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BEENISH RIAZ

Challenges in the Judicial Administration of Muslim Estates in the Sharia Courts of Appeal in Nigeria

ABDULMUMINI A. OBA¹ AND ISMAEL SAKA ISMAEL^{**}

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Abstract

The Nigerian legal system is pluralistic with common law, Islamic law and customary law as the major legal traditions/cultures in the country. However, the judicial structures for administration of Islamic law and customary law are largely ad hoc and haphazard. The Sharia Courts of Appeal are pivotal in the administration of Islamic personal law which includes matters relating to inheritance (mirāth) and wills (wasīyyah). Although these courts are superior courts of record created by the Constitution, they do not have a clearly spelt-out legal framework for the administration of estates. This poses legal challenges that include unresolved questions concerning the status of the estate distribution panels constituted

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by the Sharia Courts of Appeal, ambivalence in the membership of the panels, and limitations of the panels in dealing with substantive legal issues. Other challenges include jurisdictional competition from the area/sharia courts and the legal implications of litigation on an estate distributed by the panel coming on appeal before the same Kadis. The paper recommends that the Grand Kadis of the Sharia Courts of Appeal invoke their statutory and constitutional powers to make the appropriate court rules for the administration of estates in their courts.

I. Introduction

In Nigeria, the regulation of marriages governed by Islamic law is within the legislative competence of the states while the federal government regulates marriages governed by statutory law.² However, the administration of estates under all these marriage regimes comes under residual matters which are within the exclusive jurisdiction of the states.³ The Nigerian legal system is pluralistic with common law, Islamic law and customary law as the major legal traditions/cultures in the country.⁴ Islamic law and customary law were the dominant state law in the pre-colonial era in their respective areas of influence; colonialism relegated both to the background. The colonial authorities adopted common law as state law which operated in the country as a full-fledged legal system but curtailed the operation of Islamic law and customary law.⁵ Islamic law became a mere variant of customary law and there was no systematic attempt to incorporate Islamic law and customary law into the country's legal

2 The Constitution puts "The formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto" on the Exclusive Legislative List, see Item 61, Second Schedule, Part I, Exclusive Legislative List, Constitution of the Federal Republic of Nigeria, as amended 1999 (the 1999 Constitution).

3 See ONOKAH MARGARET, *Family Law*, Ibadan 2007, at 7–12.

4 See OBA ABDULMUMINI ADEBAYO, *Harmonisation of Shari'ah, Common Law and Customary Law in Nigeria: Problems and Prospects*, *Journal of Malaysian and Comparative Law*, Vol. 35 (2008), at 119–145.

5 *Id.*, at 120–126 and OBA ABDULMUMINI ADEBAYO, *The Administration of Customary Law in the Post-Colonial Nigerian State*, *Cambrian Law Review*, Vol. 37 (2006), at 95–112.

system.⁶ Rather, ad hoc and haphazard laws were made for the administration of both laws. The position has remained largely the same in the post-colonial era (despite attempts to systemize the administration of Islamic law by some states in northern Nigeria in the post-1999 era).⁷ This haphazardness is reflected in the legal framework for the administration of estates in the Sharia Court of Appeal which was first established in the Northern Region of Nigeria in 1960 as an Islamic court of equal status with the High Court.⁸ The Sharia Courts of Appeal are pivotal in the administration of Islamic personal law which includes matters relating to inheritance and wills. However, a major challenge is that although the Sharia Courts of Appeal are superior courts of record created by the constitution,⁹ there are no clear rules for administration of estates in these courts. Another challenge is that the Constitution makes the court optional for states.¹⁰ While there are Sharia Courts of Appeal in all the states in northern Nigeria, none has been established in any of the states in the southern part of the country. In addition, the Sharia Courts of Appeal being essentially appellate courts need trial or subordinate courts from whence appeals would come. There are area courts and sharia courts for this purpose in all northern states,¹¹ but there are no such courts in the southern states.

This paper examines the legal framework under classical Islamic law and in the Sharia Courts of Appeal for the administration of estates. The paper identifies the *lacunae* and ambiguities in the legal framework for administration of estates in the Sharia Courts of Appeal and explores the legal challenges which the absence of a clearly spelt-out legal framework

6 See generally OBA ABDULMUMINI ADEBAYO, *Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction*, *American Journal of Comparative Law*, Vol. 52(2004), No. 4, at 859 and OBA, *supra* n. 3, at 123.

7 See a summary of the ambit of the post 1999 reforms in OBA, *supra* n. 3, at 132.

8 See *Sharia Court of Appeal Law* (no. 16 and 30 of 1960), Cap. 122, *Laws of Northern Nigeria*, 1963; on the circumstances surrounding the establishment of the court, see OBA, *supra* n. 5, at 859–867.

9 Section 6 (3) and (5) (a)-(i), 1999 Constitution

10 “There shall be for any State that requires it a Sharia Court of Appeal for that State”: Section 275 (1), 1999 Constitution.

11 For example, see Section 54 (1), *Area Courts Law*, Cap. A9, *Laws of Kwara State*, 2004 and Section 51, *Sharia Courts Law*, State, 2001 respectively.

poses to the courts and Muslims in matters of inheritance (*mirāth*) and bequests (*wasiyyah*) and suggests what can be done to remedy the situation.

The paper uses the Kwara State Sharia Court of Appeal as a case study since the court has consistently engaged in estate distribution and it has published comprehensive reports of its activities in this regard since 1994. Since there is no Sharia Court of Appeal in any of the southern states, this paper is limited to considering the position in the northern states. In terms of sources, this paper relies on statutes, judicial decisions and court records (again, particularly those of the Kwara State Sharia Court of Appeal),¹² interviews of relevant role actors such as judges, lawyers and litigants¹³ and the experience and observations of the authors as practicing lawyers in Nigeria.¹⁴

II. The Legal Framework for the Administration of Estates in the Sharia Courts of Appeal

The Constitution gives the Sharia Court of Appeal of each state a limited jurisdiction consisting of an appellate and a supervisory jurisdiction in civil proceedings involving “any question of Islamic personal law regarding a *wakf*, gift, will or succession where the endower, donor, testator or deceased person is a Muslim”.¹⁵ This jurisdiction is in addition to “such other jurisdiction as may be conferred upon [the court] by the law of the [applicable] state”.¹⁶ The Supreme Court has held that any additional jurisdiction conferred on the Sharia Court of Appeal by any such law must be within the ambit of Islamic personal law.¹⁷ What follows from this is

12 There is a paucity of reported cases of Islamic courts. Although all the 19 states in northern Nigeria have a Sharia Court of Appeal each, only the Kwara State Sharia Court of Appeal publishes an annual report of the activities of the Court. As of now, the reports for 1994 to 2015 are available.

13 These interviews are largely informal and unstructured.

14 Both authors are conversant with the practice of law in Nigeria generally and in Kwara State in particular where they have practiced as legal practitioners for more than three decades and two and half decades respectively.

15 Section 277 (1) and (2), 1999 Constitution.

16 Section 277 (1) and (2), 1999 Constitution.

17 *Fannami v Sarki* (1961–1989) 1 Sh. L. R. N. 94, *Maida v Modu* (2000) 4 NWLR (Pt. 659) 99, *Faransi v Noma* (2007) 10 NWLR (Pt. 1041) 202 and *Fada v Ibrahim* (2015) LPELP 24449. See also OBA, *supra* n. 5, at 858–874.

that there is nothing preventing states from giving original jurisdiction to their own Sharia Courts of Appeal provided that it is limited to Islamic personal law. However, no state has taken advantage of this to give original jurisdiction to its Sharia Court of Appeal. On the contrary, the constitutive law of the Sharia Courts of Appeal in some states expressly prohibits the court from having original jurisdiction in any matter.¹⁸

The Constitution makes provisions for the adjective and procedural laws applicable in the Sharia Courts of Appeal. The Constitution says that subject to the provisions of any law made by the House of Assembly of the relevant states, the Grand Kadis may make rules “regulating the practice and procedure” in the Sharia Courts of Appeal.¹⁹ The constitutive law of the Sharia Courts of Appeal of the various states makes “Islamic law of the Maliki school” and “natural justice, equity and good conscience according to Islamic law” as a part of the sources of the courts’ procedural laws.²⁰

In classical Islamic law, courts are constituted by Kadis. Although the Kadi is primarily a judge, the role of the Grand Kadis under Islamic law is not limited to litigation. In relation to administration of estates, where a Kadi is vested with a general unrestricted jurisdiction, scholars say that this jurisdiction includes guardianship over persons who are incapable of looking after their affairs such as minors and insane persons, administration of endowments (*waqf*), and disposing of legacies under wills (*wasiyyah*).²¹ These jurisdictions are exclusive as no other official shares these jurisdictions with the Kadi.²² However, Kadis do not have

18 For example, in Kwara State, see Section 10 (3), Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State, 2007: “Except as provided in subsection (2), the Court shall have no original jurisdiction in any cause or matter”. Subsection (2) deals with matters incidental to the powers of the court as an appellate court.

19 See Sections 274 (High Courts) and 279 (Sharia Courts of Appeal), 1999 Constitution.

20 For example in Kwara State, see Section 13 (a), Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State, 2007.

21 See AL-MAWARDI ABŪ AL-ḤASAN, *The Ordinances of Government: A Translation of al-Aḥkām al-Sulṭāniyya wa al-Wilāyāh al-Dīniyya* (translated by Wafaa H. Wahba), Reading 1996, at 79.

22 FODUYE ABDULLAHI BIN, *Guide to Administrators Diyā’ al-Hukkām* (edited and translated by Shehu Yamasu), Sokoto 2000, at 21. The surname is also spelt as ‘FUDI’ and ‘FODIO’.

exclusive jurisdiction in the distribution of inheritance.²³ The primary jurisdiction to distribute estates of a deceased person among the heirs is vested on competent Muslims who possess the requisite knowledge.²⁴ The scholars and leaders of the Sokoto Caliphate accepted the traditional Islamic exposition of the administration of estates. However, when there are not many who possess the knowledge of distribution of estates, the Kadi could assume jurisdiction upon invitation of the heirs. Such was the position in the early period of the Sokoto Caliphate and thus one of the leaders, Abdullahi bin Fodiye, puts distribution of estates among heirs as one of the jurisdictions of the Kadi.²⁵ What follows from this is that although Kadis do not have exclusive jurisdiction in the distribution of estates among heirs, disputes as to inheritance being matters affecting the “rights of persons” are within the jurisdiction of the courts.²⁶

In addition to recourse to Islamic law of the Maliki school, the constitutive laws of the Sharia Courts of Appeal in each state specifically allow Grand Kadis to make rules concerning the administration of estates in their respective courts. For example, section 24 of the Sharia Court of Appeal of Kwara State provides *inter-alia* thus:

“The Grand Khadi²⁷ with the approval of the Governor may make rules of court providing for any or all of the following matters –

[...]

- (h) securing the due administration of estates;
- (i) requiring and regulating the filing of accounts of administration of estates;
- (j) ascertaining the value of estates;
- [...]
- (o) generally carrying into effect the provisions of the Law.”²⁸

These rules clearly intend that the administration of estates of Muslims should be within the jurisdiction of the Sharia Court of Appeal and that

23 This jurisdiction is not included among the jurisdiction of Islamic courts in AL-MAWARDI, *supra* n. 20, at 79 – 80 and AL-JAZA’IRY ABU BAKR JABIR, *Minhāj al-Muslim*, Riyadh, Vol. 2 (2001), at 537 – 538.

24 See Qur’an 4: 7 – 9.

25 FODUYE, *supra* n. 21, at 21.

26 See AL-MAWARDI, *supra* n. 20, at 79, and AL-JAZA’IRY, *supra* n. 22, at 537.

27 This spelling has no legal backing as the spelling that the constitution has adopted is ‘Kadi’, see Sections 275 – 279, 1999 Constitution.

28 Section 24 (h)-(j), (o), Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State, 2007.

the control of rules relating thereto should be in the hands of the Grand Kadi.

III. The *Lacunae* in the Legal Framework for the Administration of Estates

Although Grand Kadis have statutory powers to make rules of court relating to the administration of estates in the Sharia Courts of Appeal, no Grand Kadi has exercised this power, even though this power had been granted to them since the creation of the Sharia Court of Appeal in the defunct northern region of Nigeria.²⁹ The courts that succeed did not invoke their jurisdiction in respect of administration of estates until recently. Although in 2007 the then Grand Kadi in Kwara State referred to “the approval of [the Governor] to formalize the distribution of the estates of Muslims”,³⁰ this reference was to the fact that the Court had obtained the approval of the Governor for the court to charge fees for the distribution of estates through a memo.³¹ While the power to charge fees implies the power to distribute estates, there are still no rules stating the procedure that the court and applicants would follow in the distribution of estates. In any case, the approval and the fees approved were not published in the official gazette as required in cases of delegated legislation.³² The authors have not come across any rules for the administration of estates in the Sharia Courts of Appeal in any of the northern states. For the foregoing reasons, the procedures for the administration of estates in the Sharia Courts of Appeal are currently not based on clear-cut rules.³³

29 Section 25 (h), Sharia Court of Appeal Law, Cap. 122, Laws of Northern Nigeria, 1960.

30 2007 Annual Report of the Sharia Court of Appeal, Kwara State, at X.

31 See the Kwara State Sharia Court of Appeal approved memo SCA/GKC/C/77/04 of 19 October 2005 cited in AMBALI MUTTALIB ATANDA, *The Practice of Muslim Family Law in Nigeria*, 3rd ed., Lagos 2013, at 382.

32 Section 20 (3) Interpretation Act, Cap. I5, Laws of Kwara State, 2007, provides that “All orders, regulations and rules of court made under any law of the State shall be published in the State Gazette”.

33 See OBA ABDULMUMINI ADEBAYO, *The Sharia Court of Appeal: Accounting to the Public in Kwara State*, *The Jurist*, Vol. 10 (2005), 161 at 165.

Some disagree and affirm that based on the current laws, the Sharia Courts of Appeal have an inherent *jurisdiction* and *power* to distribute estates. For example, ISHOLA argues that sections 10 and 11 (which confer appeal jurisdiction on the Sharia Courts of Appeal) and 24 of the Sharia Court of Appeal law (which empowers the Grand Kadi to make rules for the administration of estates) together with “a clear and proper grasp of the scope and nature of the inherent jurisdiction of the court”³⁴ conferred on the court by the Constitution make it “logical to conclude that extra judicial services of the court are within and intrinsic to the exercise of the judicial jurisdiction of the court and therefore not statutorily baseless, but is rather constitutionally justified”.³⁵ The reliance placed on sections 10, 11 and 24 of the Sharia Court of Appeal Law is misplaced. Sections 10 and 11 merely affirmed the *appellate* jurisdiction of the court in matters of Islamic personal law and therefore cannot be stretched beyond this. The jurisdiction to distribute estates can be inferred from section 24. It is arguable that under section 24 the Grand Kadi of a state has power to make rules for the administration of estates and that the Sharia Court of Appeal could distribute estates if the Grand Kadi has made the relevant rules. In absence of such rules, there is no legal basis for the distribution of estates by the Sharia Courts of Appeal. What this means is that although the court has *jurisdiction* to administer estates, it has not yet acquired the *power* to do so. Although ISHOLA did not proffer arguments in support of his reliance on section 24, the section could provide a basis for the *power* of the Sharia Courts of Appeal to administer estates if properly utilized. Again, the inherent jurisdiction argument cannot provide a basis for this *power*. It is true that the Constitution recognizes and affirms the inherent power of all superior courts of record in the country. Section 6 (a) of the 1999 Constitution provides that:

“The *judicial powers* vested in accordance with the foregoing provisions of this section -
(a) shall extend, notwithstanding anything to the contrary in this constitution, to *all inherent powers and sanctions of a court of law*”(emphasis supplied).

34 ISHOLA ABDULLAHI SALIU, Beyond Adjudication: The Extra Judicial Services of the Sharia Court Appeal to the Muslim Community in Nigeria, Al-Irshaad (The Guidance) – Maiden Edition of the Magazine of the Muslim Students Society of Nigeria (MSSN), Kwara State University Branch, Vol. 1(1) (2013), 46 at 47.

35 *Id.*

The court referred includes the Sharia Courts of Appeal.³⁶ Two questions come up here. First, it is clear that the section refers to “judicial powers” of “a court of law”. Is the Sharia Court of Appeal a court exercising judicial powers while distributing estates? This question has been asked many times in the course of administration of estates by the Sharia Courts of Appeal over the years. As noted below, the Kadis (at least in Kwara State) do not claim to exercise judicial powers of a court. The second question is what are the inherent powers of a court and especially, what are specifically the inherent powers of the Sharia Courts of Appeal? As noted by OBA:

“Inherent powers are generally vague and are part of “an innate and intrinsic element in the court’s search for justice”. It is likely that these powers and sanctions are different in the common law and Islamic law traditions. If this is the case, then, for the Sharia Court of Appeal, these powers and sanctions must be traced not to the common law courts as in the case of courts of common law origin such as the High Court, but to Islamic courts in their pristine form. The implication is therefore that this section preserves for the Sharia Court of Appeal, all the inherent powers and sanctions that Islamic courts traditionally possessed“(references omitted).³⁷

The inherent powers and sanctions of Islamic courts are discussed above. Islamic courts traditionally have the *jurisdiction* and *power* to administrate estates. However, according to OBA there is a further caveat to this within the Nigerian legal system:

“The relationship between these inherent powers and sanctions and the Constitution needs comment. A literary reading of the provisions of section 6 (6) (a) wording of the section creates the impression that the Constitution has placed these powers and sanctions over and above the provisions of the Constitution. However, judicial interpretations have pointed to the contrary. The courts have held those inherent powers though omnibus does not extend the jurisdiction of a court of record and that the powers must be exercised subject to the Constitution and other statutes“(references omitted).³⁸

Another argument that can be advanced in support of the power of the Sharia Courts of Appeal to distribute estates is that the court could invoke Maliki law as provided in the Sharia Court of Appeal laws to fill the

³⁶ See Section 6 (5), 1999 Constitution.

³⁷ OBA, *supra* n. 5, at 881 – 882.

³⁸ OBA, *supra* n. 5, at 882.

lacuna in the distribution of estates rules. For example, in Kwara State the relevant law states that:

“As regards both *substantive law* and *practice and procedure*, [the court] shall administer, observe and enforce the observance of the principles and provisions of (a) Islamic law of the Maliki school [...] and (d) natural justice, equity and good conscience according to Islamic law”.³⁹

However, we found no specific reference to Maliki rules by the Sharia Courts of Appeal generally and the Kwara State Sharia Court of Appeal in particular in matters of distribution of estates. The statute quoted above notwithstanding, it is reasonable to postulate that with the existence of rules of court in the Sharia Courts of Appeal – even though the rules do not cover the administration of estates – Islamic law of the Maliki school as a source of procedural rules is only complementary rather than primary and as such could not be the major source of rules relating to administration of estates in the court. It would also appear equally reasonable to assert that given the tenor of the same statutory provision, the court can invoke Islamic law in absence of any rules expressly promulgated by the Grand Kadi.

It should be pointed out that the controversy on the rules for the distribution of estates in the Sharia Courts of Appeal is a needless one. The Grand Kadi can put an end to the controversy by making the relevant rules and getting the Governor of the relevant state to approve the rules.

IV. Consequences of Absence of a Well-Defined Legal Framework for the Distribution of Estates

The problems inherent in the absence of a well-defined legal framework were evident in the work of the Sharia Courts of Appeal panels involved in the distribution of estates.

³⁹ Section 13 (a) and (d), Sharia Court of Appeal Law, Cap. S4, Laws of Kwara State, 2007 (italics supplied).

1. Status of estate distributing panels

There are some ambiguities in the status of estate distribution panels of the Sharia Court of Appeal. First, it is not clear in which capacity the court is distributing estates. In Kwara State Kadis wear their official robes when meeting for distributing estates and do not use the regular court but use a disused courtroom that has now been refurbished and rearranged to make it more conducive to the more informal task of estate distribution. The sitting arrangement is unlike the formal court where lawyers sit fully robed opposite the Kadis and the parties sit by the side. While distributing estates, lawyers are not robed and they sit by the heirs facing the panel. The Kadis themselves are not sure of their status when distributing estates. Grand Kadis have variously described estate distribution as the court's "semi-constitutional judicial duties",⁴⁰ "extra-judicial activities"⁴¹ "community services",⁴² and "semi-judicial function".⁴³ Official records usually refer to Kadis distributing estates as "officiating ministers"⁴⁴ but in addition to this term the 2002 report of the court variously referred Kadi in charge of distributing the estate as "distributing officer", "administrator" and "secretary/administrator".⁴⁵ The appellation "officiating minister" has also been used for non-Kadis to distribute estates.⁴⁶ No one considers the panel of Kadis distributing an estate as sitting as a court. It is probably because of the ambiguity in status that

40 See 2001 Annual Report of the Sharia Court of Appeal, Kwara State, at V (per Ambali, Grand Kadi).

41 2012 Annual Report of the Sharia Court of Appeal, Kwara State, at VII (per Haroon, Grand Kadi), 2010 Annual Report of the Sharia Court of Appeal, Kwara State, at V, and 2011 Annual Report of the Sharia Court of Appeal, Kwara State, at VII.

42 2014 Annual Report of the Sharia Court of Appeal, Kwara State, at VII (per Muhamad, Grand Kadi) and 2015 Annual Report of the Sharia Court of Appeal, Kwara State, at VI.

43 2013 Annual Report of the Sharia Court of Appeal, Kwara State, at VII (per Haroon, Grand Kadi) and 2013 Annual Report of the Sharia Court of Appeal, Kwara State, at VI.

44 For example, see 2014 Annual Report of the Sharia Court of Appeal, Kwara State, at 439.

45 See 2002 Annual Report of the Sharia Court of Appeal, Kwara State, at 201, 205 and 208 respectively.

46 For example, in the *Estate of Akano*, 2014 Annual Report of the Sharia Court of Appeal, Kwara State, 379 at 381. The person listed as no. 2 on the attendance list as "officiating minister" is an Islamic scholar, but not a Kadi. Again, in the *Estate of Sanni*, 2013 Annual Report of the Sharia Court of Appeal, Kwara State, at 214, the Islamic scholar described as "officiating minister" and listed as no. 2 on the attendance list at 216, 225, 228, 235, and no. 3 on the attendance list at 237, is not a Kadi.

the panels would not assume jurisdiction to distribute estates unless the invitation to the court is supported by the unanimity of the heirs. Thus, in the *Estate of Justice Olagunju* the deceased was a justice of the Court of Appeal. The President of the Court of Appeal asked the Kwara State Sharia Court to administer the estate. However, the Kwara State Sharia Court of Appeal did not continue with the distribution of the estate as the non-muslim wife and daughter of the deceased by obtaining letters of administration in respect of the estate protested against the Sharia Court of Appeal distributing the estate.⁴⁷

2. Powers of estate distributing panels

There is the question of the legal status of orders that a Sharia Court of Appeal estate distribution panel makes. Since a Sharia Court of Appeal estate distribution panel does not have the powers of a court, any order that the panel makes is not a court order. The uncertain nature of the panel's status and powers creates problems when the panel has to deal with those who are not parties to the distribution before court. This problem comes up for example where the court wants to access the deceased's bank accounts. Banks normally require letters of administration. In Kwara State when the heirs have yet not obtained letters of administration, the Sharia Court of Appeal has resorted to issuing letters of request for banks to pay such moneys into the account of the Court. This request presents a legal challenge to banks. Most banks located in Kwara State will comply with the request often after personal interactions with the court registrar. It is not so simple with branches of banks located outside the states. Some banks (mostly bank branches located in the

47 The annual report of the Court does not contain a report of this estate. However, newspapers reports are available, see "Request for withdrawal of Sharia Court of Appeal from administration of the Estate of Late Hon. Justice S.A. Olagunju", *The Nation*, 24 November 2013, available at: <http://thenationonlineng.net/re-request-withdrawal-sharia-court-appeal-administration-estate-late-hon-justice-s-olagunju/>, OLADIMEJI SAMUEL, "Release My Husband's Estate, Justice's Widow Urges Court", *Frontiers News*, 18 October 2013, available at: <http://www.frontiersnews.com/release-my-husbands-estate-justices-widow-urges-court/> and "Release my husband's property, late justice's widow urges court", *The Nation*, 20 October 2013, available at: <http://thenationonlineng.net/release-husbands-property-late-justices-widow-urges-court/> (all links last assessed on 17 July 2016).

south) ask rightly in our view that the Chief Registrar should furnish them with a certified copy of the court order directing the bank to release the moneys to the Court. In reality, no such order exists because the Sharia Court of Appeal is not sitting as a court (the court has only appellate jurisdiction) when administering estates but is engaged in an administrative function. In absence of an order of the court, some banks insist that the Chief Registrar of the court should sign an agreement personally indemnifying the bank against any loss that may occur to the bank from the release of the money.⁴⁸ In an instance, the bank's external solicitor insisted on a certified copy of the Chief Registrar's letter ordering the bank to make the payment to the account of the Sharia Court of Appeal.⁴⁹ In some other instances, it could be that the banks were simply coerced into submission with barely veiled threats of dire repercussions for 'disobedience' to court 'order'.⁵⁰

A similar challenge arises in respect of entitlements (gratuities, pensions, etc.) payable by the deceased's employers. In many instances, the applicable rule is that such entitlements are payable to the legal representatives and next of kin previously designated by the employee. Normally, in Muslim cases the legal representatives or next of kin collects the entitlements and hands it over to the administrators of the estate to distribute according to the applicable Islamic law. In the *Estate of Olumo*, the Kwara State Sharia Court of Appeal grappled with the challenges of collecting the terminal benefits of the deceased from his former employer the National Immunization Programme (NPI). The estate came into the Sharia Court of Appeal when one of the two wives of the deceased wrote a letter of petition against the next of kin. The letter written to the NPI was copied to the Sharia Court of Appeal and the Sharia Court of Appeal was able to take over the administration of the estate.⁵¹ A similar letter was written by the wife to the Sharia Court of Appeal and copied to the NPI. Upon receipt of this petition, the Grand Kadi through the Chief Registrar of the Sharia Court of Appeal wrote to the NPI asking that the

48 See *Estate of Sulaimon*, 2007 Annual Report of the Sharia Court of Appeal, Kwara State, 369 at 375 – 378.

49 See *Estate of Adegboye*, 2007 Annual Report of the Sharia Court of Appeal, Kwara State, 265 at 279.

50 For example, see *Estate of Adegboye*, 2007 Annual Report of the Sharia Court of Appeal, Kwara State, 265 at 285 – 286.

51 2006 Annual Report of the Sharia Court of Appeal, Kwara State, at 428.

deceased's entitlements be paid into the account of the court. The NPI, presumably after taking legal advice, refused to comply with the directive. The NPI insisted that the NPI being a statutory corporation was governed by law. According to the NPI, the relevant law states that the entitlements are to be paid to the deceased's "legal representative" or to "any person designated by him during his life time as his survivor".⁵² The court's response came through a letter signed by the Chief Registrar of the court. The letter stated that following the "application/petition" of the deceased's wife, the Sharia Court of Appeal "became seized with the matter in an official manner" and that "whatever directives [and requests] which emanate there from and there under have the potent force of a court order under the law" because of the court's "exclusive jurisdiction over [...] matters involving questions of inheritance of deceased Muslims".⁵³ The court went on to justify its assuming jurisdiction on the estate and the mandatory nature of Islamic law of inheritance on Muslims. The court stated that under Islamic law the designated next of kin cannot take precedence over the heirs in the course of administering the estate and that in any case the next of kin is no more than a trustee of the heirs. The court asked the NPI to furnish it with the names of the next of kin on file. In addition, the court attached a letter written by a brother of the deceased inviting the court to distribute the estate.⁵⁴ According to the court, the letter is not only an "eloquent testimony" to the fact that the Sharia Court of Appeal is "well-positioned to handle the estate of the deceased which include all entitlements from his place of work", it also shows that the court "enjoys the recognition and confidence of the Muslims of Kwara State for who it was established to serve and protect their interests". The chief registrar's letter ended with the hope that the NPI will "readily respect and comply with the laws of the land". In response to this rather lengthy letter, the NPI complied by paying the entitlements of the deceased into the account of the court and thanking the court "for the intervention".⁵⁵

⁵² *Estate of Adegboye, supra* n. 50, at 434.

⁵³ *Estate of Adegboye, supra* n. 50, at 435 – 436.

⁵⁴ It is not clear from the report whether the brother who wrote the letter is the next of kin registered by the deceased with NPI.

⁵⁵ 2006 Annual Report of the Sharia Court of Appeal, Kwara State, 428 at 438.

3. Membership of estate distributing panels

The absence of a legal framework has brought some ambivalence in the workings of the Sharia Courts of Appeal estate distribution panels. Panel membership is often fluid. Unlike court proceedings where the court would maintain the same panel of Kadis to hear a case, membership of estate distribution panels are not stable. For example, in the *Estate of Omodele*⁵⁶ who is a well-known and highly respected Islamic scholar, the panel met nine times. Although only three Kadis distributed the estate finally, six Kadis participated at various stages. Of these three Kadis only one was present at every stage of the proceedings; the other Kadis were absent four and three times respectively. Of the three Kadis who were not present at the final distribution of the estate, one was present at all other proceedings while two Kadis were present in only four and two of the proceedings respectively.⁵⁷ Again, official records of estate distribution by the Kwara State Sharia Courts of Appeal panels often list persons who are not Kadis as “officiating ministers”⁵⁸ and “members”.⁵⁹ In addition, there is often confusion about the status of Sharia Courts of Appeal officials who are not Kadis. For example, one official was listed in various proceedings of the same estate distribution panel as “secretary” and “member”.⁶⁰ The reports often describe the same official as “secretary” and “recording secretary” at various sittings of a panel.⁶¹ In the distribution of the *Estate of Abdullateef Salaudeen*,⁶² the report of the court says that the estate was distributed by two Islamic scholars “with guidance from” a Kadi who

56 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 480.

57 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 480 at 482, 485, 488, 492, 498, 501, 503, 505 and 508.

58 For terminology, see discussion above.

59 For example, in the report of a panel the same official was listed as “panel member” and as “Asst. Rec. Sec [Assistant Recording Secretary]”, *Estate of Adisa*, 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 401 at 401 and 403. See also another official was listed as “panel member” and “secretary” in the various sittings of a panel, *Estate of Bale*, 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 416 at 416, 418 and 423.

60 For example, see 2005 Annual Report of the Sharia Court of Appeal, Kwara State, 345 where an official was listed as secretary at 354 and 357 and as member at 369 and 383.

61 See *Estate of Adisa*, 2011 Annual Report of the Sharia Court of Appeal, Kwara State, 401 at 401 and 403.

62 2013 Annual Report of the Sharia Court of Appeal, Kwara State, 301 at 312

signed the report. One of the scholars also signed the report as “Officiating Minister/Representative of [some heirs]”.⁶³

4. Limitations as to substantive issues arising out of distribution of estates

The Sharia Court of Appeal is conscious of its appellate-only jurisdiction hence its estate distribution panels are reluctant to deal with controversial matters. For example, the panels leave the issue of illegitimacy to the deceased family to resolve and abide by the family decision. It is not clear whether the modes of determining the paternity issues employed by those families are consistent with Islamic law. The reference of legitimacy issues to families and the subsequently apparent ratification of the decisions of the families by the Sharia Court of Appeal could create the false impression that those decisions have a legal backing whereas those decisions are ordinarily challengeable in the courts. This feeling of helplessness is perceivable in the two estates mentioned above where this had happened and the affected persons “left everything to God” instead of pursuing legal remedies.⁶⁴ The correct position is that any person dissatisfied with a family decision declaring him or her a child born out of wedlock has the right to challenge the decision in an area court. The Sharia Court of Appeal should always make it clear to all the relevant parties that such family decisions are not legal judgments of the court and could be challenged by filing suits at the area courts.

5. Accountability

The absence of a well-defined legal framework could also facilitate fraud. In a case in Kaduna State, an area court judge was allegedly invited to participate in the distribution of an estate. In the course of the exercise, large sums of money were collected on behalf of the estate. The area judge ordered that

63 2013 Annual Report of the Sharia Court of Appeal, Kwara State, 301 at 321.

64 For example, see *Estate of Alaya*, 2006 Annual Report of the Sharia Court of Appeal, Kwara State, 338 at 349, 352, 354 – 362, 374 – 375 and 377 – 378, where the legitimacy of several children of the deceased (from different mothers) were in issue and the family rejected some of the children.

the moneys totaling 23 million Naira be paid to the account of the Sharia Court of Appeal, the court that supervises area courts. The money handed over to the Chief Registrar of the Sharia Court of Appeal who paid the money into the court's account. When it came to the distribution to the heirs, it was found that the money was not available as the registrar had allegedly absconded with the money. The Grand Kadi disclaimed responsibility on the ground that the area court judge acted extra-judicially as no case concerning the inheritance was actually before the area court. The area court judge was suspended and put on half pay for paying "wrongly" into the account of the Sharia Court of Appeal and the Court washed its hands off the case leaving the heirs to take whatever action they wished against the area court judge.⁶⁵ The excuses given by the learned Grand Kadi is not satisfactory to say the least. The area court judge actually ordered the money to be paid to the accounts of the Sharia Court of Appeal as is the usual practice when money is paid into area courts. It is not correct for the Grand Kadi to say in the circumstances that the area court judge was acting in a personal capacity and that the court would not accept any responsibility for the alleged misconduct of the registrar. The case illustrates the kind of issues that can arise when there are no clear-cut rules on administration of estates governed by Islamic law.

6. Absence of probate and letters of administration

As noted above, administration of estates in the Sharia Courts of Appeal is limited to distribution of estates. The court provides no services in respect of estates not distributed by the court. This means that one cannot apply for letters of administration or letters of authority to deal with estates not administered by the court.⁶⁶ In addition, the Sharia Courts of Appeal have

65 This story here is derived from "How a court registrar ran away with N21.6 m inheritance, by Grand Khadi" by KRISHI MUSA ABDULLAHI, Daily Trust, 4 September 2014, available at: <http://www.dailytrust.com.ng/daily/news/33469-how-court-registrar-ran-away-with-n21-6-m-inheritance-by-grand-khadi> (last access 21 April 2016).

66 However in exceptional cases, the Court Registry will write an authorization letter for the bank to release money to the court when the application to that effect is made by a reputable person well-known to the Court such as retired Kadis and senior lawyers concerning estates not distributed directly by the Court. This was stated by Mallam Y. M. Gbalasa, Head of Department (Probate), Kwara State Sharia Court of Appeal in an

not invoked their jurisdiction in respect of the administration of wills. However, it has been suggested that the Sharia Courts of Appeal could provide facilities for the safekeeping of wills.⁶⁷ It is significant that the High Court already provides this service in respect of wills governed by the Wills Acts.⁶⁸ The suggestion goes further that a Sharia Court of Appeal can even act as executor of wills deposited with the court.⁶⁹

7. Competition and challenges from area/Sharia courts

Another major challenge to the administration of estates in the Sharia Court of Appeal comes from area courts and Sharia courts. Area courts evolved from the colonial native courts that evolved from the pre-colonial Kadi courts. There were area courts in all of the northern states until the post-1999 era when some states replaced their own area courts with Sharia courts as part of the Islamic revivalism that took place after 1999. Area courts and Sharia courts have original jurisdiction in litigations involving Islamic personal law, which includes administration of estates under Islamic law. What operates in practice is that the Sharia Court of Appeal of each state exercises jurisdiction in the administration of non-contentious Muslim estates voluntarily submitted to the court for distribution among heirs. But when the estate is contentious, the parties have to file a case in the area courts. In the area courts and Sharia courts, there are no provisions for non-contentious distribution as distribution can be done only when a party applies to the court for that purpose and the court will proceed to hear the case and distribute the estate without needing unanimity of all the parties.

Even then, there remains the major obstacle that the Sharia Courts of Appeal have only appellate jurisdiction under the constitution and under their

interview conducted by Dr. Ismael on 21 November 2016 at the Probate Registry Office, Sharia Court of Appeal, Ilorin.

67 ISHOLA, *supra* n. 33, at 48.

68 See Order 52, Custody of Wills, Rule 15, Kwara State High Court (Civil Procedure) Rules, 2005: "Every original Will, of which probate or administration with Will annexed is granted shall be filed and kept in the Probate Registry in such manner as to secure at once its due preservation and convenient inspection. A copy of every such Will and of the probate or administration shall be preserved in the Registry".

69 ISHOLA, *supra* n. 33, at 48.

respective constitutive laws. The area courts and Sharia courts have original jurisdiction in all cases involving Islamic law of inheritance.⁷⁰ In *Adua-Hassan v Probate Registrar* the High Court rejected the contention by counsel that the Sharia Court of Appeal is best placed to issue a letter of authority (in lieu of a letter of administration) to be used by the plaintiffs to collect the deceased's cash deposits in the defendant banks.⁷¹ The court held that what is appropriate is "a sealed order of the class of Area Court vested with jurisdiction for the release of a deceased Muslim property which administration is [governed] by Islamic law".⁷² It would appear that the Sharia Court of Appeal and area courts/Sharia courts have respectively administrative and judicial jurisdictions in the distribution of Muslims' estates while the Sharia Court of Appeal and area courts are trial and appellant courts respectively for litigations arising *after* distribution of such estates. Unlike the Sharia Court of Appeal, what makes the area courts unattractive here is that there is no provision for a non-contentious application to distribute inheritance. Rather, area courts will only take cases arising from distribution or non-distribution of estates, which means that the parties before area courts in this respect are plaintiffs and defendants rather than a family consisting of heirs, family members and the *wali ul amr* ('executor') of the estate.

8. Post-distribution of estates remedies

Lastly, there are some unresolved incongruities in the role of the Sharia Courts of Appeal in the distribution of estates and the position of area/sharia courts. For example, if a heir is dissatisfied with the distribution by the Sharia Courts of Appeal, such a person can seek judicial remedy. The problem here is that the only court for remedy are the area or Sharia courts which are subordinate courts to the Sharia Courts of Appeal. In

70 For example, see Section 18, Area Courts Law, Cap. A9, Laws of Kwara State, 2007 and Sections 19 and 22, Sharia Courts Law, Kaduna State Law No. 10, 2001.

71 Suit no. KWS/13S/2012 decided on 30 July 2013 by the Kwara State High Court. This case is quoted and discussed extensively in ISHOLA ABDULLAHI SALIU, Judicial Declarations of 10 % Probate Fee and Issuance of Letters of Administration on Muslim Estates as Illegal in Kwara State of Nigeria: A Reportage Review, *Naklas-Buk Journal of Law*, Vol. 2 (2013), 106 at 107 – 118.

72 Quoted in ISHOLA, *supra* n. 71, at 117 – 118.

fact, the only judicial jurisdiction of the Sharia Courts of Appeal are appeals coming from these courts. Two major jurisdictional incongruities arise from this. First, it is not neat that the area courts sit on a matter decided by Kadis who are superior to them. The acting Grand Kadi of Kwara State Sharia Court of Appeal remembered a case_where he as an Area Court summoned a Kadi that presided the Sharia Court of Appeal panel was responsible for the distribution of the estate that was subject of litigation before the area court.⁷³ The Kadi was called as a witness and was subjected to cross-examination accordingly. Secondly, if appeals from area courts on estate distributions are made to the Sharia Courts of Appeal, Kadis who were part of distribution panels cannot sit as judges on cases emanating from the same estates that they distributed. The *Estate of Laufe* relates to the estate of Laufe who was a prominent member of the ruling family and an important chief in the Emirate. The Kwara State Sharia Court of Appeal indicated that given the status of Laufe and “out of respect for the Emir”, five Kadis would constitute the panel that would distribute the estate.⁷⁴ If any heir had gone to the area court and the matter came on appeal to the Sharia Court of Appeal, all the Kadis that took part in the distribution would have not be competent to hear the appeal. Given that the total number of Kadis of the court at that time was six⁷⁵ and the quorum of the Court for hearing appeals is three,⁷⁶ that would have ended in a crisis. Again, in *the Estate of Omodele*,⁷⁷ although the estate was eventually distributed by a panel consisting of three Kadis, all the six Kadis of the court participated in the proceedings at various times.⁷⁸

V. Conclusion: The Way Forward

Since the colonial era, there are no rules for the administration of estates in the Sharia Courts of Appeal and no such rules were made in the post-colonial

⁷³ Hon Kadi M. O. Abdulkadir, interview by Ismael Saka Ismael, 14 July 2010, Ilorin, Nigeria.

⁷⁴ 2011 Annual Report of the Sharia Court of Appeal, Kwara State, at 360.

⁷⁵ The six Kadis were Haroon, Mohammad, Idris, Abdalbaki, Abdulkadir and Owolabi.

⁷⁶ See Section 278, 1999 Constitution.

⁷⁷ 2011 Annual Report of the Sharia Court of Appeal, Kwara State, at 479.

⁷⁸ 2011 Annual Report of the Sharia Court of Appeal, Kwara State, at 488 and 505.

period. There is a dire need to remedy the situation in the Sharia Courts of Appeal. A major step in the administration of estates of Muslims in Nigeria would be for Grand Kadis to make rules governing the administration of estates in their respective states. Such rules should be comprehensive and should include both probate and letters of administration in all estates governed by Islamic law, whether or not the estate is administrated directly by the court or by other persons. In addition, the rules concerning distribution of estates should empower the Kadis to constitute a panel for distribution of estates, but should also protect in a clear manner the power of other scholars learned in Islamic law to distribute estates according to Islamic law. For reasons of logistics and possible litigation the Sharia Court of Appeal panel for estate distribution should not consist of more than two Kadis. This would leave enough Kadis free in case the court needs to empanel the mandatory three Kadis to hear any possible appeal case on the distribution should it come to the court on appeal. Similarly, there should be rules of the Sharia Court of Appeal on the safekeeping of wills and for appointing the Sharia Court of Appeal as an executor of wills. Here again it should be clearly asserted that rules regarding the distribution of estates or to administration of wills should not exclude the rights of any qualified Muslim to distribute estates and administrate wills. As noted above, the making of these rules should be within the competence of the Grand Kadis and their respective State Governors.

Another major step that would improve the administration of estates in the Sharia Court of Appeal is to give these courts original jurisdiction in their current area of appellate competence. This will ensure that the Court will be able to deal effectively with litigations arising out of the estates administrated by Kadis rather than have area courts sit over such cases, as is currently the case.

Eine rechtssoziologische Analyse des islamischen *waqf*-Systems

ALI DEMIR¹

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Abstrakt

Je abstrakter eine Rechtsnorm gefasst ist, desto besser kann sie den durch die funktionale Differenzierung der Gesellschaft entstandenen Kontingenzen gerecht werden. Umgekehrt hemmt ein Rechtssystem die System- und Sozialintegration einer Gesellschaft, wenn es hauptsächlich mit Analogien arbeitet, materielle Ziele verfolgt und damit den notwendigen Formwandel verhindert. Ein gutes Beispiel dafür ist das islamische waqf-System. Im Frühislam war Solidarität durch freiwillige Wohltätigkeit im zakāt-System

1 Ali Demir hat seine Dissertation an der Universität Zürich am Lehrstuhl für Politische Philosophie geschrieben. Sie ist im Lit-Verlag unter dem folgenden Titel erschienen: Die Moderne. Von Muhammad zu Atatürk: Eine Analyse des türkischen Pfades in die Moderne anhand der Theorie des kommunikativen Handelns von Jürgen Habermas, Wien 2016.

erwünscht. In der Expansionsphase der islamischen Herrschaft wurde die Freiwilligkeit in eine theologisch legitimierte Norm verwandelt und im waqf-System institutionalisiert. Während dieser Transformationsphase dienten awqāf als ein System von Kompromissen. Dabei wurden die Bedingungen für waqf-Gründungen vom Zentrum bestimmt und ihre Verwaltung der Peripherie überlassen. Diese Arbeitsteilung wurde im Osmanischen Reich durch das duale Rechtssystem von sakralem und sultanischem Ursprung zusammengehalten. Zugleich wurde während dieser Phase die Lebenswelt einer rationalen Reflexion und das Recht einer Positivierung unterzogen. Die Stadien dieser Evolution werden im Folgenden nachgezeichnet und kritisch bewertet.

I. Forschungsstand

Das islamische waqf-System wurde verschiedentlich beschrieben und mit anderen Systemen verglichen.² Die erste institutionalisierte und systematische Erforschung von awqāf wurde im Jahre 1938 am Institut für

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- 2 FAROQHI SURAIYA, Der Bektaschi-Orden in Anatolien: vom späten fünfzehnten Jahrhundert bis 1826. III: Wiener Zeitschrift für die Kunde des Morgenlandes, Sonderband 2, Wien 1981; HOEXTER MIRIAM, Waqf Studies in the Twentieth Century: The State of the Art, *Journal of the Economic and Social History of the Orient*, Vol. 41 (1998), 474 – 495, URL: <http://booksandjournals.brillonline.com/content/journals/10.1163/1568520001445568> [29. Mai 2017]; ODED PERI, Waqf and Ottoman Welfare Policy: The Poor Kitchen of Hasseki Sultan in Eighteenth-Century Jerusalem, *Journal of the Economic and Social History of the Orient*, Vol. 35 (1992), 167 – 86, URL: <http://www.jstor.org/stable/3632408> [06. September 2016]; DAVID S. POWERS, The Islamic Endowment (waqf), *Vanderbilt Journal of Transnational Law*, Vol. 32 (1999), 1167 – 1190; CIZAKCA MURAT, A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present, Istanbul 2000; VAN LEEUWEN RICHARD, Waqfs and Urban Structures: The Case of Ottoman Damascus, Leiden 1999; MORGAN CLAIRE, Islam and Civil Society: The Waqf. The Good Society, Vol. 10 (2001), 21 – 24, URL: <http://www.jstor.org/stable/20710998> [06. September 2016]; ISIN ENGIN F./LEFEBVRE ALEXANDER, The Gift of Law: Greek Euergetism and Ottoman Waqf, *European Journal of Social Theory*, Vol. 8 (2005), at 5 – 23, URL: <http://est.sagepub.com/content/8/1/5.full.pdf+html> [04. September 2016]; SINGER AMY, Charity in Islamic Societies, Cambridge 2008; ÇÖTELI METHIYE GÜL, The Impact of Waqfs on the Formation of Historical Commercial Zone: The Cyclical Nature of the Property and Charity Relation/İslam Kentinde Vakıfların Ticaret Bölgesinin Oluşumu Üzerine Etkisi: Hayrat-Akar İlişkisinin Döngüsel Doğası, Vol. 45 (2016), 9 – 28, DOI: <http://dx.doi.org/10.16971/vd.88109> [06. September 2016].

Stiftungen mit der Herausgabe der *Vakıflar Dergisi* (*Zeitschrift für Stiftungen*) eingeleitet.³ Fahrettin Kiper (1879 – 1965) bestimmte in seiner Rolle als Direktor des Instituts im Vorwort der ersten Ausgabe der *Vakıflar Dergisi* das Ziel wie folgt: “In jeder historischen Epoche, an jedem Ort des türkischen Volkes, im sozialen, kulturellen Leben, in der Kunst und in der Architektur fällt die Welt der *vakıflar* als ein grossartiges Phänomen auf, das eine Untersuchung mit wissenschaftlichen Methoden und Erklärungen verdient.”⁴ Der prominente Professor Mehmed Fuat Köprülü (1890 – 1966) ging noch weiter, indem er behauptete, dass eine Untersuchung der *vakıflar*-Dokumente nicht nur die Geschichte und die Rechtsgeschichte der *vakıflar* bzw. *awqāf* tangiere, sondern auch neue Dokumente zutage fördere, die einen Einblick in jede Phase der türkischen Geschichte ermöglichen würden. Dazu zählt er die Sozial- und Wirtschaftsgeschichte, die Geschichte der Städte, die Geschichte der Besiedlungen, die Geschichte der Topographie, die Herrschafts- und Finanzgeschichte, die Religionsgeschichte und die Frühgeschichte der Turkvölker.⁵ Was hier auffällt, ist, dass in beiden Fällen in der Zielsetzung der *Vakıflar*-Zeitschrift das Wort “Islam” gar nicht vorkommt. Entgegen dieser Sichtweise wurden *awqāf* als eine genuin islamische Institution mit globalen Auswirkungen gesehen. Nach Suleiman konnte die Oxford University dank dem Trust-System gegründet werden, das ursprünglich auf die islamischen *awqāf* zurückgehe.⁶ Demnach sind *awqāf* “charitable endowments for the benefit of the civic”,⁷ die im Gegensatz zu Trusts einen Rückgang erfuhren.⁸

3 Die Begriffe *waqf* (Arabisch, Plural *awqāf*) und *vakıf* (Türkisch, Plural *vakıflar*) werden als Synonyme gebraucht.

4 KİPER FAHRETTİN, [Vorwort], *Vakıflar Dergisi*, Vol. 1 (1938), I,
URL: <http://dergipark.ulakbim.gov.tr/vakiflar/article/view/5000070535> [02. September 2016].

5 KÖPRÜLÜ M. FUAT, *Vakıf Müessesesi ve Vakıf vesikalarının tarihi ehemiyeti* [Die Stiftungsinstitution und die Bedeutung der Stiftungsurkunden], *Vakıflar Dergisi*, Vol. 1 (1938), 5,
URL: <http://dergipark.ulakbim.gov.tr/vakiflar/article/view/5000070535> [02. September 2016].

6 SULEIMAN HAITAM, *The Islamic Trust waqf: A Stagnant or Riviving Legal Institution?*, *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)*, Vol. 4 (2016), 32 f.,
URL: <http://www.zora.uzh.ch/123754/1/Suleiman%20Haitam%20Waqf%20Published.pdf> [02. September 2016].

7 SULEIMAN, *supra* n. 5, 35, vgl. 39.

8 SULEIMAN, *supra* n. 5, 33.

Funktional gleicht das islamische *waqf*-System dem europäischen Trust-System insofern, als beide Systeme ursprünglich zur Sicherung der Kollektivgüter dienen.⁹ Während sich das *waqf*-System im Rahmen des öffentlichen Rechts von einer freiwilligen Wohltätigkeit hin zu einer Form des Privateigentums entwickelte, jedoch ohne einklagbare Rechtsansprüche blieb,¹⁰ die Universitäten im Osmanischen Reich praktisch verschwanden¹¹ und die *awqāf* einen Niedergang erfuhren,¹² entfernte sich das europäische Trust-System von seinen familienrechtlichen Ursprüngen und steht heute innerhalb des säkularen Privatrechts als eine höchst ausdifferenzierte Institution des modernen Rechts da.¹³

Die erste Frage lautet: Wie kann diese entgegengesetzte Evolution der beiden Systeme erklärt werden? Ist der Grund des Niedergangs von *awqāf* im islamischen Recht zu suchen, wie verschiedenlich vorgeschlagen wurde, oder war der vermutete Niedergang einfach eine vorübergehende Phase, die mit dem folgenden "revival" aufgefangen wurde, wie Suleiman annimmt?¹⁴ Ausgehend von diesen einleitenden Fragen geht es im Folgenden zunächst um die Ableitung der eigenen Forschungsfrage wie auch um die Hypothese. Zu diesem Zweck wird die Definition von *waqf* nach Timur Kuran als Ausgangspunkt genommen und dann mit Singers und Schoenblums Ansätzen erweitert.

1. Definition von waqf

Awqāf wurden von Timur Kuran wie folgt umrissen: "In the premodern Middle East, from 750 C.E., perhaps even earlier, an increasingly popular

9 SCHOENBLUM JEFFREY A., The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust, *Vanderbilt Journal of Transnational Law*, Vol. 32 (1999), 1191 – 227,

URL: <http://heinonline.org/HOL/LandingPage?handle=hein.journals/vantl32&div=40&id=&page=> [02. September 2016]; KURAN TIMUR, The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System, *Law & Society Review*, Vol. 4 (2001), 841 – 897, URL: www.jstor.org/stable/3185418 [02. September 2016].

10 ISIN/LEFEBVRE, *supra* n. 1.

11 IHSANOĞLU EKMELEDDIN, Science, technology and learning in the Ottoman Empire: Western influence, local institutions, and the transfer of knowledge, *Aldershot* 2004, 48.

12 SCHOENBLUM, *supra* n. 8, 1192; SULEIMAN, *supra* n. 5, 33.

13 SMITH LIONEL (Ed.), *The Worlds of the Trust*, Cambridge 2013.

14 SULEIMAN, *supra* Fn. 5, 29.

vehicle for the provision of public goods was the waqf, known in English also as an 'Islamic trust' or a 'pious foundation'. A waqf is an unincorporated trust established under Islamic law by a living man or woman for the provision of a designated social service in perpetuity."¹⁵ Die Gründer von *awqāf* mussten in der Entstehungsphase Moslems sein und die Gründung musste an einem islamischen Gericht registriert werden.¹⁶ *Awqāf* als islamische Institution können in karitative *awqāf* (*waqf ḥayrī*) und Familien-*awqāf* (*waqf ahlī*) unterschieden werden. Während die karitativen *awqāf* auch historisch den Familien-*awqāf* vorausgingen, nahm die Anzahl der letzteren besonders im Osmanischen Reich zu.

Nach Kuran geht die Ausbreitung von *awqāf* darauf zurück, dass ihre Gründer dadurch, dass sie öffentlich wohlthätig waren, nicht nur hohes Ansehen in der Gesellschaft erhielten, sondern auch die Garantie dafür, dass ihre Länder nicht verstaatlicht wurden.¹⁷ "One of the literal meanings of the term waqf is 'to stop', and another is 'to make dependent and conditional'. What the system was meant to stop was, on one hand, the expropriation of waqf assets and, on the other, deviations from the founder's directives on the use of these assets. What it rendered dependent and conditional was both the waqf's objective and the means it used to reach the objective."¹⁸ Das *waqf*-System war aus dieser Perspektive ein islamisches Geschäftsmodell, das sich zwischen dem Staat und seinen wohlhabenden Bürgern positionierte.¹⁹ Während sich der Staat von *awqāf* gute Investitionen in die öffentlichen Güter versprach, verknüpfte der Kaufmann damit Rechtssicherheit und eine Reduktion der Steuern.²⁰ Implizit wurde mit dem *waqf*-System die Prosperität, politische Macht, Legitimation und Rechtssicherheit in einer Art von Quid-pro-quo-Abkommen institutionalisiert. Je mehr der Kaufmann in öffentliche Güter investierte – d. h., die sozial erwünschten Investitionen in Form eines *waqf*

15 KURAN, *supra* n. 8, 842; ÜNSAR SEDA, A Study on Institutional Change: Ottoman Social Structure and the Provision of Public Goods, Akademik Bakış, Vol. 6 (2012), 170 – 200, URL: <http://www.gaziakademikbakis.com/index.php/gab/article/view/175> [02. September 2016].

16 SINGER, *supra* n. 1, 93; KURAN, *supra* n. 8, 844 f., 851.

17 KURAN, *supra* n. 8, 842 f.

18 KURAN, *supra* n. 8, 862.

19 KURAN, *supra* n. 8, 844, 848.

20 KURAN, *supra* n. 8, 869.

auf dem Lande des Propheten Mohammad tätigte –, desto höher war die soziale Akzeptanz für die Steuerreduktion zulasten des profanen Staates.²¹

Nach Singer sind *awqāf* keine genuin islamische Institution, sondern ihre Ursprünge lassen sich auf das Römische, das Byzantinische und das Sassanidische Reich zurückführen und wurden innerhalb des islamischen Rechts weiterentwickelt.²² Singer hebt in Übereinstimmung mit *Vakıflar Dergisi* hervor, dass sie einen Einfluss auf religiöse Praktiken, soziale Interaktionen, kulturelle Transformation, ästhetische Werke, politische Legitimation, Wirtschaftsorganisation und auf die physikalischen Konstrukte eines Dorfes oder einer Stadt ausübten.²³ *Awqāf* wurden aus unterschiedlichen Gründen von ganz verschiedenen Akteuren gegründet. “Jews and Christians living in Muslim lands also founded waqfs. Because the purpose of the waqf had to be legal under Muslim law, synagogues and churches were not legitimate beneficiaries, but many other personal and communal goals were permitted.”²⁴ Zwar waren *waqf*-Gründer und der jeweilige Anlass für die Gründungen sehr unterschiedlich, doch in ihrer Vielfalt umfassten die *awqāf* das ganze Leben, und es war insofern unmöglich, ihnen zu entrinnen. “In the course of their lives, few people in Muslim societies remained unaffected by endowments.”²⁵ Nicht nur jeder Mensch als Gründer oder Nutzer, sondern auch jeder *waqf* hatte nach Singer seine hoch individuelle Geschichte. “Each individual waqf, therefore, constitutes a discrete story of individual intentions and local circumstances, and each was integrated into its local political, economic, and social context through its functions, personal, and properties.”²⁶ Die Beständigkeit der *awqāf* führt Singer auf den “spiritual benefit” zurück, den sich die Gründer und die Nutzer von ihnen versprachen: das Ansehen in einer überschaubaren Gemeinschaft und die Erwartung eines angenehmen Jenseitslebens.²⁷

21 KURAN, *supra* n. 8, 848.

22 SINGER, *supra* n. 1, 91.

23 SINGER, *supra* n. 1, 91.

24 SINGER, *supra* n. 1, 99.

25 SINGER, *supra* n. 1, 100.

26 SINGER, *supra* n. 1, 96.

27 SINGER, *supra* n. 1, 100 f., 141.

2. Waqf und Trust im Vergleich

Jeffrey A. Schoenblum geht in diesem Zusammenhang der Frage nach, ob auch andere Rechtssysteme zur Verwaltung des Familienguts eine ähnliche Institution entwickelt haben, und wird im europäischen Trust-System fündig.²⁸ Schoenblum legt in seinem Beitrag einen Vergleich zwischen Trust und *waqf* vor und stellt fest, dass das Trust-System eine Domäne des modernen Wirtschaftssystems ist, während der islamische *waqf* mit einem inkrementellen Niedergang konfrontiert war.²⁹

Schoenblum zählt vier prinzipielle Gründe dafür auf, warum sich das Familiengut nicht im islamischen *waqf*, aber im europäischen Trust-System entwickelte. Den ersten Grund sieht er in den Quellen der beiden Rechtssysteme: Das islamische Rechtssystem, in das die *awqāf* eingebettet waren, verhinderte nach Schoenblum eine Anpassung. Eine Entwicklung durch rationale Planung wurde von den als heilig geltenden sozialen Normen der islamischen Gesellschaft verhindert. Dieselben Normen macht Schoenblum auch für die Förderung eines Ethos verantwortlich, das einen die notwendigen Lernvorgänge zulassenden Vergleich mit bereits existierenden Alternativen unterband. Im Gegensatz zum Trust-System waren die erforderlichen Reformen entweder strikte verboten oder wurden im Modus überlieferter Analogien angewendet, welche die im europäischen Trust-System vorhandenen Abstraktionen nicht zuließen.³⁰ Mit der Rigidität des islamischen Rechtsverständnisses hängt auch zusammen, dass bei den *awqāf*, obschon älter als die Trusts, detaillierte Rechtsanwendungsregeln fehlen.³¹ “The premise of this article is that [legal] doctrine matters, and this is true in all legal systems. While ad hoc adjustments can sustain the system for some time, it must ultimately falter when it can no longer efficiently serve the interests of the consumers. This is not the case, however, where the legal process itself permits adaptation in response to inevitably changing conditions and needs.”³²

28 SCHOENBLUM, *supra* n. 8, 1191 f.

29 SCHOENBLUM, *supra* n. 8, 1192.

30 SCHOENBLUM, *supra* n. 8, 1193 f.

31 SCHOENBLUM, *supra* n. 8, 1193.

32 SCHOENBLUM, *supra* n. 8, 1193 f.

Zweitens gehören gemäss Schoenblum die beiden Systeme zu zwei verschiedenen Rechtslogiken. Die *awqāf* seien von der religiösen Autorität des Propheten Muhammad abgeleitet und verfolgten daher religiöse, fromme, karitative Ziele.³³ Während die Trusts ins säkulare Rechtssystem eingebettet waren, wurden *awqāf* von einer "inflexible and divine" Rechtsdoktrin getragen.³⁴ Darin sieht Schoenblum auch den Grund dafür, dass Kinder im Trust-System als legitime Erben³⁵ betrachtet werden, nicht aber im *waqf*-System.³⁶

Eine dritte Differenz zwischen *waqf* und Trust sieht Schoenblum in der staatlichen Regulierung. Während Trusts im Rahmen der Rechtsentwicklung permanent an die gesellschaftlichen Anforderungen angepasst werden konnten, wurden die *awqāf* in vielen islamischen Ländern von islamischen Herrschern als ein Verbot gegen Rechtsreformen und als ein Herrschaftsmittel für das Erlangen von Ansehen verwendet.³⁷ Das islamische Rechtssystem war von der Politik abhängig und verfolgte materielle Ziele. Aufgrund dieses politisierten Rechtszustandes befreite sich das *waqf*-System als juristische Persönlichkeit erst im 21. Jahrhundert; fortan konnte nicht nur der Verwalter (*mutawallī*), sondern der *waqf* selbst angeklagt werden.³⁸

Ein letzter Unterschied besteht im Verständnis des Eigentumsrechts. "At the core of the restrictions on alienation, mortgaging, and leasing lies the question of 'ownership'."³⁹ Ein *waqf* gehört gemäss Schoenblum im Endeffekt *Allah* und der Inhaber führt die Geschäfte eigentlich in dessen

33 SCHOENBLUM, *supra* n. 8, 1198.

34 SCHOENBLUM, *supra* n. 8, 1201.

35 SCHOENBLUM, *supra* n. 8, 1203.

36 Im Grunde genommen hatten im Osmanischen Reich auch Frauen kein Erbrecht und auch sie konnten keine *awqāf* gründen, obschon es Ausnahmen gab, so auch die berühmte Hürem Sultan, die Frau von Kanuni Sultan Süleyman und Mutter von Sultan Selim. IMBER weist darauf hin, dass nach den Celâli-Aufständen um 1600 auch Frauen als Erben in Frage kamen, da es einfach zu wenige Männer gab, die das Land bearbeiten konnten. IMBER COLIN, The law auf the land, in WOODHEAD CHRISTINE (Ed.), The Ottoman world, London 2012, 53. Für die Celâli-Aufstände siehe AKTAĞ MUSTAFA, Celâli Isyanlarının Başlaması [Der Beginn der Celâli Aufstände], *Ankara Dil ve Tarih-Coğrafya Fakültesi Tarih Bölümü* Vol. 4 (1946), 23 – 50, URL: <http://dergiler.ankara.edu.tr/dergiler/26/1243/14194.pdf> (20. März 2017).

37 SCHOENBLUM, *supra* n. 8, 1204 f.

38 SCHOENBLUM, *supra* n. 8, 1196, 1221 ff.; KURAN, *supra* n. 8, 843.

39 SCHOENBLUM, *supra* n. 8, 1217.

Namen.⁴⁰ Die erste Folge davon war, dass das Land dem Wirtschaftsmarkt entzogen wurde und an eine die Produktivität hemmende, risikoaverse “indolent class of beneficiaries” ging.⁴¹ Genau diese Funktion verbirgt sich nach Schoenblum auch hinter dem Umstand, dass im 19. Jahrhundert die Hälfte Algeriens und ein Drittel Tunesiens als *waqf* galten.⁴² Diese wirtschaftlich brachliegenden Ländereien hätten politische Instabilität und eine entmutigende soziale Mobilität zur Folge gehabt.⁴³

Dann formuliert Schoenblum die Frage: “How can the underlying commitment of the property to Allah and, thereby, religious, pious, or charitable use for the Muslim community be squared with private benefit?”⁴⁴

II. Forschungsfrage und Forschungshypothese

Historisch und rechtssoziologisch haben Rechtsnormen einen sakralen, kulturellen wie auch politischen Hintergrund. Aus dieser Warte gibt es keine Rechtsentwicklung, wenn sie nicht von einer entsprechenden Ethik getragen wird. Schoenblum bringt in seinem Beitrag diesen Zusammenhang so zur Geltung, dass die eigentümliche Einheit von Rechts-, Sozial-, Wirtschafts- und Herrschaftssystemen unübersehbar wird. Obschon seine Frage implizit die Komplexität von Herrschaft, Ordnung, Ethik, Zweckrationalität und ihre Steuerung durch legitimierte Macht aufnimmt, verdient seine Frage sowohl auf der Abstraktionsebene eine Verallgemeinerung, wie auch auf der empirischer Ebene eine präzisere Formulierung.

Daher und angesichts der Komplexität des Untersuchungsgegenstandes wird die von Schoenblum gestellte Frage zunächst auf eine abstrakte Ebene gestellt: Wie wird ein Eigentumsrecht trotz seiner sakralen Ursprünge/Hintergründe in das moderne Privatrecht überführt? Diese Frage soll uns erlauben, Schoenblums Frage zum Ersten rechtssoziologisch zu behandeln. Zugleich verweist die Frage auf den historischen Hintergrund einer

40 SCHOENBLUM, *supra* n. 8, 1206, 1218.

41 SCHOENBLUM, *supra* n. 8, 1208.

42 SCHOENBLUM, *supra* n. 8, 1206.

43 SCHOENBLUM, *supra* n. 8, 1211.

44 SCHOENBLUM, *supra* n. 8, 1207.

Rechtsentwicklung insofern, als dass auf dem europäischen Boden diese Evolution stattfand, wie Schoenblum im Falle des Trust-Systems zeigt.

Zum Zweiten soll Schoenblums Frage auf die islamischen Rationalitätsformen übertragbar werden, ohne einen direkten Vergleich zwischen *waqf*- und Trust-System anzustellen, oder das Trust-System als einen Idealtyp anzusehen. Anstelle dessen sollen mit einer Forschungsfrage die Besonderheiten in der Entwicklung des *waqf*-Systems hervorgehoben werden. Und um die Frage auch empirisch angehen zu können, lautet die Forschungsfrage dieses Beitrags: Wer hat wann und warum die *awqāf* gegründet? Gab es auch im islamischen *waqf*-System eine rechtssoziologisch nachweisbare Rechtsentwicklung?

Hinter der Forschungsfrage stehen zwei Annahmen: Erstens, dass es zwischen der vorislamisch-ethischen Gemeinschaft und der vom Propheten Muhammad in Medina gegründeten *umma* strukturelle und funktionelle Ähnlichkeiten gibt. Mit der *umma* wurde anstelle der Sippengemeinschaft eine neue Herrschaftsform mit einer neuen Form der Monopolisierung eingerichtet. Die zweite Annahme lautet, dass mit *awqāf* eine funktional bessere Lösung angeboten wurde, als es unter den existierenden Rechtsverhältnissen der Fall war. Von diesen beiden Annahmen ist die Hypothese abgeleitet. Sie lautet, dass die islamische Gemeinschaft den Rahmen einer staatlichen Herrschaftsordnung erhielt, indem die *awqāf* als eine neue Solidaritätsform innerhalb der *umma*-Lehre auf Kosten des alten *zakāt*-Systems eingeführt wurden.

III. Vom *zakāt*- zum islamischen *waqf*-System

Wir können vorwegnehmen, dass der Koran die Notwendigkeit von *awqāf* zwar andeutet (*Sure* 34, *Vers* 39 und 58:12), sie aber nicht direkt erwähnt.⁴⁵ Als solche werden sie erst im 8. Jahrhundert in *aḥādīṭ* erwähnt. Als islamische Institution tauchen sie dann bei den Fatimiden im

⁴⁵ Der Koran enthält 114 Suren, die ihrer Textlänge nach angeordnet sind. Dabei steht die erste Zahl in Klammern für die Zählung der Sure und die zweite Zahl für diejenige des Verses. Aus dem Koran wird nach der folgenden Übersetzung zitiert: URL: <http://www.ewige-religion.info/koran/> [29. Mai 2017].

12. Jahrhundert auf.⁴⁶ In der Zeit des Propheten Muhammad hatten die angedeuteten *awqāf* die Funktion einer freiwillig geleisteten Steuerform. Insofern ist es erlaubt, festzustellen, dass die *awqāf* nicht zur islamischen Theologie, aber zum islamischen Herrschaftssystem gehören. Diese Unterscheidung erlaubt eine Auseinandersetzung mit den *awqāf* anhand einer Untersuchung der Sozial-, Wirtschafts- und Rechtsgeschichte. Die Frage lautet: Warum kommt eine so wichtige islamische Institution im Koran, in der wichtigsten Schrift des Islams, nicht vor? Die Frage kann am besten mit der Suche nach einer funktional gleichen Institution beantwortet werden. *Awqāf* waren und sind eine institutionalisierte Form der Wirtschaftssolidarität insofern, als dass *awqāf* als eine Besteuerungsform eingesetzt wurden. Insofern muss nicht nach dem Warum, sondern nach dem Was gefragt werden: Welche Institution wurde vor der Prophetie Muhammads für die Besteuerung eingesetzt?

Die eindeutige Antwort auf diese Frage lautet: das *zakāt*-System. Der koranische Islam baut auf fünf Säulen auf: dem Glaubensbekenntnis, dem Pflichtgebet, das die Gläubigen fünfmal am Tag zu verrichten haben, dem Fasten im Monat Ramadan, der Pilgerfahrt nach Mekka und der Armensteuer, der *zakāt*. *Zakāt* impliziert einen Akt freiwilliger Wohltätigkeit. Etymologisch stammt das Wort aus dem Hebräischen und bedeutet "rechtschaffenes Verhalten". Es hat die Bedeutung von "Wachsen" und "Zunehmen". Im Arabischen, Osmanischen, Türkischen, Persischen, Kurdischen usw. gibt es nebst dem Begriff *zakāt* auch das Wort *sadaqa*, das ursprünglich für die Bezeichnung von Almosen und Geschenken ohne religiöse Konnotation reserviert war. Erst im theologischen Kontext erhält es die Bedeutung von "rein", "gerecht", "gut" und suggeriert eine moralische Abstandnahme von materiellen Gütern.⁴⁷

1. Der Formwandel

Bis vor der Gründung der *umma* in Medina wurde *zakāt* als eine freiwillige Wohltätigkeit betrachtet. Im Koran kommt *zakāt* dreissig Mal vor und nur zwei Verse (18:81 und 19:13) stammen nach Watt aus der mekkanischen

46 KURAN, *supra* n. 8, 846.

47 WEHR HANS, Arabisches Wörterbuch für die Schriftsprache der Gegenwart, Beirut 1997, 344.

Periode.⁴⁸ Daher haben sich die im medinensischen Kontext entstandenen Suren (2:263, 4:114, 9:79) noch die Bedeutung von freiwilliger Almosenspende bewahrt.⁴⁹ Auch die Bedeutung „jemanden läutern“ stammt aus dieser Zeit. Das ist der Grund, warum im Koran *zakāt* nie als etwas bezeichnet wird, „das man als Geschenk gibt, um ein bestimmtes Ziel zu erreichen oder eine Sache wiedergutzumachen. In diesem Fall steht stets das Wort *ṣadaqa*.“⁵⁰ Denn die Bedeutung „freiwilliges Almosen“ musste mit der Herrschaftsetablierung in eine erzwingbare Norm übersetzt werden.⁵¹ Erst nachdem *zakāt* anstelle der Bedeutung von *ṣadaqa* die Bedeutung von vorgeschriebenen Obligation (2:83, 2:177, 9:5, 9:11, 9:71) erhielt, wurde es als eine religiöse Pflicht normiert (7:156, 19:31, 21:73, 30:38, 31:4, 41:7) (9:19).⁵² Die Anhäufung von Reichtum wurde folglich theologisch für unmoralisch (92:18) erklärt und die freiwillige oder theologisch wünschenswerte Vergabe von Almosen mit Reinheit (9:103) verknüpft. Am Ende dieser Evolution zahlte der wahrhaft Gläubige diese Steuer (2:177) freiwillig, durfte dafür mit einem „Lohn bei seinem Herrn“ rechnen (2:277) und wer sie umgehen wollte, musste mit harten Strafen rechnen (3:180, 9:34 f).

Insofern gehört entgegen der weitverbreiteten Annahme die Heiligerklärung des Eigentums weder zur islamischen Theologie noch zur islamischen Herrschaft. Das kann darin genauer gesehen werden, dass *awqāf* im Koran nicht vorkommen und die Heiligerklärung nach der Religionssoziologie Durkheims zu einer Phase gehört, die eine Differenzierung zwischen dem allmächtigen Gott und bedürftigen Gläubigen gar nicht kannte. Gemäss Durkheim konnten die Götter während dieser Phase bestimmte Objekte, Orte, Städte wie auch Gedanken besitzen. Er führt dafür Beispiele aus Honolulu auf, wo der König eine Diamantmine für heilig erklärte, und Beispiele aus Tahiti, wo alles, was der Häuptling berührte, für heilig, zum Tabu erklärt wurde.⁵³ Er weist darauf hin, dass gewisse Orte, an denen religiöse Zeremonien abgehalten wurden, dem profanen Gebrauch, der

48 WATT WILLIAM MONTGOMERY, *Der Islam*, Stuttgart 1980, 85 und 301.

49 NAGEL TILMAN, *Medinensische Einschübe in mekkanischen Suren*, Göttingen 1995, 108.

50 FARSCHID OLAF, *Zakāt in der Islamischen Ökonomik: Zur Normenbildung im Islam*, Würzburg 2012, 54.

51 FARSCHID, *supra* n. 49, 54.

52 FARSCHID, *supra* n. 49, 53 f.

53 DURKHEIM EMILE, *Physik der Sitten und des Rechts: Vorlesungen zur Soziologie der Moral*, Frankfurt am Main 1991, 203 f.

Marktwirtschaft, entzogen waren; zum Teil sind sie es bis heute. “Nur jene Menschen konnten diese Zone durchschreiten und die auf diese Weise von der Umgebung abgetrennte Insel betreten, welche die Rituale vollzogen und dadurch spezielle Bindungen zu den heiligen Wesenheiten eingegangen waren, denen der Boden ursprünglich gehörte. Dann gingen die göttlichen Kräfte, die den Dingen innewohnten, nach und nach auf die Menschen über; die Dinge waren nicht mehr aus sich heraus heilig; vielmehr kam ihnen diese Eigenschaft nur noch indirekt zu, insofern sie sich in der Abhängigkeit von Personen befanden, die ihrerseits heilig waren. Das ursprünglich kollektive Eigentum wurde zu einem persönlichen Eigentum.”⁵⁴ Mit der Heiligerklärung konnte die heilige Sache dem Gemeinnutzen entzogen und dem privaten Gebrauch einer einzigen Person unterstellt werden. Am Ende wurde mit jedem Tabu ein persönlicher Rechtsanspruch auf das Objekt erhoben.⁵⁵ Tabuerklärung funktioniert also dort, wo die gesellschaftliche Differenzierung nach dem Verschiedenheitsprinzip geregelt wird, die gemäss Niklas Luhmann schon in der mythischen Urgemeinschaft gegeben hat. “Sie [die Verschiedenheit] ist, nach alten Darstellungen, ein Moment der Perfektion der Schöpfung. Zur Ungleichheit kommt es erst durch den Sündenfall oder, nach der Theorie des Naturrechts, durch differentielle Nutzung des Eigentums. Das Beobachtungsschema gleich/ungleich ist im Unterschied zur blossen Anerkennung von Verschiedenheiten ein universelles und zugleich hoch spezifisches Schema.”⁵⁶

2. Die Differenzierung im Recht- und Sozialsystem

Dieses Schema wurde für die Rechtsentwicklung eingesetzt. So kam innerhalb des Rechtssystems “das Gesetz” als einen Rechtskode schon mit einer Formalisierung und Ritualisierung der Entscheidungsfindung *vor* dem Auftauchen des Judentums zur Anwendung.⁵⁷ Aber “der Vertrag” als eine

54 DURKHEIM, *supra* n. 52, 237.

55 DURKHEIM, *supra* n. 52, 203, 207.

56 LUHMANN NIKLAS, *Das Recht der Gesellschaft*, Frankfurt am Main 1993, 115.

57 LUHMANN NIKLAS, *Rechtssoziologie*, Wiesbaden 2008, 160; AMSTUTZ MARC, *Das Gesetz*, in GAUCH PETER/PICHONNAZ PASCAL (Hrsg.), *Figures juridiques, Mélanges dissociés, pour Pierre Tercier à l'occasion de son soixantième anniversaire* (= Rechtsfiguren, eine Festschrift [für] Pierre Tercier zu seinem sechzigsten Geburtstag), Zürich 2003, 155 – 165.

neue Form der Rechtskode kommt erst *nach* der Ausbreitung eines exklusiven Eigentumsrechts zur Geltung, womit die ideelle Freiheit des Individuums mit seinen materiellen Wahlmöglichkeiten verbunden wurde.⁵⁸ Seitdem wenden die Gerichte in Übereinstimmung mit diesen beiden Rechtsquellen ihre Entscheide an.⁵⁹ Mit der Implementierung vom Vertrag und den damit verbundenen Eigentumsrechten wurde nun auch eine Differenzierung in der Sozialstruktur der Gesellschaft notwendig, die in der Form von Zentrum und Peripherie eingeleitet wurde. Diese Differenzierung im Recht- und Sozialsystem kann im Osmanischen Reich im Aufkommen einer Mittelschicht gesehen werden, worauf die *waqf*-Gründungen hindeuten. Bis dahin kannte das Osmanische Reich nur ein Unten und Oben (Herrscher vs. Beherrschter, Diener vs. Allmächtiger) aber keine funktionale Differenzierung.⁶⁰ Besonders in seiner Expansionsphase wurde das Osmanische Reich anstelle von dem alten Schema Oben-Unten von einer funktionalen Dualität zwischen Zentrum und Peripherie getrieben.⁶¹ Seit dem wurde im Zentrum *einheitlich geplant* und per Gesetz durchgesetzt, während in der Peripherie das per Gesetz Vorgeschriebene mit einem Vertrag *individuell umgesetzt* wurde. Diese Differenzierung entsprach den nun neu funktional prädestinierten Besitzverhältnissen.

Diese neue Form des Regierens wurde folglich im Land- und Militärsystem angewendet und unter der Leitung von *Derwischen* in den Dienst der Perfektionierung der Staatlichkeit gestellt, die sich erst mal im Kleinformat innerhalb eines Ordnes herausbildete. *Awqāf* gekoppelt mit Orden kamen dieser Ordnung entgegen, da damit das Zentrum die Landgewinnung und die Finanzierung der Kriege sicherstellen konnte, während die Peripherie in dieser Regelung eine gewisse Autonomie in der Implementierung des

58 LUHMANN, *supra* n. 55, 450 f., 463; LUHMANN NIKLAS, Die Gesellschaft der Gesellschaft, Frankfurt am Main 1998, 783 f.

59 TEUBNER GUNTHER, Ist das Recht auf Konsens angewiesen? Zur sozialen Akzeptanz des modernen Richterrechts, in GIEGEL HANS JOACHIM (Hrsg.), Kommunikation und Konsens in modernen Gesellschaften, Frankfurt am Main 1992, 203.

60 BERKES NIYAZI, The development of secularism in Turkey, Montreal 1964, 11 ff.

61 HEPER METIN, Center and Periphery in the Ottoman Empire: With Special Reference to the Nineteenth Century, International Political Science Review/Revue Internationale De Science Politique, Vol. 1 (1980), 81 – 105, URL: www.jstor.org/stable/1600742 [02. September 2016]; BARKEY KAREN, Bandits and bureaucrats: The Ottoman route to state centralization, Ithaca 1994.

Eigentumsrechts erhielt.⁶² Dank dieser funktionalen Arbeitsteilung übernahm das Zentrum die Koordinierung für die Eroberung fremder Länder und die Peripherie die Verwaltung der nun herrenlos gewordenen Länder.

Sowie das Prinzip der natürlichen Gerechtigkeit zur Unterscheidung von zwei Menschen ohne eine moralische Wertung diente, übernahm das Prinzip der Verschiedenheit dieselbe Funktion, indem sie aber auf der nächst höheren Abstraktionsebene auch die funktionale Unterscheidung zwischen Peripherie und Zentrum aufnahm. Der Gewinn besteht darin, dass, während im Prinzip der natürlichen Gerechtigkeit die Sozialintegration angestrebt wurde, im Verschiedenheitsprinzip und damit in der Differenzierung zwischen Peripherie und Zentrum auch die Systemintegration sichergestellt werden konnte. Mit dieser neuen Sozialstruktur waren sowohl die Vielfalt als auch eine einheitliche Koordinierung bis zur Moderne gewährleistet.⁶³ Gestützt auf diese rechtsoziologischen Annahmen stellt die Gründung des islamischen *waqf*-Systems drei Kompromisse dar: der Kompromiss (1) zwischen Königen und Propheten, (2) zwischen Ordensführern/lokalen Eliten und Bauern und (3) zwischen dem sakralen und säkularen Recht.

IV. Awqāf im Osmanischen Reich

Zur Bekräftigung dieser Arbeitshypothese ist die Gründungszeit des Osmanischen Reiches exemplarisch, zumal in dieser Phase die *awqāf* zu ihrer vollen Entfaltung kamen. Das Osmanische Reich (1299 – 1918) entstand aus dem Machtvakuum nach der Zersplitterung der islamischen Dynastien, dem Niedergang des anatolischen Seldschukenstaates und des

62 GERBER HAIM, *Economy and Society in an Ottoman City: Bursa, 1600 – 1700*, Jerusalem 1988.

63 ÖLMEZ ADEM, *II. Meşrutiyet Devrinde Osmanlı Medreselerinde Reform Çabaları ve Merkezileşme / Reform Efforts in Ottoman Madrasas in the Second Constitutional Era and Centralization*, *Vakıflar Dergisi*, Vol. 41 (2014), 121 – 140, URL: [http://dergipark-ulakbim.gov.tr/vakiflar/issue/view/5000007219](http://dergipark.ulakbim.gov.tr/vakiflar/issue/view/5000007219) [07. September 2016]; HEPER METİN, *The state, religion and pluralism: The Turkish case in comparative perspective*, *British Journal of Middle Eastern Studies*, Vol. 18 (1991), 38 – 51, URL: <http://www.jstor.org/stable/195380> [04. September 2016]; KÜRŞAT ELÇİN, *Der Verwestlichungsprozess des Osmanischen Reiches im 18. und 19. Jahrhundert: Zur Komplementarität von Staatenbildungs- und Intellektualisierungsprozessen*, Hannover 2003.

byzantinischen Reiches und dem Rückzug der Mongolen.⁶⁴ Es stellte die Integration der Menschen aus diesen Staatsgebilden wie auch die Integration von um 25 Kleinfürstentümern dar.⁶⁵ “Insofern repräsentierte das Osmanische Reich einen aus verschiedenen Gegenden und, entsprechend ihren unterschiedlichen Kulturen, verschiedenen Menschen bestehenden Verband. Nachdem es für die damaligen islamisch-türkischen Verhältnisse eine neue Welt, ein anderes Amerika zu implizieren begann, wurde es zur Bühne des Neuen in einer neuen Welt und für ein neues Leben bereit.”⁶⁶

Wie das spätere “neue” Amerika wurde besonders das Osmanische Reich nebst der Kontrolle der Handelswege vor allem durch Landbesetzung, Landgewinnung, Landkultivierung und Landbesteuerung errichtet.⁶⁷ Damit hatten die späteren Osmanen schon vor der Zeit der Mongolen und Seldschuken begonnen, indem sie eine Reihe von *beylikler* (Fürstentümer) an der Grenze zu Byzanz errichtet hatten, weswegen sie *uç-beylik* (Grenz-Fürstentümer) und ihre Führer *uç-bey* genannt wurden.⁶⁸ Die osmanische Dynastie geht aus einem solchen Fürstentum hervor. Ein Charakteristikum dieser *beylikler* war, dass sie über ein Kontingent von irregulären

64 KAFADAR CEMAL, Introduction: A Rome of one's own: Reflections on cultural geography and identity in the lands of Rum, *Muqarnas* 24, (2007), 7 – 25, URL: <http://www.jstor.org/stable/25482452> [04. September 2016]; KAFADAR CEMAL, *Between the worlds: The construction of the Ottoman state*, Berkeley 1995.

65 ERGENÇ ÖZER, *Osmanlı Devletine Ruh Üfleyen Nefesler: Osman Gazi'nin Liderliğinin ve Karizmasının Ortaya Çıkışı* [Akteure, die dem Osmanischen Reich den Atem eingehaucht haben: Die Entstehung des Charismas vom Osman Gazi], in İNALCIK HALİL (Hrsg.), *Kuruluş: Osmanlı Tarihini Yeniden Yazmak* [Gründungszeit: Neuschreibung der Geschichte des Osmanischen Reiches], Istanbul 2012, 67 – 80.

66 BARKAN ÖMER LUTFI, *Osmanlı İmparatorluğunda bir İskân ve Kolonizasyon Methodu olarak Vakıflar ve Temlikler I, İstila Devirlerinin Kolonizatör Türk Dervişleri ve Zâviyeler* [Awqâf und Orden als eine Besetzung- und Kollonialisierungsmethode im Osmanischen Reiche I, die türkische Derwische und Orden in den Zeiten der Eroberung], *Vakıflar Dergisi*, Vol. 2 (1942), 285.

67 JLYBYER ALBERT HOWE, *The Ottoman Turks and the routes of Oriental trade*, *The English Historical Review*, Vol. 30 (1915), 577 – 588; İNALCIK HALİL, *The Ottoman Economic Mind and Aspects of the Ottoman Economy: Studies in the Economic History of the Middle East*, (Ed.), COOK MICHAEL A., London 1970, 207 – 218.

68 İNALCIK HALİL, *Devlet-i Aliyye: Osmanlı İmparatorluğu Üzerine Araştırmalar. Klasik Dönem (1302 – 1606), Siyasal, Kurumsal ve Ekonomik Gelişim* [Der ewige Staat: Untersuchung über das Osmanische Reich: Klassische Zeit (1302 – 1606), Band 1, Politische, institutionelle und ökonomische Entwicklung], Istanbul 2009, 11 ff.

Guerillakämpfern verfügten. Die wichtigsten davon wurden *apler* (Held), *nöker* (Genosse) und *akıncılar*⁶⁹ genannt und ihre Hauptaufgabe bestand darin, beim gegnerischen Heer Angst und Verwirrung auszulösen. Für ihren Dienst erhielten sie als Kriegsbeute jeweils Land (*yurtluk*).⁷⁰

Nach einer Lesart war es das Werk von *Derwischen* und ihren mit der *gaza*-Ideologie instruierten irregulären Truppen (wie *apler*, *nöker* und *akıncılar*), dank denen die Islamisierung vorangetrieben wurde und das Osmanische Reich sich als ein islamisches Weltreich durchsetzen konnte.⁷¹ Dazu trug bei, dass während der Gründungszeit des Osmanischen Reiches die bestehende Vielfalt von Kulturen wie auch der Gegensatz zwischen Sesshaften und Nomaden besonders mit dem Mongolensturm (1256) zugespitzt wurden. Die Nomaden gefährdeten nicht nur als Viehzüchter den Ackerbau der Sesshaften, sondern wurden von den Emiren, den Kriegsherren, zu Kriegszwecken hin und her geschoben, was die städtische Abneigung ihnen gegenüber verstärkte.⁷² Trost fanden auch diese Nomaden und Soldaten bei den *Derwischen*, die bei diesen Völkerumsiedlungen dabei waren.⁷³ “There was a wide range of dervishes, from the very orthodox to the heterodox.”⁷⁴

Um den Zusammenhang zwischen der Landeroberung und der Landverwaltung mit dem islamischen *waqf*-System herzustellen und sie dann mit folgenden Ausdifferenzierungen zusammenzubringen, ist es notwendig, die damalige sakrale Einheit von Land-, Militär- und Glaubenssystem in Erinnerung zu rufen. Zur Illustration eignet sich der

69 “Akıncılar” kann mit “die Schnellen”, “die Brenner” übersetzt werden und bezieht sich auf die Mobilitätsfähigkeit dieser Guerillagruppen.

70 FAROQHI SURAIYA, Geschichte des Osmanischen Reiches, München 2010, 24; INALCIK, *supra* n. 67, 27 f.

71 DOUMANIS NICHOLAS, Before the nation: Muslim-Christian coexistence and its destruction in late Ottoman Anatolia, Oxford 2013, 22 f.; NAGEL TILMAN, Timur der Eroberer und die islamische Welt des späten Mittelalters, München 1993, 31; INALCIK, *supra* n. 67, 10, 13 f, 30 ff.; LANGER WILLIAM L./BLAKE ROBERT P., The rise of the Ottoman Turks and its historical background, The American Historical Review, Vol. 37 (1932), 503, URL: <http://www.jstor.org/stable/1837961> [02. SEPTEMBER 2016].

72 NAGEL, *supra* n. 70, 74 f., 124 f.; NAGEL TILMAN, Staat und Glaubensgemeinschaft im Islam: Geschichte der politischen Ordnungsvorstellungen der Muslime, Band 1, von den Anfängen bis ins 13. Jahrhundert, Zürich 1981, 46.

73 SMITH GRACE MARTIN (Ed.), The poetry of Yünus Emre: A Turkish Sufi poet, Berkeley 1993, 3.

74 BAŞKAL ZEKERIYA, Yunus Emre: The Sufi poet in love, New York 2010, 10.

Bektaşî-Orden (*dergâh*), der massgeblich zur Staatswerdung des Osmanischen Reiches beitrug. Der *Bektaşî-Orden* übernahm bei der Gründung des Osmanischen Reiches ideologisch wie auch militärisch eine Führungsrolle. Seinen Namen erhielt der Orden von seinem geistigen Vater Hacı Bektaş Veli.⁷⁵ Max Weber nannte das Glaubenssystem dieses Ordens *Derwischreligiosität* und konnte es weder der Askese noch der Mystik zuordnen.⁷⁶ Gemäss *Vilâyetnâme* handelte Osman Gazi, der Gründer des Osmanischen Reiches, im Namen des *Bektaşî-Ordens*.⁷⁷ Tatsächlich war Osman Gazi mit der Tochter Scheich Edebâlis verheiratet, der den *Ahi-Orden* führte.⁷⁸ Historisch gesichert ist der Umstand, dass der *Bektaşî-Orden* während der Zeit von Sultan Murad I. (reg. 1362 – 1389) gute Beziehungen zum Herrscherhaus unterhielt.⁷⁹ Auch der spätere Ordensführer Balım Sultan (gest. 1516) wurde vom Sultan Beyazid II. finanziell und politisch unterstützt.⁸⁰ “In other words, two organisations laid a victory of Islam over Eastern Christendom: the Ottoman state and the Bektasi Orden.”⁸¹

a) Awqâf als Kompromiss zwischen Königtum und Prophetentum

In dieser historischen Konstellation wurde im *waqf*-System der erste Kompromiss zwischen Prophetentum und Königtum gefunden. In dieser Phase stand die Religion mit dem Landsystem in einer strukturellen

75 GROSS ERICH, Das Vilâjet-nâme des Hağgi Bektasch: Ein türkisches Derwischevangelium, Leipzig 1927.

76 WEBER MAX, Gesammelte Aufsätze zur Religionssoziologie, Band 1, Tübingen 1920, 155, 260, 538.

77 GROSS, *supra* n. 74, 133.

78 BARKAN, *supra* n. 65, 286 f.; LEWIS BERNARD, The Islamic Guilds, in The Economic History Review, Vol. 8 (1937), 29 f., URL: <http://www.jstor.org/stable/2590356> [04. September 2016]; KURAN TIMUR, Islamic Influences on the Ottoman Guilds, in ÇIÇEK KEMAL et.al, (Ed.), The Great Ottoman-Turkish Civilisation, Economy and Society, Vol. 2, Ankara 2000, 44 f.; BAER GABRIEL, The Administrative, Economic and Social Functions of Turkish Guilds, International Journal of Middle East Studies, Vol. 1 (1970), 28 – 31, URL: <http://www.jstor.org/stable/162064> [04. September 2016].

79 GROSS, *supra* n. 74, 152; FAROQHI SURAIYA, The tekke of Hacı Bektas: Social position and economic activities, International Journal of Middle East Studies, Vol. 7 (1976), 187, URL: <http://www.jstor.org/stable/162600> [07. September 2016].

80 FAROQHI, *supra* n. 78, 191.

81 KAFADAR, *supra* n. 56, 1995, 98.

Beziehung, weil die Soldaten nach *gaza*-Ideologie geführt und ihnen im Falle eines erfolgreich geführten Krieges Länder zugeteilt wurden. Das eroberte Land gehörte nach dieser Logik nicht einem Staat oder König, sondern Gott höchstpersönlich, weswegen es auch kultiviert, das heisst, erobert werden durfte.⁸² Faktisch hatten die Propheten mit dieser Sprachregelung einen Rechtsanspruch auf die Länder der Könige erhoben.⁸³ Auf Handlungsebene wurde in Form des Heiligen Kriegs auch eine überalltägliche Motivation für die Soldaten geschaffen, womit die Länder der Könige verunsichert wurden.

Die Kriege des Frühislams wurden durch einen egalitären und universalistischen Herrschaftsanspruch legitimiert, welcher die faktische und genealogisch legitimierte Sippongemeinschaft und damit das Königtum in Frage stellte. Legitimation kann insofern aus einem philosophisch-juristisch definierten Recht abgeleitet werden, indem anhand von abstrakten Prinzipien Sollen-Sätze gewonnen werden. Hier hat die Legitimation die Bedeutung eines idealen Guten bzw. ideal guten Rechts, das nur durch eine intellektuelle Leistung, zum Beispiel in Form eines Idealzustandes, entworfen werden kann. Der Entwurf einer islamisch perfekten Gesellschaft, der *umma*, entspricht dieser Vorstellung. Dieser Legitimationstyp gibt den Adressaten idealerweise die Orientierung durch Normen, die sich ein jeder Mensch im Privaten aneignet, sodass er sein Handeln auch ohne einen äusseren Zwangsapparat danach richten könnte. Dagegen kann die Legitimation auch auf dem Faktischen beruhen. In diesem letzten Fall hat die Legitimation eine soziologische Geltung, da die Orientierung an dieser Ordnung aufgrund eines äusseren Zwangsapparats und zum Teil entgegen persönlichen Interessenlagen und nur in einer Gemeinschaft erfolgt.⁸⁴ Da historisch die Königtümer in einer Sippongemeinschaft verankert waren und auf einer Legitimation im soziologischen Sinn beruhten, stand sie im Widerspruch zur aufkommenden Verantwortungsethik, die mit dem Islam innerhalb der

82 Die Osmanen pflegten zu sagen; "toprak senin benim değil, Allahındır" (Das Land gehört weder dir noch mir, sondern einzig Allah).

83 Historisch ging das Königtum dem Prophetentum voraus. Soziologisch ist die Grenze zwischen diesen beiden Ordnungssystemen fließend.

84 WEBER MAX, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie*, Tübingen 1980, 180 f. Darin definiert WEBER Macht wie folgt: "Macht bedeutet jede Chance, innerhalb einer sozialen Beziehung den eigenen Willen auch gegen Widerstreben durchzusetzen, gleichviel worauf diese Chance beruht", § 16, 62.

umma angeboten wurde.⁸⁵ Das Rechtliche war im Falle des Königtums spätestens vor der faktischen Macht des Sultans machtlos. Dagegen erhielt ein ethisch legitimes Recht im Falle der *umma* erst recht ihre Ausschlagkraft mit der Idee einer Überwindung der königlichen Mächte.

Das Osmanische Reich war ein Königtum, das auf Kosten des Prophetentums gegründet wurde. Im Gegensatz zu andern Königreiche bediente sich das Osmanische Reich nun aber auch der ethischen Herrschaftslegitimation. Zur Einsicht dieser Differenzierung trug auch die gleichzeitige Existenz des sunnitischen Kalifats und des schiitischen Imamats bei. Da sie beide funktional der Durchsetzung des *dār al-islām* auf der Weltbühne dienten, machte eine alleinige Herrschaftslegitimation auf Grundlage islamischer Ethik obsolet. Folglich hatte der osmanische Hofhistoriker Tursun Bey (1427 – 1490) lautstark festgelegt, dass der Sultan *zillulah-ı fi'l-arz* bzw. *zillullah* (der faktische Schatten Gottes auf Erden) sei, womit er ihn auch als einzig legitime Instanz mit Herrschaftsanspruch transzendierte.⁸⁶ In der Tat bediente sich der osmanische Staat auch der ethischen Kriegsführungslegitimation, indem er seinen Anspruch auf die Länder einerseits mit dem sakralen Rechtsverständnis erhob, gemäss dem der Sultan der Verwalter des Irdischen ist und andererseits damit, dass der Staat durch das Kriegsrecht (*kılıç hakkı*) diese Länder besitze.

In beiden Fällen setzte die Ideologie des ethischen oder ethnischen Weltreiches die Kriege und die staatsrechtliche Verwaltung der eroberten Gebiete als ein Reizsystem voraus. Aus der Sicht der *waqf*- und anderer Typen von Landinhabern konnte in beiden Fällen (König/Prophet) deswegen gar nicht eine von Prinzipien abgeleitete rechtliche Sicherheit gegeben werden, da ihr Besitz nicht infolge einer rechtlich-normativen Beziehung, sondern infolge einer faktischen Waffenmacht zustande kam.

Abgesehen von dieser fehlenden Rechtsgrundlage existierte in der Zeit auch kaum eine nach ethisch/rationalen Kriterien eingerichtete Bürokratie, die sich nicht nur in bereits eroberten Ländern, sondern auch erst noch zu

85 WEBER MAX, Gesammelte politische Schriften, Politik als Beruf, Tübingen 1988, 505 – 560. Für die Gesinnungs- und Verantwortungsethik, 551 f.

86 OCAK AHMET YAŞAR, Türkler, Türkiye ve İslam: Yaklaşım, Yöntem ve Yorum Denemeleri [Türken, Türkei und Islam: Auffassung, Methode und Interpretationsversuche]. İstanbul 2011, 70; İNALCIK HALİL, Tursun Beg, historian of Mehmed the Conqueror's time, Wiener Zeitschrift für die Kunde des Morgenlandes, Vol. 69 (1977), 55 – 71, URL: <http://www.jstor.org/stable/23868095> [04. September 2016].

erobernden Ländern auf eine Organisation und/oder Institution hätte verlassen können. Weder Herrschaft, noch Herrschaftsinstrumente waren in der Phase auf der Staatsebene im Sinne von Weber rationalisiert.⁸⁷ Es gab zwar von Anfang an einen militärischen Zwangsapparat, aber in dieser Phase existierte noch keine staatliche Bürokratie, in der nicht die faktische Macht des Stärkeren, sondern abstrakte Regeln zum Machterhalt führten. Die Gründung einer solchen Bürokratie muss von moralisch-ethischen Einstellungen einzelner Menschen absehen, die eine spätere Phase der Vergesellschaftung darstellt. Die unabdingbare Voraussetzung einer institutionellen Rationalisierung ist die Existenz eines verallgemeinerten Schemas, auf dessen Grundlage die bereits bestehenden Eigentumsverhältnisse und/oder Berufe nach dem Prinzip von (Un-)Gleichheit bewertet, besteuert und miteinander integriert werden können.⁸⁸ Dort, wo diese Bedingungen nicht weitverbreitet und vielfältig vorhanden sind oder aus politischen Gründen verhindert wurden, dort kommt es mit Worten von Max Weber zur "Hemmung der formalen Rationalität."⁸⁹

Der Keim dieser Rationalisierung bildete auf soziologisch-institutioneller Ebene der Orden. Im Osmanischen Reich waren die Orden die erste Organisationsform, aus der sowohl Berufe wie auch verschiedene Typen von Eigentumsverhältnissen zugleich hervorgingen.⁹⁰ Im Orden wird die Konstitution sozialer Beziehungen von dem alten ethisch-ethnischen Schema hin zu einem System von generalisierbaren Erwartungsabhängigkeiten verlagert. Im Rahmen eines Ordens wurden generalisierbare Verhaltenserwartungen, wie die Bildung, Kapitalakkumulation, (politische) Kooperation und der Tausch von verschiedenen Gütern institutionalisiert. Das *waqf*-System ermöglichte in dieser historischen Konstellation die Teilnahme am wirtschaftlichen und sozialen Leben gleichzeitig. Die Orden gehören sowohl in ihrer Funktionsweise, wie auch in ihrer Konstitution weder zu einer typischen Königtumsinstitution, noch zur Prophetie. In ihrer Funktionsweise kombinieren die Orden die Logik des rationalen Wirtschaftens, des Geldes,

87 WEBER, *supra* n. 83, 551 – 576.

88 LUHMANN NIKLAS, Grundrechte als Institution. Ein Beitrag zur politischen Soziologie, Berlin 1999, 162 – 185.

89 WEBER, *supra* n. 75, 543.

90 LUHMANN, *supra* n. 87, 108 – 135.

mit der einer ethischen Zugehörigkeit zu einer bestimmten sozialen Gruppe. So haben die Ordensangehörigen eine rationalisierte Beziehung zu Ordensverwaltern, auch wenn sich die Letzteren zu einer bestimmten Ethik zugeordnet haben. Die Orden sind in ihrer Organisationsart jedoch näher zu einem Wirtschaftsbetrieb als zu einer Sekte. Aus dieser soziologisch-wirtschaftlichen Warte sind die *awqāf* in ihrer Rationalität weniger eine prophetische als viel mehr eine wirtschaftlich-staatliche Institution.

Der springende Punkt ist dabei, dass sich das *waqf*-System als ein kollektives Eigentumsrecht die volle Implementierungskraft erhielt, als es erstens in einen strukturellen Zusammenhang mit der Landeroberung durch ethisch und/oder ethnisch legitimierte Kriege gesetzt wurde. Zweitens war diese strukturelle Kopplung des *waqf*-Systems mit der Landeroberung, Landgewinnung, Landkultivierung sowohl im Falle des Königtums, wie auch der Prophetie konstitutiv. Das *waqf*-System war in beiden Fällen unverzichtbar und der *waqf*-Besitzer hätte in beiden Fällen gute Gründe für seine Existenz: Mit der faktischen Gründung eines *waqf* wurde der ideelle Geltungsanspruch erhoben, zum Ruhme Gottes die Länder zu bearbeiten. Gleichzeitig wurde das Land nicht nach dem egalitären Weltbild des Islams, sondern nach Prinzip von (Un-) Gleichheit erworben und verwaltet, indem eine vorbestimmte kleine Anzahl von Menschen inkludiert und der Rest vom Eigentumsrecht und Nutzungsrecht ausgeschlossen wurde.

b) *Awqāf* als Kompromiss zwischen Ordensführern sowie lokalen Eliten und Bauern

Soziologisch ist die inhaltliche Beziehung zwischen Königtum, Prophetentum, Orden und Land- und Militärsystem konstitutiv für diese Zeit. Während dieser Zeit war die Landwirtschaft die Basis der Gesellschaft und gleichzeitig die Grundlage für die Macht der lokalen Herrscher, der Ordensvorsteher wie auch des Sultans selbst. Angelehnt an das Landsystem der Seldschuken wurde im Osmanischen Reich grundsätzlich zwischen *has*, *zemaet* und *tumar* unterschieden. Das kleinste Landgut wurde *tumar* genannt und an die berittenen Soldaten (*sipahi*) und die Bediensteten des Sultans vergeben. Die *zemaet* dagegen erhielten die Provinzverwalter und die Wesire (Minister). Schliesslich erhielten die *kadı* (Richter) die sogenannten *has*. Mit der Islamisierung der Gesellschaft

wurde die Unterscheidung zwischen *arz-i miri* (Staatsbesitz), *waqf* (*vakıf*: Stiftungsgut) und *mülk* (Privatbesitz) getroffen. Nach einer Landeroberung wurden die Länder als *arz-i miri* betrachtet und zunächst tatsächlich und später höchstens theoretisch vom Sultan direkt an den Bauern verpachtet.⁹¹ Wie Faroqhi anhand der *tahrir* (osmanische Grundbücher) im Falle des Bektaşî-Ordens feststellt, wurden die eroberten Länder später nicht direkt den Bauern, sondern hauptsächlich den *waqf*-Gründern weitergegeben.⁹² Die Orden finanzierten sich ihrerseits aus diesen Stiftungsgütern, indem sie die Länder an Bauern verpachteten. Die Bauern erwarben das Mietrecht (*istigbal*),⁹³ indem sie das Land im Rahmen eines bestimmten Steuertyps (*cizye*, *haraç*) pachteten.⁹⁴ Sie durften das Land nicht weitervererben, nicht weitergeben und nicht mit der Bearbeitung aufhören, da ihnen ansonsten eine Busse (*çift bozan*) drohte.⁹⁵

Die neuen osmanischen Dörfer in den eroberten Ländern wurden in der Regel um die *waqf*-Ländereien eines Ordens oder einer *zaviye* herum gegründet.⁹⁶ Ein jedes neue Dorf war im Grunde genommen die Gründung des Osmanischen Reiches im Kleinformat:⁹⁷ Die Gründung eines *waqf* setzte ein herrenfreies bzw. herrenfrei gemachtes Land, eine Gruppe von landlosen oder nomadischen Bauern, einen visionären Gründer und tüchtigen Verwalter voraus. Der Prozess vom brachliegenden Land zum

91 ISLAMOĞLU-İNAN, Huricihan, Osmanlı İmparatorluğu'nda Devlet ve Köylü [Bauern und der Staat im Osmanischen Reich], Istanbul 1991; ÇIN HALİL, Mirî Arazi ve Bu Arazinin Özel Mülkiyete Dönüşümü [Die Mirî-Länder und ihre Verwandlung in den Privatbesitz], Konya 1987.

92 FAROQHI hebt hervor, dass in den *tahrir* die Steuern, wie zehent oder *öşür*, gar nicht auftauchen, da sie in Naturalien gezahlt wurden. *Tahrir* wurden dann angelegt, wenn sie vom Sultanat ausdrücklich verlangt wurden, was schon auf ein bestehendes Misstrauen hindeutet, FAROQHI, *supra* n. 1, 48.

93 ISLAMOĞLU-İNAN, *supra* n. 90, 194.

94 İNALCIK HALİL, Osmanlı İmparatorluğu'nun Ekonomik ve Sosyal Tarihi, Band 1, 1600 – 1914 [Sozial- und Wirtschaftsgeschichte des Osmanischen Reiches, Band 1, 1600 – 1914], Istanbul 2000, 145 – 150.

95 Die Angehörigen der nicht moslemischen Millets waren in das System integriert. Sie durften *Haracıyye*-Länder bearbeiten und mussten dafür die *cizye*-Steuer in bar und im Vergleich höher bezahlen. Wenn sie *kul* (Diener) des Sultans wurden, indem sie Militärdienst leisteten, verzichtete der Staat auf diese *cizye*-Steuer. Siehe dafür AKDAĞ MU-STAFİA, Türk Halkının Dirlik ve Düzenlik Kavgası. Celali İsyanları [Der Kampf des türkischen Volkes um Land und Ordnung. Celali-Aufstände], Ankara 1999, 108 f.

96 FAROQHI, *supra* n. 78, 183.

97 BARKAN, *supra* n. 65, 284.

funktionstüchtigen Dorf lief zum Teil über mehrere Generationen. Die Motivation für die Gründung eines *waqf* bezogen die Gründer nicht nur aus der idealen *gaza*-Ideologie, das Land für die Welt des Islams zu gewinnen, sondern auch aus der soziologischen Tatsache, dass diese Dörfer später den Namen des Gründers bekamen, womit dieser wie auch die Familie zu hohem Ansehen gelangten. Zu ihrem Tätigkeitsgebiet gehörte das Bauen von Brunnen, das Bauen von *kervansaraylar* für Reisende oder die Gründung von Suppenhäusern für die Armen. Auch konnten sich die *zaviyeler* die Anstellung eines Imams leisten, der im Namen des Gründers den Koran rezitierte.⁹⁸ Darüber hinaus wurde nach dem Tod des Gründers zur Sicherung des von ihm im Namen des Islams gewonnenen Landes und seines Ruhmes eine Grabstätte (*türbe*) gegründet, um die herum öffentliche Güter zur Verfügung gestellt wurden, wozu auch die Restaurierung von Grabsteinen und Grabstätten gehörte.

Die Leistungen dieses *waqf*-Systems für die Wohltätigkeit wurden vom osmanischen Staat damit gefördert, das er auf bestimmte Steuern verzichtete.⁹⁹ Je nach Zeit und nach der Stärke des Ordens warb das Reich mit Zuwendungen (*avarız-ı divaniye* und *tekâlif-ı örfiye*) um die Gunst der Ordensführer.¹⁰⁰ Auch dienten diese *waqf*-Güter als Rekrutierungs-, „Propaganda- und Kulturzentrum“ für das Osmanische Reich.¹⁰¹ Ein weiterer Gewinn lag für den Staat darin, dass der *waqf*-Besitzer für den Kriegsfall je nach Grösse des *waqf*-Landes eine rationalisierte Anzahl von Fusssoldaten (*sipahi*) zu liefern hatte, die er auch zum Teil selber kommandierte.¹⁰²

Die islamischen *awqāf* waren im Vergleich zum *zakāt*-System eine bessere Lösung für die Ordensgründer, da ihnen die *awqāf* eine höhere Rechtssicherheit bezüglich ihres Eigentums und eine bessere Art der

98 BARKAN, *supra* n. 65, 294 f.

99 BARKAN, *supra* n. 65, 296 f.

100 FAROQHI, *supra* n. 1, 88 f.

101 BARKAN, *supra* n. 65, 295.

102 BARKAN, *supra* n. 65, 299 f., 354 – 362; KARPAT KEMAL. H., Osmanlı'dan Günümüze Elitler ve Din [Eliten und Din. Vom Osmanischen Reich bis zur Gegenwart] Istanbul 2009, 47; KARPAT KAMAL H., The transformation of the Ottoman state, 1789 – 1908, International Journal of Middle East Studies, Vol. 3 (1972), 254, URL: <http://www.jstor.org/stable/162799> [04. September 2016]; SADAT DEENA R., Rumeli Ayanları: The eighteenth century, The journal of modern history, Vol. 44 (1972), at 348, URL: <http://www.jstor.org/stable/1876416> [06. September 2016].

Besteuerung ihres Einkommens boten. *Waqf*-Gründer konnten *waqf*-Verwalter anstellen, die sowohl mit den Gründern wie auch mit den Bauern in einer funktionalen Beziehung standen. Sie wurden im Idealfall nach wirtschaftlichen Kriterien beurteilt und nicht nach ethisch-ethnischen Erwartungen. Die *awqāf* waren eine Lösung für ihre Gründer, weil sie ihnen nebst besseren Eigentumsrechten auch eine bessere Berechenbarkeit und Rationalisierung ihrer Beziehungen zu Koalitionspartnern, Bauern und Herrschern, ermöglichten. Die Herrscher haben ihrerseits in den *waqf*-Gründern eine verlässlich intermediäre Instanz gefunden.

c) *Awqāf* als Kompromiss zwischen sakralem und sultanischem Recht

Während der Gründungsphase des Islams wurde die Kriegsführung nach Aussen mit der Prophetie und nach Innen mit der neuen, rechtlich konstituierten Solidaritätsform legitimiert. Nach einem *ḥadīth* darf nur ein Araber vom Stamm der Quraisch das Kalifat übernehmen.¹⁰³ Insofern lag die historische Herausforderung darin, die angestammte genealogische Herrschaftslegitimation mit einer universalistisch/egalitär angelegten religiösen Ethik zusammenzubringen. Dies sieht man sowohl in den islamisch-messianisch motivierten Volksbewegungen, in der Gründung verschiedener Rechtsschulen wie auch darin, dass die Iraner, Seldschuken und Osmanen den Islam annahmen, womit sie dieses Prärogativ faktisch ausser Kraft setzten, indem sie ihr Reich auch Kalifat nannten.

Auf rechtsoziologischer Ebene war das Osmanische Reich von Anfang an mit der Frage konfrontiert, wie gesellschaftlicher Wandel ohne Gefährdung des Rechtssystems zugelassen werden konnte. Je stärker die Lebenswelt¹⁰⁴ infolge von Kriegen und Kriegsvorbereitung einer Zentralisierung, Bürokratisierung und Rationalisierung unterzogen werden musste, desto stärker machte sich die faktische Macht auf Kosten rechtlich gültigen und allgemein anwendbaren egalitären Prinzipien bemerkbar. In diesem Zuge

¹⁰³ KARATEPE HAKAN T., Legitimizing the Ottoman sultanate: A framework for historical analysis, in KARATEPE HAKAN T./REINKOWSKI MAURUS (Ed.), Legitimizing the order: The Ottoman rhetoric of state power, Leiden 2005, 27.

¹⁰⁴ Für den Begriff "Lebenswelt" siehe HABERMAS JÜRGEN, Theorie des kommunikativen Handelns, Band 2. Zur Kritik der funktionalistischen Vernunft, Frankfurt am Main 1987, 173 – 297.

musste die islamische Herrschaftslegitimation mit einem Hinweis auf höhere Mächte durch eine profanere Legitimationsform ergänzt werden. Nicht mehr alleine die ethisch abgeleitete rechtliche Legitimität setzte sich als Quelle legitimer Herrschaft durch, sondern verstärkt auch wieder durch wirtschaftliche und/oder bürokratische Faktizität erlangte Macht. Das ist der Grund, warum sich die Herrscher erneut zum *Schatten Gottes* erklärten und sich nicht mehr mit dem Titel des Nachfolgers des Propheten Mohammad begnügten. Deswegen bezeichneten die Osmanen das Osmanische Reich als *nizām-ı alem* (Weltordnung) und sahen in ihrem Staat einen *devlet-i ebedi müddet* oder *devlet-i alıye* (den ewigen Staat). Ursprünglich war der osmanische Sultan kein Schatten Gottes, sondern einfach der *Hakan*, der gerechte Kriegsführer.

Paradoxerweise war der erste grosse Schritt dazu, der Erwerb des islamischen Kalifentitels. Nach der Eroberung von Kairo im Jahr 1517 durfte das Osmanische Reich den rechtlichen Anspruch auf das Kalifat erheben. Der Eroberer Yavuz Sultan Selim¹⁰⁵ holte den Kalifatstitel wie auch den Kalifen selbst nach Istanbul.¹⁰⁶ Der letzte Kalif von Kairo, Al-Mutawakkil, durfte erst zwei Jahre nach dem Tod von Sultan Selim I. im Jahr 1520 nach Ägypten zurückkehren.¹⁰⁷ Damat Çelebi Lütü Paşa (?–1563), der Schwager Yavuz Sultan Selims, gab dem oben erwähnten *hadit* nun eine neue Interpretation:

“Falls die oben erwähnten Eigenschaften in einer Person vereinigt sind, nämlich Eroberung, Macht zur Ausübung von Gewalt, Aufrechterhaltung eines gerechten Glaubens, das Gebieten des Guten und das Verbieten des Bösen und die allgemeine Führeigenschaft, dann ist diese Person der Sultan, der berechtigterweise Anspruch darauf hat, die Titel Imam und Kalif zu tragen sowie die Titel Vali und Amir, ohne Widersprüche.”¹⁰⁸

105 Er erhielt den Beinamen “Yavuz” (der Grimmige). Siehe dafür, TANSEL SELÂHATTIN, Yavuz Sultan Selim, Ankara 1969.

106 KASI MIRZA DJEVAD KHAN, Das Kalifat nach islamischem Staatsrecht: Eine historisch-dogmatische Studie. Die Welt des Islams, Band 5, Heft 4, (1918), 207, URL: <http://www.jstor.org/stable/1569211> [04. September 2016]; SPULER-STEGEMANN URSULA, Die Stellung des Islams und des islamischen Rechts in ausgewählten Ländern: Türkei, in ENDE WERNER/STEINBACH UDO (Hrsg.), Der Islam in der Gegenwart, München 2005, 231.

107 KARATEPE, *supra* n. 102, 27.

108 Zit. nach KARATEPE, *supra* n. 102, 28.

Der Entsakralisierung folgte eine Rationalisierung in Form eines Kompromisses. Der Nachfolger von Yavuz Sultan Selim war Sultan Süleyman I. (reg. 1520 – 1566), der den Beinamen “der Prächtige” trug. Er kam im Alter von 26 Jahren an die Macht und machte sich einen Namen als Gesetzgeber, weswegen er auch *Kanuni* Sultan Süleyman genannt wird. Nachdem die Zentralisierung unter den Sultanen Murad und Mehmed II. weitgehend erreicht worden war, legte Sultan Süleyman mit seinem Gesetzbuch die wichtigsten Bestimmungen zum Landrecht, dem Finanzrecht und dem fiskalischen Recht fest.¹⁰⁹ Die sultanischen Erlasse betrafen vor allem das *waqf*-System. Mit diesen Erlassen leitete Sultan Süleyman den wichtigsten Schritt zum Kompromiss zwischen dem sakralen und sultanischen Recht dadurch ein, dass er seine Erlasse (*kanun*) auf der Grundlage des *örfi*-Rechts und in seiner Rolle als *Hakan* durchsetzte.¹¹⁰ Seine Rechtsreformen wurden als eine Alternative zum bestehenden sakralen Recht eingesetzt.¹¹¹ Mit diesen Erlassen bekam er innerhalb des Osmanischen Reichs die Rechtsunsicherheit bezüglich Landverwaltung in den Griff.¹¹² Damit wurden gleichzeitig nicht nur alle anderen Rechtsquellen (Prophetentum vs. Königtum), sondern auch alle anderen Rechtsverständnisse/Rechtsschulen zugunsten des nun direkt den staatlichen Zwecken unterworfenen Rechtsverständnisses rationalisiert.¹¹³ In der Folge wurden die Erlasse nicht mehr *fetwa*, sondern *adaletname* (wörtlich: Gerechtigkeitsverordnungen) genannt. Das Osmanische Reich

109 GENÇ MEHMET, Klâsik Osmanlı Sosyal-İktisadî Sistemi ve Vakıflar / Classical Ottoman Socio-Economic System and Waqfs, *Vakıflar Dergisi*, Vol. 42 (2014), 9 – 18, URL: <http://dergipark.ulakbim.gov.tr/vakiflar/issue/view/5000008802> [07. September 2016].

110 İNALCIK HALİL/ANHEGGER ROBERT, *Kânûnnâme-i Sultânî ber mûceb-i örf-i Osmânî. II. Mehmed ve II. Beyazid devirlerine ait yasaknâme ve kânûnnâmeler* [Sultanische Rechtsetzungskompetenz: Verbote und Gesetze während der Zeit von Mehmed II. und Beyazid II.], Ankara 2000.

111 BARKEY, *supra* n. 60, 469 f.

112 RÖMER CLAUDIA, Zu Verlassenschaften und ihrer fiskalischen Bearbeitung im Osmanischen Reich des 16. Jhs, *Wiener Zeitschrift für die Kunde des Morgenlandes*, Vol. 88 (1998), 185 – 211, URL: <http://www.jstor.org/stable/23865117> [07. September 2016]; SCHAENDLINGER ANTON C., *Süleymân I, Sultan des Osmanischen Reiches, 1494 – 1566: Die Schreiben Süleymans des Prächtigen an Vasallen, Militärbeamte, Beamte und Richter*, Wien 1986.

113 GERBER HAIM, *Islamic law and culture 1600 – 1840*, Leiden 1999, 29; ERGENE BOĞAÇ A., *On Ottoman justice: Interpretations in conflict (1600 – 1800)*, *Islamic Law and Society*, Vol. 8 (2001), 52 – 87, URL: <http://www.jstor.org/stable/3399486> [07. September 2016].

wurde so gesehen weder alleine vom *šarī'a*-Recht noch vom *örfi*-Recht geleitet, sondern von beiden gleichzeitig. Der Ort, an dem dieses duale Recht zur Anwendung kam, war das *waqf*-System. Das *waqf*-System repräsentiert mit andern Worten die Organisation eines Kompromisses zwischen sakralem und sultanischem Recht.

V. Rechtssoziologische Bewertung

Den einen richtungsweisenden Schub verdankt sich eine Prinzipien geleitete Rechtsentwicklung der Prophtie. Aus religionssoziologischer Sicht treiben die Propheten einen Keil in die bestehende magische Ordnung von Sein und Haben. Propheten erhoben ihren Führungsanspruch sowohl auf die Güter der Diesseits wie auch der Jenseits. In Bezug auf das Sein hat jede umfassende Religion eine Theologie und was das Haben betrifft, verfügt jede Weltreligion über eine Herrschaftsstruktur. Der völkerrechtlich anerkannte Staat Vatikan ist ein gutes Beispiel für den diesseitigen Herrschaftsanspruch bzw. für die religiös verankerte Herrschaftslegitimierung auf der profanen Welt. *Awqāf* waren aus dieser Warte zunächst die islamische Lösung für das Problem der Integration des Seins und des Habens, der Integration der profanen und der sakralen Welt. Im *zakāt*-System waren die Anforderungen für eine solidarische Gemeinschaft durch eine angemessene Besteuerung des Eigentumsrechts weder reglementiert noch wurde dafür ein zweckrational einsetzbares Instrument vorgesehen. Vielmehr wurde dem wohlhabenden Gläubigen zugemutet, seinen moralischen Pflichten durch das Almosengeben nachzukommen. Dagegen wurde diese Erwartung im *waqf*-System in eine sozial wirksamere Handlungslogik gegossen und im Osmanischen Reich durch mehrere Kompromisse institutionalisiert.

Zur Expansion der islamischen Gemeinde hat die Erkenntnis entscheidend beigetragen, dass die religiöse Einheit durch die wirtschaftliche Einbindung der Nichtsesshaften und die politische Einheit durch die Integration der Mekkaner und anderer Kulturen sichergestellt werden musste, indem ein Gleichgewicht zwischen zum Teil divergierenden Interessen gesucht wurde.¹¹⁴ Der Prophet Muhammad legte selbst die grösste

114 SONN TAMARA, Islam: A brief history, Second Edition, Malden 2010, 34 f.

Verhandlungsbereitschaft an den Tag. Dieses Verständnis wurde nach seinem Tod weiterentwickelt, indem seine später fixierten Praktiken zum Modell einer islamischen Entscheidungsfindung erklärt wurden. Im Kampf um das Kalifat, in der Anzahl von Rechtsschulen und in messianischen Volksbewegungen kann die Entwicklung, die Anpassung und die Fixierung der islamischen Rechtsentwicklung rekonstruiert werden. So waren die Umayyaden-Dynastie eine sesshafte, städtische Bildungselite, die die altarabisch-mekkanische Aristokratie repräsentierte.¹¹⁵ Die Umayyaden bauten ihre Herrschaft auf ihrer eigenen Genealogie auf und verstanden sich nicht nur als Nachfolger des Gesandten Gottes (*ḥalīfat rasūl allāh*), sondern als direkte Stellvertreter Gottes (*ḥalīfat allāh*) auf Erden.¹¹⁶ Dieser Legitimitätskampf entzündete sich hauptsächlich an dem Umstand, dass mit der islamischen Expansionsphase die erreichte Komplexität der Gesellschaft staatliche Strukturen bedingte, deren Finanzierung eine funktionierende Besteuerung notwendig machte, die eher nach ökonomischen als nach ethnisch-ethischen Kriterien rationalisiert werden musste. Das Osmanische Reich baute auf diese Erfahrungen auf, indem es sich ethisch und ethnische Herrschaftslegitimation bediente und diese Legitimation im Rahmen des *waqf*-Systems auch in der Lebenswelt organisierte. Der Sultan war zugleich der gerechte Kriegsführer, der Nachfolger des Propheten Muhammads, der Besitzer aller Länder und Schatten Gottes auf Erden. Je nach der Phase und der Machtkonstellation wurde jeweils ein Attribut hervorgehoben.

Max Weber hatte herausgearbeitet, dass sich das Recht von der Moral und der Religion erst in seiner späteren Phase trennt. Zunächst wurde das Recht unter den abstrakten Begriff der Staatsräson gestellt, die "ohne Ansehen der Person" gleiche Fälle gleich zu behandeln hatte.¹¹⁷ Historisch hat sich dieser Weg erst unter dem Ansehen des Königs, des Sultans und auf den Kriegsfeldern etabliert. Der Krieg stellte nicht nur den Grund für eine Rationalisierung der Ethik dar, sondern bereitete auch den Boden für die Entstehung eines Pathos, das die Reziprozität unter den Mitgliedern der neuen Solidaritätsgemeinschaft förderte.¹¹⁸ In der islamischen Herrschaftsgeschichte kann dieser Prozess dadurch nachgezeichnet werden,

115 HOURANI ALBERT, Die Geschichte der arabischen Völker, Frankfurt am Main 1992, 50 – 58.

116 ROHE MATHIAS, Das islamische Recht: Geschichte und Gegenwart, 2011 München, 31.

117 WEBER, *supra* n. 75, 546.

118 WEBER, *supra* n. 75, 547.

dass mit der Expansion des islamischen Kalifats das *zakāt*-System nicht mehr für die Finanzierung der islamischen Gemeinde ausreichte. Zugleich veranlasst die reformwillige Frage danach, wie der Frühislam anpassungsfähig bleiben und gleichzeitig an der Unveränderbarkeit der Worte Gottes festhalten konnte, einige Gelehrten der Kalifatslehre dazu, jeglichen Bemühungen, die vollkommenen Gesetze Gottes mithilfe der Ratio (*idschtihâd*) den historischen Umständen anzupassen, einen Riegel zu schieben, indem sie das *idschtihâd*-Tor für geschlossen erklärten. Je stärker der rationale Diskurs unterbunden wurde, desto mehr wurde von Missbrauch, Misskredit und Misstrauen berichtet.¹¹⁹ Einerseits wurden Kriege im Namen des Islams geführt, Länder erobert, besteuert und Ortschaften für heilig erklärt und andererseits leitete die Missachtung der Tabuerklärung durch die Kriegsherren die Entzauberung der bestehenden Ethik ein. Beide Prozesse, die Heilserklärung und Schliessung der *idschtihâd*-Tore einerseits, die Entzauberung der Ethik und Notwendigkeit der Einrichtung einer bürokratischen Besteuerung andererseits sind zwei Seiten der gleichen Medaille insofern, als dass sie je auf ihre Art auf die Dysfunktionalität des *zakāt*-Systems hinwiesen.

Die Forschungsfrage kann aus dieser Logik damit beantwortet werden, dass das sakrale Recht dort zum modernen Recht überführt werden konnte, wo ein König ein Monopol entweder gestützt auf ethisch-rechtliche Normen oder dank faktischer Präsenz über die Verwaltung und Interpretation der gesellschaftlich knappen Güter errichtet hatte. Jede Herrschaft braucht daher nicht nur gute Ideen (z. B. *umma*) sondern auch profane Institutionen (z. B. *awqāf*), die diese Ideen abgestützt auf verallgemeinerbare Interessen dauerhaft machen. In diesen Fällen kam es gemäss Habermas zu einem "Richterkönig", der aus dem sakralen Recht eine durch Sitte und Moral bindende Autorität ableitete.¹²⁰ Dieser strukturelle Formwandel wurde im Osmanischen Reich dank dem *waqf*-System beschleunigt. Das *waqf*-System ermöglichte mehrere Kompromisse, die in ihrer Handlungslogik zu einer zeitgleichen System- und Sozialintegration dienten.

119 GHAUSSY A. GHANIE, Die islamische Wirtschaftsethik und Wirtschaftslehre, in Jahrbuch für Sozialwissenschaft, Band 34, Heft 3, (1983), 373; HOEXTER, *supra* n. 1, at 480 f.; FARSCID, *supra* n. 49, 71 f.

120 HABERMAS JÜRGEN, Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaates, Frankfurt am Main 1998, 177.

VI. Zwischenbetrachtung

Awqāf wurden bis anhin unter verschiedenen Gesichtspunkten erforscht, jedoch nicht aus dieser rechtssoziologischen Sichtweise. Dafür war Max Webers These, wonach handlungstheoretisch allein die protestantische Ethik die Fähigkeit zur Moderne hat, zu dominant. "Universalgeschichtliche Probleme wird der Sohn der modernen europäischen Kulturwelt unvermeidlicher- und berechtigterweise unter der Fragestellung behandeln: welche Verkettung von Umständen hat dazu geführt, dass gerade auf dem Boden des Okzidents, und nur hier, Kulturerscheinungen auftraten, welche doch – wie wenigstens wir uns gern vorstellen – in einer Entwicklungsrichtung von universeller Bedeutung und Gültigkeit lagen?"¹²¹ Seit Webers Diktum wurde die Auffassung, dass im Vergleich zum europäischen Rechtsverständnis das islamische Recht antimodern ist, immer wieder aktualisiert. Und seitdem ist die Versuchung gross, das "islamische" Recht in eine strukturelle Beziehung zu Antirationalität zu setzen.¹²²

1. Funktionale Vergleichbarkeit

In der Debatte um die Natur der *awqāf* gibt es mindestens vier Positionen: die Position Webers, Trubeks und Schoenblums, die etwas Islamisches mit etwas Europäischem vergleicht, um dann zum Schluss zu kommen, dass das Islamische antimodern und das Europäische modern ist. Die zweite Position ist in den Schriften von Fuat Köprülü, Timur Koran und Halil Inalcık zu sehen, wonach nicht die islamische Ethik, sondern die Herrscher des Osmanischen Reiches für die Erfolge einer Reihe von Institutionen verantwortlich waren, die fälscherweise dem Islam zugeschrieben werden. Nach der dritten Position ist der Islam der Grund für den Rückgang (Tilman Nagel) bzw. das Aufkommen der islamischen Institutionen (Haitam Suleiman) – ihre Gemeinsamkeit ist ihr Gegensatz. Gemäss der vierten Auffassung gibt es weder den Islam noch das

¹²¹ WEBER, *supra* n. 75, 1.

¹²² TRUBEK DAVID M., Max Weber über das Recht und die Entstehung des Kapitalismus, in BREUER STEFAN/TREIBER HUBERT (Hrsg.), Zur Rechtssoziologie Max Webers, Interpretationen, Kritik, Weiterentwicklung, Wiesbaden 1984, 152 – 198; HUFF TOBY E., The rise of early modern science: Islam, China, and the West, Cambridge 2003.

islamische Recht, auch nicht ein Christentum und ein europäisches Recht. Vielmehr müssen sie differenziert betrachtet werden (Mathias Rohe und Heim Gerber).

Die erste Position ist deswegen zu kritisieren, weil zum Beispiel die von Schoenblum angewendete Methode des Vergleichs die Annahme suggeriert, dass Trust und *waqf* in ihrem Wesen ähnliche/gleiche oder ungleiche Phänomene seien. Doch das islamische *waqf*- und das europäische Trust-System sind keine Institutionen, bei denen hinsichtlich ihrer Eigenschaften eine Gleichheit und/oder Ungleichheit vermutet werden könnte.¹²³ Sie zeichnen sich viel mehr durch ihre Verschiedenheit aus: Während *awqāf* eine Institution der Gemeinschaft waren, gehört das europäische Trust-System zu Institutionen der Gesellschaft.¹²⁴ Das ist auch der Grund dafür, dass die *awqāf* innerhalb des sakralen Rechts organisiert wurden und der Idee des Islams zu dienen hatten. Dagegen sind die Trusts dem hoch ausdifferenzierten Rechtssystem zuzuordnen, das sich als ein Selbstzweck versteht. Dieses Rechtssystem besteht aus einem Ensemble von Rechten. Insofern dürfen wir "Unterschied" nicht mit "Ungleichheit" verwechseln: Fingerabdrücke können nicht verglichen werden, auch wenn sie voneinander unterschieden werden können. Auseinanderhalten muss nicht mit Wertung einhergehen.

2. Formwandel anstelle einer Verfallsgeschichte

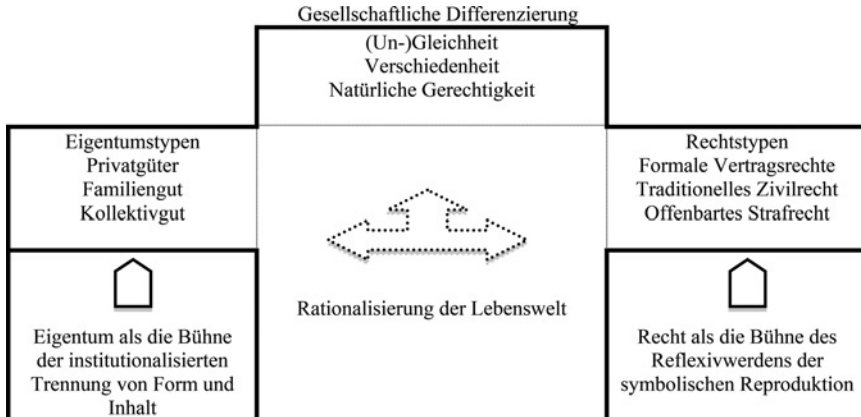
In diesem Beitrag wurde von den oben erwähnten vier der letzte Forschungsansatz vertreten. Anstatt von einer Verfallsgeschichte auszugehen, kann die Ausbreitung der *awqāf* mit der Dysfunktionalität des bestehenden *zakāt*-Systems als Besteuerungssystem und ihr Rückgang mit dem Formwandel des Rechts erklärt werden, der jeweils von der entsprechenden Wirtschaftsordnung getragen wurde. Durkheim zeigte anhand des Familienrechts, dass dieser Formwandel von konkreten Handlungen hin zu abstrakten Normen verläuft. Und in den Schriften Webers, Luhmanns und Habermas' kann diese Entwicklung mit Rechts- und Eigentumstypen und gesellschaftlicher Differenzierung

123 PICKEL SUSANNE et al. (Hrsg.), Methoden der vergleichenden Politik- und Sozialwissenschaft: Neue Entwicklungen und Anwendungen, Wiesbaden 2009.

124 TÖNNIES FERDINAND, Gemeinschaft und Gesellschaft: Grundbegriffe der reinen Soziologie, Darmstadt 1991.

zusammengebracht werden. Die Tabelle unten gibt diese Logik wider. Sie wurde ausgehend von der bisherigen Diskussion und angelehnt an Jürgen Habermas entwickelt.¹²⁵

Tabelle 1: Lebenswelt und gesellschaftliche Differenzierung



Die gesellschaftliche Differenzierung findet durch eine lebensweltliche Kommunikation hindurch statt, worauf in der Darstellung die gestrichelten Linien aufmerksam machen. Der tabellarischen Darstellung liegt der Gedanke zugrunde, dass die gesellschaftliche Entwicklung einerseits auf Ideen im Sinne einer rechtlich-philosophischen Geltung, andererseits auf Interessen im Sinne eines soziologischen Ordnungssystems beruht. In Bezug auf Solidarität geht die Differenzierung nach Luhmann von natürlichen Gerechtigkeitsvorstellungen der segmentären Gesellschaft in das Schema von Gleich- und Ungleichheit einer funktional differenzierten Gesellschaft und schliesslich in System-Umwelt Differenzierung über.¹²⁶

3. Lebenswelt und die Differenzierung

Diese Differenzierung wird von der Rationalisierung der Lebenswelt angestossen: In der Lebenswelt wurde die normative Orientierung zunächst von konkreten historischen Menschen anhand konkreter

¹²⁵ HABERMAS, *supra* n. 103, 229 – 223, 260; LUHMANN, *supra* n. 55, 156 f.

¹²⁶ LUHMANN, *supra* n. 55, 115; LUHMANN, *supra* n. 57, 60 – 78.

Handlungen und nicht von Institutionen angeboten, die von abstrakten Prinzipien geleitet waren. Eine Rechtsentwicklung findet in dieser Phase noch durch Analogien statt. Auf der Herrschaftsebene fanden die Menschen unter der Leitung von Magiern und Zauberern zu einer Transzendenz, dank der sie eine Transformation in Gottheiten und vice versa ohne Widerspruch erlebten.¹²⁷ Auf der anderen Seite waren die Menschen so mechanisch in ihrer Lebenswelt integriert, dass sie nach Durkheim infolge des zu starken altruistischen Wertesystems ihr Leben für das Überleben der Gemeinschaft zu opfern bereit waren.¹²⁸ Ausgehend von Durkheim steht insofern fest, dass die (vor-)koranische Erwartung an Normen von der Empirie gestützt war, der erwünschten Wohltätigkeit im Rahmen des *zakāt*-Systems die notwendige Geltung mit dem Verweis auf eine ausseralltägliche Macht zu verleihen. Diese moralische Erwartung war effektiv und konstitutiv für die Zeit.

Nach der segmentären Differenzierung war die Rolle einer Person irgendwie und für immer von höheren Mächten bestimmt. Die Sozialintegration wurde anhand des Reziprozitätsprinzips durch konkrete Handlungen hergestellt. In diesen Gemeinschaften wurde die Vielfalt von Glaubens- und Lebensführungsstilen in den Rahmen der natürlichen Verschiedenheit durch diese segmentäre Differenzierung aufgefangen. Rechtsfragen wurden in diesen Gemeinschaften nicht nach abstrakten Normen, sondern nach Analogien geregelt.¹²⁹ Gleichzeitig führten der Fernhandel, die Kriege und die egalitäre Ethik zu einer Rollendifferenzierung, deren Steuerung nicht mehr innerhalb religiöser Verheissungen geleistet werden konnte.

Mit dem Aufbruch der Weltreligionen und in diesem Fall des Islams findet eine Rechtsentwicklung dadurch statt, dass die islamische Solidarität anstelle des Systems der freiwilligen Almosen (*ṣadaqa*) in der Form einer erzwingbaren Besteuerung im *zakāt*-System reorganisiert wurde. Der strukturelle Grund lag darin, dass die festen Zuschreibungen in einem Widerspruch zu den Leistungen standen, die von den Menschen für die Einrichtung einer gerechten islamischen Gesellschaft, einer Weltherrschaft erwartet wurden.¹³⁰ Der Stellenwert der *zakāt* ist darin genauer erkennen,

127 DURKHEIM EMILE, Die elementaren Formen des religiösen Lebens, Frankfurt am Main 1981, 307.

128 DURKHEIM EMILE, Der Selbstmord, Frankfurt am Main 1983, 243 – 347.

129 LUHMANN, *supra* n. 57, 651 f.

130 LUHMANN, *supra* n. 57, 636.

dass sie eine der fünf Säulen des Islams blieb. Zugleich und im Gegensatz zu den Zeiten des Propheten Muhammads musste diese räumlich und kulturell expandierende Gemeinschaft anstelle von der Magie oder heiligen Versen durch Gesetze neu ausgerichtet werden, die von Menschen für die Steuerung der Gesellschaft rational entwickelt wurden.¹³¹

Die Anpassungsfähigkeit, die Verhandlungsbereitschaft und die theologischen Rationalisierungsversuche waren für die Sozialintegration unverzichtbare Leistungen, aber für eine Systemintegration mussten den von verschiedenen Interessen geleiteten Akteuren auch die Partizipationsinstrumente zur Verfügung gestellt werden.¹³² Daher war die Frage nicht mehr, ob, sondern mit welchen Steuerungsformen die islamische Ordnungspolitik die beste Koordinierung erhalten würde. Die Lösung wurde im *waqf*-System gefunden. Im Gegensatz zum *zakāt*-System garantierte das *waqf*-System als ein islamisches Eigentumsrecht den Moslems, den Trägern der neuen Identität, eine Legitimationsgrundlage für die kommunizierte Eigenständigkeit und erlaubte ihnen, ihre Unabhängigkeit gegenüber der Sippengemeinschaft effizient geltend zu machen. Folglich wurde die Gründung eines *waqf* auch strukturell in einen Zusammenhang mit der Förderung der Idee der islamischen Gemeinde gestellt. Die islamische Herrschaft stand in dieser Phase vor der grossen Aufgabe, die auf Genealogie basierende Ordnung durch abstraktere Normen zu reformieren.¹³³ Dafür entwickelte der Prophet Muhammad selber die islamische *umma*. In die Entwicklung der *umma* flossen nicht nur die Lerneffekte aus den jüdisch-christlichen Modellen ein, sondern sie wurde auch durch Offenbarungen neu ausgerichtet. *Umma* als eine Solidaritätsgemeinschaft bot zugleich vor allem den ersten Moslems, die mit ihrem Islambekenntnis in einen Konflikt mit ihrer Sippe, mit ihrem

131 LUHMANN, *supra* n. 57, 634 – 662.

132 Für die Unterscheidung von Sozial- und Systemintegration siehe LOCKWOOD DAVID, Social Integration and System Integration, in ZOLLSCHAN GEORGE K./HIRSCH WALTER (Ed.), Social Change: Explorations, Diagnoses and Conjecture, New York 1964, 370 – 383; HABERMAS, *supra* n. 103, 179 f.; LUHMANN, *supra* n. 57, 618 f.; MOUZELIS NICOS, Social and System Integration: Lockwood, Habermas, Giddens. Sociology, Vol. 31 (1997), 111 – 119, DOI: <https://doi.org/10.1177/0038038597031001008> [29. Mai 2017]; DEMIR ALI, Entzauberung durch Diskurs: Eine rechtssoziologische Analyse zu systemischen Risiken und handlungstheoretischen Verantwortlichkeiten. Zur Option einer zeitgleichen System- und Sozialintegration, Hamburg 2017, 192 – 203.

133 ROHE, *supra* n. 115, 21.

Stamm gerieten, nicht nur konkreten Personenschutz an, sondern erwartete von ihnen auch die Befolgung und die Verinnerlichung ein abstrakteres ethisches Vergesellschaftungsprinzip auf Kosten der alten ethnischen Vergemeinschaftung.

4. Institutionalisierung des Formwandels

Als ein wichtigster Akteur dieser Phase wurde der *Bektaşî*-Orden identifiziert. Der Orden war sowohl bei der Gründung, Verteidigung, Etablierung wie auch bei der Expansion des Osmanischen Reiches eine der wichtigsten Institution für die Elitebildung. In der Organisation dieses Ordnes kann explarisch die Institutionalisierung des Formwandels der Rechtscode nachgezeichnet werden. Seine *Derwische* spielten bei der Sozialintegration der Menschen aus verschiedenen Sprachen, Religionen und Lebensstilen eine entscheidende Rolle. Der *Bektaşî*-Orden steht auch in einen strukturellen Zusammenhang mit dem Land- und Militärsystem des Osmanischen Reiches. Denn die Ordensgründer haben die Frage beantworten müssen, wie das Kollektivgut mit dem islamischen Konzept des individuellen Schicksals auf eine Linie gebracht werden konnte. Im *waqf*-System wurde zunächst die Lösung gefunden, dass das Land weiterhin Gott oder dem Sultan gehörte, aber das Einkommen der wohltätigen/religiösen Einrichtungen nicht mehr pauschal für öffentliche Güter, sondern einzig und allein für islamisch-soziale Zwecke einzusetzen war, wofür sich jeder Mensch auf seine Art einbringen konnte. Praktisch meinte diese Regelung, dass *waqf*-Land nicht versteuert werden musste, wenn sein Gründer es im Kriegsfall dem Sultan als Finanzquelle und "Humanressource" zur Verfügung stellte. Aus dieser Warte verdankt sich die Gründung des Osmanischen Reiches nicht alleine der Idee des Islams, zumal es historisch in der Zeit auch andere (islamische) Dynastien gab, sondern der rationalen Koordinierung der bestehenden Interessen durch die Gründungen einer Vielzahl von Orden. Im Orden wurde der Sinn von einer neuen Landgewinnung kommuniziert, die dadurch hergestellte soziale Ordnung einer generalisierbaren Wertidee unterstellt und dieser Wertidee mit einer *waqf*-Gründung materielle Sichtbarkeit verliehen.

Die Ordens- und *waqf*-Gründer liefern auch Hinweise auf das Aufkommen einer Mittelschicht. *Awqāf* als Familiengut beruhen in ihrer Funktionalität

auf einer Arbeitsteilung zwischen Peripherie und Zentralstaat.¹³⁴ Diese Ländereien wurden Ende des 16. Jahrhunderts von einem halbprivaten Status ins Verwaltungsrecht verschoben. Der Kampf der *waqf*-Gründer um ihre Länder ist idealtypisch abgebildet in den Begriffen *tumar*-Länder und *mülk*. *Tumar* waren brachliegende Kollektivgüter, welche die Bauern nach einem Steuertyp (*cizye*, *haraç*, *istigbal*) pachten konnten. Die Bauern durften das Land nicht weitervererben, nicht weitergeben und *nicht* auf die Bearbeitung verzichten. Am anderen Ende der Skala standen die *mülk*- und *waqf*-Länder. Sie sind insofern als *halbprivate* Familiengüter zu bezeichnen, da sie im Kampf um Herrschaft verstaatlicht werden konnten, wie dies für die sogenannte *Fetret-Devri* (Zeit des Chaos) (1402 – 1412) gut dokumentiert ist.¹³⁵ *Awqāf* wurden in der Regel mit der Waffengewalt des Zentrums erworben und mit „Humanressourcen“ der Peripherie kultiviert.

Das *waqf*-System war *das Ergebnis mehrerer Kompromisse*, die im Laufe der Zeit eingegangen und je nach Phase wie auch gesellschaftliche Erfordernisse gewichtet wurden. Bei diesen Kompromissen ging es im Grunde genommen um die System- und Sozialintegration. Nachdem die Systemintegration durch Vereinheitlichung, Rationalisierung und Differenzierung angegangen worden war, wendeten sich die Osmanen der Sozialintegration zu, indem sie das Recht zunächst von seinen sakralen Ursprüngen trennten und in die administrative Macht übersetzten. Während dieser Übersetzungsphase wurde das sakrale Recht entzaubert, in den *awqāf* institutionalisiert und für die spätere Positivierung freigegeben. Erst nach der Positivierung des Rechts bzw. des Reflexivwerdens des Rechts konnte die Rechtssetzung routinemässig und legitimerweise als Instrument zur Steuerung der Gesellschaft eingesetzt werden.¹³⁶

5. Tautologien in der Moderne

Nichtdestotrotz wurde mit der Moderne die Tautologie, die Geltung des Rechts aufgrund einer geltenden Rechtsnorm, offensichtlich. Um diese

134 FAROQHI, *supra* n. 78, 189 f.; BARKEY, *supra* n. 60, 469 f.

135 INALCIK, *supra* n. 82, 171 ff.; SALGIRLI SAYGIN, The rebellion of 1416: Recontextualizing an Ottoman social movement. *Journal of the Economic and Social History of the Orient*, Vol. 55 (2012), 32 – 73, URL: <http://booksandjournals.brillonline.com/content/10.1163/156852012x628491> [29. Mai 2017].

136 LUHMANN, *supra* n. 56, 207 f.; HABERMAS, *supra* n. 118, 108.

Paradoxie zu überwinden, definierte Luhmann Geltung als “ein von Moment zu Moment neu zu erarbeitendes Produkt des Systems”.¹³⁷ Luhmann spricht hier auch den modernen Umstand an, dass soziale Phänomene je nach Standpunkt anders bewertet werden. Ein Erkenntnisgewinn ist gering, wenn die Standpunkte fix sind. Darin liegt auch der Grund, warum eine Debatte über die Gründe des Niedergangs oder des Wiederauflebens der islamischen *awqāf* in beiden Fällen zu einer Auflistung von Hintergründen der Gründe führt. Dagegen erlaubt ein evolutiver Ansatz, auch die feinen Unterschiede zwischen den verschiedenen Systemen zu sehen und vor allem sie als solche anzuerkennen. Insofern kann der Grund für das Fehlen des Wortes *waqf* im Koran damit erklärt werden, dass es für die damaligen sozioökonomischen Verhältnisse kaum von Belang war. Auf der anderen Seite liegt der Grund für das Fehlen des Wortes *islām* in der Zielsetzung von *Vakıflar Dergisi* darin, dass sie in einer Phase der Nationbildung herausgegeben wurde, in der die “Nation” als solche auf der Grundlage eines rationalen Plans eine Vorreiterrolle in der Modernisierung der Gesellschaft übernehmen sollte.¹³⁸ Deswegen mussten aus der Sicht der *Vakıflar Dergisi* die religiösen Erklärungen entkräftigt und dem islamischen Erklärungsmodell entzogen werden, um sie dann mit Instrumenten der Wissenschaft, die als die höchste Form der Rationalität angesehen wurde, zu beschreiben.

In der Moderne gibt es andere Formen von Tabuerklärungen. Gleichzeitig hat die Gesellschaft genügend Erfahrungen damit gemacht, dass Rechtsvorstellungen durch Positivierung, Abstrahierung von kontingenten Umständen in das moderne Privatrecht überführt werden können. Im Zusammenhang mit dem Zeitgeist kann eine legitime und solidarische Ordnung unter der Bedingung einer gleichzeitigen System- und Sozialintegration gelingen, wozu evidenterweise verschiedene Modelle der Abgestimmtheit zwischen der Demokratie, der Rechtsstaatlichkeit, dem Privateigentum und einer vitalen Öffentlichkeit gehören. Es bleibt eine

137 LUHMANN, *supra* n. 55, 109.

138 HABERMAS JÜRGEN, *Zeitdiagnosen: Zwölf Essays*, Frankfurt am Main 2003, 175; ANDERSON BENEDICT, *Die Erfindung der Nation: Zur Karriere eines folgenreichen Konzepts*, Frankfurt am Main 1996; MARDIN ŞERİF, *Jön Türklerin Siyasi Fikirleri 1895 – 1908: Bütün Eserleri 1* [Die politischen Vorstellungen der Jungtürken 1895 – 1908: Gesammelte Werke 1], Istanbul 2006; BELGE MURAT, *Genesis: Büyük Ulusal Anlatı ve Türklerin Kökeni* [Genealogie: Epik der Nation und die Ursprünge der Türken], Istanbul 2008.

empirische Frage, ob das *waqf*-System soweit entwickelt werden kann, dass es den modernen Rechtsprinzipien genügt.

Takaful – Foundations and Standardization of Islamic Insurance

JOEL EL-QALQILI ¹

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Abstract

The Islamic Finance industry grew from a socio-economic movement to a global industry. The enabling mechanism was a rather legalistic interpretative approach towards Islamic prohibitions such as riba, maysir and gharar. The emergence of an Islamic kind of insurance, i.e. takaful, shows how this process was driven by socio-economic and political factors. Today, one of the central claims often raised in discussions around Islamic Finance in general and takaful in particular is that of standardization. In order to grow and

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further develop, the claim goes, Islamic Finance requires standardized legal frameworks and products. Although such standardization appears to be difficult given the diverse and pluralistic nature of Islamic law and its interpretation, it also appears to make sense, at least with a view to insurance, an industry particularly dependent on scale. Examining this claim ultimately requires an economic analysis. Assuming standardization would indeed further the growth of the takaful industry, the (legal and political) question arises, how, i. e. through which mechanisms, such standardization is currently supported. In conventional finance, standardization is often achieved through soft law norms produced by (private or public) international regulatory bodies. To examine whether similar processes can be found in Islamic finance, this article applies a framework by Charles Brummer, which looks at the central actors and main coercive forces of soft law norms, to the takaful industry.

I. Introduction

The Islamic Finance industry grew from a socio-economic movement to a global industry. Such development was possible on the basis of a rather legalistic, formal interpretative approach towards Islamic prohibitions such as *riba*, *maysir* and *gharar*. The emergence of an Islamic kind of insurance, i. e. *takaful*, demonstrates this process and also shows, how it was driven by socio-economic and political factors. Going forward, Islamic finance could continue to grow in scale and geography in its current forms, or it could gravitate back to its rather socio-economic beginnings, concentrating more on substance than form. This article first explains how the current forms of *takaful* have been developed. Part one describes how Islamic Finance developed from its socio-economic beginnings to its current forms. The second part of the paper then explores the prospects for future development. For that purpose part two explores the institutional framework, asking how AAOIFI's standards may be seen, and are effective, as soft-law tools for international harmonization and further growth. To answer this question, part two applies Charles Brummer's framework, which looks at the central actors and main coercive forces of soft law norms, to the Islamic Finance landscape with a view to the *takaful* industry.

II. The Development of Islamic Finance

With the introduction of European inspired legal frameworks came the demise of the role traditional Islamic institutions such as the *Shari'a* courts and the *Mujtahids* had played before.² Nonetheless, Islamic law still played an important role in that it was taken seriously as a moral guideline for individuals.³ The imposition of secular law on the largely Muslim societies of the Arab states inspired political movements, often concerned with social and economic progress based on traditional, i. e. Islamic values.⁴ Among the first experiments aiming at empowerment and inclusion of the poor by providing financial services compliant with Islamic law was the Egyptian bank Mit Ghamr, which operated without charging any interest, profiting only from engaging in trade and business directly or in partnership with others.⁵ Such socio-economic approach⁶ based on Islamic values, although not openly marketed as such, created tensions with the government's policies of largely secular modernization,⁷ and ultimately, Mit Ghamr was shut down by the Egyptian government.⁸

With exploding oil revenues the demand side of Islamic finance changed drastically by the 1970 s.⁹ This and the rise of political Islam led to an increased political interest in Islamic finance.¹⁰ By that time the academic debate had already created the theoretical foundation for what would ultimately become today's Islamic finance industry. A legalistic approach, as Hegazy describes it, towards Islamic banking rather than the original

2 HALLAQ WAEL, *Shari'a: Theory, Practice, Transformations*, Cambridge 2009, at 445; HOURANI ALBERT, *Arabic Thought in the Liberal Age*, Oxford 1970, at 350.

3 BÄLZ KILIAN RUDOLF, *Versicherungsvertragsrecht in den Arabischen Staaten*, Karlsruhe 1997, at 39. Officially, Islamic law was marginalized to the sphere of personal status law, and even there secularization took place (HOURANI, *supra* n. 1).

4 HEGAZY WALID, *Contemporary Islamic Finance: From Socioeconomic Idealism to Pure Legalism*, Chicago Journal of International Law, Vol. 7 (2007), No. 2, Article 13, at 583.

5 WARDE IBRAHIM, *Islamic Finance in the Global Economy*, Edinburgh 2010, at 73–74.

6 The term socio-economic approach is borrowed from HEGAZY (see HEGAZY, *supra* n. 3, at 582).

7 See for example BÄLZ, *supra* n. 2, at 40.

8 HEGAZY, *supra* n. 3, at 589; Warde mentions other accounts according to which Mit Ghamr was closed due to severe financial problems (see WARDE, *supra* n. 4, at 74).

9 HEGAZY, *supra* n. 3, at 602; Warde describes this phase as “The First Aggiornamento” of Islamic finance (see WARDE, *supra* n. 4, at 74 to 78).

10 HEGAZY, *supra* n. 3, at 589.

socio-economic approach was most prominently proposed by Muhammad Baqir as-Sadr.¹¹ As-Sadr understood Islamic economics as a dogma (not a science),¹² the essence of which must be discovered starting from the law, i. e. the rules derived from the four legal sources of Islamic law¹³ – not from observations of reality. Yet, while As-Sadr built his propositions for an Islamic kind of banking acknowledging the proscriptive nature of the dogma, he acknowledged the absence of a general theory of economics (or even banking) in Islamic law, and also a certain degree of contextual realism as he argued that in order to succeed in an environment where conventional competition exists, Islamic banks had to offer similar economic incentives for customers, such as guaranteed deposits and a fixed rate of return on deposits.¹⁴ Simplifying his model, an Islamic bank – like a conventional bank – serves as an intermediary for capital providers and those seeking capital, albeit – different from conventional banks – not earning profits from an interest differential, but in exchange for its intermediation service only (a fee consisting of fixed and variable components).¹⁵ Without going into detail at this point, As-Sadr managed to build in features such as guaranteed deposits and a *de facto* fixed return on deposits by considering the applicable Islamic contracts (with the rights and obligations thereunder) governing the relations between the three parties and then structuring the transaction in a way that formally avoids triggering central prohibitions under Islamic law.

Based on this formal premise Islamic Finance grew rapidly, regional growth engines being Kuala Lumpur on the one hand and the Gulf countries on the other.¹⁶

11 HEGAZY, *supra* n. 3, at 583.

12 MALLAT CHIBLI, *The renewal of Islamic law*, 122, 123 referencing As-Sadr; see also BÄLZ, *supra* n. 2, at 56 referencing Muhammad Abu Zahra.

13 MALLAT, *supra* n. 11.

14 HEGAZY, *supra* n. 3, at 593; MALLAT, *supra* n. 11, 166 – 167.

15 MALLAT, *supra* n. 11, at 169 – 171. The moral dimension becomes apparent as As-Sadr stresses the bank would need to deal with honest and capable entrepreneurs (MALLAT, *supra* n. 11, at 171).

16 The Malaysian model and the Gulf model differ as the Malaysian model follows the *Shafi* school while the Gulf model follows the *Hanbali* school. For a description on the development of Islamic finance in Malaysia see WARDE, *supra* n. 4, at 123 – 128. This paper focuses on the Gulf region.

For the purposes of this short paper we may describe the development from socio-economic idealism to legalism as move from substance to form, a largely uncoordinated process which can be illustrated using insurance as an example.

Traditionally, insurance had been widely considered impermissible under Islamic law. The prohibition of insurance under Islamic law had long been controversial when around 1960 Egypt was going through a process of modernization and nationalization,¹⁷ and different views surfaced, ranging from liberal – justifying conventional insurance¹⁸ Islamically – to conservative – prohibiting insurance generally. The nationalization extended to foreign insurers, and Egypt's European inspired civil law provided the legal basis for this business allowing conventional insurance.¹⁹ Egypt's leading jurists sought to reconcile the new Egyptian civil law with the country's long Islamic tradition.²⁰ To facilitate such reconciliation they brought about remarkable reforms resulting in a systemic shift towards abstraction as opposed to a traditional *numerus clausus* of contracts.²¹ The radical shift those jurists now (successfully) proposed towards contractual freedom, only limited by certain Islamic legal principles instead of a formal *numerus clausus* of contracts, was accompanied by a change of the mode of the legal debate.²² Traditionally, questions of Islamic law had been answered through *fatawa*, which were non-binding and employed on a case-by-case basis.²³ Now conferences were held, where Islamic jurists not only searched for general solutions, but also began to look more

17 BÄLZ, *supra* n. 2, at 40.

18 For the purposes of this article, conventional insurance comprises proprietary and mutual insurance. Whereas in proprietary insurance the risk of the insured is transferred from the insured to the insurer in exchange for premiums, mutual insurance does not involve such risk transfer, but instead a risk sharing between the insured. Both forms are seen as impermissible under Islamic law.

19 The insurance contract was regulated for the first time in Articles 747 to 771 of Egypt's civil code of 1948 (for details please see BÄLZ, *supra* n. 2, at 72 – 82).

20 BÄLZ, *supra* n. 2, at 55.

21 BÄLZ, *supra* n. 2, at 46.

22 BÄLZ, *supra* n. 2, at 43.

23 BÄLZ, *supra* n. 2, at 28. The *fatwa* was provided by a *mufti* on demand. According to Schacht the *mufti's* "authority was based on his reputation as a scholar, his opinion had no official sanction, and a layman could resort to any scholar he knew and in whom he had confidence" (SCHACHT JOSEF, *An Introduction to Islamic Law*, Oxford 1964, at 74).

closely at the actual insurance techniques and economics.²⁴ With the momentum of the oil boom and political Islam's rise during the 1970s an Islamic form of insurance evolved based on the formal approach considering the applicable Islamic contracts governing the relations among the insured as well as between them and the insurer, and structuring the transaction in a way that avoids triggering central prohibitions under Islamic law.

III. Prohibitions of Islamic Law against Conventional Insurance

The shift from a *numerus clausus* of contracts towards abstraction opened the door for a substance oriented discussion focusing on the relevant Islamic prohibitions of gambling (*maysir*), excessive uncertainty (*gharar*) and unlawful gain (*riba*).

1. Maysir and Gharar

In various instances the Quran prohibits *maysir*.²⁵ *Maysir* may be understood as games of chance or pure speculation in which final sales of wholly unknown values are made.²⁶

Often *maysir* is seen as the broader concept from which *gharar* is derived.²⁷ *Gharar* is widely understood as uncertainty, risk or speculation.²⁸ It is rooted

24 BÄLZ, *supra* n. 2, at 44.

25 "O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone altars [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful" (Quran 5:90), or "Satan only wants to cause between you animosity and hatred through intoxicants and gambling and to avert you from the remembrance of Allah and from prayer. So will you not desist?" (Quran 5:91).

26 VOGEL FRANK/HAYES SAMUEL, *Islamic Law and Finance: Religion, Risk, and Return*, Boston 1998, at 16, 88.

27 WARDE, *supra* n. 4, at 58; EL-GAMAL MAHMOUD, *Islamic Finance: Law, Economics, and Practice*, Cambridge 2006, at 58; SCHACHT, *supra* n. 22, at 146; BALALA MAHA HANAAN, *Islamic Finance and Law: Theory and Practice in a Globalized World*, Vol. 5 (2011), 36.

28 WARDE, *supra* n. 4, at 56.

in various *hadiths* around which legal doctrine primarily evolved.²⁹ Such *hadiths* stipulate for example

“do not buy fish in the sea, for it is *gharar*”, or “the Prophet forbade sale of what is in the wombs, sale of the contents of the udders, sale of a slave when he is a runaway, ... and sale of the stroke of the diver”, or “whoever buys foodstuffs, let him not sell them until he has possession of them”, or “He who purchases food shall not sell it until he weighs it”.³⁰

Those *hadiths* all refer to sales contracts. From here it is derived that *gharar* applies only to bilateral contracts of exchange. All of these *hadiths* prohibit selling or buying of something unknown – either regarding existence or quantity. What constitutes *gharar* beyond the scenarios mentioned in the *hadiths* is controversial.

Vogel classified the *gharar-hadiths* according to how central *gharar* was to the transaction.³¹ The resulting spectrum ranges from “Pure Speculation” on one end of the spectrum to “Uncertain Outcome” to “The Unknown Future Benefit” to “Inexactitude”.³² The *hadiths* mentioned above could be understood in a way that they only bar risks affecting the existence of the object as to which the parties transact, rather than the risk regarding the price. Such risk can arise (1) because of the parties’ lack of knowledge about that object, (2) because the object does not now exist, or (3) because the object evades the parties’ control.³³ Vogel recommends scholars might use one of these three characteristics to detect *gharar* in transactions.³⁴

All of those three elements are present in conventional insurance: (1) the parties lack knowledge about the object of the insurance transaction, which is the payment upon occurrence of the insured event (i. e. the performance of the insurer), since such payment is uncertain at the time of the conclusion of the contract; (2) at the time of the conclusion of the contract the object does not yet exist, because such payment is subject to

29 NETHERCROTT CRAIG/EISENBERG DAVID, *Islamic Finance: Law and Practice*, Oxford 2012, at 45.

30 VOGEL/HAYES, *supra* n. 25, at 16, 88.

31 VOGEL/HAYES, *supra* n. 25, at 88 – 91.

32 VOGEL/HAYES, *supra* n. 25, at 16, 88.

33 VOGEL/HAYES, *supra* n. 25, at 90.

34 VOGEL/HAYES, *supra* n. 25, at 90.

occurrence of the insured event; (3) finally, the payout being conditional upon the occurrence of an uncertain event, is beyond the parties' control. In conclusion, conventional insurance is prohibited under Islamic law due to its conflict with *gharar* and *maysir*.

2. Riba

The prohibition of *riba* is mentioned several times in the Quran, such as “*Those who consume interest cannot stand [on the Day of Resurrection] except as one stands who is being beaten by Satan into insanity. That is because they say, “Trade is [just] like interest.” But Allah has permitted trade and has forbidden interest. So whoever has received an admonition from his Lord and desists may have what is past, and his affair rests with Allah. But whoever returns to [dealing in interest or usury] – those are the companions of the Fire; they will abide eternally therein.*”³⁵

As with *gharar* the Quran does not specify what *riba* actually is. However, the *hadiths* provide some specification for sales and loan contracts. With respect to sales contracts a famous *hadith* states “*Gold for gold, silver for silver, wheat for wheat, barley for barley, dates for dates, salt for salt, like for like, equal for equal, hand to hand. If these types differ, then sell them as you wish, if it is hand to hand*”³⁶. With regard to loan contracts a famous *hadith* states “*Every loan that attracts a benefit is riba*”³⁷.

The majority of scholars understand *riba* as including all of the mentioned forms of *riba*, in the words of Warde, as any unlawful gain derived from the quantitative inequality of the countervalues.³⁸ With respect to conventional insurance *riba* leads primarily to restrictions regarding the insurer's investment business. To avoid *riba* insurance companies have to refrain from investments in interest bearing instruments or prohibited sectors (e. g. alcohol, pornography, weapons, pork). Shares in companies

35 Quran 2:275.

36 Muslim, according to Vogel and Hayes (VOGEL/HAYES, *supra* n. 25, at 73).

37 According to Vogel and Hayes this *hadith* is related by the most respected scholars only to the authority of Companions, not the Prophet himself (VOGEL/HAYES, *supra* n. 25, at 73).

38 WARDE, *supra* n. 4, at 58.

that pay interest on their debt or generate profits from prohibited (*haram*) industries are usually accepted as long as certain thresholds are not exceeded. For example, companies with debt of 33 % or more of twelve-month average market capitalization could be screened out.³⁹ Where income nevertheless stems from illicit activities, it must be purified, i. e. given to charity.⁴⁰ On the product side late payments of premiums may not be sanctioned in the form of interest.⁴¹

3. Earlier Alternative Views

The central prohibitions of *maysir*, *gharar* and *riba* had been discussed in length, especially during the time preceding the formalistic paradigm. This might be attributable to the inherent diversity of opinion in matters of Islamic law, but also the economic benefits of a functioning insurance sector for a country, as developmental and modernization efforts were a political priority at that time. The following views demonstrate the range of the discussion around the permissibility of conventional insurance against the background of the aforementioned prohibitions.

Al-Zarqa argued that given the law of large numbers the degree of uncertainty is very low, and therefore – viewed in the aggregate and as an institutional form – insurance could not constitute *gharar*.⁴² The performance owed by the insurer, he argued, was not the payout upon occurrence of the insured event, but the guarantee granted.⁴³ Such guarantee exists upon contracting, and hence there is no uncertainty beyond the ordinary business risk.⁴⁴ Thus, according to al-Zarqa insurance contracts are permissible under Islamic law.⁴⁵

39 WARDE, *supra* n. 4, at 152.

40 WARDE, *supra* n. 4, at 152; see also IFSB Standard 6 – Guiding Principles on Governance for Islamic Collective Investment Schemes, Nr. 11, 41, p. 5, 14, available at: <http://www.ifsb.org/standard/ifsb6.pdf>, last accessed 29 November 2015.

41 WARDE, *supra* n. 4, at 147.

42 AL-ZARQA MUSTAFA AHMAD, *Nizam al-ta'min*, as referenced Mustafa Ahmad al-Zarqa, *Nizam al-ta'min* (Damascus: Matba'at Jami'at Dimashq, 1962) as referenced in VOGEL/HAYES, *supra* n. 25, at 151; BÄLZ, *supra* n. 2, at 50, 51.

43 BÄLZ, *supra* n. 2, at 51.

44 BÄLZ, *supra* n. 2, at 51.

45 BÄLZ, *supra* n. 2, at 50; VOGEL/HAYES, *supra* n. 25, at 151.

Sanhoury stressed the difference between minor *gharar* (*gharar yasir*) and major *gharar* (*gharar khatir*), only the latter of which leads to the concerned contract's voidance.⁴⁶ He argued that the determination of *gharar* being major or minor depends on the circumstances of the time at which such determination is made.⁴⁷ In modern times the degree of uncertainty involved in insurance contracts is seen as minor by Sanhoury.⁴⁸ According to Bälz, Sanhoury arrives at this finding through the application of the concept of (public) need (*haja*).⁴⁹ According to Sanhoury (conventional) insurance would be permissible under Islamic law.

With respect to *riba*, some argue that only real interest – as opposed to nominal interest – qualifies as *riba*.⁵⁰ Or, only *riba al-jahiliya*, i. e. a pre-Islamic practice in which the lender gives the borrower upon maturity the choice between settling the debt or doubling it,⁵¹ is subject to the prohibition, whereas other forms of *riba* (*riba al fadl*, and *riba al nasi'a*) may be overcome in cases of need (*haja*).⁵²

As every set of abstract rules knows exceptions for specific cases, Islamic law does so, too, for example necessity (*darura*) and public need (*haja*).⁵³ Applying them to allow conventional insurance had been discussed, especially in the 1960 s, i. e. at a time of socio-economic focus and prior to the widespread adoption of the legalistic approach. However, this

46 BÄLZ, *supra* n. 2, at 51.

47 BÄLZ, *supra* n. 2, at 51.

48 BÄLZ, *supra* n. 2, at 51.

49 Bälz differentiates between *darura* in a narrow sense, and *darura* in a broader sense (*haja*). According to BÄLZ *darura* in a narrow sense requires a state of emergency and allows the individual under certain circumstances to breach Islamic prohibitions, whereas *haja* considers general social and economic factors (BÄLZ, *supra* n. 2, footnote 202). This paper uses the terms *darura* and *haja*, both of which will be introduced below.

50 BÄLZ, *supra* n. 2, 53.

51 BÄLZ, *supra* n. 2, 53.

52 BÄLZ, *supra* n. 2, 53 referencing Sanhoury.

53 Technically, *darura* and *haja* are sometimes considered in interpreting a rule, sometimes they are seen as exceptions from a rule. There are various other conduits of flexibility in Islamic law, e. g. *wf* or *maqasid* (for a good overview see: KAMALI MOHAMMAD HASHIM, *Istihsan and the Renewal of Islamic Law*, Islamic Studies 43, No. 4 (2004), available at: <http://www.iais.org.my/e/index.php/publications-sp-1447159098/articles/item/16-istihsan-and-the-renewal-of-islamic-law.html>, last accessed 29 November 2015.

endeavor was never widely accepted.⁵⁴ Nonetheless, those substance-oriented concepts illustrate the diversity of opinion in Islamic law and contrast with the current models of *takaful*, the religious justification of which relies on a rather formal approach.

Darura and *haja* are not defined in the Quran. *Darura* is based on specific exceptions mentioned in the Quran, most of which relate to forbidden food and allow its consumption under certain circumstances.⁵⁵ Numerous *hadiths* stipulate such exceptions under specific circumstances. *Haja* constitutes a lesser degree of necessity and differs with respect to its prerequisites and effects.⁵⁶

Both types of exceptions require – cumulatively – some specifics and that no Islamic alternative (which would provide the same benefit as relying upon the exception) is available. While Quranic passages and *hadiths* mention cases involving the fear of death,⁵⁷ modernists argue a genuine fear of

54 Nonetheless, *darura* and *haja* are used to allow conventional insurance where an Islamic alternative is not available, for example in non-muslim countries or with respect to reinsurance (according to Hodgins and Jaffer the permissibility of conventional reinsurance for *takaful* providers is controversial, see NETHERCROTT/EISENBERG, *supra* n. 28, at 292.

55 Quran 2:173; 5:3; 4:119; 6:145.

56 MUSLEHUDDIN MOHAMMAD, *Islamic Jurisprudence and the Rule of Necessity and Need*, Islamabad 1975, 61 – 63. Muslehuddin refrains from clearly distinguishing, while Al-Mutairi does (AL-MUTAIRI MANSOUR, *Necessity in Islamic Law*, Edinburgh 1997, 16).

57 Al-Mutairi refers to Abu Bakr al-Jassas from the *Hanafi* school who defined necessity as follows “The meaning of necessity, here, is the fear of injury (damn to one’s life or some of one’s organs) if one refrained from eating” (AL-MUTAIRI, *supra* n. 55, at 11). Zarkashi, al-Siyuti and al-Hamawi al-Hanafi defined necessity as follows: “It is a situation in which one reaches a limit where if one does not take a prohibited thing, one will die or be about to die”(AL-MUTAIRI, *supra* n. 55, at 11) Al-Dardir from the *Maliki* school said: “Necessity is preserving lives from being lost or from being greatly injured” (AL-MUTAIRI, *supra* n. 55, at 11) Ibn Qudamah has given a similar definition: “Permitting necessity is the state in which one fears losing one’s life if one abstained from eating”. Yet, when those scholars explained their “definitions” they went beyond those subject matters, touching upon very different ones, for example financial matters or the preservation of property (AL-MUTAIRI, *supra* n. 55, at 11); AL-MUTAIRI puts it as an open question why the classical definitions of *darura* were so narrow compared to the wider usage of the concept. Mawil Izzi Dien offers an explanation: he writes that the methodology of definition by example was common among Arabic writers in general and not only among legal writers He also mentions the metaphorical nature of the Arabic language and culture, but then states “this methodology seems to be deliberate on occasions, with a view to avoiding the

injury to one of the five fundamental values (life, religion, property, reason, and offspring) suffices.⁵⁸ Such fear, some argue broadening *darura*'s scope of application, might similarly be caused by compulsion, aggression, or change in circumstances in contracts.⁵⁹

Public *haja* may be applied to remove hardship and difficulty.⁶⁰ *Haja* was specifically employed to sanction certain transactions in the economic life of the people.⁶¹ To differentiate between cases of *darura* and *haja* some distinguish between preventive prohibitions (when *haja* may apply), and definitive prohibitions (when only *darura* may apply).⁶² According to this theory *haja* refers to what is prohibited as a preventive measure (*sadd al-dhari'a*), but may become permissible, whereas *darura* relates to what is prohibited with definite purpose.⁶³ In other words, according to this logic, the determination of whether a prohibition is preventive or definitive depends on the exposure of the protected value vis-à-vis the behavior addressed by the prohibition. If the behavior addressed by the prohibition does not by itself constitute an injury of the protected value, but may be expected to lead – in connection with a typical development of events – to such injury in the future, then such prohibition is of preventive nature. In such cases *haja* may apply.

The prohibition of *maysir* is found next to the prohibition of alcohol in the same verses of the Quran, and protects religion indirectly by addressing a behavior that might lead to such injury in the future (like intoxication, gambling leads to addiction and may keep the believers from praying). Thus, the prohibition of *maysir* can be seen as a preventive prohibition and *haja* applies.

hypothetical definition which could deviate from the meaning of the text in order to serve non-existent cases" (see AL-DIN MU'IL YUSUF 'IZZ, *Islamic Law: From Historical Foundations to Contemporary Practice*, Notre Dame 2004, at 83.

58 AL-MUTAIRI, *supra* n. 55, at 15.

59 AL-MUTAIRI, *supra* n. 55, at 15.

60 AL-MUTAIRI, *supra* n. 55, at 17.

61 MUSLEHUDDIN, *supra* n. 55, at 62.

62 MUSLEHUDDIN MOHAMMAD, *Insurance and Islamic Law*, Lahore 1969, 102 – 103.

63 ZAKARIYA LUQMAN, *Legal Maxims and Islamic Financial Transactions: A Case Study of Mortgage Contracts and the Dilemma for Muslims in Britain*, Arab Law Quarterly 26, No. 3 (2012), at 277.

Public *haja* is present where a whole community faces hardship due to certain social benefits being neglected. A functioning insurance market generally represents social benefits.⁶⁴ Neglecting such benefits, one might argue, could be seen as hardship for the community.

4. Summary

Conventional insurance conflicts with the prohibitions of *maysir* and *gharar*, as well as *riba* and is, therefore, prohibited. *Darura* and *haja* are conduits of flexibility in Islamic law, the application of which requires a substance-oriented approach to distinguish the permissible from the prohibited. Yet, *takaful* was not developed on that basis, it was part of the general development of Islamic finance based on a positivist, i. e. legalistic approach.

IV. The Emergence of Takaful

Although there was no Islamic equivalent of conventional insurance, some scholars argue that there had been certain precursors in pre-Islamic times that later were accepted by the Prophet.⁶⁵ According to Billah it was an ancient practice among the tribal Arabs that upon the killing of a member of the tribe, the tribe responsible for such killing had to pay blood money to the heirs of the killed.⁶⁶ The name for this practice was *'aqilah*, a reference to the heirs who would receive the blood money.⁶⁷

64 The positive effects of wide-spread insurance coverage on economic development has been studied extensively and is recognized widely (see for example FEYEN ERIK/LESTER RODNEY/ROCHA ROBERTO, *What Drives the Development of the Insurance Sector? An Empirical Analysis Based on a Panel of Developed and Developing Countries*, Journal of Financial Perspectives 1, No. 1 (2013), available at:

http://www.wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2011/02/23/000158349_20110223115546/Rendered/PDF/WPS5572.pdf, last accessed 29 November 2015.

65 BILLAH MOHD. MA'SUM, *Applied Takaful and Modern Insurance: Law and Practice*, Petaling Jaya, Selangor, Malaysia 2007, at 5.

66 BILLAH, *supra* n. 64, at 5; AYUB MUHAMMAD, *Understanding Islamic Finance*, Hoboken 2007, at 420.

67 MUSLEHUDDIN, *supra* n. 55, at 62; AYUB, *supra* n. 65, at 421.

The religious foundation for an Islamic form of insurance, *takaful*, was provided by various *fatawa*. For example, a *fatwa* was issued in 1977 by the Secretariat General of the Supreme Council of the Senior Ulama of the Kingdom of Saudi Arabia.⁶⁸

1st: Cooperative insurance is a form of contract of donation, which means the distribution of risks and anticipation of sharing the responsibility in case of disasters. This is based on the fact that people contribute in cash to compensate those who sustain damage. In doing so, the cooperative insurance group does not aim to trade in, or make a profit from, the money of others. Its members only mean to distribute the risks among themselves and to cooperate in bearing the damage.

2nd: Cooperative insurance is free of usury in its two forms, *riba al-fadul* and *riba al-nisa*. The contributors' contracts are not usurious, and they do not exploit the collected money in usurious transactions.

3rd: The fact that the contributors in cooperative insurance ignore to define the benefit they gain does not harm, because they are donors. Therefore, there are no risks or gambling, and it is different from commercial insurance which is a contract of commercial financial transactions.⁶⁹

Another *fatwa* was issued by the Islamic Fiqh Academy in 1985:⁷⁰

“First: The commercial insurance contract with a fixed periodical premium, which is commonly used by commercial insurance companies, is a contract which contains major elements of deceit, which void the contract and, therefore is prohibited (*haram*) according to *Shari'a*.

Second: The alternative contract, which conforms, to the principles of Islamic dealings is the contract of cooperative insurance, which is found on the basis of charity and cooperation. Similarly, is the case of reinsurance based on the principle of cooperative insurance.”⁷¹

Those *fatawa* spell out very clearly the key principles of *takaful*, i.e. the principle of donation-based contributions (*tabarru*), mutual ownership and assistance (*ta'awun*), and the prohibition of *riba*. Where *tabarru* and *ta'awun* are preserved, the prohibitions of *maysir* and *gharar* do not apply.⁷²

Tabarru describes a unilateral declaration of intent, whereby the donor provides a benefit to the recipient without seeking any specific

68 See Appendix 1.

69 See Appendix 1.

70 See Appendix 2.

71 See Appendix 2.

72 NETHERCROTT/EISENBERG, *supra* n. 28, at 279.

consideration in return.⁷³ Since the prohibition of *gharar* is applicable only to bilateral contracts, structuring premium payments as unilateral donations, i. e. *tabarru*, circumvents the prohibition of *gharar*.

While *tabarru* governs how the *takaful* fund generates its funds, *ta'awun* governs how the payouts are made upon occurrence of the insured events. Under the concept of *ta'awun* the policyholders agree to compensate each other mutually for losses arising from the specified risks.⁷⁴ As owners of the *takaful* fund the policyholders are generally entitled to their share in the surplus of the *takaful* fund. To clarify this the mentioned fatwa from 1977 states that the cooperative insurance group does not make a profit from the money of others (meaning that there is no difference between the providers and the (ultimate)⁷⁵ owners of the funds). Such surplus exists where an underwriting surplus and profits from investment activities outweigh all payouts and costs of the *takaful* fund.

Against the background of the two conventional forms of insurance, namely mutual insurance, which offers risk sharing (i. e. spreading the burden of loss between all participants involved⁷⁶), whereas proprietary insurance offers risk transferring (risk is transferred contractually to a counterparty rather than shared among participants), *takaful* developed as a third form of insurance.

73 IFSB, Guiding Principles of Governance for Takaful (Islamic Insurance) Undertakings, December 2009, 5, available at: <http://www.ifsb.org/standard/ED8Takaful%20Governance%20Standard.pdf>, last accessed 29 November 2015. For a more detailed description of different views on what constitutes *tabarru'*, see NOORDIN KAMARUZAM, 'The Implementation of *Tabarru'* and *Ta'awun* Contracts in the Takaful Models', available at: http://repository.um.edu.my/36472/1/Islamic_ch07_091-112.pdf, last accessed 29 November 2015. According to Noordin, *tabarru'* is just a generic term under which various specific contracts may be subsumed. Among those specific contracts, Noordin argues in favor of the *hiba bi shart al-i'wad*, which – according to him – allows for a conditional donation and makes enforceable claims to the risk fund as well as a distribution of the underwriting surplus to the policyholder permissible (see NOORDIN, at 8, 20).

74 IFSB, Guiding Principles on Governance of Takaful (Islamic Insurance) Undertakings, available at: <http://www.ifsb.org/standard/ED8Takaful%20Governance%20Standard.pdf>, last accessed 29 November 2015.

75 Of course, the policyholders are not owners of the funds, but owners of shares.

76 The risk remains to some extent with the insured, who is bearing his share of it as a part of the collective.

The relation between the *takaful* fund and the *takaful* operator depends on the specific *takaful* model. The most common *takaful* models are the *wakala* model, the *mudaraba* model, a combination of both (the *wakala-mudaraba* model).⁷⁷

1. Wakala Model

In the *wakala* model the *takaful* operator acts as agent (“*wakil*”) for the *takaful* fund. The *wakil* is remunerated either on the basis of a fixed management fee or a fee calculated as a percentage of either the assets under management⁷⁸ or the volume of contributions (e.g. 30 %⁷⁹).⁸⁰ The fee is fixed annually and in advance.⁸¹ Depending on performance a part of the underwriting surplus may be distributed to the operator as well.⁸² This is controversial, since the surplus should remain with the policyholders.⁸³

2. Mudaraba Model

In the *mudaraba* model the *takaful* operator acts as *mudarib*, i.e. as entrepreneur, while the participants act as *rab al mal*, i.e. capital provider. The *takaful* operator is remunerated only with his share in the investment profits (participation in the underwriting surplus is widely seen as impermissible), out of which he has to cover his expenses.⁸⁴ The relatively small amounts of investment profits in general *takaful* make this pure *mudaraba* model practically useless.⁸⁵ The *mudaraba* model is often criticized for not being shari’a compliant. For example, contributions are

77 NETHERCROTT/EISENBERG, *supra* n. 28, at 287.

78 NETHERCROTT/EISENBERG, *supra* n. 28 at 283.

79 AYUB, *supra* n. 65, at 424.

80 ARCHER SIMON/KARIM RIFAAT AHMAD ABDEL/NIENHAUS VOLKER, *Takaful Islamic Insurance: Concepts and Regulatory Issues*, Singapore 2009, at 13.

81 AYUB, *supra* n. 65, at 424.

82 AYUB, *supra* n. 65, at 424.

83 AYUB, *supra* n. 65, at 426. For further criticism of performance related *wakala* fees see: ARCHER/KARIM/ NIENHAUS, *supra* n. 79, at 14.

84 NETHERCROTT/EISENBERG, *supra* n. 28, at 287.

85 ARCHER/KARIM/NIENHAUS, *supra* n. 79, at 14.

supposed to be donations, yet serve as mudaraba capital.⁸⁶ Also, in a mudaraba the invested capital is to be returned along with the profits – if any – whereas in takaful contributions are donations.⁸⁷ Moreover, the provision of *qard hasan* is in conflict with the profit-and-loss-sharing idea of mudaraba.⁸⁸

3. Wakala-Mudaraba Model

The blended *wakala-mudaraba* model combines both models. The *takaful* operator acts as *wakil* with respect to the underwriting business and as *mudarib* with respect to the investment business.⁸⁹ This way he may be remunerated for the underwriting business as a *wakil* (i. e. primarily on a fixed-fee basis) and – as a *mudarib* – also entitled to participate in the investment profits.⁹⁰ The issues mentioned above for the *wakala* and the *mudaraba* model apply here as well.

4. Conclusion

As was shown, through a largely uncoordinated process, driven by socio-economic and political factors, *takaful* developed as pragmatic way to enable an Islamic form of insurance on the basis of a rather legalistic approach. The *wakala-mudaraba* model is the model proposed by the Accounting Organization for Islamic Financial Institutions (“AAOIFI”), as will be shown the preeminent international standard setting body for Islamic Finance. Unlike in its beginnings, today Islamic Finance develops within an institutional landscape with centralized standard setting bodies like AAOIFI producing non-binding standards. Will the current forms of Islamic Finance in general, and *takaful* in particular grow within this institutional landscape? To examine this question, the following explores the institutional mechanics of international Islamic Finance

86 AYUB, *supra* n. 70, at 426.

87 AYUB, *supra* n. 70, at 426.

88 AYUB, *supra* n. 70, at 426.

89 ARCHER/KARIM/NIENHAUS, *supra* n. 79, at 15.

90 NETHERCROTT/EISENBERG, *supra* n. 28, at 285 – 286.

standardization, specifically to what extent such standards create hard-law-like compliance effects.

V. Prospects for Growth Through Harmonization

Today, Islamic finance is a global industry of approximately US\$ 2 trillion, of which *takaful* is a relatively small part with only around US\$ 26 billion.⁹¹ A lack of standardization and regulatory harmonization is often seen as one of the key challenges to further growth of *takaful* and, indeed, Islamic finance as a whole.⁹² As was shown in the first part of this paper, the current forms of *takaful* developed through an uncoordinated process driven by various factors, which were political and economical in nature, falling on the fertile ground of a formal, legalistic interpretative approach. Other approaches had been, and still are, around, but they are not “mainstream”.⁹³ Today, further growth is expected to come with the internationalization of Islamic Finance through standard setting. For that purpose international bodies have been set up, such as AAOIFI. Looking at AAOIFI’s organizational design and norms may help understanding to what extent its standards may be seen, and are effective, as soft-law tools for international harmonization and further growth

1. Islamic Standard Setters vs. Conventional Standard Setters

While those standard setting bodies resemble their conventional counterparts (since they all work towards coordinating their different legal frameworks)⁹⁴ they differ with respect to the nature of their coordination

91 See for example <http://www.mifc.com/index.php?ch=28&pg=72&ac=106&bb=uploadpdf>, last accessed 29 November 2015.

92 As a recent example please see Standard & Poor’s 2016 Industry Outlook for 2016 available at: https://www.globalcreditportal.com/ratingsdirect/renderArticle.do?articleId=1466521&SctArtId=347908&from=CM&nsl_code=LIME&sourceObjectId=9373552&sourceRevId=1&fee_ind=N&exp_date=20251018-15:03:29&sp_mid=60153&sp_rid=33734 (last accessed 27 November 2015).

93 See above (III).

94 While Drezner refers to regulatory coordination as a codified adjustment of national standards in order to recognize or accommodate regulatory frameworks from other

process: Islamic finance and its regulation involves an additional layer of coordination: the coordination of Islamic law and secular law.

The coordination process of international standard setting bodies in Islamic finance can be described as a two level process. On a first level the central question of what is *shari'a* compliant must be answered.⁹⁵ This first level coordination may be international (meaning it might be answered by a group of scholars of different nationalities), but it needs to be thought of as a separate level of coordination, because it is not political, i. e. beyond a “wordly give and take”. The coordination of Islamic law and modern finance requires interpreting Islamic law, which is primarily a process of discovery, and applying it to conventional finance. Islamic scholars apply their efforts at discovering the right answer based on the sources and methodologies of Islamic law. In that sense it is a rather technocratic process, not a political one in which the ideal result would be defined by a maximum amount of economic and power benefits. It is the second level of coordination where national or international legal frameworks must be coordinated with Islamic law – as discovered on the first level. This second level process is inherently political as it involves choices of the “rulers”.⁹⁶

countries (DREZNER DANIEL, *All Politics Is Gobal: Explaining International Regulatory Regimes*, Princeton 2007, at 11), coordination is referred to in a broader sense here in that it refers to processes which aim at eliminating contradictions of different rule-based frameworks rule-based frameworks.

95 According to Bälz developments in Islamic financing transactions must be integrated with and adapted to the overall legal and regulatory framework of the prospective jurisdiction in which the transactions will take place, and also with the needs of the respective Muslim communities they serve (see BÄLZ KILIAN RUDOLF, *Islamic Finance for European Muslims: The Diversity Management of Shari'ah-Compliant Transactions*, Chicago Journal of International Law, Vol. 2 No. 2 Art. 11, available at: <http://chicagobound.uchicago.edu/cjil/vol7/iss2/11>, last accessed 29 November 2015. Bälz argues that regarding first level coordination (i. e. the question of what is *shari'a* compliant) the specificities of local Muslim communities must be taken into account especially for retail transactions (as opposed to “big ticket”-transactions which are subject to global standards such as those issued by AAOIFI). This paper does not deal with such local specificities and their implications for the standardization of Islamic finance.

96 Warde describes national interest considerations as including domestic factors and national circumstances among which he mentions indigenous forms of Islam (see WARDE, *supra* n. 4, at 85 – 86). Here Warde describes the various aspects which inform countries' political decisions regarding the design of their legal frameworks for Islamic institutions. This does not contradict the distinction between a technocratic process of discovering

2. AAOIFI

The main international body engaging in standard setting is Islamic Finance AAOIFI.⁹⁷ AAOIFI is based in Manama, comprises around 200 member bodies from 40 countries, including central banks and Islamic financial institutions.⁹⁸ Its standards have, according to AAOIFI, been adopted in the Kingdom of Bahrain, Dubai International Financial Centre, Jordan, Lebanon, Qatar, Sudan and Syria.⁹⁹ Regulators in Australia, Indonesia, Malaysia, Pakistan, Kingdom of Saudi Arabia, and South Africa have issued guidelines based on AAOIFI's standards and pronouncements.¹⁰⁰

The forum for the first level coordination is AAOIFI's a *Shari'a* Board. Specifically, the *Shari'a* Board's function is (1) to achieve harmonization and convergence in the concepts and application among the *Shari'a* supervisory boards of Islamic financial institutions, to avoid contradiction or inconsistency between the *fatawa* and applications by these institutions, (2) providing a pro-active role for the *Shari'a* supervisory boards of Islamic financial institutions and central banks, (3) preparing and adopting of *Shari'a* standard and *Shari'a* rules for investment, financing and insurance instruments, and financial services and the interpretation thereof, (3) helping to develop *Shari'a* approved instruments, thereby enabling Islamic financial institutions to cope with the developments taking place in instruments and formulas in fields of finance, investment and other banking services, (4) examining any inquiries referred to the *Shari'a* Board from Islamic financial institutions or from their *Shari'a* supervisory boards, either to give the *Shari'a* opinion in matters requiring collective *Ijtihad* (reasoning), or to settle divergent points of view, or to act as an arbitrator, (4) reviewing the accounting,

what is *shari'a* compliant and a political process of integrating such discoveries into national or international law.

97 Other organizations include for example the International Islamic Rating Agency (IIRA), the Islamic Financial Services Board (IFSB) and the International Islamic Liquidity Management Corporation (IILM).

98 See <http://www.aaofi.com/en/about-aaofi/about-aaofi.html>, last accessed 29 November 2015.

99 See <http://www.aaofi.com/en/about-aaofi/about-aaofi.html>, last accessed 29 November 2015.

100 See <http://www.aaofi.com/en/about-aaofi/about-aaofi.html>, last accessed 29 November 2015.

auditing, governance and ethical standards and related statements which AAOIFI shall issue throughout the various stages of the due process, to ensure that these issues are in conformity with the Islamic *Shari'a* rules and principles.

The *Shari'a* Board is appointed by AAOIFI's members (through the Board of Trustees,¹⁰¹ which is appointed by the General Assembly,¹⁰² the primary forum for all members).¹⁰³ The *Shari'a* Board is composed of up to 21 members, who are appointed for a four-year term from among *Fiqh* scholars including those from member financial institutions and member regulators.¹⁰⁴ Neither the Board of Trustees nor any of its sub-committees may interfere directly or indirectly with the work of the *Shari'a* Board or direct it in any manner.¹⁰⁵ While the members of the *Shari'a* Board are appointed by the Board of Trustees, which is itself appointed by the General Assembly, i. e. by the members, this power to appoint appears to create little influence on the *Shari'a* Boards work, which is (supposed to be) free of any influence by the members, and which is provided free of charge.¹⁰⁶ Based upon this organizational design the interpretative processes of AAOIFI are designed as technocratic processes allocated to an expert body, which operates free of direct political influence.

101 Article 37/1 of AAOIFI's statute, see <http://www.aaofi.com/en/about-aaofi/governance-accountability/aaofi-statute.html>, last accessed 29 November 2015.

102 The General Assembly is the primary forum for all members, although not all members are granted voting rights. There are five kinds of members: founding members, associate members, observer members, supporting members and members representing regulatory and supervisory authorities (that supervise Islamic financial institutions). Founding members, associate members and members representing regulatory and supervisory authorities enjoy a right to vote on matters within the General Assembly's responsibilities (Article 3 of AAOIFI's statute, see <http://www.aaofi.com/en/about-aaofi/governance-accountability/aaofi-statute.html>, last accessed 29 November 2015).

103 Not all members have voting rights. The number of voting rights per member depends on the "membership fee or the multiple thereof, but shall not exceed twenty votes", Article 10/3 of AAOIFI's statute, see <http://www.aaofi.com/en/about-aaofi/governance-accountability/aaofi-statute.html>, last accessed 29 November 2015.

104 Article 37/1 of AAOIFI's statute, see <http://www.aaofi.com/en/about-aaofi/governance-accountability/aaofi-statute.html>, last accessed 29 November 2015.

105 Article 18/2 of AAOIFI's statute, see <http://www.aaofi.com/en/about-aaofi/governance-accountability/aaofi-statute.html>, last accessed 27 November 2015.

106 Article 42 and 32 of AAOIFI's statute, see <http://www.aaofi.com/en/about-aaofi/governance-accountability/aaofi-statute.html>, last accessed on 27 November 2015.

To coordinate Islamic law, i. e. the sphere of the jurists, and the state law, i. e. the sphere of the ruler, a doctrine was developed during the Umayyad dynasty according to which the rulers' sphere of administrative law (*siyasa shari'a*) was restricted by the limits of Islamic law, i. e. it was not allowed to contradict Islamic law.¹⁰⁷ The task of interpreting Islamic law, and thereby marking the limits of the rulers' sphere of administrative law (*siyasa shari'a*) was with the Islamic jurists.

On a national level, today's second level coordination finds an expression in constitutions of modern states with Muslim majorities.¹⁰⁸ Various constitutions describe the *shari'a* either as a source of law or *the* source of law, Saudi Arabia declares it the constitution of the state.¹⁰⁹ In practice coordinating Islamic law and national law proves to be difficult (not only)

¹⁰⁷ SCHACHT, *supra* n. 22, at 53. Schacht ties the development of this doctrine to a saying of the Umayyad caliph 'Abd al-'Aziz: "No one has the right to personal opinion (*ra'y*) on points settled in the Koran; the personal opinion of the caliphs concerns those points on which there is no revelation in the Koran and no valid *sunna* from the Prophet after ours, and no holy book after ours, what Allah has allowed or forbidden through our Prophet remains so forever; I am not one who decides but only one who carries out, not an innovator but a follower."

¹⁰⁸ Of course, this is not the case for all countries with Muslim majorities (see footnote 76 in RABB INTISAR A., 'We the Jurists': Islamic Constitutionalism in Iraq, University of Pennsylvania Journal of Constitutional Law, Vol. 10 (2008), No. 3, 572, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263354, last accessed 29 November 2015).

¹⁰⁹ For example Iraq's constitution designates Islamic law as a source of law (*Ibid.*); Islamic Law shall be a main source of legislation in Kuwait (Art. 2 constitution of Kuwait, available at:

https://www.constituteproject.org/constitution/Kuwait_1992.pdf, last accessed 29 November 2015); "Shari'a law shall be a main source" of legislation in Qatar (see Article 1 of the constitution of Qatar, available at: http://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—ilo_aids/documents/legaldocument/wcms_125870.pdf, last accessed 29 November 2015), "The Islamic Shari'ah shall be principle source of [sic.] legislation" in the United Arab Emirates (see Article 7 of the constitution of the United Arab Emirates, available at: https://www.constituteproject.org/constitution/United_Arab_Emirates_2004.pdf, last accessed 29 November 2015); "The principles of Islamic Sharia are the principle source of legislation" in Egypt (Article 2 of the constitution of Egypt, available at: https://www.constituteproject.org/constitution/Egypt_2014.pdf?lang=en, last accessed 29 November 2015); Nationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Islamic Sharia and the consensus of the people" in Sudan (Article 5 of the constitution of Sudan, available at: https://www.constituteproject.org/constitution/Sudan_2005.pdf?lang=en, last accessed 29 November 2015).

in the realm of finance. Sovereign wealth funds are an example. Huge amounts of capital belong to sovereign wealth funds of Muslim majority countries.¹¹⁰ Yet, most of those sovereign wealth funds tend to invest conventionally as opposed to Islamically.¹¹¹ The tensions between the investment requirements and such countries' self-image as expressed, for example, in their constitutional choices, are eased by on the one hand utilizing exemptions embedded in Islamic law and on the other hand by promoting the growth of the Islamic Finance industry through institutions such as AAOIFI.

On an international level, the organisation's existence expresses the members' intention to afford practical relevance to the norms issued by AAOIFI. Such relevance requires some form of application of the standards and guidelines. The question, however, remains how and to what extent the members create effective links to authority, e.g. regulators formally recognize or even implement – depending on the domestic legal powers of the regulator – the standards.

AAOIFI's articles of association do not impose subordination or any formal obligation of any member to conform to its standards on their members. Bahrain chose to subordinate Islamic financial institutions to AAOIFI's standards by introducing a dynamic reference to those standards in its national law, but this is a *national* exception and not required by AAOIFI's founding documents. Absent any formal obligations, level two coordination can only work informally, i. e. through soft law mechanisms.

110 According to numbers of the Sovereign Wealth Institute the following sovereign wealth funds are believed to hold the following assets under management (in billions): The Abu Dhabi Investment Authority (ADIA) around US\$ 773; SAMA Foreign Holdings (Saudi Arabia) around US\$ 671.8; Qatar Investment Authority around US\$ 256.

111 Sovereign wealth funds' investments in conventional financial institutions may serve as an example, such as Qatar Investment Authority's investment of around CHF 6 billion in Credit Suisse in 2011, Kuwait Investment Authority's investment of around US\$ 800 million in Agricultural Bank of China in 2010, Mubadala Investment Company's (United Arab Emirates – Abu Dhabi) investment in Engine Financing Air Berlin of around US\$ 100 million in 2010, Oman State General Reserve Fund's investment in Petrovietnam Insurance Co PVLHN, of around US\$ 42.3 million in 2010, Qatar Investment Authority's investment in Barclays PLC of around US\$ 2.9 billion in 2008, Qatar Investment Authority's investment of around US\$ 140 million in Deutsche Bank in 2013 (data obtained from SovereignNet, The Fletcher Network for Sovereign Wealth and Global Capital of the Fletcher's Institute for Business in the Global Context).

Such soft law mechanisms dominate the realm of conventional financial regulation.

Brummer suggests concentrating on three central actors of soft law in the field of financial regulation. Those actors are national financial authorities, international standards and agenda setters, and international financial institutions.¹¹² According to Brummer, international agenda setters, are institutions that are geared towards large organizations with broad and diverse memberships that define broad strategic objectives for the international system, such as the G-20 or the Financial Stability Board^{113,114}. They issue broad recommendations and principles,¹¹⁵ to be further developed by so called-standard setting organizations.¹¹⁶ National financial authorities (either universal regulators or specialists) are involved in the creation of international financial regulation, most often as executive bodies within their domestic setting. Depending on their domestic market and resource base they can vary to a large degree in their capabilities, i. e. human and other resources as well as their mandate within which they operate. Besides standard-setting bodies and national financial authorities there are international institutions such as the International Monetary Fund and the World Bank tasked with monitoring the international financial system as well as individual countries through a Financial Sector Assessment Program (“FSAP”), which includes a comprehensive and in-depth analysis of a country’s financial sector.¹¹⁷

According to Brummer those key actors interact against the background of three coercive forces: market discipline, reputational constraints and institutional sanctions.¹¹⁸ From his analysis Brummer concludes that while being soft law international financial regulation shows hard-law-like

112 BRUMMER CHRIS, *How International Financial Law Works (and How It Doesn't)*, Georgetown Law Journal, Vol. 99 (2011), 275, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542829, last accessed 29 November 2015.

113 The FSB is an international body that monitors and issues recommendations about the global financial system. The FSB aims at promoting international financial stability by coordinating national financial authorities and international standard-setting bodies (see <http://www.financialstabilityboard.org/about/>, last accessed 29 November 2015).

114 BRUMMER, *supra* n. 111, at 275.

115 BRUMMER, *supra* n. 111, at 277.

116 BRUMMER, *supra* n. 111, at 277.

117 See <http://www.imf.org/external/np/fsap/fssa.aspx>, last accessed 29 November 2015.

118 BRUMMER, *supra* n. 111, at 284 – 290.

characteristics.¹¹⁹ Applying Brummer's framework may help to learn more about the effectiveness of AAOIFI's standards as well as its potential as a driver for further standardization, particularly with a view to *takaful*.

A forensic assessment of whether Brummer's three coercive forces, i.e. market disciplines for firms, reputational constraints for regulators, and institutional sanctions, influence the three actors' behaviour in the sphere of Islamic Finance, would require a more rigorous and quantitative analysis than this paper can provide. There is, however, value in applying the logic of Brummer's framework (perhaps as a basis for forensic examination).

a) Market Discipline and Reputational Constraints

Generally, market participants react to how other market participants comply or defect from regulatory soft law.¹²⁰ In efficient markets firms will be rewarded for complying with practices that are viewed by investors as contributing to profitability.¹²¹ Shareholders, potential counterparties to financial transactions, as well as analysts will likely have more faith in well-regulated companies, contributing to higher valuations of those firms.¹²² AAOIFI's *shari'a* standards and *fatawas* are widely accepted as market standard. They create a strong and internationally recognized label which is important for products, whose key differentiator (vis-à-vis conventional products) is being Islamic.¹²³ Creating an alternative, globally accepted label would require high costs and face a significant risk of failure, since part of the legitimacy of the existing standards derives from the organizations' broad and inclusive membership and the sharing of resources – all of which is difficult to replicate. There is also a compliance pull towards accepting those standards, because the more market participants comply, the more the value of compliance increases.

119 BRUMMER, *supra* n. 111, at 262.

120 BRUMMER, *supra* n. 111, at 287.

121 BRUMMER, *supra* n. 111, at 287.

122 BRUMMER, *supra* n. 111, at 288.

123 The IFSB calls it the *raison d'être* of *takaful* (see IFSB Standard 8, p. 3, no. 11, available at: <http://www.ifsb.org/standard/ED8Takaful%20Governance%20Standard.pdf>, last accessed 29 November 2015).

The reputation of a national regulator depends on its capability – as perceived by other regulators and market participants – and its exposure. The high degree of technical capacity required for dealing with Islamic finance institutions,¹²⁴ and the resulting scarcity of human resources require substantial investments from national regulators to provide state-of-the-art regulation and supervision. A regulator's exposure depends on the degree of regulatory coordination and communication with market participants (through regulations, instructions, or regulatory advice). Mutual recognition schemes are a case in point. Regulators often rely on one another with respect to informational exchange and expect compliance. Where those expectations are frustrated the compliant party will rethink and re-evaluate its expectations and adjust accordingly.¹²⁵ Reputational benefits for regulators complying with AAOIFI standards might play a role, but this seems to be difficult to ascertain. Perhaps one aspect that promotes regulatory participation is that regulators' reputation depends on their capability – as perceived by other regulators and market participants. Capability is a specific challenge in the context of Islamic finance regulation as expertise in Islamic law already an immensely deep and broad expertise. In combination with expertise in finance and economics, i.e. the expertise conventional financial regulation requires apart from politics, capable persons are a scarce resource. The "capacity-challenge" and the increasing exposure regulators face in dealing with a growing and increasingly international industry likely leads regulators to embrace international standards.

Based on the foregoing, the applicability of market discipline and reputational benefits appear to be quite plausible with respect to AAOIFI's standards. However, in practice there is non-compliance even by major members of AAOIFI. Saudi Arabia, deviates with respect to the distribution of the insurance surplus. While the AAOIFI standard requires that such surplus belongs to the policyholders,¹²⁶ Saudi Arabian law requires that at least 90 % is transferred to the income statement of the

¹²⁴ Mohammed Shafiqe provides a brief overview of which skills are rare and what kinds of efforts are under way to reduce the shortage of human resources (see ANWAR HABIBA/MILLAR RODERICK, *Islamic Finance: A Guide for International Business and Investment*, GMB Publishing, at 143).

¹²⁵ BRUMMER, *supra* n. 111, at 286.

¹²⁶ AAOIFI Shari'a Standard No. 26, Section 12.

takaful operator's shareholders, and only 10 % of the net surplus belongs to the policyholders.¹²⁷ It is important to note that Saudi Arabia is the world's largest market for *takaful*,¹²⁸ and is expected to continue growing.¹²⁹ Considering the economic importance and leading role in AAOIFI as well as the countries' self-perception as guardian of the holy places¹³⁰, Saudi Arabia is a "price-maker rather than a price-taker"¹³¹ in the realm of Islamic finance and *takaful* in particular. Against that background the country may be less motivated to exercise discipline regarding AAOIFI's standards.

127 See page 2 of the Surplus Distribution Policy of Saudi Arabian Monetary Agency (SAMA), available at: http://www.sama.gov.sa/en-US/Laws/InsuranceRulesAndRegulations/IIR_-_Surplus_Distribution_Policy.pdf, last accessed 29 November 2015, and Article 70 lit. e of the Implementing Regulations of the Law on Supervision of Cooperative insurance Companies promulgated by Royal Decree No. (M/32) dated 2. 6. 1424 H, available at: http://www.sama.gov.sa/enUS/Laws/InsuranceRulesAndRegulations/IIR_4600_-C_ReguExecutive_En_2005_08_18_V1.pdf, last accessed 29 November 2015.

128 Ernst & Young, Global Takaful Insights 2014, 3, available at: [http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/\\$FILE/EY-global-takaful-insights-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/$FILE/EY-global-takaful-insights-2014.pdf), last accessed 29 November 2015.

129 Ernst & Young, Global Takaful Insights 2014, 6 – 7, available at: [http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/\\$FILE/EY-global-takaful-insights-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/$FILE/EY-global-takaful-insights-2014.pdf), last accessed 29 November 2015. A relatively low insurance penetration rate of (according to the Saudi Arabia Monetary Agency) below 1 % in 2013 and just slightly above 1 % in 2014 (see http://www.sama.gov.sa/sites/samaen/Insurance/InsuranceLib/Sur_KSA%20Market%20Report_2013_English-vf.pdf, last accessed 29 November 2015, p. 7) indicates growth potential.

130 See for example: https://saudiembassy.net/about/country-information/Islam/guardian_of_the_Holy_Places.aspx, last accessed 29 November 2015; according to Al-Yahia and Fustier it is a key foreign policy priority of Saudi Arabia to fulfill and maintain its role as leader of the Islamic world, see: AL YAHYA KHALID/FUSTIER NATHALIE, Saudi Arabia as a Humanitarian Donor: High Potential, Little Institutionalization, available at: http://www.gppi.net/fileadmin/user_upload/media/pub/2011/al-yahya-fustier_2011-saudi-arabia-as-humanitarian-donor_gppi.pdf, last accessed 29 November 2015).

131 This expression is borrowed from Drezner, who used it to describe the relative power of great powers (DREZNER, *supra* n. 93, at 34).

b) Institutional Sanctions

Institutional sanctions may, according to Brummer, support the effectiveness of soft law.¹³² Such institutional sanctions could be imposed by international organizations such as the World Bank and the IMF. They are, for example, both members of the International Association of Insurance Supervisors (“IAIS”). While the IAIS itself does not impose any sanctions for non-compliance of its members with its standards and principles, the World Bank and the IMF impose conditionality considerations on their loans,¹³³ and monitor their borrowers through a Financial Sector Assessment Program (“FSAP”). The FSAP includes a comprehensive and in-depth analysis of a country’s financial sector,¹³⁴ including compliance with the IAIS. The results of the FSAP analysis are summarized and published in Reports on Observance of Standards and Codes (“ROSCs”).¹³⁵ The ROSCs intend to identify developmental and technical assistance needs, identify risks, and help prioritize national policy objectives.¹³⁶ ROSCs are voluntary, which leads Brummer to comment that only the best performers are participating.¹³⁷ However, their absence may already be seen as a signal of defection, according to Drezner.¹³⁸

AAOIFI does not sanction non-compliance of its members with its standards. Yet, on the national level some countries have integrated the AAOIFI standards into domestic law in one way or another. For example in Bahrain, where the Central Bank acts as national regulator for financial services, rendering Islamic insurance services requires compliance with the principles of the *shari’a*. To ensure such compliance a *shari’a* board must be established, and the AAOIFI standards must be adhered to. Also, in Malaysia, where the central insurance regulator is located within the

132 BRUMMER, *supra* n. 111, at 289.

133 Brummer refers to the conditionality of the IMF and the World Bank as the lenders of last resort and sources of developmental assistance (BRUMMER, *supra* n. 111, at 289).

134 See <http://www.imf.org/external/np/fsap/fssa.aspx>, last accessed 29 November 2015.

135 BRUMMER, *supra* n. 111, at 291.

136 The Financial Sector Assessment Program (FSAP) is a comprehensive and in-depth analysis of a country’s financial sector, the results of which may be summarized and published in ROSC (see BRUMMER, *supra* n. 111, at 280 – 281) and for more detail: <https://www.imf.org/external/NP/fsap/fsap.aspx>, last accessed 29 November 2015).

137 BRUMMER, *supra* n. 111, at 291.

138 DREZNER, *supra* n. 93, at 141.

central bank, a *shari'a* board must be established and the standards of the AAOIFI must be implemented. Such direct and dynamic references incorporate international financial regulations into national law, elevating international soft law to national hard law. Such dynamic referral is remarkable as it concedes considerable authority to AAOIFI, albeit on a national level only.

On the international level, however, International Islamic Finance Regulation lacks the institutional embeddedness of its conventional counterparts.

Islamic finance related codes and standards are currently not subject of such ROSCs. On November 11, 2015 Christine Lagarde, Managing Director of the IMF issued a statement at the conclusion of her visit to Kuwait saying “Going forward, we will be working towards taking an institutional view on better integrating Islamic finance into our surveillance work”.¹³⁹ The IMF already takes into account “the implications of Islamic finance for those members where it has been relevant, in the context of (...) its Financial Sector Assessment Program (FSAP) assessments”¹⁴⁰. However, such integration appears to relate to prudential regulation rather than extending to level two coordination within the meaning of this paper. The Islamic Development Bank, whose purpose is “to foster the economic development and social progress of member countries and Muslim communities individually as well as jointly in accordance with the principles of *shari'a* i. e., Islamic Law”,¹⁴¹ refrains from interfering with the political choices of the countries it finances.¹⁴² It offers its Islamic

139 IMF Press Release No. 15/512, available at: <http://www.imf.org/external/np/sec/pr/2015/pr15512.htm>, last accessed 29 November 2015.

140 KAMMER ALFRED/NORAT MOHAMED MARCO PIÑÓN/ANANTHAKRISHNAN PRASAD/TOWE CHRISTOPHER/ZEINE ZEIDANE, AND AN IMF STAFF TEAM, *Islamic Finance: Opportunities, Challenges, and Policy Options*, IMF Staff Discussion Note April 2015, available at: <http://www.imf.org/external/pubs/ft/sdn/2015/sdn1505.pdf>, last accessed 29 November 2015.

141 <http://www.isdb.org/irj/portal/anonymouse?NavigationTarget=navurl://24de0d5fioda906-da85e96ac356b7af0>, last accessed 29 November 2015.

142 The financings made available by the IDB are *shari'a* compliant, but the IDB does not attach policy conditions to its financings like the IMF and WB do. For a more general observation including the IDB see for example Neumayer, who states that Arab aid money usually comes untied, but he seems to refer primarily to economic conditions such as restrictions on what kind of goods may be purchased (NEUMAYER ERIC, *What Factors Determine the Allocation of Aid by Arab Countries and Multilateral Agencies*, The Journal of Development Studies 39, No. 4, 2003, available at: http://eprints.lse.ac.uk/615/1/JournalofDevelopmentStudies_39%284%29.pdf, last accessed 29 November 2015.

products, but does not attach political conditions in order to influence a countries' policies. Theoretically, the Islamic Development Bank could demand compliance with international Islamic standards such as the AAOIFI standards as a prerequisite for eligibility. It could, for example, make any support subject to a certain form of level two coordination, i. e. some degree of integration of AAOIFI's standards into the recipient country's national legal framework. The IDB does, however, not pursue such a conditionality approach. With respect to level two coordination external institutional sanctions for non-compliance with international Islamic finance regulation does not exist.

VI. Conclusion

Islamic Finance shifted from its socio-economic beginnings to a rather legalistic approach underlying today's global industry. Whether the current forms will continue to lead the way for further expansion and growth could depend on the institutional framework within which the industry operates. Part one explained the diverse and pluralistic nature of Islamic law and its interpretation. Against that background AAOIFI as an international body with broad multinational membership from the private and public sector, and a single *shari'a* board assessing the *shari'a* compliance of financial instruments and transactions is a quite remarkable achievement in itself. But how effective are its norms with regard to *takaful*?

AAOIFI generates a market standard and serves as a benchmark for corporate *shari'a* boards as well as for national regulators. However, it appears to be important to also note that AAOIFI should be understood as a technocratic forum rather than international effort to produce international law. AAOIFI's main function is bundling resources and exchanging knowledge and experience. Several reasons justify that description: first, AAOIFI itself does not impose sanctions for non-compliance with its standards; second, AAOIFI's standards are not embedded in other international institutions processes which could impose (direct or indirect) sanctions for non-compliance. To what extent there may be coercive forces at play, such as market discipline, remains to be examined in detail. Yet, in practice there is non-compliance even by major members of AAOIFI. Saudi Arabia, for example, deviates with

respect to the insurance surplus. While AAOIFI standard requires that such surplus belongs to the policyholders,¹⁴³ Saudi Arabian law requires that at least 90 % is transferred to the income statement of the *takaful* operator's shareholders, and only 10 % of the net surplus belongs to the policyholders.¹⁴⁴ Such deviation is not a Saudi Arabia is the world's largest market for *takaful*,¹⁴⁵ and is expected to continue growing.¹⁴⁶ In 2014 the global estimation is US\$ 14 billion, 48 % of which are believed to be the Saudi Arabia's share.¹⁴⁷ Considering the economic importance and leading role in AAOIFI as well as the countries' self-perception as guardian of the holy places¹⁴⁸, Saudi Arabia is a "price-maker rather than a price-taker"¹⁴⁹

143 AAOIFI Shari'a Standard No. 26, Section 12.

144 See page 2 of the Surplus Distribution Policy of Saudi Arabian Monetary Agency (SAMA), available at: http://www.sama.gov.sa/en-US/Laws/InsuranceRulesAndRegulations/IIR_-_Surplus_Distribution_Policy.pdf, last accessed 29 November 2015, and Article 70 lit. e of the Implementing Regulations of the Law on Supervision of Cooperative insurance Companies promulgated by Royal Decree No. (M/32) dated 2. 6.1424 H, available at: http://www.sama.gov.sa/enUS/Laws/InsuranceRulesAndRegulations/IIR_4600_-C_ReguExecutive_En_2005_08_18_V1.pdf, last accessed 29 November 2015.

145 Ernst & Young, Global Takaful Insights 2014, 3, available at:

[http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/\\$FILE/EY-global-takaful-insights-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/$FILE/EY-global-takaful-insights-2014.pdf), last accessed 29 November 2015.

146 Ernst & Young, Global Takaful Insights 2014, 6 – 7, available at:

[http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/\\$FILE/EY-global-takaful-insights-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/$FILE/EY-global-takaful-insights-2014.pdf), last accessed 29 November 2015. A relatively low insurance penetration rate of (according to the Saudi Arabia Monetary Agency) below 1 % in 2013 and just slightly above 1 % in 2014

(see http://www.sama.gov.sa/sites/samaen/Insurance/InsuranceLib/Sur_KSA%20Market%20Report_2013_English-vf.pdf, last accessed 29 November 2015, p. 7) indicates growth potential.

147 Ernst & Young, Global Takaful Insights 2014, 6 – 7, available at:

[http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/\\$FILE/EY-global-takaful-insights-2014.pdf](http://www.ey.com/Publication/vwLUAssets/EY_Global_Takaful_Insights_2014/$FILE/EY-global-takaful-insights-2014.pdf), last accessed 29 November 2015. Other estimations indicate a slightly higher percentage (see <http://www.islamicfinance.com/2015/01/takaful/>, last accessed 29 November 2015).

148 See for example: https://saudiembassy.net/about/country-information/Islam/guardian_of_the_Holy_Places.aspx, last accessed 29 November 2015; according to Al-Yahia and Fustier it is a key foreign policy priority of Saudi Arabia to fulfill and maintain its role as leader of the Islamic world, see: AL YAHYA KHALID/FUSTIER NATHALIE, *Saudi Arabia as a Humanitarian Donor: High Potential, Little Institutionalization*, available at: http://www.gppi.net/fileadmin/user_upload/media/pub/2011/al-yahya-fustier_2011_saudi-arabia-as-humanitarian-donor_gppi.pdf, last accessed 29 November 2015).

in the realm of Islamic finance and *takaful* in particular. Against that background the country may be less motivated to exercise discipline regarding AAOIFI's standards. Considering those aspects, it should be prudent to state that AAOIFI is indeed a conduit for soft law, albeit with limited effectiveness. Therefore, the potential for further growth through standardization seems to be limited. If Islamic Finance is to continue growing it may rather be driven by national programs or the demand side, perhaps in the form of a more socio-economically oriented approach (in some ways perhaps not so different from the general trend towards social and ethical finance). Examining the potential for growth through such approach e.g. through social impact funds remains to be examined in a different paper.

¹⁴⁹ This expression is borrowed from DREZNER, who used it to describe the relative power of great powers (DREZNER, *supra* n. 93, at 34).

Appendix 1

In the name of God, the Merciful, the Compassionate
The Kingdom of Saudi Arabia
Department of Research, Iftaa and Guidance
Secretariat General of the Supreme Council of the Senior Ulama
Resolution No. 51 dated 4th Rabi Thani 1397 Hejra [corresponding to 23rd March
1977 Gregorian]
Praise be to God and prayers and peace be upon the last Prophet.

At its tenth session held in Riyadh in Rabi Awal 1397 the Supreme Council of the Senior Ulama has looked into the documents prepared by the group of experts concerning a possible alternative to commercial insurance, so as to achieve the Islamic Law goal of cooperation, for which it has been created, and its validity as a lawful alternative to commercial insurance in all its forms.

After hearing all relevant facts, discussions and deliberations, the council, with the exception of the learned Sheikh Abdullah Bin Manei, decided that cooperative insurance is permissible and that it is possible to adopt it instead of commercial insurance, in order that the nation [of Islam] can achieve cooperation according to Islamic Law, for the following reasons:

1st: Cooperative insurance is a form of contract of donation, which means the distribution of risks and anticipation of sharing the responsibility in case of disasters. This is based on the fact that people contribute in cash to compensate those who sustain damage. In doing so, the cooperative insurance group does not aim to trade in, or make a profit from, the money of others. Its members only mean to distribute the risks among themselves and to cooperate in bearing the damage.

2nd: Cooperative insurance is free of usury in its two forms, *riba al fadul* and *riba al nisa*. The contributors' contracts are not usurious, and they do not exploit the collected money in usurious transactions.

3rd: The fact that the contributors in cooperative insurance ignore to define the benefit they gain does not harm, because they are donors. Therefore, there are no risks or gambling, and it is different from commercial insurance which is a contract of commercial financial transactions.

4th: It is permissible that the contributors or their representatives may invest the collected money to achieve the goals for which this cooperation is created, whether is done generally or for a specified sum of money. The council, with the exception of the learned Sheikh Abdullah Bin Manei, agrees that the cooperative insurance can be in the form of a mixed cooperative insurance company for the following reasons:

First: To be obligated by the concept of Islamic economics, which leaves the responsibility for individual to carry out the different economic projects, and the role of the state, comes only as a complementary element, for what the individuals have

failed to undertake, as directors and controllers, to guarantee the success of these projects and the correctness of their transactions.

Second: To be obligated by the concept of cooperative insurance, in which case the contributors shall autonomously govern the institution.

Third: Training the people in direct cooperative insurance, and inspire them to contribute positively. By such inspiration and through such contribution, self-awareness can be maintained, and this process will help lessen the risks and losses and develop success of the institution.

Fourth: The fact of its being a mixed company shall not depict it as a governmental donation or grant to the beneficiaries. The government only protects and supports. Positive relationship as it is, nevertheless, each party's responsibility remains firm.

The council, except the learned Sheikh Abdullah Bin Manei, requires that, in drafting the detailed provisions for the cooperative insurance, the following guidelines should be included:

First: The cooperative insurance organization shall have branches Kingdom-wide, in addition to its head office. The organization shall include departments for all kinds of risks covered by insurance, such as a department for health insurance, insurance against disability, senility, and-so-on. Or a department for peddlers, merchants, students, engineers, lawyers, physicians, and-so-on.

Second: The cooperative insurance organization shall be farsighted and not adopt complicated measures.

Third: The organization shall have a supreme board to set forth policies, regulations and resolutions, to be valid and binding as long as they are in accordance with Islamic Law.

Fourth: The government as well as the contributors shall be represented on this council. The supervision by the government shall guarantee against any possible mal-administration or fraud and ensure its safety.

Fifth: If the risks drain the institution's resources in a manner which necessitates the increase of its capital, the government shall shoulder this responsibility jointly with the contributors. The council, with the exception of the learned Sheikh Abdullah Bin Manei, resolved that a set of detailed articles shall be drafted by a group of experts specialized in this field, nominated by the government. After they finish this task, the articles shall be

entrusted to the Supreme Council of the Senior Ulama to review them in accordance with Islamic Law. May God bless us all.

Supreme Council of the Senior Ulama

Chairman of the Tenth Session: Abdulaziz Bin Baz (stamped)

Abdul Razaq Afifi (signed)

Abdullah Bin Mohamed Bin Hameed (stamped)

Abdullah Khayat (signed)

Mohamed Al Harakan (stamped)

Salih Bin Uthaimen (stamped)

Ibrahim Bin Mohamed Al Sheikh (signed)

Suliman Bin Abaid (signed)

Mohamed Bin Jubair (signed)

Abdullah Bin Alian (signed)

Rashid Bin ... (signed)

Abdullah Bin Ga'wood (signed)

Salih Bin Lihaidan (signed)

Abdullah Bin Minei (signed)

Appendix 2

Bismillah Arrahman Arrahim

Praise be to Allah, the Lord of the Universe, and Prayers and Blessings be upon

Sayyidina Muhammad, the last of the Prophets, and upon his Family and his Companions

RESOLUTION N° 9 (9/2)

CONCERNING

INSURANCE AND REINSURANCE

The Council of the Islamic Fiqh Academy, during its second session, held in Jeddah (Kingdom of Saudi Arabia), from 10 to 16 Rabiul Thani 1406 H (22 – 28 December 1985);

After having reviewed the presentations made by the participating scholars during the session on the subject of “Insurance and reinsurance”; And after discussing the same;

Having closely examined all the types and forms of insurance and having an indepth review of the basic principles upon which they are founded and their goal and objectives;

Having looked into what has been issued by the Fiqh Academies and other edifying institutions in this regard;

RESOLVES

First: The commercial insurance contract with a fixed periodical premium, which is commonly used by commercial insurance companies, is a contract which contains major elements of deceit, which void the contract and, therefore is prohibited (haram) according to *Shari'a*.

- Second: The alternative contract, which conforms, to the principles of Islamic dealings is the contract of cooperative insurance, which is founded on the basis of charity and cooperation. Similarly, is the case of reinsurance based on the principle of cooperative insurance.
- Third: The Academy invites the Islamic countries to work on establishing cooperative insurance institutions and cooperative entities for the reinsurance, in order to liberate the Islamic economy from exploitation and put an end to the violation of the system which Allah has chosen for this Ummah.

Verily, Allah is All-Knowing

The Normalization of Saudi Family Law

CHIBLI MALLAT*

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Abstract

This article examines a large set of court decisions made public recently by the Saudi government in family matters. In 2007, the publication of law reporters finally allows lawyers and scholars to examine detailed decisions of disputes adjudicated in court. The full range of family law litigation is examined here in the light of court decisions: Marriage, divorce, maintenance, custody, filiation, and succession, including hereditary trusts. The overall picture is one of a functioning legal system, coherent and balanced, which begs the need for a comprehensive family code. Even in the absence of a code, it

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Note on transliteration. With the rise in importance of Islamic law in the world, a number of words have become common, such as fatwa, which the *Oxford English Dictionary* has now adopted in the English lexicon. It is therefore not italicized here. Similarly, I do not italicize the following familiar names amongst scholars: mufti (the issuer of fatwas), qadi (judge), talaq (repudiation, divorce), waqf (trust), hadith (Prophetic saying). I generally adopt the transliteration of the *International Journal of Middle Eastern Studies*, without the diacritics. *Al al-ta'rif* is sometimes dropped for aural convenience or common use, such as Shatibi instead of al-Shatibi. There are no capital letters in Arabic, but I use a capital at the beginning of a sentence, and for personal names. When two dates are mentioned, the first is Hijri, the second is Gregorian. The internet has several sites that allow easy conversion.

concludes, legal norms in the field of Saudi family law are established and fathomable.

I. Introduction

With the adoption by Qatar, the United Arab Emirates and Bahrain of comprehensive family law codes in the first decade of the 21st century, Saudi Arabia is the last important Middle Eastern country holding out on codification in this central area of the law.¹

Family law codification is much easier than the codification of civil law. The field is better circumscribed, and includes four central areas which legislation deals with comprehensively: (a) marriage and marital life (b) separation and maintenance, (c) children, including custody and filiation, and (d) succession, including sometimes hereditary trusts, waqfs.

With the fall into obsolescence of slavery in the 20th century,² family law was restricted to the categories mentioned above. This is true for all schools of law, including the Hanbalis who are now well represented by the Qatar

1 The United Arab Emirates adopted a family code in 2005, Qatar in 2006, Bahrain in 2009. In the Arab Gulf, this comes after Oman in 1997 and Kuwait in 1984. Recurring reports to codify family law in Saudi Arabia appeared in recent years, see e.g. 'Kingdom to codify personal affairs law', *Saudi Gazette*, 27 July 2016 (mentioning three months for the Shura Council to transfer a family Code to the King for approval).

2 Classical law presents a more complex scene because of slavery and the additional layers that slavery forced onto a highly stratified system, both for civil (sale and property, manumission) and family law (marriage, filiation, inheritance). Women and male slaves, and their children, stand at the lower side of a social spectrum compared to their free human counterparts in the classical age, and there are several gradations at all levels, often noted in the law treatises. This is also true for some court cases extant from the classical age. We have from Middle Eastern courts before the modern era a fair amount of cases dealing with slaves. In one of the earliest decisions available, from the Jerusalem Haram al-Sharif in 1394, manumission was central. Plaintiffs were former slaves who claimed they had been freed by their owner, only to be turned down by the judge on account that the owner was under age when the manumission took place. *Al-Muqaddam at-Tawashi'Anbar et al. v. estate of Muhibb ad-Din Ahmad ibn Qadi al-Qudat Burhan ad-Din Ibrahim ibn Jama'a*, Case 31, dated 19 Muharram 797/14 December 1394, see my *Introduction to Middle Eastern Law*, Oxford 2007, 63 n. 228 [hereinafter MALLAT, IMEL].

Family Law.³ Tiny Qatar is particularly interesting for the Saudi neighbour, because it is the only other independent state in the world which professes to be Hanbali. Qatari judges are asked by the law to apply the Hanbali school precepts before turning to the other four schools.⁴ The Qatari law is divided in five books: marriage⁵ (book 1), separation⁶ (book 2), a short two-article book on capacity and guardianship⁷ (book 3), a book on gifts and wills⁸ (book 4), and a final book on inheritance⁹ (book 5).

Hanbalism in family law is dented by the now century-long tradition of eclecticism in the codification process between the four Sunni schools.¹⁰ The Qatar Family Law of 2006 owes as much to the long comparative effort that culminated in a model Arab Family Code of 1986, as it owes to purely Hanbali dispositions.¹¹ Saudi Arabia could easily follow in the steps

3 *Qanun al-usra*, Law 22 of 2006, hereinafter QFL, available on the internet at Al Meezan (*al-mizan*), the Qatar Legal Portal, in Arabic and in English.

4 QFL Art. 3: 'In what does not get mentioned in this Law, the preponderant opinion (*ra'i rajeh*) of the Hanbali school is applied, so long as the court does not decide otherwise for reasons it must explain in its decision. If there is no preponderant opinion in the Hanbali school in a case for which no text applies in this Law, the judge may apply what he sees adequate amongst the opinions of the four schools. If this is not possible, the judge applies the general rules of Islamic law (*shari'a*).' Article 4 is murkier however: 'This law applies to those on whom the Hanbali school applies, otherwise the rules that are specific to them will apply. For non-Muslims, the rules that are specific to them apply. In all cases, this Law applies on those who request it or are different in religion or in school.'

5 *nikah*.

6 *firqa*.

7 *ahliyya wa wilaya*.

8 *al-hiba wal-wasiyya*.

9 *irth*.

10 On eclecticism, *takhayyur*, in modern family law, see MALLAT, IMEL, 363 – 4. On schools (*madhhab*, plural *madhaheb*), see MALLAT, IMEL, 111 – 21.

11 Presentation and discussion in MALLAT, IMEL, 367 – 77. In the case of the Arab Gulf, legislation is also inspired by a similar family law restatement known as 'the Muscat Document' (full title '*wathiqat masqat lil-nizam (al-qanun) al-muwahhad lil-ahwal al-shakhsiyya*'), Muscat Document of the GCC Common Law of Personal Status', adopted by the members of the Gulf Cooperation Council states in 1996. See generally MOELLER LENA-MARIA, *Struggling for a modern family law: A Khaleeji perspective*, in YASSARI NADJMA (ed.), *Changing God's law: The Dynamics of Middle Eastern family law*, Routledge, London/ New York 2016, 83 – 112.

of its Qatari neighbour,¹² but the Saudi scene is marginally complicated by a significant minority of Shi'is in the Kingdom.¹³

There is, however, no urgency. Saudi courts do not look particularly at loss in the absence of a written family code. A significant set of published decisions in Saudi Arabia allows an effective mapping of the field of family law even in the absence of a dedicated legislation. Contrary to received wisdom, family law in Saudi Arabia can now draw on a solid set of published court decisions. A code would not particularly change its landscape.

Professional, public reporting of court decisions started decisively with the *Mudawwana*,¹⁴ a Saudi reporter published in three volumes in 2007.¹⁵

At first instance, the court consists of one judge, who is mentioned here. In cassation there are usually three judges, whose names are mentioned only

12 Recurring rumours on imminent codification of family law are confirmed in the press, see *supra* n. 1, together with serious public discussions around delicate or controversial issues. A lengthy report carried out by the newspaper *al-Riyadh* on 23 April 2013 shows the extensive discussions about family law rights in expectation of a Saudi family law code, '*Nizam "al-ahwal al-shakhsiyya" yantashir lil-'adala wa himayat al-usra* (The Law of 'Personal Status' (would) vindicate justice and the protection of the family)', available at www.alriyadh.com/828651.

13 Bahrain ignored the problem of its Shi'i population with a family law, passed in 2009, that applies only to Sunnis. See WELCHMAN LYNN, Bahrain, Qatar, UAE: First time family law codifications in three Gulf States, in ATKIN BILL (ed.), *International Survey of Family Law 2010 edition*, July 2010, 163–178.

14 This is a compilation in three volumes of Saudi cases undertaken by the Ministry of Justice and published as *Mudawwanatal-ahkam al-qada'iyya* (Reporter of judicial decisions), Riyadh, 1428/2007 to 1429/2008. It is available at the time of completing this article on feqhbooks.com [Hereinafter *Mudawwana*] Note that *mudawwana* simply means notebook, register, here reporter, and is also the official name of the Family Law of Morocco, passed initially in 1958 and significantly revised in 2004. See MALLAT, IMEL, 400–2. The most famous *Mudawwana* in the Arab legal tradition is the mostly hadith-based compilation of the eponym of the Maliki School, Malik ibn Anas (d. 795), whose *Muwatta'* was edited by his student Sahnun (d. 854) under the name *alMudawwana alkubra*, 16 vols, Cairo, 1906 and other editions.

15 *Note on cases and case citation*. No uniform citation, in English or in Arabic, has yet been adopted for Saudi cases. Thereports themselves come in different shapes and with different types of headnotes. The first time a case is mentioned in this article, the footnote includes the full reference and pagination, so that the reader can appreciate the length of the case. The second time the case is mentioned, mention appears in the main text (e. g., M.2.33, for *Mudawwana* volume 2 page 33). Following the system I adopted in IMEL, I have reduced as much as possible the use of Arabic words in the text.

when the first instance judge's decision is reversed. Other judicial bodies or quasi-judicial bodies often include the names of the judge or judges, or the mufti in some cases. The parties are never named in the Saudi decisions. Sometimes the date mentioned in the heading is not the same as the one found in the text. The slight discrepancy is probably due to the difference between the decision and the writing up of the case, which can take place a few days after it was issued. The decision is usually read in the presence of the parties, and the judge explains the appeals' procedure, important especially with regard to divorce cases because the decree of divorce is final only upon confirmation in cassation. For the first time in the history of the country, the lawyer, litigator, judge, law professor, can look at disputes and the way judges ground their judgments to solve them in everyday life. The Mudawwana is particularly alluring as a compilation because the decisions are selected from all Saudi regions, with cases almost invariably starting in first instance jurisdictions across the vast country. The language of the Mudawwana reports is often raw. Saudi decisions give a strong flavor of real disputes, almost as if the reader were in the midst of a reality television show. Litigants speak their mind in open court before the judge with their words reported often verbatim. The parties' behaviour, as well as that of the witnesses and the qadi/judge, are richly documented in the decisions.

Most of the cases in the Mudawwana operate in first instance, and are rarely reversed on appeal to the court of cassation, owing to the fiction in the Kingdom that there is no formal appeal. Cassation¹⁶ is considered more of a court of verification¹⁷ in order not to jar with the received notion that the qadi's decision could not be reviewed by another judge. We therefore end up with reports of mainly first instance court decisions. When they are reversed or queried on 'verification', the issue is often a controversial one, and the law gets refined in 'grey areas'. As elsewhere in the world, the facts matter more and are presented in more detail in first instance, than on appeal or in cassation.

16 *tamyiz* in the Levant, *naqd* in Egypt. In 2007, a comprehensive law (Nizam al-qada', 19. 9. 1428/1.10/2007) reformed the judicial system, introducing a three-tier structure including courts of first instance, courts of appeal, and a supreme court, *al-mahkama al-ulya*, (Art. 9). The change has been implemented slowly.

17 *tadqiq*.

The 2007–8 Mudawwana stands as a breaking moment in the legal history of Saudi Arabia. At the beginning of the first decade of 21st century, the government undertook the publishing of hundreds of decisions by general courts, as well as rulings of administrative courts and agencies.¹⁸ The Mudawwana provides a remarkable record of its own. The breadth of its stories is remarkable. It offers unprecedented insight into daily life in Saudi Arabia, as well as its legal system and the reasoning and sources used by its judges.

With the Mudawwana and subsequent efforts to publish decisions, Saudi law has normalized. Through the prism of the courts in the classical age, Islamic law becomes ‘normal’.¹⁹ I use the word normal in this article in both meanings of the word as usual, expected, using common sense to adjudicate and solve a conflict; and normal as bearer of norms, common rules by which society lives. With Saudi cases now available to the public, and to the professionals of the law, judges, lawyers, law professors and notary-publics, norms emerge which create precedent, and therefore more order, more regularity, more stability, and more accountability. Citizens can now rely on a solid framework of reference for their family affairs. By

18 Until the publication of the first volume of the Mudawwana in 2007, case-law reporting was in-existent, except for a few registers of mostly uninteresting cases in Diwan al-Mazalem around 1980. Typed, photocopied decisions circulated only amongst prominent law offices looking for precious precedents and examples. Since 2007, a determined effort by the Ministry of Justice, together with the courts’ administration, has resulted in series of reported judgments, including the Mudawwana and Diwan al-Mazalem’s *Majmu’at al-ahkam wal-mabade’* (Collection of decisions and principles), which is available on the internet on the Diwan’s site, www.bog.gov.sa, and in the paper publication by the Diwan’s technical department of six annual sets of decisions covering the Hegire years 1427–1432 (2006–2012, the latest set for 1432/2012 published in 1436/2015). The Diwan has been the main commercial and administrative court of the Kingdom, but it has no jurisdiction in family law matters. Starting around 2012, the Ministry of Justice started publishing a large number of cases from the courts across the Kingdom. This includes *Majmu’at al-ahkam al-qada’iyya*, a massive collection of court decisions in 30 volumes bearing the date 1436/2015, which was made available by the Ministry of Justice for decisions issued in 1434/2013 and posted on the internet on <https://beta.moj.gov.sa/ar/SystemsAndRegulations/Pages/System1434.aspx>.

[Herein Ahkam, followed by the volume and the pagination]. Unlike the Mudawwana, Ahkam reports do not mention the name of the judges.

19 See for the argument of the common sense and ‘normality’ of law in the classical age studied from the perspective of the judge dispensing justice, the section entitled ‘Courts, judges, case-law’ in MALLAT, IMEL, 61–85.

the mere publication of its court records, Saudi Arabia has normalized its law, including Islamic law, which its judges apply to solve everyday conflicts.

II. Marriage and marital life

I start with a colorful case in which the plaintiff is a first wife requesting fair treatment by her polygamous husband.²⁰ She is specifically asking the court to force him to spend the same amount of time with her as he does with his second wife, to not travel with the second wife more often than he travels with her, and to not visit the second wife too often during the day. Her three requests are rooted in the Qur'anic verse on the need for a husband 'to treat all his wives fairly.'²¹ All three demands were granted by judge Tamim al-'Unayzan:

The situation being as described, and considering her request to be treated well and justly with his other wife in both residence and travel inside the Kingdom, and her request for him not to be absent without excuse; and since it appears that the defendant lives with his other wife in Hufuf, the place where the plaintiff resides, and since he stated that he did not treat the plaintiff well, and expressed his readiness to stay in the plaintiff's house in... [location omitted], night after night, and to travel with her like he travels with his other wife; and since he doesn't accept her leaving [him] and since she is ready to return home; and considering what the scholars' opinion in the section on the treatment of women, which requires for each spouse to treat the other well and in pleasant companionship, to reject any harm, to provide for each other generously, and to not deflect this [generosity] with mendacity or harm; and since each of the spouses is bound to improve his companion's character and be kind to him and prevent harm from affecting him; and since the man who has two wives or more must divide his stay night by night. Night sets the standard because a human being repairs at night to his house and takes comfort with his family and usually sleeps in his bed with his wife. His livelihood is by day, and it is forbidden for him to go to another [woman] during the day except for a special need such as paying maintenance owed or visiting for health reasons or asking about something he needs to know, or visiting because he has been away for a long time. And the husband can travel with one of his wives only after a draw of lots²² or if the other wives agree to that, for God has ordered to 'treat them fairly', and to give 'wives the good they deserve as well as the good they owe';²³

20 M.1.76 – 81. Decided 20. 1. 1419/16. 5. 1998, confirmed in cassation on 16. 2. 1419/11. 6. 1998.

21 Qur'an 4: 129.

22 *qur'a*.

23 Qur'an 4:19 and 2:228 respectively.

'Aisha [said to be the favorite wife of Prophet Muhammad] is reported to have said: 'The Prophet used to divide matters between us justly.' (M.1.78 – 9)

This is powerful literalism by the judge in favour of the wife left behind.²⁴ Judge 'Unayzan's decision does not reveal why the defendant husband did not simply repudiate his first wife, instead of undergoing all this timesharing exercise she was requesting. The matter of his children living with her appears to have weighed in favour of the defendant husband remaining in the first marriage, or, more cynically, he may have been reluctant to divorce because she had more means to spend on the children than he could afford for their upkeep as a divorced father.

Judge 'Unayzan was behind another sensible judgment. The case was brought on behalf of his mentally impaired son by a father who was requesting that his son's wife, who was also mentally impaired, return to the marital home.²⁵ In court, she protested that their marital flat over the father's house was sparse and unfit for her. When the father explained that he could not let his son live totally separately because of his condition (and hers), and the financial difficulties the son had, earning 1000 riyals (ca. 250 USD) per month, the judge proceeded with a request for medical assessment of the mental deficiencies of the spouses. The medical report found that the husband was indeed impaired and needed assistance. The wife was found mentally sounder, but still required assistance. After some further negotiations in court under the judge's supervision between all the parties involved, including the spouses' parents, an agreement was reached for the return of the wife to the marital flat, on condition that her father-in-law leaves it totally for their use.

Before the Riyadh judge, the plaintiff was a daughter insisting on her right to get married against the opposition of her father, and succeeding in persuading the court that he was unreasonable.²⁶ In the particulars of this unusual case, a woman aged 28, and formerly married with two children,

24 The Qur'anic request of dealing fairly between his wives was first underlined by Muhammad 'Abduh (d. 1905), and ineffectively used by the Tunisian legislator reading fairness as full equality, and concluding that equality of treatment was impossible in practice, and that the law must ban polygamy to avoid the problem altogether. Details in MALLAT, IMEL, 113, n. 463 and accompanying text.

25 M.3.46 – 51. Decided 13.1.1422/7. 4. 2001, confirmed in cassation on 30.1.1422/24. 4. 2001.

26 M.1. 378 – 84. Decided 14. 6. 1427/11. 7. 2006, no appeal.

brought a suit to the general court of Riyadh against her father, who was refusing to let her marry a local religious leader of good reputation and acceptable means. The father appeared in court to defend his decision because of the suitor's lack of courtesy towards him. He also explained that he asked around about the suitor nonetheless, and concluded that the suitor lacked social standing to marry his daughter.²⁷ Clearly unnerved by his daughter's case against him, he reluctantly stood before the court to make this argument, saying he was not ready to appear again, and suggesting that this one court appearance as defendant against his daughter was humiliating enough. And since he was so unhappy to show up as a defendant in a case brought by his own daughter, he concluded that he was ready to abide by the court decision, however it turned, to avoid returning to the defendant's box. He then put his arguments in writing, repeating points put orally to the judge in a previous *ex parte* meeting, on the inadequacy of the suitor's social standing and personal behaviour. He also reiterated in writing his wish not to be bothered any further.

Judge 'Unayzan asked for the suitor's appearance. The suitor came and stated his readiness and keenness to marry the plaintiff, and defended the adequacy of his social status: already married with kids, and a preacher in the locality, he was studying for a Master's degree in Islamic law. Then the frustrated plaintiff appeared again in court to insist that her father was being excessive and abusive, that she was missing a chance of getting married, probably the last chance since the suitor was the only man 'in two years of solitude' to have approached her; and that the social standing argument was not convincing since her aunt had married in similar circumstances.

There were further attempts from the court to bring the parties together, to no avail. Finally, the judge found that the father was being excessive in the matter,²⁸ on no less an authority than *ibn Taymiyya* (d. 1328) and *ibn*

²⁷ *kafa'a*, equality in social standing.

²⁸ The term used in Saudi courts to qualify the excessive guardian in the matter of marriage is *wali 'udal*, from '*adl*' with a *dad*, deriving from Qur'an 2:232, '*la ta'duluhunna*', translated in the context of the verse as 'do not prevent women from marrying their former husbands' once a certain number of condition are fulfilled. Note the extension of the concept of '*adl*' in modern cases. For six other cases of '*adl*', which is considered a priori illegal by Saudi courts, see *Ahkam*, 11, 73–124.

Qudama (d. 1123).²⁹ He ruled that the court would substitute itself in the father's role as his daughter's guardian, and ended up marrying the frustrated couple over the father's obstinate refusal. The father did not avail himself of his right to appeal. The judgment concluded as follows:

On the basis of what preceded in court in the accusations and responses made, and considering the above mentioned letter of the Emirate of the region of Riyadh and what the two parties decided, as well as the attempts to reconcile them; and considering the situation of the plaintiff from the previous marriage, and her age, and the fact that the defendant did not provide evidence showing that the suitor was not adequate in religion or morals or social standing, and the testimony of two righteous witnesses about his good moral standing and social adequacy; and considering the occurrence of harm in delaying the marriage of the plaintiff where she presently stands, and what the defendant mentioned in terms of no other suitor coming forward after her divorce from her previous husband and the precedent in a similar marriage taking place [the daughter arguing that her aunt had married a suitor like hers in standing]; and considering one of the two reports of Imam Ahmad [ibn Hanbal, d. 855] – and the preferred view of Shaykh al-Islam ibn Taymiyya – to the effect that if the nearer guardian³⁰ frustrates her,³¹ she is removed [i. e. authority over her passes on] to the Sultan. Transfer of guardianship to the closer guardian who accepts or rejects marrying her, and taking over by the ruler/judge³² of this [i. e. marrying her], allows the prevention of evil.³³

*Maintenance.*³⁴ Of note in the set of cases on marriage is a maintenance case which appears as a surviving evidentiary and procedural practice found in pre-modern courts, and allows the parties to use the court for purposes of registering an already agreed settlement.³⁵ The case was initiated by the father of a woman living at his house with her three children, and he

29 In his classical treatise, *al-Mughni*, 15 vols, Riyadh 1986, 9:383, the Hanbali jurist ibn Qudama provides a definition: 'thmeaning of *'adl*: prohibiting the woman from marrying an equal (*kuf*, from *kafa'a*) if she asks, when both [she and hersuitor] wish to marry.'

30 *al-wali al-aqrab*.

31 *'adalaha*.

32 *hakem*.

33 M.1.383, prevention of evil, *dar' li-hadhih al-mafsada*. The last sentence is awkward in the original Arabic. The judgeprobably meant that the authority to marry the frustrated daughter passes on to the judge to avoid harm to the singlewoman.

34 *nafaqa*.

35 M.1.256 – 9, judge 'Abdallah ibn 'abd al-Rahman, court of Riyadh decision 16.9.1426/19.10.2005, date mentioned at 259 butthe date of case in the heading is six days later, at 22.9.1426/25.10.2005. No appeal here obviously, since the two parties arein agreement. For the use of the classical courts to register an agreement, see MALLAT, IMEL, 64 – 6.

appeared as her representative in court against her husband. Before the judge, he pleaded for adequate maintenance by the defendant, including a separate marital home for her and the children, and the return of the equivalent of 10,000 riyals in gold that he had paid in the last years for her and her children's upkeep. The defendant husband agreed on the spot on all facts and demands, and requested a grace period of nine months to secure housing, also committing to pay back the maintenance debt in monthly instalments effective immediately. The agreement is simply recorded by the court, and dated. With no mention of an appeal, this suggests that the arrangement had been reached by the parties before the case was brought before the judge, and that the court was simply used to register it more effectively than if the agreement had just been concluded privately.

In another minor case of maintenance, a wife brought a case against her husband who had married another woman and forced her to live with the second wife. She requested to have a separate house for her and her children, and they agreed before the judge that the husband would secure separate housing on condition that 'she treats him well and abstains from going out of the house without his knowledge and his permission.'³⁶

III. Separation

1. Cases of Marital Disputes

Saudi courts adjudicated several cases of marital disputes in which an unhappy wife sought a divorce in court, and almost invariably prevailed. In one instance before the general court of Riyadh, a Palestinian wife requested the divorce³⁷ from a Palestinian husband who, a year after the marriage, had not had sexual intercourse with her, and treated her shabbily, being 'profligate with insults'.³⁸ The defendant husband appeared in court, denying his bad behavior but confirming the absence of sexual

³⁶ M.1.283 – 6. Decided 21. 12. 1426/21. 1. 2006, Agreement in the Riyadh court recorded before judge 'Abd al-Rahman al-Dahash. Quote at 286.

³⁷ *khul'*

³⁸ M.1.92 – 4. Judge Ibrahim al-Khudayri, 29. 7. 1425/14. 9. 2004. No appeal. 'Profligate with insults, *shadid al-sabb wal-shatm'*, at93.

intercourse. He immediately agreed to the divorce, on condition that the dower he had paid for the marriage be returned to him, 10,000 riyals and some gold. Judge Ibrahim al-Khudayri acquiesced to the common request, making the husband repudiate his wife in court in return for the dower, and registered the divorce.

The same judge granted the divorce of an abandoned wife, mother of two children for whose upkeep she alone was paying.³⁹ She had been married for twelve years, had not heard from her Jordanian husband for the last six years, and was unable to ascertain his whereabouts after he left the country. In his decision, the judge explained to her that she had the choice to be patient or to get the divorce on the well-known 'no harm' principle;⁴⁰ and that, should she decide upon the latter before him, which she quickly did, she could not remarry before the lapse of the three months waiting period. The authorities on the matter were plentiful:

Building on the above, considering Article 34/10 of the Law of Procedure,⁴¹ what the scholars have decided, the Prophetic saying on 'no harm',⁴² and what the scholars stated in *Zad al-Ma'ad* (4/11), *al-Rawd al-Murabba'* (p. 134), *al-Mughni* (p. 576), *al-Muqni'* (30/318, 'if he goes away and does not provide her with maintenance and she is unable to have access to his money or borrow against it, then she has the right to divorce.)⁴³ Divorce is not allowed without a decision from the judge,⁴⁴ and it is an irrevocable divorce according to the [Hanbali] school.⁴⁵ This is supported by Shafi'i and Ibn al-Mundhir, and reported back to 'Umar and 'Ali and Abi Hurayra; it was also said by Ibn al-Musayyab and al-Hasan and Malek and Ishaq and others; 'Umar was asked about men who went away from their wives, and he ordered them either to provide maintenance or to divorce.

Considering the evidence in the case, the situation of this woman and her needs for care and probity,⁴⁶ and her insistence on the rescission of her marriage, and since the

39 M.1.136 – 9. Decided 26. 11. 1424/18. 1. 2004, confirmed in cassation 17. 1. 1425/9. 3. 2004.

40 '*la darar wa la dirar*', the no harm principle hadith which establishes liability in Islamic law, see MALLAT, IMEL, 250.

41 Nizam al-murafa'at, which refers here to the 1421/2000 Nizam al-murafa'at al-shar'iyya, the law of civil procedure. It is not clear what the reference to Art. 34/10 means, since Art. 34 does not have ten paragraphs. Article 34 in the 1421 Law organizes territorial competence. An amended code of civil procedure was passed in 1435/2014.

42 Short for '*la darar wa la-dirar*'.

43 Rescission of the marriage, *faskh*.

44 *hakem*.

45 *madhhab*.

46 *siyana wa 'afaf*.

objectives of the law⁴⁷ are for marriage to secure abode,⁴⁸ purity and probity, and this is not achieved in the case of this woman plaintiff, the conditions for rescission are met. We explained to her that she has the choice between rescinding her marriage, and exercising patience and persistence. She chose divorce. It is clear to me that the wife is harmed by remaining under her missing husband's control,⁴⁹ so I granted her the divorce.⁵⁰

Despite the absence of a Code, and perhaps thanks to that absence since the judge is less constrained by a clear statute than by his interpretation of more obscure scholarly texts, one finds Saudi courts comfortably adapting old legal principles to technological advances. The continued absence of the husband seems to be a recurrent problem in Saudi Arabia, leading the court to facilitate divorce to free the wife from her AWOL husband. The court will also take advantage of novel situations, illustrated by repudiation over a mobile phone.⁵¹ Here, before judge 'Atiq in the Riyadh court, an abandoned wife sought a divorce on the basis of a conversation others had heard from her husband, away for jihad, in a call he made over his mobile phone. The judge found the evidence sufficient, likening the divorce by telephone to a divorce amongst people present. The main authority sought was that of Majma' al-fiqh al-islami,⁵² which accepts contracts made over the phone as valid, although classical jurists were also cited to liken the case to blindness: similar to the repudiation of the blind man who does not see his wife, a repudiation made over the phone is taken at face value. Note that the argument is made by the wife, who sought deliverance from marriage with an absentee husband, and that the request was granted even though the call was not made directly to her. It is not clear whether the court would hold in the same way if termination had been made by the husband over a mobile phone.

47 *maqased al-shari'a*.

48 *sakan*.

49 *'isma*.

50 M.1.138 – 9. *Zad al-Ma'ad* is by Ibn Qayyim al-Jawziyya (d. 1392). *Al-Rawd al-Murabba'* is by Buhuti (d. 1641). *Al-Mughni andal-Muqni'* are by Ibn Qudama (d. 1123). They are all Hanbalis. Shafi'i (d. 820) is the eponym of the Shafi'i school. Ibn al-Mundhir (d. 932), and the other scholars and companions of the Prophet mentioned, are early specialists or tradents of hadith.

51 M.2.60 – 66, decided 17. 4. 1426/26. 5. 2005, confirmed on cassation 20. 5. 1426/27. 6. 2005.

52 The Islamic Fiqh Academy, established by the Organization of the Islamic Countries in 1981.

Divorce was also granted to another Palestinian woman who had been abandoned for three years by her husband.⁵³ She knew he was in Morocco, and tried to track him down for maintenance and other marital obligations. The response the husband made to the Saudi consulate offices in Morocco was that he was too ill to take care of her, and that he could therefore not bring her over to Morocco. Upon which judge Naser Jarbu' of the general court of Riyadh issued a judgement of divorce⁵⁴ to remove 'the harm to the wife in her person and her religion and the undermining of her legal rights, for the law requests the removal of harm', here 'resulting from the abandonment of the husband for three years without paying maintenance.' (M.1.210) The plaintiff was also informed by the judge that she could not remarry before the lapse of three menstrual periods from the date the judgement was final. The missing husband had to be notified, however, and the procedure of notification was initiated by the relevant authorities, though no answer came about his whereabouts.

There was a twist that resulted from the disagreement of the court of cassation. The successful plaintiff wife did obviously not appeal, since she had won her divorce for harm, but there was an automatic appeal in cases where a party was not present in court. The cassation court objected to judge Jarbu's decision, because he should have reserved the right of the husband, in case he returned, to make his case anew, and because the court should have tried to notify him.⁵⁵

Judge Jarbu' was unfazed. He answered that the Executive Note for the Law of Civil Procedure⁵⁶ had not made a difference between a case of divorce and other cases involving an absentee defendant. In case the husband returned, he was entitled to make his case regardless of the nature of the divorce. As for notification, four months had already passed since the judgment was rendered, and there had been no answer from the husband. Delay only

53 M.1.206 – 12. Decided 17. 3. 1426/26. 4. 2005, Judge Naser Jarbu', general court of Riyadh.

54 *faskh*.

55 Decision of cassation on 9. 8. 1426/13. 9. 2005 at M.1.211. Because the divorce granted by the lower court was 'final', the cassation judges objected that the husband's right had been breached. By this they probably meant that the decision could be final only when the cassation court had said so. Also, since the defendant was abroad, his notification required more than the two months mentioned by Jarbu' at first instance.

56 *Al-la'iha tanfidhiyya li-nizam al-murafa'at al-shar'iyya*. This type of 'Note' accompanies major statute passed in the Kingdom with some comments and explanations.

added to the plaintiff's harm. (M.1.211 – 2) The court of cassation confirmed without commenting further.⁵⁷

The court of cassation would not be as tolerant of another judgment confirming the power of women over the termination of their marriage.⁵⁸ The first instance judge in that case, Hasan Aal Khayrat, had to confront three successive reviews of his decision by the court of cassation to see his decision in favour of the aggrieved wife finalised. In the particulars, the woman plaintiff appeared before the court on 16. 6. 1425/2. 8. 2004 to claim a divorce from a husband whom she accused of cursing and beating her, taking her money, and not caring for the ten children she had from him. She reminded the judge that she had come to him earlier to complain informally about the situation. All of this, she said, to no avail. She now requested a divorce because she was unwilling to live with him any longer,⁵⁹ and demanded further that he return her belongings after she left the marital home to live at her mother's. She also asked for custody over those amongst her children who were under age.

The husband denied the allegations of ill treatment, and said he did not beat her 'except in self-defense.' (M.1.309) He did not want to grant the divorce, but intimated he would acquiesce to it upon certain conditions. A longish period of mediation requested by the judge followed, with two designated arbitrators⁶⁰ concluding in a report to the court that their marital life could not be saved, that the marital and personal property should be distributed in a detailed way they prescribed, in addition to making arrangements for the children's custody. The judgment cites in full the report of the two arbitrators, reached on 30. 7. 1426/4. 9. 2005. Their conclusion reads as follows:

First: the separation takes place between them with the wife being content with her dower.⁶¹ The husband is not obligated to add anything to it. Second: the husband accepts the wife forfeiting what is left on the dower in return for the separation. He does not receive back what [the immediate dower] he already paid. Third: the jewelry

57 Decision in cassation on 6. 9. 1426/9. 10. 2005.

58 M.1.306 – 25. Decided 17. 8. 1426/21. 9. 2005. No exact date for cassation, see below.

59 *al-talaq li-'adam istita'ati al-'ishra ma'ahu*, M.1.308.

60 *hakaman*.

61 *mahr*. In the law of dower, a separation is made between money paid upon marriage (immediate, *mu'ajjal*) and money deferred for payment in case of divorce or other events (deferred, *mu'ajjal*).

owed by the husband [as deferred dower] is considered equivalent to the money he claims from his wife. She acknowledges this against the husband surrendering the property deed of his house following the annulment of that agreement and the agreement [of the two parties] not to pursue its course. Fourth: the wife receives all the above mentioned furniture as agreed by the spouses. Fifth: Order the two abovementioned daughters, or one of them, to be with one of the parents under the oversight of the judge, and with God helping us to success, we [the arbitrators] note that both parties, as mentioned, want the separation which therefore just needs to be registered and adopted. This is what the two arbitrators found, signed 1-... [withheld name of first arbitrator] 2- ... [withheld name of second arbitrator], issued Sunday 30. 7. 1426/4. 9. 2005.

After being entered on the register, the report was read to the two parties. The wife agreed but the husband decided to disagree. (M.1.313 – 4)

A week later, on 9. 8. 1426/13. 9. 2005, judge Khayrat issued his first judgment:

I decide as follows:

First: I declare the rescission of the marriage⁶² between ... [the wife] and her husband... against the compensation mentioned in the last report of the arbitrators, as developed above; I explained to both parties that the wife is not free to remarry⁶³ before the decision is made final by the proper court.⁶⁴ I also explained to them that she cannot allow her husband to have intercourse with her before the decision becomes final, and I explained to the husband that he may not approach her during that period.

Second: I decide that the children who are of custody age stay with their mother so long as she does not remarry, and I rule that maintenance must be paid to them by their father in accordance with the relevant custom [i. e. relative to the social situation of the father], estimating payment of 200 riyals for each child monthly. As for the children over 7, in case they are girls they go with their father and in case they are boys they are asked to choose between the parents. They stay with the one they choose, and they are not prevented to visit the one with whom they choose not to stay. The girls who go with the father visit their mother once a month. (M.1.315)

The husband did not agree and appealed to the court of cassation. Here was the start of a painfully repetitive process where the court would reject some arrangements decided by the lower court, judge Khayrat would take the requested changes on board, another appeal would be lodged, and the cassation court would disagree again and send the judgment back to

62 *faskh al-nikah*.

63 *tu'tadd*, i. e. respects the *'idda* period, which is for divorced women three months.

64 The court of cassation, which verifies/confirms the decision.

Khayrat for yet another review. This took place three times until the decision became final on 6. 8. 1427/31. 8. 2006.

The convoluted story is alluring both in substance and on procedure.

Procedurally, the amount of intercession and mediation by the judge, directly and through the arbitrators, is remarkable. Time and again he suggests to the spouses to be patient and try to make things work, and he and the arbitrators request a cooling off period twice. Most remarkable is the repeated to and fro between the first instance sole judge and the three judges sitting in cassation. Their disagreement allows the observer to see more clearly into the judicial mechanisms at work in Saudi Arabia. Throughout, the lower judge defers to his elders and seeks to abide by their decision, even when they sometimes appear to be moving the goalposts.

On substance, the sense that the wife could force her husband to grant a divorce, like in other cases in the Mudawwana, is remarkable. Once the right of the unhappy wife to get a judicial divorce is accepted, the dispute, as elsewhere in raucous divorces across the world, rests on particulars. As elsewhere, it becomes an issue of money and children's custody. How did the court of cassation correct judge Khayrat's decision on this score?

In the first cassation judgment, issued on 18. 10. 1426/10. 11. 2005, the reproach is that the first instance judge was not precise enough:

We have decided to return the case to the judge in charge [Khayrat] to note the following: 1- His Honour⁶⁵ ruled that the marriage should be annulled and did not annul it. He needs to annul it first and then follow with the consequences in the judgement. Alternatively he could allow the wife to decide whether to end her marriage, and if she so chooses then he can rule on the consequences accordingly. 2- HH's disposition in the second paragraph of the decision is overly general, for he did not mention the names and ages of the children. The judgment should be straightforward and clear. 3- HH mentions that the son is made to choose between his parents, but it is he who should make him choose before deciding, so that he can draw the proper legal conclusions on the choice. 4- HH ruled that the father of the children must pay the maintenance in accordance with custom in a case like this, and mentioned that it is estimated at 200 riyals for each. The basis used for this estimate, and whether the father's income

65 Literally His Virtue, *fadilatuh*.

and support to the family and his means were taken into account, does not appear in the document. These must be taken into account. 5- The judgment on the visitation rights is not specific enough. The ruling should be clear and easy to implement. 6- HH mentioned that the separation period starts after the judgment becomes final. In fact, it starts from the time of the rescission.⁶⁶

Upon which judge Khayrat proceeded with the requested changes, after investigating the father's social situation, and ascertaining the kids' names and ages. Once this was done, the two parties were appraised again, on 18.12.1426/18.1.2006, of their right to appeal to the court of cassation. The husband appealed again. Again the court rejected Khayrat's decision. His last decision had been taken on 18.2.1427/19.3.2006, and there were two outstanding issues that needed to be corrected. Khayrat had requested the sons to choose at a time when they were already of age, and this was not necessary. Also, the cassation judges explained, the expression used by him to 'remove custody from the mother and pass it on to a better person if she remarries' was inappropriate. It made his decision 'premature'.⁶⁷

Back to the drawing board for judge Khayrat. He duly obliged, told the sons that they need not choose since they were adults, and struck out the 'premature' judgment. Unfortunately, this was not the end of the matter, for he received on 7.5.1427/4.6/2006 another 'note'⁶⁸ from the court of cassation. The judges reminded Khayrat that the husband had mentioned a number of property deeds, and told him he could not finalize the judgement without properly ascertaining what these deeds said in order to consider whether they were related to the case. They also suggested he revisit the matter of the kids 'and do what was necessary for the benefit of the children because they are at the center of the case.' (M.1.323) He duly obliged again, but could only find some of the deeds, and concluded they were not related to the case. It is not clear what he did 'for the benefit of the children', but the spouses seem to have agreed on some deal, with the wife helping the husband to complete building a house against his readiness to accept 100 riyals monthly allowance if he could

66 *faskh*. M.1.317. Judgment of the court of cassation, 'first circuit dealing with personal status, waqfs, wills, minors and treasury. Signed: judge Saleh ibn Muhammad al-Nujaidi head of the circuit, with the two other judges Salem ibn al-Hamidi al-'Ayyad and 'Abd al-Rahman ibn Saleh al-Jabr'.

67 *al-hukm sabiq li-awanih*, M.1.321.

68 *mu'amala*.

not pay the 500 riyals, which had been decided after the first revision. (M.1.323 – 4) Still, the husband decided to appeal the Khayrat revised decision of 6. 8. 1427/31. 8. 2006. (M.1.323)

Following three requested revisions, the court of cassation finally let the Khayrat decision stand.⁶⁹

In contrast to the long and convoluted case with Khayrat, which turned on the details of the divorce arrangements, the court of cassation agreed to a wife's request for a divorce simply because her husband had AIDS: 'AIDS is one of the dangerous diseases which necessitates the alienation⁷⁰ of the spouse who has contracted it, and this is what scholars, like in *al-Rawd al-Murabba'*,⁷¹ say about defects which confirm the right to terminate⁷² the marriage, even if it occurs after the marriage contract and after sexual intercourse, although termination of the marriage needs the judge to decree it.'⁷³

Other decisions confirm the pattern common to Saudi judges confronting unhappy wives' insistence to be freed from the marriage bond in cases far less dramatic than a husband afflicted by AIDS. The judge tries hard to salvage the marriage, appointing arbitrators to bring the spouses together. But even if the husband disagrees, the judge accepts that the distance between the two parties has become so large as to make it impossible for marital life to continue. In line with this clear trend, irretrievable breakdown of marriage regardless of fault appears well established in Saudi law. In one straightforward case of divorce upon the wife's demand, her argument was simply that she couldn't stand living anymore with her husband. She just hated him.⁷⁴

The case starts with the husband as plaintiff requesting his wife to return to the marital home from her stay with her parents. Upon being questioned by judge Nayef al-Hamad at the general court of Riyadh acting as substitute for judge Khaled al-Luhaydan, the wife responded bluntly: 'I am staying at my

69 M.1.324 – 5, date not specified.

70 *nafrat*.

71 By Mansur al-Buhuti, the leading Hanbali scholar of the 11/17th century.

72 *faskh*.

73 M.2.45, decision by judge Ibrahim Aal 'Atiq, from the General Court of Riyadh.

74 M.2.28 – 35. Judge Nayef ibn Ahmad al-Hamad at the general court of Riyadh, 13. 2. 1428/ 2. 3. 2007, confirmed in cassation 4. 4. 1428/22. 4. 2007.

parents, I hate him and I do not like him.’ (M.2.29) She had previously asked for divorce,⁷⁵ but her husband effectively undermined the request by divorcing her in a sole repudiation. He then had her return to him. ‘A month after I uttered the first repudiation, I asked her back because I love her and I want her back, but she did not return. We have no children, and I think she is inhabited by an evil eye, and I uttered a single repudiation so that the bad eye is removed. So the husband stated.’ (M.2.30)

Two arbitrators were appointed by the court to bring the spouses together, and in case of failure, to see about the terms of the separation. They sat with the two parties, and concluded that the marriage had irretrievably broken down and that she would have to return the dower. The judge tried again to bring them together, failed upon the determination of the wife who repeated point blank that ‘she hated him’. Quoting several verses of the Qur’an including ‘the need for the husband to hold on to his wife in good faith or free her gently,’⁷⁶ the judge decided to follow the arbitrators’ recommendation and avoid ‘leaving a woman hanging in this day and age full of temptations.’⁷⁷ She being young suffers from profound harm.⁷⁸ She was freed from the marriage, with the understanding that she needed to observe the waiting period before remarrying, and that the judgment would only be final upon confirmation in cassation. The husband appealed to the court of cassation, which rejected his appeal and confirmed judge Hamad’s divorce decree.

This is close to the irretrievable breakdown of marriage for no fault of either party as cause for separation. It shows how common it is for family cases in Saudi Arabia to consider a low standard of harm to the wife as sufficient cause for judicial divorce.⁷⁹ We have already seen her prevailing in convincing the judge in several trials. The protracted absence of the husband is common.⁸⁰ Similarly, ‘drug addiction and harming the wife by

75 *khul’*.

76 ‘*fa-imsak bi ma’ruf aw tasrih bi-ihsan*’, Qur’an 2: 229, M.2.31.

77 *fitan*.

78 *adrar baligha*, at M.2.34.

79 This trend is confirmed in twenty-eight more recent cases reported under the category *faskh al-nikah*, Ahkam, 10, 167 – 405. They include the husband’s long absence, no payment of maintenance, anal sex, mental disability, sterility, and simple strong dislike of him by his wife.

80 See e. g. case in M.2.36 – 40 by judge Khaled al-Luhaydan, Riyadh, quote of *la darar wa la dirar* at 40; and the cases above at nn. 39, 51.

beating her contradict the wisdom for which marriage was instituted.⁸¹ This is shameful.⁸² It impairs marital life and obligates marriage termination.⁸³ The equality pattern in matters of divorce in the basis of harm is even established in a marital dispute where it is the husband who requests a judicial annulment⁸⁴ of the marriage on account of his wife refusing to have sex with him, and for refusing to return to the house soon after marriage.⁸⁵ He argued, and the defendant did not dispute the argument, that ‘she had the eye’. (M.3.71) He of course could have simply repudiated her, but he wanted the dower returned to him, which would not have been possible upon repudiation. But the court rejected his plea for annulment, arguing that this was a case of disobedience⁸⁶ ‘for which the proper way to deal is indicated in the well-known verse.’ (M.3.72) Reference here is to Qur’anic verse 4:34 which suggests that disobedient wives be ‘corrected’, with modern interpretations ranging from ‘educating’ the wayward wife to beating her up into submission.⁸⁷ Despite ‘the bad eye’, the wife formally won the case, and the husband could not get an annulment with the return of the dower paid to her. The case does not say how he ‘educated’ her.

While the aggrieved wife seems to invariably get her way, obvious forms of inequality remain, including the husband’s right to unilateral divorce in simple utterances of repudiation, and the compensation paid to him, usually by way of the return of the dower by the wife. This unilateral,

81 *shurri’a*.

82 *’ayb*.

83 M.3.60 – 68, decision of judge Hamad ibn Hasan al-Hammad, head of courts of Aflaj, 26. 1. 1427/7. 3. 2005, court of cassation confirmation on 13. 2. 1427/13. 3. 2006, quote at 68. This is an interesting case for the sociology of drugs in Saudi Arabia. To appreciate the phenomenon in Saudi society, see full 5 volumes of decisions (out of the 28 volumes of Ahkam) on drug-related court cases. Ahkam, vol. 17 to vol. 22.

84 *faskh*.

85 M.3.68 – 75. Decision by judge Ahmad ibn ‘Abdallah al-Ja’fari in General Court, 6. 4. 1428/ 23. 4. 2007 of Ras Tannura confirmed in cassation 9. 5. 1428/26. 5. 2007.

86 *nushuz*.

87 Qur’an 4:34: ‘Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband’s] absence what Allah would have them guard. But those [wives] from whom you fear arrogance – [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them.’ Abdallah Yusuf Ali’s translation (1934).

extra-judicial termination by repudiation⁸⁸ remains distinct from the judicial termination⁸⁹ achieved by the wife after an elaborate trial. But the two parties appear generally equal in the possibility to terminate the marriage they are unhappy about. 'I hate him' is sufficient grounds for the judge to grant divorce to the wife who simply considers the continuation into the marriage as harmful to her happiness. The main difference is that she cannot terminate the marriage at will, as her husband remains capable of, albeit with constraints of registration of the divorce before the court. She must get the court to decree it. This general pattern conforms with Muslim family courts across the Middle East.

2. A mufti/qadi jurisdictional battle in three-time talaq

A telling testimony of the relation between judges and muftis appears in a relatively old case, which the reporter clearly found important to include in volume 2 of the *Mudawwana*.⁹⁰

The substantive issue was less important than the procedural one. The issue of substantive law was whether the three-time repudiation formula said in quick succession – 'you are repudiated'⁹¹ repeated three times – leads to a full divorce, or whether it amounts to just one utterance and some time needs to pass between each instance of repudiation. The practical consequences are important. If a man utters the talaq formula three times in one full swoop, often the expression of a moment of extreme anger, the wife is considered divorced 'irrevocably'.⁹² To return to her former husband, she needs in traditional Sunni law to complete the three-month waiting period,⁹³ then remarry a stranger, get a divorce from him and complete again another three-month waiting period. Only then can she remarry her former husband. Should the three-talaq formula be considered as only one, then the divorce is not complete; it is a revocable

88 *talaq*.

89 *khul'*, when demanded by wife, *faskh* being the rescission itself.

90 M.2.46 – 59. Decision dated 14. 6. 1392/25. 7. 1972.

91 *anti taleq*.

92 *talaq ba'en*.

93 *'idda*.

repudiation.⁹⁴ The husband may get his wife back at will, and the revocable repudiation is considered not to have taken place.

This was the crux of the issue at hand in that case, and two legal institutions in the Saudi State were involved at the highest level: the Grand Mufti, the famed 'Abd al-'Aziz ibn Baz (d. 1999), v. the local judges buttressed by the court of cassation. The Mufti's view was that the three-time repudiation amounted to only one and was therefore revocable. The lower court judge, following a practice confirmed by the court of cassation, considered such form of repudiation to lead to a final, irrevocable divorce.

From a social perspective, the issue has its advocates on both sides of the liberal divide. A wife freed from marriage after a three-time repudiation in one session is not left in limbo. With the repudiation considered final, the husband is made responsible for his decision, taken in anger or not, in the fateful three-time utterance considered as final. The wife is free from him and the divorce is total. To marry her again, she must remarry another man and get another irrevocable divorce before they get back together and enter into a valid marriage contract.

On the other hand, the unilateral dimension of a three-time repudiation taken in a moment of anger can put the wife at a strong disadvantage. To protect her from the irascible husband, ibn Baz and some classical jurists count it only as one of three strikes, so the husband and the wife have a chance to get back together and prevent a final divorce.

The debate is not new, and most Middle Eastern countries have chosen to give marriage a chance by holding, like ibn Baz, that the three-time divorce uttered as one unit should be considered as just one of the three utterances required for an irrevocable divorce.⁹⁵ Time must elapse between each of the three utterances, during which husband and wife may not have sex. If the husband expresses his wish to have her back, or if they have sexual relations, the previous one or two repudiations are considered no longer effective. The latest family law codification, in Hanbali Qatar, takes this view. In the Qatari family code, the three-time *talaq* in one unit

⁹⁴ *talaq raj'i*.

⁹⁵ All Middle Eastern countries have followed Egypt's early position, taken in 1925, to count triple *talaq* uttered in one session as one revocable *talaq*, save of course when it takes place on the third occasion.

is tantamount to just one utterance, and therefore a talaq of the revocable type.⁹⁶

The more unusual issue raised by the case was procedural, and concerned the relation between the mufti and the qadi. When ibn Baz was solicited by the husband to give his opinion on the matter, he took his time, asked a local judge to look into the matter and bring the spouses together if he could, and then gave his opinion to the husband that the three-time utterance was equal to one, so that he and his wife could live together again. After Ibn Baz's pronouncement, according to the report, husband and wife were back together for over a year. Then disputes arose again, leading eventually the court of Mecca to decide on the matter, probably by the wife who wanted to see the marriage terminated on the strength of the earlier three-time repudiation being considered as final. The court accepted her plea, and confirmed the irrevocability of the divorce.

Understandably, the losing husband took the matter to ibn Baz again. In turn, ibn Baz, whose authority was now being challenged by a lower instance judge, brought it to the King. The King directed the Minister of Justice to raise the matter with the High Judicial Council (HJC),⁹⁷ a parallel authority to the court of cassation at the time. The important matter in dispute was no longer the nature of the repudiation, but the authority of the mufti vis-à-vis the qadi's.

The solution to the dispute was pragmatic. Five judges on the HJC, including another leading Saudi jurist at its head, Muhammad ibn Jubayr,⁹⁸ found for the Mufti.

96 Art. 108.4 QFL considers that 'talaq does not take place... when successive or numbered in word or writing or by signal[since it is considered] as one utterance.' Numbered means that the husband, instead of repeating the formula of repudiation three times in full, says '*anti taleq bil-thalath*, I repudiate you thrice.' Art. 88c of the Family Law of Bahrain of 2009 includes a formula mentioned 'numbered' but not 'successive'. However the repudiation must take place in court to take effect (Art. 91).

97 *Al-hayat al-ulya lil-qadaya*, composed of senior judges and reporting to the Minister of Justice.

98 'Shaykh Muhammad Ibn Jubayr, who has held many 'ulama' leadership positions, including president of the judiciary, president of the Board of Grievances, and member of the Board of Senior 'Ulama, and who is currently president of the Consultative Council...', cited in VOGEL FRANK, *Islamic law and the legal system of Saudi Arabia*, The Hague 2000, 97. Shaykh Muhammad Ibn Jubayr died in 2002.

From what precedes in the words of the author of the *Iqna'*, and the *Muntaha*, and the *Ghaya*, and the *Muswadda* of ibn Taymiyya, and the opinion of Amidi and *Jame' al-Jawame'* and other leaders from the four Sunni schools, when the layman⁹⁹ who seeks a fatwa from the Mufti, receives it, and abides by its ruling, he is not authorized to abandon it for the opinion of another jurist.¹⁰⁰

The HJC noted the specificity of the case: the spouses sought the opinion of the Mufti, it was given to them, and they lived by it. They cannot go to another jurist, including the qadi, to avoid it. The husband, the HJC said, is right. The wife is not allowed to go to court to seek another interpretation of the three-time repudiation that makes it irrevocable, simply to sidestep the Mufti whose fatwa she originally sought with her husband (or at least did not openly oppose). Importantly for the HJC, it noted that the couple observed the fatwa and implemented it for a full year.

This makes sense in the legal system of Saudi Arabia, even if it underlines the two orders of authority fighting each other's competence. A different answer would have dramatically undermined the authority of the Grand Mufti on the most outrageous premises, a case where the fatwa had been initially requested by the married couple. Turning later to the qadi to undermine the Mufti so directly appears to be simply unconscionable.

The fine print, however, is important. Ultimately, the HJC, not the Mufti, had the ultimate word. In a typical show of authority, the judges were suggesting that outside the narrow grounds of a fatwa applied by both parties, the judge might not be as kind to the Mufti's authority. The ultimate decision rests squarely with the judge.

Several questions remain unanswered. What if one of the two spouses had not sought the fatwa? Or did not accept it? Would he or she have the right to go to court? Or conceivably go to another mufti, since not all the muftis in the Kingdom have the considerable status of the Grand Mufti ibn Baz?

⁹⁹ *muqallid*.

¹⁰⁰ M.2.58. Musa al-Hijawi (d. 1580) is the author of the *Iqna'*. Ibn al-Najjar (d. 1584) is the author of *Muntaha al-iradat*; Mar'ial-Karmi (d. 1624) is the author of the *Ghaya*. They are all Hanbalis. Amidi (d. 1233) is a Shafi'i jurist, as is Suyuti (d. 1505), the author of *Jame' al-Jawame'*.

Of note also in the long report is that the authorities quoted do not concur fully on this central point of who is the final arbiter. The HJC cites, as we saw, several classical jurists, who do not see eye to eye on the matter. They do converge to a large extent, however, on the authority of the fatwa once sought and/or applied by the petitioner. Ibn Taymiyya considers that if a fatwa contradicts another fatwa, the fatwa seeker can choose the one he wishes to follow. But once he has followed it, he cannot renege and resort to the opposite fatwa. (M.2.54) Amidi, the Shafi'i scholar also quoted by the HJC, does not allow the person who has followed the opinion of a mufti *and* started to execute the fatwa received, to then change course and seek another opinion. (id.) Others, like the Maliki jurist ibn al-Hajeb (d. 1249), allow the change, but the commentators reject it in favour of the prohibition to change course once the fatwa is executed. This, in one of the classical opinions quoted at length, does not prevent the lay person¹⁰¹ from choosing the expert opinion he prefers in case of a contradictory views between two or more experts. But if one *starts* implementing an opinion, then seeking another mufti or using a contrary fatwa is no longer possible.¹⁰²

There is a further twist. This case shows conflicting positions at the highest level, between the Mufti (ibn Baz) and the HJC, and an additional complication. After the protest of ibn Baz triggered the HJC reaction, the case was transferred to the court of cassation, which forwarded it back to the judge handling the case.¹⁰³

He [the judge] built his decision in this case on a circuit order¹⁰⁴ of the late Shaikh Muhammad ibn Ibrahim number 14595/2 of 1/11/[19]80 which includes the need to act in all courts by considering final¹⁰⁵ the three-time repudiation uttered in one single instance.¹⁰⁶ A fatwa cannot be issued instead of a judicial decision, on the preponderant view in the school,¹⁰⁷ and previously issued decisions like the present one were confirmed by the court of cassation. HH concluded his letter by insisting on his decision in this case. (M.2.48 – 49)

101 *'ammi*.

102 Quoting *Mukhtasar al-tahrir fi usul al fiqh*, by ibn al-Najjar. M.2.56 – 7.

103 Not totally clear in the report who he was, see M.2.48. He is referred to as His Virtue, *fadilatuh*, maybe 'Abd al-Malik ibnDahish.

104 *amr ta'mimi*.

105 *batt*.

106 Uttered in one expression, *bi-lafz wahed*.

107 *al-rajeh fil-madhhab*.

While ibn Baz's contrary view, namely that the three-time repudiation amounted to only one repudiation rendering the divorce revocable, the strenuous efforts to save the Grand Mufti's reputation through the acceptance and implementation of the fatwa by the spouses did not succeed in legal terms. The court held on substance that a three-time repudiation uttered as one unit was indeed irrevocable.

A more recent case, decided in 1425/2004 and published in the third volume of the *Mudawwana*, sides on this issue with ibn Baz.¹⁰⁸ Judge 'Abdallah ibn Sulayman al-Mukhallaf of the general court of Madina opines in an obiter that a three-time repudiation is considered to be equivalent to only one repudiation, and is therefore of the revocable type: 'The divorce was in violation of the rules',¹⁰⁹ since 'it was reported that the husband uttered the three-time repudiation in a single word, which stands for the first repudiation only.'¹¹⁰

We have therefore two contradictory decisions on substance in Saudi Arabia. One considers a three-time repudiation as irrevocable and terminates the marriage. The other considers the three-time repudiation as only the first of three, and therefore revocable, allowing the estranged spouses to resume marital life by simply getting back together again when they so decide. We have seen that the 'liberal' view leans towards to the second, more lenient position of allowing the marriage to resume. In this way, the unilateral fiat of the husband leading to a full marital break is dented, thus offering the wife some protection by way of allowing some time to pass after the first irascible moment. On the other hand, the wife left with one or two utterances of repudiation is kept hanging without a set deadline in an uncertain, often cruel situation. To get a divorce, she must go to court and plead for the harm occasioned to her, a burden that the husband does not face in similarly stark terms. There is no Solomonic solution to the debate, and it may well be that courts could benefit from

108 M.3:32 – 39. General court of Madina, decided 5. 4. 1425/25/5/2004, confirmed in cassation 20. 12. 1425/31. 1. 2005.

109 *li-anna al-talaq waqa'a mukhalifan*, M.3:35 – 6.

110 *haythu nusiba ilayh al-talaq thalathan bi-lafz wahed wa hiya al-talqa al-ula*, M.3:36. See also the case of a three-time repudiation conditioned on the wife not going to hajj with her parents. It can be rescinded if the husband thought that the condition had been met whereas it was not. The explanation is confused. M.3:56 – 59, decision of *hay'a qada'iyya*, ibn Jubayr presiding, 8. 4. 1393/11. 5. 1973.

a case by case situation without being bound by a sharp rule, so that they can champion the wife's preference when a three-time repudiation is uttered in one session. She might want to be free once and for all. Or she might prefer not to see the three-time repudiation irrevocably terminate the marriage at once.

The last case cited, the one decided by judge Mukhallaf, is interesting for additional reasons, as it sheds light on two thorny issues. The first, and most important, is the illegality of a repudiation made during the last days of a deceased person, and the court casting doubt on the sanity of the husband in such an instance. Quoting both ibn Qudama and a common Ottoman Majalla principle,¹¹¹ the judge considered that the repudiation, which was pronounced three days before the husband's death in addition to having been said on his deathbed,¹¹² was intended to deprive the wife from her share in the inheritance. It was therefore vitiated, and the classical jurists mention several examples in which the repudiated wife is still considered to be in the revocable period when this happens. She is not considered therefore to have been divorced, and inherits her share as if she was still married to the deceased. (M.3.37)

This last case is also interesting for evidence. To prove the divorce had taken place, the son of the deceased produced a written document stating that his father's wife was repudiated. The document was read in full in court. It was a statement that the son had taken from his father on his deathbed. It was signed by the father and witnessed by two adult males, one of whom was the son himself. The court brought in the second witness who said that the deceased had called him on the phone and told him that he was tired, did not go out, and that he had repudiated his wife thrice in an irrevocable manner. The witness recounted that the deceased said he would send a paper to this effect to him with his son, who was his work colleague. The witness signed the paper sent to him and kept a copy,

111 M.3.36: '*man ta'ajjala shay'an qabla awanih 'uqiba bi-hirmanih*, by accelerating a matter before it is due, one gets deprived from it', which is a legal rule (*qa'ida*) found in the *Qawa'ed* of ibn Rajab (Hanbali d. 1393, Beirut ed. 1988, rule 102), and in the *Ashbah* of ibn Nujaym (Hanafi, d. 1563, Beirut ed. 1999, at 156). It was adopted with a slight variation (*man istajjala*) by the Ottoman Majalla as Article 99.

112 *marad al-mawt*, Ibn Qudama, cited at M.3.36: '*li-anna hadha – ay al-mutalliq fil-marad – qasada qasdan fasidan*, because he, i. e. the one who repudiates in death sickness, means ill.'

which he produced in court. While the evidence seemed stretched, the court did not reject it as such, and preferred to resort to the argument of the deathbed action as vitiating the written documentation.

This was not sufficient for the court of cassation, which wanted to see the full probate decision,¹¹³ and asked also for the wife to be put to the oath on this issue. She took the oath. The decision in her favour was confirmed in cassation.

IV. Children

Custody and filiation are the two main areas of disputes that courts adjudicate in cases involving children in Saudi Arabia. They tend to come with their own idiosyncrasies, especially for the establishment of filiation and the multiplicity of marriages in Islam, but common sense appears to guide the decisions of Saudi judges also here.

1. Custody

Modern Middle Eastern authors have distinguished between guardianship¹¹⁴ and custody,¹¹⁵ with guardianship inevitably inuring to the father as established *pater familias*, and custody being the effective daily control of child or children by the designated parent.¹¹⁶ All the cases below refer to the latter category, which is evidently the most important. Both the classical and the modern canon establish an age before which minor children are the wards of the mother, after which the father has custody. As established elsewhere in the Middle East, the trend has been for modern courts to water down or ignore this general scheme 'in the interest of the child.'¹¹⁷ Saudi Arabia's custody decisions confirm this overall trend.

¹¹³ *sakk hasr wiratha*, M.3.34.

¹¹⁴ *wilaya*.

¹¹⁵ *hadana*.

¹¹⁶ See MALLAT, IMEL, 357 – 8.

¹¹⁷ *Id.*, 393 – 5.

In a typical case, judge Sulayman Ibrahim al-Hadithi at the court of Riyadh held for the ‘right of the ward’,¹¹⁸ an eleven-year old girl whose father was claiming custody rights based on her age.¹¹⁹ The particulars of the case resemble estranged parents’ fight over their minor children the world over. The parents had divorced a decade earlier, and their daughter grew up with her mother, who did not marry so long as the girl was with her. At age eight, following Hanbali custody (generally set at 7 years for boys and girls), her father took her to his house, where he lived on his own. He did not allow the mother to visit. Two years later, the mother waited for her daughter at the door of the school and took her home. When the mother succeeded in physically keeping her at her house, the father claimed his right to custody in court.

In court, the girl’s mother and grandmother expressed their fear of leaving her alone with him, especially since he was without a job. At one point, the record shows the girl asking to be interviewed by the court officials alone.¹²⁰ Her deposition was taken, but no details were made public. The father’s claim was then dismissed, with judge Hadithi ruling that the child’s interest prevailed in law: ‘The right is the ward’s, this has been established by the scholars, and the rule is the interest of the ward. Since the defendant’s mother did not marry again, the interest of the girl is to stay with her mother. This is in accordance with the Prophet’s saying: ‘you [the mother] have more right to the child [than the father] so long as you do not marry again.’ (M.1.198)

The interest of the child, as shown in most jurisdictions in the Middle East, appears to have become the key consideration of judges in such cases. Saudi Arabia is no different when the situation appears to the judge as worrisome for the child. In this case, the father seemed unstable, invoking the death of his own mother as a spell on the family,¹²¹ and living jobless alone with his daughter, whilst preventing her from seeing her mother. At one point the judge mentioned the rule of the mother losing custody if she remarries, and it transpires from the report that the mother did remarry for a couple of years between the surrender of custody to the father when the girl turned eight and the snitching episode which gave way to the court case

118 *haqq al-mahdun*.

119 M.1.192 – 99, 9. 2. 1426/19. 3. 2005, confirmed in cassation, 3. 3. 1426/11. 4. 2005.

120 M.1.197.

121 *sahr*, at M.1.196.

brought by the father. However, despite what might have appeared as grounds for loss of custody, the judge remained severe with him, rejecting his claims outright and requesting that he exercise his right of visitation only upon a new judicial request. The girl must have made a damning deposition against her father in the *in camera* interview.

In contrast, sometimes the situation is so unfavorable to the mother that she is denied custody even when the children are minor. This was the case of a Russian mother who was married to a Saudi man who divorced her in 1426/2005. She had borne him two sons, in 1998 and 2002 respectively. He took them to Jordan, where the court granted him custody despite their young age. The wife did not live in Jordan, and a procedural device was used to assert the husband's custody over his small children. It was the husband's mother who brought the case in Amman demanding custody over her grandchildren against her son. With that 'fake' lawsuit, the husband was probably able to avoid notifying his previous wife, while engineering with his mother a phony case that would consolidate his effective custody over his sons. It worked, and the Amman court granted the father custody by denying the grandmother's (his own mother) request, 'who was demanding for the children to be surrendered over to her, and feared that the plaintiff woman [i. e. the mother bringing in the subsequent case in Riyadh her request for custody] would take the two sons to Russia, a country which was not Muslim; and the woman does not pray nor fast, and I [the husband] fear for the sons from her and for their beliefs [not to be impaired by their mother in that non-Muslim country].'¹²²

So judge Sulayman ibn 'Abdallah al-Majed, in the general court of Riyadh, confirmed the judgment of his peers in Jordan by rejecting the mother's stronger rights under classical law for the protection of her infant children. He invoked their higher interest, namely to be brought up by their Muslim father.¹²³ In his conclusions, the Riyadh judge mentioned 'the agreement of the majority of Maliki, Shafi'i and Hanbali scholars that the father has the right [of custody] in this case, including ibn Qudama in the *Mughni*, vol. 8 p. 193 – if the country to which the father had moved was

¹²² M.1.372 – 402, at 373, with the full Amman decision of 2005 quoted at 374.

¹²³ M.1.376. There seemed to be doubt over the religion of the mother in the case, who argued that she had converted to Islam, see at 375.

secure and the road to it secure, then the father has a better right than others, whether he resides in it or he moves.’ (M.1.377)

The plaintiff/mother, he concluded, has visiting rights, and retains the right to request custody if the former husband returns to her place of residence. The attorney of the mother made an appeal but failed to follow up, making the lower court decision final.

While the bias was evident against a Russian mother who could educate the children as Christians back in her country if she had been granted custody, judge Majed seemed genuinely attentive to the child’s interests in another decision in which he granted custody to the mother of a minor boy because ‘she could better take care of him’.¹²⁴ To be precise, the judge argued that ‘custody was a right both of the ward and the custodian,’¹²⁵ and concluded that ‘the interest of the (toddler) child’ prevailed.¹²⁶

2. Filiation

A fair amount of filiation decisions appears in Saudi courts.

In one case, the judge accepted a filiation for a son born 18. 1. 1429/27. 1. 2008 almost two years after his father’s death (22. 2. 1427/23. 3. 2006), on account that all the heirs had accepted it, and that the lapsed period remained within the maximum laid by ibn Qudama.¹²⁷

¹²⁴ M.1.392 – 395, decision confirmed in cassation on 27. 6. 1427/24. 7. 2006.

¹²⁵ *kawn al-hadana haqqan lil-mahdun wal-haden ma’an*, at 394.

¹²⁶ In another case where the parents lived in different cities, custody went also to the father in a dispute where the mother of two boys, aged 11 and 13, had refused a judicial settlement requesting the father to deliver the boys to their mother during the weekend, and for a week during the holidays. M.1.296 – 99. The judge mentioned that ‘the jurists had decided that if the home of the two parents differed, custody goes to the father but the children cannot be prevented from visiting their mother.’ (at 298). Note the concept of ‘*hadana murtaja’a*’, i. e. the possibility of new requests when circumstances change, such as change in the residence of the divorced parents. This is also the case for visits of children to their divorced parents, which the court deems always subject to being reviewed for changed circumstances, see case M.3.50 – 55, at 55. Decision of 8. 4. 1391/13. 6. 1971 by *hay’a qada’iyya* presided over by Muhammad ibn Jubayr.

¹²⁷ M.3.40 – 44. Decided 25. 2. 1429/4.32008, confirmed in cassation 3. 4. 1429/10. 4. 2008. In *al-Mughni*, 9, 180, ibn Qudama mentions in special circumstances the acceptance of filiation up to two years, in some reports even four, after the father’s death.

In another case, following divorce, the filiation of a daughter was confirmed against the 'doubt' of the father.¹²⁸ The daughter was born during the marriage, but the father was seized with a strong sense of doubt as to his paternity, and brought a case in court to reject her filiation. Marriage and divorce documents were produced and ascertained by the court, including by deposing a plethora of witnesses. Against the father's doubt, the authority of Ibn Qayyim's *Zad al-ma'ad* was invoked: 'To the one whose wife gave birth to a child who could have been from him, the child is considered his if birth has taken place after half a year from the moment sexual intercourse was possible.' (M.2.74) This having been the case here, the father's denial of paternity failed.

In a third, unusual paternity case, the plaintiff came to court ten years after the divorce to claim as his son the boy who was born to his former wife ten months after their separation.¹²⁹ He had seen the evidence 'in his dream.' The court responded patiently with a long string of citations from classical jurists vindicating the wife's claim that having her period after the divorce was evidence that the son could not be the first husband's, as well as a rejection of his 'dream' as evidence. Both classical scholars Shatibi and ibn Taymiyya were quoted to dismiss proof by dream. In a reference prefiguring the Cartesian *malin génie*, the court quoted 'Shaikh al-Islam ibn Taymiyya R.I.P.':

The one who sees a dream is often a liar. To appreciate his (dis)honesty, the one who might have brought the dream to him could well be Satan, and the pure vision that carries no proof as to its veracity cannot be used as evidence for anything by common scholarly accord. The verified sayings¹³⁰ of the Prophet establish it: 'The vision is of three types, a vision of God, a vision of what the person herself asserts, and a vision of Satan.' So if the vision is of three types, it is necessary to distinguish each. End of ibn Taymiyya's quote.¹³¹

The judge concluded: 'The vision of non-prophets will not be used in a court of law in any way, except if it confirms already existent legal rules. If it does

128 Decision of judge 'Abd al-Rahman Aal 'Atiq, Riyadh, dated 21. 3. 1428/8. 4. 2007, confirmed by cassation 19. 3. 1428/6. 4. 2007, at 68 – 75.

129 M.2.76 – 86, judge Nayef ibn Ahmad al-Hamad, court of Nafi, decision of 4. 11. 1415/16. 9. 1994, decision of the court of cassation 25. 11. 1415/24. 4. 1995.

130 *sahih*.

131 M.2.84, quoting ibn Taymiyya, *Majmu' al-fatawa*, 27, 458.

so, it is accepted and applied, if not it must be dismissed and avoided.¹³² 'Silence of the claimant for over ten years is a strong sign of the invalidity of his claim'. (M.2.84) The claim was dismissed. The doubting father's appeal in cassation was summarily rejected.

V. Succession and trusts

One is not likely to find many cases on inheritance. The field has been well circumscribed following a common hadith emphasizing the importance for jurists to be acquainted with the 'science of shares'.¹³³ Sunni and Shi'i rules differ vastly, but the mathematical exercise that judges have mastered early on from the disjointed verses of the Qur'an is solid in both cases. In contrast to marriage and divorce, changes to the classical system in the modern world are limited, and the inheritance judge treads on firm grounds.¹³⁴ It is therefore on peripheral issues that disputes over inheritance tend to emerge.

One such case is a conflict mixing inheritance and marriage issues. The plaintiff, a woman repudiated after 25 years of marriage, appeared before judge Ahmad al-'Arini to request the annulment of a repudiation uttered a year earlier.¹³⁵ She argued that the repudiation was null because her husband had AIDS and cancer. She also claimed that the objective of the repudiation was to deprive her from her inheritance, and to deprive her nine children from benefits they are entitled to. The unsaid legal principle was the 'illness of death',¹³⁶ which allows the questioning of a donation because of the sick man's sanity that death illness may have impaired.

The defendant admitted to the cancer but did not mention AIDS. Following his statement, the court requested and received a long medical report quoted in full in the decision. The medical report confirmed that he had both AIDS

¹³² M.2.84 – 5, quoting Shatibi, *Itisam*, 1, 260.

¹³³ *'ilm al-fara'ed*. The Prophetic saying appears in various forms, including '*ta'allamu al-fara'ed wa 'allimuh fa-innahu nisf al-'ilm*(Learn the sciences of shares/inheritance and teach it, for it is half of all science.)'

¹³⁴ See for a summary of basic rules MALLAT, IMEL, 358 – 60.

¹³⁵ M.1.300 – 5. Decided 30. 12. 1426/30. 1. 2006, confirmed on cassation 14. 2. 1427/15. 3. 2006.

¹³⁶ *marad al-mawt*. See above n. 112.

and cancer, but also suggested that he was being treated effectively for it. (M. 1.303)

The judge asked the husband why he had repudiated his wife. He explained that he could not live with her any longer, and that he was committed now to another, previous wife, with whom he also had several children. The court also asked about his job. He was still working. This allowed the judge to conclude that illness had not impaired his sanity, especially since the repudiation had taken place over a year earlier. The defendant was then asked whether he would consider the return of the repudiated wife. He responded that was firmly opposed to taking her back. Judge 'Arini could only confirm that 'death illness' did not apply:

Since the plaintiff confirms that the defendant continues to work, and considering that a full year has passed since the divorce, and the defendant remains alive and well, what the plaintiff stated is not persuasive, because the classical jurists¹³⁷ are of the view that death illness prevents a person from working. In view of all the above, I rejected the defendant's case and explained to her that her husband's repudiation remained valid and effective.¹³⁸

The court of cassation rejected the wife's appeal. The consequence on her inheritance was stark. She had become estranged from her previous husband and from any entitlement to inherit his estate.

Hereditary trusts are also an area rife for disputes over succession. Waqfs (Arabic plural *awqaf*) are trusts of two kinds in both classical and modern law, and remain so in the countries where they still survive: the family or hereditary trust,¹³⁹ and the charitable trust¹⁴⁰ designated for non-kin beneficiaries at large, usually the poor and disenfranchised. Waqf rules are complex, and the institution plays a significant economic and social role in the history of the Middle East. Where, as in Saudi Arabia, the waqf survives as an institution, its regulation is also complex. To the traditional system is increasingly superposed the commercial law of trust in its Western model, as in companies with trustees as fiduciaries. In company law, the fiduciary dimension adds a significant layer of complication.

¹³⁷ *fuqaha'*.

¹³⁸ M.1.305.

¹³⁹ waqf *dhirri*.

¹⁴⁰ waqf *khayri*.

Waqf terms are honored by Saudi courts, and judges are considered the ultimate trustees of a waqf. In a case reported in Ahkam, the terms of a waqf established as far back as 1279/1862 in the city of Madina were upheld.¹⁴¹ With time however, the revenue from the waqfs, which is a condition for its effectiveness, may dry up, setting in complex dismantlement rules of changing the waqf into a disposable property.¹⁴²

Normally, a person may dispose of property at will during lifetime or as specified upon death. A first case revolved over the difference between a will and a waqf. It came to the HJC from the first instance court of Jeddah by way of the Ministry of Justice.¹⁴³ The question was whether the deceased could have willed the third of his estate, the third being the maximum portion allowed for a will in the Islamic law of succession, to the benefit of 'the poor of village x in Hadramut.'¹⁴⁴ More specifically, was the distribution of that portion of the estate outside Saudi Arabia tantamount to a trust, in which case it would be forbidden on account of a statute prohibiting trust benefits to be spent outside the Kingdom?

The HJC allowed the will to stand. Despite language that looked like a trust, it argued, this was a will rather than a trust, and because of this, there was nothing to prohibit it from benefiting heirs abroad.

Free disposal of property by way of waqf was confirmed in another decision, issued in 1426/2005, for an important family trust established over fifty years earlier, on 1. 12. 1362/28. 11. 1943.¹⁴⁵ The case is complex, for the trust had been established in the form of a will dated 8 dhu al-hujja 1361/16. 12. 1942, which a probate judgment¹⁴⁶ acknowledged only on 11. 9. 1425/20. 12. 2004. Part of the trust had been respected by the heirs, some of it had been substituted over the course of time, but there emerged two outstanding issues which the court had to rule on: the claim by the children of the founder's daughters to a share in the inheritance, and the equality in trust benefits by the

141 Ahkam, 9, 5 – 29. Decided 28.10.1433/15.9.201, confirmation on appeal 11. 3. 1434/23. 1. 2013.

142 This is called substitution *istibdal*.

143 HJC, *hay'a qada'iyya 'ulya*, four judges headed by Muhammad ibn Jubayr, M.2.18 – 21, decision dated 30. 3. 1392/12. 5. 1972.

144 M.2.19. Hadramut is a province in Yemen.

145 M.1.214 – 23. Decision of Ahmad ibn Sulayman al-'Arini, General Court of Riyadh, 25. 5. 1426/2. 7. 2005, confirmed incassation on 5. 9. 1426/8. 10. 2005.

146 *hasr al-irth*.

sons and daughters of the testator/founder in accordance with the waqf. The first claim did not seem serious, considering the rules on inheritance, which do not give any share of the estate to such distant relatives. The second claim, on the equality of male and female offspring in accordance with the trust deed, was more serious.

Therefore I decided as follows: first, I explained to the daughters' children who intervened in the trial that they have no right in the trust which is the subject of this case. Second I explained to the trustee¹⁴⁷ defendant that he must divide the benefits of the trust in accordance with the wishes of the founder, equally between sons and daughters, and between the children of his sons but not the children of his daughters. The daughters' children have nothing for them in the trust. Third, I explained to the daughters x and y of the founder that they are entitled to bring a case against their brothers to reclaim, if they so wish, the difference between what they are owed and what they were given in the past, because what they were deprived from contradicts the terms¹⁴⁸ of the trust. This is what appears to me [right] and I have ruled accordingly. (M.1.232)

On substance therefore, and with textual support found in authoritative Hanbali sources such as ibn Qudama's *Mughni*, the decision paves the way to inheritance arrangements by way of trust that make heirs equal irrespective of the intestate rules of 'two shares for a male, one share for the female.' (Qur'an 4:11) This is a remarkably enlightened decision resting on the sanctity of the trust founder's choice.

Also in the matter of waqf, the Judicial Council had issued a judgment, which, despite its brevity, may constitute a significant precedent on the totally opposite side of the sanctity of the trust.¹⁴⁹ In this brief case dated 1390/1970, a radical substitution ended¹⁵⁰ the waqf altogether.

The case arose upon the succession of children to a father who died insolvent without any property left to his children, yet had established a trust over four properties he owned in Mecca. The heirs were completely deprived from their inheritance by the trust, as the only property of the father was

¹⁴⁷ *nazer*.

¹⁴⁸ *shart*.

¹⁴⁹ M.2.22 – 24, decision of the Judicial Council, *al-hay'a al-qada'iyya*, of 14. 8. 1390/15/10/1970, probably the same High Judicial Council which issued the judgment of 1392/1972 discussed above at M.2.18. The report mentions at M.2.23 that it was the 'scientific council', *al-hay'a al-'ilmīyya* which issued the judgment, but does not give precisions on its composition.

¹⁵⁰ *inha'*.

included in the waqf deed. Despite the established sanctity of the waqf as principle, the judges decided otherwise. After taking cognizance of the trust deed,¹⁵¹ which had been authorized by the previous head of the Mecca court, the Judicial Council simply allowed it to be voided: 'Since the trust deed did not declare that the founder had not left behind any other property than the one he put into the trust, and considering the opposition of the heirs without anyone arising to confront them, the Council does not see an objection to hear the heirs' opposition to the validity of the trust, and do with it what the law dictates.' (M.2.24) The trust was dismantled.

VI. Conclusion

The span of judgements examined in this article provides a fair sample of how family law disputes are adjudicated and solved in Saudi Arabia. Overall, the litigants appear to get a fair hearing in court, and judges are attentive to their pleas irrespective of gender. The readiness for judges in matters of marriage to let a woman prevail over her father in choosing her husband, to let a wife get out of a difficult marriage because 'she hates her husband', to make the best interest of the child weigh in favour of a divorced mother, and to allow a family trust to give equal shares to daughters and sons if the founder of the trust has so chosen, all these judgments show pugnacious women seeking their day in court and prevailing. The language is simple, and the parties are heard clearly in the reports. Judges look into the tradition, quote classical scholars, and listen to the pleas of the litigants intently. They often defer to expert committees, whether legal as in the opinion of muftis, or medical when mental impairment or the affliction of AIDS need to be ascertained for the purpose of the trial. Procedurally, the report shows a simple process and an effective mode of operation. The timeframe between the first appearance in court of the litigants and the end of the generally two-tiered judicial system is reasonable. Judges are interventionist and conciliatory, and do not hesitate to suggest compromises to the litigants, with a high degree of didacticism as they explain their rulings and court

¹⁵¹ *sakk al-waqfiyya*, or *waqfiyya* simply.

regulations to the parties at various stages of the trial, and propose to them their legal options.

Still, the discrimination prevailing at the root of the legal system is not challenged. Polygamy, the husband's absolute right to repudiate his wife, or intestate rules giving two shares for females as opposed to their counterpart males are the preserve of a traditionalist, pre-modern understanding of the law as unequal between genders. Here Saudi courts follow an established pattern common to most Muslim/Middle Eastern jurisdictions.

In the normalization of law as the article posits it, Saudi judges appear no different from their counterparts elsewhere in the world. In the massive majority of cases, their decisions are just and balanced, albeit within a legal system where women's equal rights are impaired. Normalization also operates, for the first time in the country in a hundred years, through the emergence of stable and consistent case-law, made finally available to the larger public. Even without a comprehensive family code, the Saudi citizen can now ascertain his and her rights and obligations precisely enough.

Imagined Religious Institutions: Pre-modern Hanbali *Ulama* in the Juristic Sphere from (850 – 1350)

ABDULLAH ALAOU DH¹

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Abstract

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This article discusses the features of “religious institutions” in the pre-modern Hanbali context. As we will see, the religious institutions were somewhat like the “imagined communities” that Benedict Anderson describes in his seminal work. Most religious movements and productions are not directly traceable to formally organized institutions and even when such institutions happened to exist, their function was usually unrelated to the religious work, or to religious intellectual activities as a whole, or in any case less relevant than the broader sphere of jurists. This sphere is discussed in the context of the clergy in the Sunni and Hanbali experience, where hierarchy and institutionalization were rarely operative. The article ends with the debate of whether ulama, namely the Hanbalis, represented a “corporate group.” Different studies adopt different approaches to determine whether ulama and jurists have established the type of solidarity that would qualify them as a corporate group. I argue that, although many jurists were members of such corporate groups, not all of them were. The general juristic sphere encompassed many who were members neither of a corporate group or even of a madhhab. This feature of free-floating juristic sphere allowed jurists to protect their domain from both internal and external controls.

I. Introduction

This article discusses several features of “religious institutions” in the pre-modern Islamic context focusing on the Hanbali jurisprudential school (*madhhab*) from the establishment of this *madhhab* in around 850 by its founder, Ahmed Bin Hanbal, until around 1350. As will be seen, the religious institutions of the time were somewhat akin to the “imagined communities” that Benedict Anderson describes in his seminal work.² They comprised imagined institutions because most religious movements and productions did not issue from formally organized institutions and even where such institutions did exist, their purpose was usually unrelated to religious work or religious intellectual activities broadly understood, or in any case were less relevant than the broader sphere of jurists. The “clergy”

² ANDERSON BENEDICT, *Imagined communities: Reflections on the origin and spread of nationalism*, Verso 2006, at 1–9. See also TAYLOR GEORGE, *Modern social imaginaries*, Duke 2004, at 23–31.

in the Sunni Muslim experience, to the extent it existed, was rarely hierarchical or formally institutionalized. The article therefore contributes to the debate over whether the *ulama*, namely Hanbalis, comprised a “corporate group.” Different studies have adopted different approaches to determine whether Islamic scholars (*ulama*) and Islamic jurists (*fuqaha*, *sing. faqeeh*) ever possessed an established sense of solidarity that would qualify them as a corporate group.

One traditional orientalist debate focused on the question of whether the *ulama* had failed to institutionalize their religious authority and therefore were responsible for the lack of an organized corporate group. At the same time, others ask whether these jurists were ever able to really act in virtue of a common self-identity as *ulama* and thus constitute an institutionalized corporate group.³

Both approaches were dominated by the orientalist presumption that institutionalization is synonymous with progress and leverage. They presume that the lack of dominant corporate groups and completely institutionalized *ulama* are failures. Through the example of Hanbalis, one of the four prevalent *madhabs* in Islamic jurisprudence (covering the *madhab*’s first five centuries), I argue that, although some corporate groups existed, the most important feature of jurists in general is the imagined sphere that delimits membership. There is no such organized institution that gathers the whole of the different Hanbali and non-Hanbali jurists, and scholars in one comprehensive group or rigidly classifies the jurists into corporate subgroups. But rather than seeing this as evidence of some failure by the Hanbali *ulama* to consolidate their group identity and mission, I understand it as evidence of the *ulama*’s intentional resistance to persistent efforts of institutionalization in order to maintain their *sphere*. Allowing them to be consolidated into a *group* may have offered unity but it would also make them susceptible to external controls as well as the internal threat that one particular interpretation of religious meaning would be adopted, pushing out all others.

3 See e. g. MAKDISI GEORGE, *Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court*, *Clev. St. L. Rev.* 34 (1985), at 10; EPHRAT DAPHNA, *A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad*, SUNY Press, 2000, at 143; KEDDIE NIKKI, *Scholars, Saints, and Sufis: Muslim Religious Institutions in the Middle East Since 1500*, Univ of California Press, 1972, at 2.

I will focus on the Hanbali “clergy,” some of whose juristic features persist and can arguably represent different jurists throughout Islamic history and probably even today. It is worth noting that not all practices of the Hanbalis could be generalized or were present everywhere throughout the Hanbali experience. Examining certain of these features, however, will enhance our understanding of the juristic work and draw attention to possible similarities with other schools and times. Most importantly, examining these features of Hanblai *ulama* in the past opens the way to a new understanding of other Islamic jurists, including some contemporary ones who are trained in classical jurisprudence. Taking different examples from different times and schools could reveal that Islamic jurists share more in common than we suspect. By presenting the formation of Islamic scholars, I will test the dispersed nature of these scholars and how they self-conceived their tasks and roles. Then, I will apply the non-corporate features to the political field to examine how their features affected their activism, withdrawal, and political mode in general. In the last section, I will give the example of modern *ulama* during the Tanzimat period to demonstrate that powerful features of the dispersed authority of the imagined religious institutions still exist.

II. “Clergy” in Islam and the “Religious Institution”

It is important to define what we mean by religious institutions and scholars (*ulama*). Our understanding of the term “religious institution” affects our appraisal of the roles, the nature, and our discernment of the decrease or increase in the presence and influence of that institution. Epistemological presuppositions regarding the characteristics of “religious institutions” have influenced the literature in a powerful, and in my view negative, way.⁴ Western writers have approached the issue of “religious institution” with presuppositions that reflect the historical experience of Western

4 For the idea of epistemological conflict between two cultural narratives and their powerful influence on our understanding and consciousness see MACINTYRE ALISDAIR, *Epistemological Crises, Dramatic Narrative and The Philosophy of Science*, *The Monist* 1977, at 60.

Christendom—its understanding of the religious sphere and operations—rather than those of Muslim cultures.⁵

At the same time, the phrase “religious institutions” as applied to Islamic history may prove misleading for two reasons. First, and most importantly, most of the work and literature produced by Islamic jurists and *ulama* did not take place in any formal “religious institution” as we understand the concept today. Many scholars who have enriched the judicial and religious literature with their contributions can hardly be linked to an actual, identifiable institution. Books, *fatwas*, and responses of Islamic scholars are religious works, but the religious community is not a religious institution nor is it mainly composed of religious institutions unless we use “religious institution” in an imagined, metaphorical sense.⁶ Even keeping this metaphorical and imagined institutional status in mind, the individual qualities of the scholar and his work almost always matter more than the aspects of self-identity that are determined by their pertaining to a given imagined school, as we will see was the case in the ranks of Hanbali *ulama* across five centuries.

The second pitfall of the term “religious institutions” from the point of view of the community described as such involves a large segment of the community that has reservations about the deep Christian heritage associated with the phrase. According to a number of influential contemporary Muslim scholars, the term “religious institution” possesses a connotation related to the Christian context in which it arose, a connotation that contaminates its understanding in the Islamic context.⁷

5 The researcher HUSSEIN AGRAMA noted the predicament of the presuppositions of Western studies that analyze the Islamic thought as a “problem” to be explained and then solved. This predicament happened because the Western standards and narrative were so powerful, and then shaped the presupposition about how religion operates in society. I may add here that the Western narrative shaped how we (and they) understand Islamic works by reducing them to “religious institutions” that dominated Christian literature and experience. See ALI AGRAMA HUSSEIN, *Questioning secularism: Islam, sovereignty, and the rule of law in modern Egypt*, University of Chicago Press 2012, at 1 – 42.

6 This nature of Islamic jurisprudence is going to be discussed from another aspect, the (lack of) corporate group.

7 See e.g. AL-QARADAWI YOUSEF, *Al-Islam wa al-'Almanyah Wajhan li Wajh*, Maktabat Wahbah 1987, at 45; AL-HAWALI SAFAR, *Al-'almanyah*, Dar al-Hijrah 1982, at 65 – 108; IMARAH MUHAMMAD, *Al-Islam wa Al-Syasa*, Al-Shorouk International 1992, at 28 – 9 – 70. This book is important because it was first published by the Center of Research in al-

The vast majority of commentators, writers, and scholars in Islamic studies,⁸ especially Sunni ones, assert that there is no clergy in Islam, where “clergy” is to be understood as hierarchal and representative of the sacred.⁹ Although at different points in history there were clerical traditions or practices that were justified by different methods in Islamic jurisprudence and thought, these practices never formed a pattern or marked any divergence from the mainstream practice which was of a decidedly non-clerical nature.¹⁰

The “religious community” whose Western counterpart would be described as a “religious institution” presents itself in the Muslim world as, for example, “scholars” (*ulama*) and jurists (*fuqaha*) more than “institutions” or establishments. For example, the self-presentation and self-image of the Hanbali scholarly community identifies them as scholars, jurists, authors, jurisconsults, and so on.¹¹ Therefore, the whole group of *ulama* as conceived by the *ulama* themselves is therefore somewhat comparable to the concept of “*ummah*” (Islamic nation) in the sense that it is not a physically identified distinct identity, institution, or group, separate and classified.¹² Rather, the *ulama* as “imagined institution,” I would say, is a combination of organized institutions and religious scholars who may or may not be affiliated with formal or even jurisprudential institutions known as “*madhabs*.”¹³ And even if most Hanbali scholars were affiliated to a fixed institution at some point, they acted as independent scholars

Azhar, and is prefaced by then-al-Azhar’s Grand Sheikh: Jad al-Haqq who asserts in his preface that there is no sacred religious institutions in Islam.

- 8 See for e. g. AL-MAWDUDI ABU AL-'ALA, *Nazarayyat al-Islam al-Syasyah*, Dar al-Fikr. 1967, at 30; AL-QARADAWI, *supra* n. 6, at 36; al-HAWALI, *supra* n. 6, at 65 – 108; IMARAH, *supra* n. 6, at 28 – 9,50 – 123. See also BROWN CARL, *Religion and State, The Muslim Approach to Politics*. New York 2000, at 32. Brown clearly distinguishes between the Church-based system and clergy in Western experience on the one hand and Islamic State and governance on the other in the idea that Islam in its traditional approach does not separate religion from state but meanwhile does not have the (Christian) clergy in its history.
- 9 See BROWN, *supra* n. 7, at 32.
- 10 HATINA MEIR, ‘Ulama’, Politics, and the Public Sphere: an Egyptian Perspective, Utah 2010, at 2; EPHRAT, *supra* n. 2, at 96. For the Christian clergy in the West, see e. g. JELEN TED, *The political world of the clergy*, Praeger 1993, at 23. Jelen here cited a clerk who specifies his job as to represent the sacred.
- 11 In later examples of the other non-institutionalized Muslim scholarly communities see KEDDIE, *supra* n. 2, at 149; EPHRAT, *supra* n. 2, at 10 – 14.
- 12 See in general ANDERSON, *supra* n. 1; Taylor, EPHRAT, *supra* n. 2.
- 13 See HATINA, , *supra* n. 9, at 2; EPHRAT, *supra* n. 2, at 96.

whose authority derived from their scholastic aptitude more than from institutional affiliation. This is why, for example, they were much more invested in the imagined school of jurisprudence than the formally established schools of their times, as we will see in the next section.¹⁴

Reducing the scope of religious authority to the role attributed to it in the scholarly literature on formal institutions leaves out rich historical debates and factors and, thus, makes the attempt to provide a normatively acceptable understanding of the clerics' proper role unrealistic. This is not to say that formal institutions were not established or that they failed to affect Islamic jurisprudence. However, these formal Islamic "institutions" were inherently more fluid, dispersed, and horizontal to such an extent that they, for the most part, could not even be called institutions in the Western sense of the term. Hanbali jurists flow in and out of them, and their behavior tends to be that of individuals accountable only to themselves, often attached to a school of thought in an imagined sense that does not imply any sort of institutional loyalty or obligations to the school or institution. Portraying official religious establishments as monolithic representations of religious institutions in Islamic jurisprudence neglects a wide range of influential and sometimes more important segments of the religious community. As a result, any attempt to determine whether the power or authority of religious institutions in Muslim countries at any historical point decreased or increased will depend on the how the term "religious institution" is understood and applied to the community in question.¹⁵

14 MAKDISI differentiated between the schools of law "madhab" and colleges of law "*madrasas*/institution." See, MAKDISI GEORGE, *The Rise of Colleges. Institutions of Learning in Islam and the West*, Eric 1981, at 1. It is noteworthy when Ijarah in the book prefaced by the Sheikh of al-Azhar, and Abdul-razzaq al-Sanhouri, used the phrase "the Muslim nation with its *scholars and civil institutions*." (Emphasis is mine). He distinguished between Muslim *scholars* and *civil* institutions instead of, say, "religious institutions" and "civil institutions." IMARAH, *supra* n. 6, at 56.

15 As examples of analyses that suffer from this reductionist approach in a way or another, thus, concluded that scholars' or religious institutions' influence in the Muslim world decreased, see HAMILTON ALEXANDER ROSSKEEN GIBB/HAROLD BOWEN, *Islamic Society and the West: Islamic society in the eighteenth century*, Oxford University Press 1957, at 2:112 – 3. BERNARD LEWIS, *Islam in history*, Alcovoe Press. 1973, at 4; KEDDIE, *supra* n. 2, at 149 – 167. Compare in general, ZEGHAL MALIKA, *Religion and Politics in Egypt: The Ulema of al-Azhar, Radical Islam, and the State (1952 – 94)*, 31 *International Journal of Middle East Studies*, 371(1999); ZAMAN MUHAMMAD QASIM, *The Ulama in Contemporary Islam:*

Let us now take up the case of Hanbali *fuqaha* and *ulama* in order to discuss the idea of guilds and imagined institutions focusing on a very important period of the Hanbali school—the period running from its establishment (850) by Ibn Hanbal to around five centuries later (1350).

1. The Ranks of Hanbalis (850 – 1350)

Hanbalis refers to the *fuqaha* trained in the jurisprudential school of Ahmed bin Hanbal (d. 855), the founder and the main articulator of that *madhab*. The Hanbali *madhab* is one of the four principal Sunni schools that dominated the literature of Islamic jurisprudence. The Hanbali jurisprudence was established by Ibn Hanbal in around 850. It was propagated within learning circles by books of the founder and later those of his followers and adherents. Hanbali thought enjoyed a period of robust momentum during its early years which gradually dissipated until about two centuries later when it was revived by the Judge Abu Ya'la (d. 1066), who is probably the second most important figure in the Hanbali traditions.¹⁶

After the death of Abu Ya'la, his son Abu al-Husain Mohammed (Ibn Abi Ya'la, d. 1131) decided to document the jurisprudential biographies of Hanbali figures, compiling and classifying them into ranks (*tabqat*). His book can be translated as “the Ranks of Hanbali Jurists.” Each rank represents a generation of scholars going back to the establishment of the

Custodians of Change: Custodians of Change, Princeton University Press (2010), at 1 – 17; HATINA, *supra* n. 9, at 9; SHADAAB H RAHEMTULLA, *Reconceptualizing the Contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian State in the Late Twentieth Century*, Simon Fraser University 2007, at 1.

16 IBN ABI YA'LA, *Tabaqat al-Hanabilah*, Dar al-Kutub al-'Ilmiyyah 1996, at 173 – 133; ABU ZUHRAH MOHAMMAD, *Ahmed Bin Hanbal*, Dar al-Fikr al-'Arabi, at 139 – 463; SCHACHT JOSEPH, *An Introduction to Islamic Law*, Clarendon 1964, at 63 – 6; WAEL B HALLAQ, *An Introduction to Islamic Law*, Cambridge University Press 2009, at 31 – 8; MELCHERT CHRISTOPHER, *Ahmad ibn Hanbal*, Oneworld Publications 2012, at 59 – 82. There was an early debate whether Ibn Hanbal was a jurist at all. For example, IBN JAREER AL-TABARI in 922 A.C. argued that Ibn Hanbal was just an authentic narrator of the Prophet's traditions, a position known as “*muhaddith*” instead of jurist, faqeeh. Ibn Jareer paid a harsh toll on this opinion. In 922 A.C., the followers of Ibn Hanbal in Baghdad attacked him, threw rocks at him until he died or probably was killed. BIN AL-WARDI OMAR, *Tatimmat al-Mukhtasar fi Akhbar al-Bashar* (Tarikh Ibn al-Waerdi), Dar al-Kutub al-'Ilmiyyah 1996, at 1 – 248 – 9.

Hanbali jurisprudence. Two centuries after the death of Abi Ya'la, another well-known jurist, Ibn Rajab (d. 1393), resumed the jurisprudential biographical work, covering the ranks of Hanbalis from Abi Ya'la's time until his own. Ibn Rajab's work can be translated as "the Supplement of the Ranks of Hanbali Jurists."

The two books, "the Ranks" by Ibn Abi Ya'la and "the Supplement" by Ibn Rajab are both important works for understanding the jurisprudential works and institutions of the Hanbali *madhab*. They provide a survey of the Hanbalis from the establishment of the Hanbali jurisprudence (850) until five centuries later (1350). Each Hanbali jurist belongs to a rank that generally lasts between twenty to forty years.¹⁷ The authors start each biography with a simple introduction of the date of birth and place and a list of teachers and instructors. Then, Ibn Abi Ya'la and Ibn Rajab narrate the main events of the life of the jurist, and how they contributed to the Hanbali jurisprudence. Usually, the two authors end each biography with notable jurisprudential opinions and selections (*ikhtharat*) by that jurist. Reading the texts, one notices figures who are more influential in the Hanbali jurisprudence than others—those individuals whose authority is considered sufficient to establish a new interpretation of the Hanbali jurisprudence to be followed by adherents of the school. Examples of these influential include al-Khallal (d. 923), al-Barbahari (d. 940), al-Khiraqi (d. 954), al-Harawi (1089), and Ibn Hubairah (d. 1165).¹⁸

In the following sections, I will discuss the Hanbali mode—juristic features that persist and describe different judicial practices throughout Islamic history and probably even today. It would be inaccurate to generalize and project practices that existed at specific times and circumstances, yet a broad grasp of these features will enhance our understanding of the

17 For the ranks (or layers, as FRANZ ROSENTHAL translated the word "Tabqat"), ROSENTHAL notes that dividing Muslim biographies into figures is an authentic Islamic approach to historiography. It started with the first generation of the Prophet's companions (Peace Be Upon Him). According to him, some Muslim medieval historians choose twenty years for a rank, while others extend it to forty years. However, a third group seems to fluctuate between the twenty and forty and stretch it sometimes more. The case of the two compilations here of the Ranks of Hanbalis and its Supplement seem to adopt the latter approach. See AL-IMAM MUSLIM AL-NAISABOURI, *al-Tabaqat*, Dar al-Hijrah 1st ed. 1991, at 33–8; ROSENTHAL, *A History of Muslim Historiography*, E. J. Brill. 1968, at 82–3.

18 IBN ABI YA'LA, *supra* n. 15, at 2:64, 16, 64; IBN RAJAB, *Dhail Tabaqat al-Hanabilah*, Dar al-Kutub al-'Ilmiyyah 1996, at 1:44–211–38.

juristic work, and draw our attention to the possibility of similar features in other schools and times. Ideally, these features of the past Hanblai would lead us to a fuller understanding of other Islamic jurists, some even contemporary, whose outlook and orientation largely follows the structures of classical Islamic jurisprudence.

2. The *Ulama* as Corporate Group

If indeed neither “clergy” nor “religious institutions,” as they are understood in the West, existed in analogical form in the Islamic mainstream or at least did not have a central role in the religious life of the community could other corporate groups have existed and exerted influence? In this section, I will review some important ideas from the literature on this subject, and by taking the Hanbali example, I will conclude that some corporate groups or guilds did indeed exist in the Islamic context. The most important defining feature of such groups, however, is the existence of a sphere that encompasses both corporate and non-corporate groups. Other than the existence of the juristic sphere, there was no such organized institution that gathered the different jurists, scholars, and institutions into a single comprehensive corporate group or established a corporate relationship between all the bodies of religious scholars. For those reasons, I argue that corporate relationships were at most secondary in the religious juristic sphere.

Following Louis Massignon valuation of the importance of “guilds” in Islamic history,¹⁹ George Makdisi went one step further by applying the concept not only to formal schools and associations of artisans in medieval Islam but also to jurisprudential schools (*madhabs*).²⁰ Sherman Jackson, in turn, described the relationship of the jurist to the jurisprudential school (*madhab*) in terms of “corporate status” where “[e]ach school (*madhab*) acquires the ability to confer a measure of protection to its members by virtue of their

19 According to MAKDISI, Louis Massignon was the first who spoke of guilds in Islam in an article published in 1920. MAKDISI, *supra* n. 2, at 4.

20 MAKDISI, *supra* n. 13, at 1. See IBN ABI YA'LA, *supra* n. 15, at 1:73 – 133; ABU ZUHRAH, *supra* n. 15, at 139 – 463; SCHACHT, *supra* n. 15, at 63 – 6 (1964); HALLAQ, *supra* n. 15, at 31 – 8; MELCHERT, *supra* n. 15, at 59 – 82.

membership in that particular group.”²¹ Jackson, interestingly, likened the relationship between the individual jurist and the corporate group, the *madhab* in this case, to the relationship between the *rajih* (weighted opinion) and the *mashhur* (predominant opinion) in Islamic jurisprudence. Both individual and weighted opinions could be substantively more valuable in term of jurisprudence, but the predominant opinion and corporate group usually exert more influence.²² As Daphna Ephrat concludes in her study of the Sunni *ulama* of the eleventh-century Baghdad in *A Learned Society in a Period of Transition*, affiliation with a *madhab*, at some point, lost the sense of “solidarity group” and became a formal, hollow bond.²³ Although group solidarity had been established, the *ulama*, as a whole, never demonstrated serious commitment to it.²⁴

To test whether the Hanbalis can be considered a corporate group, I will first see whether membership in the group proffered its members protection. Ibn Abi Ya’la begins the series of Ranks of Hanbali by emphasizing a startling principle of Islam. He asserts that “the [doctrine] of loyalty and enmity is an innovation. Those who [think it is part of their faith to] say we are loyal to this person or a group and enemy to another [other than the general loyalty to Islam itself]” are religious innovators.²⁵ In other words, by just considering loyalty to a certain group as an innovation, the very idea of “by-virtue-of-their-membership” is rejected because what matters, according to one prominent narrator of Hanbali biographies and jurisprudence, are the principles and general doctrines of the *madhab*, not affiliation with any school or group.

On the other hand, in the *Ranks*, in telling the stories of Hanbalis, Ibn Abi Ya’la divides them into ranks and treats them as a group of people who have some affiliation to Hanbali jurisprudence and institutionalized benefits. For example, Abu Muhammed al-Barbahari, from the second rank of Hanbalis, is the “leader of the Hanbali community in his time,” and was “leading in fighting against the people of [religious] innovation,” according

21 SHERMAN JACKSON, *Islamic Law and the State: the Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfi*, Brill 1996, at 72.

22 JACKSON, *supra* n. 19, at 83. MAKDISI also presented the argument that schools were based on individuals so they did not establish “guilds”. MAKDISI, *supra* n. 2, at 10.

23 EPHRAT, *supra* n. 2, at 143.

24 EPHRAT, *supra* n. 2, at 96.

25 IBN ABI YA’LA, *supra* n. 15, at 1:37.

to Ibn Abi Ya'la.²⁶ He says that al-Barbahari “has a reputation at the ruler’s court and a prominence among our [Hanbali] people” and that he “was one of the well-versed distinguished leading scholars who memorized hadiths, are trustworthy, and faithful.”²⁷ Although al-Barbahari was a leader of the community, he acts mostly on the basis of principles against “people of religious innovation” whatever their affiliation. On the other hand, other Hanbali figures from different ranks, such as al-Khiraqi, Abduaziz Ghulam al-Zajjaj, and Abu Abdullah Ibn Hamid were also described as “leaders of the Hanbalis” of their times which brings the issue of affiliation again.²⁸

Also of note is the ease with which affiliation can be changed, like in the case of Abi Ya'la, the father of the Ibn Abi Ya'la and one of the leading Hanbalis of all time. Abi Ya'la was introduced to the Hanbali jurisprudence by the above-mentioned Ibn Hamid. Abi Ya'la's religious and legal education, which had begun by age ten, had followed the Hanafi madhab until he met Ibn Hamid, who inspired him and opened his eyes to the Hanbali jurisprudence.²⁹ The change reveals both the strong attraction of Hanbali jurisprudence and the competition among jurists to strengthen their jurisprudence and, at the same time, we can sense the relative strength of the individual relationships among jurists over institutional affiliations to the extent that jurists could change *madhab* affiliation following an encounter with a charismatic learned scholar, as in the case of Ibn Hamid.³⁰

In the thirteenth and fourteenth centuries, the Hanbali school increasingly developed toward certain symbols and institutions. We start to notice a Hanbali “pulpit” from which one Hanbali once preached, “I am a Hanbali as much as I am alive, and when I die, my will for the people is to follow the Hanbali school.”³¹ Another Hanbali taught a friend to respond when asked by God what he followed by simply saying “Ibn Hanbal.”³² We also notice that in addition to Hanbali schools (*madrasa*), the Hanbali learning circle (*halaqah*), the Hanbali section, the Hanbali leader, and the Hanbali

26 IBN ABI YA'LA, *supra* n. 15, at 2:16.

27 IBN ABI YA'LA, *supra* n. 15, at 2:16

28 IBN ABI YA'LA, *supra* n. 15, at 2:64 – 143 – 5.

29 IBN ABI YA'LA, *supra* n. 15, at, 2:166 – 7.

30 IBN ABI YA'LA, *supra* n. 15, at 2:16 – 7.

31 IBN RAJAB, *supra* n. 17, at 1:44.

32 IBN RAJAB, *supra* n. 17, at 1:33.

endowments,³³ a Hanbali niche devoted to prayers involving the Hanbali jurisprudence is mentioned more than three times.³⁴ Indeed there is even a Hanbali qadiship, about which Ibn Rajab complains because it is sometimes empty and no Hanbalis appear disposed to occupy it.³⁵

While *madrasas* can exclusively follow one jurisprudential school such as the Hanbali *madhab*, other *madrasas* existed that taught more than one jurisprudence.³⁶ Al-Mustansir Billah, for instance, established a *madrasa* in the 1230s, and assigned two principal supervisors to it: Abu al-Waleed al-Hanbali and Ibn al-Najjar al-Shafi'i.³⁷ In this *madrasa*, both jurisprudences were taught and both *madhabs* competed to gain followers among students and the learning community. In these *madrasas*, presenting the principles of jurisprudence mattered more than belonging to a particular *madhab*. The case of Muwaffaq al-Din Ibn Qudamah (d. 1223) is worth relating.

Ibn Qudamah was the leader of that Hanbalis at the great mosque of Damascus. According to Ibn Rajab, towards the end of his life, "he was the destination of every jurist regardless of *madhab*."³⁸ Therefore, while Ibn Qudamah was the head of Hanbalis and one of the most influential Hanbalis of all times, he nonetheless taught jurists from other *madhabs* and his influence went beyond *madhab* affiliation or "membership." Different well-known *ulama* recognized the high level of independent jurisprudential reasoning that Ibn Qudamah reached—a concept known as *Ijtihad*.³⁹ This is relevant for the purposes of this article because reaching

33 IBN RAJAB, *supra* n. 17, at 2: 139, 152, 189, 227 – 243.

34 IBN RAJAB, *supra* n. 17, at 2: 137, 178 – 227.

35 IBN RAJAB, *supra* n. 17, at 2: 178 – 189.

36 IBN RAJAB, *supra* n. 17, at 2: 136.

37 IBN RAJAB, *supra* n. 17, at 2: 139.

38 IBN RAJAB, *supra* n. 17, at 2: 63.

39 IBN RAJAB, *supra* n. 17, at 2: 63 – 6. For the classical discussions of *ijtihad* and its rulings and requirements, see the classical sources in the origins of jurisprudence e.g. AL-ZIRKESHI BADR AL-DEEN, al-Bahr al-Muheet, Dar al-Kutbi 1994, at 8:226 – 58; AL-GHAZALI ABU HAMID, al-Mustasfa, Islamic U of Medina 1995, at 4:10 – 129; AL-AAMIDI ALI BIN AHMED, al-Ihkam Fi Usul al-Ahkam, Al-Maktab al-Islami, at 4:162 – 221; ALJAWZEYAH IBN QAYYEM, 'Ilam al-Muq'een, Dar al-Kutub al-'Ailmayyah 1991, at 2:126 – 9; AL-SHATIBI IBRAHEEM, al-Muwafaqat, Dar Ibn al-Qayyem-Dar Ibn Affan 2003, at 5:41 – 58; AL-TUFI NAJM AL-DEEN SULAIMAN, Mukhtasar Sharh al-Rawdhah, Mu'assasat al-Risalah 1987, at 3:575 – 84; AL-SHUKANI MUHAMMED ALI, Irshad al-Fuhul Ila Tahqeeq 'Ilm al-Usul, Dar al-Salam 1998, at 2:713 – 54; AL-SHINQEETI, Al-Mudhakkirah Fi Usul al-Fiqh, n.a. 2001, at 369 – 74. In the

such a level of *ijtihad* is considered reaching a point that goes beyond representing a sole *madhab* or jurisprudence. Ibn Rajab tells us that Ibn Qudamah “used every Friday to run a learning circle and, then afterwards, engage in an hour debate with opponents and dissenting jurists.”⁴⁰ Ibn Rajab mentions famous jurists from different backgrounds and *madhabs* who would not issue Islamic *responsa* until having read Ibn Qudamah’s works. Lastly, Ibn Rajab lists some of Ibn Qudamah’s major opinions, as well as a selection of jurisprudential work by which Ibn Qudamah went beyond the school of Ibn Hanbal.⁴¹

The case of Hanbalis, as presented by the accounts by Ibn Abi Ya’la and Ibn Rajab that span five centuries, clearly demonstrates the existence of corporate elements but, at the same time, corporate self-identity was also clearly limited and never attained enough strength to seriously affect Islamic jurisprudence on the whole. Perhaps the bonds of affiliation were too loose, or maybe the jurists are to be blamed for failing to construe a community tied by solidarity. Or, on the other hand as I argue, perhaps a conscious decision was made to eschew an authoritative group identity to protect that community from domination or total political control. In the modern Western literature, debate continues to examine whether, from the fifteenth century onwards, *ulama* in general maintained a robust, continuous corporate nature.

In the work *Scholars, Saints, and Sufis*, different academics discuss religious institutions in Islam from the fifteenth century on. One theme that runs throughout the book is the reading of *ulama* as a “corporate group.” Unlike Massignon, Makdisi, and Jackson, the researchers Nikki Keddie (editor),⁴² Afaf Lutfi al-Sayyid Marsot,⁴³ Edmund Burke III,⁴⁴ Daniel

orientalist literature, JOSEPH SCHACHT discussed the concept of “closing the door of *ijtihad*” that was introduced to the Islamic jurisprudential centuries after the development of the four main schools (Hanafi, Maliki, Shafi’I, and Hanbali) in Islamic jurisprudence. SCHACHT, *supra* n. 15, at 69. Compare with Wael Hallaq’s critique of Schacht’s approach in discussing *ijtihad* and “closing the door of *ijtihad*”, HALLAQ WAEL, Was the gate of *ijtihad* closed?, 16 International Journal Of Middle East Studies (1984), at 2.

40 IBN RAJAB, *supra* n. 17, at 2:63.

41 IBN RAJAB, *supra* n. 17, at 2:63.

42 KEDDIE, *supra* n. 2, at 2.

43 KEDDIE, *supra* n. 2, at 146 – 150.

44 KEDDIE, *supra* n. 2, at 101 – 6.

Crecelius,⁴⁵ and Aziz Ahmed⁴⁶ argue that the *ulama* do not consistently act as a “corporate group.”⁴⁷ Marsot complains that the (high) *ulama* in the eighteenth century did not act as a corporate group and did not perform specific state functions and, therefore, failed to achieve much influence.⁴⁸ A counterexample is found in Leon Carl Brown’s account of nineteenth-century Tunisia, where the *ulama* are seen to have a sense of a “corporate entity separating themselves from the government,”⁴⁹ but this example seems rather exceptional.⁵⁰

Much more common are assertions such as that of Edmund Burke III who notes that until 1900, “[n]ot only was there no religious institution, *per se*, in Morocco in the sense that there was no separate bureaucratic hierarchy of religious officials controlled from the top, it is even possible to say that *ulama* as an identifiable corporate group did not exist in Morocco.”⁵¹ Aziz Ahmed, describing the *ulama* of Pakistan, notes that in 1950s and 1960 their activity decreased dramatically because they were making individual efforts, not collective ones, to exert influence.⁵² An operative presupposition of these researchers is that the *ulama* should have behaved as a corporate group in order to capitalize on the group’s social status, so they are consequently criticized by the researchers for having lacked the quality of corporate solidarity.

In fact, the lack of corporate identity and belonging in the *ulama*’s functions and roles in these cases and that of the Hanbalis might have more to do with the nature of their role as dispersed groups who are not organized into formal institutions or unified guilds.⁵³ This is why describing their

45 KEDDIE, *supra* n. 2, at 180–1.

46 KEDDIE, *supra* n. 2, at 264.

47 Compare in the same book the work of Brown in KEDDIE, *supra* n. 2, at 146–150.

48 KEDDIE, *supra* n. 2, at 146.

49 The use of the phrase “corporate entity” here looks to suggest “autonomy” more than real “corporate group.”

50 BROWN LEON CARL, *The Religious Establishment in Husainid Tunisia*, in *Scholars, Saints, and Sufis: Muslim Religious Institutions in the Middle east since 1500* (Nikki R Keddie ed. 1972), at 73–4.

51 BURKE III EDMUND, *The Moroccan Ulama, 1860–1912: An Introduction*, see KEDDIE, *supra* n. 2, at 101.

52 AHMAD AZIZ, *Activism of the Ulama in Pakistan*, in *scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500* (Nikki R Keddie ed. 1972), at 264.

53 HOEXTER MIRIAM et al., *The Public Sphere in Muslim Societies*, Suny Press 2002, at 21.

operation as an imagined institution acting within a certain social sphere is more accurate than describing them as a corporate institution because, even when they formed corporate-like institutions, their power derived from their status as *ulama*—an imagined institution—rather than from their formal association with another institution. Miriam Hoexter puts it much better than I: “*ulama* were not acting as a concentrated group. They were hardly a “group” in the sociological meaning of the term. It was the expertise of the Sharia that gave them authority not their membership to a specific group.”⁵⁴

Thus, as Ephrat explains, the fluid and flexible label of *ulama* is what confers legitimacy despite the lack of official institutions and corporations.⁵⁵ Moreover, we should not be surprised to see fragmentation of authority among contemporary Sunni scholars because such dispersion comes from the nature of the religion itself, at least according to one renowned commentator.⁵⁶ Wael Hallaq has taken the extreme position of denouncing the whole idea of corporate personhood as being immoral and against Islamic law.⁵⁷ What seems more accurate is that Islamic law does not contemplate or recognize a total dominance of corporate groups for Islamic scholars as a class, whose unifying function is the honorable one of interpreting Sharia. At the same time, the existence of corporate groups within the scholars as a class did help to perpetuate their work to the extent that they remained independent of state coercion.⁵⁸

54 HOEXTER, *supra* n. 52, at 123.

55 EPHRAT, *supra* n. 2, at 6.

56 EICKELMAN DALE, and others., *Muslim Politics*, Princeton University Press 2004, at 131. ZEGHAL, *supra* n. 14, at 372.

57 HALLAQ WAEL, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament*, Columbia University Press 2014, at 153 – 4.

58 It is worth reading the analysis by MUHAMMAD ZAMAN of the fragmentation of authority when he says,

Throughout the Muslim-majority world, advancing levels of education, greater ease of travel, and the rise of new communications media have contributed to the emergence of a public sphere— some call it the “street”—in which large numbers of people, and not just an educated, political, and economic elite, want a say in political and religious issues. The result has been increasing challenges to authoritarianism and fragmentation of authority. ZAMAN, *supra* n. 14, at ix.

On the other hand, in RAHEMTULLA'S estimation, the fragmentation of *ulama* left room for jihadists and extremists. In fact, it is the other way around. Fragmentation would protect the disagreements and diversity of opinions—the celebrated principles of jurisprudence.

To summarize my position here, there are four points. First, the *madhabs* are very loosely connected institutions that do not meet the criteria of guilds or corporate groups. Although I clearly admit that there are some corporate elements, there exist some resisting elements that keep *madhabs* from being completely corporate groups, or turn the sphere completely into organized corporate groups. The relationship of scholar to *madhab* is much looser still and is more imagined than it is formal. Although there have been more formal bodies in the past (meaning not *madhabs* but more formal institutions within particular geographic regions that constituted independent establishments), they have not encompassed all jurists nor do they explain the locus of juristic authority.⁵⁹ Different *madhabs* and schools never constituted a single comprehensive corporate group that qualified for representing the community as a whole. Second, and perhaps most importantly, all this casting about to describe juristic authority as either corporate group via *madhab* or via some other formal institution seems to presuppose a need to have such a formality and organization to exert political influence, and that is just wrong, as the next section shows.

3. The Dispersed Influence

The issue that occupies the debate of corporate group is whether the fractured Islamic jurists and scholars could constitute organized and formal institutions—either through “corporate groups” or through their affiliation to the *madhab* or other corporate, solidarity or pressure groups.

These fragmented individuals as a whole would dismiss the unidirectional discourse adopted by extremists and jihadists. Disagreements may allow for untraditional opinions or unorthodox discourse as well as a dangerous and extreme rhetoric but within the free sphere that by its nature dismiss the direct politics that is central to jihadists' discourse. Moreover, the fragmentation protects from state control as well meaning provides legitimacy. Formalization of ulama and associating them with the state official institutions strip them from legitimacy, which leaves room for jihadists and extremists. Furthermore, going against the very nature of scholars does not fight extremism; rather, it helps extremists gain ground and *free* them to develop social networks that the official scholars lack. RAHEMTULLA, *supra* n. 14, at 34.

59 Tunisia appears to be an example when al-Fasi and others popularly acted without being affiliated to the establishment or its institutions. He was dismissed from al-Zitouna, he resumed his teaching in the mosque. KEDDIE, *supra* n. 2, at 77.

If they succeed in establishing such group solidarity, was this group status powerful enough to dominate the jurisprudential activities. Similar to the debate on “religious institution,” the discussion of corporate group seems to have been premised on the idea that a corporate group is what assures the existence, leverage, and powerful sociopolitical influence of the community of jurists. Even when scholars agree with the existence of guilds, they tend to either point out the lack of overall corporate organization or the incapacity of the religious institutions to act as a concentrated group, thereby diluting their influence and rendering them largely marginal or irrelevant. It seems, for this approach, like if domination of corporate nature is what brings influence and strength.⁶⁰

What really seems to be missing from the argument is whether the overall comprehensive corporate group idea does any good to scholars as a community. Discussion on this is not completely absent in the literature, but it is comparatively rare.⁶¹ Arguments concerning corporate groups (or the lack thereof) as formal institutions should be turned on their head since most of these arguments fail to recognize the very nature of the *ulama*. The *ulama*'s basic principle of disagreement among themselves preserves the dispersed authority they represent.⁶² This is not to say that corporate groups of different sorts did not influence society, jurisprudence, or politics. However, it is important to turn the focus to a more salient but less studied feature of scholars and jurists: fragmentation. This feature highlights their strengths and their freedom more than references to institutions or specific groups does.

Hanbalis from the early existence during the time of the founder, Ibn Hanbal, appreciated the doctrine of disagreement (*khilaf*). When Ishaq bin Bahlul (d. 766) wrote a book on the different opinions of jurists cross-*madhabs*, he titled his book “the Disagreements.” When he presented it to Ibn Hanbal, the latter told him to title it “the flexibility” because jurisprudential disagreements serve the Muslim community by providing flexibility and

60 HOEXTER, *supra* n. 52, at 123.

61 See the brief discussion of some of the positive side non-corporate nature of *ulama*, ZEGHAL, *supra* n. 14, at 372; EPHRAT, *supra* n. 2, at 6; RAHEMTULLA, *supra* n. 14, at 17.

62 For the concept of disagreement (*khilaf*) see e.g. IBN TAYMIYYAH, Raf' al-Malam 'an al-'Aemmah al-'Alam, The General Presidency of Scholarly Research and Ifta 1992, at 8 – 35; ALJAWZEYYAH, *supra* n. 38, at 40 – 205.

different options for different conditions.⁶³ Even within one Hanbali doctrine, Al-Khiraqi disagreed with al-Khallal in ninety questions.⁶⁴ Ibn Hanbal himself seems to have more than one doctrine and approach according to Ibn Abi Ya'la. Ibn Hamid tells the disagreement over whether Ibn Hanbal has two contradicting or different doctrines: old and new.⁶⁵

The followers of Ibn Hanbal continued the tradition of honoring disagreements. Al-Hasan al-Banna al-Baghdadi wrote a book reconciling the jurisprudence of al-Shafi'i and Ibn Hanbal to bring together the followers of the two schools.⁶⁶ One unique case of the Hanbalis is Abu al-Wafa' Ibn 'Aqeel (d. 1119).

Ibn Rajab tells that Ibn 'Aqeel's conduct resembles the early mystical (Sufi) school. According to Ibn Rajab, Ibn 'Aqeel studied every subject and science from their masters whether hadith, fiqh, poetry, Quran or its exegesis etc. Ibn 'Aqeel was proud that he learned from the best people in each subject. He walked with his teachers, sat with them, listened, and attended their lectures. Ibn 'Aqeel said about his life and learning, my father's side was a house of learning and education and they were [practicing] on the school of Abi Hanifah. I was following the resources of learning wherever they are, while some of my Hanbali friends wanted me to stick to Hanbali learning circles and Hanbali teachers. I would have missed a lot of learning had I listened to their advice. I would sit in Abu 'Ali al-Mansour's learning circle and he would bring me closer to him and present me to other students and authorize me to issue *fatwas* [Islamic response] despite the presence of older students and scholars. Nothing could take me from my beliefs and opinions, not a Sultan's blackmail nor a societal pressure. I was put in harm's way from both some of colleagues and from rulers. The colleagues campaigned against me to the degree of asking for my blood, while the rulers threatened with imprisonment and chase but I feared no one but Allah and loved nothing more than knowledge. Despite what I suffered and some of my colleagues's prejudice, I found that most of the students who follow Hanbali school exercise self-control, and most of their teachers act with temperance and cleanness.⁶⁷

63 IBN ABI YA'LA, *supra* n. 15, at 1:104.

64 IBN ABI YA'LA, *supra* n. 15, at 2:64.

65 IBN ABI YA'LA, *supra* n. 15, at 2:149.

66 IBN RAJAB, *supra* n. 17, at 1:28.

67 IBN RAJAB, *supra* n. 17, at 1:119 – 25.

Ibn 'Aqeel was a case of Hanbalis who sees that being an honest Hanbali means to surpass superficial jurisprudential borders, and to learn from anyone, and communicate with every *madhab* affiliate. While his conduct and approach brought him to be of the highest Hanbalis and jurist, he complained from some Hanbalis and others who targeted him just because he was an unorthodox Hanbali. Ibn Rajab commented on Ibn 'Aqeel's approach attributing the calamity that happened to Ibn 'Aqeel to the fact that he was attending learning circles of some Mu'tazalis, orientalistically called Rationalists, like Ibn al-Walled and Ibn al-Tabban, and read on them in theology and was influenced by that.⁶⁸ Also influenced by Sufism, Ibn 'Aqeel wrote an apologetic book for Mansour al-Hallaj (d. 922) and his theology but he later retracted it and admitted that al-Hallaj was wrong and that there was a consensus among scholars during al-Hallaj's time that the latter was wrong.⁶⁹ In the year of 1082, when a conflict erupted between Hanbalis and other *madhabs*, Ibn 'Aqeel distanced himself and focused more on teaching and, thus, he was saved. He once was on a debate, and when he was told that what he is arguing for is not consistent with the Hanbali school, he replied, "I have my own independent *ijtihad*."⁷⁰

The case of Ibn 'Aqeel is blatant that *ijtihad*, disagreement, and jurisprudential flexibility exist and defeat the generalization of corporate group that needs more solidarity than flexibility. Ibn 'Aqeel got his position as a leading Hanbali jurist in the eleventh century by caring less about affiliation and focusing on the Hanbali knowledge and authority. While there are other cases of the opposite according to the opposing parties of Ibn 'Aqeel, both Ibn 'Aqeel and his enemies, exist in broader sphere that allowed them to compete and fight over authority more than

68 The Mu'tazili school is presented as the Islamic rationalists in the medieval Islam or the defenders of reason, see HOURANI GEORGE FADLO, *Islamic Rationalism: The Ethics of 'abd al-Jabbār*, Oxford University Press 1971, at 1 – 17; MARTIN RICHARD C. and others, *Defenders of Reason In Islam: Mu'tazilism from Medieval School to Modern Symbol*, Oneworld Publications Limited 1997, at 10.

69 Mansour al-Hallaj was a famous mystical figure in Islam. He was executed because he preached and called for the doctrine of unity of existence. The doctrine means to unify humans and probably everything with God and, thus, considering everything to be God. See in general, MASSIGNON LOUIS, *The Passion of al-Hallaj: Mystic and Martyr of Islam*, Princeton University Press 1994, at 1 – 23.

70 IBN RAJAB, *supra* n. 17, at 1:118 – 38.

being strictly institutionalized Hanabalīs. The dispersed influence of their jurisprudence is what matters at the end. As I discussed in the third section, this sphere of influence encompasses guild members and non-guild scholars, jurists related to the state and those acting outside of it. The most important aspect is that the *ulama* regardless of their loose or firm affiliation with formal or imagined schools act at some point as individuals who are responsible only to themselves and their authority.

III. Formations of the Scholar: The Role of *Ulama*

The first section of this article draws attention to the manner in which scholars and jurists operated as an imagined institution rather than a formal religious one. It also showed how scholars retained influence despite the absence of any all encompassing association or corporate group. In this section, I will present the role and basic functions of the Hanbali scholars and jurists.⁷¹ The scholars' roles and modes range from being cooperative with the state, to semi-independent, to resistant and oppositional. Considering the traditional roles and formations of the scholar, I will finally address modern responses of *ulama* to the many calls for change in their traditional roles.

1. The Weapon of Speech

The depiction of Islamic scholars as having the “weapon of speech” is proudly used in Islamic jurisprudence.⁷² This image implies that their strength is not tangible or coercive like their political counterparts but rather moral and

71 It is not my intention to lay down all roles and functions of scholars and jurists nor to cover Islamic history but to focus on roles and modes related to the issue of their relationship to the state, constitutional order, or the ruler in a way that adds and helps our understanding of the issue.

72 In his long biographies of the scholars, AL-DHAHABI narrated a story about Ibn Hazim, a famous jurist from Andalusia, likening his tongue to the sword of al-Hajjaj, a bloody ruler in Islamic history. The comparison invokes the soft power of knowledge vis-à-vis the hard power of force and direct politics. AL-DHAHABI SHAMS AL-DEEN, *Sear A'lam al-Nubla'*, Al-Risalah Publisher 2001, at 18:199.

intellectual.⁷³ In fact, this weapon of tongue and pen alike is often deemed in Islamic discourse to be more important than the influence of political actors themselves. When Abdul-Rahman al-Jabarti, classified the categories of Muslim society, he placed the scholars in the second ranking right after the prophets and before the rulers and kings.⁷⁴ With this ranking, it is no wonder that the *ulama* say the pen is mightier than the sword.⁷⁵ As a result of this intangible weapon, they enjoyed privileges and exercised influence on different aspects of society, in a manner that could be more influential than those of political actors. This is demonstrated by the fact that, in addition to their own considerable funds from endowments and schools, they were exempted from taxation.⁷⁶

2. The Essential Functions

One central function and role of scholars is to bear, carry and interpret the principles of Islamic law. To teach the rules and principles of Islam and to call upon society to act according to them are essential functions of *ulama* as well. As a result of these roles, they are often called to administer Islamic law as well, which itself then becomes an additional, fundamental role.⁷⁷ The types of roles and functions of *ulama* and jurists conform to their typical interactions with people because Islamic law itself is the texts interpreted within the circumstances and environment of a given society at a given time.

73 See HATINA, *supra* n. 9, at 209.

74 ABDUL-RAHMAN AL-JABARTI, 'Aja'ib al-Aathar, Dar al-Kutub al-Arabiyyah 1998 (Abdul-Raaheem Abdul-Raheem ed.), at 1:14 – 5.

75 KEDDIE, *supra* n. 2, at 150. In his book, *al-Fikr al-Ussuli* (the Jurisprudential Thought), ABDUL-MAJEEED AL-SAGHEER brilliantly and somewhat overly presented the literature and acts of *ulama* as a production of the persistent and continuous conflict between scholars and rulers, or may be between religion and politics. AL-SAGHEER ABDUL-MAJEEED, *Al-Fikr Al-Asuli*, Dar al-Muntakhab al-'Arabi 1994, at 7 – 19. However, I interpret the same struggle as continuous attempts of scholars to protect the sphere that maintains their freedom of debate and interpretations and, most of the time, not over direct power.

76 KEDDIE, *supra* n. 2, at 133.

77 See ALJAWZEYYAH, *supra* n. 38. Al-Baghdadi al-Khateeb, *Al-Faqeeh Wal Mutafaqqeh*. 2007. See also KEDDIE, *supra* n. 2, at 33 – 152.

In addition to their basic functions, or perhaps because of them, scholars are seen as “guardians of faith,” “protectors of the religion,” or “bearers of Islam.”⁷⁸ Although this is arguably true, they have these roles due to their sociopolitical influence more than because of the exercise of any sort of direct power. From this perspective and more accurately, scholars are the bearers of knowledge and jurisprudence, as well as the protectors of the faith and religion of the people and the nation (*ummah*).

Scholars are therefore the most vocal demonstration of the nation's fundamental religious duties.⁷⁹ As Hoexter indicates: “From the early Islamic times, the *ummah* (nation), not the ruler was bearer and interpreter of the norm and basic values of the proper Islamic social order. The ruler was responsible for the implementation of the rules.”⁸⁰ Within the nation, scholars are the group most associated with the work of defending and protecting the Islamic doctrine that defines it.

3. The Authority Holders

As indicated above, because Islamic law is a jurist's law, jurists carry the authority that sustains it.⁸¹ Exercising the authority is not facilitated only through controlling Islamic texts and traditions, but also by controlling the taxes and endowments. Hanbalis and other jurists try to set out basic qualities for anyone to be a jurist. Ibn Hanbal said about himself that he spent five years in the subject of menstruation and its jurisprudence until he understood it.⁸² He, then, said that nobody can present himself for jurisprudential ruling as a *mufti* until he acquire certain qualities: good faith and intention, patience, quietness, tranquility, being well-versed in his subjects, adequacy, and knowing people.⁸³ Therefore, Ibn Hanbal did not forget the importance of interacting with people, learning them and leaning on them. In this sense, scholars are the legitimacy givers who, in

78 KEDDIE, *supra* n. 2, at 115.

79 See FELDMAN NOAH, *The Fall and Rise of Islamic State*, Princeton University Press 2008, at 10 – 14.

80 HOEXTER, *supra* n. 52, at 123.

81 HALLAQ WAEL, *Juristic authority vs. state power: the legal crises of modern Islam*, 19 *Journal of law and religion* (2004), at 248; KEDDIE, *supra* n. 2, at 308.

82 IBN ABI YA'LA, *supra* n. 15, at 1:250.

83 HALLAQ, *supra* n. 80, at 245 – 7.

turn, lean on people for credibility and support.⁸⁴ I put emphasis on the jurists' role regarding authority because locating this authority takes on a greater importance in the course of deciding the sphere in which the *ulama* work.

If we to apply the claim-versus-belief formula developed by Ricoeur,⁸⁵ the self-proclaimed authoritativeness of *ulama* can be examined in people's reaction and support of what can be called these meta-constitutional authority, an authority developed in a space beyond mere constitutional framework. Throughout Islamic history, the mere existence of *ulama*'s meta-constitutionalism indicates the belief and trust of people in this authority. The following pages will try to review the main political modes of *ulama*, and how meta-constitutionalism existed in different forms within these imagined institutions.

IV. The Political Modes of Ulama

The literature on scholars and their political presence fluctuates reductively between portraying them as bureaucratic religious officials and mediators, or presenting them as mass leaders and prominent figures of opposition.⁸⁶ In fact, the political influence of scholars was quite significant, and can be divided into five main types, as discussed below. These are activism, mediation, consultation, counterbalance and withdrawal.

The analysis that presents scholars as government officials or state institutions as well as mediators and brokers between people and the state seems self-contradictory. Mediators are presumed not to be officially members of one party; otherwise, their mediation would be entirely

84 KEDDIE, *supra* n. 2, at 115.

85 TAYLOR GOERGE, Paul Ricoeur and the Task of Political Philosophy, Lexington 2012, at 66 – 67; RICOEUR PAUL, Lectures on Ideology and Utopia, Columbia University Press 1986, at 202 – 203. For Weber's original idea about the claims of authority, see WEBER MAX, On Charisma and Institution Building, University of Chicago Press 1968, at 46 – 47.

86 Researchers do this sometimes in a contradictory way. Many researchers swing back and forth between describing the role *ulama* played either as part of the government or as mediators and brokers between the government and people. See e.g. KEDDIE, *supra* n. 2, at 150, 153 – 165 – 172. 1972; Hatina, *supra* n. 9, at 58 – 74. 2010; EPHRAT, *supra* n. 2, at 113; JACKSON, *supra* n. 20, at 170; HOEXTER, *supra* n. 52, at 23.

compromised. Some researchers address this problem by describing different types or modes of scholars. They conclude that *ulama* are divided into two groups. One group is an official religious institution with members and functionaries, while the other is less reliant on the state and serves as a mediatory class that is always suspicious of the state.⁸⁷ Still others summarize responses of scholars toward political events as either being in total opposition or as passive withdrawal.⁸⁸

All of these accounts fall short of presenting other possible responses and fail to include other influential groups of scholars that were not considered, due to the reductionist approach in defining and dealing with Muslim scholars. Because *ulama* by their very nature are a dispersed authority, we should look at them as belonging to diverse groups in society, whether they were peripheral, *madhab* jurists as corporate group or otherwise, official state *ulama* or others unaffiliated with any formal institution. Due to their authority working mainly in a sphere that is (or at least in an ideal sense is supposed to be) uncontrollable even if they happen to work in the bureaucracy, *ulama* may resort to their own sphere if they are to issue fatwas or to work generally as scholars or jurisconsults.

I will present examples, focusing on pre-modern Hanbalis, of different modes of political engagement in order to prove the existence of a wider space available for different types of jurists and scholars—a space where they mainly acted as scholars but with vastly different capacities.

1. Outside Bureaucracy: Religious Activism

One prominent mode of scholars in regard to politics is their activism outside state institutions, or sometimes against them. I avoid simplifying their activism as “opposition” because in many cases it is not. Opposition in the contemporary state system means being able or willing to replace the government, or it may mean the competition over direct political power. Other understandings of opposition presume the operation of a coherent group, which leads back to the debate about whether the

87 KEDDIE, *supra* n. 2, at 72–3.

88 KEDDIE, *supra* n. 2, at 176.

scholars are a corporate or pressure group.⁸⁹ In all these situations, scholars cannot be described as simply a form of opposition. Therefore, I use “activism,” following Aziz Ahmed and others, to generally describe the scholars’ actions outside the state’s official sphere.⁹⁰ The illustrations here are just examples of the long and diverse activism of scholars. I present them to help demonstrate the role of *ulama* in politics as independent moral watchdogs. Rebellion, public pressure and protests are examples of the forms that scholastic activism could take.⁹¹ In his book about the relationship between *ulama* and rulers, Abdul-Aziz al-Badri presents countless cases and names of scholars in Islamic history that “stood” in front of the rulers and challenged the government, and thus, they paid a toll with persecution, pressure, imprisonment or even execution.⁹²

A silent repeated move among Hanbalis, and probably scholars in general, is to resort to the mosque and to teach in learning circles instead of institutions endowed by political elites. This happens as a juristic defiance to the political ban and to the outside attempts to control scholars. Ibn Sam’un (d. 997) was a Hanbali preacher who took to the mosque to preach despite the ban on preaching from the ruler. He was brought to the ruler’s court and defended his position and found his way to convince the ruler.⁹³ At the same period, another Hanbali preached the ruler and reminded him of the Islamic role of the jurists until the ruler wept out of emotions and allowed for such activities.⁹⁴ When Ibn Sam’un died in 997 and was buried in his home, the people of Damascus were outraged by the fact that he didn’t have a proper funeral so they dug his grave and took his body to the great mosque in the city, and a lot of people prayed on him and buried him. The funeral, then, was a popular message.⁹⁵ Hanbalis narrated to their founder Ibn Hanbal that he said, “our promised meetings are the day

89 For the meaning of “opposition” in the contemporary context see BLONDEL JEAN, *Political Opposition in the Contemporary World, Government and Opposition* (1997), at 32.

90 KEDDIE, *supra* n. 2, at 257.

91 See RAHEMTULLA, *supra* n. 14, at 17.

92 ABDUL-AZIZ AL-BADRI, *Al-Islam Bain al-Ulama and al-Hukkam, al-Maktabah al’ilmayyah* n.d., at 129 – 244.(Ironically, the author himself ended up to be another case of these inquisitions of scholars; he was executed by Ahmed al-Bakr’s regime in Iraq in 1969).

93 IBN ABI YA’LA, *supra* n. 15, at 2:158.

94 IBN ABI YA’LA, *supra* n. 15, at 2:159.

95 IBN ABI YA’LA, *supra* n. 15, at 2:161.

of funerals,” meaning that huge funerals that are attended by large number of people are the signs of strength and truth.⁹⁶

Ibn Rajab does not miss the chance to complement principled Hanbalis who never feared the rulers nor the people. He gives the example of Abdul-Khaliq Bin ‘Isa (d. 1077) who “always said the truth and never favored a person of position or influence. In the matters of Allah, he never shied away. He moved between five mosques and taught in them...”⁹⁷ He was “the final destination to travel for students of the school of Ibn Hnabal” and “was undisputedly leader of Hanblis in his time.” According to Ibn Rajab, Ibn ‘Isa “was appreciated by the ruler but also never took anything from the ruler in return for matters of this life.” This is why he built his reputation and popular strength to the extent that two subsequent rulers in Baghdad started their reign by going to the mosque and asking allegiance from Ibn ‘Isa.⁹⁸ In 1071, Hanbalis went to the Great Mosque close to the Palace of the ruler and requested to eliminate bars, investigate selling wines in the city, and fight corruption and corruptors. The Caliph ‘Adhud al-Dawlah responded positively.⁹⁹

Later After the death of a Hanbali scholar, some Mu‘tazili wanted to proselytize the sect of Mu‘tazili but al-Shareef Abu Ja‘far (d. 1077) rushed to the great mosque of al-Mansour and reestablished the Hanbali doctrine with the other scholars of the people of hadith. For Ibn Rajab, “this is when the people of the Tradition and Sunnah were happy. The Book of Tawheed was read there too. All who were present agreed to support the [traditional Hanbali] doctrine.”¹⁰⁰

Around the year 1077 in Baghdad, the “calamity of Ibn al-Qushairi” took place. The basic facts are that Ibn al-Qushairi (d. 1120) accused Hanbalis of theological heresy. The accusation was that Hanbalis embody Allah and liken Him to human beings. Some influential scholars leaned toward al-Qushairi’s accusation and believed it, and, then, al-Qushairi and others resorted to the ruler complaining against Hanbalis. When the students of al-Shareef Abu Ja‘far, the representative of Hanbalis, learned that their

96 ISMAIL IBN UMAR IBN KATHIR, *al-Bidayah wa al-Nihayah*, Dar ‘alam Al-kutub 2003, at 10:342.

97 IBN RAJAB, *supra* n. 17, at 1:12 – 5.

98 IBN RAJAB, *supra* n. 17, at 1:12 – 5.

99 IBN RAJAB, *supra* n. 17, at 1:12 – 5.

100 IBN RAJAB, *supra* n. 17, at 1:15.

teacher was targeted by the group of al-Qushairi, they assigned some of them to protect their teacher at the doorsteps of the mosque. When both groups met, it turned violent and one passerby was killed as a result of the chaos. Both parties wrote to different political rulers: the Caliph and the Minister. The latter brought the leader of both parties to stop involving violence and ordinary people in their doctrinal conflict. When they refused, the Minister wrote to the Caliph. The Caliph then ordered house arrest for al-Shareef and exile for al-Qushairi and this is when the calamity of Ibn al-Qushairi came to an end.¹⁰¹

While the story itself does not technically present a case of activism, it shows how jurists respond to different actors of the society and how they interact with the rulers. More importantly, it shows again the persisting nature of the jurists to protect their juristic domain. They can defy politicians and expose themselves to danger, violence, and exile in order to draw a line that protects the jurisprudence of Ibn Hanbal and more the religion of Islam. For many Hanbalis and others, involving rulers in matters of jurisprudence could distort the doctrine and jeopardize the principle. This is why they refused to follow political favorite doctrines, and even to keep silent about other minor opinions that they held. Al-Harawi said that he was brought to be executed five times in order to just keep quiet, let alone to change his juristic opinions, but he refused and survived all times.¹⁰²

In Egypt, the case of the scholar al-'izz bin Abdul-Salam (d. 1262) is a striking one. In Islamic history, he was given the title the "Sultan of the *Ulama*" in appreciation of his bold moves in addition to his scholastic books on jurisprudence and jurisprudential politics. He was imprisoned and persecuted because of his activism and outspokenness. When Ibn Abdul-Salam noticed the influence the slaves of the Sultan Ayyub gained, he became alarmed and tended to invalidate the transactions they would make, which angered them. The slaves, who would become rulers later, complained and drove a wedge between the Sultan and Ibn Abdul-Salam. This led to an extreme confrontation with the ruler, as a result of which Ibn Abdul-Salam packed and started leaving Cairo with people and nobles following him. This forced the ruler and ruling elites into a position where they had to accept his authority and judgment and urge him to stay in

101 IBN RAJAB, *supra* n. 17, at 1:16 – 20.

102 IBN RAJAB, *supra* n. 17, at 1:145.

order to stabilize society.¹⁰³ This example helps to demonstrate the power of the *ulama* when they choose the path of activism. Despite the fact that this scholar did not have a formal position or political office, he could influence politics through societal and popular pressure.

Activism could take many other forms as well. Scholars engaged in public affairs based on their understanding of the moral obligations and religious principles that they promoted. They pressured rulers as they did in the example of “Salat al-Raghaib” during the Ayyubid period (from the twelfth to the thirteenth centuries). Salat al-Raghaib is the prayer performed on the first Friday of the month of Rajab. The scholars opposed the general practice of this prayer on the grounds that it is an innovative religious practice. The ruler responded to their demands accordingly.¹⁰⁴ During the eleventh century, jurists gathered to protest against drinking wine, charging interest, and allowing prostitution. This protest is an important sign of the relationship between these protesting jurists and the state.¹⁰⁵

Not only pre-modern scholars protested or challenged orders that threatened their own morals or interests, but also some early modern scholars took the lead in defending the interests of the general public. Activist *ulama* were not only a Hanbali feature, but a mode that many other *ulama* exercised. In 1794, in Egypt after the Mamluk, the rulers of Egypt, introduced taxes on goods, the scholars fiercely opposed taxation. They led a general strike against the ruler to stop tax exploitation and, in the end, the rulers negotiated with the *ulama* and the taxes were repealed.¹⁰⁶

Another kind of activism, and one that could mark the climax of *ulama*'s influence, was challenging the authority of existing rulers. They could morally, in the form of a fatwa, delegitimize one ruler in favor of another, as they did many times throughout history when they perceived the public interest better served by the challenger.¹⁰⁷ In this context, Umar Makram (d. 1822) is an important name. He graduated from al-Azhar and rose among the nobles and scholars of Egypt during the French colonization (1798 – 1801). The *ulama*, under the leadership of Umar

103 ALI AL-SALLABI, Al-'izz bin Abdul-Salam, Al-Maktabah al-'Asriyyah n.d., at 65 – 66.

104 HOEXTER, *supra* n. 52, at 49.

105 EPHRAT, *supra* n. 2, at 92.

106 HATINA, *supra* n. 9, at 24.

107 KEDDIE, *supra* n. 2, at 105 – 6.

Makram, organized a popular mobilization and recognized the challenger Muhammad Ali as the legitimate ruler of Egypt over the existing Wali. It was a moment when Egyptians chose their own government in 1807.¹⁰⁸ Not long after that, Umar Makram told Muhammad Ali himself that the people had the right to remove any unfit ruler.¹⁰⁹

Scholars' activism of this sort has become particularly intense in the modern era, in the context of resisting colonization and occupation. The jurist Rawaq, dubbed "the Sheikh of the Blind", led the first opposition against the French in Egypt. Beyond Rawaq, the *ulama*, in general, orchestrated the resistance movement.¹¹⁰

The Urabi movement (1879 – 1882) was a popular mobilization that ended up fighting the British intervention in Egypt. The Urabi movement in Egypt was named after Ahmed Urabi, a popular soldier who decided to reject the unpopular policies of Taufeeq, the ruler of Egypt. Scholars proved to be a critical component of the movement he inspired. It is worth noting that the Urabi movement attracted diverse scholars from "both sides of the aisle," from those described as conservatives like Illysh to those who were reformists like Muhammad Abduh.¹¹¹ Illysh, Mansour al-Adawi, al-Haddad, and Salim al-Bishri were among the *ulama* who contributed to the Urabi revolution.¹¹² In 1879, al-Bakri with his friends and other scholars issued the "National Charter" to request a constitutional monarchy in 1879, but Khedive challenged the move and sent al-Bakri into exile.¹¹³ Later, a popular fatwa by *ulama*, signed by 10,000 people, delegitimized Taufeeq and called for a fight against the British occupation.¹¹⁴ Despite the official position of the Grand Mufti of al-Azhar, the majority of professors and students joined the revolutionaries against the Khedive Taufeeq, the contested ruler of Egypt who was supported by the British.¹¹⁵ Scholars who supported the Urabi movement paid an expensive toll as some were

108 KEDDIE, *supra* n. 2, at 176..

109 KEDDIE, *supra* n. 2, at 178.

110 KEDDIE, *supra* n. 2, at 162 – 3.

111 HATINA, *supra* n. 9, at 39 – 44.

112 HATINA, *supra* n. 9, at 35; KEDDIE, *supra* n. 2, at 163 – 4.

113 KEDDIE, *supra* n. 2, at 164.

114 HATINA, *supra* n. 9, at 55.

115 HATINA, *supra* n. 9, at 70.

dismissed from al-Azhar, some were imprisoned like Illysh who was 80 years old, and others faced exile like Abduh.¹¹⁶

The Urabi movement inspired similar activism on the part of *ulama* in Morocco who opposed the monopoly of tobacco by the government of Hasan I (1873–1894) and who wanted to defend public interests against the alliance of big merchants and ruling elites. The scholars issued an opinion condemning the monopoly, which came as a shock to the King. The King addressed the issue and tried to calm the public.¹¹⁷

After the Urabi movement, al-Azhar participated in the 1919 revolt in Egypt. This revolution was led by Saad Zaghlul (d. 1927) who graduated from al-Azhar and was one of Muhammad Abduh's disciples. The movement broke out against the British occupation of Egypt and demanded national independence. The revolutionaries frequently met in the homes of the scholars.¹¹⁸ The movement was organized by the collective efforts of the national activists like Zaghlul and the other members of al-Wafd as a national delegation.¹¹⁹ The *ulama* generally contributed to the independence of Egypt by signing a petition to Britain that Egypt should be free and independent.¹²⁰

The Activism of scholars was a traditional way in which *ulama* sought to challenge the status quo, and one that they embraced. Another manner in which they engaged the state was in the role of mediators and peace brokers, as the next section shows.

2. Mediation Role

It could be said that because jurists never occupied an official political position for their religiosity, they continued for a long time to mediate on behalf of the people with the political authorities in the state in order to

116 HATINA, *supra* n. 9, at 76–82.

117 KEDDIE, *supra* n. 2, at, 101.

118 HATINA, *supra* n. 9, at 142–3.

119 For more about the 1919 Revolution and the mobilization of Zaghlul and the Wafd see SELMA BOTMAN, *Egypt from Independence to Revolution, 1919–1952*, Syracuse University Press 1991, at 25–55.

120 HATINA, *supra* n. 9, at 143.

voice the needs and interests of the people.¹²¹ Ephrat thinks that *ulama* served as mediators because of the “heterogeneous character of their socioeconomic background and networks, and their close ties with the urban populace....”¹²²

An interesting aspect of the scholars’ role as mediators is that it serves a dual function. The first is defending the public and people’s interests against the ruler’s exploitation and overstep, and the second is being in charge of calming people down from the ruler’s side. “*Ulama* served a communication tool between the ruler and the ruled for the ruler to manipulate the public.”¹²³ A perfect example of this occurred during the Urabi Revolution when the Khedive Taufeeq singled out *ulama* as responsible for public order and for ensuring the obedience of the people while these *ulama* and others were carrying the people’s demands to him.¹²⁴ Even at times of occupation and colonization, some *ulama* tended to work with the de facto rulers so they carried on in their role of representing people but to the colonizing forces this time. During the French occupation in Egypt, some *ulama* represented the public before the French, while other *ulama* represented the public against the French.¹²⁵

In order for *ulama* to resume their mediatory task, they need to be independent of the state’s bureaucracy, as they cannot mediate if they work for one side and part (of the state); otherwise, they will lose the confidence of the public as faithful mediators.

3. The Consultation Role

One of the most famous judges (*qadis*) in Islamic history is the noted early Hanafi jurist Abu Yusuf (d. 798). His book about the land tax, *al-Kharaj*, is a jurisprudential hallmark. He started the book by saying, the “caliph instructed me to write a book for him to *study and act upon*.”¹²⁶ The book,

121 HALLAQ, *supra* n. 56, at 56; EPHRAT, *supra* n. 2, at 13.

122 HOEXTER, *supra* n. 52, at 32.

123 KEDDIE, *supra* n. 2, at 53.

124 HATINA, *supra* n. 9, at 53.

125 KEDDIE, *supra* n. 2, at 173.

126 AL-QADI ABU YUSUF, *Al-Kharaj*, Dar al-Ma’rifah 1979, at 3.(italics is mine, and translation is Nimrod Hurvitz’) See HOEXTER, *supra* n. 52, at 20.

in other words, grew out of Abu Yusuf's role of consultant and enabled the Caliph to act upon the rules that Abu Yusuf set. The famous political jurisprudence theorist, al-Mawardi (d. 1058) is another example of a jurist who played the role of consultant when he wrote *al-Ahkam al-Shar'iyyah*, which has proved to be one of the hallmarks in political jurisprudence. This work was prepared under the instruction of the ruler al-Qadir Billah (d. 1031) in order for him to "study and act upon" it.¹²⁷ Al-Juwaini (d. 1085),¹²⁸ and his student, al-Ghazali (d. 1111),¹²⁹ produced similar books to instruct future rulers on how to follow Islamic principles.

The custom of the ruler consulting scholars and scholars writing books or rulings of jurisprudence in response demonstrates how the consultation function worked between some scholars and rulers in Islamic history. The practice of consultation was not just a tradition established in the *ulama's* practice and literature, it was also a custom and principle on the rulers' part. Rulers like Nizam al-Mulk, a Seljuk ruler (d. 1092), advised rulers to consult learned scholars especially the experienced ones.¹³⁰ The objectives of scholars in their services as advisors were to maintain the cooperation and understanding of rulers, and thereby have influence in the implementation of Islamic principles that would in their judgment maximize the interests of the public while furthering their own longer-term interests and influence as well.¹³¹

Around the 1100 s, Abu Saad al-Baqqal al-Baghdadi was used to preach in the presence of the Caliph al-Mustadhhir. He once preached Nizam al-Mulk that "Allah could turn his [fancy] wooden door into his casket.... Al-Baqqal added, addressing Nidham al-Mulk, you have no choice but to follow Allah's rules because you're the agent of the [Islamic] nation unlike ordinary individuals. [You are] an agent who is responsible to take care of the

127 AL-MAWARDI ABU AL-HASAN, *Al-Ahkam Al-Sultanyyah*, Dar Ibn Qutaibah 1989, at 1.

128 AL-JWAINI ABU AL-MA'ALI, *Al-Ghyathi: Ghyath AlUmam fi Eltyath AlDhulam*, Dar al-Da'uah 1980, at 1.

129 AL-GHAZALI ABU HAMID, *Sirr al-'Almeen*, Dar al-Aafaq 2001, at 1. (It is worth noting that this book's author is highly disputed whether was al-Ghazali or not).

130 AL-MULK NIZAM/HUBERT DARKE, *The Book of Government; or, Rules for kings*, Yale University Press 1960, 95. Nizam al-Mulk says, "Holding consultations on affairs is a sign of sound judgment, high intelligence and foresight." See also EPHRAT, *supra* n. 2, at 63.

131 KEDDIE, *supra* n. 2, at 177.

interests of people and report to the higher political authority of this life, and to Allah in the Hereafter.¹³²

This custom of playing the role of consultation was not exclusive for Hanbalis nor only in the medieval Islam. With the Ottoman Empire in the sixteenth century, scholars and sultans reached an important level of cooperation and consultation where *ulama* who played a large part in bringing what one scholar regards as “a major achievement of the Empire, namely the endowment of Islamic law, in its *Hanafi* form.”¹³³ This role of consultant continued even during the codification when the traditional role of scholars within the state was at stake. The *ulama* who justified the change and facilitated the codification feared that if the change was adopted without their presence, it might have worsened their position as scholars. The attitude of some *ulama* to justify codification was, therefore, based on the fear that the entire process would take place without their input at all if they did not participate.¹³⁴ The effort in the end, however, delegitimized not just some of the scholars involved in the codification process but the state as well. The effort was seen as justifying late Ottoman tyranny and monopoly of power rather than as an effort to implement Islamic law.

Consultation worked in cases where the *ulama* consulted were associated in one way or another with the ruler, sultan, or government, such that the scholar acquired the confidence of the ruler. In the absence of such trust, it is unlikely that a jurist could have played this role effectively.

4. The Official Counterbalance

Despite partial subordination of ruler-friendly *ulama* to the people in power, these *ulama* were still able to function as an official counterbalance. According to Feldman, the compromise was that jurists offer legitimacy to the order as a realistic compromise for the acceptance of the status quo as a means of then exercising influence and using pressure to ensure Sharia compliance in society.¹³⁵ Feldman presents al-Ghazali and al-

¹³² IBN RAJAB, *supra* n. 17, at 190.

¹³³ KEDDIE, *supra* n. 2, at 29.

¹³⁴ LAYISH AHARON, *Die Welt des Islams*, 2004, at 89 – 101.

¹³⁵ FELDMAN, *supra* n. 78, at 50 – 1, 38 – 9.

Mawardi as examples.¹³⁶ The move may be read, then, not as a scholarly concession to power, but as a brilliant maneuver that successfully preserved the law and the scholars in their constitutional position even after the caliphate had failed in its assigned task of preserving orderly government.¹³⁷

From the Hanbali jurisprudential history, Yahya bin Hubairah al-Wazeer (the Minister, d. 1165) represents probably the highest Hanbali official in the Abbasid state. Unlike al-Ghazali, and al-Mawardi and some others, Ibn Hubairah served in the government as a bureaucratic minister. According to Ibn Rajab, Ibn Hubairah was poor until he was brought to the Sultanic services and was promoted until became a minister during the rule of al-Muqtafi li Amrillah. Ibn Hubairah was then praised a lot and was called different great titles by the people for his position and dedicated learning. However, he refused to be called the lord of ministers. He said that Allah calls Aaron a minister to Moses, and the Prophet called Jibreel and Mika'eal his ministers in the heavens while Abu Bakr and 'Omar are his ministers on earth. Thus, Ibn Hubairah wouldn't allow himself to be called the lord of these great people and angels who should be called lords themselves. When Ibn Hubairah held the position of minister he brought closer to him the scholars, and best of people in learning circles and the people of worship. He benefitted the people of knowledge and Sunnah as best as he could, May Allah bring mercy upon him.¹³⁸

Ibn Hubairah once was in a learning debate with al-Ashtari al-Maliki, a jurist following the school of Malik, and al-Ashtari attributed to Malik an opinion that is, in fact, not Malik's. Then, Ibn Hubairah tried to correct him but al-Ashtari insisted on that, until Ibn Hubairah brought the authoritative book from both resources, Malik and Ibn Hanbal, and won the argument. Following this incident, Ibn Hubairah asked al-Ashtari to apologize for the people of knowledge for claiming something that was not true but he

136 I do not agree with analysis that al-Ghazali has a similar move to al-Mawardi. This is because al-Ghazali's authorship of the book, *Sirr al-'almeen*, is really disputed and I believe it is not his. See AL-DHAHABI, , *supra* n. 71, at '19/328. In addition, this approach of being ruler-friendly does not fit the whole works and moves of al-Ghazali like his criticism of the association with sultans in his infamous book, ABU HAMID AL-GHAZALI, *Ihya' 'Ulum al-Deen*, Kiriata Futra n.d., at 66 – 8 § 1.

137 FELDMAN, *supra* n. 78, at 39

138 IBN RAJAB, *supra* n. 17, at 1:211 – 38.

refused. Then, Ibn Hubairah called him a name and cursed him. The next session, Ibn Hubairah started blaming himself for mistreating al-Ashtari and apologized for him, but al-Ashtari said he was the one who should apologize for telling a false fact. After that, a lot of people cried in the place and was emotional.

Ibn Rajab described Ibn Hubairah as a jurist who served the Abbasids but highly respected the juristic sphere and respected its rules and borders. Ibn Hubairah once was shown a book that was brought to him from the library of the *madrassa* of al-Nizamiyyah, but he refused to read it and ordered it to be brought back since the terms of the endowment of the library stated that “no book should be brought outside it.” This was part of the Hanbali and other schools jurisprudential doctrine of “*shart al-waaqif*” that the endowment must be run completely according to the terms of the endower.¹³⁹ During a learning circle in the mosque, Ibn Hubairah gave an example of how the terms of the endower should be respected. He said he once was not allowed to enter a *madrassa* because it was built exclusively for Shafi’is and he was Hanbali.¹⁴⁰

Although he served in the Abbasid government, Ibn Hubairah maintained reasonable neutrality towards jurisprudential orientations, and respected the juristic sphere regardless of *madhabs*. Despite the fact that he was a learned jurist trained and affiliated with the Hanbali *madhab*, he said that mosques must not be affiliated with any school or jurisprudence, because they’re for Allah, like in the Quran “Mosques are not but for Allah.”¹⁴¹ Therefore, according to Ibn Hubairah, nobody can establish an exclusive mosque for some *madhab* or school within Islam because mosques must be open for all Muslims and serve all Muslims. He considers the act of specifying a mosque for a *madhab* or a jurisprudence as a bad innovation in Islam and against the verse of Quran that talks about “the Sacred Mosque, which We have made (open) to (all) men – equal is the dweller there and the visitor from the country.”¹⁴² Ibn Hubairah did not serve as an official counterbalance *per se*, but he was more like a political protector of the juristic domain.

139 IBN RAJAB, *supra* n. 17, at 1: 215 – 20.

140 IBN RAJAB, *supra* n. 17, at 1: 235.

141 Quran (72:18).

142 Quran (22:25).

The official counterbalance seems to attempt to reach the same destination: protecting the free sphere of jurisprudence from the total political control. Samuel Eisenstadt described the relationship between ruler-friendly *ulama* and the rulers as a “tacit bargaining” that the *public* sphere is for the public, and that *ulama* are always free to operate in this arena.¹⁴³ Ottoman *ulama* and modern Islamic scholars in the official counterbalance mode use their pressure to fight what they see as social and economic injustices.¹⁴⁴ Official Ottoman *ulama* could even issue rulings that circumvented the Sultan’s will and order.¹⁴⁵ When a university of sciences was open at the order of the Sultan Abdulmecid II in 1870 s, Sheikh al-Islam Hasan Fehmi Efendi saw it as a rival to the traditional madrasa system so he issued a fatwa and campaigned against it and succeeded in closing it.¹⁴⁶

Because the rulers decided to engage *ulama* in their legitimation process, the rulers paid the toll of bending to the wind created by *ulama* and the society they represented. In this mutual-interest relationship, scholars developed their own jurisdiction and sphere and the state protected its own domain. So, the dispute sometimes seems to be over “whose jurisdiction should govern?” or “whose sphere is at stake?”

The role of scholars as a counterbalance is sometimes vague due to the fact that the degree of “legitimacy” the *ulama* offer is often unclear and therefore perceived to be unconditional. It seems that al-Mawardi and the others would occasionally offer a temporary de facto solution to a political crisis by approving a ruler, but that solution could introduce a worse crisis when it is later used to justify forever de facto rule. Moreover, the “compromise” that brings scholars under the umbrella of the government ends up stripping them from real influence including counterbalance, and

143 HOEXTER, *supra* n. 52, at 6–151. Compare the interesting analysis of Haider Hamoudi about different bargains that, sometimes, involved al-Najaf, religious institutions and scholars in the Iraqi constitutional context, HAMOUDI HAIDER ALA, *Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq*, University of Chicago Press 2013, at 82,87,120,137–141.

144 HATINA, *supra* n. 9, at 18–9. See ZAMAN, *supra* n. 14, at 108.

145 KEDDIE, *supra* n. 2, at 33.

146 KEDDIE, *supra* n. 2, at 41.

costs them their own legitimacy in the eyes of the public whom they should represent.¹⁴⁷

5. The Time of Withdrawal?

A salient phenomenon that repeatedly appears when *ulama* react to political developments is what some describe as “withdrawal.” Interestingly, analysts’ definitions of withdrawal differ dramatically from complete silence, to denial of participation in the discussion, to denial of participation in official governance.¹⁴⁸ In this section, I tend to revisit the analysis of withdrawal in light of the fact that scholars are characterized by fragmentation, and they each have their own space of influence.

Some analysts like Jackson and Hatina tend to describe *ulama*’s response to politics as quietist. Quietism describes the wide range of methods that defer direct political questions or disputes over direct power to politicians or ruling elites that are directly involved in politics.¹⁴⁹ In this sense, quietism means abandoning (direct) politics in order scholars to devote the time and effort to the religious or jurisprudential work and debates.

Some analysts who present some *ulama* as quietists do not take into consideration the factor of whether these scholars are official, government-friendly *ulama* or non-official. Quietism does certainly exist in scholarly response to politics, but the point here is that the scholars’ quietism could be interpreted differently according to the locus that the scholar traditionally occupied.¹⁵⁰

If the literature that speaks of withdrawal does not interpret this move by *ulama* as a quietist approach toward public discussion, it will describe it as a method of avoiding troubles and adopting a passive reaction toward

147 HATINA, *supra* n. 9, at 134.

148 Compare the following materials, JACKSON, *supra* n. 20, at 70; KEDDIE, *supra* n. 2, at 117; HATINA, *supra* n. 9, at 18–58–9.

149 JACKSON, *supra* n. 20, at 70; HATINA, *supra* n. 9, at 18–58–9.

150 As an example of the analysis that does not make this differentiation see JACKSON, *supra* n. 20, at 70. Compare the Shi’i Semi-Quietism and Quietism in Hamoudi’s work, HAMOUDI HAIDER ALA, *Between Realism and Resistance: Shi’i Islam and the Contemporary Liberal State*, *Journal of Islamic Law and Culture*, 111–8 (2009), at 11.

the serious issues in society.¹⁵¹ However, although passive withdrawal happens, most of what is described as “withdrawal” seems to be a part of the scholars’ typical role of operating in their own sphere and refusing to give that up for direct political involvement. Unlike common conception of non-political moves as simply passive withdrawal, the non-political attitude of the *ulama* can be powerful due to the nature of their arena, networks and authority.

It could be part of the confusing analysis of withdrawal as quietism is that it presupposes the modern state’s setting where real influence is primarily through direct politics and the state’s institutions.¹⁵² Because the analysis seems to reduce influence to the one of state institutions in the modern context, they assume the same setting when analyzing medieval Islamic scholars.

Sherman Jackson, for instance, notes that medieval Islamic jurists ignored the question of the proper substantive political authority and dealt with procedural validity instead.¹⁵³ He gives the example of Ibn Taymiyyah who “shifted the focus from the top to the bottom, people, and their relationship to the divine law.”¹⁵⁴ This was the shift from the issue “who should rule” to “how should they rule.”¹⁵⁵ In studying al-Qarafi, Jackson points to the fact that “while Qarafi was conspicuously silent about the chaos and mayhem between the Ayyubids and the Mamluks, he finds time to address indiscretions that occur at a slighter lower level.”¹⁵⁶

With respect to al-Qarafi’s method in constitutional debates, his approach emphasizes that, although Islamic law should govern some conflicts, these conflicts reside outside the *ulama*’s own “jurisdiction.” As a result, the *ulama* exercise restraint in matters that might provoke political forces to invade matters normally within their arena. In addition, they developed a realist technique of “procedural validity” that has allowed them to serve

151 JACKSON, *supra* n. 20, at 70; KEDDIE, *supra* n. 2, at 117; HATINA, *supra* n. 9, at 18/58 – 9.

152 See HALLAQ, *supra* n. 80, at 50 – 7.

153 JACKSON, *supra* n. 20, at XX.

154 JACKSON, *supra* n. 20, at Xxii/70.

155 JACKSON, *supra* n. 20, at 71. It is worth comparing the analysis of Carl Popper of the modern democratic shift of political question from “who rule” to “how”. POPPER KARL RAIMUND/BOSETTI GIANCARLO, *The Lesson of This Century: With Two Talks on Freedom and The Democratic State*, Psychology Press. 2000, at 9.

156 JACKSON, *supra* n. 20, at XXii.

people's and society's needs even when essential legitimacy of the state is at stake. Therefore, when scholars exercise restraint from becoming involved in politics, this is not always passive withdrawal and quietism, but it could be to a means of protecting their legal domain, or protesting the current setting as well. The line between these positions is not always fixed, but it is important to analyze the motives of scholars by looking at their literature to include all these possible factors in the analysis.

Daniel Crecelius reads the *ulama's* refusal to rule during colonization, for example, as the typical submissive role of *ulama* to engage with government and direct decision-making.¹⁵⁷ This evaluation reduces the "active role" to being one that exists only by means of direct political governance and rule in the state as we know it today. In my opinion, the *ulama's* refusal to rule was a remarkably smart one because they resumed their typical role of representing people in refusing to participate in forces that occupied their land, culture and political life. *Ulama* stripped the system of the French of its legitimacy and retained the legitimacy for themselves by proving to be independent and uninterested in power. *Ulama*, actually, put the French in a difficult situation because the French needed someone local to rule so they (the French) could indirectly rule but *ulama* refused this deal.¹⁵⁸

There may be some element of passive withdrawal and quietism on the part of some *ulama* in certain contexts. However, Jackson ignores the fact that *ulama* can protest by withdrawal, which is powerful in light of the tools of legitimacy that they have.

Thus, in the end, refusing to serve in politics is not merely withdrawal; it could also signal a powerful active reaction of protesting the status quo. In the case of scholars, it is even stronger when we know that the public could see their absence from the state as an attempt at delegitimization of the state. In addition, "withdrawal" could be a stand itself as it builds a space that is stronger and more attached to the people—an entirely

157 KEDDIE, *supra* n. 2, at 174–6.

158 KEDDIE, *supra* n. 2, at 71. It is fair to say that there are times and many cases of *ulama's* legitimizing absolute tyranny with no return for the public interests but this is mostly considered a corrupt move more than a typical pattern acceptable of *ulama*.

different authority that the state does not control.¹⁵⁹ It is fair to suggest that the way and the kind of withdrawal must be analyzed to interpret this move.

In wars between two or more powers, scholars' refraining from engagement is not always withdrawal as some may suggest,¹⁶⁰ but rather a means of maintaining their role no matter which wins. For example, in the war between Ottomans and Mamluks, the scholar Arusi argued that his goal was the welfare of Muslim subjects, not the victory of either the Ottomans or the Mamluk.¹⁶¹

When some scholars resort to their very locus to exercise influence, some commentators interpret this move as a kind of withdrawal. In explaining what some regard as a quietist approach, Hallaq hints at the separation of the legal and the political in medieval Islam.¹⁶² It is actually more of a revealing feature of the locus that the jurists and scholars work in rather than passively accepting the status quo.

At any rate, whether withdrawal existed as much as some claim or not, this mode of withdrawal is one mode that scholars assume while they can and do assume other modes at other times. Sometimes, even when some *ulama* adopt one mode toward politics, other *ulama* adopt another mode. This is why, for example, we saw these different reactions toward one issue, one party, or government.

In the following section, I will discuss the example of westernization that threatens the traditional role of modern scholars, and how they have reacted to it.

159 This explains why the Saudi government, for example, takes popularity of "peripheral" ulama and jurists very seriously and may even imprison a popular scholar for being popular or prevent him from having regular learning circles. This is because this popularity builds a bigger space for a sphere that widens the scope of the influence of this out-of-the-state authority. In the course of building this authority, jurists could use an Islamic maxim of "multiplying the number of Muslims." By this, jurists mean that even those who are not dedicated to a specific moral Islamic task (not jurists or dedicated students) can come and listen. The exercise of multiplying the numbers of people surrounding the learning circle and ulama functions to build a social support in the space where these jurists reside and exercise their influence.

160 HATINA, *supra* n. 9, at 24.

161 HATINA, *supra* n. 9, at 24.

162 HALLAQ, *supra* n. 80, at 251

V. The Modern Mode: in the Course of “Change”: Between Reform and Westernization

1. The *Ulama* and Legal Change

When we discuss the roles of scholars and pre-modern Hanbali jurists and how these roles have shaped their domain, the response to change is fundamental. It becomes even more important when we see that the change could enhance the functions of scholars, and could, on the other hand, marginalize their influence and role. In this section, I will discuss how modern scholars reacted to the calls for change in their juristic domain.

There are different approaches toward evaluating the importance of the role of scholars in the course of change in Muslim societies. One approach assumes that meaningful change comes from the westernized elites. Under this approach, scholars are not just less relevant but somehow a potential obstacle toward a useful change that an Islamic society might need.¹⁶³ Some authors complain that the orientalist scholarship on *ulama* portrays them as foreign, if not opposed, to change and reform and that the “premodern Islamic legal tradition is a highly rigid structure, defined in opposition to the social and political institutions of society.”¹⁶⁴ Another approach interprets the response of scholars as dependent on their interests and social position rather than their values and public interests. Therefore, scholars could pose a threat or lend support depending on how their interests as a group are protected.¹⁶⁵ A third approach tends to portray *ulama* as “custodians of change” as long as public interests and values are not at stake.¹⁶⁶

This chapter takes the position that, although scholars vary and assume different modes, they maintain a very significant role in advocating for change that appeals to the public. If they cannot enhance the common good, they at least work to lessen the inevitable wrongs. They call for some change while they struggle against others.

163 See KEDDIE, *supra* n. 2, at 136 – 9 – 145; HATINA, *supra* n. 9, at 33,83 – 138. Compare KEDDIE, *supra* n. 2, at 14.

164 ZAMAN, *supra* n. 14, at 17.

165 See KEDDIE, *supra* n. 2, at 107 – 191.

166 ZAMAN, *supra* n. 14, at 17 – 9. See HATINA, *supra* n. 9, at 134; RAHEMTULLA, *supra* n. 14, at 84.

In his book of the rules of jurisconsult and *ifta'*, Ibn al-Qayyem (d. 1350), following a settled rule in Islamic jurisprudence, asserts that fatwas change according to the time, place, circumstances and customs.¹⁶⁷ This at least recognizes the possibilities of legal change. Other jurists have reached largely similar conclusions. Ibn Aabideen (d. 1836) authored a book that focuses on jurisprudential changes according to circumstances and environment.¹⁶⁸ Therefore, jurists respond to people of their time in order to reach the best implementation possible of Islamic law. This is why, for example, Ebussuud Efendi (d. 1574), one of the most important scholars in the sixteenth century, relaxed a fatwa on endowments in order to respond to people's needs.¹⁶⁹

With the modernization of our culture, we find reservations from scholars not on the principle of change, but rather on certain kinds of change, change that jeopardizes the values of people or threatens to invade the very free channels between people and scholars. This kind of change is commonly described as "westernization."¹⁷⁰ At the same time, scholars have embraced changes that elevated the quality of living and allowed for free interaction between people and scholars. "Some *ulama* did not encounter problems with dealings with modernity as they applied to public interest rule."¹⁷¹ Therefore, reforms that fulfilled the requirements of serving public interest, the *ulama* would support and adopt, but those that stood against public interest, they were committed to opposing.

Some debate revolves around whether certain aspects of modernization could be implicit mechanisms of colonization. This applies to ways of living, dress code, languages, cultures, and related matters. Thus, some scholars warned against Western-style brimmed hats, jackets, and trousers¹⁷² while others allowed them.¹⁷³ Similar reactions were narrated

167 ALJAWZEYYAH, *supra* n. 38, at 255 § 3.

168 IBN 'AABIDEEN, *Nashr Al-'Urf Fi Bina' Al-Ahkam 'Ala Al-'Urf*, Sayyed 'illysh n.d., at 114 – 48 § 2. See ZAMAN, *supra* n. 14, at 19.

169 HOEXTER, *supra* n. 52, at 73.

170 For example, *ulama* of Morocco supported local reforms but opposed the Protectorate. Only reforms that attempted to limit the influence of *ulama* in Morocco attracted the opposition of scholars. KEDDIE, *supra* n. 2, at 106 – 7.

171 HATINA, *supra* n. 9, at 134.

172 HATINA, *supra* n. 9, at 83 – 6.

173 HATINA, *supra* n. 9, at 106.

about fatwas against coffee,¹⁷⁴ tea¹⁷⁵ and cigarettes¹⁷⁶ when they were attached to certain westernizing influences. The fatwas and rulings were relaxed on these issues when the *ulama* began to consider other aspects of those activities.

Yet scholars were not opposed to other changes. For example, while they initially expressed reservations about the modern press because it was thought to have threatened the sacred texts,¹⁷⁷ they started to embrace it once there arose the phenomenon of a “media mufti” who could use modern press to disseminate Islamic messaging.¹⁷⁸ Their position seems to be that, while technology is a blessing, using it in religious matters should be done carefully to protect against the distorting of the message of Islam.¹⁷⁹ As Daniel Crecelius puts it: “The transformation of Islamic society under the impact of the modernization has been the major concern of scholars interested in the modern history of Islam.”¹⁸⁰

In understanding the modern *ulama*’s responses to changes brought about by colonization and westernization, and the reasons for the strong opposition of the *ulama* to them, the Ottoman era “Tanzimat” reforms prove a particularly salient example. The Tanzimat represent a turning point in modern Muslim history when the Ottoman Empire adopted reforms that were broadly viewed as severely limiting the role of scholars. In reality, however, as the next section shows, the Tanzimat induced scholars to return to their original role and their traditional sphere—resorting to the people and operating in an independent and autonomous space.

Between 1839 and 1876, the Sultans of the Ottoman Empire introduced a package of political, administrative, legal and social reforms known as the

174 KEDDIE, *supra* n. 2, at 288.

175 KEDDIE, *supra* n. 2, at 116.

176 KEDDIE, *supra* n. 2, at 288.

177 HATINA, *supra* n. 9, at 33.

178 See MESSICK BRINKLEY, *Media muftis: Radio fatwas* (in: *Yemen, Islamic Legal Interpretation: Muftis and Their Fatwas*, Harvard University Press 1996 (David Powers and others eds.)), at 310–20. See also, ZAMAN, *supra* n. 14, at 58.

179 HATINA, *supra* n. 9, at 138.

180 KEDDIE, *supra* n. 2, at 167.

Tanzimat.¹⁸¹ In this section, I will discuss these reforms and their aftermath in the Muslim and Arab world, with a particular focus on Egypt, to show how these reforms affected scholars and their role.

2. The Tanzimat and its Aftermath

After a long period during which the *ulama* enjoyed autonomy, the *ulama* were placed pursuant to the Tanzimat under the control of the Sultan when he introduced the office of chief mufti (Sheikh al-Islam). Religious activities then came under the control of the state appointed mufti. Sultan Mahmud II (d. 1839) further made a distinction between the affairs of the state and the affairs of the *ulama*, a step that was followed by subordinating the affairs of the *ulama* to those of the state.¹⁸² The lesson of the Tanzimat is that these reforms jeopardized and actually infringed on scholars' autonomy, and the autonomy of people they represented. It was not surprising to see scholars opposing not only the Tanzimat themselves, but other changes as well that resembled the Tanzimat throughout the Muslim world.¹⁸³

A notable response to the Tanzimat came from a conservative base of scholars. The stance of these *ulama* was depicted as a passive and indifferent response in that they saw these reforms as "worldly matters."¹⁸⁴ Again, as we saw from the analysis of "withdrawal," this stand can also be seen as an active one, building social authority away from state affairs.

The boldest moves of the Tanzimat involved the intervention of executive authorities in law making. Sultan Mahmud provided the concept of "*adalat*/justice" to be a resource of law along with Sharia and administrative ordinances, frequently referred to as *Kanun* (ordinances).¹⁸⁵

181 See CHAMBERS RICHARD, *The Ottoman Ulema and the Tanzimat* (in: *Scholars, Saints, and Sufis: Muslim Religious Institutions in the Middle East Since 1500*, University of California Press 1972), at 33 – 46.

182 CHAMBERS, *supra* n. 180, at 35 – 7.

183 CHAMBERS, *supra* n. 180, at 37.

184 CHAMBERS, *supra* n. 180, at 41.

185 CHAMBERS, *supra* n. 180, at 42. The "*adalat*" rule here resembles the English concept of "equity" with similar consequences. For the concept of equity in English and American law, see in general, HOFELD WESLEY NEWCOMB, *The Relations Between Equity and Law*,

A new council was formed so that the secular elites could make laws instead of Islamic jurists. In 1855, mixed courts were introduced. Within a few years (1840 – 1858), the Panel and then Land Codes were promulgated as well.¹⁸⁶

The culmination of these efforts was the creation of an Islamic Civil Code known as the Mejlle. Between 1869 – 76, a commission led by Ahmed Cevdet Pasha produced this massive 16-volume work, meant to be an Islamic equivalent of the Western Civil Code. The grand mufti firmly opposed this move, arguing that deciding Islamic law should be deferred to his office not a secular committee. Nonetheless, the official scholars did not oppose the Tanzimat in the hope that they could serve in the legal process.¹⁸⁷ By the end of Tanzimat period, *ulama* did not actually lend legitimacy to the state but slowly and gradually stripped themselves, and perhaps the state, of legitimacy by subordinating religious institutions to the government. One commentator describes the attempts of reform during the Tanzimat to be “on the right track until the removal of effective law-making scholars to the advantage of the codes.”¹⁸⁸

The experience of Tanzimat inspired the “reformist” ruler in Egypt Muhammad Ali, and the year 1872 marked the beginning of modernization for *ulama* and for al-Azhar. The impact of “modernization” in Egypt led to centralizing the government and threatening people’s values. Muhammad Ali did not challenge *ulama* in their religious institutions but, rather, he created another order that existed alongside and gradually changed the locus of focus and influence. It is not surprising that modernization for *ulama* meant a retreat not just from political influence but also from social prominence. Although neglected during later period of Muhammad Ali’s rule, *ulama* still played an active role, however, through blocking some reformative projects. All major “reforms” proposed by Muhammad Ali were undermined by the absolute refusal of the *ulama* and students to support them. They even used space that was allowed by the reform to block further reforms.¹⁸⁹ Daniel Crecelius rightly notes that, although sheikhs and students truly desired reforms, each reform proposed was

Michigan Law Review (1913); NEWMAN RALPH ABRAHAM, *Equity and Law: A Comparative Study*, Oceana Publications. 1961.

186 CHAMBERS, *supra* n. 180, at 42 – 4.

187 CHAMBERS, *supra* n. 180, at 44.

188 FELDMAN, *supra* n. 78, at 7.

189 KEDDIE, *supra* n. 2, at 183 – 204.

associated with government interference, and thus they were committed to opposing those proposed by Muhammad Ali.¹⁹⁰

To conclude, *ulama* could be guardians of change, but only to the extent that such change does not threaten their principles and public interests as they view them. If they did see the change as threatening, as in the case of “Westernization,” they would not hesitate to fight it vigorously.

VI. Conclusion

In this article, I presented the different roles and modes of scholars to reemphasize the different forms of engagement that scholars can assume. These were all possible because they probably transcend the traditional rigid positioning of religious institutions in the modern state. *Ulama* appeal to people and form their positions according to what they think are the best interests of the public, as well as the tradition they carry and seek to protect. Most religious movements and productions are not directly traceable to formally organized institutions and even when such institutions happened to exist, their function was usually unrelated to the religious work, or to religious intellectual activities as a whole, or in any case less relevant than the broader sphere of jurists. This sphere was discussed in the context of the clergy in the Sunni and Hanbali experience, where hierarchy and institutionalization were rarely operative. The article ended with the debate of whether *ulama*, namely the Hanbalis, represented a “corporate group.” Different studies adopt different approaches to determine whether *ulama* and jurists have established the type of solidarity that would qualify them as a corporate group. However, I argue that, although many jurists were members of such corporate groups, not all of them were. The juristic sphere also encompassed many who were members neither of a corporate group nor even of a madhhab. This feature allowed jurists to protect their domain from both internal and external controls.

¹⁹⁰ KEDDIE, *supra* n. 2, at 204.

Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates

Fostering and Adoption in Islamic Law

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Abstract

The importance of family and lineage runs like a golden thread through Islamic history, thought, and law. However, many children around the Islamic world

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are deprived of the opportunity to develop and grow up in their own biological families. With the aim to preserve blood ties as the only means of legitimate filiation, adoption is prohibited in most countries influenced by or based on Islamic law or Shari'a. For this reason, alternative forms of adoption have been developed as well as a model of legal fostering called kafalah. A kafalah enables children deprived of a family environment to be legally raised on a permanent basis by families other than their own. First, this paper looks at the legal framework of filiation and kafalah in classical Islamic law. Second, three modern-day approaches on regulating kafalah as a means of child protection will be outlined. We have chosen three countries from the Arab world with different legal-historical backgrounds, namely Morocco, Egypt, and the United Arab Emirates. The three countries have enacted child-specific legislation as well as specific legislation on the regulation of fosterage of children, of kafalah. We will look at similarities and differences among the three legislative frameworks and pinpoint benefits and risk factors.

I. Introduction

Orphans and children deprived of family care have been a social reality since ancient times, and so have ways to care for such children. These ways differ from culture to culture. Whereas in the “West”, adoption in the sense of creating legal filiation between adopter and adoptee has served as the main instrument to integrate abandoned and orphaned children into new families, in Islam, it is generally not regarded permissible. Most Muslim-majority states maintain this prohibition today. However, Islamic law provides for a legal alternative called *kafalah*. With the increase of movements and migration across continents and countries, family formation across borders has become a wide spread phenomenon, and the institution of *kafalah* has become internationalised.

The following article on fostering and adoption of children will take departure in classical Islamic law by considering what the classical sources have to say to legitimate filiation, orphans, adoption and fostering. In order to illustrate the modern relevance of the classical law, we will outline what the concept of *kafalah* entails, what its legal prerequisites

and implications are, and how the laws of three different Muslim-majority countries deal with legal parentage and fostering.

II. Filiation in Islamic Law

1. Establishment of Filiation

The importance of family and lineage runs like a golden thread through Islamic history and thought. From a linguistic point of view, lineage is established through father and mother; however, in the legal sphere lineage refers to the agnatic line of descent only, which is a result of the paternalistic structure of society.² The paternal tie defines and determines several seminal rights and duties in Islamic law;³ in itself, it is a right that gives other rights.⁴ The rights given by the paternal relationship include custody and guardianship, maintenance, rights of citizenship and name, and, importantly, inheritance.

In particular, the father must provide his offspring with clothing, food, shelter and education until they reach maturity (in case of a boy) or marry (in case of a girl). The term used in Islamic law for paternity in the sense of lineage is *nasab*.⁵ In many cultures and up to this day, the relevance of a person's kin is shown by the use of patronyms (ben, bint, i. e., son, daughter of) which highlights the importance of the paternal tie. In order to have a proper *nasab*, certain preconditions must be fulfilled.

2 See e. g. SHABANA AYMAN, The Islamic Law of Paternity between Classical Legal Texts and Modern Contexts: From Physiognomy to DNA Analysis, *Journal of Islamic Studies*, Vol. 25 (2014), 1–32, at 1, 3.

3 WELCHMAN LYNN, *Women and Muslim Family Laws in Arab States*, Amsterdam 2007, at 143.

4 See e. g. CLARKE MORGAN, *Islam and New Kinship*, New York 2009, at 96.

5 Referring to a male genealogical line, *nasab* has been described as “the most fundamental organising principle of Arab society”. See ROSENTHAL FRANZ, *Nasab*, in: BEARMAN PERI et al. (eds.), *Encyclopaedia of Islam*, 13 Vol., Leiden 1997–2009, at 967.

a) Children Born in Wedlock

In Islamic law, proper filiation to the father is established by procreation under the further condition that the parents of the child were legally married at the time of conception of the child.⁶ To the mother it is established by birth.⁷ The requirement of marriage is linked to the criminalisation of extramarital sex, called *zinā*, which is one of the very few crimes against God for which a set punishment (*ḥadd*) is demanded by the Quran and the Sunna (the basic sources of Islam). In addition, the marriage requirement serves to maintain “genealogical clarity”. A well-known *fiqh* principle confirms the interconnectivity of marriage, procreation and *nasab* as well as a desire to uphold proper sexual mores in society. It says that “the child (belongs to) the conjugal bed” (*al-walad li-l-firāsh*).⁸

In classical Islamic law, marriage is a civil contract that requires the contracting parties to be of sound mind, have attained puberty, and have consented to the marriage. Muslim men of legal capacity typically contract their own marriages, while women must usually have a guardian in marriage, a *walī*, who contracts their marriage for them. Marriage is concluded by the offer (*ijāb*) of one contracting party and the acceptance

6 NASIR JAMAL J., *The Islamic Law of Personal Status*, 3rd edition, Leiden 2009, at 81; SHABANA, *supra* n. 1, at 1; BARGACH JARMILA, *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*, Lanham 2002, at 56.

7 NASIR, *supra* n. 5, at 146, 154; AZ-ZUBAIR KABIR BANU MUHAMMAD, *Who is a Parent? Parenthood in Islamic Ethics*, *Journal of Medical Ethics*, Vol. 33 (2007), 605–609, at 606 ff.; KREUTZBERGER KAI, *Single Mothers and Children Born out of Wedlock in the Kingdom of Morocco*, *Yearbook of Islamic and Middle Eastern Law*, Vol. 14 (2008–2009), 49–82, at 62. This principle derives from the Quran (58:2) which states: “[...] none can be their mothers except those who gave them birth [...]”. See e.g. Art. 146 Moudawana which states that filiation to the mother has the same effects irrespective of legitimate or illegitimate birth.

8 Cf. PEARL DAVID/MENSKI WERNER, *Muslim Family Law*, London 1998, 399 f.; POLLACK DANIEL et al., *Classical Religious Perspectives of Adoption Law*, *Notre Dame Law Review*, Vol. 79 (2004), 101–158, at 734; SHABANA, *supra* n. 1, at 6; EICH THOMAS, *Constructing Kinship in Sunni Islamic Legal Texts*, in: Tremayne Soraya/Inhorn Maria C. (eds.), *Islam and Assisted Reproductive Technologies*, New York/Oxford 2012, 27–52, at 37; WELCHMAN, *supra* n. 2, at 142; AZ-ZUBAIR, *supra* n. 6, at 606; CLARKE, *supra* n. 3, at 47. Regarding the *firāsh* principle in history, see LANDAU-TASSERON ELLA, *Adoption, Acknowledgment of Paternity and False Genealogical Claims in Arabian and Islamic Societies*, *Bulletin of the School of Oriental and African Studies*, Vol. 66 (2003), 169–192, at 176 ff.

(*qabūl*) of the other, occurring at the same time before two – generally male – witnesses.⁹ The marriage contract is classified by different degrees of validity which have a bearing on the legitimacy of the child born from this union: valid (*ṣaḥīḥ*), irregular (*fāsid*), and void (*bāṭil*) marriages.¹⁰

Legitimacy presupposes birth during a regular or irregular (but not void) marriage within specific pregnancy terms and with consummation having been possible. In order to avoid illegitimate birth, the Islamic jurists set minimum and maximum terms of gestation which are rather generous: A child is deemed legitimate if born after six months of pregnancy and up to two or even more years of pregnancy depending on the school of law.¹¹

Modern state laws are also rather generous in their presumption of a child's legitimacy and thus in granting *nasab*. This is at least true as long as there is a claim of marriage between a particular woman and a man. Thus, children born from a marriage of doubtful validity or children born following an

9 PEARL/MENSKI, *supra* n. 7, at 139 ff.; NASIR, *supra* n. 5, at 44 f.; ESPOSITO JOHN L., Women in Muslim Family Law, Syracuse/New York. 2001, at 15 f. See also ALI KECIA, Marriage in Classical Islamic Jurisprudence, in: Quraishi Asifa/Vogel Frank (eds.), The Islamic Family Contract, Cambridge 2008, 11 – 45, at 13. In Sunni Islam, the place of one man may be taken by two female witnesses: ESPOSITO, *supra* n. 8, at 16; NASIR, *supra* n. 5, at 56. Regarding the issue of state registration of marriage and official marriage documents as proof of marriage, see WELCHMAN, *supra* n. 2, at 53 ff. See also SONNEVELD NADIA, Rethinking the Difference between Formal and Informal Marriages in Egypt, in: Voorhoeve Maaik (ed.), Family Law in Islam: Divorce, Marriage and Women in the Muslim World, London 2012, 77 – 107.

10 See PEARL/MENSKI, *supra* n. 7, at 143 ff.; see also NASIR, *supra* n. 5, at 75 ff.; ESPOSITO, *supra* n. 8, at 17.

11 Based on Quran (31:14) and (46:15), there is a consensus among Islamic jurists regarding the minimum period of gestation at six months. The maximum term of gestation was in contestation among Islamic jurists, ranging from two (Hanafi School of Law) to four (Shafi'i, Maliki, and Hanbali School of Law) or even more years, thus potentially minimising illegitimacy and adultery accusations. In Shia Islam, there is a consensus that one year is the maximum period of gestation; according to some jurists, this period might be shorter. See KHAN ARIF ALI/KHAN TAUQIR MOHAMMAD, Family Law in Islam, in: Encyclopedia of Islamic Law, Vol. 5, New Delhi 2009, at 188; BAKHTIAR LALEH, Encyclopedia of Islamic Law, Chicago 1996, at 456 ff.; NASIR, *supra* n. 5, at 146. Among the codified rules of family law that have been adopted in Arab countries in the present and past centuries exist provisions pertaining to the minimum and maximum term of pregnancy. Regarding the maximum term of pregnancy, legislators have introduced a one-year rule into most Arab Personal Status Laws as a substantive rule or rule of procedure, citing medical authorities as support. WELCHMAN, *supra* n. 2, at 143; see also NASIR, *supra* n. 5, at 146.

“engagement” of her or his parents may be considered legitimate.¹² In addition, parentage is often considered to be an indication of the existence of a marriage as the principle generally holds that the establishment of lineage establishes wedlock and not vice versa.¹³

b) Other Forms of Filiation

Apart from marriage, parentage (and with it legitimacy) may also be established through acknowledgment by the father, the mother¹⁴ (who is neither married nor in her *iddat*¹⁵) or the child. *Iqrār* requires that four basic conditions are met (which are varied slightly to fit the respective individual). First, the child must be of unknown parentage; second, there must be a certain age difference between father and child so that parentage is plausible;¹⁶ third, the father must indicate that the child is legitimate and not the offspring of *zinā*; fourth, if the child is of age, he or she must agree to the acknowledgement. If the mother is married or in her waiting period, her acknowledgement shall only establish the paternity of the husband if this individual confirms the acknowledgment.¹⁷ Finally, aside from marriage and *iqrār*, the Islamic religious legal texts acknowledge other means of establishing parentage to a child: *al-bayina*

12 See WELCHMAN, *supra* n. 2, at 145; see also NASIR JAMAL J., *The Status of Women under Islamic Law and Modern Islamic Legislation*, 3rd edition, Leiden/Boston 2009, at 174.

13 WELCHMAN, *supra* n. 2, at 144; see also KHAN/KHAN, *supra* n. 10, at 207. – On this chapter, see also BÜCHLER ANDREA/SCHNEIDER KAYASSEH EVELINE, *Medically Assisted Reproduction in Egypt, Iran, Saudi Arabia and the United Arab Emirates*, *European Journal of Law Reform*, Issue 2 (2014), 430 – 464, at 432 ff.

14 It must be pointed out, however, that not all schools consider the acknowledgment of a woman valid: See BARGACH, *supra* n. 5, at 60; KHAN/KHAN, *supra* n. 10, at 210. See also ESPOSITO, *supra* n. 8, at 27.

15 Waiting period following death of the husband or divorce during which a woman is not allowed to get remarried. Regarding the *iddat*, see ESPOSITO, *supra* n. 8, at 20 f.; NASIR, *supra* n. 5, at 137 ff.

16 See PEARL/MENSKI, *supra* n. 7: real paternity must be possible, i. e., the acknowledger must have reached the minimum age of puberty and the minimum period of gestation must have passed by.

17 Concerning the whole, see NASIR, *supra* n. 11, at 176; KHAN/KHAN, *supra* n. 10, at 214. See also ESPOSITO, *supra* n. 8, at 27; NASIR, *supra* n. 5, at 150 ff.; KHAN/KHAN, *supra* n. 10, at 210 f. Further see LANDAU-TASSERON, *supra* n. 7, at 176.

(evidence) and *al-qyāfa* (the comparing of physical characteristics).¹⁸ Used in classical times, physiognomy (especially the characteristics of the feet) was mainly used in cases where paternity was contested between two or more men.¹⁹ The rules of *al-bayna* have been codified under some modern family laws such as Morocco, Tunisia and Algeria.²⁰

2. Effects of Filiation

Only a child that is born legitimately can become a full member of society. In order to protect the child's legitimate status, once the legal bond to the father is established, it is difficult to break it. As an example, a husband may only deny paternity under a valid marriage contract by claiming that his wife was infidel. If the father has not previously acknowledged his paternity or confirmed the acknowledgment of the mother or the child, he may start a judicial procedure called *li'an* by claiming under oath that his wife committed adultery and dispute his parentage whereas the wife denies these allegations. Under these circumstances, the judge will rule the separation of the spouses which amounts to an irrevocable dissolution of marriage and to the illegitimacy of the child.

3. Effects of Lack of Filiation

Anyone born outside of marriage is considered an "illegitimate child". He or she will be deprived of the support that the father and his family owe legitimate children²¹ and will take the mother's name. This is considered a

18 In detail see SHABANA, *supra* n. 1, at 8 ff. – Some schools also accept "drawing of lots" (*al-qur'ah*) as a valid means to establish paternity if one is unable to determine the paternity of a child by other means: SUJIMON M. S., *The Treatment of the Foundling (al-Laḳit) According to the Ḥanafis*, Islamic Law and Society, Vol. 9 (2002), 358–385, at 378.

19 See SUJIMON, *supra* n. 17, at 374 ff., who discusses in which cases the Hanafis accepted physiognomy as proof of paternity. See also AL-AZHARY SONBOL AMIRA, *Adoption in Islamic Society: A Historical Survey*, in: Warnock Fernea Elizabeth (ed.), *Children in the Muslim Middle East*, Austin 1995, 45–67, at 53 f. See BARGACH, *supra* n. 5, at 60, on the revival of this practice in modern times.

20 See NASIR, *supra* n. 11, at 178; BARGACH, *supra* n. 5, at 60.

21 NASIR, *supra* n. 5, at 119, 147 f.; NASIR, *supra* n. 11, at 119, 172; see also PEARL/MENSKI, *supra* n. 7, at 400; AL-AZHARY, *supra* n. 18, at 50; KHAN/KHAN, *supra* n. 10, at 205; WELCHMAN,

shame in societies where patriarchal lineage is highly valued, especially for boys who are expected to pass on lineage through their name..²² Illegitimate children in many instances face a life on the fringes of society, as will their mothers.

Particularly unwed mothers who give birth will face harassment from family and community members. In extreme cases, unwed mothers may fear for their lives if family members perceive the illegitimate birth as a transgression against “family honour”. In addition, they may be tried and punished for adultery (*zinā*). Given the social stigma of illegitimacy, mothers often see no alternative other than to abandon the baby in the hope of giving him or her a “better life” in a loving family, and sometimes also to protect their already existing family and their own life.²³

III. Adoption in Islamic System and Society

1. Historical Background

In a historical perspective, the concept of adoption as of giving the child the status of one’s own rightful offspring by adopting him or her was not foreign to what we call today the “Middle East”. Before the advent of Islam, in the *Jahiliyya*, or pre-Islamic period, adoption (*tabannī* from the Arabic word *ibn*, which means “son”) was practiced in the sense of creating a permanent parent-child relationship between persons biologically not

supra n. 2, at 142; Quran (24:6 – 9). NASIR, *supra* n. 5, at 148 and idem, *supra* n. 11, at 172, points out that father and child would remain un-marriageable to each other.

22 FORTIER CORINNE, *Le droit musulman en pratique: genre, filiation et bioéthique*, Droit et Cultures, Vol. 59 (2010), 1 – 19, at 9; BARRAUD ÉMILIE, *L’adoption au prisme du genre: l’exemple du Maghreb*, CLIO, Vol. 2 (2011), 153 – 165, at 160.

23 On the situation of women who have children out of wedlock see, e. g., BARGACH, *supra* n. 5, at 133; ABDUL-HAMID YARA, *Child Rights Situation Analysis Middle East and North Africa, A Report Commissioned by Save the Children Sweden, Regional Office for the Middle East and North Africa*, 2nd edition, Beirut 2011, at 77, 110. See also FISHER BETSY, *Why Non-Marital Children in the MENA Region Face a Risk of Statelessness*, Harvard Human Rights Journal Online, January 2015, 1 – 8, at 5 f. It must be highlighted that the profiles of mothers who decide to give up their new-born vary highly. Also, there are myriad reasons why mothers decide to take this step.

related to each other.²⁴ In pre-Islamic tribal Arabia, it is presumed that adoption mainly took place to strengthen the work force of clans and tribes for economic and defence reasons²⁵ and in order to safeguard progeny.²⁶

In these patriarchal societies, the adoptees were usually male,²⁷ some were free men and others freed slaves,²⁸ and some of them took the name of the adopting father.²⁹ The adoption could take place at any time in a person's life and irrespective of whether their parents were still alive or not.³⁰ Indeed, solid data regarding the function and effects of adoption do hardly exist.³¹ What is certain though, is that adoption became widely absent in the Middle East after the advent of Islam.

The origins of the prohibition of adoption are not quite certain. Some argue that by prohibiting adoption the prophetic message aimed at replacing the traditional tribal bonds with the sense of belonging to the Islamic community, the *umma*.³² Others refer to textual evidence which underline

24 There is some disagreement in the doctrine regarding the prevalence of adoption in pre-Islamic times. See LANDAU-TASSERON, *supra* n. 7, at 171 f., who points to the fact that the number of recorded adoptions was in fact very small. But see AL-AZHARY, *supra* n. 18, at 46, who maintains that widespread adoption was the norm.

25 Cf. AL-AZHARY, *supra* n. 18, at 46. See also MATTSON INGRID, Adoption and Fostering, in: Suad Joseph (ed.), *Encyclopedia of Women & Islamic Cultures: Family, Law, and Politics*, Leiden 2003 – 2007, at 1: Since the adoptive parents would manage the orphan's property, self-interest was oftentimes at the bottom of adoption.

26 BARRAUD ÉMILIE, Les multiples usages sociaux de la Kafalah en situation de migration: protection et non protection des mineurs recueillis, e-migrinter, no. 2 (2008), 133 – 142, at 133.

27 MATTSON, *supra* n. 24, at 1; LANDAU-TASSERON, *supra* n. 7, 173.

28 MATTSON, *supra* n. 24, at 1; AL-AZHARY, *supra* n. 18, at 46.

29 LANDAU-TASSERON, *supra* n. 7, at 170; AL-AZHARY, *supra* n. 7, at 48; BARRAUD, *supra* n. 25, at 133.

30 SUJIMON, *supra* n. 17, at 370.

31 – and therefore, is disputed: See LANDAU-TASSERON, *supra* n. 7, at 170; YASSARI NADJMA, Adoption und Funktionsäquivalente im islamischen Rechtskreis, in: Hilbig-Lugani Katharina et al. (eds.), *Zwischenbilanz: Festschrift für Dagmar Coester-Waltjen zum 70. Geburtstag*, Bielefeld 2015, 1059 – 1071, at 1060 ff.

32 See DUCA RITA, Diffusion of Islamic Law in the UK: The Case of the ‚Special Guardianship‘, in: Farran Sue et al. (eds.), *The Diffusion of Law: The Movement of Laws and Norms around the World*, Oxon/New York 2016, at 47 ff., 50 f. with further references.

the importance of biological ancestry³³ and the episode known as the “Zayd incident”.³⁴

After having adopted the former slave Zayd Ibn Ḥāritha, Mohammad desired to marry his cousin Zainab bint Ḡaḥṣ who was Zayd's former wife and his ex-daughter in law. However, the marriage was considered incestuous according to existing customs and rules.³⁵ According to Islamic tradition, the Quranic verses (33:37 – 40) were revealed in this context. These verses as well as the later revealed verses (33:4 – 5) asserted the legality of the Prophet's marriage to Zainab. It was argued that since adoption was prohibited and had no effect, the Prophet had no male child and therefore Zainab did not become his daughter in law.³⁶ From then on, “adopted” children could no longer take the name of their adoptive parents and there were no marriage impediments between them and no mutual rights of inheritance.³⁷

2. Contemporary Perspective

Referring to the outlined textual evidence, Muslim legal scholars agreed generally³⁸ and without delay that creating a new legal and permanent parent-child relationship by terminating existing legal bonds through adoption is not permissible in Islam. “Artificial” filial bonds were viewed as non-compliant within a system that puts an emphasis on clear bloodlines as an integral part of traditional patriarchal societies. Filial relationships created without procreation could furthermore confound the idea of family as a quasi-divine institution. It was also feared that lineages

33 See MATTSON, *supra* n. 24, at 1; Quran (4:5). There are other Quranic verses and *ahādīth* (sing. *hādīth*) which are considered to support this belief: see the references in AL-AZHARY, *supra* n. 18, at 51 and SAYED MOSA, *The Kafalah of Islamic Law – How to Approach it in the West*, in: Maunsbach Ulf et al. (eds.), *Essays in Honour of Michael Bogdan*, Lund 2013, 507 – 520, at 510.

34 See LANDAU-TASSERON, 169; AL-AZHARY, *supra* n. 18, at 48, 52

35 See LANDAU-TASSERON, *supra* n. 7, at 169; SAYED, *supra* n. 32, at 509.

36 Cf. LANDAU-TASSERON, *supra* n. 7, at 169; POLLACK et al., *supra* n. 7, at 733 f.

37 See e. g. BARRAUD, *supra* n. 25, at 134.

38 It is important to mention that there are scholars who do not fully agree that adoption in the modern sense does necessarily conflict with Islamic teachings: PEARL DAVID, *Textbook on Muslim Family Law*, Croom Helm 1987, at 91; SAYED, *supra* n. 32, at 511.

might be mixed by procreation between members of the adoptive family and the adoptee.³⁹

In most of today's Muslim-majority countries, the legal institution of adoption is absent or banned.⁴⁰ Some countries accept adoptions only for certain persons, notably non-Muslims. For example, in countries where different sets of laws exist for different creeds, Christian families may adopt children from Christian orphanages.⁴¹ However, the ban on adoption does not imply that children deprived of family are left without care. Children are often cared for in informal ways. Indeed, the only legal alternative to adoption is the fostering of children inspired by the traditional concept of *kafalah*.

3. Informal Alternatives to Adoption

Various verses in the Quran address the issue of orphans and the duties and proper conduct of the believer towards those children.⁴² According to these texts, orphans should not be mistreated or cheated, but be treated fairly, kindly and generously.⁴³ The holy book of Islam encourages the charitable upbringing of orphans and describes God as their ultimate caregiver.⁴⁴ According to Islamic tradition, the Prophet Muhammad, who was an

39 The rationale behind this is the fact that sexual relations with adopted family members are not religiously forbidden (an adopted non-biological child would not be seen as *mahram* – i. e. non-marriageable). See CLARKE, *supra* n. 3, at 72 f.; BARGACH JAMILA, Orphans of Islam: Family, Abandonment, and Secret Adoption, ISIM Newsletter, no. 11 (2002), 18, at 18; idem, *supra* n. 5, at 75 ff; PEARL/MENSKI, *supra* n. 7, at 408.

40 NASIR, *supra* n. 5, at 153 f. Exceptions from this rule are Tunisia and Turkey.

41 E. g. in Lebanon. For Indonesia, see LEWENTON URSULA, Indonesien, in: Bergmann Alexander et al., Internationales Ehe- und Kindschaftsrecht mit Staatsangehörigkeitsrecht, Loseblattsammlung, Ordner VII, 6. Auflage, Frankfurt a. M./Berlin 1983 ff. (Stand 2018), at 43 ff.

42 See e. g. SAYED, *supra* n. 32, at 512.

43 AL-AZHARY, *supra* n. 18, at 55. – An example is Quran (4:36): “[...] And do good – To parents, kinsfolk, orphans, those in need [...]”. See also e. g. Quran (4:127); (93:9); (107:1 – 3).

44 See Quran (93:6).

orphan himself (he had lost his father), asked believers to provide for orphans, irrespective of whether related to them or not.⁴⁵

In Islamic jurisprudence, a foundling is considered a fellow Muslim and as such a holder of the same rights and bearer of the same duties as others.⁴⁶ The classical *fiqh* books (the books of Islamic jurisprudence) discuss extensively his or her rights as well as the duties and the proper conduct of the finder of such a child.⁴⁷ In these texts, the finder of an abandoned child has the individual duty to care for the baby if the child is at risk of dying or the person voluntarily took custody of the baby. Otherwise, taking care of a foundling is considered to be a communal responsibility and the non-fulfilment of this religious duty a communal sin.⁴⁸

In reality though, people often shy away from taking in an orphan because he or she could be perceived as being a “fruit of sin”.⁴⁹ Traditionally, not all orphans are considered “equal”. There is a distinction between a child who has lost one or both parents (*yatīm*) and the foundling (*laqīt* – the root word of this term means something that is “picked up”⁵⁰) who is a child of unknown parentage.⁵¹ Those with unknown origin are often equated to

45 MATTSON, *supra* n. 24, at 1; AL-AZHARY, *supra* n. 18, at 54 f.; SAYED, *supra* n. 32, at 513; THOMASON LAURA M., On the Steps of the Mosque: The Legal Rights of Non-Marital Children in Egypt, *Hastings Women's Law Journal* Vol. 19 (2008), 121 – 148, at 139.

46 This position is based on the notion that it is piety that characterizes a Muslim and not her or his lineage (*nasab*) or wealth (*hasab*). See BARGACH, *supra* n. 5, at 62; *idem*, *supra* n. 38, at 18; CLARKE, *supra* n. 3, at 77. See also Quran (6:164): “Each soul draws the meed of its acts on none but itself: no bearer of burdens can bear the burden of another.”

47 See BARGACH, *supra* n. 5, at 61; AL-AZHARY, *supra* n. 18, at 52, 57, referring to the original definition of *luqta* as “that which is picked up”.

48 Cf. POLLACK et al., *supra* n. 7, at 736; NASIR, *supra* n. 11, at 178 f.; *idem*, *supra* n. 5, at 155; BARGACH, *supra* n. 5, at 61.

49 See LISTON MARGARET, From Laws to Last Names: Examining Popular Opinions of Adoption in Morocco, Independent Study Project (ISP) Collection, paper no. 2063 (2015), at 9; BREUNING MARIJKE/ISHIYAMA JOHN, The Politics of Intercountry Adoption: Explaining Variation in the Legal Requirements of Sub-Saharan African Countries, *Perspectives on Politics*, Vol. 7 (2009), at 96; The National, 19 September 2012: “Homes hard to find in UAE for abandoned baby boys”, available at <<http://www.thenational.ae/news/uae-news/homes-hard-to-find-in-uae-for-abandoned-baby-boys>>, accessed 01 June 2018. See also BARGACH, *supra* n. 38, at 18.

50 E. g. AL-AZHARY, *supra* n. 18, at 52.

51 From a “Western” perspective, an orphan is regularly a child who has lost mother or father or both parents, either because they died or have abandoned the child permanently. Today, various definitions are used by states and international institutions for

an illegitimate child, a *walad zinā*, and carry the stigma of a suspected immoral act by their birth-parents.⁵² As a result, they often face a lifetime of marginalization and discrimination as well as difficulties in finding a marriage partner or a job and additionally, a lack of familial financial support or protection.⁵³ From a religious point of view however, the fostering of a child in need is considered to be a sign of piety.⁵⁴ Nevertheless, the establishment of “fictive” descent or kinship is not possible.

Since the care for abandoned or orphaned children was not institutionalised in historical times, the taking in of orphans was quite common.⁵⁵ The first so-called orphanages in the medieval period were little more than schools where children were trained to become soldiers or state officials by the Ottomans and the Mamluks.⁵⁶ In the case of the Mamluks, the relationships between the masters and their recruits often closely resembled adoption as the child was integrated into the household and would form close ties to his foster family.⁵⁷

With the raise of modern nation states, governments assumed social responsibilities and functions and the establishment of orphanages became quite common.⁵⁸ Some of today’s orphanages are run by the state and

defining whether a child is an orphan. The United Nations Children Fund (UNICEF) labels any child that has lost at least one parent as an orphan, irrespective of the way he or she was conceived. See <http://www.unicef.org/media/media_45279.html>, accessed 01 June 2018.

52 See AL-AZHARY, *supra* n. 18, at 52; CLARKE, *supra* n. 3, at 76 ff.; BARGACH, *supra* n. 38, at 18; also critical of the “blame” transferred to the child: THOMASON, *supra* n. 14, at 138.

53 See Fisher, *supra* n. 22, at 4 ff.; ABDUL-HAMID, *supra* n. 22, at 77, 92, 110, 137, 144, 161, 167, 190, 205; AL-AZHARY, *supra* n. 18, at 60; THOMASON, *supra* n. 14, at 143; Ahram Online, 5 April 2013: “Egyptian orphans still suffering on their National Day”, available at <<http://english.ahram.org.eg/NewsContent/1/64/68132/Egypt/Politics-/Egyptian-orphans-still-suffering-on-their-National.aspx>> accessed 01 June 2018. – Notwithstanding the fact that in legal theory, the children should not be blamed for immoral acts of their parents, but be judged on merit of their *‘taqwa’* (godfearing, virtue).

54 MATTSON, *supra* n. 24, at 1; SAYED, *supra* n. 32, at 513.

55 AL-AZHARY, *supra* n. 18, at 58.

56 Idem, referring to GOITEIN SHLOMO DOV, A Mediterranean Society, in *The Family*, Vol. 3, Berkeley 1978, 302 – 311, at 304.

57 AL-AZHARY, *supra* n. 18, at 58 f.

58 Regarding the evolution of institutional care for orphans in Egypt, see RUGH ANDREA B., Orphanages in Egypt: Contradiction or Affirmation in a Family-Oriented Society, in: Warnock Fernea Elizabeth (ed.), *Children in the Muslim Middle East*, Austin 1995, 124 – 141, at 130 ff.

some are supervised by the state, but run on a private initiative, such as religious foundations, individuals or the community.⁵⁹ In some cases, orphanages do not only care for children with no known family, but also act as a social institution which cares for children whose parents are in a difficult social situation.⁶⁰

There have always been orphans but also families who cannot conceive naturally. They could neither expand their family tree nor shed love on a child and ensure her or his well-being.⁶¹ It should not come as a surprise that so-called “informal adoptions” were and are practiced in various “culturally sanctioned forms”,⁶² sometimes by using *hīlah shar‘īyah* (legal ruse).⁶³ For example, a man may claim an infant of unknown provenance (who is not the offspring of unlawful intercourse) as his legitimate child, provided that there is no evidence to the contrary (acknowledgment – *iqrār*).⁶⁴ As long as the formal elements of the claim are intact, the child will be considered the biological son or daughter of the claimant and acquire all concomitant rights and duties.⁶⁵ Furthermore, a man may claim a child was the legitimate offspring of a former marriage that has previously not been registered under the man’s name.⁶⁶ A child may also be adopted secretly by aspiring parents who take in an abandoned baby and then raise him or her as their own child by pretending to have given birth without informing the authorities.⁶⁷

It also happens that related persons exchange children. Especially in the Maghreb, such family or customary adoptions are widespread.^{68 69} In

59 See AL-AZHARY, *supra* n. 18, at 59.

60 AL-AZHARY, *supra* n. 18, at 60; see also RUGH, *supra* n. 57, at 124, 126 f.; CLARKE, *supra* n. 3, at 75.

61 For an insight into the shift in the value of a child over time see BARGACH, *supra* n. 5, at 163 ff.

62 BARGACH, *supra* n. 5, at 27.

63 See LANDAU-TASSERON, *supra* n. 7, at 187, with historical evidence.

64 CLARKE, *supra* n. 3, at 80 ff. On *iqrār*, see KHAN/KHAN, *supra* n. 10, at 210; NASIR, *supra* n. 5, at 150 ff.; see also YASSARI, *supra* n. 30, at 1062.

65 LANDAU-TASSERON, *supra* n. 7, at 172 f.; CLARKE, *supra* n. 3, at 80 f.; SUJIMON, *supra* n. 17, at 372 f.

66 CLARKE, *supra* n. 3, at 80.

67 AL-AZHARY, *supra* n. 18, at 60 f.; BARGACH, *supra* n. 5, at 27 f.

68 See e.g. BARRAUD ÉMILIE, *Kafāla transnationale: Modalités de formation des familles kafalates de France*, Autrepart, no 57 – 58 (2011/1), 247 – 261, at 249.

Moroccan Arabic this form of “adoption” is called *trebi*. Such adoptions take place quite informally by extended family members or close acquaintances taking in and caring for a child that is biologically not their own. For example, a child may be entrusted to a family without children or with only boys or only girls through an informal transaction without legal procedure.⁷⁰ The ties between an “adopted” child and her or his biological family are usually not ruptured; the child keeps her or his last name as well as the inheritance rights. *Trebi* can be seen as an infinite visit where guardianship is transferred to the host family. Even though the host family will not incorporate the child legally, emotional ties between the host parents, siblings and the entrusted child will most likely develop quite naturally.⁷¹

Another form of “alternative adoption” is the creation of milk kinship (*ridā*), a relationship with special rights under Islamic law.⁷² The child nursed by the foster mother will be regarded as the milk-sibling of the wet nurse’s biological children. In this case, the child may still not inherit from her foster parents, but it is barred from marrying any of the mother’s biological children.⁷³ In some countries, the nursing of small foster children (younger than two years old) is encouraged by the authorities in order to prevent issues with religious prescriptions, such as the veiling of female family members when the – biologically unrelated – foster child gets older.⁷⁴ Milk kinship may create a basis for co-operation and solidarity between unrelated people, but has otherwise no legal consequences.⁷⁵

69 BARRAUD ÉMILIE, Adoption et kafalah dans l’espace migratoire franco-maghrébien, *L’Année du Maghreb* 2008, no. IV (2008), 471–489, at 275 f.

70 See idem at 249, 253; BARRAUD, *supra* n. 25, at 136.

71 BARGACH, *supra* n. 5, at 27.

72 NASIR, *supra* n. 5, at 63 f.; BAKHTIAR, *supra* n. 10, at 419; see also e.g. Art. 114 (2) UAE Personal Status Law.

73 AZ-ZUBAIR, *supra* n. 6, at 608.

74 See The National, 19 September 2013: “Homes hard to find in UAE for abandoned baby boys”, available at <<http://www.thenational.ae/news/uae-news/homes-hard-to-find-in-uae-for-abandoned-baby-boys>> accessed 01 June 2018.

75 LANDAU-TASSERON, *supra* n. 7, at 188.

IV. The Fosterage of Children (*Kafalah*) in Classical and Modern Islamic Law

1. In General

Kafalah, which derives from the Arabic root verb of ka-fa-la, meaning “to take care”, or *ḍamān*, “to guarantee”,⁷⁶ is the Islamic equivalent to “Western” adoption. This legal institute, rooted in the law of contract and obligations rather than in family law,⁷⁷ is based upon the traditional understandings that oppose fictive filiation and encourage fostering of abandoned or orphaned children.⁷⁸

Kafalah is usually described as a form of legal guardianship or tutelage that aims at creating a permanent arrangement for a child deprived of a family environment. Basically, two kinds of *kafalah* exist: a consensual *kafalah*, which shall only be addressed in passing here, whereby a *kafalah* arrangement is made between two private parties, and a legally binding contract between state authorities as wardens of an abandoned child and a family or single person.⁷⁹ The latter kind shall be the focus of this paper.

Unlike in legal parenthood, there are no mutual rights and duties in a *kafalah* arrangement. The so-called *kafil* makes a commitment by contract, usually in front of a notary or judge to maintain, guard and educate the *makfoul* (child taken into *kafalah*) in the same way, as they would do for a biological child.⁸⁰ A feature of this commitment is its quasi-definitive nature or permanence by which the *kafil* usually commits to support the *makfoul* until his or her legal maturity. But due to the contractual nature of the relationship, the legal,

76 BARRAUD, *supra* n. 67, at 248; BARGACH, *supra* n. 5, at 29. In its other meaning, *kafālah* serves as a kind of sponsorship system used in the context of migrant labourers mainly – but not exclusively – in the Gulf countries.

77 BARGACH, *supra* n. 5, at 29 f., 42, 177; see also WELCHMAN, *supra* n. 2, at 148.

78 BARRAUD, *supra* n. 25, at 133; idem, *supra* n. 67, at 247; LE BOURSICOT MARIE-CHRISTINE, *La Kafāla ou recueil légal des mineurs en droit musulman : une adoption sans filiation, Droit et cultures*, no. 59 (2010), 283 – 302, marginal no. 1 – 5; SAYED, *supra* n. 32, at 51.

79 In more detail, see BARGACH, *supra* n. 5, at 28.

80 See e. g. SAYED, *supra* n. 32, at 513; Fact Sheet No. 50, Specific case Kafalah, International Social Service, International Reference Service for the Rights of Children Deprived of their Family.

moral, educational, and financial duties towards the child may vary.⁸¹ The feelings, however, can be equally strong as in biological child-parent relationships, which is expressed in the way caretakers speak of their wards, namely as “adopted children”.⁸²

In contrast to adoption in Western systems, *kafalah* does not establish a legal parent-child relationship between the *kafil* and the *makfoul* and it does not end the legal relationship between the legitimate parents and the child.⁸³ Hence, core rights or privileges of *nasab*, such as family name and proportionate inheritance entitlements usually do not accrue to the minor taken into *kafalah*.⁸⁴ However, the person taking in a minor under *kafalah* is indeed free to assign certain portions of their assets to the *makfoul* since the Quran encourages Muslims to leave part of their wealth to those who are dependent on them.⁸⁵ In practice, bequests often tend to attenuate the inequality between biological children and minors taken in under *kafalah* as well as providing a form of social security for such children.⁸⁶ Therefore, from a functional point of view, *kafalah* appears to

81 BARRAUD, *supra* n. 67, at 248; DUCA, *supra* n. 31, at 52. However, because it is based on a contractual agreement, the *kafil* may only owe a select number of moral, educational, financial and other duties towards the child taken into *kafalah*: BARGACH, *supra* n. 5, at 29.

82 See e.g. Al Jazeera, 6 March 2015: “Adopting Orphans Breaking Taboos in Dubai”, available at <<http://www.aljazeera.com/news/2015/03/adopting-orphans-breaking-taboos-dubai-150302080741099.html>> accessed 01 June 2018. – But, as everywhere, there are other realities as well. In Morocco namely, notarial *kafalah* arrangements, especially regarding minor girls, sometimes have another function that does not serve the child’s best interest at all: children taken into *kafalah* must serve as domestic helps, traditionally called “petites bonnes”. Often, those children are subject to sexual exploitation and abuse. BARRAUD, *supra* n. 25, at 137 f., states that the (single) mothers of these children had frequently been “petit bonnes” themselves.

83 Either fully or in part: SAYED, *supra* n. 32, at 509.

84 BARRAUD, *supra* n. 67, at 248; BARRAUD, *supra* n. 25, at 134; BARGACH, *supra* n. 5, at 28.

85 Cf. AL-AZHARY, *supra* n. 18, at 50; ARSHAD RAFFIA, *Islamic Family Law*, London 2010, at 177 f., 187. – According to Islamic jurisprudence (*fiqh*) – both Sunni and Shia – a person may bequeath a maximum of one-third of their estate to an unrelated person or give it to them as a gift. See POWERS DAVID STEPHAN, *The Development of Islamic Law and Society in the Maghrib: Qadis, Muftis and Family Law*, Farnham 2011, at 12; MOUSSA REZIG, *Les Aspirations Conflictuelles du Droit de L’Adoption: Études Comparative*, Arab Law Quarterly, Vol. 19 (2004), 147 – 168, at 155; BARRAUD, *supra* n. 67, at 248.

86 See HASHEMI KAMRAN, *Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation*, Human Rights Quarterly, Vol. 29 (2007), 194 – 227, 220 f.; ASSIM USANG M./SLOTH-NIELSEN JULIA, *Islamic*

be close to adoption; from a legal perspective it has similarities to foster care. Its structure and historical as well as socio-cultural background make it an institution in its own right.

The laws of certain Muslim majority countries regulate forms of traditional *kafalah* as a means of child protection.⁸⁷ The details of how this is operated in practice, especially its modalities and procedures, largely depend on the laws of the respective states. Common features are the *kafil*'s religion (usually he or she must be a Muslim) and his or her mental, financial and personal suitability to this role as well as the child's status as "abandoned". In the following paragraphs, we will have a brief look into the *kafalah* or fostering-regulations of three countries with a different legal-historical background, namely Morocco, Egypt and the United Arab Emirates.⁸⁸ Due to the constraints of this article, the focus will be on some central aspects of the relevant laws rather than an in-depth study of the legal situation.

2. *Kafalah* in Morocco, Egypt and the United Arab Emirates

a) Morocco

The Kingdom of Morocco is a constitutional monarchy in the Maghreb region of North Africa. The religious affiliation of the country is predominantly Muslim with a Christian and Jewish minority. The

Kafalah as an Alternative Care Option for Children Deprived of a Family Environment, *African Human Rights Law Journal*, Vol. 14 (2014), 322 – 345, at 330.

87 *Kafalah* is also recognised as an alternative method of care for children deprived of parental care in a number of international treaties and regional instruments, namely: The United Nations Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989, the 1996 Hague Child Protection Convention (but not in the Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption), as well as certain regional instruments such as the African Charter on the Rights and Welfare of the Child, adopted by the Organisation of African Unity in 1990 (entered into force in 1999), and the European Convention on Human Rights (entered into force in 1993).

88 For Algeria, see LE BOURSICOT, *supra* n. 76, marginal no. 29 ff.; BETTAHAR YAMINA, La construction sociale de la parentalité: L'exemple de l'Algérie, *L'Année du Maghreb II* (2005 – 2006), 155 – 170; CHABIB-ZIDANI FARIDA, L'enfant né hors mariage en Algérie, *Alger* 1992.

Moroccan legal system is a mixed system of civil law based on French law and Islamic law. The Constitution of Morocco describes the State as a constitutional, democratic, parliamentary and social monarchy, as well as “an Islamic sovereign state” and accords Islam the status of state religion.⁸⁹ The majority of Moroccans are Sunnites.⁹⁰

aa) Family Law and Lineage

Until the late fifties, the law applied in family matters were the rules of classical Islamic law based on dominant Maliki doctrines. Since then, traditional family law issues including marriage, divorce, child custody and maintenance as well as inheritance are governed by the Code of Personal Status, also known as *Moudawanat al-usra*, or *Moudawana* (as it will be called hereinafter). The Moudawana was last revised in 2004 and is based on Islamic law.⁹¹ The law is in principle applicable to all Moroccans irrespective of faith; the Jewish citizens apply their own laws.⁹²

For Muslims, the laws of Morocco retain the principle that *nasab* is tied to legitimate birth. Paternity is assumed when a child is born in wedlock.⁹³ *Nasab*, or paternity, “is a legitimate bond between the father and the child that is transmitted through the generations.”⁹⁴ The Moudawana

89 See Dahir no. 1–11–91 du 27 chaabane 1432 (29 juillet 2011) portant promulgation du texte de la constitution, available at <http://www.maroc.ma/en/system/files/documents_page/bo_5964bis_fr_3.pdf> accessed 01 June 2018, Preamble para. 2, Art. 1 para. 1 and Art. 3.

90 The World Factbook, CIA, Morocco, available at <<https://www.cia.gov/library/publications/the-world-factbook/geos/mo.html>> accessed 01 June 2018.

91 Dahir no. 1–04–22 du 12 hija 1424 (3 février 2004) portant promulgation de la Loi no. 70–03 portant Code de la famille. The official Arabic text was published in the Bulletin Officiel (édition générale) no. 5184 du 14 hija 1424 (5 février 2004), 418 ff. The French version was published in the Bulletin Officiel no. 5358 du 2 ramadan 1426 (6 octobre 2005), 667 ff. Royaume de Maroc, Ministère de Justice, Traduction en Français du Code de la famille, Version non officielle, available at <<http://adala.justice.gov.ma/production/legislation/fr/civil/Code%20de%20la%20famille%20Maroc%20Texte.htm>> accessed 01 June 2018.

92 Art. 2 No. 1 and No. 4 para. 2 Moudawana.

93 Art. 152–154 Moudawana.

94 Art. 150 Moudawana.

enumerates three alternatives to establish legitimate male filiation: the conjugal bed, acknowledgment or sexual intercourse by error.⁹⁵

The conjugal bed is considered to be an irrefutable proof of paternity. It is proven by the same means that is used to prove the marital relationship.⁹⁶ If the conjugal bed meets these requirements, the husband can only contest paternity through a sworn allegation of adultery committed by his spouse or by means of an irrefutable expertise upon two conditions: First, the husband must present solid proof of his allegations; and second, the issuance of a judicial decision ordering the expertise.⁹⁷ The child rendered illegitimate by court order or by birth does not have any rights vis-à-vis her or his father.⁹⁸ Because this creates great hardship, several methods are considered to be an acceptable proof of paternity: the conjugal bed, the father's acknowledgement, the testimony of two public notaries, oral testimony and by all other legal means, including judicial expertise.⁹⁹

According to Article 147(1), the three alternatives to establish legitimate filiation to the mother are birth, acknowledgment, and judicial decision. In its second paragraph, the Article adds that maternal filiation is legitimate in cases of marriage, sexual relations by error and rape. Moreover, it states that filiation to the mother has the same effect whether the child is the offspring of a legitimate or an illegitimate relationship.¹⁰⁰ Thus, in contrast to the articles regulating legitimate filiation to the father, the relevancy of the subcategory in the Moudawana regarding legitimate maternal filiation remains unclear.¹⁰¹

The Moroccan family law states that adoption has no legal value and does not produce any of the effects of legal filiation.¹⁰² Children without parental care can be taken into *kafalah* instead.¹⁰³

95 Art. 152 Moudawana.

96 See Art. 10 ff. Moudawana, Art. 16 Moudawana.

97 See Art. 153, 159 Moudawana.

98 Art. 148 Moudawana.

99 Art. 158 Moudawana.

100 Art. 146 Moudawana.

101 KREUTZBERGER, *supra* n. 6, at 63.

102 Art. 149 Moudawana.

103 For a short history of the legal *kafalah* in Morocco and Algeria see BARRAUD, *supra* n. 25, at 134 f.

ab) The Fostering of Abandoned Children

In General

In 2013, the Ministry of Justice reported that Morocco was dealing with a staggering number of 5,377 cases of abandoned children, or nearly 15 per day.¹⁰⁴ Various reasons explain this figure. Mothers who give birth out of wedlock are often considered to be a shame for their families, since family honour bases on the marriageability, which in turn depends on the virginity of daughters.¹⁰⁵ Often, these women are poor, homeless, sex workers or maids who are already socially discriminated.¹⁰⁶

Children born outside of marriage are socially heavily stigmatised as they are considered being “unworthy” and children of sin with the concomitant social rejection and marginalisation.¹⁰⁷ In addition, mothers run the risk of being the subject of criminal prosecution, because childbirth is the visible proof for an extramarital sexual relationship. Morocco does not apply the classical penalties for *zinā*, but extramarital sex remains a crime punishable by a prison sentence of one month to one year (unmarried people) and one to two years (adultery).¹⁰⁸

Prerequisites

The Moroccan law on *kafalah* came into force in 1993 and was last revised in 2002.¹⁰⁹ According to the legal text, abandoned children are registered by the public prosecutor (Royal Prosecutor). They are given a fictive first name and surname as well as a fictive filiation by adding a mother’s and father’s first names.¹¹⁰ Until *kafalah* is established, abandoned infants are placed in

104 See “Morocco: Every day almost 15 children are being abandoned”, available at <<http://en.protothema.gr/morocco-every-day-almost-15-children-are-being-abandoned/>> accessed 01 June 2018.

105 SAYED, *supra* n. 32, at 514.

106 See the profiles of single mothers described in BARGACH, *supra* n. 5, at 15, 133.

107 SAYED, *supra* n. 32, at 514.

108 Art. 490 – 491 Moroccan Penal Code.

109 Dahir no. 1 – 02 – 172 du 1 rabii II 1423 (13 juin 2002) portant promulgation de la Loi no. 15 – 01, relating to *kafalah* of abandoned minors (Moroccan Kafalah Law).

110 BARRAUD, *supra* n. 67, at 248; BARRAUD, *supra* n. 25, at 135. Loi 15 – 1 relative à la prise en charge des enfants abandonnés promulguée par le dahir no. 1 – 02 – 172 du 13 juin 2002.

state or private run orphanages or are given into the custody of a foster family.¹¹¹

In order to place a child into a family under *kafalah*, the first administrative measure that needs to be undertaken is the legal establishment of the child as being abandoned.¹¹² According to the law, an “abandoned child” means anyone below the age of eighteen who is abandoned, orphaned or with parents who are incapable of exercising their parenthood.¹¹³ The Royal Prosecutor shall request the declaration of abandonment on his own initiative or at the request of a third party. The competent judge starts an investigation into finding the child’s parents. If it is proven that the child falls within one of the situations provided for in the first article of the law, he shall declare by judgment that the child is abandoned.¹¹⁴ An abandoned child is under the guardianship of the Minors judge affiliated with the competent court.¹¹⁵

The proceedings start with an application to the competent judge at the place of residence of the abandoned infant by the party requesting to take the child into *kafalah*. The party must supply the judge with a copy of the birth certificate of the abandoned child as well as documents proving that they fulfil the following conditions:¹¹⁶

The person or persons intending to take a minor into *kafalah* can be a Muslim couple or a Muslim single woman.¹¹⁷ In addition, the applicants must have full legal capacity, as well as the social and moral capability to exercise guardianship over the child. They must have sufficient means to support the child financially; be free of contagious diseases or diseases that render them incapable to undertake their responsibility; they should neither be in a legal battle with the child whom they request to take into *kafalah* or with her or his parents; and lastly, there should be no family

111 KREUTZBERGER, *supra* n. 6, at 66; BARGACH, *supra* n. 5, at 3 f., 195 ff., 204.

112 Art. 3 – 7 Moroccan Kafalah Law.

113 Art. 1 Moroccan Kafalah Law.

114 Art. 2 – 4 Moroccan Kafalah Law.

115 Art. 7 para. 2 Moroccan Kafalah Law; SAYED, *supra* n. 32, at 515.

116 Art. 14 f., 9 Moroccan Kafalah Law.

117 Interestingly, in Tunisia where plain adoption is permitted the Muslim faith is not a prerequisite for adoption. See YASSARI, *supra* n. 30, at 1063.

dispute in existence raising concerns regarding the best interests of the child.¹¹⁸

The role of the *kafil* can also be assumed by charitable organisations and institutions with sufficient financial and organisational means to protect, to educate the child, and to raise it according to the precepts of Islam.¹¹⁹

Until recently, international *kafalah* placements in favour of nationals living abroad or in favour of foreigners were practiced as long as the applicants would respect the procedural conditions (e. g. the conversion to Islam). On 21 September 2012, Justice Minister El Mostapha Ramid published a notice that appears to indicate that the right to *kafalah* should only be granted to Muslim families who reside in Morocco.¹²⁰

If the before-mentioned prerequisites are met, the judge assisted by a commission investigates the specific case especially by assessing the suitability of the applicants to exercise *kafalah*. Before a decision is taken, the child over twelve years old must give his or her personal consent, except in cases where the applicant is a legal entity rather than a natural person.¹²¹ If more than one party applies to take the *kafalah* of a child, spouses without children or those who are deemed particularly suitable to serve the child's interests will be given preference.¹²²

If the applicants are deemed suitable, the judge makes a ruling providing them with the right of *kafalah*. The decision will be executed within 15 days from the court ruling.¹²³

Effects of the Decision

The party (a person or an institution) given the right to *kafalah* is appointed legal guardian of the child by the aforementioned court ruling. The *kafalah* parents have to respect the best interest of the child, which is one of the

118 Art. 9 No. 1 and 2 Moroccan Kafalah Law.

119 Art. 9 No. 3 Moroccan Kafalah Law.

120 See Bundesamt für Justiz (BJ), Adoption Marokko, available at <<https://www.bj.admin.ch/bj/de/home/gesellschaft/adoption/herkunftslander/marokko.html>> accessed 01 June 2018. However, according to the text of the law, a departure from Morocco of the person/persons undertaking the *kafalah* is possible subject to the authorisation of the competent Minors Judge (Art. 24 Moroccan Kafalah Law).

121 Art. 12, 16 Moroccan Kafalah Law.

122 Art. 10 Moroccan Kafalah Law.

123 Art. 17 f. Moroccan Kafalah Law.

central concerns of the law and reiterated in numerous passages.¹²⁴ In particular, the *kafalah* parents have the responsibility to take care of the child, as well as guaranteeing custody of the child up to legal maturity.¹²⁵ This means that the *kafalah* parents have to make sure that the child grows up in a healthy environment catering to his or her physical and psychological needs and that he or she is given an education.¹²⁶

The law stipulates that the *kafalah* parents are to take care of the child in the same way as if the child were their biological offspring according to the relevant rules in the Moudawana concerning guardianship and maintenance.¹²⁷ Therefore, in case of a girl, maintenance continues until her marriage or until she is able to finance her own livelihood. If the child is handicapped or unable to meet her or his own needs, the maintenance obligation continues to exist after legal maturity.¹²⁸ In any case, neither *nasab* nor inheritance rights are established.¹²⁹ Because the legal ties to the biological parents are not ruptured by *kafalah*, the child maintains the inheritance rights in his or her birth-parents' estate.¹³⁰ In principle, the *kafalah* does not have any effect on the child's name. However, it seems possible that the *kafil's* name may be attributed to the fostered child if authorised by an official decree.¹³¹

124 E.g. Art. 25 Moroccan Kafalah Law: Cancellation of the *kafālah* by court decision if required by the best interest of the child. – The Moroccan Kafalah law thus aligns to the United Nations Convention on the Rights of the Child (UN-CRC), which states in its Art. 3 that “in all actions concerning children (...) the best interests of the child shall be a primary consideration”.

125 Art. 2 Moroccan Kafalah Law; Art. 166 Moudawana. According to Art. 209 Moudawana, the age of legal maturity is 18 Gregorian years.

126 Sadly though, in some cases children and particularly girls, are “used” as cheap labour through the act of *kafālah*. Arguably, this is one reason why the orphanages are full of boys only. See BARRAUD, *supra* n. 21, at 157 f.; LISTON, *supra* n. 48, at 10.

127 Art. 2, 22 Moroccan Kafalah Law; Art. 163 ff., 187 ff. Moudawana.

128 Art. 22 Moroccan Kafalah Law; Art. 198 para. 2 and 3 Moudawana. The *kafil* benefits from social benefits and allowances dedicated to parents with children. Also, the *kafil* is liable for the acts of his or her “adoptive” children: Art. 22 Moroccan Kafalah Law.

129 Art. 2 Moroccan Kafalah Law.

130 ISHAQUE SHABNAM, Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of a Child's Right to Identity, *International Journal of Law, Policy and the Family*, Vol. 22 (2008), 393 – 420, at 407.

131 See Art. 20, Loi no. 37 – 99 relative à l'état civil; Dahir no. 1.02 – 239 du 3 octobre 2002; Further: FORTIER, *supra* n. 21, at 9; BARRAUD, *supra* n. 25, at 135 f.

The *kafalah* parents intending to endow the child or make inheritance dispositions in her or his favour must do this under the supervision of the competent judge at the place of residence of the child taken into *kafalah*.¹³² As already mentioned, according to Islamic jurisprudence (*fiqh*) – both Sunni and Shia – a person may bequeath a maximum of one-third of their estate to an unrelated person. Gratification (*jaza*) or testamentary adoption (*tazil*) provided for by the Moudawana may accord the child the position of an heir of the first rank but does not prove legal filiation. These types of adoption are governed by testamentary rules.¹³³

Termination of Placement

The *kafalah* placement comes to an end when the child reaches the age of legal maturity¹³⁴ if the child or his *kafalah* parents or *kafalah* mother die, or if the *kafalah* parents or the *kafalah* mother become legally incapacitated. Furthermore, the *kafalah* placement is revoked if the *kafalah* parents fail to provide for the child in accordance with the rules foreseen by the *kafalah* law or do not perform the *kafalah*. The judge may also terminate the *kafalah* placement if the best interests of the child so necessitate.¹³⁵ Divorce of the *kafalah* parents may also terminate the *kafalah* placement. However, upon application from the *kafalah* father or mother, or an official acting in the public interest or ex officio, the judge may – by again assessing the suitability of the applicant – decree the continuation of the *kafalah* or another measure.¹³⁶ At the same time, the biological parents may reclaim the child at any time if the reasons for abandonment cease to exist.¹³⁷

132 Art. 23 Moroccan Kafalah Law.

133 See Art. 149 para. 3 Moudawana. See also Guide Pratique du Code de Famille, 101, available at <<http://www.jafbase.fr/docMaghreb/MarocCodeFamGuidePratique.pdf>> accessed 01 June 2018.

134 The *kafalah* will not end at that age for a non-married girl, a handicapped child or a young adult who is unable to support themselves financially.

135 Art. 19, Art. 25 Moroccan Kafalah Law.

136 Art. 26 Moroccan Kafalah Law.

137 Art. 29 Moroccan Kafalah Law.

b) Egypt

The Arab Republic of Egypt is the most populous country in North Africa and the Arab World. The great majority of its people are adherents to Sunni Islam, with a considerable minority of Coptic Christians and other Christian denominations.¹³⁸ The Egyptian legal system encompasses Islamic law and a system of codified laws. Egypt's supreme law is its written constitution. According to its provisions, the principles of the Islamic Shari'a are the main source of legislation and Islam is the religion of the state.¹³⁹

ba) Family Law and Lineage

Egypt neither does have a unified personal status law that applies to all religious denominations, nor are the rules of Egyptian Muslims personal status law codified in a comprehensive code. For Muslims, matters of family are regulated by the Egyptian Personal Status laws which are informed by the dominant view of the Hanafi School of law.¹⁴⁰ The scholarship of the Hanafi School of law is also used for gap-filling purposes.¹⁴¹

There are quite a few substantive laws dealing with personal status. These include for instance Law No. 131 of 1948, the Egyptian Civil Code; Decree-Law No. 25 of 1920 regarding Maintenance and some Questions of Personal Status; Decree-Law No. 25 of 1929 regarding certain Personal Status Provisions; Law No. 100 of 1985 amending decree-laws No. 25 of

138 The World Factbook, CIA, available at <<https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html>> accessed 01 June 2018.

139 Art. 2 of the Constitution of the Arab Republic of Egypt of 2014, unofficial English translation available at <<http://www.sis.gov.eg/Newvr/Dustor-en001.pdf>> accessed 01 June 2018. At the same time, the constitution states that Christians and Jews have the right to follow their religious laws "regulating their personal and religious affairs". It also grants them the right to select their own religious leaders (Art. 3 Constitution).

140 The personal status law has been amended several times. See FAWZY ESSAM, *Personal Status Law in Egypt: A Historical Overview*, in: Welchman Lynn (ed.), *Women's Rights and Islamic Family Law: Perspectives on Reform*, London/New York 2004, 30–44, at 30 ff.

141 Judges usually refer to the unofficial codification of Qadri Pasha of 1875, wherein the rules of the Hanafi school are compiled. See EBERT HANS-GEORG/HEFNY ASSEM, *Ägypten*, in: Bergmann Alexander et al., *Internationales Ehe- und Kindschaftsrecht mit Staatsangehörigkeitsrecht*, Loseblattsammlung, 6. Auflage, Frankfurt a. M./Berlin 1983 ff., at 16 f.

1920 and 1929 as well as procedural laws.^{142 143} Religious minorities like the Coptic Christian population apply their own religious rules to personal status matters, provided that the parties to the dispute belong to the same faith, and that there are no legal provisions and court judgments which are applicable to all Egyptian citizens irrespective of their faith.¹⁴⁴

In Egypt, the principle of *al-walad li'l-firāsh* establishes legal paternity. According to Egyptian law, courts may not hear any paternity claims if there was no physical contact between the spouses after their marriage or if a child was born more than one year after his or her father's absence or more than one year after the divorce of the parents (or the father's death).¹⁴⁵ The other means of establishing *nasab* is acknowledgement (*iqrār*). In order to prove legitimate filiation, witnesses and scientific methods may be used.¹⁴⁶ Furthermore, legitimate filiation may be proven

142 The law currently in force is Law No. 1 of 2000 organizing Certain Conditions and Procedures of Litigation in Matters of Personal Status (amended by Law No. 91 of 2000). Further laws include: Decree-Law No. 118 of 1952 on rules of guardianship over one-self; Decree-Law No. 119 of 1952 on rules of guardianship over money; Law No. 62 of 1976 amending certain rules concerning maintenance; Law No. 1 of 2000 regarding the Promulgation of a Law to Organize Certain Conditions and Procedures in Matters of Personal Status (mainly procedural in nature but also containing two important substantive provisions, namely no-fault divorce (*khul'*) and the right of the wife to divorce in the context of an unregistered marriage); Law No. 4 of 2005 amending Article 20 of Decree-Law No. 25 of 1920 (raising the age of custody); Law No. 126 of 2008 amending the provisions of the Child Act (No. 12 of 1996, "Child Law"); See MOUSSA JASMINE, *Competing Fundamentalisms and Egyptian Women's Family Rights: International Law and the Reform of Shari'a-derived Legislation*, Leiden 2011, at XIX.

143 MOUSSA JASMINE, Egypt, in: Yassari Nadjma/Möller Lena-Maria/Gallala-Arndt Imen (eds.), *Parental Care and the Best Interests of the Child in Muslim Countries*, The Hague 2017, 1 – 26, at 5 f.

144 See SEZGIN YÜKSEL, *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India*, New York 2013, at 119 ff.; TADROS MARIZ, Egypt, in: Kelly Sania/Breslin Julia (eds.), *Women's Rights in the Middle East and North Africa: Progress amid Resistance*, New York/Lanham, 89 – 120, at 95; EBERT/HEFNY, *supra* n. 140, at 15.

145 Art. 15 of the Decree-law no. 25 of 1929 regarding certain Personal Status Provisions. See SHAHAM RON, *Law versus Medical Science: Competition between Legal and Biological Paternity in an Egyptian Civil Court*, *Islamic Law and Society*, Vol. 18 (2011), 219 – 249, at 229 f. According to Hanafi doctrine, the minimum term of pregnancy is six months.

146 EBERT/HEFNY, *supra* n. 140, at 36. Regarding the scope and limits of the use of modern medical technology in paternity cases see SHABANA AYMAN, *Paternity between Law and Biology: The Reconstruction of the Islamic Law of Paternity in the Wake of DNA Testing*, *Zygon*, Vol. 47 (2012), 214 – 239, at 216 ff. In particular, see Art. 4 Law no. 126 of 2008

by *al-bayina* (evidence).¹⁴⁷ Denial of paternity may arise through the procedure of *li'an*. Even though the Egyptian personal status law does not deal with the *li'an* procedure, courts hear such cases on the basis of the rules for lacunae in the relevant laws and the according Islamic schools of law's acceptance of such procedure.¹⁴⁸

According to Egyptian laws, members of the Coptic Christian church may adopt children but Muslims may not.¹⁴⁹ However, Muslim citizens may turn to secret informal adoption, for instance through acknowledgment (*iqrār*)¹⁵⁰ or in the case of someone finding an abandoned newborn baby and raising the baby without informing the authorities.¹⁵¹ The declaration of paternity is prohibited where one parent is in wedlock with a party other than the biological parent of the child in question.¹⁵²

bb) The Fostering of Abandoned Children

In General

Children are regularly abandoned in Egypt. The causes for abandonment are numerous and diverse and include poverty, unwanted pregnancies, rape and *'urfi* (customary)¹⁵³ as well as *misfar* (temporary) marriages.¹⁵⁴ According to

(“Child Law”): “The child shall have the right to establish his legitimate paternal and maternal lineage, using all lawful scientific means in order to establish such lineage.”

147 EBERT/HEFNY, *supra* n. 140, at 36.

148 FAWZY, *supra* n. 139, at 41.

149 The relevant rules for Coptic citizens are formulated in the Personal Status Law for the Orthodox Copts of 1938 in Art. 110 – 123 of the said law. For an overview, see ROWBERRY RYAN/KHALIL JOHN, A Brief History of Coptic Personal Status Law, *Berkeley Journal of Middle Eastern and Islamic Law*, Vol. 3 (2010), 81 – 139. For Muslim citizens, see Art. 4 para. 3 Child Law.

150 EBERT/HEFNY, *supra* n. 140, at 36.

151 AL-AZHARY SONBOL, *supra* n. 18 at 60.

152 Art. 22 para. 1 No. 2 Child Law.

153 An *'urfi* marriage is an unregistered marriage not celebrated by a state representative and will only produce certain legal effects.

154 See e.g. MEGAHEAD HAMIDO A./CESARIO SANDRA, Family Foster Care, Kinship Networks, and Residential Care of Abandoned Infants in Egypt, *Journal of Family Social Work*, Vol. 11 (2008), 463 – 477, at 466 f.; THOMASON, *supra* n. 14, at 127; The Cairo Times, 25 March 2004, “Beloved outcasts”, available at <http://www.mafhoum.com/press7/187528_fichiers/adoption0804.htm> accessed 01 June 2018; Arab News, 14 October 2010,

the Children's rights group FACE, which gives assistance to street children and orphans, there are at the present officially 6500 orphans throughout 238 legally recognised institutions in Egypt. However, numbers are probably much higher as several institutions are not recognized and some operate on an illegal basis.¹⁵⁵ Furthermore, it is estimated that tens of thousands of children live on Egypt's streets, however not all of them are orphans.¹⁵⁶ Also, some of the children left in orphanages know who their parents are but often these parents are unable to care properly for the children due to poverty or a prison sentence.¹⁵⁷ Illegitimate children are often abandoned due to shame and the fear that relatives would harass the mother due to her status as a woman who committed *zinā*. Regardless of their background, orphans bear the stigma of illegitimacy and are even regarded as a "source of evil".¹⁵⁸

According to Egyptian child law, any infant found abandoned in the streets must immediately be delivered either to the police or to an institution designated to receive new-borns which in turn will notify the police. They will record all data regarding the child and the finder.¹⁵⁹ A doctor will then estimate the age of the child, and the child receives a name. The relevant data is then included in the birth registry.¹⁶⁰ The law also provides for alternative or foster care for children without parental care.¹⁶¹

"Misfar misfortune: 900 children abandoned in Egypt by Saudi fathers", available at <<http://www.arabnews.com/node/357711>> accessed 01 June 2018.

155 See FACE for children in need, available at <<http://www.facechildren.org/en/Context-in-Egypt.htm>> accessed 01 July 2017.

156 See <http://www.unicef.org/egypt/protection_4397.html> accessed 16 July 2018.

157 AL-AZHARY SONBOL, *supra* n. 18, at 60.

158 See e. g. idem; RUGH ANDREA B., Orphanages in Egypt: Contradiction or Affirmation in a Family-Oriented Society, in: Warnock Fernea Elizabeth, Children in the Muslim Middle East, Austin 1995, 124 – 141, at 126 f.; THOMASON, *supra* n. 14, at 131 f.; Ahram Online, 5 April 2013, "Egyptian orphans still suffering on their National Day", available at <<http://english.ahram.org.eg/NewsContent/1/64/68132/Egypt/Politics-/Egyptian-orphans-still-suffering-on-their-National.aspx>> accessed 01 June 2018.

159 However, this person may lawfully choose not to give her or his details to the police. In case of known parents, there are instances where their names will not be included in the child's records, notwithstanding their personal wishes: See Art. 20 para. 3 and Art. 21 Child Law of 2008.

160 Art. 20 Child Law. MEGAHEAD/CESARIO, *supra* n. 153, at 469; THOMASON, *supra* n. 14, at 125 f.; AL-AZHARY, *supra* n. 18, at 61.

161 Art. 4 para. 3, Art. 46 Child Law.

The fostering of children is further detailed in the 'Fostering of Children Regulations'.¹⁶²

In January 2015, Egypt amended its child law to lower the age when children can be raised by foster parents from two years to three months allowing non-institutional support of orphans and other children in need nearly from birth.^{163 164}

Prerequisites

Under Egyptian law, the following children are eligible for foster care: illegitimate children; abandoned children; children who lost their parents and whose location or place of residence can neither be located by the child nor by the relevant authorities; children whose parents are unable to look after their offspring due to social reasons.¹⁶⁵ Applicants wishing to take a child into *kafalah*, i. e. to enter into a formal care arrangement for him or her,¹⁶⁶ must be married whereby one of the spouses should be of

162 Prime Minister Decree No. 2057 for 2010 issuing the Executive Regulation for the Child Act No. 12 of 1996: Fostering of Children Regulation.

163 Law No. 6 of 2015; see Arabstoday, 24 January 2015: "Fostering age for abandoned kids lowered to 3 months in Egypt", available at <<http://www.arabstoday.net/en/women/also-in-the-news/fostering-age-for-abandoned-kids-lowered-to-3-months-in-egypt.html>> accessed 01 June 2017. Children at such a young age can be breastfed. Breastfeeding creates a relationship similar to those who are related by blood. This means that the child suckled in infancy is not eligible for marriage to the milk-mother's other children or husband and the family members may mingle relatively freely even after the milk-child has reached puberty. See BALKRISHAN SHIVRAM, Exploring Gender: Islamic Perspectives on Breastfeeding, International Research Journal of Social Sciences, Vol. 2 (2013), 30 – 34, at 32.

164 Regarding milk-kinship, see *idem*.

165 See Art. 85, 86 Fostering of Children Regulation.

166 The Egyptian Child Law uses the Arabic terminology *ri'āya al-badila* or *usr al-badila* for alternative or foster care, see e. g. title chapter 3 and art. 46. Another term used in Egypt is *al-usr al-kāfla*, see YASSARI NADJMA, Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law, The American Journal of Comparative Law, Vol. 63, No. 4 (2015), 927 – 962, at 951. In this paper, the term *kafalah* is used for consistency reason and in accordance with the literature, which generally refers to this terminology when speaking of an alternative institution for adoption in Muslim jurisdictions. However, this does not mean that the *same* legal structure for the institution of *kafalah* exists in all of these states, see YASSARI, *ibid*, at 949, 950 f. For literature that also uses the term *kafalah* in the Egyptian context, see e. g. MOUSSA, *supra* n. 142 at 16; EBNER/HEFNY, *supra* n. 140 at 36; MCLEAN EADIE KIERAN, The application of kafala in the

Egyptian nationality; they should have the same faith as the child, be between 25 and 55 years of age and married for at least five years. Furthermore, they must be psychologically and physically healthy, have an income sufficient to provide for the family unit, live in a proper environment with, inter alia, educational and medical facilities, and have enough time to handle the fostering of a child. Finally, they must prove their ability to jointly cover the needs of the family and provide the child taken into *kafalah* with financial and social security. Also, they must give the solemn promise to preserve the ancestry of the child.

Single women, divorcees and widows over the age of forty-five may foster children upon approval by the Alternative Families Committee.¹⁶⁷ The number of children in the applying family should not exceed two, unless they are old enough to depend on themselves. Prospective foster parents must also obtain approval from the Social Solidarity Directorate to provide foster care for more than one child.¹⁶⁸ After a process, which includes a background check by a social worker and the submission of the relevant documents, the Family and Childhood Administration reviews the application which then presents the application as well as the social survey report and other relevant documents to the Alternative Families Committee of the relevant governorate for decision-taking. If the family's application is approved, the applicants have to sign a foster care contract.¹⁶⁹ ¹⁷⁰ If the application is rejected, the applicants are entitled to appeal it.¹⁷¹

Effects of the Decision

The foster family has the duty to look after and care for the foster child as a family member and to comply with the relevant authorities regarding the child's future as well as informing them regarding any change in the

West, in: Nadirsyah Hosen (ed.), *Research Handbook on Islamic Law and Society*, Cheltenham 2018, 47 – 76 at 55 f.

167 Art. 89 No. 2, 93 Fostering of Children Regulation.

168 Art. 89 No. 4 Fostering of Children Regulation.

169 Art. 90, 93, 101 Fostering of Children Regulation.

170 Apart from a formal agreement based on a contract between the state authority and foster parents for the support and care of an abandoned child, there is the option for support on a voluntary basis for a child who remains in residence in an orphanage, see MEGAHEAD/CESARIO, *supra* n. 153, at 469.

171 Art. 90 para. 5 Fostering of Children Regulation.

child's social status, residence and circumstances.¹⁷² The orphaned child or child with unknown ancestry may add the name of her or his foster family as her or his own, yet without gaining any natural inheritance rights.¹⁷³ Notwithstanding this, the foster parents may bequest one-third of their estate to an unrelated person such as a foster child.¹⁷⁴ In addition, they may bestow money or property upon the child during their lifetime.¹⁷⁵

The law provides that social specialists shall oversee the welfare and progress of the child,¹⁷⁶ and entitles foster parents to certain benefits during and after the end of the foster care period.¹⁷⁷

Termination of Placement

The family foster care continues until boys reach the employable age and girls marry.¹⁷⁸ If the foster family infringes upon the regulations of the relevant law, for instance by not following the directives of the social worker or by conducting a lifestyle that negatively influences the psychological or physical health of the foster child, it may be terminated earlier. The *kafalah* placement may also come to an end if either of the foster parents dies¹⁷⁹ or the child is returned to its biological family.¹⁸⁰

c) United Arab Emirates

The United Arab Emirates (UAE) is a federation established in 1971 in the area previously known as the Trucial Coast in the Persian Gulf, consisting of seven Emirates, namely Abu Dhabi, Dubai, Sharjah, Ras Al Khaimah, Umm Al Quwain, Ajman and Fujairah. The majority of its citizens are adherents to Sunni Islam with Christian, Shia and Hindu minorities. Approximately four-fifth of the population are migrant workers who reside

172 Art. 89 No. 7, No. 11, Art. 91 Fostering of Children Regulation.

173 Art. 92 Fostering of Children Regulation. See also MOUSSA, Egypt, *supra* n. 142, at 16 f.

174 The Islamic inheritance laws are codified into Law No. 77 of 1943 and Law No. 71 of 1946.

175 See also Art. 99 Fostering of Children Regulation.

176 Art. 89 No. 9, 102 f. Fostering of Children Regulation.

177 See Art. 95 ff. Fostering of Children Regulation.

178 Art. 87 Fostering of Children Regulation.

179 See Art. 100 Fostering of Children Regulation.

180 Cf. Art. 89 No. 11 Fostering of Children Regulation.

in the country temporarily. They are predominantly Muslims, Christians and Hindus.¹⁸¹

According to the UAE Constitution, Islam is the official religion of the federation, and Islamic law (Shari'a) a main source of legislation.¹⁸² As a federation, it has two sets of laws: On the one hand, federal laws and decrees which make up the legal framework of the federation, and on the other hand, the laws and regulations of the individual Emirates. The Emirates have the jurisdiction over subject matters that are not assigned by the Constitution to the exclusive jurisdiction of the Federal Government as well as the right and duty to implement federal laws through local laws and regulations.¹⁸³

ca) Family Law and Lineage

In the relatively short period since its establishment, the UAE has passed many important laws. Yet until recently, there was no codified family law in the UAE and the law applied in family matters were the rules of classical Islamic law based on dominant Maliki doctrines. In 2005, the UAE passed its first codified family law, the Federal Law on Personal Status.¹⁸⁴ It covers a wide range of issues considered to be in the realm of family law, such as marriage and divorce, issues arising during and after marriage, rules pertaining to children, and inheritance.¹⁸⁵ The law applies to all citizens as long as the non-Muslims among them (mostly Hindus) do not have their own laws; non-citizens have a choice to subject themselves to the law.¹⁸⁶

181 The World Factbook, CIA, United Arab Emirates, available at < <https://www.cia.gov/library/publications/the-world-factbook/geos/ae.html> > accessed 01 June 2018.

182 Art. 7 Federal Constitution of the United Arab Emirates.

183 See Art 116 ff., 120, 121, 122 and 125 UAE Constitution.

184 UAE Federal Law No.28 of 2005 on Personal Status of 19 November 2005, Official Gazette No.439, November 2005.

185 See e.g. WELCHMAN LYNN, First Time Family Law Codifications in Three Gulf States, in: Bill Atkin (ed.), *The International Survey of Family Law*, 2010 Edition, Bristol 2010, 163 – 178, at 164.

186 Art. 1 UAE Federal Law on Personal Status.

According to the UAE Personal Status Law, the *nasab* to the mother is acquired through birth.¹⁸⁷ In order to be legitimately affiliated to the father and acquire a *nasab*, the law requires that the child must be born under a valid marriage within the minimum term of pregnancy after the conclusion of the marriage contract. If the spouses think they are legally married but the marriage contract is defective, the child is attributed to the husband if he or she is born within the minimum terms of pregnancy counted from the time of consummation of the (defective) marriage.¹⁸⁸ The other alternatives to establish *nasab* are acknowledgement, evidence and “scientific methods if the conjugal bed is established”.¹⁸⁹ Here, the law refers to methods such as DNA-testing.¹⁹⁰ In any case, for illegitimate offspring paternity cannot be established. Extramarital relationships are considered a crime under the UAE Penal Code.¹⁹¹

The husband can refute paternity through the traditional process of *li’an* if he has not admitted to his paternity or consented in the child’s being attributed to him previously.¹⁹² During the court proceedings, the judge can have recourse to “scientific methods” in order to clarify the question of paternity.¹⁹³ If the *li’an* procedure is successful, the child will not be attributed to the wife’s husband and the spouses will be separated definitely.¹⁹⁴

Marriage is the exclusive framework for licit sexual relations and legitimate offspring. Because sex outside of marriage is illegal, the women – many of whom are migrant workers – often conceal their pregnancies and abandon their babies shortly after giving birth.¹⁹⁵ The UAE does not endorse a

187 Art. 60 No. 2, 90 f. UAE Federal Law on Personal Status. The minimum and maximum terms of pregnancy are 180 and 365 days respectively, “unless a medical committee established for this purpose decides otherwise”.

188 180 and 365 days respectively, “unless a medical committee established for this purpose decides otherwise”, see Art. 89 ff. UAE Federal Law on Personal Status.

189 Art. 89 UAE Federal Law on Personal Status.

190 WELCHMAN, *supra* n. 2, at 145.

191 Cf. Art. 356 Federal Law No. 3 of 1987 on the Penal Code.

192 Art. 96, 97 No. 1 UAE Federal Law on Personal Status.

193 Art. 97 UAE Federal Law on Personal Status.

194 Art. 96 No. 1 and Art. 97 No. 2 UAE Federal Law on Personal Status.

195 See, e.g., Al Jazeera, 6 March 2015: “Adopting Orphans Breaking Taboos in Dubai”, available at <<http://www.aljazeera.com/news/2015/03/adopting-orphans-breaking-taboos-dubai-15030208074099.html>> accessed 01 June 2018.

system of adoption that severs a child's lineage to her or his biological parents. As such, the UAE laws do not expressly prohibit adoption, but it is commonly agreed that UAE nationals, which are mostly Muslims, cannot adopt.¹⁹⁶ They should turn to fosterage instead which is considered as a worthy deed and permitted according to the precepts of Islam.

cb) The Fosterage of Abandoned Children

In General

Until 2011, the fosterage of children was not regulated in the UAE. In early 2012, the UAE President Shaikh Khalifa Bin Zayed Al Nahyan issued a law on the protection and care for abandoned children.¹⁹⁷ The law created a system involving the Ministry of Social Affairs and the Ministry of Interior to provide care for children without parental support and lays down the criteria and process by which foster families are being chosen. The law not only aims at securing the care of abandoned children in order to secure their health, education and social integration, but also stipulates their protection from abuse and cruel treatment.¹⁹⁸ This is in line with Article 16 of the UAE Constitution which states: "Society shall be responsible for protecting childhood (...) and shall protect minors and others unable to look after themselves for any reason, such as illness, disability (...). It shall be responsible for assisting and enabling them to help themselves for their own benefit and that of the community. Such matters shall be regulated by welfare and social security legislations."

Prerequisites

According to Federal Law 1 of 2012 on the care for abandoned children, an abandoned child is one found inside the borders of the UAE who has no known parents.¹⁹⁹ Anyone who finds an abandoned infant must deliver him or her to the police including anything found on the child. The police notify the Public Prosecutor and hand over the child to the designated

196 Adoption is possible for foreign, non-Muslim expatriates living in the UAE. The adoption process follows the rules of their own national laws.

197 Federal Law No. 1 (2012) on the care of abandoned children (hereinafter "Abandoned Child Law"). Executive by-laws are planned to be released soon.

198 Art. 2 UAE Abandoned Child Law.

199 Art. 1 UAE Federal Abandoned Child Law.

health centre. A doctor estimates the age of the infant and gives him or her the necessary care.²⁰⁰ The Public Prosecutor then assigns the child to an orphanage with the approval of the two involved ministries. There, the child is given a name.²⁰¹ According to the law, abandoned children are eligible for Emirati citizenship.²⁰²

Anyone wishing to foster a child must be an Emirati national residing in the UAE²⁰³; he or she must be Muslim and married and be at least 25 years of age. According to the relevant law, single men are not eligible and single women (unwed, widowed or divorced) must be at least 30 years of age. Further, the hosting family or single mother should be free from infectious diseases²⁰⁴ and should not suffer from psychological and mental disorders. The hosting family or single mother must be financially capable to provide a decent living to the foster child as well as the members of their own families, and they must not have a criminal record.²⁰⁵

In the Emirate of Dubai, the Community Development Authority is the responsible authority for the care of abandoned children.²⁰⁶ The person or persons wishing to foster a child have to apply to the CDA by submitting a form accompanied by a number of documents (e.g., certificate of clearance of infectious diseases, salary certificate). A social worker assesses the family and their living circumstances through interviews and home visits.²⁰⁷ The Commission then decides on the eligibility of the family or single person and informs them accordingly. After placement, social

200 Art. 3 UAE Federal Abandoned Child Law.

201 This name shall not imply that the child is of unknown parentage. See Art. 3 para. 5 UAE Federal Abandoned Child Law.

202 Art. 3(e) UAE Federal Law No. 17/1972 concerning nationality and passports, amended by Federal Law No. 10/1975; Art. 3, Art. 5 para. 1 UAE Federal Abandoned Child Law.

203 See Art. 10 UAE Federal Abandoned Child Law for the eligibility criteria.

204 Exceptions are possible: cf. Art. 10 para. 2 UAE Federal Abandoned Child Law.

205 The by-laws are yet to be released: The National, 9 February 2014: "Shelter is required before UAW can enforce abandoned child law", available at <<http://www.thenational.ae/uae/government/shelter-is-required-before-uae-can-enforce-abandoned-child-law>> accessed 01 June 2018.

206 According to Art. 7, 8 UAE Federal Abandoned Child Law, each Emirate has its own commission to identify eligible foster families.

207 See Art. 8, 9, 13 UAE Federal Abandoned Child Law.

workers monitor the wellbeing of foster children by visiting the foster families and by an annual health check.²⁰⁸

Effects of the Decision

The child is referred to the family for a trial period of six months after which the foster care becomes permanent.²⁰⁹ Foster parents have to sign an undertaking that they will treat the child well, provide her or him with secure living conditions and that he or she may grow up in an Islamic and social environment. The law specifies that the foster parents are to take care of the child's needs, such as giving it a home, clothing, and sustenance, and cater to the health and social life of the child according to his or her age. In addition, they must allow her or him to interact with other children, and provide for her or his education.²¹⁰ The law further stipulates that fostering is a gift of care and that the foster parents are not entitled to any remuneration.²¹¹

Since the foster parents are to take care of the child in the same way as if the child were their biological offspring, they must care and bring him or her up according to the rules laid down in the Personal Status Law.²¹² In case of a girl, maintenance continues until her marriage and in case of a boy until he is able to finance his own livelihood or he finishes his studies. If the male child is disabled or the female widowed or divorced, the maintenance obligation of the father continues or reverts to him.²¹³ However, no inheritance rights are established to the foster parents. Indeed, according to Islamic law, they may bequeath a maximum of one-third of their estate to an unrelated person.²¹⁴

208 Cf. Art. 8, 12, 13, 14 UAE Federal Abandoned Child Law.

209 Art. 9 para. 2 UAE Federal Abandoned Child Law.

210 Art. 5 UAE Federal Abandoned Child Law.

211 Art. 15 UAE Abandoned Child Law.

212 See Art. 5, 10 UAE Abandoned Child Law.

213 Art. 78 UAE Federal Law on Personal Status.

214 Art. 243 UAE Federal Law on Personal Status.

Termination of Placement

The foster care ends when the child comes of age;²¹⁵ foster parents fail to provide for the child in accordance with the rules of the law;²¹⁶ or the biological parents come forward;²¹⁷ or the foster child dies.²¹⁸ In case of divorce of the foster parents or the death of one spouse, the continuation of the foster arrangement may be ruled.²¹⁹

V. Appraisal and Concluding Remarks

In the three countries under review, Morocco, Egypt and the UAE, adoption in the sense of integrating a child into one's own family by legally giving him or her an equal status to the one of a biological child is either not legally possible, or not possible for people with certain faiths, namely Muslims. By contrast, fostering is legally permitted in all three countries. A special emphasis is laid on the faith: In Morocco and the UAE, the applicants must be a Muslim couple or a Muslim single woman, in multi-faith Egypt, the couple or single woman must have the same faith as the child. In line with Islamic legal precepts, foster arrangements in these three countries have no effect on lineage like adoption. However, they offer a family-based solution for children deprived of family for reasons such as orphanage or birth out of wedlock by recognising the role family plays in the development and growth of young children.

In contrast to adoption, the fostering arrangements under review offer a certain flexibility allowing for adjustments in case the child's individual

²¹⁵ According to Art. 85 UAE Federal Law on the Civil Transactions Law (Civil Code), a person comes of age at the age of 21.

²¹⁶ Art. 14 UAE Federal Abandoned Child Law provides the following: If the foster parents fail to comply with their rights and duties, they are reminded to discharge their duties. If they still fail to comply with the rules laid down by law, they are cautioned. If foster parents continue to disregard their duties, the fostering arrangement is put to an end, and another family is given the right to take the child into foster care.

²¹⁷ If the biological parents reclaim the child, they must prove that they are the biological parents before the court issues a ruling to this effect, and the child will be re-registered: Art. 17 f. UAE Federal Abandoned Child Law.

²¹⁸ Art. 20 para. 1 UAE Federal Abandoned Child Law.

²¹⁹ According to Art. 14 UAE Federal Abandoned Child Law, a relative may claim the right to foster the child in place of the deceased foster parent.

situation changes; such may be given if reintegration into the birth family becomes possible or the arrangement with the foster parents does not work out in the best interest of the child. However, it must be pointed out that such revocation possibilities also have their downfalls, namely the uncertain legal status of the child, and possible emotional hardship. This said, under the national laws of Egypt, Morocco and the UAE fostering is designed to be a permanent arrangement for a child without parental care. The permanence factor is reflected in the fact that termination is only possible in special circumstances.

As has been outlined, *nasab* identifies the lineage of a person and typically is a patronym (i. e., name of the father) or a series of patronyms in both historical and modern Islamic legal frameworks. Lineage indicates the parentage of a child and consequently the establishment of all legal rights and claims. Since lineage can only be established through blood (kinship) and marriage, a fostered child (child under *kafalah*) will retain her or his father's or mother's name, if known, or will be named by officials, if unknown. Perhaps in an effort to atone the stigma of not having the father's or family's last name, in Morocco the child's last name may be aligned to the *kafil's* name by an official act, and in Egypt the foster family's name might be added to one's own. As far as can be seen, in the UAE the child keeps the name attributed to them by the officials. Furthermore, since the biological family bonds are preserved in all three countries by a fostering arrangement, the child has no inheritance rights towards their fostering parents. It is however possible to grant him or her limited inheritance rights by drawing up a will and thus enabling the child to inherit a certain portion of the foster parent's fortune.

Modern-day fostering arrangements as mirrored in the laws of Morocco, Egypt and the UAE certainly have benefits for children deprived of a family environment. However, because of the obvious challenges of this type of system, effective monitoring and regular follow-ups by officials are vital components in order to prevent or deflect a placement for economic reasons and children's exploitation. Also, the high prevalence of abandoned children namely in Egypt and Morocco highlights the need to develop preventive and inclusive programs for the support of single mothers especially. Besides their own "illegitimate" children, these individuals are most vulnerable in societies with patriarchal structures, where giving illegitimate birth (birth out of wedlock) may be considered as a transgression against "family honour".

Fatwas und Muftis im Zeitalter des Internets:

Das Fatwa-Portal *islamfatwa.de* als Fallstudie

MAHMUD EL-WERENY¹

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Abstrakt

Fatwas dienen nicht nur der Klärung von Alltagsfragen unterschiedlicher Art, sondern auch der Rechtfertigung und Verbreitung von politischen Ideologien und religiösen Weltanschauungen. Muftis, die sich dieser Aufgabe zuwenden, sollen daher bestimmte Qualifikationen erfüllen, um in der Lage zu sein, zeit- und ortsgemäße Lösungen für die an sie herangetragenen Sachverhalte liefern zu können. Auch wenn Fatwas über keinen bindenden Charakter verfügen, finden sie bei vielen Muslimen Anerkennung und gelten als Orientierungshilfe und Richtschnur für ein schariatgetreues Leben. Der Cyberspace hat neue Welten eröffnet und vielfältige Möglichkeiten geschaffen. Auch für Musliminnen und Muslime, die sich über ihre Religion informieren wollen, bietet sich in der virtuellen Welt eine Vielzahl von Fatwa-Foren. Diese erleichtern nicht nur das

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Finden von islamkonformen Antworten auf Alltagsfragen, sondern ermöglichen es auch, durch die gewährleistete Anonymität, heikle Fragen zu stellen und zugleich unterschiedliche Positionen und Sichtweisen verschiedener Muftis zu vergleichen und davon zu profitieren. Problematisch ist allerdings, dass man nicht ohne Weiteres erkennen kann, wer hinter dem jeweiligen Fatwa-Forum steht und welche ideologischen Inhalte dort propagiert werden. Im Mittelpunkt des vorliegenden Beitrags steht die Darstellung und Analyse des ersten und meistbesuchten Fatwa-Portals im deutschsprachigen Raum islamfatwa.de, um es dann anhand von ausgewählten Fallbeispielen ins Spektrum der Online-Fatwa-Dienste einzuordnen.

I. Einleitung

Viele Musliminnen und Muslime legen großen Wert darauf, ihr Leben nach Werten und Normen des Islam auszurichten.² Da nicht jeder Muslim in der Lage ist, selbstständig aus den normativen Quellen des Islam Antworten auf neu aufgetretene Fragen zu finden, wendet man sich in der Regel an einen ortsnahen vertrauten Islamgelehrten, der durch seine Qualifikationen befugt ist, religiöse Auskünfte auf an ihn herangetragene Fragen zu geben. Der Fragesteller wird in der Fachsprache *mustaftī* („Ratsuchender“), der Ratgeber *muftī* und sein Rat *fatwā* genannt. Das Wort Fatwa wird in der deutschsprachigen Literatur häufig mit „Rechtsgutachten“ übersetzt.³ Als Fachterminus des islamischen Rechts bezeichnet es eher eine religiöse Auskunft eines Muftis, die dem Ratsuchenden auf Anfrage hin erteilt wird. Diese Tätigkeit kann, wie es über die islamische Geschichte hinweg der Fall war, entweder formell von einem durch den Staat eingesetzten Mufti oder informell von

2 Der Einfachheit halber wird im weiteren Verlauf des Artikels auf das Femininum verzichtet.

3 Nicht selten wird der Begriff *fatwā* in Assoziation mit dem Schriftsteller Salman Rushdie (geb. 1947), der wegen seiner 1988 erschienenen Schrift *Die satanischen Verse* auf der Grundlage einer vom Ajatollah Chomeini (gest. 1989) erteilten Fatwa zum Tode verurteilt wurde. Siehe statt vieler VOGEL GEREON, Blasphemie – Die Affäre Rushdie in religionswissenschaftlicher Sicht, Bern 1998.

einem Gelehrten durchgeführt werden, der aufgrund seiner Kompetenz und Popularität in der Gesellschaft Gehör und Anerkennung findet.⁴

Mit der Entwicklung des Internets haben sich die Wege und Formen der religiösen Ratgebung (*iftāʿ*) verändert. Während man sich früher in der Regel an den Mufti der ortsnahen Gemeinde gewandt und seine Frage vor Ort vorgetragen hat, bedient man sich heute oftmals des Internets. Denn Online-Fatwa-Dienste haben neue Zugänge und Kanäle geschaffen, um Fatwas zu erhalten und somit die Religion zu verstehen. Der Cyberspace bietet im Gegensatz zu Radio oder Fernsehen überschaubare Kategorisierungen, eigene Räume und Inhalte sowie einfacheren Zugang. Was die Online-Fatwas besonders attraktiv macht, ist u. a. die Möglichkeit, anonym Fragen zu stellen bzw. zu suchen und zu finden. Auf diesem Wege können auch Tabuthemen sozialer, politischer oder anderer Art aufgegriffen werden. Darüber hinaus überwindet das Internet die geografische Begrenztheit und ermöglicht dem Ratsuchenden, seine Frage nicht nur einem, sondern mehreren Muftis zu stellen und somit unterschiedliche Antworten zu vergleichen.⁵

Heute gibt es eine Vielzahl an Internetseiten, die sich hauptsächlich dem *iftāʿ* widmen. Nicht nur staatliche Institutionen und Organisationen islamisch geprägter Gesellschaften haben schon seit Längerem die Möglichkeiten des Internets erkannt und es als Kommunikationsmedium innerhalb der muslimischen Gemeinschaft eingesetzt.⁶ Auch islamistische Gruppierungen und

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- 4 Vgl. weiterführend dazu MOTZKI HARALD, Religiöse Ratgebung im Islam: Entstehung, Bedeutung und Praxis des *muftī* und der *fatwā*, Zeitschrift für Religionswissenschaft, Vol. 2 (1994), 3 – 23; KRAWIETZ BIRGIT, Der Mufti und sein Fatwa. Verfahrenstheorie und Verfahrenspraxis nach islamischem Recht, Die Welt des Orients, Vol. 26 (1995), 161 – 180; MASUD KHALED MUHAMMAD, Mufti, Fatwas and Islamic Legal Interpretation, in: Masud Khaled Muhammad/Messick Brinkley/Powers David (Hrsg.), Islamic Legal Interpretation. Muftis and Their Fatwas, London 1996, 3 – 33; EL-WERENY MAHMUD, Scharia-Normen im Wandel: Zum Konzept der Fatwa-Wandelbarkeit zwischen Tradition und Moderne“, Zeitschrift für Recht und Islam, Jg. 9 (2017), (im Erscheinen).
- 5 Vgl. MASUD, *supra* Fn. 3, 32; BRÜCKNER MATTHIAS, Fatwas zum Alkohol unter dem Einfluss neuer Medien im 20. Jhd., Würzburg 2001; GRÄF BETTINA, Medien-Fatwas@Yusuf al-Qaradawi. Die Popularisierung des islamischen Rechts, Berlin 2010, 231.
- 6 Vgl. bspw. Dār al-Ifṭāʿ in Ägypten <http://dar-alifta.org/>, in Libyen <https://ifta.ly/web/> und in Saudi-Arabien <http://www.alifta.net/> (letzter Aufruf 22.04.18). Mehr dazu LOHLKER RÜDIGER, Islam im Internet. Neue Formen der Religion im Cyberspace, in: Hafez Kai/Rotter Gernot (Hrsg.), Hamburger Beiträge: Medien und politische Kommunikation – Naher Osten und Islamische Welt, Bd. 3, Hamburg 2001, 1 [eigene Nummerierung]

Einzelpersonen machen davon Gebrauch, um ihre politisch ideologisierte Interpretation des Islam sowie angestrebte Ziele zu propagieren. In ihrer virtuellen Präsenz nehmen Fatwas einen zentralen Platz ein. Sie dienen dort als Erklärungsmittel für alle Fragen des Lebens sowie für die Rechtfertigung von religiösen und politischen Ansichten.⁷

Als erstes deutschsprachiges Fatwa-Portal, das facettenreiche Fatwas zu unterschiedlichen Themenbereichen des Islam bietet, tritt *islamfatwa.de* auf, wenn man das Schlagwort *Fatwa* bzw. *Islam Fatwa* in der Suchmaschine Google eingibt.⁸ Der vorliegende Beitrag macht es sich zur Aufgabe, diese Internetseite vorzustellen und am Beispiel ausgewählter Fatwas zu analysieren, um sie dann ins Spektrum der Online-Fatwa-Dienste einzuordnen. Es sollen dabei folgende Fragen beantwortet werden: Wer fungiert dort als Mufti und welches Gedankengut wird dort propagiert? Wie sind Fatwas dort gestaltet und wie sind die Argumentationsweisen? Welche Agenda und Ziele werden dabei verfolgt? Online-Fatwas zu untersuchen, ist deshalb relevant, weil das Internet zum einen eine Schlüsselrolle bei der Verbreitung von Ideologien spielt und Fatwas zum anderen dazu dienen, wie es über die gesamte islamische Geschichte hinweg der Fall war, religiöse Überzeugungen und politische Entscheidungen wie etwa Kriegsführung oder Friedensschluss zu rechtfertigen und zu fördern.⁹

Um diese Fragen zu beantworten, wird zunächst ein Überblick über die Bedeutung und Funktion von Fatwas bzw. Muftis gegeben. Anschließend wird die Internetplattform *islamfatwa.de* vorgestellt, um dann einige exemplarische Fatwas auf ihren Argumentationsgehalt hin zu analysieren und auszuwerten. Im Zuge dessen werden zwecks ihrer Einordnung andere Online-Fatwas herangezogen. Dabei liegt der Fokus aus Gründen der Praktikabilität auf den

[Elektronische Ressource]. Siehe auch u. a. SKOVGAARD-PETERSEN JAKOB, *Defining Islam for the Egyptian State: Muftis and Fatwas of the Dār Al-Iftā*, Leiden 1997.

7 Siehe z. B. www.salaf.de; www.basseera.de; www.erbederpropheten.de; www.al-madinah.de (letzter Aufruf 12.05.18). Weiterführend dazu BRÜCKNER MATTHIAS, *Der Mufti im Netz*, in LOHLKER, *supra* Fn. 5, 60–74; RUDOLPH EKKEHARD, *Salafistische Propaganda im Internet. Eine Analyse von Argumentationsmustern im Spannungsfeld von missionarischem Aktivismus, Islamismus und Gewaltlegitimation*, *Jahrbuch für Extremismus- und Terrorismusforschung* (2009/2010), 486–501.

8 Vgl. <https://islamfatwa.de/> (letzter Aufruf 28.04.18).

9 Siehe ausführlich dazu KRÜGER HILMAR, *Grundprobleme des islamischen Fatwa-Wesens*, in: Ebert Hans-Georg/Hanstein Thoralf (Hrsg.), *Beiträge zum Islamischen Recht III*, Frankfurt a. M. 2003, 9–33, hier 11 f.; RUDOLPH, *supra* Fn. 5, 489.

Theorien bzw. Ansichten des sog. „New Media Shaykh“ und „Global Mufti“¹⁰ Yūsuf al-Qaraḏāwī (geb. 1926) und des syrischen Reformdenkers Muḥammad Šahrūr (geb. 1938), der in der virtuellen Welt ebenfalls stark präsent ist und durch seine Reformüberlegungen für großes Aufsehen, vor allem in der arabisch-islamischen Welt, gesorgt hat.¹¹

II. Zur Bedeutung und Veränderbarkeit von Fatwas

Die Aufgabe der Fatwa-Erteilung beschränkt sich nicht nur darauf, praktische bzw. gottesdienstliche Fragen zu behandeln, vielmehr erstreckt sie sich auf die gesamte Bandbreite des Lebens. Sie umfasst Fragen aller Couleur, sei es theologischer, rechtlicher, gesellschaftlicher, politischer, ökonomischer oder medizinischer Natur. Wenngleich Fatwas rechtlich unverbindlich bleiben, gelten sie vielen Muslimen als Handlungsorientierung und Wegweiser für ein schariagetreues Leben. Das Fatwa-Wesen war über die islamische Rechtsgeschichte hinweg und ist noch heute nicht nur für die Weiterentwicklung des islamischen Rechts von eminenter Bedeutung, sondern auch als zentrale Instanz für die Anpassung der Muslime an neue Gegebenheiten und Herausforderungen unterschiedlicher Art zu sehen. Denn neue Entwicklungen und Veränderungen wurden und werden heute von vielen Muslimen nur dann akzeptiert, wenn diese islamisch legitimiert sind, was in der Regel auf Basis einer Fatwa erfolgt. Die Erteilung von zeit- und ortsgemäßen Fatwas wird daher als notwendig erachtet.¹²

¹⁰ Vgl. SKOVGAARD-PETERSEN JAKOB, The Global Mufti, in: Schaebler Birgit/Stenberg Leif (Hrsg.), *Globalization and the Muslim World. Culture, Religion and Modernity*, Syracuse 2004, 153 – 165. Für Näheres zu al-Qaraḏāwīs Person und Werk siehe z. B. GRÄF, *supra* Fn. 4, 43 ff., 134 ff.; EL-WERENY MAHMUD, Mit Tradition in die Moderne? Yūsuf al-Qaraḏāwīs Methodologie der Fiqh-Erneuerung in Theorie und Praxis, Köln 2016, 40 ff., 54 ff.

¹¹ Siehe ausführlich zu seiner Person und seinem Denken u. a. AMBERG THOMAS, Auf dem Weg zu neuen Prinzipien islamischer Ethik: Muhammad Shahrour und die Suche nach religiöser Erneuerung in Syrien, Würzburg 2009; AL-ĠABI SALIM, *al-Qirā'ah al-mu'āšira li-d-duktūr M. Šahrūr muğarrad tañjīm*, Damaskus 1995.

¹² Zutreffend z. B. AL-QARĀFĪ ŠIHĀB AD-DĪN, *al-Iḥkām fi tamyīz al-fatāwā 'an al-aḥkām wa-ṭašarrufāt al-qāḏī wa-l-imām*, ed. v. Abū Ġudda 'Abd al-Fattāh, Beirut 1995, 31 ff., 43 ff. und 56 ff.; KRÜGER, *supra* Fn. 8, 30 f.; MOTZKI, *supra* Fn. 3, 14 f. Zum Thema Fatwa-Wandel siehe EL-WERENY, *supra* Fn. 3.

Die Notwendigkeit, Fatwas entsprechend den zeitlichen und örtlichen Gegebenheiten zu erteilen bzw. bereits tradierte Rechtsauskünfte zu modifizieren, stellt kein neues Verfahren dar, vielmehr ist es in der prophetischen Tradition verwurzelt.¹³ Auch Prophetengefährten sowie frühe Rechtsgelehrte wie etwa aš-Šāfi‘ī (gest. 820), Namensgeber der schafitischen Rechtsschule, und Aḥmad b. Ḥanbal (gest. 855), Gründervater der hanbalitischen Rechtsschule, haben ihre religiösen Auskünfte kontextentsprechend ausgesprochen.¹⁴ Eine erste intensive theoretische Beschäftigung mit diesem Grundsatz liefert der Ḥanbalit b. Qaiyim al-Ğauziya in seinem Werk *I‘lām al-muwaqqi‘in*.¹⁵ In dieser Diskussion um die Fatwa-Wandelbarkeit lassen sich im zeitgenössischen Diskurs drei unterschiedliche Position nachzeichnen, die sich in der virtuellen Welt in Form von Fatwa-Portalen widerspiegeln:¹⁶

Die erste Denkschule, vertreten von zeitgenössischen Intellektuellen wie beispielsweise Šaḥrūr, nimmt an, dass Scharianormen zeitlichen und örtlichen Veränderungen unterliegen und kontextbedingt modifiziert werden sollten. Ausgenommen seien die dogmatischen Glaubensgrundlagen, die rituellen Pflichten sowie weitere Regelungen ethischen Charakters. Diese gälten als unveränderbare Prinzipien des Islam. Alle anderen Normen, die vor allem die zwischenmenschlichen Beziehungen betreffen, gelten zeit- und ortsabhängig als veränderbar. Die Scharia wird somit auf bestimmte Fragen theologischer, ritueller und ethischer Art beschränkt. Das Hauptanliegen ist dabei, tradi-

13 In Anbetracht der *iftā’*-Rolle ist diese Tätigkeit nicht jedermanns Sache, vielmehr haben muslimische Gelehrte für die Übernahme dieser Aufgabe eine Reihe an Zugangsvoraussetzungen definiert, die erfüllt werden müssen. Neben den fachlichen Kompetenzen muss der Mufti auch moralische Eigenschaften wie etwa Gottesfurcht und Rechtschaffenheit erfüllen. Eine eigene Literaturgattung des sog. *Adab al-muftī wal-mustaftī* befasst sich ausführlich mit den Verhaltensregeln des Muftis sowie auch Ratsuchenden. Vgl. z. B. IBN AŞ-ŞALĀḤ ‘UṬMĀN B. ‘ABD AR-RAḤMAN, *Adab al-muftī wa-l-mustaftī*, ed. v. ‘ABD AL-QĀDIR MUWAFFAQ, Medina 1986; SCHNEIDER IRENE, Das Bild des Richters in der „adab al-qādi“-Literatur, Frankfurt a. M. 1990; KRAWIETZ, *supra* Fn. 3, 161 – 180; MASUD MUHAMMAD KHALID, *Adab al-muftī. The Muslim Understanding of Values, Characteristics, and Role of a Muftī*, in: Metcalf Barbara D. (Hrsg.), *Moral Conduct and Authority. The Place of Adab in South Asian Islam*, Berkeley 1984, 124 – 151.

14 Vgl. ausführlich dazu EL-WERENY, *supra* Fn. 3.

15 Vgl. IBN AL-QAIYIM, *I‘lām al-muwaqqi‘in ‘an rabb al-‘ālamīn*, ed. v. ĀL SULAIMĀN ABŪ ‘UBAIDA MAŞHŪR B. ḤASAN, Dammam, 2002, 337, Bd. 6, 113 f., 192 ff. Weiterführend dazu EL-WERENY, *supra* Fn. 3.

16 Diese modernen Ansätze stützen sich direkt oder indirekt auf die Überlegungen vor-moderner Gelehrter, auf die hier nicht näher eingegangen werden kann. Siehe mehr dazu EL-WERENY, *supra* Fn. 3.

tionelle Fatwas und Normen, die heikle Fragen wie etwa Geschlechterrollen, Erbregelungen, Kleidungsvorschriften und Körperstrafen (*hudūd*) betreffen, zeitgemäß neu zu interpretieren, um den Islam mit der Moderne bzw. modernen Grundwerten wie etwa der Allgemeinen Erklärung der Menschenrechte, Gleichberechtigung der Geschlechter und Demokratie etc. in Einklang zu bringen.¹⁷ Zwecks der Verbreitung dieser Theorien begnügen sich die Apologeten dieser Position nicht nur mit der Veröffentlichung von Publikationen, sondern sie greifen auch auf das Internet zurück, um ihren Thesen mehr Gehör zu verschaffen. So unterhält Šahrūr z. B. eine arabischsprachige Internetseite, auf der er nicht nur theoretische oder methodische Themen für sein anvisiertes Reformprojekt behandelt, vielmehr bietet sein Portal die Möglichkeit, Fragen in einem Eingabeformular direkt an den Autor zu stellen. Dort beantwortet er eine ganze Reihe an Fragen unterschiedlicher Natur, seien es politische, gesellschaftliche, medizinische oder theologische.¹⁸

Im Gegensatz zu dieser Position halten sich dem Salafismus zuzuordnende Autoren wie etwa ‘Abd al-‘Azīz b. Bāz, Großmufti Saudi-Arabiens (von 1992 bis zu seinem Tode 1999), am Wortlaut des koranischen bzw. prophetischen Textes und sehen in den Quellentexten die einzigen Maßstäbe für die Findung von Normen bzw. für die Modifikation bereits erlassener Fatwas. D. h. überkommene Ansichten und traditionelle Rechtsentscheidungen dürften nur dann Veränderung erfahren, wenn dafür textuelle Belege vorliegen. Andernfalls seien sie so umzusetzen, wie sie überliefert worden sind. Demnach wird dem Kontext, in dem die Normen bzw. die Fatwas erstellt werden, sowie neuen Entwicklungen des Lebens keine Aufmerksamkeit geschenkt.¹⁹ Auch Ibn Bāz verfügt über eine Website, die ebenfalls ausschließlich in arabischer Sprache konzipiert ist. Diese Site bietet einen umfassenden Einblick in sein

17 Vgl. z. B. ŠAHRŪR MUHAMMAD, *Naḥwa uṣūl ḡadīda li-l-fiqh al-islāmī. Fiqh al-mar’a (al-waṣīya – al-irt – al-qawāma – at-ta’addudīya – al-lībās)*, Damaskus 2000. Ausführlich dazu AMBERG, *supra* Fn. 10, passim; CHRISTMANN ANDREAS, 73 Proofs of Dilettantism. The Construction of Norm and Deviancy in the Responses to Mohamed Shahrour’s Book *Al-Kitāb wa al-Qurān: Qirā’a Mu’āšira*, *Die Welt des Islam* 44/2 (2004), 21 – 73.

18 Vgl. z. B. http://shahrour.org/?page_id=1679. Zum Tag der Datenerhebung wurden auf der Website 939 Fragen behandelt. Vgl. <http://shahrour.org/> und http://shahrour.org/?page_id=2921 (letzter Aufruf 04. 05. 2018).

19 Vgl. ausführlich dazu AL ATAWNEH MUHAMMAD, *Wahhābī Islam Facing the Challenges of Modernity. Dār al-Iftā in the Modern Saudi State*, Leiden 2010; EL-WERENY MAHMUD, *Normenlehre des Zusammenlebens: Religiöse Normenfindung für Muslime des Westens. Theoretische Grundlagen und praktische Anwendung*, Frankfurt a. M. 2018, z. B. 139 f., 160 f. 179 f.; ders., *supra* Fn. 3.

Denken und Wirken und ermöglicht, fast all seine Schriften, die teilweise in unterschiedliche Sprachen übersetzt vorliegen, online zu lesen bzw. in PDF-Format herunterzuladen.²⁰ Im Mittelpunkt dieses Portals steht dennoch die Erstellung von Fatwas für Fragen diverser Natur. Neben den dort zur Verfügung gestellten Angeboten an Büchern, Artikeln und Audio-Dateien wird die *fatwā*-Kategorie laut der Statistik der Website selbst am häufigsten besucht.²¹

Die dritte Denkschule, die sog. *wasatīya*, vertreten von Gelehrten wie etwa Yūsuf al-Qaradāwī, beansprucht eine mittlere Position zwischen den beiden oben angeführten Parteien: Sie erkennt zwar die Veränderbarkeit von Fatwas an, beschränkt dies aber auf eine Kategorie der Scharianormen. In diesem Sinne wird im Großen und Ganzen zwischen „statischen“ (*tābit*) und „wandelbaren“ (*mutaǧayyir*) Normen der Scharia unterschieden. Dabei bilden die textuellen Grundlagen aus dem Koran und/oder der Sunna die Argumentationsbasis. Der statische Teil betrifft demnach Normen, deren Beweislage authentisch und eindeutig sind. Zu den oben von Šahrūr angeführten Grundsätzen (theologischen, ethischen und gottesdienstlichen Normen) zählen Sprecher dieser Schule weitere Regelungen wie die Körperstrafen (*ḥudūd*) und die Heirats- und Erbre Regelungen zwischen Mann und Frau.²² Trotz ihrer konservativen Haltung zu vielen Fragen sind sie durch die Nutzung unterschiedlicher Massenmedien und internationale Vernetzung unter Muslimen in islamisch wie nichtislamisch geprägten Ländern stark präsent, wie am Beispiel al-Qaradāwī zu erkennen ist. Neben seiner Funktion als Präsident der *International Union of Muslim Scholars* (IUMS) und Vorsitzender des *European Council for Fatwa and Research* (ECFR) unterhält er ebenfalls eine Website, auf der er nicht nur Fatwas, sondern auch eine breite Auswahl an Texten und Bücher anbietet.²³ Laut Gräf gilt er als der erste muslimische Gelehrte, der 1997 Fatwas auf seiner persönlichen Website publizierte.²⁴ In der

20 Vgl. <https://binbaz.org.sa/books?page=1>; <https://binbaz.org.sa/>, <https://binbaz.org.sa/fatwas/kind/1?page=317>. Einige seiner Werke liegen in chinesischer, französischer, russischer und persischer Sprache vor. <https://binbaz.org.sa/books?page=23> (letzter Aufruf 04. 05. 2018).

21 Vgl. <https://binbaz.org.sa/stats> (letzter Aufruf 04. 05. 2018).

22 Vgl. EL-WERENY MAHMUD, Reichweite und Instrumente islamrechtlicher Normenfindung in der Moderne: Yūsuf al-Qaradāwīs *ijtihād*-Konzept, Die Welt des Islams, Vol. 58 (2018), Iss. 1, 65 – 100, hier 78; ders., *supra* Fn. 3.

23 Vgl. <https://www.al-qaradawi.net/> (letzter Aufruf 10. 05. 2018).

24 Vgl. GRÄF, *supra* Fn. 4, 84.

Rubrik *fatāwā wa-ahkām* („Fatwas und Rechtsurteile“) behandelt er rund um die Tausend Fragen zu unterschiedlichen Themen. Seine Fatwas beschränken sich, ähnlich wie die von Ibn Bāz und Šaḥrūr, nicht auf ein bestimmtes Themengebiet, sondern decken alle Aspekte des Islams ab. Dies beinhaltet praktische, rituelle, wirtschaftliche, politische, medizinische, bioethische, theologische und exegetische Fragestellungen.²⁵

Wenngleich die drei Autoren unterschiedliche Positionen zur Fatwa-Modifikation vertreten und somit viele Fragen unterschiedlich bewerten, was sich in ihrem Verständnis zum Islam und zur Moderne widerspiegelt, eint sie das Anliegen, ihre Theorien bzw. Ideologien über das Internet zu verbreiten und somit das Wissen über das islamische Recht zu popularisieren. Wer die Publikationen der Autoren in Buchform kennt, den wird inhaltlich nichts Neues erwarten. Formell erfahren ihre Fatwas meistens durch die Online-stellung gewisse Änderungen, die sich auf den Kern der Fatwas aber nicht auswirken. Solche Veränderungen entstehen dadurch, dass die Muftis oft nicht diejenigen sind, die die Website betreiben. Sie bleiben zwar die ursprünglichen Autoren, die Bearbeitung und Onlinestellung wird aber zumeist von ihren Administratoren vorgenommen, wie etwa bei Ibn Bāz und al-Qaradāwī zu sehen ist.²⁶ Darüber hinaus sind Online-Fatwas, anders als printmediale Fatwas, nicht an eine bestimmte Zielgruppe, sondern an Muslime weltweit gerichtet. Sie sind daher oft in einer einfachen Sprache formuliert, fernab der üblichen Komplexität der rechtstheoretischen Argumentation.²⁷ Die Frage, ob und inwieweit die Theorien dieser Autoren zur Fatwa-Wandelbarkeit bzw. ihre Fatwas rezipiert und von Muslimen als religiöse Ratgebung wahrgenommen werden, ist von großem Interesse, kann aber hier aufgrund der in vorliegender Arbeit anderweitig fokussierten Fragestellung nicht nachgegangen werden. Im Folgenden soll nun das Fatwa-Portal *islamfatwa.de* vorgestellt werden.

25 Vgl. <https://www.al-qaradawi.net/section/%D9%81%D8%AA%D8%A7%D9%88%D9%89-%D9%88-%D8%A3%D8%AD%D9%83%D8%A7%D9%85> (letzter Aufruf 04. 04. 2018). Für Näheres dazu GRÄF, *supra* Fn. 4, 244 ff.

26 Ibn Bāz erblindete im Alter von 16 Jahren und verfügte daher, ähnlich wie al-Qaradāwī, über keine Computerkenntnisse. Ausführlich zu al-Qaradāwī als Medien-Mufti siehe GRÄF, *supra* Fn. 4, S. 242 ff. und 382.

27 Vgl. z. B. ŠAHRŪR, *supra* Fn. 16, 331 ff., http://shahrou.org/?action=bbp-search-request&bbp_search=%D8%A7%D9%84%D8%AD%D8%AC%D8%A7%D8%A8 (letzter Aufruf 13. 05. 2018); GRÄF, *supra* Fn. 4, 292 f.

III. islamfatwa.de – Aufbau und Inhalt

Systematisch gibt es zwei Kategorien von Fatwa-Portalen: Online-Fatwa-Dienste wie etwa die Website *islamQA*, die die Möglichkeit anbieten, Fragen per E-Mail oder in Form eines Formulars online zu stellen, worauf die Antwort dann entweder direkt an den Ratsuchenden geschickt und/oder auf der Site publiziert wird, und Fatwa-Archive, wie etwa das Portal von Ibn Bāz, die sich mit der Publikation von bereits erteilten Fatwas begnügen, deren Entstehungsprozess schon vor ihrer Aufnahme ins Internet abgeschlossen ist. Wenngleich es zahlreiche Fatwa-Foren unterschiedlicher Prägung gibt, ist die Mehrzahl der in der virtuellen Welt verfügbaren Fatwas der der salafistischen Richtung zuzuordnen.²⁸ Bei der dieser vorliegenden Untersuchung zugrunde liegenden Website handelt es sich um eine deutschsprachige Fatwa-Datenbank, die sich ausschließlich zum Ziel gesetzt hat, Fatwas aus dem Arabischen ins Deutsche zu übersetzen und online zu stellen.²⁹ Sie umfasst keine anderen Rubriken neben den Fatwas, wie es auf vielen anderen Websites der Fall ist, die neben den anderen Angeboten eine Fatwa-Rubrik zur Verfügung stellen. Fatwas werden dort nicht wörtlich aus dem Arabischen übersetzt, vielmehr werden nur ihre Inhalte, jedoch möglichst genau, wiedergegeben. Es wird in dieser Hinsicht betont, dass das Team penibel darauf achte, dass der Sinn der Fatwas niemals verändert werde. Um dies sicherzustellen, werde jede Fatwa von mehreren Personen kontrolliert, bevor sie online geht. Dennoch lassen sich nicht wenige Rechtschreib- und Grammatikfehler, vor allem bei der Kommasetzung, feststellen, wie es den im Folgenden zu zitierenden Stellen zu entnehmen ist. Jene Fatwas erfahren demnach nicht nur formelle, sondern auch inhaltliche Veränderungen, die sich in erster Linie aber ausschließlich auf die Zusammenfassung bzw. Verkürzung von angeführten Argumenten beschränken.³⁰

Die Site ging 12. 01. 2012 online.³¹ Das Impressum gibt Khidr Malik als Betreiber der Site und als Standort Manchester an. Hierzu werden mit Hinweis auf Sicherheitsbedenken keine weiteren Angaben gemacht. Auf die Fragen, ob mit

28 Vgl. weiterführend dazu BRÜCKNER, *supra* Fn. 4, 37 – 39.

29 Vgl. <https://islamfatwa.de/ueber-uns/1729-was-ist-islamfatwa-de> (letzter Aufruf 04. 05. 2018).

30 Vgl. <https://islamfatwa.de/ueber-uns/1731-von-islamfatwa-de-veroeffentlichte-uebersetzungen> (letzter Aufruf 07.05.18).

31 Vgl. <https://web.archive.org/details/https://islamfatwa.de/> (letzter Aufruf 18. 05. 2018).

deutschen Vereinen oder Organisationen zusammengearbeitet wird, wer die Übersetzungstätigkeit übernimmt und warum überhaupt eine deutschsprachige Website in Großbritannien betrieben wird, lassen sich dort keine Antworten finden.³² Beim Verwalter der Top-Level-Domain.de *Denic* wird wiederum Malik Nasser als Eigentümer und Geesthacht/Schleswig-Holstein als Adresse angegeben. Durch das Googeln des Namen Malik Nasser kommt man auf den Twitterlink <https://twitter.com/nassermalik1>. Dort ist die Internetadresse <http://www.malikhhouse.co.uk/> zu finden. Dabei handelt es sich um ein Business Center in Manchester.³³ Andere salafistisch geprägte Websites weisen den gleichen Namen als Betreiber auf.³⁴

Das Portal präsentiert sich in einem einfachen Layout und ist nicht wie viele andere Fatwa-Foren mit Bildern von einzelnen Muftis oder Gelehrten wie etwa al-Qaraḍāwī oder Ṣaḥrūr, gestaltet.³⁵ Dies deutet auf ihre religiös-begründeten ablehnende Haltung zum Fotografieren oder zur Abbildung von Menschen hin. Neben der Startseite, *Home*, finden sich im oberen Bereich der Internetseite vier Reiter: *Kategorien*, wo die inhaltlichen Schwerpunkte der Fatwas aufgelistet sind, *Gelehrte* bzw. die Muftis, deren Fatwas auf der Seite übersetzt werden, *Glossar*, in dem sich eine kurze Erläuterung zu allen in den Fatwas verwendeten arabischen Begriffen findet, und der Reiter *Suche*, der das Finden von Fatwas erleichtert.³⁶ Im unteren Rand bietet die Internetsite Links zu anderen verwandten Online-Portalen, die sich dem salafistischen Spektrum zuordnen lassen.³⁷ Das Portal bietet über 1.630 Fatwas und deckt eine weite Bandbreite an Fragen ab: Von Theologie, Koranexegese, Hadithwissenschaften, Gottesdienst, über islamisches Finanzwesen, Geschlechterrolle, Politik, zwischenmenschliche Beziehungen bis hin zum Privatleben des Menschen hinsichtlich der Ernährung, Kleidung, Körperpflege und der Unterhaltung.

32 Er ist zugleich der verantwortliche Redakteure für die Website *Erbe des Propheten*, abrufbar unter: <https://erbederpropheten.de/impressum> (letzter Aufruf 08. 05. 2018).

33 Vgl. <https://www.denic.de/webwhois-web20/accepted-angenommen> (letztere Aufruf 08. 05. 2018).

34 Vgl. z. B. <https://erbederpropheten.de/impressum>; <https://islamgegenextremismus.de/impressum/> (letzter Aufruf 10. 05. 2018).

35 Vgl. <https://www.al-qaradawi.net/>; <http://shahrour.org/> (letzter Aufruf 05. 05. 2018).

36 Vgl. <https://islamfatwa.de/> (letzter Aufruf 14. 04. 2018).

37 Zu den dort verlinkten Webseiten zählen <http://www.basseera.de/>; <https://erbederpropheten.de/>; <http://miraath.de/>; <https://al-madinah.de/> (letzter Aufruf 14. 04. 2018).

Jede Frage hat einen Button, über welchen die Nutzerinnen und Nutzer zu weiteren ähnlichen Fragen gelangen können.³⁸

Der Aufbau der Startseite bietet den Nutzerinnen und Nutzern sofort einen Überblick über aktuell übersetzte Fragen. Formell werden alle Fatwas durch eine Anfrage eingeleitet, wobei keine Angaben zum Ratsuchenden gemacht werden. Am Ende einer jeden Antwort wird der Name des Muftis bzw. der *iftā*²-Institution angegeben. Alle dort zur Verfügung gestellten Fatwas stammen von Gelehrten salafistischer Prägung. Dabei handelt es sich in erster Linie um Muftis aus Saudi-Arabien. So ist das *Ständige Komitee für islamische Forschung und Rechtsfragen*,³⁹ das 1971 durch König Faisal (gest. 1975) gegründet wurde, mit 414 Fatwas vertreten.⁴⁰ Dieses Komitee berät zum einen die Regierung Saudi-Arabiens in Sachen Politik und Gesetzgebung und ist zum anderen der Bevölkerung bei der Beantwortung von Fragen unterschiedlicher Art dienlich. ‘Abd al-‘Azīz b. Bāz, der auf der Website *islamfatwa.de* mit 247 Fatwas präsent ist, leitete neben seinem Amt als Großmufti Saudi-Arabiens bis 1999 dieses Komitee.⁴¹ Darüber hinaus sind dort der Reihe nach u. a. folgende Muftis stark vertreten: Muḥammad b. Šāliḥ al-‘Uṭaimīn (gest. 2001) mit 248 Fatwas, Šāliḥ al-Fawzān (geb. 1933) mit 121 Fatwas, Naṣr ad-Dīn al-Albānī (gest. 1999) mit 49 Fatwas, Ibn Taimiyya (gest. 1328) mit 25 Fatwas und Ibn Qaiyim al-Ġauzīya (gest. 1358) mit 23 Fatwas.⁴² Es handelt sich demnach entweder um Vordenker des Salafismus oder um zeitgenössische führende Köpfe des Salafismus, die primär aus Saudi-Arabien stammen. Dies unterstützt die Vermutung, dass diese Website von saudischer Seite finanziert wird, wenngleich die Site selbst darüber keine Angaben macht. Vielmehr weisen sie die Behauptung zurück, „Wahhabiyah-Agenten“ zu sein. Sie seien „die Rufer zu Allah“.⁴³

38 Vgl. <https://islamfatwa.de/sitemap>; <https://islamfatwa.de/kleidung-schmuck/101-koerperpflege-a-kosmetik/301-augenbrauen-zupfen-wenn-ehemann-es-befiehlt> (letzter Aufruf 15. 04. 2018).

39 Arabisch: *al-Laḡna ad-Dā’ima li-l-Buḥūṭ al-‘Ilmīya wa-l-Ifṭā’*.

40 Für Näheres zu diesem Komitee siehe AL ATAWNEH, *supra* Fn. 18, 17 ff.; <http://www.alifta.net/>; <https://islamfatwa.de/biografien/89-das-staendige-komitee-fuer-rechtsfragen> (letzter Aufruf 15. 04. 2018).

41 Vgl. <http://www.alifta.net/MailList/contactwithus.aspx?languagename=ar&type=1>; <http://www.binbaz.org.sa/list/book> (letzter Aufruf 22. 05. 2018).

42 Vgl. <https://islamfatwa.de/gelehrte> (letzter Aufruf 22. 05. 2018).

43 <https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqidah-und-da-wah>, Punkt 25 (letzter Aufruf 14. 05. 2018).

Die Mitwirkenden der Website, die die Übersetzungstätigkeit angeblich ehrenamtlich übernehmen und die Website betreiben, bezeichnen sich als „[...] Muslime, die bestrebt sind dem Qur’aan und der Sunnah des Propheten [...] zu folgen, nach dem Verständnis der rechtschaffenden Vorfahren (*Salaf-us-saalih*)“.⁴⁴ Sie führen zwar ihre Namen an, diese lassen sich aber nicht weiter zuordnen. Es handelt sich möglicherweise um Pseudonyme.⁴⁵ In ihrer Selbstdarstellung werden insgesamt 34 Grundsätze aufgeführt, denen die Website in ihrer *‘aqīda* („Glaubenslehre“) und *da‘wa* („Missionierung“) zu folgen beansprucht. Diese Prinzipien gehen auf die Schrift eines führenden Kopfes des Salafismus im Jemen Muqbil b. Hadī al-Wādīī (gest. 2001) zurück. Die Hauptmerkmale dieser Ideologie lassen sich wie folgt zusammenfassen:⁴⁶ Sie stützen sich auf Aussagen des Korans, der Sunna sowie der *Salaf* und lassen keine anderen Interpretationen der religiösen Quellen zu als ihre eigenen. Auch Interpretationen früherer Gelehrter, sei es auf dem Gebiet der Jurisprudenz (*fiqh*), der Koranauslegung (*tafsīr*) oder der islamischen Geschichte (*tārīḥ*), werden, sofern diese sich nicht auf Beweise aus dem Koran oder der Sunna stützen, nicht miteinbezogen.⁴⁷ Dies deutet auf eine klare Abgrenzung zu den Kontextualisierungspraktiken der Quellentexte hin, wie es indessen von vielen anderen zeitgenössischen Intellektuellen angestrebt wird.⁴⁸

In der Antwort auf die Frage, welcher Rechtsschule die dargelegten Ansichten auf der Website folgen, wird betont, dass sich die Fatwa-Erstellung auf diesem Portal nicht auf eine bestimmte Rechtsschule beziehe, sondern „[...] [v]ielmehr wird dem Urteil gefolgt, welches Haqq (Wahrheit/rechtens) ist, so wie es für jeden Muslim verpflichtend ist. In einigen Angelegenheiten werden auch die unterschiedlichen Meinungen der Gelehrten aufgeführt.“⁴⁹ Die Vertreter

44 Vgl. <https://islamfatwa.de/ueber-uns/1730-das-islamfatwa-de-team> (letzter Aufruf 22. 04. 2018).

45 Zu den dort angeführten Namen zählen Abu Abdul-Majid, Seyyid at-Turki, Abdurahman al-Albani, Abu Idris und Abou Obaida at-Tunisi. Vgl. <https://islamfatwa.de/ueber-uns/1730-das-islamfatwa-de-team>. (letzter Aufruf 18. 05. 2018).

46 Vgl. <https://islamfatwa.de/ueber-uns/521-ueber-uns> (letzter Aufruf 22. 04. 2018).

47 Vgl. <https://islamfatwa.de/ueber-uns/1729-was-ist-islamfatwa-de>, <https://islamfatwa.de/ueber-uns/1730-das-islamfatwa-de-team>; <https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqidah-und-da-wah>, Punkt 8 (letzter Aufruf 22. 04. 2018).

48 Vgl. z. B. ABU ZAID NASR HAMID, Gottes Menschenwort, ausgewählt, übersetzt und kommentiert von Thomas Hildebrandt, Freiburg i. B. 2008; KRÖNER FELIX, Alter Text – neuer Kontext. Koranhermeneutik in der Türkei heute, Freiburg i. B. 2006.

49 <https://islamfatwa.de/ueber-uns/1736-welche-rechtsschule-madhhab-wird-auf-islamfatwa-de-vertreten> (letzter Aufruf 25. 04. 2018).

der Website erheben demnach Anspruch darauf, die Wahrheit zu erkennen und zu präsentieren. Indem sie behaupten, die Rechtsmeinungen anderer Rechtsschulen miteinzubeziehen, wollen sie Offenheit gegenüber anderen Ansichten suggerieren und geben damit vor, dass sie die Vielfalt des Islam aufzeigen würden.

Aufbauend auf ihrem buchstabengetreuen Textverständnis erfolgt in ihrer Ideologie eine strikte Unterscheidung zwischen den „Gläubigen“ und den „Ungläubigen“, was durchgehend zur Intoleranz und Diskriminierung gegenüber anderen religiösen Vorstellungen führt. Dazu gehören nicht nur Nichtmuslime, sondern auch alle andersdenkenden Muslime wie etwa die Schiiten.⁵⁰ Den Sprechern dieser Website gilt nur der Islam als „Wahrheit“ und alle anderen Religionen müssen daher eine „Lüge“ sein.⁵¹ Der Islam wird dabei als holistisches Gebilde verstanden, das Regelungen für Staat und Religion aufstelle. Seine Regelungen gälten für jede Zeit und an jedem Ort. Ideen zur Trennung von Religion und Politik werden strikt abgelehnt. Es gebe „keine Ehre oder Sieg für die Muslime [...], bis sie zum Buch Allahs und der Sunnah des Gesandten Allahs [...] zurückkehren.“⁵² Der Glaube daran stelle eine Voraussetzung zur Vollständigkeit des Glaubens eines jeden Muslims dar.⁵³

Die auf dem Portal *islamfatwa.de* zur Verfügung gestellten Fatwas sind in sieben Kategorien unterteilt: Das Genre Glaubenslehre (*‘aqīda*) behandelt Fragen theologischer Natur wie etwa der Glaube an Gott, Seine Attribute, Engel und Propheten, das Schicksal und der Tag der Auferstehung.⁵⁴ Im Rahmen der zweiten Kategorie der sog. *manhağ* („Methodik“) werden

50 Siehe ausführlich dazu EL-WERENY MAHMUD, Salafismus als Herausforderung für die Integration: Der religiös Andere in der salafistischen Ideologie, Demokratie-Dialog, Jg. 3 (2018), 38 – 45; OURGHI MARIELLA, Schiiten als Ungläubige: Zur situativen Kontingenz einer salafistischen Feindbildkonstruktion, in: Schneiders Thorsten Gerald (Hrsg.), Salafismus in Deutschland Ursprünge und Gefahren einer islamisch-fundamentalistischen Bewegung, Bielefeld 2014, 279 – 291.

51 Vgl. z. B. <https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqidah-und-da-wah> (letzter Aufruf 07.05.2018).

52 <https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqidah-und-da-wah>, Punkt 19. (letzter Aufruf 08.05.2018). Für Näheres dazu FARSCID OLAF, Salafismus als politische Ideologie, in: Said Behnam T./ Fouad Hazim (Hrsg.), Salafismus: Auf der Suche nach dem wahren Islam, Freiburg i. B. 2014, 160 – 193.

53 Vgl. <https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqidah-und-da-wah>, Punkt 14, 18 und 19 (letzter Aufruf 06.05.18). Siehe ausführlich dazu Abschnitt 3 (Fallbeispiel II).

54 Vgl. <https://islamfatwa.de/aqidah-tauhid> (letzter Aufruf 09.05.2018).

unterschiedliche Themen besprochen wie z. B. die Notwendigkeit, die *salaf* zu befolgen, den Aufruf zum Islam zu betreiben (*da'wa*) und mögliche Neuerungen (*bid'a*) zu bekämpfen. Zudem werden in diesem Zusammenhang Fragen zur Politik, Gewaltanwendung und der Befolgung einer Rechtsschule thematisiert.⁵⁵ Die dritte Rubrik *ibādāt* („Gottesdienste“) umfasst Fatwas zur rituellen Praxis wie etwa dem Gebet, Fasten und zur Pilgerreise.⁵⁶ Die darauffolgende Kategorie widmet sich exegetischen Fragen zu heiligen Schriften des Islam (Koran und Sunna) sowie auch zum Umgang mit den Schriften anderer Offenbarungsreligionen (Judentum und Christentum).⁵⁷ Die übrigen drei Kategorien befassen sich mit Fatwas gesellschaftlicher Art. Dort werden Rechtsgutachten zur Kleidung, Bildung, Arbeit, Musik, Krankheit, Ehe, Schwangerschaft, Scheidung, weiblichen Genitalverstümmelung und zum Umgang mit Mitmenschen, Speisevorschriften und mit Tieren dargestellt.⁵⁸ In Anbetracht dieser Kategorisierung beschränkt die Website die Fatwa-Funktion nicht nur auf die Erteilung von Antworten auf alltägliche Rechtsfragen soziökonomischer oder politischer Art. Vielmehr wollen Vertreter des Portals die Fatwa-Erteilung als allumfassendes Instrument verstanden wissen, das sich sowohl auf alltägliche Rechtsprobleme als auch ideologische, theologische und exegetische Fragen zum Koran und der Sunna erstreckt. Auf diesem Wege streben sie eine weitreichende Verbreitung ihrer salafistischen Ideologie an, welche alle Bereiche des Lebens in den Blick nimmt. Um diese nun als salafistisch zu bewertende Website in das salafistische Spektrum einordnen zu können, wird im Folgenden neben frauenbezogenen Fatwas auch die dort vertretene Haltung zu Politik und Demokratie thematisiert. Das sind zwei Themenschwerpunkte, die das möglich bestehende Konfliktpotenzial zwischen dem auf der Website vertretenen Islamverständnis und den in Deutschland bzw. im Westen herrschenden Gesetzen zutage fördern. Glaubens- und Ritusfragen sind in diesem Zusammenhang weniger relevant, da sie nach dem Grundgesetz den Schutz der Religionsfreiheit genießen. Die einschlägigen Ansichten werden auf ihre inhaltlichen Argumentationsweisen und in vergleichender Gegenüberstellung mit den Positionen der bereits oben erwähnten Autoren ausgewertet.

55 Vgl. <https://islamfatwa.de/manhaj> (letzter Aufruf 09. 05. 2018).

56 Vgl. <https://islamfatwa.de/gottesdienste-ibadah> (letzter Aufruf 10. 05. 2018).

57 Vgl. <https://islamfatwa.de/qur-an-sunnah-offenbarungsschriften> (letzter Aufruf 10. 05. 2018).

58 Vgl. <https://islamfatwa.de/krankheit-heilung>, <https://islamfatwa.de/soziale-angelegenheiten>; <https://islamfatwa.de/kleidung-schmuck> (letzter Aufruf 12. 05. 2018).

IV. Darstellung und Analyse ausgewählter Fatwas

1. Fatwas zur Stellung der Frau

Zum Thema Frauen bietet das Portal zahlreiche Fatwas, die unterschiedliche Fragen wie etwa die Kleidervorschriften, Körperpflege und Kosmetik, das Verlassen des Hauses und die Ausübung eines Berufes behandeln. Einschlägige Fatwas zu Kleidervorschriften, die an dieser Stelle etwas näher betrachtet werden, machen nicht nur das Kopftuchtragen zur Pflicht, sondern tendieren eher zur Vollverschleierung (*niqāb*). Die zentrale Argumentationsbasis bilden dabei Belege aus dem Koran und der Sunna. Im Koran heiße es beispielsweise: „Und sag zu den gläubigen Frauen, sie sollen ihre Blicke senken und ihre Scham hüten, ihren Schmuck nicht offen zeigen, außer dem, was (sonst) sichtbar ist. Und sie sollen ihre Kopftücher auf den Brustschlitz ihres Gewandes schlagen und ihren Schmuck nicht offen zeigen.“⁵⁹ Zudem heiße es in 33:59: „O Prophet, sag deinen Gattinnen und deinen Töchtern und den Frauen der Gläubigen, sie sollen etwas von ihrem Überwurf über sich herunterziehen. Das ist eher geeignet, dass sie erkannt und so nicht belästigt werden. Und Allah ist Allvergebend und Barmherzig.“⁶⁰ Auch zahlreiche Überlieferungen bestätigen nach der Darstellung der Website einmal mehr die *niqāb*-Pflicht. Über ‘Ā’iṣā wird beispielhaft berichtet, dass sie und andere Frauen des Propheten ihre Tücher vom Kopf runter auf ihr Gesicht nehmen sollten, als sie in Begleitung des Propheten auf einer Wallfahrt waren und ihnen Reisende entgegenkamen.⁶¹ Ohne den historischen Hintergrund dieser Aussagen oder den Authentizitätsgrad der prophetischen Überlieferung zu hinterfragen, werden diese Beweise und dergleichen hingenommen und ihre praktische Umsetzung angestrebt.

Diese Position zur *Niqāb*-Pflicht wird von vielen Gelehrten und zeitgenössischen Autoren widerlegt. Entsprechend seiner Differenzierung zwischen statischen und wandelbaren Teilen der Scharia bestreitet Ṣaḥrūr beispielsweise

59 Koran 24:31. Zitiert nach <https://islamfatwa.de/kleidung-schmuck/139-niqab-gesichtsschleier/217-darlegung-ueber-die-pflicht-des-niqab>. Sieh auch <https://beta.islamqa.info/ge/answers/36619/regeln-die-speziell-f%C3%BCr-die-frauen-in-der-hajj-gelten> (letzter Aufruf 07. 05. 2018).

60 <https://islamfatwa.de/kleidung-schmuck/139-niqab-gesichtsschleier/215-darf-tugendhafte-frau-gesicht-a-haende-entbloessen> (letzter Aufruf 07. 05. 2018).

61 Koran 24:31. Zitiert nach <https://islamfatwa.de/kleidung-schmuck/139-niqab-gesichtsschleier/217-darlegung-ueber-die-pflicht-des-niqab> (letzter Aufruf 07. 05. 2018).

nicht nur das Niqab-, sondern auch das Kopftuchtragen. Auf seiner Website behandelt er zahlreiche einschlägige Fragen, wobei er diese Thematik in seiner Schrift *Naḥwa uṣūl ḡadīda li-l-fiqh al-islāmī. Fiqh al-mar'a* eingehend behandelt.⁶² Die Koranstelle 24:31 interpretiert er, im Gegensatz zur oben angeführten Interpretation, als die Bedeckung des Dekolletés. Der erwähnte Koranvers besage nicht, dass Frauen ihren Kopf mit einem Tuch bedecken müssten, vielmehr sollten sie den Schlitz ihres Kleides bedecken. Die Koranstelle 33:59 liest er als Sonderregelung für Ehegattinnen des Propheten. Darauf aufbauend erklärt er, dass jene Verse keine rechtliche eindeutige Aussagekraft weder für die Niqab- noch für die Kopftuchpflicht haben.⁶³ Die Kopfbedeckung erachtet er als kulturspezifische Praxis im damaligen Arabien und führt sie auf die klimatischen Gründe zurück. Diese zeit- und ortsabhängige Praxis sei demnach je nach Zeit und Ort veränderbar.⁶⁴

Unter der Rubrik *Fatāwā wa-aḡkām* bietet al-Qaraḡāwīs Internetportal⁶⁵ umfangreiche Abhandlungen zur Stellung der Frau im Islam, wobei all diese Fatwas seinen bereits publizierten Schriften entnommen sind. Anders als Šahrūr ist al-Qaraḡāwī in seiner Argumentation zum Thema Niqab- und Kopftuchtragen bemüht, die oben angeführten Beweise für die Niqab-Pflicht lediglich auf das Tragen von Kopftuch zu beschränken. Ihm zufolge implizieren die oben angeführten Beweise keine soliden Grundlagen für die Notwendigkeit, das Gesicht und die Hände zu bedecken. Selbst wenn jene Belege authentischer Natur wären, gelte die darin enthaltene Regelung nicht für alle Musliminnen, sondern nur für die Gattinnen des Propheten, die sogenannten Mütter der Gläubigen (*ummaḡāt al-mu'minīn*).⁶⁶

In vielen weiteren Fatwas auf *islamfatwa.de* werden darüber hinaus Inhalte propagiert, die muslimische Frauen vor große Herausforderungen stellen. Alltägliche Fragen gehen damit einher. So sei muslimischen Frauen verboten, alleine ohne *maḡram* zu verreisen. Denn sie laufen Gefahr, in Kontakt mit

62 Vgl. u. a. <http://shahrour.org/?topic=%D8%A7%D9%84%D8%AD%D8%AC%D8%A7%D8%A8-3>, <http://shahrour.org/?topic=%D8%AE%D9%84%D8%B9-%D8%A7%D9%84%D8%AD%D8%AC%D8%A7%D8%A8> (letzter Aufruf 08. 05. 2018). Ausführlich dazu ŠAHRŪR, *supra* Fn. 16; EL-WERENY, *supra* Fn. 18, 160 ff.

63 Vgl. ŠAHRŪR, *supra* Fn. 16, 347 f.

64 Vgl. ŠAHRŪR, *supra* Fn. 16, 355 f.

65 Siehe ausführlich dazu GRÄF, *supra* Fn. 4, 244 ff.

66 Vgl. u. a. <https://www.al-qaradawi.net/node/4053>; <https://www.al-qaradawi.net/node/1454> (letzter Aufruf 28.04.18). Mehr dazu al-Qaraḡāwī: *Fatāwā mu'ašira*, Kuwait 2005, Bd. 2, 328 ff.; EL-WERENY, *supra* Fn. 9, 235 ff.

fremden Männern zu kommen (*iḥilāt*), was schariagemäßig verboten sei. Argumentiert wird an dieser Stelle vor allem mit dem Prophetenausspruch: „Eine Frau darf nur reisen, wenn ein *mahram* dabei ist“.⁶⁷ Viele andere zeitgenössische Gelehrte kontextualisieren diesen Hadith und erachten es für notwendig, ihn zeit- und ortsgemäß zu verstehen. Der Prophet hätte das verboten, weil es damals noch keine Züge oder Flugzeuge gegeben hätte, worin viele Menschen mitreisten. Die Begründung, Frauen seien während einer Reise allein und kämen zusammen mit fremden Männern, sei nicht mehr haltbar.⁶⁸

In einer anderen Fatwa wird muslimischen Frauen auch verboten zu arbeiten oder überhaupt rauszugehen, außer wenn eine Notlage vorliege. Dies sei in ihrem Interesse:

„Der Mann macht seine Arbeit, welche normalerweise das Arbeiten um den Lebensunterhalt zu sichern und/oder der Nutzen der Ummah ist. Wenn sie [die Frau] daheim ist schaut sie nach ihm und den Kindern, denn dies ist ihre Aufgabe. Es ist zu alldem ein Schutz für sie, denn es schützt sie vor Unmoral, die im Zusammenhang mit dem Vermischen mit dem [fremden] Mann, aufkommt. [...] Wenn ein Mann mit einer Frau zusammen trifft, dann wird er von ihr abgelenkt, besonders wenn sie jung und schön ist.“⁶⁹

Frauen sei es darüber hinaus verboten Passfotos zu machen, da das Gesicht 'aura' („ein zu verhüllender Teil des Körpers“) sei, oder Hosen zu tragen, da sie so Männer nachahmen würden, was verboten sei.⁷⁰ Diese Fatwas und der-

67 Vgl. <https://islamfatwa.de/soziale-angelegenheiten/161-gesellschaft-aktuelles/sonstiges-speziell-fuer-frauen/407-darf-die-frau-ohne-mahram-reisen> (letzter Aufruf 24. 04. 2018).

68 Vgl. z. B. www.qaradawi.net/new/Articles-5429 und http://shahrou.org/?page_id=1679 (letzter Aufruf 01.05. 2018).

69 <https://islamfatwa.de/soziale-angelegenheiten/161-gesellschaft-aktuelles/sonstiges-speziell-fuer-frauen/774-ist-islam-ungerecht-weil-er-frauen-zuhause-behaelt> (letzter Aufruf 01.05. 2018).

70 Vgl. <https://islamfatwa.de/kleidung-schmuck/139-niqab-gesichtsschleier/216-das-gesichtsfoto-einer-frau-im-pass>; <https://islamfatwa.de/kleidung-schmuck/134-aura-von-frau-mann/293-einige-urteile-ueber-frauendie-hosen-tragen> (letzter Aufruf 24.04.18). Frauen dürften darüber hinaus weder Absatzschuhe tragen, da sie somit den ungläubigen Frauen nachahmen würden, als auch verbotenerweise die Aufmerksamkeit von Männern auf sich zögen, noch Schuhe, die Männerschuhen ähnlich seien, mit der gleichen Begründung wie bei Hosen. Siehe auch <https://islamfatwa.de/kleidung-schmuck/134-aura-von-frau-mann/425-darf-eine-frau-absatz-stoekelschuhe-tragen> (letzter Aufruf 24. 04. 2018).

gleichen mehr stellen eindeutig dar, wie Frauenrechte nach dem Verständnis dieser Website beschnitten werden. Männer werden dort im Generellen über die Frauen gestellt. Die Argumentationsbasis bilden Belege aus dem Koran und der Sunna. Im Koran heie es z. B.: „Die Mnner stehen in Verantwortung fr die Frauen wegen dessen, womit Gott die einen von ihnen vor den anderen ausgezeichnet hat und weil sie von ihrem Besitz (fr sie) ausgeben.“ In einer prophetischen berlieferung heie es ferner: „Kein Volk wird jemals erfolgreich sein, welches eine Frau zu seinem Fhrer ernennt.“⁷¹

Es lsst sich demnach erkennen, dass *islamfatwa.de* ein Frauenbild prsentiert, das Unterdrckung impliziert und erhebliche Zweifel an der Gleichberechtigung der Geschlechter aufkommen lsst. Dies basiert auf dem wortwrtlichen Verstndnis der Quellentexte, das der Frau ausschlielich die Rolle als Ehe-, Hausfrau und Mutter zuerkennt.⁷² Es widerspricht somit eindeutig dem in Art. 3 Abs. 2 und 3 Satz 1 GG garantierten Grundsatz der Gleichberechtigung von Mann und Frau.⁷³

2. Haltung zur Politik und Demokratie

Die Website vermittelt unmissverstndlich die Botschaft, dass Gottessouvernitt Vorrang vor der Volkssouvernitt – der Demokratie – eingerumt werden msse. Demokratie wird im Generellen als Gegenreligion zum Islam aufgefasst, da sie sich statt auf Gottes Herrschaft zu grnden, auf politische Instanzen und menschengemachten Gesetzen grnde. Nur Gottes Gesetze knnten Antworten auf alle Fragen des Lebens geben. Dies umfasse sowohl die religise als auch die politische Sphre; beide seien eine inhrente Einheit, die nicht voneinander zu trennen seien. Skularisierungsversuche zielten unweigerlich auf die Zerstrung des Islam und die Verbreitung von Chaos ab. Alle politischen Parteien werden als abtrnnig diskreditiert. Auch werden Ideologien wie Kommunismus, Sozialismus, Liberalismus und Skularismus

71 <https://islamfatwa.de/gottesdienste-ibadah/37-gebet-salah/gemeinschaftsgebete/1794-eine-frau-darf-weder-maenner-noch-jungen-im-gebet-leiten> (letzter Aufruf 23. 04. 2018).

72 Vgl. mehr dazu FONTANA SINA, *Universelle Frauenrechte und islamisches Recht*, Tbingen 2017, 134 ff.; VINCENZO OLIVETI, *Terror's Source. The Ideology of Wahhabi-Salafism and its Consequences*, Birmingham 2002, 36 f. und 41 f.

73 Vgl. https://www.gesetze-im-internet.de/gg/art_3.html (letzter Aufruf 13. 05. 2018).

als *kufr* stigmatisiert.⁷⁴ Es gebe ausschließlich zwei Kategorien von Menschen; die Partei Gottes, die die Scharia und all ihre Regelungen auf alle Bereiche des Lebens anwenden, und die Partei des Teufels (*ḥizb aš-šayṭān*), die indessen „den Krieg gegen Allahs Scharia erklärt haben“, d. h. jene, die die islamische Gesetzgebung in ihrem holistischen Gebilde nicht umsetzen oder infrage stellen. Nach den auf der Website vertretenen Rechtsansichten verfügt die Scharia als ganzheitliche Staats- und Gesellschaftsordnung über eine ewige Gültigkeit, die unabhängig von Zeit und Ort umgesetzt werden solle.⁷⁵

Der Zustand der islamisch geprägten Gesellschaften wird wie folgt beschrieben: „Demokratie und Aberglauben! In der Politik wenden wir die Demokratie an, in der *Ibādah* (Gottesdienste) beten wie die Gräber an und in den Namen und Eigenschaften Allahs begehren wir *Ta'tiil* (das Verleugnen der Namen und Eigenschaften Allahs) [...]“.⁷⁶ Als Folge seien Muslime heute wie „der Schaum am Meer, wertlos, mit Ausnahme einiger weniger“.⁷⁷ An dieser Misere seien die demokratischen Systeme, die auf menschengemachten Gesetzen basieren und Gottes Recht außen vor lassen, Schuld. „Der Gesandte Allahs [...] informierte uns über die Lösung dazu, dass wir [Muslime] zu unserer Religion zurückkehren. Wenn wir dies nicht tun, werden die Angriffe unserer Feinde [im Westen] zunehmen [...]“.⁷⁸ Die Notwendigkeit, demokratische Systeme abzulehnen und alle Fragen des Lebens nach der Scharia-Ordnung auszurichten, wird in erster Linie mit koranischen Aussagen gerechtfertigt:

„Und so richte zwischen ihnen nach dem, was Allah (als Offenbarung) herabgesandt hat, und folge nicht ihren Neigungen, sondern sieh dich vor ihnen vor, dass sie dich nicht der Versuchung aussetzen (abzuweichen) von einem

74 Vgl. z. B. <https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqidah-und-da-wah> (letzter Aufruf 06.05.2018). Weiterführend zu ihrer Haltung zur Politik siehe u. a. FAR-SCHID, *supra* Fn. 51, 160–193; EL-WERENY MAHMUD, Wahlen und Demokratie versus Scharia? Salafismus und die Teilhabe am politischen Leben im Westen, Demokratie-Dialog, Jg. 1 (2018), 48–55.

75 Vgl. <https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqidah-und-da-wah> (letzter Aufruf 27.04.18).

76 <https://islamfatwa.de/manhaj/112-das-folgen-der-salaf-us-salih/876-verhalten-bei-verunglimpfung-des-propheten-sallallahu-alayhi-wa-sallam> (letzter Aufruf 28.04.18).

77 <https://islamfatwa.de/manhaj/112-das-folgen-der-salaf-us-salih/876-verhalten-bei-verunglimpfung-des-propheten-sallallahu-alayhi-wa-sallam> (letzter Aufruf 20.04.18).

78 <https://islamfatwa.de/manhaj/112-das-folgen-der-salaf-us-salih/876-verhalten-bei-verunglimpfung-des-propheten-sallallahu-alayhi-wa-sallam>; <https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqidah-und-da-wah> (letzter Aufruf 20.04.18).

Teil dessen, was Allah zu dir (als Offenbarung) herabgesandt hat! Doch wenn sie sich abkehren, so wisse, dass Allah sie für einen Teil ihrer Sünden treffen will. Viele von den Menschen sind fürwahr Frevler.“⁷⁹

Auf dem Fatwa-Portal wird nicht nur eine ablehnende Haltung gegenüber den politischen Systemen westlicher wie islamischer Staaten vertreten, die sich nicht nach der Scharia richten. Vielmehr werden Muslime in zahlreichen Fatwas dazu aufgerufen, sich von jenen Systemen loszusagen (*barāʿ*). Gestützt auf das Prinzip des sogenannten *al-walāʾ wa-l-barāʾ* („Loyalität und Lossagung“) vertreten Salafisten die Ansicht, dass Muslime, die ein Mehrparteiensystem befürworten oder sich in diesem engagieren, sich unzulässiger Loyalität gegenüber politischen Führern schuldig machen und somit keine wahren Muslime mehr seien. Die Loyalität gebühre nur Gott, seinem Gesandten und den muslimischen Gläubigen.⁸⁰ Auch dieses Prinzip wird mit vielen Zitaten aus dem Koran und der Sunna untermauert, die wortgetreu verstanden werden. U. a. heiße es:

„Du findest keine Leute, die an Allah und den Jüngsten Tag glauben und denjenigen Zuneigung bezeigen, die Allah und Seinem Gesandten zuwiderhandeln, auch wenn diese ihre Väter wären oder ihre Söhne oder ihre Brüder oder ihre Sippenmitglieder. Jene – in ihre Herzen hat Er den Glauben geschrieben [...]“⁸¹

Unter Berufung auf dieses Loyalitätsprinzip sind auf der Website eine Vielzahl an Fatwas zu finden, die ein Feindbild gegenüber Andersdenkenden vermitteln. Dabei wird eine dichotome Weltsicht aus „gut“, „wahr“, „gläubig“ gegenüber „böse“, „falsch“, „ungläubig“ vertreten.⁸² Muslimen wird in diesem

79 <https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqidah-und-da-wah>. Siehe für weitere Belege <https://islamqa.info/ar/107166> (letzter Aufruf 01. 05. 2018).

80 Vgl. <https://islamfatwa.de/manhaj/28-gruppen-a-sekten/shia/911-die-aussage-schia-und-rafidah-sind-unsere-brueder>; <https://islamfatwa.de/soziale-angelegenheiten/150-muslimen-in-nicht-muslimischen-laendern/901-kuffar-staatsbuergerschaft-annehmen>, <https://islamfatwa.de/soziale-angelegenheiten/147-gesellschaft-aktuelles/begrueessung-a-begluueckwuenschung/1240-gratulieren-zum-neujahr-silvester> (letzter Aufruf 01. 05. 2018). Für Näheres dazu WAGEMAKERS JOAS, Salafistische Strömungen und ihre Sicht auf *al-walāʾ wa-l barāʾ* (Loyalität und Lossagung), in: Said/Fouad (Hrsg.), *supra* Fn. 51, 55 – 79, hier 57 ff.

81 Zitiert nach <https://islamfatwa.de/aqidah-tauhid/164-tauhid-monotheismus/1246-die-bedingungen-von-la-ilaha-illa-allah> (letzter Aufruf 01. 05. 2018).

82 Vgl. <https://islamfatwa.de/aqidah-tauhid/135-tag-der-auferstehung-anzeichen/paradies-hoelle/142-bedeutung-ewiger-aufenthalt-in-der-hoelle>, <https://islamfatwa.de/aqidah-tauhid/135-tag-der-auferstehung-anzeichen/paradies-hoelle/142-bedeutung-ewiger-aufenthalt-in-der-hoelle>, <https://islamfatwa.de/aqidah-tauhid/135-tag-der-auferstehung-anzeichen/paradies-hoelle/142-bedeutung-ewiger-aufenthalt-in-der-hoelle>.

Sinne verboten, Kontakt mit Nichtmuslimen zu suchen oder ihnen zu ihren Festen und Ritualen zu gratulieren. Denn dies beinhalte eine Art Einverständnis mit ihrer „Falschheit“ und impliziere gewisse Loyalität ihnen gegenüber.⁸³ Zur Rechtfertigung dieser und ähnlicher Positionen greifen Vertreter dieser Meinung auf Koranverse sowie auf die Ansichten früherer Gelehrter wie Ibn Taimiyya und Ibn al-Qaiyim zurück.⁸⁴ Dazu soll letzterer in Bezug auf die Teilhabe an jüdischen oder christlichen Feierlichkeiten gesagt haben: „So ist es auch den Muslimen nicht erlaubt, ihnen [Juden und Christen] dabei zu helfen oder ihnen dabei Gesellschaft zu leisten, gemäß dem Konsens der Gelehrten. [...] Wer das tue, begehe somit eine Sünde.“⁸⁵ Obwohl Angehörige des Judentums und des Christentums von der Mehrheit der Muslime als „Besitzer einer Heiligen Schrift“ (*ahl al-kitāb*) und somit als Gläubige einer anderen Religion anerkannt werden, werden sie in den auf *islamfatwa.de* angeführten Fatwas als „Ungläubige“ (*kuffār* Sg. *kāfir*) bezeichnet und als Feinde des Islam und der Muslime dargestellt.⁸⁶

Das *walāʾ*- und *barāʾ*-Prinzip dient darüber hinaus als weitere Argumentationsstütze, um Muslimen in mehrheitlich nichtislamischen Gesellschaften

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- tauhid/135-tag-der-auferstehung-zeichen/paradies-hoelle?layout= und ähnlich bei <https://islamqa.info/en/cat/234> (letzter Aufruf 01. 05. 2018).
- 83 <https://islamfatwa.de/soziale-angelegenheiten/147-gesellschaft-aktuelles/begrueessung-a-beglueckwuenschung/1240-gratulieren-zum-neujahr-silvester>; <https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/492-es-ist-muslim-nicht-erlaubt-an-christlichen-festen>; Ähnlich bei <https://islamqa.info/ge/50074> (letzter Aufruf 01. 05. 2018). Für Näheres dazu EL-WERENY, *supra* Fn. 49, 39 ff.
- 84 Vgl. <https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/1326-speisen-u-geschenke-der-kuffar-anlaesslich-ihrer-feste-essen-od-annehmen> (letzter Aufruf 01. 05. 2018). An dieser Stelle wird u. a. 5:51 angeführt: „O die ihr glaubt, nehmt nicht die Juden und die Christen zu Schutzherren! Sie sind einer des anderen Schutzherren. Und wer von euch sie zu Schutzherren nimmt, der gehört zu ihnen. Gewiß, Allah leitet das ungerechte Volk nicht recht.“ Mehr dazu EL-WERENY, *supra* Fn. 18, 241 ff.
- 85 <https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/1326-speisen-u-geschenke-der-kuffar-anlaesslich-ihrer-feste-essen-od-annehmen>, <https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/493-muslime-welche-feiertage-der-nicht-muslime-feiern> (letzter Aufruf 01. 05. 2018).
- 86 Siehe weiterführend dazu <https://islamfatwa.de/suche?query=kafir> (letzter Aufruf 01. 05. 2018). Für Näheres dazu u. a. RUDOLPH EKKEHARD, Von „Schriftbesitzern“ zu „Ungläubigen“ Christen in der salafistischen Daʿwa, in: Schneiders Thorsten Gerald (Hrsg.), *Salafismus in Deutschland Ursprünge und Gefahren einer islamisch-fundamentalistischen Bewegung*, Bielefeld 2014, 91 – 301.

aufzuerlegen, die dort geltenden Gesetze nicht oder nur in Zwangslagen zu akzeptieren. Gerichtsurteile seien auch nur im Notfall anzunehmen. Man sollte seine möglich auftretenden Rechtskonflikte bestenfalls nicht vor Gerichte „der Ungläubigen/*kuffār*“ tragen. „Ein Muslim muss sein Bestes tun, um Gerichte der *Kuffar* zu vermeiden. Wenn er jedoch keine andere Möglichkeit hat, darf er sie nutzen.“⁸⁷ Die Ablehnung solcher Gerichte wird damit begründet, dass dort nicht nach der Scharia, sondern nach von Menschen gemachten Gesetzen gerichtet werde. In einer anderen Fatwa wird Muslimen ebenfalls verboten, die Staatsbürgerschaft eines nichtislamischen Landes zu erwerben. „Es ist nicht erlaubt die Nationalität der *Kuffar* anzunehmen, auch dann nicht, wenn man seine eigene behalten darf, weil es negativ auf den Muslim, seine Religion und Glauben einwirkt.“⁸⁸ Als Grundlage dieses Verbots dient ihnen erneut der Koran.⁸⁹ Der Erwerb einer solchen Staatsbürgerschaft impliziere Loyalität gegenüber dem Land sowie eine bereitwillige Unterwerfung gegenüber den Ungläubigen. Dies widerspreche wiederum „der Perfektion des [muslimischen] Glaubens, oder es vernichtet ihn, je nach Situation.“⁹⁰ In Anbetracht dessen vermittelt dieses Fatwa-Portal ein Feindbild von Andersgläubigen sowie eine ablehnende Haltung gegenüber allen scharia-widrigen Staatsordnungen.

Viele andere zeitgenössische Gelehrte befürworten indessen die Einbürgerung von Muslimen mit dem Argument, sie bekämen dadurch viele Vorteile. Explizit wird hier das Wahlrecht als Beispiel angeführt, was eindeutig auf ihre Zustimmung der Inanspruchnahme des Wahlrechts hindeutet.⁹¹ Die Frage, ob sich Muslime gegenüber den Gesetzen oder den Mitbürgern loyal verhalten sollen, wird befürwortet. Die von salafistisch geprägten Gelehrten angeführten Beweise, wie oben gezeigt, werden entweder kontextualisiert oder ihre

87 <https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/760-gerichtsverfahren-vor-kuffar-gericht-anstreben>. Ähnlich bei <https://islamqa.info/ge/92650> sowie <https://islamqa.info/ge/176910> (letzter Aufruf 08. 05. 2018).

88 <https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/901-kuffar-staatsbuergerschaft-annehmen> (letzter Aufruf 13. 05. 2018).

89 In diesem Zusammenhang wird der oben angeführte Koranvers (58:22) zitiert.

90 <https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/901-kuffar-staatsbuergerschaft-annehmen> (letzter Aufruf 04. 05. 2018)

91 Vgl. für einen Überblick SULTĀN ṢALĀH AD-DĪN, *al-Iqāma fi ġair dār al-islām baina l-nāfiʿ wa-l-muʿbitīn* (05/2007), unter: <https://saaid.net/PowerPoint/568.pps> (letzter Aufruf 12. 02. 2018). Ausführlich dazu EL-WERENY, *supra* Fn. 18, z. B. 232 ff., 238 ff.; SCHWEIZER URSI, *Muslimen in Europa: Staatsbürgerschaft und Islam in einer liberalen und säkularen Demokratie*, Berlin 2008.

Authentizität infrage gestellt.⁹² Zur weiteren Untermauerung dieser Position wird zwischen weltlicher und religiöser Loyalität unterschieden. Auf der Grundlage dieser Lesart werden Handlungen von Muslimen gegenüber Andersgläubigen begründet: In weltlichen Belangen dürften Muslime sich mit Nichtmuslimen zusammenschließen und mit ihnen kooperieren, solange dies von Nutzen für die gesamte Gesellschaft sei. Dazu gehöre auch die Erlaubnis, Nichtmuslimen zu ihren religiösen oder nationalen Feierlichkeiten zu gratulieren oder ihren Festen beizuwohnen. In religiösen Angelegenheiten hingegen bezieht sich die Loyalität auf Gott, Seinen Propheten und die anderen muslimischen Gläubigen.⁹³ Loyalität gegenüber dem Staat bzw. dessen Gesetzen bedeute die Einhaltung und Anerkennung aller Staatsregeln. Auch alle Formen von Verträgen oder Verabredungen, die ein Muslim mit dem Staat oder nichtmuslimischen Mitbürgern abschließt, sollten eingehalten werden. Die Argumentationsbasis bilden in diesem Zusammenhang die Prinzipien des islamischen Vertragsrechts, was anhand von zahlreichen Belegen aus dem Koran und der der Sunna untermauert wird.⁹⁴

Wirft man nun einen Blick zurück auf die angeführten Ansichten, kann man hier die auf dem Internetportal *islamfatwa.de* zur Verfügung gestellten Fatwas dem traditionalistischen bzw. dem heute sog. salafistischen Spektrum zuordnen. Die Frage, um welche Gruppe es sich innerhalb des Salafismus handelt und ob die Inhalte dieser Site im Unterschied zu anderen, im Allgemeinen als moderat einzustufenden, Fatwa-Diensten rezipiert werden, steht im Mittelpunkt des folgenden Abschnitts.

V. *islamfatwa.de* – Einordnung in den Salafismus

Der Terminus „Salafismus“ geht auf das arabische Wort *salaf* zurück, was so viel wie „Altvorderer“ oder „Vorgänger“ bedeutet. Gemeint sind in diesem

92 Vgl. ausführlich dazu EL-WERENY, *supra* Fn. 18, z. B. 241 ff.

93 Vgl. mehr dazu <https://www.al-qaradawi.net/node/4985> (letzter Aufruf 28.04.18); SCHWEIZER, *supra* Fn. 90, 40; EL-WERENY, *supra* Fn. 18, z. B. 185 ff.

94 Koran 17:34. In Sure 16 Vers 91 heißt es ähnlich: „Und erfüllt die Verpflichtung gegen Gott, wenn ihr eine (solche einmal) eingegangen habt, und brecht nicht die Eide, nachdem ihr sie (in aller Form) bekräftigt habt! Ihr habt ja Gott zum Garant gegen euch gemacht. Gott weiß, was ihr tut.“ Zitiert in AL-QARADĀWĪ, *Min hady al-islām: Fatāwā mu’āsira*, Kuwait 2003, Bd. 3, 642; EL-WERENY, *supra* Fn. 18, 241 ff.

Zusammenhang *as-salaf aš-šāliḥ* („rechtschaffenen Altvorderen“) der ersten drei Generationen islamischer Zeitrechnung, etwa zwischen dem sechsten und dem neunten Jahrhundert n. Chr.⁹⁵ Sie haben bei Vertretern dieses Fatwa-Portals sowie auch bei vielen anderen Muslimen einen hohen Stellenwert, da ihr Handeln und Islamverständnis aufgrund ihrer Nähe zu dem Propheten (gest. 632) und dessen Nachfolger als Idealzustand für die harmonische Einheit der Muslime, für religiöse Kompetenz und für Frömmigkeit angesehen wird.⁹⁶ Der Begriff Salafismus findet seit einigen Jahren sowohl im medialen als auch im wissenschaftlichen Diskurs zunehmend Verbreitung. Dabei handelt es sich um eine konservative Ideologie, deren Anhänger auf die Errichtung bzw. Wiedererrichtung einer an der Scharia orientierten Gesellschafts- und Staatsordnung nach dem Vorbild der ersten drei Generationen der Muslime abzielen.⁹⁷

Der zeitgenössische Salafismus ist laut Steinberg von der im 18. Jahrhundert auf der Arabischen Halbinsel entstandene Wahhabiyya-Bewegung maßgeblich beeinflusst worden,⁹⁸ wobei es über die islamische Geschichte hinweg immer wieder Persönlichkeiten und Bewegungen gab, die diese Strömung geprägt haben.⁹⁹ Das wahhabitische Islamverständnis wurde von zeitgenössischen

95 Nach Nedza besteht kein Konsens darüber, welche Zeitspanne genau diese drei Generationen umfasst. Vgl. dazu NEDZA JUSTYNA, „Salafismus“ – Überlegungen zur Schärfung einer Analysekategorie, in: Said/Fouad (Hrsg.), *supra* Fn. 51, 80 – 106, hier 97 f. Zur klaren Differenzierung zwischen dem oben dargestellten Salafismus und der „modernen“ Salafiyya, vertreten von Muḥammad ‘Abdu (gest. 1905) und Muḥammad Rašid Riḍā (gest. 1935) siehe ebd., 85 f.; EL-WERENY MAHMUD, Salafiyya, Salafismus und Islamismus: Verhältnisbestimmung und Ideologiemerkmale, *Demokratie-Dialog*, Jg. 1 (2017), 32 – 40.

96 Vgl. CEYLAN RAUF/KIEFER MICHAEL, Salafismus. Fundamentalistische Strömungen und Radikalisierungsprävention, Wiesbaden 2013, 77 ff.; KOZALI ABDURRAHIM, Zur Bedeutung von salaf und „Salafismus“, in: Ceylan Rauf/Jokisch Benjamin (Hrsg.), *Salafismus in Deutschland. Entstehung, Radikalisierung und Prävention*, Frankfurt a. M. 2014, 37 – 47.

97 Vgl. statt vieler SAID BEHNAM T/FOUAD HAZIM, Einleitung, in: Said/Fouad (Hrsg.), *supra* Fn. 51, 23 ff.

98 Vgl. CEYLAN/KIEFER, *supra* Fn. 95, 79; und mehr dazu bei STEINBERG GUIDO, Religion und Staat in Saudi-Arabien – Die wahhabitischen Gelehrten 1902 – 1953, Würzburg 2002, 28; GHARAIBEH MOHAMMAD, Zum Verhältnis von Wahhabiten und Salafisten, in: Schneiders Thorsten Gerald (Hrsg.), *Salafismus in Deutschland Ursprünge und Gefahren einer islamisch-fundamentalistischen Bewegung*, Bielefeld 2014, 117 – 125.

99 Zu nennen sind hier neben Aḥmad Ibn Ḥanbal (gest. 855) insbesondere die Gelehrten Ibn Ḥazm (gest. 1064) und Ibn Taimiyya (gest. 1328). Für Näheres dazu KOZALI, *supra* Fn. 95, 41; JOKISCH BENJAMIN, „Salafistische“ Strömungen im vormodernen Islam, in: Ceylan/Jokisch (Hrsg.), *supra* Fn. 95, 15 – 37.

salafistischen Gelehrten und Autoritäten Saudi-Arabiens in unterschiedlicher Ausprägung übernommen. Zahlreiche Gelehrte wie Ibn Bāz und al-Uṭaimīn orientieren sich an den Lehren der Wahhabiyya. Theologisch richten sich Anhänger der Wahhabiyya, als auch des Salafismus, in erster Linie nach den Lehren des Korans, der Sunna und der Lebensweise der frommen Altvorderen. Sie lehnen die blinde Übernahme tradierter Lehrmeinungen früherer Gelehrter ab und wenden sich den Quellentexten zu. Mit dieser Herangehensweise streben sie selbstständige Normenfindung an, um ihre Überzeugungen allein auf der Grundlage der autoritativen Texte zu begründen, die allerdings aufgrund ihrer buchstabengetreuen Auslegung der Lebensrealität weitgehend fremd ausfallen.¹⁰⁰ Folgerichtig wird die Wahhabiyya-Bewegung als „die wohl größte Antriebsfeder für den gegenwärtigen Salafismus“ erachtet.¹⁰¹

Innerhalb des salafistischen Spektrums gibt es unterschiedliche Strömungen, wobei die Übergänge fließend sind. Daher herrscht Meinungsverschiedenheit über eine systematische Aufteilung.¹⁰² Die weitgehend verbreitete Klassifizierung geht auf Wiktorowicz zurück. Er unterscheidet zwischen drei Hauptgruppen, auf die die anvisierte Einordnung der *islamfatwa.de* erfolgen soll: Erstens die salafistischen Dschihadisten, zweitens die politischen Salafisten und drittens die Puristen.¹⁰³ (1) Dschihadisten sehen in der Gewaltanwendung ein legitimes Mittel, um den vermeintlich reinen Islam zu verteidigen und ihre Vision eines islamischen Staates umzusetzen. Sie lehnen sowohl Missionsarbeit als auch politische Aktivitäten als Strategie für die Wiedererrichtung eines islamischen Gemeinwesens ab und erachten den Dschihad als den einzigen Weg zu dem ihnen vorschwebenden Staatswesen. Ihre Ideologie basiert in erster Linie auf dem ewigen Kampf zwischen dem Glauben an den *einen* Gott,

¹⁰⁰ Vgl. STEINBERG GUIDO, Wer sind die Salafisten? Zum Umgang mit einer schnell wachsenden und sich politisierenden Bewegung, in: SWP-Aktuell 28. Mai 2012, URL: https://www.swp-berlin.org/fileadmin/contents/products/aktuell/2012_A28_sbg.pdf (letzter Aufruf 07.05.2018), S. 5. Ausführlich zu Ibn ‘Abd al-Wahhābs Person siehe HASHMI SOHAIL H., Muhammad Ibn ‘Abd al-Wahhab (1703 – 1792), in: Martin Richard C. (Hrsg.), *Encyclopaedia of Islam and the Muslim World*, New York 2004, Vol. 1, 6.

¹⁰¹ Vgl. SAID/FOUAD, *supra* Fn. 96, 30.

¹⁰² Vgl. ausführlich dazu WIEDL NINA, Geschichte des Salafismus in Deutschland, in: Said/Fouad, *supra* Fn. 51, 411 – 442, hier 413 ff.

¹⁰³ Vgl. WIKTOROWICZ QUINTAN, Anatomy of the Salafi Movement, in: *Studies in Conflict & Terrorism*, Vol. 29 (2006), Iss. 3, 207 – 239, hier 208, und ähnlich bei CEYLAN/KIEFER, *supra* Fn. 95, 82 ff.

tauhīd, und sündhafter Götzendienerei, dem *širk*.¹⁰⁴ Auch wenn *islamfatwa.de* viele Andersdenkende, Muslime wie etwa die Schiiten und Nichtmuslime diskreditiert und für ungläubig erklärt, distanziert sie sich eindeutig von dschihadistischen Salafisten und spricht sich gegen Gewalt im Namen des Islam aus. Nicht nur in ihrer Selbstdarstellung positioniert sich die Site eindeutig gegen die Anwendung von Gewalt, sondern sie widmet dem Thema Extremismus und Terrorismus vielmehr eine eigene Website *islamgegenextremismus.de*, welche vom gleichen Betreiber der *islamfatwa.de* betrieben wird und auf Deutsch und Englisch abrufbar ist. In zahlreichen Beiträgen verurteilt die Homepage jede Form von Gewalt und distanziert sich von allen in der Neuzeit verübten Terrorakten.¹⁰⁵ Dementsprechend ist *islamfatwa.de*, zumindest in Anbetracht ihrer theoretischen Abhandlungen zur Gewalt, dem dschihadistischen Salafismus nicht zuzuordnen.

(2) Anders als die Dschihadisten beteiligen sich die politischen Salafisten aktiv am politischen Leben. Ihre Vorstellung von einem schariakonformen Gesellschafts- und Staatssystem wollen sie, im Gegensatz zu der obigen Gruppe, nicht im Wege der Gewalt, sondern auf friedlich-parlamentarische oder auch außerparlamentarische Art und Weise verwirklichen.¹⁰⁶ Durch Partizipation an Wahlen, Bildungsarbeit, medienwirksamen Auftritten und sozialen Initiativen bieten sie sich als Interessenvertreter und „Verteidiger“ der Muslime gegenüber der Mehrheitsgesellschaft an und infiltrieren auf diese Weise das politische System. Der politische Salafismus wurde vor allem von der Muslimbruderschaft beeinflusst und wird oft dem Islamismus zugeordnet.¹⁰⁷ Die *islamfatwa.de* distanziert sich von der Muslimbruderschaft mit der Begründung, dass ihre Mission „[...] keine aufrechte und rechtschaffende Da'wah ist, welche die [muslimische] Gemeinde verbessert. Wahrlich, ihre

104 Vgl. weiterführend dazu u. a. CEYLAN/KIEFER, *supra* Fn. 95, 86 f.; SUKHNI ELHAKAM, Das gezielte Töten von Zivilisten und Nichtkombattanten im salafitisch-ğihādistischen Diskurs, in: Ceylan /Jokisch, *supra* Fn. 95, 129 – 153. Zum dschihadistischen Salafismus in Deutschland siehe BAEHR DIRK, Dschihadistischer Salafismus in Deutschland, in: Schneiders Thorsten Gerald (Hrsg.), *Salafismus in Deutschland Ursprünge und Gefahren einer islamisch-fundamentalistischen Bewegung*, Bielefeld 2014, 231 – 251.

105 Vgl. <https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqidah-und-da-wah> und <https://islamgegenextremismus.de> (letzter Aufruf 08. 05. 2018).

106 Vgl. weiterführend dazu FARSCID, *supra* Fn. 51, S. 165.

107 Vgl. STEINBERG, *supra* Fn. 99, S. 3 f.

Da'wah ist politisch, nicht religiös.¹⁰⁸ Die Website erachtet den Islam zwar als Religion und Staat, will dies aber nicht durch aktive Partizipation am politischen Leben umsetzen, vielmehr durch religiöse Schulungsveranstaltungen und umfangreiche öffentlichkeitswirksame missionarische Medienkampagnen. Das hat jedoch nicht zu bedeuteten, dass sie in überhaupt keiner Nähe zur Politik stehen möchte. Vielmehr wird zu einigen Fragen politischer Natur Stellung genommen, deren Inhalte Sympathie zu islamischen Regierungen aufweisen. So wird beispielsweise davon abgeraten, gegen Staatsführer zu rebellieren, „solange sie Muslime sind [...]“.¹⁰⁹ Demnach kann dieses Fatwa-Portal nicht an erster Stelle dem politischen, sondern eher dem im Folgenden darzustellenden puristischen Salafismus zugerechnet werden, wengleich die Übergänge zwischen den beiden als fließend zu betrachten sind. Denn Fatwas greifen im Grunde in alle Bereiche des Lebens ein und können auch politisch instrumentalisiert werden.¹¹⁰ Dass die Site kaum politikbezogene Fragen behandelt, bestätigt die Annahme, dass es sich hierbei vorwiegend um den puristischen Salafismus handelt.

(3) Die Ideologie der Puristen weist zahlreiche Schnittpunkte mit der von der Website *islamfatwa.de* aus. Die Puristen haben zwar das gleiche Ziel wie die politischen und dschihadistischen Salafisten, wollen dies aber friedlich durch persönliche Frömmigkeit und individuell-frommes Handeln verwirklichen. Im Gegensatz zu den oben angeführten Gruppen lehnen Vertreter dieser Richtung aktive politische Partizipation und die Bildung von Parteien sowie die Gewaltanwendung ab. Sie sehen, dass sie das angestrebte islamische Gemeinwesen nur sukzessiv etablieren könne, und zwar wenn sich die Individuen, Familien und Gruppen gottgefällig verhalten. Um dieses langfristige Ziel zu erreichen, richten sie ihr Augenmerk insbesondere auf die Missionsarbeit, Erziehung und die religiöse Bildung.¹¹¹ Ihre ideologischen Grundlagen stammen vor allem von als Vordenkern des zeitgenössischen Salafismus angesehenen Gelehrten wie etwa Ibn Taimiyya, Ibn al-Qaiyim und Mu-

108 <https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah>, Punkt 15 (letzter Aufruf 08. 05. 2018).

109 <https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah>, Punkt 13 (letzter Aufruf 08. 05. 2018).

110 Für Näheres dazu siehe z. B. ARMBORST ANDREAS/ATTIA ASHRAF, Die Politisierung des Salafismus, in: Schneiders Thorsten Gerald (Hrsg.), Salafismus in Deutschland Ursprünge und Gefahren einer islamisch-fundamentalistischen Bewegung, Bielefeld 2014, 217 – 231.

111 Vgl. STEINBERG GUIDO, Saudi-Arabien: Der Salafismus in seinem Mutterland, in: Said/Fouad, *supra* Fn. 51, 265 – 297; WAGEMAKERS, *supra* Fn. 79, 58 ff.

ḥammad b. ‘Abd al-Wahhāb und Naṣir al-Dīn al-Albānī¹¹² – Namen, deren Ansichten auf *islamfatwa.de* Beachtung finden.¹¹³

Im Vergleich zum Islamismus, mit dem der Begriff Salafismus häufig gleichgesetzt wird, ist letzterer eine Strömung innerhalb des sunnitischen Islam, dessen Anhänger eine Rückbesinnung auf die Frühzeit des Islam anstreben und sich in der Lebens- und Religionspraxis an den Traditionen der ersten drei Generationen orientieren. Islamismus ist hingegen eine im sunnitischen wie schiitischen Islam vertretene Ideologie politischer Natur die, ähnlich wie beim Salafismus, auf die Wiedererrichtung eines islamischen Gemeinwesens abzielt, aber nicht unbedingt nach dem Vorbild der ersten drei Generationen. Vielmehr wollen Vertreter des Islamismus den Islam und die Moderne versöhnen und sind infolgedessen bemüht, die Quellentexte des Islam zeitgemäß auszulegen, wie am Beispiel al-Qaraḏāwī's Theorien gezeigt, der der Muslimbrüderschaft zugerechnet wird. Die Muslimbrüderschaft Ägyptens gilt als Mutterbewegung und als organisatorische Wurzel des Islamismus, wenngleich sein ideologischer Ursprung in erster Linie auf die Reformbewegungen des 19. Jahrhunderts in der Auseinandersetzung mit dem Kolonialismus zurückgeführt wird. Ähnlich wie der Salafismus umfasst der Islamismus sowohl friedlich-politisch wirkende Gruppen als auch gewaltgeneigte bis terroristische Gruppen. Im Unterschied zu anderen salafistischen Gruppierungen ist der Islamismus in toto politisch ausgerichtet und stellt eine besondere Lesart des Islam als politisches Programm dar.¹¹⁴

Was die Rezeption der *islamfatwa.de* angeht, liegt sie laut *Alexa Traffic Rank* im globalen Ranking auf Position 467,415.¹¹⁵ Sie schneidet somit zwar schlechter ab als die Website von al-Qaraḏāwī (auf Position 240,881) und von Ṣaḥrūr (auf Position 249,154), die dort übersetzten Fatwas finden aber vergleichsweise größere Popularität weltweit. Dies ist an dem Ranking der salafistischen Website *islamQA* zu sehen, deren Fatwas mit den der auf *is-*

112 Vgl. für Näheres dazu KRAWIETZ BIRGIT, Ibn Taymiyya, Vater des islamischen Fundamentalismus? Zur westlichen Rezeption eines mittelalterlichen Schariatsgelehrten, dies., Open Source Salafiyya Zugriff auf die islamische Frühzeit durch Ibn Qayyim al-Dschauziyya, in: Schneiders Thorsten Gerald (Hrsg.), Salafismus in Deutschland Ursprünge und Gefahren einer islamisch-fundamentalistischen Bewegung, Bielefeld 2014, 67 – 103.

113 Vgl. <https://islamfatwa.de/gelehrte> (letzter Aufruf 10. 05. 2018).

114 Vgl. EL-WERENY, *supra* Fn. 94, 36 ff.; HEINE PETER, Islamismus – Ein ideologiegeschichtlicher Überblick, in: Islamismus. Bundesministerium des Innern (Hrsg.), (ohne Jahrgang), 5 – 20.

115 Vgl. <https://www.alexa.com/siteinfo/islamfatwa.de> (letzter Aufruf 19. 06. 2018).

lamfatwa.de publizierten identisch und zugleich in 16 Sprachen zugänglich sind; sie steht im globalen Ranking auf Platz 5,850 und gilt somit als eines der meistbesuchten Fatwa-Foren. Auch das *Ständige Komitee für Rechtsfragen*, dessen Angebote in neun Sprachen online zur Verfügung stehen und von dem zahlreiche Fatwas auf dem Portal *islamfatwa.de* übersetzt vorliegen, schneidet mit 68,352 eindeutig besser ab als die Sites von al-Qaraḏāwī und Šaḥrūr.¹¹⁶ Dies gilt auch für die Website von Ibn Bāz mit dem globalen Rank 22,348.¹¹⁷ In Deutschland steht das Portal *islamfatwa.de* auf dem Rang 29,215, wobei 76,3 % der Nutzer aus Deutschland und der Rest aus Österreich stammen.¹¹⁸ Verglichen mit anderen deutschsprachigen Fatwa-Portalen wie *fatwazentrum.de* (auf Position 517,130)¹¹⁹ darf man annehmen, dass *islamfatwa.de* die meistbesuchte Fatwa-Site im deutschsprachigen Raum ist. Die Frage, welcher Altersgruppe die Besucher der Website angehören, kann aufgrund mangelnder Datenlage nicht beantwortet werden. Aus verschiedenen Studien zum Internet ist jedoch bekannt, dass das Internet vor allem junge Leute nutzen.¹²⁰

VI. Zusammenfassung

Im Mittelpunkt des vorliegenden Beitrags stand die Darstellung und Analyse des deutschsprachigen Fatwa-Portals *islamfatwa.de*. Dabei wurden die dort als Muftis fungierenden Akteure, ihre gesellschaftliche und politische Weltanschauung sowie ihre rechtmethodischen Grundlagen der Erstellung von Fatwas herausgearbeitet. Um ihre Ansichten und verfolgte Agenda einordnen zu können, wurde zunächst die islamrechtliche Diskussion um die Relevanz und Modifizierbarkeit von Fatwas angeführt. Drei unterschiedliche Positionen lassen sich in diesem Zusammenhang nachzeichnen, die sich in der virtuellen Welt widerspiegeln: Während die eine alle überkommenen Normen und Fatwas, bis auf die dogmatischen, ethischen und rituellen Bestimmungen der

116 Vgl. <https://www.alex.com/siteinfo/alifita.net> und <http://www.alifita.net/default.aspx?language=> (letzter Aufruf 07. 05. 2018).

117 Vgl. <https://www.alex.com/siteinfo/binbaz.org.sa> (letzter Aufruf 08. 05. 2018).

118 Vgl. <https://www.alex.com/siteinfo/islamfatwa.de> (letzter Aufruf 19. 06. 2018).

119 Vgl. Vgl. <https://www.alex.com/siteinfo/islamfatwa.de>; ausführlich zu *fatwazentrum.de* siehe <http://fatwazentrum.de/> (letzter Aufruf 23. 05. 2018).

120 Vgl. z. B. BUNT GARY, *Islam in the Digital Age: E-Jihad, Online Fatwas and Cyber Islamic Environments*, London 2003.

Scharia, für kontextbedingt veränderbar betrachtet, die andere, die sog. *wasatīya*, dazu das Familien-, Erb- und Strafrecht hinzuzieht, vertritt die dritte eine konservative, dem salafistischen Denkmuster zuzurechnende Haltung: Sie machte sich für eine buchstabengetreue Lesart stark und sieht die Veränderbarkeit jedweder Fatwas nur dann ein, wenn dafür textuelle Grundlagen aus dem Koran oder der Sunna vorliegen.

Aus der Darstellung und Analyse ausgewählter Fatwas der Website *islamfatwa.de* ging hervor, dass sie dem salafistischen Spektrum zuzurechnen ist, was an Profilen und Rechtsansichten der dort als Muftis agierenden Gelehrten wie etwa Ibn Bāz, al-ʿUṭaimīn und al-Fawzān zu erkennen ist. Dieses Fatwa-Portal tritt für ein wortwörtliches Verständnis des Koran und der Sunna ein, nimmt darüber hinaus die Lebensweise der Altvorderen als Vorbild hinzu und lässt keine hermeneutischen Interpretationen zu. Das Portal propagiert ein starres Abbild aus der Frühzeit des Islam, das sich ausschließlich auf Aussagen des Korans, der Sunna und Lebensweise erster Muslime stützt. Diese werden als eindeutige, umfassende und ausreichende Grundlagen erachtet, nach denen zeitgenössische Muslime ihr Leben jenseits zeitlicher und örtlicher Gegebenheiten auszurichten hätten. Folgerichtig wird in den auf der Website zur Verfügung gestellten Fatwas fast ausschließlich mit religiösen Texten argumentiert. Der Grundsatz, nach dem Fatwas nach Zeit- und Orts Umständen ausgesprochen bzw. modifiziert werden sollten, findet keine Beachtung. Religiöse oder kulturelle Veränderungen im Leben werden als „unislamische Neuerung“ (*bidʿa*) verurteilt.¹²¹ Im Gegensatz zu diesem auf *islamfatwa.de* präsentierten Bild des Islam sind andere Websites, die im Rahmen der vorliegenden Untersuchung angesprochen wurden, indessen bemüht, die Quellentexte des Islam auf unterschiedliche Art und Weise kontextbedingt zu verstehen und zeitgemäß auszulegen.

Anhand der angeführten Fallbeispiele zur Geschlechterrolle und zur Haltung der Website zur Demokratie und Politik wurde ihre traditionell-salafistische Weltanschauung deutlicher. Der Frau stehe nur die Rolle zu, die der Koran, die Sunna und tradierte Fatwas früherer Gelehrter des 7. bzw. 8. Jahrhunderts vorsehen. In der Konsequenz ergibt sich Ungleichheit zwischen Mann und Frau, Abschottung und womöglich Unterdrückung der Frau. In Politikfragen wird die vermeintlich allumfassende Scharia einzig und allein als Verfassungs- und Gesetzgeber angesehen. Als holistisches Gebilde solle sie die Gesell-

121 Siehe für Beispiele <https://islamfatwa.de/suche?query=bida> (letzter Aufruf 08. 05. 2018).

schafts- und Staatsordnung regeln. Ausgehend davon wird den Muslimen auferlegt, sich von – aus der Sicht der Website schariawidrigen – Staatssystemen loszusagen. Dies spiegelt sich auch in einigen Fatwas für Muslime im Westen wider, wie etwa zur Einstellung gegenüber dem Staat, den nichtmuslimischen Mitbürgern und der Einbürgerungsfrage. In einschlägigen Fatwas vermittelt *islamfatwa.de* eine den Grundprinzipien der freiheitlichen Demokratie widersprechende Ideologie, die der Integration von Muslimen in mehrheitlich nichtislamischen Gesellschaften gefährden bzw. hindern könnte.

Auf Grundlage der vorangegangenen Analyse und gestützt auf die mittlerweile in der Wissenschaft etablierte Einteilung des Salafismus konnte dieses Fatwa-Portal vornehmlich dem puristischen Salafismus zugeordnet werden, wenn gleich die Übergänge zum politischen Strang fließend bleiben. Immerhin kann man keine strengen Grenzen zwischen den drei Gruppen ziehen. Bezüglich der Gewaltanwendung konnte auf der Website kein unmittelbarer Aufruf zum bewaffneten Dschihad festgestellt werden. Sie distanziert sich eindeutig von Gewalt und setzt sich für eine schariakonforme Gesellschaftsordnung ein, die friedlich mittels der Missionierung, Bildung und karitativen Tätigkeiten anvisiert wird. Ihre Position steht soweit in erster Linie in Übereinstimmung mit der Ideologie des puristischen Salafismus.

Termination of Agreement under the UAE Law and Judicial Precedent

HESHMATOLLAH SAMAVATI*

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Abstract

The article examines provisions related to the termination of contracts in the UAE Civil Transactions Law and illustrates how the UAE Courts interpret the rules laid down by this law. These provisions do not repeal any special law related to the same subject; they only relate to the subject of the contract in general. In order to express the meaning of termination, the UAE contract law uses the Arabic word faskh. Based on the manner of termination, the UAE law provides four types of termination:

- 1. Termination by mutual agreement after the conclusion of the contract;*
- 2. Termination by judicial decision;*
- 3. Termination by prior agreement;*

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4. Termination by law;

Among these types, termination by judicial decision is regarded as a general rule applicable to all disputes occurring between individuals. However, in accordance with article 274 of the UAE Transactions Law, the effects of all types of terminations are the same on the contracting parties and the third party, except when a contract is terminated by mutual agreement after its conclusion (iqala). The effects of iqala on the third party vary from other types of termination.

I. Introduction

Sometimes the contracting parties or one of them may not meet all the requirements of the contract. This failure may be due to the act of both parties or one of them or the circumstances surrounding the parties. Failure to fulfill the right of others to contract leads to harm to the other party. Therefore, the law has not left this matter without giving some solution. As it provides a solution to eliminate the damage caused by the failure to meet the requirements of contracts, the fulfillment of the contract may be accompanied by the possibility of its dissolution. In general, the reasons for the dissolution of contracts are not related to the nature of the contracts in transactions.

The termination of the contract is not a recent subject but an ancient theme of the Romans in their era and applied in a narrow field. The contracts of the Romans were not accompanied by revocation, and there was no way for the contracting parties to demand that they be terminated. Therefore, the other party could only submit an application for the execution of the obligations of the contract.¹

At present, the termination of contracts is significant and essential, and the study will highlight some of the greatness of the Arab countries' legislations, which do not order anything that might put someone in a tight and critical

¹ For more details, see ELIAS NASSIF, *Al mawsū'a al-Uqood al-Madania wa al-Tijariyah* (Encyclopedia of Civil and Commercial Contracts), Dar Al-Nahda Al Arabiya, Beirut 1974, at 582 – 583.

position, and do not prevent anything unless there is an alternative, so that the purpose of ordering or prohibiting in the form of legislation brings benefits to the people and prevents them from any harm in the present and the future. The provisions on the termination of contract in the UAE's laws and legislations have the same purpose. In this article, we shall study the nature of termination, reasons for termination, types of termination, and the effects of termination on the contracting parties and on the third party.

II. Definition of Termination

When a contract is valid and enforceable, it must be executed. The execution is the natural way for the termination of the contractual relationship and by that the contract dissolves. However, there are some matters that may lead to the dissolution of a contract before its execution or before the execution can be completed by the parties. These matters may occur during the conclusion of an agreement or in the future only. In immediate execution contracts (e.g., a sale contract), the termination of the agreement may occur during its conclusion; and in the United Arab Emirates, like other Arab countries, this is called *faskh*.²

In Arabic dictionaries, the word termination (*faskh*) has three meanings:

1. Weakness of wisdom and body;
2. Lack of knowledge, which refers to the weakness of wisdom;
3. Cast or take off (for example, I take off my clothes).³

In addition, Ahmad bin Faris bin Zakariya in his book explains that the word *faskh* means breaking of a thing or object.⁴

² In French law, it is called *résolution*. It should be noted that the UAE Civil Transactions law (like the Egyptian civil law) is under the influence of the French civil law.

³ AL ZUBAIDI, *Taj Al Arus* (Arabic), Vol. 7, Al Torath al-Arabi, Kuwait 1965, at 319; SA'ID AL SHARTUNI, *Aqrab al-Mawarid* (Arabic), Part 2, Ayatollah Marashi Najafi Library Publications, Qom 1983, at 926.

⁴ AHMAD BIN FARIS BIN ZAKARIYA, *Mu'jam al-maqayis fi'l- luqah* (Arabic), Dar al-fikr, Beirut, without date, at 846.

However, as a legal term, *faskh* means revocation (of agreement), rescission (of sale), disaffirmance, repudiation, dissolution, countermand, annulment, recall, setting aside, reversal.⁵ In the eyes of the UAE Law, *faskh* is a form of recompense (or sanction or penalty) for the infringement of performance of an obligation, such as misrepresentation and its existence of conditions, which empower the injured party to terminate the agreement. Article 190 of the UAE Civil Transactions Law states: "If the misrepresentation is made by a person other than the contracting parties, and the person to whom the misrepresentation was made proves that the other contracting party knew of the misrepresentation, it shall be permissible for him to cancel the contract".

Therefore, this case differs from the breach of agreement at the time of its formation. The necessary elements to form and create an agreement are described in Article 129 of the UAE Civil Transactions Law⁶. Lack of any of these elements makes the agreement void (*butlan al- aqd*).

III. Reasons for Termination

The basis of the agreement, essentially, is the consent of the parties that can be shown by offer and acceptance. However, sometimes the parties or one of them is unable to fulfill all requirements of the agreement. This may happen when failure is resulted from the parties or one of them or from the circumstances surrounding the parties. Non-fulfillment of the parties' right leads to damages to the innocent party. To compensate these damages

5 HARITH SULEIMAN FARUQI, *Faruqi's Law Dictionary (Arabic-English)*, Librairie du Liban Publishers 2001, at 257.

6 Article 129: "The necessary elements for the making of a contract are: (a) that the two parties to the contract should agree upon the essential elements; (b) the subject matter of the contract must be something which is possible and defined or capable of being defined and permissible to be dealt in; and (c) there must be a lawful purpose for the obligations arising out of the contract." It should be noted here that the UAE Civil Transactions Code has been translated from Arabic into English. The following book is considered as a reliable English translation of this law: WHELAN JAMES / HALL MARJORIE J., *The Civil Code of the United Arab Emirates: the law of civil transactions of the state of the United Arab Emirates*. Translated from Arabic into English by James Whelan & Marjorie J. Hall. Graham & Trotman, London/Boston 1987.

and in certain circumstances, the law gives the right to the injured party to terminate the agreement but in the manner prescribed by the legislator.

IV. Types of Termination

According to Article 267 of the UAE Civil Transactions Law, an agreement may be terminated in several ways, namely by mutual consent or by an order of the court, or under a provision of the law.

Therefore, four types of termination can be detected in the UAE Law: termination by mutual agreement after the conclusion of the contract, termination by judicial decision, termination by prior agreement, and termination by law.

1. Termination by mutual agreement after the conclusion of the contract

The UAE Civil Transactions Law recognizes the right of cancellation of the contract by the parties' mutual consent after the contract's conclusion. Article 268 stipulates that "[t]he contracting parties may mutually cancel the contract by their mutual consent after entering into the contract". Hence, it is permissible that the parties revoke the agreement by mutual consent after the contract has been concluded and be restored to the position they were in before the contract was made. Such termination is valid and in the UAE, like in other Arab countries, it is called *iqala*. According to Article 270 of the UAE Civil Transactions Law "[r]evocation (al *iqala*) shall be by offer and acceptance in the session (*majlis*), and by receiving (back the thing contracted for) on condition that the subject matter of the contract is in existence and in the possession of the contracting party at the time of the revocation, and if part of it has been lost the revocation shall be valid as to the remainder to the extent of the amount of the consideration attributable to it."

The Dubai Court of Cassation, by referring to the articles 268, 269, and 270 of the same law, has deduced that these articles together show that the cancellation of contract by mutual consent of the parties (*iqala*) is an agreement by that the obligation arising from the contract between the

parties will expire and consequently it causes dissolution of the contract as well as the expiration of the obligations (regardless whether they were executed and whether their execution was completed or not). And that the basic condition for the validity of the *iqala* is the consent of the contracting parties. To find out whether the consent of the contracting parties exists or not, which is a factual matter, the court has the power to gather and review the facts of the case.⁷

The nature of the *iqala* is a matter of dispute. There are three views on this issue: the first view takes *iqala* into account as a new agreement. The second view considers it as termination by agreement. Finally, the third view considers *iqala* to be a termination between the parties and a new agreement in respect to the third party.⁸ The last one has been followed by the UAE Law.⁹

2. Termination by judicial decision

Principally, contract termination is made by judicial decision. As a general rule, this is applicable to all disputes between individuals. In other words, the judge is the one who determines the dispute between the opponents.¹⁰ Article 272 of the UAE Civil Transactions Law provides that: “(1) In contracts binding on both parties, if one of the parties does not do what he is obliged to do under the contract, the other party may, after giving notice to the obligor, require that the contract be performed or canceled. (2) The judge may order the obligor to perform the contract forthwith or may defer (performance) to a specified time, and he may also order that the contract be canceled and compensation paid in any case if appropriate”.

This article is similar to the Article 1184 of French Civil Law of 1804 which states that “[t]he resolutive condition is always implied in synallagmatic

7 The decision is dated 26/02/2007 in Petition No. 275/2006, Commercial Petition, see Collection of Judgements of the Court of Cassation, Dubai Courts, Rights, Vol. 1 (2007), at 23.

8 For more details see, ABD AL MAJID AL HAKIM, *Al Mujez fi sharh al-qanun al-madani* (Arabic), Part 1, Nadim Publisher, Baghdad 1974, at 440 – 442.

9 Article 269 of the UAE Civil Transactions Law provides that “[s]o far as concerns the contracting parties revocation amounts to cancellation, and with regard to a third party amounts to a new contract”.

10 In French law, this kind of termination is called *la résolution judiciaire*.

contracts, for the case where one of the two parties does not carry out his undertaking. In that case, the contract is not avoided as of right. The party towards whom the undertaking has not been fulfilled has the choice either to compel the other to fulfill the agreement when it is possible or to request its cancellation with damages. Cancellation must be applied for in court, and the defendant may be granted time according to circumstances”.¹¹

a) Conditions of termination

In order for the court to make a decision on the termination of an agreement, the following conditions should be present:

First Condition: *Binding Contracts*

As the UAE Civil Transactions Law has provided, some contracts are binding, and some of them are not. Article 218 of the same law gives a definition of a non-binding contract: “(1) A contract shall not be binding on one or both of the contracting parties despite its validity and effectiveness if there is a condition that such party may cancel it without mutual consent or an order of the court. (2) Each party may act unilaterally in canceling it if by its nature the contract is not binding upon him or if he has made it a condition in his own favor that he has the option to cancel.”

However, the binding contract is an agreement which none of the contracting parties may revoke, modify or rescind it except by mutual consent, order of the court or a law provision.¹² Therefore, termination of an agreement can only occur in binding agreements.

Second Condition: *One party's failure to fulfill any of its contractual obligations*

When one of the contracting parties has failed to perform his obligation, the other party has two options. The first option is to seek the execution of the obligor's obligation from the court; and the second option is to ask the court to terminate the agreement, provided that he has already sent a notice to the obligor. Article 272 of the UAE Civil Transactions Law clearly states that before referring the case to the court, the party who is seeking

¹¹ This article has been modified by the Order No. 2016 – 131 of February 10, 2016, art. 2.

¹² Article 267 of the UAE Civil Transactions Law.

termination of the contract must send a notice to the obligor requiring the contract to be performed or canceled. However, the mere opening of a file for termination is in itself considered to be a notice to the defendant. However, it should be noted that giving notice before stating the claim of termination possesses practical importance since the judge can give a quick response to such a claim.¹³

Third Condition: *The party requesting termination to be performed or is prepared to carry out his obligation*

If the obligee does not fulfill his obligations or if he is not ready to perform, he has no right to claim for termination of the agreement. The reason being that in such a condition, he fails to perform his obligations. If one party seeks for termination of the contract, he needs to fulfill his obligations. For example, if a buyer wants to terminate the agreement, he must prove that he has paid the price or, at least, that he is willing and ready to pay the price. However, if a seller seeks for termination he must prove that he has fulfilled his obligations or he is ready to perform his obligations. In conclusion, if the buyer refuses to fulfill his obligation without any right he cannot resort to termination. The same rule is applicable to the seller.

Fourth Condition: *The party requesting termination is able to return the situation to its original if it is ruled to be terminated*

The effect of termination is that the two contracting parties shall be restored to the positions they were in before the contract was made. In case that this is not a possibility anymore, compensation shall be ordered. The contracting party who insists on the termination is required to be able to restore the situation to what it was before. However, if the contractor is unable to do that, he has no right to resort to the termination of the agreement. In this a situation, on the request of the obligee, the court may enforce the obligor to perform the agreement or may order him to pay compensation to the obligee. Furthermore, if a part of the subject matter of the contract has been delivered to the buyer and he sells it to another person or converts it from one condition to another condition (such as when the buyer buys some clothes but only receives part of the goods and changes them into dresses) he has no right to cancel the agreement.

13 Al SANHOURI, *Al-Wasīf fi sharḥ al-qānūn al-madanī* (Arabic), Vol. 4, Dar Ihya al-Turath al-Arabi, Beirut, without date, at 821.

Fifth Condition: Sending notice to the other party

The obligee must send a notice to the other party regarding his refusal of his obligations' fulfillment. This notice is essential as it is a requirement for filing a termination case.

Sixth Condition: Obligee's request for termination of the agreement without its performance

Certainly, if the obligee asks for the performance of the agreement the court takes this request into consideration as far as possible.

Seventh Condition: The obligor remains in his position

In determining the cancellation of the contract, the obligor is liable if the court considers that no action is being taken to fulfill his obligation. Therefore, he remains in his position. However, if he takes steps to fulfill his obligations, the judge has the discretionary power to decide on compensation for delay in performance, in case there is place for compensation.¹⁴

b) The discretionary power of the court

As we will explain later, in contrast to termination by prior agreement, termination by judicial decision does not limit the discretionary power of the judge. When the obligee asks for termination of an agreement as a result of the obligor's non-performance of the contractual obligation, the judge is not obliged to accept his request but he has a right to give time to the obligor to fulfill his obligation in soft conditions to enforce the payment of the compensation (where appropriate). However, if the obligee seeks the execution of the contract and the obligor is able to perform his obligations, the judge must accept this application but he can also decide on compensation (if it is considered necessary).

Where there has been partial performance of some aspects of a contract, the judge can restrict his judgement for compensation of the unperformed part of the contract, provided that the partial performance relates to the most important part of the obligation. Nevertheless, the judge can always accept

¹⁴ For more details, see HASAN AHMAD ABD AL KHALIGH, *Al wajize fi sharh Qanun al-moamelat al-madania* (Arabic), Part 1, Dubai Police Academy 2007, at 223.

the obligee's application for termination of the agreement and rule on the matter where appropriate.¹⁵

3. Termination by prior agreement

Sometimes the parties forecast the non-performance of an obligation by one of them at the time of the contract's conclusion and agree on stipulating a clause in the agreement that in case of non-fulfillment by either one of the parties the agreement shall be canceled or considered to be canceled without the need of a judicial decision. Such a clause is valid under the UAE law. Article 271 of the UAE Transactions Law prescribes that “[i]t shall be permissible to agree that a contract shall be regarded as being canceled spontaneously (automatically) without the need for a judicial order failing performance of the obligations arising thereout, and such an agreement shall not dispense with notice unless the contracting parties have expressly agreed that it should be dispensed with.” This type of termination is called *faskh al- itefaghi* or termination by agreement in the UAE law.¹⁶

It is established by the judgments of the Dubai Court of Cassation that:

“[...] It is the principle in contracts giving priority to the *Autonomie de la Volonte*, i. e. autonomy of the will principle; thus, *Pacta Sunt Servanda*, i. e. the contract makes the law between the contracting parties, and, accordingly, none of the contracting parties may unilaterally rescind, amend or cancel the contract unless upon the consent of the other contracting party or by law in accordance with the provision of Article No. 267 of the Civil Transactions Law.”¹⁷

The Court of Cassation has defined this kind of termination as follows:

“[...] Termination by agreement means that the contract contains a cancellation by agreement clause stipulating the contract to be regarded as being cancelled automatically without the need for a court judgement when the obligations arising from the contract or one of them are not fulfilled. It is called ‘explicit cancellation condition’, and then the termination here is definitely compulsory when the breach of the contractual obligation occurs, and the contractor or the judge has no choice

¹⁵ Ahmad, *supra* n. 14, at 223.

¹⁶ In French law, it is called *la résolution conventionnelle*.

¹⁷ The Decision is dated 18/11/2012 in Petition No. 347/2011 Real Estate Petition, see <<https://www.dc.gov.ae/PublicServices/LatestVerdicts.aspx?lang=en>> (last accessed 14 May 2019).

between cancellation and execution of the contract. Here the decision of the court shall discover the occurrence of cancellation and does not create the contract termination status.”¹⁸

In addition, the same Court has emphasized that the law does not require specific words for the explicit cancellation condition.¹⁹

An agreement on termination has several forms and each form has a different effect. In the following, attention shall be drawn to some remarkable points.

Firstly, sometimes the parties agree that if one of them fails to fulfill his obligation the agreement will be deemed to have been terminated. On the one hand, such phrase only illustrates the uncertainty in the general rule of termination and it does not add anything to such a rule. On the other hand, if the condition occurs, it is hard to reach the conclusion that the parties have definitely intended to cancel the agreement. Therefore, the obligee is not exempted from the duty of sending a legal notice to the obligor and must open a termination file in the court. Also, the agreement does not deprive the judge of his discretionary power in relation to the termination of the contract. Moreover, the obligor has the right to prevent the termination of the agreement by the performance of his obligations.²⁰

In a decision of the Dubai Court of Cassation, this matter has been explained as follows:

“[...] It is established under the judgments of this court that the termination based on implicit termination clause established under the law for all contracts binding on both parties, as implied from Article No 272 of the Civil Transactions Law, grants the obligor the right to avoid the termination by fulfilling the debt before the rendering of a final judgment in the lawsuit, as long as it is not evident that the delayed fulfillment is alleged by the obligee. That is to say for affording a satisfactory answer to the claim for termination in such case, the other party to the contract should remain late in fulfilling the obligation thereof till the rendering of a final judgment for the termination. Further, the implicit termination clause does not necessitate the

18 Union Supreme Court of Cassation, decision dated 17/03/2013 in Petition No. 576/2012 Commercial Petition, at 3.

19 The Decision dated is 10/07/2008 in Petition No. 92/2008 Commercial Petition, see Collection of Judgements of the Court of Cassation, Dubai Courts, Rights, Vol.1 (2008), at 1097.

20 AL SANHOURI, *supra* n.13, at 831.

termination, even upon the occurrence of failure to fulfill the obligation, rather, it is subject to the estimation of the judge who is entitled to allow a period of time to the obligor in order to avoid the termination as stated above. The estimation of the judge in this regard is not subject to the supervision of the court of cassation as long as the judge based the judgment thereof on apposite grounds derived from the papers. Further, it is established that the obligor may, before the issuance of the final judgment, fulfill the obligation thereof and avoid the termination."²¹

Secondly, sometimes the parties agree on the contract to be terminated spontaneously. Such an agreement does not exempt the obligee to not give notice or to not open a file in the court. However, it deprives the judge of his discretionary power and he has no right to give time to the obligor.

Thirdly, sometimes the parties agree to the contract being terminated spontaneously without the need for a judicial order. This does not exempt the obligee to not send notice. In a situation where the obligor fails to fulfill his obligation, the obligee must send him a notice and afterwards, if the obligor does not perform his obligation, the agreement is automatically terminated without the need for a judicial order. However, if the obligor claims to fulfill his obligations, the dispute should be raised before the court. Here, the duty of the judge will be limited to this claim. Therefore, if he finds out that the obligor has not fulfilled his obligations, he shall decide on the agreement to be canceled. Such a decision has the nature of discovering the fact that the agreement was terminated and it is not therefore creating the status of termination.

Fourthly, sometimes the parties agree that the contract shall be terminated spontaneously without the need to send notice or without a court judgment. In this case, when the obligor is unable to fulfill his obligations, the agreement will be canceled without the need for sending a notice or obtaining a judgment from the court. This is the maximum requirement the cancelation of the agreement.²² The UAE Courts in several decisions has declared that with regard to the agreement of termination of a contract without warning or notice, the judge takes away his discretion in the matter of cancellation. Nevertheless, this shall be subject to the Court's verification of the existence of terminatory conditions by the

21 Petition No. 403/2015 Real Estate Petition issued on 04/06/2016, at 3.

22 SANHOURI, *supra* n.13, at 832 – 835.

agreement and necessity of its application.²³ However, the Dubai Court of Cassation has stressed that:

“[...] The provisions of articles 271 and 274 of the Civil Transactions Law stipulate that the contract is not considered to be automatically canceled when the obligations arising therefrom are not fulfilled unless the parties agree to that. And this condition must be set forth in a clear and unequivocal manner, indicating that the contract has been terminated definitely and automatically once the violation of the contract has been occurred, without the need for a court ruling when the obligation has not been fulfilled.”²⁴

As we can see, in the mentioned forms (except for the first one), the obligee has the right to ask for the performance of the agreement or for its termination. It does not prevent the obligee to request the performance of the agreement. Otherwise, the obligor will be at the mercy of the obligee; therefore, he can succeed in making the agreement to be terminated by refusing to perform his obligations if he wishes so. Also, we can reach the conclusion that based on the Article 271 of the UAE Transaction Law, termination by agreement leads to the deprivation of two guarantees, which the law provides for the obligor:

First guarantee (the option to choose between the execution of the contract or its termination): This guarantee is the option to choose between the execution of the contract or its termination. In the above form the agreement defiantly will be terminated without leaving the obligor and the judge the option of choosing between the performance of the contract and its termination. This option will remain for the obligee only.

Second guarantee (the necessity of referring the matter to the Court): The issue of termination of the contract does not require referral to the court unless the obligor raises a dispute about the performance of the agreement.

Indeed, deprivation of these two guarantees does not prevent the obligor to benefit from other protection such as the necessity of sending him a notice by the obligee.

In summarizing the condition of termination by prior agreement, we should emphasize that it is necessary that:

23 For example, see the Union Supreme Court of Cassation, decision dated 29/10/2015 in Petition No. 533/2015 Commercial Petition.

24 The decision dated 23/01/2011 in Petition No. 122/2010 Real Estate Petition, see <<https://www.dc.gov.ae/PublicServices/LatestVerdicts.aspx?lang=en>> (last accessed 14 May 2019).

- (i) the agreement is a binding contract. Hence, as we have mentioned before, termination of agreement can only occur in binding agreements;
- (ii) one of the parties fails to fulfill the specific contractual obligation as described in the termination agreement;
- (iii) the party requesting termination has performed or is willing to carry out his obligation;
- (iv) the party requesting termination is able to return the situation to its original if it is ruled to be terminated.

4. Termination by law

Part one of the article 273 of UAE Civil Transactions Law provides that “[i]n contracts binding on both parties, if force majeure supervenes, which makes the performance of the contract impossible, the corresponding obligation shall cease and the contract shall be automatically canceled.” According to this article, if the performance of the subject matter of the contract becomes impossible and the impossibility is not related to the act of the obligor, the obligor’s obligations shall be terminated. Such as when a subject matter of the contract has been destroyed by a natural disaster. Here, for example, if the contract is a sale agreement, the agreement shall be terminated by the law, and the seller must return the price if he has received it from the buyer. In relation to the obligation of the buyer it must be said that his obligation is to pay some amount of money. Such an obligation is a debt in the hands of the buyer. Therefore, it cannot be destroyed materially. Article 565 of the Civil Transactions Law states that “[i]f a specific time for the payment of the price is laid down in the contract and it is stipulated therein that if the purchaser does not pay the price within that time then there will be no sale, then, if he does not pay the price and the property is still in the hands of the seller, the sale shall be deemed to be canceled”.²⁵

In understanding the concept of Article 273 of the UAE Civil Transactions Law, we shall mention articles 386 and 472 of the same law. Article 386 provides that “[i]f it is impossible for an obligor to give specific performance of an obligation, he shall be ordered to pay compensation for

²⁵ For more details, see HASAN AHMAD ABD AL KHALIGH, *Al wajze fi sharh Qanun al-moamelat al-madania* (Arabic), Part 3, 2nd edition, Dubai Police Academy 2008, at 236.

non-performance of his obligation, unless it is proved that the impossibility of performance arose out of an external cause in which (the obligor) played no part. The same shall apply in the event that the obligor defaults in the performance of his obligation". In addition, Article 472 lays down that "[t]he right shall expire if the obligor proves that the performance of it has become impossible for him for an extraneous cause in which he played no part".

Thus, the conditions of termination by law (*infesakh*) in brief are:

- i) the impossibility of performance of the agreement;
- ii) the impossibility must be caused by the third party and due to reasons that are not attributable to the obligor;
- iii) the impossibility must happen after the conclusion of the agreement;
- iv) the impossibility must concern the entire performance of the contract and not a part of the contract only. However, the part 2 of Article 273 of UAE Civil Transactions Law prescribes that "[i]n the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligor to cancel the contract provided that the obligee is so aware".

V. Effects of Termination of Contract

In case the parties cancel the agreement or the agreement is canceled automatically, the cancellation of the agreement shall result in ceasing the effects of the contract by retroactive effect and the contract shall be regarded as not having existed before. In such a situation, the parties shall be reinstated to the positions that they were in before the contract was made. Article 274 of the UAE Civil Transactions Law provides that "[i]f the contract is canceled automatically or by the act of the parties, the two contracting parties shall be restored to the position they were in before the contract was made, and if that is not possible, compensation shall be ordered". This Article is similar to the Article 1183 French Civil Law of 1804 which stated: "The resolutive condition – when fulfilled – brings the

revocation of the obligation and puts things back in the same condition as if the obligation had not existed”.²⁶

Below, we shall discuss the effects of cancellation on the parties and the third party.

1. The effect of cancelation on the parties

In accordance with the provision in article 274 of the UAE Civil Transactions Law, in case the contract is terminated by agreement or by a judgment of the court, the termination of the contract shall result in restoring the contracting parties to the positions they were in before the conclusion of the contract. If, for example, a sale agreement is terminated, the parties of contract shall be restored to the position they were in before the contract was made, i. e. the buyer is not considered to have ever owned the subject matter of the sale agreement, and the seller is not considered to have possessed the price. As a result, the buyer must return the subject matter with its profits that have resulted before the cancelation. If the subject matter of the sale agreement, for instance, is a farm, he must return the farm with its crops (if they exist). Otherwise, he must pay the price of the crops to the seller. Also, the seller must give back the price with the legal interest from the date of judicial claim. The root of such an obligation goes back to the *unjust enrichment doctrine*.²⁷

In circumstances where it is not possible that one or both parties return the sale subject matter or the price, the court shall order compensation (as is mentioned in the article 274 of the UAE Civil Transactions Law). In its Decision No. 295 of 25/10/1998, the Dubai Court of Cassation emphasized that the content of article 274 is that when the contract is canceled by agreement or judgment, the result is the termination of the contract and it is considered to have never come into existence, and the parties return

²⁶ This Article has been totally modified by the Order No. 2016 – 131 of February 10, 2016, art. 2.

²⁷ Article 321 of the UAE Civil Transactions Law provides that “[a] recovery of property handed over without entitlement may be made if payment was made in satisfaction of a debt for which the cause had not existed, or for a debt of which the cause has ceased to exist after it had materialized”.

to the position in which they were before entering into the contract.²⁸ Therefore, all agreements, obligations, and undertakings included in the contract cease and come to an end. For example, if the parties have agreed in a contract on compensation or penalty for the violation of an obligation, the clauses shall lapse if the original obligation lapses by the termination of the contract.

In this regard, the following two decisions of the Dubai Court of Cassation are worth mentioning. The first case is in respect of compensation:

“[...] It is established that the provision of Article No. 274 of the Civil Transactions Law implies that in case the contract is terminated by agreement or by a judgment of the court, the contract shall be dissolved and considered null and void and the contracting parties shall be restored to the positions they were in before the conclusion of the contract. Hence, the agreements and undertakings included in the contract shall lapse accordingly, the compensation provided for under the contract shall not count, and if the compensation is deemed necessary, then it shall be determined by the judge in accordance with the general rules which impose the burden of proving the harm, the realization and the extent thereof on the obligor.”²⁹

The second decision concerns the penalty clause:

“[...] It is established, as applicable under the judgments of this court, that the termination of the contract, in accordance with the provision of Article No. 274 of the Civil Transactions Law, shall result in restoring the contracting parties to the positions they were in before the conclusion of the contract; and if such restoration is deemed impossible, then the compensation shall be ruled with. The consequences of the impossibility shall be borne in this case by the obligor whose obligation is deemed to be impossible to fulfill in operation of the principle of bearing the consequences in contracts binding on both parties. If the original obligation lapses with the termination of the contract, the penal clause agreed upon under the contract shall lapse as well on the consideration that such clause is an obligation subsequent to / dependent on the original obligation. Thus, the compensation estimated thereunder shall not count.”³⁰

28 See Collection of Judgements of the Court of Cassation, Dubai Courts, Rights, vol.1, 1998, at 706.

29 The decision dated 07/11/2010 in Petition No. 202/2010 Civil Petition, see Collection of Judgements of the Court of Cassation, Dubai Courts, Rights, Vol.2, 2010, at 1482.

30 The decision is dated 23/09/2012 in Petition No. 09/2012 Real Estate Petition, see <<https://www.dc.gov.ae/PublicServices/LatestVerdicts.aspx?lang=en>> (last accessed 14 May 2019). Also in its other decision, the same court confirmed that: “It is established, as applicable under the judgments of this court, that the penal clause is an obligation dependent on the original obligation; since it is an agreement on a penalty for the violation of such

The last subject to be discussed here is the situation where one party does not return what he has obtained from the other party after the cancellation of the agreement. According to the Article 275 of the UAE Civil Transactions Law, with regard to the above mentioned situation, each party has the right to detain what he has received so long as the other party has not returned what he has received from the former, or has provided security for such return.³¹

2. The effect of cancelation on the third party

Article 274 of the UAE Civil Transactions Law applies to the rights of others as well as the parties to the contract. Therefore, for example, when it is said that the buyer is deemed to have never owned the subject matter after the termination of the sales contract, it means that the rights placed on the subject matter before cancelation ceases to exist, too. The seller recovers the subject matter of the sale free of any third-party rights. Accordingly, in a situation in which someone has sold a commodity to a person and he (the buyer) sells it or the property rights³² placed on the commodity (such as usufruct or the right of easement) to a third party and subsequently the first contract is canceled by the parties, the seller recovers the subject matter of the sale from the first buyer free of any attached property rights.

The legal bases of this rule are certain jurisprudential maxims such as “a person cannot transfer to other any right more than he has” or “who does not have a thing cannot give it to someone else”. In order for such an effect to take place, it is necessary that the cancelation claim is indicated

obligation; thus, if the obligation lapses with the termination of the contract, the penal clause shall also lapse and the compensation estimated thereunder shall not count.”, Judgment of the Dubai Court of Cassation dated 05/02/2012 in Petition No. 352/2011 Real Estate Petition, see <<https://www.dc.gov.ae/PublicServices/LatestVerdicts.aspx?lang=en>> (last accessed 14 May 2019).

31 Article 275: “If the contract is dissolved by reason of voidness or cancellation or through any other cause and each of the parties is obliged to return that which he has obtained, it shall be permissible for each of them to detain what he has received so long as the other party has not returned what he has received from the former, or provided security for such return.”

32 Article 109 of the UAE Civil Transactions Law states: “A property right is a direct power over a particular thing, given by law to a particular person”.

on the margin of the original registration of the sale contract, and the second transaction occurs after that indication in the margin of the original registration of the sale contract. This is the case for real properties. However, in movable properties, the basic rule of possession of the movable object is that evidence for its holder creates the necessary protection for the third party and limits the effect of the dissolution of the original contract as against others.³³ It means that if the subject matter of the sale is movable and the first buyer sells and delivers it to the second buyer, and then the first seller cancels the sale agreement, he cannot recover the subject matter from the second buyer who had a good intention. That is because he owned the subject matter by possession. Therefore, the seller shall reimburse the first buyer for compensation. On the other hand, if the second buyer did not receive the sale subject matter, or he had bad intention, it cannot be said that he owned the sale by possession. As a result, the subject matter returns to the seller and the second buyer must go back to the first buyer to recover his money.³⁴

3. Effects of termination by mutual consent

In relation to termination by mutual consent after the agreement, it is interesting to know that the termination has no effect of returning the contracting parties to the position that they were in before the contract was made. To the third party, termination by mutual agreement after the conclusion of the contract has been recognized as a new agreement. Article 269 of the UAE Civil Transactions Law states that termination, as far as it concerns the rights of the contracting parties, amounts to rescission and, in regards to third parties' rights, to a new contract. Therefore, its effect on other than the parties is limited to the future. For example, if someone sells a house to another person and then the buyer enters into a mortgaged agreement with a third party and later on, the seller and the buyer terminate the contract based on mutual consent, the termination of the agreement would not have a retroactive effect on the mortgagee. That is because such *iqala* is counted to be a new agreement. Therefore the seller in the first agreement is considered to be the buyer in

³³ AHMAD, *supra* n. 14, at 277 – 278.

³⁴ AL SANHOURI, *supra* n. 13, at 828.

the termination agreement (*aqad al' iqala*) and the buyer in the first agreement is considered to be the seller in the termination agreement. The termination agreement entails that the house is returned to its old owner while it is loaded with the mortgagee's right.³⁵

VI. Conclusion

In this study, we saw that the term of termination of contract means termination by agreement, by law, or by *iqala*. The study did not address the issue of termination of contracts by death of a contractor, by expiration of the contract, by execution (of contract) or by lack of leave in the suspended contract. In our research, the termination of the contract was described in its general concept, which consists of a single objective system. The research was based on the rules and regulations of the same concept in order to clarify the overall legislative idea in regards to termination.

Although termination can be divided into different main types, we have only discussed the kinds of termination that occur by mutual agreement of the contracting parties or by law or by judicial decision. Both UAE law and the judicial precedent show that in the comparison between termination by prior agreement and termination by judicial decision, the latter is regarded as a general rule applicable to all disputes between individuals. However, the effects of both types of terminations on the contracting parties and on the third party are the same.

³⁵ Ahmad, *supra* n. 14, at 263.

An Analysis of Renunciation in Terms of s 2(C)(1) of the Wills Act 7 of 1953 in Light of the *Moosa NO and Others v Harnaker and Others* Judgment

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Abstract

Muslims have been living in South Africa for over 300 years. These persons are required in terms of their religion to follow Islamic law. There has (to date) been no legislation enacted by the South African parliament that gives effect to Islamic law. South African Muslims are able to make use of existing South African law provisions in order to apply certain Islamic laws within the South African context. An example of this would be where a testator or testatrix makes use of the South African common law right to freedom of testation in order to ensure that his or her estate is distributed in terms of the Islamic law of succession upon his or her demise (Islamic will). This would ensure that his or her beneficiaries would inherit from his or her estate in terms of the Islamic law of succession. A potential problem could arise in the event where a beneficiary who inherits in terms of an Islamic will, renounces a benefit. Should the Islamic law or South African law consequences of renunciation apply? This paper critically analyses a recent South African High Court judgment where the issue of renunciation of a benefit in terms of an Islamic will was looked at.

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I. Introduction

Muslims have been living in South Africa for over 300 years.¹ These persons are required in terms of their religion to follow Islamic law. There has (to date) been no legislation enacted by the South African parliament that gives effect to Islamic law. South African Muslims are able to make use of existing South African law provisions in order to apply certain Islamic laws within the South African context. An example of this would be where a testator or testatrix makes use of the common law right to freedom of testation in order to ensure that his or her estate is distributed in terms of the Islamic law of succession upon his or her demise.² This would ensure that his or her beneficiaries would inherit from his or her estate in terms of the Islamic law of succession. A potential problem could arise in the event where a beneficiary who inherits in terms of the above-mentioned will renounces a benefit. An example of this would be where a child of a testator renounces his or her benefits in terms of his last will and testament. The Western Cape Division of the High Court held that such benefits must be inherited by the surviving spouse or spouses in terms of s 2(C)(1) of the Wills Act 7 of 1953 (hereafter referred to as the Wills Act).³ The High Court judgment was subsequently confirmed by the Constitutional Court on the 29 June 2018.⁴ This paper aims to highlight some of the problems created as a result of the Constitutional Court judgment. It discusses the application of the Islamic law of succession within the South African context by way of introduction. It then analyses the *Moosa NO and Others v Harnaker and Others* judgment and concludes with recommendations as to a way forward.⁵

1 The first recorded Muslim arrived in South Africa in 1654. See MAHIDA EBRAHIM MOHAMED, *History of Muslims in South Africa: A Chronology*, Durban 1993, at 1.

2 South African law recognises the common law principle of freedom of testation. See JAMNECK JUANITA, *Freedom of testation*, in: Jamneck Juanita, et al., *The Law of Succession in South Africa*, Cape Town 2009, at 115, for a discussion on this issue.

3 *Moosa NO and Others v Harnaker and Others* 2017 (6) SA 425 (WCC), at para 39.

4 *Moosa NO and Others v Harnaker and Others* (CCT) 251/17.

5 *Moosa v Harnaker* (WCC), *supra* n. 3; and *Moosa v Harnaker* (CCT), *supra* n. 4.

II. Application of the Islamic Law of Succession in South Africa

A South African Muslim is able to make use of the right to freedom of testation in order to apply the Islamic law of succession to his or her estate upon his or her demise. A basic clause in a will stating that the Islamic law of succession must be applied to his or her estate would suffice in this regard. This type of a will could be referred to as an Islamic will.⁶ The clause would direct that an Islamic institution or an Islamic law expert should draft an Islamic distribution certificate which states who the lawful beneficiaries of the testator or testatrix are at the time of his or her demise. Islamic wills are generally accepted by the Master of the High Court for liquidation and distribution purposes.⁷ It could be argued that this constitutes delegation of testamentary powers, which is prohibited in terms of South African law.⁸ It has been argued that the application of the Islamic wills has been incorporated into South African law by way of custom.⁹ A further discussion on this issue is beyond the scope of this paper.

6 ABDUROAF KHALID, *Deceased Estates: Islamic Law Mode of Distribution*, Highlands Estate 2017, at 210 – 215; and ABDUROAF MUNEER, *The Impact of South African Law on the Islamic Law of Succession*, Bellville 2018, at 205 – 207, for examples of Islamic wills.

7 In the *Moosa v Harnaker* judgment it was stated that “[t]he deceased in his Last Will and Testament (‘the Will’) dated 23 January 2011, expressly referred to his marriages to both women. In terms of the Will the deceased directed that his estate should devolve in terms of Islamic Law and that a certificate from the Muslim Judicial Council or any other recognised Muslim Judicial Authority shall be final and binding on his executors.”, see *Moosa v Harnaker* (WCC), *supra* n. 3, at para 5.

8 An example of an invalid delegation of testamentary power would be in a situation where the grantee thereof is given unlimited discretion. This could be referred to as a general power of appointment. An example of general power of appointment would be where X states in his will that the beneficiaries of his estate shall be decided by his daughter Y, see DE WAAL M. J./SCHOEMAN-MALAN M.C., *Law of Succession*, 5th ed., Cape Town 2015, at 49.

9 See ABDUROAF MUNEER, *supra* n. 6, at 125, where it was argued that the common law has been developed through custom and is now part of South African law. It should also be noted that the Islamic law expert who drafts the Islamic Distribution Certificate does not have unlimited power. He can only issue a certificate in terms of Islamic law.

III. An Analysis of the *Moosa NO and Others v Harnaker and Others* Judgment

The facts of this case concerned a deceased Muslim (X) male who died testate on 9 June 2014. X was married to two wives when he died.¹⁰ He married his first wife (Y) in terms of Islamic law on 10 March 1957. He subsequently married his second wife (Z) in terms of Islamic law on 31 May 1964. Y consented to the marriage between X and Z.¹¹ X subsequently married Y in terms of South African law during August 1982. Z consented to the civil marriage between X and Y.¹² A total of nine children were born of the two marriages. Four of these children were male and five were female. X's will was executed on 23 January 2011 and it stated that his estate must devolve in terms of Islamic law. It further stated that an Islamic distribution certificate issued by the Muslim Judicial Council (SA) or other judicial body shall be final and binding upon the executors of his will.¹³ The Islamic distribution certificate was issued by the Muslim Judicial Council (SA) in terms of Al Quraan, sura 4 (11 – 12).¹⁴ The Islamic

¹⁰ *Moosa v Harnaker* (WCC) supra n. 3, at para 4.

¹¹ M is married to X in terms of both Islamic law and the Marriage Act 25 of 1961. See *Moosa v Harnaker* (WCC), supra n. 3, at para 3.

¹² *Moosa v Harnaker* (WCC), supra n. 3, at paras 3 – 7.

¹³ *Moosa v Harnaker* (WCC), supra n. 3, at paras 4 – 8. It should be noted that a clause in an Islamic will stating that Islamic law should apply could be problematic in the event where there are differences of opinions found within Islamic law. I am of the opinion that a testator or testatrix must state in his or her will which school of law must find application in this regard. This would also bring about legal certainty and prevent abuse by executors of estates who are trusted with administering Islamic wills.

¹⁴ See KHAN MUHAMMAD MUHSIN, *The Noble Qur'an – English Translation of the Meanings and Commentary*, New Delhi 1404H, sura 4 (11 – 12), where it states: “11. Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females; if (there are) only daughters, two or more, their share is two thirds of the inheritance; if only one, her share is half. For parents, a sixth share of inheritance to each if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers or (sisters), the mother has a sixth. (The distribution in all cases is) after the payment of legacies he may have bequeathed or debts. You know not which of them, whether your parents or your children, are nearest to you in benefit, (these fixed shares) are ordained by Allah. And Allah is Ever All-Knower, All-Wise. 12. In that which your wives leave, your share is a half if they have no child; but if they leave a child, you get a fourth of that which they leave after payment of legacies that they may have bequeathed or debts. In that which you leave, their (your wives)

distribution certificate stated that each widow must inherit $1/16 = 13/208$, each son must inherit $7/52 = 28/208$, and each daughter must inherit $7/104 = 14/208$.¹⁵

The nine children renounced the benefits due to them in terms of the Islamic distribution certificate.¹⁶ The nine children “[...] all agreed and expressed their intention in writing to renounce all their benefits accruing to them in terms of the Will read with the Islamic distribution certificate and stipulated that it be inherited in equal shares by the Second and Third Applicants [surviving spouses of the testator]. As a result of the renunciation, the Executor relied upon the provisions of s 2(C)(1) of the Wills Act.” The executor considered both Y and Z to be surviving spouses for purposes of s 2(C)(1), and was of the opinion that the renounced benefits should vest in them equally.¹⁷ The liquidation and distribution account recorded that Y and Z would each inherit an equal share of the renounced benefits. The liquidation and distribution account was accepted

share is a fourth if you leave no child; but if you leave a child, they get an eighth of that which you leave after payment of legacies that you may have bequeathed or debts. If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies he (or she) may have bequeathed or debts, so that no loss is caused (to anyone). This is a Commandment from Allah; and Allah is Ever All-Knowing, Most-Forbearing.” These verses stipulate the inheritance of parents, children, surviving spouses, and uterine siblings.

15 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 7. The fact that the daughters inherited half the shares of the sons in terms of the Islamic Distribution Certificate raises the question of discrimination based on sex or gender. This issue is beyond the scope of this case note. It should be noted that the South African Constitution prohibits discrimination based on sex or gender. See s 9 of the Constitution of the Republic of South Africa 1996, where it states that “(3) [t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).”

16 The renouncement was reduced to writing. The children stated that they wanted the surviving spouses to inherit the renounced benefits in equal shares, see *Moosa v Harnaker* (WCC), *supra* n. 3, at para 8.

17 Section 2(C)(1) of the Wills Act states that “[i]f any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse.”

by the Master of the High Court.¹⁸ The Registrar of Deeds was of the opinion that the benefits renounced by the descendants of X who were born from his marriage to Y should vest in Y as she was recognised as a surviving spouse for purposes of s 2(C)(1) due to her civil marriage with the deceased. The Registrar of Deeds was, however, of the opinion that the benefits renounced by the descendants of X who were born from his marriage to Z should vest in the descendants of the children of the repudiating descendants in terms of s 2(C)(2) as the Islamic marriage between X and Z was not recognised for purposes of s 2(C)(1).¹⁹

The disputed matter was referred to the Western Cape Division of the High Court where it was argued that s 2(C)(1) unfairly discriminates against Z on the grounds of religion and marital status.²⁰ The Court held that s 2(C)(1) is inconsistent with the Constitution as it does not include a husband or wife in a marriage that was solemnised in terms of Islamic law.²¹ Section 2(C)(1) was declared invalid insofar as it does not include multiple widows married to a deceased husband in terms of Islamic law.²² The order of invalidity was suspended subject to confirmation by the Constitutional Court as it required in terms of s 15(1) (a) of the Superior Courts Act 10 of 2013.²³ The

18 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 9.

19 *Moosa v Harnaker* (WCC), *supra* n. 3, at paras 12 – 13. It could be argued that the renounced benefits should technically vest in Y as she was the surviving spouse in terms of s 2(C)(1). It should be noted that s 2(C)(2) is also subject to s 2(C)(1). See s 2(C)(2) of the Wills Act 7 of 1953 where it states that “[i]f a descendant of the testator, whether as a member of a class or otherwise, would have been entitled to a benefit in terms of the provisions of a will if he had been alive at the time of death of the testator, or had not been disqualified from inheriting, or had not after the testator’s death renounced his right to receive such a benefit, the descendants of that descendant shall, subject to the provisions of subsection (1), per stirpes be entitled to the benefit, unless the context of the will otherwise indicates.”

20 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 17.

21 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 39 (a) (i).

22 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 39 (a) (ii).

23 *Moosa v Harnaker* (WCC), *supra* n. 3, at para 39 (g). Section 15 (1) (a) of the Superior Courts Act states that “[w]henver the Supreme Court of Appeal, a Division of a High Court or any competent court declares an Act of Parliament, a provincial Act or conduct of the President invalid as contemplated in terms of s 172 (2) (a) of the Constitution, that court, must in accordance with the rules, refer the order of constitutional invalidity to the Constitutional Court for confirmation.”

order of the High Court was in essence confirmed by the Constitutional Court.²⁴

The question that should be raised is whether relying on s 2(C)(1) of the Wills Act was the correct approach or whether the Islamic distribution certificate should have been referred back to the Muslim Judicial Council (SA) for an amendment in terms of Islamic law based on the renunciation.²⁵ Two situations must be distinguished with regard to the above. The first situation would be where the last will and testament of the testator or testatrix expressly states how his or her estate should be distributed without any reference to Islamic law. In this instance s2(C)(1) of the Wills Act would find application. This would be the case even if the consequences of the will are the same as Islamic law that would appear on the Islamic Distribution Certificate.²⁶ The second situation would be where the testator or testatrix states in his or her last will and testament that his or her estate must be distributed in terms of Islamic law and that an Islamic law expert or Islamic institution should draft an Islamic Distribution Certificate in this regard. This is what has transpired in the *Moosa v Harnaker* case, and is the focal question looked at in this paper.²⁷

I am of the opinion that s 2(C)(1) of the Wills Act should not find application in the above instance. My argument is based on the fact that the testator stated in his last will and testament that his estate should be distributed in terms of Islamic law.²⁸ This would be the application of the common

²⁴ See *Moosa v Harnaker* supra n. 4.

²⁵ Section 2(C)(1) of the Wills Act 7 of 1953 states that that “[i]f any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse.”

²⁶ Another question that should be looked at is whether the Islamic law consequences of renunciation should apply in the event where a testator or testatrix expressly states in his or her will that the Islamic law consequences should apply in the event where there is a renunciation by his or her child who he or she has bequeathed a testate benefit to. An example of this would be where a testator bequeaths 1/3 of his net estate in favour of his non-Muslim son. This son would not appear on the Islamic Distribution Certificate as is disqualified from inheriting in terms of the Islamic law of intestate succession. This question is beyond the scope of this paper as these are not the facts as found in the *Moosa v Harnaker* case. I am of the opinion that s 2(C)(1) would find application as the wording of the section does not allow for a difference consequence to the renunciation.

²⁷ *Moosa v Harnaker* (WCC), supra n. 3, at para 7.

²⁸ *Moosa v Harnaker* (WCC), supra n. 3, at para 7.

law right to freedom of testation. I am of the opinion that the Muslim Judicial Council (SA) should have been approached in regards to the renunciation of benefits and the Islamic Distribution Certificate should have been amended accordingly. The Islamic law doctrine of *takhaaruj* would then have found application.²⁹ The doctrine allows for renunciation of benefits in deceased estate. This could be done in favour of the surviving spouses. The doctrine of *takhaaruj* is broader than s 2(C)(1) as the children are not restricted in their renunciation in favour of the mother only. A child listed on the Islamic Distribution Certificate would, for example, be free to renounce his or her benefit in favour of any of the other persons listed on the Islamic Distribution Certificate. The doctrine of *takhaaruj* also allows for renunciation in favour of an asset inside or outside of the deceased estate. An example of this would be where a son renounces his right to inherit a share in estate in favour of the surviving spouse, in exchange for a car.³⁰ It should be noted that there would be nothing preventing the son in this example from renouncing his share in the estate in favour of the surviving spouse for no exchange at all. The children in the *Moosa v Harnaker* case could therefore have renounced their rights in the estate in favour of the surviving spouses based on the doctrine. The Islamic Distribution Certificate would then have reflected this. There would then have been no need for s 2(C) (1) of the Wills Act to apply.

It could be argued that once an Islamic Distribution Certificate is issued and lodged with the Master of the High Court, s 2(C) (1) of the Wills Act should find application (as in the instance of *Moosa v Harnaker*), whereas the Islamic law consequences should apply in the event where the certificate has not yet been lodged. This type of a situation could lead to a friction between the rules applicable in terms of Islamic law and South African law. An example of this would be where a son of the testator wishes to renounce a benefit in favour of the testator's father. This type of renunciation would be possible in terms of Islamic law in terms of the doctrine of *takhaaruj*, but it would not be possible in terms of s 2(C) (1) of the Wills Act. The renounced benefit should go to the surviving spouse

29 See AL SUBAA'EE MUSTAFAA, *Sharḥ Al Qaanoon Al Aḥwaal Al Shakhshiyah*, vol. 2, part 3, 3rd ed., Beirut 2000, at 177 – 178; and AL ZUḤAYLEE WAHBA, *Al Fiqh Al Islaamee Wa Adillatuhoo*, vol 8, 3rd ed., Damascus 1989, at 440 – 442.

30 See AL SUBAA'EE, *supra* n. 29, at 177 – 178; and AL ZUḤAYLEE, *supra* n. 29, at 440 – 442.

in terms of s 2(C) (1) of the Wills Act, whereas it should go to the father in terms of the doctrine of *takhaaruj*. This situation could also lead to an abuse of power. If, for example, the testator of a deceased estate is aware that the son of the testator wants to renounce a benefit, he or she could then request the Islamic Distribution Certificate and lodge it prior to the renunciation. This would then ensure that the renounced benefit would be inherited by the surviving spouse in terms of s 2(C)(1) of the Wills Act. He or she could, for example, also accept the renunciation document of a son in favour of the daughter of the deceased, but not inform the Islamic law expert of the renunciation. He would then subsequently lodge the renouncement document at the Masters Office. This would mean that the renouncement would now be in terms of s 2(C)(1) of the Wills Act and not in terms of Islamic law. This creates a huge problem with legal certainty as it would not be clear as to how the estate of the deceased would devolve.

IV. Conclusion

This paper has highlighted some of the problems with the *Moosa v Harnaker* judgment with regard to s 2(C)(1) of the Wills Act. The research has shown that the consequences of renunciation by a descendant of a deceased testator in terms of South African law are not the same as those in terms of Islamic law. It has also shown that the application of s 2(C)(1) of the Wills Act could be quite problematic in the instance where a testator or testatrix states in his last will and testament that Islamic law should find application to the distribution of his estate and that an Islamic Distribution Certificate issued by an Islamic law expert would be binding in this regard. The precedent set by the *Moosa v Harnaker* judgment would lead one to believe that the Master of the High Court would most likely not accept a request to amend an Islamic Distribution Certificate in the event where a descendant who is named in such a certificate renounces the benefit subsequent to the lodging of the certificate at the Master of the High Court. My recommendation in this regard would be that executors of Islamic wills should discuss issues regarding renunciation and related matters with the Islamic law experts or institutions like the Muslim Judicial Council (SA) prior to lodging it with the Master of the High Court. This would ensure

that Islamic law consequences would find application in this regard, and it would ensure that the testator's right to freedom of testation is given effect.

Certification of Islamic Marriages in Nigeria: Realities, Challenges, and Solutions

HALIMA DOMA-KUTIGI*

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Abstract

The Nigerian Constitution guarantees the rights to have a family life, and freedom of religion. To this end, it recognizes three forms of marriage, namely customary marriage, Islamic marriage, and statutory marriage. While statutory marriage is required to be registered by law, there is no law necessitating the registration of customary or Islamic marriages. Yet in recent times, statutory marriage has gained popularity amongst Nigerians regardless of cultural or religious affiliations. This development is linked to modernization, the requirement to prove marriage for official transactions, and a perceived protection that documentation from the marriage registry offers against socio-legal challenges such as guardianship of children,

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increase in interfaith marriages, immigration, protection against arbitrary divorce, etc. Thus, it is now common to find couples who may have contracted customary or Islamic marriage combining it with statutory marriage thereby giving rise to a multi-tiered or double-decker marriage which seems to have emerged as a fourth type of marriage in Nigeria.

Drawing on current literature and empirical research using qualitative methods, this study examines the systems of marriage in Nigeria while placing the spotlight on Islamic marriages that are accompanied by statutory marriage. The pattern of marriage registration among the Muslim community is investigated in order to understand its possible link with the growing popularity of multi-tiered marriage among Muslims in Nigeria. The study then reflects on the legal implication by probing potential conflict situations between certain provisions of the Marriage Act and basic ideals of Islamic law. It concludes by calling for the compulsory registration of all types of marriages in Nigeria within a unified system.

I. Introduction

The sanctity of marriage is a well-established standard globally, and matrimonial relationships are universally recognized and respected as a necessary prerequisite for the establishment of a legitimate family. Marriage is a social institution which is guided by the socio-cultural and religious norms in every society. Where a nation is populated by people of different ethnicities and religions, the recognition and application of different systems of law will naturally be required pertaining to their respective customs, and this reflects mostly in the forms of their ceremonies including marriage.¹

Nowhere does this ring truer than in Nigeria, Africa's most populous country with an estimated population of 184 million people.² It is also one of the most ethnically diverse countries in the world with well over 250 ethno-linguistic

¹ AGBEDE ISAAC OLUWOLE, *Themes on Conflict of Laws*, Lagos 1989, at 6 – 7.

² National Population Commission, Nigeria, <www.population.gov.ng> (last accessed 11 March 2019).

groups, some of which are larger than many sovereign states in Africa³. Roughly half of the population in the country is Muslim, followed by a large percentage of Christians, and a minority population of traditional religious practitioners and atheists.⁴ Following the multiethnic and multi religious nature of the country, the Nigerian Constitution⁵ sanctions three types of marriages, namely statutory marriage, customary marriage, and Islamic marriage; which are acknowledged as distinct and separate from each other.⁶

In recent times, statutory marriage has gained popularity amongst Nigerians regardless of cultural or religious affiliations due to the protection it offers against socio-legal challenges such as the need to prove marriage for purposes of official transactions, increase in interfaith marriages, immigration, long distance marriages, protection against arbitrary divorce, etc.⁷ Thus, it is now common to find couples who may have contracted customary or Islamic marriage applying to contract statutory marriage, thereby engaging in multi-tiered contracts by combining marriages under different systems of law,⁸ and thus subjecting the regulation of their family life to multiple systems of law.

Following the enumerated problems above, this study sets to examine the ensuing questions:

- i. What is the pattern of registration of Muslim marriages in Nigeria; and which instruments are available to generate documents for marriages conducted under traditional Islamic marriages in order to make them accepted within other traditions and societies?
- ii. What is the rate of Muslim couples that engage in multi-tiered marriages, and what are their reasons for doing so?

3 World Directory of Minorities and Indigenous Peoples <www.minorityrights.org> (last accessed 8 March 2019).

4 See *supra* n. 3; see also AN-NA'IM ABDULLAHI AHMED (ed.), *Islamic Family Law in a changing World: A Global Resource Book*, London 2002, at 299.

5 Constitution of the Federal Republic of Nigeria 1999.

6 Accordingly the formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law, including matrimonial causes relating thereto are in the Federal Exclusive Legislative List.

7 RIFATU ABDULHAMID/IMAM ABDULRAHIM SANUSI, Challenges and Negative Effects of Divorce Among Muslim Women in Northern Nigeria, *Journal of Arts & Humanities*, Vol. 5, No. 11 (2016), 13 – 25.

8 Marriage Act, Cap 212 LFN 1990.

- iii. How does 1 and 2 above impact on rights and duties of the parties in marriage, divorce, and inheritance?

II. Literature Review

1. Definition of Marriage

Marriage is defined in Black's Law Dictionary as the legal union of one man and one woman as husband and wife.⁹ Lord Penzance also defined marriage in *Hyde v Hyde* as “[...] the voluntary union for life of one man and one woman to the exclusion of all others”.¹⁰ For a long time, this definition was commonly accepted in many parts of the world; however, it now seems to be obsolete. Notably, those who contract marriage for short term objectives in order to achieve a particular purpose, and same-sex marriage cannot fall under the definition of marriage by Lord Penzance. Furthermore, although the definition by Lord Penzance is similar to the one under the Nigerian Marriage Act,¹¹ it must clearly be stated that this definition does not strictly speaking hold true because it fails to accommodate customary or Islamic marriages, which are polygamous in nature.

Nwogugu describes marriage as “[...] a universal institution which is recognised and respected all over the world as a social institution founded on, and governed by the social and religious norms of society”.¹² This clearly implies that any marital union must and should be socially approved, but the acceptable process and medium of social approval has become a contentious issue in pluralistic societies like Nigeria. This view covers an aspect of the study.

9 BLACK H.C., Black's Law Dictionary with Pronunciations, 6th ed., St. Paul 1990, at 972.

10 (1866) L.R.1 PD. 130, at 133.

11 See Section 27 of the Marriage Act Cap. M6, Laws of the Federation of Nigeria, 2004; See also Sections 33(1) and 39 of the same Act.

12 NWOGUGU E. I., Family Law in Nigeria (Revised Edition), Ibadan 1996, at 5.

2. Sources of Family Law in Nigeria

Tobi identifies the sources of Nigerian family law as: the Nigerian Constitution of Nigeria; customary laws that have been in existence from ancient time; Islamic law that is universally applicable among Muslims; and received English law brought into the country by the British colonialists. Other sources include international law, case law, and legislation.¹³

He acknowledges that though Nigeria is now independent, the state's legal system is modeled after the British legal system, and the body of English laws imposed by the colonial masters still plays a major role in our system of law.¹⁴ Accordingly, family law in Nigeria is a subset of the legal system, and thus shares the same sources, development with the general legal system in the country. The author further narrates that before the British came into Nigeria, the natives had different systems of law governing their affairs, including marriage, and besides the system operating under the traditional customary law which is indigenous to the people, there were also rules of Islamic law. He noted that Islamic law is not indigenous to any tribe and is especially practiced in the areas presently within the northern region and some south-western parts of Nigeria; but by virtue of Section 2 of the Native Courts Ordinance 1914, Islamic law was categorized as customary law in Nigeria.¹⁵ This development has always been a subject of debate. While some authors like Eniola¹⁶ and Adaramola¹⁷ consider customary law in Nigeria as consisting of both native law and Islamic law, others like Tobi,¹⁸ Ambali¹⁹ and Yakubu²⁰ argue that Islamic law operates as a distinct system from customary law. Ambali suggests that the classification of Islamic law as a form of customary law in Nigeria reflects an unaccommodating approach to Islamic law, and concludes that notwithstanding challenges to the

13 TOBI NIKI, *Sources of Nigerian Law*, Lagos 1996, pp 25 – 74.

14 See TOBI, *supra* n. 13, at 34.

15 See TOBI, *supra* n. 13, at 136.

16 EMIOLA AKINTUNDE, *The Principles of African Customary Law*, Ogbomosho 2005.

17 ADARAMOLA FUNSO, *Jurisprudence*, London, 2008.

18 TOBI, *supra* n. 13.

19 AMBALI M. A., *The Practice of the Muslim Family Law in Nigeria*, 2nd ed., Zaria 2003.

20 YAKUBU J. A., *Within and Without: The Relevance and Potency of the Law beyond our Frontiers*, Ibadan 2006.

application of Islamic law in the country, it still endures as a system of law and is accordingly recognized by Section 275 of the Constitution of the Federal Republic of Nigeria 1999. Citing the decision in the case of *Khairie Zaidan v Fatimah Khalil Mohssen*, he further concludes that Islamic law is the personal law of Muslims in Nigeria and it operates as a distinct legal system.²¹

3. Systems of Marriage in Nigeria

Nnamani identifies three systems of marriage in Nigeria: statutory or registry marriage, customary marriage, and Islamic marriage.²² These three forms of marriage are fully recognised as distinct and separate from each other by Nigerian Law.²³ The laws regulating marriage in Nigeria are the Marriage Act, which regulates statutory marriage; customary law (of the various ethnic groups in Nigeria), which regulates customary marriage; and Islamic law, which regulates Islamic marriage.

a) Statutory marriage: This form of marriage is contracted under the Marriage Act, a federal enactment designed for the celebration of voluntary union between a man and a woman to the exclusion of all others during the continuance of the marriage.²⁴ This type of marriage, which is also referred to in Nigeria as “registry marriage” or “marriage under the Act”, is monogamous in nature; thus, parties to this union must not have been previously married to any other person. Furthermore, a party cannot during the lifetime of the other party to the marriage purport to marry some other person, whether under customary law or under the statute unless this marriage has been validly dissolved by a court of competent jurisdiction. Thus, Section 33(1) of the Marriage Act provides that: “No marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage is married under customary law to any person other than the person to whom such

21 (1973) 11 SC 1, at 27.

22 EMMANUEL NNAMANI, *Misconceptions and Inadvertences Affecting the Customary Courts System in Nigeria*, NJI Law Journal 2017, at 1323 – 24.

23 EMMANUEL, *supra* n. 22.

24 Cap M6 LFN 2004.

marriage is had.” Also, the marriage must not be between parties related by blood or marriage.

Christians in Nigeria go through statutory marriage in the Marriage Registry before proceeding to church for solemnization. However, they do not need to go to the Registry if their church is recognized as a *licensed place of worship*. The licenses for churches to conduct marriages are obtained from the Ministry of Interior to enable it for the conduction of statutory marriages after the fulfillment of certain requirements.

b) Customary marriage: This is essentially marriage contracted and regulated under the native laws and customs of the various communities in Nigeria. It is the commonest form of marriage in Nigeria and it is recognized under the law as a legitimate matrimonial union. There is no single uniform system of customary law prevailing throughout Nigeria, and so customary laws differ from one locality to another. However, under indigenous or native customary laws of Nigeria, marriage is essentially a union of a man and a woman for the duration of their lives, involving a wider association between two families or sets of families. Thus, customary marriage is conducted as proof to the community that the couple is actually husband and wife; to guarantee the children’s parentage; and generally upholding customary values.²⁵

From the foregoing, it is clear that ample allowance and incentive is provided under customary law for polygamy given that there is no limit to the number of wives a man can marry under customary law. The basic requirements of a valid customary law marriage are: capacity,²⁶ consent of the parties and their families, bride price, and the celebration of marriage through a ceremony. The prohibition of marriage between people related by blood or marriage often exists under customary marriages.

c) Islamic marriage: This marriage is conducted according to the tenets of Islamic law. It is also not limited to one man and one woman provided he is capable of meeting the requirements and conditions stipulated under Islamic law. For a valid Islamic marriage, the following conditions must be satisfied:

²⁵ ONOKAH M. C., *Family Law*, Ibadan 2003, at 144 – 146.

²⁶ The parties to the marriage must be of marriageable age. Although no custom expressly states any age for marriage, the Child’s Right Act provides that 18years is the minimum age for any marriage.

there must be a clear proposal and acceptance, witnesses, bride price, and guardian.

It is emphasized that Islamic law and customary law marriages are in no way inferior in status to marriage contracted under the Act. Instructive in this regard is the Supreme Court case of *Jadesimi v. Okotie Eboh*, where it was decided that “[...] the status of being married under Islamic law or customary law is well recognized in this country and such marriages should not be accorded any status that is inferior to that of marriage conducted under the marriage act.”²⁷

d) Multi-tiered/double-decker marriage: According to Imam-Tamim, a fourth type of marriage subsists in Nigeria, which is a hybrid form of marriage where a single couple combines marriages under different systems of law.²⁸ This practice of contracting multi-tiered marriage by the same couple is what Onokah terms “double-decker marriage”, and which she defines as “[...] involving the celebration by the same couple of a marriage under one system and their subsequent marriage under another system”.²⁹ The author posits that the Nigerian Marriage Act has given validity to this practice by enabling those who are married under customary law to marry each other under statute law. The accommodation of a multi-tiered marriage contract under Nigerian family law can also be deduced from the provision of section 35 of the Marriage Act 1914 which provides to the effect that couples are not allowed to conduct any other form of marriage(s) after the celebration of marriage under the Act either with themselves or with a third party. Any such marriage conducted is pronounced null and void and punishments are provided in sections 47 and 48 of the Marriage Act 1914. The Act however permits “customary law” marriage as far as it is between the same couple married under the Act. As at 1914, the term customary law was intended to include Islamic law.³⁰

27 (1996) 2NWLJ (Pt 429) 128, at 142.

28 IMAM-TAMIM MUHAMMAD KAMALDEEN, A doctrinal review of literature on multi-tiered marriage in Nigerian family law, presented at the Postgraduate Colloquium on Innovation in Postgraduate Research, Organised by Goal Centre, Islamic Science University Malaysia (USIM) on 10 June 2015.

29 ONOKAH, *supra* n. 25, at 143.

30 This intention was conveyed in Section 2 of the Native Court Ordinance 1914.

Many Nigerians conduct statutory marriage mainly for its perceived “legality”, monogamous security, the official purpose that the certificate serves, urbanization, status symbol, etc.³¹ There is also a general impression that couples who engage in several forms of marriage are somehow “more married” and thus are entitled to greater protection than those who enter into traditional marriage.

4. Issues and Implications of Multi-Tiered Marriages under Nigerian Family Law

Imam-Tamim examines the legal predicaments that could arise in respect of marital causes between multi-tiered marriage couples by particularly relating to the question of which distinct system of family law governs a relationship.³² Each of the different systems of family law has its own peculiar understanding of marriage rules and application. He identifies the potential conflict incidents including ownership of matrimonial property acquired during the subsistence of such marriage, termination of the marriage between the parties, guardianship and custody of children born of a marriage, etc.

In addressing the legal predicaments, Kolajo notes that ordinarily where customary law conflicts with a statute the provision of the statute shall prevail.³³ However, such provision can be deemed to enjoy prevalence over customary law where the statute expressly makes provision to that effect. Tonwe and Edu also support Kolajo’s position on the determinant factor for the superiority of statute over the customary law.³⁴

In contributing to the debate, Onokah streamlines two theories that guide the courts in resolving the conflict of law issue that may arise in the multi-tiered marriage.³⁵ These are the co-existence theory and the conversion theory. The conversion theory states that the customary marriage merges (converts) into the statutory marriage, and that dissolution of the statutory marriage brings an end to the marital relation

31 ONOKAH, *supra* n. 25, at 147 – 151.

32 IMAM-TAMIM, *supra* n. 28.

33 KOLAJO A. A., *Customary Law in Nigeria through Cases*. Revised Edition, Ibadan 2005.

34 TONWE S. O./EDU O. K., *Customary Law in Nigeria*, Lagos 2017.

35 ONOKAH, *supra* n. 25, at 153.

between the parties. On the other hand, the co-existence theory advances that both marriages co-exist and thus in the event of dissolution separate actions must be taken in order to dissolve both marriages: in the case of the statutory marriage a decree of divorce issued by a High Court, and in case of a customary law marriage by an extra-judicial act of refund of bride price or by judicial divorce by a customary court. This view is supported in the case of *Ohochukwu v Ohochukwu* where the question arose whether the English Court had jurisdiction to dissolve the two forms of marriages between the parties. Wrangham J. granted a decree nisi dissolving the subsequent English marriage and stated that, “[...] the Nigerian marriage must be regarded as polygamous marriage over which the court does not exercise jurisdiction.”³⁶

Although these theories seem to have aided the courts to some extent, it appears that the debates have still not been settled because the differences between all the systems of marriages are so significant that it is incomprehensible for one form to be subsumed under another.

Perhaps the only treatise on Islamic family law in Nigeria that pointedly addresses multi-tiered marriage is authored by Ambali. He examines the implication of contracting this kind of marriage from the Islamic law perspective with a focus on its effect on succession, and observes that although Islamic law recognizes monogamous marriage (which is the essence of the Marriage Act), the converse is the situation in the Marriage Act which shuts Islamic law out of the lives of the Muslims who enter into statutory marriage contracts.³⁷ Thus, Section 36 (1) of the Marriage Ordinance 1958 is to the effect that when a person who was subject to Islamic law marries under the Ordinance and dies intestate, his legacy will be distributed in accordance with common law. This provision was applied in *Adesubokan v Yinusa* where it was held that a Muslim who contracted marriage under Islamic law but wrote a will in accordance with the Wills Act must be deemed to be governed by common law.³⁸

Ambali further reasons that the laws of marriage and succession constitute part of a Muslim's faith, which is not supposed to be varied by human whims and caprices; therefore, any Muslim who marries under the

36 (1960) 1 All ER 253.

37 AMBALI, *supra* n. 19.

38 (1973) 3 UILR 22 or (1971) NNLR 77.

Marriage Act in Nigeria rejects the injunctions of Allah regarding marriage and succession since forcing oneself to monogamy when there are circumstances that require a man to take additional wives amounts to making something unlawful (*haram*) for himself which Allah has made lawful (*halal*) for him. Moreover, a Muslim never dies intestate as the manner of distributing a Muslim deceased's property is clearly explained by Islamic law; therefore, a Muslim who marries under the Marriage Act has subjugated the rules of succession in Islamic law for the rules of succession under common law, which is applied through the administration of estates laws of various states in Nigeria.³⁹

It is observed that the issues presented by the author are legitimate; however, his discourse in the treatise is limited to the issue of succession. Nevertheless, this is the only treatise on Islamic family law in Nigeria that pointedly addresses this issue.

5. Registration of Marriage in Nigeria

Boparai notes that of all forms of marriages recognized in Nigeria, it is only the statutory marriage (under the Act) that is automatically registered with certificates issued to the parties.⁴⁰ This observation deserves some comment. There is no principle of law which requires the recording of a customary law or Islamic marriage; therefore, proof of such marriage involves many more difficulties than a proof of statutory marriages. Although the preliminaries leading to marriage and the marriage itself are marked by public ceremonies, which serve as evidence of the marriage, the value of such evidence is lessened because it places reliance on the memory of witnesses who may eventually be unreliable or even dead.⁴¹

Thus, over time efforts have been made around the country to provide for the registration of customary law marriages. To this end, the local government laws in most states of the federation have authorized local authorities to make by-laws for the registration of customary law marriages within their respective jurisdictions. For example, the

39 AMBALI, *supra* n. 19.

40 BOPARAI HARINDER, *The Customary and Statutory Law of Marriage*, *The Rabel Journal of Comparative and International Private Law*, Vol. 46.3 (1982), 530 – 557, at 548.

41 BOPARAI, *supra* n. 40, at 553.

Registration of Marriages Adoptive By-Laws Orders, which are applied in Lagos, Ogun, Oyo, Ondo and Bendel States, require a customary law (which includes Islamic law) husband to register the marriage in the relevant local government office within one month of its celebration.⁴² It also states that any person may on the payment of the appropriate fees inspect or make copies of the contents of the marriage register. The records, however, may be extremely unreliable because the registrar can only record such particulars as are supplied to him. Many of the by-laws do not stipulate any penalty for non-compliance of the requirements, thereby reinforcing the belief held by many people that registration is not necessary.

This is the general position in the predominantly Muslim northern part of the country. Many Muslims believe that in an Islamic marriage, paper work is not necessary and registration is not a pre-condition for marriage. However, Imam-Tamim points out that there are no provisions in the Qur'an or Sunnah relating to registration of marriage, nor are there any prohibitory provisions.⁴³ Therefore, it has been argued that the purpose for which Muslims conduct multi-tiered marriage is to protect against modern challenges and perceived injustices faced by unregistered marriages and, as such the obligation to register marriage is important as it is for the benefit (*maslahah*) and protection of the society at large. The emerging trend now indicates that Muslim couples are becoming more aware about the need for marriage registration owing in most cases to the official purpose that marriage certificate will serve. Hence, in most urban cities in the North the cleric (imam) or mosques, which conduct the *nikah*, will register the marriage and give the couple a corresponding certificate. The question that arises here is how much recognition is given to such certificates in Nigeria and abroad, especially when compared to the certificate issued for statutory marriage? This issue is addressed in the ensuing parts of the article.

All the texts reviewed above attempted to examine the nature and types of family law in Nigeria and the emerging trend of couples engaging in multi-tiered marriage. It is however noted that most of the literature reviewed were

42 Western Region of Nigeria Legal Notice (in Western Region Gazette), No. 4 of 1957; see also Laws of Eastern Nigeria, 1963, Cap. 79, ss. 84, 90; and Laws of Northern Nigeria, 1963, Cap. 77, s. 38.

43 IMAM-TAMIM, *supra* n. 28.

narrow in scope in the sense that they were only limited to statutory law and customary law marriages leaving out Islamic law marriage. It is also observed that multi-tiered marriages portend certain legal problems, and though scholars and jurists of family law in Nigeria acknowledge this fact, very few of them have engaged in detailed analysis of the problems that could be caused by this type of marriage arrangement. Most of the reviewed literature discussed multi-tiered marriages involving customary marriage and statutory marriage, without looking into the Islamic/statutory model of such marriage. Thus, the literature reviewed above are narrow in scope as they exclude the practice of multi-tiered marriage involving couples who have combined both Islamic marriage and statutory marriage, and this is the gap which the present research seeks to fill.

III. Methodology

This is a qualitative study that employs both doctrinal and non-doctrinal methods of legal research. For the doctrinal method, the study reviews the library and online based literature available on the types, processes, and registration patterns of marriages in Nigeria with particular emphasis on Islamic marriages. For the non-doctrinal method, targeted participants were selected through convenience and purposive sampling methods. Key informants were also used based on their role in the community, and knowledge about the research interest. The research was conducted in Abuja because of its metropolitan nature, and the residents are a typical representation of the heterogeneous nature of Nigerian society.

In-depth interview was conducted on targeted participants who were selected through convenience and purposive sampling methods. Furthermore, key informants such as imams, marriage registrars, court staff, qadis, etc. were interviewed based on their role in the community, or knowledge about the research interest. Information was also collected from the marriage registry in Abuja, the Federal Capital Territory. Thus, 50 married Muslims participated in the study from different societal classes, ranging from the educated to the uneducated and also from the working to the non-working class. Their age range was between 21 to 60 years. This age group was considered appropriate for the study given that most of the marriages in Nigeria occur between the aforesaid ranges. More women

than men were interviewed (30 women and 20 men) because it is generally believed women are more affected by lack of registration of marriages. Ten key informants including imams, marriage registrars, court staff, lawyers, qadis, etc. also shared their practical knowledge and experience on the research interest.

IV. Findings and Discussions

1. What are the Factors that Couples Consider when Deciding what Type of Marriage to Contract?

This study found that the three types of marriage persisting in Nigeria – statutory, Islamic and customary marriage – are all legally recognized, although they differ considerably in character and consequences. Nevertheless, individuals decide on a preferred type of marriage based on factors such as traditional beliefs, religion and level of exposure of both the couples and their families. According to a respondent:

“When it comes to marriage, you should know that Nigerians as most Africans will always exhibit their traditional or religious beliefs. All we know is that if you are from a Muslim family, you do *nikah* and if you are from a Christian family, you go to church for marriage blessings. Those that are more enlightened from the south also go to the registry afterwards. Even if you do not practice any faith, in our society, you have to be associated with one. I lived with a certain family for several years and although I never saw them go to church or mosque during this period, I concluded that they are Muslims when they sent me an invitation to their daughter’s wedding, and I saw the word ‘*nikah*’ on the wedding card.” (49-year-old female business woman)

This study also found that all Muslims go through the Islamic marriage ceremony, known as *nikah* or *fatiha*. All the respondents in Abuja consider the *nikah* as the only way they can marry legitimately. Furthermore, most of them said that they expect their marriage to be regulated by Islamic family law. A respondent rationalized that:

“Islam is a complete way of life, it dictates how we live from the time we are born till the day we die. Therefore, a Muslim will be going against the

dictates of his religion if he decides to celebrate any other form of marriage besides *nikah*.”(43-year-old male teacher)

An imam (who also happens to be a qadi) interviewed in the course of this study briefly summarized the *nikah* procedure as follows:

“*Nikah* is a very brief and straightforward procedure that requires the following compulsory ingredients: offer and acceptance, presence of the bride’s and groom’s guardians, witnesses, and dowry. On the main wedding day, the intending couples and their families meet at the wedding venue (usually the bride’s house, mosque or hall). Soon after this, the *nikah* is commenced. There are usually two guardians present at the place, representing the two parties. The amount of *mehar* (dowry), a compulsory amount of money to be given to the bride by the groom is also decided. After this, the officiating imam asks the bride’s guardian (*waliy*) in the presence of everybody three times whether the bride accepts the groom as her husband with the decided amount of dowry. After her consent, the groom’s guardian is asked three times, whether the groom accepts the bride as his wife with the decided amount of dowry. After his consent, the *fatihah* (the wedding prayer) is recited. This is followed by the recital of the *khutbah*, a religious discourse. Blessings are showered upon the bride and the groom for a prosperous married life. The marriage is then announced”.

The Imam further explained that to validate the full recognition of Islamic marriage, the Shariah Court of Appeal is established by the Nigerian Constitution to decide in accordance to Islamic law any question of Islamic personal law regarding marriage or relating to family relationships; any question of Islamic personal law regarding succession where the deceased person is a Muslim; and in the case where all parties to the proceeding are Muslims and request the court that hears the case in the first instance to determine that case in accordance with Islamic personal law.

From the above discussion, it is clear that in Nigeria Islamic marriage is a legal marriage that protects all in it. Thus whether or not it is registered, the law fully recognizes it and nobody is disenfranchised in any way on the basis of having conducted an Islamic marriage rather than a statutory marriage.

2. Pattern of Registration of Muslim Marriage

The study found that there is no uniform law for the registration for all forms of marriages in Nigeria. While statutory marriage comes with registration, couples who contract either customary or Islamic marriage have to take further steps to register the marriage. Thus, very few couples register the *nikah* immediately, and most do not bother to register the *nikah* unless the need arises for them to do so in the future. Out of the 50 respondents in the study, 19 of them (38 %) registered their *nikah* immediately after the ceremony, and at the venue; notably, those that gave this response all got married after the year 2000. This indicates that registration of Islamic Marriage is a fairly recent phenomenon in Nigeria.

The research also found that Islamic marriages do not have to take place in a registered venue. However an authorized Muslim cleric known as imam can conduct the *nikah* usually in the bride's father's house, mosque, or an Islamic Centre. Out of the 50 respondents in this study, 27 (54 %) said that their marriage was conducted at home while the remaining 23 marriages (46 %) were at the mosque or the Islamic Centre. It was further found that out of the marriages conducted in the mosque, 15 were immediately registered in the marriage record book at the mosque, while only 3 of the marriages conducted at the bride's home were registered through the officiating imam.

The findings above indicate that there is no specific or compulsory system of registration for Muslim marriage; however, the venue of the marriage influences the chances of registration. Thus, Muslim weddings are more inclined to be registered when conducted in a mosque, rather than at home. The registration done by the mosques is also a fairly recent development. According to an imam:

“It is modernization that has brought about the need for registration of marriages. In my experience of over 20 years as an Imam in this mosque, it was only a few years ago that we decided to start registering marriage and issuing certificates to the couples, and we had to do this because people started asking for certificate for one reason or the other. I understand that even the Al Noor Mosque, National Mosque and NASFAT⁴⁴ Mosque are also registering all the marriages they conduct, and

44 Nasrul-lahi-li Fathi Society of Nigeria (NASFAT) is a Nigerian Muslim association with over one million members.

they also give certificates to the couples. I don't think that the smaller mosques are doing this yet.”(60-year-old male imam)

It can be deduced from the above comment that the high rate of unregistered Muslim marriages is now a matter of concern to Muslim scholars who worry that this may adversely affect Muslim integration into broader modern society. Thus, mosques and Islamic societies have gradually begun to register Islamic marriages conducted under their auspices and also issue marriage certificates; however, this is not done systematically as there is no uniform format and each mosque has its distinct style of registration and certification.

Upon further research, the study also uncovered the difference in the level of education between those who had registered their *nikah* and those that had not done so. Those who had registered their marriages were more educated than those with unregistered marriages. Similarly, there is a marked difference between rural and urban lifestyles in Nigeria. Those that reside and work in urban areas are more likely to register their marriages. As one respondent stated:

“In this day and age, any married person must have some document to show as evidence of the marriage. You might need such certificates to travel or conduct certain administrative procedures. I remember being posted to Enugu during my NYSC⁴⁵ in 2015. Then, I had just gotten married and my husband was in Kaduna, so I applied for redeployment to Kaduna. The Officer in charge of redeployment asked me to attach my marriage certificate to my application but I explained that I had none, and the mosque where I conducted the *nikah* did not register the marriage. I was then advised to go to the High Court and fill a declaration of marriage form as proof of marriage which I then presented to the NYSC. Some of my colleagues with similar problem collected theirs from the Shariah Court of Appeal.” (29-year-old female lawyer)

A divergent view was expressed by another participant whose highest level of education is secondary school. She said:

45 The National Youth Service Corps (NYSC) is a scheme set up by the Nigerian government to involve Nigerian graduates in nation building and the development of the country. Graduates of tertiary institutions are required to take part in the National Youth Service Corps program for one year. This is known as national service year.

“What do I need a marriage certificate for? Anyone or any authority that needs proof that I am married should just go and ask my family head who was my guardian during the *nikah*. The imam who conducted the *nikah* and the witnesses who attended are also alive to testify.” (33-year-old housewife)

From the foregoing comments by the lawyer respondent, it is clear that even the courts recognize that most Islamic marriages are not registered and yet people require marriage certificates to pursue some administrative processes such as NYSC documentation, school documentation, certain transactions in banks, to process travel documents, etc. Hence, alternative arrangements have been made by the courts in the form of “marriage declaration” and “affidavit of marriage” which serve as proof of marriage in the absence of a civil marriage certificate. A nagging problem with this arrangement is that it is prone to abuse since unlike the civil marriage registry the courts do not have a standard procedure to verify the claim of the person making the declaration of marriage. A court staff opined that:

“In this office, we issue affidavits of change of name and declaration of marriage every day. Some say they were asked to bring it by their school or work, or some will tell you it is for visa application. We just give them, even though you can’t be sure if they are saying the truth or not. But it is an affidavit... So they pay the necessary fees, produce their photographs, we administer the oath and give them the documents.” (50-year-old male commissioner for oath at High Court of the Federal Capital Territory, Abuja)

Another finding of this study is that whereas all marriage certificates issued either by the mosques or courts in form of marriage affidavits or declarations are generally accepted everywhere and for every purpose within Nigeria. The same weight is not attached to such documents abroad and thus they are not automatically accepted as evidence of marital status for international transactions and documentation. For instance, to qualify for a marriage-based visa to join a spouse abroad, most countries would require a certificate of a *legal* marriage. A legal marriage in this sense is one that is officially recognized by the government in the country or state where you were married. This usually means that an official record of the marriage was made or can be obtained from some government office. Therefore, a copy of the civil marriage certificate is required, and the only way to obtain this in Nigeria is through the Marriage Registry.

3. How Common is Multi-tiered Marriage Amongst Muslims in Nigeria?

This research established that all Muslims couples in Nigeria conduct *nikah*; however, some still proceed to also contract a statutory marriage in the marriage registry. The study could not find reliable statistics on what proportion of Muslims who get married in Nigeria have both a *nikah* and a civil marriage. In this study 7 out of the 50 (14 %) respondents fell into this group. Furthermore, the data collected from the Abuja Marriage Registry revealed that out of a yearly average of 2000 marriages conducted by the Registry; about 40 (2 %) involve Muslim/Muslim couples, while 55 (2.75 %) involved Muslim/Christian interfaith couples. Commenting on this, a staff of the Abuja Municipal Area Council (AMAC) Marriage Registry said:

“I have been working in this registry for over 20 years, and in the past you will rarely find any Muslim couple coming for registry marriage. But due to modernization and the changing times, we see them now. However, I noticed that they make this request only when the need arises. Some will say it is for visa, or they are relocating abroad and they need civil certificates. One man even told me that only registry marriage is recognised by the law in Britain. We also have Muslims who want to go into interfaith marriage coming for statutory/registry marriage to prove their love and give the women a sense of security. This is because the women always insist that they want to avoid polygamy, and guard against arbitrary divorce.” (53-year-old male AMAC Marriage Registry staff)

The foregoing remarks have thrown light into some of the reasons why Muslim couples go into statutory marriage (legal protection, monogamous security, the official purpose that the certificate serves, etc.), which they all felt that marriage by *nikah* alone could not cover. Some women want to strengthen their legal position by ensuring that they get married under the Act. The non-codification of the Islamic law marriage among the regime of federal legislations inevitably induces some Nigerians to look on it as a mere conventional ceremony and the Act marriage as one with legal force even though this is wrong. Furthermore, the need to setback the potentially polygamous nature of the initial Islamic law marriage is quite common among the educated female class.

Thus, it is noticed that while the legal status of Islamic marriage is not in doubt, the issue of documentation for the purpose of verification can only

be addressed at present by the Marriage Registry due to the reliability and objectivity of the Registry Record. This clearly goes to show that the present position as regards to registration of Muslim marriages in Nigeria is unsatisfactory.

An interesting finding of this study is that although the Marriage Act recognizes marriages conducted in *licensed places of worship*, which the Marriage Registry is mandated to register and certify, no single mosque in Abuja including the National Mosque is a licensed place of worship though many churches are. Our research was however unable to find an explanation as to why no mosque in Abuja has approached the relevant authorities for this license.

4. Legal Implications of Islamic/Statutory Multi-tiered Marriage in Nigeria

Multi-tiered marriages accept that each system of family law has its own understanding of marriage rules and has its own independent application. This is bound to have certain legal and social implications especially relating to how rules applicable under the distinct and respective systems of family law should be applied to the parties. Thus, several provisions of the Marriage Act are found to be inconsistent with the rules of Islamic law which may create problems for the couple in future.

One of the issues that could come up in a marriage governed by multiple regimes is determination of status and quantum of ownership of matrimonial property. While the Marriage Act recognizes the right of the wife to claim a part of the matrimonial property, Islamic law leans toward individual ownership of property.

Polygamy is also a problem as the Marriage Act recognizes only monogamy; thus, any Muslim who marries under the Marriage Act in Nigeria confines himself to monogamy. A respondent to this study shares his dilemma:

“I am from Okene but I lived in Lagos for many years before relocating to Abuja. I met and married my wife in 2002 through an Islamic ceremony in Lagos. Although both of us are Muslims, she insisted that we should also go for statutory marriage and I obliged because I loved her and many people in Lagos do this. Our problem started when she heard I was planning to marry a second wife. Now she keeps warning me that I

cannot take another wife and if I do she would take me to court and claim all my property and children. I thought of divorcing her through talaq, but I was advised against it by a brother who reminded me that even if I divorce her islamically, she would still remain my wife according to statutory law. Honestly, I feel trapped and regret conducting the statutory marriage.” (50-year-old male civil servant)

Another problematic aspect in respect of this kind of marriage arises from the termination of the marriage. Dissolution of statutory marriage is based on a petition by a party to the marriage stating that the marriage has broken down irretrievably.⁴⁶ On the other hand, dissolution of an Islamic law marriage can occur extra-judicially or by the order of the Shariah Court (judicial divorce). Notably, the majority of divorces of Islamic law marriages occur through the non-judicial unilateral action of one of the spouses, or by the mutual consent of both spouses.

Succession⁴⁷ also presents a problem in the sense that when a Muslim marries under the Act and dies intestate his legacy will be distributed in accordance with common law, which is applied through the administration of estates laws of various states in Nigeria. This was the Court’s decision in *Adesubokan v Yinusa*.⁴⁸ although a Muslim never dies intestate as the manner of distribution of his property is clearly established in the Koran.

Guardianship and custody of children born of a multi-tiered marriage are common issues that may arise regarding how to determine the appropriate party to get custody or guardianship of the infant. While the issue of guardianship is well established under Islamic law, the Marriage Act relies on the concept of the best interest of a child to determine custody.

Interestingly, even with the potential challenges that may arise as discussed above 43 of the study respondents including some of those who also married in the Registry expressed that they expect their marriage to be regulated by Islamic law.

46 Section 15(1) of the Matrimonial Causes Act.

47 Section 36 (1) of the Marriage Ordinance 1958.

48 See, *supra* n. 38.

V. Conclusion

Different social, cultural and legal factors contribute to the type of marriage that Nigerians choose to celebrate. It has been established that all Muslims recognize *nikah* as the principal form of marriage. Nevertheless, modernization has contributed reasonably to the increase in the practice of multi-tiered marriage in the contemporary Nigerian society. However, responses from the interviews in this study suggest that many Muslims who enter a multi-tiered marriage do so out of necessity due to the absence or weak model of registration of Islamic marriages in the country. Consequently, despite its susceptibility to create legal problems that could affect the couples and even confuse the courts the number of Muslims engaged in a multi-tiered marriage is gradually rising and will continue to grow unless a better arrangement is made to adapt to this particular requirement of a modern globalized world.

Accordingly, it is suggested that there is a need for the government to create a unified, efficient and compulsory system for the registration of all types of marriages in Nigeria, which should be adopted throughout the country within the responsibility of the Registry of Marriages. All marriage certificates should also be issued by the same authority, and marriages celebrated outside the country should also be registrable. The existence of such a system will not only help to solve the problems arising from this study, but it will also generate reliable data that can be used to plan better policies and programs for the development of the country.

Marriage in Iran: Women Caught Between Shi'i and State Law

LADAN RAHBARI*

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Abstract

This study investigates juristic Shi'i guidelines as well as philosophical and legal perspectives on marriage in the Iranian contemporary context where specific interpretations of Twelver Shi'a are encoded in civil law. The study discusses three important factors that contribute to the legal and juristic complexity of Shi'i marriage: (i) length of marriage, including discussions on permanent and temporary marriage; (ii) registration of marriage and the problem of unregistered marriages; and (iii) age of marriage and the issue of child marriage. All three factors have been significantly present in the social, public and political debates on marriage and reproduction as well as in women's and children's rights movements in Iran. I outline some of the potential social implications and harmful effects of the existing problematic discourses of temporary, child and unregistered marriages. After discussing the three factors and the diversity of marriage practices, the study contextualizes the existing diversities within the broader Shi'i political and religious discourses.

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I. Introduction

Marriage is often described as an important social and economic institution in Islam. Interpretations of Islamic perspectives have shown that existing traditions encourage halal heterosexual relationships, and denounce the practice of celibacy as an unwelcome practice, if not a dishonorable one.¹ Despite the fact that celibacy is neither condemned nor desacralized, and is not considered a sin either, it is heterosexual marriage that gets promoted as the true Islamic way of life. To prove this point, two famous quotations by the Prophet are often used as testimonies. The Prophet of Islam has famously stated, “whoever marries has completed half of their religion”² and “marriage is my Sunnah”.³ Islamic perspectives on the importance of heterosexual marriage go hand-in-hand with the religion’s attitude towards procreation.⁴ Not only satisfying sexual intimacy, but also procreation is promoted in Islamic narratives as a reason for practicing halal heterosexual marriages.⁵ Heteronormative perspectives of family that are built around marriage of a man and a woman or women as well as reproduction are currently mainstream in most Muslim majority contexts.

Due to the widespread social acceptance of the importance of the mainstream Muslim family model as well as the integration of Islamic juristic rulings in state laws in many Muslim contexts, Islamic family institution is shaped at the intersection of religious, political and legal discourses. This means that based on the variety of such existing

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- 1 RIZVI SAYED MOHAMMAD, *Marriage and Morals in Islam*, Al-Islam 1990; HATHOUT HASSAN, *Islamic Views on Some Reproductive Issues*, in: Teebi Ahmad S. / Talaat Farag I. (eds.), *Genetic Disorders among Arab Populations*, New York 1997; ZAREAN MANSOUREH / BARZEGAR KHADIJEH, *Marriage in Islam, Christianity, and Judaism*, *Religious Inquiries*, Vol. 5 (2016).
 - 2 ANON, *Hadith: Whoever Marries, Completes Half of Their Religion*, Shi'i Hadith Library, Hadithlib, n.d., available at <<http://bit.ly/2Wjwg6phadithofmarriage>> (last accessed 21 August 2019).
 - 3 ANON, *What Is the Meaning of “Marriage Is My Sunnah”?*, *Islam Quest*, 2013, available at <<http://www.islamquest.net/fa/archive/question/fa23334>> (last accessed 21 August 2019).
 - 4 ATIGHETCHI DARIUSCH, *The Position of Islamic Tradition on Contraception Medicine, Medicine and Law*, Vol. 13 (1994).
 - 5 IUPUI, *Marriage in Islam*, 2019, available at <<http://www.iupui.edu/~msaiupui/marr.html>> (last accessed 21 August 2019); SAYFUDDIN MURAD / MUHAMETOV ABDULLAH, *Love and Sex in Islam*, Bloomington 2011; SACHEDINA ZULIE, *Islam, Procreation and the Law*, *International Family Planning Perspectives*, Vol. 16 (1990), 107 – 111.

discourses in Muslim contexts, and due to different relationships between religious authorities and the states in power in these countries, a variety of approaches towards marriage and reproduction have emerged.⁶ Despite the great diversity in the Middle Eastern region in terms of marriage patterns, one commonly and widely shared value is marriage itself, which remains fundamental to social identity – especially that of women – and the pressure to marry persists.⁷ To better understand the variety of social and religious approaches towards marriage, it is important to make a distinction, as Ziba Mir-Hosseini has argued, between Islam as a faith that consists of religious values and principles, and Islam as an organized religion that includes institutions, laws, and regulated practices.⁸ Keeping this distinction in mind, this study focuses on the variety of Twelver Shi'i marriage practices in the context of Islamic Republic of Iran and the legal measures taken by the state to facilitate or control them.

The study aims to investigate Shi'i guidelines, philosophical and legal perspectives on temporary marriage in the Iranian context where specific interpretations of Twelver Shi'a are encoded into the law. While there are many other factors affecting practices of marriage in Iran, this study will centralize three important factors that contribute to philosophical, legal and juristic complexity of marriage: (i) length of marriage; (ii) registration of marriage; and (iii) age of marriage. It should be noted that this research does not have claims of comprehensive coverage of all the problematic aspects of Shi'i marriage in Iran. Additionally, while comparisons are sometimes made between the pre- and post-Islamic Revolution Iran, the focus of this study is on the philosophical, juristic and legal discourses of marriage that have become prevalent after the Iranian Revolution in 1979. In the following section, the paper first briefly outlines the consequences of the establishment of a Shi'i state of Iran for conditions of marriage, especially for women. Then, the research shifts its focus towards highlighting various issues regarding marriage in Iran's Twelver Shi'i and state discourses.

6 SACHEDINA, *supra* n. 5; BOONSTRA HEATHER, Islam, Women and Family Planning: A Primer, The Guttmacher Report on Public Policy, Vol. 4 (2001), 4–7.

7 TREMAYNE SORAYA, Modernity and Early Marriage in Iran: A View from Within, Journal of Middle East Women's Studies, Vol. 2 (2006), 65–94.

8 MIR-HOSSEINI ZIBA, Muslim Women's Quest for Equality: Between Islamic Law and Feminism, Critical Inquiry, Vol. 32 (2006), 629–645.

II. The Institution of Marriage After the Islamic Revolution: A Brief Overview

Establishment of a Shi'i state in Iran in 1979 resulted in many dramatic transformations in the areas of gender, family and marriage politics among other societal and political issues. The Iranian law after the Revolution has codified religious guidelines and created a body of regulations that should be followed by the people,⁹ sometimes regardless of their religious beliefs.¹⁰ The codified religious rulings and the state mandates are a source of legal authority in the land and are separate from rulings by religious institutions that produce up-to-date religious guidelines for personal everyday issues. This means that opposite to the popular belief in the Western world, political and some semi-democratic institutions play an important role in delineating the status and role of religion in the Iranian society.¹¹ The state regulations and manipulations of reproduction regimes after the revolution have been highly relied on the state's changing views on population growth either as a comparative advantage or as a developmental socio-economic burden.¹² Based on these changing views, in different periods, pronatalist and antinatalist policies have been promoted by the state. While not all the post-revolutionary regulations on family and marriage have brought about equally problematic social consequences,¹³ some state policies can be considered deteriorations from the progress made in areas of social equality, especially those that were made in the realms of protection of women's rights in the family.¹⁴

9 OSANLOO AREZOO, What a Focus on "Family" Means in the Islamic Republic of Iran, in: Voorhoeve Maaiké (ed.), *Family Law in Islam: Divorce, Marriage and Women in the Muslim World*, London/New York 2012.

10 This is the case for many laws, but the most notorious one is the compulsory hijab law that obliges all women over the Shi'i age of puberty to cover their bodies and hair in public spaces regardless of their religion.

11 ROY OLIVIER, The Crisis of Religious Legitimacy in Iran, *Middle East Journal*, Vol. 53 (1999), 201 – 216.

12 ABBASI MOHAMMAD JALAL et al., Revolution, War and Modernization: Population Policy and Fertility Change in Iran, *Journal of Population Research*, Vol. 19 (2002), 25 – 46.

13 AFARY JANET, *Sexual Politics in Modern Iran*, New York 2009.

14 MOGHADAM VALENTINE, Revolution, Religion, and Gender Politics: Iran and Afghanistan Compared, *Journal of Women's History*, Vol. 10 (1999), 172 – 195.

Despite some legal deteriorations, as both Valentine Moghadam and Ziba Mir-Hosseini have argued,¹⁵ the status of women has been improving in many social aspects since the late 1980s, partly due to the efforts of modernizing Muslim women in and around the government; and partly because of the quiet and firm determination by many urban women to continue their education and seek jobs despite the patriarchal attitudes dominating the job market and economic sector.¹⁶ New marriage laws, however, brought about many complexities, some of which were caused by new regulations on the age of marriage, length of marriage, and legal transformations that introduced different legitimized or legalized ways of registering marriages.

In the contemporary Iranian society, perceptions and beliefs on religion and family range from Muslim traditionalism to highly secular tendencies. The existing groups include (but are not limited to) Muslim traditionalists who resist change and promote minimalist version of shari'a, Islamic fundamentalists who want to return to an earlier and purer version of shari'a, as well as secular fundamentalists who deny that religious law could have any value at all.¹⁷ These highly different attitudes are also reflected in diversities of marriage styles and sexual behavior.

This study focuses on three important factors that contribute to the social, legal and juristic complexities of Shi'i marriage in Iran. These three factors are: (i) length of marriage: juristically legitimate and legally encoded into two categories of permanent and temporary marriage; (ii) registration of marriage: which includes privately and nationally registered marriages as well as unregistered marriages; and (iii) age of marriage: a legal and juristic topic of great contemporary relevance, especially due to the alarming rates of child marriage in the country. All three factors have been significantly present in the social, public and political debates on marriage and family as well as in women and children's rights activism in the history of Iran after its establishment as a nation-state, but more specifically after the Islamic Revolution in 1979. These three factors are discussed separately in the following three sections (III–V).

15 MOGHADAM, *supra* n. 14; MIR-HOSSEINI ZIBA, *Women and Politics in Post-Khomeini Iran*, in: Afshar Haleh (ed.), *Women and Politics in the Third World*, London/New York 1996.

16 MOGHADAM, *supra* n. 14.

17 MIR-HOSSEINI, *supra* n. 8.

III. Length of Marriage: Temporary and Permanent Marriages

There are two types of marriage provided by the Iranian Civil Code: permanent and temporary marriages.¹⁸ A permanent marriage is equivalent to the globally practiced form of a legally binding conjugal contract based on a relationship that is often assumed to be life-long or at least long-term. This marriage does not have an end-date and continues as long as the partners agree to maintain the relationship. The practice of temporary marriage on the other hand has historically been referred to a legal form of marriage between a man and a woman for a short and predefined period for which the woman is compensated. While the practice has long been outlawed in Sunni traditions of Islam, it is still considered legitimate in (most) Shi'i jurisprudence and is predominantly practiced in Shi'i contexts, including Iran.¹⁹ While the dominant majority of Shi'i scholars legitimize temporary marriage and it is legal in Iran, there is a small minority among Shi'i scholars who rule it out because they find it neither compatible with social needs in the contemporary societies, nor with the common law,²⁰ and thus is not juristically justifiable.²¹

In Iran, permanent and temporary marriages have many similarities. Both forms of marriage are based in a form of exchange between the man – as the financial provider and head of the family unit – and the woman who bears the responsibility of providing exclusive sex to her husband in return to financial protection. In discussing the legal structure of temporary marriage, Shi'i jurists employ the analogy of rent, as opposed to the analogy of sale that is sometimes used for permanent marriage.²² In both forms of marriage, if any children are born, they are eligible to

18 BERNARDI ALBERT, Iran: Family Law after the Islamic Revolution, *Journal of Family Law*, Vol. 25 (1986), 151 – 154.

19 HAERI SHAHLA, *Law of Desire: Temporary Marriage in Shi'i Iran*, New York 2014.

20 In Farsi *urf* and in Arabic *urf*, which refers to mainstream social norms and widely accepted practices.

21 SAANEI, Rulings and Conditions of Temporary Marriage, n.d., available at <<http://saanei.org/index.php?view=01,02,09,3295,0>> (last accessed 19 August 2019).

22 MIR-HOSSEINI ZIBA, Mut'a Marriage in Iran: Law and Social Practice, paper presented at Register Amsterdam, Informal Marriages and Dutch Law, 2003.

inherit from their parents. In both forms of marriage, *idda*²³ regulations apply to the woman. There are also differences between the two types of marriage. While inheritance from the spouse is the natural result of a permanent marriage, in temporary marriage, the couples do not inherit from each other.²⁴ Also, a notable difference is that a permanent marriage requires a divorce while a temporary marriage automatically expires after the pre-defined period of marriage has passed. Temporary marriage is thus a marriage “without there being any need for the formalities of divorce”²⁵ as explained by Shi'i *mujtahid*.²⁶

In contemporary Twelver Shi'a Islam in Iran, temporary marriage stays a legal and religious conjugal union between an unmarried woman and a married or unmarried Muslim man (due to laws that sanction polygamy), which is contracted for a fixed time period in return for a set amount of money that the woman receives.²⁷ The practice of temporary marriage is not only sanctioned, but also encouraged in Shi'i discourses. This is because any form of extramarital sexual relationship is prohibited by Islamic law and is culturally interdicted.²⁸ Temporary marriage is, in this context, promoted as a halal alternative and an Islamically-sanctioned way to avoid premarital, extramarital and other “illegitimate” sexual relationships. It is thus considered a sanctified way of indulging earthly sexual desires without having to step outside of religious moral guidelines.²⁹

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- 23 This is the period after a divorce during which women should abstain from marrying another man. *Idda* only applies to women and in Shi'a, this period is three lunar months.
- 24 SAADAT ASADI LEILA, Critique of Laws on Marriage Registration, *Women's Strategic Studies*, Vol. 10 (2008), 103 – 130.
- 25 SOBHANI AYATOLLAH JA'FAR, *Doctrines of Shi'i Islam: A Compendium of Imami Beliefs and Practices*, translated and edited by Shah Kazemi Reza, London 2013.
- 26 *Mujtahid* are religious scholars with juristic authority.
- 27 ABBASI-SHAVAZI MOHAMMAD JALAL et al., The “Iranian Art Revolution”: Infertility, Assisted Reproductive Technology, and Third-Party Donation in the Islamic Republic of Iran, *Journal of Middle East Women's Studies*, Vol. 4 (2008), 1 – 28.
- 28 RAHBARI LADAN, Premarital Dating Relationships in Iran, in: Shehan Constance L. (ed.), *The Wiley Blackwell Encyclopedia of Family Studies*, Chisester 2016.
- 29 MILANI FARZANEH, *Veils and Words: The Emerging Voices of Iranian Women Writers*, Syracuse 1992.

Temporary marriage was prescribed by the state after the Islamic Revolution, during and after the Iran–Iraq War.³⁰ It was seen as both a legal solution for widows of men who lost their lives in the war and an outlet for the strict regulations that made dating impossible.³¹ After the revolution, the state's promotion of temporary marriage grew gradually. Recently, temporary marriage has been advocated for mostly by conservatives who continue to present it either as a solution for women in vulnerable socio-economic conditions to be protected by men, or as a reaction to the moral panic on Iranian youth's lifestyle. It is seen as a way to hinder un-Islamic relationships that – as it is portrayed by the conservative political and religious forces – have become increasingly more prominent among young Iranians.³² Despite the continuous promotion of temporary marriage, it remains a largely unpopular practice among young Iranians, and for this, it is often practiced in secrecy.³³

Since the objective of a temporary marriage is sexual enjoyment, and often involves monetary exchange, temporary wives are often associated with prostitution and do not enjoy the social prestige women seek in a marital relationship, as it often takes place in secrecy and is not a well-respected form of marriage in the Iranian society.³⁴ Temporary marriage is also largely considered a tool used by permanently married men to expand their sexual experience, while the same opportunity does not exist for married women. The practice of temporary marriage is connected to problematic issues including unregistered marriages and specially, child/early marriages in Iran, as young women have been reported to be one of most prominent groups who are negatively affected by temporary (and

30 The war between the countries Iran and Iraq was an armed conflict that began on 22 September 1980 after Iraq invaded Iran, and ended on 20 August 1988, when after eight years of conflict, Iran accepted the UN-brokered ceasefire.

31 AFARY, *supra* n. 13.

32 ANON, Chastity House: A Place Like a Brothel, *Setare*, 2016, available at <<https://setare.com/fa/news/5884/>> (last accessed 21 August 2019); SHOJAEI MITRA, Temporary Marriage: The Legal Substitute for Un-Islamic Relationships, 2009, available at <<https://p.dw.com/p/Ky9J>> (last accessed 21 August 2019).

33 KHALAJ FARIDEH et al., Associations between Family Factors and Premarital Heterosexual Relationships among Female College Students in Tehran, *International Perspectives on Sexual and Reproductive Health*, Vol. 37 (2011); BARARI MOSTAFA et al., Temporary Marriage: Attitude and Tendency in Iran, *Journal of Divorce & Remarriage*, Vol. 53 (2012), 533 – 542.

34 TREMAYNE, *supra* n. 7.

sometimes unregistered) marriage.³⁵ Temporary marriage is, for instance, sometimes used to legitimize early marriage with the approval of the parents.³⁶ It is conceivable that in countries such as Iran, where the search for equal rights for women in and out of the family continues,³⁷ young girls and young women would be one of the most vulnerable groups affected by non-egalitarian conditions. I return to the issue of age of marriage in section 5. In the next section, I discuss diverse forms of marriage registration, and the problem of unregistered (temporary or permanent) marriages.

IV. Marriage Registration: Private and Nationally Registered and Unregistered Marriages

In Iran, permanent marriages take place only after a compulsory submission of an application by the couple, followed by an official process that includes blood tests and possible vaccinations. If the application is approved, registration of the marriage by a legal authority and entering the marriage information in the birth certificates of both spouses will become compulsory. This law illustrates the integration of legal and religious guidelines and shows that while an Islamic marriage does not require registration to be juristically valid, it does require registration to be considered lawful. As such, unregistered marriages are religiously valid and as long as proof or witnesses of marriage exist, they are not considered indecent behaviour (and are thus not punishable by law like pre-marital relationships); however, they are considered illegal and do not enjoy legal protection. Practicing marriage without registering it in a notary has legal repercussions including a fine and possible jail time for the male partner³⁸ and a similar penalty for any person(s) marrying the couple without

35 BAHRAMI KUROSH, Children Are the Most Prominent Victims of Temporary Marriage, 2018, available at <<https://iranwire.com/fa/features/25199>> (last accessed 19 August 2019).

36 TREMAYNE, *supra* n. 7.

37 BOE MARIANNE, Family Law in Contemporary Iran: Women's Rights Activism and Shari'a, London/New York 2015.

38 ANON, Do You Know Unregistered Marriage Is Illegal?, Mizan Online, 2016, available at <<http://bit.ly/2VPJGYt>> (last accessed 21 August 2019).

having state authority.³⁹ To this end, the law gives the male partner twenty days to register the marriage (and a divorce) after the religious ceremony takes place. This has to be done at an official registration authority.

The existence of such strict rules, however, does not mean that unregistered marriages do not take place. The problem of unregistered marriages in Iran is widely understudied and most national statistics published by the government of Iran do not include it in their databases.⁴⁰ Additionally, unregistered marriages have connections to other problematic practices such as early or child marriage (to be discussed in the next section); where the practice of early marriage is more prevalent, such marriages often go unregistered as well.⁴¹ Unregistered marriages can have severe social and legal consequences, especially for women, since their rights to fair treatment and financial support are not protected.

While the law is very clear in that registering permanent marriages is compulsory and failing to do so is subject to legal punishment, it is much less coherent and clear in its approach towards registration of temporary marriages. As a general rule, temporary marriages are often considered the Iranian equivalent of common law or unregistered marriages.⁴² This is however not completely accurate. While for a permanent marriage there are two possibilities of unregistered (illegal) and registered (legal) marriages, in the case of temporary marriage, there are two legal possibilities. Temporary marriage can be legally practiced with a private registration. In this form, a religious authority (not a legal one) marries the couple and enters their information in a marriage booklet that he stamps.⁴³ This private registration is not equivalent to a legal document and does not enter a database but is proof of a religiously legitimate relationship. The booklet can however be partially used as a legal proof of marriage and can stand as evidence in a court of law.

39 Since the man is the head of the family, he is responsible for the registration of marriage. There is no punishment foreseen for the woman; SAADAT ASADI, *supra* n. 24.

40 Veiled and Wed: Enforced Hijab Laws, Early Marriages, and Girl Children in the Islamic Republic of Iran, Submission to the UN Committee on the Rights of the Child, 71st Pre Sessional Working Group, Justice for Iran Publications 2015.

41 Justice for Iran, *supra* n. 40.

42 MIR-HOSSEINI, *supra* n. 22

43 ANON, Legal Temporary Marriage, Donyaye Eghtesad, 2012, available at <<http://bit.ly/2LYA49e>> (last accessed 21 August 2019).

The second legal possibility is registering the temporary marriage, which could be performed just like the official registration of a permanent marriage. The registration of temporary marriage can happen if the couple agrees upon it (although they do not have to) and might happen if it is a required condition set by one of the spouses and accepted by the other. Registration of the temporary marriage does, however, become legally compulsory if the temporary wife gets pregnant,⁴⁴ and the same legal punishments (as in permanent marriage, discussed above) will apply to the husband if he fails to do so accordingly. A temporary marriage without legally binding private or national registration is considered a valid Shi'i marriage, but the couple does not enjoy any legal rights based on unregistered marriage claims. There is no legal punishment for unregistered temporary marriages if they have been conducted correctly according to the Shi'i doctrine. While it seems that the issue of accidental pregnancy during a temporary marriage is resolved by enforcing compulsory registration, in practice, if the temporary marriage is not registered, it creates a long and hard legal process for the woman to prove her legitimate relationship claims,⁴⁵ and otherwise she is prone to harsh social stigmatization and legal issues as the child could be considered out of wedlock if the man does not confirm her claims of marriage.

Annelies Moors has defined unregistered marriages as marriages that “are not registered according to the law of the country where they are concluded”.⁴⁶ If we accept this definition, based on the above discussion on the legality of privately registered temporary marriages in Iran, they will not be considered unregistered marriages since registration is not a legal requirement. Privately registered marriages have some of the characteristics of an unregistered marriage. For instance, since the marriage information is not entered in the birth certificate, it can be kept a secret, from legal authorities or even from a permanent wife. While there might be personal gains for both men and women, and social

44 ALISHAHI ABOLFAZL / ESKANDARI FARZANEH, Investigating Juristic and Legal Consequences of Not Registering Marriage by Official Registration Authorities, *Fiqh and Family Law*, Vol. 23 (2018).

45 ANON, What Does the Law Say About Pregnancy from a Temporary Marriage?, Pendaar Group, n.d., available at <<http://bit.ly/2VSRzw8>> (last accessed 21 August 2019).

46 MOORS ANNELIES, Unregistered Islamic Marriages: Anxieties About Sexuality and Islam in the Netherlands, in: Berger Maurits S. (ed.), *Applying Sharia in the West: Facts, Fears and the Future of Islamic, Rules on Family Relations in the West*, Leiden 2013.

advantages in being able to practice a secret temporary marriage, the law in this case, clearly favours a man's right to temporarily marry, over a permanent wife's right to a monogamous conjugal union as well as her right to know about her husband's sexual partners. While a permanently married man can only marry a second permanent wife after receiving an official permission from his first wife and an Islamic court, he can marry a temporary wife without an official permission.⁴⁷ This means that while the law obliges men to consult their first permanent wife to temporarily or permanently remarry, there are no legal measures foreseen to actually hinder men's temporary marriage without consulting their first permanent wife.

V. Age of Marriage: Early or Child Marriage

Child (or early) marriage is a marriage where either or both the bride and groom (but in reality, most predominantly the bride) is/are under the legal age of eighteen, which is the age limit for protection under the 1989 Convention on the Rights of the Child.⁴⁸ Child marriage is often considered a global issue and a widespread harmful practice that affects great numbers of girls and is practiced for a variety of different reasons in the world.⁴⁹ Research on the child marriage phenomenon in Iran show that the most common reasons behind child marriage and forced marriage include the social prestige awarded to girls who marry young, poverty in the girl's family, lack of child support persons/institutions, as well as some cultural traditions and tribal customs.⁵⁰ Child marriage is also sanctioned by some religious discourses. While the religious possibility is hardly ever

47 ANON, Rulings of Mujtahid over Man's Remarriage Without Wife's Permission, Hadana, 2016, available at <<http://bit.ly/2QibXkn>> (last accessed 21 August 2019).

48 TREMAYNE, *supra* n. 7.

49 MONTAZERI SIMIN et al., Determinants of Early Marriage from Married Girls' Perspectives in Iranian Setting: A Qualitative Study, *Journal of Environmental and Public Health* (2016).

50 Suuntaus Project, Violence against Women and Honour-Related Violence in Iran, Finnish Immigration Service and The European Refugee Fund, 2015, available at <<http://bit.ly/2TANoAG>> (last accessed 21 August 2019).

the reason behind child marriage, it is a significant facilitator that both adjusts the moral tone and affects legal possibilities.

According to most Shi'i scholars, a girl is eligible to marry at eight years and nine months and a boy at fourteen years and seven months, when they are supposed to have reached puberty and can reproduce.⁵¹ Despite this, there are some Shi'i *mujtahid* who oppose the majority Shi'i ruling on the age of marriage and advocate for eliminating child marriage because of the harm it causes to the child's life as well as to the religion.⁵² While after the Islamic Revolution in Iran, the minimum age of marriage was dropped to the age approved by shari'a law (nine and fifteen), in August 2003, and under pressure from the female members of the Iranian parliament, the age of marriage was raised to thirteen for girls; however, a clause was added stating that earlier marriage is allowed if the girl's guardian and an Islamic court approve the girl's readiness for marriage. This clause has in fact made the application of the law regarding the minimum age of marriage arbitrary.⁵³

Statistically speaking, in terms of child marriage, despite the installation of regulations such as decreasing the legal age of marriage, the average age of marriage for both men and women has gradually risen after the Islamic Revolution: Between the years 1976 and 2016, the average age of marriage has increased gradually and steadily from 24 to 27 for men and from 19 to 23 for women. The average age of marriage, however, does not reflect the diversities of attitudes in different provinces of Iran. Child marriages are reported to be most common in the country's religious regions where strict patriarchal social attitudes might be dominant, especially in some areas in Sistan and Baluchestan, Kurdistan, Khuzestan and Khorasan provinces.⁵⁴ Additionally, the average age does not reflect the starting age of marriage and can be misleading because of the patterns of age distribution. This seems to be the case in Iran, since UNICEF's report in 2015 shows that 3 percent of Iranian children marry by the age of 15, and

51 TREMAYNE, *supra* n. 7.

52 ANON, Grand Ayatollah Speaks out against Child Marriage, Radio Farda, 2019, available at <<https://en.radiofarda.com/a/iran-grand-ayatollah-speaks-put-against-child-marriage/29762095.html>> (last accessed 21 August 2019).

53 TREMAYNE, *supra* n. 7.

54 Suuntaus Project, *supra* n. 50.

17 percent marry by the age of 18.⁵⁵ According to the latest official statistics inside Iran, more than 29'000 marriages were registered in 2016 that have taken place between brides who were younger than 15 and boys/men of different age groups.⁵⁶ The largest age group of men who married girls under 15 years was the 20–24 age groups, making up over 16'900 registered marriages out of all marriages; this was followed by the age groups 25–29, making up over 7'000 registered marriages.⁵⁷ Furthermore, because of the issue of unregistered marriages that – as previously discussed – takes place in connection to child marriage, these reported statistics usually do not include information on unregistered and temporary marriages.

The practice of child marriage could bear more severe consequences when coupled with other factors such as temporary and unregistered marriages. Besides the hindering effects on the child's social development, education and possible harmful effects on the child's sexual, physical and mental health among many other negative consequences, early temporary marriage may result in lasting social stigmatization as well. Because of the persisting social value of virginity for permanent marriages,⁵⁸ women and girls with previous temporary or permanent marriage history are viewed as “damaged goods” in many social settings, and their future social life – in a context where marriage is still an important source of social status – is put in serious peril. Early pregnancies, losing their spouse and financial support (especially when there is a great age gap between spouses) as well as other legal and social issues attached to unregistered and temporary marriages are among the many problematic aspects of child marriage. Another largely unresolved and ignored problem in both legal and juristic perspectives on child marriage is the issue of consent that needs further exploration (that is beyond the capacity of this paper). Consent connects to another problematic practice, namely forced marriages, and there seems to be a lack of attention to identifying and scrutinizing consent to both marry and have sexual relationship in relation to the age of marriage. In both legal and juristic discourses, it seems that the consent of the legal

55 Suuntaus Project, *supra* n. 50.

56 ANON, A Look at the Conditions of Marriage in 2016, Mehrkhane, 2016, available at <<http://bit.ly/2WnPgFy>> (last accessed 21 August 2019).

57 ANON, *supra* n. 56.

58 RAHBARI, *supra* n. 28.

guardian of a child is automatically considered equivalent to the child's consent, while in many cases, the child's life course, future, social status and image are shaped by a choice that they have had no say in.

VI. Discussion and Some Concluding Remarks

This study investigated Shi'i guidelines and some philosophical and legal perspectives on temporary marriage in the Iranian context where specific interpretations of Twelver Shi'a are encoded in the law. As I showed in the three lines of discussion on length, registration and age of marriage, a combination of juristic (*fiqhi*)⁵⁹ rulings, based on Shi'i jurists' interpretation of shari'a and state legal regulations form the legitimate and lawful ways marriage can be practiced. These legal and *fiqhi* frameworks are, as shown in the three sections, not always compatible with each other. In the case of length of marriage, there is relatively high similarity between the civil law and the religious guidelines, but while registering a marriage or having a religious authority perform the marriage is not necessary in Shi'a *fiqh*, the law prohibits and punishes those who perform permanent unregistered marriages without the involvement of a religious and legal authority. In the case of age of marriage, the law puts some limitations on practice of early marriage – in the form that is sanctioned by a majority Shi'i *fiqh* – but still leaves enough room for the possibility of practicing child marriage. Additionally, as seen in different cases, Shi'i *fiqh* – which is often portrayed as a homogenous body of religious guidelines by the state – entails diversities and interpretative variations. The rulings can differ based on the scholars' understandings of shari'a as well as their notions of common law. Common law is specifically important in the contemporary model of Twelver Shi'i *fiqh*, where jurisprudence draws on social relevance and implication of their interpretations and rulings.⁶⁰ On the other hand,

59 *Fiqhi* is the adjective form of *fiqh*. *Fiqh* is the human attempt, usually by designated scholars, to understand divine law (shari'a). Whereas shari'a is immutable, *fiqh* is changeable, ANON, *Fiqh*, Oxford Islamic Studie Online, n.d., available at <<http://www.oxfordislamicstudies.com/article/opr/t125/e659>> (last accessed 21 August 2019).

60 SHAKERI RUHOLLAH / ABDOLI MARZIEH, Necessity of Islamic Governance with a Focus on Governance-Centered Social Fiqh, *Islamic Revolution Researches* (Scientific Association of Islamic Revolution In Iran), Vol 4 (2015).

the history of Iran after the Revolution has shown that the *fiqhi* and state regulations work as both competing and moderating factors. The integration of Islamic shari'a and the governmental entities in Iran introduces both limitations and possibilities of positive change as the state both facilitates and controls practices of marriage.⁶¹

This study discussed some of the potential implications of problematic discourses of temporary, child and unregistered marriages. To understand these issues more contextually, it is important to keep in mind that there are several methodological issues in the study of marriage diversity in Iran. First, the lack of qualitative, statistical and demographic data on child and early marriage, unregistered marriages, and privately registered temporary marriages is a significant issue in researching practices and diversities of marriage in Iran. Additionally, I would like to emphasize that Twelver Shi'i perspectives on marriage in Iran are affected by multiple socio-political, juristic and legal discourses outside of those centralized in this paper. For instance, polygamy is accepted and legally sanctioned in Iran. The legal conditions of polygamy and the lack of any restrictions on the number of temporary wives a man can simultaneously marry inevitably complicate the distribution of sexual and social justice in marriage. Another important and unresolved issue that has recently arisen – despite existing opposition by rights and civil society activists – is the bill that passed in the Iranian parliament in 2013 that allowed for marriage between an adopted female child and the adoptive father. While the Shi'i jurisprudence and legal frameworks in Iran have allowed the marriage between the adoptee and the adoptive father to facilitate conditions and terms of adoption, it is believed by some legal and religious groups that performing temporary marriage with the adoptee is not in the child's best interest. As these examples show, the problematic aspects of marriage require attention to multiple discourses and are affected by many different underlying factors, beyond the three issues that were focused upon in this article.

Furthermore, Iranian people's resilience and resistance to state enforced regulations that are considered unjust have been well-documented.⁶² In

61 JAFARI ALIAKBAR / MACLARAN PAULINE, Escaping into the World of Make-up Routines in Iran, *The Sociological Review*, Vol. 62 (2014), 359 – 382.

62 COHEN JARED, Iran's Young Opposition: Youth in Post-Revolutionary Iran, *SAIS Review of International Affairs*, Vol. 26 (2006), 3 – 16.

fact, in the case of child and temporary marriage it is safe to say that both practices are highly unpopular and looked down upon by a majority of Iranians regardless of the region they live in.⁶³ On the other hand, as new studies in the Iranian contemporary context show, despite the legal and social pressure to marry, unregistered and non-religious forms of cohabitation can be traced in Iran.⁶⁴ This means that, perhaps inevitably, by putting an exclusive focus on legal and juristic perspectives on marriage, many significant cultural and social nuances have been lost in the discussion.

Additionally, the interaction between religion, morality, and sexuality are well-documented in studies on desire and marriage discourses in Iran.⁶⁵ While these topics were beyond the thematic focus of this paper, I believe that they are necessary to complement and complicate marriage as a social, legal and (non-)religious institution. It is also my conviction that it is the gravity of social and legal consequences of child marriage, unregistered marriage and temporary marriage, not their popularity or statistical significance, that make it crucial for us to highlight the contemporary religious and political discourses around them. This means that no matter how little or statistically insignificant some of these issues may seem to be, juristic and legal loopholes have to be scrutinized. What is at stake here is not only the well-being, status and protection of vulnerable populations as well as guaranteeing the right to love or sex or a fulfilling marital life, but the standpoints and the imagery of a belief system and its followers. Only by highlighting the harmful effects of religious fundamentalism on Muslim communities on local, regional and global levels can we stimulate the process that includes (self)critique, rethinking mainstream moral frameworks, and eventually, positive reform.

63 Suuntaus Project, *supra* n. 50.

64 MAHBOOBI ELAHEH, "White Marriage" in Contemporary Iran, *Imperial Journal of Interdisciplinary Research*, Vol. 2 (2016), 1283 – 1288.

65 GHORASHI ZOHREH et al., Religious Teachings and Sexuality of Women Living in Rafsanjan: A Qualitative Inquiry, *International Journal of Reproductive Biomedicine*, Vol. 15 (2017), 771 – 778.

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Why Only Religious (In)Equality? A Gramscian Reading of Traditional Intellectuals and the ‘Citizenship’ Debate in Egypt

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Abstract

The article seeks an answer to one of the most puzzling aspects of the century-long, engaged debate on ‘citizenship’ (muwāṭana) in Egypt: its scope. How did ‘citizenship’ come to be confined to issues of religious (in)equality, thus preventing any form of meaningful engagement with other aspects of citizenship, be it political participation, gender equality, or class mobility?

The article applies the Gramscian conceptual toolkit to shed some light on the limited scope of the discourse on ‘citizenship’ in Egypt by analyzing how the hegemonic consensus on what ‘citizenship’ means was built. It identifies and characterizes three main phases in the debate, with an eye always on the scope. In its first phase (the counter-hegemonic inception), traditional intellectuals challenged the post-colonial nationalist project of the ruling class and its organic intellectuals; in its second phase (the accommodation), traditional intellectuals explored ways to find mid-ground solutions with organic intellectuals; and in its third phase (the counter-challenge), organic

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intellectuals were mobilized by an emerging sector of the ruling class against traditional intellectuals and their accommodation attempts. In the buildup of the hegemonic consensus, however, the main accomplishment was eminently to occupy the space of the public debate with questions of religious (in)equality.

A large, closing section is then dedicated to the analysis of a recent contribution by a prominent traditional intellectual (Ṭāriq al-Bishrī) that shows how arguments are constructed so as to provide a constraining framework of reference for the debate, and at the same time ground the hegemonic consensus in Islamicate discourse.

I. Introduction

Why does ‘citizenship’ in Egypt evoke only images of religious (in)equality? Why not questions of political participation, or of gender equality, or of class mobility? This article argues that the citizenship debate is one of the prime examples of how cultural hegemony has been constructed in Egypt in the past one hundred years, and how it has served to keep to the margins some of its undesired components.

The Gramscian lens of hegemony—focusing on the non-coercive forms of domination of the ruling class—allows us to understand two key phenomena in the Egyptian citizenship debate: the construction of a hegemonic consensus around what citizenship means, and also—as a result—the marginalization of all other counter-hegemonic discourses on citizenship focusing on class, or gender, or participation in decision making. The hegemonic discourse on citizenship generated a common sense that citizenship can only mean irrelevance of religious affiliation in certain areas of the legal system.

I will mainly engage with the first prong of the argument, which can also be articulated in the reverse: the contention between traditional and organic intellectuals is only apparent. In the case of Egypt, ‘organic intellectuals’ are the ones upon which the ruling class that emerged with the creation of ‘modern Egypt’ in the first half of the 19th century relied to build consensus for the ‘new order.’ ‘Traditional intellectuals,’ on the other hand, are networks of intellectuals not engaged with the ruling class and its project, and who ground their authority in ‘tradition’. When it comes to

citizenship, both groups resort to Islamicate ideas and discourses, but ‘traditional intellectuals’ tend to refer to it as their (main) frame of reference.

In order to analyze the construction of the hegemonic discourse on citizenship, I will follow the trajectory of traditional intellectuals from counter-hegemonic stances to open conciliation with organic intellectuals. I will then consider a recent contribution of a prominent traditional intellectual (Ṭāriq al-Bishrī) to show how the two (apparently irreconcilable) discourses might be harmonized.

II. The Citizenship Debate in Egypt: Three Phases and an Overarching Hegemonic Discourse

The citizenship debate in Egypt can be described as a long war of position between organic and traditional intellectuals, but—taking a step away from the confrontation—one can easily see both parties engaged in the construction of a hegemonic discourse on citizenship that aimed at occupying the public space and preventing any other discussion of citizenship themes beyond religious (in)equality. Focusing on the war of position, one can identify three main phases of the debate that illuminate the dynamics behind the building of the hegemonic consensus (this latter consensus should be kept as the *fil rouge* of the former debate, and will be fully detailed in the following subsections): in the first phase, which I call “the counter-hegemonic inception,” traditional intellectuals brought a challenge against the post-colonial, nationalist project of the ruling class and its organic intellectuals (‘we do not accept any form of political affiliation beyond or below Islam’). In the second phase, “the accommodation,” traditional intellectuals explored areas of accommodation with organic intellectuals (‘we can work within a modern state, as long as it operates Islamically’). Finally, in the third phase, which I call “the counter-challenge,” the regime massively mobilized its organic intellectuals and brought a counterchallenge against the traditional intellectuals (‘if you want to work within a modern state, then you need to accept its (=our) rules’).

The most striking hegemonic element of the discourse is its scope; citizenship in Egypt is almost exclusively referred to as a shorthand for religious (in)equality. And what is even more striking is that, historically,

the major breakthroughs for religious equality—like the abolition of the *jizya* or the conscription of non-Muslims in the army—had happened in the mid-1850s, long before the debate was started. Articulating a position on these breakthroughs by traditional intellectuals will be a main feature of the accommodation phase, and internal discussions among traditional intellectuals will surface in the account of that phase.

1. The First Phase: The Counter-Hegemonic Inception

In the first phase, from the late 1920s to the early 1950s, the main concern of organic intellectuals—epitomized in the thought of Aḥmad Luṭfī al-Sayyid (1872–1963) or Salāma Mūsá (1887–1958)—was the definition of ‘new’ political communities in national terms (*waṭan*),¹ using nationalism (*waṭaniyya*) as their ideological underpinning, and citizenship (*muwāṭana*) as the centerpiece of their engineered loyalty. The relationship between the new regimes and their organic intellectuals with colonialism was at best problematic.² In contexts like Egypt, the organic intellectuals had to engage with the colonial nature of the ‘new nation’, whereas in contexts like India, at stake was the de-colonization project.

Traditional intellectuals, opposed to the nationalist project, initially articulated a counter-hegemonic discourse that targeted the definition of the political community in national terms. Citizenship was criticized just as a form of engineered loyalty to the new entity, and traditional intellectuals believed that the participation of non-Muslims was the most compelling evidence of the project’s wanting foundations.

Opposition to (local) nationalism was chiefly expressed in Egypt by Ḥasan al-Bannā (1906–1949), the founder of the Muslim Brotherhood. Because of his opposition to the nationalist project, al-Bannā strongly denounced the attempts to define the political community through the establishment of bonds of a lesser degree than Islam – i.e. bonds that he described as

1 In order to render the semantics in Arabic, the sequence in English should be: nation, nationalism, nationality.

2 Ansari points out that traditional intellectuals did not object to the ‘immediate political objectives’ of nationalism, such as liberation from foreign control and dominance. See ANSARI ZAFAR, *Contemporary Islam and Nationalism: A Case Study of Egypt*, *Die Welt des Islams* 7.1 (1961), at 36–38.

belonging to the Age of Ignorance (*al-Jāhiliyya*). Only Islam could serve as a proper political connector in his view. Arabness played a role in Islam and al-Bannā did not challenge such a role, but openly stated that Arabness—just like local and other lesser connections—could not serve as ‘the’ political connector: “The Muslim Brothers,” he wrote, “do not believe in nationalism (*qawmiyya*) [...] and do not call [the nation] Pharaonic, Arab, Phoenician, Syrian, or any of the other expressions used by people, but believe in what the Prophet (ṢAAS) said: ‘There is no preference for an Arab over a non-Arab, except on grounds of piety.’”³

Responding to accusations of disloyalty by organic intellectuals, al-Bannā’s arguments showed some ambivalence and lost some of their counter-hegemonic strength when tinkering with different definitions of community. On the horizon of organic intellectuals were the local political community (*waṭan*) and a broader Arab political community (*qawm*), whereas on the horizon of counter-hegemonic traditional intellectuals was only the Islamic political community (*umma*). *Waṭan*, *qawm* and *umma* were used in a variety of different connotations, hinting to the stark competition over both (a) the definition of ‘community,’ but also over (b) the political capital of the terms (in either traditional or contemporary thought).

Al-Bannā’s chief compromise was with the local political community (*waṭan*), when he declared that Muslims are the most loyal and devoted to their homelands (*awṭān*, plur. of *waṭan*), but that the “foundation of their patriotism (*waṭaniyya*) is the Islamic faith (*al-‘aqīda al-islāmīyya*)”. Al-Bannā’s argument compromised with the local dimension of the community (*waṭan*) and its form of allegiance (*waṭaniyya*), while trying to square the circle by keeping the reference to Islam as the only proper political connector.

Islam as the only proper political connector for al-Bannā thus meant that his Muslim Brothers “do not call for ethnic discrimination among classes in the community (*al-umma*) because [they] believe that Islam affords the widest protection by upholding the broadest human connector (*rābiṭa*) among humans, and recommends benevolence (*al-birr wa-l-iḥsān*) among citizens regardless of ideological or religious differences.” Beyond that, however, al-Bannā wrote: “we do not buy that unity with our faith (*imān*), nor bargain

3 AL-BANNĀ ḤASAN, *Majmū‘at Rasā‘il al-Imām al-Shahīd Ḥasan al-Bannā*, Beirut 1992, at 21.

for it with our belief (*‘aqīda*), and do not forfeit for it the interests of Muslims (*maṣāliḥ*), but we rather buy it with truth, fairness and justice (*al-ḥaqq wa-l-inṣāf wa-l-‘adāla*) alone.”⁴

Al-Bannā’s arguments resonated well beyond Egypt, and heavily influenced a prominent figure of political Islam working in India (and later independent Pakistan): Abū ‘l-A‘lā Mawdūdī (1903 – 1979).⁵ Mawdūdī further articulated al-Bannā’s compromise by positing that the only acceptable form of state for traditional intellectuals was a state whose belief or ideology was Islam.

Mawdūdī developed his views in the context of pre-independence fears of either Muslims being absorbed in a Hindu-dominated state, or establishing their own state infused with nationalist ideas. He thus posited Islam as the only acceptable political connector, and opposed the creation of an independent state in Pakistan (in which the majority of the population would be Muslim, but the state would have to be built around a larger nation, with a nationalist ideology, and a citizenship connector). When that happened, however, in 1947, he and his Jamā‘at-e-Islāmī pledged allegiance to the new state, but only after Pakistan was declared an Islamic state (thus ushering in a new compromising approach).

The declaration of the state as Islamic squared the circle for Mawdūdī. What to do with the non-Muslims of Pakistan, then? Mawdūdī wrote that residents of the Islamic state—a state qualified as ideological (*‘aqā‘idī*)—are to be distinguished between those who believe in it (Muslims), and those who do not (non-Muslims). Because of its ideological underpinnings, the Islamic state—which has to uphold the arrangements with non-Muslims as laid out in classical fiqh (like their basic protection and jurisdictional autonomy)⁶—cannot allow non-Muslims to have any impact on its

4 AL-BANNĀ, *supra* n. 3, at 88 – 89.

5 The thought of Mawdūdī and al-Bannā, the two ‘founders or trailblazers of political Islam’ (ESPOSITO/SHAHEEN, *The Oxford Handbook of Islam and Politics*), heavily influences later generations of traditional intellectuals (from the ‘revolutionary ideologues’ like Sayyid Quṭb (1906 – 1966), to ‘intellectuals’ like al-Qaraḍāwī (1926-) or al-Ghannūshī (1941-)), as will appear from the resurfacing of concepts, concerns and expressions employed by them. AL-GHANNŪSHĪ RĀSHID, *Ḥuqūq al-Muwāṭānah: Waḍ‘iyyat Ghayr al-Muslim fī ‘l-Mujtama‘ al-Islāmī*, Tunis 1989.

6 Article originally published in *Tarjumān al-Qur‘ān* in August 1948. Translated by Khurshīd Aḥmad and published in MAWDŪDĪ ABŪ YA‘LĀ, *Islamic Law and Constitution*, 2nd ed., Lahore 1960, 273 – 299.

decision-making including, for instance, participating in the election of Muslim representatives.⁷ Mawdūdī conceded, however, on a separate representative body for non-Muslims.⁸

Because of the close ideological positions of two traditional intellectuals like al-Bannā and Mawdūdī, the comparison between their approaches and their reactions to the political developments in Pakistan and Egypt is even more illuminating. Citizenship (*muwāṭana*) was not per se the target of traditional intellectuals in the first phase; the political community defined in national terms (*waṭan*) was. Even in this first phase, however, signs of a shift from a counter-hegemonic discourse challenging the new states to positions that could accommodate these new states can be detected. This leads us to the next phase, where disagreement over the accommodation created a rift among traditional intellectuals.

2. The Second Phase: Hegemonic Accommodation

The second phase is characterized by a change in strategy, which eventually led to a split among traditional intellectuals. As it will be detailed in this subsection, the majority opted for an accommodation over the legitimate foundation of the political community, while some pursued the line of confrontation on this latter point, but both camps drew on arguments elaborated in the earlier phase to build their case. An essential part of the accommodation for the participation of traditional intellectuals in institutional politics was to set conditions over issues of religious (in) equality.

At the root of the accommodation was the last shift in al-Bannā's thought, which was pursued by the largest number of traditional intellectuals who followed in his footsteps, and elements of the accommodation can be seen both in the discourse on regional (Arab) and local (Egyptian) nationalism.

Towards regional (Arab) nationalism (*qawmiyya*)—which was the chief ideological trend until the mid-1960s—traditional intellectuals fluctuated from indifference to appreciation.⁹ An example of indifference can be

7 Article originally published in 1955. MAWDŪDĪ, *supra* n. 6, 300–311.

8 *Supra* n. 6, at 296.

9 The organic intellectuals' attempts to bridge the divide between Arab nationalism and political Islam and extend a hand to traditional intellectuals are not the focus of this

detected in the commentary of Muḥammad al-Ghazālī (1917–1996), an influential and divisive revivalist. Whilst denouncing nationalism as a foreign plot to undo the unity of Muslims, al-Ghazālī asserted that as long as Islam could live by the side of (Arab) nationalist rule (*fi kanaf al-ḥukm al-qawmī*), it was fine. In particular, he did not see any problem (*lā junāḥ*) in (Arab) nationalist rule as long as it “enabled the Islamic system (*al-niẓām al-islāmī*) to flourish under it (*an ya’īsh fi ẓilālīh*).”¹⁰ Al-Ghazālī thus seemed to be content with an al-Bannā-styled coexistence, without requiring a Mawdūdī-styled Islamic frame of reference.

An example of appreciation for Arab nationalism can be detected in the words of Yūsuf al-Qaraḍāwī (1926–), chairman of the International Union of Muslim Scholars and member of al-Azhar’s Body of Senior Scholars. Whilst sharing al-Bannā’s view on (local) nationalism—which he defined as a “*Jāhilī* approach” (*nuzu’āt jāhiliyya*) and declared it a form of *shirk* (polytheism), as “new idols are associated to God” (*awthān jadīda ma’a allāh*)¹¹—al-Qaraḍāwī nevertheless saw in the Arab nationalist project of bringing together the Arab peoples (*al-shu’ūb al-‘arabiyya*) a first step to further bringing together all Muslims. In order to sustain the *qawmiyya* exception to his anti-nationalist position, al-Qaraḍāwī had to resort to the ample literature in Islam’s texts and traditions that upholds a certain primacy for Arabs, and went so far as to declare the connection between Islam and Arabness as ‘organic’ (*irtibāt ‘uḍuwī*).¹²

With the demise of regional (Arab) nationalism (soon followed by the demise of state socialism), intellectuals (both organic and traditional) focused on the local (Egyptian) articulation of nationalism. The accommodation manifested itself in this stage as acquiescence to the hegemonic discourse on Egypt as “the” political community, whose

chapter, but are explored in HAIM SYLVIA, *Islam and the Theory of Arab Nationalism, Die Welt des Islams* 4.2 (1955), 124–149.

10 AL-GHAZĀLĪ MUḤAMMAD, *Ḥaqīqat al-Qawmiyya al-‘Arabiyya wa-Uṣṭūrāt al-Ba’tḥ al-‘Arabi*, Cairo 1977, 8–23, cit. in AL-BISHRĪ, *al-Muṣlīmūn wa-l-Aqḃāt*, at 814.

11 AL-QARAḌĀWĪ YŪSUF, *Ḥatmiyyat al-Ḥall al-Islāmī*, Vol. 1, *al-Ḥulūl al-Mustawrada wa-Kayfa Janat ‘alā Ummatinā*, Cairo 1977, at 54. The author also attributes to nationalism(s) the fall of the ‘Islamic fortress,’ the Caliphate (“*wa-saqāṭat al-qal‘a al-islāmiyya, al-Khilāfa*”), *ibid.*, at 55.

12 AL-QARAḌĀWĪ YŪSUF, *Ḥatmiyyat al-Ḥall al-Islāmī*, Vol. 2, at 29, but also, Vol.1, *supra* n. 11, at 143. The author in the first volume discusses Arab nationalism in the section on the Socialist Revolutionary solution (*al-ishtirākī al-thawrī*).

citizens were the ones permanently residing within its geographical boundaries before WW1.¹³ Issues of definition of the political community thus receded to the background, while intellectuals debated the content of membership.

In this stage the hegemonic discourse manifested itself in the participation of organic and traditional intellectuals alike in occupying the space of the debate on citizenship with issues of religious (in)equality.¹⁴ This concern with religious (in)equality is rather surprising, because no momentous or symbolic change had happened in that domain since the abolition of the *jizya* (the poll tax levied on non-Muslims) or the conscription of non-Muslims in the army in the mid-1850s, more than a century earlier.¹⁵

In this operation, traditional intellectuals engaged with the concept of status of protection for non-Muslims (*dhimma*), and the widest theoretical divide among them seemed to be on the persistence and bearing of such a status, because they in turn tended to agree on the operational rules. At one end of the theoretical continuum (almost on the verge of a counter-hegemonic discourse), Quṭb and al-Qaraḏāwī posited the persistence of the status of protection. At the other end of the continuum (more in line with organic intellectuals), scholars like ʿUthmān, al-ʿAwwā, and Huwaydī challenged such a position.

In traditional *fiqh*, the *dhimma* was the status of protection that some non-Muslims could contract with the imam. The only non-Muslims who could enter such an agreement were the ones collectively identified as the People of the Book (*Ahl al-Kitāb*), a definition that conventionally encompassed Majūs (Zoroastrians), Naṣārā (Christians), Ṣābiʿūn (Sabians),¹⁶

13 See Law 26/1975 on Egyptian citizenship and all previous legislation.

14 Coptic intellectuals and the Coptic Church itself actively participated in the debate, but I am focusing here on the perspective of traditional intellectuals. See ʿABD ALLĀH ISMĀʿĪL Ṣ./QILĀDA WILLIAM S./AL-ʿAwwā MUHAMMAD S. (eds.), *al-Muwāṭana*, Madīnat Naṣr 1998.

15 Even then, in the 1850s, these breakthroughs in religious equality were an integral part of the Ottoman reform plan to establish a fuller control by the Sultan over his subjects, and command their loyalty—especially at the Empire level. From the Khaṭṭ-i Sharīf of 1839, and the Khaṭṭ-i Humāyūn of 1856 all the way to the Ottoman Citizenship Law of 1869, the path of reforms pursued this goal over the Sultan's subjects, including identifying who they were, away from the protection schemes of foreign powers—which, incidentally, explains the prohibition of dual citizenship in the law.

16 On the problematic identification of the Sabians, see the two entries in the *Encyclopaedia of Islam*, Second Edition, 'Ṣābi' and 'Ṣābi'a.'

and Yahūd (Jews). Sayyid Quṭb (1906 – 1966), the revolutionary ideologue of political Islam,¹⁷ did not question the permanence of the *dhimma*. He considered the *dhimma* to be the source of an obligation of good treatment of the protected non-Muslims, but not of loyalty towards them (*ḥusn al-muʿamala dīn al-muwālāh*).¹⁸ Yūsuf Al-Qaraḍāwī theorized the continuity of the contract of protection (*ʿaqd al-dhimma*) from which rights and obligations descend. Among these rights, al-Qaraḍāwī identified a general right to protection from foreign enemies and domestic injustice, including the protection of life, physical integrity, property, and honor,¹⁹ social welfare, the free exercise of religion (*ḥurriyyat al-tadayyun*), and the freedom to engage in work and other economic activities. Among the obligations, al-Qaraḍāwī included the payment of *jizya* (the poll tax levied on non-Muslims), *Kharāj* (the land tax levied on non-Muslims) and the commercial tax, along with the observance of Islamic regulations of civil transactions and respect of the rites and sentiments of Muslims.²⁰

The idea of the *dhimma* as an (obsolete) historical qualification was put forward as early as 1960 by Muḥammad Faṭḥī ʿUṭhmān (1928 – 2010), “a modest, unassuming and tireless *mujaddid*, reviver and reformer of Islam.”²¹ ʿUṭhmān stressed the necessity of transcending the old categories and qualifications encapsulated in the term *dhimma* and accepting non-Muslims as citizens with full rights.²² Elaborating on the justifications for such a transition from *dhimma* to citizenship, Muḥammad Salīm al-ʿAwwā (1942-), former Secretary General of the International Union of Muslim Scholars, argued that the contract of protection was terminated by the extinction of two parties under colonialism: the Islamic state and the non-Muslims living in the conquered lands.²³ For al-ʿAwwā, the participation of

17 AL-BANNĀ, *supra* n. 3.

18 QUṬB SAYYID, *Naḥw Mujtamaʿ Islāmī*, 9th ed., Cairo 1993, at 65.

19 Clearly reminiscent of abū Ḥāmid al-Ghazālī’s five *maqāṣid* in the *ḍarūriyyāt* category— with the obvious absence of religion (*dīn*).

20 *Adāʾ al-jizya wa-l-kharāj wa-l-ḍarība al-tijāriyya, wa-iltizām aḥkām al-qānūn al-islāmī fī l-muʿamalat al-madaniyya wa-naḥwihā, wa-ʾākhīr^{am} iḥtirām shaʾāʾir al-muslimīn wa-mashāʾirihim*. AL-QARAḌĀWĪ YŪSUF, *Ghayr al-Muslimīn fī l-Mujtamaʿ al-Islāmī*, Cairo 1977, at 21.

21 These are the words used by Esposito in the foreword to ʿUṭhmān’s biography. OSMAN GHADA, *A Journey in Islamic Thought. The Life of Fathi Osman*, London/New York 2011, at xiv.

22 FAṬḤĪ ʿUṬHMĀN MUḤAMMAD, *al-Fikr al-Islāmī wa-l-Taṭawwur*, Cairo 1960.

23 AL-ʿAWWĀ MUḤAMMAD SALĪM, *al-Fiqh al-Islāmī fī Ṭariq al-Tajdid*, Beirut 1998, at 74 – 75.

non-Muslims alongside Muslims in the struggle for liberation from colonialism established new states on new grounds: states were no longer functioning because of the legitimacy of the Conquest (*shar‘īyyat al-fath*), but rather that of Liberation (*shar‘īyyat al-tahrīr*).²⁴ In a further challenge to the “Islamicity” of the *dhimma* as historically practiced and legally codified in traditional *fiqh*, Fahmī Huwaydī (1937-), one of the most eminent Islamist political analysts, underlined in his celebrated work, *Muwāṭinūn lā Dhimmiyyūn*, how the *dhimma* from a positive connotation was transformed by evil practices contrary to the spirit of Islam into “an instrument to degrade and humiliate.”²⁵

On a more practical level, when confronted with the issue of the applicability of the *jizya*—the poll tax levied on *dhimmīs*, and widely considered as the main marker of the *dhimma*—traditional intellectuals tended to subscribe to the connection between the *jizya* and military service, regardless of their different theoretical assessments on the persistence of the *dhimma*. If the rationale for the *jizya* was the non-service of *dhimmīs* in the army, then their full conscription in the mid-1800s marked the end of the *jizya*.²⁶ The position was embraced both by authors that affirm the continuity of the *dhimma* like al-Qaraḍāwī,²⁷ and those who affirm its termination like al-‘Awwā.²⁸ A significant exception was Quṭb, who conceived of the *jizya* as an expression of the principle of equality. For Quṭb, non-Muslims were called to contribute to the treasury just like Muslims were with the zakah. In his overview, Shāhīn concludes that there is consensus (*ijmā‘*) on the termination of the *jizya* either as a form of acceptance of reality or on the basis of the disappearance of the

24 *Supra* n. 23, at 62.

25 *Sabīl[an] ilā al-intiqāṣ wa-l-mahāna*. HUWAYDĪ FAHMĪ, *Muwāṭinūn lā Dhimmiyyūn*, Cairo 1985, at 125.

26 Historically, the termination of the *jizya* in Egypt by Sa‘īd (r. 1854–1863) anticipated the Khaṭṭ-i Humāyūn of 1856 by over almost two years according to a recent study and went hand-in-hand with the conscription of Copts. The termination of the *jizya* by the Khaṭṭ-i Humāyūn of 1856 for all the Ottoman provinces was followed by the introduction of an alternative conscription tax for those non-Muslims who kept not serving in the army, the *badaliyya ‘askariyya*—which generated a strong backlash against non-Muslims, especially in the Levant. MAḤMŪD AYMAN, *al-Jizya fī Miṣr 1713–1856*, Cairo 2009, at 185–225.

27 AL-QARAḌĀWĪ, *supra* n. 20, at 33.

28 AL-‘AWWĀ, *supra* n. 23, at 75.

historical context of the conquest or in consideration of the partaking of non-Muslims in the defense of the homeland (*waṭan*).²⁹

On the same practical level, when it comes to the access of non-Muslims to public posts, traditional intellectuals tended to differentiate between ordinary state posts, open to everyone, and other positions, open only to Muslims. These ‘other’ positions were variously defined in scholarship. Al-Qaraḍāwī and al-‘Awwā, for instance, recognized the exclusion of non-Muslims from positions with a ‘religious connotation’ (*ṣabgha dīniyya*). In the positions with a ‘religious connotation’ al-Qaraḍāwī included the presidency, army leadership, adjudication among Muslims, and collection of zakāh,³⁰ while al-‘Awwā did not mention adjudication at all, and narrowed the exclusion in army leadership to cases of *jihād*. Al-‘Awwā did affirm, however, that the participation of non-Muslims in the army, government, and representative councils is contingent on their non-performance of any act with ‘religious connotation.’³¹ ‘Abd al-Qādir ‘Awda (1906 – 1954)³² and ‘Abd al-Karīm Zaydān (1917 – 2014)³³ shared a similar view. Huwaydī—citing al-Fārūqī (1921 – 1986), a co-founder of the International Institute of Islamic Thought—argued that non-Muslims need to be excluded from all positions where decision making is premised on a personal commitment to Islam.³⁴ On this issue again we see that the positions do not necessarily descend from the theoretical premise on the persistence of the status of protection.

29 SHĀHIN ‘IMĀD, *al-Muwāṭana Mawḍū‘^{am} li-l-Fikr wa-l-Baḥth. al-Khiṭāb al-Islāmī fī Miṣr*, in: Abū Zayd ‘Alā et al. (ed.), *al-Muwāṭana al-Miṣriyya wa-Mustaqbal al-Dīmuqrāṭiyya*, Cairo 2005, at 141.

30 AL-QARAḌĀWĪ, *supra* n. 20, at 46.

31 AL-‘AWWĀ, *supra* n. 23, at 76.

32 ‘Awda frames the issue of *dhimmīs* within a broader, apologetic reflection on the concept of equality in Islamic criminal legislation. He argues that a consequence of the *dhimma* is the *dhimmīs*’ commitment to Islamic law (*li-anna al-dhimmī wa-qad iltazam aḥkām al-islām* [...]). ‘AWDA ‘ABD AL-QĀDIR, *al-Tashrī‘ al-Jinā‘ī al-Islāmī Muqāran^{am} bi-l-Qānūn al-Waḍ‘ī*, Vol. 1, Beirut (s.d.), at 332 – 333.

33 In his doctoral thesis defended in 1962, and published two decades later, Zaydān explicitly allows the participation of *dhimmīs* in presidential and parliamentary elections. ZAYDĀN ‘ABD AL-KARĪM, *Aḥkām al-Dhimmīyīn wa-l-Musta‘minīn fī Dār al-Islām*, Baghdad 1982, 83 – 85.

34 *Illizām shakhṣī bi-l-islām*. Cit. in HUWAYDĪ, *supra* n. 25, 170 – 171.

The turn of most traditional intellectuals to accommodation within the hegemonic discourse generated a response in the form of a counter-hegemonic offshoot. Traditional intellectuals who carried on with the confrontation that al-Bannā (and Mawdūdī) had initiated represented quite a marginal trend, and to their marginalization heavily contributed the efforts of both organic intellectuals and traditional intellectuals engaged in the accommodation.

The idea that political bonds of lesser degree than Islam belong to the Age of Ignorance (*al-Jāhiliyya*), and need thus to be discarded, was retained as a main feature of two quite different trends of thought, the Salafī and Jihādī currents.³⁵ This is particularly clear in the rhetoric of both the (Salafī) Jamā‘a Islāmiyya,³⁶ and the (Jihādī) Jamā‘at al-Jihād. Refusing the idea of a political community defined in national terms, Salafī³⁷ and Jihādī³⁸ thinkers tended then to frame the issue of relations with others living on the same territory in terms of *al-walā’ wa-l-barā’* (loyalty to fellow Muslims and disavowal of non-Muslims).

On the grounds of *al-walā’ wa-l-barā’* discourse this counter-hegemonic offshoot also engaged the accommodating (traditional) intellectuals, challenging their accommodation as a form of collaboration in the hegemonic project of the ruling class and its organic intellectuals. Al-Ḍawāhirī (1951-), for instance, as one of the main ideologues of al-Qā‘ida accused the Muslim Brotherhood of having committed “grave sins and ideological lapses” in accepting the concept of citizenship of non-Muslims. It is interesting that al-Ḍawāhirī did not cite in support of his position al-Bannā (the originator of this renewal), but rather classics like al-Qurṭubī (d. 1273) and Ibn Taymiyya (d. 1328).³⁹

35 It is worth mentioning that those within the Egyptian Salafī galaxy that later decided to engage in active politics sidelined this line of argument and joined the accommodation bloc.

36 AL-JAMĀ‘A AL-ISLĀMIYYA, *Mūthāq al-‘Amal al-Islāmī*, Cairo 1987, at 206.

37 For a (biased) survey of the positions of Salafism on citizenship, and a (useful) mapping of political articulations of Salafism, see, ḤASANAYN TAWFIQ IBRĀHĪM, *al-Salafīyyūn wa-l-Muwāṭana: Idṭirāb al-Ru‘ya wa-Ghiyāb al-Murāji‘āt al-Fiqhiyya*, Cairo 2013.

38 AL-ḌAWĀHIRI AYMAN, *Al-Walā’ wa-l-Barā’: ‘Aqīda Manqūla wa-Wāqi’ Maḥqūd*, s.l. 2002.

39 See the discussion reported in SHĀHĪN, *supra* n. 29, at 148 – 149. *Al-walā’ wa-l-barā’* is still the horizon of the current debate on citizenship within Salafism; see WRIGHT BRIAN, *The Legal Methodology of the Salafī Movement in Egypt* [MA Thesis at American University in Cairo, 2012], at 55 – 58.

3. The Third Phase: The Counterchallenge

The third phase of the debate was precipitated in the early 2000s by the counterchallenge of the Egyptian regime against its opposition, which was ideologically framed as a challenge by state nationalism to political Islam. Citizenship was brought back to the center of the debate by President Mubārak's son Jamāl, who mobilized *en masse* the regime's organic intellectuals against traditional intellectuals. Jamāl Mubārak's political ascent, one could even argue, was centered around the revival of the citizenship debate. In resorting to citizenship, Jamāl pursued three main goals: reviving Egypt's ruling party ideology with injections from political liberalism, grounding a neoliberal economic vision that would favor his constituency in the private sector, and challenging the opposition on what was perceived as a favorably uneven playing field.

The mobilization of organic intellectuals by Jamāl started at the ruling party level, the National Democratic Party (NDP). The NDP's poor performance in the 2000 parliamentary elections allowed Jamāl to put forward a plan to reform the party. Central to the reform plan was the retirement of the last vestiges of state socialism that still lingered in the official rhetoric (and in the constitution), and the embracing of political liberalism. Organic intellectuals were rallied under the slogan 'al-Fikr al-Jadīd' (New Thinking), and, under this label, political liberalism began being injected into the NDP discourse. The party's annual conventions started revolving around these concepts as early as 2002, when Jamāl was appointed to head the Policies Secretariat. The 2003 annual convention, in particular, worked on a white paper titled *al-Fikr al-Jadīd wa-Ḥuqūq al-Muwāṭin* (The New Thinking and the Rights of the Citizen). The first point of the white paper was "the revival (*iḥyā'*) of the concept of citizenship and the renewal (*taḥdīth*) of the structural relationship between the citizen (*al-muwāṭin*) and the state (*al-dawla*)."

The mobilization of organic intellectuals extended far beyond the ruling party; almost all institutions and associations organized events, workshops or conferences on citizenship in the 2000s. Perhaps the best example is the massive, two-volume collection of proceedings of the annual meeting of the Center of Political Research and Studies in 2003. Its 1407 pages

feature all the most prominent Egyptian intellectuals of the time engaging with the concept of citizenship.⁴⁰

The counterchallenge eventually generated two cycles of amendments to the 1971 Constitution, one in 2005 and one in 2007.⁴¹ In the latter amendment cycle, “citizenship” (*muwāṭana*) even became the rhetorical centerpiece of Egypt’s form of state, substituting “the alliance of the working forces of the people” as the basis of Egypt’s system of government (Article 1).⁴² The amendment to Article 1 was presented as part of a general purging of the socialist terminology, but so were other controversial amendments, like the one that entrenched violations of constitutional rights under pretext of anti-terrorism (Article 179).⁴³ In the reading of the constitutional amendments in the Upper House (*Majlis al-Shūrā*), there was a moment in which a challenge to the hegemonic discourse on citizenship was brought by Rifāṭ al-Saʿīd, Secretary General of al-Tajammuʿ (an opposition party on the left of the political spectrum). Questioning the clarity of what was meant by “citizenship”, al-Saʿīd proposed the addition of the following clause: “which means full equality (*musāwāh*) among citizens irrespective of gender, religion or social class.” This suggestion—which was rejected—was made probably to push back on Jamāl’s neoliberal approach.

A dignified position of citizenship in the constitution served different items on Jamāl’s political agenda, including challenging traditional intellectuals. In particular, a strong statement in the sense of full (formal) equality to be

40 ABŪ ZAYD ʿALĀ/RAʿŪF ʿIZZAT HIBA (eds.), *al-Muwāṭana al-Miṣriyya wa-Mustaqbal al-Dīmuqrāṭiyya: Ruʾā Jadīda li-ʿālam Mutaghayyir*, Cairo 2005.

41 The amendments were actually first presented at the 2006 convention of the NDP by Jamāl Mubārak himself. What citizenship fully represented in his vision has not been fully identified, but was strongly connected with the idea of economic empowerment of the individual in a neoliberal landscape, away from any previous focus on the social and with a view to progressively abandon any form of substantial wealth redistribution policies.

42 The 1971 formula read that the Arab Republic of Egypt was a state with “a socialist, democratic system based on the alliance of the working forces of the people.” After the 2007 reform, the article read: “a democratic system based on citizenship” (*nizāmuhā dīmuqrāṭī yaqūmu ʿalā asās al-muwāṭana*).

43 The 1971 text, which provided for the Socialist Public Prosecutor, was substituted in 2007 with a provision on counter-terrorism. The provision allowed state institutions to disregard fundamental rights of suspect terrorists, and gave to the President the right to refer “any crime of terrorism” to any judicial authority. The practice of referring civilians to military courts thus suddenly became constitutional.

enshrined in the constitution in the form of ‘citizenship’ fit such an agenda by offering grounds for agitating the spectrum of a discourse of political relations based on unequal standing by the Muslim Brotherhood and its base of traditional intellectuals. In other amendments of the same cycle, one can also identify this very goal. A clause was added, for instance, to art. 5 prohibiting all political activity within a religious frame of reference (*marji‘iyya dīniyya*), and was read as an attempt to constrain the Muslim Brotherhood, whose candidates had performed really well in the 2005 general elections.⁴⁴

Reactions to the massive mobilization of the counterchallenge were rather tepid, both in the circles of traditional intellectuals, and in the state institutions called to implement the new vision. Traditional intellectuals did not significantly alter the positions they had articulated during the second phase:⁴⁵ a number of earlier publications on citizenship were simply reprinted, while no major theoretical shift was recorded. State institutions, for their part, never fully espoused the citizenship discourse (signaling a halfhearted embrace of Jamāl’s political agenda), which never featured even in their official narratives, not even in the decisions of higher courts.

III. The Hegemonic Consensus

The hegemonic consensus on the restriction of the debate on citizenship to issues of religious (in)equality seemed to crumble in 2011, when the Revolution reopened the discussion on questions of political participation, class and gender. With the contribution of traditional and organic intellectuals, however, the constitution-making process put a lid back on the revolutionary enthusiasm – a lid cloaked in citizenship rhetoric.⁴⁶ After

44 HAMZAWY AMR, Political Motivations and Implications, in: Brown Nathan J./Dunne Michele/Hamzawy Amr (eds.), *Egypt’s Controversial Constitutional Amendments*, Washington 2007, at 6 – 7.

45 A good example of this trend is ‘IMĀRA MUḤAMMAD, *Ukdhūbat al-Idṭihād al-Dīnī fī Miṣr*, Cairo 2000.

46 On the seizing of the constitutional (Big Bang) moment in Egypt and its consequences see PAROLIN GIANLUCA P., Constitutions Against Revolutions: Political Participation in North Africa, *British Journal of Middle Eastern Studies* 42 (2015), 31 – 45, at 37 – 40.

2011, the constitutional provision enshrining ‘citizenship’ was maintained, sidelined or otherwise returned to in line with the positions of the actors (organic or traditional), but still betraying the overarching, hegemonic consensus on what citizenship should mean, and thus prevent its use in more progressive discourse.

In early 2011, Article 1 was reproduced verbatim in the interim Constitution by the military junta, but removed from the 2012 Constitution drafted by a Constitutional Assembly in which traditional intellectuals were heavily overrepresented because of the electoral success of the Brotherhood and al-Nūr Salafis. Showing some unease with the citizenship rhetoric, traditional intellectuals opted for a non-descriptive reference to the “democratic system” of Article 1, and expounded on the foundations of such a system in Article 6, which read: “the political system is based on the principles of democracy and consultation (*shūrā*), citizenship—which makes all citizens equal in public rights and duties—, political and party pluralism, peaceful transfer of power, the separation and balance of powers, the rule of law, the respect of human rights and freedoms.” Citizenship thus became ‘one of the many’ foundations of the political system, and the explanatory clause (“which makes all citizens equal in public rights and duties”) was also introduced to rule out any other possible interpretation beyond the hegemonic understanding of citizenship as religious (in)equality in certain areas of the legal system, namely public rights and duties.

After the ousting of Muḥammad Mursī, the situation reversed and the 2014 Constitution was drafted by a Committee in which organic intellectuals became heavily overrepresented because of the direct appointment by the Interim President. They reverted to the 1971 text as amended in 2007, just adding to ‘citizenship’ a reference to the rule of law. In its final form, Article 1 now reads: “the republican, democratic system is based on citizenship (*muwāṭana*) and the rule of law (*siyādat al-qānūn*).”

The turmoil that followed 2011 could suggest a shift from the hegemonic consensus on citizenship, especially considering the brutality with which both organic and traditional intellectuals seemed to be at each other’s throat. Surprisingly, however, the recent contribution of one of the most prominent contemporary intellectuals appears to suggest otherwise, as we will explore in the following section

IV. Grounding the Hegemonic Consensus in Islamicate Discourse: Ṭāriq al-Bishrī

As the hegemonic consensus on citizenship was being sealed and entrenched in constitutional documents, how did traditional intellectuals (re)articulate their positions? In this last section of the article, I zoom in on a recent contribution that illustrates the quest by a prominent traditional intellectual, Ṭāriq al-Bishrī (1933-), for a framework for the hegemonic consensus on citizenship that is both coherent and grounded in Islamicate discourse. I will closely follow the unfolding of his thought as it offers in illuminating insight into how the goal of hegemonic consensus seems to guide and constrain the intellectual inquiry.

Ṭāriq al-Bishrī (1933-) is a Cairo University graduate who spent his entire professional life in Egypt's Council of State. He has participated in the citizenship debate for over three decades and injected into it his ample knowledge of the contemporary Egyptian legal system. He is counted among the traditional intellectuals because of his desire to ground his positions in Islamicate discourse.

Al-Bishrī started considering the issue of citizenship as early as 1980 in his *al-Muslimūn wa-l-Aqbāt fi Itār al-Jamā'a al-Waṭaniyya* (Muslims and Copts in the Framework of the National Community).⁴⁷ He has continued thinking about the issue since then, has extensively published on the subject, and has recently pushed his analysis to a further level of maturity in a short essay entitled: 'al-Jamā'a al-Waṭaniyya fi Ḍaw' Maqāṣid al-Sharī'a al-Islāmiyya' (The National Community in the Light of the Objectives of Islamic Law), published in 2014.⁴⁸ It is in this last work ('al-Jamā'a al-Waṭaniyya') that we will follow the unfolding of al-Bishrī's thought and his search for a framework for the hegemonic consensus.

In 'al-Jamā'a al-Waṭaniyya' (2014), al-Bishrī opens his contribution by situating his analysis within the *maqāṣid* stream—a renewal stream that emphasizes a teleological reading of the law by focusing on the *maqāṣid al-sharī'a* (lit. aims or purposes of the law)—, and warning the reader of

47 Itself republished in 2004 by al-Shurūq.

48 AL-BISHRĪ ṬĀRIQ, *al-Jamā'a al-Waṭaniyya fi Ḍaw' Maqāṣid al-Sharī'a al-Islāmiyya*, in: al-'Awwā Muḥammad Salīm (ed.), *Tafīl Maqāṣid al-Sharī'a fi 'l-Majāl al-Siyāsī: Majmū'at Buḥūth*, London 2014, 115 – 58.

the dangers of not considering political concepts like the ‘national community’ within the historical practices that lend these concepts their intellectual significance.⁴⁹ After tracing an Aristotelian account of the historical development of the national community as a political community embracing a variety of forms of affiliation and sub-units, al-Bishrī moves to define ‘citizenship’ in rather conventional ways, as the “status (*ṣifa*) of the individual who belongs to a certain political community as defined by the state”.⁵⁰

Al-Bishrī then sifts Islam’s texts and traditions for indicators of *maqāṣid* on human communities. As a result, he identifies in the *Ṣaḥīfa*—the political arrangements of Yathrib after the hijra (also known as the Constitution of Medina) and recorded in Ibn Ishāq’s *Sīra*—a foundational moment in the establishment of a political community beyond the previous forms of affiliation.⁵¹ Al-Bishrī argues that even an historical event can be a source of *maqāṣid*, especially if it captures a fundamental transformation such as the establishment of the first Islamic community in its political form in Medina.⁵² In reading the *Ṣaḥīfa*, al-Bishrī stresses how it encompassed lower units (like kin groups) into a larger community⁵³ without displacing the former and their forms of affiliation.⁵⁴ And citing “*wa-inna al-mu’minīna ba’duhum mawālī ba’ḍin dūn al-nās*” he concludes that the higher form of affiliation was the bond of faith or Islam which is the foundation of what would be today called the ‘political community’ and ‘citizenship’.⁵⁵ In al-Bishrī’s reading, this community—the first state (*dawla*) that Islam has known—transcended older affiliations without

49 AL-BISHRĪ, *supra* n. 48, at 117.

50 AL-BISHRĪ, *supra* n. 48, at 120.

51 The *Ṣaḥīfa* plays an important role also in the view of many other scholars trying to define citizenship within an Islamic frame of reference. See the ones cited in SHĀHĪN, *supra* n. 29, at 136.

52 AL-BISHRĪ, *supra* n. 48, at 123.

53 “And with their kins and communities they became one nation (*umma*)—that is: one community (*jamā’a*); and from the multiplicity of communitarian affiliations they became a community with one affiliation (*Fa-hum bi-aqwāmihim wa-jamā’atihim al-muta’addida ṣārū umma^{tan} ayy jamā’a, wa-hum ma’a ta’addud intimā’atihim al-jamā’iyya ṣārū jamā’a^{tan} dhawī intimā’ wāḥid*).” AL-BISHRĪ, *supra* n. 48, at 123.

54 Citing the section where the *Ṣaḥīfa* establishes that the Quraysh who left Mecca “are responsible for each other as a group (*‘alā rab’atihim yata’āqalūn baynahum*).” AL-BISHRĪ, *supra* n. 48, at 123.

55 (Believers protect each other against the enemy), AL-BISHRĪ, *supra* n. 48, at 124.

obliterating them, embraced non-Muslims on an equal footing whilst being founded on a dogmatic religious basis, established the principle of equality and solidarity in view of the common protection against the enemy, and was also the first state (*dawla*) that Islam has known.⁵⁶

When considering the Islamic ‘political community,’ later scholars—argues al-Bishrī—were consumed with a concern for unity. He takes *al-Aḥkām al-Sultāniyya wa-l-Wilāyāt al-Dīniyya* by al-Māwardī (d. 1058) as an example of this concern for unity. Unity was, however, reconsidered after the abolishment of the Caliphate in the 1920s, and al-Bishrī cites three authors justifying pluralism (*ta‘addud*) within the political community: Rashīd Riḍā (1865–1935),⁵⁷ Muṣṭafá Ṣabrī (1869–1954),⁵⁸ and ‘Abd al-Razzāq al-Sanhūrī (1895–1971).⁵⁹ Political Islam on the other hand, concedes al-Bishrī, did resist the idea of pluralism within the political community; the positions of Mawdūdī, al-Bannā, al-Ghazālī, or al-Qaraḍāwī can be explained within the context of their resistance to the threat of nationalism. While these latter authors did indeed challenge pluralism as a proxy of nationalism, what they were really aiming at was Islamic rule (*an yakūn al-ḥukm islāmīyy^{an}*). Al-Bishrī summarizes it as a need for (1) the reference (*marji‘iyya*) of the various political systems and (2) the parameters (*mu‘āmalāt*) that rule the community to be Islamic. Beyond Islamic rule, all other issues – whether unity or pluralism within the community itself, the system of citizenship, or even state sovereignty (*ḥākimiyya*) – are open to discussion and conceptualized in the Islamic perspective within historical dynamics.⁶⁰

Moving into the definition of citizenship in Islam, al-Bishrī claims that the equality element at its core is firmly established in Islam’s texts and tradition, even if historical circumstances or political considerations might have, at times, steered the relations between Muslims and non-Muslims in

56 AL-BISHRĪ, *supra* n. 48, at 124–125.

57 RIḌĀ RASHĪD, *al-Khilāfa aw al-Imāma al-‘Uẓmā*, Cairo 1923, cit. in AL-BISHRĪ, *supra* n. 48, at 126–127.

58 ṢABRĪ MUṢṬAFĀ, *al-Nakīr ‘alā Munkarī al-Ni‘ma min al-Dīn wa-l-Khilāfa wa-l-Umma*, Beirut 1924, cit. in AL-BISHRĪ, *supra* n. 48, at 127–128.

59 AL-SANHŪRĪ ‘ABD AL-RAZZĀQ, *Le Califat, son évolution vers une Société des Nations Orientales*, Paris 1926, cit. in AL-BISHRĪ, *supra* n. 48, at 128–129.

60 AL-BISHRĪ, *supra* n. 48, at 131–132.

other directions.⁶¹ Beyond citizenship's core of equality, however, remain controversial issues like the access of non-Muslims to positions of public authority (*al-wilāyāt al-‘amma*); al-Bishrī is keen to discuss this point, but before doing so warns against the decontextualized use of legal opinions (fatwas). He does this by wittily referring to a scholar whose opinions are the most cited in discussions on the status of non-Muslims often without proper contextualization: Ibn al-Qayyim (d. 1350).⁶²

In analyzing the concept of *wilāya*, al-Bishrī looks first at the Qur’anic verses that are invoked in support of its limitation to Muslims alone (Q. 3:28, 5:51, 5:57, 4:144, 4:138 – 9, 60:9, 60:1). He relies on the *tafsīr* literature of modern scholars like ‘Abduh, Riḏā, and Quṭb, but also that of traditional scholars like al-Qurṭubī (d. 1273) and Ibn Kathīr (d. 1373). While challenging the scope of the verses, al-Bishrī reaffirms the point that resorting to the context of revelation (*asbāb al-nuzūl*) is not a way to historically bracket the revelation, but rather to identify the circumstances (*munāsabāt*) that allow the scholar to apply the same ruling (*ḥukm*) to comparable situations.⁶³

When it comes to the meaning of *wilāya*, al-Bishrī briefly points to its semantic richness and then parses its use by traditional scholars like Ibn al-Qayyim. He dissects the episodes that the latter cites to justify the prohibition of employing Jews in any matter related to it or other affairs of Muslims (*fi shay’ min wilāyāt al-muslimīn wa-umūrihim*).⁶⁴ Just as with the controversial interpretations of the Qur’anic verses, al-Bishrī points to the particular context of both the prophetic episode in the wake of the Battle of Badr, and the caliphal practice of ‘Umar employed by Ibn al-Qayyim. He then challenges the depiction of historical events as law (*fiqh*) without engaging with the proper *fiqh* methodology.

After sketching the main positions in the current debate, al-Bishrī concludes that the principle of equality as expressed in the maxim “their rights are our rights, their duties are our duties”⁶⁵ is not questioned; what requires further

61 AL-BISHRĪ, *supra* n. 48, at 134 – 137.

62 IBN AL-QAYYIM, *Ilām al-Muwaqqi’in ‘an Rabb al-‘Alamīn*, Beirut 1991, cit. in AL-BISHRĪ, *supra* n. 48, at 137 – 139.

63 AL-BISHRĪ, *supra* n. 48, at 140 – 142.

64 IBN AL-QAYYIM, *Aḥkām Ahl al-Dhīmna*, Vol. 1, Dammam 1997, at 450, cit. in AL-BISHRĪ, *supra* n. 48, at 146.

65 *Lahum mā lanā wa-‘alayhim mā ‘alaynā*. In the wider debate, this expression is actually widely challenged as to its origin and authenticity.

fiqh engagement—in the spirit of citizenship—is the issue of the right to take up key state posts and leading policy functions, be it in the judiciary, the army or the public administration, or elsewhere—what traditional scholars used to refer to as the ‘*wilāyāt ‘amma*.’⁶⁶

In order to address the question of the *wilāyāt ‘amma*, al-Bishrī claims that the contemporary political community emerged with decolonization, and is therefore founded on the common resistance of Muslims and non-Muslims against the colonizer—it is this point which frames his post-colonial view on citizenship.⁶⁷

When it comes to the *wilāyat ‘amma* of the imam, al-Bishrī posits that in traditional fiqh the extension of the imam’s jurisdiction was tremendous and that both decision making and policy implementation depended on the individual will of the imam alone. Even the ‘delegated minister’ (*wazīr al-tafwīd*) in al-Māwardī’s design had powers that not even the President, the Prime Minister or the entire Government would have in a contemporary system. Both posts, according to al-Māwardī, were open to Muslims alone.

Al-Bishrī thus contends that in contemporary constitutional design there is neither the same traditional concentration of powers, nor is any individual allowed to decide or act alone as the imam (or as even the *wazīr al-tafwīd*) used to in al-Māwardī’s design. This holds true—maintains al-Bishrī—even in the administrative apparatus, where the work is divided among various individuals (and bodies) according to technical specialization.

From al-Bishrī’s perspective, even if one such post with the same breadth of jurisdiction, individual decision making, and policy implementation as the imam or *wazīr al-tafwīd* were to exist, it would be limited in its operation by the constitution (and ordinary, and secondary legislation). Constitution making or legislating themselves are not in the hands of an individual, but are rather found in bodies where various individuals participate in the deliberation.

In al-Bishrī’s view, the traditional autocratic powers of the imam are not found in contemporary constitutional systems, because these very powers are divided among many bodies and institutions, and the main political

66 AL-BISHRĪ, *supra* n. 48, at 153.

67 AL-BISHRĪ, *supra* n. 48, at 154.

deliberations are left to communal—instead of individual—decision making.⁶⁸ If bodies replaced individuals (imams and *wuzarā' mufawwadūn*) in the discharge of public functions (*tawallī al-wilāyāt al-amma*), al-Bishrī argues that the individual requirement of adhering to Islam needs to be transferred onto the body. The body does not have a religion, but can have a *marji'iyya*, which he defines as the intellectual foundation to which the body resorts to when acting and the extent of its legitimacy over the people.⁶⁹ If the body has an Islamic *marji'iyya* (reference), then, claims al-Bishrī, its authority (*wilāya*) is Islamic according to law (*fiqh*).

Since the 1923 Constitution, the provision that Islam is the religion of the state was introduced on the suggestion of the mufti emeritus al-Muṭṭī, and has been maintained ever since.⁷⁰ Such a provision in al-Bishrī's reading marks the authority of the state as Islamic, and thus allows all citizens—Muslims and non-Muslims alike—to fully participate in decision making and policy implementation on an equal footing. This resolves for him the issue of access of non-Muslims to key state posts and leading policy functions.

In addition to the effect of the Islamic reference on the grounding of the citizenship principle, the interaction between Article 2 (declaring Islam the religion of the state) and Article 1 (declaring the centrality of citizenship in the political system) signals to al-Bishrī that the constitution identifies as its *marji'iyya* not just any of the various possible Islamic readings, but the one embracing equality among citizens. It is an operation which, in al-Bishrī's view, is a form of preference (*tarjih*) well-established in traditional scholarship as one of the prerogatives of the (political or judicial) authority (*walī al-amr*).⁷¹

Al-Bishrī's arguments in 'al-Jamā'a al-Waṭaniyya' (2014) raise more questions than they answer. But they speak to the driving desire to ground in Islamicate discourse a reconciled reading of citizenship that can meet organic intellectuals half way: "we accept the participation of non-Muslims

68 AL-BISHRĪ, *supra* n. 48, at 156.

69 *Al-aṣl al-fikrī al-marjū' ilayh fīmā yuṣdar 'anhā min nashāt wa-madā iltizāmihā bi-hādihā al-aṣl bi-ḥusbānih mawrid^{an} li-shar'iyat wilāyatihā 'alā al-nās*. AL-BISHRĪ, *supra* n. 48, at 157.

70 With the notable exception of the 1958 Constitution.

71 AL-BISHRĪ, *supra* n. 48, at 158.

as long as Islam is established.” By doing so, traditional intellectuals confirm their positioning and seal the hegemonic consensus on the restriction of the debate on citizenship to issues of religious (in)equality.

V. Conclusion

Citizenship offers a good vantage point to observe how cultural hegemony has been constructed in Egypt since the 1920 s. Citizenship is however just one instance of how non-coercive forms of domination were articulated, and they stretched far beyond citizenship onto the structures of the post-colonial state and its governance system.

The article focused on the positions of traditional intellectuals in order to shed light on their contribution to the construction of cultural hegemony, while the ruling class and its organic intellectuals were heavily engaged with structuring the nationalist project. The three phases of the debate allow us to appreciate how the positions shifted over time, but these shifts should not distract us from the consolidation of consensus over what citizenship meant—a consensus that was taking shape in the background.

In the first phase (the counter-hegemonic inception phase), the debate started as a counter-hegemonic challenge by traditional intellectuals to organic intellectuals and their nationalist ideologies (over the century both the local *waṭanīyya* and the wider *qawmīyya*). The challenge was brought by traditional intellectuals on citizenship, because it was perceived as a playing field that was unfavorable to organic intellectuals: “equality irrespective of religious affiliation, or citizenship (*muwāṭana*). The traditional intellectuals must have thought that it was an element of the nationalist project that could not fly with the wider Egyptian public, and counted on widespread ‘consensus’ against such a principle. When this challenge did not work, traditional intellectuals experimented with forms of accommodation until it was the organic intellectuals who, spearheaded by the ruling party, decided in the third phase to re-engage traditional intellectuals on the same playing field. Beginning in the accommodation phase and continuing through the counter-challenge third phase, the contention between traditional and organic intellectuals seems to fade, giving way to an overarching consensus on the post-colonial state and its structures of governance.

In the counter-challenge phase, revamping the contention with traditional intellectuals was at the heart of the political project of President Mubārak's son Jamāl, who mobilized organic intellectuals. The counter-challenge—which suffered from the personal political successes and defeats of Jamāl Mubārak—did not affect the core of the hegemonic consensus over what citizenship means (in Egypt). Al-Bishrī's contribution confirms that the hegemonic consensus even went through the 2011 uprising and the 2013 coup unscathed, and seals such consensus *ex parte* traditional intellectuals by grounding it in Islamicate discourse.

At the heart of the hegemonic consensus is thus a discourse that fully occupies the public debate on citizenship with issues of religious (in) equality, and thus prevents any meaningful engagement with other key components of citizenship, like political participation, gender equality or class mobility. Both traditional and organic intellectuals contributed to the emergence and perpetuation of this hegemonic consensus, with traditional intellectuals showing a remarkable ability to work within Islam's texts and traditions to dress it in 'proper' Islamic garments.⁷²

The partaking of traditional intellectuals in the construction of the hegemonic consensus constrains at once their ability to engage with both religious (in)equality, and wider citizenship issues in Islam's texts and traditions. On religious (in)equality, for instance, the status of non-Muslim citizens not belonging to the canonical category of People of the Book is left hanging, or is—at best—discussed on the margins. Beyond the conventional equality core, traditional intellectuals constrain themselves not to explore and engage with other wider aspects of citizenship,⁷³ like the scope for participation in decision making for the Muslim citizen in the overall governance structure, how to address gender disparities, or rethink rigidities in class mobility. Even if traditional intellectuals think they are providing a counter-hegemonic discourse (as it might have been the case in the first phase), they are really participating in the construction of a hegemonic consensus that holds down even their potentials.

72 Part of the conventional reading of citizenship in the religious discourse is to articulate the discussions in terms of rights and duties (*al-ḥuqūq wa-l-iltizāmāt*). SHĀHĪN, *supra* n. 29, at 134.

73 SHĀHĪN, *supra* n. 29, at 132.

An Analysis of the Right of a Muslim Spouse to Claim Pension Interest Subsequent to Divorce: A South African Case Study

MUNEER ABDUROAF*

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Abstract

Section 37D(1)(d)(i) of the Pension Fund Act 24 of 1956 enables a divorced spouse to claim pension interest from the pension fund organisation of his or her former wife or husband if certain requirements are met. This paper analyses the application of s 37D(1)(d)(i) to South African Muslims who married in terms of Islamic law only as well as those South African Muslims who married in terms of Islamic law as well as civil law. It highlights some of the problem areas found within the current application of the provision. The paper concludes with an overall analysis of the findings and makes a recommendation as to a way forward.

I. Introduction

A pension fund organisation is referred to inter alia as an ‘association of persons established with the object of providing annuities or lump sum

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payments for members or former members of such association [...].¹ Section 37D(1)(d)(i) of the Pension Fund Act 24 of 1956 (hereafter referred to as PFA) enables a divorced spouse to claim pension interest from the pension fund of his or her former wife or husband if certain requirements are met. The claim must be based on the amount assigned in terms of a divorce order granted in terms of s 7(8)(a) of the Divorce Act 70 of 1979 (hereafter referred to as DA) or in terms of a court order granted based on a settlement reached pursuant to an Islamic divorce.² This paper analyses the application of s 37 D(1)(d)(i) of the PFA to a South African Muslim couple and looks at a number of scenarios in this regard. For purposes of illustration, the letter X is used

1 See s 1 of the Pension Fund Act 24 of 1956 which states that a pension fund organisation means '[...] (a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members upon the death of such members; or (b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons; or (c) any association of persons or business carried on under a scheme or arrangement established with the object of receiving, administering, investing and paying benefits that became payable in terms of the employment of a member on behalf of beneficiaries, payable on the death of more than one member of one or more pension funds [...]'. Section 1 of the DA states that a pension interest '[...] in relation to a party to a divorce action who – (a) is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have terminated on the date of the divorce on account of his resignation from his office; (b) is a member of a retirement annuity fund which was *bona fide* established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1 (2) of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), for the purposes of that Act.'

2 Section 37D of the PFA states that the '[...] (1) a registered fund may [...] (d) deduct from a member's or deferred pensioner's benefit, member's interest or minimum individual reserve, or the capital value of a pensioner's pension after retirement, as the case may be – (i) any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7 (8) (a) of the Divorce Act, 1979 (Act No. 70 of 1979) or in terms of any order made by a court in respect of the division of assets of a marriage under Islamic law pursuant to its dissolution [...].'

hereafter to refer to the member of the pension fund organisation whereas the letter Y is used hereafter to refer to the non-member spouse of X. Two scenarios are looked at in this paper. The first scenario looks at how s 37D(1)(d)(i) of the PFA applies to a couple married in terms of both Islamic law as well as civil law. The second scenario looks at how s 37D(1)(d)(i) of the PFA applies to a couple married in terms of Islamic law, and not civil law. The paper concludes with an overall analysis of the findings and makes recommendations as to a way forward.

II. Analysis of a couple subject to an Islamic and a civil marriage

A South African Muslim couple has the option of concluding a marriage in terms of their religion. This type of marriage is not governed by any of marriage legislation within the South African context. This could be referred to as an Islamic marriage.³ The couple in question also has the option of concluding a marriage in terms of existing South African marriage legislation governing marriages. The marriage would then be referred to as a civil marriage.⁴ It is also possible that the couple concludes both an Islamic marriage as well as a civil marriage. The couple in question would then be married in terms of both Islamic and civil law.

Section 37D(1)(d)(i) of the PFA enables Y to lodge a claim against the pension fund organisation of X if certain requirements are met. The claim must be based on the amount assigned in terms of a divorce order granted in terms of s 7(8)(a) of the DA or in terms of a court order granted based on a settlement agreement reached pursuant to an Islamic divorce.⁵ It can be seen from this section that there are two ways in which a claim can be made against a pension fund organisation. The first

3 See 2010 version of the Muslim Marriages Bill for an example of proposed legislation governing Islamic marriages and some of its consequences within the South African context, available at <https://pmg.org.za/bill/235/> (accessed on 14 April 2020).

4 See the Marriage Act 25 of 1961, the Recognition of Customary Marriages Act 120 of 1998, and the Civil Union Act 17 of 2006 for examples of law governing marriages in terms of South African legislation governing marriages and its consequences.

5 Section 37D of the PFA, see *supra* n. 2.'

way is in terms of the DA whereas the second way is in terms of a court order granted based on the settlement agreement reached pursuant to an Islamic divorce.

Section 7(8(a) of the DA states that '[t]he court granting a decree of divorce in respect of a member of such a fund, may make an order that – (i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party [...]'.⁶ This section would apply in the event where X and Y concluded a civil marriage or concluded an Islamic marriage as well as a civil marriage.⁷ It will be accepted for purposes of this illustration that X and Y concluded both an Islamic marriage as well as a civil marriage.

The question as to whether Y is entitled to a portion of the X's pension interest would depend on the matrimonial property subject to the marriage.⁸ Section 7(7)(a) of the DA states that '[i]n the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c) be deemed to be part of his assets [...]'.⁹ Section 7(7)(c) of the DA states that s 7(7)(a) of the DA 'shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.'¹⁰ It will be assumed for purposes of this discussion that X and Y have not concluded an antenuptial contract. This would then mean that they were married in terms of the default matrimonial property system which is in community of property.¹¹ It should be noted that the default matrimonial property system in terms of Islamic law is that the

6 See Section 7(8(a) of the DA.

7 It should be noted that a civil marriage is not regarded as a valid marriage for Islamic law purposes. It would therefore be required that X and Y conclude both the Islamic as well as the civil marriage.

8 The three matrimonial property regimes found within the South African context are the marriage in community of property, the marriage out of community of property with the application of the accrual system, and the marriage out of community of property without the application of the accrual system. See Matrimonial Property Act 88 of 1984.

9 See s 7(7)(a) of the DA.

10 See s 7(7)(a) of the DA.

11 See Matrimonial Property Act 88 of 1984.

property of both parties to the marriage are kept separate.¹² This would be more in line with the notion of out of community of property without the application of the accrual system. It is also interesting to note that there have been many attempts to enact aspects of Islamic law in terms of South African legislation and that in the 2010 attempt of the proposed marriage legislation it states that the default system in terms of the proposed legislation would be out of community of property without the application of the accrual system.¹³ It could be argued that Y is not entitled in terms of Islamic law to claim the pension interest of X. It should be noted here that there are a number of Islamic institutions in South Africa that are of the opinion that marriages in community of property as applied in South Africa is not valid and not allowed in terms of Islamic law.¹⁴ It will be assumed that X and Y knew of the default regime in terms of Islamic law, but decided to marry in community of property in terms of South African law.

12 See 2010 version of the Muslim Marriages Bill where it states under s 8 that '(1) A Muslim marriage to which this Act applies is deemed to be a marriage out of community of property excluding the accrual system, unless the proprietary consequences governing the marriage are regulated by mutual agreement of the spouses, in an antenuptial contract which must be registered in the Deeds Registry – (a) in the case of a marriage concluded before the commencement of this Act, and if at the time of the conclusion thereof a written agreement regulating the proprietary consequences of the marriage existed between the spouses, within 12 months from the date of commencement of this Act; and (b) in the case of a marriage concluded after the commencement of this Act, within three months from the date of execution of the contract, or within any extended period as the court may, on application, allow.', available at <https://pmg.org.za/bill/235/> (accessed on 14 April 2020).

13 See 2010 version of the Muslim Marriages Bill under 8, *supra* n. 12.

14 See Muslim Judicial Council (SA) Fatwa Committee 'MJC Position on Succession Law and Related Matters' (2017) where it states under 2.5.1 that '[i]t is difficult, if not impossible, to reconcile community of property as a consequence of marriage with ownership and transfer of property under the Shariah.' See also JAMIATUL ULAMA KWAZULU-NATAL Resolving a Community of Property estate?, available at <https://jamiat.org.za/resolving-a-community-of-property-estate/> (accessed 14 April 2020), where it states that '[...] [t]he 'Community of Property' matrimonial regime is not recognized in Islamic Law. In the Shari'ah, ownership is established for each person individually by default. Such ownership is transferred or shared through specific juristic acts or events. Marriage is not one of them, and hence does not create a partnership or 'Community of Property'. The only recognized matrimonial regime in the Shari'ah that has been prescribed by South African Law is a marriage 'Out of Community of Property without the accrual system' by means of an Ante Nuptial Contract where each spouse retains all of his/her assets [...]'.

One of the problems with the dual marriage situation is that it could lead to a scenario where the civil marriage has been dissolved but the Islamic marriage has not been dissolved. The requirements in terms of s 37D(1)(d) (i) of the PFA would nonetheless have been met in a situation like this, as a decree of divorce would be present.¹⁵ However, s 5 A of the DA enables a presiding officer to refuse granting a divorce in a situation where the Islamic marriage would remain intact subsequent to the civil divorce. The section states that '[i]f it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just.'¹⁶ This provision would be quite useful to Y in the event where X wants a civil divorce but does not want to issue a religious divorce by way of a talaaq.¹⁷ Y could then raise the issue in terms of s 5 A of the DA and the proceedings could possibly be stayed until such a point where X has issued the divorce in terms of Islamic law and Y is then free to remarry. It should be noted that s 5 A is prescriptive as the word 'may' is used regarding the refusal.¹⁸

It is also not always possible for a presiding officer to know whether or not one of the parties are also married in terms of their religion and would not be able to remarry subsequent to the civil divorce, unless this is brought to the attention of the presiding officer by the parties to the divorce themselves. A ground for the divorce must however be present in order for the civil divorce to take place. Section 3 of the DA states that '[a] marriage may be dissolved by a court by a decree of divorce and the only grounds on which such a decree may be granted are – (a) the irretrievable break-

15 Section 37D of the PFA, *supra* n. 2.

16 See s 5 A of the DA.

17 It should be noted that a talaaq occurs when a husband issues a wife with a divorce by pronouncing it on her.

18 See s 5 A of the DA.

down of the marriage as contemplated in section 4; (b) the mental illness or the continuous unconsciousness, as contemplated in section 5 of a party to the marriage.¹⁹ These requirements could easily be met on the paper if alleged by the parties concerned, and the divorce decree would then be granted even though the couple is still married in terms of Islamic law. The situation could be seen as a loop hole in the South African legal system. The state of affairs could also lead to a scenario where the couple intentionally decides to dissolve the civil marriage for the sole purpose of claiming pension interest. It is not certain as to whether the dissolution of the civil marriage in such a way would be regarded as a crime in terms of South African law. It seems highly unlikely that this would be the case.

The next question that should be looked at is whether the Islamic marriage would be impacted upon in the event where a civil marriage is dissolved. The general answer to this question would be that the Islamic marriage remains intact, as long as there is not an act that causes it to be dissolved.²⁰ A tricky situation would arise in the event where a presiding officer asks the couple whether their Islamic marriage has been dissolved as required in terms of s 5 A of the DA.²¹ It is not certain as to whether the presiding officer would grant the divorce if the couple answers by saying that the Islamic marriage has not been dissolved and that they have no intention on dissolving it. The question that would then arise would be whether there is truly an irretrievable breakdown of marriage if the couple nonetheless wants to remain married as husband and wife in terms of Islamic law. An alternative argument that could be made is that the civil marriage has broken down but the Islamic marriage is still intact. It is not certain as to how a presiding officer would respond to this claim. The couple could also just respond to the question by stating that the Islamic marriage has been dissolved even though in fact it has not. This would bring about an issue regarding the status of the Islamic marriage. There is an opinion found within the body of Islamic jurisprudence to the effect that if a husband is asked by someone if he divorced his wife and he respond with a 'yes' then it would have the same effect as if he said he has informed

19 See s 3 of the DA.

20 See s1 of the draft 2010 Muslim Marriages Bill where the issue of divorce is discussed, available at <https://pmg.org.za/bill/235/> (accessed on 14 April 2020).

21 See s 5 A of the DA.

the presiding officer that he has divorced his wife.²² This could be quite problematic in terms of Islamic law as there is an opinion that this would be regarded as an Islamic divorce in terms of Islamic law.²³

An easier approach would be for X to pronounce an Islamic divorce on Y, and then apply for the civil divorce via the courts. This would then also be in line with s 5 A of the DA.²⁴ The couple may then remarry in terms of Islamic law after the pension fund matter has been concluded. The big question would be whether all of this hassle would be worth it and this type a scenario would bring about a number of ethical questions

22 See ZUHAYLEE MM, *Al Qawaa'id Al Fiqhiyyah Wa Tatbeeqaatuhaa Fee Madhaahib Al Arba'ah*, Vol. 1, 3rd ed. Damascus 2009, 384 – 386, where it states that if a man is asked whether he Islamically divorced his wife and he says yes, then it is as if he said I divorced her.

23 See AL MUNAJJID MS, 120315: If the husband says “I divorced my wife” but he is lying or does not intend to divorce, available at <https://islamqa.info/en/answers/120315/if-the-husband-says-i-divorced-my-wife-but-he-is-lying-or-does-not-intend-divorce> (accessed 15 April 2020), where it states that “Question [:] If a husband announces his divorce of his wife among his family and relatives by saying ‘I have divorced her’, with the intention of divorce based on the fact that he goes to the judge to divorce her, but the divorce is not completed because the two sides cannot agree with regard to the custody of the children, what is the Islamic ruling on a husband who announces his divorce among the people by saying I have divorced her and that’s that? Answer [:] Praise be to Allaah. If the husband says of his wife: ‘I have divorced her’, then divorce takes place, whether he intended divorce or not, and whether he was telling the truth or lying, because this phrase is clear and divorce takes place thereby even if he did not intend it. Ibn Qudaamah (may Allaah have mercy on him) said in *al-Mughni* (7/306): [Begin quote] ‘If it is said to him, ‘Do you have a wife?’, and he says no, intending thereby to lie, then he does not have to divorce his wife. But if he says, ‘I have divorced her’, intending thereby to lie, then the divorce is binding. Rather [the first scenario] is not binding if he intended to lie, because he is saying ‘I do not have a wife’ which is a metaphor that cannot refer to divorce at all. And if he is telling lies with no intention of divorce, then it does not count as such. But if he said, ‘I have divorced her’, intending to lie, then she is divorced, because the word divorce (*talaq*) is clear and divorce takes place thereby even if it was not intended’ [end quote]. The divorce that takes place in this case is a revocable divorce; a husband may take his wife back during the ‘iddah if it is the first or second divorce. And Allaah knows best.” The other opinion is that the Islamic divorce is not valid. This opinion is followed by some Hanafee and Shaf’ee scholars. See Islamweb.net ‘Fatwa 23014: Ruling on informing someone that you divorced his wife but lied about it’ available at <https://www.islamweb.net/ar/fatwa/23014/%D8%AD%D9%83%D9%85-%D9%85%D9%86-%D8%A3%D8%AE%D8%A8%D8%B1-%D8%A3%D9%86%D9%87-%D8%B7%D9%84%D9%82-> (accessed 15 April 2020) for a further discussion on this issue.

24 See s 5 A of the DA for the wording in this regard.

concerning X and Y. It might also lead to a situation where either X or Y decide that they are no longer meant for each other as they are better off apart. The above-mentioned problematic examples support the argument that there is a real need for the regulation of Islamic marriages, divorces and related matters in terms of South African legislation. This would also lead to legal certainty as to what laws are applicable to Muslims in South Africa.

III. Analysis of a couple subject to an Islamic marriage only

Section 37D(1)(d)(i) of the PFA was amended in 2013 and its amended version came into effect on 28 February 2014. The amended version now states that '[...] (1) A registered fund may [...] (d) deduct from a member's or deferred pensioner's benefit, member's interest or minimum individual reserve or the capital value of a pensioner's pension after retirement, as the case may be – (i) any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7 (8) (a) of the Divorce Act, 1979 (Act No. 70 of 1979) or in terms of any order made by a court in respect of the division of assets of a marriage under Islamic law pursuant to its dissolution [...]'.²⁵ The italics part is the addition to the section. There has been some contention regards the interpretation and application of the addition made to the section.

The Pension Fund Adjudicator stated in a determination in the matter of *Z Paulse (complainant) v Sanlam Staff Umbrella Pension Fund (First Respondent) and Sanlam Life Insurance Limited (Second Respondent)* [2015] that in their view '[...] the intention of the legislature [regarding s 37D(1) (d)(i) of the PFA] was to accord spouses married in terms of Islamic law equal treatment granted to parties married in terms of civil and customary marriages in so far as dealing with patrimonial assets following the

²⁵ Section 37D of the PFA, supra n. 2.

dissolution of a marriage [...].²⁶ The complaint submitted by the complainant to the Pension Fund Adjudicator was that the respondents refused to pay the pension interest in accordance with the settlement agreement that was made an order of court pursuant to an Islamic divorce.²⁷ The respondents argued that they were not in a position to pay the pension interest in favour of the complainant because the amended provision was problematic. Their submission to the Pension Fund Adjudicator was that ‘if the intention [of the legislature was] that it should be possible to obtain section 7(8) orders in respect of Islamic marriages, there is a shortcoming in the legislation insofar as the Financial Services General Laws Amendment Act, 2013 only amended section 37D(1) (d)(i) of the Act, while there are many provisions in the Act, the Income Tax Act, 58 of 1962 and the Divorce Act, which [are required to be amended] before orders following the dissolution of Islamic marriages (i. e. orders dealing with matrimonial consequences of the parties) may be treated in the same manner as the dissolution of civil and customary marriages (i. e. divorce orders granted in terms of the Divorce Act).’²⁸ One of the recommendations made by the respondents was that ‘[...] [t]he parties can wait for the legislative amendments to be made and come into effect, whereafter they can resubmit the order to the first respondent and claim the payment of the share of the pension interest to the non-member spouse. However, there is no guarantee that such legislative amendments will apply retrospectively.’²⁹

26 See 5.7 of the Determination in terms of section 30M of the Pension Funds Act, 24 of 1956 in the matter of *Z Pause (complainant) v Sanlam Staff Umbrella Pension Fund (First Respondent) and Sanlam Life Insurance Limited (Second Respondent)* issued on 23 April 2015, Reference Number PFA/WC/00011266/2014/MD, available at <https://www.pfa.org.za/Determinations/20142016/Pause%20v%20Sanlam%20Staff%20Umbrella%20Pension%20Funds%20and%20Another.pdf> (accessed 15 April 2020).

27 See 3.1 and 3.2 of the Determination in terms of section 30M of the Pension Funds Act, 24 of 1956 in the matter of *Z Pause (complainant) v Sanlam Staff Umbrella Pension Fund (First Respondent) and Sanlam Life Insurance Limited (Second Respondent)*, *supra* n. 26.

28 See 4.8 of the Determination in terms of section 30M of the Pension Funds Act, 24 of 1956 in the matter of *Z Pause (complainant) v Sanlam Staff Umbrella Pension Fund (First Respondent) and Sanlam Life Insurance Limited (Second Respondent)*, *supra* n. 26.

29 See 4.9 of the Determination in terms of section 30M of the Pension Funds Act, 24 of 1956 in the matter of *Z Pause (complainant) v Sanlam Staff Umbrella Pension Fund (First Respondent) and Sanlam Life Insurance Limited (Second Respondent)*, *supra* n. 26.

The Pension Fund Adjudicator stated in its determination that even though the Pension Fund Adjudicator (Tribunal) '[...] welcomes the second respondent's concern about the need to make amendments to certain provisions of the Act and other relevant pieces of legislation in order to give full effect to the provisions of section 37D(1)(d)(i) of the Act, it is this Tribunal's view that the intention of the legislature was to accord spouses married in terms of Islamic law equal treatment granted to parties married in terms of civil and customary marriages in so far as dealing with patrimonial assets following the dissolution of a marriage. Were this Tribunal to accede to the request of the respondents for the parties to wait until an amendment is made to the relevant pieces of legislation, it would be perpetuating a differentiation which cannot be justified in a democratic and multi-cultural society as ours. This Tribunal holds the view that it cannot be party to the perpetuation of injustice and discrimination against parties married and divorced in terms of Islamic tenets, where it is clear that the legislature intended them to be treated in a similar fashion as parties in civil and customary marriages, and where parties have reached an agreement regarding the payment of pension interest and made such an agreement an order of the court.'³⁰

The Pension Fund Adjudicator then made the order stating that '[...] [t]he first respondent is ordered to compute and pay the complainant her share of pension interest [...] as provided in the settlement agreement made an order of the court on 25 February 2014 within four weeks of this determination.'³¹ It should be noted that there has (to date) been no further legislative amendments made with regard to the provisions in question. It would be highly unlikely for pension fund organisations to withhold benefits in favour of former spouses that were married in terms of Islamic law based on the conclusions reached by the Pension Fund Adjudicator in this matter.

An interesting question that should be raised at this point would be on what basis in terms of Islamic law would the claim for the pension interest be

30 See 5.7 of the Determination in terms of section 30M of the Pension Funds Act, 24 of 1956 in the matter of *Z Paulse (complainant) v Sanlam Staff Umbrella Pension Fund (First Respondent) and Sanlam Life Insurance Limited (Second Respondent)*, *supra* n.26.

31 See 6.1.1 of the Determination in terms of section 30M of the Pension Funds Act, 24 of 1956 in the matter of *Z Paulse (complainant) v Sanlam Staff Umbrella Pension Fund (First Respondent) and Sanlam Life Insurance Limited (Second Respondent)*, *supra* n. 26.

made by Y? It has already been stated in section III of this paper that 2010 version of the Muslim Marriages Bill would be out of community of property without the application of the accrual system.³² It has also been stated above that there are a number of South African institutions that deem a marriage in community of property to be invalid.³³ These are only but a few points that should be reflected on in this regard, which confirms the need for legislative intervention in this regard.

IV. Conclusion

This paper has analysed the right of Muslim couples married in terms of Islamic law to inherit pension interest. The findings have shown that there are a number of problems that could arise when civil and Islamic divorce laws are looked at. This has been illustrated when the status of a couple married in terms of Islamic law as well as South African was looked at. The problems highlighted within s III of this paper have shown that there is a need for legislative intervention in order for the issue of legal certainty to be addressed with regard to Islamic marriages and its consequences within the South African context. I would therefore recommend legislation to be enacted by the South African Parliament to deal with issues concerning Islamic marriages, Islamic divorces and related matters.

32 See the draft 2010 Muslim Marriages Bill where the status is discussed, available at <https://pmg.org.za/bill/235/> (accessed on 14 April 2020).

33 See Muslim Judicial Council (SA) Fatwa Committee 'MJC Position on Succession Law and Related Matters' (2017) for 2.5.1, *supra* n. 14. See also JAMIATUL ULAMA KWAZULU-NATAL, *supra* n. 14, where it states that '[...] [t]he 'Community of Property' matrimonial regime is not recognized in Islamic Law. In the Shari'ah, ownership is established for each person individually by default. Such ownership is transferred or shared through specific juristic acts or events. Marriage is not one of them, and hence does not create a partnership or 'Community of Property'. The only recognized matrimonial regime in the Shari'ah that has been prescribed by South African Law is a marriage 'Out of Community of Property without the accrual system' by means of an Ante Nuptial Contract where each spouse retains all of his/her assets [...]']

Reinterpreting Usul al-fiqh: Taking a Literary Approach to Prohibitions against Homosexuality in the Qur'an

BEENISH RIAZ*

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Abstract

In just a few decades, homosexuality has gone from a condemned criminal practice to a protected status. Each individual now has a recognized human right to be free from discrimination on the basis of his or her sexual orientation. Still, homosexuality remains a crime in many Muslim countries. Some even impose capital punishment for the act, using Islamic law to justify this. Jurists derive Islamic law (fiqh) from interpretations of two revealed sources of law – the Qur'an and the Sunna – through a set methodology termed usul al-fiqh. The prohibition against homosexuality largely (and often exclusively) stems from literalist, inflexible interpretations of the narrative of Prophet Lot in the Qur'an. The Egyptian scholar Nasr Hamid Abu Zayd sought to reform contemporary usul al-fiqh by integrating literary analyses in legal exegesis. A literary approach allows the mujtahid or mujtahidda to decipher the purpose of the law. Knowing this, Abu Zayd argued, he or she can adapt the letter of the law to suit its overarching objective keeping in mind evolving norms and modern standards. Yet, Abu

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Zayd did not fully flesh out what a literary approach to usul al-fiqh would look like in practice. This paper begins to do that by applying such an approach to the prohibition against homosexuality. In fact, a literary analysis of the text suggests that the narrative does not proscribe homosexuality at all. The specific crime of the people of Lot remains ambiguous even though a ban on egotistical immorality and impurity is apparent.

I. Introduction

In just a few decades, homosexuality has gone from a condemned criminal practice to a protected status.¹ Each individual now has a recognized human right to be free from discrimination on the basis of his or her sexual orientation.² Still, homosexuality remains a crime in many Muslim countries. Some even impose capital punishment for the act, using Islamic law to justify this.³ Jurists derive Islamic law (*fiqh*) from interpretations of

1 See Human Rights Council Res. 17/19 (14 July 2011). India became the most recent country to decriminalize homosexuality. See e.g. MICHAEL SAFI, *Campaigners Celebrate as India Decriminalizes Homosexuality*, THE GUARDIAN (Sept 6, 2018), <https://www.theguardian.com/world/2018/sep/06/indian-supreme-court-decriminalises-homosexuality>. In the United States, the Supreme Court declared statutes criminalizing homosexuality and sodomy unconstitutional in 2003. *Lawrence v. Texas*, 539 U.S. 558 (2003). Later, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), established a constitutional right to marry for same-sex couples.

2 See Human Rights Council Res. 32/2 (15 July 2016).

3 73 countries criminalize homosexuality. A number of nations have laws that punish homosexuality with the death penalty, including Afghanistan, Mauritania, Iran, Pakistan, Qatar, Saudi Arabia, Sudan, the United Arab Emirates, Yemen, parts of Somalia and Nigeria where sharia law applies and in areas controlled by non-state actors, such as the Islamic state, in Iraq and Syria. See Rosamond Hutt, *This is the state of LGBTI rights around the world in 2018*, WORLD ECONOMIC FORUM (June 14, 2018), <https://www.weforum.org/agenda/2018/06/lgbt-rights-around-the-world-in-2018/>. All major Sunni and Shia schools of legal thought agree that a homosexual is eligible for capital punishment. See JAVAJD REHMAN/ELENI POLYMENOPOULOU, *Is Green a Part of the Rainbow? Sharia, Homosexuality and LGBT Rights in the Muslim World*, 37 FORDHAM INT'L L. J. 1, 12 (2013) (finding, "[r]egarding the punishment for homosexuality, there is a consensus among the four leading Sunni schools of thought and most Islamic scholars that homosexual acts are a major sin (*fahicha*) and may be punishable by death"). Extending by analogy (*qiyas*) the proscription on homosexuality, Islamic jurists often criminalize other 'deviant' sexual orientations including lesbian and bisexual persons.

two revealed sources of law – the Qur’an and the *Sunna*⁴ – through a set methodology termed *usul al-fiqh*.⁵ The prohibition against homosexuality largely (and often exclusively) stems from literalist, inflexible interpretations of the narrative of Prophet Lot in the Qur’an.⁶ The Egyptian scholar Nasr Hamid Abu Zayd sought to reform contemporary *usul al-fiqh* by integrating literary analyses of the Qur’an in legal exegesis. A literary approach allows the *mujtahid*⁷ or *mujtahidda*⁸ to decipher the purpose of the law. Knowing this, Abu Zayd argued, he or she can adapt the letter of the law to suit its overarching objective keeping in mind evolving norms and modern standards. Yet, Abu Zayd did not fully flesh out what a literary approach to *usul al-fiqh* would look like in practice. This paper begins to do that by focusing on the narrative of Lot and its use in justifying the prohibition against homosexuality. In fact, a literary analysis of the text suggests that the narrative does not proscribe homosexuality at all. The specific crime of the people of Lot remains ambiguous even though a ban on egotistical immorality and impurity is apparent. The paper, then, calls on Muslim lawmakers to decriminalize homosexuality and instead points to alternate ways to enforce the broad spirit of the law. Such a novel approach to *usul al-fiqh* has implications for

4 *Sunna* is the words, actions or tacit approval of the Prophet. MOHAMMAD HASHIM KAMALI, *Principles of Islamic Jurisprudence* 1 (3rd ed. 2005).

5 *Usul al-fiqh* establishes the sources of *Shari’ah*, “their order of priority and the methods by which legal rules may be deduced from the source materials of the *Shari’ah*.” *Id.* One of the primary concerns of *usul al-fiqh* and the focus of this paper is how to interpret one key source of Islamic law – the Qur’an. In addition to the two revealed sources mentioned, jurists derive *fiqh* from two key non-revealed sources – *ijma’* (consensus), which is the unanimous agreement of scholars on a matter of law derived from the revealed sources and *qiyas* (analogy) which uses deductive and inductive reasoning to derive rationales from cases in the Qur’an and *Sunna* and apply those to new cases. *Id.* at 228 – 306. At the outset, it is important to establish that *usul al-fiqh* itself is not a revealed source and so not binding on Muslims, but rather a product of political circumstances that Muslims can adapt to suit the modern times. See MUHAMMAD HASHIM KAMALI, *Methodological Issues in Islamic Jurisprudence*, 11 ARAB L. QUARTERLY 3 (1996).

6 Note that *hadith* on the matter is not probative since there are accounts of “effeminate men” (though not homosexual men) and the Prophet’s encounters with them are ambiguous, interpreted by some as showing tolerance and by others, as curses. REHMAN/POLYMEANOPOULOU, *supra* note 3, at 16 – 23.

7 A *mujtahid* is a “qualified jurist.” “Each qualified jurist (*mujtahid*) employs his own tools of interpretation in undertaking the search of God’s law.” WAEL B. HALLAQ, *The Origins and Evolution of Islamic law* 131 (2005).

8 A female *mujtahid*.

the millions of Muslims seeking to define, follow, and integrate Islamic law into their daily lives in the modern context. Nevertheless, while informative, this study is only a beginning to a much deeper analysis.

This paper makes the case for integrating literary analyses in legal exegesis in three main parts. Section I presents a brief historical background of a literary approach to the Qur'an and its resurgence in modern times. Section II discusses Abu Zayd's theory of how the literary can inform the legal and briefly compares this approach to traditional *usul al-fiqh*. Section III, then, conducts a literary analysis of the narrative of Prophet Lot. It notes some general principles of law derived from such an analysis before looking to the spirit of the law and its application in the modern context.⁹ The paper ends with a call to adopt this new approach to the law.

II. Reading the Qur'an as a Literary Text

For centuries, Muslims remained spellbound by the exquisite nature of the Qur'anic language, its *i'jaz* or inimitability, just as they devoutly followed its rules, enshrined in *sharia* law.¹⁰ Yet, while the Book of God has played a prominent role in defining Islamic law since the early development of Islam,¹¹ a literary reading of the Qur'an steadily grew controversial. Often, only minority groups including the Shia and Sufis, whom most orthodox Sunni Muslims deemed heterodox or 'deviant,' even attempted such an analysis.¹² Moreover, while such a reading was always present, it

9 Here, while the paper implements Abu Zayd's broad framework for a new *usul al-fiqh*, the analysis itself remains my own.

10 In fact, the Qur'an explicitly challenges its readers to create a text like it. *The Study Qur'an: A New Translation and Commentary* (Seyyed Hossein Nasr et. al. eds., 2015) at 17:88 (hereinafter *The Qur'an*).

11 For details on the historical development of Islamic law, see generally HALLAQ, *supra* note 7.

12 After the death of the Prophet, Muslims divided into two main sects – Sunni and Shia. A vast majority of Muslims are Sunni, but a sizeable minority make up the Shia group. The Shia are characterized by their belief that Ali and his progeny are the successors of the Prophet. Sunni schools of legal thought include the prominent four, Hanbali, Maliki, Shafi and Hanafi. Other schools of thought including those of the Shia remain at the periphery. Farhad Daftary, though, contests what he calls a dominant "Sunni narrative" that paints Shia Islam as "unorthodox" and deviant, emphasizing how "Shi'i Muslims have played a

repeatedly distinguished itself from the legal one. This is despite the fact that the Qur'an itself uses metaphorical "signs," stories, and "parables" to explain its rules.¹³ In the past few decades, though, contemporary scholars have sought to inject flexibility back into Qur'anic interpretation through a literary reading of the text. This is in response to a recent surge of extremism and essentialism¹⁴ followed by Western orientalist's disparagements of the beauty of the Qur'an.¹⁵ A literary reading, then, can

key role, proportionately much greater than their relative size, in contributing to the intellectual and artistic accomplishments of Islamic civilization. Indeed, Shi'i scholars and literati of various communities and regions, including scientists, philosophers, theologians, jurists and poets, have made seminal contributions to Islamic thought and culture. There have also been a multitude of Shi'i dynasties, families or individuals...[and] numerous [Shi'i] institutions of learning." FARHAD DAFTARY, *Shi'i Communities in History*, in: THE SHI'I WORLD: PATHWAYS IN TRADITION AND MODERNITY 169, (Farhad Daftary et. al. eds., 2015), at 169 – 70.

- 13 See e.g. *The Qur'an*, supra note 10, at 15:75 – 77, 18:54, 26:174, 29:35, 29:50, 30:58, 39:27. Note that this is not an exhaustive list. For a more detailed account see also ROSALIND WARD GWYNNE, *Sign, Analogy, and the Via Negativa: Approaching the Transcendent God of the Qur'an*, in: SACRED TROPES: TANAKH, NEW TESTAMENT, AND QUR'AN AS LITERATURE AND CULTURE (BIBLICAL INTERPRETATION SERIES VOL. 98) 53 (Roberta Sterman Sabbath ed., 2009).
- 14 See e.g. BERNARD HAYKEL, *Minbari al-Faruq al-Ikhbari (al-Qaeda's Creed and Path)*, in: ON THE NATURE OF SALAFI THOUGHT AND ACTION IN GLOBAL SALAFISM: ISLAM'S NEW RELIGIOUS MOVEMENT 51 – 57 (Roel Meijer trans., 2014). See also MEHNAZ M. AFRI-DI, *Contemporary Readings of the Qur'an: Cruel/Compassionate?*, in: SACRED TROPES: TANAKH, NEW TESTAMENT, AND QUR'AN AS LITERATURE AND CULTURE (BIBLICAL INTERPRETATION SERIES VOL. 98) 21 (Roberta Sterman Sabbath ed., 2009) (elaborating on the dangers of literalism and its espousal by extremist groups like al-Qaeda). Islamic fundamentalists adopt a literalist reading of the Qur'an that pushes Muslims to violence or to adopt seemingly unjust and unfair *sharia* laws that fail to appreciate the essence of compassion and mercy in the Qur'an. Salama describes this conservative discourse as "the condition where theory morphs into dogma and forms its own autoimmune cells of malicious thought to the points where a specific structure in analyzing a text, the Qur'an in this case, is followed "religiously," meticulously, blindly, and relentlessly to the detriment of all other approaches." See MUHAMMAD SALAMA, *The Qur'an and Modern Arabic Literary Criticism: From Taha to Nasr 7* (2018).
- 15 Orientalists criticize the Qur'an for its disjointed and formulaic nature especially in comparison to the Bible. See e.g. MUSTANSIR MIR, *Some Aspects of Narration in the Qur'an in Islam*, in: SACRED TROPES: TANAKH, NEW TESTAMENT, AND QUR'AN AS LITERATURE AND CULTURE (BIBLICAL INTERPRETATION SERIES VOL. 98) 93 (Roberta Sterman Sabbath ed., 2009). (quoting one orientalist, Thomas Carlyle, who described the Qur'an as "toilsome reading...[a] wearisome, confused jumble, crude, incondite" with "unreadable masses of lumber"). The West even works to separate famous Islamic poets from the religion that

and often does inform other interpretations of the Qur'an. This section briefly outlines the emergence of literary and quasi-literary Qur'anic exegesis.

The earliest accounts often limited themselves to commenting on the poeticity¹⁶ of the text without delving deeply into its implications for exegesis.¹⁷ At the outset, the Qur'an's power to convert confirmed its majesty. Simply upon hearing or reading the text, the most obstinate disbelievers would fall to their knees and recite the *shahadah* (declaration of faith).¹⁸ One of the most notable instance of this is the story of 'Umar, a key Companion of the Prophet, who upon reading the words of the

influenced their works, including the celebrated Rumi. See e. g. ROZINA ALI, *The Erasure of Islam from the Poetry of Rumi*, THE NEW YORKER (Jan. 5, 2017), <https://www.newyorker.com/books/page-turner/the-erasure-of-islam-from-the-poetry-of-rumi>.

- 16 JAKOBSON defines poeticity as “when the word is felt as a word and not a mere representation of the object being named or an outburst of emotion, when words and their composition, their meaning, their external and inner form, acquire a weight and value of their own instead of referring indifferently to reality.” See ROMAN JAKOBSON, *Language in Literature* 378 (Krystyna Pomorska/Stephen Rudy eds., 1987).
- 17 Even contemporary scholars, like Bint al-Shati (1913–1998), one of the few female *tafsirs*, continues this approach, emphasizing the beauty of the Qur'an and its effect in gathering converts, but failing to go beyond that. See SALAMA, *supra* note 14, at 67. At the same time, the Qur'an heavily influenced Arabic literature from the moment it was revealed. See WADAD KADI/MUSTANSIR MIR, *Literature and the Qur'an*, in: ENCYCLOPEDIA OF THE QUR'AN (Jane McAuliffe ed., 2017) (ebook) (noting that “the use of the Qur'an in Arabic literature began as early as the lifetime of the Prophet, for we know that some of the new poet-converts to Islam, 'Abdallāh b. Rawāḥa (d. 8/629), Ka'b b. Zuhayr (d. 26/645), and Ḥassān b. Thābit (d. 54/674), used it extensively in their poetry [...]. As the Islamic community expanded, this use grew conspicuously and was undertaken not only by Muslims but also by non-Muslims, like the Christian Umayyad poet al-Akḥṭal (d. 90/709) and the Sabian 'Abbāsīd prose writer Abū Hilāl al-Ṣābī (d. 384/994)”). One example of a genre heavily influenced by the Qur'an is the genre ‘mirrors for princes’ whose authors used morale, ethical and spiritual messages from the Qur'an “to guide their royal and privileged audiences towards the expression of Qur'anic values in their lives and behaviors.” See LOUISE MARLOW, *Wisdom and Justice: The Reception of the Qur'an in Some Arabic and Persian Mirrors for Princes*, in: THE QUR'AN AND ADAB: THE SHAPING OF LITERARY TRADITIONS IN CLASSICAL ISLAM 401 (Nuha Alshaar ed., 2017).
- 18 See e. g. NAVID KERMANI, *The Aesthetic Reception of the Qur'an as Reflected in Early Muslim History*, in: LITERARY STRUCTURES OF RELIGIOUS MEANING IN THE QUR'AN 255, at 256 (Issa J. Boullata ed., 2009) (noting that, “while in Western treatises on Islamic history one may find many ideological, political, psychological, social or military reasons for the success of Muhammad's prophetic mission, Muslim authors over the ages have emphasized the literary quality of the Qur'an as a decisive factor for the spread of Islam among seventh-century Arabs”).

Qur'an, converted from the staunchest opponent of Islam to its most powerful follower.¹⁹ Often, such accounts focused solely on Meccan *suras*, which are full of narratives, ignoring the more administrative and legal Medinan *suras*, arguing that the latter lack the unity and coherence of the former.²⁰

By the beginning of the eight century, though, preliminary literary exegesis had begun, starting with the Mu'tazila in Basra, particularly the work of the scholar Abu Ubayda.²¹ Central to the Mu'tazila reading was a core belief that reason and human intellect could and did inform exegesis. On this note, the Mu'tazila stood in opposition to the traditionalists at the time, the Medinan Ash'arites.²² While for the Mu'tazila, the Qur'an was "created" in a particular context, for the Ash'arites, a human could never

19 *Id.*

20 See generally MIR, *supra* note 15, at 173. "Meccan" *suras* are those revealed in Mecca and Medinan *suras* are those revealed in Medina after the Prophet's hijra.

21 The word 'Mu'tazali' or 'Mu'tazila' often used as a pejorative in Islamic history described a minority school of thought who broke away from Orthodox practices of the majority Ash'arite school. The word literally translates to "seceders" or "separatists." DETLEV KHALID, *Some Aspects of Neo-Mu'tazilism*, 8 ISLAMIC STUDIES 319 (1969). Generally, the Mu'tazila emphasize rationalism, reason and metaphorical readings of the Qur'an as opposed to literalist, strict constructionist exegesis. The defining characteristics of Mu'tazila include (1) a belief in the oneness of God and the createdness of the Qur'an (2) an understanding of humans as ultimately responsible for their actions and capable of exercising free will and (3) the argument that something is not good because God deems it so but rather reason establishes it as inherently good or bad. D. GIMARET, *Mu'tazila*, in: ENCYCLOPEDIA OF ISLAM (P. Bearman et. al. eds., 2nd ed. 2012) (ebook); NASR HAMID ABU ZAYD, *Divine Attributes in the Qur'an: Some Poetic Aspects*, in: ISLAM AND MODERNITY: MUSLIM INTELLECTUALS RESPOND 190, at 195 (John Cooper ed., 1998) (noting that "the Mu'tazilites therefore drew from the Qur'anic text on the assumption that it was a created act and not the eternal verbal utterance of God...the divine word was a fact which adjusted itself to human language in order to ensure well-being for mankind"). All of God's actions, then, have a reason. In fact, for the Mu'tazila, "if God has created men and imposed a Law upon them, it is because He had a reason to do so...it is for their good that He has imposed a Law upon them, with the object of enabling them thereby to accede to the sublime form of happiness, which is the reward consecutive upon a pain endured."

22 For the Ash'arites, on a theological level, all acts are predestined and determined by God. God's actions do not need to accord with reason and are indecipherable to mere mortals. A law is 'just' and worthy of adherence solely because God deemed it is so. An individual cannot simply use his or her own intellect to determine what the law is. GIMARET, *supra* note 21.

question or even fully know the true meaning of the “divine gift” that is the Word of God. For the Mu’tazila, for instance, “good” in the Qur’an had to accord with notions of “good” derived from human reason. In contrast, for the Ash’arites, something was “good” only because God said it was so and not from its inherent quality or essence.²³ The Mu’tazila, then, were in a unique position to move beyond the plain meaning of the text and search for its metaphysical and literary meaning.²⁴ One key Mu’tazili and Shia scholar, al-Sharif al-Radi, in the fourth century A.H., used the concept of *majaz* (metaphor) to do this. He argued, for example, that when God refers to His Hand, it cannot be a literal hand, but must represent something more such as a “sense of divine power.”²⁵ What it represents, he underscored, will also differ depending on the identity of the interpreter. Al Radi stated that, “the measure of whether one interpretation is of this or that nature has very little to do with any ‘objective’ characteristics of the Qur’anic text itself; it has everything to do with the ideological point of view of the interpreter.”²⁶ At the same time, though, the scope of the Mu’tazila’s literary analyses remained limited. By the end of the ninth century, scholars like al-Shafi and ibn Hanbal combined traditionist and rationalist readings, leaning on the side of the Ash’arites.²⁷ As time progressed and several Ash’arite schools of thought

23 *Id.*

24 Abu Zayd notes of the Ash’arites, since “God’s word is eternal, uncreated and immutable, the idea of reinterpretation within new situations become anathema; there is no difference between the letter and the spirit of the divine law, and only theologians are entitled to the prime role in its maintenance and guardianship.” *Supra* note 21, at 198.

25 MAHMOUD M. AYOUB, *Literary Exegesis of the Qur’an: The Case of al-Shafi al-Radi*, in: LITERARY STRUCTURES OF RELIGIOUS MEANING IN THE QUR’AN 292, AT 297 (Issa J. Boullata ed., 2009).

26 KAMAL ABU-DEEB, *Studies in the Majaz and Metaphorical Language of the Qur’an: Abu Ubayda and al-Sharif al-Radi*, in: LITERARY STRUCTURES OF RELIGIOUS MEANING IN THE QUR’AN 310, AT 330 (Issa J. Boullata ed., 2009). Other key figures in the literary realm include Muslims scholars ‘Abd al-Jabbar (935–1025) and ‘Abd al-Qahir al-Jurjani (1009–1078). The latter is renowned for his literary and poetic criticism and his two main works on the Qur’an include *Dala’il al-I’jaz* (Proofs of *I’jaz*) and *Asrar al-balaghah* (“Secrets of Eloquence”). See NAVID KERMANI, *From Revelation to Interpretation: Nasr Hamid Abu Zayd and a Literary study of the Qur’an*, in: MODERN MUSLIM INTELLECTUALS AND THE QUR’AN 169, AT 179 (Suha Taji Farouk ed., 2009).

27 CHRISTOPHER MELCHERT, *Traditionist-Jurists and the Framing of Islamic Law*, 8 ISLAMIC L. SOC’Y 383 (2001).

developed, the Mu'tazila faced a rapid decline and lost all favor with most Muslims.²⁸

Despite the decline of the Mu'tazila, literary readings of the Qur'an survived in esoteric interpretations of the text.²⁹ These interpretations, while not explicitly termed literary by their authors, are *de facto* such in that they attempt to make sense of ambiguities and to unearth deeper hidden meanings behind the literal words of the text, often using the concepts of symbol, allegory, metaphor and others to do this.³⁰ The aim of esoteric interpretations, though, was (and is) to achieve a mystical, personal, or theological connection with God such that a literary analysis is only one of many tools for attaining that connection. The major esoteric traditions include the Sufis and broadly several schools of thought within the Shia. One influential Shia scholar and philosopher with a deep emphasis on the literary was Sadr-al Din Shirazi (ca. 1571–1636).³¹ Sadra grounded his theories in a particular verse of the Qur'an (8:5).³² He found that the Qur'an had three levels of interpretation. One was a literal level, but beyond the literal, there was a hidden meaning and within that, there was yet another deeper meaning. For Sadra, “[i]t is not for a human that God should speak to him [directly] but through inspiration [i. e. the intellectual level, as Sadra would say] or behind a veil [i. e. in symbols for Sadra] or He may send a messenger who inspires him by God's permission [i. e. the

28 ABU-DEEB, *supra* note 26, at 346 (describing that in spite of al-Radi's theories, there was still “a dominant rationalist, Zahiri tone to most contemplations of the Qur'an in scholarly circles”).

29 Scholars undertaking esoteric interpretations may but do not often fit themselves into the Ash'arite-Mu'tazila dichotomy.

30 AYOUB, for instance, characterizes “[l]iterary writing” as one that “is born out of imagination: of feelings and emotions, which may arise out of ordinary experiences. It may therefore be argued that the primary framework of literature is metaphor, allegory...” *Supra* note 25, at 306.

31 Mulla Sadra lived during the Safavid empire and is “arguably the most significant Islamic philosopher after Avicenna.” See SAJJAD RIZVI, *Mulla Sadra*, in: THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2009) (ebook). He was a crucial contributor to the literary approach. His philosophy drew upon the mystical and the poetic including Sufi poetry as key ways of knowing. In fact, “[h]e championed a radical philosophical method that attempted to transcend the simple dichotomy between a discursive, ratiocinative mode of reasoning and knowing, and a more intuitive, poetic and non-propositional mode of knowledge.” *Id.*

32 MULLA SADRA SHIRAZI, ON THE HERMENEUTICS OF THE LIGHT VERSE OF THE QUR'AN (Latimah-Parvin Peerwani trans., 2004).

external, literal level, as Sadra would have it.]”³³ Sufis approached Qur’anic exegesis in a similar manner.³⁴ The Sufis created “alternatives to traditional *tafsirs* [exegesis] [...] through which infinite meanings unfold on multiple level.”³⁵ For them, one way to get at a hidden meaning and connect one’s soul with God was to appeal to the ‘signs’ and symbols in the Qur’anic text. Herein, “the internal life becomes purely textual and the text becomes purely internal.”³⁶ One Sufi thinker of the twelfth century A.D., al-Ghazali, for instance, emphasized the relationship between the literal and the metaphorical, how “language expresses ‘truthfully’ – *haqiqatan* – the metaphysical world, while it expresses ‘metaphorically’ – *majazan* – our witnessed world.”³⁷ All verses, then, have a deeper spiritual message

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- 33 *Id.* at 15 (brackets from text). Such a reading fundamentally resists a blind focus on the exoteric and obvious in the Qur’an. Drawing from the metaphors of the Light Verse in the Qur’an, Sadra argues, “[t]he Qur’anic revelation is the light that causes one to ‘see.’ Intellect is the eye that sees...In order for the phenomenon of vision to be produced, there must be light, but it is necessary to have eyes to see. If you suppress this light, your eyes will not see anything; if you obstinately close your eyes, as do the literalists and jurists, you will not see anything either.” *Id.* at 19. See also FERAS HAMZA, *Locating the “Esoteric” in Islamic Studies*, in: ISLAMIC STUDIES TODAY: ESSAYS IN HONOR OF ANDREW RIPPIN 354 (Majid Daneshgar & Walid A. Saleh eds., 2016).
- 34 Sufis are a group of Sunni Muslims that emphasize spirituality and mysticism as worthwhile pursuits of Islam and key to forming a connection with God. The fundamental goal for Sufis in “both right activity and correct understanding was transformation of the soul, that is, achieving inner conformity with *al-Haqq*, “the Real,” the Supreme Truth and Absolute Reality that is God Himself.” See WILLIAM C. CHITTICK, *The Qur’an and Sufism*, in: THE STUDY QUR’AN: A NEW TRANSLATION AND COMMENTARY 1737 (Seyyed Hossein Nasr et al. eds., 2015). To achieve this goal, Sufis “practiced an internalization of the Qur’an, a mediation and investigation of its deeper meanings. They assimilated it into their lives through constantly reciting it and listening to it.” NADA SAAB, *Sufi Negotiation of the Qur’anic Text and its Prophetic Stories in the Literature of Abu Sa’id al-Kharraz (d. 286/899)*, in: THE QUR’AN AND ADAB: THE SHAPING OF LITERARY TRADITIONS IN CLASSICAL ISLAM 475, AT 479 (Nuha Alshaar ed., 2017).
- 35 See NUHA ALSAAR, *Introduction: The Relation of Adab to the Qur’an: Conceptual and Historical Frameworks*, in: THE QUR’AN AND ADAB: THE SHAPING OF LITERARY TRADITIONS IN CLASSICAL ISLAM 1, AT 40 (Nuha Alshaar ed., 2017) (brackets added); LOUISE MARLOW, *Wisdom and Justice: The Reception of the Qur’an in Some Arabic and Persian Mirrors for Princes*, in: THE QUR’AN AND ADAB: THE SHAPING OF LITERARY TRADITIONS IN CLASSICAL ISLAM 401 (Nuha Alshaar ed., 2017).
- 36 TOBY MAYER, *Traditions of Esoteric and Sapiential Qur’anic Commentary*, in: THE STUDY QUR’AN: A NEW TRANSLATION AND COMMENTARY 1659, AT 1674 (Seyyed Hossein Nasr et al. eds., 2015).
- 37 ABU ZAYD, *supra* note 21, at 206.

regardless of their plain meaning and the Sufi sets out on a quest to decipher these.³⁸ This includes texts that scholars otherwise see as legal. For example, where the Qur'an proscribes homicide and suicide, saying "[s]lay not yourself," Sufis interpret it as telling the reader not to deprive his higher spiritual self of life.³⁹ This deep level of symbolism also applies to narratives in the Qur'an. In fact, "the entire story of Joseph as narrated in *Surah* 12 [...] is analyzed by al-Kashani [a prominent Sufi philosopher and poet of the thirteenth century] as an allegory of the soul, in which Joseph himself is a metaphor (*mathal*) for the heart, extremely beautiful in its spiritual preparedness [...] and regarded lovingly by his father Jacob, who symbolizes the intellect [...]. Jacob's eleven brothers, for their part, represent the inner and outer sense faculties and their hostility toward Joseph expresses the senses' tendency to draw the heart away from the intellect."⁴⁰ In this way, Sufis and some Shia use literary theories to build a deeper connection with God.

Nevertheless, such interpretations do not seek to influence or change legal interpretations of the text, the exoteric. A good Muslim would follow the text literally as well as attempt to understand its deeper significance. According to Sadra, "[o]ne should not be among those who interpret the Qur'an according to their unbridled wit and oblique insight, giving rational philosophical meanings and common universal notions and giving up the literal meanings of the Scripture, because that amounts to the invalidation of the *Shari'ah*."⁴¹ For Sadra, then, the realm of the esoteric does not contradict, influence or alter the plain meaning of the text. Rather, one should learn both, maintaining strict boundaries between them. The Sufis adopted a similar view.⁴² As the scholar Selzer summarizes, "[o]pposed to

38 MAYER, *supra* note 36, at 1671 (describing how allegory, as Sufis use it, "reads the sacred text as symbolic, but more than this, as systematically so...that is, a Divinely intended system of symbols"). See also *The Qur'an*, *supra* note 1, at 4:29.

39 MAYER, *supra* note 36, at 1672.

40 *Id.* at 1672 – 73. See also SAAB, *supra* note 34, at 486 (echoing a similar understanding of narratives expressed by another early Sufi mystic in the literary context, Kharraz). See generally MUSTANSIR MIR, *Irony in the Qur'an: A Study of the Story of Joseph*, in: LITERARY STRUCTURES OF RELIGIOUS MEANING IN THE QUR'AN 228 (Issa J. Boullata ed., 2009).

41 SHIRAZI, *supra* note 32, at 21.

42 Sufis draw a distinction between the 'inner' and the 'outer' aspects of religion where "the 'inner' aspect of a religion is then associated with mysticism, whereas the 'outer' is said to be expressed in its legal and dogmatic aspects." See STEFFEN SELZER, *Serving from Afar: Jalal al-Din al-Rumi (d. 626/1273) on the Adab of Interpreting the Qur'an*, in: THE QUR'AN

the dry casuistry of the lawyer-divines, the mystics nevertheless scrupulously observed the commands of the divine law."⁴³ In adhering to the literal and metaphorical meaning of a text concurrently, Sufis and Shi'a scholars like Sadra did not seek to change the law through the literary, differing from the Mu'tazila.⁴⁴

In recent years, scholars have begun to take an avowedly literary approach to the Qur'an, but many retain the distinction between literary and legal interpretations. The earliest contemporary thinker to describe the Qur'an explicitly as a literary text was the Egyptian author Taha Husayn (1889 – 1973). He labelled the Qur'an its own "genre" in an attempt to integrate Western critical thinking and methods in the Egyptian context.⁴⁵ The first scholar to conduct a deep literary exegesis, though, was the Egyptian Amin al-Khuli (1895 – 1966) for whom proper *tafsir* not only included the socio-cultural, linguistic, and historical context at the time of the Prophet, but also a literary element which he articulated as the "psychological function of revelation."⁴⁶ Under this approach, a scholar seeks to understand the emotions of the Prophet at the time that God revealed the particular verse of the Qur'an and these emotions influence how one reads the text. In fact, for al-Khuli, since the Qur'an is fundamentally a text, "the literary method should supersede any other

AND ADAB: THE SHAPING OF LITERARY TRADITIONS IN CLASSICAL ISLAM 545 (Nuha Alshaar ed., 2017). Both the inner and the outer are crucial to achieve oneness with the divine.

43 STEFFEN SELZER, *Sufism: Islam*, in: ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/Sufism> (last visited Nov. 24, 2018). Note, however, that while Sufis do not strive to change the law, they do understand the pursuit of the mystical as more important than following the letter of the law and a path to "divine love and wisdom in the world." *Id.*

44 This has significantly impacted the perception of literary approaches to the Qur'an. See KADI/MIR, *supra* note 17 (noting that "the atomistic style...which has dominated in qur'anic studies, has militated against the development of a proper literary approach to the Qur'an" where "[i]n the atomistic approach, individual verses (q.v.) and verse segments become the focus of study, with little literary significance attached to the larger units of composition").

45 See generally SALAMA, *supra* note 14. Taha Husayn was a very well-known Egyptian author and activist. A part of the Egyptian Renaissance of the twentieth century, he sought to integrate Western learning in the Egyptian Arabian context. *Taha Husayn's Intellectual Legacy in the Arab World*, The Library of Congress Webcasts (23 Mar. 2010), https://www.loc.gov/today/cyberlc/feature_wdesc.php?rec=4872.

46 NASR ABU ZAYD, *The Qur'an as a Literary Text*, in: REFORMATION OF ISLAMIC THOUGHT: A CRITICAL HISTORICAL ANALYSIS 53, at 55 (2006).

approach.”⁴⁷ Yet, al-Khuli stopped short of advocating that one should change the laws in light of this new approach.⁴⁸ Later, the renowned Egyptian jurist, SAYYID QUTB (1906–1966) wrote two main *tafsirs* that describe the literary style of the Qur’an – *al-Taswir al-Fanni fi’l Qur’an* (1945) and *Fi Zilal al-Qur’an* (1951–1965), the latter written while QUTB was in prison in Egypt.⁴⁹ In the former, he emphasized a need to inspect the “*taswir fanni*” or “artistic portrayal” of the Qur’an that scholars of the past had neglected because of their overt focus on legalisms and the lens of *i’jaz*.⁵⁰ For QUTB, the Qur’an contains an essential “emotive language” that “offers life and not an imitation of life” to believers.⁵¹ The Qur’an, then, “seeks to convince by always appealing to common sense, by awakening feeling, and by aiming to directly reach one’s intuitive insight, one’s emotions, and ultimately one’s soul, to which the intellect is merely one of many channels and not the only one.”⁵² Like this paper does, in *Fi Zilal al-Qur’an*, QUTB also made explicit connections between the literary and the legal in the Qur’an. Commenting on the rhythm of the narratives in the Qur’an, for instance, he noted that, these often start “with an implicit warning which is covered with mystery,” but that “explains the law that God has set in operation concerning His message and people’s attitudes to it, either accepting and believing in it or rejecting it.”⁵³ Yet, while QUTB adopted a broad flexible approach to a literary understanding

47 *Id.*

48 SALAMA, *supra* note 14, at 45.

49 Qutb was a novelist, a poet, and a literary critic in his own right prior to turning to Islamic studies. In fact, he began as a poet because, in his words, a poet is “an intermediary between what is and what should be.” His first poetry collection is *al-Shati al-Majhul* (The Unknown Shore). *Id.* at 17–18. For him, “poetry was the highest expression of the connection between humanity’s inner feelings and its outside world.” *Id.* No wonder, then, that Qutb saw the Qur’an’s greatest brilliance in its poetic nature. Eventually, the Egyptian government executed Qutb for treason. JAMES TOTH, *The Life and Legacy of a Radical Islamic Intellectual* (2013) (ebook).

50 ISSA J. BOULLATA, *Sayyid Qutb’s Literary Appreciation of the Qur’an*, in: *LITERARY STRUCTURES OF RELIGIOUS MEANING IN THE QUR’AN* 354, at 356 (Issa J. Boullata ed., 2009).

51 *Id.*

52 *Id.* at 357.

53 SAYYID QUTB, *IN THE SHADE OF THE QUR’AN (FI ZILAL AL-QUR’AN)* VOL. 10, at 299 (Adil Salahi trans. 2004). Unlike Qutb, though, this paper takes literary analysis a step further and indicates how it is practically applicable.

of the Qur'an, when it came to the practical creation of *fiqh*, he drew sharp boundaries between literary and other readings of the text.⁵⁴

III. How the Literary Can Inform the Legal

Contemporary scholars who have used a literary reading of the text to advocate for change in Qur'anic interpretation have only been with controversy, scandal, and rejection by the larger Muslim community. The most prominent of these thinkers is Nasr Hamid Abu Zayd and his immediate intellectual forebearer Muhammad Ahmad al-Khalafallah.⁵⁵ In fact, Khalafallah's thesis on the literary in the Qur'an received such intense criticism that the Al-Azhar University rejected it.⁵⁶ Scholars attacked the use of methods of literary criticism in multiple ways. First, they declared that comparing the word of God to fiction written by humans is a sin.⁵⁷ Literary criticism, then, can never be an appropriate lens through which to

54 See TOTH, *supra* note 49, at 64 (describing Qutb's turn towards *salafi* thought and his publication of the radical text *Signposts on the Road*).

55 Controversy surrounding these radical literary articulations of the Qur'an began in 1950 when the Egyptian Muhammad Ahmad Khalafallah (1916–1991), a student of al-Khuli, wrote a controversial dissertation, presenting the Qur'an as fundamentally a literary and not a historical text. Khalafallah divided all stories in the Qur'an into three distinct categories: "the historical, the allegorical, and the mythical." SALAMA, *supra* note 14, at 55. In his discussion of the mythical in particular, he argued that some portions of the Qur'an transcend their historical truth to reveal a more profound message, a universal Truth. To him, these segments of the Qur'an are nonhistorical and so by their nature fictional representations designed to teach broader lessons. Khalafallah combines all narratives in the Qur'an into one large unit. For instance, "the unity of the text (Noah's story) reflects the unity of the context (the exact point in time of revealing the story/stories) and is indispensable for our understanding of the subtext (the emotional conditions of the Prophet while receiving the revelation and its effect on the status of his prophethood)." *Id.* To make his argument, Khalafallah emphasizes how the Qur'an repeats the word *mathal* (example) exhaustively to connect the literal and the metaphorical. *Id.* at 60.

56 Ultimately, Khalafallah wrote a dissertation on a non-religious topic and left the field of Qur'anic exegesis. Em. G., *Mohammed Ahmad Khalafallah, l'homme qui voyait la poésie dans le Coran*, LE TEMPS (Jan. 28, 2015), <https://www.letemps.ch/opinions/mohammed-ahmad-khalafallah-lhomme-voyait-poesie-coran>.

57 See NASR ABU ZAYD, *The Dilemma of the Literary Approach to the Qur'an*, 23 ALIF: J. OF COMPARATIVE POETICS 8, at 9 (2003) (summarizing criticisms leveled against his, Khalafallah and other literary theorists by *tafsirists*).

interpret the Qur'an because its primary use is in interpreting fiction. They saw a literary reading of the narratives in the Qur'an as particularly appalling because it seemed to treat them as untruths and to deny their historical significance.⁵⁸ However, the strongest criticism drew on the Qur'an itself. Scholars noted how the Qur'an repeatedly resists the idea that it is a mere work of poetry or literature,⁵⁹ averring that its use of the literary is not for the sake of art, but rather for the sake of meaning.⁶⁰

As this article shows, these criticisms, though, are baseless. Adopting a literary approach does not mean reading the Qur'an as a meaningless beauty. Rather, it is one way of finding meaning in the text. Islamic law crucially depends on interpretation of the revealed texts to establish rules for Muslims to abide by. Rejecting literary analysis on its face is a disservice to the *fiqh* and to the *mujtahid's* duty to interpret the text.⁶¹ Underscoring the importance of this method of interpretation, this section focuses on Abu Zayd's attempts to integrate literary analysis into the legal interpretation of the Qur'an. It also briefly outlines traditional legal exegesis and indicates how Abu Zayd's approach compares to that.

58 *Id.*

59 *See e.g. The Qur'an, supra* note 10, at 21:5, 37:36, 52:29 & 69:42. The Qur'an instead emphasizes that all it contains is truth. *See e.g. Id.* at 15:63 – 64 (“[n]ay but we bring thee that which they used to doubt. And we bring thee the truth, and surely we are truthful”) (statement of the envoys of God in the narrative of Lot).

60 *See e.g. THOMAS HOFFMAN, The Poetic Qur'an: Studies on Qur'anic Poeticity* 66 (2007) (emphasizing that, “[t]he Qur'an does not present a literary beauty and an art for its own sake, but rather for persuasion and authority”). The scholar Stewart also describes this when he notes, “[a] tension has existed between recognition of the Qur'an's literary beauty and rhetorical effect, of which rhyme and rhythm form a crucial part and the urge to defend the Qur'an from slanderous attacks suggesting it was a literary invention derived from, or on par with, other mundane texts.” *See DEVIN STEWART, Rhythmical Anxiety: Notes on Abu'l-Ala' al-Ma'arri (d. 449/1058) al-Fusul wa'l-Ghayat and its Reception*, in: *THE QUR'AN AND ADAB: THE SHAPING OF LITERARY TRADITIONS IN CLASSICAL ISLAM* 239, AT 239 – 40 (Nuha Alshaar ed., 2017).

61 BOULLATA articulates that “the literary structures of the Qur'an are not ornamental elements in it that can be dispensed with; they are part and parcel of its meaning and without them that meaning is lost.” *See supra* note 50, at 354.

1. Abu Zayd

Abu Zayd (1943 – 2010) drew an explicit connection between the literary and the legal in Qur’anic interpretation. For him, revelations were communications from God to the Prophet, delivered with a specific “code” and “a channel which is the Holy Spirit” to address particular problems in the socio-cultural and linguistic context of pre-Islamic Arabia.⁶² Muslims today must undertake “an endless process of decoding” the text to decipher the deeper message of the revelation and the laws that it created.⁶³ Decoding involves finding the spirit of the text. Here is where literary interpretation can be informative. Abu Zayd argued that, “the Koran is a text, a literary text, and the only way to understand, explain and analyze it is through a literary approach.”⁶⁴ He described the spirit of the law as a dynamic “significance” found “in the linguistic tool of metaphor (*magaz*).” The exegete, in turn, “approaches the text with the aim to tease out the significance.”⁶⁵ After applying several interpretive techniques to decode the text, Muslims must, then, ‘recode’ the message. Here, they can use the spirit of the law to deviate from the letter of the law and to craft new laws. These new laws adapt the original message of the Qur’an to current social conditions.⁶⁶ In fact, for Abu Zayd one is under an obligation to change the letter of the law because what might have accorded with the spirit of the law in ancient Arabia is not the same as what would today.⁶⁷ The qualified jurist, then, will have knowledge of

62 ABU ZAYD, *supra* note 21, at 195. Heavily drawing on Mu’tazili theories, Abu Zayd explains that Islam “is the product of Muslims” since God reveals Himself through fallible humans. See Nasr Hamed Abu Zeid, *Heaven, which way?*, AL-AHRAM (12 – 18 Sept. 2002), <http://weekly.ahram.org/Archive/2002/603/sc16 – 17.htm>.

63 *Id.* at 200.

64 HOFFMAN, *supra* note 60, at 13.

65 KATARINA HAINES VOLKER, Qur’an and reform: Rahman, Arkoun, Abu Zayd 161 (2017).

66 ABU ZAYD, *supra* note 21, at 200. This is so because “while we can acknowledge the Qur’an had a particular historical context, “God’s words exist in a sphere beyond any human knowledge” and so “a modern linguistic methodology should be applied in interpretation.” *Id.* at 197.

67 According to ABU ZAYD, ‘freezing’ the Qur’an in history would contradict God’s message. He underscores, “I am convinced that folks who think that everything mentioned in the Qur’an is binding, should be obeyed, and should be followed literally are going against God’s Word.” NASR HAMID ABU ZAYD, *Voice of an Exile: Reflections on Islam* 165 (2004). A helpful example, for instance, is that the Qur’an lays out the punishment for

modern social circumstances and norms as well as that of the pre-Islamic Arabian context.⁶⁸ Knowledge of language and literature is important in so far as it connects the past, the Word of God, and the present context. In articulating this overarching theory, Abu Zayd expressly criticizes Salafism and literalism. He points out that in marginalizing Shiism, Sufism and Mu'tazilism, Ash'arites have neglected deeper readings of the Qur'an to the detriment of Islamic law.⁶⁹

One example Abu Zayd gives of his approach is in inheritance law.⁷⁰ Here, with the revelation of verse 4:11, the Qur'an deviated from pre-Islamic practices where only sons would inherit to grant daughters a right as well. 'Decoding' the text reveals an overarching spirit of equality.⁷¹ Abu Zayd comes to this conclusion with a literary analysis that points out that the sentence structure in the verse and "the semantic focus of the text" places emphasis on the male and on limiting his rights rather than restricting those of women.⁷² He notes that "a deeper reading shows that this text is

theft as cutting a thief's hand. Abu Zayd notes, "[a] historically nuanced understanding of the Islamic tradition would see this form of punishment as a borrowing from pre-Islamic Arabian society, and as rooted in a particular social and historical context." YOGINDER SIKAND/ABU ZAYD, *Interview with Nasr Hamid Abu Zayd: For a Plurality of Koranic Interpretations*, QANTARA.DE (2011), <https://en.qantara.de/content/interview-with-nasr-hamid-abu-zayd-for-a-plurality-of-koranic-interpretations>. The ultimate spirit or goal (*maqasid*) is punishment for the crime of theft. One need not and should not cut thieves' hands today, but simply have another punishment (e. g. a jail sentence) for the crime to meet the obligation under the Qur'an. The law, then, can and should adapt to the modern age. Abu Zayd emphasizes, "[h]ence, doing away with this form of punishment today would not, one could argue, be tantamount to doing away with Islam itself. By thus contextualizing the Koran, one could arrive at its essential core, which could be seen as being normative for all times, shifting it from what could be regarded as having been relevant to a historical period and context that no longer exists." *Id.*

68 VOLKER, *supra* note 65, at 161 (for Abu Zayd, "[i]n order to find the most appropriate application, the current social circumstances need to also be studied and identified").

69 *Id.* at 162.

70 ABU ZAYD, *Voice of an exile*, *supra* note 67, at 178.

71 In fact, several jurists who have argued over the years on this point. Some claim that the Qur'an makes men superior to women, giving them special rights and obligations. See e. g. MANUELA MARIN, *Disciplining Wives: A Historical Reading of Qur'an 4:34*, 97 *STUDIA ISLAMICA* 5 (2003). Several others have made a powerful case for equality. See e. g. ASMA T. UDDIN, *Women's Rights in Islamic Law: The Immutable and the Mutable*, in: *ISLAM AND HUMAN RIGHTS: KEY ISSUES FOR OUR TIMES* 27 (Geneive Abdo et. al. eds., 2017). A literary approach favors the latter over the former.

72 *Id.*

not about establishing the rights of women – it is about limiting the rights of men. The Qur’an here is moving in the direction of equality between women and men.⁷³ The literal text itself however limits the share of the daughter to half that of a son.⁷⁴ For several Ash’arite schools, the text is specific and perspicuous and even today a daughter will inherit less. For Abu Zayd, though, since the modern context is different and full equality practically possible to implement, Islamic jurists should move towards this goal and change the law to grant both daughters and sons an equal share of their parents’ inheritance.⁷⁵

In many respects, Abu Zayd’s reform proposal, here, resembles that of several other progressive scholars,⁷⁶ particularly that of Fazlur Rahman (1919 – 1988).

73 He emphasizes that the Qur’an states, “unto the male, a share equal to that of two females,” restricting man’s ability to inherit rather than stating that the female shall inherit half of what the male would inherit which would limit women’s rights. ABU ZAYD, *Voice of an Exile*, *supra* note 67, at 178.

74 *The Qur’an*, *supra* note 10, at 4:11.

75 Similarly, the overarching purpose of the Lawgiver in enacting the rule of *qisas* (life for a life), for instance, is justice and proportionality. Knowing the pre-Islamic context of the revelation of the verse, *The Qur’an*, *supra* note 10, at 2:178, one need not remain confined to the literal meaning of the text. Rather, our modern context is different. Capital punishment is no longer an accepted norm. Abu Zayd, underscores, “[i]n order to establish justice, a society needs to punish people who commit crimes against that society. But the form of punishment mentioned in the Qur’an is a historical expression of punishment carried out by a specific society in a specific time and place – it is not a divine directive.” ABU ZAYD, *supra* note 67, at 165. Therefore, Muslims must now establish a punishment that conforms to justice and proportionality. One such modern method is punishment by imprisonment. Injecting this flexibility into Islamic law is a fundamental break from traditional *usul al-fiqh*. Abu Zayd emphasizes, “[i]f anything spoken about in the Qur’an has a precedent in pre-Islamic tradition – whether Jewish, Roman, or anything else – we need to understand that its being mentioned in the Qur’an does not automatically make it Qur’anic, and therefore binding on Muslims.” *Id.* at 167.

76 Other reform proposals echo Abu Zayd’s call for flexibility and adaptability of *usul al-fiqh*. Recent reform efforts in the dominant Ash’arite school, particularly, attempt to rejuvenate the concept of *maslahah* (“public interest”) and the associated *istihsan* (“juristic preference”) without fundamentally altering traditional *usul al-fiqh* as Abu Zayd would do. See KAMALI, *supra* note 5, at 325. Like Abu Zayd, these scholars emphasize the significance of the general objectives and principles underpinning *sharia* law. See e.g. FELICITAS OPWIS, *Chapter 4: Islamic Law and Legal Change: The Concept of Maslahah in Classical and Contemporary Islamic Legal Theory*, in: SHARI’A: ISLAMIC LAW IN THE CONTEMPORARY CONTEXT 62, at 69 (Abbas Amanat & Frank Griffel eds., 2007) (describing Al Shatibi’s “model of *maslahah*” which centers on the “general message of Islam in which universal sources of the law were laid down”). Shatibi (720 – 790 A.H.) enumerates these

Like Abu Zayd, Rahman looks for broad universals in the Qur'an and indicates how the text gradually progresses towards achieving them.⁷⁷ Abu Zayd, though, distinguishes himself from Rahman and other reformists in calling for a literary reading of the text to decipher its universals. Such an analysis is important and can have a fundamental impact on *usul al-fiqh*.⁷⁸

2. Traditional *Usul al-fiqh*

One of the primary concerns of *usul-al-fiqh* and the focus of this paper is how to interpret the Qur'an. Kamali indicates that jurists traditionally begin with a *tafsir* reading of the text, one that "basically aims at explaining the meaning

principles as the five essential "values" of Islam, also known as the *maqasid* (purpose) of *Sharia* law. See KAMALI, *supra* note 5, at 23. These include religion, life, intellect, property, and family. *Id.* Contemporary reformers add values, including concepts like justice, equality, freedom and human rights. See OPWIS at 75. One such reformer is the Lebanese scholar Mahmasani (1909 – 1986) who argued that, "Western law was compatible with Islamic law as long as the people's *maslaha*, that is, the intention of the lawgiver, was preserved." *Id.*

77 Compare NASR HAMID ABU ZAYD, Critique of Religious Discourse *Naqd al-Khitab al-Dini* (Johnathan Wright trans. 2018) with FAZLUR RAHMAN, *Interpreting the Qur'an*, 3 *AFKAR INQUIRY* 45 (May 1986). The underlying assumption both scholars make is that had the Qur'an attempted a radical change directly (such as calling for total gender equality), the backlash would have crippled the spread of the religion. The Qur'an, then, adopted gradualism. This appears in the Qur'an's slowly progressing towards the total ban on alcohol, starting by simply prohibiting it during prayer.

78 ASMA UDDIN emphasizes how perceiving the mutable in the Qur'an can be crucial for gender equality, allowing reform of laws that discriminate against women and thereby, limiting violence against women. Calling for a recognition of the mutability of Islamic law, she emphasizes, "If Islamic law is seen as beyond human interpretation, that is, as a set of absolutes, rather than dependent on particular circumstances, it will remain unchallenged regardless of how inadequate the provisions become in the context of Muslims' lived experiences." UDDIN, *supra* note 71, at 30. Specifically looking at the context of family law in the Egyptian system, MENYAWI too, describe ambiguity as a political tactic, claiming that "such a political tactic does not guarantee the entrance of feminists through the door of the law, but rather introduces sufficient contingency, unknowability and uncertainty into the ontology of the legal institutions and family law (and more broadly throughout Egyptian law) and, by doing so, in turn advancing possibilities for change in Egyptian family law and the family legal systems throughout the Middle East." See HASAN EL MENYAWI, *Chapter 4: The gift of ambiguity Strategizing beyond either/or of secularism and religion in Islamic divorce law*, in: ISLAM, LAW AND IDENTITY 89, AT 110 (Marimos Diamantides & Adam Gearey eds., 2012).

of a given text and deducing a *hukm* [legal ruling] from it within the confines of its words and sentences.⁷⁹ In other words, the jurist first looks to the plain meaning of the text. If unable to deduce a justifiable rule in this manner, a *mujtahid* moves on to a *ta'wil* meaning, one that uses reasoning (*ijtihad*) to find the deeper “hidden meaning” of the text.⁸⁰ In traditional legal exegesis, though, *ta'wil* must be justified as “[a]ll words are presumed to convey their absolute, general and unqualified meanings unless there is reason to warrant a departure to an alternative meaning.”⁸¹ In actual use, scholars limit *ta'wil* to rare instances where the meaning of a word or a phrase would make no sense without recognizing its metaphorical nature. One instance is use of the word “lion,” which often does not denote the actual animal but signifies bravery.

A correct interpretation of the text also requires an understanding of the specific words used. Jurists classify words into several distinct categories. Often listed in a continuum, words may be clear (including the *zahir* which is “open to *ta'wil* primarily because the meaning it conveys is not in harmony with the context in which it appears,” *nass* where the word is in harmony with its context but still open to *ta'wil*, *mufassar* where the term is not open to *ta'wil* but is open to abrogation,⁸² and finally *muhkam* which is a perspicuous word, not open to *ta'wil* or abrogation).⁸³ Words may also be unclear (including *khafi* which is “partially ambiguous,” a word that the jurist can clarify with other evidence, *mushkil* “which is inherently ambiguous and whose ambiguity can only be removed by means of research and *ijtihad*,” *mujmal* “which is inherently unclear” such that there is “no indication as to its precise meaning” and *mustashabih* “whose meaning is a total mystery”).⁸⁴ Moreover, the text has several levels of meaning. The first and the most obvious from a literal reading of the

79 See KAMALI, *supra* note 5, at 119 (brackets added). A *hukm* is a legal ruling. There are five categories of legal rulings. An act may be obligatory, recommended, permissible, reprehensible, or forbidden.

80 *Id.* *Ijtihad* refers to a jurist using his or her reasoning based on the sources to arrive at a legal ruling, *hukm*.

81 *Id.*

82 Abrogation of a revealed source can only occur if another revealed source contradicting it exists later in time.

83 *Id.* at 122 – 140

84 *Id.*

text is the “explicit meaning.”⁸⁵ The second that requires some minor investigation but essentially constitutes a necessary inference is the “alluded meaning.”⁸⁶ The third derived from the rationale of the law is the “inferred meaning.”⁸⁷ Relatedly, there is the “required meaning” which is one read into the text to ensure the law stays true to its purpose.⁸⁸ Finally, there is a “divergent meaning,” one that departs from the text.⁸⁹

Abu Zayd’s theory of *usul al-fiqh* constitutes a radical departure from traditional approaches. For him, the ‘unclear’ and the ‘clear,’ the “explicit meaning” and the “divergent meaning,” are not separable categories. All verses occupy all these levels of meaning at once. For this reason, he rejects *tafsir* to embrace only *ta’wil*.⁹⁰ To emphasize the compatibility of the “specific” and “unspecific” verses of the Quran, he cites the verse 3:7, the only verse that guides the *mujtahid* on how to interpret the text.⁹¹ For him, the verse avers that, “those firm in knowledge say, ‘We believe in it. All [of it] is from our Lord.’”⁹² Laying specific emphasis on the “all,” Abu Zayd claims that the specific informs the unspecific and vice versa with

85 *Id.* at 168.

86 *Id.* at 169.

87 *Id.* at 171.

88 *Id.* at 172

89 *Id.* at 175.

90 In his *tafsir*, *Mafhum al-nass: Dirasat fi ulum al-Qu’ran* (The Conception of a Text: A Study in the Sciences of al-Qu’ran): Abu Zayd emphasizes that rather than a *tafsir* (exegesis), his work goes a step further in acting as a *ta’wil*, where the latter is true interpretation and the former merely explanation. VOLKER, *supra* note 65, at 161. The term *ta’wil* indicates the importance of reason and intellect in interpretation. See KERMANI, *supra* note 26, at 173 (noting “[i]n Abu Zayd’s view, an individual’s interpretation is never absolute (*fahm nisbi*), since the ‘information’ in the divine ‘message’ varies according to whoever ‘receives’ it”). This allows Abu Zayd to modify and adapt laws to the modern context. *Id.* Abu Zayd’s understanding of *ta’wil*, though not explicit, appears to be an amalgam of the *ta’wil* used to indicate esoteric or mystical interpretations of the text and the *ta’wil* used in *usul al-fiqh*. DAFTARY, *supra* note 12, at 189–190 (treating *ta’wil* as synonymous to esotericism in his account of the Ismaili emphasis on *batin* or inner purity as the product of a *ta’wil* reading of the text).

91 *The Qur’an*, *supra* note 10, at 3:7 (“He it is Who has sent down the Book upon thee; therein are signs determined; they are the Mother of the Book, and others symbolic. As for those whose hearts are given to swerving, they follow that of it which is symbolic, seeking temptation and seeking its interpretation. And none know its interpretation save God and those firmly rooted in knowledge. They say, “We believe in it; all is from our Lord.” And none remember, save those who possess intellect”).

92 ABU ZAYD, *supra* note 21, at 195.

both coming from God.⁹³ He notes, “[a]nother feature of its textuality is the Qur’anic declaration that it includes clear verses (*ayatun mukhamatun*), which are the backbone of the Book, and ambiguous verses (*ayatun mutashabihatun*), which should be interpreted in accordance with clear ones.”⁹⁴ To truly understand the full import of the Qur’an, then, the scholar must appreciate both what is clear and what is not and use each to inform the other. A literary approach does this. It injects ambiguity into the text just as it attempts to decode what is unclear in creative ways.

For his views, Abu Zayd was ostracized from the Muslim community. Declared an infidel, the Egyptian state instituted forced divorce proceedings between him and his wife, causing both to flee the country.⁹⁵ One of the most prominent critiques of Abu Zayd was that he sought to make Islamic law conform to the modern Western state, and thereby sacrificed centuries of Islamic tradition that built a powerful body of *fiqh*.⁹⁶ In doing this, he is said to be nothing more than an apostate and a Western apologist.⁹⁷ However, in emphasizing the spirit and purpose of the law, Abu Zayd only appealed to centuries old Mu’tazila understandings and recognized that a single objective interpretation of the text does not exist. Rather, each reader interprets the text differently, influenced by his or her context. The flexibility this brings can make it difficult to precisely define the law since if each individual jurist can

93 *Id.*

94 *Id.* at 196. Interpretation is key. This verse is the subject though of immense dispute as placing the pause in an alternate location changes the meaning of the verse significantly. *The Quran*, *supra* note 10, at 3:7 (commentary) notes, “[a]n alternate pause in the Arabic would yield the translation, “And none know its interpretation save God. And those firmly rooted in knowledge say, “We believe in it; all is from our Lord.” This reading reserves all interpretation [...] to God; the *firmly rooted* (*rasikhun*) are then characterized merely by their faith in it.” Whereas in Abu Zayd’s reading, those in the know must look to the clear and the ambiguous verses, in alternate readings of the same verse, only God knows the meaning of the ambiguous and those who believe in God do not attempt to decipher the meaning of these mysterious words, focusing only on what is clear.

95 In the final years of his life, though, Abu Zayd returned to Egypt and died of unidentified health reasons. See e. g. REUTERS, *Nasr Abu Zayd, Who Stirred Debate on Koran, Dies at 66*, N. Y. TIMES (July 6, 2010), <https://www.nytimes.com/2010/07/06/world/middleeast/06zayd.html>.

96 Even though Abu Zayd drew on an early Islamic tradition of the Mu’tazila to make his arguments as indicated earlier.

97 REUTERS, *supra* note 95.

modify even perspicuous verses in the Qur'an, the Qur'an becomes open to arbitrary interpretation. Nevertheless, Abu Zayd recognized that this is inevitable. All interpretation, literary or otherwise, crucially depends on the interpreter's background, personality, and the way in which he or she reads the text. It depends on whether the interpreter applies a Salafi lens, a feminist lens, a critical theory lens, or some other one. Recognizing the importance of the reader and remaining aware of bias is a strength and not a weakness of the literary approach. At the same time, literary interpretation finds broad themes in the Qur'an that jurists can agree on. Despite the subjective nature of literary interpretation, then, it also unearths commonalities, making it a valuable tool to use to read the text.

IV. Applying Abu Zayd's Theory in Practice

Applying Abu Zayd's theory in practice, this section conducts a literary analysis of the narrative of Prophet Lot.⁹⁸ Rather than simply listing literary features of the text, this paper searches for insights that a jurist may practically apply in a legal context. The section begins by providing a brief background of the narrative itself and its current application in the law as well as specifying several literary and other approaches used in the analysis. It, then, gives an account of some of the general principles of law⁹⁹ that the analysis reveals. Next, it attempts to determine the spirit of the law. This paper finds that the narrative is ambiguous (possibly intentionally so) concerning the specific act proscribed, but clear in outlawing a larger concept of *fahisha*. Focusing on this theme and related

98 Note also that while this paper looks to derive legal meaning from the narrative, the narrative of Lot can be read solely for its moral, ethical, and religious import. Parsing out rules intended to be ethical and moral and those intended as legal can be a difficult task. The reason the narrative of Lot, though, provides insight into the legal and not just the ethical is because the rule that the Prophet Lot asks the people to follow is enforced by God. While morals and ethical rules are not often subject to enforcement, laws have "teeth" and an enforcer behind them. For this reason, jurists have already used the narrative as a source of legal rules, particularly to justify the prohibition on homosexuality and the punishment of the death penalty for it.

99 I use the term "general principles of law" to refer to general procedural rules that every legal system requires to function. An example of this in the common law context is *stare decisis*.

procedural rules, it argues that the narrative does not naturally lead to a prohibition on homosexuality let alone its criminalization.¹⁰⁰ The section concludes by pointing to ways jurists may apply knowledge of the spirit of the law in the modern context.

1. Basic Background

Most Islamic jurists declare homosexuality *haram* and prohibit it under Islamic law.¹⁰¹ This is in spite of the fact that the Qur'an has no particular word for homosexuality.¹⁰² Arguably, homosexuality understood in the modern sense as sexual relations between two consenting adults did not even exist as a concept in early Arabian society let alone a widespread practice.¹⁰³ Still, scholars interpret the prohibited act that the people of Lot committed as homosexuality and use this interpretation to justify criminalizing the act. In fact, all major Sunni and Shia schools of legal

¹⁰⁰ While crimes punishable as *fahisha* are definitively some of the worst and warrant the severest punishments, capital punishment need not be that punishment as Abu Zayd has argued in the past. See footnote 75 of this paper.

¹⁰¹ See REHMAN/POLYMEÑOPOULOU, *supra* note 3, at 11 (noting that “[a]ll the major doctrines within the Sunni and Shi’a traditions, and most notably the Shafi School, agree that homosexual intercourse (*liwat*) is analogous to heterosexual *zina*, and should therefore be rejected. Apart from the Hanafi school, all Islamic schools take the position that homosexual conduct amongst men, and particularly the act of sodomy (i. e., anal penetration), attracts the *Hadd* punishment. Only minor doctrines, like Zahirism (a Sunnite doctrine) and Rafida (a Shi’ite doctrine), suggest that homosexuals should not be punished”).

¹⁰² See *Id.* at 13 (“[t]here are no terms used within the Qur’an which specifically refer to same-sex relations”). In fact, classical jurists coined the term *liwat* for homosexuality long after the revelation of the Qur’an. *Id.* at 18.

¹⁰³ KHALED EL-ROUAYHEB, *Before Homosexuality in the Arab-Islamic World, 1500 – 1800* (2005), does a wide-ranging historical study of homosexuality in early Islam and finds that the concept as we define it today never existed. Rather, the act of sodomy was associated with older men’s passion for young boys, a desire classified as pederasty and that today we would see as pedophilia. Similar work has informed the thinking of gender and sexuality in ancient Greek society and led to the argument that gender and sexuality are not inherent qualities of an individual, but rather significantly shaped by the environment and social context. See generally DAVID M. HALPERIN, *One hundred years of homosexuality and other essays on Greek Love* (1990).

thought agree that a homosexual is eligible for capital punishment.¹⁰⁴ At the same time, as already noted, the international community and several nations around the world now recognize lesbian, gay, bisexual and transgender (LGBT) peoples' rights as 'human rights.' After the 2011 United Nations Human Rights Council Resolution on "Human Rights, Sexual Orientation and Gender Identity," several countries from Ireland to India have not only de-criminalized sexual orientation, but also taken steps to make same-sex marriage lawful.¹⁰⁵ Reinterpretation of the narrative of the Prophet Lot, then, is especially timely in the context of evolving norms on human rights, consensual sexual intercourse and homosexuality. A literary reading of the Qur'an can take many different forms.¹⁰⁶ The Qur'an is important as both a written and an oral text.¹⁰⁷ Narrative is one of the

104 All major Sunni and Shia schools of legal thought agree that a homosexual is eligible for capital punishment. See REHMAN/POLYMEPOPOULOU, *supra* note 3, at 12 (finding, "[r] egarding the punishment for homosexuality, there is a consensus among the four leading Sunni schools of thought and most Islamic scholars that homosexual acts are a major sin (*fahicha*) and may be punishable by death").

105 See Human Rights Council Res. 17/19 (14 July 2011). See also Human Rights Council Res. 32/2 (15 July 2016). See e.g. MICHAEL SAFI, *Campaigners Celebrate as India Decriminalizes Homosexuality*, THE GUARDIAN (Sept 6, 2018), <https://www.theguardian.com/world/2018/sep/06/indian-supreme-court-decriminalises-homosexuality>; BROOKE SOPELSA /ARIEL JAO, *Bermuda legalizes same-sex marriage – again*, NBC NEWS (June 6, 2018), <https://www.nbcnews.com/feature/nbc-out/bermuda-legalizes-same-sex-marriage-again-n880696>. In the United States, the Supreme Court declared statutes criminalizing homosexuality and sodomy unconstitutional in 2003. *Lawrence v. Texas*, 539 U.S. 558 (2003). Later, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), established a constitutional right to marry for same-sex couples.

106 One can focus, for instance, on the language of the Qur'an including its use of "recurrence (e.g. rhyme, alliteration, parallelism, various structures of equivalence and patterning), stylistic deviation from conventional language (e.g. tropes, figures of speech, hyperboles and various forms of poetic license), semantic ambiguity (e.g. allusions, contradictions, enigmatic words or phrases), sound-symbolic devices (e.g. *figura etymologica*, onomatopoeia, puns (*jinās*)), and pervading rhythm. Additional traits like terseness (e.g. compositions written in cola, sing. colon), passionate speech, "chantability," apostrophes and vocative hailings, structural dominance of personal pronouns, unexpected shifts of pronouns (i.e. *iltifat*), and a recurring self-reflectivity of the text." HOFFMAN, *supra* note 60, at 3–4.

107 See generally ANGELIKA NEUWIRTH, *The 'Discovery of Writing' in the Qur'an: Tracing a Cultural Shift in Arab Late Antiquity*, in: THE QUR'AN AND ADAB: THE SHAPING OF LITERARY TRADITIONS IN CLASSICAL ISLAM 61 (Nuha Alshaar ed., 2017).

many styles it uses.¹⁰⁸ The Qur'an, like the Bible and Torah, contains multiple narratives, recounting the lives of several Prophets. All the narratives, though, share a common plot characterized by a severe punishment on those who would deny God's message. WELCH summarizes: [Their basic plot is that God sends or selects a messenger from among the people of a tribe or town who urges his people to serve only the true God, warns them that they will be destroyed if they reject his message, which the majority do, and then God rescues the messenger and those who believe and destroys those who do not.]¹⁰⁹ The narrative of Prophet Lot appears in several verses of the Qur'an, both those revealed in Mecca and Medina and those whose place of revelation is unknown.¹¹⁰ The Qur'an describes the narratives as an example for people to follow a "sign."¹¹¹ Each narrative is

108 Scholars in the past have articulated the peculiarly literary nature of narratives in the Qur'an, claiming that they go beyond mere historical accounts. This is true for many reasons: "[f]irst, the Qur'an deliberately does not mention either the time or location of historical incidents in its stories, and it also omits some characters. Second, in dealing with several historical stories the Qur'an selects some events and leaves out others. Third, it changes the chronological order of events. Fourth, the Qur'an occasionally switches the character performing given activities. Fifth, when the story is repeated in another chapter of the Qur'an, a character's dialogue may be different from that spoken in a previous context. Sixth, the Qur'an occasionally chronologically adds later incidents to the narrative." SALAMA, *supra* note 14, at 57 (explaining Khalafallah's arguments in his thesis). Several scholars also emphasize that the narratives serve some sort of "moral purpose," indicating that they are a good place to begin looking for universal themes. See ANDREW RIPPIN, *The Place of the Qur'an in 'The Sermons and Exhortations' of Abu Ubayd (d. 224/838)*, in: THE QUR'AN AND ADAB: THE SHAPING OF LITERARY TRADITIONS IN CLASSICAL ISLAM 219 (Nuha Alshaar ed., 2017). Others even describe narratives as "Islamic myths" where "[m]yths provide explanations of phenomena of the real world by attributing to them significance within the framework of a larger order." GOTTFRIED HAGEN, *From Haggadic Exegesis To Myth: Popular Stories Of The Prophets*, in: SACRED TROPES: TANAKH, NEW TESTAMENT, AND QUR'AN AS LITERATURE AND CULTURE (BIBLICAL INTERPRETATION SERIES VOL. 98) 301, at 305–07 (Roberta Sterman Sabbath ed., 2009). Since several modern literary scholars focus on narratives, the emphasis allows this paper to remain in conversation with them and encourage such a reading of the text.

109 See ALFORD T. WELCH, *Formulaic Features of Punishment-Stories*, in: LITERARY STRUCTURES OF RELIGIOUS MEANING IN THE QUR'AN 77, at 78 (Issa J. Boullata ed., 2009).

110 The specific *suras* are *The Qur'an*, *supra* note 10, at 7:80–84, 11:77–83, 15:57–77, 26:160–73, 27:54–58, 29:28–35, 37:133–138, 54:33–38.

111 See *e.g. Id.* at 29:35 (describing the narratives as "a manifest sign for a people who understand") & 29:51 (describing the Qur'an itself as a sign). In *Id.* at 11:20, the Qur'an specifies why narratives are important, noting, "[a]ll that we recount unto thee of the

God's model of how to make and enforce the law. Using legal imagery, the Qur'an likens them to "trials."¹¹²

The complete history of the people of Lot and the spirit of the law they violate only appears gradually in the text after the reader-listener has read all the verses that refer to the narrative.¹¹³ While the Qur'an repeats some key facts, each *sura* also contains several variations. QUTB, in his *tafsir*, compares as an example the account of the narrative of Lot in *sura* 7 with that in *sura* 11. He notes that in the former, "the angels do not reveal their identity to him [Lot] until his people arrived and he had pleaded with them to spare his guests", while in the latter "a totally different layout is given to the story" and here, "the identity of the angels is revealed right at the outset while the design of his people against his guests is mentioned later."¹¹⁴ Such variations encourage the reader-listener to investigate and put together the different pieces of the puzzle making up the different parts of the Qur'an. With each new fact or variation, the Qur'an also heightens the effect of the repeated theme. Each time the reader finds himself or herself surprised, the effect and clarity of the message that remains constant multiplies. This message is the spirit of the law and its attendant general principles. In interpreting the narrative to find these, this paper considers several theories of literary criticism particularly AUSTIN's theory of "speech acts"¹¹⁵ and reception theory.¹¹⁶ These theories

stories of the messenger is that whereby We make firm thine heart. And herein there has come unto thee the Truth, and an exhortation and reminder for the believers."

112 See e.g. *The Qur'an*, *supra* note 10, at 29:2 – 3 where God promises to 'try' all humans. Not only does each narrative present a 'trial,' but the Day of Judgement itself is one such trial where God will balance the good and the evil and give to each person his or her dues. The judgment is to come during "God's term." *Id.* at 29:5.

113 A basic outline of the narrative is: Prophet Lot warns the people of Lot to leave their sinful lifestyle. The people refuse to do so, and Lot sends a plea to God for help. God sends his angels (also called envoys or messengers) to destroy the people of Lot. The envoys come to Lot and tell him to take his family and leave and to not look back and to stop all in his family from looking back except his wife. The people of Lot arrive to commit sinful acts against the envoys and Lot protests, offering them his daughters instead. The people refuse. The envoys of God destroy the people of Lot and Lot's wife with a rain of stones after blinding them. The Prophet Lot and his family escape except for his wife. The events are said to have taken place at a location near Mecca.

114 QUTB, *supra* note 53, at 348 – 49.

115 This theory sees literature as a 'productive force,' an active mode of communication that involves interaction with the author/speaker, ultimately leading to action. SANDY PETREY, *Speech Act and Literary Theory* 3 (1990) (noting how "[s]peech-act theory...shifts

are apt in the context of the Qur'an because the text aims to guide the actions of its adherents. One example is its repeated use of the imperative to command believers.¹¹⁷ McAULIFFE articulates this understanding of the text, saying "[e]ven those most casually acquainted with the Qur'an recognize that it is a highly interactive text, one that frequently addresses the listener directly, seeking to persuade, to influence, to transform."¹¹⁸ The Book also speaks to several audiences both past and present including disbelievers and believers as well as the Prophet.¹¹⁹ MUSTANSIR MIR articulates how Qur'anic narration is especially unique in this respect, casting the Qur'an as "an orator."¹²⁰ The literary reading of the Qur'an, as

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- attention from what language is to what it *does* and sees a *social process* where other linguistic philosophies see a *formal structure*"; see also HOFFMAN, *supra* note 60, at 26 (claiming that Austin put forth the idea that language not only refers to the world in a "detached and 'constative' way but performs and executes social acts by simply saying something e. g. by commanding, promising, warning, praising etc."). Consider for instance the way divorce works in Islam. A man attains a divorce by saying "*talaq*" three times. Language in its social context ends the marriage, performing an act. See MAAIKE VOORHOEVE, *Divorce*, in: THE OXFORD ENCYCLOPEDIA OF ISLAM AND WOMEN (Natana J. DeLong-Bas ed., 2013) (online). Yet, the word only commits this action because society accepts that this is how "*talaq*" works. Petrey highlights, "[t]he context is subsequently a vital component of any attempt to apprehend an utterance's performative strength," at 3.
- 116 Here, "a text is seen as having an effect on the reader and its literary devices invite the reader to respond to that text in various ways." See ALSAAR, *supra* note 35, at 2. See also ROBERT C. HOLUB, *Reception Theory* (2005).
- 117 See e. g. *The Qur'an*, *supra* note 10, at 29:8.
- 118 See JANE DAMMEN McAULIFFE, *Text and Textuality: Q. 3:7 as a Point of Intersection*, in: LITERARY STRUCTURES OF RELIGIOUS MEANING IN THE QUR'AN 56, at 70 (Issa J. Boullata ed., 2009).
- 119 Hoffman points out, "[t]he Qur'an, for instance, emphatically addresses issues that pertain to the life and society of Muhammad, but its language is also cast in such a manner that it reaches beyond the flux of contemporary affairs." *Supra* note 48, at 34. In her reading of "Mary" in the Qur'an, for instance, Abboud argues that, "[s]ituating the telling of the story with its original audience can help understand the message and purpose of the text better." See ANGELIKA NEUWRITH, *Foreword to HASN ABBOUD, Mary in the Qur'an: A Literary Reading*, at xii, xiv (2014). Looking at this context leads Abboud to conclude that Mary in her struggle was "a model to the Prophet Muhammad in his own struggle with his own people and in his carrying the Word of God, which is, in his case, not 'Isa, but the Qur'an." HASN ABBOUD, *Mary in the Qur'an: A Literary Reading* 157 (2014).
- 120 See MIR, *supra* note 15, at 94. The orator breaks and modifies the narrative in response to its audience as God seems to be anticipating His reader-listener's questions before he or she can even ask them. Mir emphasizes, "Qur'anic narration often mirrors real life. In real

employed in this paper, strives to take into the account this dynamic nature of the text. The paper also draws on linguistics and hermeneutics.¹²¹ Among the selected literary features of the Qur'an it references are ambiguity, repetition, word choice, metaphors and symbols, allusions, and the use of dialogue.¹²²

2. General Principles of Law

This section begins a literary analysis of the narrative. It finds several general principles of Islamic law in the text. These define and guide the creation and implementation of the substantive law. In fact, one cannot conceive of substantive law absent an understanding of its underlying procedural rules. The scholar MAIN notes that “the construction of substantive law entails assumptions about the procedures that will apply when that substantive law is ultimately enforced,” making them an appropriate place to begin the search for law in the narrative.¹²³ Yet, states that follow the *sharia* code today often ignore these and punish defendants unjustly.¹²⁴ Some of these principles Islamic law shares with common law and others

life, events do not follow abstractly conceived logical sequence, and yet they have a logic of their own – the logic of the dynamic context in which they occur.” *Id. See also* HOFFMAN, *supra* note 60, at 66 – 67 (noting how “the speech should strike a balance between a common and straightforward linguistic style (what has been designated *wat' al-ligha*, ‘the middle ground of language’) and a more elevated and formalized style”).

121 Abu Zayd's account of literary exegesis drew on several key linguistic theorists including grammarian Sibawayhi, philologist Izutsu and philosopher of hermeneutics Hans-Georg Gadamer. *See* KERMANI, *supra* note 26, at 180. Izutsu and several rules of grammar are referenced later in this paper. Gadamer's understanding of hermeneutics parallels reception theory mentioned above and thereby informs this paper as well. For Gadamer, hermeneutics signifies “a practice of reading texts while trying to understand the conditions which made truth possible. The truth of the text is disclosed while discovering the conditions of understanding.” *See* ANDRZEJ WIERCINSKI, *Hans-Georg Gadamer and the Truth of Hermeneutic Experience*, 1 ANALECTA HERMENEUTICA 3, at 4 – 5 (2009). Context and a reader-listener's background, then, influence interpretation.

122 Several others exist. This is not an exhaustive list.

123 *See* THOMAS O. MAIN, *The Procedural Foundation of Substantive Law*, 87 Wash. U. L. REV. 801 (2010) (finding that “substantive law is...inherently procedural...Those procedures are embedded in the substantive law and, if not applied, will lead to over- or under- enforcement of the substantive mandate”).

124 *See generally* SADIQ REZA, *Due Process in Islamic Criminal Law*, 46 George Wash. Int'l L. REV. 1 (2014).

are unique to it. Principles shared between common law and Islamic law include prohibitions against ex post facto punishment, a general leaning towards punishing acts done in public and not private ones, notice and fair warning requirements, the principle of non-discrimination and equality before the law, *res judicata*, and the maxim that punishment must be proportional to or less than culpability. Principles unique to Islamic law include the fundamental connection between religion and the law where adhering to the law is a part of being a good Muslim, and when it comes to criminal liability, the imposition of affirmative duties to act as opposed to the simple harm principle.¹²⁵ In crafting and enforcing positive laws, jurists must keep in mind these fundamental due process rights.¹²⁶

The narrative of Lot begins with notice and fair warning to the people. Prophet Lot communicates a law from God to the people, one that informs them of what conduct constitutes wrongdoing and warns them of the consequences of failing to obey God.¹²⁷ Following this is a response from the people that is an intentional disregard of the law and an espousal of wrongdoing, revealing a criminal mens rea. For instance, God notes, “[y]et the answer of his [Lot’s] people was but to say, “[b]ring us God’s punishment if you are among the truthful.”¹²⁸ Even before they face punishment, Lot offers the people a final chance at redemption.¹²⁹ Their response paints them as irredeemable. They emphasize, “surely you know that which we desire [the wrongful act of intercourse with the envoys of God].”¹³⁰ The people of Lot, then, face punishment not simply for their conduct, but also their knowing commission of a criminal act after notice of its ‘evil’ nature.

Similarly, the Qur’an underscores the public nature of the act. It is a group criminal activity committed on roads as the people “cut off” travellers on

125 See generally JOHN STUART MILL, *On Liberty* (1859) (describing the harm principle).

126 Note this is not a part of Abu Zayd’s theory if *usul al-fiqh*, but rather my own addition to it.

127 See *The Qur’an*, *supra* note 10, at 7:81 & 29:28 (where the narrative commences with the words “[a]nd [We sent] Lot, when he said to his people, “Truly you commit indecency such as none in the worlds committed before you”); see also *Id.* at 11:78, 15:68 – 69, 26:161 – 66, 27:54 – 55, 54:33, & 54:36.

128 See *e.g. Id.* at 26:167, 27:56, & 29:29.

129 See *e.g. Id.* at 11:78.

130 See *e.g. Id.* at 11:79 (brackets added).

their way and invade others' houses.¹³¹ Immediately before they face punishment, the mass of people enter Lot's home to harm his visitors, the envoys, making what is private public.¹³² In doing this, they violate Lot and the envoys' right to liberty. The deeply public nature of the crime implicates an already established rule of procedure in the *fiqh*. SADIQ REZA puts it briefly, "[f]rom two simple rules in the Qur'an, several related reports in the *Sunna*, and pertinent doctrines [of] classical jurists [...] this maxim emerges clearly: personal privacy must be honored in the process of detecting crime and investigating criminal suspects."¹³³ In a similar manner, the Qur'an and the Prophet preached lenity and sought to forgo punishment for *hudud* offenses in the case of doubt.¹³⁴ Islamic law, then, leans towards punishing public as opposed to private acts.

The Qur'an also highlights the finality of judgment on those who transgress, the principle of *res judicata*. Before the envoys punish the people, God informs Abraham, "[w]e shall surely destroy the people of this town; truly its people are wrongdoers."¹³⁵ Despite protests by Abraham that Lot was "in it," the judgment is final as God informs Abraham, saying simply, "We know better who is in it."¹³⁶ Similarly, when Lot expresses his "distress [...]" on their [his people's] account,¹³⁷ God notes that, "he [Lot] was

131 *Id.* at 29:29.

132 *Id.* at 11:78 & 15:67. Note while it is true that God punishes Lot's wife even though she commits no act in public, God specially determines her punishment. She is not one of the people that Lot himself condemns. The Qur'an repeatedly distinguishes her from the rest of the people even though she perishes like them because only God knows what is in her heart and only He can punish her. While the envoys punish the people of Lot more generally, Lot's wife has to act to disobey her husband and look back at the city to face any punishment. *See e.g. Id.* at 15:65. In doing this, the Qur'an indicates that while Lot and others are aware of and can enforce punishment against those who commit public indecency, only God can and does punish private disbelievers.

133 REZA, *supra* note 124, at 16. The two verses the jurists refer to in *The Qur'an*, *supra* note 10, 24:27 & 49:12. REZA notes the "message is clear: *muhtasibs* [the Islamic equivalent of police officers] are generally forbidden to intervene in the private lives of fellow Muslims, even to enforce the religious prohibitions that are central to their duties." REZA, *supra* note 124, at 18 (brackets added).

134 REZA, *supra* note 124, at 19. Note also that the rules of evidence make it extremely difficult if not practically impossible to punish offenses committed in private including adultery.

135 *The Qur'an*, *supra* note 10, at 29:32.

136 *Id.*

137 Note an alternative reading claims that "their" refers to the envoys and that Lot was distressed for them and not for the wrongdoers about to perish.

constrained from helping them.”¹³⁸ In fact, the people of Lot themselves seem to accept their unworthiness and punishment. When Lot offers them redemption by asking if they would take his daughters instead of the guests, they state, “we have no right to your daughters.”¹³⁹ Use of the word “right” indicates their acceptance that committing illegal acts renders them unfit to marry the daughters of a Prophet. All these general principles grant Islamic law a sense of fairness and ensure that defendants have certain core rights.

The Qur’an, also, explicitly and consistently, underscores that all are equal before the law. At the outset, it repeatedly includes Lot’s wife among the ranks of the damned, conveying that Islamic law covers all people regardless of their gender, relationships, or social status.¹⁴⁰ The law also applies to all people – past, present, and future. The Qur’an explicitly connects its different audiences when it informs the reader-listener that God “has tried those who were before them [the people of Lot]” and will do so for those who come after.¹⁴¹ The dialogic nature of the narrative and its use of questions also implicitly reinforces that the law applies to all. The narrative consists almost entirely of dialogue with both sides [Lot on one end and his people on the other] making their arguments and God delivering a judgment. The reader-listener takes on the role of a spectator at the hearing in court. Yet, as God speaks to Lot or Abraham, He simultaneously speaks to the Prophet, the people around the Prophet, and all present and future reader-listeners. The reader-listener becomes no longer a mere observer, but a part of the text.¹⁴² The clearest examples of this are when the Qur’an describes the remains of Lot’s city and demands that the reader-listeners take notice. In 37:137 – 38, God states, “[a]nd truly you pass by them [“them” could indicate the actual remains of the people of Lot which is historically not considered far from Mecca or disbelievers and hypocrites within society] in the morning and at night. Do you not understand?”¹⁴³ The narrative of Lot, moreover, ends with a warning “and

138 *The Qur’an*, *supra* note 10, at 29:33.

139 *See e. g. Id.* at 11:79 & 15:71.

140 The Qur’an imposes several obligations on individuals, noting for instance *Id.* at 29:6 that “whosoever strives, strives only for [the benefit of] himself.”

141 *Id.* at 29:3 (brackets added).

142 Note also that the people are not a distant Satanic demon, but rather neighbouring towns, friends, and relatives.

143 *Id.* at 37:137 – 38 (brackets added).

they [this could be a reference to the reader-listener or the people of Lot] are never far from wrongdoers.”¹⁴⁴ 15:76 repeats this account and reinforces this understanding, again causing the reader-listener to look around in fear, noting “and verily they [the people of Lot] are on a path still standing.”¹⁴⁵ In other places, the Qur’an asks questions that seem to speak to its entire audience. For instance, the Qur’an recounts how “his [Lot’s] people came hurrying toward him, while earlier they had been committing evil deeds,” and Lot asks, “[i]s there not among you a man of sound judgment?”¹⁴⁶ This question seems to address the entirety of the Qur’an’s audience. Later, leading up to the climax, the angels give Lot a means to escape in the morning and to not turn around. The Qur’an, then, makes this rule relevant to each reader-listener with the question immediately before punishment comes, “[i]s not the morning nigh?”¹⁴⁷ This underscores the urgency of obeying the laws of God while one has the chance rather than delaying and risking eternal condemnation like that faced by the people of Lot. The *sura* concludes with a question asking, “[a]nd indeed We have made the Qur’an easy to remember; so, is there any who remember?”¹⁴⁸ No member of the audience, then, is immune from their obligation to follow the law or their potential to face punishment in the event of any violations now that they know the truth of the Qur’an. Using a dialogic narrative structure, the Qur’an introduces the basic due process right to equality before the law.

Proportionality is another key component of punishment. The people of Lot are met with an evil rain for the evil that they do.¹⁴⁹ The word used to describe both evils (*saw’*) is the same, connecting the gravity of the

¹⁴⁴ *Id.* (brackets added).

¹⁴⁵ *Id.* at 15:76. (“[a]nd truly you pass by them [the remains of the people of Lot or alternatively other disbelievers] in the morning and at night. Do you not understand?”) (repeating *Id.* at 37:137 – 38) (explanatory brackets added).

¹⁴⁶ *Id.* at 11:78 (brackets added).

¹⁴⁷ *Id.* at 11:81. Note that while my reading of the text stresses its terrifying nature and describes the verse as calling the reader-listener to attention, for other scholars, the impact is very different. Qutb describes these words as “meant to help Lot relax.” SAYYID QUTB, In The Shade of the Qur’an (*Fi Zilal al-Qur’an*) Vol. 9, 281 (Adil Salahi trans. 2004). For him, God is responding to Lot’s initial despair at his helplessness and now order and peace are restored. No longer does Lot have to fear harm to the envoys or other travelers since soon the people of Lot will be no more.

¹⁴⁸ *Id.* at 54:40.

¹⁴⁹ See e.g. *Id.* at 26:173 & 27:58.

punishment to the severity of the harm.¹⁵⁰ Punishments and rewards under Islamic law, though, are not necessarily directly proportional to deeds. The text informs the believers that they shall be absolved “of their evil deeds,” and ‘recompensed’ “according to the best of that which they used to do.”¹⁵¹ Use of the word “recompense” suggests that each man and woman would receive his or her just dues, namely reward or compensation (and presumably punishment) in proportion to their good (or bad) deeds. Yet, the reward need not be exactly equivalent. God vows to recompense “according to the best of which they used to do, “choosing not to punish evil deeds for those who do good. Rather than a balancing act, those believers acting in and for God will receive a larger reward than what they contributed since God will wipe the slate clean and “absolve them of their evil deeds.”¹⁵² As in criminal law in common law countries, retribution is a limiting principle, but the aim of punishment may extend broadly to cover other purposes of punishment such as utilitarianism. Islamic law punishes up to culpability, but retains the discretion not to punish, taking into account the totality of the circumstances. At the very outset, then, the Qur’an explicitly and implicitly provides a preliminary framework for Islamic law that resembles common law in many ways couched in the use of several literary devices.

Unlike common law, though, law in Islam is decidedly religious and God’s law is supreme to all other laws. The Qur’an employs several literary tools to explain how Islamic law can and should play a role in the daily lives of the believers. First and most crucially, the Qur’an connects a good, believing Muslim to a law-abiding one, determining that a person’s “deeds” on earth influence their admittance into Heaven or Hell.¹⁵³ The Qur’an connects “deeds” in turn to a code of *sharia* law. For example, indicating a deed recommended to man, God notes, “[a]nd We have enjoined man to be good onto his parents.”¹⁵⁴ The use of the word “enjoin” indicates that this duty is recommended or even obligatory. Similarly, God uses the word “obey” to demand that Muslims keep away from an act that is *haram* when He states, “if they urge thee to ascribe as partners unto Me that

150 TOSHIHIKO IZUTSU, *Ethico-Religious Concepts in the Qur’an* 230 (2002).

151 *The Qur’an*, *supra* note 10, at 29:7.

152 The trial of God concludes in admittance to Paradise or Hell. *Id.* at 29:68–69.

153 *Id.* at 29:7.

154 *Id.* at 29:8.

whereof thou hast no knowledge, then obey them not.”¹⁵⁵ Individuals’ responses to daily struggles and their avoidance of criminal wrongful conduct is a crucial part of God’s calculus in His Court then.¹⁵⁶ An actual analysis of the words and their meanings at the time of the Prophet reveals how worldly life and spiritual life are connected down to diction in the Qur’an. In his work, TOSHIHIKO IZUTSU takes specific words in the Qur’an and compares the use of these words in various other contexts to decipher their true import.¹⁵⁷ One word IZUTSU discusses in his semantic analysis is *khayr* denoting “good.”¹⁵⁸ Citing a verse of the Qur’an that uses the word twice in two consecutive sentences, IZUTSU notes that *khayr* serves a “double function: it means ‘wealth’ in the first sentence, and, in the second, ‘pious work.’”¹⁵⁹ Taking a variety of other examples, he finds that “the denotata of the word *khayr* in the field of religious matters falls roughly into two classes: one is the ‘good’, the source of which lies in God, and the other is the ‘good’ produced by man.”¹⁶⁰ The word *khayr*, then, in its use in the Qur’an connects a person’s daily acts to divine beneficence and piety so much so that both good acts in worldly life and those in the Hereafter are represented by the same word. Another word IZUTSU notes that appears to occupy both the material and the spiritual realms simultaneously is *hasan*. He claims, “as in the case of *khayr*, its [*hasan*’s] scope covers both worldly and religious spheres of human life.”¹⁶¹ The fact that one word tells us both about life and religion indicates how connected the rules that guide life are to the religious obligations of a Muslim, such that they are one and the same.¹⁶² In the context of the

155 *Id.*

156 The Qur’an mentions that each person will “bear their own burdens, and others’ burdens along with their own and on the Day of Resurrection they will surely be questioned regarding that which they used to fabricate” in the human world. *Id.* at 29:13.

157 See IZUTSU, *supra* note 150.

158 A semantic analysis of “good” is important in the legal context because Islamic law seeks to further that which is “good” and proscribe that which is “bad.” While distinct, theology and the law remain deeply connected in Islamic law.

159 IZUTSU, *supra* note 150, at 218.

160 *Id.* at 220

161 *Id.* at 221.

162 NASR in the Introduction to *The Qur’an*, *supra* note 10, at xxxii, also echoes this, indicating, “[s]ince God is both *the Outward (al-Zahir)* and *the Inward (al-Batin)* as the Qur’an states (57:3), so does His Word have outward and inward levels of meaning. And since God is the Creator of both the apparent or visible (*al-shahadah*) and the absent of

narrative of Lot, then, the people have laws that run contrary to those of God including prohibitions on purity.¹⁶³ They challenge the legitimacy of the divine law Lot communicates and create laws contrary to the will of God.¹⁶⁴ Eventually, the people of Lot receive the punishment that they ask for, reinforcing the understanding that a law from God supersedes any that is manmade including those that are democratically determined. Islamic law, then, has a decidedly religious element absent from common law.¹⁶⁵

Having firmly connected law and the divine, the Qur'an also differs from common law in that it imposes affirmative obligations on believers to behave in certain ways, not simply 'negative' obligations to do no harm; it encourages action not passive acceptance. Connecting one's struggles in this world to rewards and punishments in the Hereafter, the commentary to *sura 29* in *The Study Qur'an*, notes that the Qur'an explicitly challenges "the believers who think that their faith or belief alone will save them from the trials of this life, reminding them of the difficulties of this life and that one must continue to strive in the way of God since truth rarely prevails without great effort and sacrifice."¹⁶⁶ The *sura* asks, "[d]o the people think they will be left to say, "We believe," and they will not be tried?"¹⁶⁷ A mere declaration of one's belief in God, then, is not sufficient to pass the divine trial. All Muslims, for instance, have a duty to give for the general welfare of the community as with *zakat*. Laws implement and enforce such obligations to act. The Qur'an thereby reveals several procedural rules to guide the implementation of Islamic law.

Unseen (*al-ghayb*), in His Words the Unseen often manifests itself mysteriously in the visible and apparent words and phrases."

163 See e. g. *Id.* at 7:82 & 26:167 (the people of Lot chastise their messenger yelling, "[e]xpel them from your town! Truly they are a people who keep themselves pure").

164 See e. g. *Id.* at 29:29.

165 A "parable" in the text embedded in *sura 29* describes this. See generally *Id.* at 29:41 ("[t]he parable of those who take protectors apart from God is that of the spider that makes a house. Truly the frailest of houses is the spider's house, if they but knew").

166 *Id.* at 29 (commentary on the *sura*).

167 *Id.* at 29:2.

3. *Fahisha* and the Spirit of the Law

Keeping this procedural context in mind,¹⁶⁸ the paper next discusses the substantive law found in the narrative, focusing on the particular crime the people of Lot committed. Analyzing the theme of *fahisha*, it argues that capital punishment for homosexuality fails to accord with the spirit of the law read in light of its general procedures in the modern context.

To decipher the spirit of the law in the narrative of Lot, an analysis of the crime committed by the people of Lot is critical. The Qur'an describes the crime simply as *fahisha*, translated often as "indecent" or "an abominable sin."¹⁶⁹ The Qur'an describes the *fahisha* that the people of Lot commit as one "such as none in the worlds committed before."¹⁷⁰ Words with the root *f-h-sh* in Arabic repeatedly indicate some of the worst sins in the Qur'an broadly including the terms *fahisha*, *fawahish*, and *fahsha* for instance.¹⁷¹ To truly understand their import, one must appreciate their use in other places in the Qur'an. IZUTSU conducts a semantic analysis of the word *fahisha* and other synonymous words, notably *su* and the related *saw'*.¹⁷² He finds both verses that describe the word as a general sin and verses that specifically tie it to illicit sexual transgressions. In one sense, *fahisha*, then, exists as a generic filler term for a grave sin characterized by egoism and immorality where the context becomes crucial to deciphering its specific manifestation. Often, the specific manifestation is some form of unspecified sexual transgression.

As a general sin, *fahisha* appears to be the antithesis of generosity, signifying instead selfishness. IZUTSU notes that *fahsha* and Satan often appear together.¹⁷³ One such verse is 2:268 which juxtaposes God's promise of generosity with Satan's call for *fahsha*.¹⁷⁴ Another, 16:90, pits *fahsha* in

168 As indicated in the previous section, procedure is a critical background because "substantive law is neither a procedural nor trans-procedural, but rather is constructed with a specific procedural apparatus in mind to vindicate the rights created or the responsibilities assigned by that substantive law." MAIN, *supra* note 123 at 288.

169 See *e.g. Id.* at 7:80 (commentary).

170 See *e.g. Id.* at 7:80 & 29:28.

171 See DEVIN J. STEWART, *Sex and Sexuality*, in: ENCYCLOPEDIA OF THE QUR'AN (Jane McAuliffe ed., 2017) (ebook).

172 IZUTSU, *supra* note 150.

173 See IZUTSU, *supra* note 150, at 234.

174 See *The Qur'an*, *supra* note 10, at 2:268.

opposition to “justice (*‘adl*) and kindness (*ihsan*) and giving to kinsfolk” and on par with *munkar* (things that are disapproved) and *baghy* (insolence).¹⁷⁵ Echoing this reading, referring further to verses such as 3:135, 7:28, and 17:32, the scholars BUCAR and SHIRAZI find that in its “broadest semantic meaning,” *fahisha* connotes “strongly condemned immoral behavior that is pursued for egoistic goals.”¹⁷⁶ The emphasis is on the aggressive pursuit of an object, whether that be sex, food, wealth, or power, without caring or thinking of others involved. In the narrative of Lot, the people pursue their lust in “drunkenness,” indicating a complete lack of self-control.¹⁷⁷ The scholars BUCAR and SHIRAZI stress, “[t]he defining characteristic of *fahisha* is that these ends are pursued [...] to such an extent that an individual forgets her duties to family, friends, community and most importantly, to God.”¹⁷⁸ *Fahisha*, also, has a uniquely theological dimension. In several instances, rather than using the term *fahisha*, the Qur’an refers to the sin of the people of Lot as criminalizing “purity”.¹⁷⁹ The people even seem to create a rule against purity, shunning and condemning Lot for it.¹⁸⁰ The word for purity in this context is *tatahhara*, a term that has a strong link to prayer and ablution (appearing in 2:222 and 9:109) with disbelievers classified as “impure” (as in 9:28 and 9:95).¹⁸¹ *Fahisha*, read in light of *tatahhara*, implies that one of the worst crimes that the people committed was denying Lot and his family the freedom to practice Islam by outlawing it. Another indication of what *fahisha* means comes with the concept of “corruption.” In response to the mocking of his people and their denial to conform to God’s laws, Lot asks, “[m]y Lord,

175 See *The Qur’an*, *supra* note 10, at 16:90.

176 See ELIZABETH M. BUCAR/FAEGHEH SHIRAZI, *The “Invention” of Lesbian Acts in Iran: Interpretive Moves, Hidden Assumptions, and Emerging Categories of Sexuality*, 16 J. OF LESBIAN STUDIES 416, at 424 (2012). See also *The Qur’an*, *supra* note 1, at 3:135, 7:28 & 17:32.

177 See *The Qur’an*, *supra* note 10, at 15:72.

178 BUCAR/SHIRAZI, *supra* note 176, at 425.

179 This paper addresses the concept of “purity” only in so far as it relates to law (since a part of Islamic law involves furthering and maintaining the religion itself) and does not go deeply into theology.

180 The people of Lot indicate the existence of such a rule for instance when they say to Lot as he protects the envoys of God from their abuse “[d]id we not forbid you from [providing protection] to all the people?” See *e.g.* *The Qur’an*, *supra* note 1, at 15:70; see also *Id.* at 7:82 & 27:56 (the people of Lot order, “[e]xpel them [Lot and his family] from your town! Truly they are a people who keep themselves pure”).

181 See *e.g. Id.* at 2:222, 9:28, 9:95 & 9:109.

help me against the people who work corruption.”¹⁸² Corruption has multiple potential meanings in this context. It can indicate physical violence, but also encompass a deeper spiritual degradation.¹⁸³ One of the core principles to draw from such an account is that Islamic law embodies a quest for purity and faith and a denial of selfishness. Another word *fahisha* shares a lot in common with is the word *su* and the related *saw’* in the Qur’an, including within the narrative of Lot such that IZUTSU declares the two terms “synonymous.”¹⁸⁴ Like *fahisha*, *saw’* indicates general immorality. The people of Lot are termed “*qawm saw’*” (an evil people). The same term is, “[o]n a level, which is more properly religious...used in reference to Noah’s folk, the evidence of their evilness being, this time, the *takdhib*” (lying).¹⁸⁵ In fact, the eventual punishment of the people of Lot was *matar al-saw’* (an evil rain).¹⁸⁶ Here, *saw’* or *su* has a “subjective aspect” and “most generally [...] means anything felt as being displeasing, disagreeable, or abominable, anything that arouses aversion.”¹⁸⁷ *Fahisha*, then, often generally refers to abominations, but particularly those involving greed, that cause a person to forget and disregard their duty to others and to God in pursuit of hedonistic ends.¹⁸⁸

Despite this general meaning, in certain contexts, *fahisha* and *su* take on a decidedly sexual tint. One example is the verse 2:168 which speaks of the Prophet Joseph resisting the wife of the Pharaoh and her sexual desires for him because he knew the wrongs of “*su* and *fahsha*.”¹⁸⁹ Other verses are

182 *Id.* at 29:30.

183 *Id.* (commentary).

184 IZUTSU, *supra* note 150, at 233. One key verse that connects the two is *The Qur’an*, *supra* note 1, at 2:168 which orders, “follow not the footsteps of Satan; he is a manifest foe to you. He enjoins upon you naught but *su* and *fahsha*.”

185 *Id.* at 230.

186 *Id.* at 231. See *The Qur’an*, *supra* note 10, at 26:173.

187 IZUTSU, *supra* note 150, at 232.

188 As I will explain later, this general message of the law informs the lawmaker that he/she must create laws to prevent egoism and religious persecution (that makes prayer difficult) in modern day society. The specifics of the law, though, will depend on the context and circumstance. As long as their aim is to achieve this end goal, though, they remain Islamic laws.

189 Izutsu quotes the verse of the Qur’an “she desired him passionately and he would have desired her too, had it not been that he saw a proof of his Lord. Thus did We turn away from him *su* and *fahsha*.” *The Qur’an*, *supra* note 10, at 12:24. With this citation, he claims,

4:22 and 4:24 that refer to unlawful intercourse in an illegal marriage as *fahisha*.¹⁹⁰ The term also appears in relation to adultery and *zina* in verse 17:23.¹⁹¹ Stewart notes, “[i]llicit sex or sexual infractions are termed *fāḥisha* (3:135; 4:15, 19, 22, 25; 7:28, 80; 17:32; 24:19; 27:54; 29:28; 33:30; 65:1), pl. *fawāḥish* (6:151; 7:33; 42:37; 53:32), usually referring to specific instances of adultery, fornication, or other sexual offenses, or the collective term *al-fahshā*’ (2:169, 268; 7:28; 12:24; 16:90; 24:21; 29:45).”¹⁹² *Fahisha* exists in all these instances in opposition to “licit sex” referred to as *nikah*.¹⁹³ The related *su’* and *saw’* too often imply specifically “unchastity or sexual license.”¹⁹⁴ The term *fahisha*, then, is complex and indicates some form of sexual transgression, but one that differs from context to context. In referring to *fahisha* in the story of Lot, God appears to punish some form of sexual transgression that is a specific manifestation of egoistic immorality.

Traditionally, scholars have read *fahisha* narrowly to denote ‘fornication’ so that some articulate a ‘consensus’ on the definition of the term.¹⁹⁵ One key scholar is AL-TABARI (224 – 310 AH) who treats *fahisha* like a placeholder, defining it simply as homosexuality.¹⁹⁶ Other scholars, though, connect the term to sexual transgression broadly, ranging from adultery to premarital intercourse. The early Islamic scholar AL-RAZI (1149 – 1209) summarizes, referring to *fahisha* in 4:15, “[y]ou say that someone commits *fahisha* when they do a terribly lewd act in speech or action...the meaning of *fahisha*...is fornication.”¹⁹⁷ Both the salafi AL-RIDA and the Shi’i scholar Ayatollah KHUI echo this understanding, noting that, “[t]he word *al-fahisha* (lewdness) means an act that is excessively evil and abominable. This applies to the act [sexual intercourse] when it occurs between two women, which is tribadism (*sihaq*); and between two men, which is sodomy (*liwat*); and

“[h]ere it is contextually clear that the expression, *su* and *fahsha*, means fornication.”
Supra note 150, at 233.

190 See *The Qur’an*, *supra* note 10, at 4:22 & 4:24.

191 *Id.* at 17:23.

192 See STEWART, *supra* note 171.

193 *Id.* See also BUCAR/SHIRAZI, *supra* note 176, at 422 (arguing that “[i]n general, Islam views human sexuality as positive: it both acknowledges sex as a human need and as potentially embodying virtues such as kindness, reciprocity, and generosity”).

194 IZUTSU, *supra* note 150, at 230.

195 See SCOTT SIRAJ AL-HAQQ KUGLE, *Strange bedfellows: Qur’an interpretation regarding same-sex female intercourse*, 22 THEOLOGY AND SEXUALITY 9, at 19 (2017).

196 BUCAR/SHIRAZI, *supra* note 176, at 424.

197 See KUGLE, *supra* note 195, at 19.

between a man and a woman, which is fornication (*zina*).¹⁹⁸ Other scholars like QUTB also treat it as some form of “sexual perversion.”¹⁹⁹ Taking for granted that homosexuality is the illegal act mentioned in the narrative, QUTB notes that unlike all other narratives, that of Lot does not directly refer to God’s oneness (which he argues is the critical message of all the other narratives).²⁰⁰ Rather, here, God proscribes this perversion because it is unnatural. This is so because God wills that humanity survive and this can only occur if reproduction is possible (which it is not in homosexuality).²⁰¹ Jurists interpret other words like *tatahharra* similarly as relating to the sexual practices of the people of Lot. In this case, Lot’s espousal of purity implies his refusal to take part in sexual transgressions.²⁰² Scholars, then, interpret broad terms used in the text as explicit indicators of homosexuality.

Reading the word in its textual context, though, reveals more than one potential interpretation of the specific act proscribed. Analysis of this act centers on the scene where the reader-listener has an opportunity to learn the particular nature of the misconduct when he or she actively watches as the people of Lot plan to commit the sin upon the arrival of the envoys/angels/messengers of God.²⁰³ In the guise of young boys, the envoys provoked a desire in the people of Lot that the people looked to satisfy despite clear indications that the boys did not consent to engage in sexual activity. One reading of this crime is that it was non-consensual forceful sexual intercourse, particularly with unsuspecting passers-by, often young boys, out of a voracious lust, that the people sought.²⁰⁴ The punishment was harsh because several aggravating factors were present. Certain words emphasize the violent nature of the act. The Qur’an states,

198 *Id.* at 13.

199 SAYYID QUTB, In *The Shade of the Qur’an (Fi Zilal al-Qur’an)* Vol. 6 141 (Adil Salahi trans. 2002).

200 *Id.*

201 *Id.* Note, however, that this is no longer much of a concern even if it is a valid rationale for God’s message in the narrative of Lot. Science, the prevalence of egg and sperm donors, the possibility of using surrogates all negate that at least today the only way the human race can survive is if heterosexual couples reproduce.

202 See e.g. *The Qur’an*, *supra* note 10, at 7:82 (commentary).

203 See *Id.* at 11:77, 29:33, & 15:61.

204 This is the reading closely aligned with contemporary scholar Kugle who argues that the narrative is “a critique of male sexuality driven by aggression and the urge to subjugate others by force, not of male homosexuality.” BUCAR/SHIRAZI, *supra* note 176, at 424.

“[h]e [Lot] said, ‘Would that I had strength [to resist] you or could seek refuge in some mighty support!’”²⁰⁵ Here, Lot expressed his physical powerlessness to defend the boys. The Qur’an also notes, “[w]hen Our messengers came to Lot, he was distressed on their account, and felt himself powerless concerning them. And he said, ‘This is a terrible day!’”²⁰⁶ Lot’s fear was a product of the violence he expected the people to use against the envoys. Lot and the young boys cannot resist when a mob of men push them to submit. Other scholars, though, find a different crime here. They argue that it is not rape, but rather homosexuality that the Qur’an refers to when it talks of gross “indecentcy.”²⁰⁷ To make this argument, they point to several verses. First, these scholars note how Lot offered up his “daughters” in place of the envoys to the men to satisfy their lust.²⁰⁸ Lacking any indication that his daughters consented to the act, this should still qualify as rape. Yet, something makes sexual intercourse with the women “purer” and with the men wrong.²⁰⁹ A counterargument, though, emphasizes Lot’s subsequent words, “[s]o reverence God, and disgrace me not with regard to my guests.”²¹⁰ This suggests that the only reason that Lot offered up his daughters was because those who the people would harm were “guests” and he sought a diversion to delay the people from reaching them. In fact, the “guests” were God’s envoys and individuals should sacrifice their bodily integrity if it is for God. Such a reading likens Lot’s sacrifice of his daughters to Abraham’s sacrifice of his son, an act that never truly occurs out of God’s grace,²¹¹ but that shows believers the utter devotion to God that He

205 *The Qur’an*, *supra* note 10, at 11:80.

206 *Id.* at 11:77.

207 MOBEEN VAID, for instance, delivers a scathing critique of KUGLE when he notes, “Kugle objects to al-Ṭabari’s glossing of the iniquity (*fāhisha*) in question as “coming with desire unto men instead of women.” Instead, he urges his reader to understand the term *fāhisha* in its most generic and etymologically literal sense, devoid of the very context in which it is found. A full reading of Q. (al-A’rāf) 7:80 – 81, however, shows Lot accusing his people of committing an unprecedented indecentcy, one which is identified in the very next verse of the Qur’an itself as “coming with desire unto men instead of women.” See MOBEEN VAID, *Can Islam Accommodate Homosexual Acts? Qur’anic Revisionism and the Case of Scott Kugle*, 34 AMERICAN J. OF ISLAMIC SOCIAL SCIENCES 45, at 61 (2017).

208 See e.g. *The Qur’an*, *supra* note 10, at 11:78 & 15:71.

209 *Id.*

210 *Id.* at 11:78 & 15:68 – 69.

211 *Id.* at 37:102.

expects. “daughters” might also refer to the women who are wives of the men, encouraging them to fulfil their sexual desires through the lawful act of marriage.²¹² In other places too it appears that the men had spouses and it was their desire for intercourse outside of marriage that was a cause for concern and less so their desire for men in particular.²¹³ Lot asked the people, “[a]mong all creatures do you come unto males, leaving your spouses your Lord created for you?”²¹⁴ To counter this, though, scholars often point to yet another verse that seems to explicitly concern itself with outlawing homosexual conduct, where Lot told the people, “[v]erily you come with desire unto men instead of women. Indeed you are a prodigal people!”²¹⁵ Reading this verse in context, though, may still indicate that the true sin was “prodigality,” transgressing beyond a particular limit so as to be “excessive and wasteful,” and the differentiation between desiring men as opposed to women was specific to the rape the people of Lot committed since they only appeared to rape men.²¹⁶ Alternatively, the Qur’an might be attacking the problem of pederasty and not homosexuality here. Those reading the crime as homosexuality often point to yet another verse where Lot repeated the sin of the people in shock, claiming “[w]hat! Do you come unto men, cut off their way, and commit reprehensible deeds in your gatherings?”²¹⁷ These scholars treat “cut off their way” as a metaphor where the people of Lot “cut off their way” to have offspring since they did not engage in intercourse with women.²¹⁸ Others, though, argue that it literally means cutting off a traveller’s way to rape them as the people of Lot did when they arrived at Prophet Lot’s home searching for God’s envoys.²¹⁹ The main crime proscribed, then, remains subject to debate.

A literary reading argues that these attempts, to parse out what the specific proscribed act is, are needless. In fact, whatever the conclusion, the jurist will never be certain since the verse simply is not perspicuous. In fact, in leaving the specific prohibited act unclear, the Qur’an intentionally creates

212 *Id.* at 11:78 (commentary).

213 *Id.* at 26:165 – 66.

214 *Id.* at 26:165 – 66.

215 *Id.* at 7:81 & 27:55.

216 *Id.* at 7:81 (commentary).

217 *Id.* at 29:29.

218 *Id.* (commentary).

219 *Id.*

ambiguity. Had the Lawgiver wished He could have prohibited homosexuality directly.²²⁰ Making the act even more elusive, the transgressors included both men and women even though women cannot commit homosexual acts. In particular, they included Lot's wife who appears to commit no illegal overt act. God assured Abraham and later Lot, "assuredly We shall save him [Lot] and his family, save for his wife; she is among those who lagged behind."²²¹ God repeats this for emphasis every time the Qur'an tells the narrative of Lot.²²² Each time, the woman's misconduct remains a mystery.²²³ All that is certain is that it falls within the general framework and spirit of *fahisha*. Using the catch-all of "those who lagged behind," then, the Qur'an expands the reach of the law. Later, once God makes His judgment on the fate of the people of Lot, the Qur'an describes the people ambiguously simply as "wrongdoers"²²⁴ and directs punishment at them "for having been iniquitous," denoting a general disobedient character.²²⁵ The people were likewise simply "guilty" or "prodigal."²²⁶ The crime, thereby, remains obscure.

What the reader-listener can determine from use of the term *fahisha*, though, is that the law bans an egotistical immorality and impurity that may be some form of sexual deviance and disobedience. In this case, informed about the spirit of the law, the jurist can make specific laws that proscribe "sexual immorality" and uphold purity of faith taking into account the morals and

220 I draw this inference because had the Lawgiver wished He could have perspicuously outlawed homosexuality in a provision similar to *The Qur'an*, *supra* note 10, at 5:3's prohibition on, for instance, eating pork.

221 *Id.* at 29:32 & 11:81.

222 In some verses, the Qur'an describes her as "an old woman." *Id.* at 7:83, 15:60, 26:171, 29:33, & 37:135.

223 There are several potential reasons for the consistent inclusion of Lot's wife among the ranks of the damned. One message for believers might be that they cannot save family members who sin. Another message, specifically directed at hypocrites, would emphasize that God, in fact, knows those who disbelieve and will not protect them even as they act and stand close to believers. Alternatively, the inclusion of women may indicate that committing a forbidden act itself is not simply problematic, but also complicity or aiding and abetting the occurrence of such an act is. It could even suggest that homosexuality, not simply among men, but also among women, is forbidden. Regardless, though, the Qur'an is not definitive on any theory. Echoing the broader principle of equality of men and women before the law, it indicates some broader idea of *fahisha* as punishable.

224 See *The Qur'an*, *supra* note 10, at 29:31.

225 *Id.* at 29:34.

226 *Id.* at 7:81, 7:84, & 15:58.

norms of modern-day society. Any laws that are made, moreover, must accord with the general principles appearing in the narrative.²²⁷ In particular, the principles of equality and non-discrimination are informative. In the context of proscribing homosexuality, the maxim against punishing private consensual acts as opposed to violent public ones also becomes key.²²⁸ Considering this, the *mujtahid* can create several laws from the concept of *fahisha*.²²⁹ For example, *sharia* can and still should proscribe rape, sexual assault and any non-consensual sexual acts including of children and young boys, not simply by men, but also by and against women, particularly those committed in public and by groups. These acts resemble those committed by the people of Lot that the Qur'an labels *fahisha*. They are all selfish acts of sexual immorality that people pursue without regard to their effects on others. *Sharia* can also forbid discrimination against Muslims on the basis of their religion and any laws that render the rules of *ibadah* difficult to follow such as forcing Muslims to work on Friday during prayer times. This addresses the problem of purity and recognizes the religious nature of divine law. However, considering the ambiguity in the text, the principle of equality and privacy, and changing beliefs around homosexuality, the state should not proscribe homosexuality. Such a prohibition is not only unwarranted but may also be harmful for Islam, its followers, and the perception of Islamic law in the wider global community. In fact, since marriage is critical to establishing licit sex in Islam, the lawmaker can legalize same-sex marriage, declining to discriminate against people on the basis of their sexual orientation.²³⁰

227 See the previous section on *General Principles of the Law*.

228 An argument that echoes the one made to decriminalize homosexuality in *Lawrence*, 539 U.S. at 558. In fact, looking at its use in other verses (particularly 4:15), MIR-HOSSEINI argues that *fahisha* itself denotes a "public" immoral sexual act and not a "private" one, including prostitution or gang rapes not intercourse at home. See ZIBA MIR-HOSSEINI, *Criminalizing Sexuality: Zina Laws as Violence against Women in Muslim Contexts*, 16 J. OF LESBIAN STUDIES 416, at 422 (2012).

229 This paper suggests some, but this is not an exhaustive list and several other acts could fall within the rubric of *fahisha* that a lawmaker may choose to proscribe.

230 See generally JUNAID JAHANGIR/HUSSEIN ABDULLATIF, *Same-sex unions in Islam*, 24 THEOLOGY & SEXUALITY 157 (2018) (arguing that same-sex marriage is permissible in Islam) (citing verses 30:21 and 7:189 to illustrate that the purpose of marriage is for souls to find tenderness and peace within each other not solely procreation to argue that Islam is compatible with and favors same-sex marriage).

On a final note, as previously indicated, most scholars hold the death penalty to be a just punishment for *fahisha*. To justify this, they cite the harsh punishment God subjected the people of Lot to. While this paper has presented many ways the law is steeped in ambiguity, the penalty for the sin was a severe one. In 29:34, the Qur'an describes the punishment as "a torment from Heaven."²³¹ QUTB indicates of these scenes that "[t]hey all emphasize that God's law always operates, and His promises and warnings always come true."²³² However, what exactly the severest punishment is or should be remains ambiguous. QUTB speculates that it might have been a volcanic eruption, but he underscores that, "[a]ll we can say is that this might have happened, but we do not know for certain."²³³ While the Qur'an details several specifics, it leaves much of the punishment up to the imaginations of the reader-listener.²³⁴ What is clear, though, is the

231 *The Qur'an*, *supra* note 10, at 29:34. The use of the present tense to do this has a terrifying effect in that it speaks directly to the audience of what is to come should they disobey the commands of God. While other *suras* and *ayahs* specify the punishment, the use of the broad "torment" appeals to the reader-listener's imagination to actively construct their sense of a high level of physical and/or mental suffering, something the reader-listener believes might be proportional to the worst of evils committed by the people of Lot.

232 QUTB, *supra* note 53, at 356.

233 QUTB, *supra* note 147, at 282.

234 In describing the punishment, *The Qur'an*, *supra* note 10, at 7:84, references an unknown "rain," noting "[a]nd We sent down a rain upon them; so, behold how the guilty fared in the end." The text also paints a powerful image of stones raining down and burning people, destroying the tallest buildings. *Id.* at 11:82 & 15:74 ("[s]o when Our Command came, We made its uppermost to be its lowermost, and We rained down upon them stones of baked clay, one upon another"). This leaves the reader with an image without elaborating on details of where the rain came from, leaving him or her to visualize the worst. The Qur'an also details the visual and aural aspects of the punishment in such a way that it amplifies the severity of the punishment without revealing all of its details. The Qur'an describes "the Cry" that "seized them at sunrise." *Id.* at 15:74. What renders the Cry even more damning is *sura* 54 which indicates that it was the only sound the blinded people of Lot heard at the end with the refrain "So taste My punishment and My warning," adding a further element of fear. *See Id.* at 54:37 – 39 ([a]nd indeed he had warned them of Our assault, but they disputed the warnings. They had sought to lure him from his guests; so, We blotted out their eyes. So, taste My Punishment and My warnings! And indeed, an enduring punishment greeted them early in the morning So taste My Punishment and My warnings!"). These descriptions engender in the reader-listener a fear of disobeying God and His law. At the end, though, the exact causes, circumstances and contours of the punishment remain unclear.

general principle of proportionality. The lawmaker can determine the specific sanction taking this principle into account and his or her context.²³⁵

V. Conclusion

In this manner, a literary reading of the Qur'an can inform legal exegesis and guide the lawmaker in deriving and implementing *fiqh*. This paper has applied Abu Zayd's theory of interpretation to the narrative of Prophet Lot and the context of homosexuality. It found that a literary interpretation can reveal general principles of the law, the spirit of the law and ambiguities in the text. Lawmakers can use this knowledge to adapt *fiqh* to the modern context, granting the law the necessary flexibility to do justice without sacrificing its fundamental aims as explicated in the Qur'an. While this approach is promising, especially in an effort to decriminalize homosexuality and legalize same-sex marriage, this paper is only an initial attempt to implement this novel approach to *usul al-fiqh*. Moving forward, scholars should explore the relationship between the legal and the literary more, particularly those who are well-versed in Arabic literature and linguistics and the historical context of pre-Islamic Arabia.

²³⁵ For a detailed description, see footnote 75 of this paper.

