Islamic Studies 60:1 (2021) pp. 9–30

The Relevance of Islamic Law to Non-Muslims in Muslim Juridical Sources

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Abstract

A standard question in early and medieval works of uṣūl al-fiqh *(the theory and principles of Islamic jurisprudence) was whether non-Muslims were addressed by the specific rules of Islamic law and meant to abide by them. Despite some evidence that it was rooted in legal issues that early Muslim societies faced, a later trend in* uṣūl al-fiqh *turned it into a rather pedantic subject irrelevant to real life in these societies, as some notable Muslim jurists believed it to be. By examining how the question was discussed prior to the rise of the Ottoman and modern legal systems, this article argues that it likely originated in early discussions of real cases from everyday life in Muslim societies, an origin that was later obscured by abstract legal and theological discussions that nearly severed it from that early context and turned it into an offshoot of broader, mostly theoretical issues. This study examines that likely origin of the question, which contributes to our understanding of not only the question itself, but also the extent to which issues of* uṣūl al-fiqh *were related to actual considerations, even when they seemed only part of theoretical debates.*

Keywords

non-Muslims, Islamic law, *uṣūl al-fiqh*, *taklīf al-kuffār*.

Introduction

Muslim scholars unanimously agree that non-Muslims are required to believe in the basic tenets of the Islamic faith (*muṭālabūn bi 'l-īmān*) and are subject to Islamic law (*sharīʿah*) in most of their dealings with Muslims (in matters that generally fall within what is known today as "private law"), and to some of the rules pertaining to "public law." Other

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I would like to thank Ahmad Atif Ahmad and the three anonymous reviewers of *Islamic Studies* for some useful comments and suggestions.

DOI: https://doi.org/10.52541/isiri.v60i1.905

than these, there exists a disagreement on whether non-Muslims are meant to abide by the specific rules of Islamic law (*furūʿ*) as a matter of principle. The question over this issue was formulated variously, but the two terms that are commonly used here are *mukhāṭabūn* and *mukallafūn*, that is, are non-Muslims addressed (*mukhāṭabūn*) and required to abide (*mukallafūn*) by the specific rules of Islamic law? Generally speaking, and with some exceptions (at times involving prominent scholars) and disagreements within each school of law (*madhhab*) over some details, the answer to this question that came to dominate the Sunnī legal discourse is that non-Muslims are indeed addressed by the specific rules of Islamic law and required to observe them. This is reportedly the dominant view in the Mālikī, Shāfiʿī, and Ḥanbalī schools, with the Ḥanafī school generally deviating from it with some exceptions.

Modern Muslim scholars tend to state that earlier Muslim scholars had agreed that, in addition to the requirement of believing in Islam, non-Muslims were indeed addressed by the specific rules of Islamic law in their dealings (*muʿāmalāt*) in Muslim societies, and were subject to the Islamic penal code (*ʿuqūbāt*).[1] In these writings, the only point of disagreement is said to be whether they are also addressed by the rituals (*ʿibādāt*) of Islam, an issue that does not have worldly repercussions anyway as will be seen later. In this study, it will be seen that pre-modern discussions among Muslim scholars were much more diverse than these modern writings would have readers believe. Furthermore, the bulk of these studies is preoccupied by theological and abstract legal issues that reflect some relatively late discussions of the subject (as we will later discuss it in this article), but say almost nothing about the possible emergence of the question in the social context of early Muslim societies, an argument that this article makes, even when they seem aware that it can have many worldly repercussions.

In what follows, the arguments for and against the view that non-Muslims are addressed and required to abide by the rules of Islamic law are presented. It will be argued that although the question was prompted by and rooted in real practical issues in early Muslim societies, it was later buried in extensive discussions of a host of broader abstract legal and theological issues that severed it from its practical origin.

[1] For instance, see Faḍl Allāh Ibrāhīm Ṭāhā, "Taklīf al-Kuffār bi Furūʿ al-Sharīʿah al-Islāmiyyah" (master's thesis, College of Sharīʿah and Law, Omdurman Islamic University, Sudan, 1998), 101; Muḥammad ʿAbd al-ʿĀṭī Muḥammad ʿAlī, "Taklīf al-Kuffār bi Furūʿ al-Sharīʿah," *Majallat Kulliyyat al-Sharīʿah wa 'l-Qānūn bi Ṭanṭā* 12 (n.d.): 3; Ramaḍān Thābit Muḥammad Abū Samrah, "Mas'alat Taklīf al-Kuffār bi Furūʿ al-Sharīʿah: Dirāsah Naẓariyyah Taṭbīqiyyah," *Majallat al-Dirāsāt al-ʿArabiyyah* 2, no. 25 (2012): 647.

Whereas this reflects the breadth and depth that came to characterize works of *uṣūl al-fiqh*, it did not necessarily serve the question itself with which this article deals, so much so that an eighth/fourteenth-century Ḥanbalī scholar 'Alā' al-Dīn Abū 'l-Ḥasan b. al-Laḥḥām (d. 803/1400–01) seems to have felt the need to sidestep those broader issues and put together a list of real-life cases that demonstrates the relevance of the question to *this* world, as will be seen later. By uncovering that likely origin of the question, this article aims to contribute to our understanding of not only the question itself, but also the extent to which issues of *uṣūl al-fiqh* were related to actual considerations, even when they seemed later to be only relevant to scholarly debates.

Before we begin our discussion, the following points are in order. Firstly, the scope of this article is roughly the period of Islamic history that preceded the rise of the Ottoman and modern legal systems.[2] Secondly, the primary sources used here are essentially Sunnī *uṣūl al-fiqh* works, with occasional references to non-Sunnī scholars as needed. While the list of the sources used is not exhaustive, it is arguably representative of different trends in *uṣūl al-fiqh* works, including those works that belong to the same *madhhab* (notably the Ḥanafī *madhhab*, especially for the first few centuries) and which still report various views on each subject.[3] Thirdly, this article does not deal primarily with the question of whether, and to what extent, Islamic law was actually imposed on non-Muslims living under Muslim rule, but rather with what Muslim jurists thought about the relevance of the question of whether, and to what extent, non-Muslims should be subject to the specific rules of Islamic law. In other words, even when Muslim jurists thought that the question was void of any practical relevance, this does not necessarily mean that the actual practice in Muslim societies did not reflect such practical relevance.

Early Discussions of the Question of the Relevance of Islamic Law to Non-Muslims

Abū Bakr al-Jaṣṣāṣ (d. 370/981)—who, along with his teacher Abū 'l-Ḥasan al-Karkhī (d. 340/951–52),[4] deviated from the view that seems to

[2] This is not meant to suggest that discussions of the subject of this article have changed under the Ottomans or later; it only means to delineate a time frame for this article.

[3] Given the relatively long period that this article covers and the vast geographical area in which pre-modern Muslim societies flourished, it is rather difficult to use the large number of the *uṣūl al-fiqh* works that various theological and juristic schools produced. This article relies primarily on some of the notable works that these schools produced.

[4] For al-Jaṣṣāṣ's opinion, see Abū Bakr al-Jaṣṣāṣ, *al-Fuṣūl fī 'l-Uṣūl* (Kuwait City: Wazārat

have been dominant in his Ḥanafī school[5]—provides us with one of the earliest discussions of the question of whether non-Muslims are addressed by the specific rules of Islamic law and required to abide by them. He states that just as they are required to believe in Islam, non-Muslims are similarly required to observe its duties.[6] Al-Jaṣṣāṣ refers here to the following Qur'ānic verses (41:6–7, 74:43–46, 4:142, 4:160) that he believes support his view.[7] He also argues that since they are subject to some of Islam's punishments (such as the punishments prescribed for fornication/adultery and theft), they are likewise subject to other rules except the "punishment for disbelief," obviously in this world.[8] On this view, although non-Muslims are not believers (which means that their performance of the requirements of Islam is automatically void), they still fall under the duty to abide by these requirements because they can choose to believe in Islam. However, non-Muslims are not forced to fulfil

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al-Awqāf wa 'l-Shu'ūn al-Islāmiyyah, 1994), 2:158.

[5] Unlike other *madhhab*s, the Ḥanafī *madhhab* did not seem to have developed a fixed view on the question of this article, perhaps because Ḥanafī scholars disagreed on many of the details pertaining to it. Generally speaking, most of the primary sources used here either suggest or state that with some exceptions, the Ḥanafīs were of the view that non-Muslims were *not* addressed or required to abide by Islamic law. Among the sources that say this explicitly is Fakhr al-Dīn al-Rāzī, *al-Maḥṣūl fī 'Ilm al-Uṣūl* (Beirut: Mu'assasat al-Risālah, 1997), 2:237. The view is also attributed in many sources to "*aṣḥāb al-ra'y*." When speaking of Ḥanafī scholars, many other sources mention that al-Karkhī and others were among those Ḥanafīs who held that non-Muslims were addressed by Islamic law. For example, see Abū 'l-Wafā' b. 'Aqīl, *al-Wāḍiḥ fī Usūl al-Fiqh* (Beirut: Mu'assasat al-Risālah, 1999), 3:133. Arguably, the fact that al-Jaṣṣāṣ himself attributes his view to al-Karkhī specifically may in itself suggest that other Ḥanafī scholars had a different view. Modern sources tend to state that unlike their Iraqi counterparts, the Ḥanafīs of Samarqand held that non-Muslims were not *mukallafūn*. For instance, Ṭāhā says that in addition to being the view of the Ḥanafīs of Samarqand, it is also the view of the majority of Ḥanafī scholars (*jumhūr al-Ḥanafiyyah*). Ṭāhā, "Taklīf al-Kuffār," 117. Also see Abū Samrah, "Mas'alat Taklīf al-Kuffār," 646.

[6] Al-Jaṣṣāṣ, *al-Fuṣūl*, 2:158.

[7] Ibid., 2:159–60. These verses read as follows: "And woe unto the idolaters. Who do not give charity and who are disbelievers in the Hereafter" (41: 6–7); "They said: We were not among those who prayed, nor were we among those who fed the needy, and we used to wade (in vain dispute) with waders, and we used to deny the Day of Judgement" (74:43–46); "And when they [the hypocrites] stand up for prayer, they do so languidly" (4:142); and "Because of their [the Jews] wrongdoings, we made unlawful for them good things which had been lawful to them, and because of their preventing many people from Allah's way" (4:160). That the use of some of these verses for al-Jaṣṣāṣ's purposes is problematic is obvious (see footnote 49). In fact, 4:142 and 4:160 were scarcely used in later discussions of our question. For the translation of Qur'ānic verses, I draw freely on Muḥammad Marmaduk Pickthal, *The Meaning of the Glorious Koran* (New York: New American Library, n.d.).

[8] Al-Jaṣṣāṣ, *al-Fuṣūl*, 2:160.

any of these requirements or to believe in Islam as long as they pay the *jizyah*, a tax levied on them to live in the Muslim state. Al-Jaṣṣāṣ concludes his short discussion of this subject by pointing out that if we were to argue that non-Muslims do not have to fulfil the duties that Islam imposes on people by virtue of their being non-Muslims, a Muslim lacking ritual purity (*junub*) would not be required to pray.[9]

Short as it is, al-Jaṣṣāṣ's account is still useful. First of all, it places the question in the larger context of "commands" (*al-amr*), a key subject of *uṣūl al-fiqh*.[10] Here, absent evidence to contrary, a command must be presumed to be unqualified in terms of its addressees. A command to pray, for instance, must be taken to address everybody. But al-Jaṣṣāṣ's account alludes to another theoretical question, that is, does a duty remain incumbent on those addressed by it even if any of its prerequisites (*sharṭ*) is missing?[11] This is a context within which many later sources of *uṣūl al-fiqh* place the question.[12] However, when contrasted with later, extensive discussions of our question in medieval sources, al-Jaṣṣāṣ's account seems rather simple and less theoretical, which obviously demonstrates the breadth and depth that the genre of *uṣūl al-fiqh* came to acquire, but also possibly the less abstract origin of our question.

In the next century, we encounter two other Ḥanafī scholars representing what seems to have been the prevalent view in their school, Abū Zayd al-Dabūsī (d. 430/1039) and Muḥammad b. Aḥmad al-Sarakhsī (d. 490/1096). Al-Dabūsī discusses our question in the context of when and how religious duties become incumbent on people. He argues

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[9] Ibid.

[10] And the next source that we will look at—al-Sarakhsī's *Uṣūl*—discusses our question in the same context. Abū Ya'lā al-Farrā' (d. 458/1066) discusses the question under the title "The inclusion of unbelievers in absolute commands" (*dukhūl al-kuffār fī 'l-amr al-muṭlaq*), which includes believers as well as unbelievers. Abū Ya'lā al-Farrā', *al-'Uddah fī Uṣūl al-Fiqh* (Riyadh: n.p., 1993), 2:358ff. Also see Abū Isḥāq al-Shīrāzī, *al-Tabṣirah fī Uṣūl al-Fiqh* (Damascus: Dār al-Fikr, 1980), 82, where al-Shīrāzī (d. 476/1084) speaks of "*al-lafẓ al-muṭlaq*."

[11] "*Hal wujūd al-sharṭ sharṭ li 'l-taklīf?*" Later scholars of *uṣūl al-fiqh* distinguish between two kinds of prerequisites: prerequisites that render a duty incumbent upon a person (*sharṭ al-wujūb*), and prerequisites that render the duty valid (*sharṭ al-ṣiḥḥah*). As far as our question is concerned, the discussion seems to revolve around the former kind of prerequisites. The prevalent opinion here is that even in the absence of a prerequisite, a duty remains incumbent upon those addressed by it, which is why a Muslim lacking ritual purity is still under the obligation to pray. For this, see Shams al-Dīn al-Maqdisī, *Uṣūl al-Fiqh* (Riyadh: Maktabat al-'Ubaykān, 1999), 1:266.

[12] For instance, see 'Alī b. Muḥammad al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām* (Riyadh: Dār al-Ṣumay'ī, 2003), 1:192ff.

that these duties are due only when they have reached those who are addressed by them, for knowledge is a prerequisite of practice.[13] Now, in the case of a *ḥarbī* (i.e., a non-Muslim who lives in *dār al-ḥarb*, the "abode of war," in contrast to a *dhimmī*, a non-Muslim living in the "abode of Islam") who marries two sisters, divorces one of them, and converts to Islam, al-Dabūsī mentions that the leading scholars (*imāms*) of his school accept the validity of his marriage to that sister even if she happened to be the second sister to marry him.[14] Since both sisters are *not* subject to the prohibition (of being married to one man simultaneously), al-Dabūsī points out, this rule does not apply to them.[15] The same rule applies to a convert who had married five women and divorced the first one of them before converting, or a convert who married without witnesses before his conversion, or married a woman in her waiting period (*'iddah*). However, if these marriages happen to be "originally void" (namely, invalid in the former religions of these converts), they remain void in Islam.[16]

Al-Dabūsī distinguishes here clearly between two kinds of non-Muslims, *ḥarbī*s and *dhimmī*s. As far as these latter are concerned, he reports that Abū Ḥanīfah (d. 150/767) accepted some of their practices, such as polygamy (which—it must be the case—exceeds four wives) and marrying without witnesses. Here, even if these non-Muslims are *dhimmī*s, they do not fall under the duties of Islam because they have not accepted it. In other words, Islam cannot be used against them. Agreeing with al-Jaṣṣaṣ, al-Dabūsī argues that God commanded the Prophet (peace be on him) to call unbelievers to Islam; if they refuse, they are invited to enter into the *dhimmah* contract, an agreement that regulates their affairs in the Muslim society. Under this contract, they are free in their beliefs and are generally not obliged to abide by Islamic "private" law except in certain cases. All their transactions—including those that Islam considers invalid—are deemed judicially valid and remain so even if they decide to convert to Islam. Accordingly, al-Dabūsī attributes to early authorities the opinion that if a Muslim spoils the liquor of a non-

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[13] "*Lā wus' 'alā 'l-'amal illā ba'd al-'ilm*." Abū Zayd al-Dabūsī, *Taqwīm al-Adillah fī Uṣūl al-Fiqh* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2001), 431. There are two ways by which knowledge of the duties reach people: the direct hearing of the duties (*samā' al-khiṭāb*), and the spread of the duties among them (*shuyū' al- khiṭāb*). Once the duties have spread and are known, no one is excused in not observing them. Ibid.

[14] Ibid. For a scriptural evidence possibly underlying this view, see al-Āmidī, *al-Iḥkām*, 3:68.

[15] "*Li anna khiṭāb al-taḥrīm qāṣir 'an hum fa baqaw 'alā 'l-ḥill al-thābit qabl al-khiṭāb*." Al-Dabūsī, *Taqwīm al-Adillah*, 431.

[16] "*Wa law waqa'a fāsidan min al-aṣl, lamā inqalaba ṣaḥīḥan bi 'l-islām*." Ibid., 431–32.

Muslim, he is required to compensate him, for this non-Muslim is entitled to keep the liquor, which, for him, is a commodity of value. And if a non-Muslim spoils the liquor of another non-Muslim and a Muslim judge hears their case, this judge must treat liquor as a commodity that has value, as it is the case in the religion of the non-Muslim.[17]

In a chapter in his *Uṣūl* on the applicability of "command" to unbelievers, al-Sarakhsī distinguishes between the issue of whether non-Muslims are addressed (*mukhāṭabūn*) by Islamic law, and the issue of whether they have to observe it (*adā'*). As a general rule, non-Muslims are addressed by Islamic law and are subject to its punishments. Furthermore, under the *dhimmah* contract, they are required to follow the rules of Islam except certain rules from which they are exempt by clear evidence.[18] This exemption, however, only applies to this life but will not benefit non-Muslims in the Day of Judgement, when they will be held accountable for failing to observe all duties of Islam. Al-Sarakhsī alludes here to al-Jaṣṣāṣ's view, pointing out that the Iraqi scholars of his school maintain that non-Muslims are obliged to observe the duties of Islam because they have the ability (*tamakkun*) to fulfil their prerequisite, namely, acceptance of Islam. Their unwillingness to do so should not be a ground to relieve them (*takhfīf*) of observing these duties.[19] On the other hand, based on their views on numerous cases, al-Sarakhsī points out that the scholars of his own community[20] held that non-Muslims were not addressed by the rituals of Islam (*'ibādāt*) that were "waivable."[21] Thus, an apostate (*murtadd*) is not required to make up

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[17] Ibid. 432. Remarkably, al-Dabūsī mentions that in the case of a Muslim spoiling the liquor of a non-Muslim, al-Shāfi'ī argued that the Muslim would not have to compensate him because liquor was prohibited in Islam and the religion of a non-Muslim should not be taken against a Muslim (*li anna 'l-ḥurmah thābitah fī ḥaqq al-Muslim wa diyānātuhum lā takūn ḥujjah 'alā 'l-Muslim*). What is remarkable here is that al-Shāfi'ī did not come to this opinion on the basis of the belief that non-Muslims were meant to abide by the rules of Islam (the prohibition of liquor in this case), but because Muslims would not need to abide by the rules of other religions.

[18] Muḥammad b. Aḥmad al-Sarakhsī, *Uṣūl al-Sarakhsī* (Haydarabad: Lajnat Iḥyā' al-Ma'ārif al-Nu'māniyyah, n.d.), 1:73. Al-Dabūsī, we recall, argues that *dhimmī*s are not obliged to follow the rules of Islam except for those rules that we know through evidence to be incumbent upon them. Al-Sarakhsī's understanding, however, seems to have prevailed among later Sunnī scholars.

[19] Ibid., 1:74.

[20] Al-Sarakhsī was born in Sarakhs, a town in Khorasan, and was active in Transoxania later in his life.

[21] "*Lā yukhāṭabūn bi adā' mā yaḥtamil al-suqūṭ min al-'ibādāt.*" Ibid., 1:74–75. This should not be taken to suggest that whereas some rituals are waivable, others are not. Generally speaking, rituals can be waived under various conditions, in contrast to belief, which can never be waived.

(*qaḍā'*) for the prayers that he missed if he reconverts to Islam, because an apostate is not a believer.[22] From this and other views, al-Sarakhsī believes that early legal authorities were "close to stating" that non-Muslims were not required to observe ritual duties which could be dropped.[23]

To demonstrate that non-Muslims are not addressed by the ordinances of Islam, al-Sarakhsī refers to a report where the Prophet instructs his Companion Mu'ādh b. Jabal (d. 18/639) to call the people of Yemen to Islam, and if they accept, proceed to inform them about their duties and dues.[24] Furthermore, since the duties of Islam are meant to lead to God's eternal reward, and since non-Muslims are not worthy of that reward to begin with, they are not qualified to perform those duties.[25] This, however, does not apply to a Muslim who happens to be ritually impure but remains, nonetheless, worthy of that reward.[26] Not being required to abide by the rules of Islam, however, is not a relief for non-Muslims, but rather aggravates their ordeal in the Day of Judgement for failing not only to believe in Islam, but also to abide by its rules. It is on this ground, al-Sarakhsī points out, that Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/804) thought that *kaffārat al-ẓihār* (expiation of a *ẓihār* oath)[27] and *kaffārat al-yamīn* (expiation of an unfulfilled oath) are not required of non-Muslims because they eliminate sins and non-Muslims are not worthy of this.[28]

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[22] It is noteworthy that al-Sarakhsī feels obliged to point out here that this view should not be taken as evidence that non-Muslims are not meant to abide by the duties of Islam in the first place.

[23] Ibid., 1:75–76. We see here a new distinction between an unbeliever and an apostate (an unbeliever who was once a Muslim).

[24] "*Ud'uhum li 'l-shahādah, fa in ajābūka, fa a'limhum anna lahum mā 'alā 'l-Muslimīn, wa 'alayhim mā 'alā 'l-Muslimīn*." Ibid., 1:76. The inference here is that acceptance of Islam is a prerequisite of their eligibility for those duties and entitlement to the dues.

[25] Ibid., 1:76, 78.

[26] Ibid., 1:77. This is, obviously, a response to al-Jaṣṣāṣ's argument.

[27] An oath by which a husband pledges not to have intercourse with his wife by swearing to treat hers as his mother's body, a practice that is prohibited in the Qur'ānic verses 58:2–3.

[28] Al-Sarakhsī, *Uṣūl*, 1:77–78. Later, Badr al-Dīn al-Zarkashī (d. 794/1392)—who offers one of the most extensive discussions of our question—lists more opinions on our question, sometimes without attributing them to particular scholars. In one view, non-Muslims are bound by all the duties of Islam except contributing in fighting (*jihād*). In another view, they are bound only by Islam's prohibitions (*nawāhī*), or, in yet another view, only by its commands (*awāmir*). In other views, apostates are still addressed by the rules of Islam which they had once accepted. The same applies to *dhimmī*s, who, unlike *ḥarbī*s, are addressed by Islamic law. Finally, unable to decide for lack of decisive evidence, some scholars adopted *waqf*, refraining from giving an answer to the

At this juncture, it is worth taking a look at an early Ḥanafī text that was written in and *for* a Muslim society where Muslims may have been outnumbered by non-Muslims,[29] namely, *Kitāb al-Aṣl*[30] of al-Shaybānī. In this compendium of legal cases, al-Shaybānī systematically refers to non-Muslims in distinct sections within his discussion of nearly every topic. Al-Shaybānī's work, however, poses several challenges, and it is not always clear if early Ḥanafī authorities—namely, Abū Ḥanīfah and his two prominent students, Abū Yūsuf (d. 182/798) and al-Shaybānī himself—agreed on whether non-Muslims were required to abide by the rules of Islamic law, and if so, with what qualifications. On the one hand, al-Shaybānī attributes to Abū Ḥanīfah the view that a wife of a *dhimmī* does not inherit if she is among the categories of women whom men are forbidden to take as wives under Islamic law, *and even if that is allowed in their religion.* The same rule applies to a woman whose deceased husband married her while she was pregnant, or divorced her thrice and married her again before she is married to another man (a requirement under Islamic law).[31] Furthermore, if a *dhimmī* were to make an oath that he would not have intercourse with his wife for more than four months (a practice known as *īlā'*), Abū Ḥanīfah is reported to have said that the rules of *īlā'* apply to him according to the Qur'ānic verse 2:226.[32] All this seems to confirm that Abū Ḥanīfah thought that non-Muslims were addressed and required to abide by the rules of Islamic law (or face the consequences).

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question. Badr al-Dīn al-Zarkashī, *al-Baḥr al-Muḥīṭ fī Uṣūl al-Fiqh* (Kuwait City: Wazārat al-Awqāf wa 'l-Shu'ūn al-Islāmiyyah, 1992), 1:397ff.

[29] On the question of when Muslims have become a majority in different regions of the Middle East, see Thomas A Carlson, "When did the Middle East Become Muslim? Trends in the Study of Islam's 'Age of Conversions'," *History Compass* 16, no. 10 (2018): 1–10. Also see Michael G. Morony, "The Age of Conversions: A Reassessment," in *Conversion and Continuity: Indigenous Christian Communities in Islamic Lands Eighth to Eighteenth Centuries*, ed. Michael Gervers and Ramzi Jibran Bikhazi (Toronto: Pontifical Institute of Medieval Studies, 1990). Both sources are critiques of earlier secondary sources rather than being substantive contributions to the subject, but they provide an overview of various estimates on the percentage of Muslims to non-Muslims in early and medieval Islamic history. In a nutshell, while estimates vary greatly, the most recent scholarship strongly suggests that at the time of al-Shaybānī, Muslims were still a minority in Iraq. Another potentially useful second-century source in this context is *Kitāb al-Umm* of Muḥammad b. Idrīs al-Shāfi'ī (d. 204/820). Al-Shaybānī's, however, suffices to illustrate the point made here.

[30] Also known as *Kitāb al-Mabsūṭ*.

[31] Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-Aṣl* (Doha: Wazārat al-Awqāf wa 'l-Shu'ūn al-Islāmiyyah, 2012), 6:98.

[32] Ibid., 5:39.

On the other hand, al-Shaybānī mentions "another opinion"—which he attributes to Abū Yūsuf and himself—on this last case, that is, the rules of *īlā'* do not apply to a non-Muslim who would not be contradicting his oath if he were to have intercourse with his wife, although his oath would be effective if it involved a pledge to set a slave free or divorce a wife.[33] In the same vein, *li'ān* between a non-Muslim couple is not valid.[34] Elsewhere, al-Shaybānī states that non-Muslims are free to use wine and pigs in various transactions *among themselves*—such as trade, exchange, gifts, collaterals, inheritance, etc.,[35]—because these are items that have value in their religion.[36] Furthermore, forms of marriage that non-Muslims may engage in are considered valid if these are valid in their religion.[37] Obviously, views on these and other cases indicate that al-Shaybānī did not think that non-Muslims were meant to abide by the rules of Islam as a matter of principle.

Now, whether Abū Ḥanīfah and other early Ḥanafī scholars agreed on or dealt consistently with the question of the relevance of Islamic law to non-Muslims is beyond the scope of this article.[38] But what we can see

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[33] Ibid.

[34] Ibid., 8:79. *Li'ān* is an oath that a husband makes if he were to accuse his wife of committing adultery without having witnesses, which releases him of liability for slander (*qadhf*). The wife can then respond by swearing that she did not commit adultery, which also releases her of liability. According to the Qur'ānic verses (24:6–10), God curses the lying spouse.

[35] For instance, see al-Shaybānī, *Kitāb al-Aṣl*, 2:430, 471, speaking of the validity of *dhimmī*s trading in wine as a matter of principle. Also see ibid., 3:351–52 for the validity of their inheriting wine and pigs and dividing them among themselves, and ibid., 3:420 for the validity of using these items in gifts. However, non-Muslims are not allowed to inherit and divide carrion or "blood," for these are not things that have value (*laysa lahā thaman wa laysa bi māl*). Furthermore, the division of an inherited estate is invalid if one of the heirs is minor or absent without a guardian or proxy to represent them (ibid., 3:353), a rule that is obviously Islamic.

[36] Ibid., 3:420. It is noteworthy that in all this, al-Shaybānī points out that Muslims may take part in transactions involving pigs and wine, but only indirectly. For instance, if a Muslim happens to be the guardian of a non-Muslim inheriting wine and pigs, while he should not participate directly in the division of the inheritance, this Muslim has to appoint a non-Muslim to represent him in the process. Ibid., 3:352.

[37] Ibid., 10:215.

[38] We can briefly note here that medieval Muslim jurists readily acknowledged that part of their disagreement on the theoretical views (*uṣūl*) of the founders of their schools was the difficulty of inferring fixed rules from their views on the specific cases (*masā'il*) that they addressed. This issue related to a distinction that some scholars made between two methods of writings on *uṣūl al-fiqh*. Whereas "*ṭarīqat al-fuqahā'*" focuses primarily on presenting the views of the founder and the early authorities of each school on the cases on which they are reported to have expressed views, "*ṭarīqat al-mutakallimīn*" was concerned with inferring general rules from views on specific cases

clearly in al-Shaybānī's work are real cases that probably took place on a regular basis and prompted thinking about the relevance of Islamic law to non-Muslims.[39] This relevance, to be sure, was still alive in most medieval works on *uṣūl al-fiqh*—as evinced by the regular reference to some particular cases to support one answer to our question or another—but it was at times completely buried under layers of a host of abstract legal and theological issues that came to dominate discussions of our question, so much so that the question turned to be a sort of an "offshoot" question that only serves to illustrate other issues or provide additional support to one view or another. To this we now turn.

Later Discussions of the Question of the Relevance of Islamic Law to non-Muslims

Scholars from the fifth/eleventh century onwards provide increasingly detailed arguments to support the view that non-Muslims are addressed by the rules of Islamic law and required to abide by them, reportedly the view of the majority of Mālikī, Shāfi'ī, Ḥanbalī, and some Ḥanafī and Mu'tazilī scholars.[40] The arguments provided here are both scriptural

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by these founders and early authorities. It is generally held that the first method was the earliest. For instance, see 'Abd al-Raḥmān b. Khaldūn, *Muqaddimat Ibn Khaldūn* (Beirut: Mu'assasat al-Kutub al-Thaqāfiyyah, 1994), 2:73–74. Be this as it may, inferring general rules from scattered cases has proved tricky, leading to attributing even conflicting rules to each founder based on their *masā'il*. For instance, the Ḥanbalī scholar Ibn 'Aqīl (d. 513/1119) attributes to Aḥmad b. Ḥanbal (d. 241/855) views on particular cases that suggest that Ibn Ḥanbal either thought or did not hold that non-Muslims were addressed by the specific rules of Islamic law. Ibn 'Aqīl, *al-Wāḍiḥ*, 3:132–33. For a similar observation about Mālik b. Anas (d. 179/795), see al-Zarkashī, *al-Baḥr*, 1:399. This process of "justifying the law retrospectively"—by which scholars of *uṣūl al-fiqh* "attempted to explore and lay out in an organized manner the methodological processes that had given rise to a body of rules that was already in existence" (Bernard G. Weiss, *The Spirit of Islamic Law* [Athens: University of Georgia Press, 1998], xi–xii)—has been noted by many scholars.

[39] This, however, should not be taken to suggest that all the cases that al-Shaybānī mentions were real cases. It is well known that Ḥanafī scholars used to pose hypothetical questions. Arguably, however, it is unlikely that all the questions involving non-Muslims were only hypothetical, especially when, as has been pointed out earlier, the Muslim minority had to interact, both socially and economically, with the non-Muslim majority on a regular basis in early Islamic history.

[40] Some exceptions are reported in each of these schools. For example, the Shāfi'ī scholar Abū Ḥāmid al-Isfarāyīnī (d. 406/1015) is reported to have deviated from the view of his school on our question. For instance, see al-Zarkashī, *al-Baḥr*, 1:399. As for the theologians (*al-mutakallimūn*), Abū 'l-Muẓaffar al-Sam'ānī (d. 489/1095) mentions that most of them agree with the majority view on our question. Abū 'l-Muẓaffar al-Sam'ānī, *Qawāṭi' al-Adillah fī Uṣūl al-Fiqh* (Riyadh: Maktabat al-Tawbah, 1998), 1:187.

(*adillah naqliyyah*), including the Qur'ān and *ḥadīth*, and rational (*adillah ʻaqliyyah*) and non-textual, including *ijmāʻ* (consensus), *qiyās* (analogy), and reasoning in general.

The Qur'ānic verses used to support the majority opinion are mostly verses that address "mankind" (*al-nās*) or similar words of general reference, and verses that castigate and threaten non-Muslims who fail to observe certain ordinances and prohibitions. The most widely used verse of the first category of verses is "And pilgrimage to the House is a duty unto Allah for mankind,"[41] as well as "O mankind, worship your Lord."[42] Fewer scholars refer to "And there is a life for you in retaliation, O men of understanding, that you may ward off (evil),"[43] and "So learn a lesson, O you who have eyes."[44] For this kind of verses, Sunnī scholars argue that there exists no rational or scriptural evidence that supports the exclusion of non-Muslims from what are obviously general prescriptions to all mankind. This is part of a larger, and all-important, debate in *uṣūl al-fiqh* on "generalization and particularization."[45] Examples of the second category of verses include 74:43–46 and 41:6–7 that we have seen before, but also "For he neither believed nor prayed,"[46] explaining the fate of unbelievers in the preceding verses, "And those who cry not unto other god but Allah, nor take the life which Allah has forbidden save in justice, nor commit adultery—and whoso does this shall pay the penalty,"[47] and "And they are not ordered save to serve Allah, keeping religion pure for him, as men by nature upright, and to establish worship and to pay the poor-due,"[48] referring to the "People of the Book," namely, Jews and Christians.[49] But although these verses

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[41] Qur'ān 3:97. For instance, see Abū 'l-Ḥusayn al-Baṣrī, *al-Muʻtamad fī Uṣūl al-Fiqh* (Beirut: Dār al-Kutub al-ʻIlmiyyah, 1983), 1:273. Al-Baṣrī (d. 436/1085), a Muʻtazilī scholar, agrees with the view that non-Muslims are *mukallafūn*, although his famous teacher al-Qādī ʻAbd al-Jabbār (d. 415/1025) is reported to have held the opposite view. For instance, see Ṭāhā, "Taklīf al-Kuffār," 117.

[42] Qur'ān 2:21. Al-Rāzī, *al-Maḥṣūl*, 2:238.

[43] Qur'ān 2:179.

[44] Ibid., 59:2.

[45] On this, see al-Rāzī, *al-Maḥṣūl*, 2:307ff.; al-Āmidī, *al-Iḥkām*, 3:62–64. Also see Abū Muḥammad b. Ḥazm, *al-Iḥkām fī Uṣūl al-Aḥkām* (Beirut: Dār al-Āfāq al-Jadīdah, n.d.), 3:127ff.

[46] Qur'ān 75:31.

[47] Ibid., 25:68.

[48] Ibid., 98:5.

[49] Sunnī scholars are aware that the use of some of these verses in our context is problematic. For instance, in responding to the argument that the verses (74:43–46) simply mean, "We were not [among the believers, or among the Muslims] in praying

mention specific regulations, non-Muslims are nevertheless under the obligation to observe the Qur'ān's other ordinances and prohibitions "by way of analogy."[50]

In addition to the scriptural evidence, analogy is regularly drawn between lacking ritual purity and unbelief, which we have encountered in al-Jaṣṣāṣ. Just as the former does not waive the duty of praying, the latter is not a ground for dismissing the duties of Islam. And just as the person lacking ritual purity is required to perform ablution so that he can pray, an unbeliever is required to accept Islam so that he can pray.[51] The distinction that we have seen earlier between whether non-Muslims

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and giving charity," they argue that in the absence of compelling evidence to the contrary, we must adhere to the apparent (*ẓāhir*) meaning of these verses, which is that they are punished for not praying and giving charity. For this argument, see al-Baṣrī, *al-Mu'tamad*, 1:274–75. Also see al-Farrā', *al-'Uddah*, 2:361; al-Shīrāzī, *al-Tabṣirah*, 81. Al-Rāzī mentions that those who introduced this understanding of the verses refer to the Prophet Muḥammad's statement, "I have been forbidden to fight people of prayer" (*nuhītu 'an qatl al-muṣallīn,* or, *ahl al-ṣalāh*). In either case, *al-muṣallīn* refers to the Muslims, whether they actually pray or not. Al-Rāzī, *al-Maḥṣūl*, 2:240. Al-Rāzī also argues here that the verse (74:43) does not exclude People of the Book on the ground that they pray, for prayer in Islam is the prayer *of* Islam, and not of any other religion. For the argument that the speakers in the verses are apostates, see al-Sam'ānī, *Qawāṭi'*, 1:95. For the argument that since these speakers are unbelievers, their statements should not be taken as evidence, see al-Rāzī, *al-Maḥṣūl*, 2:239 and al-Farrā', *al-'Uddah*, 1:362. And for the argument that their saying "We did not give the poor-due" only meant that they did not believe in giving the poor or accept their obligation to do it, see al-Farrā', *al-'Uddah*, 1:361.

[50] Or "because no scholar says otherwise." Jamāl al-Dīn al-Isnawī, *Nihāyat al-Sūl fī Sharḥ Minhāj al-Wuṣūl ilā 'Ilm al-Uṣūl* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1999), 74.

[51] For this argument, see al-Baṣrī, *al-Mu'tamad*, 1:273 and al-Rāzī, *al-Maḥṣūl*, 1:244–45. In responding to the argument that this analogy is invalid since in the case of ritual impurity makeup (for missed prayers) is binding, whereas in the case of unbelief it is not, Sunnī scholars argue that the duty of makeup in the latter case is waived by scriptural evidence: "Tell those who disbelieve that if they cease (persecuting believers), that which is past will be forgiven them" (8:38), and by the Prophet's statement that "Islam cancels that which is past it" (*al-Islām yajubb mā qablah*). For this, see al-Farrā', *al-'Uddah*, 2:367. To illustrate this point even further, Sunnī scholars contrast this with the case of a menstruating woman or a mentally disabled person. In either case, the duty to pray is waived because there is no way a menstruating woman or a mentally disabled person, for instance, can pray; unlike an unbeliever who can pray by accepting Islam first. A different argument in this context is that makeups require additional commands and do not become incumbent upon people automatically. For this, see al-Baṣrī, *al-Mu'tamad*, 1:277 and al-Shīrāzī, *al-Tabṣirah*, 83. Some scholars point out that non-Muslims are not required to make up so that they are not discouraged from converting to Islam for fear of having to pay all the poor-due that they had not paid or perform all the prayers that they had not said prior to conversion. For instance, see al-Sam'ānī, *Qawāṭi'*, 1:202.

are addressed by the rules of Islam, on the one hand, and the validity of their observation of these rules, on the other hand, is evident here. Another key analogy appears in the context of responding to some scholars who held that non-Muslims were only required to abide by Islam's prohibitions and not by its commands.[52] Here, it is argued that commands and prohibitions are similar in that both seek to bring about a certain advantage or benefit (the former by doing something, and the latter by avoiding doing something). Since a non-Muslim is ordered to heed the prohibitions in order to avoid a certain disadvantage, he is, on the same ground, required to abide by the commands in order to achieve a certain advantage.[53]

Furthermore, without reference as to when, where, and how it took place, most Sunnī scholars hold that there is a consensus that non-Muslims are subject to Islam's rulings on fornication and adultery.[54]

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[52] Those who held that non-Muslims were meant to abide only by the prohibitions of Islam (one of two opinions attributed to Aḥmad b. Ḥanbal) made two arguments. The first and more frequent argument is that non-Muslims can abide by these prohibitions because unlike commissions, they do not require a particular intention. For this argument, see al-Baṣrī, *al-Muʿtamad*, 1:274 and al-Farrā', *al-ʿUddah*, 2:363. Furthermore, commands in Islam are supposed to serve a certain purpose, which is the attainment of God's satisfaction, something of which non-Muslims are not worthy due to their insistence on unbelief. It is noteworthy that although al-Sarakhsī, for instance, holds the minority view (namely, that non-Muslims are not addressed by the rules of Islam), he nevertheless regards this as an exacerbation of their ordeal in the Day of Judgement (al-Sarakhsī, *Uṣūl*, 1:78), just as many scholars of the majority view maintained. Remarkably, in discussing this specific point, some Sunnī scholars seem to suggest that making the rules of Islam incumbent upon non-Muslims is a kind of mercy for them, for a good non-Muslim may be more inclined to accept Islam if he knows that he is addressed by its prohibitions and commands. Abū 'l-Ḥasan b. al-Laḥḥām, *al-Qawāʿid wa 'l-Fawā'id al-Uṣūliyyah* (Beirut: al-Maktabah al-ʿAṣriyyah, 1998), 85. In a similar vein, Ibn ʿAqīl argues that when a non-Muslim knows that he will be punished not only for not accepting Islam, but also for not performing its duties throughout his life, this may encourage him to accept Islam. Ibn ʿAqīl, *al-Wāḍiḥ*, 1:148.

[53] Al-Rāzī, *al-Maḥṣūl*, 1:243–45. Also see al-Farrā', *al-ʿUddah*, 1:364 and al-Shīrāzī, *al-Tabṣirah*, 82. Al-Baṣrī tackles this point differently: A non-Muslim can only know that adultery is bad through Islam. It is similarly through Islam that he knows the advantages of commands. In other words, he is required to accept Islam in either case. Al-Baṣrī, *al-Muʿtamad*, 1:274. Also see al-Samʿānī, *Qawāṭiʿ*,1:198.

[54] For this claim of *ijmāʿ*, see al-Baṣrī, *al-Muʿtamad*, 1:273 and al-Samʿānī, *Qawāṭiʿ*, 1:197. Al-Maqdisī seems to suggest that non-Muslims are subject to Islam's prescribed punishment for adultery according to the verse (25:68), particularly its statement: "And whoso does this shall pay the penalty," which we have encountered earlier. Al-Maqdisī, *Uṣūl al-Fiqh*, 1:266. The basis of this rule is also likely to be the practice of the Prophet Muḥammad, who reportedly stoned a Jewish couple who committed adultery after asking their leaders about the punishment prescribed for it in the Torah. In his comment on this tradition, the famous Shāfiʿī scholar Yaḥyā b. Sharaf al-Nawawī

Drawing on this consensus, it is argued that non-Muslims would not have been punished for adultery if they had not been required to avoid it. According to another consensus, a Muslim who does not pray on account of lacking ritual purity is also punished, likely a response to the view attributed to the Muʿtazilī scholar Abū Hāshim al-Jubbāʾī (d. 321/933) and others that a Muslim lacking ritual purity is not required to pray even if he remains ritually impure for the rest of his life.[55] A third consensus establishes that converts do not need to make up for the duties they had missed before converting to Islam.[56] Last but not least, consensus is used to sanction certain interpretations of some Qur'ānic verses that Sunnī scholars used to support their view on our question. For instance, there is a consensus that what the unbelievers say in the Qur'ānic verse (74:43–46) is true.[57]

Finally, Sunnī scholars argue that since we do not have scriptural or rational evidence that indicates otherwise, we must assume that non-Muslims are meant to be included under the Qur'ānic commands and prohibitions.[58] There is no indication here as to why this assumption is compelling, but this point is always followed by the argument that the Prophet was sent with both faith and law together, and nothing indicates that people need to accept only one of them.[59] Reasoning is also used to refute counter-arguments. For instance, in responding to the argument that if non-Muslims had been required to abide by Muslim laws, this would have been tantamount to putting on their shoulders a burden that they cannot bear,[60] the majority scholars argue that that would have been true only if they had been asked to abide by those laws while

(d. 676/1277)—who regards the report as evidence that non-Muslims are addressed by the specific rules of Islam—comments that the Prophet was not necessarily asking the Jews about the punishment to follow what they say, but possibly because he knew that it coincided with the Islamic punishment (supposedly stoning adulterers to death). Yaḥyā b. Sharaf al-Nawawī, *Ṣaḥīḥ Muslim bi Sharḥ al-Nawawī*, 2nd ed. (Cairo: Muʾassasat Qurṭubah, 1994), 11:296–98.

[55] Abū 'l-Maʿālī al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh* (Doha: n.p., 1980), 1:109.

[56] Al-Āmidī, *al-Iḥkām*, 1:193.

[57] Abū Ḥāmid al-Ghazālī, *al-Mustaṣfā min ʿIlm al-Uṣūl* (Riyadh, Dār al-Maymān, n.d.), 1:136; al-Āmidī, *al-Iḥkām*, 1:195.

[58] For instance, see al-Baṣrī, *al-Muʿtamad*, 1:273 and al-Samʿānī, *Qawāṭiʿ*,1:196.

[59] Al-Samʿānī, *Qawāṭiʿ*,1:196.

[60] "*Taklīfuhum bi mā lā yuṭāq*," an argument that is part of a broader question that applies to Muslims and non-Muslims alike, that is, would God place on our shoulders a burden that we cannot carry? For this, see al-Āmidī, *al-Iḥkām*, 1:179–92, where al-Āmidī (d. 631/1233) discusses this question just before attending to the question of this article.

remaining non-Muslims, a situation that they are able to alter.[61] In other words, if they can do the prerequisite, they can achieve what is contingent upon it.[62] Lastly, relying on the reported consensus that non-Muslims are subject to the punishment prescribed for adultery, the majority scholars argue that the infliction of punishment entails that they committed a sin. By way of analogy, they must be punished for any other sin that they commit. However, they are not punished for drinking wine because of the *dhimmah* contract, under which they can do certain things that are prohibited in Islam but not in their own religions.[63] As has been noted earlier, this particular logic was used to argue that there must be a special instruction sparing non-Muslims the obligation to heed certain Islamic prohibitions.[64]

So far, we have seen that the contexts in which discussions of our question usually appear are juridical, primarily the contexts of "the addressees of Islamic law,"[65] general terms and commands,[66] and prerequisites.[67] However, some of these arguments touch on certain theological issues, for instance, whether God would impose on people a

[61] For instance, see al-Baṣrī, *al-Muʿtamad*, 1:276 and al-Juwaynī, *al-Burhān*, 1:108–09. Another, close argument goes like this: If the performance of the duties of Islam by non-Muslims is invalid, and if they are not required to make up when they convert, then they are not addressed by those duties in the first place. For instance, see al-Farrā', *al-ʿUddah*, 366–67.

[62] Al-Shīrāzī, *al-Tabṣirah*, 82. This explains why in his letters to the rulers of his time and instructions to Muʿādh, the Prophet did not mention any duties, for Islam was a prerequisite for the validity of observing its duties. Al-Farrā', *al-ʿUddah*, 364–65; al-Āmidī, *al-Iḥkām*, 1:324. Abū 'l-Ḥusayn al-Baṣrī, however, argues that belief in Islam and abiding by its duties are two different requirements, insisting that non-Muslims are not required to perform the duties by accepting Islam first, but rather required to do two separate things: accept Islam, and perform the duties, for which non-Muslims will be either rewarded or punished. Al-Baṣrī, *al-Muʿtamad*, 1:277.

[63] For this argument, see al-Farrā', *al-ʿUddah*, 1:263 and al-Samʿānī, *Qawāṭiʿ*,1:199. Ibn al-Laḥḥām explains these exceptions by pointing out that whereas adultery, for instance, is prohibited in all religions, drinking liquor is not. Ibn al-Laḥḥām, *al-Qawāʿid*, 85.

[64] For this, see al-Ghazālī, *al-Mustaṣfā*, 1:453. Interestingly, in explaining why, if prohibitions and commands are essentially similar, non-Muslims are not punished for not praying, while Muslims are, al-Shīrāzī argues that in not praying, non-Muslims are actually exercising discretion (*ijtihād*) on whether praying is incumbent upon them, which spares them the punishment. Al-Shīrāzī, *al-Tabṣirah*, 84. Also see Ibn ʿAqīl, *al-Wāḍiḥ*, 3:149.

[65] For instance, see al-Baṣrī, *al-Muʿtamad*, 1:273; al-Samʿānī, *Qawāṭiʿ*, 1:186; and al-Isnawī, *Nihāyah*, 1:397ff.

[66] See footnote 49.

[67] Abū Ḥāmid al-Ghazālī (d. 505/1111) discusses our question in both contexts. Al-Ghazālī, *al-Mustaṣfā*, 1:135–38, 453–54).

burden that they cannot carry, as we have seen.[68] But there are two theological issues that seem to be particularly significant in the context of our question, and even if they are only rarely stated. These are the issues of the definition of faith and its relationship with work (*al-īmān wa 'l-'amal*), and the question of whether reason can distinguish between good and evil (*al-ḥasan wa 'l-qabīḥ*) independently of revelation.

In his *Uṣūl*, al-Sarakhsī mentions that some scholars—whom he does not name—treated the question of whether non-Muslims are addressed by the specific rules of Islamic law as part of the larger question of whether the laws of Islam are part of faith (*īmān*).[69] Later, Abū 'l-Wafā' b. 'Aqīl (d. 513/1119) seems anxious to refute the argument of those who distinguished between accepting Islam, on the one hand, and performing ablution (*wuḍū'*), for instance, on the other hand. In this view, whereas the former is wanted for itself, the latter is meant to serve, or make valid something else—the prayers. Ibn 'Aqīl, a Ḥanbalī scholar, makes an interesting statement here: Faith, according to the verse (51:56),[70] is not meant for itself, but for worshiping God. Just as performing ablution is useless if it is not meant as a prerequisite for the prayers, faith is worthless if it is not meant to serve work.[71] Ibn 'Aqīl's opinion here reflects one of two views on the issue of the definition of faith that were once in contention in Islamic history. The Ḥanafīs generally held that faith was comprised exclusively of belief (*taṣdīq*). One's works (*a'māl*) are irrelevant to his faith, which does not increase or decrease according to his behaviour.[72] On the other hand, to some other Muslim schools of thought, such as the Ḥanbalīs, works were integral to faith, which increases and decreases depending on them.[73] Now, if it is granted that

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[68] See footnote 60.

[69] Al-Sarakhsī, *Uṣūl*, 1:75; "*wa minhum man ja'ala hādhihi 'l-mas'alah far'an li aṣl ma'rūf baynanā wa baynahum anna 'l-sharā'i' 'indahum min nafs al-īmān wa hum [non-Muslims] mukhāṭabūn bi 'l-īmān fa yukhāṭabūn bi 'l-sharā'i', wa 'indanā 'l-sharā'i' laysat min nafs al-īmān wa hum mukhāṭabūn bi 'l-īmān*." Centuries later, al-Zarkashī reports the view that our question branches out from the belief that obedience to God (by observing his ordinances) is part of faith. Al-Zarkashī, *al-Baḥr*, 1:398–90.

[70] "I have created the Jinn and humankind only that they might worship me."

[71] Ibn 'Aqīl, *al-Wāḍiḥ*, 3:141–43.

[72] This view is attributed to Abū Ḥanīfah in a few epistles and creeds ascribed to him, namely, *al-'Ālim wa 'l-Muta'allim, al-Fiqh al-Absaṭ, al-Fiqh al-Akbar, Risālat Abī Ḥanīfah ilā 'Uthmān al-Battī, al-Waṣiyyah* (published together in Cairo by al-Maktabah al-Azhariyyah li 'l-Turāth, 2001). For a discussion of these works, see A. J. Wensinck, *The Muslim Creed: Its Genesis and Historical Development* (Cambridge: Cambridge University Press, 1932).

[73] But it must be emphasized that for the Ḥanbalīs, even grave sins do not lead to unbelief. For these and other early views on the definition of faith, see W. Montgomery Watt, "The Conception of Īmān in Islamic Theology," *Der Islam* 43, nos. 1–2 (1967): 1–10

work is an integral part of faith, and if non-Muslims are required to believe in Islam, it follows that they are meant to abide by its rules which are *inseparable* from faith. However, if work is deemed irrelevant to faith, it is much harder to argue that non-Muslims are required to abide by the rules of Islam just because they are required to accept it.

Furthermore, Muslim scholars disagreed on the ability of reason to distinguish between good and evil independently of revelation. A question that illustrates this disagreement is whether adultery, for example, is bad because it is forbidden in Islam, or it is forbidden in Islam because it is bad.[74] Most Sunnī scholars agree that it is only through revelation, rather than reason, that we can distinguish good from evil. It is also through revelation that we learn that we have to observe certain rules. If that is so, then non-Muslims cannot be expected to know that adultery is wrong before they have converted to Islam.[75] On the other hand, to other Muslims—notably the Mu'tazilīs—reason can distinguish good from evil, and revelation comes to confirm the distinction that reason makes.[76] Most Māturīdīs and Ḥanafīs, however, held that reason could only establish the necessity of belief, but not of duties.[77] Now, if reason can distinguish good from bad, it can be argued

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and Wilferd Madelung, "Early Sunnī Doctrine Concerning Faith as Reflected in the *Kitāb al-Īmān* of Abū 'Ubayd al-Qāsim b. Sallām (d. 224/839)," *Studia Islamica*, no. 32 (1970): 233-54.

[74] For a discussion of the various views on this subject, especially the difference between the Ash'arīs (named after Abū 'l-Ḥasan al-Ash'arī (d. 324/936), on the one hand, and the Shī'ahs and Mu'tazilīs, on the other hand, see Muḥammad Riḍā al-Muẓaffar, *Uṣūl al-Fiqh* (Qumm: Mu'assasat Intishārāt Dār al-'Ilm, 1999), 285ff.

[75] For this argument, see al-Baṣrī, *al-Mu'tamad*, 1:274. Also see 'Abd al-Raḥmān Kamāl Muḥammad, *'Ilm Uṣūl al-Dīn wa Atharuhu fī 'l-Fiqh al-Islāmī* (Beirut: Dār al-Kutub al-'Ilmiyyah, 2006), 241–55. Abū Bakr Muḥammad b. al-Ṭayyib al-Bāqillānī (d. 403/1013) refers explicitly to the relationship between the issue of *taklīf* and the issue of our ability to distinguish between good and evil rationally and independently of revelation. See Abū Bakr al-Bāqillānī, *al-Taqrīb wa 'l-Irshād* (Beirut: Mu'assasat al-Risālah, 1998), 1:274–75, 278–87 (for a discussion of the various points of view on the latter issue) and 2:184–79 (for al-Bāqillānī's discussion of the subject of *taklīf al-kuffār*, where he also refers to its relation with the issue of *al-ḥusn wa 'l-qubḥ*).

[76] For example, see Muḥammad, *'Ilm Uṣūl al-Dīn*, 240–41 and 247–50.

[77] For this, see Wahbah al-Zuḥaylī, *al-Wasīṭ fī Uṣūl al-Fiqh* (Damascus: Maṭba'at Jāmi'at Dimashq, 1965), 116–17. According to 'Abd al-Raḥmān Kamāl Muḥammad, the position of the Māturīdīs on this subject is not easy to discern because they sought to take a "middle position" between the Ash'arīs, on the one hand, and the Mu'tazilīs, on the other hand. Generally speaking, and despite differences between early and later Māturīdīs, the Māturīdīs held that whereas reason could distinguish between good and evil, only revelation could establish the duty to act (*al-taklīf la yakūn illā bi ṭalab min al-Shāri'*). Muḥammad, *'Ilm Uṣūl al-Dīn*, 255–57, 281.

that people, including non-Muslims, are required to distinguish between them *even if* no messenger from God has been sent to them, and should they fail to do so, they are liable. This is to say that they will be punished not for failing to follow the rules of Islam, but for not following the rules of reason.[78] The Ḥanafīs—whose position on this issue is more eclectic—held that since the *specifics* of good and evil are unknowable except through revelation, non-Muslims are required to abide by the rules of Islam only after having accepted it.[79] The majority view on our question, however, remains puzzling in this frame of analysis, for whereas good and evil—in this view—can only be distinguished through revelation, non-Muslims are still meant to abide by the rules of Islam even when they do not believe in it. But as we have seen, the prevalent argument introduced here is that they are able to convert to Islam and learn about good and bad things. Furthermore, the argument that they are liable for things that their own religions also forbid seems to solve part of the difficulty.[80]

Conclusion

When the Arabs conquered and settled in the regions surrounding Arabia in the mid-first/seventh century, it was only a matter of time before they became partners with the non-Muslim majority in these regions. This partnership took various economic, social, and even political forms. It stands to reason, then, that Muslim jurists had to think of how Islamic law may relate to these non-Muslims. We are talking here about a period before such abstract legal and theological issues that we have seen in medieval works of *uṣūl al-fiqh* emerged or developed the way they did.

What we have discussed in this article is a question, the origin of which seems to have been obscured by centuries of discussions of abstract legal and theological issues that have rendered it irrelevant, in the sense of not being related to any practical considerations, but also of

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[78] This means that although the Muʿtazilīs agree with the majority view on this subject, they did that on a totally different ground.

[79] The Ḥanafīs, however, held that the testimony of non-Muslims against each other was acceptable because the evilness of lying could be established through reason, a view that is attributed to Abū Ḥanīfah himself. Muḥammad, *ʿIlm Uṣūl al-Dīn*, 278.

[80] And here, the question of whether non-Muslims are meant to abide by the specifics of Islamic law intersects with another standard question of *uṣūl al-fiqh*, namely, whether previous revelations (*sharʿ*—or *sharāʾiʿ*—*man qablanā*) can have any role in Islamic law. Punishing non-Muslims for adultery because it is forbidden in their religion (rather than in Islam) can, but does not have to, suggest that previous revelations hold at least some normativity for Muslims.

not having much influence on the actual reality in Muslim societies.[81] This, however, does not reflect the fact that the question dealt with an issue that was integral to life in early Muslim societies and was, therefore, embedded in practical considerations.[82] The presence of this fact waned in medieval discussions, and even if it never fully disappeared, it still reached the point of being dismissed as "fruitless" in a short discussion by the eighth/fourteenth-century prominent legal scholar Abū Isḥāq al-Shāṭibī (d. 790/1388).[83] And here comes the significance of another account by a contemporary of al-Shāṭibī, that is, 'Alā' al-Dīn b. al-Laḥḥām who, by putting together a list of nearly twenty cases relating to our question, seemed keener than others to keep the question alive by showing its relevance to everyday life in Muslim societies.[84] To this end, he points out that the answer to many legal questions depend on how we answer the question of this article. These legal questions deal with specific issues pertaining to the marital

[81] It is also noteworthy that Western scholarship on Islam has hardly attended to this question. Baber Johansen admits that we "certainly need much more research into this question [of "Do the ethical qualifications of acts apply also to non-Muslims?"] before we can answer it." Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999), 70-71. Johansen touches on this question in the context of distinguishing between legal and ethical norms, which, he argues, are strongly related to an opposition between *ẓāhir* (apparent) and *bāṭin* (invisible) which "poses a problem for the application of the *fiqh* to non-Muslims." Here, whereas *ẓāhir* is the sphere of "judiciary procedures and legal norms," *bāṭin* is only accessible to religious and ethical norms. It is not very clear how this opposition affects the question, but be that as it may, Johansen's brief reference to our question does not take into account most of what Muslim scholars wrote about its various aspects.

[82] Weiss writes, "The business of formulating rules took place from the very beginning within a context of discussion of methodological and theoretical issues." Weiss, *Spirit of Islamic Law*, xii.

[83] Al-Shāṭibī did not consider the like of this question part of *uṣūl al-fiqh*. Abū Isḥāq al-Shāṭibī, *al-Muwāfaqāt fī Uṣūl al-Fiqh* (al-Khubar: Dār Ibn 'Affān, 1997), 1:41. For a similar view on the irrelevance of the question to this world, see al-Rāzī, *al-Maḥṣūl*, 2:237, 245. And for describing our question as a subsidiary issue that branches out from a larger issue (of whether a prerequisite must be fulfilled for the validity of the requirement to perform a particular act), see al-Isnawī, *Nihāyah*, 73.

[84] Al-Sam'ānī and al-Isnawī (d. 772/1370), for instance, mention a few such repercussions by way of example. Al-Sam'ānī, *Qawāṭi'*,1:204–05 and al-Isnawī, *Nihāyah*, 75. It must be noted here that, relevant as it is to our subject, I have avoided Ibn Qayyim al-Jawziyyah's (d. 751/1350) *Aḥkām Ahl al-Dhimmah* to focus primarily on discussions within the genre of *uṣūl al-fiqh*. Al-Shaybānī's *Kitāb al-Aṣl* has been discussed here as evidence from early Islamic history of the relevance of our question to life in Muslim societies. However, it is worth investigating how Ibn al-Qayyim's work relate to the argument of this article.

relationship between a Muslim husband and his non-Muslim wife,[85] things that non-Muslims can and cannot do in Muslim societies,[86] things that Muslims are allowed to do with non-Muslims,[87] the validity of some practices by non-Muslims,[88] and certain aspects of the liability of Muslims[89] and non-Muslims under Islamic law.[90]

Three final points are in order. Firstly, as has been pointed out from the beginning, the obfuscation or denial of the practical relevance of the question in medieval works of *uṣūl al-fiqh* does not necessarily mean that the actual practice in Muslim societies did not reflect such practical relevance. Investigating this actual practical relevance requires consultation of other kinds of sources, such as *fatāwā* collections and legal rulings (when available), which has not been done in this article. Secondly, it is indeed worth researching how the Ottoman legal system, for instance, and later legal developments in Muslim countries may have been influenced by our question, which, expectedly, is no longer posed in the same way it was posed in pre-modern Muslim societies, even if some of the issues to which the question is relevant are still present.[91] Thirdly, even with the modern emphasis in most Muslim countries on "citizenship" as the basis of membership in modern nations, with all the

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[85] For instance, can a Muslim husband have intercourse with his non-Muslim wife if she does not perform ghusl (ritual washing) after her menstruation? Ibn al-Laḥḥām. *al-Qawā'id*, 78. And can Muslims eat an animal slaughtered by a *dhimmī* if this latter does not mention the name of God (*al-basmalah*) before the slaughter? Ibid., 85. Obviously, this issue is relevant to the question of whether Muslims can eat animals slaughtered in predominantly Christian or Jewish countries. If non-Muslims are believed to be meant to abide by the rules of Islam, then the answer to these two questions is "no."

[86] Such as whether they can enter mosques when they are ritually impure, read the Qur'ān, wear silk, and "eat and drink in the day of Ramaḍān." Ibid., 78-80.

[87] Such as selling them dishware and utensils made of gold and silver, or even recruiting them in Muslim armies. Ibid., 78, 80.

[88] Such as forms of marriage permissible in their religion but not in Islam. Ibid., 83.

[89] Such as whether a non-Muslim is liable for damaging wine (or pigs, for that purpose) belonging to another non-Muslim. Ibid., 82–83.

[90] Such as the punishment for adultery. Ibid., 84. For similar and other cases, see al-Zarkashī, *al-Baḥr*, 1:407ff.

[91] For example, some Muslim countries have laws that criminalize eating and drinking publicly during the day in Ramaḍān. For instance, Article 267 of Qatar's Penal Code (Law no. 11 of 2004) states that "Whoever publicly eats or drinks during a day of Ramadan shall be punished by imprisonment for a term not exceeding three months and/or a fine not exceeding three thousand Qatari Riyals." This article is part of Part 7 of the law dealing with "Social Crimes," particularly, to "Crimes Related to Religions," (http://www.almeezan.qa/LawArticles.aspx?LawArticleID=859&LawId=26&language=en). And for a *fatwā* emphasizing the duty of Muslim rulers to make sure that all residents in their countries abstain from eating or drinking in the day of Ramaḍān, see https://www.islamweb.net/ar/fatwa/126075/.

equal privileges and responsibilities that this notion establishes, some of the laws in these countries may still contain traces of the old debate on the status of non-Muslims in Muslim societies.[92] This is an issue to which the subject of this article obviously relates to and one which warrants a separate study.[93]

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[92] By "Muslim" countries, I mean countries where Islam is the official religion and/or the main source of legislation, and where Muslims typically constitute the majority of the population.

[93] Some modern scholars have indeed noticed the relationship between the subject of this article and the status of non-Muslims in Muslim societies. For example, see Ṭāhā, "Taklīf al-Kuffār." Unfortunately, however, Ṭāhā does not elaborate on that relationship. Furthermore, when he speaks about the rights of the *ahl al-dhimmah* (pp. 62-77), he mentions the protection of their lives and property, freedom of religion, of residency and movement, and the right use of the available facilities and infrastructure. No right is mentioned as to the Islamic laws under which they fall or by which they must abide. Also see footnote 91 above for the case of the general prohibition of eating and drinking in public in a Muslim country, even for non-Muslims.