Minority *Fiqh* as Deliberative *Ijtihād*: Legal Theory and Practice

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Abstract

Deliberation is an essential characteristic of transmitting, interpreting, and teaching religious knowledge in Islam. During the Muslim community's formative period, the process of studying and reflecting on the Qur'an (*tadārus wa tadabbur al-Qur'ān*) was done collectively. Within the local context of Muslim communities living in the West, the deliberative *ijtihād* practiced by those involved in formulating minority *fiqh* is a symbolic form of collective action. This article examines several standpoints on deliberative *ijtihād*, namely, those of al-Alwani (who emphasizes epistemology and legal hermeneutics), al-Qaradawi (who tends to highlight the ummah's collective action, which faces challenges and carries on reforms), and Ibn Bayyah (who puts forward the public interest and decision sharing).

Relying on the public interest (*maṣlaḥah*) as being the core intent of Islamic law, minority *fiqh* develops a stronger concern for maintaining social ties in the West between Muslims and non-Muslims. Minority *fiqh* jurists perceive their task as providing a local western form of a universal deliberative *ijithād*, and insist that these councils of jurists be open to scholars of the natural and social sciences in order to uphold the concepts of community, consultation, and pluralism.

Introduction

Deliberation is an essential characteristic of transmitting, interpreting, and teaching religious knowledge in Islam. During the Muslim community's formative period, the process of studying and reflecting on the Qur'an (*tadārus wa tadabbur al-Qur'ān*) was done collectively. The idea of scientific circles (*ḥilaq al-'ilm*) in the mosques originated among those early Muslims who gathered

together around a scholar to learn and share knowledge. In the classical age (ninth to eleventh centuries), scholars developed deliberative methods to communicate knowledge of the Qur'an and Sunnah, such as recitation (*qirā'ah*), dictation (*imlā'*), assignment of a lesson (*muḥāsabah*), collective memorization (*dhikr*), and many others.

In particular, the field of juridical opinions (*iftā'*) evolved as a collective scientific activity of divergence of opinion, consultation, and discussion. Thus, deliberation has been particularly helpful in generating and developing legal schools (*madhāhib*). Not just the operative aspects of law are concerned (e.g., institutions, processes, communication, and contestation), for deliberation is also involved in very basic legal concepts (e.g., norms, reasoning, and customs). Above all, it intervenes as a process of making law through argumentation (*khilāf*), constructed rules (*qawā'id*), and consensual meanings (*ijmā'*). In Islamic jurisprudence, this undertaking can be described as the difference-consensus process through which jurists tried to solve the problem of multiple juridical opinions and complex realities. In various times and places, these difficulties compelled them to use collective methods to solve legal issues.

Within the local context of Muslim communities living in the West, I argue that the deliberative *ijtihād* practiced by minority *fiqh* is a symbolic form of collective action. In this form, action is an application of a hermeneutical understanding based on an ethical concern and practical reasoning. In this way, jurists engage in an effective dialogue, both within and without their communities, to respond to challenging western realities. On the one hand, given that Islamic law is indivisible from Muslim identity and ethics, jurists consider respecting its legal provisions (*fiqh*) to be a matter of daily life. On the other, Muslims in the West have to cope with different legislations, ethical principles, and social practices of the non-Muslim societies in which they live.

In the following pages, I will first discuss deliberative *ijtihād*'s theoretical background, as seen by Muslim legal theorists and minority *fiqh* jurists, and then define the concept of minority *fiqh* and discuss its developers. Subsequently, I will treat its function within the Muslim public space in the West and close by analyzing the hijab as a deliberative form of *iftā'*.

Deliberative Ijtihād *in Islamic Law: A Theoretical Setting*

Modern scholarship has understood deliberative *ijtihād* (*ijtihād jamā'ī*) in several quite different manners. Certain scholars equate consensus (*ijmā'*) and deliberative *ijtihād*, where consensus stands for "a form of collective *ijtihād*."[1]

This position considers *ijmā'*, the third source of Sunni Islamic law, as the origin of deliberative *ijtihād*. Further, since *ijmā'* itself is based on the Sunni principle of consultation (*shūrā*), deliberative *ijtihād* can be traced back to consultation. The goal of both processes is to reach a compromise, since unanimous agreement is necessary to solve juridical cases. As failing to resolve such issues would be inappropriate, a majority agreement is considered the next best option. But if they fail to reach even that, their endeavor cannot be considered deliberative *ijtihād*.[2] Nevertheless, a major difference between these two undertakings has to be stated here: If *ijmā'* is conditioned by the jurists' unanimous consensus, which is almost impossible to achieve if we consider the contemporary world's diversity, deliberative *ijtihād* is based on the majority principle and therefore accessible.[3]

A second perspective looks at "fatwa-giving committees as a novel form of collective *ijtihād*."[4] Here, emphasis is placed on the experts' complementarity of knowledge as regards combining their efforts and balancing opinions. As such, deliberative *ijtihād* seeks to make *ijtihād* an outcome of the comprehensive examination of a specific matter. In particular, when compared to the efforts of an individual jurist, who tends to consider partially the balance of benefit and harm in a juridical case, this form of *ijtihād* has the advantage of weighing between them. At any rate, it produces an opinion that is stronger than the individual's opinion. Under current circumstances, it is almost infeasible for an individual to attain a level of expertise equaling that displayed by fatwa-issuing committees. However, such an opinion is not obligatory. Even if a juridical council proclaims a ruling, an individual jurist's divergent opinion is worth considering by those who would like to follow it.[5]

Finally, a few reformist scholars perceive deliberative *ijtihād* as being embodied in a legislative assembly.[6] Given that this process involves consultation, it is seen above all as a representative body of the community. Despite this apparent similarity, if in a democracy elected parliamentary members legislate within positive law, then jurists are legislating within Islamic law. Further, that which is legislated by a parliamentary majority becomes binding, whereas deliberative *ijtihād* does not. These three standpoints (viz., consensus, fatwa-issuing committees, and legislation) are in fact embedded meanings within deliberative *ijtihād*'s structure and function. Although it does not result in an absolute consensus, it does reach a compromise to which a majority of jurists agree. Second, in the contemporary context it takes the form of a fatwa-issuing committee. As for legislation, deliberative *ijtihād* plays a parallel role to assemblies that, in a majority of Muslim societies, are regulated by positive law.

Granted that no agreement has been achieved yet with regard to deliberative *ijtihād*'s scope and meaning, the discussion here is limited to jurists of minority *fiqh*. These jurists have developed a legal reasoning that looks at deliberative *ijtihād* as a general category or a pre-condition that frames minority *fiqh*. Among them, Taha Jabir al-Alwani (b. 1935) has dedicated a great deal of his intellectual project to discussing this form of *ijtihād* as a collective legal undertaking that is part of the ummah's unity. He begins with the complexity of crises, problems, and realities that Muslims need to resolve with a "complex light" (*nūr murakkab*). The latter could be brought in only by means of a collective effort. He makes a strong statement that "no organism or elite or sect is able to cope with this complex darkness alone."[7] Not only are the realities complex, but the social sciences that help us grasp them are also undergoing tremendous change and fragmentation. Both complex realities and knowledge should push jurists to assert the necessity of deliberative *ijtihād*.[8] In other words, as individual hermeneutics cannot understand complex realities and texts on its own, a sort of collective hermeneutics is necessary.

Deliberative *ijtihād* should rely on "the epistemological complementarity of fields of inquiry which evolve in one universal framework attempting at dealing with human as well as natural phenomena."[9] Thus the philologist who dives deep into the meanings of a legal text by reviewing its interpretations in different historical periods enriches the deliberative character of *ijtihād*. Similarly, the ethnologist, historian, and archaeologist would be as effective as the philologist in exploring certain aspects of the legal texts. For al-Alwani, the importance of similar interdisciplinary contributions is shown through such scholars as Ibn Battutah (d. 770/1368) and Ibn Khaldun (d. 808/1406).[10] In the final analysis, complementarity should bridge the gap between the fragmented sectors of knowledge. As such, and within its universal logic, this implies a plurality of inquiries.[11] Since the purpose is to deal with complex realities, al-Alwani calls on the community to implement this complementarity/plurality through specific organs that would bring ideas into effective action.

M. A. Zaki Badawi noted al-Alwani's engagement with deliberative *ijtihād* in his preface to the latter's *Towards a Fiqh for Minorities: Some Basic Reflections*. The preface asserts that "al-Alwani calls for collective *ijtihād* that invites experts from the various fields of social science to play a major part in formulating new ideas and developing new perceptions."[12] Al-Alwani substantiates this claim by emphasizing collective action in his *Issues in Contemporary Islamic Thought* (2005), where he reiterates the necessity for all members of the ummah to seek reform through "collective and concerted action."[13] He justifies using collective *ijtihād* to resolve the many difficulties of

individual *ijtihād* and states that "we must adopt the principle of collective or institutional *ijtihād* based on diverse disciples and specialists outside the framework of current fatwa committees or *fiqh* councils."[14]

Whereas al-Alwani sees deliberative *ijtihād* from the perspective of epistemology and legal hermeneutics, Yusuf al-Qaradawi (b. 1926) perceives it as a form of collective action (*al-'amal al-jamā'ī*). He opines that collective action is needed now in the form of a complex jurisprudential structure that features a high level of contemporary scientific knowledge and issues its legal decisions after study and examination. In addition, it should have the benefit of courage and freedom from any governmental or people pressure. In his view, the ultimate purpose of any collective action is to serve and support Islam. He therefore calls for the establishment of collective organs[15] on the condition that they should go public because they can attain their objectives only when they are exposed to the public.[16]

Since these objectives are essential for the community and can be accomplished only through collective action, deliberative *ijtihād* is a duty and a necessity (*farīḍah wa ḍarūrah*): "Help one another to do what is right and good; do not help one another towards sin and hostility" (Q. 5:2).[17] He understands this verse and similar Sunnah texts as indicating that Muslims should gather together to be influential, and compares such action to mass production, since small-scale production is not competitive.[18] This is also a necessity, because reality forces Muslims to achieve major objectives, among them liberation from occupation, resistance to foreign danger, unification of the divided community, social justice, freedom, establishing consultative political systems, and human rights. Such tasks, he maintains, cannot be done via individual efforts.[19]

Lastly, Abd Allah ibn al-Shaykh al-Mahfudh ibn Bayyah (b. 1935) shares the same idea of deliberative *ijtihād* with these two scholars, although he differs with them in some aspects. For instance, he talks of deliberative fatwa (*al-fatwā al-jamā'īyah*; also *iftā' jamā'ī*), a form of collective consultation initiated by caliphs to consult the community's leaders and reach a consensual opinion. He refuses to call these deliberations *ijtihād jamā'ī*, since he defines *ijtihād* as the personal conviction of a *mujtahid* who strives to deduce a legal judgment. Ibn Bayyah establishes continuity between these early deliberations and the revival of Islamic law in the fourteenth and the fifteenth centuries.[20] In this regard, he asserts that "the Islamic world has revived the establishment of deliberative jurisprudential opinion through the establishment of international *fiqh* academies, whether official or independent and popular."[21]

Ibn Bayyah states that these councils should deal with those public issues that are crucial for the community. On the one hand, "they should deal with

political issues dealt with in political systems: *shūrā*, democracy and women's participation. On the other, they might treat economic issues such as investing in multinational companies taking into account the corruption that taints these companies or the involvement in organizations such as the GATT."[22] Furthermore, he admits that so far they have focused "on some social issues like the relationship between men and women in terms of reciprocal rights and duties."[23] Markedly, he highlights the political aspect of deliberative fatwa as a "revival of the Prophet's companions' custom which consists in consulting the community (*jamā'ah*) in public affairs."[24] This was the case, he maintains, with Umar ibn al-Khattab (d. 23/644), who rejected the idea that only a few members could address the community's issues, regardless of their level of scientific knowledge.[25] Rather, the collectivity should solve these issues and take the public interest into account.[26]

For Ibn Bayyah, two specific constituents need to be considered when inquiring into these issues: (1) a broad knowledge of all aspects of reality and a holistic vision that observes its different angles. Thus, such councils must give political, social, and economic experts a major status without granting them too much authority to issue legal judgments, and (2) juridical council members should upgrade their ability to handle such issues in order to acquire a balanced vision between the macro and micro levels. Given that they should bear in mind the law's purposes without discarding individual texts, they must create a relative continuity and meanwhile establish the comprehensiveness of the purposes. In other words, they should seek the middle way (*wasaṭīyah*).[27]

So far, this article has examined several standpoints on deliberative *ijtihād*, namely, those of al-Alwani (who emphasizes epistemology and legal hermeneutics), al-Qaradawi (who tends to highlight the ummah's collective action that faces challenges and carries on reforms), and Ibn Bayyah (who puts forward the public interest and decision sharing). In my view, each one looks at a specific facet of deliberative *ijtihād* and therefore they do not contradict each other. Deliberative legal hermeneutics might lead to collective action that benefits the public or, inversely, decision sharing will create a collective action that influences, in its turn, legal hermeneutics. Before analyzing how these conceptions intervene in the perception of minority *fiqh*, I will define the latter's scope and meaning.

The Concept and Developers of Minority Fiqh

Based on what has been presented above, any application of deliberative *ijtihād* should be done within the framework of reviving the ummah. As such,

it should take into account the balance among the universal Shari'ah, Muslim realities, and collective action. This section examines how minority *fiqh* came into existence as a deliberative *ijtihād* adapted to the western context.

The Concept. Minority *fiqh* (*fiqh al-aqallīyāt*) is a legal discourse that tries to respond to challenging private and public issues for Muslims living in the West. This concept is believed to have arisen first in 1994 when al-Alwani, an Iraqi Sunni jurist, sought to provide a legal framework for Muslims to participate in American elections.[28] Within the current literature, one can distinguish between legal reasoning and legal practice. As a form of legal reasoning, minority *fiqh* selects and emphasizes specific sources, procedures, and principles of Islamic law that are seen as promoting the Shari'ah's intents as opposed to its strict letter. As a form of legal practice, it is a set of legal opinions (fatwas) on specific problems that allow Muslims in the West to overcome everyday dilemmas.

The key element in both expressions is the attempt to reconcile Muslim law and ethics with the sociopolitical conditions facing these Muslims. Hence, minority *fiqh* is tailored for particular individuals and groups, whereas fatwas are meant to be specific to those involved. For this reason, it does not perceive its legal function as competing with traditional *fiqh*. Rather, it derives its references from the Shari'ah, which minority *fiqh* jurists consider to be general and universal, and focuses on principles and cases that provide indulgent answers to problems faced by minority Muslim communities.

With regard to its sources, minority *fiqh* has recourse to the primary sources of Sunni law, namely the Qur'an and Sunnah, consensus and analogy, as well as to such secondary sources as public interest, juristic preference, custom, and the opinion of a Companion.[29] However, it is highly selective when dealing with Muslim legal sources. One can look at this type of *fiqh* from both a closed-source and an open-source perspective. In the first case, minority *fiqh* seems to draw on a set of traditional sources and principles used in Islamic law for exceptional juridical cases, especially in forced situations or in the absence of specific religious texts. In this respect, one can compare it to a *fiqh al-ḍarūrah* (a jurisprudence of necessary cases) since it is dealing with exceptional cases (*ḥālāt istithnā'īyah*), for Muslims should normally live in Muslim lands. In this sense, necessity is the closed dimension of *fiqh al-aqallīyāt* for, as seen from this perspective, it is a legal process that reacts passively to those hardships facing Muslims in the West.

In particular, *maṣlaḥah* (public interest) is a central issue and approach here. Its theoreticians have argued that minority *fiqh* allows one to formulate

a pragmatic and adaptive attitude toward western norms and institutions. Thus they often reiterate the idea that if interests change, the legal opinions should also change according to time, place, and circumstances. As a result, public interest opens legal reasoning and practice to interacting with the context, seeking simplicity, and pro-activeness. Inversely, as al-Alwani has stated, such *fiqh* "applies to a specific group of people living under particular conditions with special needs that may not be appropriate for other communities."[30]

Although its supporters underline the individual's role in legal awareness and application, it is predominantly a collective jurisprudence. Cases of individual jurists making legal decisions with reference to minority *fiqh* remain limited. The major role is played by two organs: the ECFR (European Council for Fatwa and Research) in western Europe and the AMJA (Assembly of Muslim Jurists in America) in North America. This deliberative character of *fiqh al-aqallīyāt* enables the development of a legal approach that considers three conditions: the legacy of majority *fiqh*, the social condition of Muslim minorities in the West, and Muslims' legal obligations toward the laws of western societies.

The Developers. The credit for laying the foundations for minority *fiqh* should perhaps be accorded to al-Alwani. In 1999, his "An Introduction to Minority *Fiqh*: Foundational Insights" ("*Madkhal ilā Fiqh al-Aqallīyāt: Naẓarāt Ta'sīsīyah*") offered the first results of his reflection on the new subsection of fiqh. One year later he published (in Arabic) *Toward a Minority Fiqh for Muslims* (*Fī Fiqh al-Aqallīyāt al-Muslimah*), in which he argues for the necessity of *ijtihād* for Muslims in the West. His main concern seems to be the kind of constructive relations Muslims living there should establish with their non-Muslim counterparts. It should be noted that he is, above all, a specialist in *uṣūl al-fiqh*, and thus his interest in minority *fiqh*'s theoretical aspects is obvious. His intellectual project seeks to construct a new *ijtihād* that relies on a Qur'anic methodology that interacts with the social and natural sciences. For him, minority *fiqh*'s purpose is to develop a set of methodologies that make Islamic law and ethics flexible enough to be applied to the western context. His views were made accessible in English after his *An Introduction to Minority Fiqh* was translated and published as *Towards a Fiqh for Minorities: Some Basic Reflections* (2004).

Less theoretical and critical, but far more focused on legal practice, the Egyptian jurist and preacher al-Qaradawi (b. 1926) has authored one of the major foundational texts of minority *fiqh*: *The Jurisprudence of Muslim Minorities: The Life of Muslims among Other Societies* (*Fiqh al-Aqallīyāt al-*

Muslimah: Ḥayat al-Muslimīn wasaṭ al-Mujtama'āt al-Ukhrā) (2001). In his legal understanding, minority *fiqh* is part of a series of books on *taysīr al-fiqh li al-muslim al-mu'āṣir* (facilitating *fiqh* for contemporary Muslims). He shares with al-Alwani the centrality of *ijtihād* in shedding new light on modern sociopolitical issues. Nevertheless, in developing his "modern *fiqh*," al-Qaradawi draws more on his legal experience as a mufti. His formula is to combine traditional *fiqh* with an emphasis on public interest and moderation. He is often led to accept concessions for modernity on such issues as women and the state. Additionally, he conceives his version of minority *fiqh* as complementary to his *Religious Minorities and the Islamic Solution* (*Al-Aqallīyāt al-Dīnīyah wa al-Ḥall al-Islāmī*), which deals with non-Muslims living in Muslim societies. Above all, in respect to his presence in western Europe, al-Qaradawi seems to be motivated by a concern about the Muslims' religiosity and especially their secularization.[31]

Other recent contributions mostly illustrate the same issues discussed by al-Alwani and al-Qaradawi. The Mauritanian jurist Abd Allah ibn al-Shaykh al-Mahfudh ibn Bayyah (b. 1935), who published *The Making of Fatwā and Minority Fiqh: Ṣinā'at al-Fatwā wa Fiqh al-Aqalliyyāt* in 2007, stands close to the latter's style. Other jurists, preachers, and thinkers, mainly from Lebanon, Egypt, Tunisia, and Morocco (e.g., Khalid Abd al-Qadir, Salah al-Din Abd al-Halim, Abd al-Majid al-Najjar, and Isma'il al-Hasani) popularize the subject mainly by sticking to the line of reasoning elaborated by the above-mentioned authors. However, most of the Arabic-language literature on this topic has no direct contact with Muslim minorities in the West. Thus, *fiqh* and society belong to two different realms. Some jurists try to replace the necessary social asset for this type of *fiqh* with a philological work of terms and sources of *fiqh al-aqallīyāt*. At this point in time, their methodology seems to be a set of *ready-to-wear* concepts and processes that they apply to any sort of *fiqh*. Accordingly, the deliberative link based on embodying *fiqh* in everyday life is completely absent.

ECFR decision 5/12, issued in 2004, stipulates that it attributes special importance to *fiqh al-aqallīyāt* since it leads to an understanding of the Muslim presence in non-Muslim countries and to the application of Islamic legal provisions in that reality. In addition, it has reiterated the authority of al-Alwani, al-Qaradawi, and Ibn Bayyah as well as agreed that this concept is valid insofar as it fixes this subject within the legal provisions related to minority Muslim populations.[32] The ECFR mainly uses two procedures to issue legal decisions for them: (1) providing legal opinions (*iftā'*) to those individuals or groups that ask a question (*mustaftī*) through any communication media. It should be noted

that the rulings are not necessarily binding on the askers, for they can seek another opinion and choose the most convenient one, and (2) holding long collective deliberations on more controversial questions. Its decisions seem to seek western Muslims' positive participation without assimilation. Thus as a strategy of image improvement, it follows a more conciliatory line.

In the words of al-Najjar, the ECFR seeks to incarnate a sedentary, civic, and collective Muslim presence in Europe, as opposed to one that is accidental, individual, and circumstantial.[33] Nevertheless, this body often produces a *fiqh* that is, to a certain extent, adapted to the second kind. The latter is based on licentious laws and practices (*fiqh al-tarkhīṣ*), which is the type of *fiqh* most convenient for individual cases. He sees Europe's Muslims as primarily groups and individuals who have specific social links with their surrounding environment. This collective dimension should increase and strengthen in the future.[34] For this reason, minority *fiqh* has yet to produce a jurisprudence of foundation (*fiqh al-ta'sīs*) that would normalize their juridical status,[35] one that would treat their juridical cases as if they were a majority in a Muslim country.

Instead of dealing with the licit and the illicit in daily issues, major issues need to be tackled, including political participation and family matters. However, al-Najjar does not predict the end of minority *fiqh* once it becomes a jurisprudence of foundation; he simply appears eager to readjust the former's dependence on dispensation (*rukhṣah*) while it should be promoting the punctual application (*'azīmah*). If Europe's Muslims fail to transition toward a jurisprudence of foundation, there is a double risk: religious practice will weaken, and they will not be in a position to transmit Islam's message or be a cultural partner with non-Muslim Europeans.[36]

Similar to other juristic deliberative *fiqhī* bodies in the Muslim world that rely on collective *ijtihād*, legal diversity characterizes the ECFR's deliberations. One of its immediate outcomes is eclecticism, which is typical of juristic councils comprised of members with different juristic backgrounds from the Muslim world.[37] No prominent ECFR founders or authorities were born or raised in Europe. Since most of them live in the Muslim world, the ECFR reflects a variation on modern Islamic jurisprudence, seen within the projects of *fiqh* renewal.

Minority Fiqh within the Muslim Public Space in the West. Hitherto, we have examined minority *fiqh*, from its genesis to its maturity, as an application of a new deliberative *ijtihād*. Furthermore, its theoreticians and institutions helped to provide solid foundations for it. Be that as it may, any new juristic effort is stimulated by the society in which the jurisprudence evolves.

Like any other hermeneutic tradition, Muslim legal hermeneutics necessarily responds to a given human condition. Therefore, minority *fiqh* is expected to achieve its goals inasmuch as it interacts with the West's deliberative environment. Moreover, because of these societies' fragmentation of authority, especially of religious authority, minority *fiqh* becomes a Muslim voice in the public debate on Muslim issues.

Increasingly, many Muslim scholars and institutions have come to realize that one cause of their fragmented authority is modernity.[38] Granted that in any public space legal pluralism is recognized by religious authorities, one could speak of a *deliberative religiosity*, by which I mean controversial religious practices that become part of the public debate and subject to the admitted differences of "authorized" interpretations.[39] I subscribe to Robert Justin Lipkin's framing of this concept as a "religious argument that plays a full role in the public square."[40]

In addition to social conditions that enhance fragmentation, other hermeneutic factors make the process of *iftā'* in the West a multi-part one. A particular question arises with reference to the law/fact dichotomy in Islamic jurisprudence. In this regard, Muslim American scholar Sherman A. Jackson establishes an opposition between the ability to understand the scripture's implication (Qur'an and Hadith), which belongs to the authority of law and the ability to verify the reality of those elements that refer to the authority of fact.[41] In other words, just because a principle is universally Islamic does not imply that its particularization has been put correctly. He makes the point that if "a jurist states such and such is permissible or impermissible because of the existence of this or that fact, it remains the right – indeed the responsibility – of individual Muslims to ascertain for themselves (or through other qualified determiners of specific facts), whether or not these facts actually exist."[42] Thus, when it comes to deciding how Islamic law is going to be applied, individual Muslims have to prolong their deliberation on the matter at hand, either independently or with other Muslim authorities.

Since *fiqh* in the West is a locus of interplay between texts and facts, it has to keep the balance between the fatwa-makers and the audience. A new study on a mosque in southern France shows that questions and answers have the same significance in determining a Muslim ethical space. *Fiqh* deliberations became the result of "multivocal authorship, authority as answerability and casuistic reasoning."[43] The jurist uses the question and answer genre to teach his audience the tenets of Muslim ethics. Rather than preaching, he develops a practical reasoning that focuses on behaviors and constructs his authority as "inherently dialogical and based in his relationship to the mosque commu-

nity."[44] In this intellectual meeting, the audience is expected not only to listen, but also to challenge the imam's premises or even reject some of his conclusions. This interchange leads to a "collective ethical reflection, if not necessarily democratic endeavor."[45] The two dynamics of *fiqh*, the universalization of laws and the particularization of facts, establish the authority of Muslim ethos but also enhance the public's importance. The jurist must listen carefully to local voices in order to keep the discussion going until a consensus is reached.

Similarly, the public interventions of British Muslims with reference to 9/11 show how Muslims access the British "dialogical network" by expressing their reaction in the same or similar utterances of "a performative discourse that inscribes them in the inclusive category of those who condemn the terrorist attacks."[46] Thus, the capacity of western European societies to include Muslim minorities relies on the latter's ability to access these societies by means of the "Western cultural code." In this respect, L. Swaine noted that:

> Muslims seem to be fully able to take part in democratic deliberation, and that they violate no commandments of their faith by so doing"[47]:.. "Muslim minorities support liberty of conscience and religious liberty for all....via respectful argumentation and reasoning in public fora and also through the examples that they set in public and private life, in their interactions with others.[48]

Consequently, western Muslims are likely to shape any political construction in the West, inasmuch as they willingly promote the core interests of the societies in which they live. In particular, they would not have to expect Muslims in the West to follow the Shari'ah scrupulously, while aspiring to achieve a proactive role in the western political sphere. The only applicable requests, M. Benhanda reminds us, "are those made within the limits of public reason that is to say, claims are valid only when they rely on reasons consistent with the view of the person and society."[49] In other words, political liberalism allows Muslims to lead their own religious life but requires them to adhere, in an absolute manner, to its system of values on a universal basis.[50] The confrontation between liberalism and Islamic law becomes clear when a certain matter of consensus within Islamic juridical schools, such as inheritance rules, is discussed in the West.[51] For this reason, minority *fiqh* seems disposed to avoid "no through road" fatwas and tends to consider western societies' values and interests as well.

In this regard, A. March compares many of its thinkers to western theorists of discourse and deliberation who "reject an antagonistic, conflictual, zero-sum form of *da'wah* and debate in favor of something more collabora-

tive and open-minded."[52] Likewise, A. Caeiro argues for "a complex deliberative process that underlies the European Council for Fatwa and Research"[53] and describes the ECFR project as an attempt to "imagine an Islamic counter-public."[54] To be accurate, this project seeks to shape an imagined Islamic counter-public. However, it has to accept the extreme fragmentation of the western Muslims' religious sphere.

For instance, conservative Muslims contest the legitimacy of minority *fiqh* and criticize several points in its reasoning. They rely on traditional *fiqh*, which has limited recourse to customs in making laws and is restricted to cases in which scriptural regulations are missing. When the scriptural regulations are founded on custom, legal provisions can be changed when the custom changes. Thus, conservatives criticize especially al-Qaradawi's fatwa that a Muslim woman living in the West can remain married to a non-Muslim (forbidden by a Qur'anic regulation). If he relies on weighing interests and finds a stronger interest for Islam in maintaining social ties in the West between Muslims and non-Muslims, conservatives reject this pragmatic reasoning on the grounds that western reality should not be the source of legislation. On the contrary, western societies are just as subject to the authority of Islamic law as are Muslim societies.[55] In other words, conservatives reject the idea of integration within western societies and, therefore, any principle that could enable them, under Islamic terms, to interact with these societies.

Inasmuch as minority *fiqh* is a legal discourse that aims at affirmative action, its proponents do not worry about such criticism. Rather, they focus on the complex Muslim reality of western European societies, wherein the major concern is the weakening religiosity among young Muslims. Thus, their legal process focuses on preserving Muslim identity, predication, relations with non-Muslims, and providing legal knowledge. As such it is, so to speak, a missionary *fiqh* (*fiqh da'wah*). In many respects, minority *fiqh* appears to be a way to establish communication links among Muslims over daily matters and to prevent their overwhelming secularization in the West. Many critical European Muslim voices do not accept the involvement of Islamic universities (e.g., al-Azhar) or Muslim *fiqh* councils in committees of fatwas and in the making of minority *fiqh*. Nevertheless, the pluralism and deliberation that characterize the ECFR and AMJA sessions could, if opened to young European Muslims, play a significant role in the life of these Muslims. Furthermore, any development of minority *fiqh* should consider the public space in the West and work in accordance with it.

It has been stated that the fragmentation of religious authority in the western Muslim public space has made minority *fiqh* jointly share this space with

other Muslim representatives. In addition, the deliberative characteristics of western societies allowed this *fiqh* to critically assess the claims and arguments of its western opponents. Finally, its proponents show little interest in the conservatives' rejection of it as an innovation that alters the nature of Islamic law. Consequently, it represents a contribution to the development of a Muslim legal culture and a step toward the community's integration. In sum, *fiqh* in the West functions mainly as a counterculture that contests certain western values. In contrast, European societies say that their norms are not to be "offended" and thus demand uniformity. Muslim legal culture could eventually find its place as a legitimate part of western culture, provided that it is allowed to enter the public debate.

Case Analysis: Deliberating the Hijab. The dynamics of fragmentation and pluralism mentioned above help shape the scope of religious authority. As a result, diverging religious standpoints and multiple voices over religious questions coexist in the Muslim religious field in western Europe. In the following, I highlight the deliberative character of these communities' participation in the public space via the headscarf debate. The latter also illustrates the will, so to speak, of Muslim authorities and individuals to negotiate their integration in western European societies.

I suggest beginning with the case of a Muslim employee in the German state of Hessen, who appealed the notice at the Labour Courts of Appeal at Hessen to end her contract because of her hijab. The Federal Labour Court finally accepted her claim.[56] However, as M. Rohe has asserted, the solution is "probably not to be found, only, in the sphere of law."[57] For the most part, western societies view the hijab as a matter of culture, values, and biases. The democratic and humanitarian values of its legal order, in addition to the associated beliefs concerning it (e.g., the persecution of women and religious fundamentalism) are fundamental to the western sensitivity.[58] In other words, persuasion should not be individual in courts, case by case, for the hijab could give rise to an infinite number of cases. Rather, interaction should be done with the European public, admitting the need for constructing a public order in which Muslims should be allowed to participate in the construction of society and culture.

Although *sunnah* provides a model of Islamic law and ethics, its many principles and rules can be applied in various ways. For instance, a tribal Arab society sees modesty, which is strongly recommended in Islam, rather differently than a highly urbanized environment in Egypt. Social perception shapes, through beliefs and practices, how reticence is expressed. Islamic modesty, symbolized by the hijab, also raises the question of universality/particularity.

In fact, just wearing it establishes a double particularization: (1) it particularizes the female body from the male body, for Muslim clothing sets boundaries to prevent indecent exposure, and (2) hijab-wearing women practice a Qur'anic obligation in a western society that has a different standard of modesty. A recent sociological study reveals that the hijab allows women to go further than their particular feelings and modesty, for it is related to "a broader system of normative gender relations operating within the community at large and above all a type of practice through which one develops the moral dispositions necessary to carry out such a system."[59]

In the aftermath of the French parliament's outlawing "ostentatious" religious signs, including the hijab, in March 2004 the ECFR issued an important statement. Its legal decision condemned this decision and advised Muslims in France to stand up for their legitimate rights. It stated:

1. Coexistence is an Islamic principle that should regulate societies;
2. Coexistence cannot be applied without respect for individual and collective freedoms and the preservation of human rights;
3. There is no real incompatibility between the demands of pluralism and diversity on the one hand and national unity on the other;
4. The hijab is an act of worship and a divine prescription; it is not a simple religious act and certainly not a political symbol;
5. Compelling the Muslim to remove her hijab is an act of persecution of Muslim women, which is not in accord with the French values;
6. Banning the hijab constitutes religious discrimination against Muslims and is contrary to all western constitutions;
7. The board recommends that Muslims in France demand their legitimate rights and oppose this unjust law through peaceful and legitimate means, in words and acts, in accordance with the law;
8. The board invites government officials at all levels in France to reconsider this bill in accordance with the principles of national unity, social peace, and solidarity
9. To monitor this case, the board established a committee to present its views to the relevant departments in France, including Muslims, and to open the door for dialogue.[60]

Here, the ECFR clearly displays a sense of awareness that the hijab is not only a matter for jurists, but also a subject of concern to many voices within a multifaceted public space. The board of jurists also reveals its full understanding of the cultural code of the French public space by defending the hijab

against the accusation of disrupting French values. Besides, the ECFR is conscious of the fact that Muslim minorities have divergent understanding of texts and customs. Hence, it pinpoints that "it is not right either to take into account the outrageous behaviour of some Muslims to justify the deprivation of five million Muslims in France of their rights."[61] On the other hand, one has to be sensitive to the fact that even if many families can be identified as Muslims, this does not necessarily imply that the third-generation of Muslim immigrants is respecting Islamic ethics and law. On the ground, the majority of these individuals in France, as shown by sociological studies, do not practice Islam. A recent study shows that only 33 percent declare that they believe in and practice Islam.[62]

Interestingly enough, the ECFR used the argument of freedom vs. secularism, both of which express western values, to claim state neutrality with regard to their attire: "Secularism should not be either a justification to launch 'exclusion laws' that would result in destroying the most fundamental rights of man and his freedom: individual liberty and religious."[63] Regardless of the outcome, Muslim minorities came to discuss a legal matter (in Islamic law) with non-Islamic opponents in a non-Islamic public space with arguments borrowed from that same space. Be that as it may, this ongoing debate allowed them, and especially Muslim women, to be included in the public deliberation.

Further, the ECFR drew attention to the fact that this particular French law isolates those who wear the hijab: "National unity must not at any rate constitute a pretext to trample on individual and religious freedom, or threaten the opportunities of French Muslims and others in education, and to marginalize their role as citizens. Such behavior would push Muslims in isolation instead of making contacts with other French citizens."[64] Here, the council rejects the law by virtue of national unity, inclusiveness, and social equity. In other words the ambiguity of the French law, motivated by sociopolitical concerns, is deconstructed by the same claims to which it refers.

For the most part, the statement's last three points emphasize its deliberative character. First, it recommends that Muslims in France "demand their legitimate rights, and oppose this unjust law, using peaceful and legitimate means, in words and acts, in accordance with the law."[65] Further, it encourages them to seek the support of other Muslims despite the disagreement on wearing the hijab. If we take public deliberation in the sense of voting, campaigning, letter writing, and pamphleteering,[66] then Muslim women largely responded to the conditions of political deliberation. As for the outcomes, one must admit that deliberation did not achieve consensus.

Subsequently, it invites the French authorities "to reconsider this bill in accordance with the principles of national unity, social peace and solidarity."[67] In this regard, the statement calls upon Muslims to cooperate with non-Muslims who are willing to defend this right on the "principles of individual freedoms, religious and human rights, even if they do not share the same beliefs and religious practices."[68] Al-Qaradawi himself had a dialogue with the French prime minister and expressed "his annoyance with the law banning the hijab."[69] Thus one can say that Anver Emon is not wide of the mark when he sees in the immigrant Muslim woman "the challenge of accommodating minorities amidst a universal, albeit ambiguous, claim of French core values."[70]

Finally, the statement encourages Muslim jurists to continue their deliberations by announcing the formation of a "committee from among its members, to present its views to the relevant departments in France, including Muslims, to open the door for dialogue."[71] These three points plainly illustrate the council's readiness for collective action with the French Muslim community and western societies.

Conclusion

Overall, the ECFR has shown a constant interest in deliberating within the *fiqh* council, with other voices in the French Muslim community, with French civil society, and with political actors. Within the Muslim milieu, deliberative *ijtihād* carried out via minority *fiqh* has led to affirmative action. The ECFR handled the case of the hijab in a way that allowed it to keep up an ongoing deliberation between the jurists and the public. Thus, minority *fiqh* jurists showed their commitment to preserving Muslim identity, being religious authorities after all, while displaying their awareness of the complex realities faced by Muslims in the West.

Relying on the public interest (*maṣlaḥah*) as being the core intent of Islamic law, minority fiqh develops a stronger concern for maintaining social ties in the West between Muslims and non-Muslims. At this point, it clearly promotes integration and, accordingly, any principle that could enable these Muslims, while safeguarding the Islamic way of life, to interact with their non-Muslim counterparts.

Furthermore, minority *fiqh* jurists perceive their task as providing a local western form of a universal deliberative *ijithād*. Thus they consider the latter a necessity for any renewal of Islamic law. This being the case, reform should not be achieved only within juristic councils or via jurisprudence. On the contrary, minority *fiqh* jurists insist that these councils be open to scholars of the

natural and social sciences and call upon them to establish an effective link with Muslim societies. In other words they uphold, in deliberative terms, the concepts of community, consultation, and pluralism.

Endnotes

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4. Muhammad Khalid Masud et al., "Muftis, Fatwas, and Islamic Legal Interpretation," in *Islamic Legal Interpretation: Muftis and Their Fatwas*, ed. Muhammad Khalid Masud et al. (Cambridge, MA: Harvard University Press, 1996), 30.
5. Ibrahim, "Al-Ijtihād al-Jamā'ī," 367.
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7. Taha Jabir al-Alwani, *Ab'ād Ghā'ibah 'an Fikr wa Mumārasāt al-Ḥarakāt al-Islāmiyyah al-Mu'āṣirah* (Cairo: Dar al-Salam, 2004), 100.
8. Ibid., 98.
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10. Ibid., 97.
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19. Ibid.
20. Abd Allah ibn al-Shaykh al-Mahfudh ibn Bayyah, *Ṣinā'at al-Fatwā wa Fiqh al-Aqalliyyāt* (Jeddah: Dar al-Minhaj, 2007), 148-49.
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22. Ibid.
23. Ibid., 149.
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28. Muhammad Khalid Masud, "Islamic Law and Muslim Minorities," *ISIM Newsletter* 11 (2002): 17.
29. Yusuf al-Qaradawi, *Fiqh of Muslim Minorities* (Cairo: al-Falah Foundation for Translation, 2003), 8-12.
30. Al-Alwani, *Towards a Fiqh for Minorities*, 3.
31. For a comprehensive study of al-Qaradawi's minority *fiqh*, see Sarah Albrecht, *Islamisches Minderheitenrecht Yūsuf al-Qaraḍāwī Konzept des fiqh al-aqalliyyāt* (Würzburg: Ergon-Verl, 2010).
32. "Al-Bayān al-Khitāmī li al-Dawrah al-'Ādiyah al-Thāniyah 'Ashrah li al-Majlis al-Urūbī li al-Iftā' wa al-Buḥūth," Dublin, December 31, 2003-January 4, 2004, http://www.e-cfr.org/ar/index.php?ArticleID=280.
33. Abd al-Majid al-Najjar, "Fiqh al-Aqalliyyāt bayna Fiqh al-Tarkhīṣ wa Fiqh al-Ta'sīs: Al-Majlis al-Urūbī li al-Iftā' unmūdhajan," *Al-Nadwah al-'Ālamīyah ḥawla Fiqh al-Aqallīyāt* (Kuala Lumpur: 2009): 13-14.
34. Ibid., 20-22.
35. Ibid., 23.
36. Ibid.
37. The ECFR's functioning has been thoroughly investigated in Alexandre Caeiro, "The Social Construction of Shari'ah: Bank Interest, Home Purchase, and Islamic Norms in the West," *Die Welt des Islams* 44 (2004): 351-75. Alexandre Caeiro, "The Power of European Fatwas: The Minority *Fiqh* Project and the Making of an Islamic Counterpublic," *International Journal of Middle East Studies* 42 (2010): 435-49.
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39. Jean-Paul Charnay has described this pluralistic Muslim legal process as being "une recherche entre diverses solutions pour découvrir la plus adéquate au cas concret envisagé. Elle permet aussi la lutte dialectique des prétentions opposées

qui s'affrontent au cours du litige." See Jean-Paul Charnay, "Pluralisme normatif et ambigüité dans le Fiqh," *Studia Islamica* 19 (1963): 78.

40. Robert Justin Lipkin, "Reconstructing the Public Square," *Cardozo Law Review* 24 (2003): 2082-86.
41. Sherman A. Jackson, "Muslims, Islamic Law, and the Sociopolitical Reality in the United States," *The American Journal of Islamic Social Sciences* 17 (2000): 10.
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43. Kirsten M. Yoder Wesselhoeft, "Making Muslim Minds: Question and Answer as a Genre of Moral Reasoning in an Urban French Mosque," *Journal of the American Academy of Religion* 78 (2010): 795.
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59. Daniel Winchester, "Embodying the Faith: Religious Practice and the Making of a Muslim Moral Habitus," *Social Forces* 86 (2008): 1770-1171.
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The deliberative *ijtihād* practiced by minority *fiqh* is a symbolic form of collective action. He first says that deliberation has a historical role in *fiqh*. He compares three modern views, those of Taha Jabir al-Alwani (collective hermeneutics [epistemological complementarity]), Yusuf al-Qaradawi (collective action), and Abdullah Mahfudh ibn Bayyah (uses *deliberative fatwa*, because *ijtihād* is by nature individual rather than deliberative). These views are complementary rather than competitive. Deliberative *ijtihād* does not compete with traditional *fiqh*, but derives references from it and focuses on reaching decisions for Muslims in a minority situation. The goal is simplicity and pro-activeness.

The capacity of western societies to accommodate Muslim practices requires Muslims to access the western cultural code to negotiate their position. Any development of minority *fiqh* must accept and work within the western public space. He illustrates this by the European Council for Fatwa and Research's (ECFR) approach to the hijab controversy in France. Its fatwa calls upon Muslims to demand their legiti-

mate rights and oppose unjust law through peaceful, legitimate, and legal means; appeals to the government to stand by its own goals of national unity, social peace, and solidarity; and urges Muslims to engage in dialogue with the appropriate government bodies. Belhaj says that these points show that discussing the hijab is not reserved only for Islamic jurists, but must include many voices in the public space. Public deliberation includes voting, campaigning, letter writing, and personal engagement with a variety of civil and political actors.