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# Religious Minorities and Islamic Law: Accommodation and the Limits of Tolerance

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## A. Introduction

At the discursive intersection of Islamic law and the rights of minorities lies a difficult, and often politicized, inquiry into the Islamic legal treatment of religious minorities—in particular non-Muslim minorities who permanently reside in the Islamic polity, known as the *dhimmis*. Legally, the *dhimmi* pays a poll tax (*jizya*) to enter into a contract of protection under which he is permitted to reside peacefully within Muslim lands and preserve his faith commitments. The contract of protection, or the *'aql al-dhimma*, is a politico-legal device that embraces the content of the *dhimmi* rules, outlining the terms under which the *dhimmi* lives in the Islamic polity and the degree to which his difference will be accommodated or not. In the premodern legal literature, *dhimmis* are subjected to various rules regulating the scope of what modern lawyers would call their freedom and liberty, whether to manifest their religious beliefs or to act in ways contrary to Islamic legal doctrines but in conformity with their own normative traditions. The premodern regulations are often called ‘the *dhimmi* rules’, which will be used hereinafter as a shorthand to refer to the vast body of rules that govern the conduct of *dhimmis* in the Muslim polity.

The *dhimmi* rules often lie at the centre of debates about whether the Islamic faith is tolerant or intolerant of non-Muslims. Some suggest that these rules are important indices of the inherent intolerance in the Islamic tradition, and therefore of Muslims themselves.<sup>1</sup> Others suggest that these rules had only limited real-world application and should not be considered characteristic of the Islamic legal treatment of religious minorities. Both sets of arguments are not without evidence. The first view is bolstered by historical incidents of persecution, premodern rules that

<sup>1</sup> For a concise overview of the myths and counter myths, see Mark Cohen, ‘Islam and the Jews: Myth, Counter-Myth, History’ in S Deshen and W Zenner (eds), *Jews among Muslims: Communities in the Precolonial Middle East* (New York: New York University Press, 1996), 50–63.

discriminate on religious grounds, and reports of human rights monitoring groups that detail incidents of persecution (both official and unofficial) against non-Muslim citizens of Muslim-majority states today. The second view finds support in historical records that illustrate the important role non-Muslims played in Muslim-ruled lands, whether economically, politically, or otherwise.

Given the aim and purpose of this book, a treatment of the *dhimmi* rules seems appropriate. Indeed, along with the other topics addressed herein, the treatment of minorities generally, and religious minorities in particular, has been an important index of the quality of freedom and dignity that a given legal system fosters. Whether that system is medieval or modern, religious or secular, the treatment of minorities remains highly sensitive. For some, the sensitivity of the issue is framed in terms of the language of ‘tolerance’. This essay, however, will suggest that to use ‘tolerance’ to frame the debate on minorities all-too-often misses the larger socio-political conditions that make debates about tolerance intelligible, meaningful, and relevant in a given historical moment. Indeed, frequently among philosophers and political scientists, tolerance is decried as a cover that hides the underlying dynamics of governance amidst pluralism.<sup>2</sup> In other words, to use ‘tolerance’ to frame the analysis of the treatment of minorities is to look past how the meaningfulness of being a minority is dependent upon the extent to which majoritarian values animate the governing enterprise that rules in a context of diversity. This political reality is not unique to the Islamic legal tradition; it is a shared feature of legal systems across both space and time. Consequently, this brief study of the *dhimmi* rules significantly qualifies the use of ‘tolerance’ as a meaningful term of art, and instead recognizes that the *dhimmi* rules are symptomatic of the more general (and shared) challenge of governing pluralistically.

## B. Myths and counter myths: the *dhimmi* rules and the limits of tolerance

The academic interest in the *dhimmi* rules has much to do with the fact that they are facially discriminatory in ways that offend contemporary sensibilities. There is no denying the fact that such rules discriminate because the *dhimmi* is not a Muslim. Examples of such rules include: limitations on whether *dhimmis* can build or renovate their places of worship; clothing requirements that distinguish *dhimmis* from Muslims; a special tax liability known as the *jizya*; and their incapacity to serve in the military.

Those writing about the *dhimmi* rules sometimes indulge certain myths about Islam, which are principally interpretations of history that do not contend with the complex tensions and interests at play when governing a pluralist polity.<sup>3</sup> The two predominant myths hovering over the *dhimmi* rules are those of harmony and

<sup>2</sup> See for instance, Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2008).

<sup>3</sup> For a concise overview of the myths and counter myths, see Cohen, ‘Islam and the Jews’.

persecution. Adherents of the myth of harmony argue that the different religious groups coexisted in peace and harmony, with each non-Muslim group enjoying a degree of autonomy over its internal affairs. This image is constructed by reference to periods of Islamic history where the different religious groups seem to have co-existed without substantial turmoil or persecution. For instance, considerable ink has been spent on the history of Andalusian Spain. This period is often described as one of harmonious interaction between Muslims, Jews, and Christians, and posited in contrast to a soon-to-come Reconquista and Inquisition led by a Catholic Spain. For instance, María Rosa Menocal writes:

In principle, all Islamic polities were (and are) required by Quranic injunction not to harm the dhimmi, to tolerate the Christians and Jews living in their midst. But beyond that fundamental prescribed posture, al-Andalus was . . . the site of memorable and distinctive interfaith relations. Here the Jewish community rose from the ashes of an abysmal existence under the Visigoths . . . Fruitful intermarriage among the various cultures and the quality of cultural relations with the dhimmi were vital aspects of Andalusian identity . . .<sup>4</sup>

Menocal does not ignore the fact that tensions existed in the Andalusian period. But those tensions were not always between religious groups. Rather, as she notes, much political friction existed among the Muslim ruling elites, thereby rendering minority groups important political allies to different elite factions among the Muslim populace.

Notably, Menocal's work contributes to an ongoing debate within Andalusian studies, in particular about whether the climate of 'tolerance' in fact existed, or whether to frame that period in terms of tolerance adopts a too-presentist perspective on any reading of the past. As Anna Akasoy reminds us, '[p]opular attitudes still reveal a simplistic general picture, but debates among historians are now much more nuanced'.<sup>5</sup> That nuanced historical reading reveals serious concerns about the sources available, and the kinds of historical data that can be gleaned from them, keeping in mind the historical Andalusian context, as opposed to any present context or set of values. For Akasoy, an important lesson to be gained from the focus on Andalusian Spain is how that history is instrumentalized for contemporary ideological purposes. She concludes: 'one lesson to be learned not so much from history . . . but from the way it is presented is just how much negotiating the past is part of negotiating the present'.<sup>6</sup>

Additionally, those adopting the myth of harmony might privilege historical practice over legal doctrine, or argue that the rules were more academic than reflective of a lived reality. For instance, while some rules prohibited non-Muslims from holding high governmental office, historical records show that non-Muslims held esteemed positions within ruling regimes, often to the chagrin of Muslim elites.<sup>7</sup> Others argue

<sup>4</sup> María Rosa Menocal, *How Muslim, Jews, and Christians Created a Culture of Tolerance in Medieval Spain* (Boston: Little, Brown and Company, 2002), 30.

<sup>5</sup> Anna Akasoy, 'Convivencia and its Discontents: Interfaith Life in al-Andalus' (2010) 42 *International Journal of Middle East Studies* 489–99, 491.

<sup>6</sup> Akasoy, 'Convivencia and its Discontents', 498.

<sup>7</sup> Mark R Cohen, 'Medieval Jewry in the World of Islam' in *The Oxford Handbook of Jewish Studies*, ed Martin Goodman (Oxford: Oxford University Press, 2002), 193–218; Roger M Savory, 'Relations between the Safavid State and its Non-Muslim Minorities' (2003) 14(4) *Islam and Christian-Muslim Relations* 435–58.

that despite its application to *dhimmis* only, the *jizya* tax was merely an administrative matter used to organize society. *Jizya* was a non-Muslim tax whereas the charitable *zakat* tax was the Muslim one. They argue that both groups paid taxes and, as such, the *jizya* should not be considered a discriminatory tax that speaks to an underlying Muslim intolerance of the religious Other.<sup>8</sup>

The myth of harmony stands in stark contrast to the myth of persecution. This myth suggests that endemic to the Muslim mindset is a notion of the non-Muslim as not only the *Other*, but also as subservient, submissive, and politically disempowered. Those adopting the myth of persecution justify their position by referring to the *dhimmi* rules, as well as historical accounts of Muslim rulers oppressing non-Muslims.<sup>9</sup> Consequently, while the myth of harmony considers the law as a mere technicality found in academic books, the myth of persecution relies on the law to illustrate Islam's inherently intolerant nature. Importantly, contemporary beliefs and attitudes about tolerance and pluralism are often anachronistically projected backward as standards by which to judge the past.<sup>10</sup>

Perhaps the most alarmist works adopting the myth of persecution are the studies by Bat Ye'or, the pseudonym of an independent scholar of Egyptian-Jewish origins. Notably, her work on the *dhimmi* has been criticized as less than scholarly.<sup>11</sup> That does

<sup>8</sup> Abdelwahab Boudhiba, 'The Protection of Minorities' in A Boudhiba and M Ma'ruf al-Dawalibi (eds) *The Different Aspects of Islamic Culture: The Individual and Society in Islam* (Paris: UNESCO, 1998), 331–46, 340–1. See also, Ghazi Salahuddin Atabani, 'Islamic *Shari'ah* and the Status of Non-Muslims' in *Religion, Law and Society: A Christian-Muslim Dialogue* (Geneva: WCC Publications, 1995), 63–9, who writes that religious classifications in Islam are for making distinctions in the hereafter, but not in worldly terms. He writes that the *dhimmi* concept was not one of disparagement, but rather allowed historical minority communities to maintain the distinctiveness they needed to survive. In other words, it was a means of preserving religious pluralism, not squashing it. Likewise, see also, Fazlur Rahman, 'Non-Muslim Minorities in an Islamic State' (1986) 7 *J Inst Muslim Minority Affairs* 13–24, 20, who writes that the *jizya* was a tax in lieu of military service. Furthermore, not all non-Muslims paid the *jizya*. He refers to 'Umar's receipt of the *zakat* from a Christian tribe as an example. This is likely a reference to the Banu Taghlib. Notably, Rahman does not mention that Banu Taghlib was required to pay a higher rate of *zakat* tax than Muslims, which some have suggested equaled the amount they would have paid under a *jizya* scheme.

<sup>9</sup> Notably, rulers often referred to *Shari'a* to justify their persecution; but often they did so as a pretext in order to satisfy the political demands of special interest groups among the Muslims and to preserve their legitimacy as Muslim rulers over a sometimes fractious polity. See, for example, John O Hunwick, 'The Rights of Dhimmis to Maintain a Place of Worship: A 15th Century Fatwa from Tlemcen', (1991) 12(1) *al-Qantara* 133–56; C E Bosworth, 'The Concept of Dhimma in Early Islam' in B Braude and B Lewis (eds) *Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society*, 2 vols (New York: Holmes & Meier Publishers, 1982), 41; Bernard Lewis, *Semites and Anti-Semites: An Inquiry into Conflict and Prejudice* (New York: W.W. Norton & Co, 1986), 123; Jacques Waardenburg, 'Muslim Studies of Other Religions: The Medieval Period' in G Jan van Gelder and E de Moor (eds), *The Middle East and Europe: Encounters and Exchanges* (Amsterdam: Rodopi, 1992), 10–38, 13; Jacques Waardenburg, *Muslim Perceptions of Other Religions: A Historical Survey* (Oxford: Oxford University Press, 1999), 23; Richard Gottheil, 'An Answer to the Dhimmis' (1921) 41 *J American Oriental Soc* 383–457, who translates an essay in which the *dhimmi* is abused.

<sup>10</sup> Haggai Ben-Shammai, 'Jew Hatred in the Islamic Tradition and the Koranic Exegesis' in S Almog (ed), *Antisemitism Through the Ages* (Oxford: Pergamon Press, 1988), 161–9.

<sup>11</sup> Robert Irwin, 'Book Reviews: Islam and Dhimmitude: Where Civilizations Collide' (2002) 38(4) *Middle Eastern Studies* 213–15; Paul Fenton, 'Book Review: Islam and Dhimmitude' (2003) 49(2) *Midstream* 40–1; Johann Hari, 'Amid all this panic, we must remember one simple fact—Muslims are not all the same', *The Independent*, 21 August 2006.

not alter the fact, though, that her arguments contribute to this field of inquiry, where scholarly and polemical arguments do battle.<sup>12</sup> Her analysis of *dhimmi* rules is reviewed here to help illustrate the extreme mythic poles that help define the terrain of *dhimmi* historiography.

Adherents of the myth of persecution often rely on legal doctrine to prove their point, but generally in a piecemeal fashion, without due attention to the details embedded in complex legal argument. For example, Ye'or writes of how non-Muslim communities could not build new places of worship, and were limited in the extent to which they could restore preexisting ones.<sup>13</sup> Yet, she fails to reveal that this restriction was contested. For some jurists, whether a religious community could build a new place of worship depended on the demographics of the relevant township. If the township included both *dhimmis* and Muslims, then Ye'or is correct in asserting her position. But if the township was a pure *dhimmi* village then she is incorrect, given the Hanafi doctrines that offer exceptions. Through her selective use of evidence, she paints a monist picture of persecution without engaging the nuances of the legal tradition. Nuance is centrally significant in order to understand, without anachronism, the conditions that rendered the *dhimmi* rules intelligible at one time.

### C. Delimiting the space for difference: the *dhimmi* contract, accommodation, and the public good

Attentiveness to the nuance of legal argument reveals that the *dhimmi* rules are symptomatic of the more general challenge of governing amidst diversity. Jurists utilized legal arguments to justify accommodating minority group interests in an Islamic polity, and also used legal arguments to limit the scope of such accommodation. The question at this juncture is focused less on whether the *dhimmis* could or could not do one thing or another, and more on how jurists justified accommodating one thing while denying permission for another. The analysis of these sets of justifications, this essay suggests, will further illuminate why the two proffered myths of harmony and persecution miss the point. This is not the place to offer a systematic analysis of each and every *dhimmi* rule; such an endeavor would require

<sup>12</sup> Scholarly and not-so-scholarly sources on both sides of the tolerance debate are many. See for instance, Robert Spencer (ed), *The Myth of Islamic Tolerance: How Islamic Law Treats Non-Muslims* (Prometheus Books, 2005); Robert Spencer, *The Truth about Muhammad: Founder of the World's Most Intolerant Religion* (Washington DC: Regnery Publishing, Inc, 2006); Robert Spencer, *Islam Unveiled: Disturbing Questions about the World's Fastest-Growing Faith* (San Francisco: Encounter Books, 2002), 143–64; Aaron Tyler, *Islam, the West and Tolerance: Conceiving Coexistence* (New York: Palgrave MacMillan, 2008); Khaled Abou El Fadl, *The Place of Tolerance in Islam* (Boston: Beacon Press, 2002); Yohanan Friedmann, *Tolerance and Coercion in Islam* (Cambridge: Cambridge University Press, 2003).

<sup>13</sup> Bat Ye'or, *The Dhimmi: Jews and Christians Under Islam* (Associated University Press, 1985), 57; Bat Ye'or, *Islam and Dhimmitude: Where Civilizations Collide* (Cranbury, NJ: Associated University Presses, 2002), 83–5, where her references for the 'unanimous opinion' of Muslim jurists are to the texts by two Shafi'i jurists (al-Mawardi and al-Nawawi).

book-length treatments.<sup>14</sup> For the purpose of illustration, three legal issues will be addressed in this essay, all of which relate to the *dhimmi*'s property interests, the scope of protection afforded to his claims upon his property, and the liberty he enjoyed to perform charitable acts with his property. The analysis below will show that Muslim jurists recognized the fact of diversity in the Islamic polity, and thereby made efforts to accommodate the religious minority's interests. But, as in the case of most legal systems, Muslim jurists also limited the scope of accommodation so as not to undermine conceptions of the public good that had to be upheld if the ruling regime were to maintain its political legitimacy. Defining the public good was not always an easy matter for them. That does not change the fact, however, that some image of the public good operated in their analysis.

### 1. Contract as politico-legal paradigm of governance and accommodation

The conceptual site within which jurists debated the content of the *dhimmi* rules is the so-called '*uqd al-dhimma*', or contract of protection. Notably, *dhimmis* were not the only category of non-Muslims who could and did reside in the Muslim polity. Some might come for temporary periods; others might be present subject to a political agreement between regional leaders; and yet others might be able to come and go due to a peace treaty between otherwise warring polities.<sup>15</sup> In this essay, the focus will be on the *dhimmi* and his contract of protection, given the permanence of residence that the contract implies, and the challenges such permanence raises for the task of governing pluralistically.

The contract of protection was the legal mechanism by which a non-Muslim either actually or fictively contracted into protected and permanent residency status in Islamic lands. The contract of protection effectuated the legal (and thereby political, social, and economic) inclusion and accommodation of the non-Muslim within the larger Muslim polity. Whether the contract was actual or fictional depended on whether the non-Muslims agreed to pay the *jizya* when offered the option of peaceful surrender (*sulhiyya*) by conquering Muslim forces, or whether they refused and had terms of settlement imposed on them through conquest (*anwiyya*).<sup>16</sup> Furthermore, it might be applied to later generations despite the lack of any actual consent. In this sense, the 'contract of protection' is a conceptual device that creates politico-legal space for debate about governance amidst diversity. This instrumental role of the contract of protection is captured by a tradition from 'Ali b. Abi Talib (d 661), in which he said: 'They [non-Muslims] pay the *jizya* so that their lives are [protected] like our lives, and their property is [protected] like

<sup>14</sup> For books in Arabic and English that provide an introduction and overview of the *dhimmi* rules, see 'Abd al-Karim Zaydan, *Ahkam al-Dhimmiyin wa al-Musta'minin fi Dar al-Islam* (Beirut: Mu'assasat al-Risala, 1988); Friedmann, *Tolerance and Coercion in Islam*.

<sup>15</sup> Abu al-Hasan al-Mawardi, *al-Hawi al-Kabir*, eds 'Ali Muhammad Mu'awwad and 'Adil Ahmad 'Abd al-Mawjud (Beirut: Dar al-Kutub al-'Ilmiyya, 1994), 14:296–7.

<sup>16</sup> Ibn Rushd al-Jadd, *al-Muqaddimat al-Mumabhidat*, ed Muhammad Hajji (Beirut: Dar al-Gharb al-Islami, 1988), 1:368–9.

our property'.<sup>17</sup> 'Ali's tradition has been interpreted to suggest that once the non-Muslim pays the *jizya*, enters the contract of protection, and thereby becomes a *dhimmi*, his life and property are as inviolable (*ma'sum*) as a Muslim's life and property.<sup>18</sup>

But as will be shown below, 'Ali's claim is easier said than satisfied. For instance, Qur'an 9:29 states: 'Fight those who do not believe in God or the final day, do not prohibit what God and His prophet have prohibited, do not believe in the religion of truth, from among those who are given revelatory books, until they pay the *jizya* from their hands in a state of submission'. Muslim jurists debated what it means to be in a *state of submission*. Although it could mean abiding by a Shari'a-based legal tradition, some also held it reflects the subservient status of *dhimmis* in the Muslim polity.<sup>19</sup> The import of 'Ali's statement, if read alongside Q 9:29, illustrates how source-texts can contribute to the contrary imperatives of inclusion and marginalization that jurists had to resolve. The contrary imperatives are not considered here to be a sign of incoherence or inconsistency in the law. Indeed, the very nature of accommodation is a messy business. Equality in some cases may exist alongside legalized and legitimate differentiation between peoples. Of interest in this essay, therefore, is not the fact of legalized differentiation (as opposed to illegitimate differentiation, or discrimination), but rather the conditions that render such differentiation legitimate.

#### D. Accommodation and its limits: contraband or consumer goods?

As noted earlier, the *dhimmi* paid the *jizya* tax and thereby enjoyed the rights and protections granted to him by the contract of protection, or the *'aqd al-dhimma*. But what were the terms of that contract? The contract, as a legal term of art served a political function by offering jurists a discursive site where debates about the inclusion, accommodation, and exclusion of *dhimmis* could occur. The contract of protection, thereby, was the politico-legal device that framed the debates about the

<sup>17</sup> Ibn Nujaym, *al-Sharh al-Bahr al-Ra'iq* (Beirut: Dar al-Kutub al-'Ilmiyya, 1997), 5:127 (*innama badhalu al-jizya li-takuna dima'uhum ka dima'ana wa amwaluhum ka-amwalana*). See also Zaydan, *Ahkam al-Dhimmiyyin*, 76.

<sup>18</sup> Ibn Nujaym, *al-Sharh*, 9:20.

<sup>19</sup> Mahmoud M Ayoub, 'The Islamic Context of Muslim-Christian Relations' in M Gervers and R J Bikhazi (eds) *Conversion and Continuity: Indigenous Christian Communities in Islamic Lands, Eight to Eighteenth Centuries* (Toronto: Pontifical Institute of Mediaeval Studies, 1990), 461–77; Ziauddin Ahmad, 'The Concept of Jizya in Early Islam' (1975) 14(4) *Islamic Studies* 293–305; C E Bosworth, 'The Concept of *Dhimma* in Early Islam' in B Braude and B Lewis (eds) *Christian and Jews in the Ottoman Empire: The Functioning of a Plural Society*, 2 vols (New York: Holmes & Meier Publishers, 1982), 1:37–54; M Izzi Dien, *The Theory and the Practice of Market Law in Medieval Islam: A Study of Kitab Nisab al-Ihtisab* (Cambridge: E.J.W. Gibb Memorial Trust, 1997), 51–2; Wadi Zaidan Haddad, 'Ahl al-Dhimma in an Islamic State: The Teaching of Abu al-Hasan al-Mawardi's *al-Ahkam al-Sultaniyya*' (1996) 7(2) *Islam and Christian-Muslim Relations* 169–80; Ahmad Dallal, 'Yemeni Debates on the Status of Non-Muslims in Islamic Law' (1996) *Islam and Christian-Muslim Relations* 181–92, 189.

*dhimmi* rules. As a frame or site of debate, the contract also provided an important legal device that *dhimmis* and Muslims could refer to in order to assess what the Muslim polity owed to *dhimmis* and vice versa. A fundamental feature of the contract is that it requires the governing regime to protect the property interests of *dhimmis*, just as it protects the Muslims' property interests. The scope of that protection, though, is called into question when the *dhimmis* want to use their property in a way that is viewed as incompatible with other aspects of Shari'a doctrines. The contract becomes a site of legal debate and negotiation about the degree to which the *dhimmis*' property rights and freedom to exercise them can be accommodated without impinging on other values that contribute to the legitimacy and functioning of a governing regime legitimated by reference to Shari'a. To demonstrate how the contract offers a negotiative site for deliberating on the scope of inclusion of *dhimmis*, this section will address whether or not the *dhimmi* can consume alcohol and pork in an Islamic polity, and explain the limits on the Shari'a's scope for accommodating the *dhimmis*' difference.

The *dhimmi*'s contract of protection upholds his interest in his private property. But this begs an important legal question—what counts as legally protected property? Not all property is equally protected under Islamic law. Only certain types of property are legally recognized as conveying rights of exclusive use and enjoyment. As the Hanafi al-Kasani said, the property that conveys such rights is considered *mutaqawwam*, or inviolable under the law.<sup>20</sup> How one defines inviolable property could have an adverse impact on the *dhimmi*'s expectation interests under the law. Specifically, in the case of wine and pork, can *dhimmis* consume such items in a Muslim polity in which such activity is prohibited, and in some cases is subject to corporal punishment? If they can consume such items, on what basis can they do so? And if they can own and consume wine and pork when living in a Muslim polity, then can *dhimmis* also petition the governing authorities to punish anyone who steals the wine and pork products from them on the grounds of the Qur'anic penalty for theft—namely, amputation of the thief's hand? If the government punishes someone for stealing the *dhimmi*'s wine or pork, it is effectively using Shari'a-based norms and institutions to uphold the *dhimmi*'s property interests in wine and pork. How can Shari'a doctrines on the one hand deny the Muslim from owning or consuming such products, and yet punish someone with a Qur'anic penalty for stealing such items? As illustrated below, consumer goods such as wine or pork may not offer their owners the same expectation interests that other types of property might. However the legal debate about protecting the *dhimmis*' property interest in wine and pork illustrates how Muslim jurists used the law to include the *dhimmis* by protecting their property interests, while also demarcating the limits of accommodation in the interest of protecting certain public values as represented in juridical terms by reference to other, related, Shari'a-based doctrines.

<sup>20</sup> Abu Bakr al-Kasani, *Bada'i' al-Sana'i' fi Tartib al-Shara'i'*, eds 'Ali Muhammad Mu'awwad and 'Adil Ahmad 'Abd al-Mawjud (Beirut: Dar al-Kutub al-'Ilmiyya, 1997), 9:292.



Consuming alcohol (*shurb al-khamr*) is a crime under Islamic law, with a penalty of 40 or 80 lashes, depending on which school of law is referenced.<sup>21</sup> Additionally, the consumption of pork is prohibited to Muslims under their dietary laws. However, neither of these prohibitions apply to *dhimmis*; premodern jurists allowed *dhimmis* to consume both items. This begs the questions of why, on what basis, and with what limits? For jurists such as al-Ghazali and al-Kasani, *dhimmis* were entitled under the contract of protection to have their own traditions respected. For al-Ghazali, when *dhimmis* enter the contract of protection, the contract's terms do not include their liability for consumption of alcohol or pork because their own traditions permit consumption of both.<sup>22</sup> Likewise, al-Kasani argued in similar fashion that *dhimmis* can consume alcohol and pork because their tradition allows them to do so.<sup>23</sup> On the other hand, if the *dhimmis'* traditions prohibit something that Shari'a-based rules also prohibit, then there is little room for the *dhimmi* to argue on contract grounds that he is immune from liability. But where the *dhimmis'* tradition permits one thing, and the Shari'a prohibits it, jurists had to decide whether or not the *dhimmis'* practice fell within the protection afforded by the contract of protection.

The jurists' decision was not always an easy one. Their decision occurred in the discursive space of the contract of protection where they considered the imperatives of inclusion, exclusion, accommodation, and the more general public good. As much as jurists permitted *dhimmis* some liberty, as in the case of consuming wine and pork, they were nonetheless aware that they might have to limit their accommodation in light of other issues of law and legal order. For instance, although jurists agreed that *dhimmis* could consume alcohol, they nonetheless were concerned that unrestricted alcohol consumption might endanger the social good—a general good that they often did not define, but rather simply assumed as given and important. Consequently, though they permitted *dhimmis* to consume alcohol, they developed legal rules banning public drunkenness or public displays of alcohol.<sup>24</sup> In other words, premodern jurists permitted the *dhimmis* to consume alcohol, despite the Qur'anic prohibition. But they limited the scope of the *dhimmis'* license in the interest of a virtue about the public good whose content was informed by (but not reduced to) the legal ban on alcohol consumption. In this case, then, while the *dhimmi* enjoyed an exception to a rule of general application,

<sup>21</sup> The punishment for consuming alcohol is generally held to be 40 lashes, although some schools such as the Malikis required 80. For a discussion of this debate, see Husayn Hamid Hassan, *Nazariyyat al-Maslaha fi al-Fiqh al-Islami* (Cairo: Dar al-Nahda al-'Arabiyya, 1971), 73.

<sup>22</sup> Abu Hamid al-Ghazali, *al-Wasit fi al-Madhab*, ed Abu 'Amru al-Husayni (Dar al-Kutub al-'Ilmiyya, 2001), 4:152.

<sup>23</sup> Al-Kasani, *Bada'i' al-Sana'i'*, 9:292. See also, Sahnun b. Sa'id al-Tanukhi, *al-Mudawwana al-Kubra* (Beirut: Dar Sadir, nd), 6:270, who does not apply the punishment for consumption of alcohol to the *dhimmi*.

<sup>24</sup> Al-Mawardi, *al-Hawi al-Kabir*, 13:328; Abu Ishaq al-Shirazi, *al-Muhadhdhab fi Fiqh al-Imam al-Shafi'i*, ed Zakariya 'Amirat (Beirut: Dar al-Kutub al-'Ilmiyya, 1995), 3:317; al-Muzani, *Mukhtasar al-Muzani*, in vol 5 of al-Shafi'i, *Kitab al-Umm* (Beirut: Dar al-Fikr, 1990), 5:385; al-Kasani, *Bada'i' al-Sana'i'*, 9:214. For a general discussion on the exception to the punishment for alcohol consumption, see Zaydan, *Abkam al-Dhimmiyyin*, 179–80.

that general rule was nonetheless used to give content to an abstract notion of the public good that found expression in new legal rules banning public drunkenness by *dhimmis*.

The second example of the complex of inclusion/exclusion/accommodation when governing amidst pluralism concerns the premodern legal debate about whether a *dhimmi* could petition the governing authorities to punish a thief who steals the *dhimmi*'s pork or wine. Suppose a *dhimmi* steals wine or pigs from another *dhimmi*. This is an interesting case for purposes of this discussion because for both parties the items may be lawful to consume. Indeed, the Hanafi al-Kasani recognized that under the *dhimmis*' law, the property is deemed as rights-conferring. But under Shari'a-based doctrines, such property is not necessarily rights-conferring since it is not *mutaqawwam*. If the wronged *dhimmi* seeks redress under Shari'a against the thieving *dhimmi*, should the Muslim judge punish the thieving *dhimmi* with the Qur'anic punishment of hand amputation? If the judge does so, would that effectively be using a Shari'a-based legal system to enforce a right to a type of property that is not regarded as value-conferring under Shari'a norms, despite being value-conferring under the *dhimmis*' tradition? In other words, wouldn't the judge implicitly prioritize the *dhimmis*' tradition on value-conferring goods in a Shari'a-based legal system to effectuate a Qur'anically prescribed punishment? This question poses not only a conflict of law issue, but also a question of priority, sovereignty, and systemic coherence in the law. The question is not simply a matter of which doctrine to rely upon. Instead, it involves funneling a *dhimmi* doctrine into the contract of protection, and thereby granting it normative significance in a legal system that is deeply wedded to the Shari'a as a tradition and source of legitimacy. Certainly the *dhimmi* enjoys legal protection under the contract of protection, but at what cost to the Shari'a-based legal system? Consequently, at first glance giving redress to the *dhimmi* who has suffered the loss seems consistent with the commitment to protect people from theft. But the systemic questions raise important issues that were not missed by premodern Muslim jurists, and which therefore forced them to consider the scope and limits of accommodation.

The Hanafi al-Kasani resolved the immediate question by prioritizing the view that wine and pork are not *mutaqawwam*, or in other words are not value conferring. Consequently, if a *dhimmi* steals wine from another *dhimmi*, he will not suffer the Qur'anic punishment for theft, despite having stolen something that does not belong to him.<sup>25</sup> Under a Shari'a analysis, if such property has no value, then no theft has occurred. To view al-Kasani's position from the systemic level, though, one can appreciate that, for al-Kasani, to use the coercive power of Shari'a to redress the theft of a type of property that is condemned under Shari'a might appear to 'over-accommodate' the *dhimmi* at the expense of legal consistency and the public good sought through Shari'a regulations.

This is not to say, however, that a *dhimmi* whose pork or wine is stolen by another is without recourse. Although the *dhimmi* may not be able to pursue a

<sup>25</sup> Al-Kasani, *Bada'i' al-Sana'i*, 9:292.

criminal action against the thief on Qur'anic grounds, some (but not all) jurists permitted the *dhimmi* to be compensated for the value of his lost property. The Maliki Sahnun held that where pork or wine are stolen from a *dhimmi*, the thief should not suffer the Qur'anic punishment, but can be required to pay damages in the form of financial compensation for its value (*aghrama thamnahu*).<sup>26</sup> Ibn Hazm noted various opinions that held the thief liable to both the Qur'anic punishment and financial compensation, given that the property in question has value for the *dhimmis* under their tradition. However, he also noted that others held that the thief only owed financial compensation, but was not subjected to the Qur'anic punishment. And yet others held that the thief had no liability whatsoever. Importantly, in the interest of legal consistency and coherence, Ibn Hazm was critical of those who would deny the corporal sanction but allow financial contribution; if the property has no value for one sanction, how can it have value for another?<sup>27</sup> Nonetheless, the fact that jurists might deny corporal sanction but impose compensatory liability on the thief illustrates a crucial negotiative feature of governing pluralistically.

The general bans on the consumption of alcohol and pork, coupled with the exceptions derived from the contract of protection, provide important insights into how jurists used legal argument both to accommodate *dhimmis* and to limit the scope of that accommodation in the interest of the social good. The legal debates of particular interest are less about the bans themselves, than about corollary issues that are related to but distinct from the bans. The debates on these corollary issues illustrate that Muslim jurists acknowledged, respected, and accommodated the *dhimmis'* traditions by exempting them from certain Shari'a liabilities. The scope of that accommodation, though, had to be limited where it posed a threat to the social good of the Islamic polity, whether defined in terms of Shari'a norms or concerns over the priority and pride of place given to Shari'a in an Islamically defined governance system.

### E. Property, piety, and securing the public good: the case of charitable endowments

The third example to be addressed emphasizes the jurisprudential significance of the 'public good', which operates in the backdrop of the *dhimmi* rules. Reference to the 'public good', often by a general if not ambiguous invocation of the Islamic character of the polity, was a device by which jurists could determine whether an accommodation was appropriate or went too far. As discussed in the prior section, a *dhimmi* who consumed alcohol was not subject to the general rule prohibiting alcohol consumption, but rather was exempted from that ban in light of the contract of protection, which provided a legal mechanism for accommodating the

<sup>26</sup> Sahnun, *al-Mudawwana al-Kubra*, 6:278.

<sup>27</sup> Ibn Hazm, *al-Muhalla bi'l-Athar*, ed 'Abd al-Ghaffar Sulayman al-Bandari (Beirut: Dar al-Kutub al-'Ilmiyya, nd), 12:321–2.

*dhimmi*'s difference. The accommodation in this case, though, was an exception, and did not alter the general nature of the ban, nor its implications for a general public policy concern about alcohol consumption and its effects, deleterious or otherwise. Consequently, though jurists held that *dhimmis* could consume alcohol in the Muslim polity, their freedom was not absolute: other considerations having to do with public policy concerns limited its scope. Such limits included the legal rule that prohibited any public drunkenness by the *dhimmi*. In other words, the general ban on alcohol consumption was lifted for the *dhimmi* (accommodation). But that general ban, coupled with the accommodation, raised questions for premodern Muslim jurists about the public weal, and thus led them to devise a second general rule, namely the ban on public drunkenness. The jurists accommodated the *dhimmi*, but they also demarcated the scope of his liberty in the interest of the public weal. This particular example illustrates how Islamic legal analysis can and does operate at multiple levels in order to constitute and regulate a political society that is marked by a diverse demography.

Alcohol consumption is but one example that illuminates how premodern jurists invoked public policy concerns to address the challenge of governing pluralistically. Another more powerful example is evident in the legal debates among jurists about whether *dhimmis* could create charitable endowments, or *awqaf* (singular *waqf*), for the purpose of teaching the Bible or Torah. To create a charitable endowment is a right that accrues to a property owner as a private individual. To use one's property to create a charitable endowment is meant, however, to influence the public weal. Private rights of ownership and bequest raise concerns when property is donated for public purposes that may contravene what many consider the public good. In other words, although private property rights are protected, the scope of that protection is limited in light of competing interests of a more general, public nature. Consequently, the premodern debate about whether and to what extent a *dhimmi* could endow a charity balanced respect for the *dhimmi*'s private property interests, and the imperative to protect an Islamically defined public good. The appropriate balance depended on the factors that contributed to the public good, those that diminished it, and how best to strike an appropriate balance in pluralist settings where not all members of the polity share the same set of core values.

Two ways to create a charitable endowment (*waqf*) are (1) a bequest that takes effect upon the testator's death (ie, *wasiyya*), and (2) an *inter vivos* transfer of property directly into a trust (*waqf*). Shafi'i and Hanbali jurists generally agreed that *dhimmis* could create trusts and issue bequests to any specified individual (*shakhs mu'ayyan*), regardless of religious background, although some jurists limited the beneficiaries to one's kin group.<sup>28</sup> This permissive attitude was based on the legal respect for private ownership (*tamlík*) and the rights the property owner holds

<sup>28</sup> Al-Ghazali, *al-Wasit*, 2:397–8. Al-Mawardi, *al-Hawi al-Kabir*, 8:328–30, wrote that there is a dispute about whether a non-Muslim can make a bequest to anyone other than a free Muslim of legal majority; al-Nawawi, *Rawdat al-Talibin wa 'Umdat al-Muftin* (3rd edn, Beirut: al-Maktab al-Islami, 1991), 5:317, held that a *waqf* could be for the benefit of a *dhimmi*, but not for an enemy of the state (*harbi*) or apostate; al-Shirazi, *al-Muhadhdhab*, 2:323–4, allowed *waqfs* for specified *dhimmis* but noted the debate about *waqfs* for the benefit of apostates or enemies of the state.

because of his claim on the property.<sup>29</sup> Shafi'i and Hanbali jurists held that the *dhimmi's* private property interest was sufficiently important to warrant the right to bequest property to other individuals.

However, if the *dhimmi's* bequest was for something that might adversely affect the public interest, then for Shafi'i and Hanbali jurists, the bequest was a sin against God and could not be valid under the Shari'a.<sup>30</sup> To hold otherwise would be to use the doctrines and institutions of a Shari'a-based governance system to legitimate practices that contravene an Islamically defined public good. Consequently, if a *dhimmi* created a charitable trust to support building a church, synagogue, or a school for Torah or Bible studies, these jurists would invalidate the *waqf*, because it constituted a sin (*ma'siya*) that could not be upheld by the law.<sup>31</sup>

The Shafi'i jurist al-Shirazi provided a precise, nearly syllogistic account and justification for this position. First, he held that a *waqf*, in its essence, is a pious endowment that brings one close to God (*qurba*). Second, he held that anyone who creates a charitable endowment through a bequest or *wasiyya* creates an institution that bestows bounties (*hasanat*) on others. Lastly, he concluded that any charitable endowment that facilitates sin (*i'ana 'ala ma'siya*) is not lawful.<sup>32</sup> Al-Shirazi's argument begs the question of whether a charitable endowment that supports a Bible or Torah reading school brings one close to God or bestows bounties on others. For al-Shirazi, such institutions perpetuate disbelief in the land of Islam, which is tantamount to sin. Indeed he argued that a charitable endowment in support of these activities was void (*batila*), as its bounty was sinful.<sup>33</sup> Al-Shirazi went so far as to liken such bequests with a bequest that arms the Muslim polity's enemies, thereby equating both in terms of their potential to inflict harm on the Muslim polity.<sup>34</sup> In other words, for al-Shirazi, a charitable endowment that supports the perpetuation of value systems that are contrary to Islam is not simply sinful; it is a security threat that must be contained for the benefit and perpetuation of the governing regime and the polity it governs. To allow such charitable endowments as a matter of law would be to use the Shari'a rule of law system,

<sup>29</sup> Al-Ghazali, *al-Wasit*, 2:397–8. Abu 'Abd Allah b. Muflih, *al-Furu'*, ed Abu al-Zahra' (Beirut: Dar al-Kutub al-'Ilmiyya, 1997), 4:513; Ibn Qudama, *al-Mughni* (Beirut: Dar Ihya' al-Turath al-'Arabi, nd), 5:646.

<sup>30</sup> Al-Ghazali, *al-Wasit*, 3:41–2; al-Nawawi, *Rawda*, 6:107, allowed a *wasiyya* to be for the benefit of *dhimmis*, *harbis*, and apostates; Ibn Qudama, *al-Mughni*, 6:103, analogized a *wasiyya* to a gift, and said that both could be given to *dhimmis* and *harbis* in the *dar al-harb*; Abu 'Abd Allah b. Muflih, *al-Furu'*, 4:513; al-Bahuti, *Kashshaf al-Qina' 'an Matn al-Iqna'* (Beirut: Dar al-Kutub al-'Ilmiyya, 1997), 4:442. For a Shi'a source for this position, see al-Muhaqqiq al-Hilli, *Shara'i' al-Islam fi Masa'il al-Halal wa al-Haram*, ed Sadiq al-Shirazi (10th edn, Beirut: Markaz al-Rasa'il al-A'zam, 1998), 1:482.

<sup>31</sup> Al-Ghazali, *al-Wasit*, 2:397; Ibn Shihab al-Din al-Ramli, *Nihayat al-Muhtaj ila Sharh al-Minhaj*, (3rd edn, Beirut: Dar Ihya' al-Turath al-'Arabi, 1992), 5:366. The Ja'fari al-Muhaqqiq al-Hilli interestingly held that a *Muslim* could not create a *waqf* to support a church, synagogue, or schools for studying the Torah or Bible. However, he allowed a non-Muslim to do so, thus introducing yet another complicated piece into the debate. Al-Muhaqqiq al-Hilli, *Shara'i' al-Islam*, 1:459.

<sup>32</sup> Al-Shirazi, *al-Muhadhdhab*, 2:323–4.

<sup>33</sup> Al-Shirazi, *al-Muhadhdhab*, 2:341–2.

<sup>34</sup> For another argument, the Hanbali Ibn Qudama argued that a bequest could not be made to support schools for teaching the Torah or the Bible because both had been abrogated by the Qur'an and contain corruptions. Ibn Qudama, *al-Mughni*, 6:105. See also al-Bahuti, *Kashshaf al-Qina'*, 4:442.

both in terms of its doctrines and institutions, in a manner contrary to the public good.

An alternative approach adopted by Hanafi jurists addressed this question using a hypothetical about a *dhimmi* who bequeaths his home to a church, as opposed to leaving it to a specifically named person. Abu Hanifa held this bequest lawful on the ground that this act constitutes a pious, devotional act for the *dhimmi* (ie, *qurba*), and must be respected just as Muslims respect the *dhimmi's* faith in other regards. In other words, while both al-Shirazi and Abu Hanifa viewed charitable endowments as bringing one closer to God, Abu Hanifa differed in that he appreciated that what it means to bring someone closer to God cannot be defined only in Islamic terms; closeness to God takes different shapes depending on the tradition to which one belongs. Abu Hanifa's students, Muhammad al-Shaybani and Abu Yusuf, however, disagreed with their teacher because they (like al-Shirazi) deemed the subject matter of such endowments sinful (*ma'siyya haqiqah*) despite the *dhimmi's* belief that they are pious acts.<sup>35</sup>

This dispute within the Hanafi school begs a fundamental question for governance amidst diversity: does one measure the act's impact on the public good in terms of the *dhimmi's* faith tradition, or in terms of the prevailing Islamic one?<sup>36</sup> To resolve this question, the Hanafi al-'Ayni offered four possible outcomes:

- If a bequest involves a pious act in the *dhimmi's* tradition but not in the Islamic tradition, many Hanafis held that it should be allowed, although other schools (as well as other Hanafis) would disagree.
- If the *dhimmi* makes a bequest that would be a pious act for Muslims, like donating to support the Muslim pilgrimage to Mecca (ie, *hajj*) or for building a mosque, the bequest is invalid, as it goes against the *dhimmi's* faith. However, if the bequest benefits specifically named individuals, it is valid, since the beneficiaries' private interests as property owners are to be respected under the law.
- If the bequest concerns subject matter that is lawful under the *dhimmi's* beliefs and Islamic beliefs, it is valid.
- If the bequest involves a subject matter that is unlawful in both the *dhimmi's* faith and the Muslim faith, it is invalid. The underlying subject matter would be a sin for both Muslims and *dhimmis* to allow.<sup>37</sup>

By offering these alternatives, al-'Ayni illustrated the underlying issues at stake—namely, the *dhimmi's* private property interests that he holds as an individual, the limits on the *dhimmi* in light of his tradition's requirements, and lastly, the public good defined by reference to Islamic norms and general rules. In the interest of

<sup>35</sup> Badr al-Din al-'Ayni, *al-Binaya Sharh al-Hidaya*, ed Ayman Salih Sha'ban (Beirut: Dar al-Kutub al-'Ilmiyya, 2000), 13:495; Ibn Nujaym, *al-Sharh*, 9:302; al-Kasani, *Bada'i' al-Sana'i'*, 10:500–1.

<sup>36</sup> Indeed, this was the dilemma in the jurisprudence noted by al-'Ayni. Al-'Ayni, *al-Binaya*, 13:495.

<sup>37</sup> Al-'Ayni, *al-Binaya*, 13:496; Ibn Nujaym, *al-Bahr al-Ra'iq*, 9:302; al-Kasani, *Bada'i' al-Sana'i'*, 10:500–1.

upholding the *dhimmis*' private property interests, al-'Ayni granted them the authority to create pious endowments that do not violate any precept in the *dhimmis*' traditions or the Islamic one. If the charitable endowment is lawful under both the *dhimmis*' tradition and the Islamic tradition, there is no legal problem since to allow such bequests both upholds the Islamic values underpinning the polity and government, and shows deference to the *dhimmis*' tradition given the requirement to do so under the contract of protection. Notably, the *dhimmi* cannot bequest a charitable endowment for something that is lawful under Islam but unlawful under the *dhimmis*' tradition. An almost paternalistic respect for the *dhimmis*' tradition animates this outcome, thereby illustrating the significance of the contract of protection in reaching this particular legal outcome: the *dhimmi*'s private rights of property disposition are limited by his own tradition, regardless of how he might feel about the matter. The final issue has to do with whether the *dhimmi* can create a charitable endowment that upholds a value in his own tradition, but not in the Islamic tradition. This is the case on which jurists disagreed, as noted above.

To further complicate matters, the Malikis had their own approach. They addressed the issue of charitable endowments by reference to the religious association of the testator, the framework of Islamic inheritance law, and the prevailing tax regime. Under Islamic inheritance law, two-thirds of a decedent's property is distributed pursuant to a rule of inheritance that designates percentage shares for specifically identified heirs. The decedent can bequest the remaining one-third to non-heirs.<sup>38</sup> Malikis asked, though, whether a Christian *dhimmi* with no heirs could bequest all of his property to the head of the church, the Patriarch. According to many Maliki jurists, the Christian can give one-third of his estate to the Patriarch, but the remaining two-thirds escheats to the Muslim polity, which is considered his lawful heir in this case.<sup>39</sup> Even if the testator leaves a testamentary instrument that transfers his whole estate to the Patriarchate, the above arrangement is to be carried out nonetheless.<sup>40</sup>

The application of this rule, however, depends on whether the *dhimmi* is personally liable to the governing regime for the *jizya*, or whether the *dhimmi* community is collectively liable for the tax payment. If the *dhimmi* is personally liable for paying the *jizya* directly to the government, the above ruling on escheat to the government applies. The rationale for this rule is as follows: with the death of the *dhimmi*, the ruling regime will lose its annual tax revenue from him. Consequently, the escheat of his estate is designed to account for the regime's lost revenue.<sup>41</sup>

<sup>38</sup> On the rules of inheritance in the Qur'an and Islamic law, see Q 4: 11–12; David Powers, *Studies in Qur'an and Hadith: The Formation of the Islamic Law of Inheritance* (Berkeley: University of California Press, 1986).

<sup>39</sup> Ibn Rushd al-Jadd, *al-Bayan wa al-Tahsil* (Beirut: Dar al-Gharb al-Islami, 1988), 13:326–7.

<sup>40</sup> Ibn Rushd al-Jadd, *al-Bayan*, 13:326–7. See also al-Hattab, *Mawahib al-Jalil*, ed Zakariyya 'Amirat (Beirut: Dar al-Kutub al-'Ilmiyya, 1995), 8:515, who relates this view, and critiques another that upholds the validity of any *wasiyya* by a *kafir*; Shihab al-Din al-Qarafi, *al-Dhakhira*, ed Sa'id A'rab (Beirut: Dar al-Gharb al-Islami, 1994), 7:12.

<sup>41</sup> Ibn Rushd al-Jadd, *al-Bayan*, 13:326–7. See also al-Qarafi, *al-Dhakhira*, 7:35.

In the second case, the *dhimmi* community's leadership collects the *jizya* from its members and delivers the payment to the ruling regime on behalf of the community. If the community collectively pays a pre-established collective *jizya*, and the total sum does not decrease with deaths of community members, many Malikis allowed individual *dhimmis* (presumably without heirs) to bequest their entire estate to whomever they wished.<sup>42</sup> This particular ruling works to the financial benefit of the ruling regime. The regime would still receive the same *jizya* tax returns, suffering no diminution in tax revenue. Any financial loss is distributed to the *dhimmi* community, since its tax liability does not diminish with the death of its community members. To offset that financial loss, the Malikis permitted *dhimmis* to bequest their entire estate to the community in cases where they lack any heirs.

In conclusion, when a *dhimmi* sought to endow a religious institution, Muslim jurists were concerned about giving such charitable institutions legal recognition. To use Shari'a categories to uphold non-Muslim religious institutions would seem awkward at best, illegitimate at worst, if the Shari'a is designed in part to ensure a public good defined in terms of an Islamic ethos. The legal debate about the scope of the *dhimmi's* power to use these methods to bequest property for religious purposes suggests that Muslim jurists grappled with the effects of diversity on the social fabric of the Islamic polity. The disagreements and alternative outcomes can be appreciated as juridical attempts to account for and respect the *dhimmi's* conception of piety and property interests, the public good, and, for some, the security of the Islamic polity. Regardless of the analytic route any particular jurist adopted, the legal debate further shows that the *dhimmi* rules are hardly clear cut indices of tolerance or intolerance, harmony or persecution. Rather they are symptoms of the larger, more difficult, and arguably globally shared challenge of governing pluralistically.

## F. *Dhimmi* rules in the post-colony

One might ask why the *premodern* rules are such a source of contention *today*. Certainly, premodern Islamic legal history is not alone among medieval traditions that discriminated against the religious Other.<sup>43</sup> Nonetheless, the historical doctrine remains a point of ongoing contention about Muslims and Islam today, whether in Muslim states that rely on Shari'a in their legal system or for Muslims

<sup>42</sup> Ibn Rushd al-Jadd, *al-Bayan*, 13:326–7. However, Ibn Rushd did note others who disagreed with him, and held that the estate escheats to the state when there is no heir. Al-Qaraḥī, *al-Dhakhira*, 7:12, held the same view as Ibn Rushd al-Jadd but also noted the disagreement on this issue.

<sup>43</sup> For instance, Canon 68 of the Fourth Lateran Council of 1215 decreed that Muslims and Jewish just dress differently from Christians, so that Christian men not have relations with the Jewish or Muslim women, or that Muslim and Jewish men misrecognize a Christian woman as one from their respective peoples. Furthermore, during the last three days before Easter, Jews and Muslims must not be out in public whatsoever. H J Shroeder, 'The Fourth Lateran Council of 1215: Canon 68' in *Disciplinary Decrees of the General Councils: Text, Translation, and Commentary* (St. Louis: B. Herder, 1937), <<http://www.fordham.edu/halsall/basis/lateran4.html>> (accessed 25 May 2012).



as citizens of Western liberal constitutional states.<sup>44</sup> The fact remains that, despite the *dhimmi* rules having a premodern provenance, they remain relevant today in debates by, about, and among Muslims the world over.

For example, elsewhere I have written about the operation of certain *dhimmi* rules in the modern state of Saudi Arabia, in particular, the rules governing the measure of wrongful death damages.<sup>45</sup> According to the Indian Consulate in Jeddah, Saudi Arabia, the families of Indian expatriates working in the Kingdom can claim wrongful death compensation pursuant to a schedule of fixed amounts. However, the amounts vary depending on the victim's religious convictions and gender. If the victim is a Muslim male, his family can claim SR100,000. But if the victim is a Christian or Jewish male, the family can only claim half that amount, namely SR50,000. Further, if the victim belongs to another faith group, such as Hindu, Sikh, or Jain, his family can claim only approximately SR6,667. The family of a female victim can claim half the amount allowed for her male co-religionist.<sup>46</sup>

Arguably, it seems that Saudi Arabia patterns its wrongful death compensatory regime on early Hanbali rules of tort liability. For example, premodern Muslim jurists held that the *diyya* or wrongful death compensation for a free Muslim male was one hundred camels.<sup>47</sup> But if the victim is a Jew or Christian male, his family could only claim a percentage of that amount. The Shafi'is held that the family was entitled to one-third of what a free Muslim male's family would receive.<sup>48</sup> But the Malikis and Hanbalis granted them one-half of what a Muslim's family could obtain.<sup>49</sup> Furthermore, Sunni and Shi'a jurists held that if the victim was a Magian (*majus*), his family received even less, namely 1/15th of what a free Muslim male was worth.<sup>50</sup> Importantly, 1/15th of SR100,000 is approximately SR6667, the amount a Hindu, Sikh, or Jain's family can claim under current Saudi law.

<sup>44</sup> See for instance Andrew F March, *Islam and Liberal Citizenship: The Search for an Overlapping Consensus* (Oxford: Oxford University Press, 2009).

<sup>45</sup> Anver M Emon, 'The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law' in S Choudhry (ed), *Constitutional Design for Divided Societies* (Oxford: Oxford University Press, 2008), 258–86.

<sup>46</sup> <<http://www.cgijeddah.com/cgijed/index.htm>>. Last viewed on 11 June 2007; copy on file with the author.

<sup>47</sup> Al-Ghazali, *al-Wasit*, 4:64; al-Shirazi, *al-Muhadhdhab*, 3:210.

<sup>48</sup> Muhammad b. Idris al-Shafi'i, *Kitab al-Umm* (Beirut: Dar al-Fikr, 1990), 3:113; al-Mawardi, *al-Hawi al-Kabir*, 12:308; al-Nawawi, *Rawda*, 9:258; al-Ramli, *Nihayat al-Muhtaj*, 7:320.

<sup>49</sup> Malik b. Anas, *al-Muwatta'* (Beirut: Dar al-Gharb al-Islami, 1997), 2:434–5, related that 'Umar II decided that the *diyya* for a killed Jew or Christian is half the *diyya* for free Muslim male. See also Ibn Rushd al-Jadd, *al-Muqaddimat al-Mumabhidat* (Beirut: Dar al-Gharb al-Islami, 1988), 3:295; Ibn Rushd al-Hafid, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid* (Beirut: Dar al-Kutub al-'Ilmiyya, 1997), 2:604–5; al-Qarafi, *al-Dhakhira*, 12:356; Ibn Qudama, *al-Mughni*, 7:793–4, who said that Ahmad b. Hanbal held the amount was one third, but then changed his position to one half; Ibn Muflih, *al-Furu'*, 6:16, also indicated some would provide the Muslim *diyya* for *dhimmis* if the latter were killed intentionally. However, Maliki and Hanbali jurists held that in personal injury cases (*jirahat*), the *diyya* for the injury is whatever a free Muslim male would get. Malik b. Anas, *al-Muwatta'*, 2:434–5; Sahnun, *al-Mudawwana al-Kubra*, 6:395; Ibn Qudama, *al-Mughni*, 7:795; al-Bahuti, *Kashshaf al-Qina'*, 6:23–4.

<sup>50</sup> Al-Shafi'i, *Kitab al-Umm*, 3:113; al-Ghazali, *al-Wasit*, 4:67; al-Mawardi, *al-Hawi al-Kabir*, 12:311; al-Nawawi, *Rawda*, 9:258, who said that the *majus* get *thultha 'ushr* of the *diyya* for a free Muslim male; al-Ramli, *Nihayat al-Muhtaj*, 7:320. Notably, Ibn Qudama related a minority opinion

To take away from this premodern and modern comparison the view that Saudi Arabia cannot get past the premodern mindset, though, would be a mistake. Saudi Arabia is very much a product of a post-colonial context of modernity, in which the modern state (as opposed to the premodern empire) predominates as a (if not the) most significant centre of power and authority. Like its counterparts in the international community, Saudi Arabia cannot escape the inevitable interactions between and among states that happen in the day-to-day context of a globalized communications and economic network. So while Saudi Arabia incorporates elements of premodern *fiqh* into its legal system, it also aspires to modern principles of governance that arise from the shared challenge of governing a state amidst pluralism—a challenge that it has certainly been criticized for managing poorly.

What are we modern readers to make of the Saudi example though? What is the significance of the *dhimmi* rules in a modern state such as Saudi Arabia? To answer this question, one might benefit from examining how the *dhimmi* rules are used in Saudi Arabia to cultivate a culture of identity and identity politics in a post-colonial setting. For instance, Eleanor Doumato writes about references to the *dhimmi* rules in Saudi Arabian school books. Doumato reviews Saudi Arabian school textbooks to determine if they foster and incite anti-Western sentiments. She is critical of the curriculum, although she has doubts about the extent to which the textbooks contribute to a widespread hatred of the West. Nonetheless, she notes that among the 9th–12th grade textbooks she reviewed, some lessons counseled students to show caution concerning the non-Muslim. She writes:

Without any attempt at historicization, the concept of *ahl al-dhimma* [People of the Covenant] is introduced as if it were an appropriate behavioral model for contemporary social intercourse between Muslims and non-Muslims . . . Non-Muslims who are *ahl al-kitab* [People of the Book] are given a special status as *ahl al-dhimma*, people in a covenant relationship with Muslim rulers, which secures their property, possessions and religion . . . With no mediating discussion or attempt to place the restrictions in historical context, the chapter ends with questions posed to the students such as ‘What is the judgement about greeting the *ahl al-dhimma* on their holidays?’ . . . leaving the impression that the historical relationship of inferior subject people to superior conquering people is meant as a model with contemporary relevance.<sup>51</sup>

According to Doumato, the textbook’s discussion on the *dhimmi* is not meant to incite an aggressive agenda. Rather, Doumato argues that the texts reflect a sense of

held by al-Nakha’i and others who equated the *diyya* for the *majus* and free Muslims because both are free and inviolable human beings (*adami hurr ma’sum*). Ibn Qudama, *al-Mughni*, 7:796. The Ja’fari al-Muhaqqiq al-Hilli, *Shara’i’ al-Islam*, 2:489, related three views, namely that Jews, Christians, and Magians are valued at 800 *dirhams*, or all enjoy the same *diyya* as Muslims, or that Christians and Jews are entitled to 4,000 *dirhams*. According to the Ja’fari al-Hurr al-Amili, *Wasa’il al-Shi’a ila Tabsil Masa’il al-Shari’a* (Beirut: Dar Ihya’ al-Turath al-‘Arabi, nd), 19:141–2, the *diyya* of a free Muslim male is roughly 10,000 *dirhams*, while the *diyya* of a *dhimmi* Jew or Christian is 4000 *dirhams*, and the *diyya* of the *majus* is 800 *dirhams*, roughly 40% and 8% respectively of the *diyya* for a free Muslim male.

<sup>51</sup> Eleanor Abdella Doumato, ‘Manning the Barricades: Islam According to Saudi Arabia’s School Texts’ (2003) 57(2) *Middle East Journal* 230–47, 237–8.

defensiveness and a people struggling against a perceived threat to their existence and wellbeing. Drawing on the work of Martin Marty, Doumato suggests that the Saudi textbooks are designed to inculcate a traditional set of values for a people who feel 'they have inherited an ancestral past, but then experience a sense of being threatened. The threat may be something vague such as a fear of "identity diffusion" or secularism, or it might be quite concrete, such as assault by outsiders.'<sup>52</sup>

Considering the *dhimmi* doctrines in Saudi school books alongside the *dhimmi* rules that operate in the Saudi legal system, one might surmise that today's recourse to the *dhimmi* rules constitute premodern answers to very modern questions concerning the post-colonial Muslims' sense of dispossession, threat, and the loss of authority and authenticity in a modern world.<sup>53</sup> Invoking the *dhimmi* rules is to name the *other who is not us*, thereby creating a foil against which to define one's self and community. As much as both Saudi examples draw upon the premodern tradition, the significance of resorting to the *dhimmi* rules today has less to do with the past, and more to do with finding a footing in a post-colonial present. Although premodern in provenance, the *dhimmi* rules today reflect modern efforts to inculcate and situate the post-colonial Muslim struggling to find his or her place in a complex, modernizing world that dominates regions that once witnessed the glory of an Islamic empire.

### G. Conclusion: the shared challenge of governing amidst pluralism

This essay has predominantly focused on premodern Islamic legal debates to show that the *dhimmi* rules reflect the challenge of governing pluralistically. Implicit in the analysis is the contention that such a challenge is common across time, space, and tradition. There is no denying that the *dhimmi* rules differentiated between people in ways that in the modern day we would find patently discriminatory; but the fact that minorities could be treated in such fashion is hardly unique to the Islamic tradition. For instance, in the 20th century, the US Supreme Court constitutionally justified limiting the religious freedom of Jehovah's Witnesses in the name of national security and well-being. In *Minersville School District v Gobitis* (1940), Lillian and William Gobitis were expelled from the public schools of Minersville School District for refusing to salute the US flag as part of a daily

<sup>52</sup> Doumato, 'Manning the Barricades', 233.

<sup>53</sup> Scholars and Muslim reformists have deeply criticized the effect of the West and modernity on the nature and organic integrity of Islam for Muslims today. These criticisms are perhaps so ingrained in and accepted by those such as Keller and the authors of the Saudi textbooks as to animate a framework of analysis that requires no justification. Much has been written on Islam and modernity. For some useful references, see Bassam Tibi, *The Crisis of Modern Islam: A Preindustrial Culture in the Scientific-Technological Age*, trans Judith von Sivers (Salt Lake City: University of Utah Press, 1988); Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition* (Chicago: University of Chicago Press, 1982).

school exercise as required of all students by the local school board.<sup>54</sup> Justifying the court's decision, Justice Frankfurter wrote:

The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution. This Court has had occasion to say that '... the flag is the symbol of the nation's power,— the emblem of freedom in its truest, best sense. ... it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.'<sup>55</sup>

For Frankfurter J, national unity is an essential condition for order and wellbeing: '[n]ational unity is the basis of national security'.<sup>56</sup> Notably, the case was overturned three years later in *West Virginia State Board of Education v Barnette*.<sup>57</sup> Nonetheless, *Gobitis* is a reminder that no political system is immune from the challenges of governing amidst diversity.

In more recent years, the challenge of governing a pluralist polity has illuminated the xenophobic underbelly of American and European national sensibilities concerning the Muslim members of their polity. Countries in Europe and North America are increasingly issuing (and passing) legislation that bans certain forms of veiling for Muslim women. Muslim women who wear the veil are often (re) presented as threats to security, the national polity, or as outsiders whose religious beliefs make them incapable of truly being 'one of us'.<sup>58</sup> The creation of mosques has also become a point of concern for countries such as Switzerland and the United States. In Switzerland, a campaign that featured an ominous image of a covered Muslim woman standing next to missile-like minarets emanating from the Swiss flag galvanized the populace to the extent that it passed a referendum that constitutionally bans the erection of any minarets in the country.<sup>59</sup> Across the Atlantic Ocean, the national controversy over a community center being built two

<sup>54</sup> *Minersville School District v Gobitis*, 310 US 586 (1940).

<sup>55</sup> *Gobitis*, 310 US 586 at 596.

<sup>56</sup> *Gobitis*, 310 US 586 at 595. Frankfurter J was aware of the stakes at issue in this case. The claims of a religious minority are weighed against the demands of the polity for national well-being and order. The legislation at issue is neither specific nor particular; it is a general rule of law that is well within the power of the legislature to put into effect. Frankfurter J seemed especially compelled to respect the power of the legislature in matters such as education, as the court lacks the competence to advise on education policy.

<sup>57</sup> *West Virginia State Board of Education v Barnette*, 319 US 624 (1943).

<sup>58</sup> Examples of such cases are from France, the United Kingdom, and the United States. For a case where a covered Muslim woman was denied French citizenship because her religious beliefs were deemed incompatible with French core values, see *In re: Mme M* (Case 286798). *Le Conseil d'Etat* <[http://www.conseil-etat.fr/ce/jurispr/index\\_ac\\_1d0820.shtml](http://www.conseil-etat.fr/ce/jurispr/index_ac_1d0820.shtml)> (accessed 23 September 2008). For a UK case in which a high school girl's desire to wear a *jilbab*, in contradiction of school policy, was transformed into a symbol of extremism and threat to others, see *Shabina Begum v Headteacher and Governors of Denbigh High School* [2006] UKHL 15. For a US case in which a *niqab*-wearing Muslim woman was held to legal standards that ignored her status as an American citizen, see *Sultaana Lakiana Myke Freeman v State of Florida, Department of Highway Safety and Motor Vehicles* Mp/5D03-2296, 2005 Fla Dist Ct App LEXIS 13904 (Court of Appeal of Florida, Fifth District, 2 September 2005).

<sup>59</sup> Christopher Caldwell, 'No Minarets, Please,' 15(3) *The Weekly Standard*, 14 December 2009; Bandung Nurrohmah, 'A lesson to draw from the Swiss ban on minarets,' *The Jakarta Post*, 15 December 2009, p 7.

blocks away from Ground Zero in New York City again reveals that the challenge of governing amidst diversity is shared across polities and legal systems. For as long as people aspire to govern with regard to majoritarian values defined in terms of the assumptions held by the majority, minorities will often suffer with little recourse, especially amidst claims of crises. It is hard to ignore that the Muslim (especially the covered Muslim woman) is securitized in an increasingly security-conscious world. With the threat of terrorism and the seeming futility of defeating the Hydra-like al-Qaeda, visible Muslims, such as the covered Muslim woman or proponents of mosques and Islamic centres, offer an easy target for pacifying anxieties about the unseen, undetected, and unexpected terror threat. The language of justification may invoke 'security', but more often than not, the promotion of 'security' is meant to promote the presumed core values without which the particular contemporary society will presumably not survive.

Perhaps such challenges are unavoidable in a heterogeneous society. Determining the scope of accommodation that will be granted to the 'Other' is not an easy matter. The more government officials encounter the demands of minority communities, the more they will need to be mindful not only of what the communities' demands are, but also of the extent to which the prevailing legal order can or cannot accommodate those demands. The more a jurist defers to the foundational values as against claims of difference, the more minority groups may feel unduly oppressed. But the more jurists accommodate the demands and values of the 'Other', the more they may undermine the integrity and sovereignty of the prevailing legal order.

Ironically, contemporary concerns about Muslims in Europe and North America have more in common with the *dhimmi* rules than many may realize. In both cases, legal and political arguments are used to regulate the bodies of the 'Other' in a manner that is linked to majoritarian values that are deemed to animate and legitimate the governing regime. Whether in the Islamic or liberal constitutional case, both share in the very human phenomenon of addressing anxieties about the public good by targeting those who are different and, quite often, powerless to resist.