

## The *Marja'iyah* and the Juristic Challenges of the Diaspora

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This paper examines the new diasporic jurisprudence that has emerged within Shi'i juridical circles. Shi'i jurists (*maraji'*) have responded to the needs of Shi'i communities that live as minorities in the West by recasting Islamic legal discourse on Muslim minorities and reconciling Islamic legal categories to the demands of the times. In their writings, the *maraji'* have articulated the juridical and moral parameters within which the followers are to base their demeanor.

Keywords: *Marji'*, fiqh al-Aqalliyya, Sistani, hand-shaking, *mustahdathat*, diaspora

The term diaspora means scattered or dispersed. As Kathleen Moore has argued, the term signifies fluidity and change; of a minority community co-existing with a majority other. This inevitably presents numerous sociological challenges like those of assimilation, integration, identity formation etc.<sup>1</sup> In the case of Islam, living in the diaspora also challenges a Muslim to be faithful to his/her tradition and yet be able to integrate and flourish in non-Muslim countries; of being dissociated from the majority within which the diaspora is located. In essence, the diasporic narrative is that of a connection of people, law, and their environment. It is also one of an adjustment of customs, religious practices, integration, and ethnic affiliations.<sup>2</sup>

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<sup>1</sup> See Kathleen Moore, *The Unfamiliar Abode: The Application of Islamic Law in non-Muslim countries* (New York: Oxford, 2010), 11; 62-63.

<sup>2</sup> Ibid.

Presently, there are more Muslims living in non-Muslim countries than ever before. It is estimated that almost a third of the 1.3 billion Muslims live in countries where they make up the minority.<sup>3</sup> This paper will examine some of the juridical injunctions that address the needs of the Shi'i diasporic community. My main argument is that Shi'i jurists residing in the Middle East have composed a distinctive genre of literature to respond to the various religious and socio-economic challenges that their followers encounter in the diaspora. Some jurists have invoked hermeneutical devices to meet special needs, whereas other jurists have gone beyond the rulings cited in the classical juridical manuals to formulate new edicts for diasporic Shi'is. In some instances, the jurists have imposed laws formulated in the classical period of their history (ninth-tenth centuries) on contemporary diasporic Shi'is.

### ***Fiqh al-Aqalliyya***

An important dimension of a law-centered religion like Islam is the application of its pronouncements in the diaspora. In recent times, there has been much discourse on the significance and function of the term jurisprudence of minorities (*fiqh al-aqalliyya*).<sup>4</sup> The term, which is also called diasporic jurisprudence, refers to the issuance of juristic ordinances to

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<sup>3</sup> Khaled Abou El-Fadl, "Striking a Balance: Islamic Legal Discourse on Muslim Minorities." In Yvonne Haddad and John Esposito eds. *Muslims on the Americanization Path?* (Atlanta: Scholars Press, 1998), 59.

<sup>4</sup> See for example Khaled Abou El-Fadl, "Islamic Law and Muslim Minorities: The Juristic Discourse on Muslim Minorities from the Second/Eight to the Eleventh/Seventeenth Centuries," *Islamic Law and Society*, 1, 2 (1994); Khalid Abou El-Fadl, "Striking a Balance"; Omar Khalidi, "Living as a Muslim in a Pluralistic Society," in *Muslims' Place in the American Public Square: Hope, Fears, and Aspirations*. Zahid H. Bukhari, Sulayman S. Nyang, Mumtaz Ahmad, and John L. Esposito eds. (Walnut Creek: AltaMira Press, 2004); See also al-Sayyid Husayn al-Husayni, *Ahkam al-Mughtaribin* (Tehran: Markaz al-Taba'a wa'l Nashr Lil-Majma' al-'Alami li ahl al-Bayt, 1999); Taha Jabir al-Alwani, "Towards a Fiqh for Minorities: Some Reflections," in Zahid H. Bukhari et al. eds., *Muslims' Place in the American Public Square*; Tariq Ramadan, *Western Muslims and the Future of Islam* (Oxford: Oxford University Press, 2004).

accommodate the needs of Muslims residing among non-Muslim majorities with special requirements that may not be appropriate for other communities. These include acts like shaking hands with the opposite gender, visiting places where alcohol is served, working in grocery stores where alcohol is sold, taking interest from non-Muslim banks, investing in stocks, and other daily activities.

Diasporic jurisprudence recognizes the need for a different genre of interaction between people and their habitat. It challenges them to rethink the axioms along which their law was fashioned in the past. The operative rule of this genre of *fiqh* is “changes of *al-ahkam* (judgments) are permissible with the times.”<sup>5</sup> Diasporic jurisprudence also challenges the notion of a monolithic and static law that can be applied at all times and places. Besides dealing with issues like prayers, ritual purity and social interaction, this genre of jurisprudence also addresses topics like Muslim political involvement, citizenship, domestic and international policies, serving in Western judiciaries and armies, working for government secret service agencies, civic duties. It should be remembered that the current system of jurisprudence in the Islamic world was composed and codified by classical jurists like Abu Hanifa (d. 767), Malik b. Anas (d. 795) and al-Shafi‘i (d. 820) whose outlook regarding interaction with non-Muslims and minorities differed drastically from the challenges encountered by diasporic Muslims. Contemporary juridical decision-making is premised primarily on traditions that were uttered when Muslims were the majority, an entirely different social context which bears little or no relevance to the present diasporic community. The legal methodology and laws enunciated by erstwhile jurists reflect the rulings based on their socio-political circumstances and some of the principles they used in articulating their pronouncements. A different historical backdrop would have produced

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<sup>5</sup> Jocelyne Cesari, ed. *Encyclopedia of Islam in the United States*. 2 vols., (Westport: Greenwood, 2007), 703.

different interpretations of the sacred texts.<sup>6</sup> Rather than regurgitating the rulings stated in the classical legal corpus, contemporary Islamic jurisprudence requires a more critical and nuanced approach, one that would be more appropriate to the challenges faced by diasporic Muslims.

New legal treatises for diasporic Muslims are necessary because the inherited *fiqh* does not address the perpetual challenges that diasporic Muslims encounter. Diasporic jurisprudence draws on the classical legal heritage of Islam yet it is not restricted by it. Rather, this genre of *fiqh* has to be reconstructed from the traditional *fiqh* heritage or discovered through innovative interpretive efforts. The legal ordinances formulated for diasporic Muslims has to take into account the relationship between religious edicts, the community of believers, and the socio-political environment of the diasporic community. The discourse on *fiqh al-aqalliyya* as a viable reference for law in the diaspora indicates that the *shari'a* has to deal with the actual realities of society and the changes that occur within it. Since the *shari'a* is all-inclusive and covers social and personal conduct, the rulings from jurists should encompass all issues that their followers encounter. These include topics such as political identity, serving in a non-Muslim army especially when it fights a Muslim country, and supporting a political party like the Republicans in the United States which endorses the Islamic prohibition on abortion and yet extends unconditional support for Israel. Viewed in this light, the topics for *shari'a* legislation should not be restricted to religious issues. On the contrary, *fiqh al-aqalliyya* must empower Muslims to live as fully-fledged citizens and participate completely in the civic and political process in the diaspora.

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<sup>6</sup> For examples of how the companions of the Prophet revised rulings when their socio-economic circumstances changed see Taha Jabir Alalwani, *Towards a Fiqh for Minorities: Some Basic Reflections* (Washington: International Institute of Islamic Thought, 2003) p. 40; fn 14.

### *Fiqh al-Aqalliyya and Shi'ism*

Within the Sunni communities, a center for the study of Muslim minorities was established in Jeddah in the 1990s. However, so far little has been heard from it nor has the center issued juristic guidelines that can assist diasporic Muslims.<sup>7</sup> There have been other calls for the re-interpretation and application of Islamic law in the diaspora. Most of these suggestions have come from individual scholars like Yusuf al-Qaradawi (b. 1926), Taha Jabir al-Alwani (d. 2016), Khalid Abou el-Fadl (b. 1963) and Tariq Ramadan (b. 1962), who have felt the need to articulate an alternative form of jurisprudence. Al-Qaradawi, for example, states that the intrinsic spirit of Islamic jurisprudence is flexible, hence, contemporary legal practices do not have to conform to precedents established in the past.<sup>8</sup> For him, Islamic diasporic norms should be constructed from traditional *fiqh* and new interpretive efforts based on novel contexts in the West.<sup>9</sup> Based on such postulations, he rejects, for example, the traditional ruling that non-Muslims cannot inherit from Muslims, claiming that this was probably to be observed when the two parties were at war.<sup>10</sup>

In the past, scholars often issued disparate rulings where Muslims lived as minorities. Some Hanafi jurists, for example, ruled that Muslims can sell alcohol in *dar al-harb* (the abode

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<sup>7</sup> Yusuf Talal DeLorenzo, "The Fiqh Councilor in North America," in Yvonne Haddad and John Esposito eds., *Muslims on the Americanization Path?*, 87

<sup>8</sup> Tauseef Ahmad Parray, "The Legal Methodology of Fiqh al-Aqalliyyat and its Critics: An Analytical Study" in *Journal of Muslim Minority Affairs*, vol. 32, 1, (2012), 98.

<sup>9</sup> Amjad Mohammed, *Muslims in Non-Muslim Lands: A Legal Study with Application*, (Cambridge: The Islamic Texts Society, 2013), 38. See also Alexandre Caeiro and Mahmoud al-Saify, "Qaradawi in Europe, Europe in Qaradawi? The Global Mufti's European Politics," in Bettina Graf and Jakob Skovgaard-Peterson eds. *Global Mufti: The Phenomenon of Yusuf al-Qaradawi* (New York: Columbia Univ. Press, 2009), 116-117

<sup>10</sup> Yusuf al-Qaradawi, *Fi Fiqh al-Aqalliyyat al-Muslima: Hayat al-Muslimin wast al-Mujtama'at al-Ukhra* (Cairo: Dar al-Shuruq, 2001), 58-9.

of war).<sup>11</sup> More recently, Rashid Rida (d. 1935) argued that Muslims are not bound by *shari'a* laws in non-Muslim countries.<sup>12</sup> He also maintained that permitting Muslims to live in the diaspora and yet deny them economic and political empowerment is a contradiction in terms. According to Rida, Muslims need to engage in commerce and participate in political decision making which would affect not only diasporic Muslims but also Muslims living all over the world. He therefore allowed Muslims to borrow and lend money with interest.<sup>13</sup>

In the Shi'i case, issuing such juristic opinions by individual scholars in the diaspora is almost impossible. This is because, in Shi'ism, the obligation to follow the religious dictates of the *maraji'* (singl. *marji'*)<sup>14</sup> has meant that their interpretations and pronouncements, formulated in the seminaries in Qum and Najaf, are seen as both normative and binding on their followers all over the world. Such a structured system of religious leadership and imitation of the most learned (*taqlid al-a'lam*) is absent in Sunni Islam where there is no recognized clergy or ecclesiastic authority that can claim sole monopoly of the hermeneutics of religious texts. For diasporic Shi'is, solutions to their social and religious issues are predicated on the interpretive enterprises of the *maraji'* residing in the Middle East. Due to the pervasive influence of the *maraji'*, there is no Shi'i equivalent of a Fiqh council or group of religious scholars who could extrapolate legal rulings in the diaspora independently of the *maraji'* in the Middle East.<sup>15</sup>

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<sup>11</sup> See the statement of the Hanafi jurist Ibn 'Abdun cited in Amjad, *Muslims in non-Muslim Lands*, 150-2.

<sup>12</sup> Khaled Abou El Fadl, "Striking a Balance," 66.

<sup>13</sup> Ibid.

<sup>14</sup> The term refers to the most learned juridical authority in the Shi'i community whose rulings on Islamic law are followed by those who acknowledge him as their source of reference or *marji'*. The followers base their religious practices in accordance with his legal edicts.

<sup>15</sup> See Liyakat Takim, *Shi'ism in America* (New York: NYP, 2009), chapter 4.

Shi'is living in the West have posed a wide range of questions to their religious leaders (*maraji*)<sup>6</sup> ranging from the permissibility of taking mortgages to praying in areas where the sun does not rise in winter or set in summer. The *maraji*<sup>6</sup> have responded by composing a distinct genre of juridical texts called the *mustahdathat* (lit. new matters or occurrences).<sup>16</sup> A study of this literature indicates an underlying commitment to casuistry – that is, the examination of specific cases rather than the exposition or elaboration of detailed rules or principles. Rather than presenting a fully-fledged or well-articulated legal system, most of the *responsa* are on an *ad hoc* and piece-meal basis. Whether in their compositions or statements on the internet, the *maraji*'s pronouncements present Islam as a legal code of dos and don'ts, often ignoring the particular context in which these laws are to be practiced.<sup>17</sup>

Titles such as “*Ahkam lil Mughtaribin* (Rules for those Residing in the West)” and “Code of Practice for Muslims in the West” indicate that the *mustahdathat* literature addresses ritual points raised by the followers of the *maraji*<sup>6</sup>. A study of this genre of literature also reveals that erstwhile edicts have been either imported to the diaspora or relaxed when abiding by these injunctions have created difficulties (*haraj*) for the faithful believers. Stated differently, Shi'i minority *fiqh* is restricted to the collection of *fatawa* (religious edicts) produced in the seminaries by jurists who do not fully comprehend the challenges experienced by their followers living in the diasporic milieu.<sup>18</sup>

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<sup>16</sup> See for example Ayatullah al-Sayyid 'Ali al-Husayni al-Seestani, *Contemporary Legal Rulings in Shi'i Law*. Translated Hamid Mavani (Montreal: Organization for the Advancement of Islamic Knowledge and Humanitarian Services, 1996).

<sup>17</sup> See [www.sistani.org/english](http://www.sistani.org/english); [www.saanei.org](http://www.saanei.org).

<sup>18</sup> See for example, *Current Legal Issues According to the Edicts of Ayatullah al-Sayyid 'Ali al-Seestani* (London: Imam 'Ali Foundation, 1997). 'Abdul Hadi al-Hakim, *A Code of Practice for Muslims in the West in Accordance with the*

There is little direction in the *responsa* or *fatawa* from the *maraji'* or any other genre of literature on specifically social or political diasporic issues. The challenges of assimilation and integration, the dilemma of Muslims who serve in the military, or judges required to enforce non-Muslim laws, swearing allegiance to a non-Muslim government, Muslim youth who experience peer pressure or marry outside the community, the question of building a network of economic enterprises within the community, or how to empower the diasporic Shi'i community politically, socially and economically have not been addressed. Similarly, the rulings from the *maraji'* have yet to discuss issues like countering marginalization, Islamophobia, and social exclusion. The issuance of juridical injunctions to address the specific needs of diasporic Muslims or in accordance with their newly adopted customs is a phenomenon that has yet to be discussed extensively.

The view that Shi'i diasporic law is underdeveloped is highlighted by the Lebanese jurist Ayatullah Mahdi Shams al-Din (d. 2001).<sup>19</sup> He complains that the social-political dimension of Islamic jurisprudence has not been as accentuated as it should be in Shi'i juridical manuals. This is partly because, due to unfavorable political circumstances, Shi'i jurists, in the past, alienated themselves from socio-political affairs to the extent that their jurisprudence has been isolated from mundane and daily issues. Consequently, they have not contributed to the evolution of political and social jurisprudence. Jurists have, instead, immersed themselves in personal issues such as prayers and fasting.<sup>20</sup> Shams al-Din claims that this is a greater problem for Shi'i scholars than Sunni jurists

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*Edicts of Ayatullah al-Udhma as-Sayyid Ali al-Husaini as-Seestani*. Translated by Sayyid Muhammad Rizvi (London: Imam 'Ali Foundation, 1999); *Jurisprudence Made Easy: According to the Edicts of His Eminence Grand Ayatullah as-Sayyid Ali al-Husaini as-Seestani*. Translated by Najim al-Khafaji (London: Imam Ali Foundation, 1998).

<sup>19</sup> Shams al-Din was a leading jurist and social activist in Lebanon. He was the deputy chairman of the supreme Islamic Shi'i Council in Lebanon and was also representative of Ayatullah al-Khu'i, one of the most prominent Shi'i scholars of the last century.

<sup>20</sup> 'Abd al-Jabbar al-Rifa'i ed., *Maqasid al-Shari'a: Tahrir wa Hiyar* (Beirut:



since the latter were politically engaged and have developed legal mechanisms and antecedents to assist them in this process. As a result, Shams al-Din argues, a cleavage has occurred in Shi'i jurisprudence between the understanding of the law (including its derivation and the processes - *manahij*) and its application in the real world (*waqi'*).<sup>21</sup>

For Shams al-Din, due to the corruption he sees as affecting Muslim societies and politics, Shi'i law has focused primarily on issues affecting the hereafter (*al-mashru' al-ukhrawi*) and questions of personal salvation. Shams al-Din further emphasizes that a jurisprudence that relates to the society in general and people at a personal level is required.<sup>22</sup>

### **The *Mustahdathat* and the Diaspora**

A study of the *mustahdathat* literature reveals that the questions posed to Ayatullah Sistani (d. 1930) and other jurists reflect the legalistic challenges that confront diasporic Shi'is. Sistani is asked on the genre of music that Shi'is are permitted to listen to, consuming food products that contain gelatin,<sup>23</sup> offering prayers in a space craft, eating at tables where alcohol is served and praying and fasting in places that have extremely long days or nights.<sup>24</sup>

Ayatollah Fadhil Milani is a prominent Shi'i jurist who has lived in England for over thirty years. He is fully conversant with the challenges that Shi'is encounter in the West. Many

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Dar al-Fikr al-Mu'asir, 2002), 17. This work is a collection of interviews and excerpts of writings of a number of scholars regarding *maqasid al-shar'iyya* (objectives of the law). I am grateful to my research assistant, Vinay Khetia, for sharing his research on this section with me.

<sup>21</sup> See also Liyakat Takim, "Maqasid al-Shari'a in Contemporary Shi'i Jurisprudence" in *Maqasid al-Shari'a in Contemporary Reformist Thought: An Examination* (New York: Palgrave 2014): 101-126, edited by Adis Duderija,

<sup>22</sup> 'Abd al-Jabbar al-Rifa'i ed., *Maqasid al-Shari'a*, 18.

<sup>23</sup> *Contemporary Legal Rulings in Shi'i Law*, 36.

<sup>24</sup> 'Abdul Hadi al-Hakim, *A Code of Practice for Muslims in the West*, 70, 84.

of his responses are pragmatic and indicative of the wide array of challenges that diasporic Shi'is encounter. He rules, for example, that it is permissible to pray in clothes cleaned by non-Muslim dry cleaners<sup>25</sup> and to invest in stock markets as long as the firms do not invest in products that are *haram*.<sup>26</sup> Other questions that are specific to diasporic Shi'is include how to determine the middle of the night where days are abnormally long or short,<sup>27</sup> and whether it is permissible to articulate marriage vows in the vernacular.<sup>28</sup> Juridical discourse such as these reflect a departure from classical Shi'i texts where such matters were not discussed.

In the juridical response literature, *Fiqh Lil-Mughtaribin and al-Mustahdathat* (translated as *Current Legal Issues*), Ayatullah Sistani couches legal norms with a concern to uphold moral and ethical codes in the diaspora. For Sistani, moral imperatives must be upheld by Muslims wherever they reside. Thus, Muslims must faithfully discharge all their contractual obligations and they may not violate the property of non-Muslims.<sup>29</sup> Like other Muslim jurists, he states that Muslims in the West must uphold Islamic law, serve the public and individual interest of Muslims, and fulfill the pledges or agreements made to a non-Muslim state. If Muslims enter or reside in a territory, they must abide by the laws of the land.<sup>30</sup> They may not cheat, lie, fiddle with gas meters,<sup>31</sup> or give false information to government agencies like immigration officials.<sup>32</sup>

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<sup>25</sup> Ayatollah Sayyid Fadhel Milani. *Frequently Asked Questions on Islam: Islamic Answers for Modern Problems* (London: 2001), 41.

<sup>26</sup> Ibid, 87

<sup>27</sup> Ibid, 48.

<sup>28</sup> Ibid., 105-6.

<sup>29</sup> See Liyakat Takim, *Shi'ism in America*, chapter 4.

<sup>30</sup> *Current Legal Issues*, 40. Al-Khu'i also rules that it is forbidden (*haram*) to disobey the laws of the land even if one is living in a non-Muslim country. See al-Sayyid Husayn al-Husayni, *al-Ahkam*, 407.

<sup>31</sup> 'Abdul Hadi al-Hakim, *A Code of Practice*, 138.

When asked whether it is permissible to deceive an insurance company in a non-Islamic country if one is confident that this will not lead to the image of Islam and Muslims being tarnished, he states quite unequivocally that deception in any form is not permissible.<sup>33</sup> Sistani is clearly concerned that Muslims uphold ethical principles, especially when residing in non-Muslim countries.

Sistani also seeks political empowerment for his followers. Without engaging in a detailed or nuanced discourse, he encourages them to participate in elections and run for office.<sup>34</sup> According to imam Mustafa al-Qazwini, during his meeting with Sistani, the Ayatullah told him that anything that serves the interests of Islam in America, including inter-faith dialogue, should be promoted.<sup>35</sup> He also states that the interests of diasporic Muslims might necessitate them to seek membership of or create political parties or even become a member of parliament. In such cases it is permissible for Muslims to co-operate with non-Muslim groups to enhance the needs of the Muslim community.<sup>36</sup> Besides political engagement, he encourages interaction with non-Muslims in all spheres of Western life. Sistani states that Muslims can greet non-Muslims on Christmas and other festive occasions.<sup>37</sup> This is in stark contrast to the views of some Sunni fundamentalist groups which declare greeting non-Muslims or any participation in Christian

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<sup>32</sup> *Contemporary Legal Rulings*, 74-5.

<sup>33</sup> Al-Sayyid Husayn al-Husayni, *Ahkam*, 408.

<sup>34</sup> Hasan al-Qazwini, *American Crescent: A Muslim Cleric on the Power of his Faith, the Struggle against Prejudice and the Future of Islam in America* (New York: Random House, 2007), 192-3.

<sup>35</sup> Liyakat Takim, *Shi'ism in America*, chapter 4.

<sup>36</sup> Al-Hakim, *A Code of Practice for Muslims*, 137.

<sup>37</sup> *Current Legal Issues*, 41.

holidays to be forbidden.<sup>38</sup> The Saudis prohibit any type of cooperation between Muslims, Jews, and Christians.<sup>39</sup>

Ayatullah Muhammad Hussein Fadlallah (d. 2010) also urges the respect of the laws of the diasporic countries including the payment of taxes. Muslims should not distort the image of Islam. Obtaining a visa to enter a country he says, is a contract with the government of that country. Hence, Muslims are required to observe the laws of the country. Fadlallah goes so far as issuing a *fatwa* prohibiting the violation of anyone's property, Muslims or otherwise.<sup>40</sup> This is because fulfilling contracts and promises made is central to the Qur'anic ethos. (2:177).

It is to be noted that when discussing interaction with non-Muslims, the *maraji'* accentuate the moral rather than juristic parameters of Islam. The two spheres are distinctly different. At the moral plane, Muslims are not allowed to cheat, lie or deceive non-Muslims. Yet, at the juridical level, Sistani's rulings are discriminatory. He rules, for example, that it is obligatory to save Muslim lives, but it is not mandatory to save non-Muslim ones.<sup>41</sup> Similarly, he states that Muslims can receive from but not give body organs to non-Muslims.<sup>42</sup> The discriminatory rules in Shi'i *fiqh* can be further illustrated from the fact that Ayatullah al-Khu'i (d. 1992), who was widely acknowledged as the most learned Shi'i jurist of his time, had ruled

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<sup>38</sup> Olivier Roy, *The Search for a New Ummah* (New York: Columbia University Press, 2004), 199, 279.

<sup>39</sup> *Ibid.*, 216.

<sup>40</sup> Fadlallah, *Tahdiyat al-Mahjar Bayna al-Isala wa al-Mu'asara* (Beirut: Dar al-Malak, 2000), 205.

<sup>41</sup> *Current Legal Issues*, 49.

<sup>42</sup> *Ibid.*, 102.

that it is permissible to steal from a *kafir*.<sup>43</sup> In fact, in the juridical treatises, non-Muslims have often been treated as subhuman species as the question of their purity is discussed along with the impurities of dogs, blood, urine, and human excrements.

In addressing the needs of their followers in the diaspora, the *maraji'* have deployed hermeneutical devices posited in Islamic legal theory (*usul al-fiqh*) to deduce appropriate responses. They invoke principles such as *maslaha* (welfare), *darura* (necessity), and *la haraj* (no harm) in validating certain practices in the diaspora. For example, the Lebanese jurist Fadlallah states that when implementing a ruling that would result in *mafsada* (corruption), such an edict may be suspended. He cites the example of Shi'i mourning and lamentation rituals such as striking the head with a knife which he opines should be suspended if such acts will denigrate the image of Islam.<sup>44</sup>

Based on the principles of *la darar* (no harm is permitted in Islam) and *haraj* (difficulty), jurists have sought to reduce the difficulties encountered by their followers especially those living in the diaspora. For example, for those living in areas where the sun does not set in summer or rise in winter, Fadlallah and Sistani both advise their followers to follow the times of 'the nearest places that have night and day covering all twenty-four hours.'<sup>45</sup> According to Sistani, they will pray five prayers according to the times of that closest city.<sup>46</sup> Fadlallah suggests a more lenient solution of arranging one's own schedule for offering the five prayers within a twenty-four hour period. According to al-Khu'i, if it is possible for a person to migrate to a place where he can pray and fast, then it is mandatory for him to do so. Otherwise, as a precautionary

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<sup>43</sup> Al-Khu'i's *fatwa* is cited in Sayyid Husayn al-Husayni, *Ahkam al-Mughtaribin*, pg. 400.fatwa #1221 and pg. 400.Fatwa #1224.

<sup>44</sup> Linda Darwish, "Texts of Tensions, Spaces of Empowerment: Migrant Muslims and the Limits of Shi'ite Legal Discourse," (Ph.D Thesis, Concordia University, 2009), 105.

<sup>45</sup> al-Sayyid Husayn al-Husayni, *Ahkam al-Mughtaribin*, 98; 231.

<sup>46</sup> Abdul Hadi al-Hakim, *A Code of Practice*, 70. *Current Legal Issues* 114-5;

measure, he offers a more liberal suggestion of spreading the five prayers throughout the day.<sup>47</sup> Fadhil Lankarani (d. 2007) echoes al-Khui's travel advisory but on the basis of precaution, he comes up with a novel interpretation, recommending that following one's homeland timings as an option.<sup>48</sup>

The application of laws based on the principles of necessity or no harm can be further illustrated from the juristic ruling concerning inter-gender handshaking, something that many Muslims, especially those living in the diaspora, are required to do on a regular basis. Most jurists have prohibited inter-gender handshaking. As a matter of fact, Ayatullah Sistani includes women shaking hands with unrelated men in a list of activities that, 'if forced to do by her husband, justifies her leaving him and remaining entitled to full maintenance'.<sup>49</sup> Ayatullah Fadlallah goes so far as to imply that the alleged *haraj* (harm) claimed by a questioner is nothing but intentional self-deception. Elsewhere, however, Fadlallah acknowledges the permissibility of shaking hands in 'compelling cases' but not otherwise. Fadlallah is asked, 'Is it permissible to shake hands with a western woman in case of extreme embarrassment or in ordinary situations?' to which he replies:

Shaking hands with a foreign woman is not allowed except in extremely delicate and inconvenient situations. Moreover, the believer must be very precise in judging the delicacy of a certain situation so that he won't be driven by this permission to become lenient or indulgent as regards his religious commitment.<sup>50</sup>

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<sup>47</sup> Darwish, 'Texts of Tensions', 227.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid., 238.

<sup>50</sup> Ayatullah al-'Uzma al-Sayyid Muhammad Husayn Fadlallah, *World of Our Youth*. Translated by Khaleel Mohammed (Montreal: Organization for the Advancement of Islamic Learning and Humanitarian Services, 1998), 217.

The tough stance adopted by the *maraji*<sup>51</sup> on inter-gender hand-shaking is borne out from the fact that both al-Khu'i and Sistani allow it only when other options like wearing gloves or refusal to shake hands are impractical.<sup>51</sup> Most jurists have opined that it is permissible to shake hands with the opposite gender only under an unusually critical situation, one that will cause extreme difficulty (*al-haraj al-shadid*) if one refuses to shake hands. Ayatollah Mirza Jawad Tabrizi (d. 2006) goes even further by stating that shaking hands with the opposite gender is not allowed even under extreme circumstances since not touching the opposite gender is among the distinctive markers of Islam, something that has to be preserved whenever possible.<sup>52</sup> The ruling is indicative of how, rather than acknowledging the daily needs of their followers in the West, the *maraji*<sup>53</sup> have resorted to invoking secondary principles like *haraj* and *darura* on the sensitive issue of inter-gender hand-shaking.

### **Offering Prayers at Work**

One of the most significant challenges that diasporic Muslims are confronted with is the offering of prayer during hours of employment. Shi'is enjoy greater flexibility when offering prayers since they can combine the afternoon and night prayers. In addition, they can offer them at any time from the beginning of the prayer time to the end. For example, they can offer the *maghrib* prayer from sunset until midnight when the time that the night prayer (*'isha*) elapses.<sup>53</sup>

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<sup>51</sup> See Sayyid Husayn al-Husayni, *Ahkam al-Mughtaribin*, 187-8.

<sup>52</sup> *Ibid.*, 188.

<sup>53</sup> See the details cited in Sharaf al-Din al-Musawi, *Questions of Jurisprudence: A Comparative Study of Muslim Ritual Practices*, trans. Liyakat Takim, (Toronto: Hyder Press, 1996), chapter 1.

Despite these flexibilities, some Shi'is are not able to pray at work. Shi'i jurists are unanimous in stating that prayers cannot be compromised under any circumstance. Since prayer is deemed to be one of the pillars of faith, the principles of *la darar* or *haraj* cannot be invoked to avoid or postpone offering daily prayers. When asked about the difficulties to take time off from work so as to offer prayers, Fadlallah states that if the employment contract allows for breaks during hours of work, then one must use these breaks to pray.<sup>54</sup> If the contract does not allow for prayer time or any breaks, then a person must negotiate with the employer. However under no circumstance can prayer be compromised.

Similarly, Ayatullah Muhammad Sa'id al-Hakim does not allow the prayer to elapse (*qada*) even if this would mean a person losing his or her job. He allows the prayer be offered up to the last possible time before the time elapses.<sup>55</sup> Sistani also states that a person should look for a job where s/he would not have to compromise prayers since it is a major pillar of faith.<sup>56</sup> Although Islamic law allows prayers to be altered when a person is travelling or ill, when it comes to postponing prayers or allowing the time for offering prayers to lapse, the *maraji'* make no exceptions, instructing diasporic Shi'is to risk losing their jobs than compromise their prayers.

## Miscellaneous Diasporic Rulings

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<sup>54</sup> Fadlallah, *Islamic Lanterns: Conceptual and Jurisprudence Questions for Natives, Emigrants and Expatriates*, compiled by Adil al-Qadi and S. al-Samarra'i, trans. S. Samarra'i (Beirut: Dar al-Malak, 2004), 311-12. See also Darwish, *Texts of Tension*, 231-4.

<sup>55</sup> Ayatullah al-Sayyid Muhammad Sa'id al-Tabataba'i al-Hakim, *Murshid al-Mughtaribin* (Beirut: Mu'asssa al-Murshid li Taba'a wa al-Nashr wa'l Tawzi', 2002), 193-4.

<sup>56</sup> Darwish, *Texts of Tension*, 217.



Despite the hermeneutical devices at their disposal, the *maraji'* are quite strict and inflexible in their social rulings. For example when he is asked if a Muslim builder or contractor can build a place of worship for non-Muslims in the West, Sistani says it is not permissible to do so because this is tantamount to promoting false religions.<sup>57</sup>

In many instances, laws are as applicable in the diaspora as they are in Muslim-majority countries. Sistani does not allow Muslims to serve in the Western judiciary. He is asked if it is permissible for a holder of a law-degree to serve as a judge in non-Muslim countries where s/he would be required to judge according to non-Islamic laws. He states that he does not deem it permissible to administer judgment for those are not qualified and for those who judge based on non-Islamic laws.<sup>58</sup> However, he also states that it is permissible for a holder of a law-degree to become a lawyer in a non-Muslim country and take up cases of non-Muslims provided this does not involve the violation of anyone's rights or being deceitful.<sup>59</sup>

We should not conceive of the *marja'iyya* as a monolithic institution governed by a uniform and indivisible law formulated by jurists. As a matter of fact, some *maraji'* have issued liberal edicts that are in complete contrast to what more "traditional" jurists have opined. Ayatullah Fadlallah is regarded as a reformist jurist who appeals to many diasporic Shi'is because of his more pragmatic and flexible views. Most jurists consider polytheists, atheists, and idolaters to be ritually impure (*najas*). Thus, their food cannot be consumed. Fadlallah disagrees, saying that in essence, no one is impure. The impurity, he argues, lies in matters of beliefs, not in

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<sup>57</sup> al-Hakim, *A Code of Practice for Muslims*, 150

<sup>58</sup> Ibid., 155.

<sup>59</sup> Ibid.

essence.<sup>60</sup> Hence, he rules that even Hindus and Buddhists are ritually pure and that their food may be consumed.<sup>61</sup> Although such rulings apply to Shi'is everywhere, they are more germane to those living in the diaspora where they have to interact with and consume the food of non-believers more frequently.

## Conclusion

This article has tried to convey that far from being a static and rigid tradition, there is much discourse within the Shi'i community and that some jurists go beyond the classical articulation of Islam. It is only through such self-critique that reformation can generate a fresh understanding of Islamic revelation and Prophetic practices.

While it is true that in Europe religious norms have no binding force in the social and political spheres, the *maraji'* have to go beyond general moral maxims and articulation of religious norms that pertain to the dos and don't dos. To be relevant to the lives of ordinary Shi'is, the *maraji'* need to articulate an integrated world-view that can relate and respond to the socio-political and economic needs of the community. The directives issued by the *maraji'* are often connected to particular points of jurisprudence or matters of belief. These do not resolve many of the challenges that Shi'is in the diaspora encounter. For diasporic Shi'is, the hermeneutical principles within *ijtihad* should allow for a different and more flexible interpretation of the Islamic message. For them, it is essential that Muslims continue to review

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<sup>60</sup> Muhammad Husayn Fadlallah, *Al-Nadwa* (Beirut: Dar al-Malak, 1997), 674. See also Liyakat Takim, "Reinterpretation or Reformation: Shi'i Law in the West." *Journal of Shi'a Islamic Studies*, 3, no. 2 (2010): 141-165.

<sup>61</sup> On his other liberal views see Liyakat Takim, "Foreign Influences on American Shi'ism." *The Muslim World* 90 (2000): 459-77.

and revise the law in keeping with the dictates of their changing circumstances. Jurists who argue for the reformulation of Islamic laws claim that the interpretations of Islamic revelation were interwoven to the specificity of those times and places.

As the second generation of Shi'is has come to see the diaspora as their permanent home, it has appropriated distinctly local values and outlook. Shi'is have opted for voluntary social activism and to identify with diasporic culture, develop a sense of patriotism leading to a greater politicization of the community and a sense of national consciousness. This is their way to counter marginality, Islamophobia, and social exclusion.

It is important to understand the role of Shi'i Muslims in weaving the religious as well as social tapestry of the diaspora and to see several gaps – between religion and culture, the gap between religion and politics, religious loyalty and ethnic identity and the lacuna between normative religious texts and the reality of diasporic life. With time, these gaps will be filled. It is here that the challenge for the next generation of Shi'is lies.

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