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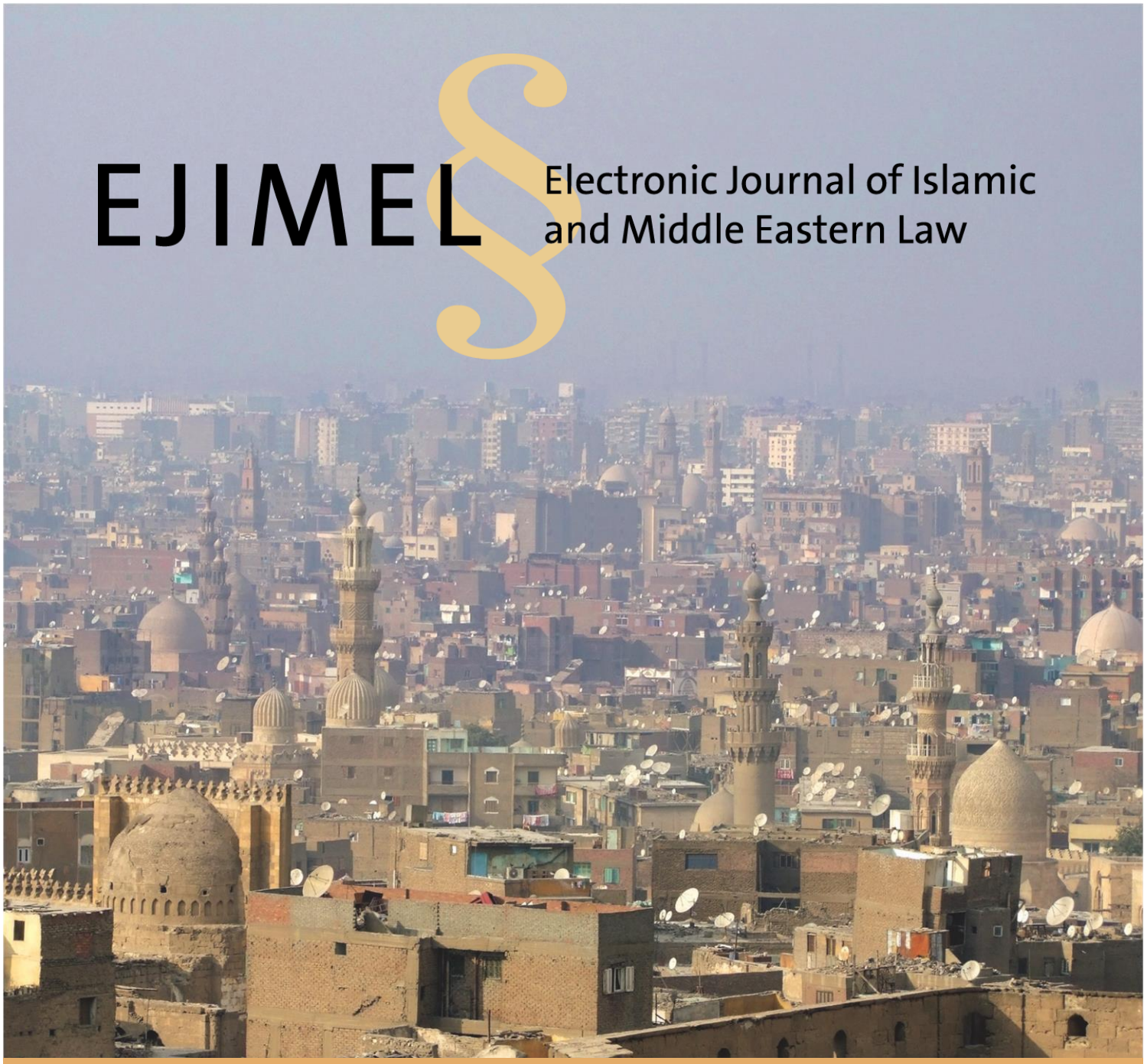

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The Legal Status of Children Born out of Wedlock in Morocco

*by Eva Schlumpf**

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Abstract

According to a study made by the Moroccan NGO Insaf (Institution Nationale de Solidarité avec les Femmes en détresse), 27'199 women gave birth to 45'424 children without being married in Morocco in 2009.[1] Every single day, 153 children of unknown paternity were born, of which 24 were abandoned.[2] Not as high but just as alarming numbers of the year 2008 were published in a report by UNICEF and the Ligue Marocaine pour la Protection de l'Enfance in 2010.[3] And the rising number of court cases dealing with the issue of abandoned children (5'274 cases in 2009 and 5'377 cases in 2013) indicates that it remains a matter of concern.[4] In 1990 Morocco has signed the UN Convention on the Rights of the Child (CRC). This was a first big improvement for the rights of the Moroccan children and their mothers in general. In 2004 the family code of Morocco's Personal Status law – the Moudawana – was reformed. Concerning the children's rights, the commitment to the CRC directly influenced the reform of the family code. The various amendments of the Moroccan law in the past thirty years have significantly improved the

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1 Available at http://www.lavieeco.com/news/societe/4-des-femmes-qui-accouchent-sont-des-meres-celibataires-19591.html, last accessed 5 September 2015.

2 Available at http://www.lavieeco.com/news/societe/4-des-femmes-qui-accouchent-sont-des-meres-celibataires-19591.html; http://www.lavieeco.com/news/actualites/association-insaf-24-bebes-abandonnes-par-jour-au-maroc-23401.html, both last accessed 5 September 2015.

3 Available at http://www.unicef.org/adolescence/morocco_55422.html, last accessed 5 September 2015.

4 Available at http://www.infosoir.com/actualite/1266-maroc-15-cas-d-enfants-abandonnes-chaque-jour.html, last accessed 5 September 2015.

legal situation. However, the issue of illegitimate and abandoned children remains worrisome as it is not merely a legal but more a social and cultural problem deeply rooted in the Moroccan society.

I. Introduction

Orphan(s) of Islam – this is the title of two books I have read in the past year, which are very unequal yet similar.[5] The first one is a novel by ALEXANDER KHAN, telling the true story of the three-year-old Mohammed, born in England to an English mother and a Pakistani father, who is, together with his younger sister, taken away from the secular mother and brought to Pakistan by his father and his family in order to become a good Muslim.

The second book by Jamila Bargach is more technical but not less devastating. It is an ethnography portraying the lives of abandoned children, whether they are street children, orphans or children born out of wedlock in Morocco. The book contains facts and figures, interviews with illegitimate children, adoptive parents, social workers and explains the social, historical, political and legal background of this issue in Morocco.

Despite the differences, overall the two books approach the same issue and I became aware that it is a subject of great significance within Islamic societies, however also highly complex. One must understand the historical and cultural background of the issue. I also learned that in Islam an orphan is not necessarily a child who has neither mother nor father. The orphan in Islam describes a child whose father has died before it has reached maturity, or a child deprived of parental care and lacking support from both or either parent (who might still be alive).[6] However, most of the time it refers to a child who does not have a known father, or paternity to a known father cannot be established and therefore a child is illegitimate. Islamic law knows two categories of children: legitimate and illegitimate children. Only children born to a married couple can be legitimate, whereas children born out of wedlock are not legally recognized, as extramarital sexual intercourse is considered a sin and is a criminal offence, also under the Moroccan Penal Code. These children have no legal status and belong to the most socially marginalized people not only in Morocco but in all MENA (Middle Eastern and North African) states.[7] In this paper I will examine the situation of children born out of wedlock in Morocco.

[5] KHAN ALEXANDER, Orphan of Islam, London 2012; BARGACH JAMILA, Orphans of Islam: Family, Abandonment and secret Adoption in Morocco, Lanham/Boulder/New York/Oxford 2002.

[6] ARSHAD RAFFIA, Islamic Family Law, London 2010, at 171, M.9.2; TUCKER JUDITH E., Women, Family, and Gender in Islamic Law, New York 2008, at 156.

[7] WILLMAN BORDAT STEPHANIE/KOUZZI SAIDA, Legal Empowerment of Unwed Mothers: Experiences of Moroccan NGOs, Legal Empowerment Working Papers, Paper No. 14, Rome 2010, available at: http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id=138103, last accessed 27 September 2015, at 1.

II. A historical summary of the Moroccan family law

1. Up to 1993

The Kingdom of Morocco became independent in 1956.[8] Only one year later Morocco's first Personal Status Law, the '*Moudawana*', was established and came into force in 1958.[9] For the young Kingdom it was an important symbol of unity and modernity. However, the *Moudawana* was in fact not able to really reform the law in Morocco, as it was more a reinterpretation and simple codification or even transcription of the classical Islamic Mālikī family law.[10] The patriarchal beliefs remained and the *Moudawana* clearly reiterated the inferior position of women, for example that a woman always needed a male guardian or the approval of their matrimonial guardian, the '*walī*', to get married.[11] The lasting influence of the classical Mālikī School can still be seen today in art. 400 *Moudawana,* where it is ruled that for all issues not regulated in the present *Moudawana* the opinion of the Mālikī School should be drawn upon to resolve the problem.[12] The unequal treatment of women in the first *Moudawana* existed for many years and was ignored by society and the government despite the constitution, which was voted for in 1962, and which stipulated equal political rights for males and females.[13] Moreover, no national codification concerning abandoned children existed then. Only in 1962 the general secretary of the government signed a circular addressed to all local governors, elevating this issue to national significance.[14] It was a first small step by the state towards the official awareness of the situation of abandoned children. The circular clearly distinguished between adoption, which is prohibited, and '*kafala*', the legal guardianship, which is considered a charitable and humanitarian act without any effects of filiation such as taking the name of the parents.[15] In 1983 the Ministry of Interior Affairs issued a similar circular also describing the procedure of taking *kafala.* However, an official national law still did not exist.[16]

[8] WEINGARTNER LAURA A., Family Law & Reform in Morocco – The Mudawana: Modernist Islam and Women's Rights in the Code of Personal Status, in: Baderin Mashood A. (Ed.), Islamic Law in Practice, Volume III, Surrey/Burlington 2014, 199-225, at 202.

[9] ENNAJI MOHA, The New Muslim Personal Status Law in Morocco: Context, Proponents, adversaries and Arguments, New Brunswick/Fes 2004, at 11; HARRAK FATIMA, The History and Significance of the New Moroccan Family Code, Working Paper No. 09-002, Institute for the Study of Islamic Thought in Africa (ISITA), Working Paper Series, Evanston 2009, at 2.

[10] CHARRAD MOUNIRA M., Family Law Reforms in the Arab World: Tunisia and Morocco, Report for the United Nations, Austin 2012, 7; ENNAJI, *supra* n. 9, at 2; GUESSOUS NOUZHA, Women's rights in Muslim societies: Lessons from the Moroccan experience, in: Philosophy and Social Criticism 38(4-5), Boston 2012, 525 – 533, at 527; POUPART ANDRÉ, Adaptation et immutabilité en droit musulman, L'expérience marocain, Paris 2010, at 137.

[11] CHARRAD, *supra* n. 10, at 11; ENNAJI, *supra* n. 9, at 2; POUPART, *supra* n. 10, at 138.

[12] Also indicated by HARRAK, *supra* n. 9, at 2 and a reference in the preamble of the *Moudawana* can be found. Dahir N° 1-04-22 du 12 Hija 1424 (3 Fevrier 2004) portant promulgation de la Loi N° 70-03 portant Code De La Famille (*Moudawana*), an unofficial English translation of the original Arabic text is available at: http://www.hrea.org/moudawana.html, last accessed 27 September 2015.

[13] POUPART, *supra* n. 10, at 138; WEINGARTNER, *supra* n. 8, at 202.

[14] BARGACH, *supra* n. 5, at 41.

[15] BARGACH, *supra* n. 5, at 42.

[16] BARGACH, *supra* n. 5, at 42 f.

2. Reform in 1993

For almost forty years, the Personal Status Law in Morocco remained untouched. However, Morocco's women were not inactive and feminist movements started to organize themselves.[17] In 1990, the Union de l'action feminine (UAF) launched a petition and collected one million signatures calling for an amendment of the *Moudawana*.[18] But the opposition was strong and in the end only minor chances were made.[19] Along with these small amendments to the *Moudawana*, the Parliament also for the first time ratified a bill concerning abandoned children.[20] This was a major improvement since this issue, previously ignored, was finally given official and legal recognition. On the other hand, the new law contained many weaknesses. People involved with abandoned children, such as social workers, claim that the situation even worsened. Prior to the new law, women who wanted to abandon their child could go to a hospital and, after an interview with a social worker clarifying her intention to abandon her child, she could officially abandon the child by signing an official paper.[21] With the new law, every case had to be reported to the police and a criminal procedure was initiated for both adultery and abandonment, which are criminal offences under the Moroccan Penal Code.[22] In light of this new rule, it was not surprising that the number of secret abandonments in public spaces or secret adoptions increased.[23] Despite these various, but minor changes in the legislation, the feminist movement could not yet reach their goals to improve the rights of women and children. However, awareness of the issue was raised.

3. Reform in 2004

In the aftermath of these first initiatives in the early 1990s, things continued to progress. Human rights groups and women activist groups grew stronger and bigger. Also, King Hassan II was aware of the human rights situation in his country and the image projected to the rest of the world, which is why he supported the new government.[24] In 1998, the new government initiated a 'Plan d'Action' as a proposal to improve the status of women in Morocco.[25] Due to massive resistance from Islamists and traditionalists, the plan however was doomed to failure. With the death of King Hassan II in 1999, and the accession of his son Mohammad VI to the throne, hopes for reform were raised again.[26] The new leader pushed for changes to modernize

[17] POUPART, *supra* n. 10, at 138; WALTZ SUSAN/BENSTEAD LINDSAY, When the Time is Ripe: The Struggle to Create an Institutional Culture of Human Rights in Morocco, in: Chase Anthony/Hamzawy Amr (Eds.), Human Rights in the Arab World, Independent Voices, Philadephia 2006, 174 – 195, at 181.

[18] BARGACH, *supra* n. 5, at 67 f.; ENNAJI, *supra* n. 9, at 23; HARRAK, *supra* n. 9, at 2; POUPART, *supra* n. 10, at 138; SALIME ZAKIA, Between feminism and Islam: Human Rights and Sharia Law in Morocco, Minneapolis/London 2011, at 24, 30 ff.; WALTZ/BENSTEAD, *supra* n. 17, at 183.

[19] POUPART, *supra* n. 10, at 139; SALIME, *supra* n. 18, at 46 f., 65; WALTZ/BENSTEAD, *supra* n. 17, at 184; WEINGARTNER, *supra* n. 8, at 203.

[20] BARGACH, *supra* n. 5, at 34.

[21] BARGACH, *supra* n. 5, at 37, 39, 113.

[22] Art. 490 f. and art. 459 ff. Code Pénal (Dahir N° 1-59-413 du 28 Joumada Ii 1382 (26 Novembre 1962) portant approbation du texte du Code Pénal); BARGACH, 37, 216.

[23] BARGACH, *supra* n. 5, at 37, 39 f.

[24] HARRAK, *supra* n. 9, at 3 f.; WALTZ/BENSTEAD, *supra* n. 17, at 176; WEINGARTNER, *supra* n. 8, at 202.

[25] EL HAJJAMI AÏCHA, The Religious Arguments in the Debate on the Reform of the Moroccan Family Code, in: Mir-Hosseini Ziba/Vogt Kari/Larsen Lena/Moe Christian (Eds.), Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition, London 2013, 81 – 105, at 81; HARRAK, *supra* n. 9, at 4; POUPART, *supra* n. 10, at 40; WALTZ/BENSTEAD, *supra* n. 17, at 184.

[26] HARRAK, *supra* n. 9, at 5; WALTZ/BENSTEAD, *supra* n. 17, at 184.

his kingdom, demonstrations organized by women's groups took place, and the King created a committee (unlike his father, even inviting three women to sit on the committee) to provide advice on reforming the *Moudawana*.[27] After two years of work but no substantial sign of change, people feared another failure. In the end, it ironically was a tragic incident relating to the Islamic faith that was the decisive factor for the success of the reform. In May 2003, Casablanca was hit by a suicide bomb attack committed by radical Islamists, killing 45 people and injuring nearly 200.[28] Populist Islamic groups lost popularity and political influence immediately, and the King seized the opportunity to announce that he was bringing forward a proposal for a new *Moudawana*.[29] Only ten months later, in January 2004, the Moroccan parliament passed the new family code.[30] The new *Moudawana* did not completely emancipate women but improved their situation significantly.[31] Furthermore, the new family law helped to change other statutes such as the Labor Code or the Nationality Code.[32]

The reform of the *Moudawana* in 2004 had long been awaited and was the achievement of a longstanding process involving different actors, with human rights groups and women's movements playing a key role. Today, Morocco's law is considered as one of the most progressive in the Arab world and, after Tunisia, considered to be the second most advanced country with regard to the equality of women and men.[33] It offers a much wider protection from abuse and discrimination for women and children than the former *Moudawana*.

III. Parent-Child relationship and the concept of *nasab*

The relationship between a child and its parents consists of different aspects. There is the emotional tie, the biological bond of sharing the same blood and genes and there is the legal relationship from which arise rights and obligations for both the parents and the child. The legal relationship is defined through the law and social values and bears direct consequences for the parents and the child concerning matters such as guardianship, maintenance, fosterage, custody, inheritance or parentage. Parentage is the key to all the other rights as only through the establishment of parentage can a child be legitimate and therefore be entitled to the other rights.[34] MONJID points out that Moroccan law distinguishes 'filiation parentale' ('*bounouwa*') from 'filiation paternelle' ('*nasab*') and that the sacred *nasab* can only be established for a legitimate child to his father, whereas *bounouwa* is established to both parents through their procreation of the child, whether it was legitimate or illegitimate (Art. 142 *Moudawana*).[35] The parentage to the mother is established through birth and consequently only to the natural

[27] EL HAJJAMI, *supra* n. 25, at 83; ENNAJI, *supra* n. 9, at 14; HARRAK, *supra* n. 9, at 5 f.; POUPART, *supra* n. 10, at 141; SALIME, *supra* n. 18, at 87 f.; WALTZ/BENSTEAD, *supra* n. 17, at 184 f.

[28] ENNAJI, *supra* n. 9, at 14; POUPART, *supra* n. 10, at 146; SALIME, *supra* n. 18, at 110; WALTZ/BENSTEAD, *supra* n. 17, at 185.

[29] SALIME, *supra* n. 18, at 115; WALTZ/BENSTEAD, *supra* n. 17, at 185.

[30] Instead of many EL HAJJAMI, *supra* n. 25, at 83; WEINGARTNER, *supra* n. 8, at 199.

[31] EL HAJJAMI AÏCHA, Le Code de la famille à l'épreuve de la pratique judiciaire: Enquête de terrain, Marrakech 2009, at 25.

[32] GUESSOUS, *supra* n. 10, at 530.

[33] CHARRAD, *supra* n. 10, at 2; WALTZ/BENSTEAD, *supra* n. 17, at 186.

[34] NASIR JAMAL J., The Islamic Law of Personal Status, Leiden/Boston 2009 (*cit.* NASIR, …), 145; NASIR JAMAL J.: The Status of Women under Islamic Law and Modern Islamic Legislation, Leiden/Boston 2009 (*cit.* NASIR, Status of Women, …), 169.

[35] FOBLETS MARIE-CLAIRE/CARLIER JEAN-YVES, Le Code Marocain de la Famille, Incidences au regard du droit international privé en Europe, Brussels 2005, at 75, 77; MONJID MARIAM, L'Islam et la modernité dans le droit de la famille au Maghreb, Paris 2013, at 146 f.

mother.[36] A mother cannot deny her child and, as art. 146 *Moudawana* states, filiation to the mother has the same effects whether the child was the result of a legitimate or illegitimate relationship. On the other hand, the parentage to the father ('filiation paternelle' or '*nasab*') can only be established for a legitimate child.

Nasab identifies the lineage of a person. It is a patronym (name of the father) or a series of patronyms, which is usually in the third position of one's name and is included to indicate the lineage.[37] This lineage tie between family members is deemed to be one of God's great gifts to his believers.[38] Lineage (or '*nasab*') indicates the parentage of a child and consequently the establishment of all legal rights and claims.[39]

BARGACH describes lineage-*nasab* as the backbone and most fundamental organizational principle of Muslim society.[40] Together with '*wasat*' (environment) and '*tarbiyah*' (education), the group of '*asl*' and '*nasab*' (roots and lineage) builds a triangle, which defines a Muslim person.[41] Only when a person has a certain background is he or she complete. This background is seen in a proper environment ('*wasat*') provided by the parents, family and neighborhood, in *tarbiyah* as a certain education, behavior and manner of a person and, last but not least, in *asl* and *nasab,* the blood lineage but also the social identity resulting from a point of geographic and cultural origin.[42] This triangle is deeply rooted in Islam, which is one explanation for the sacred status of blood.

The only means through which lineage-*nasab* can be established are blood (kinship) and marriage. Lineage-*nasab* is therefore passed through the male via blood and through the female via marriage.[43] *"And He it is Who hath created man from water, and hath appointed for him kindred by blood and kindred by marriage; for the Lord is ever Powerful"*.[44] This verse is often cited when explaining the concept of *nasab* and it strengthens the belief that *nasab* is a blessing and grace, a gift from God.[45] This gift was made in order to give structure and organization to human beings. The avoidance of an amoral and unnatural condition among mankind is the aim.[46] This means a legal union is absolutely essential to establish lineage-*nasab* and it can never originate from adultery. The latter is considered one of the greatest sins in Islam, because it is a mixing up of lineage-*nasab*.[47] It could lead to incestuous relations and would therefore result in the feared condition of personal and social immorality, chaos and even economic and financial dislocation.[48] The sacred status of blood is emphasized as it is even deemed to be a religious

[36] BÜCHLER ANDREA, Das islamische Familienrecht: Eine Annäherung, Bern 2003, at 57; NASIR, *supra* n. 34, at 146; NASIR, Status of Women, *supra* n. 34, at 169.
[37] ARSHAD, *supra* n. 6, at 176, M. 9.3.1.
[38] SONBOL AMIRA EL-AZHARY, Adoption in Islamic Society: A Historical Survey, in: Warnock Elizabeth (Ed.), Children in the Muslim Middle East, Austin 1995, 45–67, at 48.
[39] WELCHMANN LYNN, Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy, Amsterdam 2007, at 143.
[40] BARGACH, *supra* n. 5, at 56 f.
[41] BARGACH, *supra* n. 5, at 88.
[42] BARGACH, *supra* n. 5, at 85 – 91.
[43] BARGACH, *supra* n. 5, at 54, 56.
[44] Qur'ān 25:54 as translated in BARGACH, *supra* n. 5, at 56.
[45] BARGACH, *supra* n. 5, at 58.
[46] BARGACH, *supra* n. 5, at 58.
[47] BARGACH, *supra* n. 5, at 57 f.; SONBOL, *supra* n. 38, at 49.
[48] BARGACH, *supra* n. 5, at 58; SONBOL, *supra* n. 38, at 48 f.

duty of every Muslim to assure a clean and pure lineage-*nasab*.[49] But it is not only due to the fear of incest that it is important to acquire lineage-*nasab*. Having a lineage-*nasab* also means having a father and being legitimate and hence being entitled to all the fundamental rights of kinship such as care, guardianship, maintenance, education and, perhaps most importantly, inheritance.[50] Furthermore, the marriage impediments are established and a person is taken into the existing family accountability (*'hasab'*) when lineage-*nasab* is fixed.[51] These rights and kinship effects only arise through legal kinship to the father, i.e. being born in a legal union and therefore being legitimate and having a lineage-*nasab*. Biological paternity is not sufficient.[52] Art. 152 *Moudawana* enumerates the three alternatives to establish paternity as being the conjugal bed, acknowledgment or sexual intercourse by error. Yet, under no circumstances can filiation to a father be determined for an illegitimate child. This is clearly stated in art. 148 *Moudawana*: "*Illegitimate filiation to the father does not produce any of the effects of legitimate filiation.*"[53] Only the exceptions of acknowledgment by the father and evidence of witnesses offer two additional ways to establish paternity. Therefore, avoiding the illegitimacy of a child is most crucial in order to establish paternity. In today's Moroccan law, several methods are accepted to prove paternity.[54] These are: the conjugal bed, acknowledgement of the father, the testimony of two public notaries (*'adouls'*) or oral testimony, and all other legal means, including judicial expertise, particularly through a DNA test.[55] This last possibility, "all other legal means", was one of the reforms in the new Moroccan family code and, through the ability of courts to require an expertise, provided the courts with an important weapon to fight the illegitimacy of children.[56] However, the first three traditional methods have remained much more common and important, as the DNA test can only be imposed in certain circumstances, when offer and acceptance of marriage have been made but the contract due to 'overwhelming circumstances' has not been formally completed.[57] Indeed, over the course of one year (2005-2006), only two DNA tests were imposed on possible fathers.[58] Moreover, only judges can order such an expertise and none of the father, the mother or the child has the right to demand a DNA testing.[59] A further obstacle are the comparatively high costs of such a test (some $ 350 US), which have to be borne by the woman.[60]

The next section will outline the methods through which lineage-*nasab* can be established.

1. Through marriage

A quotation of the Prophet says: "A child is considered legitimate through the relationship which unites its mother with her husband, and one born of adultery is to be deprived

[49] BARGACH, *supra* n. 5, at 52, 58; SONBOL, *supra* n. 38, at 48 f.
[50] NASIR, *supra* n. 34, at 145, 154; NASIR, Status of Women, *supra* n. 34, at 169, 181; WELCHMANN, *supra* n. 39, at 143 f.
[51] BARGACH, *supra* n. 5, at 56, 60.
[52] WELCHMANN, *supra* n. 39, at 143 f.
[53] Art. 148 *Moudawana*.
[54] FOBLETS/CARLIER, *supra* n. 35, at 81.
[55] Art. 158 *Moudawana*; WELCHMANN, *supra* n. 39, at 145.
[56] WELCHMANN, *supra* n. 39, at 144 f.
[57] WELCHMANN, *supra* n. 39, at 145 indicating that this regulation addresses the problem of *'fatiha'* marriages in Morocco not formalised by a marriage deed.
[58] WELCHMANN, *supra* n. 39, at 145.
[59] FOBLETS/CARLIER, *supra* n. 35, at 82.
[60] WELCHMANN, *supra* n. 39, at 145.

thereof."[61] As a result of this quotation, the child is presumed to be legitimate when it is born within marital ties and the husband of the child's mother is presumed to be the father and cannot deny his parentage.[62] Art. 151 *Moudawana* states that paternity is established by presumption. However, this is not always as clear as it may seem, for different rules apply to the minimum and maximum terms of the pregnancy. In addition, there may be questions about whether the marriage contract is valid or irregular or there may not even be a contract.

A common question concerning lineage through marriage is when the marriage actually starts. This can either be at the time when the marriage contract is concluded or when the marriage is consummated, i.e. at the time of the first physical engagement between the couple.[63] Most Sunni schools argue that marriage is only effective when the possibility of sexual encounter between husband and wife exists.[64] In contrast, for the Hanafi school (Sunni) and the Shia schools, the time of contract is sufficient.[65] The determination of the actual date of union is closely linked to the next question of the length of pregnancy, as it is crucial to know from what date on the "legitimate" pregnancy has to be counted.

In traditional Islamic law the minimum term of pregnancy is set at six months, a period that all schools agree on.[66] The calculation of this period goes back to two Qur'ānic verses.[67] In the personal status law of Sunni Morocco, this minimum term of pregnancy is enshrined in art. 154 para. 1 *Moudawana*, which states that paternity is proven by the conjugal bed if the child is born at least six months after the marriage contract was concluded. In paragraph 2 of art. 154 and art. 135 *Moudawana*, the maximum pregnancy term is stated. Today, it is set at one year unanimously under the majority of the modern Arab personal status laws, although it used to be much more disputed and was extended to as much as two and even more years.[68] In particular, the Mālikī custom used to recognize a maximum gestation period of five years.[69] It was believed that the fetus was sleeping inside the womb and was only aroused later on.[70] This so called "*Ragued*" (Moroccan colloquial Arabic for asleep) or "sleeping baby" possesses legal foundation and is legitimate.[71] Under this maximum period a child can only be legitimate if it is born not more than one year after the date of separation, whether the separation is due to divorce, annulment of the marriage or death of the husband.[72]

[61] ALAOUI M'DAGHRI MUHAMMAD ABDELKEBIR, The Code of Children's Rights in Islam, in: Warnock Elizabeth (Ed.), Children in the Muslim Middle East, Austin 1995, 30–41, at 39.

[62] ALAOUI, *supra* n. 61, at 39.

[63] BARGACH, *supra* n. 5, at 59; NASIR, *supra* n. 34, at 147; NASIR, Status of Women, *supra* n. 34, at 171; PEARL DAVID/MENSKI WERNER, Muslim Family Law, London 1998, at 400, M. 10-07.

[64] BARGACH, *supra* n. 5, at 59; NASIR, *supra* n. 34, at 147; NASIR, Status of Women, *supra* n. 34, at 171.

[65] BARGACH, *supra* n. 5, at 59; NASIR, *supra* n. 34, at 147; NASIR, Status of Women, *supra* n. 34, at 171.

[66] BARGACH, *supra* n. 5, at 59; NASIR, *supra* n. 34, at 146; NASIR, Status of Women, *supra* n. 34 at 170; PEARL/MENSKI, *supra* n. 63, at 400, M. 10-07; SCHIRRMACHER CHRISTINE/SPULER-STEGEMANN URSULA, Frau und die Scharia: Die Menschenrechte im Islam, Kreuzlingen/München 2004, at 46 f.; WELCHMANN, *supra* n. 39, at 142 f.

[67] Qur'ān 31:14 and 46:15.

[68] For example the Hanbali, Shafi'i and most of the Mālikī set the duration at four years, some even at five years. BARGACH, *supra* n. 5, at 59; NASIR, *supra* n. 34, at 146; NASIR, Status of Women, *supra* n. 34, at 170; PEARL/MENSKI, *supra* n. 63, at 400, M. 10-06; see also WELCHMANN, *supra* n. 39, at 143.

[69] BARGACH, *supra* n. 5, at 162.

[70] SCHIRRMACHER/SPULER-STEGEMANN, *supra* n. 66, at 47.

[71] BARGACH, *supra* n. 5, at 59 f., 162 f.

[72] NASIR, *supra* n. 34, at 150; NASIR, Status of Women, *supra* n. 34, at 174.

If all these requirements are met and the child is born within the preceding mentioned period and under a valid marriage contract, paternity between the husband and the child is established. Nevertheless, in classical Islamic law the father has two methods to refute his paternity. He can either deny his paternity at the time of the birth, or at the time that he finds out about the birth in case he was absent.[73] The second way is through imprecation, called '*lian*',[74] whereby the husband pledges under oath before a judge that his wife committed fornication and that he is not the father of the child.[75] Moroccan law has adopted these provisions to a certain degree in art. 153 *Moudawana*, which says that the conjugal bed is the irrefutable proof of paternity, and only through disavowal by the husband through an accusation of his wife or by an expertise (e.g. DNA testing, one of the reforms of 2004) can paternity be disallowed. In addition, the law postulated that the husband must have solid proof for his allegation or that the expertise must have been ordered by judicial decision. If paternity is then deprived, which can also only be done by judicial decree for the protection of the child,[76] the child is effectively illegitimate, and so all the rights between the husband and the child such as maintenance or inheritance will be void, but an illicit degree of kinship between the child and the husband arises.[77]

In case the marriage is invalid because it is defective or null and void, it is an irregular marriage contract, which eventually can either be validated or must be dissolved. In classical Islamic law, all schools agree that in the case of an irregular contract, the length of pregnancy has to be counted not from the date of the contract, as it is irregular, but from the time of consummation.[78] So, whenever a child is born not less than six months nor more than nine months after consummation, paternity shall be established, whether it is before or after separation, even though the marriage had to be annulled due to an irregular contract.[79] Art. 56 to 64 *Moudawana* regulate the invalid marriage and its effects. Art. 58 *Moudawana* adapts this traditional rule for an invalid marriage will still establish paternity after consummation when the couple acts in good faith. Also, art. 157 *Moudawana* stipulates that, once paternity is established even under an irregular contract, all effects of kinship are created. These provisions both intend to protect the child from the status of illegitimacy.

In the case when there is no marriage contract, paternity can usually not be established, at least not through the conjugal bed. However, there is the exception of so-called sexual relationship by error, when sexual intercourse by mutual agreement took place and the couple believed to have the right thereto (when they thought they were husband and wife). In that case, paternity can be established because the parents did not have the intention to commit adultery and the

[73] NASIR, *supra* n. 34, at 147; NASIR, Status of Women, *supra* n. 34, at 171.

[74] BARGACH, *supra* n. 5, at 61; ENGINEER ASGHAR ALI, The Rights of Women in Islam, New York 1992, at 66; NASIR, *supra* n. 34, at 147 f.; NASIR, Status of Women, *supra* n. 34, at 172; PEARL/MENSKI, *supra* n. 63, at 400, M. 10-09.

[75] NASIR, Status of Women, *supra* n. 34, at 119, 172.

[76] Art. 151 and 159 *Moudawana*; NASIR, *supra* n. 34, at 148; NASIR, Status of Women, *supra* n. 34, at 173.

[77] NASIR, *supra* n. 34, at 148; NASIR, Status of Women, *supra* n. 34, at 172; SONBOL, *supra* n. 38, at 50 who indicates that a child with no paternity due to a *lian* cannot inherit from the father. However, a girl could marry her 'father' under Shafi law. Yet, as this is not accepted in society, since she might have been raised by this man, such marriages are refused, which explains the creation of the illicit degree of kinship between 'father and daughter' although paternity was revoked through the *lian*.

[78] NASIR, *supra* n. 34, at 149; NASIR, Status of Women, *supra* n. 34, at 173.

[79] NASIR, *supra* n. 34, at 149; NASIR, Status of Women, *supra* n. 34, at 173; WELCHMANN, *supra* n. 39, at 143.

child will be attributed to the man as long as the child is born within the designated pregnancy period and if the man does not confess the child as a product of adultery.[80]

A second case occurs when offer and acceptance of marriage have been made and agreed to but, for some reason ('force majeur' or 'overwhelming circumstances'), the contract could not be formally concluded, and in that engagement period the woman gets pregnant.[81] Under these circumstances, paternity of the child is appointed to the fiancé provided that three conditions are met. First, the families of the two engaged people must have known about the engagement and the tutor of the woman must have given his approval, if necessary. Second, the woman must have become pregnant during the engagement period. Third, the couple must have accepted responsibility for the pregnancy. It is precisely for this situation, but where the man denies his responsibility, that under the new law judges are empowered to require that the man take a DNA test in order to determine his paternity.[82] Art. 156 *Moudawana* has to be read in combination with art. 16 *Moudawana*, limiting the period of such recognition to five years. FOBLETS and CARLIER raise the question why such a limit was set, albeit the aim of this regulation is the establishment of paternity and not the recognition of the marriage.[83]

2. Through acknowledgment ('*iqrār*')

Although the conjugal bed is the regular way to establish lineage, Islamic law has accepted other means for doing so. One is the acknowledgment of a child by its father (and in some schools also the mother).[84] In general, four conditions need to be fulfilled to acknowledge a child. First, the child needs to be of unknown parentage. Second, it needs to be plausible that the man is actually the father of the child. Thus, for example, there needs to be a certain difference in age between the father and the child. Third, the child needs to agree to the acknowledgement if it is already an adult. Fourth, the man needs to confirm that the child is not the offspring from an illicit relationship.[85] Art. 160 ff. *Moudawana* are applicable for the acknowledgement in Morocco. Only a man can acknowledge paternity, which has to be proven by an official certificate or by an unquestionable and irrefutable handwritten statement of the man.[86] It seems quite unjust that in such cases the parentage is solely dependent on the decision of the father, who can then easily free himself of any responsibility by not acknowledging a child, whereas the mother (or the child) cannot file a paternity suit.[87]

3. Through evidence ('*al-bayyinah*')

A third method to grant lineage to a child is through evidence either by legal notaries or by a specific number of Muslims.[88] The general Sunni rule indicates that in order to prove paternity the witnesses can either be two men or one man and two women, whereas the Shias only

[80] Art. 155 *Moudawana*; NASIR, *supra* n. 34, at 149; NASIR, Status of Women, *supra* n. 34, at 174.
[81] Art. 156 *Moudawana*; FOBLETS/CARLIER, *supra* n. 35, at 82; WELCHMANN, *supra* n. 39, at 145.
[82] WELCHMANN, *supra* n. 39, at 145.
[83] FOBLETS/CARLIER, *supra* n. 35, at 83.
[84] BARGACH, *supra* n. 5, at 60; NASIR, *supra* n. 34, at 150 ff.; NASIR, Status of Women, *supra* n. 34, at 175 ff.; PEARL/MENSKI, *supra* n. 63, at 400, M. 10-08.
[85] BARGACH, *supra* n. 5, at 60; NASIR, *supra* n. 34, at 151; NASIR, Status of Women, *supra* n. 34, at 176.
[86] See also NASIR, *supra* n. 34, at 152; NASIR, Status of Women, *supra* n. 34, at 177.
[87] Pointed out also by MONJID, *supra* n. 35, at 145, 147.
[88] BARGACH, *supra* n. 5, at 60; NASIR, *supra* n. 34, at 153; NASIR, Status of Women, *supra* n. 34, at 178.

accept two men.[89] Art. 158 *Moudawana* declares that, in Morocco, paternity can be established by two public notaries or by oral testimony.

4. Through comparison of physical characteristics (*'al-qyāfa'*)

A traditional but less frequent and less reliable method is to compare physical characteristics between a child and its alleged father. This is done only in severe or urgent cases and, even though it is accepted as a proof of *nasab*, it is not generally favoured.[90] The Hanafi school does not accept this method to prove paternity.[91] In principle, any physical characteristics can be compared, although a comparison of the feet is generally practiced.[92] The reason behind this is the story of Zayd bin Haritha and his son Usama.[93] The Prophet Muhammad had to determine the paternity of Zayd and his son and it is said that Muhammad covered the heads of the two men and only looked at their feet. The similarities and physical resemblances then proved the kinship between Zayd and Usama.

5. Through Adoption?

Adoption is a judicial process in which the legal obligations and rights of a child toward the biological parents are terminated and new rights and obligations are created between the child and the adoptive parents at the time of the conclusion. A fictional blood link is established. The legal relationship results in the adoptee taking the adopters name as well as becoming the legal heir of the adopter. Any legal rights with the natural parents are terminated and the lineage is extinguished.[94] In the Qur'ān you find different stories about children who were adopted or fostered by parents other than their biological parents. The Prophet Muhammad for example was an orphan (in the Islamic sense) with a mother who could not raise him, wherefore Muhammad was taken in as an infant by a foster mother, who nursed and raised him.[95] Later in his life Prophet Muhammad himself adopted a former slave named Zaid and raised him like his own son.[96]

Adoption has always been an important topic in Islam and its history. In the so-called '*Jāhilīyah'* period, in the pre-Islamic Arabia, adoption was common and widely practiced.[97] Society then was organized in tribes and clans and, the larger a clan was, the more important it was within the tribe, and the bigger a tribe was, the stronger it was in competition with other tribes.[98] Therefore, adoption of mainly boys had the important function of increasing the size of a clan and was done for socioeconomic reasons to obtain human capital and to consolidate the

[89] NASIR, *supra* n. 34, at 153; NASIR, Status of Women, *supra* n. 34, at 178.
[90] BARGACH, *supra* n. 5, at 60.
[91] SONBOL, *supra* n. 38, at 54.
[92] BARGACH, *supra* n. 5, at 60.
[93] See SONBOL, *supra* n. 38, at 54.
[94] Referring to definitions on http://legal-dictionary.thefreedictionary.com/adoption, last accessed 2 November 2015; https://www.law.cornell.edu/wex/adoption, last accessed 2 November 2015.
[95] For a summary of the story of Prophet Muhammad see ARSHAD, *supra* n. 6, at 171 ff., M. 9.2.2.
[96] The story of Prophet Muhammad and Zayd bin Haritha, later called Zayd bin Muhammad (bin meaning son of) in ARSHAD, *supra* n. 6, at 174, M. 9.2.3.
[97] NASIR, *supra* n. 34, at 153; NASIR, Status of Women, *supra* n. 34, at 180; SONBOL, *supra* n. 38, at 46.
[98] BARGACH, *supra* n. 5, at 47 referring to Robertson Smith's work *Marriage and Kinship in Early Arabia* (New York 1956); SONBOL, *supra* n. 38, at 46.

tribe's military strength.[99] Concerning inheritance, adoption did not cause any problems at that time as the tribal grounds were the property of the entire tribe; private ownership of the land did not exist.[100] As a consequence, it was important to have enough men in your tribe in order to preserve its patrimony since the clans were patriarchal and patrilineal in their structure, which means that everything was passed through the adult male link; women were not allowed to inherit.[101] However, in the sixth century, the tribal system started to disappear and the period of trade, merchants and exchange began.[102] The social structure was transformed as the tribes were replaced by the nuclear family as the basic unit of society.[103] In the early seventh century, when Mecca was already an important commercial center, the Prophet received the revelations from God, which were first transmitted orally and eventually 'codified' as the Qur'ān.[104] With the coming of the Islam novel inheritance rules (as well as regulations regarding the family law in general) were introduced.[105] Whether these changes happened as a reaction to the breakdown of the tribal system, whether they were specifically directed towards bringing about a new order or whether they were the logical consequences of the new social structure is not clear.[106] The ties within the nuclear family became more important and the goal was to keep more of the inheritance within the nuclear family as well as to strengthen the legal status of the women by entitling them to inherit.[107] The blood tie within the nuclear family became the crucial criterion in order to keep property and wealth within the close family, wherefore the heirs nearest in degree and heirs of full blood were prioritized as well as formal adoption was forbidden.[108] The focus of the Quranic laws lay on the distribution of property and wealth rather than strengthening clan structures, which also the strong connection between family matters and inheritance issues show.[109] Since inheritance also strongly depended on *nasab* and blood relationships, various rules were enacted to ensure the purity of *nasab*. Apart from the prohibition of adoption, which could result in a confusion of *nasab*, also the *'idda'* (waiting period) and the dress code and moral code (covering the female body, lowering the gaze)[110] belonged to the measures designed to enshrine *nasab*.[111] The central and only verses in the Qur'ān directly concerning adoption are the following:

[99] BARGACH, *supra* n. 5, at 47; POWERS DAVID STEPHAN, The Islamic Inheritance System: A Socio-Historical Approach, in: Baderin Mashood A. (Ed.), Issue in Islamic Law, Volume II, Surrey 2014, 165–181, at 165; SONBOL, *supra* n. 38, at 46.

[100] SONBOL, *supra* n. 38, at 46.

[101] POWERS, *supra* n. 99, at 165 f.; RAHMAN M. HABIBUR, The Role of Pre-Islamic Customs in the Islamic Law of Succession, in: Baderin Mashood A., Issue in Islamic Law, Volume II, Surrey 2014, 147 – 163, at 147.

[102] SONBOL, *supra* n. 38, at 47.

[103] POWERS, *supra* n. 99, at 166.

[104] ESPOSITO JOHN L., The Oxford Encyclopedia of the Modern Islamic World, Volume 3, LIEBE-SARE, New York 1995, at 385f.

[105] POWERS, *supra* n. 99, at 166; SONBOL, *supra* n. 38, at 47.

[106] POWERS, *supra* n. 99, at 166; SONBOL, *supra* n. 38, at 47.

[107] ESPOSITO JOHN L., The Oxford Encyclopedia of the Modern Islamic World, Volume 2, FAQI-LEBA, New York 1995, at 203; POWERS, *supra* n. 99, at 166; RAHMAN, *supra* n. 101, at 147 f.

[108] ESPOSITO, *supra* n. 107, at 203; RAHMAN, *supra* n. 101, at 161.

[109] SONBOL, *supra* n. 38, at 48.

[110] Qur'ān 14:30-31: "Say to the believing men that they should lower their gaze and guard their modesty, that will make for greater purity for them. And God is well-acquainted with all that they do. And say to the believing women that they should lower their gaze and guard their modesty, that they should not display their beauty and ornaments except what (must ordinarily) appear thereof." as translated in SONBOL, *supra* n. 38, at 49.

[111] SONBOL, *supra* n. 38, at 49.

> *"God has not made a man with two hearts in one body; nor has He made your wives – whom you declare (meaning divorce, A/N) "as unlawful to you as your mother's bodies"; nor has He made your adopted sons your sons. Such are only figures of speech invented by your mouths, whereas God speaks the Truth to you and indicates the True Path.*
>
> *Call your adopted sons by their fathers' names – for this is the most just way according to God – and if you do not know their fathers' names, then call them your brothers in faith or your protected wards. But there shall be no sin upon you should you make a mistake in this matter, for it is what your hearts intend that counts; and God is merciful and forgiving."*[112]

The question whether the verses truly forbid adoption, remains a controversial subject.[113] Nonetheless, these verses are used to explain and defend the interdiction of so-called plain adoption, and since then adoption has not been recognized and considered to be a sin in Islamic law and society.[114] Adoption is even seen as a dangerous practice since it can lead to a confusion of blood and veils the real background of a person, its *nasab* and *asl*. It is not in the interest of the family to give a name and a share of the estate to a stranger.[115] Therefore, through adoption of a child it is not possible to establish lineage-*nasab* to the adopting father.[116] In Morocco, art. 149 *Moudawana* states that adoption has no legal value and it results in no legal effects of legitimate filiation. This is not actually a prohibition, but it declares adoptions to be null and void.[117]

On the other hand, nobody would contradict the fact that adoption exists within Islamic societies. Even though adoption is legally not allowed, it has always been practiced after the Islam was introduced to the Arabs.[118] There have always been women who have given birth to an unwanted child or a child they were not able to look after, and at the same time there have been women or families who could not have a child. Yet, for financial security and continuity of the family it was important to have children.[119] This fact in itself made it inevitable that (secret) adoptions would take place during all these years. Also, the Islamic belief and law have had an influence on miscellaneous practices of adoption, even though plain adoption is prohibited. This is because Islamic law does not ignore orphans or illegitimate children in general, but it requires that the same treatment be offered to them as to children with known

[112] Qur'ān 33:4-5 as translated in AWDE NICHOLAS, Women in Islam: An anthology from the Qur'ān and Hadīths, London 2005, at 160.
[113] PEARL/MENSKI, *supra* n. 63, at 408, M. 10-26; SONBOL, *supra* n. 38, at 51.
[114] See i.a. BÜCHLER, *supra* n. 36, at 57; NASIR, *supra* n. 34, at 153; NASIR, Status of Women, *supra* n. 34, at 180; SONBOL, *supra* n. 38, at 51.
[115] RUGH ANDREA B., Orphanages in Egypt: Contradiction or Affirmation in a Family-Oriented Society, in: Warnock Elizabeth (Ed.), Children in the Muslim Middle East, Austin 1995, 124 – 141, at 133.
[116] Confirming this ALAOUI, *supra* n. 61, at 33.
[117] In Algerian law adoption is explicitly forbidden (Art. 46 of the Algerian Act No. 84/1984).
[118] BARGACH, *supra* n. 5, at 5, 27; SONBOL, *supra* n. 38, at 57, 60.
[119] BARGACH, *supra* n. 5, at 163 f.

filiation.[120] It even is a religious duty and a communal responsibility to take care of a foundling, to support children, orphans and those in need in general.[121]

Another form is the legal guardianship, or so-called '*kafala*', translated as the gift of care.[122] It is the official Islamic principle of fosterage. A child taken into *kafala* is entitled to similar rights as a natural child, such as maintenance, education, financial protection and also moral and physical protection, and the parental authority is given to the new family.[123] Although this might sound very similar to plain adoption, the difference lies in the *nasab* because between the new family and the child taken into *kafala*, parentage cannot be established for it can not be a substitute for lineage by blood.[124] This also means that the child cannot take the name of the new family nor has it any right to inherit, but the legal ties remain with the biological family (if known).[125]

Despite the prohibition of adoption enshrined in the Sharī'ah, not all Muslim countries obey this religious ruling. Many countries do not explicitly regulate it in their national codes, and some countries, such as Turkey,[126] Tunisia,[127] or Somalia,[128] even allow adoption subject to certain conditions.

IV. The rights of the illegitimate child

The family in Islam, which is the center of the social organization, is traditionally paternalistically structured.[129] The father holds the authority and responsibility, the natural guardianship over his family is appointed to him and he gives his name to the children, whereby they follow his lineage.[130] A father is responsible for his children and must provide them with food, clothing, shelter, etc. until a son reaches maturity and until a daughter is married, after which her husband henceforward is responsible.[131] By law, the mother only has temporary rights over her children, which are limited to birth and nursing, to meet the physical needs of a child. However, in reality the responsibilities of the mother often exceed this limited

[120] ALAOUI, *supra* n. 61, at 33.

[121] BARGACH, *supra* n. 5, at 61 f.; NASIR, *supra* n. 34, at 155; NASIR, Status of Women, *supra* n. 34, at 178; ALI SHAHEEN SARDAR, A Comparative Perspective of the Convention on the Rights of the Child and the Principles of Islamic Law: Law Reform and Children's Rights in Muslim Jurisdictions, in: Protecting the World's Children: Impact of the Convention on the Rights of the Child in diverse Legal Systems/UNICEF, New York 2007, at 153 f., 157.

[122] BARGACH, *supra* n. 5, at 28 f.; SCHIRRMACHER/SPULER-STEGEMANN, *supra* n. 66, at 194 f.; WELCHMANN, *supra* n. 39, at 148.

[123] ARSHAD, *supra* n. 6, at 170, M. 9.1; BARGACH, *supra* n. 5, at 29; WELCHMANN, *supra* n. 39, at 148.

[124] ARSHAD, *supra* n. 6, at 170, M. 9.1; BARGACH, *supra* n. 5, at 42; WELCHMANN, *supra* n. 39, at 148.

[125] Art. 2 Abandoned Children Act: Dahir N° 1-02-172 du 1 Rabii Il 1423 portant promulgation de la Loi N° 15-01 relative à la prise en charge (la kafala) des enfants abandonnés. (B.O du 5 septembre 2002); also ARSHAD, 170, M. 9.1; WELCHMANN, 148.

[126] Art. 305 ff. of the Turkish Civil Code; SCHIRRMACHER/SPULER-STEGEMANN, *supra* n. 66, at 194 f.

[127] Tunisian Law No. 27/1958 with different provisions regulating adoption. BÜCHLER, *supra* n. 36, at 58; NASIR, *supra* n. 34, at 153 f.; NASIR, Status of Women, *supra* n. 34, at 180.

[128] Art. 110 ff. of the Somalian Family Law 1975; PEARL/MENSKI, *supra* n. 63, at 409, M. 10-27.

[129] BARAKAT HALIM, The Arab Family and the Challenge of Social Transformation, in: Warnock Elizabeth (Ed.), Women and the Family in the Middle East, New Voices of Change, Austin 1985, 27 – 48, at 27, 31.

[130] BARAKAT, *supra* n. 129, at 27, 31; TUCKER, *supra* n. 6, at 29.

[131] POWERS DAVID STEPHAN, The Development of Islamic Law and Society in the Maghrib, Qādīs, Muftīs and Family Law, Farnham/Burlington 2011, at 178.

scope.[132] This is the normal situation of a family if the father and mother are married and their children were born in wedlock and are therefore legitimate. However, as mentioned earlier, if a child is born outside of wedlock and is not acknowledged, nor its legitimacy proven, the child is illegitimate. No paternity can be established, there is no lineage-*nasab* – father and child are legally not related. The father is not obliged to support his child and the child has therefore no claims against his biological father because only through a legal relationship to his father are the child's rights secured.[133] In such cases it is the mother who must provide for the child.[134] The following will outline the general rights of a child and in particular what consequences the status of illegitimacy has for a child concerning these rights. Art. 54 *Moudawana* lists the rights guaranteed to children in Morocco.

1. Name and Nationality

Art. 54 para. 2 *Moudawana* states that it is the right of every child that the parents ensure respect of the child's identity and its preservation, particularly the child's name, nationality and registration in the civil status record. To give a name to something existing is considered as giving form to it, and only by giving a name is a newborn made into a "social being". It is like a second birth.[135] The surname indicates who your father is and defines your *nasab* (but does not create *nasab*).[136] As illegitimate children legally do not have a father, they cannot receive his surname. However, since the existence of the civil register in Morocco, which was introduced by the French in the early twentieth century, the law states that, within one month after birth, all children have to be registered, whether they are "normal", foundlings or illegitimate children, and must also be given a last name.[137] On these grounds, a foundling brought to a shelter will be given a name (and also fictitious place and date of birth, fictitious names of mother and father) by the police or a social worker working in the shelter, with the last name chosen from an official list of last names.[138] As for a natural child who has a mother, the child can be given the mother's name on condition that her family gives the written permission to do so.[139] The right of a mother to register her child and to give her name is enshrined in art. 16 of the Moroccan Civil Status Act.[140] What stands out in this provision is the fact that it has to be indicated that the name was chosen (the name must begin with '*Abd*').[141] However, this can already be considered a significant improvement compared to the situation before 1992 when the child could only be given two first names instead of a first and a last name (fictitious or the mother's name) and, even worse, their birth certificate had to indicate '*ibnu zinā*', meaning

[132] MERIWETHER MARGARET, The Rights of Children and the Responsibilities of Women, Women and Wasis in Ottoman Aleppo, 1770 – 1840, in: Sonbol Amira El-Azhary (Ed.), Women, the Family, and Divorce in Islamic History, Syracuse 1996, 219 – 235, at 233 f.; TUCKER, *supra* n. 6, at 29.

[133] ALAOUI, *supra* n. 61, at 34, 36.

[134] ALAOUI, *supra* n. 61, at 34.

[135] BARGACH, *supra* n. 5, at 104, 107 f.

[136] ARSHAD, *supra* n. 6, at 176, M. 9.3.1; BARGACH, *supra* n. 5, at 112, 118.

[137] BARGACH, *supra* n. 5, at 112 f.

[138] BARGACH, *supra* n. 5, at 113; SONBOL, *supra* n. 38, at 61.

[139] BARGACH, *supra* n. 5, at 113 f., 117 f.; BARGACH indicates that in most cases the woman does not get the permission of her family and therefore a last name will also be chosen from the list. Dr. Nadia Sonneveld confirmed this fact in the personal interview of the author with Dr. Sonneveld (see n. 219).

[140] Loi N° 37-99 relative à l'état civil, promulguée par le Dahir N° 1-02-239 du 25 Rejeb 1423 (3 Octobre 2002) (Civil Status Act).

[141] WILLMAN/KOUZZI, *supra* n. 7, at 5.

child of adultery.[142] Yet, in order to register a child or to receive a family booklet, the most essential document in Moroccan's lives,[143] the mother needs to bring forward a birth attestation of the child and also a birth certificate for herself as well as a copy of the marriage certificate.[144] One can imagine that it would be extremely difficult for a mother to obtain these documents because often her birth certificate is with her family, which might have disowned her due to her 'sinful behavior', or the family might live far away in a more rural area. In addition, these procedures bear high costs for an impecunious woman and take a long time (three to eight months).[145] The new Civil Status Act clearly entitles a mother to register a child. However, the question whether an unwed woman can also obtain a family booklet is not regulated and therefore the practice among Civil Status Officers is different.[146] Moreover, it is reported that women were often humiliated when trying to register their child and they were in constant fear that the police would be called since they had committed a crime.[147] For these reasons, it is not surprising that many mothers still do not register their illegitimate child. An improvement however was made with the enactment of the new Nationality Code.[148] Art. 6 of the Nationality Code stipulates that Moroccan citizenship is given to a child born to a Moroccan woman and, thus, it is not necessary to have filiation to a Moroccan father. As indicated above it is prohibited and considered a sin to give a child taken into *kafala* the name of its fostering family, since this would create the fiction of lineage and result in an illegal plain adoption.[149] If a child is taken into *kafala* it will keep its name whether it is a fictitious name given by the police or whether it is the name of the known natural parents.[150]

2. Fosterage

After the establishment of paternity, the first right of a child after birth concerning its physical needs is breastfeeding ('*rada*').[151] Art. 54 para. 4 *Moudawana* states that the child has a right to be suckled by the mother whenever possible. Suckling is generally a religious obligation of the mother and it is the father's duty to ensure the suckling of the child if necessary by hiring a wet nurse.[152] If a woman other than the mother breastfeeds the child (whether because it has no mother or because the mother cannot, or is not willing to, suckle), paternity cannot be established. However, it results in a similar legal relationship between the child and the fosterage mother. Between the child and the fosterage mother, along with her husband and children, the marriage impediments arise, however no right to inherit from the fosterage

[142] BARGACH, *supra* n. 5, at 114.

[143] WILLMAN/KOUZZI, *supra* n. 7, at 5. It is e.g. needed in order to get a National Identity Card or driver's license, as a proof of identity to get a job, to get married or to be admitted to a hospital. It is proof for legal existence.

[144] WILLMAN/KOUZZI, *supra* n. 7, at 4, 12 f.

[145] WILLMAN/KOUZZI, *supra* n. 7, at 12, 18.

[146] WILLMAN/KOUZZI, *supra* n. 7, at 5 ff.

[147] WILLMAN/KOUZZI, *supra* n. 7, at 11 f.

[148] Dahir N° 1-58-250 du 21 Safar 1378 (6 Septembre 1958) portant Code de la Nationalite Marocaine tel que modifie et complete par la Loi N° 62-062 promulgue par le Dahir N° 1-07 du 03 Rabii I 1428 (23 Mars 2007) (Nationality Code).

[149] BARGACH, *supra* n. 5, at 104; SONBOL, *supra* n. 38, at 62.

[150] SONBOL, *supra* n. 38, at 61.

[151] Indicated by Qur'ān 2:233: *"The mothers shall give suck to their offspring for two whole years…"* (translated by SYED MOHAMED ALI, The Position of Women in Islam: A Progressive View, Albany 2004, at 77) as well as the previously mentioned verses 31:14 and 46:15; BARGACH, *supra* n. 5, at 69; NASIR, Status of Women, *supra* n. 34, at 183.

[152] BARGACH, *supra* n. 5, at 69.; NASIR, Status of Women, *supra* n. 34, at 183 f.

parents will arise.[153] Milk, therefore, can create kinship but not inheritance for inheritance can only be passed through blood.[154]

3. Custody and guardianship

Classical Islamic law recognizes two types of guardianship known as '*Al-Hadāna*' ('guardianship of the infant') and '*Al-Wilāy*a' ('guardianship of education/morality/spirituality and money/property').[155] Whoever is appointed guardian of a child must do the utmost to take care of the child and act in its best interest concerning the child's physical and emotional health, education and wealth.[156]

The English terms custody and guardianship do not exactly correspond with the two types in Islamic law. However, often *Al-Hadāna* is referred as custody or nurturing and embracing because it means the personal physical care during the first years in life of a minor, which is why *Al-Hadāna* is traditionally appointed to the mother.[157] On the other hand, *Al-Wilāy*a can be seen as guardianship, since they deal with legal rights of the father concerning education, religion, finances and all other fields where the ward encounters the world outside of home.[158]

For illegitimate children, there is no parentage established to a father. Thus, the child does not have a natural guardian. Concerning the *Al-Hadāna*, it is recognized that for an illegitimate child it would always belong to the mother even after the *Al-Hadāna* period until the child can be responsible for itself.[159] As for guardianship, it is usually also the mother who is appointed as *walī* since she naturally has the closest relationship to the child. Therefore, it is the mother who is responsible for the property, maintenance and also marriage of the illegitimate son or daughter.[160] However, since guardianship can also be appointed by a court or by testament and is not as closely linked to paternity as, for example, the right of inheritance, it would be possible to appoint the biological father of an illegitimate child as a guardian even though paternity cannot be established, assuming that the real father is known and willing to be the guardian of his illegitimate child. Regarding abandoned children who have neither mother nor father, it is the state that has to act as a guardian (*walī*) and appoints a legal tutor.[161] If such children are taken in by fostering parents, it becomes their responsibility as it is considered a religious duty to ensure the upbringing of a child.[162] Basically, a guardian can be any man or woman meeting the compulsory criteria and must not necessarily be a relative by blood.[163]

[153] ARSHAD, *supra* n. 6, at 178, M. 9.3.3; BARGACH, *supra* n. 5, at 69.

[154] BARGACH, *supra* n. 5, at 137 f.

[155] Where *Al-Wilāy*a can be divided into '*Wilāya al māl*' related to the management of the financial affairs of the child (property, goods, money) and '*Wilāya al*-nafs' regarding the marriage of the girl but also the education, morality and spirituality of the child (*in* NASIR also called *' Wilayah at-Tarbiyah')*, ARSHAD, *supra* n. 6, at 152, M. 8.3; BARGACH, *supra* n.5, at 69; NASIR, Status of Women, *supra* n. 34, at 186.

[156] ARSHAD, *supra* n. 6, at 152.

[157] BARGACH, *supra* n. 5, at 69; BÜCHLER, *supra* n. 36, at 58; NASIR, Status of Women, *supra* n. 34, at 186; PEARL/MENSKI, *supra* n. 63, at 410 f., M. 10-32 ff.

[158] WELCHMANN, *supra* n. 39, at 133.

[159] SYED, *supra* n. 151, at 80.

[160] MERIWETHER, *supra* n. 132, at 228, 232 f.; TUCKER, *supra* n. 6, at 147, 156.

[161] BARGACH, *supra* n. 5, at 42.

[162] BARGACH, *supra* n. 5, at 61; NASIR, *supra* n. 34, at 155; NASIR, Status of Women, *supra* n. 34, at 178.

[163] BARGACH, *supra* n. 5, at 69.

Art. 163 to 179 *Moudawana* deal with the upbringing of a child, which today is the shared responsibility of both parents as long as they are married (art. 164).[164] Custody must be guaranteed to the child up to his or her legal majority (art. 166). If the child has reached the age of fifteen, he or she is free to decide himself or herself who will be the custodian (art. 166). The autonomy of decision is also given to a child without parents who, according to art. 166 *Moudawana*, can chose a custodian from the relatives provided that the legal tutor of the child gives his permission. Otherwise, it is the court that has to settle the matter taking into consideration the child's best interest (art. 166).

Art. 236 *Moudawana* states that by law it is the father who is the tutor of his children unless he is disqualified by judicial order. Art. 229 ff. *Moudawana* deal with the legal representation of a child. Art. 230 and 231 *Moudawana* list the possible legal guardians as well as in which order they are to be appointed. First, it is the father who is the legal representative, and in his absence the mother. The aforementioned articles make it clear that it is the father who is the natural legal guardian of the child. Afterwards, it can be a testamentary guardian appointed by the father or, if none is appointed by the father, then by the mother, and only then does the state become responsible. It can either be a judge who acts as a legal representative or, as a last possibility, the court may appoint a legal tutor.

4. Maintenance

The maintenance of a child is in general solely the father's duty even if the mother is wealthy.[165] It is the man's responsibility to pay for the child's support, including food, clothing, shelter, medicine, education and also wages given to the custodian (custodian woman or custodian mother).[166] This is also stipulated in art. 167 *Moudawana*. The maintenance generally lasts until the children are able to pay for their own expenses, i.e. generally for a boy until puberty or majority and for a girl until she gets married and her husband is financially liable for her.[167] Moroccan law awards children the right of maintenance until they are of legal age or if they are still in education up to the age of twenty-five (art. 198). New to the Moroccan law is that the mother is also responsible for the maintenance of the child if the father is unable to pay and provided that the mother is affluent.[168]

Art. 187 *Moudawana* states that financial maintenance is only due for reasons of marriage, kinship or commitment. As an illegitimate child is not legally related to the father, the father is also not bound to pay maintenance. However, if the child has a known mother it will be her duty to provide maintenance since art. 197 *Moudawana* obliges both parents to pay for the children. This is also due to art. 199, which states that it is the mother's duty to pay if the father is unable to. A child without any parents must provide for itself provided that it has its own

[164] See also NASIR, Status of Women, *supra* n. 34, at 189.

[165] ABDAL-RAHMAN ABDAL-REHIM ABDAL-REHIM, The Family and Gender Laws in Egypt during the Ottoman Period, in: Sonbol Amira El-Azhary (Ed.), Women, the Family, and Divorce in Islamic History, Syracuse 1996, 96 – 111, at 108; BÜCHLER, *supra* n. 36, at 61; PEARL/MENSKI, *supra* n. 63, at 430, M. 10-84; ROHE MATHIAS, Das Islamische Recht: Geschichte und Gegenwart, 3. Edit., München 2011, at 97.

[166] NASIR, Status of Women, *supra* n. 34, at 198 f.; ABDAL-RAHMAN ABDAL-REHIM, *supra* n. 165, at 108; see also art. 167 and 168 *Moudawana* and art. 189 *Moudawana* describing what maintenance shall include.

[167] BÜCHLER, *supra* n. 36, at 61; PEARL/MENSKI, *supra* n. 63, at 430, M. 10-84; POWERS, *supra* n. 131, chapter III, at 178; ROHE, *supra* n. 165, at 98.

[168] Art. 199 *Moudawana*; see also ROHE, *supra* n. 165, at 228.

resources. A legal guardian can use the child's property to pay for its expenses.[169] If a minor has no financial means, it is the legal tutor's responsibility to ensure the child's maintenance. As seen earlier, it is the responsibility of the fostering parents also to provide maintenance if they take a child into *kafala*.[170]

5. Inheritance

Inheritance is not a birthright in Islamic law, i.e. the right of an heir only comes into being at the time of death of the bequeather and the heir is not entitled to any estate of his ancestor at any time before.[171] One intention of inheritance is to split property, permitting the distribution of wealth amongst generations and preventing individuals from amassing property.[172] In order to do so, Islamic law divides the heirs into different classes.[173] Only relatives with a legitimate blood relationship to the deceased are entitled to inherit.[174] It is *nasab* (lineage) which decides who will inherit and who will be left out.[175] Therefore, it is not surprising that an illegitimate child is not entitled to succeed from its biological father. The state of illegitimacy leads to total exclusion from inheritance.[176] For the Shias, an illegitimate child is even a '*nullus filius*' (the son of no one), and hence cannot be an heir of either the father or the mother.[177] Unlike the Shia law, the Hanafi law awards the illegitimate child the right to inherit from the mother and her relatives. Reciprocally, the mother and her relatives can also be successors of the child.[178]

As seen above, if a child is taken into *kafala* the right of inheritance cannot be established since there is no blood lineage. However, the fostering parents still remain responsible for the financial needs of the "adopted" child in the same way as they have to look after their own natural children during the lifetime of the parents as well as after their death.[179] This can be done by means of a gift ('*hiba*') or a bequest ('*wasiyah*').

Islamic inheritance law has many compulsory rules and hence is quite inflexible and complex.[180] As a result, jurists created a system of legal means, specifically the law of gifts, through which people could be more flexible in their property and estate planning.[181] Gifts can either be made *inter vivos* or *post mortem.* For an endowment during lifetime, Islamic law knows no restriction on the size of such gifts and they take immediate effect. However, an *inter vivos*

[169] As a result of art. 187 *Moudawana*.
[170] BARGACH, *supra* n. 5, at 29.
[171] KHAN HAMID, The Islamic Law of Inheritance: A comparative study of Recent Reforms in Muslim Countries, Karachi 2007, at 39; POWERS, *supra* n. 131, chapter III, at 180; POWERS, *supra* n. 131, chapter VIII, at 5.
[172] POWERS, *supra* n. 131, chapter III, at 179; SONBOL, *supra* n. 38, at 50.
[173] KHAN, *supra* n. 171, at 70, 118.
[174] ARSHAD, *supra* n. 6, at 187 f., M. 10.4.
[175] SONBOL, *supra* n. 38, at 48.
[176] KHAN, *supra* n. 171, at 47 f.
[177] KHAN, *supra* n. 171, at 51.
[178] KHAN, *supra* n. 171, at 51; ALAOUI, *supra* n. 61, at 33.
[179] ARSHAD, *supra* n. 6, at 177 f., M. 9.3.2, 187, M. 10.4; Also SONBOL indicates that even though an adopted child is not allowed to inherit it must financially be provided for and supported and therefore Muslims should leave part of their wealth to the orphan (in general one should leave something for those who are dependent). SONBOL, *supra* n. 38, at 50.
[180] POWERS DAVID STEPHAN, The Islamic Inheritance system: A Socio-Historical Approach, in: Mallat Chibli/Conners Jane (Eds.), Islamic Family Law, London/Dordrecht/Boston 1990, 11-30, at 16 ff., 19; POWERS, *supra* n. 131, chapter IV, 5.
[181] POWERS, *supra* n. 180, at 19.

gift cannot be revoked and the proprietor must really divest himself of the ownership.[182] Gifts *post mortem* can be created in a last will or testament and takes effect only upon the donor's death.[183] However, such a bequest must not be given to anyone who qualifies as an heir and it must not exceed the amount of one-third of the deceased's net estate, i.e. after debts and costs of the funeral have been paid.[184] Considering this, it is possible that illegitimate children can be considered and be placed in a position similar to an heir through the means of a gift or a bequest.[185]

V. The influence of the UN Convention on the Rights of the Child

Morocco signed the United Nations Convention on the Rights of the Child (henceforward CRC) in 1990 and in 1993 it was ratified.[186] This was at the time that the first small changes were being implemented to the Moroccan law and it was another indication of the increasing awareness and concerns about women's rights and human rights in general. The signing of the CRC was not only a gain for children but also for their mothers and all women, as the rights of children and the rights of women are inherently linked. If a girl is guaranteed equal rights from birth until adulthood, equal rights for her as a woman will automatically follow.[187] Moreover, certain guarantees for a child will ensure coherent rights to the mother such as custody, access to the child, maternity leave, etc. Like most other Muslim states, which all are members of the CRC, Morocco made a reservation to art. 14 CRC concerning the child's right to freedom of thought, conscience and religion.[188] However, this reservation was removed by the government in 2005.[189] The worldwide acceptance of the CRC is also due to the fact that, during its development, a wide range of different interest groups (member states, NGOs) was represented in the working group. It was not primarily the West that designed it and the convention explicitly refers to Islamic law (art. 20 CRC).[190] After the ratification of the CRC Morocco had to take a number of measures to ensure the implementation of the Convention. Also regarding children born out of wedlock, steps were necessary as their treatment by the

[182] POWERS, *supra* n. 180, at 20; POWERS, *supra* n. 131, chapter III, at 180; POWERS, *supra* n. 131, chapter IV, at 5; POWERS, *supra* n. 131, chapter IX, at 382.

[183] POWERS, *supra* n. 131, chapter IV, at 5; POWERS, *supra* n. 131, chapter IX, at 382.

[184] ARSHAD, *supra* n. 6, at 190, M. 10.5; BARGACH, *supra* n. 5, at 69; EBERT HANS-GEORG, Das Erbrecht arabischer Länder, Leipziger Beiträge zur Orientforschung, Band 14, Frankfurt am Main 2004, at 14; POWERS, *supra* n. 180, at 23; POWERS, *supra* n. 131, chapter IV, at 5; POWERS, *supra* n. 131, chapter IX, at 382.

[185] BARGACH, *supra* n. 5, at 69.

[186] Save the Children Sweden, Regional Office for the Middle East and North Africa / International Bureau for Children's Rights / Bayti Association: Country Profile of Morocco, A review of the implementation of the UN Convention of the Rights of the Child, Beirut/Montreal/Casablanca 2011, available at: http://resourcecentre.savethechildren.se/sites/default/files/documents/5151.pdf, last accessed 27 September 2015 (*cit.* Country Profile, ...), at 17.

[187] ALI stressing this linkage with reference to the United Nations World Conference on Human Rights in Vienna in 1993 and the World Conference on Women in Beijing in 1995 where women's rights were at the center of attention and this linkage was equally enhanced. ALI SHAHEEN SARDAR, Gender and Human Rights in Islam and International Law, Equal before Allah, unequal before him?, Den Haag/London/ Boston 2000, at 216 f.

[188] Country Profile, *supra* n. 186, at 19; HASHEMI KAMRAN, Religious Legal Traditions, International Human Rights Law and Muslim States, Leiden/Boston 2008, at 220; WELCHMANN, *supra* n. 39, at 140.

[189] Country Profile, *supra* n. 186, at 19.

[190] HASHEMI, *supra* n. 188, at 220.

law was at odds with the principles of the CRC.[191] In 1998, Morocco established a ministerial committee in order to bring in line Moroccan law with its international commitments.[192] In the preamble of the 2004 *Moudawana* it is clearly stated that the law was created in accordance with Morocco's commitment to international human rights and that provisions of international conventions were directly implemented. The following will give a summary of the measures of implementation taken by Morocco focusing on the situation of the child born out of wedlock and how their situation was directly influenced by the CRC.[193]

1. Improvements

One of the most important improvements is the definition of a child in the context of the legal age for marriage, labor and criminal responsibility, which was criticized in the Concluding Observations in 1996.[194] Art. 1 CRC describes the child as a human being below the age of eighteen years. Morocco now has raised the age of marriage and criminal responsibility to 18 years and the age to be allowed to work to 15 years instead of 12 years.[195] With the increase in the marriageable age, the discriminatory differentiation between boys and girls was also removed.

The general principle of the child's best interest was introduced to the *Moudawana* (e.g. art. 163, 166, 171, 178, 244) according to art. 3 CRC.[196] For example, Art. 166 *Moudawana* that entitles children who have reached the age of 15 to choose their custodian implements the principle of the child's best interest but also its right to express his or her view (art. 12 CRC).[197] The interest of a child can further be promoted through the joint custody of the parents (art. 164 *Moudawana*) and the fact that a mother is given priority for custody and does not automatically lose custody if she remarries (art. 171, 145, 175 *Moudawana*). This satisfies art. 18 CRC.[198]

One of the biggest achievements to fight the discrimination of children born out of wedlock is art. 146 and 147 *Moudawana*, whereby children can also be recognized through the mother since filiation to the mother has the same effects as filiation to the father and children can, for

[191] UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations: Morocco, 30 October 1996, CRC/C/15/Add.60, available at: http://www.refworld.org/docid/3ae6af5b14.html, last accessed 27 September 2015 (*cit.* Concluding Observations 1996, …), 2, 5 where the Committee on the Rights of the Child expresses its concerns about the situation of children born out of wedlock; HASHEMI, *supra* n. 188, at 253 citing a member of the Committee on the Rights of the child, Judith Karp, in the summary record of Morocco 1996.

[192] ALI, *supra* n. 121, at 186.

[193] This summary was created with the help of different reports about Morocco and the CRC: Concluding Observations 1996; UN Committee on the Rights of the Child (CRC), UN Committee on the Rights of the Child: Concluding Observations, Morocco, 17 March, 2006, CRC/C/OPSC/MAR/CO/1, available at: http://www.refworld.org/docid/45377ed80.html, last accessed 27 September 2015 (*cit.* Concluding Observations 2006, …); UN Committee on the Rights of the Child (CRC), Consideration of the reports submitted by States parties under article 44 of the Convention, Third and fourth periodic reports of States parties due in 2009: Morocco, 5 August 2013, CRC/C/MAR/3-4, available at: http://www.refworld.org/docid/540053ea4.html, last accessed 27 September 2015 (*cit.* Consideration, …); Country profile.

[194] Concluding Observations 1996, *supra* n. 191, at 3.

[195] Consideration, *supra* n. 193, at 7, 16, Country profile, *supra* n. 186, at 20, 29, 44; HASHEMI, *supra* n. 188, at 222, 237.

[196] Consideration, *supra* n. 193, at 5 f., 17; Country Profile, *supra* n. 186, at 21, 33; HASHEMI, *supra* n. 188, at 41; WELCHMANN, *supra* n. 39, at 140.

[197] Consideration, *supra* n. 193, at 6; Country Profile, *supra* n. 186, at 45.

[198] Consideration, *supra* n. 193, at 6, 25; Country Profile, *supra* n. 186, at 27; HASHEMI, *supra* n. 188, at 231.

example, carry the name of the mother if her own father agrees.[199] Moreover, art. 153 to 159 *Moudawana* in general facilitate the establishment of paternity. For example, through the assumption of legitimacy (art. 151, 155, 156 *Moudawana*) or with the possibility to use medical evidence such as DNA testing (art. 16, 153, 156, 158 *Moudawana*) to prove paternity, it is made more difficult for a father to deny his paternity (art. 153, 159 *Moudawana*).[200] In addition, in cases where the validation of the marriage contract is contestable, the child will still be considered as born within the marriage within a period of five years (art. 16, 156 *Moudawana*). Also, the fact that today it is compulsory to register every child after birth (art. 31 Civil Status Act and art. 468 Penal Code, which states that it is a criminal offense to not register a child), the fact that every child has a right to have a name (art. 20 Civil Status Act) and the fact that nationality can also be passed to the child through the mother (art. 6 Nationality Code) all improve the status of illegitimate children with or without parents and fulfills the purpose of art. 7 CRC.[201] It is an immense progress that women are given the authority to register their children themselves, that they can name them and that children without a Moroccan father are no longer stateless. However, we have seen that the implementation of this is not yet optimal. Concerning the maintenance of children born out of wedlock who do not have a father, certain progress was made, as mothers are also responsible for the maintenance of the child if the father is unable to pay (art. 199 *Moudawana*), and the failure to pay maintenance or abandonment in general are punishable acts (art. 459, 479 f. Penal Code).[202] Since the reform of the *Moudawana*, children have a right to inherit from their maternal grandmothers, and so a child without a father can possibly inherit.[203] Furthermore, an improvement in favor of illegitimate and abandoned children is that the legal framework was revised to facilitate the system of *kafala.* The new law is in accordance with art. 9, 20 and 21 CRC.[204]

When comparing the Concluding Observations 1996 with the later reports, all reports underline that, in general, Morocco has made a lot of progress relating to the rights of the child between 1996 and 2011. A few examples are the creation of the ministerial committee in charge of the harmonization of national law with international human rights treaties and the creation of other positions and committees within the administration responsible for child matters, the formation of a Child Parliament, the setting up of a free telephone hotline for children and the establishment of a 'Plan d'Action' for children.[205] Moreover, the cooperation with NGO's and international cooperation was intensified (art. 45 CRC), measures to raise public awareness of the Convention were implemented (something that was criticized in the Concluding Observations of 1996 although required in art. 42 CRC), especially through the education of children, teachers, social workers, lawyers, etc., and the collection of data and the realization of studies was initiated.[206]

[199] Consideration, *supra* n. 193, at 6; Country Profile, *supra* n. 186, at 24, 29 f.
[200] Consideration, *supra* n. 193, at 6; HASHEMI, *supra* n. 188, at 233.
[201] Consideration, *supra* n. 193, at 9, 20 f.; Country Profile, *supra* n. 186, at 20, 42.
[202] Consideration, *supra* n. 193, at 26.
[203] Consideration, *supra* n. 193, at 6.
[204] Consideration, *supra* n. 193, at 9, 23; Country Profile, *supra* n. 186, at 20, 41 f.; HASHEMI, *supra* n. 188, at 245 ff.
[205] Concluding Observations 2006, *supra* n. 193, at 2, 6; Consideration, *supra* n. 193, at 11 f., 19; Country Profile, *supra* n. 186, at 20 f., 24.
[206] BARGACH, *supra* n. 5, at 195 f.; Concluding Observations 1996, *supra* n. 191, at 4; Concluding Observations 2006, *supra* n. 193, at 2; Consideration, *supra* n. 193, at 10, 13-15; Country Profile, *supra* n. 186, at 20, 26, 28 f.

2. Matters of Concern

Morocco has put great effort into securing children's rights. Nevertheless, a number of issues remain. Children born out of wedlock and children taken into *kafala* are still discriminated against regarding inheritance rights as no paternity can be established, although the severity of this can be minimized by the means of a gift or a bequest to these children. Yet, they have no guarantee to inherit.[207] Furthermore, concerning the guardianship of the child, women are still discriminated against and the best interest of the child is not necessarily ensured. Art. 231 and art. 236 *Moudawana* appoint the father as the legal tutor of the child and the mother can only exercise legal representation in the absence of the father, art. 238 *Moudawana*, which is not in accordance with art. 18 CRC.[208] Also, the registration of the child after birth needs more progress. There is still a great number of people, especially children, who are still not officially registered, with the complicated procedure, the high costs and the often disrespectful treatment by civil servants (corruption, bribery) being the biggest impediments.[209] Further matters of concern continue to be the lack of data about children's issues, mostly concerning vulnerable children, including children born out of wedlock, which are persistent taboos, wherefore it is more challenging to collect reliable data. A main reason for the lack of data is also that, up to this day, no centralized, standardized and systematic mechanism exists for the collection of such data as well.[210] The cooperation within the state must be enhanced as well as an organization responsible for the implementation and an independent monitoring body must be established as these are lacking so far.[211] Additional matters of concern are the education of children, above all for girls and children in rural areas, the illiteracy rate, sexual and domestic abuse of children and the growing number of abandoned children who often end up on the street and are exposed to any kind of abuse, whether it be economic, sexual or drug abuse.[212]

VI. Conclusion

In the past thirty years, a lot of work has been done to reform the law in order to improve the situation of illegitimate children in Morocco and other Islamic countries. Human rights organizations, professors, politicians, activists and many more have advocated for a better status of these children and their mothers. All the same, the topic remains a taboo. Certain prejudices and principles such as *nasab* or the supremacy of the male are deeply rooted in Morocco's society and could not yet be broken. The ongoing increase in the number of children born without filiation indicates that the situation continues to be unsatisfactory, and as long as sexual relations outside of marriage remain a criminal offence, it will not improve.[213] A change of the whole society and mentality is required. A cultural reconstruction founded on the new

[207] HASHEMI, *supra* n. 188, at 236 f., where a remedy on voluntary basis is discussed, which in my opinion still does not guarantee a child the right to inherit but is akin to the system of gifts.
[208] Country Profile, *supra* n. 186, at 33.
[209] Country Profile, *supra* n. 186, at 42; WILLMAN/KOUZZI, *supra* n. 7, at 12 f., 22
[210] Concluding Observations 1996, *supra* n. 191, at 2; Concluding Observations 2006, *supra* n. 193, at 3; Consideration, *supra* n. 193, at 14; Country Profile, *supra* n. 186, at 21.
[211] Concluding Observations 1996, *supra* n. 191, at 2; Consideration, *supra* n. 193, at 10; Country Profile, *supra* n. 186, at 21; ALI, *supra* n. 121, at 193; WILLMAN/KOUZZI, *supra* n. 7, at 2.
[212] Consideration, *supra* n. 193, at 31 ff., 45 ff., 47 f.; Country Profile, *supra* n. 186, at 21, 29 f., 36 f., 39 f.
[213] MONJID, *supra* n. 35, at 144.

principle of equality and responsibility is needed in order to effectively improve the rights of women and children. But such a change of culture, mentality and society will take a long time.

The implementation of the new law is not yet optimal. The judges play a central role in the implementation of the law as the new code cedes a great scope of discretion to them, whether it is the permission to marry a girl under eighteen, the allowance to have a second wife or to define the best interest of the child, meaning that the actual equality of women and the protection of children are strongly dependent on the decisions of the judiciary.[214] However, this is not an easy task to do. The judges must not only apply the *Moudawana* but also take into consideration human rights and the traditional Islamic law, which sometimes are at issue with one another.[215] For example, art. 16 and art. 156 *Moudawana* (recognition of marriage and paternity during the engagement period) are regarded as being in conflict with the precept of Islam, as they indirectly legitimize sexual relationships outside of marriage.[216] Nevertheless, most judges agree that these regulations are important for the protection of children and engaged women and therefore give more weight to the interest of the child and young women than to their religious believes.[217] Yet, judges have to constantly balance out the two legal systems. According to the survey by AÏCHA EL HAJJAMI the judges are generally open minded, they want to consider the new law and advocate the equality of women, but they sometimes hesitate due to traditions, social orders and customs and the divine law.[218] The similar impression, that judges try to take the interest of the child into account, within the confines of Islamic law had also Dr. Nadia Sonneveld[219] based on interviews with 55 judges in Morocco in 2014/2015. This is also reflected in the judgments, where reference is made to the *Moudawana* and to the religious code but seldom to any international human rights conventions, ratified by Morocco.[220] The judges find that their task is the strict application of the law, considering also the new regulations and human rights, but when it comes to their discretionary power, this may only be done on the basis of the Mālikī law as referred to in art. 399 *Moudawana*.[221] This ambiguity hinders full equality in certain cases. Other reports by local NGOs reveal a more negative picture of the judiciary stating that in practice they often do not apply the relevant laws.[222] So far, there is no reporting mechanism for judicial decision, which means there is little control over the decisions taken by the judges.[223] I imagine the truth lies somewhere in between, with each case being different, but one can certainly comprehend that the judges do not have an easy task. Furthermore, the lack of resources in the judicial system causes problems; there are not enough judges, especially no specializes family law judges.[224] This

[214] EL HAJJAMI, *supra* n. 31, at 25, 63.
[215] EL HAJJAMI, *supra* n. 31, at 36 f., 64.
[216] EL HAJJAMI, *supra* n. 31, at 39.
[217] EL HAJJAMI, *supra* n. 31, at 39.
[218] EL HAJJAMI, *supra* n. 31, at 63f., 157, 166.
[219] Dr. Nadia Sonneveld is a researcher at the Radbound University Nijmegen (Netherlands) and was a scholar-in-residence for the academic year 2014-2015 at the Hillary Rodham Clinton Center for Women's Empowerment at the Al Akhawayn University in Ifrane (Morocco). Her research focused on the question as to whether women judges differ from male judges in the way they apply the Moudawana family law reform of 2004. Any reference made to Dr. Sonneveld in this article is based on a personal interview of the author with Dr. Sonneveld.
[220] EL HAJJAMI, *supra* n. 31, at 157, 165.
[221] EL HAJJAMI, *supra* n. 31, at 165.
[222] CHARRAD, *supra* n. 10, at 9; WILLMAN/KOUZZI, *supra* n. 7, at 2.
[223] ALI, *supra* n. 121, at 194.
[224] EL HAJJAMI, *supra* n. 31, at 61 f.

leads to overloaded courts and overworked judges, who in addition, have to work in badly equipped court rooms and offices.[225]

A major barrier for the implementation of the new law is also the high illiteracy rate in Morocco.[226] Many women are not able to read or to understand the new laws and, much less, to defend their rights. In the survey conducted by EL HAJJAMI only 16% of the trial participants affirmed to be aware of the content of the new law, which indicates that awareness campaigns by the government were not efficient enough.[227] The ignorance of the new code along with the high illiteracy and poverty rates are seen as the biggest obstacles towards the full implementation of the law.[228] It is the responsibility of the state, the schools and also the media to educate people about their new rights. Moreover, minorities living in the mountain areas need a special notification of the law with a version translated into their minority language.[229] Education will be the main weapon to fight illiteracy, poverty, stereotypes and, hopefully in the end, the stigmatization of children born out of wedlock.

Up to this day there is a great inequality between children born to a married couple and children born out of wedlock because the traditional concept that only children born within a marriage can be legitimate survived the reform in 2004.[230] Still, only the filiation to the father is legally important. The child born out of wedlock itself has no possibility to fight for its own legitimacy.[231] It is generally still the father who decides whether *nasab* can be established or not.[232] Although today it is theoretically possible for mothers to register the child and the child can thus obtain the status of a Moroccan citizen, this process is not as easy for the mother and the child as it should be. The report of STEPHANIE WILLMAN BORDAT and SAIDA KOUZZI about the legal empowerment of unwed mothers created in 2010 clearly shows that unwed mothers are highly discriminated against and not legally recognized.[233] An improvement, however, can be seen in art. 156 *Moudawan,* which can be used in order to establish paternity.[234] However, the high costs of these tests appear to be a great obstacle.[235] The research made by EL HAJJAMI showed that, in cases where paternity tests were used, it was within a family and it was not used to prove paternity in cases of rape or sexual relations outside of marriage since in order to invoke this provision one must prove that the parties concerned were actually engaged.[236] However, according to SONNEVELD, not all judges demand the same standard of proof: Usually, the judges establish *nasab* through the father's line as long as the parents, usually the mother, do not explicitly mention that the child was born out of wedlock and are able to bring

[225] EL HAJJAMI, *supra* n. 31, at 62, 168.

[226] The exact number obviously is difficult to determine however, studies have shown that among women approximately 60%, in rural areas even up to 89% are illiterate. CHARRAD, *supra* n. 10, at 9 (referring to a publication of Dr. Fatima Sadiqi); ENNAJI, *supra* n. 9, at 8; GUESSOUS, *supra* n. 10, at 531. According to the Country Profile, *supra* n. 186, at 15 the illiteracy rate for girls between 15 and 24 years is at 32%.

[227] EL HAJJAMI, *supra* n. 31, at 78, 112, 164, 170 ; also WILLMAN/KOUZZI, *supra* n. 7, at 12.

[228] EL HAJJAMI, *supra* n. 31, at 60.

[229] EL HAJJAMI, *supra* n. 31, at 61.

[230] MONJID, *supra* n. 35, at 146, 150.

[231] FOBLETS/CARLIER, *supra* n. 35, at 77.

[232] FOBLETS/CARLIER, *supra* n. 35, at 80.

[233] WILLMAN/KOUZZI, *supra* n. 7, at 1, 11 (reporting the discrimination and humiliation by authorities).

[234] EL HAJJAMI, *supra* n. 31, at 148.

[235] EL HAJJAMI, *supra* n. 31, at 148.

[236] EL HAJJAMI, *supra* n. 31, at 149; WILLMAN/KOUZZI, *supra* n. 7, at 4.

forward a witness who can testify that the woman was engaged to the father of the child. SONNEVELD states that sometimes, the judges "close their eyes" and do not ask for more than one witness while others will demand more than one witness or ask for further prove of the engagement (pictures etc.). But she adds that, in such cases the judges will not always ask for a DNA test as they are afraid it could reveal that the "accused" father is not the biological father after all. Moreover, WILLMAN and KOUZZI point out that the law does not provide for courts to order such DNA tests against the will of the biological father.[237] What is striking are also the findings of judges, that cases exist where these provisions are abused by men claiming that they are engaged to a pregnant girl, only in order to get the court's permission to marry a girl under age and/or take a second wife.[238]

One of the aims of the new *Moudawana* was to approach equality between men and women.[239] The reformed *Moudawana* has introduced new principles such as equality, the child's best interest and opened up to human rights concepts. It was a win for both women and children, and concerning children born out of wedlock in particular, their legal situation was improved. Yet, full equality has not been and cannot be reached with the 2004 *Moudawana*. As long as children born out of wedlock are treated differently than children born to a married couple and as long as sexual relationships outside of marriage remain a criminal offence, these children will be stigmatized and cannot be granted full legal rights. In the end, it is not a problem of religion or legislation but of the mentality. Morocco still has a lot of work to do – legally, socially, culturally and economically – in order to acknowledge illegitimate children and related issues. However, the developments of the past years have shown that Morocco is willing to do so and that it is on the right path.

[237] WILLMAN/KOUZZI, *supra* n. 7, at 4.
[238] EL HAJJAMI, *supra* n. 31, at 167.
[239] EL HAJJAMI, *supra* n. 31, at 13, 161.

The Islamic Trust *waqf*: a Stagnant or Reviving Legal Institution?

*by Haitam Suleiman**

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Abstract

For a millennium, the waqf (Islamic trust) has financed Islam as a society, although more recently it has been on the decline. This article examines the grounds for the success of the waqf; the primary one being its solid foundational structure, developed by jurists benefiting from the flexibility of ijtihad that praises the waqf to be compatible and adaptable to any substantial changes. This article also establishes that the decline cannot be attributable to its foundational basis, nor to the legal doctrine but rather to factors unrelated to its legal theory. The decline can strongly be linked to the absence of an entire Islamic legal system that can accommodate the waqf. Another crucial factor is the political impact; in Muslim countries the main reason was the control of its assets in order to strengthen their existence. In Palestine, the grounds are different; with the need to acquire land and constrain Palestinian political aspiration.

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I. Introduction

From the outset, the Islamic legal system has concerned itself with the basic requirements of the human being, asserting the supremacy of the value of justice and the principle of human dignity and in so doing has developed the principles that constitute the heart and the basis of that legal system. The right for property is regarded as one of the five essentials of life (*Daruryyat). The waaf,* which is an unincorporated charitable trust, is an influential institution which exists to satisfy this life essential by providing the Muslim community with extensive social, educational and economic services. In Arabic, *waqf* is defined as hold, confinement or prohibition. Under Islamic *shari'a* law, *waqf* is established by a living man or woman, known as the *waqif* (founder/ settlor), who holds a certain property and makes the *asl* (principal) of a revenue-producing property inalienable in perpetuity. This has the effect of preserving it for the confined benefit of philanthropy, and prohibiting its use or disposition outside of those specific objectives. To achieve this, the property is placed under the possession of a fiduciary (*wali* or *mutawalli*) thereby assuring that the confined *waqf* reaches the intended *mustahiqeen* (beneficiaries), and is prohibited from sale, gift and inheritance. Sait and Lim[1] pointed out that the Islamic *waqf* is an important tool of institutionalized and sustainable giving, achieving its development and providing services to all sections of society and in almost every aspect of life, without relying on governmental or foreign funds. Baskan found through the great variety of recipients and players, the *waqf* system "succeeded for centuries in Islamic lands in redistribution of wealth, as a product of state-individual cooperation".[2] As the *awqaf* supported numerous economic sectors, the evolution of Islamic civilisation is incomprehensible without taking account of them. Hodgson comments that the *waqf* system eventually became the primary "vehicle for financing Islam as a society"[3], with Fyzee claiming that *waqf* is the most important branch of *Muhammadan* law because it is interwoven with the entire religious life and social economy of Muslims.[4] Similarly to the modern corporation, the *waqf* was acknowledged in Islamic law as a 'juristic person', referred to as *thema.* The concept of *waqf* points towards an Islamic system that recognizes the significance of the non-profit sector in social and economic development. The *fiqih* of *waqf,* through *shari'a* law, also offers the required legal and institutional protection to allow this sector the freedom to function separately from self-interest motives and the power of government.[5]

The *waqf* system failed to meet the objectives for which it was originally intended, and has declined to the extent that it has failed to provide the minimal services that it offered in the past.[6] Researchers have explored the possibility of revival, for example by examining the social and historical perspectives of *waqf, and* this paper sought to investigate the possibilities for revival of the *waqf* system and explores whether the legal process permits adaptation in response to inevitably changing conditions and needs.

[1] SAIT SIRAJ/LIM HILARY, Land, Law & Islam: Property and Human Rights in the Muslim World, London 2006, at 147. See also, AL-ZARKA MUSTAFA, Ahkam Al Awqaf, [Awqaf Rulings], Dar Ammar, Jordan [in Arabic] 1998, at 17.

[2] BASKAN BIROL, Waqf System as a Redistribution Mechanism in Ottoman Empire, paper presented at 17th Middle East History And Theory Conference, (May 10-11), Centre for Middle Eastern Studies, University of Chicago 2002, at 23.

[3] HODGSON MARSHALL, The Venture of Islam: Conscience and History in a World Civilisation, Vol. 2, Chicago 1974, at 124.

[4] FYZEE ASAF, Outlines of Muhammedan Law, New Delhi 1974, at 274.

[5] SULEIMAN HAITAM/HOME ROBERT, God is an Absentee, too: The Treatment of Waqf (Islamic Trust) Land in Israel/Palestine, Journal of Legal Pluralism and Unofficial Law, Vol. 41 (2009), at 49-65.

[6] SAIT/LIM, *supra* n. 1, at 161.

This paper has examined the impact upon the *waqf* of applying secular law in Islamic countries and has used Palestine/Israel as a case study. In Palestine, the *waqf* experienced a decline similar to elsewhere in the Islamic world, although has faced different challenges and fate. In the Muslim world, the availability of English publications relating to the *waqf* is limited and, similarly, court rulings and relevant legislation are either unpublished or not available in English. This article has been written on the basis of field research undertaken by a Palestinian Arab living in Israel (Haitam Suleiman). It discusses the revival of the Islamic *waqf* drawing upon Arabic, Hebrew and English language competence, and sensitivity to nuances of language, including body language, and cultural background. Interviewees may have sought to mislead, where questions dealt with controversial and sensitive issues, and officials may withhold information, while the field-study carried risk and was interrupted by the current conflict.

II. The legal context of *waqf* in Islamic law

1. The origins of the Doctrine of *waqf*

As set out below, the law of the *waqf* encompasses "religious" elements. Due to the divine *Qur'an* being its primary source, Islamic law is often perceived as a 'religious law', and thus described as rigid. However, this is not accurate for several reasons: - Islamic law has two primary sources, namely, the *Qur'an* which was revealed by God to the prophet (Mohammad), and the *Sunnah*, which is the sayings, acts and the conducts of the prophet, and which also constitute a practical application of the *Qur'anic* principles. This divine feature is a distinctive one and a significant feature of Islamic law. God is the only lawmaker, and the foundations and principles (*Nusus*) that were revealed by God, as being the basic needs for humans, should never be abolished or reformed. As stated by Vogel, the foundation of the Islamic legal system on religious beliefs means that "the Law is perfect but humans are not".[7] In addition the primary sources of Islamic law throughout Islamic jurisprudence *(Usul Al Fiqih),* offered scope for jurists to interpret the primary sources by creating instruments and methods such as *Ijtihad* (interpreting a text in such a way as its legal implications became apparent) and comparative *Qiyas* (which is concerned with deriving a particular ruling from general statements), or adopting a specific interpretation. These methods were eventually adopted as the secondary sources of Islamic law, and are applied to new areas of law where there is no applicable text in the *Qur'an* or the *Sunnah* concerning the area in question. These secondary sources have added the feature of flexibility that characterises s*hari'a* law to be adaptable to every new social development, and one that governs every aspect of life, as well as being applicable to all periods of time.

Bowen comments: "Far from being an immutable set of rules, Islamic jurisprudence (*Fiqih*) is best characterised as a human effort to resolve disputes by drawing on scripture, logic, the public interest, local custom, and the consensus of the community".[8] In other words, it is imbricated with social and cultural life, similarly to Anglo-American law. Moreover, Sait and Lim observe, "the distinguishing

[7] VOGEL FRANK, Islamic Law and Legal System: Studies of Saudi Arabia, Boston 2000, at 3-4.
[8] BOWEN JOHN, Islam, Law and Equality in Indonesia, Cambridge 2003, at 9.

feature of Islamic law is that it was not born in a vacuum or constructed out of current needs and priorities. Rather it is the product of centuries of legal thought and experiences".[9]

Islamic law therefore represents an extreme case of a 'jurist's law', which was created and further developed by private specialists. It represents a critical difference between Western philosophical beliefs that are based primarily on common law, and the separation, and/or reduced role of religion within the legal system. This foundational understanding is a critical component in understanding the Islamic legal system, and its implications with respect to the *waqf*.

The majority of Muslims are of the Sunni branch of Islam, following one of the four Sunni traditional law schools (*Hanbali*, *Shafi*, *Maliki*, and *Hanfi).* Each school has a different *Mathhab* view and differs in interpretation of the law. The four schools of law are still in existence and are known as personal schools, that is, groups designated as followers of a leading jurisconsult. The schools are considered equally orthodox, and each has benefited from the flexibility of Islamic law, using the *Ijtihad* and other Islamic instruments, to develop their own view and thoughts on debated issues in law. The law of *waqf* was quite similar among the schools, although there are some noted differences.

Islamic law may be divided into three categories: *Ibadat*, obligations regarding worship; *Mu'amalat*, civil/legal obligations; and *Ouqubat*, punishments. The jurisprudence that governs Islamic *waqf* is called *fiqih al muamalat*. Under such category, references to the basic law (*Nusus*) represent a little compared to the other categories. Therefore, the law developed due to the availability of a large space for *Ijtihad*.

The *waqf* was not specifically referred to in the *Qur'an*, although it contains verses that contain repeated urgency to believers to be charitable and donate to the alms *(zakat).* The main foundational aspects of *waqf* emerged from *Sunnah*; the first *waqf* originated from the *Sunnah* of the prophet Mohammad.[10] The juridical form of the *waqf* initially took shape around the year 755, during the 2nd and 3rd Islamic centuries.[11] Yediyildiz suggests that the reason why the *waqf* expanded as an institution in the 8th century but played no formal role in the original Islamic economic system, in the first Islamic community of Western Arabia, was because the state could provide public goods; at the time, the community was relatively small and homogeneous enough to make basic needs apparent and a centralized delivery system efficient.[12] The expansion of *waqf* came with a bigger and more compound society. Yediyildiz indicates that the proliferation of *awqaf* accompanied the establishment and development of successive Muslim-ruled states.[13] After the initial three centuries, a complex body of law emerged to oversee the creation and administration of these trusts.[14] Through the Islamic jurisprudence *(Usul Al Fiqih),* the jurists developed the *waqf* as a legal doctrine. As an institution, the *waqf* evolved more systematically from the 7th to 8th centuries[15], and became key

[9] SAIT/LIM, *supra* n. 1, at 35.
[10] AL-ZARKA, at 11.
[11] HENNIGAN PETER, The Birth of a Legal Institution: The Formation of the Waqf in Third-Century A.H. Hanafi Legal Discourse, London 2004.
[12] YEDIYLLDLZ BAHAEDDIN, Institution du vaqfau XVIIIe siècle en Turquie: Etude sociohistorique, Ankara, Turkey 1990, at 35-39.
[13] YEDILLDLZ, *supra* n. 12, at 5.
[14] GAUDIOSI MONICA M., The influence of the Islamic Law of Waqf on the Development of the Trust in England: the Case of Merton College, University of Pennsylvania Law Review, Vol. 136 (1988), at 1231-1261.
[15] CIZAKCA MURAT, A History of Philanthropic Foundations: The Islamic World from the Seventh Century to the Present, Istanbul 2000, at 6.

element in the Ottoman city, providing the main services: the imaret (soup kitchen), *madrassa* (school), Friday mosque, orphanages, shelters, and hospitals.[16]

2. The legal components of *waqf*

A *waqf* could be regarded as valid if it were irrevocable, made in perpetuity, and initiated the legal precedent that allowed the foundation of the *ahli* (family *waqf*) in addition to the *waqf khayri* (pious *waqf*). The distinction between the two is that the pious *waqf* immediately benefits religious institutions, or such pious causes as providing food to orphans, whereas a family *waqf* allows the donor to receive the income of the endowment during his lifetime and that of his heirs after his death[17]. The three basic principles governing the *waqf*, namely the trust being irrevocable, perpetual, and inalienable, are overlapping to some extent. Therefore, once an owner declared that his property was *waqf*, the subsequently created trust was 'irrevocable'. The owner, known as the *waqf* founder, could retain certain rights as to its administration, but the endowment itself was invalid unless irrevocable, and the *waqf* was bound by the terms of the *waqf* document.

Similarly, the formation of the *waqf* could not be dependent on the actions of any third party, nor was a conventional choice clause permissible. The *waqf* is 'perpetual', although the specific object of the trust is not required to be permanent. To a certain extent, the requirement of perpetuity referred to 'the dedication of the income' of the *waqf* to charitable purposes. Where the particular rationale for which the trust was created ceases to exist, the *waqf* income will be applied to a similar charitable purpose.[18] The *Maliki* School of law permitted the creation of a *waqf* limited as to time or as to a life or series of lives, and at the termination full ownership of the property reverted to the founder or the founder's heirs. This, however, was the exception to the generally accepted rule of perpetuity. Moreover, the w*aqf* is inalienable, regardless of the grounds, and could not be subject to any sale, disposition, mortgage, gift, inheritance, attachment, or alienation. However, under certain circumstances Islamic jurists have shown some flexibility in this regard, and the property could be exchanged for equivalent property if the *waqf* reserved the right to do so, or if the original *waqf* property is in danger of ruin and ceased to produce income, the property could be sold, provided that the price received was reinvested in another property.[19] Where new property is acquired in an exchange or in the course of investment through the proceeds of the sale of the original property, all the elements of *waqf* should be attached to the new property, which will be subject to the same conditions as the original property.

III. *Waqf* influence on socio-economic issues

The characteristics of *waqf* led to the creation and development of a third sector, separate from the profit-based private sector and the official public sector. The concept of *waqf* points towards an Islamic system that recognizes the importance of the non-profit sector in social and economic development, and offers the required legal and institutional protection for this sector to function

[16] STILLMAN NORMAN, Charity and Social Service in Medieval Islam, Societas, Vol. 5 (1975), at 105-115.
[17] ZARKA, *supra* n. 10, at 14-15.
[18] ZARKA, *supra* n. 10, at 38
[19] ZARKA, *supra* n. 10, at 35.

isolated from both motives of self-interest and the power of government. Moreover, this sector is supported with resources thereby making it a main actor in the social and economic life of Muslims. From the outset the *waqf* embraced significant issues within Islamic society, for instance in education, health, social welfare and environmental welfare. Subsequently, Muslim society relied profoundly on the *waqf* for the provision of education at all levels, as well as cultural services, such as libraries and lecturing, scientific research in all material and religious sciences and health care, including the provision of services of a physician, hospital services and medicines. The evidence points to the substantial economic significance of the *waqf* system, and lies in the variety of services provided by the *waqf*. Therefore, because the *waqf* supported many economic sectors the evolution of Islamic civilisation is incomprehensible without taking account of them.[20] In the Ottoman period Yediyildiz wrote:

"thanks to the prodigious development of the waqf institution, a person could be born in a house belonging to a waqf, sleep in a cradle of that waqf and fill up on its food, receive instruction through waqf-owned books, become a teacher in a waqf school, draw a waqf-financed salary, and, at his death, be placed in a waqf provided coffin for burial in a waqf cemetery, in short, it was possible to meet all one's needs through goods and services immobilised as waqf."[21]

At its creation in 1923, three-quarters of the arable land in the Republic of Turkey belonged to *awqaf*. Also, one-eighth of all cultivated soil in Egypt and one-seventh of that in Iran were known to be *waqf* property. In the middle of the 19th century, one-half of the agricultural land in Algeria, and in 1883 one-third of that in Tunisia, was owned by *awqaf*.

Kuran comments, "not only did the *waqf* turn into a defining feature of Islamic civilization; it went on to become a source of cross-civilization emulation".[22] Consequently, there is an indication that the *waqf* influenced the development of unincorporated trusts in other regions including Western Europe, where the institution of the trust emerged only in the 13th century which was 500 years after it struck roots in the Islamic Middle East.[23] Legal historians established that the origins of the Western trust might be traceable to an Islamic legal foundation of the *waqf*.[24] Gaudiosi indicates that the Crusaders brought the *waqf* back to England, possibly affecting the development of the English trust. Similarly as to the Western legal system, that same inclination exists in Islamic societies to manage family wealth over time. Cattan found general similarities and differences between the *waqf* and the early English trust or use.[25] Therefore, the *waqf* differs from trusts and foundations found in Western legal systems because it has the perpetuity element; it is this what distinguishes the *waqf* from the trusts and foundations found in Western legal systems, but which apparently influenced the early English trusts during the time of the crusades when there was much population movement between Europe and the Holy Lands, including the Franciscan Friars. In its early years, Oxford

[20] SIAT/LIM, *supra* n. 1, at 155-156.
[21] YEDIYLLDLZ, *supra* n. 12, at 5.
[22] KURAN TIMUR, The Provision of Public Goods under Islamic Law: Origins, Contributions, and Limitation of the Waqf System, Law and Society Review, Vol. 35 (2001), at 848.
[23] GAUDIOSI, *supra* n. 14, at 1244-1245.
[24] SCHOENBLUM JEFFREY, 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), at 1191-1227.
[25] CATTAN HENRY, The Law of Waqf, Herbert Law in the Middle East, Vol. 1, Washington 1955, at 212-218.

University might have been influenced by the *waqf*, with the 1264 Statutes of Merton College (significant in the founding of the college system) showing Islamic influences.[26] As the only form of perpetuity in Islam, founders have used the *waqf* for a variety of unprofessed, non-religious purposes, such as avoidance of confiscation of property by rulers, tax avoidance, and control over an heir's excesses.[27]

IV. The 'decline' of *waqf*

While the trust is performing well, the *waqf* faced a decline. It is questionable whether such a decline can be attributable to the foundational characteristic of the *waqf* or whether it is related to the legal doctrine itself?

The remaining traces of *waqf* have become distorted as a result of several practices that occurred in the last century. The culture of *waqf* almost vanished to the extent that the majority of Muslims do not possess a basic knowledge of it. Both economic and political factors led to the decline of *waqf*, and during the colonial era, the *waqf* was reconstructed to mirror the Western trust.[28] The 19th century involved steps toward centralization[29], although the legal framework for founding and administering *awqaf* remained the same. Therefore, in the following decades, huge new *awqaf* were founded, with the obvious effects on state revenues. During the 20th century most Muslim countries have nationalized the *waqf*, and this has involved massive confiscations of *waqf* properties. Persistently, due to a shortage of funds, governments of the region approached the *waqf* system as a potential source of new revenue.[30] In the process of reforming the *waqf*, the stipulations of *waqf* founders ceased to be treated as 'sacred and inviolable', denying the fact that it violates Islamic *shari'a* principle. The 'reformers' contributed to this radical conversion they based their opinion on range of Westernizers; to whom the *waqf* system seemed to be declining purely because of its identification with Islam. According to Kuran:

"European policymakers fanned the reforms for reasons of their own… They hoped to transform the world in the image of their own societies. They thought that stronger states would find it easier to pursue Westernization… they wanted to facilitate foreign investment in the Islamic world. They sought to curb the losses that their subjects incurred in trying to have property seized for repayment of debt, only to learn that it was inalienable."[31]

Furthermore, European leaders wished to enable central governments to repay their Western creditors.[32] Kuran proceeds further stating, "Whether interested in reforming the *waqf* system or in destroying it, all these groups exaggerated its inefficiencies".[33]

[26] GAUDIOSI, *supra* n. 15, at 1247-1250.
[27] CIZAKCA, *supra* n. 15, at 79-86.
[28] LIM HILARY, The Waqf in Trust, in SCOTT-HUNT SUSAN/LIM HILARY (eds), Feminist Perspectives on Equity and Trusts, London 2000, at 47-64.
[29] CIZAKCA, *supra* n. 15, at 110-168.
[30] KURAN, *supra* n. 22, at 888.
[31] KURAN, *supra* n. 22, at 889.
[32] DAVISON RODERIC, Reform in the Ottoman Empire, 1856-1876, New York 1973, at 258.
[33] KURAN, *supra* n. 22, at 889.

Consequently, rather than modernising the *waqf* institution the post-colonial Muslim states, under the impress of modernising 19th century reforms, abolished or nationalised the *waqf*. They also restricted the family *waqf* and some have totally forbidden the establishment of new ones. It has also been claimed that the *waqf* did not serve the purposes for which it was originally intended, and the state could administer them more efficiently. The transformation of *waqf* welfare into the public sphere has turned it into dead capital. Whatever the reason behind its decline, for Sait and Lim, "the eclipse of *waqf* has left a vacuum in the arena of public services,…students, health patient, the homeless, travellers, the poor, the needy and prisoners are only some of the vulnerable people who have lost the cover of the *waqf*".[34]

V. Doctrinal deficit versus maladministration?

An essential effective principle of *waqf* law is that, as a general rule, a *waqf* for a limited period of time is invalid on the basis that it must be perpetual (*mu'abbad*). This requirement arises out of the application of the fundamental principle that property in *waqf* is dedicated to Allah, and thus cannot easily be reclaimed.

Some commentators claimed that the consequences of this mandatory rule of perpetuity were disastrous from an economic standpoint. However, these commentators, particularly orientalists such as Schoenblum and Kuran, had mistakenly interpreted Islamic principles. Perpetuity does not mean tying up the land, yet prohibiting its use; it relates to tying up the asset in order to disallow the usage of the property and to preserve it to constantly produce revenue. Schoenblum also stated that a contradiction exists with respect to the family *waqf*. He stated "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" and further stated, "Indeed, the Prophet Mohammed said (in *Hadith*), "one's family and descendants are fitting objects of charity, and that to bestow on them and to provide for their future subsistence is more pious and obtains greater 'reward' than to bestow on the indigent stranger".[35] Islamic law is clearly promoting the act of charity even to an individual's own family he is rewarded even to a greater degree. At the same time the *waqf* property, economically speaking, is producing revenue that can provide a profit for the community.

Subsequently, contrary to the interpretation by orientalists such as Kuran and Schoenblum, the earlier Muslim *fuqaha*, and the contemporary Western and Muslim researchers are impressed by its flexibility. The Islamic principle that requires perpetuity has had the affirmative effect of actually inflating value. The rationalization for this is that the law imposes, as a logical conclusion of the perpetuities mandate, a fundamental, though not absolute, outlawing against sale or other alienation of property held in *waqf*. Indeed, this prohibition is attributed directly to the Prophet, who is reported to have declared, "You must bestow the actual Land itself, in order that it may not remain to be either Sold or Bestowed, and that Inheritance may not hold in it". However, there are certain strict exceptions: in cases where *waqf* property has fallen 'into ruins or ceases to produce any benefit, so that the objects of the *waqf* cannot be fulfilled', the *mutawalli* can apply to the *qadi* for permission to sell. Nevertheless, the *mutawalli* is only allowed to sell the property and reinvest the proceeds in other property or exchange properties. Undeniably, a sale or exchange of properties is permitted,

[34] SIAT/LIM, *supra* n. 1, at 172.
[35] SCHOENBLUM, *supra* n. 24, at 1199.

even if property is not in a ruinous or unproductive state, where the *waqif* had authorized the sale or exchange originally at the creation of the *waqf*. Some founders seem to have approved a power of sale for a diversity of reasons. When there is no express permission, the power to sell or exchange is very strictly exercised and *waqf* property may not, generally speaking, be sold in exchange for another property merely because the resulting increase of the corpus would be beneficial to the *waqf*. While some *fuqahaa* have recognized the right of sale purely for gain, most have not, and orthodox theory clearly disapproves of this practice. As for the new property acquired in an exchange or through investment of the proceeds of the sale of the original property, 'all the incidents of *waqf* would attach to the new property which will be subject to the same conditions as the original property'. Moreover, through inspired interpretation of the founder's directives, a *mutawalli* could make large transformations that the founder would narrowly have expected, let alone permitted. Where such changes are conducted they must be strictly supervised by the *shari'a* court *qadi*.[36] The operational obstacles attached to the *waqf* system were noticed early by the *fuqahaa*. Not only were these acknowledged, rules were taken to diminish them. The classic *waqfiya* contained a standard formulary, outlining operational alterations the *mutawalli* was entitled to exercise. This point additionally supports the observation that the *waqf* system offered operational flexibilities. Therefore, the *waqf* is equipped with standard flexibilities that refresh its adaptive capacity.[37] During the 15th century the Ottoman courts approved these endowments.[38] The *waqf* has also been used for other wealth preservation purposes, including the protection of property in times of insecurity from unprincipled rulers and the defeat of creditors. With respect to the latter objective, *fatwas*, as the general law, of (*fuqahaa*) jurisconsult, forbids this, though it still has been pursued.

Some students of *waqf* put forward another economic motive for establishing a *waqf*, describing it as a motive to circumvent the Islamic inheritance system.[39] However inheritance, as economic rules in the *Qur'an*, is the most detailed principles. Restricting the individual's testamentary power to one-third of his or her estate, the *Qur'an* assigns two-thirds to sons and daughters, spouses, parents and grandparents, brothers and sisters, grandchildren, and possibly even distant relatives. Also, in the *shari'a* interpretation, nobody who inherits automatically may be named in a will. The entire estate of a person who dies intestate is divided among all his legal heirs.

1. Autonomous *waqf* (Ottoman Case)

Cizakca argued that the Ottoman case should be interpreted cautiously as it can be traced to French colonialist and orientalist arguments about the autocracy of the Ottoman Empire.[40] *Awqaf* were founded in Ottoman cities as hospitals, shelters, public kitchens, orphanages, and most importantly, schools and mosques. Therefore, it can be considered as charitable endowments for the benefit of the civic. Isin and Lefebvre observe, by founding *awqaf*, appointing supervisors, managers, and trustees to manage and perpetually maintaining them, show the creation of an urban civic administration by

[36] ZARKA, *supra* n. 10, at 147.
[37] VAN LEEUWEN RICHARD, Waqfs and Urban Structures: The Case of Ottoman Damascus, Studies in Islamic Law and Society, Vol. 11 (1999), at 48-52.
[38] CIZAKCA, supra n. 15, at 313.
[39] POWERS DAVID S., The Islamic Family Endowment (*waqf*), Vanderbilt Journal of Transnational Law, Vol. 32 (1999), at 1167-1190.
[40] CIZAKCA, supra n. 15, at 5-24.

imperial authorities and refute the socio-political criticism the Ottoman Empire was charged with[41] Isin and Lefebvre argue that:

"in the occidental tradition from Montesquieu to Weber, the Ottoman Empire is interpreted as having inadequate mediation between imperial and provincial notables and authorities with the result that the development of a social and economic civic spirit was inhibited, which 'diminished the likelihood of an indigenous movement to amend Islamic provisions contrary to self-governing".[42]

To a certain extent, it should be argued that the state itself (in conjunction with privately endowed *awqaf*) integrated civic space, and organized Ottoman cities. By such performance, the state instituted its own rule by proceeding through this sacred object and gift-giving practices. The *waqf* and the state were mutually combining. As Van Leeuwen convincingly demonstrates, *waqf* was primarily an urban institution and shaped the civic space of Ottoman cities, acting as crossroads between "*urbs*, the city in its material form, and *civitas*, the idea of an urban community".[43] On the one hand, the *qadi* is the representative of the sultan and has to abide by the *sultanic* decrees; however, the sultan is subjected to the same general rules that apply to everyone else, such as the procedures for establishing the validity of evidence, the sacrosanct nature of the stipulations of the founder and the rules for the validity of *waqf*.[44] Therefore, it appears that the conversion of sacrilegious wealth into sacred endowment is a movement whereby a social gift produces legal subjects, which are sacrosanct and secure, and achieves a legal recognition. As states by Van Leeuwen, "by becoming a *waqf*, an object is subjected to a whole set of rules developed especially to protect its status and to enhance its exploitation to the general benefit to the community".[45] Therefore, more courageously, Islamic law, insofar as it pertains to guarantee property rights by alienation into the sacred, endows to the subject autonomy, right, and legal resort.[46]

2. Maladministration and enforcement versus revival

A further way of assessing the *waqf* performance is through the enforcement of law and maladministration. Diwan and Diwan write on the issue of *waqf* administration in India:

"all the world over mismanagement, maladministration of, and corruption in waqf have become legendary.... Yet, satisfactory solution of [sic] problem eluded us. Another and probably more effective effort has now been made by Parliament by replacing the 1954 Act with the Waqf Act 1995. It may be hopefully thought that India would succeed providing better management of awqaf and eradicate corruption." [47]

As mentioned earlier, the *waqif* can stipulate the line of sequence of *mutawallis*. He can even empower a *mutawalli* to appoint his successor. Moreover, according to all schools apart from the *Malakite* school of Islam, the *waqif* himself can serve as *mutawalli*. However, once a *mutawalli* is designated, he cannot be removed by the *waqif*, who cannot reserve a power to do so.

[41] KURAN, supra n. 22, at 882.
[42] ISIN ENGIN F./LEFEBVRE ALEXANDER, The Gift of Law: Greek Euergetism and Ottoman Waqf, European Journal of Social Theory, Vol. 8 (2005), at 17.
[43] VAN LEEUWEN, *supra* n. 37, at 203.
[44] VAN LEEUWEN, *supra* n. 37, at 54.
[45] VAN LEEUWEN, *supra* n. 37, at 66.
[46] ISIN/LEFEBVRE, *supra* n. 41, at 13.
[47] PARAS DIWAN/PEEYUSHI DIWAN, Muslim Law in Modern India, 7th ed., Faridabad 1997; SCHOENBLUM, *supra* n. 24, at 277-78.

In cases where the *waqif* has not retained the power to designate a successor, or is no longer able or alive, the board of *awqaf* or the *qadi* has the power to replace a *mutawalli* in addition to oversee the *mutawalli's* operation. The extent and limitation to the *mutawalli's* duty should undoubtedly be determined and defined. Indeed, the *mutawalli* is expected to do everything that is necessary and reasonable to protect and administer the *waqf* property according to all schools of Islam. His duty is viewed as a moral and religious duty. However, the *mutawalli* can be removed for misfeasance, insolvency, breach of trust, or adverse claims to the *waqf*. He can also be held accountable in a case of misappropriating his position. Apparently a *Waqif* can apply to remove *mutawalli* in cases of misappropriation. However, this does not apply to the *waqf* in Jerusalem where the *waqif* cannot enforce the judgment other than in the Israeli court, where he refuses to do so. Recent Indian legislation imposes a fine on the *mutawalli* for wrongdoing[48], and with regards to the *qadis* they are expected to exercise their power to create institutional deterrent to self-interest on the part of tempted *mutawallis*, particularly those of long-standing *awqaf* where the temptation would likely be furthermost. As Reiter has explained, with respect to the 20th century experience of enforcement in Jerusalem:

> *"One of the weaknesses of the waqf system is the absence of an efficient supervisory mechanism for the administrations of its properties.... procedures of governance ... do not vest the qadi with the means to discharge this duty. Neither have the authorities devised auditing rules to ensure control of sound management of awqaf by the qadi.... This weakness is exploited by the mutawalli ... to derive personal gain from waqf resources....".*[49]

The difficulties found with respect to 20th century Jerusalem also can be found in India. Thus, "The institution of family *waqf* also needs immediate attention of the government as well as of the public particularly Muslims. These *awqaf* are looked upon by *mutawallis* in management as though they were *awqaf* for their benefit only. They tend to ignore the rights and interests of other beneficiaries".[50] The current author noted the similar problems regarding *qadi* lack of ability to enforce judgments that is regularly experienced in Jerusalem at present.

Therefore, it may be strongly argued that the plans of the *waqif* were often not fulfilled due to the absence of a reliable enforcement regime, to the extent that there is no personal liability, or it is inadequately outlined, or is only occasionally imposed. The requirement that the *mutawalli* does all that is necessary and reasonable to protect and administer the *waqf* property has significant operational consequences. Yet, he cannot sell or lease the underlying property freely, except with the approval of the governing board or *qadi*. However in many cases in Israel, maladministration is noticed and the inability to enforce judgments led to the decline of the *waqf*, especially in Jerusalem. Therefore, an enforcement system must exist, to make accountable, a *mutawalli* or any other actor who has misappropriated his position.[51]

The main obstacles to the revival:

[48] HIDAYATULLAH MOHAMMED/HIDAYATULLAH ARSHAD, Mulla's Principles of Mahomedan Law [sections], 19th ed., Bombay 1990; SCHOENBLUM, *supra* n. 24, at 173.

[49] REITER YITZHAK, Islamic Endowments in Jerusalem under British Mandate, London/Portland 1996, at 181.

[50] QUERESHI MOHAMMED, Waqfs in India: A Study of Administrative and Statutory Control, New Delhi 1990, at 39.

[51] For more on the case of Jerusalem see, SULEIMAN HAITAM, Conflict over *Waqf* property in Jerusalem: Disputed jurisdictions between civil and Shari'a courts, Electronic Journal of Islamic and Middle Eastern Law (EJIMEL), Vol. 3 (2015), at 97-110, http://www.ejimel.uzh.ch.

Although conditions differ dramatically from one Muslim country to another, the principle behind the doctrine of *waqf* is largely uniform and unvaried from one region to another, and *waqf* law could not have been differentiated geographically. Nonetheless, the *waqf* faced different practices from one country to another. Consideration is therefore given to Israel as a country with Islamic populations living under non-Islamic power. The field-study in Jerusalem has revealed that due to the absence of enforcement system, Israeli law has, on several occasions, facilitated the beneficiaries in owning *waqf* property, whereas such events were rarely found throughout the Islamic history. A central element that influenced the *waqf* is the modern practice with sovereign regulations in the Muslim countries. The family *waqf*, at least, has largely been regulated out of existence in a number of predominately Muslim countries, such as Egypt Law No. 180 of Sept 1952. Also, prior to the new military regime that took power in the early 1950s; a serious effort had been made to "reform" the *waqf* in Syria (Legislative Decree No. 762, May 16, 1949), with the *waqf-dhurri* no longer being permitted. Furthermore, in Syria, there was no grandfathering for pre-existing *awqaf*. Schoenblum presents conflicting statements, where he without any theoretical, let alone practical, evidence claimed, "the utilization of legislation to address *waqfs* in modern society is a direct response to resistance of many Islamic authorities to significant change in the traditional law. It is an outgrowth of the failure of that law to adapt naturally in prior periods to radically different social and economic realities".[52] Earlier, in the same article, he claimed otherwise adding the 'reforms' in Arab countries caused the prohibition and reining of the *waqf* through imperative stages "in the consolidation of power by new governing elites, such as the military, and the elimination of potentially alternative power centers of accumulated wealth and prestige that could challenge their hegemony". Schoenblum proceeds further, "the legislations have not served as a liberalizing influence with respect to *waqf* law but as a prohibitory or constraining, 'reformist' one".

One may question why the present *waqf* has suffered a different fate than the early *waqf*? The present regulations made by Muslim countries diminished the status of the *waqf*, claiming that it would not be able to adapt to current economic complexes, and therefore raised the question by Layish, asking what are the grounds and reasons that the institution of the *waqf* has survived, and even flourished, in East Jerusalem, when it has been on the decline in Israel and in some Arab countries?[53] Furthermore, Reiter notes, that making widespread use of the *waqf* in Jerusalem ran counter to its decline in other Islamic countries in the 20th century.[54] Indeed, the literature (practice) and the field-study have provided an answer to the question posed by the preceding scholars. Unfalteringly, the independence and autonomy attached to the *waqf* are vital components for the sustainable living of the *waqf*; the decline therefore may not be attributable to the character of the doctrinal *waqf* law. Even though there is inadequate and even uncertain empirical data respecting the *waqf*, at least in Israel, the argument here is that while it may have served an efficient purpose in its earlier development, such as the consolidation of land for agricultural use, it has been unable to accommodate the demands of a modern structural state. Once again, there were many reforms made to address these conditions that could not compensate for the absence of a systematic legal doctrine, in harmony with a modern structural state.

[52] SCHOENBLUM, *supra* n. 24, at 1197.

[53] LAYISH AHARON, The Muslim Waqf in Jerusalem after 1967: Beneficiaries and Management, Le Waqf dans le monde musulman contemporian (XIXe-Xxe siècles), ed. Faruk Bilici, Varia Turcica, Istanbul 1994, 26, at 145-68.

[54] REITER YITZHAK, Islamic Institutions in Jerusalem: Palestinian Muslim Administration under Jordanian and Israeli Rule, The Hague/London/Boston 1997, at 27-28.

The institution of *waqf* could play a crucial role in social and economic development. Several Muslim countries and organisations have noticed the potential for the development of the *waqf* properties and the revival of their functions and ability to provide those important services they used to carry out in the past. Therefore, the North American Islamic Trust was established to provide services to the Islamic Society of North America. The World *Waqf* Foundation has made a commitment to activate the role of the *waqf* to provide a contribution to the different charitable purposes and to help the poor and needy people. The 1990 Algerian Act of *Awqaf* stated that all the *awqaf* properties that were diverted to other usages must be returned to *Awqaf* and devoted to promoting the charitable objectives assigned for them by the founder.[55] The existing assets of *awqaf*,in most Muslim countries, represent a huge amount of social wealth that can be developed to provide the required services for the society. There are countries that have developed its *waqf* system such as Kuwait, and it is therefore possible to learn from their administrative processes and experience. As the endowment (*waqf*) is not a Qur'anic Nus, it is more easily subject to creative interpretation (*Ijtihad*) and change. This assertion is being debated amongst scholars and the classical rules relating to the *waqf* are under review.[56] However, modern reforms in several Muslim countries have abolished, nationalised or highly regulated endowments, although the *waqf* remains influential and there are signs of its reinvigoration. Islamic *Awqaf* properties occupy a considerable proportion of the societal wealth in several Muslim and non-Muslim countries, and the concept of *waqf* itself is also a principle that entails generous applications in the direction of developing the non-profit, non-governmental sector and increasing the quantity of welfare services that aim to improve the socio-economic welfare of a society. This provides a strong justification for a detailed study of the potentiality of the application of *awqaf* and the development of their properties in Muslim countries and communities. Further, it encourages studying the potentiality of the idea even in all non-Muslim economies.[57]

The revival of *awqaf* properties is an issue worthy of study, both from the point of view of the existing *awqaf* and from the point of view of encouraging the establishment of new *awqaf*. Kahf argues that if one attempts to reformulate the definition of *waqf* for expressing its economic content, the *waqf* could be deemed to be "diverting funds (and other resources) from consumption and investing them in productive assets that provide either usufruct or revenues for future consumption by individuals or groups of individuals".[58] Therefore, *Waqf* consists of the combination of the act of saving with the act of investment. It involves taking certain resources off consumption and simultaneously putting them in the form of productive assets that increase the accumulation of capital in the economy for the purpose of increasing future output of services and incomes. Services provided by *waqf* may take the form of a patient bed space in a hospital building, a prayer space in a mosque or a student space in a school building. By the same token, the *waqf* may produce output to be sold to the public in order to generate net income for the beneficiaries of the *waqf*. Kahf noted that the Islamic definition of *waqf* makes its assets cumulative, in application to the principle of perpetuity in *waqf*. He argues, as discussed earlier, that a *waqf* asset may not be sold or disposed of in any form, for instance, a *waqf* asset remains in the *waqf* domain perpetually and any new *waqf* will be added to that domain, implying that *Awqaf* assets are only liable to increase, and are not permitted to decline since it is illegal to consume the assets of *waqf* or to leave

[55] SIAT/LIM, *supra* n. 1, at 172.
[56] SIAT/LIM, *supra* n. 1, at 172.
[57] KAHF MONZER, Financing the Development of Awqaf Property, Seminar Paper, IRTI, Kuala Lumpur, Malaysia, March 2-4, 1998.
[58] KAHF, *supra* n. 57, at 3.

them inactive by any action of neglect or abandonment. Not only is the *waqf* an investment, it is a cumulative and ever increasing investment. This argument is supported by the historical development in Muslim lands that eventually made a considerable proportion of cultivable lands and metropolitan real estates in the domain of *waqf*, to the extent that *Awqaf* properties were estimated at over one third of the agricultural land in countries including Turkey, Morocco, Egypt and Syria.

The premise of this study was that the doctrine matters. While reforms and adjustments can sustain the system for some time, it must ultimately abate if it is not systemised. This is not the case, however, where the legal process itself permits adaptation in response to inevitably changing conditions and needs. Efforts have been made to accommodate the differences among the various schools. Thus, legal forms have been written to satisfy the requirements of them all. In addition, Muslims can apparently assign as governing law in agreements, including (the creating instrument), the rules of one school or another. In recent times, for example, Arab states have unreservedly accepted principles from schools predominant in other countries and incorporated them in statutes. The literature on *waqf* has referred to some difficulties and declines regarding foundational and operational issues, and these critics have dealt disjointedly with each situation, failing to link each decline to the whole surrounding atmosphere, and neither did it examine the entire legal system of the time.

VI. *Waqf* in Palestine/Israel: special status

Palestine is regarded as a special case, with a different status at all levels. The legal position in Palestine is, simultaneously, one of the most complicated and rare situations, emerging in unsteady circumstances due to the several powers that ruled Palestine through history.
The partition of Palestine led to the creation of complex and different legal systems in the West Bank, Gaza Strip and Jerusalem as well as in the parts of the country that were occupied in 1948. Until the end of the Ottoman rule in 1917, the Palestinian legal system was based on the principles of Islamic *shari'a* law, following which there was a British Mandate and a remodelling of the legal system. Along with the Ottoman law making, the British introduced the principles of the Anglo-Saxon system, which is based on common law. While the West Bank, inclusive of eastern Jerusalem, was under the rule of the Hashemite Kingdom of Jordan in 1948, and the Jordanian legal system, which is influenced by many other systems, prevailed, the Gaza Strip was under the Egyptian administration where the joint legal system of the former British Mandate prevailed. Later, the Israeli occupation imposed its military law on the West Bank and the Gaza Strip after the 1967 war and made eastern Jerusalem subject to the local law of the Israeli occupier after annexing it in 1980. After the Oslo Accord, the Palestinian Authority was founded and the jurisdiction of the new authority was agreed upon. The Palestinian legislators then started unifying and harmonizing the diverse legal systems prevailing in the Palestinian territories. Since 1994, unifying legislation has been enacted for both the West Bank and Gaza Strip.[59]
In Israel, most *waqf* property was expropriated under the *Absentee Property Law 1950*, and it is one of the most sensitive and complicated issues in the Palestinian-Israeli conflict. Israel claims 93 per cent of its territory as public domain for the Jewish faith, and the process has isolated and contained the surviving Arab communities within Israel, while the rest of the Palestinian people

[59] SULEIMAN/HOME, *supra* n. 5, at 52-56.

have been displaced to peripheral locations (such as Gaza and the West Bank), which Israel has held under military occupation since 1967 and where it also has control of most of the land.
In 1948, *waqf* land was estimated to comprise a sixth of the country, but estimates are unreliable, and the Israeli Government does not disclose (and may not hold) data on the extent of *waqf*. In 1980, the Custodian of Absentee Property estimated that about 70 per cent of the land of the state of Israel might potentially have two claimants - an Arab and a Jew holding respectively a British Mandate and an Israeli deed to the same property.[60]
Another important law is the so-called 1965 amendment, ironically described by Israeli scholars as a "reform" of the *waqf* in Israel: the Absentees' Property (Amendment No. 3) (Release and Use of Endowment Property) Law 1965. The amendment represented a further stage in the confiscation of any remaining Muslim *awqaf,* authorising the transfer of *waqf* property to the custodian, denying the conditions that were attached when the property was endowed, and ensuring that property confiscated from the *waqf* would not be returned, regardless of whether the m*utawalli* or the beneficiary is 'absentee'. The law empowered the custodian to pass the property to the Development Authority or to the board of trustees, ostensibly to prevent its neglect, but in practice to sell it for development, contradicting the fundamental perpetual characteristic of *waqf* land. The law freed the remaining *waqf* from restrictions under *shari'a* law, and restricted the political use of funds generated from those *awqaf*.
The situation with *waqf* property is particularly complicated in Jerusalem, because of its special status under international law. *Waqf* represents some 90 per cent of property within the Old City (both Islamic and Christian).[61] During the mandate, the Palestinians used *waqf* properties as a buffer against the sale of land to the Jews. Jordan continues to exercise its sovereignty and law over *waqf* institutions in Jerusalem, through the Ministry of *Waqf* in Amman, and while Jordanian law became obsolete with the establishment of the Palestinian Authority (PA) in the West Bank and Gaza, it still forms the legal basis for some institutions in Jerusalem where the PA is not allowed to function. Jordanian control allowed the decline of *waqf* until 1967: only 16 new *awqf* were founded in Jerusalem during the 19 years of Jordanian rule, compared with 90 under the first 23 years of Israeli occupation (1967-1990), giving the *waqf* a central position in Palestinian society.[62]

VII. Conclusion

The *waqf* has succeeded for a millennium to finance Islam as a society; this was proved by historical practices during the Muslim empire. The literature and the field-study emphasised that the grounds for the success of the *waqf* are numerous. The primary one is its solid foundational structure that is based on the development of jurists benefiting from the flexibility of *Ijtihad* that praises the *waqf* to be compatible and adaptable to any substantial economic changes. In contrast, the field-study indicated that the decline of the *waqf* cannot be attributable to its foundational basis, nor to the legal doctrine, but rather to factors unrelated to its legal theory. The decline can strongly be linked to other issues, the principal one is the absence of an entire Islamic legal system that can accommodate the *waqf* and supports its sustainable living. Another crucial factor is the political impacts, which are different in terms of methods and objectives. Political incentives can be varied,

[60] DUMPER MICHAEL, Islam and Israel: Muslim Religious Endowments and the Jewish State, Washington DC 1994, at 28.
[61] BAGAEEN SAMER, Evaluating the Effects of Ownership and Use on the Condition of Property in the Old City of Jerusalem, University of Strathclyde, Glasgow 2006, at 135-150.
[62] REITER, *supra* n. 49, at 27-28.

for instance, in Muslim countries the main reason was to control the assets in order to strengthen their existence. Whereas in Israel the grounds are different- the need to acquire land and constrain Palestinian political aspiration overrode the need to address Muslim demands that the *waqf* system be given some form of representative role.[63]

The main reasons behind the decline of the *waqf* in Palestine/Israel are of political grounding, undertaken through the influence of control and land acquisition exerted by the continuous Israeli governments. Recent cases, such as '*Maamanollah'* (in Jerusalem), are practical evidence of implementing the policy of continuous expropriation of the Muslim *waqf* to Jewish hands. More recently, in 2009-2015, three Muslim cemeteries *(MaamanoAllah, Ijzim & Alberwa, in the north)* were confiscated to reach into the hands of Jews and these were legalised by the Israeli Supreme Court.[64]

The *waqf* should have expanded its province in the modern state, whereas it has experienced an unreasonable decline throughout the Islamic world. To a number of Muslim and western writers, this has been attributable to factors that are not related to inefficiencies with respect to the *waqf* legal doctrine itself, but to impacts of political powers tending to control its capitals. It is therefore meaningless to link such decline to the legal doctrine associated with the *waqf*. As a legal regime, *waqf* law has been largely responsive, particularly in light of changing classifications of wealth, socio-economic conditions and state structure. There are several factors and explanations to the success of the legal doctrine to respond and adapt itself with the changing economic situations. A principal of these is the character or foundational grounding of *waqf* law, making it simple for the law to evolve in a responsive and uncontroversial manner. Moreover, another affirmative cause is the related religious principles observed by inhabitants of Islamic societies that have deterred individuals from insistently planning in ways that contradict "divine" precepts of *waqf* law. These customs have advanced a culture of not taking seriously alternatives to the rules of *shari'a* law.

The paper therefore revealed that a substantial cause of the *waqf's* decline is the inappropriate statutory response. Legislative 'reforms' in countries with substantial Muslim populations (Muslim and non-Muslim) were remarkably different from one region to other, and in the main it has affected the performance of *waqf*. *Waqf* legislation should have gradually eliminated many of the significant impediments that hindered the efficiency of the *waqf*. However, legislation addressing the *waqf* has tended more to its overregulation or absolute prohibition, and in several occasions accompanied by confiscation of property currently held in existing *awqaf,* as the case of the Palestinian *waqf*. The contemporary Islamic states governed by overstretched and authoritarian regimes, where serious corruption existed, are on an extensive scale. An unplanned consequence of rules modified through means of questionable legality caused the decline to the law of *waqf,* and these rules legitimized the prevalence of secular law over *shari'a* principles. During the Islamic authority (for instance, the Ottoman era) the *waqf* was treated as sacred and was regulated by Islamic *shari'a* law, indeed during these times one can notice several attempts to control or confiscate *waqf* properties but this was greatly resisted, and such practices can be regarded as violating *shari'a* rules. Whereas practices of nationalization, by contemporary Muslim states, of the entire *waqf* system are without doubt denying *shari'a* law and therefore substitute it with secular law to regulate the *waqf,* the result is it has greatly affected the performance of *waqf*. The facts invalidate the assertion that inflexibilities of the *waqf* system caused its decline and therefore reforms were made to revive it. Muslim *fuqhaa* recognized the flexibility characteristic of *waqf* system regarding the foundational and operational issues,

[63] DUMPER, *supra* n. 60, at 2.
[64] SULEIMAN, *supra* n. 52, at 105-107.

whereas the literature indicates that a few orientalists, still with no legal or practical substances, insist that perpetuity is 'static' and cannot be challenged. One can clearly distinguish that the *waqf* system, throughout Islamic history, served many imperative functions. It is imprecise to assert the claim that the *waqf* is inflexible without disregarding the barriers and obstacles to its achievement of economic efficiency. There were many practical opportunities for transforming the operations and objectives of *awqaf,* however the traditional *waqf* system was flexible enough to remain the principal basis for social services.

The question was raised whether the present *waqf* is capable of being adaptive and compatible to the increasingly complex and fast-changing economy. The field-study and the literature essentially provided theoretical and practical answers, as well as identifying adaptations of approaches and instruments proposed by the *waqf* system to avoid economic inefficiencies throughout Islamic history. In view of these patterns, one might suspect the fact that the Islamic states regimes of the time might have been able to restructure the *waqf* system. The present article argues that the *waqf* has played an essential role in preventing expropriations by the state, and forced the recognition of unchallengeable property by placing it into a sacred legal code. The *waqf* has been examined in an anachronistic and inappropriate approach, where this strongly represents an outright orientalism. In contrast, being codified by *shari'a* jurisprudence, the *waqf* provided a symbolic and legal guard against encroachment by the state of such endowment. The *waqf* and the state in the past were mutually combining, for example during the long period of the Ottoman era. The *waqf* has managed to restructure its operational role through legal flexibility, and has, in practice, reoriented its mission through various means, being able to generate a dynamic 'civil society'. While the modern *waqf* has become mainly a stagnant institution, the earlier *waqf* has proven to be remarkably flexible and responsive to changing conditions affecting public endowments and management of family wealth and its preservation. Indeed, contemporary *waqf* has continued to lose position, a victim of political influences leaves it unable to adapt to modern conditions, due to the absence of adequate legal system and adjudicatory mechanism. While the *waqf* has successfully functioned for long periods under different conditions, its modern decline seems predictable. The legal system (in Israel and Muslim states) as a fundamental component and its exceedingly overregulated rules, alongside obstacles of enforcement procedures, made any different outcome unfeasible to achieve without retaining *waqf's* autonomy and independence. Beyond doubt, the decline is due to absence of *shari'a* law that can embrace the success, development and reform of the *waqf* system.

The contribution of Yusuf Qaradawi to the development of Fiqh

*by Yasmin Hanani Mohd Safian**

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Abstract

This paper analyses the contribution of a preeminent Muslim scholar, Yusuf Qaradawi to the religion, especially in the area of fiqh. His active role in disseminating the knowledge of fiqh began when he was 17 years old. His major works include The Lawful and Prohibited in Islam, Fiqh al-Zakat and Fiqh of Minority have greatly contributed to the progress of contemporary fiqh, putting him as one of the most influential Muslims in the world. He received many critical reviews over the years. Therefore, this paper analyses some of his fiqh works vis-à-vis the analytical reviews he received. It can be concluded that Qaradawi has made a considerable effort to exercise ijtihad corresponding to the current problems that is beneficial to Muslims worldwide. At the same time, he has called for a renewal in ijtihad process and an abandonment of religious extremism, a religious neglect and blind imitation in legal rulings.

I. Introduction

This paper will be analysing Yusuf Qaradawi fatwas[1] in addressing current *fiqh* issues. The fatwas will be divided into several sections including his methodology and approach in giving fatwas. In most of his publications, he is very much interested in reviving the spirit of *ijtihad* in fatwas. He believes that Muslim scholars should exercise the real *ijtihad* and at the same time, they must ensure the issued fatwa is workable and does not cause harm to the Muslim society.

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[1] Fatwa is religious ruling, the plural of fatwa is *fatawa* in Arabic. However, in this writing, the author has pluralised the term by adding 's' at the end of the word. The same is applied for other term such as *madhhab.*

1. Yusuf Quaradawis Person

Yusuf Qaradawi can be regarded as one of the most influential and preeminent Muslim scholars in the world. In 2009, he was ranked as the ninth most influential Muslims by The Royal Islamic Strategic Studies Centre. He was born in Nile Delta Village. At the age of 17, he started delivering his Friday sermon in the city of Tanta.[2] He was a part of the Azhari generation scholars who were impressed by the teachings of Hassan al-Banna.[3] Qaradawi joined the Muslim Brotherhood in his teenage years. He is the most influential leader of the Muslim Brotherhood since Mahdi Akef stepped down in 2010. He was imprisoned several times due to his active involvements in the Muslim Brotherhood. His earliest publication in *fiqh* and Shariah entitled *The Lawful and the Prohibited* in Islam marked him as a 'rising star' for the future.[4] However, this work is not free from criticism and reviews. He is also widely known for his Al Jazeera television program, *al-Shariah wal hayat* that is viewed by an estimated 60 million people worldwide.[5] However, his long support of Muslim Brotherhood has harmed his standing among the wider Arab public and has made him the centre of criticism by the West. For instance, his controversial view in legitimizing suicide bombing as a form of self-defence was criticised vehemently by many of his opponents. In February 18, 2011, after a long exile in Qatar, he returned to Egypt and delivered a Friday sermon calling for the conquest of al-Aqsa Mosque. As a result, he has been labelled as the 'Egyptian Khomeini' and 'Muslim Pope'.[6]

2. His methodology and approach in Fiqh

In most of his publications, Qaradawi has called for middle way approach (*manhaj wasat)* in the Shariah and he is the founder of the centrist school of Islamic thought.[7] In his fiqh works, he repeatedly condemns those who are *mutashaddidin* (extremists) and *mutasahilin* (religious neglect). He always chooses the middle position between these two situations.[8] Unlike any other Muslim scholars, he opts not to judge explicitly an action by categorizing the act according to any of the five legal rulings (obligatory, recommended, prohibited, permissible, and detestable) as any other jurists. He is not judgemental in his responds to the public. In the midst of differences in *fiqh*, pluralism and sectarianism, he always calls for harmonization and unity in thought.[9] Examining this centrist school, a research by Polka

[2] QARADAWI YUSUF, Khutb As-Shaikh al-Qaradawi, Cairo 1997, at 6-9.

[3] QARADAWI YUSUF, Kaifa Nataamul ma'a al-Turath, Cairo 2004, at 5; QARADAWI, *supra* n. 2, at 6-9; WARREN DAVID H./GILMORE CHRISTINE, One nation under God? Yusuf al-Qaradawi's changing Fiqh of citizenship in the light of the Islamic legal tradition, Contemporary Islam, Vol. 8 (2013), Issue 3, at 219, retrieved from http://ezproxy.usim.edu.my:2072/10.1007/s11562-013-0277-4, last access date 7/6/2016.

[4] WARREN/GILMORE, *supra* n. 3, at 219.

[5] WARREN/GILMORE, *supra* n. 3, at 220.

[6] EL DEEB SARAH/MICHAEL MAGGIE, Gadhafi's grip on Libya weakens, Telegraph – Herald, 22 February 2011, retrieved from http://search.proquest.com/docview/853174876?accountid=33993, last access date 7/6/2016; WARREN/GILMORE, *supra* n. 3, at 220; GANOR BOAZ, The Revolutions and US euphoria, Jerusalem Post, 28 February 2011, retrieved from http://search.proquest.com/docview/854909188?accountid=33993, last access date 7/6/2016; RUBIN BARRY, Egypt gets is Khomeini,Jerusalem Post, 21 February 2011, retrieved from http://search.proquest.com/docview/853623830?accountid=33993, last access date 7/6/2016.

[7] HELFONT SAMUEL, Yusuf al-Qaradawi, Islam and Modernity, Tel Aviv 2009, at 41; WARREN/GILMORE, *supra* n. 3, at 220.

[8] WARREN/GILMORE, *supra* n. 3, at 220; YUSUF, *supra* n. 3, at 30-32.

[9] QARADAWI, *supra* n. 3, at 30-34.

concluded that Qaradawi has combined the two concepts of salafiyya; returning to the way of Islamic forefathers- and the concept of renewal, or *tajdid*.[10] However, he does not embrace the method adopted by strict *salafi* and liberalists in understanding *fiqh.*

In addressing current Muslim problems, a Muslim scholar cannot set himself free from the classical legacy. According to Qaradawi, real Muslim scholars must exercise real *ijtihad* by examining the classical legacy, i.e the evidences. A scholar should not confine himself to one particular School of Law (*madhhab)* and abandon the rest. Even the weightiest evidence from any particular School of Law must be carefully examined and the suitability of the *fatwas* must be thoroughly assessed. One view might be the most appropriate in one place at one time, but it might not be suitable in other places at a different time. The renewal of Islamic jurisprudence must be taken into consideration to balance between the dictates of foundational texts and the true reality, and this method has been described as 'neo-salafi' on the grounds that it permits to circumvent Islamic traditions in a selective and pragmatic manner.[11] Qaradawi emphasises that the concept of *ijtihad* in *fiqh* must be clearly understood by all scholars. In other words, no School of Law is superior over another. There is no infallibility concept in *fiqh* except for the Prophet Muhammad. In this regard, he is greatly influenced by Hassan al-Banna's doctrine of *usul 'ishrin* (the 20 principles), promulgating that the concept of *`iṣmah* or infallibility is only for the Prophet. In addition, any *ijtihad* of a scholar cannot nullify other's *ijtihad*. Qaradawi is always open for discussions as he promotes talks and peaceful negotiations even with the enemies or those who are different from us. He proposes Muslim scholars to embrace the methodology of peaceful talk as promoted by the Quran.[12] Qaradawi's *wasatiyya* approach can be defined as middle way approach, moderation or justly balanced approach which is different from the ultra-conservative ways of Muhammad Abdul Wahhab. He can be regarded as *"a follower of a liberal, flexible approach to religious law"*. Qaradawi even condemned the strict explicit interpretation of modern Zahiri in some of *fiqh* issues, for instance in the case of fiat money. Qaradawi's authority in fatwa rests in the legal tradition and not merely based on reasoning as practiced by other secular trained scholars. He always attempts to integrate any *fiqhi* issues into the Islamic tradition. This approach according to his critics, has the potential to be far more convincing and far-reaching to the public.[13]

II. Yusuf Qaradawi and *ijtihad*

In early 90s, Qaradawi has repeatedly called for *ijtihad* in these two areas; the area of business transaction and the area of science and medicine.[14] These are the two modern areas that need extra attention by modern Muslim scholars. These problems have not existed in the past. For example, in the issue of paper money (fiat money), he has discussed the urgency to review the position of money whether it should be restricted to gold and silver, or should the interpretation of money be expanded to fiat money as well. He criticises the

[10] HELFONT, *supra* n. 7, at 41-44.
[11] WARREN/GILMORE, *supra* n. 3, at 224.
[12] QARADAWI, *supra* n. 2, at 10-11.
[13] WARREN/GILMORE, *supra* n. 3, at 224.
[14] QARADAWI YUSUF, Al-Ijtihad al-Muasir bayna al-indibat wal infirat, Cairo 1994, at 7-9.

modern Zahiri who restricts money as *ribawi* item only on gold and silver. Thus, the group argues that fiat money is not zakatable. This new modern Zahiri, according to Qaradawi, only interprets textual evidence explicitly and failed to understand the real issue of *riba.* Fiat money is considered as *ribawi* item as gold and silver, hence carries the same legal effects and rulings.

As regards to poverty alleviation, Qaradawi in his publication, *Fiqh al-Zakat* has long called for better distribution of *zakat* collection to help the poor to grow.[15] This book was derived from his PhD thesis in 1973. Mohamad El Gari, the Director for the Centre for Research in Islamic Economics in King Abdulaziz University described this work as "*still remains unparalleled in its comprehensiveness exposition and depth"* as compared to any other works in its field.[16] *Zakat*, according to Qaradawi is a way to improve the state of a deserving person and at the same time purifying the wealth of the *zakat* payer. The *zakat* system has never been established before Islam. Comparing *zakat* with a tax system, Qaradawi contends that this system is a comprehensive system of public finance that is beneficial to the Muslim individual, community and nation. It can be argued that Qaradawi's considerable efforts in reviving *fiqh zakat* were based on his deep rooted knowledge in the legal tradition and his ability to interpret the textual evidences explicitly and implicitly.

On the subject of medical and science issues, he has called for new *ijtihad,* for instance, in the issue of organ transplantation. In light of the available legal textual evidences, he carefully examined the permissibility of transplantation of an animal organ to a human patient, organ donation after one's death, transplanting organ from a non-Muslim to a Muslim patient as well as blood donation. He has permitted the donation and the transplantation of organs from a living of a deceased person even to a non-Muslim patient in a critical situation provided that the act does not bring significant harm to the donor and those who have rights on the donors. He however, prohibits organ trading.[17] One of his controversial fatwas is the permissibility of milk bank which was strongly opposed by traditional Muslim scholars especially in the Middle East. In 1983, responding to the question by the Islamic Organization for Medical Sciences, he permitted the establishment of milk bank on the basis of the urgent need of the baby. In this matter, he supports the opinion of classical scholars who interpret the Quranic verses (4:23), fostering sibling kinship only through direct breastfeeding. He argued that it is permissible to establish milk bank to feed premature babies whose mothers have died. His argument is due to the juristic reasoning that milk banks do not facilitate nursing directly from the breast, the absence (or doubt) of a donor record means that kinship is void, and that overall, the banks have a noble aim that should be considered for the good of society. In this matter, he gives preference to the view of Laith bin Saad, Daud bin Ali and some Zahiri scholars. International Islamic Fiqh Academy, for instance, prohibited the establishment of milk bank in the Muslim worlds. It took almost two decades before Qaradawi's fatwa was fully supported, this time by the European Council for Fatwa and Research in 2004. The council argued that milk banks were now more widespread

[15] For further reading, see QARADAWI YUSUF, Fiqh al-Zakat, Beirut 1999.
[16] For further reading, see also the translation of Fiqh al-Zakat by Monzer Kahf, Jeddah 2000.
[17] Malaysian Ministry of Health, Organ Transplantation from Islamic Perspective, Kuala Lumpur 2011, at 26.

and that having access to milk through these banks was of great concern for Muslims minorities living in "Western" countries, something the previous ruling overlooked.[18]

1. Qaradawi: The importance of mastering classical fiqh texts

In addressing current *fiqhi* situation, he stresses that the solution for contemporary *fiqh* cannot be discussed separately from *turath al fiqhi* (the legacy of Islamic law). This means, modern scholar must be able to understand the wisdom behind the lengthy *fiqhi* discussions in *classical fiqh* books. He admires the earlier scholars who made substantial efforts on leaving a great *fiqh* legacy for the next generation. However, the later generation, in his opinion, tends to forget this legacy. This means, the later generation has failed to understand the wisdom that has been left by earlier generations of scholars. Each *fiqh* problem should be carefully and thoroughly examined as every case is unique and different. However, he admits that the process of *ijtihad* has never been easy as there are many differences or pluralism especially when the texts contain more than one meaning that are open for discussion. At the same time, there are many cynical critics towards modern Muslim scholars questioning the scholars' capability to become a real *mujtahid*. The critics argue that many Muslim scholars are not competent and still lacking in exercising their *ijtihad*. Despite this claim, Qaradawi still persistently believes that *ijtihad* can be exercised by modern Muslim scholars. The scholars can utilise *ijtihad* and show their mastery skills in the areas that they are familiar with.

Despite the strict requirements of *ijtihad*, he argues that *ijtihad* processes today are much easier as printing materials are readily available as compared to the past where the *mujtahid* had to travel everywhere to gather information, collecting and validating evidences and meeting great Sheikhs. He admires continuous efforts of Muhammad `Abduh, Rashid Rida, `Abdul Majid Salim, Mahmud Shaltut, Tahir `Ashur, Faraj Sanhuri and Muhammad Abu Zahrah to revive Islam for the benefit of mankind. Addressing the current pressing needs of the Muslim society, he is of the opinion that the obligation to exercise *ijtihad* nowadays is not only permissible but is an obligation. He also opposes the idea of closing the gate of *ijtihad*. In addition, a scholar should not confine himself to one specific School of Law and a scholar should not be only a follower. As regards to renewal of the some religious issues, he shares the same opinion as Mustafa al Maraghi, the late sheikh of Al-Azhar who criticised people who opposed and rejected any attempt of *tajdid* in Muslim personal codes in Egypt.[19]

2. Qaradawi: Between preponderance ijtihad and innovative ijtihad

In addressing current *fiqhi* issues, Qaradawi has proposed two approaches of *ijtihad* namely preponderance *ijtihad* and innovative *ijtihad.* Preponderance *ijtihad* according to Qaradawi is where a scholar chooses the strongest or weightiest view of the past after careful

[18] Patheos, More than Breast Friends: Kinship and Muslim Milk Banks, 26 March 2013, retrieved from http://www.patheos.com/blogs/mmw/2013/03/more-than-breast-friends-kinship-and-muslim-milk-banks/, last access date 7/6/2016.

[19] QARADAWI, *supra* n. 14, at 15-16.

consideration and thorough examination.[20] The first method is by choosing the most sensible and weightiest opinion. It is called *tarjih,* preponderance, weighing conflicting or incongruent evidence. In understanding the revealed evidences, the scholars were trained to deal with all conceivable possibilities of conflict in textual evidence. He is against the practice of selecting only a few fatwas within certain specific *madhhab*. He argues that the real *tarjih* must take place in the fatwa making process. *Tarjih* is an effort in examining all available views across all *madhhabs*; by examining the evidences and avoiding *taqlid* or following certain *madhhab* blindly. He also objects the practice of selecting and giving preference to a fatwa without examining the evidence. This is what he called as *taqlid* which according to him as accepting the strongest view without verifying the validity of the evidences. Meanwhile, according to him a *talfiq* is accepting a view without looking at the evidences. In selecting the most appropriate view, he said the selected fatwas must comply with certain conditions; namely the closest view to those of modern experts', the easiest for society to adapt to; and at the same time fulfilling the objectives of Shariah and preventing from potential harm.

The society must be taught that differences in *fiqh* are inevitable and do not cause harm as long as Muslims can tolerate each other. The fatwas can differ according to locations, time and people. He also tried to harmonize between the classical fatwas and the current research findings especially in the area where the Muslim scholars are not familiar with, such as medicine, physics and other science fields. He gave a few examples such as the case of wine. The old schools only restricted the ruling of *khamr* to wine, a beverage produced from grapes, whereas the latter scholars expanded the prohibition on all alcoholic beverages that carry similar effects of intoxicants. Similarly, in the case of determining the minimum and maximum duration of pregnancy, the classical *fiqh* indicates 7 years as the maximum period for pregnancy. This opinion, according to Qaradawi is not suitable due to the availability of more accurate medical research that proves the maximum period of pregnancy is only 9 months. We can conclude here that the scholars must be well informed regarding current issues even though the previous fatwa has covered it textually. Past *ijtihadic* matters that were justified based on custom, public interest or any juristic tools are open for review for modern interpretation. Similarly, in the case of determining excessive menstrual blood for a woman that exceeds her normal length of period, the principle of '*urf* (custom) can be observed by looking at difference experience among Muslim women.

Meanwhile, innovative *ijtihad* is a serious effort to derive ruling for new current issues that are not covered textually in the past. In this regard, Qaradawi suggests that modern Muslim scholars must be able to venture this type of *ijtihad.* This *ijtihad* is riskier than the previous method, as the area of concern is left uncovered textually. The process of *ijtihad* will be lengthy, exhausting and difficult to persuade the public to accept. *Ijtihad* gave an example of zakat on a person who rented a piece of land. According to Qaradawi, the person who works on the rented land has to pay zakat from the revenue or crops of the rented agricultural land. At the same time, the landowner has to pay zakat on the rental fee. This view however contradicts the established view of Hanafiah where zakat is only obligatory on the land owner.

[20] QARADAWI, *supra* n. 14, at 19-28.

Despite the two specific methods of *ijtihad* mentioned above, Qaradawi affirms the possibility to combine these two methods when there is a need to do so, for instance in the issue of obligatory bequest and abortion.

Qaradawi reminds Muslim scholars of several pitfalls in the process of *ijtihad*. Firstly, an abandonment of textual evidences due to ignorance and forgetfulness. *Mujtahid* should be well-versed in verifying all legal textual evidences in the Quran and Sunnah. These legal evidences serve as the premier sources of ruling. Ignorance of the Quranic injunctions and hadith traditions leads to misinterpretation of the evidence, and even worse, it will lead to deviation from the true meaning of the textual sources. The wrong understanding of a *dalil* (textual evidence) is normally attributed to hasty efforts in issuing a fatwa. A wise scholar will never rush in making a fatwa, instead he will examine the relevant evidences with extra consideration and careful thought. Qaradawi has given an example of wrong deviation in textual interpretation; in the case of cutting off the hand of a thief and whipping an adulterer. Some people translated the Quranic verses regarding the punishment for these sinful acts as merely permissible, a non-obligatory punishment. The group suggests a new interpretation of the verses by giving the wisdom to the ruler *(wali al-amr)* to establish new means of punishment which is more appropriate. In this regard, it gives more room for Shariah to be adapted to social needs according to the liberalists.

The other pitfall highlighted by Qaraḍawī is an abandonment of *ijma'* or consensus such as the case of permitting a Muslim woman to marry a man of the book. He also warns about exercising wrong *qiyas* (analogy). For example, in the case of imposing interest on the people by the state, the group promotes its permissibility by supporting their argument base on a saying that there *riba* does not occur between a father and son. For Qaradawi, the relation between a father and son is not analogous to the relation between the state and the people, hence adapting *qiyas* in this case is inappropriate.

Other pitfalls that Muslim scholars should avoid are ignorance about the reality of people and failure to understand the reality of Muslim society leading to the issuance of unsuitable *fatwas*. In addition, the scholars must comprehend clearly the notion of public interest. Public interest, as practiced by the Khulafa, has never violated the Quranic and Hadith texts. In other words, an interest that contradicts the textual evidence is void. In modern days, some people have overrated a public interest, prioritising it over an established and consensus of the jurists. A few examples of void interest; the practice of *riba* in conventional banks, the prohibition of polygamous marriage in Tunisia and the distribution of equal portion of inheritance among sons and daughters.

3. Qaradawi – facing new challenges

Calling for reforms in the science of issuing fatwas, Qaradawi persistently advocates the importance of embracing the original doctrine of Shariah. The textual evidences should be read correctly as understood by established prominent classical scholars, and at the same time he realises the importance of being pragmatic. This means, the laws which are clearly outlined in the Quran and hadith, and agreed upon by all scholars must be set free from *ijtihad. Ijtihad* can only be exercised in new issues that are not covered textually or when

there are differences in interpreting relevant evidence. Scholars must be able to distinguish between the non-amended fixed laws, and the laws that may change according to different situations and locations. Rigid interpretation must be avoided for instance, in addressing the pressing needs of Muslim communities living in the West. Their needs and problems are unique and should be treated differently from their Muslim counterparts in Muslim countries. In this sense, Qaradawi has responded to various problems faced by Muslims in non-Muslim majority countries. The uniqueness of this minority Muslim society has called for a special new legal discipline and should focus more on devising exceptional rulings pertaining to their unique circumstances.[21] Qaradawi has pioneered this effort by establishing *fiqh* for the minority.[22] However, some have doubted its effectiveness and argued it will take years to realise. Conversely, how to measure the *fiqh* that can support peaceful co-existence among the Muslims and non-Muslims within non-Muslim societies?

The main challenge is how to develop a concrete methodology and sources of *fiqh* of the minority to achieve its goal and at the same time do not depart from traditional juristic framework and style[23]. Qaradawi has called for sound contemporary *ijtihad*. The concept of easiness, removing harm and public interest have been widely used in Qaradawi's approach of *fiqh* of minority without sacrificing the fundamental teaching of Islam. However, this approach is regarded by some critics as a temporary short term solution[24]. In addition, Qaradawi also promotes the concept of *tadarruj* (gradual implementation of law) that can be utilised to lessen the burden of practicing a strict rule. In defining his methodology, Qaradawi has presented his mastery sources by quoting Quran, the hadith and legal texts in a simple language understandable by the majority of Muslim.

In many situations, Qaradawi insists the original rules and the fundamental teachings must remain and one should try their best to perform the original rule before resorting to the facility (*rukhsah)*. In responding to the case of the prohibition of hijab in France for instance, he gave a wise answer without simply jumping directly to the rule of *darura* (necessity excuse). Hijab, according to him, must be worn and Muslim women's right should be respected. In this sense, the freedom to practice one's belief is clearly in line with the international convention of human rights. He further argues that hijab is not merely a religious symbol unlike the Christian cross or Star of David. A religious symbol according to him, does not function like a hijab does, nor is it an advertisement like the cross, or Star of David. He claims that a hijab is worn to protect a woman's dignity. In addition, he has elaborated the notion of religious tolerance as permitting one to practice her/his religious obligation, and not to compel her/him to commit what the religion has prohibited. Meanwhile, the highest level of religious tolerance, he added, is accepting what is permissible in one's religion.

[21] PARRAY TAUSEEF AHMAD, The legal methodology of fiqh al-aqalliyyat and its critics: An Analytical study, Journal of Muslim Minority Affairs, Vol. *32* (2012), Issue 1, at 88-107, DOI: 10.1080/13602004.2012.665624, last accessed 7/6/2016.

[22] For further reading refer to QARADAWI YUSUF, Fi fiqh al-Aqalliyat al-Muslimah, Cairo 2005; QARADAWI YUSUF, Fiqh al-Daulah fi al-Islam, Cairo 1997.

[23] HASSAN SAID FARES, Fiqh al-Aqalliyyat: History, Development, and Progress, New York 2013, at 7-10.

[24] NAJIMDEEN BAKARE, From the *Fiqh* of Minority to Cosmopolitan *Fiqh,* An Analysis, Policy Perspectives, Vol. 11 (2014), No. 1, at 38.

Despite Qaradawi's considerable effort to establish the special *fiqh* for Muslim minority, a more acclimatized and Westernised Muslim like Tariq Ramadan scorns this, rather finds it appealing.[25] That is why Najimdeen in his article "From the *Fiqh* of Minority to Cosmopolitan *Fiqh* An Analysis" proposes for a cosmopolitan *fiqh* to replace *fiqh* of minority. A cosmopolitan or dynamic *fiqh* according to Najimdeen, drives the Muslims back to the pristine, non-fanatical and non-sectarian epoch of flexibility, where Muslims were undivided along the lines of differences in Madhhabs. Quite necessarily, a cosmopolitan *fiqh* will bring forth the reunification of the Madhhabs. Hence, instead of minority *fiqh*, a cosmopolitan *fiqh* that resonates with all Muslims taking abode in *dar al-amr* (abode of solace) should logically be distinctive from what actually manifest in *dar al-islam* (abode of Islam). Najimdeen is of the opinion that Qaradawi should transcend finding solutions for the Western or European Muslims, rather, concerted efforts should be tailored at developing a comprehensive, dynamic and yet cosmopolitan *fiqh* that will address the issues faced by Muslims regardless of their locations. A cosmopolitan *fiqh* according to Najimdeen, delineates the universal value of Islam as opposed to the narrow context of minority fiqh. Najimdeen gave an example of the story of Malik bin Anas who rejected the idea of Caliph al-Mansur to codify his hadith compilation, making it a sole authoritative status and binding document for the people. However, examining Najimdeen's idea of promoting cosmopolitan fiqh that calls for elimination of boundaries between *madhhab*, we can however conclude that this idea is not new to Qaradawi himself. He has elaborated the issue comprehensively in his book *al-Ijtihad al-mu`asir bayna al-indibat wa al-infirat.* Qaradawi scorns the practise of blind imitation to one specific *madhhab* or choosing one's best opinion without justifying and examining the *dalils* (legal evidence).

III. Conclusion

It can be concluded that the intellectual rigor surrounding Qaradawi's fiqhi discussion has received substantial intellectual appraisal although not exculpable from criticisms. He strongly advocates for *ijtihad* and *tajdid* (renewal) in religious matters that is flexible in nature. He proposes to adopt preponderance *ijtihad* and innovative *ijtihad* or a combination of both. In exercising real *ijtihad*, a *mujtahid* must be well versed in legal evidences, making a reality check in every fatwa issued, be extra careful with religious extremism and religious neglect, and at the same time weighing the best opinion that is closest to the society and the easiest for the people. His remarkable contribution in Shariah and *fiqh* has been acknowledged by many scholars and intellectuals, placing him as one of the most influential persons in the Muslim world. Shariah as a way of life, should not be seen as a burden to human kind, rather should be pictured as a bless to the whole universe.

[25] NAJIMDEEN, *supra* n. 24, at 38.

Misyār-Ehe: Begriffsbestimmung und islamrechtliche Grundlagen unter besonderer Berücksichtigung Yūsuf al-Qaraḍāwīs (geb. 1926) Ansichten

von Mahmud El-Wereny[*]

Inhaltsverzeichnis

Abstrakt

Für die Richtigkeit und Anerkennung eines gemäß dem islamischen Familienrecht abgeschlossenen Ehevertrags müssen bestimmte Bedingungen eingehalten werden. Heutzutage sind neue Eheformen in Erscheinung getreten, in deren Rahmen den Partnern erlaubt wird, ein gemeinsames „eheliches" Leben zu führen, ohne alle Voraussetzungen eines herkömmlichen Ehevertrags zu erfüllen. Eine dieser Eheformen ist die misyār-Ehe, welche sich in den 1980er Jahren im Nadschd/Saudi-Arabien entwickelte und seit Anfang der 2000er Jahre kontrovers diskutiert wird. Der vorliegende Beitrag stellt die Debatte zu dieser Ehe vor, wobei der Fokus besonders auf Yūsuf al-Qaraḍāwīs Ansichten liegt. Es soll dabei vor allem eruiert werden, wie diese Eheform definiert und rechtsmethodologisch begründet wird.

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I. Einleitung

Infolge der Moderne und der damit verknüpften sozio-ökonomischen, rechtlichen und politischen Entwicklungen sowie des gesellschaftlichen Wertewandels hat die Institution der Ehe einen radikalen Wandel erfahren. So werden heutzutage zahlreiche sexuelle Beziehungen als Ehe betrachtet, wenngleich diese die islamrechtlichen Bedingungen einer Eheschließung nicht immer einhalten.[1]Eines dieser Ehephänomene, das den Gegenstand einer kontroversen Debatte in der islamischen Welt darstellt, ist die *misyār*-Ehe. Dabei handelt es sich um eine relativ neue Variante von Ehe, im Rahmen derer eine Beziehung zwischen Mann und Frau geführt wird, ohne alle nach islamischem Familienrecht erforderlichen Bestandteile eines Ehevertrags zu erfüllen.[2]Die Handlungen von Musliminnen und Muslimen werden islamrechtlich im Allgemeinen nach denso genannten Fünf-Beurteilungskategorien (*al-aḥkām al-ḫamsa*)bewertet, und zwar entweder als verpflichtend (*wāǧib*), empfohlen (*mandūb*), verpönt (*makrūh*), erlaubt (*mubāḥ*) oder als verboten (*ḥarām*).[3] Muslimische Rechtsgelehrte sind unterschiedlicher Meinung darüber, in welche der letzten drei Kategorien dieses Konzept von Ehe einzuordnen ist.[4]

Einer der zeitgenössischen Gelehrten, der sich mit dieser Frage intensiv auseinandersetzt, ist der 1926 in Ägypten geborene und seit 1961 in Katar lebende Yūsuf al-Qaraḍāwī.[5] Sowohl seine Popularität als auch seine nicht zu unterschätzende Autorität unter Muslimen weltweit machen seine Ansichten zu diesem Thema relevant und somit für diesen Beitrag geeignet. Er gilt darüber hinaus als einer der wichtigsten und ersten Gelehrten, der eine ausführliche Fatwa zu dieser Frage erteilt und eine entsprechende Schrift verfasst hat.[6] Im vorliegenden Artikel soll seine Fatwa zu der seit Anfang der 2000er Jahre sowohl in arabischsprachigen elektronischen Medien als auch in

[1] Näheres dazu vgl. AL-AŠQAR USĀMA B.ʿUMAR, *Mustaǧaddāt fiqhīya fī qaḍāya az-zawāǧ wa-ṭ-ṭalāq,* Amman 2000 und RITTER OLIVER, Entwicklungen der islamischen Ehe im globalen Kontext: die nichtregistrierte Ehe (*zawāǧ ʿurfī*), die „Gelegenheitsehe" (*zawāǧ misyār*) und die „Freundehe" (*zawāǧ frind*)", in: HATEM ELLIESIE/SCHOLZ PETER (u.a.), GAIR-Mittelungen 2013, 5. Jg., 130-148.

[2] Siehe zur Begriffsbestimmung III. Bedingungen eines traditionellen Ehevertrags.

[3] Mehr dazu siehe GOLDZIHER IGNAZ, Die Ẓāhiriten. Ihr Lehrsystem und ihre Geschichte. Ein Beitrag zur Geschichte der muhammedanischen Theologie, Leipzig 1884, 66f. und SCHNEIDER IRENE, Die Terminologie der *aḥkām al-ḫamsa* und das Problem ihrer Entstehung, dargestellt am Beispiel der šāfiʿitischen *ʾadab al-qāḍī*-Literatur, in: FLATURI ABDOLJAVAD/DIEM WERNER (Hrsg.), ZDMG, Suppl. VIII, XXIV. Deutscher Orientalistentag vom 26. bis 30. Sep. 1988 in Köln, Stuttgart 1990, 214-223.

[4] Weiterführend dazu vgl. AL-MUṬLAQ ʿABDALLĀH YUSUF MUHAMMAD, *Zawāǧ al-misyār: Dirāsa fiqhīya wa-iǧtimāʿīya naqdīya*, Riad 1423 H./2002, 112-151 und AL-AŠQAR, *supra* Fn. 1, 159 f. und 202-206.

[5] Zum Forschungsstand über al-Qaraḍāwī vgl. GRÄF BETTINA, Medien-Fatwas@Yusuf al-Qaradawi: Die Popularisierung des islamischen Rechts, Berlin 2010, 84-102.

[6] Für Näheres dazu vgl. III. Bedingungen eines traditionellen Ehevertrags.

Zeitschriften und Büchern geführten Debatte über die *misyār*-Ehe dargestellt werden.[7] Dabei soll vor allem der Frage nachgegangen werden, wie al-Qaraḍāwī diese Eheform definiert und seine Haltung dazu rechtsmethodologisch begründet. Dafür wird zunächst ein allgemeiner Überblick über seine Person als Mufti sowie über die Voraussetzungen einer konventionellen schariagemäßen Eheschließung erforderlich. Die Transkription arabischer Termini richtet sich nachfolgend nach den Richtlinien der Deutschen Morgenländischen Gesellschaft (DMG). Eigene Übersetzung der Koranverse unter Einbeziehung der Übersetzung von Rudi Paret.[8]

II. Yūsuf al-Qaraḍāwī als Mufti

Yūsuf al-Qaraḍāwī ist ein ägyptisch-stämmiger islamischer Rechtsgelehrter und Autor.[9]Seine Ausbildung erhielt er an der Al-Azhar Universität in Kairo, an welcher er an der *Uṣūl ad-Dīn*-Fakultät islamische Theologie, islamische Philosophie sowie Koran- und Hadithwissenschaften studiert hat. Er war bereits seit seiner Schulzeit vom Gedankengut der ägyptischen Muslimbruderschaft beeinflusst, so dass er dieser bereits 1942/43 offiziell beitrat.[10] Seit seiner Ansiedlung in Katar 1961 und durch die Nutzung aller ihm zur Verfügung stehenden Massenmedien erfährt er weltweite Popularität**.** Von besonderer Bedeutung für den Anstieg seines Bekanntheitsgrades sind auch seine über einhundertfünfzig Publikationen, welche teilweise in diverse Sprachen übersetzt vorliegen. Sein erstes und wohl bekanntestes Werk „Das Erlaubte und Verbotene im Islam" (*al-Ḥalāl wa-l-ḥarām fī al-islām*)aus dem Jahr 1960 ist beispielsweise in über dreißig Auflagen immer wieder veröffentlicht und in verschiedene Sprachen übersetzt worden.[11]

[7] Es gibt einige arabischsprachige Publikationen sowie kurze Beiträge zum Thema *misyār*-Ehe im Allgemeinen. Dort wird al-Qaraḍāwīs Fatwa angesprochen. Vgl. beispielsweise AL-MUTLAQ, *supra* Fn. 4, AL-NASR TOFOL JASSEM, Gulf Cooperation Council (GCC), Women and Misyar Marriage: Evolution and Progress in the Arabian Gulf, Journal of International Women's Studies, Vol. 12 (2011), 43-57; FAKIH HASSEN, Misyar Marriage Enrages Gulf Women, Middle East Online (25.04.2006), abrufbar unter: http://www.middle-east-online.com/english/?id=16308 (Stand: 10.02.2016) und JABARTI SOMAYYA, Misyar Marriage – a Marvel or Misery?, Arab News (05.06.2006), abrufbar unter: http://archive.arabnews.com/?page=9&section=0&article=64891 (Stand 18.02.2016).

[8] Vgl. PARET RUDI, Der Koran: Übersetzung, Stuttgart 2007.

[9] Für einen ausführlichen Überblick über al-Qaraḍāwīs Leben und Wirken vgl. GRÄF BETTINA/SKOVGAARD-PETERSEN JAKOB (Hrsg.), Global Mufti: The Phenomenon of Yūsuf al-Qaraḍāwī, London 2009.

[10] Vgl. al-Qaraḍāwīs Darstellung zufolge hörte er in seinem allerersten Jahr in Ṭanṭā Ḥasan al-Bannā anlässlich der Auswanderung (hiǧra) des Propheten sprechen und war von ihm so tief beeindruckt, dass er seine Rede noch heute auswendig kann. Vgl. AL-QARADĀWĪ YŪSUF, *Ibn al-qarya wa-l-kuttāb. Malāmiḥ sīra wa-masīra*, Bd. 1, Kairo 2006, 159 f., 178. Weiterführend zu al-Qaraḍāwī und al-Azhar siehe SKOVGAARD-PETERSEN JAKOB, Yūsuf al-Qaraḍāwī and al-Azhar", in: GRÄF BETTINA/SKOVGAARD-PETERSEN JAKOB, *supra* Fn. 9, 27-51.

[11] Vgl. AL-QARADĀWĪ, *supra* Fn. 10, B. 2, 301 f. und für die deutsche Ausgabe: AL- QARADĀWĪ JUSUF Erlaubtes und Verbotenes im Islam. Übersetzung Ahmad von Denffer, München 1989. Für Näheres dazu vgl. GRÄF BETTINA, Yūsuf al-Qaraḍāwī: Das Erlaubte und das Verbotene im Islam", in: AMIRPUR KATAJUN/AMMAN LUDWIG (Hrsg.), Der Islam am Wendepunkt. Konservative und liberale Reformer einer Weltreligion, Freiburg 2006, 109-117.

Al-Qaraḍāwīs *iftāʾ*-Praxis hat seiner eigenen Darstellung zufolge sehr früh begonnen. Schon als Abiturient soll er Fatwas in der Moschee seines Dorfes erteilt haben.[12] Er berichtet in seiner Autobiografie, wie er anfangs über theologische sowie moralische Themen referiert habe. Später, im zweiten Jahr der Sekundarstufe, soll er sich mit Themen rechtlicher Natur befasst haben, insbesondere mit den gottesdienstlichen Pflichten (*aḥkām al-ʿibādāt*). Als materielle Grundlage für den Unterricht habe er sich hauptsächlich des Rechtskompendiums *Fiqh as-sunna* von Saiyid Sābiq (gest. 2000) bedient.[13] Nach seinen eigenen Angaben verfolgte al-Qaraḍāwī bei der Behandlung von an ihn gestellte Rechtsfragen ein neues Rechtsverfahren (*nahǧ ǧadīd*), welches in erster Linie auf der Befreiung von der Befolgung einer bestimmten Rechtsschule (*taḥarrur maḏhabī*) und der Erleichterung (*taisīr*) basierte.[14]

Nach seiner Immigration nach Katar erfahren seine Fatwas mehr Resonanz und Anerkennung. Als Verbreitungsmedium seiner Fatwas dienen ihm nicht ausschließlich die traditionellen, sondern auch die neuen Medien. Er gibt an, seit Anfang der 1960er Jahre als Mufti in der katarischen Radiosendung *Nūr wa-hidāya* („Licht und Rechtleitung") sowie im Fernsehen *Qatar TV* mit einem Programm namens *Hady al-islām* auf *Qatar TV* vertreten gewesen zu sein.[15] Seine vom Satellitensender al-Jazeera[16] ausgestrahlte Sendung aš-Šarīʿa wa-l-ḥayāt („die Scharia und das Leben") machte ihn für ein noch breiteres, internationales Publikum sichtbar. Darüber hinaus verfügt er über eine eigene Internetseite unter *www.qaradawi.net,* die 1997 lanciert wurde.[17] Auch in der arabischsprachigen Presse werden Fatwas von al-Qaraḍāwī veröffentlicht.[18] Somit machte er sich unterschiedliche Kommunikationswege zu Nutze, um seine Fatwas sowie Lehren im Allgemeinen über lokale Grenzen hinweg zu verbreiten.

Al-Qaraḍāwīs Fatwa-Erteilung beruht auf zwei *iǧtihād*-Formen: (1) Die „selektive, abwägende Rechtsfindung" (*iǧtihād tarǧīḥī intiqāʾī*), bei der er die Rechtsmeinungen früherer Gelehrter und das gesamte islamische Rechtserbe studiert und daraus eine Rechtsantwort für den jeweils

[12] Vgl. AL-QARADĀWĪ, *supra* Fn. 10, 235 f.
[13] Vgl. AL-QARADĀWĪ, *supra* Fn. 10, Bd. 2, 237.
[14] Vgl. AL-QARADĀWĪ, *supra* Fn. 10, Bd. 2, 235 f.
[15] Vgl. AL-QARADĀWĪ, *supra* Fn. 10, Bd. 3, 189 f. und ausführlich zur Gestaltung dieser Sendungen vgl. GRÄF, *supra* Fn. 5, 192-209.
[16] Näheres zum al-Jazeera-Inhalt vgl. GRÄF, *supra* Fn. 5, 218-223.
[17] Für Näheres dazu vgl. GRÄF BETTINA, Sheikh Yūsuf al-Qaraḍāwī in Cyberspace, Die Welt des Islam, Vol. 47 (2007), 3-4, 403-421, hier 407.
[18] Vgl. ausführlich dazu GRÄF, *supra* Fn. 5, 194-201.

vorliegenden Fall auswählt. Hinsichtlich der Frage, welches Urteil beim Selektionsverfahren (*taḫaiyur*) befolgt werden soll, vertritt er die Position, dass jenes Urteil auszusuchen sei, das auf die Verwirklichung der Ziele der Scharia (*maqāṣid aš-šarīʿa*) sowie der Interessen der Menschen abzielt.[19]In dieser Hinsicht spricht sich al-Qaraḍāwī für die Emanzipation von der *maḏhabīya* („Zugehörigkeit zu einer bestimmten Rechtsschule") aus. Hierbei geht es ihm nicht ums Verleugnen und Verwerfen tradierter Rechtsmeinungen klassischer Gelehrter, sondern um die Befreiung von der starren ideologischen Bindung an eine einzige Rechtsschule. Die Abhängigkeit von einer spezifischen Rechtsautorität sei islamwidrig, da man sich zu etwas verpflichte, das weder Gott noch Sein Gesandter dem Menschen als Pflicht auferlegt haben.[20] Seine Forderung begründet er des Weiteren damit, dass es bisweilen vorkomme, dass eine Rechtsschule ein nur schwer umsetzbares Rechtsurteil abgibt, während sich eine andere hingegen für ein einfaches Urteil entscheide. Durch *at-taḥarrur al-maḏhabī* biete sich also die Möglichkeit, einen Vergleich der vorliegenden Ergebnisse vorzunehmen und sich der leichter zu befolgenden Entscheidung anzuschließen.[21] Dem Bedenken, dass es sich hierbei um *talfīq* („Normenkombination aus den unterschiedlichen Rechtsschulen") handelt, entgegnet al-Qaraḍāwī damit, dass es zwei Kategorien von *talfīq* gebe: Eine erlaubte Form (*ǧāʾiz*), in deren Rahmen die Auswahl basierend auf der Überprüfung der Rechtsbeweise der jeweiligen Rechtsschule erfolgt und in dem Fall nicht als *talfīq*, sondern als *iǧtihād tarǧīḥī* oder *iǧtihād ǧuzʾī* („partielle Rechtsfindung") gelte.[22]Die zweite Kategorie erachtet er hingegen als *mamnūʿ* („verboten"), wenn sie der Bequemlichkeit halber und willkürlich vorgenommen würde.[23] Demnach ist der *talfīq* aus seiner Sicht erlaubt, solange dieser auf Grundlage von Beweisen vollzogen werde. Wie und inwieweit die Nachprüfung der Rechtsbeweise der zusammengestellten Rechtsmeinungen erfolgen soll, erläutert al-Qaraḍāwī nicht.

(2) Die zweite *iǧtihād*-Form nennt al-Qaraḍāwī *ibdāʿī inšāʾī* („kreative, schöpferische Rechtsfindung"). Sie finde nur dann Anwendung, wenn das islamische Rechtserbe keine passende Antwort für eine offene Rechtsfrage zur Verfügung stellt. In diesem Zusammenhang merkt al-Qaraḍāwī an, dass diese Kategorie nicht nur für neue Fälle, sondern auch bei der Modifizierung

[19] Vgl. AL-QARADĀWĪ YŪSUF, *al-Iǧtihād fī š-šarīʿa al-islāmīy maʿa naẓarāt taḥlīlīya fī al-iǧtihād al-muʿāṣir*, Kuwait 2011, 142.
[20] Vgl. AL-QARADĀWĪ YŪSUF, *Min hadī al-islām: Fatāwā muʿāṣira*, Kuwait 2005, Bd. 2, 113 f.
[21] Vgl. AL-QARADĀWĪ YŪSUF, *Fī fiqh al-aqallīyāt al-muslima. Ḥayāt al-muslimī wasaṭ al-muǧtamaʿāt al-uḫrā*, Kairo 2001, 57 f.
[22] Vgl. AL-QARADĀWĪ YŪSUF, *Taisīr al-fiqh li-l-muslim al-muʿāṣir. Naḥwa fiqh muyassar muʿāṣir. Fī uṣūl al-fiqh al-muyassar. Fiqh al-ʿilm*, Kairo 2008, 32 f.
[23] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, 128 f. und ders., *supra* Fn. 22, 32 f.

alter Rechtsmeinungen Anwendung finden dürfe.[24] Was die Verfahrensregeln dieser Kategorie anbelangt, präferiert al-Qaraḍāwī eine kollektive Rechtsfindung (*iǧtihād ǧamāʿī*), die von einem Expertenausschuss durchgeführt werden soll.[25] Quellen dieser Form weichen nach al-Qaraḍāwīs Darstellung nicht von denen der traditionellen Rechtsfindung ab. Dementsprechend bedient er sich des Korans, der Sunna, des Konsenses (*iǧmāʿ*), dem Analogieschluss (*qiyās*), der rechtlichen Präferenz (*istiḥsān*), dem in den Rechtsquellen unerwähnten Nutzen (*maṣlaḥa mursala*)[26], der Unterbindung der Mittel (*sadd aḏ-ḏarāʾiʿ*)[27], der Rechtsaussagen der Prophetengefährten (*qaul aṣ-ṣaḥābī*) und Normen vorislamischer Offenbarungsreligionen (*šarʿ man qablanā*).[28] Neben diesen Rechtsquellen zieht er andere Prinzipien wie die Wandelbarkeit der Fatwas gemäß dem Zeit- und Ortswandel (*taġayyur al-fatwā bi-taġayyur az-zamān wa-l-makān*), die Erleichterung (*taisīr*), die Berücksichtigung der Ziele der Scharia (*maqāṣid aš-šarīʿa*), das Verständnis der Lebensumstände (*fiqh al-wāqiʿ*) und der Prioritätensetzung (*fiqh al-aulawīyāt*) mit ein, d. h. das Treffen zeitgemäßer und adäquater Rechtsentscheidungen für neue Lebensfragen infolge von stetigen Wandlungsprozessen erfordere die genaue Kenntnis der Lebenswirklichkeit, die Berücksichtigung des Wohls der Menschen sowie ein richtiges Verständnis im Abwägen der Rechtsmeinungen, um zugunsten der stimmlichen und erleichternden Rechtsmeinung zu entscheiden.[29]

Auf praktischer Ebene – das heißt die Erteilung von Rechtsgutachten (*fatāwā* Pl. *fatwā*) – hat al-Qaraḍāwī zahlreiche Fatwas zu unterschiedlichen Themenbereichen erteilt. In diesem Zusammenhang sei seine vierbändige Fatwa-Sammlung *Min hadī l-islām: Fatāwā muʿāṣira* („Von der Rechtleitung des Islam: Zeitgenössische Rechtsgutachten") genannt, in der er darum bemüht ist, themenübergreifende Rechtsfragen zeitgemäß islamisch zu beantworten.[30] Dieses Werk basiert laut eigener Darstellung auf seiner Fernsehsendung *Hady al-islām* auf *Qatar TV*. In dieser Sendung

[24] Vgl. AL-QARADĀWĪ, *supra* Fn. 19, 157 f.

[25] Vgl. AL-QARADĀWĪ, *supra* Fn. 19, 119 f.

[26] Bei der sogenannten maṣlaḥa mursala („nicht erwähnter Nutzen"), handelt es sich um eine unter den sunnitischen Gelehrten umstrittene Rechtsquelle, die für die Beurteilung einer Handlung eingesetzt wird, für die es keinen rechtlichen Hinweis auf ihre Zulassung oder ihre Unterbindung gibt. Das Fällen von Rechtsentscheidungen gründet in diesem Fall allein auf der Berücksichtigung des allgemeinen Interesses der Menschen. Vgl. ausführlich dazu OPWIS FELICITAS, Islamic Law and Legal Change: The Concept of Maṣlaḥa in Classical and Contemporary Islamic Legal Theory, in: AMAANAT ABBAS/GRIFFEL FRANK (Hrsg.), Shariʿa: Islamic Law in the Contemporary Context, California, Stanford University Press, 2007, 62-83.

[27] Sadd aḏ-ḏarāʾiʿ ist eine Rechtsquelle, deren Funktion darin liegt, scheinbar erlaubte Handlungen zu verbieten, da deren Vollzug in Wirklichkeit als Mittel missbraucht wird, etwas Verbotenes zu erlangen. Vgl. AZ-ZUHAILĪ, *Uṣūl al-fiqh*, Bd. 2, 873 f. und weiterführend dazu siehe IZZI DIEN MAWIL, *Sadd al-ḏharāʾiʿ*, Encyclopedia of Islam, 2nd edition, Vol. VIII, 718f.

[28] Vgl. AL-QARADĀWĪ, *supra* Fn. 22, 41 f. und 172 f. und ders., *supra* Fn 21, 37 ff.

[29] Vgl. AL-QARADĀWĪ, *supra* Fn. 22, 37 f. und ders., *supra* Fn. 21, 48 ff.

[30] Vgl. AL-QARADĀWĪ, *supra* Fn. 20 (verwendete Auflage: Bd. 1, 2011, Bd. 2, 2005, Bd. 3, 2003, Bd. 4, 2012) (Erstauflage jew.: 1979, 1993, 2001 und 2009). Weiterführend dazu GRÄF, *supra* Fn. 5, 212-216.

erteilte Fatwas wurden, al-Qaraḍāwī zufolge, auf Wunsch der Zuschauer/innen und –hörer/innen thematisch sortiert, für eine Buchversion ausformuliert und schließlich in besagtem Titel veröffentlicht.[31] Im dritten Band dieses Werkes aus dem Jahr 2001 lässt sich dann auch seine Fatwa zur *misyār*-Ehe finden. Bevor nun auf diese Abhandlung zur *misyār*-Ehe eingegangen wird, seien der Verständlichkeit halber die Bedingungen eines traditionellen Ehevertrags kurz thematisiert.

III. Bedingungen eines traditionellen Ehevertrags

Die Bestandteile eines klassisch-islamischen Ehevertrags lassen sich im Großen und Ganzen wie folgt zusammenfassen.[32] Als erstes wird das Einverständnis der Eheleute eingeholt, indem sie beim Abschluss des Ehevertrages ihre Zustimmung *īǧāb wa-qabūl* („Angebot und Annahme") in derselben Sitzung mündlich artikulieren.[33] In der Regel wird das Angebot vom rechtmäßigen Vormund (*walī*)der Braut geäußert, worauf der Bräutigam mit der Zustimmung erwidert. Die Mehrheit der Gelehrten setzt das Einverständnis des *walī* als einen unerlässlichen Bestandteil der Eheschließung voraus. Abū Ḥanīfa (gest. 767) und Ibn Šihāb az-Zuhrī (gest. 741) meinen hingegen, dass eine voll geschäftsfähige Frau *(bāliġa)* die Ehe ohne Vormund bzw. dessen Einverständnis eingehen darf, solange der Ehemann *kufuʾ*(„ebenbürtig") ist.[34]

Zweitens muss der Ehevertrag nach überwiegender Meinung muslimischer Gelehrter von zwei männlichen (*ḏakar*), zurechnungsfähigen (*ʿāqil*), erwachsenen (*bāliġ*) Muslimen bezeugt werden.[35] Drittens müsse der Ehemann *ṣadāq* bzw. *mahr* („Brautgabe") an seine Ehefrau zahlen. Dies ist ein an die Frau auszuhändigender Vermögenswert zu ihrer finanziellen Absicherung im Scheidungsfall. Dieser kann je nach Vereinbarung voraus- oder auch nachgezahlt werden. Die islamischen Rechtsquellen erwähnen weder eine Mindest- noch eine Höchstsumme. Alles, was Vermögenswert hat, kann demnach als *mahr* vergeben werden. Die *mahr* wird den Menschen ihrem Lebenskontext entsprechend überlassen und variiert deshalb von Land zu Land bzw. von Stadt zu Stadt.[36] Darüber

[31] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, 9.

[32] Siehe ausführlich dazu RAUSCHER THOMAS, Sharīʾa – Islamisches Familienrecht der sunna und shīʾa, Frankfurt a. M. 1987, 31 ff.; ROHE MATHIAS, Das islamische Recht: Geschichte und Gegenwart, München 2009, 82 ff.

[33] Ist eine der Vertragsparteien abwesend oder sprachunfähig, wird eine schriftliche Formulierung oder verständliches Zeichen als vertragskonstituierend akzeptiert. Näheres dazu SĀBIQ SAIYID, *Fiqh as-sunna*, Kairo 1365/1945, Bd. 2, 22 ff.

[34] Vgl. IBN RUŠD B. AHMAD, *Bidāyat al-muǧtahid wa-nihāyat al-muqtaṣid*, Hrsg. von ʿAbdallāh, al-ʿAbādī, Bd. 3, Kairo 1995, 1248 und ISMAʿIL MUHAMMAD BAKR, *al-Fiqh al-wāḍiḥ min al-kitāb wa-s-sunna ʿalā al-maḏāhib al-arbaʿa*, Kairo 1997, Bd. 2, 30 f.

[35] Vgl. IBN RUŠD, *supra* Fn. 34, 1267 f. Nach ḥanafitischer Rechtsschule ist die Zeugenschaft eines Mannes und zweier Frauen ausreichend. Vgl. ISMAʿIL, *supra* Fn. 34, 35.

[36] Vgl. IBN RUŠD, *supra* Fn. 34, 1267 f. und SĀBIQ, *supra* Fn. 33, 101 f. sowie ISMAʿIL, *supra* Fn. 34, 36 f.

hinaus gibt es Aspekte, die als erwünscht (*mustaḥabb*) gelten. Diese stellen aber keine Voraussetzung für die Rechtmäßigkeit einer Ehe dar, wie beispielsweise die Ebenbürtigkeit (*kafāʾa*) des Ehepaares und die Bekanntmachung der Ehe (*išhār*).[37] Infolge des Vollzugs der Ehe ist der Mann laut Koran, Sunna und Gelehrtenkonsens dazu verpflichtet, für den Lebensunterhalt (*nafaqa*) seiner Frau, sprich die Unterkunft, Nahrung, Kleidung, medizinische Versorgung und alle weiteren Lebensbedürfnisse, aufzukommen, auch wenn sie wohlhabend ist. Es werden in diesem Zusammenhang unter anderem folgende Koranstellen angeführt: „Und gebt den Frauen ihre Morgengabe gutwillig (so dass sie frei darüber verfügen können)!" (4:4), „Heiratet sie also mit der Erlaubnis ihrer Herrschaft und gebt ihnen ihren Lohn in rechtlicher Weise!" (4:25).[38]

In Anbetracht dieser skizzenhaft angeführten Bedingungen muss ein Ehevertrag nicht amtlich eingetragen werden, um dessen religiöse Gültigkeit zu erlangen. Entstehende Rechte und Pflichten des Ehepaars wurden meistens entsprechend der damaligen Lebenssituation von der Familie oder der Gemeinde geprüft. Im Konfliktfall wandte man sich an lokale Richter oder Muftis.[39] Heute wird aufgrund immer komplexerer Gesellschaftsstrukturen die Verschriftlichung und Registrierung von Eheverträgen als notwendig erachtet und von vielen islamisch geprägten Staaten in dem Bestreben vorgeschrieben, im Scheidungsfall die Wahrung der Rechte der Frau und der Kinder gewährleisten zu können.[40] Um das islamische Familienrecht im Allgemeinen an die Notwendigkeiten und Bedürfnisse der Menschen entsprechend der neuen Lebensverhältnisse infolge der Moderne und der europäischen Kolonialisierung anzupassen, wurde in Ländern wie etwa Algerien, Ägypten, Tunesien Syrien, im Irak, im Jemen und in Somalia etc. die Kodifizierung des Familienrechts in Form von Gesetzen und Verordnungen eingeführt. So muss beispielsweise der Ehevertrag vor einem Gericht oder einem staatlichen Beauftragten geschlossen werden oder zumindest staatlich eingetragen werden, um im Scheidungsfall gerichtlich verfahren bzw. eine Klage erheben zu

[37] Vgl. SĀBIQ, *supra* Fn. 33, 93 f. und 148 f. sowie ISMAʿIL, *supra* Fn. 34, 50-59.

[38] IBN RUŠD, *supra* Fn. 34, 1260 f. Für Näheres dazu siehe auch AL-FAUZĀN, *Nafaqat az-zauǧa wāǧiba ʿalā zauǧiha wa-hiyā min ākid al-ḥuqūq*", abrufbar unter: http://fiqh.islammessage.com/NewsDetails.aspx?id=4619 (Stand: 14.12.15).

[39] Weiterführend dazu vgl. SONBOL AMIRA EL AZHARY, Women, the Family, and Divorce Laws in Islamic History, New York 1996, 96 ff. und RITTER, *supra* Fn. 1, 136 f.

[40] Dies wird jedoch nicht für die islamisch-religiöse Anerkennung der Ehe vorausgesetzt. Eine Ausnahme stellt in dieser Hinsicht Tunesien dar. Es legt die Registrierung der Eheschließung zu einer Voraussetzung ihrer Gültigkeit fest. Vgl. RITTER, *supra* Fn. 1, 136 f. Für einen allgemeinen Überblick über Scharia-Elemente in den Verfassungen islamischer Staaten vgl. EBERT HANS-GEORG, Islam und *šarīʿa* in den Verfassungen der arabischen Länder, Zeitschrift für Religionswissenschaft, Vol. 6 (1998), 3-21. Die Verschriftlichung und Registrierung von Eheverträgen stellt aber kein neues Phänomen dar, sondern sie lässt sich bereits im Osmanischen Reich sowie auch in al-Andalus nachweisen. Vgl. SONBOL, *supra* Fn. 39, 96 ff. und RITTER, *supra* Fn. 1, 136 f.

können.[41] Ferner wird die durch die islamische Religion zunächst zulässige Polygamie durch das Gesetz sehr stark eingeschränkt.[42] Des Weiteren wird die Morgengabe in einigen Ländern wie Somalia und dem Jemen auf einen bestimmten Höchstbetrag begrenzt, um Missbräuche zu unterbinden. Allgemein gesehen zielt die Kodifizierung des islamischen Familienrechts darauf ab, vorhandene Missstände zu bekämpfen, die Stellung der Frau im Bereich der Ehe zu verbessern, Gleichstellung zwischen Mann und Frau zu fördern und Rechte der Frau zu bewahren.[43] Im Folgenden soll nach einem allgemeinen Überblick über das Phänomen der *misyār*-Ehe al-Qaraḍāwīs Fatwa entsprechend der eingangs aufgeführten Frage untersucht werden und zwar, wie er diese Eheform definiert und seine Position dazu rechtsmethodologisch rechtfertigt.

IV. Die *misyār*-Ehe

Der Begriff *misyār*, aus dem arabischen Dialekt des saudischen Nadschd stammend, ist die Intensivform (*ṣīġat al-mubālaġa*) vom Verbstamm *s ā r* („gehen", „passieren" oder „durchreisen") im Sinne von „viel umhergehen" oder „durchreisen".[44] Dieses Ehephänomen ist als erstes Mitte der 1980er Jahre im Qaṣīm, einer Region im nördlichen Nadschd, in Erscheinung getreten und wird heute insbesondere in Saudi-Arabien und den Golfstaaten praktiziert.[45] Dabei handelt es sich zumeist um die zweite oder dritte „Ehe", von der die erste Frau möglichst nichts erfahren soll und aufgrund dessen die *misyār*-Ehefrau in diesem Fall auch auf das den regulären Ehefrauen grundsätzlich zustehende Recht der Gleichbehandlung freiwillig verzichtet. Mittlerweile finden sich im Internet sogar vereinzelt Webseiten zur *misyār*-Ehe, auf denen anonyme Heiratsanzeigen beider Geschlechter zu finden sind.[46] Als Begründung für die Entstehung dieser Eheform werden unter anderem die ökonomischen Belastungen von regulären Ehen erwähnt. Diese gehen nämlich mit einer gegebenenfalls hohen Brautgabe, hohen Kosten für die Hochzeit und der finanziellen

[41] Für Näheres dazu vgl. DIGLER KONRAD, Die Entwicklung des islamischen Rechts", in: AHMED MUNIR D. u.a. (Hrsg.), Der Islam. III. Islamische Kultur – Zeitgenössische Strömungen – Volksfrömmigkeit, Stuttgart u.a. 1990, 66 ff.

[42] Bislang ist die Polygamie lediglich in Tunesien im Jahre 1957 verboten worden. Dies wurde damit begründet, dass heutzutage niemand mehr mehrere Frauen gleich behandeln kann, was der Koran für die Erlaubnis einer Mehrehe voraussetzt. Vgl. weiterführend dazu DIGLER, *supra* Fn. 41, 71 f.

[43] Vgl. DIGLER, *supra* Fn. 41, 70 f.

[44] Vgl. AL-AŠQAR, *supra* Fn. 1, 161 ff.

[45] Vgl. AL-AŠQAR, *supra* Fn. 1, 159-162 und FRANKE PATRICK, Gatten zu Besuch: Uxorilokale Eheformen in der Geschichte des Islams, Antrittsvorlesung, Universität Bamberg (16.12.2010), 15 f., abrufbar unter: http://www.uni-bamberg.de/fileadmin/uni/fakultaeten/split_professuren/islamkunde/dateien/Gatten_zu_Besuch.pdf (Stand: 11.03.2015).

[46] Vgl. dazu beispielsweise: https://msyaronline.com/ und http://misyarmarriage.blogspot.de/p/saudi-arab-misyar-sites-for-saudis.html (Stand: 20.07.2014).

Versorgung der Ehefrau einher. Ferner scheinen Männer eine solche Beziehung zu suchen, da sie oftmals mit regionalen Ehetraditionen in Bezug auf arrangierte Ehen unzufrieden sind.[47] Als Beweggründe für Frauen, sich auf derartige Beziehungen einzulassen, wird vor allem das Phänomen der Ehelosigkeit im Alter *(ʿunūsa)* erwähnt, welches in islamisch geprägten Gesellschaften weit verbreitet sei. Die *misyār*-Ehe erlaube solchen Frauen, nach islamischer Auffassung „legale" Beziehungen mit Männern einzugehen, auch wenn sie nicht als die optimale Eheform betrachtet wird.[48]

Im Jahre 1996 kam es über die *misyār*-Frage in saudischen Zeitungen zwischen verschiedenen Intellektuellen zu einer kontroversen Debatte. Es handelte sich bei diesen Auseinandersetzungen vor allem um die Klärung von Fragen der Legalität dieses Ehephänomens. In Folge dessen erklärte sie ʿAbd al-ʿAzīz Ibn Bāz, der ehemalige Großmufti Saudi-Arabiens (zwischen 1992–1999), im September desselben Jahres für „einwandfrei" (*lā ḥaraǧa fīhā*); bedingt dadurch, dass alle Bestandteile des Ehevertrags erfüllt werden. In diesem Zusammenhang erwähnt er nicht nur die oben angeführten Konditionen der Eheschließung, sondern macht die Bekanntgabe (*iʿlān*) der Ehe zu einer Voraussetzung für die Richtigkeit des Ehevertrags.[49] Dabei schenkt er der Bestimmung des *misyār*-Begriffs selbst keine Aufmerksamkeit. Er schreibt ausschließlich: „Ein Muslim darf nur nach den schariarechtlichen Regeln heiraten und soll alle anderen [Heiratsformen] vermeiden – Dabei ist es gleichgültig, ob diese als *misyār*-Ehe oder als etwas anderes bezeichnet wird."[50] In einer anderen von ihm erteilten Fatwa wird die *misyār*-Ehe von dem Fragesteller wie folgt definiert: […] Ein Mann heiratet eine zweite, dritte oder vierte [Frau] und da sie bestimmte Gründe hat, die sie dazu zwingen, bei ihren Eltern oder bei einem der beiden weiterhin zu bleiben, geht ihr Ehemann sie nur gelegentlich zu unterschiedlichen Zeiten besuchen."[51] Sowohl im Rahmen dieser Definition als auch der Antwort von Ibn Bāz ist keinerlei Rede vom Verzicht der Frau auf ihren Anspruch auf *nafaqa*, was darauf hindeutet, dass es unterschiedliche Formen bzw. Definitionen von *misyār*-Ehe gibt. Ibn Bāz versteht sie folglich als eine einvernehmliche Vereinbarung zwischen dem Ehepaar, auf deren Basis bestimmte eheliche Angelegenheiten geklärt werden, wie beispielsweise, dass sich die Frau

[47] Vgl. JABARTI, *supra* Fn. 7 und FRANKE, *supra* Fn. 45, 15 f.
[48] Vgl. AL-NASR, *supra* Fn. 7, 51.
[49] Vgl. IBN BĀZ, ʿABDALAZĪZ (u.a.), *al-Fatāwā aš-šarʿīya fī al-masāʾil al-ʿaṣrīya min fatāwā ʿulmāʾ al-balad al-ḥarām*, Hrsg. von AL-ǦIRĪSĪ, ḪĀLID, Riad 1999 H./1420, 450 f., ders, *Zawāǧ al-misyār wa-šurūṭuh*, abrufbar unter: http://www.binbaz.org.sa/node/2890 (Stand: 14.12.15) und FRANKE, *supra* Fn. 45, 15.
[50] Vgl. IBN BĀZ, ʿABDALAZĪZ, *Zawāǧ al-misyār wa-šurūṭuhu*, abrufbar unter: http://www.binbaz.org.sa/node/2890 (Stand: 14.12.15).
[51] IBN BĀZ, *supra* Fn. 49, 450 f.

weiterhin bei ihren Eltern aufhält und der Ehemann sie von Zeit zu Zeit besucht. Diese Ehe erklärt er für schariagemäß und begründet seine Position mit dem Prophetenspruch *al-Muslimūn ʿinda šurūṭihim* („Muslime sollen sich an [vereinbarte] Bedingungen halten").[52]

Die der Islamischen Weltliga angehörende International *Fiqh Academy* veröffentlichte im Jahr 2006 ein Rechtsgutachten, in dem die *misyār*-Ehe für gültig erklärt wird, mit der Begründung, dass alle Voraussetzungen der Eheschließung erfüllt werden. Die Entscheidung der Akademie stützt sich vor allem auf al-Qaraḍāwīs Abhandlung zu dieser Frage. Diese soll nun daher im folgenden Abschnitt eingehender diskutiert werden.[53]

1. Al-Qaraḍāwīs Abhandlung zur misyār-Ehe

Im Vergleich zu den oben angeführten Gelehrten widmet Yūsuf al-Qaraḍāwī dieser Frage eine umfangreichere Diskussion. Als Motivation für seine erste Beschäftigung mit dem Gegenstand gibt er an, von einem Journalisten nach der Rechtmäßigkeit dieser Eheform gefragt worden zu sein. Hierbei benennt er keinen konkreten Zeitpunkt. Seine darauf erfolgte Antwort hat nach seiner Aussage vor allem in der Golfregion großes Aufsehen erregt.[54] Am 3. Mai 1998 diskutierte er dieses Thema live in der auf *al-Jazeera* ausgestrahlten Fernsehsendung *aš-Šarīʿa wa-l-ḥayāt* („Die Scharia und das Leben").[55] Die Inhalte dieser Sendung floßen in seine 1999 veröffentlichte Abhandlung *Zawāǧ al-misyār: Ḥaqīqatuhu wa-ḥukmuh* („Besuchsehe: Ihr Wesen und ihre Rechtmäßigkeit") ein.[56] Im dritten Band seiner Fatwa-Sammlung *Fatāwā muʿāṣira*, welcher als Grundlage meiner Ausführung dient, lässt sich seine Diskussion zur selben Thematik erneuet wörtlich wiederfinden.[57] Darin befasst er sich mit den Grundlagen, Bedingungen sowie der Abgrenzung dieser Ehe von anderen Heiratsformen.[58] Zum lexikalischen Sinngehalt des *misyār*-Begriffs liefert er keine Erklärung, sondern gibt an, dass dieses Wort keine lexikalische Bedeutung habe. Es sei ausschließlich in der

[52] Vgl. IBN BĀZ, *supra* Fn. 49, 451.

[53] Vgl. al-Maǧmaʿ al-Fiqhī al-Islāmī: *„Aḥkām ʿuqūd an-nikāḥ al-mustaḥdaṯa"*, abrufbar unter: http://www.themwl.org/Fatwa/default.aspx?d=1&cidi=162&l=AR (Stand: 22.12.15).

[54] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, 287 f.

[55] Vgl. AL-QARADĀWĪ YŪSUF, *Zawāǧal-misyār* (03.05.1998), abrufbar unter: http://www.aljazeera.net/channel/archive/archive?ArchiveId=90777 (Stand: 14.07.2014).

[56] Vgl. AL-QARADĀWĪ YŪSUF, *Zawāǧ al-misyār. Ḥaqīqatuh wa-ḥukmuh*, Kairo 2005 (Erstauflage 1999).

[57] Vgl. AL-QARADĀWĪ, *supra* Fn. 56 und ders., *supra* Fn. 20, Bd. 3, 287-305. Komplette Bücher fließen zum Teil wörtlich in sein vierbändiges Werk ein. Vgl. beispielsweise AL-QARADĀWĪ, *Fatāwā li-1-marʾa al-muslima*, Kairo 2010 und ders., *supra* Fn. 20, 253-307.

[58] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 287 f.

Volkssprache in einigen Golfstaaten angewandt worden und deute auf „das Vorbeigehen und den Kurzaufenthalt (*al-murūr wa-ʿadam al-mukṯ aṭ-ṭawīl*) hin".[59]

Inhaltlich definiert al-Qaraḍāwī die *misyār*-Ehe als die Befreiung des Ehemannes von einigen Pflichten gegenüber seiner Frau, wie das Aufkommen für die Unterkunft (*maskan*), den Unterhalt (*nafaqa*) sowie, falls vorhanden, die Aufteilung der Nächte mit anderen Frauen zu gleichen Teilen (*at-taswīya fī al-qisma*).[60] Anstelle dessen, dass der Mann der Frau die häusliche Aufnahme gewährleistet, besucht er sie gelegentlich und zahlt ihr keinen Unterhalt. Auch wenn dies eine Missachtung der schariagemäßen Rechte der Frau darstellt, bezeichnet es al-Qaraḍāwī als „Befreiung des Mannes" (*iʿfāʾ ar-rağul*) und geht davon aus, dass die Frau in solchen Heiratsfällen über ein ausreichendes Vermögen verfüge und nur einen Mann benötige, der sie keusch und tugendhaft hält (*yuʿiffuhā wa-yuḥaṣṣinuhā*) sowie ihr Gesellschaft leistet (*yuʾnisuhā*).[61] Die Verbreitung dieser Ehe führt al-Qaraḍāwī auf den Wandel der Lebensumstände zurück. Eine *Misyār*-Ehe sei früher – wird von ihm nicht spezifiziert – selten eingegangen worden, da die damaligen Heiratskosten einfacher aufzubringen gewesen seien. Heute gebe es hingegen zahlreiche sozio-ökonomische Schwierigkeiten, die zur vermehrten Ehelosigkeit (*ʿunūsa*) geführt hätten. Die *misyār*-Ehe erlaube vor allem wohlhabenden und berufstätigen Frauen ihrem Ehemann entgegenzukommen und freiwillig auf bestimmte Rechte zu verzichten. Dies ermögliche ihnen, eheliche Beziehungen mit Männern einzugehen und gleichzeitig ihre Unabhängigkeit und Autonomie zu bewahren.[62]

Die Beurteilung zu dieser Frage fällt bei al-Qaraḍāwī dann wie folgt aus: „Ich sehe die *misyār*-Ehe nicht als empfehlenswert an (*lā uḥabbiḏ zawāğ al-misyār*),"[63] dennoch sei sie erlaubt (*ḥalāl*) und schariagemäß richtig (*ṣaḥīḥ šarʿan*), solange alle Bedingungen des Heiratsvertrags erfüllt seien. Zu dessen Bestandteilen zählt er das Einverständnis der Ehewilligen, das Brautgeld (*mahr*), die Bekanntmachung der Ehe und – in Abgrenzung von der Zeitehe (*zawāğ mutʿa*) – die Unbestimmtheit der Ehedauer auf. Der Verzicht der Ehefrau auf die ihr infolge der Eheschließung zustehenden Rechte mache den Ehevertrag nicht ungültig.[64] Al-Qaraḍāwīs Argumentationsbasis bilden in erster

[59] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 291.
[60] Al-Qaraḍāwī behauptet in diesem Zusammenhang, dass diese Eheform meistens als polygame Ehe eingegangen wird. Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 289.
[61] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 289 f.
[62] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 290 f.
[63] AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 289.
[64] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 291.

Linie die *maṣlaḥa* und das Prinzip der Abwägung zwischen den Vor- und Nachteilen dieser Ehe. Eine volljährige (*bāliġah*), geistig gesunde (*ʿāqilah*) und urteilsfähige (*rašīdah*) Frau habe das Recht darauf, auf bestimmte Teile ihrer finanziellen Ansprüche an ihren künftigen Ehemann zu verzichten, wenn sie darin einen Nutzen (*maṣlaḥa*) sähe.[65] Als Beweis hierfür erwähnt al-Qaraḍāwī unkommentiert und ohne die Überlieferungsquelle anzugeben, dass die zweite Frau des Propheten, namens Saudah bint Zumʿa, auf ihren turnusmäßigen Besuchstag von Muḥammad zugunsten von ʿĀʾiša verzichtet habe. Aus diesem Anlass und als Bestätigung für die Rechtmäßigkeit dieses Verfahrens sei der Koranvers (4:128) herabgesandt worden: „Und wenn eine Frau von ihrem Ehemann rohe Behandlung oder Abneigung befürchtet, so ist es keine Sünde für beide, sich friedlich auf geziemende Art miteinander zu versöhnen. Es ist besser, sich friedlich zu einigen (als weiter im Unfrieden zu leben)."[66]

In einem weiteren Schritt unterscheidet al-Qaraḍāwī zwischen der *misyār*-Ehe und anderen Eheformen wie der „herkömmlichen Ehe" (*zawāǧ ʿurfī*), „Genussehe" (*zawāǧ al-mutʿa*) und der „Zwischen- bzw. Scheinehe" (*zawāǧ al-muḥallil*).[67] Aus al-Qaraḍāwīs Perspektive ist eine *ʿurfī*-Ehe schariagemäß (*zawāǧšarʿī*), da in ihrem Rahmen alle signifikanten Teile des Ehevertrags erfüllt würden. Seitens des Staates werde dieser aber nicht anerkannt, sofern eine amtliche Registrierung ausbliebe. Der Unterschied zwischen den beiden Formen liege darin, dass der Mann für die Unterkunft und den Lebensunterhalt seiner *ʿurfī*-Ehefrau aufkomme, wohingegen er in einer *misyār*-Ehe von den finanziellen Verpflichtungen befreit werde. Ferner behauptet al-Qaraḍāwī, dass *misyār*-Ehen in den meisten Fällen (wie in Saudi-Arabien oder in den Vereinigten Arabischen Emiraten) registriert würden. Wenngleich al-Qaraḍāwī präferiert, dass der Vertrag einer *misyār*-Ehe amtlich eingetragen werden sollte, um die Rechte der Frau und der Kinder abzusichern, fügt er zugleich hinzu, dass er dennoch einen nicht-registrierten *misyār*-Ehevertrag nicht für ungültig erklären könne (*lā astaṭīʿu an ubṭila al-ʿaqd*), solange alle weiteren Bedingungen eingehalten würden. Er verweist an dieser Stelle ganz allgemein auf das Personalstatut arabischer Länder, welche die Registrierung des Ehevertrags vorsieht. Diese würden das Eintragen der Eheverträge vorschreiben, da ansonsten im Scheidungsfall einer *ʿurfī*-Ehe keine Klage annehmbar wäre.[68] Folglich bestünde der Unterschied

[65] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 292.
[66] AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 292.
[67] In al-Qaraḍāwīs Ausführungen wird der Begriff *muḥallil* (محلِّل) fälscherweise *muḥallal* (محلَّل) geschrieben. Es handelt sich möglicherweise um einen Tippfehler hinsichtlich der Vokalisierung. Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 298.
[68] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 293 f.

zwischen beiden Eheformen lediglich in der Befreiung des Mannes von der Bezahlung des Lebensunterhalts an die Frau. Für die Richtigkeit des Ehevertrags müsse dieser folglich nicht registriert sein. Auf die Frage hin, wie die mit dem Ehevertrag einhergehenden Rechte und Pflichten zwischen Mann und Frau geregelt werden sollten und wer diese schützt, gibt al-Qaraḍāwī keine Antwort.

Im Vergleich zur Genussehe (*zawāǧ al-mutʿa*) sieht al-Qaraḍāwī einen großen Unterschied zwischen den beiden Eheformen. Dieser bestünde in der Festlegung des Zeitraumes sowie des Entgelts für die jeweilige Eheschließung: Während die Dauer einer *mutʿa*-Ehe von vorneherein festgelegt wird – weswegen sie auch als „Zeitehe" bekannt ist – und je nach Frist ein vereinbarter Lohn ausgehändigt wird, bleibt eine *misyār*-Ehe unbefristet und die Frau verzichtet freiwillig auf einige ihrer Rechtsansprüche, erklärt al-Qaraḍāwī. Zum anderen bedürfe es bei der *mutʿa*-Ehe im Falle der Beendigung der Ehe keiner Scheidung oder Annullierung (*fasḫ*) des Ehevertrags, da diese automatisch mit dem Ablauf der Frist ende, die bereits beim Vertragsabschluss bestimmt und beabsichtigt war. In der *misyār*-Ehe dürfe die Scheidung hingegen nicht beabsichtigt, geschweige denn auf eine Frist festgelegt werden. Drittens zähle die Ehefrau einer Zeitehe nicht zu den islamisch legitimen vier Ehefrauen, eine *misyār*-Ehefrau hingegen schon.[69] Al-Qaraḍāwī ist demnach bemüht, diese Eheform stark von der schiitischen *mutʿa*-Ehe abzugrenzen. Quellenangaben bleiben jedoch aus. Unangesprochen bleibt zudem die Frage, ob im Falle einer Scheidung in der jeweiligen Ehe das Recht auf Unterhalt oder ein wie auch immer gearteter Versorgungsausgleich besteht.

Eine weitere Eheform ist die *muḥallil*-Ehe. Hierbei handelt es sich um eine kurzfristige Zwischenehe mit einem Scheinehemann zwecks der Wiederaufnahme einer unwiderruflich geschiedenen Ehe.[70] Der Scheinehemann (*muḥallil*) geht eine Ehe mit einer dreimal verstoßenen Ehefrau ein und verstößt sie dann selbst erneut, damit sie ihren ehemaligen Ehemann (*muḥallal lah*) wieder heiraten darf. Einen solchen Scheinehemann nennt al-Qaraḍāwī, gestützt auf einen Hadith,[71] „den ausgeliehenen Bock" (*at-tais al-mustaʿār*) und erklärt mit Berufung auf Ibn Taimīya

[69] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 298 f.

[70] Nach islamischem Recht gilt die Ehe als nicht wieder aufnehmbar, wenn die Scheidung dreimal vollzogen ist. Nur, wenn die Frau neu heiratet und wieder geschieden wird, was nicht vorsätzlich geschehen darf, kann ihre erste Ehe wieder aufgenommen werden. *Muḥallal lah* ist der Exmann, der seine Frau dreimal verstoßen hat und ihre Scheidung von dem *muḥallil* („Scheinehemann") erwartet, um sie erneut zu heiraten. Vgl. ISMAʿIL, *supra* Fn. 34, 115 f.

[71] In einer Überlieferung soll Muḥammad seinen Gefährten gesagt haben: „Soll ich euch über den ausgeliehenen Bock berichten? Sie sagten: Doch oh Prophet. Er setzte fort: Er ist der *muḥallil*; verflucht seien der *muḥallil* und der *muḥallal lah*." AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 298 f.

(gest. 1328) das eindeutige Verbot (*taḥrīm*) dieser Eheform, da sie eine „Brücke" (*qanṭara*) sei, welche lediglich zur Wiederaufnahme der ersten Ehe geschlagen werde. Es bestehe dabei somit keine Absicht zur Fortsetzung der Ehe, sondern die Scheidung werde grundsätzlich bei der Eheschließung eingeplant. Die *misyār*-Ehe hingegen stelle eine dauerhafte Beziehungsform dar, die alle notwendigen Ehebedingungen erfülle.[72]

2.Kritische Stimmen zur misyār-Ehe

In der Debatte um die Rechtmäßigkeit sowie die negativen Folgen der *misyār*-Ehe haben sich in den vergangenen Jahren Kritiker aus unterschiedlichen Bereichen, darunter insbesondere Frauenrechtlerinnen und Feministinnen, zu Wort gemeldet.[73] In seiner Abhandlung räumt al-Qaraḍāwī dieser Kritik einen großen Platz ein, wobei Namen oder Vertreter dieser Kritik leider anonym bleiben. Er wirft die Kritikpunkte zunächst selber auf und versucht, diese im Anschluss zu widerlegen. Unter anderem wird der *misyār*-Ehe nach seiner Darstellung vorgeworfen, dass sie die erstrebten Ziele einer konventionellen Ehe nicht verwirkliche. Sie diene lediglich der sexuellen Befriedigung und dem Genuss (*mutʿa*) zwischen Mann und Frau, obwohl eine eheliche Beziehung bei weitem nicht nur darauf abziele. Al-Qaraḍāwī sieht in dieser Eheform keine im Sinne des Islam erstrebenswerte Variante, betrachtet sie aber als eine Möglichkeit, die „[…] die Lebensnotwendigkeiten, die Entwicklungen der Gesellschaften sowie die Lebensumstände auferlegten (*awǧaba*) […]."[74] Kinderlosigkeit oder das Nichtvorhandensein von Ruhe und Barmherzigkeit setzten die Gültigkeit des Ehevertrags nicht außer Kraft. Es gebe zahlreiche Ehen, aus denen aufgrund der Zeugungsunfähigkeit eines der Ehepartner keine Kinder hervorgingen. Auch in einer herkömmlichen Ehe könne eine streitsüchtige Ehefrau ihrem Ehemann das Leben verbittern und trübe machen. Dazu schreibt er: „Die Nichtrealisierung aller erstrebten Ziele macht den Vertrag [rechtlich] nicht zunichte und annulliert die Ehe nicht, beeinträchtigt (*yuḫdišuhu*) sie jedoch und setzt sie herab (*yanālu minhu*)."[75]

In Bezug auf den Kritikpunkt, dass die Frau in einer *misyār*-Ehe sexuell ausgenutzt würde, versucht al-Qaraḍāwī, anhand von koranischen und prophetischen Beweisen die Bedeutung der

[72] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 298 f.
[73] Vgl. AL-MUṬLAQ, *supra* Fn. 7, 125 ff. und „*Muṭālabāt bi-taʾhīl al-azwāǧ fī as-suʿūdīya*", (10.08.11) abrufbar unter: al-Jazeera.net (Stand: 15.12.15).
[74] AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 295.
[75] AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 295.

Sexualbeziehung innerhalb der Ehe hervorzuheben und dabei aufzuzeigen, dass das Sexualleben im Islam respektiert wird und einen „großen Stellenwert" (*qīma kabīra*) hat. Im Koran (2:187) heiße es: „Es ist euch erlaubt, zur Fastenzeit bei Nacht mit euren Frauen Umgang zu pflegen. Sie sind für euch, und ihr für sie (wie) eine Bekleidung." Darüber hinaus soll Muḥammad beispielhaft gesagt haben: „Oh ihr jungen Männer! Wer immer unter euch die Mittel zur Ehe hat, der soll heiraten. Denn dies hilft, die Blicke zu senken und die Keuschheit zu wahren."[76] In diesem Zusammenhang beschreibt al-Qaraḍāwī die Befriedigung der physischen Bedürfnisse sowohl für den Mann als auch für die Frau als „das primäre Ziel der Heirat" (*awwal ahdāf az-zawāǧ*). Dieses Bedürfnis stelle ein natürliches Verlangen dar, dessen Erfüllungswege islamrechtlich erleichtert werden sollten.[77]

Al-Qaraḍāwī stellt des Weiteren dar, was an dieser Ehe darüber hinaus kritisiert wird: Diese stelle das Vormundschaftsrecht (*qiwāma*) des Mannes gegenüber der Frau in Abrede.[78] Da die Frau im Rahmen einer *misyār*-Ehe auf den Unterhalt durch den Mann verzichte und gegebenenfalls selbst dafür aufkomme, würde sie das *qiwāma*-Recht beanspruchen, was im Widerspruch mit der koranischen Vorschrift stünde, dass der Mann die Verantwortung für seine Ehefrau trage und demnach über die *qiwāma*-Macht verfüge.[79] Al-Qaraḍāwīs Gegenargumente fallen an dieser Stelle knapp aus: Die *qiwāma* für den Ehemann ergebe sich aus zwei Faktoren; zum einen daraus, dass Gott dem Mann im Vergleich zur Frau Vorzüge wie Geduld und stärkere Ausdauer gewährt habe und zum anderen, dass der Mann für die finanziellen Sorgen der Familie aufzukommen habe. Ersterer sei naturgemäß gegeben und letzterer sei schon durch die von dem Mann geleistete Brautgabe erfüllt. Das *ṣadāq*, das hier nicht näher definiert wird, betrachtet al-Qaraḍāwī als „ausreichend" (*yakfī*) für den Unterhalt und für die Vorsorge, damit der Mann das Vormundschaftsrecht beibehalten darf: „Der Verzicht der Frau auf den Unterhalt bedeutet daher nicht, dass er [der Ehemann] das Vormundschaftsrecht aufgibt."[80] Wie die Brautgabe den Lebensunterhalt ersetzen soll, vor allem, wenn sie in erster Linie der finanziellen Absicherung der Frau im Scheidungsfall dient, lässt al-Qaraḍāwī offen.

Ferner wird die Möglichkeit, die *misyār*-Ehe geheim zu halten, als Einwand gegen ihre Rechtmäßigkeit vorgebracht. Al-Qaraḍāwīs Widerlegung basiert auf der Tatsache, dass die

[76] AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 296.
[77] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 296.
[78] Weiterführend zu diesem Kritikpunkt vgl. AL-AŠQAR, *supra* Fn. 1, 197 ff.
[79] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 297 f.
[80] AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 298.

Bekanntmachung einer Ehe keine Bedingung für ihre Gültigkeit darstelle. Für den Zweck der Bekanntgabe reichten zwei Zeugen oder auch nur die Anwesenheit des Vormundes (*walī*) bzw. seine Erlaubnis. Auch wenn die Ehe geheim gehalten werden sollte, stelle dies nach der Meinung der Gelehrtenmehrheit ihre Rechtsgültigkeit nicht infrage. Die mālikitische Auffassung, dass der Ehevertrag als nichtig gelte, wenn den Zeugen die Verheimlichung der Ehe auferlegt werde, interpretiert al-Qaraḍāwī folgendermaßen: Dies bezöge sich nur auf den Zeitpunkt der Eheschließung. Erfolge diese Auferlegung nach dem Abschluss des Vertrags, stelle diese keinen Grund für die Ungültigkeit des Vertrags dar. Ad-Dardīrī, ein mālikitischer Gelehrter (gest. 1786), bewertet laut al-Qaraḍāwī darüber hinaus die Bekanntmachung der Ehe als wünschenswert (*mustaḥab*), nicht aber als Pflicht (*īǧāb*).[81] Demnach wäre die *misyār*-Ehe, wie sie hier von al-Qaraḍāwī gestaltet wird, eine ungültige Ehe aus Ibn Bāz' Perspektive, der, wie bereits angeführt, die Bekanntgabe der Ehe als eine unabdingbare Voraussetzung für ihre Richtigkeit darstellt.

Zum Schluss spricht al-Qaraḍāwī die gesellschaftliche Akzeptanz dieser Eheform an. Aus seiner Argumentation geht hervor, dass ihm bewusst ist, dass diese Ehe auf sehr geringe Akzeptanz unter Muslimen stößt. Dazu bemerkt er, es gebe viele andere Eheformen, die „aus schariarechtlicher Perspektive erlaubt" (*ǧāiʾz min al-wiǧha aš-šarʿīya*), dennoch „aus gesellschaftlicher Sicht inakzeptabel" (*ġair maqbūl min an-nāḥīya al-iǧtimāʿīya*)[82] seien, wie beispielsweise die Ehe zwischen einer wohlhabenden Frau und ihrem Chauffeur oder einem Mann und seiner indischen oder philippinischen Hausangestellte. Solche Ehen könne man nicht für verboten erklären, solange alle islamischen Bedingungen erfüllt seien, auch wenn sie von der Gesellschaft nicht gutgeheißen oder Missfallen erregen würden.[83] Dem Einwand, dass ein Ehepaar innerhalb einer *misyār*-Ehe kein gemeinsames Leben führe, begegnet al-Qaraḍāwī damit, dass dies auch im Rahmen einer traditionellen Ehe vorkommen könne, wenn der Ehemann beispielsweise aus geschäftlichen Gründen immer wieder reisen müsse.[84]

[81] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 301.
[82] AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 303.
[83] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 303.
[84] Vgl. AL-QARADĀWĪ, *supra* Fn. 20, Bd. 3, 295.

V. Fazit

Aus den obigen Darstellungen geht Folgendes hervor: Al-Qaraḍāwī erklärt die *misyār*-Ehe zwar für erlaubt, hält sie aber persönlich für nicht empfehlenswert. Bei der Rechtfertigung seiner Ansicht bedient er sich in erster Linie dem *maṣlaḥa*-Prinzip und unterstützt es mit Beweisen aus dem Koran und der Sunna. Indikatoren, die er jedoch weitestgehend unkommentiert anführt. Sie erlauben laut seiner Darstellung der Frau, auf Verpflichtungen des Ehemannes ihr gegenüber zu verzichten, wenn sie für sich einen Nutzen darin sieht. Auf der anderen Seite nimmt er keine Notiz vom Koran oder der Sunna, die es dem Mann als Pflicht auferlegen, für den Lebensunterhalt der Frau zu sorgen. Er bemüht sich vielmehr, die *misyār*-Ehe von anderen Eheformen abzugrenzen, wobei seine Erläuterungen dazu recht knapp ausfallen und demnach viele Aspekte offenlassen. Termini wie *muḥallil*, *muḥallal lah* oder *ṣadāq* bleiben ebenfalls unscharf. Auch der Begriff *misyār* wird durch al-Qaraḍāwī sprachlich nicht definiert. Daher setzt das Lesen seiner Abhandlung zur *misyār*-Thematik gute Vorkenntnisse über das islamische Familienrecht voraus, sowohl was die Termini als auch die Funktionsweise der Eheregeln anbelangt.

Wenngleich al-Qaraḍāwī nachdrücklich für die Befreiung von unhinterfragter Rechtsschulzugehörigkeit appelliert, bewegt er sich im Rahmen der hier angeführten Fatwa ausschließlich im Rahmen des tradierten Rechtserbes und übernimmt die überlieferten Bedingungen eines Ehevertrags. Er unternimmt keinen Versuch, diese zeitgemäß zu modifizieren, vielmehr betreibt er *talfīq* – von ihm als *iǧtihād tarǧiḥī* oder *iǧtihād ǧuzʾī* bezeichnet – und stützt sich auf die Rechtsaussagen unterschiedlicher Rechtsschulen als Begründung seiner Erlaubnis jeder Eheform, die diese herkömmlichen Anforderungen erfüllt, sei sie *ʿurfī* oder *misyār*. Der Frage, wer für die Rechte der Frau bzw. die gegenseitigen Rechte und Pflichten des Ehepaars garantiert, schenkt er keine Aufmerksamkeit. Sein Grundsatz der Fatwa-Wandelbarkeit gemäß der Zeit- und Ortsgebundenheit findet in diesem Fallbeispiel keine Anwendung. Tradierte Voraussetzungen eines islamischen Ehevertrags haben sich, wie dargestellt, stets an den lokalen Gewohnheiten orientiert. Die Garantie für die Einhaltung der mit dem Ehevertrag entstehenden Rechte und Pflichten wurde durch die Familie bzw. die Gesellschaft gewährleistet. Doch die Wahrung derselben kann heute aufgrund der Veränderung der Lebenssituation sowie Umwälzungen gesellschaftlicher Werte in vielen Fällen auf diese Art und Weise nicht mehr vorausgesetzt werden. Als Reaktion auf diese Veränderungen wurde die Kodifizierung des islamischen Familienrechts in

vielen islamisch geprägten Ländern vorgenommen. Es sei hier beispielhaft die Registrierung des Ehevertrags erwähnt: Einerseits muss dieser laut islamischer Rechtstraditionen nicht verschriftlicht oder amtlich registriert, sondern kann ausschließlich mündlich ausgeführt werden. Anderseits erkennen Gesetze sogenannter islamischer Länder nur solche Eheverträge an, deren Verschriftlichung und amtliche Registrierung vorgenommen wurden. Auf die Frage, wer die Rechte und Pflichten des Ehepaars wahrt, kann das islamische Familienrecht aufgrund der veränderten Lebensumstände keine zeitgemäße Antwort geben. Auch der staatliche Gesetzgeber kann dies nicht, wenn der Ehevertrag nicht amtlich eingetragen wurde, was jedoch von angesehenen und anerkannten Gelehrten bzw. Muftis wie al-Qaraḍāwī und Ibn Bāz islamisch legitimiert wird. Dementsprechend besteht eine Lücke zwischen Theorie und Praxis im islamischen Familienrecht. Es gibt eine Diskrepanz zwischen erstellten Fatwas und den vom staatlichen Gesetzgeber vorgesehenen Regelungen eines Ehevertrags. Um dies zu vermeiden, ist das islamische Rechtsdenken aufgefordert, die traditionellen Bestandteile des Ehevertrags in Übereinstimmung mit staatlichem Recht entsprechend der heutigen Lebenslage neu zu überbedenken sowie nach einer Harmonie zwischen positivem und islamischem Recht zu streben.

Das Konzept der *maṣlaḥa mursala*: Theoretische Rahmenbedingungen und praktische Anwendung zwischen Tradition und Moderne

von Mahmud El-Wereny[*]

Inhaltsverzeichnis

Abstrakt

Da der Koran und die Sunna – die Primärquellen des islamischen Rechts – eine begrenzte Quantität an Rechtsargumenten aufweisen und somit nicht alle Fragen des Lebens abdecken, greifen Rechtsgelehrte seit je auf andere Quellen und Methoden zurück, um neu erschienene Fragen und Tatbestände im schariarechtlichen Rahmen behandeln zu können. Eine dieser Quellen ist die maṣlaḥa mursala. Über ihre Anwendung als autonome Rechtsquelle lösten sich seit ihrer Entwicklung zahlreiche kontroverse Debatten aus, die sich bis heute fortsetzen. Der vorliegende Beitrag zeigt, wie diese Quelle als im Mittelalter entwickeltes Konzept im 20. und 21. Jahrhundert verstanden und bei der Erteilung von Rechtsgutachten umgesetzt worden ist und wird. Für diesen Zweck werden die Ansätze dreier Autoren aus unterschiedlichen Epochen untersucht: al-Ġazālī und aṭ-Ṭūfī aus der mittelalterlichen Periode und al-Qaraḍāwī aus der Gegenwart.

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I. Einleitung

Das Wort *maṣlaḥa* entstammt dem Verb *ṣalaḥa* oder *ṣaluḥa* („passend sein oder sich wohl befinden") und wird ins Deutsche zumeist als „Wohl", „Interesse" oder „Nutzen" übersetzt. Das arabische Antonym ist *ḍarar*, *maḍarra* oder *mafsada* („Schaden, Nachteil, Verdorbenheit").[1] Als *Terminus technicus* der islamischen Rechtsmethodologie (*uṣūl al-fiqh*) wird *maṣlaḥa* bzw. *istiṣlāḥ* im Sinne von „das Allgemeinwohl" oder „das öffentliche Interesse" verstanden. *Maṣlaḥa mursala* („unerwähnter Nutzen"), der Gegenstand der vorliegenden Untersuchung, bezieht sich auf solche Interessen und Nutzen, welche in den Offenbarungstexten (Koran und Sunna) unerwähnt bleiben – d. h. weder an- noch aberkannt. Als rechtliches Instrument dient die *maṣlaḥa mursala* dazu, Antworten auf solche juristischen Fragen zu geben, für die keine Auskünfte in den Offenbarungstexten oder im hinterlassenen Gelehrtenkonsens zu finden sind. Sie soll vor allem zugunsten solcher Entscheidungen angewandt werden, die den Menschen Nutzen bringen und Schaden abwenden.[2] Die Anwendung dieser Quelle löst seit jeher kontroverse Debatten unter den Rechtsgelehrten aus. Heute greifen noch viele Gelehrte auf dieses Prinzip zurück, um jegliche Art von neuen Rechtsgutachten (*fatwa* Pl. *fatāwā*) zu rechtfertigen, auch wenn ihre Ansichten manchmal willkürlich ausfallen oder im Widerspruch mit den autoritativen Texten stehen.[3]

Der vorliegende Beitrag stellt einen Vergleich zwischen dem traditionellen und dem zeitgenössischen Verständnis der *maṣlaḥa mursala* an.[4] Für den ersten Teil des Vergleiches werden die Ansätze des schafiitischen Gelehrten Abū Ḥāmid al-Ġazālī (gest. 1111) und des ḥanbalitschen Gelehrten aṭ-Ṭūfī (gest. 1316) herangezogen; zweier hoch anerkannter Figuren des Mittelalters, die sich mit dem Thema *maṣlaḥa* intensiv befasst und dazu zwei gegensätzliche Konzeptionen hinterlassen haben. Al-Ġazālī gilt als der erste, der dieses Thema systematisch und eingehend abgehandelt hat. Seine Diskussion darüber liefert laut Opwis "[…] a highly developed system of legal theory which is more coherent than the thought of previous jurists."[5] Aṭ-Ṭūfī, der in der Moderne insbesondere durch seinen radikalen Standpunkt, der *maṣlaḥa* im Bereich der *muʿāmalāt* Vorrang vor dem *naṣṣ* (Koran und Sunna) und dem *iǧmāʿ* („Gelehrtenkonsens") zu verleihen,

[1] Vgl. IBN MANẒŪR, *Lisān al-ʿarab*. AL-KABĪR ʿABDALLĀH ʿALĪ u.a (Hrsg.), Kairo: Dār al-Maʿārif 1981, B. 4, 2479 und WEHR HANS, Arabisches Wörterbuch für die Schriftsprache der Gegenwart, Wiesbaden 1985, 722 f. Weiterführend zur Begriffsbestimmung siehe BIN SATTAM ABDUL AZIZ, Sharia and the Concept of Benefit: The Use and Function of Maslaha in Islamic Jurisprudence, London: I.B. Tauris 2015, 3 ff.

[2] Zu weiteren Kategorien der *maṣlaḥa* siehe Abschn. III.

[3] Vgl. RAMADAN TARIK, Western Muslims and the future of Islam, Oxford: Oxford University Press 2004, 41.

[4] Opwis diskutiert in ihrem Artikel *Maṣlaḥa in Contemporary Islamic Legal Theory* das theoretische Verständnis moderner Gelehrter zu *maṣlaḥa*, wie Rašīd Riḍā, ʿAbdalwahhāb Ḫallāf, ʿAllāl al-Fāsī und Muḥammad Said al-Būṭī. Dabei geht sie auch auf die ersten Ansätze der *maṣlaḥa* im Allgemeinen ein. Vgl. OPWIS FELICITAS, *Maṣlaḥa* in Contemporary Islamic Legal Theory. In: Islamic Law and Society, Vol. 12, No. 2 (2005), 182-223.

[5] OPWIS FELICITAS, *Maṣlaḥa* and the Purpose of the Law. Islamic Discourse on Legal Change from the 4th/10th to 8th/14th Century, Leiden: Brill 2010, 65.

bekannt geworden ist, wird aufgrund seiner *maṣlaḥa*-Theorie als "[o]ne of the most innovative jurisprudents writing on the concept of *masḷaḥa* […][6] angesehen.

Für den zweiten Teil des Vergleiches werden die Ansichten Yūsuf al-Qaraḍāwīs thematisiert. Der 1926 in Ägypten geborene und seit 1961 in Katar lebende al-Qaraḍāwī gilt als einer der populärsten und anerkanntesten Rechtsgelehrten der Gegenwart.[7] Er fungiert als Vorsitzender des *European Council for Fatwa and Research* (ECFR)[8] sowie als Präsident der *International Union of Muslim Scholars* (IUMS).[9] Seine Rechtsgutachten finden aufgrund seiner institutionellen und medialen Vernetzungen nicht nur unter Muslimen der arabischen Welt Gehör, sondern auch unter Muslimen im Westen.[10] Die Ansätze weiterer moderner Gelehrter, wie etwa Rašīd Riḍā (gest. 1935), ʿAbdelwahhāb Ḫallāf (gest. 1956), ʿAllāl al-Fāsī (gest. 1974) und Muḥammad Said al-Būṭī (gest. 2013), wurden bereits in Felicitas Opwis' Artikel *Maṣlaḥa in Contemporary Islamic Legal Theory* behandelt, weswegen darauf nicht näher eingegangen wird.[11]

Ziel der vorliegenden Untersuchung ist es zu zeigen, wie die *maṣlaḥa mursala*, ein im Mittelalter entwickeltes Konzept, in der Gegenwart im Kontext des 20. und 21. Jahrhunderts aufgefasst und als Quelle bei der Beurteilung von Rechtsfragen eingesetzt wird. Für diesen Zweck wird zunächst ein Überblick über die Entstehung und Entwicklung der *maṣlaḥa*-Theorie gegeben. Darauf folgen die Ansätze von al-Ġazālī und aṭ-Ṭūfī. Anschließend werden al-Qaraḍāwīs Überlegungen in vergleichender Gegenüberstellung thematisiert und hinsichtlich ihrer praktischen Umsetzung bei der Erteilung von Fatwas überprüft. Als Grundlage dieses Beitrags dienen vor allem folgende Schriften: al-Ġazālīs *al-Mustaṣfā min ʿilm al-uṣūl,*[12] aṭ-Ṭūfīs *Risāla fī riʿāyat al-maṣlaḥa,*[13] und von al-Qaraḍāwī u.a. *Naḥwa fiqh muyassar muʿāṣir*[14] und *as-Siyāsa aš-šarʿīya.*[15]

[6] OPWIS, *supra* Fn. 5, 200.

[7] Vgl. GRÄF BETTINA, Medien-Fatwas@Yusuf al-Qaradawi. Die Popularisierung des islamischen Rechts, Berlin: Klaus Schwarz Verl. 2010, 84. Zum Forschungsstand über al-Qaraḍāwī vgl. ebenda, 84-102 und EL-WERENY MAHMUD, Mit Tradition in die Moderne? Yūsuf al-Qaraḍāwīs Methodologie der Fiqh-Erneuerung in Theorie und Praxis, Köln: Ditib-Verl. 2016, 12-30.

[8] Vgl. *Al-Maǧlis al-Ūrūbbī li-l-Iftāʾ wa-l-Buḥūṯ* (European Council for Fatwa and Research), unter: http://e-cfr.org/new/members/ (Stand: 15.05.2015) und ROHE MATHIAS, *Iftāʾ* in Europa, in: EBERT HANS-GEORG/HANSTEIN THOARALF (Hrsg.), Beiträge zum Islamischen Recht III, Frankfurt/M. 2003, 33-35 und CAEIRO ALEXANDRE, The making of the fatwa The production of Islamic legal expertise in Europe, in: Archives de sciences sociales des religions, Vol. 155 (2011), 81-100.

[9] Mehr dazu siehe GRÄF BETTINA, Yusuf al-Qaradawi und die Bildung einer 'globalen islamischen Autorität' (21.04.2005), in: Qantara.de, unter: https://de.qantara.de/inhalt/internationale-vereinigung-muslimischer-gelehrter-yusuf-al-qaradawi-und-die-bildung-einer (Stand: 06.04.2016).

[10] Vgl. ausführlich dazu CAEIRO ALEXANDRE/AL-SAIFY MAHMOUD, Qaraḍāwī in Europe, Europe in Qaraḍāwī? The Global Mufti's European Politics, in: GRÄF BETTINA/SKOVGAARD-PETERSEN JAKOB (Eds.), Global Mufti. The Phenomenon of Yūsuf al-Qaraḍāwī, London: Hurst 2009, 109-148.

[11] Vgl. OPWIS, *supra* Fn. 5, 182-223.

[12] AL-ĠAZĀLĪ, *al-Mustaṣfā min ʿilm al-uṣūl,* ḤĀFIZ ZUHAIR (Hrsg.), Medina: al-Madina li-ṭ-Ṭibāʿa wa-n-Našr 1413/1992, Bd. 2.

[13] Vgl. AṬ-ṬŪFĪ, *Risāla fī riʿāyat al-maṣlaḥā,* AS-SĀYĪḤ AḤMAD A. AR-RAḤĪM (Hrsg.), Kairo: ad-Dār al-Maṣrīya al-Libnānīya 1993.

[14] Vgl. AL-QARADĀWĪ, *Taisīr al-fiqh li-l-muslim al-muʿāṣir. Naḥwa fiqh muyassar muʿāṣir. Fī uṣūl al-fiqh al-muyassar. Fiqh al-ʿilm,* Kairo: Maktabat Wahba 2008 (Erstauflage 1999).

[15] Vgl. AL-QARADĀWĪ, *as-Siyāsa aš-šarʿīya fī ḍauʾ an-nuṣūṣ aš-šarʿīya wa-maqāṣidihā.* Kairo: Maktabat Wahba 2008 (Erstauflage 1998).

II. *Maṣlaḥa mursala*: Anfänge und Entwicklung

Die Einbettung der *maṣlaḥa* in die Normenfindung (*iǧtihād*) bzw. in die Erstellung von Rechtsgutachten (*iftāʾ*) lässt sich bis in die Frühzeit des Islams zurückverfolgen, wenn man sie mit dem Gebrauch von Fachbegriffen wie *asrār* („Geheimnisse"), *ḥikma* („Weisheit"), *maṣlaḥat aš-šarʿ* („Interesse der Gesetzgebung") oder *maʿānī š-šarʿ* („Bedeutungen der Gesetzgebung") verbindet.[16] Prophetengefährten haben beispielsweise einige ihrer Entscheidungen auf der *maṣlaḥa* aufgebaut und sind dabei manchmal vom Wortlaut der koranischen Anordnungen abgewichen. Als Beispiel dafür sei an dieser Stelle ʿUmar b. al-Ḫaṭṭābs (reg. 634-644) Vorgehensweise in Bezug auf die Verteilung der Almosen erwähnt. Diesbezüglich heißt es im Koran:

> „Die Almosen sind nur für die Armen und Bedürftigen (bestimmt), (ferner für) diejenigen, die damit zu tun haben, (für) diejenigen, die (für die Sache des Islam) gewonnen werden sollen, für (den Loskauf von) Sklaven, (für) die, die verschuldet sind, für den heiligen Krieg und (für) den, der unterwegs ist. (Dies gilt) als Verpflichtung von Seiten Gottes. Gott weiß Bescheid und ist weise."[17]

ʿUmar vertrat hingegen die Ansicht, dass mit der in diesem Vers geregelten Zahlung an Ungläubige, deren Herz mit dem Islam vertraut gemacht werden sollte, um für den Islam gewonnen zu werden, aufgehört werden sollte. Er sah, dass der Islam nun mächtig genug war und folglich die Unterstützung der Ungläubigen nicht mehr brauchte. Die hinter dieser koranischen Regelung steckende *maṣlaḥa* bestünde aus ʿUmars Sicht nicht mehr. Das heißt, er ist nicht vom Wortlaut des Korans, sondern von dessen Intentionen und Absichten ausgegangen.[18]

Nicht nur die Prophetengefährten und ihre Nachfolger (*tābiʿūn*) sollen die *maṣlaḥa* als Rechtsquelle beachtet haben. Die führenden Köpfe der vier sunnitischen Rechtsschulen sollen ebenfalls auf die *maṣlaḥa* als Rechtfertigungsmethode ihrer Entscheidungen zurückgegriffen haben, wenngleich dies nur auf praktischer Ebene (d. h. bei der Erstellung von Rechtsgutachten und nicht im theoretischen Sinne) und in unterschiedlichem Maß erfolgt haben soll.[19] In diesem Zusammenhang wird Mālik b. Anas (gest. 795), Begründer der mālikitschen Rechtsschule, als der erste betrachtet, der die *maṣlaḥa mursala* in seiner Begutachtung von Rechtsfragen herangezogen hat.[20] Er soll sie als eigenständiges Rechtsargument angewandt haben, wenn es für einen Sachverhalt keine Antwort aus dem Koran, der Sunna oder dem Gelehrtenkonsens zu finden war;

[16] Vgl. AL-BŪṬĪ MUḤAMMAD SAʿĪD, *Ḍawābit al-maṣlaḥa fī aš-šarīʿa al-islāmīya,* Beirut: Muʾassasat ar-Risāla 1402/1982, 352 ff., AR-RAISŪNĪ AḤMAD, *Naẓarīyat al-maqāṣid ʿinda al-imām aš-Šāṭibī, Beirut*: IIIT 1995, 5 f. und AL-QARADĀWĪ, *Dirāsa fī fiqh maqāṣid aš-šarīʿa. Baina al-maqāṣid al-kullīya wa-n-nuṣūṣ al-ǧuzʾīya*, Kairo: Dār aš-Šurūq 2006, 172 f.

[17] Koran 9:60. Eigene Übersetzung der Koranverse unter Einbeziehung der Übersetzung von Paret: Vgl. PARET RUDI, Der Koran. Übersetzung, Stuttgart: W. Kohlhammer Verl. 2007. Die Hervorhebung hier ist von mir.

[18] Vgl. IBN KAṮĪR, *Muḫtaṣr tafsīr b. Kaṯīr*. AṢ-ṢĀBŪNĪ M. ʿALĪ (Hrsg.), Kairo: Dār at-Turāṯ al-ʿArabī 1987, Bd. 2, 151 und AL-QARADĀWĪ, *Madḫal li-dirāsat aš-šarīʿa al-islāmīya,* Beirut: Muʾassast ar-Risāla 1993, 194 f.

[19] Vgl. weiterführend dazu AL-BŪṬĪ, *supra* Fn. 16, 367 f.

[20] Vgl. PARET RUDI, "*Istiḥsān* and *istiṣlāḥ*", in: P. BEARMAN TH. BIANQUIS u.a. (Eds.): Encyclopaedia of Islam 2nd edition, Leiden: Brill 1978, Vol. IV, 257.

sowie wenn ein Analogieschluss (*qiyās*) nicht vertretbar ist.[21] Die Ḥanbaliten nehmen nach den Mālikien den zweiten Platz ein, was die Anwendung der *maṣlaḥa mursala* betrifft. Sie wenden sie ebenfalls an, wenn kein Textbeleg vorliegt und ordnen sie somit dem *naṣṣ* nach. Ihr Einsatz dieses Prinzips wird von Gelehrten der Ḥanbalīya wie Ibn Taimīya (gest. 1328) und Ibn Qaiyyim al-Ǧauzīya (gest. 1350) damit begründet, dass alle Bestimmungen Gottes gemeinhin darauf abzielen, das Gute zu bringen und das Schlechte zu unterbinden. Laut Ibn Qaiyyims Darstellung gründen die Vorschriften der Scharia ausnahmslos auf der Gerechtigkeit, der Barmherzigkeit und dem Wohl der Menschheit im Dies- und Jenseits.[22] Zeitgenössische Gelehrte, die sich dieser Position anschließen, wie z. B. Abū Zahra (gest. 1974), Ḫallāf und al-Qaraḍāwī, unterstützen diese Meinung des Weiteren damit, dass eine Vielzahl der Prophetengefährten nach diesem Prinzip gehandelt hätten. So sei das während der Sammlung des Korans unter dem ersten Kalifen Abū Bakr (reg. 632-634), seiner Kodifizierung und der Verbrennung anderer Kodizes unter dem dritten Kalifen ʿUṯmān (reg. 644-656) geschehen. Es wird darüber hinaus damit argumentiert, dass die Anwendung der *maṣlaḥa mursala* von besonderer Relevanz für die Weiterentwicklung des islamischen Rechts sei. Das Leben befinde sich nämlich im Wandel und Fragen der Menschen seien unendlich. Um diese Fragen abdecken zu können, leiste die *maṣlaḥa mursala* als Rechtsquelle einen unverzichtbaren Beitrag.[23]

Während die Mālikiten und Ḥanbaliten die *maṣlaḥa mursala* als eigenständiges Rechtsargument nutzten, sprechen die Ḥanafiten ihr den eigenständigen Rechtsquellencharakter ab und verwenden sie im Zusammenhang mit dem Analogieschluss (*qiyās*) oder der rechtlichen Präferenz (*istiḥsān*).[24] Andere wie die Schafiiten stehen der normativen Funktion der *maṣlaḥa mursala* grundsätzlich kritisch gegenüber.[25] Ihre Ablehnung gründet sich darauf, dass die Erteilung von Fatwas oder die Behandlung von Rechtsfragen auf Grundlage der *maṣlaḥa mursala* der Willkür Tür und Tor öffne. Das heißt, dass man unter dem Vorwand dieses Prinzips die Tatbestände beliebig und nach seinem eigenen Gutdünken beurteile, was die Einheit der islamischen Gesetzgebung beeinträchtige und folglich den göttlichen Charakter der Scharianormen in Frage stelle.[26]

Die Anfänge der theoretischen Beschäftigung mit der *maṣlaḥa*-Theorie lässt sich im 9. Jahrhundert n. Chr. nachweisen, insbesondere wenn man sie im Zusammenhang des Konzepts der *taʿlīl al-aḥkām* („Begründung der Rechtsnormen") betrachtet.[27] At-Tirmiḏī[28] beispielsweise

[21] Vgl. AZ-ZUḤAILĪ WAHBA, *Uṣūl al-fiqh al-islāmī*, Damaskus: Dār al-Fikr 1986, Bd. 2, 761 f. und AL-BŪṬĪ, *supra* Fn. 16, 367 f. und KRAWIETZ BIRGIT, Hierarchie der Rechtsquellen im tradierten sunnitischen Islam, Berlin: Duncker & Humblot 2002, 243 f.

[22] Vgl. IBN QAIYIM AL-ǦAUZĪYA, *Iʿlām al-muwaqqiʿīn ʿan rabb al-ʿālamīn*. ĀL SULAIMĀN ABŪ ʿUBAIDA MAŠHŪR B. ḤASAN (Hrsg.), Dammam: Dār b. al-Ǧauzī 2002/1423, Bd. 4, 337. Weiterführend dazu vgl. KRAWIETZ, *supra* Fn. 21, 245 f.

[23] Vgl. AZ-ZUḤAILĪ, *supra* Fn. 21, Bd. 2, 783 f., AL-BŪṬĪ, *supra* Fn. 16, 367 f. und ABŪ ZAHRA: *Uṣul al-fiqh*, Dammam: Dār al-Fikr al-Arabī 1958, 281 f. und ḪALLĀF ʿABDALWAHHĀB, *ʿIlm uṣūl al-fiqh*, Kairo: Maktabat ad-Daʿwa al-Islāmīya 2002, 85-88.

[24] Vgl. AZ-ZUḤAILĪ, *supra* Fn. 21, Bd. 2, 758-760, ABŪ ZAHRA, *supra* Fn. 23, 280-285 und KRAWIETZ, *supra* Fn. 21, 243-253. Weiterführend zu *qiyās* vgl. M. BERNAND/G. TROUPEAU, "*Ḳiyās*", in: BEARMAN PERI/BIANQUIS THIERRY u.a. (eds.): Encyclopaedia of Islam, 2nd Edition, Leiden: Brill 1986, Bd. V, 1986, 235 f. und zu *istiḥsān* siehe PARET, *supra* Fn. 20, 256 f.

[25] Vgl. AZ-ZUḤAILĪ, *supra* Fn. 21, Bd. 2, 758-760.

[26] Vgl. weiterführend AZ-ZUḤAILĪ, *supra* Fn. 21, Bd. 2, 762-764.

[27] Vgl. AR-RAISŪNĪ, *supra* Fn. 16, 40-47.

untersucht in seinen Werken, „*aṣ-Ṣalāh wa-maqāṣiduhā*" („Das Gebet und dessen Zwecke") und „*al-Ḥağğ wa-asrāruh*" („Die Pilgerfahrt und deren Geheimnisse"), Ziele und Zwecke hinter den Vorschriften Gottes. Auch der ḥanafitische Theologe Abū Manṣūr al-Māturīdī (gest. 944) widmet in seinen Werken „*Maʾāḫiḏ aš-šarīʿa*" und *Taʾwīlāt ahl as-sunna* dieser Frage große Aufmerksamkeit.[29] Es profilierten sich zudem weitere ausgewiesene Gelehrte, die einen nicht unbedeutenden Beitrag zur Etablierung des *maṣlaḥa*-Konzepts geleistet haben. Als Beispiel dafür seien hier namhafte Gelehrte wie der malikitische Abū Bakr al-Abharī (gest. 986) und al-Baqillānī (gest. 1012) genannt.[30] Auch wenn diese Gelehrten und dergleichen mehr keine konkreten theoretischen Ansätze zu *maṣlaḥa* hinterließen, sprachen sie die Thematik der Ziele der Gesetzgebung (*maqāṣid aš-arīʿa*) allgemein an und gingen dabei davon aus, dass alle Vorschriften Gottes auf die Herbeiführung von Nutzung (*maṣlaḥa*) und die Abwehr von Schaden (*ḍarar*) abzielen. In dieser Hinsicht behauptet der syrische Gelehrte al-Būṭī in seiner Dissertationsschrift zum Thema *maṣlaḥa*, dass ein einhelliger Konsens unter allen Gelehrten über diese Auffassung des Nützlichkeitsprinzips der Schariavorschriften bestünde.[31]

Eine systematische Thematisierung der *maṣlaḥa*- bzw. *istiṣlāḥ*-Theorie wurde erst von Gelehrten des 11. Jahrhunderts vorgenommen. Dazu schreibt Paret: „Nor in the period following Mālik and his generation is it possible yet to demonstrate clearly the development of *istiṣlāḥ*. The names which are quoted as authorities in the later works in discussion of the principle […] belong at earliest to the 11th century."[32] In diesem Zusammenhang wird der schafiitische *uṣūl*-Gelehrte al-Ğuwaynī (gest. 1028) als „the first of those who are mentioned as followers of the principle of *istiṣlāḥ*" genannt.[33] Sein Ansatz wird als die „offizielle Grundsteinlegung für die gesamte Entwicklung" der *maṣlaḥa*-Theorie angesehen.[34] Im Zuge seiner Definition des *ratio legis* (*ʿilla*) unterscheidet er zwischen fünf Kategorien von Scharianormen. Da diese bereits ausführlich bei Opwis sowie ar-Raisūnī behandelt wurden und außerdem nicht der Gegenstand der vorliegenden Untersuchung sind, beschränken wir uns auf eine kurze Wiedergabe der Kategorien:[35]

- Die erste Kategorie stellt solche göttlichen Normen dar, die mit grundlegenden und notwendigen Interessen in Zusammenhang stehen (*amr ḍarūrī*). So ziele die Anordnung der Vergeltungsstrafe beispielsweise auf den Schutz des Lebens ab.[36]

[28] Abū ʿAbdallāh Muḥammad b. ʿAlī, bekannt als al-Ḥakīm. Er lebte im 3. Jahrhundert, jedoch bleibt sein genaues Geburt- und Todesdatum unbekannt.

[29] Vgl. AR-RAISŪNĪ, *supra* Fn. 16, 43 f. und NEKROUMI MUHAMMED, Koraninterpretation im Kontext intentionalistischer Rechtstheorie. Zu argumentativen und kommunikationstheoretischen Aspekten göttlicher Offenbarung in Šāṭibīs (gest. 780/1388) *maqāṣid*-Theorie", in: ders./MEISE JAN (Hrsg.), Modern controversies in Qurʾānic studies, Hamburg-Schenefeld 2009, 156.

[30] Al-Bāqillānī war ein berühmter, sunnitischer Rechtsgelehrter und Sprachwissenschaftler, weshalb er unter „*Šaiḫ as-sunna wa-lisān al-umma*" bekannt war. Nach aš-Šāfiʿī gilt er als der zweitwichtigste Reformer der *usūl al-fiqh.* Eine direkte Befassung mit den *maṣlaḥa* ist nicht nachzuweisen, er verfasste aber viele Werke, die sich mit *ʿilal* beschäftigen. Vgl. AR-RAISŪNĪ, *supra* Fn. 16, 45 f.

[31] Vgl. weiterführend dazu AL-BŪṬĪ, *supra* Fn. 16, 73.

[32] PARET, *supra* Fn. 20, 257.

[33] PARET, *supra* Fn. 20, 257.

[34] Vgl. NEKROUMI, *supra* Fn. 29, 154.

[35] Vgl. OPWIS, *supra* Fn. 5, 49 ff.

[36] Vgl. AL-ĞUWAINĪ, *al-Burhān fī uṣūl al-fiqh.* AD-DĪB ʿABD AL-ʿAẒĪM (Hrsg.), Kairo: Dār al-Anṣār 1399/1980, Bd. 2, 923f.

- Die zweite Kategorie beinhaltet allgemeine bedürfnisbezogene Angelegenheiten (*ḥāǧa ʿāmma*) wie etwa die zwischenmenschlichen Interaktionen, sprich die Anmietung einer Wohnung oder die Anwerbung einer Arbeitskraft. Da dem ganzen Kollektiv geschadet werden kann, wenn das Bedürfnis des Individuums nicht erfüllt wird, merkt al-Ǧuwaynī an, dass das Bedürfnis eines einzelnen Individuums sich in eine Notwendigkeit steigern kann, um damit einen Schaden für die Gemeinschaft abzuwenden.[37]
- Die dritte Gattung umfasst solche edlen Handlungen (*makrama*), welche den Rang der eben erwähnten Stufen, des Notwendigen und des gemeinnützigen Bedarfes nicht erreichen und nach gutem Verhalten streben. Hierfür nennt al-Ǧuwaynī die rituelle Waschung und die Sauberkeit als Beispiel.[38]
- Das vierte Kategorie inkludiert ihm zufolge die empfehlenswerten Handlungsnormen (*mandūbāt*), für die es keinen ausdrücklichen Befehl in den Schariatexten gibt. Als Beispiel dafür führt er *al-kitāba* an: Ein schriftlicher Vertrag zwischen einem Sklaven und seinem Herrn, demzufolge der Sklave seine Freiheit durch bestimmte zu erbringende Arbeit erkaufen kann. Diese Art von Verträgen gelte in diesem Fall als legitim, da der Zweck eines solchen Vertrages die Freilassung von Sklaven sei, was in den Offenbarungstexten unterstützt werde.[39]
- Die fünfte Kategorie in al-Ǧuwainīs Aufstellung enthält die Normen, für die weder eine erkennbare Begründung noch ein eindeutiges Ziel in der Scharia vorliegt.[40] Da hinter allen göttlichen Vorschriften ein Ziel stehe, sei diese Kategorie in der Scharia sehr eingeschränkt. Hierfür werden die Bewegungsart beim Gebet oder die zeitliche Festlegung des Fastenmonats als Beispiel angeführt.[41]

Im Folgenden wird näher gezeigt, wie diese Überlegungen al-Ǧuwainīs von seinem Schüler Abū Ḥāmid al-Ġazālī übernommen und weiterentwickelt worden sind.

III. Die *maṣlaḥa mursala* nach al-Ġazālīs Verständnis

Abū Ḥamid al-Ġazālī befasst sich mit der Problematik der *maṣlaḥa mursala* in zwei seiner Werke: Zunächst in *Šifāʾ al-ġalīl* sowie in seinem oben erwähnten *uṣūl*-Werk *al-Mustaṣfā*, wo er das Thema ausführlich und systematisch behandelt. In den beiden Werken verwendet er die Termini *maṣlaḥa* und *maqāṣid aš-šarīʿa* („Ziele der Scharia") bedeutungsgleich und sieht sie als zusammenhängend an. So definiert er den Terminus *maṣlaḥa* als „das Herbeiführen eines Nutzens (*manfaʿa*) oder die Abwendung eines Schadens (*maḍarra*)."[42] Gleichzeitig merkt er an, dass sich diese Definition auf

[37] Vgl. AL-ǦUWAINĪ, *supra* Fn. 36, 923 f.
[38] Vgl. AL-ǦUWAINĪ, *supra* Fn. 36, 924 f.
[39] Vgl. AL-ǦUWAINĪ, *supra* Fn. 36, 925 f.
[40] Vgl. AL-ǦUWAINĪ, *supra* Fn. 36, 924-927.
[41] Vgl. AL-ǦUWAINĪ, *supra* Fn. 36, 958 und 926 f.
[42] AL-ĠAZĀLĪ, *supra* Fn. 12, 481.

die Ziele der Geschöpfe (*maqāṣid al-ḫalq*) beziehe. Mit *maṣlaḥa* meint er aber „die Erhaltung der Ziele der Scharia (*al-muḥāfaẓa ʿalā maqṣūd aš-šarʿ*).“[43] Diese Ziele beschränkt er auf den Schutz von fünf Werten und zwar Schutz der Religion (*ad-dīn*), des Lebens (*an-nafs*), des Verstands (*al-ʿaql*), des Vermögens (*al-māl*) und der Nachkommenschaft (*an-nasl*).[44] Alles, was die Bewahrung dieser fünf Grundlagen garantiere, sei *maṣlaḥa* und alles, was zu ihrer Beeinträchtigung führe, erachtet al-Ġazālī hingegen als *mafsada*.[45]

In einem weiteren Schritt unterteilt al-Ġazālī die *maṣlaḥa* hinsichtlich ihrer Anerkennung bzw. Erwähnung in den Offenbarungstexten in drei Kategorien: (1) Eine anerkannte *maṣlaḥa*, die sich durch den Koran oder die Sunna begründen lässt, eine sogenannte *muʿtabara*, wie beispielsweise der Schutz des Verstandes durch das Verbot von Alkohol sowie allen berauschenden Getränken auf Grundlage der Analogie (*qiyās*) zum Weinverbot im Koran (Koran 5:90). (2) Eine *maṣlaḥa*, welche durch einen autoritativen Text abgelehnt bzw. zurückgewiesen wird. Als Beispiel dafür führt al-Ġazālī einen Sachverhalt an, in dem es sich um einen König handelt, der während des Fastenmonats Ramadan Geschlechtsverkehr hat. Laut göttlicher Anweisungen muss er dafür büßen, indem er entweder einen Sklaven freilässt, oder (falls er die Möglichkeit nicht hat) zwei Monate ununterbrochen fastet oder (falls er nicht kann) 60 Hungrige beköstigt. Würde der Mufti oder der Gelehrte nun trotz dieser Regulierung den König zu zwei Monaten ununterbrochenem Fasten verurteilen, weil er davon ausgeht, dass die Befreiung eines Sklaven oder die Beköstigung Hungriger ihn nicht angemessen bestrafen würde, so gilt das nach Ġazālīs Verständnis als ungültige Meinung (*qaul bāṭil*), auch wenn dies sich auf eine *maṣlaḥa* stützt.[46] (3) Für die dritte Kategorie findet man laut al-Ġazālīs Darstellung hingegen gar kein Indiz in den Offenbarungsquellen, weder für ihre Anerkennung noch für ihre Ablehnung. Es heißt demnach der „unerwähnte bzw. unbestimmte Nutzen“ (*maṣlaḥa mursala*).[47] Für Anwendung dieser Gattung als Rechtsargument legt al-Ġazālī bestimmte Voraussetzungen fest und unterscheidet im Zuge dessen zwischen drei Stufen von *maṣāliḥ*:[48]

Die erste Stufe schließt die notwendigen *maṣāliḥ* (*ad-ḍarūrāt*) ein. Diese reduziert al-Ġazālī auf die Bewahrung der eben erwähnten fünf Grundwerte, die er als *aḍ-ḍarūrāt al-ḫams* bezeichnet.[49] Auf die zweite Ebene stellt er die „bedürfnisbezogenen Interessen“ (*ḥāǧāt*). Als Beispiel wird die Vormundschaft bei der Eheschließung angeführt. Dies ist bei den Minderjährigen laut al-Ġazālī zwar nicht *ḍarūrī*, aber erforderlich, wenn davon auszugehen ist, dass das unmündige Mädchen in der Zukunft keinen passenden Kandidaten zu heiraten finden würde, der für sie später sorgen könne. Während al-Ġazālī in diesem Zusammenhang die Vormundschaft zu den erforderlichen Interessen zählt, unterstreicht er, dass andere Verpflichtungen des Vormundes wie z. B. die

[43] AL-ĠAZĀLĪ, *supra* Fn. 12, 481.
[44] Vgl. AL-ĠAZĀLĪ, *supra* Fn. 12, 481.
[45] Vgl. AL-ĠAZĀLĪ, *supra* Fn. 12, 482.
[46] Vgl. AL-ĠAZĀLĪ, *supra* Fn. 12, 479 f.
[47] Vgl. AL-ĠAZĀLĪ, *supra* Fn. 12, 481.
[48] Vgl. AL-ĠAZĀLĪ, *supra* Fn. 12, 481f. und AZ-ZUḤAILĪ, *supra* Fn. 21, Bd. 2, 1026 f.
[49] Vgl AL-ĠAZĀLĪ, *supra* Fn. 12, 481.

Erziehung, Ernährung oder Bereitstellung von Kleidung hingegen zur *ḍarūrāt*-Stufe gehören.[50] Dem dritten Rang der *maṣāliḥ* widmet al-Ġazālī die „Verbesserungen" (*taḥsīnāt*), welche er als moralische Verschönerungen und sittliche Kultivierung erachtet wie z. B. gute Manieren beim Essen und Trinken, die Beseitigung von Schmutz und das Erhalten der Sauberkeit.[51]

Auf Grundlage dieser dreistufigen Einteilung der *maṣlāliḥ* schränkt al-Ġazālī die Verwendung von *maṣlaḥa mursala* auf die erste Stufe ein, die „Notwendigkeiten" (*ḍarūrāt*). Dazu setzt er noch voraus, dass die *maṣlaḥa mursala* allgemein (*kullīya*) und definitiv (*qaṭʿīya*) erwiesen sein müsse, wobei er mit „*kullīya*" die ganze islamische Gemeinschaft (*umma*) meint.[52] Als Beispiel dafür stellt er eine fiktive Kriegssituation zwischen Muslimen und Nichtmuslimen dar, in der einige muslimische Kämpfer zu Geiseln genommen und in der Schlacht als menschliche Schutzschilde missbraucht werden. Würden sich die Muslime wegen der muslimischen Gefangenen zurückhalten, würden die Ungläubigen die Herrschaft über alle Muslime erringen und anschließend auch die Kriegsgefangenen töten. Al-Ġazālīs Argumentation lautet daher, die Muslime dürften die Nichtmuslime angreifen, auch wenn ihre muslimischen Geiseln dabei getötet werden müssten. Dies verstößt zwar gegen eindeutige Schariavorschriften,[53] welche die Tötung von Muslimen verbieten, wird hier aber gebilligt, da es sich laut al-Ġazālīs Auffassung um eine definitiv notwendige Angelegenheit handelt und man gleichzeitig eine allgemeine Bedrohung für die gesamte *umma* abwehrt. Ginge man anders an diese Sache heran, würden die Nichtmuslime die Muslime angreifen und das Territorium des Islam unterwerfen sowie die Gesamtheit der Muslime einschließlich der Geiseln töten.[54]

Beim genaueren Hinsehen auf die aufgestellten Bedingungen für die Heranziehung der *maṣlaḥa mursala* als Rechtsquelle – also (*qaṭʿīya*), (*ḍarūrīya*) und (*kullīya*) – stellt man fest, dass es sich nicht mehr um eine *maṣlaḥa mursala* handelt. Denn die Legitimität des Angriffs in dem angeführten Fallbeispiel lässt sich durch andere koranische Passagen begründen. Es sei hier als Beispiel die Koranstelle 6:196 erwähnt, der zufolge Verbotenes erlaubt werden darf, wenn man sich in einem Notfall befindet.[55] Auch die Rechtsmaxime „*aḍ-ḍarūrāt tubīḥ al-maḥẓūrāt*, etwa „Not kennt kein Gebot", welche auf diesem Vers gründet, bestätigt einmal mehr diese Bedeutung. Dementsprechend kann von der *maṣlaḥa mursala* als Rechtsargument laut al-Ġazālīs Verständnis kein Gebrauch gemacht werden. In seinem Werk *al-Mustaṣfā* zählt er sie demnach eindeutig – neben anderen Quellen wie *istiḥsān* („rechtliche Präferenz"), und *qaul aṣ-ṣaḥābī* („Aussagen der Prophetengefährten") – zu den Pseudo-Quellen (*al-uṣūl al-mauhūma*).[56]

[50] Vgl. AL-ĠAZĀLĪ, *supra* Fn. 12, 483 f.
[51] Vgl. AL-ĠAZĀLĪ, *supra* Fn. 12, 485 f.
[52] Vgl. AL-ĠAZĀLĪ, *supra* Fn. 12, 489.
[53] Zu den Beweisen, die die Tötung von Menschen verbieten, siehe z. B. (Koran: 4:93, 5:32 und 17:33).
[54] Vgl. AL-ĠAZĀLĪ, *supra* Fn. 12, 487-489.
[55] Die entsprechende Stelle besagt: "Gott hat euch bereits ausführlich verkündet, was euch verboten ist, ausgenommen das, wozu ihr gezwungen werdet."
[56] Vgl. AL-ĠAZĀLĪ, *supra* Fn. 12, 434 und 478.

Während der zwei Jahrhunderte zwischen al-Ġazālī und aṭ-Ṭūfī profilierten sich weitere Rechtsgelehrte mit Beiträgen zur Etablierung der *maṣlaḥa*-Theorie. So haben Gelehrte wie etwa Sayif ad-Dīn al-Āmidī (gest. 1255) und al-Bayḍāwī (gest. 1286) al-Ġazālīs Klassifizierung der *maṣlaḥa* aufgegriffen und eine Hierarchie der Ziele der Scharia angestrebt. Sie setzten sich vor allem mit der Frage der Prioritätensetzung zwischen den einzelnen Absichten des göttlichen Gesetzgebers auseinander, weswegen ihre Überlegungen sehr nah an al-Ġazālīs Konzept blieben.[57] Ohne auf die Ansätze früherer Gelehrter Bezug zu nehmen, entwarf der Ḥanbalit Naǧm ad-Dīn aṭ-Ṭūfī hingegen ein komplett neues Konzept für die Anwendung der *maṣlaḥa*, wodurch er als „an independent student of law (mudjtahid)"[58] proklamiert wurde. Im Folgenden soll nun seine entsprechende Konzeption vorgestellt werden.

IV. Aṭ-Ṭūfīs Ansatz zur *maṣlaḥa mursala*

Zum Thema *maṣlaḥa* oder *istiṣlāḥ* hat aṭ-Ṭūfī kein eigenständiges Werk hinterlassen. Die Frage der Anwendung der *maṣlaḥa* als rechtliches Instrument thematisiert er in seinem Kommentar *at-Taʿyīn fī šarḥ al-arbaʿīn* zum Hadith-Werk des schafiitischen Gelehrten an-Nawawī (gest. 1278).[59] Ausgehend von der Prophetenaussage *Lā ḍarar wa-lā ḍirār* („Es soll weder Schaden erlitten noch zugefügt werden") wendet sich aṭ-Ṭūfī der Problematik der *maṣlaḥa* zu. Trotz seiner innovativen Idee zur *maṣlaḥa* stieß seine Theorie zu seiner Zeit weder auf Anerkennung noch auf Ablehnung. Dass er aus Kairo verbannt wurde, führen viele Biografen nicht auf seine Ansichten zur *maṣlaḥa* zurück, sondern auf einen Streit mit seinem Lehrer al-Qāḍī al-Ḥātiṯī (gest. 1312).[60] Erst nachdem der syrische Gelehrte Ǧamāl ad-Dīn al-Qāsimī (gest. 1914) das Traktat von aṭ-Ṭūfī im Jahre 1342/1906 veröffentlichte und später von Rašīd Riḍā in der von ihm herausgegebenen Zeitschrift al-Manār nachgedruckt wurde, ist aṭ-Ṭūfīs *maṣlaḥa*-Konzept der Gegenstand zahlreicher kontroverser Diskussionen geworden.[61]

Lexikalisch definiert aṭ-Ṭūfī den Terminus *maṣlaḥa* als „das Befinden einer Sache in einer vollkommenen Gestalt, die man für sich erwartet."[62] So befinde sich ein Stift in der richtigen Form, wenn man damit seine *maṣlaḥa*, hier das Schreiben, erledigen könne. Da aṭ-Ṭūfī die Begriffe *maṣlaḥa* und *maqāṣid*, ähnlich wie al-Ġazālī, als aufeinander bezogen verwendet, versteht er unter *maṣlaḥa* als *Terminus technicus* den Grund (*sabab*), der zur Erfüllung Gottes Ziele führt, und zwar der Nutzen (*nafʿ*) sowie das Wohlergehen (*ṣalāḥ*) der Menschen wie z. B. der Profit, der durch den

[57] Vgl. weiterführend dazu NEKROUMI, *supra* Fn. 29, 163 f.

[58] Vgl. PARET, *supra* Fn. 20, 258.

[59] Vgl. AṬ-ṬŪFĪ, *at-Taʿyīn fī šarḥ al-arbaʿyīn.* ʿUṮMĀN ḤĀǦǦ AḤMAD (Hrsg.), Mekka: al-Maktaba al-Makīya u.a. 1998, 234-280.

[60] Weiterführend dazu DURAN MUHAMMAT, Zur Theorie einer teleologischen Methode in der islamischen Normenlehre: Aš-Šāṭibīs (gest. 790/1388) Konzept der Absichten der Scharia (*maqāṣid aš-šarīʿa*), Berlin: EB-Verl. 2015, 158.

[61] Seitdem finden über aṭ-Ṭūfīs Ansichten in zahlreichen Schriften und wissenschaftlichen Studien kontroverse Diskussionen statt. Vgl. beispielsweise Vgl. ḤASSĀN ḤUSAIN ḤĀMID, *Naẓarīyat al-maṣlaḥa fī l-fiqh al-islāmī*, Dammam: Maktabat al-Mutanabbī 1981, 525-569, ZAID MUṢṬAFĀ ZAID, *al-Maṣlaḥa fī t-tašrīʿ al-islāmī*, Kairo 2004 und AL-BŪṬĪ, *supra* Fn. 16, 202 ff, OPWIS, *supra* Fn. 5, 200-247 und DURAN, *supra* Fn. 60, 157-167.

[62] AṬ-ṬŪFĪ, *supra* Fn. 13, 25.

Handel entsteht. Aṭ-Ṭūfī unterschiedet zwischen zwei Kategorien von *maṣlaḥa*: Es gebe einerseits Ziele bzw. Interessen des Gesetzgebers (hier Gott), auf die Er abzielt wie etwa solche, die hinter den gottesdienstlichen Handlungen (*ʿibādāt*) stehen, und andererseits solche, auf die Er nicht abzielt, aber im Sinne der Menschen vorschreibt wie etwa die zwischenmenschlichen Angelegenheiten (*muʿāmalāt*).[63]

In seiner Abhandlung gibt aṭ-Ṭūfī der *maṣlaḥa* den Vorrang vor den Beweisen aus dem Koran und/oder der Sunna sowie dem Gelehrtenkonsens (*iǧmāʿ*). Im Allgemeinen stellt er die Berücksichtigung der *maṣlaḥa* als das wichtigste Prinzip in der Scharia überhaupt dar. Er listet in diesem Zusammenhang 19 Rechtsquellen[64] auf und misst dabei der *maṣlaḥa* die höchste Priorität bei:

> „Die soliden Quellen dieser 19 sind der Text (*naṣṣ*: Koran und Sunna) sowie der Konsens. Entweder stimmen diese mit der *maṣlaḥa* überein, oder sie widersprechen ihr. Stimmen sie mit ihr überein, dann liegt kein Grund für den Streit vor, da sich alle drei Quellen – der Text, der Konsens und die *maṣlaḥa* […] – über die eine Rechtsentscheidung einig sind. Wenn sie [der *naṣṣ* und der Konsens] ihr [der *maṣlaḥa*] widersprechen, muss die *maṣlaḥa* im Wege der Spezifizierung (*taḫṣīṣ*) und der Erklärung (*bayān*) vorgezogen werden. Diese Präferenz darf nicht durch die Dementierung oder die Aufhebung erfolgen; genauso wie die Sunna dem Koran im Wege der Erklärung vorgezogen werden kann.“[65]

Anschließend setzt er auf Grundlage der eben angeführten Unterteilung der *maṣlaḥa* eine inhaltliche Grenze für die Anwendung der *maṣlaḥa* als Rechtsquelle: Seiner Darstellung zufolge hat das *maṣlaḥa*-Prinzip Vorrang vor dem *naṣṣ* und dem *iǧmāʿ* nur im Bereich der zwischenmenschlichen Handlungen *(muʿāmalāt*). Hingegen seien die Normen zu rituellen Handlungen (*ʿibādāt)* überlieferungsgemäß (durch den Koran, die Sunna oder den Konsens) zu bestimmen. Diese Differenzierung rechtfertigt er damit, dass die Berücksichtigung der *maṣlaḥa* im Bereich der *muʿāmalāt* den Dreh- und Angelpunkt bilde, warum Gott diese überhaupt vorschreibe. Die *ʿibādāt* allerdings seien nur durch autoritative Texte zu bestimmen, da nur Gott die Art und Weise kenne, wie diese zu vollziehen sind.[66]

Zur Begründung seiner Position der Bevorzugung der *maṣlaḥa* vor dem *naṣṣ* und dem *iǧmāʿ* führt er zahlreiche Beweise aus dem Koran und der Sunna an, denen zufolge alle göttlichen Bestimmungen auf die Herbeiführung von Nutzen und die Abwehr von Schaden bestimmt worden sind. Unter anderem erwähnt er: „O ihr Menschen! Zu euch ist Belehrung von eurem Herrn, innerliche Heilung, Rechtleitung und Barmherzigkeit für die Gläubigen gekommen. Sprich:

[63] Vgl. Aṭ-Ṭūfī, *supra* Fn. 13, 25.
[64] Zu diesen Quellen vgl. Aṭ-Ṭūfī, *supra* Fn. 13, 13-18.
[65] Aṭ-Ṭūfī, *supra* Fn. 13, 23 f.
[66] Vgl. Aṭ-Ṭūfī, *supra* Fn. 13, 27.

‚Dieses alles habt ihr durch Gottes Huld und Barmherzigkeit.'"[67] In diesem Kontext interpretiert er die innerliche Heilung, die Rechtleitung und die Barmherzigkeit Gottes als großartige und hochrangige *maṣāliḥ*, auf die alle göttlichen Vorschriften hinarbeiten.[68] Als weitere Hinweise aus dem Koran bringt er *ḥudūd*-Verse wie etwa 2:179 an: „Die von Gott geregelte Vergeltung sichert euch das Leben […]".[69]

Seine Präferenz der *maṣlaḥa* vor den Textquellen und dem Konsens sieht er darüber hinaus darin begründet, dass die Textquellen widersprüchlich (*mutaʿāriḍa*) und vielfältig (*muḫtalifa*) seien. Dies sorge laut seiner Auffassung für unerwünschte Meinungsverschiedenheiten und Konflikte unter den Rechtsgelehrten, was wiederum innerislamische Spaltung sowie Fanatismus unter den Muslimen mit sich bringe. Da sich alle Gelehrten hingegen über das Nützlichkeitsprinzip der Scharianormen einig seien, ermögliche dieses *maṣlaḥa*-Prinzip eine einheitliche Interpretation der Textquellen und somit auch eine innerislamische Einheit.[70] Aṭ-Ṭūfī geht folglich davon aus, dass sein Konzept zur Vereinigung der Gemeinschaft der Muslime führen könne. Seine Überlegungen werden demnach auf seine Sorge um die islamische Einheit sowie seinen Wunsch, diese Wiederherzustellen, zurückgeführt. Opwis fasst dies wie folgt zusammen: „[Aṭ-Ṭūfī] desire[s] to propose a principle of law-finding that creates unity among Muslims. Time and again al-Ṭūfī emphasizes that his understanding of *maṣlaḥa* will end disagreement and factionalism since everybody agrees that *maṣlaḥa* is the purpose of the law."[71] Hinsichtlich der Bevorzugung der *maṣlaḥa* vor dem Konsens führt er ebenfalls die Uneinigkeit der Gelehrten über die Gültigkeit des Konsenses als Motiv dafür an. Denn es herrsche Einigkeit über die Berücksichtigung der *maṣlaḥa*, wohingegen über den Konsens als Rechtsquelle nicht. „So ist dies, worüber es Einigkeit herrscht, dem vorzuziehen, worüber Uneinigkeit herrscht."[72]

Aṭ-Ṭūfīs Ansichten stehen demnach im Widerspruch zu den traditionellen Sichtweisen zur *maṣlaḥa* im Allgemeinen sowie zu den Prinzipien seiner eigenen Rechtsschule, der ḥanbalitischen, im Besonderen, welche die *maṣlaḥa* zwar als rechtliches Argument anerkennt, aber diese dem *naṣṣ* unterordnet. Verglichen mit al-Ġazālī vertritt aṭ-Ṭūfī eine völlig gegensätzliche Position in Bezug auf die *maṣlaḥa mursala*. Während al-Ġazālī für die Anwendung der *maṣlaḥa* drei schwer erfüllbare Bedingungen aufstellt und sie folglich kaum anwendbar macht, spricht aṭ-Ṭūfī der *maṣlaḥa* mehr Bedeutung zu als den autoritativen Texten sowie dem Gelehrtenkonsens. Ähnlich wie al-Ġazālī verwendet er aber den Begriff *maṣlaḥa* im Sinne von *maqāṣid* und postuliert ebenfalls, dass alle Schariaregelungen auf den Nutzen der Menschen abzielen. Entsprechend seinem *maṣlaḥa*-Verständnis fungiert die *maṣlaḥa mursala* nicht nur als ausschlaggebende Rechtsquelle in der Erstellung von Normen. Vielmehr kann sie solche Normen revidieren, die im Widerspruch zum menschlichen Nutzen stehen, auch wenn diese Normen aus den Textquellen oder dem Konsens

[67] Koran 10:57-58, zitiert in Aṭ-Ṭūfī, *supra* Fn. 13, 26 f.
[68] Vgl. Aṭ-Ṭūfī, *supra* Fn. 13, 26 f.
[69] Aṭ-Ṭūfī, *supra* Fn. 13, 30 f.
[70] Vgl. Aṭ-Ṭūfī, *supra* Fn. 13, 34.
[71] Opwis, *supra* Fn. 5, 244.
[72] Aṭ-Ṭūfī, *supra* Fn. 13, 27.

hergeleitet sind. Dieses Nützlichkeitsprinzip schränkt aṭ-Ṭūfī auf die zwischenmenschlichen Handlungen (*muʿāmalāt*) ein, da menschliche *maṣāliḥ* zeit- und ortsbedingt und daher auch veränderlich sind. Durch seine nicht-traditionelle bzw. innovative These gilt er als „[…] der einzige Gelehrte in der klassischen Zeit, der die Hierarchie der normativen Quellen, d. h. die Grundlagen der Methodologie der Normenlehre in Frage gestellt hat."[73]

Neben weiteren Rechtsgelehrten wie Ibn Taimīya (gest. 1328), Abū ʿAbduallāh al-Muqrī (gest. 1357) und Ibn as-Subkī (gest. 1369), die sich mit der *maṣlaḥa*-Theorie in der Zeit nach aṭ-Ṭūfī befasst haben, hebt sich der mālikitische Gelehrte Abū Isḥāq aš-Šāṭibī (gest. 1388) durch sein Schaffen einer neuen Herangehensweise mit dem *maṣlaḥa*-Prinzip hervor. In seinen Werken *al-Muwāfaqāt* und *al-Iʿtiṣām* setzt er sich speziell mit den Hauptzielen der Scharia auseinander und liefert im Zuge dessen eine systematische und umfassende Abhandlung der *maṣlaḥa*-Theorie.[74] Da sein Ansatz Gegenstand zahlreicher Studien ist[75] sowie von al-Qaraḍāwī zitiert wird, wie im Folgenden gezeigt, wird auf seine Ansichten hier nicht näher eingegangen.

V. Al-Qaraḍāwīs Ansatz zur *maṣlaḥa mursala*[76]

1. Al-Qaraḍāwīs Theorie zur *maṣlaḥa mursala*

Al-Qaraḍāwī hat bislang kein eigenständiges eingehendes Werk zum Fachgebiet *uṣūl al-fiqh* verfasst. Seine Überlegungen zur *maṣlaḥa mursala* lassen sich daher nur verstreut an unterschiedlichen Stellen seiner Werke wiederfinden.[77] In seinem erstmals 1998 erschienenen Werk „Die schariarechtliche Politik im Lichte der Schariatexte und ihrer Ziele"(*as-Siyāsa aš-šarʿīya fī ḍauʾ an-nuṣūṣ aš-šarʿīya wa-maqāṣidihā*) behandelt er ausführlich das Konzept der *maṣlaḥa* im Zusammenhang der politischen Führung. Wiederholend bespricht er das Thema in seinem 1999 veröffentlichten Werk „*Fī uṣūl al-fiqh al-muyassar*" („Über die Grundlagen der erleichterten Normenlehre"), welches im Rahmen seines Projekts zur „Erleichterung des islamischen Rechts für den zeitgenössischen Muslim im Lichte des Korans und der Sunna" (*Taisīr al-fiqh li-l-muslim al-muʿāṣir fī ḍauʾ alqurʾān wa-s-sunna*) entstanden war.[78]

Unter *maṣlaḥa* versteht al-Qaraḍāwī alles, was den Menschen im Dies- oder Jenseits Nutzen und Wohl bringt oder von ihnen Schaden abwendet.[79] Von der Überzeugung getragen, dass die islamische Gesetzgebung einer früher oder später eintretenden *maṣlaḥa* dient, vertritt er die Positionen, dass die Schariareglungen allesamt für jeden Muslim, unabhängig von Ort und Zeit,

[73] DURAN, *supra* Fn. 60, 157.

[74] Vgl. AŠ-ŠĀṬIBĪ ABŪ ISḤĀQ, *al-Muwāfaqāt*. ĀL SULAIMĀN ABŪ ʿUBAIDA MAŠHŪR B. ḤASAN (Hrsg.), al-Chubar: Dār b. ʿAffān 1997, Bd. 2 und ders., *al-Iʿtiṣām*. ĀL SULAIMĀN ABŪ ʿUBAIDA MAŠHŪR B. ḤASAN (Hrsg.), Medina: Maktabat at-Tauḥīd 1421/1999, Bd. 3.

[75] Ausführlich zur aš-Šāṭibīs *maṣlaḥa*-Theorie siehe z. B. DURAN, *supra* Fn. 60, 87 ff., AR-RAISŪNĪ, *supra* Fn. 16, OPWIS, *supra* Fn. 5, 248 ff und MASUD MUHAMMAD KHALID, Islamic Legal Philosophy: A Study of Abū Isḥāq al-Shāṭibī's Life and Thought, Delhi: International Islamic Publishers 1989.

[76] Dieser Teil fußt teilweise auf der Dissertationsschrift des Autors. Vgl. EL-WERENY, *supra* Fn. 7, 138-144.

[77] *Vgl.* AL-QARADĀWĪ, *supra Fn. 18, ders, supra Fn. 15, passim.*

[78] Vgl. AL-QARADĀWĪ, *supra* Fn. 14, 6.

[79] Vgl. AL-QARADĀWĪ, *supra* Fn. 15, 82.

Gültigkeitsanspruch haben.[80] In dieser Hinsicht verwendet er die Begriffe *Scharia* und *Islam* als synonym: „[…] Ich meine mit der Scharia hier den ganzen Islam: seinen Glauben und seine Vorstellungen, seine Riten und seinen Kultus, seine Gedanken und Gefühle, seine Moral und Werte, seine Ethik und Sitten sowie seine Vorschriften (*qawānīnuh*) und gesetzlichen Regelungen (*tašrīʿātuh*)."[81] In seiner Vision der universalen Gültigkeit der Scharia nimmt die *maṣlaḥa mursala* eine zentrale Bedeutung ein, da sie laut seiner Auffassung die Elastizität und Anpassungsfähigkeit der Schariavorschriften reflektiert. Sie stellt für ihn nicht nur eine Rechtsquelle dar, sondern gilt auch als dynamisches Instrument für die Normenfindung für neue auftretende Rechtsfragen. Er bezeichnet sie als „einen der fruchtbarsten Methoden der Gesetzgebung" (*aḫṣab aṭ-ṭuruq at-tašrīʿīya*) in denjenigen Rechtsfragen, für die die Quellentexte keine Antworten hergeben.[82]

Davon ausgehend, dass es keine göttlichen Ge- oder Verbote gibt, die die menschlichen Interessen nicht berücksichtigen, sieht al-Qaraḍāwī den Vorteil des *maṣlaḥa*-Prinzips hauptsächlich darin, die Anpassungsfähigkeit der Schariaregelungen an die unterschiedlichen Lebensverhältnisse sowie an die damit einhergehenden Bedürfnisse der Menschen zum Ausdruck zu bringen.[83] Aus seiner Sicht räumt die *maṣlaḥa mursala* den Gelehrten die Möglichkeit ein, je nach zeitlichen und örtlichen Gegebenheiten unterschiedliche rechtliche Entscheidungen zu treffen, solange dies im Interesse des Rechtsratsuchenden (*mustaftī*) liege und fest stehende islamische Rechtsvorschriften dabei nicht verletze.[84]

Al-Qaraḍāwī nimmt die Uneinigkeit muslimischer Gelehrsamkeit in Sachen *maṣlaḥa mursala* als unabhängige Rechtsquelle zur Kenntnis und unterscheidet ganz allgemein zwischen folgenden Positionen: Einige, wie die Mālikiten und Ḥanbaliten, nutzen sie als eigenständiges Argument; andere aber, wie z. B. die Ḥanafiten, wenden sie auch an, jedoch in Kombination mit der rechtlichen Präferenz (*istiḥsān*). Die Schafiiten würden die *maṣlaḥa mursala* zwar theoretisch ablehnen, auf praktischer Ebene, also bei der Erstellung von Fatwas, aber einsetzen.[85] Wie sich die Argumentation sowie die praktische Anwendung der jeweiligen Lehrmeinung konkret gestaltet, führt al-Qaraḍāwī an dieser Stelle nicht aus. In dieser Hinsicht behauptet er vielmehr, dass die große Masse der muslimischen Rechtsgelehrten (*ǧumhūr fuqahāʾ al-muslimīn*) die *maṣlaḥa mursala* praktisch als Normenfindungsmethode in der Gesetzgebung (*tašrīʿ*), der Gutachtenpraxis (*iftāʾ*) sowie in der Rechtsprechung (*qaḍāʾ*) anerkenne. Diese Tatsache bestätige die überlieferte Rechtsliteratur verschiedener Richtungen, welche unzählige auf Grundlage der *maṣlaḥa mursala* getroffene Rechtsentscheidungen beinhalte.[86] Auch die Prophetengefährten hätten sich auf die *maṣlaḥa mursala* bei der Begutachtung von Rechtsfragen gestützt. Als Beispiel dafür erwähnt er

[80] Vgl. AL-QARADĀWĪ, *Šarīʿat al-islām ṣāliḥa li-t-taṭbīq fī kull zamān wa-makān,* Kairo: Dār aṣ-Ṣaḥwa 1993, passim.
[81] AL-QARADĀWĪ, *supra* Fn. 18, 283.
[82] Vgl. AL-QARADĀWĪ, *supra* Fn. 18, 158 und ders., *supra* Fn. 14, 81.
[83] Vgl. AL-QARADĀWĪ, *supra* Fn. 14, 81 und ders., *supra* Fn. 18, 158.
[84] Vgl. AL-QARADĀWĪ, *supra* Fn. 15, 102 und ders., *supra* Fn. 14, 79.
[85] Vgl. AL-QARADĀWĪ, *supra* Fn. 14, 83 f. und ders., *supra* Fn. 15, 83.
[86] Vgl. AL-QARADĀWĪ, *supra* Fn. 14, 81.

unter anderem die Einrichtung von Gefängnissen und die Aufnahme von Rechnungsbüchern des Staatshaushaltes unter dem zweiten Kalifen ʿUmar b. al-Ḫaṭṭāb.[87]

In Kontroverse über die Anerkennung der *maṣlaḥa mursala* greift al-Qaraḍāwī die schafiitische Position noch einmal auf und nennt al-Ġazālī als Hauptvertreter der ablehnenden Haltung. In diesem Zusammenhang zitiert al-Qaraḍāwī ihn ausführlich und kommt dabei zu dem Schluss, dass al-Ġazālīs Ablehnung gegenüber der *maṣlaḥa mursala* in seinen dafür aufgestellten Voraussetzungen impliziert sei.[88] Für den Rückgriff auf die *maṣlaḥa mursala* als normgebende Quelle habe er drei nach al-Qaraḍāwī nur „schwer erfüllbare Bedingungen" (*ṣaʿbat at-taḥqīq*) vorausgesetzt.[89] Diese bereits oben erwähnten Voraussetzungen versucht al-Qaraḍāwī aufzuheben. In Anlehnung an aš-Šāṭibīs Ausführungen stellt er dar, dass die Anwendung der *maṣlaḥa mursala* immer erfolgen dürfe, wenn sie für den Menschenverstand akzeptabel (*maʿqūlah*) sei, den allgemeinen Zielen der Scharia (*maqāṣid aš-šarīʿa*) entspreche und auf die Erfüllung einer Notwendigkeit oder die Aufhebung einer Bedrängnis (*rafʿ ḥaraǧ*) abziele. In dieser Hinsicht unterstreicht al-Qaraḍāwī, dass die *maṣlaḥa* nicht nur bei Fragen notwendiger Art (*ḍarūrāt*) eingesetzt werden dürfe. Vielmehr solle sie auch bei bedürfnisbezogenen Angelegenheiten (*ḥāǧāt*) Anwendung finden, und zwar um Erleichterung und Mäßigung ins Leben der Menschen zu bringen.[90] Demnach ist es für al-Qaraḍāwī „nicht zwingend erforderlich (*laisa min al-lāzim*)",[91] dass eine *maṣlaḥa* unbedingt notwendig, allgemein oder definitiv sein muss, wie al-Ġazālī vorgibt. Es müsse sich aber hauptsächlich um ein „wirkliches" (*ḥaqīqīya*) und nicht um ein „vermeintliches" Interesse (*mauhūma*) handeln.[92] Wie man ein solches ‚wirkliches' Interesse erkennen kann und nach welchen Kriterien dabei verfahren werden soll, erläutert al-Qaraḍāwī nicht. Er warnt nur davor, dass die Verwendung der *maṣlaḥa mursala* nicht bedeuten soll, nach persönlichen Neigungen und Gelüsten Ge- und Verbote auszusprechen. Eine *maṣlaḥa mursala* müsse vorsichtig und besonnen geprüft und gerecht beurteilt werden.[93] Mit dieser Forderung will al-Qaraḍāwī vermeiden, dass Fatwas auf Gedeih und Verderb verlautbart werden, legt aber dafür keine konkreten Rahmenbedingungen fest.

Mit seinem Versuch, die Anwendungsbedingungen der *maṣlaḥa mursala* aufzulockern, stellt al-Qaraḍāwī keine Ausnahme dar. Abū Zahra setzt für die Anwendung der *maṣlaḥa mursala* bereits in seinem 1958 erschienenen Werk ähnlich wie al-Qaraḍāwī voraus, dass sie rational nachvollziehbar (*maʿqūla*) sein, mit den Offenbarungstexten und grundsätzlichen Zielen der Scharia (*maqāṣid aš-šarīʿa*) übereinstimmen und Schwierigkeiten bzw. Erschwernisse beheben soll.[94] Demnach kann al-Qaraḍāwīs Ansatz nicht als Neuerung betrachtet werden. Weitere zeitgenössische Gelehrte und

[87] Vgl. AL-QARADĀWĪ, *supra* Fn. 14, 81 f.
[88] Vgl. AL-QARADĀWĪ, *supra* Fn. 14, 85 f.
[89] Vgl. AL-ĠAZĀLĪ, *supra* Fn. 12, 489 und AL-QARADĀWĪ, *supra* Fn. 14, 85 und ders., *supra* Fn. 15, 99 f.
[90] Vgl. AL-QARADĀWĪ, *supra* Fn. 14, 86 und ders., *supra* Fn. 15, 100.
[91] AL-QARADĀWĪ, *supra* Fn. 14, 87.
[92] Vgl AL-QARADĀWĪ, *supra* Fn. 14, 87.
[93] Vgl. AL-QARADĀWĪ, *supra* Fn. 14, 87.
[94] Vgl. ABŪ ZAHRA, *supra* Fn. 23, 279 f. und ähnlich bei ḪALLĀF, *supra* Fn. 23, 86 f. und ausführlich dazu ders., *Maṣādir at-tašrīʿ fī-mā lā naṣṣ fīh*, Kuwait: Muʾsassat ar-Risāla 1993, 85 ff.

Autoren streben ebenfalls eine Neudefinition der Bedingungen für den Einsatz der *maṣlaḥa* an. Sie bezwecken damit, die *maṣlaḥa* als Rechtsfertigungsmethode für ihre möglichen Ansätze und Thesen einfacher einsetzbar zu formulieren. Kerr beschreibt dieses Phänomen wie folgt: „The element in their jurisprudence which the modernists have particularly seized upon as the basis for dynamism and humanism is the notion of *maṣlaḥā* (welfare, benefit, utility)."[95] So bemüht sich beispielsweise Tarik Ramadan in seinem Werk *Western Muslims and the Future of Islam* die traditionellen Bedingungen zu entschärfen. Seine Ausführungen überschneiden sich in diesem Zusammenhang mit al-Qaraḍāwīs oben angeführten Voraussetzungen und liefern keine neuen Ideen. Er stellt dar, dass die *maṣlaḥa mursala* allgemein (*kullīya*, also der Allgemeinheit dienlich) und authentisch (*ḥaqīqīya*) sein muss, in Übereinstimmung mit den Textquellen stehen und mit großer Sorgfalt und Gewissheit ausgeführt werden sollte.[96] Ebenfalls wie al-Qaraḍāwī geht Ramadan von der Nützlichkeit aller Scharianormen aus und unterstreicht den Vorrang des Korans und der Sunna vor jedem anderen rechtlichen Instrument. Als Referenz für seine Position greift er explizit auf al-Qaraḍāwī zurück:

> "What is clear above all is the supremacy of the Qur'an and the Sunna over all other references and legal instruments. Yusuf al-Qaradawi rightly recalls, taking up the ideas of al-Ghazali, Ibn al-Qayyim, and al-Shatibi, that everything found in the Qur'an and the Sunna is, in itself, in harmony with "the good of humankind" in general, for the Creator knows and wants what is best for human beings, and He shows them what they must do to achieve it."[97]

Dass aṭ-Ṭūfī der *maṣlaḥa mursala* vor dem *naṣṣ* und dem *iǧmāʿ* Vorrang verleiht, stellt al-Qaraḍāwī in Frage. Während zahlreiche Gelehrte wie M. Said al-Būṭī und Ḫallāf die Meinung vertreten, dass aṭ-Ṭūfī tatsächlich den definitiven *naṣṣ* meinte,[98] stellt al-Qaraḍāwī die These auf, aṭ-Ṭūfī habe ausschließlich den mutmaßlich zu erschließenden und bedeutungsoffenen Text (*naṣṣ ẓannī*) gemeint.[99] Zur Verteidigung seiner These bezieht er sich auf die Dissertationsschrift von Ḥusain Ḥāmid Ḥassān (geb. 1932)[100], in der er sich mit dem *maṣlaḥa*-Konzept intensiv auseinandersetzt und dabei ausführlich auf aṭ-Ṭūfīs Ansatz eingeht.[101] Dabei geht es Ḥassān nicht darum, ob aṭ-Ṭūfī den *naṣṣ qaṭʿī* oder *ẓannī* gemeint hat. Vielmehr hat er es sich zur Aufgabe gemacht, aṭ-Ṭūfīs Präferenz der *maṣlaḥa* vor einem *naṣṣ* oder *iǧmāʿ* gemeinhin zu widerlegen.[102] Im Zuge dessen geht er davon

[95] KERR MALCOLM H., Islamic Reform. The Political and Legal Theories of Muḥammad ʿAbduh and Rashīd Riḍā, Berkeley: University of California Press 1966, 55.

[96] Vgl. RAMADAN, *supra* Fn. 3, 41.

[97] RAMADAN, *supra* Fn. 3, 42.

[98] Vgl. AL-BŪṬĪ, *supra* Fn. 16, 202 ff. und ḪALLĀF, *supra* Fn. 94, 96 ff. Tarik Ramadan vertritt ebenfalls die Position, dass aṭ-Ṭūfī der *maṣlaḥa* Vorrang vor den textuellen Belegen einräumt. Für Näheres dazu vgl. RAMADAN, *supra* Fn. 3, 41.

[99] Vgl. AL-QARADĀWĪ, *supra* Fn. 15, 160 f.

[100] Ḥassān ist ein Rechtsgelehrter und Wirtschaftsexperte ägyptischer Herkunft. Er fungiert als Mitglied in verschiedenen nationalen wie internationalen Gremien und Institutionen wie etwa der *International Union of Muslim Scholars* (IUMS). Für Näheres über seine Biografie siehe http://www.isegs.com/forum/showthread.php?t=1881 (Stand: 12.10.2016).

[101] Vgl. ḤASSĀN, *supra* Fn. 61, 525-569.

[102] Vgl. ḤASSĀN, *supra* Fn. 61, 559f und 566 f.

aus, dass aṭ-Ṭūfīs Standpunkt lediglich den präsumtiven Text (*naṣṣ ẓannī*) einschließt, den definitiven (*naṣṣ qaṭʿī*) aber nicht.[103] Als Kernargument für seine Behauptung bedient sich Ḥassān vor allem der oben angeführten Aussage aṭ-Ṭūfīs, wonach die *maṣlaḥa* vor dem *naṣṣ* oder dem *iǧmāʿ* „im Wege der Spezifizierung (*taḫṣīṣ*) und der Erklärung (*bayān*)"[104] favorisiert werden darf.[105] Dies bedeutet nach Ḥassāns Verständnis,

> „dass eine *maṣlaḥa* nur einem allgemeinen (*ʿāmm*) bzw. unbeschränkten (*muṭlaq*) Text widersprechen darf. Da die Beweiskraft eines allgemeinen oder unbeschränkten Rechtsbeweises aus der Sicht der Mehrheit der Rechtsgelehrten präsumtiver Natur (*ẓannīya*) bleibt, so hat aṭ-Ṭūfī mit seiner Aussage [ausschließlich] den *ẓannī*-Text gemeint. Handelt es sich um einen spezifischen Text (*naṣṣ ḫāṣṣ*), dann darf die *maṣlaḥa* ihm nicht widersprechen. Denn die Beweiskraft eines spezifischen *naṣṣ* gilt laut Gelehrtenkonsens als definitiv (*qaṭʿīya*) […].[106]

Dass aṭ-Ṭūfī mit seiner These anstrebt, die Abspaltung unter den Muslimen sowie die Meinungsverschiedenheit der Gelehrten zu beenden, wie oben demonstriert, darf er meines Erachtens keine Differenzierung zwischen *ẓannī* und *qaṭʿī*-Text vorgenommen haben, wie Ḥassān hier zu begründen versucht. Denn muslimische Gelehrte sind sich auch uneinig darüber, welche Textbelege dem *ẓannīyāt*-Bereich und welche dem *qaṭʿīyāt* zuzuordnen sind.[107]

Al-Qaraḍāwī nimmt Ḥassāns Argumente wörtlich auf und schließt sich seiner Meinung kommentarlos an. Anschließend kritisiert er jene Gelehrte, die seiner Darstellung zufolge schariawidrige Entscheidungen treffen und zu freigebig mit den autoritativen Texten umgehen.[108] Anhänger dieser Denkschule, die in al-Qaraḍāwīs Ausführungen Anonym bleiben, nennt er *al-madrasa aṭ-ṭūfīya*, da sie ihre Entscheidungen mit aṭ-Ṭūfīs *maṣlaḥa*-Ansatz rechtfertigen würden.[109] Wie al-Qaraḍāwī selbst mit der *maṣlaḥa mursala* als Entscheidungskriterium für die Begutachtung von Rechtsfragen umgehet und ob er seinen hier dargestellten Theorien treu bleibt, wird im Folgenden anhand von zwei Fallbeispielen untersucht.

[103] Vgl. ḤASSĀN, *supra* Fn. 61, 539 f.

[104] AṬ-ṬŪFĪ, *supra* Fn. 13, 23 f.

[105] Paret versteht unter der Bevorzugung der *maṣlaḥa* vor dem *naṣṣ* und dem *iǧmāʿ* auf Grundlage der „Spezifizierung (*taḫṣīṣ*) und der Erklärung (*bayān*)", dass "[t]hey [*naṣṣ* und *ijmāʿ*] are rather to be reconciled subsequently with the demands of the *maṣlaḥa* by the help of exegesis (*bayān*) or specification (*takhṣīṣ* , *i.e.*, by separating a subdivision from the general and the principles applicable to it). In any case however, the *riʿāyat al-maṣlaḥa* represents the highest court of appeal." PARET, *supra* Fn. 20, 258.

[106] ḤASSĀN, *supra* Fn. 61, 539 f.

[107] Für Näheres dazu vgl. AL-QAṬṬĀN MANNĀʿ, *Mabāḥiṯ fī ʿulūm al-qurʾān*, Maktabat Wahba 2000, 223-237 und KINBERG LEAH, *Muḥkamāt* and *Mutashābihāt* (Koran 3/7): Implication of a Koranic Pair of Terms in Medieval Exegesis, in: Arabica, Vol. 35 (1988), 143-172.

[108] Vgl. AL-QARADĀWĪ, *supra* Fn. 15, 165.

[109] Vgl. AL-QARADĀWĪ, *al-Iǧtihād fī š-šarīʿa al-islāmīy maʿa naẓarāt taḥlīlīya fī al-iǧtihād al-muʿāṣir*, Kuwait: Dār al-Qalam 2011, 232 f.

2. Al-Qaraḍāwīs praktische Anwendung der *maṣlaḥa mursala*

Im Bereich der Fatwa-Erteilung hat al-Qaraḍāwī zahlreiche Fatwas erstellt. Eine Vielzahl seiner online verfügbaren und in Zeitschriften veröffentlichten Fatwas fließen wiederum wörtlich oder zusammengefasst in seine vierbändige, zentrale Fatwa-Sammlung *Min hady al-islām: fatāwā muʿāṣira* („Von der Rechtleitung des Islam: Zeitgenössische Rechtsgutachten") ein, wo er bemüht ist, themenübergreifende Rechtsfragen zeitgemäß islamisch zu beantworten. Dieses Werk dient hier als Grundlage für diesen Abschnitt.[110]

Im zweiten Band seines eben erwähnten Werkes befasst sich al-Qaraḍāwī mit neuartigen Fragen wie etwa dem Klonen von Menschen, der Organspende und Sterbehilfe.[111] Da es sich hier um neu auftretende Sachverhalte handelt, für die sich keine expliziten Beweise in den Textquellen finden lassen, bedient sich al-Qaraḍāwī des Öfteren des *maṣlaḥa*-Prinzips.[112] Als Beispiel sei hier seine Fatwa zur Organspende kurz erwähnt:[113] In seiner Beantwortung der Frage, ob Muslime Organe spenden dürfen, kommt er zum Schluss, dass nichts dagegen spreche, da dadurch ein Interesse (*maṣlaḥa*) bedient und ein Schaden (*ḍarar*) vermieden wird. Dabei erklärt er, dass die Organspende wie die Geldspende sei. Sie dürfe an einen Muslim wie an einen Nichtmuslim gehen. In al-Qaraḍāwīs Ausführungen werden Ex-Muslime, die sich vom Islam abgewandt haben (*murtadd*) sowie Nichtmuslime, die den Islam bekriegen oder ihm gegenüber feindlich eingestellt sind (*ḥarbī*) als Empfänger eines von einem Muslim stammenden Spenderorgans völlig ausgeschlossen. Die Frage, ob ein Muslim die Organspende eines Nichtmuslims annehmen darf, bejaht er hingegen bedingungslos, sei dieser *murtadd* oder *ḥarbī*. Der Einwand, den al-Qaraḍāwī selbst erhebt, es handele sich dabei um Organe eines Ungläubigen (*kāfir*), entkräftet er damit, dass Körperteile eines Menschen nicht als muslimisch oder ungläubig einzustufen sind. Sie seien lediglich Instrumente, die der Mensch je nach seiner religiösen Überzeugung einsetze. Ferner seien die Organe unabhängig davon, ob sie im Körper eines Muslims oder Nichtmuslims sind, muslimisch (*muslima*) und gottpreisend (*musabbiḥa*). Im Koran (17:44) heiße es: „Die sieben Himmel und die Erde und (alle) ihre Bewohner preisen ihn [Gott]. Es gibt (überhaupt) nichts, was ihn nicht lobpreisen würde."[114] Im Generellen richtet al-Qaraḍāwī sein Augenmerk auf den Nutzen und das Interesse der Muslime. So formuliert er eindeutig, dass die Religionszugehörigkeit des Organempfängers einerseits und der Grad seiner Frömmigkeit andererseits in Betracht gezogen werden sollten. Nach diesen Kriterien sei eine Organspende der Reihe nach zunächst an rechtgläubige Muslime, dann an wenig oder nicht-fromme Muslime und letztlich an Nichtmuslime zu gehen (ausgeschlossen seien als *murtadd* und *ḥarbī* eingestufte Menschen). Die Präferenz zugunsten rechtgläubiger Muslime begründet er damit, dass die Organspende an einen

[110] Vgl. AL-QARADĀWĪ, *Min hadī al-islām: Fatāwā muʿāṣira*, Kuwait: Dār al-Qalam 2005, Bd. 2, 113 f. (verwendete Bände Bd. 2, 2005 und Bd. 3, 2003) (Erstauflage jew.: 1993 und 2001). Weiterführend dazu GRÄF, *supra* Fn. 7, 212-216.
[111] Vgl. ausführlich dazu EL-WERENY, *supra* Fn. 7, 251 ff.
[112] Vgl. beispielhaft AL-QARADĀWĪ, *supra* Fn. 110, Bd. 3, 524 f. und Bd. 2, 543.
[113] Vgl. weiterführend dazu EL-WERENY, *supra* Fn. 7, 251-261.
[114] Vgl. AL-QARADĀWĪ, *supra* Fn. 110, Bd. 2, 538.

gottesfürchtigen Muslim diesem dabei helfe, seinen religiösen Pflichten nachzugehen. Ein sündiger Mensch hingegen werde die Spende missbrauchen.[115]

Das zweite Fallbeispiel befasst sich mit der Frage der interreligiösen Vererbung. Dies dreht sich konkret im Kontext des muslimischen Minderheitenrechts (*fiqh al-aqallīyāt*), wo ein britischer Muslim die Frage stellt, ob er die Erbschaft seiner nichtmuslimischen verstorbenen Eltern antreten darf.[116] Es sei hier zunächst der Verständlichkeit halber erwähnt, dass ein Gelehrtenkonsens grundsätzlich darüber besteht, dass Vererbung zwischen Muslimen und Nichtmuslimen verboten ist. Als Beweis hierfür wird unter anderem diese Prophetenaussagen angeführt: „Weder ein Muslim erbt von einem Ungläubigen (*kāfir*), noch ein Ungläubiger von einem Muslim" und „Angehörige zweier unterschiedlicher Religionen beerben einander nicht."[117] Al-Qaraḍāwī kommt hingegen in der Begutachtung der eben gestellten Frage aus Großbritannien zu dem Urteil, dass Muslime von Nichtmuslimen erben dürfen, aber nicht umgekehrt. Seine Position rechtfertigt er vor allem mit der *maṣlaḥa.* Bemerkenswerterweise spricht er in diesem Zusammenhang vom Vorhandensein einer *maṣlaḥa ẓāhira* („offensichtlicher Nutzen"), wenngleich er in seinen theoretischen Ausführungen zur Anwendung der *maṣlaḥa* voraussetzt, dass es sich um eine *maṣlaḥa ḥaqīqīya* handeln müsse. Dies spiegelt al-Qaraḍāwīs terminologische Ungenauigkeit wieder. Denn eine *maṣlaḥa ẓāhira* muss nicht *ḥaqīqīya* sein. Es steckt beispielsweise im Handel mit Zinsen eine *maṣlaḥa ẓāhira*, und zwar der Profit. Dennoch wird dieser durch koranische und prophetische Aussagen eindeutig für verboten erklärt.[118] Des Weiteren stellt al-Qaraḍāwī keine Maßstäbe dar, an denen man ein solches Interesse erkennen kann.

Unter *maṣlaḥa ẓāhira* versteht al-Qaraḍāwī hier nicht nur die Verbesserung der wirtschaftlichen Lage der Muslime in einer Minderheitensituation, sondern auch die Verbreitung des Islams. Denn viele Nichtmulsime wollen den Islam annehmen, fürchten jedoch die Enterbung, behauptet er. Eine Erberlaubnis soll, ihm zufolge, diese Barriere überwinden und Muslimen die Möglichkeit einräumen, die Erbschaft ihrer Erblasser anzutreten, damit sie sich vom Islam nicht abwenden. Den Hadith des Propheten, der besagt, dass ein Muslim keinen *kāfir* beerben darf und umgekehrt, legt al-Qaraḍāwī folgendermaßen aus: Mit dem Terminus *kāfir* sei ausschließlich der *ḥarbī* gemeint. Das bedeutet aus al-Qaraḍāwīs Sicht, dass Hinterlassenschaften eines Heuchlers (*munāfiq*), Schutzbefohlenen (*ḏimmī*) oder eines Apostaten (*murtadd*) nicht mit eingeschlossen seien und demnach von Erbberechtigten muslimischen Glaubens angenommen werden dürften.[119] Dass er hier den *murtadd* als geltenden Erblasser sowie als Organspender für Muslime akzeptiert, ihn aber als Organempfänger, wie oben dargelegt, und Erbberechtigten von Muslimen ausschließt, bringt

[115] Vgl. AL-QARADĀWĪ, *supra* Fn. 110, Bd. 2, Bd. 2, 534.

[116] Vgl. AL-QARADĀWĪ, *supra* Fn. 110, Bd. 3, 674 f. und ausführlich dazu EL-WERENY, *supra* Fn. 7, 279-285.

[117] IBN QAIYIM AL-ĞAUZĪYA, *Aḥkām ahl aḏ-ḏimma.* AL-BAKRĪ YŪSUF ABĪ BARĀʾ (Hrsg.) u.a., Dammam: Ramādī li-Našr 1997, Bd. 2, 824 f. und 853.

[118] Zu den Versen, die dieses Verbot proklamieren, zählen 2:276-279, 3:130 und 4:161. Dazu ausführlich LOHLKER RÜDIGER, Das Islamische Recht im Wandel: *Ribā*, Zins und Wucher in Vergangenheit und Gegenwart, Münster u.a.: Waxmann 1999, 23-27. Ferner soll der Prophet den Handel mit Zinsen als eine der sechs größten Sünden im Islam (*al-mūbiqāt*) beschrieben sowie den Zinsnehmer, den Zinsgeber, den Schreiber und die Zeugen eines Zinsvertrages verflucht haben.

[119] Vgl. AL-QARADĀWĪ, *supra* Fn. 110, Bd. 3, 677.

seine willkürliche Interpretation der Begriffe sowie seine arbiträre Anwendung der *maṣlaḥa mursala* eindeutig zum Ausdruck.

VI. Fazit

Einführend wurde gezeigt, wie die Verwendung der *maṣlaḥa mursala* unter den Rechtsgelehrten umstritten ist. Zwar geht die große Mehrheit der muslimischen Gelehrten davon aus, dass alle göttlichen Bestimmungen Nutzen bringen und Schaden abwenden; uneinig sind sie sich aber über die Unabhängigkeit der *maṣlaḥa mursala* als Rechtsquelle sowie ihr Verhältnis zu den anderen Quellen. Auch wenn die erste theoretische Erarbeitung der *maṣlaḥa*-Theorie erst auf das 11. Jahrhundert zurückgeführt wird, ist ihre praktische Anwendung bei der Thematisierung von Rechtsfragen älteren Datums, wie am Beispiel von ʿUmar b. al-Ḫaṭṭābs Rechtsverfahren gezeigt. Eine systematische Ausarbeitung der *maṣlaḥa*-Theorie, samt ihren Kategorien hinsichtlich ihrer Erwähnung in den Quellentexten (*muʿtabara*, *mulġāt*, *mursala*) sowie ihrer Dringlichkeit (*ḍarūrāt*, *ḥāǧāt*, *taḥsīnāt*), wurde anfangs von al-Ġazālī vorgenommen und später von weiteren Gelehrten, insbesondere von aš-Šāṭibī, weiterentwickelt und optimiert.

Im Großen und Ganzen kann die *maṣlaḥa mursala* als ein produktives Rechtsinstrument angesehen werden, das dem islamischen Normensystem eine gewisse Flexibilität verleiht sowie seine Fruchtbarkeit und Anpassungsfähigkeit zum Ausdruck bringt. In Anbetracht der drei oben angeführten Ansätze kann sie aber auch aus dreierlei Gründen als kontraproduktives Instrument sowie als Mittel zur willkürlichen Erteilung von Fatwas erachtet werden: Erstens könnten Vorteile versäumt werden und Nachteile entstehen, sollte man sich an die von al-Ġazālī aufgestellten Konditionen ihrer Anwendung halten. Seine dafür vorgeschlagenen Vorbedingungen machen ihren Gebrauch nur in sehr seltenen Fällen möglich, wie anhand seiner hypothetischen Kriegssituation illustriert. Zweitens könnten grundlegende fest stehende Schariavorschriften vernachlässigt bzw. aufgehoben werden, wenn man sich an der von aṭ-Ṭūfī vertretene Position unhinterfragt orientieren würde. Dazu schreibt Ramadan zu Recht: „In more recent times, this notion [of *maṣlaḥa*] has been used to justify all sorts of new *fatawa* (plural of *fatwa*), even some that were manifestly in contradiction with obvious proofs from the Qur'an and the Sunna, as in the case of rules concerning interest (*riba*) and inheritance."[120] Aṭ-Ṭūfī sieht nämlich, dass die *maṣlaḥa* immer Vorrang haben darf, auch vor solchen Vorschriften, die aus den Offenbarungstexten stammen.

Drittens kann die *maṣlaḥa mursala* nach Belieben und Gutdünken des Gelehrten interpretiert werden, wie anhand von al-Qaraḍāwīs Fatwas demonstriert. Wenngleich er direkten Bezug auf die Ansätze früherer Gelehrter nimmt, hält er sich nicht uneingeschränkt daran. Vielmehr bemüht er sich, die Bedingungen ihrer Anwendung im Sinne eines argumentativen Rechtsbeweises einfacher zu gestalten. Aus seiner Sicht muss die *maṣlaḥa mursala* nur *ḥaqīqīya* und *maʿqūlah* sein sowie auf

[120] RAMADAN, *supra* Fn. 3, 38. An einer anderen Stelle schreibt er: „The notion of *al-maslaha al-mursala* thus sometimes seems to justify the strangest behavior, as well as the most obscure commercial dealings, financial commitments, and banking investments, under the pretext that they protect, or could or should protect, "the common good." RAMADAN, *supra* Fn. 3, 41.

die Verwirklichung der *maqāṣid aš-šarīʿa* abzielen. Er strebt ferner an, aṭ-Ṭūfīs Standpunkt zur *maṣlaḥa*-Präferenz vor dem *naṣṣ* zu regulieren und auf eine bestimmte *naṣṣ*-Kategorie, und zwar *ẓannīyāt*, zu beschränken; seine praktische Anwendung bleibt allerdings nicht kongruent mit seinen theoretischen Ansätzen. Die zwei angeführten Fatwas haben dargelegt, wie er die *maṣlaḥa* beliebig und hauptsächlich im Sinne der Muslime, jenseits seiner dafür entworfenen Theorien, auslegt.

Folgerichtig kann man nicht genau festlegen, nach welchen Kriterien die *maṣlaḥa mursala* Anwendung finden darf. Traditionelle wie zeitgenössische Gelehrte schlugen dafür entsprechend ihren Lebensgegebenheiten unterschiedliche Bedingungen vor. Diese könnten heute bzw. künftig je nach zeitlichen und örtlichen Umständen verändert werden. Dies dürfte man zwar als Lücke im islamischen Recht abwerten, gleichzeitig aber als Gnade und Barmherzigkeit Gottes hoch schätzen. Denn die *maṣlaḥa mursala* stellt für viele Gelehrte ein dynamisches Argument dar, welches die Anpassung der Schariaregeln an die unentwegten Entwicklungen des Lebens und somit für jede Zeit und an jedem Ort möglich macht. Es sei schließlich hervorgehoben, dass die Behandlung von Rechtsfragen nur von hoch qualifizierten Rechtsgelehrten durchgeführt werden sollte, die über die *iǧtihād*-Bedingungen verfügen.[121] Die Ausübung des *iǧtihād* sollte bestenfalls in kollektiver Form (*iǧtihād ǧamāʿī*) und nur unter Berücksichtigung des spezifischen Kontextes erfolgen.[122] Handelt es sich dabei um interreligiöse Angelegenheiten, sollte es sich nicht nur ums Wohl der Muslime drehen, sondern ums Wohlergehen der gesamten Gesellschaft.

[121] Vgl. weiterführend dazu Vgl. AL-ĠAZĀLĪ, *supra* Fn. 12, Bd. 4, 6 ff., AL-QARADĀWĪ, *supra* Fn. 109, 18-48, EL-WERENY, *supra* Fn. 7, 86-100, POYA ABBAS, Anerkennung des *iǧtihād* - Legitimation der Toleranz. Möglichkeiten innerer und äußerer Toleranz im Islam am Beispiel der *iǧtihād*-Diskussion, Berlin: Klaus Schwarz Verl. 2003, und ÇINAR HÜSEYIN İLKER, „Wer ist ein *muǧtahid*? Die Diskussion um die Eigenschaften eines *muǧtahid* in den Quellen der Methodenlehre des islamischen Rechts", in: UCAR BÜLENT (Hrsg.): Hikma. Zeitschrift für Islamische Theologie und Religionspädagogik 4, Heft 6, April 2013, 43-50.

[122] Für Näheres dazu siehe IBN BAIYA ʿABDALLĀH, *Tanbīh al-marāǧiʿ ʿalā taʾṣīl fiqh al-wāqiʿ*, Riad 2014 und RAMADAN TARIK, Radikale Reform. Die Botschaft des Islams für die moderne Gesellschaft, München 2009, 134-148.

Muslim Marriage and Divorce in Sri Lanka: Aspects of the relevant jurisprudence

by Muneer Abduroaf[*] and Najma Moosa[**]

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Abstract

Muslims form 10 per cent of the Sri Lankan population. The country applies a mixed legal system. For many decades Muslim marriages and divorces have been governed by a separate piece of legislation. Courts in Sri Lanka have interpreted some of the legislative provisions. The purpose of this article is to highlight the case law emanating from Sri Lankan courts interpreting the provisions of the Muslim Marriage and Divorce Act 13 of 1951 dealing with different issues: age for marriage; proof of marriage; co-existence of a civil marriage and a Muslim marriage; maintenance of children especially children born out of wedlock; and types of divorce.

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I. Introduction

Muslims form 10 per cent of the Sri Lankan population.[1] The country applies a mixed legal system. Muslim law is one of the special laws applicable to the Muslim inhabitants of Sri Lanka.[2] It should be noted that Sri Lanka has been under a new government since January 2015. The new government brought about the nineteenth amendment to the Sri Lankan Constitution in June 2015. The Sri Lankan Constitution provides for freedom of religion. It states that every person is entitled to freedom of religion, which includes the freedom to have or to adopt a religion or belief of his or her choice. However, in the same chapter (dedicated to human rights) it also provides that existing written and unwritten law is to continue in force.[3] The latter provision implies that laws like Muslim law may be exempt from its provisions and for this reason may prove to be problematic. It should also be noted that the Sri Lankan Constitution states that the State "shall endeavour to foster respect for international law and treaty obligations in dealings among nations".[4] The court cases looked at in this article focus on the position before the 2015 amendment. Relevant issues within the amended Constitution are referred to where appropriate.

In the early twentieth century Muslim marriages were referred to as Muhammadan marriages.[5] In 1929 the Muslim Marriage and Divorce Registration Ordinance was passed.[6] In 1951 this Ordinance was renamed the Muslim Marriage and Divorce Act 13 of 1951.[7] Since then it has undergone several amendments. It has also been the subject of various court judgments interpreting its relevant sections. Different aspects of the Muslim Marriage and Divorce Act 13 of 1951 have been dealt with by the Sri Lankan courts including: the constitutionality of the appointment of the quazis;[8] whether the quazi is a public servant whose salary may not be seized;[9] the sale of property between Muslims;[10] the right to appeal to the Supreme Court against the quazis' decisions;[11] whether a Magistrate's Court has jurisdiction to make a maintenance order in terms of the Act 13 of 1951;[12] whether a quazi may be appointed by the

[1] Opinion, Is Muslim identity a liability in Sri Lanka? Available at http://www.aljazeera.com/indepth/opinion/2014/06/muslim-identity-liability-sri-l-201462075937574567.html (20 June 2014).
[2] Muslim Law in Sri Lanka. Available at http://archives.dailynews.lk/2012/01/27/fea10.asp (20 January 2012).
[3] Sections 10 and 16 (1) respectively of the Constitution of the Democratic Socialist Republic of Sri Lanka (As amended up to 15th May 2015) Revised Edition – 2015)). Available at www.parliament.lk/files/pdf/constitution.pdf (14 October 2016).
[4] Section 27 (15) of the Constitution of Sri Lanka. Available at www.parliament.lk/files/pdf/constitution.pdf (14 October 2016).
[5] Ramupillai v. Festus Perera - SLR - 11, Vol 1 of 1991 [1991] LKSC 29; (1991) 1 Sri LR 11 (7 January 1991) Page 48.
[6] Ramupillai v. Festus Perera - SLR - 11, Vol 1 of 1991 [1991] LKSC 29; (1991) 1 Sri LR 11 (7 January 1991) Page 48. For the history also see Panagoda v. Budinis Singho - NLR - 490 of 68 [1966] LKSC 8; (1966) 68 NLR 490 (22 July 1966) Page 493.
[7] This is the short title of Act 13 of 1951 in terms of Cap 134.
[8] Jaliabdeen v. Danina Umma - NLR - 419 of 64 [1962] LKSC 2; (1962) 64 NLR 419 (17 December 1962).
[9] Mohamed v. Walker & Greig - NLR - 453 of 44 [1943] LKCA 66; (1943) 44 NLR 453 (17 March 1943).
[10] Mohideen v. Sulaiman - NLR - 227 of 59 [1957] LKCA 67; (1957) 59 NLR 227 (4 September 1957).
[11] Ansar v. Fathima Mirza - NLR - 86 of 73 [1970] LKSC 28; (1970) 73 NLR 86 (4 March 1970).
[12] Ismail v. Muthu Marliya - NLR - 431 of 65 [1963] LKSC 10; (1963) 65 NLR 431 (30 September 1963).

Minister of Justice;[13] and the circumstances under which Muslims may take an oath before giving evidence as witnesses.[14] However, it is beyond the scope of this article to deal with all these issues as they do not directly relate to marriage and divorce. The purpose of this article is to highlight case law emanating from Sri Lankan courts interpreting the provisions of Act 13 of 1951 dealing with the following issues: age for marriage; proof of marriage; co-existence of a civil marriage and a Muslim marriage; maintenance of children especially children born out of wedlock; and types of divorces. Some of the cases discussed in this article date back to the 1960s. This is so because there has not been recent case law dealing with some of these issues and the legislation has not been amended to introduce any new changes. These cases therefore still reflect the current legal position on some of these issues.

II. Age for Marriage and Proof of Marriage

Section 23 of Act 13 of 1951 provides:

> "Notwithstanding anything in section 17,[15] a marriage contracted by a Muslim girl who has not attained the age of twelve years shall not be registered under this Act unless the Quazi

[13] Jaliabdeen v. Danina Umma - NLR - 419 of 64 [1962] LKSC 2; (1962) 64 NLR 419 (17 December 1962).

[14] Sooriya Enterprises (International) Ltd. v. Michael White and Company Ltd. - SLR - 371, Vol 3 of 2002 [1994] LKSC 45; (2002) 3 Sri LR 371 (27 July 1994) Page 372.

[15] Section 17 (1) of Act 13 of 1951: Save as otherwise hereinafter expressly provided, every marriage contracted between Muslims after the commencement of this Act shall be registered, as hereinafter provided, immediately upon the conclusion of the Nikah ceremony connected therewith.
(2) In the case of each such marriage, the duty of causing it to be registered is hereby imposed upon the following persons concerned in the marriage: - (a) the bridegroom; and (b) in every case where the consent of the wali has not been dispensed with under section 47 and is required by the Muslim law governing the sect to which the bride belongs, the wali of the bride; and (c) the person who conducted the Nikah ceremony connected with the marriage.
(3) For the purpose of. causing the marriage to be registered, it shall be the duty of the person specified in subsection (2)- (a) to give to the registrar information of the date on which and the time and place at which the Nikah ceremony is to take place, and to request him to attend the ceremony for the purpose of registering the marriage ; and (b) immediately upon the conclusion of the Nikah ceremony, to call upon the registrar to register the marriage, and for that purpose to render him all such assistance and take all such other measures as may be necessary.
(4) Where the registrar, notwithstanding that the acts or measures required by subsection (3) have been done or taken, neglects or refuses to register the marriage, it shall be the duty of the persons specified in subsection (2) to send to the District Registrar, within the seven days next succeeding the date of the Nikah ceremony, a written report setting out the following particulars relating to the marriage :- (a) the names of the parties to the marriage, (b) the date on which and the time and place at which the Nikah ceremony was conducted, (c) the name of the wali, if any, (d) the name of the person who conducted the Nikah ceremony.
(5) Where any marriage which is required by this Act to be registered is not registered owing to default in doing or taking any act or measure required by any of the preceding provisions of this section, every person on whom the duty of doing or taking that act or measure is imposed by that provision shall be deemed to have failed to cause the marriage to be registered.
(6) The court convicting any person of the offence of failing to cause a marriage to be registered or of failing to send the District Registrar a report as to any marriage which the registrar has neglected or refused to register, shall send to the District Registrar, as early as may be after the close of the proceedings in respect of the offence, a report setting out such particulars relating to the marriage as are required by subsection (4).
(7) It shall be the duty of the District Registrar, on receipt of any report under subsection (4) or subsection (6), to satisfy himself by such inquiry or investigation as may appear to him to be adequate, that the marriage has taken place and that it has not been registered, to verify the particulars furnished in the report and amend them if they are not correct, and to make order directing that the marriage be registered with the particulars verified or amended; and it shall be the duty of the registrar specified in the order to register the marriage accordingly.

for the area in which the girl resides has, after such inquiry as he may deem necessary, authorized the registration of the marriage."

In terms of section 23 of Act 13 of 1951, a Muslim girl can marry after attaining the age of twelve. However, the section also places an exception thereto. In terms of Muslim Personal Law (MPL), it is also possible for a Muslim girl to marry after reaching the age of puberty. However, the various sects deal differently with the issue of whether the guardian's consent is necessary. It has been held that: "A Muslim maiden, therefore, of the Hanafi sect who has reached the age of bulugh can enter into a contract of marriage without the intervention of a wali or marriage guardian, or appoint a wali herself for the purpose of her marriage. In the case of a maiden of the Shafi sect, whatever her age may be a wali is necessary."[16] The above discussion raises the issue of child marriages.

This is so because Sri Lanka is a State Party to the International Convention on the Rights of the Child which defines a child in Article 1 as a person under the age of eighteen years but at the same time qualifies it[17], and the Committee on the Rights of the Child has called upon State Parties to prohibit and eliminate child marriages.[18] It should also be recalled that some pieces of legislation in Sri Lanka also define a child as a person under the age of eighteen years.[19] International human rights bodies, such as, the Committee against All Forms of Discrimination against Women[20] and the Committee on Economic, Social and Cultural Rights[21], have called upon Sri Lanka to amend its MPL to eliminate early child marriages. It may therefore be necessary for Sri Lanka to strike a balance between its Muslim law and its international human rights obligations. Related to the above is the issue of proof of a Muslim marriage. It has been held that the existence of a valid Muslim marriage has to be proved by a certificate.[22] This is so because the marriage has to be registered in terms of Act 13 of 1951.[23] However, with or without registration a Muslim marriage is valid.[24]

[16] Abdul Cader v. Razik Et Al. - NLR - 156 of 52 [1950] LKCA 64; (1950) 52 NLR 156 (28 September 1950) Page 156.

[17] The Convention on the Rights of the Child was adopted on 20 November 1989 and entered into force on 2 September 1990. Article 1 of the Convention provides: "For the purposes of the present Convention, a child means every human being below the age of eighteen years *unless under the law applicable to the child, majority is attained earlier* (our emphasis)".

[18] Committee on the Rights of the Child General Comment No. 13 (2011) CRC/C/GC/13 18 April 2011.

[19] See s 14 of the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. Act No. 30 of 2005 defines a child to mean "a person who has not attained the age of eighteen years".

[20] Concluding Observations of the Committee on the Elimination of Discrimination against Women on the combined fifth to seventh periodic reports of Sri Lanka (CEDAW/C/LKA/5-7) CEDAW/C/LKA/CO/7 8 April 2011 paragraphs 44-45.

[21] Concluding Observations of the Committee on Economic, Social and Cultural Rights on the combined second to fourth periodic reports of Sri Lanka on the implementation of the Covenant (E/C.12/LKA/2-4)E/C.12/LKA/CO/2-49 December 2010 paragraph 19.

[22] Beeran v. Minister Defence and External Affairs - NLR - 308 of 60 [1958] LKSC 7; (1958) 60 NLR 308 (3 October 1958).

[23] See s 8 of Act 13 of 1951.

[24] Section 16 of Act 13 of 1951 provides: "Nothing contained in this Act shall be construed to render valid or invalid, by reason only of registration or non-registration, any Muslim marriage or divorce which is otherwise invalid or valid, as the case may be, according to the Muslim law governing the sect to which the parties to such marriage or divorce belong."

III. The co-existence of a civil marriage and a Muslim marriage

Act 13 of 1951 allows a Muslim man to contract more than one marriage. Section 24(1) of Act 13 of 1951 states:

> "Where a married male Muslim living with or maintaining one or more wives intends to contract another marriage, he shall, at least thirty days before contracting such other marriage, give notice of his intention to the Quazi for the area in which he resides, and to the Quazi or Quazis for the area in which his wife or each of his wives resides, and to the Quazi for the area in which the person whom he intends to marry resides."

The fact that Sri Lankan law allows polygynous marriages has been criticised by international human rights bodies, such as, the Committee against All Forms of Discrimination against Women[25] and the Committee on Economic, Social and Cultural Rights.[26] Although Act 13 of 1951 addresses the issue of the co-existence of more than one Muslim marriage, it is silent on the co-existence of a Muslim marriage and a civil marriage. The question of whether a person who is married in terms of Muslim law may also contract a civil marriage without committing the offence of bigamy has been addressed by courts in Sri Lanka. A Muslim marriage cannot co-exist with a civil marriage. This means that if a person enters into a Muslim marriage when his civil marriage is still valid, the Muslim marriage is invalid.[27] However, if a person who is married converts to Islam and enters into a second marriage with another person who is Muslim the second marriage is valid. For example, in *Reid v. Attorney General*[28] the appellant was convicted of bigamy and sentenced to three months imprisonment in that, while his lawful wife in a civil marriage was living, he married another women. His first marriage had been contracted in terms of the Marriage Registration Ordinance No 19 of 1907 as he was a Catholic. During the subsistence of his first marriage he converted to Islam and married another woman. The question before the Court was whether he had committed bigamy contrary to section 362 (B) of the Penal Code Ordinance which stated:

> "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to a fine."[29]

[25] Concluding Observations of the Committee on the Elimination of Discrimination against Women on the combined fifth to seventh periodic reports of Sri Lanka (CEDAW/C/LKA/5-7) CEDAW/C/LKA/CO/7 8 April 2011 paragraph 44-45.

[26] Concluding Observations of the Committee on Economic, Social and Cultural Rights on the combined second to fourth periodic reports of Sri Lanka on the implementation of the Covenant (E/C.12/LKA/2-4)E/C.12/LKA/CO/2-49 December 2010 paragraph 19.

[27] Beeran v. Minister Defence and External Affairs - NLR - 308 of 60 [1958] LKSC 7; (1958) 60 NLR 308 (3 October 1958).

[28] Reid v. Attorney General - NLR - 97 of 65 [1963] LKCA 6; (1963) 65 NLR 97 (11 July 1963). See also Katchi Mohamed v. Benedict - NLR - 505 of 63 [1961] LKHC 28; [1961] 5; (1961) 63 NLR 505 (20 December 1961).

[29] Section 362 (B) of the Penal Code Ordinance which is an Ordinance to provide a general Penal Code for Ceylon (now Sri Lanka) which came into effect on 1 January 1885. In terms of its short title, the Penal Code Ordinance may be cited as the Penal Code.

The Court found that "In the instant case the appellant had a wife living. Therefore the first element of the penal provision is satisfied. The second element is also satisfied because he contracted a second marriage".[30] The issue for the Court to decide was whether "the third element is that the second marriage should be void by reason of its taking place during the life of the first husband or wife".[31] In resolving this issue the Court referred to section 18 of the Marriage Registration Ordinance No 19 of 1907[32] which provides that "no marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void", and held that:

> "The section declares that no "marriage" shall be valid where there is a prior "subsisting marriage". Now what is a marriage for the purpose of section 18. That expression is defined in section 64 and it means- "any marriage, save and except marriages contracted under and by virtue of the Kandyan Marriage Ordinance 1870 or the Kandyan Marriage and Divorce Act [44 of 1952[33]], and except marriages contracted between persons professing Islam". There is nothing in the context of section 18 which renders the definition inapplicable. That section has therefore no application to marriages contracted under the Kandyan Marriage Ordinance 1870, the Kandyan Marriage and Divorce Act [44 of 1952], and marriages "contracted between persons professing Islam". Although Kandyan marriages are excluded from the definition and therefore from the ambit of section 18, a Kandyan is not free to marry a second time while the first marriage is subsisting as section 6 of the Kandyan Marriage and Divorce Act [44 of 1952] declares invalid a second marriage under the Act where the spouse of the previous marriage is alive and the marriage is subsisting. Now the appellant's second marriage was registered under the Muslim Marriage and Divorce Act 13 of 1951. Although that Act is not specially mentioned in the definition, marriages contracted by persons professing Islam are accepted. Persons professing Islam can now marry only under the Muslim Marriage and Divorce Act 13 of 1951. So that marriages under that Act are not marriages within the definition of the expression marriage in the Marriage Registration Ordinance [No 19 of 1907]."[34]

On appeal to the Privy Council the High Court's decision was upheld.[35] However, that legal position would change after over a quarter of a century later in the Supreme Court decision of *Natalie Abeysundere v. Christopher Abeysundere and Another*[36] where the Court observed that "[t]he material facts in the present case are almost the same as the facts in Reid's case".[37] Overruling *Reid v Attorney General*, the Court held:

[30] Reid v. Attorney General - NLR - 97 of 65 [1963] LKCA 6; (1963) 65 NLR 97 (11 July 1963) Page 98.
[31] Reid v. Attorney General - NLR - 97 of 65 [1963] LKCA 6; (1963) 65 NLR 97 (11 July 1963) Page 99.
[32] In terms of its short title, this Ordinance may be cited as the Marriage Registration Ordinance.
[33] This is the short title of Act 13 of 1951 in terms of Cap 132.
[34] Reid v. Attorney General - NLR - 97 of 65 [1963] LKCA 6; (1963) 65 NLR 97 (11 July 1963) Page 99. See also The Attorney General v. A.E. Reid - NLR - 25 of 67 [1964] LKCA 8; (1964) 67 NLR 25 (15 December 1964) where the court arrived at the same decision as in Reid v. Attorney General - NLR - 97 of 65 [1963] LKCA 6; (1963) 65 NLR 97 (11 July 1963).
[35] The Attorney General v. A.E. Reid - NLR - 25 of 67 [1964] LKCA 8; (1964) 67 NLR 25 (15 December 1964).
[36] Natalie Abeysundere v. Christopher Abeysundere and Another - SLR - 185, Vol 1 of 1998 [1997] LKSC 8; (1998) 1 Sri LR 185 (16 December 1997).
[37] Natalie Abeysundere v. Christopher Abeysundere and Another - SLR - 185, Vol 1 of 1998 [1997] LKSC 8; (1998) 1 Sri LR 185 (16 December 1997) Page 188.

> "Reid's case… was wrongly decided and must be overruled. As stated earlier, the material facts in Reid's case and in the present appeal before us are almost identical and the legal issues are the same. I accordingly hold that the second purported marriage … during the subsistence of the prior valid marriage contracted under the Marriage Registration Ordinance [No 19 of 1907] is void, notwithstanding the respondent's conversion to Islam. It follows that the charge of bigamy (section 362 (B) of the Penal Code) preferred against the respondent is proved."[38]

It should also be noted that a Muslim man who marries according to Act 13 of 1951 and enters into a second marriage in terms of the Marriage Registration Ordinance No 19 of 1907 while his first marriage still subsists, commits bigamy.[39]

IV. Maintenance

Child maintenance is provided for under section 35 of Act 13 of 1951 which provides:

> "(1) A child or any person on behalf of a child shall not be entitled to claim or to receive maintenance in respect of any period during which the child is or was living with or supported by the father. (2) In allowing any claim for maintenance by or on behalf of a child a deduction shall be made of the sums which may have been paid by the father for the use or support of the child between the date of the claim and the date of the order allowing the claim."

Section 34 deals with the maintenance of a wife. It provides that "[a] wife or any person on behalf of a wife shall not be entitled to claim or to receive maintenance in respect of any period during which the wife lives or has lived with her husband whether on the orders of a Quazi or otherwise". Act 13 of 1951 does not address the issue of the maintenance of children born out of wedlock. However, courts have dealt with this issue. In the event of a divorce, the husband has a duty to pay maintenance to the former wife and the children if the woman has custody. However, a court will only make an order against the husband in his presence. This means that he has a right to be heard before a maintenance order may be made.[40] It should also be noted that in *Seyed Mohamed v. Mohamed Ali Lebbe*[41] the High Court held that "a wife who leaves her husband's house without valid and sufficient reason is not entitled to claim maintenance from her husband". In addition, an order for maintenance is valid from the date of the order as opposed to the date of the application.[42] A maintenance order has to be made by a court with jurisdiction otherwise it is invalid.[43]

[38] Natalie Abeysundere v. Christopher Abeysundere and Another - SLR - 185, Vol 1 of 1998 [1997] LKSC 8; (1998) 1 Sri LR 185 (16 December 1997) Page 200.
[39] Katchi Mohamed v. Benedict - NLR - 505 of 63 [1961] LKHC 28; [1961] 5; (1961) 63 NLR 505 (20 December 1961).
[40] Wahid v. Naleera - NLR - 210 of 76 [1972] LKHC 15; [1972] 27; (1972) 76 NLR 210 (5 July 1972).
[41] Seyed Mohamed v. Mohamed Ali Lebbe - NLR - 307 of 54 [1953] LKSC 16; (1953) 54 NLR 307 (5 February 1953).
[42] Seyed Mohamed v. Mohamed Ali Lebbe - NLR - 307 of 54 [1953] LKSC 16; (1953) 54 NLR 307 (5 February 1953).
[43] Ismail v. Muthu Marliya - NLR - 431 of 65 [1963] LKSC 10; (1963) 65 NLR 431 (30 September 1963).

An interesting issue arose in the case of *Nizam v. Beebi*[44] where the Court dealt with the question of whether a Muslim practice which did not impose an obligation on a father to pay maintenance to an illegitimate child was contrary to Act 13 of 1951. The Court referred to the relevant legislation[45] and held:

> "It is quite clear therefore that in this country an illegitimate child is conferred the right to claim maintenance from the putative father by section 47 (1) (cc)[46] of the Muslim Marriage and Divorce Act 13 of 1951 and the Muslim law to the extent that it does not impose a liability on a father to maintain his illegitimate child has thereby been abrogated."[47]

Over fifty years ago in the case of *Umma Saidu v. Hasim Marikar*[48] the Supreme Court of Sri Lanka had held that a Muslim man has a duty to pay maintenance for his illegitimate child. It should also be remembered that as early as 1969 the Supreme Court of Sri Lanka had held that even if Muslim law did not impose an obligation on a father to pay maintenance for an illegitimate child, he had an obligation to pay such maintenance if the relevant legislation required him to do so.[49] It should be noted that the High Court has held that under Muslim law there are different categories of illegitimate children. In *Ismail v. Latiff*[50] the High Court stated:

> "At first sight, the Muslim Marriage and Divorce Act 13 of 1951 would appear in section 47 to contain provisions, empowering a Quazi to entertain applications for maintenance of illegitimate children, which are inconsistent with section 2 of Act 13 of 1951, limiting his powers to matters connected with Marriages and Divorces. Under the Roman-Dutch law, illegitimate children are confined generally to those children whose parents are unmarried;

[44] Nizam v. Beebi - SLR - 47, Vol 1 of 1998 [1997] LKCA 51; (1998) 1 Sri LR 47 (1 December 1997).

[45] See s 47 of Act 13 of 1951.

[46] Section 47 of Act 13 of 1951 provides: (1) The powers of the Quazi under this Act shall include the power to inquire into and adjudicate upon- (a) any claim by a wife for the recovery of mahr; (b) any claim for maintenance by or on behalf of a wife ; (c) any claim for maintenance by or on behalf of a legitimate child (whether legitimate or illegitimate); (d) any claim by a divorced wife for maintenance until the registration of the divorce or during her period of iddat, or, if such woman is pregnant at the time of the registration of the divorce, until she is delivered of the child ; (e) any claim for the increase or reduction of the amount of any maintenance ordered under this section or under section 21 of the Muslim Marriage and Divorce Registration Ordinance, 1929; (f) any claim for kaikuli; (g) any claim by a wife or a divorced wife for her lying-in expenses; (h) any application for mediation by the Quazi between a husband and wife; (i) any application for a declaration of nullity of marriage either by a husband or by a wife; (j) any application for authority to register the marriage of a girl who has not passed the age of twelve years: (2) A Quazi may inquire into and deal with any complaint by or on behalf of a woman against a wali who unreasonably withholds his consent to the marriage of such woman, and may if necessary make order authorizing the marriage and dispensing with the necessity for the presence or the consent of a wali. (3) Where a woman has no wali, a Quazi may, after such inquiry as he may consider necessary, make [an] order authorizing the marriage and dispensing with the necessity for the presence or the consent of a wali (4) Where an order is made under subsection (2) or subsection (3) authorizing any marriage, a permit authorizing the registration thereof shall be issued by the Quazi, but no such permit shall be issued until the expiry of a period of ten days from the date of the order, or, where an appeal is preferred against such order, unless such order is confirmed by the Board of Quazis, or, in the event of a further appeal, by the Court of Appeal. (5) In this section "divorced wife" includes a wife against whom the talak has been pronounced, and who has not been taken back by the husband. (6) Every inquiry under this section shall be held as nearly as possible in accordance with the rules in the Fourth Schedule, but no Muslim assessors shall be empanelled for the purpose of assisting the Quazi at such inquiry.

[47] Nizam v. Beebi - SLR - 47, Vol 1 of 1998 [1997] LKCA 51; (1998) 1 Sri LR 47 (1 December 1997) Page 50.

[48] Umma Saidu v. Hasim Marikar - NLR - 165 of 43 [1941] LKSC 12; (1941) 43 NLR 165 (16 September 1941).

[49] Pallithamby v. Saviriathumma - NLR - 572 of 73 [1969] LKSC 32; (1969) 73 NLR 572 (28 October 1969). See also Aliyarlebbai v. Pathummah - NLR - 571 of 63 [1961] LKSC 35; (1961) 63 NLR 571 (7 July 1961).

[50] Ismail v. Latiff - NLR - 172 of 64 [1962] LKHC 7; [1962] 3; (1962) 64 NLR 172 (3 April 1962).

> but under the Muslim law, unlike as in the Roman-Dutch law, there exist categories of children who are deemed to be illegitimate even though their parents are married… [There are] several instances where under the Muslim law, though the parents get married, the children remain illegitimate… Not only are children of marriages where the parents are within prohibited decrees illegitimate but children born prior to marriage of parents who are free to get married would despite subsequent marriage remain illegitimate… [A] child conceived out of wedlock but born after marriage [is] illegitimate…but any acknowledgment by a father that such a child or a child born even before wedlock is his would make the child legitimate …It will thus be seen that even in cases where Muslim parties are married they can have children who are illegitimate and…section 47 when it refers to illegitimate children must necessarily be construed to refer to such children."[51]

A wife can institute a civil action against her husband to recover her mahr (dower) should he fail to pay it.[52] However, she has to approach the correct court and that court has to make the correct order.[53] In the same vein, in the event of a divorce, the wife may also institute a civil action against her husband to recover the money that her family gave to the husband to contribute to her maintenance (this money is normally known as kaikuli).[54] With implicit negative connotations of a bride price, this practice can hardly be attributed to Islamic law. It appears to be based on custom and has more in common with a dowry and little, if anything, to do with dower. Nonetheless, in terms of section 37, a woman who is unable to claim kaikuli or mahr may be represented.[55]

Section 97 defines kaikuli to mean "any sum of money paid, or other movable property given, or any sum of money or any movable property promised to be paid or given, to a bridegroom for the use of the bride, before or at the time of the marriage by a relative of the bride or by any other person". In *Zainabu Natchia v. Usuf Mohamadu*[56] the Court defined kaikuli to mean "a sum of money given by the parents of the bride to the intended husband, which the husband possesses and owns but which he has to pay over to the wife, if she demands it, or to her heirs, on death".[57] The definition in this case appears to be more limited compared to the one under section 97. This is so because it indicates that the money must only originate from the bride's parents. However, a civil action for kaikuli cannot succeed unless the wife's demand for the return of the same was clear and unambiguous.[58]

[51] Ismail v. Latiff - NLR - 172 of 64 [1962] LKHC 7; [1962] 3; (1962) 64 NLR 172 (3 April 1962) 174. See also Jiffry v. Binthan - NLR - 255 of 62 [1960] LKHC 19; [1960] 25; (1960) 62 NLR 255 (1 September 1960) (The court held that a child born out of wedlock was illegitimate even if both parties were Muslims).

[52] Sithy Raheem v. Hafeel - NLR - 34 of 59 [1957] LKSC 27; (1957) 59 NLR 34 (11 April 1957); Marikkar v. Habeeba Umma - NLR - 238 of 50 [1943] LKCA 50; (1943) 50 NLR 238 (24 December 1943).

[53] Marikkar v. Habeeba Umma - NLR - 238 of 50 [1943] LKCA 50; (1943) 50 NLR 238 (24 December 1943).

[54] Manzil v. Mihilar and Others - SLR - 69, Vol 2 of 2002 [2001] LKCA 24; (2002) 2 Sri LR 69 (21 June 2001); Sharifdeen v. Rahuma Beebi - NLR - 138 of 60 [1958] LKHC 19; [1958] 25; (1958) 60 NLR 138 (29 September 1958).

[55] Section 37 of Act 13 of 1951 provides: "Where it is proved to the satisfaction of a Quazi that a woman claiming or intending to claim mahr or kaikuli is, through sickness, infirmity or other reasonable cause, unable to appear in person, the Quazi may permit any fit and proper person authorized in that behalf by the claimant and approved by the Quazi, to institute proceedings or to appear on behalf of the claimant."

[56] Zainabu Natchia v. Usuf Mohamadu - NLR - 37 of 38 [1936] LKCA 47; (1936) 38 NLR 37 (11 March 1936).

[57] Zainabu Natchia v. Usuf Mohamadu - NLR - 37 of 38 [1936] LKCA 47; (1936) 38 NLR 37 (11 March 1936) Page 37.

[58] Haseena Umma v. Hashim - NLR - 239 of 57 [1955] LKCA 72; (1955) 57 NLR 239 (13 October 1955); Sowdoona v. Abdul Muees - NLR - 75 of 57 [1955] LKCA 31; (1955) 57 NLR 75 (4 March 1955).

It should also be noted that a court will not make a maintenance order against a father if he would not be able to pay the maintenance. In other words a proper assessment of the father's income and expenditure has to be made before an order may be made.[59] Before an enforcement order is made to compel the father to pay maintenance, he must be given a chance to be heard.[60] Under Muslim law a father has a duty to maintain his son until the son reaches the age of puberty. However, that duty continues even after puberty if the son has a disability.[61] Failure to pay maintenance is a criminal offence.[62] It should be noted that the maintenance laws raises the question of discrimination based on sex. The Sri Lankan Constitution provides that the State must protect children from discrimination based on sex.

V. Types of divorce

Act 13 of 1951 provides for two types of divorce: divorce by the husband[63] and divorce by the wife.[64] There are detailed procedures for each type of divorce. Act 13 of 1951 also provides for grounds of divorce. Section 28 of Act 13 of 1951 states:

> "(1) Where a wife desires to effect a divorce from her husband, without his consent, on the ground of ill-treatment or on account of any act or omission on his part which amounts to a "fault" under the Muslim law governing the sect to which the parties belong, the procedure laid down in the Third Schedule shall be followed. (2) Where a wife desires to effect a divorce from her husband on any ground not referred to in subsection (1), being a divorce of any description permitted to a wife by the Muslim law governing the sect to which the parties belong, the procedure laid down in the Third Schedule shall be followed so far as the nature of the divorce claimed in each case renders it possible or necessary to follow that procedure."

In terms of Act 13 of 1951, a Muslim man is not required to give the ground for divorce.[65] If there are grounds for more than one type of divorce the petitioner may be granted both. For example, in *Ansar v. Fathima Mirza*[66] the special quazi granted the petitioner both a faskh divorce and a khul divorce. However, on appeal the board of quazis held that the petitioner was entitled to a faskh divorce. It is important to note that in this case the board of quazis did not question the legality of the special quazis' powers to grant two types of divorce to the same person. However, on the facts it found that the grounds for a faskh divorce were established and those for a khul divorce were not.

[59] Umma Saidu v. Hasim Marikar - NLR - 165 of 43 [1941] LKSC 12; (1941) 43 NLR 165 (16 September 1941).
[60] Thahir v. Shafi - NLR - 19 of 72 [1968] LKSC 37; (1968) 72 NLR 19 (7 December 1968).
[61] Ummul Marzoona v. Samad - NLR - 209 of 79I [1977] LKSC 1; (1977) 79 NLR 209 (24 October 1977).
[62] Abdeen v. Alavia - NLR - 313 of 75 [1972] LKHC 8; [1972] 11; (1972) 75 NLR 313 (16 May 1972).
[63] Section 27 of Act 13 of 1951.
[64] Section 28 of Act 13 of 1951.
[65] Section 27 of Act 13 of 1951 read with Schedule 2 paragraph 3.
[66] Ansar v. Fathima Mirza - NLR - 86 of 73 [1970] LKSC 28; (1970) 73 NLR 86 (4 March 1970).

In *Mirza v. Ansar*[67] the Supreme Court held that a wife cannot be granted a khul divorce without the husband's consent. Muslim law provides for different types of talaq and the type of talaq will determine whether or not the wife has to be present for the husband to pronounce the talaq.[68] In the event of a faskh divorce an appeal against the order of the quazi can only be made by one of the parties to the divorce proceedings, unless such a party grants a power of attorney to another person.[69]

One of the grounds upon which a wife may be granted a faskh divorce is that the husband is cruel. The Supreme Court held in *Ansar v. Mirza*[70] that actual violence is not required for the treatment to amount to legal cruelty. What is important is for the wife to show that "life together was fraught with danger to the health of the wife and tended to reduce her to a state of nervous prostration". The Court of Appeal held that habitual physical ill-treatment is not necessary for cruelty to be established.[71] In *Rasheeda v. Usoof Dheen*[72] the Court granted the wife a faskh divorce on the ground of cruelty because the husband habitually made false allegations of adultery against her. Although somewhat out of context, the following arguments from other cases are included because they pertain to divorce. A wife would also be granted a divorce if the husband is suffering from an incurable disease.[73] A wife's father may not prevent her from requesting a divorce from the quazi.[74] For a Muslim divorce to be valid it does not have to be registered.[75]

Once a talaq divorce has been pronounced, a wife cannot be granted a faskh divorce in respect of the same marriage, because once a talaq divorce has been pronounced and becomes irrevocable; the marriage has ceased to exist.[76] The husband may pronounce a talaq (divorce) before a quazi in the absence of the wife and the divorce would be valid. What matters is that the wife will be informed later of the divorce.[77] However, a wife may not be granted a khul divorce without the consent and participation of the husband.[78] In all matters affecting people governed by Act 13 of 1951, the respondent has the right to be heard. This is the case even if the relevant legislation does not expressly say so. It is a rule of natural justice.[79] It should be noted that the divorce laws in this section raise the question of discrimination based on sex. The provision favours men and not women. This position goes against the Convention on the Elimination of all Forms of Discrimination Against Women.

[67] Mirza v. Ansar - NLR - 295 of 75 [1971] LKSC 33; (1971) 75 NLR 295 (10 November 1971).
[68] Khan v. Moomin and Others - SLR - 107, Vol 1 of 1995 [1992] LKCA 35; (1995) 1 Sri LR 107 (16 September 1992).
[69] Ameera Jabir v. Yasmin Jabir Nee Nazick - SLR - 282, Vol 1 of 1991 [1991] LKCA 51; (1991) 1 Sri LR 282 (2 August 1991).
[70] Ansar v. Mirza - NLR - 279 of 75 [1971] LKSC 8; (1971) 75 NLR 279 (10 November 1971).
[71] Deen v. Rauff - SLR - 253, Vol 2 of 1997 [1997] LKCA 53; (1997) 2 Sri LR 253 (9 May 1997).
[72] Rasheeda v. Usoof Dheen - NLR - 570 of 61 [1958] LKSC 28; (1958) 61 NLR 570 (29 September 1958).
[73] Noorul Naleefa v. Marikar Hadjiar - NLR - 529 of 48 [1947] LKCA 52; (1947) 48 NLR 529 (2 October 1947).
[74] Deen v. Rauff - SLR - 253, Vol 2 of 1997 [1997] LKCA 53; (1997) 2 Sri LR 253 (9 May 1997).
[75] Abdul Cader v. Weeraman - NLR - 190 of 70 [1965] LKSC 31; (1965) 70 NLR 190 (22 September 1965).
[76] Nansoora v. Jaria - NLR - 441 of 47 [1946] LKSC 17; (1946) 47 NLR 441 (22 August 1946).
[77] Khan v. Moomin and Others - SLR - 107, Vol 1 of 1995 [1992] LKCA 35; (1995) 1 Sri LR 107 (16 September 1992).
[78] Mirza v. Ansar - NLR - 295 of 75 [1971] LKSC 33; (1971) 75 NLR 295 (10 November 1971).
[79] Mohamed Mustapha v. Ibrahim Alim - NLR - 478 of 40 [1938] LKSC 8; (1938) 40 NLR 478 (12 October 1938).

VI. Conclusion

This article has highlighted case law emanating from Sri Lankan courts interpreting the provisions of Act 13 of 1951 in respect of several different issues. The part on the age for marriage provisions raised the issue of child marriages. Act 13 of 1951 allows a girl to marry at the age of 12 years even though Sri Lanka is a State Party to the International Convention on the Rights of the Child. It was stated above that the Committee on the Rights of the Child is calling for the prohibition of child marriages. Act 13 of 1951 further permits polygynous marriages. As indicated above, this issue has been criticised by many international human rights bodies. It makes provision for a customary practice (kaikuli) that is unrelated to Islamic law and therefore questionable. Act 13 of 1951 also provides that maintenance must be paid by the father and not by the mother of the children. The Sri Lankan Constitution does however prohibit discrimination based on sex. The issue of divorce was also looked at in Act 13 of 1951. The position is that females find it much more difficult to obtain a decree of divorce; this also goes against the Convention on the Elimination of all Forms of Discrimination Against Women. It is therefore recommended that Sri Lanka should strike a balance between its Muslim law and international human rights obligations.

Agency Contract under Conventional Law and Islamic Law as Manifested in the *Civil Code* of Oman: A Comparative Analysis

by Muhammad Masum Billah[*]

Table of Contents

Abstract

The paper analyzes the main principles of agency under Islamic law as reflected in the Civil Code of Oman and compares them with conventional law. Upon comparative analysis, the paper concludes that the main principles of agency contract under both systems of law are very similar. Some differences do exist in the details and in the application of main principles to some specific cases. While these minor differences may be important in an actual case of agency, they do not make the Islamic law on agency dramatically different from the conventional law on the subject matter.

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I. Introduction

1. General Remarks

The contract of agency is one of the most important contracts in the commercial settings both under Islamic and conventional legal systems. Corporations, partnerships, securities, law firms, firms of accountants, investments, insurance, shipping, all involve contracts of agency. Many products of Islamic banking and finance are tied to the concept of agency in one way or another.[1] The paper analyzes and compares the main principles of agency both under conventional law[2] and under Islamic law as reflected in the *Civil Code* of Oman.[3] The paper concludes that these principles are very similar under both systems. Some differences, however, exist in the details and in the application of main principles to few specific cases. The main principles of agency analyzed in the paper are those mentioned under the *Civil Code* of Oman. These principles include the concept of agency contract, its conditions, and classifications, rights and duties of agents, and the termination of agency relationship.

In 2013 Oman adopted its *Civil Code* containing one thousand and eighty six sections and covering a wide range of topics from basic principles of contract and tort to the specific types of contacts such as sale, lease, loan, guarantee, mortgage, etc. Contract of agency is covered under sections 672 to 698. Like the most provisions in the *Civil Code*, the provisions on the contract of agency reflect mainly the principles of Islamic law on agency. The provisions of the *Civil Code* cover the basic principles of agency. Books on Islamic law contain much more detailed provisions on agency contract. Any gap in the Omani *Civil Code*, however, can be filled from those sources as indicated clearly in the very first section of the *Civil Code*.[4] In addition, Islamic schools of jurisprudence sometimes differ in their rulings in some aspects of agency. Where

[1] As Islamic banks do not make direct financial loan, most products of Islamic banking in consumer financing involve the sale of a commodity to clients. Initially, the banks appoint their clients as agents to buy the commodity from the market on behalf of the banks. Then the banks sell the same commodity to the clients. The financing of the particular commodity is the very reason the client approaches an Islamic bank in the first place. See BILLAH MUHAMMAD MASUM, Extensive Use of *Ḥilah* in Islamic Banking and Finance, Islamic Quarterly, Vol. 59 (2015) pp. 65-88 at 66-68.

[2] Our reference to conventional law is mainly to Anglo-American common law as well as to the provisions from various pieces of Omani legislation which are not modelled on Islamic law (e.g., *Commercial Code*, Royal Decree No. 55/90, published in *Official Gazette* (no. 435) (Ministry of Legal Affairs, Oman: July 19, 1990), amended by Royal Decree nos. 3/91 and 75/2010; *Companies Law*, Royal Decree No. 4/74, published in *Official Gazette* (no. 56) (Ministry of Legal Affairs, Oman: June 01, 1974), amended by Royal Decree nos. 54/75, 53/82, 32/84, 13/89, 83/94, 16/96, 26/96, 66/97, 39/98, 85/99, 77/2002, 41/2005, 99/2005; and *Capital Market Law*, 80/98), published in *Official Gazette* (no.635) (Ministry of Legal Affairs, Oman: November 15, 1998), amended by Royal Decree nos. 18/2002 and 5/2007).

[3] Royal Decree No. 29/2013; published in *Official Gazette* (no. 1012) (Ministry of Legal Affairs, Oman: May 12, 2013) at 5-199. The literal translation of the title of the code is '*Civil Transactions Law*,' for brevity and convenience, we would use the words '*Civil Code*'.

[4] Section 1 of *Civil Code* reads, 'The provisions of *Civil Code* in their words and meaning would apply to all issues covered by its provisions as well as to issues not covered by any special legislation. In case there is no specific provision in the *Civil Code*, the court will decide the matter using the provisions of Islamic law. If there is no clear provisions of the Islamic law on the matter, the matter would be decided using the general principles of *shari'ah*. If there is no such general principle of *shari'ah*, the issue would be decided in light of custom.' [Translation is provided by the author.] It is noteworthy that the *Civil Code* did not specify a particular school of jurisprudence in case of differences among various schools on a matter not covered by the *Civil Code*. This may give rise to some uncertainty or inconsistency in the application of Islamic law to actual cases. However, as the majority of Omani citizens follow the Ibaadhi School of Jurisprudence, preference may be given to the opinion of this school over those of others.

relevant, the paper would indicate the view of a particular school or jurist on an aspect of agency.

After a brief discussion on different sets of rules under Omani law to govern the agency contract, the paper would take up the analysis of the main principles of agency under Islamic law as appeared in the *Civil Code* and compare them with conventional law.

2. Different Sets of Rules on Agency Contract in Oman

Oman has three sets of legal provisions on agency contract. The first set was issued in 1977 under the title of *Commercial Agency Law*.[5] This law mainly governs the issuance of license to individuals and companies which intend to sell the products of foreign manufacturers and suppliers in Oman. In strict legal sense, these individuals and companies may not be considered as 'agents' as they sell the foreign-manufactured products to their buyers through independent contracts made in their own name and *not* on behalf of the foreign manufacturers and suppliers. The second set of provisions on agency is found in sections 276 to 338 of *Commercial Code*, issued in 1990.[6] These provisions predate the *Civil Code* and would apply to commercial transactions.[7] On the other hand, the provisions of *Civil Code* on agency would apply to a civil transaction related to agency. This set of the provisions is the focus of our analysis in the paper.

II. Agency under Islamic Law (as Reflected in the Civil Code) and Conventional Law

Part 1: Definition, Conditions, and Classification of Agency

The provisions on agency contract under the *Civil Code* are divided into three groups: general provisions, provisions on the effects of an agency contract, and the provisions related to the termination of an agency contract. General provisions cover the definition of agency contract, its conditions and classifications, and some other related issues. The provisions on the effects of an agency contract are divided into two parts: the obligations of an agent to his/her principal and the obligations of the principal towards the agent. In our analysis, we would follow this structure and the order with occasional cross references among different parts when necessary.

[5] Royal Decree No. 26/77, published in *Official Gazette* (no. 126) (Ministry of Legal Affairs, Oman: June 01, 1977), amended by Royal Decree nos. 82/84, 73/96 and 66/2005. The Act has twenty two sections in total.

[6] Royal Decree No. 55/1990, *supra* n. 2.

[7] See section 1 of *Commercial Code*, *supra* n. 2. Commercial transaction is defined under section 8 of *Commercial Code* as any transaction made for the purpose of earning a profit even if the transaction is made by a non-merchant. Thus, it appears that any agency contract under which the agent works for commission would be a commercial transaction and would be subject to the provisions of *Commercial Code* on agency. However, section 690 of *Civil Code* also covers both paid and voluntary agents. Strictly speaking, the contract of paid agency should be covered by the *Commercial Code*. This inconsistency is probably due to the fact that under Islamic law, upon which the provisions of *Civil Code* on agency are modelled, does not make any distinction between commercial and civil transactions.

1. What is agency?

Agency is defined under section 672 of the *Civil Code* as a contract under which a principal appoints another person in his place to conduct a known and a valid transaction. This definition reflects the concept of agency under Islamic law[8] and is very similar to the definition of agency under conventional law. For example, the American Law Institute's *Restatement of Law* defines agency as "the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."[9] However, a 'valid transaction' under conventional law may not necessarily be a permissible transaction under Islamic law. For example, buying interest-bearing bonds through an agent (i.e., stock exchange broker) is a valid transaction under conventional law[10] but would be invalid under Islamic law due to the involvement of interest (*riba*) in the transaction.[11] Similarly, buying some commodities through an agent when both the price and the delivery of the goods would occur in the future (i.e., a forward contract) would not be a valid contract under Islamic law[12] but can be enforced under conventional law including under the *Commercial Code* of Oman.[13]

The religious validity of a transaction under an agency contract may become important in an Islamic banking and finance transaction involving agency. For instance, in the case *The Investment Dar Company KSCC v. Blom Developments Bank SAL*,[14] two Islamic financial institutions entered into a *wakalah* (agency) contract under which the bank (Blom) appointed the investment company (The Investment Dar) as its agent to invest some fund (US$11.5 m) in *shari'ah*-compliant instruments with an agreed anticipated profit to be paid quarterly. In 2008, the investment company was unable to pay the anticipated profit and, as a result, the bank brought an action in English court to get its money back together with the anticipated profit. The court of first instance issued summary judgment against the investment company and ordered it to pay the original amount of investment fund. The investment company appealed against the summary judgement and argued that the agency contract was void as it violated Islamic law due to the undertaking of fixed profit in the contract. The UK High Court allowed the appeal against the summary judgment mainly on the ground that the case involved sufficient contentious issues to be resolved in a formal trial.

[8] For example, in the Ottoman codification of Hanafi law, *The Mejelle* (Book XI) (translated by Judge C. A. Hooper and reproduced in Arab Law Quarterly, Vol. 4 (1989) pp. 244-253) (hereinafter *Mejelle*), agency is defined in article 1449 as "Agency consists of one person empowering some other person to perform some act for him, whereby the latter stands in the stead of the former in regard to such act."

[9] Cited in MUNDAY RODERICK, Agency: Law and Principles, 2nd ed., Oxford 2013, at 1 para 1.01.

[10] See section 87 of *Companies Law*, Royal Decree No. 4/74, *supra* n. 2, which allows a joint-stock company to issue bonds with fixed interest rates.

[11] See generally, SALEH NABIL, Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking, Cambridge 1986, at 87-88; BILLAH MUHAMMAD MASUM, The Prohibition of *Riba* and the Use of *Ḥiyal* by Islamic Banks to Overcome the Prohibition, Arab Law Quarterly, Vol. 29 (2014) pp. 398-408 at 403.

[12] When both the price and the sold item are deferred, the transaction is considered as a sale of debt for debt. Such sale is not permitted under Islamic law. See USMANI MUHAMMAD, Introduction to Islamic Finance, Karachi 2010, at 187.

[13] This can be implied from the reading of section 100 (which allows the sale of goods not available at the time of the contract) together with section 113 (which indicates that the price can be deferred) of *Commercial Code* of Oman, *supra* n. 2.

[14] *The Investment Dar Company KSCC v. Blom Developments Bank SAL* [2009] (EWHC 3545 (ch)).

2. Conditions of agency

The conditions of agency mentioned under section 673 of the *Civil Code* are: 1) the principal must himself have the legal right to enter the transactions which he delegates to an agent, 2) the agent must have the legal capacity to complete the delegated transaction, and 3) the delegated transaction or activity is known and is suitable for delegation.

These conditions of agency under the Omani *Civil Code* reflect Islamic law on the matter and are very similar to those under conventional law. Under both Islamic law and conventional law, a person can delegate an act to another person only if the former can complete the act by him- or herself.[15] In other words, the principal must have the legal capacity to do the delegated task by himself. Although this general principle is applicable both under Islamic law and conventional law, its application would bring different results to some specific cases based on the contractual capacity of a person under the relevant Islamic or conventional laws. For example, under the common law an enemy alien does not have the legal capacity to enter into a contract with a local resident. Thus, any contract made on behalf of such a person by a local agent would be void *ab initio*.[16] In the context of Islamic law, non-Hanafi schools view that a woman does not have the legal capacity to marry herself without the permission of her guardian. As such, she also lacks the capacity to appoint an agent to accept a marriage proposal on her behalf. Similarly, as the non-Hanafi schools do not allow a person in *ihram* (i.e., in the state of ritual purity for pilgrimage) to marry, such a person cannot also appoint an agent for the same purpose.[17]

In determining the above condition, the main emphasis lies on the legal capacity of the principal as opposed to his physical capacity. For example, even though it is physically impossible for a company as an inanimate juristic person to enter into contract, the company has the legal capacity to make such contract and thus can appoint an agent (e.g., directors or employees) to enter into many legal transactions.[18] Similarly, a blind person does not have the required physical capacity to enter into a transaction which requires the inspection of sold items. However, a blind person can appoint an agent to enter into such a transaction on his behalf.[19] In fact, one of the very reasons a person may appoint an agent is that it is physically impossible for the principal to be present in more than one place at the same time to look after his various business interests.

Like the principal, the agent too must have the legal capacity to complete the delegated task. Thus, as the non-Hanafi schools do not allow a woman to get married by herself without the

[15] See article 1459 of *Mejelle*, *supra* n. 8; ARCHER GLEASON, The Law of Agency, Chicago 1915, at 46 ("Generally speaking, anything that a principal may lawfully do if acting in person he may delegate to agents.").

[16] See *Boston Deep Sea Fishing & Ice Co Ltd v. Farnham (Inspector of Taxes)*, [1957] 3 All ER 204.

[17] See AL-ZUHAILI WAHBAH, *Financial Transactions in Islamic Jurisprudence*, (translated by Mahmoud A El-Gamal), Beirut 2011, at 638 (v.1).

[18] The *Civil Code* of Oman recognizes the legal personality of companies. See section 48(4) of the *Civil Code*, *supra* n. 3. While classical Islamic jurisprudence is silent about the legal personality of a business organization, many contemporary Islamic scholars approve the concept of legal personality under Islamic law. See OIC (Organization of Islamic Conference) Fiqh Academy Decision no. 63/1/7 (paragraph 12), seventh session, May 9-14, 1992, in *Resolutions and Recommendations of the Council of the Islamic Fiqh Academy 1985-2000*, Jeddah 2000, at 130; also USMANI, *supra* n. 12 at 221-232.

[19] See AL-ZUHAILI, *supra* n. 17 at 638.

permission of her guardian, she cannot be also an agent to conduct a marriage for others.[20] As for the minor who reached the discerning age (*sinn al tameez*) but not the age of majority (*sinn al rushd*),[21] even though he may not appoint an agent to conduct a financial transaction unless the transaction is beneficial for the minor,[22] there appears to be no restriction under the Omani *Civil Code* on such a minor to act as an agent.[23] The provision reflects the view of the Hanafi School, which allows such a person to act as an agent even if he cannot do a similar task for himself.[24] This view is more sensible as the role of a minor in such a situation is simply to follow the order of his principal. The maturity of the person who issues the order is more important than that of the person who follows the order. Conventional law on agency also adopts this approach in allowing a minor to act as an agent. As long as a minor is mentally and physically fit to carry out the delegated task, any transaction entered by him in carrying out the task on behalf of his principal is valid.[25]

The third condition of an agency contract is that the delegated task must be suitable for delegation. Not every action can be delegated under Islamic law. Thus, pure acts of worship (*'ibadah*) such as prayer, fasting etc. are not suitable for delegation to others as they require personal performance and piety.[26] Although there are differences of opinion about the delegation of an act of worship which also has financial dimension such as pilgrimage to Mecca and compulsory alms tax (*zakah*), the *Civil Code* is silent on this matter. As they are personal religious obligations, the *Civil Code* did not side with one opinion over the other. People are free to choose whatever view they find acceptable to them.

Finally, the delegated transaction or activity must be known.[27] Thus, an agency contract is not valid if the object of agency is not clearly identified. For example, if the principal asks the agent to buy an animal without specifying its genus and type, the agency is not valid due to excessive *gharar* (uncertainty).[28] Similarly, if the principal asks the agent to buy a piece of land without specifying its location and price, the agency is not valid.[29] In conventional law, on the other hand, an agent with ambiguous instructions must try to get clarification from the

[20] See AL-ZUHAILI, *supra* n. 17 at 639.

[21] Under the *Civil Code* of Oman, *supra* n. 3, a child who has reached seven years of age is considered a discerning child (section 42(2)). On the other hand, the age of majority (*sinn al rushd*) is eighteen years (section 41(2)).

[22] See section 93 of *Civil Code*, *supra* n. 3. Where a transaction (e.g., trading) may bring either profit or loss, a discerning child can appoint an agent only if the child is given permission by his guardian to do such tasks or if the child ratifies the transaction upon reaching the age of majority. See article 1457 of *Mejelle*, *supra* n. 8; see also section 93 of the *Civil Code*, *ibid*. This is the view of Hanafi School. Other schools do not allow such agency mainly because such a child is not allowed to enter into this type of transaction by himself. See AL-ZUHAILI, *supra* n. 17 at 638.

[23] Section 94 of *Civil Code*, *supra* n. 3, provides that a minor who was given 'permission' to enter into a transaction would be treated like a person who has reached the age of majority (*sin al-rushd*). Under section 679 of *Civil Code*, permission is one of the means through which agency can be established.

[24] See article 1458 of *Mejelle*, *supra* n. 8. The view is supported by the incident of the Prophet (PBUH) appointing Ibn Umm Salamah as his agent to conduct the Prophet's marriage.

[25] ARCHER, *supra* n. 15 at 30-31. See *Talbot v. Bowen*, 1 A. K. Marsh (Ky.) 436, R. 42, H. 40, where a contract entered by a minor on behalf of his father was held valid.

[26] The Maliki scholars do not allow agency for pilgrimage to Mecca on the ground that the financial aspect in the pilgrimage is minor and transitory.

[27] Section 673 of *Civil Code*, *supra* n. 3.

[28] See the second paragraph of article 1459, article 1468, and articles 1475-1477 of *Mejelle*, *supra* n. 8.

[29] Article 1475, and also articles 1476 and 1477 of *Mejelle*, *ibid*.

principal. If it is not possible to get the timely clarification, the agent is to try his best to ascertain the reasonable meaning of the instructions and work accordingly.[30]

3. Classification of Agency

There are four types of agency mentioned under sections 674 and 675 of the *Civil Code*: unrestricted (*mutlaq*) agency, restricted (*muqaiyad*) agency, general or comprehensive (*'aam*) agency, and special (*khas*) agency. A general agency (also known as 'universal or comprehensive agency') covers all transactions which a principal can do by himself or herself provided that the transactions can be legally delegated.[31] Under section 677 of the *Civil Code*, however, even a general agency would not cover the following transactions unless they are specifically mentioned in the agency contract: donations, settlement, debt forgiveness, arbitration, loan, and matters related to personal status (*al ahwal al shaksiyah*).

On the other hand, a special (*khas*) agency would exist if the delegated authority is confined to one or more specific activities.[32] In such case, the agent is allowed to do only the specified activity on behalf of the principal and the necessary related activities.[33] For example, an agent authorized to sell a car of his principal has to complete the procedures related to the transfer of ownership and insurance to the new buyer. However, if the task has various aspects and each aspect requires special skill and is usually done by separate individuals, an agent authorized for one aspect of the whole task is not automatically authorized for the other aspect/s of the task unless mentioned specifically in the agency contract. This is mainly due to the fact that an agent may not have the necessary skills for all aspects of a large complicated transaction. For example, section 687 of the *Civil Code* provides that an agent for collection [of debt] does not have the authority for litigation and the agent for litigation cannot collect the compensation awarded after such litigation unless there is specific permission from the principal. This reflects the view of the majority of Islamic jurists with the exception of some earlier Hanafi jurists.[34]

Both general agency and special agency may be unrestricted (*mutlaq*) agency. For example, if an agent is authorized to sell a car of his principal without any specifications or restrictions from the principal with regard to the price, time, and place of the sale, this would be an example of special (*khas*) but unrestricted (*mutlaq*) agency. The agent can sell the car at any time to anyone and at any suitable price.[35] On the other hand, if the principal fixed the price or a

[30] See MUNDAY, *supra* n. 9 at 49-50 para 3.14-3.15. See also *Ireland v. Livingston* (1820) 3 B & Ald 616; cited in MUNDAY, *ibid* at 49 para 3.14.

[31] Section 675 of *Civil Code*, *supra* n. 3. A general agency is not permissible according to Shafii' and Hanbali Schools due to massive uncertainty (*gharar*). On the other hand, the Hanifi and Maliki Schools allow this kind of agency on the ground that when each of the tasks under a general agency can be delegated separately, all these tasks can be also delegated together under a general agency. AL-ZUHAILI, *supra* n. 17 at 634.

[32] Section 675 of *Civil Code*, *supra* n. 3.

[33] Section 676 of *Civil Code*, *ibid*.

[34] AL-ZUHAILI, *supra* n. 17 at 655; articles 1519 and 1520 of *Mejelle*, *supra* n. 8. As for debt collection, the earlier Hanafi jurists differentiated between the collection of fungible and the collection of non-fungible debt. In the case of fungible debt such as money, the agent has the right to engage in legal dispute because in such case the agent is considered as the contracting party for collecting debt like the case with a sale contract. As for non-fungible, the agent is not allowed to engage in litigation. The agent in such case is considered merely a messenger and not an agent. See AL-ZUHAILI, *ibid* at 656-658.

[35] According to non-Hanifi jurists, an unrestricted agent is not allowed to make any admission of liability on behalf of his principal because he is appointed to establish the rights of the principal. Hanafi scholars allow a legal agent to make admission of liability as long as it does not result in legal punishment or legal revenge (*qisas*). Similarly, non-Hanafi jurists

specific buyer, the agent cannot sell the car below that price or to anyone other than the specific person. However, the agent is allowed to sell at a higher price as that would be beneficial for the principal.[36] A general (*'aam*) agency can be also restricted (*muqaiyad*). For example, even if an agent has the authority to do any transaction on behalf of the principal, the principal may require the agent to inform the former before completing a transaction if the transaction involves a large amount of money.[37]

The classification of agency under Islamic law as stated in the *Civil Code* is very similar to the types of agency under conventional law. For example, in his classical book on agency Professor Gleason Archer mentioned three types of agents: universal agent, general agent, and special agent.[38] A universal agent has the authority to enter into any delegable transaction on behalf of the principal. This is very similar to the universal (*'aam*) agency under Islamic law. On the other hand, a general agent is authorized to make any transaction in a particular area of principal's business or any transaction at a particular place, whereas a special agent is authorized to make a specific transaction or a series of specific transactions on behalf of the principal. A general agent under conventional law is similar to *mutlaq* agent under Islamic law, whereas special agency under conventional law can be considered as either as *khas* or as *muqiayad* agency under Islamic law.

The above classification of agency does not give rise to much problem in the actual cases of agency as the type and scope of an agent's authority would be determined from the wording of the principal's instructions. If an agent exceeds his authority, the agent would be liable to the principal for any loss the principal suffers both under Islamic law and conventional law.[39] However, under conventional law a principal may be bound by certain unauthorized transactions of his agent entered with a third party if the transactions fall under either implied or apparent authority of the agent. It is not clear whether the same result would follow under Islamic law. In general, under Islamic law a principal is not bound by any transaction of the agent beyond the scope of his authority.[40] The cases of implied authority under conventional law cover the situations where some aspects of an agent's usual activities are restricted by the principal but the agent still engages in such a restricted activity. In such cases, the principal would be bound by a transaction of the agent with a third party who is unaware of such restriction.[41] On the other hand, the cases of apparent authority under conventional law

and majority of Hanafi jurists opine that an unrestricted selling agent is implicitly restricted to sell at a market price or at a price close to the market price and must sell at cash price. Abu Hanifa, on the other hand, allows an unrestricted selling agent to sell at any price he sees fit. This view was adopted in article 1494 of *Mejelle*, *supra* n. 8. As for an unrestricted buying agent, all jurists agree that such an agent must buy at or close to the going market price. The different opinions of Abu Hanifa with regard to selling and buying agents is due to the fact that a buying agent may buy something for himself first at a price which he may later regret and may pass the purchased item to his principal. This possibility does not exist in the case of a selling agent and he is thus given wider discretion. See AL-ZUHAILI, *ibid* at 653-655, 661-663.

36 See section 680 of *Civil Code*, *supra* n. 3.

37 Following the view of most jurists with regard to an unrestricted special agent, it can be argued that a general agent would be also implicitly restricted by conventions and customs. See the discussion in *supra* n. 35.

38 ARCHER, *supra* n. 15 at 11-12.

39 See ARCHER, *ibid* at 121-122; section 680 of the *Civil Code*, *supra* n. 3.

40 See generally article 1470 of *Mejelle*, *supra* n. 8; section 680 of the *Civil Code*, *ibid*.

41 See *The Unique Mariner* [1978] 1 Lloyd's Rep 438, where an agreement entered by the master of a ship with a salvage tug was held to be binding on the owner of the ship despite the fact that the owner of the ship expressly instructed the master to use only the salvage tug sent by the owner.

include situations where an agent does not have the authority to enter into a particular transactions but he appears to have such authority because of certain representation (i.e., action or omission) of the principal.[42]

Both Islamic law and conventional law recognize the subsequent ratification by the principal of an earlier unauthorized transaction entered by an agent. Such ratification makes the transaction effective retrospectively from the date it was entered. Section 679 of *Civil Code* provides that a subsequent ratification is equivalent to prior permission.[43] Thus, an unauthorized act of an agent could be later ratified by the principal and the transaction would be valid.[44]

Part 2: Duties and Rights of an Agent

1. Duties of an agent

a) Duty to follow the instructions of the principal

An agent must not exceed his authority. Fulfillment of this duty would be important when the agency is restricted (*muqaiyad*), or special (*khas*). In such cases, the agent has to exactly follow the principal's instructions including restrictions, if any, unless he can prove that the transaction would bring greater benefit for his principal despite the fact that he did not follow the exact instructions or restrictions.[45] For example, an agent authorized to sell a product at a specified price (e.g., RO1,000) can sell it at a higher price, say, RO1,100. Similarly, if an agent authorized to buy a property at a specific price is able to buy it at a lower price, the contract would be binding on the principal.[46] Under conventional law too, one of the most important obligations of an agent is to follow the instructions of the principal. The failure of an agent to follow the instructions of his principal would make the agent liable for any loss suffered by the principal.[47] On the other hand, an agent would not be liable for any financial losses suffered by

[42] See *Summers v Solomon* (1857) 7 E1 & B1 879, where the principal was held bound by a transaction entered by a former employee (agent) with a wholesale merchant with whom the principal had regular credit transaction through that employee. The principal failed to inform the merchant about the termination of employment of that employee.

[43] See articles 1442 and 1443 of *Mejelle*, *supra* n. 8. Article 1443 of *Mejelle* reads, "Subsequent ratification has the same effect as a previous authorization to act as agent."

[44] For conventional law, see *Williams v. North China Insurance Co*, (1876) 1 CPD 757, where an agent entered into an insurance contract on behalf of the principal without the authorization but the principal was allowed to ratify the insurance contract after the loss of the insured property (i.e., ship).

[45] Section 680 of *Civil Code*, *supra* n. 3.

[46] See article 1479 of *Mejelle*, *supra* n. 8. Hanafi jurists made a distinction in this regard between a buying agent and a selling agent. When a buying agent buys something without following the instructions of the principal and the transaction is not beneficial for the principal, the agent would be considered the buyer of the product. On the other hand, when a selling agent fails to follow the instructions of his principal to the disadvantage of his principal, the contract of sale would be suspended upon the approval of the principal. See articles 1470 and 1494 of *Mejelle*, *supra* n. 8. This is due to the possibility that a buying agent may buy something for himself and may give it to his principal when the agent realizes the transaction was disadvantageous. This kind of possibility does not exist in the case of a selling agent. See AL-ZUHAILI, *supra* n. 17 at 667. On the other hand, if the agency of a buying agent is unrestricted, most Islamic jurists still state that the agent's actions would be implicitly restricted by conventions i.e., the purchased item must be free from defect and fit for the purpose and the price should be close to or below the market price. AL-ZUHAILI, *ibid* at 667-668.

[47] See *Turpin v Bilton* (1843) 5 Man & G 455, where an agent was liable for the loss of uninsured vessel because the agent neglected to follow the instructions of the principal to insure the vessel.

the principal when the agent follows the instructions even if the instructions appeared to be a bit imprudent from the very beginning.[48]

A transaction entered by an agent in violation of the principal's instructions, especially as to the nature of the thing to be purchased, would be considered as a transaction concluded for the agent himself and not for the principal.[49] For example, if the principal asks the agent to buy a goat but the agent buys a sheep, the contract would be concluded for the agent and not for the principal.[50] Under conventional law, a similar result would also ensue unless the third party to the transactions can prove that the action falls under the agent's implied or apparent authority. However, the principal may bring a recourse action against the agent for such an unauthorized but binding transaction.[51] As mentioned earlier, both under conventional law and Islamic law the principal may ratify an unauthorized transaction and would be bound by the ratified transaction.

b) Duty to exercise due care

In performing the tasks assigned, an agent must exercise proper care i.e., care which a reasonable person in the agent's position would exercise. This is especially the case if the agent works for fees.[52] If the agent is not a paid agent, he still has to exercise the level of care which he would exercise in his personal transaction.[53] In other words, even a gratuitous agent has to perform the task with certain degree of care. Such an agent would be liable for negligent performance unless he could prove that he would have conducted the transaction in the same manner even if it were for himself. The difference in the levels of care required to be taken by a paid agent and a gratuitous agent is that the former has to take reasonable level of care (an objective test) while the latter has to take subjective level of care (i.e., the level of care he would take for his personal transaction).

Under conventional law, however, both a commissioned agent and a gratuitous agent have to exercise reasonable care in performing the delegated task.[54] Another difference maintained in the conventional law is between *nonfeasance* (non-performance of the delegated task) and *misfeasance* (negligent performance of the delegated task). While a gratuitous agent would be liable only for misfeasance,[55] a paid agent would be liable for both nonfeasance and misfeasance.[56] The reason for the difference lies in the doctrine of consideration. As there is no

[48] See *Overend & Gurney Co v Gibb*, (1871-72) LR5 HL 480, where the purchase of an existing business by the directors of a new company turned out to be a financial disaster, the directors (i.e., agents) were not held liable.
[49] Article 1470 of *Mejelle*, *supra* n. 8.
[50] Article 1471 of *Mejelle*, *ibid*.
[51] See ARCHER, *supra* n. 15 at 189-191.
[52] Section 681 of *Civil Code*, *supra* n. 3.
[53] Section 681 of *Civil Code*, *supra* n. 3.
[54] See *Solomon v Barker* (1862) 2 F&F 726, where selling agents were held liable for not exercising due care to ensure the best price for the goods sold on behalf of the principal; see also section 277 of the *Commercial Code*, *supra* n. 2.
[55] See *Chaudhry v Prabakhar*, [1989] 1 WLR 29, where a friend (i.e., a gratuitous agent) who helped a new driver to buy a used car was found negligent and liable for the un-roadworthy car.
[56] See ARCHER, *supra* n. 15 at 188-189.

consideration in the case of a gratuitous agency, the agent would not be liable for any failure to perform the promised task.[57] Under Islamic law on agency, this distinction is not maintained.

c) Duty to avoid conflict of interest

Under both Islamic law and conventional law, an agent must not have any conflict of interest in a transaction concluded for his principal. Thus, under Islamic law an agent who is authorized to purchase a specific object or a unique item (e.g., a specific house) cannot buy it for himself.[58] If the agent buys the specific object for himself, the purchase would be considered as a transaction for his principal.[59] Similarly, an agent authorized to purchase a product (e.g., a horse) for his principal cannot sell the agent's own product to his principal.[60] Doing so would put the agent in a situation where his personal interest as a seller would conflict with the interest of his principal as a buyer. This is the view of the majority of Islamic jurists.[61]

Although a similar conflict would arise if a selling agent sells a product of his principal to himself or to any of his close relatives, the *Civil Code* of Oman is silent about the invalidity of such transaction. This is probably due to the difference of opinions among Islamic schools of law. For example, Hanafi School does not allow a selling agent to sell the product of his principal to himself,[62] while some jurists from other schools see no problem with such a sale.[63]

It is noteworthy here that Islamic law on agency and the *Civil Code* of Oman do not provide a general or normative principle on conflict of interest in the context of agency. Islamic law only discusses some specific examples where a conflict of interest would arise. In this regard, conventional law on agency is broader and would cover any conflict of interest no matter how they come to exist. Under conventional law, agents are considered as a fiduciary and owe single-minded loyalty towards their principals. As such, agents cannot make any profit other than their commission out of the transactions they bring into conclusion for their principals without the knowledge or permission of the principals.[64]

d) Duty to perform the delegated task personally

Under Islamic law, an agent must personally perform the task he is assigned for.[65] He cannot delegate the work to another agent without the permission of the principal.[66] For example, a

[57] ARCHER, *ibid* at 189.

[58] Section 688 of the *Civil Code*, *supra* n. 3.

[59] Article 1485 of *Mejelle*, *supra* n. 8; AL-ZUHAILI, *supra* n. 17 at 668.

[60] Section 688 of the *Civil Code*, *supra* n. 3. According to Imam Abu Hanifa, a buying agent is not also allowed to buy from his close relatives whose testimony for the agent would not be acceptable in a court of law. As for Abu Yusuf and Mohammad, such purchase is allowed as long as the price paid is at or below the market price. AL-ZUHAILI, *ibid* at 669.

[61] Article 1488 of *Mejelle*, *supra* n. 8; AL-ZUHAILI, *supra* n. 17 at 669.

[62] Article 1496 of *Mejelle*, *supra* n. 8. Imam Abu Hanifa does not allow a selling agent to sell even to his close relatives, whose testimony for him would not be allowed in courts (e.g., father, son, wife, grandson etc.), at or below the market price because family members may share the use of such property. This view was adopted in article 1497 of *Mejelle*, *supra* n. 8. On the other hand, Abu Yusuf and Mohammad allow such sale at market price because family members do not share the ownership. See AL-ZUHAILI, *ibid* at 664-665.

[63] AL-ZUHAILI, *ibid* at 665.

[64] See MUNDAY, *supra* n. 9 at 161-169 para 8.15-8.28; ARCHER, *supra* n. 15 at 193-195.

[65] Section 683(1) of *Civil Code*, *supra* n. 3.

legal agent appointed to represent the principal in a case cannot delegate the task to a second agent without the permission of the principal.[67] This is because the principal has probably hired a specific agent for his or her special skills, personal honesty, and other individual qualities. The second agent may not have those qualities. If, however, the principal permits the agent to hire a sub-agent and specifies the sub-agent, the sub-agent would be considered as a direct agent of the principal and not as an agent of the first agent.[68] On the other hand, if the permission to appoint a sub-agent is general and does not specify the sub-agent, the first agent would remain responsible for any fault in appointing the sub-agent or in giving him instructions.[69]

Conventional law on the appointment of sub-agent contains similar rules. In general, an agent cannot delegate his authority to a sub-agent without an express or implied authorization of the principal. A legal doctrine under conventional law states, 'delegated authority cannot be delegated.'[70] Thus, the principal would not be bound by a transaction entered by a sub-agent appointed without any express or implied authorization unless the principal later ratifies the transaction.[71] On the other hand, if a sub-agent is appointed with the express or implied authority of the principal, the first agent would not be liable for any fault or negligence of the sub-agent.[72] Like the case with Islamic law, under conventional law also the liability of the first agent is limited to the negligence of the first agent in selecting the sub-agent.[73] The instances of implied authority to appoint sub-agents include the situations when it is customary to do so in a particular business, or when the nature of the transaction requires such appointment.[74] If the sub-agent is appointed with the express or implied authorization of the principal, the sub-agent becomes a direct agent of the original principal.[75]

If multiple agents are appointed for the same task, they may be appointed either under one contract or under separate contracts. If they are appointed under one contract and the contract does not specify separate aspects of the task for each agent, they must perform the task jointly unless the particular activity cannot be completed jointly (e.g., oral legal defense) or the nature of the transaction does not require any consultation with each other (e.g., debt collection or debt payment).[76] On the other hand, if multiple agents are appointed under separate contracts

[66] This is the general rule. All schools make some exceptions to the general rule. For example, Hanafi jurists allow the appointment of a second agent if the principal gives the agent wide discretion to do whatever is necessary to accomplish the task. In such case, the agent (e.g., a debt collecting agent) can appoint a second agent to do the task. If no such discretion is given, the appointment of the second agent is invalid. In the context of debt collection, the collection of debt by such an unauthorized second agent would not discharge the debtor from his liability toward the creditor. The Shafi'i and Hanbali jurists allow a second agent if the first agent is not able to perform the task. The Maliki jurists allow the appointment of a second agent if the performance of the task is against the social status of the first agent. See AL-ZUHAILI, *supra* n. 17 at 658-659; article 1466 of *Mejelle*, *supra* n. 8.

[67] AL-ZUHAILI, *ibid* at 656; article 1463 of *Mejelle*, *supra* n. 8.

[68] Section 683(1) of *Civil Code*, *supra* n. 3.

[69] Section 683(2) of *Civil Code*, *ibid*.

[70] See ARCHER, *supra* n. 15 at 100- 101. This is based on a Latin maxim, *Delegata potestas non potest delegari*; cited in ARCHER, *ibid* at 101.

[71] See ARCHER, *supra* n. 9 at 174-177.

[72] *Dorcester & M. Bk. v. N. E. Dk.*, 1 Cush (Mass.) 177; cited in ARCHER, *supra* n. 15 at 103.

[73] See *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 443; cited in ARCHER, *supra* n. 15 at 104.

[74] ARCHER, *supra* n. 15 at 101-103.

[75] ARCHER, *supra* n. 15 at 104; see also section 279 of the *Commercial Code* of Oman, *supra* n. 2.

[76] Section 682(2) of *Civil Code*, *supra* n. 3.

for a task, they should act independently unless the principal asks them to work jointly.[77] When the task is supposed to be completed jointly by multiple agents, all the agents would be jointly liable for the task.[78] The provisions of the *Civil Code* with regard to multiple agents reflect mainly the view of Hanafi School.[79]

In this regard too, the approach of the conventional law appears to be mostly similar to that of Islamic law i.e., the instructions and the intention of the principal would determine whether multiple agents are supposed to work jointly or separately. Thus, when a principal appoints multiple agents to perform the same task, the agents must act jointly unless expressly indicated otherwise. If one of the agents acts alone, the transaction would not be binding on the principal.[80]

e) Duty to protect the principal's property

Both under Islamic law and conventional law, an agent must protect the property of his principal under his control. In Islamic law, the legal status of the principal's property under an agent's control is that of a deposit.[81] As such, the agent is not responsible for any loss of or damage to the property unless such loss or damage is due to the agent's negligence or transgression.[82] However, an exception to the above rule is mentioned in *Mejelle*.[83] When a purchasing agent buys a product for his principal with the agent's own money or on credit and retains the purchased product in order to secure the payment of the price from the principal, the loss of the product in such case would be borne by the agent. This is probably due to the distinction Hanafi School makes between 'deposit' and 'pledge'. When the agent holds the purchased object as a means to ensure the payment of the price, the status of the purchased product in the hand of the agent would change from 'deposit' to 'pledge'. Destruction of the pledged property in the possession of a pledgee creditor would dissolve the debt up to the value of the pledged property.[84] In case of any dispute between the principal and the agent with regard to the cause of the loss, the statement of the agent would be accepted if supported by an oath under Islamic law. The principal can prove otherwise by bringing evidence.[85]

[77] Section 682(1) of *Civil Code*, *ibid*.

[78] Section 682(3) of *Civil Code*, *ibid*.

[79] See article 1465 of *Mejelle*, *supra* n. 8; AL-ZUHAILI, *supra* n. 17 at 679-681.

[80] See ARCHER, *supra* n. 15 at 41-42; *Loeb & Bro. v. Drakeford*, 75 Ala. 464 H. 42; cited in ARCHER, *ibid* at 42.

[81] This is regardless of whether the agent is considered as a 'messenger' or 'agent'. See articles 1463, 1464, and 1500 of *Mejelle*, *supra* n. 8; see also AL-ZUHAILI, *supra* n. 17 at 675-677.

[82] Section 685 of *Civil Code*, *supra* n. 3.

[83] See article 1492 of *Mejelle*, *supra* n. 8.

[84] Even though Hanafi School considers a pledged property in the possession of a creditor as a possession of 'trust,' the School changes the status of the pledged property into the possession of 'guarantee' with regard to its financial consequence in securing the debt. Thus, the destruction of the pledged property would be the destruction of the guarantee and would absolve the debt up to the value of the pledged property. On the other hand, the non-Hanafi schools consider the possession of the pledged property by the creditor as the possession of trust under all circumstances. The destruction of the trust in the possession of trustee (the pledgee creditor) would not bring any liability on the trustee unless the destruction is due to any negligence or transgression on the part of the trustee. As a result, the destruction of the pledged property in the possession of the creditor would not absolve the debt. See AL-ZUHAILI, *supra* n. 17 at 166-167 (v. 2)

[85] Hanbali jurists require proof from the agent if the cause of the loss claimed by the agent is fire, breakage, or any other observable events. AL-ZUHAILI, *supra* n. 17 at 675-676. The general rule under Islamic law is that default position can be supported by an oath and any exception to the default position must be proven by evidence. For example, if there is any

Under conventional law too, an agent is not liable for the loss of or damage to any property of his principal due to any external cause or inherent defect in the property.[86] In other words, the agent would be liable for the loss or damage of the property only if the loss or damage is caused by the agent's own negligence. If there is dispute with regard to the cause of the loss, the agent has to prove an external cause or inherent defect in order to avoid liability.[87]

f) Duty to disclose the identity of the principal

As for the agent's duty to disclose the name of his principal in a transaction, Islamic law on agency sometimes makes a distinction between an 'agent' and a 'messenger'. When a person enters into a transaction on behalf of someone else and discloses the identity of the person for whom the former is making the transaction, the former is considered as a messenger of the latter. If the identity of the latter is not disclosed, the former is considered as an agent. An example is given under article 1454 (2) of *Mejelle*,

> "*A* sends *B* to a horse-dealer to buy a horse. *B* tells the horse-dealer that *A* wishes to buy a certain horse from him. The horse-dealer informs *B* that he has sold *A* the horse for so much money and asks *B* to inform *A* of this fact, and to deliver the horse to him. *B* does as requested and hands the horse over to *A*. *A* accepts forthwith. A sale has been concluded between *A* and the horse-dealer. *B* has merely been a messenger and intermediary between the two, and not an agent."

However, no such distinction is made under conventional law on agency. In fact, the above example would be considered as an example of agency under conventional law. Under ordinary circumstances, an agent must indicate in a contract entered with a third party on behalf of his principal that that he is acting as an agent. Otherwise, the agent can be sued personally by the third party for the contractual obligations.[88] However, the difference between Islamic law and conventional law here seems to be a matter of terminology and nomenclature ('agent' v. 'messenger'). In practice, both Islamic law and conventional law would consider the above transaction concluded between the principal and the third party.[89]

Even Islamic law on agency does not always maintain the above distinction between 'agent' and 'messenger'. Under Islamic law, there are some transactions in which an agent must mention the name of the principal. Otherwise, the transaction would be considered as concluded for the agent himself. Strictly speaking, these transactions should be considered as concluded *not* by an 'agent' but by a 'messenger' because under Islamic law when a person mentions the name of the person on whose behalf he is entering the transaction, he is considered simply as a 'messenger'. However, Islamic schools refer such intermediaries as

disagreement about the existence of an agency, the default state is non-agency. Thus, if a supposed principal claims non-existence of an agency, the principal would be believed if he takes an oath. AL-ZUHAILI, *ibid* at 677.

[86] Section 283 of *Commercial Code*, *supra* n. 2.

[87] See 283 of *Commercial Code*, *supra* n. 2. Section 283 makes the agent liable for any loss of the principal's property under his possession unless the agent can prove an external cause or inherent defect in the property.

[88] See ARCHER, *supra* n. 15 at 125-127.

[89] See also articles 1461(3) and 1462 of *Mejelle*, *supra* n. 8.

agents. These transactions include marriage, gift-giving, donation, deposits, loans,[90] pawning, partnerships and silent partnership.[91] Similarly, section 684 of *Civil Code* also states that the name of the principal must be indicated in the following transactions: donation, borrowing, pledge (mortgage), deposits, giving loans, partnership, silent partnership, settlement on denial of rights.[92]

Also, in some transactions the agent must clearly indicate whether he is making the transaction for himself or for his principal. Indication that he is acting on behalf of someone else does not change his status from 'agent' to 'messenger'. These transactions include contracts of purchase or sale, lease, and settlement on admission of rights.[93] This rule reflects the view of the majority of Islamic jurists. If the agent relates these contracts to his principal within the limits of his authority, then all the rights of the contract will be for the principal and the principal would be the contracting party. If the agent makes himself a party to these contracts without declaring that he is contracting in his capacity as an agent, then the rights of contract will be for him.[94] Contract rights include the receipt of goods or price, the return of the sold goods due to defect or based on inspection option etc.[95]

Under conventional law, a properly authorized transaction concluded by an agent in which the agent does not disclose the identity of the principal will still be binding on the principal. If the principal does not take the responsibility for the transaction, the other party to the transaction may elect either the principal or the agent in order to implement contractual rights and obligations.[96] This is in contrast to the right of a principal to ratify an unauthorized transaction in which his identity disclosed. If the identity of the principal is not disclosed in an unauthorized transaction, the non-disclosed principal would not be able to ratify the transaction.[97]

g) Duty to give proper account

Finally, both under Islamic law and conventional law an agent has the duty to give the correct account of the transaction entered on behalf of the principal. Section 689 of *Civil Code* requires that the agent provide the principal with the necessary information the agent received in performing the task and also give an account of all the expenses incurred and the profits made.[98]

[90] Islamic schools are in agreement that borrowing would not be effected through agency. AL-ZUHAILI, *supra* n. 17 at 640.
[91] See article 1460 of *Mejelle*, *supra* n. 8; AL-ZUHAILI, *ibid* at 648-649.
[92] The reason behind this rule is probably the fact that most of these transactions impose pure financial obligation or they are of very private nature.
[93] Section 685 of the *Civil Code*, *supra* n. 3.
[94] Section 685 of *Civil Code*, *supra* n. 3.
[95] See the examples under article 1461 of *Mejelle*, *supra* n. 8; AL-ZUHAILI, *supra* n. 17 at 670-671.
[96] See ARCHER, *supra* n. 15 at 125-127.
[97] See ARCHER, *supra* n. 15 at 89-90, 125.
[98] For similar duty under conventional law, see ARCHER, *supra* n. 15 at 196-198; section 285 of the *Commercial Code* of Oman, *supra* n. 2.

2. Rights of an agent

Both under Islamic law and conventional law,[99] an agent has three main rights: the right of commission for the work done, the right to reimbursement for the expenses incurred, and the right to indemnification for any liability faced in performing the delegated tasks. This is also clearly mentioned under the *Civil Code* of Oman. The principal must pay an agent the agreed remuneration upon the completion of the delegated task.[100] If the remuneration is not agreed and the agent is someone who is known to work for remuneration, the remuneration would be a reasonable amount usually given for such task.[101] Remuneration is due upon the completion of the task.[102] If no remuneration is agreed and the agent is *not* known to be someone who works for fees, the agent would be considered a volunteer and would receive no remuneration.[103]

In addition, if the agent incurs any expenses in the performance of the delegated task, the principal has to reimburse the agent for reasonable expenses.[104] For example, an agent for purchase is entitled to reimbursement of any price he has paid from his own pocket.[105] Similarly, if the agent incurs any liability or obligation, the principal must indemnify the agent for such liability or obligation,[106] provided that such liability or obligation is not incurred due to any negligence or misconduct on the part of the agent. For instance, the principal would take any losses incurred by the agent in the performance of his task.[107]

Part 3: Termination of Agency

The last part of the provisions on agency under the *Civil Code* deals with the termination of an agency contract. Termination of an agency contract occurs either automatically i.e., due to the operation of law, or by the parties either unilaterally or mutually. Under Islamic law, agency is considered a permissible (*jaaiz*) but a non-binding (*ghair-laazim*) contract. As such, the contract can be terminated at any time by either party. However, if the agency involves the right of a third party, it cannot be terminated without the consent of that third party according to Hanafi School as well as most jurists from Maliki School.[108] The example of an agency related to the interest of a third party is the appointment of an agent to sell a mortgaged property to satisfy a debt when the debt becomes due. Termination of such an agency would affect the right of the creditor in getting the debt paid on time.[109] Thus, the agency in this case cannot be terminated without the consent of the creditor for whose benefit the agent was appointed. Mirroring Islamic law on the issue, the *Civil Code* provides that if termination of an agency contract would

[99] For conventional law on the rights of the agent, see ARCHER, *supra* n. 15 at 172-180.
[100] Section 690 of *Civil Code*, *supra* n. 3.
[101] Section 690 of *Civil Code*, *ibid*.
[102] AL-ZUHAILI, *supra* n. 17 at 673.
[103] Section 690 of *Civil Code*, *supra* n. 3; article 1467 of *Mejelle*, *supra* n. 8.
[104] Section 691 of *Civil Code*, *ibid*.
[105] Article 1491 of *Mejelle*, *supra* n. 8; AL-ZUHAILI, *supra* n. 17 at 673-674.
[106] Section 692 of *Civil Code*, *supra* n. 3.
[107] AL-ZUHAILI, *supra* n. 17 at 673.
[108] AL-ZUHAILI, *ibid* at 684-685; articles 1521 and 1522 of *Mejelle*, *supra* n. 8.
[109] See article 1521 of *Mejelle*, *ibid*.

affect the right of a third party, neither the principal nor the agent can terminate the contract without the consent of the third party.[110]

Although stated in different terminology, similar result would also ensue under conventional law. Under conventional law, an agency becomes irrevocable when the authority of an agent is coupled with an interest or obligation i.e., the interest of a third party is involved and the agent would be personally liable to meet some obligations arising under the agency.[111] Thus, it was held in a case that when the principal transferred a piece of real estate to the agent as a security for the benefit of a third party creditor, the death of the principal did not to terminate the agency contract.[112]

Even though Islamic law does not consider any earlier termination of agency as a breach of contract, compensation is allowed to the non-terminating party for any loss suffered due to untimely termination.[113] Thus, if the agent has already started doing the assigned task and has completed part of it, termination of the contract by the principal may cause financial loss for the agent. Similarly, if the agent leaves the job incomplete, the principal may also suffer some financial loss to start the task all over again. In the same vein, conventional law also imposes liability on the party whose untimely termination causes loss to the other party to an agency contract. However, such a termination is considered a breach of contract under conventional law.[114] An untimely termination occurs, for example, when the agency is for a specific period of time and the agent leaves the job in the middle of the contract causing loss to the principal. However, if the contract allows either party to terminate the contract at any time, no liability would be imposed on the terminating party.[115]

As per the grounds of automatic termination of agency, section 694 of the *Civil Code* provides that an agency contract would be automatically terminated with 1) the completion of the task assigned,[116] 2) the expiry of the fixed term,[117] 3) death or legal incapacity of the principal unless the agency is related to the right of a third party, 4) death or legal incapacity of the agent even if the agency is related to the right of a third party. These rules are reflective of Islamic law on the subject.[118] These are also grounds for automatic termination of agency under conventional law.[119]

With regard to insanity, Islamic schools of jurisprudence differ on the effect of short term insanity on agency. Shafi'i School considers the agency automatically terminated due to the

[110] Sections 696 and 697(1) of *Civil Code*, *supra* n. 3.

[111] See ARCHER, *supra* n. 15 at 208-210

[112] *Ronald v. Coleman*, 76 Ga. 652, H 203; cited in ARCHER, *supra* n. 15 at 209.

[113] Section 696 and 698(1) of *Civil Code*, *supra* n. 3.

[114] ARCHER, *supra* n. 15 at 208 and 211.

[115] See ARCHER, *supra* n. 15 at 210-211.

[116] The task may be completed either by the agent or by the principal. If the principal completes the task, the agency would have no purpose left and thus automatically terminated. See AL-ZUHAILI, *supra* n. 17 at 685. In addition, if it becomes impossible to complete the task due to the fact that the object of agency is perished, the agency would be terminated automatically. AL-ZUHAILI, *ibid* at 687.

[117] Agency will also terminate with the expiry of the fixed-term agency according to most non-Hanafi jurists. AL-ZUHAILI, *supra* n. 17 at 689.

[118] See articles 1526-1528, and 1530 of *Mejelle*, *supra* n. 8.

[119] See ARCHER, *supra* n. 15 at 207 (for the expiry of the term and for the completion of the task) and 211 (for the death and insanity of the principal).

insanity of either the agent or the principal even if the insanity is for a short term. On the other hand, non-Shafi'i jurists do not consider agency contract terminated in the case of temporary insanity. Insanity for less than a month is considered 'short term' insanity according to the majority Hanafi view.[120] The *Civil Code* of Oman seems to follow the view of Shafi'i School on this matter as there is no mention about any specific duration of insanity for the purpose of legal incapacity. Under conventional law too, the insanity of the principal or the agent would also terminate the relationship of agency and there is no qualification with regard to the duration of insanity.[121]

In classical Islamic jurisprudence, there are also discussion and differing juristic views on the effect of apostasy (*riddah*) of a principal or an agent on the agency contract. According to Hanbali School, apostasy of a principal or an agent would not terminate the agency contract mainly because faith is not a condition for a valid agency contract. Other schools have different views. The *Civil Code* of Oman does not mention apostasy at all as a ground for termination of agency. This is probably due to the fact that apostasy is not considered a crime under the *Penal Code*[122] of Oman.

The *Civil Code* does not also mention the effect of bankruptcy on agency contract. Under the *Commercial Code* of Oman bankruptcy of an agent is considered as a ground for the termination of the agency contract.[123] However, legal incapacity as an automatic cause for termination of agency under the *Civil Code* can be interpreted to include any ground for legal incapacity including bankruptcy. Under conventional law, bankruptcy amounts to legal incapacity.[124] In the context of company law, the managers/directors of a company are considered as agents of the company. When a company becomes bankrupt, these agents lose their usual authority to do any transaction on behalf of the company.[125] If the company itself works as an agent or principal, dissolution of the company would bring an end to the agency contract.[126] There is also not much discussion on this issue under classical Islamic jurisprudence due probably to the fact that bankruptcy is a modern legal concept and did not exist under classical Islamic law. However, some Maliki jurists mentioned that if the agency contract is for the sale of the principal's property and the property is later transferred to or preserved for his creditors in a bankruptcy situation, the agent cannot sell the property and the agency would be terminated.[127]

The *Civil Code* does not include also any provisions with regard to a third party's right in a transaction entered by an agent either after his termination or during the existence of an agency contract but exceeding his scope of authority. Conventional law requires a principal to provide general notice of termination of an agent to the public and individual notice to anyone

[120] AL-ZUHAILI, *supra* n. 17 at 685.
[121] See section 291 of the *Commercial Code*, *supra* n. 2; see also ARCHER, *supra* n. 15 at 211.
[122] Royal Decree 7/74, published in *Official Gazette* (no. 52) (Ministry of Legal Affairs, Oman: April 1, 1974); amended by Royal Decrees 12/97, 77/99, 4/2000, 72/2001, 75/2005, 6/2007, 52/2007, 36/2009.
[123] Section 291 of *Commercial Code*, *supra* n. 2.
[124] MUNDAY, *supra* n. 9 at 340 para 13.23.
[125] Section 16 of *Companies Law* of Oman, Royal Decree 4/1974, *supra* n. 2; see also *Pacific and General Insurance Co Ltd v. Haell*, [1997] BCC 400.
[126] See MUNDAY, *supra* n. 9 at 340-341 para 13.23-13.24.
[127] AL-ZUHAILI, *supra* n. 17 at 687.

who has dealt with the agent before his termination.[128] Otherwise, the principal may be liable for the actions of a terminated agent under the concept of apparent authority. Under Islamic law, a principal would not be liable for any action of an agent beyond the scope of his authority or after the termination of agency. Since the *Civil Code* is silent on this issue, it seems that in a non-commercial agency contract the rules of Islamic law would apply in such circumstances.

III. Conclusion

The provisions of agency law under the *Civil Code* of Oman reflect Islamic law on the subject. The rules of Islamic law on agency are very similar to those of conventional laws. Islamic law on the main issues of an agency contract such as the condition of agency and its types, the rights and obligations of agents, and the termination of agency is comparable to conventional law on agency. However, there are some minor differences in the details. While these minor differences may become important in an actual case of agency, they do not affect the main observation of the paper i.e., the existence of close similarity between Islamic law and conventional law on agency contracts. Due to this close resemblance, it may be advisable for Oman to have just one set of rules for all types of agency contracts instead of three different sets of rules[129] unless the minor differences between Islamic law and conventional law are thought to be important for commercial agencies.

[128] ARCHER, *supra* n. 15 at 210; see also section 292 of *Commercial Code*, *supra* n. 2.
[129] See *supra* n. 5 to 7 and the accompanying text.