EJIMEL

Electronic Journal of Islamic and Middle Eastern Law

Vol. 1 (2013)

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. 1 (2013)

EJIMEL Vol. 1 (2013)

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. 1 (2013), pages, http://www.ejimel.uzh.ch

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

Contents

MUSLIM MINORITIES IN THE WEST: BETWEEN FIQH OF MINORITIES AND INTEGRATION

by Dina Taha[*]

Abstract

Fiqh of minorities is a specific framework/perspective of the general Fiqh that looks with one eye at the objectives and principles of Sharî'a, and the other eye to consider the reality of Muslim minorities in cases that will, usually, only arise in the situation where Muslims constitute a minority. Fiqh of minority is, arguably, based on the premises that Muslim existence in non-Muslim communities, should promote a civilizational dialogue between the Islamic culture and other cultures. This paper argues that Fiqh of minorities' scholars attempt to provide legal opinions and solutions for Muslim minorities in the West in order for them to fulfill their role as both good Muslims and good citizens, i.e. positive integration as they define it. The paper asks whether the cultural background of the scholar–Western/non-Western–impacts the nature of these solutions. The paper argues that Fiqh of minorities can provide two types of solutions a long-term one, for a permanent Muslim presence in the West, and a short-term–exceptional–one, for a temporary presence. The first suggests that we are dealing with full citizens and members of the society who happen to be Muslims in religion, while the second assumes that Muslims' natural and ultimate residence is in a Muslim majority country. Both types of solutions are reflected on the nature of the compromise Fiqh of minorities' scholars, who in turn are affected by their own cultural backgrounds, provide to solve "the good Muslim, Good citizen equation"–i.e. whether they are perceived as "Western Muslims" or "a Muslim minority in the West".

I. Introduction

What does a Muslim do when he or she has to follow the secular rules of a non-Muslim country that contradict his or her obligations to *Sharî'a*? When is a Muslim marriage legitimate? How does divorce take place? What governs child custody? What happens when a woman converts to Islam but her husband does not? Immigrant Muslims face similar and many other issues while trying to live as both responsible citizens and committed Muslims. The most crucial issue, however, has to do with the validity and permissibility of Muslims, especially immigrants, residing in a non-Muslim community and whether it is acceptable in Islamic *Sharî'a*, and if so then under which conditions. Even more, what about obtaining the nationality of an "infidel" country and thus obtaining the right to vote as well as political participation in a non-Muslim regime. This entails the duty of obligatory army recruitment which is usually not a problem unless there is a confrontation with another Muslim country.

The increasing Muslim presence in non-Muslim countries, made a group of Muslim scholars reach the conclusion that innovation and compromise are key concepts for Muslims trying to live Islamic lives in the context of a Judeo-Christian country. Hence they introduced the Islamic jurisprudence of Muslim minorities [hereinafter *Fiqh* of minorities]. *Fiqh* of minorities is based on the premise that Muslim existence in non-Muslim communities, promotes dialogue among civilizations between the Islamic culture and other cultures. That is not to say that *Fiqh* of minorities is a "new" *Fiqh;* rather it is a specific framework/perspective of the general *Fiqh* that looks at the objectives and principles of *Sharî'a*, relative to the reality of Muslim minorities in cases that usually only arise in situations where Muslims constitute a minority. *Fiqh* of minorities' have been subjected to significant criticism, however, its advocates state that the purpose of this *Fiqh* is not to recreate Islam, *Sharî'a*, or even *Fiqh;* rather it is a specialized

[*] MA in International Human Rights Law, The American University in Cairo (AUC).

modernist perspective of the general *Fiqh* that governs how a jurist might work within the flexibility of the religion to best apply it to a set of particular circumstances.[1]

Although the early scholars did not recognize this *Fiqh,* in terms of its title, due to the absence of such phenomenon in the past, it does not mean its principles and objectives have not always been there. However, what modern scholars attempted to do is to reorganize and rearticulate these principles and objectives based on a special philosophical perspective that thoroughly considers the Western modern context where Muslims minorities live, as well as valuing the importance of the existence and coexistence in non-Muslim countries. Hence, *Fiqh* of minorities turns into a tool in the hands of the scholars and *Muftîs* to respond to these special conditions in a way that reflects the fundamental principles of *Sharî'a*: protection of one's faith and identity through preserving *Maslaha* or public interest.

This paper argues that *Fiqh* of minorities' scholars attempt to provide legal opinions and solutions for Muslim minorities in the West in order for them to fulfill their role as both good Muslims and good citizens, i.e. positive integration as they define it. The paper asks whether the cultural background of the scholar–Western/non-Western–impacts the nature of these solutions. The paper argues that *Fiqh* of minorities can provide two types of solutions a long-term one, for a permanent Muslim presence in the West, and a Short-term–exceptional–one, for a temporary presence. The first suggests that we are dealing with full citizens and members of the society who happen to be Muslims in religion, while the second assumes that Muslims' natural and ultimate residence is in a Muslim majority country. Both types of solutions are reflected on the nature of the compromise *Fiqh* of minorities' scholars, who in turn are affected by their own cultural backgrounds, provide to solve "the good Muslim, Good citizen equation"–i.e. whether they are perceived as "Western Muslims" or "a Muslim minority in the West".

This study focuses on the "immigrant" element within the Muslim minority in particular. It specifically focuses on the application of *Fiqh* of minorities in the West. The reason for that goes back to considerable attention Muslim scholars have paid to these regions and the relation between Islam and the West. Although the latter raises more questions than offering answers, it lies outside of the scope of this study. The study is concerned with the specific relation between *Fiqh* of minorities and the phenomenon of the integration of such minorities. It asks the question of whether the latter *Fiqh* actually takes into account the conditions under which Muslim minorities live. Such issues are highly essential for both: Islamic faith and identity, and thus affect the minority's integration process in the society. The paper proposes that *Fiqh* of minorities introduces a new paradigm using the notion of *Umma*, and its related concepts, to establish religious basis and justifications for Muslims' positive integration in their society. Such paradigm does not only reflect the commitment to the *Umma* message, but also signifies the importance of all individuals practicing their own rights and fulfilling their own duties. The paper accordingly examines the impact of the context from which *Fiqh* of minorities' advocates' come–Western, non-Western, hybrid and so forth–on the final outcome of the legal opinion adopted. It highlights certain trends of thought in looking to an issue facing Muslim minorities.

Chapter one starts by asking the question of whether the immigration to a non-Muslim country is permissible in the first place. It then moves to over viewing the methodological and contextual reasons that encouraged advocates of *Fiqh* of minorities to introduce it. Chapter two is dedicated to *Fiqh* of minorities' theory which proposes a unique interpretation of *Sharî'a* in an attempt to allow it to fulfill its purpose in the lives of Muslim minorities who are exposed to unique circumstances. Chapter three centers on how *Fiqh* of minorities theorizes for the

[1] *See*, Nash'at *Fiqh* al-aqalliyyât wa Ilaqatoh Bisa'ir Furu' al-*Fiqh*, *available at*: http://www.islamweb.net/*verdict*/index.php?page=show*verdict*&Option=*Verdict*Id&Id=72660 (last *visited Mar. 23, 2012)* [translated in the origin of *Fiqh* or minorities and its relationship to other branches of *Fiqh*].

Muslim presence in a way that enables fulfilling the "*Umma* message" through responding to and embracing modern concepts like citizenship and secularism, which pose restrictions and are rarely convinced with divine laws. It also exposes to different scholars' perspectives regarding the nature of the relation between *Fiqh* of minorities on one side, and the Muslim identity, integration and loyalty on the other. The final chapter tries to apply the previous theory and aspirations of *Fiqh* of minorities' advocates, specifically, regarding the role this *Fiqh* can play in the process of integration. The focus will be on two case studies: interest-based Mortgage and *Islâm al-zawja*. The study concludes by evaluating the status and role of *Fiqh* of minorities in its relation with integration through identifying the discrepancies among different scholars in perceiving such relation.

II. Muslim minorities' need for a special *Fiqh*

Fiqh Al-Aqalliyyat or the jurisprudence of Muslim minorities [hereinafter *Fiqh* of minorities], is a legal doctrine introduced in the 1990s. This doctrine asserts that Muslim minorities, especially those residing in the West, "deserve a special new legal discipline to address their unique religious needs, which differ from those of Muslims residing in Islamic countries." [2] In this chapter, we will start with an overview of both the classical and modern scholars' views and discrepancies on the position of *Sharî'a* regarding residency in a non-Muslim country. The latter will explore the methodological and practical reasons that encouraged advocates of *Fiqh* of *minorities* to introduce it. The chapter will then highlight several examples of the main jurisprudential issues and concerns that arise in the context of a Muslim minority living in a non-Muslim-ruled society. The chapter concludes by pointing out the main criticism the new discipline has received.

1. Arguments for and against *Hijra* to non-Muslim countries

Muslims, by virtue of their commitment to Islam, are expected to follow its moral imperatives as manifested in *Sharî'a*.[3] Scholars, whether classical or modern, for or against *Fiqh* of minorities, seek evidence from *Sharî'a* to support their arguments. The mainstream traditional *Fiqh* tends to favor the opinion that while Muslims generally should not reside in non-Muslim ruled territories, it is allowed in certain cases, for instance: their inability to migrate to Muslim territories; the objective of restoring Muslim rule like in Sicily; or to spread the message of Islam.[4] The term *Hijra* or immigration has been interpreted by classical Islamic scholars in different ways. Some went to favor that the only reason justifying *Hijra* as an obligation is to strengthen the Muslim community in its early days and in similar situations. Other scholars were more elaborate, such as *Ibn al-'arabî*, who defined six situations resulting in *Hijra*. Three of these situations involve compulsory *Hijra* like in the case of Injustice or lawlessness; the remaining three involve recommended *Hijra* which includes "physical persecution, disease or financial insecurity."[5] A third group of scholars showed more tolerance towards the idea of residency in non-Muslim countries and emphasized that if Muslims were able to practice their religion then it is considered within *Dâr al-islâm* as long as this country does not revert into *Dâr al-harb*.[6]

Thus, modern Islamic scholars mostly agree with what the classical scholars have to say regarding the conditions under which a Muslim gains permission to migrate. Nevertheless,

[2] SHAMMAI FISHMAN, *Fiqh al-Aqalliyyat: A Legal Theory for Muslim Minorities* –Center on Islam, Democracy and the future of the Muslim world, Series No. 1, Paper No. 2, October 2006, at 5.

[3] HISHAM A. HELLYER, *Minorities, Muslims and Sharî'a: Some Reflections on Islamic Law and Muslims without Political Power*, 18 Islam and Christian-Muslim Relations Muslim 85, 89 (2007).

[4] *Id.* at 88.

[5] *Id.* at 89.

[6] *Id*.

scholars advocating *Fiqh* of minorities like Qaradâwî, add a modern dimension to their opinion by stating that currently many non-Muslim countries provide a liberal atmosphere in which freedom of choice, expression and practice are guaranteed. These countries like in Europe and North America, more or less, take a neutral position against religion. Qaradâwî, hence, finds it permissible for Muslims to migrate to such countries provided two conditions are met. The occurrence of a legitimate objective like searching for a job and making a living, and that such residency will not harm one's faith and practice of religion.[7]

Fiqh of minorities' scholars have taken a further step towards justifying the Muslims residency in a non-Muslim country in general and in the West in particular. They cite the Emigration to Abyssinia–now Ethiopia–during the early days of Islam, when a group of Muslims took refuge there to preserve their faith.[8] They respond to criticism, that such incidents took place when Muslims were in a weak stage, by confirming that some Muslims preferred to stay there even after Prophet Muhammad's *Hijra* to Madina and the establishment of the state of Islam. Thus, Muslims are allowed to stay in a non-Muslim country and cannot be forced to leave as long as their faith is safe.[9] They draw several conclusions from this incident: first, that Muslims can and have to plan for their presence as being permanent and plan accordingly; second, that Muslims should not limit themselves with traditional terminology that was not mentioned in Qur'ân like *Dâr al-islâm*, Land of Islam, and *Dâr al-harb*, Land of War, or *Dâr al-kufr*, Land of Infidelity. Rather they should embrace the idea of the universality of Islam. Third, Muslims share the duty of participating in the social and political life of their new community for various purposes including: defending their rights, supporting their brothers and sisters in Islam, and fulfilling the universal message of Islam.[10] Thus, *Fiqh* of minorities does not only rationalize the permissibility of Muslim presence in non-Muslim countries, rather it asserts it is an obligation towards their religion and their country provided the mentioned conditions are met.[11]

2. Methodological and contextual reasons for *Fiqh* of minorities

The disagreements among early scholars, modern scholars and *Fiqh* of minority scholars in the case of Muslim presence in a non-Muslim country shows that many Islamic scholars sometimes rely heavily on examples from the past that do not really match contemporary reality. This complicates the situation of Muslim minorities even more. Thus, an important conclusion made by a few researchers is that "Innovation and compromise are key concepts for Muslims trying to live Islamic lives in the context of a Judeo-Christian country."[12] That is when the calls of the establishment of a specialized Islamic jurisprudential discipline started to get louder. Though they confirm that the traditional "inherited" *Fiqh* is the foundation and the main guideline,[13] *Fiqh* of minorities' scholars justify the need for an allegedly new discipline by proposing both methodological and contextual rationales.

In terms of methodology, Tâha Jâbir Al-'Alwânî elaborates that concepts like *Dâr al-islâm* versus *Darul or Harb*, *Jizya*–Poll Tax, rights of women, *Jihâd* and other similar concepts create misconceptions, raise questions and promote stereotypes that need to be correctly approached and put in proper context. He argues that classical jurists did not classify the sources of Islamic

[7] YUSUF AL QARADÂWÎ, Al Watan Wal Muwatana Fi Dawu' Al Osoul Al Aqadiyya Wal Maqâsid Al Shar'iyya 63-67, Cairo, Dar Al-Shorouq (2010)[translated in the country and citizenship in lights of Islamic fundamentals and Sharî'a purposes].

[8] TÂHA JÂBIR AL-'ALWÂNÎ, *Toward a Fiqh for minorities*, in Muslims' Place in the American Public Square: Hopes, Fears, and Aspirations 28-29, (Zahid H. Bukhari et al. eds., Altamira Press) (2004).

[9] QARADÂWÎ, *supra* note 7, at 69.

[10] ASHRAF ABDUL 'AATI AL-MIMI, *Fiqh* al-aqalliyyât Al Muslima Bayn Al Nathariyya Wal Tatbiq 252-253, Dar Al-Kalima (2008).

[11] QARADÂWÎ, *supra* note 7, at 77.

[12] *Id*.

[13] AL-MIMI, *supra* note 10, at 87.

Sharî'a in a way that facilitates the deduction of rulings that respond to contemporary issues. In addition most jurists ignore the notion of the universality of Islam as one of the determinants to rulings and its importance in reflecting modern relation between Muslims and non-Muslims. The traditional *Fiqh,* formulated in the early decades of Islam, was necessarily affected by topics and discourses which were associated with the historical and geographical circumstances that prevailed at that time.[14]

On the other hand, when it comes to contextual reasons, 'Alwânî counts a number of modern phenomena that in his mind call for a new specialized discipline. First, the phenomenon of seeking justice and refuge in a non-Muslim land did not exist in the early days of *Fiqh.* Second, the modern concept of citizenship entails political and geographic, rather than religio-cultural connotations. Third, the supremacy of international law, which obliges states to protect and apply justice to immigrants, is also new to traditional *Fiqh.* Fourth, the rationale of power at the early scholars' time was based on conflict and empires knowing no frontiers, unlike the modern diplomatic and soft power predominance. Finaly, globalization and the close cultural interaction urges for a *Fiqh* of coexistence that "suites our world in spirit and in form."[15]

Abd al-Majîd al-Najjâr further elaborates on the contextual reasons proposed by 'Alwânî by referring to some distinctive characteristics and factors that separate Muslim minorities in the West from the rest of Muslims. In his view, the reason for the increasing attention to Muslim minorities goes back to three factors.[16] First, the general vulnerability of Muslim minorities that can be traced back to psychological vulnerability due to cultural and social estrangement or in some cases even inferiority. In addition, there are other forms of vulnerability such as political, economic and social, which are shared among many minority groups. Second, the legal abidance that characterizes these new modern communities usually does not allow any type of personal practices or rights outside the frame of law. Thus, Muslim minorities find themselves in various occasions obliged to follow the secular rules of the country that might contradict with *Sharî'a* or less severely with cultural traditions. Third, there is a cultural pressure whereby Muslims may tend to live in an entirely new and different community with a totally different value system in all aspects of interaction. This unfamiliar environment subjects the original culture to pressure and conflict, which can lead to problems of assimilation and isolation. The final factor Najjâr refers to as the civilizational linkage or partnership whereby Muslim minorities carry the responsibility of delivering the Islamic cultural heritage and message to these communities. Najjâr argues that such factors challenge many of the premises of the earlier *Fiqh.* For instance, that they are not subjected to *Sharî'a* law which is the main foundation of classic *Fiqh* and thus require a new type of *Ijtihâd* or interpretation.[17] Although Tariq Ramadan disagrees with the assumption of the "Muslim weakness" proposed by Najjâr, he agrees with him that *Dâr al-islâm* and *Dâr al-harb* do not apply in today's world.[18] He also supports the argument that the entire classical *Fiqh* is based on the fact of Muslims being the majority.[19]

While *Fiqh al-Nawâzil*–jurisprudence of new occurrences–is part of the general *Fiqh,* it still deals with partial issues which do not properly respond to major societal issues. Hence, a new discipline is needed to respond to both occasional and day-to-day issues and, more

[14] 'ALWÂNÎ, *supra* note 8, at 8.
[15] *Id.* at 8-9.
[16] NADIA MAHMOUD MUSTAFA, *Fiqh* al-aqalliyyât al-Muslima Bayna *Fiqh* Al Imdimaj (al-Mowatana) wa *Fiqh* al- In'ezal: Qira'a Siyasiya Fi Waqi' Al Muslimeen Fi Ourobba 28, *available at*: www.e-cfr.org/ar/bo/35.doc [translated in *Fiqh* of Muslim Minorities between *Fiqh* of integration and *Fiqh* of isolation: Political examination of the Muslim reality in Europe].
[17] ABD AL-MAJÎD AL-NAJJÂR, *Fiqh* Al Muwatana Lil Muslimeen Fi Orubba 190-187, *available at* http://www.moslimonline.com/download.php?id=204 (*Last visited Feb. 10, 2012*).
[18] HELLYER, *supra* note 3, at 11.
[19] SHAMMAI FISHMAN, *Some Notes on Arabic Terminology as a Link Between Tariq Ramadan and Sheikh Dr. Tâha Jâbir Al-'Alwânî, Founder of the Doctrine of "Muslim Minority Jurisprudence" (Fiqh al-aqalliyyât al-Muslimah), available at*: www.e-prism.org/images/tariqfinal291203.doc (*Last visited Feb. 10, 2012*).

importantly, issues that found for the presence of the Muslim minorities in such communities, its purposes and conditions.[20]

3. Responsible citizens or committed Muslims

Immigrant Muslims face many issues while trying to live as both responsible citizens and committed Muslims. In education, for instance, many Muslim families are concerned about the experience their children are likely to have in public schools, including the quality of education or the influence of their, likely non-Muslim, peers concerning mainly drugs, crime and premarital sex.[21] For these reasons, many Muslims tend to believe that an Islamic system of education suites their children better.

Another obvious aspect has to do with controversial issues regarding finance and economics which can be a problem for Muslims dealing with non-Muslim banking and economic system. Whether the money a Muslim earns from a bank is *Harâm*–unlawful–or not, is a huge issue among Muslim minorities. The level of flexibility of interpretations of Islamic *Sharî'a* regarding this matter vary. Conflict often arises when the issue of interest–arguably a form of the unlawful usury in Islam–affects Muslims through, for instance, interest-based mortgages in buying property, or whether their money, saved in banks, is going to be invested in alcohol, pornography and other questionable industries. To avoid such concerns, Muslims seek alternative solutions through avenues such as investment clubs,[22] *Murâbaha*,[23] and others. Though some extreme voices argue that the "American *Umma*" must have its own treasury, most of the inclinations are to find middle ground solutions within the existing economy.[24]

Another common issue is concerned with nutrition and health. Probably the obvious concern among Muslims is the prohibition of certain nutritional habits such as pork and alcohol. Recently more attention has been given to the proper ritual slaughter of edible animals known as *Hâlal* food.[25] *Hâlal* food has gained more popularity with time. However, the impact of nutritional habits prevails other occasions when some Muslims, for instance, refuse to attend ceremonies or events that serve alcoholic beverages. Some simply abstain from drinking alcohol itself leaving others to make their own decisions. The issue of whether a Muslim may work in a place that serves alcohol is forbidden or not is another controversial issue. Here again responses differ, ranging from conditional acceptance to utter rejection.[26]

Socializing and holidays, whether Islamic or not, is another area of concern to Muslim minorities. A Muslim woman clarified "we celebrate Christmas for two reasons, it is important to get involved with the American society, and if you don't celebrate . . . to me really you are telling those people you are not part of American society."[27] On the other hand, some Muslims tend to see the Fourth of July as a chance to affirm their civic participation and engagement with the society. Similarly, Halloween to most of them seems rather harmless as well.[28]

In addition to problems concerning education, economics, nutrition and holidays, personal problems must be considered as well. Most of the personal problems that face Muslims have to

[20] NAJJÂR, *supra* note 17, at 99-102.

[21] JANE I. SMITH, Islam in America 156 (Columbia University press) (2010).

[22] *Id.* at 166.

[23] A concept found in Islamic finance that governs a contract between a bank and its client, by which the bank purchases goods and then sells them to the client at a cost that includes a profit margin. The contract requires specific installment payments to the bank. This arrangement allows the bank to avoid charging interest, which is forbidden under some interpretations of Islamic law. For more information *See*, Webster's New World Finance and Investment Dictionary, available at: http://www.credoreference.com.library.aucegypt.edu:2048/entry/wileynwfid/murabaha (*Last visited May, 12, 2012*).

[24] *See generally*, SMITH, *supra* note 21, at 166-167.

[25] *Id*.

[26] *Id.* at 169.

[27] SELCUK R. SIRIN & MICHELLE FINE, Muslim American Youth: Understanding Hyphenated Identities through multiple methods 170 (New York University Press) (2008).

[28] *Id*.

do with their attempt to balance the requirements of their faith with expectations of American society. Examples of such problems include whether a Muslim should accept a gift from a non-Muslim, or attend funerals, weddings and other forms of events of non-Muslims. Relating to that are the family law issues especially marriage to non-Muslims, conversion, and adoption must also be dealt with.

The most crucial issue, however, has to do with the validity and permissibility of Muslims, especially immigrants, residing in a non-Muslim community at all and whether it is acceptable in Islamic *Sharî'a* and under which conditions. Obtaining the nationality of such an "infidel" country and thus possessing the right of voting and political participation in a non-Muslim regime and the duty of obligatory army recruitment especially when there is a confrontation with another Muslim country must all be considered.

Now that we have covered the reasons behind the calls for a new discipline of *Fiqh* and consolidated it by examples of jurisprudential issues that face Muslims as minorities we turn to the criticism that has been directed to such a called-for discipline.

4. Criticism: *Fiqh* of minorities… an innovation?

Fiqh of minorities defends the necessity and not just the permissibility, of Muslims residing in a non-Muslim country. This point has been subjected to considerable criticism. For instance, scholars, like sheikh Mohamed Saeed Ramadan al-Buti, are utterly against the concept of a new discipline for minorities. Buti believes it is merely a plot to divide Islam and a means to manipulate divine *Sharî'a*.[29] Proponents argue that *Fiqh* of minorities is a reflection of a mentality dominated by the Western capitalist ideology and its utilitarian solutions.[30] He emphasizes that immigration from *Dâr al-kufr* is an obligation on Muslims and he supports his argument with some Qur'ânic verses.[31] He further contends that because of Fiqh of minorities, Muslim minorities are in fact assimilating in these non-Muslim communities and adopting their traditions and life-styles that contradict with Islamic faith and Sharî'a. What *Fiqh* of minorities is doing, in his point of view, is giving this unacceptable life style an Islamic cover and justification.[32]

Asif Khan, on the other hand, is more systematic in his criticism. He identifies two main categories of criticism to the pillars of *Fiqh* of minorities. First, he refutes the need for a new specialized *Fiqh* for minorities in the first place as traditional *Fiqh* includes all answers without the need to commit *Harâm*–forbidden. Second, he refutes the justifications and means for public participation and integration provided by *Fiqh* of minorities' scholars. In his view, issues facing Muslim minorities are complex but are not unique; they are common problems among Muslims across the world.[33]

Regarding the needs for a new *Fiqh*, he responds to the claim that *Sharî'a* has stayed silent on some issues especially new ones. He bases his argument on the verse "*And We have sent down to you the Book–the Qur'ân–as an exposition* of *everything, a guidance, a mercy, and glad tidings* of *those who have submitted for those who have submitted themselves to Allâh.*"[34] As for the claim that Islam changes from time to time and from place to place he asserts that the laws that are subjected to

[29] MOHAMMAD SAEED RAMADAN AL BUTI, *Fiqh Al Aqalyyat Ahdath Wasa'el Al Tala'ob be din Ellah, available at*: http://www.ummah.com/forum/archive/index.php/t-45686.html (*Last visited Feb. 10, 2012*)[translated in *Fiqh* of minorities the latest tool to manipulate religion].

[30] *Fiqh* al Aqalyyat (*Fiqh* of minorities) A Jurisprudence to Assimilation (Draft), *available at*: http://www.ummah.com/forum/archive/index.php/t-20319.html?s=0d886ae8ccabb842c7857b2ac93c82ab (*Last visited Feb. 10, 2012*).

[31] For instance "When angels take the souls of those who die in sin against their souls, they say: "In what –plight– were ye?" They reply: "Weak and oppressed were we in the earth." They say: "Was not the earth of Allâh spacious enough for you to move yourselves away –From evil–?" Such men will find their abode in Hell, - What an evil refuge*!"* (Qur'ân 4:97)

[32] BUTI, *supra* note 29.

[33] ASIF KHAN, The *Fiqh* of minorities – the New *Fiqh* to Subvert Islam 4 (Dawud Masieh ed., Delux Printers London) (2004).

[34] Qur'ân 16:89.

change are not the *Sharî'a* ones, rather what is meant are the laws based on customs, habit–*'Urf*–and Juristic opinions–*Ra'y*–that were based on the prevailing opinions at the time. He finally responds to the concept of reworking the question in a way that reflects reality and need. He refers to it as a pragmatic manipulative method that will eventually lead to evil–*Munkar*.[35]

In his second category of criticism where he criticizes the pillars of political participation and integration claimed by advocates of *Fiqh* of minorities, he refutes the validity of some evidences provided to justify civic and social engagement. For instance he challenges the definition of *Maslaha*–benefit–in the assumption that one of the *Maqâsid*–purposes–of *Sharî'a* is "benefit"–which is a central pillar to *Fiqh* of minorities. He explains that *Maqâsid* are the results and not the reasons for *Sharî'a* rules. Thus, the wisdom and the *Maqâsid* of the *Sharî'a* rule are aims sought by the law giver–*Allâh* and consequently are insufficient for justifying a certain action.[36]

Citizenship is another core concept in the theory of *Fiqh* of minorities that is challenged by Khan, where he argues that it cannot, as defined by *Fiqh* of minorities' scholars, serve as a justification for political participation because by subjecting to rules and laws entailed in citizenship we are making it a source of legislation that takes precedence over *Sharî'a*. This contradicts the core of Islam.[37]

Criticism to *Fiqh* of minorities' theory is directed towards its premises, methodology and even purposes–integration included. Advocates of *Fiqh* of minorities respond by refuting that the latter is anything but *Bid'a*–innovation–because early *Fiqh* writings are filled with rulings of Muslims living in *Dâr al-harb*. Thus, even though the terminology *Fiqh* of minorities is new, it serves more as an organizational tool to modern scholars using mainly classic rules and methodologies. They also emphasize not to confuse *Sharî'a* and *Fiqh.* Relating to the issue of citizenship raised by Khan, Nadia Mustafa, on the other side, summarizes the main issue *Fiqh* of minorities tries to resolve to be: identifying the position of religion between citizenship and identity.[38] Here, comes the role of *Fiqh* of minorities with its philosophy and objectives. The next chapter explores what exactly *Fiqh* of minorities is and what it is comprised of. It also provides answers to the points of criticism raised in this chapter.

III. Theoretical Framework of *Fiqh* of minorities

This chapter is dedicated to *Fiqh* of minorities' theory which proposes a unique interpretation of *Sharî'a* in an attempt to fulfill its purpose in the lives of Muslim minorities who are exposed to unique circumstances. Islamic law is understood in two forms, *Sharî'a* and *Fiqh. Sharî'a* relates to the primary sources of Islamic law and is drawn from both *Qur'ân* and *Sunna*–the Prophets traditions. However, when specific issues arise that are not directly covered in the two latter sources, one is to use reason to deduce the principles on how *Sharî'a* would apply and this process is called *Ijtihâd*, which literally means "to exert oneself."[39] *Fiqh,* on the other side, means intelligence. It represents the actual laws deduced to form *Sharî'a*, and thus, it covers all legal issues concerning religious, political, civil and criminal matters, as well as other aspects of life.[40] These laws of *Fiqh* can change depending on the circumstances, whereas the principles of *Sharî'a* are considered monolithic and constant.

Fiqh can be understood as the process of deducing and applying the principles of *Sharî'a*. The process of *Fiqh* is divided into two parts. *Usûl al-Fiqh,* or the roots, which is the methodology

[35] KHAN, *supra* note 33, at16.
[36] *See generally, Id.* at 28-30.
[37] *Id*. at 33.
[38] MUSTAFA, *supra* note 16, at 51.
[39] DONALD BROWN, *A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a-based Arbitration*, 32 N.C. J. Int'l L. & Com. Reg. 495, 516 (2007).
[40] *Id*.

and interpretation principles used in determining the law; and *Furû' al-Fiqh* , or the branches, which is the practice of law and deals with the actual decisions or verdicts–*Fatâwà*, reached by applying *Usûl al-Fiqh* .[41] Hence, Tâha Jâbir Al-'Alwânî introduces the need for *Fiqh* of minorities by arguing that the special circumstances of Muslim minorities has to be put into consideration,

> [T]he idea that the Muslim Jurist must relate the general Islamic jurisprudence to the specific circumstances of a specific community, living in specific circumstances where what is suitable for them may not be suitable for others . . . jurist must not only have a strong background in Islamic sciences, but must also be well versed in the sociology, economics, politics, and international relations relating to that community . . . *[the purpose* of *Fiqh* of *minorities is not to] recreate Islam, rather it is a set* of *methodologies that govern how a jurist would work within the flexibility* of *the religion to best apply it to particular circumstances*.[42] [Emphasis added]

Thus, *Fiqh* of minorities is not only concerned with Islamic studies but other areas of knowledge important to understanding the characteristics and the pressing needs of the society in order to issue a verdict that responds to the objectives of the Islamic *Sharî'a* in its solutions for the Muslim minorities as well.

1. Position and Sources of *Fiqh* of minorities

Fiqh of minorities does not mean that it is the *Fiqh* of minor issues–a mere branch of general *Fiqh.* Rather it should come under the science of *Fiqh* in its general sense and thus covers all theological and practical branches of Islamic jurisprudence.[43] *Fiqh* of minorities is a qualitative jurisprudence that relates the *Sharî'a* ruling to the conditions and the context of the group. It is still part of the general *Fiqh* but has special characteristics, topics, and issues of concern. Most of these are known in classic jurisprudence but under different scattered titles.[44] These special topics focus specifically on issues affecting Muslim minorities who endeavor both to preserve their faith and their identity and interact with their society at the same time. It is a similar category to *Usûl al-Fiqh*–*Fiqh* of foundations, *Fiqh* al-*Awlawiyyât*–priorities, *Fiqh* al-*Muwâzanât*–contrasts, *Fiqh al-Wâqi'*–reality and *Fiqh* al-*Nawâzil*–New occurrences.[45]

Particularly, 'Alwânî argues that originally, *Fiqh* of minorities was an evolution of *Fiqh* al-*Nawâzil* that dealt with brand new issues. However, he points out that the new discipline tries to overcome the temporary and negative impressions and connotations *Fiqh* al-Nawâzil leaves.[46] The methodological and contextual reasons, mentioned in chapter one, encouraged *Fiqh* of minorities' scholars and affiliated institutions, like the European council for fatwa and research [hereinafter ECFR], to start the process of developing a methodology for this new discipline. Their aim was not only to create a simple system of answering personal questions in jurisprudence but a framework for political and social interaction between Muslims and non-Muslims as well.

ECFR agrees with *Fiqh* of minorities' advocates on using the authentic classical sources of *Sharî'a* as the basis of their theory and framework,[47] but in an innovative and specialized

[41] *Id.* at 517.
[42] KHAN, *supra* note 33, at 6.
[43] 'ALWÂNÎ, *supra* note 8, at 6.
[44] AL-MIMI, *supra* note 10, at 80.
[45] 'ALWÂNÎ, *supra* note 8, at 16.
[46] Personal Interview with Taha Jabir al-'Alwânî, Qordoba center for research and studies, Cairo (Feb 2, 2012) [hereinafter 'Alwânî interview] (refer to the annex).
[47] FISHMAN, *supra* note 2, at 5.

manner. Moreover, they acknowledge the supremacy of the *Qur'ân* as the main source.[48] 'Alwânî explains that *Qur'ân* is considered the foundational source for all other sources, including early scholars' *Ijtihâd*, and consequently should be the original source of all rules and verdicts.[49] *Sunna*, in turn, is the explanatory source of *Qur'ân* that can only be interpreted and understood in light of the latter.[50] 'Alwânî believes that no tradition can be tracked to the Prophet unless it has an origin in the *Qur'ân*.[51] As for the classic jurisprudential opinions, they are considered supporting or complementary sources that should not be ignored nor viewed as a restraint.[52] *Fiqh* of minorities' advocates depend frequently on certain tools found in the traditional *Fiqh* methodology, namely, *Ijtihâd*, *Maslaha*–public interest or benefit, *Taysîr*–Making *Fiqh* easy, and '*Urf*–custom.[53]

The purpose of *Fiqh* of minorities is not to recreate Islam, *Sharî'a*, or even *Fiqh* ; rather it is a specialized modernist perspective of the general *Fiqh* that governs how a jurist may work within the flexibility of the religion to best apply it to a set of particular circumstances.[54] Although the early scholars did not recognize this *Fiqh* as such due to the absence of such phenomenon in the past, it does not mean its principles and objectives have not always been there. However, what modern scholars have attempted to do is to reorganize and rearticulate these principles and objectives based on a special philosophical perspective that thoroughly considers the Western modern context where Muslim minorities live, as well as valuing the importance of the existence and coexistence in non-Muslim countries. Hence, *Fiqh* of minorities turns into a tool in the hands of the scholars and *Muftîs* or jurists to respond to these special conditions in a way that reflects the fundamental principles of *Sharî'a*: protection of one's faith/identity through preserving *Maslaha*. An important prerequisite for the *Fiqh* of minorities' scholar is to be more specialized in the areas of social sciences and economics and their sciences while extracting the appropriate opinions and verdicts from the general *Fiqh.*

Most concepts and issues of *Fiqh* of minorities have always existed within *Sharî'a* and general *Fiqh* but lack the necessary organization, details and renovation in the process of *Ijtihâd* that is required to appropriately answer to the targeted phenomenon. This reflects the view that *Sharî'a* is suitable for every time and place while verdict is subject to change. The resulting verdicts from *Fiqh* of minorities, however, are not necessarily exclusive to the case of minorities and can be applied to other cases but on different bases and reasons. The reason it is labeled as *Fiqh* of minorities goes back to "the reason" why the scholar has issued this verdict–which is argued to be the philosophy of integration that entails both *Da'wa* and preserving the identity. The latter requires the scholar to be an expert in real life issues and circumstances faced by Muslims and not just abstractions.

2. Objectives of *Fiqh* of minorities

Advocates of *Fiqh* of minorities recognize the importance of preserving Islamic faith and identity while endorsing Muslim minorities' presence in non-Muslim communities. As noted in chapter one they contend that such presence is an obligation and not just permissible. Reasons of the nature of such presence can be interpreted from the objectives of *Fiqh* of

[48] *See* YUSUF AL-QARADÂWÎ, Fi *Fiqh* Al Aqalyyat Al Muslimah, Hayat Al muslimin Wasat Al Mujtama'at Al Ukhra 39, Cairo, Dar Al- Shorouq (2001) [translated in the *Fiqh* of Muslim Minorities, the life of Muslims in other communities]; and 'ALWÂNÎ, *supra* note 8, at 12.

[49] TÂHA JÂBIR AL-'ALWÂNÎ, *Madkhal Ila Fiqh al-Aqalyyat*, *available at*: http://www.dahsha.com/old/viewarticle.php?id=27332 (*Last visited Feb. 10, 2012*).

[50] *See* QARADÂWÎ, *supra* note 48, at 39 and *id*.

[51] *Id*.

[52] AL-MIMI, *supra* note 10, at 84.

[53] FISHMAN, *supra* note 2, at 8.

[54] *See*, Nash'at *Fiqh* al-aqalliyyât wa Ilaqatoh Bisa'ir Furu' al-*Fiqh*, *available at*: http://www.islamweb.net/*verdict*/index.php?page=show*verdict*&Option=*Verdict*Id&Id=72660 (*Last visited May, 12, 2012*) [translated in the origin of *Fiqh* or minorities and its relationship to other branches of *Fiqh*].

minorities pointed out by different scholars. Qaradâwî, for instance, sets objectives that include supporting Muslim minorities and facilitating their living within the Islamic framework while making life easier on them; helping to preserve the core of Islamic identity with its unique culture, values, traditions and concepts and educating such minority about its rights and duties in its new society; providing flexibility, guided openness, and interaction with other members of society, which consequently encourages positive contribution within such society, without the previously mention isolation or assimilation; and answering to the special circumstances and problems in a non-Muslim society in an attempt to alleviate difficulty.[55] Thus, the objectives, as set by Qaradâwî,[56] revolve around supporting and empowering Muslims, preserving identity, facilitating living within *Sharî'a* framework, delivering the message of Islam, whether cultural or religious–*Da'wa*–directly or indirectly, and finally promoting a positive interaction and coexistence through educating Muslim minorities about their rights and duties as citizens.

Recalling the methodological and contextual reasons that lead to calls for a new discipline, *Fiqh* of minorities is designed to respond to such reasons. Methodologically, it tries to resolve the conflict between the culture and values of host societies from within the framework of Islamic jurisprudence. It aims at reshaping and reinterpreting engrained Islamic concepts such as *Dâr al-islâm* and *Dâr al-kufr*.[57] On the other hand, Contextually, as Najjâr states, the reason why the ECFR, which adopts *Fiqh* of minorities as a policy, was established is to provide a guide for Muslim minorities for their own, as well as their community's benefit in order for them to serve as a role model.[58]

Thus, one can count common objectives and intentions among scholars of *Fiqh* of minorities. The first is attracting more Muslims to follow *Sharî'a* instead of assimilating and losing both faith and identity. Second, it is not only a jurisprudential legal system, but a tool for increasing social bonds and political influence and even unity among Muslim minorities within their non-Muslim society. Third, it tries to establish a platform for peaceful coexistence with non-Muslims through providing effective solutions to reconcile Islam with the secularist West without moving outside the boundaries of *Sharî'a*.[59] This last objective reflects the concept of *Shahâda* or witnessing whereby Muslims are obliged to serve as role models within their community wherever that is. Such *Shahâda* is the flip coin of the concept of *Da'wa*–propagating the message of Islam,[60] which will be discussed later in more detail.

3. Characteristics of *Fiqh* of minorities

The reason for identifying the characteristics of *Fiqh* of minorities is to lay down the regulations and criteria that control the process of *Ijtihâd*–an integral element to the framework of *Fiqh* of minorities. Qaradâwî asserts that in order for it to fulfill its objectives; *Fiqh* of minorities must be characterized by linking and balancing the general principles and foundations of traditional *Fiqh* at one hand and the contemporary issues and problems on the other; reflecting the universality of the Islamic belief, law and the current social realities, where it tries to provide solutions for the latter from within the Islamic legal framework as not to contradict the proper Islamic faith; Third, Balancing between partial *Sharî'a* texts and general objectives of *Sharî'a*, i.e. returns the branches to its roots and bypasses the particularities to the collective; Fourth, recognizes that *Fatwa*–religious verdict–varies according to time, place, traditions and circumstances, a thing that cannot apply more in the case of Muslim minorities in modern era;

[55] QARADÂWÎ, *supra* note 48, at 34-35.
[56] Copied by others; *See,* AL-MIMI, *supra* note10, at 81-82.
[57] FISHMAN, *supra* note 2, at 1.
[58] NAJJÂR, *supra* note 10, at 3.
[59] FISHMAN, *supra* note 2, at 14.
[60] SALAH SULTAN, *Methodological Regulations for the Fiqh of Muslim Minorities*, *available at*: http://islamicstudies.islammessage.com/Article.aspx?aid=308 (*Last visited Feb. 10, 2012*).

and Finally, valuing the idea that one should balance between his/her distinct cultural and religious identity on one side and integrating, influencing and communicating with his/her current society on the other.[61]

The process of *Ijtihâd* in *Fiqh* of minorities' framework is based on two main premises that can be extrapolated from the preceding characteristics: universality of Islam–*'Alamiyyat al-Islâm*–and the objectives of *Sharî'a*–*Maqâsid al-Sharî'a*.[62] The first premise reflects the idea that Islam is a global religion. This definition carries implicit messages one of which is linked to the Muslim *Umma* and the future of Islam beyond the current borders.[63] This message does not necessarily imply the direct message of spreading the faith in the same sense of the missionaries. Rather it is more reflected in the indirect message of turning into a role model–*Shahâda*–for humanity and for their community. Such concept of universality stresses on the fact that verdict changes from time to time and from place to another, which is a core characteristic in *Fiqh* of minorities. It also reflects the necessity of one's responsibility towards his or her community in all aspects whether political, economic or social as long as they preserve and add to their Muslim-Western identity. Salah Sultan states that "the *Ijtihâd* in the field of *Fiqh* of Muslim Minorities must emphasize the Muslim's role in reforming his or her country and community rather than being limited to the *Fiqh* of protection against temptations and tribulations,"[64] otherwise it will not achieve "the whole message of Islam nor the entire role entitled for Muslims [which is] to benefit oneself . . . and to prove oneself useful to his community or country whether it was good or bad."[65]

The second premise which recognizes *Maqâsid al-Sharî'a* or the ultimate intentions of *Sharî'a* will not take place without combining the understanding of revealed text with reality–context–as well as acquiring a true knowledge of *Sharî'a*. Such is achieved only through recognizing certain methodological principles. 'Alwânî stresses on specific characteristics necessary for *Fiqh* of minorities in order for it to fulfill the intended *Maqâsid*: unveiling the structural unity of Qur'ân by reading it in contrast to the physical universe; studying very closely the complicated aspects of the lives of people from which the issues and problems of Muslim minorities arise; and most importantly to recognize that the inherited *Fiqh* from classic scholars is not always an adequate reference for verdict in matters of minorities. "It does however, contain precedents of Verdicts and legislations than can be applied and referred to for determining approaches and methodologies as appropriate."[66] Qaradâwî concurs by differentiating between selective *Ijtihâd*–where modern scholars pick and choose from the inherited *Ijtihâd* and opinions the best that respond to the context as well as the *Maqâsid*; and creative *Ijtihâd*–that mostly deals with new occurrences that are almost impossible to find answers for in inherited *Fiqh*.[67] While the notion of *'Alamiyyat al-Islâm* sets justifications and foundations for the permanent Muslim presence in a non-Muslim regime,[68] the other notion of *Maqâsid al-Sharî'a* enables jurists to adapt integral concepts such as *Darûra*–necessity, *Taysîr*–leniency, and *Maslaha*–benefit–to *Fiqh* of minorities. The significance and implications of such concepts will become apparent when we turn to the application of *Fiqh* of minorities in the final chapter.

4. Principles and Foundations of *Fiqh* of minorities

Fiqh of minorities' jurists must consider certain factors when formulating a legal opinion. First, the field of *Fiqh* should depend on modernist *Ijtihâd*, which responds to objectives and

[61] *Id*.
[62] FISHMAN, *supra* note 2, at 2.
[63] *Id*. at 3.
[64] SULTAN, *supra* note 60.
[65] *Id*.
[66] 'ALWÂNÎ, *supra* note 8, at 12.
[67] QARADÂWÎ, *supra* note 48, at 43.
[68] FISHMAN, *supra* note 2, at 2.

purposes of *Sharî'a*. Here, Qaradâwî identifies two types of *Ijtihâd*: selective and creative.[69] Second, depending and putting into consideration the general rules of Islamic law. Most importantly: matters are to be considered in light of their objectives; harm should be removed; customary usage is the determining factor; the presence of difficulty requires that allowances be made to facilitate matters; what is established with certainty is not removed by doubt; what is necessary to achieve an obligation is obligatory; what leads to Harâm is also Harâm; and the Lesser of the two evils.[70] Najjâr pays extra attention to the rule that matters are to be determined by their objectives.[71] The ultimate purpose of identifying such jurisprudential rules is to fulfill *Maqqasid* which are the deduced meanings and consequential objectives attempted to be accomplished by the jurisprudential rules found in sources of *Sharî'a*. All of this tracks back to the ultimate objective of achieving monotheism or the oneness of *Allâh* along with fulfilling *Maslaha* of Muslims.[72]

The third consideration is that jurists must put into consideration the jurisprudence of current reality–*Fiqh al-Wâqi'*. This implies factual not just theoretical observation of the conditions, its necessities and obligations.[73] Here the principle that a verdict varies according to time, place, and circumstances is essential. Moreover, *Fiqh* of minorities, in applying the concept of *Waqi'*–reality, adopts the vision of the importance of peaceful coexistence between Muslims and non-Muslims in their shared community. Muslims are obliged in Qur'ân to involve and interact with people of other faiths. The nature of such interaction revolves around two interrelated concepts: being a role model and *Da'wa*.[74] Such approach evolves eventually into fulfilling the idea of citizenship and its entailed rights and duties.[75]

Fourth, is to focus on the jurisprudence of the group not merely individuals. In other words, focus on the identity as a group that shares common characteristics, issues and situations on regular basis.[76] Thus, bypassing the mere principle of *al-Darûrât Tubîh al-Mahzûrât*–necessities allow the Prohibited–[hereinafter the principle of *Darûra*] which implies that the derived verdict is a temporary license into establishing a permanent Islamic presence.[77] Fifth, is to adopt a methodology of *Taysîr* or facilitation and the tendency to ease up on Muslims.[78] Based on the aforementioned principle which indicates that the presence of difficulty requires that allowances be made to facilitate matters, *Fiqh* of minorities' advocates adopt such methodology in perceiving reality and interpreting verdicts. Such principle is the flip coin of the principle of *Darûra*. *Fiqh* of minorities responds to criticism by identifying what exactly is meant by *Darûra* or difficulty and when such principles apply. Scholars differentiate between bearable and unbearable difficulty.[79] They also set very tight conditions under which the principle of *Darûra* applies. They also identify how this principle is applied according to different circumstances.[80]

The notion of *Taysîr* leads necessarily to the sixth concept which implies gradualism not just an Islamic principle but a universal characteristic. The special conditions Muslim minorities are in calls for such gradualism.[81] Finally, in addition to *Fiqh al-Wâqi', Fiqh* of minorities puts into consideration other types of *Fiqh*, namely,[82] *Fiqh al-Muwâzanât*–balancing between good, less

[69] QARADÂWÎ, *supra* note 48, at 40.
[70] *For further details See*, General Principles of Islamic Law & Their Practical Applications for Medicine, *available at*: http://islamtoday.com/artshow-385-3398.htm (*Last visited Nov. 13, 2011*).
[71] NAJJÂR, *supra* note17, at 147.
[72] AL-MIMI, *supra* note 10, at 121.
[73] *Id.* at 199.
[74] AL-MIMI, *supra* note 10, at 227.
[75] *Id.* at 237.
[76] QARADÂWÎ, *supra* note 48, at.
[77] 'Alwânî interview, *supra* note 46.
[78] *Id.* at 40-45.
[79] AL-MIMI, *supra* note 10, at 284.
[80] *For further details see, Id.* at 90.
[81] QARADÂWÎ, *supra* note 48, at 55.
[82] AL-MIMI, *supra* note 10, at 319.

good, evil and most evil while applying jurisprudential rules and principles in reality; and *Fiqh al-Awlawiyyât*–arranging issues based on their priority while trying to reach a verdict.

In conclusion, *Fiqh* of minorities is viewed by its founders and defenders not merely as a simple system for answering personal questions in jurisprudence, but as a *Sharî'a*-based framework for political and social interaction between Muslim minorities and non-Muslim majority.[83] Thus, based on this branch of *Fiqh*, when a question is raised, its practitioners need to identify the special circumstances and put it in a logical and scientific framework that takes into consideration the background of the query, the inquirer, the underlying social factors and the essential objectives of Islamic law.[84] Hence, the issue depends a lot on "how to phrase the questions accurately so as to elicit appropriate and correct answers . . . [in addition to] highlight[ing] the elements that shape the question." [85]

Accordingly, a question that asks about the possibility of Muslim minorities' participation in the political life of a host non-Muslim country/legal system should be rephrased and restructured to question Islam's view regarding a group of Muslims who find themselves living among a non-Muslim majority whose system allows them to practice their faith and moreover, participate in public life. Should such a minority reject such an opportunity for fear of assimilation or influence? The question when phrased this way reflects a sense of responsibility instead of merely seeking a license to justify a negative situation. [86]

Finally, any legislation whether divine or secular has its impact on its own culture. Similarly, "culture stems from *Fiqh* and the laws that govern society." [87] The following chapter explores the how *Fiqh* of minorities' advocates and scholars view the role it can play in the lives of Muslim minorities and whether it serves the purpose of integration while preserving Muslim's cultural and religious identity.

IV. *Fiqh* of Minorities and Integration

Because of the all-encompassing nature of *Sharî'a* in Muslims' lives, scholars have always strove to respond to Muslim minorities' issues in terms of special cases and emergencies which required *Rukhas* and *Darûra*–Licenses and necessity situations.[88] This perspective promotes a temporary conception to the situation of such minorities which has led many to doubt the ability of Muslims to integrate into non-Muslim societies. It was not until the emergence of *Fiqh* of minorities in its modern interpretation and analysis did scholars start to theorize for Muslims as permanent citizens with rights and duties in their hosting community. In other words, it was the beginning of an era of theorizing for a *Western Islam* not just a series of exceptional verdicts and licenses with regards to the temporary presence in a non-Muslim community. It does not contradict with the fact that Muslims all over the world belong to the Islamic *Umma* and are committed to its civilizational and religious purpose.

The focus of this chapter centers on how *Fiqh* of minorities theorizes the Muslim presence in a way that enables fulfilling this "*Umma* message" through responding to and embracing modern concepts like citizenship and secularism, which pose restrictions and are rarely supportive of divine laws. The argument in this paper is that *Fiqh* of minorities introduces a new paradigm using the notion of *Umma*, and its related concepts, to establish religious basis and justifications for Muslims' positive integration in their society. Such paradigm does not only reflect the commitment to the *Umma* message, but also signifies the importance of all individuals practicing their own rights and fulfilling their own duties. However, in order to

[83] FISHMAN, *supra* note 2, at 3.
[84] 'ALWÂNÎ, *supra* note 8, at 21-21.
[85] *Id*. at 12.
[86] *Id*. at 13.
[87] *Id*. at 31.
[88] NAJJÂR, *supra* note 17, at 131.

analyze how *Fiqh* of minorities' advocates view the role of this *Umma* in the context of Muslim minorities, specifically in the area of integration, we have to determine first what these scholars meant by integration. We will then move to exploring different academic and theoretical contributions regarding the relation between *Fiqh* of minorities and the concepts of integration, loyalty and citizenship.

1. Integration

Integration is often identified as a healthy middle ground between total assimilation and total isolation. It is the positive interaction and contribution with the new society by which the immigrant cultural identity constitutes an addition to the whole society and has no significant impact on the immigrant's sense of belonging to his or her new society. That is to say that integration is more positive for both the immigrant and the society than assimilation and isolation, as the immigrant participates in the new culture while maintaining his/her own cultural identity.[89] Concepts of adaptation and absorption within the new society, requires the cultural integration process to be accomplished as a two-way process: from the immigrants' perspective and from the immigrant-receiving societies' perspective.

Advocates of *Fiqh* of minorities share a similar definition of integration to the one above. Qaradâwî recognizes that Muslim minorities are part of the Islamic *Umma* and at the same time part of their society. Thus, both sides should be considered and balanced. When tracking the objectives of *Fiqh* of minorities, he counts preserving the core or the identity of the Islamic personality as an objective. It is followed by the objective of guided openness that rejects isolation and assimilation, where Muslim minorities are obliged to fulfill their roles and responsibilities in their community in the best way.[90] While introducing the concept of civilizational partnership between Muslims and non-Muslims, Najjâr maps for the definition of integration. For individuals to create a community there has to be a level of integration between them, which represents the interaction among them that leads to psychological, social, economic, and political homogeneity. They have to share common interests and common conception regarding their legal systems and social rules as well. Such integration does not imply producing exact copies of individuals, rather differences among individuals enriches the community. Positive integration is accomplished when they share a common goal of developing and benefiting their community as well as declaring allegiance to such entity. He adds that if Muslim minorities lived a true Islamic life and fulfilled the *Umma* objectives they should be contributing to their community and its value system.[91] 'Alwânî, on the other side, introduces the concept of peaceful coexistence; Muslims should not withdraw from proactive interaction with the environment he or she lives in. Otherwise it would be a contradiction to the principles advanced by Qur'ân[92] that calls for affirmative and constructive engagement.[93]

Noting how *Fiqh* of minorities' scholars have defined integration, one can conclude that they view positive integration as comprising two main factors: preserving the identity and promoting a responsible citizenship, which in turn entails responsibilities, rights and duties towards the community. Citizenship, in turn, is a "voluntary bond joined within national horizons and ruled by a constitution." [94] Such bond is strengthened by feelings of allegiance, mutual recognition and tolerance among the society's members regardless of their differences or origins.

[89] THE FACTS: INTEGRATION OF IMMIGRATION 1, http://www.energyofanation.org/sites/25e1f498-741c-478a-8a08-aa486d8533a5/uploads/integration_of_immigrants.pdf (*Last visited May, 12, 2012).*

[90] QARADÂWÎ, *supra* note 48, at 36-37.

[91] NAJJÂR, *supra* note17, at 39-40.

[92] (Qur'ân 42:39) ("And those who avenge themselves when tyranny is incurred upon them help and defend themselves").

[93] 'ALWÂNÎ, *supra* note8, at 15.

[94] ANDREW F. MARCH, *Sources of Moral Obligation to non-Muslims in the Jurisprudence of Muslim Minorities (Fiqh al- Aqalyyat)* Discourse 48, 16 Islamic Law and Society 34, 48 (2009).

Before we explore and analyze how *Fiqh* of minorities' advocates view the relation between the latter *Fiqh*, integration and, consequently, its entailed concepts–relation with non-Muslims, citizenship, and loyalty, we will explore briefly the work of two intellectuals, Nadia Mustafa[95] and Andrew March.[96] Both provide an essential foundation for the relation between the proposed *Umma* concept, *Fiqh* of minorities and where the positions of integration and citizenship are found between them.

2. *Fiqh* of minorities and integration: between *Da'wa* and *Umma*

While March suggests a reading where the concept of *Da'wa* is the main link justifying the relation between *Fiqh* of minorities and integration, Nadia Mustafa adopts a wider view. She considers *Da'wa* as one of the main pillars forming the nature and the message of the Islamic *Umma*. In this paper's view, her idea responds to the latter relation in a more comprehensive way than March.

a) March and the concept of Da'wa

His main argument contends that *Fiqh* of minorities is an attempt to provide an Islamic foundation for a moral obligation and solidarity with non-Muslims. The reasons behind the need for revisiting the nature of moral relations with non-Muslims goes back to two main factors: the global trends towards equality in citizenship and human rights; and the large scale of migration of Muslims to the West which increased interaction and subjected Muslims to Western legal system. He states that the main basis for theorizing *Fiqh* of minorities is the concept of *Da'wa* or proselytism.[97] He identifies three main sources that justify moral obligation to non-Muslims: *Sharî'a* text; legitimate contracts; and public interest–*Maslaha*. He concludes that the concept of *Da'wa* finds basis in these three sources and that:

> Along with contract, *Da'wa* is the core Islamic concept at the heart of the project to theorize the legitimacy of permanent Muslim citizenship in non-Muslim liberal democracies. . . It allows scholars who might otherwise be skeptical about voluntary integration into a non-Muslim culture . . . to proclaim life in the West to be not only permissible, but also spiritually meaningful and beneficial to the Islamic movement.[98]

He interprets the notion of citizenship by elaborating the importance of attitudes of solidarity among fellow citizens which cannot take place except through recognition. The same modern definition entails a reciprocal relationship between individuals living within geographic borders that do not necessarily share decent, religion or even collective memory, but so share same rights and duties. It is "a voluntary bond joined within national horizons and ruled by a constitution."[99] *Da'wa*, which represents the basic justification of relation with non-Muslims in Islamic jurisprudence, shares in its theory factors of recognition, tolerance, and voluntary bond through its meta-ethical approach and communication with non-Muslims. Moreover, "*Da'wa* is not merely motivated by the aim of winning adherents to one's way of life, but rather by a desire to extend a good to others unconditionally."[100] March goes on to explore the characteristic of Islamic *Da'wa* and how they respond to the concept of recognitions which is essential to citizenship and thus integration. He suggests that *Fiqh* of minorities, by elaborating on *Da'wa*, attempts to go beyond the importance of contract to create a thicker form of

[95] Nadia Mustafa, Director of the Center for Research and Policy Studies program and the supervisor of the dialogue of civilizations center, faculty of economics and political science, Cairo University.
[96] Andrew F. March, Department of Political Science, Yale University.
[97] MARCH, *supra* note 94, at 39.
[98] *Id*. at 36.
[99] *Id*. at 48.
[100] *Id*. at 49.

obligation towards non-Muslims which involves recognition to non-Muslims and contributing to their well-being. The higher aim of *Da'wa* is, in turn, mercy upon all mankind, Muslim or non-Muslim. In Mawlawi's words, ". . . there can and must be affection and love towards a person whom you wish to call to God."[101] Other scholars elaborate that *Da'wa* does not take place only through direct call to God, it includes also another factor: *Shahâda*.

According to March, *Da'wa*, through its values of good will, transparency, honesty, sincerity, reason, freedom of choice, non-coercion, patience, openness to getting to know the other and respect for all, leads to recognition which creates the mutual bonds required for a full citizenship and thus, opens the door to integration. For him *Da'wa* is the common theme among all *Fiqh* of minorities' scholars and, thus, integration serves as a means to fulfill it.

b) Mustafa and the Umma

The term *Umma*, though differing from the modern definition, is commonly translated as "nation". It is used by Islamists to refer to a body comprising all Muslims wherever they may be.[102] Nadia Mustafa defines the *Umma* as a group of people who share belonging and allegiance to a common perception to life and seek its promotion and serving its purposes.[103] In this sense, *Umma* is a civilizational doctrinal entity that is not bound to time and place. The role of this *Umma* as defined by Mustafa *as*: promoting the presence of such entity in reality to be able to fulfill the other two purposes; empowering Muslims and the Islamic belief system or doctrine; and encouraging positive interaction to promote this religio-cultural way of life–*Da'wa*–.[104]

In any society, whether Muslim or non-Muslim, Muslims tend to view their *Umma* as designed to lead humanity from darkness to light in all possible senses,[105] to lead it towards a better humanity and a better world, quoting the Qur'anic verse "you were the best nation ever raised for mankind".[106] This means that the role of Muslims is not confined to the *Umma* followers or geographically restricted within Muslim-majority land. The very concept of *Umma* indicates no restriction to a particular human group or geographical location. The modern Islamic scholars, specifically *Fiqh* of minorities' advocates, disagree with some points in classic jurisprudence, and refer to the notion of *Dâr al-islâm*–in contrast to *Dâr al-kufr or Dâr al-harb*, to denote any place where "Muslims can live in peace and security, even if he lives among non-Muslim minority."[107] They support their view by a set of arguments, most important of which is the emigration to Abyssinia mentioned in chapter one.

The grounds on which *Fiqh* of minorities' scholars have tried to articulate the modern reasons and importance of the Islamic presence in non-Muslim societies are based primarily on the previous perception of *Umma*. Their justification of the importance of Muslims presence and engagement in their new society is organized along three main axes: the Universalist nature of the Islamic message engrained in its creed and *Sharî'a*; to protect Muslims and to support them morally and practically in these societies.[108] And to promote a civilizational dialogue between Islamic and other civilizations,[109] which is the core idea of *Da'wa*. These previous axes reflect the core pillars of the role and the message of the *Umma* identified by Mustafa. In this sense, Muslim minorities do not just represent a quantitative power that has merely transferred from

[101] *Id.* at 57.
[102] FISHMAN, *supra* note 19 , at 4.
[103] NADYA MUSTAFA, Ishkaliyyat al Bahth Wal Tadrees Fi 'Ilm Al 'Ilaqat Al Dawliyya Min Manzour Hadary Muqaran 56-57 , *available at*: http://www.ccps-egypt.com/upLoad/63387491953953262 5.pdf (*Last visited May 12, 2012*).
[104] *Id.* at 56.
[105] 'ALWÂNÎ, *supra* note 8, at 14.
[106] Qur'ân 3:110.
[107] 'ALWÂNÎ, *supra* note 8, at 15.
[108] MUSTAFA, *supra* note 16, at 31.
[109] *Id*.

one place to another; rather their existence in these communities signifies a cultural and a civilizational symbol that goes along with the universalistic nature of the concept of *Umma*.
Thus, the *Umma* argument provides a bigger context than the *Da'wa* one, where the latter is reflected as one of the pillars of the Islamic *Umma*, as well as one of its objectives. Such context would turn integration from a means to an end in itself especially that *Fiqh* of minorities was originally designed to theorize for a permanent presence and the creation of a genuine European Muslim. The coming section tests both March's and Nadia's arguments by exploring advocates of *Fiqh* of minorities' views on integration and its entailed concepts, namely the relation with non-Muslims, loyalty, and citizenship in lights of both *Umma* and *Da'wa*.

3. Contributors to *Fiqh* of minorities' theory and integration

The notion of integration entails other concepts: the relations with non-Muslims, citizenship, and loyalty–national loyalty as opposed to *Umma* loyalty. In this section we will analyze how different scholars articulated the position of integration within the *Fiqh* of minorities' framework, and relating them to the previously introduced *Da'wa* and *Umma* perspectives.

a) 'Alwânî

Tâha Jâbir Al-'Alwânî is widely recognized as the founder of *Fiqh* of minorities. He studied *'Usûl al-Fiqh* at *Al-Azhar* University and migrated to the United States in the 1970s. He ended up as the founder and former chairman of the *Fiqh* Council of North America.[110] He asserts that the concept of *Fiqh* of minorities did not come about in vacuum; rather it reflects tens of cases he was exposed to in his interaction with Muslim minorities whether in Europe or the United States.[111] In a personal interview, 'Alwânî details how the original reason behind *Fiqh* of minorities was not how to integrate or incorporate Muslims within the community because they already had the potential for total assimilation due to their lack of religious awareness and the consolidation of the concepts of followership. Rather, the aim was to preserve a proper identity that does not lead to a "schizophrenic personality" when it comes to who they are and what their purpose or role towards their Umma and community are. Culture is an integral factor of shaping a society and, thus, the aim of *Fiqh* of minorities is to "purify "what Muslims take from their original countries, to avoid negative characteristics engrained in such societies, and carry their positive contribution and potential with them to their new society. The main distinction between *Fiqh* of minorities and general *Fiqh* in 'Alwânî's view is the aim to establish and theorize for a "permanent" Islamic presence in the West, by creating a paradigm shift from the *Fiqh* of a temporary license into a *Fiqh* of permanent context. Such presence would serve as a fundamental component of the Western community because Islamic speech is universal and the civilizational and religious message of the oneness of Allâh has to reach all areas of the world.[112]
In theorizing for such a presence, 'Alwânî explores, first, for the nature of the relation between Muslims and non-Muslims, and second, the necessity of a proactive engagement with society. He notes that one of the main principles of *Fiqh* of minorities is to determine the nature of interaction between Muslim minority and other non-Muslim majorities' and how it should be like. A number of methods, means and tools assist different branches of *Fiqh,* including *Fiqh* of minorities. Among these methods is to go back to the general verses and principles of the main sources of *Sharî'a*: *Qur'ân* and *Sunna* putting into account the higher objectives of *Sharî'a* as well as the context of the Muslim minority. One of these verses that are considered by 'Alwânî, as well as most *Fiqh* of minorities' founders, as a fundamental rule in Muslims relations with others states that:

[110] FISHMAN, *supra* note 2, at 3.
[111] 'ALWÂNÎ, *supra* note 49.
[112] 'Alwânî interview, *supra* note 46.

> God does not forbid you to be kind and equitable to those who have neither fought you on account of your religion nor driven you from your homes. God loves the equitable. But God only forbids you to be allies with those who have fought you because of your religion and driven you from your homes and abetted others to do so. Those that make friends with them are wrongdoers.[113]

According to scholarly interpretations, "this verse permits associations with those who have not declared war against the Muslims and allows kindness towards them, even though they might not be allies."[114] [115] *Fiqh* of minorities takes the principle of these two verses into consideration when establishing the moral and legal foundations upon which Muslim minorities should deal with other non-Muslim majorities. All developments, situations and verdicts are judged according to this principle.[116] Moreover, he cites the Qur'ânic verse "best nation ever raised for mankind,"[117] to clarify the leading role Muslims should be taking. This implies that the Muslim nation–*Umma*–was raised for the benefit of all mankind and "should be sharing this benefit with other human societies."[118] 'Alwânî refutes the misconception of *Dâr al-islâm* and *Dâr al-harb* stating that *Dâr al-islâm* is wherever Muslims enjoy peace and security and more importantly the cultural and religious message of Islam should not be hindered by boundaries.[119] Although 'Alwânî does not expose directly to the issue of citizenship, one can withdraw from his previous analysis on *Dâr al-islâm* that *Fiqh* of minorities views any place where Muslims can practice their faith as the abode, the home, or the land of Islam.

This previous thought on where *Dâr al-islâm* lies is completed by his idea concerning the obligation and the responsibility towards public participation. 'Alwânî's vision was articulated in his suggestion to redefine the question posed in front of jurists from Muslim minorities individuals. Redefining the question would reflect reality in all its facets and turn the answer from a negative license to a positive responsibility towards the Muslim community as well as the Western community.[120] He views interaction and constructive engagement within the community as based on two principles: standing up for oneself and forbearance. The first states that Muslims should under no circumstances accept an inferior position, thus any negativity or lack of interaction with one's community are against core Islamic principles.[121] The second entails that even if positive engagement required some compromises in areas that do not contradict the core creed of Islam; integration is still acceptable, given the positive nature and the role of the Muslim *Umma*.[122]

b) Qaradâwî

Yusuf al-Qaradâwî also studied at *Al-Azhar* University and in 1997 he founded the European Council for *Fatwa* and Research [ECFR] for the purpose of providing Muslim minorities in

[113] Qur'ân 60:8-9.
[114] 'ALWÂNÎ, *supra* note 8, at 14.
[115] Although there have been arguments that this verse has been abrogated, the majority of interpretations argue otherwise that this verse applies to all non-muslims who didn't antagonize muslims or show hostility to their religion declare war against them. *See*, Qurtuby's Al Jami' li Ahkam Al Qur'ân, *available at*: http://www.islamweb.net/newlibrary/display_book.php?flag=1&bk_no=48&surano=60&ayano=8 (*Last visited Jan 12, 2011).*
[116] *Id*.
[117] Qur'ân 3:110
[118] 'ALWÂNÎ, *supra* note 8, at 14.
[119] *Id.* at 15.
[120] For instance, check his example of political participation mentioned earlier.
[121] TÂHA JÂBIR AL-'ALWÂNÎ, *Natharat Ta'sisiyya Fi Fiqh Al-Aqalyyat, available at:* http://islamselect.net/mat/59471 (*Last visited Feb. 2, 2012*).
[122] 'ALWÂNÎ cites *Ibn Taymiya* in establishing this principle where the latter mentions that "Muslims are required to do their best to cope with the situation. Those who assume office with the intention of pleasing God and serving the objectives of Islam and the interests of the people to the best of their ability, and who try their best to prevent wrong-doing, will not be penalized for what they could not achieve. It is far better that food people are in office tan bad ones."

Europe with Islamic legal guidance.[123] It was not until later in the last decade that the ECFR, eventually, adopted *Fiqh* of minorities as its general policy. Qaradâwî realizes that Muslim minorities are part of the Muslim *Umma* on one hand and of their current community on the other. He stresses the importance of balancing these two aspects of a Muslim's belonging and identity and that *Fiqh* of minorities should consider them while exploring Muslim minorities' issues.[124] Furthermore, he distinguishes between different connotations–faith, geographic, political and social–of the concept of *Umma* in his analysis to the definition, all of which has different impact on the idea of citizenship. For Qaradâwî, *Umma* does not contradict with having multiple loyalties, belongings and identities. On the other side, the concept of citizenship itself is a neutral concept that carries no ideological significance whether religious or secular; it is a flexible notion that is shaped and adapted based on preference and need.[125]

For Qaradâwî, though the concept of citizenship is new, it was recognized by the prophet in the *Madina* statement–the constitution of the first Islamic state–that recognized residents who belonged to different religions and tribes. The philosophy of the *Madina* statement was based on peaceful coexistence and mutual support among the citizens of this state regardless of their differences.[126] The only bond among them was their loyalty to their state which responds to the previous definition of citizenship as a "voluntary bond joined within national horizons and ruled by a constitution".[127] Qaradâwî builds on the issue of citizenship and integration by establishing for the necessity of Muslim presence in non-Muslim communities. The reasons for such presence are classified into three main categories: the universalistic nature of the message of the Islamic *Umma*; supporting and empowering Muslim minorities in such countries through allowing them to live a proper Islamic life, preserving their identity, and guiding them through interaction and integration; and participating in the development of humankind in general and their community specifically through educating Muslim minorities on their rights and freedoms as well as on their duties.[128] Moreover, for Qaradâwî, the term "Islamic state" does not mean it includes those who belong to the Islamic faith only, rather it reflects the majority and legal system.[129] Thus, Qaradâwî refutes the dichotomy of *Dâr al-islâm* and *Dâr al-harb* and prefers the notion "out of *Dâr al-islâm*."[130]

Qaradâwî posits that it is currently impossible to undo the Islamic presence in the West as Muslims have been involved in all aspects of life, political, economic and social. However, when it comes to their identity, he stresses that the concept of integration entails the values of diversity and exchange that lead to enriching the society.[131] The idea of citizenship allows for a Muslim a peaceful coexistence with the Western community. It also entails having the same rights and duties of other individuals in the community–which adds to the ideas of empowering Muslim minorities as well as making positive contribution. The first generation Muslim immigrants, Qaradâwî argues, show more attachment to their countries of origin. Thus, the ECFR has always urged Muslim minorities for integration. In fact it has called it an obligation for Muslim minorities to positively integrate and interact with their community. Furthermore, they have to strive for the service and the development of their communities while preserving their faith, values and moral system that are core to their Islamic belief system. Only through preserving the proper identity, can Muslim minorities integrate and

[123] FISHMAN, *supra* note 1.
[124] QARADÂWÎ, *supra* note 48, at 34.
[125] *Id.* at 47.
[126] QARADÂWÎ, *supra* note 7, at 25.
[127] MARCH, *supra* note 94, at 81.
[128] QARADÂWÎ, *supra* note 48, at 35-37.
[129] QARADÂWÎ, *supra* note 7, at 32.
[130] QARADÂWÎ, *supra* note 48, at 35.
[131] QARADÂWÎ, *supra* note 7, at 83.

contribute positively in the Western communities. Qaradâwî calls this vision the tough equation: commitment without isolation, integration without assimilation.[132]

c) Najjâr

Abd al-Majîd al-Najjâr is a Tunisian scholar and another graduate of Al-Azhar University, who is also a member of the ECFR. In the introduction to his book "*Fiqh* of citizenship", he denotes that the role of contemporary verdict is to preserve the Islamic identity of the Muslim presence in the West on one side, and to turn this presence into a role model to all people which will also, hopefully, lead to resolving European local issues and participate in the development of these communities on the other. The latter vision turns Muslim minorities into contributors and not mere consumers. Like 'Alwânî and Qaradâwî, Najjâr emphasizes the permanent nature of Muslim minorities that *Fiqh* of minorities strives to preserve.[133] Moreover, he identifies the role of *Fiqh* of minorities as a legal framework that responds to issues in front of Muslim minorities as "citizens" and members of a Western community and not just as Muslims. While initially, Muslim immigrants had short-term objectives that centered mainly on economic, social and political realms, with time they have evolved into the long-term objective of settlement or *Tawtîn*. *Fiqh* of minorities, in Najjâr's view, is an adequate tool to respond to the permanent presence of Muslim minorities and answers philosophical questions such as their role in the West in light of their settlement project.[134]

He introduces the concept of civilizational partnership between Muslims and non-Muslims where both cooperate to contribute to and promote their own society. The logic of this concept entails that, given the current quantitative and qualitative existence of Muslims as a minority–especially those who have become full citizens, in non-Muslim countries, that requires a fundamental change in their role in the community. The basic argument here is that while the Muslim existence in non-Muslim communities–especially the West–can be of benefit specifically in the areas of science and administration for instance, such presence, at the same time can contribute to the promotion of the community culture in areas such as family cohesion and violence.[135] That is to say, this argument opposes the theory of the clash of civilization[136] and creates a culture of dialogue and common contribution. Such "cultural partnership" plays, arguably, a pivotal role in the positive integration of Muslim minorities.[137] Cultural partnership becomes an objective for Muslim minorities it will lead eventually to integration whereby Muslims have to be interactive actors in the community in order to add value.[138]

The core of the civilizational partnership reflects the essence of the modern concept of social contract which requires agreeing on working in the community's best interest.[139] Such a social contract is the practical interpretation of both: loyalty and citizenship. Najjâr finds for the latter an Islamic justification that centers on two main reasons: first, fulfilling their role as good citizens which is also part of the Islamic belief, regardless of the secular notion of the social contract; and second, and more importantly in his view, to serve as a role model which fulfills Muslims' original purpose in life which is the duty of *Da'wa*. His definition of *Da'wa* bypasses

[132] *Id.* at 79-84.
[133] NAJJÂR, *supra* note 17, at 5.
[134] *Id.* at 24.
[135] *See generally, id.*
[136] For more information, *see*, SAMUEL HUNTINGTON, The Clash of Civilizations, *available at*: http://www.polsci.wvu.edu/faculty/hauser/PS103/Readings/HuntingtonClashOfCivilizationsForAffSummer93.pdf (*Last visited May 12, 2012).*
[137] *See*, QARADÂWÎ, *supra* note 48 at 188-191 (he mentioned proposed solutions suggested by Abdul Sattar Abu Ghodda for the mortgage issue in the Muslim countries. Many of these solutions could be adapted to the economic system to overcome the side effects of the interest-based systems).
[138] NAJJÂR, *supra* note 17, at 42.
[139] *Id.* at 25.

the direct preaching that aims at converting non-Muslims to Islam. Rather he calls it *Da'wa Limâ Fih Maslaha* or the call and working for what leads to benefit or public interest.[140] Thus, Najjâr views the role of *Fiqh* of minorities as facilitating living an Islamic life in a non-Islamic-rule context, and to interacting with their community positively guided by their Islamic identity. Such interaction would lead eventually to the development of this community especially through offering ethical, cultural and spiritual Islamic values, which is an essential dimension of the concept of *Da'wa* which he proposes.[141]

The concept of civilizational partnership, introduced by Najjâr, in addition to emphasizing on the idea of social contract, bases foundations for both: citizenship and integration. At first he provides evidence for the nature of the relationship that should take place between Muslims and non-Muslims by citing two *Qur'ânic* verses:

> O mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another. . .[142]
>
> Thus We have made you [true Muslims - real believers of Islamic Monotheism, true followers of Prophet Muhammad and his Sunnah–legal ways–], a Wasat–just—and the best–nation, that you be witnesses over mankind and the Messenger–Muhammad–be a witness over you.[143]

The first verse responds to the nature of the relationship between Muslims and non-Muslims which is based on knowing one another and interacting. The speech in this verse is directed to *all* humankind, and not just Muslims. The second verse mentions *Shahâda*. To Najjâr, *Shahâda* is the core of *Da'wa*, where Muslims have to deliver their message of good and benefit–whether moral or physical, to all humankind. This also entails cooperation with all people, whether Muslims or non-Muslims, on what is common interest and good, and to unite and fight, whether with Muslims or non-Muslims, against evil.[144] The latter is the essence of definition of *positive* integration: cooperation and interaction to fulfill the mutual interest of the community.[145]

d) Bin Bayya

Abdulla Bin Bayya is a Mauritanian scholar currently teaching at King *Faysal* University in Saudi Arabia. He has not theorized as much as the previous scholars concerning the reasons behind Muslims presence in non-Muslim countries. Rather he deals with it as the status-quo where "Muslim minorities face strong challenges on an individual level as they try to lead an Islamic life among an environment that adopts a materialistic philosophy,"[146] thus a special *Fiqh* is needed to respond to their special circumstances. He identifies four main objectives. The first is called the general objective and protecting the religious life of Muslim minorities; the second is the propagation of the message of Islam, "leading to a gradual establishment of Islam in the communities where they live"; the third is establishing rules of coexistence with non-Muslims; the last is moving from an individual to collective stage in *Fiqh* rules when dealing with issues of Muslim minorities.[147] Unlike the previous scholars, Bin Bayya shares a narrow view of the concept of *Da'wa*. He confines only converting other non-Muslims. However,

[140] *Id.* at 6.
[141] *Id.* at 54.
[142] Qur'ân 49:13.
[143] Qur'ân 2:143.
[144] NAJJÂR, *supra* note 17, at 27.
[145] *Id.* at 80.
[146] ABDULLA BIN BAYYA, Sina'atul Fatwa Wa *Fiqh* al-aqalliyyât, *available at*: www.saaid.net/book/9/2033.doc (*Last visited Feb. 10, 2012*).
[147] *Id.*

similar to the previous scholars, *Bin Bayya* is concerned with both preserving the identity and establishing bases for a healthy Muslim interaction with the community.

e) Ramadan

Tariq Ramadan is a Swiss Islamic intellectual and preacher. Though his family is originally from Egypt, he was born in Switzerland where he lived his entire life. Currently, he is Professor of Contemporary Islamic Studies at Oxford University.[148] Unlike the others, he is not a *Fiqh* scholar. That is why he does not delve into the theory of *Fiqh* of minorities. Rather his arguments center on Muslim identity in the West and how Islamic *Fiqh* can serve it.

In his book: *Western Muslims and the Future* of *Europe*, Ramadan talks about "Western Muslims" and not "Muslim minorities in the west". He promotes a new Muslim identity arguing that contemporary Muslims are succeeding in finding harmony between their faith and their Western context. His goal is to create an *independent Western Islam* anchored not in the traditions of Islamic countries, but in the reality of the West.[149] This is where his connection with *Fiqh* of minorities begins as he supports a "fresh reading of Islamic sources, interpreting them for a Western context and demonstrating how a new understanding of universal Islamic principles can open the door to integration into Western societies."[150] He, however, challenges the term "*Fiqh* of minorities" and believes it should be rethought because, in his view, Muslims should not think of themselves as a minority, but rather as citizens and partners in their own society.[151]

He challenges three main misconceptions or "staging posts" with regards to the Muslim presence in the West: the dualist approach, minority mindset and thinking, and the integration in the sense of adaptation. The dualist approach refers to the idea that Muslims continue to perceive themselves as "the other" which will naturally end with *Fiqh al-Rukhas*–*Fiqh* of licenses–that consolidates the temporary nature of the Muslim presence in such communities.[152] He even criticizes Qaradâwî's conception of dealing with Western societies as "other societies" because the normal place for Muslims is the Muslim-majority societies. He believes that *Sharî'a* teaches Muslims to integrate anything that is not contradict its core. This, for him, includes all dimensions of life–legal, social, and cultural, which Muslims should consider their own.[153]

He redefines the role of the *Umma* to reflect the "universal message of Islam directed to human intelligence toward the quest for justice."[154] Western Muslims, thus, can benefit from the new framework of *Fiqh* of minorities–regardless of his disagreement with some of its premises. Muslims share the duty of studying their society and to working for justice and against any form of injustice with their fellow citizens.[155]

Ramadan links the idea of loyalty and *Umma* in a unique way. The value of monotheism in Islam gives rise to a specific way of life and interprets every action in a common way. This perception is the heart of Muslims' sense of belonging to the *Umma*.[156] Muslims ultimate loyalty belongs to God, not countries or ideologies; therefore, they should be models of honesty, justice and loyalty.[157] Given that contracts–in this case Ramadan refers specifically to social contracts–determine one's status, rights and duties and guides his or her interaction,

[148] For more information in Tariq Ramadan, *See*, http://www.tariqramadan.com/Elements-de-biographie,014.html?lang=fr (*Last visited May 12, 2012*).
[149] TARIQ RAMADAN, Western Muslims and the Future of Islam 3, (Oxford University press)(2004).
[150] *Id*.
[151] *Id*. at 82.
[152] *Id*. at 68.
[153] *Id*. at 68-69.
[154] *Id*. at 176.
[155] *Id*. at 177-178.
[156] *Id*. at 101.
[157] *Id*. at 107.

Muslims do not have the right to break such a contract unilaterally. Thus, loyalty has no exceptions, because to be a Muslim means to be entrusted with a pledge–*Amâna*.[158] Thus, if a clear conflict of terms of reference between *Sharî'a* and Western secular law occurs, "a specific study should be carried out by Muslim jurists to determine, by formulating a legal opinion–Verdict–. . . that might provide the Muslim with a satisfying solution, both as a practicing believer and as a resident and/or citizen."[159]

Thus, Ramadan sees no contradiction between being a Muslim and having loyalty to *Umma* on the one side and being a European and having loyalty to your country on the other since loyalty should not be to an Islamic culture that is affiliated to an Islamic nation. That is why he encourages building an independent Islamic European culture and identity. However, not to undermine the influence and the importance of the Islamic *Umma*, Tariq Ramadan posits that one of the advantages of such integration is empowering Muslim minorities all over the world.

4. Concluding remarks: *Umma*, integration, and *Fiqh* of minorities

After reviewing different contributions on how *Fiqh* of minorities responds to the issues of citizenship and integration, we note the following:

First, the need for a special case for the existence of Muslims as a minority has to be framed in a wider collective and more cultural way. It cannot be limited only to religious rituals; rather, it supersedes this one dimension of the Islamic belief system to embrace all sorts of social, political and economic interactions, whether among Muslims themselves or between Muslims and non-Muslims in the same community. Nadia Mustafa argues that the issues facing Muslim minorities, especially in the West, can be traced back to the following three dimensions: the relationship between Islam and secularism, the relation between *Sharî'a* and national legislations, and the issue of dual loyalty–religion, civilization and/or culture versus national and civil allegiance.[160] She contends, that socio-political issues remain the most important compared to other religio-cultural factors.[161] She summarizes the main issue in the question of the position of religion between citizenship and identity,[162] culminating in the role of *Fiqh* of minorities.

Second, the objectives common among all mentioned scholars of *Fiqh* of minorities are: to protect the Muslim identity and religious practices; to recognize and become involved in the Western legal and social system as full citizens with rights and duties; and to serve as a role model that fulfills the core of the Islamic message of the *Umma*. Thus, the real question *Fiqh* of minorities advocates are concerned with is not whether Muslim minorities should integrate or not. Rather, it is *how* they should integrate and what the necessary conditions required for a positive integration that is beneficial for both the Muslim and his or her community are. In other words, this *Fiqh,* while attempting to accomplish the mission of integration and preserving the Muslim identity, treats the Muslim not only as a Muslim with religious ritualistic obligations, but also as a member in a society and, more importantly, as a law abiding citizen in a modern society with rights and obligations.

Third, in its principles and methodology, *Fiqh* of minorities is designed to respond to the issue of Muslim minorities' integration in a non-Muslim community, which is why it requires the scholar to master the knowledge of the actual circumstances and factors facing Muslim minorities. However, one is to question the relation between the success of such *Fiqh*, in practice, and the numbers of Muslims welcoming the concept of this *Fiqh.*

[158] *Id.* at 107-108.
[159] *Id.* at 110-111.
[160] MUSTAFA, *supra* note 16, at 41.
[161] *Id.* at 51.
[162] *Id*.

The final chapter applies the previous theory and aspirations of *Fiqh* of minorities' advocates regarding the role such *Fiqh* can play in the process of integration to two case studies: interest-based Mortgage and *Islâm al-zawja*.

V. *Fiqh* of Minorities in Application

This chapter applies the theories and aspirations of different *Fiqh* of minorities' scholars articulated in chapters two and three to reality and measures their validity. The focus will be on two case studies: *Islâm al-zawja* and interest-based mortgage.

1. Islâm al-zawja

The widespread modern rule regarding the conversion of the wife to Islam while her husband is still a non-Muslim–the case known in *Fiqh* as *Islâm al-zawja*–is clear. The modern legal opinion on interfaith marriage states that "Interfaith marriages are prohibited, except in the case of a Muslim male marrying a scriptural female–*Kitâbiyyah*."[163] Despite different articulations and criticisms of this rule, our concern here is not the validity or the basis of this rule; rather, it is how *Fiqh* of minorities–given its principles and objectives, deals with the issue of *Islâm al-zawja* and whether it has a significant impact on integration.[164]

While most Islamic schools agree that a Muslim wife cannot remain married to a non-Muslim husband, *Fiqh* of minorities scholars like Qaradâwî addresse the issue in a broader manner while introducing this *Fiqh.* Though similar efforts, like the ECFR verdict, have tried to suggest alternatives, most of them have treated the issue as an exception, or an attempt to get a license. This is a fundamental difference with *Fiqh* of minorities that bypasses the mere individual verdict for a standard framework comprising clear principles and objectives. In other words, *Fiqh* of minorities is not just concerned with *what* the final verdict is but rather *how* and *why* this verdict was reached, which is, arguably, determined largely by this *Fiqh's* philosophy of the importance of integration.

The ECFR periodical–*al-Majalla al-Ilmiyya*–announced in one of its issues, dedicated particularly to the case of *Islâm al-zawja*, that due to the different opinions on this matter, it could not reach one definite verdict. Instead, it stated the majority opinion while mentioning the opposing ones as well. The final verdict was that the wife is not allowed to stay with her husband after the three months of *Iddah*–her waiting period after divorce–and even if they do not divorce they must be separated. Thus, there are no marital rights and obligations on the wife's side. The verdict concludes by noting some scholarly opinions which allow full marriage with full rights and obligations including sexual relationship under the condition that it does not harm or affect her faith and that she strives for his conversion no matter how long it takes. That is, not to push females away from converting.

In the same issue of *Al Majalla al Ilmiyya*, the first article by Joudai, explores whether the objectives of the Islamic faith–given the context and the reasons, are accomplished by separating a wife from her family and husband and reaches a similar conclusion as Qaradâwî's seen later: the act of conversion gives the woman the option and not the obligation to ask for separation.[165] The second article by Zoubair proposes that though the standard rule is separation there are conditions–like the wife's insistence on staying with her husband, preserving her faith and so forth. Under such conditions if fulfilled, the marriage is permitted

[163] GIANLUCA PAOLO PAROLIN, *Interfaith Marriage and Muslim Communities in Scotland: A Hybrid Legal Solution?* 1, (HKU Diversity Conference, April 2011).

[164] *Id.* at 10.

[165] *See generally*, ABDULLA IBN AL-JOUDAI, *Islam Al Mar'aa Wa Baqaa' Zawjaha Ala Deeneh* [The conversion of the woman withouther husband], AL Majalla Al Ilmiyya Lil Majlis Al Orubbi Lil Ifta' [the scientific Magazine of ECFR], Jan. 2003, at 13-197.

to be sustained.[166] The third article by Faisal reaches the conclusion of separation as well; the only case where temporary marital rights and obligations are sustained is during the period between the termination of the marriage contract and the actual divorce. Given that the process may take a significant period of time, sexual and marital needs, thus, lie under the category of *Darûra*.[167] The fourth article by Fares, on the contrary, criticizes any argument that promotes sustaining the marriage. In his opinion, the case here is the annulment of both physical separation as well as contractual divorce.[168] The fifth article by Kouddous states that though there is a consensus on the principle of separation, there is a lack of consensus when it comes to when exactly separation takes place, and what the form of such separation is–just physical or contractual as well. He concludes that it is a termination of the contract after the three months of *Iddah* and that the wife should seek termination even through court.[169]

With the exception of *Faisal* who to some extent considers reality and the resulting *Darûra* of the physical needs, the rest of the opinions here are separated from the demands of reality and are very much immersed in jurisprudential discourse. Even when Joudai refers to objectives of *Sharî'a*, he does not identify clearly those objectives and their relation to the reality of Muslim minorities. Their opinions are mostly quoting and seeking evidence in classical jurisprudential opinions with no original *Ijtihâd* whatsoever. By examining how *Fiqh* of minorities' scholars perceive the case of *Islâm al-zawja*, this section identifies how the latter *Fiqh* proposes real *Ijtihâd* that, more importantly, truly considers Muslim minorities' situation.

Qaradâwî–as one of the advocates of *Fiqh* of minorities–points out that many women might be willing to convert but the separation rule hinders them. He starts his argument by mentioning nine opinions found in the traditional *Fiqh,* articulated namely by Ibn al-Qayyim,[170] regarding the matter of *Islâm al-zâwja*.[171] The first five opinions call for the immediate or the eventual separation between spouses. While the second group of opinions, which will be discussed, favor the maintenance of the marriage contract. The sixth opinion confirms that the woman has the choice of waiting and hoping for her husband's conversion even if it takes years–based on the narrative of *Umar* who gave a converting woman the choice of staying with or leaving her still-Christian husband.[172] This was the opinion favored and adopted by Ibn al-Qayyim. The seventh opinion, establishes the principle that husband, even if non-Muslim, is more worthy of his wife, condition that she does not leave her home country and performed Hijra–based on *Ali's* narrative. The eighth opinion proclaims that the marriage contract is maintained as long as they were not separated by the *Imâm* or the judge. The final opinion provides that she continues to be his wife with all rights and duties except for the sexual relationship.

Qaradâwî criticizes Ibn al-Qayyim for not considering the whole nine opinions while focusing on and adopting the sixth opinion where a woman can stay with her husband, wait and strive for his conversion but with *no* sexual relationship.[173] Qaradâwî denotes a significant practical problem with such an opinion: the physical needs. That is why he turns to reconsidering and reinterpreting the Qur'ânic text while consolidating it with the seventh opinion of *Ali*. In his analysis, the verse is directed to Muslim women who have converted, left their husbands and

[166] ABDULLA ZOUBAIR SALEH, *Hokm Baqaa' Man Aslamat Ma'a Zawjaha Alathi Lam yoslem* [The verdict on the woman who converts while her husband does not], AL Majalla Al Ilmiyya Lil Majlis Al Orubbi Lil Ifta' [The Scientific Magazine of ECFR], Jan. 2003, at 207-242.

[167] FAYSAL MAWLAWY, *Islam Al Mar'aa Wa Baqaa' Zawjaha Ala Deeneh* [the conversion of the woman withouther husband], AL Majalla Al Ilmiyya Lil Majlis Al Orubbi Lil Ifta' [The scientific Magazine of ECFR], Jan. 2003, at 243-308.

[168] MOHAMED ABDUL QADIR ABU FARIS, Athar Islam Ahad Al tarafayn Fil Nikah, [The impact of the conversion of one spuse on the marriage], AL Majalla Al Ilmiyya Lil Majlis Al Orubbi Lil Ifta' [The scientific Magazine of ECFR], Jan. 2003, at 309-401.

[169] NEHAT ABDUL KOUDDOUS, *Islam Al Mar'aa Wa Baqaa' Zawjaha Ala Deeneh* [The conversion of the woman withouther husband], AL Majalla Al Ilmiyya Lil Majlis Al Orubbi Lil Ifta' [the scientific Magazine of ECFR], Jan. 2003, at 409- 420.

[170] For more information on Ibn al-Qayyim, *See*, http://www.ibnalqayem.com/ (*Last visited May 12, 2012*).

[171] QARADÂWÎ, *supra* note 48, at 108-120.

[172] *Id.* at 118.

[173] *Id.* at 119-120.

performed *Hijra*. The order here is for Muslims not to return them–the newly Muslim women–to their non-Muslim husbands in this particular case. He adds another condition; by examining the context of this verse it was meant in the period when the husbands were from a group of people explicitly at war with Muslims.[174] Recalling the need of new converts to stay with their husbands and families in non-Muslim environments, especially if they are hoping for their conversion, Qaradâwî infers that it is possible that 'Alî based his opinion on such a rationale and perspective to the verse. He also responds to the opinions that call for strict immediate separation by stating that the evidence from *Qur'ân* and *Sunna* were taken out of context and misinterpreted. Such opinions, in his view, are against the narratives as they were not adopted by the Prophet's companions.[175] Thus, noting how Qaradâwî developed his argument and based on his classification, this case reflects as both selective and creative *Ijtihâd*.

Qaradâwî concludes by highlighting three considerate opinions on which scholars and *Muftîs* can rely on to respond to the issue of *Islâm al-zawja* in a non-Muslim community in order to overcome the resulting social dilemmas. The first is that of 'Alî who stated that the husband enjoys protection and, thus, the advantage of keeping her since she is originally his wife under the condition that she does not leave her town or place of residence–and does not migrate whether to *Dâr al-islâm* or other. The second opinion is Umar's where he asserts that when women convert the judge either terminates directly or not, giving the women the opportunity to choose between staying with her husband or terminating the marriage. The final opinion is al-Zahry's whereby the marriage continues as long as there is no verdict or judgment that separates them. Unlike the known case where a Muslim man is only allowed to marry a scriptural woman, in the case of *Islâm al-zawja*, scholars consider the marriage of a Muslim–converting–woman from a non-Muslim man in general, whether scriptural or not. This evidence is found in different narratives used by scholars like that of *Umar*, 'Alî and Zainab the daughter of Muhammad himself who was married to a "non-scriptural" non-Muslim.[176] However, this is not to be confused with marriage to a communist or an apostate–even if legally a Muslim. While Qaradâwî's verdict is clear on the prohibition of marrying the latter in the first place, one might wonder whether *Islâm al-zawja* verdict includes maintaining the marriage contract with a communist or an apostate husband, who, according to Qaradâwî's verdict should be penalized.[177]

Qaradâwî concludes his argument with several points. First, there is no definite text, nor is there a consensus that addresses this issue clearly. Second, the mere act of conversion though allowing annulment does not entail the automatic annulment of the marriage. Finally, Qaradâwî bypasses Ibn al-Qayyim's favored opinion, which although does not call for separation, bars the physical marital relationship. His interpretation of the Qur'ânic text concludes that the marriage contract and its entailed marital rights can be maintained. This includes the sexual relationship since it is a necessity for good companionship between spouses–a fundamental value in Islamic philosophy, given that she can preserve her faith and practice. The act of conversion, thus, merely turns the contract from binding to optional.

Qaradâwî contends that such case can be generalized on Muslims all over the world; however, he stresses that Muslim minorities deserve it more given their circumstances.[178] On the contrary, Ahmad al-Rawi, chairman of the Union of Islamic Organizations in Europe, strictly limits this verdict to the European context where "the woman is respected and this is crucial."[179] 'Alwânî provides an interesting point of view on the objectives of *Sharî'a*. He notes

[174] QARADÂWÎ, *supra* note 48, at 124.
[175] *Id.* at 118-124.
[176] *Id*.
[177] Refer to his verdict on the marriage of a Muslim woman from a communist, QARADÂWÎ, *supra* note 48, at 89.
[178] Personal interview with sheikh Yusuf al-Qaradâwî , Cairo (Jan. 23, 2012) [hereinafter Qaradâwî interview].
[179] FISHMAN, *supra* note 2, at 12.

that one of the fundamental purposes of Islam is *I'mâr* or construction.[180] If we prevent a woman from staying with her husband after her conversion, Islam would contradict the concept of construction and nurturing in Islam. Rather, in such cases, Islam would be the direct reason for a family collapse.[181] Moreover, by valuing the importance of the family by a wife staying with her husband, *Fiqh* of minorities does not only value the principles of *Taysîr* and responds to reality when it comes to Muslim minorities and the ideal nature of relationship with non-Muslims, it also considers the social interest represented in preserving the family unit, which signifies an important Islamic value. This idea relates directly to *Najjâr's* concept of *cultural partnership* and how Muslims should positively contribute to their community.
The next case requires more creativity when it comes to *Ijtihâd* due to the lack of both: sufficient evidence from inherited tradition and explicit rules in the text.

2. interest-based mortgage

The general rule is that *Ribâ or* usury is forbidden–*Harâm*–based on evidence from *Qur'ân*, *Sunna*, and the Islamic scholar's consensus. *Ribâ*, as defined in the encyclopedia of Islam, literally means "increase" and is technically used by Islamic scholars to reflect "any unjustified increase of capital for which no compensation is given."[182] Such definition, according to many scholars, applies to the interest-based mortgage.[183] For instance, the Islamic research academy reached the verdict that any interest on any type of loan is considered prohibited *Ribâ* regardless of the amount or any categorization attempt. Other institutions of higher Islamic status like the Academy of Muslim World League, the Second Conference of Islamic Banks and Organization Islamic Conference support similar legal opinions.[184]
Some significant attempts, however, such as Abdul Razzâk al-Sanhûrî,[185] and his contemporary 'Alî Gom'aa,[186] have tried to draw some distinctions. For instance, *Al-Sanhûrî* categorizes *Ribâ*–usury–into *Ribâ Fadl*,[187] *Ribâ Nasî'a*,[188] *Ribâ Jâhiliyya*,[189] and *Ribâ Qardh*.[190] Although he asserts that all four kinds are prohibited in Islam, one is the worst of them all–*Ribâ al-Jâhiliyya*–when a person does not pay his due after the stipulated time and the seller increases the price. This type resembles the modern concept of "compound interest"[191] which should be utterly prohibited under any circumstances. Sanhûrî states that other types of *Ribâ* are prohibited as

[180] Could also mean reclamation, development and nurturing.
[181] Qaradâwî interview, *supra* note 178.
[182] J. SCHACHT "Ribā" *Encyclopaedia of Islam, Second Edition*, (P. Bearman , Th. Bianquis; , C.E. Bosworth; , E. van Donzel; and W.P. Heinrichs, eds.), (Brill, 2012), *available at*: http://www.brillonline.nl.library.aucegypt.edu:2048/subscriber/entry?entry=islam_COM-0918 (*Last visited March 3, 2011).*
[183] QARADÂWÎ, *supra* note 48, at 169.
[184] *See* generally, Fawa'id al-Bonouk Hiya al-Ribâ al-Harâm, *available at*: http://www.Qaradâwî.net/library/70.html (*Last visited March 6, 2012*).
[185] 1895-1971
[186] *See*, 'Alî Gom'aa's verdict on Ribâ, *available at*: www.youtube.com/watch?v=u8vJcFlCmqE (*Last visited Feb. 11, 2012).*
[187] *Ribâ al-fadl* "literally [a] profit or [a]surplus obtained by exchanging or selling commodities of superior value over other commodities given), i.e. the form of Ribâ in which an excess or increase is paid in a direct exchange of commodities, from hand to hand, without any time extensions. ZIAUL HAQQI, *The Nature of Ribâ al-Nasî'a and Ribâ al-Fadl*, 21 Islamic Studies , 19-38 (1982).
[188] *Ribâ Nasî'a* means that "Ribâ was rather in loans and credits and not in exchanges/sales. Thus it creates profit or increase whether it is borrowed by a producer or a consumer, used by them or not." *Id.* at 31.
[189] *Ribâ Jâhiliyya* literally means "pre-Islamic usury, according to which if a debt was not repaid at the proper time the amount due was increased." ETIENNE RENAUD, The Islamic Banks, *available at:* http://www.oikonomia.it/pages/2003/2003_febbraio/pdf/studi_1.pdf (*Last visited May 12, 2012*).
[190] Unlike *Ribâ Jâhiliyya, Ribâ Qardh* is imposed from the beginning and not after the proper time. HASSAN O. AHMAD, Shariah contracts in Islamic Banking and finance, available at: http://www.slideshare.net/Annie05/shariah-contracts-islamic-banking-presentation (*Last visited May 12, 2012*).
[191] The difference between simple interest and compound interest is that compound interest generates interest on interest, whereas simple interest does not. An Introduction to the Mathematics of Money 13-43 (2007), *available at*: http://www.springerlink.com.library.aucegypt.edu:2048/content/?k=doi%3a(%2210.1007%2F978-0-387-68111-5_2%22) (*Last visited May 12, 2012*).

well but in terms of techniques and practices and not in principles. That is to say that other than *Ribâ al-Jâhiliyya*, that was explicitly prohibited in *Qur'ân*, followed by *Sunna*, the other types of *Ribâ* were–correctly–developed and clarified by scholars and jurists to overcome any potential misunderstandings. While this makes these types of *Ribâ* originally *Harâm*–prohibited, it opens the door for license and exceptions.[192] In Sanhûrî's definition, the "need" is justified here by the givens of the current capitalist global economic system as well as the "collective" and not "individual" interests. Sanhûrî interestingly notes that the validity of applying any of these types of *Ribâ* is associated with the specific circumstances and the economic system. Thus if, for instance, socialism eventually prevailed as the global economic doctrine, the nature of the previous "need" should be reevaluated and the formerly allowed *Ribâ* might be prohibited again.[193]

How different scholars measure and reinterpret the rules of *Ribâ* in the case of interest-based mortgage in non-Muslim societies and economic systems from the lens of *Fiqh* of minorities. The following covers different contributions by scholars from different backgrounds regarding this issue.

a) Al-Haidary

A verdict regarding borrowing money with interest for the purpose of education in a non-Muslim country was answered by Hamad *Bin Ibrahim Al-Haidary*[194] as follows:[195]

> Question: I am a male who lives in Sweden. My question is: whether a Muslim is allowed to borrow money for the purpose of education, noting that the educational system here in Sweden especially university, required that the borrower should return money plus interest after graduation and finding a job?
>
> Answer: A Muslim in not allowed to borrow interest money neither for education nor for any other purpose, whether the load is provided by the government or other entity, because this counts as Usury–Riba, as one takes the loan in cash and returns the money more than the originally received debt. The previous case is the typical Ribâ that is determined unjust by Allâh. Be aware my brother that you are in a Land of Test–Dar Ibtila', your need for education through such mean is a test for your faith. So if you choose to favor what your heart desires over Allâh's satisfaction then you are following the road of seduction, which might degrade you in Judgment day. And if you favored Allâh's satisfaction, He will compensate you sooner or later. "And for those who fear Allâh, He–ever–prepares a way out",[196] so fear God and he will reward you.[197]

This is a case where a Muslim living in a non-Muslim country faces an interest-based economic system. Thus, in order for him to be involved in any economic activities whatsoever, he has to deal with this system. The verdict, however, came from traditional Islamic jurisprudence that depended mainly on the scholar's consensus on, first, a certain rigid definition of what *Ribâ* or usury, and second, on the prohibition of usury in its different forms including interest. Whether the mortgage is for buying a house, a car or for education the rules and the standards are constant. The following explores how advocates of *Fiqh* of minorities, on the other hand, perceive and answer questions regarding interest-based mortgage in a non-Muslim system.

[192] He doesn't use the term *Darûra*.

[193] ʿABD AL-RAZZĀQ AḤMAD AL-SANHŪRĪ, Maṣ̣ādir al-ḥaqq fī al-*Fiqh* al-Islāmī : dirāsah muqāranah bi-al *Fiqh* al-Gharbī 269-271, (The high institute for Arabic studies, Cairo) (1954-1959).

[194] Faculty member of Imâm Mohamed Bin Saud Islamic University.

[195] *See, Fatwa on Interest-based bank loan for the purpose of Education, available at:* http://www.islamport.com/d/2/ftw/1/26/2130.html (*Last visited Feb. 12, 2012*).

[196] Qur'ân 65:2

[197] *See also*, QARADÂWÎ, *supra* note 48, at 165.

b) ECFR and SSANA

The European council for fatwa and research–ECFR–as well as the *Sharî'a* Scholars Association of North America [hereinafter SSANA] have issued a verdict on this regard. Both concluded that usury and its different forms like mortgage are prohibited in Islam and that both councils encourage Muslims in a non-Muslim society to promote *Hâlal* alternatives such as Islamic banking. However, if such alternatives are not currently available, "in case of need and lack of availability of other contracts that are *Sharî'a* acceptable, people living in non-Muslim societies may buy their residence house on mortgage, but not commercial properties and not without needs."[198] The basis of this verdict go back to the rule of *Darûra*, that necessity allows the prohibited, which in turn is subject to many conditions in order to be applicable. [199] The verdict rationalizes that otherwise it would create a huge obstacle for Muslims living in a non-Muslim country given that shelter is a necessity for a decent life. Second, the opinion of Abû Hanîfa which states that Muslims are not responsible for changing economic and political rules in non-Muslim countries, and their subsequent economic vulnerability which contradicts with the objectives of *Sharî'a*.[200]

c) 'Alwânî

He begins by noting how much Western economic circumstances are fundamentally different from Muslim countries' economic systems. Thus such a different system should be subjected to a different set of jurisprudential rules. The industrial revolution had a significant impact on the society, thus, the jurist must be aware of the culture of mass-production that prevails in the advanced Western systems. 'Alwânî argues that the philosophy of usury is not found in the Western mentality. Interest is associated with the concept of inflation. It is unjust to borrow a certain amount of money and return it after a certain period of time with a lower normative value. Thus, the main purpose of the interest, which is correlated to the economic cycle, is to maintain the value of the money qualitatively and not just quantitatively. So for him the unlawful *Ribâ* in Islam is not interest by its Western definition.[201]

For 'Alwânî, the role of *Fiqh* of minorities here is not to extract *Fiqh* rules and principles like *Darûra* or *Maslaha* to justify an originally unlawful activity. Rather, *Fiqh* of minorities exercises one of its fundamental characteristics by studying reality thoroughly and relating *Sharî'a* to context. In such case, the rule of illegitimacy of *Ribâ* is non-applicable in the first place as the economic system is dealing with a totally different economic activity with different conditions and implications.

d) Ramadan

It is important to note, before we resume, that unlike the previous scholars, Ramadan is not a jurist, he is not a jurisprudential scholar, and thus, he does not discuss legal theory of *Ribâ* as much as providing real life alternatives. Hence, unlike 'Alwânî, Ramadan views interest as one form of *Ribâ* and is, thus, utterly unlawful–*Harâm.* Any economic exchange that does not reflect equality and simultaneity is considered *Ribâ*.[202] In other words, any activity that increases the value of the good without performing any service is a form of *Ribâ*.[203] He contends that the prohibition of *Ribâ* in the Islamic economic model has a moral dimension that values justice and solidarity. This same model urges, rather obliges, Muslims to search for other models that respect and comply with the reasons of such prohibition. "We must think of a global

[198] FATWA ON MORTGAGE, http://monzer.kahf.com/fatawa/2000-2002/FATAWA_MORTGAGE.pdf 11 (*Last visited Dec. 2, 2011).*
[199] For more information on *Da'wabit* (regulations) of *Darûra*, *See* AL-MIMI, *supra* note 10, at 476-477.
[200] QARADÂWÎ, *supra* note 48, at 177.
[201] 'Alwânî interview, *supra* note 46.
[202] RAMADAN, *supra* note 140, at 200.
[203] *Id.* at 201.

alternative, and local projects must be implemented with the idea of leaving the system to the extent possible and not affirming it through blindness, incompetence, or laziness."[204]
Ramadan views the previous verdict of ECFR and SSANA as a short-term solution that reflects a temporary situation. *Darûra* and dealing with non-Muslim countries as Dâr al-Kufr, do not serve the purposes of citizenship and permanent presence of Muslim minorities. He emphasizes his point by elaborating on the importance of developing foundational solutions

> What Muslims in the West are in painful need of today is a global approach that would make it possible for them not only to live but also to develop a spirit of economic initiative and creativity capable of putting forward concrete alternatives. . . Constant ad hoc solutions and adaptations are methods that, as we have said, affirm the dominant system of speculation and interest more than they resist it. Our ethics require us to commit ourselves to an in depth and radical resistance.[205]

His solution revolves around Western Muslims creating their own economic structure in the Western landscape and thus moving towards economic and financial autonomy. Thus, *Fiqh* 's role in solving similar issues has to be "dynamic, ongoing, refined and constantly elaborative over the years."[206] This process of, specifically, legal integration will eventually lead to a comprehensive *Fiqh* for the West and not for minorities, that will not only supersede influences of majority Islamic thought, but the Western legal and legislative systems as well.[207]

VI. Towards a *Fatwa*: Main Elements of *Fiqh* of Minorities' Methodology

From the previous discussions, different scholars view the issues of interest-based mortgage and *Islâm al-zawja* from a variety of perspectives. They provide different, and sometimes conflicting, solutions and legal opinions. At the same time, in the case of *Islâm al-zawja*, much hesitation on the part of scholars, especially those affiliated with the ECFR have been noticed. Such hesitation leads to a lack of consensus. There are two levels of disagreement that lead to such fragmentation. The first level has to do with the permissibility of the action in the first place–keeping the marriage contract or not, allowing interest-based mortgage or not. The second level relates to the reasons constituting the justification for the permissibility of such activity–whether *Darûra*, *Maslaha*, civilizational partnership or different system with different rules. However, in spite of all these differences such discrepancies, one can identify five main elements in the *Fiqh* of minorities' methodology that help respond to this particular question, regardless of the fact that Scholars might disagree on the way they combine or prioritize these elements.
In the case at hand, the first element starts by thoroughly studying the context of the matter in question and its prevailing dimension. So in terms of interest-based mortgage, *Fiqh* of minorities considers the advantages and the disadvantages of owning a house in a non-Muslim system. For instance, it counts economic advantage like the benefits of investment, which is not an option if they rent instead. There are also the non-economic advantages like the quality and the environment of the place, as well as the independence, the future security and the settlement that are not provided by the rent.[208] It is present in the ECFR and SSANA verdict, but it is more obvious, particularly in 'Alwânî's opinion. The same thing takes place with adopting the *I'mâr* perspective and the resulting deconstruction of the family.

[204] *Id*. at 203.
[205] *Id*. at 206.
[206] *Id*. at 114.
[207] *Id*.
[208] QARADÂWÎ, *supra* note 48, at 159-160.

Recalling 'Alwânî's concept of redefining the question–in the *Istiftâ'* process–the second element is to formulate an accurate question in a proper manner that expresses the reality of the Muslim community there, and more importantly, that reflects the higher objectives of Islamic *Sharî'a*. So in the case of *Islâm al-zawja* the question is whether a married woman converted before or without her husband, whether they both love and respect each other and they might have children. Separation in this case would be not just an obstacle to her conversion but rather a reason for the deconstruction of a family which is against the purposes of Islam.

Similarly, in the second case at hand the main sub-questions to the general question of mortgage in a non-Muslim community are:[209] first, whether this case fulfills the conditions of unlawful *Ribâ*; whether the contract between the individual and the bank is a pure interest-based contract or whether it lies under the heading of a deferred sales contract where by the property–or any other article–is replaced with money between the contractors–since the rules of *Ribâ* apply only on virtual money where you buy money and return it back for more of its original value? Second, whether this interest-based mortgage fulfills the Islamic objective of protecting Muslims money and property? Third, whether owning a property through this mean is a requirement for fulfilling the fundamental Islamic rule of Maslaha or general interest of Muslims? Are there other reasonable and realistic economic alternatives for the process of buying such property?

This very last question brings us to the third element regarding the existence of other *Sharî'a*-compliant alternatives like Islamic *Murâbaha*.[210] Such an alternative is not always available in non-Muslim countries; moreover, it does not resolve the issue of property ownership as initially one has to pay down payments of around 30% of the value of the property. Also Islamic banking does not have long-term financing for more than five years unlike the normal banks which might finance for up to 30 years.[211] Such a dilemma represents the flip coin of a fundamental objective of *Fiqh* of minorities which is the previously discussed *Darûra*. It is, however, viewed differently by Ramadan who looks at searching for alternatives as an obligation. He agrees with 'Alwânî that the long-term dependence on concepts like *Darûra* challenges the core of the permanent presence of the Muslim in the West.[212]

The fourth element, after other alternative cease to be available, is to search within the classic opinions of *Fiqh* itself for a foundation that allows and explains such activity, even if not aligned with scholarly consensus. For instance, *Sheikh* Mustafa al-Zarka was one of the first scholars who allowed interest-based mortgages in non-Muslim economic systems, given the appropriate conditions. He based his verdict on the logic of the *Hanafî madhhab*, which although not in accordance with the general scholarly consensus, is worth considering and responds better to the given needs and circumstances.[213] He, however, stressed that such verdict is not applicable in *Dâr al-islâm*.[214]

The opinion of Abû Hanîfa, founder of *Hanafî madhhab*, one of the four *maḏahib*–legal schools–of Sunni Islam, that if a Muslim is allowed peacefully in Dâr al-harb, then it is permissible for him to interact using their own economic system, even if forbidden generally in Dâr al-islâm like usury. Although Abû Hanîfa allowed the taking of usury from non-Muslims and not the other way around, based on the principle of *Maslaha*–to safeguard the Islamic higher objective of preserving the money of Muslims, this view has been revised by the modern scholars of *Fiqh*

[209] *Id*. at 160-161.

[210] A Contract, whereby the seller declares the profit he made on the good sold. In Islamic finance the term is used for sales contracts, whereby the bank is selling against deferred payment (*Bai' Muajjal*) and declared profit rate.

[211] QARADÂWÎ, *supra* note 48, at 158-159.

[212] 'Alwânî interview, supra note 46.

[213] QARADÂWÎ, *supra* note 48, at 165.

[214] *Id*.

of minorities, which brings us to the fifth element of the *Fiqh* of minorities' methodology.[215] Such element prevails better in the case of Islâm al-zawja. Qaradâwî, as elaborated, identified nine different opinions regarding the matter and eventually chose the one that responds best to the posed question, even if not the most popular choice among them.

In the fifth and final element, the jurist reorganizes the facts and implications of the issue to identify its objectives and how it relates to the Muslim minorities context. This takes place when there are no previous jurisprudential opinions–a brand new incident–or to support the case at hand and cover it with the *Fiqh* of minorities philosophy of integration. The *Hanafî madhhab's* rule, which allows taking *Ribâ* from non-Muslims only and prohibits giving it, was based on the higher *Sharî'a* objective of preserving the money of the Muslims. *Fiqh* of minorities develops this idea and takes it a step forward–applying *Fiqh* of minorities *Ijtihâd* and main principles. Hence, in buying an essential property, taking the loan and paying the mortgage fulfills the objective of preserving the money of Muslims even more than taking it–taking into consideration the advantages mentioned in the first element. So based on the *Sharî'a* principle that matters are to be determined by their objectives, mortgage is a better use of Muslim money than rent.[216]

Recognizing the context from which the scholar come–Western, non-Western, hybrid and so forth–one can highlight certain strains of thought when looking to an issue facing Muslim minorities. These trends can be categorized into four main approaches or categories of scholars. The first category is the "literalist or traditionalist scholars" who are mostly local scholars and cannot be considered *Fiqh* of minorities' scholars. They look at the presence of Muslim minorities in the West as an unsatisfactory exception where surviving the foreign system reflects a divine test. Thus, no compromises, adaptations or reinterpretation may be considered. Such thought leans towards the isolation of Muslims. A significant number of its promoters are from Muslim-majority countries and have not been exposed to Western or non-Muslim communities' experiences.

The second category includes the "international institution scholars", like the ECFR, who are mostly international scholars, most of whom are from Muslim-majority countries either entirely or originally. Those scholars share a concern with the issues facing Muslim minorities. They understand the importance of Muslim presence in the West, and are avoiding challenging the fundamental sources and premises of traditional *Fiqh.* Instead, they adopt a method of reinterpretation and specialized *Ijtihâd* based on these fundamentals. They promote the importance of integration; however, many of their premises and verdicts serve as a short-term and a temporary solution that does not necessarily respond to the essence of integration. Most of them, implicitly believe that the eventual normal place for Muslims to be is in an Islamic-ruled society. Thus, their approach is based on survival reflected in the concept of *Darûra* which implies dealing with an exceptional short-term situation.

The third category includes the "adaptational scholars", like 'Alwânî, who are also international scholars and mostly have a direct experience and involvement with the west. Their exposure to both, the issues facing Muslims and the Western system lead to adopt an approach that tries to justify and explain how Muslim minorities are not particularly different from the rest of their community. Rather the community itself entails different context, different rules and, consequently, different verdicts. Thus, their work is based on attempts to fit Muslims within the society. Their aim is integration that fulfills the purpose of empowering Muslims, preserving their identity as part of the *Umma* message. Thus for them integration is mostly a means to an end.

[215] *See*, Fatawa of al-Zarka, QARADÂWÎ, *supra* note 48.
[216] QARADÂWÎ, *supra* note 48, at 167.

The fourth and the last category are the "partnership scholars", like Ramadan, who were originally born in the West. They include intellectuals who are not necessarily legal theorists–*Fuqahâ'*–so are less interested on whether, for instance, mortgage is allowed or not. They view Muslims as Westerners, citizens and partners in the society, not minorities. They, hence, stress on the importance of bypassing short-term solutions to imposing convenient solutions based on the system of their society. They view integration and citizenship as "inevitable" ends in themselves–as well as a means for other purposes of the *Umma*. Their approach is based on the desire to make one's own society fit him or her and not the other way around.

The two case studies examined in this paper raise some important issues. One is whether it is time for scholars coming from Muslim majorities to leave the floor to "Western-Muslim" scholars who have clear and direct exposure and comprehension of the Western society. This raises a question regarding the nature of impact such change would make on the end result of *Ijtihâd* when it comes to Muslim minorities jurisprudential issues. The second question is whether *Fiqh* of minorities is still a project that lacks coherence and consistency among scholars and needs to be developed and institutionalized on wider scales and in a manner that pushes the boundaries of *Ijtihâd*. For instance, although Qaradâwî reaches a "creative *Ijtihâd*" opinion he still feels the need to "justify" it with evidence from traditional *Fiqh.* This is understandable in this case, where evidence was available in the first place. However, concerns arise when no clear evidence in the tradition is found and hence an *Ijtihâd* that utterly depends on the texts and the objectives that are drawn from it is needed. The third and final question is whether *Fiqh* of minorities has to develop tools and discourses to address the receiving communities of the West themselves. For in dilemmas like the discrepancy between the Islamic legal system and the Western legal systems, in areas like perception to gender inequality for instance, scholars must search for common rationale and understandable explanations that deliver the message of cultural relativity and are valid.

VII. Conclusion:

Fiqh of minority scholars articulate the importance of the Islamic presence in non-Muslim societies in a unique way. Their objective is to help those who are searching for a healthy middle ground between being a dedicated Muslim and a loyal citizen. That is to say that, Muslim scholars advocating for *Fiqh* of minorities, are also, intentionally or unintentionally, advocating for the universality of the religious, cultural and developmental message of Islam, as well as promoting the notions of citizenship and positive integration. Thus, the real question *Fiqh* of minorities advocates are concerned with is not whether Muslim minorities should integrate or not. Rather, it is *how* they should integrate and what the necessary conditions required are for a positive integration that is beneficial for both the Muslim and his community. In other words, this *Fiqh,* while attempting to accomplish the mission of integration and preserving the Muslim identity, treats the Muslim not only as a Muslim with religious ritualistic obligations, but also as a member of a society and, more importantly, as a law abiding citizen in a modern society with rights and obligations. Such a context would turn integration from a mere means to an end in itself especially that *Fiqh* of minorities is "theoretically" designed to theorize for a permanent presence and the creation of a genuine "Western Muslim".

As we have noticed, different Muslim scholars view the nature and the function of *Fiqh* of minorities from different perspectives. One can note that the scholars' different backgrounds–Western/non-Western–impact their perceptions of the role of a Muslim in the West. On one side, scholars like 'Alwânî and Ramadan–adaptational and partnership scholars, who either lived their entire life or most of it in these Western societies, highly appreciate the intrinsic value of citizenship. For instance Ramadan rejects the notion "minorities" and insists on

Western Muslims or citizens. On the other side, Qaradâwî, Najjâr and Bin Bayya–international institutions scholars–view integration as a mere tool for other purposes, whether intentionally or unintentionally. Bin Bayya, does not even consider the concept of citizenship and still justifies *Fiqh* of minorities as a tool to respond to crucial–day to day–issues of Muslim minorities. Najjâr focuses on the concept of *Da'wa* and being a role model for the ultimate purpose of propagating the religious and civilizational message of Islam. Qaradâwî, though calls for a permanent presence, implicitly believing that the eventual and the normal place for Muslims to be is where the Muslim majorities are. He, thus, still perceives Muslim minorities' issues in terms of temporality–which is reflected in him using *Darûra* and similar concepts as a basis for a verdict.[217]

Such variation of backgrounds, and consequently perspectives, has several implications. First, the nature of the solution offered within the framework of *Fiqh* of minorities: long-term solutions which reflect permanent presence perception, versus short-term solutions which reflect a temporary presence perception. Second, the identity and role of Muslim minorities–promoting a "Western Muslims" identity; versus preserving the Muslim minorities' identity occasionally residing in the West. On one side, the study has shown that *more* Western scholars tend to skew towards long term jurisprudential solutions as they believe in theorizing for a "permanent presence" of "Western Muslims". On the other hand *less* Western scholars still theorize short-term solutions for Muslim minorities, temporarily residing in a non-Muslim society. Third, the latter–Western/non-Western dichotomy–is directly proportional to the nature of the relationship between *Ijtihâd* and tradition, in other words, abiding directly or indirectly to classic scholars' jurisprudence. For example, one can notice the obvious gender inequality that highlights the methodology and *Ijtihâd* in case like Islâm al-zawja for instance. Qaradâwî contends that it is difficult for Muslim scholars to recognize legal opinions similar to *Islâm al-zawja* because it is contrary to what they have been used to and have inherited from the "traditional jurisprudential culture". He, thus, encourages seeking "new" solutions while taking the latter into consideration to overcome the effects of this cultural influence. Ramadan also addresses this point by pointing out that specialists in *Usûl al-Fiqh*–foundations of laws and jurisprudence–are themselves "immersed in a cultural milieu and a society that influence the way they proceed . . . [which] shapes their mind and their way of looking at the Qur'ân and the world."[218]

Hence, one can say that *Fiqh* of minorities has, to a large extent but not entirely, succeeded in providing a new original *Ijtihâd*. At one level, one can trace innovation and *Ijtihâd* in encouraging women to convert through not putting them in an either-or situation, encouraging them to strive for their husbands' conversion, and while considering the essentiality of both sexual and emotional relationships on the one side and preserving the unity of the family on the other. However, on another level, when it comes to the receiving community and its legal system, in which Muslim minorities are living and interacting, *Fiqh* of minorities pays less attention to this community's dynamics and value system. For example, there is obvious gender inequality, from the Western value system perspective, that highlights the methodology and *Ijtihâd* whether of traditional *Fiqh* or even *Fiqh* of minorities. This idea of the discrepancies between Western and Islamic culture and value systems makes us go back to Qaradâwî and Ramadan's remarks on the still-persistent predicament of challenging the "inherited jurisprudential culture."

[217] Half of the members of the ECFR are from the European continent and half are from the Arabian Peninsula, Northern Africa or Northern America. This is a breach of the internal rules of the ECFR, as members not residing in Europe "must not constitute more than 25% of the total members of the Council at any one time." ECFR CONSTITUTION, § 8 –5–, *available at*: http://www.euro-muslim.com/En_u_Foundation_Details.aspx?News_ID=343 (*Last visited Feb. 11, 2012).*

[218] RAMADAN, *supra* note 140, at 140.

The findings of this paper leave us with several thoughts. First, despite the discrepancies among scholars–which turn *Fiqh* of minorities into a means/tool or an end–it is, at the end of the day, a mere medium to the central notions forming integration, which are the attitudes, impressions and collective consciousness towards this integration that are either reflected or influenced by this medium. Without them, no integration is possible. Second, while *Fiqh* of minorities is designed to respond, in the general sense, to Muslim minorities' attitudes towards integration, it hardly has any impact on the attitudes towards them from the receiving society. Finally, one is to wonder whether the amount of success of such *Fiqh*, in practice, is yet to be determined by the amount of Muslims welcoming the concept of this *Fiqh.* That is to say that, whether, in reality, the increase of Muslim minorities' awareness and adoption of such methodology/perspective of *Fiqh* will have an eventual impact on the tendency towards a positive integration or not.

At the end of the day, *Fiqh* of minorities' desired impact on Muslim minorities' integration in their non-Muslim societies will only be effective when the attention shifts from developing a Western *Fiqh* for Muslim minorities to developing Western Muslim scholars who will be more capable of developing tools and discourses to address the Western culture and value system in a way that fulfills the essence of the role of *Fiqh* of minorities especially when it comes to integration and the role of the *Umma*.

Marriage Age in Islamic and Contemporary Muslim Family Laws
A Comparative Survey

by Andrea Büchler[*] and Christina Schlatter[*]

Abstract

Throughout the world, marriage arguably is one of the most important social and legal institutions. The socially and legally recognised bond between a man and a woman lies at the heart of most families. However, there is no globally uniform understanding of marriage. Its meaning is inseparably linked to culture, religion and social class. The purpose of this essay is limited to providing a comparative perspective on the situation in five different Arab and Islamic countries. The main focus is on the minimum age for marriage. Child marriages are a major concern of both human rights organisations and international treaties. There is a strong link between marriageable age and the overall status of women in society: the earlier a woman marries, the more the time for her education, employment and personal development is constrained.[1]

In many countries, various attempts have been made to ban marriages between minors. In Arab and Islamic countries, difficulties in this area also arise from tensions between traditional interpretations of religious sources on the one hand, and international treaty commitments on the other.

The first section of this paper introduces the classical Islamic law position on marriageability. The second part provides a brief outline of the international framework with regard to the age at which marriage is permitted. The third and central part is dedicated to an analysis of legal developments in five different Islamic countries - Morocco, Egypt, Saudi Arabia, Iran and Afghanistan – as well as a consideration of the political, historical and social framework of marriage in those countries and the current legal situations which apply there. The fourth and final part of the paper recapitulates the results of this analysis and presents the conclusions drawn from it.

I. Part One: Classical Islamic law on marriageability

1. Sharia and the schools of law

Classical Islamic law comprises a system of rules whose development had been more or less completed by the end of the ninth century. It represents a particular interpretation of the religious sources on which it is based. It is not codified, but is set out in a number of substantial private works promulgated by renowned Islamic jurists and scholars who saw it as their task not to develop a new set of laws, but rather to lend formal substance to a set of laws which

[*] Prof. Dr. iur., Chair of Private and Comparative Law, University of Zurich, Faculty of Law.
[*] lic. iur., University of Zurich, Faculty of Law.

[1] The most influencial factor reducing child marriages seems to be education, cf. the statistics and analyses by UNICEF, Early Marriage: A Harmful Traditional Practice. A Statistical Exploration, passim (2005). Marriages are often postponed until education is finished. On the other hand the educational level also influences the perception of the ideal marriage age, see for instance E. FAWZY, Muslim Personal Status Law in Egypt: The Current Situation and Possibilities of Reform Through Internal Initiatives, in L. Welchman (Ed.), Women's Rights and Islamic Family Law. Perspectives on Reform, 17-94, at 47 (2004) (Egypt). For more general information cf. T. B. HEATON, Socioeconomic and Familial Status of Women Associated With Age at First Marriage in Three Islamic Societies, Vol. 27 No. 1 Journal of Comparative Family Studies 41-58, at 41 et seq. (1996).

were already given and which would endure forever. Islamic law is thus not a national law, but rather a source and a point of reference for a legal order. Hence one has to distinguish the legal codifications of individual countries, such as Egypt, Iran or Afghanistan from classical Islamic law. The relationship between these national legal orders and the sharia varies, as does the Islamic imprint of the laws of these individual states. Islamic law and Islamic legal concepts and perceptions thus refer to transnational phenomena which are linked to the past.

According to classical doctrine, Islamic law is essentially based on four sources, which are ranked as follows: first the Quran and the Sunna (the way, the sayings and the manners of the Prophet) – the two primary sources of Islamic law – then *ijma* (the consensus of legal scholars) and *qiyas* (interpretation through analogy) – the two secondary sources.[2] The Quran is the supreme source of law and is considered an imperative. It consists of 114 *suras* and more than 6,000 verses. Of this total of over 6,000 verses, however, only relatively few – the figure is variously given as anything from 50 to 800 – deal with questions of law.[3] Numerous methods and principles, the *usul al-fiqh*,[4] serve to derive legal rules from the religious sources and to guide the exercise of *ijtihad*,[5] the independent and personal reasoning and interpretation of those sources. The result is a highly elaborated and well-defined, yet at the same time flexible and adaptable, system of jurisprudence, the *fiqh*. The various schools of legal thought also have their own individual methods for interpreting source texts and take differing views on specific legal matters. There are four main schools of legal thought in Sunni Islam: the Hanafi school, the Maliki school, the Shafi'i school and the Hanbali school. The names of the schools refer to the names of the leading legal scholars Abu Hanifa, Malik ibn Anas, Muhammad ibn Idris al-Shafi'i and Ahmad ibn Hanbal.[6] The four schools are regarded as equivalent and believers are free to choose among them. Countries of the Islamic world usually adhere to a specific school, the choice being an expression of the different geographical roots and extensions of the schools: the Hanafi school, which is the largest of the Sunni schools,[7] prevails in Egypt, Lebanon, Syria, Jordan, Afghanistan and Pakistan as well as in Turkey and several Asian countries. The Maliki school predominates in North Africa as well as Kuwait, Bahrain and the United Arab Emirates, whereas the Shafi'i school is preponderant in the countries of Eastern Africa and South East Asia. The Hanbali school of law, which is the smallest and most conservative of the Sunni schools, prevails in Saudi Arabia and Qatar.[8] In addition to the four Sunni schools of law there are also Shia schools of legal thought. Shia is a separate sect of Islam which diverged from the Sunni branch in a succession controversy which arose following the death of the Prophet in 632.[9] The most influential and largest school of Shia Islam is the Jafari school named after the

[2] Cf. M. H. KAMALI, Principles of Islamic Jurisprudence, 3rd Edition 16, 228 (2003); K. S. VIKØR, Between God and the Sultan 3 (2005).

[3] Cf. KAMALI, supra note 2 at 25; A. SAEED, Interpreting the Qur'ān: Towards a Contemporary Approach 16 (2006). The legal section deals with the issues of marriage, divorce, alimony, child custody, paternity, inheritance law, law on the sale of goods, rent, murder, space, military law and the laws of evidence. They constitute the basis of what is called Islamic law.

[4] See KAMALI, supra note 2 at 117.

[5] See KAMALI, supra note 2 at 469.

[6] Cf. W. B. HALLAQ, Authority, Continuity, and Change in Islamic Law 150 (2005); VIKØR, supra note 2 at 89.

[7] Cf. A. SAEED, The Qur'an: An Introduction 17 (2008).

[8] Cf. SAEED, supra note 7 at 17.

[9] The point of contention was the question of whether the Prophet's successor ought to be chosen solely according to his qualifications, as was deemed appropriate by the Sunni view, or whether potential candidates with no blood ties to the Prophet ought to be debarred from succeeding him, as required by the Shia opinion. After the Sunni choice eventually fell on Abu Bakr Abdallah ibn Abi Quhafa al-Siddiq, the Prophet's former father-in-law, the Shia ultimately opted to secede, cf. M. A. SHOMALI, Shi'i Islam. Origins, Faith and Practices, 14 et seq. (2003).

Islamic scholar and imam Ja'far ibn Muhammad al-Sadiq.[10] Besides the Jafari school, there are numerous smaller schools of law in Shia Islam. In Kuwait, Saudi Arabia, Afghanistan, Pakistan and Oman followers of the Jafari school constitute significant minorities, while in Bahrain, Lebanon and Iraq they form the majority of the Muslim population.[11] In Iran, Shia Islam as specified by the Jafari school is the declared state religion. The Shia view not only differs from Sunni Islam with regard to the succession of the Prophet but also in respect of matters of methodology.[12]

The core of sharia law is family law. Family law is at the heart of Islamic law because, within the sharia, it is the branch of the law with the greatest density of regulation emanating from the highest-ranking sources. The reason it has maintained its relevance until the present day is that it is the part of sharia law which was successfully protected against encroachment by European codes during the colonial era and has also remained untouched by the various degrees of secularisation which have occurred in Arab and Islamic countries. While the nineteenth century saw large swathes of Islamic law being eradicated and replaced by codifications on the continental European model, most countries with a predominantly Islamic population have maintained sharia-based family law to this day.[13]

Thus, for many Muslim men and women, family law has become a symbol of collective identity, and adherence to it an absolute and inviolable core of belonging to the Muslim religious community.[14] While, in countries of the Islamic world themselves, family law is an instrument of patriarchal, conservative power and policy, it is also an indispensable source of protection and order for family units both large and small. The way in which religious pronouncements have been codified, however, varies significantly from country to country. Comparative analysis of family-law provisions based on Islamic principles reveals not only the diversity and dynamism of Islamic legal tradition, but also the flexibility and interpretative openness of Islamic legal rules. Given the sheer size of the territory under Islamic influence, the number of individual historical, social, economic and political factors which have shaped the various legal systems is vast and the range of provisions is correspondingly wide.[15]

2. Classical Islamic family law on marriageability

Marriage, *nikah*, in Islam is a highly religious covenant. However, it is not religious in the sense of constituting a sacrament, but rather in the sense of realising the essence of Islam. It is a civil contract legitimising sexual relations and procreation.[16] According to the Quran, everyone who is physically, mentally and financially capable of so doing has the obligation of entering into a marriage.[17] The contract is concluded by mutual consent, with the offer of marriage and its

[10] In Islam the imam is a spiritual leader. The followers of the Jafari school recognise twelve imams, which is why they are also referred to as Twelver Shiites. Ja'far ibn Muhammad al-Sadiq was the sixth of the twelve imams.

[11] Cf. also I. ABDAL-HAQQ, Islamic Law: An Overview of Its Origin and Elements, in H. M. Ramadan (Ed.) Understanding Islamic Law 1-42, 29 (2006).

[12] By way of example, Shia do not recognise *ijma* as a source of law, cf. SHOMALI, supra note 9 at 69.

[13] Cf. N. J. COULSON, A History of Islamic Law, 149 (1964).

[14] Cf. S. POULTER, The Claim to a Separate Islamic System of Personal Status Law for British Muslims, in C. Mallat & J. Connors (Eds.), Islamic Family Law 147-166, at 147 (1990).

[15] Cf. A. A. AN-NA'IM, Islamic Family Law in a Changing World: A Global Resource Book 16, passim (2002); L. WELCHMAN, Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy, passim (2007); J. J. NASIR, The Islamic Law of Personal Status, 3rd Edition 34 (2009).

[16] See J. L. ESPOSITO & N. J. DELONG-BAS (Eds.), Women in Muslim Family Law, 2nd Edition 15 (2001). See also Z. MIR-HOSSEINI, Marriage on Trial. A Study of Islamic Family Law, 2nd Edition 31 (2000).

[17] Cf. sura 24, verses 32 and 33.

acceptance being expressed by the two future spouses or their proxies[18].[19] The state plays no role in these proceedings, its non-involvement being most evident in the fact that registration of the marriage is not a prerequisite for the validity of the marriage contract.[20] According to the Sunni schools of law, the presence of two male witnesses is necessary.[21]

A marriage contract is valid only if both spouses possess full legal capacity. Legal capacity is defined as being both of age and of sound mind.[22] Marriageable age according to classical Islamic law coincides with the occurrence of puberty. The notion of puberty refers to signs of physical maturity such as the emission of semen or the onset of menstruation. In the absence of such signs, the Hanafi school assumes that puberty will occur no later than at eighteen years for males and seventeen years for females.[23] At these ages the spouses are deemed to have attained full legal capacity to enter a marriage and are no longer considered minors in this regard. While marriageable age is not the same as the age of legal majority in civil law, the two age limits may nevertheless correspond.[24] In contrast to the Hanafi opinion, both the Shafi'i and the Hanbali school set the age of the legal capacity to marry at fifteen years for both sexes, while the Maliki school draws the line at seventeen years.[25] According to the Jafari school, fifteen years for boys and nine years for girls is considered as the age of majority.[26] According to the Hanafi school there is a presumption that girls do not reach puberty until the age of nine and boys not until the age of twelve.[27] In Islamic teaching, girls cannot therefore be deemed to have reached puberty any early than nine, while for boys the minimum age is twelve.

Having reached full legal capacity, the spouses are also required to consent freely to the marriage.[28] However, in Maliki, Shafi'i and Hanbali teaching, a woman cannot conclude a marriage contract on her own and is required – despite her legal capacity – to obtain the consent of her guardian, or *wali*.[29] In contrast, both the Hanafi school and the Shia doctrine allow the woman

[18] One must differentiate between the conclusion of the contract by proxy, where the future spouses are of full legal capacity and authorise a proxy in order to conclude the contract for them, and guardianship in marriage. Guardianship in marriage takes place because the ward does not have the legal capacity to decide on the marriage and the power of decision is therefore conferred to the guardian (*wali*), usually the father of the spouse. For a general survey of guardianship see Nasir, supra note 15 at 186 et seq., for more details about guardianship in marriage see J. J. NASIR, The Status of Women Under Islamic Law and Modern Islamic Legislation, 3rd Edition 49 et seq. (2009); NASIR, supra note 15 at 52 et seq. See also R. SHAHAM, Family and the Courts in Modern Egypt. A Study Based on Decisions by the Shari'a Courts, 1900 – 1955, at 43 (1997).

[19] See NASIR, supra note 15 at 48. For more detailed information see K. ALI, Marriage in Classical Islamic Jurisprudence: A Survey of Doctrines, in A. Quraishi & F. E. Vogel (Eds.), The Islamic Marriage Contract. Case Studies in Islamic Family Law 11-45, at 13 et seq. (2008). See also D. S. EL ALAMI, The Marriage Contract in Islamic Law in the Shari'ah and Personal Status Laws of Egypt and Morocco 20 et seq. (1992).

[20] See A. BÜCHLER, Das Islamische Familienrecht: Eine Annäherung unter besonderer Berücksichtigung des Verhältnisses des klassischen Islamischen Rechts zum geltenden Ägyptischen Familienrecht 26 et seq. (2003).

[21] The presence of one male and two female witnesses is considered sufficient as well. By contrast, the presence of witnesses is not necessary according to Shia Islam. See ALI, supra note 19 at 17.

[22] Legal capacity means being of age and of sound mind, see EL ALAMI, supra note 19 at 49.

[23] Cf. L. BAKHTIAR, Encyclopedia of Islamic Law. A Compendium of the Major Schools, 403 (1996).

[24] Cf. WELCHMAN, supra note 15 at 63.

[25] Cf. BAKHTIAR, supra note 23 at 403; M. ZAHRAA, The Legal Capacity of Women in Islamic Law, Vol. 11 No. 3 Arab Law Quarterly 245-263, at 250, footnote 37 (1996).

[26] Cf. BAKHTIAR, supra note 23 at 403.

[27] Cf. A. A. KHAN & T. M. KHAN (Eds.), Encyclopaedia of Islamic Law, Vol. 3, 48 (2007); BAKHTIAR, supra note 2323 at 403.

[28] See A. A. KHAN & T. M. KHAN (Eds.), Encyclopaedia of Islamic Law, Vol. 6, 22 (2007).

[29] Cf. KHAN & KHAN, supra note 28 at 22, 28; E. Y. KRIVENKO, Women, Islam and International Law. Within the Context of the Convention on the Elimination of all Forms of Discrimination against Women, 60 (2009). The main reason given for the necessity of the guardian's contribution is the need to protect the woman, cf. D. S. EL ALAMI, Legal Capacity with Specific Reference to the Marriage Contract, Vol. 6 No. 2 Arab Law Quarterly 190-204, at 193 (1991). However, most Islamic jurists agree that the guardian has the obligation to secure the approval of the bride, see BÜCHLER, supra note 20 at 28.

to act on her own behalf, without an intermediary.[30] Despite this, it is a commonly observed traditional custom for an adult woman to authorise her guardian to settle the contract details in her stead.[31]

Notwithstanding the precondition of mutual consent, all schools recognise the power of a guardian to marry off his ward before she reaches puberty, and it is not uncommon for this in fact to occur shortly after the female child is born.[32] In this case, the consummation of the marriage must be postponed until puberty.[33] The so-called 'option of puberty' offers the minor the possibility of objecting to the marriage upon attaining puberty, for as long as the marriage has not yet been consummated.[34] However, classical opinions agree that this right of objection can be excercised only through a court and that it is applicable only to marriages concluded by a person other than the father or grandfather of the minor.[35]

The issue of child marriage is one on which there is considerable controversy within Islamic teaching. Scholars argue that the core element of the Islamic marriage contract is the consent of both spouses.[36] Thus, a child marriage arranged by the guardians violates the sharia - either because the will of the future spouses is not sufficiently respected or because a minor does not have the mental maturity effectively to consent to marriage. One argument that is often put forward in support of the practice of child marriage is the marriage of the Prophet Muhammad to Aisha, who was only been seven years old when the marriage took place.[37]

3. Modernisation and codification

The main challenges to the classical Islamic position on marriageable age have stemmed from processes of modernisation and codification. Generally speaking, Islamic family-law structures are largely self-regulating, informal in nature, situation-specific and essentially flexible. More importantly, Islamic law is inherently suited to reform. Many efforts are being undertaken to re-read classical Islamic law and to liberate it from rigidities. There is a growing global movement of scholars who are re-reading the fundamental and canonical Islamic texts with a view to finding a perspective which does not essentialise Islamic law or subject it to a generalising construction. This is an initiative which is redynamising Islamic thought.

While independent interpretation of religious sources was something early Islamic scholars took for granted, over time the practice became increasingly restricted. No later than the tenth

[30] See KHAN & KHAN, supra note 28 at 22, 28; NASIR, supra note 15 at 52 et seq. (2009); EL ALAMI, supra note 29 at 193; ZAHRAA, supra note 25 at 257.

[31] With regard to the person of the guardian the schools hold different views. Most give precedence to the father of the bride, namely the Maliki, Shafi'i, Hanbali and the Jafari school, while, according to the Hanafi school, the son of the bride has priority. The schools differ when it comes to the order of priority in the absence of a father or a son respectively, but the majority of them recognises the judge as the ultimate guardian if there is no other possible guardian, see BAKHTIAR, supra note 23 at 425 et seq.

[32] See COULSON, supra note 13 at 178; ZAHRAA, supra note 25 at 259; D. PEARL & W. MENSKI, Muslim Family Law, 3rd Edition 154 (1998).

[33] See ZAHRAA, supra note 25 at 259, footnote 99; BÜCHLER, supra note 20 at 27.

[34] See ZAHRAA, supra note 25 at 259; PEARL & MENSKI, supra note 32 at 143; F. RAHMAN, A Survey of Modernization of Muslim Family Law, Vol. 11 No. 4 International Journal of Middle East Studies 451-465, at 455 (1980) and BÜCHLER, supra note 20 at 29 et seq. If the ward is ignorant of the marriage the option of puberty is lost only if not exercised upon the discovery of the marriage. In contrast, being ignorant of the option of puberty itself does not conserve the right to object, cf. K. HODKINSON, Muslim Family Law: A Sourcebook, 231 (1984).

[35] Cf. NASIR, supra note 18 at 29; H. M. KAMALI, Law in Afghanistan. A Study of the Constitution, Matrimonial Law and the Judiciary 107 (1985); HODKINSON, supra note 34 at 231; I. SCHNEIDER, Registration, Court System, and Procedure in Afghan Family Law, 12 Yearbook of Islamic & Middle Eastern Law 209-234, 222 (2005/2006).

[36] See NASIR, supra note 18 at 28 et seq.

[37] See EL ALAMI, supra note 19 at 51 and SHAHAM, supra note 18 at 53.

century, a broad consensus had become established to the effect that *ijtihad*, the 'gate to independent interpretation', had closed, that Islamic law had been comprehensively structured and interpreted and that its formulation had reached such a stage of completeness and finality that all future generations were bound by the views of their predecessors, who were alone in being authorised to engage in *ijtihad*. The creative legal enthusiasm of Islamic scholars of jurisprudence gradually dried up along with their hermeneutic freedom, with the result that Islamic law became a rigid, ossified and systematically self-contained set of norms on which external influences exerted little sway.[38]

Major changes in Islamic societies, partly due to the fact that Western ways of life and Western science were beginning to infiltrate the Islamic world, prompted new, reform-oriented hermeneutic interpretation of religious source texts. Efforts by Muslim intellectuals to bring about social, political and legal reform were particularly prevalent in the nineteenth century. Under the Ottoman Empire, many of these efforts were aimed at centralising and consolidating the state. Governments' new powers to regulate coalesced with the traditional Islamic legal system, which, until then, had been the sole source of law. Personal status law was the only area in which the dominance of classical Islamic law was left intact.[39] Other efforts were inspired by the state's need to adapt to new economic developments. The inability of the traditional Islamic rules to cope with the complex commercial relationships with European countries which had evolved during the last decades of the nineteenth century resulted in radical reforms, especially in commercial and procedural law.[40] Profound reforms were also associated with the process of colonialisation, which was itself inherently based on the premise that the regulatory power of government, and not the rules developed by Islamic jurists, is the main source of law.[41] Colonialisation not only led to the scope of traditional Islamic law being marginalised, but also meant that the more limited role enjoyed by Islamic law was further encroached upon by statutory regulation.[42]

In family law, the process of codification, as an arena for contesting different positions, is the main force driving reform. The first post-colonial national family-law codes were promulgated in the 1950s and the process of reform - with its patterns of consultation, reciprocal borrowings from jurisprudential arguments and advocacy for progress - continues to this day.[43] This process of codification has continued over the past three decades. It has been characterised, on the one hand, by substantive amendments being made to existing family-law codifications and, on the other hand, by the adoption of a series of newer codifications.[44] In a few countries, howev-

[38] Cf. SAEED, supra note 3 at 145; A. BÜCHLER, Hermeneutik und Recht in der Tradition des Islam, in M. Senn & B. Fritschi (Eds.), Rechtswissenschaft und Hermeneutik, Kongress der Schweizerischen Vereinigung für Rechts- und Sozialphilosophie, ARSP-Beiheft 117, 185-206, at 197 (2009).

[39] Cf. L. ABU-ODEH, Modernizing Muslim Family Law: The Case of Egypt, 37 Vanderbilt Journal of Transnational Law 1043-1146, 1079 (2004).

[40] Cf. ABU-ODEH, supra note 39 at 1084.

[41] Cf. ABU-ODEH, supra note 39 at 1088 et seq.

[42] Cf. ABU-ODEH, supra note 39 at 1088 et seq. The process of codification of Islamic family law began in the Middle East with the Ottoman Law of Family Rights of 1917. In the 1920s and 1940s Egypt enacted some laws concerning family-law matters without issuing an overall code.

[43] See WELCHMAN, supra note 15 at 33. Such codifications emerged, for example, in Jordan (Law No. 92 of 1951 of Family Rights), Syria (Law No. 95 of 1953 of Personal Status), Tunisia (Order No. 13 of 1956 on the Promulgation of the Code on Personal Status), Morocco (Ordinance No. 1-57-343 of 1957 implementing books I and II of the Law of Personal Status) and Iraq (Law No. 188 of 1959 of Personal Status).

[44] New codifications came into force for instance in Qatar (Amiri Decree No. 22 of 2006 regarding the Law of the Family) and the United Arab Emirates (Federal Law No. 28 of 2005 on Personal Status). Important revisions took place in Egypt (Law No. 1 of 2000 regulating certain litigation procedures in personal status), Jordan (Temporary Law No. 82 of 2001 amending the Law of Personal Status) and Morocco (Law No. 70-03 of 2004 on the Family Code).

er, most notably Saudi Arabia, sharia was declared the relevant source of state law and statutory legislation was restricted to administrative matters.

Although no two codes are the same, since legislation is subject to political contingencies reflecting national and international dynamics, the family-law reforms undertaken in many Islamic and Arab countries are nevertheless testimony to processes of modernisation. Polygamy, for example, has been made contingent on certain conditions being met, divorce by repudiation has been made harder, women's rights to petition for divorce have been strengthened, registration requirements for marriage and divorce have been introduced, post-divorce maintenance under certain circumstances has been introduced, the parental custody rights of the mother have been extended and the marriageable age has been raised.[45] Pleas for systematic further progress along this route are regularly heard.

Today's modern Islamic legal scholars are adopting a variety of methodological approaches in order to circumvent the narrow restrictions placed on their work by classical Islamic scholarly tradition and the literal adherence to source texts which its exegesis demands. Reference to the history of Islam and the historicisation of certain sharia legal concepts is being used as a basis for interpretative initiatives, not in the sense that Islam should be abandoned as a point of reference, but rather that inspiration should again be drawn from its core and that the law should be moved closer to its original intent of achieving justice.[46] One view put forward in this context is that the density of family-law texts in the Quran demonstrates its efforts to grant women a stronger position than that which they had in pre-Islamic times: 'The principal sources of the sharia and Islamic family laws, the Quran and Sunna, represent progressive values – the legal regulations that are extrapolated from both these sources advocate, in particular, welfare of women and children'[47] It is indeed paradoxical that, at the time of Islamic revelation, the very verses and regulations which are currently at the centre of criticism and contestation in fact heralded a revolution. From a historical perspective, religious Islamic sources should be viewed against the background of pre-Islamic times, which Muslims call the *jahiliya* or 'time of ignorance'. One of the essential objectives of Islam's message was to bring about a significant improvement in the status of women and to establish the family as the core constituent unit in society. It was this which ushered in the transformation from a tribal culture to a family-based structure, in the course of which protecting the members of a family became the paramount imperative. For the first time, women were accorded legal personality and legal rights, and ceased to be treated as chattels. Specific rights granted to them included that of owning and having charge over property. Women were also granted inheritance rights. The bride's consent became a prerequisite for marriage. Islam forbade the killing of newborn baby girls, a practice which had been widespread in pre-Islamic times. Polygamy was restricted. Some restrictions were also placed on the divorce rights which husbands had enjoyed in pre-Islamic times and wives were also granted certain separation rights of their own. Dowers were to be paid to the wife and no longer to her tribe. Finally, women were granted the same status as religious be-

[45] See M. ROHE, Das Islamische Recht. Geschichte und Gegenwart 209, 214, 226 (2009); for a comparative review encompassing several countries, see WELCHMAN, supra note 15, passim; ESPOSITO & DELONG-BAS, supra note 16 at 47. Important material on this can also be found in AN-NA'IM, supra note 15 at 26, 40, 67, 93, 153, 191, 204, 247, 284.

[46] For a groundbreaking contribution to this debate, see for example AN-NA'IM, Human Rights in Cross-Cultural Perspectives. A Quest for Consensus (1992); N. ABU ZAYD, Reformation of Islamic Thought. A Critical Historical Analysis (2006); A. WADUD, Qur'an and Woman. Rereading the Sacred Text from a Woman's Perspective (1999). Regarding various modern hermeneutic interpretations, cf. BÜCHLER, supra note 38 at 200.

[47] J. REHMAN, The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq, 21 International Journal of Law, Policy and the Family 108-127, 113 (2007). Cf. also COULSON, supra note 13 at 14.

lievers as men.[48] Admittedly, the reforms ushered in by Islam served less to turn existing social order on its head than to place as many restrictions on the customary laws which had prevailed in pre-Islamic times as the society of the day was prepared to accept and understand. The degree of detail in which certain verses of Islamic family law are formulated is largely a reflection of the efforts being made at that time to provide women with effective protection. However, it is precisely this density of regulation which is proving a constant hindrance to the ongoing development of family law towards greater gender equality – unless, of course, the Quran is read in its historic context, based on its spirit of introducing a gradual and progressive change to the status of women in the context of the transition from a tribal to an Islamic society, as its ideals anticipated. Many Islamic legal scholars emphasise that the basic ethical norm of the Quran is equality between the sexes.[49]

II. Part Two: International framework

While child marriage is widespread in the Arab and Islamic world it is also commonly encountered elsewhere as well.[50] Marriages involving very young spouses are frequently concluded in the light of financial, property or relationship considerations and in order to secure not only the child's but also the family's interests.[51] They are often more rooted in local customary traditions than in classical Islamic law, especially in rural areas.[52] Since extra-marital relationships are strictly forbidden in Islam, marriage relieves the father of a girl of his duty to protect her chastity and thus the honour of the family.[53] Child marriages are also commonly seen as a means of elongating marital life and thus enhancing procreation.[54]

However, there is a growing international consensus that child marriages need to be eradicated, and this consensus finds expression in international law.[55] Child marriages deprive children, and especially girls, of the opportunity to gain a proper education and thus make it impossible for them to pursue a professional career.[56] They are not allowed to experience real childhood and adolescence, but are expected to take over familial responsibility at a very early age.[57] From a medical point of view, there are also major concerns about girls getting married when they are still very young. First, the risks of complications during pregnancy and child-

[48] Quran, sura 33, verse 35.

[49] Cf. the numerous detailed references in S. S. ALI, Gender and Human Rights in Islam and International Law. Equal before Allah, Unequal Before Man? 50 (2000).

[50] According to the latest available demographic surveys, more than 51 million girls between the ages of 15 and 19 are currently married worldwide. However, there is also a high estimated number of unknown cases as the underlying statistics do not contain any information on girls younger than 15 years, see Human Rights Watch, „How Come You Allow Little Girls to Get Married?", Child Marriage in Yemen, 2011, 15, available at: http://www.hrw.org/reports/2011/12/07/how-come-you-allow-little-girls-get-married [16 November 2012].

[51] See I. SCHNEIDER, supra note 35 at 224 et seq.; SHAHAM, supra note 18 at 45; BÜCHLER, supra note 20 at 30. See also UNICEF Innocenti Research Centre, Early Marriage. Child Spouses, 7 Innocenti Digest 1, at 6 (2001), available at: www.unicef-irc.org/publications/pdf/digest7e.pdf [16 November 2012]; Human Rights Watch, supra note 50 at 16.

[52] Cf. KAMALI, supra note 35 at 109; Human Rights Watch, supra note 50 at 15 et seq.

[53] See EL ALAMI, supra note 19 at 51; PEARL & MENSKI, supra note 32 at 153. See also ESPOSITO & DELONG-BAS, supra note 16 at 14 and UNICEF Innocenti Research Centre, supra note 51 at 6.

[54] See UNICEF Innocenti Research Centre, supra note 51 at 2.

[55] However, the practice has not fully disappeared yet, see UNICEF Innocenti Research Centre, supra note 51 at 5.

[56] See Y. ERTÜRK, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences of 23 June 2009, A/HRC/11/6/Add.6 at 46, available at: www2.ohchr.org/english/issues/women/rapporteur/docs/A.HRC.11.6.Add.6.pdf [16 November 2012]; UNICEF Innocenti Research Centre, supra note 51 at 11.

[57] Cf. Human Rights Watch, supra note 50 at 16.

birth are much higher when physical maturity has not yet fully developed.[58] Second, most adolescents are not familiar with methods of contraception or protection against sexually transmitted diseases.[59] Third and most importantly, children can be severely traumatised by early sexual experiences, particularly when these are unwanted. Beyond this, it is a proven fact that minor girls tend to fall victim to domestic violence far more often than grown-up women.[60]

Given the importance and sensitive nature of this matter, there have been numerous attempts to define minimum age standards for marriage through international agreements. However, since there is no universal understanding of what constitutes marriage, it is virtually impossible to establish principles and rules which command universal approval and observance. These difficulties are reflected in the international treaties on the subject, which often either fail to set an exact age limit for marriage or else circumscribe it in a rather vague manner. Other conventions, such as the Convention on the Rights of the Child[61], do not address the matter at all.[62]

Article 16 of the Universal Declaration of Human Rights[63] credits men and women of full age the right to marry, while failing to give any indication as to the exact age at which this full age is reached. Likewise, Article 23 of the International Covenant on Civil and Political Rights[64] calls for both spouses to be of marriageable age, but without further specification. Article 16 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)[65] declares child marriages invalid and urges the state parties to implement a minimum age for marriage, yet remains silent with regard to what constitutes an appropriate minimum age for marriage. Even article 2 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages[66] does not itself establish a clear age limit but calls on the signatory states to do this themselves.[67] Article 11 of the Convention on Celebration and Recognition of the Validity of Marriages[68] does not mention a minimum age as a precondition of a valid marriage but relies on the mental capacity and free will of the spouses, as does article 10 of the International Covenant on Economic, Social and Cultural Rights[69]. A more decisive approach was adopted in 1965 by the United Nations High Commissioner for Human Rights, who restricted marriage to age 15 and above, albeit with the option of earlier marriage in exceptional cases.[70]

[58] See UNICEF Innocenti Research Centre, supra note 51 at 10 et seq.; L. DAVIDS, Female Subordination Starts at Home: Consequences of Young Marriage and Proposed Solutions, 5 Regent Journal of International Law 299, at 300 (2007) ; Human Rights Watch, supra note 50 at 16.

[59] See H. RASHAD & M. OSMAN & F. ROUDI-FAHIMI, Marriage in the Arab World 3 (2005), available at: www.prb.org/pdf05/MarriageInArabWorld_Eng.pdf [16 November 2012], and DAVIDS, supra note 58 at 300.

[60] See DAVIDS, supra note 58 at 300; UNICEF Innocenti Research Centre, supra note 51 at 12; Human Rights Watch, supra note 50 at 16.

[61] 1989 Convention on the Rights of the Child, 1577 UNTS 3.

[62] Art. 1 of the convention reads: "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."

[63] GA Res. 217 A (III), 10 December 1948.

[64] 1966 International Covenant on Civil and Political Rights, 999 UNTS 171.

[65] 1979 Convention on the Elimination of all Forms of Discrimination against Women, 1249 UNTS 13. With the exception of Iran, all of the Arab states in question have ratified this convention. When looking at the national level in Part Three this essay will pay special attention to how the states deal with the convention. The CEDAW is a good example of the collision of international and national - or rather cultural - values and the corresponding difficulties of implementation.

[66] 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 521 UNTS 231.

[67] As a matter of fact, none of the five Arab states examined in this essay are state parties.

[68] 1978 Convention on Celebration and Recognition of the Validity of Marriages, 1901 UNTS 131. Egypt is the only one of the five Arab states surveyed that has ratified this convention. However, it has yet to come into force there.

[69] 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.

[70] Principle II of the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, GA Res. 2018 (XX), 1 November 1965.

III. Part Three: Marriage age in contemporary Muslim family laws

1. Morocco

a) Attempts at unification

Formerly a French and Spanish protectorate, Morocco gained independence in 1956. The pre-existing multi-faceted legal system proved to be the main obstacle to the creation of a modern nation state. Prior to 1956, Islamic law was predominant in certain regions of the protectorate only, whereas large parts of the population with an indigenous Berber background had developed distinct customary rules over the centuries.[71] Whilst the Arab population almost entirely followed the Maliki school of legal thought, the tribal population, though religiously committed to Islam, followed separate customary traditions as far as the law was concerned, particularly in civil-law matters,.[72] These usages were not perceived as a departure from Islamic law but rather as an integral part of it, since the sharia, though not providing a textual basis for them, abstained from an explicit ban.[73] As a result, the Moroccan legal system was two-tiered.[74] Rather than challenging this bifurcation in legal practice, the French authorities governing the protectorate encouraged tribal self-administration.[75]

Moroccan nationhood marked the beginning of a thorough process of codification driven by the ambition to harmonise the diverging Arab and Berber practices and create an Islamic state.[76] A reform of the justice sector divested the tribal authorities of the right to self-administration and mandated the application of official statutory law.[77] The newly enacted statutory law was largely based on the French model, while the scope of application of the sharia was limited to inheritance and family-law matters.[78] Statutory codification of family law did not take place until the promulgation of the so-called Moudawana, the national family-law code, in 1958.[79] The code harked back to the core values of sharia, while drawing strongly on Maliki legal thought for its basis. As a result, not only were the provisions of the code largely

[71] See G. H. BOUSQUET, Islamic Law and Customary Law in French North Africa, Vol. 32 No. 3 Journal of Comparative Legislation and International Law, Third Series 57-65, at 57 et seq., 61 et seq. (1950).
[72] See BOUSQUET, supra note 71 at 61 et seq.
[73] See L. ROSEN, Law and Custom in the Popular Legal Culture of North Africa, Vol. 2 No. 2 Islamic Law and Society 194-208, at 194 et seq. (1995); cf. the statement of King Muhammad I of 1958 cited by J. N. D. ANDERSON, Reforms in Family Law in Morocco, Vol. 2 No. 3 Journal of African Law 146-159, at 146 et seq. (1958).
[74] See BOUSQUET, supra note 71 at 61 et seq.
[75] Cf. B. VENEMA & A. MGUILD, Access to Land and Berber Ethnicity in the Middle Atlas, Morocco, Vol. 39 No. 4 Middle Eastern Studies 35-53, at 41 (2003). In 1930, a French decree referred to as the Berber Dahir and signed by the Moroccan sultan explicitly sanctioned the application of customary Berber law by tribesmen, cf. W. A. HOISINGTON JR., Cities in Revolt: The Berber Dahir (1930) and France's Urban Strategy in Morocco, Vol. 13 No. 3 Journal of Contemporary History 433-448, at 433 et seq. (1978). Only penal law was standardised for both Arab and Berber speaking territories, see BOUSQUET, supra note 71 at 61.
[76] See L. BUSKENS, Recent Debates on Family Law Reform in Morocco: Islamic Law as Politics in an Emerging Public Sphere, Vol. 10 No. 1 Islamic Law and Society 70-131, at 72 (2003).
[77] Cf. VENEMA & MGUILD, supra note 75 at 41.
[78] Cf. also L. BUSKENS, Sharia and National Law in Morocco, in J. M. Otto (Ed.), Sharia Incorporated. A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present 89-138, at 131 (2010).
[79] An electronic French version of the document is available at: http://perso.menara.ma/~lezbare/ [16 November 2012].

modelled on Maliki teachings,[80] but Maliki jurisprudence was also declared the only applicable source of law in all cases where no statutory provisions had been formulated.[81]
A telling example of the strong Maliki influence on the Moudawana can be seen in article 12, paragraph 1, which established guardianship in marriage by denying women of full legal capacity the right to enter into marriage without a guardian's approval.[82] Other provisions, however, such as article 8, did not entirely correspond with classical Maliki teaching. That article defined the minimum marriageable age as 15 years for females and 18 years for males, while bestowing on the courts the power to permit marriage at an earlier age in cases of hardship. In contrast, the classical Maliki school sets minimum marriageable age at 17 years for both sexes.[83] According to the Moudawana, minor children of either sex could be given into marriage by their fathers and minor female children could even be forced to marry by parental constraint.[84] Prior to the enactment of the Moudawana, based on classical Maliki law, a father had had the power to force his virgin daughter into marriage even after she had reached puberty. The code limited this option to cases in which there was deemed to be a danger of immoral behaviour on the daughter's part and made its granting subject to judicial approval.[85] Furthermore, the code also introduced the mandatory registration of marriage and divorce.[86] Although their opposition to the new code ultimately proved unsuccessful, tribal authorities perceived it as an undue intrusion and an unwarranted attempt at unification by the state.[87]
In the context of under-age marriage, another relevant piece of legislation enacted during this period was the Moroccan Penal Code of 1963, which, except for some minor revisions carried out in 1967, is still in force in its original form today. This code criminalises rape and both consensual and violent sexual activity involving minors.[88] Consensual sexual activity with minors is, however, exempted from prosecution on condition that the culprit marries the victim.[89] The ulterior motive of this provision is to secure both the victim's and the family's honour.[90] Thus, minors who fall victim to non-violent sexual actions can be married off to the offender, provided that the minor's guardian seeks court approval of the marriage and this approval is granted by the court. Once the marriage has taken place, criminal investigation can be initiated only by a person empowered to demand the annulment of the marriage. Usually, that person would be the minor's guardian, and no criminal investigation can commence until the marriage has been judicially annulled.[91]

[80] Cf. the statement of King Muhammad I of 1958 cited by Anderson, supra note 73 at 146 et seq.; BUSKENS, supra note 76 at 73.
[81] See BUSKENS, supra note 76 at 72 et seq.
[82] See BUSKENS, supra note 76 at 74.
[83] See ANDERSON, supra note 73 at 148 et seq., footnote 3; BUSKENS, supra note 76 at 74; MIR-HOSSEINI, supra note 16 at 26. For the Maliki position see Part One, II.
[84] Art. 12 Para. 4 of the Moudawana of 1958.
[85] Art. 12 Para. 4 of the Moudawana of 1958. See also ANDERSON, supra note 73 at 149 et seq.; NASIR, supra note 18 at 50; WELCHMAN, supra note 15 at 64.
[86] See MIR-HOSSEINI, supra note 16 at 26.
[87] Cf. VENEMA & MGUILD, supra note 75 at 44, 50.
[88] Art. 484 to 486 of the Penal Code of 1963, as amended in 1967. An electronic French version of the document is available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=190447 [16 November 2012].
[89] Art. 475 of the Penal Code.
[90] See Human Rights Watch, Morocco: Girl's Death Highlights Flawed Laws, 23 March 2012, available at: http://www.hrw.org/news/2012/03/23/morocco-girl-s-death-highlights-flawed-laws [16 November 2012].
[91] Art. 475 of the Penal Code. See Human Rights Watch, supra note 90.

b) Minor reform in 1993

The 1990s were marked by political, intellectual and economic liberalisation and the public emergence of women's rights activist groups.[92] Mounting calls for a reform of the Moudawana coincided with increasingly forceful discussion of human rights in a more general sense. Activists' major concerns were the abolition of guardianship in marriage and an increase in the marriageable age for females from 15 to 18 years. Notwithstanding the harsh opposition from religious and conservative camps, the Moudawana underwent some important changes in 1993. The revised code deviated from the classical Maliki opinion in that it made the validity of a marriage conditional on the woman's explicit consent while at the same time revoking a father's previous compulsorily held right to conclude a marriage contract against his daughter's will.[93] However, the reform left both the fundamental institution of guardianship in marriage and the issue of marriageable age untouched.[94]

c) The 2004 reform

Around the turn of the twenty-first century, modernisation of Moroccan family law was the principal subject of debate between reformers and traditionalists. In October 2003, the King announced a landmark reform of the Moudawana which was adopted by the Morrocan parliament in 2004.[95] Since this revised Moudawana came into force, the marriageable age has been set at 18 years for both sexes.[96] Marriage below this age remains permissible, but is contingent upon judicial authorisation. Permission is granted if there are legitimate grounds justifying the marriage, and these grounds must be determined by the courts based on the opinions of the parents or the guardian of the minor spouse and on the outcome of a medical evaluation or a social inquiry.[97] Guardianship in marriage is now abolished and women also have the right to enter into matrimony without intermediation.[98] Proof of marriage is generally established by an officially registered and valid marriage contract.[99] However, claims relating to unregistered marriages can be judged by the courts taking into account all legal evidence and expertise and paying special attention to any pregnancies or children arising from such marriages.[100]

Non-recognition of an unregistered marriage by the courts may have severe implications especially for the children of the marriage concerned, as they are equated with children born out of

[92] See BUSKENS, supra note 76 at 104; K. ŽVAN, The Politics of the Reform of the New Family Law (the Moudawana) 48 (2007); F. HARRAK, The History and Significance of the New Moroccan Family Code, 09-002 Working Paper Series of the Institute for the Study of Islamic Thought in Africa 1, at 2 (2009), available at: www.cics.northwestern.edu/documents/workingpapers/ISITA_09-002_Harrak.pdf [16 November 2012].

[93] Art. 5 Para. 1 and Art. 12 Moudawana of 1993.

[94] See HARRAK, supra note 92 at 3.

[95] See B. MADDY-WEITZMAN, Women, Islam, and the Moroccan State: The Struggle Over the Personal Status Law, Vol. 59. No. 3 Middle East Journal 393, at 406 (2005); K. ZOGLIN, Morocco's Family Code: Improving Equality for Women, 31 Human Rights Quarterly, 964-984, 969 (2009). In contrast to the 1993 revision, the Moudawana of 2004 was not put into force by royal decree. King Muhammad IV strove towards a reform of family law that was acceptable to all, thus making parliamentary enactment a better basis of legitimation.

[96] Art. 19 Moudawana of 2004. See also BUSKENS, supra note 76 at 114 et seq.; M.-C. FOBLETS & J.-Y. CARLIER, Le Code Marocain de la Famille. Incidences au Regard du Droit International Privé en Europe 25 (2005); NASIR, supra note 18 at 57; HARRAK, supra note 92 at 7. An electronic version of the document is available at: http://www.globalrights.org/site/DocServer/Moudawana-English_Translation.pdf [19 August 2011].

[97] Art. 20 Moudawana of 2004. The marriage authorisation petition must be signed by both the minor and his or her tutor, cf. art. 21 Moudawana of 2004.

[98] Art. 12 Para. 4 and Art. 25 Moudawana of 2004. According to Art. 24 a woman still has the right to delegate this power to a tutor of her choice.

[99] Art. 16 Para. 1 of the Moudawana of 2004.

[100] Art. 16 Paras. 2 and 3 of the Moudawana of 2004. Cf. also WELCHMAN, supra note 15 at 57.

wedlock. As a consequence, they will not be registered in the civil status records, which will affect their inheritance and custody rights and may even deny them access to public health care and education. Moreover, non-registration of a marriage is effectively tantamount to circumvention of protective legal standards such as minimum age restrictions.

The 2004 revision of the Moudawana has brought about substantial reforms in family law and has considerably loosened the law's previously strict adherence to classical Maliki principles. Meanwhile, however, the broad enthusiasm this progressive reform initially earned has now largely worn off and its actual implementation has proven far from adequate for a number of reasons. First, shortcomings in implementation are closely linked to the central role assigned to the judiciary in family-law matters under the revised law. The new legislation leaves questions of great social importance to the courts' discretion. Judges often feel overwhelmed by their lack of training and resources in the face of the new expectations placed upon them.[101] Some are even unwilling to apply the new law correctly, because it is contradictory to their personal perceptions of marriage and the family, and it is for this reason that an increasing number of judgments are still issued based on classical Maliki law.[102] Most notably, judges tend to handle the conditions stipulated by article 20 of the 2004 Moudawana far too generously, often granting approval of under-age marriages in cases where the requirements for such approval are not in fact met. Second, deficiences in the implementation of statutory law in this area can also be attributed to insufficient awareness of the new legal situation among the public at large, particularly among the tribal population.[103] Third, the inefficacy of the statutory law also stems from its insensitivity to specific regional or tribal customs and practices. Since their defining purpose is to achieve unification, the new statutory provisions have made little effort to incorporate customary practices and rules into official law. This has given rise to feelings that the new law does not pay sufficient heed to people's needs and concerns and has also raised questions of legitimation, thus widening the gap between statutory and customary law. A good example in this regard is the problem of marriage registration. Today, many marital alliances are not officially recorded simply because registration is not a prerequisite for the validity of a marriage either under classical Islamic law or under customary law. When the new Moudawana came into force in 2004, preventing the non-registration of marriages was considered an imperative. Accordingly, the revised code offered a procedure for the retroactive registration of marriage but limited its applicability to a five-year period commencing on the date on which the new law came into force.[104] While the code did thus make some attempt take practical realities into account, it failed to acknowledge the fact that tribal concepts of marriage do

[101] See K. ZOGLIN, supra note 95 at 978 et seq.

[102] See K. ZOGLIN, supra note 95 at 978. This is so despite the fact that Art. 400 of the Moudawana allows courts to resort to classical Maliki jurisprudence only if a specific question was left unaddressed by the code.

[103] See K. ZOGLIN, supra note 95 at 982 et seq.; International Foundation for Electoral Systems & Institute for Women's Policy Research, The Status of Women in the Middle East and North Africa Project. Focus on Morocco. Opinions on the Family Law and Gender Quotas, at 2 (2010), available at: http://www.ifes.org/~/media/Files/Publications/Papers/2010/swmena/2010_Morocco_Quotas_and_Family_Law_English.pdf [17 August 2011].

[104] The Preamble of the Moudawana of 2004 enumerates the fundamental points of the reform. Para. Nine of the Preamble reads: 'Protect the child's right to acknowledgement of paternity in the event the marriage has not been officially registered for reasons of force majeure, where the court examines the evidence presented to prove filiation, and establish a five-year time limit for settling outstanding cases in this regard to put an end to the suffering endured by children in this situation.' Likewise, Art. 16 Para. 4 Moudawana of 2004 states that during this period of time petitions for recognition of marriages can be filed. The procedure was open both to marriages acknowledged by both partners and unilaterally contested marriages. For the latter, the Ministry of Justice's guide to the revised Moudawana stated that for the verification of the contested marriage all kinds of proof were admitted, see WELCHMAN, supra note 15 at 57 et seq.

not involve registration. This approach was not well received by the Berber population and, despite numerous awareness campaigns conducted by the government and human rights NGOs, the deadline for retroactive registration has now expired without bringing about significant changes to marriage practices in rural areas.[105]

In summary, the effectiveness of the Moudawana is impaired by a number of factors which also tend to encourage the occurrence of under-age marriages. Currently, it is estimated that under-age marriages account, on average, for about ten percent of all marriages concluded in Morocco and that in rural areas this percentage is even higher.[106] The latest official data were collected in a census carried out in 2003/2004. According to these evaluations, approximately 10 percent of women aged between 15 and 19 were married in 2004.[107] 7.9 percent of women aged 25 to 49 and 1.6 percent of women aged 15 to 19 in 2004 were 15 years old at the time of their first marriage; 6 percent of women aged 20 to 24 in 2004 had either been married or in informal union[108] before the age of 18.[109] It should however be borne in mind that this census was conducted at the same time as the 2004 Moudawana reforms came into force. It cannot therefore be regarded as representative of the current situation and does not, by definition, reflect the practical changes the reform has since achieved.

Another complex set of problems can be found in the field of criminal law. As stated above, article 475 of the Penal Code ensures impunity for consensual sexual activity with minors if the offender later agrees to marry the victim. Although the wording of this provision explicitly limits the applicability of this remedy to non-violent sexual activity only, article 475 of the Penal Code is in fact also being applied in rape cases. In recent years, two such cases have attracted much attention in both the national and international media, since the minor victims in both cases committed suicide after being married to their tormentors, a circumstance which at the very least leaves room for doubts as to the extent to which the legal requirements for under-age marriage are in fact being observed, particularly with regard to such marriages requiring mutual consent by both spouses.[110] Dramatic incidents such as these have meant that criminal legislation in this area – which was already controversial - has drawn fervent criticicism from both domestic and international human rights activists and become a hotly debated political issue. It has not only prompted calls for an alteration of the Penal Code, but was also the motivation for the drafting of a new law prohibiting violence against women which is currently awaiting min-

[105] Cf. K. ZOGLIN, supra note 95 at 982 et seq. (2009).

[106] Cf. H. FASSI-FIHRI, It's Time for Additional Reforms, in H. Fassi-Fihri & Z. Tahiri (Eds.), Perspectives: Morocco's Family Code, 5 Years Later (2009), available at: www.commongroundnews.org/article.php?id=25395&lan=en&sp=0 [16 November 2012].

[107] Cf. United Nations Department of Economic and Social Affairs, Population Division, World Marriage Data 2008 on Marital Status, available at: http://www.un.org/esa/population/publications/WMD2008/Main.html [16 November 2012] (10.7 percent); Ministère de la Santé, Enquête sur la Population et la Santé Familiale 2003-2004, at 83, available at: http://www.measuredhs.com/Publications/Publication-Search.cfm?ctry_id=27&c=Morocco&Country=Morocco&cn=Morocco [16 November 2012] (10.5 percent).

[108] According to an explanation given by UNICEF, the term 'in union' refers to informally concluded, i.e. non-registered marriages.

[109] See Ministère de la Santé, supra note 107 at 83 et seq.; UNICEF Database on Child Marriage which was last updated in February 2011, available at: http://www.childinfo.org/marriage_countrydata.php [16 November 2012].

[110] See Human Rights Watch, supra note 91; A. Maghri, In Morocco, the Rape and Death of an Adolescent Girl Prompts Calls for Changes to the Penal Code, available at: http://www.unicef.org/infobycountry/morocco_62113.html [16 November 2012]; http://www.equalitynow.org/take_action/discrimination_in_law_action411 [16 November 2012]. By virtue of public statements, the original allegation of rape had been withdrawn by the victim, which enabled criminal exoneration through consensual marriage under the terms of art. 475 of the Penal Code.

isterial review and has not yet been presented to parliament.[111] For the time being, however, the present provision will remain in force.[112]

d) CEDAW

Morocco ratified the CEDAW in 1993, but did not publish the text of the convention in the official Moroccan law gazette until 2001.[113] At the time of ratification, the government expressed reservations with regard to articles 2[114], 9[115], 15[116] and 16 of the convention. These reservations made it very clear that the government was unwilling to give precedence to the CEDAW in cases where its provisions conflicted with sharia law. Given the significance of the articles in question, these reservations effectively deprived Morocco's ratification of the convention of any practical consequences. In December 2008, King Muhammad IV announced the retraction of the reservations to the CEDAW and these were then formally withdrawn in April 2012.[117]

2. Egypt

a) Early codifications of personal status law

Even after the country's independence from the British authorities in 1922, Egypt's legal system continued its process of gradual assimilation. The Islamic principles on which it had mainly been based were now progressively displaced by a somewhat secular European civil law system.[118] Personal status law, conversely, remained uncodified until 1920.[119]

Previously, towards the end of the nineteenth century, child marriages were quite a common and widespread phenomenon, particularly in Egypt's rural areas. At the turn of the twentieth century, increased public awareness of the physical and psychological risks of early marriage triggered a wave of statutory efforts to curb the practice.[120] The first such attempt was a draft bill referred to the legislative assembly in 1914 recommending 16 as the minimum marriageable age for girls and punishing parents, guardians and husbands for arranging under-age marriages.[121] Although this bill was later rejected, it was soon followed by an alteration of the Egyptian Penal Code under which the consummation of a marriage with a girl younger than 12

[111] See The Human Rights Warrior of 15 March 2012, Amina Filali and Violence Against Women in Morocco, available at: http://open.salon.com/blog/the_human_rights_warrior/2012/03/15/amina_the_face_of_violence_against_women_in_morocco [16 November 2012].

[112] See Human Rights Watch, supra note 91.

[113] See BUSKENS, supra note 76 at 109; Association Démocratique des Femmes du Maroc of 15 December 2008, The Withdrawal of the Reservations to CEDAW by Morocco, available at: http://www.adfm.ma/spip.php?article695&lang=en [16 November 2012].

[114] Art. 2 embodies the basic ideas and principles of the CEDAW.

[115] Art. 9 grants a mother the right to transmit her nationality to her child. Morocco has never formally withdrawn this reservation but in 2007 enacted a law allowing for the transmission of nationality from the mother to the child, see BUSKENS, supra note 76 at 127.

[116] Art. 15 calls for equality between the sexes and Art. 16 prohibits discrimination relating to marriage and family relations.

[117] Cf. Amnesty International, Annual Report 2012. Morocco/Western Sahara, 24 May 2012, available at: http://www.unhcr.org/refworld/country,,,,ESH,456d621e2,4fbe3923c,0.html [16 November 2012]; BUSKENS, supra note 76 at 127.

[118] See M. BADRAN, Feminists, Islam, and Nation: Gender and the Making of Modern Egypt 124 and 181 (1996). See also L. ABU-ODEH, Egyptian Feminism: Trapped in the Identity Debate, 16 Yale Journal of Law and Feminism 145-192, at 146 (2004) and ESPOSITO & DELONG-BAS, supra note 16 at 47.

[119] See T. MAHMOOD, Statutes of Personal Law in Islamic Countries: History, Texts and Analysis, 2nd Edition 10 (1995).

[120] See B. BARON, The Making and Breaking of Marital Bonds in Modern Egypt, in N. R. Keddie & B. Baron (Eds.), Women in Middle Eastern History: Shifting Boundaries in Sex and Gender 275-291, 281 (1991).

[121] See A. THOMPSON, The Woman Question in Egypt, Vol. 4 No. 3 Moslem World 266-272, 266 (1914).

years old was classified as rape.[122] Under this new provision the validity of the marriage as such was not affected by the crime of rape, however.[123]

Between 1920 and 1931 a series of personal status laws was passed. While, in purely formal terms, the new laws had much in common with European laws in this area, they embodied rules mostly derived from the Islamic principles of the Hanafi school of thought.[124] To some extent, however, the new legislation also had the effect of reforming the Islamic legal framework from within inasfar as it also drew on a number of rulings from other schools of Islamic law or combined them with Hanafi interpretations.[125] In cases where there was no applicable statutory law, courts were instructed to apply the Hanafi doctrine.[126]

The two main problems addressed by the new legislation were child marriages and non-registration of marriage. Child marriages were counteracted by denying court access to marriage-related claims in cases where the marriage had been concluded with a female below 16 or a male below 18 years of age.[127] Accordingly, civil registry offices were also urged not to register marriages involving under-age spouses.[128] Claims arising from unregistered, so-called *'urfi* marriages were likewise denied a judicial hearing except in cases where the marriage was not contested by any of the parties concerned.[129]

Remarkably, as a concession to classical Hanafi opinion, the legal validity of marriages concluded in violation of age or registration requirements was left unchallenged by the legislators.[130] This opened the door for severe abuses such as depriving spouses of their matrimonial rights or alleging non-existant claims.[131]

A new law passed in 1931 reaffirmed the legislative steps taken with regard to child marriages and non-registration of marriage in the foregoing decade. The age requirements for marriage were maintained, though the relevant point in time for determining the spouses' ages was shifted from the time of the conclusion of the marriage to the time of the court hearing.[132] Unregistered marriages also remained outside the courts' jurisdiction, since official documents were deemed to be the only authoritative documentary evidence of marriage.[133] Furthermore,

[122] Cf. A. C. MCBARNET, The New Penal Code: Offenses against the Morality and the Marriage Tie and Children, Vol. 10 No. 46 L'Egypte Contemporaine, 382-386 (1919) as cited by B. BARON, supra note 120 at 281.

[123] See SHAHAM, supra note 18 at 54.

[124] See M. BADRAN, Competing Agenda: Feminism, Islam and the State in Nineteenth- and Twentieth-Century Egypt, in D. Kandiyoti (Ed.), Women, Islam and the State 201, at 201 (1991); M. F. HATEM, Secularist and Islamist Discourses on Modernity in Egypt and the Evolution of the Postcolonial Nation-State, in Y. Yazbeck Haddad & J. L. Esposito (Eds.), Islam, Gender, and Social Change 85, at 89 (1998); ABU-ODEH, supra note 39 at 1101 et seq.; ESPOSITO & DELONG-BAS, supra note 16 at 47.

[125] So-called doctrine of supra-madhab, see ABU-ODEH, supra note 39 at 1091; R. SHAHAM, Custom, Islamic Law, and Statutory Legislation: Marriage Registration and Minimum Age at Marriage in the Egyptian Shari'a Courts, Vol. 2 No. 3 Journal of Islamic Law and Society, 258-281, 260 (1995).

[126] Art. 280 Law No. 78 of 1931. See M. BERGER & N. SONNEVELD, Sharia and National Law in Egypt, in J. M. Otto (Ed.), Sharia Incorporated. A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present 51, at 74 (2010) and M. BERGER, Secularizing Interreligious Law in Egypt, Vol. 12 No. 3 Journal of Islamic Law and Society, 394-418, at 397, 410 (2005).

[127] Art. 1 Law No. 56 of 1923. Cf. EL ALAMI, supra note 29 at 198 et seq.; BARON, supra note 120 at 281.

[128] See ESPOSITO & DELONG-BAS, supra note 16 at 50; BARON, supra note 120 at 281 et seq.; WELCHMAN, supra note 15 at 62.

[129] Art. 1 Law No. 56 of 1923. See BÜCHLER, supra note 20 at 27 et seq.; SHAHAM, supra note 125 at 266.

[130] Cf. SHAHAM, supra note 125 at 264, 266.

[131] See for instance the examples given by SHAHAM, supra note 18 at 57 et seq.

[132] Art. 99 Para. 5 and Art. 367 Law No. 78 of 1931 and Art. 33 Regulations for Marriage Officials issued in accordance with Law No. 78 of 1931. Cf. SHAHAM, supra note 125 at 263; E. FAWZY, supra note 1 at 42 et seq.

[133] Art. 99 Law No. 78 of 1931. Cf. WELCHMAN, supra note 15 at 56.

under the 1931 legislation, the guardian's consent, as required by classical Hanafi doctrine, was not defined as a precondition for the validity of a marriage contract.[134]

With regard to its reception by the judiciary, the new legislation was supported by the majority of judges while a minority pursued a very narrow interpretation of the new provisions in order to limit their scope of application.[135] In practical terms, however, implementation of these reforms proved to be a very cumbersome endeavour, since it was not uncommon for birth certificates either not to exist or to be forged and because the new laws were resisted by large swathes of the population. Furthermore, registry office officials frequently took advantage of the fact that infringements of the new law were rarely prosecuted and simply refused to comply with the new standards.[136]

b) Recent reforms

The legal framework established by the 1931 legislation regulating under-age marriages and marriage registration endured for a long time. Family law was not included in the national Civil Code that came into force in 1948.[137] Similarly, in 1971, although calls for an increase in the marriageable age to 18 years for girls and 21 years for boys were put forward for discussion when Egypt's new constitution was being drafted, these proposed changes were not in fact included in the final draft.[138]

It was only as recently as 2000 that marriage registration again became the focus of public attention – in the context of a far-reaching set of reforms to Egyptian divorce law.[139] In many respects the new law resembles its predecessor, particularly since it also denies court access to claims arising from unregistered marriages. However, the most important discrepancy between the new law and its 1931 predecessor lies in the fact that the new law allows for the judicial admissibility of divorce claims relating to unregistered marriages, provided that there is some sort of documentation of the marriage having occurred.[140] Although there were fears that this partial legitimisation of *'urfi* marriages would encourage secret marriages and the circumvention of the law,[141] legislators opted for their limited recognition because their previous judicial exclusion had, in practice, been a cause of major iniquities.[142] In addition to its provisions regarding registration of marriage, the new law also reconfirmed the minimum marriageable ages of 16 years for females and 18 years for males originally set in 1931.[143] With the exception of the minimum marriageable age for females which, as a result of a more recent reform enact-

[134] For an extensive discussion see EL ALAMI, supra note 29 passim.

[135] See SHAHAM, supra note 125 at 276.

[136] See SHAHAM, supra note 125 at 275; MOUSSA J., Competing Fundamentalisms and Egyptian Women's Family Rights. International Law and the Reform of Shari'a-derived Legislation, 166 (2011).

[137] The Civil Code was drafted under the leadership of the nationalist secular movement. At first, the drafters intended to include a section on personal status law in the code in order to reconcile religious tradition and reformist progress, but the project was eventually dropped, see ABU-ODEH, supra note 39 at 1097 et seq.

[138] See ESPOSITO & DELONG-BAS, supra note 16 at 58.

[139] Law No. 1 of 2000.

[140] Art. 17 Para. 2 Law No. 1 of 2000, see FAWZY, supra note 1 at 69; MOUSSA, supra note 136, at 168.

[141] See FAWZY, supra note 1 at 72; SONNEVELD N., Rethinking the Difference between Formal and Informal Marriages in Egypt, in M. Voorhoeve (Ed.), Family Law in Islam. Divorce, marriage and Women in the Muslim World, 77 et seq., at 79 et seq. (2012).

[142] See the example given by FAWZY, supra note 1 at 42: If under the 1931 law a woman entered a non-registered marriage, she was not allowed to marry another man. However, due to lack of registration she would not be heard by the court if she wanted to obtain a judicial divorce, even in the event that her husband officially married another woman. She was thus trapped in the marriage. Cf. also MOUSSA, supra note 136, at 166, 168.

[143] Art. 17 Law No. 1 of 2000. Marriages involving minors were nevertheless considered valid, cf. FAWZY, supra note 1 at 69.

ed in 2008,[144] was raised to 18 years, the 2000 regulations remain in force and have recently been complemented by a ministerial decree limiting the age gap between spouses to a maximum of 25 years.[145] The 2008 reform also led to a tightening of penal law which makes it a criminal offence for both guardians and registry office officials to allow under-age marriages to take place.[146] Very recently, however, it has been rumoured that the Egyptian parliament is considering debating a reduction of the marriageable age for girls from 18 to 14 or possibly even nine years. While these rumours have raised deep concerns among human rights activists, they have not yet been officially confirmed by the government.[147]

Another problem closely entwined with under-age marriages and one which has been addressed by legislators both in 2008 and 2010 is the issue of human trafficking. Egypt is commonly reputed to be a source, transit and destination country for women and children who have fallen victim to forced labour and sex trafficking.[148] A common phenomenon in this regard is that of so-called summer marriages, i.e. temporary, commercial marriages which serve to legitimise sexual relations for a certain period of time, which have been heavily criticised by human rights activists and widely reported in the international media.[149] Such alliances - which essentially lack a basis in classical Hanafi doctrine - often involve minors, typically girls, and are generally concluded out of financial need. They are usually facilitated by the minor's parents in exchange for a commission, and occasionally rely on the aid of professional marriage intermediaries. Such arrangements not only expose the minor to sexual exploitation, but also to forced labour, as the child victims are sometimes taken back to the husband's home state to work as domestic servants.[150] The legislature has taken several steps to prevent this practice, including a tightening of the Child Law[151], alterations to the Penal Code[152] and the adoption of a comprehensive law against human trafficking in 2012[153]. Furthermore, in 2010, the government established a National Plan of Action to combat human trafficking, whose measures included the establishment of a national victim referral mechanism.[154] According to human rights

[144] Art. 31bis Law No 143 of 1994 as stipulated by Law No. 126 of 2008.
[145] Cf. F. HARRISON, Egypt Bans 92-Year-Old's Marriage, BBC News of 13 June 2008, available at: http://news.bbc.co.uk/2/hi/7452456.stm [16 November 2012].
[146] See MOUSSA, supra note 136, at 167, footnote 7, referring to the corresponding alterations of the Child Act (Law No. 12 of 1996) and the Penal Code (Law No. 58 of 1937).
[147] See http://www.equalitynow.org/take_action/child_marriage_action [16 November 2012]; http://www.trust.org/alertnet/news/egypt-new-child-marriage-laws-are-a-step-backwards [16 November 2012]; http://plan-international.org/about-plan/resources/news/egypt-new-child-marriage-laws-threaten-girls/ [16 November 2012].
[148] See United States Department of State, Trafficking in Persons Report – Egypt, 14 June 2010, 146, available at: http://www.unhcr.org/refworld/docid/4c1883f8c.html [16 November 2012].
[149] Cf. for instance http://www.dailymail.co.uk/news/article-2173796/Rich-Arab-tourists-buying-age-brides-Egypt-just-summer-3-200.html [16 November 2012]; VESELINOVIC M., Scandal of 'Summer Brides', The Independent, 15 July 2012, available at: http://www.independent.co.uk/news/world/africa/scandal-of-summer-brides-7944467.html [16 November 2012].
[150] See VESELINOVIC, supra note 149.
[151] Law No. 12 of 1996, as amended by Law No. 126 of 2008. An electronic version of the document is available at: http://www.nccm-egypt.org/e7/e2498/e2691/infoboxContent2692/ChildLawno126english_eng.pdf [16 November 2012]. Cf. for instance the right of a child to protection from all forms of violence, or injury, or physical, mental or sexual abuse as enshrined in art. 3 sec. 1 lit. a.
[152] See art. 291 of the Penal Code, Law No. 58 of 1937, added in accordance with Law No. 126 of 2008, which amongst other things criminalises the violation of the right of a child to protection from trafficking or from sexual, commercial or economic exploitation. An electronic version of the article is available at: http://www.nccm-egypt.org/e7/e2498/e2691/infoboxContent2692/ChildLawno126english_eng.pdf [16 November 2012].
[153] Law No. 64 of 2012 regarding Combating Human Trafficking. An electronic version of the document is available at: http://www.protectionproject.org/wp-content/uploads/2010/09/Egypt_TIP-Law_2010-Ar+En.pdf [16 November 2012].
[154] See United States State Department, supra note 148 at 146.

activists, however, these legislative measures have yet to be sufficiently and effectively implemented and summer marriages thus remain a problem.[155]

The most recent surveys, carried out in 2008, indicate that 17 percent of all women in Egypt aged 20 to 24 at that time had been married or in union[156] before the age of 18 and that this percentage is almost twice as high in rural areas as it is in towns and cities.[157] The proportion of women aged 15 to 19 who were married in 2008 amounted to 13.1 percent.[158] 7.4 percent of women aged 25 to 49 in 2008 had been first married at the age of 15 and 1.1 percent of women aged 15 to 19 in that same year were married by the time they were 15.[159] It is also important to note that these statistics do not include either *'urfi* marriages – which are reportedly showing a continuing upward trend[160] – or temporary marriages. From this it is clear that under-age marriages are still a widespread phenomenon in Egypt and that, despite a trend towards spouses being older when they first marry, actual implementation of the statutory law is not yet guaranteed throughout the country. Law enforcement is often frustrated by the falsification of birth certificates and corruption, despite noticeable efforts by the government to intensify its implementation of these laws, particularly with regard to criminal prosecution.[161] Another element of uncertainty in this area stems from the previously mentioned ongoing rumours of a possible significant reduction of the minimum marriageable age, though these have not yet been corroborated by the official authorities.

c) CEDAW

Egypt ratified the CEDAW in 1981, recording reservations with regard to articles 2, 9, 16 and 29[162]. The reservations to articles 2 and 16 were the only ones explicitly based on the state's commitment to the sharia.[163] Until powerful mass demonstrations forced a change of government in February 2011, this commitment to the sharia had been enshrined in article 2 of the Constitution of 1971, which declared the principles of Islamic jurisprudence to be the *principal* source of legislation.[164] In its ongoing jurisdiction, the Supreme Constitutional Court has always interpreted this provision as meaning that the sole matters which the legislature had no right to regulate were those on which *ijtihad* was prohibited.[165] Consequently, apart from the core principles of Islam, Egyptian legislators have been free to regulate based on their autono-

[155] See United States State Department, supra note 148 at 147.
[156] Cf. supra note 108.
[157] See UNICEF Database on Child Marriage, supra note 109; cf. also MOUSSA, supra note 136, at 167, footnote 10 with further information.
[158] See F. EL-ZANATY & A. WAY, Egypt Demographic Health Survey 2008 97, available at: http://www.measuredhs.com/pubs/pdf/FR220/FR220.pdf [16 November 2012].
[159] Cf. EL-ZANATY & WAY, supra note 158 at 99.
[160] See Institute of National Planning, Egypt/United Nations Development Programme, Egypt Human Development Report 2010. Youth in Egypt: Building Our Future, 3 (2010), available at: http://www.undp.org.eg/Portals/0/NHDR%202010%20english.pdf [16 November 2012].
[161] See MOUSSA, supra note 136, at 167.
[162] Art. 29 offers the possibility of arbitration for disputes between state parties to the convention.
[163] Paradoxically, Egypt has not made reservations to other provisions of the CEDAW such as Arts. 1 (discrimination in general) or 11 (discrimination in employment) which also conflict with the sharia. According to AN-NA'IM this is because in Egypt family-law matters as dealt with in Art. 16 of the convention are based on the sharia whereas nearly all other aspects of law have been modified through state legislation, cf. A. A. AN-NA'IM, The Rights of Women and International Law in the Muslim Context, 9 Whittier Law Review 491-516, at 513 (1987).
[164] Cf. the Constitution of 1971 as amended in 1980. An electronic version of the document is available at: http://www.sis.gov.eg/en/LastPage.aspx?Category_ID=208 [16 November 2012].
[165] See C. B. LOMBARDI, Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Shariah in a Modern Arab State, Vol. 37 No. 1 Columbia Journal of Transnational Law 81-124, 99 et seq. (1998/1999); A. BÜCHLER, Kinderrechte und Kindesschutz in Ägypten. Die jüngsten Reformen, 4 FamPra.ch 833-841, 835 et seq. (2008).

mous interpretation of the religious sources and without reliance on a specific scholarly exegesis.[166] Thanks to this relatively liberal understanding of the 1971 Constitution, the reservations to the CEDAW did not present a major obstacle to an effective implementation of the convention. In April 2011, the Supreme Council of the Armed Forces (SCAF), which had been in charge since the resignation of President Hosni Mubarak, adopted an Interim Constitutional Declaration. The wording of article 2 of this Declaration was almost identical to that of article 2 of the 1971 Constitution and declared the principles of Islamic jurisprudence to be the *main* source of legislation.[167] The similarity between the two provisions suggested that the interpretation which the Supreme Constitutional Court has adopted hitherto was likely to continue.
This situation changed, however, when the new constitution adopted by the Constituent Assembly came into force on 26 December 2012. It provides for a different distribution of interpretational sovereignty, declaring the principles of sharia to be the *main* source of legislation (Article 2), while at the same time vesting the power to interpret the sharia in the Al-Azhar, a prominent religious schooling institution (Article 4).[168] Human rights activists disapprove of this delegation of interpretational powers on the grounds that it would enable an unelected body to decide, without judicial review, on matters which are crucial to the future of human rights in Egypt.[169] Bearing in mind the relatively conservative orientation of the Al-Azhar, there would appear to be only a very scant possibility that the previous liberal interpretation of the CEDAW reservations will continue to hold sway.

3. Saudi Arabia

a) Supremacy of Islamic law

Unlike Morocco or Egypt, Saudi Arabia has never been subject to colonial rule. Its legal system has developed indigenously and has essentially remained unaffected by European influences. Instead, familial and tribal relations form the basis on which the state is founded and its core principles are purely religious in their origin.[170] The strong bond between the state and Islam was perhaps most tellingly expressed in a royal decree enacted in 1992 which declared the Quran and the Sunna of the Prophet to be the Saudi Arabian constitution.[171] Given the supremacy of the sharia over every man-made law, the scope for state legislation is thus considerably limited.[172] Accordingly, for the most part, Saudi Arabian law is classical Islamic law, and this is

[166] See O. ARABI, The Dawning of the Third Millennium on Shari'a: Egypt's Law no. 1 of 2000, or Women May Divorce at Will, Vol. 16 No. 1 Arab Law Quarterly 2-21, 8 et seq., 19 et seq. (2001).
[167] An electronic version of the Interim Declaration is available at:
http://www.sis.gov.eg/en/LastPage.aspx?Category_ID=1155 [16 November 2012].
[168] See the description given by Human Rights Watch, Egypt: Fix Draft Constitution to protect Key Rights, 8 October 2012, available at: http://www.hrw.org/news/2012/10/08/egypt-fix-draft-constitution-protect-key-rights [16 November 2012].
[169] See Human Rights Watch, supra note 168; Human Rights Watch, Letter to Members of the Egyptian Constituent Assembly, 8 October 2012, available at: http://www.hrw.org/news/2012/10/08/letter-members-egyptian-constituent-assembly [16 November 2012].
[170] Cf. A. AL-YASSINI, Religion and State in the Kingdom of Saudi Arabia, 83 (1985); M. FANDY, Religion, Social Structure and Political Dissent in Saudi Arabia, in A. Hourani & P. Khoury & M. C. Wilson, The Modern Middle East: A Reader, 2nd Edition 657, at 665 (2005); M. Q. ZAMAN, The Ulama in Contemporary Islam. Custodians of Change xiv (2002).
[171] Art. 1 of the Basic Law. The Basic Law (Royal Decree No. A/90 of 1 March 1992) regulates the structure of government, the state's organisation and the rights of individuals. A printed version of the decree can be found in Saudi Arabia: The New Constitution: The Kingdom of Saudi Arabia, Vol. 8 No. 3 Arab Law Quarterly 258-270 (1993).
[172] According to A. M. AL-JARBOU, Judicial Independence: Case Study of Saudi Arabia, Vol. 19 No. 1 Arab Law Quarterly 5-54, at 14, footnote 31 (2004), state regulation is possible only (1) if the quran and the sunna remain silent on a matter, (2) if the rules of the Quran and the Sunna on a matter are of a very general nature, or (3) if there are different valid interpretations as to a certain provision of the quran and the sunna. Thus, in the context of Saudi Arabia, state legislation means supplemen-

especially true of family law, since its rules as elaborated by classical Islamic jurisprudence are deemed to be exhaustive.[173] This immobile state of affairs has completely paralysed family-law reform. It reflects the views of the conservative scholars, the *ulama*, who enjoy enormous political power[174], despite the clear power structure laid down in the Basic Law – which designates the King as the head of state who derives his authority directly from the holy sources of Islamic law and is thus not in fact subject to the control of any other state authority.[175]

Islamic law and jurisprudence in Saudi Arabia are dominated by the Hanbali school of thought, which is, in many respects, the strictest of the four Sunni schools,[176] and the official Saudi Arabian state doctrine is Wahhabism.[177] Wahhabites are an extremely conservative sect whose main points of view are largely modelled in accordance with Hanbali teaching.[178] Like the Hanbali school of thought, Wahhabism does not recognise non-textual sources of Islamic law, and personal reasoning or rationalist methods of interpretation of religious sources are therefore not permitted.[179] Wahhabites espouse a very traditional lifestyle, especially with regard to family law, and, at least to some extent, even adhere to puritanical pre-Islamic practices.[180] The resultant adverse consequences for women are justified by the different roles ascribed to the two sexes in Islam.[181]

---

tary legislation and it is mainly to be found in sectors such as administrative, labour and commercial law since these are the areas of law where the sharia leaves more room for interpretation, cf. J. LEITES, Modernist Jurisprudence as a Vehicle for Gender Role Reform in the Islamic World, 22 Columbia Human Rights Law Review 251-330, at 283 (1990/1991); N. ABIAD, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study, 144 et seq. (2008); cf. also J. SCHACHT, Islamic Law in Contemporary States, Vol. 8 No. 2 American Journal of Comparative Law 133-147, at 136 et seq. (1959). For more details see F. E. VOGEL, Saudi Arabia: Public, Civil and Individual Shari'a, in R. W. Hefner, Islamic Law and Society in the Modern World, 55-93, 55 et seq. (2011).

[173] See VOGEL, supra note 172 at 84; LEITES, supra note 172 at 284; G. N. SFEIR, The Saudi Approach to Law Reform, Vol. 36 No. 4 American Journal of Comparative Law 729-759, at 756 (1988).

[174] One famous example for such a conflict between the monarch and the ulama is the controversial ban on female drivers. It is well known that the king would be willing to allow women to drive but due to the ulama's resistance he refrained from lifting the prohibition, see VOGEL, supra note 172 at 59, 82 et seq. The ban is an ongoing issue in Saudi Arabia, cf. http://www.bbc.co.uk/news/world-middle-east-13809684 [16 Nomber 2012]; http://news.bbc.co.uk/2/hi/7000499.stm [16 November 2012].

[175] Arts. 7 and 70 of the Basic Law. See AL-JARBOU, supra note 172 at 19.

[176] See LEITES, supra note 172 at 282; Schacht, supra note 172 at 136; S. SHAMMA, Law and Lawyers in Saudi Arabia, Vol. 14 No. 3 International and Comparative Law Quarterly 1034-1039, 1034 (1965).

[177] The strong link between Wahhabism and the Saudi Arabian state is the result of a historic alliance of the current royal family, the house of Saud, and Muhammad ibn Abd al-Wahhab, the founder of the Wahhabi sect, back in the eighteenth century. At that time, King Ibn Saud was trying to ensure his supremacy over the Arabian Peninsula and invited al-Wahab to provide for a Wahhabist interpretation of the law in exchange for religious legitimisation of his claim to power. Cf. for example AL-JARBOU, supra note 172 at 19.

[178] See LEITES, supra note 172 at 282.

[179] See VOGEL, supra note 172 at 55 et seq.; H. CHAPIN METZ, Saudi Arabia: A Country Study, Federal Research Division, Library of Congress, 5th Edition 82 (1993); A. SAEED, Islamic Thought. An Introduction, 52 (2006).; H. ESMAEILI, On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System, Vol. 26 No. 1 Arizona Journal of International & Comparative Law 10-47, at 14 (2009).

[180] See LEITES, supra note 172 at 282. For more information on Wahhabism see W. OCHSENWALD, Saudi Arabia and the Islamic Revival, Vol. 13 No. 3 International Journal of Middle East Studies 271-286, at 283 (1981)

[181] See the Combined Initial and Second Periodic Report of Saudi Arabia under Article 18 of the CEDAW submitted on 29 March 2007, CEDAW/C/SAU/2, at 10 et seq.; E. A. DOUMATO, Saudi Arabia, Women's Rights in the Middle East and North Africa, Freedom House Special Report, 17, footnote 2, 34 (2009).

b) Minimum age for marriage

As outlined above, personal status and family law have not been codified in Saudi Arabia. The authoritative rules are the ones laid down in the Quran and the Sunna, as interpreted by the Hanbali school of law and Wahhabite ideology. Thus, minors lack the legal capacity to enter into marriage on their own. Physical evidence of the onset of puberty brings that incapacity to an end, provided that there are no mental deficiencies requiring further guardianship.[182] If the physical signs fail to appear, the Hanbali school assumes that puberty is attained by both sexes at the age of 15 years.[183] Furthermore, the consent to marriage by a woman who has attained legal capacity must be expressed by her guardian since she cannot conclude a marriage contract on her own,[184] although the consent of the woman is an indispensable prerequisite for the validity of the marriage.[185]

A minor can be married off by the guardian before reaching puberty, provided that consummation of the marriage is put off until puberty. The Hanbali school also recognises the right of a child spouse to terminate the marriage upon reaching puberty and before consummation. In practice, however, this right is hard to exercise, especially for girls since they usually cannot return to their parents' home after ending their betrothal. The formation of a marriage contract on behalf of a minor, even if it takes place shortly after birth, is not in and of itself regarded as immoral. Opinions appear to differ, however, as far as the appropriate time for the consummation of the marriage is concerned. Human rights groups as well as the state-run Human Rights Commission object that marriages are frequently consummated at too early an age. Medical practitioners oppose this practice by refusing to carry out the mandatory premarital tests if the future spouses are still very young.[186] Religious authorities, conversely, usually sanction the early consummation of marriage.[187]

To date, it can be said that the practice of marrying off children in order to clear debts or to ensure property rights is commonly accepted in Saudi Arabia, though it should be noted that reliable data on this are virtually non-existent. The most recent available statistics indicate that 3.9 percent of women aged 15 to 19 in 2007 were married.[188] The latest national demographic research, carried out in 2007, shows that 0.1 percent of these women were married at 15, 0.2 percent at 16, 0.2 percent at 17 and 0.2 percent at 18 years.[189] The number of women who were married at the age of 19 (3.2 percent) is significantly higher, at 3.2 percent. This indicates a

[182] Cf. ZAHRAA, supra note 25 at 251 et seq.

[183] Cf. BAKHTIAR, supra note 23 at 403; Zahraa, supra note 25 at 250, footnote 37.

[184] Cf. KHAN & KHAN, supra note 28 at 60.

[185] According to a circular issued by the Supreme Council of the Judiciary, courts and marriage registration officials need to secure the consent of the woman to the marriage (Decree No. 109 of 5 Jumada I 1391 AH). Mandatory registration of marriages is part of the state's authority to regulate administrative matters.

[186] See www.adnkronos.com/AKI/English/CultureAndMedia/?id=3.0.2865409658 [16 November 2012]. According to Royal Decree No. 5 of 18 March 2002 concerning the health regulations applicable to all Saudis wishing to marry, the future spouses have to undergo medical testing in order to obtain a marriage certificate. In 2008 the list of obligatory tests for several defined genetic or blood diseases was extended to tests for HIV/AIDS and certain forms of hepatitis.

[187] As mentioned above, the most significant argument put forward by the religious scholars is the marriage of Prophet Muhammad to the seven-year-old Aisha. Based on this tradition they deem girls much younger than fifteen years old mature enough for the consummation of marriage, cf. Y. ADMON, Rising Criticism of Child Bride Marriages in Saudi Arabia, The Middle East Media Research Institute, Inquiry & Analysis Series Report No. 502 of 8 March 2009 with references therein, available at http://www.memri.org/report/en/0/0/0/0/0/0/3216.htm [16 November 2012]. Nevertheless, the practice of marrying young girls to elderly men partly also encounters resistance from clerics, cf. http://english.alarabiya.net/articles/2012/11/08/248411.html [16 November 2012].

[188] See United Nations Department of Economic and Social Affairs, supra note 107.

[189] Cf. Demographic Research Bulletin 1428H (2007), Table 20-2, available at: http://www.cdsi.gov.sa/english/index.php?option=com_docman&task=cat_view&gid=77&Itemid=113 [16 November 2012]. These percentages were derived from the absolute figures contained in this table and rounded to one decimal place.

slight tendency towards a higher marriage age, albeit one which is not explained by the legal situation. The data for all women in 2007 who had ever been married show that around 8.3 percent had been married at the age of 15, 8.9 percent at the age of 16, 10.1 percent at the age of 17 and 9.2 percent at the age of 18.[190]

In recent years, child marriages, in particular constellations of very young girls wedded to elderly men, were often reported in the international and Saudi Arabian media.[191] Interestingly, there were several cases brought before Saudi Arabian sharia courts in which the state-run Human Rights Commission either actively tried to stop these marriages or to delay their consummation.[192] This commission is currently also carrying out research into the consequences of child marriages and plans, in conjunction with the Ministry of Justice, to prepare proposals for establishing a legal minimum age for marriage.[193] International pressure on the Saudi Arabian legislature was also exerted by the Committee on the Rights of the Child, which recommended setting the age of legal majority as well as the marriageable age at 18 years for both sexes.[194] In January 2011, the Saudi Arabian parliament passed a draft bill for a new child protection law. The aim of this draft legislation is to improve the protection afforded to children in a number of instances, including cases of negligence, trafficking and physical or mental abuse. In accordance with the Convention on the Rights of the Child, this new draft legislation also fixes the age of legal majority at 18 years for both sexes. However, in order to avoid a controversy with the *ulama*, the issue of a minimum age for marriage was carefully excluded from the debate.[195] In the light of the restraint exercised both by the King and by government officials with regard to family law, it appears highly unlikely that a minimum statutory age for marriage will be introduced in the near or indeed even the distant future.[196]

[190] Cf. Demographic Research Bulletin 1428H (2007), supra note 189 Table 21-2. These percentages were derived from the absolute figures contained in this table and rounded to one decimal place

[191] By way of example see the overview given by ADMON, supra note 187; http://www.globalpost.com/dispatch/saudi-arabia/090416/child-marriage-case-showcases-deep-splits-saudi-society [16 November 2012]; http://news.bbc.co.uk/2/hi/middle_east/7579616.stm [16 November 2012]; http://www.memri.org/report/en/0/0/0/0/0/0/3216.htm [16 November 2012].

[192] See for instance SAMBRIDGE A., Saudi 'Eyes Minimum Age for Marriage', ArabianBusiness.com, 20 January 2009, available at: http://www.arabianbusiness.com/saudi-eyes-minimum-age-for-marriage--81147.html [16 November 2012].

[193] Cf. BRINKLEY J., Child Marriage Still an Issue in Saudi Arabia, San Francisco Chronicle, 14 March 2012, available at: http://www.sfgate.com/opinion/brinkley/article/Child-marriage-still-an-issue-in-Saudi-Arabia-3270366.php [16 November 2012]; D. E. MILLER, Saudi Arabia Inches Closer to Ban on Child Marriages, The Jerusalem Post, 9 March 2011, available at: http://www.jpost.com/MiddleEast/Article.aspx?id=211404 [16 November 2012]; http://www.emirates247.com/news/region/saudi-approves-child-protection-law-2011-01-18-1.343828; H. TOMLINSON, 12-Year-Old Bride's Divorce Prompts Marriage Age Review in Saudi Arabia, The Sunday Times, 22 April 2010, available at: www.timesonline.co.uk/tol/news/world/middle_east/article7104248.ece [16 November 2012]; http://english.alarabiya.net/articles/2012/11/08/248411.html [16 November 2012]. However, the efforts of the Ministry of Social Affairs which had conducted earlier studies in this vein and submitted them to parliament in order to prepare for a statutory minimum age for marriage did not succeed.

[194] CRC/C/SAU/CO/2 of 17 March 2006, 6, No. 26.

[195] See MILLER, supra note 193. However, several members of parliament seem to argue in favour of minimum age legislation, cf. KAWACH N., Emirates 24/7, 2 June 2011, available at: http://www.emirates247.com/news/child-marriage-is-murder-of-innocence-2011-06-02-1.400336 [16 November 2012].

[196] In 2010 for example the Ministry of Interior introduced new standard marriage contracts which require marriage registration officials to record the age of the bride. The main idea behind this was to turn the officials' attention to the problem of child marriages and at least establish some kind of social, yet not legal control. Cf. also BRINKLEY, supra note 193, passim.

c) CEDAW

Saudi Arabia became a signatory to the CEDAW in 2000.[197] As was the case with other Muslim signatory states, ratification was subject to a very general reservation stating that, in cases of conflict between the convention and the sharia, Saudi Arabia would not be bound by the former.[198] Given that, as explained previously, classical Islamic law in Saudi Arabia still prevails in a very primordial, literal form, it is easily conceivable that the convention's progressive provisions will not fully come into effect. That indeed was also the conclusion reached by both the initial and second reports to the Committee on the Elimination of All Forms of Discrimination against Women[199].[200]

4. Iran

a) Marriageable age under the regime of the Shah

Following a coup d'état, Iran became a constitutional monarchy under the reign of Reza Shah Pahlavi in 1925. Dedicated to establishing a secular, central legal system, the Shah's receptiveness towards Western concepts was reflected in the legislation promulgated at that time, despite the fact that Iran, like Saudi Arabia, had never been subjected to colonial rule.[201] The Shah initiated a large-scale process of codification which also led to the promulgation of a law on marriage in 1931[202] and of the Iranian Civil Code in 1935.[203] The Civil Code was partly inspired by European models. However, in the field of personal status and family law, the reforms to previous Iranian law were kept within narrow bounds, and the rules codified in the Civil Code mainly corresponded to classical Islamic law as interpreted by the Shia doctrine.[204]

Notwithstanding the clear commitment to Shia Islam, a few provisions of the new legislation, including some related to marriageable age, deviated slightly from the traditional Jafari teachings.[205] Most notably, marriages of girls younger than 15 or boys younger than 18 years of age were forbidden as a matter of principle.[206] Power was bestowed on the courts to authorise marriages by spouses below these age limits with their guardians' approval and on condition that the marriage was justified by 'proper reasons', provided the female spouse was aged at least 13

[197] Royal Decree No. 25 of 28 August 2000.

[198] See L. A. KHAN, The Qur'an and the Constitution, 85 Tulane Law Review 161, at 187 (2010). In addition to the general reservation Saudi Arabia also made an explicit reservation to Art. 9 Para. 2 and Art. 29 Para. 1 of the convention.

[199] CEDAW/C/SAU/2 submitted on 29 March 2007. Cf. the obligation of the state parties under Art. 18 of the CEDAW.

[200] See for instance the critique expressed by KRIVENKO, supra note 29 at 168 et seq.; CEDAW/C/SAU/2, at 47 et seq. Altogether it becomes very clear that the protective effect of the CEDAW in Saudi Arabia is limited.

[201] Thus, the French Civil Code for example served as a model for several provisions, cf. Z. MIR-HOSSEINI, How the Door of Ijtihad Was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco, 64 Washington & Lee Law Review 1499, at 1502, footnote 9 with references (2007).

[202] Marriage Act of 1931, amended in 1937.

[203] See S. A. ARJOMAND, History, Structure, and Revolution in the Shi'ite Tradition in Contemporary Iran, Vol. 10 No. 2 International Political Science Review 111-119, at 115 et seq. (1989); H. SEDGHI, Women and Politics in Iran. Veiling, Unveiling and Reveiling, 65 (2007). These political reforms increasingly weakened the position of religious scholars and tribal authorities, cf. Y. ERTÜRK, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences of 27 January 2006, E/CN.4/2006/61/Add.3 at 5.

[204] See MIR-HOSSEINI, supra note 201, at 1503; MIR-HOSSEINI, supra note 16 at 33. Art. 12 of the Constitution of 1906 declared Twelver Shiism the official state doctrine of Iran, while some other schools of law enjoyed full recognition when it came to the performance of religious rituals. One of the typical Shia elements comprised in the code was the recognition of temporary marriage, see Art. 1075 of the Civil Code of 1935; MIR-HOSSEINI, supra note 16 at 24; A. E. GRAVES, Women in Iran: Obstacles to Human Rights and Possible Solutions, 5 American University Journal of Gender, Social Policy & the Law 57-92, at 63, footnote 29 (1996/1997).

[205] Cf. MIR-HOSSEINI, supra note 16 at 24.

[206] Art. 1041 of the Civil Code of 1935.

and the male spouse was at least 15 years old.[207] This meant that marrying off girls below 15 years of age without judicial permission was declared a punishable offence.[208] In order to establish state control over marriage and divorce, the registration of such events became mandatory.[209] Failure to register a marriage or notify a divorce made both the husband and the registry office official participating in the marriage proceedings liable to punishment.[210]
The age limitations set by the Civil Code and the Marriage Act were considerably higher than those advocated by the Jafari school, which defines marriageable age as nine for females and 15 for males.[211] The Shah's legislation in fact proved to be mainly beneficial to women of higher social class, since the age requirements set out by the new law were hardly observed in rural regions.[212] Furthermore, the courts, despite taking the new legislative provisions into account, did not in fact succeed in significantly reducing child marriages, because exceptions under article 1041 of the Civil Code were granted too permissively.[213]
In 1967, the primacy of classical Islamic law with regard to matters of personal status was substantially curtailed when a new Family Protection Law, subsequently revised in 1975, came into force. The new law was commonly seen as one of the most liberal family laws in the Middle East. While not directly challenging the intrinsically religious nature of the pre-existing law, the new law introduced a number of changes, most of which were purely formalistic in nature.[214] The practical effect of the registration requirement, for example, was reinforced by denying court access to claims related to unregistered marriages.[215] Moreover, although it refrained from explicitly negating the validity of temporary marriages, the new law did strictly prohibit such alliances from being registered.[216] Last but not least, the Family Protection Law also increased the marriageable age for females to 18 and for males to 20.[217] Girls could be given into marriage earlier, though not before the age of 15, provided that they had reached the requisite degree of physical development and the marriage was agreed upon by both the public prosecutor and the court.[218]

b) Islamic Revolution

In the Islamic Revolution of 1979, Ayatollah Ruholla Khomeini, a powerful cleric, succeeded in overturning the Iranian monarchy and proclaiming the Islamic Republic of Iran. The new constitution adopted in December of that year and still in force today marks the complete take-

[207] Art. 1041 of the Civil Code of 1935. Cf. D. A. MOMENI, The Difficulties of Changing the Age at Marriage in Iran, Vol. 34 No. 3 Journal of Marriage and Family 545-551, at 545 et seq. (1972).
[208] Art. 3 of the Marriage Act of 1931 as amended in 1937. If the girl had not even reached the age of 13 years or if she was physically harmed as a result of the marriage the punishment was more severe, cf. MOMENI, supra note 207 at 546.
[209] Art. 1 Para. 3 Marriage Act of 1931 as amended in 1937. Authors seem to differ as to whether unregistered marriages were denied legal validity or not, cf. MIR-HOSSEINI, supra note 16 at 166; Z. MIR-HOSSEINI, Women and Politics in Post-Khomeini Iran: Divorce, Veiling and Emerging Feminist Voices, in H. Afshar (Ed.), Women and Politics in the Third World 142-170, at 145 (1996); N. YASSARI, An Islamic Alternative: Temporary Marriage, in J. M. Scherpe & N. Yassari (Eds.), The Legal Status of Cohabitants 557-569, at 559, footnote 14 (2005) (affirmative); M. ENAYAT, Iran, in A. Bergmann & M. Ferid & D. Henrich (Eds.), Internationales Ehe- und Kindschaftsrecht mit Staatsangehörigkeitsrecht, at 38 (2002) (negative).
[210] Art. 1 Para. 2 of the Marriage Act of 1931 as amended in 1937.
[211] Cf. Part One, II; BAKHTIAR, supra note 23 at 403.
[212] Cf. ERTÜRK, supra note 203 at 5.
[213] For a detailed evaluation of the minimum age legislation of the 1930s cf. MOMENI, supra note 207 at 546 et seq.
[214] Cf. MIR-HOSSEINI, supra note 209 at 145; L. HALPER, Law and Iranian Women's Activism, in Z. R. Kassam (Ed.), Women and Islam 3-18, at 5 (2010).
[215] See MIR-HOSSEINI, supra note 16 at 166.
[216] See MIR-HOSSEINI, supra note 16 at 166.
[217] Art. 23 of the Family Protection Law as revised in 1975.
[218] Art. 23 of the Family Protection Law as revised in 1975.

over of the state by the Shiite clergy, fusing its democratic and theocratic elements.[219] It is deeply influenced by the authority structure prevalent in Shia Islam and confers great powers to the spiritual leader.[220] The constitution ordains that all forms of state legislation be compliant with the sharia, with the consequence that any laws which contradict the sharia are null and void.[221] In the aftermath of the revolution, the majority of the laws enacted under the Shah were not in fact repealed by the clergy, but were incorporated into the law of the republic instead.[222] Thus, the Family Protection Law was never formally suspended, but simply declared un-Islamic in a personal statement by Khomeini.[223] Indeed, some of its provisions did continue to be applied, though these related solely to matters of relative insignificance.[224]

During the period of re-Islamisation which followed the revolution, the question of marriageable age was re-visited as part of the 1983 revision of the Civil Code, and this revision also encompassed article 1041. The revised provision generally prohibits marriage before the age of majority,[225] which, in line with classical Shia doctrine, is defined as nine years for girls and 15 years for boys.[226] Marriage before puberty is permissible by way of exception, if the guardian approves of the marriage and the alliance serves the spouses' 'best interests'.[227] One provision which is at variance with classical Shia law is that a woman who has never been married before must obtain her guardian's consent for the conclusion of a marriage contract, even if she has already reached full legal majority.[228]

The 1983 amendments to the Civil Code – with the exception of the successive revisions to article 1041 set out below – are still in force today. The same applies to the Marriage Act of 1931 which, in common with the Family Protection Law, was not abrogated in the aftermath of the revolution. Today, the discrepancies between the wording of article 3 of the Marriage Act and the 1983 amendments to the Civil Code are largely ignored in practice on the basis that the alteration to the Civil Code also extends to the substance of the Marriage Act, so that the latter should be interpreted in the light of the revised Civil Code.[229]

[219] See ARJOMAND, supra note 203 at 116 et seq.

[220] Arts. 5 and 107 of the Constitution of 1979.

[221] Art. 4 of the Constitution of 1979. The power to review the conformity of state legislation with the rules of sharia is bestowed on the Guardian Council, a small board of Islamic scholars and jurists (Arts. 4, 72 and 91 of the Constitution of 1979). If a draft parliamentary bill is rejected by the Guardian Council, parliament can either go over the draft again or insist on it. If the Guardian Council is still unwilling to sanction the draft the matter will be referred to the Exigency Council, which will decide based on public welfare, not on conformity with the sharia (Art. 112 of the Constitution of 1979).

[222] See ARJOMAND, supra note 203 at 117. Thus, both the Civil Code of 1935 and the Marriage Act of 1931 as revised in 1937 remained in force, cf. YASSARI, supra note 209 at 559, footnote 14; MIR-HOSSEINI, supra note 201, at 1504 with references.

[223] See MIR-HOSSEINI, supra note 209 at 145.

[224] The secular courts instituted under the Family Protection Law for example continued to settle disputes until they were finally replaced by special civil courts in September 1979, see MIR-HOSSEINI, supra note 209 at 145. Similarly, the substantive restrictions imposed on polygamy by the Family Protection Law remained in force until 1984, cf. A. R. KOOHESTANI, Towards Substantive Equality in Iranian Constitutional Discourse, Vol. 7 No. 2 Muslim World Journal of Human Rights Article 2, 9 (2011); MIR-HOSSEINI, supra note 209 at 145.

[225] Art. 1041 of the Civil Code of 1935 as amended in 1983.

[226] Note 1 to Art. 1210 of the Civil Code of 1935 as amended in 1983.

[227] Note 1 to Art. 1041 of the Civil Code of 1935 as amended in 1983.

[228] Art. 1043 of the Civil Code of 1935 as amended in 1983. Cf. also N. SHID, Selected Aspects of Iranian Family Law, in N. Yassari (Ed.), The Shari'a in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law 141-152, at 142 (2005). Therefore, for girls who had not been married before the option of puberty did not, de facto, offer any way out of an unwanted marriage. Yet, conversely, if a girl intended to marry and her guardian refused his consent the girl under Art. 1043 of the Civil Code had the right to apply to the court in order to conclude her marriage.

[229] See ENAYAT, supra note 209 at 36; V. M. MOGHADAM, Women in the Islamic Republic of Iran: Legal Status, Social Positions, and Collective Action, Presenter's Article for the Conference "Iran After 25 Years of Revolution: A Retrospective and a Look Ahead" at the Woodrow Wilson International Center for Scholars, 16 November 2004, available at: www.wilsoncenter.org/events/docs/ValentineMoghadamFinal.pdf [16 November 2012].

Around the year 2000, the Iranian parliament again addressed the minimum age for marriage by referring a redraft of article 1041 of the Civil Code to the Guardian Council. This redrafted version proposed raising the marriageable age for girls from nine to 13 years, while maintaining the age limit of 15 years for boys.[230] The Guardian Council rejected the bill, which the parliament then referred to the Council of Exigency for a final decision. That body approved the redraft, though it also insisted on an additional clause which permitted the marriage of girls younger than 13 years based on the guardian's consent and the girls' physical maturity, thus rendering the proposed age limitations non-compulsory.[231] This version of article 1041 was finally adopted and is still in force to this day. It should however be noted that the chairman of the Iranian parliament's legal affairs committee recently announced that the committee is again envisaging lowering the marriageable age for girls under article 1041 of the Civil Code back down to nine years.[232]

In July 2007, a new draft bill for the protection of the family was submitted to the Iranian parliament for discussion. Amongst other things, the draft addresses the problem of non-registration of marriage and provides for compulsory registration of all changes in marital status. Most notably, in its original form, the draft also imposed an obligation to register temporary marriages in order to safeguard the interests not only of the woman, but also of any children, who, if born out of a non-registered marriage, typically lack sufficient legal protection with regard to healthcare and education.[233] In March 2012, however, the Iranian parliament passed a new version of the provision which renders registration of temporary marriages optional, except in cases where the woman is pregnant.[234] Because it also contains some highly controversial provisions relating to polygamy and the taxation of dowers, the rest of the draft is currently still awaiting parliamentary ratification.[235]

The fact that registration of temporary marriages is not compulsory notably compromises the accuracy of the data collected in the latest available demographic surveys on marriage and the family.[236] The official statistics indicate that in 2006 16.6 percent of women aged 15 to 19 were

[230] Previously, parliament had formulated two other drafts in the same matter but the Guardian Council had rejected both bills on the grounds that they violated the sharia. The first redraft wanted to reintroduce the age limitations that had been implemented by the first version of the Family Protection Law of 1967, i.e. 15 years for girls and 18 years for boys. The second redraft suggested raising the minimum age for girls to 14 and for boys to 17 years. Cf. also P. NORTHON, How Many Bicameral Legislatures Are There?, Vol. 10 No. 4 Journal of Legislative Studies 1-9, at 5 (2007); N. YASSARI, Das iranische Familienrecht und seine Anwendung im Teheraner Familiengericht, in S. Tellenbach & T. Hanstein, Beiträge zum Islamischen Recht IV, 59-76, at 70 (2004).

[231] See R. BARLOW & S. AKBARZADEH, Prospects for Feminism in the Islamic Republic of Iran, Vol. 30 No. 1 Human Rights Quarterly 21-40, at 28 (2008); S. TREMAYNE, Modernity and Early Marriage in Iran: A View from Within, Vol. 2 No. 1 Journal of Middle East Women's Studies 65-94, at 71 (2006); ERTÜRK, supra note 203 at 9.

[232] Cf. TSAI V., Child Bride Practice Rising in Iran, Parliament Seeks to Lower Girl's Legal Marriage Age to 9, International Business Times, 30 August 2012, available at: http://www.ibtimes.com/child-bride-practice-rising-iran-parliament-seeks-lower-girls-legal-marriage-age-9-760263 [16 November 2012].

[233] Cf. A. OSANLOO, What a Focus on 'Family' Means in the Islamic Republic of Iran, in M. Voorhoeve (Ed.), Family Law in Islam. Divorce, Marriage and Women in the Muslim World 51 et seq., at 52 (2012).

[234] Art. 22 of the Draft Bill. Cf. http://www.payvand.com/news/12/mar/1064.html [16 November 2012]; http://theiranproject.com/blog/2012/03/08/iran-mps-temporary-marriage-registration-not-mandatory-2/ [16 November 2012]; TAHMASEBI S., The Family Protection Bill Hurts not only Women but Men and Children too, Interview with Farideh Gheyrat on the Family Support Bill, 13 November 2010, available at: http://we-change.org/english/spip.php?article792 [16 November 2012].

[235] Cf. http://www.payvand.com/news/10/aug/1318.html [16 November 2012]. For more information on the draft cf. I. SCHNEIDER, Civil Society and Legislation: Developments of the Human Rights Situation in Iran in 2008, in H. Elliesie (Ed.), Beiträge zum Islamischen Recht VII, Islam and Human Rights, 387-414, passim (2010).

[236] See TREMAYNE, supra note 231 at 71.

married.[237] A study conducted in 2004/2005 revealed that 16 percent of married women aged 15 or older had been married before the age of 15 and that 53 percent of women aged 15 to 19 married of their own free will.[238] Furthermore, more recent data compilations also reveal a dramatic, 30-percent increase in the number of under-age marriages between 2006 and 2009.[239] Overall, despite the theocratic nature of the Iranian state, there are reform-oriented movements in the country which both oppose misinterpretations of the holy sources by clerical leaders and call for modernist re-readings of Islamic teaching.[240] Strict clerical interpretations do however enjoy considerable support in the conservative-dominated Guardian Council, which has proven to be a major obstacle to reform on several occasions.[241]

c) CEDAW

In 2003, the Iranian parliament passed a resolution for Iran to join the CEDAW. The bill was later rejected by the Guardian Council on the grounds that the provisions of the CEDAW violate both the Iranian constitution and the sharia.[242] The Council's reasoning was based on the principles of gender equality in Islam teaching. According to the Islamic notion of equality, men and women do not enjoy equal rights, because they are different in nature and therefore require different kinds of protection.[243] Interestingly, as indicated above, ratification of the CEDAW was discussed by both proponents and opponents in an entirely Islamic framework which was not in any way influenced by international perceptions of human rights. While supporters of the convention argued that the provisions of the CEDAW were compatible with Islam, the opponents of the convention put forward arguments demonstrating their inconsistency with Islamic teaching.[244] Since the proposed adoption of the CEDAW was dismissed by the Guardian Council, the matter has now been placed before the Council of Exigency for a final decision.[245]

5. Afghanistan

a) Legal pluralism

When Afghanistan gained independence from British colonial rule in 1919, its legal system exhibited a complex, triple-layered structure comprising elements of Islamic, customary and statutory law. In everyday life, Islamic and customary law played a much more important role than statutory law, since they had already held sway in Afghanistan for centuries, whereas state regulation had only been introduced by the Afghan rulers in the late nineteenth and early twentieth century. The Afghan population was a heterogeneous composition of various different tribes, ethnicities and religious communities. For them, Islamic law provided a common

[237] See United Nations Department of Economic and Social Affairs, supra note 107.
[238] Cf. A. KIAN-THIÉBAUT, From Motherhood to Equal Rights Advocates: The Weakening of Patriarchal Order, Vol. 38 No. 1 Iranian Studies 45-66, at 51 et seq. (2005).
[239] Cf. TSAI, supra note 232; Report of the Special Rapporteur on the Situation of Human rights in the Islamic Republic of Iran of 13 September 2012, A/67/369 at 21 et seq., available at: http://www.iranhrdc.org/english/human-rights-documents/united-nations-reports/un-reports/1000000196-report-of-the-special-rapporteur-on-the-situation-of-human-rights-in-the-islamic-republic-of-iran-13-september-2012.html#.UJ0QtlElrTp [16 November 2012].
[240] See BARLOW & AKBARZADEH, supra note 231 at 25 et seq.
[241] See ERTÜRK, supra note 203 at 9.
[242] See KOOHESTANI, supra note 224 at 2; MIR-HOSSEINI, supra note 201, at 1505; OSANLOO, supra note 233, at 62.
[243] Cf. BARLOW & AKBARZADEH, supra note 231 at 29. The principle is enshrined in Arts. 20 and 21 of the Constitution of 1979.
[244] One argument against the ratification was that the convention's notion of equality would deprive women of rights which they enjoyed under Islamic law such as not being obliged to maintain the family, cf. ERTÜRK, supra note 203 at 8.
[245] See also SCHNEIDER, supra note 235 at 391, 405.

ground and identity. It proved to be a consistent, stable body of rules even in times of political turbulence and uncertainty. Islamic law was interpreted and applied according to the Hanafi school of thought, which was followed by the majority of Afghans.[246] Tribal customs, on the other hand, often either adapted these religious rules to local needs or, in some instances, entirely overlooked them.[247] Customary usages were elaborated through oral traditions, which essentially outlined codes of conduct or honour applicable to the members of a specific group or clan.[248] These codes varied significantly from tribe to tribe and were subject to continual change.[249] The scope for the application of these codes partly overlapped with sharia law, because they also addressed matters relating to criminal, property and marriage law.[250] Today, customary law is still of vital importance among the Afghan tribal structures. Most notably, traditional habits such as dispute settlement through so-called *jirgas* or *shuras* often serves as a basis for the legitimacy of political actions as well as providing a judicial framework for civil and criminal law cases.[251]

In contrast to Islamic and customary law, statutory legislation, as indicated above, is a much more recent phenomenon in Afghanistan. Initially, the Afghan rulers aimed at consolidating their leadership through purely administrative measures and left matters of personal status and family law fully at the discretion of the sharia and customary law.[252] It was not until the formation of a modern nation state in Afghanistan in the 1910s that the legal reforms pursued by the rulers also extended to personal status law as a means of prohibiting customary practices that had repeatedly caused tribal controversies in the past.[253]

One such problem that had attracted the King's attention was the issue of child marriages. In those days, marriages of minors were often arranged by parents in order to return a favour, ensure inheritance rights or stabilise bonds between families.[254] A law passed by the King in

[246] Cf. T. BARFIELD, Culture and Custom in Nation-Building: Law in Afghanistan, Vol. 60 No. 2 Maine Law Review 347-373, 352 (2008). A considerable minority of Afghans adhered to the Jafari school of law. However, as outlined below, Shia doctrine was not officially recognised as a source of law until 2004.

[247] See C. T. RIPHENBURG, Post-Taliban Afghanistan: Changed Outlook for Women?, Vol. 44 No. 3 Asian Survey 401-421, 410 (2004). Cf. also M. H. SABOORY, The Progress of Constitutionalism in Afghanistan, in N. Yassari (Ed.), The Shari'a in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law 5-22, 6 (2005). Remarkably, most of Afghan citizens do not have profound knowledge of Islamic law itself and often believe that customary traditions are compatible with the sharia, cf. Max Planck Institute for Foreign Private Law and Private International Law, Family Structures and Family Law in Afghanistan. A Report of the Fact-Finding Mission to Afghanistan January – March 2005, 10 (2005), available at: http://www.mpipriv.de/shared/data/pdf/mpi-report_on_family_structures_and_family_law_in_afghanistan.pdf [16 November 2012].

[248] Cf. BARFIELD, supra note 246 at 351 et seq.; N. YASSARI, Legal Pluralism and Family Law: An Assessment of the Current Situation in Afghanistan, in N. Yassari (Ed.), The Shari'a in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law 45-60, 49 (2005). The most important and well-known customary codex is the Pashtunwali, created by the ethnicity of Pashtuns. For more information in this regard see W. STEUL, Paschtunwali: Ein Ehrenkodex und seine rechtliche Relevanz, passim (1981); SCHNEIDER, supra note 35 at 212 et seq.

[249] Cf. BARFIELD, supra note 246 at 351 et seq. There, BARFIELD also points out the influential power of the religious scholars who at times even stepped in and enforced the correction of customary law which they saw as diverging too far from the classical sharia.

[250] Cf. KAMALI, supra note 35 at 46; YASSARI, supra note 248 at 49.

[251] Cf. C. JONES-PAULY & N. NOJUMI, Balancing Relations Between Society and State: Legal Steps Toward Reconciliation and Reconstruction of Afghanistan, Vol. 52 No. 4 American Journal of Comparative Law 825-857, 829 (2004); SCHNEIDER, supra note 35 at 216. The term jirga refers to a gathering of representatives of a tribe or community in order to discuss and decide on a specific problem. For more details see YASSARI, supra note 248 at 53.

[252] Cf. also YASSARI, supra note 248 at 47 et seq., 54; BARFIELD, supra note 246 at 353.

[253] Cf. SCHNEIDER, supra note 35 at 222 et seq.; H. TRAVIS, Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq, 3 Northwestern University Journal of Human Rights 1-52, 3 et seq. (2005).

[254] Cf. KAMALI, supra note 35 at 108 et seq. It was also very common for families to exchange their daughters in marriage in order to avoid pre-marital expenses or to give a girl into marriage as compensation for a previously committed crime, cf. United Nations Assistance Mission in Afghanistan & United Nations High Commissioner for Human Rights, Report, Harm-

1921 prohibited marriage before majority.[255] It also abolished the guardian's power to conclude a marriage contract on behalf of his ward in cases where the ward was below 13 years of age.[256] Disputes arising from marriages concluded on behalf of a ward younger than 13 years were denied judicial hearing.[257]

The Law on Marriage of 1921, as well as other secularising reforms initiated by the King, encountered harsh opposition both from clerical circles struggling to maintain their influential position and clans fearing for their local authority.[258] In 1924, the reforms were discussed in a *loya jirga*, a gathering of the country's most prominent tribal and clerical leaders. As a result, both the Constitution of 1923 and the Law on Marriage of 1921 were amended. In response to clerical demands, the revised constitution explicitly named the Hanafi school of law as the official Afghan state doctrine.[259] Marriage before the age of 13 was tolerated, judicial access was granted to claims arising out of such alliances, and the revised law merely emphasised the social dangers related to early marriage.[260] The option of puberty was explicitly enshrined in the law for both boys and girls, but it was limited to marriages contracted by any person other than the spouses' father or grandfather.[261]

In 1960, another law was promulgated which sought to reduce the incidence of child marriages by unequivocally stating that a marriage before the age of 15 was not a marriage of majority.[262] As interpreted by Kamali, this provision was, at most, tantamount to a recommendation of adult marriage and fell well short of directly banning child marriages.[263] However, the guardian's compulsory power was curtailed to the extent that he was no longer allowed to conclude a marriage contract on behalf of a ward younger than 15 years old if he either had a reputation for moral corruption or if the marriage did not safeguard the ward's best interests.[264] Non-compliance with these requirements rendered the marriage contract invalid and claims related to a marriage not evidenced by a valid marriage contract were denied judicial hearing.[265]

The objective of the 1960 law was to establish clarity through a clear age requirement. In practice, however, since Afghanistan lacked a comprehensive birth registration system, the age of the spouses could often not be ascertained beyond doubt, thus leaving the final decision to the courts' discretion and significantly curtailing the protection afforded to minors by the law.[266] As a result of the difficulties associated with ascertaining the ages of young spouses, the explic-

---

ful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan, 15 et seq. (2010), available at: http://unama.unmissions.org/Portals/UNAMA/Publication/HTP%20REPORT_ENG.pdf [16 November 2012].

[255] Art. 5 of the Nizamnama (Law) of Marriage of 1921.

[256] Art. 6 of the Nizamnama (Law) of Marriage of 1921. See KAMALI, supra note 35 at 110.

[257] Art. 8 of the Nizamnama (Law) of Marriage of 1921.

[258] Cf. YASSARI, supra note 248 at 54 et seq.; BARFIELD, supra note 246 at 348 et seq.; SABOORY, supra note 247 at 6; MOGHADAM V., Modernizing Women. Gender and Social Change in the Middle East, 2nd Edition, 238 et seq. (2003).

[259] Art. 2 of the Constitution of 1923 as amended in 1924. See SABOORY, supra note 247 at 6.

[260] Arts. 3 and 5 of the Nizamnama (Law) of Marriage of 1921 as amended in 1924. See KAMALI, supra note 35 at 116, footnotes 16 and 17. According to article 5, all disputes in this regard had to be brought before the court until the year 1305 A.H. Claims brought later and not evidenced by a document or decisive proof could not be heard by the courts unless the monarch himself authorises the court to entertain them.

[261] Art. 9 of the Nizamnama (Law) of Marriage of 1921 as amended in 1924. See KAMALI, supra note 35 at 116, footnote 18.

[262] Art. 2 of the Law on Marriage of 1960.

[263] See KAMALI, supra note 35 at 112.

[264] Art. 19 of the Law on Marriage of 1960. See KAMALI, supra note 35 at 113.

[265] Arts. 5 and 18 of the Law on Marriage of 1960. Yet, an exception was to be made if there was a child born from such a marriage or if neither of the spouses contested the marriage, see KAMALI, supra note 35 at 113, footnote 20; H. MALIKYAR, Development of Family Law in Afghanistan: The Roles of the Hanafi Madhab, Customary Practices and Power Politics, Vol. 16 No. 3 Central Asian Survey 389-399, at 394 (1997).

[266] Cf. KAMALI, supra note 35 at 117.

it statutory marriage age was eventually abandoned when this law was revised in 1971 and substituted by a relatively vague clause stating that the marriage of a bride and groom below the age of majority was not a marriage of majority.[267] Apart from this purely formal modification, the remaining measures set out by the 1960 law to prevent the guardian from abusing his powers were maintained.[268] Access to court was broadened, as courts were now also allowed to hear marriage-related claims in cases where the marriage was established by reliable witness statements that a marriage had been concluded or that the couple were cohabiting as man and wife.[269]

b) The Civil Code of 1977

In 1973, Afghanistan became a republic and subsequently adopted a new constitution. With the enactment of the new Civil Code in 1977, personal status and family law was comprehensively codified for the first time.[270] The code was mainly based on the Hanafi school of thought, though it also incorporated a number of elements taken from the Maliki school of law and the French Civil Code.[271] The code emphasised the precedence of statutory law over Islamic law.[272] Article 70 of the Civil Code defined the minimum marriageable age as 16 for girls and 18 for boys. Girls below this age could only be given in marriage by their guardian if judicial permission was sought and obtained and if they were at least 15 years old.[273] A woman with full legal majority was granted the right to conclude a marriage on her own.[274] This autonomy in contracting a marriage was congruent with both the classical Hanafi position and with article 517 of the Penal Code adopted in 1976, which also classified certain forms of forced marriage as criminal offences.[275] Moreover, the Civil Code eventually also introduced the mandatory registration of marriages as well as other changes in marital status law.[276]

In theory, the Civil Code of 1977 was intended to replace the application of uncodified sharia and customary law norms, particularly with regard to harmful traditional practices such as child marriage and the sale of children, mostly girls, in return for goods or favours.[277] In fact, however, the practical implementation of statutory measures preventing these practices was

[267] Art. 3 of the Law on Marriage of 1971. An electronic version of the document is available at: http://www.asianlii.org/af/legis/laws/lom1971ogn190p1971080813500517a383/ [16 November 2012]; cf. also KAMALI, supra note 35 at 122 et seq., who also indicates that in the preceding parliamentary debate different proposals for the formulation of this article had been made, such as retaining the age limit of 15 years or setting it at an even higher level.

[268] Art. 20 of the Law on marriage of 1971, according to which the guardian was not permitted to conclude a marriage contract on behalf of his ward if he had a bad moral reputation or the marriage was of no benefit to the minor.

[269] Art. 37 of the Law on Marriage of 1971 and Supreme Court Circular No. 1991/21:IX.1350/1971. For more details see KAMALI, supra note 35 at 125 et seq.

[270] Cf. YASSARI, supra note 248 at 56. An electronic version of the document is available at: http://www.asianlii.org/af/legis/laws/clotroacogn353p1977010513551015a650/ [16 November 2012].

[271] Cf. YASSARI, supra note 248 at 56; Schneider, supra note 35 at 212.

[272] Art. 1 Para. 2 of the Civil Code of 1977 permitted the application of Islamic law only where no statutory provision exists. This article was in conformity with Art. 99 of the new constitution which had been enacted in 1977 and allowed courts to apply sharia law based on the Hanafi opinion only in the absence of statutory law.

[273] Art. 71 of the Civil Code of 1977.

[274] Art. 80 of the Civil Code of 1977, see MALIKYAR, supra note 265 at 394.

[275] Under Art. 517 Para. 1 of the Penal Code of 1976 any person giving in marriage a widow or a woman of 18 years or older contrary to her will was liable to imprisonment. Para. 2 of the same article aggravated the punishment in cases where the marriage was concluded as compensation for a previously committed crime. An electronic version of the document is available at: http://www.cicr.org/ihl-nat.nsf/6fa4d35e5e3025394125673e00508143/845809a497304d8fc12571140033ac69/$FILE/Penal%20Code%20-%20Afghanistan%20-%20EN.pdf [16 November 2012].

[276] Arts. 48 and 61 of the Civil Code of 1977.

[277] According to Art. 1 of the Civil Code of 1977 the application of religious law is not permitted unless the code contains no provision on a particular matter, see YASSARI, supra note 248 at 56.

far from systematic and they continued to occur, particularly in rural areas where centralised state control held little sway.[278] Generally speaking, statutory interventions were not as readily accepted by the Afghan population as sharia and customary law norms, a circumstance which was at least partly attributable to the instability of the political situation and the corresponding decline of confidence in state institutions.[279]

Shortly after the enactment of the Civil Code in 1977, the political climate underwent a further major change when power was seized by a communist regime driven by the ambition to turn Afghanistan into a modern socialist state. In addition to radical land reforms and the enactment of a provisional constitution, reforms in the field of personal status law were also part of the communist agenda.[280] A decree issued by the communist Revolutionary Council in 1978 aimed at abolishing discriminatory marital customs directly challenged the Islamic notion of gender equality.[281] It declared engagements and marriages involving girls below 16 and boys below 18 years of age to be punishable offences, thus making the rules set forth in the Civil Code more stringent.[282] Faced with massive protests by both tribes and clerics alike, the government later suspended the decree on gender equality along with its legislation on land reforms.[283]

Political instability continued when the communist regime was overthrown by a coalition of Islamist warlords, the so-called *mujaheddin*, and did not come to an end until internal power struggles among the warlords gave way to the rise of the Taliban, an extremely conservative Islamist sect, in 1996.

c) Taliban rule

The Taliban movement's ideology was in some respects similar to that of the Wahhabist doctrine. The Taliban strove to establish a theocratic state under the strict rule of sharia in its primordial form.[284] All laws enacted under the communist regime were revoked and those which had been in force prior to the communist takeover were re-enacted.[285] Courts were instructed to follow a strict interpretation of the sharia with due regard to the Hanafi school of thought.[286] Priority was also given to the eradication of customary practices which the Taliban deemed contradictory to Islamic law. Paradoxically, the Taliban themselves generally lacked any profound knowledge of either the theological foundations of Islamic jurisprudence or its classical methods.[287]

[278] See YASSARI, supra note 248 at 47, 56; KAMALI, supra note 35 at 126 et seq.

[279] Cf. also BARFIELD, supra note 246 at 348; V. M. MOGHADAM, Revolution, the State, Islam, and Women: Gender Politics in Iran and Afghanistan, 22 Social Text 40-61, 44 (1989).

[280] See H. AHMED-GOSH, A History of Women in Afghanistan: Lessons Learnt for the Future Or Yesterdays and Tomorrow: Women in Afghanistan, Vol. 4 No. 3 Journal of International Women's Studies 1-14, 6 (2003); SABOORY, supra note 247 at 13. One of the most contested issues was the education of girls, cf. MOGHADAM, supra note 279 at 56.

[281] Decree No. 7 of 1978 of the Revolutionary Council. Arts. 1 and 2 for instance outlawed the practice of giving a woman in marriage in return for money or other favours cf. MOGHADAM, supra note 279 at 47. The impetus of the communist legislation did not take into account customary or religious peculiarities but was driven by a purely autonomous notion of equality, cf. SCHNEIDER, supra note 35 at 223.

[282] Arts. 5 and 6 of the Decree No. 7 of 1978 of the Revolutionary Council.

[283] Cf. KAMALI, supra note 35 at 128; AHMED-GOSH, supra note 280 at 6; W. M. RAHIMI, Status of Women: Afghanistan, 31 Social and Human Sciences in Asia and the Pacific: Afghanistan 1, at 29 (1991).

[284] Cf. TRAVIS, supra note 253 at 12 et seq.; N. NOJUMI, The Rise and Fall of the Taliban, in R. D. Crews & A. Tarzi (Eds.), The Taliban and the Crisis of Afghanistan 90, at 91 (2008).

[285] – albeit with the exception of all provisions related to the monarchy, see SABOORY, supra note 247 at 17.

[286] See SABOORY, supra note 247 at 18.

[287] See TRAVIS, supra note 253 at 13; SABOORY, supra note 247 at 18.

d) Process of reconstruction

After the collapse of the Taliban regime in 2001, the political reconstruction of Afghanistan was initiated by an agreement signed in Bonn, Germany.[288] This document reinstated the Constitution of 1964 as well as most of the laws and regulations in force prior to the communist era.[289] Accordingly, the Civil Code of 1977 re-entered the statute books in 2001.[290] A new constitution was adopted in January 2004 which declares Islam to be both the state religion and the benchmark for statutory legislation.[291]

Today, the statutory approach to child marriage sets out clear limitations. As outlined above, the reinstated Civil Code defines the marriageable age as 16 years for girls and 18 years for boys and prohibits the conclusion of a marriage contract by a guardian on behalf of girls younger than 15 years.[292] A new standard marriage contract introduced by the Supreme Court of Afghanistan in 2007 in accordance with the Civil Code stipulates that the girl should be at least 16 years old at the time of marriage.[293] Moreover, in 2009, a new Law on Elimination of Violence against Women was enacted. Its primary goal is to eliminate harmful customary practices which have no basis in Islamic law.[294] The law qualifies specific practices as acts of violence against women, including the selling or buying of women in the context of marriage, forced marriage and marriage before the minimum legal age.[295] This law also urges the government to take both protective and informative measures to eliminate these practices.[296]

A further notable development was the Shia Personal Status Law, which came into force in 2009 and was designed to address the special needs of Afghanistan's large Shiite minority.[297]

[288] Agreement on Provisional Arrangements of 5 Decemver 2001. An electronic version of the document is available at: http://www.un.org/News/dh/latest/afghan/afghan-agree.htm [16 November 2012].

[289] Art. II, Para. 1 of the Agreement on Provisional Arrangements of 5 December 2001. The agreement also established an interim authority which was empowered to repeal or modify these laws. Cf. also A. WARDAK, Building a Post-War System in Afghanistan, 41 Crime, Law and Social Change 319-341, 328 (2004).

[290] Cf. M. H. KAMALI, Islam and its Shari'a in the Afghan Constitution 2004 with Special Reference to Personal Law, in N. Yassari (Ed.), The Shari'a in the Constitutions of Afghanistan, Iran and Egypt – Implications for Private Law 23-44, 39 (2005); I. SCHNEIDER, Recent Developments in Afghan Family Law: Research Aspects, 104 ASIEN 106-118, at 109 (2007).

[291] Under Art. 2 of the Constitution of 2004, Islamic law can only be applied in the absence of a statutory provision. Art. 3 of the Constitution ordains that no law or international convention be in contradiction with Islam. The power to review the constitutionality of national laws and treaties is vested in the Supreme Court (Art. 121 of the Constitution of 2004). See D. KANDIYOTI, Between the Hammer and the Anvil: Post-Conflict Reconstruction, Islam and Women's Rights, Vol. 28 No. 3 Third World Quarterly 503-517, 506 et seq. (2007). Under art. 54 of the Constitution, the state shall adopt any necessary measures to attain the physical and spiritual health of the family, including the elimination of related traditions contrary to the principles of Islam. An electronic version of the document is available at: http://www.afghanembassy.com.pl/cms/uploads/images/Constitution/The%20Constitution.pdf [16 November 2012].

[292] Arts. 70 and 71 of the Civil Code of 1977.

[293] See http://www.irinnews.org/report.aspx?reportid=70684 [16 November 2012].

[294] Art. 2 of the Law on Elimination of Violence against Women of 2009. For more information cf. A. GILBERT, Reforming and Drafting Laws in the Post-Taliban Era: The Role of Coalitions, in International Centre for Human Rights and Democratic Development, A Woman's Place. Perspectives on Afghanistan's Evolving Legal Framework 15-26, 18 et seq. (2010), available at: http://appro.org.af/downloads/A_Womans_Place.pdf [16 November 2012].

[295] Art. 5 of the Law on Elimination of Violence against Women of 2009. See also United Nations Assistance Mission in Afghanistan & United Nations High Commissioner for Human Rights, supra note 254 at 3.

[296] For more information on the law in general as well as on its weak points see United Nations Assistance Mission in Afghanistan & United Nations High Commissioner for Human Rights, supra note 254 at 3 et seq.

[297] Art. 1 of the Shiite Personal Status Law of 2009 referred to Art. 131 of the Constitution of 2004 which, as explained above, permits the application of Shia jurisprudence in special circumstances. An electronic version of the document is available at: http://www.unhcr.org/refworld/docid/4a24ed5b2.html [16 November 2012]. The law caused vigorous protests both in the international media and among the Afghan civil society. While human rights activists criticise the law on the basis that it contrads international human rights obligations and the Afghan constitution, Afghan citizens have revolted against the clear signs of Iranian influence and its restrictive interpretation of Islamic law, cf. http://www.hrw.org/news/2009/08/13/afghanistan-law-curbing-women-s-rights-takes-effect [16 November 2012]; C. FARHOUMAND-SIMS, Family Law in Afghanistan: Reflecting on the Past to Understand the Present and Prepare for the Future, in

This law contains distinct provisions with regard to marriageable age and the marriage of minors. It differentiates between marriages of minors and marriages of adults and makes the former conditional on either the guardian's approval or judicial permission.[298] Male puberty is defined as occurring at the age of 15 years or at the time of first ejaculation, while female puberty is marked by the onset of menstruation. Both these definitions are compatible with the classical Shia interpretation.[299] Furthermore, the validity of a virgin girl's marriage contract is contingent upon her own consent and the permission of her guardian or, failing that, the permission of a court.[300] A husband consummating a marriage before his wife reaches puberty is liable to punishment.[301] Last but not least, the law also enshrines the option of puberty for both sexes, though only in cases where a marriage concluded by a guardian does not safeguard the ward's best interests.[302]

Despite these substantial efforts to reduce the incidence of child marriages, it should be remembered that, for as long as it has existed, statutory legislation in Afghanistan has never really succeeded in taking the place of either religious law or traditional practices. The poverty, illiteracy and the lack of economic development which long periods of war have brought in their wake have all served to obstruct the practical implementation of statutory legislation, as indeed has the somewhat hostile approach taken to such norms by the tribal authorities and, perhaps most importantly of all, widespread unawareness of their existence among the general population. There are thus numerous reasons why, even today, Afghanistan's official legal framework has relatively little bearing on the legal realities of everyday life. A good example of this can be seen in the fact that only about five percent of marriages are estimated to be registered at all, even though such registration is mandated by article 61 of the Civil Code.[303] Similarly, the clear tenets set out in the statutory legislation with regard to child marriage have clearly yet to become fully effective, since, according to the Ministry of Women's Affairs and a number of NGOs, up to 57 percent of girls are in fact married before the age of 16.[304] This problem is aggravated by the absence of a nationwide birth registration system and the fact that, as a result, marriages are ordinarily concluded based upon simple estimates of the spouses' ages.[305] Moreover, studies carried out by the Afghanistan Independent Human Rights Commis-

---

International Centre for Human Rights and Democratic Development, A Woman's Place. Perspectives on Afghanistan's Evolving Legal Framework 5-13, 13 (2010), available at: http://appro.org.af/downloads/A_Womans_Place.pdf [16 November 2012].

[298] Art. 99 Para. 1 of the Shiite Personal Status Law of 2009.

[299] Art. 27 of the Shiite Personal Status Law of 2009.

[300] Art. 102 of the Shiite Personal Status Law of 2009.

[301] Art. 100 of the Shiite Personal Status Law of 2009.

[302] Art. 99 Para. 2 of the Shiite Personal Status Law of 2009.

[303] See ERTÜRK, supra note 203 at 8. Cf. also SCHNEIDER, supra note 290 at 112, 115; Max Planck Institute for Foreign Private Law and Private International Law, supra note 247 at 10; S. BAGHAM & W. MUKHATARI, Study on Child Marriage in Afghanistan, Medica Mondiale, 5 (2004), available at: http://www.medicamondiale.org/fileadmin/content/07_Infothek/Afghanistan/Afghanistan_Child_marriage_medica_mondiale_study_2004_e.pdf [16 November 2012]. For more background information cf. A. HOZYAINOVA, The Marriage Contract: Process and Recommendations for its Implementation, in International Centre for Human Rights and Democratic Development, A Woman's Place. Perspectives on Afghanistan's Evolving Legal Framework 27-36, 31 et seq. (2010), available at: http://appro.org.af/downloads/A_Womans_Place.pdf [16 November 2012].

[304] See Afghanistan National Development Strategy, 2008-2013, at 41, available at: http://www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf [16 November 2012]. Cf. also http://www.irinnews.org/report.aspx?reportid=24431 [16 November 2012]; ERTÜRK, supra note 203 at 7; see also Afghan Child Bride's In-Laws Sentenced for Torture, CBS News, 5 May 2012, available at: http://www.cbsnews.com/8301-202_162-57428609/afghan-child-brides-in-laws-sentenced-for-torture/ [16 November 2012].

[305] See BAGHAM & MUKHATARI, supra note 303 at 5; Afghanistan Independent Human Rights Commission, Report on the Situation of Economic and Social Rights in Afghanistan, IV, November/December 2009, at 54, available at:

sion indicate that somewhere between 60 and 80 percent of all marriages involve coercion.[306] Actual enforcement of either marital age requirements or the precondition of free consent rarely occurs in practice, because infringements of these rules are scarcely punished.[307] The law in this area is thus clearly ineffective, even if the data supporting this contention are not fully reliable. Due to lack of birth and marriage registration, data are not collected comprehensively and the indications that are available are thus often based on little more than rough estimates.[308]
Another factor which could potentially affect the enforceability of statutory measures is the power vested in the the Supreme Court under article 121 of the Constitution to strike down both national and international legislation which it deems contradictory to Islam. It should be noted that the Supreme Court has not yet assessed the constitutionality of the 2009 law on violence against women, and it is unclear at this stage what position it will adopt on this matter.

e) CEDAW

In 2003, as part of the reconstruction process, Afghanistan became a signatory to the CEDAW. It is noteworthy that government ratified the convention without reservations and its applicability was reconfirmed by the 2004 constitution.[309] Practical implementation of the CEDAW does however face the same obstacles as state legislation in general. Furthermore, in 2004, some conservative members of parliament objected that the convention had been signed by the interim authority only, which – in the view of these conservative parliamentarians – did not possess the power to enter into such a commitment on behalf of the Afghan nation.[310] Also, as is the case with the 2009 law on violence against women, the Supreme Court has not yet assessed the constitutionality of the CEDAW.

III. Conclusion

In general, the classical schools of Islamic legal thought tend to regard child marriage as a form of matrimony which, though very controversial, is nevertheless admissible. Islamic scholars generally recognise the option of giving minors into marriage before puberty, and they usually equate the onset of puberty with the beginning of autonomous marriage capacity. In the absence of physical signs, scholarly opinions assume that puberty commences at slightly different lunar ages which, depending on the school, are either the same for both sexes or a little higher for male spouses. The range of marriageable ages for males extends from 15 years according to the Hanbali, the Shafi'i and the Jafari schools to 17 or 18 years in Hanafi and Maliki teaching. For female spouses, the range of marriageable ages extends from a high of 17 years, as represented by the Hanafi school, to 15 years according to both Shafi'i and Hanbali opinion, and down to as little as nine years according to Jafari teaching.
To a large extent, neither the institution of marriage involving minors, nor the assumption that young people have the necessary capacities to marry at such ages correspond to the notion of marriageability underlying modern human rights treaties. This divergence is not an exclusively Arab or Islamic problem, and until recently was still observable in other parts of the world. It is

http://www.humansecuritygateway.com/documents/AIHRC_ReportOnSituationOfEconomicAndSocialRightsInAfghanistan.pdf [16 November 2012].

306 Cf. Afghanistan Independent Human Rights Commission, supra note 305 at 55 et seq.

307 See Afghanistan National Development Strategy, supra note 304 at 41.

308 See for instance the remarks as to research methods in BAGHAM & MUKHATARI, supra note 303 at 4.

309 Art. 7 of the Constitution of 2004.

310 See C. FARHOUMAND-SIMS, CEDAW and Afghanistan, Vol. 11 No. 1 Journal of International Women's Studies 136-156, 149 et seq. (2009).

however the case that, to date, sharia lies at the heart of virtually every modern Muslim family law system, a circumstance attributable to the fact that colonial rulers prioritised the modernisation of public, commercial and procedural law over reforms to personal status law. As a result, the area of the private and the family law became the exception within state legislation in Muslim countries, which irrevocably associated family law with an intrinsic Islamic identity.[311]
To date, the close links between religion and family-law matters have resulted in many national legislators exercising considerable restraint when attempting to enact statutory reforms in marriage law. One legislative approach – as exemplified by the initiatives taken in Egypt at the beginning of the twentieth century – is to circumvent the state's strict adherence to a specific school of Islamic law by eclectically incorporating more liberal interpretations from other schools of law into statutory provisions, thus preserving the supremacy of Islamic law. Another approach is that of introducing reforms on a merely procedural level and abstaining from any direct, substantive challenges to the established sharia rules. This, again, is best exemplified by the Egyptian legislation of 1923, which denied judicial access to claims arising from under-age and unregistered marriages. In addition to these more unobtrusive initiatives, other statutory approaches have even ventured into the very essence of sharia rules by completely replacing them with 'modern' provisions modelled on European codes or based on new and autonomous concepts. A striking example of direct interventions of this kind can be seen in Afghanistan, where the Civil Code of 1977 curtailed a guardian's power to contract his minor female ward into marriage below the age of 15.
These various initiatives have resulted in a considerable number of reforms, which have generally had the effect of raising the legal marriageable age. These reforms have been, and continue to be, carried out against a background of increasing public awareness of the harmful potential of early marriage and of intensified efforts in support of reform by human and women's rights activists. It is through this prism that the ratifications of international human rights treaties such as the CEDAW need to be viewed. However, precisely because family law on the national level is generally considered a specifically Islamic affair, international human rights obligations are likely to be perceived as unjustified Western interventions devoid of the necessary understanding of, and respect for, Islamic values.[312] In terms of marriage and the family, the main problem here is the basic conception of gender roles in Islam which, by its very nature, contradicts transnational notions of human rights and gender equality. Reform-minded governments and rulers face the difficult task of reconciling international commitments with conservative religious demands and, as a consequence, often resort to relatively vague, yet far-reaching, reservations. In this regard, state institutions vested with the power to assess the constitutionality of statutory provisions, especially those associated with international conventions, have the potential to provide an important reforming counterweight to more traditional family-law notions, as the example set by the Egyptian Supreme Constitutional Court demonstrates. Conversely, these very same constitutional bodies can, when subject to strong conservative, religious influences, also constitute major impediments to reform as is the case with the Iranian Guardian Council. A similar constellation may also arise in cases where religious authorities, even when they lack any formal authority to carry out judicial reviews, exercise substantial political power and prestige of the kind enjoyed by the *ulama* in Saudi Arabia.

[311] See ABU-ODEH, supra note 39 at 1087.
[312] The same applies to national legislation based on alien ideological concepts such as Decree No. 7 of 1978 of the Marxist Revolutionary Council of Afghanistan.

The problems encountered by family-law reform extend far beyond the purely legislative level. Indeed, it is with regard to implementation and application of the law that the majority of difficulties occur. In the case of under-age and premature marriage, for example, numerous statistics have shown that statutory reforms, even though enacted, do not in fact have any practical consequences for large parts of the population. In some instances, this can be attributed to the state-controlled administration of law, in particular with regard to the judiciary and the institutions of criminal prosecution. Evidence from Egypt and Morocco shows that, in addition to the lack of appropriate training, it is the personal perceptions of judges and registry office officials which are often the root cause of even the most clearly formulated statutory law provisions being flouted, particularly in cases where there is wide scope for judicial and administrative discretion. Similarly, the fact that a child marriage is a criminal offence is meaningless in jurisdictions, such as Afghanistan, where offenders are not prosecuted.

The authority of the state often also lacks the operational wherewithal to enforce the law, as well as being overcome by geographical or political difficulties, as is the case in Morocco and Afghanistan. A critical factor here is the documentation of births and marriages, which is an essential prerequisite for any kind of state control. While the non-registration of births affects the practicability of statutory standards, the non-registration of marriages not only has severe consequences for any children born of the marriage, but also completely nullifies any of the protection afforded by statutory prescriptions, particularly as far as marital age requirements are concerned. The extreme example of Afghanistan illustrates the direct correlation between the absence of a comprehensive, functioning registration system and the failure of law enforcement. Commenting on this matter, Schneider recommends transferring the registration authority to local clerics or mullahs rather than to civil courts or registry office officials as a means of maintaining familiar and reliable structures which members of the public do not primarily associate with the presence of the state.[313]

The inefficacy of statutory law is also connected to the phenomenon of legal pluralism, i.e. the coexistence of indigenous, traditional customary law alongside statutory norms. These customary rules generally have their origins in the pre-Islamic era and, in contrast to classical Islamic law, are not uniform in character but vary significantly between specific tribes or ethnicities. Despite the deeply held religious convictions which generally characterise traditional clans, child marriage is a very common phenomenon. Poverty, property considerations and the need to keep peace between families are usually prioritised over free choice, and the idea of physical maturity as a prerequisite of marriage is generally regarded as a minor consideration. Taken together, these various factors all conspire to reduce the average age at which young spouses first marry.

Compared to tradition and religion, state legislation does not command anything like the same level of recognition among tribal populations, being, as it is, a much more recent phenomenon, which lacks both traditional and religious legitimation and is often perceived as a threat to ethnic tribal autonomy. This is well illustrated by the example of marriage registration, where statutory measures, such as the limitation of judicial access to claims arising from registered or documentarily evidenced marriages, often fail to achieve their objective and in fact prompt tribal counteraction, as can be seen in both Morocco and Afghanistan.[314] There is also evidence that social barriers can give rise to personal inhibitions against the enforcement of rights guaranteed by statutory law. Court proceedings, for example, are often simply not initiated due to

[313] See SCHNEIDER, supra note 290 at 113 et seq.; SCHNEIDER, supra note 35 at 218.
[314] Cf. SCHNEIDER, supra note 35 at 221, 226.

fears of social condemnation or public pressure resulting from a general consensus in favour of traditional methods of dispute resolution. For women, this situation can be further aggravated by the fact that in some legal systems judicial protection is contingent on male representation. Moreover, as a result of illiteracy and the inadequate provision of education, large parts of the population are often not even aware of the protection afforded to them by state legislation, nor are they necessarily familiar with classical Islamic rules. Both these factors tend to foster adherence to customary law.

Recapitulating the sensitive nature of Muslim family law in general and child marriage in particular, and taking into account the multi-layered structure of the various specific difficulties arising in this area, it is hard to imagine that attempts at reform at the international level will ever succeed in bringing about substantive changes. The inability to consider local circumstances and contexts – which is very much in evidence even at the national level – is far more pronounced at the international level. International human rights initiatives naturally tend to articulate their demands in the form of general, universally applicable principles which lack any tangible local dimensions. As a result, global human rights activism is confronted with an intrinsic dilemma, which Merry describes as follows, 'Rights need to be presented in local cultural terms to be persuasive, but they must challenge existing relations of power in order to be effective.'[315] Merry argues that human rights require translation into local, i.e. vernacular, meanings of relationships and power.[316] The main task is to transfer attitudes towards marriage and the family from the private to the public domain and to shift local conceptions of permissible and reprehensible practices over time.[317]

At this stage internal actors such as social movements or human rights NGOs are needed to mediate between the international and the local level in order to contextualise human rights and make them both accessible and acceptable.[318] In this regard, Merry rightly points out that it is important to take advantage of the adaptability of local customs and the fact that culture – if understood as a product of historical implications in a constant state of flux, rather than as a fixed, immutable set of habits and customs – can be a driving force for social change.[319] It remains to be seen if this will, over time, succeed in shifting conceptions of marriage and maturity and reconcile them with international standards in this area.

[315] See S. E. MERRY, Human Rights and Gender Violence. Translating International Law into Local Justice, 5 (2006).
[316] Cf. MERRY, supra note 315 at 1, 5.
[317] Cf. MERRY, supra note 315 at 25; HOZYAINOVA, supra note 303 at 35.
[318] Cf. MERRY, supra note 315 at 3; A. A. AN-NA'IM, State Responsibility Under International Human rights Law to Change Religious and Customary Laws, in R. J. Cook (Ed.), Human Rights of Women: National and International Perspectives 167-188, 184 (1994); BAGHAM & MUKHATARI, supra note 303 at 17.
[319] Cf. MERRY, supra note 315 at 9, 11, 15, 28.

Das islamische Erbrecht in Tunesien

*von Mouez Khalfaoui**

Abstract

In diesem Beitrag soll die Debatte über das Familien- und Erbrecht in Tunesien erneut aufgenommen werden. Dieses Rechtsgebiet bildet einen der wichtigsten Bestandteile des Personenstandrechts Tunesiens, denn das Personenstandgesetzbuch (Code du Statut Personnel) von 1956[1] zählt zu den modernsten der muslimischen Welt, und Tunesien damit zu einem der Vorreiter in Sachen Reform des Familienrechts unter den muslimischen Ländern. Das Personenstandgesetzbuch Tunesiens schöpft aus den Quellen des Islamischen Rechts (malikitische Rechtschule) und orientiert sich an westlichen Rechtskulturen. Von besonderer Bedeutung in diesem Rechtsbereich sind u.a. die Abschaffung der Polygamie und die Einführung des Scheidungsrechts für Frauen.[2] Die mit dieser Reform vorgenommenen gesetzlichen Änderungen wurden von berühmten tunesischen Gelehrten und Wissenschaftlern wie Sheikh Muhammad al Fadel Ben Achour (gest1970) konzipiert und mit der Norm des Gemeinwohls (maslaha)[3] begründet. Nichtsdestotrotz lösten die Regelungen des Erbrechts kurz nach ihrem Inkrafttreten in Tunesien eine heftige Auseinandersetzung zwischen verschiedenen Akteuren aus, nämlich zwischen Liberalen, deren Ziel es ist, die Gleichberechtigung der Geschlechter im Erbrecht zu verankern, und Konservativen, die die Vorgaben des Qur'ans im Hinblick auf das Erbrecht als unveränderbar ansehen und aufrecht erhalten möchten.

I. Einführung

In den nächsten Abschnitten wird die Diskussion auf die sogenannte „Reform des Erbrechts" in Tunesien beschränken. In einem ersten Schritt soll der politisch–historische Aspekt der Debatte um das Erbrecht in Tunesien thematisiert werden; im zweiten Schritt soll die rechtliche Dimension erläutert werden; und im dritten Schritt soll die Beziehung des tunesischen Erbrechts zum Internationalen Rechtsystem thematisiert werden.

* Jun. Prof. Dr. Mouez Khalfaoui, Lehrstuhl für islamisches Recht am Zentrum für islamische Theologie der Universität Tübingen seit 2012. Er forscht und lehrt zum islamischen Recht, Minderheiten in Europa sowie Arbeitsethik im Islam. Jun. Prof. Dr. Khalfaoui fungiert als Berater bei zahlreichen politischen und gesellschaftlichen Institutionen in Europa und der muslimischen Welt.

[1] Das tunesische Personenstandgesetz trat am 1. Januar 1957 in Kraft. Siehe PRITSCH, ERICH (1958), Das tunesische Personenstandsgesetz, in: Die Welt des Islams, New Series, Vol. 5, 3/4, S. 188-205.

[2] Vgl. KURT PATTAR, ANDREAS (2007), Islamisch inspiriertes Erbrecht und deutscher Ordre public: Die Erbrechtsordnungen von Ägypten, Tunesien und Marokko und ihre Anwendbarkeit im Inland, Duncker & Humblot, Berlin, S. 349ff./ SCHOLZ, PETER (2006), Erbrecht der maghrebinischen Staaten und deutscher Ordre public, Verlag Dr. Kovac, Hamburg, S. 5ff./ EBERT, HANS-GEORG (2004), Das Erbrecht arabischer Länder, Peter Lang, Frankfurt am Main, S. 44ff.

[3] Maslaha bezeichnet das Gemeinwohl. Sie wird als Begründung für Änderungen und Anpassungen bzw. Reform des islamischen Rechts thematisiert; Vgl. Encyclopedia of Islam, New Edition, E.J. Brill, Leiden 1991, S. 738ff.

II. Die historisch-politische Dimension der Diskussion über das Erbrecht in Tunesien

Das vom französischen Rechtssystem geprägte tunesische Erbrecht beruht auf dem Prinzip der Gleichberechtigung zwischen Mann und Frau. Dieses ist in der Verfassung Tunesiens verankert.[4] Nichtsdestotrotz erben Frauen nach einem sich auf den Qurʾan stützenden Gesetz (Sure 4, Ver. 11-12) nur die Hälfte dessen, was einem männlichen Erben zugestanden wird. Trotz der Absicht des damaligen Präsidenten Bourguiba (1956 bis 1987) sowie der Versuche zahlreicher Wissenschaftler und Menschenrechtsaktivisten, die Gleichberechtigung von Männern und Frauen im Erbrecht zu etablieren, blieb dieses Erbrechtgesetz unverändert und führte zu immer neuen Diskussionen. Am 11. Juni 2006 kündigten zwei oppositionelle Frauenorganisationen in Tunesien („Femmes Tunisiennes Démocrates"/Tunesische Demokratische Frauen, deren Präsidentin die Juristin Sanaa Ben Ashour, Tochter des berühmten Gelehrten Muhammad Al-Fadal Ben Ashour ist, und „ Femmes pour la Recherche et le Développement"/Frauen für Forschung und Fortschritt) an, dass es ihre feste Absicht sei, das von ihnen als veraltet und unpassend erachtete tunesische Erbrecht zu reformieren. Dafür legten sie dem Gesetzgeber ein fünfzehn Argumente enthaltendes Papier vor, die sogenannten „Fünfzehn Argumente für ein gleichberechtigtes Erbrecht". [5] Als Beleg dafür, dass dies kein Desiderat der Eliten sondern eines der Massen sei, fügten die beiden Organisationen dem Papier eine Liste mit mehr als tausend Unterschriften bei. Diese Ankündigung löste unter Juristen, Islamwissenschaftlern, islamischen Gelehrten und Politikern eine heftige Debatte aus.[6] Seit 2011 wird dieses Thema im Rahmen der Debatte um die neue Verfassung Tunesiens, neu aufgerollt, und es sind neue Akteure und Argumente zu verzeichnen. Es ist zu hervorzuheben, dass die Diskussion über das tunesische Erbrecht sich nicht nur auf die tunesische Gesellschaft beschränkt. Vielmehr erreichte sie auch andere arabische und selbst westliche Gesellschaften und ist auch von den (westlichen) Konzepten der Menschen- bzw. Frauenrechte geprägt.

Als unter dem damaligen von westlichen modernen Rechtssystemen beeinflussten tunesischen Präsidenten Bourguiba (reg. 1956-1987) 1956 das Personenstandsgesetzbuch „Code du Statut Personnel" (CSP) verabschiedet wurde, war dieser darüber verbittert, dass das Privatrecht das alte Erbrecht enthielt, das die Frauen benachteiligte. Zwei Jahrzehnte später (im Jahre 1974) eröffnete er erneut die öffentliche Diskussion über das Thema des Frauenerbrechts und betonte seine Absicht, das ungleiche Erbrecht zu ändern. Dieses Vorhaben beschrieb er als seinen letzten Lebenswunsch.[7] Bourguibas Bestrebungen riefen eine Debatte ins Leben, an der sich muslimische Gelehrte aus verschiedenen Ländern beteiligten, was der Diskussion des Erb- und Familienrechts einen überregionalen Charakter verlieh.

In der Folge schaltete sich beispielsweise 1974 der bekannteste Mufti Saudi Arabiens, Ibn Baz (gest. 1999), in die Debatte über die Reform des Erbrechts in Tunesien ein. In zahlreichen Briefen an Bourguiba kritisierte er dessen Vorhaben und bezichtigte ihn der Apostasie[8]. Auch die Muftis Abu Bakr Mahmoud Joumi (st. 1992), der damalige Mufti Nigerias, Hasanin Makhlouf

[4] Siehe Constitution du 1er juin 1959 insbesondere §5-6, vgl.: (http://mjp.univ-perp.fr/constit/tn1959i.htm).

[5] Wurde auf der Webseite beider o.e. Organisationen veröffentlich unterm Titel "Les quinze arguments pour l´égalité en heritage" Siehe: http://www.manifeste.org/IMG/pdf/Tunisie.pdf.

[6] Siehe QADRI, ADEL: (http://www.magharebia.com/cocoon/awi/xhtml1/ar/features/awi/features/2006/10/10/feature-02).

[7] HAJJI, LOTFI (2004), Bourguiba wal-Islam: az-Za`ama wal-Imama, Dar al-Janoub, Tunis, S. 233f.

[8] Vgl. (http://tunisalaf.wordpress.com/2011/08/16/mosawat/) gesichtet am 13.11.12/ HAJJI, 2004, S. 193.

(st. 1990), der berühmte Gelehrter aus al-Azhaz (Ägypten) und der damalige Vorsitzende der Islamischen Weltliga Abul Hasan Ali Nadwi (st. 1999) aus Indien mischten sich in die Diskussion ein und unterstützten den Mufti aus Saudi Arabien.[9] Nicht nur Religionsgelehrte, sondern auch einflussreiche Politiker waren an dieser Debatte um das Erbrecht in Tunesien beteiligt. Der berühmte König Faysal (gest. 1975), damaliger König Saudi Arabiens, schaltete sich ebenfalls in die Diskussion ein und übte starken Druck auf Bourguiba aus, indem er ihm mit einem möglichen Boykott Tunesiens durch die arabischen Länder drohte. Daraufhin lenkte Bourguiba ein, ohne seine Meinung zu widerrufen. So blieb die polarisierte Diskussion zwischen dem vom westlichen Weltbild geprägten Tunesien und dem nach der Weltölkrise 1973 erstarkten Saudi-Regime damals auf muslimische Gelehrten und Politiker beschränkt. Bourguiba gelang es nicht, das Gesetz zu „ändern bzw. zu reformieren", so dass diese Frage bis zum 21. Jahrhundert ungeklärt blieb. Bemerkenswert ist, dass sich die transregionale Diskussion über das Erbrecht in Tunesien in den 1970er Jahren auf Politiker und Gelehrte beschränkte. Zwar wurde sie in den Massenmedien thematisiert, aber sie war weder in Tunesien noch in den anderen muslimischen Ländern ein wichtiges Thema für die Bevölkerung.

Während die in den 1970er Jahren in Tunesien geführte Debatte über libanesische Zeitungen (u.a. die berühmte Zeitung An-Nahar) Saudi Arabien erreichte und sich von Ägypten aus über Nordindien bis Nigeria ausbreitete, finden gegenwärtig die Diskussionen gleichzeitig in unterschiedlichen Online-Foren und Blogs statt. Im Gegensatz zu der „elitären" Debatte der 1970er Jahre kann die gegenwärtige Diskussion über das tunesische Erbrecht, die seit 2006 fortlaufend stattfindet, als öffentliche Debatte betrachtet werden. Denn die Diskussion über die Reform des Erbrechts in Tunesien zieht gegenwärtig die Aufmerksamkeit zahlreicher Intellektueller und Menschenrechtsaktivisten nahezu im gesamten arabischen Raum auf sich. Das Thema wird von Politikern, Bloggern, Studenten, Juristen und Internetnutzern aus verschiedenen muslimischen Ländern zur Sprache gebracht. Von besonderer Bedeutung ist die Diskussion über das Thema im arabischen Raum. Dabei sind zwei Diskussionsgruppen zu verzeichnen, deren Meinungen in Internetforen Ausdruck finden:

Auf der einen Seite finden sich die Befürworter des tunesischen Reformmodells bzw. die Befürworter einer gleichberechtigten Stellung der Frauen im Erbrecht. In dieser Gruppe finden sich überwiegend Teilnehmer aus den maghrebinischen Ländern (u.a. Tunesien, Algerien und Marokko). Auf der anderen Seite sind Teilnehmer überwiegend aus dem arabischen Orient, insbesondere aus den Golfstaaten, zu finden. Diese Gruppe vertritt eine kritische Haltung gegenüber jeglichen Gesetzesänderungen in Tunesien und lehnt die oben erwähnte Reform des Familien- und Erbrechts in Tunesien strikt ab.

Betrachtet man die Debatte zwischen beiden Gruppen, so stellt man fest, dass die Auseinandersetzung zwischen ihnen sich meist um die Interpretation der religiösen Quellen bzw. die Qurʾanverse dreht, die man auf das Erbrecht beziehen kann. Die Argumente beider Gruppen werden im zweiten Abschnitt behandelt. Dabei wurde keine Änderung des Erbrechts in Richtung Gleichberechtigung erreicht. Im folgenden Abschnitt werde ich den rechtlichen Aspekt der Debatte um die Reform des Erbrechts in Tunesien beleuchten.

[9] Einige an Bourguiba gerichtete Briefe wurden von diesen Gelehrten unterschrieben.Vgl. Hajji, 193.

III. Die rechtliche Debatte um das Erbrecht in Tunesien

Der rechtliche Aspekt der Reform des Erbrechts in Tunesien vermittelt einen Einblick in die Diskussion über die Interpretation religiöser Quellen bzw. des Qurʾans. Folgende Aspekte werden zunächst hervorgehoben:

1. Die Diskussion um die Argumente aus dem Qur'an

Kernbestandteil der Diskussion über das Erbrecht in Tunesien ist wie bereits erwähnt die Interpretation des Qurʾans. Alle Lager berufen sich auf die Qurʾan-Sure 4, Vers 11-12, die lautet:

Sure 4:11 „Allah verordnet euch hinsichtlich eurer Kinder: Auf eines männlichen Geschlechts kommt (bei der Erbteilung) gleichviel wie auf zwei weiblichen Geschlechts. Wenn es (ausschließlich) Frauen sind, (und zwar) mehr als zwei, stehen ihnen zwei Drittel der Hinterlassenschaft zu; wenn es (nur) eine ist, die Hälfte. Und den beiden Eltern steht jedem ein Sechstel der Hinterlassenschaft zu, wenn der Erblasser Kinder hat. Wenn er jedoch keine Kinder hat und seine beiden Eltern ihn beerben, steht seiner Mutter ein Drittel zu. Und wenn er (in diesem Fall auch noch) Brüder hat, steht seiner Mutter ein Sechstel zu. (Das alles) nach (Berücksichtigung) einer (etwa) vom Erblasser getroffenen testamentarischen Verfügung oder einer (von ihm hinterlassenen) Schuld. - Ihr wißt nicht, wer von euren Vätern und Söhnen euch im Hinblick auf (den) Nutzen (den ihr von ihm habt) am nächsten steht. (Das gilt) als Verpflichtung von seiten Allahs. Allah weiß Bescheid und ist weise."[10]
Sure 4:12 „Und von der Hinterlassenschaft euer Gattinnen steht euch die Hälfte zu, falls sie keine Kinder haben. Falls sie jedoch Kinder haben, steht euch ein Viertel zu. (Auch dies) nach (Berücksichtigung) einer (etwa) von ihnen getroffenen testamentarischen Verfügung oder einer (von ihnen hinterlassenen) Schuld. Und euren Gattinnen steht ein Viertel zu von dem, was ihr (Männer) hinterlasst, falls ihr keine Kinder habt. Falls ihr jedoch Kinder habt, ein Achtel. (auch dies) nach (Berücksichtigung) einer (etwa) von euch getroffenen testamentarischen Verfügung oder einer (von euch hinterlassenen) Schuld. Und wenn ein Mann oder eine Frau von seitlicher Verwandtschaft (kalaala) beerbt wird und er (bzw. sie) einen Halbbruder oder eine Halbschwester hat, steht jedem von den beiden ein Sechstel zu. Wenn es mehr (als zwei) sind, teilen sie sich in ein Drittel (und zwar) nach (Berücksichtigung) einer (etwa) getroffenen testamentarischen Verfügung oder einer (hinterlassenen) Schuld. Dabei soll niemand schikaniert werden. (Das gilt) als Verordnung von Seiten Allahs. Allah weiß Bescheid und ist mild."[11]

Die „Modernisten" bzw. die Befürworter einer weiteren Reform des Erbrechts in Tunesien plädieren für eine neue Interpretation der oben genannten Qurʾan-Verse anhand der kontextuellen Interpretationsmethode. Dies wird damit begründet, dass die tunesische Gesellschaft des 21. Jh. sich von der Situation der ersten muslimischen Gemeinden zur Prophetenzeit auf der arabischen Halbinsel stark unterscheidet und dass die Norm der Maslaha (Gemeinwohl/öffentliches Interesse) eine Änderung der Gesetze erlaube. Im Folgenden werden die wichtigsten Argumente dieser Gruppe vorgestellt:[12]

a) Soziokulturelles Argument

Dieser Ansatz bezieht sich darauf, dass sich die Situation der Frauen in Tunesien im 21. Jahrhundert von ihrer Situation im Arabien des 7. Jahrhunderts und auch von ihrer Situation zur Zeit des Inkrafttretens des Personenstandgesetzes in Tunesiens im Jahr 1956 unterscheidet.

[10] Vgl. PARET: http://www.koransuren.de/koran/surenvergleich/sure4.html.
[11] PARET, in: http://www.koransuren.de/koran/surenvergleich/sure4.html
[12] Für eine ausführliche Darstellung der Argumente, siehe QADRI, op.cit.

Dafür werden Zahlen und Daten vorgelegt: Aufbauend auf der Annahme, dass 95% der Frauen in Tunesien die Schule besucht haben, dass 25% der Richterposten von Frauen besetzt sind (in Ägypten gibt es nur 2 oder 3 weibliche Richterinnen), dass 34% der Ärzte in Tunesien Frauen sind, dass 64% der Apotheker und Apothekerinnen Frauen sind, dass 14% der Staatsbeamten Frauen sind, dass 16,5% der Bürgermeisterposten von Frauen besetzt sind, und dass 25% der Mitglieder von politischen Parteien Frauen sind,[13] wäre eine gleichberechtigte Stellung im Erbrecht eine angemessene Antwort auf die gesellschaftlichen Entwicklungen. Dass Männer aufgrund ihrer finanziellen Verantwortung stärkere Rechte haben, ist demnach nicht mehr angemessen. Frauen sind ebenso wie Männer finanziell für die Familie verantwortlich und übernehmen ebenso die Rolle der Ernährerin.

b) Die rechtlichen Argumente

Das zweite Argument bezieht sich direkt auf die Methoden des islamischen Rechts. Hierbei wird die Norm der Abrogation/Naskh zur Sprache gebracht. Das im Islam als Abrogationsprinzip bekannt besteht darin, dass einige im Qurʾan zu einem früheren Zeitpunkt verkündeten Gesetze, durch neue Gesetze ersetzt werden (z. B. das Alkoholverbot: Zuerst wurde Alkoholkonsum beim Beten verboten, erst später wurde er ganz verboten).

Die Befürworter einer Reform des Erbrechts heben hervor, dass die Abrogation von Qurʾanversen auch nach dem Tod des Propheten Muhammad stattfand. U.a. wird das Verhalten der beiden Weggefährten des Propheten und ersten Kalifen Abu Bakr (st. 634) und Omar ibn al Khattab (st. 644) als Beispiel genannt. Der erste Kalif Abu Bakr hat den in Qurʾan-Vers 60, Sura 9(At tawba) verkündeten Anteil für Nichtmuslime, mit deren Konversion bzw. Unterstützung für die Muslime man rechnet (muʿallafati Qulubuhum) von der Verteilung von Almosen ausgenommen. Im Qurʾan wird die Verteilung der Almosen wie folgt thematisiert: „Die Almosen (sadaqaat) sind nur für die Armen und Bedürftigen (? lil-fuqaraaʿi wal-masaakieni) (bestimmt), (ferner für) diejenigen, die damit zu tun haben, (für) diejenigen, die (für die Sache des Islam) gewonnen werden sollen, für (den Loskauf von) Sklaven, (für) die, die verschuldet sind, für den heiligen Krieg und (für) den, der unterwegs ist. (Dies gilt) als Verpflichtung von seiten Allahs. Allah weiß Bescheid und ist weise.“ Abu Bakr begründete seine Entscheidung damit, dass die Qurʾan-Stelle sich auf eine Zeit bezieht, in der Muslime schwach waren. Nun (zu seiner Zeit) seien die Muslime stark geworden und bräuchten keine Unterstützung von außen mehr.

In Bezug auf den Kalifen Omar I wird berichtet, dass er nach der Eröffnung des fruchtbaren Iraq-Landes im 7. Jahrhundert, den im Qurʾan festgeschriebene Anteil für Qurʾan-Leser bzw. Weggefährten des Propheten an der Kriegsbeute stark reduziert bzw. ganz gestrichen habe. Omar begründete diese Entscheidung damit, dass die Zeiten sich geändert hätten und der Anteil der Qurʾan-Leser eher in die Staatskasse einfließen solle. Es wird berichtet, dass Omar I seine Entscheidung damit begründete, dass die Verteilung der eroberten Länder ausschließlich auf die anwesenden muslimischen Kämpfer die nächsten muslimischen Generationen beeinträchtige.

Ferner führen die Befürworter einer Reform des Erbrechts an, dass die Gelehrten des Islamischen Rechts in späteren Epochen den Vers 282, Sure II (Al-Bakara) entkräftet hätten. Dabei

[13] Ebd.

handelt es sich darum, dass für jede Geldtransaktion ein Vertrag zwischen den Akteuren benötigt wird: „Ihr Gläubigen! Wenn ihr auf eine bestimmte Frist ein Schuldverhältnis eingeht, dann schreibt es auf! Und ein Schreiber soll (es) in eurem Beisein aufschreiben, so wie es recht und billig ist (bil-`adli). Und kein Schreiber soll sich weigern zu schreiben, so wie Allah es ihn gelehrt hat. Er soll schreiben. Und der Schuldner soll diktieren und Allah seinen Herrn fürchten und nichts davon abzwacken." (Qurʾan II:282)

Hierbei wird unterstrichen, dass die Mehrheit der Bevölkerung in den ersten Jahrhunderten der muslimischen Geschichte Analphabeten waren. Daraufhin entschieden sich die Gelehrten des islamischen Rechts, diese Bedingung nicht durchzusetzen. Die o.g. Sure wird benutzt, um die Idee einer möglichen Reform des Islamischen Rechtes zu rechtfertigen.

IV. Der Gegenpol und die Ablehnung der Reform

Die meisten Gegner der Reform des Erbrechts in Tunesien, unter ihnen nicht nur Gelehrte, sondern auch Richter, Politiker und Wissenschaftler, lehnen die Meinung der "Modernisten" ab und betonen, dass diese Gesetze die einzigen Regelungen mit einem engen Bezug zum islamischen Recht im tunesischen Rechtssystem seien. Sie bestehen darauf, dass das Gesetz in dieser Form erhalten bleiben solle, so dass die tunesische Rechtsordnung ihr spezifisch islamisches Erkennungsmerkmal nicht verliere. Ferner bestehen sie darauf, dass die im Qurʾan festgelegten Gesetze verbindlich und unveränderbar seien.

Zusammenfassend kann festgestellt werden, dass in dieser Debatte zwischen Befürwortern und Gegnern der Reform des Erbrechts bisher kein Durchbruch erzielt wurde. Doch nach der tunesischen Revolution vom 17. Dezember 2010 bzw. 14. Januar 2011[14] kam es zu einer Erweiterung dieser Debatte. Unter anderem wird die Beziehung des tunesischen Erbrechts zum internationalen Recht in dieser Debatte herangezogen. Im nächsten Abschnitt wird dieser Aspekt thematisiert.

V. Die Debatte über das tunesische Erbrecht im internationalen Kontext

1979 wurde *das Übereinkommen der Vereinten Nationen zur Beseitigung jeder Form von Diskriminierung der Frau (CEDAW)* verabschiedet und allen Mitgliedstaaten der UNO zur Ratifizierung zugestellt. Tunesien war unter den ersten Ländern, die das CEDAW-Übereinkommen bereits 1984 ratifiziert haben. Da dieses Übereinkommen einigen Regelungen des tunesischen Rechts widerspricht, ratifizierte Tunesien das Abkommen mit einigen Vorbehalten. Hierbei handelt es sich um zwei Typen von Vorbehalten:

a) Einzelne Vorbehalte bezüglich bestimmter Artikel des CEDAW-Übereinkommens, wie z.B. Artikel 9, der sich auf die Staatsangehörigkeit von Kindern bezieht.
b) Allgemeiner Vorbehalt bezüglich des gesamten Übereinkommens. Dieser bezieht sich darauf, dass der tunesische Staat kein Internationales Abkommen umsetzen kann, das im Widerspruch mit der Verfassung des Landes steht. Konkret: Das CEDAW-Abkommen steht im Widerspruch zu Art. 1. der tunesischen Verfassung. Dort heißt es:

[14] Es besteht eine Unstimmigkeit über das Datum der Revolution in Tunesien, der 17.12.10 entspricht dem Datum an dem Muhammad Bouazizi sich verbrannt hat und die Demonstrationen auslöste. Während der 14.1.12 der Tag ist, an dem der damalige Präsident Ben Ali sich ins Ausland absetzte.

> „Tunesien ist ein freier Staat, unabhängig und souverän, seine Religion ist der Islam, seine Sprache das Arabische, und seine Staatsform die Republik." Damit verpflichtet sich der tunesische Staat, den Normen des Islamischen Rechts den Vorzug zu geben. Rein rechtlich betrachtet ist die nationale Gesetzgebung dem Internationalen Rechtssystem untergeordnet. Deshalb sind die Staaten der Weltgemeinschaft aufgefordert, ihr jeweiliges Rechtssystem gemäß internationalem Recht zu reformieren. Nichtsdestotrotz liegt die Umsetzung internationalen Rechts auf nationalem Territorium in der Hand der jeweiligen Nationalstaaten.

Im November 2011 - also einige Monate nach dem Sturz des tunesischen Diktators Ben Ali, hat die tunesische Übergangsregierung als Beweis für ihre Bestrebungen zur Stärkung der Zusammenarbeit mit der internationalen Gemeinschaft, einige Vorbehalte Tunesiens bzgl. des CEDAW-Übereinkommens zurückgenommen. Dies bezieht sich allerdings nur auf die erste Kategorie von den o.g. Vorbehalten. Der allgemeine rechtliche Vorbehalt bleibt jedoch bestehen. Folglich können einige Klauseln des CEDAW-Übereinkommens umgesetzt werden. Da der allgemeine rechtliche Vorbehalt weiter besteht, können diese Gesetze jederzeit abgelehnt werden, weil sie im Widerspruch zu Artikel 1 der tunesischen Verfassung stehen.[15]

In Tunesien wird seit 2011 Jahr an einer neuen Verfassung gearbeitet. Damit bestünde die Hoffnung der Modernisten auf Änderung des 1. Artikels der Verfassung.

Die politischen Akteure Tunesiens haben sich jedoch Mitte 2012 darauf geeinigt, den alten ersten Verfassungsartikel beizubehalten. Damit ist die Hoffnung der Liberalen in Tunesien auf einen Durchbruch durch das internationale Übereinkommen gescheitert. Ende Mai 2012 hat der tunesische Minister für Menschenrechte und Übergangsgerechtigkeit (Samir Dilou) anlässlich der Generalversammlung der Mitglieder der UNO Menschenrechtskommission bekräftigt, dass eine Rücknahme aller Vorbehalte Tunesiens im Hinblick auf das CEDAW-Übereinkommen eine sehr schwierige Entscheidung sei. Ein solcher Schritt hätte soziale und gesellschaftliche Konsequenzen und sollte nur durch einen Volksentscheid entschieden werden.

Eine wesentliche Frage besteht darin, wie die politischen Machthaber, angeführt von der moderaten islamistischen Partei An-Nahda, in dieser Diskussion Stellung bezieht:

Sollte sie das Familien- und Erbrecht ändern, um die Gleichberechtigung von Mann und Frau durchzusetzen, so wäre dies eine Anerkennung der Macht der Opposition, was die Türen für weitere Rechtsreformen öffnen könnte. Zudem könnte die Regierung durch eine Modernisierung des Erbrechtes die Unterstützung der religiösen Autoritäten verlieren. Bliebe das Gesetz jedoch unverändert, so würden internationale Organisationen mit lautem Protest das Regime kritisieren.

[15] GHABBARA, ebd.

VI. Fazit

Aus der Debatte über das Erbrecht in Tunesien sind folgende Schlussfolgerungen zu ziehen:

Im ersten Teil dieses Beitrags wurde das Erbrecht in Tunesien aus der Perspektive der panarabischen bzw. panislamischen Beziehungen behandelt. Dabei sind zwei widersprüchliche Hauptströmungen zu verzeichnen: a.) auf der einen Seite steht die Meinung derjenigen, die die religiöse und politische Einheit der Muslime für einen Mythos halten. Ihnen zufolge hat sich die religiöse Einheit der Muslime bereits zur Zeit des Kalifen Othman bzw. Ali aufgelöst. Dieser Meinung zufolge, stünde seit dem Niedergang des Osmanischen Reichs eine immer größer werdende Kluft zwischen den verschiedenen muslimischen Gesellschaften. Die Entwicklung der Massenmedien und die Intensivierung des Globalisierungsprozesses machen die Unterschiede zwischen den Regionen deutlicher.

Auf dieser Grundlage distanzieren sich die Befürworter des Erbrechts in Tunesien von anderen muslimischen Gesellschaften und sprechen eher vom tunesischen Modell. b.) Auf der anderen Seite gibt es religiöse Gelehrte und religiöse Strömungen, die an dem Konzept der Einheit der Muslime festhalten und die in der Entwicklung der Massenmedien und Kommunikationsmittel ein geeignetes Mittel zur Stärkung der panislamischen Beziehungen sehen. Kurz, die Debatte um das Erbrecht in Tunesien und die rechtlichen Regelungen im Hinblick auf das Verhältnis zwischen den Geschlechtern zeigt zwei Tendenzen auf: eine Desintegrationstendenz, die meistens von „progressiven" Akteuren vertreten wird, und eine „Integrationstendenz", die von „konservativen" Akteuren bzw. Gelehrten vertreten wird. Beide Tendenzen sind in allen Debatten und gesellschaftlichen Angelegenheiten sichtbar.

Zusammenfassend kann festgestellt werden, dass die Debatte um die Reform des Erbrechts in Tunesien einen Einblick in die Auseinandersetzung zwischen Modernisten und konservativem Lager in Bezug auf ein wichtiges gesellschaftliches Thema ermöglicht. Hieran lässt sich ablesen, ob und inwieweit eine Entwicklung hin zu einer Gleichberechtigung der Geschlechter umsetzbar wäre, oder ob eine Stagnation oder gar Vertiefung der Geschlechterdifferenzen im Erbrecht der muslimischen Länder, insbesondere in Tunesien, zu verzeichnen ist. Die Untersuchung dieser Debatte zeigt, dass das islamische Recht eine transregionale Dimension hat und die Grenze des nationalen Staates überschreitet.

Ausgehend von den oben genannten Argumenten ist es zu prophezeien, dass die Debatte um die Reform des Erbrechts die muslimischen Gesellschaften weiter beschäftigen wird, solange es keinen gemeinsamen Lösungsansätze seitens der religiösen und zivilgesellschaftlichen Institutionen in diesen Ländern gibt. Solch eine gemeinsame Behandlung der grundlegenden Fragen bezüglich des Erbrechts könnte eventuell durch eine Zusammenarbeit aller muslimischen Gelehrten, Politiker und Rechtswissenschaftler erreicht werden. Eine Zusammenarbeit zwischen muslimischen Institutionen schließt die Zusammenarbeit mit internationalen Rechtsinstitutionen nicht aus. Denn die bisherige Strategie der meisten muslimischen Länder im Hinblick auf internationales Recht und internationale Übereinkommen bestand darin, solche Übereinkommen zu ratifizieren, sie jedoch gleichzeitig durch zahlreiche Vorbehalte außer Kraft zu setzen.

Diese Strategie stößt gegenwärtig an ihre Grenzen und kann keine Lösungen für die Probleme der muslimischen Gesellschaften versprechen. Stattdessen wäre eine ernsthafte Auseinandersetzung mit der Reform der lokalen Gesetzgebung notwendig.

The Application of Islamic Law and the Legacies of Good Governance in the Sokoto Caliphate, Nigeria (1804-1903): Lessons for the Contemporary Period

by Mukhtar Umar Bunza[*]

Abstract

One of the key jargons of contemporary democracy is good governance, which entails social justice, effective, responsible, and transparent administrative machinery. In the same way, social and political maladies such as corruption, nepotism, favoritism, ethnicity, and flagrant abuse of power were ostracized in the system.

Those terms, are usually echoed in Nigeria by politicians and their cohorts rhetorically in the media, with almost nothing to show in practice. Consequently, the faith of Nigerians is being eroded in the successive Nigerian governments as all promises to improve their lots and living standards remain a mirage.

However, a little reflection and appreciation of the polity that was attained on the Nigerian soil in the 19th century to the beginning of the 20th century (i.e., the Sokoto Caliphate) represents encouraging historical evidence and legacy of good governance, that will help Nigeria in the current derive for nation building and sustainable development.

It is the submission of this paper that, some of the mechanism deviced and employed by the Sokoto Caliphate in uniting its diversed citizens through equity, social justice, transparency and accountability for one-hundred years, if studied and utilized will help the Nigerian state, as well as other developing nations in the Muslim World and beyond to address their present political quandary.

This also shows that the Shari'ah –Islamic Law, as demonstrated by the Sokoto Caliphate in the 19th century entails laudable developmental programs, innovative initiatives for welfare packages, and assured rights and freedom for the citizens.

I. Background

The Sokoto Caliphate was the upshot of the reform movement that started in Hausaland as early as 1776 under the leadership of a scholar and reformer known as Shehu Usmanu Danfodiyo, 1754-1817. He was supported principally by the masses in the region due to the social dimension of the movement, later scholars and a few middle and upper class citizens in the area joined his group called, the *Jama'a*. By 1804-1809 the movement had captured power in almost all the ancient prosperous Hausa

[*]Mukhtar Umar Bunza is a Professor of Social History, Department of History Usmanu Danfodiyo University, Sokoto, Nigeria. He obtained a PhD in History from Usmanu Danfodiyo University, Sokoto, Nigeria. He was a Fellow of Leventis Postdoctoral Research, SOAS, University of London, ISITA Fellow, Northwestern University, Evanston, USA, and SACRI Fellow for Summer School at Babes Bolyai University, Cluj, Romania. He is the author of Christian Missions among Muslims: Sokoto Province, Nigeria, 1935-1990, Africa World Press, NJ, USA, 2007, and a number of published articles on various aspects of religious movements in Nigeria and the Middle East. One of his recent publications include "Migration and Itinerancy among the Ulama'a in West Africa: The Making of Trans-National Muslim Intelligentsia in Nigeria", in Harrak F., Ross E., and Anegay, S., eds, Religion et Migration, publication de L' Institute des Etudes Africaines, Rabat, Morocco, 2012, pp.65-80 (ISBN:978-9981-37-064-7). Mukhtar Umar Bunza is currently the Head of History Department, Usmanu Danfodiyo University, Sokoto, Nigeria.

states that flourished for over five centuries before his reform drive. Within a short period of time, they succeeded in changing the political landscape of the entire Hausaland and to certain proportion most parts of the West African sub-region, ranging from Cameroon to Timbuktu in Mali. The Caliphate brought landmark transformations in the political, social, economic, and religious spheres of the people of West Africa.

One of the major milestones and legacies of the new Caliphate was political transformation. A complete shift from oppressive administrative machinery based on whims and caprises of those on power, to a sanitized system with all checks and balances. The issue of good governance and ensuring equity and justice regardless of one's economic, social, religious, or political status was top-most in the blueprint of the Sokoto Caliphate.

It was due to the sophisticated administrative mechanism established in the Caliphate that made it easy for the European colonialists to adopt an indirect rule system in the areas of the Caliphate after 1903. The Nigerian colonial state also benefited a lot from the superstructures left behind by the very Caliphate they fought against initially and overthrew. In the same vein, the post-colonial Nigeria also, does have a number of lessons to learn and legacies to adopt from the theory and practice of governance of the Sokoto Caliphate, which for over one hundred years continued to shine its beacons in spite of the trouble and tribulations caused by the British invading forces.

The postcolonial Nigeria is yet to actualize some of the legacies of the Caliphate in terms of federalism, rule of law, management of pluralism, accountability, peace and security, toleration of opposition and equality, which are some of the major components for survival and prosperity of any nation. These are indeed the secrets for the century survival of the Sokoto Caliphate and its sustained relevance in the Nigerian setting for generations to come.

II. THE FOUNDATION OF THE SOKOTO CALIPHATE

A historical reflection over the circumstances and situation that necessitated the Sokoto *Ulama'* to champion the needs and yearnings of the people in 19th century Hausaland would suffice understanding the basis of the grassroot and popular support, which the Jihad movement received among the masses.[1] Monarchical system of government gave way to elected leaders of satisfactory credentials to lead, not based on any ethnic, or blood connection, but under the support and free allegiance of the people who accepted them to lead their public affairs. That sprit, from the onset, served as the basis for the strength and consolidation of the Sokoto Caliphate as a democratic polity uncommon in Sub-Saharan Africa. Some of the founding pillars of the Caliphate include:

1. Resisting Tyrannical and Corrupt Leadership

The Sokoto *Ulama'* were forced by circumstances even against their main pre-occupation of learning, research and teaching to start addressing political issues. At the initial stage of the movement, Shehu Usmanu Danfodiyo, the leader of the reform movement, adopted diplomacy, and avoided confronta-

[1] See some of the pioneer works on the history of the Sokoto Caliphate which include, D. M. LAST, *The Sokoto Caliphate*, Longman: London, 1967, S. J. HOGBEN and A. H. M KIRK-GREENE, *The Emirates of Northern Nigeria: A Preliminary Survey of their Historical Traditions*, Oxford University Press: London, 1966, Y. B. USMAN, *Studies in the History of the Sokoto Caliphate: The Sokoto Seminar paper*, Lagos, 1979, and IBRAHIM SULAIMAN, *The Islamic State and the Challenge of History: Ideals, Policies and Operations of the Sokoto Caliphate,* Mansell Publishing Company: London & New York, 1987.

tion. The unbearable hardship experienced by the people and high level of insensibility of the administration compelled him to strongly appeal to the rulers in Hausaland to be responsible to their duties as rulers. However, their malign disregard of this request further necessitated the Shehu and his supporters to take a drastic approach. The point of departure was marked by publishing and distributing his *Kitab al-Farq* in Hausaland, which categorically outlines the charges of misgovernance, corruption, confiscation of people's belonging, misappropriation of public funds and neglect of people's welfare and standards of living by the leaders. In *Kitab al-Farq*, Shehu categorically criticised the existing leadership of abusing public funds, imposing of levies beyond the resources of their subjects, over affluence on the side of the rulers and their immediate families to the detriment of their subjects, collecting of gratifications through their public offices, bribery among the judges (making courts a place where highest bidder takes all). In addition, the sharp practices in the corridors of power in Hausland can be glaring, as lying, treachery, and pride became the ways of their government.[2]

These were some of the issues, which according to Shehu made it obligatory for them to confront the political structure of the region with a view to changing it for a more humane, transparent and responsible system. That was according to Shehu one of the main causes of the rebellion against the existing polity.

2. Establishing Government Based on Consultation and Respect for Public Opinion

The system of government in pre-jihad Hausa states was monarchical, against the one favoured by the Shari'a-government of cosultation (*shura*), where officers are elected into office due to their qualities and qualifications. In *Kitab al- Farq* Shehu categorically stresses this in the following:

> One of the ways of their government (in Hausaland) is succession to the emirate by hereditary right (monarchy) and by force (military take-over) to the exclusion of consultation. And one of the ways of their government is the building of their sovereignty upon three things: the people's person, their honor, and their possessions; and whomsoever they wish to kill or exile or violate his honor or devour his wealth they do so in pursuit of their lusts, without any right in the law- Shari'a.[3]

Shehu thus rejected any form of government not based on consultation, one not based on *shura* or consultative assembly guided by Islamic political philosphy. The practice of consultation and allowing people to partcipate in the act of administration as it relates to their rights and privileges were some of the salient achievements and legacies of the Caliphate for the contemporary Nigerian polities.[4] Professor John N. Paden in his recent studies of the Sokoto Caliphate's relevance to the Nigerian State on issues relating to rule of law and associated matters identified the system and polity of the Caliphate as such that continued to influence the state affairs in contemporary Nigeria. In his opinion, even the British colonial government for political expediency had to adopt some of the legal frame of the Caliphate up to 1959 when the penal code came to be operational.[5]

[2] See SHEHU USMANU DANFODIYO, *Kitab al-farq*, edited and translated, Mervyn Hiskett, 1962, 7-11.

[3] SHEHU USMANU DANFODIYO supra, n. 2, 7.

[4] See SAMBO WALI JUNAIDU, 'The Concept of Leadership and its Application in the Sokoto Caliphate', in Abubakar Aliyu Gwandu, et al., eds, *The Sokoto Caliphate: A Legacy of Scholarship and Good Governance*, Center for Islamic studies, UDUS, 2006, 67.

[5] See details discussion on the issue in J. N. PADEN, 'Contemporary Relevance of the Sokoto Caliphate: Rule of Law, Federalism and Conflict Resolution', in Hamid Boboyi and Alhaji Mahmud Yakubu, *The Sokoto Caliphate: History and Legacies, 1804-2004, Vol. II,* Arewa House: Kaduna, 2006, 242-250.

3. Combating Indiscipline and Social Ills in the Society

Having realised that a viable political structure requires a strong foundation from youths and younger generations who are, focused, disciplined, and mobilized, the Shehu strove for a society with a sound moral fabric. Indiscipline is one of the major causes of failure at an individual level, or running of public institutions. The Jihad leaders targeted the problems of nudity, fornication, adultery, and alcoholism for eradication as the cornerstone of the agenda in the 19th century Jihad movement. In order to sanitise the society from crimes and criminal activities and ensure a promising crop of citizens through a responsive younger generation, the Jihad leaders vehemently fought against all forms of social vices. These issues were addressed in various places in the writings of the jihadists.

The Shehu further directed that:

> Every governor of a province should strive to fortify strongholds… set up a military station on every frontier, and combat every cause of corruption which occurs in his country, and forbid every disapproved thing.[6]

Of equal consequences was also the corruption and manipulation of religion by the so-called custodians of the religion- the *Ulama'*. The category of such *Ulama'* was described by Shehu as representative and helper of the Satan, who chose worldly gains and influence from the people in authority, than the mercy and pleasure of God. Such *Ulama'* legalized the corrupt practices of the leaders and were not resisting the exploitation and oppression against the weak by the powerful. Shehu branded such scholars as, 'more dangerous than the devil, and their position in the society was no better than a rock in the sea, which neither drinks water nor allows anybody to drink'. Removing their influence in governance and the society entirely was, in the opinion of the Shehu, a catalyst to a viable political system.[7] Thus, the jihadists transformed the outlook and functions of the scholars after the establishment of the Caliphal system.

4. Mobilization and Liberation of Women

The indispensable position of women in building a vibrant and productive society is indubitable. It was in recognition of this fundamental fact that as early as 1786 women were allowed to participate in teaching and enlightenment campaigns embarked upon by the Shehu and his supporters. It was indeed, the first challenge, which the Shehu received in the cause of his *Da'wa*. Mustafa Goni wrote, criticizing the Shehu for allowing women to attend the sessions in the same ground with men to receive lectures and learn the religion. The letter reads:

> To you, from us, blessed greetings, which caused those who meet us to smell musk and perfume. O son of Fudi, rise and warn the ignorant, that perchance they may understand religion and things of this world. Forbid women to visit your preaching, for mixing of men and women is sufficient a disgrace. Do not do what contributes towards disgrace, for God has not ordered vice, which would

[6] SHEHU USMANU DANFODIYO, supra, n. 2, 12.

[7] See ABBA YUSUF, 'The 1804 Jihad in Hausaland as a Revolution', in Usman Yususf Bala (ed), *Studies in the History of the Sokoto Caliphate,* published by the Department of History ABU, 1979, 20-33, the chapter is generally good for understanding the point.

> cause us harm. The verses of al-Mustafa thirteen complete them, in the year twelve hundred, plus a number, which will suffice us.[8]

In the instructions of the Shehu, his brother Abdullahi responded in the most eloquent and academic tune to the letter of Mustafa Goni. He denied any act of committing of sins by the Shehu and his *Jama'a* in the cause of teaching their followers male and female. However, he accepted going by a lesser evil if it were, of allowing women to come out to learn instead of leaving them in ignorance, which is inseparable with unbelief. Abdullahi's response reads:

> O you who have come to guide us aright, we have heard what you have said. Listen to what we say. You gave advice to the best of your ability, but would you have freed us from blame! And you spoke- Glory be to God, this was calumny! Indeed devils, if they come to our gathering, spread evil speech, exceeding all bounds! We have not had promiscuous intercourse with women, how could that be… But I do not agree that their being left to go free in ignorance is good, for the committing of the lesser evil has been made obligatory. Ignorance pardons, even though it was disobedience. We found the people of this country drowning in ignorance; shall we prevent them from understanding?... Their number is ten. And the date is twelve hundred and one (i.e. 1201AH /1786 AD)[9].

In order to attain the egalitarian reform, which the Shehu and his companions envisaged for their people, the women folk must be fully educated and mobilized to be responsible members of the society. Professor Ismail Balogun observes that, 'he (Shehu) condemned those who shut their women folk in without affording them the opportunity to learn extensively' (the affairs of their religion and the world). His own example with the education of his wives and daughters was very glaring.[10]

Unequivocally, Shehu declared in his *Nur al- Albab* and *Wathiqat al-Ikhwan*, that the domestic services rendered by women in terms of cooking, provision of firewood, grinding, fetching of water, and labor in the farm were not sanctioned upon them by the Shari'a. Shehu tirelessly fought for the economic and social emancipation of women, through ensuring their rights to ownership of property, inheriting of estates of deceased relatives and husbands, and opening of educational opportunities.[11]

In response to the seriousness of the problem, the Shehu adopted some radical measures to match with the gravity of the problem. He started by describing the situation of women in the pre-jihad societies in the following:

> One of the habits of men, scholars of the Sudan is that they leave their wives, daughters and slaves neglected like a grazing livestock without teaching them what Allah made obligatory on them of their articles of Faith, regulations governing their purity, fasting and their like, i.e. buying and selling. They consider them like a container, which they use; when it breaks, they throw it in dung and rubbish places. It is the duty of every Muslim to start with himself and guards it by

[8] ABDULLAHI FODIYO, *Tazyin al-Waraqat*, Hikett, Mervyn., (ed &trans), Ibadan University Press, 1963, 86-87.
[9] ABDULLAHI FODIYO, supra, n. 8, 87.
[10] ISMAIL BALOGUN, "Shaikh Uthman Danfodiyo: The Founder of the Sokoto Legacy", in Ahmad Muhammad Kani and Kabiru Ahmad Gandi (eds), *State and Society in the Sokoto Caliphate,* Usmanu Danfodiyo University, Press, 1990, 216.
[11] See detail discussions on this issue in JAFAR MAKAU KAURA, "Emancipation of Women in the Sokoto Caliphate", in Ahmad Muhammad Kani and Kabiru Ahmad Gandi, supra, n. 10, 75-99.

> performing his duty properly also, to abandon unlawful things, thereafter, he should teach his family and relations.[12]

Finally, Shehu unreservedly called the women folk in the strongest terms saying:

> O, Muslim women, do not listen to the speech of the misguided (group) who misguide others and deceive you by making you to obey your husbands without ordering you to obey Allah and His messenger (peace be upon him). They claim that the happiness of the women is in obeying their husbands. They do this in order to get their selfish desire out of you. They also ask you to do what Allah and His prophet did not stipulate at all, like cooking and washing of cloth and the like. At the same time, they do not ask you about what Allah and His messenger has ordained to you of obedience. Yes, it is incumbent upon the wife to obey her husband according to the consensus of scholar-jurist in secret and in open even when the husband is very poor or a slave. It is not permissible for her to disobey him at all, according to the consensus unless he orders her to disobey Allah, in which case she should not obey him.[13]

Through this onerous effort by the Sokoto jihadists, women in the Caliphate were emancipated and appropriately placed as equal partners in progress in the realization of the ideals upon which the Sokoto Caliphate was founded. One would be left in no doubt of this fact, if one views the mobilization of women program chaired by Nana Asma'u 1793-1864 (the daughter of the Shehu Usmanu Danfodiyo) under the *Yantaru*[14] system. The study conducted by Jean Boyd and Beverly Mack on Nana Asma'u and the Yantaru confirmed that, the movement was a mass movement involving almost all women in the Caliphate and not in any way restricted to few women in the aristocracy. The women network provided a platform for social service, and addressing special problems related to women in the Caliphate. In the opinion of Boyd and Mack:

> The network of teachers established a conduit for all women to be apprised of current events and news of political concerns during a period of rapid socio-political change. Women in these networks acted deliberately. They undertook responsibilities, organized food for the army, brought up orphans, distributed goods to the poor, gave religious instruction, sorted out problems and related well to everyone willing to respond, regardless of their background or status. They were by no means isolated in seclusion as has often been suggested by contemporary scholars, but constituted a sisterhood.[15]

From the scholarly comments and contributions by Nana Asma'u and other women, the Caliphate did not only create opportunities for women in juristic and spiritual spheres, but also on some administrative ethos such as military expeditions and other related issues in the governance of the soci-

[12] Cited in AHMAD MUHAMMAD KANI, *The Intellectual Origin of Sokoto Jihad,* Iman Publications; Ibadan, Nigeria, (1405AH)1985, 69.
[13] Cited in AHMAD MUHAMMAD KANI, supra, n. 12, 69-70.
[14] That was an association of the women folk, founded by Nana Asma'u, daughter of the Shehu Usmanu Danfodiyo for the advancement of the course of the Sokoto Jihad movement principally targeting the women folk, teaching, re-orienting and enlightening them.
[15] See JEAN BOYD and BEVERLY MACK, *The Collected Works of Nana Asma'u, Daughter of Shehu Usman Danfodiyo (1793-1864)*, Ibadan: Sam Bookman, 1999, 9.

ety. The gender balance and equality achieved in this regard by the jihadists were some of the secrets of their long lasting success and the indelible impact of their ideology in the society, which had its roots from the family and then to the wider society. The annual general convention of the Yantau is until today celebrated in the two major cities of the Caliphate (Sokoto and Gwandu) attracting participants from all over West Africa. Women in their thousands converge to perform rituals, conduct pilgrimage, and undertake some educational sessions; similar to what was practiced during the days of Nana Asma'u, the founder of the movement some two hundred years ago.

5. Provision of Education and Mass Literacy

Unlike other reform movements in the 19th century Africa, the Sokoto reformers were perfectly scholars and teachers more than politicians or warriors. The foundation of the whole movement was knowledge, education, and scientific discoveries. The Sokoto Caliphate was established on a sound academic and intellectual foundation. Those who pioneered the establishment of the Caliphate, viz: Shehu Danfodiyo, Abdullahi and Muhammad Bello, presented themselves as scholars and teachers more than political leaders or military commanders. Until today, the Jihad leaders are remembered as scholars and *Ulama'* that left behind hundreds of books to their credit.

Their writings were, mainly intended to address the need of their contemporary situation. It was the belief of the Shehu that the works of the contemporary scholars at any given moment were more relevant to their people as they addressed the specific needs of the situation. The intellectual outputs of these scholars were tailored such that each established a kind of specialty and a specific target audience to avoid duplication of efforts. Shehu himself acknowledged this where he advised in his book *Najm al-Ikhwan* that:

> Take to reading the works of my brother Abdullah for he is, on the whole, concerned with the letter of the *Shari'ah.* Take to reading the works of my son Muhammad Bello for he is overall concerned with the preservation of the political science of the Muslim community with regards to persons, aims, time, place, and prevailing conditions. Take to reading of my works too for I am concerned with the preservation of both.[16]

Abdullah's works are mainly on the high academic issues, and the target audiences were scholars and advanced level learners; that was why he was the only one among the Sokoto scholars of the 19th century who wrote the *Tafsir* (exegesis) of the holy Qur'an known as *Kifayat al-Dua'fa' al-Sudan* and *Diya' al- Ta'weel fi ma'ani al-Tanzeel*. He also wrote on the most technical aspects of religious sciences like *Tajweed* (Science of reciting the holy Qur'an) and *Mastalah al-hadeeth* (Study of the authenticity of Hadith). In addition, Abdullah authored a number of works in Arabic language such as *Balagah* (rhetoric), *Nahwu* (grammar) as well as syntax and phonology which are studied not only in Nigeria but as far as Egypt and other countries in the Middle East. In order to address similar technical issues he produced a series of *Diya'ats* books namely: *Diya' al Ummah, Diya' ahl-Ihtisab, Diya' al-Sultan, Diya' Al-faraid, Diya' al-Umara', Diya' al- Hukkam, Diya' ul al- amr wa al-Mujahideen* and *Diya'al-Ulum al-Deen.* Each of those volumes of *Diya'* was intended to illuminate on a certain juristic question or another; thus his choice of the title *Diya'* which means 'an illuminating light'.

[16] See SHEHU USMAN DANFODIYO, *Najm al-Ikhwan yahtaduna bihi bi izn Allah fi umur al- Zaaman,* printed in a collection of titled *Wasiyat Shaikh Usman Bin Fodiyo* by Alhaji Dan Ige Sokoto, (nd), 69. The translation of the statement used in the text could be found in ABDALLAH ISMAIL, "Some Reflections on the Literature of the Jihad and the Caliphate", in Usman Yusuf Bala (ed), supra, n. 7, 170.

The Shehu on the other hand enthusiastically was concerned with *aqeedah* (creed), rejuvenating the people's faith, avoidance of the innovations (*bid'a)* and strict adherence to the Sunnah of the prophet. Thus, his titles of the works reflect in form of *nasihah, wathiqah,* like *nasihat ahl-al- Sudan* and *wathiqat al-Ikhwan* respectively. Similarly, he authored book series like *Najm al-ikhwan, Siraj al-Ikhwan, Hidayat al- Tullab, Ihya' al-Sunnah,* etc.

While Bello concentrated on administrative issues like land, labor, urbanization, settlements, defense and security, social justice as well as social welfare, and issues like medicine, community health, personal hygiene, and diplomacy.[17] Nana Asma'u extensively addressed issues related to mobilization and sensitization of the women folk in education and other state matters. It was the first time in the history of Islam in Hausaland where women exercised a degree of freedom as such that they organized their own programs among themselves. In order for knowledge to be widespread and not in the monopoly of a clique, Shehu directs in his book *Ihya al-Sunnah wa Ikhmad al-Bid'a* that:

> There should be, in every mosque and quarter in the town, a learned person teaching the people. So also is it, in every village, obligatory on every learned person who has completed his fully compulsory duty (*fard ain*) and has devoted himself to the partially compulsory one (*fard kifayah*, such as science and medicine), that he should go out to the neighboring on his town in order to teach them their obligatory part of the Sharia'h.[18]

In this light therefore, the Sokoto scholars established knowledge as supreme and great lever and uplifter of the individuals and groups in the society. The question of racial supremacy of one ethnic group over another, caste, or class as far as the Sokoto *Ulama'* were concerned had no place in the scheme of things. Whoever excels in knowledge and science and tamed his physical environment for the service of God is superior regardless of his family or social background. Yusuf Abba argued that some writers portrayed the Fulani tribe as symbol of power and influence in the Caliphate due to their race as a mere fallacy and superstition.[19] He buttressed his point with the statement where Sultan Muhammad Bello says:

> The people of Hausa corrupt our children when they tell them that their family is a family of saints and turn them from the path of learning. This is but a lie, an illusion, an error and a fallacy; for sciences can only be preserved by learning and *Mallams* (scholars) are nearer to science than anyone else.[20]

The concept of *Mallams* (scholars) expressed here by Muhammad Bello was the type of Ibn Sina (Avecina), Ibn Khaldoon, al-Jabarti, al-Razes and host of others who were stars and icons of science not only for the Muslim world but the foundation layers of modern science and technology. In the

[17] See for instance Professor Murray Last study on the Social Policies of Sultan Muhammad Bello, who was the Sultan of Sokoto 1817-1837, "Aspects of Muhammad Bello's Social Policy", *Kano Studies* No. 2 (1966).
[18] Cited in ISMAIL BALOGUN, supra, n. 10, 216-217.
[19] That was also part of the colonial campaigns; Lugard asserts that the Fulani conquered the Hausa due to their racial supremacy.
[20] YUSUF ABBA, supra, n. 7, 25.

field of medicine, Muhammad Bello himself authored over fourteen books on various fields such as pharmacology, ophthalmology, community and general medicine.[21]

In the opinion of this paper, the educational policies of the Sokoto Caliphate, which made them to realise such an enormous intellectual acumen, was not the current *almajiri* system practiced by some Muslims in this part of the country. We have not seen, as far as historical evidences within our reach could provide, where any of the triumvirates, sanctioned children to be in dirt, neglected and abandoned with bowls begging for food, as a means of acquiring education.

III. SOME ASPECTS OF GOOD GOVERNANCE IN THE SOKOTO CALIPHATE

According to the United Nations Economic and Social Commission for Asia and the Pacific, (UNESCAP), 'the concept of "governance" is not new. It is as old as human civilization. Therefore, governance in this regard denotes, 'the process of decision-making and the process by which decisions are implemented (or not implemented)'. Governance can be used in several contexts such as corporate governance, international governance, national governance, and local governance. Since governance is the process of decision-making and the process by which decisions are implemented, an analysis of governance focuses on the formal and informal actors involved in decision-making and implementing the decisions made and the formal and informal structures that have been set in place to arrive at and implement the decision.[22]

Good governance, as contained in the UNESCAP, has eight major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society.[23]

From the above discussion on the foundation of the Sokoto Caliphate, it becomes clear that participatory government was established in place of a dictatorial polity that characterised the pre-Caliphal period in Hausaland. A new political setting was established. This paper would want to highlight some of its legacies in this sector for the use by the Nigerian democratic government in order to address some of its critical issues that threatened the corporate survival of Nigeria as a nation.

The aptitude of the Sokoto Caliphate to hold together hundreds of tribes and ethnic groups with utmost solidarity and sense of respect and commitment between them for over a century is a great lesson that the modern Nigeria should copy. The democratic Nigeria has enormous legacies to emulate in the history and polities of the Nigerian areas, which the Sokoto Caliphate was central for. It was observed that:

[21] See detail discussion in MUKHTAR UMAR BUNZA, "The Contribution of Sultan Muhammad Bello to the Development of Medical Sciences in the Nineteenth century Hausaland", M.A. History, Usmanu Danfodiyo University, Sokoto, 1995.
[22] UNESCAP, 'What is Good Governance?', article available at *www.unescap.org/pdd.* Visited on October 12 2011.
[23] UNESCAP, supra, n. 22.

> The collective memory of our people attests to a very long period of various types of interaction between the peoples of the Nigerian area… This is especially the case here in the north where, by the time of British conquest, factors such as population movements, trade, exchange of cultural practices, the creation and expansion of powerful polities like the Kwararafa, Borno and Hausa States and more recently the Sokoto Caliphate, were all acting to bring the people of the area into an inter-related, if not single socio-economic and political matrix.[24]

Therefore, the democratic Nigerian state has a lot to copy from our history and political settings. Disregard and neglect of this historical reality, paved ways for some derogatory, contemptuous, and uncivilized terms such as 'settler', 'alien', 'minority', 'migrant' or 'marginalized', which were not known in the early history of the Nigerian areas. That was why the cities of Kano, Katsina and Sokoto were settlements not only for the Hausa and Fulani, but all other peoples and tribes of the West African sub-region and even beyond.[25]

1. Management of Pluralism

The establishment of the Sokoto Caliphate in the nineteenth century further consolidated and strengthened the bond of cooperation among the people of different geographical locations. Integration between regions and peoples of various ethnic and tribal groups in the Nigerian areas were further enhanced. As early as 1806, and specifically in the 1850s, a number of Yoruba merchants established strong commercial and trading relations with Kano and were well established right in the city of Kano and were credited for the establishment of the Ayagi ward in Kano[26]. So also Muslims of other tribal and ethnic entities, especially Hausa, Kanuri and Nupe settled and absorbed as single community imost parts of Yoruba land such as Badagry, Ikoyi, Ijaye, Igboho, Iseyin, Shaki, Abeokuta, Ede, Ibadan and host of others. This is an indicator of the existence of cordial relationship based on mutual benefit, away from acrimony and conflicts.[27]

The ideology of the Sokoto Caliphate was neither ethnic nor tribal or regional affilliates; but sound Islamic creed and professionalism, which cemented peoples together. Any ethnic, tribal or regional attachments were discouraged. The Shehu warns leaders, especially of Nigerian type that:

> One of the swiftest ways of destroying a (country/state) kingdom is to give preference to a particular tribe over another, or to show favor to one group of people rather than another and draw near those who should be kept away and keep away those who should be drawn near.[28]

[24] LIMAN CHIROMA, "National Unity and the Responsibility of leadership", *ECPER Journal*, Vol. II, No. I, 1994, 20, see also IYOCHIYA AYU, 'Nigeria : A Case Study in Federalism' *ECPER Journal*, n. 24, 42-45.

[25] See MUKHTAR UMAR BUNZA, "Prospects of Nigerian Federalism", a paper presented at the 2nd national conference on Nigerian federalism issues and problems, organized by the school of arts and social science federal college of education Kontagora, Niger State, 30th August-2nd September, 2005, 4-6.

[26] ZAKARIYA SAMBO, 'Consolidating the Pre-Colonial Diaspora: The Ara Ilorin in Kano', in in Alahji Mahmud Yakubu, Jumare Ibrahim Muhammad, and Asma'u Garba Saed, (eds), *Northern Nigeria: Years of Transformation, 1903-2003*. Arewa House: Kaduna, 2004, 480-81.

[27] See for details GHAZALI KALLI, *The Kanuri in Diaspora; The Contribution of Kanem Borno Ulama' to Islamic Education in Nupe and Yoruba land.* Nigeria: CSS Bookshops, 2005, 173-265.

[28] SHEHU USMANU DANFODIYO, *Kitab Wujub al-Hijrah ala-Al-ibad*, F.H. El-Masri (tran), Sudan: Khartoum University Press, 1978, 142.

What a great lesson for contemporary polities in the world at large, where the preferential treatments against one national, racial, or regional people against another is the order of the day. The transformation of most societies from the level of simple lineage, clan, or tribal organizations to that of centralized emirates system, the Hausa states, Nupe and part of Yoruba states were consolidated into a single Caliphate. This involved an unprecedented diversification of the political communities refocusing of loyalties from supra-clan and supra-tribal institutions to a wider Caliphal and universal worldview that the Caliphate represented.[29]

As result of the territorial expansion by the Caliphate over two hundred and fifty tribes were found in the Caliphate, most of them constituted the tribes in northern Nigeria, parts of Cameroon, Niger Republic and other modern countries in West Africa. Those tribes and cultural entities were united under one state in progress and development. The relevance of the mechanism and method of management of pluralism to contemporary Nigeria attracted the comment of Ashafa in the following:

> Now that there is a vocal demand for restructuring Nigeria's federalism, where diversity exists in unity, Sokoto's administrative model in pre-modern era with a political and social order based on the *Shari'a* would provide the mechanism for harmony…[30]

2. Respect for Opposition and the Rule of Law[31]

One of the historic features of the Sokoto Caliphate was its tolerations of opposition and accommodating differences from within and without the government structures. The leaders, from the embryonic stage of the Caliphate considered themselves as representatives of the people in the execution of the will of Allah on earth. Therefore, the wide gulf that exists today between the rulers and the ruled was minimized in the Caliphate. The same President (the Caliph or Sultan) and his governors (emirs) were teachers, judges and spiritual leaders who were in constant contact with their subjects and responded promptly to their needs and requests. They tolerated their individual difference at the administrative level. Abdullahi (the Prime Minister) used to differ in many cases with his brother, Shehu Usman, the President-general, and commander-in-Chief of the Caliphate. Issues such as administrative titles, using gorgeous attire for judges and political officers etc. were some points of disagreement between them. The level of discontent with the Caliphate, which Abdullahi freely expressed, made him to attempt to leave the Caliphate, if not for the intervention of Shehu himself.[32]

The case of Malam Abd al-Salam, one of the students of Shehu Usman Danfodiyo who was critical of the government especially during the consolidation period was very glaring. After the establishment of the Caliphate the territories of Kware (few kilometers from Sokoto town) were given to Abd al-Salam due to his enormous support and contribution to the success of the Jihad. The Abd al-Salami's opposition however, continued and even took a military dimension, but was handled perfectly by Sultan Muhammad Bello with diplomacy. The series of petition and counter petitions between the

[29] MAHMUD HAMMAN, "Inter-ethnic relations and Inter-ethnic Conflicts", in Yaubu Alhaji Mahmud, Jumare Muhammad Ibrahim, and Asma'u Garba Saeed, (eds), supra, n. 26, 453.
[30] ABDULLAHI MUSA ASHAFA, "The Management of Pluralism in the Sokoto Caliphate: A Lesson for Contemporary Nigeria", *DEGEL; Journal FAIS*, Vol. VI, 2003, 70.
[31] See on this aspect J. N. PADEN, 'Contemporary Relevance of the Sokoto Caliphate: Rule of Law, Federalism and Conflict Resolution', in Hamid Boboyi and Alhaji Mahmud Yakubu, supra, n. 5, 242-250.
[32] See ABDULLAHI FODIYO supra, n. 6 & 7.

opposition and the Caliph were compiled into a book titled, *Sard al-Kalam fi ma jara bainana wa baina Abd al-Salam*. In spite of the fact that, total control of the army and other security operatives of the Caliphate were under Muhammad Bello Abd al-Salam held an opposing position with the government of the day; until when he took up arms and declared war against the Caliphate, state machineries were directed against, protecting the life of innocent citizens. Indeed, Abdullahi Fodiyo appointed the son Abd al-Salam called Buhari as the Sarkin Kebbi of Jega in 1821. That was to show that the fault of the father cannot in any way affect his innocent children.[33]

From the external side we can see the oppostion of Borno to the Sokoto Caliphate. The way and manner through which the dialogue was conducted between the two leaderships of Sokoto under Muhammad Bello and Borno under al-Kanemi, is still eluding even the so-called civilized nations who use military sophistication and superiority in international relations to intimidate and subdue other nations. The Borno –Sokoto debate was intellectually and harmoniously resolved after years of academic and diplomatic disputes.[34] Even before the coming of al-Kanemi into the affairs of Borno and his disputations and dialogue with Sultan Muhammad Bello, Malam Mustafa Goni was already a critic of Shehu and the level of respect and tolerance to criticism for the betterment of the system and community was exhibited between them. That may well be the foundation of the slogan of some early Nigerian politicians- Siyasa ba da gaba ba, meaning, 'politics without bitterness'.

Adopting the Sokoto example by the Nigerian state could go along way in curbing the prevalent political assassinations against opposition leaders in order to eliminate their rivals, which is almost pushing the country to anarchy. The use of thugs and hooligans in maiming and manhandling of people from opposition parties, critics of government policies, or even colleagues who may threaten their continuity in office, can be addressed through imitation of the Sokoto example.

The essence of the rule of law and justice is to ensure that no person no matter how highly placed, such as president, governor, or other political leaders should enjoy any concession or special treatment, or immunity before justice. The example of the Sokoto Caliphate in this direction can illuminate the way forward for Nigeria, where some political office holders are(above the law) exempted from facing justice in case of committing crime while in office under the 'Immunity' provision in the Constitution. A serving president in the Caliphate, Caliph of Sokoto Aliyu Babba (1808 to 1859) was tried by the leading jurists in Sokoto for some allegations labeled against him. He reigned as the Sultan of Sokoto from 1842-1859, was the son of Sultan Muhammad Bello and grandson of the Shehu Usmanu Danfodiyo, however, was invited to trial at the famous Shehu mosque in Sokoto town for five charges against him.

Some of these charges included, failure to lead and command the army himself in some expedition for territorial defense of the Caliphate as required of his office and tradition of his predecessors. He was also accused of failure to repair and keep the maintenance of mosques as required of him by law, and failed to disburse funds from the treasury to cater for the need of the poor in the Caliphate. The implication of this was that it may have led to his removal from office if found guilty. Immediately, the Caliph appeared in person, defended himself against all the charges, and was acquitted by

[33] See MUHAMMAD BELLO, Infaqul Maisur fi Tarikh Bilad al-Tekrur, Annett John (trans), 1922, 71-72.
[34] See detail discussion on this in MUKHTAR UMAR BUNZA, "Intellectual Factor in African Diplomatic History: Sokoto and Borno Sultanates, 1786-1817" submitted for publication to the Alternatives: Turkish Journal of International Relations, September, 2012.

the jurists. According to Kyari Tijjani, Caliph Aliyu Babba improved his general conduct in office consequent upon that he escaped impeachment from office.[35]

3. Appointment of Political Officers

One of the main reasons for the state failure in contemporary Nigeria, and developing countries generally is the appointment of incompetent, unqualified officers to shoulder the responsibility of the state. Some of the appointments were mainly due to other considerations, without recourse to professionalism, skills, and competence. Some occupy an office because their parents or masters contributed to a political party to establish government, or were sons and daughters of influential persons in the society without the necessary qualification and capability to lead. It is in very rare circumstances that you find appointment in public office purely based on merit, qualification, and competence of the candidates. The guidance of the Sokoto Caliphate on this matter could be seen in theory and practice as legacy for contemporary polities in the country. Sultan Muhammad Bello warns governments in the following:

> Know also that most of the evil that befalls the state comes from the appointment of officers who are anxious to have the appointment, because none would be keen on such but a thief in the garb of hermit and a fox in the guise of a pious worshipper. Someone who is keen in the collection of money, sacrificing for such his religion and integrity, all his endeavors are for the fruits of this world, not portraying zeal and honesty, and that is the sign of treachery…[36]

In the same vein, Abdullahi Fodiyo commands that any officer to be appointed must be learned, honest and pious. He warned against nepotism and appointment of unqualified people to any public office. Similarly, Abdullahi emphasised that, 'the Head of State (Governor) must not fold his arms after appointing his officials, he must consistently monitor their activities and remove those found wanting. Both he and his officials should see themselves as God's trustees over their people. They must treat them gently and work for their welfare. They are shepherds over their subjects and are expected to cater for their interest. On the day of judgment, they would be called upon to account for the way they treated them'.[37]

It was in this respect that Abdullahi refused to appoint his son Muhammad, as the emir of Gwandu initially after the fall of Birnin Kebbi to the forces of the Caliphate in April 1805, but entrusted it to the Magajin Gari, although he was one of the commanders that led the expedition which subsequently subdued the town.[38]

In addition, Shehu further commands leaders in *Kitab al-Farq*, to create relevant offices, units and ministries that will expedite the dispensation of justice as well as ensure efficient service delivery in the state. The president must ensure appointment of deputies who oversee affairs in different aspects of government, Chief Judge to review judgment of lower judges who shall be appointed by him(the

[35] KYARI TIJJANI, "The Force of Religion in the conduct of political affairs and inter-personal relations in Borno and Sokoto", in Usman Yusuf Bala (ed), supra, n. 7, and 16, 269-271.
[36] See *al-Ghays al-Shubub* of Sultan Muhammad Bello, the translation adopted here could be seen in IBRAHIM SULAIMAN, supra, n. 1, 36.
[37] See details of Abdullahi's call in A.A. GWANDU, 'The Vision and Mission of Abdullahi Fodio', Hamid Boboyi and Alhaji Mahmud Yakubu, supra, n. 5, 32.
[38] See MUKHTAR UMAR BUNZA, "Gwandu Emirate 1805 to Present", *mimeo*, 2009.

Chief Judge), Chief of Police who shall obtain justice for the weak, sound treasury to be presided by an honest accountant.[39]

That was the prevailing situation in the general affairs of the Caliphal administration. In spite of the fact that sons of the emirs inherited their fathers in most cases, normal election processes had to be followed, and the king makers screen and elect the appropriate candidate among the contestants. The succession dispute that led to the Kano civil war otherwise known as Kano Basasa that occurred from 1893 to 1895 primarily for succession to the emirship of Kano. The two major contenders Muhammad Tukur and Aliyu led the war, which was referred to as the Basasa.[40] There were some reports of resistance in case the popular candidate was not endorsed by the electoral college. On the whole, Hogben and Kirk-Greene, call attention to the fact that presence of some corrupt rulers or princes who wanted to take power by any means should not delude us away from the good and impressive records in the Caliphate. According to them:

> Nevertheless, we must not let stories about the corruption of some, with their concubines and eunuchs, their embezzlement and extortion, their nepotism and indolence, blind us to the virtues of those other distinguished Fulani rulers who defied corruption.[41]

4. Religious Tolerance

It is worthy of note that, Shehu and his other triumvirate were not in any way extremists in their religious attitudes and beliefs; the same way that they were not reactionary and traditionalists. They never, voluntarily, over-stepped beyond the limits of the Shari'a for any sentiments, in religious affairs and tenets. That was the genesis of Shehu's writing of a book to address the issue of *ifrat* and *tafrit*(extremism and compromise) what made them moderates in their dealings among themselves and with others who belonged to other religions. The question of religious tolerance in the Sokoto Caliphate has been fairly treated elsewhere to require our in depth presentation here.[42]

In order to ensure equity among the followers of other religions they promulgated laws to address such issues. The Caliphal leadership directed all governors to take a good care of properties of diseased travelers in their territories and the non-Muslims. Their properties must be identified and should be sent to his guardian no matter the distance. He further says: 'know that a deposit left with us by a non-Muslim person who has been granted an *amana* (guarantee of protection by the state) should be sent to him wherever he may be, even if he had fought against the Muslims(his property must be protected and sent to him).[43]

Professor Ismail Balogun attested that it was the Shehu's strict observance of the middle course and following of the Shari'a that:

[39] SHEHU USMAN DANFODIYO, supra, n. 2, 6 and 13.
[40] See details on this episode in ADAMU MUHAMMAD FIKA, *The Kano Civil War and British Over Rule 1882-1940*, Ibadan; Oxford University Press, 1978, and SAID HALIL, 'Revolution and Reaction: The Fulani Jihad in Kano and its Aftermath, 1807-1919', PhD Thesis, University of Michigan, USA, 1978.
[41] SIDNEY HOGBEN and ANTHONY KIRK-GREENE, supra, n. 1, 122.
[42] See MUKHTAR UMAR BUNZA, "Religious Tolerance in the Sokoto Caliphate: Lessons for the Nigerian State", in Boboyi Hamid and Alhaji Mahmud. Yakubu, eds., supra, n.32, 251-269.
[43] See translation of Abdullahi's statement in IBRAHIM SULAIMAN, supra, n. 31, 59.

> Accounted for his leniency and tolerance where others were unacceptably strict, bordering on seeming harshness. It must be stated that it was his middle of the way attitude to life and to all around him that won him the hearts of millions of his adherents. That, indeed was the greatest heritage that Uthman Danfodiyo had bequeathed to the world.[44]

Therefore, the example of Sokoto shows that equity and justice should be the bedrock of any polity if it all wants to survive.

5. Justice, Prudence, and Accountability

Problems associated with lack of prudence and accountability in public offices have been the major cog on the wheels of development of Nigeria as nation. The responsible agencies for checking the excesses of public servants should be strengthened for good governance and development. In the Sokoto Caliphate, Abdullahi Fodiyo(who was in charge of the western flank of the Caliphate) directed to all governors and officers as contained in *Diya' al-Hukkam,* 'that all public officers must declare their assets and interests before they assume public responsibility and do the same when they leave office. Whoever is found to have wealth above what he earns from his work, the ruler (president) shall confiscate and restore it to the treasury'.[45] Further, Abdullahi Fodiyo stresses that, the leader does not have the right to revert to acquiring power and wealth from people. Nor is he, let alone his lieutenants, permitted to either receive gifts or use his office/position to acquire wealth in excess of his lawful entitlements.[46] The practical application of this rule and guiding principle in the Caliphate that resulted in the fact that the early caliphs up to recently the Premier of the Northern Region late Sardauna of Sokoto did not leave behind estates and wealth, unlike the crazy show and display of wealth seen today from political leaders.

The key word of the Sokoto Caliphate was 'justice' in theory and practice. One finds the following as the opening statements in the books of the Sokoto jihad leaders: 'A kingdom (country) can endure with unbelief but not with injustice', 'victory is gained through justice and defeat comes through injustice', 'justice and mercy safeguard the kingdom (country). The basis for the well-being of the world is justice'.[47] That explained why the Caliphate prospered during its early days, and brought a vast area under its domains, but when the leaders turned against the principle of justice they fell into decay and internal disorder, and were finally overwhelmed, and gave way to British subjugation.

6. Provision of Welfare to General Public

Taking a good care of the wellbeing of the masses is the fundamental role of a leader/ government in any given society. In *Usul al-Siyasat*, Sultan Muhammad Bello states:

> For this purpose, he (ruler, governor/president) shall foster the artisans, and be concerned with tradesmen who are indispensable to the people. They include farmers, smiths, tailors, dyers, physicians, grocers, butchers, carpenters, and all sort of trade, contribute to (stabilize) the proper order of the world. The ruler must set up these tradesmen in every village and locality. He should urge his

[44] ISMAIL BALOGUN, supra, n. 10, 221.

[45] ABDULLAHI FODIYO, *Diya' al-Hukkam fima lahum wa alaihim min al-Ahkam,* the quotation used in the text was copied from IBRAHIM SULAIMAN, supra, n. 31, 36-37.

[46] See IBRAHIM SULAIMAN, supra, n. 1, 31, 36, and 38, 37.

[47] See SHEHU USMANU DANFODIYO, supra, n. 24.

> subjects to produce foodstuff and store it for future use. He must keep villages and countryside peopled, construct fortresses, bridges, maintain markets, roads, and realize for them all what are of public interest so that the proper order of this world may be maintained.[48]

Payment of allowances to destitutes, orphans, elderly and unemployed in order to restrain them from crimes and unlawful acts should be well established. Abdullahi directed that: 'the leader shall pay the indigents(poor) their allowances until he covers all of them, male and female, minors and adults, on the basis of the amount they need, and the nature of their needs… if the money is more than enough, the surplus shall be kept in the treasury for what may possibly occur in form of calamity, or for building mosques, or freeing of captives, or settling debts, or assisting bachelors to get married, or helping the pilgrims, or for any other purpose which may possibly arise.[49] That was exactly what was attained in the Sokoto Caliphate. To the extent that peace was enshrined in the whole Caliphate due to social justice, that a woman can carry a casket of gold from one end of the Caliphate to the other without fear.

Hugh Clapperton attests to this during his visit to Sokoto in 1824 and reported in his journal of expedition:

> The laws of the Qur'an were in his (Bellos) time so strictly put enforce… that the whole country when not in a state of war, was so well-regulated that it is a common saying that a woman might travel with a casket of gold upon her head from one end of the Fellata dominion to the other (without fear).[50]

7. Industrialization and Craft

Any government that does not venture into technological inventions and scientific discoveries to address the needs of the people in relation to their physical environment, has at least the risk of being a slave of others who take lead in that direction. It was in recognition of that fact, that Sultan Muhammad Bello made agricultural revolution a catalyst to technological and industrial developments. Agricultural revolution inspired and indeed made the industrial revolution possible. Since most industries in the Caliphate were agro-allied or processing industries, agriculture was the mainstay for development. The government ensured massive agricultural produce, which left surpluses for exportation and vast income in the hand of the people out of the sales of their produce. New crops were introduced and extended farms were established by the government and also new techniques in agriculture and irrigation methods using fulcrum and bucket-shaduf in order to maximise production and allow farming in the dry season.[51]

The use of slaves especially for domestic purposes cannot be denied in the Caliphate, however slave raiding and generation of income from sales of slaves were not in any way encouraged or supported. The practice of slavery that the colonial government observed in the Caliphate was such that even

[48] MUHAMMAD BELLO, *Usul al- Siyasat*, Shehu Yamusa, tran, 17.
[49] ABDULLAHI FODIYO, *Diya' al-Hukkam,* translation used here see IBRAHIM SULAIMAN, supra, n. 31, 53.
[50] HUGH CLAPPERTON, *Journal of a Second Expedition into the Interior of Africa*. London: 1829, 206.
[51] See HUSSAIN USMAN MALAMI, *Economic Priciples and Practices of the Sokoto Caliphate,* The Institute of Islamic Sciences, Sokoto, 1998, 51.

the colonial administration was reluctant to abolish it completely. In his study of Northern Nigeria, Robert Shenton reported a resident officer lamenting:

> I am very much afraid that if slavery disappears and with it the wealthy class we will find in some ten to twenty years' time that the Fulani administrative machinery has disappeared and that we have nothing to replace it with. The only solution I can think of … is that domestic slavery in some modified form be legalized, it would be a temporary measure and help to bridge the next twenty years at the end of which one hopes that the revenue of the country will have increased so much that it will be possible to provide adequate remuneration for native administrators.[52]

Thus, in Lugard's eyes the Sokoto Caliphate and the rest of Northern Nigeria was to be transformed into a version of post-manumission British West Indies, in which slaves, while freed, were compelled to remain on the plantation. Slaves were not to be permitted to 'desert', and the Caliphate aristocracy was to become a wage-paying landlord class.[53]

Industries that followed immediately were leather industries, supplying all sorts and styles of leather materials, which were exported as far as Europe, from Morocco via the Sahara. There were also dyeing and chemical as well as sugar refining industries established in various centers in the Caliphate.[54] The next major industries were the textile industry, glass industry, iron smelting which the Nupe and the Zoramawa in the Caliphate mostly dominated.[55]

The democratic Nigerian state can by following the legacies of the Caliphate in this sector, alleviate poverty from its citizens, encourage development and self-reliance as against the consumer syndrome that characterised the Nigerian state and majority of its population without any vocational training and trade acquisition for subsistence. A society can only be self-reliant if it controls what it requires for its survival as an entity.

IV. Conclusion

The paper attempted to draw from the wealth of historical treasure that the Sokoto Caliphate left behind as a lesson for the Nigerian state, and other nations as well. Indeed, most of that may be required for good governance in Nigeria such as accountability and probity, transparancy and equity, management of pluralism and resolution of conflicts, social security and welfare, and development oriented programs are abound in the history of the Sokoto Caliphate under the ambit of the Shari'a.

[52] See ROBERT SHENTON, *The Development of Capitalism in Northern Nigeria*, University of Toronto Press: Toronto & Buffalo, 1986, 28.
[53] ROBERT SHENTON, supra, n. 52, 29.
[54] See detail discussion on this subject in ALIYU CHIKA UMAR, 'An Analytical Study of the views of Abdullahi Danfodiyoon Economic Development' Ph. D, Econmics UDU, Sokoto, 2000 and A.S.M. BAYERO, 'Production Policy of the Sokoto Caliphate', in *Degel Jornal of FAIS*, Vol. VI, August, 2003, 123-134.
[55] See detail discussion in MUKHTAR UMAR BUNZA and SANUSI USMAN JUNAIDU, "Sourcing Indigenous Materials for Science and Technical Education for the Year 2010: Lessons from the Pre-colonial Northern Nigeria" *Technical Education and Vision 2010, Proceedings of the Second National Conference on Technical Education and Vision 2010,* Published by Federal College of Education Technical Gusau, 1997, 202-210.

The strength and viability of the democratic Nigeria relies in its efforts to make the resource of the people reach the very citizens they were meant for, and not by circulating the wealth in the hands of the few who continue to manipulate and hold the nation and the people at ransom. The Sokoto Caliphate, as well as its leadership left indelible imprints for good governance, selflessness and patriotism. It suffices in this regards to end our discussion with the warning of Shehu Usman Danfodiyo, 1754-1817, the President General of the Caliphate in following:

> One of the swiftest ways of destroying a nation/kingdom is to give preference to a particular tribe over another, or to show favor to one group of people(ethnic or political party supporters) rather than another and draw near those who should be kept away and keep away those who should be drawn near.

The message serves as the foundation and viable pillar for good governance and sustainable development, as well as averting political crisis, inter-ethnic and inter-religious conflicts that characterized the plural Nigerian state due to injustices, inequality and corruption.

Überblick über das Schuldvertragsrecht arabischer Staaten*

von Professor Dr. Hilmar Krüger, Universität zu Köln

I. Einführung

Untersucht man das in den arabischen Staaten geltende Schuldrecht näher, so führt dies in den meisten Fällen dazu, dass nach wie vor insoweit kaum noch islamische, sondern auf französischem Recht beruhende Regeln gelten. Man kann insoweit von arabisiertem französischen Recht sprechen. *Bälz* schreibt z.B zutreffend, dass es sich beim ägyptischen ZGB von 1948, der Mutterrechtsordnung in der arabischen Welt, „um ein Derivat des französischen Code civil" handelt und Ägypten „was das Vermögensrecht angeht, zum französischen Rechtskreis gehört"[1]. In Frankreich spricht man im Zusammenhang mit der Verkündung des ZGB von Bahrain 2001, einem ägyptischen Tochterrecht, mit Recht von der „persistance d'influence de notre Code civil"[2]. Im wesentlichen kollidieren aus dem Bereich des islamischen Rechts ernstlich nur Fragen des Zinsrechts (wegen ribâ) mit staatlichem Gesetzesrecht. Einige andere Fragen werde ich kurz erwähnen. Die Problematik des gharar (alea, Risiko, Unklarheiten beim Abschluss von Verträgen, Unsicherheit, Unwägbarkeit) insbesondere, aber sicherlich nicht nur bei Versicherungsverträgen, lasse ich beiseite[3].

Wenn man insbesondere in Veröffentlichungen von US-Amerikanern[4] und Engländern nicht selten findet, dass die Tendenz in der Gesetzgebung der arabischen Staaten im Bereich des vermögensrechtlichen Privatrechts dahin gehe, dieses Rechtsgebiet nicht weiter zu säkularisieren, sondern ihren islamischen Inhalt zu erweitern, so ist dies höchst zweifelhaft. Zwar enthalten einige der arabischen Zivilgesetzbücher (z.B. Jordanien, Sudan und die VAE) mehr islamischrechtlichen Inhalt als die früheren (z.B. Ägypten, Syrien, Libyen). Die Tendenz setzt sich

*Bei diesem Beitrag handelt es sich um meinen leicht überarbeiteten Vortrag, den ich am 12.10.2013 in Zürich auf der Jahrestagung der Gesellschaft für Arabisches und Islamisches Recht in Zusammenarbeit mit dem Center for Islamic and Middle Eastern Legal Studies der Universität Zürich gehalten habe. – Einige Fussnoten habe ich eingefügt, aber es ist im wesentlichen *a tune without notes*.

[1] *Bälz*, Europäisches Privatrecht jenseits von Europa ?, ZEuP 8 (2000), 49 – 76 (49); *ders*., Das islamische Recht als Grundlage arabischer Rechtseinheit, in: Beiträge zum Islamischen Recht I (2000), 35 – 51 (42); *Krüger*, Zur Rezeption ägyptischen Zivilrechts in der arabischen Welt, in: Beiträge zum Islamischen Recht VIII (2011), 9 – 21 (9); *ders*., Überblick über das Zivilrecht der Staaten des ägyptischen Rechtskreises 14 (1997), 67 – 131 (75 m.w.N. in Fn. 56); *ders*., An Introduction to the Law of Contract in Arab States, Studi Magrebini 2 (2004), 201 – 222 (205 f.); *Castro*, La codificazione del diritto privato negli stati arabi contemporaneri, Riv.dir.civ. 31 (1985), I 387 – 447 (396: Ägyptisches ZGB ist eine „derivazione francese"); jüngst *Schultze*, Die zivilrechtliche Produkthaftung nach ägyptischem Recht, Frankfurt 2013, 62 f. , 65.

[2] *Peyrard*, Persistance de l'influence de notre Code civil – Le Code civil de l'état de Bahrain, Rev.int.dr.comp. 2001, 927 – 944.

[3] Hierzu grundlegend *Bälz*, Versicherungsvertragsrecht in den arabischen Staaten, Karlsruhe 1997, mit sehr umfangeichen Nachweisen auf S. 224 – 244; ergiebig auch *Muslehuddin*, Insurance and Islamic Law, 2. Aufl. Lahore 1978.

[4] *Vogel*, Contract Law of Islam and the Arab Middle East, IECL VII/7, Nr. 7-1 und 7-3; s. dazu bereits die kritische Rezension von *Krüger*, RabelsZ 27 (2008), 441 – 448.

jedoch keineswegs ohne weiteres fort. Man braucht sich lediglich die beiden ZGB von Bahrain (2001) und Qatar (2004) anzusehen, die durchgängig dem ägyptischen Modell entsprechen. Im übrigen findet man, wenn man sich z.B. mit der Rechtslage in den VAE befasst, dort aufgrund höchstrichterlicher Judikatur – anders als z.B. *Ballantyne*[5] - meint, keinesfalls durchgängig eine „reassertion" des islamischen Rechts (z.B. nicht im Bereich der Forderungsabtretung[6]).

D.h., trotz eines in der arabischen Welt besonders in den letzten Jahrzehnten festzustellenden verbreiteten Unbehagens an der Moderne (Staat, Recht und Wirtschaft) sind zentrale Bereiche des Privatrechts (Zivil- und insb. Handelsrecht) nach wie vor säkularisiert. Eine Umkehr dieser Entwicklung, einige Besonderheiten beiseitegelassen, scheint nicht sehr wahrscheinlich zu sein; denn die vornehmlich aus Frankreich übernommenen Normen haben in den meisten arabischen Staaten längst feste Wurzeln geschlagen und inzwischen eine eigene Tradition begründet.

Bisher sind nach meinem Kenntnisstand trotz der derzeitigen politischen Situation in mehreren Mitgliedstaaten der Arabischen Liga (Ägypten, Irak, Libyen, Somalia, Syrien, Tunesien) jedenfalls im Bereich des Zivilrechts keine Änderungen erfolgt. Die weitere Entwicklung bleibt jedoch abzuwarten.

II. Ausgangspunkt: Ägyptisches ZGB

Auszugehen ist ganz selbstverständlich für die meisten arabischen Staaten mit dem ägyptischen ZGB (Gesetz Nr. 131) von 1948; denn dieses ist in einer Vielzahl von arabischen Staaten – wenngleich keineswegs immer wörtlich – übernommen worden, so dass man ohne weiteres vom ägyptischen Rechtskreis sprechen kann[7]. Zu beachten ist ferner, dass die Normen des ägyptischen ZGB in anderen arabischen Staaten nicht stets unmittelbar aus Ägypten übernommen wurden (z.B. Syrien, Libyen). Es gibt auch gleichsam Ketten; z.B. gilt dies für die VAE (Ägypten/ Irak/ Jordanien/VAE). Festzuhalten ist auch, dass das irakische ZGB von 1951 in den zutreffenden Worten von *Francesco Castro* „una variante al modello egiziano" ist[8]. Es enthält durchaus Abweichungen vom ägyptischen. Lediglich ein Beispiel sei genannt: Die Regeln über die Vertragauslegung (tafsîr al-'aqd) in Art. 155 – 167 ZGB entstammen der osmanischen Mejelle und nicht französischem Recht. Der Hintergrund ist klar, denn *Al-Sanhûrî* (1895-1971)[9] der auch der geistige Vater dieses Gesetzbuchs ist, betrachtete wohl das irakische ZGB mehr als das ägyptische als sein Hauptwerk, weil es ihm hier möglich war, mehr islamische mit französischen Rechtsvorstellungen miteinander zu verknüpfen[10]. Diesen Modell folgten später Jordanien und die VAE.

[5] The New Civil Code of the United Arab Emirates: A Further Reassertion of the Shari'a, Arab L.Q. 1 (1985/86), 245 – 264.
[6] *Krüger*, ZvglRWiss 97 (1998), 369 f. zu den VAE.
[7] So zuerst *Krüger*, Überblick über das Privatrecht der Staaten des ägyptischen Rechtskreises, Recht van de Islam 5 (1987), 98 – 168. Dieser Begriff hat Anklang gefunden; s. die Nachweise bei *Krüger*, Zum Recht der Forderungsabtretung in der arabischen Welt, Festschrift für Ulrich Spellenberg, München 2010, 605 – 615 (610 Fn. 25); danach noch *Yassari*, Rezension von *Mallat*, Introduction to Middle Eastern Law, 2009, Am.J.Comp.L. 59 (2011), 1135 – 1139 (1135 Fn. 2). Zuletzt *Krüger*, Zur Rezeption ägyptischen Zivilrechts in der arabischen Welt, in: Beiträge zum Islamischen Rechts VIII (2011), 9 – 21.
[8] *Castro*, La codificazione del diritto privato negli stati arabi contemporanei, Rev.dir.civ.31 (1985) I 387 – 447 (387).
[9] Zu ihm statt vieler z.B. *Hill*, Al-Sanhuri and Islamic Law, Kairo 1987; *Castro*, Abd al-Razzaq Ahmad al-Sanhuri (1895 – 1971) – Primi appunti per una biografia, in: Studi in onore di Francesco Gabrieli, Rom 1984, 173 – 210.
[10] *Krüger*, Überblick über das Zivilrecht der Staaten des ägyptischen Rechtskreises, Recht van de Islam 14 (1997), 67 – 131 (92 m.w.N. in Fn. 177).

In einer kurzen Übersicht werde ich lediglich einige Hinweise auf mehrere Probleme in einigen Rechtsordnungen, die zum ägyptischen Rechtskreis gehören, geben. Dies sind inzwischen 13 Staaten. In chronologischer Reihenfolge Syrien (1949), Irak (1951), Libyen (1953), Somalia (1973), Algerien (1973), Jordanien (1976), Kuwait (1980), Sudan (1984), VAE (1995), Bahrain (2001), Jemen (2002), Qatar (2004) und jüngst Oman (2013)11.

Die Mitgliedstaaten der Arabischen Liga, die sehr stark französischrechtlich geprägt sind (Libanon und Djibouti), bleiben beiseite. Dasselbe gilt für den Staaten des maghrebinischen Modells (Tunesien, Marokko und Mauretanien), deren Codes des Obligations et des Contrats, auf einem Gesetzentwurf von David Santillana (1855 – 1931) beruhen12, sowie aus anderen Gründen für Saudi-Arabien, wo bisher keine zivilrechtliche Kodifikation existiert. Im Bereich des dortigen Schuldrechts wird nach wie vor islamisches Recht - primär der hanbalitischen Rechtsschule – von den Gerichten angewendet13.

III. Zum Allgemeinen Teil des Schuldrechts

Im Folgenden beschränke ich mich auf den *Allgemeinen Teil* des Schuldrechts in arabischen Zivilgesetzbüchern und zwar am Beispiel von Ägypten, der Mutterrechtsordnung, und Qatar mit dem jüngsten mir zugänglichen arabischen ZGB von 2004. Zunächst wird der Inhalt des Allgemeinen Teils des Schuldrechts dieser beiden Gesetze wiedergegeben. Danach folgen einige Bemerkungen zu Fragen der Abweichungen dieser Rechtsordnungen vom islamischen und dem französischen Recht in diesem Bereich.

Von Interesse ist in jedem Fall, dass das traditionelle islamische Recht keine allgemeine Vertragstheorie entwickelt hat; der Kaufvertrag ist das Modell für *alle* synallagmatischen Verträge (’uqûd al-mu’âwadât)[14]. Das islamische Recht kennt kein Vertragsrecht, sondern nur ein Recht der Verträge[15]. Dies spielt heute jedoch in den geltenden einschlägigen Zivilgesetzbüchern keine Rolle mehr. Sie kennen alle einen Allgemeinen Teil des Schuldrechts.

[11] Im Sultanat Oman ist im Gesetzblatt Nr. 1012 vom 12.5.2013 ein ZGB (Gesetz Nr. 29/2013) veröffentlicht worden, das mir zur Zeit meines Vortrages noch nicht vorlag. Es ist aufgrund Art. 2 EinfG am 12.8.2013 in Kraft getreten; s. Oman Daily Observer vom 5.7.2013; Oman Tribune vom 14.8.2013.

[12] Dazu z.B. *Charfeddine* (Hrsg.), Livre du centenaire du Code des Obligations et des Contrats 1906 – 2006, Tunis 2006; zu Mauretanien *Krüger*, Das internationale Privat- und Zivilverfahrensrecht Mauretaniens, RIW 1990, 988 – 992 (988 f.); *Mohamed Salah*, Droit des contrats en Mauretanie, Nouakchott 1996.

[13] Am einfachsten zugänglich ist das saudi-arabische Zivilrecht in der *Kompilation* des hanbalitischen Rechts des mekkanischen Gelehrten *al-Qârî*, Majallat al-ahkâm ash-sharî’a, Djidda 1401/1981 (oder Nachdruck Djidda 1417/1996).

[14] Z.B. *Gräf*, Vom Geiste islamischen Rechts, in: Festschrift für Ernst Klingmüller, Karlsruhe 1974, 115 – 144 (130); *Spies/Pritsch*, Klassisches islamisches Recht, in: Handbuch der Orientalistik, Ergänzungsband III, Leiden 1964, 220 – 343 (228); *Vogel*, IECL VII Chapter 7-61; ausführlich zur Problematik *Hamid*, Islamic Law of Contract or Contracts?, J.Isl.Comp.L 3 (1969), 1 – 10.

[15] Auch wenn man sich neue Kodifikationen oder Kompilationen ansieht, ist in ihnen kein Allgemeiner Teil des Schuldrechts enthalten; man vgl. z.B. aus hanbalitischer Sicht die in Fn. 13 genannte Kompilation; aus hanafitischer Sicht die osmanische Mejelle von 1869-1876; dazu *Krüger*, Zum zeitlich-räumlichen Geltungsbereich der osmanischen Mejelle, in: Liber Amicorum Gerhard Kegel, München 2002, 43 – 63 (47, 53). – Der Einzige, der versucht hat, allgemeine Regeln auf dem Gebiet des Vertragsrecht zu entwickeln, ist nach meinem Kenntnisstand der hanafitische Gelehrte *Ibn Nujaim* (1520 – 1563) in seinem Werk al-Ashbâh wa’n nazâ’ir, gedruckt u.a. in Istanbul 1290/1873; s. z.B. *Krüger*, Zur Geschichte der Schiedsgerichtsbarkeit im Nahen und Mittleren Osten, in: Festschrift für Gunther Kühne, Frankfurt 2009, 749 – 764 (751).

IV. Struktur des Allgemeinen Teil des Schuldrechts am Beispiel der ägyptischen und qatarischen Zivilgesetzbücher

Der erste Hauptteil des ägyptischen ZGB ist in zwei Bücher gegliedert: 1. Allgemeines über die Obligationen (iltizâmât) in Art. 89 – 388 und 2. die benannten oder Nominatverträge (al-'uqûd al-musammât), also der Besondere Teil des Schuldrechts (Art. 418 – 801). Das Gleiche gilt für Qatar. Der Allgemeine Teil des Schuldrechts findet sich in Art. 64 – 418, der Besondere Teil in Art. 419 – 836.

Der Aufbau des Allgemeinen Teils des Schuldrechts sei also knapp für Ägypten und Qatar dargestellt; also am Beispiel des ältesten und jüngsten ZGB. Die Unterschiede sind gering. Im *ersten Kapitel* werden die Quellen der Obligationen (masâdir al-iltizâm) geregelt: Zuerst die praktisch wichtigste, der Vertrag (al-'aqd) in Art. 89 – 161 äg. ZGB bzw. Art. 64 – 198 qat. ZGB (Zustandekommen, Objekt, causa [sabab], Nichtigkeit und Beendigung des Vertrages).

Es folgen die einseitigen Rechtsgeschäfte, wie z.B. die Auslobung (Art. 162 äg. ZGB; Art. 192 – 198 qat. ZGB); danach die unerlaubten Handlungen (Art. 163 – 178 äg. ZGB; Art. 199 – 219 qat. ZGB). Sie werden, anders als bei uns (§§ 823 ff. BGB), aber wie in der Schweiz (Art. 41 – 61 OR), im Rahmen des Algemeinen Teils des Schuldrechts geregelt. Dasselbe gilt für den folgenden Abschnitt, in dem zusammengefasst nach französischem Vorbild (Art. 1372 - 1381 Cc), die sog. Quasidelikte geregelt werden. D.h,. die ungerechtfertigte Bereicherung (Art. 179 – 187 äg. ZGB, Art. 220 – 228 qat. ZGB), die bei uns im Besonderen Teil des Schuldrechts (§ 812 ff. BGB), in der Schweiz jedoch im Allgemeinen Teil des Schuldrechts (Art. 62 – 67 OR) normiert wird, und die Geschäftsführung ohne Auftrag (Art. 188 – 197 äg. ZGB; Art. 229 – 239 qat. ZGB). Bei uns und in der Schweiz findet man sie in beiden Staaten dagegen im Besonderen Teil des Schuldrechts (§§ 677 – 687 BGB bzw. Art. 419 – 424 OR).

Das *zweite Kapitel* (Art. 199 – 264 äg. ZGB; Art. qat. 241 – 284 ZGB) befasst sich mit den Wirkungen der Obligationen: Erfüllung, Schadensersatz wegen Nichterfüllung, Arten der Sicherung der Gläubiger, Zurückbehaltungsrecht usw. Im *dritten Kapitel* (Art. 265 – 302 äg. ZGB; Art. 285 – 323 qat. ZGB) folgen die einzelnen Arten der Schuldverhältnisse und es enthält Regeln über Bedingungen, Befristungen sowie Mehrheit von Schuldnern und Gläubigern. Wichtig ist, dass Gesamtschuldnerschaft kraft Gesetzes nicht vermutet wird. D.h., eine solidarische Haftung der Schuldner tritt nicht ein, sofern dies nicht vertraglich vereinbart ist oder sich im Einzelfall aus dem Gesetz ergibt (Art. 279 äg. ZGB, Art. 302 qat. ZGB).

Das *vierte Kapitel* (Art. 303 – 322 äg. ZGB; Art. 324 – 353 qat. ZGB) regelt unter dem Oberbegriff Übertragung einer Verbindlichkeit (intiqâl al-iltizâm) die Forderungsabtretung (hawâlat al-haqq) und die Schuldübernahme (hawâlat al-dain). Ein Gläubiger kann seine Forderung an einen Dritten abtreten, soweit dies gesetzlich zulässig ist, ohne dass der Schuldner zustimmen muss (Art. 303 äg. ZGB; Art. 324 qat. ZGB). Ebenso wie in Frankreich (Art. 1690 Cc) erwirbt der Zessionar Dritten gegenüber die Forderung erst durch förmliche Mitteilung der Abtretung (signification) an den Schuldner (Art. 305 äg. ZGB; Art. 326 qat. ZGB). Solange dies nicht bewirkt ist, kann der Schuldner weiterhin mit befreiender Wirkung an den Zedenten leisten[16].

[16] Ausführlich zur Problematik *Krüger*, Zum Recht der Forderungsabtretung in der arabischen Welt, in: Festschrift für Ulrich Spellenberg, München 2010, 605 – 615.

Im *fünften und* letzten *Kapitel* (Art. 323 – 388 äg. ZGB; Art. 354 – 418 qat. ZGB) werden die Fragen des Erlöschens von Schuldverhältnissen normiert: Erfüllung, Novation, Aufrechnung, Konfusion, Schulderlass und Verjährung. Die sog. regelmäßige Verjährungsfrist beträgt 15 Jahre (Art. 374 äg. ZGB; Art. 403 qat. ZGB). Hemmung und Unterbrechung der Verjährung sind bekannt (Art. 382 – 384 äg. ZGB; Art. 411, 414 qat. ZGB). Für bestimmten Gruppen, wie z.B. Rechtsanwälte, Ärzte, Kaufleute, sind die Verjährungsfristen kürzer (Art. 376 – 378 äg. ZGB; Art. 405 – 407 qat. ZGB). Im übrigen ist auch nach ägyptischem und qatarischem Recht die Verjährung durch Einrede geltend zu machen. Der Richter berücksichtigt sie nicht von Amts wegen; sie ist also keine Einwendung (Art. 387 äg. ZGB; Art. 417 qat. ZGB). Nach Ablauf der Verjährungsfrist ist der Verpflichtete berechtigt, die Leistung zu verweigern. Die verjährte Forderung bleibt jedoch als obligatio naturalis (iltizâm tabî'i) bestehen und ist erfüllbar (Art. 386 äg. ZGB). Leistet also der Schuldner in Unkenntnis der Verjährung, so kann er das Geleistete nicht zurückverlangen.

Das für Ägypten und Qatar zum Schuldvertragsrecht Gesagte ist weitgehend französischem Recht nachgebildet (Struktur und wesentlicher Inhalt) worden. Es gilt ohne ins Detail zu gehen grundsätzlich in allen Staaten des ägyptischen Rechtskreises mit, wie gesagt, einigen Abweichungen im Irak, Jordanien, Sudan und den VAE; denn der Inhalt deren Zivilgesetzbücher ist teilweise islamischer, wie man Beispiel der Forderungsabtretung (Jordanien und VAE) belegen kann. Das in den beiden Zivilgesetzbüchern kodifizierte Recht beruht durchaus auf islamischem Recht, das – wie bekannt – nur die Schuldübernahme, nicht jedoch die Forderungsabtretung kennt. Dies führte in den VAE nach dem Inkrafttreten des ZGB zu einer lebhaften Judikatur der Kassationshöfe Dubai und Abu Dhabi. Ursprünglich hielt man am Gesetzestext fest. Inzwischen ist nach durchgehender Rechtsprechung jedoch klar, dass die Forderungsabtretung anerkannt wird. Ausreichend ist en Vertrag zwischen dem Zedenten und dem Zessionar, ohne dass der Schuldner zustimmen muss. Aufgrund Richterrechts existiert damit – möglicherweise contra legem islamicam – in den VAE dieselbe Rechtslage wie aufgrund des ägyptischen ZGB[17].

V. Weiterentwicklung des französischen Rechts im ägyptischen ZGB: Zwei Beispiele

1. Forderungsabtretung

Bemerkenswert ist, dass Professor *Al-Sanhûrî*, der geistige Vater des ägyptischen Zivilgesetzbuches, nicht immer nur das französische Gesetzesrecht übernommen hat. Er hat es auch weiterentwickelt, was selten erwähnt wird. Zwei Beispiele seien gegeben. Wohl aus historischen Gründen ist das Recht der Forderungsabtretung (cession de créance) im französischen Kaufrecht geregelt, weil sie sich meist als Kauf darstellt (vgl. Art. 1689 ff. Code civil). Eine Forderung kann jedoch auch unentgeltlich oder tauschweise abgetreten werden. Dieses Rechtsinstitut gehört deshalb selbstverständlich in den Allgemeinen Teil des Schuldrechts.

[17] Zur Rechtslage in den VAE näher *Krüger* (Fn. 16), 611 f.

Dies hat *Al-Sanhûrî* getan und dieses Rechtsinstitut zutreffend unter den Abschnitt über den intiqâl al-iltizâm/transmission de l'obligation normiert (Art. 303 – 314 ägypt. ZGB). Dem sind die anderen Staaten des ägyptischen Rechtskreise gefolgt; als Beispiel diene wieder das ZGB von Qatar in seinen Art. 148 – 156 ZGB.

Abgesehen von der systematischen Stellung der Forderungsabtretung in der ägyptischen - anders als in der französischen Legalordnung - ist in Ägypten inhaltlich kaum eine Änderung erfolgt. Dies gilt für den Kreis der abtretbaren Forderungen, das Zustandekommen der Abtretung und die Wirkungen der Zession (insb. ihre Drittwirkung).

2. Wegfall der Geschäftsgrundlage

Sehr viel interessanter ist Art. 147 des ägyptischen ZGB. In dessen Absatz 1, nachgebildet Art. 1134 Code civil, wird statuiert, dass ein Vertrag zwischen den Parteien wie ein Gesetz wirkt. In der offiziösen französischen Übersetzung heißt es „Le contrat fait la loi des parties". Weiter wird bestimmt, dass ein Vertrag nur durch übereinstimmende Erklärung der Parteien oder aus im Gesetz vorgesehenen Gründen rückgängig gemacht werden kann.

Und nun wird es wirklich in dessen Absatz 2 interessant. Er lautet in deutscher Übersetzung: Wird jedoch die Erfüllung einer vertraglichen Verpflichtung übermäßig schwer, ohne dass der Fall der Unmöglichkeit der Erfüllung[18] vorliegt, infolge außerordentlicher und unvorhersehbarer Ereignisse allgemeinen Charakters übermäßig schwer, so dass dem Verpflichteten ein außerordentlicher großer Verlust droht, kann der Richter entsprechend den Umständen und unter Berücksichtigung der Interessen der Parteien diese Verpflichtung in einem angemessenen Verhältnis herabsetzen. Jede entgegenstehende Vereinbarung ist nichtig.

Dies ist, unschwer zu erkennen, die ägyptische Version der Störung oder des Wegfalls der Geschäftsgrundlage, normiert bei uns jetzt seit 2002 in § 313 BGB im Zusammenhang mit dem Schuldrechtsmodernisierungsgesetz. In Frankreich wird die Theorie von der Geschäftsgrundlage, die théorie de l'imprévision, im *Zivilrecht* dagegen nicht anerkannt oder ist zumindest in diesem Bereich bis heute umstritten[19]. Hintergrund ist, dass es den Gerichten nicht zustehe, die Parteiautonomie zu substituieren und vertragliche Vereinbarungen abzuändern. Nach französischem Recht kommt nur bei Verträgen mit der Verwaltung (contrat administratif) das Problem der Geschäftsgrundlage ins Spiel.

Damit galt nach dem zur Zeit der Kompilierung des ägyptischen ZGB geltenden französischen Zivilrecht die Lehre vom Wegfall der Geschäftsgrundlage zweifelsfrei nicht. Zurückgehend auf das berühmte Urteil der Cour de Cassation in der Sache *Canal de Craponne* (1876) galt nämlich die Theorie der imprévision (Theorie der Anpassung von Dauerverträgen bei wesentlicher Veränderung der Umstände) nur im Bereich des Verwaltungsrechts bei einem contrat administratif (und damit meist bei einem marché public), wie dann grundlegend in der Sache *Compagnie général d'éclairage de Bordeaux* (1916) judiziert wurde.

[18] Geregelt in Art. 373 ZGB.

[19] Jüngst dazu *Doralt*, Der Wegfall der Geschäftsgrundlage – Altes und Neues zur théorie de'imprévision in Frankreich, RabelsZ 76 (2012), 761 – 784.

Und hier wird Al-Sanhûrî rechtsschöpferisch tätig, als er die in Frankreich nur im Bereich des Verwaltungsrechts geltende imprévision im ägyptischen ZGB normiert hat. Damit war, soweit ich sehe, weltweit erstmals in Ägypten eine *gesetzliche* Regelung über den Wegfall der Geschäftsgrundlage geschaffen. In der europäischen Rechtsliteratur habe ich dies jedoch bisher erstaunlicherweise nie erwähnt gefunden, obwohl in der arabischen Welt seit 1948 in den meisten Staaten dieses Rechtsinstitut auf gesetzlicher Grundlage existiert.
Übernommen wurde die ägyptische Norm über den Wegfall der Geschäftsgrundlage, soweit ich sehe, nämlich wohl in allen Staaten des ägyptischen Rechtskreises. Beispiele: Syrien (Art. 150 ZGB), Somalia (Art. 144 ZGB), Irak (Art. 146 ZGB), Libyen (Art. 147 ZGB), Jordanien (Art. 205 ZGB), Algerien (Art. 107 ZGB), VAE (Art. 249 ZGB), Bahrain (Art. 130 ZGB), Qatar (Art. 171 ZGB); in Kuwait bereits durch Art. 146 HGB, Gesetz Nr. 2/1961, in dem ein ganzes Kapitel, wie wohl bekannt, einen Allgemeinen Teil des Schuldrechts enthält ist, weil zu jener Zeit dort noch kein ZGB galt; dies wurde erst 1981in Kraft gesetzt[20].

VI. Mögliche Kollisionen mit islamischrechtlichen Regeln: Drei Beispiele

1. Vertragsfreiheit

Das ägyptische Recht und seine Tochterrechte kennen – anders als weitgehend das islamische Recht - zweifelsfrei den Grundsatz der Vertragsfreiheit (liberté contractuelle)[21]. Meine Bemerkung zum islamischen Recht mag vielleicht irritieren. Liest man heute in der Rechtsliteratur fast immer, dass der Sharî'a dieser Grundsatz bekannt sei. Hier ist jedoch Vorsicht geboten, denn wir haben es nämlich mit einem kaum jemals detailliert untersuchten ikhtilâf al-madhâhib zu tun[22].

Bei *Schacht* findet man in aller Deutlichkeit „Islamic law does not recognize the liberty of contract"[23], bei *Mahmasani* ebenso deutlich das Gegenteil: „Freedom of contract is fundamental in the Sharî'a[24]. Für beide Ansichten ließen sich Belege häufen. Dazu ganz kurz: Der Widerspruch ist nur ein scheinbarer. *Schacht* spricht vom Recht der Hanafiten, *Mahmasani* von dem der Hanbaliten und verallgemeinert dies ohne weiteres. Die Hanbaliten weichen aber offenkundig von den anderen drei sunnitischen Rechtsschulen ab. Zum Beispiel kannte die auf hanafitischem Recht beruhende osmanischen Mejelle (1869-1876) den Grundsatz der Vertragsfreiheit noch nicht. Er ist im Osmanischen Reich erst 1914 durch ein staatliches Gesetz eingeführt worden[25].

Durchgesetzt hat sich heute offenkundig die hanbalitische Rechtsansicht, dass Alles, was nicht gegen das Gesetz oder die guten Sitten verstößt, zwischen den Parteien vereinbart werden kann[26]. Der internationalen Öffentlichkeit ist dies von der saudi-arabischen Regierung erstmals

[20] Zu Kuwait *Krüger* (Fn. 10), 93 f.
[21] Aus Ägypten z.B. *Gemei*, Introduction to Law – Theory of Law: Theory of Right, Kairo 1999, 26, 28.
[22] So schon *Krüger* (Fn. 10), 79 mit Fn. 80.
[23] An Introduction to Islamic Law, 2.Aufl. 1966, Oxford 144.
[24] Transactions in the Sharî'a, in: *Khadduri/Liebesny* (Hrsg.). Law in the Middle East, Washington 1955, 179 – 202 (194).
[25] *Krüger*, Liber Amicorum (Fn. 15), 48.
[26] Kurz dazu *Krüger* (Fn. 15; FS Kühne), 754.

in den 50er Jahren in dem berühmten Schiedsverfahren *Saudi Arabia v. Aramco*[27]. bekannt gemacht worden.

Zurück zu Ägypten: Aus dem bereits genannten Art. 147 äg. ZGB folgt, dass geschlossene Verträge die Parteien binden. Sie sind in der Ausgestaltung ihrer vertraglichen Verpflichtungen im Rahmen des Gesetzes grundsätzlich frei. Im Schuldvertragsrecht besteht kein Typenzwang. Den Parteien steht es damit frei, ihre schuldrechtlichen Beziehungen abweichend von gesetzlich normierten Vertragstypen zu gestalten oder neue Vertragtypen zu entwickeln, die nicht im Gesetz geregelt sind. Leasing-, Factoring- oder Lizenzverträge z.B. sind damit zulässig.

Dass die unbeschränkte Vertragsfreiheit auch zu „unsozialen Rechtsverhältnissen" (*Uwe Wesel*) führen kann, ist evident. Mit dem Gesetz über den Verbraucherschutz (Gesetz Nr. 67/2006) hat z.B. Ägypten versucht, die Interessen der Konsumenten vor Übervorteilung zu schützen[28].

Die Annerkennung des Prinzips der Vertragsfreiheit in den Staaten des ägyptischen Rechtskreises beruhigt im übrigen nicht nur gelegentlich deutsche Unternehmen, die sich vor Abschluss von Verträgen mit arabischen Partnern über die dortige Rechtslage kundig machen[29].

2. Verjährung

Als zweites Beispiel diene das Rechtsinstitut der Verjährung (murûr az-zamân), das das ägyptische und qatarische Zivilrecht selbstverständlich kennen (Ägypten Art. 374 – 388 ZGB; Qatar Art. 403 – 418)[30]. Die sog. regelmäßige Verjährungsfrist beträgt 15 Jahre.

Auch insoweit ist wieder eine Abweichung von den überkommenen Lehren der Sharî'a festzustellen. Das islamische Recht kennt nämlich das Rechtsinstitut der Verjährung nicht. Gestützt wird dies auf ein dem Propheten Muhammad zugeschriebenes hadîth, wonach ein Anspruch nicht durch Zeitablauf erlöschen kann. Es bestehen keine festen Regeln darüber, innerhalb welcher Fristen Ansprüche gerichtlich geltend zu machen sind: Ein für die Rechtspraxis unbefriedigender Zustand. Dieser Grundsatz ist deshalb seit Jahrhunderten reine Theorie.

Die Trias der drei großen Juristen in der Blütezeit des Osmanischen Reichs im 16. Jhd. wird bekannt sein: *Ibrâhîm al-Halabî* (1567-1635) mit seinem Hauptwerk Multaqa l-abhur, das in Europa gern als Corpus Iuris Ottomanorum bezeichnet wurde. Der zweite ist *Ibn Nujaim* aus Kairo (1520-1563). Er ist deshalb so bedeutsam, weil er wohl als erster in seinem Kitâb al-ashbâh wa'n nazâ'ir versucht hat, allgemeine Regeln insbesondere im Vertragsrecht zu entwickeln. Sie haben übrigens zu erheblichen Eingang in die osmanische Mejelle am Ende des 19. Jhd. gefunden.

Und jetzt wird es interessant; der Dritte ist wohl der bedeutendste osmanische Scheich ül-Islam *Ebûsu'ûd* Efendi (1490 – 1574). Um nur ein Beispiel der Fortentwicklung des islamischen Rechts durch ihn zu nennen, sei erwähnt, dass er ein Gesetz (qânûn), das die Verjährung, ein der Sharî'a unbekanntes Rechtsinstitut, in der Form der Klageverjährung (nicht Anspruchsverjäh-

[27] ILR 27 (1963), 117; Schiedsspruch vom 23.8.1958.
[28] Grundlegend dazu *Schultze*, Die zivilrechtliche Produkthaftung im ägyptischen Recht, 2003.
[29] Z.B. IPG 2002 Nr. 2 (*Köln*).
[30] Einzelhalten oben in Abschnitt IV.

rung) durch eine Fatwa sanktioniert hat. Dies wird in den Gutachten späterer Scheichülislam durchgängig bestätigt. Das heißt, Klagen werden nach dem Ablauf von 15 Jahren nicht mehr gehört. Später sind weitere Verjährungsfristen für besondere Fälle eingeführt und in der Praxis der Gutachter (Muftis) und der Gerichte befolgt worden. Insbesondere wurden diese Regeln u.a. in die osmanische Mejelle in der traditionellen Formulierung aufgenommen: Klagen werden nach Ablauf dieser Fristen nicht mehr gehört (Art. 1660 - 1662). In anderen Worten: Es handelt sich nicht um eine Verjährung des Anspruchs, sondern um eine Klageverjährung. Der Anspruch erlischt nicht durch Zeitablauf; er wird nur nicht mehr gehört[31]. In dieser Form findet man es dann heute durchgängig in den Staaten des ägyptischen Rechtskreises, sondern selbst im hanbalitisch geprägten Saudi-Arabien.

Obwohl damit zwischen den geltenden Gesetzen der Staaten des ägyptischen Rechtskreises und der einen Lehre der Sharî'a ein Widerspruch besteht, erscheint es unwahrscheinlich, dass diese Frage zumindest in den hanafitisch beeinflussten Staaten des ägyptisch Rechtskreises – anders als bei den Schiiten im Iran[32] - zu einem Problemfall wird.

3. Zinsproblematik

a) Islamischrechtliches – Zum Verbot des ribâ

Schließlich, wohl unvermeidlich, noch ein paar Worte zur Zinsproblematik, die seit einigen Jahrzehnten im Mittleren Osten eine erhebliche Rolle spielt; insb. wohl im Bereich des sog. Islamic Banking, zu dem ich nichts sagen werde.

Es wird allgemein bekannt sein, dass das islamische Recht, primär abgeleitet aus dem Koran (Sure 2, 275 f.) ein Verbot des ribâ enthält. Dieser Begriff wird in Koranübersetzungen öfter mit Wucher übersetzt. Dies ist sicherlich zu eng und führt leicht zu Missverständnissen. Unter ribâ fällt eindeutig nach späterer Interpretation der Quellen nicht nur der Wucher in Sinne von § 138 BGB in Deutschland oder Art. 21 OR in der Schweiz, sondern jeder nicht gerechtfertigte Überschuss ('iwad) aus einem Rechtsgeschäft. Voraussetzung eines wirksamen Rechtsgeschäfts ist, modern ausgedrückt, somit stets, dass Leistung und Gegenleistung in einem angemessenen Verhältnis stehen. Wenn dies nicht der Fall ist, so ist der erzielte Überschuss ribâ. Ribâ ist danach in der Scharî'a leidiglich ein Unterfall der ungerechtfertigten Bereicherung (fadl mâl bi-lâ 'iwad).

Eine Legaldefinition des Begriffs ribâ enthält u.a. das hanafitische Standardwerk von *Ibrahim al-Halabî*, der Multaqâ 'abhur aus dem 16. Jhd. Im bâb ar-ribâ (Abschnitt über den ribâ), enthalten im kitâb al-buyû' (Buch über das Kaufrecht), wird ribâ im ersten Satz definiert als „ein Vermögensüberschuss ohne Gegenwert, der von einem der beiden Vertragspartner bei einem Austausch von Vermögen ausbedungen worden ist"[33]. Eine ähnliche Formulierung findet man bereits bei *Al-Kâsânî* im 12. Jhd.[34]

[31] Dazu *Krüger*, Fetwa und Siyar, 1978, 48 f. mit umfangreichen Nachweisen.
[32] Dazu ausführlich *Alikhani Chamgardani*, Der Allgemeine Teil des iranischen Schuldvertragsrecht, 2013, 193 – 200.
[33] *Ibrahim al-Halabî*, Multaqa 'al-abhur, Istanbul 1309/1891-92, 106.
[34] Zitat bei *Bälz*, Die „Islamisierung" des Rechts in Ägypten und Libyen, RabelsZ 62 (1998), 437 – 463 (445).

Im übrigen werden die Einzelheiten des ribâ-Verbots in den Rechtsschulen unterschiedlich ausgestaltet. Bemerkenswert ist Folgendes: Die Fragen im Zusammenhang mit dem Zinsverbot spielen in den klassischen Werken aller Schulen (mahdahib) keine besondere Rolle. Man sucht in vielen Fällen vergeblich nach Darlegungen des Zinsverbots im Zusammenhang mit Darlehen und es gibt überhaupt keine für Verzugszinsen bei Schadensersatzansprüchen. Bearbeitet werden im allgemeinen ribâ-Probleme nur bei Kauf- oder Tauschverträgen[35].

Das ist die Rechtslehre im Schrifttum (furû' al-fiqh). In der Vergangenheit wurden übrigens in der Rechtsprechung und in der Fatwa-Literatur in der dâr al-Islâm, wie unschwer nachzuweisen, Ansprüche auf Zinsen zugestanden[36] .Wenn Muslime heute seit etwa 30/40 Jahren sagen, dass nur ihre Ansicht des Zinsverbots die einzig richtige ist, fragt man sich, weshalb dies zutreffend sein soll. Die Muftis und Gerichte haben sich in der Vergangenheit in dubio auch für gute Muslime gehalten.

Wie dem auch sei: Nach der heute vorherrschenden Ansicht muslimischer Gelehrter sei jeder Zins ribâ und enthalte einen Verstoß gegen die Scharî'a, auch wenn dies weder auf frühere Rechtsprechung und der Gutachtenpraxis zurückgeführt werden kann. Damit gibt es für die Gesetzgeber in den arabischen Staaten im Zusammenhang mit der Kodifizierung von Zinsansprüchen seit dem Ende des 20. Jhd. erhebliche Probleme.

b) Rechtsprechung in ausgewählten arabischen Staaten

aa) Ägypten

Um wieder mit dem ägypt. ZGB zu beginnen, kurz folgendes: Es enthält in seinem Art. 226 Regelungen über Verzugszinsen (4% in Zivil- und 5% in Handelssachen). Dies gilt in derselben Form u.a. in Syrien (Art. 227 ZGB), im Irak (Art. 171 ZGB), in Somalia (Art. 223 ZGB) und ursprünglich auch in Libyen (Art. 229 ZGB). Nicht dagegen z.B. in Jordanien oder in Qatar (Art. 268 ZGB) sowie in Bahrain (Art. 228 ZGB), wo die Höhe der Verzugsschadens vom Gericht bestimmt wird.

In anderen Staaten, z.B. in Kuwait, sind Verzugszinsen in zivilrechtlichen Sachen nicht im ZGB vorgesehen, jedoch ohne weiteres in handelsrechtlichen Sachen (Art. 110 HGB). Das Gleiche gilt u.a. für Bahrain (Art. 76 HGB), Oman (Art. 80 – 83 HGB) und die VAE (Art. 76 HGB) sowie in Libyen aufgrund des ZGB-Änderungsgesetzes (Gesetz Nr. 74/1972).

Dies ist die Gesetzeslage und nun wird es interessant, wenn man die einschlägige Rechtsprechung überprüft. Begonnen wird wieder mit Ägypten. Dort ist die ideologische Kontroverse zwischen Liberalen und Fundamentalisten um den ribâ vor dem *VerfGH* ausgetragen worden. Der Fall wird bekannt sein. Kurz dazu: Ein ägyptischer Kaufmann lieferte der Medizinischen Fakultät der Azhar Universität einige chirurgische Instrumente und machte nach Fälligkeit des Anspruchs neben dem Kaufpreis 4% Verzugszinsen gemäß Art. 226 ZGB gerichtlich geltend. Im Verfahren trug der Rektor der Universität vor, diese Norm sei wegen Verstoßes gegen Art.

[35] *Krüger* (Fn. 10), 81 – 84.

[36] Umfangreiche Nachweise aus Judikatur und der Fatwa-Literatur, bei *Krüger*, Zum islamischen Zinsverbot in Vergangenheit und Gegenwart, in: Festschrift Rudolf Welser, Wien 2004, 586 – 591.

2 der Verfassung nichtig; denn nach Änderung der Verf. 1980 bildeten „... die Grundsätze der islamischen Sharî'a „danach – anders als früher - *die* Hauptquelle der Gesetzgebung". Der *VerfGH* wies die Klage im wesentlichen gestützt auf den Grundsatz der Nichtrückwirkung von Gesetzen ab. Der Gesetzgeber sei erst nach der Änderung der Verfassung daran gebunden. Früher in Kraft getretene Gesetze, wie das ZGB von 1948, gelten weiter, weil sie vorkonstitutionelles Recht enthalten. Dieser Rechtsauffassung sind inzwischen andere Gerichte gefolgt[37].

bb) Vereinigte Arabische Emirate

Ein zweiter Fall aus den VAE. Heute gilt dort Folgendes: Das ZGB von 1985 untersagt Kreditzinsen aufgrund von Darlehen (Art. 714 ZGB). In Verträgen bei Beteiligung von Privatpersonen sind sie nicht zulässig, und das ZGB enthält keine Regeln über Verzugszinsen. Die Zulässigkeit von Zinsen in Handelsgeschäften wurden vom *VerfGH* und dem *Kassationshof Dubai* übrigens bereits vor dem Inkrafttreten des ZGB bejaht. Der verfassungsrechtliche Senat des Obersten Gerichtshofs ist in einem Grundsatzurteil der ägyptischen Auffassung gefolgt. Vor dem Inkrafttreten der Verfassung verkündete Gesetze gelten weiter, und damit können Zinsansprüche geltend gemacht werden.

Das Ganze war jedoch nicht immer klar. Inzwischen ist jedoch 1993 ein HGB in den VAE in Kraft gesetzt worden, das Zinsen in handelsrechtlichen Sachen kennt. Gemäß Art. 76 HGB hat ein Gläubiger aufgrund eines kommerziellen Darlehens Zinsansprüche in Höhe bis zu 12%. Die Höhe des Zinssatzes kann – grundsätzlich in diesem Rahmen – vertraglich frei vereinbart werden. Ist dies nicht erfolgt, so gilt der im Zeitpunkt des Vertragsschlusses geltende marktübliche Zins.

Im übrigen können in handelsrechtlichen Sachen gemäß Art. 88 HGB Verzugszinsen in derselben Höhe wie für Kreditzinsen geltend gemacht werden. Nach der Rechtsprechung kann für Verzugszinsen sogar der gesetzliche Höchstsatz von 12% durch Parteivereinbarung überschritten werden, wie der Kassationshof seit 1997 mehrfach entschieden hat. Eingeklagte Verzugszinsen, vertraglich vereinbart in Höhe von 14 bzw.15%, sind Klägern zugesprochen worden. In handelsrechtlichen Sachen kann der Gläubiger – mangels abweichender Vereinbarungen - im übrigen ab Fälligkeit und nicht erst ab Klageerhebung Zinsansprüche geltend machen (Art. 90 HGB).

Dies alles wird von den Gerichten gesetzeskonform angewandt. Mir ist seit 1993 (Inkrafttreten des HGB) keine Entscheidung aus Abu Dhabi und Dubai bekannt geworden, in der wegen des ribâ-Verbots eine Partei oder ein Gericht diese gesetzlichen Normen in Zweifel gezogen hat. Verzugszinsen werden nach den mir zugänglichen Quellen von Klägern wohl stets geltend gemacht und ihnen, sofern die gesetzlichen Voraussetzungen vorliegen, zuerkannt. Seit 1993 spielt die islamischrechtliche Zinsproblematik in den VAE keine Rolle mehr[38]

cc) Kuwait

[37] *VerfGH* (Gesch.-Z. 20/1), 4.5.1985, veröffentlicht im Gesetzblatt (jarîda r-rasmîya) Nr. 20 v. 16.5.1985, S. 992 – 1000; statt aller ausführlich *Bälz,* RabelsZ 62 (1998), 446 –448; kurz *Krüger* (Fn. 10), 84.

[38] Hierzu mit Nachweisen aus der Rechtsprechung *Krüger* (Fn. 10), 85 f.; *ders*., Vermögensrechtliches Privatrecht und Sharî'a am Beispiel der Vereinigten Arabischen Emirate, ZvglRWiss 97 (1998), 360 – 386 (381 – 383).

Auch der *VerfGH* in Kuwait musste sich bereits 1992 mit der Zinsproblematik befassen. In einem handelsrechtlichen Fall trug der Beklagte, gegen den Verzugszinsen in Höhe von 7% ab Fälligkeit des Anspruchs geltend gemacht wurden, vor, dass die einschlägigen Art. 110 und 112 HGB wegen Verstoßes gegen Art. 2 Verf. (Islamisches Recht ist die Hauptquelle der Gesetzgebung) verfassungswidrig und damit nichtig seien. Das Gericht weist diesen Einwand zurück; denn Art. 2 Verf. wende sich nur an den Gesetzgeber. Dieser allein könne entscheiden, ob nach seinem Ermessen eine Norm Gesetzeskraft haben solle oder nicht. Es sei ihm nicht untersagt, auch andere als islamischrechtliche Regelungen in Kraft zu setzen. Verzugszinsen in handelsrechtlichen Sachen sind damit gesetzeskonform möglich[39].

dd) Libyen

Aber es geht weiter. Jetzt ein Beispiel aus Libyen. Dort galt zunächst im Bereich der Zinsen dieselbe Regel wie in Ägypten: In Zivilsachen 4%, in Handelssachen 5% Verzugszinsen. Im Zuge der Islamisierung des Staates u.a. durch das ZGB-Änderungsgesetz Nr. 74/1972, über das Verbot von ribâ in Zivil- und Handelsgeschäften zwischen natürlichen Personen wurde u.a. Art. 229 ZGB teils aufgehoben und teils modifiziert worden. D.h., in handelsrechtlichen Sachen, soweit es nicht um natürliche Personen geht, können weiterhin Verzugszinsen geltend gemacht werden. Die Rechtsprechung lässt damit in diesem Bereich nach wie vor Zinsansprüche zu. Dies gilt selbst in den Fällen, in denen der libysche Fiskus Partner eines ausländischen Unternehmens ist; denn aufgrund Art. 128 des Gesetzes über verwaltungsrechtliche Verträge, eine Art marché public nach französischem Vorbild, hat der ausländische contractor Anspruch auf Verzugszinsen, wenn der libysche Auftraggeber nicht innerhalb von 45 Tagen nach der Genehmigung seiner Forderung durch die zuständige staatliche Aufsichtsbehörde zahlt. Die libysche Judikatur entscheidet gesetzeskonform, wie sich z.B. aus einem Urteil des Gerichtshofs Tripolis aus dem Jahr 1982 in einem libysch/schweizerischen Rechtsstreit ergibt Damit sind Zinsansprüche im wesentlichen nur im Privatrechtsverkehr unzulässig[40].

ee) Algerien

Zum Abschluss noch ein paar Worte zu Algerien. Dort wurde 1975 ein Zivilgesetzbuch in Kraft gesetzt, das weitestgehend auf ägyptischem Recht und nicht unmittelbar auf dem französischen Code civil beruht Die ägyptischen Vorschriften über Verzugszinsen (Art. 226/227 ZGB) wurden jedoch in Art. 186 alg. ZGB nur teilweise übernommen. Das Schweigen des algerischen Gesetzgebers ist wahrscheinlich mit Rücksicht auf islamischrechtliche Vorstellungen zu erklären.

In der Rechtspraxis spielt dies jedoch keine Rolle, denn Gerichte verurteilen Schuldner im Fall des Zahlungsverzugs trotz Fehlens einer ausdrücklichen Norm zumindest in Handelssachen unter dem Gesichtspunkt der dommages intérêts contractuel regelmäßig zur Zahlung von Verzugszinsen. Auch hinsichtlich der Höhe der Verzugszinsen besteht anscheinend kein besonderes Problem, denn die Gerichte wenden einfach die bis 1975 in diesem Bereich geltenden Zinssätze an[41]. Ob in Zivilsachen andere Regeln befolgt werden, kann ich aufgrund der mir zur Verfügung stehenden Quellen leider nicht abschliessend beantworten.

[39] *VerfGH* (Gesch.-Z. 3/1992) 28.11.1992, veröffentlicht im Gesetzblatt (al-Kuwait al-Yaum) Nr. 80 vom 6.12.1992, S. 3 – 5; ausführlich *Krüger* (Fn. 36), 592 – 595.

[40] Nachweis bei *Krüger* (Fn. 10), 120.

[41] *Krüger* (Fn.10), 86 f.; allgemein zur Interpretation algerischen Zivilrechts *Vialard*, Reflexions sur la méthode d'interprétation et d'utilisation du droit civil algérien, Rev, alg. 1979, 289 – 296.

VII. Zusammenfassung

1. Das Schuldvertragsrecht der Staaten des ägyptischen Rechtskreises ist französischrechtlich geprägt; denn bei dem gesamten ägyptischen ZGB handelt es sich um einen code d'inspiration française.

2. Das im arabischen Staatenkreis geltende Schuldvertragsrecht beruht im wesentlichen auf dem von seinem geistigen Vater, Al-Sanhûrî, konzipierten – allerdings nicht völlig durchgängig – auf französischem Recht beruhenden ägyptischen Zivilgesetzbuch.

3. Fragen der Forderungsabtretung, Vertragsfreiheit und der Verjährung könnten zwar nach der reinen islamischen Lehre mehrerer Rechtsschulen zu Kollisionen mit der Scharî'a führen, spielen in den von mir untersuchten Quellen jedoch kaum eine Rolle.

4. Probleme der Zinsen spielen wohl nur im Privatrechtsverkehr eine Rolle. Für den großen Bereich des Handels- und Wirtschaftsrecht, mit Ausnahme von Saudi-Arabien, dagegen nicht, wie an fünf Beispielen erörtert.

Changing interpretations of Shari'a, 'Urf and Qanun

An anthropologically grounded overview of Islamic encounters with the post-enlightenment premises of European Family Law

by Roger Ballard[1]

Abstract

Prepared for a conference on current developments in Islamic Family Law, this paper takes the opportunity to compare and contrast the meaning of 'law' in general, and 'family law' in particular in the classical Shari'a tradition with the premises which currently underpin contemporary forms of post-enlightment European Family Law. Having done so, it goes on to explore the way in which the institutions of the Shari'a have been comprehensively remoulded (if not yet entirely wholly eliminated) in the course of confrontations with the impact of 'progressive' impact of hegemonic European ideological assumptions, no less in colonial, post-colonial and diasporic contexts.

I. The socio-cultural context

1. Family life

In common parlance family life has much the same status as motherhood and Apple Pie. It is easy to see why: households whose members are bound together by reciprocal ties of kinship, marriage and descent are a salient feature of all known human societies, and as such they invariably provide the foundation of every local socio-cultural order. But despite an immense degree of internal variance of these structures – if only because conceptualisations as to just how relationships of kinship, marriage and descent can best be articulated varies enormously as between differing cultural traditions – the institution of family life invariably stands at the cusp between the private domain of domesticity, reproduction and sexuality on the one hand, and the wider social and public order. Within that framework, within which these units are the basic building blocks, families take the form of more or less autonomous, but nevertheless systematically interconnected cell-like collectivities.

Yet if this is so, just when, how far, and if so on what basis, can and should efforts be made to subject these cell-like structures to external regulation? How far should be left to settle their affairs, or at least within the context of the local community of which they are apart? Should this task fall to the jurisdiction of overarching institutions of the state within which such families are domiciled? And if so, should such regulation be implemented on a uniform basis, such that all such familial cells within that jurisdiction should be expected to order their domestic affairs according the same set of conceptual premises? Or is it the case that efforts to impose 'one law for all' in on a unilateral basis in jurisdictions marked by a significant degree of religio-cultural plurality inherently unjust, in the sense that those sub-sections of the population who chose their personal and domestic lives according to premises which differ from those deployed by the

[1] Dr. Roger Ballard is a Consultant Anthropologist, and Director of the Centre for Applied South Asian Studies

dominant majority will inevitably find themselves legally marginalised? And if so, how can the resultant contradictions best be equitably resolved?

2. From plurality to uniformity and back to de facto plurality once again

From a legal perspective, these dilemmas are far from unprecedented. Plural societies, in which communities utilising differing sets of religio-cultural premises have found themselves living side by side in in the same locality, often on an autochthonous basis, but also as a result of long distance migration, have long been a commonplace feature of human experience. However in many parts of the contemporary world the ancient art of living with difference has been steadily eroded, largely as a result of the impact European colonial expansion, followed more recently by post-Imperial processes of globalisation. Two key developments have come to the fore in that context: on the one hand the more or less universal adoption of the premises of the European enlightment (albeit in all manner of different flavours) as the only legitimate foundation for governmental practice, and hence for the maintenance of law and order within ideally homogeneous nation states; on the other hand these developments have been countermanded by unprecedented flows of mass migration, such that processes of globalisation have generated additional dimensions of plurality within nation states which had come to regard themselves as intrinsically ethnically homogeneous nation states. (See Gray 2008, 2009, Ballard 2007, 2010 and many others)

Against the background this paper is primarily concerned with one of the most troubling features of contemporary global order: namely the processes of ethnic polarisation which have erupted within Dar-ul-Islam itself, as well as within its long-standing alter – namely the Christian *farangis* of Euro-America – during the course of the past two centuries. But whilst the economic, political and military dynamics of this period lie constantly in the background of this paper, my principal concern in this context to explore how far these processes of polarisation have been the outcome of encounters between the ancient set of ideological premises around which the Islamic Shari'ah has been constructed on the one hand, and the ever growing hegemony of the relatively newly minted – and in that sense the 'progressive' – ideological premises of the increasingly post-Christian European enlightment on the other. Moreover given that the Conference at which this paper first saw the light of day was focussed on Islamic family law in modern Europe and the Muslim world, by analysis focuses heavily especially – although by no means exclusively – on how these issues have played out in the sphere of family life.

In exploring issues of this kind, it is worth emphasising that hegemons invariably stand in a position of ideological advantage, since they can readily ascribe their position of socio-economic advantage to the superiority of the intellectual norms. On that basis they can readily assume that in seeking to make sense of the behaviour of their subalterns, and indeed to provide them with an opportunity to 'progress', it is only reasonable take their own more rational premises as yardsticks of normality. As a result they routinely fall into the trap of assuming that the central focus of any analytical enquiry into matters of cultural difference will of necessity be concerned with identifying those aspects of the subalterns' conceptual premises which have served to 'hold them back', hence, amongst other things, directly confirming the legitimacy of the hegemons' presumed position inherent ideological superiority.

Given the premises of the European enlightenment, as well as two centuries of imperial expansion which followed its initial articulation, the comparative analysis of religio-cultural diversity has been so deeply influenced by just such assumptions. As a result the analysis of difference has all too often been viewed as a one-way street. Hence when efforts have been made to identify the distinctive of character of the cultural premises deployed within subaltern communities, the conceptual foundations of such exercises has all too often been grounded in the hegemons' own taken-for-granted yardsticks, such that the premises of their alters have regularly been found wanting. With such considerations in mind I have deliberately structured my analysis in this

paper in what may seem at first sight to be reverse order, in the sense I have begun by considering the premises currently deployed by the contemporary hegemons – no less in European than the non-European contexts – before moving on to consider how the subalterns have responded to the ideological challenges with which they consequently found themselves confronted.

3. The status of the family within the contemporary discourse of Human Rights

In keeping with the premises of the European Enlightment, contemporary international law identifies access to marriage, and hence to family life and to the production of offspring, as a universal human right. Indeed few other components of the European Convention of Human Rights have a greater potential impact on the course of our everyday lives than does Article 8, which roundly proclaims that 'Everyone has a right to respect for their private and family life, their home and their correspondence'. Yet however much this might appear to recognise, and to indeed to legitimise this key component of human existence, a closer examination of the text reveals that it is so deeply riddled with omissions, contradictions and qualifications that it largely undermines the promise of its opening proclamation.

In the first place the text provides no specific indication as to how the concept 'family life' should be construed; secondly, and just as significantly, careful inspection also reveals that its wording is primarily directed at protecting respect for the private, and in that sense the *personal* aspects of family life; by doing so it thereby wholly (and presumably quite deliberately) overlooks the legal significance of the collectively grounded networks of mutual reciprocity which are necessary prerequisite for the construction of the collectivities in the absence of which that condition of 'family life' cannot be effectively enjoyed.

That said, the real sting in the tail comes in the qualifying reservations set out in the Article 8's second clause, which reads as follows:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Once again we encounter a paradox. Whilst the opening phrase of this formulation might lead the unwary to conclude that that the second clause was designed to yet further reinforce the promise of the first, insofar as it appears to offer families unlimited protection from external interference, its ultimate purpose proves to be quite the opposite. Far from providing members of such collectivities with a guarantee of autonomy, it provides public authorities – the state in other words – with legitimate grounds on which to monitor, and ultimately to constrain, any aspects of familial activity which can be deemed to contradict any a wide of range of public interests, always provided that these interests are democratically – and hence legally – grounded. Last but not least, last but not least second clause also goes on to suggest that such interference can also be justified in the grounds that its purpose will be to protect the 'rights and freedoms of others'. But just who are the potential 'others' whose rights and freedoms which familial arrangements are likely to threaten, given that such arrangements are overwhelmingly confined to a private arena?

A little reflection provides the answer: this component of the formulation provides public authorities with a right to intervene on at least three further counts: firstly when a powerful member of the family is deemed to have been unjustifiably restricting the rights and freedom of more vulnerable members of the family; secondly it opens the way to find that the cultural premises in

terms of which personal relationships within the family are grounded in liberty-constricting 'harmful traditional practices; and thirdly that those premises and practices are 'public safety or the economic well-being of the jurisdiction in question.

From this perspective it of Article 8 has some deeply paradoxical legal consequences. In addition to failing to offer any significant recognition of the multitude of social, cultural, economic and emotional purposes which family life serves to support, it also provides public authorities with clear legal grounds on the basis of which to unilaterally undermine the autonomy – and hence the privacy – this key institutional structure, especially when the premises in terms of which the members of any distinctive minority choose to organise their interpersonal relationships in domestic contexts on a basis which contradicts the expectations of the democratic majority. This can have far reaching implications for public policy, especially in post-enlightenment contexts. In particular it has regularly precipitated the emergence of legislation given rise to wide range of professionally qualified agents – led by Social Workers and to a lesser extent by the Police – whose duty, amongst other things, is to scrutinise the internal dynamics of family units if and when they have reason to believe that the rights of their most vulnerable members are being unjustifiably compromised, together with the power to intervene where necessary in order to protect their rights and interests.

Given the caveats set out in paragraph two of Article 8, it is easy to see how such draconian initiatives can be readily be justified as a matter of public policy. Moreover these developments are particularly salient in contemporary Euro-American jurisdictions, where 'modern' developments – most especially as result the way in which ever greater salience of egotistic individualism has not only exacerbated by ever widening degrees of socio-economic inequality, but has also steadily fractured the integrity of standing kinship networks amongst most sections of the indigenous majority, all too often with disastrous consequences. Hence most contemporary initiatives in the field Euro-American family law are on the one hand designed to legitimise the results steadily growing levels of egotistical individualism amongst ever more confident self-programming adults, and on the other to introduce statutory initiatives which legitimize professional interventions aimed at protecting the rights and interests of children – and indeed of vulnerable adults – as and when networks of mutual reciprocity within familial networks fall apart.

4. Modernity and Plurality

From this perspective family-oriented jurisprudence in contemporary Euro-American contexts – as in all other jurisdictions in which attempts have been made to follow in its 'modernistic' footsteps – is a specifically post-enlightenment phenomenon. As such is the consequence of the intersection three closely inter-connected developments: a rapid expansion of the power of the state and its agencies; an equally rapid process of urbanisation; and last but not least a steady dissolution of community based – and ultimately of kin-based – networks of reciprocity as the conceptual foundations of liberal societies have become steadily more individualistically oriented.

These developments had two further complementary consequences amongst the indigenous majority, especially in Euro-American contexts. As local communities have gradually disintegrated, so their capacity to monitor the behaviour of neighbours and kinsfolk has steadily declined; and as families have steadily turned themselves inwards to become ever more private spaces, so the prospect of neighbourly efforts to intervene in an effort to resolve internal familial differences has come to be regarded as unwelcome. Instead the more acceptable response has been to call the Police or Social Services. As a result elders within local communities have long since lost their ancient roles as advisors, mediators and arbitrators: instead their former role in dispute resolution has been passed on to state-appointed agents with the force of statutorily grounded family law behind them. But the route more the route dispute resolution has begun to be conducted on this formal, arm's length basis, the greater the likelihood that the underlying

dispute will have got even further out of hand by the time these formal processes spring into action.

It was not always thus. That there has always been a universal need for processes of dispute resolution within domestic contexts goes without saying. Despite family members' intrinsic commitment to mutual reciprocity, the very intensity of the relationships articulated within such networks is such that jealousies and squabbles can all too easily get out of hand. Hence the construction of strategies by means of which to mediate, and ultimately to achieve a form of reconciliation which serves to calm – and better still to eliminate – the underlying contradictions is essential if order is to be restored and violence to be avoided. Dispute settlement in this sense a very much a pre-enlightenment phenomenon: indeed as anthropological research has repeatedly confirmed, such mechanisms are as ancient as family life itself.

It follows that the prime difference between 'traditional' modes of dispute resolution and those currently deployed in Euro-American contexts is the formalisation, and hence the professionalization, of these processes under the *aegis* of the state, if only because local communities have largely lost and/or been stripped of their former regulatory roles. All this has had further consequences: once professionalised on a 'rational', universal, post-enlightenment basis, the conceptual yardsticks which were constructed to underpin these mediatory exercises were rapidly replaced by formal codes; in response to statutory injunctions, further developed on the basis of caselaw, welfare professionals were consequently expected to ply their trade in what soon came to be identified as 'best practice'.

But around just what conceptual premises have current understandings of 'best practice' in the sphere of family law been constructed? Whilst the integrity of family life continues to be regarded as a holy grail, such that all initiatives in this sphere make a careful nod in that direction, interventions are invariably precipitated by concerns about personal safety, and the potential need to take action in order to protect the rights and freedoms of individual members from the unjustified – and indeed unjustifiable – actions and demands of other members of the familial collectivity. Moreover initiatives of this kind are wholly in keeping with the provisions of Article 8. But no matter how rationally grounded the resultant professional premises may assumed to be, they have in no way come out of the blue. Rather they are a product of the specific dynamics Western Europe's religio-cultural history, which were subsequently radically reinterpreted during the course impact of a specifically *European* Enlightment. Moreover during the course of the past two centuries those premises have been systematically developed in the direction of ever more radical individualism, along a trajectory which it is widely assumed – especially by its ideologically motivated enthusiasts – as leading to an ever greater degree of liberally-minded sociocultural perfection, which by definition all others should consequently be advised to adopt (Gray 2008).

Given this wider context, it should come as no surprise that the preferred professional and conceptual yardsticks of best practice which are currently deployed in the 'progressive' sphere of family law are far from universalistic in character: rather they reflect the premises of the local statutorily generated jurisdictional norm – or in more vernacular terms, 'the law'. Does this matter? If the all sections of the population of the jurisdiction in question ordered their familial affairs in terms of Euro-America's increasingly 'enlightened' premises, all the issues I have sought to flag would be of little more than academic significance. But as the indigenous[2] inhabitants of every contemporary Euro-American jurisdiction are becoming uncomfortably aware, the world around them is being rendered steadily more plural in character. As a result of what can best be

[2] I must apologise to the descendants of the historical indigenes of the New (at least to Europeans) World which over whom European adventurers imposed themselves during the course of five centuries of European expansion for identifying their hegemons as 'indigenes'. But although technically much better identified as the offspring of colonists, from the perspective of contemporary migrants 'from below', these post-colonial hegemons are best described as indigenes.

described as a process of 'reverse colonisation', substantial ethnic colonies composed of settlers (and their offspring) whose cultural heritage was largely untouched by the impact of the reformation, and whose religious premises owe little or nothing to Christianity, can be found in every major European city. As such their preferred behavioural norms in domestic contexts regularly owe much more to concepts derived from their ancestral heritage than they do to the premises routinely utilised by the indigenes amongst whom they have settled. These differences are far from marginal: on the contrary most settlers (and indeed the majority of their offspring) remain strongly committed to preserving a sense of ethnic alterity, especially in domestic contexts – where their behaviour continues to deviates sharply from indigenous norms. In doing so, they frequently stand many key aspects contemporary post-enlightenment premises on their heads.

5. The European Enlightenment and its Discontents

To the extent that the majority of non-European migrants who were of drawn into Euro-America during the past half century had formerly made their living as subsistence farmers, the settlers had little or no previous experience of urbanisation and industrialisation – or of the corrosive socio-cultural impact of 'modernisation'. Rather they were drawn from, and to a large extent continue to order their personal lives within, what Max Weber (1919) suggested was best understood as an 'enchanted', as opposed to the fractured – and hence 'disenchanted' – conceptual universe which had developed in the aftermath of the European enlightenment; Émile Durkheim was making much the same distinction when he drew a similar contrast between societies grounded in 'organic', as opposed to 'mechanical' solidarity.

In another variation of the same argument, this time articulated in terms of comparative jurisprudence rather than the sphere of socio-religious studies, Sir Henry Maine used his observations of customary law in Punjab more than half century highlight a further dimension of the same distinction in his once much celebrated volume *Ancient Law* (1862). In doing so he drew a categorical distinction between those jurisdictions in which interpersonal relationships were primarily organised in terms of long-lasting hierarchically structured reciprocities of *status*, as opposed to those in which these ancient legal methodologies had been swept to one side to be replaced by short term, and hence time bound, relationships of *contract*, negotiated on a presumptively egalitarian basis between autonomous individuals who had no other obligations to one another beyond those specifically identified in the contract to which they had committed themselves. In these circumstances the premises of *caveat emptor* and *laissez-faire* lay at the heart of the game.

But if Weber was writing in the chaotic aftermath of the First World War, and hence acutely aware of the forms of conceptual resilience which had been swept away in the onrush of individualism which had been let loose by the enlightenment, Maine wrote half a century earlier in the immediate aftermath of the publication of Darwin's *Origin of the Species*. Moreover this was close to the high point of Britain's Imperial pretensions, in which such visions of Progress, once again rooted in the self-same premises of the enlightenment, were very much the order of the day; and to that extent that Maine famously utilised his analysis to proclaim that the evolution of progressive societies inevitably took the form of a passage *from status to contract*. In doing so he appeared, at least on the face of things, to have produced yet another empirically grounded argument which served to further underpin the teleological premises of the enlightenment – and, of course, the equally 'progressive' and enlightened character of the forms of governance being developed in Britain's Indian Raj.

However a careful exploration of Maine's comparative analysis of the underlying issues soon reveals that his arguments are much more subtle than they might seem at first sight, so much so that he actively subverts the progressivistic conclusions which hit the headlines. Like many lawyers at the time, Maine was a classicist by training, and one of his key findings with respect to

the customary laws whose premises he had encountered at first hand in India ran remarkably parallel to those which were deployed in pre-Republican Rome: hence his use of the title Ancient Law. However there was no way in which classical scholars were prepared to identify the laws of ancient Rome as 'primitive', let alone 'barbarian'. Given the close parallels which he discovered between Roman law and the customary laws of rural India, it followed that that there was no way was he prepared to apply such derogatory terms in the course of his analysis, no matter how enthusiastically much his more 'enlightened' peers chose to deploy them. Instead Maine engaged in what can best be described as a subversive exercise in comparative jurisprudence, in which he argued while legal premises and practices differed substantially in character as between those jurisdictions in which status rather than contract were the order of the day, the former were in no way intrinsically inferior to the latter (Mantena 2010:82).

But whilst Maine was consequently an early exponent of the merits of approaching the phenomenon of law from comparative, and hence a pluralistic, perspective, he was also a realist, as was only to be expected of a scholar who had served for six years as the Legal Member in administration of the Jewel in Britain's Crown. Moreover in empirical terms Maine's prediction has so far proved to be profoundly prescient. During the century and a half since he put pen to paper, individualistically and commercially driven relationships of contract, and hence of *caveat emptor* and *laissez faire*, have progressively over-ridden morally grounded relationships mutual obligation, and hence of status, in more and more jurisdictions all around the globe. However what Maine did not – and for all sorts of contemporary reasons could not – explicitly emphasise was that he had no great admiration for 'progress' in this sense, even though it was steadily gathering pace around him. But if so, just what have been the consequences of these developments?

As contract in this sense has become the order of the day in contemporary Euro-American contexts – as well as in post-colonial states whose elites sought to follow in their former hegemons' 'progressive' footsteps – virtually all the resultant jurisdictions have found it difficult, if not impossible, to accommodate the *de facto* presence of cultural plurality within their borders – no matter whether that condition of plurality was of indigenous or of immigrant origin. Instead 'one law for all' (as defined by members of the hegemonic majority, and most by members of its highly educated elite) remains the order of the day, no less in post-colonial than in metropolitan jurisdictions.

To be sure well-trained lawyers in metropolitan jurisdictions frequently suggest that the resources of Private International Law can readily resolve such issues of plurality. However this can only occur when at least one of the litigants in legal proceedings can realistically can be deemed to be domiciled in some other jurisdiction, whose statutory legal principles can be utilised as an alternative – and more accommodative – route to dispute settlement. However such a stop-gap solution is by definition unavailable in the case of indigenous minorities (such as the Romany gypsies, for example); moreover it also follows that as time passes steadily shrinking proportion of communities of immigrant origin meaningfully be identified as being extra-jurisdictionally domiciled. Furthermore if the legal conventions deployed within such immigrant communities were much more customarily than statutorily grounded, was indeed largely the case, the premises in terms of which members of the resultant ethnic colonies began to order their interactions in domestic contexts were are often far removed from those set out in the colonial and post-colonial codes which remain in force in the jurisdictions which they had long since left behind them. Hence members of the communities non-European descent who which have emerged the Euro-American heartlands during the course of the past half century currently occupy much the same legal position as did the Punjabi villagers who had recently been incorporated into the British Raj a century and a half ago. Although nominally subject to the uniform legal codes based in the premises of English law which were being promulgated prior to migration, at an empirical level their inter-personal interactions were articulated within largely self-

governing communities which were typically ordered in terms of ancestrally-generated conventions of customary law – by status in other words, precisely as Maine sought to emphasise.
Put like this, it is easy to see why contemporary European jurisdictions find it so difficult to accommodate plurality, especially when the premises of which members of differing sections of the population utilise to order their inter-personal reactions differ so markedly in their conceptual foundations: all of Europe's contemporary jurisdictions currently find themselves facing much the same kind of contradictions as those which Maine observed a century and a half ago. But if this is indeed the case, how can those contradictions best be resolved on an equitable basis?

6. Alternative perspectives on 'family life'

Just what can reasonably regarded as 'normal' behaviour when it comes to the articulation of family life? Those who enjoy a position of dominance rarely find themselves asked to explain, let alone to justify, the premises in terms of which they order their everyday behaviour. Rather they take their own 'normality' for granted, such that it is only those whose behaviour differs from this common or garden yardstick who are ever asked to explain and justify why they organise their quotidian behaviour on such a distinctive, and hence abnormal, fashion. But if we approach the investigation of patterns of difference on such a myopic basis, any conclusions we reach on this basis will seriously flawed, if only because they will of necessity be intrinsically ethnocentric in character.
Plurality is in no sense an abnormal phenomenon. Given that we are not genetically programmed to order our behaviour in terms of any particular set of cultural (and linguistic) premises, it follows that the linguistic and cultural codes in the terms of which we humans organise our behaviour are always and everywhere the product of creative but diverse and context-specific processes of historical development. Those (unwritten) linguistic and cultural codes are not transferred from generation on a genetic basis, but rather as a result of processes of socialisation articulated largely – although my no means solely – in familial contexts. However it should never be forgotten that socialisation is an intrinsically creative process: hence for example, adolescents invariably go through a period where they are vigorously critical of the premises into which we have been socialised by their parents, even if they end up bringing up their own children using a mildly tweaked version of the values into which they were themselves socialised in childhood. From this perspective there are excellent reasons to suggest that there is no part of our personal behaviour that is more significantly constrained by the intrinsic ethnocentrism of our upbringing than our own personal lifestyles, even if we continue constantly to tweak those lifestyle as a consequence of our on-going personal experiences.

II. From Status to Contract

1. Sir Henry Maine

Maine was well aware of this when he distinguished between the consequences of deploying premises of status as opposed to those of contract in the organisation of family life – even though the collective character of European family life in the latter part of the 19th century had been less severely split asunder by the rise of unfettered individualism which has taken place since then. Nevertheless Maine's vision of 'progress' distinction has proved to be extremely prescient. Given that the majority of non-European settlers who have established themselves in western Europe during the past half century have been drawn from social arenas in which ties of kinship, descent and marriage are far more intense, more extended, more autonomous, and above all more corporately structured than those deployed by the indigenes amongst whom they have settled, for the most part they find very little to admire about the natives' familial premises and practices. In-

deed from their perspective the personal freedom which the indigenes prize so highly is widely regarded as being no more than an invitation to personal hedonism, regardless of any consequences this may have for their kinsfolk, to whom all too many young people feel they have no further necessary obligations once they have reached adulthood – and of course vice-versa.

All this stands in sharp contrast to the articulation of inter-personal relationships in arenas where status rather than contract is the order of the day. In those contexts it is taken for granted that all family members operate within a network of mutual obligations to each other with corporate and invariably more or less hierarchically structured whole. Hence it is expected that those obligations should routinely override one's individual interests – at least until one had been given explicit permission by the collectivity, and most especially by the elders, to pursue them. It also followed that newcomers to the familial corporation – whether arrived by birth or by marriage – did not gain their personal status within the corporate whole solely on the basis of their birthright; rather they established their rights as family members by fulfilling their obligations to the other members of the corporate whole, so gradually gaining power and influence – stats, in other words – along the way.

In such a conceptual universe it follows that corporate families have institutional priority over the individual persons of which they are composed, all of whom are bound together by ties of mutual interpersonal reciprocity, which can at least in principle be summed up by the dictum, 'from each according to his ability, to each according to his needs'. But since each member is regarded as having a distinct but complementary role to play within the corporate whole, relationships within the collectivity are rarely intrinsically egalitarian. On the contrary they are invariably hierarchical in character, typically as between the sexes, as between the generations, and last but not least as between older and younger members of the same generation. Within this structure superordinates are routinely expected to support and care for their subordinates, while subordinates were similarly expected to respect and obey their superordinates. It followed that the unity and continuity of the family was dependant on the maintenance of these asymmetric reciprocities.

By now it should be clear that premises around which such families are constructed stand at the far end of a lengthy spectrum in comparison with those currently found in post-enlightment Euro-American contexts. It follows that those who have been born and brought up in corporate families of this kind (as is the case with most members of the new minorities) invariably look in askance at the much more libertarian, self-centred and indeed the disenchanted practices of their indigenous neighbours, amongst whom the incidence of divorce (amongst other things) is sky-high. However those self-same neighbours are invariably equally critical of the much more authoritarian premises and practices of the newcomers, not least on the grounds that they routinely seek to arrange the marriages of their offspring, rather than allowing them to choose their partners for themselves.

The scope for mutual incomprehension is enormous in these circumstances. Given the scale of the conceptual gulf between those rely on premises of mutuality as opposed to those who priorities liberty and equality – or more generally the gulf between status and contract – those standing on either side of the chasm find themselves equally perplexed, since each side views the premises having unacceptable moral foundations.

Can the contradictions between the underlying conceptual frameworks be readily resolved? Taken as ideal models, I fear not, if only because both systems have their own distinctive strengths and weaknesses. Hence, for example, whilst families grounded in tightly-knit networks of mutual reciprocity provide their members with the prospect of an almost unlimited degree of mutual support, at the cost of (sometimes severe) restraints on personal freedom, their more 'modern', and in that sense more libertarian, counterparts give rise to unprecedented levels of personal freedom – at the cost of those so 'liberated' finding themselves faced in due course with

ever greater levels of isolation and loneliness. Likewise whilst most members of the new minorities still find personal succour in the spiritual resources of their enchanted universes, in the context of their steadily more disenchanted post-enlightened universe the Churches once universally patronised by members of the indigenous majority are attracting ever smaller congregations.

2. Wider issues

Nor are developments of this kind to the arena of family life; rather notions of contract in Maine's sense have spread out into almost every dimension of contemporary socio-economic activity, all of which are contractually based. As are such contracts are best understood as legal agreements, often on credit, which serve to facilitate the exchange of goods and services within specified timescales as between autonomous and freestanding legal actors. What is even more significant in this context is that all such agreements are made on the basis of *caveat emptor*. As a result the buyer has no rights over or obligations toward the seller than those explicitly spelt out in the contract. But just how can the terms of such contracts be enforced? Since free-standing individuals have no moral hold over one another, and if disagreements are to be settled on a more equitable basis than force of arms, some alternative means of settling disputes is clearly essential. An integral feature of all contemporary post-enlightenment jurisdictions well-oiled legislatures – together with an equally well articulated system of formally constituted courts of law – stand ready and willing to ready determine and resolve disputes on an equitable basis, which usually take the form of winner-take-all outcomes. Furthermore these state agencies invariably claim monopoly powers within each such jurisdiction: as a result informal arrangements, made on a basis of mutual trust within networks of mutual reciprocity, and hence on a 'customary' basis have largely ceased to have any significant legal traction.

In a globalising world this can have severe consequences for those who choose to swim against the hegemonic tide by continuing to organise their inter-personal relationships on a pre-enlightenment basis. Changes in personal legal status – as, for example, in cases of birth, marriage, divorce, adoption and so forth – have no force unless properly registered the state; similarly transfers of value on an informal basis – especially when large sums are involved – instantly raise suspicions of money laundering. In other words 'informal' status-based arrangements implemented in the public domain are in severe danger of being regarded as criminal in character on the grounds that they are inherently 'contrary to law' (Ballard 2011, 2009).

But before we pursue this line of argument and further we must catch up with ourselves by considering what has been going on in Europe's nearest neighbour: the world of Dar ul-Islam.

III. The history of law in Islamic contexts

1. Roots

Islamic law has even more ancient roots than those from which the distinctive premises which have underpinned the Euro-America's post-enlightenment jurisdictions as they developed during the course of the past two centuries. Moreover as Hallaq (2009) has eloquently argued, during that self-same period Islamic jurisdictions across the globe from Morocco to Indonesia have found themselves subjected to ever growing political and ideological pressure (much of it self-generated) to abandon their traditional premises of law and governance in favour of the allegedly more 'progressive', and indeed more 'rational', premises of the European Enlightenment. As Hallaq goes also goes on to argue, the impact of these developments proved to be particularly severe in the sphere of jurisprudence – no less in post-Imperial contexts than in the earlier periods during previously autonomous Islamic jurisdictions found themselves 'protected' and then

over-ridden by one or other of Europe's imperial regimes. Hence when European empires collapsed during the course of the past half century in no way was the *status quo ante* in the form of ancient Sultanates and Emirates – let alone the Shari'a – restored to its former glory. Instead the nationalistically minded reformists who overthrew who took over the basic the ideological premises of their former masters – most usually in a socialistically oriented format – construct new found jurisdictions. As such these were primarily ordered as nation-states, geographically constrained within the boundaries laid down during the Imperial period, and deploying administrative and legal structures which owed far more to the premises of the enlightenment than to those of *shariah*, *'urf* and *qanun.* Hence as Hallaq observes:

> The most pervasive problem in the legal history of the modern Muslim world has therefore been the introduction of the nation-state and its encounter with the Shari'a. It would be no exaggeration to state that there is virtually no problem or issue in this history that does not hark back to the conceptual, structural and institutional discord that exists between the thoroughly indigenous Islamic/customary laws, and the European-grown imports that were the inevitable concomitant of the nation-state and its modern legal system. (Hallaq 2009: 360)

But whilst the great majority of these emergent nation-states identified themselves as being both 'Islamic' and 'democratic' in character, they were invariably founded by members of a small, largely western-educated, and hence 'progressive' elite operating from the top down, whose premises differed radically from the much more traditionally minded peasants and merchants who made up the vast majority of the population over whom they exercised their jurisdiction. Moreover such elites were all too often overwhelmingly drawn from narrowly grounded sectarian backgrounds, although at a political level they simultaneously relied on premises of 'modernity' to justify their refusal to acknowledge the plural character of the newly-created 'nation' over which they had come to preside. As a result the discordances and contradictions which were erupted as between the 'modernist' premises of sectarian elites and the allegedly more 'backward' premises still maintained by allegedly ill-informed peasants in the countryside became steadily more intense throughout the Islamic world, and remain so to this day. The result, amongst other things, has been the emergence of dictatorial and increasingly militarised regimes throughout the Islamic world, now facing ever more vigorous insurgencies – often of a sectarian kind – articulated 'from below'.

Meanwhile it is worth noting that similar contradictions have also begun to emerge in diasporic contexts. Whilst the great majority of the early migrant-workers settlers were thoroughly 'traditionalist' in out-look, they were also accompanied by a much smaller number of formally educated modernist refugees – many of whom were fleeing from dictatorial regimes with which they had fallen out. But whilst mass migration from these sources has declined in the face of ever more draconian immigration restrictions, an ever more substantial second (and hence indigenous) generation has emerged into adulthood, all of whom have found themselves conceptually squeezed between status-based premises of their parent's ancestral heritage and the individualist and markedly disenchanted premises underpinned the intellectual curriculum with which they found themselves confronted at school and college. As a result they have found themselves confronted with by much the same conundrums which students in the Punjab's newly reconstructed found themselves facing in the latter decades of the nineteenth century, and which continue to be experienced by upwardly mobile students drawn from peasant and working-class families in

what remains of *Dar-ul-Islam.* Much of the remainder of this essay is concerned with the dynamics of these processes

2. The on-going significance of customary law: Shari'a, 'Urf and Qanun

In the conclusion of his immensely learned commentary on the historical development of Islamic jurisprudence, Hallaq comes to some extremely gloomy conclusions about the current state of the glories of this once-majestic intellectual tradition. Having reviewed what he describes as the impact of 'the sweep of modernity' to which the entirety of *Dar-ul-Islam* succumbed in the face of two centuries of European Imperial expansion, he comes to the conclusion that by the middle of the twentieth century, the point at which the institutionalised aspects of European hegemony at long last collapsed, the Sharia

> … had been reduced to a fragment of itself at best and, at worst, structurally speaking, to a nonentity. The chipping away by the modern state of the Shari'a resulted in: first, the collapse of the financial and waqf foundations that sustained the legal profession and its reproductive mechanisms; the gradual displacement of this profession by a class of modern lawyers and judges who came from a newly rising bourgeoisie and/or transformed *ulama* families; third, the replacement of institutional legal structures by modern law faculties and modern hierarchical courts of law; and the introduction of a massive bulk of commercial, criminal, civil and other laws.
>
> The totality of these effects amounted to the effective structural demise of the Shari'a. Although the law of personal status finds its roots in *fiqh* it has been transformed in function and modality into state law, whilst the manner of its functioning, as well as the moral community that permitted and nourished its operation, no longer exist. Together with the *Shari'a*, all manner of artisanal professions, kinship structures, household crafts, and indeed entire ways of life, have met with their demise. (ibid: 500)

From an institutional, and above all from a scholarly perspective, there can be little dispute about the accuracy of Hallaq's conclusions. In the contemporary world classical forms of both governance and jurisprudence have been swept away, not so much because 'the doors of *ijtehad* were closed' – as Orientalist scholars once so confidently proclaimed – but rather in the face of the hegemonic impact of European imperial expansion.

But however much Hallaq's critical conclusions may hold good in formal, institutional, hence administrative contexts, it would be quite wrong to presume that premises and practices embedded in customary practice would likewise be so lightly abandoned. Indeed from an anthropological perspective many aspects of the basic principles of Islamic law remain with us to this day in personal domestic contexts, even if the intellectual and institutional structures in which the classical premises within which the Shari'a once flourished have by now fallen into abeyance. With that in mind it is most illuminating to turn back to the earlier parts of Hallaq's analysis, where he carefully identifies the immense significance of *'urf*, custom, in the context of *usul-ul-fiqh,* jurisprudential practice. Hence just as the *hadith* serve to contextualise and historicise the soaring poetry of the Qur'an, so *'urf* serves to similarly qualify formally articulated principles set out in the Qur'anically based *shari'a.* Hence in keeping with my earlier comments customary practices

throughout Dar ul-Islam have always been inspired by, although by no means necessarily determined by, the guidance set out in the Shari'a. Hence as Hallaq observes,

> In pre-modern Islamic societies, disputes were resolved with a minimum of legislative guidance, the determining factors having been informal mediation/arbitration and equally informal law courts. Furthermore, wherever mediation and law are involved in conflict resolution, morality and social ethics are invariably intertwined, as they certainly were in the case of lslam in the pre-industrial era.
> By contrast, where they are absent, as they are in the legal culture of Western and, increasingly, non-Western modern nation-states, morality and social ethics are strangers. Morality, especially its religious variety, thus provided a more effective and pervasive mechanism of self-rule and did not require the marked presence of coercive and disciplinarian state agencies, the emblem of the modern body politic. (*ibid*: 160).

Secondly, and just as significantly, Hallaq also emphasises that in sharp contrast to procedures deployed in contractually grounded jurisprudential contexts, Islamic litigants – and indeed non-Muslims who utilised Islamic procedures to settle their differences – were routinely assumed to stand in the midst of a complex network of mutual reciprocities. As a result *Qazis*' verdicts relatively rarely took the form of winner-takes-all judgements in which one party is adjudged to be in the right whilst the other is identified as being wholly in the wrong – as is routinely the case in contemporary Euro-American jurisdictions. Rather the objective of Islamic mediators – who were by no means necessarily fully trained *Qazis* – invariably sought to seek negotiate a settlement which served to restore the integrity of social fabric within which the dispute arose. Instead they routinely sought to do so on a morally equitable basis, often by referring back to the *Qur'an* and the *Shari'a*, and in doing so often took the opportunity to tick off *all* parties to the proceedings. To illustrate the point Hallaq he cites Rosen's anthropologically grounded analysis of contemporary judicial proceedings in a *qazi* court in Morocco, in which

> The predominant goal is not simply to resolve differences, but to put people back into a position where they can, with the least adverse implications for the social order, continue to negotiate their own arrangements with one another ... even though the specific content of a court's knowledge about particular individuals may be both limited and stereotypical, the terms by which the courts proceed, the concepts they employ, the styles of speech by which testimony is shaped, and the forms of remedy they apply are broadly similar to those that people use in their everyday lives and possess little of the strange formality or professionalized distortions found in some other systems of law. (Rosen: 39 - 40)

A further aspect of proceedings of this kind is a complete absence of professionally trained counsel engaged to present legal arguments on behalf of the litigants: rather the litigants – together with any witnesses whom they brought along to support their plea – were expected to argue their case in person and in the vernacular; moreover they invariably argued their cases on a

strongly moralistic basis[3]. It also followed that in an effort to do justice (*insaaf*) with respect to the issues before them, adjudicators were routinely particularly attentive to the pleas of weaker parties to the dispute, especially if the stronger party appeared to have been taking every opportunity to exploit his opponent's relative weakness. Hence as Hallaq goes on to note, there is plentiful evidence to suggest that

> By all indications, when women approached the court in person, they did so on the same terms as did men, and asserted themselves freely, firmly and emphatically. The courts allowed for a wide margin of understanding when women were assertively forthright, giving them ample space to defend their reputation, honor, status and material interests. They approached the court as both plaintiffs and defendants, suing men but also other women. Women sued for civil damages, for dissolution of their marriages, for alimony, for child custody plus expenses, for remedies against defamation, and brought to trial other women on charges of insolvency and physical assault. But women were also sometimes sued by men on charges of physical abuse. (Hallaq: 188).

In these circumstances it follows that adjudicators makers were not bound by precedent, either in terms of case law or with respect to statutory directions – as is the case in 'modern' contexts. To be sure they would regularly refer to the principles of *Shari'a* in evaluating the behaviour of the litigants; however when it came to the nitty-gritty of their judgements, they paid far more attention to the specific conventions which underpinned local customary law (*'Urf* in Arabic, and *Riwaj* in Persian and Urdu) as they sought to negotiate an equitable settlement. In doing so they had plenty of scope to ground their arguments in terms of *insaaf* and *'urf*, not least because these were precisely the yardsticks which litigants and their supporters would routinely have utilised in arguing their respective corners.

With all this in mind, it is also worth noting that in classical times *qazi* courts were very much more of an urban phenomenon than a rural phenomenon – where either Sufi *Pirs* or tribal elders much more likely to fulfil the role of adjudicator. Meanwhile in the cities *Qazi* courts were normally staffed by locally trained *'ulema,* and supported from the public purse. However these 'judges' were in no sense agents of the state in the European sense: indeed as autonomous scholars, the great majority of *'ulema* were proud of their autonomy, and hence sought to distance themselves from *siyasat*, the necessarily authoritarian – and hence often violent – activities of the state and its ruler. For precisely that reason *qazis* for the most part had little or nothing to do with *Qanun*, the administrative measures which Sultans and Emirs laid down in the form of directive *Firman* which they regularly issued both to facilitate the collection of taxes, and in an attempt to keep potentially rebellious subjects under firm political control.

Hence as Hallaq goes on to observe

> Neither the Shari'a nor *siyiisa shar'iyya* [*qanun*, in other words] penetrated deeply enough within the social fabric as to regulate all aspects of social life. To be sure the Shari'a was far more successful than the sovereign in asserting its legal norms within that

[3] South Asian litigants (and their witnesses) find themselves in terrible trouble in English courts when they present their evidence on a moralistic basis as, rather than 'sticking to the facts'. As a result their evidence is frequently dismissed either as unsound or irrelevant. This can have disastrous consequences.

> fabric, since it constituted itself as the hegemonic moral and legal discourse in the lives of Muslims everywhere. But whilst the social system was heavily permeated by "Shari'a-mindedness" (which was never the case with political discourse), custom and customary law were conjointly responsible for the operation of the social order and for providing conflict-resolution mechanisms within it.
>
> Having evolved over the millennia, and adapting to every political, dynastic and legal turn, these customs absorbed, and indeed conditioned the principles of Shari'a in multiple and particular ways, depending on the specific local context. Custom and customary law thus stood in a dialectical relationship with religious law; but neither lost their independence from political intervention until modernity and the dawn of the nation-state precipitated radical changes in the structure of the socio-political order during the nineteenth century and thereafter. (*ibid*: 203)

3. The fate of shari'a and 'urf in the face of Dar ul-Islam's encounters with post-enlightment visions of progressive modernity

In the light of all this there is a strong case to support the views that at almost every conceivable level, the premises which underpin virtually all forms of legal practice currently deployed in contemporary European jurisdictions – and indeed in all those non-European jurisdictions in which post-colonial reformers have striven to sweep aside their indigenous pre-enlightenment legal procedures such as the Shari'a – were incommensurate from those which were deployed prior to the arrival of European colonial activity. Hence as the structure of the world order has been since them been steadily globalised from above around the premises of the European enlightenment (aka 'progress' and 'modernity') it would seem, at least on the face of it, that prescient visions articulated long ago by both Maine and Weber have by now become overwhelmingly true: just as status has been steadily replaced by more 'rational' premises of contract, so social relationships, and indeed whole social orders, have become steadily more individualised and 'disenchanted'. But if this is indeed the case, is it follows that 'tradition' – whose remaining existence is currently very largely exemplified by premises and practices which lurk in the background in the form of 'unofficial' and/or as 'customary' law – has come to be regarded (at least by enthusiastic supporters of 'progress') as a form of jurisprudence which long passed its sell-by date. But if that is indeed the case, is there any likelihood of the tsunami of jurisprudential rationality let loose by the *philosophes* of the European Enlightenment two centuries ever being tamed?

On the face of things Hallaq appears to take precisely that view, most especially in the light of his observation that 'by the middle of the twentieth century the Shari'a had been reduced to a fragment of itself at best and, at worst, structurally speaking, to a nonentity'. It is clear that there is great deal of empirical evidence on his side, given that his analysis vigorously underlines the extent to which these corrosive processes have been undermining the institutional foundations of Dar ul-Islam during the course of the past two centuries. But despite the strength of his arguments, could it be that despite their steady marginalisation in the face of modernity, the basic premises *usul ul-fiqh* and *'urf* have continued to thrive – no less in the contemporary diaspora than in large swathes of Dar-ul-Islam itself? But even if that is indeed the case, their on-going presence is most unlikely to lead to a reconstruction of the Shari'ah system as it once was: history rarely repeats itself. But in the contemporary world it is equally clear that the current applica-

tions of the premises of the enlightenment are also proving to be precipitating deeply troublesome consequences, no less in the metropolitan heartlands where they originated than in the post-colonial jurisdictions whose elites succumbed to the lures of its promises. Could it be that we have now reached a point in history at which the two rival traditions could profitably begin to re-examine their own premises in the light of those of their alters to better enlighten each other?

IV. An exercise in comparative jurisprudence

1. Getting our bearings

To make any sense of such a suggestion, we must first establish our conceptual bearings. To do I would suggest that that the time has come to take several steps beyond Hallaq's groundbreaking analyses in order to take greater cognisance of the logic of *current* developments. Hence if Hallaq's arguments to the effect that the premises and practices around which classical forms of Islamic law differed so radically from those currently deployed in contemporary European jurisdictions (let alone those deployed in all the other non-European jurisdictions in which post-colonial reformists have sought to sweep aside 'archaic' traditions in favour of more 'modernistic' practice) are ultimately incommensurable, such that each finds the key conceptual premises deployed by the other stands in sharp contradiction to its own – as he implicitly, and in my view cogently suggests – if we are to make any progress towards comprehending developments in the contemporary world it is essential to develop a conceptual vocabulary which will enable us to appreciate the logic of both conceptual systems in their own terms, thereby enabling us to explore their respective strengths and weaknesses on a more objective basis.

Given that that starting point in this paper was Article 8, it is worth reprising my earlier conclusions: namely that the premises of family law in European jurisdictions are Austinian in character, in the sense that it is grounded in written norms whose *imprimatur* is underpinned by the state, significant deviations from which are likely to lead to proceedings in formally constituted courts, whose primary duty is to separate rights from wrongs, and where necessary to impose sanctions on those who fail to respect court orders designed to protect the best interests of vulnerable members of the family. Moreover these proceedings invariably take place in camera. Nothing could be more lawyerly in character.

With such criteria in minds the label 'Shari'a Law' is in many respects a comprehensive misnomer, if only because it is in no sense Austinian in character. Its premises were not promulgated by a sovereign of any sort: rather it is a source of personal guidance stemming from many centuries of scholarly effort, aimed at interpreting the contents of the Qur'an and the Hadith in an effort to determine how Muslims can best follow the insights vouchsafed by God to the Prophet Mohammed fourteen hundred years ago. Moreover if the *shari'a* is no way statutory in character, neither is it necessarily perfect, if only because it is a man-made interpretation of the insights vouchsafed to the Prophet as a seal to the Abrahamic tradition. As such it is best understood a comprehensive source of guidance offered to pious Muslims as to the basic premises they should follow in ordering all aspects of their personal lives, with the object of bringing their it behaviour into the closest possible congruence with the underlying logic of the universe which Allah created, given that He is ever-present in all its manifestations.

In consequence the *shari'a* is no way a comprehensive legal code. Rather it is best understood as a compendium of behavioural advice derived by scholars from their studies of the Qur'an and the Hadith, directed towards individual Muslims on a personal basis; and since this guidance in *personally* oriented, it has little if anything to say about corporate families, about the wider social

structures of which families are cellular components, let alone about the way in which its premises should be applied in everyday processes of dispute resolution. Nor is the Shari'a significant source of guidance with respect to the practice of governance, let alone with spiritual and philosophical issues: such matters are primarily the domain of Sufis and hence the Tariqa – a domain which runs parallel to the Shari'a, and which has proved to be far more resilient in the face of the corrosive influence of the disenchanted enlightenment than has the Shari'a. To this day its premises of the Tariqa, in all its many flavours, remains a vital source of spiritual guidance to all Muslims, no matter how closely – or loosely – they follow the guidance set out in the Shari'ah (Chittick 1989, Ballard 2006).

By contrast commonly understood rules and conventions around which '*urf* is constructed may well deserve the appellation of law – always provided that it is understood as law rather than Law. As noted above, just as the accounts of the Prophet's behaviour set out in the *hadith* serve to complement, and to hence to further illuminate, the largely metaphysical teachings set out in the *Qur'an*, so *'urf* – together with the procedural directions set out in *usul ul-fiqh* – to fulfil the same role with respect to the *Shari'a*, in the sense that it provides space within which basis principles set out in the *Shari'a* can be read in such a way that specific local circumstances and practices (*'urf* in other words) can be more equitably more accommodated in active (as opposed to theoretical) processes of dispute settlement. However customary law is far from being 'law' in Austinian terms. It is not statutorily grounded, nor is it enforced by the state, and it rarely if even exists in a written form, if only because it is being reinterpreted all the time. Rather it reflects the current normative consensus of the elders of the community within which it is articulated. Nor is it much concerned about making explicit judgements distinguishing guilt from innocence, let alone imposing sentences of incarceration of those in the wrong: rather it is much more concerned to identify what would be regarded as torts in English law. And having done so it is not so much concerned with physical punishment, let alone incarceration: rather it concentrates on reparation, whose objective is to restore tears which have emerged within the fabric of the established social order on an equitable, and above all a mutually acceptable, basis. As such it is undoubtedly a swift, effective, and indeed a widely deployed vehicle by means of which to settle inter-personal disputes of all kind, most especially when the relationships in question are routinely articulated through tight-knit networks of status-driven reciprocity.[4]

Once considered from this perspective, careful analysis suggests that in Islamic contexts it is primarily within the domain of 'urf rather than that of shari'a that family law has long been primarily articulated. In consequence it follows that it has never been implemented on any kind of centrally codified basis: rather it has been articulated as a means of repairing and/or reconstructing potential breaches in the established networks of kinship reciprocity – as they are routinely understood in terms of the customary premises and practices articulated within specific local communities. That is no way to dismiss the overarching significance of the shari'a throughout Dar ul-Islam; rather it is reiterate the point that it understood as a vital source of moral and behavioural guidance, rather than a set of formal instructions which must be obeyed come what may, regardless of local circumstances.

Hence as Hallaq acutely observes:

> The legal maxim "amicable settlement is the best verdict" (*al-sulh sayyid al-ahkam*) represents a long-standing tradition in Islam and Islamic law, reflecting the deep-rooted perception, both legal and social, not only that arbitration and mediation are integral to the

[4] It is noteworthy that one of the few positive points about the Taliban's approach to governance in Pakistan and Afghanistan is that most (although by no means all) of its courts exhibit these properties, in sharp contrast to the state-run courts which seek to emulate Austinian principles.

> legal system and the legal process but that they even stand paramount over court litigation, which was usually seen as the last resort.
>
> Islamic rulers not only depended on this tradition of micro-self-regulation, but indeed encouraged it, for it facilitated efficient and low-cost governance that simultaneously ensured public order. In a society that viewed as sacrosanct, all family relations and affairs, disputes involving intimate and private matters were kept away from the public eye and scrutiny, so for every case that went to court – and these were countless – many more were informally resolved as a result of intervention of the elders, the imam, the household matriarch, or others of equal prestige and authority.
>
> In some cases this was a decisive factor: informal mediation was indispensable for avoiding the escalation of conflict. In communities that heavily depended on group solidarity and in which the individual was defined by his or her affiliation to larger group units, private disputes had great potential of becoming "expandable into political disputes between competing groups." If the sanctity of family was paramount, it was so also because it constituted an integral part of a larger consideration, namely, the maintenance of social harmony. Attending to and eliminating dispute at the most local level pre-empted the escalation of disputes that might have disrupted such harmony. (ibid 162-3)

From all of this a further feature of distinctiveness also begins to emerge. At first sight the personal guidance set out in the Shari'a might seem to run parallel to the equally individualistically oriented character contemporary forms of European law: indeed in historical terms this is not surprising, since both systems have their roots in the even more ancient Jewish traditions. However such a conclusion is misleading, for despite the strongly contractual character of the Shari'a, it also constantly emphasises that the resulting relationships should always and everywhere be understood in dyadic and hence contextual terms, such that both parties become linked in relationships of mutual obligations no less than rights – with a result, amongst other things, that risks must always be shared. This is in turn rooted in the Qur'anic (and in all probability the pre-Qur'anic) tribal understandings that rights only emerge in response to the fulfilment reciprocal obligations, which – when multiply implemented within any given context – in turn give rise to a dynamic social order.

Hence anyone who looks to the shari'a for an overview of the way in which the which internal dynamics of the corporate structures – whether large or small – to which multiplicity of networks of mutual reciprocity which have established on this basis have given rise will be in for a disappointment. The shari'a is almost entirely silent on such matters. If, however, we accept the self-evident point that shari'a is best understood as an overarching source of personal moral and behaviour guidance, as opposed to Law in the Austinian sense, the key role of 'urf springs directly into focus as the applied counterpart to the formal, and hence much more abstracted, premises set out in the shari'a. In other words it was to localised forms of customary law (with shari'a standing in the background) that Islamic jurisprudence routinely turned for empirical guidance when seeking to resolve breakdowns the everyday dynamics of everyday inter-personal relationships which had erupted in localised networks of mutual reciprocity. Hence as Hallaq acutely observes:

> The legal maxim "amicable settlement is the best verdict" *(al-sulh sayyid al-ahkam*) represents a long-standing tradition in Islam and Islamic law, reflecting the deep-rooted perception, both legal and social, not only that arbitration and mediation are integral to the legal system and the legal process but that they even stand paramount over court litigation, which was usually seen as the last resort.
>
> Islamic rulers not only depended on this tradition of micro-self-regulation, but indeed encouraged it, for it facilitated efficient and low-cost governance that simultaneously ensured public order. In a society that viewed as sacrosanct, all family relations and affairs, disputes involving intimate and private matters were kept away from the public eye and scrutiny, so for every case that went to court – and these were countless – many more were informally resolved as a result of intervention of the elders, the imam, the household matriarch, or others of equal prestige and authority.

In some cases this was a decisive factor: informal mediation was indispensable for avoiding the escalation of conflict. In communities that heavily depended on group solidarity and in which the individual was defined by his or her affiliation to larger group units, private disputes had great potential of becoming "expandable into political disputes between competing groups." If the sanctity of family was paramount, it was so also because it constituted an integral part of a larger consideration, namely, the maintenance of social harmony. Attending to and eliminating dispute at the most local level pre-empted the escalation of disputes that might have disrupted such harmony. (ibid 162-3)

It consequently follows that despite the well-established capacity of Islamic rulers to issue administrative orders in the form of qanun, let alone the ever-expanding scholarly commentaries produced by the 'ulema in the course of their efforts to yet further illuminate the guiding principles of the shari'a, by far the greater part of Islamic jurisprudence followed a more or less autonomous trajectory of its own, so much so that largely sidestepped the prescriptive top-down directions emanating from both these sources. Indeed insofar as the ultimate objective of *usul-ul-fiqh* was to facilitate insaaf – justice in the widest possible sense – it followed that it deliberately set codes in the Austinian (and indeed the Biblical) sense to one side. In keeping with the Islamic understanding that the social order, no less than any other feature of the Allah's created universe was a manifestation of the Godhead Himself, the ultimate objective of Islamic law was not so much to create a more perfect socio-political universe, but rather to release the stresses and strains which human negligence had allowed to developed in the existing and thoroughly dynamic social universe which was already a manifestation of the Godhead. It consequently follows that premises of 'Urf, Riwaj are of necessity both varied and dynamic in character, since their objective is always and ever to resolve and reconstruct the warp and weft of a social universe which – just like all other aspects of Allah's manifestation – is as varied as it dynamic.

In consequence there is a strong sense in which the premises which underpinned classical Islamic jurisprudence as it was delivered at the coalface were closely akin to those deployed in English common law in early mediaeval contexts: in both cases the central objective of jurisprudential activity was to facilitate dispute resolution on a local, as well as more or less private basis, facilitated by respected elders drawn from community within which the dispute in question had erupted (juries, in other words), with the objective of negotiating amicable settlements in the light of the premises of local customary law (Roebuck 2008). Where they may well have differed

however, is in terms of the character enchanted universes which underpinned the two systems. But since I am unfamiliar with the cosmological vision which underpinned early English Christianity, I will have to leave that matter to other specialists.

2. The modernisation of English Law

Likewise my knowledge of the how and when the premises which served to underpin medieval Common Law was steadily marginalised, initially by Canon law, and subsequently by steadily more secularly oriented statutory interventions, articulated on a national basis by Parliamentary fiat (Wormald 2001) is strictly limited. Nevertheless a broad pattern of development is fairly easy to discern. In the early medieval period when the social order was still primarily grounded in ties of reciprocity between kinsfolk, the juries were routinely recruited on a local basis, since personal knowledge of the litigants was routinely regarded as an asset, rather than a liability. Since then, these procedures have since been comprehensively over-turned. Juries (whose members are now recruited at random), since any kind of prior acquaintance with the litigants is regarded as an unacceptable liability rather than a positive asset. And although they may still remain finders of fact in criminal cases (although they are now no longer entitled to interrogate the litigants), juries have by now been effectively been eliminated from civil proceedings, and most especially so from proceedings in the family courts – from which interested members of the public at large are also routinely excluded.

In other words as the premises of the enlightenment have become steadily more influential, so the articulation of family law Euro-American contexts. As a result dispute resolution is now comprehensively subservient to premises articulated by the state and its agents, who decision making is in turn largely expected to be grounded in the premises set out in the European Convention of Human Rights. As a result the touchstone of decision-making in the family courts is to facilitate outcomes which so far as possible maximise individual freedom, qualified only by the overarching need to protect the best interests of children and/or vulnerable adults.

3. Recent developments in Dar ul-Islam.

By contrast developments in Dar ul-Islam have followed a very different trajectory. This was not just because the pieces its jurisprudential jigsaw were laid out on a strikingly different basis from those which had developed in Western Europe, but rather because its internal dynamics were severely interrupted – and eventually swept to one side – by the forces let loose in the process of European Imperial expansion. As we saw earlier, the premises of the enlightment began to come into force in European jurisdictions towards end of eighteenth century, just before processes of Imperial expansion came into full flow during the next century, as a result of which the European powers, led by Britain, managed to establish a position of global hegemony. Moreover the teleological premises of the enlightenment played a dual role in that process: on the one hand they served to legitimise the process of Imperial expansion as a 'civilizing mission' which would in due course enlighten the barbarians; and on the other it also went on to provide the subjects of this 'mission' with an ideological framework on the basis of which to challenge the political and economic hegemony to which they had been unjustly subjected.

However so great was the influence of these premises – and most particularly amongst members of the newly (western) educated elites whose rebellious efforts hastened the collapse of all these Imperial structures had been so overwhelmed by the logic of these modernistic premises – that when Independence at long last arrived, they promptly set about constructing nation states whose internal structures of governance were modelled on, and indeed exemplified by the 'progressive' premises of the European enlightenment. As a result of these developments the intellectual and conceptual foundations of Islam's classical moral and jurisprudential infrastructure

have largely collapsed – just as Hallaq suggests. But does it necessarily follow that the whole of that edifice has consequently disappeared without trace?

I think not. Despite the corrosive impact of the visions of modernisation which were so enthusiastically adopted by progressively-minded urban elites once they gained control of governance, their top-down initiatives had far less impact on established institutional practices in rural areas, or indeed amongst the inflow of poverty stricken-peasants who have settled on the outskirts of every major city during the course of the past half century. The consequences of all this are now plain to see, especially in the cities, above all because the character of the urban elite has undergone a sea-change. Not so long ago its members provided the conceptual, intellectual, political and economic foundations of Dar ul-Islam. As such its most prominent components included the madrasseh within which scholarly 'ulema developed and articulated the theologically grounded premises of the shari'a, partnered by administrators who prepared and implemented *qanun* on behalf of the local Emir, together with the merchants craftsmen based in the bazaar. But whilst the bazaaris remain firmly in place, the scholars in the madrasseh have long since been side-lined professionally qualified engineers, doctors, lawyers and army officers – from whose ranks the administrators of the new order have been drawn.

Meanwhile the great bulk of the population at large occupied a very different behavioural and conceptual universe. This was particularly true in the countryside. Largely ensconced within a multitude of more or less autonomous tribal communities, the majority of whom made their living as peasant farmer, their behavioural premises continued to be grounded in localised understandings of 'urf, further supplemented by spiritual inspiration provided by Sufi Pirs, whose influence largely out-trumped the generally ill-educated mullahs hired to act as prayer leaders in local mosques. As the gulf between the two arenas widened, no less in political and economic than conceptual terms, progressively minded members of the urban elite have made increasingly vigorous efforts to reform and improve the lot of the 'ignorant' peasantry by 'modernising' their traditional forms of governance and jurisprudence. Moreover having at long last been released from the hegemony of Western European capitalism, most such reformists sought to do in socialist terms, often with the active backing of the Soviet Union – which by then developed its own highly centralised interpretation of the premises of the European enlightenment; but as these centralised and usually highly militarised regimes began to implode as governing elites became steadily more predatory in character, alternative visions of utopia led by neo-fundamentalist activists seeking inspiration from the past in order to find a way to a better future began to appear. In the context of Dar ul-Islam these invariably took the form of efforts to re-Islamize the established social order (Gray 2008).

By and large these developments flew over the heads of the rural peasantry, and indeed of most members of the poorer sections of the urban population. Socialistic initiatives routinely became unpopular when their efforts to collectivise threatened to undermine peasant farmers property rights, and hostility to socialism became even more intense when elite activists sought to that religion was nothing more than irrational superstition; and whilst these developments provided neo-fundamentalists with a highly effective platform around which to gather recruits with their alternative visions of utopia, they ran into similar difficulties when they sought to re-Islamise the well-established customs, beliefs and practices of those who already considered themselves to pious be pious Muslims – and all the more so when the neo-fundamentalists invariably proved to be even more incapable of effective governance as and when they over-threw their predecessors' regimes. However to the extent these were very largely urban developments, the customary practices 'Urf and Riwaj, reinforced by the spiritually oriented premises of local Sufi Pirs, remained virtually untouched in the countryside, regardless of the efforts of the reformers, and despite the steady erosion of the institutions which once provided the organisational foundation of the Shari'a.

Moreover precisely because the bulk of the long-distance migrants who have established themselves in European cities during the past half century were drawn from precisely such backgrounds, it is the parochially oriented premises of 'urf, and riwaj, rather than the more universally oriented premises of the shari'a, which have provided settlers with their principal sources moral inspiration as they constructed ethnic colonies around themselves. Hence it is essentially the customary dimensions of the Islamic tradition which have continued to thrive in western European contexts – in the midst of the jurisdictions within which the premises of the enlightenment were initially let loose. As a result contemporary interpretations of the two traditions have found themselves face to face once again in the diaspora. The time has come to consider the consequences.

4. The on-going impact of Orientalism

The term Orientalism was coined by Edward Said in 1978, as a means of identifying the generally patronizing character of Western attitudes towards Middle Eastern, Asian and North African societies. Further underlining the significance of this concept, Mamdani suggests that

> In Said's analysis, the West essentializes these societies as static and undeveloped—thereby fabricating a view of Oriental culture that can be studied, depicted, and reproduced. Implicit in this fabrication, writes Said, is the idea that Western society is developed, rational, flexible, and superior. (Mamdani 2004: 32)

As we have seen, all too many Euro-American studies of Islamic legal procedures have fallen into this post-enlightenment conceptual trap – as have all too many Islamic reformers who have found themselves bewitched by these progressive notions. As a result external observers can all too easily find themselves trapped in a hall of mirrors when they seek to make sense contemporary dynamics of non-European legal systems. This is particularly true of the legal foundations of the Islamic tradition. As a result of institutional support the by now been reduced to such a shadow of itself – and hence has become stagnant – as Hallaq has quite rightly reminded us. Nevertheless it would be grave mistake to assume that the premises of the shari'a have consequently ceased to have any significant traction in contemporary world. Quite the contrary: pious around the globe Muslims still routinely assume that its premises provide the ultimate overarching backstop to their parochial understandings 'urf. But having highlighted the way in which '*urfic* premises and practices have always served as a means by which the broadly articulated guidance set out in the shari'a can be contextualised in specific circumstances, careful inspection also reveals that this has always been a two-way process, especially in matters of everyday behaviour – with the result that Muslims in any given community routinely claim that their local customs and practices are ipso facto grounded in the precepts of the Qur'an, the Hadith and the Shari'a, even if no explicit references to anything of the kind can found in any of the kind in any of these sources.

Hence as Hallaq puts it:

> While the social system of values was heavily permeated by Shari'a-mindedness (which was never the case with any political discourse), custom and customary law were considerably and conjointly responsible for the operation of the social order, and for providing conflict-resolution mechanisms within it.

Having evolved over the millennia, and adapting to every political, dynastic and legal turn, these customs absorbed, and indeed influenced, the Shari'a in multiple and particular ways, depending on the specific local context. Custom and customary law thus stood in a dialectical relationship with religious law, but never lost their independence from it, or especially from political intervention – until, that is, modernity and the dawn of the nation-state changed the scene in structural ways during the nineteenth century and thereafter.

In the context of mediation we noted the importance of self-ruling groups in effecting conflict resolution. Their ability to negotiate and effect mediation was an integral part of the system of self-governance that they developed over time, a system that was embedded in both custom and morality. (Hallaq 2009: 203)

But if Islamic scholars had no great difficulty in acknowledging the distinction between the formal injunctions set out in the shari'a and their subsequent application in *usul-ul-fiqh* and *'urf*, as well as the flexible and adaptive character of the legal structures to which they gave rise, when European scholars set out to make sense of their new found subjects' legal processes, they looked for material that was congruent with their own prior assumptions – in other words for legal codes. As they did so Orientalism began to run wild. Refusing to acknowledge that own perspectives were anything other than rational in character, they approached their task in a thoroughly Procrustean manner, such that they made strenuous efforts to press the 'primitive' premises and practices of their new found subjects into their own ready-made conceptual frameworks.

Given this ethnocentric perspective, shari'a appeared to be – and indeed is still widely regarded as – the prime source of Muslim law. But having dome so, it failed to fit the bill. Its structure – so far as it could be detected – appeared to wholly be chaotic, since failed to distinguish between Canon Law, Civil Law and Criminal Law; similarly it had no clear-cut codes, and no sense of precedents when it came to legal rulings. Hence the 'antics' of the Qazis were dismissed as something out of Alice in Wonderland in an irrational system which was in urgent need of reform.

5. Islamic understandings of contract

But if Europe's Orientalist commentators largely overlooked the key role of *usul-ul-fiqh* and *'urf* in Islamic jurisprudence, not least because it fell, and continues to fall, below their Olympian gaze, it is also worth noting that the shari'a pays a great deal of attention to the institution of marriage, *nikah*. Why should this be so?

In sharp contrast to the Christian tradition, Islam has never been shy of sexuality: rather all adult Muslims – from the Prophet onwards – have been regarded as having a right of access to sexual pleasure in domestic contexts; however this right was also accompanied some specific obligations, not least because families, of which marriage was a key component, was regarded as the keystone of the social order. It consequently followed that so long as the bountiful potential of sexual activity remained untamed, the God-given human capacity for sociality could never be either fully or safely articulated – unless suitably subjected to moral constraints. Moreover in a further sharp contrast with Christian premises, sexual activity has never been regarded as a source of shame, let alone of guilt, always provided that the partners are legitimately married.

Hence the key purpose of the contract of *nikah* – in the course of which both parties took on specific obligations to, as well as rights over each other – was (and is) to socialise sexuality, so replacing potential chaos with social order. Hence *nikah* – just like all other contractual relationships constructed on a similar vein – came to be regarded as an indispensable prerequisite for the maintenance social harmony, and of a crucial component of Allah's creation. This proposition still holds good to this day, which explain why it is that Islamic contexts adults (and especially women) are not only expected to behave modestly in public contexts, but also why it is in sexual activity on an extra-marital basis are routinely regarded a heinous offence which shatters the

very foundations of the social order. As a result the discovery of such relationships still invariably attracts exceptionally severe sanctions.

But if contracts of nikah served to identify, and hence to legitimise, key dimensions of the newly established relationship to which marital partnerships gave rise, it has always been regarded as a civil contract. Hence in sharp contrast with Christian, Jewish and Hindu traditions, marriage has never been regarded been as sacramental in character. But if *nikah* precipitated a change of status for both parties – as was and is the case in all Islamic contractual arrangements – the tie could nevertheless be unwound. Hence the shari'a explicitly recognises the right of a husband to unilaterally repudiate a wife with whose services he had become dissatisfied by pronouncing a talaq, which also required him to transfer the remainder of the *mehr* specified in the *nikahnama* to his divorced wife. Meanwhile a wife was also entitled to seek permission to terminate her marriage in a *khul*, always provided that she could demonstrate that her husband failed adequately to fulfil his obligations towards her; but in that context she would lose the right her claim her *mehr*. Moreover as many ethnographically-oriented commentators have observed, one of the most significant roles of the Qazis was provide unhappy wives with a khul if and when they had been maltreated by their husbands.

What is also notable about these contractual procedures is that they did not need the imprimatur of the state to underpin the agreement's validity. To be sure it was regarded as advisable to call on the services of an 'alim to officiate when the contract was brought into being, if only to ensure that the contents of agreement were recorded in writing in a *nikahnamah*. But in doing so the matter remained a private arrangement which did not require any kind of registration with the state: what ultimately legitimated the contract was not so much the document itself, but it rather the its confirmation of the presence of witnesses drawn from both parties, whose verbal evidence will be called upon should the relationship run into difficulties at some point in the future – precisely in keeping with the expectations of *usul-ul-fiqh* if and when the relationship between the parties should fall out with one another.

All this once again reminds us that the shari'a is in no sense an Austinian legal code. Rather its prime objective is to provide Muslims with theologically grounded guidance as to how they should order their personal behaviour in a manner which is as congruent as possible with that of the ultimate human exemplar, the Prophet Mohammed. But in doing so it nevertheless explicitly acknowledges that as a result of human frailty, some contractual arrangements are bound to come adrift, such space must be found for contradictions to be legally accommodated. Hence procedures for unwinding *nikah* contracts by means of *talaq* and *khul* attract almost as much attention as do the construction of the contract in the first place, although they are also accompanied by admonitions to the effect that such disruptions should as far as possible be avoided, in favour of mediation, arbitration aimed at persuading both sides make concessions to the other in search of some form of reconciliation with can regard as acceptable.

Considered from this perspective, the commonplace European assumption that the shari'a could reasonably be regarded as a confused and rather poorly articulated Austinian code – a view which all too many reformists in Dar-ul-Islam took aboard in their aftermath of their encounters with the premises of the European enlightment – is, and remains, most misleading. This is not to suggest that history should in some way be turned back in order to revive Islamic jurisprudence in all its classical splendour – if only because the both the scholarly and the institutional structure has by now long since disappeared, and it seems most unlikely that it will ever be revived in its original format. But that does not mean, however, that jurisprudence which is characteristically Islamic in style and character has disappeared: rather it still lived on, largely in the form of what can perhaps best be described as 'unofficial' 'urf – if only because the institutions of the Shari'a of which it was once such a crucial component that it have by now all but evaporated.

How, then, does Islamic customary law in the sense manifest itself in the context of the contemporary global order? My own experience suggests that it makes its presence felt in at least two spheres of activity – although there may well be others that I have not come across. In the first place it is as a means of ordering the relationships of reciprocity which underpin the structure of the vast majority of corporately ordered Muslim families, as well the relationships which bind such families together into more or less well organised tribal descent groups; and secondly as the foundation of the coalitions of reciprocity which underpin the logistics of contemporary long-distance transjurisdictional value transfer networks which continue to operate in terms of the ancient Shari'a-based principles of Hawala (Ballard 2013).

Both share wide range of common features. They include: contractually binding networks of mutual reciprocity, such that mutual trust replaces caveat emptor; differences are settled informally by mediation and arbitration, facilitated by senior members of the collectivity in which the dispute erupted, using the cultural conventions of that collectivity as their signposts; litigants speak up for themselves, rather than being represented by formally qualified advocates; a systematic avoidance of formally constituted courts, on the grounds that judges and formally qualified advocates are invariably unfamiliar with their own customs and practices, that trial procedures are lengthy and expensive, and above all because legal proceedings which simply seek to distinguish guilt from innocence routinely ignore the familial repercussions which are precipitated regularly by incarceration, when efforts to identify – and then to re-order – the underlying contradictions can often allow much less collectively damaging outcomes to be negotiated.

6. The survival of customary law in South Asia as well as in its external diaspora

Despite my interest in formal legal processes, as a field-working anthropologist I am primarily accustomed to exploring socio-cultural phenomena from the bottom up, on the basis of which I have conducted extensive ethnographic fieldwork in rural communities in Pakistani Punjab, as well as within the thriving Pakistani ethnic colonies which have emerged in the UK during the course of the past century – and as a result of which I have had plentiful opportunities to observe how my informants set about resolving their inter-personal disputes in both jurisdictions.

With that in mind it is worth noting that Pakistan is a classic example of a post-colonial jurisdiction within which contemporary criminal, civil and codes are still rooted in the Anglo-Indian codes of practice which were brought into force as the British Raj consolidated its hold over the sub-continent a century and a half ago. Indeed Sir Henry Maine not only played a major role in their construction, but and thanks to his influence they were replicated in virtually other British colonial jurisdictions, thereby providing them with rationally codes which sought to summarise the key components of English criminal and procedural law.5 To be sure these codes have all been suitably 'indigenised' by the newly minted jurisdictions which sprang into being after the British departed in 1947, especially with respect to issues of family law; nevertheless the basic structure of the original 1860 codes have been left virtually untouched.

As such these codes remain strictly adversarial as well as strongly Austinian in character, and as such only make a strictly limited range of concessions to the significance of Indic socio-cultural practices, let alone to the significance of the patterns ethno-religious plurality which are, and always have been, such a salient feature of every South Asian jurisdiction, whether the rulers were Hindu, Muslim, Christian or allegedly secular in character. But whilst pre-British rulers invariably left local communities to sort out internal conflicts on their own terms, such that the ruler only intervened with his danda if Panchayats found they were unable to negotiate an equi-

[5] In fact Sir James Stephenson, Maine's successor, went to considerable lengths to persuade the House of Commons to improve legal practice in the UK to utilise his 'Indian' codes as the basis for improving rationalising English Law. However there were too many established English lawyers in the House to let such an initiative pass. Hence all his efforts to persuade the House to implement his Bills failed miserably.

table settlement with which all parties could be satisfied, in the after of 'the Mutiny' (which the indigenous rapidly began to identify as the first war of Independence), India's new rulers decided that they could no longer tolerate this muddle. Hence the construction of the new legal codes, whose premises all District Officers – who were also commissioned as Magistrates – were expected to enforce as a key component of their legal duties.

However unilaterally rewriting the Law on a hegemonic basis is one thing; persuading those subject to such jurisdictional initiatives to take its premises to their hearts is quite another – as many an eager Magistrate soon discovered (Mason 1948). My own much more recent fieldwork confirms that that this is as true today as it was a century ago, no less than in South Asia itself than in the diaspora: wherever one chooses to look, and no matter how the jurisdiction(s) within which they reside may expect them to behave, there is still a strong sense in which the premises in terms of which my informants ordered their personal and domestic affairs remained largely untouched by individualistic premises of the European enlightenment. Nor did they have any confidence that the formally constituted legal procedures implemented through the courts – whether in the subcontinent or the UK – would be capable of resolving their differences on an equitable basis. Instead customary law – in this context identified as riwaj rather than as 'urf – remained the order of the day. Likewise their preferred vehicles for dispute resolution, no less in the UK than in South Asia, routinely took the form of informally constituted 'family meetings', panchayats and jirgas (Chaudhary 1999, Lyon 2004).

But if riwaj consequently provided the source of the normative yardsticks in terms of which the behaviour of all concerned was assessed in such contexts, when I asked my Muslim informants about the source of these yardsticks, they invariably responded that the relevant instructions could be found in the Qur'an. Indeed they invariably regarded such questions as no-brainers: after all they were good Muslims who automatically looked to Qur'an for guidance! But if we approach these assertions from a more analytical perspective, just how can we best assess the significance of these heart-felt assertions?

V. An analytical perspective: 'Family Life' in the context of 'Urf, of the Shari'a and the Qur'an

1. The logic of Shari'a

One of the key themes of the analysis I have set out in this paper is that whilst the premises around which the 'shari'a is constructed takes the form of guidance to individuals, almost all discussion of the structures of mutual reciprocity to which the implementation of this guidance gives rise – or in other words the *de facto* social order – is largely outsourced either to the parochial domain of 'urf, or failing that to the political and administrative domains of *siyasat* and *qanun*. But if that is indeed the case, just where does the key phenomenon of 'family law' fit into this structure?

As Hallaq observes, the contract of *nikah* as specified in the Shari'a does not – at least in principle – generate a community of property between wives and their husbands, let alone as between the couple and their offspring. More strikingly still, the prospect that Islamic families might have any kind of corporate character which might extend over the generations is further undermined by the rules of inheritance set out in the Qur'an, which set out precise instructions as to how the estate of deceased person, whether male or female, should be broken up and apportioned between their various surviving kinsfolk in mathematical shares of half, a quarter, an eighth, two thirds, one third and one sixth, depending on the propinquity of each set of kinsfolk to the deceased. I am in no position to comment on how far, if at all, these comprehensively these strong-

ly anti-corporate premises were ever put into practice across the length and breadth of Dar ul-Islam. What I can readily confirm, however, is that in South Asian contexts these individualistically oriented premises and procedures run entirely contrary popular understandings of the significance of interpersonal patterns of reciprocity amongst kinsfolk, such that riwaj comprehensively trumps the guidance of the shari'a, just as it does in numerous other contexts.

Hence all I can say from an Indic perspective (and I suspect that the same may well be true in many other regions of Dar ul-Islam) corporately structured multi-generational families – based on much the same premises as those which underpin the operation of Hindu joint families – still remain the order of the day in all the Muslim communities in the subcontinent with which I am familiar. There has, however, been one highly significant change: hence while Hindus and Sikhs follow complex rules of exogamy which precludes the prospect of marriage with their immediate kinsfolk, Muslims (the vast majority of whose ancestors were converts from the Hindu tradition) look on the prospect of marriages between cousins with considerable enthusiasm, following the example set by the Prophet insofar as he chose to marry his daughter Fatimah to his nephew Ali bin Talab, who in due course became the fourth *Rashidun Khalifa*.

None of this should come as a surprise in the light of the historical processes which led to the expansion and development of Dar ul Islam. As Hallaq notes

In the context of mediation we noted the importance of self-ruling groups in effecting conflict resolution. Their ability to negotiate and effect mediation was an integral part of the system of self-governance that they developed over time, a system that was embedded in both custom and morality. Furthermore, in the village, often far more remote from direct political control than the city, the dominant group was the extended family, clan or tribe. In the city the equivalent communal groups were mainly the professional guilds and neighbourhoods, which likewise enjoyed a large measure of self-rule, even with regard to security and public order. Once corporately constituted as a clan, quarter or guild, these units came to serve crucial administrative functions, most notably as instruments for governing the local populations (ibid: 203).

All this serves to remind us that whilst Dar ul Islam had its roots in Arabia and the Levant, it expanded with astounding speed to become an Afro-Asian religio-political edifice which soon stretched all the way from *al-Andalus* to the Indonesian archipelago; and although Arabic remained the lingua franca amongst scholars, it was not long before the Muslims speaking non-Arabic languages far outnumbered those that did. In other words whilst the inhabitants of Dar ul-Islam have long been culturally, ethnically, linguistically and indeed religiously plural character, the whole edifice has always been strongly egalitarian in its outlook, particularly, but by no means exclusively, amongst those who have committed themselves to the Shahada. But if Dar ul-Islam has always held an open door to converts, remarkably few of them were driven through such doors by force – regardless of long-standing European assumptions to the contrary. Rather the principal source of recruits to the faith derived from the proselytising activities of Pirs and Sheikhs – Sufi preachers, in other words – whose message was primarily articulated in the enchanted terms of spirituality. In other words Tariqa was invariably the initial route into conversion to Islam, whilst Shari'a followed later – and often much later (see, for example, Eaton: 1993). Indeed the intrinsically plural character of *'urf* actively facilitated these processes: so long as long established cultural conventions could be given a gloss which brought them into congruence with broadly articulated understandings of insaaf set out in the Shari'a, it could readily be accepted as legitimate Islamic practice. Such was the overall structural character of Dar ul-Islam prior to the arrival of European hegemons.

However to the extent to which a multitude of parochial, and hence *'urfi* initiatives provided the popular – and above the autonomous – foundations of Dar ul-Islam, the evaporation of the once thriving institutional resource of the Shari'a has done remarkable little damage to the everyday practice of Islam in a religious sense, or indeed to customary behaviour in domestic contexts:

rather both have continued to thrive to this day. All this stands in sharp contrast to English legal developments, where the Church – and subsequently the State – gradually imposed their hegemony over virtually all forms of jurisprudence, so much so that that English common law has been reduced to a shadow of its former self. By contrast developments in Dar ul-Islam have followed a very different trajectory. Faced with the irruption of European notions of 'modernity', Hallaq is wholly correct in insisting that institutional umbrella of shari'a under whose shadow 'urf both emerged and in due course legitimised itself has by now effectively collapsed. However Islamic law in the wider sense has by no means disappeared. Rather as a result of its encounter with the 'progressive' principles of the European enlightenment, both the making and the administration of Law has effectively passed into a modernised versions of *siyasat* and *qanun*. And although there appears to be little likelihood of the classical edifice of shari'a being reconstructed in the near future, the disappearance of the greater part of institutional umbrella under which the 'common-law' practices of *usul-ul-fiqh* and *'urf* originally sheltered and developed has by no means led to their obliteration. Rather they have not only survived in domestic contexts throughout Dar ul-Islam, but have also begun to be actively reproduced in the overseas diaspora which has recently sprung into existence in Euro-America. If so, what kind of trajectories might the future hold in store, no less for the premises of the European enlightenment than for those of Dar ul-Islam?

2. To what extent have the premises of the enlightenment turned out to be a false dawn?

During the course of the past two centuries the secularly oriented premises of the European enlightenment – in all its many local flavours – have come to occupy a position of global conceptual hegemony, no less amongst members of prosperous elites than amongst political activists – ranging all the way from monetarist conservatives to fiery revolutionaries (Gray 2008, 2009). The legal consequences of these developments are now plain to see: each member of the ever-growing global flock of contemporary nation-states which recently come into being – and who currently identify themselves as 'the international community' – have all begun to commit themselves to yet further enhancing their condition of autonomous sovereignty. Regularly described (and indeed legitimised) as 'homeland security', the result has everywhere led to a steady reinforcement of the jurisdictional powers of the state. In doing so two interlinked concerns have become particularly salient: firstly in the form of border security, aimed at keeping strict controls over the unwelcome strangers crossing jurisdictional boundaries, and above all the prospect of them being granted full rights of local citizenship; secondly, and just as significantly, in the introduction and statutory policies aimed at enhancing the integrity, and above all the homogeneity, of each jurisdiction's distinctive social, cultural and ideological order.

But if the powers of the state are being systematically reinforced in the sphere of 'border control', at the opposite end of the legislative spectrum enlightened liberal democracies are equally busy introducing policies which seek to promote maximise the space within in which individuals can expect to articulate their personal freedom, driven, amongst other things, by the premises of Human Rights. However closer examination of these initiatives soon reveals that their consequences are proving to deeply contradictory: as states grant themselves an ever more draconian legislative and juristic powers, they have found themselves in a position where they are able – on democratic grounds – both to open up ever widening degrees of personal freedom for members of the indigenous majority, as for example in the steady process of change which rendered divorce ever more accessible, followed by the legitimation of homosexuality sexual relationships and ultimately of same-sex marriages. By contrast the experience of members of 'alien' minorities the self-same regime has been quite different. No matter whether they are kinsfolk of established settlers seeking to join their extended families from overseas jurisdictions, or established settlers

and their locally born offspring, such 'aliens' found themselves under ever-increasing pressure to adopt the premises of the indigenous majority, and hence to abandon their own preferred interactive behavioural conventions, even in domestic contexts.

Nowhere are the resultant contradictions more salient than in the sphere of family law, where their kinship-based networks interpersonal reciprocity which provide the foundation of their domestic relationships are being steadily being cast into a position of extra-legal limbo, where they are increasingly vulnerable to finding themselves criminalised on statutory ground. If justification of from draconian initiatives is required, it is invariably suggested that their alien lifestyles, and in particular the extended networks of mutual reciprocity to which they routinely give rise, are either actually or potentially criminal conspiracies, or alternatively that they serve to curtail the rights and freedoms of vulnerable members of the collectivity. Hence, for example, the authorities are currently making considerable efforts to monitor the activities of those who might subject their offspring to forced marriages, who might require them to wear a hijab, who lend each other substantial sums of cash without having prepared written records of their transactions, and/or who engage and informally-grounded forms of dispute resolution, ranging all the way from intimate 'family meetings' to so called 'Shari'a' courts are all finding themselves increasingly vulnerable criminal prosecution.

In making sense of all this, it is worth noting that in all these contexts, it is the informality – or to put it more precisely, the lack of formal contractual agreements to back up the corporate character (in the European sense) of the networks of mutual reciprocity within which these behaviours manifest themselves – which invariably appears to be the ultimate sticking point. In other words it is the newcomers' manifest tendency to resile from any kind of commitment to the premises of personal freedom and unfettered personal individualism embedded at the heart of the European enlightenment. Instead they are for the most part managing to maintain a profound respect for mutual reciprocity and hierarchy, further reinforced by a metaphysical outlook of a kind which Max Weber long ago identified as an 'enchanted' conceptual universe (for an example of its structure, see Chittick 1989). Nothing could be more contrary to contemporary European visions of progress, modernity, and ultimately of rationally grounded individual liberty.

3. On the history of English individualism and the subsequent construction of 'legal persons'

By their very nature families are social constructs. They may be large or small, nuclear or extended, matrilineal or patrilineal, hierarchical or egalitarian, as well as monogamous or polygamous: however in all cases they are grounded in relationships of mutual reciprocity, and hence of mutual trust, as between their members. In northern European contexts kinship did not give rise to corporate families in the Asiatic sense, in sharp contrast to the state of affairs almost all varieties of '*urf* – and indeed in pre-republican Rome. Hence in the common law traditions which developed in northern Europe families were not only expected to be nuclear in character, but ultimately grounded in the inherently temporary relationship (if only because the inevitably of death) established on a contractual relationship between two spouses. Hence succession by heredity, and hence the possibility of constructing more permanently established corporate families stretching over several generations simply did not arise; nor did hereditarily defined clans, for that matter.

Indeed doing so the premises of early English common law with respect to matters of succession and inheritance seem at first sight to remarkably similar to those set out in the Qur'an, and hence replicated in the Shari'a: namely that the assets of the deceased were broken up, rather than being passed on as a whole to a narrow collectivity of heirs. With than in mind the only difference between the two systems is that whilst the Qur'an specifies the many fractions into which the assets of the deceased should be divided as between differing categories kinsfolk, the Anglo-

Saxon tradition included a provision for asset-holders to draw up wills indicating just how their assets should be distributed post-mortem, in which they were under no necessary obligation to make any provisions for any of their offspring. Indeed as Macfarlane (1979) has shown, the inheritance was regularly implemented pre-mortem, when the land of an elderly peasant could be handed over to any successor he might chose, in return for the provision of so many bags of wheat, so many yards of cloth and so forth after each harvest. From that perspective it is clear the conventions of kinship, marriage and descent amongst the indigenes of northern Europe have changed remarkably little over the course of the past millennium. In keeping with the principles of inheritance nominally set out in the Qur'an, but in sharp contrast to long-standing kinship conventions deployed in the greater part of the Mediterranean and Asiatic world, Anglo-Saxon family structures were so weakly articulated that the hardly merited being described as 'corporate' in character. Rather individualism was very largely the order of the day, no less in familial contexts than in commercial and financial transactions..

However as commercial and financial operations became steadily more complex towards the end of the eighteenth century, the creation of collective (and monopolistic) corporate by royal fiat – as was the case for Britain's East India Company, as well as its most immediate competitor, the Dutch VOC – had became severely anachronistic. To remedy this problem a legal fiction of a kind which was initially devised in Roman Law was brushed off and refurbished as a means of resolving this conundrum. The procedure was quite straightforward: if a body of would-be shareholder they drew up appropriately formulated set of articles of association, they gained the right incorporate themselves as a limited company with a legal personality of its own. Having done so, such corporate entities were deemed to have the same legal status – and hence the same capacity to strike contracts with other such persons – regardless as to whether or not the personality in question legal or natural person in character. This development had far reaching consequences: at the outset it led to the emergence of Limited Companies, but by now has supported the construction of vast Transjurisdictional Corporations who still have the status of 'legal persons', even though they are resident located both everywhere and no-where, and with an annual turnover is often many time larger than the GDP of many sovereign states.

However with exception of the Sovereign Investment Funds controlled by the Emirs of sparsely populated statelets with access to vast reserves of oil and gas, corporate behemoths of this kind are remarkably few and far between in almost all sectors of the Islamic world.6 But in jurisdictions where status rather than contract (in Maine's sense) was the order of the day, there was no intrinsic need to engage in fictional manoeuvres of this kind. Given the premises of 'urf, such that persons gained their jural status as a result of fulfilling their obligations to each of the collectivities of which they became members, the networks of mutual reciprocity to which such premises gave rise – and which were by no means necessarily kinship-based – were always and everywhere strongly corporate in character, even if their corporateness appeared to be informally grounded from post-enlightenment perspective. It follows that in sharp contrast to Anglo-Saxon premises identified by Macfarlane, in Dar ul-Islam, no less in the past than into the present, persons were routinely bound into a series of organic communities, which together identified their social status.

Yet despite their ubiquity – for organic communities of this kind are in no way restricted to Dar ul-Islam – there is invariably a source of a great deal of confusion when their existence becomes manifest in contemporary Euro-American contexts, largely on the grounds that those who order their social, and above all their financial transactions act as if they were members of a legally

[6] One of the most notable exceptions to this trend is found amongst the Ismaeli communities based in Gujarat, Bombay and Karachi. However it is worth noting that they are relatively recent converts from the Hindu Lohana caste, who have long been well known throughout the Indian Ocean region for their skills as Merchants, Traders and Bankers.

constructed corporation. This can and does create all sorts of problems. Despite having no right to act as if they had a legal personality, they nevertheless routinely distribute and redistribute their collective assets amongst themselves as and when they choose, often across jurisdictional boundaries, without keeping any documentary evidence of what they are up to. Such activities render them wide open to charges of fraud, and worse still of money-laundering – even though such activities would have been wholly legitimate had they incorporated themselves, thereby gaining a legal personality. If so, the solution to the resultant conundrum might seem at first sight to be quite straightforward: namely to incorporate themselves as a means avoiding suggestions that are ipso facto engaged in criminal conspiracies.

Unfortunately this runs into severe difficulties in English law. Precisely because corporations have the status of legal persons, the natural persons whose contractual arrangements have brought these fictional persons into existence cannot simultaneously be an integral component of that corporate being: the one of necessity stands apart from the other. Hence, for example, the two are separately taxed. Hence current legal practice in Euro-American jurisdictions does not permit families, no matter how small or large, to represent themselves as legal persons, even – or perhaps especially – for tax purposes. It is easy to see why: in post-enlightenment legal systems it is invariably individual adult persons – as opposed to informally constituted kinship groups of one kind or another – which provide the foundations of the social order. Of course clever lawyers can invariably find a way around these obstacles by setting up a free-standing private trust of some sort, preferably located (at least in principle) in the Cayman Islands, thereby establishing a corporate entity which is entirely empty of the natural persons who are in fact its ultimate beneficiaries. However such strategies are invariably extremely expensive.

4. Contrasting understandings of social processes

One of the most salient features of the premises of the European Enlightenment is its marked teleological character. In former times, however, it was routinely assumed that the established order was more or less fixed in character. To be sure both the physical and socio-cultural dimensions of those orders were invariably assumed to be dynamic in character – but in no sense along a linear, let alone an intrinsically progressive, trajectory. Rather the best that could be achieved by human actors in an enchanted universe was the maintenance of the local status quo, given that that very condition was in constant danger of erosion as a result of physical disasters at one end of the spectrum, right through to human turpitude at the other. An 'Enchanted Universe' in other words, in which the premises of the Almighty far outweighed those of mere humans, whose ultimate duty it was to sustain the created order as best they could. By contrast the modernistic premises and prospects let loose in the 'disenchanted' context of European enlightenment could hardly have been more different. Rooted in the Protestant Reformation, which was itself significantly inspired by Christian millenarian eschatology, history came to be regarded linear as well as processual in character. In the midst of all this rational thought was expected to progressively marginalize irrational superstition, and perhaps even morality itself, making ever greater space within which individual liberty could thrust tyranny ever more firmly into the sidelines, thereby opening the way towards an increasingly perfect, as well a more globally uniform, future.

Whilst law in the widest sense was, and still is, an integral component in both modes of articulating socio-political order, it nevertheless plays a markedly different role in each context. Whether we designate we designate the difference between these organisational modes as a arising from the disjunction between status and contract, between *gemeinschaft* and *gesellschaft*, between organic as opposed to mechanical solidarity, or at yet more abstract level, as between 'enchanted' as opposed to 'disenchanted' conceptual universes, in the first instance law is invariably customary and conservative in character. As a result it invariably grounded in the view that the socio-

cultural order is de facto both plural and given, and that the central role of what we can probably best identify as 'common law jurisprudence' is to ultimately sustain, as well as to continually patch up, any stresses and strains which emerge in the socio-cultural order on an equitable basis.
By contrast law in the second instance is envisaged as being much more politically active in character, so much so that it readily emerges as a vehicle by means of which to implement social change (invariably depicted as progress and/or reform), and hence as an instrument of social policy, invariably implemented on a statutory basis from the top down. For convenience sake it is helpful to identify these differing approaches to the same underlying phenomenon as law and Law; moreover to the extent that Austin suggested that Law was always and everywhere articulated from above by a sovereign, it follows that law is of necessity a more ancient phenomenon than Law.
But does that mean that Law was destined ultimately to swallow law – as Maine and many others feared? Or can the two be expected to continue to flourish side by side? That the two can in principle be expected to achieve a modus vivendi in which they complement one another one another is very clear from Hallaq's historical analysis of the classical period, when *qanun* was sharply differentiated from Shari'a, and even more so from '*urf*. However as we have seen, all this appears in principle to have been swept away in the aftermath of its encounters with the 'progressive' premises of the European enlightenment.

5. Current consequences

At one level the ideological assumptions of the European enlightenment have proved to be enormously successful, since its modernistic premises (now in many different flavours) have by now achieved a condition of global conceptual hegemony, so much so that they now underpin the constitutional foundations of almost every contemporary jurisdiction. But as Gray (2008) has rightly emphasised, the utopian dreams embedded in these visions of progress have always been strongly iconoclastic in character, as became clear from 1789 onwards. At the outset these revolutionary visions were largely both secularists and nationalist in character, but in recent years they have become ever more explicitly religiously inspired, right across the spectrum way from the apparently unstoppable rise of the influence of Christian right in the United States on the one hand, and to the current ideological impact of the al-Qaida franchise at the other – as a result of which local Salafi movements have begun to mount ever more serious challenges secularly oriented ex-revolutionary regimes across the length and breadth of Dar-ul-Islam.
The results of all this have proved to be deeply paradoxical. Despite having gained a condition of global conceptual hegemony, so much so that it has effectively spread across the entire political spectrum, in all its various flavours these ideological visions of modernity has begun to present a number of characteristic flaws, whose emergence its original authors largely failed to predict – and which are currently giving their utopian dreams a severe thrashing. Given that their dreams were invariably both ideological and iconoclastic, once efforts were made to put them into practice, their efforts were invariably implemented from the top down, if necessary by force if (as was invariably the case) they encountered popular opposition. As a result they routinely found themselves engaged in exercises of violence as they sought to suppress all the antiquated obstacles of 'tradition' – or of 'false consciousness' as the Marxists used to put it – which stood in the way of progress towards a more utopian and egalitarian future.
As the years have passed, these contradictions have led to disastrous consequences. To the extent at that efforts to implement these reforms were invariably initiated from the top down – if necessary by a 'vanguard of the proletariat' – all too many 'enlightened' regimes constrained personal freedom at least as much as it promoted it liberation, especially when the state and its agencies were constantly rendered more powerful than ever, especially, although by no means exclusively, in 'socialist' regimes. Secondly, and yet more significantly, these liberal ideologies had little or

nothing to say about two further issues: jurisdictional boundaries, and the even more pressing phenomenon of cultural plurality. One can immediately appreciate why: as far as the philosophers of the enlightenment were concerned, national boundaries, no less cultural and religious disjunctions were irrational hangovers from the past, which would of necessity be swept away in a utopian future.

Little did they realise just how inaccurate these prognostications would prove to be. As new and more 'rational' – but ever more centralised – jurisdictions came into being, the easy going responses to plurality which were commonplace in earlier times were swept away as national integrity, and hence national uniformity, became ever more pressing priorities. As this occurred so the establishment of defined borders, together with increasingly draconian controls over the passage of both persons and goods across them became the focus of ever more pressing political concerns. Hence far from precipitating a steady process socio-cultural convergence, what we have witnessed during the past two centuries is a steady closure of ranks within an ever-growing range of increasingly prickly national jurisdictions, each of which has become steadily more concerned about maintaining the integrity of their external boundaries, as well as of the purity of their distinctive socio-cultural characteristics.

Nor has globalisation in any way undermined the vigour of these processes: on the contrary it has reinforced them, no less in Western Europe than in the remained of the globe. As labour migrants from the Global South – the majority of whom were Muslims of rural origin – have emerged 'from below' to establish ethnic colonies in the cities of Euro-America, so a major additional dimension of ethno-religious plurality began to emerge in every local jurisdiction. Moreover their presence promptly opened up a crack in regional tectonics which had been relatively quiescent for the best part of a millennium: namely the disjunction between European Christendom and the world of Dar ul-Islam to its East and South. At the heart of this disjunction was an ideological assumption that even more Judaism, Islam was the antithesis of Christianity, of the European cultural tradition, and indeed of morality itself. As a result members of Europe's emergent Muslim minority soon found themselves facing a double whammy. It was not just that they found themselves subject to intense pressure to assimilate – as did members of other minorities of non-European origin – on the grounds that their alterity was threating to undermine the integrity of the established social order; in addition they also found that any overt manifestation of their Muslim-ness which they might display, whether by covering their heads or constructing minarets, effectively treasonous – on the grounds that it was an explicit challenge to the values of European civilisation (Ballard 2007).

Nor has Dar ul-Islam fared much better in the aftermath of its encounter with the premises of the enlightenment, where the faults have precipitated similar, and in many respects even more serious consequences. In the first place it has allowed its post-colonial rulers to borrow their immediate European predecessors and advisors administrative 'steel frames' to aggregate far more unilateral power to themselves than rulers in the classical period could ever have dream of. But despite the fact rapacious and increasingly violent depredations have begun to promote all manner of revolutionary uprisings, so far, at least, the most successful of these insurrections – whether in the form of the Muslim Brothers, Al-Qaida, the Taliban and indeed in the case of Ayatollah Khomeini's in Iran, the self-same flaws in the premises of the enlightenment have proved to be just socially destructive – if not more so – than parallel developments in Euro-America. It is easy to see why: by bringing Shari'a under direct state control – prospect which was an anathema during the classical period – both rulers, and even more so the revolutionaries, arrogated an unprecedented degree of power to themselves, not least with respect to the behavioural conventions which they now felt they could legitimately instruct all those subject to their rule to obey.

But just what were the conventions which they required them to obey? They had nothing to with the spiritual premises of Sufism, or indeed local premises of *urf*, both which they dismissed as

bida, illegitimate – and hence superstitious – deviance from guidance provided by the Prophet; they also dismissed Euro-American visions of untrammelled personal liberty – most especially in the case of relationships between men and women – as immoral; but nevertheless they borrowed a key aspect of the 'rationalism' which lay at the heart of the protestant enlightenment, name that if one is ever to get to the bottom of a religious text, one should take care to cast aside all the priestly reinterpretations which had been constructed the better to obscure, rather than to illuminate, its true meaning. Instead they should free themselves individual from weight of external oppression by acting as fundamentalists: in other words they should ignore intrusive scholarship, and go back and read off the original text as if it was an instruction manual. The consequence of this 'enlightened' strategy of strict and uncritical textualism, routinely practiced on a 'cherry-picking basis' has almost everywhere proved to be disastrous.

VI. Escaping from ethnocentricity

1. The key issues

But if these developments have precipitated an increasing degree of socio-political chaos, no less within Dar ul-Islam than in Euro-American contexts, the resultant developments, in contemporary contexts the more families order their inter-personal relationships on an unenlightened' basis – such that that they prioritise mutual reciprocity over individual freedom – the more they are likely to find to themselves at the interstice between two radically different conceptual domains: the autochthonous privacy of the domestic group (and of the wider community of which it is a cellular component) on the one hand, and the premises (or Laws) laid down on a hegemonic basis of the wider administrative system of which it is also a component on the other. It is also worth noting that whilst contradictions of this kind are probably a universal phenomenon in the contemporary world, there are few context This inevitable raises a further series of questions: most strikingly, how far, to what ends, and in terms of what criteria should the state and its agencies have a right to monitor, and hence to constrain, its subjects' interpersonal relationships within their otherwise private domestic arenas? With this in mind it is also self-evident that that these questions become ever more pressing in situations where the families in question have recently migrated from jurisdictions in the global South and have established themselves in one or other Euro-American jurisdictions, in which cries of 'one law for all' – most particularly in familial contexts – are being ever more vigorously articulated by members of the dominant majority.

However once viewed from an anthropological, and hence from a comparative perspective, it is quite clear that no matter how we choose to cut the issue, there is no such thing as 'universally applicable' family law, let alone Law. Nor is there any no reason to suppose that there ever will be. Culture, like language, sets the conceptual framework within which we order our everyday transactions in the communities of which we are members, and in that sense it is a vehicle for communication. Hence the less we familiar with the lexicon and the grammar – and in a wider sense the cultural premises – deployed by those with whom we seek to interact, the greater our mutual misunderstanding will be.

But even though there is an ultimate sense the differing cultures and languages are ultimately incommensurate with one another, it does not follow that that there is no prospect of building and crossing bridges between them. To extent that linguistic and cultural codes are learned, rather than being genetically, it is self-evident that we humans can readily learn, and hence learn to communicate in, several of these codes at the same time – provided that we have the opportunity and the will to do so. Moreover as anyone who is bilingual can readily confirm, languages code the world around us

using different criteria. Nor is that all: in doing so they will also begin to realise that each such code has its own strengths and weaknesses, especially when it comes to articulating complex ideas. By contrast hegemonic monoglots who have long since concluded that there is no need to familiarise themselves with their inferiors are acutely vulnerable to the silent pit-falls of ethnocentricity – such that those who ought to know better to fall into the trap of assuming that 'our' cultural premises are *ipso facto* superior than 'theirs'.

Given the specific character of their religio-cultural inheritance, and especially the recent achievements of the European enlightenment on a global scale, Euro-American analysts are in my experience particularly vulnerable to these pitfalls. This is particularly true if they have been bewitched by the positivistic premises and associated conceptual categories generated in aftermath specifically *European* enlightenment are of necessity of universally applicable. No matter how successful these premises may have proved to be in the natural sciences (in which there is much less scope for ethnocentric ideologies to develop), current developments suggest that this is anything but the case in the social sciences despite the fact that established European conceptual categories are all too often turning out to not only to be inherently flawed, but to be clumsy analytical sledgehammers in cross-cultural contexts.

2. Re-writing our analytical vocabulary

As an anthropologist with strong comparative interests, and with such considerations in mind, I have found it extremely illuminating to look beyond the limitations of our own parochial heritage in search of more fine-grained (and above all less unconsciously ethnocentrically grounded analytical categories, the better to engage in comparative analyses. Indeed as I have already sought to demonstrate, logic of what is all too often assumed to be a singular edifice of 'Shari'a Law' can me much better appreciated if it is disaggregated into four distinctive, but nevertheless comprehensively inter-related, components.

a. Deconstructing 'religion'

However this is not the first time I have sought to engage in an exercise of this kind.. As can be seen from Table 1 below, in the light of my ethnographic observation of religious belief and practice amongst Sikh, Hindu and Muslim communities in Punjab, I set about constructing a comprehensive analytical framework which would serve to comprehend the multiple dimensions of 'Religion' into which the beliefs and practices I had observed within all three communities could be conveniently be classified, not least in terms of the various functional purposes which each of these dimensions served (Ballard 2011b, Ballard 2000).

I should also add despite making this diversion into matters of religion in course of summing up a paper which id primarily devoted to matters of law, there is nevertheless method in my madness. In the first place the figure below provides a convenient means of highlighting the logic of my preferred analytical methodology, and in the second it provides a convenient means of identifying the distinctive way in which issues of 'religion' intersect with 'law' in Dar ul-Islam, no less in classical than in contemporary contexts.

As can be seen from the Table below, I have not only avoided using the term religion the first in column, even though all these five dimensions can – as the second and third columns confirm – can in some sense or other be interpreted as such. But to the extent that the European concept of 'religion' consequently reveals itself as a sledgehammer, and an ethnocentric one to boot, I have devised an alternative set of carefully defined analytical categories, all of which I deliberately labelled using terminology drawn from non-European/non-Christian sources, to identify the key distinctions which I have set out in the central column of the table – which in my view may well prove to be more or less universally applicable.

Secondly, and more importantly still in this context, in this version I have also taken the opportunity to add final column to my model, in which I have 'translated' the three broadest categories 'religion' which to which this model identifies can be mapped onto the key threes socio-religious categories around which I would suggest Dar ul-Islam has been constructed: *Tariqa*, its spiritual and philosophical dimension, Shari'a, its principal source of ritual, social and behavioural advice, and finally *Siyasat*, politics, which has emerged as the sphere of governance and hence of q*anun*.

Sphere of Activity	Significance	Definition	Euro-Domain	Islamic Domain
Panthic	Spiritual/ Gnostic inspiration	The ideas and practices deployed by those in search of spiritual and mystical inspiration, invariably under the guidance of a Spiritual Master (e.g. *Pir, Yogi, Sant, Swami or Guru*)	Spiritual/ Occult	*Tariqa*
Kismetic	Occult/ Making sense of the world	The ideas used to explain the otherwise inexplicable, and the occult practices deployed to turn such adversity in its tracks; both are usually deployed with the assistance of a Spiritual Master.		
Dharmic	Morality/ Social order	The moral ideology in terms of which all aspects of the established social and behavioural order is conceptualised and legitimated.	Social	*Shari'a*
Sanskaric	Rites of passage/ social reconstruction	The set of ritual practices – and most especially those associated with birth, initiation, marriage and death – which celebrate and legitimate each individual's progress through the social and domestic order.		
Qaumic	Political/ Ethnic mobilisation	The use – and more often than not the reinterpretation – of religious ideology as a vehicle for collective social and political mobilisation. The typical outcome of this process is that an increasingly clearly defined body of people begin to close ranks on a morally sanctioned basis the better to pursue shared social and economic objectives	Political	*Siyasat*

Table 1: Five (potentially universal) dimensions religious activity as observed in Punjab

b. Deconstructing Law

However my central concern in this paper is not so much to de-construct 'religion' – although that is undoubtedly an underlying component of my argument – but rather to perform the same kind of exercise with respect to the phenomenon of law. However in this case my objectives are considerably less far reaching, since I make no claims – at least at this stage – that the categories I have identified are universally applicable, since at this stage my analysis is restricted solely to an initial exploration of the parallels and differences as between the premises in which post-Austinian jurisprudence has been founded as compared with those which underpinned its classical Islamic visions of law and jurisprudence, as well as the impact which the former has had on the latter during the course of the past two centuries. It is with precisely these considerations in mind that I have drawn up the table below.

Sphere of Activity	Significance	Articulator	Practice	Domain	European legal parallels
Qanun	*Administrative directions*	*Sultan, Emir*	*Siyasat*	*Politics*	*Statutory Law*
Shari'a	Moral and Spiritual Guidance	'Ulema, Maulvi, Pir	Tabligh	Personally directed behavioural advice	Canon Law
Usul ul-Fiqh	Jurisprudence	*Qazi*/Elders	*Jirga, Panchayat, etc*	Dispute settlement	i. Restitution ii. Incarceration
'Urf	Local cultural premises and practices	*Buzorg*, Elders	Riwaj	Custom	Common Law

Table 2: Differential dimensions of 'Law' in Islamic contexts

As we have seen, one of the most salient features of classical Islamic law, and most especially of the Shari'a, is that its implementation was largely independent of the state. This was not because Islamic law emerged in the absence of powerful centralised states. Quite the opposite. Rather it was because the structure of Islamic governance fell into the field of *siyasat*, politics, and its activities were primarily administrative, and hence fell into the legal category of *qanun* rather than Shari'a. But to the extent to which Shari'a, the interpretive field of *usul ul-Fiqh* and customary *'urf* were all in consequence largely autonomous of the state, and directed much more toward dispute settlement and the equitable restoration of the established social order at a communitarian level, they relatively rarely trod on the toes of the Emir's *qanun:* indeed it was only when these processes of dispute settlement failed that to sort matters out that the Emir might be persuaded to intervene from above to settle the matter in keeping with his administrative duties.

Two further points stand out in the midst of all this: firstly, given the central significance of *'urf* in the process of *usul ul-Fiqh*, the classical Shari'a tradition was as fluid as it was adaptive to local circumstances; secondly, when considered from a contemporary European perspective the classical edifice of the Shari'a can usefully be regarded as being rooted in what might be identified, if somewhat crudely, as a melange of Cannon and Common law. However in comparative terms the one of the key feature of this structure is personal law, which rapidly crystallised as *'urf*, was autochthonous in character, and in no sense directly open to state interference; and whilst the sovereign was a powerhouse in direct charge of governance, and hence of *qanun*, Law in the Austinian sense, his behaviour was still subject –at least in principle – to the premises of the *shari'a*.

3. The demise of the classical structure of the Shari'a

However Hallaq has made it abundantly clear, in the aftermath of two centuries of European Imperial expansion, by the middle of the twentieth century – by when all the many components of Dar ul-Islam had at long last escaped from the clutches of European hegemony, the Shari'a in its classical sense had at best been reduced to a fragment its former self, and at worst, structurally speaking, to a nonentity, largely as a result of its encounters with the 'modernising, 'rationalis-

ing' and above all the allegedly progressive premises of the more firmly secularly oriented visions which had been promulgated globally in the aftermath of the European enlightenment.

This certainly did not mean that Dar ul-Islam had evaporated: rather it had been radically transformed, in a manner which can readily be appreciated with reference to the two interlinked models which I have laid out above. The core of Hallaq's argument, as I understand it, is that in the course of the steady rise of European political and intellectual hegemony during the course of the past two centuries, the intellectual core of Dar ul-Islam – in other words the Shari'a and all its works – was steadily shredded, largely as a result of the success of European missionaries in rolling out an alternative educational system, without access to which members of indigenous elites in colonised jurisdictions could not hope to retain their position in the newly emergent Imperial order. As a result members of established elites in almost every jurisdiction which was subjected to European hegemony – and indeed in virtually all of the remaining jurisdictions which managed to avoid that fate – took steps to ensure that their offspring gained access to 'modern' forms of education, since that was manifestly the only way in which they could hope to compete on level ground with their new-found hegemons.

However this relatively rarely led to the conversion to Christianity which the missionaries so fervently hoped to achieve; and even when that did indeed occur, converts frequently began to re-read the bible in their own, often Pentecostalist and hence liberationist terms. However this kind of re-reading of a pre-existent code was by no means restricted to nominally all-out converts. Similar rereading also began to emerge those who resisted conversion, not least in an effort to counter their new-found hegemons' constant arguments to the effect that their own indigenous behavioural premises and practices were inherently backward, primitive and irrational. As a result an ever larger proportion of the rising educated generations became ardent reformers – in which they at least partially accepted the force of the arguments directed at them by their allegedly more enlightened teachers. Nevertheless they rapidly became aware that their proselytising activities were also intrinsically hegemonic in character, with the result that they largely refused to take the medicine wholesale. Instead they sought to 'modernise' those parts of their heritage which their critics found most egregious – typically by making strenuous efforts to bring it into conformity with the European enlightenment, whilst still preserving the metaphysical essence of their tradition.

The structural consequences of all this are now plain to see, especially in Islamic contexts. As elites throughout the Islamic world steadily turned their back on Islamic scholarship in favour of more 'modern' and 'progressive' education, and as financial support for the institutional foundations by the state fell away, so the developments which Hallaq so vigorously laments became steadily more salient. But this did not spell the end of Dar ul-Islam, no matter how much damage may have been by the virtual collapse of vast scholarly enterprise which had once underpinned the operation of classical *Shari'a*, which had hitherto been one of the two keystones which underpinned the whole edifice. But although the reformers also did their best to dismiss Tariqa, the spiritual and metaphysical dimension of Islam, on the grounds that its many stands could safely be dismissed as 'irrational superstition' which had no place in a more enlightened vision of Islam, the spiritual core of the Islamic tradition still retains an enormous following, no less among intellectuals than amongst ordinary folk; likewise the customary sphere of *'urf* , of which the reformers were equally critical on the grounds that its premises deviated from the principles laid down in the Qur'an, remained largely untouched at a popular level – and hence also continues to thrive until this day.

4. The emergence of neo-fundamentalist interpretations of Islam

Nevertheless the collapse of Shari'a as it was originally conceived had far reaching implications, for its influence still remained even as it was subjected to radical reinterpretation, whose dynam-

ics can be readily appreciated if approached bearing in mind the conceptual distinctions with the sphere of both 'religion' and 'law' which I have set out in my models above.

As far as developments in the field of religion are concerned, Tariqa has remained as vital as ever in both intellectual and popular contexts; the spiritual and meaning-and-purpose generating dimension may have been pushed underground by the politically minded reformists, but it has most certainly not faded away into oblivion in the manner which the rationalists once assumed would be inevitable. Meanwhile at the other end of the spectrum the use of religious ideologies as a vehicle around which to build *qaumic* mobilisation has increased by leaps and bounds. This phenomenon has in no way been specifically Islamic: on the contrary there are excellent grounds on which to suggest that western European Christians were amongst the earliest articulators of this tactic, when they released a series of Crusades to remove the Muslim infidels from 'their' Holy Land. But although the Crusaders did not manage to hold Jerusalem for much more than a century, this in no way brought the European Holy War to an end: rather it gradually morphed into a vision of *conquistadores*, who were prepared to use force to in order to introduced infidels all around the globe to the teaching of Jesus Christ. But whilst this vision of religiously legitimated conquest did not survive the enlightenment, it did not disappear. Rather it morphed itself once again into a strictly ideologically grounded exercise aimed at conversion, implemented by a huge army of Missionaries who spread out in the territories over which the European powers had established their hegemony.

This is no place to discuss the many facets of the missionary exercise; my reason for doing so at this point lies elsewhere. Looking at the issue from the other side of the fence, one of the most salient features of Euro-America's post-enlightenment Imperial adventures is that they were all deeply ideologically grounded – ultimately on a strongly *qaumic* basis. Moreover as Isaac Newton long ago observed, "To every action there is an equal and opposite reaction", a point which is just as salient in processes of socio-political mobilisation as in the laws of motion. Moreover when such processes are *qaumic*, and hence ideological in character, the subalterns frequently borrow the premises of their hegemons, only to stand them on their heads. Indeed that, I would suggest, has been precisely the fate of the *Shari'a.* However in doing so it is not so much that the Shari'a itself which has been upended, but rather that its premises have been shifted by the reformers into an alternative location in the socio-political spectrum: in a word it has been systematically recast as *Qanun*.

The Islamic reformists were by no means alone in undertaking this exercise, and it is easy to see why they took it. In need of an ideological vision with which to trump their hegemonic premises, and in order to do so on indigenous, as opposed to alien, premises, they re-wrote – and are continuing to re-write their indigenous premises in such a way as to establish an upside- down mirror image of the ideological premises of their opposite numbers. As a *political* manoeuvre such a strategy is highly effective, if only because the upside-downers on both sides of the chasm regularly come to the conclusion that the anger and contumely of their opponents only serves to underline the righteousness of their own position. If ever the 'rational' premises of the European enlightenment had had a systemic downside embedded in its core, it is in its capacity – currently manifested in all it appalling glory – to precipitate such processes of *qaumic* polarisation. Indeed the disease is becoming increasingly infections, not least within Dar ul-Islam itself. If these processes were originally set off as a result of encounters with the premises of the enlightenment on the basis of which their new-found European hegemons sought to legitimise their activities, after many adventures – in which the ancient Christian/Muslim bifurcation still plays a salient role – two even more serious sets of polarisations have recently emerged: those between the antics of the increasingly violent Salafi neo-fundamentalist on the one hand, and the vast majority who remain committed to more ancient, and far more popular interpretations of spirituality and custom, and secondly the even more violent confrontations which have more recently arisen as between rival neo-fundamentalist, as can currently be witnessed as between Sunnis and Shi'as.

5. Is there a way out? On babies and the bathwater

The philosophers of the 18th Century enlightenment insisted that they had identified the only meaningful route towards a better, more perfect and above all a more rational and 'scientific' future in which individuals would have access to ever greater levels of prosperity and freedom

- under the protection of a benign democratic state
- whose Parliament would draw up legislation on rational, and in that sense on an Austinian basis
- which would serve to protect and sustain human the rights of all those subject to its jurisdiction

Two further premises also lay behind these assumptions:

- That the ever-growing impact of scientific rationality would ensure that archaic and irrational cultural differences as between jurisdictions would rapidly be eroded, and would eventually disappear
- That all restraints on personal freedom imposed by parochially oriented collectivities (other than those actively sanctioned by the state) would inevitably face a similar fate

One can only admire these idealistic premises. But how far have the teleological expectations which underpinned them actually been fulfilled in the contemporary world order? Given the analysis I have set out in this paper many aspects of these premises are proving to be deeply flawed, no less with respect to developments which have recently taken place in Dar ul-Islam than in contemporary Euro-American jurisdictions. But despite the serious character of the flaws which have consequently emerged in both kinds of jurisdiction, in no way do we need to start over from scratch – an impossibility even at the best of times, if only because every cultural system follows its own dynamic. But if that is indeed the case, and a re-think is indeed and urgent priority, it is vital to ensure that we preserve the resources of each respective cultural baby, whilst carefully discarding the unhelpful bathwater. However it is not just that both the baby and the bathwater have strikingly differing characteristics in the two conceptual arenas on which I have focused, such that both call for differing remedies; rather I would argue that far from engaging in a conceptual version of ethnic cleansing, both systems can benefit a great deal from borrowing from the other – always provided that they make the appropriate right choices in the course of so doing.

6. Flaws

If only to contain the scope of my analysis, in the concluding section of this paper I have chosen to restrict my analysis to a consideration of two very different, but nevertheless particularly egregious socio-cultural crises which are currently such a salient feature of the contemporary global order, and to which no coherent solutions have so far been articulated

- Why is it that the moral foundations the social, economic and above all the familial premises in terms of which the indigenes of Euro-America routinely order their affairs have recently descended into a chaotic mess?
- And why are parallel efforts (albeit in the reverse direction) to "enforce the shari'a" as if it was some kind of authoritative

Austinian code proving to have equally disastrous (although differently structured) consequences in Muslim contexts?

In my view there is a strong sense in which the contemporary flaws in each context are intimately connected, albeit in an antithetical sense, since they flow, in each case, from key premises embedded at the core of the enlightenment. However in doing so I also wish to suggest that a powerful remedy for those flaws has always been present as a key feature of the jurisprudential premises embedded in the Shari'a – always provided it is read in the classical sense rather than viewed through a post-enlightenment prism as *qanun*.

With this in mind one of the most salient features of the enlightenment perspective on human affairs is that although it promises a maximum degree of liberty to citizens within any given jurisdiction, and consequently seeks to sweep away all sorts of hierarchical constraints – including, once pressed hard enough, the institution of the family itself – in no way does it promote anarchy. Hence whilst the philosophers who responsible for the construction of the edifice were hostile in the extreme to hereditary monarchs, they routinely assumed that a powerful state must be ready and willing to guard the individual rights of the citizens of any given jurisdiction, as well as the integrity of the spatial and ethnic integrity of the nation state which was the very foundation of the jurisdiction itself. In other words this was the antithesis of anarchy: having swept away hereditary monarchs, it replaced them with unprecedentedly powerful, but still-sovereign, nation-states.

Of course they also presumed this power would routinely be constrained by democratic processes, a vital element in all such systems. Nevertheless there were still a number of large flaws in the ointment, which soon began make themselves felt as soon as its premises were brought into practice. Some of the most egregious can readily be identified. They included:

- Who could properly be identified as a citizen? Women? Slaves? Children?
- Who could properly be identified as a member of the nation state? Minorities? Immigrants?
- How should the interests of minorities be adequately represented in the National Assembly – if indeed he those who stood outside the magic circle deserved to participate at, all?
- Should there one set of laws for all citizens – which members of all such minorities would consequently be required to respect and obey?
- If a central function of the state is to promote the freedom and liberty of those subject to its jurisdiction, to what extent should its agent intervene in 'family life' in cases where interpersonal relationships between its members are so strongly hierarchically structured that its junior-most members deserve to be liberated from the hegemony to which they are subjected.
- And if untrammelled individualism consequently becomes the order of the day, what is to prevent all forms all forms of mutual solidarity steadily falling apart, with exception, perhaps, of a *qaumic* sense of hostility to all aliens.

As ever, well-meaning efforts to implement social engineering can often have disastrous consequences – most especially when the arena within which the project of 'improvement' is implemented is ethnically and religiously plural in character.

What though, about developments in Dar ul-Islam? Had the nineteenth and early 20th century reformers been more aware of the prospects that they, too, might run into just the same disasters if they adopted the premises of the European enlightenment – even if they took the precaution of doing so on what I have described on an upside-down basis. However in doing so they overlooked just how destructive the Enlightenment's iconoclastic vision of untrammelled personal freedom as a 'natural' – and in that sense a God-given – right could be in what we have come to describe as the 'modern' era.

7. Potential Solutions?

So is there any alternative to such 'rational' assumptions? Reflecting on these issues nearly a century ago, Max Weber drew a distinction between those societies – most of which were located in the past – whose conceptual orders were grounded within an 'enchanted' universe, as opposed to the 'disenchanted' universe he saw growing up around him. Little did he know that he was only standing on the edge of a massive conceptual shift, since there can be little doubt the conceptual universes which can be found in the contemporary global order are far more 'disenchanted' – and in that sense individualistically oriented – than they were in his day.

However the more we explore the pre-modern era, the more stable, the more equitable, and above all the meaningful the conceptual orders of our pre-enlightened past turn out to be, no matter how much the value of its resources may have been side-lined by our contemporary visions of progress and modernity. That is in no way to suggest that the past was *ipso facto* 'more perfect' than the presence above all because I know of no yardstick against which such a vision of perfection can be measured. Rather it is simply to observe that the 'enchanted universes' construct in the past after a great deal to teach us in the increasingly chaotic present.

With that in mind, Islam in its pre-modern form has a great deal to teach us, no less spiritually than socially. At a spiritual level Islamic mystics such as Ibn 'Arabi have built on the resources of the Qur'an on the one hand, and Greek, Jewish and Christian theology to build what best be identified as a veritable palace of an conceptually grounded enchanted universe, whose influence has spread to every corner of Dar ul-Islam, where it still remains influential to this day. Meanwhile the behavioural and socio-cultural sphere the premises of Shari'a provide an advisory map – based once again on the resources of Qur'an and the Hadith – on the manner in which believers can seek to bring all aspects of their personal lifestyles into the closer and closer conformity with the premises of Allah's created universe, of which we are all an integral part.

But however personalised that advice may be, it is a great mistake to assume that it is individualistically oriented: just as all *insaan*, human beings, in other words, are integral parts of Allah's creation, and indeed the most perfectible components of what can best be described as an enchanted universe, so they are also integral parts of the social universe which they consequently create around themselves. However a further message which pervades the Qur'an, and which is constantly reinforced in the Shari'a, is the huge significance of *insaaf*, social justice. Hence whilst the greater part of the behaviour dimension of the Shari'a deals with matters of contract, and most particularly with *nikah* as the contractual foundation of the family, and hence the keystone of the entire social order, its vision of the implications such contracts could hardly be more different from that which be more different from that which developed in Western Europe, and consequently became embedded in the premises of the European enlightenment.

For Muslims, *insaan* are no sense born 'free'. Rather they arrive as part and parcel of Allah's created universe, which – certainly from a Sufi perspective – is a manifestation of Allah Himself. As such *insaan* are born not so much with rights, but rather with obligations to the Creator – and hence to His

created universe, which of necessity includes the social order which *insaan* of all kinds, have built around themselves. Hence Islamic contracts are in no way a one way bet: rather they are grounded in obligations which give rise to counter counter-obligations: in other words they are in no way a one-way bet, in which the free-ranging premises of *caveat emptor* are the order of the day. Hence the Shari'a – and especially its localised conventions of '*urf* – have always encouraged the growth of networks of mutual reciprocity, and hence of mutual trust, in all familial and commercial contexts. It also followed that in such contexts the application of law was much more a matter of dispute resolution, and the reconstruction of the social order on an equitable basis, rather than the imposition of sanctions such as incarceration on the person deemed to guilty party: on the contrary the most powerful sanction against malfeasance was the prospect that the community as a whole might cast the offender aside, by excluding him (or more unusually her) from the networks of reciprocity of he had hitherto been an integral part.

Moreover in these circumstances, as we have seen, the state plays a far less salient role in everyday life than it does in post-enlightenment contexts: rather the social order was instead composed of a plurality of internally-coordinated self-governing communities, in which the Emir only intervened to knock heads together if matters got completely out of hand. With such considerations in mind I am not seeking to suggest that the Shari'a can necessarily be restored in its classical sense. Indeed I think that is most unlikely. However what we can do is learn from our mistakes, no less in Euro-America than in Dar ul-Islam, by backing away from the flawed dimensions of the premises of the enlightenment in order to produce a more stable, and above a more equitable, moral, economic, familial and spiritual order, which feels far more comfortable with the prospect of plurality than is currently the case in so many contemporary jurisdictions – and most especially in those located within the borders of what remains of a 'modernised' Dar ul-Islam. .

Bibliography

Ballard, Roger 2013 "Hundi, Hawala and 'Islamic Banking': remittances, credit and finance in the Diaspora" in *The Routledge Handbook of South Asian Diasporas*' London: Routledge

Ballard, Roger, 2011a, "Honour Killing? Or just plain homicide?" in Holden, Livia (ed) *Cultural Expertise and Litigation: Patterns, Conflicts, Narratives* London: Routledge p. 124 - 147

Ballard, Roger, 2011b "The Re-establishment of Meaning and Purpose: *Mādri* and *Padre Muzhub* in the Punjabi Diaspora" in Olwig, Karen (ed) *Mobile Bodies, Mobile Souls: Family, religion, and migration in a global world* Aarhus: University of Aarhus Press p. 27 - 53.

Ballard, Roger 2010 "Three Phases of Globalisation: the significance of Dubai's emergence as a trading hub" in Pieterse, Jan (ed) *21st Century Globalisation: Perspectives from the Gulf* Dubai: Sheikh Zaidi University 39 - 71

Ballard, Roger 2009 "Human Rights in Contexts of Ethnic Plurality: Always a Vehicle for Liberation?" in Grillo, Ballard, Ferrari, J. Hoekema, and Shah (eds) *Legal Practice and Cultural Diversity* Aldgate

Ballard, Roger 2007 "Living with difference: a forgotten art in urgent need of revival?" in Hinnells, J (ed) *Religious Reconstruction in the South Asian Diasporas: From one generation to another* London: Palgrave Macmillan 2007

Ballard, Roger 2006 "Popular Islam in Northern Pakistan and its Reconstruction in Urban Britain" in Hinnells and Malik (eds.) *Sufism in the West* London: Routledge

Ballard, Roger 2003 "The South Asian Presence in Britain and its Transnational Connections" in Singh, H. and Vertovec, S. (eds) *Culture and Economy in the Indian Diaspora*, London: Routledge

Ballard, Roger2000 "*Panth, Kismet, Dharm te Qaum*: Four dimensions in Punjabi Religion" in Singh, Pritam and Thandi, Shinder (eds.) *Punjabi Identity in a Global Context* Delhi, Oxford University Press,

Chaudhary, Muhammed Azam, 1999, *Justice in Practice: The legal ethnography of a Punjabi village* Oxford University Press

Chittick, William 1989 *The Sufi Path of Knowledge: Ibn Al-Arabi's Metaphysics of Imagination* State University of New York Press

Durkheim, Émile 1984 [1893] *The Division of Labour in Society* The Free Press

Eaton, Richard, 1993, *The Rise of Islam on the Bengal frontier 1204 – 1706* University of California Press

Gray, John 2009 *False Dawn: The Delusions of Global Capitalism* Granta Publications

Gray, John 2008, *Black Mass: Apocalyptic Religion and the Death of Utopia* Penguin Books

Gray, John 2000 *Two Faces of Liberalism* Polity Press

Hallaq, Wael 2009 *Shari'a: Theory, Practice, Transformations* Cambridge University Press.

Lyon, Stephen 2004. *An anthropological analysis of local politics and patronage in a Pakistani village* Lampeter: Edwin Mellen Press.

Macfarlane, Alan 1979 *The Origins of English Individualism* Cambridge University Press

Maine, Henry, 2008 [1862] *Ancient Law* Read Books

Mahmood Mamdani, 2004 *Good Muslim, Bad Muslim: America, the Cold War, and the Roots of Terrorism*, New York: Pantheon,

Mantena, Karuna 2011 *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* Princeton University Press.

Mason, Philip 1948 *Call the next Witness London:* British Publishers Guild

Oberoi, Harjot 1994 *The Construction of Religious Boundaries: Culture, Identity and Diversity in the Sikh Tradition* Delhi: Oxford University Press.

Roebuck, Derek 2008, *Early English Arbitration* The Arbitration Press

Rosen, Lawrence 1989 *The Anthropology of Justice: Law as Culture in Islamic Society* Cambridge University Press

Said, Edward 1978 *Orientalism* Vintage Books

Weber, Max *Science as a Vocation* Indianapolis: Hackett 2004 [1919]

Wormald , Patrick 2001 *The Making of English Law: King Alfred to the Twelfth Century: Legislation and Its Limits* Oxford: Blackwells

Legal Framework for Islamic Banking and Finance in Nigeria

by Dauda Momodu Esq.

I. Introduction: A Review of the Relevant Provisions in the CBN Act and the BOFIA

The promulgation of Central Bank of Nigeria (CBN) Act and the Banks and Other Financial Institutions Act (BOFIA) was a landmark a development as it attempted to confer some measure of autonomy on the CBN to effectively carry out its core mandate. But the financial system continued to witness rapid reforms and developments which challenged the legal framework of the CBN. Significant of such developments are the transfer of the supervision of specialized banks to the CBN, global war on economic crimes, unprecedented bank failures associated with weak internal controls, reform of banking industry and the entire economy, adoption of Universal Banking in Nigeria (Legal Services Department, CBN, 2011). These developments made a complete review of the existing legal framework necessary.

New measures were proposed for strengthening the CBN which became embodied in the CBN Act of 2007.

The Central Bank of Nigeria Act, 2007 signaled a new era of massive economic reforms in Nigeria. It gave more autonomy to the CBN in carrying out its financial regulatory functions according to international best practices. One of such functions is the supervision and regulation of the non interest banks (NIB) in Nigeria.

> It is noteworthy that the provisions in the CBN Act and the BOFIA have laid a legal foundation for non interest banking in Nigeria. It is in pursuance of this that the Bank issued certain guidelines pursuant to some relevant provisions in the CBN Act and the BOFIA. Section 33(1)(b) of the CBN Act 2007 provides:
>
> *33(1) In addition to any of its powers under this Act, the Bank may –*
> *(a)…*
> *(b) issue guidelines to any person and institution under its supervision*

In this bid, the CBN issued a draft framework for the regulation and supervision of non-interest banks in Nigeria on March 4th, 2009 (Legal Services Department, CBN, 2009). This was in response to the increasing number of investors as well as banks and other financial institutions desiring to offer Non-interest products and services (Legal Services Department, CBN,

2009). The document was issued as an exposure draft for comments, suggestions or inputs from the public. This step signified an important move to reorganize the legal framework of NIB in Nigeria.

One salient provision is section 23(1) of the BOFIA which compels every bank to display its lending and deposit interest rate and render information on same to the CBN. This section however has a proviso which excludes the NIBs from being bound by this section, thereby allowing non interest banking institutes to operate in Nigeria without the restrictions occasioned by that section. BOFIA further empowers the governor of the CBN to exclude the NIBs from being bound by the provisions of the BOFIA (Section 52) and to make rules and regulations for the operation and control of all institutions under the supervision of the Bank (Section 55(2)) including specialized banks (Section 59(1)(a)). Subsequent to these provisions, on January 13th, 2011, the CBN released the "Framework for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria" later to be followed by the "Guidelines for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria" on 21th of July, 2011.

The legal framework of NIB in Nigeria also includes the relevant provisions contained in the Companies and Allied Matters Act 1990 (as amended) as it relates to the incorporation of a company (a bank), as well as section 4(1)(c) of the "Regulation on the Scope of Banking Activities and Ancillary Matters, No. 3, 2010" which defines specialized banks to "include non-interest banks".

This work examines the legal framework of Islamic finance system in Nigeria against the backdrop of the novelty of Islamic banking in Nigeria. It identifies the fragility of the current legal framework as it stands against a number of contemporary banking challenges. The work also does a contemporary analysis of other jurisdiction where Islamic banking and finance has been flourishing side by side interest-operating banking and finance system. This essay finally advocates the need for a more vibrant and effective legal framework that meets the peculiarities and idiosyncrasies of the Nigerian financial market.

II. The Nigerian Banking Industry

The Nigerian banking industry is made up of commercial banks which are deposit money banks, development financial institutions and other financial institutions which include microfinance banks, finance companies, bureau de changes, discount houses and primary mortgage institutions.

Numerically the industry consists of 24 commercial banks, 5 discount houses, 5 development finances institutions, 50 class A bureau de change, 598 bureau de change, 98 Primary Mortgage institutions, 84 finance companies and 914 Microfinance Institutions (International Corporate Research, 2010).

The Nigerian banking industry is highly regulated because of its complexity. Its operations are regulated by the following statutes:

- The Central Bank of Nigeria (CBN) Act (2007)
- Banking and Other Financial Institutions Act (BOFIA) 1991 as amended
- Nigeria Deposit Insurance Corporation Act (NDIC) 1988
- Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, 1994
- Money Laundry Act, 1995
- CBN Prudential Lines, as well as any other Monetary, Foreign, Trade and Exchange Policy circulars that may be issued by the regulatory authorities from time to time.

The key regulators are the CBN, NDIC and the Securities and Exchange Commission (SEC). The CBN is solely responsible for the formulation of monetary, credit and exchange rate policies and plays overall supervisory and regulatory role for financial institutions in Nigeria. It is directly responsible only to the National Assembly and has the authority to grant or withdraw licenses for all financial institutions under its supervisory jurisdiction (FSDH, 2011).

The Nigerian banking industry witnessed a major recapitalization and consolidation in 2004/2005 to a minimum of N25billion in asset base and the consequential financial innovations generated an unprecedented degree of expansion and competition in the industry. The consolidation pivoted powerful incentives for the expansion of the size of banking institutions (Dominic E. Obozuwa, n. d.).

As part of its initiative to reform the Nigerian financial system, the CBN, in compliance with the provisions of BOFIA as amended, has in 2010 reviewed its universal banking policy. In 2002, the CBN had authorized banks to engage in non-core banking financial activities either directly as part of banking operations or indirectly through designated subsidiaries (Samuel A. Oni, 2010). Thus the CBN directed the discontinuance of the issuance of universal banking license and licensed banks to perform the following types of business:

- Commercial banking (regional, national and international authorization)
- Merchant banking
- Specialized banking (Microfinance banking, Mortgage banking, Non-interest banking(regional and national) and Development Finance Institution)
- Prohibit banks from undertaking non-banking activities.

It is of note that among the categories of banking permitted by the CBN during this reformation is the non-interest banking (Islamic banking). According to section 4(4) of the Regulation on the Scope of Banking Activities and Ancillary Matters, No. 3, 2010, the non-interest banks referred to in section 4(1)(c) may be authorized by the CBN to carry on banking business on the regional or national basis in accordance with rules, regulations and guidelines on licensing authorization, operation and conduct of business that the CBN may issue from time to time.

III. Absence of Regulatory Clarity

Nigeria is one of the countries with a growing interest in Islamic banking especially as it is gradually becoming obvious that Islamic banking is a banking idea that can be of immense benefit to players irrespective of their religious persuasions.
But for highly regulated industry like banking, the link between regulatory clarity and industry performance should not come as a surprise as there are many benefits of having a customized regulatory framework. Experience shows that in countries where the regulators recognize the uniqueness of Islamic banking as against conventional banking and creates a separate regulatory framework for it, results in accelerated growth in the industry. Shining examples are Bahrain and Malaysia who have established themselves as Islamic banking reference centers with over 20% market shares while other countries are at 5% or below (Ashar Nazim, et al, 2014).

Nigeria, like Libya, Iraq and Tunisia, has shown a considerable interest in opening up to Islamic banking. But the existing framework has not comprehensively contemplated leading practices on Sharia governance from around the world.

For example, a burning question on the issue of absence of a full-fledged separate regulatory system for Islamic banking is: should Islamic banking products be taxed as conventional banking products. To further understand the point one may further ask, how would Company Income Tax be charged on Musharaka, Mudarabah and Sukuk? Is it charged like conventional bond? How should Value Added Tax be charged on Ijara? How should the collection of tax such as the VAT, CITA, Withholding tax, etc be regulated in order to avoid multiple taxation of the sub-sector? What will be an equitable VAT framework on Islamic banking products? These issues remain unclear.

From a UK perspective, in light of the changes made by the government overtime, changes have been progressively incorporated into the UK tax legislation since 2003 with particular changes relating to Sukuk with more changes done in 2009 tax legislation (Frank Obaro, 2012). These changes will bring Sukuk legislation in line with convention corporate bonds and securities and address capital gains and capital allowances issues. It is noteworthy that there is no tax law specifically to regulate the NIBs in Nigeria.

In Nigeria, Jaiz Bank, the first and currently the only bank fully operating Islamic banking system (on a regional basis), recorded an operating loss of N1.07 billion loss in 2012. This loss was attributed by Mr. Umaru Mutallab, the Chairman, Board of Directors of the Bank, to lack of Sharia compliant liquidity management instruments (Premium Times, 2013). The liquidity management of a Central Bank is the framework, set of instruments and rules the Central Bank uses in steering the amount of bank reserves in order to control their price (i.e. short term interest rates) consistent with its ultimate goals (e.g. price stability). Liquidity management takes place within an operational framework and the choice of the operational framework is itself preceded by the existence of some environment (Ulrich Bindseil, 2000). The failure of the Central Bank of Nigeria to customize Sharia compliant liquidity management instruments, especially considering its non-interest operation, will therefore continue to hamper growth in the Islamic banking sector and challenge its viability in the face of obtainable legal framework.

IV. Guidelines on Non-Interest Banking in Nigeria

The CBN released the "Framework for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria" for the NIBs. This is pursuant to the Bank's power to make rules and regulations to regulate and control the operations of all the types of banks, including the specialized banks. This document was an attempt by the CBN to structure Islamic banking institution on the principles of Islamic jurisprudence. Noteworthy is that this regulation mainly covers conventional banks that have opted to offer non interest banking services either as a product or by way of opening some of their branches for the rendering of full non interest services. The regulation mandated such conventional banks to keep separate records for its Islamic banking services. It also created a Sharia Advisory Committee (SAC) whose function was to review and provide Sharia guidance and opinions in respect of non interest products and services offered by conventional banks.

The duties and responsibilities of the SAC are as contained in paragraph 7.1 of the Guidelines on Sharia Governance for Non Interest Financial Institutions in Nigeria:

i. be responsible and accountable for all Shariah decisions, opinions and views provided by them.

ii. advise the NIFI's board and management on Shariah matters so as to ensure the institution's compliance with Shariah principles at all times.

iii. review and endorse Shariah related policies and guidelines. This shall include a periodic review of products and services to ensure that operational activities and transactions of the institution are made in accordance with the principles of the Shariah.

iv. endorse and validate relevant documents for new products and services to ensure that they comply with the Shariah. These include:

   a. terms and conditions contained in forms, contracts, agreements or other legal documentation used in executing the transactions; and
   b. the product manual, marketing materials, sales illustrations and brochures used to describe the product or service.

v. ensure that the necessary ex-post considerations are observed after the product offering stage, namely the internal Shariah review processes and Shariah compliance reporting. This is in order to monitor the NIFI's consistency in Shariah compliance and effectively manage Shariah compliance risk that may arise over time.

vi. assist or advise related parties to the NIFI, such as its legal counsel, auditors or other consultants on Shariah matters upon request.

vii. provide written Shariah opinion to the NIFI in respect of new products and other issues referred to it.

viii. provide support to the NIFI in respect of questions or queries that may be raised regarding the Shariah compliance of its products.

ix. issue recommendations on how the NIFI could best fulfill its social role as well as promote non-interest banking and finance.

x. provide checks and balances to ensure compliance with Shariah principles.

xi. assist the internal audit of the NIFI on Shariah compliance audit.

xii. carry out any other duties assigned to it by the board of the NIFI.

The perceptions expressed by many groups and individuals left the provisions contained in the regulation wanting. Many were still not satisfied with the definition of non interest banking. These agitations could not be said to be completely misplaced as the scope of coverage of these document placed a burden on the CBN to justify the seeming conclusion that non interest banking was synonymous to Islamic banking.

On the 21st of July, 2011 the CBN published the "Guidelines for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria" (CBN, 2011b). This guideline attempted to broaden the meaning of non interest banking into non interest financial products and services based on principles of Islamic commercial jurisprudence and those based on other established rules and principles. Following this broader definition, the CBN has expressed its intention to be opened to "receiving and evaluating applications for licensing of non interest banking institutions based on other principles rather than the Islamic variant and will soon issue separate guidelines for non interest banking under other principles" (Chima, 2011). It also expanded its provisions to cover a full-fledged Islamic bank not subsidiary to any conventional bank. Significantly also was the removal of the Sharia Advisory Council (SAC) and the creation of the CBN Advisory Council of Experts (ACE) whose function was to advise the CBN on matters relating to the effective regulation and supervision of the Institutions offering Islamic Financial Services in Nigeria (IIFS) (Chima, 2011).

V. Legal Challenges Facing Islamic Banking in Nigeria

Islamic banks are not in any way exonerated from keeping strict banking standards observed by the conventional banks. In addition they are expected to meet the Sharia standards as they originate their banking principles from the Sharia commercial jurisprudence. This places an additional burden on the banks of keeping up with these dual responsibilities. To ensure constant compliance with the banking laws and ethics, the laws of the state usually provide for a body to oversee the activities of conventional banks with powers *inter alia* to revoke the license of a failing bank, take over or wind up any as the case may be (Alaro, 2009, p. 3). However what seem to be a missing link between Islamic banking in Nigeria and its future is standardized supervision mechanism. Although the new guidelines released in June, 2011 has provided for a CBN Advisory Council of Experts (ACE), for now it is at best a theorem as expertise comes with practice. The body has not yet tested its 'expertise' in the Nigerian banking field. It is important to see how this body grapples with the challenges of novelty of Islamic banking in

Nigeria as the CBN will need to rely on their expert advice to be guided in its future Islamic banking regulations.

One of the legal challenges facing Islamic banks in Nigeria is the problem of legislation. The establishment of Islamic banks in a number of countries has been effected by special enactments and changes in banking legislation. It should be mentioned that those changes were not intended to confer any undue advantages on those banks vis-à-vis conventional banks. They were in fact designed to remove the obstacles that hindered the establishment of Islamic financial institutions (Iqbal, Ahmad & Khan, 1998). In the UK the regulation of Islamic banking is institutionalized by the creation of the Financial Services Authority (FSA) which combined 11 different regulators into a single body under one piece of legislation (Momodu, 2011). The FSA is a statutory body vested with the authority to regulate insurance, investment and business banking in the UK. As a banking regulator, its policies have been open to the development of Islamic finance in the UK with no obstacles- no-special-favours approach (Ainley, Mashayekhi, Hicks, Rahman & Ravalia, 2007).

In the face of the recent wave in Islamic banking, the Nigerian legislature has not made moves to make further legislation to preserve and expand the legislative basis of the Islamic banking institution. The CBN had to scuttle under the existing BOFIA with its limitations and dared the ensuing barrage of zealous opposition. Though the supervisory functions of the CBN over Islamic banks are similar in many respects with that of the conventional banks, it may be necessary to suggest the creation of a separate statutory body as the regulatory authority for specialized banks where Islamic banks would be adequately provided for. The statute establishing the body would equally provide extensively for Islamic banking matters, viz its peculiar economics, judicial operation, insurance institutions as related to Islamic banking and all other related matters. This will secure a flourishing Islamic financial market which is good for innovation and diversity in the Nigerian financial market.

Another legal challenge identifiable with Islamic banking in Nigeria is the area of adjudication. The existing legal framework may be less than adequate in dispute resolution. This is because disputes that pertain to Islamic banks are (at least as at December, 2013) only open to litigation before the regular conventional courts and tribunals which are not trained in the Islamic commercial jurisprudence. Because of this lack in qualified judges, it is argued that the need to encourage the growth of Islamic banks is as important as the need to train specialists in dispute resolution mechanisms as specifically applicable to Islamic banks because of the complexities involved in Islamic banking and finance disputes. Oseni (2009) observed that the current practice where Islamic banking and finance disputes are heard and determined by the civil or common law courts with lopsided judgments will be counterproductive to the practice of Islamic banking and finance. He therefore suggested the development of Alternative Dispute Resolution (ADR) processes within the Islamic legal paradigm, a number of which he suggested to include *Sulh* (negation/mediation), *Tahkim* (arbitration), *Med-Arb* (a combination of sulh and tahkim), *Muhtasib* (ombudsman), etc.

VI. Borrowing a Leaf from the Malaysian Practice

Two types of Islamic banking systems have been observed to be obtainable across the world where Islamic banking is practiced. Whereas some countries operate only Islamic banking and outlaw interest-operating banking, others operate Islamic banking side by side the conventional banks with Malaysia being one of such successful systems (Iqbal, M., et al., 1998). The number of Islamic bank branches has increased rapidly. According to Bank Negara Malaysia (the Malaysian central bank), the number of Islamic bank branches has increased from 126 in 2004 to 766 in 2005 (Abd Razak & Abdul Karim, 2008). These banks or branches offer a wide range of Sharia compliant products like the *Sukuk, takaful* insurance, *murabaha* financing, as well as deposit and property funds structured using Sharia principles.

There is a growing sophistication in the range of products and services being offered by these financial institutions which has increased the attractiveness of Islamic financial instrument as an asset class for investment (Abd Razak et al, 2008). According to Yong (2007), despite the stiff competition Malaysia was facing it was way ahead of other countries in terms of product offerings and its sophistication having been developing the market for the past 40 years. This progressive movement is gradually turning Malaysia into an evolving international Islamic financial hub for which five pillars have been identified as causal agents (Abd Razaq et al, 2008).

Pillar 1: Malaysia has developed a deep liquid and vibrant sukuk market and the first ever in the world to issue sukuk.

Pillar 2: Malaysia has always been an open market and a major recipient of foreign direct investment for several score years, and its capital market offers a wide range of world class financial products. Besides, more than 85% of the listed companies in its equity market are Sharia compliant, which represents about 60% of the total market capitalization.

Pillar 3: The Islamic financial institution in Malaysia has been internationalized to allow for entry of foreign Islamic financial institutions that offer both domestic and international banking businesses. In furtherance to this, the foreign equity ceiling has been raised to 49% in an effort to promote strategic alliances.

Pillars 4: International Takaful business has been adopted in the Malaysian market. Not less than eight takaful operators with foreign shareholders have been licensed.
Noteworthy too is that insurance players are equally licensed to undertake these Takaful operators

Pillar 5: Human capital and thought leadership has been identified as an important pillar of the growth in Islamic financial institutions in Malaysia. Efforts to expand the pool of talent and expertise has greatly enriched the development of an Islamic financial hub in Malaysia. The International Centre for Education in Islamic Finance (INCEIF) which has an international faculty and students from more than 40 countries across the world is specialized in producing specialists and professionals to meet the human capital requirements of the global financial services industry.

VII. Conclusion: Building Effective Legal Framework for Islamic Banking in Nigeria

Islamic banking system without the law is futile and meaningless as the legal system is supposed to regulate and license Islamic banking as well as impose control and supervision of Islamic banks (Yasin: 2007). This therefore calls for legal reforms if smooth operation of Islamic banking is to be achieved. Obiyo (as cited in Daud, Yussof & Abideen, 2011) submits that Nigeria needs to reframe her banking laws before Islamic banks can be successfully implemented in the country. This further emphasizes the role of the CBN as a body with the function of regulating, controlling and supervising the banks (see Section 59(1)(a) BOFIA). However it is important to note the peculiarity and complexity of the Islamic banking system as it operates alongside interest transacting banks.

A cursory look at the role of the CBN so far reveals that the Bank has under the existing legal framework established a foundation for Islamic banks through its regulatory guidelines released in January, 2011 and that of June 2011 which improved on the former. The CBN, in pursuance of Section 9(1) and 59(1)(b) of BOFIA, has also reviewed the capital base of Islamic banks and placed it at N10 billion naira for those with national coverage and N5 billion naira for those with regional outlook (Daud, et al, 2011). This is against the N25 billion naira requirement for the commercial banks. This development is a great step towards creating an enabling environment for Islamic banks to thrive. This difference in capital bases of the Islamic banks and the commercial banks must be understood to be necessary considering that it reflects the depth of operation of the commercial banks and the novelty of Islamic banks.

It is suggestive that a research committee be set up to study each and every product of the Islamic bank before same is approved for implementation in the market. Such approved product must not be subject to any form of modification without the express permission of the Committee who has the power to withdraw its approval hitherto given. Essentially this committee should have the requisite expertise as their function requires knowledge and expertise in Islamic banking system. Therefore they should possess the necessary training and qualification to empower them with the professional competence to guide the Islamic banking transactions.
It is also important that the law provides for, as well as encourage Islamic insurance institutions for Islamic banks specifically as a contingency plan. The non existence of this vital institution may pose unforeseen challenges to Islamic banks in Nigeria considering the fear of eventualities surrounding the new system and the need to encourage its survival.

Also, there is need for a greater enhancement in manpower and capacity building as far as Islamic banking is concerned. The INCEIF in Malaysia is a brilliant effort at building leadership and competence for Islamic financial system. Therefore the need for a national center dedicated to the function of training experts in Islamic banking and finance system cannot be overemphasized. This will ensure the survival of the banking system in Nigeria and establish a much more robust leadership for the legal framework. Perhaps the frugality of experts in this area is the greatest challenge meeting the practice of Islamic banking Nigeria.

Finally it is important to stress that the CBN must continue to respond to the needs of the new banking institution through its regulatory documents, while at the same time make efforts to sponsor bills, through the executive machinery, at the national legislature that will see to the National Assembly making relevant legislations that will strengthen the wheels of Islamic banking in Nigeria.

References:

Legal Services Department, C.B.N. (2011). *A Brief on the Central Bank of Nigeria {CBN} Act, 2007*. Retrieved from www.cenbank.org on 21st October, 2011.

CBN, (2009). *Draft Framework for the Regulation and Supervision of Non-interest Banks in Nigeria*. Retrieved on 22nd October, 2011.

CBN, (2011b). "*Guidelines for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria*". Retrieved from www.

Chima, O. (2011, June 22). CBN Adjusts Guidelines on Islamic Banking. *Thisday*. Retrieved from http://www.thisdaylive.com/articles on 23rd October, 2011.

Alaro, A. A. (2009). Sharia Supervision is a Challenge for Islamic Banking in Nigeria. In I. O. Oloyede, (ed.), *Al-Adl (The Just): Essays on Islam, Islamic Law and Jurisprudence,(pp. 2 - 3)*. Ibadan, Nigeria: n.p.

Iqbal, M., Ahmad, A., & Khan, T. (1998). Challenges Facing Islamic Banking. Retrieved from www.iefpedia.com on 28th October, 2011.

Momodu, D. (October, 2011). Non Interest Banking in Nigeria. Unpublished paper presented at the First Annual National Conference SOGSON, Auchi Polytechnic, Auchi, Edo, Nigeria.

Ainley, M., Mashayekhi, A., Hicks, R., Rahman, A. and Ravalia, A. (2007). *Islamic Finance in the UK: Regulation and Challenges*. London: FSA. Retrieved from http://www.fsa.gov.uk on 28th October, 2011.

Oseni, U. A. (October, 2009). Dispute Resolution in Islamic Banking and Finance: Current Trends and Future Perspectives. Paper presented at the International Conferences on Islamic Finance Services: Emerging Opportunities for Law/Economic Reforms of the Developing Nations, University of Ilorin, Ilorin, Kwara State, Nigeria.

Abd Razak, D. and Abdul Karim, M. A. (2008). *Development of Islamic Finance in Malaysia: A Conceptual Paper*. Presented at the 8th Global Conference on Business and Economics. Retrieved from www.gcbe.us on 30th October, 2011.

Yong, Y. N. (2007). Malaysia Way Ahead in Islamic Finance. Retrieved from www.theedgedaily.com on 2nd November, 2011.

Yasin, N. (2006). Legal Aspects of Islamic Banking – Malaysia Experience. In Ali, S. S. and Ahmad, A. (eds.), Islamic Banking and Finance: Fundamentals and Contemporary Issues. Jedda: IDB. Retrieved from http://www.ibisonline.net/Research_Tools/Publication/PublicationDisplayPage.aspx?PublicationId=155 on 2nd November, 2011.

Daud, M., Yussof, I. M. and Abideen, A. (2011). Establishment and Operation of Islaimic Banks in Nigeria: Perception Study on the Role of the Central Bank of Nigeria. *Australian Journal of Business and Management Research*, 1, 2, ICR, (2010), *History of Banking in Nigeria (1892 – 2010)*. Retrieved from http://www.icr.stakescapital.com/research_int/background/nigerian_banking_industry.html on 26th January, 2014.

Federal Securities Discount House Limited (2011), *Nigeria Banking Industry, Review and Outlook*. Retrieved from http://www.fsdhsecurities.com/periodic/Nigerian_Banking_Industry.pdf on 26th January, 2014.

Ashar Nazim and Jan Bellens, *World Islamic Banking Competitiveness Report 2013–14*. Retrieved from http://www.mifc.com/index.php?ch=28&pg=72&ac=58&bb=uploadpdf on 11th February, 2014.

Premium Times "*Jaiz Bank Records Operating Loss of N1.07 Billion in 2012 – Says Mutallab*" December 19, 2013. Retreived from http://premiumtimesng.com/business/151790-jaiz-bank-records-operating-loss-n1-07-billion-2012-says-mutallab.html on 11th February, 2014.

Ulrich Bindseil, *Central Bank Liquidity Management: Theory and Euro Area Practice*. Retrieved from http://www.ecb.europa.eu/events/pdf/conferences/1b.pdf on 11th February, 2014.

Frank Obaro, "Non-interest Banking in Nigeria – Tax Issues (I)" *Vanguard*, November 19, 2012. Retrieved from http://www.vanguardngr.com/2012/11/non-interest-banking-in-nigeria-tax-issues-i/ on 6th February, 2014.

Dominic E. Obozuwa "BANKING SECTOR RECAPITALISATION AND RESTRUCTURING: A LOOK AT THE PROCESSES AND REQUIREMENTS OF AN EFFICIENT LEGAL DIAGNOSTIC *REVIEW*". Retrieved from http://www.wali-uwais.com/?page_id=770 on 6th February, 2014.

Samuel A. Oni "Circular on the Review of the Universal Banking Model" 2010 http://www.cenbank.org/OUT/2010/CIRCULARS/BSD/CIRCULAR%20ON%20THE%20REVIEW%20OF%20THE%20UNIVERSAL%20BANKING%20MODEL.PDF on 6th February, 2014.