

1-30-2015

Operating Islamic Jurisprudence in Non-Muslim Jurisdictions: Traditional Islamic Precepts and Contemporary Controversies in the United States

Mustafa R. K. Baig
University of Exeter

Follow this and additional works at: <http://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

Recommended Citation

Mustafa R. Baig, *Operating Islamic Jurisprudence in Non-Muslim Jurisdictions: Traditional Islamic Precepts and Contemporary Controversies in the United States*, 90 Chi.-Kent. L. Rev. 79 (2015).

Available at: <http://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss1/5>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwhipple@kentlaw.iit.edu.

OPERATING ISLAMIC JURISPRUDENCE IN NON-MUSLIM JURISDICTIONS: TRADITIONAL ISLAMIC PRECEPTS AND CONTEMPORARY CONTROVERSIES IN THE UNITED STATES

MUSTAFA R. K. BAIG*

Fulfill your pledge, indeed the pledge will be asked of.

(Qur'an: 17:34)

When a noble person makes a promise, he honors it.

(Arabic/Sufi proverb attributed to 'Alī Ibn Abī Ṭālib)

INTRODUCTION

In 2010, Oklahoma voters supported a ballot measure banning state courts from considering Islamic law or “Shari‘a”. The Tenth Circuit subsequently struck down the ban on the grounds that part of the ban singled out Islamic law for special restriction and because lawmakers failed to identify any instances where Islamic law caused an actual problem that the amendment sought to solve, and violated Muslims’ constitutional right to freedom of religion.¹ The “anti-Shari‘a movement,” however, gained ground in a number of states by modifying the language into more legally acceptable terms which prohibited courts from using foreign and international laws more generally (with some specific exceptions).

Critics of the bills across the United States maintained that the revised wording in the state bills simply provided a more nuanced cover for the pre-existing motivation to stoke Islamophobic sentiments and stir anti-Muslim prejudice. Some Republicans raised alarmist fears, such as Rick Santorum’s comment that “terrorism is a tactic, not an ideology. But this new existential threat to America, [Shari‘a] and its violent iteration jihadism, has yet to be adequately explained by our leaders”² and Newt Gin-

* Dr. Mustafa Baig is Research Fellow at the University of Exeter’s Institute of Arab and Islamic Studies.

1. *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012).

2. Pierre Tristam, *The Anti-Sharia Law Movement in the United States*, ABOUT.COM, <http://middleeast.about.com/od/religionsectarianism/a/sharia-law-movement.htm> (last visited Dec. 6, 2014).

grich's comment that "Shari'a is a mortal threat to the survival of freedom in the United States and in the world as we know it."³

Such alarmist fear mongering present in the narrative—whether deliberate or made out of ignorance—mischaracterizes Shari'a, both in regards to the topic under contention and the essence of Shari'a more broadly.⁴ These reductionist attitudes reflect complete disregard for the moral and philosophical underpinnings and ethical considerations of the Shari'a.⁵ The linguistic meaning of Shari'a ("pathway" or "path to a water hole") serves as a metaphor for its technical usage: just as water is essential for the vitality of human life, so is the Shari'a for wayfarers traversing the journey of life in this world. Muslims attempt to discover the dictates of Shari'a (the divine will of how they should live out their lives) through deep jurisprudential comprehension known as *fiqh*.⁶ Some aspects of this jurisprudence have been singled out in these controversies, and it is one such aspect—the Islamic jurisprudence concerning Muslims living in non-Muslim lands—which will be the focus of this paper. In addition, part of the impetus driving the analysis is the absence of any informed discussion among politicians and anti-Shari'a campaigners about what the Islamic legal tradition *actually* says on the topic.⁷

3. Abed Awad, *The True Story of Shari'a in American Courts*, THE NATION (July 2, 2012), <http://www.thenation.com/article/168378/true-story-Shari'a-american-courts#>.

4. For some underpinning points on power, discourse and narrative (and what could be argued as the historical roots of this narrative), see for example, Edward Said's introduction to *Orientalism*. EDWARD SAID, *ORIENTALISM* 1–28 (Penguin Books 2003) (1979) (and related works). For a refined application of Said's original thesis in a post-9/11 America, see HAMID DABASHI, *POST-ORIENTALISM: KNOWLEDGE AND POWER IN TIME OF TERROR* (2009). There is a burgeoning number of studies on Orientalism and citizenship and interesting parallels can be drawn to the demonization of the Muslim citizen of the United States. See Engin F. Isin, *Citizenship after Orientalism: Genealogical Investigations*, in *COMPARATIVE POLITICAL THOUGHT: THEORIZING PRACTICES* (Michael Freeden & Andrew Vincent eds., 2013); Engin F. Isin, *Citizenship Without Nations*, 30 ENV'T & PLAN. D: SOC'Y & SPACE (2012) (for race being an important constitutive factor in constructions of citizenship).

5. To visit some of the recent academic expositions on this, see for example, Wael B. Hallaq, *Groundwork of the Moral Law: A New Look at the Qur'an and the Genesis of Sharī'a*, 16 ISLAMIC LAW & SOC'Y 239, 239–79 (2009).

6. It is in this sense that I use the term Islamic law (or jurisprudence). For more discussions on Shari'a, *fiqh* and other related matters, see the introduction of Wael B. Hallaq, *SHARĪ'A: THEORY, PRACTICE, TRANSFORMATIONS* (2009) and Norman Calder, *Feqh*, *ENCYCLOPAEDIA IRANICA* 504–11 (1999), available at <http://www.iranicaonline.org/articles/feqh#article-tags-overlay>. Also useful is Robert Gleave's introduction in NORMAN CALDER, *ISLAMIC JURISPRUDENCE IN THE CLASSICAL ERA* (Colin Imber ed., 2010).

7. For more on Islamophobia and the anti-Shari'a movement in the United States, see Wajahat Ali et al., *Fear, Inc.: The Roots of the Islamophobia Network in America*, CENTER FOR AM. PROGRESS, (Aug. 26, 2011), <http://www.americanprogress.org/issues/religion/report/2011/08/26/10165/fear-inc/>. There have been a number of responses and rebuttals to the anti-Shari'a campaign in the United States from individuals and organizations (both Muslims and non-Muslims alike). For some shorter statements, see Alicia Gay, *ACLU Lens: The Truth Behind the Anti-Sharia Movement*, ACLU (Aug. 1, 2011),

In examining the Islamic jurisprudence of Muslims living under non-Muslim rule, I will begin by looking at the rudimentary issue of how Muslim jurists viewed the actuality of Muslim individuals living in non-Muslim jurisdictions. The ensuing question then, as discussed by jurists, is the relationship that a Muslim has to a Muslim polity, and the extent to which Islamic laws can be jurisdictionally extended and applied (if it all) to Muslims living beyond the jurisdiction of Muslim territory (*Dār al-Islām*). The third section addresses that question by looking at the guidance that Muslim jurists give to Muslims living in non-Muslim lands, in terms of how they should organize their own legal affairs independent from Muslim sovereignty. Particular attention is given to the appointment of Muslim judges in non-Muslim lands.

For purposes of remaining within the natural constraints of the essay, and also to provide readers with the authoritative weight of the tradition, my focus is largely on the pre-modern Islamic legal tradition (specifically the Sunni tradition).⁸ Part of the concluding comments will outline the adaptability of the Islamic juristic tradition with the actual interaction of “Shari‘a” with the contemporary American legal system.

I. MUSLIM MIGRATION (*HIJRA*) AND LIVING UNDER NON-MUSLIM JURISDICTION

There are two main precedents from the Qur’an and Prophetic practice/*Sunna* (the two primary sources of Islamic law) relating to emigration. The first precedent concerns the persecution of the early followers of the Prophet, especially those of poorer classes. When the Prophet saw the affliction of his Companions (*Ṣaḥāba*) intensify, he said to them, “If you were to go to Abyssinia (it would be better for you), for the king will not tolerate injustice and it is a friendly country, until such time as Allah shall

<https://www.aclu.org/blog/national-security-religion-belief/aclu-lens-truth-behind-anti-sharia-movement>; Usha Nellore, *The So-Called Anti-Sharia Law Movement: A Chilling Example of the Paranoid Style in American Politics*, BALTIMORE SUN (Aug. 28, 2011),

http://articles.baltimoresun.com/2011-08-28/news/bs-ed-sharia-law-20110828_1_anti-sharia-sharia-law-paranoid-style; *The Anti-Sharia Campaign*, JEWS AGAINST ISLAMOPHOBIA,

<http://www.jewssagainstislamophobia.org/wp-content/uploads/2011/09/Anti-Sharia-campaign.pdf> (last visited Dec. 10, 2014); Jesse Yurow, *Anti-Sharia Legislation*, JEWISH VOICE FOR PEACE (Nov. 6, 2014), <http://jewishvoiceforpeace.org/blog/national-anti-sharia-legislation> (includes a number of useful links here); and *Rabbis & Synagogues Standing against Islamophobia*, JEWISH VOICE FOR PEACE (Nov. 5, 2014), <http://jewishvoiceforpeace.org/blog/rabbis-synagogues-standing-against-islamophobia>. There are similar “anti-Shari‘a” trends in Canada and some European countries, although anti-Shari‘a campaigns have not been as organized nor have they had the same impact in Europe.

8. That is within the four schools of Sunni jurisprudence, namely Ḥanafī, Mālikī, Shāfi‘ī and Ḥanbalī. Much of the focus will be on the Ḥanafī School (the largest of the four) for reasons that will become apparent later.

relieve you from your distress.”⁹ Upon arrival, the Muslims engaged themselves in acts of worship and piety, living peacefully among their host community. After some time, news had spread that the Meccan population had converted to Islam. So some Companions of the Prophet returned to Mecca, only to find that the news was untrue. Some Companions returned again to Abyssinia, while others attempted and failed to conceal themselves. When they were found, they were persecuted and tortured more than before. Hence, the Prophet again ordered them to leave for Abyssinia.¹⁰

In this first instance of migration, Muslims exercised self-exile in order to avoid persecution. But the next migration to take place was of a different nature. It was not voluntary as it was in the previous case but obligatory, and the order to emigrate to Medina (known as Yathrib at the time) was not only for a few Muslims, but for almost the entire Muslim population of Mecca. A summarized description of the events is as follows: members of the Aws and Khazraj tribes of Medina (who, although idolaters, kept close company with the Jews of Medina) converted to Islam through visits to Medina where they heard verses of the Qur’an recited to them by the Prophet, and through an emissary sent to them from Mecca. The new Muslim community in Medina invited the Prophet there, taking an oath that they would protect him with their lives. As Medina established itself as a safe haven for Islam and Muslims, the Prophet permitted his Companions to migrate to Medina. Gradually, all migrated except those who were either imprisoned or did not have the financial means to do so.

In the year 622 (26th day of the Islamic month of Safar), the Prophet left for Mecca. This event marks the beginning of the Islamic calendar and the obligation on all the Companions to emigrate.¹¹ There are numerous verses in the Qur’an that discuss the *hijra* and extol the virtues of those that migrate(d).¹² Although it is not a like-for-like precedent, as the migration

9. MUHAMMAD IBN ISHĀQ, *SĪRAT RASŪL ALLAH* 146 (A. Guillaume trans., Oxford University Press 2001). Negus (Arabic: al-Najāshī), the king of Abyssinia was a devout Christian and a great scholar of the revealed scriptures. He was recognized for his justice and tolerance. Aṣḥama Ibn Abjar (his proper name) later converted to Islam and died in 9 AH.

10. I MUHAMMAD AL-ZARQĀNĪ, *SHARḤ AL-MAWĀHIB AL-LADUNĪYA BI’L-MINAḤ AL-MUḤAMMADĪYA* 503–06 (1996) (Leb.); IBN ISHĀQ, *supra* note 9, at 148.

11. IBN ISHĀQ, *supra* note 9, at 198.

12. The one most frequently mentioned (known as the “*hijra* verse”) to determine the legal aspect of migration reads:

Verily, those who are given death by the angels while they were wronging themselves, the angels say to them: In what [plight] were you in? They reply: We were oppressed in the land. They say: Was not the earth of Allah spacious enough for you to emigrate? Such people will find their abode in Hell - what an evil refuge! Except the weak among men, women and children who have no means in their power nor have guidance to a way [to the land of migration]. For these, Allah will pardon them for Allah is most Pardoning and Forgiving. Whosoever em-

that took place was from a non-Muslim land to another non-Muslim land (Mecca at the time being a non-Muslim land, as was Medina), jurists did, nevertheless, link the imperative to emigrate to Medina to the question of whether it was permissible to reside in non-Muslim lands, and it results from the fact that joining the Prophet in Medina meant the freedom to practice the Islamic faith without oppression.

Before looking at these legal discussions, it is important to comment on where these discussions are located in the works of Islamic jurisprudence. The subject of Muslim relations with non-Muslims in classical legal literature is primarily discussed under the heading of *siyar* (expeditions). Muslim jurists defined the subject of *siyar*, not only as “ways” of conduct of the warriors and what is incumbent on them and for “them,” but also as governing relations with a wide spectrum of groups ranging from unbelievers and apostates to those with whom treaties have been made.¹³ Some writers, aiming to find an analogous term, have rendered *siyar* into English as Islamic international law or the Islamic law of nations.¹⁴

Sometimes, the terms *siyar* and *jihad* are grouped together to form a heading. The impression that Muslim/non-Muslim relations are confined to military struggle seems to be confirmed by both the content and titles of this section of jurisprudence. The section has subsections that largely cover aspects of warfare, imamate (leadership in war), taxation, treaties, spoils of war, rebels and apostasy. Perhaps the reason such headings dominate the *kitāb*, or *bāb*, is that the early contact between Muslims and non-Muslims was largely by virtue of warfare, actual or potential. Hence, Muslim jurists bifurcated the world into two realms: *Dār al-Islam* (abode or territory of Islam) and *Dār al-Ḥarb* (territory of war), reflecting the historical reality of the time. This feeds the impression that jurists only discussed *jihad* and the relationship with non-Muslims in reference to military struggles against the enemy. Although the term *Dār al-Ḥarb* literally means “Abode of War,” it does not refer to a perpetual state of physical war, nor—as we shall see—does it preclude the possibility of peaceful Muslim abidance in non-Muslim territory. Furthermore, non-Muslim territory was sometimes designated as *dār al-muwāda‘a*, *ṣulḥ*, *hudna* (*muhādana*) or ‘*ahd* if *Dār al-Islam* had

igrates in the cause of Allah will find plenty and spacious refuge. And he who leaves his home emigrating toward Allah and His Messenger and death befalls him, then his reward is certain with Allah and Allah is most Forgiving and Merciful.

Qur’an, 4:97–100 (translations of Qur’anic verses are my own).

13. 10 ABŪ BAKR MUHAMMAD IBN AḤMAD AL-SARAKHṢĪ, *KITĀB AL-MABSŪṬ* 3 (n.d.) (Pak.).

14. See for example MAJID KHADDURI, *THE ISLAMIC LAW OF NATIONS: SHAYBANI’S SIYAR* (1966) and the Arabic edition by the same author MAJID KHADDURI, *AL-QĀNŪN AL-DAWLĪ AL-ISLĀMĪ: KITĀB AL-SIYAR LI’L-SHAYBĀNĪ* (1975).

entered into a peace treaty or truce with *Dār al-Ḥarb*.¹⁵ Muslim scholars viewed peace settlements as “jihad in meaning” because the purpose of jihad is to actualize peace and repel evil that result from continued hostilities, and this is what “serves the interests of Muslims.”¹⁶

Nonetheless, Abū Ḥanīfa (the eponym of the Ḥanafī School, d. 150/767) reportedly disapproved of Muslims residing in non-Muslim territories. Under the heading of “Muslims entering *Dār al-Ḥarb* with a security covenant (*amān*) for trade,” Abū Ḥanīfa’s opinion is relayed when he is asked by his pupil about marriage with People of the Book:¹⁷

I asked: What is your opinion of a Muslim who enters non-Muslim territory under an *amān* and marries from among the inhabitants of that territory who is from the People of the Book?

Abū Ḥanīfa replied: I disapprove of his doing so.

I asked: But if he marries, would such a marriage be valid?

He replied: Yes.

I asked: Then, why did you disapprove of it?

He replied: Because I disapprove of his living in it.¹⁸

Muhammad al-Shaybānī (d. 189/805)—who is among two of Abū Ḥanīfa’s most widely cited students—gives his opinion in regards to a person that converts to Islam in non-Muslim territory. He states that the duty to migrate to the land of Islam after conversion, according to the majority of scholars, was abrogated at the time of the Prophet in Medina. In support of that assertion, he cites the narration of the Prophet: “There is no migration [required] after the conquest of Mecca.”¹⁹

The renowned Transoxanian Ḥanafī jurist and redactor of al-Shaybānī, al-Sarakhsī (referred to as *shams al-a’imma*, or “sun of the leading schol-

15. Such an agreement and recognition by the Muslim land of these regions was sometimes in return for a tributary tax (*jizya*), exercising a type of suzerainty over them (although, according to prominent jurists, wealth should only be taken when the Muslims are in a state of need). The default position, however, was that they were *Dār al-Ḥarb* (and these terms are often used in conjunction with and understood as derivatives of *Dār al-Ḥarb*). *Dār al-Kufr* (abode of non-belief) and *Dār al-Ḥarb* are used interchangeably but sometimes *Dār al-Kufr* is distinguished from *Dār al-Ḥarb* as simply a land of non-Muslims as opposed to one hostile to Muslim lands (*muḥārib*). See *Qur’an*, 8:56–61. Some modern Muslim reformers advocate the reconceptualizing of these categories to reflect their perception of the modern world order. Also see KHADDURI, *supra* note 14 (translator’s introduction); Mohammed Fadel, *History of Islamic International Law*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT’L L. (2010), available at http://www.law.utoronto.ca/documents/Fadel/Max_Planck_Final.pdf.

16. 2 BURHĀN AL-DĪN ABŪ AL-ḤASAN ‘ALĪ AL-MARGHĪNĀNĪ, AL-HIDĀYA SHARḤ BIDĀYAT AL-MUBTADĪ 138-139 (n.d.) (Egypt).

17. People of the Book (*Ahl al-Kitāb*) refers to Jews and Christians (or those that have belief in divine scripture).

18. MUHAMMAD IBN AL-ḤASAN AL-SHAYBĀNĪ, AL-QANŪN AL-DAWLĪ AL-ISLĀMĪ: KITĀB AL-SIYAR LI’L-SHAYBĀNĪ 191 (M. Khadduri ed., 1975).

19. Mentioned in a number of places in all major collections under the chapters of Pilgrimage, Jihad, *Siyyar* and Expeditions of the Prophet (*Maghāzī*).

ars” (d. 499/1106)), commenting al-Shaybānī’s opinion, stated that the migration was obligated in the Qur’anic verse (cited above) because the Muslims were living under oppression and the obligation would continue to the Day of Judgment if such a cause (*sabab*) is found. On the other hand, if such a *sabab* is not found, and Muslims can live honorably, then the obligation to migrate is lifted. Hence, the majority of scholars conceived *hijra* as ending with the conquest of Mecca in accordance to the Hadith²⁰—that “there is no *hijra* after the conquest.”²¹ Similarly, the great Egyptian traditionalist and jurist, Badr al-Dīn al-‘Aynī (d. 855/1453), commenting on the Hadith, mentions that Muslims fled with their religion towards Allah and His Messenger for fear of enticement away from Islam, and in his time (already), he noted, Muslims are able to worship their Lord wherever they desire.²² As well as the Prophetic narration, the Ḥanafī jurists looked at the operative cause (*illa*) in the obligation to migrate away from non-Muslim lands. Although Abū Ḥanīfa’s opinion does not contradict that of his followers, if one did attempt to reconcile any apparent difference, one could argue that Abū Ḥanīfa’s opinion considered the question of Muslims residing in non-Muslim lands with the operative cause in place. Later scholars clarified and elaborated his view by mentioning that if Muslims did not find themselves being oppressed or persecuted, then they could remain in non-Muslim territory.

One should also bear in mind that Abū Ḥanīfa merely disapproved of Muslims living in non-Muslim lands—he did not *forbid* it. Other scholars elaborated on the implicit concern in Abū Ḥanīfa’s statement as to whether or not it was possible for Muslims living in non-Muslim lands to carry out their religious duties. Moreover, this conceptual continuity was expressed by the late Ḥanafī scholar (and exegete) from India, Na‘īm al-Dīn Murādābādī (d. 1948/1367), as he commented on the verse of obligation that “if a Muslim is residing in a land where he is unable to perform his religious obligations (*farā’id*), and is aware of a land where he can practice his faith, then it is obligatory (*wājib*) that he performs migration to that land.”²³ The important condition of having knowledge of a land where he can practice his faith without difficulty is added.

20. Transmitted reports of Prophetic practice/sayings (*Sunna*).

21. 1 MUHAMMAD IBN AḤMAD ABŪ BAKR AL-SARAKHSĪ, SHARḤ AL-SIYAR AL-KABĪR 271–72 (1958); 10 AL-SARAKHSĪ, *supra* note 13, at 8–9.

22. 15 BADR AL-DĪN ABŪ MUHAMMAD MAḤMŪD IBN AḤMAD AL-‘AYNĪ, ‘UMDAT AL-QĀRĪ SHARḤ ṢAḤĪḤ AL-BUKHĀRĪ 18 (2003) (Leb.).

23. NA‘ĪM AL-DĪN AL-MURĀDĀBĀDĪ, KHAZĀ’IN AL-‘IRFĀN FĪ TAFSĪR AL-QUR’ĀN 4:97 123 (n.d.) (Pak.) (known as *Ḥāshiyā Kanz al-‘Imān*, a marginalia on Aḥmad Riḍā (Razā) Khān al-Barēlwi al-Hindī’s translation of the Qur’an).

The Shāfi‘ī School seems to be unified in their position. Muhammad Ibn Idrīs al-Shāfi‘ī (d. 204/820) argued that, even after the establishment of the Islamic rule in Medina, ‘Abdullāh Ibn ‘Abbās and other Companions were allowed to reside in Mecca (then a non-Muslim territory). Additionally, the Prophet allowed nomadic tribes that converted to Islam to remain outside the domains of the lands of Islam. The Prophet, according to al-Shāfi‘ī, would not have given these people a choice of residence if it were sinful for them to retain their independence. Consequently, Muslims who convert in non-Muslim lands may reside there unless they fear enticement away from Islam.²⁴

Other Hadith narrations indicate that the Prophet forbade Muslims from living with non-Muslims. Abū Dāwūd, in his *Sunan* relates, “[W]hoever joins a polytheist and lives with him is like him.”²⁵ The narration could refer to Muslims residing in the dwellings of non-Muslims (as the pronouns used are all in the singular), but Abū Dāwūd’s placing of the narration under the heading “living in the lands of *shirk*” rules this out, at least according to him. A similar narration is mentioned by al-Tirmidhī (with plural pronouns) under the heading of “the disapproval [*karāhīya*] of residing among polytheists.”²⁶ Under the same heading, another report states, “I disavow myself of every Muslim who settles among the polytheists.”²⁷

There does seem to be some difference of opinion among the scholars in how these narrations should be interpreted. For example, Al-Khaṭṭābī (d. 388/988), an early Hadith commentator, reconciled the differences of opinion by arguing that *hijra* was actually meant to support and strengthen the *Dār al-Islām* in its nascent days. After the conquests, *Dār al-Islām* was so strong and established that migration was no longer required. The *hijra* would only be required again when the conditions so demanded.²⁸ Ibn Ḥajar al-‘Asqalānī (d. 852/1448)—among the foremost Hadith commentators and a jurist of the Shāfi‘ī school—analyzed the legality of Muslims

24. 4 ABŪ ‘ABDULLĀH MUHAMMAD IBN IDRĪS AL-SHĀFI‘Ī, AL-UMM 161 (Leb.); K. Abou El Fadl, *Islamic Law and Muslim Minorities*, in 1 ISLAMIC LAW AND SOCIETY 146–47 (Brill & Leiden 1994).

25. 3 ABŪ DĀWŪD SULAYMĀN IBN AL-ASH‘ATH, SUNAN 93 (n.d.) (Hadith report 2787).

26. 3 ABŪ ‘ĪSĀ MUHAMMAD IBN ‘ĪSĀ AL-TIRMIDHĪ, AL-JĀMĪ‘ 80–81 (1980) (Leb.) (Hadith report 1655). See also 2 ABŪ ‘ABDULLĀH AL-ḤĀKIM AL-NĪSHĀPŪRĪ, AL-MUSTADRAK 154 (2002) (Leb.) (Hadith report 2627).

27. 3 AL-TIRMIDHĪ, *supra* note 26, at 80 (Hadith report 1654); see also 3 IBN AL-ASH‘ATH, *supra* note 25 (Hadith report 2645).

28. See Muhammad Khalid Masud, *The Obligation to Migrate: The Doctrine of ‘Hijra’ in Islamic Law*, in MUSLIM TRAVELLERS, PILGRIMAGE, MIGRATION AND THE RELIGIOUS IMAGINATION 33 (Dale Eickelman and James Piscatori eds., Univ. of California Press 1990) (citing 6 IBN ḤAJAR AL-‘ASQALĀNĪ, FATḤ AL-BĀRĪ SHARḤ ṢAḤĪḤ AL-BAKHĀRĪ 378 (1959)).

residing in a non-Muslim land and discussed conditions that would permit them to reside there. He stated: (i) if a Muslim has the means to emigrate from non-Muslim lands, and it is not possible for him to manifest his faith nor can he perform his obligatory duties, then emigration from there is obligatory upon him; (ii) if he has the means to emigrate but it is possible for him to manifest his faith and perform his obligatory duties then it is preferable to emigrate so that he may strengthen and assist the Muslims, engage in jihad, and that he is secure from their deception and is at peace from seeing evil (*munkar*); (iii) he is unable to emigrate due to captivity or illness, for example, then he is permitted to reside there.²⁹

The Ḥanbalī scholar, Muwaffaq al-Dīn Ibn Qudāma (d. 620/1223), classifies the ruling on emigration into the same three categories. Again, he refers to the *hijra* verse cited above.³⁰

In looking at the Qur’anic verses, the Prophetic narrations, and the analyses of the jurists/Hadith scholars, the concept of *hijra* was understood to be linked to the freedom of worship and to strengthening the new Muslim community. The migration of the Prophet and his Companions took place *to* a land where Muslims could practice their religious rites unreservedly and *from* a land where they were persecuted for doing so. The juristic schools do not differ to any great extent with respect to this issue. In fact, the approach of the Ḥanafīs, Shāfi’īs and Ḥanbalīs is near identical. In terms of permanent residence in non-Muslim lands, the Shāfi’ī and Ḥanbalī view, that migration to Muslim lands is preferable, can be analogized with Abū Ḥanīfa’s view of disfavoring residence.

The Mālikī School, on the other hand, differed considerably with their counterparts. Mālik Ibn Anas (d. 179/795) strongly disapproved of Muslims even traveling to non-Islamic territory for purposes of trade, let alone for permanent residence. When one of Mālik’s students, Ibn al-Qāsim (d. 191/806), was asked by ‘Abd al-Salām Saḥnūn (d. 240/855) whether Mālik disapproved of merchants traveling to non-Muslim territory for the purpose of conducting business, Ibn al-Qāsim responded, “Yes, Mālik would disapprove of it strongly [*karāhīya shadīda*], and he used to say, ‘they should not go to their lands where they will become subject to the laws of polythe-

29. 6 AHMAD IBN ‘ALĪ IBN ḤAJAR AL-‘ASQALĀNĪ, FATḤ AL-BĀRĪ SHARḤ ṢAḤĪḤ AL-BUKHĀRĪ 209–10 (n.d.) (Egypt).

30. *Qur’an*, *supra* note 12; 8 MUWAFFAQ AL-DĪN ‘ABDULLĀH IBN MUHAMMAD IBN QUDĀMA, AL-MUGHNĪ 456–58 (1948) (Egypt). Ibn Ḥajar’s discussion (*supra* note 29) appears as a shortened (and slightly modified) version of Ibn Qudāma’s text. It may well be that Ibn Qudāma has embraced this from an early writer.

ism [*aḥkām al-shirk*].”³¹ Mālik’s view is the strictest, and seems to defy the social and historical practice of Muslim traders who, at the time, were traveling to non-Muslim lands in large numbers. As well as his concern for Muslims being subject to non-Muslim law in general, he is concerned more specifically with financial transactions being governed by non-Muslim rules (considering he is being asked about traders). Later Mālikī scholars, such as the Andalusian Ibn Rushd (d. 520/1126) and the North African al-Wansharīsī (d. 914/1508), continued to propagate the same position, albeit with some scholars taking limited exceptions.³²

II. MUSLIMS ENTERING *DĀR AL-HARB* UNDER A SECURITY COVENANT (*AMĀN*) FOR TRADE

Addressing Muslims in foreign lands as merchants was a particularly pertinent consideration for Muslim jurists, as trading was an important feature of Arab society even before the advent of Islam. Arab trade in the Malabar region of coastal India, South East Asia and East Asia is well-documented,³³ and those travels continued throughout the era of the Prophet and the early caliphate.³⁴ As such, trade naturally played an important

31. 10 ‘ABD AL-SALĀM IBN SA’ĪD SAḤNŪN, *AL-MUDAWWANA AL-KUBRĀ* 102 (1905) (Egypt). The fact that it is the opening passage in the chapter on “Travelling to the Enemy’s Land for Trade” is instructive of his attitude toward Muslims traveling to non-Muslims lands.

32. MUHAMMAD IBN AḤMAD IBN RUSHD, *KITĀB AL-MUQADDIMĀT AL-MUMAHHIDĀT* 611–12 (1970) (Iraq); 2 AḤMAD IBN YAḤYĀ AL-WANSHARĪSĪ, *AL-MI’YĀR AL-MU’RIB* 119–38 (1981) (Morocco). Also see 1 IBN ‘ABD AL-BARR AL-QURTUBĪ, *KITĀB AL-KĀFĪ FĪ FĪQH AHL AL-MADĪNA AL-MĀLIKĪ*, 370 (1980) (Saudi Arabia). There is some flexibility in the view of Abū Bakr Ibn al-‘Arabī (d. 543/1148). Some of these positions were, in part, driven by political circumstances on the ground. I intend to take up the views of Mālikī scholars in a future article.

33. Hermanus J. de Graff, *South-East Asian Islam to the Eighteenth Century*, in 2A *THE CAMBRIDGE HISTORY OF ISLAM* 123 (P. M. Holt, A. K. S. Lambton & B. Lewis eds., 1984); IRA LAPIDUS, *A HISTORY OF MUSLIM SOCIETIES* 383 (2002); JONATHAN N. LIPMAN, *FAMILIAR STRANGERS: A HISTORY OF MUSLIMS IN NORTHWEST CHINA* 24–31 (1997). Muslim merchants and political emissaries travelled as far as China during and after the caliphate of ‘Uthmān Ibn ‘Affān (24/644-35/656). Popular stories that the venerated Companion Sa’d Ibn Abī Waqqās (with some Companions) sailed to China from Abyssinia (whist in asylum) in 616 and later again leading an envoy in 650 (or other varying dates) are not corroborated by Muslim sources or Western historians. Similar can be said of the story of a supposed Companion named Mālik Ibn Dīnār entering Kerala in India and converting the king to Islam. Mālik Ibn Dīnār is actually a name of a person from the third generation of Muslims renowned for his knowledge and asceticism. Nevertheless, while the details surrounding Mālik Ibn Dīnār may be mythical, the conversion of an Indian king from that region has been linked to a Hadith (of questionable authenticity) in which the king gifted a jar of ginger pickle to the Prophet. 4 AL-ḤĀKIM, *supra* note 26 at 150 (Hadith report 7190). There is also mention in some biographical works of the Prophet (sīra).

34. Not to mention that the Prophet himself went on trade journeys before declaring his prophethood and married the successful merchant Khadīja who he married after successfully and honestly trading on her behalf. In one tradition, for example, the Prophet is reported to have said: “[The status of the] truthful, trustworthy merchant is among the Prophets, the truthful, and the martyrs.” 2 AL-TIRMIDHĪ, *supra* note 26 at 341–42 (Hadith report 1227). Other sources included slightly different

role in the propagation of Islam outside the Arabian Peninsula.³⁵ Thus, it is understandable why the earliest Islamic jurists addressed Muslim traders in non-Muslim lands. This socio-economic phenomenon required legal rules to deal with the various particulars, even if that entailed devising hypothetical (albeit, purposeful) scenarios comparable to the discourse adopted in other areas within jurisprudence. No independent heading was usually designated for the Muslim trader in legal texts.³⁶ Nevertheless, Muslim traders are mentioned in the discussion of *isti'mān* (claiming a security covenant), under the section of *siyar* (jihad), referring to a situation where a Muslim enters non-Muslim lands with a security covenant. This shows that one could in fact enter *Dār al-Ḥarb* in a peaceful state. Therefore, one cannot exclusively ascribe the connotation of war or belligerence to *Dār al-Ḥarb*.

The issue of Muslims entering non-Muslim lands for trade purposes is addressed in a renowned standard text (*matn*) of the Ḥanafī School, *al-Mukhtaṣar li'l-Qudūrī*, which summarizes the authoritative legal views of the School. It states the following: “If a Muslim enters *Dār al-Ḥarb* as a trader, it is not permitted for him to infringe on their property and life.”³⁷ In their commentaries on this statement, Burhān al-Dīn al-Marghīnānī (d. 593/1197) and Abū Bakr al-Yamānī (d. 800/1397) explain that this is because a Muslim is duty-bound to abide by the security covenant; any infringement after obtaining it is a violation of the law (*ghadar*), and violation of the law is forbidden (haram).³⁸ This is contrary to a prisoner of war, even one that is freed willingly, as he is not under a security covenant. Al-Marghīnānī also adds that, if the contract is contravened by the non-Muslim sovereign or by the consent of the sovereign, then he is no longer responsible for upholding the covenant.³⁹

In sum, Muslim jurists prohibited any kind of deceit in financial dealings or breaking of local law in *Dār al-Ḥarb*. Such rulings dismiss the notion that Islam only permits hostile relations to exist between Muslims and non-Muslims. Upon the obtaining of a security covenant (and paying mutu-

words (Truthful and Trustworthy were two honorific titles the Prophet himself earned before declaring Prophethood due to his dealings with the Arabs and conduct in trade).

35. See, e.g., 2 MAURICE LOMBARD, *THE GOLDEN AGE OF ISLAM* (Joan Spencer trans., North-Holland Medieval Translations 1975) (providing more information on trade in early Islam).

36. There are exceptions such as *al-Mudawwana* cited above. 3 IBN SA'ĪD SAḤNŪN, *supra* note 31. This may seem somewhat ironic given the Mālikī attitude toward Muslims trading in non-Muslim lands.

37. ABŪ AL-ḤASAN AḤMAD IBN MUHAMMAD AL-BAGHDĀDĪ AL-QUDŪRĪ, *AL-MUKHTAṢAR LI'L-QUDŪRĪ* 296 (n.d.) (Pak.).

38. 2 ABŪ BAKR IBN 'ALĪ AL-ḤADDĀD AL-YAMĀNĪ, *AL-JAWHARAT AL-NAYYIRA 'ALĀ MUKHTAṢAR AL-QUDŪRĪ* 373 (n.d.) (Pak.); 2 AL-MARGHĪNĀNĪ, *supra* note 16, at 152.

39. *Id.*

al observance to it), Islamic law does not allow a person to break any part of the law, let alone attack the property and persons living there.

It is interesting to note that al-Marghīnānī and other jurists allocate a separate subheading (*bāb*) for the *musta'min* (he who claims a security covenant) within the *Kitāb al-Siyar/Jihād*. This indicates that the jurists distinguished between the ways to enter non-Muslim lands (*Dār al-Ḥarb*): one way was through military expeditions, and the other was through peaceful means such as trade. Both types are discussed under *siyar/jihad*.⁴⁰ Later scholars have added other generic means of entry into the Abode of War, over and above trade, without specifying what these might be. For example, al-Maydānī, in his gloss on the al-Qudūrī text above, stated that, “[I]f a Muslim enters *Dār al-Ḥarb* by way of trade (or other means) it is not permitted for him to infringe on their property and life.”⁴¹ This suggests that al-Qudūrī was not intending to limit purposes of travel to trade only, or, from a legal-historical point of view, it perhaps indicates and acknowledges a diversification in reasons why Muslims were traveling to non-Muslim lands. In other words, “trade” is not a precluding qualification (*qayd ihtirāzī*) but an incidental one (*qayd ittifāqī/wāqī'ī*).

The obligation to uphold the security covenant is expressly mentioned by al-Māwardī (d. 448/972), who states that, “[a] Muslim who enters *Dār al-Ḥarb* with a security covenant or is taken captive but then freed and given a security covenant is not permitted to attack them or their property, and has to guarantee them quarter.”⁴² Al-Māwardī states this without mentioning any difference among the four schools of law, pointing towards unanimity among the established schools on this issue.⁴³ It is worth mentioning here that, in contrast to the Ḥanafī texts, Mālikī texts after *al-Mudawwana* appear to devote less attention to the case of a person claiming a security covenant or a Muslim trader in non-Muslim lands. This is probably because the Mālikī School was much more reluctant to permit Muslims to travel to non-Muslim lands in the first place.⁴⁴ However, the agreement of the jurists, if such a contract is made, still stands.

40. The inverse case of a non-Muslim *musta'min* entering Muslim territory is also discussed under this section, again signifying the provision in the law of a means of peaceful existence between Muslims and non-Muslims.

41. 4 'ABD AL-GHANĪ AL-MAYDĀNĪ, *AL-LUBĀB FĪ SHARḤ AL-KITĀB* 134–35 (n.d.) (Leb.). The words in parentheses are Maydānī's own words.

42. ABŪ AL-ḤASAN 'ALĪ IBN MUHAMMAD AL-MĀWARDĪ, *AL-AḤKĀM AL-SULTĀNĪYA* 141 (1973) (Egypt).

43. *Id.* Al-Māwardī (a Shāfi'ī jurist), in his book on the regulations of governance, mentions difference of opinion among the jurists if any exists. Here he only mentions Dāwūd (founder of the minority, now extinct, Zāhirī School) as the only person to differ.

44. *Id.*

III. THE JURISDICTION OF *DĀR AL-ISLĀM* (THE ABODE OF ISLAM) IN NON-MUSLIM TERRITORY

Given the obligation to abide by the security covenant, the jurists then had to address what type of law should apply if a Muslim contravened the law of the land. Essentially, this is a type of choice-of-law question. And in Islamic law, it involved defining the extent of *Dār al-Islām*'s territorial jurisdiction. The Ḥanafīs hold that Muslim jurisdiction cannot extend to non-Muslim territory. Abū Ḥanīfa is reported to have responded to the question of crimes committed in non-Muslim territory and which system of punishment is applicable in the following conversation:

I said: What is your opinion about this, that someone who goes in amongst them [in *Dār al-Ḥarb*] with a security covenant, and if then kills one of their men in *Dār al-Ḥarb*, or seizes property or a slave and takes it to *Dār al-Islām*, then the inhabitants of [*Dār al-*] *Ḥarb* convert to Islam or become a Protected Community [*dhimma*],⁴⁵ would you return to them any of what this [person] took, or is there any liability for any of [the victim's] wealth or blood?

He said: No.

I said: Why?

He said: Because he carried out this act in *Dār al-Ḥarb*, where rules for Muslims are not applicable.

I said: Would you disapprove of this [action] of the man?

He said: Yes—I would disapprove of it for him on the grounds of his religion to act perfidiously towards them.⁴⁶

Behind this discussion lies a larger concept of the inviolability and protection of life and property. The Ḥanafī jurists discussed the issue of a Muslim in non-Muslim lands who loans money or property (on credit) to a non-Muslim or is loaned something by a non-Muslim. If the two return to *Dār al-Islām*, and one of them files a suit against the other in an Islamic court, then the Islamic sovereign (*ḥākim* or *qāḍī*) will not decree anything in this regard. The same applies if one embezzles the property of the other (*ghaṣb*).⁴⁷ The jurists maintain that *wilāya*, or jurisdiction, is a requisite for

45. *Ahl al-Dhimma* are non-Muslim subjects of *Dār al-Islām* whose safety and protection is the responsibility of the sovereign in return for paying *jizya* (tributary tax).

46. AL-SHAYBĀNĪ, *supra* note 18, at 194.

47. 2 AL-MARGHĪNĀNĪ, *BIDĀYAT AL-MUBTADĪ* 153 (n.d.) (Egypt) (printed with its commentary *al-Hidāya* by the same author *supra* note 16. Although *al-Hidāya* is a commentary on his own work, *Bidāyat al-Mubtadī*, it is practically a commentary on al-Qudūrī's *Mukhtaṣar* (Epitome) but with a limited number of changes and additions to the original included from *al-Jāmi' al-Saghīr* of al-Shaybānī (or from elsewhere if necessary). See MUHAMMAD 'ABD AL-ḤAYY AL-LAKHNAWĪ, AL-FAWĀ'ID AL-BAḤIYA FĪ TARĀJIM AL-ḤANAFIYA 140 (Leb.) (although I have added some observations of my own here). Interestingly, this passage is not found in al-Qudūrī's text but al-Marghīnānī has added it in his own *Mukhtaṣar* because he must have considered its inclusion important. 1 'ABDULLĀH

the enforcement of a decree.⁴⁸ In this case, the judge did not have jurisdiction at the time the debt took place (*lā wilāyata waqt al-iddāna aṣl^{an}*)⁴⁹ as the *qāḍī* is not able to adjudicate on those who are in *Dār al-Ḥarb*.⁵⁰ The jurists also add that, at the time of adjudication (*qaḍā'*), the judge does not hold jurisdiction over the non-Muslim since the individual had not committed himself to the jurisdiction of Islam in the past (*maḍā*), when the act had been carried out, but rather had committed himself to what will take place in the future (*mustaqbal*).⁵¹ Nevertheless, the *qāḍī* will issue a fatwa to the Muslim, stating that the property owed or embezzled should be returned; this is not a legally binding decree that will enforce the return of property but rather a verdict that states his religious obligation to abide by the *amān*.⁵² Kamāl al-Dīn Ibn al-Humām (d. 861/1457) adds that although the state will not enforce the return of the property, the fatwa will state that it is obligatory (*wājib*) to return it, as the matter remains between him and God.⁵³ Here, we see the difference between a legal obligation (in terms of a state injunction) and a religious and moral obligation to return the property.

On the issue of owed property, the same ruling is given if two non-Muslims from non-Muslim territory file a case in *Dār al-Islām*. This is due

IBN AḤMAD IBN MAḤMŪD AL-NASAḤĪ, KANZ AL-DAQĀ'IQ 593–94 (2004) (Pak.); 6 MUHAMMAD IBN 'ABDULLĀH AL-TAMARTĀSHĪ, TANWĪR AL-ABSĀR 276 (2003) (Leb.) (printed with its commentary 6 MUHAMMAD 'ALĀ AL-DĪN AL-ḤASKAFĪ, DURR AL-MUKHTĀR SHARḤ TANWĪR AL-ABSĀR (2003) (Leb.) and supercommentary 6 SAYYID MUHAMMAD AMĪN IBN 'ĀBIDĪN, RADD AL-MUḤTĀR 'ALĀ DURR AL-MUKHTĀR SHARḤ TANWĪR AL-ABSĀR (2003) (Leb.) (al-Qudūrī's *Mukhtaṣar* and al-NasaḤī's *Kanz al-Daqā'iq* are counted among the four key foundational primers (*mutūn*) of the Ḥanafī School. *Tanwīr al-Aḥṣār* occupies a parallel position to them, incorporating issues addressed by later scholars); 2 SHAYKH NIẒĀM ET AL., AL-FATĀWĀ AL-HINDIYA 257 (2000) (Leb.) (compiled by around 400 scholars under the supervision of Shaykh NiẒām Burhānpūrī and known as FATĀWĀ 'ĀLAMGĪRĪ in the Indian Subcontinent, after the Mughal emperor Aurangzeb Alamgir (d. 1118/1707), who commissioned its compilation).

48. In the words of al-Marghīnānī and Zayn al-Dīn (or Zayn al-'Ābidīn) Ibn Ibrāhīm Ibn Muhammad Ibn Nujaym: "*li-anna al-qaḍā'a ya tamidu al-wilāya*"; 2 AL-MARGHĪNĀNĪ, *supra* note 16, at 153; 5 IBN NUJAYM, AL-BAḤR AL-RĀ'IQ SHARḤ KANZ AL-DAQĀ'IQ 168 (1998) (India). Fakhr al-Dīn al-Zayla'ī states "*anna al-qaḍā'a yastad'ī al-wilāya wa ya tamidu-hā*." 4 AL-ZAYLA'Ī, TABYĪN AL-ḤAQĀ'IQ SHARḤ KANZ AL-DAQĀ'IQ 135 (2000) (Leb.). Badr al-Dīn al-'Aynī states: "*lā qaḍā'a bi-dūn al-wilāya la-nā 'alā ahl al-ḥarb*."

49. 2 AL-MARGHĪNĀNĪ, *supra* note 16, at 153; 5 IBN NUJAYM, *supra* note 48; 4 AL-ZAYLA'Ī, *supra* note 48; 6 IBN 'ĀBIDĪN, *supra* note 47, at 276.

50. 4 AL-ZAYLA'Ī, *supra* note 48; 6 IBN 'ĀBIDĪN, *supra* note 47. If there is a peace treaty with a particular non-Muslim land then it is possible for some form of discretionary punishment (*ta'zīr*) to be carried if the specifics of the treaty lay this out.

51. 7 AL-'AYNĪ, *supra* note 48, at 203–04; 2 AL-MARGHĪNĀNĪ, *supra* note 16, at 153; 4 AL-ZAYLA'Ī, *supra* note 48, at 135–36; 6 IBN 'ĀBIDĪN, *supra* note 47; 5 IBN NUJAYM, *supra* note 48.

52. 7 AL-'AYNĪ, *supra* note 48, at 204 (al-'Aynī mentions that *mustaqbal* is in opposition to actions committed in *Dār al-Islām*); 6 AL-ḤASKAFĪ, DURR AL-MUKHTĀR SHARḤ TANWĪR AL-ABSĀR 277; 2 AL-MARGHĪNĀNĪ, *supra* note 16, at 153; 6 IBN 'ĀBIDĪN, *supra* note 47.

53. 6 KAMĀL AL-DĪN MUHAMMAD IBN AL-HUMĀM, FATḤ AL-QADĪR SHARḤ AL-HIDĀYA 17–18 (2003); 5 IBN NUJAYM, *supra* note 48, at 169.

to the aforementioned reason of committing to Islamic rulings in the future (*iltazama aḥkām al-islām fī'l-mustaqbal*).⁵⁴ The issue is somewhat different if both parties are non-Muslims but convert to Islam and enter *Dār al-Islām*; in that case, the judge will decree that the property owed must be returned. Here, the jurists look at the concept of *iltizām* (commitment) again, and hold that in this case the occurrence of the debt is valid jurisdictionally as the act took place with the agreement of both parties accepting and submitting to the laws of Islam. Hence, the jurisdiction required for the *qāḍī* to adjudicate is established at the time of pronouncing the decree as both had committed (*iltizām*) themselves to the laws of Islam.⁵⁵

Along with misappropriated property, the issue of murder is also mentioned in the interlocution with Abū Ḥanīfa cited earlier. Expounding on this, the jurists give the following details: if a Muslim *musta'min* (in non-Muslim territory) takes the life of another Muslim *musta'min*, whether it is by murder ('*amad^{mn}*') or by manslaughter (*khaṭa^{mn}*), in both cases it would be obligatory to pay the blood money (*dīya*) from his personal wealth. In the case of manslaughter, an expiatory act (*kaffāra*) is also required. The sentence is different from what one could face in *Dār al-Islām*, wherein, retaliatory slaughter (*qawd/qiṣāṣ*) can be applied for murder. For manslaughter, blood money must be paid by the tribal group ('*āqila*,).⁵⁶ This is because, in *Dār al-Islām*, the family/tribal group is held partly responsible for the crime, as they are required to know the perpetrator's whereabouts and restrain him from committing such an act. With a change in territory (*tabāyun al-darayan*), however, the tribal group cannot be held responsible for a crime that a member committed in another land.⁵⁷

54. The same applies if a Muslim embezzles the property of a non-Muslim who then converts to Islam and files a case in *Dār al-Islām*; i.e. a fatwa will be issued but not a court decree.

55. 2 AL-MARGHĪNĀNĪ, *supra* note 16, at 153; 5 IBN NUJAYM, *supra* note 48, at 169; 4 AL-ZAYLA'Ī, *supra* note 48, at 136–37; 6 IBN 'ĀBIDĪN, *supra* note 47. There are some further details on the issue of embezzled property (*ghaṣab*) but it is not necessary to provide them all here. One can compare these notions with the “submission rule”, “choice of jurisdiction rule” and “special jurisdiction rules” of the European Union Brussels Regulation. Council Regulation 44/2001, art. 5(1), 5(3), 23–24 2000 O.J. (L 12) 1 (EC), available at

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF>. See also Mark Rosen, *Choice of Law as Non Constitutional Federal Law*, MINN. L. REV. (forthcoming 2015).

56. '*Āqila* refers to the male relatives of the perpetrator responsible for paying the bloodwite. For the Ḥanafīs, it includes soldiers of the same regiment or traders of the same market (or wherever else solidarity can be established). See *Kitāb al-Jināyāt* in the sources *supra* note 55. For a general account of Islamic criminal law and its application in different contexts see RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY (2005).

57. 2 AL-MARGHĪNĀNĪ, *supra* note 16, at 153; 6 IBN AL-HUMĀM, *supra* note 53, at 19–20; 7 AL-'AYNĪ, *supra* note 48, at 205; 5 IBN NUJAYM, *supra* note 48, at 169; 4 AL-ZAYLA'Ī, *supra* note 48, at 137; 6 IBN 'ĀBIDĪN, *supra* note 47, at 277–78.

Ḥanafīs do not, however, excuse the expiatory act because the Qur’anic verse pertaining to manslaughter (which states “[w]hoever kills another believer must free a believing slave”)⁵⁸ is without restriction (*muṭlaq*). Hence, the ruling of expiation would apply irrespective of location—whether it is *Dār al-Islām* or *Dār al-Ḥarb*. As for the blood money, the jurists assert that a Muslim maintains the protection and inviolability of his life if he enters non-Muslim territory with a security covenant, because the inviolability here (even if to a lesser extent) is established from the protection of *Dār al-Islām* (*li-anna al-‘iṣmata al-thābita bi’l-iḥrāz bi-dār al-islām*). Retaliatory slaughter, however, is impossible to execute unless the state has the power to do so. This can only exist with a Muslim sovereign (imam/caliph) in place who rules over Muslim subjects. Because this is not the case with *Dār al-Ḥarb* (non-Muslim land), the ruling of retaliatory slaughter cannot be applied.⁵⁹ Some of the jurists emphasize the point of jurisdiction again, paralleling this to the fact that *ḥadd* punishments⁶⁰ are nullified in the case of adultery and theft in the absence of Muslim sovereignty.⁶¹

If the case involves two Muslim prisoners in *Dār al-Ḥarb*, and one takes the life of the other, or if a Muslim trader (i.e. with a security covenant) takes the life of a Muslim prisoner, then the murderer will not be punished except that an expiatory act would be required in the case of manslaughter. The same ruling is given if a Muslim kills another Muslim who converted to Islam in non-Muslim territory.⁶²

In the above cases, the emphasis that the Ḥanafī School places on territory and jurisdiction is readily observable. An important concept of the inviolability (*‘iṣma*) of life and property is highlighted in the juristic discussion of Islam in non-Muslim territory. The other schools and also Abū Yūsuf (d. 182/798, who is one of Abū Ḥanīfa’s two most prominent students), while not entirely rejecting territorial jurisdiction and inviolability, give far less significance to its effect in non-Muslim lands. They argue that

58. *Qur’an*, 4:92.

59. See *supra* note 57.

60. *Ḥadd*, pl. *ḥudūd* (lit. “limits”) are the restrictive ordinances or statutes of God that have fixed punishments in the Shari’a. They are illicit intercourse (punishable by death by stoning or one hundred lashes), making an unproven accusation of intercourse/defamation (eighty lashes), drinking wine (forty or eighty lashes), theft (amputation of the hand/limbs), highway robbery (death by crucifixion or sword if it includes murder, otherwise the same punishment as theft applies). Each has very a specific definition that determines whether a crime constitutes a *ḥadd* and there are strict evidentiary requirements also. See PETERS, *supra* note 56, at 53–64.

61. 6 IBN ‘ĀBIDĪN, *supra* note 47.

62. 7 AL-‘AYNĪ, *supra* note 48, at 206; 2 AL-MARGHĪNĀNĪ, *supra* note 16, at 153; 1 AL-NASAFĪ, *supra* note 47, at 595; 4 AL-ZAYLA‘Ī, *supra* note 48, at 138–39; 6 IBN AL-HUMĀM, *supra* note 53, at 20; 5 IBN NUJAYM, *supra* note 48, at 169–170.

the laws of God and His Messenger apply to Muslims in absolute terms, irrespective of place (*dār/makān*) and time.⁶³ In the aforementioned case, where the Muslim with a security covenant kills another Muslim with the same territorial status, those schools state that retaliatory slaughter is obligatory in the case of murder (*‘amad*). Al-Shāfi‘ī, for example, maintained that there should be no distinction between the punishment for a Muslim killed in Muslim territory or non-Muslim territory.⁶⁴ The Ḥanafīs, however, state that inviolability stems from territory, not from religion (*al-ihrāz bi’l-dār lā bi’l-dīn*). They do, nevertheless, split the inviolability into two categories: (i) *al-‘iṣma al-muqawwima*, which is tied to territory; and (ii) *al-‘iṣma al-mu’aththima*, which is tied to religion.⁶⁵ So, when Abū Ḥanīfa states that there is nothing due on a Muslim trader that kills a prisoner or a Muslim convert, it is because the inviolability of life and property that was previously available to him in *Dār al-Islām* has been waived upon entering non-Muslim territory. However, the religious inviolability is not waived as long as he is a Muslim, meaning that the sin (*ithm*) remains for committing the crime and contravening the covenant of security, even though the Islamic punishment does not (*muqawwima*).⁶⁶ Thus, the Ḥanafīs differentiate between legal obligation that is connected with *Dār al-Islām* and moral obligation that is connected with Islam.

The above discussion on the jurisdiction of *Dār al-Islām* demonstrates the complexity involved if someone violates the security covenant. One matter of particular importance understood from the above juristic discourse is that Muslim jurists envisaged Muslims sojourning to non-Islamic territory for temporary periods only. When looking at the case of a Muslim with a security covenant who murders another Muslim with a security covenant, a reason for maintaining the penalty of blood money is because the jurists treated his visit to non-Muslim lands as temporary, with the idea that he would return back to his homeland in the not-too-distant future. This can be discerned from al-Marghīnānī’s use of the word “*‘arīḍ*,” (contingency) indicating a temporary cause for visiting non-Muslim territory.⁶⁷ This

63. For al-Shāfi‘ī’s view, see 7 AL-SHĀFI‘Ī, *supra* note 24, at 354–55. For the view of Mālik, see 16 SAHNŪN, *supra* note 31, at 91. For the Ḥanbalī position, see IBN QUDĀMA, *supra* note 30, at 218, 473–74. All three discuss the application of Islamic punishments (*hudūd* and *qisās*) for infractions of criminal law. Note that the schools differ on whether (and which) punishments can be applied if the imam or army chief (vested with authority) is present among an army in a non-Muslim land.

64. 6 ‘Alā’ AL-DĪN ABŪ BAKR AL-KĀSĀNĪ, BADĀ’Ī’ AL-SANĀ’Ī FĪ TARTĪB AL-SHARĀ’Ī’ 69 (1998) (India).

65. AL-SARAKHSĪ, *supra* note 13, at 62; 7 AL-‘AYNĪ, *supra* note 48, at 205; 4 AL-ZAYLA‘Ī, *supra* note 48, at 138–39; 6 IBN ‘ĀBĪDĪN, *supra* note 47, at 278.

66. *Id.*

67. 2 AL-MARGHĪNĀNĪ, *supra* note 16, at 153.

would also explain why they often addressed Muslims in *Dār al-Ḥarb* as traders. Hence, some jurists mentioned that since there is an intention of returning to *Dār al-Islām*, it is supposed (*taqdīr^{am}*) that he was in Dar al-Islam because that is his permanent residence. *Dār al-Islām* is then able to fulfill some of its obligations to the murdered person.⁶⁸ The jurists did not discuss the case of a Muslim who does not enter non-Muslim territory for temporary purposes, but is rather a permanent resident in non-Muslim lands.⁶⁹ One can only presume that because he has no legal connection with *Dār al-Islām*, the Islamic state would not be able to apply any of its rulings for crimes committed outside of *Dār al-Islām*,⁷⁰ as the protection it offers to the life and property of Muslims would not exist.

IV. INDEPENDENT ISLAMIC JURISDICTION IN NON-MUSLIM LANDS AND APPOINTING JUDGES

Many of these principles form the basis for spreading rulings across other sections of Islamic jurisprudence outside the section on *siyar* and *jihad*. In financial law, for example, the Ḥanafīs—who are the specific focus of this section—hold that transactions that are otherwise prohibited (*al-‘uqūd al-fāsida*) in *Dār al-Islām* become permissible in *Dār al-Ḥarb*. In standard Ḥanafī texts, one can find a ruling (based on a prophetic tradition) which states, “There is no usury between a Muslim and a non-Muslim in *Dār al-Ḥarb*.” This is because a Muslim sovereign cannot extend extra-territorial protection to those living outside *Dār al-Islām*; hence, their property is violable and unprotected (*mubāḥ* and *ghayr mahfūz*).⁷¹

In the section on judiciary in Islamic jurisprudence (*Kitāb al-Qaḍā’/Adab al-Qāḍī*), Muslim scholars have also discussed independent jurisdiction within non-Muslim territory. That is, Muslim scholars have also elaborated on how jurisdiction is established and forms within non-Muslim lands (rather than the extension of *Dār al-Islām*’s jurisdiction in *Dār al-Ḥarb*, which was described in the previous section). For example, Ḥanafī jurists addressed the question of appointing Muslim judges in non-Muslim lands and the judicial authority that would be vested in them. A dictate from a standard Ḥanafī manual of jurisprudence (*matn*) states that

68. 7 AL-‘AYNĪ, *supra* note 48, at 205.

69. *Id.*

70. Apart from the Muslim having to offer an expiatory act, as this is not dependent on territory but rather an absolute verse of the Qur’an as mentioned earlier, the same expiatory is required for intentional breaking of the fast, breaking an oath, etc., irrespective of territory.

71. See, e.g., 3 AL-MARGHĪNĀNĪ, *supra* note 16, at 66. For an analysis in English, see also Mustafā R. K. Baig, A Fatwa on Usury in the Context of British Society (2005) (unpublished M.A. dissertation, University of Manchester) (on file with author).

“[i]t is permissible to accept the position of *qaḍā'* from a just or tyrannical ruler.”⁷² From this short statement, a discussion among jurists emerges with respect to a particular part of this legal rule. The characteristics of a just (*‘ādil*) ruler were quite straightforward, but the definition of a tyrant, or “*jā'ir*,” was more complex.

The permissibility of a tyrannical ruler to appoint judges is first exemplified by citing a precedent of the sultanate of Mu‘āwīya Ibn Abī Sufyān (d. 60/680) over parts of the Islamic empire.⁷³ In it, the Companions (*Ṣaḥāba*) of the Prophet and their successors (*tābi‘ūn*) accepted judicial positions during his tyrannical reign, to go along with the early generations of Muslims accepting such posts in the reign of al-Ḥajjāj Ibn Yūsuf (d. 95/714).⁷⁴ A very interesting dimension is added by some jurists in their exploration of the term *jā'ir*. ‘Alā’ al-Dīn al-Ḥaskafī (d. 1088/1677), citing earlier scholars such as Miskīn (d. 907/1501-2), states that the term can also be extended to a non-Muslim.⁷⁵ Looking at Miskīn’s original passage, he takes a linguistic view of the term, in that it refers to a tyrant in the “absolute sense” (*zālim muṭlaq^{an}*)—regardless of whether the tyrant is a Muslim or a non-Muslim. Miskīn attributes his position back to the *Kitāb al-Aṣl* of Muhammad al-Shaybānī.⁷⁶ In explaining Miskīn’s view, Abū al-Su‘ūd

72. “*Yajūzu taqallud al-qaḍā’ min al-sultān al-‘ādil wa-l-jā’ir.*” 2 AL-NASAFĪ, KANZ AL-DAQĀ’IQ, *supra* note 47, at 110; 8 AL-TAMARTĀSHĪ, *supra* note 47, at 43.

73. The unjust part of Mu‘āwīya Ibn Abī Sufyān’s rule that is being referred to is when he set himself up as a rebellious leader in opposition to the righteous/rightful caliph of the time, ‘Alī Ibn Abī Tālib (the fourth legitimate “Rightly-Guided Caliph”; d. 40/661). During that period there were Companions of the Prophet that accepted judicial office. Later, Ḥasan Ibn ‘Alī (d. 50/670)—after succeeding his father as the fifth Rightly-Guided Caliph of Islam—relinquished power to Mu‘āwīya in 41/661 after a peace treaty was forged between the two parties, and his leadership thereafter is considered legitimate (and not a rebellion).

74. Al-Ḥajjāj Ibn Yūsuf was a powerful Umayyad administrator (governing over large parts of the Umayyad empire) infamous for his brutality and oppression. The wisdom behind this ruling is that even if the rulers are unjust, then judges could at least dispense justice in society in their own capacities. The condition that a judge is able to perform his duties with justice is attached to the permissibility of accepting such positions. 3 AL-MARGHĪNĀNĪ, *supra* note 16, at 102; 8 AL-ḤASKAFĪ, *supra* note 47, at 44.

75. 8 AL-ḤASKAFĪ, *supra* note 47, at 43.

76. 3 MU‘ĪN AL-DĪN MULLĀ MISKĪN HARAWĪ FARĀHĪ (sometimes known by his pen name “Mu‘īn”), SHARḤ MULLĀ MISKĪN ‘ALĀ KANZ AL-DAQĀ’IQ 26 (n.d.) (photocopy without publisher information, printed with its commentary in 3 ABŪ AL-SU‘ŪD SAYYID MUHAMMAD IBN ‘ALĪ AL-ḤUSAYNĪ, FATHULLĀH AL-MU‘ĪN ‘ALĀ SHARḤ MULLĀ MISKĪN (n.d.)). Miskīn’s view is also mentioned in 6 IBN NUJAYM, *supra* note 48, at 461. *Al-Fatāwā al-Hindīya* cites the view in reference to *al-Multaqaṭ* in 3 AL-FATĀWĀ AL-HINDĪYA, *supra* note 47, at 295. Aḥmad Riḍā Khān al-Barēlwī al-Hindī cites both Miskīn and *al-Multaqaṭ*, in 18 AḤMAD RIḌĀ KHĀN AL-BARĒLWĪ AL-HINDĪ, AL-‘ATĀYĀ AL-NABAWĪYA FĪL-FATĀWĀ AL-RİḌĀWĪYA 545 (2000) (Pak.). *Kitāb al-Aṣl* (also known as *al-Mabsūṭ*) is among the six authoritative texts compiled by Muhammad al-Shaybānī in which (mainly) the opinions of Abū Ḥanīfa, Abū Yūsuf and his own are narrated. The texts belong to the classification of *zāhir al-riwāyāt* and form the structural authority of the Ḥanafī School, as the narrations have been reliably established from the author through mass transmission or well-known reports. Legal opinions that

(who wrote a commentary on Miskīn's work), states that this notion deems valid the sultanate of a non-Muslim over Muslims and establishes the validity of such a ruler to appoint a person to the judiciary. According to this view, Islam is not a condition to establish rule; since it is valid for a non-Muslim to appoint judges, it is also valid for a non-Muslim to remove them.⁷⁷

Another text, *al-Fatāwā al-Tātārkhānīya*, also mentions that Islam is not a condition for the sovereign to appoint judges and adds some interesting points relating to Muslim sovereignty, governance, and judiciary. It mentions that when lands come into the possession of non-Muslims, but the judicial affairs remain with the Muslims, such countries will still be classed as Islamic lands (*bilād al-islām*) because the judges are Muslim and non-Islamic (*kufīr*) laws are not prevalent there.⁷⁸ The underlying notion is that the lands are only occupied by non-Muslims for a temporary period, and there is an expectation that sovereignty will return to the Muslims. The *Fatāwā* adds a general point about Muslim rulers that are subservient to non-Muslims; it states that those that are subservient out of compulsion are still Muslims, but those that are without compulsion will be considered transgressors.⁷⁹

Next, there is mention of cities that have Muslim governors appointed by non-Muslims. The *Fatāwā* states that, because of the jurisdiction that they hold there, it is permissible for those judges to perform the Friday and 'Īd congregational prayers as well as to collect land taxes (*kharāj*), appoint judges, and marry off orphans.⁸⁰ This ruling is significant because these acts must be undertaken by the Muslim sovereign/authority. It is normally among the conditions of the Friday and 'Īd prayers, for example, that the prayers must be led by the sovereign (imam/caliph), or by one of his appointees/governors (*wālī*). In the ruling above, even though the governors/officials are not appointed by a Muslim sovereign, but are appointed by a non-Muslim, they are permitted to administer the Friday and 'Īd prayers.

contradict the *zāhir al-riwāyāt* are thus dismissed. The other five works are: *al-Jāmi' al-Kabīr*, *al-Jāmi' al-Ṣaghīr*, *al-Siyar al-Kabīr*, *al-Siyar al-Ṣaghīr* and *al-Ziyādāt*.

77. 3 ABŪ AL-SU'ŪD, *supra* note 76, at 26.

78. *Al-Fatāwā al-Tātārkhānīya*, authored primarily by 'Ālim Ibn al-'Ulā' al-Andrīū al-Dehlawī (d. 786/1384) and about 30 other authors, in 8 IBN 'ĀBIDĪN, *supra* note 47, at 43; 18 AḤMAD RİDĀ KHĀN, *supra* note 76, at 546–47. My personal copy of *al-Fatāwā al-Tātārkhānīya* (published in Karachi) is incomplete from which the chapter concerning judges (*Kitāb Adab al-Qāḍī*) is missing. I have also checked a copy from another publisher (Beirut) and the same section is missing.

79. *Id.*

80. *Id.*

In case one wonders whether the jurists only discussed those territories that are in some way occupied or dominated by non-Muslims or whether they discussed such lands that were essentially non-Muslim without some form of political involvement or engagement between the Muslim and non-Muslim polities, an answer seems to appear in the following passage from *al-Fatāwā al-Tātārkhānīya*, which states:

As for those lands where non-Muslims rule, the Muslims are permitted to undertake the performance of Friday and *ʿĪd* [prayers] and judges will be [recognized as official] judges with the [collective] agreement of the Muslims. It is necessary for the Muslims to request a Muslim governor from the non-Muslim rulers.⁸¹

The distinct feature of the above is that it refers to lands where complete authority and control lies with non-Muslims, whether such lands were previously Muslim, or if they were lands always under non-Muslim rule. Although the text consists only of a few lines, it contains matters of importance for Muslims living in non-Muslim countries today in that it provides a basis for performing the *Jumuʿa* and *ʿĪd* prayers as well as managing other affairs through the appointment of judges. One may assume that the above passage does not specifically state that the following refers to countries that have permanently and entirely remained under non-Muslim rule, but because this new subject item mentions countries under non-Muslim rule without any other condition, one could be assured that it is inclusive of non-Muslim countries (such as the United States) if one wishes to apply the ruling in that way. What is being said is that Muslims should appoint their own authority, who is then the *locum tenens* of a judge or Islamic sovereign (*ḥākim sharʿī*).

A. Ibn al-Humām on Appointing Judges

The renowned Ḥanafī jurist Ibn al-Humām comments on the ruling in *Hidāya*, and found in the works of other jurists, that it is only permissible to accept judgeships from a tyrannical ruler when one knows that the duty

81. *Id.* In Ibn ʿĀbidīn's citation of *al-Fatāwā al-Tātārkhānīya*, he states at the end of the quote that Miskīn has attributed the above to *al-Aṣl* (of Muhammad al-Shaybānī), although I have shown that here Miskīn's discussion is limited to the definition of *jāʿir* and that it includes non-Muslims (this shall be discussed in more detail later). He also says this is similar to what is mentioned in *Jāmiʿ al-Fuṣūlayn*. See BADR AL-DĪN MAḤMŪD IBN ISRĀʿĪL AL-SHAḤĪR BI-IBN QĀDĪ SAMĀWUNA, *JĀMIʿ AL-FUṢŪLAYN* 11 (1882) (Egypt). The original text is indeed similar to *al-Fatāwā al-Tātārkhānīya* with the exception of the first two points—that Islam is not a condition for the sultanate and the question of lands being occupied by non-Muslims. It would be interesting to discover whether the views found in *Jāmiʿ al-Fuṣūlayn* and *al-Fatāwā al-Tātārkhānīya* were generated from within the legal-literary tradition or whether the special situation of fourteen and fifteenth century Ottoman Turkey (in the case of Badr al-Dīn Samāwuna) and thirteen and fourteenth century India (in the case of *al-Fatāwā al-Tātārkhānīya*) might have impacted the texts here. This, however, would require a separate study.

could be carried out rightfully and fairly.⁸² He discusses a situation where there is neither a sultan, nor anyone who is permitted to appoint judges, pointing out that this is currently the situation found in some Muslim countries (in his time) where non-Muslims have taken control, “such as Cordoba today and Valenica in the Maghreb, and Abyssinia.”⁸³ In such circumstances, they should appoint Muslims from among themselves to collect taxes, and they are required to agree on a person whom they will make a governor (*wālī*); then the governor shall appoint a judge who shall adjudicate among them. Similarly, they should appoint an imam who shall lead the Friday prayer.⁸⁴

Before discussing the above, it is useful to summarize the above texts and make clear the various scenarios that the jurists have discussed. Thus, in light of the juristic discourse, one can identify three categories of places with respect to the appointment of judges: (1) those countries where the sovereign is Muslim but the Muslim government is under the authority of non-Muslims; (2) those places that attain independent judicial authority but the sovereign is non-Muslim (and the sovereign has appointed Muslim governors); and (3) those lands that are ruled entirely by non-Muslims; the sovereign and all other administrative positions are held by non-Muslims.⁸⁵

Returning to the ruling of Ibn al-Humām from the three categories mentioned above, he is describing the third category. This is comparable to the last part of the *Tātārkhānīya* text. For purposes of clarity, both statements cited earlier are juxtaposed here: “As for those countries where non-Muslims rule . . .” (*al-Fatāwā al-Tātārkhānīya*) and “[w]here there is no sultan, nor one for whom it is permitted to appoint judges . . .” (Ibn al-Humām, *Fath al-Qadīr*).

The text of *Tātārkhānīya* left the statement open, but Ibn al-Humām, after stating the general point about lands where no sultan exists, exemplifies the matter in reference to lands that have been taken over by non-Muslims (such as Cordoba). He does not specifically refer to lands that have always been non-Muslim, probably because classical jurists did not

82. See *supra* note 74.

83. 7 IBN AL-HUMĀM, *supra* note 53, at 246. His view is also cited in 6 IBN NUJAYM, *supra* note 48, at 461, and slightly summarized in 8 IBN ‘ĀBIDĪN, *supra* note 47, at 43–44.

84. *Id.*

85. I have adopted the categories from Imām Aḥmad Riḍā Khān al-Barēlwī with slight variations in order to keep the discussion more coherent. See 18 AḤMAD RIḌĀ KHĀN, *supra* note 76, at 547. Aḥmad Riḍā Khān gives the corresponding Arabic words from the text to point out where each block of text from the legal sources starts and ends to denote each category. I should mention here that Aḥmad Riḍā Khān’s fatwa, which is essentially a monograph on the appointment of judges in British India, warrants a separate research project; in it he makes the distinction between *shar’ī* and *‘urfī* jurisdiction.

envisage Muslims to be residing in such lands. Thus, Ibn al-Humām gave the example of a practical problem affecting the Muslims at that time.

Both parts of the text discuss the same issue. Nevertheless, Ibn al-Humām's passage is sometimes presented by jurists after the citation of *Tātārkhānīya* as a statement in opposition to the former, although, Ibn al-Humām himself does not explicitly rebut the views of any earlier jurists. The point of difference between the jurists lies in who is eligible to appoint judges. One of the last major authorities of the school, Ibn 'Ābidīn (d. 1252/1836), quotes Sirāj al-Dīn Ibn Nujaym's (d. 1005/1596) *al-Nahr al-Fā'iq*⁸⁶ as saying that the position of Ibn al-Humām is "satisfying and should be depended on."⁸⁷ Ibn 'Ābidīn states that this is referring to Ibn al-Humām's position regarding the invalidity of non-Muslims appointing judges ('*adam siḥḥat taqallud al-qaḍā' min kāfir*), which is contrary to what has been mentioned in *Tātārkhānīya*.⁸⁸ The disagreement is that a non-Muslim authority cannot appoint judges; it is only this element of *Tātārkhānīya* that is disagreed upon. In a similar fashion, the elder Ibn Nujaym (Zayn al-Dīn) cites Miskīn's view (which is the same view held in *Tātārkhānīya*) regarding the permissibility of accepting judgeships from non-Muslim rulers. After making clear that Ibn al-Humām opposed this, he states that the view of Ibn al-Humām is corroborated by the text of *Jāmi' al-Fuṣūlayn* (which does not mention that it is permissible to accept judicial positions from non-Muslims).⁸⁹

As noted earlier, Miskīn referenced his view to *al-Aṣl* (also called *al-Mabsūt*) of Muhammad al-Shaybānī. As such, this position is attributed to the most authoritative works of the Ḥanafī School. In later years, the Indian jurisprudent, Aḥmad Riḍā Khān al-Barēlwī (d. 1340/1921), investigated the matter further. He traced the original text of *al-Aṣl*, finding that the quote is cited in the chapter of prayer (*Kitāb al-Ṣalāh*) in *Radd al-Muḥtār* (with reference to another text, *Mi'rāj al-Dirāya*).⁹⁰ Interestingly, Aḥmad Riḍā Khān finds that there is no mention of what Miskīn has ascribed to it. The

86. See SIRĀJ AL-DĪN 'UMAR IBN IBRĀHĪM IBN NUJAYM, AL-NAHR AL-FĀ'IQ ṢHARḤ KANZ AL-DAQĀ'IQ (2002) (Leb.) (Not to be confused with his elder brother, Zayn al-Dīn Ibn Nujaym, author of *al-Baḥr al-Rā'iq*, who died in 970/1563, *supra* note 48).

87. Jurists use the term *mu'tamad 'alay-hi* to signify the opinion (from among other opinions) which the school depends upon.

88. 8 IBN 'ĀBIDĪN, *supra* note 47, at 44.

89. 6 IBN NUJAYM, *supra* note 48, at 461; JĀMI' AL-FUṢŪLAYN in 18 AḤMAD RIḌĀ KHĀN, *supra* note 76, at 542.

90. 18 AḤMAD RIḌĀ KHĀN, *supra* note 76, at 545–46. I was not able to find the quote in *al-Aṣl* in the edition published by Dā'irāt al-Ma'ārif, Hyderabad in 1966, edited by Abū'l-Wafā al-Afghānī; perhaps a more thorough look may unveil it or another manuscript or published edition may reveal the actual text.

text is very similar to what is found in *Tātārkhānīya*, except for the opening line, which states that Islam is not a condition for the sultanate. The only significant point it adds is that, for those lands where governors have been appointed by a non-Muslim sovereign (the second category mentioned earlier), Islamic penal laws (*ḥudūd*) can also be implemented there as well as the Friday and *ʿĪd* prayers. Again, this is because of the administrative power and jurisdiction that Muslims possess there.⁹¹ If the findings of Aḥmad Riḍā Khān are to be accepted by all subsequent jurists then not only *should* Ibn al-Humām’s opinion be depended upon, as mentioned by Ibn ‘Ābidīn, but rather it will become the authoritative or official ruling of the school.

It is necessary to unpack the various layers of textual discussion here because of the implications it might have on modern juristic discourse in countries like the United States. If the view of *Tātārkhānīya* and Miskīn is adopted, then it would be legally possible (from a *sharʿī* point of view) for U.S. governments to appoint Islamic judges in America. The majority of jurists, however, rule that it is not possible, and that judges shall only be appointed by the choice and agreement of the Muslims. Nevertheless, Ibn ‘Ābidīn adds an interesting point: if a non-Muslim sovereign designates a judge over them and the Muslims accept it, then such an appointment is undoubtedly valid.⁹²

Therefore, in a modern United States or Western context, and in the discussion regarding the implementation of certain elements of Islamic law and incorporating them into the legal system, two options are available for discussion from an Islamic (Ḥanafī) juristic point of view. The Muslims either nominate a person to adjudicate among them or the government proposes a person who is appointed on the condition that the Muslims are satisfied with such a person’s appointment to office.

B. Where it is not Possible to Officially Appoint a Governor or Judge

The above scenarios are not ones that are found in the United States or elsewhere, such as in Europe. Presently, there are no Islamic judges in official judicial positions,⁹³ nor is there any concept of a Muslim governor who would appoint a judge over the Muslims. Late Ḥanafī jurists have discussed this situation and suggest that Muslims should appoint a scholar competent

91. See 8 IBN ‘ĀBIDĪN, *supra* note 47, at 43.

92. *Id.* at 44.

93. By Islamic judges, I am referring to judges that apply Shari’a rulings and not judges that are Muslim and apply the secular law of the land (of which there are many).

in Islamic jurisprudence, who is upright and of the correct Sunni faith, as a sort of de facto judge.⁹⁴ In fact, ‘Abd al-Ghanī al-Nābulusī (d. 1143/1731), refers back to a sixth/twelfth century legist who covered the subject conclusively:

When the era is void of an appropriate sultan [to administer the affairs of his Muslim subjects], then the ‘*ulamā*’ (scholars) will be empowered [to administer their affairs] and it is necessary upon the *umma* (Muslim community) to take recourse to these scholars. The scholars will become governors. If it is difficult for all of them to take recourse to one scholar then each region should independently adhere to their [local] scholars. If there are many [scholars in one area] then the most knowledgeable among them should be followed. If they are all equal [in knowledge] then [one should be selected] by casting lots among them.⁹⁵

The issue in this case is comparatively straightforward, and no difference of opinion within the school has been cited here. In fact, a similar concept can be found among the other schools so it is not restricted to Ḥanafī legal thinking.⁹⁶ It delegates the legal affairs of Muslims to competent Muslim scholars in society. Although the above passage does not define the scope of which areas of Shari‘a are to be administered by scholars, later Ḥanafī scholars (such as Aḥmad Riḍā Khān writing in British India) have outlined a practical set of areas that should be governed by Muslim

94. 18 AḤMAD RIḌĀ KHĀN, *supra* note 76, at 549. I have obtained an unpublished fatwa from the late Ḥanafī Mufti Ghulam Rasool who lived in London (on file with author). He similarly states that in those places where there is no Islamic sovereign, reliable and trustworthy scholars are representative or the *locum tenens* of an Islamic sovereign.

95. 1 SAYYID ‘ABD AL-GHANĪ IBN ISMĀ‘ĪL AL-NĀBULUSĪ, AL-ḤADĪQA AL-NADĪYA SHARḤ AL-ṬARĪQA AL-MUḤAMMADIYA 351 (1994) (Turkey). His reference is to al-‘Attābī, that is Abū Naṣr Aḥmad Ibn Muḥammad al-‘Attābī al-Bukhārī (d. 586/1190). Although the passage does not specify non-Muslim lands and may well have been written in the context of Muslim lands without appropriate rulers, the fact that the statement is *general* (“when the era is void”) has allowed the contemporary mufti mentioned above (Ghulam Rasool) to cite the passage in his fatwa addressing Muslims in Britain, and Aḥmad Riḍā Khān to cite it in the context of British India (18 AḤMAD RIḌĀ KHĀN, *supra* note 77, at 549-50). Couple this with rulings cited above that non-Muslims can appoint judges.

96. Al-Juwaynī (d. 478/1085—writing a century before al-‘Attābī), for example, states something similar to the above passage from al-Nābulusī. IMĀM ĀL-ḤARAMAYN ABŪ AL-MA‘ĀLĪ ‘ABD AL-MALIK AL-JUWAYNĪ, GHIYĀTH AL-UMAM FĪ ILTIYĀTH AL-ẒULAM 280–83 (1979) (Egypt). Although he belongs to the Shāfi‘ī School, *Ghiyāth al-Umam* (also known as *al-Ghiyāthī*) is a work of the Islamic governance genre (*al-siyāsa al-shari‘iyya/al-fikr (al-fiqh) al-siyāsī al-islāmī*) akin to the contemporaneous *al-Aḥkām al-Sulṭāniyya* of al-Māwardī, *supra* note 42, and the book of the same name (and time) by al-Qāḍī Abū Ya‘lā (Muḥamad Ibn al-Husayn Ibn al-Farrā’, d. 458/1066). The contents of the book tend to accord with the consensus of the schools, indicating that there is convergence of the schools on this particular issue. Al-Nābulusī himself in fact cites the Shāfi‘ī scholar Nūr al-Dīn Abū al-Ḥasan ‘Alī al-Samhūdī (d. 911 /1506), who says that this specific type of power (*al-wilāyā al-khāssa*) vested in these scholars does not negate the general obligation to follow other Muslims scholars (*muṭlaq^m*) not vested with such powers (this work by al-Nābulusī is also not restricted to the Ḥanafī School; in fact, it would not be considered a legal work as such because it engages with the full breath of Islamic disciplines to provide “religious guidance” to believers). IBN ISMĀ‘ĪL AL-NĀBULUSĪ, *supra* note 95, at 351–52. The scriptural basis for this obedience to scholars would stem from the Qur’anic verse (4:59): “O you who have believed, obey Allah and obey the Messenger, and *those in authority among you . . .*”

scholars, which would normally come under the judicial remit of an officially appointed judge. These areas of the law include leading the Friday and 'Īd prayers, sighting of the new moon (establishing the new months), dissolving marriages (*faskh al-nikāh*), marrying orphans and others unable to marry independently, and other areas of Islamic law that are not at conflict with, or do not face any hindrance from, the laws of the land.⁹⁷

V. EVALUATING THE ISLAMIC DISCOURSE OF MUSLIMS IN NON-MUSLIM LANDS

At the outset, it was noted that the Qur'an discusses emigration, and that it is a very important part of the religious history of the early community (and for Muslims in other instances of history). The earliest Muslim scholars addressed the social and commercial phenomenon of Muslims traveling outside *Dār al-Islām* and coming under non-Muslim rule. Although these Muslims were discussed in the context of traders, the legal matters discussed with respect to those traders were not limited only to financial transactions, but they also covered penal law and other matters. Islamic jurists expressed a variety of attitudes toward Muslims living under non-Muslim rule. While these opinions were largely informed by the positions of their school (*madhhab*), the political and social circumstances sometimes contributed to the cementing of these positions.⁹⁸

A study of the section on *siyar*/jihad reveals that it is not a body of literature solely concerned with hostile relations between Muslims and non-Muslims. Instead, its nature is multifaceted: not only do the jurists discuss matters that regulate military warfare, but, in the same section, they also discuss matters relating to peaceful abidance in non-Muslim territory. Thus, just as Islamic law contemplates entry into non-Muslim lands through warfare, Islamic law clearly makes space for peaceful relations in non-Muslim lands. In American public discourse, some use jihad as a catchall phrase to encapsulate all of Shari'a, which is clearly misguided. But, even in this single element of the Shari'a, misconstrued notions of jihad continue to perpetuate. The fact that this guidance is in the section on jihad calls for a more panoptic understanding of what the section comprises. Because of issues arising from the wider context of jihad, discussions centered on jihad have a wider rubric than are often assumed.

97. 18 AḤMAD RIḌĀ KHĀN, *supra* note 76, at 549. Also see, Mufti Ghulam Rasool's fatwa mentioned above. Aḥmad Riḍā Khān is writing in the context of British India while Mufti Ghulam Rasool's fatwa was penned in present day London.

98. There was not sufficient space in the present article to discuss these in any detail.

Although legal manuals were predominantly designed to address Muslims living in *Dār al-Islām*, classical Islamic jurists also codified complex and profound legal rulings pertaining to Muslims in non-Muslim lands. In particular, one is able to discern the practical concerns of Ḥanafī jurists in extending the jurisdiction of Islam to non-Muslim lands. While judges in Muslim lands cannot enforce Islamic law for acts committed in non-Muslim lands because of a lack of jurisdiction (in light of a “territorialist” or “anti-extraterritorialism” approach adopted by Ḥanafīs), Islamic law makes a subtle, yet important, qualification: a Muslim will not be relieved from his religious sin or his moral obligations in the event of breaking the law. Furthermore, although Ḥanafīs stress that inviolability (of life and property) stems from territory, and not from religion, *Dār al-Islām* can still exercise some of its judicial authority. However, this is in light of the fact that Muslims were only conceived of as temporary sojourners to non-Muslim lands, and in the case of permanent residency, we can understand that there would be no question of applying Islamic law in non-Muslim lands.⁹⁹ Choice-of-law questions were clearly central here to Islamic jurists in discussing the extra-territorial jurisdiction of Islam. The division of the world into the “Abode of Islam” and “Abode of War” was not to indicate a permanent and necessary state of hostility,¹⁰⁰ but contained a central concern for the principle of territorial jurisdiction, especially for the Ḥanafīs.¹⁰¹

Contrary to the rhetoric found in sections of the media, blogosphere, and political sphere, Muslims are not commanded to implement penal law in non-Muslim jurisdictions. And contrary to assertions made today by certain radical groups claiming to adhere to the Shari‘a, this paper shows that Muslims are obliged to observe the local law of the land (which includes not harming citizens and property). Not only that, but—at least according to the Ḥanafī School—in the event of escaping legal justice for transgressing the law in a non-Muslim country (or being the victim of an offense), they will be deprived of all access or only receive limited access to Islamic justice if a case is brought to a Muslim country. All the while, Islamic law will continue to hold them responsible from a theological point

99. There are differences among the other schools here, as alluded to earlier.

100. In the way put forward by Bernard Lewis for example. BERNARD LEWIS, *THE POLITICAL LANGUAGE OF ISLAM* 71–80 (1988).

101. In terms of understanding concordance and difference among Islamic legal schools (*madhāhib*), one can observe here that on the issue of migration and residence in non-Muslim lands, three of the schools hold the same view while the Mālikīs hold a distinctive one. In terms of extra-territorial jurisdiction, the position of the Ḥanafī School is unique in contrast to the other three that are in agreement.

of view. According to the other schools, Islamic law will hold them responsible from both a theological and judicial-legal point of view.

In terms of independent jurisdiction in non-Muslim territories, Muslim scholars discussed the different scenarios in which Muslims could find themselves. Centuries ago, those jurists laid out the guidance for Muslims living in non-Muslim lands, and detailed how they should manage their legal affairs. The rulings perhaps go some way to address the Mālikī scholars' concerns that Muslims would be subject to non-Islamic laws. At the heart of the jurists' concern is the need to enunciate how Muslims could lead a practicing Muslim life, in all the possible or practical situations that they may face. It would not be anachronistic to assert that early Muslim jurists provided, not only a blueprint, but in some cases, precise details to directly address, in very practical terms, the contentiously debated issue of Muslims being able to live by Islamic laws beyond ritual matters. This is conceived by vesting authority in personalities that have legal and binding power in the absence of an imam (Muslim sovereign) in non-Muslim territory. With respect to the appointment of judges and administration of Islamic law, the different scenarios addressed by the jurists depended on how Muslims were governed. As such, they reflect different considerations that result from the realities of the particular Muslim community. The same process of determining the practical circumstances of Muslims can be adopted for Muslims in the United States today, in terms of defining the scope of Islamic jurisprudence that they need to be most immediately concerned with. Traditional jurists did not clearly delineate which areas of the law should be administered (except the Friday and *ʿĪd* prayers), leaving it open to the Muslims of a particular time and place.

This perhaps challenges, or provides a new perspective to, the statements made by some writers that voluntary Muslim migration to non-Muslim lands is a question that never seems to have entered the minds of Muslim jurists and theologians.¹⁰² While the jurists do not explicitly mention voluntary migration, the fact that they were hardly concerned with the means by which these Muslims had arrived in non-Muslim lands (except by referring to them as traders or converts in the land), suggests that they may have deliberately refrained from this discussion in order not to completely restrict this activity. Permanent residency does not seem to be encouraged in the early works. However, the detailing of rules governing the appointment of judges, which can only occur in a permanent and stable setting,

102. See for example, BERNARD LEWIS & BUNTZIE ELLIS CHURCHILL, ISLAM: THE RELIGION AND THE PEOPLE 10 (2009). Lewis basically says that Muslims came under non-Muslim rule either by conquest or by imperialism, and the thought of voluntary emigration never entered their thoughts.

mitigates this. The fact that traditional jurists today do not object to Muslims remaining indefinitely in non-Muslim lands, although much of the modern migration was initially for economic reasons as it was in pre-modern times, also shows there was nothing explicitly prohibitive in the sacred texts regarding emigration. This is not to mention that the home countries of these immigrants did/do not (always) rule by God's law.¹⁰³

VI. ISLAMIC LAW IN THE AMERICAN LEGAL SYSTEM

Reviewing the different instances where Islamic law, or general Muslim practice, has been considered by American courts, one finds that no special exemptions are granted to Muslims that are not granted to others on the grounds of religion. Eugene Volokh has (convincingly) argued that “[m]any other complaints about incidents of alleged ‘creeping Shari‘a’ in American law are misguided, partly because the complaints miss the way those incidents simply reflect well-settled (and sound) American law.”¹⁰⁴ American law, recognizing an individual's religious principles, provides for freedom of contract and testamentary dispossession of property at death. So Muslims, like Christians, Jews and others, can therefore write contracts (including marriage) and wills to implement their understanding of their religious obligations. Accordingly, Muslims can route their disputes to Muslim tribunals in the way others often route their disputes to private arbitrators.¹⁰⁵

Likewise, some of the areas where U.S. law has made provisions for religious accommodation for Muslims in the workplace include religiously mandated dress, such as the headscarf or modest dress, religious holidays and objecting to carrying alcohol.¹⁰⁶ Such cases are often covered under the

103. Note the famous Hadith narrated on the authority of ‘Umar:

Actions are only [judged] by intention. And for every person is what he has intended. So whosoever migrates for Allah and His Messenger, then his migration is for Allah and His Messenger. And whosoever migrates for worldly affair to gain, or for a woman to marry, then his migration is for what he has migrated for.

1 ABŪ ‘ABDULLĀH MUHAMMAD IBN ISMĀ‘ĪL AL-BUKHĀRĪ, AL-JĀMI‘ AL-ŠAHĪḤ, 2 (1893-95, reprint of the Bulaq edition) (Egypt) (Hadith report 1), and five other places in his collection; 6 ABŪ AL-ḤUSAYN MUSLIM IBN AL-ḤAJJĀJ, AL-JĀMI‘ AL-SAḤĪḤ, 48 (1963, reprint of the Istanbul edition 1911-1915) (Egypt) (Hadith report 1907); and mentioned in all major collections (with slightly different wording). Scholars apply the Hadith unrestrictedly. Sufi travelers to non-Muslim lands are also well-documented as well as traders who also served as ambassadors for their faith (so improving one's financial state was embedded within religious intentions for migrating).

104. Eugene Volokh, *Religious Law (Especially Islamic Law) in American Courts*, 66 OKLA L. REV. 431, 433 (2014).

105. *Id.* at 431, 434–35, 437–38.

106. *Id.* at 441–43. The Religious Freedom Restoration Act is a federal law but since 1997 (after the Supreme Court ruled that it could not be applied to states), 22 states have passed their own RFRAS that apply to their individual state and local governments.

Civil Rights Act of 1964 and the Religious Freedom Restoration Act of 1993. There are, of course, constitutional limitations in place that prevent the enforcement of contracts or penalties that interfere with compelling government or safety interests.¹⁰⁷

Government entities also provide religious accommodations that benefit employees, students or customers. Some of these include public school holidays on religious occasions in areas where there are many Muslims, ablution facilities in universities and airports, provision of halal food in government run cafeterias, and government lenders offering loans that formally avoid interest.¹⁰⁸ Courts may also deal with issues relating to private international law involving companies based in Muslim countries (that adhere to certain laws of Islamic commerce) that operate in the United States and/or have United States' employees/partners. Traditional American choice-of-law rules apply here as they would for all other interactions with foreign laws.¹⁰⁹

Abed Awad,¹¹⁰ for example, has handled over 100 cases as an attorney, consultant or expert witness involving components of Shari'a. They include international business contracts where courts deemed that the law of a Muslim country applied and enforcing dower payment in an Islamic marriage contract. U.S. courts, he notes, also refuse to recognize such orders due to constitutional and due process reasons.¹¹¹ The American Civil Liberties Union has examined similar cases and demonstrably reported that "there is no evidence that Islamic law is encroaching on our courts. On the

107. *Id.* at 435–37, 443–45.

108. These accommodations are not implemented by courts under the above acts but by other government agencies on an ad hoc basis relative to the desires of employers, students, customers, etc. *Id.* at 448.

109. See Eugene Volokh, *Foreign Law in American Courts*, 66 OKLA. L. REV. 219 (2014). In fact, one could say that the value the United States places on the diversity found in its interstate legal system—which acts to reflect the distinctive values of citizens in each state—makes it more amenable to accommodate foreign law. Particularly considering the fact that choice-of-law was conceptualized as a subset of the "general commercial law" of private international law for most of the country's history. Although two Supreme Court rulings (in 1938 and upheld in 1941) declared a federal court sitting in diversity should apply the substantive laws of the forum state (*lex fori*), Mark Rosen has argued that choice-of-law must be re-conceptualized as federal law. See Rosen, *supra* note 55. There is scope here to examine how such a framework could be useful for dealing with Islamic law (and foreign laws in general), not only because uniformity (of choice-of-law procedures) is necessary to determine predictability, but it would also reduce political interference. *Id.* at 61–62 (a point pertinent to the politicized nature of debates surrounding Islamic law mentioned above). Incidentally, the defendants in the Oklahoma case cited above contended that the "[anti-Shari'a law] amendment is merely a choice-of-law provision that bans state courts from applying the law of other nations or cultures." James C. McKinley Jr., *Judge Blocks Oklahoma's Ban on Using Shariah Law in Court*, N.Y. TIMES, Nov. 29, 2010, <http://www.nytimes.com/2010/11/30/us/30oklahoma.html>.

110. Awad, *supra* note 3.

111. *Id.* The Establishment Clause of the First Amendment, for example, already prevents courts applying foreign, international or religious laws that violate public policy.

contrary, the court cases cited by anti-Muslim groups as purportedly illustrative of this problem actually show the opposite.”¹¹²

There is no “special case” for Islam or a change in law that is required. Although motivated by their faith, Muslims claimants are simply seeking an application of *American law*, as is the case with people of other faiths, such as Jews observing Halakhic law. The same principle is applied for cases involving foreign law. The passing of such bills would thus have wider ramifications for other U.S. citizens including the Jewish community and those involved in international law cases.¹¹³

CONCLUSION

This paper has demonstrated that what is required is a common sense approach that recognizes the accommodating principles contained within the repositories of both the American legal system and the body of Islamic law as laid out above. Especially since there are only a very limited number of areas where Shari‘a principles may interact with courts in the United States in the first place.

From an Islamic point of view, the ideas discussed here provide a platform for Muslims to both engage with the continuity of the Islamic tradition, and to apply that tradition to local circumstances. Reductive representations—or even constructions—of the “Shari‘a” in the media and in the views of some populist politicians serves to demonstrate that they have no grasp of Shari‘a’s potential in this area, not least the unanimity of the jurists on living and maintaining a peaceful life under non-Muslim law (as necessitated by the *amān*).

112. *Nothing to Fear: Debunking the Mythical “Sharia Threat” to Our Judicial System*, ACLU 1 (May 2011),

https://www.aclu.org/files/assets/Nothing_To_Fear_Report_FINAL_MAY_2011.pdf. After presenting various cases (as Volokh does) to illustrate the point, the report concludes:

When the court cases cited by anti-Muslim groups are examined more closely, the myth of the “Sharia threat” to our judicial system quickly disappears. Far from confirming some fabricated conspiracy, these cases illustrate that our judicial system is alive and well, and in no danger of being co-opted or taken over by Islam.

Id. at 5.

113. To see some of the “unintended consequences” and ramifications of banning Shari‘a in courts, as well as the above sources visit: Sheila Musaji, *Anti-Sharia Movements’ Unintended Consequences for Jews, Native Americans, and Others*, THE AMERICAN MUSLIM (May 16, 2013), www.theamericanmuslim.org/tam.php/features/articles/anti-sharia-movements-unintended-consequences/0018763; Robert K. Vischer, *The Dangers of Anti-Sharia Laws*, FIRST THINGS (Mar. 2012), http://www.firstthings.com/index.php?permalink=article&entry_permalink=2012/03/the-dangers-of-anti-sharia-laws; Ron Kampeas, *Anti-Sharia Laws Stir Concerns That Halachah Could Be Next*, JTA, Apr. 28, 2011, <http://www.jta.org/2011/04/28/life-religion/anti-sharia-laws-stir-concerns-that-halachah-could-be-next>.

Such a study therefore provides valuable information, resources, and insights for approaching the contemporary debates surrounding co-existence and Muslims living in non-Muslim lands such as the United States, in which legal affairs continue to feature prominently. This ties into the point that Islamic law incorporates the importance of having peaceful and pragmatic relationships with non-Muslims in non-Muslim lands, and provides the principles to enable such peaceful relations to be maintained for the benefit of Muslims and non-Muslims alike.