

SACRED LAW IN A SECULAR LAND

To What Extent Should Sharī'a Law be Followed in Australia?

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Muslims are obliged to follow the Sharī'a law wherever they live. However, in Australia – as in other Western, secular countries – the extent to which Sharī'a should be followed is debatable. In these countries, some Muslims appeal for partial application of Sharī'a in personal, financial and family matters; others hope for full Sharī'a implementation. The sentiment among the wider non-Muslim community is typically pejorative, leading to outright rejection of Sharī'a law, regardless of any ensuing benefit. However, the practice of Sharī'a is dependent on a number of factors, not the least of which is the country in which a Muslim lives – the 'abode'. This article examines classical and contemporary juristic discourse on the extent to which a Muslim is obliged to follow Sharī'a in non-Muslim countries. It presents a holistic understanding of the meaning and intent of Sharī'a, and describes the conditions under which these laws should be followed. Importantly, relying on the views of leading classical and contemporary scholars, the article demonstrates that in non-Muslim lands Muslims are only obliged to follow certain aspects of personal status law.

Sharī'a¹ usually conjures fear in the Western psyche, for it is often associated with the *ḥudūd* laws – the penalties prescribed for certain crimes, or penal laws – and the supposed incompatibility it has with democracy and human rights. Notwithstanding the fact that some contemporary Western scholars postulate the influence of Islamic law on certain aspects of the

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¹ Usually spelt Sharia but other spellings include Shariah, Shari'a and Syariah. Phonetically, Sharī'a is a more accurate spelling and this will be used henceforth in this article. In the transliteration of Arabic terms and names the article uses macrons (such as ū, ʿ, ḥ, ā) to enable Arabic speakers and specialists to re-establish precise equivalence of the words.

common law,² and Sharī'a's compatibility with the higher objectives of democracy,³ it seems that 'no legal system has ever had worse press'.⁴ For example, in 2006 the then federal Treasurer Peter Costello used a speech at the Sydney Institute to declare that 'there was no place for Sharī'a laws in secular society like Australia' because being an Australian means that 'you do have to believe in democracy, the rule of law and the rights and liberties of others'⁵ – concepts that are not discounted by the Sharī'a. Similarly, in March 2012, the Attorney-General, Nicola Roxon, said 'there is no place for Sharī'a law in the Australian society and the government strongly rejects any proposal for its introduction' in response to the execution of wills that favour sons over daughters.⁶

This pejorative response is the result of a host of factors including, but not limited to, 'media's reports which highlight "differences" and feed into fears about Muslim presence in Australia',⁷ a failure to understand the meaning and nature of Sharī'a⁸ and a view that 'Muslims are the least liked of all immigrants and are seen as the most threatening'.⁹ More specifically, 'for many women's rights activists working internationally, especially those coming from a Western context, Sharī'a is believed to be a major obstacle to

² Professor George Makdisi (1999) provides new ground-breaking research that demonstrates that three legal concepts – which were injected into the English legal system – have no other origin but in the Islamic legal practice – namely, contract (action of debt – identified with the Islamic '*aqd*'), the assize of *novel disseisin* (which played a major role in shaping the common law, and is identified with the Islamic *istiḥqāq*), and trial by jury (identified with the Islamic *laḥf*). Makdisi's evidence lies in the 'unique identity of characteristics of these three institutions with those of their Islamic counterparts, the similarity of function and structure between Islamic and common law, and the historic opportunity for transplants from Islam through Sicily'. The Islamic influence on the common law was suggested by other earlier scholars, such as Henry Cattan, who in 1955 noted that the English trust closely resembled and probably derived from the earlier Islamic institution of *waqf*. See, for example, Cattan (1955), pp 213–15.

³ See Abdalla and Rane (2009), pp 164–85.

⁴ Feldman (2008).

⁵ Barlow (2006).

⁶ Karvelas (2012). This was in response to a bitter dispute between siblings that came before the ACT Supreme Court in Canberra in March 2012, when a daughter of a devout Muslim woman demanded she receive the same inheritance as her brothers. Based on Qur'an 4:11, a female receives half the inheritance of her male siblings or relatives. However, it should be noted that there are also eleven cases where a woman inherits the same amount as a man, in fourteen cases she inherits more than a man, in five cases she inherits and a man does not, and only in four cases will a woman inherit less than a man. For more information on this topic see, for example, Sultan (1999).

⁷ Black and Sadiq (2011), p 397.

⁸ Feldman (2008), p 3.

⁹ Black and Sadiq (2011), p 398.

women's rights'¹⁰ because 'to many, the word "Shariah" conjures horrors of hands cut off, adulteress stoned and women oppressed'.¹¹

In the Australian context, this is possibly exacerbated by recent requests made by some Australian Islamic organisations and individuals to introduce a plural legal system in Australia (such as that in Singapore or India) that can accommodate aspects of Islamic law, and by more extreme demands to fully implement *Shari'a* by groups such as Sharia4Australia. For example, former Islamic Council of Victoria (ICV) president and lawyer Hyder Gulam has called for Australia to embrace legal pluralism. Specifically, he called for the 'recognition of Sharia in terms of dispute resolution (similar to what the Jewish community has in relation to the Beth Din courts, or similar to the reconciliation hearings at the Koori Courts in Victoria)'.¹² Hyder argues that, up to 1992, 'the Muslim communities of Christmas and Cocos (Keeling) Islands successfully managed their religious affairs and regulations using their Muslim personal and customary laws without any conflict with Australian Family Law of 1975'.¹³

Likewise, in 2011 the Australian Federation of Islamic Councils (AFIC), Australia's peak Islamic organisation, submitted a proposal to the government calling for legal pluralism to accommodate *Shari'a* family law, Islamic finance and *halal* certification.¹⁴ Notwithstanding the above, a preliminary Australian Research Council funded study of 80 Australian Muslim lawyers and religious community leaders 'revealed a mixed attitude towards Sharia law ... some participants believed that Australian law should always come first. But others believe that aspects of Sharia and civil law could coexist, for example in the areas of family law, wills and Islamic finance'.¹⁵

The debate over legal pluralism is not the focus of this article.¹⁶ However, the fact that there is a call for the recognition of aspects of *Shari'a* law in Australia begs the article's central question about the extent to which a Muslim is obliged to follow *Shari'a* law in a non-Muslim country. In answering this question, the article discusses the meaning, sources and objectives of *Shari'a*; the bifurcation of the world into abodes and its

¹⁰ Quraishi (2011), p 173.

¹¹ Feldman (2008).

¹² Hyder (2012a), p 72.

¹³ Hyder (2012b), p 26.

¹⁴ Berkovic (2012).

¹⁵ Berkovic (2012).

¹⁶ March (2009), p 38 notes that: 'On many non-constitutional matters there is a space in liberal societies for negotiating the precise terms of public and private life, a condition for which *fiqhī* reasoning is ideally suited. On the other hand, liberal societies are more inflexible than non-liberal ones on the question of legal pluralism. It is much harder for liberal societies to grant Muslim communities parallel legal jurisdiction to apply the *shari'a* than it is for societies without universalizing commitments to equality in civil rights.'

relevance to the subject-matter; and the aspects of Sharī'a that Muslims are obliged to follow in non-Muslim countries.

Sharī'a: Meaning, Sources and Objectives

The word Sharī'a appears once in the Qur'ān, denoting a religious path: 'Now We have set you [Muhammad] on a clear religious path [Sharī'a], so follow it. Do not follow the desires of those who lack [true] knowledge.'¹⁷ Sharī'a therefore means more than just 'Islamic law', for this 'prosaic translation does not capture the full set of associations that the term "Shariah" conjures for the believer'.¹⁸ Lexically, it means 'path' or 'road' to a watering place¹⁹ or a path to 'achieve salvation'²⁰ in the Hereafter (*ākhirā*). As water gives life to the physical body, religion gives life to the soul and heart, providing ultimate salvation in the Hereafter.²¹ Commenting on this verse, the renowned classical exegete of the Qur'ān, al-Qurṭubi, understood the term to mean 'religion as ordained by God for His worshippers'.²² Technically, the Sharī'a refers to a body of explicit revealed laws (*naṣ* pl. *nuṣūṣ*) found in the primary sources of the Qur'ān²³ and Sunna (sayings, actions and tacit approval of Prophet Muhammad), which provide the subject matter of the law. The *naṣ* is fixed and unchangeable and largely general, with basic principles such as 'establish prayer' and 'do not approach prayer whilst intoxicated'.²⁴

Fiqh (jurisprudence) is a related term that refers to 'knowledge of practical legal ruling derived from their specific evidence',²⁵ which is better known as a body of laws deduced from the Qur'ān and Sunna to cover specific situations not directly treated in the revealed sources.²⁶ Unlike the

¹⁷ Qur'ān (45:18). This English translation, and all subsequent translations, are by MAS Abdel Haleem (2010).

¹⁸ Feldman (2008).

¹⁹ Al-Qatān (1985), p 8.

²⁰ Saeed (2006), p 43.

²¹ Sha'rawi (1991), p 14105.

²² Al-Qurṭubi (2003), p 163.

²³ There are 114 chapters (*suras*) and 6235 verses (*ayāt*) of unequal length in the Qur'ān. There are 500 texts that deal with broad ethical-legal principles (*aḥkām*). One hundred and forty of these deal with acts of worship (*ibādāt*) and the remainder deal with transactions (*mu'amalāt*) that cover areas such as 'constitutional' law (about ten verses), international law (about fifteen verses), financial transactions (about ten verses), civic involvement (about 70 verses), criminal law (about 30 verses) and ruling of personal status (about 70 verses): Khuja et al (1981), pp 20–21. The Qur'ān, it must be noted, provides *general* guidelines on almost every major topic of Islamic law; some rulings, however, are specific 'on such matters as marriage, divorce, inheritance and penalties, [but] the larger part of Qur'anic legislation consists of broad and comprehensive principles': Kamali (2008), p 20.

²⁴ Abdalla (2011), p 216.

²⁵ Abdalla (2011), p 216.

²⁶ Abdalla (2011), p 216.

Sharī'a, *fiqh* 'is flexible and changes according to the circumstances under which it is applied, and it tends to be specific'.²⁷ The process of deducing legal laws is undertaken through independent legal reasoning (*ijtihād*)²⁸ based on secondary sources including *ijmā'* (general consensus of the learned), *qiyās* (analogical reasoning), *istiḥsān* (juristic preference), *istiṣlāh* or *saṣaḥa mursala* (consideration of public interest), *sadd al-dharā'i'* (blocking the means), *istiṣhāb* (presumption of continuity) and '*urf* (customary practice).²⁹

In deriving legal-ethical rules (*aḥkām*), qualified scholars first examine the Qur'an and Sunna for a particular *naṣ*, which 'constitute the real eternal Sharī'a'. With the exception of the explicit texts, the Islamic legal system is not static, immutable or unchangeable, but has evolved in response to changing social, political, economic, intellectual and political circumstances.³⁰ Hence the overwhelming attitude of Muslim jurists and scholars over the centuries has been the continued examination and re-examination of Islamic legal literature, making the evolution of Islamic jurisprudence a common practice.

Furthermore, in developing its legal system, scholars take into account the higher objectives of Sharī'a, known as *maqāṣid al-Sharī'a*,³¹ and divide it into two general categories: (1) higher objectives of the lawgiver; and (2) objectives of those accountable before the law.³² Like Imām al-Ghazālī (d. 1111), Imām al-Shāṭibi (d. 1388) concluded that the major objectives of Sharī'a are the preservation of religion, human life, progeny, material wealth and human reason. He further opined that Islamic law aims to preserve essential and other interests by preserving their *existence* and also protecting them from annihilation.³³ Taqī al-Dīn ibn Taymiyyah (d. 1328) added to the list of objectives 'fulfilment of contracts, preservation of the ties of kinship, honouring the rights of one's neighbour, insofar as the affairs of this world are concerned, and the love of God, sincerity, trustworthiness and moral purity, in relationship to the hereafter'.³⁴ Other contemporary scholars who added to this list were concisely summarised by the twentieth-century Moroccan scholar 'Allāl al-Fāssi (1910–74):

²⁷ Abdalla (2011), p 216.

²⁸ According to Kamali (2008), pp 162–3, *ijtihād* means 'striving or exertion; it is defined as the total expenditure of effort by a *mujtahid*, in order to infer, with a degree of probability, the rules of *Sharī'ah* from the detailed evidence in the sources'.

²⁹ Khuja et al (1981), pp 149–50.

³⁰ Basha (1990), p 8.

³¹ Other terms that are used interchangeably to mean the same thing are *maqāṣid al-Shāri'* (the higher objectives of the lawgiver), and *al-maqāṣid al-shar'iyyah* (legal objectives). See Al-Raysuni (2006), p xxi.

³² Al-Raysuni (2006), p 107.

³³ Al-Raysuni (2006), p 109.

³⁴ Cited in Kamali (2008).

The higher objective of Islamic law is to populate and civilize the earth and preserve the order of peaceful coexistence therein; to ensure the earth's ongoing well-being and usefulness through the piety of those who have been placed there as God's vicegerents; to ensure that people conduct themselves justly, with moral probity and with integrity in thought and action, and that they reform that which needs reform on earth, tap its resources, and plan for the good of all.³⁵

For believers, therefore, the Sharī'a is always relevant and important wherever they reside, because it is the core of their *Dīn* – religion – guiding every aspect of their social, economic, political and private lives. It is religion and law at once. While 'religion' is concerned with determining the 'path' to eternal salvation, informing one how to live and conduct one's public and private life, 'law' is concerned with establishing legal relationships between people, and establishing appropriate institutions to regulate such a relationship in a just and equitable manner.³⁶ While religion focuses on belief in God and the Hereafter, ritual and prayer, morals and ethics, and reward and punishment, law focuses on 'rights, duties, and remedies'.³⁷

Given the centrality and importance of Sharī'a in the lives of Muslims, the question is not whether it should be followed, but which of its laws Muslims are obliged to follow in non-Muslim lands. Any discussion concerning the obligation to follow the Sharī'a is incomplete without an exposition of the classical and contemporary bifurcation of the world into abodes (or territories): *dār al-Islam* and *dār al-kufr*. This is true because the extent to which Sharī'a laws can be followed is directly dependent on this bifurcation. Therefore, a somewhat detailed explanation of this bifurcation is essential.

Bifurcation of Territories into Abodes

The Arabic noun *dār* simply denotes home, house or abode. In its wider juristic meaning, it refers to a country, region or territory. In the absence of an explicit (*qaṭ'ī*) text in the Qur'an and Sunna,³⁸ classical Muslim jurists (*fuqahā'*) coined the terms *dār al-Islām* ('abode of Islam'), *dār al-kufr* ('abode of unbelief') and *dār al-Ḥarb* ('abode of war') to reflect the intended meaning found in speculative (*zanni*) texts.³⁹ The bifurcation is a product of

³⁵ Al-Raysuni, (2006), p xxiii.

³⁶ Makdisi (1999), p 1654.

³⁷ Makdisi (1999), p 1654.

³⁸ For example, Qur'an 4:97 and 8:72 are viewed as permitting the legality of migrating (*hijra*) from an abode that is oppressive and prohibits the practice of Islam to another abode that does (Al-Rāfi'i, 2002).

³⁹ Al-Rāfi'i (2002), p 21. Also see the 2012 *fatwa* by the International Union of Islamic Scholars (IUIS), in which they declare that these labels are 'jurisprudential labels that do not occur in the Qur'an and Sunna.' IUIS (2012).

ijtihād, and is therefore subject to various interpretations.⁴⁰ Undoubtedly, this bifurcation was influenced by the geo-political context of the day,⁴¹ and is thus dictated by events and not derived from explicit Islamic legislation.⁴² Given this actuality, the juristic understanding of the division of the world into abodes was heavily influenced by prevailing political circumstances and the balance of military power between the Islamic world and the rest of the world.

The complexity and diversity of contextual circumstances forced a wide range of scholarly discussions on this issue, leading to ambiguous language and no explicit stance on what is actually meant by labelling territories with any of the terms.⁴³ However, in attempting to classify territories into abodes, and in the absence of explicit texts, classical jurists suggested that one looks at the ‘illah – or rationale (*raison d’être*) for determining whether a land is *dār al-Islām* or otherwise.⁴⁴ This naturally led to a number of conclusions.

First, the majority (*jumhūr*) of Sunni jurists said that the ‘illah that distinguishes one country from another is the prevalence of *aḥkām* (laws, ordinances or legal rulings). That is, a country is considered *dār al-Islām* where Islamic laws prevails (*al-aḥkām ta’lū al-dār*).⁴⁵ This view is supported by the majority [*jumhūr*] of scholars of the Ḥanafī, Ḥanbalī and Zāhirī schools of law.⁴⁶ For example, the Ḥanafī jurist Al-Kāsānī (d. 1189) stipulated that ‘there is no difference among our friends that *dār al-kufr* becomes *dār al-Islām* through the manifestation [*zuhūr*] of Islamic laws therein’.⁴⁷ Equally, the Ḥanbalī scholar Ibn al-Qayyim al-Jawziyya (1292–1350) concluded that ‘the majority said: *dār al-Islām* is one which is populated by Muslims and where Islamic laws prevail. An abode is not *dār al-Islām* if Islamic laws do not prevail.’⁴⁸

Second, another group of jurists, most notably Imām Abu Ḥanīfa (699–767),⁴⁹ argued that the *raison d’être* is safety (*‘amn*) or fear (*khawf*), such that a territory is considered *dār al-Islām* if its Muslim and *dhimmi* (protected non-Muslims) population feel safe to practise their faith.⁵⁰ Furthermore, he argued that a territory becomes *dār al-kufr* only if: (1) non-

⁴⁰ Saliḥ (2011), p 42.

⁴¹ Saliḥ (2011), p 36. For views of contemporary scholars who advocate this view, see Abu Zahra (1995); al-Zuhaili (1981).

⁴² Zawati (2011), p 50.

⁴³ El Fadl (1994), p 161.

⁴⁴ Saliḥ (2011), p 42.

⁴⁵ Saliḥ (2011), p 42.

⁴⁶ Saliḥ (2011), pp 42–43.

⁴⁷ Al-Kāsānī (2003), p 519.

⁴⁸ Al-Jawziyya (1997), p 728.

⁴⁹ The founder of the Sunni Hanafī school of thought, Nu’mān ibn Thābit – better known as Imām Abū Hanīfah (699–767) – was a *mujtahid*, judge, and the author of the encyclopedic *al-Mabsūt* [The Extensive]. See Keller (1994), p 1093.

⁵⁰ Al-Kāsānī (2003), p 519.

Islamic laws prevail; (2) directly bordering (*mutākhīma*) on *dār al-kufr*; and (3) there remains no Muslim or *dhimmi* safe to practise their faith as was afforded to them by *dār al-Islām*.⁵¹ Abu Ḥanifa's foremost students, Abu Yusuf and Muḥammad, rejected the last two conditions, arguing that *dār al-Islām* becomes *dār al-kufr* only if Islamic laws cease to prevail.⁵² Some Shaff'i jurists added that a territory becomes *dār al-kufr* if Muslims are no longer *safe* to practise their faith, even if it is a majority Muslim country,⁵³ and a majority non-Muslim country is considered *dār al-Islām* if it is ruled by Islamic law⁵⁴ and Muslims are safe to practise their faith. The Ḥanafī Imām al-Sarkhasī (d. 1090) added that *dār al-Islām* is any place that is under Muslim jurisdiction and where Muslims feel safe⁵⁵ to practise their faith. Al-Shawkānī (1760–1834)⁵⁶ went further, arguing that a country that is *not* under Muslim jurisdiction (*hukūm islāmī*) is considered *dār al-Islām* 'as long as a Muslim can reside there in safety and freely fulfil his religious obligations'.⁵⁷

The third opinion, advocated most notably by Abdul Wahāb Khalāf (1888–1956),⁵⁸ reconciles both of these views, and stipulates that an abode is considered *dār al-Islām* if: (1) Islamic laws prevail; and (2) all citizens, Muslims and *dhimmis*, feel safe to practise their faith, while the opposite is true.⁵⁹ Lastly, a group of scholars from the Maliki school of law, such as Muhammad 'Arafah ad-Dāsuqī (d. 1815), argue that the '*illah* is the extent to which the rituals (*sha'ā'ir*) and acts of worship (*'ibādāt*) are publicly manifested. This view is also supported by scholars of the Zaydī School of law.⁶⁰

The diversity of definitions is indicative of the evolving understanding of the concept of abode. In fact, the geo-political context forced jurists to continuously reassess the standard bifurcation and offer more fitting constructs. Thus to the above list they added *dār al-'ahd* ('abode of covenant'), which is divided into (1) *dār 'ahd al-dhimma* (abode of covenant with protected non-Muslims who are under the jurisdiction of *dār al-Islām*),

⁵¹ Al-Kāsānī (2003), p 519.

⁵² Al-Kāsānī (2003), p 519.

⁵³ Saliḥ (2011), p 43. For more information on this, see Zaydan (2004); Lutfi (1990).

⁵⁴ Tubuliak (1997), p 16. For this reason, some contemporary scholars argue that today no country qualifies as a *dar al-Islam*. This opinion is equally refuted by other contemporary scholars based primarily on Imam Abu Hanifa's (699–767) definition of *dar al-Harb*.

⁵⁵ Al-Ṭarīqī, (2007), p 201.

⁵⁶ A nineteenth-century scholar of Sharia law and ḥadīth, and an Islamic judge, who was born and died in San'a, Yemen.

⁵⁷ Zawati (2011), p 50.

⁵⁸ A renowned Islamic scholar and jurist from al-Azhar with specialisation in Principles of Islamic Jurisprudence (*Usūl al-Fiqh*).

⁵⁹ Saliḥ (2011), p 44. See also Khalaf (1988), p 20.

⁶⁰ Saliḥ (2011), pp 45–46. This is a Shiite school of law named after Zayed ibn 'Ali, and is prevalent in Yemen. It is closer to other Sunni schools of law than that of major Shiite schools of law.

and (2) *dar al-muwāda‘a* (abode of covenant with non-Muslims who are not under the jurisdiction of *dār al-Islām*).⁶¹ This can be appreciated further from the *fatwa*⁶² issued by the Ḥanbali jurist Taqī al-Dīn ibn Taymiyyah (d. 1328) regarding the city of Mardīn (now in south-eastern Turkey), which was conquered by the Mongols in the fourteenth century. The majority of the population of Mardīn were Muslims and although its Mongol rulers were also Muslim, they were criticised for failing to faithfully adhere to Islam. Hence Ibn Taymiyyah was asked whether the city of Mardīn was an abode of war, and if so whether its Muslim population should migrate to *dār al-Islām*. In response he said:

As for whether it is a land of war or peace, it is a composite situation [*dār murakkaba*]. It is not an abode of peace where the legal rulings of Islam are applied and its armed forces are Muslim. Neither is it the same as an abode of war whose inhabitants are unbelievers. It is a third category. The Muslims living therein should be treated according to their rights as Muslims, while the non-Muslims living there outside of the authority of Islamic law should be treated according to their rights.⁶³

This diversity of opinions should not be surprising because, in formulating legal doctrines, jurists were exercising *ijtihād* based on speculative texts and influenced by the political context of the day. This evolution is indicative of the flexibility of Islamic jurisprudence, which is meant to interact with its context. That is why Ibn Taymiyyah invented a new term to delineate the particular context of Mardīn, demonstrating his cognisance of the fact that ‘the world is not to be divided simplistically into Islamic lands and non-Islamic lands, unlike many before him who held to that dualistic view’.⁶⁴

Therefore, in classifying territories into abodes, jurists were guided by text and context. Further, the bifurcation seems to have served two important

⁶¹ Salih (2011), pp 54–55.

⁶² Fatwa (pl. *fatāwā*) is ‘a legal opinion issued by an expert scholar (*mufti*) clarifying a ruling within Islamic law based on evidence as a response to a question ... [and] denotes clarifying God’s law for a problematic legal case (*nawazil*) based on some textual legal evidence’. Cited in Abdalla (2011), pp 215–16.

⁶³ Al-Turayri (2010). This *fatwa* has been the subject of controversy because of the misprint of *one* word in the original Arabic *fatwa* issued by Ibn Taymiyya. The controversy surrounds the last passage of the *fatwa*: ‘the non-Muslims living there outside of the authority of Islamic law should be *treated* according to their rights’. In some printed editions, the text is corrupted to read ‘while the non-Muslims living there outside of the authority of Islamic law should be *fought* as is their due’, where the word ‘treated’ is replaced by the word ‘fought’. Instead of the correct, original word *yū‘āmal* (should be treated), the word is rendered *ūqātal* (should be fought). This typographic error changes the meaning of the phrase dramatically. The correct wording of the *fatwa* appears in a number of early sources while the corrupted version began to appear only about 100 years ago in a 1909 edition of Ibn Taymiyya’s *fatāwa*: Al-Turayri (2010).

⁶⁴ Al-Turayri (2010).

functions: to guide and govern international relations between Islamic and non-Islamic countries; and to determine the extent to which the Sharī'a should be followed or applied in the abode in which Muslims reside – as a majority or minority community. Of course, the globalised context of our modern world, and its geo-political dynamics, have forced the emergence of secular democracies such as Australia – a form of government whose constitution allows and protects religious freedom. As such, and to a very large degree, Australian Muslims are safe and secure to practise their faith freely. This is the case despite the fact that Islamic laws do not prevail and the Sharī'a does not shape or influence Australia's constitution.

Australia: An Abode of Islam, Unbelief or War?

How, then, can the various abodes coined by classical jurists apply to modern, democratic countries (such as Australia) where Muslims are considered equal citizens, and where they enjoy the right to practise their faith safely and without being coerced into suppressing or abandoning their faith?⁶⁵ In offering answers, contemporary scholars – like their predecessors – differ. Shaykh Fayṣal Mawlawī (adviser to the Sunni High Court in Beirut) labels secular, democratic nations as *dār al-da'wa*,⁶⁶ best translated as abode of invitation to Islam – or, as March calls it, 'Islamic proselytism'.⁶⁷ It is interesting that Mawlawī carefully chooses this label, perhaps because:

Da'wa has long served a number of purposes for *sharī'a* minded scholars, from justifying long-term residence in non-Muslim lands to the suspension of *jihād*. But embedded in contemporary discussions of *da'wa* is a subtle reformulation of basic attitudes towards non-Muslims' welfare and moral personality.⁶⁸

Prominent contemporary scholars Abd al-Qādir 'Awda (d. 1954), Muḥammad Abū Zahra (1898–1974)⁶⁹ and more recently Shaykh Yusuf al-Qaradāwī argue that secular, democratic nations are best regarded as *dār al-'ahd* ('abode of covenant').⁷⁰ This was recently supported by a 2012 *fatwa*

⁶⁵ It is important to note that: 'Unlike Muslim minorities in Russia, Israel, China, East Africa, India and Southeast Asia, Muslim minorities in the West are told that the prevailing liberal values of equality, religious tolerance, universal citizenship, public civic education, gender equality and moderate civic loyalty are not merely contingent political demands which a particular regime poses in return for security and religious freedom but values which represent the achievements of the Enlightenment and Modernity and might very well be political practices which all countries in the world should adopt. This political culture need not describe itself as *metaphysically true* and thus Western societies need not explicitly demand that Muslims abandon Islamic truth claims.' March (2009), p 36.

⁶⁶ Shadid and Koningsveld (1996).

⁶⁷ March (2009), p 39.

⁶⁸ March (2009), p 39.

⁶⁹ Shadid and Koningsveld (1996).

⁷⁰ Qaradawi (2001).

issued by the International Union for Muslim Scholars (IUMS) regarding the Russian Republic of Dagestan, where the majority of the population comprises Muslims of diverse ethnic backgrounds. The *fatwa* declared that, ‘based on present-day realities countries that have embassies or enjoy diplomatic relations with Muslim countries fall within the realm of *dār al-‘ahd* (“abode of covenant”).’⁷¹ This label is also significant because of its legal Shari‘a implications, for it justifies the prohibition of breaching covenants while living in non-Muslim countries, prohibition of treachery and upholding the law of the land.⁷²

The Dagestan *fatwa* also declared that:

the jurists agree that a territory or nation in which Muslims reside, wherein the rituals and rules of Islam are practiced, and Muslims enjoy religious freedom, cannot be considered an abode of war. Rather it is an abode of Islam or *dār al-salam* (‘abode of peace’), even if such a country is dominated by a non-Islamic state.⁷³

The Republic of Dagestan was thus labelled an abode of peace, even though it is not governed by Shari‘a law, and is less democratic than Australia.

On the other hand, due to the religious freedoms afforded to Muslims in non-Muslim countries, the Moroccan scholar Abd al-Azīz ibn al-Siddīq argues that:

Europe and America [and by extension Australia], by virtue of this fact, have become Islamic countries fulfilling all the Islamic characteristics by which a resident living here becomes the resident of an Islamic country in accordance with the terminology of the legal scholars of Islam.⁷⁴

While this view contradicts the majority view stipulated above, it is consistent with Al-Shawkānī’s view that a country that is *not* under Muslim jurisdiction is considered *dār al-Islām* ‘as long as a Muslim can reside there in safety and freely fulfil his religious obligations’.⁷⁵ Based on the same logic, in 1989 at the occasion of a congress of the Union of Islamic Organisations in France (UOIF), the Tunisian intellectual Rached al-Ghannouchi declared that France should be considered an abode of Islam (*dār al-Islām*) and not an abode of covenant (*dār al-‘ahd*).⁷⁶

⁷¹ IUMS (2013a).

⁷² These and other stipulations are well established in the work of jurists, most notably in the work of the father of Islamic international relations, Muhammad ibn Hasan al-Shaybani (d. 805), whose works *Siyar al-Ṣaghīr* and *Siyar al-Kabīr* are considered the first treatise on the topic. See Dhumairiyya (1997).

⁷³ IUMS (2013b). This is my own translation of the original Arabic *fatwa*.

⁷⁴ Shadid and Koningsveld (1996).

⁷⁵ Zawati (2011), p 50.

⁷⁶ Shadid and Koningsveld (1996).

Despite the fact that Australia fulfils many of the higher objectives of Shari‘a, to consider it ‘Islamic’ or an abode of Islam is problematic for two main reasons: this view contradicts the majority view (*jumhūr*) of Muslim jurists; and Australia is a secular democracy, a form of government that is not affiliated with any religious identity. Section 116 of Australia’s constitution separates religious and civil authority and prohibits the Commonwealth from enacting laws establishing any religion or enforcing religious observance, or prohibiting freedom of religious practice:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.⁷⁷

This is a type of government unknown to classical Muslim jurists, and has no historical precedent in any Islamic legal school of thought. As a democracy, no particular religious law prevails or is advocated. For that reason, and the fact that Islamic laws do not prevail, Australia cannot be labelled ‘Islamic’. Nor can Australia be labelled an abode of war because it is not a ‘territory of war’ that is aggressive towards its Muslim citizens. Based on the aforementioned juristic views, Australia does not – strictly speaking – fit within the definition of the abode of unbelief because it provides Muslims safe and free practice of their faith despite the fact that it is not governed by Shari‘a laws.

This is why – perhaps – Al-Turayri, Professor of Theology at Imam University in Riyadh, argues that secular, democratic countries are best described as *dār al-ṣulḥ* (‘abode of truce/armistice or peace and reconciliation’),⁷⁸ denoting – in its classical definition – a ‘non-Muslim territory that has concluded an armistice with a Muslim government, agreeing to protect Muslims and their clients in that territory and often including an agreement to pay (or receive) tribute’.⁷⁹ However, while Australia is bound by its constitution to protect all of its citizens – including minority religious communities such as the Muslims – it has not concluded an armistice with a Muslim government, nor does it pay or receive a tribute. This label is therefore partially accurate, but fails to encompass the political reality of Australia.

The array of views offered by contemporary Muslim scholars is further evidence that labelling of abodes is subjective and heavily influenced by context. Interestingly, however, none of the leading contemporary scholars has labelled Western, democratic nations such as Australia negatively (abode of war or unbelief). Instead, the labelling is positive (abode of Islam, peace or covenant), if we can call it that. At best, Australia fulfils – to some limited

⁷⁷ Australian Constitution, s 116

⁷⁸ Al-Turayri (2010).

⁷⁹ Esposito (2013).

extent – the conditions of an abode of covenant even though this is the result of its own constitution and not some treaty with a Muslim nation. There is no doubt that it also fulfils the conditions of an abode of peace and not war. Regardless of what label one gives to Australia, the fact remains that it is a secular democracy and is not ‘Islamic’. To what extent, then, are Muslims obliged to follow the Sharī‘a in a secular, democratic country?

The Obligation to Follow Sharī‘a in Australia: Limitations

As a jurisprudential principle, Muslims are obliged to follow the dictates of Sharī‘a whether living in Muslim or non-Muslim countries.⁸⁰ This principle was summed up by Imām Shāfi‘ī (767–820):⁸¹

whatever [the Sharī‘a] declares as lawful [*ḥalāl*] in the abode of Islam [*dār al-Islam*] is considered lawful in the abode of unbelief [*dār al-kufr*]. And whatever it declares as unlawful [*ḥarām*] in the abode of Islam is considered unlawful in the abode of unbelief.⁸²

Hence, for instance, lying, cheating and fraud are considered unlawful in both abodes, whether dealing with Muslims or non-Muslims. Equally, devotional matters such as the five times daily prayers, fasting and payment of *zakah*⁸³ are binding on Muslims wherever they may reside. However, the extent to which the Sharī‘a should be followed is dependent on various circumstances,⁸⁴ including the social and political context of a country and/or personal reasons such as health. For Muslim jurists, one of the most important factors is the ‘abode’ in which a Muslim resides.⁸⁵

The application of Sharī‘a for minority Muslim communities in predominantly Western countries belongs to a ‘new’ field of jurisprudence named *fiqh al-aqaliyyāt* (jurisprudence for Muslim minorities). Coined in the 1990s,⁸⁶ the concept caused controversy among the more ‘traditional’ scholars, who assumed that it referred to the formation of a new jurisprudence that fell outside normative Islamic law. This term is more appreciated today, especially given that it allows scholars to study the peculiar situation of minority Muslim communities and propose juristic solutions consistent with the prevailing context. Examples of issues that this field of jurisprudence investigates include political participation in non-

⁸⁰ Al-Rāfi‘ī (2002), p 82.

⁸¹ One of the most brilliant and original Islamic legal scholars and founder of the Shāfi‘ī school of thought. Where the article refers to dates, the article adopts the year in Common Era (CE) and not that of the Islamic Hijrī calendar.

⁸² Al-Rāfi‘ī (2002), p 82.

⁸³ A compulsory annual charity given if one possesses a minimum amount of savings (*niṣab*).

⁸⁴ Al-Qaṭān (1985), p 86.

⁸⁵ Al-Rāfi‘ī (2002), p 83.

⁸⁶ Coined by Dr Taha Jabir al-‘Alwani (United States) and Dr Yusuf al-Qaradāwi (Qatar).

Muslim government, citizenship, military service and family law,⁸⁷ performance of the Friday congregational prayer in places of worship other than the mosque, delivering the Friday sermon in a language other than Arabic, determining the beginning and end of the fasting month of Ramaḍān, interest-based transactions, taxation, polygamy and so forth.⁸⁸

The *fiqh* of Muslim minorities derives its rules from the same sources of Sharī'a. Under this branch of *fiqh*, a number of legal maxims (*Qawā'id al-kulliyah al-fiqhiyyah*) are utilised to facilitate the removal of hardship, and consideration of public interests for Muslim minorities.⁸⁹ Hence the juristic principles of *ḥukm al-makān* (place-dependent rulings)⁹⁰, *zamān* (time), *aḥwāl* (circumstances) and '*urf* (customary practices)⁹¹ play an important role in the *fiqh* of Muslim minorities. Accordingly, some scholars would 'consider the situation of Muslims who live in non-Muslim lands as a reason to drop some of the Sharī'a rulings',⁹² not to abrogate an original explicit ruling of Sharī'a (*ḥukm qat'i*) but to fulfil public interest (*maṣlahah*) and the higher objectives (*maqāṣid*) of Sharī'a.⁹³ This view is based on the opinion of a number of companions of the Prophet Muhammad (*ṣaḥābah*) such as 'Amr ibn al-'Aās (592-663), and leading Imāms such as Ibrāhīm al-Nakh'ī (666-715), Sufyan al-Thawrī (716-78),⁹⁴ Imām Abū Ḥanīfa (699-767),⁹⁵ Muḥammad ibn Ḥassan al-Shaybāni (748-804)⁹⁶ and Aḥmad ibn Ḥanbal (780-855).⁹⁷

Further, dropping 'some of the Sharī'a rulings' in non-Muslim countries is based on a number of legal maxims, including the maxim 'Hardship is to be alleviated' (*al-mashaqqatu tajlib al-taysīr*), which 'merely paraphrases parallel Qur'ānic dicta on the theme of removal of hardship (*raf' al-ḥaraj*).⁹⁸ For this reason, for example, the European Council for Fatwa and Research (ECFR) issued a *fatwa* allowing minority Muslim communities in non-Muslim countries to purchase houses with a usurious

⁸⁷ Shadid and Koningsveld (1996).

⁸⁸ Ibrahim (2007), p 881.

⁸⁹ Bayyah (2012).

⁹⁰ Ibrahim (2007), p 875.

⁹¹ Al-Qatan (1986), p 86; Kuja et al (1982), p 113; Ibrahim (2007), p 359. On the question of the importance of '*urf* in Islamic Law, see Abd-Allah (2009).

⁹² Bayyah (2012).

⁹³ Ibrahim (2007), p 360.

⁹⁴ The Imām of Ḥadīth, master of his time and one of the most learned in Sharī'a Law.

⁹⁵ See note 12

⁹⁶ A *mujtahid* Imām with mastery of the primary sources of Sharī'a (Qur'ān and Ḥadīth), and known as one of the greatest figures in the history of Islamic jurisprudence.

⁹⁷ Ibrahim (2007), p 875. Aḥmad ibn Ḥanbal is the founder of the Ḥanbali School of jurisprudence, and is one of the most learned in the science of Ḥadīth, among the four great Imāms of Sunni schools of thought.

⁹⁸ Kamali (2008), p 142.

loan from a conventional bank, despite clear textual evidence in the Sharī'a that prohibits dealing with usury (*riba*).⁹⁹

The ECFR arrived at their *fatwa* based on two juristic considerations: (1) the agreed-upon Juristic maxim that 'necessity makes the unlawful lawful' (*al-ḍarūrāt tubīḥ al-mahzūrāt*), derived from five Quranic texts such as 'But whosoever is forced by necessity without wilful disobedience, nor transgressing due limits; (for him) certainly, your Lord is oft-Forgiving, most merciful (6:145)'; and (2) 'The juristic verdict which claims that it is permissible for Muslims to trade with usury and other invalid contracts in countries other than Islamic countries.'¹⁰⁰ The ECFR argues that its *fatwa* is also founded on the juristic understanding that 'according to Sharī'a, Muslims are not obliged to establish the civil, financial and political status of Sharī'a in non-Muslim countries, as these lie beyond their capabilities. God does not require people to do things that are beyond their capacity.'¹⁰¹

Despite some opposition to the *fatwa*, prominent contemporary jurists such as Abdallah ibn Bayyah¹⁰² agree that minority Muslim communities in non-Muslim countries are *only* obliged to follow laws of personal status (*al-aḥwāl al-shakhṣiyyā*) to the best of their capacity.¹⁰³ These include 'religious obligations, as well as moral recommendations, and are essentially addresses to the individual',¹⁰⁴ and would primarily cover *ibadāt* or devotional matters (including prayer, fasting, pilgrimage, confirming to modest dress code, paying *zakah*¹⁰⁵ and so on). On the other hand, juridical obligations are dropped for minority Muslim communities because they are 'enforceable through formal sanctions by the courts of justice'.¹⁰⁶ Hence they are not obliged or expected to follow Sharī'a laws that fall under juridical obligations such as criminal law, government policy and constitution, and

⁹⁹ Fatwa (26), 'Purchasing houses with an usurious loan for Muslims living in non-Muslim countries, i.e. taking up a mortgage to buy a house': see www.e-cfr.org/ar. The *fatwa* starts by acknowledging that *riba* (usury) is prohibited, and encourages Muslims to establish usury-free banking when possible. It then lists three conditions for Muslims who wish to deal with usurious mortgage: (1) The house to be bought must be for the buyer and his household; (2) The buyer must not have another house; (3) The buyer must not have any surplus of assets that can help him buy a house by means other than mortgage.

¹⁰⁰ ECFR (2009).

¹⁰¹ ECFR (2009).

¹⁰² Sheikh Abdullah ibn Bayyah was born 1935 in the east of Mauritania, and is regarded as one of the foremost Muslim jurists of our time. He held many prominent positions including Judge at the High Court of the Islamic Republic of Mauritania and Head of Sharī'a Affairs at the Ministry of Justice.

¹⁰³ Bayyah (nd), p 160.

¹⁰⁴ Kamali (2008), p 17.

¹⁰⁵ Lexically, *zakah* means 'growth or increase in good, or purification. In sacred law it is the name for a particular amount of property that must be paid to certain kinds of recipients under special conditions. It is compulsory upon every Muslim who has possessed a zakah-payable amount (*nisab*) for one lunar year.' Keller (1994), p 246.

¹⁰⁶ Kamali (2008), p 17.

economic policy. These laws belong to a set of rules known to Muslim jurists as *al-aḥkām al-sulṭāniyyah* (principles of government), and are the prerogative of juridical authority.

An example of *al-aḥkām al-sulṭāniyyah* is the *ḥudūd* laws: the penalties that the Qurʾān and Sunna have prescribed for heinous crimes, including murder, fornication, adultery and rape, defamation, theft and consumption of intoxicants.¹⁰⁷ These laws are only enforceable by the state through the apparatus of the judiciary, and would be part of the criminal law. Muslim minorities are not obliged to practise the *ḥudūd* laws because imposing punishments has been left to the ruler and the judge of an Islamic state (the legislature and judiciary in modern society).¹⁰⁸

Clearly, Muslims are not obliged to bring to practise aspects of the Sharīʿa that deal with juridical obligations. Most aspects of personal status law, however, are being practised unhindered in Australia. Muslims are free to believe and follow any of the schools of law in the Sunni or Shia tradition; or the ‘*sufi/salafi* spectrum; the national and expatriate versions, and the dynamic of *ijtihād* (reasoning) which spawns a spectrum of views on legal, theological and doctrinal matters’.¹⁰⁹ They are also free to follow the modest clothing dictates of Sharīʿa, despite some opposition to the wearing of the face-cover (*niqāb*). And, given that Australian family law is ‘by and large, relatively accommodating’, Muslims are able to conduct marriage in accordance with the Sharīʿa and Australian laws.¹¹⁰ Whenever possible, marriage and divorce according to Sharīʿa are being practised ‘quietly’ in Australia.¹¹¹

¹⁰⁷ Usmani, (2006). It should be noted, however, that ‘the *hudud* laws are meant to act as a deterrent, and once a crime is committed they are meant to act as a legal means of discipline. But the prerogative of applying these laws belongs to the state and the judiciary, and not individuals.’ However, Islam also recognises and encourages ‘non-legal teachings for the reform of society, which greatly help in curbing crimes. This implies that an Islamic state cannot absolve itself of its duties by just enforcing the *hudud*; it is also responsible for creating an atmosphere that discourages the incidence of crime in the first place.’ Usmani (2006), p 288.

¹⁰⁸ Usmani (2006).

¹⁰⁹ Black and Sadiq (2011), p 386.

¹¹⁰ Nonetheless, there are a number of well-known issues of tension between Sharīʿa laws and Australian laws, especially those relating to family law such as marriage (polygamy), divorce (a husband’s unilateral right to divorce without giving a reason), maintenance, guardianship (*wilāya*) and custody (*ḥadāna*) of minor children, and adoption of minors (*tabannī*): Rohe (2003). There are a number of reasons why Islamic family law conjures fear among Australians, as was outlined in Black and Sadiq (2011), including media’s misrepresentation and Islamophobia. More substantially, however, Islamic family law is seen as ‘antiquated and inconsistent with current Australian realities and family practices’ and ‘incompatible with [the] 21st century’: Black and Sadiq (2011), p 397. Equally, issues of contention noted above are seen to ‘contradict constitutional rights concerning the equality of the sexes and religious freedoms’: Rohe (2003), p 56.

¹¹¹ Black and Sadiq (2011), p 386. However, complications arise when, at times, people choose not to officially register their marriage. While such a marriage remains valid from a Sharīʿa viewpoint, it is considered invalid under the *Marriage Act 1961* (Cth). This can

In addition to being able to consume *ḥalāl* (permissible) food, many non-Islamic commercial industries are complying with *ḥalāl* specifications to meet the needs of a growing national and international clientele. In fact, for more than a century Australian Muslims ‘have worked and studied, raised families, worshipped and lived their lives in accordance with the tenets of Islam while adhering to Australian Law’.¹¹² There are also alternative options (though limited and subject to further reform) to the interest-based conventional loans, such as MCCA Islamic Finance and Banking, based in Melbourne. Measures have been taken by the Australian government to ‘position itself as a ‘financial hub in the Asia Pacific region’; in 2012, it issued a ‘review of the Australian taxation laws to ensure Islamic finance have “parity with conventional products”’.¹¹³

At a more general level, Muslims are obliged to follow the dictates of Sharī‘a that call for living mercifully and compassionately with non-Muslims, based on primary evidence such as the Hadīth: ‘God will not be merciful to those who are not merciful toward people’.¹¹⁴ Furthermore, in dealing with non-Muslims the Sharī‘a demands Muslims to show *birr* (kindness) and *qisṭ* (justice) – ‘and He does not forbid you to deal kindly and justly with anyone who has not fought you for your faith or driven you out of your homes: God loves the just’¹¹⁵ – to honour legal contracts including abiding by laws of the land – ‘fulfil any pledge you make in God’s name and do not break oaths after you have sworn them, for you have made God your surety’¹¹⁶ – and not to cause, promote or be involved in corruption nor cause destruction, for ‘God does not like corruption’.¹¹⁷ The extent to which Muslims need to follow the dictates of Sharī‘a in a non-Muslim country such as Australia was succinctly summarised by Abdallah ibn Bayyah:

A Muslim is not obliged to establish [*yūqīm*] Sharī‘a law (*ahkām al-Shar‘*) in civil, financial or political matters, or anything related to the prevailing social order (*al-nizām al-‘āmm*) in a non-Muslim country. The reason is that these laws are beyond individual’s capacity, and God does not burden a soul beyond its capacity. A Muslim, however, is obliged to abide by the Sharī‘a rules (*ahkām*) specific to him such as the rituals (*‘ibadāt*), food (*maṭ‘umāt*), drinks (*mashrūbāt*), clothing (*malbusāt*), and

disadvantage the wife if problems arise in the future. Furthermore, it allows marriages that are deemed illegal under the *Marriage Act 1961* (Cth), ‘including polygynist marriages and marriages where one party is under the lawful marriage age ... [and] any separation, divorce or custody issues ... be kept private without the intrusion of the state.’ Black and Sadiq (2011), p 389.

¹¹² Black and Sadiq (2011), p 386.

¹¹³ Black and Sadiq (2011), p 386.

¹¹⁴ Al-Naṣir (2001), p 10.

¹¹⁵ Qur’ān 60:8–9 and 4:135.

¹¹⁶ Qur’ān 16:91, also see Q17:34, 23:8 and 70:32.

¹¹⁷ Qur’ān 2:204–5.

that which relates to matters of marriage and divorce, inheritance and matters of personal status (*al-ahwāl al-shakhsīyyah*).¹¹⁸

The Obligation to Follow the Law of the Land

That the Sharī'a obliges Muslims to comply with the laws of their country of residence is premised on the Qur'ānic dicta demanding fulfilling 'obligations' and 'covenants', as in the imperative 'You who believe, fulfil your obligations'¹¹⁹ and 'Honour your pledges: you will be questioned about your pledges'.¹²⁰ Hence, when asked for a *fatwa* about the extent to which the Sharī'a allows Muslims to obey the governments of the non-Muslim countries in which they live, the prominent contemporary Shaykh Salman al-Oadah replied:

The Muslims living in a non-Muslim country, even if they originally entered that country by means of forged documents, are considered to be living in their adopted country under a covenant. They must, therefore, comply with the laws of their country of residence without, at the same time, disobeying Islamic Law.¹²¹

By 'disobeying Islamic law' is meant matters that relate to personal obligations – as, for example, Muslim women being asked by the Australian government to remove their *hijab* (headscarf), or Muslims being asked to consume alcohol or unlawful food, which is unconstitutional and far-fetched. Given that section 116 of Australia's constitution separates religious and civil authority and prohibits the Commonwealth from enacting laws establishing any religion or enforcing religious observance, or prohibiting freedom of religious practice, it is evident that no authority – religious or otherwise – can force a Muslim to abide by, or abandon, any personal religious laws unless it is deemed illegal by Australian law. Classical Muslim jurists applied the same rule for Muslims passing through enemy lands (an abode of war), as demonstrated in the *fatwa* of the imminent jurist of his time, Muhammad ibn Ḥasan al-Shaybāni (748–804):

If it happens that a company of Muslims pass through the enemy's front lines by deceptively pretended to be messengers of the Muslim's Caliph carrying official documents – or if they were just allowed to pass through the enemy lines – they are not allowed to engage in any hostilities with the enemy troops. Neither are they entitled to seize any of their money or properties as long as they are in their area of authority. This also applies in case of being truly trusted by the other party.¹²²

¹¹⁸ Bayyah (nd).

¹¹⁹ Qur'ān 5:1.

¹²⁰ Qur'ān 17:34.

¹²¹ Al-Oadah (2013).

¹²² Al-Oadah (2013).

This understanding was summed up by the eleventh century Maliki jurist Abu al-Hasan al-Qābisi (935–1012).¹²³ When asked about the authority of a leader appointed by local Muslims living in non-Muslim lands, he replied:

When Muslims reside and settle in a place (among non-Muslims) and make it their established abode, they need to have someone [a leader such as an Imām] to deal with their affairs and judge among them. Such a person needs to have power to execute his judgments delegated to him by the authority ruling the place, because it would be unthinkable to act in defiance of kings [or the government] in the regions under their rule.¹²⁴

Muslim jurists therefore understood that the ultimate authority in any country belongs to the government, and so in a non-Muslim context it is counter-intuitive to assume that individual Muslims, or the religious leaders, can take the law into their own hands when they are not permitted to do so, even in Muslim countries. The question of authority in non-Islamic countries was discussed at length by classical Muslim jurists. For example, in his book *Ghiyāth*, the renowned jurist Imām Al-Juwaynī (d. 1085) examined ‘the forms and duties of Islamic government and the options open to the Muslim community in case of non-existence of such a government’ and the ‘status of Muslims when Islam is not in power’. Writing in the eleventh century, when the Islamic empire was powerful, Al-Juwaynī hypothesised that a time might come when the Islamic empire was weakened and bereft of a legitimate Islamic authority. In that case, he assumed either that there would be no qualified imams (religious scholars) in these regions or that they would not possess the adequate power to rule.¹²⁵ If this was to happen, al-Juwaynī argued, Islamic law (or part thereof) could only continue to be implemented by ‘conferring authority’ to its religious scholars (the *‘ulamā*). This ‘authority’ can be bestowed by the ruling government, making it formal and legally binding, or by the minority Muslim community, making it informal and not legally binding.¹²⁶

Historically, minority Muslim communities in religiously plural countries such as China, India and Spain ‘exercised considerable autonomy in judicial matters’, and were allowed to govern their own affairs according to Islamic law.¹²⁷ The religious leaders in these countries acted as judges and applied Islamic law for Muslims who chose this option. This is not the case in Australia, so Muslim religious leaders – like leaders from other religious communities –

¹²³ He was an Imām, *Hafith* and jurist of the Maliki School of law. He was known as the scholar of the Maghrib, and was an expert in the science of Ḥadīth.

¹²⁴ Khir (2007), p 85.

¹²⁵ Khir (2007), p 82. See also the work of Imam Al-Juwaynī *Ghiyath al-'umam fi 'iltiyāth al-ḥulam* edited by Hilmi and Fu'ad (1979).

¹²⁶ Khir (2007), pp 81–82.

¹²⁷ Khir (2007), p 79.

simply act as arbitrators, mediators or advisers to individual Muslims who choose to seek their advice. The advice given, or *fatwa* issued, is not legally binding from an Australian law perspective because Australian Muslims – like all Australians – are subject to the jurisdiction of government.

Conclusion

Whether in Australia or Saudi Arabia, the Sharī'a helps Muslims live their lives in ways that are deemed legal, fulfilling and pleasing to their Maker. Contrary to the fear-mongering discourse propagated by media and politicians, the application of Islamic law in Australia is limited to personal status law only. Given the nature of Australia's constitution and the absence of a plural legal system, aspects of Islamic law beyond personal status law are exempted because 'God does not burden a soul with more than it can bear'.¹²⁸ When conflict arises between Sharī'a and Australian law, and Sharī'a law cannot be accommodated or causes unnecessary hardship, then abiding by the law of the land becomes binding. Thus far, Australian law has by and large been very accommodating to various demands of Sharī'a personal status law, and therefore it may be possible in the future that Australian courts will find 'well-balanced' solutions which can maintain the 'two important goals of preserving the public order and fulfilling individual needs for legal "difference"'.¹²⁹ There are a number of areas of convergence between the higher objectives of Sharī'a and Australian law, such as the preservation of public interest. While 'Muslim thinkers both in and outside of Western liberal democracies are engaged in a particularly vibrant process of first-order, abstract, ideal interrogation of their religious commitments in light of the minority condition',¹³⁰ specialists from both sides need to work together on the more contentious aspects of Sharī'a to facilitate its proper application within the confines of Australian law.

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