RELIGIOUS MINORITIES AND ISLAMIC LAW: ACCOMMODATION AND THE LIMITS OF TOLERANCE

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Introduction

At the discursive intersection of Islamic law and the rights of minorities lies a difficult, and often politicized, inquiry into the Islamic legal treatment of religious minorities, in particular those non-Muslim minorities who permanently reside in the Islamic polity, known as the *dhimmīs*. In the premodern legal literature, *dhimmīs* are subjected to various rules regulating the scope of what moderns would call their freedom and liberty, whether to manifest their religious beliefs or to act in ways contrary to Islamic legal doctrines but in conformity with their own normative traditions. The premodern regulations are often called ‘the *dhimmī* rules’, which will be used hereinafter as a shorthand reference to the vast body of rules that govern the *dhimmī*’ conduct in the Muslim polity.

The *dhimmī* rules often lie at the centre of debates about whether the Islamic faith is tolerant or intolerant of non-Muslims. Legally, the *dhimmī* pays a poll tax (*jizya*) to enter into a contract of protection under which he is permitted to reside peacefully within Muslim lands and preserve his faith commitments. The contract of protection, or the ‘*aqd al-dhimma*, is a politico-legal device that embraces the content of the *dhimmī* rules, outlining the terms under which the *dhimmī* lives in the Islamic polity and the degree to which his difference will be accommodated or not. Some suggest that these rules are important indices of the inherent intolerance in the Islamic tradition, and therefore of Muslims themselves.¹ Others suggest that these rules had only limited real world application and should not be considered characteristic of the Islamic legal treatment of religious minorities. Both sets of arguments are not without evidence. The first view is bolstered by historical incidents of persecution, premodern rules that discriminate on religious grounds, and reports of human rights watch groups that detail incidents of persecution (both official and unofficial) against non-Muslim citizens of Muslim-majority states today. The second view finds support in historical records that illustrate the important role non-Muslims played in Muslim-ruled lands, whether economically, politically or otherwise.

Given the aim and purpose of this collection of articles on Islamic and International Human Rights law, a treatment of the *dhimmī* rules seems appropriate. Indeed, along with the other topics addressed in this book, the treatment of minorities generally, and religious minorities in particular, has been an important index of the quality of freedom and dignity that is fostered by a legal tradition. Whether that tradition be medieval or modern, religious or

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secular, the treatment of minorities remains a highly sensitive. For some, the sensitivity of the issue is framed in terms of the language of ‘tolerance’. This article, however, will suggest that to use ‘tolerance’ to frame the debate on minorities generally misses the larger socio-political conditions that make debates about tolerance intelligible, meaningful, and relevant in a given historical moment. Indeed, frequently among philosophers and political science tolerance is decried as a cover that hides the underlying dynamics of governance amidst pluralism. In other words, to use ‘tolerance’ to frame the analysis of the treatment of minorities is to look past how the meaningfulness of being a minority is dependent upon the socio-cultural content of the majority, and the extent to which majoritarian values animate the governing enterprise that must rule in a context of pluralism. This political reality is not unique to the Islamic legal tradition; it is a shared feature of legal systems across both space and time. Consequently, this brief study of the dhimmī rules rejects the use of ‘tolerance’ as a meaningful term of art, and instead recognizes that the dhimmī rules are symptomatic of the more general (and shared) challenge of governing amidst pluralism.

Myths and Counter Myths – The Dhimmī Rules and the Limits of Tolerance

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

Those writing about the dhimmī rules sometimes indulge certain myths about Islam that are principally interpretations of history that do not contend with the tensions operating in the legal system and its contributions to governance amidst pluralism. The two predominant myths hovering over the dhimmī rules are those of harmony and persecution. Adherents of the myth of harmony argue that the different religious groups coexisted in peace and harmony, with each non-Muslim group enjoying a degree of autonomy over its internal affairs. This image is constructed by reference to periods of Islamic history where the different religious groups seem to have co-existed without substantial turmoil or persecution. For instance, considerable ink has been spent on the history of Andalusian Spain. This is a period that is often described as a period of harmonious interaction between Muslims, Jews and Christians, often posited in contrast to a soon-to-come Reconquista and Inquisition led by a Catholic Spain. For instance, Maria Rosa Menocal writes:

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In principle, all Islamic polities were (and are) required by Quranic injunction not to harm the dhimmi, to tolerate the Christians and Jews living in their midst. But beyond that fundamental prescribed posture, al-Andalus was...the site of memorable and distinctive interfaith relations. Here the Jewish community rose from the ashes of an abysmal existence under the Visigoths...Fruitful intermarriage among the various cultures and the quality of cultural relations with the dhimmi were vital aspects of Andalusian identity...³

Menocal does not ignore the fact that tensions existed in the Andalusian period. But those tensions were not always between religious groups. Rather as she notes, much political friction existed among the Muslim ruling elites, thereby rendering minority groups important political allies to different elite factions among the Muslim populace. Notably, Menocal’s work lies at the center of an ongoing debate within Andalusian studies, in particular about whether the climate of ‘tolerance’ existed, or whether to frame that period in terms of tolerance adopts a too-presentist perspective on any reading of the past. As Anna Akasoy reminds, “[p]opular attitudes still reveal a simplistic general picture, but debate among historians are now much more nuanced.”⁴ That nuanced historical reading reveals serious concerns about the sources available, and the kinds of historical data that can be gleaned from them, keeping in mind the historical Andalusian context, as opposed to any present context or set of values. For Akasoy, an important lesson to be gained from the recent ink spilled on Andalusian Spain is how that history is instrumentalized for contemporary, ideological purposes. She concludes: “one lesson to be learned not so much from history...but from the way it is presented is just how much negotiating the past is part of negotiating the present.”⁵

Additionally, those adopting the myth of harmony might privilege historical practice over legal doctrine, or argue that the rules were more academic than reflective of a lived reality. For instance, while some rules prohibit non-Muslims from holding high governmental office, historical records show that non-Muslims held esteemed positions within ruling regimes, often to the chagrin of Muslim elites.⁶ Others argue that despite its application to dhimmīs only, the jizya tax was merely an administrative matter used to organize society. Jizya was a non-Muslim tax whereas the zakāt was the Muslim tax. They argue that both groups paid taxes and, as

³ Maria Rosa Menocal, How Muslim, Jews, and Christians Created a Culture of Tolerance in Medieval Spain (Boston: Little, Brown and Company, 2002), 30.
⁵ Akasoy, “Convivencia and its Discontents,” 498.
such, the jizya should not be considered a discriminatory tax that speaks to an underlying Muslim intolerance of the religious Other. 7

The myth of harmony stands in stark contrast to the myth of persecution. This myth suggests that endemic to the Muslim mindset is a notion of the non-Muslim as not only the Other, but also as the subservient, submissive and the politically disempowered. Those adopting the myth of persecution justify their position by referring to the dhimmi rules, as well as historical accounts of Muslim rulers oppressing non-Muslims. 8 Consequently, while the myth of harmony considers the law as mere technicality in academic books, the myth of persecution relies on the law to illustrate Islam’s inherently intolerant nature. Importantly, contemporary beliefs and

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7 Abdelwahab Boudhiba, “The Protection of Minorities,” in The Different Aspects of Islamic Culture: The Individual and Society in Islam, eds. A. Boudhiba and M. Ma’ruf al-Dawalibi (Paris: UNESCO, 1998), 331-346, 340-341. See also, Ghazi Salahuddin Atabani, “Islamic Shari’ah and the Status of Non-Muslims,” in Religion, Law and Society: A Christian-Muslim Dialogue (Geneva: WCC Publications, 1995), 63-69, who writes that religious classifications in Islam are for making distinctions in the hereafter, but not in worldly terms. He writes that the dhimmi concept is not one of disparagement, but rather allowed historical minority communities to maintain the distinctiveness they needed to survive. In other words, it was a means of preserving religious pluralism, not squashing it. Likewise, see also, Fazlur Rahman, “Non-Muslim Minorities in an Islamic State,” Journal Institute of Muslim Minority Affairs 7 (1986): 13-24, 20, who writes that the jizya was a tax in lieu of military service. Furthermore, not all non-Muslims paid the jizya. He refers to ‘Umar’s receipt of the zakāt from a Christian tribe as an example. This is likely a reference to the Banū Tahghlib. Notably, Rahman does not mention that Banū Taghlib was required to pay a higher rate of zakat tax than Muslims, which some have suggested equaled the amount they would have paid under a jizya scheme. 8 Notably, rulers often referred to Shari‘a to justify their persecution; but often they did so as a pretext in order to satisfy the political demands of special interest groups among the Muslims and to preserve their legitimacy as Muslim rulers over a sometimes fractious polity. See, for example, John O. Hunwick, “The Rights of Dhimmis to Maintain a Place of Worship: A 15th Century Fatwa from Tlemcen,” al-Qantara 12, no. 1 (1991): 133-156; C.E. Bosworth, “The Concept of Dhimma in Early Islam,” in Christians and Jews in the Ottoman Empire: The Functioning of a Plural Society, ed. Benjamine Braude and Bernard Lewis, 2 vols (New York: Holmes & Meier Publishers, 1982), 41; Bernard Lewis, Semites and Anti-Semites: An Inquiry into Conflict and Prejudice (New York: W.W. Norton & Co., 1986), 123; Jacques Waardenburg, “Muslim Studies of Other Religions: The Medieval Period,” in The Middle East and Europe: Encounters and Exchanges, eds. Geert Jan van Gelder and Ed de Moor (Amsterdam: Rodopi, 1992), 10-38, 13; idem., Muslim Perceptions of Other Religions: A Historical Survey (Oxford: Oxford University Press, 1999), 23; Richard Gottheil, “An Answer to the Dhimmis,” Journal of the American Oriental Society 41 (1921): 383-457, who translates an essay in which the dhimmi is abused.
attitudes about tolerance and pluralism are often anachronistically projected backward as standards by which to judge the past.  

Perhaps the most alarmist works adopting the myth of persecution are the studies by Bat Ye’or, the pseudonym of an independent scholar of Egyptian-Jewish origins. Notably, her work on the dhimmī has been criticized as less than scholarly. That does not alter the fact, though, that her arguments contribute to this field of inquiry, where scholarly and polemical arguments do battle. Her analysis of dhimmī rules is reviewed here to help illustrate the extreme mythic poles that undeniably exist in dhimmī historiography.

The myth of persecution often relies on legal doctrine to prove its point. But just as those adhering to the myth of harmony, those proffering the myth of persecution invoke the law only in a piecemeal fashion, without due attention to the details embedded in complex legal argument. For example, Ye’or writes of how the non-Muslim communities could not build new places of worship and were limited in the extent to which they could restore preexisting ones but she fails to reveal that this restriction was contested. For some jurists, whether a religious community could build a new place of worship depended on the demographics of the relevant township. If the township included both dhimmīs and Muslims, then Ye’or is correct in asserting her position. But if the township was a pure dhimmī village then she is incorrect, given the Ḥanafi doctrines that offer exceptions. Through her selective use of evidence, she paints a picture of persecution without engaging the nuances of the legal tradition. Nuance is centrally significant for understanding, without anachronism, the conditions that rendered the dhimmī rules intelligible at one time.


12 Bat Ye’or, The Dhimmi: Jews and Christians Under Islam (Associated University Press, 1985), 57; idem, Islam and Dhimmitude: Where Civilizations Collide (Cranbury, NJ: Associated University Presses, 2002), 83-85, where her references for the “unanimous opinion” of Muslim jurists are to the texts by two Shāfīʿī jurists (al-Māwardī and al-Nawawī).
Delimiting the Space for Difference: The Dhimmi Contract, Accommodation, and the Public Good

Attentiveness to the nuance of legal argument reveals that the dhimmi rules are symptomatic of the more general challenge of governing amidst pluralism. Jurists utilized legal arguments to justify accommodating minority group interests in an Islamic polity, and also used legal arguments to limit the scope of such accommodation. The question at this juncture is focused less on whether the dhimmīs could or could not do one thing or another, but rather how jurists justified accommodating one thing while denying it for another. The interstices of these sets of justifications, this essay suggests, will further illuminate why the two proffered myths of harmony and persecution miss the point. This is not the place to offer a systematic analysis of each and every dhimmi rule; such an endeavor would require book-length treatments. For the purpose of illustration, three legal issues will be addressed in this essay, all of which relate to the dhimmi’s property interests, the scope of protection afforded to his claims upon his property, and the liberty he enjoys to perform charitable acts with his property. The analysis below will show that Muslim jurists accepted the fact of pluralism in the Islamic polity, and thereby made efforts to accommodate the religious minority’s interests. But as in the case of most legal systems, Muslim jurists also limited the scope of accommodation so as not to undermine conceptions of the public good that must be upheld if the ruling regime were to maintain its political legitimacy. Defining the public good was not always an easy matter for them. That does not change the fact, though, that some image of the public good operated in their analysis.

Contract as Politico-Legal Paradigm of Governance and Accommodation

The discursive site at which jurists debated the content of the dhimmi rules is the so-called ‘aqd al-dhimma, or contract of protection. Notably, dhimmīs were not the only category of non-Muslims who could and did reside in the Muslim polity. Some might come for temporary periods, others might be present subject to a political agreement between regional leaders, and yet others might be able to come and go due to a peace treaty between otherwise warring polities. In this essay, the focus will be on the dhimmi and his contract of protection, given the permanence of residence that is implied by the contract, and the challenges such permanence raises for the task of governing amidst pluralism.

13 For books in Arabic and English that provide an introduction and overview of the dhimmi rules, see Friedman and Zuhayli
The contract of protection was the legal mechanism by which a non-Muslim either actually or fictively contracted into protected and permanent residency status in Islamic lands. The contract of protection is the mechanism that effectuates the legal (and thereby political, social, and economic) inclusion and accommodation of the non-Muslim within the larger Muslim polity. Whether the contract is actual or fictional might depend on whether the non-Muslims agreed to pay the *jizya* when offered the option of peaceful surrender (i.e. *sulhiyya*) by conquering Muslim forces, or whether they refused and had terms of settlement imposed on them through conquest (‘*anwiyya*’).\(^\text{15}\) It might be applied to later generations despite the lack of any actual consent. In this sense, the “contract of protection” is a conceptual device that creates politico-legal space for debate about governance amidst pluralism. This instrumental role of the contract of protection is captured by a tradition from ‘Ali b. Abi Talib (d. 661), in which he states: “They [non-Muslims] pay the *jizya* so that their lives are [protected] like our lives, and their property is [protected] like our property.”\(^\text{16}\) ‘Ali’s tradition has been interpreted to suggest that once the non-Muslim pays the *jizya*, enters the contract of protection, and thereby becomes a *dhimmi*, his life and property are as inviolable (*ma‘sum*) as a Muslim’s life and property.\(^\text{17}\)

But as will be shown below, ‘Ali’s assertion is easier said than done. For instance, Qur’an 9:29 states: “Fight those who do not believe in God or the final day, do not prohibit what God and His prophet have prohibited, do not believe in the religion of truth, from among those who are given revelatory books, until they pay the *jizya* from their hands in a state of submission.” Muslim jurists debated what it means to be in a *state of submission*. While it could mean abiding by a Shari’a rule of law system, some also held it reflects the subservient status of *dhimmis* in the Muslim polity.\(^\text{18}\) The import of ‘Ali’s statement, if read alongside Q 9:29, illustrates how source-texts can contribute to contrary imperatives of inclusion and marginalization that jurists must resolve. The contrary imperatives are not considered here to be a sign of incoherence or inconsistency in Shari’a. Indeed, the very nature of accommodation.

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is a messy business. Equality in some cases may exist alongside legalized forms of discrimination. Of interest in this essay, therefore, is not the fact of legalized discrimination, but rather how it is understood to further the efficacy and legitimacy of governance amidst pluralism.

**Accommodation and Its Limits: Contraband or Consumer Goods?**

As noted earlier, the *dhimmī* pays the *jizya* tax and thereby enjoys the rights and protections granted to him by the contract of protection, or the ‘aqd al-dhimma. But what are the terms of that contract? The contract, as a legal term of art serves a political function by offering the discursive site where debates about the inclusion, accommodation, and exclusion of *dhimmīs* occur. The contract of protection, thereby, is the lego-political device that frames the debates about the *dhimmī* rules. As a frame or site of debate, the contract also provides an important legal device that *dhimmīs* and Muslims could refer to in order to assess what the Muslim polity owed to *dhimmīs* and vice versa. The content of the contract, as suggested earlier, consists of the multitude of *dhimmī* rules. A fundamental feature of the contract is that it requires the governing regime to protect the *dhimmīs’* property interests, just as it protects the Muslims’ property interests. The scope of that protection, though, is called into question when the *dhimmīs’* property interests might be viewed either as incompatible with other aspects of Sharī‘a doctrines. The contract becomes a site of legal debate and negotiation about the degree to which the *dhimmī* is included and the extent to which the *dhimmīs’* difference can be accommodated without impinging on other values that contribute to the legitimacy and functioning of the governing regime. To demonstrate how the contract offers a negotiative site for deliberating on the scope of the *dhimmīs’* inclusion, this section will address whether or not the *dhimmī* can consume alcohol and pork in an Islamic polity, and explain the limits on the Sharī‘a’s scope for accommodating the *dhimmīs’* difference.

The *dhimmī’s* contract of protection upholds his interest in his private property. But this begs an important legal question – what counts as legally protected property? Not all property is equally protected under Islamic law. Only certain types of property are legally recognized as conveying rights of exclusive use and enjoyment. As the Ḥanafī al-Kāsānī said, the property that conveys such rights is considered *mutaqawwam*, or inviolable under the law. How one defines inviolable property could have an adverse impact on the *dhimmī’s* expectation interests under the law. Specifically, in the case of wine and pork, can *dhimmīs* consume such items in a Muslim polity in which both items are sanctioned in Islamic legal teachings in some cases with corporal punishment? If they can consume such items, one what basis can they do so? And if they can own and consume wine and pork when living in a Muslim polity, then can *dhimmīs* also petition the governing authorities to punish anyone who steals the wine and pork products from them? If the government punishes someone for stealing the *dhimmī’s* wine or pork, it is

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effectively using Shari’a-based norms and institutions to uphold the dhimmī’s property interests in wine and pork. How can Shari’a doctrines on the one hand deny the Muslim from owning or consuming such products, and yet punish someone with a Qur’ānic penalty for stealing such items? As illustrated below, consumer goods such as wine or pork may not offer their owners the same expectation interests that other types of property might. The legal debate about protecting the dhimmīs’ property interest in wine and pork illustrates how Muslim jurists used the law to include the dhimmīs by protecting their property interests, while also demarcating the limits of accommodation in the interest of protecting certain public values as represented in juridical terms by reference to other, related Shari’a-based doctrines.

Consuming alcohol (shurb al-khamr) is a crime under Islamic law, with a penalty of forty or eighty lashes, depending on which school of law is referenced.20 Additionally, the consumption of pork is prohibited to Muslims under their dietary laws. However, neither of these prohibitions apply to dhimmīs; jurists allowed dhimmīs to consume both items. This begs the questions of why, on what basis, and with what limits? For jurists such as al-Ghazālī and al-Kāsānī, the dhimmīs are entitled under the contract of protection to have their own traditions respected. For al-Ghazālī, when dhimmīs enter the contract of protection, the contract’s terms do not include their liability for consumption of alcohol or pork because their own tradition permits consumption of both.21 Likewise, al-Kāsānī argued in similar fashion that dhimmīs can consume alcohol and pork because their tradition allows them to do so.22 On the other hand, if the dhimmīs’ traditions prohibit something that Shari’a-based rules also prohibit, then there is little room for the dhimmī to argue on contract grounds that he or she is immune from liability. But where the dhimmīs’ tradition permits one thing, and the Shari’a prohibits it, jurists had to decide which tradition would prevail and why.

The jurists decision was not always an easy one. Their decision occurred in the discursive space of the contract of protection where they considered the imperatives of inclusion, exclusion, accommodation, and the more general public good. As much as jurists permitted dhimmīs some liberty, as in the case of consuming wine and pork, jurists were nonetheless aware that they might have to limit their accommodation in light of other ancillary issues of law and legal order. For instance, while jurists agreed that dhimmīs could consume alcohol, they nonetheless were concerned that unrestricted alcohol consumption by dhimmīs might endanger the social good, a general good that they often did not define, but rather simply assumed as true and important. Consequently, while they permitted the dhimmī to consume

20 The punishment for consuming alcohol is generally held to be forty lashes, although some schools such as the Mālikīs required eighty. For a discussion of this debate, see Ḥusayn Ḥāmid Ḥassān, Ṣanā‘īyyat al-Maṣlaḥa fī al-Fiqh al-Islāmī (Cairo: Dār al-Nahḍa al-ʿArabiyya, 1971), 73.
21 Al-Ghazālī, al-Wasīṭ, 4:152.
alcohol, they developed legal rules banning public drunkenness or public displays of alcohol.\textsuperscript{23} In other words, the jurists permitted the dhimmīs to consume alcohol, despite the Qur'ānic prohibition. But they were mindful to limit the scope of the dhimmīs' license in the interest of a virtue about the public good whose content is informed by (but not reduced to) the legal ban on alcohol consumption. In this case, then, while the dhimmī enjoys an exception to a rule of general application, that rule of general application is nonetheless used to give content to more general, abstract public good that finds expression in new legal rules banning public drunkenness by dhimmīs.

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

The Ḥanafī al-Kāsānī resolved the immediate question by prioritizing the view that wine and pork are not mutaqawwam, or in other words are not value conferring. Consequently, if a dhimmī steals wine from another dhimmī, he will not suffer the punishment for theft, despite having stolen something that does not belong to him.\textsuperscript{24} Under a Shari'ī analysis, if such property has no value, then no theft has occurred. To view al-Kasānī's position from the


\textsuperscript{24} Al-Kāsānī, Badā‘ī al-Ṣanā‘ī, 9:292.
systemic level, though, one can appreciate that for al-Kāsānī, to use the coercive power of Sharī‘a to redress the theft of a type of property that is condemned under Sharī‘a might appear to “over-accommodate” the dhimmī at the expense of legal consistency and the public good sought through Sharī‘a regulations.

Al-Kāsānī’s argument is one example of how the dhimmī rules reflect much more complicated inquiries about governance, pluralism, accommodation and legitimacy. The general bans on the consumption of alcohol and pork, coupled with the exceptions derived from the contract of protection, provide important insights into how jurists used legal argument both to accommodate dhimmīs and limit the scope of that accommodation in the interest of the social good. The legal debates of particular interest are less about the bans themselves, but rather about ancillary issues that are related to but distinct from the bans. The debates on these ancillary issues illustrate that Muslim jurists acknowledged, respected, and accommodated the dhimmīs’ traditions by exempting them from certain Sharī‘a liabilities. The scope of that accommodation, though, had to be limited where it posed a threat to the social good of the Islamic polity, whether defined in terms of Sharī‘a norms or concerns with the priority and pride of place given to Sharī‘a in an Islamically defined governance system.

Property, Piety, and Securing the Public Good: The Case of Charitable Endowments

The third example to be addressed emphasizes the jurisprudential significance of the ‘public good’, which operates in the backdrop of the dhimmī rules. Jurisprudentially, reference to the ‘public good’, often by a general if not ambiguous invocation of the Islamic character of the polity, was a device by which jurists could determine whether an accommodation was appropriate or went too far. As discussed in the prior section, a dhimmī who consumes alcohol is not subject to the general rule prohibiting alcohol consumption, but rather is exempted from that ban in light of the contract of protection that offers a means of accommodating the dhimmīs’ difference. The accommodation is an exception, and does not alter the general nature of the ban, nor its implications for a general public policy concern about alcohol consumption and its effects, deleterious or otherwise. Consequently, while the dhimmī can consume alcohol in the Muslim polity, that freedom is not absolute; the freedom is limited by other considerations having to do with public policy concerns. Such limits include the legal rule that prohibits any public drunkenness by the dhimmī. In other words, the general ban on alcohol consumption is lifted for the dhimmī (accommodation). But that general ban, coupled with the accommodation, raises questions about the public weal, and thus leads to a second general rule, namely the ban on public drunkenness. The dhimmī is accommodated, but the scope of his liberty interest is demarcated by concerns for a notion of the public weal. The dhimmī rules illustrate that the Islamic legal analysis operates at multiple levels in order to constitute and regulate a political society that is marked by a pluralist demography.

Alcohol consumption is but one example that illuminates how Sharī‘a invokes public policy concerns to address the challenge of governing amidst pluralism. Another more powerful example is evident in the legal debates among jurists about whether dhimmīs could create
charitable endowments, or awqāf (sing. waqf), for the purpose of teaching the Bible or Torah. To create a charitable endowment is a right that accures to a property owner as a private individual. To use one’s property to create a charitable endowment is meant, however, to influence the public weal. Private rights of ownership and bequest raise concerns when property is donated for public purposes that may contravene what many consider the public good. In other words, while private property rights are protected, the scope of that protection is limited in light of competing interests of a more general, public nature. Consequently, the debate about whether and to what extent a dhimmī can endow a charity will and must balance respect for the dhimmī’s private property interests, and the imperative to protect an Islamically defined public good. The appropriate balance will thereby depend on the factors that contribute to the public good, those that diminish it, and how best to strike an appropriate balance in pluralist settings where not all members of the polity share the same set of core values. As will be suggested below, the public good is defined and rendered intelligible in terms of an Islamic universalist ethos. Hence, the rules limiting the scope of the dhimmī’s bequesting capacity are manifestations of that universalist ethos in the content of Sharī‘a-based doctrines.

Two ways to create a charitable endowment are (1) a bequest that takes effect upon the testator’s death (i.e. waṣiyya), and (2) an inter vivos transfer of property directly into a trust (waqf). Shāfi‘ī and Ḥanbalī jurists generally agreed that dhimmīs could create trusts and issue bequests to any specified individual (shakhṣī mu‘ayyan), regardless of religious background, although some jurists limited the beneficiaries to one’s kin group.25 This permissive attitude is based on the legal respect of private ownership (tamliḵ) and the rights the property owner holds because of his claim on the property.26 Shāfi‘ī and Ḥanbalī jurists held that the dhimmī’s private property interest was sufficiently important to warrant the right to bequest property to other individuals.

However, if the dhimmī’s bequest was for something that might adversely affect the public interest (understood in terms of an Islamic universalism), then the bequest was a sin against God and cannot be valid under the Sharī‘a.27 To hold otherwise would be to use the institutions of Sharī‘a as Rule of Law to legitimate practices that contravene an Islamically defined public good. Consequently, if a dhimmī created a charitable trust to support building a

25 Al-Ghazālī, al-Wasīl, 2:397-8. Al-Māwardī, al-Hāwī, 8:328-30, wrote that there is a dispute about whether a non-Muslim can make a bequest to a free Muslim of legal majority; al-Nawawī, Rawḍa, 5:317, held that a waqf could be for the benefit of a dhimmī, but not for an enemy of the state (ḥarbī) or apostate; al-Shirāzī, al-Muhadhdhab, 2:323-4, allowed waqfs for specified dhimmīs but noted the debate about waqfs for the benefit of apostates or enemies of the state.

church or a school for Torah studies, Shāfiʿī jurists would invalidate the *waqf*, because it constitutes a sin (*maʿṣīya*) that cannot be upheld by the law.28

A precise, nearly syllogistic analysis was provided by the Shāfiʿī jurist al-Shīrāzī. First, he held that a charitable *waqf*, in its essence, is a pious endowment that brings one close to God (*qurba*). Second, he held that anyone who creates a charitable endowment through a bequest or *waṣīyya* will create an institution that bestows bounties (*ḥasanāt*) on others. Lastly, he concluded that any charitable endowment that facilitates sin (*iʿāna ‘alā maʿṣīya*) is not lawful.29 Al-Shīrāzī’s argument begs the question of whether a charitable endowment that supports a church or Torah reading school brings one close to God or bestows bounties on others. For al-Shīrāzī, such institutions perpetuate disbelief in the land of Islam, which is tantamount to sin. Indeed he argued that a charitable endowment in support of a church was void (*bāilla*) as its bounty was sinful.30 Al-Shīrāzī went so far as to liken a bequest in favor of a church or synagogue with a bequest that arms the Muslim polity’s enemies, thereby equating both in terms of their potential to inflict harm on the Muslim polity.31 In other words, for al-Shīrāzī, a charitable endowment that supports the perpetuation of value systems that is contrary to the Islamic universalist ethos is not simply sinful; it is a security threat that must be contained for the benefit and perpetuation of the governing regime and the polity it governs. To allow such charitable endowments as a matter of law would be to use the Shariʿa Rule of Law system, both in terms of its doctrines and institutions, in a manner contrary to the public good.

Contrary to this approach, Ḥanafi jurists addressed the power to bequest using a hypothetical about a *dhimmī* who bequests his home to be a church, as opposed to leaving it to a specifically named person. Abū Ḥanīfa held this bequest lawful on the ground that this act constitutes a pious, devotional act for the *dhimmī* (i.e. *qurba*), and must be respected just as Muslims respect the *dhimmī*’s faith in other regards. In other words, while both al-Shīrāzī and Abū Ḥanīfa viewed charitable endowments as bring one closer to God, Abū Ḥanīfa differed in that he appreciated what it means to bring someone closer to God cannot be defined only in Islamic terms; closeness to God takes different shapes depending on the tradition to which one belongs. Abū Ḥanīfa’s students, Muḥammad al-Shaybānī and Abū Yusuf, however, disagreed with their teacher because they (like al-Shīrāzī) deemed its subject matter sinful (*maʿṣīyya /ṣaqīqa*) despite the *dhimmī*’s belief that it is a pious act.32


31 For another argument, the Ḥanafī Ibn Qudāma argued that a bequest could not be made to support schools for teaching the Torah or the Bible because both had been abrogated by the Qurʾān and contain corruptions. Ibn Qudāma, *al-Mughni*, 6:105. See also al-Bahūtī, *Kashshāf al-Qināʾ*, 4:442.

This dispute within the Ḥanafi school begs a fundamental question for governance amidst pluralism: does one measure the act’s impact on the public good in terms of the dhimmī’s faith tradition or in terms of the prevailing Islamic one?³³ To resolve this question, the Ḥanafi al-ʿAynī offered four possible outcomes:

- If a bequest involves a pious act in the dhimmī’s tradition but not in the Islamic tradition, many Ḥanafīs held that it should be allowed, although other schools (as well as other Ḥanafīs) would disagree.

- If the dhimmī makes a bequest that would be a pious act for Muslims, like donating to support the Muslim pilgrimage to Mecca (i.e. ʿhajj) or for building a mosque, the bequest is invalid, as it goes against the dhimmī’s faith. However, if the bequest benefits specifically named individuals, it is valid, since the beneficiaries’ capacity and private interests as property owners are to be respected under the law.

- If the bequest concerns subject matter that is lawful under the dhimmī’s beliefs and Islamic beliefs, it is valid.

- If the bequest involves a subject matter that is unlawful in both the dhimmī’s faith and the Muslim faith, it is invalid. The underlying subject matter would be a sin for both Muslims and dhimmīs to allow.³⁴

By offering these alternatives, al-ʿAynī illustrated the underlying issues at stake, namely the dhimmī’s private property interests that he holds as an individual, the limits on the dhimmī in light of his tradition’s requirements, and lastly the public good. In the interest of upholding the dhimmīs’ private property interests, al-ʿAynī granted them the authority to create pious endowments that did not violate any precept in the dhimmīs’ traditions or the Islamic one. If the charitable endowment is for a matter that is lawful under both the dhimmīs’ tradition and the Islamic tradition, this is not a problematic outcome, since to allow such bequests would uphold the Islamic values underpinning the polity and enterprise of governance, as well as show deference to the dhimmīs’ tradition given the requirement to do so under the contract of protection. The difficulty lies in whether the dhimmī can bequest a charitable endowment for something that is lawful under Islam but unlawful under the dhimmīs’ tradition. In such cases dhimmīs could not create endowments to support, for instance, the ʿhajj. Respect for the dhimmīs’ tradition animates this outcome, thereby illustrating the significance of the contract of protection in negotiating this particular legal outcome. Notably, though, one cannot ignore the fact that the dhimmīs’ private rights of property disposition are limited by his own tradition, regardless of how a particular dhimmī grantor might feel about the matter. The final issue has

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³³ Indeed, this was the dilemma in the jurisprudence noted by al-ʿAynī. Al-ʿAynī, al-Bināya, 13:495.

to do with whether the dhimmī can create a charitable endowment that upholds a value in his own tradition, but not in the Islamic tradition. This is the alternative on which jurists disagreed, as noted above.

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

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

In the second case, the dhimmī community’s leadership collects the jizya from its members and delivers the payment to the ruling regime on behalf of the community. If the community collectively pays a pre-established collective jizya, and the total sum does not decrease with deaths of community members, many Mālikīs allowed individual dhimmīs (presumably without heirs) to bequest their entire estate to whomever they wished. This particular ruling works to the financial benefit of the ruling regime. The regime would still receive the same jizya tax returns, suffering no diminution in tax revenue. Any financial loss is distributed to the dhimmī community, since its tax liability does not diminish with the death of its community members.

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37 Ibn Rushd al-Jadd, al-Bayān, 13:326-7. See also al-Ḥattāb, Mawāhib al-Jalīl, 8:515, who relates this view, and critiques another that upholds the validity of any wasīyya by a kāfir; al-Qarāfī, al-Dhakhīra, 7:12.


39 Ibn Rushd al-Jadd, al-Bayān, 13:326-7. However, Ibn Rushd did note others who disagreed with him, and held that the estate escheats to the state when there is no heir. Al-Qarāfī, al-Dhakhīra, 7:12, held the same view as Ibn Rushd al-Jadd but also noted the disagreement on this issue.
To offset that financial loss, the Mālikīs permitted *dhimmīs* to bequest their entire estate to the community where they lack any heirs.

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

**Dhimmī Rules in the Post-Colony**

One might ask why the premodern *dhimmī* rules are such a source of contention today. Certainly, premodern Islamic legal history is not alone among medieval traditions that discriminated against the religious Other. Nonetheless, the historical doctrine remains a point of ongoing contention about Muslims and Islam today, whether in Muslim states that rely on Sharī‘a in their legal system or for Muslims as citizens of non-Muslim liberal constitutional states. The fact remains that, despite the *dhimmī* rules having a premodern provenance, they remain relevant today in debates by, about, and among Muslims the world over. For example, elsewhere I have written about the operation of certain *dhimmī* rules in the modern state of Saudi Arabia, in particular, the rules governing the measure of wrongful death damages. According to the Indian Consulate in Jeddah, Saudi Arabia, the families of Indian expatriates working in the Kingdom can claim wrongful death compensation pursuant to a schedule of fixed amounts. However, the amounts vary depending on the victim’s religious convictions and gender. If the victim is a Muslim male, his family can claim SR100,000. But if the victim is a Christian or Jewish male, the family can only claim half that amount, namely

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40 For instance, Canon 68 of the Fourth Lateran Council of 1215 decreed that Muslims and Jewish just dress differently from Christians, so that Christian men not have relations with the Jewish or Muslim women, or that Muslim and Jewish men misrecognize a Christian woman as one from their respective peoples. Furthermore, during the last three days before Easter, Jews and Muslims must not be out in public whatsoever. H.J. Shroeder, “The Fourth Lateran Council of 1215: Canon 68,” in Disciplinary Decrees of the General Councils: Text, Translation, and Commentary (St. Louis: B. Herder, 1937), [http://www.fordham.edu/halsall/basis/lateran4.html](http://www.fordham.edu/halsall/basis/lateran4.html) (accessed on April 17th, 2023).


SR50,000. Further, if the victim belongs to another faith group, such as Hindu, Sikh or Jain, his family can claim only approximately SR6,667. The family of a female victim can claim half the amount allowed for her male co-religionist.  

Arguably, it seems that Saudi Arabia patterns its wrongful death compensatory regime on early Hanbali rules of tort liability. For example, pre-modern Muslim jurists held that for the *diyā* or wrongful death compensation for a free Muslim male is one hundred camels. But if the victim is a Jew or Christian male, his family can only claim a percentage of that amount. The Shafi’is held that the family is entitled to one-third of what a free Muslim male’s family would receive. But the Malikis and Hanbalis granted them one-half of what a Muslim’s family can obtain. Furthermore, Sunni and Shi’ite jurists held that if the victim is a Magian (*majus*) his family gets even less, namely 1/15th of what a free Muslim male is worth. Importantly, 1/15th of SR100,000 is approximately SR6,667, the amount a Hindu, Sikh, or Jain’s family could claim under current Saudi law.

To take away from this premodern and modern comparison the view that Saudi Arabia cannot get past the premodern mind-set, though, would be a mistake. Saudi Arabia is very much a product of a post-colonial context of modernity, in which the modern state (as opposed to the

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47 Al-Shafi’i, *Kitab al-Umm* 3:113; al-Ghazali, *al-Wasit*, 4:67; al-Mawardi, *al-Hawi al-Kabir*, 12:311; al-Nawawi, *Rawdat al-Talibin*, 9:258, who said that the *majus* get thultha ‘ushr of the *diyā* for a free Muslim male; al-Ramli, *supra* n 41 at 7:320; Notably, Ibn Qudama related a minority opinion held by al-Nakha’i and others who equated the *diyā* for the majus and free Muslims because both are free and inviolable human beings (*adami hurr ma’sum*). Ibn Qudama, *al-Mugni* 7:796. The Ja’farite al-Muhaddiq al-Hilli, *Shara’i’ al-Islam fi Musa’ il-al-Halal wa al-Haram* (10th ed., Markaz al-Rasul al-A’zam, 1998), 2:489, related three views, namely that Jews, Christians and Magians are valued at 800 *dirhams*, or all enjoy the same *diyā* as Muslims, or that Christians and Jews are entitled to four thousand *dirhams*. According to the Ja’farite al-Hurr al-‘Amili, *Wasa’ il-Shi’a ila Tahsil Masa’il al-Shari’a* (Dar Ihya’ al-Turath al-‘Arabi, n.d.), 19:141-2, the *diyā* of a free Muslim male is roughly 10,000 *dirhams*, while the *diyā* of a dhimmi Jew or Christian is 4000 *dirhams*, and the *diyā* of the *majus* is 800 *dirhams*, roughly 40% and 8% respectively of the *diyā* for a free Muslim male.
premodern empire) predominates as a (if not the) most significant center of power and authority. Like its counterparts in the international community, Saudi Arabia cannot escape the inevitable interactions between and among states that happen in the day-to-day context of a globalized communications and economic network. So while Saudi Arabia incorporates elements of premodern fiqh into its legal system, it also aspires to principles of governance that arise from the shared challenge of governing a state amidst pluralism – a challenge that it has certainly been criticized for managing poorly.

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

Without any attempt at historicization, the concept of ahl al-dhimma [People of the Covenant] is introduced as if it were an appropriate behavioral model for contemporary social intercourse between Muslims and non-Muslims...Non-Muslims who are ahl al-kitab [People of the Book] are given a special status as ahl al-dhimma, people in a covenant relationship with Muslim rulers, which secures their property, possessions and religion...With no mediating discussion or attempt to place the restrictions in historical context, the chapter ends with questions posed to the students such as ‘What is the judgement about greeting the ahl al-dhimma on their holidays?’...leaving the impression that the historical relationship of inferior subject people to superior conquering people is meant as a model with contemporary relevance.\footnote{48}

According to Doumato, the textbook’s discussion on the dhimmī is not meant to incite an aggressive agenda. Rather, Doumato argues that the texts reflect a sense of defensiveness and a people struggling against a perceived threat to their existence and wellbeing. Drawing on the work of Martin Marty, Doumato suggests that the Saudi textbooks are designed to inculcate a traditional set of values for a people who feel “they have inherited an ancestral past, but then experience a sense of being threatened. The threat may be something vague such as a fear of ‘identity diffusion’ or secularism, or it might be quite concrete, such as assault by outsiders.”\footnote{49}


\footnote{49} Doumato, “Manning the Barricades,” 233.
Considering the *dhimmi* doctrines in Saudi school books alongside the *dhimmi* rules that operate in the Saudi legal system, one might surmise that today’s recourse to the *dhimmi* rules constitute premodern answers to to very modern questions concerning the post-colonial Muslims’ sense of dispossession, threat, and the loss of authority and authenticity in a modern world.  

50 Invoking the *dhimmi* rules is to name the *other who is not us*, thereby creating a foil against which to define one’s self and community. As much as both Saudi examples draw upon the premodern tradition, the significance of resorting to the *dhimmi* rules today has less to do with the past, and more to do with finding a footing in a post-colonial present. Although premodern in provenance, the *dhimmi* rules today reflect modern efforts to inculcate and situate the post-colonial Muslim struggling to find his or her place in a complex, modernizing world that has and continues to dominate regions that once witnessed the glory of an Islamic empire.

**Conclusion: The Shared Challenge of Governing Amidst Pluralism**

This study has predominantly focused on premodern Islamic legal debates to show that the *dhimmi* rules reflect the challenge of governing amidst pluralism. Implicit in the analysis is the contention that such a challenge is common across time, space, and tradition. There is no denying that the *dhimmi* rules were discriminatory against others; but the fact that minorities could be treated in such fashion is hardly unique to the Islamic tradition. For instance, in the 20th century, the U.S. Supreme Court constitutionally justified limiting the religious freedom of Jehovah’s Witnesses in the name of national security and well-being. In *Minersville School District v. Gobitis* (1940), Lillian and William Gobitis were expelled from the public schools of Minersville School District for refusing to salute the U.S. flag as part of a daily school exercise as required of all students by the local school board.  

51 Justifying the court’s decision, Justice Frankfurter wrote:

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

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


52 *Gobitis*, 310 US 586 at 596.
For Frankfurter J., national unity is an essential condition for order and wellbeing: “[n]ational unity is the basis of national security.”\textsuperscript{53} Notably, the case was overturned three years later in \textit{West Virginia State Board of Education v. Barnette}.\textsuperscript{54} Nonetheless, \textit{Gobitis} is a reminder that no political system is immune from the challenges of governing amidst pluralism.

In more recent years, the challenge of governing amidst pluralism has illuminated the underbelly of American and European national sensibilities concerning the Muslim members of their polity. Countries in Europe and North America are increasingly issuing (and passing) legislation that bans certain forms of veiling for Muslim women. Muslim women who wear the veil are often (re)presented as threats to security, the national polity, or as outsiders whose religious beliefs make them incapable of truly being “one of us”\textsuperscript{55}. The creation of mosques has also become a point of concern for countries such as Switzerland and the United States. In Switzerland, a campaign that featured an ominous image of a covered Muslim woman standing next to missile-like minarets emanating from the Swiss flag galvanized the populace such that it passed a referendum that constitutionally bans the erection of any minarets in the country.\textsuperscript{56} More recently, the national controversy over a community center being built two blocks way from Ground Zero in New York City again reveals that the challenge of governing amidst pluralism is shared across polities and legal systems.

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

\textsuperscript{53} \textit{Gobitis}, 310 US 586 at 595. Frankfurter J. was aware of the stakes at issue in this case. The claims of a religious minority are weighed against the demands of the polity for national well-being and order. The legislation at issue is neither specific nor particular; it is a general rule of law that is well within the power of the legislature to put into effect. Frankfurter J. seemed especially compelled to respect the power of the legislation in matters such as education, as the court lacks the competence to advise on education policy.


\textsuperscript{55} Examples of such cases are from France, the United Kingdom, and the United States. For a case where a covered Muslim woman was denied French citizenship because her religious beliefs were deemed incompatible with French core values, see \textit{In re: Mme M} (Case #286798). \textit{Le Conseil d’Etat} [http://www.conseil- etat.fr/ce/jurispd/index_ac_1d0820.shtml] (accessed on September 23, 2008). For a UK case in which a high school girl’s desire to wear a jilbab, in contradiction of school policy, was transformed into a symbol of extremism and threat to others, see \textit{Shabina Begum} (respondent) v. \textit{Headteacher and Governors of Denbigh High School} (appellants), [2006] UKHL 15. For a US case in which a niqab wearing Muslim woman was held to legal standards that ignored her status as an American citizen, see \textit{Sultaana Lakiana Myke Freeman v. State of Florida, Department of Highway Safety and Motor Vehicles} Mp/ 5D03-2296, 2005 Fla Dist. Ct. App. LEXIS 13904 (Court of Appeal of Florida, Fifth District, September 2, 2005).

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

For as long as people aspire to govern with regard to majoritarian values defined in terms of the assumptions held by the majority, minorities will always suffer, especially amidst claims of crises. It is hard to ignore that the Muslim (especially the covered Muslim woman) is securitized in an increasingly security-conscious world. With the threat of terrorism and the seeming futility of capturing terrorists such as Bin Laden, visible Muslims, such as the covered Muslim woman or proponents of mosques and Islamic centers, offer an easy target for pacifying anxieties about the unseen, undetected, and unexpected terror threat. The language of justification may invoke “security”, but more often than not, the promotion of “security” is meant to promote the presumed core values without which the particular contemporary society will not survive.