EJIMEL

Electronic Journal of Islamic and Middle Eastern Law

Vol. 2 (2014)

ISSN 2504-1940 (Print)
ISSN 1664-5707 (Online)
www.ejimel.uzh.ch

University of Zurich[UZH]

EJIMEL Electronic Journal of Islamic and Middle Eastern Law

Vol. 2 (2014)

EJIMEL Vol. 2 (2014)

Published by
The Center for Islamic and Middle Eastern
Legal Studies (CIMELS), University of Zurich,
Zurich, Switzerland

Suggested citation style
Electronic Journal of Islamic and Middle Eastern Law
(EJIMEL), Vol. 2 (2014), pages, http://www.ejimel.uzh.ch

ISSN 2504-1940 (Print)
ISSN 1664-5707 (Online)

Contents

Organ Transplantation in the United Arab Emirates: Legal, Ethical and Historical Aspects

*by Eveline Schneider Kayasseh**

Abstract

Organ transplantation has recently been the subject of significant public policy attention in the United Arab Emirates (UAE). In May 2013, the first donated organ from a deceased person was successfully transplanted to a young woman with a damaged kidney. Although the first laws on organ transplantation were issued in the Arabian Peninsula in the late 1980s and legislation on organ transplantation has existed in the UAE since 1993, a national organ transplant programme was not started until 2007. Since then, transplanted organs have come exclusively from living, related donors. Mainly due to the absence of a definition of death in the relevant law, transplants from deceased donors were not performed. In addition, religious-ethical and socio-cultural concerns, such as the principle of inviolability of the human body and the significance and timing of death and burial, exert a strong influence on potential donors in the region. Some of these concerns are reflected in the UAE legislation, as well as in the laws elsewhere in the Arabian Peninsula. In order to implement these laws and promote the readiness of residents to commit to organ donation, governments have published the rulings of select religious-juridical scholars who deem organ donation compatible with Islam, and have started awareness campaigns that aim at breaking the ice regarding deceased organ donation.

I. A Brief History of Healthcare in the UAE

Until the beginning of large-scale oil exploration in the 1950s, the territory that now forms the UAE was a relatively isolated area known as the 'Trucial States'. Its people lived in subsistence economies and the main economic resource was pearl fishery. However, in the wake of the economic depression of the late 1920s and early 1930s, and the development of pearl cultivation by the Japanese, the pearling industry declined and was eventually destroyed. Already in the 19th and early 20th centuries, the Sheikhdoms bordering the Persian Gulf had allied themselves with the British Empire in a series of maritime defence treaties ('Maritime Truces') and exclusive and non-alienation treaties. The consequence of the treaties was that these polities eventually ceded control over foreign affairs and defence to the Empire and were thus under British protection.[1] In fact, Britain had recognised very early on the strategic importance of the Gulf region as part of the trade route to its Indian colony and the need to preclude other European powers from establishing a presence in the Gulf. At the same time, the local rulers (Sheikhs) lacked the means to protect their domains without the support of an outside power. The coastal Arabs who occasionally raided British trading vessels headed to the Indian subcontinent were also a nuisance making it necessary to protect ships as well as British

* Dr. iur., University of Zurich, Faculty of Law.

[1] *N.J. Brown*, The Rule of Law in the Arab World, Cambridge 1997 at 131; *R. Said Zahlan*, The Making of the Modern Gulf States: Kuwait, Bahrain, Qatar, the United Arab Emirates and Oman, London etc. 1989, 7 et seq.; *D.D. Commins*, The Gulf States: A Modern History, London 2012 at 72 et seq., 83.

subjects and British-protected persons, such as Indian pearl merchants and traders who resided in the Trucial States.[2] Because British officials did not consider the local courts capable of handling cases involving foreigners, Britain also assumed jurisdiction over – broadly speaking – all non-Muslim foreigners, including British subjects residing in the Trucial States, most of whom were Indian traders and pearl merchants under the protection of the British Government of India.[3] In 1971, the formal British presence ended and the UAE was founded as a federation of six (later seven) emirates.[4]

The predominantly desert landscape but also the mountainous and maritime environments, made living conditions in the Trucial States harsh and the people generally had little external assistance in case of maladies. The geography of the country did however also contribute to the rich medical tradition of the UAE providing the medicinal herbs used by traditional healers. In addition to local Arabic and Islamic medical lore, medicinal traditions from countries including India, Iran, and East Africa also influenced the local medicinal traditions.[5] Basically, there were two types of traditional medicine in the UAE: 'natural' folk medicine, based on herbs, minerals and traditional remedies such as the practice of cauterization (al wasm), which was the method of choice against almost any kind of malady.[6] Cupping (al ḥijāma/al ḥajāmah),[7] another traditional treatment, is still practiced today.[8] The second type of medicine was based on magico-religious ceremonies and practices; e.g., the writing of Qur'anic verses on amulets to be worn by those affected by illness.[9] It is interesting to note that lately, despite the availability of modern healthcare facilities, there has been a renewal in the demand for alternative medicine, especially in traditional herbal and natural cures.[10]

Before the advent of modernity, illness and the nursing of the sick was the responsibility of the extended family, which only turned to a muṭabbib (traditional healer) if a disease persisted or was unknown to the family elders. Medical plants and herbs were acquired at the al 'ashshab's (herbalist) shop. Childbirth was the responsibility of the female members of the family, who were assisted in this task by the al dāya (the midwife) who also cared for premature babies.[11] However, until the first modern medical facilities opened in the region, many women died during or shortly after childbirth. Malaria, tuberculosis, intestinal parasites and eye infections were also widespread.

[2] See *Commins*, supra note 1 at 78 et seq.; *J. Onley*, Britain and the Gulf Shaikhdoms, 1820-1971: The Politics of Protection, Center for International and Regional Studies, Georgetown University School of Foreign Service in Qatar, Occasional Paper No. 4, Qatar 2009, 1–44 at 1 et seq.

[3] Cf., e.g., *Onley*, supra note 2 at 15. – From the early 1930s onwards, a small group of British subjects staffed the Sharjah airport station, which was a stopover for Imperial Airways flying from England to India and (later) to Australia.

[4] Abu Dhabi, Dubai, Sharjah, Ajman, Umm al-Quwain, Fujairah, and Ras al Khaimah (acceded to the union in 1972).

[5] See *S.H. Hurreiz*, Folklore and Folklife in the United Arab Emirates, London 2002 at 106 et seq.

[6] *F. Heard-Bey*, From Trucial States to United Arab Emirates, Dubai 2004 at 140; *Hurreiz*, supra note 5 at 109 et seq.

[7] For further information regarding these techniques, see *S.A. Ghazanfar*, Handbook of Arabian Medical Plants, Boca Raton 1994, 3 et seq.

[8] See, e.g., The National (UAE), 20 June 2012: „Alternative Medicine is Fine if the Spice is Right", available at <http://www.thenational.ae/news/uae-news/health/alternative-medicine-is-fine-if-the-spice-is-right> accessed 15 February 2014.

[9] *Hurreiz*, supra note 5 at 107, 112 et seq.

[10] See *Hurreiz*, supra note 5 at 113; The National (UAE), 20 June 2012: „Alternative Medicine is Fine if the Spice is Right", available at <http://www.thenational.ae/news/uae-news/health/alternative-medicine-is-fine-if-the-spice-is-right> accessed 15 February 2014.

[11] See *Hurreiz*, supra note 5 at 108 et seq.

In the first decade of the 20th century, American missionaries, who eventually developed the Mason Memorial Hospital and the Marion Wells Thoms Memorial Hospital in Bahrain (their main base), began to visit the Trucial States. Although most of the missionaries were not medical doctors, they provided basic medical care for the native population. In the 1930s, when oil finds in Bahrain heralded the era of the oil industry, the British authorities restricted access to the coast out of fear that foreign subjects might approach the Sheikhs of the Trucial States on the subject of oil concessions. The result was that the Trucial States became largely inaccessible to the missionaries until after the Second World War. At the same time, the British started establishing very basic healthcare facilities.[12] In 1939, for example, on the initiative of the British government in India, a dispensary with a resident Indian doctor was opened in Dubai.[13]

Oil was discovered in the 1950s and from the early 1960s onwards, revenue from the production and export of oil improved living conditions. At the same time, the oil boom brought a large number of foreigners, mainly migrant workers, into the Trucial States. The diversification of the community soon showed that neither the existing legal framework nor the rudimentary health facilities could meet the demands of the ever increasing population and more complex society. While the first national healthcare laws were not issued until the 1970s,[14] in 1951, still in the pre-oil era, the first hospital in the Trucial States, the Maktoum Hospital in Dubai, was built with the aid of the British. It was eventually upgraded and enlarged, and offered medical services until 2009. This hospital was run by a former doctor in the Indian army who, till 1964, also co-ordinated all the health services along the coast. In 1952, the Sara Hospital (named after the American missionary Sara Hosman) was opened in the Emirate of Sharjah. In 1960, on the initiative of Sheikh Shakbout bin Sultan Al Nahyan, the then-ruler of Abu Dhabi (reigned 1928-1966) and his brother and successor Zayed (reigned 1966-2004), the Oasis Hospital (al wāḥa hospital) was opened in Al Ain in the Emirate of Abu Dhabi. In 1963 another hospital was opened in the Emirate Ras Al Khaimah. In the following years a number of clinics were set up and touring doctors, who sent the more serious cases to the hospital in Dubai, were organised. In addition, after the British Development Office had assumed responsibility for health in the mid-1960s, vaccination campaigns were organised and existing healthcare facilities were upgraded.[15] In 1968, the Central Hospital was opened in Abu Dhabi. Dubai's second-oldest hospital, the Rashid Hospital, was built in 1973. Since then the healthcare sector has grown considerably and currently, in addition to the government-funded hospitals, the individual Emirates have a growing number of private hospitals offering medical care. However, it wasn't until 2007 that the sole transplant program of the UAE, the transplant program at the Division of Transplantation and Hepatobiliary Surgery at Sheikh Khalifa Medical City in Abu Dhabi, was launched.[16]

[12] See *F. Al-Sayegh*, American Missionaries in the UAE Region in the Twentieth Century, Middle Eastern Studies 32 (1996), 120-139 at 125 et seq., 134.
[13] *Heard-Bey*, supra note 6 at 320.
[14] See below, section III.2.
[15] *Heard-Bey*, supra note supra note 6 at 320, 325.
[16] See the website of Sheikh Khalifa Medical City (Abu Dhabi), <http://www.skmc.ae/en-us/medicalservices/SpecialistCare/Surgery/ServicesProvided/Pages/TransplantationandHepatobiliary.aspx>, accessed 15 February 2014.

II. Juridical-Ethical and Socio-Cultural Framework

In the UAE, Shari'a has the status of a constitutional source of law and Islam is the official state religion.[17] Although the expatriate community, which brought along their own customs, faiths and practices, outnumbers the native Emiratis by far,[18] the majority of the inhabitants of the UAE are of Arab origin and Muslim faith.[19] As a consequence, Emirati heritage, as well as daily life, is dominated by Arab culture and Islam.[20] Religious rules and principles, for their part, have heavily influenced medical traditions, including people's ideas and beliefs about health care issues, namely illness, suffering, and cures for diseases.[21] Thus patients, healthcare professionals and indeed the legislation are the product of a culture inextricably intertwined with Islamic principles and concepts.

While operations similar to transplantation procedures have been known in the Arab world for quite a long time,[22] organ transplantation is in its main features a scientific innovation of our times and as such not explicitly mentioned in the primary sources of Islamic law, the Qur'an and the teachings and practices of the Prophet Mohammad (the sunna). In cases such as this, Muslim jurists typically have recourse to analogical reasoning (qiyās) and personal interpretation and reasoning (ijtihād) in order to derive rulings from existing legal principles and general ethical concepts to then apply them to novel situations. Such juridical opinions, fatāwā (sing. fatwā), offer moral guidelines on whether specific actions or omissions in the secular and religious realms of a Muslim's life are Sharia compliant. However, there is no 'central' or pastoral authority in Islam and in principle, a follower of Islam may ask for the opinion of any religious scholar (muftī). Yet in some countries in the Middle East, fatāwā concerning particular matters may only be issued by designated state bodies and are then considered authoritative (endorsed by the government): In Saudi Arabia, for example, the influential Council of Senior Ulama is the only body that is authorized to issue fatāwā (these legal opinions usually have quasi-legislative effect);[23] in the UAE, only a fatwā center affiliated to the General Authority of Islamic Affairs and Endowments (GAIAE) may issue official fatāwā.

When considering the issue of organ transplants from a socio-cultural and religious perspective, issues such as the sanctity of the human body and life, death, as well as the Qur'anic prohibition of self-destruction have to be weighed against other fundamental principles of juridical-ethical value, such as the common good of society (maṣlaḥa) or the

[17] Art. 7 UAE Constitution. – With the exception of Saudi Arabia, where the Qur'an and the Prophetic Sunna are declared to be the constitution, the same is true for the other countries in the Arabian Peninsula.

[18] Only approximately one fifth of the total population of the UAE is citizens.

[19] According to the Pew Research Center's Religion & Public Life Project, Pew-Templeton Global Religious Futures Project, The Global Religious Landscape, 76.9% of the population of the United Arab Emirates were Muslim in the year 2010. Available at <http://www.globalreligiousfutures.org/countries/united-arab-emirates#/?affiliations_religion_id=0&affiliations_year=2010&region_name=All%20Countries&restrictions_year=2011> accessed 15 February 2014.

[20] Amongst the four Sunni jurisprudential schools, the Maliki School of law usually prevails over the Hanbali, Shafi'i and Hanafi schools.

[21] Cf. *Hurreiz*, supra note 5 at 106 et seq.

[22] See *V. Rispler-Chaim*, Islamic Medical Ethics in the Twentieth Century, Leiden/New York/Köln 1993 at 28, 37; *M. Albar*, Organ Transplantation: A Sunni Islamic Perspective, Saudi Journal of Kidney Diseases and Transplantation 23 (2012), 817–822 at 818 et seq.

[23] Exempt from this rule are religious rulings that concern purely private matters.

principle of lesser evil. Other factors that have to be taken into consideration are the impact of tribal and familial relations on the decision-taking process regarding donation after death.

1. The Beginning of Life

The theme of life and the importance of life are highlighted in many instances in the primary sources of Islam.[24] In Islamic teaching, human life is one of the five principles underlying the law that must be protected.[25] It is commonly believed that the human body is transformed into a living being when the spirit or soul is infused into the growing foetus (ensoulment). Qur'anic passages and hadīth suggest a gradual process of this genetic entity towards the physical and spiritual attributes of humanity. Based on traditions that address the exact time of ensoulment, Muslim scholars developed the concept that an embryo undergoes three major stages of development, each lasting 40 days, in which the embryo increasingly demonstrates human features. It is generally believed that after this process, which lasts 120 days, the soul is breathed into the embryo, which then attains human status.[26, 27]

2. The Human Body, its Organs and Donation

a) The Human Body

In Islamic tradition (as in other religious traditions), the definition of a person – and, by extension, her or his body – includes a religio-legal dimension.[28] Based on the Qur'an and Sunna, classical Islamic jurisprudence distinguishes between Muslims, 'people of the book' ('ahl al-kitāb, mainly Christians and Jews), and pagans or people belonging to other polytheistic religions, as well as sub-categories of persons (e.g., free men, slaves, women). Likewise, bodies are not mere organisms, but 'religious' bodies that belong to a Muslim, a Christian, a Jew etc.[29] According to Islamic teaching, human beings (and their bodies) have been created by God, who has ensouled each individual, who then act as his viceregents (khalīfa) and servants ('abd) on earth.[30] Because God is considered the sole owner of everything he created, a human being is not the owner but merely a trustee of his or her body. On the one hand, this concept obliges individuals to take good care of the bodies entrusted to them, and on the other hand limits the freedom of action regarding one's own body, which, as God's

[24] See, e.g., Qur'an sura 5, verse 32: "[i]f anyone saved a life, it would be as if he saved the life of the whole people." – Translation from the original Arabic by *A.Y. 'Alī*, The Meaning of the Holy Qur'ān, 11th ed., Beltsville 2009.

[25] Cf. *W.B. Hallaq*, The Origins and Evolution of Islamic Law, Cambridge 2005 at 145. See also *Y.I.M. El-Shahat*, Islamic Viewpoint of Organ Transplantation, Transplantation Proceedings 31 (1999), 3271–3274 at 3271.

[26] See Qur'an sura 23, verses 12-14, sura 32, verses 6-9. See also *M. Holmes Katz*, The Problem of Abortion in Classical Sunni fiqh, in *J.E. Brockopp* (ed.), Islamic Ethics of Life: Abortion, War, and Euthanasia, Columbia 2003, 25–50 at 30 et seq.; *N. Fischer*, Islamische Positionen zum Pränatalen Leben, Freiburg i.Br. 2012 at 30, 33, 42 et seq.; *M. William*, Mensch von Anfang an?, Freiburg 2007 at 50 et seq.

[27] According to minority views, life begins at 40, 42, or 45 days after conception. See *D. Atighetchi*, Islamic Bioethics: Problems and Perspectives, Dordrecht 2007 at 93 et seq.; *A. Sachedina*, Islamic Biomedical Ethics, New York 2009 at 131; *William*, supra note 26 at 58 et seq.

[28] In this regard, see *R.D. Marcotte*, The 'Religionated' Body: Fatwas and Body Parts, in *E. Burns Coleman & K. White* (ed.), Medicine, Religion, and the Body, Leiden/Boston 2010, 27–49 at 27 et seq.

[29] See *M. Arkoun*, Rethinking Islam. Common Questions, Uncommon Answers, Boulder 1994 at 99 et seq.; *Marcotte*, supra note 28 at 29. See also, e.g., Qur'an sura 3, verse 110, sura 9, verse 29.

[30] But the human being is not made in the image of God. See in this regard Qur'an sura 112, verse 4, sura 42, verse 11. At the same time, he and she enjoy a special status within the creation: Qur'an sura 17, verse 70; sura 50, verse 16.

creation, should not be altered,[31] let alone destroyed.[32] The inviolability and dignity of the body persist after death.[33] This means in particular, that the physical integrity and wholeness of a dead body must be respected and protected, i.e. that no body parts should be amputated or injured.[34] Furthermore, it is argued that because the dead body will be resurrected on Judgment Day, it should be neither cremated nor mutilated but buried promptly according to Islamic rites.[35] At the same time, Muslim scholars accept that a person has some degree of general control over her or his body.[36] From the point of view of the individual living in a particular body, the modern trends of privatisation and commodification, as well as advances in the medical field, have motivated many among them to demand greater rights over their bodies in order to remediate medical conditions or alter their appearance by recourse to surgery.[37]

Between the poles of everyday pragmatism and religio-legal tradition, the issue of organ transplant has been debated by Muslim jurists since the 1950s.[38] Whereas opponents of transplants have based their arguments mainly on the aforementioned arguments, such as the sanctity of the human body and the individual's trusteeship of the same, similarly based arguments have also been invoked to legitimise organ transplantation.[39] In practice, there is historic evidence for operations on dead bodies. For example, it was considered licit to operate on a human body in order to remove a certain object the deceased had swallowed prior to her or his death in order to return it to its rightful owner. Also, according to the Mālikī and Shāfi'ī schools of law it was lawful to remove a foetus that was considered alive from the womb of a dead woman in order to save the unborn child (the Ḥanbalī tended to disagree with this position).[40] Similarly, perhaps, those in favour of transplants argued that the needs of the living take precedence over those of the dead and that the juridical principle of 'necessity', which makes that which would otherwise be prohibited, lawful, could apply if an operation on a dead body would help save the life of someone who would otherwise die.[41] However, in the case of a living donor, the benefit to the patient must be greater than the harm inflicted on the donor, whose health may not be adversely affected (principle of 'no harm').[42] Furthermore, it

[31] See *Sachedina*, supra note 27 at 168, 175 et seq.; *Marcotte*, supra note 28 at 35; *Albar*, supra note 22 at 819; *Atighetchi*, supra note 27 at 161.

[32] See Qur'an sura 2 verse 195; sura 4, verse 29. Regarding suicide, see *J.E. Brockopp*, The "Good Death" in Islamic Theology and Law, in *J.E. Brockopp* (ed.), Islamic Ethics of Life, Colombia 2003, 177–193.

[33] See *M.Y. Rady, J.L. Verheijde & M.S. Ali*, Islam and End-of-life Practices in Organ Donation for Transplantation: New Questions and Serious Sociocultural Consequences, HEC Forum 21 (2009), 175–205 at 191.

[34] This view is partially based upon *hadīth* evidence. See Sunan Abu-Dawud, book 20 (*kitāb al-janā'iz*), *hadīth* 3201; *Rispler-Chaim*, supra note 22 at 76; *Atighetchi*, supra note 27 at 161, 163; *Marcotte*, supra note 28 at 36; *B. Krawietz*, Brain Death and Islamic Tradition, in *J.E. Brockopp* (ed.), Islamic Ethics of Life, Abortion, War, and Euthanasia, Columbia 2003, 194–213 at 196 et seq.

[35] Cf. *Rady, Verheijde & Ali*, supra note 33 at 187; *Sachedina*, supra note 27 at 176; *Atighetchi*, supra note 27 at 161, 297; see also *Albar*, supra note 22 at 818 et seq.

[36] *Rispler-Chaim*, supra note 22 at 31.

[37] *Marcotte*, supra note 28 at 37.

[38] See an overview of the *fatāwā* in *Albar*, supra note 22 at 820; see also *Atighetchi*, supra note 27 at 169 et seq.; *Marcotte*, supra note 28 at 34 et seq.; *Krawietz*, supra note 34 at 195.

[39] See, e.g., *Atighetchi*, supra note 27 at 161 et seq.

[40] *Rispler-Chaim*, supra note 22 at 76 et seq., 81 et seq.; *Atighetchi*, supra note 27 at 298.

[41] Cf. *Albar*, supra note 22 at 819; *Atighetchi*, supra note 27 at 162, 297 et seq. regarding post-mortems; *A.-M. Hassaballah*, Definition of Death, Organ Donation and Interruption of Treatment in Islam, Nephrology Dialysis Transplantation 11 (1996), 964–965 at 965.

[42] *Rispler-Chaim*, supra note 22 at 29; *Albar*, supra note 22 at 819; *Atighetchi*, supra note 27 at 169; *Sachedina*, supra note 27 at 185.

was recognised that there are certain universal values or principles that should be protected and promoted by the law. In addition to the protection of life, which has already been mentioned, these are the protection of the mind, religion, private property and offspring.[43] Also, in Islam, the faithful are expected to take good care of and support each other especially in times of illness and suffering.[44] Illness is considered a natural occurrence, and, according to the Qur'an, illness and suffering exist by the will of God. They not only test the faithful, but also contribute to the expiation of sins.[45] Religious tenets obligate the healthy to take good care of afflicted persons and to show them compassion. In this sense, care of the sick is a social obligation.[46] Islam does not demand passivity, for tradition has it that the Prophet Muhammad declared that there exists a cure for every illness even if it is not yet known.[47] Thus, humans are encouraged to search for a cure through scientific research and apply it to those afflicted by disease.[48] On the whole, these deliberations take into account what is good for society at large and what serves public interest; through the concept of maṣlaḥa, lives can be saved, and efforts to save lives are considered licit.[49]

b) Human Organs

By definition, organ transplantation is concerned with parts of the human body. In recent years, advances in the medical field have rendered a classification of human organs necessary. In particular, it became apparent that the question of which organs can be donated during one's lifetime had to be answered.[50] In classical legal discourse, parts of the human body were discussed and classified in connection with diya (blood money),[51] an amount of money which must be paid in recompense for the accidental or semi-intentional killing or injuring of another person and in cases where someone has killed another intentionally but a sentence for retaliation (qiṣāṣ) could not be pronounced due to the absence of certain preconditions.[52] The value of the compensation paid as diya depends on various factors such as the gender of the victim and his or her social/legal status. Regarding the injured body parts, the jurists developed a functional hierarchy, grouping the organs into single organs, pairs, and double-pairs.[53]

[43] Cf. *Hallaq*, supra note 25 at 145.
[44] See *Atighetchi*, supra note 27 at 269 et seq.; see also the tradition cited in *Hassaballah*, supra note 41 at 964.
[45] See Qur'an sura 2, verses 155-157; sura 57, verse 22; sura 64, verse 11; see in detail: *Atighetchi*, supra note 27 268 et seq.; *Sachedina*, supra note 27 at 77 et seq., 92 et seq.
[46] See *Atighetchi*, supra note 27 at 162; see also *Albar*, supra note 22 at 819; see also *Rispler-Chaim*, supra note 22 at 30.
[47] Bukhari, Sahih, Vol. 7, Book 71, *hadīth* 582; *Albar*, supra note 22 at 189.
[48] See *Sachedina*, supra note 27 at 167; *Albar*, supra note 22 at 818.
[49] See *Rispler-Chaim*, supra note 22 at 29.
[50] Cf. *Rispler-Chaim*, supra note 22 at 31; *Sachedina*, supra note 27 at 187.
[51] The law of the *diya* is founded on the Qur'an: See Qur'an sura 4, verse 92; *Rudolph*, supra note at 49; *V. Rispler-Chaim*, Disability in Islamic Law, Dordrecht 2007 at 87; *Sachedina*, supra note 27 at 187 et seq.
[52] E.g., according to most schools of Islamic law, retaliation for bodily harm or homicide is only allowed if the victim's bloodprice is the same or higher than the perpetrator's. See the detailed discussion in *R. Peters*, Crime and Punishment in Islamic Law, Cambridge 2005 at 44 et seq., 49.
[53] The starting point is that the full amount of *diya* (which amounted to one hundred camels or equivalent in classical times) is due for the loss of life and organs that are single in the body (such as the nose, tongue, penis etc.), the loss of a paired organ (such as the hands, eyes), and a bodily faculty (the loss of one's sense of vision, ability to speak). Half the *diya* is due for the loss of one of a pair (such as one eye or hand). In other cases, the amount of the *diya* is prescribed in percentages of the full or the half *diya*. Where the law does not prescribe the compensation, it is the judge's task to assess the harm caused. See *Rispler-Chaim*, supra note 51 at 87–89; *M. Kahf*, Economics of Liability: An Islamic View, IIUM Journal of Economics and Management 8 (2000), 85–107, 90–92.

This traditional classification by functionality is not suited to the context of organ transplantation. For one thing, many of the injuries that qualify for diya mutilate and deform the human body and therefore constitute highly questionable if not outright forbidden acts. Secondly, because an individual does not 'own' her or his body according to Islamic teaching, in most cases, that person could not donate an organ that exists only singly in the human body sans committing suicide, which is deemed to be forbidden in Islam.[54] Such altruism would quite clearly violate the axiom of 'no harm', because greater harm would be inflicted on the donor in order to save the life of the patient.[55] Based on this ethico-legal framework, the distinction between vital and other organs was introduced to the scholarly debate and contemporary transplantation legislation.[56] Broadly speaking, body tissues can be classified as renewable (e.g. skin, bone marrow, blood[57]) and non-regenerative (other organs). The former can be donated in order to save the recipient's live as long as the donor's live and health – both physical and psychological – are not jeopardised. The latter can only be donated once and, because many of them are vital, usually only after death.[58] Also, due to the lack of body-ownership, the sale of and trade in human organs is mostly considered a forbidden act, although in detail, different positions on the subject do exist.[59]

3. Death

a) Classical Definition

Similarly to life, the Qur'an addresses the topic of death frequently but remains vague regarding its definition.[60] In the Qur'an it is clearly stated that death is inevitable[61] and that the dead will be resurrected in order to account for their earthly deeds.[62] According to this primary source of faith, it is God alone who knows the exact timing of a person's death,[63] which occurs when the spirit, or soul (rūḥ), leaves the human body.[64] However, it is not indicated where in the human body the soul is located nor which signs mark its departure,[65] despite the fact that the passing away of a human being entails legal consequences. Therefore, historically, there has been much debate about the indicators of death. In Islamic jurisprudence, death was eventually understood as a gradual process, in which there is an intermediate state between the onset of death and the moment when the spirit has been separated completely from the body.[66] In the classical era, certain (non-binding and varying) criteria that indicate the separation of the spirit from the body at the time of death were identified by Muslim jurists, such as the whitening of the skin, the heaviness of limbs, the parting of the lips, and the

[54] See above, section 1.a); *Rispler-Chaim*, supra note 22 at 31.
[55] Cf. *Sachedina*, supra note 27 at 185.
[56] See below, sections III.1. and 3.a).
[57] According to *Sachedina*, supra note 27 at 189, the permission to donate blood is mainly based on traditional Arab medicine where cupping (*al-hijjama*) was practiced. See also *Rispler-Chaim*, supra note 22 at 41 et seq.
[58] Cf. *Rispler-Chaim*, supra note 22 at 31; *Sachedina*, supra note 27 at 187 et seq.
[59] See, in this regard: *Atighetchi*, supra note 27 at 178 et seq.; *Rispler-Chaim*, supra note 22 at 38 et seq.
[60] Cf. *Sachedina*, supra note 27 at 146.
[61] See, e.g., Qur'an sura 3, verse 185, sura 4, verse 78, sura 55, verse 26.
[62] The resurrection is the subject matter of the 75th sura of the Qur'an (al-Qiyama) and a theme of many other Qur'anic verses (see, e.g., sura 49, verses 49-50).
[63] See *Sachedina*, supra note 27 at 146; see also *Krawietz*, supra note 34 at 198.
[64] Cf. Qur'an sura 39, verse 42.
[65] *Atighetchi*, supra note 27 at 297; *Krawietz*, supra note 34 at 198 et seq.
[66] See *Sachedina*, supra note 27 at 152 et seq., 155 et seq.

weakening of sight.[67] These criteria coincided with the scientific definition of death, which identified this state with the complete cessation of the cardio-respiratory functions. And from the theological point of view, the completion of the signs of death finally marks the complete departure of the soul from the human body.[68]

b) Brain Death Criteria

Prior to the mid-20th century, the irreversible cessation of spontaneous respiration and heartbeat was the scientifically accepted definition of death.[69] In the 1950s, this concept was challenged by refined methods of mechanical ventilation, which made it possible to sustain cardio-vascular functions in a patient despite the absence of spontaneous breathing. In addition, intensive care medicine and operative techniques improved. In 1959, in a pivotal study, French physiologists Mollaret and Goulson described 23 patients suffering from 'le coma depasse' (irreversible or irretrievable coma). In this paper, the authors reported the neurological findings that would later become known as 'brain death'.[70] In the years following the publication of this paper, the growing numbers of patients on life-support machines as well as the growing need for transplantable organs were the major forces driving the effort to define death in terms of neurological criteria.[71] In 1968, the report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death defined brain death as the irreversible loss of all brain functions, both cerebral and brain stem, and presented certain criteria for the diagnosis. These included irreversible coma with absence of movement, breathing, and reflexes, with an iso-electric electroencephalogram (EEG), and no alteration in these findings after at least 24 hours of observation.[72] A few years later, it emerged that damage to the brainstem was critical for brain death and eventually the concept of 'brain stem death' was developed by physicians from the United Kingdom (UK).[73] This formulation, which is the standard used in the UK and some countries that were formerly in its protectorate, does not require that all brain functions have ceased but that none of the potentially persisting functions indicate any form of consciousness.[74] In the USA, by contrast, the 1981 Uniform Determination of Death Act (UDDA) is based on the whole-brain formulation, which requires that all functions in the entire brain must have ceased.[75]

When the brain death criterion was recognised in the late 1960s, organ transplantation was non-existent on the Arabian Peninsula. After the first transplant programmes developed in the

[67] See *Krawietz*, supra note 34 at 199; *Atighetchi*, supra note 27 at 174; *Sachedina*, supra note 27 at 152 et seq.
[68] *Albar*, supra note 22 at 817; *Krawietz*, supra note 34 at 199; *Rispler-Chaim*, supra note 22 at 34.
[69] See *J.D. Morenski et al.*, Determination of Death by Neurological Criteria, Journal of Intensive Care Medicine 18 (2003), 211–221 at 211.
[70] *Morenski et al.*, supra note 69 at 211.
[71] *Morenski et al.*, supra note 69 at 211; see also *D. Gardiner et al.*, International Perspective on the Diagnosis of Death, British Journal of Anaesthesia 108 (2012), i14–i28 at i15.
[72] *H. Beecher*, A Definition of Irreversible Coma: Report of the Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, The Journal of the American Medical Association 205 (1968), 337-340; *S. Laureys*, Death, Unconsciousness and the Brain, Nature Reviews Neuroscience 6 (2005), 899–909 at 899; *Morenski et al.*, supra note 69 at 211.
[73] *Laureys*, supra note 72 at 899.
[74] *M. Smith*, Brain Death: Time for an International Consensus, British Journal of Anaesthesia 108 (2012), i6–i9 at i6 et seq. with further references.
[75] See Uniform Determination of Death Act, § 1(2), available at <http://www.uniformlaws.org/shared/docs/determination%20of%20death/udda80.pdf>, accessed 15 February 2014; *Gardiner et al.*, supra note 71 at 925; *Smith*, supra note 74 at i7; see also *A.I. Padela & T.A. Basser*, Brain Death: The Challenges of Translating Medical Science into Islamic Bioethical Discourse, Medicine and Law 31 (2012), 433–450 at 437.

1980s,[76] organ shortage became a real problem. At the same time, due to the very high incidence of traffic accidents with resulting serious brain injuries, the issue of brain death became pivotal.[77]

As a matter of fact, in Islam, a number of ethico-legal opinions on the concept of brain death exist.[78] In particular, there has been much debate about whether it is lawful to explant organs from individuals who seem to be 'alive' even though these signs of life are due to high-tech medicine. On the one hand, it is argued that such an individual is not dead but dying, because the soul had not yet departed from the still warm body.[79] On the other hand, if brain death is accepted as legal death, should a cessation of brain function indicate the departure of the soul?[80] Or, in other words, can the failure of a single organ – as opposed to the gradual end of the whole organism – be accepted as death?[81]

Uncertainties about establishing the death of an individual had already been discussed extensively by the classical jurists who considered a certain waiting-period recommendable in the case of some causes before a definite declaration of death.[82] Mainly due to the ambiguity surrounding the nature and timing of death, Islamic jurists have shown a degree of reluctance to accept the brain death formula as a valid definition for 'death'. Consonant with this attitude are various opinions on brain death issued by Muslim juridical councils.[83] In 1985, in Kuwait, scholars of the Islamic Organization for Medical Sciences (IOMS) adopted the brain-stem criterion in the context of organ transplantation by equating this state to the condition that is termed in Islam unstable or expiring life,[84] i.e., a state between life and death. However, although the scholars decided that an individual declared brain stem dead may be disconnected from life-support apparatuses, legal death would not be deemed to have occurred until all cardio-respiratory functions had ceased.[85] A year later, in Amman, Jordan, at the Third International Conference of Islamic Jurists, a declaration was issued by the Islamic Fiqh Academy Council of the Organization of the Islamic Conference (OIC) that equated brain death to the arrest of cardio-respiratory functions. According to this fatwā, a person can be pronounced dead in two instances: First, if heartbeat and breathing stop and physicians decide that this state is irreversible, and second, if all vital brain functions cease and the consultant

[76] See below, section III.1.

[77] See *J. Grundmann*, Shari'ah, Brain Death, and Organ Transplantation: The Context and Effect of Two Islamic Legal Decisions in the Near and Middle East, The American Journal of Islamic Social Sciences 22 (2005), 1–25 at 2; *F.A.M. Shaheen & M.Z. Souqiyyeh*, How to Improve Organ Donation in the MESOT Countries, Annals of Transplantation 9 (2004), 19–21 at 20; on the issue of organ shortage: *A.A. Al Sayyari*, The History of Renal Transplantation in the Arab World: A View from Saudi Arabia, American Journal of Kidney Diseases, 6 (2008), 1033–1046 at 1038 and below, section 3. Regarding the incidence of traffic accidents in the Arabian Peninsula, see *Pulitzer Center on Crisis Reporting*, Washington D.C., 'Roads Kill Map', available at <http://roadskillmap.com/> accessed 15 February 2014.

[78] See *A.I. Padela, A. Arozullah & E. Moosa*, Brain Death in Islamic Ethico-Legal Deliberation: Challenges for Applied Islamic Bioethics, Bioethics 27 (2013), 132–139 at 133; *Krawietz*, supra note 34 at 200 et seq.

[79] Cf. *Atighetchi*, supra note 27 at 175, 191; *M. Al-Mousawi, T. Hamed & H. Al-Matouk*, Views of Muslim Scholars on Organ Donation and Brain Death, Transplantation Proceedings 29 (1997), 3217 at 3217.

[80] Cf. *Padela, Arozullah & Moosa*, supra note 78 at 6.

[81] Cf. *Grundmann*, supra note 77 at 6.

[82] See *Rispler-Chaim*, supra note 22 at 79; *Atighetchi*, supra note 27 at 298; see also *Krawietz*, supra note 34 at 199 with further references: If there was doubt regarding an individual's death, her or his body was to be left alone until it started to smell.

[83] See, e.g., *Padela, Arozullah & Moosa*, supra note 78 at 133 et seq.

[84] This is a state between life and death and is characterised by certain conditions that indicate lingering life without consistent cardiac and respiratory functions: *Sachedina*, supra note 27 at 155; *Krawietz*, supra note 34 at 206.

[85] See *Padela, Arozullah & Moosa*, supra note 78 at 6; *Padela & Basser*, supra note 75 at 439; *Grundmann*, supra note 77 at 8.

doctors rule that this state is irreversible and the brain has begun to degenerate. Under these circumstances it is permissible to disconnect life support machines.[86] Yet in contrast to the 1985 decision of the IOMS, the 1986 ruling of the Islamic Fiqh Academy of the OIC did not explicitly endorse the whole brain or brain stem criteria but rather had resort to the caveat of the irreversible cessation of all vital brain functions.[87] In Saudi Arabia, the Council of Senior Ulama has declared that it is permissible to cease treatment including mechanical ventilation in hopeless cases.[88]

Today, while a plurality of opinions among Muslim legal scholars persists, the identification of brain death with death has been largely accepted in medical circles.[89] Also, the concept of brain death has been accepted in the Arabian Peninsula.[90]

4. Socio-Cultural Factors Influencing Donation Practice

It is a well-known fact that the significance of tribal culture and extended familial bonds, as well as respect for parents and senior family members is still very high in the modern Muslim societies on the Arabian Peninsula.[91] The importance of family and procreation is underscored in the Qur'an, which mandates marriage for everyone who is physically and financially fit to pursue conjugal life. This primary source of religion also considers the birth of offspring conceived within matrimony a blessing.[92] In this spirit, the constitution of the UAE states that the family is the basis of society and that the law shall safeguard its existence.[93] In fact, marriage and procreation are actively encouraged by financial incentives and support.[94] It should also be stressed that the UAE is a close-knit community where families know each other and family members usually share a hierarchical male lineage that can be traced back for many generations. Family members are usually very close – both emotionally and geographically – and the opinions of senior adult family members in particular carry great weight. In addition to the general views such family members may have regarding the issue of organ transplantation, the importance of the extended family is mirrored in the transplantation legislation, where it is often provided that consent must be obtained from the next of kin, sometimes up to the second degree, in the absence of consent from the deceased potential

[86] *Kingdom of Saudi Arabia, Saudi Health Council, Saudi Center for Organ Transplantation*, Diagnosis of Death by Brain Function Criteria, Riyadh 2007, Appendix VII (SCOT Regulations re Brain Death); *Albar*, supra note at 820; *Al Sayyari*, supra note 77 at 1037; *Hassaballah*, supra note 41 at 964.

[87] See the discussion in *Padela, Arozullah & Moosa*, supra note 78 at 4 et seq.

[88] See the Fatwas of the Permanent Committee for Scholarly Research and Ifta', Group 1, Vol. 25, Miscellaneous Fatwas 2, Page Nos. 79–83, Fatwas No. 12086 and 12762; Decree of the Council of Senior Ulama No. 190 of 1419 H. (Fatwas on Medical Issues and the Sick, Rules related to terminal illness, heart-lung resuscitation in certain hopeless cases); see also *Al Sayyari*, supra note 77 at 1037.

[89] See *Al-Mousawi, Hamed & Al-Matouk*, supra note 79 at 3217; *Padela, Arozullah & Moosa*, supra note 78 at 133; see also *Atighetchi*, supra note 27 at 175; see also the critical remarks in *Krawietz*, supra note 34 at 207.

[90] See below, sections III.3.b) and IV.

[91] Regarding the concept of the Muslim family, see *F. Moazam*, Bioethics & Organ Transplantation in a Muslim Society, Bloomington 2006 at 77 et seq.

[92] See, e.g. Qur'an sura 17, verses 23, 24, sura 24, verses 32, 33, sura 16, verse 72, sura 18, verse 46 exemplify the importance of marriage, procreation and the way children should honour their parents. On marriage, see *J.L. Esposito*, Women in Muslim Family Law, 2nd ed., Syracuse 2001 at 14 et seq.; regarding the role of parents in inner-familial organ donation see *F.A.M. Shaheen et al.*, Social and Cultural Issues in Organ Transplantation in Islamic Countries, Annals of Transplantation 9 (2004), 11–13 at 13.

[93] See Art. 15 UAE Constitution. – Similar provisions can be found in other constitutions in the Arabian Peninsula.

[94] – Through instruments like the 'Marriage Fund' (*sandūq al-zawāj*), which sponsors group-weddings and provides grants and housing supports for male citizens marrying female citizens.

donor during her or his lifetime.[95] In practice, on the one hand, the consultation process between family members can mean a long decision-making process, which is quite obviously at odds with the need to remove organs from a deceased person as soon as possible since in transplantation medicine, time is of the essence.[96] On the other hand, close family ties often mean that the readiness to donate is usually high between living relations,[97] whereas the readiness to donate an organ after death or to receive an organ from a deceased person is significantly lower.[98] In Oman, for example, family refusal is one of the main reasons for the kidney transplantation program being based solely on living related kidney donors.[99] In consonance with these findings, the majority of organs used in Middle Eastern transplantation medicine really do come from living, related donors, i.e., donors are related to the patient genetically or by marriage.[100] By contrast, non-living donation is a rare occurrence in this region.[101] In order to encourage donation after death, various campaigns, which include the publication of select religious rulings, have been launched in the Gulf region.[102]

III. The UAE Transplantation Legislation

1. Development of Transplantation Regulations in the Arabian Peninsula

Over the past few decades, transplantation medicine has progressively found approval in the countries of the Arabian Peninsula. At the same time, academic debate and public dialogue regarding a variety of issues, such as transplants from deceased donors,[103] the permissibility of

[95] See *Shaheen et al.*, supra note 92 at 12 et seq.

[96] See *E.O. Kehinde*, Attitude to Cadaveric Organ Donation in Oman, Preliminary Report, Transplantation Proceedings 30 (1998), 3624–3625 at 3625 on the situation in the Sultanate of Oman. According to the Ministerial Decision No. 8/1994, the closest relative may give the consent to donate in the absence of a consent given by the potential donor while alive (Art. 2); yet in practice, it is the extended family that decides. Furthermore, see *Shaheen et al.*, supra note 92 at 13; *Atighetchi*, supra note 27 at 174.

[97] See *Shaheen et al.*, supra note 92 at 13. – In Qatar, for example, most kidney donors are living related: *A. Rasheed & O. Aboud*, Renal Transplantation: Seventeen Years of Follow-Up in Qatar, Transplantation Proceedings 36 (2004), 1835–1838 at 1837.

[98] See, e.g., *M. Mohsin et al.*, Attitude of the Omani Population Toward Organ Transplantation, Transplantation Proceedings 42 (2010), 4305–4308 at 4306; *Rasheed & Aboud*, supra note 97 at 1837.

[99] Similar findings have been reported from other Gulf States. See *M. Al-Mousawi et al.*, Cadaver Organ Procurement in Kuwait, Transplantation Proceedings 32 (1999), 33375–3376 at 3375. – For a study from Saudi Arabia, see *A.A. Alam*, Public Opinion on Organ Donation in Saudi Arabia, Saudi Journal of Kidney Diseases and Transplantation 18 (2007), 54–59 and *B. Al-Attar et al.*, Brain Death and Organ Donation in Saudi Arabia, Transplantation Proceedings 33 (2001), 2629–2631, 2629 et seq.

[100] See *Atighetchi*, supra note 27 at 168; *Shaheen & Souqiyyeh*, supra note 77 at 20.

[101] See *D. Budiani & O. Shibly*, Islam, Organ Transplants, and Organ Trafficking in the Muslim World: Paving a Path for Solutions, in *J.E. Brockopp & Th. Eich*, Muslim Medical Ethics: From Theory to Practice, Columbia 2008, 138–150 at 139; see, for Qatar: Gulf Times, 15 July 2013: 4'000 on Organ Donor Register, available at <http://www.gulf-times.com/qatar/178/details/359521/4,000-on-organ-donor-register> accessed 15 February 2014.

[102] See, e.g., The Peninsula (Qatar), 9 October 2012: "16,606 people vow to donate organs", available at <http://thepeninsulaqatar.com/news/qatar/256360/16606-people-vow-to-donate-organs> accessed 15 February 2014; 'Shariah Fatwa on the Organ Donation' by Dr. Sheikh Yusuf Al-Qaradawi (Qatar), available at <http://organdonation.hamad.qa/en/what_is_organ_donation/religious_perspectives/religious_perspectives.aspx> accessed 15 February 2014.

[103] For example, while the influential Saudi cleric *ʿAbd al-ʿAzīz bin ʿAbd Allāh bin Bāz* (*Ibn Baz*, d. 1999), the former Grand Mufti of Saudi Arabia, acknowledged the ambiguity of the issue, he did not support post-mortem organ donation. Citing hadith evidence, this individual underscored the impermissibility of mutilating a dead body in favour of living persons as a basic principle. In addition, *Ibn Baz* pointed to the danger of commercialization of body parts by the heirs of the deceased: Fatwas of Ibn Baz, Vol. 13, Books on Funerals, Page No. 364, Organ transplant after brain death.

inter-religious organ donation and transplantation,[104] as well as the order of priority of beneficiaries and the criteria of death[105] are still on-going.

In the light of these concerns, it is somewhat surprising perhaps that the first successful kidney transplant in the Arab world involved a kidney from a deceased donor (Jordan 1972).[106] In the Arabian Peninsula, at the end of the 1970s, visiting doctors from the UK came to Saudi Arabia in order to perform a few transplants. From the early 1980s onwards, Saudi physicians started to transplant organs procured locally as well as kidneys obtained from Eurotransplant.[107] However, from the start, there has been a marked shortage of donor organs. In addition, since most other countries in the Peninsula did not have (functioning) organ transplant programmes, it was common for patients from the states bordering the Persian Gulf to travel abroad in order to undergo transplantation procedures. As an unfortunate side-effect of this 'transplantation tourism', the international trade in human organs and the exploitation of donors, who typically come from lower socio-economic background, has been intensified.[108]

Saudi Arabia and Kuwait were the first countries in the Arabian Peninsula to legislate[109] in the realm of organ transplantation. In 1978, the Saudi Council of Senior Ulama issued an official fatwā which approved corneal transplantation.[110] Four years later, in 1982, this body issued a fatwā permitting autotransplantation for a ḏimmī[111] and a Muslim, as well as tissue and organ transplantation from both living and deceased donors for the benefit of a Muslim.[112] In line with these precedent-setting legal opinions, in 1984, the first two kidney transplantations from a deceased local donor who was declared brain dead by using the brain-stem criterion[113] were performed in Saudi Arabia.[114] In 1985, the National Kidney Foundation was established and in 1993, renamed the Saudi Center for Organ Transplantation (SCOT). Today, the SCOT is the central coordinating body for all types of organ transplants in the kingdom.[115] Eventually, several scientific committees were established to deal with various aspects of organ transplantation and tasked with the preparation of regulations which allow for organ donation both from related living donors as well as brain dead donors and corpses and to outline the diagnosis, confirmation and management of brain death.[116] Organ donation from living

[104] In this regard, see *Atighetchi*, supra note 27 at 164 et seq.; *Rispler-Chaim*, supra note 22 at 35, 36 et seq.
[105] See, e.g., *Atighetchi*, supra note 27 at 161 et seq.; *Marcotte*, supra note at 33 et seq., 37 et seq.
[106] *Al Sayyari*, supra note 77 at 1033.
[107] See *Al Sayyari*, supra note 77 at 1037 et seq.; see also, regarding the UAE transplantation tourism: *Grundmann*, supra note 77 at 16.
[108] See *Budiani & Shibly*, supra note 101 at 140; see also *Al Sayyari*, supra note 77 at 1037 et seq.
[109] This term is used in a wider sense here because in Saudi Arabia, where divine law is superior to any man-made law, the legal rulings from select clerics usually have quasi-legislative effect.
[110] Resolution No. 66 of 1398 H. (1978); *Albar*, supra note 22 at 820.
[111] Non-Muslim individual residing in Muslim territory.
[112] Resolution No. 99 of 1042 H. (1982 AD); *Alam*, supra note 99 at 55.
[113] See *Al Sayyari*, supra note 77 at 1040; *Atighetchi*, supra note 27 at 176. – In later years, Saudi Arabia and other countries in the region opted for the whole brain formula; however, in the Sultanate of Oman, brain death is still equated with the brainstem formula: Medical Procedures accompanying Ministerial Decision No. 8/1994, 'Diagnosis of Death'.
[114] *Al Sayyari*, supra note 77 at 1040; *W.K. Al-Khudair & S.O. Huraib*, Kidney Transplantation in Saudi Arabia: a Unique Experience, World Journal of Urology 14 (1996), 268–271 at 268.
[115] See *Shaheen & Souqiyyeh*, supra note 77 at 20; *Al-Attar et al.*, supra note 99 at 2629.
[116] *F.A.M. Shaheen*, Organ Transplant in the Kingdom of Saudi Arabia: New Strategies, Saudi Journal of Kidney Diseases and Organ Transplantation 5 (1994), 3–5 at 4; *United Nations Educational, Scientific and Cultural Organization (Cairo Office)*, Ethics and Law in Biomedicine and Genetics: An Overview of National Regulations in the Arab States, Cairo 2011 (cited as UNESCO Cairo Office) at 49; *Kingdom of Saudi Arabia/Saudi Health Council/Saudi Center for Organ Transplantation*, Diagnosis of Death by Brain Function Criteria at 7 et seq. (SCOT Regulations re Brain Death).

unrelated donors was recognised in 2007 when the Regulations and Procedures for Organ Donation from Living Genetically Unrelated Donors were developed and released.[117] According to these regulations, the SCOT supervises organ donation from living unrelated donors. Donors must be adult nationals or legal residents[118] of at least one year and undergo a thorough medical and psychological evaluation, which has to be assessed by the SCOT. If the outcome of this assessment is positive, the SCOT will issue its written consent to the donation.[119] In order to prevent organ trade, the SCOT coordinates financial compensation for the donor, which includes the re-imbursement of wage loss and the issuance of a King Abdul Aziz Medal of third degree for the donor.[120] Donation from any living individual requires free and informed consent.[121] According to the Saudi regulative framework, diseased or brain dead donors[122] must also have expressed their consent in their lifetime. Alternatively, consent from the next of kin must be obtained. The relatives have to sign a written consent in the presence of two witnesses. In the case of prospective donors with unknown identity, permission may be obtained from the competent authority.[123] In all cases, donation from deceased donors requires the diagnosis of death by two specialist physicians who may not be part of the organ transplant team.[124] Today, many types of transplants are carried out in Saudi Arabia, which remains the regional leader in organ transplantation.[125]

In 1987, the Kuwaiti government issued Decree-Law No. 55 on Organ Transplantation.[126] According to this law, organ donors must be fully competent and have signed a written consent in the presence of two witnesses, which they may withdraw at any time.[127] After a medical examination, the donor must be informed of the consequences of donation in writing.[128] In consonance with Islamic juridical-ethical rules, the donation of vital organs or organs that are necessary to carry out one's activities, is prohibited.[129] Deceased individuals[130] must also have given their written consent to donation in the presence of two witnesses.[131] Regarding organ removal from a deceased person who has not personally expressed permission, this operation is only lawful if at least the majority of the potential donor's relatives of the same degree consent in writing to the donation and the deceased has not objected to donation in writing and in the presence of two witnesses during her or his lifetime.

[117] *Prince Fahad Bin Salman Charity Association for Renal Failure Patients Care/Kingdom of Saudi Arabia, Saudi Center for Organ Transplantation*, Regulations and Procedures for Organ Donation from the Living Genetically Unrelated Donors, Riyadh 2007 (SCOT Regulations for Organ Donation from LURD).
[118] According to the SCOT Regulations for Organ Donation from LURD, „Aim", No. 4, minors are not accepted as donors.
[119] SCOT Regulations for Organ Donation from LURD, "Procedure" Nos. 2–6, 8–9.
[120] SCOT Regulations for Organ Donation from LURD, "Procedure", No. 12; *UNESCO Cairo Office*, supra note 116 at 47.
[121] SCOT Regulations for Organ Donation from LURD, "Procedure", No. 3; *UNESCO Cairo Office*, supra note 116 at 47.
[122] In this regard, see *Saudi Center for Organ Transplantation*, Regulations, Criteria for Fitness of Cadaveric Donor, available at <www.scot.org.sa>.
[123] *Saudi Center for Organ Transplantation*, Regulations, Procedure of Deceased Organ Donation, Step VI.
[124] *Saudi Center for Organ Transplantation*, Regulations, Procedure of Deceased Organ Donation, Step III. – For the prerequisites, see also GCC Unified Manual for Organ Transfer and Transplant, below, section IV.
[125] See *Al Sayyari*, supra note 77 at 1041; *C.C. Canver et al.*, A High-Volume Heart Transplantation Center in an Islamic Country, Asian Cardiovascular and Thoracic Annals 19 (2011), 244–248 at 233.
[126] See the English text of the law in: *World Health Organization*, Legislative Responses to Organ Transplantation, Dordrecht 1994 at 250 et seq. See also Ministerial Orders Nos. 44–46 of 1989 and No. 253 of 1989, the implementing regulations.
[127] Art. 2, 4 Kuwait Organ Transplant Law.
[128] Art. 4 Kuwait Organ Transplant Law.
[129] Art. 3 Kuwait Organ Transplant Law.
[130] Including brain dead individuals. In this regard see Ministerial Order No. 253 of 1989.
[131] Art. 2 Kuwait Organ Transplant Law.

In addition, three medical specialists have to have confirmed death.[132] Organ trade is prohibited.[133] The consequences of violations of the law include imprisonment and fines.[134]

In the 1990s and early 2000s, the other countries in the Arabian Peninsula followed suit and enacted national transplantation legislation: The UAE (1993),[135] Oman (1994),[136] Qatar (1997),[137] Bahrain (1998),[138] and Yemen (2002).[139] While differing on some points, these laws enshrine the same fundamental principles such as the necessity of written consent from donors, who have to be fully informed of the potential risks and consequences of organ removal, the right to withdraw this consent at any time, and the prohibition of organ trafficking.[140] Furthermore, in all countries except Oman and Yemen,[141] donors and recipients may be living related donors or living non-related donors. The laws also permit the procurement of organs from dead persons; but due to the reluctance concerning post-mortem donation, as well as unresolved legal and practical issues, transplantation of vital organs such as hearts only occurs sporadically or not at all.[142]

2. Legal Framework of the UAE Health Legislation

In recent years, significant process has been made in modernising the UAE healthcare system by creating new authorities and enhancing the legal framework. Various regulatory bodies, such as the Ministry of Health, Health Authority Abu Dhabi (HAAD), the Dubai Health Authority (DHA), and the Emirates Health Authority (EHA) currently manage public healthcare services, which are free for UAE nationals. The Sharjah Health Authority (SHA), established in 2010, is a recent addition to these entities. The UAE constitution, which provides the legal framework for the federation, grants the federal government exclusive legislative (and, in some instances, also executive) powers over a catalogue of issues that concern principal areas of law and central aspects of the federation. The local governments have the jurisdiction over matters which are not assigned by the constitution to the exclusive jurisdiction of the federal government and which have not yet been regulated by the federation.[143] While the federal government has the exclusive authority to enact laws in the realm of public health, medical services, as well as insurances of all kinds,[144] the emirates have the duty to implement such federal laws, including the power to issue local laws and regulations necessary to implement federal legislation.[145] In the past few decades since its

[132] Art. 5 Kuwait Organ Transplant Law.
[133] Art. 7 Kuwait Organ Transplant Law.
[134] See Art. 10 Kuwait Organ Transplant Law.
[135] UAE Federal Law No. 15/1993 concerning the Transfer and Transplant of Human Organs.
[136] Omani Ministerial Decision No. 8/1994 concerning the Rules Governing the Transplantation of Human Organs.
[137] Qatar Law No. 21/1997 on the Organization of the Transfer of Human Organs.
[138] Bahrain Decree Law No. 16/1998 on Transplants of Human Organs.
[139] Yemeni Law No. 26/2002 regarding the Practice of the Medical and Pharmaceutical Professions.
[140] See *UNESCO Cairo Office*, supra note 116 at 41 et seq.
[141] According to Art. 1(d) of the Omani Ministerial Decision No. 8/1994 concerning the Rules Governing the Transplantation of Human Organs, the recipient must be related to the donor either by blood or through marriage. Regarding Yemen, see *UNESCO Cairo Office*, supra note 116 at 47.
[142] For the exception of Saudi Arabia, see above, footnote 125.
[143] See Art 116 et seq., 120, 121, 122 and 125 UAE Constitution. – It is noteworthy that the federal Constitution only foresees local laws and regulations within the frame of the implementation of federal laws through the governments of the individual Emirates. See also *Heard-Bey*, supra note 6 at 373 et seq.
[144] See Art. 120 No. 12 and 121(2) UAE Constitution, respectively.
[145] Art. 122, 125(1) UAE Constitution.

foundation (1971), the federal government has enacted general laws pertaining to medical practice as well as many specialised laws.[146] One of the most important as well as earliest laws dates back to the 1970s and regulates the practice of human medicine: Federal Law No. 7/1975 concerning the Practice of Human Medicine (as amended) stipulates the prerequisites for the licensing and registration of physicians, as well as defining the specific requirements for the establishment of medical laboratories, clinics and private hospitals. So far, there is no federal law regulating the issue of health insurance in the UAE.[147]

Existing healthcare laws include:

- Federal Law No. 4/1983 concerning Pharmaceutical Professions and Establishments and the Import, Manufacture and Distribution of Pharmaceutical Products
- Federal Law No. 5/1984 concerning the Licensing and Registration of Physicians, Pharmacists and other Healthcare Specialists within both Public and Private Healthcare Establishments
- Federal Law No. 2/1996 concerning Private Health Facilities
- Federal Law No. 10/2008 concerning Medical Liability
- Federal Law No. 11/2008 concerning Licensing Fertility Centers
- Cabinet Decision No. 28/2008 concerning Blood Transfusion Regulation
- Cabinet Decision No. 33/2009 promulgating the bylaw of the Medical Liability Law
- Cabinet Decision No. 36/2009 promulgating the bylaw of the Fertility Centres Law

The UAE federal Constitution, the federal laws relating to free zones and the legislative powers of the individual emirates emanating from the federal Constitution permit each Emirate to set up so-called 'free zones' for various economic activities.[148] In conformity to this legal framework, besides the public hospitals and private clinics, a number of so-called healthcare free zones, which offer private health care of a high international standard to patients, have been set up. Examples are the Dubai Healthcare City and Dubai Biotechnology and Research Park. Within these free zone health establishments, federal and local laws apply but are typically supplemented by the free zone's own regulatory framework, which may also override federal and Emirate-level law in some instances.[149]

[146] Federal Law No. 7/1975 concerning the Practice of Human Medicine, as amended; Federal Law No. 5/1984, concerning the Practice of some Medical Professions by Persons other than Physicians and Pharmacists; Federal Law No. 2/1996 concerning Private Medical Facilities, as amended.

[147] See, e.g., *E. Schildgen & Z. Tahsili*, Healthcare in the UAE, Lex Arabiae, January 2010, available at <http://lexarabiae.meyer-reumann.com/blog/2010-2/healthcare-in-the-united-arab-emirates/> accessed 15 February 2014. But see The National (UAE), 8 May 2013: „UAE companies to provide mandatory health insurance for all under draft law", available at <http://www.thenational.ae/news/uae-news/health/uae-companies-to-provide-mandatory-health-insurance-for-all-under-draft-law> accessed 15 February 2014.

[148] While companies established in the UAE are required to have one or more national partners whose share in the company capital must be 51% or more, free zones typically offer 100% foreign ownership of companies within their territory and offer exemptions from taxes and customs duties, as well as other benefits.

[149] See *E. Schneider Kayasseh*, Das Recht Saudi-Arabiens und der Vereinigten Arabischen Emirate, Schweizerische Zeitschrift für internationales und europäisches Recht 22 (2012), 243–287 at 278. – See, e.g., the clinical Regulations and Rules governing Healthcare Professionals and Healthcare Operators working in Dubai Healthcare City, available at <www.dhcc.aehttp://www.cpq.dhcc.ae/cpq/regulations/> accessed 15 February 2014.

3. The UAE Transplantation Law and Regulation

In 1993, in the wake of earlier Saudi and Kuwaiti transplantation regulations, UAE Federal Law No. 15 on the Transfer and Transplant of Human Organs (Transplant Law) was enacted. Although the law permits both living and deceased donation, it does neither define death nor establish the criteria for diagnosing human death. Namely, due to the absence of a definition of death, it was unclear whether brain death could be defined as human death. In 1998, on the occasion of the first Gulf Cooperation Council Organ Transplantation Congress, prominent (albeit controversial) Muslim scholar Yusuf Al-Qaradawi not only sanctioned live and dead donation and the donation from Muslim to non-Muslim (and vice versa), but also accepted the concept of brain death and subsequent organ removal from such a patient.[150] In May 2010, UAE Ministerial Decision No. 566 on the Implementing Regulation of the Organ Transplantation Law (Transplant bylaw) was issued. This regulation provides the definition that has made it legal for surgeons to explant organs from brain dead patients, as well as establishing the guidelines for multi-organ donation including kidney, liver, lung, pancreas and heart.

a) Donations from Living Individuals

Any adult person with full legal capacity, i.e. an individual who is mentally and physically fully capable and over the age of 21,[151] may express the will to donate organs.[152] Conversely, the removal of organs from minors or from living adults who are fully or partially incapacitated is illegal and any consent given by such person or her or his legal representative shall be deemed null and void.[153] Obviously, this rule is aimed at protecting the bodies and minds of those who are especially vulnerable, namely children and the mentally handicapped. On the other hand, the right of self-determination of the adult donor is protected by the stipulation that the adult donor has to give written approval willed in the presence of two witnesses with full legal capacity and that he or she remains free to withdraw her or his consent at any time prior to the removal of the organ.[154] There are to be no reasons present that invalidate consent.[155]

Organs may furthermore only be removed on condition that:

- A thorough physical examination has been performed in order to ensure that the donor is physically fit and that the donation will neither jeopardise her or his health or threaten this individual's life;[156]
- A psychological examination by specialist physicians has taken place in order to determine that the donor is acting out of free will and is in a healthy mental condition to undergo the operation;[157]

[150] See *El-Shahat*, supra note 25 at 3272; see also *A. Naher, J. M. Low & Y. L. Sim*, Ethical, Religious, Legal and Cultural Issues for Organ Banking, in *A. Naher, N. Yusof & N. Hilmy* (ed.), Allograft Procurement, Processing and Transplantation: A Comprehensive Guide, Singapore 2010, 107–120 at 110.

[151] Art. 2 Transplant Law, Art. 1, 3(3), 7(1) Transplant bylaw.

[152] Art. 2 Transplant Law, Art. 1, 7(1) Transplant bylaw.

[153] Art. 2 Transplant Law, Art. 3(3) Transplant bylaw.

[154] Art. 1, 5 Transplant Law, Art. 5(1), 7(2) and 8(1) Transplant bylaw. – After the organ has been removed, consent to donation may no longer be retracted: Art. 5 Transplant Law, Art. 8(1) Transplant bylaw.

[155] Art. 7(1) Transplant bylaw.

[156] Art. 3, 4 Transplant Law, Art. 4(a) Transplant bylaw.

[157] Art. 4 Transplant Law, Art. 4(b) Transplant bylaw.

- The donor has been notified in writing and in her or his own language of the results of the necessary tests and examinations and all confirmed and potential side-effects of the organ donation, as well as potential effects on her or his personal and professional life.[158]

The removal of a vital organ or an organ that will lead to the death of the donor or will render her or him incapable of performing her or his duty is forbidden even with the donor's consent.[159] As has been previously mentioned, in Islamic teaching, such an act would amount to the crime of homicide or suicide, which is widely considered forbidden.[160] A transplantation procedure may furthermore not take place if the specialist physicians deem it likely that the outcome of the transplantation will not be a success.[161] In other words, there must be a fairly good chance that the patient will recover from her or his condition, because otherwise, the interference with the donor's physical integrity would not be justified, since it is not legitimate to injure someone in order to prevent an equal injury. At the same time, this rule reflects the axiom that the benefit to the recipient should be greater than the harm to the donor.

b) Deceased Donors

Any living person may express her or his will to donate organs after death in writing in the presence of two witnesses who are legally fully competent.[162] This declaration of consent must be free of defects,[163] and may be withdrawn at any time prior to death.[164] In the absence of such an explicit consent, the written consent of the next of kin up to the second degree must be obtained. In the case of multiple relatives of the same degree, majority consent is a prerequisite for the organ removal.[165] This consent is further contingent upon the absence of any written opposition of the decedent to the organ removal, witnessed by two people with full legal capacity, or her or his withdrawal of the consent to donate organs post-mortem before death.[166] At any time prior to organ removal, a positive decision by the majority of the relatives of the first and second degree may be reversed if one or more persons change their minds about the decision to allow donation.[167] In any case, the recovery of organs from a deceased individual depends on the attestation of death by a committee of three specialised, trustworthy physicians one of whom must be a neurologist. Any doctor involved in the transplantation is barred from being party to this committee. These specialists must render a written account of their findings endorsed with their signature.[168] Under the law, death is defined either as the complete and irreversible cessation of heart and lung functions or the complete and irreversible absence of all brain functions, and that the brain has begun to disintegrate.[169] In other words, in the UAE,

[158] Art. 4 Transplant Law, Art. 4(c) Transplant bylaw.
[159] Art. 3 Transplant Law, Art. 3(1) Transplant bylaw.
[160] See *Albar*, supra note 22 at 819.
[161] Art. 3(1) Transplant bylaw.
[162] Art. 2 Transplant Law, Art. 5(1) and Art. 7 Transplant bylaw.
[163] Art. 7(1) Transplant bylaw.
[164] Art. 5 Transplant Law, Art. 8(3) Transplant bylaw.
[165] Art. 6 Transplant Law, Art. 5(2) Transplant bylaw.
[166] Art. 6(2) Transplant Law, Art. 5(2)(b) Transplant bylaw.
[167] Art. 8(2) Transplant bylaw.
[168] Art. 6(1) Transplant Law, Art. 5(2)(a), 6 Transplant bylaw. Arguably, the committee of three doctors was first mentioned of the decision by the Fiqh Academy of the Muslim World League in 1987: *Grundmann*, supra note 77 at 10; see also *Rispler-Chaim*, supra note 22 at 34.
[169] Art. 1 Transplant bylaw.

cardiac death and brain death are explicitly equated. Regarding brain death, the UAE has adopted the whole brain formulation.

c) Joint Provisions

Under the Transplant Law, the term 'organ' is defined as "a group of connected tissues and cells that participate in specific vital functions inside a human body".[170] The law states that organs may be explanted from a donor for the therapeutic purposes of the recipient only.[171] In the light of the Islamic teaching outlined above, any other motive for the operation is likely to be considered amounting to an unnecessary – or even forbidden – mutilation, and in case of the dead donor, desecration of the body. Also, it is forbidden to retrieve organs or parts thereof that are associated with reproduction, as well as organs that are carriers of genetic traits, and to transplant them into another individual.[172] This rule reflects a certain worry that genetic materials could be mixed and that the purity of the lineage of a person (nasab), and especially of a later-born child, could be compromised.[173]

Further ethico-religious issues, such as the respect for the human body, of which an individual is a mere trustee, and which after death will be resurrected on the Day of Judgment, are reflected in the law. Namely it is stated that human dignity must be respected during the removal of organs and that the body must be protected from humiliation or deformation.[174] In this regard, then, it can be assumed that any operation that would inflict physical deformation or affect the personal appearance of an individual, such as the removal of an eye or face tissue in order to treat people with facial disfigurement, or the donation of a hand or foot, are unlikely to be permitted.[175]

Donor identity may not be disclosed to the recipient unless necessary.[176] However, the law does not address recipient anonymity nor specify the selection criteria for recipients. Any form of organ trafficking is illegal under the law and physicians are barred from performing an organ transfer operation as soon as they become aware of a commercial exchange.[177] In spring 2008, representatives from medical bodies from the UAE participated in the International Summit on Transplant Tourism and Organ Trafficking convened by the Transplantation Society and International Society of Nephrology in Istanbul, Turkey, where the Declaration of Istanbul on Organ Trafficking and Transplant Tourism that is based on the Universal Declaration of Human Rights, was issued. Although this declaration represents the consensus of the summit participants rather than being a legal document, it contains important principles, which were eventually presented to country-specific health authorities as well as professional organisations. The document condemns any form of organ trafficking and transplant tourism and calls for eventual national self-sufficiency in organ donation and/or regional collaboration

[170] Art. 1 Transplant bylaw. – Italics added by the author.
[171] See Art. 1 Transplant Law, Art. 2(1) Transplant bylaw.
[172] Art. 3(2) Transplant bylaw.
[173] Similarly, in the realm of reproductive medicine, third-party donation involving the gametes of a person other than the biological parents of the child-to-be is forbidden. In addition, medical personnel must take precautionary measures to ensure that the sperm or eggs of different patients are not mixed up. In this regard, see Art. 10, 19 UAE Federal Law No. 11/2008 concerning Licensing of Fertility Centres in the State.
[174] Art. 2(2) Transplant bylaw.
[175] Art. 2(2) Transplant bylaw; cf. *Sachedina*, supra note 27 at 187 et seq.
[176] Art. 2(2) Transplant bylaw.
[177] Art. 7 Transplant Law, Art. 9 Transplant bylaw.

with appropriate actions to increase deceased organ donation in order to render travel for transplantation obsolete. Another important axiom that is restated is the principle of non-discrimination, i.e. that organs should be allocated to patients without regard to gender, ethnicity, religion, or social or financial status.[178] In this regard, the UAE Constitution stipulates that all citizens are equal and that cooperation and mutual mercy shall be a firm bond between them.[179] Consequently, the UAE transplantation legislation refers neither to the religious affiliation nor the gender of donor and recipient.

In closing, it is stated that operations in connection with the removal and implantation of human organs may only be performed in the medical centres designated by the UAE Ministry of Health for that purpose.[180] At present, the Abu Dhabi National Transplant Center (the Division of Transplantation and Hepatobiliary Surgery at Sheikh Khalifa Medical City) is the only institution where transplants may be performed. Any transgressions of the law is punishable with imprisonment and a fine of up to 30,000 Dirhams maximum or either one of these punishments. There is a stiffer penalty for repeat offenders.[181]

IV. GCC Unified Manual for Organ Transfer and Transplant

In the view of the ever-increasing demand for organs,[182] the absence of effective registration systems (although very recently steps in this direction have been taken)[183] and almost no coordination and cooperation between individual hospitals,[184] the need for regional collaboration arose. In the 1990s, the SCOT spearheaded an organ- and information-exchange program between Saudi Arabia, Oman, and Kuwait.[185] Over the following years, other countries in the Arabian Peninsula started their own transplantation programs. Also, in the wake of the economic boom, a high number of expatriate physicians who brought their own schools of medicine with them were employed in public and private clinics. These factors, coupled with other realities such as the high turnover of medical personnel,[186] made it evident that procurement procedures and key-points in legislation would have to be streamlined. In 2006, the Health Ministers of the member states of the Gulf Cooperation Council (GCC) approved the 'Gulf Unified Guide to Organ Transfer and Transplant' (GCC Unified Manual)

[178] See The Declaration of Istanbul on Organ Trafficking and Transplant Tourism, Clinical Journal of the American Society of Nephrology 3 (2008), 1227–1231 at 1227 et seq. – Furthermore, this document contains recommendations that should guarantee the protection and safety of living donors; see *op. cit.* at 1229.

[179] Art. 14 UAE Constitution.

[180] Art. 8 Transplant Law, Art. 10(1) Transplant bylaw.

[181] Art. 10 Transplant Law, Art. 11 Transplant bylaw.

[182] See *Grundmann*, supra note 77 at 14; *Shaheen & Souqiyyeh*, supra note 77 at 20.

[183] See, e.g., The National (UAE), 18 April 2013: „National database for organ donors will save hundreds of lives, says UAE expert", available at <http://www.thenational.ae/news/uae-news/health/national-database-for-organ-donors-will-save-hundreds-of-lives-says-uae-expert> accessed 15 February 2014; Gulf Times (Qatar), 15 July 2013: „4'000 on Organ Donor Register", available at <http://www.gulf-times.com/qatar/178/details/359521/4,000-on-organ-donor-register> accessed 15 February 2014; Gulf Daily News (Bahrain), 17 June 2013: "Organ Donation Database Hope", available at <http://www.gulf-daily-news.com/NewsDetails.aspx?storyid=355498> accessed 15 February 2015.

[184] See, in this regard, *F.A.M. Shaheen et al.*, Solid Organ Registry: Organization and Structure, Transplantation Proceedings 33 (2001), 2641; *A. Naqvi & A. Rizvi*, Registries in the Middle East: Problems and Prospects, Transplantation Proceedings 33 (2001), 2640.

[185] – and, to a lesser extent, with Bahrain and Qatar: *Grundmann*, supra note 77 at 14.

[186] In this regard, see *Shaheen et al.*, Current Issues and Problems of Transplantation in the Middle East: The Arabian Gulf, Transplantation Proceedings 33 (2001), 2621–2622 at 2622.

issued by the GCC Executive Board.[187] As a member state of the GCC, the UAE is a signatory to this agreement, which includes rules for organ transplant as well as for the definition and diagnosis of death. According to the UAE transplant legislation, the GCC Unified Manual functions as the organ transfer and transplant manual of the country, which may be subjected to amendments if developments in the field of transplant medicine necessitate such a step.[188]

In its first part, the GCC Unified Manual stipulates the key principles, which guided the legislature in the GCC states. These include the following fundamentals and minimum requirements:

- Organs may be procured from living and deceased donors;[189]
- An individual is considered dead if the irreversible and complete cessation of the cardiopulmonary or brain functions occurs;[190]
- Donation must not negatively affect the donor's health, capabilities or lead to her or his death;[191]
- Any person with full legal capacity may express her or his willingness to donate any of their organs during lifetime or after death in writing (full legal capacity is attained at the age of 18 years or older);[192]
- He or she may at any time prior to organ removal withdraw this consent;[193]
- The donor must undergo a medical examination by a specialised medical team and be fully informed about the consequences of organ donation and possible complications;
- Organs from a deceased donor may only be removed with the prior consent in writing of the donor's family and after verification of death by a committee of specialised physicians;[194]
- Organ trafficking is absolutely forbidden and physicians may not proceed with the organ transfer as soon as they become aware of the commercial background of the organ procurement in accordance with the recommendations of the World Health Organisation and the Declaration of Istanbul on Organ Trafficking and Transplant;[195]
- Organs may only be transplanted at designated medical facilities licensed in the member states.[196]

It is noteworthy that the GCC Unified Manual in principle allows the donation of any organ, as long as the donor's health or life are not jeopardised. In this context it should be remembered that in the UAE, it is illicit to transplant organs or parts thereof that are connected with reproduction from one body to another. Furthermore, in the UAE, the consent of family members to donation must only be obtained if the donor has not expressed during her or his

[187] Health Ministers' Council for the GCC States Decision No. 3/2006.
[188] See Art. 11 Transplant Law, Art. 12(1) and (2) Transplant bylaw.
[189] Art. 2 GCC Unified Manual.
[190] Preamble 'Definitions' GCC Unified Manual.
[191] Art. 6 GCC Unified Manual.
[192] Preamble 'Definitions' and Art. 3 GCC Unified Manual.
[193] Art. 5 GCC Unified Manual.
[194] Art. 3, 7 GCC Unified Manual.
[195] Art. 8 GCC Unified Manual.
[196] Art. 9 GCC Unified Manual.

lifetime the willingness to donate organs after death by a written statement in the presence of two witnesses.

The GCC Unified Manual then goes on to list the duties of the Coordination Centers for Organ Transplant,[197] as well as general rules of procedure that must be followed by all hospitals and transplant centers in the member states, such as: the duty of hospitals to report death cases to the coordination center, to verify death according to specified criteria, to provide lists of patients in need of transplantation surgery and follow-up reports after surgery. The Manual furthermore contains conditions and requirements for private hospitals that perform organ transplants. In a second part, specifications for the establishment and administration of transplant centers and conditions for the procurement of organs from deceased and (where applicable, depending on the organ in question) living donors are stipulated, followed by contraindications to transplantation and rules for the allocation of available organs to patients for each of the following organs: kidneys, heart, lungs, liver, cornea. The manual then establishes the standards of viability of deceased donor's organs for transplantation purposes, and specifies the type of care a brain dead person shall receive until organs can be removed for transplantation purposes. The Annexes contain various forms such as the death documentation form, in which the details of the clinical examination for brain death certification are stipulated (Annex 3), consent form (Annex 4), guides to medical tests donors and recipients must undergo (Annexes 5-12), the decision No. 99/1982 of the Council of Senior Ulama of Saudi Arabia, which recognised the lawfulness of both living and deceased donor transplantations (Annex 2), as well as the Resolution No. 17/1986 of the Council of the Islamic Fiqh Academy, which equated legal death to brain death but remained somewhat ambiguous regarding its definition (Annex 1). Likewise, the GCC Unified Manual is not explicit on the definition of brain death, but rather outlines the particulars of the diagnostic process.

V. Conclusion

Over the last few decades, the UAE has undergone a huge economic transformation marked by the development of modern healthcare facilities. Formerly a very isolated region where traditional medicine based on medicinal herbs, age-old practices and spiritual healing were the rule, the region was then visited by missionary doctors until the first hospitals were established in the mid-20th century. After the founding of the UAE in 1971, modern medical services became available and health laws were issued. Although the UAE was one of the first countries on the Arabian Peninsula to issue transplantation legislation, for various reasons, the national transplantation program was only started in 2007. It took another six years and the clarification of the legal definition of 'death' till the first kidney transplantation from a deceased donor was carried out last year. According to the UAE transplantation legislation, which mirrors religious and cultural issues in various respects, organs may be transplanted from a living or dead person to a living recipient. The UAE uses an opt-in system where the explicit consent of donors (or their relatives) is necessary for organ retrieval. Organ transplantation is licit for therapeutic purposes only and the removal of organs that have reproductive functions is banned. Recently, the GCC Unified Manual for Transplantation has become effective. This

[197] See for these and the following rules, *Health Authority Abu Dhabi*, Book 4: Transfer and Transplant of Human Organs, Gulf Unified Guide to Organ Transfer and Transplant in the GCC States, 16–80 at 22 et seq.

guideline aims at unification of procedures and collaboration between the GCC states Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, the UAE and Yemen in the field of organ transplantation.

Three Decades of Islamic Criminal Law Legislation in Iran: Legislative History Analysis with Emphasis on the Amendments of the 2013 Islamic Penal Code

*by Mohammad H. Tavana**

Abstract

The present paper introduces the traditional perception of Islamic criminal law and studies its status in the Iranian legal system during two eras of legislation; from 1906 to 1979 and since then up to the present day. The paper's main areas of attention are the legislative history analysis of Islamic criminal law during the past three decades and a comparison between the 1991 and 2013 Islamic Penal Codes. It concludes by enumerating the results of the comparison between similar provisions under the two Codes.

I. Islamic Criminal Law

The perception of criminal law in the Civil Law system and the Common Law system is relatively different from its understanding in the context of the Islamic legal tradition. This is partly due to the fact that criminal law was not defined as a single and unified branch of law in the sources of Islamic law.[1] In fact, Islamic criminal law has been shaped by the rules mentioned dispersedly in the sources of Islamic law and the later discussions of Muslim jurists on interpreting, justifying and expanding those rules. Various categories of crimes are classified by different criteria[2] in Islamic criminal law but the predominant classification is based on the imposed punishments. The traditional Fiqh[3] textbooks categorize offences into four groups, punishable by Hudud, Qisas, Diyat and Ta'zirat punishments and define special characteristics for each category.

* LL.B., ShahidBeheshti University, Faculty of Law, LL.M., Stockholm University, Faculty of Law, Ph.D. Candidate, University of Zurich, Faculty of Law. I would like to thank Mr. Saeed Haghani and Mr. Mansour Vesali for their comments on earlier draft of this paper. I am particularly indebted to Mr. Bagher Asadi for his valuable guidance and comments.

[1] RUDOLPH PETERS, *Crime and Punishment in Islamic Law – Theory and Practice from the Sixteenth to Twenty-first Century*, 2005, New York, Cambridge University Press, p. 7.

[2] See MOHSEN RAHAMI, 'Development of Criminal Punishment in the Iranian Post-Revolutionary Penal Code', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 13, Issue 4, 2005, pp. 588-589. The author classifies the crimes based on the Sharia interest and the interests of the society into six groups of crimes against the physical integrity and moral dignity of individuals such as homicide, injury and beating, crimes against property and assets such as theft and robbery, crimes against public security and security of the state, such as *Muharaba* (waging war against God), crimes against the religion, such as apostasy and blasphemy, crimes against reason, such as drinking alcoholic beverages, and crimes against morality and family values, such as sodomy and adultery.

[3] MOOJAN MOMEN, *An Introduction to Shi'i Islam – The Historty and Doctorines of TwelverShi'ism*, 1985, New Haven, Yale University Press, p. xix. *Fiqh* is religious jurisprodance and *Faqih* (pl. *Foqaha*) is an expert in *Fiqh*. *Faqih* is used in Shiite world as equivalent of *Mujtahid*.

The first category consists of the specific offences with fixed and mandatory punishments, as mentioned in the primary sources of Islamic law (i.e. the Quran and the Sunna[4]). It is called Hudud punishments. According to Shiite[5] and Hanafi[6] scholars, these crimes must be entirely or predominantly violation of a Divine claim and therefore they are called "rights of God" or "claims of God".[7] Qisas or retaliation is the second category which concerns the punishment for crimes against the body (bodily injury) and crime against the person (homicide). Under Islamic law, a person who has suffered from intentionally caused injuries resulting in amputation of body organs, infliction of wounds and blinding is entitled to seek retaliation, and death penalty could be imposed by way of retaliation for intentional homicide upon the request of the heirs of the victim – with the exception of the spouse.[8] The third category consists of the crimes that are punishable by Diyat or financial compensation. This category of punishments is applicable when an accidental or semi-intentional act causes bodily harm or death or in cases where they were caused intentionally but a sentence of retaliation could not be pronounced.[9] The last category comprises of all other sinful acts or forbidden conduct under Islamic law which fall outside the scope of other three categories and are punishable by Ta'zirat or discretionary punishment.[10]

II. Islamic Criminal Law in the Iranian Legal System

In the 20th century, Iran has witnessed different eras of legislation with different approaches due to two revolutions which led to substantial changes in the Iranian political and legal systems. The status of Islamic law and more specifically Islamic criminal law in the Iranian legal system has considerably changed in each era. In order to properly understand the changes in each period it is important to have a general overview of the criminal legislative history with emphasis on the status of Islamic criminal law in each era. Moreover, the survey will help us find the roots of the changes, understand the reasons and rationale behind them and finally analyze the recent changes in light of their historical background.

1. Islamic Criminal Law before the 1979 Revolution

It is to be noted that the establishment of legal system in Iran, in its modern conception, dates back to the early days of the 20th century; as an aftermath of the Constitutional Revolution (1905-06). Up until then, at least two parallel types of adjudication on criminal matters had been exercised in the country. The first type was practiced in Sharia courts where the judge – who was an Islamic law scholar as well – dealt with the abovementioned four categories of crimes and made his decision based on the precepts (rules) of Islamic criminal law. The second type of the courts worked directly under the supervision of the central or provincial

[4]*Ibid*., p. 173. *Sunna* consists of the preserved reports from the words and deeds of the Prophet (and the Imams for Shiite).
[5]The primary division between Muslim scholars into the two major sects, Sunni and Shiite, is rooted in the early developments of Islamic law and has continued until the present time. Currently different Shiite branches exist and among them the largest sect is called *Jafari* or Twelver Shiite which is pervasive in Iran, Iraq, Lebanon, and Bahrain.
[6]The four main schools of *Fiqh* within the Sunni Islam are *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali*.
[7] PETERS, *supra* note 1, pp. 53-54. Theft, banditry, unlawful sexual intercourse, the unfounded accusation of unlawful sexual intercourse (slander has a hybrid nature and unlike the other *Hudud* punishments that cannot be waived by men is considered as both a claim of God and a claim of men in this respect), drinking of alcohol and apostasy (according to some schools of law) are *Hudud* crimes.
[8]*Ibid*., pp. 36-37.
[9]*Ibid*., p. 49.
[10]*Ibid*., p. 65.

governments and heard the cases with public or political aspects such as crimes against the government, causing disorder, refusing tax payments and contact with aliens.[11] The Constitutional Revolution put an end to this dual system and led to the establishment of the Parliament and a modern semi-secular judicial system in Iran. Although according to Article 1 of the Supplement of the Constitution[12] the Shiite Islam was the official religion of the land and Article 2 stated that the laws should be in conformity with the religion of the land, these provisions did not considerably affect the criminal law legislation.

While the Code of Criminal Procedure passed in 1911, by the First Parliament, is considered as the first piece of criminal law legislation in the Iranian legal system[13], the Customary Criminal Code – a secular penal code – is the first Iranian penal code which was adopted tentatively by the decree of council of ministers in 1916. This Code was not in force for a long time and was replaced by the General Penal Code just a few days after the transition of monarchy from the Qajar to Pahlavi dynasty in 1925. Both the framework and substance of the General Penal Code of 1925 (hereinafter "the 1925 Code") were inspired, in large measure, by the French system and the Napoleonic Codes[14]; hence offences were recognized and categorized based on secular norms.[15] According to Article 1 of the 1925 Code, the punishments laid down were "to maintain order in the country and be administrated by the courts of justice". In the same Article, the 1925 Code referred to Islamic criminal law punishments in broad terms by stating that the offences "investigated and discovered according to Islamic norms" are to be punishable by Hudud and Ta'zirat according to Islamic criminal law. However, the status of the Sharia courts experienced a state of instability during the decades that followed until their abolition in 1973[16] when the application of Islamic criminal law was removed from the Iranian legal system formally by deletion of the provision related to religious prosecution from the amended form of Article 1.[17]

2. Islamic Criminal Law after the 1979 Revolution

The 1979 Revolution changed not only the political system in Iran but also the basis and norms of legislation in the country. In the view of the first leader of the Islamic Republic of Iran, Ayatollah Khomeini, only under a purely Islamic government could "true" justice be administered. As also stated in his book on "Islamic Government" (1971): "The body of Islamic laws that exist in the Quran and the Sunna have been accepted by Muslims and recognized by them as worthy of obedience."[18] Accordingly, the 1979 Constitution [19] (hereinafter "the Constitution") emphasizes that all kinds of legislation must be in conformity with Islamic

[11] RAHAMI, *supra* note 2, p. 585.
[12] The first constitution of Iran was signed by the Qajar King; Mozzafar-al-Din Shah, on December 30, 1906. A few months later the Supplement of the Constitution was signed by another Qajar King; Mohammad Ali Shah, on October 7, 1907.
[13] ZIBA MIR-HOSSEINI, 'Sharia and National Law in Iran', in *Sharia and National Law: Comparing the Legal Systems of Twelve Islamic Countries*, OTTO JAN MICHIEL (ed.), 2010, Cairo, the American University in Cairo Press, p. 357.
[14] GOODARZ EFTEKHAR JAHROMI, 'The Principle of Legality and Its Developments' (in Persian),*Journal of Legal Research*, ShahidBeheshti University, No. 25 & 26, 1999, p. 88.
[15] HAMI R. KUSHA, *The Sacred Law of Islam*, 2002, Aldershot, Ashgate Publishing Limited, p. 135.
[16] In 1973 the General Penal Code was amended and the first 59 articles of the 1925 Code on Generalities were replaced by new provisions.
[17] RAHAMI, *supra* note 2, p. 586.
[18] KUSHA, *supra* note 15, p. 155.
[19] The Constitution of the Islamic Republic of Iran was adopted by a referendum on October 24, 1979, and went into force on December 3 of that year, replacing the Constitution of 1906.

norms.[20] In order to ensure this conformity, the Constitution envisions the establishment of the Guardian Council; a body consisting of Foqaha (Mujtahids) and jurists (lawyers), which is responsible for supervising the conformity of parliamentary enactments with Twelver Shiite Fiqh and the Constitution itself.[21] Contrary to the practice of the Legislature under the Supplement of the Constitution of 1906, the conformity of the laws with Islamic norms became an objective for the Legislature under the post-1979 Constitution and the Guardian Council not only applied these criteria to the legislation passed after 1979 but also tried to revise the previously enacted legislation along the same lines.

As a first step, a series of Islamic criminal law legislations inspired by the Shiite Fiqh were passed in three separate bills in 1982."The Law Concerning Hudud and Qisas and Other Relevant Provisions" was passed in August, "The Law Concerning Islamic Punishment, Containing General Provisions" was passed in October, and finally "The Law Concerning Diyat" was passed in December 1982. The three bills were adopted as tentative laws for an interim period of 5 years. In July 1991 these three laws were combined, with some minor amendments, which constituted the Islamic Penal Code comprising of four books on Generalities, Hudud, Qisas and Diyat. The Judicial and Legal Commission of the Islamic Consultative Assembly (Majlis/Parliament, hereinafter "the Parliament") passed the 1991 Islamic Penal Code (hereinafter "the 1991 Code") according to Article 85 of the Constitution on a tentative basis for an interim period of 5 years.[22]

The Ta'zirat-related legislation has experienced a quite different path and codification in this area was more challenging for the Iranian Legislature due to the lack of clarity in the nature, definition and domain of Ta'zirat crimes in Islamic criminal law. The first Ta'zirat bill, "the Law Concerning Provisions on the Strength of Ta'zirat" was passed in August 1983. The 1983 Ta'zirat Law followed the framework of the 1925 Code in defining the crimes but most of the customary punishments such as fine and imprisonment were replaced by Sharia-oriented punishment of flogging.[23] Moreover, a number of new offences including those related to women's dress and to moral behavior were introduced by The 1983 Ta'zirat Law.[24] In May 1996, a newly drafted bill concerning Ta'zirat punishments was passed by the Parliament. Based on a fatwa (religious decree) by Ayatollah Khomeini, the 1996 Ta'zirat Law reintroduced punishments such as fine and imprisonment for some Ta'zirat crimes while it substituted flogging as punishment for some of the offences.[25] The 1996 Ta'zirat Law was incorporated into the 1991 Code as its fifth book and the interim period of the 1991 Code was prolonged for another ten years until 2006.

[20] Article 4 of the Constitution: All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the *Foqaha* of the Guardian Council are judges in this matter.

[21] Article 72 of the Constitution: The Islamic Consultative Assembly cannot enact laws contrary to the official religion of the country or the Constitution. It is the duty of the Guardian Council to determine whether a violation has occurred, in accordance with Article 96.

[22] Article 85 of the Constitution: The right of membership is vested with the individual, and is not transferable to others. The Assembly cannot delegate the power of legislation to an individual or committee. But whenever necessary, it can delegate the power of legislating certain laws to its own committees, in accordance with Article 72. In such a case, the laws will be implemented on a tentative basis for a period specified by the Assembly, and their final approval will rest with the Assembly.

[23] RAHAMI, *supra* note 2, pp. 593-594.

[24] MIR-HOSSEINI, *supra* note 13, p. 358.

[25] PETERS, *supra* note 1, p. 163.

3. The Reasons for Enactment of a New Islamic Penal Code

Following the 1979 Revolution the National Consultative Assembly was replaced by Islamic Consultative Assembly. The Legislature's lack of experience on the one hand and novelty of codification of Islamic criminal law on the other hand made the task of drafting bills highly challenging. Moreover, the demands for a prompt replacement of the 1925 Code with Sharia-based legislation had put extra pressure on the drafters. Under the circumstances, the bills of 1982 laws – which later became the 1991 Code – were prepared in a short period of time and without adequate care and attention in certain parts. The 1982 General Provisions Law – which later became the first book of the 1991 Code – was a mixture of the Sharia compatible provisions of the first book of the 1925 Code (with 1973 amendments) and the provisions extracted from the Shiite Fiqh sources regarding the general concepts and principles of Islamic criminal law. As a result, the first book of the 1991 Code was a not harmonized, consistent text; rather a combination of provisions inspired by the French general criminal law and Islamic criminal law which were brief and ambiguous in certain parts and silent on some subjects. Lack of consistency, even disorder, in the Generalities becomes more manifest when we observe that some provisions belonging to the Generalities were included the other books of the 1991 Code.[26] This is partly due to the fact that the second book of the 1991 Code – which was originally the 1982 Hudud and Qisas Law – was passed prior to enactment of the basis of the first book – the 1982 General Provisions Law.

In addition to the above-mentioned problems in the drafting process of the 1982 laws which are also reflected in the content of the second, third and fourth books of the 1991 Code on Hudud, Qisas and Diyat punishments, the methodological problem of incompatibility with the standards of penal law codification is observed in different parts of those books. This problem, a matter of case-oriented codification, could be detected in some single articles of the 1991 Code which deal with a very specific case. In fact, a number of articles of the 1982 Hudud and Qisas Law and the 1982 Diyat Law – which later became provisions in the second, third and fourth books – had been extracted (in verbatim form) from Shiite Fiqh books (book of jurisprudence) or fatwas of Shiite scholars.[27] These Fiqh books traditionally discuss each topic by stating the related Hadith[28], the different possible cases under that topic and the ruling on each case. Consequently, in certain cases, a single Hadith became subject of one or two articles of the 1991 Code.[29]

As already noted, following the inclusion of the 1996 Ta'zirat Law as the fifth book of the Islamic Penal Code the interim period of the 1991 Code was prolonged until March 2006 – which was subsequently prolonged on a yearly basis until March 2011 by the Parliament.[30] These periodic prolongations through the past three decades demonstrate that the 1991 Code –

[26] E.g., the provisions related to evidence of crime were discussed under the second book on *Hudud* punishments.
[27] Particularly Ayatollah Khomeini's *fatwas* in his *Fiqh* book '*Tahriral-Vasila*'.
[28] MOMEN, *supra* note 3, p. 173. Written reports from the words and deeds of the Prophet (and the Imams for Shiite) after being transmitted orally for several generations.
[29] Views of Prof. Hossein Mir Mohammad Sadeghi on the 2013 Code (in Persian), available at: http://dadazmoon.ir/?p=2104 [27 December 2013].
[30] Between March 2011 and June 2013 based on the directive of the head of the Judiciary the courts had continued to apply the 1991 Code without the prolongation by the Parliament. This procedure is not unprecedented in the Iranian judicial system. The Criminal Procedure Code was passed in 1999 as a tentative law for ten years. Since March 2010 the courts apply the 1999 Criminal Procedure Code by the directive of the head of the Judiciary regarding this issue until the enactment of the new Criminal Procedure Code which is pending between the Parliament and the Guardian Council.

even with the possibility of minor amendments – was not an appropriate law to be enacted permanently. Therefore, the above-mentioned disorder and flaws in the form and content of the 1991 Code, which had been further exacerbated by the problems and difficulties experienced by the practice of the courts, had practically made a major revision in the Code, in the form of a new bill, all but inevitable.

4. Legislative History of the 2013 Islamic Penal Code

The 2007 Law on the prolongation of the interim period of the 1991 Code contains a provision obliging the Judiciary to submit the new bill of the Islamic Penal Code – which had been prepared by a drafting committee of the Judiciary – to the Parliament within three months. According to the records of the Parliament, the receipt of the bill was announced in June 2008. Between December 2009 and January 2012, the bill was passed several times by the Parliament and forwarded to the Guardian Council for approval, which was sent back to the Parliament for further review and amendment in all instances on the basis of incompatibility with Sharia.[31] Once the bill had been amended in line with the views of the Council, the Code was finally approved in January 2012 and was sent to the President for signature and publication on April 10, 2012.[32] In October 2012, before the Code could be signed by the President, it was recalled by the Guardian Council due to what they considered to be "incompatibility with Sharia in 52 cases" – a very rare and indeed unprecedented action.[33] The Code was last amended by the Parliament in February 2013 and was approved for the second time by the Council on May 1, 2013. Finally, it was signed by the President and published in the official gazette on May 27, 2013 and came into force on June 12, 2013. In addition to the questions raised by the Iranian lawyers regarding constitutional legitimacy of the act of the Guardian Council in recalling the Code, the foregoing summary of the legislative history of the 2013 Islamic Penal Code (hereinafter "the 2013 Code") demonstrates the degree and intensity of supervision of the Guardian Council and its sensitivity in this specific field of law. Moreover, it illustrates the limitations that the Iranian Legislature faces in order to change criminal provisions – whether crucial or otherwise.

III. Innovations and Reintroductions

The 2013 Code contains 728 articles in four books on Generalities, Hudud, Qisas and Diyat. The 1996 Ta'zirat Law – containing, inter alia, the Computer Crimes Law (passed in July 2009) – is incorporated into the new Islamic Penal Code as its fifth book. Among the four newly enacted books of the 2013 Code, the main changes are to be found in the Generalities – which will be discussed in more detail prior to the review of the changes in the content of the second and fourth books. Finally, it should be added that the book on Qisas has not been considerably

[31] Article 94 of the Constitution: All legislation passed by the Islamic Consultative Assembly must be sent to the Guardian Council. The Guardian Council must review it within a maximum of ten days from its receipt with a view to ensuring its compatibility with the criteria of Islam [Sharia] and the Constitution. If it finds the legislation incompatible, it will return it to the Assembly for review. Otherwise the legislation will be deemed enforceable.

[32] Article 123 of the Constitution: The President is obliged to sign legislation approved by the Assembly or the result of a referendum, after the legal procedures have been completed and it has been communicated to him. After signing, he must forward it to the responsible authorities for implementation.

[33] Report of the spokesman of the Judicial and Legal Commission of the Parliament (in Persian), available at: http://dadazmoon.ir/?p=20 [27 December 2013].

changed, except when compared with the third book of the 1991 Code it appears more classified.

1. Generalities

As already noted, the first book of the 1991 Code suffered from serious problems, and not surprisingly, the most substantive changes are to be found in the Generalities of the 2013 Code. A review of the process of the preparation of the Code indicates that the drafters had tried to eliminate the flaws of the first book by taking into consideration of the experience and the lessons learnt from the actual application of the 1991 Code by courts. They have as well tried to compile and consolidate various pieces of criminal law legislations and directives under the heading of Generalities. Furthermore, the provisions related to the Generalities previously dispersed in the other books have been moved to the first book. Generally speaking, the first book of the 2013 Code, when compared with the 1991 Code, could be considered less vague and more objective; the rules have been discussed with more detail, which helps prevent broad interpretations and also meets higher legislative standards. Substantial increased in the number of the articles in the first book (from 62 in 1991 to 216 in 2013) confirms this observation.

In addition to the changes in the form of the first book, the content has also undergone serious revision; some of which could be considered as innovations of the 2013 Code or, at least, reintroduction of the previously eliminated procedures, mechanisms or institutions. One such innovation in the 2013 Code concerns the recognition of the criminal responsibility for juridical persons (Article 143). The issue of separate criminal responsibility of the juridical person from its legal representative had been a matter of controversy in the courts under the 1991 Code. Furthermore, enumeration of punishments for the juridical person (Article 20) has limited the room for long discussions about the possibility of punishment of juridical persons. Nevertheless, changes in Ta'zirat punishments and punishment and correctional measures for minors – to be reviewed in the following section – appear to have more critical impact in practice.

a) Ta'zirat Punishments

Although the 1996 *Ta'zirat* Law was incorporated into the 2013 Code as its fifth book, the first book of the 2013 Code defines specific rules for *Ta'zirat* crimes and punishments. Furthermore, it makes a distinction between these rules and the general rules applicable to all four categories of crimes and punishments. As noted previously, the definition of *Ta'zirat* crimes is relatively broad under Islamic law and their application is under the discretion of the judge. Contrary to the 1991 Code, Article 18 of the 2013 Code provides a definition for *Ta'zirat* crimes. Moreover, it limits *Ta'zirat* punishments to the provisions mentioned by the law. This Article follows the provisions of Article 2 of the 2013 Code and Article 36 of the Constitution,[34] which respectively refer to the principle of legality, a well-recognized principle of international human rights law; as stipulated in Article 11(2) of the Universal Declaration of Human Rights, Article 15 of the

[34] Article 36 of the Constitution: The passing and execution of a sentence must be only by a competent court and in accordance with law.

International Convention on Civil and Political Rights, and Article 7(1) the European Convention on Human Rights.[35]

Classification of *Ta'zirat* punishments could be considered as innovative reintroductions in the 2013 Code. Article 7 of the 1925 Code (with 1973 amendments) categorized crimes into felonies, misdemeanors and minor offences. Since this classification had not been made according to Islamic criminal law, it was not referred to in the 1991 Code. The 2013 Code reintroduces a classification with similar effects to the classification in the 1925 Code but limited to *Ta'zirat* punishments only. Article 19 of the 2013 Code categorizes *Ta'zirat* punishments into 8 degrees based on their severity. Interestingly, capital punishment is not listed by Article 19, whose absence could be assumed to reflect the intention of the Legislature in supporting the interpretation which contends that *Ta'zirat* crimes are not punishable by death penalty.

One of the salient problems under the 1991 Code concerned the heavy caseload of courts. In practice, only a relatively limited number of offences in the Iranian judiciary system are punishable by *Hudud*, *Qisas* and *Diyat*; the vast majority of the cases are related to *Ta'zirat* crimes. Furthermore, the rules of Islamic criminal law related to *Ta'zirat* punishments – in comparison with the provisions on *Hudud*, *Qisas* and *Diyat* punishments – are more flexible and the Legislature enjoys a wider discretion in terms of defining the rules in this area of Islamic criminal law. The 2013 Code attempts to solve this problem by applying lenient institutions such as "impunity" and "probation before judgment" in cases of minor *Ta'zirat* punishments. Previously, Article 22 of the 1991 Code gave the judges the power to reduce or substitute *Ta'zirat* punishments, but impunity was not included among the available options. On the contrary, Article 39 of the 2013 Code allows for resort to impunity in case of minor *Ta'zirat* punishments (categories 7 and 8) under special circumstances. Another innovation of the 2013 Code relates to the question of probation before judgment. Article 40 stipulates that when a minor *Ta'zirat* crime (punishable by categories 6 to 8) is proved, the judge can, under special circumstances, place the offender on probation from 6 months to 2 years. Based on the behavior of the offender during probation, Article 45 of the Code provides the judge with two options upon the expiration of probation; a verdict of sentence or impunity should be pronounced.

Substantial increase in the number of prisoners – not to mention the heavy and varied social costs involved – were also considered as the major problems under the 1991 Code. With a view to reducing the negative effects of this problem, the 2013 Code enhances alternative regimes that confine imprisonment, including "conditional sentence", "alternative sentence" and "intermittent sentence". Articles 38 to 40 of the 1991 Code dealt with conditional sentence and the related conditions which are discussed with more detail by Articles 58 to 63 of the 2013 Code. Alternative sentence is another regime in this context which is comprehensively covered by Articles 64 to 87 of the 2013 Code. As noted before, under Article 22 of the 1991 Code the judge had the power to reduce or replace *Ta'zirat* punishments in special circumstances. Based on this article, the Head of the Judiciary issued a directive in 2005 concerning alternative sentence[36]. Chapter 9 of the Generalities of punishments, on alternative sentence, incorporates

[35] See EFTEKHAR JAHROMI, *supra* note 14, p. 87.

[36] The directive obliged the judges to replace *Ta'zirat* imprisonment with other *Ta'zirat* punishments such as fine especially when the punishment was less than 6 months. The directive (in Persian) is available at: http://www.tebyan.net/newindex.aspx?pid=252565 [27 December, 2013]

the directive into the 2013 Code with more detail. Unlike the other two regimes, intermittent sentence (Article 56) is an unprecedented regime in the Iranian legal system. The conditions for applying this particular regime in cases that the offenders are in prison for minor *Ta'zirat* punishments (categories 5 to 7) are set by Article 57 of the 2013 Code.

As pointed earlier, the second part of book one is on the Generalities of punishments, in which Chapter 11 enumerates the grounds for nullification of punishments. In addition to the recognition of the principle of *Dara'*[37], the institutions of "prescription" and "repentance" have witnessed more changes under the 2013 Code. Contrary to the general acceptance of prescription under the 1925 Code,[38] the post-revolutionary criminal law legislations had not recognized this institution until 1999 when Article 173 of the Criminal Procedure Code (hereinafter "the 1999 Criminal Procedure Code") reintroduced prescription – even though limited to *Ta'zirat* crimes only. Article 105 of the 2013 Code follows the 1999 Criminal Procedure Code in this respect and sets the periods of prescription for the eight categories of *Ta'zirat* punishments. Repentance, as covered in Article 115, is another ground for nullification of minor *Ta'zirat* punishment (categories 6 to 8). Moreover, the Article allows the judge to reduce the punishment in case of the offender's repentance where other categories of *Ta'zirat* punishments are involved. It is noteworthy that repentance was recognized as a ground for nullification of punishments limited to *Hudud* punishments under the 1991 Code.[39] The 2013 Code stipulates the principle of *Dara'* as a general principle of Islamic criminal law and underscores its applicability in the process of nullification of punishments. According to Article 120, the applicability of this principle is not limited to nullification of punishments.[40] In fact, the principle of *Dara'* in Islamic criminal law is very close to the principle of presumption of innocence, as recognized by Article 37 of the Constitution[41], Article 11 of the Universal Declaration of Human Rights and Article 48 of the Charter of Fundamental Rights of the European Union.

b) Punishments and Correctional Measures for Minors

Aside from the negligible difference between the 1991 Code and the 2013 Code in respect of the age of criminal responsibility, the difference between the two Codes with regard to the punishment of children and juveniles is substantial. The 1925 Code (with 1973 amendments) considered offenders under the age of 18 as minors. Article 33 of the 1925 Code categorized minors into two groups of offenders; 6-12 and 12-18, and defined special rules applicable to the punishment of each group. Once customary law criterion had been substituted with those of Islamic law, Article 49 of the 1991 Code set the age of maturity as the age of criminal responsibility, but was silent on the exact age of maturity. According to the predominant view

[37]The principle of *Dara'*, as a precept in Islamic criminal law, is widely recognized by the Shiite *Foqaha.* The application of this principle was primarily limited to *Hudud* punishments but was later extended to the other three categories of punishments, including *Ta'zirat*. According to the principle of *Dara'*, the punishment could not be executed when there is a doubt about the occurrence of the crime or its commission by the accused. See MOSTAFA MOHAGHEGH DAMAD, *Rules of Fiqh – Penal Rules* (in Persian), 2000, Tehran, Center for Islamic Publications, p. 42.

[38] The related limitations were stated by Article 49 of the 1925 Code (with 1973 amendments).

[39] According to Article 116 of the 2013 Code repentance is not applicable to *Qisas* and *Diyat* punishments.

[40] Article 120 of the 2013 Code: when there is no reason to overcome the doubt about the occurrence of the crime, the conditions of the crime or one of the conditions of the criminal responsibility, the crime or the mentioned conditions are not proved.

[41] Article 37 of the Constitution: Innocence is to be presumed, and no one is to be held guilty of a charge unless his or her guilt has been established by a competent court.

in the Shiite *Fiqh* – also reflected in Article 1210 of the Iranian Civil Code[42] – the age of maturity is 9 lunar years (8 years and 9 months) for girls and 15 lunar years (14 years and 7 months) for boys. Although the Note of Article 220 of the 1999 Criminal Procedure Code considers the juvenile court as the competent court to hear claims against mature offenders of less than 18 years of age, there was no distinction between the minor offenders based on their age, and mature offenders had full criminal responsibility – exactly the same as adults – under the 1991 Code. The 2013 Code follows the framework of the 1991 Code and states in Article 146 that immature persons do not have criminal responsibility, but contrary to the 1991 Code, Article 147 of the 2013 Code sets the exact ages of 9 lunar years for girls and 15 lunar years for boys as the age of maturity.

One of the main innovations of the 2013 Code – which can also be considered as a reintroduction in some respects – concerns the establishment of a regime for punishments and correctional measures for children and juveniles. Chapter 10 of the Generalities of punishments is devoted to this issue. Article 88 categorizes the minors who committed *Ta'zirat* crimes into two groups of offenders; 9-15 and 15-18 years of age.[43] Moreover, the approach of the Legislature to the punishment of minor offenders who commit *Hudud* or *Qisas* crimes has also changed considerably under the 2013 Code. Article 91 states that one of the alternative punishments enumerated in Chapter 10[44] should be applied instead of *Hudud* or *Qisas* punishments when a minor who has reached the age of maturity does not understand the nature of the committed *Hadd* or *Qisas* crime or its prohibition, or if there is a doubt about his or her mental development and perfection. In respect of *Diyat* crimes committed by minors, the provisions of the 2013 Code are not different from those under the 1991 Code due to the compensatory aspect of *Diyat* punishments. Article 92 stipulates that when a minor who has reached the age of maturity is involved in *Diyat* and other compensations, the court will apply the general rules as stipulated in the book on *Diyat*.

Although Article 147 of the 2013 Code sets different ages as the age of criminal responsibility for different sexes, this difference is not completely reflected in their punishments. In fact, in so far as the relation between the sex of a minor offender and his or her punishment is concerned, there is no difference between boys and girls in *Ta'zirat* punishments and there exists absolute difference with respect to *Diyat* punishments. The approach to *Hudud* and *Qisas* punishments is somewhat different; a middle way is pursued. In case of the application of Article 91 to *Hudud* and *Qisas* punishments, again, there is no difference between boys and girls. But when none of the requirements of Article 91 are met, the general rule on the age of criminal responsibility is applied, hence reflecting the effect of sex on punishment of minor offenders.

[42] Article 1210 of the Civil Code: No one, when reaching the age of majority, can be treated as incapable of insanity or immaturity unless his immaturity or insanity is proved.
Note - The age of majority for boys is fifteen lunar years and for girls nine lunar years.

[43] According to Article 88 of the 2013 Code, the judge has five options to make a decision about an offender between 9 and 15 years of age who commits a *Ta'zir* crime and none of the options are considered as punishment. Moreover, under the 2013 Code, the punishments for the juveniles between 15 and 18 years of age who commit *Ta'zirat* crimes are different from *Ta'zirat* punishments for adults. According to Article 89, the judge can send the juveniles who commit *Ta'zirat* crimes to correctional and rehabilitation centers instead of jail in major crimes or sentence them to limited public working without payment or paying fine in the case of delinquency.

[44] The correctional measures and the punishments which are enumerated by Articles 88 and 89 of the 2013 Code; see note 43.

Besides the effort of the Legislature to reduce the effects of the difference between the sexes on their punishment, the criteria applied for defining minors merit scrutiny. It has already been discussed that the definition of minors based on customary criterion of 18 years of age in the 1925 Code was totally replaced by the Sharia definition of minors based on the criterion of age of maturity in the 1991 Code. The 2013 Code, however, has adopted a dual approach in this respect. The 2013 Code follows the framework of the 1991 Code for definition of minors in the Article related to criminal responsibility; it applies the criterion of age of maturity. Simultaneously, it has tried to reduce the negative effects and consequences by defining 'minor' in respect of punishments and applying the criterion of 18 years of age – as had been the case under the 1925 Code and is used by Article 1 of the 1989 Convention on the Rights of the Child.[45] Moreover, the 2013 Code follows the 1925 Code by categorizing minors into two groups in cases of *Ta'zirat* punishments.

2. Hudud

The 2013 Code second book contains 73 articles on *Hudud*; a substantial decrease from 141 articles in the 1991 Code. As noted in the preceding pages, one of the reasons for the reduction is that the provisions related to the Generalities which were included in the second book of the 1991 Code were moved to the first book in the 2013 Code. However, a more important reason for the 'minimalist' approach of the Legislature could be attributed to its view on the applicability of the principle of legality to *Hudud* punishments. Article 15 of the 2013 Code states *Hadd* as a punishment whose cause, type, amount and way of execution are determined by Sharia. Contrary to Articles 16, 17 and 18 of the 2013 Code which emphasize the applicability of the principle of legality in *Qisas*, *Diyat* and *Ta'zirat* punishments, Article 15 does not limit *Hudud* punishments to the law but to Sharia. Furthermore, Article 220 stipulates that in cases of *Hudud* crimes not mentioned in the 2013 Code, Article 167 of the Constitution[46] applies. According to Article 167 of the Constitution, it is the duty of the judge to render the judgment, and in the absence of law, the judge has to deliver his judgment on the basis of authoritative Islamic sources and authentic *fatwas*. The text of Article 220 leaves no room for any doubt about the intention of the Legislature in non-applicability of the principle of legality to *Hudud* punishments or about any interpretation limiting the application of the provisions in Article 167 of the Constitution to civil cases.[47]

Another general observation about the second book of the 2013 Code relates to the increase in the number of *Hudud* crimes in comparison with the 1991 Code. Blasphemy (*Sab al-Nabi*) is considered as a *Hadd* crime punishable by death penalty under the Shiite *Fiqh*. Although it was not stated in the second book of the 1991 Code, Article 513 of the 1996 *Ta'zirat* Law defines the penalty for insulting the Islamic values or holy persons in the Shiite Islam and implicitly

[45] Islamic Republic of Iran signed the Convention on the Rights of the Child (1989) in 1991, which was ratified by the Parliament in 1994. Article 1: "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."

[46] Article 167 of the Constitution: The judge is bound to endeavor in order to adjudicate each case on the basis of the codified law. In case of the absence of any such law, he has to deliver his judgment on the basis of authoritative Islamic sources and authentic *fatwas*. He cannot refrain from admitting and examining cases and delivering his judgment on the pretext of the silence or deficiency of law in the matter, or its brevity or contradictory nature.

[47] EFTEKHAR JAHROMI, *supra* note 14, p. 97.

referred to the *Hadd* punishment for blasphemy.[48] The second book of the 2013 Code contains a chapter (Chapter 5) on blasphemy and Article 262 explicitly defines the *Hadd* crime and its relevant punishment.

Chapter 7 of the second book of the 1991 Code dealt with "*Muharaba* and Corruption on Earth" and their relevant punishment. Articles 183 to 188 covered a number of offences considered as "*Muharaba* and Corruption on Earth", the *Hadd* punishment for which is defined in Articles 190 and 191. Instead of using the general term "*Muharaba* and Corruption on Earth", the 2013 Code defines "*Muharaba*", "Corruption on Earth" and "*Baqy*" (rebellion) as three separate categories of offence and sets the specific *Hadd* punishment for each one. Roughly speaking, the offences mentioned under Articles 183 to 185 of the 1991 Code are classified as "*Muharaba*" under the 2013 Code and Articles 279 to 285 deal with their definition and punishment. Even if the term "*Baqy*" was not used in the 1991 Code, the related offences mentioned in Articles 186 to 188 of the 1991 Code have been classified as "*Baqy*" in the Articles 287 and 288 of the 2013 Code. Despite these changes in the format and separation between these three categories of offences, the main change in this respect concerns the definition of "Corruption on Earth" in Article 286 of the 2013. This article provides a broad definition for "Corruption on Earth" which introduces new offences that were not previously mentioned under the second book of the 1991 Code.[49] Moreover, Article 286 limits the punishment for "Corruption on Earth" to death penalty[50], which is different from the provisions of Articles 190 and 191 of the 1991 Code under which the judge had four options to choose as the punishment for "*Muharaba* and Corruption on Earth".

3. Diyat

Inequality between the amount of *Diya* for a Muslim and a non-Muslim, a long-established rule under the Sharia, and for that matter, the Shiite *Fiqh*, was considered as one of the main challenging points in the practice of courts under the fourth book of the 1991 Code. Until 2003, the 1991 Code had no provision regarding the amount of *Diya* for non-Muslims; Article 297 only referred to the amount of *Diya* for a Muslim man. In the absence of statutory provisions on the amount of *Diya* for non-Muslims, judges applied the rule of the Shiite *Fiqh* on this matter. Article 297 of the 1991 Code was amended in 2003 on the basis of a *fatwa* of the current leader of the Islamic Republic of Iran, Ayatollah Khamenei, on equality between the amount of *Diya* for Muslims and the religious minorities. On the basis of the same *Fatwa*, Article 554 of the

[48] Article 513 of the 1996 *Ta'zirat* Law: Anyone who insults the sacred values of Islam or any of the Great Prophets or [Twelve] Shiite Imams or the Holy Fatima, if considered as *Saab al-Nabi*, shall be executed; otherwise, they shall be sentenced to one to five years' imprisonment.

[49] Although the author has tried to translate the articles of the 2013 Code from the text in Persian (available on the official website of the Guardian Council), the following translation (with minor changes) is quoted from another source; MOHAMMAD HOSSEIN NAYYERI, 'New Islamic Penal Code of the Islamic Republic of Iran: An Overview', University of Essex, March 2012. Article 286 of the 2013 Code: "Any person, who extensively, commits: felony against the bodily entity of people, crimes against national and international security of the state, spreading lies, disruption in economic system of the state, arson and destruction of properties, distribution of poisonous and bacterial and dangerous materials, and establishment of, or aiding and abetting in, places for corruption and prostitution, as it causes severe disruption in the public order of the state and insecurity, or causes harsh damages to the bodily entity of people or public or private property, or causes distribution of corruption and prostitution on a large scale, shall be considered as corrupt on earth and shall be sentenced to death."

[50] Articles 282 and 283 still allow the judge the same four options for the punishment of *Muharaba*.

2013 Code recognized equal amount of *Diya* for Muslims and non-Muslims; that is, the religious minorities recognized by the Constitution.[51]

Inequality between the amount of *Diya* for a man and a woman – also reflecting the long-established rule under the Sharia and the Shiite *Fiqh* – was another challenging point in the practice of courts under the 1991 Code. With a wording similar to Article 300 of the 1991 Code, Article 550 of the 2013 Code states the general rule of the Shiite *Fiqh* that the amount of *Diya* for a murdered Muslim woman is half the amount of *Diya* for a murdered Muslim man. Also similar to Article 301 of the 1991 Code, Article 560 of the 2013 Code lays out the general rule on the amount of *Diya* for a woman in cases of bodily injury that does not cause death. According to Article 560, the amount of *Diya* for a woman in cases of bodily injury is equal to the amount of *Diya* for a man up to the point that it is one third of the full amount of *Diya* for a man, and once beyond that point, the amount of *Diya* for a woman reduces to half the amount of *Diya* for a man.

The provisions of Article 551 of the 2013 Code has somewhat changed the partial inequality between the *Diya* of man and a woman. As stated in the Note of Article 551: "In all cases of *Jenayat* where the victim is not a man, the difference between the amount of *Diya* and the amount of *Diya* for a man shall be paid from the Fund for Compensation of Bodily Harm."[52] Given this provision, the amount of *Diya* for a woman in case of homicide is practically equal to the amount of *Diya* for a man under the 2013 Code, but the applicability of Article 551 to cases of bodily injury is a matter of question. Use of the term *Jenayat* in Article 551 deserves some scrutiny; the term had been used by the Legislature in other parts of the fourth book for both the actions that result in death and the actions that cause bodily injury but do not cause death. Therefore, the rule of Article 551 could be applicable to both cases and consequently the answer to question on the equality of *Diya* for both men and women in cases of bodily injury is positive. The very fact that Article 551 is under the first chapter of the second part of the fourth book on the *Diya* for homicide which immediately follows Article 550 on the amount of *Diya* for a woman in homicide cases undermines the validity of this interpretation. However, Article 560 on the amount of *Diya* for a woman in cases of bodily injury is included in the next chapter on the Generalities of the amount of *Diya* for bodily injury. Therefore, it is not easy to give an accurate answer to the questions on the equality of *Diya* for both men and women in cases of bodily injury and the actual practice of courts under the 2013 Code will provide a more precise answer.

IV. Conclusion

The present paper has discussed the legislative history analysis of Islamic criminal law in Iran during the past three decades. The legislative history of criminal law in Iran could be divided into two eras; the first era dates back to the Constitutional Revolution and the establishment of Parliament in 1906 – which came to an end in 1979. The 1925 General Penal Code, the second penal code enacted in this era, which had been inspired in large measure by the French system

[51] Article 13 of the Constitution: Zoroastrian, Jewish, and Christian Iranians are the only recognized religious minorities, who, within the limits of the law, are free to perform their religious rites and ceremonies, and to act according to their own canon in matters of personal affairs and religious education.

[52] NAYYERI, *supra* note 49, translation of Article 551 of the 2013 Code (with a minor change).

and the Napoleonic Codes, was in force for more than half a century. This Code recognized and categorized offences on the basis of secular norms. Following the 1979 Revolution and replacement of the 1906 Constitution with the Constitution of the Islamic Republic (1979), the overall approach of the legislature underwent fundamental change; conformity of the laws with Islamic rules and norms became the overriding objective. Therefore, Islamic criminal law became the basis for definition of crimes and their classification in the new era – starting from 1979 onwards. Contrary to the predominantly secular 1925 Code, Islamic law came to shape the framework and substance of the Islamic Penal Codes of 1991 and 2013. As discussed in the earlier part of the paper, a review of the history of the post-1979 criminal law legislation clearly indicates that the Guardian Council, the highest body for monitoring and supervision of all legislation in the land, has exercised its authority over the laws passed by the Legislature (Majlis/Parliament) in order to ensure strict compatibility with the rules and norms of the Sharia.

The comparison between the respective provisions in the 1991 and 2013 Islamic Penal Codes – in the third part of the paper – shows that the main distinction between the two Codes is to be found in the organization of the latter, especially as relates to the Generalities. The organization of the first book of the 2013 Code shows an improvement; the Generalities have been enhanced in terms of general criminal law. On the contrary, the organization of the 2013 Code in the related part to special criminal law and the classification of crimes which is based on Islamic criminal law – in books on *Hudud*, *Qisas* and *Diyat* punishments – have not changed considerably. In addition to certain changes in the format, the content of the 2013 Code has undergone partial change in the first, second and fourth books. The most substantial changes in the content of the first book could be summarized under two topics; the provisions related to the Generalities of *Ta'zirat* punishments and the new regime in respect of Correctional Measures for Minors. Stipulation of the provision on non-applicability of the principle of legality in *Hudud* punishments, introducing Blasphemy as a *Hadd* crime and re-classification of *Hudud* crimes of *Muharaba*, Corruption on Earth and *Baqy* can be considered as the main changes in content of the second book. Finally, the most important changes in the content of the fourth book are to be found in the provisions on equality between the amount of *Diya* for a Muslim and a non-Muslim and the provision related to equality between the amount of *Diya* for a man and a woman. The analysis of these changes and their rationale leads us to a similar conclusion in all the instances; the 2013 Code has tried to address and solve – at least – some of the problems that had arisen during the practice of the 1991 Code through designing a number of innovative and practical mechanisms without crossing the boundaries of Sharia or changing the basis, framework, characteristics and features of the 1991 Code.

Reintroduction of Islamic criminal law – after the experience of a secular penal code – as reviewed in this paper in the case of Iran, has not been a unique experience in the Muslim world. The first such experience occurred in Libya during the early years of the rule of Colonel Qaddafi (1972-1974). Since then Islamic criminal law has been enacted in a number of Muslim countries including Pakistan, Sudan, and also in Northern Nigeria. From the beginning of this process, a wide range of questions, including with respect to the rationale for the recourse to Sharia, efficacy of the new type of legislation in modern, complex societies, and also with regard to human right considerations, have been raised at the public level and extensively discussed in the relevant literature. Following three decades of actual practice, it is now quite evident that the Iranian experience with the Islamic criminal law legislation, which could be

considered the most articulated and comprehensive Sharia-based body of legislation in the entire Muslim world, has encountered a range of difficulties, uncertainties and controversies. The very fact that the 2013 Code was adopted on a tentative basis for an interim period of 5 years confirms this point. Finally, the practice of courts during the next 5 years will probably provide us with a clearer picture and possibly better answers to the outstanding questions in this area: Will the interim period of the 2013 Code be further prolonged on interim basis – similar to the 1991 Code? Will the Legislature (and the Guardian Council) succeed in articulating a permanent Islamic Penal Code? And will the enacted changes adequately respond to the actual needs of the judiciary system in order to administer justice?

Post-Revolution Constitutionalism: The Impact of Drafting Processes on the Constitutional Documents in Tunisia and Egypt*

*by Ahmed El-Sayed***

Abstract

This paper seeks to address the constitutional paths that followed the Arab awakening in both Tunisia and Egypt. The Tunisian constitutional process, despite some tensions, was largely peaceful and consensual. On the other hand, the process in Egypt of establishing a new constitutional arrangement had been tumultuous with repercussions that are likely to linger on for a protracted period of time. Therefore, despite apparent resemblance in socio-political actors in both countries, (political Islam, army intervention, strong institutional tradition, young population, etc.) the paper aims at identifying the factors have impacted both the constitutional drafting process and the popular perception of the produced constitutions in each of Tunisia and Egypt.

I. The Case of Tunisia

1. First Stage of Transition: Post Ben Ali

In the aftermath of Ben Ali's departure, Tunisia had to rapidly find a successor for its long-sitting dictator. Seeking to fill political vacuum, Ben Ali's Prime Minister, Mohammed Ghanouchi, declared himself the acting president based on Article 56 of the 1959 Constitution stating that "[I]n case of temporary disability, the President may, by decree, delegate his powers to the Prime Minister […]". However the application of the Article had two main obstacles; the delegation of power did not actually transpire and, most importantly, the application of such Article would suggest that the absence of the President is temporary, not permanent. Fortunately, the Constitutional Council, the country's ultimate arbiter on constitutional issues at the time,[1] intervened declaring that due to the permanent absence of the president the situation necessitates the application of Article 57[2] and thus the head of the lower

* This paper does not offer a comprehensive account on the constitutional processes in Egypt and Tunisia but rather an analysis of the significant factors that shaped the constitutional drafting processes.

** *Ahmed El-Sayed* studied law at the University of London and Cairo. He currently is a Ph.D. candidate at the University of Copenhagen and an Egyptian judge (on leave of absence) at El-Mansoura court of first instance.

[1] Article 75 of the 1959 Constitution stated that:
"The opinion of the Constitutional Council […] shall be binding on all public authorities [...]."

[2] Article 57 of the 1959 Constitution stated that:
"In case the Presidency of the Republic becomes vacant on account of death, resignation, or permanent disability, the Constitutional Council shall meet immediately and pronounce the permanent vacancy by absolute majority of its members […] the President of the Chamber of Deputies […] shall be invested immediately with the functions of Interim President of the Republic for a period of at least 45 days and at most 60 days […]."

chamber of parliament, not the prime minster, should serve as interim president. Accordingly, Fouad Mebazaa, was declared the interim president of the country.[3] Therefore, despite a mercurial beginning,[4] Tunisia's institutions were able to overcome the very first test and found a replacement for the fleeing President premised on constitutional legitimacy.

Striving to handle the new polity, on 18 February the government founded the High Commission for the Realization of Revolutionary Goals, Political Reforms, and Democratic Transition.[5] Even form the lengthy title, it could be deduced that the commission's aim was to accommodate the demands of the newly unfolding socio-political forces.[6] In particular, the Commission's initial role was to provide a platform of representation for the various … of Tunisian society.[7] Nevertheless, the government soon realized that although constitutional legitimacy was sufficient to provide an interim president, it was certainly not enough for the sustainability of the entire political system. The death of at least three protesters prompted the Prime Minister, who had served under Ben Ali, to tender his resignation.[8] Only days later, Mebazaa declared a future roadmap, set a date for the election of a National Constituent Assembly (NCA) that would draft a new constitution and ignored the 45- 60 day constitutional limit[9] on his interim presidency.[10] Mebazaa decisively stated that the 1959 Constitution "no longer reflects the aspirations of the people after the revolution",[11] paving the way for the Decree-Law No. 2011-14 which abolished the 1959 Constitution in its entirety.[12] Moreover, the High Commission, which was initially formed to play an advisory role, assumed more powers and "effectively operated as an unelected parliament."[13]

This hybrid of constitutional and revolutionary legitimacy (legitimacy of transition) gave the system whose President and post-revolution Prime Ministers were either closely related to Ben Ali's regime, Mebazaa and Ghanouchi,[14] or not among the participants of the 2011 revolution,

[3] "Tunisia Constitutional Council Appoints Interim Head of State," Voice of America, accessed March 5, 2014 http://www.voanews.com/content/former-tunisian-president-arrives-in-saudi-arabia----113775734/133570.html.

[4] Laurel Miller et al, Democratization in the Arab world: prospects and lessons from around the globe (RAND: Santa Monica, CA, 2012), 72.

[5] Asma Nouira, "Obstacles on the Path of Tunisia's Democratic Transformation," Carnegie Endowment For International Peace: Sada, accessed March 5, 2014, http://carnegieendowment.org/2011/03/30/obstacles-on-path-of-tunisia-s-democratic-transformation/6bej.

[6] Bruce Maddy-Weitzman, "Tunisia's Morning After: Middle Eastern Upheavals," Middle East Quarterly, volume XVIII, No 3 (Summer 2011) 11-17, 14.

[7] Bruce Maddy-Weitzman, supra n.6, 14.

[8] "Tunisian PM Mohammed Ghannouchi Resigns over Protests," BBC, accessed March 5, 2014, http://www.bbc.co.uk/news/world-middle-east-12642942.

[9] Article 57 of the 1959 Constitution, supra n.2.

[10] "Tunisia President Fouad Mebazaa Calls Election," BBC, accessed March 5, 2014, http://www .bbc.co.uk/ news/world-middle-east-12642942.

[11] "Tunisia President Fouad Mebazaa Calls Election," supra n.10.

[12] The preamble to the Decree-law no. 201114 dated 23 March 2011stated that:
"Considering that the current situation […] does no longer allow the regular operation of the public authorities and that the full implementation of the constitution provisions has become impossible." Article one on the same Decree-Law also stated "The public authorities in the Republic of Tunisia shall be provisionally organized in accordance with the provisions of this decree […]."

[13] Laurel Miller et al, supra n.4, 72.

[14] See e.g. Kim Willsher, "Tunisian Prime Minister Mohamed Ghannouchi Resigns amid Unrest," The Guardian, accessed March 5, 2014.

(El- Sebsi)[15] an opportunity to run the country until the election of the NCA. However, this relatively fragile system faced a veritable test when elections were delayed from July until October upon the request of the Independent High Authority for Elections (ISIE).[16] Officially this decision, which the government was not in favor of, was purely due to technical difficulties.[17] Some surmise that the underlying motive for the delay was to allow non-Islamist parties, who lacked any organizational advantage, more time to prepare for the election.[18] Be that as it may, the decision, which was approved by the High Commission[19] and initiated by the ISIE (whose 16 members were appointed by the High Commission),[20] questioned the authority of the Commission and the scope of its mandate.[21] Rejecting the decision, El-Nahda, Tunisia's main Islamist party, suspended its participation in the High Commission until the election date was concretized.[22] However, El-Sebsi, the sitting prime Minister, was able to develop "enough credibility that by June he was able to persuade the public and the parties to accept a postponement […] Tunisia's Islamists, who had the most to lose […] accepted the deferral."[23]

However, the High Commission was able to offer crucial services for the transitional process. Most importantly, it drafted "a law governing the election of a Constituent Assembly [NCA]"[24] and, as already mentioned, appointed the members of the ISIE, which administered the electoral process.[25] Ultimately, both the Commission and the government managed to move forward despite a number road blocks[26] and Tunisia was able to hold its first fair and free elections in October 2011. This election ushered in the second stage of the transitional process, this time the country would be run, perhaps for the first time ever, by elected officials.

[15] "Interim Tunisian Leader With Ties to Old Ruler Defends a Gradual Path," *NY Times*, accessed March 5, 2014, http://www.nytimes.com/2011/10/04/world/africa/tunisias-interim-leader-essebsi-defends-gradualistpath.html?pagewanted=all&_r=0.

[16] "Tunisia's Interim Government Delays Election," *BBC*, accessed March 5, 2014, http://www.bbc.com/news/world-middle-east-13702372.

[17] "Tunisia's Interim Government Delays Election," *supra* n.16.

[18] Erik Churchill, "Tunisia's Electoral Lesson: The Importance of Campaign Strategy," *Carnegie Endowment For International Peace: Sada*, accessed March 5, 2014, http://carnegieendowment.org/2011/10/27/tunisia-s-electoral-lesson-importance-of-campaign-strategy/6b7g. Although it is to be noted that among those who opposed the delay was the Progressive Democratic Party (PDP), a secular party. Laurel Miller et al., *supra* n.4, 72.

[19] "Tunisian Interim Government Delays Constituent Assembly Elections," *World Socialist Web Site*, accessed March 5, 2014, http://www.wsws.org/en/articles/2011/06/tuni-j29.html.

[20] "Its [ISIE] members were not elected, but appointed by the High Authority for the Realization of the Goals of the Revolution, Political Reforms, and Democratic Transition." *Elections in Tunisia: Selection of the New Independent High Authority for Elections Frequently Asked Questions* (International Foundation for Electoral Systems: Middle East and North Africa, January 24, 2014), 2.

[21] Laurel Miller et al, *supra* n.4, 72.

[22] "Key Tunisian Party Pulls out of Election Talks," *Financial Times*, accessed March 5, 2014, http://www.ft.com/intl/cms/s/0/744473ac-8ba0-11e0-a725-00144feab49a.html#axzz2v6oHtAQM.

[23] "Interim Tunisian Leader With Ties to Old Ruler Defends a Gradual Path," *NY Times*, accessed March 5, 2014, http://www.nytimes.com/2011/10/04/world/africa/tunisias-interim-leader-essebsi-defends-gradualistpath.html?pagewanted=all&_r=0.

[24] Laurel Miller et al, *supra* n.4, 72.

[25] Laurel Miller et al, *supra* n.4, 72.

[26] For instance, the Commission could not entertain some of demands to devise supra-constitutional principles to restrict the conduct of the Constituent Assembly in the drafting process. Laurel Miller et al., *supra* n.4, 73-74.

2. Remarks on the First Stage of the Transition

The most remarkable feature and what largely distinguishes Tunisian politics from most of the Arab world and Africa is the largely apolitical role of the army.[27] The Tunisian army has proven that it well earned the title of the dormant giant.[28] Even with the political vacuum caused by the unanticipated escape of Ben Ali, the army still abstained from taking part, at least overtly, in the political process. Some expected that even with the un-politicized track record of the army, it would have been challenging for an army that was developed in a secular tradition to risk allowing religious powers to take hold of the country. Nevertheless the military kept a distance from politics, sending a message that "Tunisian republicanism will continue to uphold the values of liberty, brotherhood, and equality, but add religion, reflecting a willingness to coexist with the social and political realities of the country."[29] Such message set the stage for a political competition where no one should anticipate an outsider's help i.e. from the army.

Secondly, although political instability had inflicted heavy costs on the country's security and economy, it rendered the governing system susceptible to pressure and more attentive to the demands of the political forces. Therefore, it was no surprise that at an early stage Ben Ali's Prime Minister had to resign,[30] the 1959 Constitution was abolished[31] and the High Commission, which provided an adequate representation of the Tunisian society, assumed the role of a parliament.[32] In addition, the transitional authority did not stay for long in power, the transition from Ben Ali to the NCA had transpired in almost ten months (from January to October 2011). Therefore, both flexibility and the relatively rapid hand over of power to an elected body allowed the Tunisian system to avoid collapse and serious challenges to its governing legitimacy.

Regarding the NCA, in addition to its basic mission to draft a constitution, the NCA was given the power to both decide its bylaws and run the country throughout the second phase of transition.[33] Given these expansive powers, the NCA was designed to be an extremely powerful institution with no clear limitations on the discharge of such powers. Accordingly, it was quite foreseeable that the NSA's design would allow for two potential pitfalls; drafting a constitution based on political weight not consensualism[34] and the absence of accountability criteria.[35] Even though the main political parties agreed that the NSA's mandate should not exceed one year, the agreement was "non-binding and many people assume that it will not be honored."[36]

[27] See Yezid Sayigh, "The Tunisian Army—A New Political Role?," *Carnegie Endowment for International Peace*, accessed March 6, 2014, http://carnegieendowment.org/2011/10/31/tunisian-army-new-political-role/8msb.
[28] Yezid Sayigh, *supra* n.27.
[29] Yezid Sayigh, supra n.27.
[30] "Tunisian PM Mohammed Ghannouchi Resigns over Protests," supra n.8.
[31] The preamble to the Decree-law no. 201114 dated 23 March 2011, supra n.12.
[32] Laurel Miller et al, supra n.4, 72.
[33] Daphne McCurdy, A Guide to the Tunisian Elections (Project on Middle East Democracy, October 2011), 3.
[34] See Zaid Al-Ali and Donia Ben Romdhane, Tunisia's new constitution: progress and challenges to come (open democracy, February 2014), 2.
[35] Laurel Miller et al, supra n.4, 76.
[36] Daphne McCurdy, supra n.33, 3.
"All political parties represented in the High Authority for the Achievement of Revolutionary Objectives [High Commission], except for the Congress for the Republic (CPR), signed a declaration on Sept 15, 2011, limiting the timeframe of

3. Second Stage of Transition: Power Structure under the NCA

On November 14, the ISIE declared the results of the October 23 National Constituent Assembly election. Out of 217 seats, El-Nahda (Tunisia's main Islamic party) came in first with 89 seats (41%) and Congrès pour la République (CPS) came second with only 29 seats.[37] Despite El-Nahda's comfortable victory, it was not sufficient for the party to rule alone. At an early stage, therefore, the election outcome forced political actors to play politics not ideology; majority is required to control, coalition is required to obtain majority and compromise is the key to pour ideologically-diverse, lacking majority political parties into a coalition. Furthermore, parties had to consider consensus seriously, not only because of its validity as a constitutional-building foundation, but also because it seemed the only way to deliver in a fractured political setting.

These two considerations, which may appear as two sides of the same coin, played out robustly in the conduct of the NCA both politically and procedurally. Regarding the former, an otherwise unlikely coalition, known as Troika, was forged between El-Nahda, CPR and Ettakattol (left-wing secular parties) reaching a majority of 139 seats.[38] This coalition was further manifested in the distribution of what was called "the three presidencies" even before the convocation of the NCA.[39] Following the Troika agreement,[40] the NCA elected the president of republic, prime minister and head of the NCA from the CPR, El-Nahda and Ettakattol respectively. Procedurally speaking, although it was only required to obtain absolute majority vote (fifty percent + 1) to approve a constitutional article, the draft constitution in its entirety had to pass two-thirds majority (145 votes out of 217) to become a constitution.[41] Otherwise, two failures of the draft to pass this threshold would trigger a popular referendum on the draft. If the draft that failed to pass by NCA went to popular referendum, the party unwillingly to make compromises during the drafting process would be perceived by the public as a consensus-hampering force, with the potential to suffer serious political losses.[42]

In respect of the NCA's mandate, the early settlement of the political map allowed the NCA to promulgate the Constituent Law pertaining to the Provisional organization of Public Authorities (provisional constitution also dubbed mini constitution).[43] Article two of the provisional constitution stated that:

NCA activities to one year." The Carter Center Encourages Increased Transparency and Public Participation in Tunisia's Constitution Drafting Process; Calls for Progress Toward Establishment of Independent Election Management Body (The Carter Center, May 11, 2012), 3.

[37] "National Constituent Assembly Election Results Announced in Tunisia," International Foundation for Electoral Systems, accessed March 6, 2014, http://www.ifes.org/Content/Publications/News-in-Brief/2011/Nov/National-Constituent-Assembly-Election-Results-Announced-in-Tunisia.aspx.

[38] Amine Ghali, "Tunisia's Constitutional Process: The Road Ahead," Carnegie Endowment For International Peace: Sada, accessed March 6, 2014, http://carnegieendowment.org/2011/12/09/tunisia-s-constitutional-process-road-ahead/84zy.

[39] "Primary agreement on sharing the three presidencies in Tunisia", (in Arabic), DW, accessed March 6, 2014, http://www.dw.de/اتفاق-مبدئي-على-تقاسم-الرئاسات-الثلاث-في-تونس/a-15543511; "How Will the First Session of the Constituent Assembly Be Held?", tunisialive, accessed March 6, 2014, http://www.tunisia-live.net/2011/11/18/how-will-the-first-session-of-the-constituent-assembly-be-held/.

[40] "Primary agreement on sharing the three presidencies in Tunisia", supra n.39.

[41] Article three of the Constituent Law pertaining to the Provisional organization of Public Authorities (Tunisian Provisional Constitution).

[42] See n. 85 and related text.

[43] "Tunisian Assembly Adopts Provisional Constitution," Al Jazeera English, accessed March 6, 2014, http://www.aljazeera.com/news/africa/2011/12/201112115101550490.html.

> The NCA assumes the primary responsibility of drafting a constitution for the Tunisian republic and assumes specifically the following tasks:
> Exercising legislative authority
> Electing the president of the NCA
> Electing the president of the republic
> Monitoring the government performance [emphasis added]

Accordingly, after the October election, Tunisia had a fully-fledged parliament, provisional constitution, Constituent Assembly and, though indirectly, an elected Prime Minister (hailing from the majority party) and a president.[44] A complete state structure, therefore, existed after the election where the NCA remained the most powerful institution exercising both constitution-making and parliamentary functions.[45] Accordingly, the claim that Tunisia decided to promulgate a constitution before parliamentary and presidential elections[46] may be questionable.

The second legal document that governed the drafting process, in addition to the provisional constitution, was the NCA's rules of procedure (henceforth bylaws).[47] Most importantly, the bylaws established a Joint Committee for Coordination and Drafting (JCCD) to, inter alia, coordinate between constitutional committees and prepare a final draft of the constitution (Art. 103 and 104). Nonetheless, whether in the provisional constitution or the bylaws, there was no "legal obligation to complete the draft constitution by a given deadline."[48]

The first real test of ideologies and readiness to compromise was soon to materialize; the role of Shari'a in the new constitutional order. Before the October election, El-Nahda's position was to maintain the wording of Article one of the 1959 Constitution, which recognized Islam as the religion of the country, without seeking any constitutionalization of Shari'a.[49] After the election, nevertheless, there were indicators that party would prefer granting Shari'a the status of a source or even the main source of legislation.[50] Such uncertainty led to heated debate, resulting in weeks of pro- and anti-Shari'a street protests.[51] Ettakattol took a firm position declaring its withdrawal from the Troika coalition should there has been any mention of Shari'a in the constitutional draft.[52]

[44] "Tunisian assembly elect Moncef Marzouki as interim president" *The National*, accessed March 6, 2014, available at http://www.thenational.ae/news/world/middle-east/tunisian-assembly-elect-moncef-marzouki-as-interim-president;
"Tunisia's first democratically elected government sworn in", *France24*, accessed March 6, 2014, available at http://www.france24.com/en/20111225-tunisia-new-government-sworn-in-office-carthage-presidential-palace-jebali.

[45] The NCA was as its name suggested "a constituent assembly, and not merely a constitutional convention." Bill Proctor and Ikbal Ben Moussa, *The Tunisian Constituent Assembly's By-laws: A Brief Analysis* (International Institute for Democracy and Electoral Assistance, September 2012), 15.

[46] E.g. Jason Gluck, *Constitutional Reform in Transitional States: Challenges and Opportunities Facing Egypt and Tunisia* (United States Institute of Peace, April 2011).

[47] Rules of Procedure adopted on 16 December 2011. For detailed information about the NCA's rules of procedure see Bill Proctor and Ikbal Ben Moussa, *supra* n.45.

[48] Bill Proctor and Ikbal Ben Moussa, *supra* n.45, 12.

[49] Duncan Pickard, "The Current Status of Constitution Making in Tunisia," *Carnegie Endowment for International Peace*, accessed March 28, 2014, http://carnegieendowment.org/2012/04/19/current-status-of-constitution-making-in-tunisia/ah1s.

[50] For example "[a]t a protest on March 16, the president of the Ennahda parliamentary group, Sahbi Atig, shouted that sharia would be 'the main source of legislation' […]"Duncan Pickard, *supra* n.49.

[51] Duncan Pickard, *supra* n.49.

[52] Duncan Pickard, *supra* n.49.

Facing escalating pressure, El-Nahda felt the need to end the debate stating that the party would not pursue any Shari'a stipulation in the constitution referencing a number of reasons including; an ambiguous referral to Shari'a might lead to misinterpretation by the judiciary or public and the need to focus on the country's more pressing issues.[53] Al-Ghanouchi, the founder of El-Nahda, in what seems to be a leaked video, provided an arguably more sincere and honest reason; in his response to a Salafi sheik, Al-Ghanouchi said "in practice what makes laws is not the constitution but the balance of power",[54] and that when Tunisian society is ready, Article one will be enough to promulgate Islam-based laws.[55]

Be that as it may, at an early stage, El-Nahda successfully evaded a major landmine that could have brought the Troika coalition to an end. Nonetheless, a more intricate challenge of a political nature was yet to come, namely the type of the political system to be established. This challenge, unlike the question of Shari'a, was considerably time and effort consuming,[56] with El-Nahda insisting on a parliamentary system with a weak, indirectly elected president, while other civil and secular parties, including the ones in the ruling Troika coalition, favoring semi or fully presidential system.[57] All concerned parties cited reasons justifying their positions, for instance El-Nahda stated that the parliamentary paradigm is more compatible with the Islamic principle of Shura, consultation, and thus inherently worthy of being adopted.[58] In fact, while acknowledging the validity of some reasons mentioned in support of one system or another, it is reasonable to believe that each side was acting in accordance with its own narrow party interest. El-Nahda, which garnered 40% of the NCA seats, believed that in a fractured political setting, this percentage would still grant it the leading position. Despite polarization, other secular and civil parties hoped to overcome their differences and agree on a candidate who would be capable of reaping the remaining 60% of the votes.[59]

In the meanwhile, other factors contributed to further widen the gap between Islamists and secularists. In fact, there was a growing conviction that the El-Nahda led government was intentionally reluctant to take any legal or political action vis-à-vis radical and violent groups "to cultivate deniable 'proxies' with which to intimidate political opponents."[60] Against this backdrop, the assassination of opposition leader Chokri Belaid (February 2013) largely shattered the already fragile trust between both camps.[61]

[53] Duncan Pickard, *supra* n.49.

[54] "Communication téléphonique entre Rached Ghannouchi et Béchir Ben Hassine," *businessnewscomtn*, [Video file- in Arabic], retrieved from https://www.youtube.com/watch?v=2S-PLXId6Aw.

[55] "Communication téléphonique entre Rached Ghannouchi et Béchir Ben Hassine," *businessnewscomtn*, supra n.54

[56] A few days before the voting on the final constitutional draft, the NCA voted down Article 90 that distributes powers between the president and the prime minster. Duncan Pickard, "Voting on the Tunisian Constitution," *Atlantic Council*, accessed March 28, 2014, http://www.atlanticcouncil.org/blogs/menasource /voting-on-the-tunisian-constitution.

[57] Duncan Pickard, *Lessons from Constitution-Making in Tunisia* (Atlantic Council, September 2012), 3-4.
Bill Proctor and Ikbal Ben Moussa, *supra* n.45, 12.

[58] Duncan Pickard, *supra* n.57, 3.

[59] Duncan Pickard, *supra* n.57, 3-4.

[60] "Why Tunisia's leaders must resist urge for power grab", *CNN*, accessed March 5, 2014, http://edition.cnn.com/2013/02/13/opinion/tunisia-political-crisis/.

[61] "Tunisia: Chokri Belaid assassination prompts protests," *BBC*, accessed March 15, 2014, http://www.bbc.com/news/world-21349719.

In an attempt to restore confidence, Prime Minster Hamadi Jebali, from El-Nahda party, called for a "non-partisan, technocratic government".[62] Nonetheless, failing to secure support from his party, he was forced to resign and another Islamist took over, Ali Larayedh.[63] It is true that El-Nahda refused to accommodate the opposition's strong demand to form a technocratic government, but the NCA's bylaws did witness a very significant amendment; the Joint Committee of the NCA was replaced by a "Consensus Committee, in which each political group was given equal weight to all others."[64] This step managed to restore much of the needed confidence and the Committee was entrusted to work on the June 2013 constitutional draft hoping to resolve lingering political disagreement.[65]

Nonetheless, further setbacks were yet to transpire both regionally and domestically. The ouster of the regime of the Muslim brotherhood (MB) in Egypt, the assassination of the second opposition leader Mohamed Brahmi (July 2013),[66] and the killing of eight army soldiers (July 2013)[67] gravely exacerbated the situation between the Islamists and secularists, leading to mass street protests and full suspension of the NCA in August 2013.[68] Fearing the worst and seeking to contain the political crisis, the El-Nahda government declared the Salafist *Ansar al-Shari'a* a terrorist group, a decision that irreversibly[69] ended the so called "accomodationist" approach that El-Nahda was pursuing towards extreme Salafist groups but did little to fix the deteriorated political status quo.[70]

Given the failure of political players to maintain a trustworthy relationship, actors of civil society felt the necessity of their intervention. Tunisia's "largest trade unions, the lawyers association, and one of the country's largest human rights associations (who were together referred to as the 'Quartet')" brokered negotiations between the government and the opposition, which led to a reconciliatory agreement.[71] The most important term of the agreement was the consent of El-Nahda to form a technocratic government;[72] only then did the process pick up, leading to the adoption, with 200 votes from 216, of a permanent constitution; the Tunisian Constitution of 2014.[73] Ultimately, an overwhelming consensus had been achieved

[62] "Tunisia: Ali Larayedh named new prime minister", *BBC*, accessed March 5, 2014, http://www.bbc.com/news/world-africa-21550375.
[63] "Tunisia: Ali Larayedh named new prime minister", *supra* n.62.
[64] Zaid Al-Ali and Donia Ben Romdhane, *supra* n.34, 3.
[65] Alexis Arieff and Carla E. Humud, *Political Transition in Tunisia* (Congressional Research Service, January 2014), 3-4.
[66] "Since Brahmi's July assassination and the military's overthrow of the Muslim Brotherhood in Egypt, the positions of Tunisia's secular opposition have hardened considerably." Anouar Boukhars, *In the Crossfire: Islamists' Travails in Tunisia* (Carnegie Endowment For International Peace, January 2014), 9.
[67] "Eight Soldiers Killed in Chaambi Mountain Attack," tunisialive, accessed March 6, 2014, http://www.tunisia-live.net/2013/07/29/eight-soldiers-killed-in-chaambi-mountain-attack.
[68] "Tunisia constituent assembly suspended pending talks", *BBC*, accessed March 6, 2014, http://www.bbc .com /news/world-africa-23596640.
[69] The crackdown on Salafists effectively started after an attack on the U.S. Embassy in September 2012. Alexis Arieff and Carla E. Humud, *supra* n.65, 7.
[70] See Anouar Boukhars, *supra* n.66, 9.
[71] "Islamist Party in Tunisia to Step Down," *NY Times*, accessed March 6, 2014, http://www.nytimes.com/2013/09/29/world/africa/islamist-party-in-tunisia-to-step-down.html?_r=0.
[72] "Mehdi Jomaa takes office [10 Jan 2014] to lead caretaker government until elections as part of democratic transition agreement." "Tunisia's new prime minister takes office," *Aljazeera*, accessed March 11, 2014, http://www.aljazeera.com/news/africa/2014/01/tunisia-new-prime-minister-takes-of.
[73] "Tunisia assembly passes new constitution," *BBC*, accessed March 6, 2014, http://www.bbc .com /news/world-africa-23596640.

in a considerably fractured, polarized, post-revolution political stage, ushering in the third and hopefully the final stage of transition, i.e. parliamentary and presidential elections.

4. Successful Transition

a) Contingency Approach

The largely successful Tunisian experience begs the question: what made it work in Tunisia and not elsewhere is the Arab awakening countries? The answer seems to lie in the organizational management concept of contingency:

According to the contingency approach there are no plans, organisation structures, leadership styles, or controls that can be applied under all conditions. Instead, every management situation must be approached with the "it all depends attitude"…. Managerial action, thus, depends upon circumstances within a given situation. No one best approach will work in all situations. Applying a contingency/situational approach requires that managers diagnose a given situation and adapt to meet the conditions present.[74]

Being mindful of this notion, the Tunisian administration of the transitional period could be largely deemed contingency-oriented; in a sense that a host of decisive measures were tailored to meet the exigencies of the moment with neither political fixation nor legal stubbornness. This ability to mostly act timely and adequately largely shaped the course of the whole process and set the stage for establishing consensus. In other words, the relative success of the Tunisian case was, at least partially, an outcome of institutional behavior and conscious decisions that rendered consensus a prerequisite for a legitimate and peaceful transition. While acknowledging the importance of other factors that further boosted a consensual solution such as the presence of an accommodating and moderate leader like Al-Ghanouchi of the El-Nahda party, the ouster of former President Morsi in Egypt and the high level of awareness of the Tunisian society,[75] the next section sheds light on other decisions and factors that played a substantial role in neutralizing the danger of the tyranny of the majority.[76]

b) Consensus: Reality not a Choice

The core factor that enabled Tunisia to wade through its second stage of transition was the unwavering need to maintain consensus. As challenging as it was, consensus was not a matter of choice but rather a reality that political actors had to submit to due to a number of well thought out decisions, and factors that further boosted the need for political inclusiveness.

Electoral Formula: In his detailed analysis, John M. Carey presents a staggering fact, had Tunisia "chosen the other most common formula for converting votes to seats, the *d'Hondt Divisor*

[74] V S P Rao & Hari V Krishna, *Management: Text and Cases*, (Excel Books: New Delhi, 2005), 84.

[75] E.g. David Pollock, "First Islamist Party to Voluntarily Give Up Power: A New Tunisian Model?," *The Washington Institute*, accessed March 5, 2014, https://www.washingtoninstitute.org/policy-analysis/view/first-islamist-party-to-voluntarily-give-up-power-a-new-tunisian-model.

[76] "[…] majoritarian systems not tempered by constitutional restraints on the exercise of power have a tendency to denigrate into a 'tyranny of the majority.' It is this tension between majoritarian sovereignty and minority protection that has marked democratic theory from its very beginning."
Ebrahim Afsah, "Constitution-Making in Islamic Countries- A Theoretical Framework," in Rainer Grote & Tilmann Röder (eds.) *Constitutionalism in Islamic countries: between upheaval and continuity* (Oxford: Oxford University Press, 2012), 491.

(D'HD) method – Ennahda would have won 69% of the Assembly seats and been in a position to impose a new constitution unilaterally."[77] In fact, the Tunisian High Commission opted for an electoral formula known as *Hare Quota with Largest Remainders (HQ-LR)*, which was advantageous to small parties and substantially affected the eventual political landscape. Therefore El-Nahda, which garnered 37% of votes in the October 2011 election, only occupied around 41% of the NCA seats.[78]

Moderates versus Secularists: The protagonists of the second phase were the Islamists of El-Nahda on the one hand, and civil and liberal forces on the other. The absence of the Tunisian army from the political game made it clear to secular forces that they had to fight their battles on their own without outside help. Nonetheless, it was not only the army that was out of the scene. The usually disregarded decision of Tunisian government, prior to the October election, to ban Salafist groups from running elections[79] had an equal impact on political Islam in Tunisia.

Post-revolution, Tunisia witnessed a boom in the number of political parties representing all walks of life.[80] Nevertheless, based on Tunisia's political party law, "a number of Islamist political parties were not granted party accreditation in order to contest the elections, including Hizb Al-Tahrir […]"[81] Initial estimates tended to underestimate the influence and number of Salafist groups[82] but the "rise of salafism in Tunisia has been both surprising and problematic."[83] No one can predict what the result would have been had radical groups been allowed to run elections; but as a result, El-Nahda lost a potential ally that could have boosted the position of political Islam in the NCA.[84] On the contrary, the failure to translate the presence of the Salafi groups into seats in the NCA completely dismissed the subsequent rapprochement between El-Nahda and Salafism as a sponsorship of radicalization, not as an alliance between two political parties.[85]

Need to Reach Consensus Shaped the Procedure of the NCA: The abovementioned measures had, at least in part, affected the electoral outcome. Islamists came in short of achieving a qualifying majority, triggering the need for a coalition with ideologically different parties and promoting rhetoric of consensus. The most important manifestation of this tendency was Article two of the provisional constitution, which necessitated the approval of two-thirds + one of the NCA to pass the constitution. Setting a high bar meant that the only way to prove their

[77] John M. Carey, *Electoral Formula and the Tunisian Constituent Assembly* (Dartmouth, May 2013), 1.
[78] John M. Carey, supra n.79.
[79] Kevin Casey "A Crumbling Salafi Strategy," *Carnegie Endowment For International Peace: Sada*, accessed March 5, 2014 http://carnegieendowment.org/sada/2013/08/21/crumbling-salafi-strategy/gjkq.
[80] "Whereas only nine registered political parties contested elections under Ben Ali's regime, post-revolutionary Tunisia boasted 113 registered political parties and independents." Laryssa Chomiak, *Countries at the Crossroads: Tunisia* (Freedom House, 2012), 3.
[81] Laryssa Chomiak, supra n.80, 3-4.
[82] E.g., Moncef Marzouki, the president of Tunisia once commented of Salafists saying "they are a tiny minority within a tiny minority." "Violent tide of Salafism threatens the Arab spring", *The Guardian*, accessed March 10, 2014, http://www.theguardian.com/world/2013/feb/09/violent-salafists-threaten-arab-spring-democracies.
[83] Stefano M. Torelli, Fabio Merone and Francesco Cavatorta," Salafism in Tunisia: Challenges and Opportunities for Democratization," *Middle East Policy*, volume XIX, No 4 (Winter 2012), 1.
[84] While acknowledging that the majority of the Salafist groups do not recognize modern political structure, an ideological shift could have happened, similar to Egypt, if they were given the chance to participate in the NCA election to draft the constitution.
[85] See "Why Tunisia's leaders must resist urge for power grab", *supra* n.60.

trustworthiness political parties had to reach consensus. The referral to a public referendum would have been construed as a failure of the participant parties to resolve their disagreements. For that reason, the Joint Committee was replaced by the Consensus committee where political parties were equally represented to facilitate the creation of consensus.[86]

Absence of Time Limit: In hindsight, the absence of a time limit on the work of the NCA had benefited the process. Having to deliver within certain time frame could have led to a hasty outcome, legal impasse, or questioning the legal legitimacy of the process by surpassing the deadline. The absence of such restriction allowed the NCA the time to overcome many of the tensions it encountered and to reach modus vivendi, allowing for a consensual constitution.

Civil Society and Nida Tounis: The presence of strong labor unions, syndicates, and a vibrant civil society in general, made it possible for civil actors to sponsor negotiations that led to the process-saving agreement between the opposition and the government. This role was best complemented by the political counterweight introduced to the stage by the emergence of Nida Tounis under the leadership of El-Sebsi which eventually offered a platform for the fractured civil and secular opposition.[87] This political balance rendered consensus a desirable and safer option rather than a public referendum with unpredictable results.[88]

II. The Egyptian Case

1. Post Mubarak

Though the first political role of the Egyptian army dates back to 1881, such role was usually justified, specifically in 1881[89] and 1952, to intercept foreign interference or end occupation. Therefore, it was no surprise that Egyptian protestors were jubilant to see army troops, even prior to declaring any positions, on the street during the course of the 2011 revolution.[90] Building on this psyche, neither Mubarak nor Egyptians found it problematic to mandate the Supreme Council of the Armed Forces (SCAF), which is not mentioned in any form in the 1971 Constitution, to run the transitional period.[91] The reported role of the army in toppling Mubarak,[92] barren political life, the leaderless revolution, and the notorious reputation of the

[86] Zaid Al-Ali and Donia Ben Romdhane, *supra* n.64.

[87] By April 2013, Nida Tounis was "running almost even with Ennahda in all public opinion polls." Marina Ottaway, *Learning Politics in Tunisia*, (Wilson Center, April 2013), 2; Anouar Boukhars, *supra* n.66, 9.

[88] Arguably, the rising popularity of Nida Tounis had deterred El-Nahhda from considering a public referendum as a no vote could have probably largely boosted the position of Nida Tounis at the expense of El-Nahhda.

[89] E.g. "In 1881 Egyptian army officers led by Arabi Pasha went into open revolt. This was a genuine nationalist movement against all foreign interference in Egyptian affairs [...]" Roger Parkinson, *The late Victorian Navy: The pre-dreadnought era and the origins of the First World War* (Woodbridge, UK: Boydell Press, 2008), 48.
"The Nasserite era [named after Jamal Abdel Nasser the actual leader of the 1952 coup d'état] […] overthrew the Egyptian monarchy and government, ended the occupation of the British [...]" Amal Treacher Kabesh, *Postcolonial masculinities: emotions, histories and ethics*, (Farnham, Surrey: Ashgate, 2013), 120.

[90] "Egyptian military became one of the heroes of the 2011 revolution [...]" The now-famous cries from the demonstrators—"The army and the people are one hand!" William J Dobson, *The dictator's learning curve: Tyranny and democracy in the modern world* (London: Vintage Books, 2013), 255.

[91] In a televised speech, Omar Suliman, Mubarak's vice president declared that Mubarak waived the office of presidency and delegated the SCAF to run the country's affairs. "Hosni Mubarak resigns as president," *Aljazeera*, accessed March 5, 2014 http://www.aljazeera.com/news/middleeast/2011/02/201121125158705862.html.

[92] Paul Danahar, *The new Middle East: The world after the Arab Spring*, (New York: Bloomsbury Press, 2013), 56.

1971 Constitution, specifically after the 2005 and 2007 amendments,[93] rendered the non-constitutional rule of the SCAF justified if not welcomed.

Few days after Mubarak's departure, the SCAF timed its political role to six months, suspended the 1971 Constitution, and appointed a committee of experts to introduce a number of amendments to the suspended constitution.[94] Amending the Constitution appeared to be an awkward decision for, at the very least, two main reasons; the sheer breach of the suspended constitution should have led to its demise not amendment and the irony of reviving a constitution that did not mention the SCAF, even by way of example, in any constitutional clause, let alone the ruling of the country. Nevertheless, almost five weeks after toppling Mubarak, the SCAF held a constitutional referendum on March 19, 2011 (hereinafter March referendum) where voters were required to either approve or disapprove eight amendments to the 1971 Constitution and an abrogation of one of its articles.

The amendments and the abrogation were overwhelming approved by almost 77% of the voters.[95] It was thus reasonable to expect the reinstatement of the 1971 constitution. However, the SCAF, finally realizing the impossibility of reinstating a constitution that did not recognize the junta, in a tragicomic twist, declared on the SCAF Facebook page that the 1971 Constitution was replaced by a new constitutional declaration (provisional constitution).[96] The so called constitutional declaration committed four travesties that completely dismissed any validity of the constitutional referendum. Firstly, the referendum included an abrogation of Article 179 of the 1971 Constitution which meant that abolishing a constitutional article required popular approval.[97] However, although the 1971 Constitution was 211 articles, the constitutional declaration was only 63 articles and thus, unilaterally, the SCAF repealed tens of articles without any popular consultation.[98] Secondly, although the declaration's articles were mostly derived from the replaced constitution, sometimes they were considerably different.[99] Thirdly, in order to authorize the SCAF's ruling of the country until the election of the two chambers of parliament and a president, brand new articles, such as Article 61, was added.[100] Fourthly, and most ironically, an approved article by the referendum was amended arbitrarily by the SCAF. The approved wording of Article 189 stated that "[B]oth the president, after the consent of the cabinet of ministers, and half the members of the chambers of parliament have the right to request a new constitution […]" in contrast, according to Article 60 of the declaration, only the

[93] E.g. Dafna Hochman Rand, *Roots of the Arab Spring: Contested authority and political change in the Middle East* (Philadelphia: University of Pennsylvania Press, 2013), 64-65.

[94] "On February 13, 2011, the SCAF dissolved parliament and suspended the 1971 constitution. It then established an eight-member committee of experts to draft amendments to that constitution." *Elections in Egypt: The Electoral Framework in Egypt's Continuing Transition: February 2011 – September 2013* (International Foundation for Electoral Systems, October 2013), 2.

[95] *Elections in Egypt: The Electoral Framework in Egypt's Continuing Transition: February 2011 – September 2013, supra* n.94.

[96] Nathan J. Brown and Kristen Stilt, "A Haphazard Constitutional Compromise," *Carnegie Endowment for International Peace*, accessed March 28, 2014, http://carnegieendowment.org/2011/04/11/haphazard-constitutional-compromise/2q1.

[97] Nathan J. Brown and Kristen Stilt, *supra* n.96.

[98] Nathan J. Brown and Kristen Stilt, *supra* n.96.

[99] Some of these changes are substantively significant, "such as to Article Five of the 1971 constitution dealing with political parties[…]Presumably, the SCAF only later realized it wanted to amend these clauses, but it did so without any additional explanation or justification." Nathan J. Brown and Kristen Stilt, *supra* n.96.

[100] Article 61 stated:

"The Supreme Council of the Armed Forces will continue directly with its limited responsibilities following this Declaration, until the time at which the People's Assembly and the Shura Council assume their responsibilities and the president of the republic is elected and assumes his/her position."

SCAF could start the process of drafting the constitution within six months of the election of chambers of the parliament.[101]

Regardless of its questionable procedural legitimacy, the declaration in practice had a number of significant repercussions; on the whole, whoever was in power could promulgate an edict and call it a constitutional declaration; secondly, it set in motion a roadmap for the transitional period. The roadmap provided that a parliament of two chambers were to be elected, the non-appointed parliamentarians would then elect (within six months of their election) a constituent assembly to draft a new constitution (within 6 months of its formation) and then a presidential election.[102] Therefore, though the SCAF retained its political influence until the end of the transition, the parliament was to possess the power of legislation and the competence to elect the Egyptian Constituent Assembly (ECA).

According to the roadmap, consequently, the next step to be followed was the parliamentary election. Nevertheless, arguably, prior to the election, Egypt was living a cold war atmosphere with three sets of overlapping and conflicting interests. Islamists -mainly Muslim Brotherhood (MB) and Salafists- intoxicated by their overwhelming success in manipulating a yes vote for the March referendum[103] were squarely sure about their sweeping victory and demanded to run parliamentary elections as soon as possible. However, being aware of the material and political weight of the SCAF, they mostly maintained an appeasement approach.[104] Civil and the so-called revolutionary forces, vanquished in their campaign for a 'no vote' for the March amendments,[105] lacking organizational structure or popular support, were stuck between a rock, the SCAF ruling, and a hard place, running elections and incurring defeat before Islamists. The SCAF, despite its tremendously rapid drain of popularity,[106] could not let the army's institutional interests up in the air to be decided by whoever would come to power.

Few days prior to the Lower House election a very illuminating development took place. The government introduced what became known as Elselmy Document, which contained a set of principles to serve as supra-constitutional clauses to restrain the prospective ECA.[107] In summary, the document granted the army an autonomous status and largely sought to preserve a civil character for the state.[108] The document provoked wide-spread criticism

[101] Article 60 of the March 2011 Constitutional Declaration stated that:
"The members of the first People's Assembly and Shura Council (except the appointed members) will meet in a joint session following an invitation from the Supreme Council of the Armed Forces within 6 months of their election to elect a constituent assembly composed of 100 members which will prepare a new draft constitution for the country to be completed within 6 months of the formation of this assembly. The draft constitution will be presented within 15 days of its preparation to the people who will vote in a referendum on the matter. The constitution will take effect from the date on which the people approve the referendum."

[102] Article 60 of the March 2011 Constitutional Declaration, *supra* n.101.

[103] "Muslim Brotherhood have abused the vote […] they have used the slogan, 'Yes, with Allah', [...] distributing leaflets saying that approving the proposed amendments to the constitution is a religious obligation." Rosemary Sabet, *From Trafalgar to Tahrir* (Authorhouse, 2012), 126; "Egyptian Voters Approve Constitutional Changes," *NY Times*, accessed March 6, 2014, http://www.nytimes.com/2011/03/2 1/world/middleeast/21egypt.html?pagewanted=all &_r=0.

[104] Nael Shama, *Egyptian foreign policy from Mubarak to Morsi: Against the national interest* (London; New York: Routledge, Taylor & Francis Group, 2014), 223.

[105] Rosemary Sabet, *supra* n.103, 125-127.

[106] Rosemary Sabet, From Trafalgar to Tahrir, suprasupra n.103, 125 and 129.

[107] Nael Shama, Egyptian foreign policy from Mubarak to Morsi: Against the national interest, *supra* n.104, 223.

[108] For instance Article one of the document stated that "[T]he Arab republic of Egypt is a civil and democratic state […]" For full text of the ELselmy Document see "The Text of the Basic Principles of the Constitution," Almasry Alyoum, accessed March 5, 2014, http://www.almasryalyoum.com/news/details/103142.

especially and conceivably from the Islamists who viewed the document as lose-lose situation; favoring the army and the civil forces.[109] Under threats to resort to the street, the government declared that the document was advisory and not binding.[110] However, in a clear show of force Islamists organized a mass protest in Tahrir square. The message was clear; no imposition of supra-constitutional principles because they (Islamists) were sure that they would dominate the drafting process and they rejected any potential restrictions on their discretion without obtaining any benefits in return.[111] Other civil and purportedly revolutionary forces, incapable of organizing any sizable protest on their own, joined the Islamists' protest.[112] Eventually, Islamists left Tahrir square after delivering their message while other forces ended up in bloody clashes with the security forces in what is widely known as Mohamed Mahmoud Confrontations.[113] Therefore, while the Islamists showed considerable ability to mobilize the street, self-claimed revolutionary forces were consumed in street clashes with no clear agenda nor popular support and apparent failure to prepare for the parliamentary election.[114]

2. Remarks on the First Stage of the Transition

Unlike Tunisia, the Egyptian army was the ruler of the first transitional period. The legitimacy of the SCAF's role was hardly challenged in the beginning given its reported role in toppling Mubarak and popular perception of the army as the country's savior. The warm reception of the army led to the SCAF's refusal to hand over power to a presidential council.[115] In fact, the SCAF's deluded confidence in unconditional popular support led to its full embroilment in politics. Nevertheless, as the SCAF was part and parcel of the political fray pursuing its interests, it quickly became an easy target for political onslaught. In addition, instances of disproportionate use of force and sheer scale of insecurity rendered the SCAF's administration incompetent causing a tremendous legitimacy drain that could not be harnessed by its farcical constitutional declarations.

For Islamists, the vehement pursuit of political Islam, in the run up for March referendum, to turn rivalry into an ideological one rather than political was indicative that a political coexistence between civil and religious forces in Egypt was by default evasive.[116] To rub salt in the wound, the misadministration of the SCAF further worsened the case. The failure to engage a body representative of various social and political forces (similar to the Tunisian High Commission) in the administration of the transitional period majorly harmed the SCAF itself, undermined civil forces and paved the way for street mobilization and mass protests. Faced by

[109] Nael Shama, *supra* n.104, 223.

[110] "Islamists Lead a Massive Protest in Cairo," *The Wall Street Journal*, http://online.wsj.com/news/articles/SB10001424052970203611404577046093603733830?mg= 0.html.

[111] See "Egypt's Islamists dominate Tahrir Square's dense Friday protest," Ahram online, accessed March 5, 2014, http://english.ahram.org.eg/NewsContent/1/64/26902/Egypt/Politics-/Islamists-dominate-Egypts-Tahrir-Squares-dense-Fri.aspx.

[112] See "Islamists Lead a Massive Protest in Cairo," *supra* n.110; "Egypt's Islamists dominate Tahrir Square's dense Friday protest," *supra* n.111.

[113] Nael Shama, *supra* n.104, 223.

[114] Despite that liberal forces would have relatively benefited from Elslemy Document, they joined the Islamists' protests and ended up, without the Islamists, clashing with the security forces. Unlike Islamists, their demands were unclear, marred with violence and ignored the upcoming parliamentary elections. Contrary to this opinion, some perceive these aimless confrontations to be Egypt's second revolution. See Nael Shama, *supra* n.104, 223-224.

[115] The demand of forming a presidential council to run the country instead of the SCAF was strongly pursued by a number of political actors. Mohamed El-Bendary, The Egyptian Revolution: Between hope and despair: Mubarak to Morsi (New York: Algora Publishing, 2013), 148.

[116] Rosemary Sabet, *supra* n.103, 126.

their inability to compete either politically or at the street level (protests), the so-called revolutionary forces devoted their efforts to media talks, pointless confrontations with security forces or, sometimes, pressing for demands that would only benefit political Islam.[117] The fine lines between freedom, chaos, and anarchy were repeatedly crossed amid praise of the secularly-oriented media.[118] Moreover, disregarding Article four of the army's declaration which banned "exercising any political activity or establishing political parties on a religious foundation […]" allowed political Islam to fully display its force whether in its propaganda or in the establishment of religious-oriented political parties.[119]

Lastly, the parliament was assigned to elect the ECA. Therefore, political Islam was not only given the mandate to legislate but also to draft the country's constitution; a conclusion that was enough, per se, to exacerbate the acrimony between religious\non-religious forces and fuelled an allegation that the SCAF conducted an illicit deal with the MB.[120]

3. Early Confrontation: Islamists versus Judiciary

As expected, after a lengthy parliamentary election, the MB led coalition and the Islamic bloc won 47% and 27% of the Lower Chamber and 47% and 25% of the Upper house seats[121] respectively.[122] After such political annihilation, in practice, taking about consensus seemed to be illusionist. Especially after the political alliance between the MB and the Islamic bloc (mainly the Salafist Al-Nour party). Therefore, it was no surprise that the parliament elected an ECA dominated by Islamists.[123] In the meanwhile, the parliament started to adopt an anti-judiciary rhetoric, calling for its cleansing and the sacking of the attorney general.[124] Although it was no more than non-binding speeches or recommendations, it created a feeling that the judiciary was next, after sidelining civil and liberal forces. Yet, the first direct confrontation took place when the Egypt's Administrative Court ruled the dissolution of the ECA on the basis that its members should not be the same members of parliament.[125] The decision raised questions about the competence of the Administrative Court to disqualify a parliamentary act. Nevertheless, the decision was not challenged.[126]

[117] For instance, early 2012 some of the youth and non-Islamic forces were protesting to force the SCAF to hand over power to the head of the Lower House, SAAD Elkatatny, who hailed from the MB. Amre Elshobaky, "A Revolution of Lost Opportunities," Alarabiya, (in Arabic), accessed March 6, 2014, http://www.alarabiya.net/ar/politics/2014/01/23/الثورة-فرصة-الضائعة.html.

[118] Amre Elshobaky, supra n.117.

[119] E.g. "Radial Islamist groups gaining stranglehold in Egypt," *The telegraph*, accessed March 6, 2014, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/8457030/Radial-Islamist-groups-gaining-stranglehold-in-Egypt.html.

[120] Nael Shama, *supra* n.104, 223.

[121] "Results of Shura Council elections," Carnegie Endowment for International Peace, accessed March 6, 2014, http://egyptelections.carnegieendowment.org/2012/02/29/results-of-shura-council-elections.

[122] "The High Commission Declares the Results for the Lower House Lists [...] FJP 127, Al-Nour 96 and Elkotla 33," *ALmasry Alyoum* (in Arabic), accessed March 6, 2014, http://www.almasryalyoum.com/news/details /146347.

[123] Paul Danahar, *supra* n.92, 109.

[124] For instance, the parliamentary defense committee called for the sacking of the Attorney General which is considered a judicial position in the Egyptian system. "Parliament Committee Calls for Sacking Attorney General," *Almasry Alyoum*, accessed March 6, 2014, http://www.almasryalyoum.com/news/details/149602.

[125] "The court order stated that parliament must elect 100 'qualified' people from outside the parliament to write the constitution." "Court disbands Egypt's constitutional group," *CNN*, accessed March 6, 2014 http://edition.cnn.com/2012/04/11/world/africa/egypt-cons.

[126] See Paul Danahar, *supra* n.92, 109.

Paradoxically, the composition of the second ECA again included members of parliament[127] which led many observers to expect a second dissolution of the ECA.[128] In fact, a dissolution decision was on the horizon, but this time targeting the Lower Chamber. In June 2011, the Supreme Constitutional Court (SCC) issued a decision disbanding the Lower Chamber due to the unconstitutionality of the parliamentary electoral law.[129] The SCC decided that the electoral law violated Art 38 of the constitutional declaration which stated that "the law shall organize the right of nomination to both Councils of People [Lower Chamber] and Consultation [Upper Chamber] pursuant to an electoral system that combines closed parties lists and individual system with two-thirds percentage [devoted] for the first and the remaining one-third for the second."[130] Contrary to the article, the repealed law allowed political parties to run for all the seats, including the one-third devoted to individual nominees. Therefore, according to the SCC, and a neutral reading of the article, the law violated the constitutional article.

Nevertheless, the Islamists deemed the decision a stab in the back for a number of valid considerations. Firstly and most importantly, the decision could have invalidated the result for the one-third of the seats- for which the electoral law contravened the constitutional restriction allowing political parties to run for seats allocated for independent candidates- and upheld the other two-thirds. Dissolving the entire parliament seemed to be a judicial encroachment on the legislature especially that the Court's justification for nullifying the parties' two-thirds was largely based on logic not law.[131] Moreover, the decision came against a backdrop of rising tension between the MB, on one hand, and the SCAF and the judiciary on the other.[132] Consequently, the decision largely appeared retaliatory or even politicized.[133] Thirdly, although it is true that the decision was not without a precedent or legal validity,[134] the 2011 parliament was a genuinely democratically elected parliament, unlike its predecessors. Therefore, even given the unconstitutionality of the law, overriding the expressed will of millions of voters due to a legislative error could objectively be considered manipulative and undemocratic. Be that as it may, the Lower Chamber was dissolved with expectations for the Upper House, which was formed pursuant to the same unconstitutional law, to face the same destiny.

[127] "The second Constituent Assembly has been dogged by similar legal challenges [the one that dissolved the first]." William Partlett, "Constitution-Making by 'We the Majority' in Egypt," *Brookings*, accessed March 6, 2014, http://www.brookings.edu/blogs/up-front/posts/2012/11/30-constitution-egypt-partlett.

[128] The legality of the second ECA was referred to the SCC in October 2013. "Egypt's constitutional assembly case referred to Supreme Court," *Alarabiya*, accessed March 6, 2014, http://english.alarabiya.ne t/articles/ 2012/10/23/245476.html; Paul Danahar, *supra* n.92, 109.

[129] Bassam Tibi, *The Sharia state: Arab Spring and democratization* (London: Routledge), 141.

[130] Originally this Article gave the legislature the discretion to decide any electoral system for the parliamentary elections. However, on 25 December 2011, the SCAF issued a second constitutional declaration to amend this Article.

[131] The SCC stated that the competition of political parties on the one third, which was devoted to individual candidates, had affected the formation of the political parties' lists for the other two-thirds. "The Reasons for Disolving the People's Assembly," (in Arabic) Al-Watan, accessed March 6, 2014, http://www.elwatannews.com/news/details/15636.

[132] Before the dissolution decision, the MB made assertions that the SCAF threatened to dissolve the government if the MB and its political party continued their insistence to dismiss the government. "MPs inch closer to vote of no-confidence in El-Ganzouri government" Ahramonline, accessed March 5, 2014, http://english.ahram.org.eg/NewsContent/1/64/38042/Egypt/Politics-/MPs-inch-closer-to-vote-of-noconfidence-in-ElGanzo.aspx.

[133] Paul Danahar, *supra* n.92, 109.

[134] The SCC "in 1987 and 1990 it forced the dissolution of parliament on precisely such grounds. (It struck down the parliamentary electoral framework a third time in 2000 on different grounds.)" Nathan Brown, "Judicial Turbulence Ahead in Egypt, Fasten Your Seat Belts," *Carnegie Endowment For International Peace*, accessed March 5, 2014, http://carnegieendowment.org/2012/06/06/judicial-turbulence-ahead-in-egypt-fasten-your-seat-belts/b689.

4. A Wasted Opportunity of Reconciliation

In the meanwhile, the country was consumed with a confrontation of a different type; the second round of the presidential election between the MB's candidate, Mohamed Morsi and Mubarak's last serving prime minister, Ahmed Shafeik. Apart from the adherents of political Islam, the country was almost divided between the appeal of stability, promised by Shafeik, and the fear of restoring Mubarak's regime. The former fear was common between both Islamists and civil forces. Being mindful of the ferocity of the second round, both camps (Islamists and civil) seized the rare opportunity and exchanged promises of support and reconciliation. In the Fairmont meeting, named after the hotel where it was held, many representatives of the civil forces declared their clear support of Morsi and the MB, on their part, promised to reconsider the composition of the CA to be more representative of Egypt's various forces.[135] Acting on its own, the SCAF continued its ludicrous tradition, and on the eve of the final day of the presidential election declared the fourth of its so-called constitutional declarations.[136] The edict reassigned the legislative power to the SCAF until the election of a parliament and provided immunity for SCAF's officials.[137]

A few days later, the winner of the presidency was declared; Morsi with a razor-thin margin, 51.73%,[138] became Egypt's first democratically elected president in a free election. Morsi's victory temporarily ended the bitter division between pro- and anti-Islamists with hopes that the new president might work on healing the social rift in Egyptian society. Unlike Morsi's unsuccessful and controversial step of re-establishing the dissolved parliament,[139] his decision to abolish the SCAF's latest edict quickly portrayed him as a capable and courageous president.[140] By the same token, Morsi issued an edict, also calling it a constitutional declaration, claiming the SCAF's legislative power for himself and abolishing the SCAF's immunity.[141] Immediately after, Morsi sacked the long sitting Minister of Defense, army commander of chief and other top officers, and appointed Abdel-Fatah El-Sisi as the new Defense Minister.[142]

Morsi's edict was widely praised amid claims that it put an end to the protracted political role of the army. To a high extent, Morsi benefited from the temporary alliance with civil forces and the collapsing popularity of the SCAF and the army's political interference. Therefore, hardly anyone did question the authority of his edict especially that it came on the ruins of another self-claimed, unpopular declaration. However, it seemed that Morsi disregarded these factors and believed that he, per se, could actually have become a constitutional authority. Although Morsi at this point possessed both executive and legislative powers, by the virtue of his first edict, he issued a second one. Again calling it a constitutional declaration, this time Morsi

[135] "Once election allies, Egypt's 'Fairmont' opposition turn against Morsi," *Ahram online*, accessed March 5, 2014, http://english.ahram.org.eg/NewsContent/1/152/74485/Egypt/Morsi,-one-year-on/-Once-election-allies,-Egypts-Fairmont-opposition-.aspx.
[136] Nael Shama, *supra* n.104, 222.
[137] Nael Shama, *supra* n.104, 222.
[138] Elections in Egypt: The Electoral Framework in Egypt's Continuing Transition: February 2011 – September 2013, *supra* n.94, 6.
[139] Bassam Tibi, *supra* n.129, 142.
[140] Nael Shama, *supra* n.104, 222.
[141] Nael Shama, *supra* n.104, 222.
[142] Nael Shama, *supra* n.104, 222.

granted himself powers that were never, at least overtly, available to any of Egypt's presidents including the SCAF. The Reichstag Fire-type edict stated that:

> Previous constitutional declarations, laws, and decisions made by the president since he took office on 30 June 2012, until the constitution is approved and a new People's Assembly [Lower Chamber] is elected, *are final and binding by themselves and cannot be appealed by any way or before any entity. Nor shall they be suspended or cancelled and all lawsuits related to them and brought before any judicial body against these decisions are expired.* (Article two) [Emphasis added]
> No judicial body can dissolve the Consultative Council [Upper Chamber] or the Constituent Assembly. (Article five)

In other words, after two edicts, Morsi wanted to possess unquestionable constitutional, legislative, executive, and administrative competences. With no need for deep analysis, this edict was a cure for all the fears of political Islam. There was a fear of dissolving the ECA because its second formation included members of parliament which, as already mentioned, was the same reason for dissolving the first ECA, and the 6-month period for drafting a constitution was about to expire. Besides, the unconstitutional electoral law that led to the dissolution of the Lower Chamber was the same law that applied to the Upper Chamber and thus the dissolution of the latter was inevitable.[143] Accordingly Article five came to stem these fears. Moreover, shielding Morsi's decisions against any review or scrutiny was construed as a pretext to, at the least, re-establish the dissolved Lower Chamber. The edict was thus seen as a letter of intention of the MB that ended the short-lived honeymoon with civil forces, and threatened state institutions and a wide segment of Egyptians.[144] However, shortly under the pressure of popular protests, Morsi issued his third and last constitutional declaration that repealed the earlier one.[145]

5. 2012 Constitution: Reasons of Failure

Failing to impose the dictatorial edict, Morsi and the MB followed a different two-pronged approach; the threatened ECA had to finish the draft constitution as soon as possible and the judiciary had to be silenced. To this end, seeking consensus was not on the agenda; therefore, representatives of other forces, frustrated by the process of drafting, withdrew from the ECA.[146] Instead of seeking reconciliation, the withdrawn representatives were quickly replaced by compliant members and a draft constitution was ready before the deadline. The hasty drafting process was most ironically manifested in the travesty that Christian Copts in the ECA were eventually represented by a Muslim named Mohamed.[147] Secondly, to stem the fear of any

[143] Daniel L. Tavana, "Party Proliferation and Electoral Transition in Post-Mubarak Egypt," in George Joffé (ed.) *North Africa's Arab Spring* (London: Routledge, 2013), 55.
[144] "Egyptians stage mass protests against Morsi edict," *The Washington Post*, accessed March 5, 2014 http://www.washingtonpost.com/world/middle_east/egyptians-stage-mass-protests-against-morsi-edict/2012/11/27/166d71ca-38c4-11e2-b01f-5f55b193f58f_story.html.
[145] "A look back at Mohamed Morsi's tumultuous year" *CCTV*, accessed March 5, 2014, http://english.cntv.cn/program/bizasiaamerica/20130704/102643.shtmlhttp://english.cntv.cn/program/bizasiaamerica/20130704/102643.shtml.
[146] "Complaints about Islamist domination of the constituent assembly had led to mass resignations by non-Islamist members and excoriating commentary in the Egyptian public sphere." *The Battle for Egypt's Constitution* (Project on Middle East Democracy, January, 2013), 2.
[147] "Elsawy Declares that He is the Representative of the Church in the Assembly," *Al-Watan*, accessed March 5, 2013, http://www.elwatannews.com/news/details/86722.

undesirable judicial decisions, the supporters of political Islam cast a watertight besiege on the SCC to prevent its justices from entering the court until the adoption of a new constitution.[148] In summary, the drafting process of the 2012 Constitution was marred by exclusion and physical transgression on state institutions. Nevertheless, the draft was approved by 63% in a popular referendum.[149] The 2012 Constitution itself was accused numerously of creating a theocratic state. However, an objective reading may reveal that its articles exhibited a "stronger emphasis on religion than the 1971 constitution, yet its character is [was] largely secular."[150] The Constitution was conservative, perhaps patriarchal,[151] but was not designed to turn the state overnight into a theocracy. Arguably, its main problem for Egyptians was its creation process and the political performance that followed its genesis.

In fact, the conduct of Morsi and his group (MB) was not any different from that of the ECA. Even the main Salafist party, Al-Nour, broke alliance with MB due to allegations of exclusion and MB monopoly.[152] By the end of Morsi's one year in office, it appeared that Morsi and MB were threatening opponents through alliances with groups that have black records in violence and terrorism.[153] In one of his last decisions, Morsi crossed the lines of absurdity and appointed a governor to the touristic city of Luxor who hailed from the very same group (Gamaa Islamia) that committed the most heinous terrorist attack against tourists, in the modern history of Egypt, in the very same city of Luxor.[154] The instances where political Islam in general, and MB in particular, physically and verbally, indirectly and indirectly, threatened their opponents whether citizens, politicians or state institutions are beyond the scope of this research. However, they were significant enough to loom over and further stigmatize the Constitution of 2012 regardless of its content.

Egypt was marred with a regime acted dictatorially but lacked the qualifications of a dictatorship. The MB regime antagonized state institutions without having control over them, failed on economic and security fronts, alienated most of the segments of the society and paradoxically, commanded support, and claimed democratic mandate. The electoral and

[148] "Supreme Constitutional Court besieged again," *Daily News Egypt*, accessed March 5, 2014, www.dailynewsegypt.com/2012/12/16/supreme-constitutional-court-besieged-again/.

[149] "Egyptian constitution 'approved' in referendum," *BBC*, accessed March 5, 2014, www.bbc.com/news/world-middle-east-20829911.

[150] Holger Albrecht, *Egypt's 2012 Constitution Devil in the Details, Not in Religion* (United States Institute of Peace, January 2013), 1. Nathan Brown in his comment on the Draft of the 2012 Constitution (that was wholly adopted) mentioned that "[t]his document does not establish a theocracy or anything close to it, but if there is a clear majority party it will enable it to pass a wide range of laws and probably slowly reshape parts of the state apparatus." Nathan Brown and Eric Trager, "Have We Lost Egypt? A Dialogue on Islamists, Reactionaries, and American Diplomacy" New Republic, accessed March 5, 2014, http://www.newrepublic.com/article/111095/have-we-lost-egypt-islamists-reactionaries-american-diplomacy.

[151] E.g. Holger Albrecht, Egypt's 2012 Constitution Devil in the Details, Not in Religion (United States Institute of Peace, January 2013).

[152] Under Morsi's presidency, "Al-Nour felt deceived by the Muslim Brotherhood and openly expressed its fear for the future of their party if the Brotherhood succeeded in its plans to take control over the nation's resources and key political positions." Naglaa Mekkawi, "A love, hate relationship: Al-Nour and Egypt's Muslim Brotherhood," Alarabiya, accessed March 5, 2013, english.alarabiya.net/en/perspective/alarabiya-studies/2013/08/22/A-love-hate-relationship-Al-Nour-and-Egypt-s-Muslim-Brotherhood.html.

[153] For instance, in one of his last conferences, Morsi gathered a number of hardline Sunni clerics who insulted Moris's opponents and Shiites. Gihan Shahine, "Morsi ups the ante,"Al-Ahram Weekly, accessed March 5, 2013, www.weekly.ahram.org.eg/News/3069/17/Morsi-ups-the-ante.aspx.

[154] "Egypt's Mohamed Morsi appoints hardline Islamist to govern Luxor," The Guardian, accessed March 5, 2014, www.theguardian.com/world/2013/jun/17/morsi-appoints-islamist-governor-luxor; James Tyler Dickovick, Africa 2013 (Lanham, MD: Stryker-Post Publications, 2013), 44.

constitutional legitimacy largely appeared as tools to impose submission, not governance. In such context, the June 30th protests, the pretext for Morsi's ouster, seemed inevitable. Three days after millions of Egyptians took to the streets,[155] the army declared the ouster of Morsi.[156] Regardless of whether it was a coup, good coup,[157] or an answer to people's appeal, the army movement was largely justified, widely supported, and restarted the transitional period.[158]

6. A Second Period of Transition

During the same speech declaring Morsi's removal, the Defense Minister announced the suspension of the 2012 Constitution and the intention to form a committee of experts to amend it.[159] Learning from the SCAF's tumultuous experience, this time the power was handed over to an interim president, the head of the SCC who assumed the power to issue constitutional declarations,[160] and a civilian government. On July 8, the interim president declared the governing constitutional declaration which included the roadmap for the transitional period: a committee of 10 experts to suggest amendments to the 2012 Constitution;[161] a committee of 50 representing a spectrum of socio-polecat powers to review the suggested amendments[162] then, after the adoption of the Constitution, holding parliamentary and presidential elections.[163]

Quickly, in contrast to the media coverage of dispersing violent protests during the SCAF and Morsi rulings,[164] "Most private outlets embraced the government crackdown on Morsi supporters, including by adopting almost verbatim the government's defense of its actions."[165] The killing of more than 50 protestors in front of the club of the republican guards[166] was justified due the aggression of the protestors and their attempt to break into the social club

[155] "We've covered a lot of protests in Egypt since the fall of President Hosni Mubarak, but the last time we'd seen anything on this massive scale was in the days following Jan. 25, 2011, when the revolution started against him." "Reporter's Notebook: Millions March in Egypt Protests," ABC News, accessed March 5, 2014, http://abcnews.go.com/blogs/headlines/ 2013/06/reporters-notebook-millions-march-in-egypt-protests/; "Millions flood Egypt's streets to demand Mursi quit," Reuters, accessed March 5, 2014, http://www.reuters.com/article/2013/ 06/30/us-egypt-protests-idUSBRE95Q0NO20130630; "Protesters across Egypt call for Mohamed Morsi to go," The Guardian, accessed March 5, 2014, http://www.theguardian. com/world/2013/jun/30/mohamed-morsi-egypt-protests; "By the Millions, Egyptians Seek Morsi's Ouster," *NY Times*, accessed March 5, 2014, http://www.nytimes.com/2013/07/01/world/middleeast/egypt.html?pagewanted=all&_r=0.

[156] Elections in Egypt: The Electoral Framework in Egypt's Continuing Transition: February 2011 – September 2013, *supra* n. 94, 1.

[157] For the concept of good coups see Francis Ikome, Good coups and bad coups: The limits of the African Union's injunction on unconstitutional changes of power in Africa (Johannesburg, South Africa: Institute for Global Dialogue, 2007).

[158] "On July 3, 2013, General Abdul Fatah al-Sisi, a military general who is Commander-in-Chief of the Egyptian Armed Forces and the Minister of Defense, announced the removal of President Morsi. This was done with a great deal of popular support." Elections in Egypt: The Electoral Framework in Egypt's Continuing Transition: February 2011 – September 2013 *supra* n.94, 1.

[159] For full speech see "Morsi's Historic Ouster Speech" [Video file- in Arabic] retrieved from https://www.youtube.com/watch?v=Bm6QSnrx2hs.

[160] "Morsi's Historic Ouster Speech", *supra* n.159.

[161] Article 28 of the July 8th, 2013 Constitutional Declaration.

[162] Article 29 of the July 8th, 2013 Constitutional Declaration.

[163] Article 30 of the July 8th, 2013 Constitutional Declaration.

[164] Protesters were largely depicted as freedom fighters even if they were seeking to, at the least, besiege state buildings. E.g. the clashes that followed the protestors' attempt to prevent Egypt's prime minister, under SCAF, from entering the cabinet council. "Officials: Egypt protester killed outside Cabinet," *USA today*, accessed March 5, www.usatoday.com/news/ world/story/2011-11-25/egypt-cabinet/51393332/1.

[165] "Egypt: Freedom in the World 2014," *Freedom House*, accessed March 5, 2014, www.freedomhouse.org/report/ freedom-world/2014/egypt-0#.UzhH0qiSzzh.

[166] "Egypt: Conflicting Versions Of Army Killings," *Sky News*, accessed March 20, 2014, news.sky.com/story/1113127/egypt-conflicting-versions-of-army-killings.

carrying weapons.[167] Similar was the coverage of the breaking up of the MB's supporters' sit-in in Raba, which led to the death of hundreds of protestors and tens of officers.[168] In such an atmosphere and severe mood shift the 2014 constitution was drafted.

To the credit of the drafting committee, it represented a wide spectrum of societal forces.[169] However, apart from the one representative of Al-Nour party, the force that once occupied around 75% of the Lower Chamber vanished into thin air.[170] In a dramatic reverse, the power that once excluded everyone was eventually excluded. On January 2014, the draft constitution went through Egypt's third constitutional referendum after the 2011 revolution, where it was passed with 98% of the votes.[171] Despite what seems an absurd percentage there is little evidence that the voting was rigged, especially because opponents (namely the MB supporters) boycotted the referendum due to their non-recognition of the whole process, giving the high percentage of support a considerable credibility.[172]

Ironically, liberal and civil forces who unwaveringly lamented the so-called deal between the SCAF and the MB have offered in the current constitution the same, if not more, advantages to the army. In this regard, Article 234 of the 2014 Constitution, which states that "[t]he appointment of the Defense Minister shall take place after the approval of the Supreme Council of the Armed Force [...]," imposes an unprecedented restriction on the president's discretion to appoint the Defense Minister. Accordingly, it turned out that what the liberals and civil powers lamented was not the deal but the fact, if such purported deal existed, that they were not part of it.

III. Concluding Remarks

The Tunisian ban on radical groups to form political parties turned out to be crucial for democratic transition, whereas permitting radical groups and religious demagogue in the Egyptian case gave these groups political meritocracy while lacking genuine belief in democracy. Therefore, as intrusive as it may appear, it turned out that banning radical groups or religious propaganda from politics could enhance weak and newly born democracies and not the opposite. Comparing the Tunisian and the Egyptian cases may give further credit to the concept of "Militant Democracy."[173]

Moreover, Tunisia, which is highly deemed to be a success story, did not hold any public referenda. Egypt, on the other hand, conducted three overwhelmingly supported constitutional referenda and is still wading through a protracted transition. This fact, *per se*, may call to

[167] E.g. "Video: masked gunmen between supporters of Morsi during clashes "Republican guard", *Almasry Alyoum*,(in Arabic) accessed March 5, 2014, http://www.almasryalyoum.com/news/details/232831.

[168] There is an unsettled debate regarding the actual death toll as while the MB declared that thousands were killed, the Egyptian government insists that the number was in hundreds.

[169] "Rabaa clashes spark outrage, debate over casualties," *Daily News Egypt*, accessed March 20, 2014, http://www.dailynewsegypt.com/2013/07/27/rabaa-clashes-spark-outrage-debate-over-casualties/.

[170] "Although Islamists won five popular votes held since 2011, the constituent assembly will have only two Islamists among its 50 members. One belongs to the hardline Salafi Nour party, the other is a former Brotherhood leader now harshly critical of the group he left last year." "Egypt names key constitution panel with few Islamists," *Reuters*, accessed March 25, 2014, www.reuters.com/article/2013/09/01/us-egypt-protests-constitution-idUSBRE9800C620130901.

[171] "Egypt referendum: '98% back new constitution'," *BBC*, March 30, 2014, www.bbc.com/news/world-middle-east-25796110.

[172] See "Egypt referendum: '98% back new constitution'," *supra* n.171.

[173] For more information see András Sajó (ed.), *Militant democracy* (Utrecht: Eleven International, 2004).

reconsider the significance of referenda of technical nature, such as a constitutional referendum, in a post-conflict society with a high illiteracy rate like Egypt. Similarly, the mere focus on electoral victory as a sole indicator on democracy and legitimacy may need to be re-evaluated. "[I]t seems evident that merely holding elections is insufficient and that additional institutional mechanisms in the form of constitutional restraints are necessary to make it work."[174] Morsi's second declaration considerably revealed a disingenuous belief in democratic governance. Accordingly, there was a legitimate fear that Egypt was heading towards majoritarian tyranny rather than a constitutional democracy especially that "[t]here is strong empirical evidence that constitutional liberalism will in time lead towards democracy, but democracy on its own will not necessarily bring constitutional liberalism."[175] Consequently, following the promulgation of Morsi's second edict, it was reasonable for a segment of the society to regard the democratically elected president as an illegitimate ruler who was seeking concentration of all power in his hands. By the same token, after Morsi's ouster, the uninvestigated killing of a number of the MB supporters flagrantly contradicted the most basic principles of accountability and rule of law.[176]

Therefore, arguably, the lack of confidence in the governing regime's commitment to democratic values and the exclusion of the other were among the main reasons that detracted from the normative value of both the 2012 and 2014 Constitutions. Contrary to the current Tunisian constitution which appeared to be an outcome of a consensual reconciliatory process, the two Egyptian constitutions were recognized as an expression of victory of one force over another; the 2012 Constitution expressed the dominance of a new political power, the Islamists, whereas the 2014 Constitution established a system of powerful and autonomous state institutions including, but not limited to, the army.[177] It is not particularly that the 2012 and 2014 Constitutions were ideologically divergent. The two Constitutions maintained both the precedence of principles of Islamic Shari'a as the main source of legislation,[178] and, at the same time, the secular character of the state. Accordingly, it was more about the modes operandi of the drafting processes and the political environment rather than the actual constitutional texts that affected the perception of the two constitutions. Egypt, to a high extend, has empirically proven that if "the constituent power is used in order to entrench the political programme of the majority and thus exclude the programmes of competing political forces, an important benefit of constitutionalism, namely the possibility of peaceful change, is put at risk."[179]

Related to the prospects of constitutional implementation, it was insightful that when the constitutional process in Tunisia reached a stalemate, civil society (specifically the labor union

[174] Ebrahim Afsah, *supra* n.76, 491.
[175] Ebrahim Afsah, *supra* n.76, 491.
[176] E.g. Amnesty International's written statement to the 25th session of the UN Human Rights Council (3 to 28 March 2014) included a plea that "'[t]he Egyptian authorities' unwillingness to investigate human rights violations should not go unchallenged by the international community." "The Human Rights Situation in Egypt: Amnesty International's written statement to the 25th session of the UN Human Rights Council (3 to 28 March 2014)," *Amnesty International*, available at http://www.amnesty.org/en/library/asset/MDE12/008/2014/ en/7e6ff337-c5e3-4c71-8113-142181f37944/mde120082014en.html.
[177] E.g. Nathan J. Brown and Michele Dunne, "Egypt's Draft Constitution Rewards the Military and Judiciary," *Carnegie Endowment for International Peace*, accessed March 28, 2014, http://carnegieendowment.org/2013/12/04/egypt-s-draft-constitution-rewards-military-and-judiciary/gvc8.
[178] Article two under both constitutions states that "the principles of Islamic Shari'a are the main source of legislation." This Article, per se, given political will, can fully Islamize the country with no further need for additional articles.
[179] Dieter Grimm, "Types of Constitutions," in Michel Rosenfeld & András Sajó (eds.) The Oxford handbook of Comparative Constitutional Law. (Oxford: Oxford University Press, 2012), 114.

and the lawyers' syndicate) together with an increasingly organized opposition played a major role in reaching a breakthrough agreement. On the contrary, when Egyptians lost faith in the SCAF they voted for the Islamists and when they lost faith in the Islamists they again turned to the army, with no mention of a political party, syndicate or union. What Egypt has been undergoing can hardly be categorized as a political struggle because Egypt so far has not had a political alternative for the Islamists or the army yet. Part of this could be attributed to the pervasive supra-natural savior mentality; the need for a divinely-supported savior or an army supported officer. Where the person who believes in the former is an Islamist, the latter category can include politicians, writers and, ironically, liberals. This analysis may justify, to a certain extent, liberals' shameless support of the army[180] and the strenuous attempt to depict El-Sisi as an incarnation of Nasser.[181] Unfortunately, three years after Mubarak's fall, the impotence of civil political parties can hardly be attributed to Mubarak's iron-fisted regime anymore.

In this regard, Mancur Olson contends in his examination of the logic of collective actions that:

> It does not follow that because all of the individuals in a group would gain if they achieved their group objective that they would act to achieve that objective, even if they were all rational and self-interested. *Indeed unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, rational, self-interested individuals will not act to achieve their common or group interests.*[182] [Emphasis added]

Applying this analysis on the Egyptian case, it could be argued that both Islamists and state institutions in Egypt have the advantages of having a limited number of members, when compared to the society, and a degree of physical and/or physiological coercion on their members through exploiting religious zealotry, appeal of group affiliation, disciplinary measures, institutional loyalty, nationalistic rhetoric, etc. On the other hand, it appears that the mechanism or the 'special device' that can translate youth activism and popular dynamism into a political reality is largely missing. Despite that most of these movements have rational demands; mainly democratic governance and social justice, they are unable to materialize into a robust political party or even a lobby. Tunisia, through its professional syndicates and unions, and the emergence of Nida Tounis was able to provide a real competitor for the Islamists and thus balancing the political arena.

Nevertheless, the Egyptian Constitution of 2014 represents a new political structure where power is not concentrated in a single entity or person but rather distributed among a number of state institutions.[183] With this structural change, and expected continuity of youth dynamism and economic pressure, the 2014 Constitution may accommodate the principle of checks and

[180] Negar Azimi, "The Egyptian Army's Unlikely Allies," *The New Yorker*, accessed March 20, 2014, http://www.newyorker.com/online/blogs/newsdesk/2014/01/why-egypts-liberal-intellectuals-still-support-the-army.html.

[181] "Egypt wonders if army chief is another Nasser," *The Guardian*, accessed March 23, 2014, www.theguardian.com/world/2013/aug/07/egypt-morsi-nationalist-general-sisi.

[182] Mancur Olson, The logic of collective action: Public goods and the theory of groups (Cambridge, Mass: Harvard University Press, 1971), 2.

[183] E.g. Nathan Brown, "Egypt Has Replaced a Single Dictator With a Slew of Dictatorial Institutions," *Carnegie Endowment for International Peace*, accessed March 6, 2014, http://carnegieendowment.org/2014/01/26/egypt-has-replaced-single-dictator-with-slew-of-dictatorial-institutions/gzfe.

balances leading to a sort of democratic accountability. "It could well happen that a constitution that fell short of achievement developed into a full-fledged constitution over time […]"[184] However, this leap forward is conditional on one prerequisite; having political parties that can convert enthusiasm and popular engagement into politics. Regarding Tunisia, though it is too early to say that Tunisia has made a successful democratic transition, the culture of consensus created during the drafting process is likely to enable the already progressive constitution of 2014 to establish a constitutional democracy.

[184] Dieter Grimm, "Types of Constitutions," *supra* n.177, 109.

IPR und Ordre Public im Recht Arabischer Staaten*

*von Aouni Shahoud Almousa***

I. Einleitung und Problemstellung

Ist nach den Kollisionsregeln der *lex fori* auf ein Rechtsverhältnis ein ausländisches Recht anzuwenden, oder vereinbaren dies die Parteien des Rechtsverhältnisses, so ist das ausländische Recht in diesem Fall nur dann anwendbar, wenn es nicht gegen den *ordre public* und die guten Sitten verstößt.[1] Weiterhin ist die Anerkennung bzw. Vollstreckung ausländischer Gerichtsurteile und Schiedssprüche abzulehnen, sofern ihr Inhalt im Widerspruch zum *ordre public* und den guten Sitten steht[2] bzw. ihre Anerkennung zu einem Ergebnis führen würde, das mit den wesentlichen Rechtsgrundsätzen des Anerkennungsstaates unvereinbar ist.[3] In einigen arabischen Staaten wird darüber hinaus die Vereinbarkeit des anzuwendenden ausländischen Rechts[4] und des anzuerkennenden ausländischen Urteils und Schiedsspruchs[5] mit der Scharia (nach der am Gerichtsort geltenden Auslegung) vorausgesetzt. Betrachtet man beispielsweise hier die unterschiedlichen Rechtsauffassungen zu Eheschließungen zwischen einer muslimischen Frau und einem nicht-muslimischen Mann, so ist die Schließung solcher gemischten Ehen nach der Scharia unter allen Umständen verboten.[6] Kommt allerdings eine solche Ehe nach einem weltlichen Rechtssystem zustande, so liegt hier ein Verstoß gegen den (islamischen) *ordre public* vor. Für diese Ehe gilt aus Sicht der Scharia die absolute Nichtigkeit mit *ex*

* Im Rahmen der Jahrestagung der GAIR am 11. und 12. Oktober 2013 in Zürich in Zusammenarbeit mit dem Center for Islamic and Middle Eastern Legal Studies (CIMELS), Zürich und dem Erlanger Zentrum für Islam und Recht in Europa (EZIRE) zum Thema „IPR in der Schweiz und Deutschland; Schuldrecht in der islamischen Welt".

** LL.M. corp. restruc., Promotionsstudent der Juristischen Fakultät und Lehrbeauftragter am Seminar für Sprachen und Kulturen des Vorderen Orients (SSKVO) der Ruprecht-Karls-Universität Heidelberg.

[1] Vgl. in Ägypten Art. 28 ZGB; in Syrien Art. 30 ZGB und in Deutschland Art. 6 EGBGB; Raape bezeichnete die Verweisung auf das ausländische Recht hier als einen „Sprung ins Dunkle", die durch einen Vorbehalt beschränkt werden sollte, siehe Leo Raape, Internationales Privatrecht, Berlin und Frankfurt a.M., Franz Vahlen GmbH, 1955, S. 87 m.w.N.

[2] Vgl. in Ägypten, Art. 298 Nr. 4, 299 ZPO, 58 (2) lit. b SchiedsG, Entscheidung des Kassationshofs (Zivil), Fall Nr. 16/12/1954; in Syrien Art. 308 lit. d, 309 ZPO, 56 (2) lit. b SchiedsG; in den VAE Art. 235 (2) lit. e, 236 ZPO; im Königreich Saudi-Arabien Art. 11 lit. f Vollstreckungsgesetz (2012).

[3] Vgl. in Deutschland § 328 ZPO Abs. 1 Nr. 4.

[4] Vgl. in den Vereinigten Arabischen Emiraten Art. 27 ZGB.

[5] Vgl. in Saudi-Arabien Art. 55 (2) lit. b SchiedsG (2012). Es ist darauf hinzuweisen, dass die meisten arabischen Staaten Mitgliedsstaaten der New Yorker Konvention für die Anerkennung ausländischer Schiedssprüche (1958) sind, siehe: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. Dabei ist der Verstoß gegen die Scharia in islamisch geprägten Staaten auch ein Verstoß gegen den *ordre public* im Sinne der Art. 5 (2) lit. b der Konvention.

[6] Siehe Sure 60: al-Mumtahana (Die Geprüfte) Verse (10): http://islam.de/13827.php?sura=60; dazu Tafsir Ibn-Katheer: http://quran.ksu.edu.sa/tafseer/katheer/sura60-aya10.html. Im Gegensatz dazu ist die Ehe zwischen einem Muslim und einer Jüdin oder Christin (Leute des Buches oder *ahlu l-kitāb*) in den meisten Fällen erlaubt, siehe Sure 5: al-Maida (Der Tisch) Verse (5), http://islam.de/13827.php?sura=5 dazu Tafsir Ibn-Katheer: http://quran.ksu.edu.sa/tafseer/katheer/sura5-aya5.html;und Tafsir al-Qurtubi: http://library.islamweb.net/ newlibrary/display_book.php?flag=1&bk_no=48&surano=5&ayano=5; für die unterschiedlichen Auffassungen hierbei zwischen Schiiten und Sunniten siehe Rohe, Das islamische Recht, Geschichte und Gegenwart, C.H. Beck München, 2011, S. 82 m.w.N.

tunc Wirkung.[7] Demzufolge werden diese gemischten Ehen in den meisten Staaten der arabischen und islamischen Welt nicht anerkannt und zwischen den (Ehe) Partnern getrennt.[8] Des Weiteren bestehen aus diesen Ehen weder Rechte noch Pflichten wie etwa Erbfolgen, legitime Abstammung (arab. *nasab šarʿī*) und Vaterschaft, da es sich hierbei lediglich um eine aus Sicht der Scharia nichtige Ehe (arab. *zawāǧ bāṭil*) handelt. Ein weiteres Beispiel entstammt dem Erbrecht: In den meisten arabischen Ländern dürfen Nichtmuslime im Allgemeinen nicht von Muslimen erben.[9] Ausländische Gesetze, die von diesen Normen abweichen, sowie ausländische Urteile, die nach diesen Normen erlassen worden sind oder diese berühren, stehen in den arabischen Staaten im Widerspruch zum *ordre public*.

Was allerdings unter dem Begriff *„ordre public"* oder *„an-niẓām al-ʿāmm"* (arab. النظام العام) zu verstehen ist, bleibt weiterhin sehr umstritten und kann nicht zweifelsfrei erfasst und abgegrenzt werden.[10] Bei den meisten Definitionsversuchen geht es im Kern darum, dass dieser Begriff die wesentlichen (religiösen), gesellschaftlichen, wirtschaftlichen, politischen und moralischen Grundsätze einer Gesellschaft repräsentiert, die im Bezug zum höheren Interesse dieser Gesellschaft[11] in einer bestimmten Zeit stehen.[12] Die Relativität ist daher eine seiner wichtigsten Eigenschaften.[13] Dieses juristische Institut des *ordre public* steht in enger Beziehung zu allen Rechtsbereichen und wird deshalb als Geist des Rechtssystems bezeichnet.[14] Nach Mancini ist der *ordre public*, neben den Grundsätzen der Staatsangehörigkeit und der Parteiautonomie, eines der wichtigsten Hauptprinzipien des Internationalen Privatrechts.[15] Dieser Begriff erfuhr zuerst eine Kodifizierung im französischen Recht (Art. 6 CC). Die guten Sitten sind zwar nur ein Teil des *ordre public*[16], dennoch werden die beiden Begriffe oft gemeinsam verwendet, indem von einem „Verstoß gegen den *ordre public* und die guten Sitten" gesprochen wird. In einigen islamisch geprägten arabischen Staaten (wie bereits erwähnt) ist der Verstoß gegen die islamische Scharia einem Verstoß gegen den *ordre public* gleichgesetzt, obwohl die Abgrenzung

[7] Die Nationalität der Ehepartner bleibt außer Acht, siehe Appellationsgericht (Zivil), Dubai, Fall Nr. 51, 21/10/2008; für den Fall der Apostasie und ihre Wirkung auf die Ehe und die Erbberechtigung, siehe Ibn Ḥazm al-Andalusī, al-muḥalla, Kairo, Frage Nr. 2095, Frage der Apostasie, 11. Teil, S. 227 ff.

[8] Die Scheidung kommt hier nicht in die Frage, da in diesem Fall keine Ehe vorliegt.

[9] Appellationsgericht (Zivil), Dubai, Fall Nr. 182, 17/12/2006; ʿIzz ad-Din ʿAbdallāh, al-qānūn ad-dawlī al- ḫāṣ, zweiter Teil, Kollisionsrecht, Kairo, 1986, S. 528; In Deutschland gilt das Gegenteil. Demgemäß soll das durch Verweisung zur Anwendung berufene ausländische Recht dann nicht anwendbar sein, wenn es Frauen vom Erbe ausschließt oder ihnen auf Grund ihres Geschlechtes (oder ihrer Religion bei Nichtmuslimen) kein Erbe zusteht. Nach Meinung Raapes ist die Verweisung in diesem Fall abzulehnen, da sie die moralische Anschauung sowie die Gefühle des Volkes in dieser Gesellschaft verletze, die vorrangig zu schützen seien, siehe Raape, S. 87 § 13 f; vgl. Peter Scholz, Erbrecht der maghrebinischen Staaten und deutscher ordre public, Hamburg, Kovač, 2006, S. 236 f.

[10] Der versuch *Pillets* diesbezüglich war erfolglos, siehe dazu ʿAbdallāh, S. 544, Fn 2.

[11] Ägyptischer Kassationshof (Zivil), Fälle Nr. 308, 25/06/1964; Nr. 22, 07/11/1967; Nr. 8, 26/07/1967; Nr. 33, 12/04/1972; Nr. 59, 12/02/1975; Nr. 714, 26/04/1982; Nr. 1259, 13/06/1983; vgl. in den VAE Art. 3 ZGB; Appellationsgericht (Zivil), Dubai, Fälle Nr. 3, 24/05/1998; Nr. 46, 14/12/2002; Nr. 18, 12/06/2005; Nr. 146, 09/11/2008; Appellationsgericht (Zivil), Beirut, Fall Nr. 267/95, 15/03/1995.

[12] ʿAbd ar-Razzāq as-Sanhūrī, al-wasīṭ fī šarḥ al-qānūn al-madanī, maṣādir al-iltizām, Kairo, 1964, S. 326 f.; Hišām Ṣādiq/Ḥafīẓa Ḥaddād, al-qānūn ad-dawlī al-ḫāṣ, zweites Buch, Kollisionsrecht, Alexandria, 2000, S. 203 f.; ʿAbdallāh, S. 536, 544 f.

[13] Ǧamīla Blʿīd, die internationale Schiedsgerichtsbarkeit zwischen dem nationalen und internationalen ordre public, maṣr al-muʿāṣira, Kairo 2012, S. 417-428; Māhir Mūḥammad Ḥāmid, aṯar an-niẓām al-ʿāmm fī l-ḥadd mina l-luǧūʾ ilā t-taḥkīm, Kairo, 2012, S. 9, 13; Kamāl Fahmī, al-qānūn ad-dawlī al-ḫāṣ, Kairo, 1983, S. 316; Ṣādiq/Ḥadād, S. 203; Vgl. Beschlüsse des ägyptischen Kassationshofs (Zivil), Fälle Nr. 1596, 12/05/1994; Nr. 298, 14/05/1968; Nr. 166, 05/03/1964.

[14] Maḥmūd Muṣṭafā Yūnis, naḥwa naẓarīya ʿāmma li-fikrat an-niẓām al-ʿāmm fī qānūn al-murāfaʿāt al-madanīya wa-l-tiǧārīya, Kairo, 1996, S. 10 f.

[15] Raape, S. 88 f.

[16] As-Sanhūrī, S. 326 f.

zwischen diesen beiden, dem Verstoß gegen den *ordre public* und dem Verstoß gegen die zwingenden Normen der Scharia, in diesen Staaten meistens nicht möglich ist.

Problematisch ist dabei vor allem die Bedeutung des ordre public-Begriffs. Denn welche Regeln er beinhaltet und wann ein Verstoß gegen den ordre public vorliegt, ist oft unklar. Dabei bedarf die Rolle des Richters und die Frage, welche Maßstäbe er bei der Anwendung des ordre public auf Rechtsverhältnisse mit Auslandbezug zu beachten hat, einer Klärung. Darüber hinaus existiert weder auf arabischer noch auf internationaler Ebene eine klare Abgrenzung bzw. Bestimmung des Begriffs ordre public international.[17] Vor allem in der arabischen Welt wird zwischen dem nationalen und internationalen ordre public meistens nur in der Literatur unterschieden. In der dortigen Rechtsprechung spielt diese theoretische Unterscheidung zwischen nationalem und internationalem ordre public eine geringe bzw. keine Rolle. Dabei gilt die ordre public-Überprüfung für Rechtsverhältnisse mit Aus- und Inlandsbezug gleichermaßen.[18] Weitere wichtige aber sehr problematische Fragen hierbei betreffen die Verhältnismäßigkeit bzw. den Missbrauch der ordre public-Anwendung und die Souveränität des Staates. Bemerkenswert ist dabei, dass die Anwendung ausländischer Normen sowie die Anerkennung ausländischer Urteile und Schiedssprüche in den meisten arabischen Staaten wegen ordre public-Verstoß so oft scheitert, dass die Anerkennung eher die Ausnahme ist.[19]

Ziel des vorliegenden Beitrages ist es, dem interessierten Leser einen kurzen Überblick über das Konzept des *ordre public* im internationalen Privatrecht einiger arabischer Staaten im Lichte des dortigen Rechts und der Rechtsprechung[20] zu geben.

II. Konzept des ordre public in der arabischen Welt

Zwischen den arabischen Staaten bestehen zwar viele Ähnlichkeiten, aber dennoch große Unterschiede in Bezug auf die Einwirkung des *ordre public* auf die Rechtgeschäftslehre und seine Bedeutung für die Gesetzgebung.[21] Dies erfordert eine differenzierte Herangehensweise und eine profunde Beschäftigung mit den Besonderheiten der *ordre public*-Konzepte der einzelnen Staaten. Dabei ist die Erörterung der Rolle der Scharia und ihr Einfluss auf die Bestimmung des *ordre public* im Recht arabischer Staaten unerlässlich (siehe II. 2.). Dies erfordert allerdings im ersten Schritt eine Darstellung des *ordre public*-Konzeptes aus Sicht der Scharia (siehe II. 1.).

1. Konzept des ordre public aus Sicht der islamischen Scharia

In der islamischen Literatur gilt der Grundsatz „Herrschaft der islamischen Religion (arab. *siyādat ad-din al-islāmī*)" als der leitende (oder der einzige) Ansatzpunkt für die Bestimmung

[17] Ausführlicher über diese Unterscheidung in der Literatur arabischer Staaten s. ʿAbdallāh, S. 527 f.; Ǧamāl Maḥmūd al-Kurdī, an-niẓām al-ʿāmm al-ʿarabī, Kairo, 2010, S. 10 f.; In Deutschland, der Schweiz, Frankreich und England siehe María Elena Alvarez de Pfeifle, Der Ordre Public-Vorbehalt als Versagungsgrund der Anerkennung und Vollstreckbarerklärung internationaler Schiedssprüche, Dissertation, Lang, Frankfurt am Main; Berlin; Bern; Wien, 2009, S. 165 f.

[18] Al-Kurdī, S. 10 f.

[19] Vgl. Bälz, Die Anerkennung und Vollstreckung von ausländischen Urteilen und Schiedssprüchen in den arabischen Staaten Nordafrikas, RIW, Heft 1-2/2013.

[20] Fundstelle der erwähnten Rechtsprechung ist der „Eastlaws" Dienstleister: http://www.eastlaws.com/.

[21] Die Erfahrung zeigt, dass europäische und vor allem deutsche Juristen die arabische Welt von Mauretanien im Westen bis zum Sultanat von Oman im Osten, sowie die arabischen Rechtssysteme als sehr homogen wahrnehmen und dabei die vielen kulturellen, religiösen, wirtschaftlichen und vor allem rechtlichen Unterschiede in den jeweiligen Ländern übersehen, siehe unten.

des *ordre public* in der Scharia. Der *ordre public* sollte demnach grundsätzlich dazu dienen, die islamische Religion in der (islamischen) Gesellschaft zu verankern und zu schützen.[22] Seine wesentlichen Elemente in der Scharia sind die allgemeinen Konzepte der Scharia und ihre Quellen wie Koran (Qurʾān), Sunna, Analogieschluss und Iǧmāʿ.[23] Nach der Lehre des islamischen Rechts gilt der Islam als die einzige Offenbarungsreligion, deren Scharia, wie sie im Koran Niederschlag gefunden hat, das Leben der einzelnen Gläubigen unmittelbar regelt.[24] Der Koran gilt als das ewige und unabänderliche Grundgesetz der islamischen Gesellschaft.[25] Die in ihm enthaltenen Rechtssätze[26] sind dementsprechend unantastbar. Die islamischen Rechtsgelehrten unterscheiden hierbei zwischen göttlichem, menschlichem und gemischtem Recht. Dabei stellen die zwingenden Vorschriften des göttlichen Rechts *ordre public*-Regeln dar.[27] Der *ordre public*-Begriff hat im „göttlichen" Recht der Scharia eine sehr viel größere Bedeutung als im „positiven" Recht der weltlichen Rechtssysteme.[28] Er hat im Gegensatz zu dem der säkularen Rechtssysteme eine feststehende Bedeutung und ist weder zeit- noch ortsabhängig. Darüber hinaus kennt die Scharia kein internationales Privatrecht im eigentlichen Sinne.[29] Demnach hat der Richter im Islam (arab. *al-qāḍī*) jederzeit und in allen von der Scharia dominierten Rechtsordnungen ausschließlich das islamische Recht (Scharia)[30] anzuwenden.[31] Demzufolge ist eine Unterscheidung zwischen nationalem und internationalem *ordre public* in der Scharia nicht durchführbar, da der *ordre public* im Sinne der Scharia immer national ist. Daher ist auch eine mildere Form *der ordre public*-Anwendung bzw. eine entschärfte Auswirkung des *ordre public* der Scharia unbekannt.[32]

Nach alledem ist festzustellen, dass die wesentlichen Grundsätze der Scharia immer und für alle gleich gelten; der islamische Richter hat auch bei Fällen mit Auslandsbezug ein bestimmtes, feststehendes und göttliches *ordre public*-Konzept zu beachten, das auch für jeden anderen islamischen Richter in jeder anderen islamischen Gesellschaft jederzeit gleichermaßen bindend ist. Dies versteht sich von selbst, da der Islam eine globale Religion ist; der Wille Gottes soll nach islamischer Lehre für die gesamte Menschheit gelten: „Allahs Wort (doch) das hohe ist"[33] und damit auch die Scharia und ihre Grundsätze.[34]

[22] Ṭāriq al-Bišrī, fikrat an-niẓām al-ʿāmm baina n-naẓarīya wa-l-taṭbīq, Kairo, 2011, S. 193 f.
[23] Vgl. al-Bišrī, S. 192 f. m.w.N; hierbei gelten der Koran und die Sunna als die unumstrittenen Rechtsquellen im Islam, siehe El-Ahdab, Arbitration with the Arab Countries, 3. Auflage. Kluwer Law International BV, die Niederlande, 2011, S. 49; zu den Rechtsquellen und Methoden der Rechtsfindung im Islam, Rohe, S. 43 f. m.w.N.
[24] Al-Bišrī, S. 178 m.w.N.
[25] Vgl. Am Beispiel Saudi-Arabien, Art. 1 des Grundgesetzes von 1992.
[26] Rohe, S. 48 f. m.w.N.
[27] Für weitere Kategorien von Rechtsnormen in der islamischen Lehre, al-Bišrī, S. 451 f.
[28] El-Ahdab, S. 22.
[29] Bälz/Shahoud Almousa, Reform des Schiedsrechts in Saudi-Arabien, SchiedsVZ 2013, Heft 5, S. 248-256; Krüger, Einige Anmerkungen zum traditionellen islamischen Kollisionsrecht in: Liber amicorum Klaus Schurig (FS Schurig), München, Sellier Europ. Law Publ, 2012, S. 121-127.
[30] Zur Terminologie, Abgrenzung und Bedeutung der islamischen Scharia und des Rechts, Rohe, S. 9.
[31] Al-Kurdī, S. 86, Fn. 2; Krüger, Ibid; Bälz/Shahoud Almousa SchiedsVZ 2013.
[32] Al-Kurdī, S. 165 f. m.w.N.
[33] Siehe Sure 9 At-Tauba (Die Reue), Vers 40.
[34] Al-Bišrī, S. 192 f.; Sure an-Nisāʾ 64-65.

Beispiele für ordre public-Regeln nach der islamischen Scharia: Prinzipiell haben sich die Einzelnen nach der Scharia an ihre Vereinbarungen zu halten,[35] es sei denn, dass sie dabei für erlaubt erklären (arab. *yuḥallil*), was verboten (arab. *ḥarām*) ist, oder umgekehrt.[36] Jede Abweichung oder Umgehung davon ist untersagt, da sie gegen den ordre public verstößt.[37] Eines der wichtigsten Beispiele hierfür, aus Sicht der Praxis, ist das Zinsverbot (arab. *ribā*).[38] Demnach ist auch der Kaufvertrag, der einen verbotenen Darlehensvertrag mit Zinsen umgeht, nach Ansicht der *Šāfiʿīten* und *Ḥanāfiten* nichtig.[39] Weiterhin ist das Rechtsgeschäft, dessen Motiv unzulässig ist, nach einigen Ansichten in der islamischen Scharia nichtig.[40] Selbst der Traubenverkauf an Winzer ist nach manchen Schulen nichtig, weil das dazugehörige Motiv die Weinproduktion ist, die allerdings im Islam verboten ist.[41] Gleiches gilt nach Ansicht der *Mālikīten* und der *Ḥanbalīten* für einen Kaufvertrag, wenn er ohne Erwirtschaftungsmotiv (arab. *muʿāwaḍa* oder *ribḥ*) abgeschlossen wird.[42] Weitere Scharia-Normen mit ordre public-Charakter sind das Verbot des Glücksspiels (arab. *maisar*), die Ungewissheit bzw. Unsicherheit des Rechtsgeschäfts[43] sowie auch die meisten Fragen des Personalstatuts wie u.a. die Bestimmungen über die Eheschließung,[44] das Erbrecht, die Rechtsfähigkeit, die Pubertät,[45] die Vormundschaft, und die väterliche Gewalt.[46]

Auch die für die Besetzung des Richteramts erforderlichen Eigenschaften haben nach der Scharia *ordre public*-Charakter.[47] Dementsprechend darf der Richter nicht weiblich, minderjährig, nichtgläubig oder schändlich (arab. *fāsiq*) und außerdem (heute nicht mehr relevant) kein Sklave sein.[48] Diese Anforderungen gelten nach der Scharia gleichermaßen für die Besetzung des Schiedsrichteramtes.[49] Eine Abweichung davon hätte einen nichtigen Schiedsspruch zur Folge.[50] Dabei darf der (Schieds-) Richter auf keinen Fall nicht-Muslim sein.[51] Zurückzuführen ist

[35] Sure 5: al-Maida (Der Tisch), Verse (1) „O die ihr glaubt, haltet die Abmachungen!"

[36] Spruch des Propheten (Ḥadīṯ), Sunnan al-Turmuḏī.

[37] Der Muslim ist bei Verstoß gegen diesen Grundsatz nicht nur rechtlich verantwortlich, sondern begeht darüber hinaus eine Sünde.

[38] Sure 2: al-Baqara (Die Kuh) Verse (275) „Diejenigen, die Zins verschlingen, werden nicht anders aufstehen als jemand, den der Satan durch Wahnsinn hin und her schlägt. Dies (wird sein), weil sie sagten: Verkaufen ist das gleiche wie Zinsnehmen. Doch hat Allah Verkaufen erlaubt und Zinsnehmen verboten. Zu wem nun eine Ermahnung von seinem Herrn kommt, und der dann aufhört, dem soll gehören, was vergangen ist, und seine Angelegenheit steht bei Allah. Wer aber rückfällig wird, jene sind Insassen des (Höllen-) Feuers. Ewig werden sie darin bleiben".

[39] Aḥmad Ibrāhīm, al-iltizāmāt fi l-šarʿ al-islāmī, Kairo, S. 99-100.

[40] Str.: al-Bišrī, S. 289 f. m.w.N.

[41] Al-Bišrī, S. 295 f.; siehe über das „Versperren der Mittel" (arab. sadd al-ḏarāʾiʿ), Rohe, S 70 m.w.N.

[42] Ibn Qayyim al-Ǧawzīya, dritter Teil, Bearbeiter Ṭah ʿAbd ar-Raʾūf Saʿd, S. 98-99.

[43] Zum Vertragsrecht im islamischen Recht, Rohe, S. 103 f. m.w.N.

[44] Siehe I.

[45] (Arab. *al-bulūġ*), Dieses Wort wird von den islamischen Gelehrten zur Bestimmung der verschiedenen Stufen der Geschäftsfähigkeit verwendet.

[46] (Arab. *al-wilāya*), Demgemäß steht die väterliche Gewalt folgenden Personen, solange es keinen Religionsunterschied gibt, in dieser Reihenfolge zu: Vater, Großvater, der Bruder des Vaters, der Onkel des Vaters, die Mutter und andere Verwandte, der (islamische) Richter oder eine andere Person bestimmt durch den Richter, sodass der Richter nur in Betracht kommt, wenn keine der oben genannten Personen vorhanden ist, siehe El-Ahdab, S. 25, IA-126 f. m.w.N.

[47] Vgl. Art. 3 der Ausführungsbestimmungen (1985) zum alten Schiedsgesetz in Saudi-Arabien (1983); Bälz/Shahoud Almousa, The Recognition and Enforcement of Foreign Judgments and Arbitral Awards under the Riyadh Convention (1983), erscheint in: International Journal of Procedural Law, 8 (2014), M.w.N.

[48] ʿAbd al-Fatāḥ Muḥammad Abu l-ʿAinain, al-qaḍāʾ wa-l-iṯbāt fī l-fiqh al-islāmī, S. 16 m.w.N.; Irene Schneider, Qāḍī und Qāḍī-Justiz im vormodernen und modernen islamischen Recht, in: Position und Aufgaben des Richters nach westlichem und nach islamischem Recht, Mohr Siebeck, Tübingen, 2007,S. 55-86, 2007.

[49] Abu l-ʿAinain, S. 113 f.

[50] Ali Mezghani, Islamic Law and Arbitration, Revue de l'Arbitrage 2008, N 2, S. 211.

[51] Vgl. Art. 3 der Ausführungsbestimmungen (1985) zum alten Schiedsgesetz in Saudi-Arabien.

dies auf Sure an-Nisāʾ 4, Vers 141: "Und Allah wird niemals den Ungläubigen die Oberhand über die Gläubigen geben!". Dementsprechend kommt als (Schieds-) Richter überhaupt nur ein männlicher Muslim in Frage, der zugleich weise (verständig), frei, vernünftig, gerecht und Jurist (arab. *muǧtahid*) ist.[52] Diese Regeln bezüglich der Religionszugehörigkeit und des Geschlechts des Richters finden allerdings nur in Staaten wie Saudi-Arabien Anwendung, wo die Scharia vorherrschend ist.[53] In Staaten wie dem Libanon oder Syrien haben diese Eigenschaften des Richters bzw. Schiedsrichters für die Besetzung der weltlichen Gerichte[54] keine Bedeutung.[55] In den weltlichen Gerichten dieser Staaten kann der Richter sowohl eine Frau als auch ein Nichtmuslim sein. Darüber hinaus kann der Schiedsrichter in den meisten arabischen Staaten sogar ein Ausländer sein.

Inwieweit die Scharia Einfluss auf die Bestimmung des *ordre public* in der arabischen Welt hat, wird im folgenden Abschnitt kurz skizziert.

2. Das ordre public-Konzept in der Arabischen Welt und der Einfluss der Scharia auf dessen Bestimmungen

Grundsätzlich sind alle *Normen des öffentlichen Rechts* zwingende Regeln und gehören zur öffentlichen Ordnung des Landes.[56] In diesen Normen manifestiert sich die politische, wirtschaftliche, moralische und soziale Anschauung und Ausrichtung eines Staats und einer Gesellschaft. Die Verfassung spiegelt dabei die höheren Normen einer Gesellschaft wieder, die den nationalen bzw. ausländischen Gesetzen vorgehen. Dazu gehören vor allem die Grundrechte und die Grundprinzipien der Gesetzgebung. In allen Verfassungen arabischer Staaten, außer im Libanon, ist die islamische Scharia entweder *eine* oder *die* Hauptquelle der Gesetzgebung.[57] Demnach müssen die Gesetze des Landes mit diesen Normen (Scharia-Normen) im Einklang stehen.[58] Als Beispiel hierfür eignet sich das Zinsverbot im Islam: Gilt die Scharia als *die* Hauptquelle der Gesetzgebung, ist es selbstverständlich, dass die Zinsnahme im Recht dieser

[52] El-Ahdab, S. 35, IA-193, f.

[53] Im neuen saudischen Schiedsgesetz von 2012 wird zwar keine Beschränkung bezüglich der Religion oder des Geschlechts des Schiedsrichters vorgeschrieben, dies bedeutet allerdings nicht, dass die alten Beschränkungen diesbezüglich nicht weiter fortgelten. Das ist insbesondere deswegen zu beachten, weil die islamische Scharia im neuen Gesetz wie auch bei der Anerkennung und Vollstreckung der Schiedssprüche eine entscheidende Rolle spielt. Dies bedarf noch der Klärung durch die noch zu erlassenden Ausführungsbestimmungen; siehe Bälz/Shahoud Almousa, SchiedsVZ 2013.

[54] In diesen Staaten existieren neben den staatlich-weltlichen Gerichten auch Scheriatgerichte sowie geistliche Gerichte (bischöfliche und Rabbinats Gerichte), die nur für die Personalstatut-Fragen der anerkannten Religionsgemeinde zuständig sind, siehe Krüger FS Schurig (2012) S. 121, 127 m.w.N.

[55] Über die Situation der Frauen und der Nichtmuslime nach modernem islamischem Recht, Rohe, S. 254 f.

[56] Yūnis, S. 14 f.

[57] In Verfassungen der arabischen Staaten kann unterschieden werden zwischen Staaten:
in denen der Islam die Staatsreligion ist: Algerien (Art. 2), Bahrain (Art. 2), Irak (Art. 2), Jemen (Art. 2), Jordanien (Art. 2), Katar (Art.1) , Kuwait (Art 2), Libyen (Art. 1 der konstitutionellen Erklärung von 2011), Marokko (Chapter 3), Mauretanien (Art. 5), Somalia (Art 1 (3)), Tunesien (Art. 1 des Verfassungsentwurfs 2013), in den Vereinigten Arabischen Emiraten (Art 7 der föderalen Verfassung);
die islamischen Staaten sind: Bahrain (Art. 1), Jemen (Art. 1), Marokko (Einführung zur Verfassung), Mauretanien (Art. 1);
in denen die islamische Scharia die einzige Rechtsquelle ist: Jemen (Art. 3), Libyen (Art. 1), Sudan (Art. 5 (1));
in denen der Koran und Sunna die Verfassung des Landes sind: Das Königreich Saudi-Arabien (Art. 1 GG von 1992);
in denen eine besondere Situation vorliegt: In Ägypten sind die Bestimmungen der islamischen Scharia die Hauptquelle der Gesetzgebung (Art. 2), Nach Art. 3 (2) der syrischen Verfassung ist *al-fiqh al-islāmī* eine Hauptquelle der Gesetzgebung. *Al-fiqh al-islāmī* ist das menschliche Werk der islamischen Rechtsgelehrten und hat keinen göttlichen Charakter wie die Scharia.

[58] Als Beispiel hier dient Art. 2 der ägyptischen Verfassung von 1971 und die Modifikation diesbezüglich im Jahr 1980, siehe dazu Entscheidungen des ägyptischen Oberverfassungsgerichts, Fälle Nr. 20, 04/05/1985; Nr. 67, 07/09/1996; Nr. 26, 16/11/1996; Nr. 34, 04/01/1997 je m.w.N.

Staaten verboten ist. Dies ist vor allem in Saudi-Arabien und in Bahrain der Fall.[59] In den Vereinigten Arabischen Emiraten ist die Zinsnahme grundsätzlich auch verboten, gilt allerdings auf Grund der aktuellen wirtschaftlichen Interessen der Emirate, solange diese wirtschaftlichen Interessen es verlangen, ausnahmsweise als erlaubt.[60] Anders steht es, wenn die Scharia nicht die alleinige Hauptquelle, sondern nur *eine* Hauptquelle der Gesetzgebung *neben* anderen ist. In diesem Fall stehen gesetzliche Zinsen nicht im Widerspruch zu bestehenden Verfassungsnormen. Beispiele für solche gesetzlichen Zinsen finden sich etwa im ägyptischen (Art. 226)[61] und im syrischen Zivilgesetzbuch (Art. 227). Prinzipiell gilt dieser Grundsatz in den arabischen Staaten gleichermaßen für Geschäfte mit Auslands- und Inlandsbezug. Ist zum Beispiel in Staaten, in denen Zinsen verboten sind, in einem Rechtsgeschäft (auch mit Auslandsbezug) die Zahlung von Zinsen vereinbart, oder ist in Staaten, in denen der Zinssatz beschränkt ist, der vereinbarte Zinssatz höher als der gesetzliche, so ist diese Vereinbarung nichtig.[62] Die Nichtigkeit betrifft grundsätzlich nicht das gesamte Rechtsgeschäft, sondern bleibt auf den Teil begrenzt, der gegen den *ordre public* verstößt. Etwas anderes gilt nur, wenn der Verstoß einen wesentlichen Teil des Rechtsgeschäfts ausmacht.[63] Dieser Grundsatz kann eine Rolle für die Teilanerkennung ausländischer Urteile und Schiedssprüche in den arabischen Staaten spielen. In diesem Zusammenhang erklärte das saudische *Board of Grievance* im Jahr 2006 die Teilanerkennung eines ägyptischen Gerichtsurteils für zulässig.[64] Demnach lag kein Verstoß gegen die Scharia und damit gegen den saudischen *ordre public* vor, weil die Anerkennung des widrigen Urteilsteils, hier die fälligen Zinsen, im Anerkennungsverfahren nicht beantragt war.

Des Weiteren sind die meisten Vorschriften des *Personalstatutsrechts* in der arabischen Welt religiös geprägt. Dementsprechend sind die meisten Fragen des Familienrechts wie u.a. Rechtsfähigkeit, Erbquoten, Eheschließung, Kindschaft[65] und Vormundschaft in diesen Staaten Teil des *ordre public*.[66] Im Vergleich dazu können Vorschriften des Familien- und Erbrechts in den weltlichen westlichen Rechtssystemen auch *ordre public*-Charakter haben, allerdings nicht, weil sie religiöse Vorschriften sind, sondern weil sie Bezug zu den Grund- und Menschenrechten dieser Staaten haben. In einigen arabischen Staaten existieren auch interreligiöse familienrechtliche Vorschriften für Nichtmuslime, welche im Rahmen des *ordre public* angewendet werden können.[67] In Syrien und Ägypten beispielsweise hat jede anerkannte Religionsgemeinde ihr eigenes Familienrecht.[68] Dieses ist jedoch nur dann anwendbar, wenn alle betroffenen Parteien

[59] Vgl. Art. 228 des bahrainischen Zivilgesetzbuchs.

[60] Siehe Entscheidung des Emiratischen Obersten Föderalgerichts, Fall Nr. 26, 31/12/1996 bezüglich der Frage, ob Art 76 des Handelsrechts (Gesetz Nr. 18/1993) verfassungsmäßig ist.

[61] Mit einer pragmatischen Argumentation hat das Oberste Verfassungsgericht Ägyptens in seiner oben genannten Entscheidung (am 04.05.1985) Art. 226 ZGB für verfassungsmäßig erklärt. Demnach wäre Art. 226 ZGB nur verfassungswidrig, wenn sie nach der Verfassungsänderung (Art. 2) im Jahr 1980 erlassen wäre, wo die Bestimmungen der islamischen Scharia in Ägypten „die" und nicht nur „eine" Hauptquelle der Gesetzgebung geworden sind, was allerdings hier nicht der Fall war. Die Erhebung solcher Klagen in Syrien ist nicht zulässig, solange lediglich „*al-fiqh al-islāmī*" nur eine Hauptquelle der dortigen Gesetzgebung ist (Art. 3 (2) der syrischen Verfassung).

[62] Siehe Bälz, Zinsverbote und Zinsbeschränkungen im Internationalen Privatrecht, IPRax, 2012, Heft 4, S. 306-311.

[63] ʿAbdallāh, S. 550.

[64] Siehe Entscheidung des *Board of Grievances*, Fall Nr. 2496, 10/03/1427 (hiǧrī) bzw. 2006 A.D.

[65] Vgl. Beschluss des ägyptischen Kassationshofs (Zivil), Fall Nr. 7, 31/12/1975.

[66] Appellationsgericht (Zivil), Dubai, Fälle Nr. 46, 14/12/2002; Nr. 182, 17/12/2006; Oberstes Föderalgericht (VAE), Fall Nr. 365, 12/06/2007.

[67] Dabei kommt der islamisch geprägte nationale *ordre public* in Betracht, siehe Entscheidungen des ägyptischen Oberverfassungsgerichts, Fälle Nr. 74, 01/03/1997; Nr. 81, 04/04/1998 m.w.N.

[68] Dies gilt nur für Angehörigen der drei Offenbarungsreligionen (Juden, Christen und Muslime).

der jeweiligen Religion angehören.[69] Ist dies nicht der Fall und kommt es damit zum Anwendungskonflikt zwischen mehreren religiösen Rechten (interreligiöse Kollisionsregeln), so ist zu beachten, dass die islamische Scharia als *ius commune* fungiert und deshalb in diesen Fällen automatisch zur Anwendung kommt.[70]

Die familienrechtlichen Vorschriften für Muslime in den arabischen Staaten sind jedoch nicht einheitlich. Diese Gesetze sind in erster Linie von der im jeweiligen Land offiziell als herrschend anerkannten islamischen Rechtsschule geprägt.[71] Darüber hinaus gelten in einigen arabischen Staaten im Familienrecht Beschränkungen, die der Scharia unbekannt sind und teilweise sogar gegen ihre Bestimmungen verstoßen. Hier sind etwa die Beschränkungen betreffend Scheidungen in Tunesien und Polygamie in Marokko zu nennen. In Tunesien zum Beispiel wird für die Wirksamkeit der Scheidung ein rechtliches Verfahren[72] und in Marokko für die Gültigkeit der zweiten Ehe (Polygamie) eine richterliche Einwilligung[73] vorausgesetzt. Diese Einschränkungen stehen im Widerspruch zu den Grundsätzen der Scharia und daher dem islamischen *ordre public*.[74] Die unterschiedlichen Auffassungen hierbei können die Anerkennung ausländischer Urteile und die Anwendung ausländischer Gesetze in und zwischen den arabischen Staaten verhindern.[75] Dabei reicht es aus, wenn eine der Parteien Muslim ist, da ihre Staatsangehörigkeit in diesem Fall für den islamischen Richter außer Acht bleibt.[76]

Aus Sicht der Praxis ist darauf hinzuweisen, dass ausländische Schiedssprüche in den meisten arabischen Staaten leichter anerkannt werden können als im Ausland ergangene Gerichtsurteile. Die Schiedsgerichtsbarkeit gewinnt daher in der arabischen Welt stetig an Bedeutung. Die heutigen arabischen *Schiedsgesetze* sind größtenteils vom französischen Schiedsrecht und dem UNCITRAL-Modellgesetz beeinflusst.[77] Für das dortige *ordre public*-Konzept sind Fragen der Schiedsfähigkeit (subjektive und objektive Schiedsfähigkeit) und vor allem die Frage der Schiedsfähigkeit von Streitigkeiten mit der öffentlichen Hand und die diesbezüglichen Beschränkungen von großer Bedeutung.[78] Ein weiterer wichtiger Punkt mit Bezug zum *ordre*

[69] In Ägypten wird darüber hinaus die Angehörigkeit zur selben Konfession vorausgesetzt, siehe Art. 3 des Personalstatutsrechts, Gesetz Nr. 1/2000.

[70] Appellationsgericht (Zivil), Dubai, Fälle Nr. 3, 24/05/1998; Nr. 46, 14/12/2002; Nr. 55, 26/06/2005.

[71] Zum Beispiel ist im Königreich Saudi-Arabien die *ḥanbalītische* Schule herrschend, in den Vereinigten Arabischen Emiraten die *mālīkītische* Schule (Art. 2 (3) des Personalstatutsrechts, Gesetz Nr. 28/2005), in Syrien herrscht nach Art. 305 des Personalstatutsrechts, Gesetz Nr. 59/1953 und in Ägypten nach Art. 3 des Personalstatutsrechts, Gesetz Nr. 1/2000 die *ḥanafītische* Schule. Demnach ist zur Lückenfüllung im Gesetz auf die Lehrmeinung dieser Schulen zurück zu greifen.

[72] Art. 30 Gesetz zum Personalstatut von 1956 schreibt vor: „Die (Ehe) Scheidung erfolgt nur durch das Gericht."

[73] Art. 30 Gesetz zum Personalstatut Nr. 343/1957.

[74] Al-Kurdī, S. 173 f. mit den Fußnoten.

[75] Vgl. Entscheidung des ägyptischen Kassationshofs (Zivil), Fall Nr. 10, 20/06/1977.

[76] ʿAbdallāh, S. 366; al-Kurdī, S. 49 f. m.w.N; vgl. Entscheidung des Oberföderales Gerichts in den VAE, Fall Nr. 365, 12/06/2007. Nach dieser Entscheidung lag kein Anwendungshindernis des deutschen Erbrechts vor, auch wenn dessen Bestimmungen nicht Scharia konform sind, solange keiner der Beteiligten (Hier Erblasser und Erbberechtigter) Muslim ist; Im Gegensatz dazu steht die Entscheidung des syrischen Kassationshofs (Zivil) im Jahr 1977, Fall Nr.1138, 31/10/1977, in al-Muḥāmūn, S. 417, 1977 (Der Spanierfall).

[77] Historisch galt die Medjella zunächst im osmanischen Reich als eine Kodifikation der Scharia, s. Edwin E. Hitti, Basic Mechanics of Islamic Capitalism, ArabCham, 2007, S. 186.

[78] Vgl. Art. 7 der Ausführungsbestimmungen (1985) zum alten Schiedsrecht in Saudi-Arabien (1983); Art. 10 (2) des neuen Schiedsgesetzes in Saudi-Arabien, m.w.N. Bälz/Shahoud Almousa, SchiedsVZ 2013; Bälz am Beispiel des Iran, Schiedsklauseln in Verträgen mit der iranischen öffentlichen Hand, SchiedsVZ 2006, 28 f; vgl. Otto/Elwan, Article 5 (2) in: Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, Alphen aan den Rijn, Kluwer Law Internat, 2010, S. 350.

public ist die Zusammensetzung des Schiedsgerichts.[79] Dabei muss z.B. die Zahl der Schiedsrichter in den meisten arabischen Staaten, sofern es mehrere sind, ungerade sein.[80] Ansonsten liegt ein Verstoß gegen den *ordre public* vor.[81] Ferner ist die Anerkennung und Vollstreckung des (ausländischen) Schiedsspruches abzulehnen, wenn die Parteien zum Verfahren nicht ordnungsgemäß geladen waren,[82] da in diesem Fall ein Verstoß gegen das Recht auf rechtliches Gehör und damit gegen den (internationalen) *ordre public* vorliegt.[83] Des Weiteren ist Schiedsklausel nichtig, wenn sie nicht in schriftlicher Form verfasst worden ist.[84] Hingegen war das Erfordernis, dass die Schiedsrichter bereits in der Schiedsvereinbarung benannt werden, wie es der aufgehobene Art. 502 der ägyptischen ZPO aufstellte, nach der Rechtsprechung des ägyptischen Kassationsgerichtshofes kein *ius cogens* und damit keine für den *ordre public* relevante Regel.[85]

III. Zusammenfassung

Im internationalen Privatrecht dient die Vorbehaltsklausel des *ordre public* dazu, das nationale Rechtssystem und die grundsätzlichen und wesentlichen Normen der Gesellschaft vor der Verletzung durch widrige ausländische Normen zu schützen.[86] Demnach ähnelt der *ordre public* einem Sicherheitsventil der nationalen Rechtsordnung.[87] Der Verstoß gegen den *ordre public* kann der Richter in allen Prozessinstanzen, einschließlich des Kassationshofs, von Amts wegen überprüfen.[88] Zu Recht verlangt as-Sanhūrī dabei, dass der Richter auf Grund der Relativität des *ordre public* in jedem einzelnen Fall den Geist der Zeit zu erforschen und zu achten habe.[89]

Des Weiteren ist zu beachten, dass die Gesetzgebung in den arabischen Staaten zu einem Teil von der Scharia und zum anderen Teil von westlichen Rechtssystemen beeinflusst ist.[90] Dies spielt eine (große) Rolle bei der Bestimmung des *orde public* in diesen Staaten. Zudem ist der Einfluss der Scharia auf die dortige Gesetzgebung seinerseits nicht einheitlich. Während die Scharia in manchen Staaten, wie Saudi-Arabien, herrschend ist, ist ihr Einfluss im Libanon, in Syrien und wohl auch in Ägypten auf das Familienrecht und einige Teile des Zivilrechts begrenzt. In Syrien und Ägypten z.B. greift der Richter nur im Falle einer Lücke der geschriebe-

[79] Für die Voraussetzungen bezüglich des Schiedsrichters, seiner Religion und seines Geschlechts siehe oben II. 1.
[80] Vgl. Art. 13 des neuen Schiedsrechts in Saudi-Arabien, Bälz/Shahoud Almousa, SchiedsVZ 2013 m.w.N.; Art. 12 des syrischen Schiedsgesetzes.
[81] El-Ahdab, S. 178; Appellationsgericht (Zivil), Kairo, Fall Nr. 34, 35/119, 29/01/2003; Fall Nr.61/115, 21/4/99, Journal of Arab Arbitration, vol. 07/07/2004, 182.
[82] Vgl. Art. 5 (1) lit b NYC.
[83] Ḥafīza Ḥaddād, aṭ-ṭaʿn bi-l-buṭlān ʿalā aḥkām at-taḥkīm aṣ-ṣādira fi l-munāzaʿāt al-ḫāṣa ad-dawlīya, Kairo, S. 194 f; darüber hinaus stellt der Verstoß gegen diese Norm einen Anfechtungsgrund des (ausländischen) Schiedsspruchs dar, Vgl. Art. 53 (1) (c) ägyptisches SchiedsG und am Beispiel Saudi-Arabien Art. 50 (1) (c) SchiedsG, Bälz/Shahoud Almousa, SchiedsVZ, 2013 m.w.N. über Anwendungsbereich des Gesetzes und die Anfechtungsgründe.
[84] Am Beispiel Saudi-Arabien, Bälz/Shahoud Almousa, SchiedsVZ, 2013.
[85] Kassationshof (Zivil), Ägypten, Fall Nr. 714, 26/04/1982.
[86] Yūnis, S. 31.
[87] Ṣādiq/Ḥaddād, S. 195; Fūʾād Riyāḍ/Sāmia Rāšid, uṣūl tanāzuʿ al-qawānīn wa-tanāzuʿ al-iḫtiṣāṣ al-qaḍāʾī ad-dawlī, Kairo, 1990, S. 117 f.
[88] Yūnis, S. 19. f. m.w.N.; Vgl. Beschlüsse des ägyptischen Kassationshofs (Zivil), Fall Nr. 10375, 10/11/1998; Sultanat Oman, (2. Zivilkammer), Fall Nr. 64, 31/10/2004; Bl'aid, 2012, S. 417-428.
[89] As-Sanhūrī, S. 401; ʿAbdallāh, S. 536; al-Kurdī, S. 45 und 98 f.
[90] S. Elwan, Gesetzgebung und Rechtsprechung in: Der Nahe und Mittlere Osten, Grundlagen, Strukturen und Problemfelder, Opladen, Leske und Budrich, 1988, S. 221-254.

nen Gesetze auf die Konzepte der Scharia zurück.[91] Auch wo nur die Scharia herrschend ist, wie in Saudi-Arabien und den Vereinigten Arabischen Emiraten, gelten verschiedene Konzepte bezüglich des *ordre public* (siehe oben am Beispiel von Zinsverbot und Zinsbeschränkung). Daher sollte man aus westlicher Sicht die arabische Welt von Mauretanien im Westen bis zum Sultanat von Oman im Osten, sowie ihre Rechtssystemen nicht als homogen betrachten, weil dabei die vielen kulturellen, religiösen, wirtschaftlichen und vor allem rechtlichen Unterschiede der jeweiligen Ländern übersehen werden würden.

[91] Art. 1 (2) ägy.ZGB, 1 (2) syr.ZGB; Kassationshof (Zivil), Syrien, Fall Nr. 206, 15/02/1950 in al-Qānūn S. 97, 1950; Kassationshof (Zivil), Ägypten, Fall Nr.201, 26/04/1960.

Pluralistic Family Law in Syria: Bane or Blessing?

*by Esther van Eijk**

Abstract

Family relations in Syria are governed by a plurality of personal status laws and courts. The different religious communities have the right to regulate their family relations according to their respective religious laws, most importantly in matters related to marriage and divorce. This plurality of laws creates a complex system of parallel and sometimes competing jurisdictions divided along denominational lines. This paper focuses on the merits and demerits of Syria's pluralistic family law. It aims to show, first, how the Muslim faith is given preference over other religions in the field of personal status law. This becomes especially apparent in conversion (to Islam) cases. The author describes some of the detrimental consequences that this asymmetrical plurality can have on the lives of individuals. The paper then focuses on the versatility of the family law system, in particular on legal practices involving the retro-active registration of (customary) marriages and proofs of paternity. This legal flexibility offers ample opportunities for legal practitioners to find creative solutions to help out unwed mothers and their illegitimate children, as the author exemplifies with a case study. By discussing these two different but equally important legal practices, stemming from the plurality of Syria's family legal system, the paper aims to show how this plurality can be used or work out in different ways, as a bane or a blessing in disguise.

I. Introduction

Family relations in Syria are governed by a variety of religious – or religiously-inspired –family or personal status laws.[1] The main law that regulates family relations, the 1953 Syrian Law of Personal Status[2] (hereafter SLPS), is predominantly based on Islamic legal sources, particularly Hanafi *fiqh* (Islamic jurisprudence). The Druze, Jewish and the various Christian communities[3] follow their own laws in certain specified matters of personal status, most importantly

* Esther van Eijk is a postdoctoral researcher at Maastricht University, the Netherlands. In September 2013, she defended her Ph.D. thesis entitled "Family Law in Syria: A Plurality of Laws, Norms, and Legal Practices" at Leiden University, the Netherlands. This study is based on her Ph.D. fieldwork (including interviews and participant observation) conducted in March-April 2008, and October 2008-July 2009 in Syria. An earlier draft of this paper was presented at the conference "Islamic Family Law in Modern Europe and the Muslim World", Nijmegen, The Netherlands, June 2013.

[1] I use the terms "family law" and "personal status law" interchangeably.

[2] The Syrian Law of Personal Status (*qanun al-ahwal al-shakhsiyya*), Law no. 59, was promulgated on 17 September 1953 and amended in 1975, 2003, and 2010.

[3] There are no official statistics available on religion but according to estimates about 74 per cent of all Syrians are Sunni Muslims, and around 16 per cent are non-Sunni Muslims, such as Druze, Shi'a and 'Alawi; about 10 per cent of the population belongs to various Christian denominations. In addition, a few Jewish and Yazidi families still live in Syria (see Central Intelligence Agency, *The World Fact Book* (online edition, 2013-14), available online at: https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html (last visited 11 April 2014); *International Religious Freedom Report* (2012), available online at: http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2012&dlid=208412 (last visited 11 April 2014).

marriage, divorce, and inheritance. That being said, the SLPS remains the general law, which means that it applies to *all* Syrians, irrespective of their religion. The various other personal status laws are considered special laws, as exemptions to the general law (Arts. 306-308 SLPS).[4] This plurality in family law can sometimes lead to situations in which the different jurisdictions intersect, most importantly in the event of interfaith marriages. In these incidences, the SLPS and the *shar'iyya* courts, i.e. the courts competent to hear cases under the SLPS, also play a major role, particularly when one of the spouses has converted to Islam. An interfaith marriage can have detrimental effects on spousal as well as parent-child relationships, as will become evident in this paper.

The plurality that characterises Syrian family law is not only reflected in the mosaic of personal status laws and courts that are found in Syria today, but also in the incorporation or recognition of customary legal practices. The SLPS accommodates legal enforcement of extra-judicial customary practices, by allowing retro-active registration of (customary) marriage, unilateral divorce and proof of paternity.[5] With that the state recognises and incorporates customary practices into its legal framework and thereby enhances legal plurality in the field of family law.

This paper focuses on the plurality and versatility of Syria's family law. In the first part of the paper I will examine how this plurality can work unfavourably for non-Muslims in situations of interfaith marriages and the consequences of these relationships for child custody. Secondly, I will discuss the versatility of the legal system and - in particular - that of the SLPS, by looking at how judges and other legal practitioners work with(in) the versatility of Syria's personal status law, in relation to children born out of wedlock.

II. Conversions of Convenience

One's religion (*din*) or denomination (*ta'ifiyya*) into which one is born, is the determining feature in choosing which personal status law applies. It is not possible to have "no religion"; atheists do not exist in Syria, at least not according to the Civil Registry. For that reason it is not possible, for example, to contract a civil marriage; one has to marry either according to the provisions of the SLPS or one of the canonical laws.

The SLPS is the guiding law in most interfaith relations: when a non-Muslim woman marries a Muslim man, the SLPS will be applicable; when a Druze woman marries a Sunni Muslim man, the SLPS will also be applicable. A Christian or Jewish woman, i.e. a woman who belongs to the *ahl al-kitab* (the recognised monotheistic religions), can marry a Muslim man, but it is not possible for a non-Muslim man to marry a Muslim woman, for article 48.2 SLPS states that a marriage between a Muslim woman and a non-Muslim man is considered invalid (*batil*). If a non-Muslim man wants to marry a Muslim woman, he needs to convert to Islam. A Christian or Jewish woman who marries a Muslim man is not required to change her religion, but the children will automatically be considered Muslim and the wife cannot inherit from her

[4] For a similar situation in Egypt, MAURITS BERGER (2005), *Sharia and public policy in Egyptian family law*, Groningen: Hephaestus Publishers, 27 ff.

[5] For a similar situation in Egypt, see BAUDOUIN DUPRET (2007), "Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification" in: *European Journal of Legal Studies* 1, available at: http://www.ejls.eu/1/14UK.pdf (last visited 22 April 2014).

husband, for article 264 sub b SLPS states that a non-Muslim cannot inherit from a Muslim. However, when a woman converts to Islam and the husband does not, the marriage will be considered invalid and will be dissolved due to article 48 paragraph two SLPS.[6]

For Christians, which make up around ten per cent of the population, it is very difficult to obtain a divorce and therefore men and women sometimes refer to drastic measures, most importantly converting to Islam in order to obtain a divorce. Maktabi maintains that these "conversions of convenience" by Christian men occur with the intention to avoid the long divorce proceedings of the Christian courts, and because the Islamic divorce rules "are more lenient".[7] The judges of the Christian courts are aware that this can happen. As a result, according to one of my interviewees, Christian court rulings can sometimes intentionally be more favourable to the husband; for example, by awarding the wife only a small amount of alimony after dissolution of the marriage. When a wife objects to such a ruling, the judges commonly tell her to accept the ruling because otherwise she runs the risk that her ex-husband converts to Islam and takes the children from her.[8]

What is important to note here is that, in case of conversion to Islam, the SLPS becomes the applicable law and the *shar'iyya* courts are considered the competent courts.[9] When one of the parents converts to Islam, the SLPS can also be invoked by the converted parent in order to claim full child custody. Some of my informants told me about cases where Christian men had converted to Islam and subsequently went to a *shar'iyya* court to demand full custody over their children, i.e. physical custody (*hadana*) in addition to legal guardianship (*wilaya*). According to the SLPS, in line with Islamic legal doctrine, child custody can be divided into legal guardianship (*wilaya*) and nursing (*hadana*). The parents have shared custody over their children, but the father will always have sole legal guardianship (*wilaya*) over his children until they reach the age of eighteen years (Art. 162 SLPS), also when the parents divorce. The right to nurse a child (*hadana*) is the prerogative of the mother (Art. 139 SLPS). In the event of divorce, the mother may ask for the court to give her the right to nurse her children until the age of 15 for girls and 13 for boys (Art. 146 SLPS).

I heard of at least three court rulings, one of which I read myself, in which a *shar'iyya* judge had awarded the converted father the exclusive nursing right. In this particular case the father had obtained the nursing right over his children, who were still in the age of *hadana*, as he was considered more suitable because he was a Muslim. The ruling said in so many words that his religion, i.e. Islam, is the better religion and for that reason he should raise the children.[10] In

[6] The Egyptian and Jordanian personal status laws, for example, also contain a similar provision to article 48.2 SLPS. Interestingly, in Lebanon, following the equality in personal status laws, mixed marriages across all religions and denominations are legally possible, meaning that a non-Muslim Lebanese man can marry a Lebanese Muslim woman (ANNE WEBER (2008), "Briser et suivre le norms: les couples islamo-chrétiens au Liban" in: BARBARA DRIESKENS (ed.), *Les métamorphoses du mariage au Moyen-Orient*, Beirut: Institut Français du Proche-Orient (IFPO), 13-31 (28)).

[7] RANIA MAKTABI (2010), "Gender, family law and citizenship in Syria" in: *Citizenship Studies* 14/5, 557-572 (562).

[8] Personal communication with a senior Christian lawyer, November 2008, Damascus.

[9] MAURITS BERGER (1997), "The legal system of family law in Syria" in: *Bulletin d'Études Orientales* 49, Damascus: Institut Français de Damas, 115–127 (124-125).

[10] In Arabic: *dinuhu huwa al-din al-aslah li-tarbiyyat al-awlad.*

other words, the Muslim father was given preference over the non-Muslim mother.[11] However, it can also happen the other way around, as the next section will demonstrate.

III. The Supremacy of Islam in Personal Status

In his study on the rights of Christian minorities in the Middle East, *Le droit des minorités*, Georges cites a case in which, although legally impossible following article 48.2 SLPS, a Muslim woman had married a Christian man.[12] When they wanted to register their two children at the Civil Registry, they were told they could not because the children were born of an invalid marriage. Georges maintains:

> "Sur le conseil d'un juge, la femme a porté plainte devant le tribunal 'charié' en prétendant que l'époux lui avait menti sur sa vraie religion. Le tribunal avait déclaré leur marriage corrompu et il a reconnu les deux enfants comme appartenant à leur père. Le tribunal a ordonné en outre la separation immédiate entre le couple et l'inscription des enfants en tant que musulmans car c'est la logique de suivre 'la religion la plus honnête des parents'." (2012: 294)

Hence, the couple was forced to divorce because the SLPS did not recognise their union. Furthermore, they were forced to disguise the truth in order to get their marriage declared irregular instead of invalid, in order to obtain proof of paternity. Here too, the children followed the Muslim parent, in this case the mother, because Islam was considered the righteous religion.

The examples described above demonstrate how the Muslim faith is given preference over other faiths. When a non-Muslim father or mother converts to Islam, the religious identity of the converted parent automatically devolves upon the children. Here we see that, quoting Tadros from her article on non-Muslims in Egypt's framework of personal status law: "the application of the content of the Muslim Personal Status Law is not gender specific, rather religion-specific."[13] The supremacy of the Muslim faith in personal status law, i.e. the supremacy of the SLPS and the *shar'iyya* courts over the other laws and courts, is particularly evident when a non-Muslim woman converts to Islam. Because whereas the provisions of the SLPS, similar to other Middle Eastern personal status laws, normally privilege men over women, in the event of conversion of the wife or mother, the husband or father loses out to his Muslim (former) spouse. Thus, as an exception to the rule, when a non-Muslim woman converts to Islam, the woman is privileged over the man. In other words, in conversion cases,

[11] For other, similar examples in Syrian case law, see NAEL GEORGES (2012), *Le droit des minorités. Le cas de chrétiens en Orient arabe,* Aix-en-Provence: Presses Universitaires d'Aix-Marseille, 289 ff.

[12] Georges does not give any information on where or how the marriage was contracted, I suspect it was a *'urfi* marriage, i.e. a customary marriage (see below).
It should also be noted that "legally impossible" marriages (such as a marriage between a Muslim woman and a Christian man) can be circumvented by contracting a civil marriage abroad, for example on Cyprus; a practice that is also common among mixed couples from Israel and Lebanon (cf. YÜKSEL SEZGIN (2013), *Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India*, Cambridge: Cambridge University Press, 106; LUBNA TARABEY (2013), *Family Law in Lebanon: Marriage and Divorce among the Druze*, London: I.B. Tauris, 100).

[13] MARIZ TADROS (2009), "The Non-Muslim 'Other': Gender and Contestations of Hierarchy or Rights" in: *Hawwa: Journal of Women of the Middle East and the Islamic World* 7, 111-143 (130).

the "laws of patriarchy" are superseded by the "laws of religious affiliation", in this case to the advantage of Islam and the SLPS.[14]

It can therefore be concluded that the plurality in personal status law does not entail equality of laws and jurisdictions of the different religious communities, as the SLPS and the *shar'iyya* courts have supremacy over the other laws and courts.[15] This means that the already complex situation of legal plurality is only further complicated by the unequal position of non-Muslims vis-à-vis Muslims, but is sometimes also used by individuals to achieve a particular, personal goal – in this case divorce. As the Christian laws make it very difficult for Christians to obtain a divorce or a nullification of their marriage, conversion to Islam may seem an easy way out of one's marriage. However, even if the marriage is dissolved by a *shar'iyya* court, it does not mean that the marriage is thereby also considered dissolved by a Christian court. The Christian courts will not recognise the "Muslim" divorce, for the marriage will continue to exist according to Christian doctrine. The "divorced" Christian spouse will still need to resort to his or her denomination court to ask for a separation or nullification of the marriage according to his/her canonical law, if he/she wants to remarry. *Shar'iyya* courts tend to accept these conversions without much scrutiny into the underlying motives or recognition of the jurisdiction of the other personal status courts.[16] As a result, the unconverted spouse and children are faced with the sad legal consequences of, not only, a broken marriage but also possibly the loss of child custody.

Syrian family law is not just characterised by the plurality of existing personal status laws and courts, but the plurality or versatility also reveals itself in the fact that the SLPS allows for the recognition of customary legal practices.

IV. Recognition of Customary Legal Practices

Marriages between Muslims[17], and those between a Muslim man and a non-Muslim woman, ought to be concluded in or through a *shar'iyya* court. However a significant number of marriages are contracted outside the court. So-called traditional or customary (i.e. *'urfi*) marriages are, for example, commonly found in the rural areas of Syria.[18] The SLPS also considers these *'urfi* marriages valid, provided certain legal procedures are met, which makes them eligible for registration at the Civil Registry. However, in the event that a child is born or a pregnancy is apparent, the marriage will be recognised, regardless of whether the required procedures are met (Article 40.2 SLPS). When a couple has married the so-called *'urfi* way, and especially when a child is born from this union or when a pregnancy is apparent, the

[14] TADROS 2009: 132 (supra n. 13).

[15] For a more elaborate discussion (including examples) of this situation of, what I call "asymmetrical plurality", see the first two chapters of my Ph.D. thesis (see VAN EIJK, supra asterisk footnote). See also BERGER 2005 (supra n. 4) on a similar situation in Egypt.

[16] See VAN EIJK (supra asterisk footnote), (in particular chapter two).

[17] It is important to note that the SLPS does not make a distinction between Sunni and Twelver Shi'i, Isma'ili or 'Alawi Muslims. Conversely, in Lebanon each religious group has its own personal status law and courts, including the different Muslim communities (TADROS 2009: 114 (supra n. 13)).

[18] ANNIKA RABO (2011), "Syrian Transnational Families and Family Law" in: ANNE HELLUM et al. (eds.), *From Transnational Relations to Transnational Laws: Northern European Laws at the Crossroads*, Farnham: Ashgate Publishers, 29-49 (34-35).

registration procedure of both the marriage and the filiation of the child will generally be settled promptly by the court.[19]

People have different reasons to conclude a *'urfi* marriage, for example because such marriages are common in the community to which the spouses belong (e.g. in the countryside) or because the spouses belong to different (Muslim) sects, the couple marries against the family wishes or because it concerns a polygamous marriage, with or without the first wife's knowledge.[20] It is also possible that the man serves in the army and did not get (or does not want to ask for) permission from the army to marry[21] or because the groom cannot meet the costs of a traditional wedding.[22] Finally, a man can also agree to contract a *'urfi* marriage to make sure the wife's illegitimate child receives a (his) family name. This latter example will be addressed in more detail below.

V. Nameless Children: Establishing and Providing Paternity

Couples do not only *ex post facto* register their *'urfi* marriage but also their born and unborn children. The child's paternity is generally registered simultaneously with the *'urfi* marriage before the court. Once a *'urfi* marriage is registered, it will be considered a legally valid marriage. As a result, the regulations pertaining to paternity of children born during a valid marriage are applicable (Art. 49 SLPS). In line with the Islamic notion that the child belongs to the marriage bed (*al-walad li-l-firash*), the SLPS considers a child born during a valid marriage attributable to the husband (Art. 128 ff.). Hence, establishing the paternity of children born from a *'urfi* marriage poses no serious problems. But what if there is no proof of marriage (or no marriage at all) and the father has disappeared or is unknown; such cases, although rare, do occur. The child will be considered illegitimate and a child born out of wedlock can only be affiliated to the mother. Since a mother cannot pass on her surname to her child, the child will be without a last name and thus without citizenship.[23] Without a surname, the child cannot get a government-issued identity card (*huwiya*) and will not be able to go to school, travel abroad or own property. This leaves an unwed mother with few options: she can either abandon her child as a foundling (*laqit*), i.e. a child of unknown parentage, at an orphanage or, if she wants to keep the child, try to find a man who is willing to marry her and recognise the child as his own.

[19] JESSICA CARLISLE (2008), "From Behind the Door: A Damascus Court copes with an alleged out of Court marriage" in: BARBARA DRIESKENS (ed.), *Les métamorphoses du mariage au Moyen-Orient*, Beirut: Institut Français du Proche-Orient (IFPO), 59-74.

[20] As of late, *'urfi* marriages have become subject of much debate in many Muslim countries, in particular Egypt and the Gulf (cf. FRANCES HASSO (2011), *Consuming Desires: Family Crisis and the State in the Middle East*, Stanford: Stanford University Press; NADIA SONNEVELD (2012), "Rethinking the Difference Between Formal and Informal Marriages in Egypt" in: MAAIKE VOORHOEVE (ed.), *Family Law in Islam: Divorce, Marriage and Women in the Muslim World*, London: I.B. Tauris, 77-107).

[21] cf. CARLISLE (supra n. 19).

[22] cf. HASSO; SONNEVELD (supra n. 20).

[23] Syria's Nationality Act (Law no. 276, 24 November 1969) stipulates that – as a rule – a child acquires nationality through the father (article 3 sub a). In exceptional cases, however, for example when a child is born to a Syrian national mother and the father is unknown, the mother can pass on her nationality to the child, provided the child was born on Syrian soil (article 3 sub b).

If she opts for the latter option, the "new" husband/father cannot legally adopt the child, for the SLPS does not recognise adoption. Adoption (*tabanni*) is prohibited in Islamic law[24] and therefore not recognised by Syrian legislation. It is interesting to note that when Syria ratified the Convention on the Rights of the Child (CRC) on 15 July 1993, it did so with reservations to articles 14, 20, and 21; the latter article relates to the right of adoption.[25] Syria explained its reservation to article 21 CRC by stating that the article contravened "the principles of the Islamic shari'ah which prevail in the country but also with the provisions of national legislation for which Islamic legislation constitutes one of the principal sources".[26] Interestingly, Syria lifted the reservation to article 21 (and 20) CRC in 2007.[27] Syria states in its combined *Third and Fourth Periodic Report* that it retains its reservation to article 14 CRC concerning the right to freedom of thought, conscience and religion in relation to the subject of adoption. It states that

> "[t]he reasons for this reservation are related to the religious teachings of Islam. The religion provides for the system of *kafalah* (guardianship) and placement in foster families, on condition that the filiation of the children concerned is not altered to prevent them from enjoying the right to know who their natural parents are (if their identity subsequently comes to light) and to rejoin them." (CRC 2009, par. 171)[28]

If adoption is not permissible, what options does a newlywed couple have to pass on the "father"'s surname to the "adoptive" child? Some lawyers find creative ways to provide an illegitimate child with a paternal name and, in consequence, an identity. These lawyers find a man who is willing to be the "fictitious" father to the child, which means he will agree to sign and register a fabricated *'urfi* marriage contract. As they register the *'urfi* marriage, they simultaneously register the child with the father's last name. Following the registration, the "husband/father" and mother usually agree upon contracting a *mukhala'a* divorce (i.e. a divorce by mutual consent), which dismisses the "husband" from any marital or post-divorce financial obligations. Several legal steps thus have to be taken to give mother and child a new chance on life.

But why are men willing to go through such a rigmarole, what is in it for them? My informants said that men were usually willing to cooperate because of philanthropic reasons or because they did not have children of their own. Lawyer Nawal, an experienced family lawyer, told me

[24] The prohibition is based on two verses of the *Qur'an* (33:5 and 37), which state that giving one's name to someone "who does not belong within his 'natural' descendance" is forbidden (ERIC CHAUMONT (2004), "Tabann(in)" in: PERI BEARMAN et al. (eds.), *Encyclopaedia of Islam*, Vol. XII Suppl., Second Edition, Leiden: Brill, 768-769). Having an adopted child in the family is deemed problematic because it might infringe on the inheritance rights of the "natural" family members and it might lead to moral corruption because the adopted child is not religiously prohibited in marriage to his/her close family members, see MORGAN CLARKE (2009), *Islam and New Kinship: Reproductive Technology and the Shariah in Lebanon*, New York: Berghahn Books, 72-73.

[25] Article 14 relates to "freedom of thought, conscience and religion"; article 20 relates to "children deprived of their family environment".

[26] COMMITTEE ON THE RIGHTS OF CHILDREN (1995), *Initial Report: Syrian Arab Republic*, 22 September 1995, UN Doc. CRC/C/28/Add.2. (par. 124).

[27] Decree no. 12 of February 2007, see COMMITTEE ON THE RIGHTS OF CHILDREN (2009), *Third and Fourth Periodic Report: Syrian Arab Republic*, 4 March 2009, UN Doc. CRC/C/SYR/3-4 (par. 171).

[28] The position of foundlings (or children of unknown parentage) and the corresponding system of fostering (*kafala*) are regulated by a separate law, i.e. the Law of Custody of Foundlings, Law no. 107 of 4 May 1970.

of one such example: an arranged marriage between a young man and a young mother with a child born out of wedlock.

> Alaa, a 32 year old Muslim woman from a poor Damascus suburb, was mother of a four-year-old daughter, Farah. Farah was born from a secret 'urfi marriage between Alaa and a Lebanese man. At the time, Alaa lived and worked together with her brother in Lebanon to support their family back home in Damascus. In Lebanon she fell victim to sexual abuse by some family members. She eloped with a man and contracted a 'urfi marriage with him in Beirut. After some time, it turned out that the husband had used a false identity card for the marriage.[29] The husband disappeared, leaving Alaa pregnant and unmarried. She found relief in a women's shelter where she gave birth to Farah. Some people in Damascus, who regularly provide assistance to women like Alaa, arranged a marriage for her with Muhammad, who was three years her junior. They registered a (pre-dated) 'urfi marriage contract, as well as the proof of paternity of Farah in a Damascus shar'iyya court.
>
> However, in this particular case Muhammad and Alaa did not divorce. Beyond all expectations, Muhammad and Alaa actually fell in love. The marriage was not just marriage on paper, for Alaa fell pregnant shortly after the registration process. But Alaa's brother disrupted their marital bliss by instituting legal proceedings against the newlyweds. The brother claimed the marriage and (accordingly) the proof of paternity had to be annulled. He argued that he was Alaa's legal guardian (wali) and that Muhammad was not Farah's real father, which meant he (the brother) was the lawful legal guardian to the girl.[30]

According to lawyer Nawal, the brother's main goal was to get custody over his niece. Her defence was that the brother's claim was inadmissible. He was not Alaa's legal guardian and therefore he had no right or legitimate interest to take legal action against Muhammad and Alaa. I accompanied lawyer Nawal to the *shar'iyya* court on the day she was scheduled to submit her defence. Lawyer Nawal was the only one present at the court hearing, the brother (plaintiff) did not appear before the judge. She asked the judge to dismiss the case because the brother did not take the matter seriously. The judge suggested to wait and see whether the plaintiff would make an appearance later that day.[31] If he did not, the court would decide the following day to summon him again or dismiss the case all together.[32]

Lawyer Nawal told me that the absence of Alaa's brother was beneficial to the case. She had intentionally not submitted her written defence because if the brother would decide to come to court, he would be able to read her defence and know what her defence strategy was. She hoped that Alaa's brother would be half-hearted about pursuing his claim against his sister,

[29] The lawyer assumed that the Lebanese husband was non-Muslim, because he used a false identity card that belonged to a Sunni Muslim.
[30] Personal communication with lawyer Nawal, 18 February 2009.
[31] A writ of summons (*tabligh*) only specifies the day, not an exact time.
[32] Damascus *shar'iyya* court, 10 March 2009.

which would make the judge more lenient towards Alaa and more likely to dismiss the claim. Besides his claim for annulment of proof of marriage and paternity, the brother considered initiating criminal proceedings against Alaa on the grounds of illicit sexual behaviour (*zina*).[33] If *zina* could be proved in court, Farah would be a bastard child (*ghayr shar'i*), as well as her (Alaa's) unborn child. This would of course put Alaa and her daughter in a difficult position. Lawyer Nawal hoped that if the annulment claim would be dismissed, the brother would be discouraged to commence criminal charges.

Upon inquiry with lawyer Nawal, a month later, it appeared her strategy and hopes had materialised for the court had dismissed the brother's claim. However, Alaa had been told that he had hired a lawyer and wanted to file another claim against her. Lawyer Nawal cautioned Alaa to be careful, she was worried that Alaa would receive a court summons in the near future.[34] I stayed in touch with lawyer Nawal over the course of four months, but the case had seemed to come to a standstill. The brother did not file a new claim.

VI. Pushing the Envelope for a Good Cause

The possibility of registering customary marriages and establishment of paternity of children born from these marriages (including "illegitimate" children), is one example of the versatility of Syria's legal system.[35] This versatility also offers the possibility for lawyers and other legal practitioners to find creative solutions, within the legal framework, for women like Alaa, when the existing laws do not provide an adequate or favourable solution. Extra-judicial instruments, such as the possibility to obtain an *ex post facto* proof of marriage provide a welcome alternative. Lawyer Nawal took the view that, because of the unfair laws against women and the disadvantaged position of women in general, she is "forced" to use the existing procedural gaps and legal loopholes (which are many) if this is needed to help her (predominantly female) clients.[36] With the help of connections in the right places, the rules can be circumvented and facts recreated in a manner that they make sense for the purpose at hand.[37]

Obviously, fabricating a marriage contract or proof of paternity is not in accordance with the law. Lawyers who provide legal assistance in these cases knew very well that they were liable to punishment, as the Penal Code forbids any illegal changes in a child's identity, i.e. paternity fraud (Art. 479).[38] In addition, the Syrian Bar Association tried to step up against these practices

[33] In other words, sexual intercourse between a man and a woman who are not legally married to each other.
[34] Personal communication with lawyer Nawal, 6 April 2009.
[35] Flexibility in personal status law is not limited to Syria, in legal systems of other contemporary Arab countries we find a similar situation; see, for example, on Gaza/Palestine: NAHDA SHEHADA (2009), "Negotiating Custody Rights in Islamic Family Law" in: THOMAS KIRSCH and BERTRAM TURNER (eds.), *Permutations of Order: Religion and Law as Contested Sovereignties*, Farnham: Ashgate, 247-262; and on Tunisia: MAAIKE VOORHOEVE (2014), *Gender and Divorce Law in North Africa: Sharia, Custom and the Personal Status Code in Tunisia*, London: I.B. Tauris.
[36] Personal communication with lawyer Nawal, 10 March 2009.
[37] For an adoption case in Syria, in which similar extra-judicial instruments are employed, see "Ahmed's story" recounted by CLARKE (2009: 21-25, supra n. 24). Bargach states in her study on abandoned children in Morocco that similar practices occurred in Morocco (JAMILA BARGACH (2002), *Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco*, Lanham: Rowman & Littlefield Publishers, (110-111, 116)). Likewise, Voorhoeve states that Tunisian family judges are willing to manoeuvre around the rules to establish legal paternity of an illegitimate child (MAAIKE VOORHOEVE (2012), "Judicial Discretion in Tunisian Personal Status Law" in: VOORHOEVE 2012: 199-229 (220-21) (supra n. 20)).
[38] Law no. 148 of 22 June 1949, with amendments.

by threatening to impose sanctions on transgressors. For that reason, these lawyers had to be prudent when employing extra-judicial strategies. Even so, I was told that paternity fraud happens with some regularity. One lawyer told me he "resolved" about 15 cases this way, including an imprisoned single mother and an abandoned Iraqi woman in Damascus, all with the purpose of giving an illegitimate child a last name.

Analogous to Shehada's observations in the Gaza city *shar'iyya* courts concerning the way Gaza's judges handle child custody cases, I argue here that these Syrian lawyers, litigants, judges, and other legal experts involved in the process of legitimizing an "illegitimate" child's descent, exploit the "gaps of indeterminacy" of the legal order.[39] The legal structure does not provide an adequate solution and therefore the "good-doers" push the boundaries of the system for the benefit of mother and child.

VII. Concluding remarks

Extra-judicial options may thus prove to be beneficial to a great variety of individuals, such as unwed mothers and couples who do not wish to marry in court because they want to get married (secretly) against their families' wishes (e.g. because the spouses belong to different social classes, religions, denominations). Another group that benefits from the available extra-judicial possibilities is the judiciary, as *ex post facto* registrations of marriages, divorces and proof of paternity unburden the already overloaded judicial system.[40] However, this situation of legal flexibility also offers ample opportunities for those who are not very strict with the law. It can encourage people to resort to corruptive practices or simply ignore the law; for example, husbands can divorce and abandon their wives, leaving them in a state of legal uncertainty. In that regard, the extra-judicial options only degrades the already poor legal position of women and children, especially in divorce and extra-marital circumstances.

As was demonstrated in the first part of this paper, the situation becomes even more complex when the jurisdictions of different religions intersect, and particularly when one of the spouses, usually the husband, converts to Islam. In these circumstances the plurality of the system works favourably for individuals who choose to forum shop in order to achieve some personal gain, i.e. a divorce. However, not without consequence, as a conversion may turn out unfavourable for the unconverted spouse and his/her children, for he/she might lose custody of his/her children to the converted Muslim parent. The plurality and versatility of Syria's family legal system can thus be used or work out in different ways, as a bane or blessing in disguise.

[39] SHEHADA 2009: 248 (supra n. 35).

[40] See, for example, DALIA HAIDAR, "Just Challenges" in: *Syria Today* (online edition), July 2009, available at: http://www.syria-today.com/index.php/july-2009/363-focus/1997-just-challenges (last visited 8 September 2009).

Legislation: Environmental Law Regime in the United Arab Emirates: An Investor's Guide to Environment Compliance in the Construction Industry

*by Kanishka Singh**

Abstract

The United Arab Emirates has rather successfully established a reputation for being a construction hotspot. It will also be hosting the Expo in 2020 and the announcement has already triggered an influx of investment with announcement of several new construction projects. Therefore, in this vibrant construction market, it becomes increasingly important for investors and consumers alike to understand the environmental laws applicable at the Federal and Local level and how it affects their businesses. This is also significant as some of the penalties prescribed under the statutes levy heavy fines and can also result in criminal sanctions. This paper seeks to lay out the laws and regulations which business entities need to comply when undertaking construction activities along with giving a brief background about the governmental set- up which enforces such laws.

I. Introduction

The importance of preserving the environment within the UAE is encapsulated in the following words of Sheikh Zayed bin Sultan Al Nahyan, the late President of the UAE:

> "We cherish our environment because it is an integral part of our country, our history and our heritage. On land and in the sea, our forefathers lived and survived in this environment. They were able to do so only because they recognized the need to conserve it, to take from it only what they needed to live, and to preserve it for succeeding generations. With God's will, we shall continue to work to protect our environment and our wildlife, as did our forefathers before us. It is our duty and, if we fail, our children, rightly, will reproach us for squandering an essential part of their inheritance, and of our heritage."[1]

The UAE has become synonymous with skyscrapers and it is easy to forget that away from its cosmopolitan cities lies an environment that is complex and beautiful but ultimately fragile. The challenges to the natural environment today are immense as the UAE faces the impact of rapid development and the effects of climate change. An ever increasing immigrant population coupled with mining and oil drilling activities are taking their toll on the environment every

* Kanishka Singh is a Construction lawyer based in Dubai.

[1] Quoted from Sheikh Zayed bin Sultan Al Nahyan, the late President of the U.A.E., www.adcbuae.com/Dubai/Government_in_Dubai/Government_of_Abu_Dhabi/127233-12591.html, last visited on 17 June 2014.

day. The Arabian Gulf ecosystem is facing variety of stresses due to its location within the richest oil province in the world that hosts more than 67% of the world oil reserve. Oil related activities that range from exploration to exportation result in adverse effects that cause significant damage to the ecosystem.[2] In such times, it becomes extremely vital to not only formulate stricter protection laws but also understand the existing environment protection regime within the UAE.

The United Arab Emirates (the "UAE") is a federation of seven emirates comprising Dubai, Abu Dhabi, Ajman, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain and was formed in 1971. The UAE federal constitution provides for an allocation of powers between the federal government and the government of each emirate. Environmental legislation exists both at the federal level and within each Emirate. The relevant authority and regulations will generally depend on the location of the project but the federal environmental law regime will always be applicable. The body of Environmental Law in the UAE comprises Federal Laws and Local Orders issued at municipal level within certain of the Emirates. The UAE also recognizes certain international conventions and protocols which are detailed below in this article.

II. The Setup

At a federal level, two governmental entities are tasked with overall responsibility for protecting and conserving the environment and promoting sustainable development within the UAE. These are:

a) the Federal Environmental Agency; and
b) the UAE Ministry of Environment and Water.

In addition to these entities, there are numerous governmental and nongovernmental groups which assist the federal agencies in the application of the law and the protection of the environment, including the Abu Dhabi Islands Archaeological Survey, the Emirates Environment Group, UAE Agriculture, Environment and Protected Areas Authority, and the Emirates Wildlife Society.

III. Federal and Local Laws

1. Federal Law

Federal Law No. 24 of 1999, for the Protection and Development of the Environment (the "Federal Environmental Law"), details the key federal legislative framework for environmental regulation in the UAE.

[2] WALID ELSHORBAGHY, "Overview of marine pollution in the Arabian Gulf with emphasis on pollutant transport modelling", *Academia.edu*, http://www.academia.edu/2595870/Overview_of_marine_pollution_in_the_Arabian_Gulf_with_emphasis_on_pollutant_transport_modeling, last visited on 13 July 2014.

The overarching principles of the Federal Environmental Law are to:

- protect and conserve the quality and natural balance of the environment;
- control all forms of pollution and avoid harmful immediate or long term adverse effect resulting from economic, agricultural or industrial development;
- develop natural resources and conserve biological diversity;
- protect society and human beings from activities and acts that impose harm to the environment;
- protect the UAE environment from the harmful effect of activities undertaken outside the UAE; and
- comply with international and regional conventions signed by the UAE regarding the protection of the environment. International treaties entered into by the UAE include the "United Nations Convention on Climate Change for the year 1992", the "Kyoto Protocol 1997" and the "Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998".

The Federal Environmental Law addresses key aspects of environmental protection, which are:

- environmental impact assessment;
- protection of the marine environment;
- pollution from land sources;
- soil protection;
- protection of air pollution; and
- the handling of hazardous substances and wastes.

The Federal Environmental Law is administered by the Ministry of Environment and Water, together with the Federal Environmental Agency. Any entity seeking to undertake an activity that may have an impact on the environment must obtain a licence, usually from the Federal Environmental Agency (although the granting of a licence may be delegated to a local authority).[3] A license will only be granted after an impact assessment has been undertaken and approved. Once granted, a licensee must strictly comply with the terms of the licence (i.e. this may require the licensee to curtail the discharge of pollutants beyond a particular threshold).

In addition to the Federal Environmental Law, federal legislation addresses specific environmental issues. This legislation includes Federal Law No. 23 of 1999, which concerns the conservation of aquatic resources in the UAE and Federal Law No. 20 of 2006, which amended Federal Law No.1 of 2002 and addresses the use of radioactive materials in the UAE.

2. Local Laws

Local laws supplement the federally enacted environmental laws, however, federal laws prevail in the event of any inconsistency or ambiguity. In Abu Dhabi, the relevant agency is the Environment Agency Abu Dhabi and its equivalent in Dubai is Dubai Municipality (Environmental Department).

[3] Environmental Law, Law No. 24 of 1999, Art. 4 (UAE).

In the Emirate of Abu Dhabi, the key piece of environmental legislation is Law No. 21 of 2005 for Waste Management in the Emirate of Abu Dhabi, which, among other things, requires businesses that generate waste to reduce waste in accordance with techniques approved by the Environment Agency Abu Dhabi and also deals with the transportation, storage and treatment of waste.

The Emirate of Dubai also has environmental laws and the most relevant are Local Order No. 61 of 1991. The Dubai Government has indicated that this law will be replaced in its entirety but this has yet to occur. The other significant environmental law in Dubai is Local Order No. 7 of 2002, which governs the management of waste.

IV. Environmental Compliance in Free Zones

Free Zones are part of the country's territories but considered to be outside the customs territory and subject to customs control other than normal customs procedures.[4] In other words, free zones are designated areas within the UAE where some of the trade barriers, tariffs, quotas, and other bureaucratic requirements differ from those contained in the Companies Law in order to attract foreign investment. The Dubai International Financial Center and the Jebel Ali Free Zone are the two most prominent economic free zones in the UAE.[5] Such economic free zones foster an attractive environment for business by offering companies, among other things, zero tax rates on their income, no foreign exchange controls and freedom from excessive regulation.[6]

Unlike entities formed under the UAE Companies Law in mainland UAE, licenses issued by a free zone authority only permit a free zone entity to operate in the relevant free zone or outside the UAE due to the fact that each free zone is subject to the specific laws and regulations of the applicable free zone authority. This essentially means that each free zone has its own law.

Various free zones within Dubai have their own regulatory arms which deal with environmental issues. For example, Trakhees (Ports Customs and Free Zone Corporation) has a regulatory department for Environment Health and Safety (known as EHS), which regulates and enforces rules and regulations related to environmental protection such as air and water quality, marine mammals, and "landscaping" within a number of the free zones including Dubai Multi Commodities Centre, Dubai Media City and the Jebel Ali Free Zone.[7] Similarly, Dubai Techno Park Free Zone Rules create a body named EHSS (Group Environment, Health, Safety and Security Division) to monitor environment compliance within the free zone especially during construction activities.[8]

[4] "Free Zones", *Dubai Customs*, http://www.dubaicustoms.gov.ae/en/Procedures/CustomsDeclaration/Pages/FreeZones.aspx, last visited on 13 July 2014.
[5] "Doing business in the United Arab Emirates 2009", *Baker & McKenzie*, http://www.bakermckenzie.com/files/Uploads/Documents/North%20America/DoingBusinessGuide/Dallas/br_dbi_uae_13.pdf, last visited on 13 July 2014.
[6] "Doing business in the United Arab Emirates 2009", *Baker & McKenzie*, http://www.bakermckenzie.com/files/Uploads/Documents/North%20America/DoingBusinessGuide/Dallas/br_dbi_uae_13.pdf, last visited on 13 July 2014.
[7] Alexis Waller, "A Guide to Environmental Regulation In Dubai And The Wider", *Mondaq*, http://www.mondaq.com/x/243218/real+estate/A+Guide+To+Environmental+Regulation+In+Dubai+And+The+Wider, last visited on 13 July 2014.
[8] Techno Park Rules and Regulations, Clause 8.6, http://www.ezw.ae/media-files/2011/08/15/20110815_Appendix-5-TP-Rules-Regulations-v1-31-01-08.pdf, last visited on 18 July 2014.

V. Environment and Sustainable Development

Any entity which is involved in planning, economic development, and/or construction is obliged to consider all aspects of environmental protection, the control of pollution, and the rational use of natural resources when developing economic and social plans and undertaking projects.[9] The Federal Environmental Agency is tasked with the overall responsibility of preparing, issuing, revising, developing and updating the standards required for environmental protection within the UAE.[10] When devising these standards, the Federal Environmental Agency is required to take into consideration the then-current technological capabilities available and the economic costs involved. This balance must be achieved without undermining the objectives of environmental protection and controlling pollution.[11] Noncompliance with these standards is permitted in emergencies, either to protect lives or ensure the safety of a building, installation, or work area but the Federal Environment Agency and other competent authorities are to be notified.[12] In addition to these general measures, there is a specific prohibition against hunting, killing, or capturing certain birds, wild animals, and marine life.[13] This prohibition not only extends to the sale and transportation of these animals but also destruction of their natural habitats. Any person or entity who violates this prohibition will be subject to a fine of between AED 2,000 and AED 20,000 (between USD 550 and USD 5,500) and a sentence of imprisonment for an unspecified term.[14]

VI. Environmental Monitoring

Each emirate is tasked with the responsibility of establishing, operating, and supervising environmental networks within its particular jurisdiction, some of which have already been established and some of which are currently under formation.[15] Each environmental monitoring network is then required to notify the Federal Environmental Agency, and the authority for the applicable emirate if any pollutants are discharged by any entity or person in excess of the standards required by law.[16]

VII. Compliance and Penalties for Companies Extracting Off-Shore Oil and Gas

Any entity which is licensed to prospect, extract or exploit onshore or offshore oil and gas fields is specifically prohibited from discharging any polluting substance into the environment.[17] Any person or entity who violates this will be subject to a fine of between AED 200,000 and AED 500,000 (between USD 55,000 and USD 135,000) and a sentence of imprisonment of between two and five years.[18] This prohibition extends to drilling, exploring,

[9] Environmental Law, Law No. 24 of 1999, Art. 9 (UAE).
[10] Environmental Law, Law No. 24 of 1999, Art. 10 (UAE).
[11] Environmental Law, Law No. 24 of 1999, Art. 10 (UAE).
[12] Environmental Law, Law No. 24 of 1999, Art. 11 (UAE).
[13] Environmental Law, Law No. 24 of 1999, Art. 12 (UAE).
[14] Environmental Law, Law No. 24 of 1999, Art. 83 (UAE).
[15] Environmental Law, Law No. 24 of 1999, Art. 13 (UAE).
[16] Environmental Law, Law No. 24 of 1999, Art. 14 (UAE).
[17] Environmental Law, Law No. 24 of 1999, Art. 18 (UAE).
[18] Environmental Law, Law No. 24 of 1999, Art. 73 (UAE).

testing, and producing oil or gas near protected areas unless (i) the entity in question has established safety measures to safeguard against harm to land and water; and (ii) any waste is treated with the most recent technologically advanced systems available. The Federal Environmental Agency, together with individual authorities for each emirate, issues periodic guidelines and specifications for environmental safety and the management of waste resulting from the production, exploitation and transportation of oil and gas.[19] Any entity which is licensed to prospect, extract or exploit onshore and offshore oil and gas fields may be asked to contribute information to the authorities when formulating new guidelines and specifications. The Federal Environmental Agency and the individual authorities for each emirate are required to carry out periodic environmental impact assessments to analyze the impact of the exploration, extraction, and exploitation of oil and gas taking place in production fields and throughout land and marine transportation routes.[20]

VIII. Air Pollution Compliance for Industries

Any entity undertaking business within the UAE must ensure that airborne pollutants do not exceed the permitted limits,[21] including pollutants emitted from machines, engines and vehicles producing exhaust gases.[22] Any person or entity who violates this will be subject to a fine of between AED 1,000 and AED 20,000 (between USD 275 and USD 5,500).[23] Except in designated areas which are situated away from residential, industrial and agricultural areas, and the marine environment, it is prohibited to dispose of, treat or burn waste.[24] The authority for each individual emirate will determine the precise location and specifications for each area, including the minimum distance from designated areas in which waste disposal can take place. Any person or entity who violates this will be subject to a fine of between AED 2,000 and AED 20,000 (between USD 550 and USD 5,500).[25] The Environmental authorities also prohibit spraying certain pesticides and other chemical compounds on public health grounds except where specific authorization is granted by the Federal Environmental Agency and certain conditions, controls and safeguards are complied with.[26] In any event, when using these prescribed chemicals, care must be taken to avoid direct or indirect immediate or delayed exposure to humans, animals, plants, water courses, and other elements of the environment. Any person or entity who violates this will be subject to a fine of between AED 10,000 and AED 50,000 (between USD 2,750 and USD 13,500).[27]

IX. Drilling, Construction and Demolition Activities

Any entity involved in exploration, drilling, construction and/or demolition activities is required by law to undertake precautions for the safe transport, storage and disposal of all

[19] Environmental Law, Law No. 24 of 1999, Art. 19 (UAE).
[20] Environmental Law, Law No. 24 of 1999, Art. 20 (UAE).
[21] Environmental Law, Law No. 24 of 1999, Art. 48 (UAE). Also see, Federal Cabinet Resolution No. 12 of 2006.
[22] Environmental Law, Law No. 24 of 1999, Art. 49 (UAE).
[23] Environmental Law, Law No. 24 of 1999, Arts. 79 and 82 (UAE).
[24] Environmental Law, Law No. 24 of 1999, Art. 50 (UAE).
[25] Environmental Law, Law No. 24 of 1999, Art. 82 (UAE).
[26] Environmental Law, Law No. 24 of 1999, Art. 51 (UAE).
[27] Environmental Law, Law No. 24 of 1999, Art. 80 (UAE).

waste products and dust.[28] All emissions of smoke, gases, vapors and other fumes resulting from burning fuel or other substances involved in the exploration, drilling, extraction and production of crude oil, the generation of power and construction industries must be within permissible limits.[29] The entity in charge of such activities must take all necessary precautions to reduce the amount of pollutants resulting from the aforementioned activities and keep a log of all pollutants released. Any person or entity who violates this will be subject to a fine of between AED 2,000 and AED 20,000 (between USD 550 and USD 5, 500).[30] Detailed regulations specify the precautions to be taken by industry sectors and the permissible limits for emission of smoke, gases, vapors and other fumes.

X. Quarry/Mining Law

Although there are no emirate specific laws regulating quarrying activities in Dubai or Abu Dhabi, the following Federal laws govern quarrying activities in the UAE as a whole:

- Federal Environment Law;
- Federal Cabinet Resolution No. 20 of 2008 (Quarries and Crushers Regulations);
- Federal Ministerial Resolution No. 492 of 2008 (Quarries and Crushers Environmental Guidelines); and
- Federal Ministerial Resolution No. 110 of 2010 (Quarries and Crushers Regulations).

As a preliminary point, any entity wishing to carry out quarrying activities is required to obtain an environmental license from the relevant local authority but none of the laws require the furnishing of a performance bond to a local authority (or any other authority) for rehabilitating or making good a quarry.

However, companies carrying out quarrying activities are mandated to comply with certain guidelines regarding the environment and penalties arise in the event of any breach. The obligations and relevant penalties are very much determined by specific facts and circumstances but some of these include:

- Article 15 of Federal Cabinet Resolution No. 20 of 2008, which states that "whoever through his act or neglect causes damage to the environment or others as a result of violating the provisions of the resolution shall be responsible for all necessary costs for repairing or eliminating the damages and any consequent indemnities".
- Article 16 of Federal Cabinet Resolution No. 20 of 2008 clarifies that the indemnification for the environmental damage referred to in Article 15 shall include the "damages that affect the environment itself and prevent or reduce the lawful use thereof, temporarily or permanently, or impair its economic or aesthetic value." The Federal Environment Agency is the body that decides the amount of the indemnity (taking into account the extent of the harm caused) and the company that is subject to the indemnity may refer the issue to the

[28] Environmental Law, Law No. 24 of 1999, Art. 52 (UAE).
[29] Environmental Law, Law No. 24 of 1999, Art. 53 (UAE).
[30] Environmental Law, Law No. 24 of 1999, Art. 82 (UAE).

court in the relevant jurisdiction if its disagrees with the determination of the Federal Environment Agency (including regarding the amount of the indemnity that it is required to pay).

- Federal Ministerial Resolution No. 110 of 2010, which lays down the "Quarry Rehabilitation/Restoration" process. Article 13 of this Law states that quarry and crusher operators must "perform progressive rehabilitation as they extract their sites. Progressive rehabilitation means rehabilitation shall be done sequentially within a reasonable time after extraction of quarry resources is complete. As one area of the pit or quarry is being extracted, rehabilitation must be completed in the areas where the quarry reserves have been stopped or exhausted". As above, the company may be subject to an indemnity imposed by the Federal Environmental Agency. Penalties (of both a monetary and criminal nature) may also be imposed under Chapter VIII Federal Environmental Law. The actual penalty turns on the specific activity and breach on question. In the context of quarrying activities, the definition of "Wastes" under Federal Environmental Law is potentially relevant as it includes gaseous wastes produced by stone quarries. Article 50 states that it is prohibited to throw, treat or burn garbage and solid wastes except in places designated for such purposes away from residential, industrial and agricultural areas and the water environment. The penalty for violating Article 50 is a fine of not less than AED 2,000 and not exceeding AED 20,000 (between USD 550 and USD 5,500).

XI. Risks Associated with Non-Compliance/Breach

A breach of the Federal Environmental Law can result in penalties of between AED 1,000 and AED 10 million being levied, while custodial sentences may be imposed on culpable individuals who willfully or recklessly damage the environment. A draft amendment to the Federal Environmental Law is currently before the Federal National Council. This amendment proposes extending the application of Federal Environmental Law to entities operating in free zones as well as increasing the number of offences under the legislation and the penalties under it.

In Abu Dhabi, Cabinet Resolution No. 37 of 2001 provides that any person who intentionally or negligently damages the environment is required to make good the damage and may also be liable for additional compensation arising out of any consequential or indirect losses suffered due to the breach (i.e. the diminution of any aesthetic values). In addition to remedial action, fines of between AED 500 and AED 10 million and custodial sentences may be imposed on a perpetrator. In the case of serious and intentional dumping of radioactive waste, the death penalty may even apply.

Fines similarly apply to breaches of environmental laws in Dubai. Due to the age of the applicable legislation, these are currently lower than the fines under other regimes but we understand that they are likely to be increased significantly, however, as previously indicated we do not know when this will occur.

Blacklisting and the revocation of licenses is a further likely consequence of any breach of environmental legislation under any applicable rules.

XII. CONCLUSION

Environmental protection is an increasingly vital feature of corporate compliance and commercial licensing, both in Dubai and the UAE more widely. It is therefore recommended that any construction enterprise or business entity operating in the region should be aware of the various environmental laws and regulations. Amidst hue and cry for better environment norms, UAE has hardened its stance on environment pollution and the draft law which amends the Federal Environmental Law will crack down on environmental crimes. If reports are to be believed, violators of air quality regulation and drinking water may face fines up to AED 1 million and AED 2 million respectively in addition to imprisonment.[31]

Dubai and UAE in general have established the reputation of being investment hotpots with little regards to the environment. It has rather unfortunately established itself as having the world's largest carbon footprint.[32] Stricter norms with heavier penalties will only solve a part of the problem in so far as businesses will be wary of violating laws and will put in place better compliance teams. However, the other half of the problem can only be tackled by making consumers and businesses alike about the ill effects of environmental damage and the existence of such laws.

[31] "UAE gets tough on environmental crimes", *Gulfnews.com*, http://gulfnews.com/news/gulf/uae/environment/uae-gets-tough-on-environmental-crimes-1.1308702, last visited on 20 June 2014.

[32] "UAE has world's largest environmental footprint", *The National*, http://www.thenational.ae/news/uae-news/environment/uae-has-worlds-largest-environmental-footprint, last visited on 22 June 2014.

Book Review: Nadjma Yassari, Die Brautgabe im Familienvermögensrecht, Innerislamischer Rechtsvergleich und Integration in das deutsche Recht

*von Eveline Schneider Kayasseh**

Im Rahmen von Eheschliessungen zwischen Muslimen ist eine ehevertragliche Vereinbarung über die Zahlung einer Brautgabe (*mahr*) üblich, die in einer Summe Geld oder Sachwerten bestehen kann. Dieses Rechtsinstitut wurzelt im islamischen Recht und existiert noch heute in verschiedenen Ausprägungen in den Ländern, die ihr Familien- und Erbrecht auf dem islamischen Recht aufbauen.[1]

Obschon die Brautgabe als „wichtiger Baustein im Gefüge des islamischen Eherechts"[2] bezeichnet werden kann, ist eine vertiefte Befassung mit diesem Rechtsinstitut in den islamischen Ländern bislang weitgehend unterblieben. Zugleich müssen sich westliche Gerichte im Zuge der Migration vermehrt mit Brautgabenvereinbarungen befassen, wobei „die solcherart auf Wanderschaft geratene Brautgabe der deutschen Rechtspraxis und Lehre so manches Rätsel aufgibt",[3] wie die deutsch-iranische Rechtswissenschaftlerin NADJMA YASSARI, Autorin des Buchs mit dem Titel „Die Brautgabe im Familienvermögensrecht" konstatiert. Unter diesen Vorzeichen erkennt YASSARI den Bedarf, zwischen diesen beiden „geografischen Polen eine Brücke [zu] schlagen"[4] und sich aus zwei Perspektiven mit der Brautgabe intensiv zu befassen. Dabei verfolgt sie den Ansatz, zu einen der „Frage nach der Funktion der Brautgabe im klassischen islamischen Recht sowie in den islamischen Ländern heute" und der Rolle, die dieses Rechtsinstitut „im Kontext des geltenden Familienvermögensrechts ausgewählter islamischer Länder einnimmt" nachzugehen, und sich zum anderen mit der

* Dr. iur. Eveline Schneider Kayasseh, Geschäftsleitung Center for Islamic and Middle Eastern Legal Studies (CIMELS), Universität Zürich, Schweiz.

[1] Siehe WURMNEST WOLFGANG, Die Mähr von der Mahr, Zur Qualifikation von Ansprüchen aus Brautgabevereinbarungen, RabelsZ 2007, 527-338, 528; EBERT HANS-GEORG, Das Personalstatut arabischer Länder. Problemfelder, Methoden, Perspektiven: ein Beitrag zum Diskurs über Theorie und Praxis des islamischen Rechts, Frankfurt a.M. 1996, 91ff; KRÜGER HILMAR, Ehe und Brautgabe, Rechtliche Probleme bei Ehen mit Angehörigen islamischer Staaten, dargestellt am Beispiel Tunesiens: FamRZ 1977, 114–118, 114. Ferner etwa auch zur Brautgabe: DUTTA ANATOL/YASSARI NADJMA, Islamische Brautgabe als Eheschliessungsvoraussetzung?, StAZ 2014, 289-293; ÜLKER YESIM, Die islamische Morgengabe unter dem Einfluss des deutschen Scheidungsfolgenrechts, FamFR 2010, 7-11; WURMNEST WOLFGANG, Die Brautgabe im Bürgerlichen Recht, FamRZ 2005, 1878-1885.

[2] YASSARI NADJMA, Die Brautgabe im Familienvermögensrecht, Tübingen 2014, 403.

[3] YASSARI, Fn. 2, 3.

[4] YASSARI, Fn. 2, 4.

Frage zu befassen „wie der Brautgabe in einem nichtislamischen Rechtsrahmen zu begegnen ist". Diesbezüglich legt YASSARI einen besonderen Fokus auf Deutschland.

Gegliedert ist ihr Werk in fünf Teile. Der erste führt mit einem kurzen Überblick über die islamischen Rechtsquellen in die Thematik ein; sodann verfolgt die Autorin die historische Entwicklung von Ehe und Brautgabe und bespricht ihre Grundlagen im islamischen Recht und ihre Rechtsnatur. In diesem Kontext geht YASSARI etwa der Frage nach, was von der häufig propagierten These zu halten sei, die Brautgabe sei als Kauf- beziehungsweise Nutzungsvertrag über die weibliche Sexualität – gleichsam einer „Kaufehe" – zu qualifizieren. Mit stichhaltigen Argumenten widerlegt die Autorin diese These und zeigt darüber hinaus auf, weshalb die Brautgabe auch nicht als Schenkungsvertrag qualifiziert werden kann. Nach ihrer Ansicht hat die Brautgabe eine „hybride Rechtsnatur" und ist als „eherechtlicher Vertrag *sui generis*" zu bewerten.[5]

Diese Erkenntnis dient sodann als Basis, sich mit den Einzelregelungen zur Brautgabe auseinanderzusetzen. Zu diesem Zweck greift YASSARI vor allem auf historische Rechtsgutachten – *fatāwā* – zurück. Die Relativität historischer Urteile anerkennend und daher keinen Anspruch auf Vollständigkeit erhebend, arbeitet die Autorin in den darauffolgenden Abschnitten Rechtsprobleme heraus und beleuchtet die Positionen der Rechtsschulen zum Gegenstand der Brautgabe und ihrer Modalitäten. Hier gelangt YASSARI zu dem Ergebnis, dass die Rechtsschulen zwar von denselben Rechtsquellen ausgehen, dieses Rechtsinstrument im Einzelnen – insbesondere bedingt durch unterschiedliche Ansichten bezüglich der Anwendung der Kaufregeln auf die Brautgabenvereinbarung – jedoch durchaus unterschiedlich ausgestalten. Schliesslich setzt die Autorin diese Ergebnisse in den Kontext des islamischen Familienrechtssystems, das die Ehegatten basierend auf ihren unterstellten biologisch-physischen und psychischen Unterschieden die Rollen von „Versorger und Versorgte… Bestimmer und Bestimmte"[6] zudenkt. Aus einer historischen Perspektive untersucht YASSARI einerseits die Rolle der Brautgabe als eherechtliches Instrument, so insbesondere hinsichtlich ihrer vermögensbildenden und verhaltenssteuernden Funktion im Lichte nicht kongruenter Scheidungs- und Sorgerechte, und andererseits ihre Interdependenzen mit anderen Ansprüchen während der Ehe und nach der Eheauflösung durch Tod und Scheidung. Besonders lesenswert sind die Ausführungen zur historischen Rolle der Brautgabe beim Sorgerecht und für erwerbstätige Ehefrauen. Am Ende des ersten Teils steht die Erkenntnis, dass der Brautgabe „als eherechtlichem Instrument eine wichtige wirtschaftliche Bedeutung zukam".[7]

Ausgehend von dieser Prämisse, kontextualisiert YASSARI die Brautgabe im nachfolgenden Zweiten Teil in den Familienrechten der modernen Nationalstaaten Ägyptens, Irans, Pakistans und Tunesiens. Als erstes gibt die Autorin einen Überblick über die Geschichte der Kodifikation des Familienrechts in den untersuchten Staaten. Sie zeigt auf, wie die Kodifikation und damit die Verstaatlichung des Familienrechts im 20. und 21. Jahrhundert im Bereich des materiellen Brautgaberechts mehr Rechtssicherheit und –klarheit schufen und die

[5] YASSARI, Fn. 2, 52f.
[6] YASSARI, Fn. 2, 70.
[7] YASSARI, Fn. 2, 86.

Beweisbarkeit der Brautgabe durch die Einführung der Eheeintragungspflicht (und teilweise die Mitwirkung von Behördenvertretern bei der Eheschliessung) verbessert wurde. Da das Recht nicht überall umfassend kodifiziert wurde, sind jedoch auch „neue Reibungsflächen"[8] zwischen dem staatlichen und dem unkodifizierten islamischem Recht entstanden, wie YASSARI anschaulich aufzeigt. Sodann untersucht die Autorin die Auswirkungen der Formalisierung der Ehe auf die Brautgabenvereinbarung und ihre nachträgliche Veränderung, so insbesondere den nachträglichen Verzicht auf die Brautgabe und ihre Erhöhung, sowie die gegensätzlichen Auswirkungen standardisierter Trauscheine und der Eintragungspflicht auf die Durchsetzung des Brautgabeanspruchs.

Als nächstes geht YASSARI der Frage nach, ob angesichts der Familienrechtsnovellen die Brautgabe mit ihren klassischen Funktionen der Vermögensbildung und Verhaltenssteuerung überhaupt noch zeitgemäss und notwendig sei. Hierzu setzt YASSARI die Themenschwerpunkte vermögensrechtliche Ansprüche in der Ehe, Güterrecht, nacheheliche Vermögensrechte und Sorgerecht. Die im Fokus stehenden Staaten haben die ehelichen Ansprüche des klassischen islamischen Rechts – namentlich die Brautgabe, den ehelichen Unterhalt und das Güterrecht – rezipiert und lediglich punktuell novelliert. Hervorzuheben ist etwa das tunesische Recht, das den Ehegatten privatautonome Vereinbarungen über die ehelichen Güter explizit erlaubt. Eine Fülle von Informationen bietet die Autorin dem Leser im Abschnitt über die Brautgabe im Gesetzesrecht der vier untersuchten Länder, wobei didaktisch sehr wertvoll angelegentlich auch ein Blick in die Rechtsordnungen weiterer islamischer Länder geworfen wird. Besonders erwähnenswert sind die detaillierten Ausführungen zur Brautgabenhöhe und damit verbunden den Blick in die Gesetze der Vereinigten Arabischen Emirate sowie des Iran. YASSARI stellt bezüglich Brautgabenhöhe zwei Tendenzen fest: Einerseits die Bestrebung, die Höhe der Brautgabe durch gesetzliche Erhöhungstatbestände zu bewahren und andererseits, gesetzliche Höchstsummen festzulegen, was die Autorin am Beispiel Iran nachzeichnet. Die Höhe der Brautgabe steht denn auch im Mittelpunkt der Debatten über die Brautgabe. Darüber hinaus konstatiert die Autorin sowohl das Fehlen einer kontextualisierten Betrachtungsweise der Brautgabe im Normengefüge der untersuchten Staaten, wie auch das grundsätzliche Unvermögen der Rechtsordnungen, gesellschaftliche Veränderungen adäquat nachzuzeichnen. Im Abschnitt über das Güterrecht legt YASSARI einen besonderen Fokus auf Indonesien und Malaysia. Diese beiden Staaten haben als einzige islamische Länder abweichend vom tradierten Modell, nachdem die Vermögensmassen der Ehegatten voneinander getrennt sind und die Ehefrauen am ehelichen Vermögen grundsätzlich nicht partizipieren, die Errungenschaftsgemeinschaft als gesetzlichen Güterstand eingeführt.

Im Anschluss diskutiert YASSARI die Einzelreformen im Bereich des nachehelichen Vermögensrechts sowie der Personensorge. Die Autorin zeigt auf, dass viele moderne Gesetzgeber neue Rechtsgrundlagen für nacheheliche vermögensrechtliche Ansprüche geschaffen haben, diese Gesetzesnovellen indes verschiedene Defizite aufweisen. So behält die Brautgabe im Gefüge des Familienvermögensrechts weiterhin eine wichtige Rolle bei der Schliessung von bestehenden Versorgungslücken. Bezüglich Sorgerecht macht YASSARI die folgenden Feststellungen: Die untersuchten Länder sind mit Ausnahme von Ägypten dazu

[8] YASSARI, Fn. 2, 135.

übergegangen, sich bei der Verteilung der Personensorge verstärkt am Prinzip des Kindeswohls zu orientieren. Dies hat zu einer Verlagerung der Entscheidungskompetenz auf die Gerichte geführt. Obschon die Umsetzung des Kindeswohlprinzips im Einzelnen unterschiedlich ausgestaltet ist, hat die neue Rechtslage dazu geführt, dass die Personensorge der Disposition der Eltern weitgehend entzogen wurde und die Bedeutung der Brautgabe als Gegengabe für die vertragliche Zusicherung der Personensorge über die gesetzliche Sorgerechtszeit hinaus gesunken ist. Abschliessend resümiert YASSARI den Grad der Zielerreichung der Reformbestrebungen und beleuchtet die Funktionen der Brautgabe im geltenden Gesetzesrecht der einzelnen Länder. Dabei identifiziert die Autorin die wirtschaftliche Funktion der Brautgabe im Lichte der vorerwähnten (weiter-)bestehender Versorgungslücken als ihren Hauptzweck.

Den dritten Teil widmet YASSARI Klagen vor deutschen Gerichten, die auf Zahlung der islamischen Brautgabe gerichtet sind. Die Autorin ortet den Bedarf an Kollisionsnormen für die Brautgabe und erarbeitet im Folgenden die Eckpfeiler eines selbständigen Brautgabestatuts. Vor diesem Hintergrund beleuchtet YASSARI die bisherigen Lösungsansätze des geltenden deutschen Kollisionsrechts. Sie bespricht und bewertet die Anknüpfungsmodelle, die im deutschen Schrifttum entstanden sind. Ausgehend vom Zwischenergebnis, dass eine einheitliche kollisionsrechtliche Qualifikation der Brautgabe zu favorisieren sei, befasst sich YASSARI mit den Rechtswahlmöglichkeiten des deutschen EGBGB und geht der schwierigen Frage nach, welche der zur Verfügung stehenden Verweisungsnormen der Brautgabe am ehesten gerecht werde. Der deutsche Bundesgerichtshof (BGH) qualifiziert die Brautgabe als Ehewirkung und unterstellt sie Art. 14 EGBGB. YASSARI stimmt mit dem BGH darin überein, dass „die Brautgabe sich einer eindeutigen Kategorisierung in die deutschen Kollisionsnormen“[9] entziehe, favorisiert im Sinne einer „Notlösung“[10] mit überzeugenden Argumenten das Güterrechtsstatut als Auffangtatbestand. Angesichts der Defizite der geltenden gesetzlichen Regelung untersucht YASSARI danach, ob der im März 2011 vorgelegte Vorschlag für eine europäische Ehegüterrechts-Verordnung die verorteten Schwierigkeiten zu beheben vermöge. Im Anschluss erarbeitet sie ein idealtypisches Brautgabestatut, das sich – mit gewissen wichtigen Modifikationen – an der vorgeschlagenen Ehegüterrechts-VO orientiert. Hervorzuheben ist der Vorschlag der Autorin, dass die *optio juris* de lege ferenda als primäre Anküpfung stehen sollte.[11] Die Autorin beschliesst den dritten Teil mit einer Übersicht zum Thema Brautgabenabrede und Ordre-public-Vorbehalt.

Im vierten Teil geht YASSARI schliesslich der vom BGH bislang nicht abschliessend beantworteten Frage nach, wie die Brautgabe in das deutsche Familienrecht integriert werden kann. Entkoppelt von der kollisionsrechtlichen Qualifikation der Brautgabe soll die Einbettung nach YASSARI „unter Berücksichtigung der der Brautgabe zugrunde liegenden ausländischen Rechtsvorstellungen sowie des Parteiwillens autonom erfolgen.“[12] Unter Bezug auf Rechtsprechung und Lehre gelangt die Autorin zu dem Ergebnis, dass die Brautgabe nicht in die herkömmlichen Kategorien des deutschen Familienrechts eingeordnet werden könne und

[9] YASSARI, Fn. 2, 406.
[10] YASSARI, Fn. 2, 406.
[11] Siehe im Einzelnen YASSARI, Fn. 2, 326ff.
[12] YASSARI, Fn. 2, 407; siehe auch a.a.O., 333ff.; 337ff.

qualifiziert dieses Rechtsinstitut als einen familienrechtlichen Vertrag *sui generis*, der dem Grunde nach neben den Unterhalt und das Güterrecht trete. Sodann geht die Autorin auf die materiell-rechtliche und formelle Wirksamkeit der Brautgabenvereinbarung ein. Davon ausgehend, dass mit der Brautgabe weder güter- noch unterhaltsrechtliche Inhalte geregelt werden, lehnt YASSARI ein Formerfordernis wie bei der vertraglichen Gestaltung des Güterstandes und des Unterhaltsrechts für die Brautgabenvereinbarung ab und kommt zum Ergebnis, dass im Inland geschlossene Brautgabenabreden formfrei zustände kämen. Weiter wird eine Modifikation des Anspruchsumfangs auf der Grundlage des deutschen Rechts thematisiert.

Am Ende des vierten Teils untersucht YASSARI schliesslich das Zusammenspiel zwischen der Brautgabe und den gesetzlichen Ansprüchen auf Zugewinn und Unterhalt und illustriert, wie mit dem Problem des Verbots der Doppelverwertung umzugehen ist. Die Frage, wie sich die Brautgabe zu einem Unterhaltsanspruch verhält beziehungsweise ob und gegebenenfalls wie die Brautgabe im Zugewinn anzusetzen ist, dürfte nach der Autorin mit Blick auf das neue internationale Unterhaltsrecht und der geplanten europäischen Ehegüterrechts-VO inskünftig an Bedeutung gewinnen.

YASSARI beschliesst ihre detailreiche und bestens recherchierte Arbeit im fünften Teil mit neun Thesen zur Brautgabe, wobei sie die wichtigsten Erkenntnisse und Ergebnisse ihres Werkes resümiert. Insgesamt ist festzuhalten, dass das Werk den eingangs skizzierten Erkenntnisinteressen der Autorin vollumfänglich gerecht wird.