

---

## Introduction

The religion of Islam addresses all mankind, anywhere around the world, at any time. This universality derives from the belief that religion is not intended for a specific people or nation<sup>1</sup> and that all land is God's land, and thus it should be divided according to His will.<sup>2</sup> This principle was implemented during the Prophet Muhammad's mission when he called upon the leaders of the region to embrace Islam.<sup>3</sup> In this vein, religious scholars introduced the principle of *'ālamīyyat al-Islām* (universality of Islam), which received in the modern era a broad interpretation regarding the relations of Muslims with the other peoples and nations of the world.<sup>4</sup>

According to *'ālamīyyat al-Islām*, the Islamic religion applies to all people, everywhere and at any time. Therefore, every Muslim must uphold the religious decrees, abide by shari'a laws, and practice them in both private and public life. Furthermore, every Muslim, anywhere and at any time, is under the obligation to call upon all people of the world to convert to Islam, and to disseminate it equally to all nationalities and lands without distinction.<sup>5</sup> In this sense, *'ālamīyyat al-Islām* challenges Muslim minorities in non-Muslim countries to uphold the faith, especially in the context of the religious awakening and resurgence of Islamic identity prevalent among Muslim minorities in the West in recent decades.

Classic Islamic religious law is not equipped to deal with this shift and does not offer solutions to the challenges faced by Muslim minorities. Life under these newfound circumstances raises many fundamental questions; first and foremost is the mere settlement of Muslims in non-Muslim

<sup>1</sup> Qur'an verses 107:21, 28:34.

<sup>2</sup> Qur'an verses 128:7, 105:21.

<sup>3</sup> Muhammad Khalid 'Abd al-Kadir. *Min Fiqh al-Aqalliyyat al-Muslima*. (Doha: The Qatari Office of Waqf and Islamic Affairs, 1997), 22–6.

<sup>4</sup> Mamduh al-Shaykh, "Hal Yatbalwar Mafhum Jadid li-'Alamiyyat al-Islam?" <http://www.nashiri.net/articles/intellect-and-philosophy/2075-v15-2075.html> 2008

<sup>5</sup> Yusuf al-Qaradawi, *Fi Fiqh al-Aqalliyyat al-Muslima: Hayat al-Muslimin Wasat al-Mujtama'at al-Akhra* (Cairo: Dar al-Shuruq, 1st edition, 2001), 13.

countries. Moreover, coping with an environment that differs significantly from the familiar surroundings of the Muslim world raises urgent religious quandaries in various fields: the public, private and personal spheres, and monetary interactions.

The questions that may arise in the public sphere include: are Muslims allowed to naturalize in non-Muslim countries, abide by their respective laws, and accept the obligations and rights that they entail? Are they allowed to serve in the armies of these countries, particularly if those are in a state of war against Islam? What are the rules for assuming political and public roles, and the appropriate conduct during elections? Can Muslims elect a candidate or be elected, form a political party and support it? Can they support a specific candidate or form a political party that is exclusively Muslim? And what are the rules regarding the establishment of Islamic institutions such as schools, clubs, and religious, cultural, social and economic institutions in non-Muslim countries?

In the private sphere, questions that may arise include: Can one eat from markets, especially where the meat is prepared by non-Muslims and is impossible to ascertain whether it was performed according to Muslim religious laws? Should one inquire about the nature of each food item purchased? Can one consume processed foods that are known to contain pork products? Can one eat at a restaurant that serves foods that are prohibited, such as pork or alcoholic beverages? Can they work in said restaurants? Can they trade these commodities with locals? Can one accept a colleague's invitation to dine at such establishments? Can Muslims send greetings cards to their acquaintances for a Christian or a national holiday? Can they invite locals to Muslim social events?

Questions that may arise in the personal sphere include: are marriages that are presided over by the church or a local official and not according to Muslim laws and traditions valid? Is it mandatory to formulate a new marriage contract at a mosque or an Islamic center where a Muslim cleric officiates the wedding? What is the validity of a divorce presided over by a civil judge for a Muslim couple, when the husband refuses to divorce the wife? What is the validity of a marriage that is not registered in accordance with the laws of that country (*Urfi*)? What should a woman who seeks to get married without the consent of her guardian do? Is she allowed to turn to the Imam of the local mosque to serve as her guardian in the marriage? In such a case, who will guarantee her rights if she decides to divorce her husband? What is the rule for marrying a non-Muslim Western woman? Is she considered to have no religion and therefore should not be married, or does she belong to the 'People of the Book' who are suitable for marriage?

Cambridge University Press

978-1-107-11458-6 - Shari'a in the Modern Era: Muslim Minority Jurisprudence

Iyad Zahalka

Excerpt

[More information](#)

## INTRODUCTION

3

What is the rule regarding a woman who converts to Islam while her husband remains a non-Muslim? Should they be separated? Can a man who converted to Islam accept an inheritance from his non-Muslim father, which contradicts the hadith of the Prophet that prohibits the inheritance between a Muslim and a non-Muslim?

In the financial sphere, questions that may arise include: Can Muslims collaborate with banks and insurance companies that collect and pay interest to their clients? Can one deposit money that incurs interest? Can one have life insurance or homeowners insurance? What is the rule for profits garnered from interest on investments and compensations? When a Muslim is unable to buy a house, can he take out a mortgage with an interest rate?

Modern religious scholars remain divided on the manner in which Muslim minorities in the West should adapt to their surroundings and the different aspects of life; every religious faction offers a unique approach.<sup>6</sup> The *Salafi* School of thought rejects any *ijtihād* (independent reasoning) that is designed to amend religious laws to accommodate the living circumstances of Muslim minorities. It maintains that doing so constitutes a *bid'a*, a new creation that is an abomination and utterly forbidden. Therefore, according to the *salafi* leaning, Muslims only mechanisms for coping are through the mere preservation of the religion and the faith of Islam while dissimilating from those surroundings, detaching themselves from the general public, and associating solely with Muslims.

Unlike the *salafis*, *wasatī* religious scholars argue that Muslim minorities require *fiqh khāṣ*, a special religious decree that originates from a true shari'a *ijtihād* that takes into account their location, time, and particular circumstances and needs. According to these scholars, the conditions of the Muslim minorities in the West is direr than those of their brethren in Muslim countries due to the stressful environment they reside in, the plethora of temptations they face, and their inability to subjugate these societies to their religious laws. Therefore, Muslim minorities should deal with their adoptive societies according to their rules and regulations, even if those contradict to a certain degree the laws of Islam. Thus, according to the *'ālamīyyat al-Islām*,<sup>7</sup> shari'a laws should be altered in accordance with

<sup>6</sup> On the various Islamic factions – *salafi*, *wasatī*, and liberal – see an extensive discussion in chapter one.

<sup>7</sup> This does not concur with Middle East experts who interpret the “universality of Islam” in terms of Islamic expansion and world domination. In the book it is interpreted not as a political and cultural domination, but as a call to believe in the Islamic religion, accept its values, and follow its decrees anywhere around the word and at any time.

Cambridge University Press

978-1-107-11458-6 - Shari'a in the Modern Era: Muslim Minority Jurisprudence

Iyad Zahalka

Excerpt

[More information](#)

the circumstances, the times, and the place, so every Muslim will be able to uphold religious decrees without causing an unbearable burden.<sup>8</sup> This applies to Muslim minorities in non-Muslim countries that are unable to subjugate the majority of the population to shari'a laws and at times are unable to perform religious obligations to the letter.

To cope with these newfound circumstances, Muslim minorities and religious scholars must search for religious solutions to allow them to continue to uphold the decrees and safeguard their religious identity. Meanwhile, they must avoid substantial, even irreversible, damage by preventing confrontation with the laws and accepted customs of their adoptive countries. Religious laws provide an infrastructure that alleviates some of the decrees, such as the religious obligation to hinder evil and wrongdoing, and the decree to assuage Muslim believers, free their burdens or remove obstacles from their path. Religious law assists in upholding the religion because it maintains that shari'a laws can alter depending on the time, place and circumstance. Additionally, it provides the fundamental permission to deviate from the religious path in case of *ḍarūra* (necessity), which has encouraged the development of the doctrine of *fiqh al-aqalliyyāt al-Muslima* (hereinafter: *fiqh al-aqalliyyāt*).<sup>9</sup>

Developed over the last two decades, *fiqh al-aqalliyyāt* is a jurisprudence designed to provide a religious solution for Muslim minorities, mainly in the West, taking into account their distinctive life predicaments. It aspires to incorporate the preservation of a religious Muslim identity and adherence to the laws of Islam with civil assimilation into a non-Muslim country. This is performed by altering shari'a laws according to a religious methodology that is rooted in Islam and *uṣūl al-fiqh*, the principles of religion that stipulate the terms and conditions by which new decrees can be passed.

This book focuses on *fiqh al-aqalliyyāt* of the *wasatī* faction, a school of thought dominated by the Muslim Brotherhood that positions itself in the middle ground between conservative resistance to changing religious laws and the disintegration of the commitment to religious tradition. This work does not delve into the *salafī fiqh al-aqalliyyāt*, which serves only as a point of comparison, due to the fact that it possesses its own manner with which to resolve controversies and issues affecting Muslim minorities in the West; it does not offer a unique methodology for minority jurisprudence; and it is a proponent of returning to the traditions of the "righteous" ancestors, rejecting any *ijtihād* in the religious laws.

<sup>8</sup> Qaradawi, *Fi Fiqh al-Aqalliyyat al-Muslima*, 44–6.

<sup>9</sup> Ibid., 30–1.

This book examines the development of the *fiqh al-aqalliyāt* doctrine, its position on the spectrum of Muslim religious law, and how various religious factions treat it. This is followed by a research analysis of the *fiqh al-aqalliyāt* methodology and the religious tools, mechanisms and principles it utilizes to create religious decrees, an inquiry into whether those are applicable to all walks of life, and an examination of the consistent and systematic approach of the *fiqh al-aqalliyāt* adjudicators in implementing its methodology among Muslim minorities. Finally, notwithstanding the disparity in life circumstances and conditions of different Muslim minorities, the applicability of *fiqh al-aqalliyāt* is examined as it relates to all aspects of life for all Muslim minorities. The final goal is to consolidate conclusions on the validity of *fiqh al-aqalliyāt* in the religious and judicial realms, and its standing as a shari'a policy whose scholars and philosophers aspire to apply it to Muslim minorities.

The personal sphere, which is seminal to Muslim religious law, is the test case. The rules of the personal realm regulate the basic relationships within the family, the nucleus and cornerstone of society, and determine everything in terms of family law, marital relations between husband and wife, childbirth, and child-rearing. These matters are so sensitive and inherent to Islam that it assigns God as the personal sphere's guarantor, in order to safeguard the purity of the family, the survival of its lineage, and the longevity of the Muslim nation. These matters are incorporated into the "rights of God" (*ḥuqūq Allah*), representing the public interest in the perpetuation of the nation of Islam. Therefore, within the doctrine of *fiqh al-aqalliyāt*, the personal sphere attracts significant attention and study because Muslim minorities can be exposed to, and suffer from civil laws that contradict religious ones. Furthermore, a comparative study between Muslim minorities in various places is also possible due to the likeness of the topics in question: the validity of marriage or divorce, the religious affiliation of children, guardianship, custody and alimony.

Conclusions of the personal sphere discussion will provide an answer to the aforementioned questions on the role of the doctrine as an encompassing framework for religious jurisprudence. Moreover, it will assist in determining whether the methodology allows Muslim minorities to manage personal issues in their respective political-legal environments, particularly with civil arrangements enforced upon them by society in lieu of religious ones. If the methodology does allow for a religion-based solution to this sensitive subject, while also taking into account the unique circumstances of Muslims in non-Muslim countries and the possible contradictions between local civil courts and religious courts, it is a testimony that

*fiqh al-aqalliyyāt* is indeed an all-encompassing, consistent and organized religious doctrine. However, if the methodology falls short of this, it would be reasonable to deduce that it was created to merely provide a limited solution for random issues Muslims encounter in the West. This research will make it possible to determine whether *fiqh al-aqalliyyāt* constitutes a novel approach to Muslim jurisprudence and not only a localized solution for Muslim minorities and whether it implements a fundamentally religious approach that transforms shari'a laws, in accordance with the era, the situation, and the *maṣlaḥa* – the common good and interest of Muslims.

### Tendencies in *Fiqh al-Aqalliyyāt* Research Literature

Researchers have been intrigued by Muslim minorities in the West, and research material abounds in regard to the diverse aspects of their lives: their position in society and social, political, and religious integration in the countries in which they settled. Several publications delve into the religious aspects of their lives, while others only skim the surface on the role of Muslim religious law in the life of the Muslim community and its influence on the formation of their identity and their relationship with their surroundings. Parts of the literature that describe the dangers Islam poses to Western culture are tainted by Islamophobia. Other segments of the research literature focus on the evolution of Muslim communities in the West, their integration, and predictions of what their futures entail.

Literature that researches Muslim minorities from the historical, sociological, geo-political and constitutional perspectives is not necessarily relevant to this book and will be discussed only at the point in which it intersects with the objectives of the book and complements them. This book does not refer to research conducted on Muslims in the West in general, or the various Islamist organizations in Europe and America. The focus is solely on the research on the development of the *fiqh al-aqalliyyāt* doctrine, its major trends and influence on Muslims residing in the West, and the manner in which they deal with the public and legal ramifications.

There is a body of work that has examined the general stature of the shari'a, its position as part of civil jurisprudence in the West, and the degree to which civil courts have accepted Islamic law and implemented it.<sup>10</sup> These works do not deal with *fiqh al-aqalliyyāt* directly, rather with the approach of civil law to shari'a, and not vice versa. Contrary to the aforementioned works that do not explore how the doctrine grapples

<sup>10</sup> Such researches include: Edge 2008; Rohe 2003; Rohe 2004; Rohe 2010; Yilmaz 2000.

Cambridge University Press

978-1-107-11458-6 - Shari'a in the Modern Era: Muslim Minority Jurisprudence

Iyad Zahalka

Excerpt

[More information](#)TENDENCIES IN *FIQH AL-AQALLIYYĀT* RESEARCH LITERATURE 7

with civil law, this study does so, while simultaneously exploring the treatment of civil law as a whole by *fiqh al-aqalliyyāt*, and the judicial norms that contradict religious law. The study further aspires to answer the following questions: does the doctrine promote mediation between civil and religious law or isolationism? Which religious apparatus can mitigate this issue?

Initially introduced as an organized doctrine on the writings of Yusuf al-Qaradawi and Taha Jabir al-ʿAlwani over a decade ago, *fiqh al-aqalliyyāt* is still marginally researched compared to the studies of Muslim minorities. Alexandre Caeiro examined the influence of the doctrine over the identity of Muslims in Europe and the call for the Islamization of the West.<sup>11</sup> Andrew March analyzed the doctrine's approach toward contemporary liberal theories such as freedom, religion and democracy.<sup>12</sup> Shammai Fishman explored the doctrine according to the teachings of al-Qaradawi and al-ʿAlwani.<sup>13</sup> Ralph Ghadban examined its place within Islamic religious law and whether it represented a conservative Islamist approach or whether it was influenced by modernization.<sup>14</sup> Uriya Shavit studied the functionality of theological concepts and religious decrees in general, and the *fiqh al-aqalliyyāt* methodology in particular, within the *wasatī* and *salafī* factions.<sup>15</sup>

These pioneering works on *fiqh al-aqalliyyāt* are indeed valuable, yet they lack certain topics. One such issue is the historical evolution of the doctrine of the *wasatīyya*, from which *fiqh al-aqalliyyāt* originated and upon which it is based. In addition, there is no sufficient in-depth discussion on the religious methods used in religious decrees according to the *fiqh al-aqalliyyāt* doctrine. Furthermore, the existing research refers to a small number of religious rulings in this field and does not examine the applicability of *fiqh al-aqalliyyāt* for diverse Muslim minorities.

<sup>11</sup> A. Caeiro, "The European Council for Fatwa and Research" (Paper presented at the Fourth Mediterranean Social and Political Research Meeting, European University Institute, Florence, Italy, March 19–23, 2003); A. Caeiro, "The Power of European Fatwas: The Minority Fiqh Project and the Making of an Islamic Counterpublic," *International Journal of Middle East Studies* 42/3 (2010): 435–49.

<sup>12</sup> A. F. March, "Sources of Moral Obligation to non-Muslims in the 'Jurisprudence of Muslim Minorities' (*Fiqh al-Aqalliyyat*) Discourse," *Islamic Law and Society* 16 (2009): 34–94.

<sup>13</sup> S. Fishman, "*Fiqh al-Aqalliyyat*: A Legal Theory for Muslim Minorities," *Research Monographs on the Muslim World*, Hudson Institute, Series 1 (Paper no.2, 2006).

<sup>14</sup> R. Ghadban, "*Fiqh al-Aqalliyyat* and its Place in Islamic Law," *Orient* 2 (2010): 56–63.

<sup>15</sup> U. Shavit, "The Wasati and Salafi Approaches to the Religious Law of Muslim Minorities," *Islamic Law and Society* 19/4 (2012): 416–57.



### Discussion Objectives

This book has two chief objectives: (1) To complement the existing research on *fiqh al-aqalliyyāt* from the points of view and facets that have thus far been somewhat neglected, and for the first time present a comprehensive thesis for both the ideological aspect of religious law and the actual, practical implementation for Muslim minorities who differ from one another. (2) To examine the doctrine's implication on the development of Muslim religious law in the modern era. Despite their significant and noteworthy contribution in other fields, researchers of the *fiqh al-aqalliyyāt* doctrine have not answered a string of questions from which the aforementioned objectives derive: (1) What is the validity of *fiqh al-aqalliyyāt* in terms of religion and religious law, and what is the approach of the various factions of Islam to it? (2) Does the doctrine establish a broad, all-encompassing and organized religious framework for religious decrees on every subject that considers the special circumstances of Muslim minorities? Does it offer a comprehensive solution to the array of problems and challenges faced by the Muslim minorities? (3) What are the principles and pillars of the *fiqh al-aqalliyyāt* doctrine, and is its methodology systematically and consistently implemented by its adjudicators? (4) To what extent is the doctrine implemented from theory to practice? And to what extent is it accepted by Muslim minorities in the West?

In addition, the current study examines whether the doctrine applies to minorities with diverse geo-political characteristics, indigenous as well as immigrant. In this respect, it is important to examine the doctrine's approach to the distinction between immigrant and indigenous minorities. More often than not, the indigenous minority is also a national one, which may cause a rift with the state and the majority of the population that maintains a different nationality. As opposed to the immigrant minority, which is willing to adhere to the prevailing state of affairs in the adoptive country, the indigenous one usually claims civil and collective rights that relate to its distinctive identity. This triggers several questions: (1) Do the dissimilarities between those minorities affect the application of the doctrine in the case of the indigenous Muslim minority, and the manner in which it deals with its legal-political surroundings? (2) Does this divergence affect shari'a laws, including matters of the personal sphere of each minority? (3) Is the doctrine legitimate and applicable to indigenous minorities in the same way it is for immigrant ones? (4) How does *fiqh al-aqalliyyāt* influence the development of Muslim religious law in the modern age?



## Methodology

This book is based on qualitative research obtained through textual analysis<sup>16</sup> of publications and religious decrees by the '*ulama*' of Muslim minorities in the West, alongside field interviews of Muslim activists in Western countries. The work on this book consisted of the examination of hundreds of books, essays, bodies of research, and religious decrees by adjudicators and Islamic intellectuals since the late 1980s mainly, but not exclusively, from the *wasatī* faction. The majority of scholars serve as thinkers and adjudicators for Muslim minority communities in the West, while some of the writings are by Islamist thinkers who reside in Muslim countries. In addition, classical literature on religious law was also examined.

The book focuses on systematic content analysis of the fatwa (religious legal opinion), resolutions and research issued and conducted by the "European Council for Fatwa and Research" (ECFR), as published on its website and in its scientific journal – *al-Majallat al-Ilmiyya*. These essays provide an ideological framework for the religious rulings of the ECFR and guidance for adjudicators seeking to rely on the religious law principles and the methodology of *fiqh al-aqalliyyāt*. The book further analyzes essays and religious rulings by *wasatī* adjudicators based on the *fiqh al-aqalliyyāt* methodology, as well as fatwa by other *fiqh al-aqalliyyāt* scholars, mostly al-Qaradawi and al-ʿAlwani. In addition, essays, religious rulings and articles by scholars and thinkers from other factions regarding *fiqh al-aqalliyyāt* are also examined, including publications by British shari'a councils.

Another pillar of this book is the in-depth interviews<sup>17</sup> conducted with prominent religious leaders in Islamic centers across the United States (New York, Washington, Virginia, Detroit, Texas, California, Utah, and Maryland), in Europe (London, Bradford, and Edinburgh in the United Kingdom, and Dublin in Ireland), as well as visits to and interviews with Muslims in France and Germany. These field interviews were designed to familiarize the author with the circumstances behind the aforementioned research and religious decrees. Moreover, these interviews were intended to explore the degree to which the *fiqh al-aqalliyyāt* doctrine is accepted by Muslim minorities in the West, their relationship with it, and the degree

<sup>16</sup> On textual content analysis, see Asher Shkedi, *Words of Meaning: Qualitative Research – Theory and Practice* (Tel Aviv: Tel Aviv University, 2007), 121–40.

<sup>17</sup> On in-depth interviews, see *ibid.*, 69–80.

Cambridge University Press

978-1-107-11458-6 - Shari'a in the Modern Era: Muslim Minority Jurisprudence

Iyad Zahalka

Excerpt

[More information](#)

of its applicability in the West. In addition, the book explores the existing literature on *fiqh al-aqalliyyāt* and its applicability to Muslim minorities in the West. The book also surveys the literature that evolved from the doctrine, its roots, and its standing among religious scholars from different factions; scholars whose findings are then juxtaposed with the findings of this research.

The religious law methodology of *fiqh al-aqalliyyāt* and its founding principles and guidelines derive from the research and religious rulings of *fiqh al-aqalliyyāt* scholars. Also examined in this work is the adjudicators' systematic and consistent implementation of the methodology in their rulings in general, and in matters of the personal sphere in particular. In order to investigate the disparity between the religious law that evolved around *fiqh al-aqalliyyāt* and classical religious law, the book will compare rulings on similar subject matters by *fiqh al-aqalliyyāt* scholars and classical scholars. The book will also examine the *fiqh al-aqalliyyāt* doctrine from the point of view of the "legal pluralism" approach, developed for instances where the sovereign applies diverse legal systems on groups within the population, based on ethnic, religious, national or geographical criteria. This approach has already been utilized in research on Islamic societies. In the current study it was used to examine the behavior of Muslim minorities from the perspective of religious law and in comparison to state laws. Moreover, the current study investigates the effect of state law on the lives of Muslim minorities, and the relationship between religious courts and state laws, including the mutual influence of the two systems. In addition, it explores the behavior of *fiqh al-aqalliyyāt* in cases where shari'a courts for Muslim minorities are established, such as in Israel, which allow the Muslim minority to litigate by means of religious and shari'a laws.