

Shari'a in the Modern Era: Muslim Minorities Jurisprudence

*Iyad Zahalka (trans. Ohad Stadler and Cecilia Sibony)
Cambridge: Cambridge University Press, 2016. 224 pages.*

Iyad Zahalka's commendable *Shari'a in the Modern Era: Muslim Minorities Jurisprudence* gives researchers and legal practitioners an overview of the emerging *fiqh al-aqalliyāt* (the jurisprudence of minorities) discipline. In fact, at the time of its publication several other books were published on this subject, among them Uriya Shavit's *Shari'a and Muslim Minorities: The Wasati and Salafi Approaches to Fiqh al-Aqalliyāt al-Muslima* (Oxford: Oxford University Press, 2015) and Said Fares Hassan's *Fiqh al-Aqalliyāt: History, Development, and Progress* (New York: Palgrave Macmillan, 2016).

Zahalka credits Shavit with giving him useful comments while preparing *Shari'ah in the Modern Era*.

It is no coincidence that all of these books are from a Sunni perspective with particular focus on the works of two well-known scholars in the Sunni legal world: Yusuf al-Qaradawi and Taha Jabir al-Alwani (d. 2016). Zahalka's book, therefore, captures the gradual creation of another – or perhaps a new – branch of *fiqh* that focuses on the socio-legal issues faced by Muslims ruled by non-Muslim sovereigns or systems that conflict with Islamic law. His objective is to examine the “*fiqh al-aqalliyyāt* of the *wasatī* faction, a school of thought dominated by the Muslim Brotherhood that positions itself in the middle ground between conservative resistance to changing religious laws and the disintegration of the commitment to religious tradition” (p. 4). The author identifies this conservative resistance as coming from the Salafī school of thought, which rejects using *ijtihād* and any creative legal development to respond to modern challenges. Specifically, he concentrates “on the development of the *fiqh al-aqalliyyāt* doctrine, its major trends and influence on Muslims residing in the West, and the manner in which they deal with the public and legal ramifications” (p. 6).

The book's context is intriguing, for Zahalka is a *qādī* (judge) of the Shari'a Court of Jerusalem and former director of Israel's Shari'a Court system. He directs his attention to the legal experiences of Muslims living in Israel in terms of understanding and practicing their law, just as he did when analyzing the experiences of Muslims in the United Kingdom. This gives the book a decidedly practical tone, and it is therefore of interest to Muslim and non-Muslim legal practitioners. Chapter 1 deals with this emerging discipline's theoretical background and evolution, chapter 2 presents its methodology and implementation in personal status law, chapter 3 deals with the Shari'a's implementation in general and that of the jurisprudence of minorities in particular, chapter 4 explains the case of Israel in the context of this discipline, and chapter 5 provides some thoughts on its future.

After overviewing the classical jurisprudential law on Muslim minority issues according to the four Sunni *madhāhib*, the author explains what he considers to be new jurisprudential laws, via this new *fiqh*, that not only breaks from the classical *dār al-Islām* (the territory of Islam) and *dār al-ḥarb* (the territory of war) paradigm, but also attempts to offer creative solutions for Muslim minorities. He then elaborates upon the jurisprudential methodology behind arriving at these new solutions as regards such issues as mortgage, marriage, divorce, and the appointment of Muslim and non-Muslim judges, and then uses interviews, data, and sociological analysis to assesses how they are implemented by Muslims living in the West.

The book seeks to present a view of Muslim jurisprudence that can respond to the modern era's unique social situations. At the same time, Zahalka argues that the *fiqh* of minorities does not break from the past's legal methodology, but rather extends its scope by using principles articulated by previous jurists, such as

the objectives of the shari'a (*maqāsid al-shari'a*) ... priorities in jurisprudence (*fiqh al-awlawiyyāt*), balance in jurisprudence (*fiqh al-muwāzanāt*) ... opting for the lesser of two evils (*akhaf al-ḍararayn*) ... annulling a decree in case of necessity (*darūra*), or under certain circumstances when a need becomes a necessity, thus overruling a decree or religious law (*al-hajiyat al-munāzila manzila al-ḍarūrāt*). (p. 188)

All of these jurisprudential tools are applied within Shatibi's formulation of what he considered the Shari'a's goals: "(1) the preservation of religion; (2) the preservation of the soul; (3) the preservation of mental capacities; (4) the preservation of the lineage; and (5) the preservation of property" (p. 64).

What Zahalka argues is that al-Qaradawi's usage of these tools to create solutions for Muslim minorities in western countries is a sign of Muslim jurisprudential creativity. He cites numerous examples from al-Qaradawi's own works, as well the cases received by the European Council of Fatwa and Research (ECFR) to prove this. These include al-Qaradawi's opinions that Muslims may take out mortgages despite paying and receiving interest, serve in the army of a non-Muslim state when it faces an external threat, a female convert can remain married to her non-Muslim husband under certain conditions, and a Muslimah may marry without her guardian's consent if the man's piety is unquestionable (pp. 98-107).

Despite these new rulings, several of which stem from his opinions, the book has certain theoretical limitations. For example, Zahalka rarely delves into the nature of the Shari'a itself, namely, what does God intend for human beings on a philosophical and metaphysical level? How does a vision of the Shari'a transform a Muslim jurist's legal outlook? The answers to these second-order questions would necessarily affect this discipline's *wasaṭī* approach, which he claims to be the most effective approach in dealing with Muslim minorities in the West. He states,

I believe that the doctrine [i.e., *fiqh al-aqalliyāt*] has developed on the principle of religious law, and constitutes more than a judicial approach designed to rule on specific cases. In my opinion, *fiqh al-aqalliyāt* presents an innovative religious law as it is manifested in the primary sources of sharia. (p. 187)

The problem here is that he has assumed an understanding of religious law that is fused with past jurists' deliberations upon it. For example, the Shari'a objectives formulated by al-Shatibi and al-Ghazali reflect a defensive approach to law: the preservation of religion, soul, mental capacities, lineage, and property. One may question why law should be framed in this way, when it could be conceived of in terms of the individual's dignity, the rights discourse, or an existentialist view of the human being that emphasizes self-determination.

This kind of analysis requires a deeper engagement with the primary sources of the Shari'a and their conceptual meaning – a point he alludes to by mentioning the thoughts of al-Alwani, who, in contrast to al-Qaradawi, believes that we must reinterpret primary source material. Al-Alwani opposes the claim that *fiqh al-aqalliyāt* is based on needs and necessities because it is not enough to accept religious tradition at face value or to amend laws in accordance with *uṣūl al-fiqh*. In addition, *fiqh al-aqalliyāt* should not be regarded as just another branch of *fiqh*, but rather as a more encompassing jurisprudential system.

Despite mentioning both scholars' approaches, Zahalka concludes that “nevertheless, both approaches produce similar religious laws, as the disparity in the final outcome is inconsequential and only apparent on the level of principle” (p. 69). Actually, the outcome is extremely consequential because al-Alwani's approach has major long-term implications for the Shari'a's very nature. If it is something more than just examining the needs and necessities of individuals, then *fiqh al-aqalliyāt* becomes a very different jurisprudential system altogether. Ironically, the author's own analysis of al-Qaradawi's stance shows the limitation of the current worldview on *fiqh al-aqalliyāt*.

Like Qaradawi, Halawa believes that alleviation for Muslims in Europe stems from a similar position to that of *fiqh al-da'if*, religious law for the frail. In this sense, the relief does not derive from a particularised religious law for minorities but rather from a general religious law that seeks to alleviate the burdens of the weak; this may be compared to the ways in which a sick person is entitled to unique laws due to his condition. (p. 70)

This analogy reflects a core tension in how the Shari'a is conceived – those who cannot practice its already accepted notions are regarded as exceptions to be dealt with through legal remedies. If this is really the case, then Islamic law cannot be classed as “innovative” because it considers human conditions as stagnant with exceptions, rather than as evolutionary. The emerging works of Shaykh Arif Abdulhussain of the Al-Mahdi Institute in the United

Kingdom as to the nature of the Shari'a would significantly help Zahalka's theoretical discussions about the nature of religious law itself.

It is also unfortunate that the author does not comment upon the Shi'i experience of being a minority in comparison with the Sunni majority, as well as their own experiences of migrating to western countries. An investigation here would have revealed that over the last 30 years, Shi'i jurists have been producing fatwas for Shi'is who face difficulties living in the West – Ayatullah Ali al-Husseini al-Sistani's *Fiqh li al-Mughtarabīn (Jurisprudence for Migrants)*; <http://www.sistani.org/arabic/book/17/956/>) and Abd al-Hadi al-Fadli's *Buḥūth Fiqhīyah Mu'āṣirah (Contemporary Jurisprudential Discussions)* (Beirut: Markaz al-Ghadir, 2014) being prime examples. Their fatwas are not without criticism, but they would broaden the scope of Zahalka's research.

The other major omission in Zahalka's sources are the key works by Asaf A. Fyzee that demonstrate how Muslim law worked alongside British law in colonial India. Despite the Eurocentric and Orientalist influences present in Fyzee's works, he has fulfilled the important task of outlining how both legal systems were able to coexist and influence each other. His four categories of Muhammadan law would be useful in conceptualizing *fiqh al-aqalliyyāt*: "Muhammadan law is the same as English law but English terms, phraseology and doctrines are employed; Muhammadan law is modified by doctrines of the common law or equity; Muhammadan law is varied by custom; Muhammadan law is abolished or modified by statutory law" (Tahir Mahmood, ed., *Cases in the Muhammadan Law of India, Pakistan, and Bangladesh*, 2d ed. [Oxford: Oxford University Press, 2005], xxv).

In summary, Zahalka's *Shari'a in the Modern Era* is an important and useful addition to this growing discipline. He is to be commended for providing an accessible overview of the subject-matter. A legal practitioner's view is always useful, for it allows us to become acquainted with real cases and problems. There does need to be a greater engagement with primary source material, such as the Qur'an and Hadith, English legislation as well as biographies of the scholars that Zahalka cites. However, this does not detract from his objectives. Zahalka is accurate in saying that to date, *fiqh al-aqalliyyāt* has been not treated as a discipline in its own right. He succeeds in not only raising this concern, but also in providing critical insight into the debates over the discipline.