] Ibid.

[3] The European Court of Human Rights, decided in the Refah Partisi (The Welfare Party) and Others v. Turkey case see for details; Refah Partisi (The Welfare Party) and Others v. Turkey, ECHR Grand Chamber, Judgment of 13 February 2003, (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98), notes 127 and 128.

[4] See for details, Donders, *Towards a Right to Cultural Identity* (Antwerp: Intersentia Eekelaar, 2003); "The End of an Era," *Journal of Family History*, 28(1) (2003):108–122. Ehringfeld K, *Eltern-Kind-Konflikte in Ausländerfamilien* (Berlin: Duncker & Humblot, 1997).

[5] Ibid.

[6] Büchler, *Islamic Law in Europe?*

Moreover, religious recognition is given to those customs that are legally recognized and respected more due to the perception of their being little human influenced. Association between law and culture is as powerful that an individual feels himself totally exotic, if he finds law applicable to him is not associated with his culture, could put him in isolation. Law not only requires respect from the community but it must recognize all cultural opinions and reflect them too, it has the ability to define and demark the social boundaries. Similarly, in a society where presence of migrants generated legal pluralization the uniformity in family law could be negotiated due to cultural integrity. And in case of family laws of Europe, relevancy of Islamic legal norm is crucial and possible accommodation or yet integration of family law rules of Islam into state legal structures are significant challenges. Importantly, length of legal and normative pluralism and openness and flexibility of family laws of Europe to absorb multiplicity of cultures, are also important to discuss. The family and family values still remain a symbol of hope, though despite of its total transformation into a new shape. Logically it's not possible to have common Western family values because it contradicts with what ought to be with, what is, and Muslim migrant population with traditional family forms and values, re-traditionalized. Presently, different kind of family structures exist in Europe, includes modern, traditional etc. correlation amid state and faith was defined through the constitution and rule public and private areas of individuals' life but in twentieth century increased migrations towards Europe created a threat to the connection amid faith, realm and country. The immigrants' attachment with their original lands, while joining detachments and nurturing global setups, in all these progressions faith plays significant part. The Muslim minorities have formed different organizations and accord in their host

states, to protect their identities, interests and collective aims. European countries, have to review and reconsider their political norms, rules of nationality and citizenship since national identity is embedded in history, and many countries confronting these issues have designed different strategies and plans of action to tackle the current situation. The link amid country's individuality and minority's prerogatives, and to solve the clash among cultural uniformity and variability, shared distinctiveness of many arrived societies, and to reconsider their conviction of place, tradition and homeland, then to reformulate their status by means of independent states are the major challenges encountered by the European countries. In nation-state associations amid faith or racial societies and state is diversified. It is also important that the identity of a nation as a society is demarcated through a shared background and customs or via its collective set of administrative bodies that administer the public,[7] in case of France national identity is based on citizenship, legal and political equality of its citizens[8] and policy of inclusion and assimilation with the separation between state and religion.[9] In Germany, ethnic affiliation is permitted. Complete segregation amid church and kingdom does not exist, means state and religion can co-exist, and religion can be expressed publically. Freedom of religion is available to all religions equally.[10] In Switzerland all religions are not equal, although diversity is one of the most important features of Swiss nation[11] but Roman Catholic and Evangelical Reformed churches are recognized as official churches in common law and are granted distinct benefits. UK represents an established state church by uniting religion and state. The monarch, is the symbol of special link between crown

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[7] Töpperwien, *Nation-State and Normative Diversity* (Basel: Helbing & Lichtenhahn, 2001),42
[8] Ibid, 101,110.
[9] Ibid, 152.
[10] Büchler, *Islamic Law in Europe?*,22
[11] Töpperwien, *Nation-State and Normative Diversity* (Basel: Helbing & Lichtenhahn, 2001), 233

and church and holds the positions of head of country and supreme governor of the church of Britain.[12] Spain provides equality between religions, every state has its own public policy to deal with religious diversity and to accommodate different religions.[13]

During latter period of the 20th century Muslim immigration to developed countries increased as a result of more economic, financial and job opportunities and still Muslim population is increasing day by day in the European countries. The Muslim communities in western countries are divided on the basis of origin, history and objectives and owe distinct status depending on the unique and specific state of affairs of migrated country,[14] in addition to it, these communities have diversified conceptions and relations with their religion. The Muslim communities of United Kingdom have historical background of former British colonies, apart from job opportunities and prosperous future.[15] These Muslim minority groups have different cultural, ethnic, religious and family systems but not significantly contradictory with the majority's beliefs and systems, since most of the immigrants are from India, Pakistan, Bangladesh and African countries and especially those who are born and educated in Britain have adjusted some of their customs and principles to fulfil the requirements of majority, but continued to preserve and manage a

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[12] Rosman, *The Evolution of the English Churches 1500–2000* (Cambridge: Cambridge University Press, 2003), 29.

[13] Cesari, "Muslim Minorities in Europe: The Silent Revolution," in *Modernizing Islam: Religion in the Public Sphere in the Middle East and Europe*, ed. J.L. Esposito, F. Burgat (London: Hurst & Company, 2003), 265.

[14] Hussain, "The Holy Grail of Muslims in Western Europe: Representation and their Relationship with the State," in *Modernizing Islam: Religion in the Public Sphere in the Middle East and Europe*, ed. J.L. Esposito, F. Burgat (London: Hurst & Company, 2003), 215.

[15] Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States:Dynamic Legal Pluralism in England, Turkey and Pakistan* (Aldershot: Ashgate, 2005), 55.

large amount of it. [16] They actively built mosques, Islamic centers and Muslim

organizations and managed to provide halal foods for their fellow Muslims, usually

Imāms represent their own religious communities and act as facilitators between state and

communities. It shows that the Britain approach at state level about religious diversity

and liberty of faith is moderate and for Muslim minorities is flexible. [17] France is

prominent with the large number of Muslim population due to the fact of colonial past,

mostly immigrants are from North, West parts of Africa and considerable need of labor in

the past. Especially following Second World War, majority of the immigrants came to

France as workers with the strong aim of going back to their homelands, despite of many

difficulties faced by them they opted to reside and later on combined with their relatives

in France, and that ultimately changed the situation of immigrants due to their specific

religious and cultural needs and defined societal roles, although the other challenges like

accommodation and employment were also there. French state system mainly provide

religiously secular environment in almost every institution including educational

institutes, to propagate integration, and immigrants are forced to assimilate and fifty

percent of the Muslim population of France is French national. In Germany, strict

restrictions are imposed for getting nationality, although few relaxation was given in past

few years to promote integration in second generation of immigrants, even then very few

Muslims are German nationals. [18] Before 1980 Germany was not considered immigrants'

dream destination, but during economic-boom, migrant workers were engaged in millions

with the intention of eventually sending them back to their homeland. Islam was

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[16] Poulter, "Ethnic Minority Customs, English Law and Human Rights," *International and Comparative Law Quarterly*, 36(3)(1987):589-590.

[17] Ibid.

[18] Büchler, *Islamic Law in Europe?*, 25.

considered a foreign issue, not relevant for it, although the leading Muslim society is designed by Turk immigrants and growth of its particular Islamic uniqueness is relatively new idea, which has potential to perform a significant role in dialogues with its embraced state.[19] The settlement of Muslim communities in Switzerland is an outcome of economic and job opportunities for Yugoslavians and Turks, and coming of emigrants from Balkans and Africa. The rank given to refugee personnel in Switzerland was uncertain for many years and they were essentially used to fulfil the requirement of labour[20] and recently due to change in political situation, immigration policies have been restricted more. Spain with a rich history of Islam in past, recently can be distinguished by emigration, and Muslim immigrants in Spain mostly came from North Africa, Arab world, Eastern and South-Eastern Europe, majorly due to accession to European union in 1986.[21] These migrations are creating challenges for policy makers in European countries as they gradually established themselves from mere individuals to families and then to next generations with specific defined identities, and this transnational attribute of present migration is a test for states' legal systems, because of the differences of ethics, family systems, cultures and relationships with land of origin.[22] The marriages of Muslim immigrants with partners of their motherland or motherland of their close relatives are important due to many reasons. Roger Ballard[23] puts it as follows:

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[19]Ibid.

[20]Ibid.

[21] Hussain, "The Holy Grail of Muslims in Western Europe: Representation and their Relationship with the State," in *Modernizing Islam: Religion in the Public Sphere in the Middle East and Europe*, ed. J.L. Esposito, F. Burgat (London: Hurst & Company, 2003), 215–250.

[22] Grillo, "The Family in Dispute: Insiders and Outsiders," in *The Family in Question: Immigrant and Ethnic Minorities in Multicultural Europe,* ed. R. Grillo (Amsterdam: Amsterdam University Press, 2008), 15.

[23] Ballard, "Human Rights in Contexts of Ethnic Plurality: Always a Vehicle for Liberation," in *Legal Practice and Cultural Diversity*, ed. R. Grillo, R. Ballard, A. Ferrari, A. Hoekema, M. Maussen, P. Shah

Working as an institution in modern world is one of the main reasons behind tough and volatile characteristic of immigrant communities of Europe. The economic benefits stem to those who organize their internal dealings on that foundation then it becomes more crucial, when they are overextended worldwide. As soon as it is presumed that family resources are detained mutually, it implies they ought to be circulated amid lineage conferring to the norm of 'from each as per his capability to each as per his necessity'; like a small scale worldwide organization, conveying resources, notions and recruits interregional to get the most out of their joint benefits. They set their mutual connections on the pattern where elders are supposed to offer support and guidance to the youngsters, and youngsters normally presumed to obey their elders. As a result of such a collectivity substantial benefits are attained and access to every potential resource shared between the members of network to escalate associates' substance, fiscal and spiritual sanctuary when intervals become difficult. This global expansion has rather strengthened their family unity and relationships.[24]

2-Western Legal Frameworks on Family Affairs

All Muslim countries all over the world are one on the ground of common faith attachments but European Muslims are divided in different groups with distinct religious practices and believes.

Europe undoubtedly is converting into the garrison of ethnic, religious and cultural diversity. That diversity also creates fear of domination of alien legal norms over local ones, more specifically Muslim family law has started becoming stronger in many European countries. With the increase of Muslim migrants in Europe their family law

(Farnham: Ashgate,2009), 308.
[24] Ibid.

rules clearly highlighted the clash with the host land as family law norms are main source of identification for Muslims, Europe conversely reached to that contemporary modern and liberal form after long and hard struggle. Family law matters always remained an important point of concern for European states due to the reason essential amendments have been made in family law codes. Now family system of European states is more liberal, flexible and based on the choices of individuals. Muslim migrants in Europe demand reflection of religious and cultural diversity in laws as well by giving weightage to Islamic values and concepts as protection of cultural and religious identities comes under fundamental human rights and granted by international treaties.[25] Legal system of Europe tries to accommodate Muslim immigrants under the umbrella of private international law rules. But Europe represents multicultural public where cultural and religious identity and family laws are associated in different ways and hence escalate many other problems.[26]

Religion in Europe particularly for Muslims is not just for self-identification, due to staying in non-Muslim societies they want to establish and reinforce their religious affiliations publically.[27]

Islamic family law remained intact and protected even during colonial period and secularization of many Arab and other Muslim States could not replace it, which shows its strength and importance for Muslims.[28] Muslim religious community is formed and identified on the basis of family units originated with the Islamic family law rules.[29]

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[25] Büchler, *Islamic Law in Europe?*, 1-4.
[26] Ibid.
[27] Ibid.
[28] Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964), 149.
[29] Poulter, "The Claim to a Separate Islamic System of Personal Law for British Muslims," in *Islamic Family Law*, ed. C. Mallat, J. Connors (London: Graham & Trotman, 1990), 147.

Islamic legal tradition is dynamic, diversified and flexible and Islamic family law rules exhibit the same. Islamic family law rules are essential for all Muslims whether living as minority or majority.[30]

Spanish law equally recognizes civil and religious marriages and Islamic marriages are not only allowed and recognized with compulsory state registration, but also have legal effects and consequences.[31] In English legal system Muslim marriages do not need civil marriage ceremonies, mosques are authorized to register marriages themselves, like all the other religious communities.[32] But civil marriage registration is still a necessity for a religious wedding conclusion in the legal systems of Switzerland and France.[33] In Germany however, this prerequisite has been abrogated but status of religious marriages in civil law require clarification.[34]

Divorce is also governed by laws of European countries regardless of the fact that it has religious and cultural dimensions too, therefore, harmonization and collaboration between them is crucial. In case of Muslim divorce for instance in Germany, conflict-of-laws rules would be applicable. But divorce by repudiation may be objected and taken as against the principles of gender equality and human dignity, but other forms of Islamic divorces are acceptable.[35] The marriages could be dissolved without following

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[30] Nasir, *The Islamic Law of Personal Status* (Leiden: Brill, 2009), 34.

[31] For details see Article 59 of Codigo Civil; Martinez-Torrón, "The Legal Status of Islam in Spain," in *Islam and European Legal Systems*, ed. S. Ferrari, A. Bradney (Aldershot: Ashgate, 2000), 56.

[32] Welstead, Edwards, *Family Law* (Oxford: Oxford University Press, 2008), 24.

[33] For details see Article 97 para (3), ZGB (Switzerland); Article 165 and Article 191 of the Code Civil (France).

[34] Büchler, *Islamic Law in Europe?*, 70.

[35] Bano, "Muslim Family Justice and Human Rights: The Experience of British Muslim Women," *The Journal of Comparative Law* 2, no.2 (2007): 54; Martín-Casals, Ribot, "The Postmodern Family and the Agenda for Radical Legal Change," in *The International Survey of Family Law* (Bristol: Jordan Publishing, 2008), 411–436.

conventional divorce procedures and court intervention has also been reduced in Europe due to the possibility of administrative divorces.[36] Due to the contractualisation of family law, the court powers in divorce matters are challenged as well owing to the confinement of underlying purpose of law to equitable distribution of assets, compensation and consequences of the dissolution of the relationship, even in England and some other states consequences of divorce could be resolved through mediation or alternative dispute resolution, [37] apart from this family laws nevertheless play protective role with compulsory rules in areas relating to children and financial matters to ensure smooth and just outcomes. The informal settlement of disputes through processes of counselling and mediation is opening more avenues for

Sharī'ah councils to make remarkable services in family law field for Muslim minorities.[38]

Factually conflicts-of-laws rules under private international law allow even more accommodation of Islamic family law rules than the accommodation provided by European laws practically. When a law or norm confront with other form of law or norm it would ultimately institute self-identification process. Contemporary European family-law rules are not based on religious or customary norm like Asian and African countries but in few recent years Europe has tried to harmonise family-law codes to allow more integration of different communities, cultures and nationalities.[39] Family law rules of any society based on cultural dimensions generally represent remarkable distinctions within a

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[36] Büchler, *Islamic Law in Europe?*, 112-114.
[37] Poulter, *Ethnicity, Law and Human Rights: The English Experience* (Oxford: Clarendon Press, 1998), 234.

[38] Poulter, *Ethnicity, Law and Human Rights: The English Experience* (Oxford: Clarendon Press, 1998), 234.
[39] Büchler, *Islamic Law in Europe?*, 19-20.

society, however family law in European countries is more contractual in its essence, and individuals' liberty is over and above the family law codes.[40] The perimeters between public and private spheres must be reanalyzed by taking into account the plurality of cultural identities within a society.

3-Doctrines of Conflict of Laws in Western Jurisprudences

Conflict-of-laws principles are applicable where one of the parties in the case is a foreign national, since cross-cultural related family issues are not the primary focus of these rules. But the relationship between cultural diversity and family law mainly revolve around the regulations of conflict-of-laws. These rules decide the suitable valid commandment in family disputes of foreign nationals[41] the acceptability of foreign country's law in host country and its applicability are crucial issues for instance minors marriage contracts, divorces, polygamy, legitimacy of children, marriage between people of different faith etc. Conflict-of-laws rules are applied, without taking into account the cultural aspect, if one or more of the disputants are overseas, so the conflict of law principles are available for foreign nationals only, no matters how cultural diversity is deeply effecting the nationals. Law has a cultural aspect and undoubtedly it is fragment of every culture, as the cultural identities are maintained and protected ultimately to make the rules and implement them accordingly.[42] The origin and culture of immigrants are the crucial factors to determine the suitable rule for them in case of disputes in Europe, but all European countries are not addressing the issue in same way like for instance acts of private international law of Germany, France and Spain are different from Switzerland and England. German, French and Spanish codes of Private international law, in

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[40] Ibid.
[41] Büchler, *Islamic Law in Europe?*, 36.
[42] Ibid.

determining many issues of family law consider nationality a basic factor, aiming to protect the cultural affiliation of particular individual, although in Switzerland and England law of residence or domicile is taken into account to ascertain applicable legal order. In concluding marriage contract family law rules of the country of the spouses are applied in Germany.[43] Under German legal system distributive application is done in which preconditions in respect of compatible legislative enactment are judged in accordance with those several law canons, like for instance if one of the spouses is qualified to get hitched in accordance with the ruling of the state of his nationality, yet not eligible to espouse according to the law of the state of his other spouse's nationality, can lawfully accomplish espousal but principally it will be directed through German law.[44] Similarly, legal implications of matrimony and nuptial assets arrangements are resolved according to the nationality of the partners or latest joint nationality in the course of wedding, if one of spouse nevertheless holds that state's nationality or according to the law of state in which partners usually reside, or most recently routinely resided in the course of their wedding, if one of spouses even so routinely stays around.[45] In exceptional cases where spouses possess many nationalities then they can select the rule which administers their wedding, moreover, divorce is administered according to the rulings that govern the authorized conclusions of the wedlock at the time when divorce petition is filed but in suits of partners of alike non-German citizenship or joint citizenship in the course of their wedlock and one of the partners even so bears that citizenship at the moment of pursuing for divorce then law of a foreign country will

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[43] Ibid, 37.
[44] Ibid.
[45] Ibid.

apply.[46] For the parentage of a child, law of the country in which the kid normally lives, is applicable and law of the state of relevant parent may be taken into account as well but legal relationship between child and parents is determined on the ground of kid's usual abode. [47] In France there is no particular law to deal with the issues of private international law, The Code Civil conversely, provides conflict of law rules. Therefore, the marriages are regulated via statutes of the state of which each partner is a citizen, but dependent on the restrictions imposed by *ordre public*.[48] If the future spouses are of different nationalities, then they have to fulfil the eligibility requirements to marriage provided through the code of the state of each spouses to which they are citizens, but they are bound to some particular directions of French law as well.[49] Similarly, the law of the place where marriage ceremony took place, provides the formal requirements of a marriage and legal consequences of marriage are governed through the enactments of the country of their citizenship, if the nationalities of spouses are different then the enactments of the country in which they mutually abode with domiciles is considered.[50] For the Matrimonial Property Regimes[51] in the absence of nominated law, the habitual residence of the spouses after marriage provides the applicable law but if their usual dwelling is in unlike countries then the code of the state of joint citizenship will be relevant for them. Likewise foreign divorce law is applicable in the absence of spouses' French nationality or shared French domicile. The family code of the mother at time of the kid's delivery provides the rulings for parentage, in case child and parents have their

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[46] Ibid.
[47] Ibid.
[48] Gutmann, *Droit International Privé*, 6th Edition (Paris: Dalloz, 2009), 156.
[49] Condition *de fond* derived from the Article 3 para (3) and Article 171–1 of the Code Civil.
[50] Condition *de forme* derived from the Article 3 para (3) and Article 171–1 of the Code Civil.
[51] Article 4 para (1)of the Hague Convention and Article 4 para (2), section 3 of the Hague Convention

habitual residence in France then French law is applicable.[52] In Spain[53], nationality defines the applicable personal law for the individuals.[54] It is pertinent to express that nationality is an important determining factor in international family law as it may provide authentic and honest point of reference[55] but cultural identities may not necessarily be consistent with the legislative structure of that country and applying the law of the country only does not serve the purpose in all cases. Similarly, in case of Muslims, religion has leading role and it dominates their culture and national laws as well, by restricting them to follow the law of foreign nationality would ultimately create less beneficial scenario for Muslims, especially in cases of Muslim women like for instance Spanish law declares that it would dominate in all those suits where codes of woman's nationality do not allow annulment or allow merely in discriminatory manners.[56] Many studies show that majority of Muslim women seek protection in European or western laws rather than the laws of the state of their origin. One of the argument for not applying the law of origin is to promote integration among the people of foreign society, as the emigrants need to be integrated by adopting the culture, law and nationality of the state of residence. Factually, European countries have very strict and inflexible citizenship requirements which include legal integration by way of liberalization and eventually life of immigrant is pushed toward endless adaptation. Moreover, application of law of an individual's nationality in Private international law to

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[52] Büchler, *Islamic Law in Europe?*, 30-31.
[53] Small number of provisions of the Código Civil (Articles 8–12) provide rules in matters of private international law.
[54] See for details Article 50, Article 9 para (2), Article 9 para(3), Article 107 para(2) of the Código Civil.
[55] See for more details Foblets, "Conflicts of Law in Cross-Cultural Family Disputes," in *Europe Today;* "Who will Reorient Conflicts Law?," in *Relations familiales interculturelles / Cross cultural family relations,* Oñati Papers, ed. M.C. Foblets, F. Strijbosch,1999, 8, 32.
[56] See for details Article 107 para (2), subsection c of the Código Civil.

secure person's identity and culture would not serve the purpose due to the lack of compatibility between applicable procedural and substantive law in family matters and legal systems of East and West like for instance German courts could not apply religious laws evenly due to the loop between procedure and applicable substantive law, same is the case with other European courts.[57] For the application of religious laws by a court requires separate training, understanding of different procedure and rule of evidence and authority and a secular court without proper training over religious maters and laws would make the situation even adverse for the applicant. Similarly content, meaning and effects of laws are allowed to develop in particular context and culture when they are tried to apply forcefully in another culture and context they lost their effectiveness and authority.[58]

The philosophy behind the concept of applicable law based on nationality in private international was to protect and preserve the identity and culture of immigrants, as it was understood initially that these immigrants would ultimately go back to their host countries. But with the passage of time and with the permanent settlement of immigrants and their next generations in west, now Europe is more focusing on integration and avoids nationality based application of law by introducing reforms in private international law in many European countries. According to European Union legal structure in family-law matters only divorce issues are presently administered under international judicial jurisdiction and recognition of member states' decisions in marital matters by applying national conflict-of-laws norms.[59] There are no uniform conflict of law norms in

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[57] Büchler, *Islamic Law in Europe?*, 33.
[58] Wasserstein Fassberg. "Religious Diversity and Law," in *Human Diversity and the Law*, ed. M. Bussani, M. Graziadei (Bern: Stämpfli. 2005), 40.
[59] Büchler, *Islamic Law in Europe?*, 35.

European countries. A proposal had been forwarded for amendment in applicable law in family matters with the objective of synchronization of conflict of law principles especially in divorce cases but the proposal has failed to attain the approval of all European Union member states.[60] In family law issues English law does not provide the principle of choice of applicable law[61] and the only way out for the spouses are principle of domicile of choice that have inbuilt flexibility to choose applicable law for themselves.[62] Public policy is very important in private international law and the doctrine of public order could offer the opportunity for the implementation of Muslim family code on the individuals, in countries where law is applicable on the basis of spouses' nationality.[63] English family code considers domicile as an important factor while deciding the cases of conflict of law due to the reason many Muslims opt for unofficial Islamic family laws rather than secular English law. For this purpose numerous institutions/councils of Islamic law have been established over the period of time. These Islamic councils not only represent different schools of thought of Islam and provide dispute resolution mechanism but also fulfil the religious requirement of Muslims living there by performing the role of parallel quasi-judicial institutions. The Muslim minority of Britain choose to settle their family related litigations out of secular English courts and accept the authority of Islamic councils in intra-family disputes resolution.[64] The civil

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[60] Collier, *Conflict of Laws* (Cambridge: Cambridge University Press, 2001), 320; Collins, *Dicey, Morris & Collins on The Conflict of Laws* (London: Sweet & Maxwell, 2006), 878-969.

[61] Collins, *Dicey, Morris & Collins on The Conflict of Laws* (London: Sweet & Maxwell, 2006), 4.

[62] Briggs, *The Conflicts of Law* (Oxford: Oxford University Press, 2008), 24.

[63] See for details Article 17 IPRG (applicable law), Article 27 para(1) IPRG (recognition and enforcement) of Switzerland; Article 6 EGBGB (applicable law), section 328 para(1)subsection 4 of the German Code of Civil Procedure; article 12 para(3) Código Civil (applicable law) of Spain; article 3 Code Civil (applicable law and recognition) of France.

[64] Randeria, "Entangled Histories of Uneven Modernities: Civil Society, Caste Solidarities and Legal Pluralism in India," in *Unraveling Ties*, ed.Y. Elkana, I. Krastev, E. Macamo, S. Randeria (Frankfurt am Main Campus, 2002), 284.

marriage ceremonies of Muslim couples are considered mere engagements by them, thus sexual relationship and divorce could be allowed only after nikāh ceremony as per Islamic law. Similarly, couples without concluding civil marriage contacts are not legally considered married under English legal system, due to the reason Muslim couples mostly have to conclude two marriage contracts to accomplish the requirements of two different legal systems.[65]

It does not symbolize the lack of trust in English legislative structure rather it is grounded in the cultural and religious requirement of Muslim emigrant community.[66] These religious arbitration institutions protect women in mostly cases[67] like for instance[68] a woman getting religious divorce certificate is the most common reason behind appeals to a Sharī'ah council[69] which is being issued after reconciliation process. As a matter of fact in most cases wife's British divorce is unacceptable for the husband, which forces the wife to apply for talāq/khul' in Sharī'ah council.[70] Similarly, issues of mahr after divorce and other traditional concepts and customary practices are being challenged by the women in the council. But all Muslim women are not on same page regarding these legal matters as few believe in cultural and religious identities and authority of Islamic law on them, few others are not interested in these things.[71] The Sharī'ah councils on the other

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[65] Shah, "Attitudes to Polygamy in English Law," *International and Comparative Law Quarterly* 52, no.2 (2003):369–400.

[66] Shah-Kazemi, *Untying the Knot: Muslim Women, Divorce and the Sharī'ah* (London: The Nuffield Foundation, 2001), 32-34.

[67] See for details Keshavjee, "Alternative Dispute Resolution in a Diasporic Muslim Community in Britain," in *Law and Ethnic Plurality: Socio-Legal Perspectives*, ed. P. Shah (Leiden: Martinus Nijhof, 2007), 170.

[68] See for details Yilmaz, "Muslim Alternative Dispute Resolution and Neo-Ijtihād in England," *Alternatives: Turkish Journal of International Relations* 2, no.1 (2003):130.

[69] Bano, "Muslim Family Justice and Human Rights: The Experience of British Muslim Women," *The Journal of Comparative Law* 2, no.2 (2007): 38–66.

[70] Ibid.

[71] Ibid.

hand do not possess legislative validity and enforcement. In English court for acquiring civil divorce spouse has to dissolve religious marriage under Divorce (Religious Marriages) Act of 2002 which clearly shows that though faith based wedlock is not acknowledged through the law but it must be dissolved for getting legal divorce due to its normative effects. The judgments of the Sharī'ah councils are always based on the rulings of different schools of jurisprudence, opinion of Islamic jurists, common good, necessity and public interest.[72]

4- Islamic Jurisprudence on Conflicts of Laws

Conflict of laws generally direct the disputes related to nationality, authority over foreigners, status of individuals, legal systems, laws etc., but interestingly many areas of public and private international laws are overlapping too, probably owing to this datum Islamic Jurists did not handle both laws distinctly.[73] Owing to the change in world's political scenario and concepts of states importance of the rules of private international law has increased drastically. Islamic doctrine of conflict of laws includes questions of citizenship and rank of inhabitant foreigners; clash between: Muslim and non-Muslim laws, numerous Muslim laws, numerous non-Muslim laws; change of religion; position of people of Islamic territory in other Islamic land and in a non-Muslim land.[74] The concept of nationality in early period of Islam was constructed on tribal system and people of other Arab and foreign territories could get the nationality, membership and alliance of any tribe through contract.[75] Tribal protection and membership could be

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[72] Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and Pakistan* (Aldershot: Ashgate,2005), 172.

[73] See for details Hamidullah, *Muslim Conduct of State*.
[74] Ibid.
[75] Ibid.

sought by different methods and if the protection was merely accorded by one member of a tribe even without the permission of head of the tribe, rendered it compulsory for all members of tribe to respect that promise and contract of protection. However, the concept of nationality in Islam is based on belief and religion of a person actually determines his nationality, it is something which can be acquired, selected and adopted, ethnic and other basis of nationality are not important in Islam.[76] Hence Muslim and non-Muslim lands are identified on the basis of difference of power and authority, even one Muslim territory is foreign for other Muslim territory. The world's concept of nationality now a days rests on birth and domicile rather than religion or belief. Muslim Jurists also discussed the legal issues related to permanent and temporary residence of Muslim and non-Muslim citizens of an Islamic territory. All Muslims are equally protected within an Islamic state and no discrimination is acceptable as they belong to one nation but Islamic state has no jurisdiction or authority in any other territory over the Muslims who reside in that territory.[77] All religions are protected under Islamic territory and non-Muslims are allowed to stay, by fulfilling the legal prerequisites and submission to the law of the land. During the early periods of Islamic history, non-Muslim aliens could reside in Muslim territory for period of one year and any extended stay over the period of one year could give rise to the fulfilment of legal requirements of domicile, taxation and other obligations like rest of the non-Muslim residents, in the latter term, however, this time period extended to ten years due to international political realities.[78]

Non-Muslim citizens of Muslim state are called *ahl al-dhimmah*, they enjoy citizenship on the basis of bilateral contract of *dhimmah*, with the state, and pay protection tax

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[76] Al-Qurān 30:22.
[77] Al-Sarakhsī, *Sharh Kitāb Al-Siyar al-Kabīr* (Lebanon: Dār al-kutub al-'Ilmīyyah, 1997),v.5, 108-109
[78] Hamīdullah, *Muslim Conduct of State*, 317-325.

(jizyah), ultimately state gives them protection, freedom and honor. Separate courts are established to adjudicate them according to their own religious laws, but if they choose Muslim courts and judges then they can choose. But in cases where nationality is mix or difficult to determine on the basis of belief, then Islamic court must decide the case taking into account the possible benefit of aggrieved party.[79]

In situations where conflict amid Islamic and infidel laws emerge in an Islamic land, for instance if the case is between Muslim and non-Muslim in an Islamic court, Islamic law would be applicable but there are certain exemptions and relaxations exclusively available for the non-Muslims because they are not subject to that prohibition as Muslims. Some jurists hold opinion that a Muslim will not be given death sentence for murdering a non-Muslim since both are not equal in religion, but have to pay blood money only, but Hanafīs hold that no alike difference exist amid Muslim and non-Muslim citizens. Hence, they do not favor death sentence for a Muslim murderer who commit homicide of a non-Muslim of foreign country. But *al-Shaybānī* held that a legal alien non-Muslim is protected and liable to be treated on equal footing with other citizens in an Islamic territory.[80] Doctrine of jurisdiction in Islamic jurisprudence is firm and assertive, about the crime if committed in foreign territory with the Muslim who entered that foreign land with permission, does not come within the dominion of Muslim land and if the culprit entered in Muslim territory with permission, he cannot be tried in Islamic court for the crime committed in foreign territory as the place of crime is not under the ambit of Islamic court, but in case if non-Muslim commits crime in Islamic territory and then leave the territory, again if he comes back with permission he must be

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[79] Ibid.
[80] Al-Sarakhsī, *Sharh kitāb Al-Siyar al-Kabīr*, v.5, 50-52.

tried in Islamic court for his crime.

Conflict of laws can also arise between two non-Muslim laws within an Islamic land, like for example between Jewish and Christian laws, although Islamic court does not have jurisdiction in this case originally but parties if fail to choose court or tribunal then Islamic court will decide the case according to Islamic law, as for Muslims all non-Muslims are one nation or community.

Conflict of the laws can be arisen between different Islamic schools of thought, during early period of Islam law suits were normally decided by the judges according to their own understandings, but in latter eras judges and legal officers had to give judgement according to particular school of law, and enforced by the state, but some Islamic states have given choice to the Muslim citizens to be governed by any school of law then conflict of law arises.

Conflict of laws situation arises where one of non-Muslim spouses convert to Islam or any other religion, then if husband converted to Islam and wife is Jew or Christian then marriage will continue, but if belongs to other religion she has option either to convert to Islam, or to take separation, if wife converts to Islam then husband would be asked to convert to Islam, otherwise legal separation will take place.[81]

5-Effects of Conflicts of Family Laws on the Muslims in the West

Due to the official separation between state and religion in England, recognition of any religious community in any legal sense, or in government policy is not possible, as religious affiliation of a person is not point of concern for the State, even the government refuse to introduce any law on religious discrimination.[82] Ihsan Yilmaz[83] rightly points

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[81] Hamīdullah, *Muslim Conduct of State*, 324-325.
[82] Ihsan Yilmaz, "Muslim Law in Britain: Reflections in the Socio-Legal Sphere and Differential Legal

out that legal recognition and many other relaxations have been granted to ethnic

minorities, throughout the history of English legal system which ultimately effected the

creation of consistent procedure for marriages in English law.[84] Jews are exempted from

the directions related to the formalizing and recording of matrimonies under Marriage

Acts 1949–1996 and this legal protection had been afforded to them through the Lord

Hardwicke's Marriage Act in 1753,[85] unfortunately these exclusions have not been

designed for other racial minority sections of the state. During nineteenth and initial

twentieth eras English legislative structure gradually granted legal acknowledgement to

few faith minorities but new ethnic minorities evolved in later years could not be

benefited by those rules[86] although new socio-legal facts have been addressed by English

law to some extent. For example, it was decided in a case that Asian marriage legally

validated immediately upon registration and relevant spiritual ceremony[87] and in another

case to facilitate civil and religious form of wedlock, the Marriage (Registration of

Buildings) Act, was abolished to jointly celebrate a religious and civil marriage.[88]

Similarly, Jews and Muslims are authorized to slaughter animals with their traditional

method according to s1(2) of the Slaughter of Poultry Act 1967 and s36(3) of the

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Treatment," *Journal of Muslim Minority Affairs* 20, no. 02 (2000): 353–60; Martin McEwen, "Anti-discrimination Law in Great Britain," *New Community* 20, no. 3(1994):353–370.

[83] Ibid.

[84] A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 43; Carolyn Hamilton, *Family, Law and Religion* (London: Sweet & Maxwell, 1995), 20-35.

[85] A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 42; Marriage Act, S 26(1), 35(4), 43(3), 75(1) (a), 1949.

[86] See for details Werner F. Menski, "Asians in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain," in *Ethnicity, Identity, Migration: The South Asian Context*, ed. Milton Israel and Narendra Wagle (Toronto: University of Toronto, 1993), 260; Carolyn Hamilton, *Family, Law and Religion* (London: Sweet & Maxwell, 1995), 20-35.

[87] Kaur v. Singh, 1 All ER, 1972, p. 292.

[88] Kaur v. Singh, 1 All ER, 1972, p. 293; R v. Bibi (1980), R v. Bailey, R v. Adesanya, and Malik v. British Home Stores (1980); A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 41.

Slaughterhouses Act 1979.[89] Similar concessions are available for other minorities too,

even holding knives in public places on religious ground are allowed, otherwise a crime

under Criminal Justice Act 1988.[90]

Interestingly the word ethnicity has no uniform settled denotation or interpretation in

English legal system, at some occasions it is used in the meaning of race.[91] However, in

1991 census, it is understood by means of association or affiliation to a socially unique

public of some kind,[92] the uncertain and vague meaning of the term ethnicity or ethnic

minority had created many hitches, particularly for Muslims owing to fact that minority

groups were not being determined on the basis of religions rather on change social

patterns.[93] English legal system does not deal uniformly with all ethnic minorities. Sikhs

are acknowledged by way of distinct ethnic set within the ambit of the 1976 Act but

Muslims are not considered as an ethnic group.[94] Extended common past and a distinct

national practice are considered two vital standards to consider a group "ethnic" and to

have protection of law according to Race Relation Act, 1976 in England. Religion, is not

included in it and just on the basis of religion, a group could not be entitled as an ethnic

group. Muslims in England are not an ethnic cluster per se according to the law but

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[89] Ihsan Yilmaz, "Muslim Law in Britain: Reflections in the Socio-Legal Sphere and Differential Legal Treatment," *Journal of Muslim Minority Affairs* 20, no. 02 (2000): 353–60; Martin McEwen, "Anti-discrimination Law in Great Britain," *New Community* 20, no. 3(1994):353–370.
[90] Ibid.
[91] Roger Ballard and V. Singh Kalra, *The Ethnic Dimension of the 1991 Census: A Preliminary Report* (Manchester: Census Microdata Unit, University of Manchester, 1993), 3.
[92] Ibid.
[93] Jansen Johannes J. G, "Islam and Civil Rights in the Netherlands," in *Muslims in Europe*, ed. Bernard Lewis and Dominique Schnapper (London. New York: Pinter, 1994), 41; Roger Ballard, "The Construction of a Conceptual Vision: Ethnic Groups and the 1991 UK Census (Review Article)," *Ethnic and Racial Studies* 20, no. 1(1997):181–194; Roger Ballard and V. Singh Kalra, *The Ethnic Dimension of the 1991 Census: A Preliminary Report* (Manchester: Census Microdata Unit, University of Manchester, 1993), 3-4.
[94] Mandla v. Dowell Lee, 3 All ER 1108 (CA), 1982; Mandla v. Dowell Lee 1 All ER, 1062 (HL), 1983; Tariq Modood, *Racial Equality: Colour, Culture and Justice* (London: Institute for Public Policy Research, 1994), 14; Tariq Modood, "Muslim Views on Religious Identity and Racial Equality," *New Community* 19, no. 3(1993): 513–519.

whites, Gypsies, Sikhs and Jews are ethnic groups.[95] The most significant attributes of the

minority communities in modern times are not to have particular color of skin like white,

brown or black yet their fidelity to definite civilizations, practices, faiths, morals and

ethical standards that are majorly different and distinct from those of the majority

community as emphasized by Poulter.[96]

Conversely, race has never be regarded as an important issue to be discussed in socio-

legal debates[97] and ethnicity is not purely racial but mainly cultural, not necessarily

noticeable from individual's appearance.[98] English legal system does not possess a

constant, methodical, rational and neutral acknowledgement structure to recognize ethnic

minority laws and traditions.[99] Islamic law which is a mandatory religious law for

Muslims having the rank of ethics or morals however, no legal authority, in civil and

public legal system and due to this basic fact Muslims are bound by alike commandments

like all citizens of the state.[100] It is certain that the protection of the law is not for all

ethnic minorities including Muslims.[101]The British legal system claims to be impartial in

terms of religion in family matters, happen to be discriminatory and does not fulfil the

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[95] Sebastian M. Poulter, "Muslim Headscarves in School: Contrasting Legal Approaches in England and France," *Oxford Journal of Legal Studies* 17, no. 1 (1997):64.

[96] Sebastian M. Poulter, "Cultural Pluralism and its Limits: A Legal Perspective," in *CRE Britain: A Plural Society: Report of a Seminar* (London: Commission for Racial Equality, 1990), 3.

[97] Werner F. Menski, *Ethnicity, Discrimination and Human Rights* (London: School of Oriental and Asian Studies, 1997), 4.

[98] Ibid.

[99] Carolyn Hamilton, *Family, Law and Religion* (London: Sweet & Maxwell, 1995), 38; Campbell Alan Mclachlan, *State Recognition of Customary Law in the South Pacific* (London: University College London, 1988), 84.

[100] J. Waardenburg, "Muslim Associations and Official Bodies in Some European Countries," in *Shadid and van Koningsveld,* ed. in *The Integration of Islam*, 36; The Runnymede Trust (TRT), *Islamaphobia* (London: Runnymede Trust, Cited in Q-News, June 1997); Helen L. Conway, *Divorce and Religion* (NLJ Practitioner,1995),1618–1619.

[101] Werner F. Menski, *Law, religion and South Asians* (London: School of Oriental and Asian Studies, 1996), 265; A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 51.

requirement of Muslims.[102] Muslims are under compulsion to follow the law available to

them rather to demand for acknowledgement of Islamic rules, the country however agrees

to admit societal, yet not legal pluralism and hence therefore, implementation of uniform

legal system is against the faith and traditional multiplicities of the people[103] because it

will compulsorily push the minorities to assimilation[104] that why Muslim community in

Britain is displeased owe to this existing discrimination in determining their rights on the

basis of religion.[105] It seems like British society does not realize the presence of a Muslim

public in the state.[106] Muslim spokesmen assert that they do not consider to be a cultural

group like Jews and Sikhs and are separated from the expressions of prevailing anti-

discrimination statute, and its clear denial of their legal position.[107] Owing to the

discriminatory legal position of other minorities including Muslims, the trust level of

people over the state and government has decreased over the years, as they intensely

believe that natural prerogatives of other than white people are not important for the

state.[108] Muslim scholars often emphasize in their writings on the importance of Islamic

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[102] Werner F. Menski, *Law, religion and South Asians* (London: School of Oriental and Asian Studies, 1996), 6; A. Bradney, *Religions, Rights and Laws* (Leicester: Leicester University Press, 1993), 41.

[103] Werner F. Menski, "Uniformity of Laws in India and England," *Journal of Law and Society* 7, no. 11(1988): 17.

[104] Jorgen S. Nielsen, *Muslims in Western Europe* (Edinburgh: Edinburgh University Press, 1992),164; David Pearl and Werner F. Menski, *A Textbook on Muslim Family Laws*, 3rd edn, (London: Sweet & Maxwell, 1998), Chapter 5.

[105] Jorgen S. Nielsen, "Muslims in Britain: Searching for an Identity," *New Community* 13, no. 3(1987):384.

[106] Ibid.

[107] Tariq Modood, *Racial Equality: Colour, Culture and Justice* (London: Institute for Public Policy Research, 1994), 14; United Kingdom Action Committee of Islamic Affairs (UKACIA), *Muslims and the Law in Multi-faith Britain: Need for Reform*, memorandum submitted by the UKACIA (London: UKACIA, 1993); Jan Rathetal, "The Recognition and Institutionalization of Islam in Belgium, Great Britain and the Netherlands," *New Community* 18, no. 1(1991): 106; Tariq Modood, "Muslim Views on Religious Identity and Racial Equality," *New Community* 19, no. 3 (1993): 516; Jean Ellis, "Local Government and Community Needs: A Case Study of Muslims in Coventry," *New Community* 17, no. 3(1991): 359–376.

[108] Werner F. Menski, "Asians in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain," in *Ethnicity, Identity, Migration: The South Asian Context*, ed. Milton Israel and Narendra Wagle (Toronto: University of Toronto, 1993), 6–7.

golden principles of equality, love and support for a society.[109] Muslims, due to these reasons, which is quite natural do not involve in English law but they are expected to become the part of their adaptation process.[110] Menski argues that it is reality when the law of state ignores social realities and consider them irrelevant then personal laws secure power; same is the case with Muslims, they are seeking for other solutions by avoiding the state laws, as state laws are not fulfilling what they require.[111] Ground realities show that a lot of significant litigations of all societies, especially Asians are certainly not present in front of formal law courts.[112] Similarly, Muslims apply Islamic law in their everyday lives and Matrimonies containing polygamous, unregistered, child weddings and divorces are established in line with the principles of Muslim law and traditions. Muslims pursue their particular methods to shape their dealings in the society.[113] There is a dire need on behalf of the state to keenly observe the multiculturalism and a socio-legal standpoints and to allow the law to adjust itself in line with fluctuating environments, then it would be possible to terminate prejudice against Muslims and other minorities.

English legal system presently not only permitted Islamic laws and Islamic religious

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[109] Tariq Modood, *Racial Equality: Colour, Culture and Justice* (London: Institute for Public Policy Research, 1994), 7; "Muslim Views on Religious Identity and Racial Equality," *New Community* 19, no. 3(1993): 517;Werner F. Menski, "Asians in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain," in *Ethnicity, Identity, Migration: The South Asian Context*, ed. Milton Israel and Narendra Wagle (Toronto: University of Toronto, 1993), 241.

[110] Ibid.

[111] Werner F. Menski, "English Family Law and Ethnic Laws in Britain," *Kerala Law Times*, no. 1(1988):58; "Asians in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain," in *Ethnicity, Identity, Migration: The South Asian Context*, ed. Milton Israel and Narendra Wagle(Toronto: University of Toronto, 1993), 238–268; Zaki Badawi, "Muslim Justice in a Secular State," in *God's Law Versus State Law: The Construction of Islamic Identity in Western Europe,* ed. Michael King(London: Grey Seal, 1995), 77–79; David Pearl and Werner F. Menski, *A Textbook on Muslim Family Law*, 3rd edn (London: Sweet & Maxwell, 1998); Ihsan Yilmaz, *The Dynamic Legal Pluralism and the Reconstruction of Unofficial Muslim Laws in England, Turkey and Pakistan* (London: SOAS, 1999).

[112] Werner F. Menski, "Asians in Britain and the Question of Adaptation to a New Legal Order: Asian Laws in Britain," in *Ethnicity, Identity, Migration: The South Asian Context*, ed. Milton Israel and Narendra Wagle (Toronto: University of Toronto, 1993), 253.

[113] Ibid.

practices but also accepted and accommodated it in variety of ways in secular legal system. Even many scholars like Archbishop were criticized for their schemes and suggestions to create possible harmony with religious laws as additional jurisdictions has already been provided in this regard through which parties can agree to give the power to make binding determinations in civil disputes.[114]

Werner Menski [115]believes that the true recognition of religious law is essential, and rejects the idea of giving priority to some groups over the others under the common law tradition of making exceptions in certain cases, because this type of biasness create negative impact on the society, so therefore Government must take positive measures and provide practical solution to the problems of ethnic minorities by avoiding ethnic and pluralist politics. The interaction between Islam and English law need to be comprehended with reference to the previous interaction and recognition between Islam and the law, is emphasized by Archbishop for offering practical solutions for its implementation in any society.[116]

Sara Tonolo asserts[117] that paying attention to the religious values in private international law is pivotal, as the globalization of foundations of private international law do not guarantee that conflict of laws must too transact with persons' recognitions. The culture, values, civilization and religion determine the personal identity but the application of foreign laws, in European systems misses the true understanding of nature of laws as law

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[114] A Tucker, "The Archbishop's Unsatisfactory Legal Pluralism," Public Law (2008), 463, 466.
[115] W Menski, "Law, Religion and Culture in Multicultural Britain," in *Law and Religion in Multicultural Societies*, ed. *R Mehdi et al* (Copenhagen: DJØF Publishing, 2008), 45.
[116] A Tucker, "The Archbishop's Unsatisfactory Legal Pluralism," Public Law (2008), 463, 466.

[117] Sara Tonolo, "Religious Values and Conflict of Laws," *Stato, Chiese e pluralismo confessionale Rivista telematica* (www.statoechiese.it), no.7 (2016):22, ISSN 1971- 8543.

involves cultural, religious and ethnic identities which may be collective and individual as well. Although the nature of the law, and its connection with morals and religion in Europe is similar to Islam but recently they are considered unfashionable, apart from this, coordination between legislative structures in diverse individual uniqueness is complicated, in European and Islamic structures and acceptance of some foundations of Islamic code can grow results for European systems. As Islamic legal system would not recognize foreign decisions if they are not in compliance with family law of Islam and Treaty law does not capable to provide effective remedies to these problems, since the Muslim lands customarily do not connect to the Hague Conventions and Religious values probably the main reason behind non acceptance of this conventional approach. She argues further that It is important to overcome cultural differences, by using appropriate ways as the true character of conflict of laws could offer viable managements for social variances similarly religious values could be used to achieve legal pluralism by offering new explanation of the public policy exclusion, because application of the public policy exclusion indicates a possible different elucidation of the exception, with the objective of considering religious values and principles for the defense of essential privileges of persons, for instance in polygamous marriage the distribution of estates and retirement income amid spouses of the dead husband or the legacy entitlements of kin, although use of the comparative legal method, to respect cultural and religious values is good but meaning of boundaries of the communal policy exclusion, in the light of changeability of way outs i.e,, freedom of code and law as a fact, would pose potential problems in this regard. Therefore, the notion of public policy must contain necessary standards, similar to faith's morals, private and public rights. Russell Sandberg asserts[118] that religious laws,

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[118] Russell Sandberg, "Islam and English Law," *Law & Just.-Christian L. Rev.* 164(2010): 27-44.

like EU laws and the verdicts of the European Court of Human Rights have existence beside the law of the land but contemporary legal position is not comprehended properly, although many extending codes have been promulgated to recognize and protect spiritual groups and to give them legal and financial benefits, in the form of exceptions from usually valid enactments. Similarly, faith groups are lawful and allowed to practice their religion and sacred edifices may be registered in lieu of worship and solemnization of wedlock purposes, and the traditional legal position restricts only whatever is restrained by the law. Moreover, discrimination on grounds of religion is condemned and these religious laws get recognition by way of substance of datum or through State enactment or by the Arbitration Act 1996 or through public policy or by way of private international law.

The data presented in this thesis reveals that European Convention on Human Rights condemned any kind of partiality on the bases of faith or religion. In accordance with western thoughts a democratic society cannot deny liberty of faith because human conduct and person's identity would not be governed and developed without this right. The right of liberty of faith is important for both believers and non-believers. However, this right is not unlimited as certain laws, objectives and proportion-based restrictions are imposed. In few cases this right is restricted especially when freedom of others need to be secured from undue influence. The Muslims in the West are not a homogeneous group. They are divided on the basis of origin, history and objectives. They tend to demonstrate and observe specific rituals primarily under the cultural influence of their homelands. In addition to it, these communities have diversified because of various approaches to religious conceptions and relations with their religion. The Muslim communities of

United Kingdom historically belong to former British colonies such as Pakistan, Bangladesh, India and other South Asian countries. They are also different on the basis of ethnic, professional and educational backgrounds.[119] These Muslim minority groups have different cultural, ethnic, religious and family systems but not significantly contradictory with the majority's beliefs and systems. The approach of British government to religious diversity and liberty of faith is moderate and flexible. France is also prominent with the large number of Muslim populations from its colonial past. Majority of immigrants who settled in France are from north, west parts of Africa. They were allowed to settle in France to meet the need of cheap labor. French state system mainly provides secular environment in almost every social institution including educational institutes. French secularism is aimed to promote and propagate integration. The government policies in France based on the initiatives that asked immigrants to assimilate in French culture, so that they can be part of the French culture and civilization. A Pew Research report of 2017 suggests that approximately 5,760,000 Muslims are 8.8% of French population. In spite of strict restrictions imposed on getting nationality, a sizable Muslim community has been established in Germany. To promote national integration particularly among the second generation of immigrant's German government has extended few relaxations. German naturalization is still not an easy task for the Muslims in Germany. Until 1980s Germany was not favorable and dreamed destination for immigrants. During economic-boom, millions of migrant workers were with the intention of eventually sending them back to their homeland after getting benefits from their skills. Islam was considered a foreign issue, not relevant for it, despite of the growth of leading Muslim society of

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[119]Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralism in England, Turkey and Pakistan* (Aldershot: Ashgate, 2005), 55.

immigrants which has potential to perform a major role in negotiations with its embraced land. [120] The settlement of Muslim communities in Switzerland is an outcome of economic and job opportunities for Yugoslavians and Turks, and coming of emigrants from Balkans and Africa. But the status of Muslim immigrants in Switzerland was unclear for many years. Initially they were used for labour but recently due to the change in political situation, immigration policies have been restricted more. Spain with a rich history of Islam in past, recently can be distinguished by emigrations. These migrations are creating challenges for policymakers in European countries as they gradually established themselves from mere individuals to families and then to next generations with specific defined identities. These current emigrants are multicultural and multinational and undoubtedly a potential challenge for the legal systems of different countries.

Rules of conflicts-of-laws in private international law allow even more accommodation of Islamic family law rules than the accommodation provided by European laws virtually. When a law or norm confront with other form of law or norm it would ultimately institute self-identification process. Contemporary European family-law rules are not based on religious or customary norm like Asian and African countries. In few recent years Europe has tried to harmonize family-law codes to allow more integration of different communities. Family law rules of any society based on cultural dimensions generally represent remarkable distinctions within a society. However, individual's liberty in Europe is over and above the family law codes. Therefore, perimeters between public and private spheres must be reanalyzed by taking into account the plurality of cultural

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[120]Ibid.

identities within a society.

The philosophy behind the concept of applicable law based on nationality in private international was to preserve the identity and culture of immigrants. It was understood initially that these immigrants would ultimately go back to their host countries. But with the passage of time and with the permanent settlement of immigrants and their next generations in west, now Europe is more focusing on integration and avoids nationality based application of law by introducing reforms in private international law in many European countries. Furthermore, there are no uniform conflict of law norms in European countries hence a proposal had been forwarded for amendment in applicable law in family matters with the objective of synchronization of conflict of law principles especially in divorce cases but the proposal has failed to attain the approval of all European Union member states. Muslim Jurists did not discuss public and private international laws separately due to the overlapping characteristics of both laws. Islamic doctrine of conflict of laws includes questions of citizenship, status of foreigners, clash between Muslims and non-Muslim laws, differences between Muslim laws, conflicts between non-Muslim laws, change of religion and position of people of Islamic territory in other Islamic land and in a non-Muslim land. All Muslims are equally protected within an Islamic state and no discrimination is acceptable. But Islamic state has no jurisdiction in any other territory over the Muslims who reside in that territory. All religions are protected under Islamic territory and non-Muslims are allowed to stay, by fulfilling the legal prerequisites and submitting to the law of the land.

Hence jurists emphasize in their discourses that it's important to give proper acknowledgment to the religious values in private international law since globalization of

fundamentals of private international law do not guarantee that conflict of laws must too consider individual's identity. The personal identity is determined by culture, values, civilization and religion but the application of foreign laws in European systems omit the true understanding of nature of laws. Although the nature of the law, and its connection with morals and religion in Europe were alike Islam. But recently these connections are considered outdated and inapplicable. Islamic legal system would not recognize foreign decisions if they are not in compliance with family law of Islam and religious values are the main reason behind non acceptance of all conventional approaches. There is a dire need for European states to deeply observe the multiculturalism and a socio-legal standpoints and to allow the law to adjust itself in line with fluctuating environments then it would be possible to terminate prejudice against Muslims and other minorities.

CHAPTER NO.7

DEBATE ON LEGAL PLURALISM AND ITS VALUE

FOR MUSLIMS IN THE WEST

CHAPTER NO. 7

DEBATE ON LEGAL PLURALISM AND ITS VALUE FOR MUSLIMS IN THE WEST
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It is not possible that Sharī'ah can be implemented on Muslims living in non-Muslim

countries as it was implemented on the Muslims in Muslim societies in the past. The

possible role of the Sharī'ah is dependent on its capacity to interact with other legal

systems. Moreover, Sharī'ah has well-defined rulings related to private International law.

The rulings are also working in environment that is legally pluralistic. In this background

this chapter is designed to discuss emerging concept of legal pluralism.

1-Legal Pluralism

1.1-Concept of Pluralism

Pluralism[1] is one of the important contemporary modern social values that has become

important and challengeable since 1970s. The 'existence of different groups of people in

one society' is described as pluralism. It suggests that good people having diverse faiths

sects and cultures can live together.[2] According to the European Court for Human Rights

'pluralism, tolerance and broad-mindedness' are characteristics of modern democratic

societies.[3] It suggests living of people from different backgrounds, faiths together

peacefully, while following their faiths and living in accordance with their own traditions.

Pluralism is advanced through global recognition of diverse belief, standards of morality

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[1] Oren Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict, International Studies in the Theory of Private Law* (Hart Publishing, 2004), 201, http://gen.lib.rus.ec/book/index.php?md5=7504281a3e6c76151bafaf39e7080ccc.

[2] *Oxford Advance Learning Dictionary* (Oxford: Oxford University Press, 2010), 1165. S.V "Pluralism."

[3] This opinion has been used by the EU Court of Human Rights in various judgments such as: Handyside v. U.K, 1 E.H.R.R. 737, at para (49); Dudgeon v. U.K, 4 E.H.R.R. 149, at para (53), and the "rule of law" (Golder v. U.K., 1 E.H.R.R. 524 at para (34); Klass v. Germany, 2 E.H.R.R. 214, at para (55).

and cultural systems. The theory of plurality is changing into a contemporary reality because of unprecedented social, economic, scientific and political developments. The scientific study of religions, enhancing knowledge of other faiths, rapid growth of transport, increasing trade, advancing tourism, immigration and growing modern communication and contribution in creation of awareness for diversity and pluralism. Wilfred Cantwell Smith feels that in modernity we live in context of religious pluralism and states: "The more alert we are, and the more involved in life, the more we are finding that they are our neighbors, our colleagues, our competitors, our fellows. Confucians and Hindus, Buddhists and Muslims are with us not only in the United Nations, but down the street. Increasingly, not only is our civilization's destiny affected by their actions; but we drink coffee with them personally as well."[4] Pluralism has many types and kinds such as religious pluralism, cultural pluralism, ethnic pluralism and legal pluralism.

1.2-Importance of Legal Pluralism

Legal pluralism is existence of more than one legal command in a communal domain. Nearly almost every society is legally plural regardless of colonial background and act as a central theme when relationship between law and society is concerned.[5] Legal pluralism is synchronization of two or more legal structures in one and alike communal field.[6] No wonder state laws have been changed, modified and amended by invasions, conquests, migration and for many other reasons for years.[7] Social scientists' and anthropologists' studies of early twentieth century about local laws of tribes and village people in Africa, Asia, and the Pacific colonized societies reveal that they were interested to know by what

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[4] Smith, *The Faiths of Other Men*, 10.
[5] Merry, "Legal Pluralism."
[6] Griffiths, "What Is Legal Pluralism?"
[7] Merry, "Legal Pluralism."

means these individuals preserved collective mandate devoid of European law,[8] since the

element of communal control and social influence on tradition, law, and trial procedure

have found in small communities, with the time they realized that colonized societies had

local and European laws together. Colonial rules were molding the public life of these

towns and clans more precisely.[9] According to Popsil's[10] claim operational sub-groups[11]

in a society have their own legal systems[12] that are different from their other counterparts.

According to John Griffiths[13] there is a difference between legal pluralism in the light of

Social Science[14] and in Juristic view. Juristic interpretation of legal pluralism is related to

the issue of dual legal structures specially when colonies have been established and they

force their structure of law on preceding justice arrangements, when the state instruct

distinct sets of law by taking into account the religious, national, ethnic, geographic, .etc.,

affiliation of the population and when similar commands are reliant on the justice

structure of the state. This generates many complex legal problems, for instance

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[8] Ibid.
[9] Ibid.

[10] Leopold Pospisil, *The Anthropology of Law: A Comparative Theory of Law* (New York: Harper and Row, 1971), 107; Sally Engle Merry, "Legal Pluralism*", Law &Society Review 22*, no.5(1988):869, https://doi.org/10.2307/3053638.

[11] Here subgroup denotes ancestry, lineage, communal, and political units that form a homogenous society, hierarchically ordered and primarily analogous in principle and method. For more details see Stewart Macaulay, "Private Government" (Disputes Processing Research Program Working Paper, 1983), 86; Stuart Henry, *Private Justice* (Boston: Routledge and Kegan Paul, 1983): Leon Lipson and Stanton Wheeler, eds., *Law and the Social Sciences* (New York: Russell Sage Foundation, 1986), http://www.jstor.org/stable/10.7758/9781610448833.

[12] It includes the state enforced judicial system and other normative rulings for instance institutions and organizations. It incorporates drafted codes, tribunals, and security forces. While sometimes reproducing the structure and figurative shape of state law, see for details Stewart Macaulay, "Private Government" (Disputes Processing Research Program Working Paper, 1983), 86; Leon Lipson, and Stanton Wheeler, eds., *Law and the Social Sciences* (New York: Russell Sage Foundation, 1986), http://www.jstor.org/stable/10.7758/9781610448833.

[13] Griffiths, "What Is Legal Pluralism?"
[14] Social Science observes legal pluralism as a pragmatic scenario of a society or social group where distinct legal codes of distinct legal structures co-exist.

classification of the persons who belong to that group, determination of subgroup's rules,

areas on which particular law is applicable, and in which situations a person can change

or shift from one law to another law applicable on him. These difficulties normally occur

when subgroups rules are not available especially in written form.[15] Many leaders of the

post-colonial societies considered this juristic view as confused, frustrated and difficult

due to its complex legal problems.[16]

Furthermore, it underlines acceptance and synchronization, while pluralistic discourse

points toward complete settlement, similarly it condemns the idea that all difficulties are

generated through shared unawareness and confusions.[17] Pluralism has become very

important after worldwide recognition of current realm consists of varied values, faiths,

and criteria of ethics. Due to unprecedented scientific, social, economic, scientific and

political developments, culture of plurality seems an inescapable reality. The detonation

of awareness about numerous faiths backed the scientific learning of religions. Tourism,

trade, immigration and rapid growth of means of transport and communication enhanced

personal contacts between the adherents of different religious traditions.[18] Wilfred

Cantwell Smith feels that the modern man lives his religious life in context of religious

pluralism. Not only for mankind in general but also for the individuals the people of other

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[15] Merry, "Legal Pluralism."

[16]Ibid.

[17] Panikkar, "The Invisible Harmony: Universal Theory of Religion or a Cosmic Confidence in Reality," in *Towards a Universal Theology of Religions*, ed. Leonard Swidler (Maryknoll, New York: Orbis Books, 1988), 125.

[18] See for details Alan Race, *Christians and Religious Pluralism : Patterns in Christian Theology of Religions* (London: SCM Press,1983), 1; John Hick, *The Rainbow of Faiths: Critical Dialogue on Religious Pluralism*(London: SCM Press,1995), 12-13; Daniel B. Clendinin, *Many Gods, Many Lords: Christianity Encounters World Religions* (Grand Rapids, MI:Baker Books 1995), 18-29; Charles Kimball, *Striving Together : A way forward in Christian-Muslim Relations* (Maryknoll, NY: Orbis Books,1991), 48-56; David A.Hait, ed., *Multi Faith Britain* (London: O Books,2002), 23-31; Mahmut Aydin, "Religious Pluralism: A Challenge for Muslims-A Theological Evolution," *Journal of Ecumenical Studies* 38, no. 2-3 (Spring- Summer 2001):330-345.

persuasions are no longer at distant. He suggests that 'Confucians and Hindus, Buddhists and Muslims are with us not only in the United Nations, but down the street.'[19] In this mutually dependent sphere the cohabitation of diverse faiths, civilizations, and racial assemblies constitute pragmatic difficulty that our forefathers never had to face. Therefore, multinational people of Britain, Europe and USA need to understand the acceptance of ethnic, traditional and religious diversity, hence the term pluralism has been interpreted as an impartial phrase identical to variety by social scientists and an idea alike to multiculturalism.[20] Until recently, each nation dehumanized the other, instead of accommodating seeks for its own supremacy. This current acknowledgement of aliens is attained as a result of growing technical developments in conveyance and connection.[21] Another factor added to these is 'marginalization of confessional language in theology and religious studies'.[22] Among these numerous elements are 'revealing of understanding about many faiths, developing in the technical learning' of faiths, huge migrations from East to West, interreligious exchange of ideas and meetings.[23] The people who believe in pluralism see religious assortment as a benediction, and a mark of God's bounty. Such individuals are conscious about the need of joint acceptance and dialogue with fellows of other faith societies. According to them religious pluralism has stance on lifespan and

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[19] Wilfred Cantwell Smith, 11.

[20] Roger Boase, "Ecumenical Islam: A Muslim Response to Religious Pluralism," in *Islam and Global Dialogue Religious Pluralism and the Pursuit of Peace,* ed. Roger Boase (England, USA: Ashgate Publishing Limited, 2005), 247.

[21] Abdulaziz Schedina, *The Islamic Roots of Democratic Pluralism*, 22-23.

[22] Adnan Aslan, *Religious Pluralism in Christian and Islamic Philosophy, The Thought of John Hick and Seyyed Hossin Nasr* (Curzon Press, 1998), 8.

[23] For these factors, see Alan Race, *Christians and Religious Pluralism: Patterns in the Christianity Theology of Religions* (London: SCM press,1983),1; John Hick, *The Rainbow of Faiths: Critical Dialogues on Religious Pluralism* (London: SCM Press, 1995),12-13; Daniel B. Clendenin, *Many Gods, Many Lords: Christianity Encounters World Religions* (Grand Rapids, MI: Baker Books, 1995), 18-29; Charles Kimball, *Striving Together: A way Forward in Christian-Muslim Relations* (Maryknoll, NY: Orbis Books, 1991), 48-56.

motivational model. They would say that no reasonable and truthful individual could assert that his faith has special authority.[24] All the theological developments gave way to what is called *pluralism* now. It is not the result of some overnight flight in the region of theology. The way was gradually prepared, the path was slowly paved. Pluralism does not begin with a self-contained system of terms or a self-centered theory of relations. It represents a tendency rather than an achievement. It emphasizes on change, adaptation, re-organization, or an original and genuine action whatever and whenever it occurs. It was increasingly felt that in the developing global community, no one can regard himself far and forlorn. As the geopolitical boundaries gave way to the development of wider scope for mutual coexistence, the need of mutual understanding and respect for each other's beliefs and values was also stressed. The concept of religious pluralism owes its birth to this recent historical phenomenon. [25]

1.3- Challenges to Legal Pluralism

In spite of greater acceptability of pluralism, it has certain challenges too, due to various and sometimes conflicting approaches. Some took occurrence of religious variety as a sign of chronological errors in faiths. According to the opinion of Hossein Nasr, 'plurality of faith has been utilized as a defence in opposition to the legitimacy of every faith'.[26] In the views of strict secular thinkers, religion generates irrational and obsessive

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[24] Roger Boase, "Ecumenical Islam: A Muslim Response to Religious Pluralism." in *Islam and Global Dialogue Religious Pluralism and the Pursuit of Peace,* ed. Roger Boase (England, USA: Ashgate Publishing Limited, 2005), 247-148.

[25] Mahmut Aydin, "Religious Pluralism: A Challenge for Muslims. A Theological Evaluation," *Journal of Ecumenical Studies,* 38(2001): 2-3:331.

[26] See for details Adnan Aslan, *Religious Pluralism in Christian and Islamic Philosophy, The Thought of John Hick and Seyyed Hossin Nasr* (Curzon Press, 1998).

human beings and it's just a toxic in the plasma due to God.'[27] Another disputed

approach is based on the idea that purpose of pluralism is to produce a new

heterogeneous faith by combining worldwide and motivating attributes of several faiths,

or pluralism provides platform for collection of tempting religious concepts. The critics

of this approach believe that a pluralist tradition would not crush dissimilarity rather

create admiration and acceptance for diversity.

1.4-Methods of Interaction of Various Legal Systems in Legal Pluralism

Pluralism shows recognition and respect for different religions and religious traditions

but it does not mean that all prominent faiths are alike in all characteristics of rational

endeavor. This point is made by Professor Byrne. According to him religious pluralism

demands multilateral impartiality right whereas, comparative dominance in additional

ways could be permitted. Many promoters of religious pluralism have demarcated their

forms of pluralism in other attributes, for instance John Hick, stresses more than Byrne

upon the ethical task of faith,[28] however Frithjof Schuon argues that the inspirational

unanimity of faiths is to be instituted in their mysterious scopes.[29] Religious pluralism

maintains that those who attain God's grace are saved by their own religious traditions

independently from others.[30] In this regard John Hick maintains that the prominent global

faiths, by their respective convictions, sacred text, worships, laws, norms and traditions

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[27] Roger Boase, "Ecumenical Islam: A Muslim Response to Religious Pluralism," in *Islam and Global Dialogue Religious Pluralism and the Pursuit of Peace,* ed. Roger Boase (England, USA: Ashgate Publishing Limited, 2005), 247-148.

[28] The definitive statement of Hick's view is spelled out in his An Interpretation of Religion (1989).

[29] Muhammad Legenhausents, "A Muslim's Non-Reductive Religious Pluralism," in *Islam and Global Dialogue Religious Pluralism and the Pursuit of Peace,* ed. Roger Boase (England, USA: Ashgate Publishing Limited, 2005), 53.

[30] Mahmut Aydin, 336.

constitute diverse social reactions to the decisive greater reality to which they all carry evidence.'[31] From Islamic point of view Mahmut Aydin considered religious pluralism as Muslims can go to paradise by following Islam, the adherent of other faiths may also attain God's grace by following their own faith. In other words according to this definition paradise is not limited to the followers of the Prophet Muhammad (Peace be on him).[32] Pluralism unlike tower of Babel, believes in unity of purpose and open dialogue.[33] The goal of pluralism is not to form a global place of worship for all religions, but to discover different methods to connect to each other. They also need to explore mutual bases and to enunciate shared objectives, while combining in a new universal faith on the basis of least shared congruity is not the aim rather anti thesis of pluralism.[34]

In this period of pluralism plurality of legal systems became more important and relevant. Now the legal systems from comparative study of legal tradition are moving towards the multiplicity of forms of law in a society or a territorial boundary. The issue of legal pluralism as a theme of academic discussion started to evolve in 1930s. The experts of various disciplines such as sociologists, anthropologists, jurists and lawyers initiated diverse opinions on the fundamental concepts of legal pluralism. The ideological imprint of these respective disciplines can be seen on the variety of definitions of this emerging branch of jurisprudence. John Griffiths suggested a twofold division amid resilient and fragile legal pluralism in 1986. Verity of nomenclature that is used for this new legal science includes classic versus new legal pluralism, juristic versus sociological legal

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[31] Jhon Hick, *The Fifth Dimension: An Exploration of Spiritual Realm* (Oxford: One world, 1999), 77.
[32] Mahmut Aydin, 336.
[33] Mahmoud M. Ayoub, 110.
[34] Diana L. Eck, "Is Our God Listening? Exclusivism, Inclusivism, and Pluralism," in *Islam and Global Dialogue Religious Pluralism and the Pursuit of Peace,* ed. Roger Boase (England, USA: Ashgate Publishing Limited, 2005), 46.

pluralism.[35] This theory is short of legal or analytical positivism. The main theme of John

Austin's concept was considering all laws as an order of the ruler. As a consequence of

acceptance of this theory various legal systems including non-state justice systems and

systems of customary law were qualified to be treated as legitimate legal systems.[36] Hart

while advancing legal pluralism identified a dual system of rules for various societies. In

his opinion fundamental principles established the normative directive in emerging

cultures, while ancillary principles are specific to extra progressive civilizations. He

realized that on the basis of fundamental principles a culture could survive only but for

constructing a legal structure, it would require to add subsidiary principles to proceed

further from 'pre-legal' to legal realm.[37]

Such type of discussion contributed in refining the concept of legal pluralism, since

Rouland elaborates it as 'multiplicity of forms of law present within any social field.'[38]

Another contributor of this theory Griffiths defines it as 'a situation of legal pluralism as

one in which law and legal institutions are not all subsumable within one 'system' but

have their sources in the self-regulatory activities which may support, complement,

ignore or frustrate one another, so that the 'law' which is actually effective on the

'ground floor' of society is the result of enormously complex and usually in practice

unpredictable patterns of competition, interaction, negotiation, isolationism and the

like.'[39] Legal pluralism is still an evolving concept and no comprehensive framework has

yet been emerged. However, empirical researches conducted by legal anthropologists are

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[35] Griffiths, "What Is Legal Pluralism?," 24; Jackson, "Legal Pluralism between Islam and the Nation-State," 22; Merry, "Legal Pluralism," 158.

[36] Forsyth, "The Possibilities and Limitations of Legal Pluralism," 30.

[37] H. L. A. Hart, *The Concept of Law*, 2nd ed., Clarendon Law Series (Oxford: New York: Clarendon Press ; Oxford University Press, 1994), 170.

[38] Norbert Rouland, *Legal Anthropology* (Stanford, Calif: Stanford University Press, 1994), 51.

[39] Griffiths, "What Is Legal Pluralism?" 39.

suggesting the appreciation of structural relationships between plural legal orders.[40]

Presently, the law requires to be recognized and enforced through the State. Similarly, legal pluralism if sanctioned through national law, then it would be recognized not otherwise. However, sociologists and anthropologists through the expansion of the definition of law, trying to include every kind of sub-state regulatory governments operating in contemporary world, in the boundaries of law.[41] The argumentation on the issue in presence of legal centralism as the prevailing system recognized legal pluralism as *de facto* legal system. Sociological and anthropological approaches of law obviously prove that the national law is not sole governing authority in contemporary society. On the other hand, however, the legal centralists insist that the State is not bound to implement these alternative regimes as it has not been sanctioned by the State organs.

Jackson has attempted reconciliation between opponents and proponents of legal pluralism with reference to Islamic law. He is of the opinion that legal provisions demanded commit with centralism, but the functional reality of a law required that the origin of each regulation, which is established or executed as law should be known. In this way many subdivisions of a state attained the significance of authentic law, in spite of different sources other than the State.[42] This idea is further advanced by Melissaris who suggested the importance of legal education and legal institutions as the promoters of legal pluralism. He is of the opinion that the academic research on legal issues is an extension of the state laws. Through such type of research new areas of legal rules such as alternative dispute resolution can be explored. But the adoption of these regulations is

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[40] Forsyth, "The Possibilities and Limitations of Legal Pluralism," 36.

[41] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law,* Harvard Studies in Jurisprudence ; Vol. v (Cambridge, Mass: Harvard University Press, 1936), 55–69; Griffiths, "What Is Legal Pluralism?," 5–6.

[42] Jackson, "Legal Pluralism between Islam and the Nation-State," 159–60.

dependent on the endorsement by the state law. He believes that legal pluralism can be advanced only through academic theories because only this way serious consideration of institutionalized jurisprudential discourse can be diverted towards this issue.[43]

2-Legal Pluralism and Islamic Jurisprudence

2.1-Does Islamic Law has the Capacity to Work with other Legal Systems

In the analysis of the capacity of Islamic law to interact with other legal systems it is to be understood that this legal system is not faith based law in the sense of religious law of Christians. The rulings in Islamic law can be either related to ritual matters which are classified as 'Ibadāt or related to transactions which are named as Mu'āmalāt. While Canon law deals only with rituals and Common law and Roman law deal with transactions only. In its Mu'āmalāt branch Islamic law is similar to positive law however it places additional stress upon ethical contemplations than other legal systems. Another difference between Sharī'ah law and other legal systems is that it evaluates acts of humans on five or seven scale values whereas in other laws an action could be mandatory, forbidden or indifferent as it evaluate acts only three values. [44]

2.2-Legal Pluralism within Islamic Law

The jurists who contributed in the development of Islamic Law belonged to various schools of legal thought, which are traditionally named as *madhhab*. These schools of legal thought were not formed as a result of recognized educational bodies or government authorized legislative authorities but actually represent sets of various legal experts who follow dogmas of prominent pioneer of the early centuries of Islam and these schools

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[43] Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism," *Social & Legal Studies* 13, no. 01 (2004): 59, 63.

[44] Badr, "Islamic Law," 188–89.

then started to be known by their names. That's an unprecedented situation for further legal customs as it did not experience such type of phenomenon. The main source of legal rulings in Roman law came through formal legislative organ. While the king's court verdicts and its directives were the basic foundation of legal directions in the common law. Due to the importance of the rule of precedent in common law, it is considered as a judicial law. In Sharī'ah law its provisions are required first and preferred in the derivations of law experts. The class of Muslim scholars who were well-versed in Sharī'ah law is named as Muslim fuqhā', or jurists. In its early period this law was drafted by these independent legal experts and was different from the law promulgated by a national-territorial legislature. Since the Sharī'ah law was articulated and advanced by jurists and muftis in the formative period of that law who were not part of a government. Therefore, this law is also named as the law of jurists as its development was result of their independent efforts. Any person having necessary knowledge, scholarly and ethical credentials and acknowledged even by the competitors and society due to these attributes was able to work as jurist of Islamic Law.[45]

Islamic doctrines do not require the existence of a particular class of clergy for religious guidance. However, from the early days of Islam, Islamic tradition encourages a community of independent religious leaders free from official influence, so that they can guide the people in the matters related to religiosity and correct understanding of Islam. They were not assigned task of articulation of rulings of Sharī'ah by any official authority. This community of economically independent scholars was emerged in early Islamic centuries to serve various branches of Islamic Knowledge. The main goal of this

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[45] Ibid, 189; Wael B. Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge University Press, 2001), 125; Aharon Layish, "The Transformation of the Sharī'ah from Jurists' Law to Statutory Law in the Contemporary Muslim World," *Die Welt Des Islams* 44, no. 1 (2004): 86.

community was the appropriate interpretation and maximum compliance of rulings of Islam. They were not subordinate to a government, therefore instead of following the instructions of any government they were following their own conscience as they were the main agents for inculcating changings in the Sharī'ah in accordance with the changing circumstances.[46]

In spite of that classical Sharī'ah is a commandment of perpetual godly revelation that is enforced on humanity by divinity but it had left a sufficient scope to human reason through which the will of God is identified on earth. The development of the Sharī'ah is a result of rational process that was carried by qualified jurists to identify the will of God as a source of divine blessing. As a God's law this law is equally applicable on the sovereigns and public. This is observed as a rule greater than the decision of the ruler in positive law. Despite that state organs as legislative authority were alien to Sharī'ah law but their existence is not contradictory to its philosophy as example of legislation on the basis of administrative orders of rulers and caliphs are found in the history of Islamic law. The doctrine of Siyāsah Sharī'ah as the prerogative of rulers was particularly devised and advanced in latter period so that the rulers could contribute in the legislative process. This prerogative was practiced in various domains of law, such as taxes, land and criminal law. However, its application was within the underlying concept of God as the only sovereign in whom rest the right of legislation and rulers can use it only as a delegated power in prescribed limits.[47]

In spite of distinct characteristics and fundamental differences amid Islamic and other laws particularly Westerns, it is prominent modern legal system. Presently, most

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[46] Goitein, *Studies in Islamic History and Institutions*, 211–12.
[47] Hallaq, *Authority, Continuity and Change in Islamic Law*, 57,125,158; Layish, "The Transformation of the Sharī'a from Jurists' Law to Statutory Law in the Contemporary Muslim World," 88.

important legal structures of the globe are collaborating to provide justice and resolve the problems of the people. Due to the dire need of this collaboration the legal pluralism and theories of conflict of laws became very important and relevant. In the contemporary circumstances the possibility of interaction and co-existence of Islamic law with other laws is a matter which has yet to be explored. In this regard present debate is revolving around several questions such as: What is the connection amid Islamic law and main legal structures of the globe and any substantial collaboration and process of adoption and adaptation between it and other legal systems of the world exist? And what are important impediments in dialogue between Islamic legal tradition and western legal traditions?

Historically, Roman law was reached to the peak of its development before the advancement of Islamic law. While Common law was developed much later afterward the Norman invasion of Britain as law of Islam at this time was already working as a developed legal structure. The process of adoption and adaptation between these legal systems is a part of contemporary legal debate. Followers of big legal systems have the tendency to show that it had influenced other legal systems. This type of comparison is also found between Islamic Law, Roman law and Common Law. Theodore P. Ion is of the view that Roman law has influenced Islamic law after Syria was annexed to Islam as in these areas the law of land was of the Greco-Roman empire. He claimed that Roman law was not entirely unknown to the Muslims and it may have been introduced to them through Jews, whose laws were influenced from Romans. Abdallah Ibn Abbas, the companion of Prophet Muḥammad (peace be on him), was not only one of the founders

of the law of the Hadith but was also well-acquainted with the Jewish literature.[48]

Moreover, the Arabs, on account of their contact and relations with their non-Muslim

subjects who were used to follow Roman law adopted unconsciously the commercial law

of the latter. He observed that after conquering an area, Muslims were allowing their non-

Muslim subjects to follow their national laws, however, in case of a disagreement amid a

believer and a non-believer the Islamic law was applied to settle the dispute. After the

conquest of Italy, the barbarians left the Roman law in full force amongst the conquered

people, similarly Muslims, after the conquest of Syria and Spain left the local laws

untouched. However, its compliance was limited to the non-Muslim subjects only. It is

claimed that Roman judicial system was not disturbed during the first Umayyad rule

when the capital of Islamic State was shifted to Damascus in Syria from Medina. The

magistrates rendered the formula and the judge tried the case according to the instructions

contained in the formula. Such types of arguments are presented to justify the claim that

Roman law influenced Islamic law during its evolutionary period.[49] Similarly, the

influence of Islamic law on Common law is claimed by Cattan, who invoked that the

doctrine of trust in English law is derived from the Islamic institution of *waqf*. He

advanced his claim on the early development of Islamic institution of *Waqf* and its

fundamental parallels in objectives and methods with trust. He opined that during the

Crusades, the Islamic concept of waqf probably have transferred to experts of Common

law. Hence, it is reasonable to propose that early English law may have been derived

from Islamic Law.[50]

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[48] Kremer, *The Orient under the Caliphs*.
[49] Ion. "Roman Law and Mohammedan Jurisprudence," 45–48.
[50] Henry Cattan, "The Law of Waqf," in *The Law in the Middle East Origion and Development of Islamic Law*, ed. Majid Khadduri and Herbert J. Liebesny, vol. 01 (Washington, D.C: Middle East Institute, 1955),

Badr is of the opinion that such type of claims of borrowing of a legal system from other are not easy to justify. The case made by Cattan is no doubt more persuasive than the claim of borrowing legal system of Islam from Roman legal structure, since it attests the likelihood of common law trust structured on the concept of waqf, but establishment of Common law structure on classical Islamic foundation is not verified by this. Claim of acquiring any concept from others needs irrefutable evidence, otherwise anyone can reach to same logical conclusion without explicit or implicit acquisition. Many French and Italian jurists quoted along with other matters the issue of assignment of dues that was prohibited in Roman law but commonly used in commercial matters during Middle Ages Europe. He contends that his own research revealed the interesting analogous amid Common law and Islamic law. Roman law was unfamiliar with the concept of agency. But Islamic law has given effect to the institution of agency in the field of contracts like common law, and both legal systems have headed the world in developing the laws of agency, and amusingly law of agency of the United States is more nearer to the Islamic law instead of common law. He is of the opinion that these several parallels are due to huge international business events amid Muslims of the ancient time, in England and then in the United States. Trade related undertakings have delivered the mutual circumstances upon which these peculiarly comparable and evenly generous directions of agency were self-sufficiently established in reply to the necessities of commerce.[51] The discovery of such parallels were least expected in one of the pleasures afforded by the study of comparative law. These counterparts are rational inquisitiveness and offer preview of the mechanism of individual legal system. They certainly do not specify the presence of

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213–33.
[51] Badr. "Islamic Law," 196–97.

some effect or impact. The relationship between various legal systems is not dependent on the evidence of real power or impact but it will be on highlighting parallels, so that legal systems can contribute to regulate the human societies to achieve the end of law in modern life.

Diffusionists and proponents of separation among various legal systems will continue to justify their arguments. The most valid position is to evade dogmatic pledge to any opinion so that all can move closer to each other so that 'the essential oneness of man's spirit' can be achieved.[52] Each legal system reflects the ideas of a group of people and community of ideas, means community of laws. The future role of the law will be revolving around common points among various religious traditions. It will be the duty of all law abiding citizens to march front forward as soldiers of reason against brutality, law against lawlessness and right against wrong. The comparative study of various legal systems is opening a wider vision to our eyes that will lead to open more splendid fields of research for us. As the process of globalization is continued, we may in near future hear about the nobler unity of justice through unifying various ends of the legal systems. Thomas Hobbes has said that 'commandments of Nature are fixed and perpetual, since it is code of God, although this world is facing changes and every other thing of this universe keep altering.'[53] In postmodernism human beings are living in the new conditions which require new critical techniques of investigation. Presently, we are freely making an earth where each faith and legal norm requires to work absolutely in coexistence, common acceptance and welfare of others. Wilfred Cantwell Smith states that in contemporary world Christians, Jews, and Agnostics, are living in a society where

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[52] Badr, 198.
[53] Lee, "The Civil Law and the Common Law," 101.

every other man is Buddhist, Muslim and Hindu, in this context prerequisites of collaboration and integration amid persons of diverse faiths are evident. The discretion and progressive pragmatism induced by the reduction of this earth require an improved communal forbearance with their fellow citizen via appreciation of others' loyalties, ideals and values.[54]

3- The Contribution of Islamic Law in the Western Legal Pluralism

3.1-Functioning of Sharī'ah in Pluralistic environment

The contemporary place of Sharī'ah in the pluralistic environment is dependent on its capacity to accommodate the changes. Jurists agree that Islamic law is receptive to change and it has the tendency of evolution. No doubt, the theory of 'closing of the gate of ijtihād' has contributed in widespread blind following on the name of taqlīd. The taqlīd as a *modus operandi* was used to protect the schools of *fiqh* as a methodological and interpretive entity. It was particularly important to formulate doctrines of jurists in accordance with the founder's substantive and theoretical principles. However, these jurists, on the micro-level, were practicing plurality of opinion within a given school. Every school had a collection of opinions attributed to the founder, his important students and later followers of the school. Such types of opinions were the total sum of a particular schools and it were tracing the doctrinal justification from the founder. As in Sharī'ah law the central legislative agency has been absent, therefore, the Taqlīd was a form of fundamental structure while epistemological feature of Islamic law continued to emerge to contribute in the later legal developments. This was the reason that Muslim Jurists continued the task of elaborating of the revealed texts, so that new issues can be

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[54] Smith, *The Faith of Other Men*, 03.

addressed through Islamic Law. The eventual display of this sole hermeneutical movement was the dogma of *kul mujtahid muṣīb*, i.e., that every mujtahid is correct. The legitimacy of this process and the plurality has already been accepted as theory by early jurists such as Shāfiʿī. One reason of pluralistic approach in articulation of the rulings was its salient features related to juristic differences which are named as *khilāf* or *ikhtilāf*, and considered the most important fields of learning. This field particularly encouraged the enquiry of variety of opinions of jurists. This feature of Sharīʿah, which is named by Hallaq as the ijtihādic pluralism was tool of accommodating epistemological element of Islamic law integral to its overall structure.[55] The finalization of *madhhab* through taqlīd was unable to stop the emergence of plurality of opinions. The importance of legal pluralism in Islamic law can be understood on the basis of the fact that not only the diversity of juristic opinions before the rise of the *madhāhib* is protected and compiled in Islamic law but also the plurality which emerged later on, at every stage of Islamic history is considered legitimate. It is a sound reality that plurality as a distinct feature of Islamic law remained intact until the beginning of nineteenth century.[56]

3.2-Tranformation of Sharīʿah from Law of Jurists to Law of Legislatures

In contrary to its formative period in nineteenth century, this jurist law is gradually transforming, from jurists' law to law of legislatures, as it is presently implemented through the state organs in the Muslim countries. In this process the inculcation of Western political, legal and educational structures into Islamic law has brought far-reaching changes into its articulation. No doubt, many traditional substantive rulings of Sharīʿah are still part of codes of modern Muslim states, but structurally,

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[55] Hallaq, *Authority, Continuity and Change in Islamic Law*, 125; Makdisi, *The Rise of Humanism in Classical Islam and the Christian West*, 107–11.
[56] Hallaq, *Authority, Continuity and Change in Islamic Law*, 126.

epistemologically, and hermeneutically, traditional Islamic law has largely been ignored. Modern codification through legislative organs has abandoned traditional institutions such as *waqf*. The establishment of Western court system and introduction of modern law schools have contributed into the structural collapse of the traditional Sharī'ah. The active role of legislative organs in the era of nation-state demoted the customary role of the spiritual thinkers' enactment of Islamic rulings in the modern Muslim societies. The presence of more than four legal schools functioning alongside paved path for a self-contained 'law of the state.' The codification of Islamic law which was started in Ottoman Empire through the influence of French codification substituted entire zones of Islamic law. As a result of all these developments, there is hardly any part of Islamic law that is not influenced by the Western developments excluding family law. [57]

MacIntyre's conception of a tradition is always a moving place for communally personified opinions stretched over period. He is of the opinion that certain fundamental agreements of a tradition are defined and redefined, contest the internal as well as external conflicts throughout the history. In this process through interpretative debates the connotation and logic of essential settlements and constituent elements of a practice are readjusted.[58] In pursuance of this conception, Talal Asad has proposed a more effective way of addressing Islam by way of 'broad custom' containing evolving addresses exemplified through usages and establishments of Muslim societies. In this way the practices can be traced from past through the present for its readjustment in the future through modification.[59] Hallaq is of the opinion that legal pluralism in Sharī'ah is produced and maintained as a result of discursive articulation. This discourse is advanced

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[57] Hallaq, 126; Jackson, "Jihād and the Modren World," 4.

[58] MacIntyre, *Whose Justice?*, 12.

[59] ASAD, "The Idea of an Anthropology of Islam," 14.

on two levels, one emanating from a theoretical elaboration of the problem, the other deducting from positive legal constructions. Both the levels were conceptually interconnected as a theory they acknowledged the reality of ijtihādic pluralism, while in practice as form of discursive construction provided material for substantive law.[60]

The above discussion shows that Sharī'ah has the capacity to interact with other legal systems and it can be one of the prevailing legal systems that can contribute in the era of legal pluralism with other legal systems. The rulings of Sharī'ah based on arguments from Qurān, Sunnah and interpretive views of Muslim jurists demonstrate persuasively that Islam confirms existence of truth in other religious traditions, and thus lays the ground for co-existence with the followers of other traditions and cultures. However, there are many challenges that are creating real impediments for fruitful and effective interaction between Sharī'ah law and other laws, particularly the western common law traditions.

In this age of Western hegemony, Islam is either explicitly or implicitly depicted in the Western mind as a major contender of its tradition and values or treated as a threatening force to its democracy and individual freedom. With this mindset Islamic revivalism appears in distorted and is framed through European conceptual and institutional arrangements which have pushed religion aside from the public sphere. This marginalized religious approach is unable to understand modern Muslim world on its own term and conditions. [61] The troubled relations between the Muslims and the West have manufactured many polemical and apologetic wrong perceptions that are contributing not

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[60] Hallaq, *Authority, Continuity and Change in Islamic Law*, 126.
[61] Haj, *Reconfiguring Islamic Tradition*, 1.

only in misunderstandings of the other but of oneself as well. In addition to psychological, cultural, or socio-economic factors, there are other historical and religious motivations that are also behind this misunderstanding. As the result of this: 'any attempt at a 'dialogue,' therefore, seems to be either vain or utopian.' This deficiency of mutual understanding contributed to perceive that Islam represents culture of intolerance and rigidity. It is not ready to reconcile for amicable living with the West, as it holds an ideology of aggression, conservatism and unproductiveness. [62] Mohamed Talbi has identified the reasons of this mistrust. In his view the social, political and cultural image of Muslims in the Western mirror is not reflecting reality. It portrait Muslims as either wasting millions on luxuries, or a poor making bad use of the aid so 'generously' given, or the needy migrant who fails to integrate into the society which has embraced him or her. He concludes that persons from all sides contributed in distorting history and painting a portrait of Islam that provokes dislike and hatred. He demonstrates how the misunderstanding has become a tradition. Both the past and the present have created impediments in respectful mutual understanding.[63] In the opinion of Hussain Nasr, any Islamic substance which has some scholarly or divine implication for western fellow, is rejected by the west. The balanced plus normative aspects of Islam have been shunned by the west. He argues that every culture and tradition is equally accountable in front of Allah but they do not have any prerogative to command to other cultures like West.'[64]

Majority in the West and United States are ignorant about traditional and academic liability of Europe to Islamic Civilization. Specific stratagems and beliefs related to the

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[62] Brière, *Islam, guerre à l'Occident?*, 125–36; Geaves, *Islam and the West Post 9/11*, 34; Makariev, *Islamic and Christian Cultures*, 64–65.
[63] Talbi, "Possibilities and Conditions for a Better Understanding between Islam and the West," 170.
[64] Siddiqui, *Christian-Muslim Dialogue in the Twentieth Century*, 158.

culture and tradition of Islam have been extensively projected and till date it is misjudged by the world. In this background of mistrust, intellectual contributions like Samuel Huntington's 'The Clash of Civilizations', Francis Fukuyama's 'The End of History and the Last Man' and Felipe Fernandez Armesto's 'Millennium' viewed by the Muslims as a fragment of world wide scheme contrary to Islam. This situation is aiding the radicals and fundamentalists of Muslim societies to capture Islam and use Muslims in genocide for the sake of faith. Their engagements can never be legitimized via Sharī'ah rulings, however, reasons and effects of their actions will definitely create problems for the Muslims. Factually radicalism is not restricted to the Muslim states only. In the United States after 9/11, conceptual radicalism increased drastically, harmony and acceptance amid different cultures became more unapproachable. Few Western thinkers debated on the significance of faith in modern society and contributed on the discourse of Islam. Basically it's a recent form of the ancient orientalist philosophy of Islamic autocracy, and regrettably a delusion to which some enthusiastic Islamists pledge. Consequently, the factual contradiction is amid radicals and exclusivists, and at the same time amid inclusivists and pluralists.[65]

In presence of confusions, misperceptions and misunderstandings, revival of Islamic tradition and the Western traditions could be expected on more cognizant and equitable footings.[66] This re-introduction will be possible only through the realizations of prospects of interaction between civilizations with overcoming these challenges. Need of dialogue emerges from differences and disagreements. Diversity of human beings is an expected

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[65] Boase, *Islam and Global Dialogue*, 249.
[66] Jackson, "Jihad and the Modren World." 2.

occurrence and required to be valued and sheltered.[67]

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[67] Bajsic, "The Significance and Problems of Dialogue Today," 33.

CHAPTER NO. 8

ANALYSIS OF THE DEBATE ON INTEGRATION AND ASSIMILATION OF MUSLIMS IN THE WESTERN SOCIETIES

CHAPTER NO. 8

DISCOURSE ANALYSIS OF THE DEBATE ON ASSIMILATION AND INTEGRATION OF MUSLIMS IN THE WESTERN SOCIETIES
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The contents of this chapter are analyzing the discourse among the scholars about the assimilation and integration of Muslims in the Western societies. The chapter proceed with discussion on the conceptions related to assimilation and integration. In the beginning the salient features of the studies on these concepts have been discussed. Various dimensions and styles of these studies have been presented in the beginning of the chapter. After that assimilations as a toll of uniting various cultural, ethnic, regional and religious entities have been discussed. It is followed by discussion on the meaning of integration as mechanism for composition of various segments of the society. The differences between assimilation and integration is also presented in this section. The importance of multiculturalism as an alternative of integration is also part of this chapter. The conceptions such as integration and assimilation are needs of a nation state, therefore, the emergence of Western nation state and role of social integration in it is also analysis of the discourse in this chapter. The second part of the chapter is about the role of religion in national integrations. This section deals with the capacity of faith in inclusion of immigrants and role of religion in American and European society has been explained. The third part of the chapter is about the role of Islam in integration. While Dār Al-Shahādah is proposed as the way forward for Muslim integration in the West.

1-Concepts of Assimilation and Integration

1.1-Studies on Immigrants

During 1990s, American migration scholars started heated discussion on the nature of post 1965 immigration with the aim to accelerate integration in the social fabric of the United States. They also discussed weather this process is similar to the past waves of the immigration from Eastern and Southern Europe from 1880 till 1914.[1] In the European context this type of debate has no resonance. Many European scholars remain confined to the prevailing assumptions related to history of their ethnic domination. Moreover, the new facts that appeared in the early 1980s suggested that the geographical movement was a part of European heritage.[2] These facts fail to affect the prevailing opinion which suggest that migration was an outcome of economic reasons such as famine and overpopulation or political reasons such as war and internal repression. This view was reinforced by the modernisation process in the 19th century and suggested fresh migration as a fundamental break with the past. This view enforced the perception that urbanization and industrialization stimulated massive emigration.[3]

Due to these misperceptions historians continued to neglect the impact and scale of

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[1] Leo Lucassen, David Feldman, and Jochen Oltmer, "Immigrant Integration in Western Europe, Then and Now," in *Paths of Integration*, ed. Leo Lucassen, David Feldman, and Jochen Oltmer, Migrants in Western Europe (1880-2004) (Amsterdam University Press, 2006), 07, doi:10.2307/j.ctt45kdns.3; see also Thematic issue of the *International Migration Review* , vol. 31, 1997 no. 4 ; the *American Journal of Ethnic History* vol. 21, 2002, no. 4; Nancy Foner, *From Ellis Island to JFK: New York's Two Great Waves of Immigration*. (New Haven: Yale University Press.2000); Gary Gerstle, "Contemporary and Historical Perspectives on Immigrant Political Incorporation," *International Labor and Working-Class History* 78, No. 1(2010): 110-117; Nancy Foner, *In a New Land: A Comparative View of Migration* (New York: New York University Press, 2005).

[2] Paul M. Hohenberg and Lynn Hollen Lees, *The Making of Urban Europe 1000- 1950* (Cambridge and London: Harvard University Press, 1985); Leslie Page Moch, *Moving Europeans: Migration in Western Europe since 1650* (Bloomington: Indiana University Press, 1992); Jan Lucassen and Leo Lucassen, *Migration, Migration History, History: Old Paradigms and New Perspectives* (Bern: Peter Lang, 1997) 1- 38.

[3] Lucassen, Feldman, and Oltmer, "Immigrant Integration in Western Europe, Then and Now," 07.

migration to European countries after the middle ages. The outcome of this neglect is that many Western historians have not accepted the reality that most Western societies have faced waves of immigrants from the early modern period including American mass immigrations of 1880-1914. The discussion leads to the conclusion that the European past has many cases that provides a comparison with contemporary immigrations in Western Europe. The systematic attention to European immigration started in 1980s which resulted into increasing research and publication on migration to Western Europe in the ninetieth and twentieth centuries.[4] German expert of migration Dirk Hoerder feels that the past misinterpretation has huge shadows over the present. He states:

> 'Official recognition of a many-cultured past has been achieved in but few European states. In general, neither public, nor politicians are searching for a past different from the currently imagined national ones. Historians as gatekeepers, with few exceptions, share these nationalist and nation-centered approaches.'[5]

While discussing the process of integration of European nation state it was appropriate to identify the historical problem that is faced by experts in the Europe about immigration and integration.

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[4] Some of the pioneering studies on the issue are: Colin Holmes, *Immigrants and Minorities in British Society* (London: George Allen & Unwin,1978); Christoph Klesmann, Polnische Bergarbeiter im Ruhrgebiet 1870-1945: *Soziale Integration und nationale Subkultur einer Minderheit in der deutschen Industriegesellschaft* (Go"ttingen: Vandenhoeck & Ruprecht,1978); Lynn Hollen Lees, *Exiles of Erin: Irish Migrants in Victorian London* (Manchester: Manchester University Press,1979); Richard C. Murphy,*Gastarbeiter im Deutschen Reich. Polen in Bottrop 1891-1933* (Wuppertal: Peter Hammer Verlag, 1982); Klaus J Bade, Vom *Auswanderungsland zum Einwanderungsland? Deutschland 1880 bis 1980* (Berlin: Colloquium, 1983); Jan Lucassen, *Naar de kusten van de Noordzee. Trekarbeid in Europees perspektief 1600-1900* (Gouda: eigen beheer, 1984); Jan Lucassen, *Migrant Labour in Europe: The Drift to the North Sea* (London: Croom Helm, 1987).
[5] Dirk Hoerder, "Historical dimensions of many-cultured societies in Europe: the case of Hamburg, Germany," in *Socio-Cultural Problems in the Metropolis: Comparative Analyses*, ed. Dirk Hoerder and Rainer-Olaf Schultze (Hagen: ISL-Verlag, 2000), 121-140.

Another comparatively new aspect of immigrations studies that emerged post 1980s is important in the discourse of immigration of Muslims to the West and North America and legal status of new homes of the Migrant Muslims. The first and most import impact of migration of Muslims was the reconsideration of classical Muslims paradigms of territoriality. The discussion on the legal status of Western Europe and North America for Muslim immigrants attained prime importance after the increasing Communities of the Muslims in the West. Until 1980s the discourse on fiqh of Minority or fiqh al-Aqalliyyāt was preoccupied with the explanation of Islamic norms for the Muslims of Europe and America, regarding day to day matters and practicing of Islamic rituals. It was later 1980s phenomenon when the issues related to life of Muslims in the West were came under discussion in this discourse in more theoretical perspective. The reality of the existence of millions of Muslims in various Western societies forced Muslim intellectuals and scholars and to classify West and USA against the traditional paradigm of territoriality.[6]

1.2-Meaning of Assimilation

Assimilation is a process which unite various ethnic, cultural and regional entities into a nation state. It is described as 'the process of becoming a part, or making someone become a part of a group, country, society, etc.'[7] As a noun this terminology is used to identify 'the act of assimilation' or process of 'absorbing information'. It also indicates the facts that contribute in quick assimilation. The condition of being assimilated is emerged on completion of this process. During this process the

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[6] Sarah Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West* (London; Boston: Brill, 2018), 112-113.

[7]   *Cambridge   English   Dictionary*,   s.v. "assilmilation,"https://dictionary.cambridge.org/dictionary/english/assimilation visited on 01-09-2020.

minority groups are encouraged to adopt the culture and language of leading social cluster or a nation. Usually nation states are trying to assimilate immigrants into mainstream through various methods, culture of assimilation and integration. The notion of assimilations has many dimensions. In physiology the change of "absorbed food into the substance of the body" is also called assimilation. The "process of plant nutrition, including photosynthesis and the absorption of raw materials" is also named assimilation in Botany. This conception in the meaning of "merging of cultural traits from previously distinct cultural groups, not involving biological amalgamation" is used in Sociology.[8] This terminology is used in phonetics in the meaning of "change of a sound in speech so that it becomes identical with or similar to a neighboring sound." This concept is also applied on "the process of receiving new facts or of responding to new situations in conformity with what is already available to consciousness."[9] In sociology and anthropology assimilations is used as a process "whereby individuals or groups of differing ethnic heritage are absorbed into the dominant culture of a society." This process demands adoption of characteristics of   dominant culture in such a way that assimilated group should become socially indistinguishable from other members of the dominated communities. Acculturation is demonstrated through assimilation as later is the extreme form of the former. There are many voluntary or forceful ways of assimilation. In spite of powerful efforts of assimilation, it is almost rare or impossible for a minority group to adopt all characteristics of the majority as no one can replace its previous religions, values, foods, dressing and cultural practices completely. The affiliation of a person to a particular religion, cultural and aesthetics is always resilient to

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[8] *Dictionary.Com*, s.v. "assimilation," https://www.dictionary.com/browse/assimilation visited on 01-09-2020.

[9] *Merriam-Webster*, s.v. "assimilation," https://www.merriam-webster.com/dictionary/assimilation

conversion. Assimilation is not biological and racial synthesis that may happen as an outcome rather it is very rare to occur.[10] Some dominate communities such as in Western Europe and America may desired cultural assimilation which means: "a process that occurs when one group assumes the values, behaviors, and beliefs of another group, often the majority culture."[11] As a concept cultural assimilation is close to acculturation. It has various forms and can be exemplified in various examples such as additive acculturation in which minority groups instead of replacing their indigenous culture extends it to include new elements from the dominated culture. [12]

1.3-Meaning of Integration

The terminology 'integration' is derived from Latin. It denotes the composition and combination of a whole from various elements. The opposite of integration is segmentation, which refers to the division of a whole into various parts and components. The integration is applied on different social demonstrations. It can be used to unite various phenomena such as groups, communities, organization or whole societies. On national levels this terminology is used for reconstruction of nations through the process of integration in the nation state comprising modern contemporary societies. [13] In European context this notion has been adopted by Common Basic Principles (CBPs) as:

"A dynamic two-way process of mutual accommodation by all immigrants and residents

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[10] *Encyclopedia Britannica*, s.v. "assimilation," https://www.britannica.com/topic/assimilation-society visited on 01/09/2020.

[11] Charles D Spielberger, ed., *Encyclopedia of Applied Psychology* (New York: Elsevier Academic Press, 2004), 615.

[12] David K Abe, *Rural Isolation and Dual Cultural Existence: The Japanese-American Kona Coffee Community* (Cham: Palgrave Macmillan, 2017), 17–18.

[13] Jürgen Gerhards and Holger Lengfeld, *European Citizenship and Social Integration in the European Union* (London & New York: Routledge, 2015), 13.

of the European Union."[14] This definition is defined and explained as "Integration is a dynamic long term and continuous two-way process of mutual accommodation, not a static outcome. It demands the participation not only of immigrants and their descendants but of every resident. The integration process involves adaptation by immigrants, both men and women, who all have rights and responsibilities in relation to their new country of residence. It also involves the receiving society, which should create opportunities for the immigrants' full economic, social, cultural and political participation"[15] This explanation also asked EU member states to facilitate integration process through involving immigrants on the one hand and citizens of the European states on the other. Both groups of the EU community have been asked to fulfil their duties that have been communicated to them in shape of their mutual rights and duties.[16] In spite of similarity between assimilation and integration both are not same, according to David Lockwood integration is a system that refers to the integration of subsystems and institutions, while social integration is related to individuals and it demands their integration into a nation state.[17]

1.4-Difference between Integration and Assimilation

The discourse about the effective social role of immigrants through integration or assimilations also consider the appropriateness of both the conceptions and difference among them. The studies about adaptation of immigrants in the Western societies show

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[14] The Common Basic Principles (CBPs) for Immigrant Integration Policy in the EU were adopted by the Justice and Home Affairs Council in November 2004 and form the foundations of EU initiatives in the field of integration.

[15] *Muslims in Europe: A Report on 11 EU Cities* (New York: Open Society Institute, 2010), 18.

[16] *Muslims in Europe: A Report on 11 EU Cities*, 18.

[17] David Lockwood, "Social integration and system integration," in *Explorations in Social Change*, ed. G. K. Zollschan & W. Hirsch (London: Routledge & Kegan, 1964), 244–257.

various positive and normative understandings of integration. Integration is suggesting

equilibrium among migrants and inhabitants of a society. Some researchers believe that

integration is not possible without assimilation. The proponents of assimilation suggest

that immigrants required to adjust in local culture. Other believe that both natives and

immigrants needed to reach a mutually agreed set of relations. In the view of some

scholars and observers adaptation of immigrants is required in some aspects of

socialization. Scholars such as Brubaker contends that this notion is analytically

disreputable and discredited, however, it is useful to understand difference of various

communities.[18] Multiculturalists have reservation about the space that is extended for

difference of the communities. They are concerned about the methods that the native

population and local governments use about immigrants and new arrivals. Empirical

studies show variations in the approaches used by various countries with different

newcomers' communities.[19]

Another consideration is that different period and realms of assimilation are suggested for

different communities. Its use is not one size fit for all. Western Muslims cannot be

separated from these situations. Their arrival has changed their courses, as in some cases.

Some governments designed special policies to address the normative change and

popular fear of demographic imbalance. It is also to be noted that integration is not only

the matter of assimilation of the immigrants but it also includes their adaptation by the

natives. The matter of Muslims' integration is particularly important in the countries

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[18] Rogers Brubaker, "The Return of Assimilation? Changing Perspectives on Immigration and Its Sequels in France, Germany, and the United States," *Ethnic and Racial Studies* 24 (4), 2001: 531-548.

[19] Christian Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain* (Oxford: Oxford University Press, 1999); "Beyond National Models: Civic Integration Policies for Immigrants in Western Europe," *West European Politics* 30, No.1 (2014):11-12; Alejandro Portes and Ruben Rumbaut, *Legacies: The Story of the Immigrant Second Generation* (Berkeley: University of University of California Press, 2001).

where more than a quarter of migrant Muslims are residing. States such as Belgium,

Holland, France, Greece, Sweden, Norway and the United Kingdom. In countries such as

Austria, Switzerland, Italy and Spain increase in Muslim population is projected.[20] In

integration it is expected from immigrants to settle in areas with new preferences, norms

and socio-civic conditions. Similarly, the native communities are required to show

respect for migrants' worldviews and determine what can be acceptable from it.[21]

Different governments have structured rules and procedures that regulate the process of

assimilation. The scholars have suggested that destination states must decide that the

obligation of assimilation must be defined clearly. The researchers are of the view that

governments, migrants and native societies are main players of this process. Indicators of

integration are working in accordance with the facilitation of governments. The

immigrants are usually settled through naturalization on achieving conditions of

integration.[22] This is the reason that several European countries have placed certain

conditions and indicators to be achieved by immigrants before legally meeting the

qualifications of naturalization.[23]

1.5- Multiculturalism as an Alternative of Assimilation

Many scholars have suggested multiculturalism as an alternative of assimilation. It means

having many ethnicities and cultures in a particular society. They believe that

multiculturalism is effectively visible in the private and public lives of the people. Public

and state institutions such as assemblies, parliaments, public administrations and

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[20] Gest, "Western Muslim Integration" *Review of Middle East Studies*, 192.
[21] Nasar Meer, "Misrecognizing Muslim Consciousness in Europe," *Ethnicities*, 12(April 2012): 178-196.
[22] Gest, "Western Muslim Integration" *Review of Middle East Studies*, 193.
[23] Irene Bloemraad, "Becoming a Citizen in the United States and Canada: Structured Mobilization and Immigrant Political Incorporation," *Social Forces* 85, No.2 (2006): 66.

municipalities. Due to the frequent visibility of multiculturalism in collective life, individual life and decision making is also influenced from it. Due to the visibility of multiculturalism in public life, Western ethno-cultural group became more complicated as they have the desire to live in accordance with their cultural norms.[24] After 9/11 multiculturalism is perceived to the extent of faiths particularly Islam. Muslim communities in the West are varied not only in terms of beliefs and sects but also in terms of history, culture, geographical affiliation, language etc. They belong to various continents. There are many challenges for them including lack of proper understanding. Another challenge for the Muslims' integration is increasing unacceptability of Islamic identity. These type of challenges also contributed in adaptation of fundamentalist approaches.[25] The Western intolerance toward emblems of religious diversity such as hijāb and beard and increase interference in the private lives of the Muslims created intolerance among Muslims and forced them to adopt rigidity leading toward more orthodox Islamic practices.[26] In spite of Western claims of secularity it proved herself Christian by rejecting Muslims right of identity. Moreover, many moral traditions, state laws and even education system is dominated by Christian beliefs. It is also observed that European countries describe their religious attributes within the secular framework but Christianity is dominating there. Church tax deductions on Christians' incomes in Norway and blasphemy laws in accidence with Christianity only in Britain are examples of this tradition.[27] Europe needs to demonstrate multicultural society and harmonious religious attitude at economic, political and religious levels. In all European states Islam

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[24] Shireen M. Mazari, "Multiculturalism and Islam in Europe," *Policy Perspectives* 7, no. 1 (June 2010): 91–101.
[25] Ibid.
[26] Ibid.
[27] Ibid.

is a religion of large minority, therefore it needs to be recognized as reality of the Western tradition and intolerance towards Muslims' social practices should be curtailed and condemned at public level, so that Muslim youth can be mainstreamed at all levels.[28]

1.6- The Emergence of Western Nation State

The emergence of nation state is not an outcome of any systematic process of sociology or 'methodological nationalism'.[29] The global society is composed of 195 countries, recognized by the United Nations. The world society is divided into nation states of which there are 195 presently recognized by the United Nations.[30] Since the composition of national state is not possible without integration and assimilation, therefore discussion of the emergence of nation state will be appropriate. A lot has been written on the issue therefore a complete analysis may not be possible. However, an overview of the matter is presented to understand the characteristics that are required to determine the relations between integration and a nation state. This understanding will be helpful for exploration of processes that are used in the systematic integration at social level in a nation state.

Organization of the modern societies within nation states is a comparatively new phenomenon which started in the eighteenth centaury and boosted in after that. The nation state are based on: I- political power, ii-physical power and iii-the capacity to exercise this power over the citizens who reside within the geographical boarders of the

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[28] Ibid.

[29] Anthony D. Smith, "Nationalism and Classical Social Theory," *The British Journal of Sociology*, no.34 (1983): 19–38.

[30] Out of these 195 countries 193 countries are members of the United nations while two countries the **State of Palestine and the Holy See** have the status of observers: See https://www.worldometers.info/geography/how-many-countries-are-there-in-the world/#:~:text=There%20are%20195%20countries%20in,and%20the%20State%20of%20Palestine.

state.[31] Max Weber has described the tasks that are obligatory to establish a nation state.[32] The first task that needed to be performed by the state include but not limited to: First, it defines and secure its border with the help of the armed forces and implement its control over all entry and exit points.[33] The actions such as passport controls, toll barriers, and customs control are symbolizing not only the limits of the boundaries of the state but also reflect its border policies. Second, unified system of institutions, for the implementation of law and regulations with the territory is also obligatory for the creation of a nation state. The creation of a countrywide administration is also part of this unified system of institutions because a nation state is implementing its writ through it. These state institutions ensure social integration through birth and death registration. Moreover, various systems related to state such as tax collection, national currency, nationwide transport (roads and rail), and schools and universities are established and perform its duties through these national institutions. These institutions are also paving ways for unification and protection of national territory. The state institutions governed through will of the people demonstrated with the help of democratic forums within a territory. The state institutions are also used for the intervention on the behalf of state for the purpose of regulation of national society. Through this process favorable conditions to promote social equality of a welfare state and the market economy are introduced.[34] The inclusion of the people residing within the geographical boundaries is the responsibility of the national institutions. The various steps that are included in this step are citizenship

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[31] Georg Jellinek, *Allgemeine Staatslehre* (Berlin: Haering, 1905).

[32] Max Weber, *Wirtschaft und Gesellschaft* (Tübingen: J.C.B. Mohr,1985).

[33] Stein Rokkan, *State formation, Nation Building, and Mass Politics in Europe* (Oxford: Oxford University Press, 1999).

[34] S Leibfried and M Zürn, "Von der nationalen zur post-nationalen Konstellation," in *Transformationen des Staates*, ed. S. Leibfried & M. Zürn (Frankfurt a.M: Suhrkamp, 2006), 19–65.

state through registration, record and administration of various maters. The national states

are educating their citizens and prepare them to defend their country during wars. In

return of their services to the state, they enjoy the freedom of movement and protection of

the state within its borders. The citizens of the nation states have the right to choose their

rulers. They can claim benefits related to social wellbeing in their country. The

combination of population, territory, and statehood are fundamental elements of a nation

states.[35]

After the establishment of European nation state in nineteenth century, circumstances

forced Muslim world to adopt the nation state model. From the change of one Ottoman

Empire to many Muslim nation states the Muslim world has repeatedly struggled with

ambiguous contemporary constitutionalism and religious frameworks. While developing

response to the oriental blame of despotism in Ottoman Empire,[36] Muslim reformers and

conservatives are trying to suggest integrated model of modern form of governance with

the mixture of religious ethics.[37] According to the proponent of this model Islamic nation

state has the authority to make legislations until and unless these laws are not against the

Sharī'ah and public interest.[38] Muslim scholars, in spite of several constraints recognized

that some resemblance is existing between natural law and Sharī'ah.[39] It is also argued

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[35] See David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, CA: Stanford University Press, 1995); Michael Zürn, Regieren *jenseits des Nationalstaates: Globalisierung und Denationalisierung als Chance* (Frankfurt a.M.: Suhrkamp, 1998).

[36] Historically European writers were used to describe the Ottoman government as despotic and tyrannical See for details: Aslı Çırakman, "From Tyranny to Despotism: The Enlightenment's Unenlightened Image of the Turks," *International Journal of Middle Eastern Studies* 33(2001): 49-68.

[37] Dawood I Ahmed and Tom Ginsburg, "Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions," *Virginia Journal of International Law* 54, No.3 (2014): 615.

[38] Jan Michiel Otto, *Sharī'ah and National law in Muslim countries: tensions and opportunities for Dutch and EU Foreign Policy (Law Governance and Development: Research and Policy Notes)* (Leiden: Leiden University Press, 2008), 11.

[39] Noah Feldman, *The Fall and Rise of the Islamic State (Council on Foreign Relations)*, First Edition

that some features of Sharī'ah had made it more compatible to constitutionalism than a man-made positive, constitutional order. Therefore, Islamic law may invoke negative connotations among the Western scholars but majority of Muslims still found appeal in the idea of law resonate deeply with the Islamic past.[40]

1.7-The Role of Social Integration in a Nation State

Social integration is a tool that is used for the reconstruction of a society. Its conception not only provides definition but also indicate specification of the elements which needed to be integrated. The talk of sociologists about a society is eventually lead to talk about a nation state. The mentioning of societies such as Pakistan, India, United States, Ghana, France or Peru is actually talk about these nation states. The societies without a state are also treated as nation state. The example of this is Palestinian society which is still striving to be recognized as a nation state. Even the nation states with less state authority such a Afghanistan are referred as nation state.[41]

The creation of nation states desired formulation of systematic integration, as they are portrayed by a new type of social integration. In these states specific institutions are working for creation of communities having a particular type sense of belongingness. These efforts made it possible for the national identity to dominate on identification, such

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(Princeton   University   Press,   2008),   02-10.,
http://gen.lib.rus.ec/book/index.php?md5=6d81af986b8f8e1eb60bd22c0e4117e7.

[40] Feldman, *The Fall and Rise of the Islamic State* , 79-91.

[41] Thomas Risse and Ursula Lehmkuhl, "Governance in Räumen begrenzter Staatlichkeit: Anmerkungen zu konzeptionellen Problemen der gegenwärtigen GovernanceDiskussion." In *Staatszerfall und Governance*, ed. M. Beisheim and G. F. Schuppert (Schriften zur Governance-Forschung, Band 7, 2007), 144–159; Jürgen Gerhards and Holger Lengfeld, *European Citizenship and Social Integration in the European Union*, 14.

as ethnicity, region and religion.[42]

2-The Role of Religion in National Integration

2.1-Variety of Scholarship on the National Integration

As the problem of immigration is understood differently in United States, similarly the

views on the role of religion in national integration is variant in European and American

scholarship. The outcome of a massive wave of immigration from Europe and across the

Atlantic resulted into production of growing literature of social science related to

immigrants and their integration into American society. Unfortunately, the study of the

religion of the immigrants has not been considered significant and placed into back

bench. These studies focused on issues such as labor market incorporation, political

incorporation, economic, education, residential patterns, paths of the 2nd generation,

transnational ties and citizenship but religion was either ignored or received less

attention. This situation affected research not only in United States but all over the world

because many studies rely on the US data which has no question on religion. Religion has

not been considered as problematic area for the new arrivals; therefore, it has been

ignored and overlooked. The objective of many of immigrants' studies is their smooth

adaptation. However, this situation is different in Europe where faith is placed at the top

of the agenda of the scholars who are engaged in religious matters of the immigrants,

particularly Muslims.[43]As per one estimate, publications on the issue are in thousands or

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[42] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London & New York: VERSO, 1983), 1-20.
[43] Nancy Foner and Richard Alba. "Immigrant Religion in the U.S. and Western Europe: Bridge or Barrier to Inclusion?" *The International Migration Review* 42, no. 2 (2008): 360.

more.[44] The research in United States are positive towards the religion but contrast to this in Europe religion particularly Islam is marked as source of social division. The opinions of scholars are on the role of religion in integration of immigrants in their new societies are divided on the both side of the Atlantic because of differences on ground social realities.

2.2- The Capacity of Faith in Inclusion of Immigrants in the New Societies

The researchers are trying to assess and evaluate the role of religion as belief system, community and an institution in the inclusion of the immigrants in their new society. They are also studying the capacity of faith as a bridge for integration and assimilation of the second generation of migrants in their new homelands. The questions related to immigrants have different answers from different settings due to various reasons. Like for instance the faith affiliations of migrants in Western Europe and United States. Mostly immigrants to United States are Christians, while immigrants to Western Europe are Muslims. The European societies or less religious and more secular therefore, have problem in recognition of religious communities. The papulation in United States is religiously involved. Therefore, immigrants are more accepted in United States socially. Historically relationship between state and religious groups in Europe remained problematic. Therefore, the acceptance of religious groups and their incorporation in Western societies is problematic in Europe more than in America. The result of this situation is that the substance research demonstrates that a more conducive environment

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[44] Frank J Buijs and Jan Rath, "Muslims in Europe: The State of Research" (IMISCOE Working Paper, 2006).

is for immigrant religion in North America than in the Europe.[45]

2.3-The Positive Role of Religion Paradigm in North America

The new religious diversity in the Western Europe and North America is an outcome of post-1965 wave of immigrants. The signs of this diversity are reflected in Christian churches, Islamic mosques, Hindu and Buddhist temples and worship places of other religions largely in big cities and towns. Many new temples or churches which begin in storefronts, rented quarters or in the houses are now turned into newly constructed huge buildings. New forms of Judaism and Christianity have been introduced by the new migrants. Their arrival has also affected the shape, text and the language of worship in many synagogues and churches.[46]

Consequently, the positive role of religion paradigm developed in the United States as a result of the discovery that religion is playing positive role for the incorporation of newcomers in their new homeland. Various studies reveal that religion help immigrants in variety of ways to adapt new society. It is described that religion is showing pathway for mainstreaming of immigrants.[47] It is further revealed that religion is functioning as a source for fulfilling the needs of migrants. Charles Hirschman has identified these needs as 1-refuge, 2-respectability and 3-resources and named them as three R's.[48] The migrants desire refuge from the trauma of separation and loss. Oscar Handlin and Will

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[45] Foner and Alba, "Immigrant Religion in the U.S. and Western Europe," 361.

[46] Pyong Gap Min, "The Structure and Social Functions of Korean Churches in the United States," *International Migration Review* 26, No. 4(1992): 1375; F. Yang, "Religious Diversity among the Chinese in America," In *Religions in Asian America: Building Faith Communication*, Ed. P. G. Min and J. H. Kim (Walnut Creek: CA Alta Mira Press, 2002), 88.

[47] Claude Fischer and M. Hout, A *Century of Difference: How America Changed in the Last One Hundred Years* (New York: Russell Sage Foundation, 2006).

[48] Charles Hirschman, "The Role of Religion in the Origins and Adaptation of Immigrant Groups in the United States," *The International Migration Review* 38, no. 3 (2004): 1228.

Herberg focused on this trauma in their writings. The process of integration and adaption for the immigrants is varied among immigrants due to differences in origin, time and place. Many factors such as separation from the family, community and language contribute in finding stability in their new residence. Religious membership and participation in religious rituals offer them protection and create among them sense of partnership and belonging. Religious pluralism in United States offer them opportunities to perform worship and rituals in their own mosques, churches, temples or synagogues. Religious places also extend them opportunities of friendship and fellowship in their familiar cultural environment. Through these religious places they seek shelter from the stress of settlement. They serve for them as source of solace and help them to encounter the discriminations.[49] Religious people and institutions help the immigrants to confront the challenges of life and come to the terms with life in their new home.[50]

It has been observed that religious activists extend alternative source of respect for immigrants. Some of the immigrants experienced discrimination. They felt that they were denied social recognition. Religious groups consist upon good Muslim, Christian, Buddhist and other faiths are trying to bring respect and opportunities of leadership for these new members of their community. According to sociologists religious affiliation and membership are playing impressive role in physiological healing of the immigrants. Hirschman describes outcomes of the studies which show that immigrant religious institutions offer multiple services to newcomers. They were assisted in various matters

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[49] Foner and Alba, "Immigrant Religion in the U.S. and Western Europe," 362; Hirschman, "The Role of Religion in the Origins and Adaptation of Immigrant Groups in the United States," 1228-1229.

[50] H. R. Ebaugh and J. S. Chafetz, *Religion and the New Immigrants: Continuities and Adaptation in Immigrant Congregations* (Walnut Creek, CA: Altamira, 2000), 74: A Portes and R. Rumbaut, *Immigrant America*, 3rd edn (Berkeley, CA: University of California, 2006), 329.

related to settlement such as housing, business jobs, housing, and language training.[51]

Another important role that religion is playing in the process of integration is construction of their new identity. Various studies in the issue are revealing that religious activities contribute in reshaping or reinforcing of the ethnic identity of the immigrants. Religion extend a form that is socially adequate. With this, immigrants can reconstruct, articulate and transmit their culture, ethnic and religious identities. 1950s famous synthesis of Herberg suggests that Americans are more tolerant of spiritual diversity than ethnic. They consider faith as a socially acceptable way of construction of their own culture and identity.[52] The linking ethnic identity with religion is helpful for immigrants to incorporate into American society. The religion is preparing immigrants to become part of wider society. Religious institutions not only provide formal education but also extends opportunities of non-formal education such as preparatory classes for English language or SAT examinations. They also teach incorporation of homeland, cultural and literary traditions. These institutions offer them cultural pride, sense of identity that add to their effectiveness. Some studies acknowledged the role of religion in protection of the immigrant youth from the neighborhood gangs and immoral impacts of American culture. Through helping in fulfilling the parental aspirations for higher education these institutions strengthen the integration of immigrants into the ethnic community.[53]

Dina Eck observes that region extends them "one of their first training grounds in participatory democracy." Religious organization such as Islamic societies and Temple

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[51] Hirschman, "The Role of Religion in the Origins and Adaptation of Immigrant Groups in the United States," 363.

[52] Will Herberg, *Protestant, Catholic, Jew* (New York: Anchor Books, 1960); Anna Karpathakis, "Conclusion: New York City's Religions," in *New York Glory: Religions in the City*, ed. Tony Carnes and Anna Karpathakis (New York: New York University Press, 2001), 388-394.

[53] Foner and Alba, "Immigrant Religion in the U.S. and Western Europe," 364.

associations from the American Muslim Council, American Buddhist Congress to the North American Federation of Zoroastrians help believers in organization in political skills. Their involvement in membership lists, board of directors, elections and accountability prepared them to participate in democratic activities. She states that:

> "precisely the places where new immigrants gain their feet and practice the arts of internal democracy. Long before they stand for election to the school board, they will stand for election in the governing body of the Hindu temple. Long before they enter the fray of local and state politics, they argue fiercely about their internal Sikh, Hindu and Muslim Politics."[54]

Social scientists reached to the conclusion that religion assists immigrants to become Americans. Faith provides them and their families an opportunity of belongingness in the America. With its help they are accepted in the United States.[55]

3- The Role of Religion Particularly Islam in European Integration

In contrast to North America, religion is generally treated in Western Europe as an impediment to integration and assimilation. It is considered as the problem for immigrant minorities and not the solution. The European commentaries on the religions of immigrants is exclusively focused on Islam. Some studies view Islam as a barrier to incorporation and a source of conflict with mainstreaming. They see it is as a hurdle in the process of successful adaptation and integration into European society. Majority of

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[54] Dian L. Eck, *A New Religious America: How a "'Christian Country'" Has Become the World's Most Religiously Diverse Nation* (New York: HarperCollins, 2001), 336.
[55] Alejandro Portes and Min Zhou, "The New Second Generation: Segmented Assimilation and Its Variants," *Annals of the American Academy of Political and Social Sciences* 530:74(1993): 98; Foner and Alba, "Immigrant Religion in the U.S. and Western Europe," 365.

Western scholarly writings and the dominant European imaginary on the issue are influenced from the distorted image of Islam. The reflection of this distorted binary can be seen in the observation of Goldberg who states Islam as "one of fanaticism, fundamentalism, female suppression, subjugation, and repression." [56] The Muslim capacity to integrate into Western societies is seen with dominated view which suggests that Western and Islamic cultures are irreconcilable.[57] This popular attitude toward Islam is contributing in the production of the social science literature. Many researchers have recognized positively the practices of Muslim migrants and their families. In doing so they are trying to counter prejudices about these beliefs and practices. Others have tried to describe the conflicts and animosities through their research and produced policy recommendations for reducing strains between Muslim immigrants and their Western new homelands.[58] In some cases scholars see that due the arrival of Muslim immigrants European national values are in danger.[59] Even the analysts who advocate for European Islam and appreciate the positive signs of integration of Muslims are usually seen in the perspective of the propaganda that deny, ignore, or downplay these advancements.[60] Justin Gest says that media is focusing on Muslims only for sensational religious claims related to 'real meaning' and 'competing loyalty'. Some of the media observers put forward suppositions that Muslims place their faith's obligations above civic

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[56]David Theo Goldberg, "Racial Europeanization," *Ethnic and Racial Studies* 29 (2006): 331-364.

[57] This view is reflected in books such as: Leo Lucassen, *The Immigrant Threat: The Integration of Old and New Migrants in Western Europe since 1850* (Urbana, IL: University of Illinois Press, 2005), 4.

[58] Foner and Alba, "Immigrant Religion in the U.S. and Western Europe," 368.

[59] J-H Kaltenbach and M. Tribalat, *La Republique et l'islam, Entre Crainte et Aveuglement* (Paris: Gallimard, 2002).

[60] J Klausen, *The Islamic Challenge: Politics and Religion in Western Europe* (Oxford and New York: Oxford University Press, 2005); Leo Lucassen, *The Immigrant Threat: The Integration of Old and New Migrants in Western Europe since 1850* (Urbana, IL: University of Illinois Press, 2005); J Laurence, and J. Vaisse, *Integrating Islam: Political and Religious Challenges in Contemporary France* (Washington, DC: Brookings Institution Press, 2006).

responsibilities. This position made social cohesion between Muslim and West irreconcilable in democratic states which are destination of Muslim immigrants.[61]

3.1-The Debate on the Muslims' Integration in the Western Society

As per statistics of 2010 the population of Muslims in the countries of European Union is estimated around 15–20 million. It is expected that his population will be doubled in 2025. The Muslims in Europe includes diverse citizens (converters), and migrants. Usually they prefer to live in large industrial cities and capitals. Generally Muslims are the part of the integral fabric of European societies but many of them are also experiencing economic and social disadvantages and discriminations. Today the Western Muslims are facing scrutiny and intensified suspicion. The EU institution are suspicious about them and they have to face extra ordinary scrutiny. Ensuring social cohesion and equal rights in presence of fault lines such as economic insecurity, political uncertainty, religious intolerance and expanding diversity are the greatest challenges of today's Europe. Another problem of this issue is non-existence of appropriate data. Whatever available is extrapolated form of information related to origin and ethnicity of the immigrants? The access provided by this to the lives, needs and experience of Muslims in the West is limited. In spite of this incomplete and partially correct picture Muslims are effectively present on religious, ethnic and cultural variety of the West. Usually they are on the center stage of the current debate on integration and social cohesion. The European Union considers it as a two-way mutually agreed procedure and promote policies to support social cohesion and integration. The study of the attitudes of Muslims and non-Muslims in the eleven European cities shows that both groups are engaged with

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[61] Justin Gest, "Western Muslim Integration," *Review of Middle East Studies* 46, No. 2 (winter 2012): 191.

each other and willing to work together. The research suggests that a sense of shared

values is not as essential for persons from different origins to construct communities. In

the opinion of non-Muslims, national belonging is superior to place or community

belonging. Contrast to this Muslims consider attachment to their community and city is

stronger than belonging to the nation. Cultural identification is useful for integration

various areas such as education and employment. Non-Muslims and Muslims both agree

on the importance of religious identity as a sense of cultural identification. The research

also suggests that the discrimination against Muslims is an impediment for their full and

equal social participation.[62]

3.2-Manifestation of Muslims Integration in the Western Society

In spite of several efforts of integration of Muslims in the Western societies there are still

many challenges to the Muslims' participation in the process of integration. The

assimilation and integration of first generation of immigrants is no doubt not an easy

matter. However, the situation of 2nd generation Muslim immigrants of North American

and Europe are demonstrating different trends than the generation of their parents. This

2nd generation of Muslim immigrants have spent their early young age in American,

Swedish, British, Scottish, and Saskatchewan schools. Adopting influence of local media,

they are communicating the languages of their new destinations, and socially engaging

with fellow citizens on equal footing. Similar to their other citizens they are fully skilled

to use modern tools of communication such as internet-based social networks, video

conferencing and satellite televisions. This young generation of Muslims is hybrid and

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[62] *Muslims in Europe: A Report on 11 EU Cities* (New York: Open Society Institute, 2010), 18.

connected with multiple sociopolitical features belonging to different ethnicities.[63] Is it

justified that in spite of these signs of integration the consecutive generations of Muslims

are treated as foreigners having essential differences? This behavior reflects that Muslims

are not considered as part of other migrant communities. It also shows the tendency of

"trap" in the cercal of immigrant who are in reality been outside of it for generations.

Muslim converts are one example of it as they are not immigrants but treated similar to

Muslim immigrants.[64] Many European Muslims are interested to seek religious solution

of their individual problem. At the same time they like to adhere European legal codes.

Therefore, they are searching commonality between Sharī'ah rules and European codes.

They are also trying to articulate theoretical statements to resolve the tension between

European codes and religious norms. It has also to be noted that significant Muslims are

not interested in religious life but like to retain Islamic identity. However, considerable

number of Muslims wish to show themselves as European Muslims. They like to have

Muslim identity with practical fulfilment of Islamic rules, within the limits defined by

European legal framework.[65] Skeptical mindset which is obsessed with Islamophobia[66] is

unable to see how Muslims are transforming themselves and trying to contextualized Islam

because of the changing sociopolitical environments in which Muslims of the West are living

today. Increased response to assimilation and integration has been observed with in Islamic

diversity.[67]

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[63] Justin Gest, *Apart: Alienated and Engaged Muslims in the West* (New York: Columbia University Press, 2010) 100-110; Gest, "Western Muslim Integration," *Review of Middle East Studies,* 191.

[64] "Western Muslim Integration," *Review of Middle East Studies,* 191.

[65] Mathias Rohe, "Application of Sharī'ah Rules in Europe: Scope and Limits," *Die Welt Des Islams,* New, 44, no. 3 (2004): 325.

[66] This terminology is used in the meaning of "Irrational hostility, fear and hatred of Islam, Muslims and Islamic culture, and active discrimination towards this group as individuals or collectively" Muslims in Europe: A Report on 11 EU Cities, 18.

[67] Muslims in Europe: A Report on 11 EU Cities.

3.3-Legitimacy of Immigration to Non-Muslim Territories

The issue has been discussed in detail elsewhere in this thesis during the discussion related to concept of Hijrah and contemporary implications. The discussions on the issue reveal that many classic and contemporary Muslim scholars were opposing the idea of migration of the non-Muslim territories. But current global realities lead toward the acceptance of naturalization of Muslims in non-Muslim territories through migration. Prominent Muslim reformer Rashīd Riḍā while commenting on the issue of residence under non-Muslim rule, says that it is permissible if they are allowed to perform their faith duties. His approach was pragmatic and he developed it when majority of Muslim land was under the non-Muslim rule. He drew justification for his opinion from the opinions of many classical Muslim scholars held the opinion that it is not obligatory on Muslims to migrate from these territories as long as they have the liberty to practice their faith. Riḍā's thought provoking view on the issue was manifested in a fatwa he issued in 1909 in reply to a question from a Bosnian official who asked about the legitimacy of stay of Muslims in the Bosnian territory after its occupation by Austro-Hungarian rule. The same query was earlier replied by a fatwa on the matter issued by an Ottoman jurist, who asked Muslims to migrate from Bosnia to any other Ottoman territory.[68] Riḍā drew support for his view from the opinion of al-Māwardī's (d. 1058) who said that any "territory of unbelief" where a Muslim can practice his face can change into a "territory

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[68] The fatwa entitled "Al-Hijrah wa-ḥukm Muslimi al-Būsna fīhā" was issued in the same year that Austro-Hungarian control over Bosnia was recognized by the Ottomans, after it had been annexed in 1908. It is included in Rashīd Riḍā, *Fatāwā al-Imām Muhammad Rashīd Riḍā* (Beirut: Dār al-Kitāb al-Jadīd, 1970/1971), vol. 2, 772–779. For an English translation, see Verskin, Oppressed in the Land?, 118–127; Muhamed Mufaku Al-Arnaut, "Islam and Muslims in Bosnia 1878-1918: Two Hijras and Two Fatwas," *Journal of Islamic Studies* 5, no. 2 (1994): 242-253., doi:10.1093/jis/5.2.242.

of Islam" by adopting him this territory as his residence.[69] Moreover, he emphasized that the views of pre-modern jurists particularly Mālikīs have not required a Muslim's physical emigration. In his view, the hijra was aimed to flee from al-munkar (evil) to immorality (fisq) to protect righteousness (ṣalāḥ) and (khayr). Similar to Ibn Taymiyyah he was of the view that this may be achieved through a spiritual hijrah.[70]

In response of the Algerian students' question regarding the controversy of legitimacy of travel to Western Europe and staying there, a scholar from Morocco 'Abd al-'Azīz b. al-Ṣiddīq al-Ḥasanī al-Ghamārī (1910–1993) wrote his famous study on the legitimacy of inhabiting in Europe.[71] The study of Ibn al-Ṣiddīq was first published in 1985 but was not acknowledged widely until another scholar from Morocco Al-'Amrānī mentioned this study marginally in his work.[72] Ibn al-Ṣiddīq holds that travel in residence in Europe is legitimate. He is of the view that in case of persecution the stay in West became obligatory. He says evil (al-munkar) is everywhere and some restrictions are found on it in the Western countries. He do refers west initially as the bilād al-kuffār or land of unbelievers but also praised them repeatedly for granting religious liberty and protection to Muslims. He observes that these Muslims were unable to practice their faith in their dominant Muslim land. Although Ibn al-Ṣiddīq was trained in Mālikī fiqh but his views on the legitimacy of stay in West are based on the opinions of Shāfi'ī jurists which state that Muslims can stay where they found safety, protection and liberty to practice their faith. He states:

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[69] See Riḍā, *Fatāwā al-Imām Muḥammad Rashīd Riḍā*, vol. 2, 775.

[70] See ibid., vol. 2, 777;Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West*, 101.

[71] 'Abd al-'Azīz Ibn al-Ṣiddīq al-Ḥasanī, *Ḥukm al-iqāmah bi-bilād al-kuffār wa-bayān wujūbihā fī ba'd al-aḥwāl*, 2nd ed. (Tanger: Maṭābi' al-Būghāz, 1996).

[72] Muḥammad al-Kadī al-'Amrānī, *Fiqh al-usrah al-muslimah fī al-muhājar: Hūlandā namūdhajan* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2001), vol. 1, 119–121.

"Europe and America have [...] become [like] an Islamic country (balad Islāmī),"

and concludes that "according to the opinions of the fuqahā', a [Muslim] resident

there is [just like] a resident of an Islamic country."[73]

Relying on the opinion of al-Māwardī's he said: "land of unbelief" becomes dār al-Islām

if Muslims are able to practice their religion and concludes that today's Europe

"hence constitutes dār al-Islām." [74]

Another study titled as Fiqh al-Jinsiyyāt (The Fiqh of Nationalities) that appeared in 1986

picked up the issue. The study was written by Egyptian scholar Aḥmad Ḥamad Aḥmad.

In this study the author tried to bring harmony in traditional Islamic concepts with

International law.[75]

Along with books and research papers the intellectual gathering of scholars also tried to

reconstruct tradition Islamic views of territoriality. During the conference of '*Union des*

Organisations Islamiques en France (uoif) ', in Lyon in 1986, famous Lebanese

intellectual Fayṣal Mawlawī (1941– 2011), suggested for reconsideration of traditional

territorial concepts in the perspective of the context in which they were developed. He

was of the view that the conceptions such as dār -al-Islām, dār al-kufr and dār al-ḥarb are

not based on any canonical grounds therefore, it can be changed through ijtihad to meet

special historic circumstances. He compiled his views in a monograph which was

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[73] Ibn al-Ṣiddīq al-Ḥasanī, *Ḥukm al-iqāma bi-bilād al-kuffār wa-bayān wujūbihā fī ba'd alaḥwāl*, 33, 34-35; lbrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West*, 114.
[74] Ibid. 41-42; lbrecht, *Dār Al-Islām Revisited* 114.
[75] Aḥmad Ḥamad Aḥmad, *Fiqh al-Jinsiyyāt. Dirāsah muqārana fī al-Sharī'ah wa-al-qānūn* (Tanta: al-Jāmi'iyyah, 1986).

published in 1987.[76] The exiled leader of Tunisia Nahda movement, Rāshid al-Ghannūshī treat this issue in UOIF annual meeting in Le Bourget, in the suburbs of Paris in 1989. He stressed that: "the permanent presence of Muslims in the West presented a radically new situation that necessitated a reconsideration of the dār al-Islām/ dār al-ḥarb binary and suggested that France could nowadays indeed be considered as part of dār al-Islām."[77] During the same year of 1989, the Conseil de Réflexion de l'Islam en France (CORIF) declared France as dār al-Islām the Muslims could be buried in separate sections of the cemeteries.[78] UOIF held another important seminar on the title of "Muslims in the West" at Institut Européen des Sciences Humaines (IESH) in Château Chinon in July 1992. In this seminar a milestone was achieved through conceiving the idea of "European Council for Fatwa and Research (ECFR)". In this conference Western Muslims first time explicitly discussed territoriality. [79] These new studies and intellectual gatherings contributed in the institutionalization of Islamic life in the Europe. They not only started establishing new mosques and Islamic centers but also started addressing more specific legal challenges.[80]

In this debate a remarkable contribution is from Mannā' al-Qaṭṭān (1925–1999) through his intellectual work *"Iqāmat al-muslim fī balad ghayr Islāmī"* ("Residence of a Muslim

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[76] Fayṣal Mawlawī, *Al-Usus al-shar'iyya li-l-'alāqāt bayna al-muslimīn wa-ghayr al-muslimīn* (Beirut: Dār al-Rashād al-Islāmiyyah, 1987); Ibrecht, *Dār Al-Islām Revisited* 115.

[77] Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West*, 115.

[78] Gilles Kepel, *A l'Ouest d'Allah* (Paris: Editions du Seuil, 1994), 261; Albrecht, *Dār Al-Islām Revisited*, 115.

[79] Lena Larsen, "Islamic Jurisprudence and Transnational Flows: Exploring the European Council for Fatwa and Research," in *From Transnational Relations to Transnational Laws*, ed. Anne Hellum, Shaheen Sardar Ali, and Anne Griffith, 139–164 (Surrey: Ashgate, 2011), 142. See also Alexandre Vasconcelos Caeiro, "Fatwas for European Muslims: The Minority Fiqh Project and The Integration of al-Islām in Europe," (PhD thesis, ISIM Leiden University 2011), 60–61.

[80] Albrecht, *Dār Al-Islām Revisited*, 117.

in a non-Islamic Country").[81] He raised question that can we consider countries ruled by

dictators and where Muslim population is oppressed as dār al-Islām. He discussed the

demographic factor that was invoked by Abū Zahrah and Wahbah al-Zuḥaylī and

concludes that all Muslim countries are included in dār al-Islām. These scholars were of

the view that Western countries are neither dār al-ḥarb nor dār al-Islām. They placed

West in the third domain by virtue of international treaties and membership of United

Nations. Their point of view was supported by scholars such as Yūsuf al-Qaraḍāwī

(b. 1926) who agreed that dār al-Islām/dār al-ḥarb binary is not reflecting contemporary

situations and it has to be addressed in considering new reality of new Muslim

communities in Europe.[82]

The need for integration and contribution of Muslims in the Western societies generated

emerging Islamic debate on the applicability and adequacy on the traditional concepts.

The unmatched existence of millions of Muslims in West in the 2nd half of the 20th

century created the need to alter traditional territorial calssification to the contemporary

demographic and current political conditions.

4- Way forward for Integration of Muslims through Dār Al-Shahādah (The Abode of Testimony)

4.1-Contesting Traditional Views

The reservations of Western scholarship on the application of classical concepts of

territoriality on contemporary nation states have been discussed in detail in chapter no.

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[81] Tariq Ramadan, *To be a European Muslim: A Study of Islamic Sources in the European Context* (Markfield: The Islamic Foundation, 1999), 126–128; Tariq Ramadan, *Western Muslims and the Future of Islam* (Oxford, New York: Oxford University Press, 2004), 66–67

[82] Albrecht, *Dār Al-Islām Revisited*, 117.

four. Some of the Muslim voices that emerged from the Muslims living in the West and

North America challenging the application of the notions on the West have been already

mentioned in this chapter. The paradigm shift came in from declaration at the end of

"Conference of Heads of Islamic Centers and Imāms in Europe" held on June 13-15,

2003 at Graz, Austria.[83] They showed their concerns and displeasure on the application of

traditional binaries of classification of world. They were of the views that these notions

are unable to represent current situation.[84] The declaration states:

> "European Muslims are equally aware of their religious identity as Muslims as
> they are of their social identity as Europeans. Their naturalization in no way
> entails a theological contradiction. The Islamic message is oriented at moderation,
> the logical consequence of which is the explicit rejection of all forms of
> fanaticism, extremism and fatalism. The medieval distinction between dār al-
> Islām (house of Islam) and dār al-harb (house of war) as contradictory worlds is to
> be rejected. It is not based on the Qurān nor on the Sunnah, represents an obsolete
> phenomenon and is in no way relevant today. Human rights are an essential
> component of Islam. Safeguarding the dignity of the human being as a being
> created by the Lord from the same substance, and actively advocating human
> rights is the self-evident duty of every Muslim, male or female."[85]

The spirit is found in the claims of Murad Wilfried Hofmann (b. 1931) who states that:

> "I can assure you that the non-Qurānic medieval conceptual pair of dār al-Islām

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[83] "Graz Declaration-English Version," June 15, 2003.
[84] Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West,* 282.
[85] "Graz Declaration-English Version," 04.

[...] and dār al-harb does not play any role in the thinking and discourse of contemporary Muslims." Indication the diversity of opinion on the issue he further elaborates that: "These are categories to which Orientalists adhere, which bear, however, no relation to Muslims' everyday reality." [86]

In contrast to the opinion of modern scholars from the other part of the world, these European Muslim voices instead of demanding revisiting the traditional territorial concept asked for abandoning them in 21st century. Their views were second by many other contemporary scholars who received their formal education from Canadian and European universities and spent large periods in the West.

4.2- Tariq Ramadan Paradigm Shift Model of 'Islam in Europe'

After getting traditional religious training from Al-Azhar University, Tariq Ramdan studied Philosophy and French literature for his PhD in Islamic Studies from the University of Geneva. His personality was developed as a well-known Muslim intellectual in the West. Ramadan advocates his case of reformation through re-reading of Islamic theology and law.[87] He suggested that the re-visiting of the sacred texts of Islam, mainly the Qur'ān, and of the classical Islamic legal texts is a prerequisite for a "radical reform" of Sharī'ah law.[88]

The classical concept of dār and dividing the world mainly into two zones may not work

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[86] Murad Wilfried Hofmann, *Den Islam verstehen, Vorträge 1996–2006* (Istanbul: Çağri Yayinlari, 2007), 270; Albrecht, *Dār Al-Islām Revisited,* 282.

[87] The reformist agenda can be found in his famous writings such as *To be a European Muslim, Western Muslims and the Future of Islam, and Radical Reform: Islamic Ethics and Liberation* (Oxford: Oxford University Press, 2009) a complete list of his publications is available at his web See: http://www.tariqramadan.com/spip.php?article11&lang=en (accessed September 1, 2017).

[88] Ramadan, *Western Muslims and the Future of Islam,* 63.

in this globalized world due to transformation of current geographical realities. Under the classical concept of dār, fully independent and sovereign states are required which can hardly be found now due to economic, financial and political interdependence of states. Few contemporary scholars believe that the safety and protection of Muslims and their faith were the main standards for declaring any territory dār al-Islām, but unfortunately at the present time majority of the Muslim world even fail to provide protection to their Muslim citizens.[89] West on the contrary provides both kind of protection to Muslims. The concept of dār al-ʿAhd presented by al-Shāfiʿī is also unable to provide solution in today's world.[90] As it signifies temporary or permanent harmonious and conflict-free state of affairs with non-Muslim states on the basis of peace covenants with them. But dār al-ʿAhd must also fulfil all the criteria that is fixed by the scholars for an independent dār, yet in this present world a fully independent country who concludes any treaty without any political influence can hardly be found.[91] Moreover, Muslim minorities residing in that dār al-ʿAhd, believe that they do not belong to that society, rather they reside there on certain terms and conditions. The idea of social contract is quite different from dār al-ʿAhd, while in former people own the membership of society and which allow them to fully integrate and participate. Muslim scholars are not unanimous over the division of this world mainly into three types of dār, few scholars have adopted the concept of dār al-ʿAhd with few modifications, few others adopted the old binary concept and few others have altogether rejected these kind of divisions.[92] It has ultimately left a gap amid

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[89] See for details, Giovanna Calasso and Giuliano Lancioni, *Dar Al-Islam / Dar Al-Ḥarb: Territories, People, Identities,* Bilingual edition (Leiden ; Boston: Brill Academic Pub, 2017).
[90] Tariq Ramadan, *Western Muslims and the Future of Islam,* 2003, http://gen.lib.rus.ec/book/index.php?md5=ac9ba08537cfd15834e8e8977f3ea128.
[91] Ibid.
[92] Ibid.

classical concepts and current situation of the world. The essential elements for

determination of the status of any country for instance its population, ownership of the

territory, style of government and nature of laws enforced in the country are not relevant

according to Tariq Ramadan, in this modern globalized world.[93] For becoming good

practicing Muslim, no matters residing in Muslim state or non-Muslim state, we should

go back to the sources of Islam to find the solution of the problems of present-day

Muslims. Teaching of Islam for all Muslims are one, same and valid for all situations.

More than ten centuries old concepts of three dār, are neither based on al-Qur'ān and

Sunnah nor appropriate to apply in this current world political scenario.[94] This new

situation demands fresh analysis of the current global situation in the light of sources of

Islamic law and to develop a correct legal opinion. He feels that the world now has

entered into a new complex and diversified form where new economic and political

approaches need to be adopted to face the challenges. There is a need to define

significances in the individual and collective life of a Muslim. Muslim's identity and

demands of his religion from him are fundamental to outline, since he is carrying the

identity as a European or American too.[95] Muslim minorities have already accepted many

western terms and many others are needed to be amended, reformed and applied for

peaceful coexistence.[96] Muslims in the west have been provided with the freedom to

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[93] Ibid.

[94] Tariq Ramadan, *Western Muslims and the Future of Islam*, 2003, 63-77; Sohaira Siddiqui, *Locating the Sharī a. Legal Fluidity in Theory, History and Practice*, Hardcover, Serie: Studies in Islamic Law and Society, Band: 48 (Brill, 2019), 205-215. http://gen.lib.rus.ec/book/index.php?md5=dfc1520192be7096acd0077e7e48b410.

[95] See for details, Tariq Ramadan, *Western Muslims and the Future of Islam*, 2003; Ron Geaves, *Islam and the West Post 9/11* (Aldershot, England ; Burlington, VT: Ashgate, 2004); Ṭāhā Jābir Fayyāḍ 'Alwānī and A. A. Shamis, *Towards a Fiqh for Minorities: Some Basic Reflections*, New rev. ed (Richmond, Surrey, UK ; Herndon, Va: The International Institute of Islamic Thought, 2010).

[96] See for details, Ramadan, *Western Muslims and the Future of Islam;* Tariq Ramadan, *To be a European Muslim: A Study of Islamic Sources in the European Context* (Leicester: The Islamic Foundation, 2005), 9-

practice their religion and they are safe and secure at the same time but protection of spiritual life in a secular society which categorically rejects any demonstration of religion in public spaces is a great challenge for Muslims.[97] The spiritual life of Muslims could be preserved through general education, religious education, social, political and cultural participation. Furthermore the overall image of Islam and Muslims have effected due to many political events and incidents in Muslim world and Muslim minorities inhabiting in West facing more problems due to them than the laws of secular states. As a result of series of unpleasant events that took place in near past Muslim minorities are now fighting for their representation in pluralist Western society, instead of demanding equal dealing with all faiths and faith based laws.[98] One of the contemporary scholar Faysal al-Mawlawī argues that West is either dār al-Ahd or dār al-daʿwah, and it would be considered dār al-ʿAhd if classical notion of Islamic law is applied and in case of rejection of old notion for new situation then West could be considered dār al-daʿwah similar to Makkah before hijrah.[99] Since Muslims were living in Makkah as minority before hijrah, they were bearing witness and Shahādah to their faith before people of Makkah. Same is the case of Western secular societies who have forgotten their creator and his rulings and leading a life that is based on human reasons only. The responsibility of Muslims in that society is similar to the responsibility of Muslims of Makkan period.

10; Muhammad Khalifa and Mark A. Gooden, "Between Resistance and Assimilation: A Critical Examination of American Muslim Educational Behaviors in Public School," *The Journal of Negro Education* 79, no. 3 (2010): 308–23.

[97] See for details, Andrew F. March, "Liberal Citizenship and the Search for an Overlapping Consensus: The Case of Muslim Minorities," *Philosophy & Public Affairs* 34, no. 4 (2006): 373–421.

[98] See for details, Sarah Albrecht, *Dār Al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West* (London ; Boston: Brill, 2018); Ṭāhā Jābir Fayyāḍ ʿAlwānī and A. A. Shamis, *Towards a Fiqh for Minorities: Some Basic Reflections*, New rev. ed (Richmond, Surrey, UK ; Herndon, Va: The International Institute of Islamic Thought, 2010) .

[99] Faysal al-Mawlawī, *Al-Usus al-Sharʿiyyah lil alaqāt bayna al-Muslimīn wa ghayr al-Muslimīn* (Paris: UOIF, 1987), 104; Tariq Ramadan, *To be a European Muslim: A Study of Islamic Sources in the European Context* (Leicester: The Islamic Foundation, 2005), 9-10.

Muslims must play their role and make the West realize about what they have left behind in their lives. Muslims should not surrender to that atmosphere and remain inhabit in their places and carry on their work soon they would be constructive influencer in that society. Islam and its teachings are universal and concept of Shahādah establishes identity of a Muslim as a believer in God, in his all prophets, in his last prophet (Peace be on him), in his angels, in his holy scriptures, in destiny and in the day of resurrection.[100] Muslim identity requires from them to perform religious duties that are enjoined on them and to follow all the regulations related to halāl and harām. Muslims are also under obligation to fulfil their promises, treaties, contracts and pledges.[101] Muslims hold this Shahādah in front of other people, to explain Islam in front of them. Tariq Ramadan comes up with a notion of dār al-Shahādah, contrary to the traditional concepts of dār al-Islam and dār al-harb. Shahādah is the only concept which can truly protect the identity of Muslim and demands from him to fulfil his responsibilities as a Muslim in a society, hence it permits identity and social obligations of Muslims to be pronounced.[102] The present world according to him is not confined to houses or abodes rather it is open world especially for Muslims as they are disseminated all over the world. Muslims are living in religiously and culturally diversified societies, where relations between the human beings are more essential before anything else.[103] Dār al-Shahādah may be a new idea concerning the status of Muslims in Europe as it declares European society a valid place of living for Muslim minorities. He highlights the importance of political and economic changes that

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[100] Ramadan, *Western Muslims and the Future of Islam*.
[101] Ibid.
[102] Mariella Ourghi, "Tariq Ramadan: From a Mere Co-Existence to an Authentic Contribution of Europe's Muslims," *Journal of Religion in Europe* 3, no. 2 (June 1, 2010): 285–309, doi: 10.1163/187489210X501545.
[103] Ibid.

effects human beings all over the globe. Same is the case with the Muslims, millions of them left their homelands due to job and security reasons. Internationalization has changed the world into a complex system where binary division no longer exist, it demands a fresh look into the current realities and study the fundamental sources of Islam to find answer of contemporary problems. Moreover, people and cultures are more important than houses or boundaries now a days. Islam is universal and it's teaching too. The classical theories were also grounded mainly on security and safeguard of believers. Tariq Ramadan argues that fidelity with regard to faith and religion, demands allegiance and devotion to one's land. Similarly, Islam makes its obligatory upon Muslims to follow the rules and principles of citizenship, and not to violate any of the laws of the land.[104]

Muslims inhabiting in Europe are confused about their position from perspective of Sharī'ah, they still require answers of many of their questions. Ramadan addresses few burning issues related to all Muslims no matter they are living as minority or majority. Although he was criticized for lodgings Westernization of Muslim minorities due to the definition of terms dār al-Shahādah and jihād. Nevertheless, Muslims residing in Europe are not clear about their status and position. He believes that Muslims have to follow the European laws if these laws are not forcing them to do things contrary to their faith, but in case of clash amid secular law and faith, secular Western democracy would prevail due to "social contract".[105] He attempts to develop a European Islam through reform to assist in development of more democratic inclinations in Muslim majority states.[106]Although European legal system is secular, but Muslims are free to follow their religious laws

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[104]Tariq Ramadan, *To be a European Muslim: A Study of Islamic Sources in the European Context* (Leicester: The Islamic Foundation, 2005), 9-10.

[106] Ibid.

individually because no one is forced to commit illegal acts there.[107] In this globalized

modern world person to person relationship is more important due to the diversity of faith

and culture. In Western countries where Muslims are living and forming part of their

communities, old concepts and ideologies may not work. Muslims minorities in West are

mainly holding testimony of their morals, ethical and legal norms.[108] The Western

Muslims are enjoined with a duty of dynamic involvement in the construction of that

community by way of carrying witnesses of their principles.[109] The concept of Shahādah

(testimony) refers to two fundamental aspects of Islam first is Islamic identity through

faith in the Oneness of Allah (tawhīd), in his last revelation to the Prophet Muhammad

(peace be on him) and second is the realization about his accountability to invite

individuals to God's message and for this his actions and conducts must be in accordance

with the dictates of Islam to set examples for the non-Muslims so that they may think

about their creator, faith and moralities.[110] If Muslims' land of residence offer them

safety then an important aspect of this worldwide Islamic memorandum is that a Muslim

who bears Shahādah and have security and freedom to practice his religion then he is at

home like most of the Western countries provide security and freedom nowadays.

Muslims inhabiting in Europe, both individually and collectively grasp a big

responsibility based on faith, morals, sense of accountability and a social and communal

pledge.[111] Under the doctrine of dār al-Shahādah Muslims should have to evade

reactionary and unreasonable approaches toward West and need to assume real sense of

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[107] Ibid.
[108] Ourghi, "Tariq Ramadan."
[109] Ibid.
[110] Ibid.
[111] Ramadan, *Western Muslims and the Future of Islam*; Tariq Ramadan, *To be a European Muslim: A Study of Islamic Sources in the European Context* (Leicester: The Islamic Foundation, 2005), 9-10.

duty. Since that area demands realization of obligations and constructive contributions
from Muslims to stimulate moralities, ethics and justice in the society. It's time for
genuine contribution of Muslims than mere seeking protection of their faith in west.
Which will help increase productiveness of Western societies.[112] He states that for
Muslims residing in West leaving Islam is not and can never become an option therefore,
they must have other substitutes. The Western society should also provide opportunities
to Muslims to revisit their sources, to comprehend, and to revive their religious thoughts,
it would definitely result in improvement of Western society as well.[113] Western
Muslims, he believes are not less than other Muslims even they possess more powerful
place than the Muslims of Muslim majority lands, as they have entered into the abode of
testimony to project justice and morals, for this they need to understand their importance
in terms of Ummah. He proposes constructive study of the conceptions for instance
maslahah, ijtihād, shar'īah, fatwā, dār al-harb, and dār al-Islām in the context of Muslim
minorities in the West. While Muslims must identify the pluralism within Islam, sources
of Islam, methodologies of legal application, and its incorporation according to time and
space. Similarly, the faith of a Muslim requires from him to fight for justice; protection of
civil rights; advancement of pluralism, and to condemn all bad economic and social
practices.[114]

The survey that has been presented in this chapter shows that key indicators are
reflections that Western Muslims and their descendants are integrating in the Western
societies. They are trying to adjust and assimilate in their destination societies without

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[112] Ibid.
[113] Ibid.
[114] Ibid.

compromising their religious identity and rituals. The analysis of the discourse on the issue of integration and assimilation of Muslims in west show that qualitative and thoughtful work has been done on the issues. The Muslims are discovering new ways of integration without compromising on their identities. They are contesting monolithic public images through diversifying their approaches. Due to the increasing numbers of research on the field, the researchers are able to interrogate the stratification and exclusion that demonstrating the integration of Muslims. The discourse shows that availability of creditable quantifiable data is a recent advancement in the studies related to Muslims integration in the West. The discourse describes that the scholars who are interested in research on minority groups have motivated from the scarcity of survey samples. Many other scholars tried to focus on key empirical questions and philosophical issues related to Muslim adaptation in the western societies. The population of this type of research focus groups whose data was collected through interviews, scriptural analysis and ethnography. For few decades the increasing interest in public opinion of Muslims is encouraging scholars in collection of data through quantitative instruments and surveys. These researchers are examining sentiments of Muslims about radicalism and terrorism. They are also attempting to measure matters for mainstreaming of immigrant settlements. The diversity of approaches that have been applied on the interpretation of scriptures are also subject of investigation by many researchers. Despite promising evolution of research on the Muslim immigrants and their integration into western societies there is still scarcity of experimental analysis and quantitative studies. The problem with advanced statistical investigation and survey analysis is that Muslim minorities are not considered in broader comparative context.[115] The current frontier of discovery thus

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[115] Inglehart Ronald and Pippa Norris, "Muslim Integration into Western Cultures: Between Origins and

exists where quantitative instruments are employed to address contentious debates unearthed by rigorous qualitative investigation.

Destinations." *Faculty Working Paper Series,* Harvard University Kennedy School of Government, March, 2009.

CHAPTER NO. 9

CONCLUSION & RECOMMENDATIONS

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1-Conclusion

This research is an effort to locate contemporary Islamic legal discourse on the jurisdiction of Islamic law on the Muslims living in non-Muslim societies. Quick international mobility, an unmatched movement of material, debates throughout the world and connectivity due to an unprecedented digital network has contributed in shaping the dimensions and ways of this discourse. The relevant data has been collected, discussed, analyzed and presented in this study. From the classical period till today legal experts, scholars, intellectuals, and activists are contributing in this debate. Many of the experts are trying to revisit and reinterpret the Islamic legal tradition in the light of contemporary social economic, strategic and geo-political realities. Initiating from the hypothesis, that the redefining of geo-religious territories plays a crucial role in the discourse on fiqh al-aqalliyyāt for relocation of validity of Sharī'ah for the contemporary Muslims particularly those who live in the Western Europe and North America.

The research demonstrates the ways in which scholars are engaged in this debate to redraw territorial boundaries and ways of application of Sharī'ah as law of today's legislatives. They are closely negotiating with the tradition to reconstruct the contemporary Muslim identity. They are also trying to keep the religious authority of Sharī'ah in the West intact through the process of contextualization. While this study focuses primarily on a debate among contemporary scholars, it is not restricted to the

analysis of a recent scholarly controversy, but also takes into account the larger discursive circumstances in which these authors frame and articulate their views. On the supposition that present debate about how and where to locate dār al-Islām are to be understood as contributions to the centuries-long Islamic legal discourse on territoriality. Fundamentally, this is a legal study but it also has other dimensions, such as historical, as it has tried to trace the repercussions of this debate in the wider public arena. This research has tried to illustrate how contemporary Islamic legal discourses are entangled with popular western debates and how they find their social, political and economic effectiveness.

Beginning with the significance of the issue and importance of its investigation, the study identified the social, political and economic reasons that contributed in the debate. The questions related to investigation of issues such as role of Muslims in the public sphere, social integration, validity of their personal laws, balance between religious obligations and citizenship responsibility are laid down in the introduction of the research. Both declarative and interrogative forms have been adopted for placing the issue. The objectives of the research have also been defined in the introduction of the research. The research has used a combination of research methods which includes methodologies of Sharī'ah, law and social sciences such as historical, descriptive, and philosophical. The techniques of quantitative research and various methods of discourse analysis have also been used in the research. The literature review of the research is an effort to identify the gap that justify this research.

The foundational part (2nd Chapter) of the study describes fundamental concepts of legal traditions of Muslims' and the West. The evolution of legal thought is the story of

centuries which contributed in the progressive development of jurisprudence. A mass of interpreting customs were the result of the growth of nations. Sharī'ah is Islamic response to the diversity of legal frameworks. Islamic law, is an outcome of broader framework of Sharī'ah. This framework is aimed at an ideal life. It is the product of centuries of stored experience of Ijtihād that was conducted by Muslim jurists. Sharī'ah as its law leads to attain this ideal life. The counterpart of Sharī'ah in the West is its legal tradition. West which includes Europe, United States and several other countries, is proud of its legal systems. In spite of their advancement outside Europe, Roman legal codes, Greek philosophy and Judaism are part of Western legal heritage. The legal tradition of the West is the demonstration of Western culture, its civilization, Hebrew theology and last but not least Greek philosophy. The present globalization is also influenced from the Western legal tradition. During these evolutionary stages International law was developed in the West and accommodated others in later stages to accommodate other cultures and faiths.

The data of the research states that the emergence of Sharī'ah is story of evaluation of several concepts, such as *al-Fiqh* ,*Uṣūl al-Fiqh fahm*, *'ilm* which became later on milestone of Islamic legal tradition.The scholars have categorized the sources of Islamic law as Al-Qurān, the Sunnah, *Ijmā'* (Consensus of legal opinion), *qiyās* (analogy), *istiḥsān* (juristic preference), *qawl al-ṣaḥābī* (the opinion of a Companion), *maṣlaḥah mursalah* (jurisprudential interest), *sadd al-dharī'ah* (blocking lawful means to an unlawful end), *istiṣḥāb al-ḥāl* (presumption of continuity of a rule) 'urf (custom) and earlier scriptural laws. The Islamic legal tradition has the capacity to address new circumstances through tools of Ijtihād. Both revelation and reason did an essential job in

articulation of the rulings of Sharī'ah law. An effective perception about Sharī'ah presumed that this is a rigid revealed law code having no role for reason. A detailed analyses of this perception is discussed in the foundational chapter. The data provided in the chapter sates that the place of reason and rationality in the articulation of rulings of Sharī'ah is not possible to determine without understanding the unique nature of the rational methods that have been used in Islamic thought in order to utilize human reason to understand divine communication. The study also suggests that Fiqh al-Aqalliyyāt is an emerging branch of fiqh that suggests distinct and contemporary compilation of Sharī'ah rulings which will be helpful for the Muslims in the non-Muslim majorities to regulate their affairs. It is evolving as a legal doctrine that suggests that Muslim inhabitants of the non-Muslim societies particularly in the West, require a distinct set of legal rulings which wholly deals with their affairs excluding Muslims from majority countries. This new branch of fiqh primarily deals with the problems faced by Muslim minorities but the areas of general fiqh are also part of it. It being a shared subject, consists of political, commercial, cultural, communal and legal essentials. Therefore, all areas require proper treatment and collective contribution of the experts of each and every area.

The analysis of this research is related to debate among the classical and contemporary scholars on the jurisdiction of Sharī'ah law on Muslim livings in Western countries. Therefore, the conceptions such as discourse analysis, jurisdiction and the scholars involved in this discourse have been discussed in the third chapter. The study has been conducted with the help of various socio-legal methods but the most frequently used methodology of the study is discourse analysis. Therefore, this concept and its various

dimensions have been described in a way that clarified the discourse that is used in this study. This study is fundamentally related to a variety of classical Islamic legal concepts and its contemporary interpretation for the purpose of its implementation to regulate the conduct of the Muslims in Muslim and non-Muslim societies. The analysis of the research reveals that this complex type of discourse is advanced through texts of statutes and legal codes that are demonstrated in written form. Text of legal documents such as constitutions, laws and statutes are considered as distinct purpose texts. The nature of Islamic legal texts which is called classical nasūs are developed and constructed on the basis of approved criteria that emerged from textual sources of Islamic law. This study explores various dimensions of contemporary debate on Jurisdiction of Islamic Law on the Muslims living in Western countries. The study is an effort to evaluate the impact of this discourse on the contemporary appropriateness and relevance of Islamic legal tradition. Furthermore, this thesis presents the views on territorial division on the broader debate related to role of Islamic law in the lives of Muslims in the West. The research has considered not only scholarly literature and discussions among classical and contemporary Islamic legal experts, but also contributions by those who are not traditionally trained in *Fiqh* and *Uṣūl al-Fiqh*.

The second issue that has been elaborated in this chapter is notion of "Jurisdiction." This notion is often seen either as a technical issue or a procedural impediment to be settled before the start of legal proceedings of a case. In few cases it is related with the limits of implementation of the law. This is a predominantly accurate in the matters related to territorial jurisdiction. In this type of jurisdiction, the territory is treated as it was self-evident and natural without interference of any legal or political institution. The study has

used the concept of jurisdiction to determine value of Sharī'ah law for the Muslims, who are living in territorial jurisdiction of Europe and North America. Mainly, the issues that cover this study relate with legal jurisdiction and territorial jurisdiction. The research has demonstrated the ways in which scholars who are engaged in this debate redraw territorial boundaries and ways of application of Sharī'ah as law of today's legislatives. They are closely negotiating with the tradition to reconstruct the contemporary Muslim identity. They are also trying to keep the religious authority Sharī'ah in the West intact through the process of contextualization. The chapter also discusses the description of jurisdiction in legal thoughts. The conceptual formation of the jurisdiction as a legal terminology is not an ordinary task. Due to the importance and frequent use of the terminology, it becomes a multidimensional legal concept, involving elements of domestic and International law (private and public). The place of jurisdiction in legal thought has not received much consideration in the contemporary legal discourse. Within the philosophy of law, questions of jurisdiction fall for deliberations somewhere between the moral responsibility and the apprehensions of philosophies of action and event. The concept of jurisdiction has to be linked with the questions of law, such as concepts of limit and structure in law, as well as the links between speech and law and voice and authority, because it cannot be conceived with those of morality and action. The jurisdiction is also related to the institutional practices, various devices, techniques and technologies that make the proclamation and life of the law possible.

This section also presents an overview of the scholars who have contributed in the debate related to jurisdiction of Sharī'ah on the Muslims in the West. Muḥammad 'Abduhu (1849-1905) is a profound scholar and enlightened reformer who worked for revival of

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Muslims. He believed in religious, legal and educational reforms for Muslim community owing to fact that Islām was originally based on reason and revelation, but due to some external components, basic theme has been misrepresented. He contends that contemporaneousness is constructed on logic and Islām needs to be presented as harmonious with modernity. On the footstep of Muḥammad ʿAbduhu, his student Muḥammad Rashīd Riḍā advanced ideology of reconstruction. He was of the view that Muslims could attain progress by reformation of Islamic traditions through fresh interpretation of Islamic sources in the context of modernity, change and diversity. Other scholars who participated in this debate include Dr. Muhammad Hamīdullah, Majīd Khaddūrī, Allama Yūsuf al-Qaraḍāwī, Tariq Ramadan, Wahbah al-Zuḥaylī, Khaled Abou El Fadl, Abdullah Ahmed An-Naʿīm and Muhammad Khalid Masʿūd. The analyses of the views of contemporary scholars show that majority of them, on the footstep of Muḥammad ʿAbduhu and Rashīd Riḍā are in favor of reconstruction of Islamic law.

The fourth chapter of the study particularly focuses on classical as well as the contemporary thoughts which suggests revisit and reinterpretation of the traditional territorial classification of dār al-Islām and dār al-ḥarb in terms of current nation state era and geo-political and demographic realities. The Islamic debate on the territoriality was an outcome of the establishment of first Islamic state and society. The dawn of Islām reshaped the triable confederations into a civilized society. The tribal Arabs were engaged into a new style of rationale and deeds to frame them into a new social coalition. The newly converted Arabs gripped jointly under the leadership of the Prophet (peace be on him). Islām introduced an intellectual method of solidarity by welcoming these tribes to submit themselves to Allāh. Kinship based community converted into the society of

believers with new emblems of integration and union. This union was strengthened and

cemented through new faith-based identity which is called Ummah. The concept of

Ummah brought important changes in the society. Instead of blood, faith became the

source of the social bond. The pre-Islamic badges of nationality such as tribe, god and

cult were abundant. The formation of the new ummah was based on an identity grounded

in the religious directive of Prophet Muhammad (peace be on him) rather than in

traditional tribalism.

The data of the chapter outlines the legal discourse that was evolved on the notion of

territoriality throughout the Islamic history. Initially, this discourse was entirely based on

the contribution of Muslim scholars, particularly Muslim jurists. During the middle ages,

Western scholars were not attentive to the Muslim description of territoriality. However,

during the colonial period and post-colonial periods orientalists started studying various

dimensions of Islamic thought, history and culture, including classification of territories.

During the post 1960s wave of immigrants this issue again came to the central stage of

the immigration's studies, legal studies and theological studies due to problems faced by

Muslims and their new homelands in the process of integration in European societies.

The data in this chapter reveals that classical discourse among Muslim jurists and

theologians was about literal and terminological meaning of dār al-Islām and other

terminologies that were used for this notion. They also discussed the source of this

territorial description and its relationship with pre-Islamic Arab society. The possibilities

of change of dār al-Islām into dār al-ḥarb or otherwise, and its consequential effects on

the rulings of Sharī'ah were also discussed by them. They discussed possibility of a

territory that is neither included in dār al-Islām or dār al-ḥarb. The classical jurist also

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discussed the validity of the early condition of Hijrah and its continual validity. Another theme that came under the discussion of Muslim jurist was applicability of Ahkām of Sharī'ah on the Muslims living outside Islamic territory. Another point that was discussed by the classical scholars was the essence of persistent relations with non-Muslims. This section of the study also elaborates the effects of nation state on the evolution of these notions. Generally Muslim scholars are of the view that the idea of one nation is still applicable for the better relations and coexistence among Muslim countries through adoption of fundamental principles of Islām. The analysis state that along with concepts such as Dār al-Islām, Dār al-Ḥarb, the concept of Dār al-'Ahd also came under discussion among the classical scholars. The views of the jurists are clearly showing that classification of the territoriality in Sharī'ah rulings is not a stagnant matter as the classifications are not based on the textual sources of Islamic law. These classifications emerged to address the realities of a particular period and time, therefore are not immune to any change. These are not timeless classifications, therefore, instead of insisting for the application of these classifications on situations, new realities need to be addressed with fresh thinking. The new frameworks must not be contradictory to Islamic teaching but it should also meet the contemporary needs of Muslim communities inside and outside the Muslim world.

The discussions in this chapter present various positions of classical as well as contemporary scholars on the issue of territoriality. Moreover, it also reveals that the classical centuries old debate about the idea of dār al-Islām and territorial division of world is not reached to its conclusion and is still continued. Starting from the description of the various notions of Islamic Law and Sharī'ah the study supposes that the

reconceptualization of geo-religious territories plays a crucial role in the discourse on minority fiqh (fiqh al-aqalliyyāt). The study has also traced variety of opinions in which contemporary scholars are trying to reinterpret the legal tradition of Islām. It has also explored the diverse views of the experts on the division of the territories on the bases of geo-religious consideration. By exploring the present debate on Western Muslims from a spatial viewpoint, it has provided insight into how traditional territorial concepts such as dār al-Islam, the "territory of Islam," and dār al-ḥarb, the "territory of war," are modified, revisited and contested view of the demographic, geo-political and social realities. The study has shown that the manifold methods of depiction and contesting the territorial categories may be understood as a spatial expression for the purpose of analysis of the debate on these unstable and factual notions of the complex and ever-changing relations between Muslims and non-Muslims. Since the emergence of modern nation-states, the question of how to define whether a territory, or state, can be classified as "Islamic" has not only been discussed in Islamic legal literature, but has increasingly become a subject of debate among contemporary Muslim intellectuals and activists.

This discourse has been enriched by contesting thoughts of various schools of thought throughout Islamic history. Gamal M. Badr has stated that classical notions such as dār al-Islām or dār al-ḥarb were need of era of evolution. Presently, we are living in the era of harmony in which there no room for such types of classification of territories. From the beginning of Islamic history, scholars have been redefining this territorial paradigm to respond to the needs of their period. The scholars' contribution and opinions are also affected from the time bound specific historical experiences. These classical debates were regenerated when the self-declared "Islamic State" in Syria and Iraq declared that they

were the sole representative of the true "territory of Islam" or dār al-Islām. This debate has been source of many fiery controversies as a result of efforts of many extremist groups and advocate of 'us' and 'them' mentality to apply classical concepts on the contemporary situations without understanding ground realities. Many questions were raised after the establishment of various Muslim communities in non-Muslim countries following the sizable number of Muslim emigration to West and United States, during the end of nineteenth century and middle of twentieth century. This new demographic change pushed scholars and intellectuals to reconsider the classical interpretation and its applicability on contemporary Muslims living in Western countries.

The data of the fifth chapter deals with the Hijrah and its impact on the construction of Muslim societies. The debate on territoriality is closely related to the question of residence of Muslims and their *Hijrah* to the land of Islam. It embraces issues such as: weather it is allowable for Muslims and can they live under infidel rule? And in which situations they are obliged to travel to the territory of Islamic rule? The data of the study show that these questions are almost timeless, as they are discussed from the early Islam till today. The answers to these questions are however time bound and scholar of each period try to address it in accordance with the circumstances in which they live. The debate on these questions is not limited to political rule but it extends to other factors such as the determination of status of residing in non-Muslim rule from prohibited to permissible and recommendatory. This research is an effort to assess the variety of classical as well contemporary scholars on the issue. Various positions of the classical jurists have been mentioned in this chapter. The section not only stated diversity of opinions but also highlight factual realities that affected their opinions. After identifying

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various positions that have been taken by various scholars, Khaled Abou El Fadl is of the view that these theological and legal views are heavily influenced from the political situation of the place and time. Therefore, these positions may not be treated essentialists. He states that the doctrine of hijrah will never be static. Its role in political and religious discourses will be dynamic. It will continue to go through subtle changes which may have innovatory significances. He is of the view that emerging juristic views are not indicating essentialist positions. This is the reason behind   ambiguous and uncertain juristic views on the issue. He suggested that a methodical analysis of the grounds then reasoning of various jurists upon the concept such as dār, influence, and *'iṣmah* is needed, so that it can be evaluated that how much theoretical and historical challenges effected these views. The local power structure and socio-political context also influenced the understanding and position of each jurist. He is of the view that the opinions of the classical jurists of pre-modern period would not decide the predicaments of Muslim circles in the West. Hence, theses opinions may provide them opportunity to adopt from the variety of ethical choices that emerged in response of different historical challenges.

Moving from territoriality to Hijrah, the study discussed the role of Sharī'ah and its rulings in conducting the family affairs of Muslims in the West in the sixth chapter. It begin with description of the framework of religious liberty in the West and sates that confessing any faith is person's private matter but freedom of religion essentially includes public and private demonstration of one's believes, through worship, teaching, practice, application and compliance. As per classical views Muslim community is obliged to follow Islamic law rules to design their family lives and European law is not

an authority in this regard for them, and as per the rules of freedom of religion, they can rightfully follow their religion. Due to unprecedented immigration Western societies are frequently moving towards ethnic, religious and cultural diversity. This increasing diversity has created fear of domination of alien legal norms over local laws. Due to Muslims' insistence to follow their own religious family law, it has started becoming stronger in many European countries. So, both parties are at risk of losing their cultural identity, social harmony and legal norms. With the increase of Muslim migrants in Europe their family law rules clearly highlighted the clash with the host land as family law norms are main source of identification for Muslims. On the other hand Europe's family system is more liberal, flexible and based on the choices of individuals moreover they have conversely reached to that contemporary modern and liberal form after long and hard struggle. The acceptance of Islamic family law in the West is on basis of private international law. Europe, conversely struggled a lot to achieve contemporary modernity and liberalism on account of this description Muslim family code is considered a potential risk for the whole western society. However the reaction of Western states on the Muslim personal law is not same. In Spanish Islamic marriages are not only allowed and recognized with compulsory state registration, but also have legal effects and consequences. Similarly in UK Muslim are not required civil marriage as the registration of marriage contracts in mosques and Islamic centers is allowed similar to other religious communities. However in Switzerland and France civil registration of religiously conducted marriages is required. Germany abrogated this requirement but the status of religiously conducted marriage still demand clarity.

The survey of literature for this research show that like marriages the acceptance of

religious divorce is not same in the European states. In case of Muslim divorce in Germany, rules of conflict-of-laws are applied. But divorce by repudiation is objected and taken as against the principles of gender equality and human dignity, but other forms of Islamic divorces are acceptable. Similarly in divorce through court proceedings does not required conventional divorce procedure. Due to the contractualisation of family law, the court powers in divorce matters are challenged as well owing to the confinement of underlying purpose of law to equitable distribution of assets, compensation and consequences of the dissolution of the relationship, even in England and some other states consequences of divorce could be resolved through mediation or alternative dispute resolution. The study reveals that more or less Muslim family laws are still plying proactive role in the West. Muslim communities are frequently using mechanisms of informal settlement of disputes through processes of counselling and mediation. Such practices are opening more avenues for Sharī'ah councils to make remarkable services in family law field for Muslim minorities.

The Sharī'ah can play it role in the West only on the basis is its capacity to interact with other legal systems and well-defined rulings related to private International law. This is the issue that framed the discussion in the seventh chapter of the study. This section after presenting legal pluralism as 'synchronization of two or more legal structures in one and alike communal field' states that pluralism is the most appropriate attitude for immigrants. It's unique because its purpose is to link the reality in specified perspective instead of mere discovery of shared reality. The fundamental question of pluralism is knowing the fact and then its relevance with the society, it's not a method to determine the accuracy of any faith. Due to unprecedented scientific, social, economic, scientific

and political developments, culture of plurality seems an inescapable reality. The detonation of awareness about numerous faiths backed the scientific learning of religions. The study also discussed challenges to legal pluralism and various methods that are used in various system to accommodate it. The contemporary place of Sharī'ah in the pluralistic environment is dependent on its capacity to accommodate the changes. Jurists agree that Islamic law is receptivity to change and it has the tendency of evolution. No doubt, the theory of 'closing of the gate of ijtihad' has contributed in widespread blind following on the name of taqlīd. The taqlīd as a *modus operandi* was used to protect the schools of *fiqh* as a methodological and interpretive entity. It was particularly important to formulate doctrines of jurists in accordance with the founder's substantive and theoretical principles. However, these jurists, on the micro-level, were practicing plurality of opinion within a given school. Every school had a collection of opinions attributed to the founder, his important students and later followers of the school. Such types of opinions were the total sum of a particular schools and it were tracing the doctrinal justification from the founder. As in Sharī'ah law the central legislative agency has been absent, therefore, the Taqlīd was a form of fundamental structure while epistemological feature of Islamic law continued to emerge to contribute in the later legal developments. This was the reason that Muslim Jurists continued the task of elaborating of the revealed texts, so that new issues can be addressed through Islamic Law. The discussion in the study shows that Sharī'ah has the capacity to interact with other legal systems and it can be one of the prevailing legal systems that can contribute in the era of legal pluralism with other legal systems. The rulings of Sharī'ah based on arguments from Qurān, Sunnah and interpretive views of Muslim jurists demonstrate persuasively that Islam

confirms existence of truth in other religious traditions, and thus lays the ground for co-existence with the followers of other traditions and cultures. However, there are many challenges that are creating real impediments for fruitful and effective interaction between Sharī'ah law and other laws, particularly the Western common law traditions. In presence of confusions, misperceptions and misunderstandings, revival of Islamic tradition and the Western traditions could be expected on more cognizant and equitable footings. This re-introduction will be possible only through the realizations of prospects of interaction between civilizations with overcoming these challenges. Need of dialogue emerges from differences and disagreements. Diversity of human beings is an expected occurrence and required to be valued and sheltered.

The last chapter of this study evaluate the attitude of Muslims towards integration and assimilation in the Western societies. The study show that the key indicators are reflecting tendencies of integration among Western Muslims and their descendants. They are trying to relocate their place in their destination societies without compromising their faith obligation. The Muslims are discovering new ways of integration without compromising on their identities. They are contesting monolithic public images through diversifying their approaches. For few decades the increasing interest in public opinion of Muslims is encouraging scholars in collection of data through quantitative instruments and surveys. These researchers are examining sentiments of Muslims about radicalism and terrorism. They are also attempting to measure matters for mainstreaming of immigrant settlements. The diversity of approaches that have been applied on the interpretation of scriptures are also subject of investigation by many researchers. Despite promising evolution of research on the Muslim immigrants and their integration into

western societies there is still scarcity of experimental analysis and quantitative studies. The problem with advanced statistical investigation and survey analysis is that Muslim minorities are not considered in broader comparative context. The current frontier of discovery thus exists where quantitative instruments are employed to address contentious debates unearthed by rigorous qualitative investigation.

The overview of this research show that the ascendancy of Islamic polity, culture and civilization was stopped with the start of stagnation and decline. The decline of Islamic state and society due to stagnation was paralleled in the West by far reaching development in the western state and society. As a result of this major change, the part of Islamic law which deals with international affairs was abandoned by Muslim societies. This happened at the time when those Western powers which were in contact with Muslims countries began to realize the need for Islamic law for conducting international affairs. Consequently, the European international law, which was originally a Christian law underwent certain amendments in order to include non-Christian countries and non-European states in its jurisdiction. At the beginning of the nineteenth century it further changed its scope and nature to meet the merging circumstances. The scope of International law was further altered after the emergence of the United States and the South American republics. With further international development such as inclusion of the Ottoman Empire in the Concert of Europe and the emergence of Japanese Power changed its Christian character from a regional to a worldwide system. The evolution of the Western international law from a regional into a global law contributed to integrate various legal system such as Islamic, Indian, and the Far eastern. The elements of these eastern legal systems integrated in international law because these Eastern societies had

already readjusted themselves to deal as par with the European states. In the process of evaluation of international law the East and West met but this meeting was not on equal footing. Due to advancement in science and technology, West dominated on the East which resulted into disruptive process of the Westernization. The process became the instrument of destruction of the older legal systems, particularly systems for the conduct of foreign relations. In spite of overwhelming acceptance of this system, still it is not capable to meet the needs of a changing world. The contribution of Islam to the New World Order could be through Western Muslims. International Court of Justice through its statutes allowed adoption of new maxims of law from civilized nations. The effective participation of immigrant Muslims in the Western societies can open avenue for use of non-European sources of law. It will open the way for the East and West to meet for welfare of world community on the basis of shared human values.

2-Recommendations of the Research

In the light of above conclusion the following recommendations of the research are presented for further advancement of research on the field.

1. The issue of application of Sharī'ah on the Muslims living in Western societies is vast. It requires that its various dimensions should be studied with the holistic approach, so that a viable and useful framework for compliance of Sharī'ah in the Western societies can be suggested.

2. Fiqh al-Aqalliyat is an emerging branch of Islamic law. More research through new tools and contemporary social science research methods can contribute in the advancement of this knowledge. This discipline requires contributions of scholars

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of both, the Muslim World and West. However, scholars from the Muslim countries must not try to implement their own understandings on the Western Muslims.

3. Religious diversity and multi-faith society are hallmark of present world. This situation requires that scholars on Sharī'ah should demonstrate the aspects of Sharī'ah which teaches the multi-faith contemporary society.

4. The scholars on Western Muslims should promote inter-ethnic harmony among the Muslims in the West, so that Muslims from various backgrounds and ethnicities should not reflect various versions of Islām.

5. The Western Muslims need to contextualize changeable ruling of Sharī'ah in accordance with their own circumstances. They are not required to follow Muslim countries.

6. The Muslims in the West must be united so that they can be able to present holistic view of the contemporary Islām.

7. Generally the Muslims in the majority Muslim countries such as Pakistan are living in reactionary mode. The scholars in the West must contribute in a way that provides opportunities to the Western Muslims to live in a proactive way.

8. The changeable rulings of Sharī'ah need to be contextualized in such a way that Western Muslims can contribute effectively in the social, economic and political life of West.

9. The scholars of Islām in the West must investigate methods which can contribute

in the Western legal pluralism. Moreover, it can contribute in the Western legislation.

10. Radicalism and extremism are impediments in the preaching of Islām, particularly in West and North America. Therefore, for better future of Islām in the West, all types of tendencies of extremism and radicalism among the Muslim communities must be responded through research-based action plans and mechanism, so that Muslim youth particularly in West should not get involved in any unlawful activities.

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Appendix

I

List of Qurānic Verses

S. No.	Qurānic Verses	Verse No.	P. No.
1	وَقَالُوا لَنْ يَدْخُلَ الْجَنَّةَ إِلَّا مَنْ كَانَ هُودًا أَوْ نَصَارَى تِلْكَ أَمَانِيُّهُمْ قُلْ هَاتُوا بُرْهَانَكُمْ إِنْ كُنْتُمْ صَادِقِينَ	2:111	59
2	وَلِلَّهِ الْمَشْرِقُ وَالْمَغْرِبُ فَأَيْنَمَا تُوَلُّوا فَثَمَّ وَجْهُ اللَّهِ إِنَّ اللَّهَ وَاسِعٌ عَلِيمٌ	2:115	127
3	وَكَذَلِكَ جَعَلْنَاكُمْ أُمَّةً وَسَطًا لِتَكُونُوا شُهَدَاءَ عَلَى النَّاسِ وَيَكُونَ الرَّسُولُ عَلَيْكُمْ شَهِيدًا وَمَا جَعَلْنَا الْقِبْلَةَ الَّتِي كُنْتَ عَلَيْهَا إِلَّا لِنَعْلَمَ مَنْ يَتَّبِعُ الرَّسُولَ مِمَّنْ يَنْقَلِبُ عَلَى عَقِبَيْهِ وَإِنْ كَانَتْ لَكَبِيرَةً إِلَّا عَلَى الَّذِينَ هَدَى اللَّهُ لِيُضِيعَ إِيمَانَكُمْ إِنَّ اللَّهَ بِالنَّاسِ لَرَءُوفٌ رَحِيمٌ	2:143	158
4	الْكِتَابَ كَانَ النَّاسُ أُمَّةً وَاحِدَةً فَبَعَثَ اللَّهُ النَّبِيِّينَ مُبَشِّرِينَ وَمُنْذِرِينَ وَأَنْزَلَ مَعَهُمْ بِالْحَقِّ لِيَحْكُمَ بَيْنَ النَّاسِ فِيمَا اخْتَلَفُوا فِيهِ وَمَا اخْتَلَفَ فِيهِ إِلَّا الَّذِينَ أُوتُوهُ مِنْ بَعْدِ مَا جَاءَتْهُمُ الْبَيِّنَاتُ بَغْيًا بَيْنَهُمْ فَهَدَى اللَّهُ الَّذِينَ آمَنُوا لِمَا اخْتَلَفُوا فِيهِ مِنَ الْحَقِّ بِإِذْنِهِ وَاللَّهُ يَهْدِي مَنْ يَشَاءُ إِلَى صِرَاطٍ مُسْتَقِيمٍ	2:213	158
5	إِنَّ الَّذِينَ آمَنُوا وَالَّذِينَ هَاجَرُوا وَجَاهَدُوا فِي سَبِيلِ اللَّهِ أُولَئِكَ يَرْجُونَ رَحْمَتَ اللَّهِ وَاللَّهُ غَفُورٌ رَحِيمٌ	2:218	202
6	فَإِنْ طَلَّقَهَا فَلَا تَحِلُّ لَهُ مِنْ بَعْدُ حَتَّى تَنْكِحَ زَوْجًا غَيْرَهُ فَإِنْ طَلَّقَهَا فَلَا جُنَاحَ عَلَيْهِمَا أَنْ يَتَرَاجَعَا إِنْ ظَنَّا أَنْ يُقِيمَا حُدُودَ اللَّهِ وَتِلْكَ حُدُودُ اللَّهِ يُبَيِّنُهَا لِقَوْمٍ يَعْلَمُونَ	2:230	52
7	وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُتِمَّ الرَّضَاعَةَ وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا لَا تُضَارَّ وَالِدَةٌ بِوَلَدِهَا وَلَا مَوْلُودٌ لَهُ بِوَلَدِهِ وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ فَإِنْ أَرَادَا فِصَالًا عَنْ تَرَاضٍ مِنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا وَإِنْ أَرَدْتُمْ أَنْ تَسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا آتَيْتُمْ بِالْمَعْرُوفِ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ	2:233	52

8	وَإِنْ طَلَّقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمَسُّوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيضَةً فَنِصْفُ مَا فَرَضْتُمْ إِلَّا أَنْ يَعْفُونَ أَوْ يَعْفُوَ الَّذِي بِيَدِهِ عُقْدَةُ النِّكَاحِ وَأَنْ تَعْفُوا أَقْرَبُ لِلتَّقْوَى وَلَا تَنْسَوُا الْفَضْلَ بَيْنَكُمْ إِنَّ اللَّهَ بِمَا تَعْمَلُونَ بَصِيرٌ	2:237	52
9	وَاعْتَصِمُوا بِحَبْلِ اللَّهِ جَمِيعًا وَلَا تَفَرَّقُوا وَاذْكُرُوا نِعْمَتَ اللَّهِ عَلَيْكُمْ إِذْ كُنْتُمْ أَعْدَاءً فَأَلَّفَ بَيْنَ قُلُوبِكُمْ فَأَصْبَحْتُمْ بِنِعْمَتِهِ إِخْوَانًا وَكُنْتُمْ عَلَى شَفَا حُفْرَةٍ مِنَ النَّارِ فَأَنْقَذَكُمْ مِنْهَا كَذَلِكَ يُبَيِّنُ اللَّهُ لَكُمْ آيَاتِهِ لَعَلَّكُمْ تَهْتَدُونَ	3:103	203
10	كُنْتُمْ خَيْرَ أُمَّةٍ أُخْرِجَتْ لِلنَّاسِ تَأْمُرُونَ بِالْمَعْرُوفِ وَتَنْهَوْنَ عَنِ الْمُنْكَرِ وَتُؤْمِنُونَ بِاللَّهِ وَلَوْ آمَنَ أَهْلُ الْكِتَابِ لَكَانَ خَيْرًا لَهُمْ مِنْهُمُ الْمُؤْمِنُونَ وَأَكْثَرُهُمُ الْفَاسِقُونَ	3:110	160
11	يَاأَيُّهَا الَّذِينَ آمَنُوا لَا يَحِلُّ لَكُمْ أَنْ تَرِثُوا النِّسَاءَ كَرْهًا وَلَا تَعْضُلُوهُنَّ لِتَذْهَبُوا بِبَعْضِ مَا آتَيْتُمُوهُنَّ إِلَّا أَنْ يَأْتِينَ بِفَاحِشَةٍ مُبَيِّنَةٍ وَعَاشِرُوهُنَّ بِالْمَعْرُوفِ فَإِنْ كَرِهْتُمُوهُنَّ فَعَسَى أَنْ تَكْرَهُوا شَيْئًا وَيَجْعَلَ اللَّهُ فِيهِ خَيْرًا كَثِيرًا	4:19	51
12	الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَى بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ فَالصَّالِحَاتُ قَانِتَاتٌ حَافِظَاتٌ لِلْغَيْبِ بِمَا حَفِظَ اللَّهُ وَاللَّاتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاضْرِبُوهُنَّ فَإِنْ أَطَعْنَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا إِنَّ اللَّهَ كَانَ عَلِيًّا كَبِيرًا	4:34	197, 198
13	وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُوا حَكَمًا مِنْ أَهْلِهِ وَحَكَمًا مِنْ أَهْلِهَا إِنْ يُرِيدَا إِصْلَاحًا يُوَفِّقِ اللَّهُ بَيْنَهُمَا إِنَّ اللَّهَ كَانَ عَلِيمًا خَبِيرًا	4:35	197
14	وَاعْبُدُوا اللَّهَ وَلَا تُشْرِكُوا بِهِ شَيْئًا وَبِالْوَالِدَيْنِ إِحْسَانًا وَبِذِي الْقُرْبَى وَالْيَتَامَى وَالْمَسَاكِينِ وَالْجَارِ ذِي الْقُرْبَى وَالْجَارِ الْجُنُبِ وَالصَّاحِبِ بِالْجَنْبِ وَابْنِ السَّبِيلِ وَمَا مَلَكَتْ أَيْمَانُكُمْ إِنَّ اللَّهَ لَا يُحِبُّ مَنْ كَانَ مُخْتَالًا فَخُورًا	4:36	197
15	الَّذِينَ يَبْخَلُونَ وَيَأْمُرُونَ النَّاسَ بِالْبُخْلِ وَيَكْتُمُونَ مَا آتَاهُمُ اللَّهُ مِنْ فَضْلِهِ وَأَعْتَدْنَا لِلْكَافِرِينَ عَذَابًا مُهِينًا	4:37	197
16	وَالَّذِينَ يُنْفِقُونَ أَمْوَالَهُمْ رِئَاءَ النَّاسِ وَلَا يُؤْمِنُونَ بِاللَّهِ وَلَا بِالْيَوْمِ الْآخِرِ وَمَنْ يَكُنِ الشَّيْطَانُ لَهُ قَرِينًا فَسَاءَ قَرِينًا	4:38	197
17	أَيْنَمَا تَكُونُوا يُدْرِكْكُمُ الْمَوْتُ وَلَوْ كُنْتُمْ فِي بُرُوجٍ مُشَيَّدَةٍ وَإِنْ تُصِبْهُمْ حَسَنَةٌ يَقُولُوا هَذِهِ مِنْ عِنْدِ اللَّهِ وَإِنْ تُصِبْهُمْ سَيِّئَةٌ يَقُولُوا هَذِهِ مِنْ عِنْدِكَ قُلْ كُلٌّ مِنْ عِنْدِ اللَّهِ فَمَالِ	4:78	45

	هَؤُلَاءِ الْقَوْمِ لَا يَكَادُونَ يَفْقَهُونَ حَدِيثًا		
18	وَدُّوا لَوْ تَكْفُرُونَ كَمَا كَفَرُوا فَتَكُونُونَ سَوَاءً فَلَا تَتَّخِذُوا مِنْهُمْ أَوْلِيَاءَ حَتَّى يُهَاجِرُوا فِي سَبِيلِ اللَّهِ فَإِنْ تَوَلَّوْا فَخُذُوهُمْ وَاقْتُلُوهُمْ حَيْثُ وَجَدْتُمُوهُمْ وَلَا تَتَّخِذُوا مِنْهُمْ وَلِيًّا وَلَا نَصِيرًا	4:89	202, 203, 217
19	إِنَّ الَّذِينَ تَوَفَّاهُمُ الْمَلَائِكَةُ ظَالِمِي أَنْفُسِهِمْ قَالُوا فِيمَ كُنْتُمْ قَالُوا كُنَّا مُسْتَضْعَفِينَ فِي الْأَرْضِ قَالُوا أَلَمْ تَكُنْ أَرْضُ اللَّهِ وَاسِعَةً فَتُهَاجِرُوا فِيهَا فَأُولَئِكَ مَأْوَاهُمْ جَهَنَّمُ وَسَاءَتْ مَصِيرًا	4:97	202, 217
20	إِلَّا الْمُسْتَضْعَفِينَ مِنَ الرِّجَالِ وَالنِّسَاءِ وَالْوِلْدَانِ لَا يَسْتَطِيعُونَ حِيلَةً وَلَا يَهْتَدُونَ سَبِيلًا	4:98	202, 217
21	فَأُولَئِكَ عَسَى اللَّهُ أَنْ يَعْفُوَ عَنْهُمْ وَكَانَ اللَّهُ عَفُوًّا غَفُورًا	4:99	202, 218
22	وَمَنْ يُهَاجِرْ فِي سَبِيلِ اللَّهِ يَجِدْ فِي الْأَرْضِ مُرَاغَمًا كَثِيرًا وَسَعَةً وَمَنْ يَخْرُجْ مِنْ بَيْتِهِ مُهَاجِرًا إِلَى اللَّهِ وَرَسُولِهِ ثُمَّ يُدْرِكْهُ الْمَوْتُ فَقَدْ وَقَعَ أَجْرُهُ عَلَى اللَّهِ وَكَانَ اللَّهُ غَفُورًا رَحِيمًا	4:100	202, 218
23	يَاأَيُّهَا الَّذِينَ آمَنُوا لَا تُحِلُّوا شَعَائِرَ اللَّهِ وَلَا الشَّهْرَ الْحَرَامَ وَلَا الْهَدْيَ وَلَا الْقَلَائِدَ وَلَا آمِّينَ الْبَيْتَ الْحَرَامَ يَبْتَغُونَ فَضْلًا مِنْ رَبِّهِمْ وَرِضْوَانًا وَإِذَا حَلَلْتُمْ فَاصْطَادُوا وَلَا يَجْرِمَنَّكُمْ شَنَآنُ قَوْمٍ أَنْ صَدُّوكُمْ عَنِ الْمَسْجِدِ الْحَرَامِ أَنْ تَعْتَدُوا وَتَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَى وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ شَدِيدُ الْعِقَابِ	5:02	15
24	وَكَيْفَ يُحَكِّمُونَكَ وَعِنْدَهُمُ التَّوْرَاةُ فِيهَا حُكْمُ اللَّهِ ثُمَّ يَتَوَلَّوْنَ مِنْ بَعْدِ ذَلِكَ وَمَا أُولَئِكَ بِالْمُؤْمِنِينَ	5:43	49
25	إِنَّا أَنْزَلْنَا التَّوْرَاةَ فِيهَا هُدًى وَنُورٌ يَحْكُمُ بِهَا النَّبِيُّونَ الَّذِينَ أَسْلَمُوا لِلَّذِينَ هَادُوا وَالرَّبَّانِيُّونَ وَالْأَحْبَارُ بِمَا اسْتُحْفِظُوا مِنْ كِتَابِ اللَّهِ وَكَانُوا عَلَيْهِ شُهَدَاءَ فَلَا تَخْشَوُا النَّاسَ وَاخْشَوْنِ وَلَا تَشْتَرُوا بِآيَاتِي ثَمَنًا قَلِيلًا وَمَنْ لَمْ يَحْكُمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الْكَافِرُونَ	5:44	49
26	وَكَتَبْنَا عَلَيْهِمْ فِيهَا أَنَّ النَّفْسَ بِالنَّفْسِ وَالْعَيْنَ بِالْعَيْنِ وَالْأَنْفَ بِالْأَنْفِ وَالْأُذُنَ بِالْأُذُنِ وَالسِّنَّ بِالسِّنِّ وَالْجُرُوحَ قِصَاصٌ فَمَنْ تَصَدَّقَ بِهِ فَهُوَ كَفَّارَةٌ لَهُ وَمَنْ لَمْ يَحْكُمْ بِمَا أَنْزَلَ اللَّهُ فَأُولَئِكَ هُمُ الظَّالِمُونَ	5:45	49

27	وَقَفَّيْنَا عَلَى آثَارِهِمْ بِعِيسَى ابْنِ مَرْيَمَ مُصَدِّقًا لِمَا بَيْنَ يَدَيْهِ مِنَ التَّوْرَاةِ وَآتَيْنَاهُ الْإِنْجِيلَ فِيهِ هُدًى وَنُورٌ وَمُصَدِّقًا لِمَا بَيْنَ يَدَيْهِ مِنَ التَّوْرَاةِ وَهُدًى وَمَوْعِظَةً لِلْمُتَّقِينَ	5:46	49
28	وَلْيَحْكُمْ أَهْلُ الْإِنْجِيلِ بِمَا أَنْزَلَ اللهُ فِيهِ وَمَنْ لَمْ يَحْكُمْ بِمَا أَنْزَلَ اللهُ فَأُولَئِكَ هُمُ الْفَاسِقُونَ	5:47	49
29	وَأَنْزَلْنَا إِلَيْكَ الْكِتَابَ بِالْحَقِّ مُصَدِّقًا لِمَا بَيْنَ يَدَيْهِ مِنَ الْكِتَابِ وَمُهَيْمِنًا عَلَيْهِ فَاحْكُمْ بَيْنَهُمْ بِمَا أَنْزَلَ اللهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ عَمَّا جَاءَكَ مِنَ الْحَقِّ لِكُلٍّ جَعَلْنَا مِنْكُمْ شِرْعَةً وَمِنْهَاجًا وَلَوْ شَاءَ اللهُ لَجَعَلَكُمْ أُمَّةً وَاحِدَةً وَلَكِنْ لِيَبْلُوَكُمْ فِي مَا آتَاكُمْ فَاسْتَبِقُوا الْخَيْرَاتِ إِلَى اللهِ مَرْجِعُكُمْ جَمِيعًا فَيُنَبِّئُكُمْ بِمَا كُنْتُمْ فِيهِ تَخْتَلِفُونَ	5:48	40,49
30	إِنَّمَا يُرِيدُ الشَّيْطَانُ أَنْ يُوقِعَ بَيْنَكُمُ الْعَدَاوَةَ وَالْبَغْضَاءَ فِي الْخَمْرِ وَالْمَيْسِرِ وَيَصُدَّكُمْ عَنْ ذِكْرِ اللهِ وَعَنِ الصَّلَاةِ فَهَلْ أَنْتُمْ مُنْتَهُونَ	5:91	65
31	فَأَخَذَتْهُمُ الرَّجْفَةُ فَأَصْبَحُوا فِي دَارِهِمْ جَاثِمِينَ	7:78	165
32	وَقَطَّعْنَاهُمْ فِي الْأَرْضِ أُمَمًا مِنْهُمُ الصَّالِحُونَ وَمِنْهُمْ دُونَ ذَلِكَ وَبَلَوْنَاهُمْ بِالْحَسَنَاتِ وَالسَّيِّئَاتِ لَعَلَّهُمْ يَرْجِعُونَ	7:168	158
33	وَلَقَدْ ذَرَأْنَا لِجَهَنَّمَ كَثِيرًا مِنَ الْجِنِّ وَالْإِنْسِ لَهُمْ قُلُوبٌ لَا يَفْقَهُونَ بِهَا وَلَهُمْ أَعْيُنٌ لَا يُبْصِرُونَ بِهَا وَلَهُمْ آذَانٌ لَا يَسْمَعُونَ بِهَا أُولَئِكَ كَالْأَنْعَامِ بَلْ هُمْ أَضَلُّ أُولَئِكَ هُمُ الْغَافِلُونَ	7:169	
34	يَاأَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللهَ وَرَسُولَهُ وَلَا تَوَلَّوْا عَنْهُ وَأَنْتُمْ تَسْمَعُونَ	8:20	202
35	إِنَّ شَرَّ الدَّوَابِّ عِنْدَ اللهِ الصُّمُّ الْبُكْمُ الَّذِينَ لَا يَعْقِلُونَ	8:22	57
36	وَاتَّقُوا فِتْنَةً لَا تُصِيبَنَّ الَّذِينَ ظَلَمُوا مِنْكُمْ خَاصَّةً وَاعْلَمُوا أَنَّ اللهَ شَدِيدُ الْعِقَابِ	8:25	62
37	إِنَّ الَّذِينَ آمَنُوا وَهَاجَرُوا وَجَاهَدُوا بِأَمْوَالِهِمْ وَأَنْفُسِهِمْ فِي سَبِيلِ اللهِ وَالَّذِينَ آوَوْا وَنَصَرُوا أُولَئِكَ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ وَالَّذِينَ آمَنُوا وَلَمْ يُهَاجِرُوا مَا لَكُمْ مِنْ وَلَايَتِهِمْ مِنْ شَيْءٍ حَتَّى يُهَاجِرُوا وَإِنِ اسْتَنْصَرُوكُمْ فِي الدِّينِ فَعَلَيْكُمُ النَّصْرُ إِلَّا عَلَى قَوْمٍ بَيْنَكُمْ وَبَيْنَهُمْ مِيثَاقٌ وَاللهُ بِمَا تَعْمَلُونَ بَصِيرٌ	8:72	202, 203, 217
38	وَالَّذِينَ آمَنُوا وَهَاجَرُوا وَجَاهَدُوا فِي سَبِيلِ اللهِ وَالَّذِينَ آوَوْا وَنَصَرُوا أُولَئِكَ هُمُ الْمُؤْمِنُونَ حَقًّا لَهُمْ مَغْفِرَةٌ وَرِزْقٌ كَرِيمٌ	8:74	202
39	وَالَّذِينَ آمَنُوا مِنْ بَعْدُ وَهَاجَرُوا وَجَاهَدُوا مَعَكُمْ فَأُولَئِكَ مِنْكُمْ وَأُولُو الْأَرْحَامِ بَعْضُهُمْ أَوْلَى بِبَعْضٍ فِي كِتَابِ اللهِ إِنَّ اللهَ بِكُلِّ شَيْءٍ عَلِيمٌ	8:75	202

40	فَإِن تَابُوا وَأَقَامُوا الصَّلَاةَ وَآتَوُا الزَّكَاةَ فَإِخْوَانُكُمْ فِي الدِّينِ وَنُفَصِّلُ الْآيَاتِ لِقَوْمٍ يَعْلَمُونَ	9:11	203
41	الَّذِينَ آمَنُوا وَهَاجَرُوا وَجَاهَدُوا فِي سَبِيلِ اللَّهِ بِأَمْوَالِهِمْ وَأَنفُسِهِمْ أَعْظَمُ دَرَجَةً عِندَ اللَّهِ وَأُولَٰئِكَ هُمُ الْفَائِزُونَ	9:20	202
42	يَاأَيُّهَا الَّذِينَ آمَنُوا لَا تَتَّخِذُوا آبَاءَكُمْ وَإِخْوَانَكُمْ أَوْلِيَاءَ إِنِ اسْتَحَبُّوا الْكُفْرَ عَلَى الْإِيمَانِ وَمَن يَتَوَلَّهُم مِّنكُمْ فَأُولَٰئِكَ هُمُ الظَّالِمُونَ	9:23	203
43	قَاتِلُوا الَّذِينَ لَا يُؤْمِنُونَ بِاللَّهِ وَلَا بِالْيَوْمِ الْآخِرِ وَلَا يُحَرِّمُونَ مَا حَرَّمَ اللَّهُ وَرَسُولُهُ وَلَا يَدِينُونَ دِينَ الْحَقِّ مِنَ الَّذِينَ أُوتُوا الْكِتَابَ حَتَّىٰ يُعْطُوا الْجِزْيَةَ عَن يَدٍ وَهُمْ صَاغِرُونَ	9:29	180
44	اتَّخَذُوا أَحْبَارَهُمْ وَرُهْبَانَهُمْ أَرْبَابًا مِّن دُونِ اللَّهِ وَالْمَسِيحَ ابْنَ مَرْيَمَ وَمَا أُمِرُوا إِلَّا لِيَعْبُدُوا إِلَٰهًا وَاحِدًا لَّا إِلَٰهَ إِلَّا هُوَ سُبْحَانَهُ عَمَّا يُشْرِكُونَ	9:31	61
45	يَاأَيُّهَا الَّذِينَ آمَنُوا مَا لَكُمْ إِذَا قِيلَ لَكُمُ انفِرُوا فِي سَبِيلِ اللَّهِ اثَّاقَلْتُمْ إِلَى الْأَرْضِ أَرَضِيتُم بِالْحَيَاةِ الدُّنْيَا مِنَ الْآخِرَةِ فَمَا مَتَاعُ الْحَيَاةِ الدُّنْيَا فِي الْآخِرَةِ إِلَّا قَلِيلٌ	9:38	179
46	إِلَّا تَنفِرُوا يُعَذِّبْكُمْ عَذَابًا أَلِيمًا وَيَسْتَبْدِلْ قَوْمًا غَيْرَكُمْ وَلَا تَضُرُّوهُ شَيْئًا وَاللَّهُ عَلَىٰ كُلِّ شَيْءٍ قَدِيرٌ	9:39	179
47	إِلَّا تَنصُرُوهُ فَقَدْ نَصَرَهُ اللَّهُ إِذْ أَخْرَجَهُ الَّذِينَ كَفَرُوا ثَانِيَ اثْنَيْنِ إِذْ هُمَا فِي الْغَارِ إِذْ يَقُولُ لِصَاحِبِهِ لَا تَحْزَنْ إِنَّ اللَّهَ مَعَنَا فَأَنزَلَ اللَّهُ سَكِينَتَهُ عَلَيْهِ وَأَيَّدَهُ بِجُنُودٍ لَّمْ تَرَوْهَا وَجَعَلَ كَلِمَةَ الَّذِينَ كَفَرُوا السُّفْلَىٰ وَكَلِمَةُ اللَّهِ هِيَ الْعُلْيَا وَاللَّهُ عَزِيزٌ حَكِيمٌ	9:40	179
48	انفِرُوا خِفَافًا وَثِقَالًا وَجَاهِدُوا بِأَمْوَالِكُمْ وَأَنفُسِكُمْ فِي سَبِيلِ اللَّهِ ذَٰلِكُمْ خَيْرٌ لَّكُمْ إِن كُنتُمْ تَعْلَمُونَ	9:41	179
49	لَوْ كَانَ عَرَضًا قَرِيبًا وَسَفَرًا قَاصِدًا لَّاتَّبَعُوكَ وَلَٰكِن بَعُدَتْ عَلَيْهِمُ الشُّقَّةُ وَسَيَحْلِفُونَ بِاللَّهِ لَوِ اسْتَطَعْنَا لَخَرَجْنَا مَعَكُمْ يُهْلِكُونَ أَنفُسَهُمْ وَاللَّهُ يَعْلَمُ إِنَّهُمْ لَكَاذِبُونَ	9:42	179
50	عَفَا اللَّهُ عَنكَ لِمَ أَذِنتَ لَهُمْ حَتَّىٰ يَتَبَيَّنَ لَكَ الَّذِينَ صَدَقُوا وَتَعْلَمَ الْكَاذِبِينَ	9:43	179
51	لَا يَسْتَأْذِنُكَ الَّذِينَ يُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ أَن يُجَاهِدُوا بِأَمْوَالِهِمْ وَأَنفُسِهِمْ وَاللَّهُ عَلِيمٌ بِالْمُتَّقِينَ	9:44	179
52	إِنَّمَا يَسْتَأْذِنُكَ الَّذِينَ لَا يُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَارْتَابَتْ قُلُوبُهُمْ فَهُمْ فِي رَيْبِهِمْ يَتَرَدَّدُونَ	9:45	179
53	وَلَوْ أَرَادُوا الْخُرُوجَ لَأَعَدُّوا لَهُ عُدَّةً وَلَٰكِن كَرِهَ اللَّهُ انبِعَاثَهُمْ فَثَبَّطَهُمْ وَقِيلَ اقْعُدُوا مَعَ	9:46	179

	الْقَاعِدِينَ		
54	لَوْ خَرَجُوا فِيكُمْ مَا زَادُوكُمْ إِلَّا خَبَالًا وَلَأَوْضَعُوا خِلَالَكُمْ يَبْغُونَكُمُ الْفِتْنَةَ وَفِيكُمْ سَمَّاعُونَ لَهُمْ وَاللَّهُ عَلِيمٌ بِالظَّالِمِينَ	9:47	179
55	لَقَدِ ابْتَغَوُا الْفِتْنَةَ مِنْ قَبْلُ وَقَلَّبُوا لَكَ الْأُمُورَ حَتَّى جَاءَ الْحَقُّ وَظَهَرَ أَمْرُ اللَّهِ وَهُمْ كَارِهُونَ	9:48	179
56	وَمِنْهُمْ مَنْ يَقُولُ ائْذَنْ لِي وَلَا تَفْتِنِّي أَلَا فِي الْفِتْنَةِ سَقَطُوا وَإِنَّ جَهَنَّمَ لَمُحِيطَةٌ بِالْكَافِرِينَ	9:49	179
57	إِنْ تُصِبْكَ حَسَنَةٌ تَسُؤْهُمْ وَإِنْ تُصِبْكَ مُصِيبَةٌ يَقُولُوا قَدْ أَخَذْنَا أَمْرَنَا مِنْ قَبْلُ وَيَتَوَلَّوْا وَهُمْ فَرِحُونَ	9:50	179
58	قُلْ لَنْ يُصِيبَنَا إِلَّا مَا كَتَبَ اللَّهُ لَنَا هُوَ مَوْلَانَا وَعَلَى اللَّهِ فَلْيَتَوَكَّلِ الْمُؤْمِنُونَ	9:51	179
59	قُلْ هَلْ تَرَبَّصُونَ بِنَا إِلَّا إِحْدَى الْحُسْنَيَيْنِ وَنَحْنُ نَتَرَبَّصُ بِكُمْ أَنْ يُصِيبَكُمُ اللَّهُ بِعَذَابٍ مِنْ عِنْدِهِ أَوْ بِأَيْدِينَا فَتَرَبَّصُوا إِنَّا مَعَكُمْ مُتَرَبِّصُونَ	9:52	179
60	قُلْ أَنْفِقُوا طَوْعًا أَوْ كَرْهًا لَنْ يُتَقَبَّلَ مِنْكُمْ إِنَّكُمْ كُنْتُمْ قَوْمًا فَاسِقِينَ	9:53	179
61	وَمَا مَنَعَهُمْ أَنْ تُقْبَلَ مِنْهُمْ نَفَقَاتُهُمْ إِلَّا أَنَّهُمْ كَفَرُوا بِاللَّهِ وَبِرَسُولِهِ وَلَا يَأْتُونَ الصَّلَاةَ إِلَّا وَهُمْ كُسَالَى وَلَا يُنْفِقُونَ إِلَّا وَهُمْ كَارِهُونَ	9:54	179
62	فَلَا تُعْجِبْكَ أَمْوَالُهُمْ وَلَا أَوْلَادُهُمْ إِنَّمَا يُرِيدُ اللَّهُ لِيُعَذِّبَهُمْ بِهَا فِي الْحَيَاةِ الدُّنْيَا وَتَزْهَقَ أَنْفُسُهُمْ وَهُمْ كَافِرُونَ	9:55	179
63	وَيَحْلِفُونَ بِاللَّهِ إِنَّهُمْ لَمِنْكُمْ وَمَا هُمْ مِنْكُمْ وَلَكِنَّهُمْ قَوْمٌ يَفْرَقُونَ	9:56	179
64	لَوْ يَجِدُونَ مَلْجَأً أَوْ مَغَارَاتٍ أَوْ مُدَّخَلًا لَوَلَّوْا إِلَيْهِ وَهُمْ يَجْمَحُونَ	9:57	179
65	وَمِنْهُمْ مَنْ يَلْمِزُكَ فِي الصَّدَقَاتِ فَإِنْ أُعْطُوا مِنْهَا رَضُوا وَإِنْ لَمْ يُعْطَوْا مِنْهَا إِذَا هُمْ يَسْخَطُونَ	9:58	179
66	إِنَّمَا الصَّدَقَاتُ لِلْفُقَرَاءِ وَالْمَسَاكِينِ وَالْعَامِلِينَ عَلَيْهَا وَالْمُؤَلَّفَةِ قُلُوبُهُمْ وَفِي الرِّقَابِ وَالْغَارِمِينَ وَفِي سَبِيلِ اللَّهِ وَابْنِ السَّبِيلِ فَرِيضَةً مِنَ اللَّهِ وَاللَّهُ عَلِيمٌ حَكِيمٌ	9:60	64
67	وَمَا كَانَ لِنَفْسٍ أَنْ تُؤْمِنَ إِلَّا بِإِذْنِ اللَّهِ وَيَجْعَلُ الرِّجْسَ عَلَى الَّذِينَ لَا يَعْقِلُونَ	10:100	58
68	قُلْ هَذِهِ سَبِيلِي أَدْعُو إِلَى اللَّهِ عَلَى بَصِيرَةٍ أَنَا وَمَنِ اتَّبَعَنِي وَسُبْحَانَ اللَّهِ وَمَا أَنَا مِنَ الْمُشْرِكِينَ	12:108	129
69	لَهُ مُعَقِّبَاتٌ مِنْ بَيْنِ يَدَيْهِ وَمِنْ خَلْفِهِ يَحْفَظُونَهُ مِنْ أَمْرِ اللَّهِ إِنَّ اللَّهَ لَا يُغَيِّرُ مَا بِقَوْمٍ حَتَّى يُغَيِّرُوا مَا بِأَنْفُسِهِمْ وَإِذَا أَرَادَ اللَّهُ بِقَوْمٍ سُوءًا فَلَا مَرَدَّ لَهُ وَمَا لَهُمْ مِنْ دُونِهِ مِنْ وَالٍ	13:11	59
70	ثُمَّ إِنَّ رَبَّكَ لِلَّذِينَ هَاجَرُوا مِنْ بَعْدِ مَا فُتِنُوا ثُمَّ جَاهَدُوا وَصَبَرُوا إِنَّ رَبَّكَ مِنْ بَعْدِهَا	16:110	202

	لَغَفُورٌ رَحِيمٌ		
71	وَلَا تَمْشِ فِي الْأَرْضِ مَرَحًا إِنَّكَ لَنْ تَخْرِقَ الْأَرْضَ وَلَنْ تَبْلُغَ الْجِبَالَ طُولًا	17:37	58
72	لَوْ كَانَ فِيهِمَا آلِهَةٌ إِلَّا اللَّهُ لَفَسَدَتَا فَسُبْحَانَ اللَّهِ رَبِّ الْعَرْشِ عَمَّا يَصِفُونَ	21:22	59
73	وَمَا أَرْسَلْنَاكَ إِلَّا رَحْمَةً لِلْعَالَمِينَ	21:107	64, 129
74	فَكَأَيِّنْ مِنْ قَرْيَةٍ أَهْلَكْنَاهَا وَهِيَ ظَالِمَةٌ فَهِيَ خَاوِيَةٌ عَلَى عُرُوشِهَا وَبِئْرٍ مُعَطَّلَةٍ وَقَصْرٍ مَشِيدٍ	22:45	60
75	أَفَلَمْ يَسِيرُوا فِي الْأَرْضِ فَتَكُونَ لَهُمْ قُلُوبٌ يَعْقِلُونَ بِهَا أَوْ آذَانٌ يَسْمَعُونَ بِهَا فَإِنَّهَا لَا تَعْمَى الْأَبْصَارُ وَلَكِنْ تَعْمَى الْقُلُوبُ الَّتِي فِي الصُّدُورِ	22:46	60
76	وَلَا يَأْتَلِ أُولُو الْفَضْلِ مِنْكُمْ وَالسَّعَةِ أَنْ يُؤْتُوا أُولِي الْقُرْبَى وَالْمَسَاكِينَ وَالْمُهَاجِرِينَ فِي سَبِيلِ اللَّهِ وَلْيَعْفُوا وَلْيَصْفَحُوا أَلَا تُحِبُّونَ أَنْ يَغْفِرَ اللَّهُ لَكُمْ وَاللَّهُ غَفُورٌ رَحِيمٌ	24:22	203
77	تَبَارَكَ الَّذِي نَزَّلَ الْفُرْقَانَ عَلَى عَبْدِهِ لِيَكُونَ لِلْعَالَمِينَ نَذِيرًا	25:1	129
78	وَمِنْ آيَاتِهِ خَلْقُ السَّمَاوَاتِ وَالْأَرْضِ وَاخْتِلَافُ أَلْسِنَتِكُمْ وَأَلْوَانِكُمْ إِنَّ فِي ذَلِكَ لَآيَاتٍ لِلْعَالَمِينَ	30:22	252
79	النَّبِيُّ أَوْلَى بِالْمُؤْمِنِينَ مِنْ أَنْفُسِهِمْ وَأَزْوَاجُهُ أُمَّهَاتُهُمْ وَأُولُو الْأَرْحَامِ بَعْضُهُمْ أَوْلَى بِبَعْضٍ فِي كِتَابِ اللَّهِ مِنَ الْمُؤْمِنِينَ وَالْمُهَاجِرِينَ إِلَّا أَنْ تَفْعَلُوا إِلَى أَوْلِيَائِكُمْ مَعْرُوفًا كَانَ ذَلِكَ فِي الْكِتَابِ مَسْطُورًا	33:6	203
80	ثُمَّ جَعَلْنَاكَ عَلَى شَرِيعَةٍ مِنَ الْأَمْرِ فَاتَّبِعْهَا وَلَا تَتَّبِعْ أَهْوَاءَ الَّذِينَ لَا يَعْلَمُونَ	45:18	43
81	إِنَّمَا الْمُؤْمِنُونَ إِخْوَةٌ فَأَصْلِحُوا بَيْنَ أَخَوَيْكُمْ وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُرْحَمُونَ	49:10	203
82	يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَى وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُمْ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ	49:13	174
83	وَمَا يَنْطِقُ عَنِ الْهَوَى	53:3	52
84	آمِنُوا بِاللَّهِ وَرَسُولِهِ وَأَنْفِقُوا مِمَّا جَعَلَكُمْ مُسْتَخْلَفِينَ فِيهِ فَالَّذِينَ آمَنُوا مِنْكُمْ وَأَنْفَقُوا لَهُمْ أَجْرٌ كَبِيرٌ	57:7	65
85	مَا أَفَاءَ اللَّهُ عَلَى رَسُولِهِ مِنْ أَهْلِ الْقُرَى فَلِلَّهِ وَلِلرَّسُولِ وَلِذِي الْقُرْبَى وَالْيَتَامَى وَالْمَسَاكِينِ وَابْنِ السَّبِيلِ كَيْ لَا يَكُونَ دُولَةً بَيْنَ الْأَغْنِيَاءِ مِنْكُمْ وَمَا آتَاكُمُ الرَّسُولُ فَخُذُوهُ وَمَا نَهَاكُمْ عَنْهُ فَانْتَهُوا وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ شَدِيدُ الْعِقَابِ	59:7	52

86	لِلْفُقَرَاءِ الْمُهَاجِرِينَ الَّذِينَ أُخْرِجُوا مِنْ دِيَارِهِمْ وَأَمْوَالِهِمْ يَبْتَغُونَ فَضْلًا مِنَ اللَّهِ وَرِضْوَانًا وَيَنْصُرُونَ اللَّهَ وَرَسُولَهُ أُولَئِكَ هُمُ الصَّادِقُونَ	59:8	203
87	وَالَّذِينَ تَبَوَّءُوا الدَّارَ وَالْإِيمَانَ مِنْ قَبْلِهِمْ يُحِبُّونَ مَنْ هَاجَرَ إِلَيْهِمْ وَلَا يَجِدُونَ فِي صُدُورِهِمْ حَاجَةً مِمَّا أُوتُوا وَيُؤْثِرُونَ عَلَى أَنْفُسِهِمْ وَلَوْ كَانَ بِهِمْ خَصَاصَةٌ وَمَنْ يُوقَ شُحَّ نَفْسِهِ فَأُولَئِكَ هُمُ الْمُفْلِحُونَ	59:9	166, 203
88	وَالَّذِينَ جَاءُوا مِنْ بَعْدِهِمْ يَقُولُونَ رَبَّنَا اغْفِرْ لَنَا وَلِإِخْوَانِنَا الَّذِينَ سَبَقُونَا بِالْإِيمَانِ وَلَا تَجْعَلْ فِي قُلُوبِنَا غِلًّا لِلَّذِينَ آمَنُوا رَبَّنَا إِنَّكَ رَءُوفٌ رَحِيمٌ	59:10	203
89	يَاأَيُّهَا النَّبِيُّ إِذَا طَلَّقْتُمُ النِّسَاءَ فَطَلِّقُوهُنَّ لِعِدَّتِهِنَّ وَأَحْصُوا الْعِدَّةَ وَاتَّقُوا اللَّهَ رَبَّكُمْ لَا تُخْرِجُوهُنَّ مِنْ بُيُوتِهِنَّ وَلَا يَخْرُجْنَ إِلَّا أَنْ يَأْتِينَ بِفَاحِشَةٍ مُبَيِّنَةٍ وَتِلْكَ حُدُودُ اللَّهِ وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَقَدْ ظَلَمَ نَفْسَهُ لَا تَدْرِي لَعَلَّ اللَّهَ يُحْدِثُ بَعْدَ ذَلِكَ أَمْرًا	65:1	52
90	فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَأَمْسِكُوهُنَّ بِمَعْرُوفٍ أَوْ فَارِقُوهُنَّ بِمَعْرُوفٍ وَأَشْهِدُوا ذَوَيْ عَدْلٍ مِنْكُمْ وَأَقِيمُوا الشَّهَادَةَ لِلَّهِ ذَلِكُمْ يُوعَظُ بِهِ مَنْ كَانَ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَمَنْ يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مَخْرَجًا	65:2	52
91	وَيَرْزُقْهُ مِنْ حَيْثُ لَا يَحْتَسِبُ وَمَنْ يَتَوَكَّلْ عَلَى اللَّهِ فَهُوَ حَسْبُهُ إِنَّ اللَّهَ بَالِغُ أَمْرِهِ قَدْ جَعَلَ اللَّهُ لِكُلِّ شَيْءٍ قَدْرًا	65:3	52
92	وَاللَّائِي يَئِسْنَ مِنَ الْمَحِيضِ مِنْ نِسَائِكُمْ إِنِ ارْتَبْتُمْ فَعِدَّتُهُنَّ ثَلَاثَةُ أَشْهُرٍ وَاللَّائِي لَمْ يَحِضْنَ وَأُولَاتُ الْأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ وَمَنْ يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مِنْ أَمْرِهِ يُسْرًا	65:4	52
93	ذَلِكَ أَمْرُ اللَّهِ أَنْزَلَهُ إِلَيْكُمْ وَمَنْ يَتَّقِ اللَّهَ يُكَفِّرْ عَنْهُ سَيِّئَاتِهِ وَيُعْظِمْ لَهُ أَجْرًا	65:5	52
94	أَسْكِنُوهُنَّ مِنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تُضَارُّوهُنَّ لِتُضَيِّقُوا عَلَيْهِنَّ وَإِنْ كُنَّ أُولَاتِ حَمْلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّى يَضَعْنَ حَمْلَهُنَّ فَإِنْ أَرْضَعْنَ لَكُمْ فَآتُوهُنَّ أُجُورَهُنَّ وَأْتَمِرُوا بَيْنَكُمْ بِمَعْرُوفٍ وَإِنْ تَعَاسَرْتُمْ فَسَتُرْضِعُ لَهُ أُخْرَى	65:6	52
95	وَاصْبِرْ عَلَى مَا يَقُولُونَ وَاهْجُرْهُمْ هَجْرًا جَمِيلًا	73:10	197
96	وَالرُّجْزَ فَاهْجُرْ	74:5	198
97	فَجَعَلَهُ غُثَاءً أَحْوَى	87:5	179
98	فَذَكِّرْ إِنْ نَفَعَتِ الذِّكْرَى	87:9	179

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Appendix

II

List of Āhādīth

S.NO	Hadīth	Reference	P.No
1	اللَّهُمَّ اهْدِ ذَوْصَاءَ الْبَيْتِ بِهِمْ	أخرجه البخاري في صحيحه (2937) ، والمسلم في صحيحه (6450)	179
2	أَمَرَ رسولُ الله -صلى الله عليه و سلم- بِبِنَاءِ الْمَسَاجِدِ فِي الدُّورِ وَأَنْ تُنَظَّفَ وتُطَيَّب	أخرجه أبو داود في سننه (455)، والترمذي في سننه (594)، وابن ماجه في سننه (758) باختلاف يسير عنده	166
3	دعوا الحبشة ما ودعوكم ودعوا الترك ما تركوكم	أخرجه أبو داود في سننه (4302)، والنسائي في سننه (3176)	205
4	فَإِنْ تَوَلَّيْتَ فَإِنَّ عَلَيْكَ إِثْمَ الأَرِيسِيِّنَ	أخرجه البخاري في صحيحه (2936)	179
5	لاَ تَنْقَطِعُ الْهِجْرَةُ حَتَّى تَنْقَطِعَ التَّوْبَةُ وَلاَ تَنْقَطِعُ التَّوْبَةُ حَتَّى تَطْلُعَ الشَّمْسُ مِنْ مَغْرِبِهَا	أخرجه أبو داود في سننه (2479)	204
6	لاَ هِجْرَةَ بَعْدَ الْفَتْحِ، وَلَكِنْ جِهَادٌ وَنِيَّةٌ، وَإِذَا اسْتُنْفِرْتُمْ فَانْفِرُو	أخرجه البخاري في صحيحه (1834) ، والمسلم في صحيحه (1864)	204, 205
7	لاَ يُصَلِّيَنَّ أَحَدٌ الْعَصْرَ إِلاَّ فِي بَنِي قُرَيْظَةَ	(1770) أخرجه البخاري في صحيحه (4119) ، والمسلم في صحيحه	63

Appendix

III
Glossary

S.NO	Terminology	Definition
1	Amān	Pledge of security, safe-conduct
2	Dār al-da'wah	Land of invitation to God
3	Dār al-'ahd	Territory in covenant with Islam
4	Dār al-fīsq	Land of corruption
5	Dār al-harb	Territory of war (enemy territory)
6	Dār al-Islām	Territory of Islam
7	Dār al-Īmān	Land of true faith
8	Dār al-'adl	Land of true justice
9	Dār al-nifāq	Land of hypocrisy
10	Dār al-Shahādah	Land of testimony
11	Dār al-sulh	Territory at peace with Islam
12	*Darar*	Damage
13	Diffusionist	An advocate of the theory of the dissemination of elements of culture to another region or people
14	Dhimmī (ahl al-kitāb)	People of the Book, Scripturaries (Christians, Jews, Sabians, Zoroastrians)

15	*Faqīh*	Jurist
16	Fatwā	Legal opinion
17	*Fiqh*	Jurisprudence
18	Fiqh al-Aqlliyyāt	Jurisprudence of Minorities
19	Hadīth	Tradition
20	Hakam	Arbitrator
21	Harām	Prohibited
22	Hijrah	Migration of the Prophet Muhammad (Peace be on him) to Medina in 622 A.D; the beginning of the Muhammadan era.
23	*'Ibādāt*	Devotional duties
24	Ijma'	Consensus, agreement
25	Ijtihād	Independent reasoning
26	Ikhtilāf	Legal controversy, differences among jurists on matters of law
27	Imām	Leader of people, caliph; head of state.
28	Inclusivists	They asserts that their own believers are absolutely true, and believers of other religions are correct insofar as they agree with that believer
29	'Ismah	Infallibility, impeccability
30	*Istihsān*	Equity, juristic preference
31	Jihād	Holy war
32	Jizyah	Poll tax
33	Jurisdiction	The right, power, or authority to administer justice

34	*kharāj*	Land tax
35	Legal pluralism	Synchronization of two or more legal structures in one and alike communal field
36	*Mu'āmalāt*	Transactions
37	Madhāhib	Schools of thought
38	Nass	Text of scripture
39	Pluralism	The existence of different groups of people in one society
40	Qiyās	Analogy
41	Ra'y	Legal opinion
42	Shahādat	Testimony
43	Sharī'ah	Sacred law
44	Siyar	Branch of the Sharī'ah dealing with the conduct of state
45	Sunnah	Tradition
46	Taqlīd	Imitation, conformism: following the opinion of an acknowledged Jurist
47	Territorial jurisdiction	The geographical area over which a government or governmental subdivision has power
48	Ulamā'	Scholars
49	Ummah	Community
50	Waqf	Pious endowment
51	Zakāh	Alms

Appendix

IV
List of Cases

S.NO	Case
1	Dudgeon v. U.K, 4 E.H.R.R. 149
2	Golder v. U.K., 1 E.H.R.R. 524
3	Handyside v. U.K, 1 E.H.R.R. 737
4	Kaur v. Singh, 1 All ER (1972), p. 293
5	Klass v. Germany, 2 E.H.R.R. 214
6	Malik v. British Home Stores (1980)
7	McDonald v. Mabee (243 U.S. 90 (1916))
8	R v. Bibi (1980)
9	R v. Bailey(1980)
10	R v. Adesanya (1980)
11	Refah Partisi (The Welfare Party) and Others v. Turkey, ECHR (2003)
12	SS Lotus (France v Turkey) (1927) PCIJ Ser. A No 10, 18, 42 and 59
13	Wedding v. Meyler (192 U.S. 573, 584 (1904))