

FROM DHIMMITUDE TO DEMOCRACY

ISLAMIC LAW, NON-MUSLIMS & EQUAL CITIZENSHIP



Sheikh Dr Usama Hasan



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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

With the Name of God, Most Gracious, Most Merciful

FROM DHIMMITUDE TO DEMOCRACY

ISLAMIC LAW, NON-MUSLIMS & EQUAL CITIZENSHIP

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O believers! Fulfil your covenants. – Qur'an 5:1

Whoever kills a person under covenant [i.e. with whom they have a treaty] will never smell the perfume of Paradise.

Establish prayer, give alms, shun evil and live wherever you wish in the land of your people.

The land belongs to God; people are servants of God: so wherever you find goodness, settle there!

– The Prophet Muhammad, peace be upon him (571-632 CE)

The Law is all about wisdom and achieving people's welfare in this life and the afterlife. It is all about justice, mercy, wisdom, and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the Law, even if it is claimed to be so according to some interpretation. – Ibn al-Qayyim of Damascus, 14th century CE

From among the subjects, where I distinguish who is Muslim is at a mosque, who is Christian, in a church and who is Jewish, in a synagogue. There is no difference between them on other days ... O Greeks, Armenians and Jews! All of you, just like the Muslims, are God's servants and my subjects. You have various religions, but you are all under the protection of the laws of the state and my royal will. – Ottoman Sultan Mehmet II, 1808-1839

I had long been convinced that here in this country of hundreds of millions of human beings, intensely attached to religion, and yet infinitely split up into communities, sects and denominations, Providence had created for us the mission of solving a unique problem and working out a new synthesis, which was nothing other than a Federation of Faiths ... For more than twenty years I have dreamed the dream of a federation, grander, nobler and infinitely more spiritual than the United States of America, and today when many a political Cassandra prophesies a return to the bad old days of Hindu-Muslim dissensions, I still dream that old dream of 'United Faiths of India'. – Maulana Muhammad Ali Jauhar, Presidential Address, Indian National Congress, 1923

You are free; you are free to go to your temples, you are free to go to your mosques or to any other place or worship in this State of Pakistan. You may belong to any religion or caste or creed that has nothing to do with the business of the State ... We are starting with this fundamental principle that we are all citizens and equal citizens of one State ... Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State. – Muhammad Ali Jinnah, founding father of Pakistan, 1947

The [Ottoman] Declaration of Regulations (Tanzimat Fermani, 1839) may be seen as the first Islamic human rights declaration in the modern sense ... [and when the UN's Universal Declaration of Human Rights was announced in 1948,] Turkish scholars of Islamic law, such as Kazim Kadri and Ali Fuat Basgil, produced works advocating that it was consistent with Islamic law and thus deserved the support of Muslims ... The work of ancient prophets and philosophers can be seen as achievements towards a universal concept of [the] human.

– Recep Senturk, Emory University, 2002

Citizenship is a voluntary tie binding you to a homeland, ruled by a constitution, or what the German philosopher Habermas calls constitutional citizenship, i.e. the individual's sense of belonging to a civic society founded on the sharing of basic values. Citizenship rises above group dynamics but does not cancel them: the aim is to blend and coexist with them successfully. The above is perhaps the most important development in the understanding of citizenship in the modern age. It is also perhaps the most important bridge by which the religious values of all human groupings may be respected and accepted. This accords with the understanding of Islam about human coexistence: a Muslim finds no harm in it, but rather may co-operate in it.

– Shaykh 'Abdullah bin Bayyah, 2007

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1 Executive Summary

This report addresses the common misconception found amongst extremists, both Muslim and anti-Muslim, that it is impossible for non-Muslims to ever live as equal co-citizens with Muslims in a “Muslim” or “Islamic” state or country. This misconception is based on the following early Islamic concepts and systems:

- (i) *dhimma* (protection of non-Muslims under Muslim rule) in return for the payment of
- (ii) *jizya*, a poll-tax on non-Muslims, especially *ahl al-kitab* (“people of scripture”), initially understood to refer only to Jews and Christians;
- (iii) the political division of territory based on faith, into *dar al-islam* (the land of Islam), *dar al-kufr* (the land of infidels) and *dar al-harb* (the land of war).

We show conclusively how the above concepts have evolved during the history of Islam, e.g.:

- (i) The early political division of territory also included the oft-overlooked category of *dar al-sulh* or *dar ‘ahd*: lands of permanent or temporary peace and security.
- (ii) The protection of non-Muslims under Muslim rule, in return for the payment of a poll-tax that initially applied only to Jews and Christians, was quickly extended to Zoroastrians in Persia and Hindus in India, since the term *ahl al-kitab* (“people of scripture”) applies by definition to every major world religion. Modern Muslim thinkers and theologians have extended this principle to support full religious freedom and equality.
- (iii) New situations such as Mardin and Galera, where Muslim-majority towns were ruled by non-Muslims, led to the evolution of the faith-based division of land, resulting in new mediaeval conceptions such as *dar murakkab*, a compound or composite land of both Islam and non-Islam. Modern Muslim thinkers and theologians have extended such notions of the political division of territory, confirming them to be compatible with nation-states and their federations.

The report brings together scriptural, theological, jurisprudential, historical and contemporary political analysis to situate the issue in a religious and historical context, and to support the process of intellectual and political renewal and reform that has been taking place in Muslim-majority societies over the past 200 years.

1.1 Key Findings

Based on the ethical principles and history of Islam, a strong case is made for the following:

- 1. A citizenship model of political affiliation, including nation-states and their federations, on the basis of shared values; and**
- 2. Full religious freedom and equality, on the basis of the Qur’anic principle, “There is no compulsion in religion.”**

Another key finding is that fundamentalist and extremist Muslims often reject the historical development of Islamic thought. Extreme, contemporary examples of this may be seen in the pseudo-states established by the groups known as “Islamic State” and “Boko Haram,” both of whom are known for their violent and brutal discrimination against non-Muslims, and indeed against any Muslims who oppose their fascist misinterpretations of Islam.

2 Extended Summary of Findings

1. The Prophet Muhammad's 13-year "Meccan phase" of his monotheist mission brought him into conflict with the polytheists of Mecca, and he remained sympathetic to the Jews and Christians of nearby Medina as well as of wider Arabia, Syria and Persia.
2. During the 10-year "Medinan phase" of the Prophet's mission, a treaty was concluded with the Jews and Christians of Medina that upheld a plural religious society, united against the external attacks of the polytheists. (The Qur'an uses the term *ahl al-kitab* or "People of Scripture" primarily for Jews and Christians, as opposed to the "polytheists.") The "Medinan Charter" is mentioned in early histories of Islam, and there are brief references to it in the hadith collections. Later, a major peace treaty was also concluded with the polytheists. Subsequent conflict with both polytheists and Jews were blamed on these groups' violations of those peace treaties.
3. During the rapid expansion of Islamic rule under the early caliphates (7th-10th centuries), most of the subjects were Christians and Zoroastrians, with sizeable Jewish minorities. The practice of levying *jizya* (a poll-tax on non-Muslims) in return for military protection and exemption from military service, became widespread. The *jizya* is only mentioned in one verse of the Qur'an (9:29). Those paying *jizya* became known as *dhimmi*s (those covered by a treaty of protection or *dhimma*), a concept that is only indirectly in the Qur'an but more prevalent in later hadith and *fiqh* (jurisprudential) literature. Even in early Islam, the *dhimma* protection was extended to non-Abrahamic religious communities such as Zoroastrians and Hindus, who were regarded by leading authorities as being covered by the term *ahl al-kitab* or "People of Scripture" since they were in possession of written, divine revelations.
4. During the development of substantial jurisprudential literature in the context of ascendent Islamic empires (10th-15th centuries), the use of the tools of *jizya* and *dhimma* became axiomatic, along with the associated concepts of *Dar al-Islam* (Land of Islam), *Dar al-Kufr* (Land of Disbelief) and *Dar al-Harb* (Land of War). This period also coincided with the development of the *Maqasid* theory of Islamic law that emphasizes universal values and objectives over specific texts and rulings. Later Islamic empires such as the Ottomans and the Mughals continued to experiment and develop the relationships between the state, Islam and other religions.
5. There was an early, fundamental dichotomy in the basis of this jurisprudence: traditionalist schools had a communalist approach to human rights, basing these on a person's Islam or being under its protection (*dhimma*); more rationalist schools, such as the Hanafis, had a universalist approach, basing human rights on a person's basic humanity (*adamiyya*). The Ottomans, being Hanafis, used the latter approach along with considerations of *maqasid* (universal values) to abandon their *Millet* system of multiple, parallel religious law for different faith communities in favour of a system of equal Ottoman citizenship. The Ottomans enacted radical reforms to bring about civic equality, irrespective of race or religion. In particular, they abolished *jizya* and *dhimma* in 1856.
6. Ibn Taymiyya's "Mardin fatwa" (13th century) had recognised, perhaps for the first time, a complex situation where a particular town is neither a "land of war" nor a "land of

peace” but has an intermediate or compound nature. Thus, the traditional, neat divisions of land and associated allegiances no longer applied to such a town that had previously been part of the “lands of Islam” but was consequently occupied by Mongol invaders who did not rule by Islamic laws or norms, although many of the inhabitants were Muslim. A similar situation arose around a century later in Andalusia with the town of Galera in the province of Granada: a Muslim-majority town that had come under Christian rule due to the Reconquista (15th century). Interestingly, no equivalent of the Mardin *fatwa* appears to have been given, although the situation did vex the jurists of that time, one of whom spoke of Muslims living under the *dhimma* (protection) of Christians; other jurists implied that these Muslims would pay a form of *jizya* (regarded as a protection-tax, not a religious duty) in return for this status.

7. Indian Muslims shared a homeland (India) with Hindus, Buddhists, Parsis (Zoroastrians), Sikhs and Christians for centuries, and the Mughal Empire ruled over large parts of India where the population was majority non-Muslim. Over the last century of British rule (19th-20th century), a strong nationalist movement for independence emerged. Scholars and thinkers were forced to grapple with the issue of nations, homelands and faiths: they made notable contributions to the debates around loyalty to God, religion and homeland, including possible conflicts of loyalty, especially in the context of nationalist independence from colonial rule. Their ideas and struggles had huge practical results in the form of the independence and partition of India in 1947, with the creation of a homeland, Pakistan, for Muslims mainly. These debates have continued until today.
8. Many leading, contemporary jurists, thinkers and theologians of Islam agree that the ancient and mediaeval notions of *jizya* and *dhimma* are outdated, and that modern notions of citizenship (*muwatana*) are appropriate expressions of Islamic law and ethics in the modern world. This approach is based on (i) *maqasid*, (ii) the universalist approach to jurisprudence and (iii) the necessity of adapting to practical situations.
9. Modern notions of citizenship, irrespective of religion, were also embraced and adopted by several leading Muslim political leaders from the 20th century onwards, including Atatürk and Jinnah. The constitutions of many, if not most, Muslim-majority countries such as the OIC member countries, affirm equal rights for citizens, irrespective of religion. However, the actual implementation of such equal rights is often deficient.
10. Some of the countries that proclaim themselves to be “Islamic states” or “Islamic republics”, as well as traditional theologians who remain trapped in the framework of mediaeval jurisprudence, do not accept equal citizenship and would like to discriminate against non-Muslims. The most extreme examples of this phenomenon are the pseudo-states set up by groups such as Islamic State and Boko Haram, both of whom are known for their violent and brutal discrimination against non-Muslims.
11. The debate and battle of ideas and practice within Muslim-majority societies and states continues, in a constant state of flux. This report highlights and elucidates the basic scriptural, theological, jurisprudential, historical and contemporary bases of the debate, aiming to make a strong Islamic case for equal citizenship and universal human rights.

3 Relations with non-Muslims during the Prophet Muhammad's Mission: Meccan and Medinan Phases

Traditional Muslim accounts of the Prophet Muhammad's mission divide his life into several phases, and generally agree on the following, with minor variations:

- (i) Life before Prophethood: from birth to age 40 (571-610 CE).¹ The Prophet remained in Mecca throughout this period, apart from several trade-related journeys to Syria.
- (ii) The Prophetic mission: from age 40 until his death, aged 63, (610-632 CE). Verses, passages and chapters of the Qur'an were revealed to the Prophet throughout this period. This prophetic mission is further divided into two sub-phases:
 - a. The 13-year Meccan phase, whilst the Prophet preached his mission in Mecca (610-623 CE). Some recent academics have further divided this phase into several sub-phases.
 - b. The 10-year Medinan phase, after the Prophet emigrated to Medina with his followers and settled there (623-632 CE).

3.1 The Meccan Phase

In early Islam, the Prophet Muhammad's 13-year "Meccan phase" of his monotheist mission brought him into conflict with the polytheist leaders of Mecca, and he remained sympathetic to the Jews and Christians of nearby Medina as well as wider Arabia, Syria and Persia, due to their monotheistic tradition and being, in Qur'anic terms, "People of Scripture" (*Ahl al-Kitab*).² Although the Prophet's mission brought him into conflict with polytheist leaders, who eventually plotted to kill him, forcing him to flee to Medina, many of the ordinary Meccan polytheists remained on good terms with the Muslims due to family, tribal and economic links. A number of the Prophet's followers even remained in Mecca throughout the years of hostility and warfare against their fellow Muslims in Medina, due to economic reasons. Such Muslims included Abbas bin Abdul Muttalib, an uncle of the Prophet.

3.2 The Medinan Phase: the Medinan Charter, peace treaties and *jizya*

During the 10-year "Medinan phase" of the Prophet's mission, a treaty (the "Medinan Charter") was concluded with the Jews and polytheists of Medina that upheld a plural religious society, united against the external attacks of the Meccan polytheists. The "Medinan Charter" is mentioned in early histories of Islam, although not in the canonical Hadith collections, leading to its negligible influence in the later centuries of the development of Islamic jurisprudence. However, from the end of the 19th century CE onwards, there has been renewed interest in the Muslim world in this early "Medinan Charter," due to its relevance to a plural religious society. For example, the leading Austrian Muslim scholar and political activist of the 20th century, Muhammad Asad (born Leopold Weiss), described this charter as an early Islamic form of a "social contract."

¹ There is uncertainty of up to a year about each of these dates, partly because of the transition from a pre-Islamic lunar calendar with solar corrections to a purely Islamic lunar calendar.

² A sound tradition even records that the Prophet copied Jews and Christians in their custom of allowing their hair to hang loose without a parting, rather than combing his hair into a parting as the polytheists did. (Bukhari, *Sahih*, Dar al-Kutub al-'Ilmiyyah, Beirut, 1423/2002, hadith nos. 3558, 3944 and 5917)

Later, a peace treaty was also concluded with Meccan polytheists, as well as with Arab Christians. Subsequent conflict with both polytheists and Jews were blamed on these groups' violations of those peace treaties. Even later during the Medinan phase, the verse (9:29) was revealed obliging war against non-Muslims until they convert to Islam or submit to Muslim rule and pay the *jizya* poll-tax, thus gaining the protected status of *dhimmis* (people under protection or *dhimma*). Due to the importance of *jizya* and *dhimma* throughout the history of Islamic rule, an analysis later follows of the source scripture, jurisprudence and traditional commentary related to these concepts.

3.3 Text of the Medinan Charter

The text of the charter was first given by the early Muslim historian, Muhammad Ibn Ishaq (c. 85-159 H / 704-770 CE). His original text was largely lost but preserved by his student Ibn Hisham (d. 212/218 H / 828/833 CE). English translations of the Charter have been published recently in the following sources:

- (i) A. Guillaume: *The Life of Muhammad - A Translation of Ibn Ishaq's Sirat Rasul Allah*, OUP, Karachi, 1990, pp. 231-233
- (ii) The Constitution Society website:
<http://www.constitution.org/cons/medina/macharter.htm>. Details and source of the original text are not listed.
- (iii) The Constitution Society website:
http://www.constitution.org/cons/medina/con_medina.htm. This version is a reproduction of Guillaume's translation, but with numbering added.
- (iv) A. Kurucan & M.K. Erol, *Dialogue in Islam*, Dialogue Society, London, 2012, pp. 114-117. This is a reproduction of text (iii) above.

3.3.1 The Charter of Medina - original translation and numbering

Below is an original translation of the Charter, the text of which is taken from hadith scholars of the 14th and 20th centuries: Ibn Kathir and Mubarakpuri³; the texts they give are very similar.

Interestingly, Ibn Kathir prefaces this text by mentioning that the Jews of Medina (Yathrib) had moved there after the destruction of their temple in Jerusalem by Nebuchadnezzar, and before their allies, the Yemeni-origin tribes of Aws and Khazraj, did so. The Aws and Khazraj later became the stalwart allies of the Prophet known as the *Ansar* Muslims (Helpers of the Prophet) of Medina.

³ Ibn Kathir, *al-Bidaya wa l-Nihaya* (The Beginning and the End [A History of the World]), Dar Abi Hayyan, Cairo, 1416/1996, vol. 3 pp. 256-8; Safi al-Rahman Mubarakpuri, *al-Rahiq al-Makhtum* (The Sealed Nectar [Biography of the Prophet Muhammad]), Muslim World League, Mecca, 6th ed., 1418/1997, pp. 208-9 and 213-4, quoting the *Sira* [Biography of the Prophet Muhammad] by Ibn Hisham, pp. 502-4. *Al-Rahiq al-Makhtum* is available in English translation as *The Sealed Nectar* (Darussalam, Riyadh, 2012).

With the Name of God, All-Merciful, Most Merciful

[Clauses relating mainly to Muslims]

This is a document from the Unlettered Prophet Muhammad, may God bless him and grant him peace, an agreement between the believers and Muslims of Quraysh⁴ and Yathrib⁵, and those that follow them, join them and fight alongside them:

1. *That they are one nation [ummah], to the exclusion of others.*
2. *The emigrants of Quraysh [i.e. Muslims from Mecca], as well as every clan and tribe of the Ansar [i.e. Muslims of Medina] will have their districts, and will be separately responsible for their collective blood-money [compensation in cases of injury or death]. They will pay reasonable and just ransom for their prisoners amongst the believers. The clans include: the Sa'idah, Jushm, Najjar, 'Amr bin 'Awf, and Nabit.*
3. *The believers will not leave anyone amongst them struggling under the debt of ransom or blood-money: they will reasonably help him [with their wealth].*
4. *No believer shall ally with the freed slave of a believer against him [i.e. he shall not interfere with, or risk undermining, the agreements of another believer].*
5. *The believers shall beware anyone transgressing against them or seeking to penetrate them [i.e. their society] with injustice, sin, enmity or corruption amongst the believers. They will all act together against such a person, even if he is one of their own.*
6. *A believer shall not kill another believer over [the killing of] a disbeliever.*
7. *A disbeliever shall not be supported against a believer.*
8. *The protection of God is one: the lowest of the believers may offer refuge to another [i.e. in the name of God and on behalf of all believers].*
9. *Believers are protectors of each other, to the exclusion of others.*
10. *Those Jews who follow us will receive support and equal treatment: they will not be wronged, nor will their enemies be helped.*
11. *The peace of the believers is one: no believer will make peace during fighting in the way of God to the exclusion of another believer. Suing for peace may only be on the basis of equality and justice amongst the believers.*
12. *Every raiding-party that raids with us: we will mutually look out for each other.*
13. *Believers will treat each other equally [as themselves] in regard to responding to anyone who sheds their blood in the path of God.*
14. *Believers shall beware to follow the best and most upright guidance.*
15. *No polytheist shall guarantee any property or life belonging to the Quraysh, and will not prevent any believer from taking these [rightfully].*
16. *Whoever is proved to have wilfully killed a believer, is to be executed in retaliation unless the heir of the deceased agrees otherwise.*
17. *The believers shall all stand against such a killer: it is not lawful for them to do otherwise.*
18. *It is not lawful for a believer who affirms whatever is contained in this document, and believes in God and the Last Day, to help or shelter a violator: whoever helps or shelters such a one, upon him is the curse of God and His wrath on the Day of Resurrection, when neither ransom nor compensation shall be accepted from him.*
19. *Any matter you disagree about must be referred to God, Mighty and Majestic, and to Muhammad, may God bless him and grant him peace.*

⁴ The Prophet's tribe, who were the chieftains and custodians of Mecca

⁵ The pre-Islamic name of Medina

[Clauses relating mainly to Jews]

20. *The Jews are united with the believers whilst they⁶ are at war.*
21. *The Jews of the 'Awf clan are a nation with⁷ the believers: the Jews, they and their clients⁸, have their religion and the believers have theirs, they and their clients, except for anyone who commits injustice or wrong, in which case he only destroys himself and his household.*
22. *Similar applies to the Jews of the Najjar, Harith, Sa'idah, Jushm, Aws, Tha'lab, Jafna and Shatna clans, as well as to their close allies.*
23. *None of them [the Jews] may leave [Yathrib] without the permission of Muhammad.*
24. *The Jews and Muslims are each responsible for their own expenditure.*
25. *They [Jews and Muslims] are obliged to aid each other against anyone who wages war on the parties to this treaty.*
26. *They [Jews and Muslims] are obliged to share good counsel, sincere advice and righteous behaviour rather than sin.*
27. *No-one shall be sinful due to the actions of his ally.*
28. *Support is due to the wronged party.*
29. *Yathrib is a sanctuary, all of it, for the parties to this treaty.*
30. *Any incident or dispute that threatens to cause great harm between the parties to this treaty must be referred to God, Mighty and Majestic, and to Muhammad, Messenger of God, may God bless him and grant him peace.*
31. *Neither Quraysh nor their allies may be guaranteed protection or safety.*
32. *They [Jews and Muslims] are obliged to support each other against anyone that attacks Yathrib: every group is responsible for defence against any attack from their direction.*
33. *If they [the Jews] are invited to a peace treaty, they are entitled to conclude it and the believers are obliged to respect its terms, except for someone who wages war rightfully according to the religion.*
34. *This agreement does not protect any wrongdoer or sinner.*
35. *Whoever leaves is safeguarded and whoever remains in the city (or Medina) is safeguarded, unless he does wrong or sins.*
36. *God is the protector of all who act righteously and piously.*

⁶ This word is ambiguous, but seems from the context to apply primarily to “the believers”, although it could also apply to “the Jews”, or to both. Maulana Hussain Ahmad Madani’s interpretation (20th century CE) is quoted in a later section.

⁷ Or possibly, “along with” ... The two possibilities suggest unity and separation respectively: the rest of the document provides context to judge the nuance of the situation.

⁸ *mawali*: former slaves who became part of the clans that had freed them.

3.3.2 The Charter of Medina – discussion by previous hadith scholars

Ibn Kathir, a Damascene hadith scholar of the 14th century CE, adds, “Ibn Ishaq quoted a very similar text. Abu ‘Ubayd al-Qasim bin Sallam, may God have mercy upon him, commented on it at length in his *Kitab al-Gharib* [Explanation of Difficult Words].”

Mubarakpuri, a contemporary hadith scholar of India, describes the first half of this charter as a “*Covenant of Islamic Alliance*” and prefaces it thus: “*Just as the Messenger of God, may God bless him and grant him peace, established a contract of mutual brotherhood amongst the believers, he also concluded a treaty by which he removed all traces of Jahiliyya [the pre-Islamic Era of Ignorance] and tribal tensions, leaving no room for the conventions of Jahiliyya.*”

He adds the following postscript to the Charter’s first half, “*With such wisdom and expertise did the Messenger of God, may God bless him and grant him peace, anchor the principles of a new society. This external reality was a consequence of the values that those early noble Muslims had enjoyed through their accompaniment of the Prophet, may God bless him and grant him peace, who had prepared them with teaching, education, purification of self and encouragement towards the most noble ethics. He had instilled in them the etiquettes of love, brotherhood, nobility, worship and obedience to God. [For example,] a man asked him: ‘Which aspect of Islam is best?’ He replied: ‘That you feed people, and that you greet those whom you know and those whom you do not’ ...*”

Furthermore, Mubarakpuri describes the second half of the Charter as a “*Treaty with the Jews*” and prefaces it by saying, “*After the Prophet, may God bless him and grant him peace, emigrated to Medina and was assured of the deep foundations of the principles of a new Islamic society, by establishing doctrinal, political and systemic unity amongst the Muslims, he saw fit to establish systematic relations with non-Muslims. His objective in this regard was to fully ensure safety, peace, happiness and goodness for all of humanity, as well as organising the local territory into one union. Therefore, he established rules of generosity and mutual tolerance that had previously been unknown in a world full of partisanship and mutual hatred.*”

He continues, “*The nearest non-Muslim neighbours of Medina were the Jews who, although they secretly harboured enmity⁹ towards the Muslims, had not yet displayed any resistance or opposition. The Messenger of God, may God bless him and grant him peace, agreed a treaty with them that left them **absolute freedom of religion and property**, and did not opt for any policy of marginalisation, confrontation or tension.*” [emphasis added]

Finally, he concludes his discussion by adding the following postscript at the end of the text of the Charter: “*By the enforcement of this treaty, Medina and its environs became a chartered state, its capital being Medina and its President (if such expression is correct) being the Messenger of God, may God bless him and grant him peace. The executive word and dominant power therein was for the Muslims. Thus, Medina became a real capital city of Islam ... And to extend the territory of safety and peace, the Prophet, may God bless him and grant him peace, concluded similar agreements with other tribes according to their circumstances ...*”

⁹ This is a worrying example of anti-Jewish prejudice from a contemporary Islamic scholar.

3.3.3 The Charter of Medina – analysis and summary

This document is striking in its genuine attempt to keep the peace in Yathrib, that was now becoming the new city-state of Medina: ruled by the Prophet Muhammad on behalf of the Muslims, it had significant populations of Jewish tribes as well as of Arab polytheists. According to Islamic tradition, the Jewish tribes are thought to have settled in this part of Arabia during or after their exile from the Holy Land into Babylon. The newly-converted Muslim tribes of the Aws and Khazraj had arrived more recently, but were from another part of Arabia, i.e. Yemen.

The text of the charter is mentioned in early Sira texts: biographies of the Prophet Muhammad, such as those of Ibn Ishaq and Ibn Hisham. However, very few of its significant clauses appear in the Qur'an or in the later Sunni canonical hadith collections, such as those of Malik, Ahmad, Bukhari, Muslim, Abu Dawud, Tirmidhi, Nasa'i or Ibn Majah.¹⁰ This is illustrated by the fact that although the Charter appears in the 14th-century historian Ibn Kathir's *al-Bidayah wa l-Nihaya* (A History of the World), it does not appear in the 20th-century Hadith scholar Albani's *Sahih al-Sira al-Nabawiyya*, his edition of Ibn Kathir's *Biography of the Prophet* including only sound or authentic hadiths (traditions) in his judgment. Since the corpus of traditional Islamic jurisprudence is largely based on the Qur'an and Hadith, the Charter had very little impact on the development of Islamic law and jurisprudence. However, the memory of the Medinan Charter clearly influenced the religious pluralism and co-existence in early Islamic empires such as the Umayyad and Abbasid ones that stretched from Andalusia across North Africa and into Asia, as well as later ones such as the Fatimids, Ottomans and Mughals.

Since the late 19th and early 20th century CE, there has been a resurgence of interest in the Medinan Charter amongst many Muslim theologians, scholars, intellectuals, thinkers and revivalists such as Afghani, 'Abduh, Rida, Iqbal, Hamidullah and others. There has been less influence upon Muslim jurists, who have generally continued to draw from Qur'an- and hadith-based thinking.

The political nature of the Charter has had obvious implications for Islamic thought around the nature of "Muslim states" or "Islamic states." This is evident in the comments on the Charter by Muhammad Asad, a European rationalist, modernist Muslim thinker, who described it as an ancient form of a "social contract" and Mubarakpuri, an Indian hadith scholar of the Salafi school of thought with strong links to Saudi Arabia, who sees the values of "absolute freedom of religion and property" for non-Muslims in the Charter.

The Medinan Charter is an important ancient document, being, like the Magna Carta, one amongst many from different religious and philosophical traditions that is part of the historical development of modern constitutional thinking: it is presumably for this reason that the Constitution Society, a US-based private non-profit organisation founded in 1994 and dedicated to research and public education on the principles of constitutional republican government, has published two different translations of the Charter on its website.

A parallel may be drawn here with the Prophet Muhammad's "Farewell Sermon" given during the Hajj pilgrimage that he led from Medina to Mecca towards the end of his life. This sermon, given to 10,000 Muslim followers, focuses on individual and communal rights and duties, and is one of the landmark speeches of ancient history that, along with similar speeches and sermons by people from

¹⁰ An exception to this rule is Clause 6 of the Charter that is reproduced almost verbatim in the canonical but disputed hadith, "No believer is to be killed in retaliation for the killing of a disbeliever." Another non-verbatim example is the hadith, quoted later in this study, condemning injustice against any non-Muslim under treaty.

Moses, Jesus Christ and Julius Caesar through to enlightened US Presidents and Martin Luther King Jnr., contributed to the historical development of modern human rights discourse, e.g. the Universal Declaration of Human Rights in 1948. The “Farewell Sermon” is reproduced in early Muslim biographical literature about the Prophet as well as in the later canonical Hadith collections, and therefore has had more impact upon Muslim discourse throughout the centuries, including in its theology and jurisprudence.

Muslim reformist thought will see the Medinan Charter and the Farewell Sermon in context, i.e. as part of the historical development of human thought and practice, as summarised above. However, literalist and fundamentalist Muslim thought makes wild claims of absolute universality about such texts, e.g. that they fully anticipate modern democracy, constitutionality and human rights discourse, rather than taking the more honest position that these texts may contain the *seeds* of some of this modern discourse. However, the Charter also reflects its historical context with, for example, clauses that discriminate against non-Muslims, such as nos. 6 and 7.

The contemporary scholar Senturk argues that “the [Ottoman] Declaration of Regulations (*Tanzimat Fermani*, 1839) may be seen as the first Islamic human rights declaration in the modern sense,” and further, that when the UN’s Universal Declaration of Human Rights was made in 1948, “Turkish scholars of Islamic law, such as Kazim Kadri and Ali Fuat Basgil, produced works advocating that it was consistent with Islamic law and thus deserved the support of Muslims.”¹¹ He adds that “the work of ancient prophets and philosophers can be seen as achievements towards a universal concept of [the] human.”¹²

Thus, raising the level of discussion about the Medinan Charter and Farewell Sermon in the context of the historical development of human thought and practice, will help in furthering internal Muslim debates as well as external ones.

¹¹ Recep Senturk, *Sociology of Rights: Human Rights in Islam between Communal and Universal Perspectives*, Emory University Law School, 2002, p. 10

¹² Senturk (2002), quoting M.R. Ishay, *The Human Rights Reader: Major Political Essays, Speeches and Documents from the Bible to the Present*, Routledge, New York, 1997

4 The institution of *Jizya* in the Qur'an – a poll-tax on non-Muslims in return for safety, protection and residence

The following is the verse of *jizya* (Qur'an 9:29), according to various English-language translators and commentators since the 20th century CE.

4.1 Pickthall's translation

*Fight against such of those who have been given the Scripture as believe not in Allah nor the Last Day, and forbid not that which Allah hath forbidden by His messenger, and follow not the Religion of Truth, until they pay the tribute readily, being brought low.*¹³

4.2 Yusuf Ali's translation and commentary

Fight those who believe not

In God nor the Last Day,

Nor hold that forbidden

Which hath been forbidden

By God and His Apostle,

Nor acknowledge the Religion

Of Truth, (even if they are)

Of the People of the Book,

Until they pay the Jizya

With willing submission,

*And feel themselves subdued.*¹⁴

Yusuf Ali comments on this verse as follows:

'Jizya: the root meaning is compensation. The derived meaning, which became the technical meaning, was a poll-tax levied from those who did not accept Islam, but were willing to live under the protection of Islam, and were thus tacitly willing to submit to its ideals being enforced in the Muslim State, saving only their personal liberty of conscience as regarded themselves. There was no amount permanently fixed for it, and in any case it was merely symbolical, - an acknowledgment that those whose religion was tolerated would in their turn not interfere with the preaching and progress of Islam. Imam Shafi'i suggests one dinar per year, which would be the Arabian gold dinar of the Muslim States, equivalent in value to about half a sovereign, or about 5 to 6/7 rupees ... The tax varied in amount, and there were exemptions for the poor, for females and children (according to Abu Hanifa), for slaves, and for monks and hermits. Being a tax on able-bodied males of military age, it was in a sense a commutation for military service ...

¹³ Muhammad Marmaduke Pickthall, *The Meaning of the Glorious Qur'an*, Islamic Dawah Centre International, Birmingham, UK, 2004

¹⁴ A. Yusuf Ali, *The Holy Qur'an – Text, Translation and Commentary*, Amana, Maryland, USA, 1983

'An Yadin (literally, from the hand) has been variously interpreted. The hand being the symbol of power and authority, I accept the interpretation "in token of willing submission." The Jizya was thus partly symbolic and partly a commutation for military service, but as the amount was insignificant and the exemptions numerous, its symbolic character predominated.

4.3 Muhammad Asad's translation and commentary

[And] fight against those who - despite having been vouchsafed revelation [aforetime] (40) - do not [truly] believe either in God or the Last Day, and do not consider forbidden that which God and His Apostle have forbidden (41), and do not follow the religion of truth [which God has enjoined upon them] (42) till they [agree to] pay the exemption tax with a willing hand, after having been humbled [in war]. (43)¹⁵

Asad, in his commentary on this verse, states:

The term jizyah, rendered by me as "exemption tax", occurs in the Qur'an only once, but its meaning and purpose have been fully explained in many authentic Traditions. It is intimately bound up with the concept of the Islamic state as an ideological organization: and this is a point which must always be borne in mind if the real purport of this tax is to be understood. In the Islamic state, every able-bodied Muslim is obliged to take up arms in jihad (i.e., in a just war in God's cause) whenever the freedom of his faith or the political safety of his community is imperilled: in other words, every able-bodied Muslim is liable to compulsory military service. Since this is, primarily, a religious obligation, non-Muslim citizens, who do not subscribe to the ideology of Islam, cannot in fairness be expected to assume a similar burden. On the other hand, they must be accorded full protection of all their civic rights and of their religious freedom: and it is in order to compensate the Muslim community for this unequal distribution of civic burdens that a special tax is levied on non-Muslim citizens (ahl adh-dhimmah, lit., "covenanted [or protected] people", i.e., non-Muslims whose safety is statutorily assured by the Muslim community). Thus, jizyah is no more and no less than an exemption tax in lieu of military service and in compensation for the "covenant of protection" (dhimmah) accorded to such citizens by the Islamic state ... No fixed rate has been set either by the Qur'an or by the Prophet for this tax; but from all available Traditions it is evident that it is to be considerably lower than the tax called zakah ("the purifying dues") to which Muslims are liable and which - because it is a specifically Islamic religious duty - is naturally not to be levied on non-Muslims. Only such of the non-Muslim citizens who, if they were Muslims, would be expected to serve in the armed forces of the state are liable to the payment of jizyah, provided that they can easily afford it. Accordingly, all non-Muslim citizens whose personal status or condition would automatically free them from the obligation to render military service are statutorily - that is, on the basis of clear-cut ordinances promulgated by the Prophet-exempted from the payment of jizyah: (a) all women, (b) males who have not yet reached full maturity, (c) old men, (d) all sick or crippled men, (e) priests and monks. All non-Muslim citizens who volunteer for military service are obviously exempted from the payment of jizyah. My rendering of the expression 'an yad (lit., "out of hand") as "with a willing hand", that is, without reluctance, is based on one of several explanations offered by Zamakhshari in his commentary on the above verse. Rashid Rida, taking the word yad in its metaphorical significance of "power" or "ability", relates the phrase 'an yad to the financial ability of the person liable to the payment of jizyah (see Manar X, 342): an interpretation which is undoubtedly justified in view of the accepted definition of this tax.

¹⁵ Muhammad Asad, *The Message of the Qur'an*, Dar al-Andalus, Gibraltar, 1980

4.4 Abdel Haleem's translation and commentary

*Fight those of the People of the Book who do not [truly] believe in God and the Last Day, who do not forbid what God and His Messenger have forbidden, who do not obey the rule of justice, until they pay the tax promptly and agree to submit.*¹⁶

4.5 Discussion of these translations and commentaries

Whilst Ali and Pickthall both translate *din al-Haqq* as “The Religion of Truth,” Abdel Haleem points out that the Arabic *dana* means to obey or behave as well as follow a religion. He concludes that this phrase simply “refers to breaking the *jizya* contract.” He also adopts the literal interpretation of this verse that is most generous to non-Muslim dhimmis who pay *jizya*: it is “in return for the protection of the Muslim state with all the accruing benefits and exemption from military service, and such taxes on Muslims as *zakah*. *Jizya* was levied only on able-bodied free men who could afford it, and monks were exempted. The amount was generally low (e.g. one dinar per year) ... Commentators in the past generally understood *wa hum saghirun* to mean they should be humiliated when paying. However, it is clear from the context that they were unwilling to pay, and the clause simply means they should submit to paying this tax.”

As later sections of this report show, literalist interpretations of this verse were often abandoned throughout the history of Islam, beginning with the early caliphs. The following discussions in early Islamic jurisprudence are examples of this:

- (i) Was *jizya* applicable only to People of Scripture, or to pagans also?
- (ii) Was *jizya* applicable only to non-Arabs, or were Arabs included? The exemption from *jizya* granted by Caliph Umar bin al-Khattab to the Taghlib, an Arab Christian tribe, is a case in point.

Furthermore, the Ottomans finally abolished the *jizya* in the 19th century CE, and no recognised Muslim-majority nation-state since the 20th century has levied a *jizya* tax on non-Muslim subjects or citizens. The evolution of Muslim thought that led to these developments is the subject of this study.

¹⁶ M.A.S. Abdel Haleem, *The Qur'an*, Oxford University Press, New York, 2010, pp. 118

5 Background: Canonical hadiths about *jizya* and people of *dhimma*

The following is an original translation of selected extracts from *Kitab al-Jizya wa l-Muwada'a* (The Book of *Jizya* and Temporary Truce) from the 9th-century *Sahih al-Bukhari*, revered as the most authentic collection of Prophetic traditions (hadiths) in Sunni Islam. This extract provides a fair idea of the basis of classical jurisprudence with regard to Prophetic traditions. Furthermore, the other main hadith source, *Sahih Muslim*, has no such book on *jizya* or *dhimma*. The book has the following chapter headings:

1. *On jizya and temporary truce with people of protection and war*
2. *When the ruler concludes a temporary truce with the chief of a village, does that apply to the rest of them?*
3. *Bequeathing care of the people under the protection of the Messenger of God, may God bless him and grant him peace*
4. *The territory of Bahrayn designated for particular tribes by the Prophet, may God bless him and grant him peace; what he promised of the wealth and jizya of Bahrayn; to whom are spoils of war and jizya distributed*
5. *The sin of someone who kills an innocent person under covenant*
6. *Expulsion of the Jews from the Arabian peninsula*
7. *If polytheists betray the Muslims, are they to be forgiven?*
8. *The ruler's prayer against those who violate their covenant*
9. *The guarantee of safety and security given by women*
10. *The protection and security guarantee of the Muslims is one, and may be granted by the lowest of them*
11. *If people say, "We have become Sabian" and were not aware that they should say, "We have submitted" [in Islam]*
12. *Temporary truces and treaties with the polytheists in exchange for wealth etc.; the sin of those who do not fulfil their covenant*
13. *The virtue of fulfilling covenants*
14. *Is a protected person to be forgiven if he practises sorcery?*
15. *The type of treachery that is feared*
16. *How people under covenant are told that it is revoked*
17. *The sin of those who make a covenant and then betray it*
18. *[untitled]*
19. *A truce for three days or other known time-period*
20. *An indefinite truce*
21. *Throwing corpses of polytheists into a well, and not returning them for a price*
22. *The sin of betraying righteous and unrighteous people*

This selection of hadiths provides a fair idea of the basis of classical jurisprudence with regard to Prophetic traditions, as is explored in later sections. Furthermore, the hadiths themselves include early commentary on Qur'anic verses, such as the one cited previously about *jizya*. The other main hadith source of Sunni Islam, *Sahih Muslim*, has no such book on *jizya* or *dhimma*. The other four main hadith sources are regarded as being of lesser rank and tend to follow themes similar to Bukhari.

[Selections from *Kitab al-Jizya wa l-Muwada'a* (The Book of Jizya and Temporary Truce), *Sahih al-Bukhari* – original translation and brief commentary by Usama Hasan]

5.1 On jizya and temporary truce with people of protection and war

“Lowered” in Qur’an 9:29 means “humiliated.”

This chapter also contains whatever has been related about accepting jizya from Jews, Christians, Magians and non-Arabs.

Ibn ‘Uyayna said: Ibn Abi Najih said: I asked Mujahid, “Why do the people of Syria pay four dinars whilst the people of Yemen pay one dinar?” He replied, “That was imposed according to the affluence of the people.”

‘Umar did not take jizya from Magians until ‘Abdul Rahman bin ‘Awf testified that the Messenger of God, may God bless him and grant him peace, took it from the Magians of Hajar [Eastern Arabia].

The Messenger of God sent Abu ‘Ubayda bin al-Jarrah to Bahrayn [eastern Arabia] to bring its jizya. The Messenger of God had made a peace treaty with the people of Bahrayn and appointed Ala’ bin al-Hadrami as their governor.

Al-Mughira said, before a battle against the Persians during the time of Umar, “Our Prophet ordered us to fight you until you worship God alone or pay jizya.”

Dhimma (protection) means: a covenant.

Commentary: The above traditions relate to various details about the collection of *jizya*. Centuries of jurisprudence, some of which is discussed later in this report, were based on such traditions.

5.2 The sin of someone who kills an innocent person under covenant

The Prophet said, “Whoever kills a person under covenant will never smell the perfume of Paradise, even though its perfume extends for forty years’ journey.”

Commentary: This hadith teaches the basic sanctity of the lives of non-Muslims living under Islamic rule.

5.3 Expulsion of the Jews from the Arabian Peninsula

Abu Hurayra: We were in the mosque when the Prophet came out and said, “Let’s go to the Jews.” We went to their house of study. He said, “Submit [in Islam] to be safe. Know that the land belongs to God and His Messenger, and I wish to expel you from this land. If any of you have wealth, sell it, otherwise know that the land belongs to God and His Messenger.”

Commentary: This hadith, and similar ones about Christians, were understood as requiring Arabia, and especially the holy cities of Mecca and Medina in the Hijaz region, to be populated by Muslims only, these regions being the heartlands of Islam. Such hadiths may not fit with modern notions of religious freedom and pluralism.

5.4 If polytheists betray the Muslims, are they to be forgiven?¹⁷

Hadith: Jews of Khaybar sent a poisoned sheep to the Prophet after Khaybar was conquered. They explained their motivation, “If you were a liar, we could rest. If you were a Prophet, it would not harm you.”

Before that, the Prophet asked them, “Who are the people of the Fire?” They replied, “We will be in there for a little while, and then you (Muslims) will succeed us there.” The Prophet retorted, “Go deep into it – by God, we will never succeed you there!”

Commentary: The chapter heading implies that treachery may be forgiven, if the ruler sees fit to do so. The hadith is also one of many that describe conversations between the Prophet and the Jews, some of which were amicable whilst others were difficult.

5.5 The guarantee of safety and security given by women

Umm Hani safeguarded a polytheist. ‘Ali threatened to kill him. The Messenger of God said, “We safeguard whomever you safeguard, Umm Hani.”

Commentary: Any adult Muslim, man or woman, was able to personally guarantee the safety and security of people who would otherwise be regarded as enemies.

5.6 The protection and security guarantee of the Muslims is one, and may be granted by the lowest of them

‘Ali gave a sermon and said: We have nothing written to read except for the Book of God and what is in this parchment: ... The protection of the Muslims is one ...

Commentary: As above, for the previous hadith.

5.7 Temporary truces and treaties with the polytheists in exchange for wealth etc.; the sin of those who do not fulfil their covenant

And God’s saying, “If they incline towards peace, incline you also to it ...” [Qur’an 9:61]

Abdullah bin Sahl went with a friend to Khaybar [a Jewish settlement] that was under a treaty at the time [in exchange for a land-tax on the output of the oasis]. Abdullah’s friend later found him dead. Abdullah’s brother, the friend and his brother came to the Prophet who asked them to swear an oath and seek retaliation from the killer. They replied, “How can we swear an oath when we did not witness or see anything?” He said, “Should the Jews swear fifty oaths of innocence to you?” They replied, “How can we accept the oaths of infidel people?” So the Prophet paid his blood-money by himself.

Commentary: This tradition illustrates that xenophobia was present on all sides; agreements and covenants were the only way to facilitate coexistence.

¹⁷ This chapter heading by al-Bukhari implies that Jews are polytheists, since the hadiths included are about Jews. This is a problematic claim.

5.8 The virtue of fulfilling covenants

Abdullah bin Abbas [a cousin of the Prophet] narrated that Abu Sufyan bin Harb [a leader of the Meccan polytheists before his conversion to Islam] informed him that Heraclius [Emperor of Byzantium] sent him a letter whilst he was part of a travelling group of Quraysh who were traders in Syria, during the period when the Messenger of God, may God bless him and grant him peace, had concluded a treaty with Abu Sufyan and the infidels of Quraysh.

Commentary: This hadith simply affirms the validity of concluding treaties with non-Muslims, even polytheists who were the main enemy at the time. The chapter heading extols the virtues of fulfilling promises and agreements.

5.9 Is a protected person to be forgiven if he practises sorcery?

Ibn Shihab [a leading early Muslim authority] was asked, “Is a person under treaty to be killed if he practises sorcery?” He replied, “It reached us that the Messenger of God, may God bless him and grant him peace, had that practised upon him by a person of scripture and did not kill them.”

Commentary: In early Islam, the sanctity of the lives of non-Muslims, and of people committing major acts of blasphemy such as sorcery, was a subject of intense discussion. This hadith and chapter heading encourages a great deal of tolerance and forgiveness, even for blasphemy and sorcery.

5.10 The sin of those who make a covenant and then betray it

Ali said: We did not write anything on the authority of the Prophet, may God bless him and grant him peace, except for the Book of God and what is in this parchment: ... the protection of the Muslims is one, and may be granted by the lowest of them ...

Abu Hurayra said, “How will you be when you receive neither gold nor silver coins?” It was said to him, “How do you see that happening?” He replied, “Yea, by the One in whose hand is Abu Hurayra’s soul, on the authority of the truthful and affirmed one: Violated will be the protection of God and the protection of His Messenger, may God bless him and grant him peace, so God, Mighty and Majestic, will bind the hearts of the protected people so they will withhold what they have in their hands.”

Commentary: The chapter heading condemns the violation of agreements. The context is that of agreements with non-Muslims.

5.11 Chapter: [untitled]

Asma’, daughter of Abu Bakr, said: My polytheist mother came to me, along with her father, during the time of the treaty that Quraysh [the leading polytheist tribe of Mecca] concluded with the Messenger of God, may God bless him and grant him peace. She asked the latter, “My mother came to me and is well-disposed; should I treat her well?” He answered, “Yes, treat her well.”

Commentary: This tradition affirms the validity of peace treaties with non-Muslims, even if they used to be, like the Meccan polytheists, mortal enemies of the Muslims. It is also a reminder of the basic principle of human kindness, especially towards relatives and, above all, towards parents, even if they belong to an enemy nation.

5.12 An indefinite truce

And the saying of the Prophet, may God bless him and grant him peace, [to the Jews of Khaybar] “I allow you to remain as long as God allows you to remain there.”

Commentary: Early jurisprudence disagreed over the permitted duration of peace treaties and truces. Bukhari cites this hadith to support the permissibility of indefinite truces.¹⁸

5.13 The sin of betraying righteous and unrighteous people

On the authority of Anas: the Prophet, may God bless him and grant him peace, said, “Every treacherous person will have a banner raised and seen on the Day of Resurrection, by which he will be known.”

The son of Umar said: I heard the Prophet, may God bless him and grant him peace, saying, “Every treacherous person will have a banner raised for his treachery.”

Commentary: Here, treachery, including that against sinners (often understood to include non-believers), is condemned absolutely.

5.14 A discussion of these hadiths

These traditions were written down in this particular collection during the third century of Islam (9th century CE), and were transmitted orally before that. In this extract, the terms *jizya*, *dhimma*, covenant, peace treaty and truce are commonplace. Crucially, many of the traditions mentioning a covenant refer to that with the Meccan polytheists, who were not given the option of *jizya*. Bukhari’s chapter headings and comments often refer to early juristic discussions. This is evident here in his mention of questions such as “accepting *jizya* from Jews, Christians, Magians and non-Arabs,” of time-limited as well as indefinite peace treaties, and of the importance of fulfilling covenants and treaties, whatever the circumstances. The following chapters illustrate the depth and detail of juristic discourse on such subjects in subsequent centuries.

These hadiths also contain problematic issues, such as polemics against polytheists and Jews, that need to be honestly confronted and debated by Muslims.

¹⁸ During the Israeli-Arab conflict since 1948, Islamist leaders have sometimes suggested a maximum 10-year peace treaty with Israel, based on one particular view from early Islamic jurisprudence that a longer truce is not religiously permitted. However, other early religious views also permitted indefinite and permanent peace treaties.

5.15 Are others besides Jews and Christians, “People of Scripture” (*Ahl al-Kitab*)?

As discussed above, as well as in later sections dealing with jurisprudence, some early authorities, including ‘Ali bin Abi Talib and Imam Shafi’i, widened this term, at least partially, to include Magians (Zoroastrians or Parsees) in some respects, on the basis that they were, originally at least, in possession of a scripture from God. In his commentary on the above hadiths from *Sahih al-Bukhari* at the beginning of the chapter on *jizya*, the 15th-century master of hadith, Ibn Hajar al-‘Asqalani, states:

Abu ‘Ubayd said: The jizyah is established upon Jews and Christians by the Book [Qur’an], and upon the Magians by the Sunnah. Others argued that the generality of the Prophet’s saying in the hadith of Buraydah and others, “Therefore, when you meet your polytheist enemy, invite them to Islam, otherwise the jizyah.” They also argued that the acceptance of the jizyah from the Magians indicates leaving the implication of the verse [9:29], for if the “People of Scripture” are not specifically meant, then there is no implied meaning to the phrase, “amongst the People of Scripture.” This argument is countered by saying that the Magians had a scripture that was later lifted from them: Shafi’i and others transmitted a tradition to this effect on the authority of ‘Ali, mention of which will come later in this chapter. This argument is in turn countered by the saying of the Exalted, “[Lest you say:] The scripture was only revealed to two groups before us” [6:156]. This is countered by saying that what is meant by the speakers [in this verse] is the Quraysh, for none of the many groups were well-known to them as having a scripture except for the Jews and Christians, and this does not nullify the remainder of the revealed books such as the Psalms, the scriptures of Abraham [53:37, 87:19] and others ...

One narration has: Malik said, “His statement: ‘[treat them] ... as you do People of Scripture,’ is regarded as indication that they [Magians] are not People of Scripture.” However, Shafi’i, ‘Abd al-Razzaq and others transmitted with a sound (hasan) chain on the authority of ‘Ali: “The Magians were people of a scripture that they would recite and of [revealed] knowledge that they would study. Their leader once drunk wine and raped his sister. In the morning, he invited the greedy and gave them wealth, saying, ‘Adam used to marry his sons to his daughters.’ They obeyed him and his opponents were killed. Their scripture in writing and in their hearts was taken away from them, such that none of it remained with them.”

‘Abd bin Humayd transmitted in the exegesis of Surah al-Buruj [no. 85] with an authentic (sahih) chain on the authority of Ibn Abza: When the Muslims routed the people of Persia, ‘Umar ordered them to gather and said, “The Magians are neither people of a scripture such that we may enforce the jizyah upon them, nor are they idolaters such that we are able to apply the appropriate rulings.” ‘Ali said, “Rather, they are people of a scripture,” and mentioned the story as above, except that he said, “... He raped his daughter” and added at the end that he punished his opponents using stakes. Thus, this is the proof of those who say that they had a scripture ... Ibn al-Mundhir said, “There is no agreement on prohibiting [marrying] their women and [eating] their slaughtered meat, but most of the people of knowledge take this view.”

Thus, Ibn Hajar repeats the view of ‘Ali and Shafi’i that any nation with a scripture, such as Magians (Zoroastrians or Parsees), count as “People of the Book,” not just Jews and Christians. Furthermore, Ibn al-Mundhir implies that some jurists treated Magians fully like Jews and Christians, with the permission to marry their women and eat their slaughtered meat; however, most jurists disagreed with this position. A strong logical argument may be made in favour of the minority view in this regard. This logical argument would apply to all major religions, including Hinduism, since they are all in possession of scripture. The contemporary scholar, Ekmeleddin Ihsanoglu, says, “Al-Baladhuri reports in his *Futuh al-Buldan* that when a group of Brahmins approached Muhammad [bin Qasim], the first Muslim conqueror in India, for the protection of their lives and temples after the conquest of Sindh, he granted them the status of the *dhimmis* by declaring that ‘The Hindu temples are just like Christian churches, Jewish synagogues, and the Zoroastrian fire-temples’.”¹⁹

¹⁹ Ali Abdul, ‘Tolerance in Islam’, *Islamic Culture* 56 (1982), p. 108, quoted in Ihsanoglu, *A Culture of Peaceful Coexistence* (see Appendix 1 for further details)

6 Further background: classical commentary on *Jizya*

The following selected, original translations from early and mediaeval Islamic texts of exegesis and jurisprudence provide representative examples of Muslim tradition in this regard from that period. These selections also cover the main Sunni schools of jurisprudence: Hanafi, Maliki, Shafi'i, Hanbali and Zahiri, and illustrate that the Zahiri and Shafi'i schools tend to be the most literalist of them all.

6.1 Imam Shafi'i's discussion of *jizya* (2nd/8th-9th century, Shafi'i school)²⁰

Imam Shafi'i was the founder of the school of jurisprudence that bears his name: his main teacher had been Imam Malik, founder of the Maliki school. Shafi'i also spent time studying and discussing jurisprudence with the main students of Imam Abu Hanifa, founder of the Hanafi school. All of these figures were also traditionists (hadith narrators and scholars) as well as jurists. One of Shafi'i's pupils in hadith and jurisprudence was Imam Ahmad bin Hanbal, founder of the Hanbali school of theology and jurisprudence. Thus, Imam Shafi'i was intimately linked to all four of the major Sunni schools of jurisprudence (and theology, partly): Hanafi, Maliki, Shafi'i and Hanbali. His school is often the most literalist of these four schools in terms of an insistence on the specific literal texts at the expense of the more general logic underpinning them, and this is manifested in some of the discussion that is now presented in English translation for the first time.

6.1.1 [Different types of polytheists]

Regarding idolatrous polytheists and polytheist People of Scripture (Ahl al-Kitab): the only ones of the latter who were near or in the presence of the Messenger of God, may God bless him and grant him peace, were the Jews of Medina who were allies of the Ansar. At first, these Jews made a treaty with the Messenger of God, may God bless him and grant him peace, and did not openly show any enmity towards him by word or deed. This continued until the Battle of Badr, when the Jews talked amongst themselves of enmity towards him and inciting others against him, so the Messenger of God, may God bless him and grant him peace, fought them. There were no other Jews in the Hijaz²¹, but there were Christians in Najran and Magians in Hajar [Eastern Arabia], Berber lands and Persia, away from the Hijaz. Between these groups, there were many idolatrous polytheists.

6.1.2 [Treatment of different types of polytheists]

God revealed to his Messenger the obligation of fighting the polytheists of the People of Scripture, saying, "Fight those who do not believe in God and the Last Day, and do not prohibit what God and His Messenger have prohibited, and do not follow the Religion of Truth, until they pay the jizya by hand whilst lowering themselves." (9:29) So God distinguished between fighting idolaters (until they submit in Islam) and fighting People of Scripture (until they pay jizya or submit in Islam).

A number of trustworthy authorities have transmitted to me the tradition (hadith) from the Messenger of God, may God bless him and grant him peace, that mentions inviting polytheists to Islam, then to emigrate to the lands of the Muslims, else to pay the jizya, otherwise they are to be fought.²² This applies to People of Scripture, and not to idolaters.

²⁰ Translated extracts from Imam Shafi'i, *Kitab al-Jizya* [Book of Jizya], *al-Umm* [The Source], Bayt al-Afkar al-Dawliyyah [International House of Ideas], Amman/Riyadh, n.d., pp. 769-779

²¹ A strip of western Arabia including Mecca and Medina. According to Shafi'i in this passage, the Hijaz comprises Mecca, Medina, Yamama (the plateau of central Arabia including present-day Riyadh).

²² This hadith is also recorded by the following canonical authorities: Muslim no. 1731, Abu Dawud no. 2612, Tirmidhi no. 1617 and Ibn Majah no. 2858

6.1.3 [Jizya is imposed according to religion, not race]

Before Islam, many Arab tribes followed the religion of the People of Scripture who neighboured them, especially in Yemen. The idolatrous polytheists followed the religion of their forefathers. Thus, the Messenger of God, may God bless him and grant him peace, accepted jizya from Ukaydir of Duma al-Jandal, a man of the Ghassan²³ or Kindah²⁴, from the people of Yemen (mainly Arab) and Najran. When Islam came these people were following the religion of the People of Scripture, not of idolatry.

Thus, jizya is not by race [i.e. for non-Arabs rather than Arabs] but by religion.

6.1.4 [People of Scripture other than Jews and Christians, such as Magians]

The People of Scripture known to most people were the Children of Israel, people of the Torah (Jews) and of the Gospel (Christians). God informed us that He revealed books other than the Torah, Gospel and Criterion [Qur'an], e.g. the "scriptures of Abraham" (53:36-37)²⁵ and the "scriptures of the ancients" (26:196). The Magians had a religion other than that of the idolaters but differed from Jews and Christians in parts of their religion, just as the Jews and Christians differed from each other in parts of their religion.

The Magians were in the margins of the land [Arabia], so our ancestors in Hijaz were not familiar about their religion, the way they were familiar with the religion of the Christians and Jews. The Magians were, and God knows best, People of Scripture along with Jews and Christians.

Farwa bin Nawfal al-Ashja'i questioned why jizya was accepted from the Magians when they were not People of Scripture. Mustawrid grabbed him by the scruff of the neck, "How dare you criticise [the first Caliph] Abu Bakr and [the then Caliph] 'Ali?" and took him to the palace. 'Ali emerged and said, "I know best about the Magians: they possessed divine knowledge and a scripture that they would study. One of their kings got drunk and raped his daughter or sister in the presence of some of his subjects. When he became sober, he feared he would be punished for his crime. When they came to him, he said: Do you know a religion better than that of Adam? Adam married his sons to his daughters: I am following his religion. What turns you away from his religion? So they followed him and fought and killed those who opposed him. He had violated their scripture, so it was lost to them, and the knowledge in their hearts was taken away. Thus, they are People of Scripture, and the Messenger of God, may God bless him and grant him peace, Abu Bakr and Umar all took jizya from them."²⁶

6.1.5 Jizya may only be taken from People of Scripture

This acceptable, connected narration from Ali indicates what I [Shafi'i] have described: that the Magians are People of Scripture, and that Ali informed us that the Messenger of God, may God bless him and grant him peace, and his caliphs only accepted jizya from them because they were People of Scripture. Were jizya acceptable from people who were not People of Scripture, Ali would have stated whether or not they were People of Scripture. I know of no past Muslim who allowed jizya to be taken from people who were not People of Scripture.

²³ A major Arab tribe of northern Arabia

²⁴ A major Arab tribe of Yemen

²⁵ See also Qur'an 87:19 for the "scriptures of Abraham and Moses."

²⁶ This hadith is also transmitted by Bayhaqi (9/188-9)

Umar was not going to take jizya from the Magians until Abdul Rahman bin Awf testified that the Messenger of God, may God bless him and grant him peace, took it from the Magians of Hajar [eastern Arabia].²⁷

Malik²⁸ informed us from Ja'far bin Muhammad²⁹ from his father³⁰ that Umar did not know what to do about Magians until Abdul Rahman bin Awf testified that the Messenger of God, may God bless him and grant him peace, said, "Treat them in the same way as the People of Scripture."

If this is authentic³¹, it does not apply to marrying their women or eating their slaughtered meat but it affirms that they [the Magians] are People of Scripture.

Malik informed us from Ibn Shihab³² that it reached him that the Messenger of God, may God bless him and grant him peace, took jizya from the Magians of Bahrain [eastern Arabia], and 'Uthman took it from the Berbers.

Had Umar known that jizya was acceptable from all polytheists, he would not have asked about the Magians: he only asked about them because he was not familiar with their scripture the way he was familiar with the scripture of the Jews and Christians. Everything I have transmitted indicates that jizya may not be taken from people other than People of Scripture.

6.1.6 [Detailed discussion: from whom is jizya acceptable?]

Whoever follows a religion of the People of Scripture, by himself or with others, even if his ancestors did not - any scripture revealed before the Criterion [Qur'an] - and opposed the religion of idolaters, he is not from the idolaters. If he pays the jizya whilst humbled, the ruler must accept it, whether he is Arab or non-Arab.

When Islam appears to someone and he, Arab or non-Arab, does not follow the religion of the People of Scripture and wishes to pay the jizya and be allowed his religion or to follow the religion of the People of Scripture, then the ruler may not accept jizya from him: he must fight him until he submits (in Islam), as with the idolaters.

Any polytheist who does not leave his religion for that of the People of Scripture, he is like the idolaters, e.g. he worships images or other selected things, or denies all divinity (or divine attributes), etc.

6.1.7 From whom is jizya waived?

Those who must be fought according to this verse (9:29) are adult men. There is no jizya on non-adult males, nor on women, nor on the insane because they do not hold to any religion, so cannot be said to have abandoned Islam, nor on slaves because they do not own their own property that they may pay jizya from it. Jizya, or equivalent wealth, may not be taken from women, children or slaves even if they offer it or agree to it as part of a treaty: any such clauses in a treaty will be invalid.

²⁷ This hadith is also in Bukhari no. 3156, Abu Dawud no. 3043 and Tirmidhi no. 1587

²⁸ Imam Malik of Medina, founder of the Maliki school of jurisprudence.

²⁹ A direct descendant of the Prophet; the sixth Imam of the Twelver Shia; founder of the Shia Ja'fari school of jurisprudence.

³⁰ Muhammad bin 'Ali al-Baqir, a direct descendant of the Prophet; the fifth Imam of the Twelver Shia.

³¹ Imam Shafi'i appears to have some doubt about this chain of narration, presumably because of the chronological gap between Muhammad bin Ali (Ja'far's father) and Caliph Umar.

³² Al-Zuhri, a leading early Medinan traditionist and jurist.

6.1.8 The meaning of “humiliation” or “lowering” in the verse 9:29

I heard a number of the people of knowledge say that “humiliation” or “lowering” in this verse means that they submit to the rule of Islam, since they refused to adopt it as a religion. When it rules over them, they have been subdued.

6.1.9 How much is the jizya?

Jizya is liable to increase or decrease. The Messenger of God, may God bless him and grant him peace, took jizya from the people of Yemen at the rate of one dinar per head [of male adults, per annum], and similarly from the people of Ayla and the Christians of Mecca. The rate was higher for the Christians of Najran. I do not know the rate for Ukaydir and the Magians of Bahrayn, but no-one has ever reported that he took less than one dinar from anyone.

Malik informed us from Nafi' from Aslam, freed slave of Umar bin al-Khattab that Umar imposed a jizya of four dinars upon those whose currency was gold ...³³

As for those whose currency was silver, Umar imposed a jizya of 48 dirhams for the richest, 24 for the medium-wealthy and 12 for the least affluent. This corresponds with Umar's exchange rate of 12 dirhams to one dinar for blood-money.

6.1.10 People of Scripture: marrying their women and eating their slaughtered meat

God permitted this, but there are two possibilities: either this applies to all People of Scripture or only to some of them. What is narrated from the Prophet, may God bless him and grant him peace, indicates, and I know of no-one who disagrees with this, that God intended this permission to apply to the People of the Torah and Gospel from the Children of Israel, and not to the Magians, and God Exalted knows best.

I have not known anyone to disagree that Magian women are not to be married, nor is their slaughtered meat to be eaten. Consensus indicates that the People of Scripture are of two types as to legal rulings: those whose women may be married and their slaughtered meat eaten, and those whose women may not be married, nor their slaughtered meat eaten. God mentioned His favour upon the Children of Israel in many places in His Book, and what He bestowed upon them to the exclusion of their contemporaries. Those who were not Israelites but followed their religion, their women may not be married since they are not fully People of Scripture because their forefathers were not People of Scripture, being not from the lineage of the Children of Israel. They are only People of Scripture in one aspect, not absolutely People of Scripture. Therefore, it is not permitted, and God Exalted knows best, that it is not permitted to marry any Arab or non-Arab women following the religion of Jews and Christians if they are not Children of Israel.

'Umar bin al-Khattab said, “Arab Christians are not People of Scripture. Their slaughtered meat is not lawful for us. I will not leave them unless they submit (in Islam), or I shall smite their necks.”

Those whose women may not be married, sexual intercourse with their female slaves is not permitted. As for Israelite Sabians and Samaritans following the religion of the Jews and Christians, their women may be married and their slaughtered meat eaten as long as they believe in the sources: the Torah and Gospel, even if they disagree about branches of religion, since Jews and Christians also disagree about branches of religion. However, if they oppose them regarding the fundamental source of the Torah, their slaughtered meat may not be eaten, and their women may not be married.

³³ This hadith is also transmitted by Malik and Bayhaqi (9/196)

For those of the Children of Israel where the permission applies due to their religion of Judaism or Christianity, it applies equally whether they are at war, in a peace agreement or payers of jizya. The only exception is that I dislike that men should marry in the lands of war, for fear of tribulation in their religion or of their or their children's being enslaved. However, it is not prohibited.

6.1.11 The people of jizya changing their religion

If a Jewish man or woman apostasises to Christianity or a Christian man or woman to Judaism, their jizya is not valid. A woman who apostasises from the source religion of her forefathers may not be married. Similar is the case if they apostasise to Magianism or other forms of polytheism. This is because jizya is taken from them in return for allowing them to remain upon their religion, so if they change it to one other than Islam, their state has changed away from their state as jizya-payers that permitted their meat to be eaten and their women to be married.³⁴

No-one may reside in the land of Islam except Muslims and those under covenant: we are not allowed to take jizya from someone except as long as they follow their original religion. If you change your religion to one other than Islam, we rescind the covenant with you and banish you from the land of Islam. It is said: if you return to your original religion, we can accept jizya from you.

If such a person dies before they are exiled, their heirs under their original religion will inherit from them, for unbelief is one faith (milla): idolaters, People of Scripture and Magians may inherit from each other, even if their religion differs, just as Islam is one faith (milla).

6.2 Imam al-Qurtubi's discussion of jizya (7th/13th century, Maliki school)

Imam al-Qurtubi ("the Cordoban") was a leading Andalusian scholar, best known for his comprehensive and voluminous *Tafsir*, or commentary on the Qur'an that focuses especially on jurisprudential matters, although it also covers theology and tradition. This is reflected in its official name: *al-Jami' li Ahkam al-Qur'an* ("Compendium of the Rulings of the Qur'an").

Qurtubi usually lists a number of issues to be discussed about each verse of the Qur'an. He states that verse 9:29 contains 15 issues.³⁵ Selected extracts from his lengthy commentary are now presented in translation:

6.2.1 [Why was jizya introduced historically?]

Verse 9:28 had forbidden polytheists from approaching Mecca, so trade with them suffered. The Muslims were somewhat upset about this. Jizya was introduced partly to offset this loss.

God, Glorified and Exalted, ordered that all disbelievers are to be fought. The People of Scripture are mentioned specifically because they should know better, being people who knew monotheism, prophets, revelation and sacred law.

Jizya is in place of being killed: this is the correct view. Ibn al-'Arabi said: I heard Ibn 'Aqil recite this verse and base his argument for this position upon it during a debate.

³⁴ This is one of many examples of Shafi'i literalism. Later Shafi'i scholars were to demand the death penalty for Jews converting to Christianity or vice-versa, based upon a literalist approach to the hadith, "Whoever changes his religion, kill him." See U. Hasan, *No Compulsion in Religion – Islam and the Freedom of Belief*, Quilliam, 2013, p. 23 for further details and discussion.

³⁵ Abu 'Abdullah Muhammad b. Ahmad al-Ansari al-Qurtubi, *al-Jami' li Ahkam al-Qur'an* (commonly known as *Tafsir al-Qurtubi*), Dar Ihya' al-Turath al-'Arabi [House of Revival of Arab Heritage], Beirut, 1965, vol. 8, pp. 109-116.

6.2.2 From whom is *jizya* to be taken?

The people of knowledge have disagreed about this. Abu Hanifa and his companions, Thawri, Shafi'i, Ahmad, and Abu Thawr said: It is only taken from People of Scripture, Arab or non-Arab. As for polytheists, the verse (Qur'an 9:5) obliges their killing with no option of jizya, unlike People of Scripture. It is taken from Magians also by the Sunna [example of the Prophet].

Awza'i said: It is taken from every worshipper of idols or fire, and every denier or disbeliever.

Malik's view was similar: It is taken from every type of polytheist or denier, Arab or not, Taghlib³⁶ or Quraysh³⁷, whoever they are, with the exception of the apostate.

Ibn al-Qasim, Ashhab and Suhun³⁸ said: It is taken from Arab Magians and all other nations. But Arab idolaters do not pay jizya: they should not remain on the earth at all. Their only options are Islam or the sword.

Another view of Ibn al-Qasim was that jizya may be taken from them, as Malik said. This is found in Al-Tafri' by Ibn al-Jallab: a possible derivation, not an unequivocal text.

Ibn Wahb³⁹ said: It is not taken from Arab Magians, but from non-Arab ones. This is because every Arab Magian converted to Islam, so any non-Muslim amongst them is an apostate, who must be killed⁴⁰ if he does not submit (by way of Islam): jizya is not accepted from him.

Ibn al-Jahm said: Jizya is taken from every follower of a non-Islamic religion, except by consensus for the disbelievers of Quraysh. This is to honour them above humiliation and belittlement, because they are the tribe of the Messenger of God, may God bless him and grant him peace. Others said: It is because they all submitted (in Islam) on the day of the Conquest of Mecca.

6.2.3 [Can *jizya* be accepted from Magians?]

Ibn al-Mundhir said: I know of no disagreement that jizya is to be accepted from Magians. Malik related that Umar did not know what to do about Magians until Abdul Rahman bin Awf testified that the Messenger of God, may God bless him and grant him peace, said, "Treat them as you do People of Scripture." Abu Umar [Ibn Abd al-Barr⁴¹] commented, "That is, regarding jizya specifically [and not their slaughtered meat nor women]. This hadith implies that they are not People of Scripture, the view of most jurists. Shafi'i said: They were People of Scripture but changed their religion. This is based on the tradition from Ali, related by Abd al-Razzaq [of Sanaa] and others, that is weak due to Abu Sa'id al-Baqqal. Ibn Atiyyah⁴² said: It is narrated that a Prophet called Zaradusht [Zoroaster] was sent to the Magians. God knows best.

³⁶ The Taghlib tribe were Arab Christians who refused the humiliation of paying *jizya*, preferring to be treated like Muslims and hence to pay *zakat*, the compulsory alms-tax on wealthy Muslims.

³⁷ The Prophet's tribe, chieftains and custodians of Mecca, regarded as the most noble of the Arabian tribes.

³⁸ These three authorities were leading students of Imam Malik and highly-regarded authorities within the Maliki school.

³⁹ Another leading student of Imam Malik and a highly-regarded authority within the Maliki school.

⁴⁰ This is based on the idea that all apostates from Islam must be killed, a dominant view from early Islam although it would appear to directly contradict the Qur'anic principle of "No Compulsion in Religion" (2:256). Contemporary Muslim thinking, following the Ottomans, tends to reject any death penalty for apostasy from Islam. See U. Hasan, *No Compulsion in Religion – Islam and the Freedom of Belief*, Quilliam, 2013, pp. 21-26 for further details and discussion.

⁴¹ A leading Maliki traditionist and jurist, also from Cordoba.

⁴² A leading Andalusian commentator on the Qur'an.

6.2.4 [What is the rate of jizya?]

God did not mention the amount of jizya. The people of knowledge differ about it. Ata bin Abi Rabah⁴³, Yahya bin Adam and Abu Ubayd said: There is no fixed amount - it depends on what is agreed with them. Similarly Tabari, except he said: the minimum is one dinar, but there is no maximum. This is based on the sound tradition from Abdul Rahman bin Awf: the Messenger of God, may God bless him and grant him peace, made an agreement with the people of Bahrayn [Eastern Arabia] that they pay jizya.

Shafi'i and Abu Thawr said: It is one dinar upon free adults, whether rich or poor, and cannot be reduced. Shafi'i said: If they agree to pay more than one dinar, this is allowed.

One view related from Malik is that jizya is 4 dinars of gold or 40 dirhams of silver: the same whether rich or poor, Magians or not. This is Umar's amount, not to be increased or decreased.

Some authorities said that it is reduced for the poor according to the judgment of the ruler. Abu Umar [Ibn Abd al-Barr] said: Their jizya is according to their capacity, even if it is one dirham. Malik had changed to this view later in his life.

Abu Hanifa, his companions, Muhammad bin al-Hasan [al-Shaybani] and Ahmad bin Hanbal said: It is 12, 24 or 40 dirhams⁴⁴ [according to whether the payer is of low, medium or high wealth].

Thawri said: Different tax amounts are narrated from Umar. The governor may select whichever one he wishes from protected people (dhimmis). As for people under a treaty: the agreed amount must be taken, nothing else.

6.2.5 [From whom is jizya taken?]

Our [Maliki] people of knowledge, may God have mercy upon them, said: Jizya is taken from fighting men based on the Qur'anic verse. It is not taken from slaves, even if they fight. This is consensus (ijma') that jizya is obliged upon free, adult men since they fight, and not on women, children, slaves, insane madmen and decrepit old men. The case of monks is disputed: Ibn Wahb related from Malik that there is no jizya upon them. Mutarrif and Ibn al-Majishun said: This is if they took up monasticism before the imposition of jizya, otherwise they pay jizya.

6.2.6 [Customs duties]

Malik and his companions said: There is no tax on the fruits, trade or crops of jizya-payers, unless they trade in a different land outside the area covered by the agreement or treaty, in which case they must pay a tenth every time they cross [the border], even if this is several times a year. An exception to this is that they pay 1/20th on wheat and oil brought to Mecca and Medina specifically, as per the directive of Umar. Some Medinans, i.e. Umar bin Abdul Aziz⁴⁵ and a group of jurist Imams said they pay the tenth only once per annum, similar to Muslims.

⁴³ An early leading scholar and Mufti of Mecca (1st/2nd or 7th/8th century CE).

⁴⁴ Some texts mention 48 dirhams here. Since 4 dinars of gold was a common rate for the wealthy, and the exchange rate of silver dirhams : gold dinars fluctuated between 10:1 and 12:1 during Umar's reign, the equivalent dirham rate is variously mentioned as 40 or 48 dinars.

⁴⁵ A pious and ascetic Umayyad caliph who ruled at the turn of the first/second Islamic century (8th century CE), often known as "Umar II" or "the fifth righteously-guided caliph" after the first four caliphs revered by Sunni Islam.

6.2.7 [Issues regarding the faith and practice of non-Muslim payers of jizya]

The wealth of jizya-payers is untouched, including grapes and wine if they conceal their wine and do not sell it openly to Muslims. They are prevented from selling wine and swine openly in the markets of the Muslims. If they violate this rule, their wine is spilled, and the pig-trader or pig-farmer is disciplined. If a Muslim spills their wine despite their concealment, he has transgressed and must compensate the value, although some say that there is no obligation to compensate. If he loots it [wine], he must return it. If their rules and markets involve usury, no action is taken.

If they come to us for arbitration or judgment, the judge has the choice whether to judge between them by God's revelation or turn away [i.e. refuse to judge].⁴⁶ Some say: If there is wrongdoing or injustice, he must judge amongst them: the rights of the weak must be taken from the strong, and this is a way of defending them.

The ruler must fight their enemies on their behalf and seek their help in such fighting, but they get no booty.

They must not, under any circumstances, build new churches not included in the treaty. They are not prevented from repairing existing churches.

They must adopt attire and style that distinguishes them from Muslims: they are not permitted to imitate the latter.

They are permitted to buy slaves who are people of enemy nations from them, since these slaves are not under protection.

Whoever disputes severely the paying of jizya is disciplined for his intransigence: jizya is forcibly and belittlingly taken from him.

6.2.8 What is the wisdom behind imposing jizya?

The people of knowledge differ about the reason for jizya. The Malikis and some Hanafis say that it is in place of being killed for unbelief. Shafi'i says that it is in place of being killed, and in return for living in the land [of Islam].

If jizya is in place of being killed, as Malik and some Hanafis say, it is waived if the person adopts Islam, even if this is a day before the year is up. Shafi'i says that it is an established debt in return for protection, so payment not waived by adopting Islam, just like payment for renting a house.

Other Hanafis say that it is in place of physical support [of the Muslims] and fighting [alongside them]. The Qadi Abu Zayd chose this view and thought that it was God's wisdom about the matter.

The view of Malik is most sound due to the Prophet's saying, may God bless him and grant him peace, "There is no jizya due upon a Muslim." Sufyan said that this means that if a dhimmi adopts Islam

⁴⁶ Cf. Qur'an 5:42, "They are fond of listening to falsehood, of devouring anything forbidden. If they do come to thee, either judge between them, or decline to interfere. If thou decline, they cannot hurt thee in the least. If thou judge, judge in equity between them. For God loves those who judge in equity." (Adapted from Yusuf Ali's translation) Note that this verse, as recognised by the mediaeval commentator Qurtubi and earlier Maliki authorities, dictates that a Muslim judge or ruler was not obliged to intervene in disputes amongst non-Muslims. This contradicts the contemporary excessively-politicised misinterpretation of Islam known as Islamism that advocates a totalitarian Islamic state that would interfere in every minute detail of the lives of all its subjects, whether Muslims or not.

after jizya became due upon him, it is waived from him.⁴⁷ Our [Maliki] people of knowledge said: the verse 9:29 indicates this because Islam removes the reason for jizya.

There is no disagreement that if they adopt Islam, they do not pay jizya by hand whilst belittled. But Shafi'i has a different point, saying: Jizya is a debt that is due because of a previous cause, viz. residence [in the land of Islam] or being protected from the evil of being killed, and thus becomes like any other debt.

6.2.9 [People of jizya breaking their agreement]

If the ruler makes a treaty with the people of a town or fort and they later break their agreement, refuse to pay jizya and other dues, and refuse the rule of Islam without transgressing, and if the ruler was not unjust towards them, then the Muslims are obliged to attack and fight them under their ruler. If this happens and those people are defeated, they are to be treated exactly as the people of the lands of war (dar al-harb). It is said that they and their women are booty, and this is a valid position (madhhab).

6.2.10 [People of jizya rebelling without refusing to pay]

If they come out as looters and brigands without refusing to pay jizya, they are similar to rebel (muharib) Muslims. If they come out complaining of injustice, their matter is considered and they are returned to protection (dhimma) and given justice against their oppressor. None of them are to be enslaved if they are freemen.

If some of them break their agreement, those who do not do so are not held liable for those who do. Those who uphold the treaty are known by their censure of those who violate it.

6.2.11 [Etymology of jizya]

Jizya is derived from jaza' (recompense), with the form fi'lah [ism al-hay'ah or modal noun, so it refers to the form of recompense], like qi'dah or jilsah (mode of sitting). It is as though they gave it in return for the safety they were gifted.

6.2.12 [Excessive punishment for non-payment of jizya is prohibited]

Muslim narrated from Hisham bin Hakim bin Hizam who passed a group of Nabateans [non-Arab peasants] in Syria who had been made to stand in the sun. (According to one narration: oil was poured over their heads.) He asked about them and was told that they were being held for non-payment of jizya. Hisham said: I bear witness that I certainly heard the Messenger of God, may God bless him and grant him peace, saying, "Truly, God tortures those who torture people in this world." Their emir was Umayr b. Sa'd, governor of Palestine. Hisham visited and talked to him, and the emir released the prisoners.

Our [Maliki] people of knowledge said: It is allowed to punish them if they refuse to pay it despite having the ability to do so. But if they clearly lack the capacity to do so, it is prohibited to punish them, for incapacity to pay jizya means that it is waived: the rich are not tasked to pay on behalf of the poor. Abu Dawud narrated that the Messenger of God, may God bless him and grant him peace, said: "Whoever oppresses someone subject to treaty (mu'ahad) or demeans him or burdens him beyond his capability, or takes anything from him without his approval, I will be his disputant on the Day of Resurrection."⁴⁸

⁴⁷ This hadith and explanation is found in Tirmidhi and Abu Dawud.

⁴⁸ Abu Dawud no. 3052 – it was judged to be authentic by Albani, cf. *Sahih al-Jami' al-Saghir*, no. 2655

6.2.13 [What does paying jizya “by hand” mean?]

God’s saying, “[until they pay jizya] by hand” (9:29). Ibn Abbas explained it to mean that he pays himself with no deputising on behalf of anyone. Salman said that it means that they are “censured.” Qatada explained it to mean, “overpowered.” It is said that the meaning is, “By your [Muslims’] favour upon them, by accepting jizya from them.” ‘Ikrima and Sa’id b. Jubayr said that it means, “he pays it whilst standing, with the recipient seated.” Ibn al-Arabi: This is not the meaning of “by hand” but of “whilst they belittle or lower [themselves].”

6.2.14 [The upper and lower hands]

The imams narrated from Abdullah bin Umar that the Messenger of God, may God bless him and grant him peace, said, “The upper hand is better than the lower hand: the upper hand is the one that gives or spends; the lower hand is the one that begs.” So He made the giving hand upper in charity and lower in jizya, when the receiving hand is upper. That is because He is the Raiser and Lowerer: He elevates and lowers whom He wishes. There is no god but Him.

6.2.15 [Muslims should not seek to emulate the humiliated status of a jizya-payer]

A man came to Ibn Abbas and asked him about the lands of *kharaj*⁴⁹ that were neglected by its people: may I work them, cultivate them and pay their *kharaj*? He replied: No, and recited the verse, “Fight those who believe not in God nor the Last Day ... and feel themselves subdued” [9:29], adding, “Do you wish to aim for the humiliation upon their necks, snatch it and wear it upon your own?!”

A man told Ibn Umar, “I bought land.” He replied, “Buying is fine.” He said, “I pay a dirham plus a volume of food per every 4,000 cubits of land.” He replied, “Do not bring humiliation upon yourself.”

Maymun bin Mihran narrated that Ibn Umar, may God be pleased with him, said, “It would not please me to own the entire earth in exchange for paying [even] five dirhams by which I would confess humiliation upon myself.”

⁴⁹ A tax on agricultural produce from land owned by non-Muslims under Muslim rule.

6.3 Al-Shaybani on the rulings related to *jizya* (2nd/8th century, Hanafi school)

The following are examples of early Hanafi jurisprudence on the issue, and illustrate clearly that political allegiance at the time was based on religious allegiance. Shaybani was a direct student of two of the four early Sunni Imams of jurisprudence, Abu Hanifa and Malik. In this text, he quotes the views of Abu Hanifa, as well as some of his students such as Abu Yusuf or Shaybani himself.⁵⁰

6.3.1 [Booty Acquired by the Polytheists from the Muslims]

51. *If the enemy capture wealth of the Muslims and transfer it to their land, and there is a Muslim trader present there with an agreement of security, it is lawful for him to buy it from them ...*

52. *If people of war (i.e. inhabitants of a “land of war”) submit as Muslims or become protected (by dhimma), any wealth of the Muslims that they had captured belongs to them, and the Muslims have no right to it. Similarly, if a person of war left his land with such wealth [and travelled to Muslim land] with an agreement of security, intending to sell it, its original Muslim owner has no right to it.*

60-61. *A Muslim who is in the land of war as a trader, prisoner or converted to Islam there: if he offers security to the people there, his guarantee is invalid.⁵¹ But such a guarantee is valid from a man or woman attached to the (Muslim) army ... A guarantee from a dhimmi who came to support the Muslims is invalid.*

6.3.2 [Imposing taxes on non-Muslims]

70. *If the ruler designates a group of infidels as “protected people” (ahl al-dhimma), he should impose a tax (kharaj) upon the men per capita and upon land where possible ... The annual per capita tax upon men is 12 dirhams for the poor, 24 for the wealthy and 48 for the rich.*

71. *There is no per capita tax upon women, slaves, children, the blind, the decrepit old man, the insane, the disabled or the poor man who is unable to work.*

72. *The protected people pay no alms-tax in their homelands. Lands owned by women, children or slaves are subject to the same tax as those owned by men.*

73. *If a protected person submits in Islam or dies as an infidel before the year is up, or after it but before his personal tax has been collected, it is waived from him. If many years pass before his per capita tax is collected, he is only liable for the tax of the current year according to Abu Hanifa; Abu Yusuf and Muhammad [al-Shaybani] hold that he is liable for the entire past.*

74. *The land-tax is only once per annum, even if the owner cultivates it several times during the year. If he leaves his land uncultivated, the tax is not waived. If he cultivates it and the crops are destroyed by a calamity, no tax is collected.*

75. *If a protected person submits in Islam, he continues to be liable for tax on his land as before. It is not disliked for a Muslim to pay land-tax or to buy land from protected people.*

⁵⁰ Muhammad ibn al-Hasan al-Shaybani, *Kitab al-Siyar al-Saghir* (The Shorter Book on Muslim International Law), ed. Mahmood Ahmed Ghazi, Islamic Research Institute, Islamabad, 1998. Translations given here are our own, original ones.

⁵¹ In the lands of Islam, any adult Muslim was able to guarantee security (*aman*) to a foreigner who was neither Muslim nor protected by *dhimma*.

76. *If a man, woman or child from the Taghlib tribe buys land (of non-Muslims) that is taxed, he is liable for its tax as before. If he buys land (of Muslims) that is taxed at one-tenth, the rate is doubled for him.*

77. *Muhammad [al-Shaybani] said: (Muslim) Lands that are taxed at one-tenth will remain so forever, unaffected by a change of ownership through sale. (Non-Muslim) Lands subject to tax will remain so forever, unaffected by a change of ownership through sale. Do you not see that [their status is unaffected by sale, e.g.] if a slave or child buys them, there is no change? Do you see that if land in Mecca within the sanctuary is bought by a person of protection or of the Taghlib tribe, its status as being taxed at one-tenth does not change?*

78. *If a person of war enters the land of Islam with an agreement of security and marries a [non-Muslim] woman, he does not become a protected person, unless he makes it his home(land)⁵² in which case there is a tax upon his head. If he buys (non-Muslim) land and cultivates it, he is taxed per capita as well as upon the land. If a woman of war enters the land of Islam with an agreement of security and marries a Muslim or protected person, she has made it her home(land) and has become a protected person.*

6.3.3 [Peace treaties and agreements with foreign kings]

79. *A king of the people of war has vast land with his subjects living there who are his slaves: he may sell them as he wishes. If he agrees peace with the Muslims and comes under their protection, his subjects remain his slaves as before: he may sell them as he wishes. If another people then conquer the latter but the Muslims rescue them, they are returned to that king [as slaves]. Similarly, if his subjects submit in Islam, with or without their king, they remain his slaves as before.*

80. *If, when he seeks protection [from the Muslims], he stipulates that he is allowed to rule his subjects as he wishes including killing, crucifying and other actions that he is not able to do with the people of Islam, his conditions are not accepted. If he sues for peace and protection on these conditions, any conditions that are unlawful in Islam are invalid ... If he comes under protection, and then betrays the secrets of the Muslims to the polytheists and shelters their spies, this will not constitute a breach of his covenant, but he should be punished and imprisoned for it. Similarly, if he or his subjects murder a Muslim man, this will not constitute a breach of the covenant, but there must be legal retaliation against the murderer after it being proved with evidence.*

82. *If the people of war seek a temporary peace for a number of years without paying any tributes, the ruler may consider it: if he sees it as beneficial for the Muslims due to their strength or other reasons, he may agree to it. If he agrees a temporary peace but later sees it to be harmful to the Muslims, he may inform the other side that he has revoked the agreement and fight them.*

83. *If the enemy surround the Muslims in a city and offer peace based on a specified annual amount to be paid by the Muslims, then the Muslims may accept this if they fear annihilation and see this temporary agreement as good for them.*

84. *If people of war offer a peace agreement for a specified number of years based on a specified annual amount to be paid by the non-Muslims, on condition that the rulings of Islam do not apply to*

⁵² Arabic: *watan*, from which derives the modern word *muwatana* for nationality or citizenship.

*them in their land, then the Muslims must not accept this unless it is good for them. If they agree peace and a Muslim steals something from them, it is valid for them to buy it back from them.*⁵³

85. *If people of war attack these people under agreement, the latter may buy back from them any wealth and slaves taken. Traders are not prevented from taking their goods to them (for trade), except for horses, weapons, iron etc. because they are people under agreement, not protection. If they enter the land of Islam without a new guarantee of security, but only the peace agreement, they are not to be harmed.*

6.3.4 If a *dhimmi* dies in our land, and his heirs are in a land of war

87. *If a person guaranteed security dies in the land of Islam and leaves wealth, and his heirs are in the land of war, his wealth is held in trust until his heirs come and prove their entitlement via the testimony of protected people. [Protected people must testify:] A document from the heirs' ruler is not admissible, even if some Muslims attest it by their testimony and seal.*

88. *If a person of war with security wishes to return to the land of war, he must not be allowed to take with him horses, weapons, iron or slaves, whether Muslim or infidel, that he bought in the land of Islam. He may take any such items that he brought with him. If he brought a sword but replaced it with a bow, spear or better sword, he may not take these in place of his original sword. He may take a sword of similar calibre or worse. He may take possessions other than these items.*

If a person of war sends a slave with a guarantee of security to trade on his behalf in the land of Islam and the slave submits in Islam here, he is sold and his price is paid to the person of war.

90. *If a group of people of war enter the land of Islam with a guarantee of security, any previous financial dealings amongst them are not enforceable, but only their transactions in the land of Islam.*

92. *If a Muslim enters the land of war with a guarantee of security and engages in mutual financial transactions or mutual looting with the people there, Muslim authorities do not intervene.*

If he exchanges one dirham for two, with cash or deferred payment⁵⁴, or sells them wine, swine or carrion, there is no harm in that according to Abu Hanifa and Muhammad [al-Shaybani], because he may acquire their wealth with their agreement. According to Abu Yusuf, none of that is allowed.

93. *If a person of war enters our land with a guarantee of security and a Muslim sells him such items, it is not valid. If a Muslim kills him intentionally or accidentally, it is not obligatory to execute the killer, but he must pay the blood-money (compensation) equivalent of a free Muslim.*

⁵³ i.e. if either side successfully loots or raids wealth and takes it to his own territory, it becomes his by possession. The other side cannot then regain it except by similar raiding, looting or purchase. These were the ancient rules of warfare and trade.

⁵⁴ Neither transaction is usually permitted, being a form of usury (*riba*). However, in *Dar al-Harb* (Lands of War), the Hanafi view was that since the enemies' property could be looted without permission, it could certainly be taken with their agreement through an otherwise-prohibited financial transaction.

6.3.5 Marriages of people of war, and traders entering their land with a security guarantee

94. *If a man and woman of the land of war marry, whilst she already has a husband, then they submit in Islam and leave [their land for ours], she is not lawful for him without a new nikah [marriage contract].*⁵⁵

If a man of the land of war marries four women, then all of them are captured [by Muslims], the marriages are null.

95. *There is no harm in [eating] the slaughtered meat of the People of Scripture amongst them [people of the land of war].*

6.3.6 [Muslims living in non-Muslim lands]

96. *If a Muslim, having a guarantee of security from the people of war, kills one of them or consumes his wealth, he is not obliged to compensate them if they come to our land. Similarly, [they are not obliged to pay compensation] if they kill him.*

I abhor for a Muslim, having a guarantee of security from the people of war under their religion, to betray them. If he betrays them, takes their wealth and brings it to the land of Islam, I abhor it for the Muslims to purchase it from him if they know about it, but such sale is valid.

If the wealth includes a slave-girl, I abhor for him to have sexual intercourse with her.

If the people of war [amongst whom he is living] capture [and enslave] another group of people of war, the Muslim is permitted to buy people of the latter group as slaves.

97. *If the Muslims have a temporary peace treaty with people of war, then other people of war attack the latter and capture them as slaves, a Muslim may buy slaves from the latter group.*

But if the captors had betrayed an agreement with the people of the treaty, the Muslims may not buy slaves: if they do, the sale is invalid.

98. *If a group of Muslims have a guarantee of security in the land of war, and another people of war invade that land, it is not lawful for these Muslims to fight alongside the former, for the rule of polytheism is dominant. However, if they fear harm to themselves, they may fight the attackers in self-defence.*

99. *If people of war attack the land of the Muslims, capture free Muslims and pass by those Muslims living with a security guarantee in the land of war, the latter have no option but to violate their covenant and fight to free the captured Muslims if they have the power to do so. The same is true if [non-Muslim] tax-payers [in the land of Islam] are attacked and led away [as captives]. Similarly, if there is a group of Muslims in a land of khawarij (rebel Muslims) that is attacked by people of war, the Muslims have no option but to fight alongside the khawarij to protect the community and sanctuary of the Muslims.*

⁵⁵ The rationale for this is that a woman may not have more than one husband, so her second marriage is void. However, when she becomes Muslim, her first marriage to her non-Muslim husband is also nullified. Therefore, she needs a valid marriage contract to remain with her second husband.

6.3.7 If a protected person (*dhimmi*) violates his covenant

132. *If a protected person (dhimmi) violates his covenant and settles in the land of war, his estate and heirs are treated as those of apostates [the estate is divided amongst the heirs, for settling in the land of war is equivalent to death].*

6.3.8 Chapter: Rebel Muslims (*khawarij*)

135. *If the people of justice rout the people of rebellion⁵⁶, it is not appropriate for the people of justice to pursue freedom-seeking slaves, to kill the captives or put the wounded out of their misery if they have no group that they can rejoin and regroup. If they have such a group: their captives are killed, their slaves pursued and their wounded put out of their misery.*

136. *Any horses or weapons belonging to the people of rebellion that are captured by the people of justice, there is no harm in using these. Once war ends, it is all returned. Any wealth that is captured is returned to them (without being used).*

137. *It has reached us that ‘Ali bin Abi Talib, may God be pleased with him, placed the wealth captured by his army from the army of [the khawarij rebels at] Nahrawan in a large, open space. Anyone who recognised their belongings could reclaim it, even if it was as small as an iron rod.*

138. *If a rebel woman fighter, or slave who served his rebel master but did not fight, is captured, they are not killed but are imprisoned, so that no rebels remain [alive and free]. Male fighters, whether free or slaves, are killed if they are caught in the rebel army.*

140. *If the rebels request a temporary truce, this may be granted if it is good for the Muslims, without the rebels having to pay anything. If they repent and rejoin the people of justice, they are not liable to repay any wealth they had gained, with the exception of specific items that must be returned to their owners; and similarly regarding what the people of justice gained from the rebels.*

If the rebels sought help from protected people in their war, and the latter fought alongside them, this would not break the latter's covenant. Regarding property gained during the war, they would be treated just like the rebels.

141. *It befits people of justice, when they meet rebels (in battle) to invite them to justice, for that is better. But there is no penalty upon them if they do not extend such an invitation. There is no harm if they strike the rebels with arrows and trebuchets (catapults), or flood them or their homes with water or shower them with fire or set fire to their homes ...*

142. *If they agree a temporary truce with the exchange of people as hostages on condition that if one side betrays the agreement, the other side may kill the hostages they have: then if the rebels betray the agreement and kill the hostages they have, it does not befit the people of justice to kill the hostages they have. However, they may imprison them until the rebels repent or are wiped out.*

Similarly, if such a truce is between Muslims and polytheists and the polytheists betray it, the hostages that the Muslims have are to be imprisoned until they submit in Islam or become protected people.

⁵⁶ The background to this section is the Qur’anic teaching about rebels (“people of rebellion”) who must be subdued by “people of justice.” Cf. Qur’an 49:9, “If two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other then fight ye (all) against the one that transgresses until it complies with the command of Allah; but if it complies then make peace between them with justice and be fair: for Allah loves those who are fair (and just).”

143. *If a person of justice, man or woman, promises safety to a rebel, this guarantee is permitted, irrespective of the form of the words. If this is done by a slave who does not fight alongside his master, it is not permitted. But if he fights, he may safeguard polytheists or rebels. A protected person with the Muslims, whether he fights or not, may not safeguard anyone.*

144. *Women amongst the rebels: if they fight alongside the rebels, they may be fought, otherwise not.*

145. *If there are people of justice amongst the rebels, as merchants or captives, and they commit crimes against one another: if the people of justice defeat the rebels, no action will be taken about these crimes because there was no (legitimate) authority over them: the decree of the rebels' judges (qadis) are not to be followed.*

6.3.9 Rebel judgments are not to be implemented

146. *If rebels take over a town and appoint a local person, who is not a rebel, as judge (qadi), he must establish criminal punishments, legal retaliation and rulings amongst the people justly: he has no other choice. If he writes a judgment to a judge of the people of justice regarding the rights of one of the people of that town, attested by witnesses, this is permissible if the latter judge knows those witnesses and they are not rebels. If he does not know the witnesses, the judgment should not be followed.*

(No. 156 adds:) *If rebels take over a city and appoint a judge (qadi) who makes various judgments, and then the people of justice retake that city: his judgments are referred to the judge of the people of justice: he must enforce those judgments that are just or that are based on the opinions of jurists.*

148. *Those killed amongst the people of justice (whilst fighting rebels) are treated as martyrs (those killed fighting non-Muslim enemies). No funeral prayer is offered for slain rebels, but they are given a burial. I dislike for their heads to be paraded far and wide, for that is humiliation. It has reached us from (Caliph) Ali, may God be pleased with him, that he followed such rules in all his wars.*

159. *If rebels seek help from people of war who then attack people of justice and fight them: if the people of justice overcome them, they may enslave the people of war: the rebels' seeking of help from them does not constitute a guarantee of security. Similar is the case if rebels have a temporary truce with people of war.*

160. *Anyone who joins the rebel army and fights with them: he is not judged as an apostate; his wealth is not divided amongst his inheritors, and the sacred bond between him and his wife is not broken.*

6.4 Ibn Qudama on the rulings related to *jizya* (6th/12th century, Hanbali school)⁵⁷

Issue 1627. The People of Scripture and the Magians are to be fought, and not invited [to Islam], for the invitation [to Islam] has already reached them. Idol-worshippers are to be invited [to Islam] before war is waged upon them.

*Issue 1628. The People of Scripture and the Magians are to be fought until they submit (in Islam) or pay the *jizya* by hand whilst feeling themselves subdued. Other infidels are to be fought until they submit (in Islam).*

*Issue 1687-8. *Jizya* is only accepted from Jews, Christians and Magians, as long as they stick to the terms of their agreement. As for others, their only options are: Islam or being put to death.*

*Issue 1689. *Jizya*-payers are of three levels: the least wealthy pay 12 dirhams⁵⁸; the moderately wealthy pay 24 dirhams; the wealthiest pay 48 dirhams.*

*Issues 1690-3. *Jizya* is not levied upon children, the insane, women, the poor, the decrepit elderly, the terminally-ill, the blind or the Muslim slave-owner regarding his [non-Muslim] slave.*

*Issue 1694. If a *jizya*-payer submits (in Islam) before *jizya* is collected from him, the *jizya* is waived from him.*

*Issues 1696-7. *Jizya* is not to be taken from the Christians of the tribe of Taghlib⁵⁹: *zakat* is to be taken from their wealth, livestock and fruits at double the amount taken from Muslims. According to one narration from Abu Abdullah [i.e. Imam Ahmad bin Hanbal], may God have mercy upon him, their slaughtered meat is not to be eaten, and their women are not to be married. According to the other narration, their slaughtered meat may be eaten and their women may be married.*

*Issues 1698-9. If any of the people of *dhimma* travel outside their land, half of one tenth⁶⁰ is levied upon them annually. If a trader of the people at war enters our land with a guarantee of security, one tenth is taken from him.*

Issues 1700-1. Whoever violates the covenant by opposing any of the conditions of the treaty, his blood and wealth are lawful. Whoever flees our protection for the land of war, violating the covenant, reverts to the status of a person at war.

⁵⁷ Ibn Qudama, *Al-Mughni*, Dar 'Alam al-Kutub, Riyadh, 3rd ed., 1417/1997, vol. 13 pp. 29-31 (Book of *Jihad*) & 202-255 (Book of *Jizya*)

⁵⁸ i.e. per annum

⁵⁹ An Arab tribe that became Christian before the era of the Prophet Muhammad. They, being Arab, wished to be treated honourably like the Arabian Muslims, and regarding the status of paying *jizya* as being inferior. At first, Caliph 'Umar refused their request but relented after they allied with the Byzantines and some of his advisers proposed honouring their request for a treaty in order to weaken the Byzantine position. The later caliph 'Umar II and the Andalusian scholar Ibn Hazm rejected this agreement, arguing that Qur'an 9:29 must be upheld, i.e. all Christians must pay *jizya*. Other authorities regarded the Taghlib's double-*zakat* payment as *jizya* by another name.

⁶⁰ i.e. one-twentieth or 5%, which is double the standard rate of *zakat*, the compulsory alms-tax upon wealthy Muslims (2.5%)

6.5 Ibn Hazm on the rulings related to *jizya* (5th/11th century, Zahiri school)⁶¹

6.5.1 [Dhimmis must respect the Prophet Muhammad]

*Issue 941. Jizya is not accepted from a Jew, Christian or Magian unless they affirm that Muhammad is a Messenger of God to us and do not attack (or taunt) him or anything about the religion of Islam. This is due to the hadith of Thawban that we mentioned earlier and the saying of God Exalted, "[If] ... they attack your religion, then fight the leaders of disbelief - they have no [binding] oaths" [9:12]*⁶²

*This is also the view of Malik, who said, "Whoever amongst the people of dhimma says: Muhammad was only sent to you, not to us, then there is nothing against him. If he says: he [Muhammad] was not a prophet, he is killed."*⁶³

6.5.2 [Land-owners must pay a land-tax as well as *jizya*, even if they convert to Islam]

Issue 957 ... Some jurists have a strange view that people who pay kharaj [land-tax] do not pay jizya! [This only applies to dhimmis who convert to Islam:]

It has been narrated to us via Ibn Abi Shayba from Umar and Ali that they said, "If a land-owning person submits [becomes Muslim], we waive the jizya from him but take the kharaj from the land."

*Ibn Abi Shayba narrated that two men from Ulays [in Iraq] submitted [became Muslim], so Umar wrote to [his governor] Uthman bin Hunayf, instructing him to waive jizya from them and to take a tax from their land.*⁶⁴

Ibn Abi Shayba narrated that a female chieftain from Nahr al-Malik [an area near Baghdad] submitted [became Muslim], so Umar said, "Give her her land: she must pay kharaj on it."

Ibn Abi Shayba narrated that Raqil, Chief of the Two Rivers, submitted [became Muslim], so Umar gave him two thousand [coins or area of land], waived jizya from him and obliged him to pay the kharaj of his land.

To the authorities we have mentioned, no contrary view amongst the Companions is known.

6.5.3 [Arabs and non-Arabs are equal in matters of faith and *jizya*]

Issue 958. From a disbeliever (kafir), only Islam or [being slain by] the sword are acceptable: men and women are equal in that regard. The only exception are the People of Scripture, who are the Jews, Christians and Magians only: if they pay the jizya, they are allowed to remain upon their religion, but with humiliation.

Abu Hanifa and Malik said: All Arabs specifically, other than People of Scripture, have only the option of Islam or the sword. As for non-Arabs, People of Scripture and others are equal: all of them are allowed to remain upon their religion in exchange for jizya.

⁶¹ Ibn Hazm, *Al-Muhalla*, ed. Ahmad Muhammad Shakir, Dar al-Fikr, vol. 7 pp. 317-8 and 345-8

⁶² The full verse is, "But if they violate their oaths after their covenant, and taunt you for your faith, fight ye the chiefs of unfaith: for their oaths are nothing to them: that thus they may be restrained." (A.Y. Ali translation) Pickthall's translation is, "And if they break their pledges after their treaty and assail your religion, then fight the heads of disbelief – they have no binding oaths – in order that they may desist."

⁶³ Such ancient jurisprudence was aimed at safeguarding public respect of faiths and religions, especially Islam, but is often used to justify "blasphemy laws" in today's world. It is now obsolete in an age of religious freedom, although laws are still needed to safeguard public order.

⁶⁴ *Tasaq* is an Arabicised Persian word, meaning a fixed, regular land-tax (*kharaj*). The word "tax" may be etymologically related to it.

Abu Muhammad [Ibn Hazm] commented: This view is false, due to the saying of God Exalted, “Kill the polytheists wherever you find them: seize them; besiege them; sit in wait for them at every outpost. But if they repent, establish prayer and pay the alms-tax, then leave their way free.” [9:5] He also said, “Fight those who believe not in God nor the Last Day, nor hold that forbidden which hath been forbidden by God and His Apostle, nor acknowledge the Religion of Truth, (even if they are) of the People of the Book, until they pay the jizya with willing submission, and feel themselves subdued.” [9:29]

So, God did not distinguish between Arabs and non-Arabs in either command. It is authentic that the Prophet, peace be upon him, accepted jizya from the Magians of Hajar, so it is correct that they are from the People of Scripture. Otherwise, the Messenger of God, may God bless him and grant him peace, would not have acted contrary to the Book of his Lord the Exalted.

Some object that God said, “There is no compulsion in religion” [2:256] to which we reply: You are the first to say that Arab idolaters and apostates must be compelled to submit (in Islam). It is authentic that the Prophet forced the Arab polytheists to submit (in Islam). Hence, it is established that this verse is not according to its apparent meaning, but applies to those whom God has forbidden us from forcing [into Islam]: and they are specifically the People of Scripture.

This view of ours is also that of Shafi’i and Abu Sulayman, and capability comes from God Exalted.

6.5.4 [Meaning of “humiliation” along with *jizya*; conditions laid upon Christians of Syria]

Issue 959. The saghar (belittlement, lowering, humiliation [9:29]) is that the rule of Islam is over them and that they do not publicly manifest any of their disbelief or anything prohibited in the religion of Islam.

God, Mighty and Majestic, said, “Fight them until there is no more tumult and religion, all of it, is for God.” [8:39] The Taghlib tribe and others are equal regarding this, for God and His Messenger, may God bless him and grant him peace, did not differentiate between any of them.

*The belittlement is summed up in Umar’s conditions upon them. It has been narrated to us that when Umar made a peace treaty with the Christians of Syria, he stipulated upon them that:*⁶⁵

- (i) *They must not initiate in their city, nor around it, a chapel, church, abbey or monastery.*
- (ii) *They must not repair any existing buildings when these deteriorate.*
- (iii) *They must not prevent any Muslims from staying at their churches for up to three nights and they must feed them.*⁶⁶
- (iv) *They must not shelter spies or conceal any deception against the Muslims.*
- (v) *They must not teach their children the Qur’an.*⁶⁷
- (vi) *They must not display polytheism [or call anyone to it]*⁶⁸.
- (vii) *They must not prevent their relatives from submitting (in Islam) if they wish to do so.*
- (viii) *They must respect the Muslims, including giving up their seats for them at a gathering if they wish to sit down.*
- (ix) *They must not imitate the Muslims*⁶⁹ *in any aspect of their dress: skull-cap, turban, sandals, the parting of the hair.*
- (x) *They must not speak the language of the Muslims.*⁷⁰
- (xi) *They must not adopt the by-names of the Muslims.*
- (xii) *They must not ride with saddles or bear a sword or any other arms.*
- (xiii) *They must not engrave their rings (or seals) with Arabic writing.*
- (xiv) *They must not sell wines.*
- (xv) *They may not bring swine into our neighbourhood.*
- (xvi) *They must shave the fronts of their heads.*⁷¹

⁶⁵ Numbering has been added to this lengthy passage.

⁶⁶ i.e. Muslim travellers must be offered the customary hospitality that was specified in Islam as a minimum of lodging and food for three days and three nights.

⁶⁷ i.e. for purposes of deception (cf. the previous condition), or possibly to avoid dishonouring of the Qur’an.

⁶⁸ The additions in square brackets to this section are from Wansharisi, pp. 237-8, where he adds that this text was transmitted by the hadith scholar Ibn Hibban; the following jurists relied upon it: Tartushi, Ibn al-Manasif, Ibn Khalaf of Granada and Kila’i (Malikis), Ibn al-Mundhir and Ibn Badran (Shafi’is), and Ibn Hazm (Zahiri). Note that such hadith traditions need careful scrutiny to establish whether or not they are authentic.

⁶⁹ In this context, Muslims were also forbidden to imitate non-Muslims based on some reported hadiths.

⁷⁰ Similarly, Caliph Umar allegedly discouraged Muslims from speaking “languages of the non-Muslims”: “beware the jabber of the non-Arabs” (Ibn Taymiyya, *Iqtida’ al-Sirat al-Mustaqim Mukhalafa Ashab al-Jahim* [“Following the Straight Path Contrary to the People of Hell”])

⁷¹ This may seem like a trivial detail buried in ancient books, but there are attempts to revive such practices by extremists in the modern world: for example, a 35-year-old British extremist said in a YouTube video posted in 2014, “The *kafir* [unbeliever or infidel], when he walks down the street, he has to wear a red belt around his neck, and he has to have his forehead shaved, and he has to wear two shoes that are different from one another.” – see Soeren Kern, *UK Bans Pro-Jihad Islamist Groups*, Gatestone Institute, 12th July 2014, <http://www.gatestoneinstitute.org/4399/uk-jihad-islamist-groups>. Note also that the so-called “Islamic State”

- (xvii) *They must stick to their dress wherever they may be.*
- (xviii) *They must wear belts around their waists.*
- (xix) *They must not display crosses or any of their books in any of the thoroughfares [or markets] of the Muslims.*
- (xx) *They must not bury their dead next to the Muslims.*
- (xxi) *They may only ring their church bells lightly.*
- (xxii) *They may not raise their voices when chanting in their churches if any Muslims are nearby.*
- (xxiii) *They may not celebrate their weekly festivals publicly.*
- (xxiv) *They may not raise their voices or light candles in public [in any of the thoroughfares or markets of the Muslims] at their funerals.*
- (xxv) *They may not buy any of the Muslims' customary share of slaves.*
- (xxvi) *[They may not look into the houses of the Muslims from above.]*⁷²
- (xxvii) *[They may not harm any Muslim.]*
- (xxviii) *If they violate any of these conditions, there is no protection (dhimma) for them, and the Muslims are permitted to treat them as they do people of enmity and dissension.*⁷³

Ibn Hazm added: *Belittlement also entails that they may not harm a Muslim or employ him as a servant. None of them may hold a position of authority where he is able to exercise power over a Muslim.*

6.5.5 [Jizya is required from every Person of Scripture, not just adult males]

Issue 960. Jizya is required from all of them equally: the free, slave, man, woman, poor and rich, whether a monk or not, due to the Qur'an [9:29]. There is no disagreement that women are liable for debts just as men are, and no unequivocal text has come to differentiate between men and women regarding jizya. It is established from Umar bin Abdul Aziz that he levied jizya upon the monks in their monasteries: two dinars each. If it is said: It is established from Umar [bin al-Khattab] that jizya is to be taken from everyone who has been shaved⁷⁴ except women, we say: ... There is no proof in the saying of anyone except the Messenger of God, may God bless him and grant him peace.

6.6 Ibn 'Ashur's explanation of "self-lowering" accompanying jizya (20th-century)

Ibn 'Ashur served as the leading authority (Shaykh) of the Zaytuna in Tunis, one of the oldest Islamic centres of learning, for much of the twentieth century. He was a master of Qur'an-commentary, producing the voluminous *tafsir* called *al-Tanwir wa l-Tahrir* ("Enlightenment and Liberation"), as well as of the *Maqasid al-Shari'ah*, the theory of the universal objectives and principles of law.

However, about *jizya*, Ibn 'Ashur does not seem to depart from the ancient and mediaeval view. He says, "This means humiliation ... a state that necessarily accompanies paying the *jizya* by hand. The objective of this is to magnify the matter of Islamic rule and disgrace the people of unbelief, so that this may be an encouragement for them to leave their false religion and follow the religion of Islam.

that declared a "caliphate" in parts of Iraq and Syria in June 2014 has since implemented many of these rules from ancient jurisprudence, enforcing them upon non-Muslims under its jurisdiction, especially Christians.

⁷² i.e. They may not build their houses higher than those of the Muslims. Some authorities derived this rule from a very literal reading of the hadith, "Islam dominates and is not dominated" – the root word for domination being "height" ('uluww).

⁷³ i.e. to punish and/or fight them.

⁷⁴ i.e. in public regions, denoting adults

This verse indicates accepting *jizya* from the Magians since they are people of a scripture. Ibn Wahb, one of the companions of Malik, disagreed about accepting *jizya* from Arab Magians ...”⁷⁵

6.7 Wahba al-Zuhayli’s discussion of jurisprudence about *dhimmis* (21st century)

Wahba al-Zuhayli is a senior, well-respected jurist of the 20th-21st centuries. In his comprehensive work on Islamic jurisprudence, he merely summarises ancient and mediaeval views, and does not appear to move beyond these, although he is known to have a modern approach to other issues such as war in his works on *jihad*. E.g., in his discussion on valuable (valid) wealth, he says, “*With regard to non-Muslims, wine and swine are valuable wealth [they are valueless for Muslims, being prohibited] according to Hanafi jurists because we have been ordered to leave them and their religious practices alone. Hence, if a Muslim or non-Muslim destroys wine or swine belonging to non-Muslims, he must compensate them. Non-Hanafi jurists said: These are not valuable wealth because non-Muslim residents in our lands are required to abide by Islamic rules regarding transactions: they have the same rights and duties as those of Muslims.*”⁷⁶

Furthermore, the index page in the same work lists the following topics and their rulings under “*Dhimmi*.” Zuhayli does not appear to discuss their contemporary (ir)relevance or application:

1. *A dhimmi using the sale of wine to settle a debt with a Muslim*
2. *Requiring a dhimmi to abide by the rulings of Islam*
3. *A dhimmi entering the Meccan sanctuary (haram): its prohibition according to the majority, not so Abu Hanifa*
4. *Levying zakat upon dhimmi and harbi traders when they come to the lands of the Muslims from outside, and this occurring more than once per year*
5. *A dhimmi stealing from the treasury*
6. *Compensation for wine and swine owned by a dhimmi, according to the Hanafis*
7. *Compensation for the destruction of a dhimmi’s property*
8. *Visiting a sick dhimmi: its permissibility but non-recommended status according to the Shafi’is*
9. *Visiting a sick dhimmi and greeting him first: its prohibition according to the Hanbalis*
10. *Burial in a graveyard of the Muslims of a deceased, pregnant dhimmi carrying a Muslim’s child: its ruling according to the Shafi’is and Hanbalis*
11. *The threshold for levying zakat upon a dhimmi; half of one-tenth⁷⁷ is taken from him; the stipulation of this condition according to Abu Hanifa*
12. *Oaths and their expiation; giving dhimmis a share of the expiation of oaths [i.e. of the food for ten poor people, the expiation mandated by the Qur’an]*
13. *According to the Malikis specifically, half of one-tenth is taken from dhimmi and harbi traders if they come to Mecca, Medina or their environs with wheat or oil⁷⁸*

⁷⁵ Ibn ‘Ashur, *al-Tanwir wa l-Tahrir*, under Qur’an 9:29.

⁷⁶ Wahbah al-Zuhayli, *Al-Fiqh al-Islami wa Adillatuhu* (Islamic Jurisprudence and its Bases), Dar al-Fikr, Damascus, 1427/2007, vol. 4 p. 2879

⁷⁷ i.e. one-twentieth or 5%, double the one-fortieth or 2.5% zakat rate for Muslims

⁷⁸ Wahbah al-Zuhayli, *Al-Fiqh al-Islami wa Adillatuhu* (Islamic Jurisprudence and its Bases), Dar al-Fikr, Damascus, 1427/2007, vol. 11 (Fihris or Index), entry: *Dhimmi*

6.8 Ibn Taymiyya's fatwa about a land that is indeterminate between war and peace (13th/14th century – independent, Salafi thinking from a Hanbali origin)

Here is an original translation of this important and famous text, known as the “Mardin Fatwa.”

He [Ibn Taymiyya], may God have mercy upon him, was asked:

About the town of Mardin⁷⁹, is it a town of war or peace? Is it obligatory upon a Muslim settled there to migrate to the land of Islam, or not? If migration is obligatory and he does not migrate, and helps the enemies of the Muslims with his life or his wealth, does he incur sin for that? And does someone who accuses him of hypocrisy and insults him, incur sin or not?

He answered:

All praise belongs to God. The lives and wealth of the Muslims are prohibited (to violate), whether they are in Mardin or elsewhere. Aiding those who leave the law (sharia) of the religion of Islam is prohibited, whether they are people of Mardin or others. One settled there, if he is unable to establish his religion, migration is obligatory upon him; otherwise, it is recommended but not obligatory.

Their [the Muslims of Mardin] helping the enemies of the Muslims with their lives and wealth is prohibited for them: they must desist from that in every way possible for them, such as pretending to be absent, dissimulatory words or pretending to work; if the only possible means is migration, it becomes specified [as the obligation].

It is not lawful to insult them all generally or accuse them of hypocrisy. Rather, insult and accusation of hypocrisy applies to the qualities mentioned [as deserving these] in the Book [Qur'an] and the Tradition [Sunna], so some of the people of Mardin and others are included in that.

As for its being a land of war or peace: it is compound, having both aspects. It is neither like a land of peace where the rules of Islam apply, having an army of Muslims, nor like a land of war whose residents are infidels: rather, it is a third type [of territory] where a Muslim is treated as he deserves, and the one who leaves the law (sharia) of Islam is treated as he deserves.⁸⁰

NB: The word “treated” (*yu'amal*) in the last line of the fatwa above, as found in the earliest manuscripts and other sources quoting it such as, was misprinted as “fought to kill” (*yuqatal*) in some printed editions, especially those printed and circulated worldwide from Saudi Arabia. This misprint has had devastating effects, since the misprinted fatwa has been used by takfiri groups, including Al-Qaeda and ISIL, to justify terrorism against civilians. It was also used by similar groups to justify the assassination of President Anwar Sadat of Egypt in 1981.⁸¹

⁷⁹ In modern-day Turkey. The question was asked when this town was occupied by Mongol invaders.

⁸⁰ *Majmu' Fatawa Shaykh al-Islam Ibn Taymiyyah* (Compendium of the Juristic Rulings of Ibn Taymiyya), ed. Abdul Rahman b. Qasim and his son Muhammad, Riyadh, 1398 H, vol. 28, pp. 240-1. The word “fought to kill” in the last line of this version of the fatwa has been corrected to “treated,” as explained in the note above.

⁸¹ Cf. Ian Whiteman, *Deadly Typos*, 30/9/2014, <https://ianwhiteman.wordpress.com/2014/09/30/deadly-typos/>; Shaykh Abd al-Wahhab al-Turayri, *The Mardin Conference – Understanding Ibn Taymiyyah's Fatwa*, 29/6/2010, <http://muslimmatters.org/2010/06/29/the-mardin-conference-%E2%80%93-a-detailed-account/>

6.8.1 Discussion of Ibn Taymiyya's fatwa about land indeterminate between war and peace

This fatwa (known as the “Mardin fatwa”) is historic, since it recognised, perhaps for the first time, a complex situation where a particular town is neither a “land of war” nor a “land of peace” but intermediate, or as the author describes it, “compound.” Thus, Ibn Taymiyya understood that the traditional, neat divisions of land and associated allegiances no longer applied to this town that had been part of the “lands of Islam” but was now occupied by Mongol invaders who did not rule by Islamic laws or norms, although many of the inhabitants were Muslim.

A similar situation arose around a century later in Andalusia with the town of Galera in the province of Granada: a Muslim-majority town that had come under Christian rule due to the Reconquista. Interestingly, no equivalent of the Mardin fatwa appears to have been given by any recognised jurist in this case, as the later extracts from the 15th-century North African scholar Wansharisi show. However, the numerous questions about Galera show that the situation did vex the jurists of that time, and one of them spoke about Muslim *dhimmis* (protected people) living under Christian rule.

6.8.2 The “New Mardin” Fatwa

In 2010, about a dozen Muslim scholars gathered in Mardin in modern-day Turkey to denounce the misuse of Ibn Taymiyya's fatwa by groups engaged in *takfir* (excommunication of other Muslims) and/or terrorism. Some observers referred to the declaration of this conference as “the New Mardin Fatwa,”⁸² although there is no new text that can be legitimately referred to as such.

⁸² Yahya Michot, *Ibn Taymiyya's “New Mardin Fatwa” - Is genetically modified Islam (GMI) carcinogenic?* The Muslim World (2011), pp. 130-181

6.9 Wansharisi's collection of *fatwas* relating to North Africa and Andalusia (15th century, Maliki school)

Ahmad bin Yahya al-Wansharisi (of Wansharis, modern-day Algeria) was a North African Maliki jurist who died in Fez in 914 H / 1508 CE, exactly a century after the death of Ibn Khaldun. He was therefore born after the Christian Reconquest of most of the Iberian peninsula: the only Islamic emirate in Spain that remained during his lifetime was Granada, although it too ended in 1492.

Due to his interest in classical as well as contemporary jurisprudence, Wansharisi compiled a 12-volume collection of *fatwas* (jurisprudential and legal opinions) of North Africa and Andalusia, from the early days of Islam until his own times, a period covering more than 800 years.⁸³ Since the Maliki school of jurisprudence remained dominant in these areas (and continues to do so until now), Wansharisi's collection of *fatwas* mostly consists of answers from Maliki authorities. The second volume especially contains many discussions relevant to the topic of this study. Original translations are given below in italics, with occasional comments.

6.9.1 Muslims of Cordoba recognising their wealth in the hands of Christians of Toledo during a peace treaty

Ibn Rushd [Averroes] was asked about Muslims recognising their wealth in the hands of Christians who had entered Cordoba from Toledo, may God return it to the Muslims, for trade during a peace treaty. The text of the question, posed by the Emir Abu l-Tahir Tamim bin Yusuf bin Tashfin, was:

*What is your answer, may God be pleased with you, about people of this town of ours recognising some of their wealth in the hands of traders from Toledo entering our town for trade. They have provided written proof that it was their wealth: they had not sold it or gifted it until there was a raid by a party from Toledo who carried off this wealth alongside Muslim captives. This happened during a proven truce between us and them. What is the ruling regarding this situation? Should the wealth be transferred to those recognising it as theirs?*⁸⁴

This question illustrates the issue of sovereignty over wealth under a faith-based division of the earth.

6.9.2 If a Muslim state concludes a peace treaty with non-Muslims, it is binding on that state alone

*One of the jurists was asked: if some Muslim rulers conclude a covenant and peace treaty with non-Muslims, is that binding upon those Muslims who are not their subjects, because of the hadith, "The guarantee of safety given by the lowest Muslim is valid"? This is because the people of Syria and Egypt may have a treaty with non-Muslims whilst the people of North Africa and Andalusia are at war with the same non-Muslims. He answered that this hadith is applied when the Muslims are unified together under one ruler: in that case, if someone safeguards a person of war, this guarantee is binding on all Muslims in refraining from fighting, killing or enslaving them. But this does not apply when the [Muslim] kings and states are divided and the Muslims are disunited. Any guarantee of peace is binding only on the people of that region, so the agreements of the people of Syria and Egypt are not binding upon the people of Andalusia.*⁸⁵

⁸³ Ahmad bin Yahya al-Wansharisi, *al-Mi'yar al-Mu'rab wa l-Jami' al-Mughrib 'an Fatawa 'Ulama' Ifriqiya wa l-Andalus wa l-Maghrib* [The Eloquent Standard and Amazing Collection from the Fatwas of the People of Knowledge of North Africa, the Maghreb and Andalusia], ed. Dr. Muhammad Hajji, Dar al-Gharb al-Islami, Beirut, 12 vols., n.d.

⁸⁴ Wansharisi, vol. 10, p. 598

⁸⁵ Wansharisi, vol. 2, p. 115

This fatwa by a jurist of the fifteenth century or earlier accepts the principle of multiple Muslim states: the jurist does not insist on all Muslims being united under a single caliph. Ibn Khaldun and Ibn Taymiyyah had earlier expressed similar views. Ironically, this classical consensus by some of the greatest pragmatic thinkers of Islam was ignored by, or unknown to, Islamist groups from the 20th century CE onwards, such as Jamaat-e-Islami, the Muslim Brotherhood, Hizb al-Tahrir and Al-Qa'ida, who have insisted that a single caliphate ruling all Muslims is an absolute religious obligation that can never be changed. This erroneous idea has led to a great deal of conflict, war and bloodshed that continues presently. A similar *fatwa* is as follows:

6.9.3 Someone who writes to a caliph with a pledge of allegiance whilst under the jurisdiction of another emir

Ibn 'Arafa was asked about oaths of allegiances to kings, e.g. someone who writes to a caliph with a pledge of allegiance whilst under the jurisdiction of another emir, the caliphate being legally valid.

He answered: This is a renunciation of (the duty of) obedience [to his emir] - he is to be treated as an armed rebel (muharib).

It is said: This happened in Bijaya. One of the notables there wrote a pledge of allegiance to al-Mardi of the Prophet's Household. His letter was discovered after he had sent it to the East. He was questioned about it but insisted on denying it. Witnesses testified to his handwriting. After that, he disappeared. It seems the fatwa was issued that he had intended disobedience but not carried it out, so he would be forgiven.

Ibn Hayyan narrated in Tabaqat Fuqaha' Qurtuba [Generations of the Jurists of Cordoba] that this happened in the time of Abu Umar Ahmad bin Abdul Malik of Seville, and he issued a similar fatwa.

6.9.4 Muslims staying put and not emigrating when Christians take over their homeland⁸⁶

One of Wansharisi's fellow-jurists wrote him a long question, comprising two pages of printed text: Many Muslim Andalusians had left Spain for the Maghreb after their homelands had been taken over by Christians. They had then complained that the Muslim lands of the Maghreb were not as comfortable and affluent for them as Andalusia. They had "used ugly language, indicating the weakness of their religion, their lack of true certainty in their beliefs, and that their emigration [*hijra*] was not for the sake of God and His Messenger as they had supposed, but in order to hastily acquire worldly possessions according to their desires ..." They had further insulted the lands of Islam and praised the lands of unbelief, expressing regret at leaving those. Some of them had even tried to find ways of returning under the protection of the Christians. What was the ruling about them, and how should they be treated?

Wansharisi wrote a long *fatwa*, comprising over twelve pages of printed text, emphasising that emigration [*hijra*] from the lands of unbelief to the lands of Islam was an absolute religious obligation until the Day of Judgment, based on certain Qur'anic passages and traditions of the Prophet. He also condemned those Muslims who were the subject of the question, for "loving polytheistic loyalty, Christian domicile, rejecting sacred emigration, turning to the non-Muslims, being willing to pay *jizya* to them, casting off the dignity of Islam and the obedience and pledge of allegiance to the ruler and sultan, preferring Christian rule and humiliatory dominance over it" – these were "great, destructive and back-breaking obscenities that were almost tantamount to unbelief, and God's refuge is sought!" He further recommended that those people be beaten or imprisoned as a punishment and deterrent,

⁸⁶ Wansharisi, vol. 2, pp. 119-133

since “their mischief is more harmful than that of hunger, fear, the violation of people or the looting of wealth.”

The *fatwa* also includes discussion of Muslims from Barcelona who stayed behind under Christian rule whilst their co-religionists all left within the year that they had been allowed to stay after they had lost control of its rule. These Muslims had then become enemies of their people, taking part in raids on them, fearing that they would be killed for the treachery of staying behind if they rejoined them. Wansharisi quotes earlier authorities such as Ibn al-Hajj and Averroes who said that such people are to be treated as belligerent rebels.

6.9.5 Wansharisi’s strict *fatwa* for Andalusian Muslims to leave after the fall of Granada⁸⁷

The same fellow-jurist wrote him another page-long question about a respected notable from Marbella who had stayed in Andalusia to advocate for the rights of other Muslims who remained behind under Christian rule, even though most of them were able to emigrate if they wished.

Wansharisi replied with a four-page *fatwa*, categorically prohibiting any Muslim from living under non-Muslim rule and obliging them to emigrate to the lands of Islam if they were at all able to do so. He argued that their remaining would subject their religious practice to immense harm and damage, including the four practical pillars of Islam, all of which require a Muslim ruler to organise: prayer, fasting, charity and pilgrimage, as well as their morals and ethics: “Another issue is the fear of tribulation with regard to sex. Since when has someone with a wife, daughter or female relative felt safe from the advances of the enemy dogs and pigs against them, that they would gain authority over her and lead her to obey them and leave the religion, as happened to the sister-in-law of al-Mu’tamid bin ‘Abbad and her children?”

During the course of his discussion, Wansharisi also referred to a report from the Umayyad Caliph ‘Umar bin Abdul Aziz, who is said to have forbidden Muslims from living in Andalusia even under Muslim rule, fearing that they would become deceived by its worldly riches.

6.9.6 *Fatwas* about Galera, a Muslim town under Christian rule⁸⁸

Wansharisi reproduced many discussions about Galera, a town near Granada that came under Christian rule despite its residents being mainly Muslims. Many questions were asked, including the status of the Muslims there, and that of their lives and wealth.

Two jurists, Abu Abdullah of Zaragoza and Abu Yahya bin Asim disagreed as to whether or not the sanctity of someone’s wealth could be effected due to two simultaneous causes, such as Islam and a treaty: e.g. would the property of the Muslims of Galera be safeguarded on account of their Islam, or the fact that they lived under a treaty with the Christians, or both? During this debate, Ibn Asim mentions that “*dhimmis* (protected people) of each side are safeguarded in their lives and wealth by the other side.” As mentioned above, Wansharisi disagreed strongly with this, since according to him, Muslims were not permitted to live under non-Muslim rule. Ibn Asim also refers to *Hilf al-Fudul*, the pre-Islamic treaty safeguarding social justice and welfare in Mecca in which Muhammad participated before his prophethood, later saying that “If I were invited to participate in such a venture again, I would do so.”

⁸⁷ Wansharisi, vol. 2, pp. 137-141

⁸⁸ Wansharisi, vol. 2, pp. 142-158

6.9.7 Are Jews and Christians allowed to build or repair their synagogues and churches in the lands of Islam? The case of the Jews of Tuat

There is a long discussion about this, of over 50 pages⁸⁹, based on the case of the synagogues of the Jews of Tuat⁹⁰: al-Asnuni, a Muslim jurist of Tuat, wrote to the jurists of Tlemcen and Fez about these synagogues that in his view should be allowed to remain, and Ibn Zakari agreed with him. However al-Maghili and his son had attacked this fatwa and insisted that the synagogues must be demolished. The issue caused huge controversy amongst the jurists of North Africa.

Throughout the discussion, various jurists refer to a traditional Maliki distinction within the lands of Islam:

- (i) those towns and cities established by the Muslims, e.g. Kufa and Basra
- (ii) those lands conquered by force after resistance from the original residents [e.g. Damascus]
- (iii) those lands conquered without fighting, under a peace treaty and peaceful transfer of power and which already had synagogues and churches [e.g. Jerusalem]

In brief, conditions for Jews, Christians and other non-Muslims with regard to their places of worship were much more favourable under type (iii) of lands above, as opposed to (i) and (ii). The jurists differed about some of the details, of course. Further considerations were:

- (i) whether or not the building of places of worship was agreed in the *dhimma* contract
- (ii) whether or not the non-Muslims were in violation of their general duties under the *dhimma* contract
- (iii) whether or not demolishing synagogues and churches would lead to greater strife

Examples are cited in the discussion of Tunis, Jerusalem, Cordoba and other places, and to the killing and enslavement of Jews during the Marinid dynasty for violating their covenant by continuing to sell wine to Muslims despite having been forbidden from doing so.

Wansharisi agreed with the severe position taken by Maghili and his followers, mainly on the basis of consideration (i) above, i.e. because Tuat and similar towns in the Maghreb were originally founded by the Muslims. He also cited a *fatwa* by eight leading jurists of Cordoba, who were collectively known as the city's *shura* (consultative council), that a new chapel in the city had to be demolished, because churches or synagogues may not be built in the lands of Islam. During his discussion, he quoted Ibn al-Majishun, a leading early Maliki authority, who said that non-Muslims under protection (*dhimma*) are "like the slaves of the Muslims." He also quoted Ghazzali: *jizya* includes humiliation of non-Muslims, although it may be replaced by a doubled *zakat* if that is better for the Muslims, a clear reference to the case of the Arab Christian tribe of Taghlib that has already been discussed.

6.9.8 Historical context of Wansharisi's *fatwa* about the Jews of Tuat

It is interesting to compare Wansharisi's theoretical discussions with historical facts. For example, Scott says, "Of the three groups of the Saharan oases the Tuat is the most historical, for as early as the third century the Jews reached and established themselves in it. A further immigration in the sixteenth century greatly strengthened their position, and, their influence spreading to the other groups, a new Palestine was formed. The Jewish rule and religion was widespread in spite of an

⁸⁹ Wansharisi, vol. 2, pp. 214-266

⁹⁰ Tuat may refer generally to a group of three oases located in south-central Algeria. It may be referred to separately as one of the three Saharan oases, the other two being Guara and Tidikelt.

increasing Arab population, and peace prevailed between the two races. At the end of the fifteenth century, however, the Arabs had become very powerful, and the expulsion of the Moors from Spain was taken as an excuse for the overthrow and massacre of the Jews. Traces of this Jewish occupation are still to be seen, and their citadel of Tamentit, near Adrar, is one of the most curious places in the Sahara.”⁹¹

If the above is true, Tuat was not founded by Muslims since Jews were there before. Thus, Wansharisi’s fatwa would have an invalid basis. However, the following gives us a clue as to why the historical record may not have been clear: “[Tamentit,] one of the oldest centres in Tuat, it was formerly, like many other places in the country, inhabited by Jews, who on the invasion of the Mohammedans were forcibly converted or exterminated, so that now not a single Jew is to be found in the whole of Tuat. Those of the present inhabitants who say they are descended from Jews exhibit no traces of their origin in their features, for the Negro blood in their veins has made them as dark as their neighbours. They inherit, however, the activity and industry of their forefathers in trade and handicrafts, such as those of the shoemaker, tailor, armourer, and locksmith.”⁹²

Boum agrees that the Jews had an ancient presence in Tuat:

“Early Jewish history in the northern Saharan fringe is difficult to reconstruct, as many myths are not only connected to contemporary identity politics but these myths also appeared in early antiquity. Nahum Slouschz, describes the myths of antiquity when he writes: ‘My knowledge of [the Jews of] the interior of Libya was confined to the information brought back by writers of antiquity and to the allusions occurring in Jewish literature. I knew that at one time there was a people dwelling in these caves—as the Greeks authors tell us; that in the days of Falvius Josephus [Cyrenaican Jews] claimed descent from Apher, son of Abraham; that elsewhere, several groups of cave-dwelling or mountain Jews, lost sight of amongst the Berbers, still maintain their existence—the remnants of a once numerous people, leading here a most primitive life, but still clinging to their ancient traditions.’

Despite the absence of conclusive historical data, many historians argue that ‘members of the Israelite tribes were among the earliest Phoenician traders who colonised the African coast and founded Carthage.’ Slouschz traces the origin of Saharan Jews in the southern interior of Libya, Algeria and Morocco to the ancient Israelites, and the first dispersion of the Jews. Cyrenaica (the north-eastern part of present-day Libya) was believed to house the first wave of Egyptian Jews who settled there under Ptolmey, Alexander the Great’s successor in Egypt. James Hamilton asserts that after Ptolemy conquered eastern Libya and turned it into a province of Egypt under the name of Pentapolis, Jewish colonies were introduced in the region of Cyrene. Many Jews who moved farther into the African interior were thought to be of Cyrenaican origin. In other legends, the first Jews who arrived on the Saharan fringes of Cyrenaica came after the destruction of the First Temple by Nebuchadnezzar. This early migration is believed to have facilitated the spread of Judaism among the local population at the northern and southern fringes of the Sahara.”

Boum goes on to given an account of the background and impact of Maghili’s *fatwas* that were reproduced and endorsed by Wansharisi:

“As the Maliki School of Islamic law started to take root in the Sahara and replace Kharijism, the number of Jews in Sijilmasa decreased, shifting their operations to Tuat (located in south-central

⁹¹ Leonard T. Scott, *The Saura and Saharan Oases; And the Niger from Timbuktu to Jebba*, The Geographical Journal, Vol. 74, No. 4, October 1929, pp. 323-337

⁹² *Notes on Tuat*, Scottish Geographical Magazine, 9:8, 1893, pp. 419-422

Algeria). The Almoravids controlled Sijilmasa by 1056, forcing its population to adopt their strict Islamic interpretations. Their call for religious purity began to reach the confines of Ghana and the rest of [the] Sudan. The economic prosperity of the Jews of Sijilmasa, which took place between the ninth and eleventh centuries, ended with the Almohads' control of the northern fringes of the Sahara when the Almohads conquered Sijilmasa in 1146 and forced Jews to convert or face persecution and exile.

The fall of Sijilmasa led to a shift of Jewish settlement in the Sahara from the western entrepot of Sijilmasa to the central region of the Sahara, namely Tamantit, Tuat, and Tlemcen. Jews found refuge in the Tamantit-Tuat oases and later in the Mزاب region because of the tolerance of the Ibadis. Tuat became the most important Jewish settlement in the northern part of the Sahara after the fall of Sijilmasa.

However, around 1492, a new Saharan Jewish community would emerge after the fatwa of al-shaykh Muhammad b. Ibn 'Abd al-Karim Ibn Muhammad al-Maghili al-Tilimsani. Al-Maghili was born in Tlemcen, a flourishing market in the central part of North Africa. He is known for his book *Tuhfat al-nazir* that includes a discussion on the Jews of Tuat, in which he calls for restrictions against their movement and activities. Al-Maghili condemned the custom that allowed Jews not to pay *jizya* (poll tax imposed by Islamic law on Jews in return for protection) 'by providing an excess of hospitality (*diyafa*) and staple foods (*al-arzaq*), which were, in any case, due from them, but in legally prescribed amounts.' According to al-Maghili, Jews should be forced to pay *jizya* instead of associating themselves with local leaders who defend them. Al-Maghili's fatwa against the Jews of Tuat led to the liquidation of their settlement and the destruction of their synagogue. After his success in expelling the Jews from Tuat, al-Maghili travelled around the Sahara attempting to enforce these restrictions against other Jewish communities. According to Bovill: 'As a young man, Al-Maghili resided for some time in Tuat in the north central-Sahara, where he quickly won for himself renown as a preacher. He is said to have been the apostle of Islam to the Tuareg amongst whom his name is still held in honour. A massacre of the Jews of Tuat was attributed to fervor of his preaching. But the austerity of the code which he endeavoured to impose on the people proved intolerable to this Saharan community, who rose against him and drove him out. He fled southward through Air to Hausa, preaching in Takedda, Katsina and Kano, and adding greatly to his reputation.'

Al-Maghili called on Muslims to 'rise up and kill the Jews.' Following this event, some Jews were forced to convert while others left Tuat, settling in western oases such as Goulmim, Akka and other settlements in the Dar'a and Sus region. The fatwa of al-Maghili highlights the risks that Jews underwent as strangers, and their liminality and marginality in the Saharan borderlands. Jews moved constantly along the northern fringes of the Sahara, but at the mercy of Arab nomads who wanted them to convert and become part of these Muslim communities. Al-Maghili saw the *jizya* paid by Jews as a bribe to the rich Muslims of Tamantit; therefore Jews, in his eyes, managed to avoid living under 'humiliation' as a necessary condition in Islamic lands. In addition, al-Maghili argued that Jews should not be allowed to keep their synagogue in Tamantit and that the building should be destroyed.

By introducing his fatwa against the Jews of Tuat and other Saharan communities, al-Maghili set new laws that defined Jewish movement in the Saharan borderlands until 1860, when members of the Jewish community of Akka challenged his fatwa ... In 1870, Mardochee Aby Serour claimed in a report to Beaumier, the French Consul in Essaouira, that no Jew has ever ventured to travel south of the northern termini of the trans-Saharan trade since al-Maghili's fatwa. For instance, Leo Africanus reported that Askiya 'is an inveterate enemy of the Jews. He does not wish any to live in his town. If

he hears it said that a Barbary merchant frequents them, or does business with them, he confiscates his goods.’

At the legal advice of al-Maghili and after the destruction of the Jewish community of Tamantit, the emperor of Songhay, Askiya Muhammad, forbade Jews to trade in Songhay. Saharan Jewish settlements were thus concentrated in northern southern fringes along the pre-Sahara from Libya to Morocco, even though a few Jewish traders settled in some southern oases.⁹³

6.10 Summary of Ancient and Mediaeval Islamic Jurisprudence related to non-Muslims living under Muslim rule

Allegiance, loyalty and political identity was based on faith and upon the territory in which a person lived. Rules of war and peace, and sanctity of life and property were based on these considerations. The classical law on apostasy from Islam was also related to faith- and territory-based allegiances. The following stages may be identified in the historical development of these concepts.

6.10.1 Early Islam

The situation may be summarised in the following diagram:

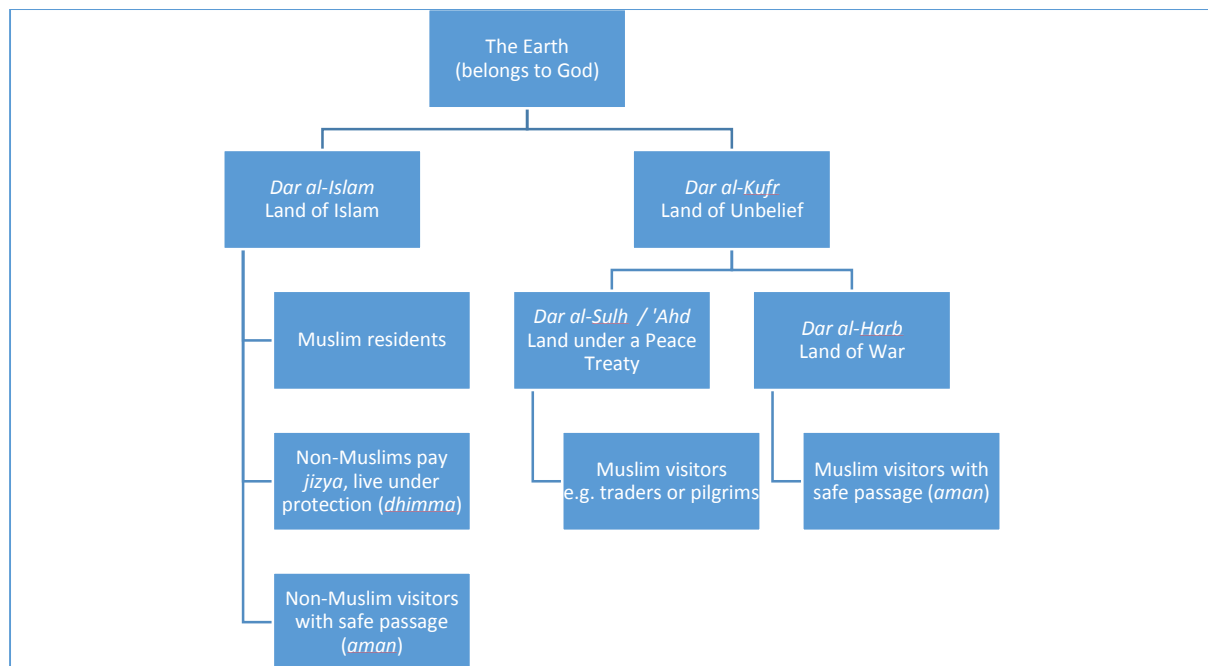


Figure 1: War and peace, according to faith and territory in early Islam

6.10.2 Ibn Taymiyya’s “Mardin fatwa” and Ibn Asim’s mutuality of *dhimma* in Andalusia

Ibn Taymiyya’s “Mardin fatwa” recognised, perhaps for the first time, a complex situation where a particular town is neither a “land of war” nor a “land of peace” but intermediate, or compound. Thus, the traditional, neat divisions of land and associated allegiances no longer applied to this town that had been part of the “lands of Islam” but was now occupied by Mongol invaders who did not rule by Islamic laws or norms, although many of the inhabitants were Muslim. A similar situation arose around a century later in Andalusia with the town of Galera in the province of Granada: a Muslim-majority town that had come under Christian rule due to the Reconquista. Interestingly, no equivalent

⁹³ Aomar Boum, *Saharan Jewry: history, memory and imagined identity*, The Journal of North African Studies, Vol. 16, no. 3, July 2011, pp. 325-341

of the Mardin fatwa appears to have been given by any recognised jurist in this case, as the extracts from Wansharisi show. However, the numerous questions about Galera show that the situation did vex the jurists of that time. Ibn Asim's mention of a mutuality of *dhimma*, i.e. Muslims also paying *jizya* when living under non-Muslim rule, in his 15th-century discussion of Galera (Andalusia) leads to the following situation:

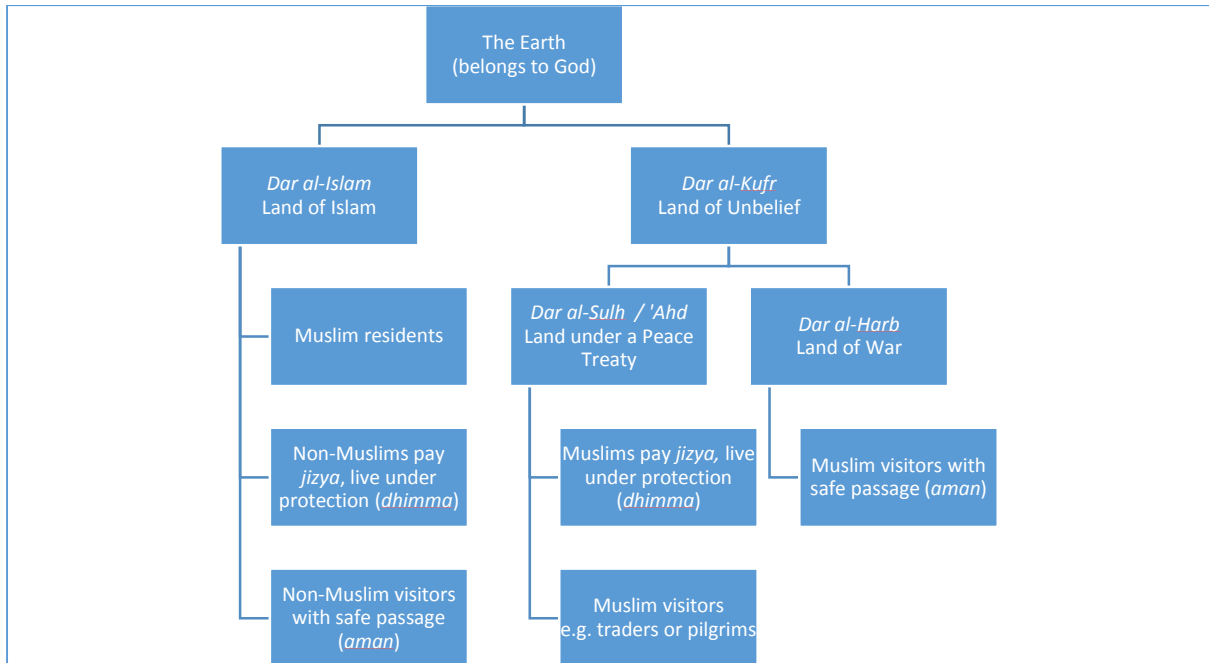


Figure 2: War and peace, updated according to Ibn Asim's fatwa about Galera

Ibn Taymiyya's "Mardin fatwa" leads to the following situation:

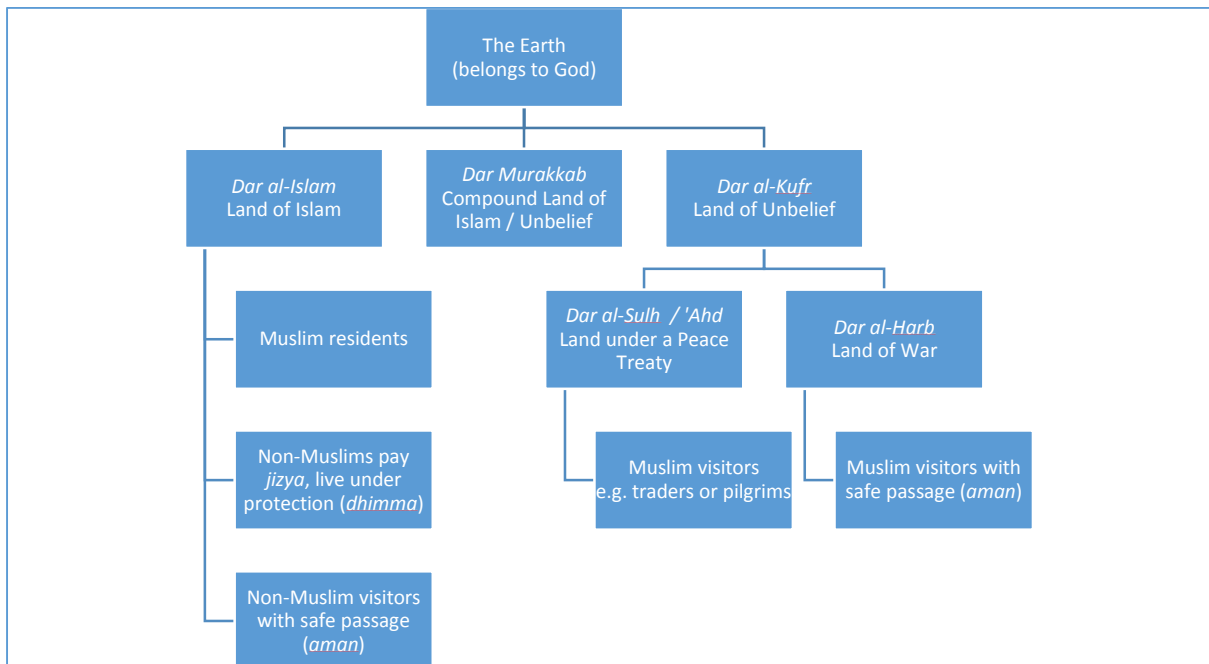


Figure 3: War and peace, updated according to Ibn Taymiyya's fatwa about Mardin

6.10.3 Modern international relations

Modern international relations give rise to the following situation, with matters such as peace, war, trade, travel, telecommunications, energy/electricity flows etc. being governed by international agreements:

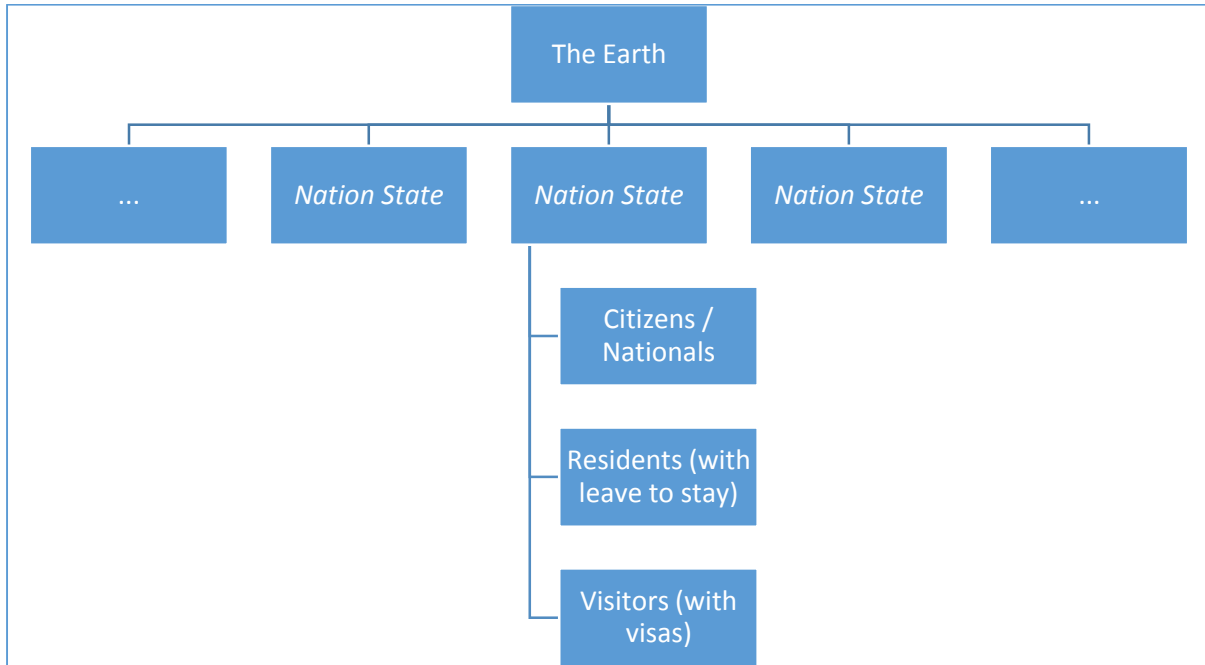


Figure 4: Modern international relations

For a discussion of the further evolution of ancient and mediaeval Islamic ideas until acceptance of modern international relations, see the later sections on Ottoman reforms and the views of contemporary jurists such as Abdullah bin Bayyah and Abdullah al-Judai (see Appendix 3 for the latter). See also *A Guide to Refuting Jihadism: Critiquing Radical Islamist Claims to Theological Authenticity* by Rashad Ali and Hannah Stuart (Henry Jackson Society, 2014).⁹⁴

⁹⁴ available at: <http://henryjacksonsociety.org/2014/02/04/a-guide-to-refuting-jihadism-critiquing-radical-islamist-claims-to-theological-authenticity/>

7 Islamic Reform: The Theory of *Maqasid al-Shari'ah* (Higher Objectives of Islamic Law)

The *Shari'ah* or *Sharia* (sacred law) is based on both universal and specific texts, principles and judgments from the Qur'an and the *Sunnah*, the example of the Prophet, peace be upon him. Far from being set in stone, the problem of specifically applying universal principles in Sacred Law has led to a vigorous debate throughout Islamic history and the complex evolution of an extremely diverse body of legal schools and opinions. Within three centuries of the founding of Islam, there were dozens of legal schools, of which about seven remain influential across the Islamic world, both Sunni and Shi'i. An important early debate that continues today was between traditionalists and rationalists over whether the universal principles of God's law were to be known by revelation or reason, or both. The four main areas covered by classical Sharia were: *ibadat* (ritual worship), *mu'amalat* (economics), *munakahat* (marriage, divorce and family) and *jinayat* (crime and punishment). A significant development in Islamic law between the 5th/11th and 8th/14th centuries was the approach to legal purpose known as the theory of *Maqasid*, or the higher objectives of law. Imam Ghazzali (d. 505/1111) argued from a holistic reading of the Qur'an that the purpose of Shari'ah was to fundamentally preserve five matters: faith, life, wealth, intellect and family.⁹⁵ This development occurred six centuries before John Locke's articulation of a similar approach to law in England. Over the next three centuries after Ghazzali, theologians such as Ibn Taymiyyah added a number of other "fundamental purposes" of law: preservation of reputations, neighbourhoods and communities; fulfilment of contracts; moral purity; trustworthiness; the love of God. The culmination of this theory came with Shatibi (of Jativa, Andalusia, d. 790/1388), who explicitly synthesised traditionalist and rationalist approaches⁹⁶ but Islamic legal theory and practice, once centuries ahead of other civilisations, fell into relative decline for the next half-millennium.

The last century has seen a renewed interest in *Maqasid*, especially amongst Muslim reformers, thinkers and revivalists, since this approach avoids legalistic hair-splitting and attempts to holistically recapture the essential spirit of Islamic law. The significance of this approach may be illustrated by the following quote from one of its masters, Ibn al-Qayyim (d. 751/351): "The Islamic Law is all about wisdom and achieving people's welfare in this life and the afterlife. It is all about justice, mercy, wisdom, and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the Islamic Law, even if it is claimed to be so according to some interpretation."⁹⁷

Recent thinkers such as Hashim Kamali of Malaysia have suggested that the following are "legal purposes" that must be protected and promoted by the Shari'ah: fundamental human rights and liberties; public welfare; education; scientific and medical research; the environment.⁹⁸ Gamal el-Banna of Egypt adds freedom of religion, freedom of expression, freedom of thought and absolute equality of all human beings to this list of universal values. In conclusion, it could be said that *Maqasid* theory derives a set of rational legal principles based upon a holistic reading of tradition.

⁹⁵ Ghazzali, *al-Mustasfa min 'Ilm al-Usul*.

⁹⁶ Shatibi, in the introduction to his *Muwafaqat*, states that his work is an explicit synthesis of the principles of Ibn al-Qasim and Abu Yusuf, i.e. of Maliki and Hanafi or traditionalist and rationalist principles of jurisprudence.

⁹⁷ Quoted in Jasser Auda, *Maqasid al-Shari'ah – A Beginner's Guide*, International Institute of Islamic Thought, London/Washington, 1429/2008.

⁹⁸ Muhammad Hashim Kamali, *Issues in the Legal Theory of Usul and Prospects for Reform*, Islamic Research Institute, International Islamic University, Islamabad, 2001.

7.1 Equality and freedom as higher objectives (*maqasid*) of Islamic law

As al-Shatibi argued, the higher objectives of Islamic law (*maqasid*, singular: *maqsad*) are known from a holistic reading of the Qur'an and Sunnah.⁹⁹ *Maqasid* theory derives a set of rational legal principles based upon a holistic reading of tradition. The aim is thus to achieve a perfect balance between tradition and reason. Gamal el-Banna argues that justice is the overriding concern of the Shari'ah and that equality and freedom are both important higher objectives of Islamic law.¹⁰⁰

The last century has seen a renewed interest in *Maqasid*, especially amongst Muslim reformers, thinkers and revivalists, since this approach avoids legalistic hair-splitting and attempts to holistically recapture the essential spirit of Islamic law. The significance of this approach may be illustrated by the following quotes from some of its masters.

Imam 'Izz al-Din b. 'Abdul-Salam (d. 660/1262), known as "the Sultan of the Scholars" of Egypt, said, "The greatest of all the objectives of the Qur'an is to facilitate benefits (*masalih*) and the means that secure them ... Every action that misses its purpose is void ... When you study how the purposes of the law bring good and prevent mischief, you realise that it is unlawful to overlook any common good or support any act of mischief in any situation, even if you have no specific evidence from the scripture, consensus, or analogy (i.e. from the Qur'an, Sunnah, *Ijma'* and *Qiyas*)."

Ibn al-Qayyim (d. 751/1351) said, "The Islamic Law is all about wisdom and achieving people's welfare in this life and the afterlife. It is all about justice, mercy, wisdom, and good. Thus, any ruling that replaces justice with injustice, mercy with its opposite, common good with mischief, or wisdom with nonsense, is a ruling that does not belong to the Islamic Law, even if it is claimed to be so according to some interpretation."¹⁰¹

A good example of the implementation of this principle is in the issue of child-custody after divorce: the Prophet (peace be upon him) gave different judgments in different situations, and the canonical schools of law tended to stick to one or another of these judgments. Ibn al-Qayyim concludes, "Before giving the choice to a child or even drawing lots, the welfare (*maslahah*) of the child must be taken into account. If one of the parents will clearly benefit a child's welfare more than the other, the child must be given to that parent without asking the child or drawing lots." This view was endorsed by Imam al-Shawkani in his *Nayl al-Awtar*, and by his fellow-Yemeni scholar al-San'ani thus, "The children should stay with the parent who fulfils their best interest. If the mother is the better carer and will follow up on the children diligently, then she should have priority over them ... The children have to be in the custody of the more capable parent, and the Law cannot possibly judge otherwise."

Maqasid theory also provides a principled approach to distinguishing Qur'anic *ayat* that have a universal, eternal resonance from those that deal with specific, context-related situations.¹⁰² Thus, the universal-equality verse of Surah al-Hujurat (Qur'an, 49:13) would be a universal one establishing the higher objective of human equality whilst the one (Qur'an, 9:29) mentioning discriminating against non-Muslims by subjecting them to the sword or *jizya* would be specific and context-related.

⁹⁹ Muhammad Hashim Kamali, *Issues in the Legal Theory of Usul and Prospects for Reform*, Islamic Research Institute, International Islamic University, Islamabad, 2001.

¹⁰⁰ Gamal el-Banna, *Hal yumkin tatbiq al-Shari'ah [Is it possible to implement the Sharia?]*, Dar al-Shorouk, Cairo, 2005; *al-Islam wa Hurriyyah al-Fikr [Islam and Freedom of Thought]*, Dar al-Shorouk, Cairo, 2008

¹⁰¹ Quoted in Jasser Auda, *Maqasid al-Shari'ah – A Beginner's Guide*, International Institute of Islamic Thought, London/Washington, 1429/2008.

¹⁰² Jasser Auda, *Maqasid al-Shari'ah – A Beginner's Guide*, International Institute of Islamic Thought, London/Washington, 1429/2008.

The *maqṣad* (universal human value) of freedom is necessary to ensure that traditional power structures are not forced on Muslims and non-Muslims, but are a question of choice and agreement. Thus, emphasis is needed on both these higher objectives of Islamic law: freedom and equality.

There is a resurgence of interest in *Maqasid* around the world, with an increasing number of publications in Arabic, English and other languages. The *Maqasid* theory was developed during the 5th/11th – 8th/14th centuries. The most important contributors during this period were: Juwayni, Ghazzali, Ibn ‘Abd al-Salam, Ibn Taymiyyah, Ibn al-Qayyim, Qarafi and Shatibi. These are all traditionalist authorities, but the most prolific and traditionalist writers amongst them include Ibn Taymiyyah and Ibn al-Qayyim, whose thought especially influences salafi and Deobandi circles. Thus, their writings need to be highlighted as a basis to opening up Muslim discourse to *Maqasid* arguments and away from fundamentalist and literalist positions.

Muslim public consciousness needs to appreciate that Islamic legal theory, including the principles (*usul*) and higher objectives (*maqasid*), emphasises the importance of local custom (*urf*) and context. For example, Ibn al-Qayyim devotes a long chapter in his detailed work on legal theory to the “Change and diversity of legal judgments (*fatwa*) according to changing times, places, situations, intentions and habits.”¹⁰³ Shatibi similarly discusses the issue at great length in his *Muwafaqat*.

Ibn al-Qayyim is also ready to discuss the rationale behind all Shari’ah rulings that may seem to be illogical, devoting over a hundred pages to this.¹⁰⁴ Such logical discussion would also apply to the rationale behind imposing *jizya* and *dhimma*, as we saw was discussed by the mediaeval Muslim jurists. Since the rationale is open to discussion, Ibn al-Qayyim would have to admit that therefore so is the ruling, in principle, in line with his chapter mentioned in the previous paragraph.

¹⁰³ Ibn al-Qayyim, *I’lam al-Muwaqqi’ in ‘an Rabb al-‘Alamin*, Dar al-Fikr, Beirut, 1397/1977, vol. 3, pp. 14-70.

¹⁰⁴ Ibid., vol. 3, pp. 52-156.

8 Islamic Reform: Muslim reformist thinking, 19th-21st century

8.1 The Ottoman reforms of the 19th century

As argued powerfully by the contemporary scholar Recep Senturk, there was an early, fundamental dichotomy in the basis of this jurisprudence: traditionalist schools had a communalist approach to human rights, basing these on a person's Islam or being under its protection (*dhimma*); more rationalist schools, such as the Hanafis, had a universalist approach, basing human rights on a person's basic humanity (*adamiyya*). The later Ottomans, being Hanafis, used the latter approach to abandon their Millet system of multiple, parallel religious law for different faith communities in favour of a system of equal Ottoman citizenship.¹⁰⁵

This equal citizenship may be illustrated by the following examples. In a public speech made in 1830, the Ottoman Sultan Mahmud (Mehmet) II said that: "From among the subjects, where I distinguish who is Muslim is at a mosque, who is Christian, in a church and who is Jewish, in a synagogue. There is no difference between them on other days." In another speech in present-day Bulgaria in 1837, Mahmud II said: "O Greeks, Armenians and Jews! All of you, just like the Muslims, are God's servants and my subjects. You have various religions, but you are all under the protection of the laws of the state and my royal will."

The contemporary historian and Ottoman scholar Ihsanoglu comments, "Such statements and a declaration of egalitarian principles would be embodied in a formal document and openly announced to the empire in a public ceremony in order to gain legal value. This document, which was called the Rescript of Gulhane or *Tanzimat Fermani* [Declaration of Regulations] was read in 1839."¹⁰⁶

The Gulhane Decree (*Hatt-i-Sharif*) of 1839 promised many reforms, including the total abolition of *jizya* or any other poll-tax on non-Muslims and giving equal citizenship status to Jews, Christians and Muslims. This was followed by a new penal code in 1843 that attempted to follow the rest of Europe in modernizing and updating its mediaeval religious heritage. In 1844, the death penalty for apostasy from Islam was abolished. The Ottoman Penal Code of 1858 was based on the 1810 Napoleonic code, and put aside traditional Islamic punishments.¹⁰⁷

Senturk adds that the 1839 Decree abolished the category of *dhimmi*, established equality between Muslim and non-Muslim citizens, "requiring them to pay the same amount of taxes, allowing all citizens to occupy political and administrative office, and to join the army. Therefore, the Declaration of Regulations (*Tanzimat Fermani*, 1839) may be seen as the first Islamic human rights declaration in the modern sense."¹⁰⁸ He further adds that the decree "assured all citizens their basic rights: right to life, property, freedom of religion, protection of honor, education, employment and due process ... [It] is especially significant for its recognition of equal rights in education and in government administration for those of Christian persuasion, exemplifying egalitarian principles. The Ferman [Decree] declared: 'All Muslim or non-Muslim subjects shall benefit from these rights. Everyone's

¹⁰⁵ Recep Senturk, *Sociology of Rights: Human Rights in Islam between Communal and Universal Perspectives*, Emory University Law School, 2002

¹⁰⁶ Ekmeleddin Ihsanoglu, *A Culture of Peaceful Coexistence*, Research Centre for Islamic History, Art and Culture (IRCICA), Istanbul, 2004, pp. 47-49

¹⁰⁷ Ishtiaq Hussain, *The Tanzimat (1839-1876): Secular Reforms in the Ottoman Empire*, Faith Matters, 2011, also available at: <http://faith-matters.org/images/stories/fm-publications/the-tanzimat-final-web.pdf>

¹⁰⁸ Recep Senturk, *Sociology of Rights: Human Rights in Islam between Communal and Universal Perspectives*, Emory University Law School, 2002, p. 10

life, chastity, honor and property is under the guarantee of the state according to the Shari'ah laws.' Representatives of all religious groups and the ambassadors of European states were present in the declaration ceremony, which was closed by the prayer of Shaikh al-Islam ... Foremost among the laws was the security of honor, life and property for all Ottoman subjects, regardless of race or religion. Other reforms, which sought to reduce theological dominance, included the lifting of monopolies, fairer taxation, secularized schools, a changed judicial system and new rules regarding military service."¹⁰⁹

As well as basic humanity (*adamiyya*), the Hanafi concept of '*ismah* (sanctity, basic human rights) played a role in the human rights declarations and regulations (1808, 1839) of the Ottomans.

Just as the words "person" and "human" in English, first used in the 13th and 16th centuries respectively, evolved in their political and legal meanings (for example, slaves were humans but not full persons under the law), the Islamic legal understanding of the Qur'anic concept of *insan* (human) or *Banu Adam* (Children of Adam) also evolved. The universalist approach to rights, already summarised in Chapter 7 as the theory of *Maqasid al-Sharia* (Universal Principles of the Sacred Law), is claimed by Senturk to be essentially a Hanafi one: the Hanafi scholars Sarakhsi, Zaylai, Dabusi, Marghinani, Ibn al-Humam, Babarti, Kasani and Timurtashi all referred to '*ismah* and *adamiyyah* or basic human rights and sanctity. However, Senturk also mentions that non-Hanafi jurists such as Ghazzali (Shafi'i), Ibn Taymiyya and Ibn al-Qayyim (Hanbali), Ibn Rushd, Shatibi and Ibn 'Ashur (Maliki), as well as Maghniyya (Ja'fari Shia) also adopted this view – these are generally all names associated with the *Maqasid* school of thinking.

The *Maqasid* theory has a hierarchy of rights: classically, at the most basic level (of necessity or *darura*) is the protection and promotion of the five or six rights to faith, life, property, mind, lineage/progeny and honour/reputation. At the next level up is the level of basic needs (*haja*), such as food and drink, shelter, education, employment and medicine. The highest level are not rights in the sense of entitlements: they are *tahsiniyyat* - aesthetics, luxuries and comforts, such as decent housing, food and drink, education and employment. During Islamic history, notes Robert Crane, a Harvard law professor, "These universal principles or *maqasid* were developed over a period of centuries into what became the world's most sophisticated code of human responsibilities and rights."¹¹⁰

The Ottomans thus understood *Maqasid* human rights theory as explaining the basic scriptural notions of '*ismah* and *adamiyyah* or sanctity and humanity, and enacted radical reforms on its basis to bring about civic equality, irrespective of race or religion.

¹⁰⁹ Recep Senturk, *Sociology of Rights: Human Rights in Islam between Communal and Universal Perspectives*, Emory University Law School, 2002, p. 10

¹¹⁰ Robert D. Crane, *Metalaw: The Ultimate Challenge*, paper presented at International Islamic University, Malaysia, 2009 – available at http://theamericanmuslim.org/tam.php/features/articles/metalaw_the_ultimate_challenge

8.2 Indian Muslim scholars and thinkers¹¹¹

Indian Muslims shared a homeland (India) with Hindus, Buddhists, Parsis (Zoroastrians), Sikhs and Christians for centuries, and the Mughal empire ruled over large parts of India where the population was majority non-Muslim. Over the last century of British rule, i.e. 19th-20th century, there emerged a strong nationalist movement for independence. Scholars and thinkers were forced to grapple with the issue of nations, homelands and faiths. Below are some of their views.

8.2.1 Maulana Mahmood Asad

The contemporary Indian Muslim scholar Maulana Mahmood Asad introduces the discussion thus, “The pertinent question is: Can Indian citizens co-exist with each other despite their cultural and religious diversity? Can Hindus, Muslims, Christians, Sikhs, Buddhists, Zoroastrians and others live together amicably as one nation?” He goes on to say,

“The patriotism of Indian Muslims is being questioned today. Those who question Muslims’ love for this country call themselves ‘Hindu’ and shout slogans such as *Garv se Kaho Hum Hindu hain* [“Say with pride: we are Hindus”], without understanding that the term ‘Hindu’ is not the appellation of followers of any religion. It is a geographical definition of a people residing in a territorial region, i.e. India.¹¹² By virtue of this definition, all people residing within the geographical territory of India, whether they are descendants of Aryans or Dravidians or Mongols or Arabs or Anglo-Saxons, are Hindus.”

8.2.2 Maulana Hussain Ahmad Madani (1879-1957): “composite nationalism”

Madani was a graduate of the famous Islamic seminary of Deoband, and served as president of the *Jamiat Ulama-e-Hind (Society of Religious Scholars of India)* for 17 years from 1940 to 1957, a period that included the momentous independence and partition of India in 1947. Madani, who was opposed to partition, played a leading role in the independence movement and was imprisoned for over three years (1916-1920) in Malta, one of the British Empire’s prison locations for dissidents against imperial rule.

In 1937, Madani stated that, “In the current age, nations [*qaum*] are based on homelands [*watan*], not religion.” This was obvious to him because people abroad, including the Turks, Germans and Austrians interred with him in Malta, made no distinction between Indians who were “Muslim, Hindu, Sikh or Parsi” – all were “Hindustani” (Indian).

Madani popularised the term “composite nationalism” (*muttahida qaumiyat*), based on the Qur’anic term *qawm* being applied to the nations or people of the Messengers of God, whether or not they were believers, and upon references to the “Medina Charter” where Muslims and Jews were understood to be one nation (*ummah*) in some respects, especially the joint defence of their common home of Medina. Madani held that Muslims, Hindus and other religious communities were united as Indians by sharing a common homeland, especially in opposition to the British colonisers. He stated that similar ideas were held by one of his teachers at Deoband, Maulana Mahmood Hasan (1851-1920), to whom he was particularly close and alongside whom he had been imprisoned in Malta.

There is another aspect of the religion/land loyalty problem in Madani’s thought: like many proselytising clerics, he appears to have harboured the dream that all non-Muslim Indians might

¹¹¹ This section is mostly based on Maulana Hussain Ahmad Madani, *Composite Nationalism and Islam*, Manohar, New Delhi, 2006

¹¹² Linguistically, the words India, Hindu, Indus and Sindh are all closely-related.

eventually convert to Islam, in which case composite nationalism would be redundant. “Composite nationalism is needed only till such time [that] different *aqwam* [nations] and different religions exist in a country. When the entire nation becomes Muslim, where is the need for it? I have termed it ‘temporal and special’ for this reason.”

8.2.3 Sir Muhammad Iqbal (1877-1938): pan-Islamism

In contrast to Madani, the philosopher-poet Iqbal felt that the Qur’anic notions of *ummah* (nation) and *millah* (religious community) should reign supreme, and he argued powerfully for pan-Islamism: Muslims the world over were united; it is religion, not homeland, that decides their ultimate identity. In effect, Iqbal was advocating a return to a pure Islamic utopia, the ancient and mediaeval notion of *dar al-Islam* (lands of Islam). Although he died before the independence and partition of India, Iqbal was a major inspiration for the creation of Pakistan, a ‘Muslim homeland’ carved out of India. Madani and Iqbal had sharp exchanges over this issue, including in verse. Madani also critiqued Iqbal correctly on one point: the Qur’anic usage of *ummah* (nation) is sometimes synonymous with *qawm* (nation or people), so Iqbal’s argument for pan-Islamism over composite nationality on the basis of the notion of *ummah* was invalid.

8.2.4 Maulana Mohammad Ali Jauhar (1878-1931): “United Faiths of India”

This Indian Muslim leader, activist, scholar, journalist and poet tried to reconcile his identities as follows during a conference in London, responding in particular to the criticism that a Muslim’s highest loyalty to God conflicts with the integrity of being Indian: “It is a wrong conception of religion that you have, if you exclude politics from it. It is not dogma; it is not ritual! Religion, to my mind, means the interpretation of life. I have a culture, a polity, an outlook on life – a complete synthesis which is Islam.”

Jauhar further explained a hierarchy of loyalty: the highest is to God via Islam, but for national matters, it is to his homeland of India. “Where God commands I am a Muslim first, a Muslim second, and a Muslim last, and nothing but a Muslim ... If you ask me to enter into your Empire or into your nation by leaving that synthesis, that polity, that culture, that ethics, I will not do it. My first duty is to my maker, not to His Majesty the King ... But where India is concerned, where India’s freedom is concerned, I am an Indian first, an Indian second, an Indian last, and nothing but an Indian.”

Jauhar was one of the Muslims who served as president of the Indian National Congress (the famous Congress Party of India), although his presidency was short-lived. In his presidential address in 1923, he outlined his vision: “I had long been convinced that here in this country of hundreds of millions of human beings, intensely attached to religion, and yet infinitely split up into communities, sects and denominations, Providence had created for us the mission of solving a unique problem and working out a new synthesis, which was nothing other than a Federation of Faiths ... For more than twenty years I have dreamed the dream of a federation, grander, nobler and infinitely more spiritual than the United States of America, and today when many a political Cassandra prophesies a return to the bad old days of Hindu-Muslim dissensions, I still dream that old dream of ‘United Faiths of India’.”

8.2.5 Sir Sayyid Ahmad Khan (1817-1898)

Khan, a philosopher and activist, originally subscribed to the idea of composite nationalism, although he later became convinced of a two-nation theory and became, along with Iqbal, an intellectual founding father of Pakistan: “The word *qaum* [nation] applies to people living in one country. Remember that Hindu and Muslim are words of religious significance; otherwise Hindus, Muslims and Christians who live in this country are one *qaum*. When these groups are called one *qaum*, their country of dwelling being one, their national interest should be one as well. Days are gone when

inhabitants of the same country will be regarded as two distinct *aqwam* (nations) on the basis of religion.”

Sir Sayyid had also said, “Like Aryans who are called *Hindu*, Muslims, too, are called *Hindu* – that means inhabitants of India ... The word *Hindu* that you have used for yourself (as a religious community) is not right, in my opinion. In my view, *Hindu* is not the name of any religion. Every one living in India can call himself a *Hindu*. However, it is quite strange and sad as well that though we (Muslims) live in India, you (Hindus) do not consider us Hindu.”

8.2.6 Maulana Abul Kalam Azad (1888-1958)¹¹³

Maulana Azad was theologically from a Salafi (*Ahl-e-Hadith*), puritan background but became, in the words of one of his biographers, an Indian nationalist and leader of the struggle for freedom, “a great universal humanist ... Gandhi admired him and Nehru rightly regarded him as one of the makers of modern India.” Azad succeeded Jauhar in 1923 as President of the Indian National Congress, at the youthful age of 37. After Independence, Azad served as Nehru’s first Minister of Education, and since his death, India’s annual Education Day has been named Maulana Azad Day.

Azad, just like Jauhar and Madani, was a firm advocate of Hindu-Muslim unity in opposition to the British Raj: “We in India need neither any Hindu Organisation nor any Muslim Organisation. We need only one organisation and that is this one, the Indian National Congress.”

Azad’s belief in freedom was universal, as taught by Islam in his view: “Liberty is the natural and God-given right of man. No man and no bureaucracy consisting of men has the right to make the servants of God its own slaves ... The greatest proof of the truth of my religion is that it is another name for the teachings of the rights of man. I am a Musulman [Muslim] and by virtue of being a Musulman this has become my religious duty ... The moment Islam appeared, it proclaimed that right is not might but right itself. No one except God has the right to make serfs and slaves of God’s creatures. All men are equal and their fundamental rights are on a par. He only is greater than others whose deeds are the most righteous of all¹¹⁴ ...”

Furthermore, the brotherhood of humanity is a basic truth according to Azad: “‘Good deeds’ are not to be understood in the narrow sense as the performance of certain formal duties, important as they may be for man’s spiritual and social welfare. Man must go beyond them and do everything to the best of his capacity in accordance with his circumstances, to fashion his whole life to conform to the twin basic concepts of unity of God and brotherhood of man. One must not serve man except in the service of God, and one cannot serve God without serving mankind.”

8.2.7 Ahmad Reza Khan (1856-1921)

Imam Ahmad Reza Khan was born in 1856 in a town called Bareilly, India. Because of the name of his place of birth his followers are commonly referred to as “Bareilwis”. Imam Ahmad Reza began writing fatwas at the age of fourteen, later going on to become a Hanafi scholar and a spiritual Sufi follower of Pir Abdul Qadir Jilani al-Baghdadi. He was a prolific writer and his fatwas are still used today. He has tens of millions of Sufi followers of Indo-Pakistani origin around the world.

¹¹³ Vidya Sagar Anand, *Maulana Abul Kalam Azad – A Great Universal Humanist*, Institute for Media Communication, New Delhi, 1994

¹¹⁴ A clear reference to Qur’an 49:13

According to a famous fatwa by Imam Ahmad Reza Khan's, India under British rule was still *Dar al-Islam* (land of Islam). This was because:

In Hindustan [India] ... Muslims are free to openly observe the two Eids [Islamic festivals], the azan [and] iqamat [calls to prayer], namaz ba-jama'at [congregational prayer] ... which are signs of the shariat [Sharia], without opposition. Also the religious duties, nikah [Islamic marriage], fosterage ... There are many such matters among Muslims on which the British government also finds it necessary to seek fatawa [fatwas] from the Ulama [religious authorities] and act accordingly, whether they (the rulers) be Zoroastrian or Christian ... In short, there is no doubt that Hindustan [India] is Dar al-Islam [a land of Islam].¹¹⁵

The leading Deobandi scholars, Ashraf Ali Thanwi and Abdul Rashid Gangohi also shared this view.

8.2.8 Summary

Indian Muslim scholars of the 19th-20th centuries made notable contributions to the debates around loyalty to God, religion and homeland, including possible conflicts of loyalty, especially in the context of nationalist independence from colonial rule. Their ideas and struggles had huge practical results in the form of the independence and partition of India in 1947, with the creation of a new homeland, Pakistan (from which Bangladesh later separated), that was mainly for Muslims. These debates have continued throughout the 20th and 21st centuries, as will be further discussed in later sections.

8.3 Muhammad 'Abduh (1849-1905) on *jizya*

Sheikh Muhammad 'Abduh was a major Egyptian Islamic jurist, religious scholar and liberal reformer. In his commentary on the Qur'an, he argues that because *jizya* was originally imposed in place of military duty and in exchange for protection, it could be abolished if non-Muslims served in the military.¹¹⁶ This step had already been taken during the Ottoman reforms of the mid-19th century (see Appendix 2).

8.4 Other reformist thinkers

In a valuable handbook on the subject edited by Kurzman, 52 prominent Muslim reformist thinkers of the 19th-20th centuries have been surveyed, including 'Abduh and some of the Indian Muslims discussed above. The regions covered are Africa, Iran, Afghanistan, the Ottoman and Russian Empires and South, East and South-East Asia. The themes covered are cultural revival, political reform, religious interpretation, science, education and women's rights.¹¹⁷ The second and third of these themes are especially relevant to this study.

Demonstrating that "liberal Islam" is not a contradiction in terms, another anthology edited by Kurzman presents the translated work of 33 Muslim scholars concerned with the separation of mosque and state, democracy, the condition of women, the rights of minorities, freedom of thought, and the future of human progress.¹¹⁸ All of these themes are relevant to this study.

¹¹⁵ *The Ahle Sunnat Movement in British India 1880-1921*, ed. Prof. Allah Bukhsh, Islamic Propagation Centre, Lahore, p. 265

¹¹⁶ Muhammad 'Abduh, *Tafsir al-Manar*, Dar al-Ma'rifah, Beirut, vol. 10 under Qur'an 9:29 (the verse of *jizya*)

¹¹⁷ Charles Kurzman, *Modernist Islam, 1840-1940, A Sourcebook*, OUP, 2002

¹¹⁸ Charles Kurzman, *Liberal Islam*, OUP, 1998

8.5 Sheikh Abdullah bin Bayyah on religious loyalty vs. citizenship¹¹⁹

Ibn Bayyah, one of the foremost traditional jurists of today, discusses this issue in relation to the modern extremist discourse around loyalty (*wala'*) and disavowal (*bara'*), since many extremist Muslim clerics argue that all Muslims must give their total loyalty to Islam and Muslims, and disavow all non-Muslims as well as their creeds and religions.

As Ibn Bayyah shows, the Qur'anic theme of loyalty is multi-layered and diverse: it is linked to allegiances of faith, family ties and structure, social ties and structure, and so forth. He then goes on to quote two hadiths or teachings of the Prophet Muhammad, peace be upon him, in support of a more universal idea of loyalty:

- (i) "The land belongs to God; the people are servants of God: so wherever you find goodness, settle there."
- (ii) Addressing one of his disciples: "Establish prayer, give alms, shun evil and live wherever you wish in the land of your people."

He further refers to both the Medinan Covenant and *Hilf al-Fudul*, the pre-Islamic treaty safeguarding social justice and welfare in Mecca in which Muhammad participated before his prophethood, later saying that "If I were invited to participate in such a venture again, I would do so."

Ibn Bayyah then criticises the puritan view of loyalty that leads to the extremism described above: ironically, the puritanical Muslims claim to eschew innovated practices and terms in religion (*bid'ah*), yet their own exclusivist use of the Qur'anic terms of loyalty and disavowal is in itself a harmful, heretical innovation. This heretical tendency was known in early Islam, and Ibn Bayyah quotes from early authorities who condemned it as a harmful innovation, such as Ali and Abu Sa'id al-Khudri (disciples of the Prophet) and Imam Ahmad bin Hanbal (founder of one of the four main Sunni schools of jurisprudence). Ash'ari, the leading Sunni theologian, even described two heretical sects that expressed disavowal of children until they confirmed orthodox Muslim faith.

Most Qur'anic verses and hadiths mentioning "disavowal" apply this to actions, not individual people. Ibn Bayyah gives several examples of these, and explains that this is because "a person may have hateful as well as lovable qualities, so he is to be loved in one aspect and hated in another. This is why, in most cases, the disavowal is from the action, not the person. And God knows best."

The Prophets of God are part of "their people" in the Qur'an, expressing approval of their considering themselves part of a nation, even though the latter were often unbelievers. The Prophet himself is told "You may not be able to guide whomever you love" (Q. 28:56), with no disapproval of his familial love for unbelieving relatives¹²⁰, and various hadiths speak of the love for one's homeland. Ibn Bayyah comments, "This attribution to peoples, and the love of homes and homelands, is a type of loyalty."

¹¹⁹ Shaykh 'Abdullah bin Shaykh Mahfuz bin Bayyah, *Sina'at al-Fatwa* [The Crafting of Jurisprudential Rulings], Dar al-Minhaj / Global Centre for Renewal and Guidance, 1428/2007, pp. 287-302

¹²⁰ This verse is traditionally said to have been revealed about Abu Talib, a paternal uncle of the Prophet.

8.5.1 Sheikh Abdullah bin Bayyah on citizenship

It is worth reproducing this long discussion, with an original translation: ¹²¹

As for citizenship [literally in Arabic, “adopting a homeland”], it now has a new meaning: a mutual relationship amongst the individuals of a human group settled in one land, and not necessarily attributed to one ancestor, unified historical memory or single religion; underpinned by a constitution, framework and laws that define the obligations and rights of the individuals. It is a quasi-mutual society to which its individuals attribute themselves voluntarily in the form of a mutual contract, such that someone joining today has the same rights as those of the oldest member.

The values of this group in the modern understanding is opposite to the historical understanding that was based on race, religion or a shared history. The modern understanding is premised on the notion that diversity itself has become a major value, through which cohesion may be attained by mutual interaction of different specialisations in order to arrive at greater public benefit by activating shared humanity, neutralising elements of marginalisation and rejection of striving for racial purity that leads to the division of residents into [unequal] levels, as was the case with the Romans or Arabs in [pre-Islamic] times of ignorance.

Citizenship is a voluntary tie binding you to a homeland, ruled by a constitution, or what the German philosopher Habermas calls constitutional citizenship, i.e. the individual’s sense of belonging to a civic society founded on the sharing of basic values.

Citizenship rises above group dynamics but does not cancel them: the aim is to blend and coexist with them successfully.

The above is perhaps the most important development in the understanding of citizenship in the modern age. It is also perhaps the most important bridge by which the religious values of all human groupings may be respected and accepted. This accords with the understanding of Islam about human coexistence: a Muslim finds no harm in it, but rather may co-operate in it.

In this historical context of the formation of western society, of which Muslims, like others, are a part, and through the wider European Union, it is a duty upon Muslims to participate in realising the understanding of citizenship that accommodates different identities. This must be done through a correct understanding and sound evaluation of the European historical heritage and world developments, so that they grasp their countries’ problems as well as the causes and nature of these. Thus, they may interact with the majority and together create new standards of citizenship. This requires some degree of moving away from self-centredness. It also requires taking the important steps, for minorities, of respecting the other and recognising the existence of different religions and cultures, living various freedoms and partnering in the running of political, economic and social life, far-removed from violence. Thus, citizenship will become a melting-pot in which all identities are blended. The degree of cohesion and knitting amongst all these factors within society determines how the citizen and society find their places.

Identity is a personal, social and philosophical understanding, a product of a mutual dialectical process between an individual and society or the group he or she favours, in the sense that identity has an individual-cum-social nature: the existence of a society or group is very important as a world

¹²¹ Shaykh ‘Abdullah bin Shaykh Mahfuz bin Bayyah, *Sina’at al-Fatwa* [The Crafting of Jurisprudential Rulings], Dar al-Minhaj / Global Centre for Renewal and Guidance, 1428/2007, pp. 302-8

to which the individual belongs. Identity and belonging thus need grouping and individual desire to be linked to, or in the presence of, others. This need appears to be widespread amongst humanity.

Thus, loyalty may be considered as circles or ranks, having the possibility of interconnecting and interacting rather than clashing and fighting. Loyalty to religion is non-controversial to every Muslim, or indeed to every religious person: it is the highest point of the pyramid of loyalties. However, it does not interfere with loyalty to homeland according to the understanding of citizenship that we have indicated. The two do not contradict as long as the contract of citizenship does not comprise leaving religion, abandoning its symbols or obstructing a Muslim's freedom to live his or her faith.

The relationship between the contract of citizenship and religion may be conceptualised as circles, including matters that are sought by religion and desired naturally, such as: the right to life, justice, equality, freedoms and protection of property; the right not to be subject to arbitrary imprisonment and torture; the right to social insurance for the poor, elderly and sick; mutual co-operation amongst the individuals of society for the common good. The relationship also includes resultant duties such as the paying of taxes, defending the homeland against aggression, and following the laws [of the land] as part of fulfilling the contract of citizenship. In reality, this falls under fulfilling covenants and respecting their consequences, which falls under loyalty to religion: "O you who believe! Fulfil your covenants." [Qur'an 5:1]

Means have the same religious rulings as their objectives, as is established in the books of the foundations of jurisprudence, especially according to [the great scholars] 'Izz al-Din bin 'Abd al-Salam, Qara'fi and others. Such means include participating in elections and joining parties and groups [and are thus encouraged by Islam as part of citizenship], and fall under helping each other towards piety and righteousness: the Exalted said, "Let not the hatred of a people, who prevented you from the Sacred Mosque, lead you to transgress. Help each other towards piety and righteousness. Do not help each other towards sin and enmity." [Qur'an 5:2] This principle was revealed about relations with polytheists who were at war [with the Muslims], so how can it not apply to fellow, peaceful citizens?! For relations with the latter are governed by the verse, "God does not forbid you, regarding those who neither fought you over religion nor expelled you from your homes, that you treat them with kindness and justice. Truly, God loves those who deal justly." [Qur'an 60:8]

The major values of neutral secularism are to be considered positive values, such as:

- (i) Respect for beliefs*
- (ii) Neutrality or impartiality between different religions*
- (iii) Recognition of individual and social human rights that the state vigilantly protects*
- (iv) The right to disagreement, diversity and change for individuals and organisations in private matters*
- (v) The right of referring to courts of natural law to extract rights and impose individual duties to respect laws and pay taxes to share in the national effort to enable infrastructure and defend against external aggression*

None of this negates the major values to which the heavenly religions invite people, especially the Islamic religion that calls for kindness, love and human brotherhood. However, as is the nature of things, the devil is in the detail, as the saying goes. For example, some proponents of secularism explain it in such a way as to take it away from neutrality such that it interferes in the private matters of people and polices their beliefs: this is a deviation from the basic meaning of secularism.

All groups should remain holding on to secularism as a means to liberation that springs from personal fulfilment, not as a totalitarian ideology wishing to impose specific concepts based on personal whims. On the other hand, all sides must resist groups who attempt to diabolically exploit aspirations such as national, social, economic and security concerns, leading to some of their foolish members carrying out destructive or terrorist actions: thus, they become natural allies of extremists on the other side who thrive in such conditions.

We are searching for mutual assistance and solidarity amongst our values, not conflict and tension. Therefore, the bearers of these values must forge alliances for their homelands to become better: "Why then were there not, among the generations before you, persons possessed of balanced good sense, prohibiting (people) from mischief in the earth?" [Qur'an 11:116]

Conclusion

Loyalty is belonging to, and relationships with, people, ideas and values. It is appropriate when discussing this matter in the context of western countries to establish that loyalty to one's homeland within the parameters of religious law does not negate loyalty to religion, and that loyalty is also to values. Honouring the homeland and its citizens is a value sanctified by religious law as well as by reason, and a Muslim must "shun the evil" as the Prophetic teaching instructs. Evil is of different levels and ranks, so [for a believer] loyalty does not mean changing one's religion, for this would be the highest level of evil; rather, he must hold on to his faith, "even if he has to gnaw at tree roots until death," as in the agreed-upon tradition about trials and tribulations.¹²²

This is a matter of no compromise: if it were supposed that a particular loyalty or belonging opposed and clashed with it, and the gradation of ranks of loyalty led to prohibited acts that are impermissible for a Muslim to partake in or support unless there is a desperate necessity that cannot be avoided. It is impermissible to transgress regarding the blood and property of people, or to participate in prohibited matters that vary in rank from those prohibited in principle to those prohibited as means towards ends.

Loyalty to fellow-believers is not an exclusive barrier rejecting any worldly relations with people, even if these do not harm the basics of faith. Such loyalty does not replace love [of non-Muslims] with hatred, nor subordination with rejection. Rather, it works with people to promote goodness and prevent mischief, with mutual love and affection. It works with them according to moral law, good character, wholesome speech and beneficial action, as in God's saying, "Speak goodness to people" [Qur'an 2:83] and the Prophet's saying, peace and blessings be upon him, "Behave with people with good character."¹²³

Thus, friendships may form, deals and covenants may be concluded: all of this is sanctified by the intellect, and the life of the Prophet bears witness to its manifestation. Thus, the Muslims were delighted at the victory of the [Christian] Negus [during an internal conflict] and by the victory of the [Byzantine] Christians over the [Zoroastrian] Persians, as mentioned in the Qur'an.

¹²² Bukhari 3606, Muslim 1847

¹²³ Tirmidhi

8.5.2 Ibn Bayyah on modern nation-states

Ibn Bayyah says, “The land of Islam (*dar al-Islam*) is every state having a Muslim majority or Muslim rulers, even if they do not implement some Sharia rulings. The land of non-Muslims is every state having a non-Muslim majority and non-Muslim rulers. Compound or composite lands (*murakkab*) are exemplified by federal states comprising Muslims and others, where each province has the power to make laws, such as in Nigeria.”¹²⁴

8.5.3 Remarks on Ibn Bayyah’s discussion

The above discussion is obviously an enlightening one from a leading Muslim jurist who is also familiar with Western society and thought. The following remarks may be made about this discussion from a purely citizenship-based perspective:

- (i) Ibn Bayyah occasionally speaks about “minorities.” Indeed, the full title of his book includes the phrase, “Jurisprudence of Minorities” (*fiqh al-aqalliyat*). Strictly-speaking, the idea of minorities is incompatible with equal citizenship. The idea of minorities only occurs under sub-primary categorisations in his hierarchy of identities or loyalties.
- (ii) The exhortation to a believing Muslim not to “change one’s religion” is a pastoral one, in Ibn Bayyah’s capacity as a traditional *shaykh*. However, it may be misinterpreted by some as an argument against freedom of religion or belief. This may need to be clarified.
- (iii) The “highest loyalty” belonging to faith, i.e. a believer’s relationship with God, may be misinterpreted by some to justify divisive, faith- or religion-based identity politics, and to argue for a return to classical Islamic law based on *jizya* and *dhimma*. This too may need to be clarified.

8.5.4 A suggested solution to the dilemma

The dilemma between the highest loyalty being to God or land is an unsolved problem, illuminated by Ibn Bayyah’s enlightening contribution above, and is the same issue that Indian Muslim scholars grappled with from the 19th century, as discussed earlier. The following is an attempt to articulate a solution concisely:

A modern-day citizen owes loyalty to their country as part of their “social contract.” If the values underpinning that contract are sufficiently universal and inclusive, people of all faiths and none are able to participate without compromising their integrity, although “the devil is in the detail,” as Ibn Bayyah remarks. However, if a fundamental value or human right is at stake, e.g. if an electorate democratically elects a fascist government that enacts racism and discrimination, many people will take a stand against their nation, even if it involves being prosecuted for treachery, based upon an appeal to higher values such as truth, justice and fairness. For many believers, such higher values are rooted in the divine. In that sense, God comes before country, but only in exceptional circumstances for a free society. The opposite may be the case if one is living under tyranny, i.e. God usually comes before country. In another sense, there is never a clash of loyalty since adhering to the highest values is always best for the country. This requires an inclusive understanding and manifestation of both state and religion.

¹²⁴ Shaykh ‘Abdullah bin Shaykh Mahfuz bin Bayyah, *Sina’at al-Fatwa* [The Crafting of Jurisprudential Rulings], Dar al-Minhaj / Global Centre for Renewal and Guidance, 1428/2007, pp. 280-1

8.6 Sheikh Abdullah al-Judai's fatwa about British men fighting for the Taliban against US/UK forces

It was on the basis of loyalty as citizens that when asked about a few British Muslims who wanted to go to Afghanistan to fight alongside the Taliban (against British troops), Sheikh Abdullah al-Judai answered as follows:¹²⁵

1. As far as the Shariah is concerned, the situation of Muslims living in the UK is that they are under contractual obligations to the state in which they live. This is a natural consequence of the citizenship that we all bear. By accepting to live here, we have taken up a social contract to live within the framework of the English Legal System whilst practising and perfecting our Islamic faith. We have to realise that these agreements are ratified between two parties, i.e. the state and the individual. Therefore, even if the state breaches its contract with any other party with whom the individual has a connection of some sort, be it Muslim or otherwise, the individual remains bound by the contract between him and the state. It is totally and completely unlawful from the Islamic point of view for a Muslim individual to actively seek to breach or contravene this agreement.

2. There is nothing in the Islamic sources that compels a Muslim living in Britain to go to Afghanistan to fight. In addition to what was aforementioned in the first point, there is no obligation upon Muslims to respond to the call to fight with Muslims elsewhere because the source of such an obligation, such as an oath of allegiance or a Muslim ruler, to whom obedience is obligatory, is absent. It is important to note that even if such a source was available, such as a Muslim ruler, responding to his call to take up arms falls only unto those who have pledged their allegiance, and such an oath cannot run concurrently with a ratified agreement or contract with the opposite party.

3. The ruling of the Shariah in such a case is clearly expressed in the Qur'an ["If they seek your aid in religion, it is your duty to help them, except against a people with whom you have a treaty of mutual alliance" 8:72]. The verse is categorical, that Muslims are not allowed to take up arms against a party that they are in a treaty with, even when this is to go to the defence of other Muslims, as abiding by agreements and treaties is one of the most crucial aspects and features of Islam. Following this, it is not allowed for British Muslims to go to another country to fight in such a way that British forces would be attacked by Muslims.

Sheikh al-Judai's discussion of "lands of Islam" and "lands of unbelief" is in Appendix 3.

¹²⁵ Sheikh Abdullah al-Judai, *Fatwa on British Muslims Fighting in Afghanistan*, November 2001, cited in Dilwar Hussain, *British Muslim Identity in British Muslims Between Assimilation and Segregation*, ed. D. Hussain, N. Malik and M.S. Seddon, Islamic Foundation, UK, 2004, pp. 111-2

8.7 Contemporary Islamist views

The most extreme Islamists such as ISIL, Al-Qa'ida, Hizb al-Tahrir and many political Salafists tend to be stuck in the mindset of ancient and mediaeval jurisprudence, and routinely refer to it. This explains ISIL's reintroduction of *jizya* and *dhimma* in parts of Iraq and Syria in 2014. Muslim Brotherhood-linked Islamists tend to have a spectrum of views: e.g. Qaradawi is generally progressive on matters of citizenship, but allows his politics to influence his jurisprudence, e.g. his insistence that all the world is an abode of Islam or peace except Israel, which is an abode of war (*dar al-harb*): all Israelis are potential soldiers in his view, so therefore there is no such thing as an Israeli civilian, and all Israeli adults are legitimate targets in the ongoing war (*jihad*) that is obligatory.¹²⁶

Others such as Rashid Ghannouchi, founder and spiritual leader of Tunisia's Ennahda party that took power after the 2011 uprising, have a far more western outlook, trying to harmonise western and Islamic ideals: the new Tunisian constitution (2014), in the drafting of which Ghannouchi had a huge influence, is very French and western in the language of its clauses, for example:

*Tunisia is a free, independent, sovereign state ... Islam is its religion. Arabic is its language. Democracy is its system ... It is a civil state, based on citizenship, the will of the people & the primacy of the law ... The people are sovereign, and are the source of authority, which they practise via elected representatives ... State slogans are: freedom, dignity, integrity, order.*¹²⁷

Others are more confused: for example,

- (i) An influential UK Islamist has recently authored an essay in which he promotes mediaeval notions of *jizya* and *dhimma* as well as modern ones of equality and universal human rights, apparently without realising the internal contradiction in this thesis and apparently being unaware of the two centuries of reform and reformist thinking in Muslim discourse since the late Ottoman period.¹²⁸ Such promotion of modern notions of equality and universal human rights are to be welcomed, of course, but these need to be contextualised within Islam in the light of the historical, intellectual and jurisprudential development summarised in this report.
- (ii) Another influential UK Islamist argued that ISIL/ISIS should not have killed the British non-Muslim aid worker, Alan Henning, because he was a "protected person" – a clear reference to the pre-modern notion of *dhimma*.¹²⁹ This Islamist argued that "Alan Henning's position in Islam ... was a protected person. I have no problem [telling Isis] because that is how they see it." As well as being a flawed approach since pre-modern notions are now outdated, this is also a counter-productive approach since groups like ISIL easily and regularly reference other justifications in pre-modern Islamic jurisprudence for the killing of non-Muslims; e.g. they can dispute whether or not *aman* (safety) and/or *dhimma* (protection) were correctly granted to non-Muslim hostages.

¹²⁶ See al-Imam Yusuf al-Qaradawi, *Fiqh al-Jihad* [Jurisprudence of War/Jihad], Qaradawi Centre for Islamic Moderation and Renewal, Qatar, 2 vols., n.d. for details

¹²⁷ Our original translation; cf. https://www.constituteproject.org/constitution/Tunisia_2014.pdf

¹²⁸ See Ismail Adam Patel, *The Question of Palestinian Independence in Light of the Islamic Law of Nations*, Cordoba Foundation, London, July 2014, available at http://www.thecordobafoundation.com/attach/A5_TCF_PAL_MAIN_FINAL.pdf

¹²⁹ Randeep Ramesh and Ian Cobain, *Moazzam Begg: I offered to help secure release of Alan Henning*, The Guardian online, 7/10/2014, <http://www.theguardian.com/world/2014/oct/07/moazzam-begg-offered-secure-release-alan-henning>

9 Muslim politicians of the 20th Century: Ataturk and Jinnah

The views of these two important Muslim politicians are now summarised, both being “founding fathers” of Muslim-majority independent nation states in the 20th century.

9.1 Ataturk’s view on coexistence

Mustafa Kemal Ataturk built the nation of modern Turkey on a set of values and principles that broke down the traditional values of the Ottoman Caliphate. He endeavoured to realise the Ottoman predecessors’ ideal of an interfaith, cross-cultural system of values by embracing a modern, minority view of Islam that not only separated religion from the state but replaced Islam with secular nationalism.¹³⁰ He strongly believed that civilisation was universal, and it was the duty of all nations to contribute to contemporary civilisation. Ataturk is revered globally as a pioneer of national liberation, for his commitment to upholding principles of humanism and for his vision of a united humanity.¹³¹ The dynasty and theocratic Ottoman system, with its Sultanate and Caliphate, thus came to an end; Atatürk's Turkey dedicated itself to the sovereignty of the national will - to the creation of, in President’s words, “*the state of the people.*” With this in mind, Ataturk was a curator of an idea of coexistence of several empires, inspired by the same civilisation, whose organising principle was not religion, but rationalism.¹³²

He commandeered a complete re-structure of society and the fundamental beliefs upon which it had been created. Between 1926 and 1930, religious laws were abolished, and a secular system of jurisprudence introduced. The new legal system made all citizens - men and women, rich and poor - equal before the law. It gave Turkey a firm foundation for a society of justice and equal rights. In his program of modernization, secular government and education played a major role. Making religious faith a matter of individual conscience, **Ataturk created a truly secular system in Turkey, where the vast Muslim majority and the small Christian and Jewish minorities are free in principle to practice their faith. As a result of Atatürk’s reforms, Turkey has fully secular institutions.**¹³³ He strongly believed that “We must liberate our concepts of justice, our laws and legal institutions from the bonds which hold a tight grip on us although they are incompatible with the needs of our century.”

9.2 Muhammad Ali Jinnah’s view on coexistence

There is much debate surrounding the key architect of the Pakistani state, Muhammad Ali Jinnah; he has been revered and criticised by both his people and the international community. He was a great advocate of Muhammad Iqbal’s *Two Nation Theory*, for which he has been widely criticised. Many supporters and critics of Jinnah have concluded that the Two Nation Theory defined Hindus and Muslims as two distinct nations that could seemingly not coexist in one state, despite having done so for over a thousand years. Jinnah is quoted to have said in 1940 in Lahore, “... it is a dream that the Hindus and Muslims can ever evolve a common nationality, and this misconception of one Indian nation has troubles and will lead India to destruction if we fail to revise our notions in time.” He is also quoted to have said in 1943 that, “In all things [Muslims’] outlook is not only fundamentally different but often radically antagonistic to the Hindus. We are different beings. There is nothing in

¹³⁰ Aaron Tyler, *Islam, the West and Tolerance: Conceiving Coexistence*, New York: Palgrave Macmillan, 2008: <http://eng.spbtolerance.ru/wp-content/uploads/2010/12/Islam-the-West-and-Tolerance-coceiving-coexistence.pdf>, pp.124-125

¹³¹ Mustafa Kemal Atatürk, Columbia University Archive: <http://www.columbia.edu/~sss31/Turkiye/ata/hayati.html>

¹³² Andrew Mango, *Atatürk*, London: John Murray, 1999, available online at *Google Books*, pp. 8-9

¹³³ Mustafa Kemal Atatürk, Columbia University Archive: <http://www.columbia.edu/~sss31/Turkiye/ata/hayati.html>

life, which links us together.”¹³⁴ However, taking into consideration the array of Jinnah’s public addresses, his main concern appears to have been to secure protection for the Muslim communities in a post-colonial state. He demanded greater political representation for Muslims in the fear that a Hindu nationalism may rise to be the dominant force in post-colonial India; until this point there had been no set precedent for multi-ethnic states on the basis of citizenship. Whether or not partition was his final goal is ambiguous, but Jinnah’s promulgation of a religious tolerance, that was inherent to Islam, was key to his vision for safeguarding religious freedom.

Through ambiguous political proclamations, Jinnah paved the way for different Muslim groups to understand his vision for greater political representation for them: for the orthodox, a religious state; for the intellectuals, a place of cultural renewal; and for the businessman, a place of new, unfettered competitive markets.¹³⁵ Jinnah was clear in his efforts to enshrine his vision as a place of coexistence, a place of equality, a place of justice and a place where the personal faith of each individual citizen was assured. His understanding of religious tolerance was cultivated from Islamic principles and values, as demonstrated in a radio broadcast in 1939:

*“If we have faith in love and toleration towards God’s children, to whatever community they may belong, we must act upon that faith in the daily round of our simple duties ... No injunction is considered by our Holy Prophet more imperative or divinely binding than the devout but supreme realisation of our duty of love and toleration towards all other human beings.”*¹³⁶

In one of his final public addresses, on 11 August 1947, Jinnah further championed the idea of co-existence:

*“Now, if we want to make this great State of Pakistan happy and prosperous, we should wholly and solely concentrate on the well-being of the people ... We should begin to work in that spirit and in course of time all these angularities of the majority and minority communities, the Hindu community and the Muslim community, because even as regards Muslims you have Pathans, Punjabis, Shias, Sunnis and so on, and among the Hindus you have Brahmins, Vashnavas, Khatris, also Bengalis, Madrasis and so on, will vanish. You are free; you are free to go to your temples, you are free to go to your mosques or to any other place or worship in this State of Pakistan. You may belong to any religion or caste or creed that has nothing to do with the business of the State ... We are starting with this fundamental principle that we are all citizens and equal citizens of one State. Now I think we should keep that in front of us as our ideal and you will find that in course of time **Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State.**”*¹³⁷

[emphasis added]

¹³⁴ Kunwar Khuldune Shahid, *Jinnah, Bhutto and the legacy of intolerance*, Daily Times, 22 December 2013: <http://www.dailytimes.com.pk/opinion/22-Dec-2013/jinnah-bhutto-and-the-legacy-of-intolerance>

¹³⁵ Aaron Tyler, *Islam, the West and Tolerance: Conceiving Coexistence*, New York: Palgrave Macmillan, 2008: <http://eng.spbtolerance.ru/wp-content/uploads/2010/12/Islam-the-West-and-Tolerance-coceiving-coexistence.pdf>, p.140

¹³⁶ Aaron Tyler, *Islam, the West and Tolerance: Conceiving Coexistence*, New York: Palgrave Macmillan, 2008: <http://eng.spbtolerance.ru/wp-content/uploads/2010/12/Islam-the-West-and-Tolerance-coceiving-coexistence.pdf>, pp.140-141

¹³⁷ *Mr Jinnah’s Presidential Address to the Constituent Assembly of Pakistan*, 11 August 1947: http://www.pakistani.org/pakistan/legislation/constituent_address_11aug1947.html

10 Conclusion

Modern notions of equal citizenship are compatible with Islamic law. Conclusions of this study are:

1. The Prophet Muhammad's 13-year "Meccan phase" of his monotheist mission brought him into conflict with the polytheists of Mecca, and he remained sympathetic to the Jews and Christians of nearby Medina as well as of wider Arabia, Syria and Persia.
2. During the 10-year "Medinan phase" of the Prophet's mission, a treaty was concluded with the Jews and Christians of Medina that upheld a plural religious society, united against the external attacks of the polytheists. (The Qur'an uses the term *ahl al-kitab* or "People of Scripture" primarily for Jews and Christians, as opposed to the "polytheists.") The "Medinan Charter" is mentioned in early histories of Islam, and there are brief references to it in the hadith collections. Later, a peace treaty was also concluded with the polytheists. Subsequent conflict with both polytheists and Jews were blamed on these groups' violations of those peace treaties.
3. During the rapid expansion of the early caliphates (7th-10th centuries), most of the subjects were Christians and Zoroastrians, with sizeable Jewish minorities. The practice of levying *jizya* (mentioned in the Qur'an) on non-Muslims in return for military protection and exemption from military service, became widespread. Those paying *jizya* became known as *dhimmi*s (those covered by a treaty of protection or *dhimma*), a concept that is only indirectly in the Qur'an but more prevalent in later hadith and *fiqh* (jurisprudential) literature. Even in early Islam, the *dhimma* protection was extended to non-Abrahamic religious communities such as Zoroastrians and Hindus, who were regarded by leading authorities as being covered by the term *ahl al-kitab* or "People of Scripture" since they were in possession of written, divine revelations.
4. During the development of substantial jurisprudential literature in the context of ascendent Islamic empires (10th-15th centuries), the use of the tools of *jizya* and *dhimma* became axiomatic, along with the associated concepts of *Dar al-Islam* (Land of Islam), *Dar al-Kufr* (Land of Disbelief) and *Dar al-Harb* (Land of War). This period also coincided with the development of the *Maqasid* theory of Islamic law that emphasizes universal values and objectives over specific texts and rulings. Later Islamic empires continued to experiment and develop the relationship between the state and religion.
5. There was an early, fundamental dichotomy in the basis of this jurisprudence: traditionalist schools had a communalist approach to human rights, basing these on a person's Islam or being under its protection (*dhimma*); more rationalist schools, such as the Hanafis, had a universalist approach, basing human rights on a person's basic humanity (*adamiyya*). The Ottomans, being Hanafis, used the latter approach along with considerations of *maqasid* (universal values) to abandon their *Millet* system of multiple, parallel religious law for different faith communities in favour of a system of equal Ottoman citizenship. The Ottomans enacted radical reforms to bring about civic equality, irrespective of race or religion. In particular, they abolished *jizya* and *dhimma* in 1856.
6. Ibn Taymiyya's "Mardin fatwa" (13th century) had recognised, perhaps for the first time, a complex situation where a particular town is neither a "land of war" nor a "land of

peace” but has an intermediate or compound nature. Thus, the traditional, neat divisions of land and associated allegiances no longer applied to such a town that had previously been part of the “lands of Islam” but was consequently occupied by Mongol invaders who did not rule by Islamic laws or norms, although many of the inhabitants were Muslim. A similar situation arose around a century later in Andalusia with the town of Galera in the province of Granada: a Muslim-majority town that had come under Christian rule due to the Reconquista (15th century). Interestingly, no equivalent of the Mardin *fatwa* appears to have been given, although the situation did vex the jurists of that time, one of whom spoke of Muslims living under the *dhimma* (protection) of Christians; other jurists implied that these Muslims would pay a form of *jizya* (regarded as a protection-tax, not a religious duty) in return for this status.

7. Indian Muslims shared a homeland (India) with Hindus, Buddhists, Parsis (Zoroastrians), Sikhs and Christians for centuries, and the Mughal Empire ruled over large parts of India where the population was majority non-Muslim. Over the last century of British rule (19th-20th century), a strong nationalist movement for independence emerged. Scholars and thinkers were forced to grapple with the issue of nations, homelands and faiths: they made notable contributions to the debates around loyalty to God, religion and homeland, including possible conflicts of loyalty, especially in the context of nationalist independence from colonial rule. Their ideas and struggles had huge practical results in the form of the independence and partition of India in 1947, with the creation of a homeland, Pakistan, for Muslims mainly. These debates have continued until today.
8. Many leading, contemporary jurists, thinkers and theologians of Islam agree that the ancient and mediaeval notions of *jizya* and *dhimma* are outdated, and that modern notions of citizenship (*muwatana*) are appropriate expressions of Islamic law and ethics in the modern world. This approach is based on (i) *maqasid*, (ii) the universalist approach to jurisprudence and (iii) the necessity of adapting to practical situations.
9. Modern notions of citizenship, irrespective of religion, were also embraced and adopted by several leading Muslim political leaders from the 20th century onwards, including Ataturk and Jinnah. The constitutions of many, if not most, Muslim-majority countries such as the OIC member countries, affirm equal rights for citizens, irrespective of religion. However, the actual implementation of such equal rights is often deficient.
10. Some of the countries that proclaim themselves to be “Islamic states” or “Islamic republics”, as well as traditional theologians who remain trapped in the framework of mediaeval jurisprudence, do not accept equal citizenship and would like to discriminate against non-Muslims. The most extreme examples of this phenomenon are the pseudo-states set up by groups such as Islamic State and Boko Haram, both of whom are known for their violent and brutal discrimination against non-Muslims.
11. The debate and battle of ideas and practice within Muslim-majority societies and states continues, in a constant state of flux. This report highlights and elucidates the basic scriptural, theological, jurisprudential, historical and contemporary bases of the debate, aiming to make a strong Islamic case for equal citizenship and universal human rights.

Appendix 1: A Summary of *A Culture of Peaceful Coexistence* by Prof. Ekmeleddin Ihsanoglu¹³⁸

This study seeks to highlight the Islamic culture of peaceful coexistence with special reference to the history of Islamic civilisation and particularly the Ottoman world, starting with the conceptual basis of Islamic religious-cultural pluralism. Other sections deal with the responsibilities of the non-Muslims in a Muslim community, the theory and practices of the Ottoman millet system and the developments that took place after the Tanzimat reforms. The Ottoman experience of peaceful coexistence among different religions and ethnic communities in its Balkan framework is the second great experience of such peaceful coexistence in the history of Islam. The Ottoman rule in the Balkans would qualify to give ample evidence for peaceful coexistence and mutual influence and interaction among the Muslims, Christians, Jews and various ethnic communities under Pax Ottomanica. Historians of civilisation and authors who deal with the issue of dialogue between East and the West have generally stressed the Andalusian experience and highlighted it as exemplary.

In an environment of increased globalisation and an expansion of communications and contacts between peoples of different continents, understanding the basic outlook of each culture towards others is crucial.

The religious-cultural pluralism in the Islamic tradition has an underlying philosophy. The Islamic tradition has a God-centred theistic interpretation and justification of political power. This assumes the totality of power and authority belongs only to God, which causes a political consequence that political power can only be justified through an ontological interpretation of power. The strong and direct link between ontological transcendence and political power in Islamic political culture has its origin in the Qur'an. This is why the concentration of political power at the centre did not form a socio-cultural monism throughout Islamic history. The multiplicity of socio-cultural groups within the territories of Muslim states is in fact a counterpart of the ontologically defined segmentation of governed people according to their ontological approaches. Looking at the history of Islam, an Islamic state, from this perspective, may be considered as a confederation of several socio-cultural groups under the patronage of the political centre where power is concentrated. The privilege of becoming a protected minority via an act of '*dhimmiship*' was given to the followers of a prophet to whom a sacred book was revealed: those known as '*ahl al-kitab*' – People of the Book.

People of the Book

In several places, the Qur'an refers very positively to some of the *ahl al-kitab*. The Qur'an is full of verses about the nature and practice of the Muslims' relationship with the People of the Book:

Hence they unto whom We have vouchsafed this revelation rejoice at all that has been bestowed upon thee [O Prophet] from on high. (13:36)

¹³⁸ Adapted from Ekmeleddin Ihsanoglu, *A Culture of Peaceful Coexistence*, Research Centre for Islamic History, Art and Culture (IRCICA), Istanbul, 2004. Prof. Ihsanoglu served as Secretary-General of the OIC (Organisation of Islamic Countries) from 1st January 2005 until 31st December 2013. Lengthy extracts have been reproduced with his permission.

Behold, We have inspired thee [O Prophet] just as We inspired Noah and all the prophets after him – as We inspired Abraham and Ishmael, and Isaac, and Jacob, and their descendants, including Jesus and Job, Jonah, and Aaron, and Solomon; and as We vouchsafed unto David a book of divine wisdom. (4:163)

As Ismail Raji Faruqi and Lois Lamya Faruqi asserted, “The honour with which Islam regards Judaism and Christianity, their founders and scriptures, is not mere courtesy but acknowledgement of religious truth. Islam sees them not as ‘other views’, which it has to tolerate, but as standing *de jure*, as truly revealed religions from God... In this, Islam is unique, for no religion in the world has yet made belief in the truth of other religions as a necessary condition of its own faith and witness.”¹³⁹

The Jews and the Christians were accepted as *ahl al-kitab*; yet the members of some other religions such as Zoroastrians, Hindus, Buddhists, the Gnostics of Harran and pagans Berbers of North Africa were considered protected minorities after the Islamic expansion. For instance, in the verses “Consider the fig and the olive and Mount Sinai, and this land secure” (95:1-3), the olive is taken to refer to Jesus, Mount Sinai refers to Moses and this land made safe is a reference to Mecca and thus to Muhammad. The mention of the fig has been accepted by some as an indication of the prophecy of the Buddha.¹⁴⁰

Al-Baladhuri reports in his *Futuh al-Buldan* that when a group of Brahmins approached Muhammad [bin Qasim], the first Muslim conqueror in India, for the protection of their lives and temples after the conquest of Sindh, he granted them the status of *dhimmis* by declaring that “The Hindu temples are just like Christian churches, Jewish synagogues, and the Zoroastrian fire-temples.”¹⁴¹

This comprehensive extension of the concept of *ahl al-kitab* is the basis of the multicultural and multinational Muslim states such as Umayyads, Andalusia, Abbasids and Muslim empires in India. One can say the so-called Ottoman *Millet* system was the last and most developed version of this religious-cultural pluralism.

Thus, nowhere in Islamic history were non-Muslims singled out for prosecution or persecution for adherence to their faith. The constitution that protected them was taken by Muslims to be God-inspired and God protected.

To cite another example, Goitein, who studied the inner organisation of the Jewish community in Egypt in the 10-12th centuries, argues that “the Christians and Jews living under Islam formed a state not only within the state, but beyond the state inasmuch as they were loyal to the heads and the central bodies of their denominations.”¹⁴²

In brief, Islam essentially advocates cultural-religious pluralism. It considers all kinds of ethnic, religious, linguistic and racial differences as coming from God, and hence natural. In general, in Muslim lands, communities with different religions had the right to live in accordance with their own laws and traditions.

¹³⁹ Ismail Raji Faruqi and Lois Lamya Faruqi, *The Cultural Atlas of Islam*, Macmillan, London, 1986, p. 191

¹⁴⁰ For this line of argumentation, see Muhammad Hamidullah, *Muhammad Rasulullah*, Centre Culturel Islamique, Hyderabad-Deccan 1974, p. 107 and also his *Le prophete d l'Islam*, vol. 1, Librairie Philosophique J. Vrin, Paris, 1959, pp. 431-2

¹⁴¹ Ali Abdul, ‘Tolerance in Islam’, *Islamic Culture* 56 (1982), p. 108

¹⁴² S.D. Goitein, ‘Minority Self-Rule and Government Control in Islam’, *Studia Islamica* 31 (1970), p. 109

The Medina Constitution

This was a historical-legal arrangement, a constitution: the covenant that was promulgated by Prophet Muhammad after he emigrated from Mecca to Medina in 662AD. It regulated the relations between the Muslims, the people of Medina and the Jews.

The Jews of Medina entered freely into this covenant with the Prophet and his Muslim followers. The new constitution raised their status from tribal clients on sufferance to citizens de jure of the state. In all Islamic states throughout history, wherever the law of Islam was sovereign, the Jews never lost that status. Their position could not come under attack or be denied because it was ordained by the Prophet Muhammad. When the Islamic state expanded to include northern Arabia, Palestine, Jordan, and Syria, Persia and Egypt, where numerous Jews lived, they were automatically treated as legal citizens of the Islamic state.

The covenant stated: "Believers are friends of each other...to the Jew who follows us belong help and equality...Conditions must be fair and equitable to all..." This constitution, the text of which has come down to us complete, specifies very clearly that everyone was to be not only free with respect to the dogma and practice of religion, but also free to abide by the laws of the community to which he belonged; the Qur'an says: "There shall be no coercion in matters of faith" (2:256). With the Medina constitution, it was the first time, since their defeat by the Romans, that Jewish communal existence was recognised as legitimate by any state.

As asserted by the late Professor Muhammad Hamidullah¹⁴³ in his book *The Emergence of Islam*, the Qur'an lays down a unique principle regarding the treatment of non-Muslims. It grants complete autonomy to every religious community to enjoy not only freedom of faith and worship, in their own way, but also to follow their own laws and decide cases by their own judges.

In this system, each group will determine its own legal and cultural standards, define its own norms according to which it will arrange the lives of the members, and thus follow a kind of judicial autonomy. The only field where one feels the existence of the central authority is the judiciary which will resolve the disputes among the groups. In this model, the state is not sacred and the individual is no slave. The state, whose fundamental duties and rights have been redefined, is organised in order to serve the people. It does not produce and impose values for the citizens; on the contrary, it protects the values of the groups.

Ibn Ishaq quoted in a report that a delegation from Najran came to the Prophet at Medina. It was an entirely Christian delegation. They entered the Prophet's mosque about the time of the late afternoon prayer; they also stood up for the prayer, with the agreement of the Prophet.¹⁴⁴ Furthermore, once a funeral procession passed by the Prophet and he stood up as a mark of respect. He was told that the coffin was that of a Jew. He replied: "Was he not a human being?"¹⁴⁵

¹⁴³ Muhammad Hamidullah, *The Emergence of Islam*, ed. and trans. Afzal Iqbal, Islamic Research Institute, Islamabad, 1993, pp. 159-68

¹⁴⁴ Shamsuddin Muhammad bin Abu Bakr Ibn Qayyim al-Jawziyya, *Zad al-Ma'ad fi Hady Khayr al-'Ibad*, ed. Shuayb al-Arnaut and Abdulqadir al-Arnaut, Imam Muhammad bin Saud Islamic University, Riyadh, 1979, vol. III, p. 629

¹⁴⁵ Bukhari

The Early Practice in the History of Islam

When the first Islamic state expanded to include other parts of Arabia, Palestine, Jordan, Syria, Persia and Egypt, the resident Jews and Christians were automatically treated as legal citizens within the pluralist spirit. In the 7th century CE, after being defeated, the Byzantines abandoned the territories of the Fertile Crescent to the natives of the region. Having heard of the Muslims and their attitude towards Christians, the archbishop of Jerusalem refused to surrender the keys of the city to anyone except the Caliph of the Muslims in person. The second Caliph Omar ibn al-Khattab travelled to Jerusalem and signed a treaty with the archbishop in the year 637AD, where the Caliph granted personal security as well as protection for their properties, churches and crosses to the adherents of the Christian religion. Furthermore, it stipulates that their churches shall not be dispossessed, nor will they be destroyed, nor their substances or areas reduced in any manner. They shall also not be coerced in any matter pertaining to their religion and shall not be harmed.¹⁴⁶

The Qur'anic injunctions, advices and principles were not confined to the pages of the Holy Book; on the contrary, they were elaborated, encouraged, explained and illustrated by the Prophet Muhammad and his Companions. As expressed in the following hadith, protection of *dhimmis* was considered a religious obligation: "Whoever hurts a *dhimmi*, hurts me. And whoever hurts me, hurts Allah."

Caliph Omar saw some Christian lepers as he passed through Jabiyah in Syria. He immediately ordered that they should be given a lump sum from the charity fund (*sadaqa*) and they should also receive their daily dole, meaning that the state should undertake to feed them free of charge.¹⁴⁷ When Caliph Omar was fatally wounded by a *dhimmi*, he gave instructions to his possible successors from his death bed to treat *dhimmis* kindly, to abide by the laws of the agreements drawn between them, fighting for their protection and not to cast greater burden on them than they could bear.¹⁴⁸

Caliph Omar's practice was not peculiar to himself, and the Muslims abided by his last wish as it was also required by the spirit of Islam. For instance, his son, Ibn Omar, repeatedly instructed his servant to take the meat of a sacrificed animal to the neighbouring Jewish family.

Excepting the few jobs of religious importance such as imamate, caliphate, head of the army and supervision of religious affairs, all others were available to *dhimmis*, conditional to capability, honesty, integrity and loyalty to the Islamic state.

In developing a policy of behaviour towards non-Muslims, early Islam made a remarkable contribution to the history of human rights. For instance, Jews and Christians joined the services of the state. They were consulted on important matters and sometimes deputed to embassies in foreign countries. Their opinions were sought on administrative affairs of the state. Occasionally, non-Muslims benefited from the war booty captured by the victorious Muslim forces. According to the custom, the Prophet chose to distribute it among the people of Mecca and those living in their neighbourhood, Muslims and non-Muslims alike.

¹⁴⁶ Quoted in Arnold, *The Preaching of Islam*, pp. 56-57, from *Tarikh al-Tabari*

¹⁴⁷ Philip Khuri Hitti (ed.), *The Origins of the Islamic State* (being a translation from the Arabic accompanied with annotations, geographic and historic notes of the *Kitab Futuh al-Buldan* by Abu-l 'Abbas Ahmad ibn Jabir al-Baladhuri), AMS Press, New York 1987, p. 198

¹⁴⁸ Abu Yusuf, *Kitab al-Kharaj*, p. 135

The following are, in brief, views of the four major Sunni schools of jurisprudence on the status of the *dhimmis*:

1. The book of the **Hanafi** school of jurisprudence *Durr-i Mukhtar* asserts that “to remove trouble or injury from a *dhimmi* is a Muslim obligation.”
2. The **Shafi’i** jurist Allamah Shamsuddin Muhammad al-Ansari Ramli writes¹⁴⁹ that “*dhimmis* in this connection are like Muslims. So removing afflictions from them is the Muslims’ obligatory duty.”
3. Again, the well known book of the **Hanbali** school *Matalib Uli al-Nuha* says: “It is the duty of the imam to protect the *dhimmis*. He should eliminate the source giving them trouble.”¹⁵⁰
4. A **Maliki** jurist, Shahabuddin Qarafi writes that “the pact of *dhimmah* makes us liable to the responsibilities concerning the rights of the *dhimmis*, since they are with us and under our protection, as also the super-protection provided by Allah, his Messenger and Islam.”¹⁵¹

Another significant example of the practice of such principles: when the Mongols occupied and dominated Syria, Ibn Taymiya went to their commander Qutlu Shah and asked for the release of the prisoners of war. When the release of the *dhimmis* was refused, Ibn Tamiya objected and persuaded Qutlu Shah to release the Christians and the Jews under the rule that they were to be protected.

Responsibilities of non-Muslims

Just as Muslims were obliged to defend the country in war, pay *zakah* and taxes, *dhimmis* too had similar or alternative duties. Among the financial responsibilities of the *dhimmis*, *jizyah*, *kharaj* and *trade tax* were their only obligations.

Jizyah was the annual tax, a nominal amount, levied on able-bodied, combat-fit men who were in a position to pay. Poor, impoverished men, women, children, decrepit and disabled persons as well as ascetics were exempted. Furthermore, friars in monasteries were also granted exemption. There was no definite amount for the *jizyah*. Rather, the imam or caliph had the right to fix the amount according to the financial position of the person without involving him in difficulties. According to some Muslim scholars, the obligation of *jizyah* is based on the Qur’anic verse 9:29. However, Professor Muhammad Hamidullah suggested that *jizyah* was not an innovation of Islam but was a legacy from Iran where people who did not serve their military duty paid a tax. The tax on non-Muslim subjects was very light: it was equivalent to 10 days’ food per year.

Islam considered the obligation of military defence to be a sacred duty and a devotional act, therefore it was non-negotiable for Muslims. The non-Muslims were not expected to sacrifice their lives for a religion they did not believe in. In order to encourage non-Muslims to participate in defending the country and share in the military expenditure to some extent, they were required to pay a tax, the

¹⁴⁹ *Nihayat al-Muhtaj ila Sharh al-Minhaj*, vol. VII, Dar al-Fikr, Beirut, 1984, p. 46

¹⁵⁰ Mustafa b.Sa’ad b.Abdulh Suyuti, *Matalib Uli al-Nuha fi Sharh Ghayat al-Muntaha*. 2nd ed., 1984, vol. II, pp. 602-3

¹⁵¹ Abu al-Abbas Shahabuddin Qarafi, *Al-Furuq*, Alam al-Kutub, Cairo, 1928, vol. III, pp. 14-15.

jizyah. Briefly, *jizyah* was a recompense for military service and not a sign of submission and humility to Muslim authority and rule. For this reason it was levied on only combat-fit men.

It seems that some jurists considered *jizyah* as a sort of tax collected for public welfare expenditures. That is why in the Maliki school of law the ordinances relating to *jizyah* have been taken up with those of *zakat*.¹⁵²

Kharaj is the revenue levied on its arable lands after the conquest of a country. These lands were left in the possession of the original owners, and a fixed rate according to an agreed weight or measure, cereals or price, thereof was realised as *kharaj*. The Muslim owners of the land had to pay *zakat* on the produce of their fields, which non-Muslims did not have to pay; instead they paid *kharaj*.

Trade tax was levied by Caliph Omar on the *dhimmis*, once a year. It was a commercial tax; in modern terminology it may be called customs duty. For Muslim traders it was calculated at 2.5% of the total cost of goods for the payment of their *zakat*, from the *dhimmis* at 5%, and from foreign traders 10% since the Muslims also paid this duty at the same rate in foreign countries.¹⁵³ A *dhimmi* trader may own a great wealth in cash or in other forms and is not obliged to pay tax on it. On the other hand, *zakat* has a claim on a Muslim's wealth.

The early period of Islam contained the Muslim expansion in the Middle East in the late 7th and first half of the 8th centuries, the time when the first Muslim caliphate in the east of the Mediterranean expanded to provinces bordering the Byzantine Empire in Palestine, Syria and Egypt. This can be considered as the first great moment of Islamic history, which also coincided with the beginning of the period of the expansion of the Muslim rule into North Africa, Spain and Sicily; with the establishment of the Muslim rule in Sicily until the 14th century and the Arab kingdoms in Andalusia that lasted until the 15th century: the second moment in Islamic history. Around the same period in the east, Muslim Turks settled in Anatolia which was formerly under the Byzantine rule, and from the 14th century onwards the Ottomans expanded their administration and civilisation gradually from Anatolia towards the west and the east. The ensuing state and civilisation represents the third major moment in Islamic history.

The Ottoman *Millet* System

The Ottoman State, established in 1299 in western Anatolia as a small principality that later spread to three continents, provides an interesting example of Muslim religious-cultural pluralism as practiced by a world power. Clearly Ottoman pluralism is the continuity of the previous Islamic pluralist traditions as experienced in various Muslim lands, yet it was improved and a new synthesis called the *Millet* system was produced. This was primarily the result of the interaction of the Islamic law and Ottoman customary law (*orfi*). Naturally, historical experience as well as the contributions of non-Muslims were also effective in the formation of the system.

One of the major indicators of the application of cultural pluralism in the Ottoman State was the *Millet* or 'community' system. The Ottoman policy about non-Muslims was based on this system, which organised the population on the basis of religion and sect and determined the relationship not

¹⁵² Ibn Abi Zaid, *Risalah*, vol.1, p. 331

¹⁵³ *The Emergence of Islam*, pp. 244-45 [A Culture of Peaceful Coexistence, p. 37]

only between communities and the state, but also within communities. The society was composed of Muslims and non-Muslims, and what determined the status of the individual within society and his relationship with the state was either religion or denomination. All the Muslims formed the *Millet-i Islam*, regardless of their race, culture, language and even sect. Thus, the *Millet-i Islam* comprised Turks, Arabs, Kurds, Albanians, Bosnians, Lazs and others. The non-Muslims were organised in different *millets*, around different churches such as the Orthodox (Greeks, Bulgarians, Serbs), the Catholic, the Gregorian (Georgians, Armenians), and the Jews around the synagogue.

It is generally accepted that the *Millet* system was initiated by Sultan Mehmed II (the Conqueror) after the conquest of Istanbul. According to his decree, the Orthodox Patriarch who was elected by the Orthodox people became the religious and administrative head of all Orthodox Christians and attended the *Divan-i Humayun* (Imperial Council) on behalf of his community. This was later extended to other communities as well. Thus, non-Muslims were granted religious freedom by the state as well as security for their lives and property.¹⁵⁴

The definition of the ‘civil(ised) (*medeni*) society’ by Kinalizade Ali Efendi (16th century Ottoman intellectual) expresses well the function of the *Millet* system: “Civil(ised) society consists of different groups and rival *millets* which come together, come to an agreement and live in order and harmony.”

The non-Muslims had a sort of autonomous status in many spheres such as religion, education, family law and social solidarity. Every *millet* established powerful organisations in order to fulfil these functions. The Ottoman government limited itself to the functions of administration, finance, military and justice, while education, social security, religious services, marriage, dowry, alimony and inheritance were mostly fulfilled by *millet* organisations. Each *millet* had separate courts and the Ottoman government usually applied their judgements. While non-Muslims applied their own laws in private and family laws, they were subject to the Muslim penal code. Able-bodied men had to pay the *jizyah* tax in return for their protection and landowners had to pay *kharaj* tax on land.

A few examples from different centuries of Ottoman rule illustrate the application of the *millet* system in real life. As soon as he conquered Istanbul in 1453, Sultan Mehmed II spoke to the people telling them to return quietly to their homes, and that they could continue to practice their own religion and trades. A new Patriarch was elected, Gennadios II, and Sultan Mehmed II conferred upon him the rank of governor in the Ottoman official hierarchy. The Sultan established the rights of the Christians by an *ahdname* (pledge) granted through an imperial decree.

Another example of the spirit of pluralism from the 15th century is the pledge made by Sultan Mehmed in Bosnia and Herzegovina on 28 May 1463 to grant safety and security to the Franciscans: “I, Sultan Mehmed Khan, inform all the world that those who possess this imperial edict, the Bosnian Franciscans, are in my good graces and do hereby command: Let nobody bother or disturb those mentioned nor their churches. Let them dwell in peace in my empire. And let those who have become refugees be allowed to do so and be safe...neither my royal highness nor my viziers or my employees or my servants, nor any citizen of my empire shall insult and disturb them. Let nobody attack, insult or endanger either their life or their property ...”

¹⁵⁴ Ekmeleddin Ihsanoglu, *A Culture of Peaceful Coexistence*, p. 41

Mehmet II's grant to the Patriarch of Jerusalem dated 862 A.H. (1457-58) is another similar historical document. It refers to the documents originating from the time of the Prophet Muhammad and Caliph Omar, copies of which were in the keeping of the patriarchate. The document extended royal protection to all the holy places of the patriarchate and its properties, recognised its religious authority over its domains and confirmed its previous rights and privileges. Another example from another region of the Empire is the decree which was issued to patriarchs in and around Jerusalem by Sultan Selim in May 1517 when he entered Jerusalem. The document guaranteed all the previous religious rights and institutions of the Christians.

It is possible to cite more examples of this sort belonging to the classical period of Ottoman history and to quote official documents as well as historical events depicting many similar applications. It would also be useful to provide various examples from the modernisation period. As distinct from the classical period when the prevailing practice was based on the provisions of the Islamic and Ottoman customary laws, in the modernisation period the system went beyond these fundamentals and brought about a new form of peaceful coexistence based on some 'modern' legal principles.

In a public speech made in 1830, Sultan Mahmud II said, "From among the subjects, where I distinguish who is Muslim is at a mosque, who is Christian, in a church and who is Jewish, in a synagogue. There is no difference between them on other days."¹⁵⁵ In another speech at Sumnu, Shumen in present day Bulgaria, delivered on 5 May 1837, Mahmut II said: "O Greeks, Armenians and Jews! All of you, just like the Muslims, are God's servants and my subjects. You have various religions, but you are all under the protection of the laws of the state and my royal will ...". Such statements and declarations of egalitarian principles would be embodied in formal documents and openly announced to the empire in a public ceremony in order to gain legal value: e.g. the *Tanzimat Fermani* (Imperial Rescript), read in 1839.

Post-*Tanzimat* developments

Until the Imperial Rescript of 1839, as mentioned above, the tolerance and protection extended to the non-Muslims were based mainly on religious and customary laws. However, after the *Tanzimat*, more systematic legal arrangements were made and some codifications took place. Moreover, the construction and management of some religious places belonging to non-Muslims were supported by the state treasury.

The *Gulhane* Decree (*Hatt-i Sharif Humayun*) of 1839 was perhaps the first step in the process of change when the Ottoman society, together with political and administrative institutions, officially opened up to the West and began to be influenced by it. In this process there was an attempt to reconcile traditional Ottoman values and institutions with Western institutions and systems, and some reforms were made with respect to the rights of the people. The most important innovation with respect to the people was the principle of "the equality of the subjects." The most striking promise was that the reforms would apply without exception to "the people of Islam and other peoples among the subjects of our imperial sultanate." By bringing equality to the fore, the document substituted the idea of Ottoman patriotism or Ottomanism, which was a cosmopolitan concept, for the *Millet* system that was based on religion, thus changing the idea of the "dominant group." All government offices and ranks were opened to non-Muslims, who benefited from the new political and administrative

¹⁵⁵ Resat Kaynar, *Mustafa Pasa ve Tanzimat*, Ankara, 1954, p. 100

rights. As they were exempt from military service, they bettered themselves in education and commerce and acquired a somewhat privileged status.

Ottomanism developed with a number of reforms. When Abdulmecid travelled in Rumelia, the equality of the Ottomans of different religions was reaffirmed; all were compatriots. In 1859 a fireman opened the army to non-Muslims, but its implementation was deferred. The education commission envisaged schools that did not make religious distinctions. Christians sat on the commercial courts and benefitted from the commercial code. As a result of the pressure exerted by the British and Americans, the government also confirmed separate religious identities in 1850 by recognising Protestants as a separate *millet*. Most of the Protestants were converts from the Armenian Gregorian church.

Some reforms were introduced in the *Millet* system after the *Tanzimat* and *Isalahat Fermani* reforms. With the latter, each community was asked to establish a commission in order to organise their own administration. The decisions of the commissions would be submitted for approval, contributing towards the idea of a parliament consisting of the representatives of the *millets*. In 1855 non-Muslims were declared eligible for army service. The old exemption tax (*jizyah*) was abolished. It became obvious that many Christians did not want to serve in the army and the Muslims did not want to serve under Christian officers. A new exemption tax (*bedel-i askeriyye*) was then instituted.

The *Hatt-i Humayun* decree of 18 February 1856 reaffirmed the representative principle, specifying greater non-Muslim participation in provincial councils and, for the first time, non-Muslim representation on the Supreme Council. Yet this emphasis on Ottomanism was paralleled by reaffirmation of the rights of non-Muslim *millets* and by a provision for reforming the administration of each millet to emphasise its representation. Thus the dualism of Ottomanism and *millets* was maintained.

The notion of Ottomanism, which was based on fair representation in the administration and equal rights, was accepted as an important principle in the 1876 Constitution as well. At the *Meclis-i Umumi*, the first Ottoman parliament, representatives of non-Muslim subjects were present and participated in the legislative activities. Non-Muslims were now freed from the status of *dhimmi* and became citizens with equal rights. After the declaration of *Tanzimat*, the status and treatment of non-Muslims in the empire changed. Churches and temples were sometimes constructed with the support of the state treasury.

Religious rights and interests of non-Muslims were upheld by the Ottoman State. For example, a *firman*/mandate issued in 1891 granted 10,100 Franks to the Marunid School to be built in Rome.¹⁵⁶ In 1886, Abdulhamid II permitted the construction of a church for the Abyssinian priests and nuns of Jerusalem. Respect for religions other than Islam concerned various aspects of life, including economic matters. A *firman* from 1847 stipulates that in the town of Yenisehr-i Fener in Greece, the marketplace should be opened only on Wednesdays, instead of Wednesdays and Sunday, since the Christians could not visit the market on Sundays. A report published in the *Bulletin de l'Alliance Israelite Universelle* in 1893 described the period of Sultan Abdulhamid II's reign: "There are but few countries, even among those which are considered the most enlightened and the most civilised, where Jews enjoy a more complete equality than in Turkey. H.M. the Sultan and the

¹⁵⁶ BOA, *Irade Meclis-i Mahsus*, No. 5242

government of the Porte display towards Jews a spirit of largest toleration and liberalism. In every respect Abdul-Hamid proves to be a generous sovereign and a protector of his Israelite subjects ...”¹⁵⁷

In this environment, many Ottoman citizens of Armenian, Jewish and Greek origin rose to significant ranks and held important posts within Ottoman administration and bureaucracy. For example, many Christians served within the Ministry of Foreign Affairs and the Ministry of Finance, while many Jews were appointed military officers, councils, judges and pashas. As non-Muslim communities prospered economically and gained political power, tensions arose amongst them and the state tried to prevent conflicts and to protect the oppressed. For instance, due to the above reasons as well as the provocation of some European diplomats and states, some anti-Jewish attitudes from other non-Muslims began to emerge. Jacob Barnai has said: “Throughout the nineteenth century, there were dozens of blood libels across Turkey and the Aegean Islands. It was the Ottoman rulers who tried to protect, with varying degrees of success, their Jewish subjects.”¹⁵⁸

Living examples of peaceful coexistence from Istanbul

We shall see three existing examples of religious-cultural pluralism from Istanbul which illustrate vividly the Ottoman heritage in our time. The first one is the Darulaceze Complex, while the second and third ones are the Kuzguncuk and Ortakoy districts, where religious buildings of the followers of different religions stand next to each other and constitute a remarkable model even for today.

Darulaceze is a charitable institution which was established in Istanbul in 1895 by Sultan Abdulhamid II as a refuge for the needy; it was started with the support of the state treasury. The complex was also supported by donations, charity contributions from companies and later by its own revenues. Since then, the mosque, the church and the synagogue stand side by side in the Darulaceze complex. Here the needy and the old, regardless of their religion or sect, are looked after.

The Kuzguncuk was the first Jewish settlement on the Asian part of Istanbul. It was considered “the last stop before reaching the holy lands” by European Jews. Therefore, those who were not able to go to the holy lands hoped to settle, live and be buried in Kuzguncuk. In addition to Jews, Greeks, Armenians and Muslims later came and also settled in Kuzguncuk. There are mosques, churches and synagogues in this district, reflecting the demographic structure of its inhabitants. Among them the co-existence of two groups of religious buildings is still striking. The Kuzguncuk Mosque (1952) and the Armenian church Surp Krikor Lusarovic (c.1835) are next to each other. On another street, the Beth Yaakov synagogue (1878) and Ayios Yeoryios church are next to each other. The existence of these buildings side by side, and others in the vicinity, clearly and strikingly reflects the peaceful co-existence of the people in the town.

A very similar situation is observed across the Bosphorus at Ortakoy, where Jewish, Armenian, Greek and Turkish communities have lived together peacefully. The existence of several religious buildings which are very near to each other bear witness to this fact; a few examples of this are Etz Ha-Hayim Synagogue (16th-century), Surp Asdvadcadcin Church (18th-century), Ortakoy Mosque (1854) and Ayios Fokas Church (1856).

¹⁵⁷ *Bulletin de l'Alliance Israelite Universelle: Deuxieme Serie* (Paris) (BAIU)

¹⁵⁸ Jacob Barnai, ‘On the History of the Jews in the Ottoman Empire’, *Sefardi Jews in the Ottoman Empire: Aspects of Material Culture*, The Israel Museum, Jerusalem, 1990, p. 29

Appendix 2: The Ottoman Empire's *Tanzimat* Reforms¹⁵⁹

The Ottoman Empire was one of the longest-lasting empires in history. This can partly be attributed to the values of tolerance and coexistence that were promoted throughout its existence; as a result, 10 million Turks were able to rule over a population of 250 million spread across three continents. The period of *tanzimat* reforms (1839-1876) spanned a number of decades: they were implemented through a series of decrees read aloud in public, as advised by the Caliph. All of these reforms in the interest of the people were accepted by the *Shaykh-ul-Islam* [chief religious authority] at the time, as being in accordance with Islamic theological reasoning. Sultans Mahmud and Abdul Majid's reforms were assisted by Shaykh Seyyid Wahab Effendi and Shaykh Mustafa Asim.¹⁶⁰ Amongst the reforms were a few key changes: homosexuality was decriminalised; Ottoman society generally moved away from punishments such as stoning (although, throughout Ottoman history, only one case of *rajm* [stoning] was decided and carried out in 1680); the death penalty for apostasy was not implemented and later repealed. These reform goals included secularising the Ottoman laws and state institutions.

The *tanzimat* were implemented as a means to combat the slow decline of the empire that had weakened it considerably in comparison to the growing and modernising European powers. For example, the printing press had been banned in Anatolia for centuries and only reached the Arabic-speaking regions of the empire following Napoleon's invasion of Egypt in 1798. This resulted in the Ottoman Empire falling about 200 years behind other European states in fields of intellectual thought. The *tanzimat* reforms served to accelerate the process of radical modernisation that were needed in order to catch up with European ideals. The two areas where reform was most successful were in the education system and creating equal status for Muslims and non-Muslims. Customary laws were either abolished or repealed in favour of secular European ones. This period saw the removal of archaic systems and infrastructure such as the *Millet* system in favour of a more centralised government, as well as a greater effort to integrate non-Muslim communities and afford them equal rights and privileges; the Ottoman Empire was adapting to new realities via the *tanzimat* reforms.

Mahmud II (1808-39) was instrumental in the modernisation of the Empire. Although he died before all his reforms were implemented, his son, Sultan Abdul Majid, succeeded him to further his mission. Sultan Mahmud implemented reforms to the military, *dhimmi* system, education system, trade laws, and penal code, amongst others. Mahmud's modernisation of the military began in June 1826: he removed the ineffective Janissaries (Ottoman soldiers) and replaced them with a European-style trained and organised army, fully equipped with modern weaponry and European uniforms.

The *Hatt-i Sharif* (Gulhane Decree), proclaimed on 3rd November 1839

Whilst acknowledging Islamic principles, it paved the way for new laws later, promising:

- to protect the lives and properties of its subjects
- a new code of justice asserting equal status of Muslims, Jews and Christians before the law
- to institute a regular system of levying taxes
- to develop a fair method of conscripting subjects for service in a modernised army and navy

A new penal code was introduced in 1843, followed by abolition of the death penalty for apostasy in 1844.¹⁶¹

¹⁵⁹ Information reproduced with permission from Ishtiaq Hussain, *The Ottoman Empire: A brief look at the adoption of secular laws in the Ottoman Empire with a particular focus on the Tanzimat reforms (1839-1876)*, Faith Matters 2011, also available at: <http://faith-matters.org/images/stories/fm-productions/the-tanzimat-final-web.pdf>

¹⁶⁰ Nadine Sultana, *The Legacy of Sultan Abdulhamid II* (USA: Sultana Publishing, First Edition, 1999), p. 58

¹⁶¹ Elie Elhadj, *The Islamic Shield: Arab Resistance to Democratic and Religious Reforms* (USA: Brown Walker Press Florida 2007), p. 49

Hatt-i-Humayun (the Imperial Rescript), proclaimed on 18 February 1856

This announcement was supported by European states, who felt that the previous proclamation had not gone far enough in providing equal rights to the non-Muslim subjects of the empire. Unlike its predecessor, this edict did not make any reference to Islamic principles and favoured a European inspired penal code:

*“The Ottoman Penal Code of 1858 was based on the Napoleonic code of 1810, putting aside Islamic punishments. It established a French-type system of courts, with tribunals of first instance, courts of appeals and a high court of appeals. These were the first distinct hierarchy of a secular court system of the country ... This secular criminal code and court system remained in operation till 1923.”*¹⁶²

The decision to abolish Islamic punishments (*hudud*) was not unprecedented, as the *hadd* for stealing had in fact been suspended before, by the second Caliph of Islam, ‘Umar ibn al-Khattab, a companion of the Prophet Muhammad, peace be upon him.¹⁶³ Thus, during the Ottoman administration of the Arabian Peninsula, the *hadd* punishments were not applied.¹⁶⁴ It was the Al-Saud family that re-introduced them after Arabia became independent. The *Jizya* tax was abolished by the Imperial Rescript; this elevated the role of non-Muslims from *dhimmi* status to equal citizens alongside their Muslim counterparts. Although Sharia law was still used in courts, these were not the only legal institutions:¹⁶⁵

“Sharia courts had primary jurisdiction over urban Muslims, rural tribes followed customary rules and procedures (urf), and Milliyya courts were regulated by and for the various sects of Christians and Jews. Hence Sharia courts were by no means the only form of law and administration. Indeed the ruler had his own body of administration law (Qanun) that did not draw authority from the Sharia.”

The Imperial Rescript allowed for further reorganisation in the empire: in 1850, ‘Napoleonic Trade Laws’ were introduced; in 1858, the French Penal Code was introduced; in 1858, the Property Law was introduced and in 1864 the Maritime Trade Law was introduced.

The 19th century saw the establishment of *Nizamiye* courts across the empire, within which the new secular laws were applied. Attempts to codify Sharia were also made in the late 19th century. This resulted in the *Mejelle*, codified law based on Hanafi fiqh. The *Mejelle* only applied to certain parts of Sharia law, such as economic legislation. It did not apply to family law, where Sharia was still dominant, or criminal law which was already codified based on European standards.¹⁶⁶

Legacy of the *tanzimat* reforms

The emergence of an Ottoman state based on secular aspects of sovereignty contrasted with the medieval concept of an Islamic empire and was a result of the *tanzimat* reforms, representing the real beginning of modernisation and secularisation. The *tanzimat* reforms led to the creation of a new identity known as *Ottomanism*, which replaced the *Millet* system. Ottomanism was understood to mean that all citizens of the empire were equal in the eyes of the law, regardless of faith. In practice, this was not easily achieved, as old prejudices were difficult to break away from.

¹⁶² Dr Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States* (UK: Ashgate, 2005), p. 90

¹⁶³ Nadirsyah Hosen ‘In Search of Islamic Constitutionalism’, *American Journal of Islamic Social Sciences*, Volume 21, No. 2, 2004, p. 23

¹⁶⁴ Mohammad S. al-Awa, *Punishment in Islamic Law: A Comparative Study* (USA: American Trust Publications, 1993), p. 31

¹⁶⁵ Talal Asad, *Formation of the Secular: Christianity, Islam, Modernity* (Stanford University Press, 2003), p. 210

¹⁶⁶ Knut S. Vikor, *Between God and the Sultan: A History of Islamic Law* (UK: C. Hurst & Co Ltd, 2005), p. 230

Appendix 3: A Summary of *The Classification of the World in Islamic Jurisprudence* by Sheikh Abdullah al-Judai (21st Century)¹⁶⁷

Sheikh al-Judai, of Iraqi origin, is a contemporary traditionally-trained UK-based scholar of hadith and jurisprudence (*fiqh*). He is a colleague of Sheikh Abdullah bin Bayyah.

His book seeks to answer whether the historical political classification of the world is still binding, and in what capacity; it also seeks to understand whether this classification subsequently affects Islamic legal rules. The following are the conclusions reached by Sheikh al-Judai: they are relatively progressive. Application of principles of religious freedom would bring them closer to modern political theory and practice.

1- Classification of the world

Classifying the world into two dichotomies, namely the *Land of Islam*, and the *Land of Disbelief* [Kufr] is approved by the Sunnah and is supported by the historic events that took place during the time of the Prophet. It was a depiction of the reality at the time; it was not invented later on by Muslim scholars and jurists. This being said, this classification was not religiously binding nor was it a command sent down from God. It is not essential to Islam as a concept, but rather one that is open to variation and interpretation, in accordance with the changing reality within which it is situated. This gives greater scope for reasoning in order to determine appropriate classifications. For example, territories were frequently identified by their inhabitants: other than the two named above, there existed the *Land of Migration*, the *Land of Polytheism* and the *Land of the Enemy*. One of the most crucial rules which helps distinguish the class of a territory is the *Hijra* (migration); the use of this term generally alludes to the migration from a territory of disbelief to lands of Islam [e.g. the migration from Mecca to Medina]. In relation to this subject, the author has resolved the following issues:

- a) The purpose of sanctioning the *Hijra* was to enable Muslims to observe and protect their faith, without feeling oppressed.
- b) Some scholars have argued that *Hijra* is mandatory upon all those able.
- c) Residing in a non-Muslim society is virtuous for those upholding justice, observing Islamic values and avoiding potential harm to themselves or their family because of their faith. On the other hand, residing in a non-Muslim society becomes discouraged if you are able to migrate to a Land of Islam in order to alleviate any injustices experienced due to faith discrimination.
- d) Lawful *Hijra* may be carried out on the basis of: the preservation of faith, preservation of life, earning a living or seeking knowledge.

Another rule that is important in distinguishing between various types of territory is *Jihad*. The author highlights the many issues that come with the use of this word:

- a) Fighting is only one method of *Jihad*; this is a figurative understanding of the word as linguistically, the verb in Arabic means to strive. *Jihad* in the early context referred to either striving against the soul and desire – representative of the highest form of *Jihad* – or simply to strive for anything.

¹⁶⁷ Abdullah bin Yusuf al-Judai, *Taqsim al-Ma'murah fi l-Fiqh al-Islami*, European Council for Fatwa and Research, Dublin, 2007.

- b) Fighting is not an end in itself; it is prescribed for the purpose of deterring aggression. In some cases, fighting is the only option: for example, if you may only prevent an individual from causing harm [in war] by ending their life, this becomes a necessary responsibility.
- c) Fighting cannot be initiated to force people to accept Islam, to gain wealth or to acquire land.
- d) The condition for *Jihad* to be lawful is that the overall harm should be less than the good; if the balance is unfavourable towards providing more benefit, *Jihad* is not permissible.
- e) Creating an agreed relationship between Muslims and others on the basis of war is incorrect.

2- Muslim jurists' classification of the world

a) Muslim jurists have taken considerable interest in the subject of classifying the world in accordance with contemporary political affairs.

b) Overall, Muslim jurists agree on classifying the world into two or more types of territory.

c) Definitions used by jurists illustrate the following:

i) The various Muslim schools of thought agree that today's constitutions provide the conditions for distinguishing the class of a piece of land.

ii) The majority opinion states that the religion of the governing authority is crucial in determining the class of the land.

iii) The 'Land of Islam' is any territory which is ruled on the basis of Islamic law, and the 'Land of Disbelief' is the opposite.

iv) The majority of jurists use the terms 'Land of War' and 'Land of Disbelief' interchangeably, but it should be noted that this labelling was dictated by realities at the time.

v) In the opinion of Abu Hanifa, a place can be labelled as a Land of Islam if the applications of Islamic rulings can be practiced by Muslims and they can maintain security.

vi) Some jurists from the Maliki School limit the use of the term 'Land of War' to the battlefield: they believe this term is solely used in association with the absence of security. Therefore, in an environment of security, territory would be labelled 'Land of Islam' or 'Land of Disbelief.'

- d) In resolving the various schools of thought and jurists' opinions and also taking contemporary reality into consideration, it is decided that labelling a territory as Islamic or non-Islamic is subject to the notion of majority and primacy. In practical terms this is determined by the dominance of political authority.
- e) The various schools of thought concur that a Land of Disbelief and a Land of War would become a Land of Islam by coming under the reign of Islam.
- f) Muslim jurists conclude that if people renounce Islam and non-Islamic rulings prevail, then the Land will become a Land of War or Disbelief.
- g) The *Compound Land* is a term which jurists have used: this applies to territories in which Muslims have equal or similar rights to non-Muslims in relation to the exercise of religion.
- h) The fact that the primacy of Islamic rulings is the determining factor in labelling a territory as Islamic demonstrates that the key issue is whether or not Muslims are sovereign with their religion. If they are, the land can be labelled as a Land of Islam.
- i) If Muslims are also allowed to invite others to Islam, then this classification as a Land of Islam is further substantiated.

- j) The *Land of Treaty*: Treaties are of two types according to Islamic jurisprudence: **treaties of security** and **treaties of peace**.

Treaties of security are divided into two further categories:

- 1 – Permanent Security or *Agreement of Dhimma*: guarantees all the rights of citizenship for all individuals, Muslim and non-Muslim.
- 2 – Temporary Security: guarantees protection in a limited capacity towards non-Muslims wishing to enter Muslim lands. Almost equivalent to a ‘visas of entry’ idea.

Treaties of Peace are treaties entered into by Muslim rulers with the enemy declaring an armistice for a stated period, with or without some form of compensation.

The rules pertaining to peace treaties are potent in Islamic Law; it is binding for both parties to keep the peace and abide by the treaty.

- k) Inhabitants of an Islamic state are regarded as follows: **citizens** and **temporary residents**.

Citizens are divided into i) Muslims; ii) non-Muslims living in Muslim territory [*dhimmis*]

Temporary Residents: status is granted to non-Muslims entering an Islamic state for specific purposes and for a specific term.

Muslim inhabitants of non-Muslim states can be one of two categories:

Citizens: those who belong to the country by absolute right [i.e. by birth]

Temporary Residents – a citizen of an Islamic state who enters a non-Muslim state by consent to reside therein for a specific period.

3- Rulings pertaining to the type of land

Jurists have agreed on the following principles:

1. Muslims are commanded to abide by all Islamic obligations: no distinction is made based on the type of land.
2. Islamic ethics and values are equally valid in either type of land; virtues such as truthfulness, honesty and loyalty are encouraged in both non-Muslim and Muslim lands. Similarly, immoral acts such as lying, betrayal or treachery are discouraged regardless of the type of land.
3. All rulings which do not require a judge to give a verdict on are obligatory in a Land of War, just as they are in a Land of Islam. Following the five pillars of Islam should be consistent regardless of the type of land. Furthermore, other rituals such as marriage, divorce, business etc. should also be continued. Likewise, prohibitions as dictated in the religion should continue to be observed, regardless of what land you are residing in, e.g. the prohibition of oppression, murder, fornication, theft or alcohol – anything that does not require the judgement of an adjudicator.
4. An agreement between Muslims and their enemy assures security of life and wealth for both. Moreover it gives equal sanctity to the enemy as to the Muslims.
5. The sanctity of a woman’s chastity is assured whether states have an agreement or not.

Jurists have disagreed on the following five issues which relate to rulings:

1. The performance of Friday Prayers in congregation in the Hanafi School, as this ruling is subject to ability
2. The performance of something which is subject to the likelihood of incurring harm due to the type of land, e.g. the prohibition of residing in a Land of War
3. Rulings that are exclusive to states, such as sentences and punishments
4. Rulings that have been based on the notion that a Land of War is characterised by permissibility [of otherwise-prohibited matters]
5. Rulings that vary according to the type of land

Having analysed the various schools of thought, the author has concluded that exaggerating the effect the type of land has on Islamic rulings is unjustified.

4- The Modern State and the Classification of Territory

- a) The political concept of the 'nation state' is relatively new and was not known at the time of classifying territories classically.
- b) The classification of contemporary states, which have replaced the historic concept of the Muslim state, is disputed because the connection to being Islamic has remained.
- c) There are numerous contemporary Muslim states. If relations between them were based on peace and cooperation then having multiple leaders is not sufficient grounds for their denunciation. However, the endeavour towards uniting their visions and policies would be a purpose supported by Islamic principles.
- d) The presence of multiple heads for the various provinces is not a matter of strict Islamic decree. It is open for deliberation by jurists and the overriding consideration to unite people.
- e) The current state of international relations is based on treaties and conventions that promote peace and cooperation between nation states. This constitutes a departure from traditional geographical divisions. As a result, the common meaning attributed to the terms Land of Islam and Land of War is no longer valid according to their original interpretations.
- f) The current international system has been bound by international law, which is based on the promotion of peace, security and the preservation of human rights and cooperation between nation states. The essential aim of this is to serve the interests of all nations. Overall, these aims are not at odds with Islamic philosophy: rather, they complement and support it.

5- A worldview based on the Qur'an and Sunnah

- a) Human relations in Islam are founded on the principle that "all humankind descends from Adam, and Adam was created from dust." The essence of their relationship is based on the principle [from hadith] that "All the earth is God's earth, and all people are God's servants."
- b) The separation of people into nations, tribes and states is for the purpose of getting to know one another. This difference is based on the provision of variety, not conflict.
- c) In order for people to get to know one another, relationships must be made on the basis of peace, safety, friendship and collaboration; not on war, conflict and animosity. Moreover, any legitimate deed based on this principle is consistent with the religion of Islam.
- d) The 'Land of War' label is not justified for any country that enters into a peace agreement with Muslims.
- e) Current international agreements are legitimate in principle; they cannot be described otherwise without strong evidence:
 - i) International agreements cannot be entered into by anyone except a ruling Muslim authority. Individuals or groups cannot be authorised to do so. This ruling remains valid in today's world order.

- ii) When entering into an international agreement, the interests of the state or the nation must be taken into consideration, and a net legitimate benefit must be realisable. Thus if the agreement brings harm to the nation, or is based on unfairness and exploitation, then it is invalid and has no sanctity. [But see the next paragraph]
 - iii) If an agreement has been entered into and it is unlawful because of terms that are evidently harmful or because its signatories are seen to be incompetent, then it is not lawful to breach it except by notification from a recognised authority.
- f) The attachment [attribution] to a state according to both Islamic and modern systems is twofold:
- i) Permanent Attachment: this attachment by individuals to a state is represented by citizenship. In modern times, this equates to belonging to a specific state, that is not based on factors such as religion. This would be the same in an Islamic system, however entitlement under this system would have been based on either faith or on the Permanent Security Treaty for non-Muslims.
 - ii) Temporary Attachment: this the granting of the right of residence for a set period, used to be known as the 'Treaty of Temporary Security.' Today, this is equivalent to the 'resident' or 'non-citizen.'
- g) The contemporary citizenship model with its emphasis on loyalty to the motherland is not against Islamic Law. Loyalty to a motherland is accepted in Islam because it is in conformity with the nature of man. Thus, citizenship does not run counter to religion.
- h) What is expected by virtue of loyalty to a motherland in terms of working towards its advancement, development and defence is lawful and indeed, an obligation. Conversely, working towards its corruption and harm is unlawful and is forbidden. The core of Islamic law commands the preservation of life, family and wealth.
- i) The universality of Islam requires the utilisation of peace, security and any legislation that guarantees freedoms and human rights – which are afforded by the contemporary system for good purposes. God has commanded the use of wisdom, kind words and gentle reasoning in order to promote decency, spread the message of goodness and direct people to what is required of them in terms of knowing their Lord.
- j) In surveying the reality of the world today, it is evident that the message of Islam has reached all frontiers because of the diaspora of Muslims. The endeavours of Muslim communities across the world to preserve their faith and to invite others to it, as well as the actions of building mosques and religious centres, are all precursors to the triumph of this faith.¹⁶⁸

¹⁶⁸ This is an unnecessary sentiment that may imply problematic Islamist expansionism and supremacism.

Findings of the Study by al-Judai¹⁶⁹

1. The historic classification of the world into 'Land of Islam' and 'Land of War' is not part of sacred text: it is open to interpretation. Despite receiving this classification from accepted tradition, it is not binding.
2. All the definitions given by jurists in relation to types of territory were points of view that were subject to the jurists' own deliberations. That is why jurists differed in opinion. Therefore, they cannot be used to counter definitive Islamic tenets.
3. Traditional classification of territory is not valid in today's world. Therefore, traditional associated notions cannot be applied. International relations have shifted such that they are now based on binding international law.
4. In assessing the current Islamic situation we can conclude that the Muslim nation has entered into peace agreements with states that had in the past been under the realm of 'Land of War.' These agreements have enabled the conversion of the word 'war' into something along the lines of 'treaty.' Accordingly, these territories are subsequently referred to as 'realms of treaty' or 'realms of peace.'
5. Muslim jurists are agreed that a 'Treaty of Peace' implies the prohibition of waging war, treason, murder and the violation of property or chastity. This agreement dictates absolute mutual security.
6. Differences of opinion among jurists in terms of secondary rulings which have been based on the type of territory are not relevant to today's world. This would be either due to internationally binding agreements or due to change in the composition of populations and the intermingling of peoples and nations. On this basis, Islamic decrees do not vary because of a change of location. Indeed they are mandatory for all Muslims, so long as they are aware of and able to perform them.
7. Factors relating to stability and security were important in establishing the type of land. In contemporary society, the command to migrate and the prohibition of residing in non-Muslim territory are not relevant.
8. The nature of citizenship entitlement in international law has given Muslims additional emancipation outside the traditional 'Land of Islam' since all citizens are granted equal civil rights, including the right to freedom of religious belief and practice.
9. However, non-Muslim states in modern day society cannot be classed as 'Land of Islam' without qualification, due to the fact that the majority of their inhabitants are not Muslim and that the governing system is not based on religion. These territories may be classed as 'Land of Justice' because they uphold the dignity and freedom of the citizen.

¹⁶⁹ Numbering has been added to the paragraphs for clarity.

Glossary

of terms from ancient and mediaeval Islam

(Note: many of these terms are arguably obsolete in the modern world)

ahl al-kitab: “people of the book” or “people of scripture”; an individual was known as a *kitabi* (scripturary). Originally applied only to Jews and Christians, but was later extended to other religious communities such as Zoroastrians and Hindus, since they were also in possession of written, divine revelations.

dar al-‘ahd: “abode of covenant” - non-Muslim territory having a peace treaty with *dar al-islam*

dar al-aman: “abode of safety” – similar to *dar al-‘ahd*

dar al-harb: “abode of war” – non-Muslim enemy territory, regarded as being at war with *dar al-islam*

dar al-islam: “abode of Islam” – territory under Muslim rule

dar al-kufr: “abode of disbelief/blasphemy” – non-Muslim territory, whether at war or peace with *dar al-islam*

dhimma, dhimmah: “protection” of non-Muslims by early Islamic governance; a protected person was a *dhimmi*

fiqh: Islamic jurisprudence

hadd*, pl. *hudud: “limit”; mandatory criminal punishments in early and mediaeval Islam

hadith*, pl. *hadiths* or *ahadith: Traditions reported from the Prophet Muhammad or the early generations of Muslims

harbi: someone living in *dar al-harb* (“abode of war”), and thus requiring a guarantee of safety (*aman*) before entering *dar al-islam* (“abode of Islam”), else treated as an enemy

jizya, jizyah: In early Islam, an “exemption tax” or “poll tax” paid by non-Muslims to Muslim rulers in return for protection (*dhimma, dhimmah*) and exemption from military service

kafir* pl. *kuffar: infidel; disbeliever; unbeliever; non-Muslim

kharaj: a land-tax

khawarij: secessionists or rebels

kitabi: a “scripturary” or individual of the *ahl al-kitab* (“people of the book” or “people of scripture”)

sharia: the totality of Islamic law and ethics

tafsir: hermeneutics or commentary on the Qur’an

zakat: compulsory alms, being one of the “five pillars of Islam”

FROM DHIMMITUDE TO DEMOCRACY: ISLAMIC LAW, NON-MUSLIMS & EQUAL CITIZENSHIP traces the evolution of Islamic thought and jurisprudence on the status of non-Muslims in Islamic law and ethics. With around 40 pages of original translations from classical and contemporary Arabic texts, it shows how ancient notions of *dhimma* (protection of non-Muslims under Muslim rule) in return for the payment of *jizya* (a poll-tax on non-Muslims) gradually evolved and were eventually superseded by modern Islamic thinking that points towards equality under a democratic model of citizenship.

The debate and battle of ideas and practice within Muslim-majority societies and states continues, in a constant state of flux. This report highlights and elucidates the basic scriptural, theological, jurisprudential, historical, political and contemporary bases of the debate, and makes a strong Islamic case for equal citizenship and universal human rights.

On the basis of the ethical principles and history of Islam, this report makes a strong case for:

- (i) a citizenship model of political affiliation, including nation-states and their federations, on the basis of shared values; and
- (ii) full religious freedom and equality, on the basis of the Qur’anic principle, “There is no compulsion in religion.” (2:256)

About the author:

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