TOWARDS A FIQH FOR MINORITIES

Some Basic Reflections

TAHA JABIR AL-ALWANI

with an introduction by
SHAIKH ZAKI BADAWI, OBE

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FOREWORD

THE INTERNATIONAL INSTITUTE OF ISLAMIC THOUGHT (IIIT) established in 1981, has served as a major center to facilitate serious scholarly efforts based on Islamic vision, values and principles. Its programs of research, seminars and conferences for the last twenty two years have resulted in the publication of around two hundred and ninety titles under different series in English and Arabic, many of which have been translated into several other languages.

In 1989 the London Office initiated the Occasional Paper series, a set of easy to read booklets designed to present in concise format a number of research papers, articles and lectures from the Institute's worldwide program as well as from scholars and social scientists willing to make contributions. Nine papers were published in the series the last of which was in 1997, with several being translated into French and German.

The London Office is delighted to re-launch this series with the publication of a number of papers, the first of which is Dr. Taha Jabir al-Alwani's *Towards a Fiqh for Minorities: Some Basic Reflections.* Two more papers will shortly follow dealing with other topical and current issues, including *Marital Discord: Recapturing the Full Islamic Spirit of Human Dignity* and *Violence in Islam.*

"Fiqh for Minorities" is a timely and important subject and a long awaited contribution to an area of fiqh that has become essential for the well being and development of Muslim communities living in non-Muslim lands, especially in the West. The limited attempts to deal with many serious issues facing these communities have failed to take into consideration the views and contributions of Muslim social scientists who live in the West, speak its languages and have a comprehensive understanding of its social, political, religious and

economic systems. As a result many of the recommendations and fatwas issued were inadequate and, in some cases, complicated the issues under consideration. Dr. Al-Alwani's recommendation that existing fiqh councils should work closely with associations of Muslim social scientists and involve these scientists on an equal footing with Shariᶜah scholars not simply as cosmetic additions, is an essential step towards building a stronger and more valid basis for a much needed fiqh.

In conformity with the IIIT In-House Style Sheet, *A Guide for Authors, Translators and Copy-Editors*, words and proper names of Arabic origin or written in a script derived from Arabic have been transliterated throughout the work except when mentioned in quoted text. In such cases they have been cited as they appear without application of our transliteration system. However, words and common nouns of Arabic origin that have entered into general usage are not italicized, nor written with initial capital.

We would like to express our thanks and gratitude to Dr. Taha Jabir al-Alwani, who, throughout the various stages of the paper's production, cooperated closely with the editorial group at the IIIT London Office. We would also like to thank our editorial and production team and those who were directly or indirectly involved in the completion of this booklet: Zaynab Alawiye, Shiraz Khan, Sylvia Hunt, and Zaynab al-Alwani, all of whom worked tirelessly in helping prepare the paper for publication. May God reward them and the author for all their efforts.

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INTRODUCTION

In a paper published in 1981 I observed that Muslim theologians have produced a theology for the majority, but a systematic formulation of the status of being a minority remains to be developed. Two decades have passed since and we now have the first significant effort to explore this important issue. This essay by the distinguished Sharīʿah scholar, Professor Taha Jabir al-Alwani outlines a set of principles that he has considered essential for the proper exploration of the status of Muslims as a minority. He rightly points out that his use of the word "fiqh" in the title of this essay does not refer exclusively to what is called Islamic Law, but to what he, following Abū Ḥanīfah, calls "the greater fiqh." In other words, his project is aimed at providing a methodology for a broad development of Muslim thought in all areas bearing on theology, law, and even history. This is an ambitious but necessary undertaking.

The author, being Chairman of the Fiqh Council of North America, is well aware that the challenges facing the Muslims in the West are broader than the confined area of the rules of conduct embodied in the Sharīʿah. The scientific discoveries, the technical revolution in all its manifestations, the economic and social transformation that have engulfed the whole world must be accommodated in a new ijtihad and a creative approach to fiqh. The Qur'an and the Prophetic Tradition have to be read alongside the new developments in human knowledge and experience. A new ijtihad is required. But how do we exercise our intellectual faculties to resolve the current divergence between the modern world and the traditional presentation of Islamic Law and theology? The call for a new ijtihad goes back to the nineteenth century with Al-Afghānī and ʿAbdū's Salafiyyah project.

The limited success of the ʿAbdū School in transforming the content of Islamic teaching in theology and law stems from the fact that they were still prisoners of the old methodology. ʿAbdū's legal reforms were not sufficiently fundamental. He relied on the views of the ancient scholars and used *talfīq* or eclecticism extensively. This was inevitable since he followed the fundamentals of *uṣūl al-fiqh*, the principles of Islamic Jurisprudence. This discipline forms the road map of Islamic Law. Unless it is altered, the jurist is bound to find himself stuck where the ancestors stopped. Dr. Al-Alwani has recognized that the intellectual and social geography of the world has so changed that the old map no longer corresponds to it. His declared assessment of the Tradition, in contrast to the Qur'an, as historical rather than eternal, and his demand that the Qur'an must be held as the ultimate authority over the Tradition, are crucial for his proposal for a new interpretation. More important still is his demand that the ultimate aims of the Shariʿah should be the focus of any new formulation of Shariʿah rules. The contribution of Al-Shaṭibī regarding the paramount importance of the ultimate aims of the Shariʿah remained buried in his *Muwafaqāt* with little impact on the development of Islamic Law.

Although this essay deals with the minority as such, the methodology advocated here is needed everywhere and in every sphere of Islamic endeavor. The term minority is used to indicate a smaller number in relation to a greater number. To my mind the term in this context does not refer to number, but power. The community that is in control of legislation should be described here as the majority, even if it is smaller in number. The reverse is equally true: the community that is superior in number, but lacks legislative authority, is in this context a minority. A colonial territory, for instance, has a perpetual minority status.

Now, is the term "Fiqh for minorities" a valid one as a separate discipline or is it simply an instance of the general field of Islamic Law? The author argues for the first on the basis that there are certain constraints that a minority community may experience and for which it has to find legal justification.

Dr. Al-Alwani calls for collective ijtihad that invites experts from the various fields of social science to play a major part in formulating new ideas and developing new perceptions. Undoubtedly, the input of the social scientists is important and I am sure that the distinguished author would welcome the physical and medical scientists' contribution too. I share with him the mistrust of committees consisting exclusively of Shariᶜah specialists.

Collective ijtihad is now the vogue despite the fact that it has had a limited role in the history of Islamic thought or law. I prefer contributions to be made in an atmosphere of open debate, which should lead to the adoption of the most acceptable view without delegitimizing other opinions. Our faith and society will succeed in overcoming its present crises only by giving space for divergent views to be expressed and fairly evaluated. This demands a degree of humility on the part of scholars in the tradition of Imam al-Shāfiᶜī who said: "My opinion is right with the possibility of being wrong, whereas my colleague's opinion is wrong with the possibility of being right."

We have suffered in the past, and we continue to suffer, from circles arrogating to themselves the exclusive right to speak for Islam. Dr. Al-Alwani's excellent essay pioneers the way for a meaningful approach to a new interpretation of Fiqh. He does so with the humility of the true scholar.

M.A. ZAKI BADAWI, OBE
London, January 2003

AUTHOR'S
INTRODUCTION

Muslim minorities did not attract as much attention in the past as they do today. Muslims were the dominant world power, feared and respected by all nations. No other power would dare attack individual Muslims or infringe the integrity of Islam when faced with such formidable enemies as the son of Harūn al-Rashīd, al Muʿtaṣim[1], the Abbasid Caliph, who conquered ʿAmūriyya[2] to rescue a Muslim woman who had sought his help against the harassment of her people.

Muslims could travel freely throughout the lands of Islam. The whole world was open to them as a residence and a place of worship.[3] Allah affirms in the Qur'an: "The earth shall be inherited by my righteous servants" (*al-Anbiyā'*: 105). Muslims would travel as messengers or diplomatic envoys, and as traders or itinerant Sufis. These people would be mainly visitors who would stay for short periods. Those who migrated from Muslim lands for political reasons or as dissidents – and expected to be away for a long time – would usually go to distant places where the influence of the central Muslim authority was much diluted. The more powerful and ambitious migrants of comfortably independent means would travel even to non-Muslim lands, where they would establish their own Muslim emirates, existing as Muslim oases or islands in the middle of non-Muslim oceans. Some communities, like those in the south of France, northern Italy,[4] and other places, were to survive for a long time.

Those Muslims, few as they were, who lived in non-Muslim communities, where the authority was not in their hands and the laws were not based on the Shariʿah, were mainly indigenous converts. Eventually, they became aware of the significant difference

between life in a Muslim community and that in a non-Muslim community. Those who had the means migrated to Muslim lands, while others endeavored to lead as full an Islamic life as possible. They developed a distinct Islamic culture, which might, at times, cause friction with the non-Muslim host community owing to their refusal, if that were possible, to comply with the laws and traditions that conflicted with what they had learnt of Islam. Although their new culture might indeed converge in certain aspects with the lifestyle of the host community, the degree of integration was minor and cosmetic. Friction might be provoked by the dominant majority if they attempted to eliminate the minorities' distinctive cultural and religious characteristics so as to absorb them into the non-Muslim society.

If the Muslim minorities resisted assimilation, they were likely to be subjected to persecution or enslavement. They would therefore be helpless and lack the means to assert their existence (*al-Nisā'*: 98). They would seek fatwas from their own *ʿulamā'* or from those outside their community, especially during the hajj season. Most of their queries would have been individual and personal. In the past, Muslim minorities were so small and isolated that they were incapable of establishing their own autonomous economic, legal or cultural organizations and institutions. Their Muslim jurists and *ʿulamā'* were fully aware of a marked difference between the issues and problems of Muslim individuals and groups in a non-Muslim society, and those of a Muslim community living under Islamic law, systems, and traditions. They certainly realized the disparities between the sources of law in Muslim lands (*dār al-Islām* or *dār al-ijābah*) and those of other societies (*dār al-daʿwah*).[5] They understood the impact of the psychological, intellectual, cultural, and juristic differences on life in both environments, thereby obliging the muftis, whether scholars or students, to investigate the evidence. They needed to contextualize that evidence in the light of the prevailing circumstances so as to issue the appropriate fatwas which could be easily and conveniently applied to this time and space, without infringing the main principles and the general aims of the Shariʿah.

Therefore, the need for a new fiqh for minorities was not as strong in the past as it is today. This was because the "reference community" was never found outside its main country of domicile, and it had not moved to the "land of *da⁽wah*" except in the limited way described above. It was a casual and transient existence that did not attract the attention of jurists to legislate and issue fatwas. It remained restricted and isolated, and its fiqh came to be known simply as the fiqh of "crises" or "emergency".[6]

PUBLIC AWARENESS OF THE SHARI⁽AH

With the popularity of the Qur'an and its accessibility the general Muslim public, no matter how rudimentary their knowledge of Islam, certain standards of Islamic education and culture emerged.

Muslims are aware that the Shari⁽ah laws are based on clemency and temperance rather then oppression and severity. They fully realize that the fulfillment of religious obligations is concomitant upon human ability (*al-Taghābun*: 16; *al-Baqarah*: 286). Muslims also know that the Shari'ah permits all that is clean and wholesome and forbids what is harmful, and so is aimed at making life easier and more convenient. It encourages and promotes good and positive conduct and forbids all that undermines society (*al-A⁽rāf*: 157).

The average Muslim understands clearly what is meant by the Qur'anic statement: "He created for you all that is on the earth" (*al-Baqarah*: 29). It confirms the use of all God's bounty with the exception of what has been specifically and categorically forbidden. Permissibility is the norm. The use of everything found in or on this earth is allowed, as long as it is clean and harmless. What is *ḥalāl* and what is *ḥarām* are clearly defined. The gray areas in between are the subject of fiqh, debate, and ijtihad.

The general and universal principles of the Qur'an created a common, widespread and accessible culture among all Muslims, which may not be attained by specialists today. No other Book or religion had hitherto succeeded in achieving such a popular awareness of the law. Principles such as "religious matters known by necessity" or instinct are unique to Islamic culture. Certain matters become com-

mon knowledge without much need for scholarship, unlike other religions in which every minor aspect of all the liturgy and dogma is a subject of debate and scrutiny by the clergy, who possess the exclusive right and authority to judge and pronounce rulings, which are then adopted by the general public. In Islam, however, areas of specialist ijtihad are established and well defined and the general public is invited to offer its own input. Ordinary people can select the scholar whom they wish to follow and pick from the "common law" the reasons, terms and restrictions. They follow the scholar in adapting the facts, and there are also matters that they cannot afford to ignore.

For this reason, Muslim society has allowed the rise of the "men of the pen" in contrast to the "men of the sword." However, it has no room for "priests" or "clergy" or a "grand ʿulamāʾ board" to dominate and monopolize the sources of religious knowledge and the interpretation of religious dogma, thereby denying the rest of society access to them and preventing those who were interested from studying, analyzing and interpreting them. The idea of an élite setting itself up as a reference for religious responsibility and authority is alien to the very nature of Islam. Even those who have tried to do so have failed. It is something that is rejected by the general public, not to mention the intelligentsia. The Qur'an is available to all and no one can monopolize or control access to it. Every reader of the Qur'an can learn the basics of Islam from it directly.

SHARIʿAH AND CULTURE

There is a well-established polemical relationship between legislation, whether divine or man-made, and cultural traditions and conventions. These aspects of society influence scholars, researchers, and legislators, just as fiqh and legislation play a role in creating cultures, traditions, and conventions and have a specific long-term impact on them. Muslim minorities live in societies in which these aspects do not stem from Islamic origins, and their Muslim members themselves have no way of completely breaking away from these influences. Even if they succeed in separating themselves with

respect to worship and moral conduct, they cannot do so in transactions, economics, politics, and all other general and common areas of society, including education, the media and other public opinion-forming systems. All this contributes, in varying degrees, to the alienation of minorities from their roots and gradually weakens their bonds with them. To compensate for the loss of the old relationships, new bonds develop within the new geographical environment inhabited by the Muslim minorities.

This is true of the first generation of immigrants. Nevertheless, in later years the old bonds may well be obliterated by the third or fourth generation and become mere bitter-sweet memories related for entertainment. Thus, the new generations may be completely assimilated into the host communities and disappear altogether, severing their links with their cultural roots, which their fathers and forefathers had made every effort to preserve.

PRESENT-DAY MUSLIM PRESENCE IN THE WEST

It is quite obvious that neither the West, especially Europe, nor the Muslims, especially the Arabs, expected to find Islam and Muslims right in the heart of Europe and the United States. These Muslims did not come as conquerors, but as immigrants, students and professionals. They were the citizens and nationals who left their Muslim lands to live in the West, forming a real, settled and permanent Muslim existence in Europe and the United States. The new immigrant communities have a very sincere wish to integrate into the host society, while preserving their religious and cultural identity. Like the rest of the population, they are quite happy and prepared to comply with and respect the law of the land, pay their taxes, assume responsibilities, and benefit from the freedom, advantages and rights provided by the law.

Until September 11, 2001, the United States considered multiculturalism and a multi-faith society as positive contributions to its multi-lateralism in general. It was the multi-culturalism that made the United States a symbol for the whole world. It could rightly assert before all humanity and the wider world that it was the uni-

versal model for integration. This would also justify its assertion that
it was the undisputed heir to Hellenism and Roman civilization: a
supra-national melting-pot of cultures and races. It would rightly
and deservedly become a world leader, as it has done by what has
come to be known as "globalism."

The United States is to be praised for its understanding and wel-
coming of Islam and Muslims by all levels of society. They included
some churches which offered, for very small fees or free of charge,
their premises to Muslims to use for Friday prayers and ʿid days, as
well as academic institutions and members of Congress from both
political parties. The same can be said of certain educational institu-
tions which welcomed Muslim members and hosted speakers and
lecturers to talk about a variety of religious, cultural, historic and
social issues. Some educational administrations have admitted Mus-
lims to their governing bodies. Prison authorities have welcomed
Muslim teachers and preachers to conduct prayers, teach prisoners
about Islam and discuss it with them. Some of them have been
appointed to well-paid positions by these authorities. They wel-
comed the spread of Islam through the prisons, once they witnessed
its positive effects on the prisoners' behavior by persuading them to
abandon drugs and avoid crime.

In 1992 the Pentagon approved the appointment of religious
instructors inside the three branches of the US Armed Forces. The
first minister, Chaplain Abdul-Rasheed Muhammad, was inaugu-
rated in an official ceremony and was followed by others, compris-
ing a final total of fourteen instructors. The number of mosques and
Islamic institutions and schools markedly increased and 1997 was
designated the year of the introduction of Islam and the Muslims to
the United States. It was a golden opportunity that the Muslims did
not successfully use to the full to present themselves, their religion,
history and civilization to the nation.

Many American institutions opened their doors to Muslims. The
first Muslim lady judge was appointed, and courts began consulting
juristic experts when dealing with cases involving Muslim litigants.
The former First Lady employed a female Muslim assistant who

wore the *ḥijāb*. A Muslim was appointed to a senior position at the White House, while the State Department has been inquiring into the appointment of Muslims as possible future ambassadors. The first Muslim American ambassador was appointed to Fiji. The Pentagon agreed to modify uniforms for female Muslim officers and privates to include a headscarf worn under the cap. All civilian and military government employees were encouraged to read and learn about Islam before going to Muslim countries so as to avoid offending local sensibilities or cultural traditions and thus provoking a negative reaction toward the United States and its citizens. These efforts have led to a good understanding of Islam and Muslims. Some people have been inspired to convert to Islam or, at least, to respect it and its followers, to be ready to appreciate their cause and, in certain cases, to empathize with it.

Cases have been brought before the courts against pressure on Muslim women to remove the *ḥijāb* or the headcover, all of which were resolved in favor of the Muslim women. Muslim men and women are now clearly visible with their distinctive dress, raising public awareness and interest in their religion, history and culture. They highlight the positive aspects of Islam that can be passed on to this country, especially in family life, and they practice what I refer to as "the silent *daᶜwah*." *

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* With large Muslim populations in France, Germany, Sweden and UK amongst others, Muslims have become part of the fabric of European life. In Britain for example, Muslims are free to practice their religion fully and the existence of more than a 1000 mosques is testament to this freedom. Community relations between Muslims and non-Muslims in recent times have been on the whole good. However, prejudice and Islamophobia still exists. The Muslim community welcomed the fact that it was the British government itself which commissioned a report to look into anti-Muslim discrimination and prejudice. The report, entitled *Islamophobia, A Challenge for Us All* (1998) was the first serious attempt to look at the topic and was used widely by Muslims and non-Muslims. In the education sector, after much campaigning, there is now some state provision of schools with a wholly Islamic ethos. Due to the acceptance of European legislation which affords protection to minorities, inroads have been made in getting the rights of Muslims

SEPTEMBER 11: THE AFTERMATH

The shattering events of September 11 have left everyone in a state of shock. Since then, Muslims and Americans have woken up to a new reality, the like of which has never been known before. Since then, the need has arisen, as never before, for a new fiqh dealing with the question of Muslim minorities in the West in particular.

Large numbers of non-Muslim Americans from all strata of society have turned toward learning about Islam from its original sources and from its followers, rather than from others. Books and publications on Islam in general, or on certain aspects of its origins, history, culture or civilization, have been sold out and public libraries have ordered extra copies to lend to readers. Inevitably, such a phenomenal interest has created some misunderstanding. Certain naïve individuals thought that it was due to a desire to convert to Islam or to seek an alternative religious faith. However, it was no more than an effort to resist ignorance and a genuine urge to learn.

Numerous churches, universities, and research and study institutions have embarked on inviting imams, professors and lecturers to speak on Islam and expound its principles, sources, relationship to other religions and its effect on its followers. In addition, speakers are invited to answer questions that are raised by many Americans about Islam, especially those debated in the media relating to the link between Islamic beliefs and extremism. People wish to know if Prophet Muhammad (ṢAAS)[7] taught his followers to be extremist and whether he ordered them to kill their opponents or those who

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to practice Islam freely. Legislation is currently being passed which outlaws discrimination against Muslims in the workplace. Muslims are also involving themselves in the wider society. Muslim periodicals such as *Q-News*, *The Muslim News*, and prominent Muslim journalists and broadcasters have shown how far Muslims have progressed. In the field of politics, the situation is contrasted with that of America, where there are no Muslim Senators. In Britain Muslim peers have been appointed to the House of Lords, and Muslims have been elected as members of parliament showing how far Muslims have become part and parcel of British life, and by extension the rest of Europe. [Editors].

did not believe in Islam. What is the Islamic view of the freedom of the human being? Does Islam exclude freedom of religion? Some people cite extracts from the Qur'an, such as verses 5 and 9 of *al-Tawbah* or 191–194 of *al-Baqarah*, which they may have heard or read out of context. These misconceptions can cause people to judge Islam to be a militant faith, ever advocating fighting, war, and the use of duress to convert others, kill them or force them to pay protection money. Some have cited the Prophet's battles against his enemies as proof of Islam's militancy.

Nor has all this been enough to satisfy Islam's detractors. Many of them have reverted to established works and references in fiqh and other Islamic sciences to randomly select passages, terms and statements and interrogate Muslim imams and workers about them. However, many of the people questioned usually have only a rudimentary knowledge of Islam, and so they tend to apologize for those statements and dismiss them as ancient and irrelevant. They give way to strange paradoxical feelings of inferiority. However these misconceptions and misunderstandings and certain stereotypes continue to be raised. Some of these are:

- Islam divides the world into the "land of Islam" and the "land of war." Does this not mean that Muslims are in a state of continual war with the rest of the world? Does it not give Muslims the right to fight the followers of any other religion whenever they wish and whenever they find themselves strong enough to declare war on others? Were the events of September 11 a result of the Muslims' belief that Americans are infidels and that their country is a "land of war?"

- What about *jizyah*, (the "poll tax") which Muslims insist that Jews and Christians pay with humiliation. It is a degrading tax that infringes people's rights, and the freedom to choose the faith in which they believe?

- How about coercing and forcing Muslims who convert to other religions to reconvert to Islam on pain of the death penalty? Is this not the kind of compulsion that you assert is rejected by your faith?

- What about the rights of women, whom Muslims believe to be of inferior minds and lesser religious conviction? A woman's testimony, according to your faith, counts as half of that of a man. What about the right to detain your women in the home, and the right of the man to marry four wives, whereas a woman can have only one husband, whom she has to serve and obey? A woman cannot disobey her husband's wishes or separate from him because he alone has the right to end the marriage. What about *ḥijāb*? Do you not see that imposing it on women is a form of humiliation and undermines your trust in them? Does this not confirm the belief that a woman is a second-class citizen who exists solely for the satisfaction of man's sexual desires, bearing and looking after his children, and taking care of his home? Nevertheless, the man is still considered superior to the woman and he has the last word on whether to keep or divorce her. Moreover, a woman's share of an inheritance is half that of a man. How about depriving women and beating them if they disobey their men?[8]
- What about the amputation of a hand for theft, the stoning to death for adultery, and the killing of homosexuals, using the vilest means such as burning them to death at the stake or throwing them from a great height?
- Why are vile dictatorship, human rights abuses, disease, backwardness, prejudice, and extremism so rife in your countries? Why have all the efforts of development and modernization in your countries failed so miserably? Is not Islam the cause of your backwardness, just as Christianity was the cause of our progress, once we had put it in its rightful place? Why have you failed in adopting democracy? Is this not evidence that the teachings of Islam encourage oppression, dictatorship, class differences, and other similar afflictions?
- Why does Islam teach you that killing yourselves in order to kill civilians in Palestine and New York will lead you to Paradise?

Such misconceptions, questions, queries and stereotypes need to be intelligently and correctly approached and responded to. They can no longer be dismissed or brushed under the carpet.

Towards a Fiqh for Minorities is a timely and important subject and a long awaited contribution to an area of fiqh that has become essential for the well being and development of Muslim communities living in the West. The author stresses that the problems of Muslim minorities can only be tackled with a fresh juristic vision based on the principles, objectives and higher values of the Qur'an in conjunction with the ultimate aims and intents (*maqāṣid*) of the Sharicah. A must read.

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