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

MUSTAFA R. K. BAIG*

Fulfill your pledge, indeed the pledge will be asked of.
(Qur’an: 17:34)

When a noble person makes a promise, he honors it.
(Arabic/Sufi proverb attributed to ‘Ali Ibn Abi Tālib)

INTRODUCTION

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

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

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

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


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

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

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

In examining the Islamic jurisprudence of Muslims living under non-Muslim rule, I will begin by looking at the rudimentary issue of how Muslim jurists viewed the actuality of Muslim individuals living in non-Muslim jurisdictions. The ensuing question then, as discussed by jurists, is the relationship that a Muslim has to a Muslim polity, and the extent to which Islamic laws can be jurisdictionally extended and applied (if it all) to Muslims living beyond the jurisdiction of Muslim territory (Dār al-Islām).

The third section addresses that question by looking at the guidance that Muslim jurists give to Muslims living in non-Muslim lands, in terms of how they should organize their own legal affairs independent from Muslim sovereignty. Particular attention is given to the appointment of Muslim judges in non-Muslim lands.

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

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

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


8. That is within the four schools of Sunni jurisprudence, namely Ḥanāfī, Mālikī, Shāfi’ī and Ḥanbalī. Much of the focus will be on the Ḥanafī School (the largest of the four) for reasons that will become apparent later.
relieve you from your distress.‘9 Upon arrival, the Muslims engaged them-
selves in acts of worship and piety, living peacefully among their host
community. After some time, news had spread that the Meccan population
had converted to Islam. So some Companions of the Prophet returned to
Mecca, only to find that the news was untrue. Some Companions returned
again to Abyssinia, while others attempted and failed to conceal them-
selves. When they were found, they were persecuted and tortured more
than before. Hence, the Prophet again ordered them to leave for Abyssin-
ia.10

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

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

9.  M UHAMMAD IBN IS HÅ, SÎRÅT RÅSÅL ALLÅH 146 (A. Guillaume trans., Oxford University
Press 2001). Negus (Arabic: al-Najashi), the king of Abyssinia was a devout Christian and a great
scholar of the revealed scriptures. He was recognized for his justice and tolerance. Aṣhâma Ibn Abjar
(his proper name) later converted to Islam and died in 9 AH.
10.  I BN IS HÅ, SHÅRÅH AL-MÅWÅHÅB AL-LÅDÅNÅYA BÎL-MÅNÅH AL-
11.  IBN IS HÅ, supra note 9, at 198.
12.  The one most frequently mentioned (known as the “hijra verse”) to determine the legal aspect
of migration reads:
Verily, those who are given death by the angels while they were wronging themselves, the
angels say to them: In what [plight] were you in? They reply: We were oppressed in the land.
They say: Was not the earth of Allah spacious enough for you to emigrate? Such people will
find their abode in Hell - what an evil refuge! Except the weak among men, women and chil-
dren who have no means in their power nor have guidance to a way [to the land of migration].
For these, Allah will pardon them for Allah is most Pardoning and Forgiving. Whosoever em-
that took place was from a non-Muslim land to another non-Muslim land (Mecca at the time being a non-Muslim land, as was Medina), jurists did, nevertheless, link the imperative to emigrate to Medina to the question of whether it was permissible to reside in non-Muslim lands, and it results from the fact that joining the Prophet in Medina meant the freedom to practice the Islamic faith without oppression.

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

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

*Qurʾān*, 4:97–100 (translations of Qur’ānic verses are my own).


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

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

I asked: What is your opinion of a Muslim who enters non-Muslim territory under an aman and marries from among the inhabitants of that territory who is from the People of the Book? Abū Ḥanīfa replied: I disapprove of his doing so.
I asked: But if he marries, would such a marriage be valid? He replied: Yes.
I asked: Then, why did you disapprove of it? He replied: Because I disapprove of his living in it.

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

The renowned Transoxianan Ḥanafi jurist and redactor of al-Shaybānī, al-Sarakhsī (referred to as shams al-a’imma, or “sun of the leading scholars

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


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


19. Mentioned in a number of places in all major collections under the chapters of Pilgrimage, Jihad, Siyar and Expeditions of the Prophet (Maghāzi).
ars” (d. 499/1106), commenting al-Shaybānī’s opinion, stated that the migration was obligated in the Qur’anic verse (cited above) because the Muslims were living under oppression and the obligation would continue to the Day of Judgment if such a cause (sabab) is found. On the other hand, if such a sabab is not found, and Muslims can live honorably, then the obligation to migrate is lifted. Hence, the majority of scholars conceived ḥijra as ending with the conquest of Mecca in accordance to the Hadith\(^{20}\)—that “there is no ḥijra after the conquest.”\(^{21}\) Similarly, the great Egyptian traditionalist and jurist, Badr al-Dīn al-‘Aynī (d. 855/1453), commenting on the Hadith, mentions that Muslims fled with their religion towards Allah and His Messenger for fear of enticement away from Islam, and in his time (already), he noted, Muslims are able to worship their Lord wherever they desire.\(^{22}\) As well as the Prophetic narration, the Hanafi jurists looked at the operative cause (illa) in the obligation to migrate away from non-Muslim lands. Although Abū Ḥanīfa’s opinion does not contradict that of his followers, if one did attempt to reconcile any apparent difference, one could argue that Abū Ḥanīfa’s opinion considered the question of Muslims residing in non-Muslim lands with the operative cause in place. Later scholars clarified and elaborated his view by mentioning that if Muslims did not find themselves being oppressed or persecuted, then they could remain in non-Muslim territory.

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

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

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

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

27. 3 Al-Tirmidhī, supra note 26, at 80 (Hadith report 1654); see also 3 Ibn al-Ash‘ath, supra note 25 (Hadith report 2645).
residing in a non-Muslim land and discussed conditions that would permit them to reside there. He stated: (i) if a Muslim has the means to emigrate from non-Muslim lands, and it is not possible for him to manifest his faith nor can he perform his obligatory duties, then emigration from there is obligatory upon him; (ii) if he has the means to emigrate but it is possible for him to manifest his faith and perform his obligatory duties then it is preferable to emigrate so that he may strengthen and assist the Muslims, engage in jihad, and that he is secure from their deception and is at peace from seeing evil (munkar); (iii) he is unable to emigrate due to captivity or illness, for example, then he is permitted to reside there.\(^{29}\)

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

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

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

\(^{29}\) 6 AHMAD IBN ʿALÍ IBN ḤAJAR AL-ʿAŠQALĀNĪ, FATH AL-BĀṬĪ SHARĪḤ ṢĀḤĪḤ AL-BUKHĀRĪ 209–10 (n.d.) (Egypt).

\(^{30}\) Qurʾan, supra note 12; 8 MUWAFFAQ AL-DĪN ʿABDULLĀH IBN MUḤAMMAD IBN QUDĀMĀ, AL-MUGHNĪ 456–58 (1948) (Egypt). Ibn Ḥajar’s discussion (supra note 29) appears as a shortened (and slightly modified) version of Ibn Qudāma’s text. It may well be that Ibn Qudāma has embraced this from an early writer.
ism [aḥkām al-shirk].”³¹ Mālik’s view is the strictest, and seems to defy the social and historical practice of Muslim traders who, at the time, were traveling to non-Muslim lands in large numbers. As well as his concern for Muslims being subject to non-Muslim law in general, he is concerned more specifically with financial transactions being governed by non-Muslim rules (considering he is being asked about traders). Later Mālikī scholars, such as the Andalusian Ibn Rushd (d. 520/1126) and the North African al-Wansharīṣī (d. 914/1508), continued to propagate the same position, albeit with some scholars taking limited exceptions.³²

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

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

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³¹ 10 ‘A BD AL-SALĀM IBN SA’ Đ SA Ḥ NŪN, AL-MUDĀWWANĀ AL-KUBRĀ 102 (1905) (Egypt). The fact that it is the opening passage in the chapter on “Travelling to the Enemy’s Land for Trade” is instructive of his attitude toward Muslims traveling to non-Muslim lands.

³² MUḤAMMAD IBN AḤMĀD IBN RUSHD, KĪTĀB AL-MU’ADDAṬ MĀ’ṣURA AL-ḤISHĀB 119–38 (1981) (Morocco). Also see 1 IBN ‘ABD AL-BARR AL-QUR BĀN, KĪTĀB AL-KĀFĪ FĪ QĪNĀ MĀ’ṢURA AL-ḤISHĀB, 370 (1980) (Saudi Arabia). There is some flexibility in the view of Abū Bakr Ibn al-‘Arabī (d. 543/1148). Some of these positions were, in part, driven by political circumstances on the ground. I intend to take up the views of Mālikī scholars in a future article.

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

³⁴ Not to mention that the Prophet himself went on trade journeys before declaring his prophethood and married the successful merchant Khadijā who he married after successfully and honestly trading on her behalf. In one tradition, for example, the Prophet is reported to have said: “[The status of the] truthful, trustworthy merchant is among the Prophets, the truthful, and the martyrs.” 2 AL-TIRMIDHĪ, supra note 26 at 341–42 (Hadith report 1227). Other sources included slightly different
role in the propagation of Islam outside the Arabian Peninsula.\(^{35}\) Thus, it is understandable why the earliest Islamic jurists addressed Muslim traders in non-Muslim lands. This socio-economic phenomenon required legal rules to deal with the various particulars, even if that entailed devising hypothetical (albeit, purposeful) scenarios comparable to the discourse adopted in other areas within jurisprudence. No independent heading was usually designated for the Muslim trader in legal texts.\(^{36}\) Nevertheless, Muslim traders are mentioned in the discussion of isti’mān (claiming a security covenant), under the section of siyar (jihad), referring to a situation where a Muslim enters non-Muslim lands with a security covenant. This shows that one could in fact enter Dār al-Ḥarb in a peaceful state. Therefore, one cannot exclusively ascribe the connotation of war or belligerence to Dār al-Ḥarb.

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

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

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36. There are exceptions such as al-Mudawwana cited above. 3 IBN SA’ID SAHĪN, supra note 31. This may seem somewhat ironic given the Mālikī attitude toward Muslims trading in non-Muslim lands.
37. ABŪ AL-HASAN AHMAD IBN MUHAMMAD AL-BAGHĪDĀDI AL-QUDĪRI, AL-MUḤTAŠAR LI’L-QUDŪRĪ 296 (n.d.) (Pak.).
39. Id.
al observance to it), Islamic law does not allow a person to break any part of the law, let alone attack the property and persons living there.

It is interesting to note that al-Marghīnānī and other jurists allocate a separate subheading (bāb) for the musta’min (he who claims a security covenant) within the Kitāb al-Siyar/Jihād. This indicates that the jurists distinguished between the ways to enter non-Muslim lands (Dār al-Ḥarb): one way was through military expeditions, and the other was through peaceful means such as trade. Both types are discussed under siyar/jihad.40

Later scholars have added other generic means of entry into the Abode of War, over and above trade, without specifying what these might be. For example, al-Maydānī, in his gloss on the al-Qudūrī text above, stated that, “[i]f a Muslim enters Dār al-Ḥarb by way of trade (or other means) it is not permitted for him to infringe on their property and life.”41 This suggests that al-Qudūrī was not intending to limit purposes of travel to trade only, or, from a legal-historical point of view, it perhaps indicates and acknowledges a diversification in reasons why Muslims were traveling to non-Muslim lands. In other words, “trade” is not a precluding qualification (qayd iṣṭirāż) but an incidental one (qayd iṭṭifāqī/wāqīʾī).

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

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

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

42.  ABŪ ‘ALĪ IBN MUHAMMAD AL-MĀWARDĪ, AL-ḤI,JĀM AL-SULṬĀNIYYA 141 (1973) (Egypt).

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

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

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

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

He said: No.

I said: Why?

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

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

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

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

The jurists maintain that wilāya, or jurisdiction, is a requisite for

45. Ahl al-Dhimma are non-Muslim subjects of Dār al-Islām whose safety and protection is the responsibility of the sovereign in return for paying jīzā (tribute tax).
46. Al-Shaybānī, supra note 18, at 194.
47. 2 Al-Marghānī, Bidāyat al-Mubtadī 153 (n.d.) (Egypt) (printed with its commentary al-Hidāya by the same author supra note 16. Although al-Hidāya is a commentary on his own work, Bidāyat al-Mubtadi, it is practically a commentary on al-Qudūrī’s Mukhtāsar (Epitome) but with a limited number of changes and additions to the original included from al-Jāmi’ al-Saghīr of al-Shaybānī (or from elsewhere if necessary). See Muhammad ‘Abd al-Ḥāyy al-Lakhnawī, al-Fawa’īd al-Bahṣya fi Tarājim al-Ḥanafīya 140 (Leb.) (although I have added some observations of my own here). Interestingly, this passage is not found in al-Qudūrī’s text but al-Marghānī has added it in his own Mukhtāsar because he must have considered its inclusion important. 1 ‘Abdullāh
the enforcement of a decree.\textsuperscript{48} In this case, the judge did not have jurisdiction at the time the debt took place (lā wilāyat waqt al-iddāna aṣ\textsuperscript{ma})\textsuperscript{49} as the qāḍī is not able to adjudicate on those who are in Dār al-Ḥarb.\textsuperscript{50} The jurists also add that, at the time of adjudication (qāḍā'), the judge does not hold jurisdiction over the non-Muslim since the individual had not committed himself to the jurisdiction of Islam in the past (mada'), when the act had been carried out, but rather had committed himself to what will take place in the future (mustaqbal).\textsuperscript{51} Nevertheless, the qāḍī will issue a fatwa to the Muslim, stating that the property owed or embezzled should be returned; this is not a legally binding decree that will enforce the return of property but rather a verdict that states his religious obligation to abide by the amān.\textsuperscript{52} Kamāl al-Dīn Ibn al-Humām (d. 861/1457) adds that although the state will not enforce the return of the fatwa, it will state that it is obligatory (wāḥib) to return it, as the matter remains between him and God.\textsuperscript{53} Here, we see the difference between a legal obligation (in terms of a state injunction) and a religious and moral obligation to return the property.

On the issue of owed property, the same ruling is given if two non-Muslims from non-Muslim territory file a case in Dār al-Islām. This is due
to the aforementioned reason of committing to Islamic rulings in the future (iltazama aḥkām al-islām fiʿl-mustaqbal). The issue is somewhat different if both parties are non-Muslims but convert to Islam and enter Dār al-Islām; in that case, the judge will decree that the property owed must be returned. Here, the jurists look at the concept of ilitation (commitment) again, and hold that in this case the occurrence of the debt is valid jurisdictionally as the act took place with the agreement of both parties accepting and submitting to the laws of Islam. Hence, the jurisdiction required for the qādī to adjudicate is established at the time of pronouncing the decree as both had committed (ilitation) themselves to the laws of Islam.

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

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


56. ʿĀqila refers to the male relatives of the perpetrator responsible for paying the bloodwite. For the Hanafis, it includes soldiers of the same regiment or traders of the same market (or wherever else solidarity can be established). See Kitāb al-Jaḥāʿir in the sources supra note 55. For a general account of Islamic criminal law and its application in different contexts see Rudolphi Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century (2005).

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

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

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

58. Qur’an, 4:92.
59. See supra note 57.
60. Hadd, pl. haddād (lit. “limits”) are the restrictive ordinances or statutes of God that have fixed punishments in the Shari‘a. They are illicit intercourse (punishable by death by stoning or one hundred lashes), making an unproven accusation of intercourse/defamation (eighty lashes), drinking wine (forty or eighty lashes), theft (amputation of the hand/limbs), highway robbery (death by crucifixion or sword if it includes murder, otherwise the same punishment as theft applies). Each has very a specific definition that determines whether a crime constitutes a hadd and there are strict evidentiary requirements also. See Peters, supra note 56, at 53–64.
61. 6 Ibn Ḥabīdīn, supra note 47.
the laws of God and His Messenger apply to Muslims in absolute terms, irrespective of place (dār/makān) and time.63 In the aforementioned case, where the Muslim with a security covenant kills another Muslim with the same territorial status, those schools state that retaliatory slaughter is obligatory in the case of murder (‘amad). Al-Shāfi‘ī, for example, maintained that there should be no distinction between the punishment for a Muslim killed in Muslim territory or non-Muslim territory.64 The Ḥanafīs, however, state that inviolability stems from territory, not from religion (al-ihrāz bi‘l-dār la bi‘l-dīn). They do, nevertheless, split the inviolability into two categories: (i) al-‘isma al-muqawwima, which is tied to territory; and (ii) al-‘isma al-mu‘aththima, which is tied to religion.65 So, when Abū Ḥanīfa states that there is nothing due on a Muslim trader that kills a prisoner or a Muslim convert, it is because the inviolability of life and property that was previously available to him in Dār al-Islām has been waived upon entering non-Muslim territory. However, the religious inviolability is not waived as long as he is a Muslim, meaning that the sin (ithm) remains for committing the crime and contravening the covenant of security, even though the Islamic punishment does not (muqawwima).66 Thus, the Ḥanafīs differentiate between legal obligation that is connected with Dār al-Islām and moral obligation that is connected with Islam.

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

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


66. Id.

67. 2 AL-MARGHĪNĀNĪ, supra note 16, at 153.
would also explain why they often addressed Muslims in *Dār al-Ḥarb* as traders. Hence, some jurists mentioned that since there is an intention of returning to *Dār al-Islām*, it is supposed (*taqdīr*) that he was in *Dar al-Islam* because that is his permanent residence. *Dār al-Islām* is then able to fulfill some of its obligations to the murdered person. The jurists did not discuss the case of a Muslim who does not enter non-Muslim territory for temporary purposes, but is rather a permanent resident in non-Muslim lands. One can only presume that because he has no legal connection with *Dār al-Islām*, the Islamic state would not be able to apply any of its rulings for crimes committed outside of *Dār al-Islām*, as the protection it offers to the life and property of Muslims would not exist.

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

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

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

68. 7 AL-‘AYN, supra note 48, at 205.
69. *Id.*
70. Apart from the Muslim having to offer an expiatory act, as this is not dependent on territory but rather an absolute verse of the Qur’an as mentioned earlier, the same expiatory is required for intentional breaking of the fast, breaking an oath, etc., irrespective of territory.
“[i]t is permissible to accept the position of *qādā*’ from a just or tyrannical ruler.”72 From this short statement, a discussion among jurists emerges with respect to a particular part of this legal rule. The characteristics of a just (*’ādil*) ruler were quite straightforward, but the definition of a tyrant, or “*jā’ir,*” was more complex.

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


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

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

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

76. 3 MU‘IN AL-DĪN MULLĀ MISKĪN HARAWĪ FARĀĪ (sometimes known by his pen name "Mu‘inī"), SHARĪ‘ MULLĀ MISKĪN ‘ALĀ KANZ AL-DĀQAṬ 26 (n.d.) (photocopy without publisher information, printed with its commentary in 3 ABŪ AL-ṢU‘ŪD SAYYID MUḤAMMAD IBN ‘ALĪ AL-HUSAYNI, FATHULLĀH AL-MU‘IN ‘ALĀ SHARĪ‘ MULLĀ MISKĪN (n.d.).) Miskīn’s view is also mentioned in 6 IBN NUYAYM, supra note 48, at 461. Al-Fāṭawā al-Ḥindīyya cites the view in reference to al-Muṭlaq in 3 AL-FĀṬAWĀ AL-ḤINDĪYYA, supra note 47, at 295. Aḥmad Rīḍā Khān al-Bārēwī al-Ḥindī cites both Miskīn and al-Muṭlaq in 18 AḤMAD RĪḍĀ KHĀN AL-BĀRĒWĪ AL-ḤINDĪ, AL-ʾAṬAYA AL-NARAWĪYYA FĪ-FATĀWA AL-RĪDAWĪYYA 545 (2000) (Pak.). *Kūṭūb al-ʾAjīl* (also known as *al-Mabṣūr*) is among the six authoritative texts compiled by Muhammad al-Shaybānī in which (mainly) the opinions of Abū Hanīfah, Abū Yūsuf and his own are narrated. The texts belong to the classification of *zāhir al-riwāyah* and form the structural authority of the Hanafi School, as the narrations have been reliably established from the author through mass transmission or well-known reports. Legal opinions that
(who wrote a commentary on Miskîn’s work), states that this notion deems valid the sultanate of a non-Muslim over Muslims and establishes the validity of such a ruler to appoint a person to the judiciary. According to this view, Islam is not a condition to establish rule; since it is valid for a non-Muslim to appoint judges, it is also valid for a non-Muslim to remove them.77

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

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

contradict the zâhir ar-riwâyât are thus dismissed. The other five works are: al-Jâmi’ al-Kabîr, al-Jâmi’ al-Saghir, al-Siyar al-Kabîr, al-Siyar al-Saghir and al-Ziyâdât.

77. 3 A B C AL-SU’UD, supra note 76, at 26.
78. Al-Fatâwâ al-Tâtârkhânîya, authored primarily by ‘Âlim Ibn al-‘Uthâm al-Andrîfî al-Dehlavî (d. 786/1384) and about 30 other authors, in 8 IBN ‘ÂBDÎN, supra note 47, at 43; 18 A H M A D R İ D A K H Â N, supra note 76, at 546–47. My personal copy of al-Fatâwâ al-Tâtârkhânîya (published in Karachi) is incomplete from which the chapter concerning judges (Kitâb Adâb al-Qâdî) is missing. I have also checked a copy from another publisher (Beirut) and the same section is missing.
79.  Id.
80.  Id.
In case one wonders whether the jurists only discussed those territories that are in some way occupied or dominated by non-Muslims or whether they discussed such lands that were essentially non-Muslim without some form of political involvement or engagement between the Muslim and non-Muslim polities, an answer seems to appear in the following passage from al-Fatāwā al-Tātārkhānīya, which states:

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

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

A. Ibn al-Humām on Appointing Judges

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

81. 'Id. In Ibn ‘Abīdīn’s citation of al-Fatāwā al-Tātārkhānīya, he states at the end of the quote that Miskīn has attributed the above to al-Asīl (of Muhammad al-Shaybānī), although I have shown that here Miskīn’s discussion is limited to the definition of jā‘ir and that it includes non-Muslims (this shall be discussed in more detail later). He also says this is similar to what is mentioned in Jāmi‘ al-Fuṣūlīyān. See BADR AL-DĪN MAHMŪD IBN ISRĀ‘ĪL AL-SHĀḤIR BĪ-BĪN QĀDĪ SAMĀWUNA, JĀMI‘ AL-FUṢULAYN 11 (1882) (Egypt). The original text is indeed similar to al-Fatāwā al-Tātārkhānīya with the exception of the first two points—that Islam is not a condition for the sultanate and the question of lands being occupied by non-Muslims. It would be interesting to discover whether the views found in Jāmi‘ al-Fuṣūlīyān and al-Fatāwā al-Tātārkhānīya were generated from within the legal-literary tradition or whether the special situation of fourteen and fifteenth century Ottoman Turkey (in the case of Badr al-Dīn Samāwuna) and thirteen and fourteenth century India (in the case of al-Fatāwā al-Tātārkhānīya) might have impacted the texts here. This, however, would require a separate study.
could be carried out rightfully and fairly. He discusses a situation where there is neither a sultan, nor anyone who is permitted to appoint judges, pointing out that this is currently the situation found in some Muslim countries (in his time) where non-Muslims have taken control, “such as Cordoba today and Valencia in the Maghreb, and Abyssinia.” In such circumstances, they should appoint Muslims from among themselves to collect taxes, and they are required to agree on a person whom they will make a governor (wālī); then the governor shall appoint a judge who shall adjudicate among them. Similarly, they should appoint an imam who shall lead the Friday prayer.

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

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

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

82. See supra note 74.
83. 7 IBN AL-HUMĀM, supra note 53, at 246. His view is also cited in 6 IBN NUIJYIM, supra note 48, at 461, and slightly summarized in 8 IBN ‘ĀNIDĪN, supra note 47, at 43–44.
84. Id.
85. 1 have adopted the categories from Imām Ahmad Rida Khān al-Barīwī with slight variations in order to keep the discussion more coherent. See 18 AHMAD RĪDĀ KHĀN, supra note 76, at 547. Ahmad Rida Khān gives the corresponding Arabic words from the text to point out where each block of text from the legal sources starts and ends to denote each category. I should mention here that Ahmad Rida Khān’s fatwa, which is essentially a monograph on the appointment of judges in British India, warrants a separate research project; in it he makes the distinction between shari‘ah and ‘urf jurisdiction.
envisage Muslims to be residing in such lands. Thus, Ibn al-Humām gave
the example of a practical problem affecting the Muslims at that time.

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

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

86. See Sirāj al-Dīn ‘Umar Ibn Ibrāhīm Ibn Nujaym, al-Nahr al-Fāʿiq Ṣharīḥ Kanz al-
Daqīq (2002) (Leb.) (Not to be confused with his elder brother, Zayn al-Dīn Ibn Nujaym, author of
al-Bahr al-Rā’iq, who died in 970/1563, supra note 48).
87. Jurists use the term *muʿtāmad ‘alay-hi* to signify the opinion (from among other opinions)
which the school depends upon.
88. Ibn ’Abīdīn, supra note 47, at 44.
89. Ibn Nujaym, supra note 48, at 461; Jāmiʿ al-Fuṣūlayn in 18 Ahmād Riḍā Khān, supra
note 76, at 542.
90. 18 Ahmād Riḍā Khān, supra note 76, at 545–46. I was not able to find the quote in *al-Âṣl* in
perhaps a more thorough look may unveil it or another manuscript or published edition may reveal the
actual text.
text is very similar to what is found in Tātārkānīya, except for the opening line, which states that Islam is not a condition for the sultanate. The only significant point it adds is that, for those lands where governors have been appointed by a non-Muslim sovereign (the second category mentioned earlier), Islamic penal laws (hudūd) can also be implemented there as well as the Friday and 'Id prayers. Again, this is because of the administrative power and jurisdiction that Muslims possess there.91 If the findings of Aḥmad Rida Khān are to be accepted by all subsequent jurists then not only should Ibn al-Humām’s opinion be depended upon, as mentioned by Ibn ‘Abbīḏīn, but rather it will become the authoritative or official ruling of the school.

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

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

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

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

91. See 8 IBN ‘Abbīḏīn, supra note 47, at 43.
92. Id. at 44.
93. By Islamic judges, I am referring to judges that apply Shari’a rulings and not judges that are Muslim and apply the secular law of the land (of which there are many).
in Islamic jurisprudence, who is upright and of the correct Sunni faith, as a sort of de facto judge.\textsuperscript{94} In fact, ‘Abd al-Ghanî al-Nâbulusî (d. 1143/1731), refers back to a sixth/twelfth century legist who covered the subject conclusively:

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

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

\begin{itemize}
\item \textsuperscript{94} 18 Ahmad Ridâ Khan, supra note 76, at 549. I have obtained an unpublished fatwa from the late Hanafi Mufti Ghulam Rasool who lived in London (on file with author). He similarly states that in those places where there is no Islamic sovereign, reliable and trustworthy scholars are representative or the locum tenens of an Islamic sovereign.
\item \textsuperscript{95} 1 Sayyid ‘Abd al-Ghanî Ibn Ismâ‘îl al-Nâbulusî, Al-Ḥadîqa al-Nâdiya Sharî‘ al-Ṭarîqa al-Muhammadiyya 351 (1994) (Turkey). His reference is to al-‘Attâbî, that is Abû Naṣr Ahmad Ibn Muhammad al-‘Attâbî al-Bukhârî (d. 586/1190). Although the passage does not specify non-Muslim lands and may well have been written in the context of Muslim lands without appropriate rulers, the fact that the statement is general (“when the era is void”) has allowed the contemporary mujtâhid to cite the passage in his fatwa addressing Muslims in Britain, and Ahmad Rida Khan to cite it in the context of British India (18 Ahmad Ridâ Khan, supra note 77, at 549-50). Couple this with rulings cited above that non-Muslims may appoint judges.
\item \textsuperscript{96} Al-Jawaynî (d. 478/1085—writing a century before al-‘Attâbî), for example, states something similar to the above passage al-Nâbulusî (Mîmâ‘ât al-Ḥaramayn Abû al-Mâ‘âlî ‘Abd al-Malik al-Jawaynî, Ghiyât al-Umam fî li-Tâyîth al-Zulam 280–83 (1979) (Egypt)). Although he belongs to the Shâfi‘î School, Ghiyât al-Umam (also known as al-Ghiyâtî) is a work of the Islamic governance genre (al-siyâsâ al-sharî‘îyâ al-fikr al-fiqî h al-siyâsî al-islâmi) akin to the contemporaneous al-Ahkâm al-Saltânîyya of al-Mawardi, supra note 42, and the book of the same name (and time) by al-Qâdi Abû Ya‘lâ (Muhammîn Ibn al-Husayn Ibn al-Farrâ‘, d. 458/1066). The contents of the book tend to accord with the consensus of the schools, indicating that there is convergence of the schools on this particular issue. Al-Nâbulusî himself in fact cites the Shâfi‘î scholar Nîr al-Dîn Abî al-Ḥasan ‘Abî al-Sanûhî (d. 911/1506), who says that this specific type of power (al-wilâyât al-khâṣṣa) vested in these scholars does not negate the general obligation to follow other Muslims scholars (mutâlîq) not vested with such powers (this work by al-Nâbulusî is also not restricted to the Hanafa School; in fact, it would not be considered a legal work as such because it engages with the full breath of Islamic disciplines to provide “religious guidance” to believers). Ibn Ismâ‘îl al-Nâbulusî, supra note 95, at 351–52. The scriptural basis for this obedience to scholars would stem from the Qur’anic verse (4:59): “O you who have believed, obey Allah and obey the Messenger, and those in authority among you . . .”
\end{itemize}
scholars, which would normally come under the judicial remit of an officially appointed judge. These areas of the law include leading the Friday and 'Id prayers, sighting of the new moon (establishing the new months), dissolving marriages (faskh al-nikāh), marrying orphans and others unable to marry independently, and other areas of Islamic law that are not at conflict with, or do not face any hindrance from, the laws of the land.97

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

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

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

97. 18 Aḥmad Rīḍā Khān, supra note 76, at 549. Also see, Mufti Ghulam Rasool’s fatwa mentioned above. Ahmad Rida Khan is writing in the context of British India while Mufti Ghulam Rasool’s fatwa was penned in present day London.

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

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

99. There are differences among the other schools here, as alluded to earlier.
101. In terms of understanding concordance and difference among Islamic legal schools (madhāhib), one can observe here that on the issue of migration and residence in non-Muslim lands, three of the schools hold the same view while the Mālikīs hold a distinctive one. In terms of extra-territorial jurisdiction, the position of the Ḥanafī School is unique in contrast to the other three that are in agreement.
of view. According to the other schools, Islamic law will hold them responsible from both a theological and judicial-legal point of view.

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

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

102. See for example, BERNARD LEWIS & BUNTZIE ELLIS CHURCHILL, ISLAM: THE RELIGION AND THE PEOPLE 10 (2009). Lewis basically says that Muslims came under non-Muslim rule either by conquest or by imperialism, and the thought of voluntary emigration never entered their thoughts.
mitigates this. The fact that traditional jurists today do not object to Muslims remaining indefinitely in non-Muslim lands, although much of the modern migration was initially for economic reasons as it was in pre-modern times, also shows there was nothing explicitly prohibitive in the sacred texts regarding emigration. This is not to mention that the home countries of these immigrants did/do not (always) rule by God’s law.103

VI. ISLAMIC LAW IN THE AMERICAN LEGAL SYSTEM

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

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

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

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

1 ABDULLAH MUHAMMAD IBN ISMAIL AL-BUKHARI, AL-JAM'I AL-SAHI, 2 (1893-95, reprint of the Bulaq edition) (Egypt) (Hadith report 1), and five other places in his collection; 6 ABU AL-HUSAYN MUHAMMAD IBN AL-HAJJAJ, AL-JAM'I AL-SAHI, 48 (1963, reprint of the Istanbul edition 1911-1915) (Egypt) (Hadith report 1907); and mentioned in all major collections (with slightly different wording). Scholars apply the Hadith unrestrictedly. Sufi travelers to non-Muslim lands are also well-documented as well as traders who also served as ambassadors for their faith (so improving one’s financial state was embedded within religious intentions for migrating).


105. Id. at 431, 434–35, 437–38.

106. Id. at 441–43. The Religious Freedom Restoration Act is a federal law but since 1997 (after the Supreme Court ruled that it could not be applied to states), 22 states have passed their own RFRAs that apply to their individual state and local governments.
Civil Rights Act of 1964 and the Religious Freedom Restoration Act of 1993. There are, of course, constitutional limitations in place that prevent the enforcement of contracts or penalties that interfere with compelling government or safety interests.\textsuperscript{107}

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

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

\textsuperscript{107.} Id. at 435–37, 443–45. \\
\textsuperscript{108.} These accommodations are not implemented by courts under the above acts but by other government agencies on an ad hoc basis relative to the desires of employers, students, customers, etc. Id. at 448. \\
\textsuperscript{109.} See Eugene Volokh, Foreign Law in American Courts, 66 OKLA L. REV. 219 (2014). In fact, one could say that the value the United States places on the diversity found in its interstate legal system—which acts to reflect the distinctive values of citizens in each state—makes it more amenable to accommodate foreign law. Particularly considering the fact that choice-of-law was conceptualized as a subset of the “general commercial law” of private international law for most of the country’s history. Although two Supreme Court rulings (in 1938 and upheld in 1941) declared a federal court sitting in diversity should apply the substantive laws of the forum state (\textit{lex fori}), Mark Rosen has argued that choice-of-law must be re-conceptualized as federal law. See Rosen, supra note 55. There is scope here to examine how such a framework could be useful for dealing with Islamic law (and foreign laws in general), not only because uniformity (of choice-of-law procedures) is necessary to determine predictability, but it would also reduce political interference. \textit{Id.} at 61–62 (a point pertinent to the politicized nature of debates surrounding Islamic law mentioned above). Incidentally, the defendants in the Oklahoma case cited above contended that the “[anti-Shari’a law] amendment is merely a choice-of-law provision that bans state courts from applying the law of other nations or cultures.” James C. McKinley Jr., Judge Blocks Oklahoma’s Ban on Using Shariah Law in Court, N.Y. TIMES, Nov. 29, 2010, http://www.nytimes.com/2010/11/30/us/30oklahoma.html. \\
\textsuperscript{110.} Awad, supra note 3. \\
\textsuperscript{111.} \textit{Id.} The Establishment Clause of the First Amendment, for example, already prevents courts applying foreign, international or religious laws that violate public policy.
contrary, the court cases cited by anti-Muslim groups as purportedly illustrative of this problem actually show the opposite.”

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

CONCLUSION

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

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

112. Nothing to Fear: Debunking the Mythical “Sharia Threat” to Our Judicial System, ACLU 1 (May 2011), https://www.aclu.org/files/assets/Nothing_To_Fear_Report_FINAL_MAY_2011.pdf. After presenting various cases (as Volokh does) to illustrate the point, the report concludes:

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

Id. at 5.

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