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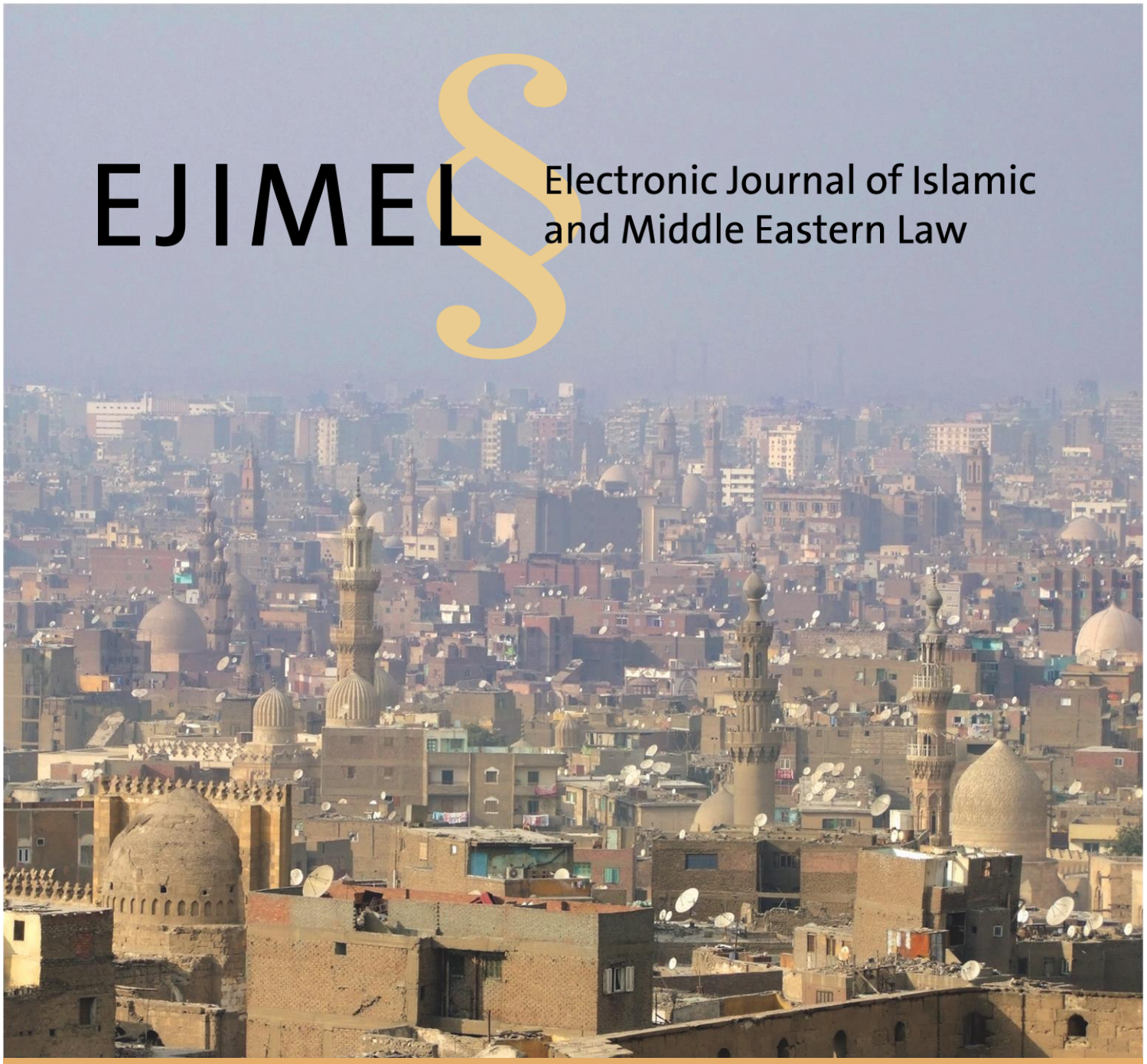

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Imagined Religious Institutions: Pre-modern Hanbali *Ulama* in the Juristic Sphere from (850-1350)

by Abdullah Alaoudh[*]

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Abstract

This article discusses the features of "religious institutions" in the pre-modern Hanbali context. As we will see, the religious institutions were somewhat like the "imagined communities" that Benedict Anderson describes in his seminal work. Most religious movements and productions are not directly traceable to formally organized institutions and even when such institutions happened to exist, their function was usually unrelated to the religious work, or to religious intellectual activities as a whole, or in any case less relevant than the broader sphere of jurists. This sphere is discussed in the context of the clergy in the Sunni and Hanbali experience, where hierarchy and institutionalization were rarely operative. The article ends with the debate of whether ulama, namely the Hanbalis, represented a "corporate group." Different studies adopt different approaches to determine whether ulama and jurists have established the type of solidarity that would qualify them as a corporate group. I argue that, although many jurists were members of such corporate groups, not all of them were. The general juristic sphere encompassed many who were members neither of a corporate group or even of a madhhab. This feature of free-floating jurisitc sphere allowed jurists to protect their domain from both internal and external controls.

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I. Introduction

This article discusses several features of "religious institutions" in the pre-modern Islamic context focusing on the Hanbali jurisprudential school (*madhab*) from the establishment of this *madhab* in around 850 by its founder, Ahmed Bin Hanbal, until around 1350. As will be seen, the religious institutions of the time were somewhat akin to the "imagined communities" that Benedict Anderson describes in his seminal work.[1] They comprised imagined institutions because most religious movements and productions did not issue from formally organized institutions and even where such institutions did exist, their purpose was usually unrelated to religious work or religious intellectual activities broadly understood, or in any case were less relevant than the broader sphere of jurists. The "clergy" in the Sunni Muslim experience, to the extent it existed, was rarely hierarchical or formally institutionalized. The article therefore contributes to the debate over whether the *ulama*, namely Hanbalis, comprised a "corporate group." Different studies have adopted different approaches to determine whether Islamic scholars (*ulama*) and Islamic jurists (*fuqaha*, *sing*. *faqeeh*) ever possessed an established sense of solidarity that would qualify them as a corporate group.

One traditional orientalist debate focused on the question of whether the *ulama* had failed to institutionalize their religious authority and therefore were responsible for the lack of an organized corporate group. At the same time, others ask whether these jurists were ever able to really act in virtue of a common self-identity as *ulama* and thus constitute an institutionalized corporate group.[2]

Both approaches were dominated by the orientalist presumption that institutionalization is synonymous with progress and leverage. They presume that the lack of dominant corporate groups and completely institutionalized *ulama* are failures. Through the example of Hanbalis, one of the four prevalent *madhabs* in Islamic jurisprudence (covering the *madhab*'s first five centuries), I argue that, although some corporate groups existed, the most important feature of jurists in general is the imagined sphere that delimits membership. There is no such organized institution that gathers the whole of the different Hanbali and non-Hanbali jurists, and scholars in one comprehensive group or rigidly classifies the jurists into corporate subgroups. But rather than seeing this as evidence of some failure by the Hanbali *ulama* to consolidate their group identity and mission, I understand it as evidence of the *ulama'*s intentional resistance to persistent efforts of institutionalization in order to maintain their *sphere*. Allowing them to be consolidated into a *group* may have offered unity but it would also make them susceptible to external controls as well as the internal threat that one particular interpretation of religious meaning would be adopted, pushing out all others.

I will focus on the Hanbali "clergy," some of whose juristic features persist and can arguably represent different jurists throughout Islamic history and probably even today. It is worth noting that not all practices of the Hanbalis could be generalized or were present everywhere throughout the Hanbali experience. Examining certain of these features, however, will enhance our understanding of the juristic work and draw attention to possible similarities with other schools and times. Most importantly, examining these features of Hanblai *ulama* in the past opens the way to a new understanding of other Islamic jurists, including some contemporary ones who are trained in

[1] ANDERSON BENEDICT, Imagined communities: Reflections on the origin and spread of nationalism, Verso 2006, at 1-9. See also TAYLOR GEORGE, Modern social imaginaries, Duke 2004, at 23-31.

[2] See e.g. MAKDISI GEORGE, Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court, Clev. St. L. Rev. 34 (1985), at 10; EPHRAT DAPHNA, A Learned Society in a Period of Transition: The Sunni _ulama_ of Eleventh Century Baghdad, SUNY Press. 2000, at 143; KEDDIE NIKKI, Scholars, Saints, and Sufis: Muslim Religious Institutions in the Middle East Since 1500, Univ of California Press. 1972, at 2.

classical jurisprudence. Taking different examples from different times and schools could reveal that Islamic jurists share more in common than we suspect. By presenting the formation of Islamic scholars, I will test the dispersed nature of these scholars and how they self-conceived their tasks and roles. Then, I will apply the non-corporate features to the political field to examine how their features affected their activism, withdrawal, and political mode in general. In the last section, I will give the example of modern *ulama* during the Tanzimat period to demonstrate that powerful features of the dispersed authority of the imagined religious institutions still exist.

II. "Clergy" in Islam and the "Religious Institution"

It is important to define what we mean by religious institutions and scholars *(ulama*). Our understanding of the term "religious institution" affects our appraisal of the roles, the nature, and our discernment of the decrease or increase in the presence and influence of that institution. Epistemological presuppositions regarding the characteristics of "religious institutions" have influenced the literature in a powerful, and in my view negative, way.[3] Western writers have approached the issue of "religious institution" with presuppositions that reflect the historical experience of Western Christendom—its understanding of the religious sphere and operations—rather than those of Muslim cultures.[4]

At the same time, the phrase "religious institutions" as applied to Islamic history may prove misleading for two reasons. First, and most importantly, most of the work and literature produced by Islamic jurists and *ulama* did not take place in any formal "religious institution" as we understand the concept today. Many scholars who have enriched the judicial and religious literature with their contributions can hardly be linked to an actual, identifiable institution. Books, *fatwas*, and responses of Islamic scholars are religious works, but the religious community is not a religious institution nor is it mainly composed of religious institutions unless we use "religious institution" in an imagined, metaphorical sense.[5] Even keeping this metaphorical and imagined institutional status in mind, the individual qualities of the scholar and his work almost always matter more than the aspects of self-identity that are determined by their pertaining to a given imagined school, as we will see was the case in the ranks of Hanbali *ulama* across five centuries.

The second pitfall of the term "religious institutions" from the point of view of the community described as such involves a large segment of the community that has reservations about the deep Christian heritage associated with the phrase. According to a number of influential contemporary Muslim scholars, the term "religious institution" possesses a connotation related to the Christian context in which it arose, a connotation that contaminates its understanding in the Islamic context.[6]

[3] For the idea of epistemological conflict between two cultural narratives and their powerful influence on our understanding and consciousness see MACINTYRE ALISDAIR, Epistemological Crises, Dramatic Narrative and The Philosophy of Science, The Monist 1977, at 60.

[4] The researcher HUSSEIN AGRAMA noted the predicament of the presuppositions of Western studies that analyze the Islamic thought as a "problem" to be explained and then solved. This predicament happened because the Western standards and narrative were so powerful, and then shaped the presupposition about how religion operates in society. I may add here that the Western narrative shaped how we (and they) understand Islamic works by reducing them to "religious institutions" that dominated Christian literature and experience. See ALI AGRAMA HUSSEIN, Questioning secularism: Islam, sovereignty, and the rule of law in modern Egypt, University of Chicago Press 2012, at 1-42.

[5] This nature of Islamic jurisprudence is going to be discussed from another aspect, the (lack of) corporate group.

[6] See e.g. AL-QARADAWI YOUSEF, Al-Islam wa al-'Almanyyah Wajhan li Wajh, Maktabat Wahbah 1987, at 45; AL-HAWALI SAFAR, Al-'almanyyah, Dar al-Hijrah 1982, at 65-108; IMARAH MUHAMMAD, Al-Islam wa Al-Syasah, Al-Shorouk International 1992, at 28-9-70. This book is important because it was first published by the Center of Research in al-Azhar, and is prefaced by then-al-Azhar's Grand Sheikh: Jad al-Haqq who asserts in his preface that there is no sacred religious instiutions in Islam.

The vast majority of commentators, writers, and scholars in Islamic studies,[7] especially Sunni ones, assert that there is no clergy in Islam, where "clergy" is to be understood as hierarchal and representative of the sacred.[8] Although at different points in history there were clerical traditions or practices that were justified by different methods in Islamic jurisprudence and thought, these practices never formed a pattern or marked any divergence from the mainstream practice which was of a decidedly non-clerical nature.[9]

The "religious community" whose Western counterpart would be described as a "religious institution" presents itself in the Muslim world as, for example, "scholars" *(ulama*) and jurists (*fuqaha*) more than "institutions" or establishments. For example, the self-presentation and self-image of the Hanbali scholarly community identifies them as scholars, jurists, authors, jurisconsults, and so on.[10] Therefore, the whole group of *ulama* as conceived by the *ulama* themselves is therefore somewhat comparable to the concept of "*ummah*" (Islamic nation) in the sense that it is not a physically identified distinct identity, institution, or group, separate and classified.[11] Rather, the *ulama* as "imagined institution," I would say, is a combination of organized institutions and religious scholars who may or may not be affiliated with formal or even jurisprudential institutions known as "*madhabs*."[12] And even if most Hanbali scholars were affiliated to a fixed institution at some point, they acted as independent scholars whose authority derived from their scholastic aptitude more than from institutional affiliation. This is why, for example, they were much more invested in the imagined school of jurisprudence than the formally established schools of their times, as we will see in the next section.[13]

Reducing the scope of religious authority to the role attributed to it in the scholarly literature on formal institutions leaves out rich historical debates and factors and, thus, makes the attempt to provide a normatively acceptable understanding of the clerics' proper role unrealistic. This is not to say that formal institutions were not established or that they failed to affect Islamic jurisprudence. However, these formal Islamic "institutions" were inherently more fluid, dispersed, and horizontal to such an extent that they, for the most part, could not even be called institutions in the Western sense of the term. Hanbali jurists flow in and out of them, and their behavior tends to be that of individuals accountable only to themselves, often attached to a school of thought in an imagined sense that does not imply any sort of institutional loyalty or obligations to the school or institution. Portraying official religious establishments as monolithic representations of religious institutions in Islamic jurisprudence neglects a wide range of influential and sometimes more important segments

7 See for e.g. AL-MAWDUDI ABU AL-'ALA, Naẓarayyat al-Islam al-Syasyyah, Dar al-Fikr. 1967, at 30; AL-QARADAWI, *supra* n. 6, at 36; al-HAWALI, *supra* n. 6, at 65-108; IMARAH, *supra* n. 6, at 28-9,50-123. See also BROWN CARL, Religion and State, The Muslim Approach to Politics. New York 2000, at 32. Brown clearly distinguishes between the Church-based system and clergy in Western experience on the one hand and Islamic State and governance on the other in the idea that Islam in its traditional approach does not separate religion from state but meanwhile does not have the (Christian) clergy in its history.

8 See BROWN, *supra* n. 7, at 32.

9 HATINA MEIR, 'Ulama', Politics, and the Public Sphere: an Egyptian Perspective, Utah 2010, at 2; EPHRAT, *supra* n. 2, at 96. For the Christian clergy in the West, see e.g. JELEN TED, The political world of the clergy, Praeger 1993, at 23. Jelen here cited a clerk who specifies his job as to represent the sacred.

10 In later examples of the other non-institutionalized Muslim scholarly communities see KEDDIE, *supra* n. 2, at 149; EPHRAT, *supra* n. 2, at 10-14.

11 See in general ANDERSON, *supra* n. 1; Taylor, EPHRAT, *supra* n. 2.

12 See HATINA, , *supra* n. 9, at 2; EPHRAT, *supra* n. 2, at 96.

13 MAKDISI differentiated between the schools of law "madhab" and colleges of law "*madrasas*/institution." See, MAKDISI GEORGE, The Rise of Colleges. Institutions of Learning in Islam and the West, Eric 1981, at 1. It is noteworthy when Imarah in the book prefaced by the Sheikh of al-Azhar, and Abdul-razzaq al-Sanhouri, used the phrase "the Muslim nation with its *scholars and civil institutions*." (Emphasis is mine). He distinguished between Muslim *scholars* and *civil* institutions instead of, say, "religious institutions" and "civil institutions." IMARAH, *supra* n. 6, at 56.

of the religious community. As a result, any attempt to determine whether the power or authority of religious institutions in Muslim countries at any historical point decreased or increased will depend on the how the term "religious institution" is understood and applied to the community in question.[14]

Let us now take up the case of Hanbali *fuqaha* and *ulama* in order to discuss the idea of guilds and imagined institutions focusing on a very important period of the Hanbali school—the period running from its establishment (850) by Ibn Hanbal to around five centuries later (1350).

1. The Ranks of Hanbalis (850-1350)

Hanbalis refers to the *fuqaha* trained in the jurisprudential school of Ahmed bin Hanbal (d. 855), the founder and the main articulator of that *madhab*. The Hanbali *madhab* is one of the four principal Sunni schools that dominated the literature of Islamic jurisprudence. The Hanbali jurisprudence was established by Ibn Hanbal in around 850. It was propagated within learning circles by books of the founder and later those of his followers and adherents. Hanbali thought enjoyed a period of robust momentum during its early years which gradually dissipated until about two centuries later when it was revived by the Judge Abu Ya'la (d. 1066), who is probably the second most important figure in the Hanbali traditions.[15]

After the death of Abu Ya'la, his son Abu al-Husain Mohammed (Ibn Abi Ya'la, d. 1131) decided to document the jurisprudential biographies of Hanbali figures, compiling and classifying them into ranks (*tabqat*). His book can be translated as "the Ranks of Hanbali Jurists." Each rank represents a generation of scholars going back to the establishment of the Hanbali jurisprudence. Two centuries after the death of Abi Ya'la, another well-known jurist, Ibn Rajab (d. 1393), resumed the jurisprudential biographical work, covering the ranks of Hanbalis from Abi Ya'la's time until his own. Ibn Rajab's work can be translated as "the Supplement of the Ranks of Hanbali Jurists."

The two books, "the Ranks" by Ibn Abi Ya'la and "the Supplement" by Ibn Rajab are both important works for understanding the jurisprudential works and institutions of the Hanbali *madhab*. They provide a survey of the Hanbalis from the establishment of the Hanbali jurisprudence (850) until five centuries later (1350). Each Hanbali jurist belongs to a rank that generally lasts between twenty to forty years.[16] The authors start each biography with a simple introduction of the date of birth and

[14] As examples of analyses that suffer from this reductionist approach in a way or another, thus, concluded that scholars' or religious institutions' influence in the Muslim world decreased, see HAMILTON ALEXANDER ROSSKEEN GIBB/HAROLD BOWEN, Islamic Society and the West: Islamic society in the eighteenth century, Oxford University Press 1957, at 2:112-3. BERNARD LEWIS, Islam in history,Alcove Press. 1973, at 4; KEDDIE, *supra* n. 2, at 149-167. Compare in general, ZEGHAL MALIKA, Religion and Politics in Egypt: The Ulema of al-Azhar, Radical Islam, and the State (1952–94), 31 International Journal of Middle East Studies, 371(1999); ZAMAN MUHAMMAD QASIM, The Ulama in Contemporary Islam: Custodians of Change: Custodians of Change, Princeton University Press (2010), at 1-17; HATINA, *supra* n. 9, at 9; SHADAAB H RAHEMTULLA, Reconceptualizing the Contemporary Ulama: Al-Azhar, Lay Islam, and the Egyptian State in the Late Twentieth Century, Simon Fraser University 2007, at 1.

[15] IBN ABI YA'LA, Tabaqat al-Hanabilah, Dar al-Kutub al-'Ilmiyyah 1996, at 1:73-133; ABU ZUHRAH MOHAMMAD, Ahmed Bin Hanbal, Dar al-Fikr al-'Arabi, at 139-463; SCHACHT JOSEPH, An Introduction to Islamic Law, Clarendon 1964, at 63-6; WAEL B HALLAQ, An Introduction to Islamic Law, Cambridge University Press 2009, at 31-8; MELCHERT CHRISTOPHER, Ahmad ibn Hanbal, Oneworld Publications 2012, at 59-82. There was an early debate whether Ibn Hanbal was a jurist at all. For example, IBN JAREER AL-TABARI in 922 A.C. argued that Ibn Hanbal was just an authentic narrator of the Prophet's traditions, a position known as "*muhaddith*" instead of jurist, faqeeh. Ibn Jareer paid a harsh toll on this opinion. In 922 A.C., the followers of Ibn Hanbal in Baghdad attacked him, threw rocks at him until he died or probably was killed. BIN AL-WARDI OMAR, Tatimmat al-Mukhtasar fi Akhbar al-Bashar (Tarikh Ibn al-Waerdi), Dar al-Kutub al-'Ilmiyyah 1996, at 1-248-9.

[16] For the ranks (or layers, as FRANZ ROSENTHAL translated the word "Tabqat"), ROSENTHAL notes that dividing Muslim biographies into figures is an authentic Islamic approach to historiography. It started with the first generation of the Prophet's companions (Peace Be Upon Him). According to him, some Muslim medieval historians choose twenty years for a rank, while

place and a list of teachers and instructors. Then, Ibn Abi Ya'la and Ibn Rajab narrate the main events of the life of the jurist, and how they contributed to the Hanbali jurisprudence. Usually, the two authors end each biography with notable jurisprudential opinions and selections (*ikhtiarat*) by that jurist. Reading the texts, one notices figures who are more influential in the Hanbali jurisprudence than others—those individuals whose authority is considered sufficient to establish a new interpretation of the Hanbali jurisprudence to be followed by adherents of the school. Examples of these influential include al-Khallal (d. 923), al-Barbahari (d. 940), al-Khiraqi (d. 954), al-Harawi (1089), and Ibn Hubairah (d. 1165).[17]

In the following sections, I will discuss the Hanbali mode—juristic features that persist and describe different judicial practices throughout Islamic history and probably even today. It would be inaccurate to generalize and project practices that existed at specific times and circumstances, yet a broad grasp of these features will enhance our understanding of the juristic work, and draw our attention to the possibility of similar features in other schools and times. Ideally, these features of the past Hanblai would lead us to a fuller understanding of other Islamic jurists, some even contemporary, whose outlook and orientation largely follows the structures of classical Islamic jurisprudence.

2. The *Ulama* as Corporate Group

If indeed neither "clergy" nor "religious institutions," as they are understood in the West, existed in analogical form in the Islamic mainstream or at least did not have a central role in the religious life of the community could other corporate groups have existed and exerted influence? In this section, I will review some important ideas from the literature on this subject, and by taking the Hanbali example, I will conclude that some corporate groups or guilds did indeed exist in the Islamic context. The most important defining feature of such groups, however, is the existence of a sphere that encompasses both corporate and non-corporate groups. Other than the existence of the juristic sphere, there was no such organized institution that gathered the different jurists, scholars, and institutions into a single comprehensive corporate group or established a corporate relationship between all the bodies of religious scholars. For those reasons, I argue that corporate relationships were at most secondary in the religious juristic sphere.

Following Louis Massignon valuation of the importance of "guilds" in Islamic history,[18] George Makdisi went one step further by applying the concept not only to formal schools and associations of artisans in medieval Islam but also to jurisprudential schools (*madhab*s).[19] Sherman Jackson, in turn, described the relationship of the jurist to the jurisprudential school (*madhab*) in terms of "corporate status" where "[e]ach school (*madhab*) acquires the ability to confer a measure of protection to its members by virtue of their membership in that particular group."[20] Jackson, interestingly, likened the relationship between the individual jurist and the corporate group, the *madhab* in this case, to the

others extend it to forty years. However, a third group seems to fluctuate between the twenty and forty and stretch it sometimes more. The case of the two compilations here of the Ranks of Hanbalis and it Supplement seem to adopt the latter approach. See AL-IMAM MUSLIM AL-NAISABOURI, al-Tabaqat, Dar al-Hijrah 1st ed. 1991, at 33-8; ROSENTHAL, A History of Muslim Historiography, E. J. Brill. 1968, at 82-3.

17 IBN ABI YA'LA, *supra* n. 15, at 2:64, 16, 64; IBN RAJAB, Dhail Tabaqat al-Hanabilah, Dar al-Kutub al-'Ilmiyyah 1996, at 1:44 -211-38.

18 According to MAKDISI, Louis Massignon was the first who spoke of guilds in Islam in an article published in 1920. MAKDISI, *supra* n. 2, at 4.

19 MAKDISI, *supra* n. 13, at 1. See IBN ABI YA'LA, *supra* n. 15, at 1:73-133; ABU ZUHRAH, *supra* n. 15, at 139-463; SCHACHT, *supra* n. 15, at 63-6 (1964); HALLAQ, *supra* n. 15, at 31-8; MELCHERT, *supra* n. 15, at 59-82.

20 SHERMAN JACKSON, Islamic Law and the State: the Constitutional Jurisprudence of Shihāb al-Dīn al-Qarāfī, Brill 1996, at 72.

relationship between the *rajih* (weighted opinion) and the *mashhur* (predominant opinion) in Islamic jurisprudence. Both individual and weighted opinions could be substantively more valuable in term of jurisprudence, but the predominant opinion and corporate group usually exert more influence.[21] As Daphna Ephrat concludes in her study of the Sunni *ulama* of the eleventh-century Baghdad in *A Learned Society in a Period of Transition*, affiliation with a *madhab*, at some point, lost the sense of "solidarity group" and became a formal, hollower bond.[22] Although group solidarity had been established, the *ulama*, as a whole, never demonstrated serious commitment to it.[23]

To test whether the Hanbalis can be considered a corporate group, I will first see whether membership in the group proffered its members protection. Ibn Abi Ya'la begins the series of Ranks of Hanbali by emphasizing a startling principle of Islam. He asserts that "the [doctrine] of loyalty and enmity is an innovation. Those who [think it is part of their faith to] say we are loyal to this person or a group and enemy to another [other than the general loyalty to Islam itself]" are religious innovators.[24] In other words, by just considering loyalty to a certain group as an innovation, the very idea of "by-virtue-of-their-membership" is rejected because what matters, according to one prominent narrator of Hanbali biographies and jurisprudence, are the principles and general doctrines of the *madhab*, not affiliation with any school or group.

On the other hand, in the *Ranks*, in telling the stories of Hanbalis, Ibn Abi Ya'la divides them into ranks and treats them as a group of people who have some affiliation to Hanbali jurisprudence and institutionalized benefits. For example, Abu Muhammed al-Barbahari, from the second rank of Hanbalis, is the "leader of the Hanbali community in his time," and was "leading in fighting against the people of [religious] innovation," according to Ibn Abi Ya'la.[25] He says that al-Barbahari "has a reputation at the ruler's court and a prominence among our [Hanbali] people" and that he "was one of the well-versed distinguished leading scholars who memorized hadiths, are trustworthy, and faithful."[26] Although al-Barbahari was a leader of the community, he acts mostly on the basis of principles against "people of religious innovation" whatever their affiliation. On the other hand, other Hanbali figures from different ranks, such as al-Khiraqi, Abduaziz Ghulam al-Zajjaj, and Abu Abdullah Ibn Hamid were also described as "leaders of the Hanbalis" of their times which brings the issue of affiliation again.[27]

Also of note is the ease with which affiliation can be changed, like in the case of Abi Ya'la, the father of the Ibn Abi Ya'la and one of the leading Hanbalis of all time. Abi Ya'la was introduced to the Hanbali jurisprudence by the above-mentioned Ibn Hamid. Abi Ya'la's religious and legal education, which had begun by age ten, had followed the Hanafi madhab until he met Ibn Hamid, who inspired him and opened his eyes to the Hanbali jurisprudence.[28] The change reveals both the strong attraction of Hanbali jurisprudence and the competition among jurists to strengthen their jurisprudence and, at the same time, we can sense the relative strength of the individual relationships among jurists over institutional affiliations to the extent that jurists could change

[21] JACKSON, *supra* n. 19, at 83. MAKDISI also presented the argument that schools were based on individuals so they did not establish "guilds". MAKDISI, *supra* n. 2, at 10.
[22] EPHRAT, *supra* n. 2, at 143.
[23] EPHRAT, *supra* n. 2, at 96.
[24] IBN ABI YA'LA, *supra* n. 15, at 1:37.
[25] IBN ABI YA'LA, *supra* n. 15, at 2:16.
[26] IBN ABI YA'LA, *supra* n. 15, at 2:16
[27] IBN ABI YA'LA, *supra* n. 15, at 2:64-143-5.
[28] IBN ABI YA'LA, *supra* n. 15, at, 2:166-7.

madhab affiliation following an encounter with a charismatic learned scholar, as in the case of Ibn Hamid.[29]

In the thirteenth and fourteenth centuries, the Hanbali school increasingly developed toward certain symbols and institutions. We start to notice a Hanbali "pulpit" from which one Hanbali once preached, "I am a Hanbali as much as I am alive, and when I die, my will for the people is to follow the Hanbali school."[30] Another Hanbali taught a friend to respond when asked by God what he followed by simply saying "Ibn Hanbal."[31] We also notice that in addition to Hanbali schools (*madrasa*), the Hanbali learning circle (*halaqah*), the Hanbali section, the Hanbali leader, and the Hanbali endowments,[32] a Hanbali niche devoted to prayers involving the Hanbali jurisprudence is mentioned more than three times.[33] Indeed there is even a Hanbali qadiship, about which Ibn Rajab complains because it is sometimes empty and no Hanbalis appear disposed to occupy it.[34]

While *madrasas* can exclusively follow one jurisprudential school such as the Hanbali *madhab*, other *madrasas* existed that taught more than one jurisprudence.[35] Al-Mustansir Billah, for instance, established a *madrasa* in the 1230s, and assigned two principal supervisors to it: Abu al-Waleed al-Hanbali and Ibn al-Najjar al-Shafi'i.[36] In this madrasa, both jurisprudences were taught and both *madhabs* competed to gain followers among students and the learning community. In these *madrasas*, presenting the principles of jurisprudence mattered more than belonging to a particular *madhab*. The case of Muwaffaq al-Din Ibn Qudamah (d. 1223) is worth relating.

Ibn Qudamah was the leader of that Hanbalis at the great mosque of Damascus. According to Ibn Rajab, towards the end of his life, "he was the destination of every jurist regardless of *madhahb*."[37] Therefore, while Ibn Qudamah was the head of Hanbalis and one of the most influential Hanbalis of all times, he nonetheless taught jurists from other *madhabs* and his influence went beyond *madhab* affiliation or "membership." Different well-known *ulama* recognized the high level of independent jurisprudential reasoning that Ibn Qudamah reached—a concept known as *Ijtihad*.[38] This is relevant for the purposes of this article because reaching such a level of *ijtihad* is considered reaching a point that goes beyond representing a sole *madhab* or jurisprudence. Ibn Rajab tells us that Ibn Qudamah "used every Friday to run a learning circle and, then afterwards, engage in an hour debate with opponents and dissenting jurists."[39] Ibn Rajab mentions famous jurists from different backgrounds

29 IBN ABI YA'LA, *supra* n. 15, at 2:16-7.

30 IBN RAJAB, *supra* n. 17, at 1:44.

31 IBN RAJAB, *supra* n. 17, at 1:33.

32 IBN RAJAB, *supra* n. 17, at 2: 139, 152,189,227-243.

33 IBN RAJAB, *supra* n. 17, at 2:137,178-227.

34 IBN RAJAB, *supra* n. 17, at 2: 178-189.

35 IBN RAJAB, *supra* n. 17, at, 2: 136.

36 IBN RAJAB, *supra* n. 17, at 2:139.

37 IBN RAJAB, *supra* n. 17, at, 2: 63.

38 IBN RAJAB, *supra* n. 17, at 2:63-6. For the classical discussions of *ijtihad* and its rulings and requirements, see the classical sources in the origins of jurisprudence e.g. AL-ZIRKESHI BADR AL-DEEN, al-Bahr al-Muheet, Dar al-Kutbi 1994, at 8:226-58; AL-GHAZALI ABU HAMID, al-Mustasfa, Islamic U of Medina 1995, at 4:10-129; AL-AAMIDI ALI BIN AHMED, al-Ihkam Fi Usul al-Ahkam, Al-Maktab al-Islami, at 4:162-221; ALJAWZEYYAH IBN QAYYEM, I'lam al-Muqe'een, Dar al-Kutub al-'Ailmayyah 1991, at 2:126-9; AL-SHATIBI IBRAHEEM, al-Muwafaqat, Dar Ibn al-Qayyem-Dar Ibn Affan 2003, at 5:41-58; AL-TUFI NAJM AL-DEEN SULAIMAN, Mukhtasar Sharh al-Rawdhah, Mu'assasat al-Risalah 1987, at 3:575-84; AL-SHUKANI MUHAMMED ALI, Irshad al-Fuhul Ila Tahqeeq 'Ilm al-Usul, Dar al-Salam 1998, at 2:713-54; AL-SHINQEETI, Al-Mudhakkirah Fi Usul al-Fiqh, n.a. 2001, at 369-74. In the orientalist literature, JOSEPH SCHACHT discussed the concept of "closing the door of ijtihad" that was introduced to the Islamic jurisprudential centuries after the development of the four main schools (Hanafi, Maliki, Shafi'I, and Hanbali) in Islamic jurisprudence. SCHACHT, *supra* n. 15, at 69. Compare with Wael Hallaq's critique of Schacht's approach in discussing *ijtihad* and "closing the door of ijtihad", HALLAQ WAEL, Was the gate of ijtihad closed?, 16 International Journal Of Middle East Studies (1984), at 2.

39 IBN RAJAB, *supra* n. 17, at 2:63.

and *madhabs* who would not issue Islamic *responsa* until having read Ibn Qudamah's works. Lastly, Ibn Rajab lists some of Ibn Qudamah's major opinions, as well as a selection of jurisprudential work by which Ibn Qudamah went beyond the school of Ibn Hanbal.[40]

The case of Hanbalis, as presented by the accounts by Ibn Abi Ya'la and Ibn Rajab that span five centuries, clearly demonstrates the existence of corporate elements but, at the same time, corporate self-identity was also clearly limited and never attained enough strength to seriously affect Islamic jurisprudence on the whole. Perhaps the bonds of affiliation were too loose, or maybe the jurists are to be blamed for failing to construe a community tied by solidarity. Or, on the other hand as I argue, perhaps a conscious decision was made to eschew an authoritative group identity to protect that community from domination or total political control. In the modern Western literature, debate continues to examine whether, from the fifteenth century onwards, *ulama* in general maintained a robust, continuous corporate nature.

In the work *Scholars, Saints, and Sufis*, different academics discuss religious institutions in Islam from the fifteenth century on. One theme that runs throughout the book is the reading of *ulama* as a "corporate group." Unlike Massignon, Makdisi, and Jackson, the researchers Nikki Keddie (editor),[41] Afaf Lutfi al-Sayyid Marsot,[42] Edmund Burke III,[43] Daniel Crecelius,[44] and Aziz Ahmed[45] argue that the *ulama* do not consistently act as a "corporate group." [46] Marsot complains that the (high) *ulama* in the eighteenth century did not act as a corporate group and did not perform specific state functions and, therefore, failed to achieve much influence.[47] A counterexample is found in Leon Carl Brown's account of nineteenth-century Tunisia, where the *ulama* are seen to have a sense of a "corporate entity separating themselves from the government,"[48] but this example seems rather exceptional.[49]

Much more common are assertions such as that of Edmund Burke III who notes that until 1900, "[n]ot only was there no religious institution, *per se*, in Morocco in the sense that there was no separate bureaucratic hierarchy of religious officials controlled from the top, it is even possible to say that *ulama* as an identifiable corporate group did not exist in Morocco."[50] Aziz Ahmed, describing the *ulama* of Pakistan, notes that in 1950s and 1960 their activity decreased dramatically because they were making individual efforts, not collective ones, to exert influence.[51] An operative presupposition of these researchers is that the *ulama* should have behaved as a corporate group in order to capitalize on the group's social status, so they are consequently criticized by the researchers for having lacked the quality of corporate solidarity.

In fact, the lack of corporate identity and belonging in the *ulama*'s functions and roles in these cases and that of the Hanbalis might have more to do with the nature of their role as dispersed groups

40 IBN RAJAB, *supra* n. 17, at 2:63.
41 KEDDIE, *supra* n. 2, at 2.
42 KEDDIE, *supra* n. 2, at 146-150.
43 KEDDIE, *supra* n. 2, at 101-6.
44 KEDDIE, *supra* n. 2, at 180-1.
45 KEDDIE, *supra* n. 2, at 264.
46 Compare in the same book the work of Brown in KEDDIE, *supra* n. 2, at 146-150.
47 KEDDIE, *supra* n. 2, at 146.
48 The use of the phrase "corporate entity" here looks to suggest "autonomy" more than real "corporate group."
49 BROWN LEON CARL, The Religious Establishment in Husainid Tunisia, in Scholars, Saints, and Sufis: Muslim Religious Institutions in the Middle east since 1500 (Nikki R Keddie ed. 1972), at 73-4.
50 BURKE III EDMUND, The Moroccan Ulama, 1860-1912: An Introduction, see KEDDIE, *supra* n. 2, at 101.
51 AHMAD AZIZ, Activism of the Ulama in Pakistan, in scholars, saints, and sufis: Muslim Religious Institutions in the Middle east since 1500 (Nikki R Keddie ed. 1972), at 264.

who are not organized into formal institutions or unified guilds.[52] This is why describing their operation as an imagined institution acting within a certain social sphere is more accurate than describing them as a corporate institution because, even when they formed corporate-like institutions, their power derived from their status as *ulama*–an imagined institution—rather than from their formal association with another institution. Miriam Hoexter puts it much better than I: "*ulama* were not acting as a concentrated group. They were hardly a "group" in the sociological meaning of the term. It was the expertise of the Sharia that gave them authority not their membership to a specific group."[53]

Thus, as Ephrat explains, the fluid and flexible label of *ulama* is what confers legitimacy despite the lack of official institutions and corporations.[54] Moreover, we should not be surprised to see fragmentation of authority among contemporary Sunni scholars because such dispersion comes from the nature of the religion itself, at least according to one renowned commentator.[55] Wael Hallaq has taken the extreme position of denouncing the whole idea of corporate personhood as being immoral and against Islamic law.[56] What seems more accurate is that Islamic law does not contemplate or recognize a total dominance of corporate groups for Islamic scholars as a class, whose unifying function is the honorable one of interpreting Sharia. At the same time, the existence of corporate groups within the scholars as a class did help to perpetuate their work to the extent that they remained independent of state coercion.[57]

To summarize my position here, there are four points. First, the *madhabs* are very loosely connected institutions that do not meet the criteria of guilds or corporate groups. Although I clearly admit that there are some corporate elements, there exist some resisting elements that keep *madhabs* from being completely corporate groups, or turn the sphere completely into organized corporate groups. The relationship of scholar to *madhab* is much looser still and is more imagined than it is formal. Although there have been more formal bodies in the past (meaning not *madhabs* but more formal institutions within particular geographic regions that constituted independent establishments), they have not encompassed all jurists nor do they explain the locus of juristic authority.[58] Different *madhabs* and schools never constituted a single comprehensive corporate group that qualified for representing the community as a whole. Second, and perhaps most importantly, all this casting about to describe juristic authority as either corporate group via *madhab* or via some other formal

52 HOEXTER MIRIAM et al., The Public Sphere in Muslim Societies, Suny Press 2002, at 21.

53 HOEXTER, *supra* n. 52, at 123.

54 EPHRAT, *supra* n. 2, at 6.

55 EICKELMAN DALE, and others., Muslim Politics, Princeton University Press 2004, at 131. ZEGHAL, *supra* n. 14, at 372.

56 HALLAQ WAEL, The Impossible State: Islam, Politics, and Modernity's Moral Predicament, Columbia University Press 2014, at 153-4.

57 It is worth reading the analysis by MUHAMMAD ZAMAN of the fragmentation of authority when he says,

Throughout the Muslim-majority world, advancing levels of education, greater ease of travel, and the rise of new communications media have contributed to the emergence of a public sphere— some call it the "street"—in which large numbers of people, and not just an educated, political, and economic elite, want a say in political and religious issues. The result has been increasing challenges to authoritarianism and fragmentation of authority. ZAMAN, *supra* n. 14, at ix.

On the other hand, in RAHEMTULLA'S estimation, the fragmentation of ulama left room for jihadists and extremists. In fact, it is the other way around. Fragmentation would protect the disagreements and diversity of opinions—the celebrated principles of jurisprudence. These fragmented individuals as a whole would dismiss the unidirectional discourse adopted by extremists and jihadists. Disagreements may allow for untraditional opinions or unorthodox discourse as well as a dangerous and extreme rhetoric but within the free sphere that by its nature dismiss the direct politics that is central to jihadists' discourse. Moreover, the fragmentation protects from state control as well meaning provides legitimacy. Formalization of ulama and associating them with the state official institutions strip them from legitimacy, which leaves room for jihadists and extremists. Furthermore, going against the very nature of scholars does not fight extremism; rather, it helps extremists gain ground and *free* them to develop social networks that the official scholars lack. RAHEMTULLA, *supra* n. 14, at 34.

58 Tunisia appears to be an example when al-Fasi and others popularly acted without being affiliated to the establishment or its institutions. He was dismissed from al-Zitouna, he resumed his teaching in the mosque. KEDDIE, *supra* n. 2, at 77.

institution seems to presuppose a need to have such a formality and organization to exert political influence, and that is just wrong, as the next section shows.

3. The Dispersed Influence

The issue that occupies the debate of corporate group is whether the fractured Islamic jurists and scholars could constitute organized and formal institutions—either through "corporate groups" or through their affiliation to the *madhab* or other corporate, solidarity or pressure groups. If they succeed in establishing such group solidarity, was this group status powerful enough to dominate the jurisprudential activities. Similar to the debate on "religious institution," the discussion of corporate group seems to have been premised on the idea that a corporate group is what assures the existence, leverage, and powerful sociopolitical influence of the community of jurists. Even when scholars agree with the existence of guilds, they tend to either point out the lack of overall corporate organization or the incapacity of the religious institutions to act as a concentrated group, thereby diluting their influence and rendering them largely marginal or irrelevant. It seems, for this approach, like if domination of corporate nature is what brings influence and strength.[59]

What really seems to be missing from the argument is whether the overall comprehensive corporate group idea does any good to scholars as a community. Discussion on this is not completely absent in the literature, but it is comparatively rare.[60]Arguments concerning corporate groups (or the lack thereof) as formal institutions should be turned on their head since most of these arguments fail to recognize the very nature of the *ulama*. The *ulama*'s basic principle of disagreement among themselves preserves the dispersed authority they represent.[61] This is not to say that corporate groups of different sorts did not influence society, jurisprudence, or politics. However, it is important to turn the focus to a more salient but less studied feature of scholars and jurists: fragmentation. This feature highlights their strengths and their freedom more than references to institutions or specific groups does.

Hanbalis from the early existence during the time of the founder, Ibn Hanbal, appreciated the doctrine of disagreement (*khilaf*). When Ishaq bin Bahlul (d. 766) wrote a book on the different opinions of jurists cross-*madhabs*, he titled his book "the Disagreements." When he presented it to Ibn Hanbal, the latter told him to title it "the flexibility" because jurisprudential disagreements serve the Muslim community by providing flexibility and different options for different conditions.[62] Even within one Hanbali doctrine, Al-Khiraqi disagreed with al-Khallal in ninety questions.[63] Ibn Hanbal himself seems to have more than one doctrine and approach according to Ibn Abi Ya'la. Ibn Hamid tells the disagreement over whether Ibn Hanbal has two contradicting or different doctrines: old and new.[64]

The followers of Ibn Hanbal continued the tradition of honoring disagreements. Al-Hasan al-Banna al-Baghdadi wrote a book reconciling the jurisprudence of al-Shafi'i and Ibn Hanbal to bring together

[59] HOEXTER, *supra* n. 52, at 123.

[60] See the brief discussion of some of the positive side non-corporate nature of ulama, ZEGHAL, *supra* n. 14, at 372; EPHRAT, *supra* n. 2, at 6; RAHEMTULLA, *supra* n. 14, at 17.

[61] For the concept of disagreement (*khilaf*) see e.g. IBN TAYMIYYAH, Raf' al-Malam 'an al-'Aemmah al-'Alam, The General Presidency of Scholarly Research and Ifta 1992, at 8-35; ALJAWZEYYAH, *supra* n. 38, at 40-205.

[62] IBN ABI YA'LA, *supra* n. 15, at 1:104.

[63] IBN ABI YA'LA, *supra* n. 15, at 2:64.

[64] IBN ABI YA'LA, *supra* n. 15, at 2:149.

the followers of the two schools.[65] One unique case of the Hanbalis is Abu al-Wafa' Ibn 'Aqeel (d. 1119).

Ibn Rajab tells that Ibn 'Aqeel's conduct resembles the early mystical (Sufi) school. According to Ibn Rajab, Ibn 'Aqeel studied every subject and science from their masters whether hadith, fiqh, poetry, Quran or its exegesis etc. Ibn 'Aqeel was proud that he learned from the best people in each subject. He walked with his teachers, sat with them, listened, and attended their lectures. Ibn 'Aqeel said about his life and learning, my father's side was a house of learning and education and they were [practicing] on the school of Abi Hanifah. I was following the resources of learning wherever they are, while some of my Hanbali friends wanted me to stick to Hanbali learning circles and Hanbali teachers. I would have missed a lot of learning had I listened to their advice. I would sit in Abu 'Ali al-Mansour's learning circle and he would bring me closer to him and present me to other students and authorize me to issue *fatwas* [Islamic response] despite the presence of older students and scholars. Nothing could take me from my beliefs and opinions, not a Sultanic blackmail nor a societal pressure. I was put in harm's way from both some of colleagues and from rulers. The colleagues campaigned against me to the degree of asking for my blood, while the rulers threatened with imprisonment and chase but I feared no one but Allah and loved nothing more than knowledge. Despite what I suffered and some of my colleagues's prejudice, I found that most of the students who follow Hanbali school exercise self-control, and most of their teachers act with temperance and cleanness.[66]

Ibn 'Aqeel was a case of Hanbalis who sees that being an honest Hanbali means to surpass superficial jurisprudential borders, and to learn from anyone, and communicate with every *madhab* affiliate. While his conduct and approach brought him to be of the highest Hanbalis and jurist, he complained from some Hanbalis and others who targeted him just because he was an unorthodox Hanbali. Ibn Rajab commented on Ibn 'Aqeel's approach attributing the calamity that happned to Ibn 'Aqeel to the fact that he was attending learning circles of some Mu'tazalis, orientalistically called Rationalists, like Ibn al-Walled and Ibn al-Tabban, and read on them in theology and was influenced by that.[67] Also influenced by Sufism, Ibn 'Aqeel wrote and apologetic book for Mansour al-Hallaj (d. 922) and his theology but he later retracted it and admitted that al-Hallaj was wrong and that there was a consensus among scholars during al-Hallaj's time that the latter was wrong.[68] In the year of 1082, when a conflict erupted between Hanbalis and other *madhabs*, Ibn 'Aqeel distanced himself and focused more on teaching and, thus, he was saved. He once was on a debate, and when he was told that what he is arguing for is not consistent with the Hanbali school, he replied, "I have my own independent *ijtihad*."[69]

The case of Ibn 'Aqeel is blatant that *ijtihad*, disagreement, and jurisprudential flexibility exist and defeat the generalization of corporate group that needs more solidarity than flexibility. Ibn 'Aqeel got his position as a leading Hanbali jurist in the eleventh century by caring less about affiliation and

[65] IBN RAJAB, *supra* n. 17, at 1:28.

[66] IBN RAJAB, *supra* n. 17, at 1:119-25.

[67] The Mu'tazili school is presented as the Islamic rationalists in the medieval Islam or the defenders of reason, see HOURANI GEORGE FADLO, Islamic Rationalism: The Ethics of 'abd al-Jabbār, Oxford University Press 1971, at 1-17; MARTIN RICHARD C. and others, Defenders of Reason In Islam: Mu'tazilism from Medieval School to Modern Symbol, Oneworld Publications Limited 1997, at 10.

[68] Mansour al-Hallaj was a famous mystical figure in Islam. He was executed because he preached and called for the doctrine of unity of existence. The doctrine means to unify humans and probably everything with God and, thus, considering everything to be God. See in general, MASSIGNON LOUIS, The Passion of al-Hallaj: Mystic and Martyr of Islam, Princeton University Press 1994, at 1-23.

[69] IBN RAJAB, *supra* n. 17, at 1:118-38.

focusing on the Hanbali knowledge and authority. While there are other cases of the opposite according to the opposing parties of Ibn 'Aqeel, both Ibn 'Aqeel and his enemies, exist in broader sphere that allowed them to compete and fight over authority more than being strictly institutionalized Hanabalis. The dispersed influence of their jurisprudence is what matters at the end. As I discussed in the third section, this sphere of influence encompasses guild members and non-guild scholars, jurists related to the state and those acting outside of it. The most important aspect is that the *ulama* regardless of their loose or firm affiliation with formal or imagined schools act at some point as individuals who are responsible only to themselves and their authority.

III. Formations of the Scholar: The Role of *Ulama*

The first section of this article draws attention to the manner in which scholars and jurists operated as an imagined institution rather than a formal religious one. It also showed how scholars retained influence despite the absence of any all encompassing association or corporate group. In this section, I will present the role and basic functions of the Hanbali scholars and jurists.[70] The scholars' roles and modes range from being cooperative with the state, to semi-independent, to resistant and oppositional. Considering the traditional roles and formations of the scholar, I will finally address modern responses of *ulama* to the many calls for change in their traditional roles.

1. The Weapon of Speech

The depiction of Islamic scholars as having the "weapon of speech" is proudly used in Islamic jurisprudence.[71] This image implies that their strength is not tangible or coercive like their political counterparts but rather moral and intellectual.[72]In fact, this weapon of tongue and pen alike is often deemed in Islamic discourse to be more important than the influence of political actors themselves. When Abdul-Rahman al-Jabarti, classified the categories of Muslim society, he placed the scholars in the second ranking right after the prophets and before the rulers and kings.[73] With this ranking, it is no wonder that the *ulama* say the pen is mightier than the sword.[74] As a result of this intangible weapon, they enjoyed privileges and exercised influence on different aspects of society, in a manner that could be more influential than those of political actors. This is demonstrated by the fact that, in addition to their own considerable funds from endowments and schools, they were exempted from taxation.[75]

2. The Essential Functions

[70] It is not my intention to lay down all roles and functions of scholars and jurists nor to cover Islamic history but to focus on roles and modes related to the issue of their relationship to the state, constitutional order, or the ruler in a way that adds and helps our understanding of the issue.

[71] In his long biographies of the scholars, AL-DHAHABI narrated a story about Ibn Hazim, a famous jurist from Andalusia, likening his tongue to the sword of al-Hajjaj, a bloody ruler in Islamic history. The comparison invokes the soft power of knowledge vis-à-vis the hard power of force and direct politics. AL-DHAHABI SHAMS AL-DEEN, Sear A'lam al-Nubla', Al-Risalah Publisher 2001, at 18:199.

[72] See HATINA, *supra* n. 9, at 209.

[73] ABDUL-RAHMAN AL-JABARTI, 'Aja'ib al-Aathar, Dar al-Kutub al-Arabiyyah 1998 (Abdul-Raaheem Abdul-Raheem ed.), at 1:14-5.

[74] KEDDIE, *supra* n. 2, at 150. In his book, *al-Fikr al-Usuli* (the Jurisprudential Thought), ABDUL-MAJEED AL-SAGHEER brilliantly and somewhat overly presented the literature and acts of ulama as a production of the persistent and continuous conflict between scholars and rulers, or may be between religion and politics. AL-SAGHEER ABDUL-MAJEED, Al-Fikr Al-Asuli, Dar al-Muntakhab al-'Arabi 1994, at 7-19. However, I interpret the same struggle as continuous attempts of scholars to protect the sphere that maintains their freedom of debate and interpretations and, most of the time, not over direct power.

[75] KEDDIE, *supra* n. 2, at 133.

One central function and role of scholars is to bear, carry and interpret the principles of Islamic law. To teach the rules and principles of Islam and to call upon society to act according to them are essential functions of *ulama* as well. As a result of these roles, they are often called to administer Islamic law as well, which itself then becomes an additional, fundamental role.[76] The types of roles and functions of *ulama* and jurists conform to their typical interactions with people because Islamic law itself is the texts interpreted within the circumstances and environment of a given society at a given time.

In addition to their basic functions, or perhaps because of them, scholars are seen as "guardians of faith," "protectors of the religion," or "bearers of Islam."[77] Although this is arguably true, they have these roles due to their sociopolitical influence more than because of the exercise of any sort of direct power. From this perspective and more accurately, scholars are the bearers of knowledge and jurisprudence, as well as the protectors of the faith and religion of the people and the nation (*ummah*).

Scholars are therefore the most vocal demonstration of the nation's fundamental religious duties.[78] As Hoexter indicates: "From the early Islamic times, the *ummah* (nation), not the ruler was bearer and interpreter of the norm and basic values of the proper Islamic social order. The ruler was responsible for the implementation of the rules."[79] Within the nation, scholars are the group most associated with the work of defending and protecting the Islamic doctrine that defines it.

3. The Authority Holders

As indicated above, because Islamic law is a jurist's law, jurists carry the authority that sustains it.[80] Exercising the authority is not facilitated only through controlling Islamic texts and traditions, but also by controlling the taxes and endowments. Hanbalis and other jurists try to set out basic qualities for anyone to be a jurist. Ibn Hanbal said about himself that he spent five years in the subject of menstruation and its jurisprudence until he understood it.[81] He, then, said that nobody can present himself for jurisprudential ruling as a *mufti* until he acquire certain qualities: good faith and intention, patience, quietness, tranquility, being well-versed in his subjects, adequacy, and knowing people.[82] Therefore, Ibn Hanbal did not forget the importance of interacting with people, learning them and leaning on them.In this sense, scholars are the legitimacy givers who, in turn, lean on people for credibility and support.[83] I put emphasis on the jurists' role regarding authority because locating this authority takes on a greater importance in the course of deciding the sphere in which the *ulama* work.

If we to apply the claim-versus-belief formula developed by Ricoeur,[84] the self-proclaimed authoritativeness of *ulama* can be examined in people's reaction and support of what cab bel called these meta-constitutional authority, an authority developed in a space beyond mere constitutional

76 See ALJAWZEYYAH, *supra* n. 38. Al-Baghdadi al-Khateeb, Al-Faqeeh Wal Mutafaqqeh. 2007. See also KEDDIE, *supra* n. 2, at 33-152.

77 KEDDIE, *supra* n. 2, at 115.

78 See FELDMAN NOAH, The Fall and Rise of Islamic State, Princeton University Press 2008, at 10-14.

79 HOEXTER, *supra* n. 52, at 123.

80 HALLAQ WAEL, Juristic authority vs. state power: the legal crises of modern Islam, 19 Journal of law and religion (2004), at 248; KEDDIE, *supra* n. 2, at 308.

81 IBN ABI YA'LA, *supra* n. 15, at 1:250.

82 HALLAQ, *supra* n. 80, at 245-7.

83 KEDDIE, *supra* n. 2, at 115.

84 TAYLOR GOERGE, Paul Ricoeur and the Task of Political Philosophy, Lexington 2012, at 66-67; RICOEUR PAUL, Lectures on Ideology and Utopia, Columbia University Press 1986, at 202-203. For Weber's original idea about the claims of authority, see WEBER MAX, On Charisma and Institution Building, University of Chicago Press 1968, at 46-47.

framework. Throughout Islamic history, the mere existence of *ulama*'s meta-constitutionalism indicates the belief and trust of people in this authority. The following pages will try to review the main political modes of *ulama*, and how meta-constitutionalism existed in different forms within these imagined institutions.

IV. The Political Modes of Ulama

The literature on scholars and their political presence fluctuates reductively between portraying them as bureaucratic religious officials and mediators, or presenting them as mass leaders and prominent figures of opposition.[85] In fact, the political influence of scholars was quite significant, and can be divided into five main types, as discussed below. These are activism, mediation, consultation, counterbalance and withdrawal.

The analysis that presents scholars as government officials or state institutions as well as mediators and brokers between people and the state seems self-contradictory. Mediators are presumed not to be officially members of one party; otherwise, their mediation would be entirely compromised. Some researchers address this problem by describing different types or modes of scholars. They conclude that *ulama* are divided into two groups. One group is an official religious institution with members and functionaries, while the other is less reliant on the state and serves as a mediatory class that is always suspicious of the state.[86] Still others summarize responses of scholars toward political events as either being in total opposition or as passive withdrawal.[87]

All of these accounts fall short of presenting other possible responses and fail to include other influential groups of scholars that were not considered, due to the reductionist approach in defining and dealing with Muslim scholars. Because *ulama* by their very nature are a dispersed authority, we should look at them as belonging to diverse groups in society, whether they were peripheral, *madhab* jurists as corporate group or otherwise, official state *ulama* or others unaffiliated with any formal institution. Due to their authority working mainly in a sphere that is (or at least in an ideal sense is supposed to be) uncontrollable even if they happen to work in the bureaucracy, *ulama* may resort to their own sphere if they are to issue fatwas or to work generally as scholars or jurisconsults.

I will present examples, focusing on pre-modern Hanbalis, of different modes of political engagement in order to prove the existence of a wider space available for different types of jurists and scholars—a space where they mainly acted as scholars but with vastly different capacities.

1. Outside Bureaucracy: Religious Activism

One prominent mode of scholars in regard to politics is their activism outside state institutions, or sometimes against them. I avoid simplifying their activism as "opposition" because in many cases it is not. Opposition in the contemporary state system means being able or willing to replace the government, or it may mean the competition over direct political power. Other understandings of opposition presume the operation of a coherent group, which leads back to the debate about whether

[85] Researchers do this sometimes in a contradictory way. Many researchers swing back and forth between describing the role ulama played either as part of the government or as mediators and brokers between the government and people. See e.g. KEDDIE, *supra* n. 2, at 150,153-165-172. 1972; Hatina, *supra* n. 9, at 58-74. 2010; EPHRAT, *supra* n. 2, at 113; JACKSON, *supra* n. 20, at 170; HOEXTER, *supra* n. 52, at 23.

[86] KEDDIE, *supra* n. 2, at 72-3.

[87] KEDDIE, *supra* n. 2, at 176.

the scholars are a corporate or pressure group.[88] In all these situations, scholars cannot be described as simply a form of opposition. Therefore, I use "activism," following Aziz Ahmed and others, to generally describe the scholars' actions outside the state's official sphere.[89] The illustrations here are just examples of the long and diverse activism of scholars. I present them to help demonstrate the role of *ulama* in politics as independent moral watchdogs. Rebellion, public pressure and protests are examples of the forms that scholastic activism could take.[90] In his book about the relationship between *ulama* and rulers, Abdul-Aziz al-Badri presents countless cases and names of scholars in Islamic history that "stood" in front of the rulers and challenged the government, and thus, they paid a toll with persecution, pressure, imprisonment or even execution.[91]

A silent repeated move among Hanbalis, and probably scholars in general, is to resort to the mosque and to teach in learning circles instead of institutions endowed by political elites. This happens as a juristic defiance to the political ban and to the outside attempts to control scholars. Ibn Sam'un (d. 997) was a Hanbali preacher who took to the mosque to preach despite the ban on preaching from the ruler. He was brought to the ruler's court and defended his position and found his way to convince the ruler.[92] At the same period, another Hanbali preached the ruler and reminded him of the Islamic role of the jurists until the ruler wept out of emotions and allowed for such activities.[93] When Ibn Sam'un died in 997 and was buried in his home, the people of Damascus were outraged by the fact that he didn't have a proper funeral so they dug his grave and took his body to the great mosque in the city, and a lot of people prayed on him and buried him. The funeral, then, was a popular message.[94] Hanbalis narrated to their founder Ibn Hanbal that he said, "our promised meetings are the day of funerals," meaning that huge funerals that are attended by large number of people are the signs of strength and truth.[95]

Ibn Rajab does not miss the chance to complement principled Hanbalis who never feared the rulers nor the people. He gives the example of Abdul-Khaliq Bin 'Isa (d. 1077) who "always said the truth and never favored a person of position or influence. In the matters of Allah, he never shied away. He moved between five mosques and taught in them…."[96] He was "the final destination to travel for students of the school of Ibn Hnabal" and "was undisputedly leader of Hanblis in his time." According to Ibn Rajab, Ibn 'Isa "was appreciated by the ruler but also never took anything from the ruler in return for matters of this life." This is why he built his reputation and popular strength to the extent that two subsequent rulers in Baghdad started their reign by going to the mosque and asking allegiance from Ibn 'Isa.[97] In 1071, Hanbalis went to the Great Mosque close to the Palace of the ruler and requested to eliminate bars, investigate selling wines in the city, and fight corruption and corruptors. The Caliph 'Adhud al-Dawlah responded positively.[98]

88 For the meaning of "opposition" in the contemporary context see BLONDEL JEAN, Political Opposition in the Contemporary World, Government and Opposition (1997), at 32.

89 KEDDIE, *supra* n. 2, at 257.

90 See RAHEMTULLA, *supra* n. 14, at 17.

91 ABDUL-AZIZ AL-BADRI, Al-Islam Bain al-Ulama and al-Hukkam, al-Maktabah al'ilmayyah n.d., at 129-244.(Ironically, the author himself ended up to be another case of these inquisitions of scholars; he was executed by Ahmed al-Bakr's regime in Iraq in 1969).

92 IBN ABI YA'LA, *supra* n. 15, at 2:158.

93 IBN ABI YA'LA, *supra* n. 15, at 2:159.

94 IBN ABI YA'LA, *supra* n. 15, at 2:161.

95 ISMAIL IBNUMAR IBN KATHIR, al-Bidayah wa al-Nihayah, Dar 'alam Al-kutub 2003, at 10:342.

96 IBN RAJAB, *supra* n. 17, at 1:12-5.

97 IBN RAJAB, *supra* n. 17, at 1:12-5.

98 IBN RAJAB, *supra* n. 17, at 1:12-5.

Later After the death of a Hanbali scholar, some Mu'tazili wanted to proselytize the sect of Mu'tazili but al-Shareef Abu Ja'far (d. 1077) rushed to the great mosque of al-Mansour and reestablished the Hanbali doctrine with the other scholars of the people of hadith. For Ibn Rajab, "this is when the people of the Tradition and Sunnah were happy. The Book of Tawheed was read there too. All who were present agreed to support the [traditional Hanbali] doctrine."[99]

Around the year 1077 in Baghdad, the "calamity of Ibn al-Qushairi" took place. The basic facts are that Ibn al-Qushairi (d. 1120) accused Hanbalis of theological heresy. The accusation was that Hanbalis embody Allah and liken Him to human beings. Some influential scholars leaned toward al-Qushairi's accusation and believed it, and, then, al-Qushairi and others resorted to the ruler complaining against Hanbalis. When the students of al-Shareef Abu Ja'far, the representative of Hanbalis, learned that their teacher was targeted by the group of al-Qushairi, they assigned some of them to protect their teacher at the doorsteps of the mosque. When both groups met, it turned violent and one passerby was killed as a result of the chaos. Both parties wrote to different political rulers: the Caliph and the Minister. The latter brought the leader of both parties to stop involving violence and ordinary people in their doctrinal conflict. When they refused, the Minister wrote to the Caliph. The Caliph then ordered house arrest for al-Shareef and exile for al-Qushairi and this is when the calamity of Ibn al-Qushairi came to an end.[100]

While the story itself does not technically present a case of activism, it shows how jurists respond to different actors of the society and how they interact with the rulers. More importantly, it shows again the persisting nature of the jurists to protect their juristic domain. They can defy politicians and expose themselves to danger, violence, and exile in order to draw a line that protects the jurisprudence of Ibn Hanbal and more the religion of Islam. For many Hanbalis and others, involving rulers in matters of jurisprudence could distort the doctrine and jeopardize the principle. This is why they refused to follow political favorite doctrines, and even to keep silent about other minor opinions that they held. Al-Harawi said that he was brought to be executed five times in order to just keep quiet, let alone to change his juristic opinions, but he refused and survived all times.[101]

In Egypt, the case of the scholar al-'izz bin Abdul-Salam (d. 1262) is a striking one. In Islamic history, he was given the title the "Sultan of the *Ulama*" in appreciation of his bold moves in addition to his scholastic books on jurisprudence and jurisprudential politics. He was imprisoned and persecuted because of his activism and outspokenness. When Ibn Abdul-Salam noticed the influence the slaves of the Sultan Ayyub gained, he became alarmed and tended to invalidate the transactions they would make, which angered them. The slaves, who would become rulers later, complained and drove a wedge between the Sultan and Ibn Abdul-Salam. This led to an extreme confrontation with the ruler, as a result of which Ibn Abdul-Salam packed and started leaving Cairo with people and nobles following him. This forced the ruler and ruling elites into a position where they had to accept his authority and judgment and urge him to stay in order to stabilize society.[102] This example helps to demonstrate the power of the *ulama* when they choose the path of activism. Despite the fact that this scholar did not have a formal position or political office, he could influence politics through societal and popular pressure.

Activism could take many other forms as well. Scholars engaged in public affairs based on their understanding of the moral obligations and religious principles that they promoted. They pressured

[99] IBN RAJAB, *supra* n. 17, at 1:15.
[100] IBN RAJAB, *supra* n. 17, at 1:16-20.
[101] IBN RAJAB, *supra* n. 17, at 1:145.
[102] ALI AL-SALLABI, Al-'izz bin Abdul-Salam, Al-Maktabah al-'Asriyyah n.d., at 65-66.

rulers as they did in the example of "Salat al-Raghaib" during the Ayyubid period (from the twelfth to the thirteenth centuries). Salat al-Raghaib is the prayer performed on the first Friday of the month of Rajab. The scholars opposed the general practice of this prayer on the grounds that it is an innovative religious practice. The ruler responded to their demands accordingly.[103] During the eleventh century, jurists gathered to protest against drinking wine, charging interest, and allowing prostitution. This protest is an important sign of the relationship between these protesting jurists and the state.[104]

Not only pre-modern scholars protested or challenged orders that threatened their own morals or interests, but also some early modern scholars took the lead in defending the interests of the general public. Activist *ulama* were not only a Hanbali feature, but a mode that many other *ulama* exercised. In 1794, in Egypt after the Mamluk, the rulers of Egypt, introduced taxes on goods, the scholars fiercely opposed taxation. They led a general strike against the ruler to stop tax exploitation and, in the end, the rulers negotiated with the *ulama* and the taxes were repealed.[105]

Another kind of activism, and one that could mark the climax of *ulama*'s influence, was challenging the authority of existing rulers. They could morally, in the form of a fatwa, delegitimize one ruler in favor of another, as they did many times throughout history when they perceived the public interest better served by the challenger.[106] In this context, Umar Makram (d. 1822) is an important name. He graduated from al-Azhar and rose among the nobles and scholars of Egypt during the French colonization (1798-1801). The *ulama,* under the leadership of Umar Makram, organized a popular mobilization and recognized the challenger Muhammad Ali as the legitimate ruler of Egypt over the existing Wali. It was a moment when Egyptians chose their own government in 1807.[107] Not long after that, Umar Makram told Muhammad Ali himself that the people had the right to remove any unfit ruler.[108]

Scholars' activism of this sort has become particularly intense in the modern era, in the context of resisting colonization and occupation. The jurist Rawaq, dubbed "the Sheikh of the Blind", led the first opposition against the French in Egypt. Beyond Rawaq, the *ulama*, in general, orchestrated the resistance movement.[109]

The Urabi movement (1879-1882) was a popular mobilization that ended up fighting the British intervention in Egypt. The Urabi movement in Egypt was named after Ahmed Urabi, a popular soldier who decided to reject the unpopular policies of Taufeeq, the ruler of Egypt. Scholars proved to be a critical component of the movement he inspired. It is worth noting that the Urabi movement attracted diverse scholars from "both sides of the aisle," from those described as conservatives like Illysh to those who were reformists like Muhammad Abduh.[110] Illysh, Mansour al-Adawi, al-Haddad, and Salim al-Bishri were among the *ulama* who contributed to the Urabi revolution.[111] In 1879, al-Bakri with his friends and other scholars issued the "National Charter" to request a constitutional monarchy in 1879, but Khedive challenged the move and sent al-Bakri into exile.[112]

[103] HOEXTER, *supra* n. 52, at 49.
[104] EPHRAT, *supra* n. 2, at 92.
[105] HATINA, *supra* n. 9, at 24.
[106] KEDDIE, *supra* n. 2, at 105-6.
[107] KEDDIE, *supra* n. 2, at 176..
[108] KEDDIE, *supra* n. 2, at 178.
[109] KEDDIE, *supra* n. 2, at 162-3.
[110] HATINA, *supra* n. 9, at 39-44.
[111] HATINA, *supra* n. 9, at 35; KEDDIE, *supra* n. 2, at 163-4.
[112] KEDDIE, *supra* n. 2, at 164.

Later, a popular fatwa by *ulama*, signed by 10,000 people, delegitimized Taufeeq and called for a fight against the British occupation.[113] Despite the official position of the Grand Mufti of al-Azhar, the majority of professors and students joined the revolutionaries against the Khedive Taufeeq, the contested ruler of Egypt who was supported by the British.[114] Scholars who supported the Urabi movement paid an expensive toll as some were dismissed from al-Azhar, some were imprisoned like Illysh who was 80 years old, and others faced exile like Abduh.[115]

The Urabi movement inspired similar activism on the part of *ulama* in Morocco who opposed the monopoly of tobacco by the government of Hasan I (1873-1894) and who wanted to defend public interests against the alliance of big merchants and ruling elites. The scholars issued an opinion condemning the monopoly, which came as a shock to the King. The King addressed the issue and tried to calm the public.[116]

After the Urabi movement, al-Azhar participated in the 1919 revolt in Egypt. This revolution was led by Saad Zaghlul (d. 1927) who graduated from al-Azhar and was one of Muhammad Abduh's disciples. The movement broke out against the British occupation of Egypt and demanded national independence. The revolutionaries frequently met in the homes of the scholars.[117] The movement was organized by the collective efforts of the national activists like Zaghlul and the other members of al-Wafd as a national delegation.[118] The *ulama* generally contributed to the independence of Egypt by signing a petition to Britain that Egypt should be free and independent.[119]

The Activism of scholars was a traditional way in which *ulama* sought to challenge the status quo, and one that they embraced. Another manner in which they engaged the state was in the role of mediators and peace brokers, as the next section shows.

2. Mediation Role

It could be said that because jurists never occupied an official political position for their religiosity, they continued for a long time to mediate on behalf of the people with the political authorities in the state in order to voice the needs and interests of the people.[120] Ephrat thinks that *ulama* served as mediators because of the "heterogeneous character of their socioeconomic background and networks, and their close ties with the urban populace…."[121]

An interesting aspect of the scholars' role as mediators is that it serves a dual function. The first is defending the public and people's interests against the ruler's exploitation and overstep, and the second is being in charge of calming people down from the ruler's side. "*Ulama* served a communication tool between the ruler and the ruled for the ruler to manipulate the public."[122] A perfect example of this occurred during the Urabi Revolution when the Khedive Taufeeq singled out *ulama* as responsible for public order and for ensuring the obedience of the people while these *ulama*

[113] HATINA, *supra* n. 9, at 55.
[114] HATINA, *supra* n. 9, at 70.
[115] HATINA, *supra* n. 9, at 76-82.
[116] KEDDIE, *supra* n. 2, at, 101.
[117] HATINA, *supra* n. 9, at 142-3.
[118] For more about the 1919 Revolution and the mobilization of Zaghlul and the Wafd see SELMA BOTMAN, Egypt from Independence to Revolution, 1919-1952, Syracuse University Press 1991, at 25-55.
[119] HATINA, *supra* n. 9, at 143.
[120] HALLAQ, *supra* n. 56, at 56; EPHRAT, *supra* n. 2, at 13.
[121] HOEXTER, *supra* n. 52, at 32.
[122] KEDDIE, *supra* n. 2, at 53.

and others were carrying the people's demands to him.[123] Even at times of occupation and colonization, some *ulama* tended to work with the de facto rulers so they carried on in their role of representing people but to the colonizing forces this time. During the French occupation in Egypt, some *ulama* represented the public before the French, while other *ulama* represented the public against the French. [124]

In order for *ulama* to resume their mediatory task, they need to be independent of the state's bureaucracy, as they cannot mediate if they work for one side and part (of the state); otherwise, they will lose the confidence of the public as faithful mediators.

3. The Consultation Role

One of the most famous judges (*qadis*) in Islamic history is the noted early Hanafi jurist Abu Yusuf (d. 798). His book about the land tax, *al-Kharaj*, is a jurisprudential hallmark. He started the book by saying, the "caliph instructed me to write a book for him to *study and act upon*."[125] The book, in other words, grew out of Abu Yusuf's role of consultant and enabled the Caliph to act upon the rules that Abu Yusuf set. The famous political jurisprudence theorist, al-Mawardi (d. 1058) is another example of a jurist who played the role of consultant when he wrote *al-Ahkam al-Shar'iyyah*, which has proved to be one of the hallmarks in political jurisprudence. This work was prepared under the instruction of the ruler al-Qadir Billah (d. 1031) in order for him to "study and act upon" it.[126] Al-Juwaini (d. 1085),[127] and his student, al-Ghazali (d. 1111),[128] produced similar books to instruct future rulers on how to follow Islamic principles.

The custom of the ruler consulting scholars and scholars writing books or rulings of jurisprudence in response demonstrates how the consultation function worked between some scholars and rulers in Islamic history. The practice of consultation was not just a tradition established in the *ulama*'s practice and literature, it was also a custom and principle on the rulers' part. Rulers like Nizam al-Mulk, a Seljuk ruler (d. 1092), advised rulers to consult learned scholars especially the experienced ones.[129] The objectives of scholars in their services as advisors were to maintain the cooperation and understanding of rulers, and thereby have influence in the implementation of Islamic principles that would in their judgment maximize the interests of the public while furthering their own longer-term interests and influence as well.[130]

Around the 1100s, Abu Saad al-Baqqal al-Baghdadi was used to preach in the presence of the Caliph al-Mustadhhir. He once preached Nizam al-Mulk that "Allah could turn his [fancy] wooden door into his casket…. Al-Baqqal added, addressing Nidham al-Mulk, you have no choice but to follow Allah's rules because you're the agent of the [Islamic] nation unlike ordinary individuals. [You are]

[123] HATINA, *supra* n. 9, at 53.

[124] KEDDIE, *supra* n. 2, at 173.

[125] AL-QADI ABU YUSUF, Al-Kharaj, Dar al-Ma'rifah 1979, at 3.(italics is mine, and translation is Nimrod Hurvitz') See HOEXTER, *supra* n. 52, at 20.

[126] AL-MAWARDI ABU AL-HASAN, Al-Ahkam Al-Sultanyyah, Dar Ibn Qutaibah 1989, at 1.

[127] AL-JWAINI ABU AL-MA'ALI, Al-Ghyathi: Ghyath AlUmam fi Eltyath AlDhulam, Dar al-Da'uah 1980, at 1.

[128] AL-GHAZALI ABU HAMID, Sirr al-'Almeen, Dar al-Aafaq 2001, at 1.(It is worth noting that this book's author is highly disputed whether was al-Ghazali or not).

[129] AL-MULK NIẒĀM/HUBERT DARKE, The Book of Government; or, Rules for kings, Yale University Press 1960, 95. Nizam al-Mulk says, "Holding consultations on affairs is a sign of sound judgment, high intelligence and foresight." See also EPHRAT, *supra* n. 2, at 63.

[130] KEDDIE, *supra* n. 2, at 177.

an agent who is responsible to take care of the interests of people and report to the higher political authority of this life, and to Allah in the Hereafter.[131]

This custom of playing the role of consultation was not exclusive for Hanbalis nor only in the medieval Islam. With the Ottoman Empire in the sixteenth century, scholars and sultans reached an important level of cooperation and consultation where *ulama* who played a large part in bringing what one scholar regards as "a major achievement of the Empire, namely the endowment of Islamic law, in its *Hanafi* form."[132] This role of consultant continued even during the codification when the traditional role of scholars within the state was at stake. The *ulama* who justified the change and facilitated the codification feared that if the change was adopted without their presence, it might have worsened their position as scholars. The attitude of some u*lama* to justify codification was, therefore, based on the fear that the entire process would take place without their input at all if they did not participate.[133] The effort in the end, however, delegitimized not just some of the scholars involved in the codification process but the state as well. The effort was seen as justifying late Ottoman tyranny and monopoly of power rather than as an effort to implement Islamic law.

Consultation worked in cases where the *ulama* consulted were associated in one way or another with the ruler, sultan, or government, such that the scholar acquired the confidence of the ruler. In the absence of such trust, it is unlikely that a jurist could have played this role effectively.

4. The Official Counterbalance

Despite partial subordination of ruler-friendly *ulama* to the people in power, these *ulama* were still able to function as an official counterbalance. According to Feldman, the compromise was that jurists offer legitimacy to the order as a realistic compromise for the acceptance of the status quo as a means of then exercising influence and using pressure to ensure Sharia compliance in society.[134] Feldman presents al-Ghazali and al-Mawardi as examples.[135] The move may be read, then, not as a scholarly concession to power, but as a brilliant maneuver that successfully preserved the law and the scholars in their constitutional position even after the caliphate had failed in its assigned task of preserving orderly government.[136]

From the Hanbali jurisprudential history, Yahya bin Hubairah al-Wazeer (the Minister, d. 1165) represents probably the highest Hanbali official in the Abbasid state. Unlike al-Ghazali, and al-Mawardi and some others, Ibn Hubairah served in the government as a bureaucratic minister. According to Ibn Rajab, Ibn Hubairah was poor until he was brought to the Sultanic services and was promoted until became a minister during the rule of al-Muqtafi li Amrillah. Ibn Hubairah was then praised a lot and was called different great titles by the people for his position and dedicated learning. However, he refused to be called the lord of ministers. He said that Allah calls Aaron a minister to Moses, and the Prophet called Jibreel and Mika'eal his ministers in the heavens while Abu Bakr and 'Omar are his ministers on earth. Thus, Ibn Hubairah wouldn't allow himself to be called the lord of these great people and angels who should be called lords themselves. When Ibn

[131] IBN RAJAB, *supra* n. 17, at 1:90.

[132] KEDDIE, *supra* n. 2, at 29.

[133] LAYISH AHARON, Die Welt des Islams, 2004, at 89-101.

[134] FELDMAN, *supra* n. 78, at 50-1, 38-9.

[135] I do not agree with analysis that al-Ghazali has a similar move to al-Mawardi. This is because al-Ghazali's authorship of the book, *Sirr al-'almeen*, is really disputed and I believe it is not his. See AL-DHAHABI, , *supra* n. 71, at ' 19/328. In addition, this approach of being ruler-friendly does not fit the whole works and moves of al-Ghazali like his criticism of the association with sultans in his infamous book, ABU HAMID AL-GHAZALI, Ihya' 'Ulum al-Deen, Kiriata Futra n.d., at 66-8 § 1.

[136] FELDMAN, *supra* n. 78, at 39

Hubairah held the position of minister he brought closer to him the scholars, and best of people in learning circles and the people of worship. He benefitted the people of knowledge and Sunnah as best as he could, May Allah bring mercy upon him.[137]

Ibn Hubairah once was in a learning debate with al-Ashtari al-Maliki, a jurist following the school of Malik, and al-Ashtari attributed to Malik an opinion that is, in fact, not Malik's. Then, Ibn Hubairah tried to correct him but al-Ashtari insisted on that, until Ibn Hubarah brought the authoritative book from both resources, Malik and Ibn Hanbal, and won the argument. Following this incident, Ibn Hubairah asked al-Ashtari to apologize for the people of knowledge for claiming something that was not true but he refused. Then, Ibn Hubairah called him a name and cursed him. The next session, Ibn Hubairah started blaming himself for mistreating al-Ashtari and apologized for him, but al-Ashtari said he was the one who should apologize for telling a false fact. After that, a lot of people cried in the place and was emotional.

Ibn Rajab described Ibn Hubairah as a jurist who served the Abbasids but highly respected the juristic sphere and respected its rules and borders. Ibn Hubairah once was shown a book that was brought to him from the library of the *madrasa* of al-Nizamiyyah, but he refused to read it and ordered it to be brought back since the terms of the endowment of the library stated that "no book should be brought outside it." This was part of the Hanbali and other schools jurisprudential doctrine of "*shart al-waaqif*" that the endowment must be run completely according to the terms of the endower.[138] During a learning circle in the mosque, Ibn Hubariah gave an example of how the terms of the endower should be respected. He said he once was not allowed to enter a madrasa because it was built exclusively for Shafi'is and he was Hanbali.[139]

Although he served in the Abbasid government, Ibn Hubairah maintained reasonable neutrality towards jurisprudential orientations, and respected the juristic sphere regardless of *madhabs*. Despite the fact that he was a learned jurist trained and affiliated with the Hanbali *madhab*, he said that mosques must not be affiliated with any school or jurisprudence, because they're for Allah, like in the Quran "Mosques are not but for Allah."[140] Therefore, according to Ibn Hubairah, nobody can establish an exclusive mosque for some *madhab* or school within Islam because mosques must be open for all Muslims and serve all Muslims. He considers the act of specifying a mosque for a *madhab* or a jurisprudence as a bad innovation in Islam and against the verse of Quran that talks about "the Sacred Mosque, which We have made (open) to (all) men - equal is the dweller there and the visitor from the country."[141] Ibn Hubairah did not serve as an official counterbalance *per se*, but he was more like a political protector of the juristic domain.

The official counterbalance seems to attempt to reach the same destination: protecting the free sphere of jurisprudence from the total political control._Samuel Eisenstadt described the relationship between ruler-friendly *ulama* and the rulers as a "tacit bargaining" that the *public* sphere is for the public, and that *ulama* are always free to operate in this arena.[142] Ottoman *ulama* and modern Islamic scholars in the official counterbalance mode use their pressure to fight what they see as social and

[137] IBN RAJAB, *supra* n. 17, at 1:211-38.
[138] IBN RAJAB, *supra* n. 17, at 1: 215-20.
[139] IBN RAJAB, *supra* n. 17, at 1: 235.
[140] Quran (72:18).
[141] Quran (22:25).
[142] HOEXTER, *supra* n. 52, at 6-151. Compare the interesting analysis of Haider Hamoudi about different bargains that, sometimes, involved al-Najaf, religious institutions and scholars in the Iraqi constitutional context, HAMOUDI HAIDER ALA, Negotiating in Civil Conflict: Constitutional Construction and Imperfect Bargaining in Iraq, University of Chicago Press 2013, at 82,87,120,137-141.

economic injustices.[143] Official Ottoman *ulama* could even issue rulings that circumvented the Sultan's will and order.[144] When a university of sciences was open at the order of the Sultan Abdulmecid II in 1870s, Sheikh al-Islam Hasan Fehmi Efendi saw it as a rival to the traditional madrsa system so he issued a fatwa and campaigned against it and succeeded in closing it.[145]

Because the rulers decided to engage *ulama* in their legitimation process, the rulers paid the toll of bending to the wind created by *ulama* and the society they represented. In this mutual-interest relationship, scholars developed their own jurisdiction and sphere and the state protected its own domain. So, the dispute sometimes seems to be over "whose jurisdiction should govern?" or "whose sphere is at stake?"

The role of scholars as a counterbalance is sometimes vague due to the fact that the degree of "legitimacy" the *ulama* offer is often unclear and therefore perceived to be unconditional. It seems that al-Mawardi and the others would occasionally offer a temporary de facto solution to a political crisis by approving a ruler, but that solution could introduce a worse crisis when it is later used to justify forever de facto rule. Moreover, the "compromise" that brings scholars under the umbrella of the government ends up stripping them from real influence including counterbalance, and costs them their own legitimacy in the eyes of the public whom they should represent.[146]

5. The Time of Withdrawal?

A salient phenomenon that repeatedly appears when *ulama* react to political developments is what some describe as "withdrawal." Interestingly, analysts' definitions of withdrawal differ dramatically from complete silence, to denial of participation in the discussion, to denial of participation in official governance.[147] In this section, I tend to revisit the analysis of withdrawal in light of the fact that scholars are characterized by fragmentation, and they each have their own space of influence.

Some analysts like Jackson and Hatina tend to describe *ulama*'s response to politics as quietist. Quietism describes the wide range of methods that defer direct political questions or disputes over direct power to politicians or ruling elites that are directly involved in politics.[148] In this sense, quietism means abandoning (direct) politics in order scholars to devote the time and effort to the religious or jurisprudential work and debates.

Some analysts who present some *ulama* as quietists do not take into consideration the factor of whether these scholars are official, government-friendly *ulama* or non-official. Quietism does certainly exist in scholarly response to politics, but the point here is that the scholars' quietism could be interpreted differently according to the locus that the scholar traditionally occupied.[149]

If the literature that speaks of withdrawal does not interpret this move by *ulama* as a quietist approach toward public discussion, it will describe it as a method of avoiding troubles and adopting a passive reaction toward the serious issues in society.[150] However, although passive withdrawal

143 HATINA, *supra* n. 9, at 18-9. See ZAMAN, *supra* n. 14, at 108.
144 KEDDIE, *supra* n. 2, at 33.
145 KEDDIE, *supra* n. 2, at 41.
146 HATINA, *supra* n. 9, at 134.
147 Compare the following materials, JACKSON, *supra* n. 20, at 70; KEDDIE, *supra* n. 2, at 117; HATINA, *supra* n. 9, at 18-58-9.
148 JACKSON, *supra* n. 20, at 70; HATINA, *supra* n. 9, at 18-58-9.
149 As an example of the analysis that does not make this differentiation see JACKSON, *supra* n. 20, at 70. Compare the Shi'i Semi-Quietism and Quietism in Hamoudi's work, HAMOUDI HAIDER ALA, Between Realism and Resistance: Shiʿi Islam and the Contemporary Liberal State, Journal of Islamic Law and Culture, 111-8 (2009), at 11.
150 JACKSON, *supra* n. 20, at 70; KEDDIE, *supra* n. 2, at 117; HATINA, *supra* n. 9, at 18/58-9.

happens, most of what is described as "withdrawal" seems to be a part of the scholars' typical role of operating in their own sphere and refusing to give that up for direct political involvement. Unlike common conception of non-political moves as simply passive withdrawal, the non-political attitude of the *ulama* can be powerful due to the nature of their arena, networks and authority.

It could be part of the confusing analysis of withdrawal as quietism is that it presupposes the modern state's setting where real influence is primarily through direct politics and the state's institutions.[151] Because the analysis seems to reduce influence to the one of state institutions in the modern context, they assume the same setting when analyzing medieval Islamic scholars.

Sherman Jackson, for instance, notes that medieval Islamic jurists ignored the question of the proper substantive political authority and dealt with procedural validity instead.[152] He gives the example of Ibn Taymiyyah who "shifted the focus from the top to the bottom, people, and their relationship to the divine law."[153] This was the shift from the issue "who should rule" to "how should they rule."[154]In studying al-Qarafi, Jackson points to the fact that "while Qarafi was conspicuously silent about the chaos and mayhem between the Ayyubids and the Mamluks, he finds time to address indiscretions that occur at a slighter lower level."[155]

With respect to al-Qarafi's method in constitutional debates, his approach emphasizes that, although Islamic law should govern some conflicts, these conflicts reside outside the *ulama*'s own "jurisdiction." As a result, the *ulama* exercise restraint in matters that might provoke political forces to invade matters normally within their arena. In addition, they developed a realist technique of "procedural validity" that has allowed them to serve people's and society's needs even when essential legitimacy of the state is at stake. Therefore, when scholars exercise restraint from becoming involved in politics, this is not always passive withdrawal and quietism, but it could be to a means of protecting their legal domain, or protesting the current setting as well. The line between these positions is not always fixed, but it is important to analyze the motives of scholars by looking at their literature to include all these possible factors in the analysis.

Daniel Crecelius reads the *ulama*'s refusal to rule during colonization, for example, as the typical submissive role of *ulama* to engage with government and direct decision-making.[156] This evaluation reduces the "active role" to being one that exists only by means of direct political governance and rule in the state as we know it today. In my opinion, the *ulama*'s refusal to rule was a remarkably smart one because they resumed their typical role of representing people in refusing to participate in forces that occupied their land, culture and political life. *Ulama* stripped the system of the French of its legitimacy and retained the legitimacy for themselves by proving to be independent and uninterested in power. *Ulama*, actually, put the French in a difficult situation because the French needed someone local to rule so they (the French) could indirectly rule but *ulama* refused this deal.[157]

[151] See HALLAQ, *supra* n. 80, at 50-7.

[152] JACKSON, *supra* n. 20, at XX.

[153] JACKSON, *supra* n. 20, at Xxii/70.

[154] JACKSON, *supra* n. 20, at 71. It is worth comparing the analysis of Carl Popper of the modern democratic shift of political question from "who rule" to "how". POPPER KARL RAIMUND/BOSETTI GIANCARLO, The Lesson of This Century: With Two Talks on Freedom and The Democratic State, Psychology Press. 2000, at 9.

[155] JACKSON, *supra* n. 20, at XXii.

[156] KEDDIE, *supra* n. 2, at 174-6.

[157] KEDDIE, *supra* n. 2, at 71. It is fair to say that there are times and many cases of ulama's legitimizing absolute tyranny with no return for the public interests but this is mostly considered a corrupt move more than a typical pattern acceptable of ulama.

There may be some element of passive withdrawal and quietism on the part of some *ulama* in certain contexts. However, Jackson ignores the fact that *ulama* can protest by withdrawal, which is powerful in light of the tools of legitimacy that they have.

Thus, in the end, refusing to serve in politics is not merely withdrawal; it could also signal a powerful active reaction of protesting the status quo. In the case of scholars, it is even stronger when we know that the public could see their absence from the state as an attempt at delegitimization of the state. In addition, "withdrawal" could be a stand itself as it builds a space that is stronger and more attached to the people—an entirely different authority that the state does not control.[158] It is fair to suggest that the way and the kind of withdrawal must be analyzed to interpret this move.

In wars between two or more powers, scholars' refraining from engagement is not always withdrawal as some may suggest,[159] but rather a means of maintaining their role no matter which wins. For example, in the war between Ottomans and Mamluks, the scholar Arusi argued that his goal was the welfare of Muslim subjects, not the victory of either the Ottomans or the Mamluk.[160]

When some scholars resort to their very locus to exercise influence, some commentators interpret this move as a kind of withdrawal. In explaining what some regard as a quietist approach, Hallaq hints at the separation of the legal and the political in medieval Islam.[161] It is actually more of a revealing feature of the locus that the jurists and scholars work in rather than passively accepting the status quo.

At any rate, whether withdrawal existed as much as some claim or not, this mode of withdrawal is one mode that scholars assume while they can and do assume other modes at other times. Sometimes, even when some *ulama* adopt one mode toward politics, other *ulama* adopt another mode. This is why, for example, we saw these different reactions toward one issue, one party, or government.

In the following section, I will discuss the example of westernization that threatens the traditional role of modern scholars, and how they have reacted to it.

[158] This explains why the Saudi government, for example, takes popularity of "peripheral" ulama and jurists very seriously and may even imprison a popular scholar for being popular or prevent him from having regular learning circles. This is because this popularity builds a bigger space for a sphere that widens the scope of the influence of this out-of-the-state authority. In the course of building this authority, jurists could use an Islamic maxim of "multiplying the number of Muslims." By this, jurists mean that even those who are not dedicated to a specific moral Islamic task (not jurists or dedicated students) can come and listen. The exercise of multiplying the numbers of people surrounding the learning circle and ulama functions to build a social support in the space where these jurists reside and exercise their influence.

[159] HATINA, *supra* n. 9, at 24.

[160] HATINA, *supra* n. 9, at 24.

[161] HALLAQ, *supra* n. 80, at 251

V. The Modern Mode: in the Course of "Change": Between Reform and Westernization

1. The *Ulama* and Legal Change

When we discuss the roles of scholars and pre-modern Hanbali jurists and how these roles have shaped their domain, the response to change is fundamental. It becomes even more important when we see that the change could enhance the functions of scholars, and could, on the other hand, marginalize their influence and role. In this section, I will discuss how modern scholars reacted to the calls for change in their juristic domain.

There are different approaches toward evaluating the importance of the role of scholars in the course of change in Muslim societies. One approach assumes that meaningful change comes from the westernized elites. Under this approach, scholars are not just less relevant but somehow a potential obstacle toward a useful change that an Islamic society might need.[162] Some authors complain that the orientalist scholarship on *ulama* portrays them as foreign, if not opposed, to change and reform and that the "premodern Islamic legal tradition is a highly rigid structure, defined in opposition to the social and political institutions of society."[163] Another approach interprets the response of scholars as dependent on their interests and social position rather than their values and public interests. Therefore, scholars could pose a threat or lend support depending on how their interests as a group are protected.[164] A third approach tends to portray *ulama* as "custodians of change" as long as public interests and values are not at stake.[165]

This chapter takes the position that, although scholars vary and assume different modes, they maintain a very significant role in advocating for change that appeals to the public. If they cannot enhance the common good, they at least work to lessen the inevitable wrongs. They call for some change while they struggle against others.

In his book of the rules of jurisconsult and *ifta'*, Ibn al-Qayyem (d. 1350), following a settled rule in Islamic jurisprudence, asserts that fatwas change according to the time, place, circumstances and customs.[166] This at least recognizes the possibilities of legal change. Other jurists have reached largely similar conclusions. Ibn Aabideen (d. 1836) authored a book that focuses on jurisprudential changes according to circumstances and environment.[167] Therefore, jurists respond to people of their time in order to reach the best implementation possible of Islamic law. This is why, for example, Ebussuud Efendi (d. 1574), one of the most important scholars in the sixteenth century, relaxed a fatwa on endowments in order to respond to people's needs.[168]

With the modernization of our culture, we find reservations from scholars not on the principle of change, but rather on certain kinds of change, change that jeopardizes the values of people or threatens to invade the very free channels between people and scholars. This kind of change is

[162] See KEDDIE, *supra* n. 2, at 136-9-145; HATINA, *supra* n. 9, at 33,83-138. Compare KEDDIE, *supra* n. 2, at 14.
[163] ZAMAN, *supra* n. 14, at 17.
[164] See KEDDIE, *supra* n. 2, at 107-191.
[165] ZAMAN, *supra* n. 14, at 17-9. See HATINA, *supra* n. 9, at 134; RAHEMTULLA, *supra* n. 14, at 84.
[166] ALJAWZEYYAH, *supra* n. 38, at 255 § 3.
[167] IBN 'AABIDEEN, Nashr Al-'Urf Fi Bina' Al-Ahkam 'Ala Al-'Urf, Sayyed 'illysh n.d., at 114-48 § 2. See ZAMAN, *supra* n. 14, at 19.
[168] HOEXTER, *supra* n. 52, at 73.

commonly described as "westernization."[169] At the same time, scholars have embraced changes that elevated the quality of living and allowed for free interaction between people and scholars. "Some *ulama* did not encounter problems with dealings with modernity as they applied to public interest rule."[170] Therefore, reforms that fulfilled the requirements of serving public interest, the *ulama* would support and adopt, but those that stood against public interest, they were committed to opposing.

Some debate revolves around whether certain aspects of modernization could be implicit mechanisms of colonization. This applies to ways of living, dress code, languages, cultures, and related matters. Thus, some scholars warned against Western-style brimmed hats, jackets, and trousers[171] while others allowed them.[172] Similar reactions were narrated about fatwas against coffee,[173] tea[174] and cigarettes[175] when they were attached to certain westernizing influences. The fatwas and rulings were relaxed on these issues when the *ulama* began to consider other aspects of those activities.

Yet scholars were not opposed to other changes. For example, while they initially expressed reservations about the modern press because it was thought to have threatened the sacred texts,[176] they started to embrace it once there arose the phenomenon of a "media mufti" who could use modern press to disseminate Islamic messaging.[177] Their position seems to be that, while technology is a blessing, using it in religious matters should be done carefully to protect against the distorting of the message of Islam.[178] As Daniel Crecelius puts it: "The transformation of Islamic society under the impact of the modernization has been the major concern of scholars interested in the modern history of Islam."[179]

In understanding the modern *ulama*'s responses to changes brought about by colonization and westernization, and the reasons for the strong opposition of the *ulama* to them, the Ottoman era "Tanzimat" reforms prove a particularly salient example. The Tanzimat represent a turning point in modern Muslim history when the Ottoman Empire adopted reforms that were broadly viewed as severely limiting the role of scholars. In reality, however, as the next section shows, the Tanzimat induced scholars to return to their original role and their traditional sphere—resorting to the people and operating in an independent and autonomous space.

Between 1839 and 1876, the Sultans of the Ottoman Empire introduced a package of political, administrative, legal and social reforms known as the Tanzimat.[180] In this section, I will discuss these reforms and their aftermath in the Muslim and Arab world, with a particular focus on Egypt, to show how these reforms affected scholars and their role.

[169] For example, ulama of Morocco supported local reforms but opposed the Protectorate. Only reforms that attempted to limit the influence of ulama in Morocco attracted the opposition of scholars. KEDDIE, *supra* n. 2, at 106-7.

[170] HATINA, *supra* n. 9, at 134.

[171] HATINA, *supra* n. 9, at 83-6.

[172] HATINA, *supra* n. 9, at 106.

[173] KEDDIE, *supra* n. 2, at 288.

[174] KEDDIE, *supra* n. 2, at 116.

[175] KEDDIE, *supra* n. 2, at 288.

[176] HATINA, *supra* n. 9, at 33.

[177] See MESSICK BRINKLEY, Media muftis: Radio fatwas (in: Yemen, Islamic Legal Interpretation: Muftis and Their Fatwas, Harvard University Press 1996 (David Powers and others eds.), at 310-20. See also, ZAMAN, *supra* n. 14, at 58.

[178] HATINA, *supra* n. 9, at 138.

[179] KEDDIE, *supra* n. 2, at 167.

[180] See CHAMBERS RICHARD, The Ottoman Ulema and the Tanzimat (in: Scholars, Saints, and Sufis: Muslim Religious Institutions in the Middle East Since 1500, University of California Press 1972), at 33-46.

2. The Tanzimat and its Aftermath

After a long period during which the *ulama* enjoyed autonomy, the *ulama* were placed pursuant to the Tanzimat under the control of the Sultan when he introduced the office of chief mufti (Sheikh al-Islam). Religious activities then came under the control of the state appointed mufti. Sultan Mahmud II (d. 1839) further made a distinction between the affairs of the state and the affairs of the *ulama*, a step that was followed by subordinating the affairs of the *ulama* to those of the state.[181] The lesson of the Tanzimat is that these reforms jeopardized and actually infringed on scholars' autonomy, and the autonomy of people they represented. It was not surprising to see scholars opposing not only the Tanzimat themselves, but other changes as well that resembled the Tanzimat throughout the Muslim world.[182]

A notable response to the Tanzimat came from a conservative base of scholars. The stance of these *ulama* was depicted as a passive and indifferent response in that they saw these reforms as "worldly matters."[183] Again, as we saw from the analysis of "withdrawal," this stand can also be seen as an active one, building social authority away from state affairs.

The boldest moves of the Tanzimat involved the intervention of executive authorities in law making. Sultan Mahmud provided the concept of "*adalat*/justice" to be a resource of law along with Sharia and administrative ordinances, frequently referred to as *Kanun* (ordinances).[184] A new council was formed so that the secular elites could make laws instead of Islamic jurists. In 1855, mixed courts were introduced. Within a few years (1840-1858), the Panel and then Land Codes were promulgated as well.[185]

The culmination of these efforts was the creation of an Islamic Civil Code known as the Mejelle. Between 1869-76, a commission led by Ahmed Cevdet Pasha produced this massive 16-volume work, meant to be an Islamic equivalent of the Western Civil Code. The grand mufti firmly opposed this move, arguing that deciding Islamic law should be deferred to his office not a secular committee. Nonetheless, the official scholars did not oppose the Tanzimat in the hope that they could serve in the legal process.[186] By the end of Tanzimat period, *ulama* did not actually lend legitimacy to the state but slowly and gradually stripped themselves, and perhaps the state, of legitimacy by subordinating religious institutions to the government. One commentator describes the attempts of reform during the Tanzimat to be "on the right track until the removal of effective law-making scholars to the advantage of the codes."[187]

The experience of Tanzimat inspired the "reformist" ruler in Egypt Muhammad Ali, and the year 1872 marked the beginning of modernization for *ulama* and for al-Azhar. The impact of "modernization" in Egypt led to centralizing the government and threatening people's values. Muhammad Ali did not challenge *ulama* in their religious institutions but, rather, he created another order that existed alongside and gradually changed the locus of focus and influence. It is not surprising that modernization for *ulama* meant a retreat not just from political influence but also from

[181] CHAMBERS, *supra* n. 180, at 35-7.
[182] CHAMBERS, *supra* n. 180, at 37.
[183] CHAMBERS, *supra* n. 180, at 41.
[184] CHAMBERS, *supra* n. 180, at 42. The "*adalat*" rule here resembles the English concept of "equity" with similar consequences. For the concept of equity in English and American law, see in general, HOHFELD WESLEY NEWCOMB, The Relations Between Equity and Law, Michigan Law Review (1913); NEWMAN RALPH ABRAHAM, Equity and Law: A Comparative Study, Oceana Publications. 1961.
[185] CHAMBERS, *supra* n. 180, at 42-4.
[186] CHAMBERS, *supra* n. 180, at 44.
[187] FELDMAN, *supra* n. 78, at 7.

social prominence. Although neglected during later period of Muhammad Ali's rule, *ulama* still played an active role, however, through blocking some reformative projects. All major "reforms" proposed by Muhammad Ali were undermined by the absolute refusal of the *ulama* and students to support them. They even used space that was allowed by the reform to block further reforms.[188] Daniel Crecelius rightly notes that, although sheikhs and students truly desired reforms, each reform proposed was associated with government interference, and thus they were committed to opposing those proposed by Muhammad Ali.[189]

To conclude, *ulama* could be guardians of change, but only to the extent that such change does not threaten their principles and public interests as they view them. If they did see the change as threatening, as in the case of "Westernization," they would not hesitate to fight it vigorously.

VI. Conclusion

In this article, I presented the different roles and modes of scholars to reemphasize the different forms of engagement that scholars can assume. These were all possible because they probably transcend the traditional rigid positioning of religious institutions in the modern state. *Ulama* appeal to people and form their positions according to what they think are the best interests of the public, as well as the tradition they carry and seek to protect. Most religious movements and productions are not directly traceable to formally organized institutions and even when such institutions happened to exist, their function was usually unrelated to the religious work, or to religious intellectual activities as a whole, or in any case less relevant than the broader sphere of jurists. This sphere was discussed in the context of the clergy in the Sunni and Hanbali experience, where hierarchy and institutionalization were rarely operative. The article ended with the debate of whether *ulama*, namely the Hanbalis, represented a "corporate group." Different studies adopt different approaches to determine whether *ulama* and jurists have established the type of solidarity that would qualify them as a corporate group. However, I argue that, although many jurists were members of such corporate groups, not all of them were. The juristic sphere also encompassed many who were members neither of a corporate group nor even of a madhhab. This feature allowed jurists to protect their domain from both internal and external controls.

[188] KEDDIE, *supra* n. 2, at 183-204.
[189] KEDDIE, *supra* n. 2, at 204.

Fostering and Adoption in Islamic Law – Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates

by Andrea Büchler and Eveline Schneider Kayasseh***

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Abstract

The importance of family and lineage runs like a golden thread through Islamic history, thought, and law. However, many children around the Islamic world are deprived of the opportunity to develop and grow up in their own biological families. With the aim to preserve blood ties as the only means of legitimate filiation, adoption is prohibited in most countries influenced by or based on Islamic law or Shari'a. For this reason, alternative forms of adoption have been developed as well as a model of legal fostering called kafalah. A kafalah enables children deprived of a family environment to be legally raised on a permanent basis by families other than their own. First, this paper looks at the legal framework of filiation and kafalah in classical Islamic law. Second, three modern-day approaches on regulating kafalah as a means of child protection will be outlined. We have chosen three countries from the Arab world with different legal-historical backgrounds, namely Morocco, Egypt, and the United Arab Emirates. The three countries have enacted child-specific legislation as well as specific legislation on the regulation of fosterage of children, of kafalah. We will look at similarities and differences among the three legislative frameworks and pinpoint benefits and risk factors.

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I. Introduction

Orphans and children deprived of family care have been a social reality since ancient times, and so have ways to care for such children. These ways differ from culture to culture. Whereas in the "West", adoption in the sense of creating legal filiation between adopter and adoptee has served as the main instrument to integrate abandoned and orphaned children into new families, in Islam, it is generally not regarded permissible. Most Muslim-majority states maintain this prohibition today. However, Islamic law provides for a legal alternative called *kafalah*. With the increase of movements and migration across continents and countries, family formation across borders has become a wide spread phenomenon, and the institution of *kafalah* has become internationalised.

The following article on fostering and adoption of children will take departure in classical Islamic law by considering what the classical sources have to say to legitimate filiation, orphans, adoption and fostering. In order to illustrate the modern relevance of the classical law, we will outline what the concept of *kafalah* entails, what its legal prerequisites and implications are, and how the laws of three different Muslim-majority countries deal with legal parentage and fostering.

II. Filiation in Islamic Law

1. Establishment of Filiation

The importance of family and lineage runs like a golden thread through Islamic history and thought. From a linguistic point of view, lineage is established through father and mother; however, in the legal sphere lineage refers to the agnatic line of descent only, which is a result of the paternalistic structure of society.[1] The paternal tie defines and determines several seminal rights and duties in Islamic law;[2] in itself, it is a right that gives other rights.[3] The rights given by the paternal relationship include custody and guardianship, maintenance, rights of citizenship and name, and, importantly, inheritance.

In particular, the father must provide his offspring with clothing, food, shelter and education until they reach maturity (in case of a boy) or marry (in case of a girl). The term used in Islamic law for paternity in the sense of lineage is *nasab*.[4] In many cultures and up to this day, the relevance of a person's kin is shown by the use of patronyms (ben, bint, i.e., son, daughter of) which highlights the importance of the paternal tie. In order to have a proper *nasab*, certain preconditions must be fulfilled.

a) Children Born in Wedlock

In Islamic law, proper filiation to the father is established by procreation under the further condition that the parents of the child were legally married at the time of conception of the child.[5] To the

1 See e.g. SHABANA AYMAN, The Islamic Law of Paternity between Classical Legal Texts and Modern Contexts: From Physiognomy to DNA Analysis, Journal of Islamic Studies, Vol. 25 (2014), 1-32, at 1, 3.

2 WELCHMAN LYNN, Women and Muslim Family Laws in Arab States, Amsterdam 2007, at 143.

3 See e.g. CLARKE MORGAN, Islam and New Kinship, New York 2009, at 96.

4 Referring to a male genealogical line, *nasab* has been described as "the most fundamental organising principle of Arab society". See ROSENTHAL FRANZ, Nasab, in: BEARMAN PERI et al. (eds.), Encyclopaedia of Islam, 13 Vol., Leiden 1997-2009, at 967.

5 NASIR JAMAL J., The Islamic Law of Personal Status, 3rd edition, Leiden 2009, at 81; SHABANA, *supra* n. 1, at 1; BARGACH JARMILA, Orphans of Islam: Family, Abandonment, and Secret Adoption in Morocco, Lanham 2002, at 56.

mother it is established by birth.[6] The requirement of marriage is linked to the criminalisation of extramarital sex, called *zinā*, which is one of the very few crimes against God for which a set punishment (*ḥadd*) is demanded by the Quran and the Sunna (the basic sources of Islam). In addition, the marriage requirement serves to maintain "genealogical clarity". A well-known *fiqh* principle confirms the interconnectivity of marriage, procreation and *nasab* as well as a desire to uphold proper sexual mores in society. It says that "the child (belongs to) the conjugal bed" (*al-walad li-l-firāsh*).[7]

In classical Islamic law, marriage is a civil contract that requires the contracting parties to be of sound mind, have attained puberty, and have consented to the marriage. Muslim men of legal capacity typically contract their own marriages, while women must usually have a guardian in marriage, a *walī*, who contracts their marriage for them. Marriage is concluded by the offer (*ijāb*) of one contracting party and the acceptance (*qabūl*) of the other, occurring at the same time before two – generally male – witnesses.[8] The marriage contract is classified by different degrees of validity which have a bearing on the legitimacy of the child born from this union: valid (*ṣaḥīḥ*), irregular (*fāsid*), and void (*bāṭil*) marriages.[9]

Legitimacy presupposes birth during a regular or irregular (but not void) marriage within specific pregnancy terms and with consummation having been possible. In order to avoid illegitimate birth, the Islamic jurists set minimum and maximum terms of gestation which are rather generous: A child is deemed legitimate if born after six months of pregnancy and up to two or even more years of pregnancy depending on the school of law. [10]

6 NASIR, *supra* n. 5, at 146, 154; AZ-ZUBAIR KABIR BANU MUHAMMAD, Who is a Parent? Parenthood in Islamic Ethics, Journal of Medical Ethics, Vol. 33 (2007), 605-609, at 606 ff.; KREUTZBERGER KAI, Single Mothers and Children Born out of Wedlock in the Kingdom of Morocco, Yearbook of Islamic and Middle Eastern Law, Vol. 14 (2008-2009), 49-82, at 62. This principle derives from the Quran (58:2) which states: "[…] none can be their mothers except those who gave them birth […]". See e.g. Art. 146 Moudawana which states that filiation to the mother has the same effects irrespective of legitimate or illegitimate birth.

7 Cf. PEARL DAVID/MENSKI WERNER, Muslim Family Law, London 1998, 399 f.; POLLACK DANIEL et al., Classical Religious Perspectives of Adoption Law, Notre Dame Law Review, Vol. 79 (2004), 101-158, at 734; SHABANA, *supra* n. 1, at 6; EICH THOMAS, Constructing Kinship in Sunni Islamic Legal Texts, in: Tremayne Soraya/Inhorn Maria C. (eds.), Islam and Assisted Reproductive Technologies, New York/Oxford 2012, 27-52, at 37; WELCHMAN, *supra* n. 2, at 142; AZ-ZUBAIR, *supra* n. 6, at 606; CLARKE, *supra* n. 3, at 47. Regarding the *firāsh* principle in history, see LANDAU-TASSERON ELLA, Adoption, Acknowledgment of Paternity and False Genealogical Claims in Arabian and Islamic Societies, Bulletin of the School of Oriental and African Studies, Vol. 66 (2003), 169-192, at 176 ff.

8 PEARL/MENSKI, *supra* n. 7, at 139 ff.; NASIR, *supra* n. 5, at 44 f.; ESPOSITO JOHN L., Women in Muslim Family Law, Syracuse/New York. 2001, at 15 f. See also ALI KECIA, Marriage in Classical Islamic Jurisprudence, in: Quraishi Asifa/Vogel Frank (eds.), The Islamic Family Contract, Cambridge 2008, 11-45, at 13. In Sunni Islam, the place of one man may be taken by two female witnesses: ESPOSITO, *supra* n. 8, at 16; NASIR, *supra* n. 5, at 56. Regarding the issue of state registration of marriage and official marriage documents as proof of marriage, see WELCHMAN, *supra* n. 2, at 53 ff. See also SONNEVELD NADIA, Rethinking the Difference between Formal and Informal Marriages in Egypt, in: Voorhoeve Maaike (ed.), Family Law in Islam: Divorce, Marriage and Women in the Muslim World, London 2012, 77-107.

9 See PEARL/MENSKI, *supra* n. 7, at 143 ff.; see also NASIR, *supra* n. 5, at 75 ff.; ESPOSITO, *supra* n. 8, at 17.

10 Based on Quran (31:14) and (46:15), there is a consensus among Islamic jurists regarding the minimum period of gestation at six months. The maximum term of gestation was in contestation among Islamic jurists, ranging from two (Hanafi School of Law) to four (Shafi'i, Maliki, and Hanbali School of Law) or even more years, thus potentially minimising illegitimacy and adultery accusations. In Shia Islam, there is a consensus that one year is the maximum period of gestation; according to some jurists, this period might be shorter. See KHAN ARIF ALI/KHAN TAUQIR MOHAMMAD, Family Law in Islam, in: Encyclopedia of Islamic Law, Vol. 5, New Delhi 2009, at 188; BAKHTIAR LALEH, Encyclopedia of Islamic Law, Chicago 1996, at 456 ff.; NASIR, *supra* n. 5, at 146. Among the codified rules of family law that have been adopted in Arab countries in the present and past centuries exist provisions pertaining to the minimum and maximum term of pregnancy. Regarding the maximum term of pregnancy, legislators have introduced a one-year rule into most Arab Personal Status Laws as a substantive rule or rule of procedure, citing medical authorities as support. WELCHMAN, *supra* n. 2, at 143; see also NASIR, *supra* n. 5, at 146.

Modern state laws are also rather generous in their presumption of a child's legitimacy and thus in granting *nasab*. This is at least true as long as there is a claim of marriage between a particular woman and a man. Thus, children born from a marriage of doubtful validity or children born following an "engagement" of her or his parents may be considered legitimate.[11] In addition, parentage is often considered to be an indication of the existence of a marriage as the principle generally holds that the establishment of lineage establishes wedlock and not vice versa.[12]

b) Other Forms of Filiation

Apart from marriage, parentage (and with it legitimacy) may also be established through acknowledgment by the father, the mother[13] (who is neither married nor in her *iddat*[14]) or the child. *Iqrār* requires that four basic conditions are met (which are varied slightly to fit the respective individual). First, the child must be of unknown parentage; second, there must be a certain age difference between father and child so that parentage is plausible;[15] third, the father must indicate that the child is legitimate and not the offspring of *zinā;* fourth, if the child is of age, he or she must agree to the acknowledgement. If the mother is married or in her waiting period, her acknowledgement shall only establish the paternity of the husband if this individual confirms the acknowledgment.[16] Finally, aside from marriage and *iqrār*, the Islamic religious legal texts acknowledge other means of establishing parentage to a child: *al-bayina* (evidence) and *al-qyāfa* (the comparing of physical characteristics).[17] Used in classical times, physiognomy (especially the characteristics of the feet) was mainly used in cases where paternity was contested between two or more men.[18] The rules of *al-bayina* have been codified under some modern family laws such as Morocco, Tunisia and Algeria.[19]

2. Effects of Filiation

Only a child that is born legitimately can become a full member of society. In order to protect the child's legitimate status, once the legal bond to the father is established, it is difficult to break it. As

[11] See WELCHMAN, *supra* n. 2, at 145; see also NASIR JAMAL J., The Status of Women under Islamic Law and Modern Islamic Legislation, 3rd edition, Leiden/Boston 2009, at 174.

[12] WELCHMAN, *supra* n. 2, at 144; see also KHAN/KHAN, *supra* n. 10, at 207. – On this chapter, see also BÜCHLER ANDREA/SCHNEIDER KAYASSEH EVELINE, Medically Assisted Reproduction in Egypt, Iran, Saudi Arabia and the United Arab Emirates, European Journal of Law Reform, Issue 2 (2014), 430-464, at 432 ff.

[13] It must be pointed out, however, that not all schools consider the acknowledgment of a woman valid: See BARGACH, *supra* n. 5, at 60; KHAN/KHAN, *supra* n. 10, at 210. See also ESPOSITO, *supra* n. 8, at 27.

[14] Waiting period following death of the husband or divorce during which a woman is not allowed to get remarried. Regarding the *iddat,* see ESPOSITO, *supra* n. 8, at 20 f.; NASIR, *supra* n. 5, at 137 ff.

[15] See PEARL/MENSKI, *supra* n. 7: real paternity must be possible, i.e., the acknowledger must have reached the minimum age of puberty and the minimum period of gestation must have passed by.

[16] Concerning the whole, see NASIR, *supra* n. 11, at 176; KHAN/KHAN, *supra* n. 10, at 214. See also ESPOSITO, *supra* n. 8, at 27; NASIR, *supra* n. 5, at 150 ff.; KHAN/KHAN, *supra* n. 10, at 210 f. Further see LANDAU-TASSERON, *supra* n. 7, at 176.

[17] In detail see SHABANA, *supra* n. 1, at 8ff. – Some schools also accept "drawing of lots" (*al-qur'ah*) as a valid means to establish paternity if one is unable to determine the paternity of a child by other means: SUJIMON M. S., The Treatment of the Foundling (al-Laqīṭ) According to the Ḥanafīs, Islamic Law and Society, Vol. 9 (2002), 358-385, at 378.

[18] See SUJIMON, *supra* n. 17, at 374 ff., who discusses in which cases the Hanafīs accepted physiognomy as proof of paternity. See also AL-AZHARY SONBOL AMIRA, Adoption in Islamic Society: A Historical Survey, in: Warnock Fernea Elizabeth (ed.), Children in the Muslim Middle East, Austin 1995, 45-67, at 53 f. See BARGACH, supra n. 5, at 60, on the revival of this practice in modern times.

[19] See NASIR, *supra* n. 11, at 178; BARGACH, *supra* n. 5, at 60.

an example, a husband may only deny paternity under a valid marriage contract by claiming that his wife was infidel. If the father has not previously acknowledged his paternity or confirmed the acknowledgment of the mother or the child, he may start a judicial procedure called *li'an* by claiming under oath that his wife committed adultery and dispute his parentage whereas the wife denies these allegations. Under these circumstances, the judge will rule the separation of the spouses which amounts to an irrevocable dissolution of marriage and to the illegitimacy of the child.

3. Effects of Lack of Filiation

Anyone born outside of marriage is considered an "illegitimate child". He or she will be deprived of the support that the father and his family owe legitimate children[20] and will take the mother's name. This is considered a shame in societies where patriarchal lineage is highly valued, especially for boys who are expected to pass on lineage through their name.[21] Illegitimate children in many instances face a life on the fringes of society, as will their mothers.

Particularly unwed mothers who give birth will face harassment from family and community members. In extreme cases, unwed mothers may fear for their lives if family members perceive the illegitimate birth as a transgression against "family honour". In addition, they may be tried and punished for adultery (*zinā*). Given the social stigma of illegitimacy, mothers often see no alternative other than to abandon the baby in the hope of giving him or her a "better life" in a loving family, and sometimes also to protect their already existing family and their own life.[22]

III. Adoption in Islamic System and Society

1. Historical Background

In a historical perspective, the concept of adoption as of giving the child the status of one's own rightful offspring by adopting him or her was not foreign to what we call today the "Middle East". Before the advent of Islam, in the *Jahiliyya*, or pre-Islamic period, adoption (*tabannī* from the Arabic word *ibn*, which means "son") was practiced in the sense of creating a permanent parent-child relationship between persons biologically not related to each other.[23] In pre-Islamic tribal Arabia, it is

[20] NASIR, *supra* n. 5, at 119, 147 f.; NASIR, *supra* n. 11, at 119, 172; see also PEARL/MENSKI, *supra* n. 7, at 400; AL-AZHARY, *supra* n. 18, at 50; KHAN/KHAN, *supra* n. 10, at 205; WELCHMAN, *supra* n. 2, at 142; Quran (24:6-9). NASIR, *supra* n. 5, at 148 and idem, *supra* n. 11, at 172, points out that father and child would remain un-marriageable to each other.

[21] FORTIER CORINNE, Le droit musulman en pratique: genre, filiation et bioéthique, Droit et Cultures, Vol. 59 (2010), 1-19, at 9; BARRAUD ÉMILIE, L'adoption au prisme du genre: l'exemple du Maghreb, CLIO, Vol. 2 (2011), 153-165, at 160.

[22] On the situation of women who have children out of wedlock see, e.g., BARGACH, *supra* n. 5, at 133; ABDUL-HAMID YARA, Child Rights Situation Analysis Middle East and North Africa, A Report Commissioned by Save the Children Sweden, Regional Office for the Middle East and North Africa, 2nd edition, Beirut 2011, at 77, 110. See also FISHER BETSY, Why Non-Marital Children in the MENA Region Face a Risk of Statelessness, Harvard Human Rights Journal Online, January 2015, 1-8, at 5f. It must be highlighted that the profiles of mothers who decide to give up their new-born vary highly. Also, there are myriad reasons why mothers decide to take this step.

[23] There is some disagreement in the doctrine regarding the prevalence of adoption in pre-Islamic times. See LANDAU-TASSERON, *supra* n. 7, at 171 f., who points to the fact that the number of recorded adoptions was in fact very small. But see AL-AZHARY, *supra* n. 18, at 46, who maintains that widespread adoption was the norm.

presumed that adoption mainly took place to strengthen the work force of clans and tribes for economic and defence reasons[24] and in order to safeguard progeny.[25]

In these patriarchal societies, the adoptees were usually male,[26] some were free men and others freed slaves,[27] and some of them took the name of the adopting father.[28] The adoption could take place at any time in a person's life and irrespective of whether their parents were still alive or not.[29] Indeed, solid data regarding the function and effects of adoption do hardly exist.[30] What is certain though, is that adoption became widely absent in the Middle East after the advent of Islam.

The origins of the prohibition of adoption are not quite certain. Some argue that by prohibiting adoption the prophetic message aimed at replacing the traditional tribal bonds with the sense of belonging to the Islamic community, the *umma*.[31] Others refer to textual evidence which underline the importance of biological ancestry[32] and the episode known as the "Zayd incident".[33]

After having adopted the former slave Zayd Ibn Ḥāritha, Mohammad desired to marry his cousin Zainab bint Ǧaḥš who was Zayds former wife and his ex-daughter in law. However, the marriage was considered incestuous according to existing customs and rules.[34] According to Islamic tradition, the Quranic verses (33:37-40) were revealed in this context. These verses as well as the later revealed verses (33:4-5) asserted the legality of the Prophet's marriage to Zainab. It was argued that since adoption was prohibited and had no effect, the Prophet had no male child and therefore Zainab did not become his daughter in law.[35] From then on, "adopted" children could no longer take the name of their adoptive parents and there were no marriage impediments between them and no mutual rights of inheritance.[36]

24 Cf. AL-AZHARY, *supra* n. 18, at 46. See also MATTSON INGRID, Adoption and Fostering, in: Suad Joseph (ed.), Encyclopedia of Women & Islamic Cultures: Family, Law, and Politics, Leiden 2003-2007, at 1: Since the adoptive parents would manage the orphan's property, self-interest was oftentimes at the bottom of adoption.

25 BARRAUD ÉMILIE, Les multiples usages sociaux de la Kafalah en situation de migration: protection et non protection des mineurs recueillis, e-migrinter, no. 2 (2008), 133-142, at 133.

26 MATTSON, *supra* n. 24, at 1; LANDAU-TASSERON, *supra* n. 7, 173.

27 MATTSON, *supra* n. 24, at 1; AL-AZHARY, *supra* n. 18, at 46.

28 LANDAU-TASSERON, *supra* n. 7, at 170; AL-AZHARY, *supra* n. 7, at 48; BARRAUD, *supra* n. 25, at 133.

29 SUJIMON, *supra* n. 17, at 370.

30 – and therefore, is disputed: See LANDAU-TASSERON, *supra* n. 7, at 170; YASSARI NADJMA, Adoption und Funktionsäquivalente im islamischen Rechtskreis, in: Hilbig-Lugani Katharina et al. (eds.), Zwischenbilanz: Festschrift für Dagmar Coester-Waltjen zum 70. Geburtstag, Bielefeld 2015, 1059-1071, at 1060 ff.

31 See DUCA RITA, Diffusion of Islamic Law in the UK: The Case of the ‚Special Guardianship', in: Farran Sue et al. (eds.), The Diffusion of Law: The Movement of Laws and Norms around the World, Oxon/New York 2016, at 47 ff., 50 f. with further references.

32 See MATTSON, *supra* n. 24, at 1; Quran (4:5). There are other Quranic verses and *ahādīth* (sing. *hādīth*) which are considered to support this belief: see the references in AL-AZHARY, *supra* n. 18, at 51 and SAYED MOSA, The Kafalah of Islamic Law – How to Approach it in the West, in: Maunsbach Ulf et al. (eds.), Essays in Honour of Michael Bogdan, Lund 2013, 507-520, at 510.

33 See LANDAU-TASSERON, 169; AL-AZHARY, *supra* n. 18, at 48, 52

34 See LANDAU-TASSERON, *supra* n. 7, at 169; SAYED, *supra* n. 32, at 509.

35 Cf. LANDAU-TASSERON, *supra* n. 7, at 169; POLLACK et al., *supra* n. 7, at 733 f.

36 See e.g. BARRAUD, *supra* n. 25, at 134.

2. Contemporary Perspective

Referring to the outlined textual evidence, Muslim legal scholars agreed generally[37] and without delay that creating a new legal and permanent parent-child relationship by terminating existing legal bonds through adoption is not permissible in Islam. "Artificial" filial bonds were viewed as non-compliant within a system that puts an emphasis on clear bloodlines as an integral part of traditional patriarchal societies. Filial relationships created without procreation could furthermore confound the idea of family as a quasi-divine institution. It was also feared that lineages might be mixed by procreation between members of the adoptive family and the adoptee.[38]

In most of today's Muslim-majority countries, the legal institution of adoption is absent or banned.[39] Some countries accept adoptions only for certain persons, notably non-Muslims. For example, in countries where different sets of laws exist for different creeds, Christian families may adopt children from Christian orphanages.[40] However, the ban on adoption does not imply that children deprived of family are left without care. Children are often cared for in informal ways. Indeed, the only legal alternative to adoption is the fostering of children inspired by the traditional concept of *kafalah*.

3. Informal Alternatives to Adoption

Various verses in the Quran address the issue of orphans and the duties and proper conduct of the believer towards those children.[41] According to these texts, orphans should not be mistreated or cheated, but be treated fairly, kindly and generously.[42] The holy book of Islam encourages the charitable upbringing of orphans and describes God as their ultimate caregiver.[43] According to Islamic tradition, the Prophet Muhammad, who was an orphan himself (he had lost his father), asked believers to provide for orphans, irrespective of whether related to them or not.[44]

In Islamic jurisprudence, a foundling is considered a fellow Muslim and as such a holder of the same rights and bearer of the same duties as others.[45] The classical *fiqh* books (the books of Islamic jurisprudence) discuss extensively his or her rights as well as the duties and the proper conduct of

[37] It is important to mention that there are scholars who do not fully agree that adoption in the modern sense does necessarily conflict with Islamic teachings: PEARL DAVID, Textbook on Muslim Family Law, Croom Helm 1987, at 91; SAYED, *supra* n. 32, at 511.

[38] The rationale behind this is the fact that sexual relations with adopted family members are not religiously forbidden (an adopted non-biological child would not be seen as *mahram* – i.e. non-marriageable). See CLARKE, *supra* n. 3, at 72 f.; BARGACH JAMILA, Orphans of Islam: Family, Abandonment, and Secret Adoption, ISIM Newsletter, no. 11 (2002), 18, at 18; idem, *supra* n. 5, at 75 ff; PEARL/MENSKI, *supra* n. 7, at 408.

[39] NASIR, *supra* n. 5, at 153 f. Exceptions from this rule are Tunisia and Turkey.

[40] E.g. in Lebanon. For Indonesia, see LEWENTON URSULA, Indonesien, in: Bergmann Alexander et al., Internationales Ehe- und Kindschaftsrecht mit Staatsangehörigkeitsrecht, Loseblattsammlung, Ordner VII, 6. Auflage, Frankfurt a.M./Berlin 1983 ff. (Stand 2018), at 43ff.

[41] See e.g. SAYED, *supra* n. 32, at 512.

[42] AL-AZHARY, *supra* n. 18, at 55. – An example is Quran (4:36): "[…] And do good – To parents, kinsfolk, orphans, those in need […]". See also e.g. Quran (4:127); (93:9); (107:1-3).

[43] See Quran (93:6).

[44] MATTSON, *supra* n. 24, at 1; AL-AZHARY, *supra* n. 18, at 54 f.; SAYED, *supra* n. 32, at 513; THOMASON LAURA M., On the Steps of the Mosque: The Legal Rights of Non-Marital Children in Egypt, Hastings Women's Law Journal Vol. 19 (2008), 121-148, at 139.

[45] This position is based on the notion that it is piety that characterizes a Muslim and not her or his lineage (*nasab*) or wealth (*hasab*). See BARGACH, *supra* n. 5, at 62; idem, *supra* n. 38, at 18; CLARKE, *supra* n. 3, at 77. See also Quran (6:164):"Each soul draws the meed of its acts on none but itself: no bearer of burdens can bear the burden of another."

the finder of such a child.[46] In these texts, the finder of an abandoned child has the individual duty to care for the baby if the child is at risk of dying or the person voluntarily took custody of the baby. Otherwise, taking care of a foundling is considered to be a communal responsibility and the non-fulfilment of this religious duty a communal sin.[47]

In reality though, people often shy away from taking in an orphan because he or she could be perceived as being a "fruit of sin".[48] Traditionally, not all orphans are considered "equal". There is a distinction between a child who has lost one or both parents (*yatīm*) and the foundling (*laqīt* – the root word of this term means something that is "picked up"[49]) who is a child of unknown parentage.[50] Those with unknown origin are often equated to an illegitimate child, a *walad zinā*, and carry the stigma of a suspected immoral act by their birth-parents.[51] As a result, they often face a lifetime of marginalization and discrimination as well as difficulties in finding a marriage partner or a job and additionally, a lack of familial financial support or protection.[52] From a religious point of view however, the fostering of a child in need is considered to be a sign of piety.[53] Nevertheless, the establishment of "fictive" descent or kinship is not possible.

Since the care for abandoned or orphaned children was not institutionalised in historical times, the taking in of orphans was quite common.[54] The first so-called orphanages in the medieval period were little more than schools where children were trained to become soldiers or state officials by the Ottomans and the Mamluks.[55] In the case of the Mamluks, the relationships between the masters and their recruits often closely resembled adoption as the child was integrated into the household and would form close ties to his foster family.[56]

46 See BARGACH, *supra* n. 5, at 61; AL-AZHARY, *supra* n. 18, at 52, 57, referring to the original definition of *luqta* as "that which is picked up".

47 Cf. POLLACK et al., *supra* n. 7, at 736; NASIR, *supra* n. 11, at 178 f.; idem, *supra* n. 5, at 155; BARGACH, *supra* n. 5, at 61.

48 See LISTON MARGARET, From Laws to Last Names: Examining Popular Opinions of Adoption in Morocco, Independent Study Project (ISP) Collection, paper no. 2063 (2015), at 9; BREUNING MARIJKE/ISHIYAMA JOHN, The Politics of Intercountry Adoption: Explaining Variation in the Legal Requirements of Sub-Saharan African Countries, Perspectives on Politics, Vol. 7 (2009), at 96; The National, 19 September 2012: „Homes hard to find in UAE for abandoned baby boys", available at <http://www.thenational.ae/news/uae-news/homes-hard-to-find-in-uae-for-abandoned-baby-boys>, accessed 01 June 2018. See also BARGACH, *supra* n. 38, at 18.

49 E.g. AL-AZHARY, *supra* n. 18, at 52.

50 From a "Western" perspective, an orphan is regularly a child who has lost mother or father or both parents, either because they died or have abandoned the child permanently. Today, various definitions are used by states and international institutions for defining whether a child is an orphan. The United Nations Children Fund (UNICEF) labels any child that has lost at least one parent as an orphan, irrespective of the way he or she was conceived. See <http://www.unicef.org/media/media_45279.html>, accessed 01 June 2018.

51 See AL-AZHARY, *supra* n. 18, at 52; CLARKE, *supra* n. 3, at 76 ff.; BARGACH, *supra* n. 38, at 18; also critical of the "blame" transferred to the child: THOMASON, *supra* n. 14, at 138.

52 See Fisher, *supra* n. 22, at 4ff.; ABDUL-HAMID, *supra* n. 22, at 77, 92, 110, 137, 144, 161, 167, 190, 205; AL-AZHARY, *supra* n. 18, at 60; THOMASON, *supra* n. 14, at 143; Ahram Online, 5 April 2013: "Egyptian orphans still suffering on their National Day", available at <http://english.ahram.org.eg/NewsContent/1/64/68132/Egypt/Politics-/Egyptian-orphans-still-suffering-on-their-National.aspx> accessed 01 June 2018. – Notwithstanding the fact that in legal theory, the children should not be blamed for immoral acts of their parents, but be judged on merit of their '*taqwa*' (godfearing, virtue).

53 MATTSON, *supra* n. 24, at 1; SAYED, *supra* n. 32, at 513.

54 AL-AZHARY, *supra* n. 18, at 58.

55 Idem, referring to GOITEIN SHLOMO DOV, A Mediterranean Society, in The Family, Vol. 3, Berkeley 1978, 302-311, at 304.

56 AL-AZHARY, *supra* n 18, at 58 f.

With the raise of modern nation states, governments assumed social responsibilities and functions and the establishment of orphanages became quite common.[57] Some of today's orphanages are run by the state and some are supervised by the state, but run on a private initiative, such as religious foundations, individuals or the community.[58] In some cases, orphanages do not only care for children with no known family, but also act as a social institution which cares for children whose parents are in a difficult social situation.[59]

There have always been orphans but also families who cannot conceive naturally. They could neither expand their family tree nor shed love on a child and ensure her or his well-being.[60] It should not come as a surprise that so-called "informal adoptions" were and are practiced in various "culturally sanctioned forms";[61] sometimes by using *hīlah shar'īyah* (legal ruse).[62] For example, a man may claim an infant of unknown provenance (who is not the offspring of unlawful intercourse) as his legitimate child, provided that there is no evidence to the contrary (acknowledgment – *iqrār*).[63] As long as the formal elements of the claim are intact, the child will be considered the biological son or daughter of the claimant and acquire all concomitant rights and duties.[64] Furthermore, a man may claim a child was the legitimate offspring of a former marriage that has previously not been registered under the man's name.[65] A child may also be adopted secretly by aspiring parents who take in an abandoned baby and then raise him or her as their own child by pretending to have given birth without informing the authorities.[66]

It also happens that related persons exchange children. Especially in the Maghreb, such family or customary adoptions are widespread.[67] [68] In Moroccan Arabic this form of "adoption" is called *trebi*. Such adoptions take place quite informally by extended family members or close acquaintances taking in and caring for a child that is biologically not their own. For example, a child may be entrusted to a family without children or with only boys or only girls through an informal transaction without legal procedure.[69] The ties between an "adopted" child and her or his biological family are usually not ruptured; the child keeps her or his last name as well as the inheritance rights. *Trebi* can be seen as an infinite visit where guardianship is transferred to the host family. Even

57 Regarding the evolution of institutional care for orphans in Egypt, see RUGH ANDREA B., Orphanages in Egypt: Contradiction or Affirmation in a Family-Oriented Society, in: Warnock Fernea Elizabeth (ed.), Children in the Muslim Middle East, Austin 1995, 124-141, at 130 ff.

58 See AL-AZHARY, *supra* n. 18, at 59.

59 AL-AZHARY, *supra* n. 18, at 60; see also RUGH, *supra* n. 57, at 124, 126 f.; CLARKE, *supra* n. 3, at 75.

60 For an insight into the shift in the value of a child over time see BARGACH, *supra* n. 5, at 163 ff.

61 BARGACH, *supra* n. 5, at 27.

62 See LANDAU-TASSERON, *supra* n. 7, at 187, with historical evidence.

63 CLARKE, *supra* n. 3, at 80 ff. On *iqrar*, see KHAN/KHAN, *supra* n. 10, at 210; NASIR, *supra* n. 5, at 150 ff.; see also YASSARI, *supra* n. 30, at 1062.

64 LANDAU-TASSERON, *supra* n. 7, at 172f.; CLARKE, *supra* n. 3, at 80 f.; SUJIMON, *supra* n. 17, at 372 f.

65 CLARKE, *supra* n. 3, at 80.

66 AL-AZHARY, *supra* n. 18, at 60 f.; BARGACH, *supra* n. 5, at 27 f.

67 See e.g. BARRAUD ÉMILIE, Kafâla transnationale: Modalités de formation des familles kafilates de France, Autrepart, no 57-58 (2011/1), 247-261, at 249.

68 BARRAUD ÉMILIE, Adoption et kafalah dans l'espace migratoire franco-maghrébien, L'Année du Maghreb 2008, no. IV (2008), 471-489, at 275 f.

69 See idem at 249, 253; BARRAUD, *supra* n. 25, at 136.

though the host family will not incorporate the child legally, emotional ties between the host parents, siblings and the entrusted child will most likely develop quite naturally.[70]

Another form of "alternative adoption" is the creation of milk kinship (*ridā'*), a relationship with special rights under Islamic law.[71] The child nursed by the foster mother will be regarded as the milk-sibling of the wet nurse's biological children. In this case, the child may still not inherit from her foster parents, but it is barred from marrying any of the mother's biological children.[72] In some countries, the nursing of small foster children (younger than two years old) is encouraged by the authorities in order to prevent issues with religious prescriptions, such as the veiling of female family members when the – biologically unrelated – foster child gets older.[73] Milk kinship may create a basis for co-operation and solidarity between unrelated people, but has otherwise no legal consequences.[74]

IV. The Fosterage of Children (*Kafalah*) in Classical and Modern Islamic Law

1. In General

Kafalah, which derives from the Arabic root verb of ka-fa-la, meaning "to take care", or *ḍamān*, "to guarantee",[75] is the Islamic equivalent to "Western" adoption. This legal institute, rooted in the law of contract and obligations rather than in family law,[76] is based upon the traditional understandings that oppose fictive filiation and encourage fostering of abandoned or orphaned children.[77]

Kafalah is usually described as a form of legal guardianship or tutelage that aims at creating a permanent arrangement for a child deprived of a family environment. Basically, two kinds of *kafalah* exist: a consensual *kafalah*, which shall only be addressed in passing here, whereby a *kafalah* arrangement is made between two private parties, and a legally binding contract between state authorities as wardens of an abandoned child and a family or single person.[78] The latter kind shall be the focus of this paper.

Unlike in legal parenthood, there are no mutual rights and duties in a *kafalah* arrangement. The so-called *kafil* makes a commitment by contract, usually in front of a notary or judge to maintain, guard and educate the *makfoul* (child taken into *kafalah*) in the same way, as they would do for a biological

70 BARGACH, *supra* n. 5, at 27.
71 NASIR, *supra* n. 5, at 63 f.; BAKHTIAR, *supra* n. 10, at 419; see also e.g. Art. 114 (2) UAE Personal Status Law.
72 AZ-ZUBAIR, *supra* n. 6, at 608.
73 See The National, 19 September 2013: „Homes hard to find in UAE for abandoned baby boys", available at <http://www.thenational.ae/news/uae-news/homes-hard-to-find-in-uae-for-abandoned-baby-boys> accessed 01 June 2018.
74 LANDAU-TASSERON, *supra* n. 7, at 188.
75 BARRAUD, *supra* n. 67, at 248; BARGACH, *supra* n. 5, at 29. In its other meaning, *kafālah* serves as a kind of sponsorship system used in the context of migrant labourers mainly – but not exclusively – in the Gulf countries.
76 BARGACH, *supra* n. 5, at 29 f., 42, 177; see also WELCHMAN, *supra* n. 2, at 148.
77 BARRAUD, *supra* n. 25, at 133; idem, *supra* n. 67, at 247; LE BOURSICOT MARIE-CHRISTINE, La Kafâla ou recueil légal des mineurs en droit musulman : une adoption sans filiation, Droit et cultures, no. 59 (2010), 283-302, marginal no. 1-5.; SAYED, *supra* n. 32, at 51.
78 In more detail, see BARGACH, *supra* n. 5, at 28.

child.[79] A feature of this commitment is its quasi-definitive nature or permanence by which the *kafil* usually commits to support the *makfoul* until his or her legal maturity. But due to the contractual nature of the relationship, the legal, moral, educational, and financial duties towards the child may vary.[80] The feelings, however, can be equally strong as in biological child-parent relationships, which is expressed in the way caretakers speak of their wards, namely as "adopted children".[81]

In contrast to adoption in Western systems, *kafalah* does not establish a legal parent-child relationship between the *kafil* and the *makfoul* and it does not end the legal relationship between the legitimate parents and the child.[82] Hence, core rights or privileges of *nasab*, such as family name and proportionate inheritance entitlements usually do not accrue to the minor taken into *kafalah*.[83] However, the person taking in a minor under *kafalah* is indeed free to assign certain portions of their assets to the *makfoul* since the Quran encourages Muslims to leave part of their wealth to those who are dependent on them.[84] In practice, bequests often tend to attenuate the inequality between biological children and minors taken in under *kafalah* as well as providing a form of social security for such children.[85] Therefore, from a functional point of view, *kafalah* appears to be close to adoption; from a legal perspective it has similarities to foster care. Its structure and historical as well as socio-cultural background make it an institution in its own right.

The laws of certain Muslim majority countries regulate forms of traditional *kafalah* as a means of child protection.[86] The details of how this is operated in practice, especially its modalities and procedures, largely depend on the laws of the respective states. Common features are the *kafil*'s religion (usually he or she must be a Muslim) and his or her mental, financial and personal suitability

[79] See e.g. SAYED, *supra* n. 32, at 513; Fact Sheet No. 50, Specific case Kafalah, International Social Service, International Reference Service for the Rights of Children Deprived of their Family.

[80] BARRAUD, *supra* n. 67, at 248; DUCA, *supra* n. 31, at 52. However, because it is based on a contractual agreement, the *kafil* may only owe a select number of moral, educational, financial and other duties towards the child taken into *kafālah*: BARGACH, *supra* n. 5, at 29.

[81] See e.g. Al Jazeera, 6 March 2015: "Adopting Orphans Breaking Taboos in Dubai", available at <http://www.aljazeera.com/news/2015/03/adopting-orphans-breaking-taboos-dubai-150302080741099.html> accessed 01 June 2018. – But, as everywhere, there are other realities as well. In Morocco namely, notarial *kafālah* arrangements, especially regarding minor girls, sometimes have another function that does not serve the child's best interest at all: children taken into *kafālah* must serve as domestic helps, traditionally called "petites bonnes". Often, those children are subject to sexual exploitation and abuse. BARRAUD, *supra* n. 25, at 137 f., states that the (single) mothers of these children had frequently been "petit bonnes" themselves.

[82] Either fully or in part: SAYED, *supra* n. 32, at 509.

[83] BARRAUD, *supra* n. 67, at 248; BARRAUD, *supra* n. 25, at 134; BARGACH, *supra* n. 5, at 28.

[84] Cf. AL-AZHARY, *supra* n. 18, at 50; ARSHAD RAFFIA, Islamic Family Law, London 2010, at 177 f., 187. – According to Islamic jurisprudence (*fiqh*) – both Sunni and Shia – a person may bequeath a maximum of one-third of their estate to an unrelated person or give it to them as a gift. See POWERS DAVID STEPHAN, The Development of Islamic Law and Society in the Maghrib: Qādīs, Muftīs and Family Law, Farnham 2011, at 12; MOUSSA REZIG, Les Aspirations Conflictuelles du Droit de L'Adoption: Études Comparative, Arab Law Quarterly, Vol. 19 (2004), 147-168, at 155; BARRAUD, *supra* n. 67, at 248.

[85] See HASHEMI KAMRAN, Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation, Human Rights Quarterly, Vol. 29 (2007), 194-227, 220f.; ASSIM USANG M./SLOTH-NIELSEN JULIA, Islamic Kafalah as an Alternative Care Option for Children Deprived of a Family Environment, African Human Rights Law Journal, Vol. 14 (2014), 322-345, at 330.

[86] *Kafalah* is also recognised as an alternative method of care for children deprived of parental care in a number of international treaties and regional instruments, namely: The United Nations Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989, the 1996 Hague Child Protection Convention (but not in the Hague Convention of 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption), as well as certain reginal instruments such as the African Charter on the Rights and Welfare of the Child, adopted by the Organisation of African Unity in 1990 (entered into force in 1999), and the European Convention on Human Rights (entered into force in 1993).

to this role as well as the child's status as "abandoned". In the following paragraphs, we will have a brief look into the *kafalah* or fostering-regulations of three countries with a different legal-historical background, namely Morocco, Egypt and the United Arab Emirates.[87] Due to the constraints of this article, the focus will be on some central aspects of the relevant laws rather than an in-depth study of the legal situation.

2. *Kafalah* in Morocco, Egypt and the United Arab Emirates

a) Morocco

The Kingdom of Morocco is a constitutional monarchy in the Maghreb region of North Africa. The religious affiliation of the country is predominantly Muslim with a Christian and Jewish minority. The Moroccan legal system is a mixed system of civil law based on French law and Islamic law. The Constitution of Morocco describes the State as a constitutional, democratic, parliamentary and social monarchy, as well as "an Islamic sovereign state" and accords Islam the status of state religion.[88] The majority of Moroccans are Sunnites.[89]

aa) Family Law and Lineage

Until the late fifties, the law applied in family matters were the rules of classical Islamic law based on dominant Maliki doctrines. Since then, traditional family law issues including marriage, divorce, child custody and maintenance as well as inheritance are governed by the Code of Personal Status, also known as *Moudawanat al-usra*, or *Moudawana* (as it will be called hereinafter). The Moudawana was last revised in 2004 and is based on Islamic law.[90] The law is in principle applicable to all Moroccans irrespective of faith; the Jewish citizens apply their own laws.[91]

For Muslims, the laws of Morocco retain the principle that *nasab* is tied to legitimate birth. Paternity is assumed when a child is born in wedlock.[92] *Nasab*, or paternity, "is a legitimate bond between the father and the child that is transmitted through the generations."[93] The Moudawana enumerates

[87] For Algeria, see LE BOURSICOT, *supra* n. 76, marginal no. 29 ff.; BETTAHAR YAMINA, La construction sociale de la parentalité: L'example de l'Algerie, L'Année du Maghreb II (2005-2006), 155-170; CHABIB-ZIDANI FARIDA, L'enfant né hors mariage en Algérie, Alger 1992.

[88] See Dahir no. 1-11-91 du 27 chaabane 1432 (29 juillet 2011) portant promulgation du texte de la constitution, available at <http://www.maroc.ma/en/system/files/documents_page/bo_5964bis_fr_3.pdf> accessed 01 June 2018, Preamble para. 2, Art. 1 para. 1 and Art. 3.

[89] The World Factbook, CIA, Morocco, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/mo.html> accessed 01 June 2018.

[90] Dahir no. 1-04-22 du 12 hija 1424 (3 février 2004) portant promulgation de la Loi no. 70-03 portant Code de la famille. The official Arabic text was published in the Bulletin Officiel (édition générale) no. 5184 du 14 hija 1424 (5 février 2004), 418ff. The French version was published in the Bulletin Officiel no. 5358 du 2 ramadan 1426 (6 octobre 2005), 667 ff. Royaume de Maroc, Ministère de Justice, Traduction en Français du Code de la famille, Version non officielle, available at <http://adala.justice.gov.ma/production/legislation/fr/civil/Code%20de%20la%20famille%20Maroc%20Texte.htm> accessed 01 June 2018.

[91] Art. 2 No. 1 and No. 4 para. 2 Moudawana.

[92] Art. 152-154 Moudawana.

[93] Art. 150 Moudawana.

three alternatives to establish legitimate male filiation: the conjugal bed, acknowledgment or sexual intercourse by error.[94]

The conjugal bed is considered to be an irrefutable proof of paternity. It is proven by the same means that is used to prove the marital relationship.[95] If the conjugal bed meets these requirements, the husband can only contest paternity through a sworn allegation of adultery committed by his spouse or by means of an irrefutable expertise upon two conditions: First, the husband must present solid proof of his allegations; and second, the issuance of a judicial decision ordering the expertise.[96] The child rendered illegitimate by court order or by birth does not have any rights vis-à-vis her or his father.[97] Because this creates great hardship, several methods are considered to be an acceptable proof of paternity: the conjugal bed, the father's acknowledgement, the testimony of two public notaries, oral testimony and by all other legal means, including judicial expertise.[98]

According to Article 147(1), the three alternatives to establish legitimate filiation to the mother are birth, acknowledgment, and judicial decision. In its second paragraph, the Article adds that maternal filiation is legitimate in cases of marriage, sexual relations by error and rape. Moreover, it states that filiation to the mother has the same effect whether the child is the offspring of a legitimate or an illegitimate relationship.[99] Thus, in contrast to the articles regulating legitimate filiation to the father, the relevancy of the subcategory in the Moudawana regarding legitimate maternal filiation remains unclear.[100]

The Moroccan family law states that adoption has no legal value and does not produce any of the effects of legal filiation.[101] Children without parental care can be taken into *kafalah* instead.[102]

ab) The Fosterage of Abandoned Children

In General

In 2013, the Ministry of Justice reported that Morocco was dealing with a staggering number of 5,377 cases of abandoned children, or nearly 15 per day.[103] Various reasons explain this figure. Mothers who give birth out of wedlock are often considered to be a shame for their families, since family honour bases on the marriageability, which in turn depends on the virginity of daughters.[104] Often, these women are poor, homeless, sex workers or maids who are already socially discriminated.[105]

94 Art. 152 Moudawana.
95 See Art. 10 ff. Moudawana, Art. 16 Moudawana.
96 See Art. 153, 159 Moudawana.
97 Art. 148 Moudawana.
98 Art. 158 Moudawana.
99 Art. 146 Moudawana.
100 KREUTZBERGER, *supra* n. 6, at 63.
101 Art. 149 Moudawana.
102 For a short history of the legal *kafālah* in Morocco and Algeria see BARRAUD, *supra* n. 25, at 134 f.
103 See "Morocco: Every day almost 15 children are being abandoned", available at <http://en.protothema.gr/morocco-every-day-almost-15-children-are-being-abandoned/> accessed 01 June 2018.
104 SAYED, *supra* n. 32, at 514.
105 See the profiles of single mothers described in BARGACH, *supra* n. 5, at 15, 133.

Children born outside of marriage are socially heavily stigmatised as they are considered being "unworthy" and children of sin with the concomitant social rejection and marginalisation.[106] In addition, mothers run the risk of being the subject of criminal prosecution, because childbirth is the visible proof for an extramarital sexual relationship. Morocco does not apply the classical penalties for *zinā*, but extramarital sex remains a crime punishable by a prison sentence of one month to one year (unmarried people) and one to two years (adultery).[107]

Prerequisites

The Moroccan law on *kafalah* came into force in 1993 and was last revised in 2002.[108] According to the legal text, abandoned children are registered by the public prosecutor (Royal Prosecutor). They are given a fictive first name and surname as well as a fictive filiation by adding a mother's and father's first names.[109] Until *kafalah* is established, abandoned infants are placed in state or private run orphanages or are given into the custody of a foster family.[110]

In order to place a child into a family under *kafalah*, the first administrative measure that needs to be undertaken is the legal establishment of the child as being abandoned.[111] According to the law, an "abandoned child" means anyone below the age of eighteen who is abandoned, orphaned or with parents who are incapable of exercising their parenthood.[112] The Royal Prosecutor shall request the declaration of abandonment on his own initiative or at the request of a third party. The competent judge starts an investigation into finding the child's parents. If it is proven that the child falls within one of the situations provided for in the first article of the law, he shall declare by judgment that the child is abandoned.[113] An abandoned child is under the guardianship of the Minors judge affiliated with the competent court.[114]

The proceedings start with an application to the competent judge at the place of residence of the abandoned infant by the party requesting to take the child into *kafalah*. The party must supply the judge with a copy of the birth certificate of the abandoned child as well as documents proving that they fulfil the following conditions:[115]

The person or persons intending to take a minor into *kafalah* can be a Muslim couple or a Muslim single woman.[116] In addition, the applicants must have full legal capacity, as well as the social and moral capability to exercise guardianship over the child. They must have sufficient means to support the child financially; be free of contagious diseases or diseases that render them incapable to

[106] SAYED, *supra* n. 32, at 514.
[107] Art. 490-491 Moroccan Penal Code.
[108] Dahir no. 1-02-172 du 1 rabii II 1423 (13 juin 2002) portant promulgation de la Loi no. 15-01, relating to *kafalah* of abandoned minors (Moroccan Kafalah Law).
[109] BARRAUD, *supra* n. 67, at 248; BARRAUD, *supra* n. 25, at 135. Loi 15-1 relative à la prise en charge des enfants abandonnés promulguée par le dahir no. 1-02-172 du 13 juin 2002.
[110] KREUTZBERGER, *supra* n. 6, at 66; BARGACH, *supra* n. 5, at 3 f., 195 ff., 204.
[111] Art. 3-7 Moroccan Kafalah Law.
[112] Art. 1 Moroccan Kafalah Law.
[113] Art. 2-4 Moroccan Kafalah Law.
[114] Art. 7 para. 2 Moroccan Kafalah Law; SAYED, *supra* n. 32, at 515.
[115] Art. 14 f., 9 Moroccan Kafalah Law.
[116] Interestingly, in Tunisia where plain adoption is permitted the Muslim faith is not a prerequisite for adoption. See YASSARI, *supra* n. 30, at 1063.

undertake their responsibility; they should neither be in a legal battle with the child whom they request to take into *kafalah* or with her or his parents; and lastly, there should be no family dispute in existence raising concerns regarding the best interests of the child.[117]

The role of the *kafil* can also be assumed by charitable organisations and institutions with sufficient financial and organisational means to protect, to educate the child, and to raise it according to the precepts of Islam.[118]

Until recently, international *kafalah* placements in favour of nationals living abroad or in favour of foreigners were practiced as long as the applicants would respect the procedural conditions (e.g. the conversion to Islam). On 21 September 2012, Justice Minister El Mostapha Ramid published a notice that appears to indicate that the right to *kafalah* should only be granted to Muslim families who reside in Morocco.[119]

If the before-mentioned prerequisites are met, the judge assisted by a commission investigates the specific case especially by assessing the suitability of the applicants to exercise *kafalah*. Before a decision is taken, the child over twelve years old must give his or her personal consent, except in cases where the applicant is a legal entity rather than a natural person.[120] If more than one party applies to take the *kafalah* of a child, spouses without children or those who are deemed particularly suitable to serve the child's interests will be given preference.[121]

If the applicants are deemed suitable, the judge makes a ruling providing them with the right of *kafalah*. The decision will be executed within 15 days from the court ruling.[122]

Effects of the Decision

The party (a person or an institution) given the right to *kafalah* is appointed legal guardian of the child by the aforementioned court ruling. The *kafalah* parents have to respect the best interest of the child, which is one of the central concerns of the law and reiterated in numerous passages.[123] In particular, the *kafalah* parents have the responsibility to take care of the child, as well as guaranteeing custody of the child up to legal maturity.[124] This means that the *kafalah* parents have to make sure that the child grows up in a healthy environment catering to his or her physical and psychological needs and that he or she is given an education.[125]

117 Art. 9 No. 1 and 2 Moroccan Kafalah Law.

118 Art. 9 No. 3 Moroccan Kafalah Law.

119 See Bundesamt für Justiz (BJ), Adoption Marokko, available at <https://www.bj.admin.ch/bj/de/home/gesellschaft/adoption/herkunftslaender/marokko.html> accessed 01 June 2018. However, according to the text of the law, a departure from Morocco of the person/persons undertaking the *kafalah* is possible subject to the authorisation of the competent Minors Judge (Art. 24 Moroccan Kafalah Law).

120 Art. 12, 16 Moroccan Kafalah Law.

121 Art. 10 Moroccan Kafalah Law.

122 Art. 17 f. Moroccan Kafalah Law.

123 E.g. Art. 25 Moroccan Kafalah Law: Cancellation of the *kafālah* by court decision if required by the best interest of the child. – The Moroccan Kafalah law thus aligns to the United Nations Convention on the Rights of the Child (UN-CRC), which states in its Art. 3 that "in all actions concerning children (…) the best interests of the child shall be a primary consideration".

124 Art. 2 Moroccan Kafalah Law; Art. 166 Moudawana. According to Art. 209 Moudawana, the age of legal maturity is 18 Gregorian years.

125 Sadly though, in some cases children and particularly girls, are "used" as cheap labour through the act of *kafālah.* Arguably, this is one reason why the orphanages are full of boys only. See BARRAUD, *supra* n. 21, at 157 f.; LISTON, *supra* n. 48, at 10.

The law stipulates that the *kafalah* parents are to take care of the child in the same way as if the child were their biological offspring according to the relevant rules in the Moudawana concerning guardianship and maintenance.[126] Therefore, in case of a girl, maintenance continues until her marriage or until she is able to finance her own livelihood. If the child is handicapped or unable to meet her or his own needs, the maintenance obligation continues to exist after legal maturity.[127] In any case, neither *nasab* nor inheritance rights are established.[128] Because the legal ties to the biological parents are not ruptured by *kafalah*, the child maintains the inheritance rights in his or her birth-parents' estate.[129] In principle, the *kafalah* does not have any effect on the child's name. However, it seems possible that the *kafil*'s name may be attributed to the fostered child if authorised by an official decree.[130]

The *kafalah* parents intending to endow the child or make inheritance dispositions in her or his favour must do this under the supervision of the competent judge at the place of residence of the child taken into *kafalah*.[131] As already mentioned, according to Islamic jurisprudence (*fiqh*) – both Sunni and Shia – a person may bequeath a maximum of one-third of their estate to an unrelated person. Gratification (*jaza*) or testamentary adoption (*tazil*) provided for by the Moudawana may accord the child the position of an heir of the first rank but does not prove legal filiation. These types of adoption are governed by testamentary rules.[132]

Termination of Placement

The *kafalah* placement comes to an end when the child reaches the age of legal maturity[133] if the child or his *kafalah* parents or *kafalah* mother die, or if the *kafalah* parents or the *kafalah* mother become legally incapacitated. Furthermore, the *kafalah* placement is revoked if the *kafalah* parents fail to provide for the child in accordance with the rules foreseen by the *kafalah* law or do not perform the *kafalah*. The judge may also terminate the *kafalah* placement if the best interests of the child so necessitate.[134] Divorce of the *kafalah* parents may also terminate the *kafalah* placement. However, upon application from the *kafalah* father or mother, or an official acting in the public interest or ex officio, the judge may – by again assessing the suitability of the applicant – decree the continuation of

126 Art. 2, 22 Moroccan Kafalah Law; Art. 163 ff., 187 ff. Moudawana.

127 Art. 22 Moroccan Kafalah Law; Art. 198 para. 2 and 3 Moudawana. The *kafil* benefits from social benefits and allowances dedicated to parents with children. Also, the *kafil* is liable for the acts of his or her "adoptive" children: Art. 22 Moroccan Kafalah Law.

128 Art. 2 Moroccan Kafalah Law.

129 ISHAQUE SHABNAM, Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of a Child's Right to Identity, International Journal of Law, Policy and the Family, Vol. 22 (2008), 393-420, at 407.

130 See Art. 20, Loi no. 37-99 relative à l'état civil; Dahir no. 1.02-239 du 3 octobre 2002; Further: FORTIER, *supra* n. 21, at 9; BARRAUD, *supra* n. 25, at 135 f.

131 Art. 23 Moroccan Kafalah Law.

132 See Art. 149 para. 3 Moudawana. See also Guide Pratique du Code de Famille, 101, available at <http://www.jafbase.fr/docMaghreb/MarocCodeFamGuidePratique.pdf> accessed 01 June 2018.

133 The *kafalah* will not end at that age for a non-married girl, a handicapped child or a young adult who is unable to support themselves financially.

134 Art. 19, Art. 25 Moroccan Kafalah Law.

the *kafalah* or another measure.[135] At the same time, the biological parents may reclaim the child at any time if the reasons for abandonment cease to exist.[136]

b) Egypt

The Arab Republic of Egypt is the most populous country in North Africa and the Arab World. The great majority of its people are adherents to Sunni Islam, with a considerable minority of Coptic Christians and other Christian denominations.[137] The Egyptian legal system encompasses Islamic law and a system of codified laws. Egypt's supreme law is its written constitution. According to its provisions, the principles of the Islamic Shari'a are the main source of legislation and Islam is the religion of the state.[138]

ba) Family Law and Lineage

Egypt neither does have a unified personal status law that applies to all religious denominations, nor are the rules of Egyptian Muslims personal status law codified in a comprehensive code. For Muslims, matters of family are regulated by the Egyptian Personal Status laws which are informed by the dominant view of the Hanafi School of law.[139] The scholarship of the Hanafi School of law is also used for gap-filling purposes.[140]

There are quite a few substantive laws dealing with personal status. These include for instance Law No. 131 of 1948, the Egyptian Civil Code; Decree-Law No. 25 of 1920 regarding Maintenance and some Questions of Personal Status; Decree-Law No. 25 of 1929 regarding certain Personal Status Provisions; Law No. 100 of 1985 amending decree-laws No. 25 of 1920 and 1929 as well as procedural laws.[141] [142] Religious minorities like the Coptic Christian population apply their own religious rules to personal status matters, provided that the parties to the dispute belong to the same faith, and that

135 Art. 26 Moroccan Kafalah Law.

136 Art. 29 Moroccan Kafalah Law.

137 The World Factbook, CIA, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> accessed 01 June 2018.

138 Art. 2 of the Constitution of the Arab Republic of Egypt of 2014, unofficial English translation available at <http://www.sis.gov.eg/Newvr/Dustor-en001.pdf> accessed 01 June 2018. At the same time, the constitution states that Christians and Jews have the right to follow their religious laws "regulating their personal and religious affairs". It also grants them the right to select their own religious leaders (Art. 3 Constitution).

139 The personal status law has been amended several times. See FAWZY ESSAM, Personal Status Law in Egypt: A Historical Overview, in: Welchman Lynn (ed.), Women's Rights and Islamic Family Law: Perspectives on Reform, London/New York 2004, 30-44, at 30 ff.

140 Judges usually refer to the unofficial codification of Qadri Pasha of 1875, wherein the rules of the Hanafi school are compiled. See EBERT HANS-GEORG/HEFNY ASSEM, Ägypten, in: Bergmann Alexander et al., Internationales Ehe- und Kindschaftsrecht mit Staatsangehörigkeitsrecht, Loseblattsammlung, 6. Auflage, Frankfurt a.M./Berlin 1983 ff., at 16 f.

141 The law currently in force is Law No. 1 of 2000 organizing Certain Conditions and Procedures of Litigation in Matters of Personal Status (amended by Law No. 91 of 2000). Further laws include: Decree-Law No. 118 of 1952 on rules of guardianship over one-self; Decree-Law No. 119 of 1952 on rules of guardianship over money; Law No. 62 of 1976 amending certain rules concerning maintenance; Law No. 1 of 2000 regarding the Promulgation of a Law to Organize Certain Conditions and Procedures in Matters of Personal Status (mainly procedural in nature but also containing two important substantive provisions, namely no-fault divorce (*khul'*) and the right of the wife to divorce in the context of an unregistered marriage); Law No. 4 of 2005 amending Article 20 of Decree-Law No. 25 of 1920 (raising the age of custody); Law No. 126 of 2008 amending the provisions of the Child Act (No. 12 of 1996, "Child Law"): See MOUSSA JASMINE, Competing Fundamentalisms and Egyptian Women's Family Rights: International Law and the Reform of Sharīa-derived Legislation, Leiden 2011, at XIX.

142 MOUSSA JASMINE, Egypt, in: Yassari Nadjma/Möller Lena-Maria/Gallala-Arndt Imen (eds.), Parental Care and the Best Interests of the Child in Muslim Countries, The Hague 2017, 1-26, at 5 f.

there are no legal provisions and court judgments which are applicable to all Egyptian citizens irrespective of their faith.[143]

In Egypt, the principle of *al-walad li'l-firāsh* establishes legal paternity. According to Egyptian law, courts may not hear any paternity claims if there was no physical contact between the spouses after their marriage or if a child was born more than one year after his or her father's absence or more than one year after the divorce of the parents (or the father's death).[144] The other means of establishing *nasab* is acknowledgement (*iqrār*). In order to prove legitimate filiation, witnesses and scientific methods may be used.[145] Furthermore, legitimate filiation may be proven by *al-bayina* (evidence).[146] Denial of paternity may arise through the procedure of *li'an*. Even though the Egyptian personal status law does not deal with the *li'an* procedure, courts hear such cases on the basis of the rules for lacunae in the relevant laws and the according Islamic schools of law's acceptance of such procedure.[147]

According to Egyptian laws, members of the Coptic Christian church may adopt children but Muslims may not.[148] However, Muslim citizens may turn to secret informal adoption, for instance through acknowledgment (*iqrār*)[149] or in the case of someone finding an abandoned newborn baby and raising the baby without informing the authorities.[150] The declaration of paternity is prohibited where one parent is in wedlock with a party other than the biological parent of the child in question.[151]

bb) The Fosterage of Abandoned Children

In General

Children are regularly abandoned in Egypt. The causes for abandonment are numerous and diverse and include poverty, unwanted pregnancies, rape and *'urfi* (customary)[152] as well as *misfar*

143 See SEZGIN YÜKSEL, Human Rights under State-Enforced Religious Family Laws in Israel, Egypt and India, New York 2013, at 119 ff.; TADROS MARIZ, Egypt, in: Kelly Sania/Breslin Julia (eds.), Women's Rights in the Middle East and North Africa: Progress amid Resistance, New York/Lanham, 89-120, at 95; EBERT/HEFNY, *supra* n. 140, at 15.

144 Art. 15 of the Decree-law no. 25 of 1929 regarding certain Personal Status Provisions. See SHAHAM RON, Law versus Medical Science: Competition between Legal and Biological Paternity in an Egyptian Civil Court, Islamic Law and Society, Vol. 18 (2011), 219-249, at 229 f. According to Hanafi doctrine, the minimum term of pregnancy is six months.

145 EBERT/HEFNY, *supra* n. 140, at 36. Regarding the scope and limits of the use of modern medical technology in paternity cases see SHABANA AYMAN, Paternity between Law and Biology: The Reconstruction of the Islamic Law of Paternity in the Wake of DNA Testing, Zygon, Vol. 47 (2012), 214-239, at 216 ff. In particular, see Art. 4 Law no. 126 of 2008 ("Child Law"): "The child shall have the right to establish his legitimate paternal and maternal lineage, using all lawful scientific means in order to establish such lineage."

146 EBERT/HEFNY, *supra* n. 140, at 36.

147 FAWZY, *supra* n. 139, at 41.

148 The relevant rules for Coptic citizens are formulated in the Personal Status Law for the Orthodox Copts of 1938 in Art. 110-123 of the said law. For an overview, see ROWBERRY RYAN/KHALIL JOHN, A Brief History of Coptic Personal Status Law, Berkeley Journal of Middle Eastern and Islamic Law, Vol. 3 (2010), 81-139. For Muslim citizens, see Art. 4 para. 3 Child Law.

149 EBERT/HEFNY, *supra* n. 140, at 36.

150 AL-AZHARY SONBOL, *supra* n. 18 at 60.

151 Art. 22 para. 1 No. 2 Child Law.

152 An '*urfi* marriage is an unregistered marriage not celebrated by a state representative and will only produce certain legal effects.

(temporary) marriages.[153] According to the Children's rights group FACE, which gives assistance to street children and orphans, there are at the present officially 6500 orphans throughout 238 legally recognised institutions in Egypt. However, numbers are probably much higher as several institutions are not recognized and some operate on an illegal basis.[154] Furthermore, it is estimated that tens of thousands of children live on Egypt's streets, however not all of them are orphans.[155] Also, some of the children left in orphanages know who their parents are but often these parents are unable to care properly for the children due to poverty or a prison sentence.[156] Illegitimate children are often abandoned due to shame and the fear that relatives would harass the mother due to her status as a woman who committed *zinā*. Regardless of their background, orphans bear the stigma of illegitimacy and are even regarded as a "source of evil".[157]

According to Egyptian child law, any infant found abandoned in the streets must immediately be delivered either to the police or to an institution designated to receive new-borns which in turn will notify the police. They will record all data regarding the child and the finder.[158] A doctor will then estimate the age of the child, and the child receives a name. The relevant data is then included in the birth registry.[159] The law also provides for alternative or foster care for children without parental care.[160] The fostering of children is further detailed in the 'Fostering of Children Regulations'.[161]

In January 2015, Egypt amended its child law to lower the age when children can be raised by foster parents from two years to three months allowing non-institutional support of orphans and other children in need nearly from birth.[162] [163]

153 See e.g. MEGAHEAD HAMIDO A./CESARIO SANDRA, Family Foster Care, Kinship Networks, and Residential Care of Abandoned Infants in Egypt, Journal of Family Social Work, Vol. 11 (2008), 463-477, at 466 f.; THOMASON, *supra* n. 14, at 127; The Cairo Times, 25 March 2004, "Beloved outcasts", available at <http://www.mafhoum.com/press7/187S28_fichiers/adoption0804.htm> accessed 01 June 2018; Arab News, 14 October 2010, "Misfar misfortune: 900 children abandoned in Egypt by Saudi fathers", available at < http://www.arabnews.com/node/357711> accessed 01 June 2018.

154 See FACE for children in need, available at <http://www.facechildren.org/en/Context-in-Egypt.htm> accessed 01 July 2017.

155 See <http://www.unicef.org/egypt/protection_4397.html> accessed 16 July 2018.

156 AL-AZHARY SONBOL, *supra* n. 18, at 60.

157 See e.g. idem; RUGH ANDREA B., Orphanages in Egypt: Contradiction or Affirmation in a Family-Oriented Society, in: Warnock Fernea Elizabeth, Children in the Muslim Middle East, Austin 1995, 124-141, at 126 f.; THOMASON, *supra* n. 14, at 131 f.; Ahram Online, 5 April 2013, "Egyptian orphans still suffering on their National Day", available at <http://english.ahram.org.eg/NewsContent/1/64/68132/Egypt/Politics-/Egyptian-orphans-still-suffering-on-their-National.aspx> accessed 01 June 2018.

158 However, this person may lawfully choose not to give her or his details to the police. In case of known parents, there are instances where their names will not be included in the child's records, notwithstanding their personal wishes: See Art. 20 para. 3 and Art. 21 Child Law of 2008.

159 Art. 20 Child Law. MEGAHEAD/CESARIO, *supra* n. 153, at 469; THOMASON, *supra* n. 14, at 125 f.; AL-AZHARY, *supra* n. 18, at 61.

160 Art. 4 para. 3, Art. 46 Child Law.

161 Prime Minister Decree No. 2057 for 2010 issuing the Executive Regulation for the Child Act No. 12 of 1996: Fostering of Children Regulation.

162 Law No. 6 of 2015; see Arabstoday, 24 January 2015: "Fostering age for abandoned kids lowered to 3 months in Egypt", available at <http://www.arabstoday.net/en/women/also-in-the-news/fostering-age-for-abandoned-kids-lowered-to-3-months-in egypt.html> accessed 01 June 2017. Children at such a young age can be breastfed. Breastfeeding creates a relationship similar to those who are related by blood. This means that the child suckled in infancy is not eligible for marriage to the milk-mother's other children or husband and the family members may mingle relatively freely even after the milk-child has reached puberty. See BALKRISHAN SHIVRAM, Exploring Gender: Islamic Perspectives on Breastfeeding, International Research Journal of Social Sciences, Vol. 2 (2013), 30-34, at 32.

163 Regarding milk-kinship, see idem.

Prerequisites

Under Egyptian law, the following children are eligible for foster care: illegitimate children; abandoned children; children who lost their parents and whose location or place of residence can neither be located by the child nor by the relevant authorities; children whose parents are unable to look after their offspring due to social reasons.[164] Applicants wishing to take a child into *kafalah*, i.e. to enter into a formal care arrangement for him or her,[165] must be married whereby one of the spouses should be of Egyptian nationality; they should have the same faith as the child, be between 25 and 55 years of age and married for at least five years. Furthermore, they must be psychologically and physically healthy, have an income sufficient to provide for the family unit, live in a proper environment with, inter alia, educational and medical facilities, and have enough time to handle the fostering of a child. Finally, they must prove their ability to jointly cover the needs of the family and provide the child taken into *kafalah* with financial and social security. Also, they must give the solemn promise to preserve the ancestry of the child.

Single women, divorcees and widows over the age of forty-five may foster children upon approval by the Alternative Families Committee.[166] The number of children in the applying family should not exceed two, unless they are old enough to depend on themselves. Prospective foster parents must also obtain approval from the Social Solidarity Directorate to provide foster care for more than one child.[167] After a process, which includes a background check by a social worker and the submission of the relevant documents, the Family and Childhood Administration reviews the application which then presents the application as well as the social survey report and other relevant documents to the Alternative Families Committee of the relevant governorate for decision-taking. If the family's application is approved, the applicants have to sign a foster care contract.[168] [169] If the application is rejected, the applicants are entitled to appeal it.[170]

Effects of the Decision

The foster family has the duty to look after and care for the foster child as a family member and to comply with the relevant authorities regarding the child's future as well as informing them regarding any change in the child's social status, residence and circumstances.[171] The orphaned child

164 See Art. 85, 86 Fostering of Children Regulation.

165 The Egyptian Child Law uses the Arabic terminology *ri'āya al-badīla* or *usr al-badīla* for alternative or foster care, see e.g. title chapter 3 and art. 46. Another term used in Egypt is *al-usr al-kāfila*, see YASSARI NADJMA, Adding by Choice: Adoption and Functional Equivalents in Islamic and Middle Eastern Law, The American Journal of Comparative Law, Vol. 63, No. 4 (2015), 927-962, at 951. In this paper, the term *kafalah* is used for consistency reason and in accordance with the literature, which generally refers to this terminology when speaking of an alternative institution for adoption in Muslim jurisdictions. However, this does not mean that the *same* legal structure for the institution of *kafalah* exists in all of these states, see YASSARI, *ibid*, at 949, 950f. For literature that also uses the term *kafalah* in the Egyptian context, see e.g. MOUSSA, *supra* n. 142 at 16; EBNER/HEFNY, *supra* n. 140 at 36; MCLEAN EADIE KIERAN, The application of kafala in the West, in: Nadirsyah Hosen (ed.), Research Handbook on Islamic Law and Society, Cheltenham 2018, 47-76 at 55f.

166 Art. 89 No. 2, 93 Fostering of Children Regulation.

167 Art. 89 No. 4 Fostering of Children Regulation.

168 Art. 90, 93, 101 Fostering of Children Regulation.

169 Apart from a formal agreement based on a contract between the state authority and foster parents for the support and care of an abandoned child, there is the option for support on a voluntary basis for a child who remains in residence in an orphanage, see MEGAHEAD/CESARIO, *supra* n. 153, at 469.

170 Art. 90 para. 5 Fostering of Children Regulation.

171 Art. 89 No. 7, No. 11, Art. 91 Fostering of Children Regulation.

or child with unknown ancestry may add the name of her or his foster family as her or his own, yet without gaining any natural inheritance rights.[172] Notwithstanding this, the foster parents may bequest one-third of their estate to an unrelated person such as a foster child.[173] In addition, they may bestow money or property upon the child during their lifetime.[174]

The law provides that social specialists shall oversee the welfare and progress of the child,[175] and entitles foster parents to certain benefits during and after the end of the foster care period.[176]

Termination of Placement

The family foster care continues until boys reach the employable age and girls marry.[177] If the foster family infringes upon the regulations of the relevant law, for instance by not following the directives of the social worker or by conducting a lifestyle that negatively influences the psychological or physical health of the foster child, it may be terminated earlier. The *kafalah* placement may also come to an end if either of the foster parents dies[178] or the child is returned to its biological family.[179]

c) United Arab Emirates

The United Arab Emirates (UAE) is a federation established in 1971 in the area previously known as the Trucial Coast in the Persian Gulf, consisting of seven Emirates, namely Abu Dhabi, Dubai, Sharjah, Ras Al Khaimah, Umm Al Quwain, Ajman and Fujairah. The majority of its citizens are adherents to Sunni Islam with Christian, Shia and Hindu minorities. Approximately four-fifth of the population are migrant workers who reside in the country temporarily. They are predominantly Muslims, Christians and Hindus.[180]

According to the UAE Constitution, Islam is the official religion of the federation, and Islamic law (Shari'a) a main source of legislation.[181] As a federation, it has two sets of laws: On the one hand, federal laws and decrees which make up the legal framework of the federation, and on the other hand, the laws and regulations of the individual Emirates. The Emirates have the jurisdiction over subject matters that are not assigned by the Constitution to the exclusive jurisdiction of the Federal Government as well as the right and duty to implement federal laws through local laws and regulations.[182]

172 Art. 92 Fostering of Children Regulation. See also MOUSSA, Egypt, *supra* n. 142, at 16f.
173 The Islamic inheritance laws are codified into Law No. 77 of 1943 and Law No. 71 of 1946.
174 See also Art. 99 Fostering of Children Regulation.
175 Art. 89 No. 9, 102 f. Fostering of Children Regulation.
176 See Art. 95 ff. Fostering of Children Regulation.
177 Art. 87 Fostering of Children Regulation.
178 See Art. 100 Fostering of Children Regulation.
179 Cf. Art. 89 No. 11 Fostering of Children Regulation.
180 The World Factbook, CIA, United Arab Emirates, available at < https://www.cia.gov/library/publications/the-world-factbook/geos/ae.html> accessed 01 June 2018.
181 Art. 7 Federal Constitution of the United Arab Emirates.
182 See Art 116 ff., 120, 121, 122 and 125 UAE Constitution.

ca) Family Law and Lineage

In the relatively short period since its establishment, the UAE has passed many important laws. Yet until recently, there was no codified family law in the UAE and the law applied in family matters were the rules of classical Islamic law based on dominant Maliki doctrines. In 2005, the UAE passed its first codified family law, the Federal Law on Personal Status.[183] It covers a wide range of issues considered to be in the realm of family law, such as marriage and divorce, issues arising during and after marriage, rules pertaining to children, and inheritance.[184] The law applies to all citizens as long as the non-Muslims among them (mostly Hindus) do not have their own laws; non-citizens have a choice to subject themselves to the law.[185]

According to the UAE Personal Status Law, the *nasab* to the mother is acquired through birth.[186] In order to be legitimately affiliated to the father and acquire a *nasab*, the law requires that the child must be born under a valid marriage within the minimum term of pregnancy after the conclusion of the marriage contract. If the spouses think they are legally married but the marriage contract is defective, the child is attributed to the husband if he or she is born within the minimum terms of pregnancy counted from the time of consummation of the (defective) marriage.[187] The other alternatives to establish *nasab* are acknowledgement, evidence and "scientific methods if the conjugal bed is established".[188] Here, the law refers to methods such as DNA-testing.[189] In any case, for illegitimate offspring paternity cannot be established. Extramarital relationships are considered a crime under the UAE Penal Code.[190]

The husband can refute paternity through the traditional process of *li'an* if he has not admitted to his paternity or consented in the child's being attributed to him previously.[191] During the court proceedings, the judge can have recourse to "scientific methods" in order to clarify the question of paternity.[192] If the *li'an* procedure is successful, the child will not be attributed to the wife's husband and the spouses will be separated definitely.[193]

Marriage is the exclusive framework for licit sexual relations and legitimate offspring. Because sex outside of marriage is illegal, the women – many of whom are migrant workers – often conceal their pregnancies and abandon their babies shortly after giving birth.[194] The UAE does not endorse a

[183] UAE Federal Law No.28 of 2005 on Personal Status of 19 November 2005, Official Gazette No.439, November 2005.

[184] See e.g. WELCHMAN LYNN, First Time Family Law Codifications in Three Gulf States, in: Bill Atkin (ed.), The International Survey of Family Law, 2010 Edition, Bristol 2010, 163–178, at 164.

[185] Art. 1 UAE Federal Law on Personal Status.

[186] Art. 60 No. 2, 90 f. UAE Federal Law on Personal Status. The minimum and maximum terms of pregnancy are 180 and 365 days respectively, "unless a medical committee established for this purpose decides otherwise".

[187] 180 and 365 days respectively, "unless a medical committee established for this purpose decides otherwise", see Art. 89ff. UAE Federal Law on Personal Status.

[188] Art. 89 UAE Federal Law on Personal Status.

[189] WELCHMAN, *supra* n. 2, at 145.

[190] Cf. Art. 356 Federal Law No. 3 of 1987 on the Penal Code.

[191] Art. 96, 97 No. 1 UAE Federal Law on Personal Status.

[192] Art. 97 UAE Federal Law on Personal Status.

[193] Art. 96 No. 1 and Art. 97 No. 2 UAE Federal Law on Personal Status.

[194] See, e.g., Al Jazeera, 6 March 2015: "Adopting Orphans Breaking Taboos in Dubai", available at <http://www.aljazeera.com/news/2015/03/adopting-orphans-breaking-taboos-dubai-150302080741099.html> accessed 01 June 2018.

system of adoption that severs a child's lineage to her or his biological parents. As such, the UAE laws do not expressly prohibit adoption, but it is commonly agreed that UAE nationals, which are mostly Muslims, cannot adopt.[195] They should turn to fosterage instead which is considered as a worthy deed and permitted according to the precepts of Islam.

cb) The Fosterage of Abandoned Children

In General

Until 2011, the fosterage of children was not regulated in the UAE. In early 2012, the UAE President Shaikh Khalifa Bin Zayed Al Nahyan issued a law on the protection and care for abandoned children.[196] The law created a system involving the Ministry of Social Affairs and the Ministry of Interior to provide care for children without parental support and lays down the criteria and process by which foster families are being chosen. The law not only aims at securing the care of abandoned children in order to secure their health, education and social integration, but also stipulates their protection from abuse and cruel treatment.[197] This is in line with Article 16 of the UAE Constitution which states: "Society shall be responsible for protecting childhood (…) and shall protect minors and others unable to look after themselves for any reason, such as illness, disability (…). It shall be responsible for assisting and enabling them to help themselves for their own benefit and that of the community. Such matters shall be regulated by welfare and social security legislations."

Prerequisites

According to Federal Law 1 of 2012 on the care for abandoned children, an abandoned child is one found inside the borders of the UAE who has no known parents.[198] Anyone who finds an abandoned infant must deliver him or her to the police including anything found on the child. The police notify the Public Prosecutor and hand over the child to the designated health centre. A doctor estimates the age of the infant and gives him or her the necessary care.[199] The Public Prosecutor then assigns the child to an orphanage with the approval of the two involved ministries. There, the child is given a name.[200] According to the law, abandoned children are eligible for Emirati citizenship.[201]

Anyone wishing to foster a child must be an Emirati national residing in the UAE[202]; he or she must be Muslim and married and be at least 25 years of age. According to the relevant law, single men are not eligible and single women (unwed, widowed or divorced) must be at least 30 years of age. Further, the hosting family or single mother should be free from infectious diseases[203] and should not suffer from psychological and mental disorders. The hosting family or single mother must be

[195] Adoption is possible for foreign, non-Muslim expatriates living in the UAE. The adoption process follows the rules of their own national laws.

[196] Federal Law No. 1 (2012) on the care of abandoned children (hereinafter "Abandoned Child Law"). Executive by-laws are planned to be released soon.

[197] Art. 2 UAE Abandoned Child Law.

[198] Art. 1 UAE Federal Abandoned Child Law.

[199] Art. 3 UAE Federal Abandoned Child Law.

[200] This name shall not imply that the child is of unknown parentage. See Art. 3 para. 5 UAE Federal Abandoned Child Law.

[201] Art. 3(e) UAE Federal Law No. 17/1972 concerning nationality and passports, amended by Federal Law No. 10/1975; Art. 3, Art. 5 para. 1 UAE Federal Abandoned Child Law.

[202] See Art. 10 UAE Federal Abandoned Child Law for the eligibility criteria.

[203] Exceptions are possible: cf. Art. 10 para. 2 UAE Federal Abandoned Child Law.

financially capable to provide a decent living to the foster child as well as the members of their own families, and they must not have a criminal record.[204]

In the Emirate of Dubai, the Community Development Authority is the responsible authority for the care of abandoned children.[205] The person or persons wishing to foster a child have to apply to the CDA by submitting a form accompanied by a number of documents (e.g., certificate of clearance of infectious diseases, salary certificate). A social worker assesses the family and their living circumstances through interviews and home visits.[206] The Commission then decides on the eligibility of the family or single person and informs them accordingly. After placement, social workers monitor the wellbeing of foster children by visiting the foster families and by an annual health check.[207]

Effects of the Decision

The child is referred to the family for a trial period of six months after which the foster care becomes permanent.[208] Foster parents have to sign an undertaking that they will treat the child well, provide her or him with secure living conditions and that he or she may grow up in an Islamic and social environment. The law specifies that the foster parents are to take care of the child's needs, such as giving it a home, clothing, and sustenance, and cater to the health and social life of the child according to his or her age. In addition, they must allow her or him to interact with other children, and provide for her or his education.[209] The law further stipulates that fostering is a gift of care and that the foster parents are not entitled to any remuneration.[210]

Since the foster parents are to take care of the child in the same way as if the child were their biological offspring, they must care and bring him or her up according to the rules laid down in the Personal Status Law.[211] In case of a girl, maintenance continues until her marriage and in case of a boy until he is able to finance his own livelihood or he finishes his studies. If the male child is disabled or the female widowed or divorced, the maintenance obligation of the father continues or reverts to him.[212] However, no inheritance rights are established to the foster parents. Indeed, according to Islamic law, they may bequeath a maximum of one-third of their estate to an unrelated person.[213]

[204] The by-laws are yet to be released: The National, 9 February 2014: "Shelter is required before UAW can enforce abandoned child law", available at <http://www.thenational.ae/uae/government/shelter-is-required-before-uae-can-enforce-abandoned-child-law> accessed 01 June 2018.

[205] According to Art. 7, 8 UAE Federal Abandoned Child Law, each Emirate has its own commission to identify eligible foster families.

[206] See Art. 8, 9, 13 UAE Federal Abandoned Child Law.

[207] Cf. Art. 8, 12, 13, 14 UAE Federal Abandoned Child Law.

[208] Art. 9 para. 2 UAE Federal Abandoned Child Law.

[209] Art. 5 UAE Federal Abandoned Child Law.

[210] Art. 15 UAE Abandoned Child Law.

[211] See Art. 5, 10 UAE Abandoned Child Law.

[212] Art. 78 UAE Federal Law on Personal Status.

[213] Art. 243 UAE Federal Law on Personal Status.

Termination of Placement

The foster care ends when the child comes of age;[214] foster parents fail to provide for the child in accordance with the rules of the law;[215] or the biological parents come forward;[216] or the foster child dies.[217] In case of divorce of the foster parents or the death of one spouse, the continuation of the foster arrangement may be ruled.[218]

V. Appraisal and Concluding Remarks

In the three countries under review, Morocco, Egypt and the UAE, adoption in the sense of integrating a child into one's own family by legally giving him or her an equal status to the one of a biological child is either not legally possible, or not possible for people with certain faiths, namely Muslims. By contrast, fostering is legally permitted in all three countries. A special emphasis is laid on the faith: In Morocco and the UAE, the applicants must be a Muslim couple or a Muslim single woman, in multi-faith Egypt, the couple or single woman must have the same faith as the child. In line with Islamic legal precepts, foster arrangements in these three countries have no effect on lineage like adoption. However, they offer a family-based solution for children deprived of family for reasons such as orphanage or birth out of wedlock by recognising the role family plays in the development and growth of young children.

In contrast to adoption, the fostering arrangements under review offer a certain flexibility allowing for adjustments in case the child's individual situation changes; such may be given if reintegration into the birth family becomes possible or the arrangement with the foster parents does not work out in the best interest of the child. However, it must be pointed out that such revocation possibilities also have their downfalls, namely the uncertain legal status of the child, and possible emotional hardship. This said, under the national laws of Egypt, Morocco and the UAE fostering is designed to be a permanent arrangement for a child without parental care. The permanence factor is reflected in the fact that termination is only possible in special circumstances.

As has been outlined, *nasab* identifies the lineage of a person and typically is a patronym (i.e., name of the father) or a series of patronyms in both historical and modern Islamic legal frameworks. Lineage indicates the parentage of a child and consequently the establishment of all legal rights and claims. Since lineage can only be established through blood (kinship) and marriage, a fostered child (child under *kafalah*) will retain her or his father's or mother's name, if known, or will be named by officials, if unknown. Perhaps in an effort to atone the stigma of not having the father's or family's last name, in Morocco the child's last name may be aligned to the *kafil*'s name by an official act, and

[214] According to Art. 85 UAE Federal Law on the Civil Transactions Law (Civil Code), a person comes of age at the age of 21.

[215] Art. 14 UAE Federal Abandoned Child Law provides the following: If the foster parents fail to comply with their rights and duties, they are reminded to discharge their duties. If they still fail to comply with the rules laid down by law, they are cautioned. If foster parents continue to disregard their duties, the fostering arrangement is put to an end, and another family is given the right to take the child into foster care.

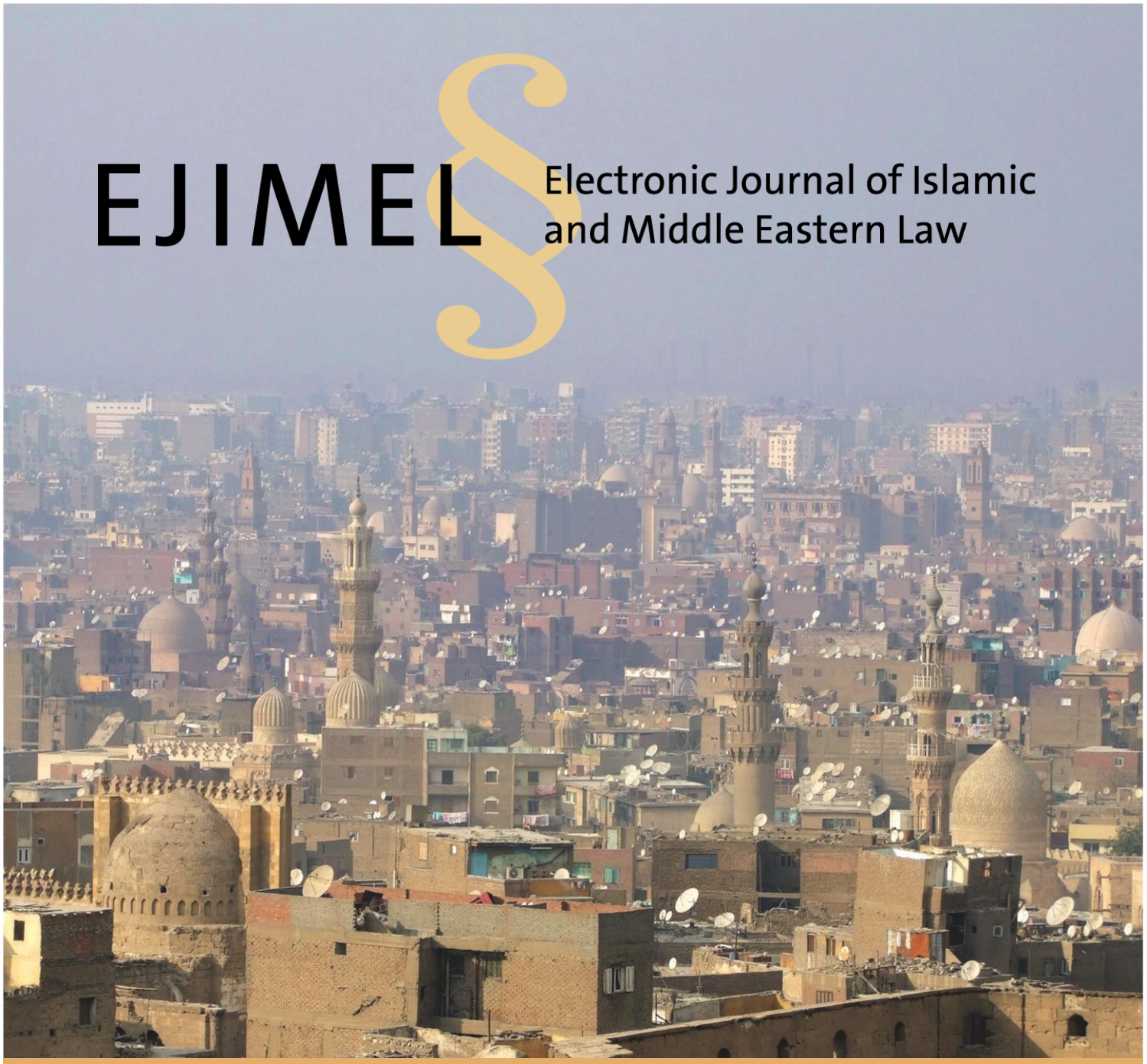
[216] If the biological parents reclaim the child, they must prove that they are the biological parents before the court issues a ruling to this effect, and the child will be re-registered: Art. 17 f. UAE Federal Abandoned Child Law.

[217] Art. 20 para. 1 UAE Federal Abandoned Child Law.

[218] According to Art. 14 UAE Federal Abandoned Child Law, a relative may claim the right to foster the child in place of the deceased foster parent.

in Egypt the foster family's name might be added to one's own. As far as can be seen, in the UAE the child keeps the name attributed to them by the officials. Furthermore, since the biological family bonds are preserved in all three countries by a fostering arrangement, the child has no inheritance rights towards their fostering parents. It is however possible to grant him or her limited inheritance rights by drawing up a will and thus enabling the child to inherit a certain portion of the foster parent's fortune.

Modern-day fostering arrangements as mirrored in the laws of Morocco, Egypt and the UAE certainly have benefits for children deprived of a family environment. However, because of the obvious challenges of this type of system, effective monitoring and regular follow-ups by officials are vital components in order to prevent or deflect a placement for economic reasons and children's exploitation. Also, the high prevalence of abandoned children namely in Egypt and Morocco highlights the need to develop preventive and inclusive programs for the support of single mothers especially. Besides their own "illegitimate" children, these individuals are most vulnerable in societies with patriarchal structures, where giving illegitimate birth (birth out of wedlock) may be considered as a transgression against "family honour".



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Fatwas und Muftis im Zeitalter des Internets: Das Fatwa-Portal *islamfatwa.de* als Fallstudie

von Mahmud El-Wereny[*]

Inhalt

Abstrakt

Fatwas dienen nicht nur der Klärung von Alltagsfragen unterschiedlicher Art, sondern auch der Rechtfertigung und Verbreitung von politischen Ideologien und religiösen Weltanschauungen. Muftis, die sich dieser Aufgabe zuwenden, sollen daher bestimmte Qualifikationen erfüllen, um in der Lage zu sein, zeit- und ortsgemäße Lösungen für die an sie herangetragenen Sachverhalte liefern zu können. Auch wenn Fatwas über keinen bindenden Charakter verfügen, finden sie bei vielen Muslimen Anerkennung und gelten als Orientierungshilfe und Richtschnur für ein schariagetreues Leben. Der Cyberspace hat neue Welten eröffnet und vielfältige Möglichkeiten geschaffen. Auch für Musliminnen und Muslime, die sich über ihre Religion informieren wollen, bietet sich in der virtuellen Welt eine Vielzahl von Fatwa-Foren. Diese erleichtern nicht nur das Finden von islamkonformen Antworten auf Alltagsfragen, sondern ermöglichen es auch, durch die gewährleistete Anonymität, heikle Fragen zu stellen und zugleich unterschiedliche Positionen und Sichtweisen verschiedener Muftis zu vergleichen und davon zu profitieren. Problematisch ist allerdings, dass man nicht ohne Weiteres erkennen kann, wer hinter dem jeweiligen Fatwa-Forum steht und welche ideologischen Inhalte dort propagiert werden. Im Mittelpunkt des vorliegenden Beitrags steht die Darstellung und Analyse des ersten und meistbesuchten Fatwa-Portals im deutschsprachigen Raum islamfatwa.de, um es dann anhand von ausgewählten Fallbeispielen ins Spektrum der Online-Fatwa-Dienste einzuordnen.

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I. Einleitung

Viele Musliminnen und Muslime legen großen Wert darauf, ihr Leben nach Werten und Normen des Islam auszurichten.[1] Da nicht jeder Muslim in der Lage ist, selbstständig aus den normativen Quellen des Islam Antworten auf neu aufgetretene Fragen zu finden, wendet man sich in der Regel an einen ortsnahen vertrauten Islamgelehrten, der durch seine Qualifikationen befugt ist, religiöse Auskünfte auf an ihn herangetragene Fragen zu geben. Der Fragesteller wird in der Fachsprache *mustaftī* („Ratsuchender"), der Ratgeber *muftī* und sein Rat *fatwā* genannt. Das Wort Fatwa wird in der deutschsprachigen Literatur häufig mit „Rechtsgutachten" übersetzt.[2] Als Fachterminus des islamischen Rechts bezeichnet es eher eine religiöse Auskunft eines Muftis, die dem Ratsuchenden auf Anfrage hin erteilt wird. Diese Tätigkeit kann, wie es über die islamische Geschichte hinweg der Fall war, entweder formell von einem durch den Staat eingesetzten Mufti oder informell von einem Gelehrten durchgeführt werden, der aufgrund seiner Kompetenz und Popularität in der Gesellschaft Gehör und Anerkennung findet.[3]

Mit der Entwicklung des Internets haben sich die Wege und Formen der religiösen Ratgebung (*iftāʾ*) verändert. Während man sich früher in der Regel an den Mufti der ortsnahen Gemeinde gewandt und seine Frage vor Ort vorgetragen hat, bedient man sich heute oftmals des Internets. Denn Online-Fatwa-Dienste haben neue Zugänge und Kanäle geschaffen, um Fatwas zu erhalten und somit die Religion zu verstehen. Der Cyberspace bietet im Gegensatz zu Radio oder Fernsehen überschaubare Kategorisierungen, eigene Räume und Inhalte sowie einfacheren Zugang. Was die Online-Fatwas besonders attraktiv macht, ist u. a. die Möglichkeit, anonym Fragen zu stellen bzw. zu suchen und zu finden. Auf diesem Wege können auch Tabuthemen sozialer, politischer oder anderer Art aufgegriffen werden. Darüber hinaus überwindet das Internet die geografische Begrenztheit und ermöglicht dem Ratsuchenden, seine Frage nicht nur einem, sondern mehreren Muftis zu stellen und somit unterschiedliche Antworten zu vergleichen.[4]

Heute gibt es eine Vielzahl an Internetseiten, die sich hauptsächlich dem *iftāʾ* widmen. Nicht nur staatliche Institutionen und Organisationen islamisch geprägter Gesellschaften haben schon seit Längerem die Möglichkeiten des Internets erkannt und es als Kommunikationsmedium innerhalb der muslimischen Gemeinschaft eingesetzt.[5] Auch

1 Der Einfachheit halber wird im weiteren Verlauf des Artikels auf das Femininum verzichtet.

2 Nicht selten wird der Begriff *fatwā* in Assoziation mit dem Schriftsteller Salman Rushdie (geb. 1947), der wegen seiner 1988 erschienen Schrift *Die satanischen Verse* auf der Grundlage einer vom Ajatollah Chomeini (gest. 1989) erteilten Fatwa zum Tode verurteilt wurde. Siehe statt vieler VOGEL GEREON, Blasphemie – Die Affäre Rushdie in religionswissenschaftlicher Sicht, Bern 1998.

3 Vgl. weiterführend dazu MOTZKI HARALD, Religiöse Ratgebung im Islam: Entstehung, Bedeutung und Praxis des *muftī* und der *fatwā*, Zeitschrift für Religionswissenschaft, Vol. 2 (1994), 3–23; KRAWIETZ BIRGIT, Der Mufti und sein Fatwa. Verfahrenstheorie und Verfahrenspraxis nach islamischem Recht, Die Welt des Orients, Vol. 26 (1995), 161–180; MASUD KHALED MUHAMMAD, Mufti, Fatwas and Islamic Legal Interpretation, in: Masud Khaled Muhammad/Messick Brinkley/Powers David (Hrsg.), Islamic Legal Interpretation. Muftis and Their Fatwas, London 1996, 3–33; EL-WERENY MAHMUD, Scharia-Normen im Wandel: Zum Konzept der Fatwa-Wandelbarkeit zwischen Tradition und Moderne", Zeitschrift für Recht und Islam, Jg. 9 (2017), (im Erscheinen).

4 Vgl. MASUD, *supra* Fn. 3, 32; BRÜCKNER MATTHIAS, Fatwas zum Alkohol unter dem Einfluss neuer Medien im 20. Jhdt., Würzburg 2001; GRÄF BETTINA, Medien-Fatwas@Yusuf al-Qaradawi. Die Popularisierung des islamischen Rechts, Berlin 2010, 231.

5 Vgl. bspw. Dār al-Iftāʾ in Ägypten http://dar-alifta.org/, in Libyen https://ifta.ly/web/ und in Saudi-Arabien http://www.alifta.net/ (letzter Aufruf 22.04.18). Mehr dazu LOHLKER RÜDIGER, Islam im Internet. Neue Formen der

islamistische Gruppierungen und Einzelpersonen machen davon Gebrauch, um ihre politisch ideologisierte Interpretation des Islam sowie angestrebte Ziele zu propagieren. In ihrer virtuellen Präsenz nehmen Fatwas einen zentralen Platz ein. Sie dienen dort als Erklärungsmittel für alle Fragen des Lebens sowie für die Rechtfertigung von religiösen und politischen Ansichten.[6]

Als erstes deutschsprachiges Fatwa-Portal, das facettenreiche Fatwas zu unterschiedlichen Themenbereichen des Islam bietet, tritt *islamfatwa.de* auf, wenn man das Schlagwort *Fatwa* bzw. *Islam Fatwa* in der Suchmaschine Google eingibt.[7] Der vorliegende Beitrag macht es sich zur Aufgabe, diese Internetsite vorzustellen und am Beispiel ausgewählter Fatwas zu analysieren, um sie dann ins Spektrum der Online-Fatwa-Dienste einzuordnen. Es sollen dabei folgende Fragen beantwortet werden: Wer fungiert dort als Mufti und welches Gedankengut wird dort propagiert? Wie sind Fatwas dort gestaltet und wie sind die Argumentationsweisen? Welche Agenda und Ziele werden dabei verfolgt? Online-Fatwas zu untersuchen, ist deshalb relevant, weil das Internet zum einen eine Schlüsselrolle bei der Verbreitung von Ideologien spielt und Fatwas zum anderen dazu dienen, wie es über die gesamte islamische Geschichte hinweg der Fall war, religiöse Überzeugungen und politische Entscheidungen wie etwa Kriegsführung oder Friedensschluss zu rechtfertigen und zu fördern.[8]

Um diese Fragen zu beantworten, wird zunächst ein Überblick über die Bedeutung und Funktion von Fatwas bzw. Muftis gegeben. Anschließend wird die Internetplattform *islamfatwa.de* vorgestellt, um dann einige exemplarische Fatwas auf ihren Argumentationsgehalt hin zu analysieren und auszuwerten. Im Zuge dessen werden zwecks ihrer Einordnung andere Online-Fatwas herangezogen. Dabei liegt der Fokus aus Gründen der Praktikabilität auf den Theorien bzw. Ansichten des sog. „New Media Shaykh" und „Global Mufti"[9] Yūsuf al-Qaraḍāwī (geb. 1926) und des syrischen Reformdenkers Muḥammad Šaḥrūr (geb. 1938), der in der virtuellen Welt ebenfalls stark präsent ist und durch seine Reformüberlegungen für großes Aufsehen, vor allem in der arabisch-islamischen Welt, gesorgt hat.[10]

Religion im Cyberspace, in: Hafez Kai/Rotter Gernot (Hrsg.), Hamburger Beiträge: Medien und politische Kommunikation – Naher Osten und Islmaische Welt, Bd. 3, Hamburg 2001, 1 [eigene Nummerierung] [Elektronische Ressource]. Siehe auch u.a. SKOVGAARD-PETERSEN JAKOB, Defining Islam for the Egyptian State: Muftis and Fatwas of the Dār Al-Iftā, Leiden 1997.

6 Siehe z. B. www.salaf.de; www.basseera.de; www.erbederpropheten.de; www.al-madinah.de (letzter Aufruf 12.05.18). Weiterführend dazu BRÜCKNER MATTHIAS, Der Mufti im Netz, in LOHLKER, *supra* Fn. 5, 60-74; RUDOLPH EKKEHARD, Salafistische Propaganda im Internet. Eine Analyse von Argumentationsmustern im Spannungsfeld von missionarischem Aktivismus, Islamismus und Gewaltlegitimation, Jahrbuch für Extremismus- und Terrorismusforschung (2009/2010), 486-501.

7 Vgl. https://islamfatwa.de/ (letzter Aufruf 28.04.18).

8 Siehe ausführlich dazu KRÜGER HILMAR, Grundprobleme des islamischen Fatwa-Wesens, in: Ebert Hans-Georg/Hanstein Thoralf (Hrsg.), Beiträge zum Islamischen Recht III, Frankfurt a. M. 2003, 9-33, hier 11 f.; RUDOLPH, *supra* Fn. 5, 489.

9 Vgl. SKOVGAARD-PETERSEN JAKOB, The Global Mufti, in: Schaebler Birgit/Stenberg Leif (Hrsg.), Globalization and the Muslim World. Culture, Religion and Modernity, Syracuse 2004, 153-165. Für Näheres zu al-Qaraḍāwīs Person und Werk siehe z. B. GRÄF, *supra* Fn. 4, 43 ff., 134 ff.; EL-WERENY MAHMUD, Mit Tradition in die Moderne? Yūsuf al-Qaraḍāwīs Methodologie der Fiqh-Erneuerung in Theorie und Praxis, Köln 2016, 40 ff., 54 ff.

10 Siehe ausführlich zu seiner Person und seinem Denken u. a. AMBERG THOMAS, Auf dem Weg zu neuen Prinzipien islamischer Ethik: Muhammad Shahrour und die Suche nach religiöser Erneuerung in Syrien, Würzburg 2009; AL-ĞĀBĪ SALĪM, *al-Qirāʾah al-muʿāṣira li-d-duktūr M. Šaḥrūr muǧarrad tanǧīm*, Damaskus 1995.

II. Zur Bedeutung und Veränderbarkeit von Fatwas

Die Aufgabe der Fatwa-Erteilung beschränkt sich nicht nur darauf, praktische bzw. gottesdienstliche Fragen zu behandeln, vielmehr erstreckt sie sich auf die gesamte Bandbreite des Lebens. Sie umfasst Fragen aller Couleur, sei es theologischer, rechtlicher, gesellschaftlicher, politischer, ökonomischer oder medizinischer Natur. Wenngleich Fatwas rechtlich unverbindlich bleiben, gelten sie vielen Muslimen als Handlungsorientierung und Wegweiser für ein schariagetreues Leben. Das Fatwa-Wesen war über die islamische Rechtsgeschichte hinweg und ist noch heute nicht nur für die Weiterentwicklung des islamischen Rechts von eminenter Bedeutung, sondern auch als zentrale Instanz für die Anpassung der Muslime an neue Gegebenheiten und Herausforderungen unterschiedlicher Art zu sehen. Denn neue Entwicklungen und Veränderungen wurden und werden heute von vielen Muslimen nur dann akzeptiert, wenn diese islamisch legitimiert sind, was in der Regel auf Basis einer Fatwa erfolgt. Die Erteilung von zeit- und ortsgemäßen Fatwas wird daher als notwendig erachtet.[11]

Die Notwendigkeit, Fatwas entsprechend den zeitlichen und örtlichen Gegebenheiten zu erteilen bzw. bereits tradierte Rechtsauskünfte zu modifizieren, stellt kein neues Verfahren dar, vielmehr ist es in der prophetischen Tradition verwurzelt.[12] Auch Prophetengefährten sowie frühe Rechtsgelehrte wie etwa aš-Šāfiʿī (gest. 820), Namensgeber der schafiitischen Rechtsschule, und Aḥmad b. Ḥanbal (gest. 855), Gründervater der hanbalitischen Rechtsschule, haben ihre religiösen Auskünfte kontextentsprechend ausgesprochen.[13] Eine erste intensive theoretische Beschäftigung mit diesem Grundsatz liefert der Ḥanbalit b. Qaiyim al-Ǧauzīya in seinem Werk *Iʿlām al-muwaqqiʿīn*.[14] In dieser Diskussion um die Fatwa-Wandelbarkeit lassen sich im zeitgenössischen Diskurs drei unterschiedliche Position nachzeichnen, die sich in der virtuellen Welt in Form von Fatwa-Portalen widerspiegeln:[15]

Die erste Denkschule, vertreten von zeitgenössischen Intellektuellen wie beispielsweise Šaḥrūr, nimmt an, dass Scharianormen zeitlichen und örtlichen Veränderungen unterliegen und kontextbedingt modifiziert werden sollten. Ausgenommen seien die dogmatischen Glaubensgrundlagen, die rituellen Pflichten sowie weitere Regelungen ethischen Charakters. Diese gälten als unveränderbare Prinzipien des Islam. Alle anderen Normen, die vor allem die zwischenmenschlichen Beziehungen betreffen, gelten zeit- und ortsabhängig als veränderbar. Die Scharia wird somit auf bestimmte Fragen theologischer, ritueller und ethischer Art

[11] Zutreffend z.B. AL-QARĀFĪ ŠIHĀB AD-DĪN , *al-Iḥkām fī tamyīz al-fatāwā ʿan al-aḥkām wa-taṣarrufāt al-qāḍī wa-l-imām*, ed. v. Abū Ġudda ʿAbd al-Fattāḥ, Beirut 1995, 31 ff., 43 ff. und 56 ff.; KRÜGER, *supra* Fn. 8, 30 f.; MOTZKI, *supra* Fn. 3, 14 f. Zum Thema Fatwa-Wandel siehe EL-WERENY, *supra* Fn. 3.

[12] In Anbetracht der *iftāʾ*-Rolle ist diese Tätigkeit nicht jedermanns Sache, vielmehr haben muslimische Gelehrte für die Übernahme dieser Aufgabe eine Reihe an Zugangsvoraussetzungen definiert, die erfüllt werden müssen. Neben den fachlichen Kompetenzen muss der Mufti auch moralische Eigenschaften wie etwa Gottesfurcht und Rechtschaffenheit erfüllen. Eine eigene Literaturgattung des sog. *Adab al-muftī wal-mustaftī* befasst sich ausführlich mit den Verhaltensregeln des Muftis sowie auch Ratsuchenden. Vgl. z. B. IBN AṢ-ṢALĀḤ ʿUṮMĀN B. ʿABD AR-RAḤMAN, *Adab al-muftī wa-l-mustaftī*, ed. v. ʿABD AL-QĀDIR MUWAFFAQ, Medina 1986; SCHNEIDER IRENE, Das Bild des Richters in der „adab al-qāḍī"-Literatur, Frankfurt a. M. 1990; KRAWIETZ, *supra* Fn. 3, 161–180; MASUD MUHAMMAD KHALID, Adab al-muftī. The Muslim Understanding of Values, Characteristics, and Role of a Muftī, in: Metcalf Barbara D. (Hrsg.), Moral Conduct and Authority. The Place of Adab in South Asian Islam, Berkeley 1984, 124-151.

[13] Vgl. ausführlich dazu EL-WERENY, *supra* Fn. 3.

[14] Vgl. IBN AL-QAIYIM, *Iʿlām al-muwaqqiʿīn ʿan rabb al-ʿālamīn*, ed. v. ĀL SULAIMĀN ABŪ ʿUBAIDA MAŠHŪR B. ḤASAN, Dammam, 2002, 337, Bd. 6, 113 f., 192 ff. Weiterführend dazu EL-WERENY, *supra* Fn. 3.

[15] Diese modernen Ansätze stützen sich direkt oder indirekt auf die Überlegungen vormoderner Gelehrter, auf die hier nicht näher eingegangen werden kann. Siehe mehr dazu EL-WERENY, *supra* Fn. 3.

beschränkt. Das Hauptanliegen ist dabei, traditionelle Fatwas und Normen, die heikle Fragen wie etwa Geschlechterrollen, Erbregelungen, Kleidungsvorschriften und Körperstrafen (*ḥudūd*) betreffen, zeitgemäß neu zu interpretieren, um den Islam mit der Moderne bzw. modernen Grundwerten wie etwa der Allgemeinen Erklärung der Menschenrechte, Gleichberechtigung der Geschlechter und Demokratie etc. in Einklang zu bringen.[16] Zwecks der Verbreitung dieser Theorien begnügen sich die Apologeten dieser Position nicht nur mit der Veröffentlichung von Publikationen, sondern sie greifen auch auf das Internet zurück, um ihren Thesen mehr Gehör zu verschaffen. So unterhält Šaḥrūr z. B. eine arabischsprachige Internetseite, auf der er nicht nur theoretische oder methodische Themen für sein anvisiertes Reformprojekt behandelt, vielmehr bietet sein Portal die Möglichkeit, Fragen in einem Eingabeformular direkt an den Autor zu stellen. Dort beantwortet er eine ganze Reihe an Fragen unterschiedlicher Natur, seien es politische, gesellschaftliche, medizinische oder theologische.[17]

Im Gegensatz zu dieser Position halten sich dem Salafismus zuzuordnende Autoren wie etwa ʿAbd al-ʿAzīz b. Bāz, Großmufti Saudi-Arabiens (von 1992 bis zu seinem Tode 1999), am Wortlaut des koranischen bzw. prophetischen Textes und sehen in den Quellentexten die einzigen Maßstäbe für die Findung von Normen bzw. für die Modifikation bereits erlassener Fatwas. D. h. überkommene Ansichten und traditionelle Rechtsentscheidungen dürften nur dann Veränderung erfahren, wenn dafür textuelle Belege vorliegen. Andernfalls seien sie so umzusetzen, wie sie überliefert worden sind. Demnach wird dem Kontext, in dem die Normen bzw. die Fatwas erstellt werden, sowie neuen Entwicklungen des Lebens keine Aufmerksamkeit geschenkt.[18] Auch Ibn Bāz verfügt über eine Website, die ebenfalls ausschließlich in arabischer Sprache konzipiert ist. Diese Site bietet einen umfassenden Einblick in sein Denken und Wirken und ermöglicht, fast all seine Schriften, die teilweise in unterschiedliche Sprachen übersetzt vorliegen, online zu lesen bzw. in PDF-Format herunterzuladen.[19] Im Mittelpunkt dieses Portals steht dennoch die Erstellung von Fatwas für Fragen diverser Natur. Neben den dort zur Verfügung gestellten Angeboten an Büchern, Artikeln und Audio-Dateien wird die *fatwā*-Kategorie laut der Statistik der Website selbst am häufigsten besucht.[20]

Die dritte Denkschule, die sog. *wasaṭīya*, vertreten von Gelehrten wie etwa Yūsuf al-Qaraḍāwī, beansprucht eine mittlere Position zwischen den beiden oben angeführten Parteien: Sie erkennt zwar die Veränderbarkeit von Fatwas an, beschränkt dies aber auf eine Kategorie der Scharianormen. In diesem Sinne wird im Großen und Ganzen zwischen „statischen" (*ṯābit*) und „wandelbaren" (*mutaġayyir*) Normen der Scharia unterschieden. Dabei bilden die textuellen Grundlagen aus dem Koran und/oder der Sunna die Argumentationsbasis. Der statische Teil

[16] Vgl. z. B. ŠAḤRŪR MUḤAMMAD, *Naḥwa uṣūl ǧadīda li-l-fiqh al-islāmī. Fiqh al-marʾa (al-waṣīya – al-irṯ – al-qawāma – at-taʿaddudīya – al-libās)*, Damaskus 2000. Ausführlich dazu AMBERG, *supra* Fn. 10, passim; CHRISTMANN ANDREAS, 73 Proofs of Dilettantism. The Construction of Norm and Deviancy in the Responses to Mohamed Shahrour's Book *Al-Kitāb wa al-Qurān: Qirāʾa Muʿāṣira*, Die Welt des Islam 44/2 (2004), 21-73.

[17] Vgl. z. B. http://shahrour.org/?page_id=1679. Zum Tag der Datenerhebung wurden auf der Website 939 Fragen behandelt. Vgl. http://shahrour.org/ und http://shahrour.org/?page_id=2921 (letzter Aufruf 04.05.2018).

[18] Vgl. ausführlich dazu AL ATAWNEH MUHAMMAD, Wahhābī Islam Facing the Challenges of Modernity. Dār al-Iftā in the Modern Saudi State, Leiden 2010; EL-WERENY MAHMUD, Normenlehre des Zusammenlebens: Religiöse Normenfindung für Muslime des Westens. Theoretische Grundlagen und praktische Anwendung, Frankfurt a.M. 2018, z. B. 139 f., 160 f. 179 f.; ders., *supra* Fn. 3.

[19] Vgl. https://binbaz.org.sa/books?page=1; https://binbaz.org.sa/, https://binbaz.org.sa/fatwas/kind/1?page=317. Einige seiner Werke liegen in chinesischer, französischer, russischer und persischer Sprache vor. https://binbaz.org.sa/books?page=23 (letzter Aufruf 04.05.2018).

[20] Vgl. https://binbaz.org.sa/stats (letzter Aufruf 04.05.2018).

betrifft demnach Normen, deren Beweislage authentisch und eindeutig sind. Zu den oben von Šaḥrūr angeführten Grundsätzen (theologischen, ethischen und gottesdienstlichen Normen) zählen Sprecher dieser Schule weitere Regelungen wie die Körperstrafen (*ḥudūd*) und die Heirats- und Erbregelungen zwischen Mann und Frau.[21] Trotz ihrer konservativen Haltung zu vielen Fragen sind sie durch die Nutzung unterschiedlicher Massenmedien und internationale Vernetzung unter Muslimen in islamisch wie nichtislamisch geprägten Ländern stark präsent, wie am Beispiel al-Qaraḍāwī zu erkennen ist. Neben seiner Funktion als Präsident der *International Union of Muslim Scholars* (IUMS) und Vorsitzender des *European Council for Fatwa and Research* (ECFR) unterhält er ebenfalls eine Website, auf der er nicht nur Fatwas, sondern auch eine breite Auswahl an Texten und Bücher anbietet.[22] Laut Gräf gilt er als der erste muslimische Gelehrte, der 1997 Fatwas auf seiner persönlichen Website publizierte.[23] In der Rubrik *fatāwā wa-aḥkām* („Fatwas und Rechtsurteile") behandelt er rund um die Tausend Fragen zu unterschiedlichen Themen. Seine Fatwas beschränken sich, ähnlich wie die von Ibn Bāz und Šaḥrūr, nicht auf ein bestimmtes Themengebiet, sondern decken alle Aspekte des Islams ab. Dies beinhaltet praktische, rituelle, wirtschaftliche, politische, medizinische, bioethische, theologische und exegetische Fragestellungen.[24]

Wenngleich die drei Autoren unterschiedliche Positionen zur Fatwa-Modifikation vertreten und somit viele Fragen unterschiedlich bewerten, was sich in ihrem Verständnis zum Islam und zur Moderne widerspiegelt, eint sie das Anliegen, ihre Theorien bzw. Ideologien über das Internet zu verbreiten und somit das Wissen über das islamische Recht zu popularisieren. Wer die Publikationen der Autoren in Buchform kennt, den wird inhaltlich nichts Neues erwarten. Formell erfahren ihre Fatwas meistens durch die Onlinestellung gewisse Änderungen, die sich auf den Kern der Fatwas aber nicht auswirken. Solche Veränderungen entstehen dadurch, dass die Muftis oft nicht diejenigen sind, die die Website betreiben. Sie bleiben zwar die ursprünglichen Autoren, die Bearbeitung und Onlinestellung wird aber zumeist von ihren Administratoren vorgenommen, wie etwa bei Ibn Bāz und al-Qaraḍāwī zu sehen ist.[25] Darüber hinaus sind Online-Fatwas, anders als printmediale Fatwas, nicht an eine bestimmte Zielgruppe, sondern an Muslime weltweit gerichtet. Sie sind daher oft in einer einfachen Sprache formuliert, fernab der üblichen Komplexität der rechtstheoretischen Argumentation.[26] Die Frage, ob und inwieweit die Theorien dieser Autoren zur Fatwa-Wandelbarkeit bzw. ihre Fatwas rezipiert und von Muslimen als religiöse Ratgebung wahrgenommen werden, ist von großem Interesse, kann aber hier aufgrund der in vorliegender Arbeit anderweitig fokussierten Fragestellung nicht nachgegangen werden. Im Folgenden soll nun das Fatwa-Portal *islamfatwa.de* vorgestellt werden.

21 Vgl. EL-WERENY MAHMUD, Reichweite und Instrumente islamrechtlicher Normenfindung in der Moderne: Yūsuf al-Qaraḍāwīs *iǧtihād*-Konzept, Die Welt des Islams, Vol. 58 (2018), Iss. 1, 65-100, hier 78; ders., *supra* Fn. 3.

22 Vgl. https://www.al-qaradawi.net/ (letzter Aufruf 10.05.2018).

23 Vgl. GRÄF, *supra* Fn. 4, 84.

24 Vgl. https://www.al-qaradawi.net/section/%D9%81%D8%AA%D8%A7%D9%88%D9%89-%D9%88-%D8%A3%D8%AD%D9%83%D8%A7%D9%85 (letzter Aufruf 04.04.2018). Für Näheres dazu GRÄF, *supra* Fn. 4, 244 ff.

25 Ibn Bāz erblindete im Alter von 16 Jahren und verfügte daher, ähnlich wie al-Qaraḍāwī, über keine Computerkenntnisse. Ausführlich zu al-Qaraḍāwī als Medien-Mufti siehe GRÄF, *supra* Fn. 4, S. 242 ff. und 382.

26 Vgl. z. B. ŠAḤRŪR, *supra* Fn. 16, 331 ff., http://shahrour.org/?action=bbp-search-request&bbp_search=%D8%A7%D9%84%D8%AD%D8%AC%D8%A7%D8%A8 (letzter Aufruf 13.05.2018); GRÄF, *supra* Fn. 4, 292 f.

III. islamfatwa.de – Aufbau und Inhalt

Systematisch gibt es zwei Kategorien von Fatwa-Portalen: Online-Fatwa-Dienste wie etwa die Website *islamQA*, die die Möglichkeit anbieten, Fragen per E-Mail oder in Form eines Formulars online zu stellen, worauf die Antwort dann entweder direkt an den Ratsuchenden geschickt und/oder auf der Site publiziert wird, und Fatwa-Archive, wie etwa das Portal von Ibn Bāz, die sich mit der Publikation von bereits erteilten Fatwas begnügen, deren Entstehungsprozess schon vor ihrer Aufnahme ins Internet abgeschlossen ist. Wenngleich es zahlreiche Fatwa-Foren unterschiedlicher Prägung gibt, ist die Mehrzahl der in der virtuellen Welt verfügbaren Fatwas der der salafistischen Richtung zuzuordnen.[27] Bei der dieser vorliegenden Untersuchung zugrunde liegenden Website handelt es sich um eine deutschsprachige Fatwa-Datenbank, die sich ausschließlich zum Ziel gesetzt hat, Fatwas aus dem Arabischen ins Deutsche zu übersetzen und online zu stellen.[28] Sie umfasst keine anderen Rubriken neben den Fatwas, wie es auf vielen anderen Websites der Fall ist, die neben den anderen Angeboten eine Fatwa-Rubrik zur Verfügung stellen. Fatwas werden dort nicht wörtlich aus dem Arabischen übersetzt, vielmehr werden nur ihre Inhalte, jedoch möglichst genau, wiedergegebenen. Es wird in dieser Hinsicht betont, dass das Team penibel darauf achte, dass der Sinn der Fatwas niemals verändert werde. Um dies sicherzustellen, werde jede Fatwa von mehreren Personen kontrolliert, bevor sie online geht. Dennoch lassen sich nicht wenige Rechtschreib- und Grammatikfehler, vor allem bei der Kommasetzung, feststellen, wie es den im Folgenden zu zitierenden Stellen zu entnehmen ist. Jene Fatwas erfahren demnach nicht nur formelle, sondern auch inhaltliche Veränderungen, die sich in erster Linie aber ausschließlich auf die Zusammenfassung bzw. Verkürzung von angeführten Argumenten beschränken.[29]

Die Site ging 12.01.2012 online.[30] Das Impressum gibt Khidr Malik als Betreiber der Site und als Standort Manchester an. Hierzu werden mit Hinweis auf Sicherheitsbedenken keine weiteren Angaben gemacht. Auf die Fragen, ob mit deutschen Vereinen oder Organisationen zusammengearbeitet wird, wer die Übersetzungstätigkeit übernimmt und warum überhaupt eine deutschsprachige Website in Großbritannien betrieben wird, lassen sich dort keine Antwort finden.[31] Beim Verwalter der Top-Level-Domain.de *Denic* wird wiederum Malik Nasser als Eigentümer und Geesthacht/Schleswig-Holstein als Adresse angegeben. Durch das Googeln des Namen Malik Nasser kommt man auf den Twitterlink *https://twitter.com/nassermalik1*. Dort ist die Internetadresse *http://www.malikhouse.co.uk/* zu finden. Dabei handelt es sich um ein Business Center in Manchester.[32] Andere salafistisch geprägte Websites weisen den gleichen Namen als Betreiber auf.[33]

Das Portal präsentiert sich in einem einfachen Layout und ist nicht wie viele andere Fatwa-Foren mit Bildern von einzelnen Muftis oder Gelehrten wie etwa al-Qaraḍāwī oder Šaḥrūr,

27 Vgl. weiterführend dazu BRÜCKNER, *supra* Fn. 4, 37-39.
28 Vgl. https://islamfatwa.de/ueber-uns/1729-was-ist-islamfatwa-de (letzter Aufruf 04.05.2018).
29 Vgl. https://islamfatwa.de/ueber-uns/1731-von-islamfatwa-de-veroeffentlichte-uebersetzungen (letzter Aufruf 07.05.18).
30 Vgl. https://web.archive.org/details/https://islamfatwa.de/ (letzter Aufruf 18.05.2018).
31 Er ist zugleich der verantwortliche Redakteure für die Website *Erbe des Propheten*, abrufbar unter: https://erbederpropheten.de/impressum (letzter Aufruf 08.05.2018).
32 Vgl. https://www.denic.de/webwhois-web20/accepted-angenommen (letztere Aufruf 08.05.2018).
33 Vgl. z. B. https://erbederpropheten.de/impressum; https://islamgegenextremismus.de/impressum/ (letzter Aufruf 10.05.2018).

gestaltet.[34] Dies deutet auf ihre religiös-begründeten ablehnende Haltung zum Fotografieren oder zur Abbildung von Menschen hin. Neben der Startseite, *Home,* finden sich im oberen Bereich der Internetseite vier Reiter: *Kategorien*, wo die inhaltlichen Schwerpunkte der Fatwas aufgelistet sind, *Gelehrte* bzw. die Muftis, deren Fatwas auf der Seite übersetzt werden, *Glossar*, in dem sich eine kurze Erläuterung zu allen in den Fatwas verwendeten arabischen Begriffen findet, und der Reiter *Suche,* der das Finden von Fatwas erleichtert.[35] Im unteren Rand bietet die Internetsite Links zu anderen verwandten Online-Portalen, die sich dem salafistischen Spektrum zuordnen lassen.[36] Das Portal bietet über 1.630 Fatwas und deckt eine weite Bandbreite an Fragen ab: Von Theologie, Koranexegese, Hadithwissenschaften, Gottesdienst, über islamisches Finanzwesen, Geschlechterrolle, Politik, zwischenmenschliche Beziehungen bis hin zum Privatleben des Menschen hinsichtlich der Ernährung, Kleidung, Körperpflege und der Unterhaltung. Jede Frage hat einen Button, über welchen die Nutzerinnen und Nutzer zu weiteren ähnlichen Fragen gelangen können.[37]

Der Aufbau der Startseite bietet den Nutzerinnen und Nutzern sofort einen Überblick über aktuell übersetzte Fragen. Formell werden alle Fatwas durch eine Anfrage eingeleitet, wobei keine Angaben zum Ratsuchenden gemacht werden. Am Ende einer jeden Antwort wird der Name des Muftis bzw. der *iftāʾ*-Institution angegeben. Alle dort zur Verfügung gestellten Fatwas stammen von Gelehrten salafistischer Prägung. Dabei handelt es sich in erster Linie um Muftis aus Saudi-Arabien. So ist das *Ständige Komitee für islamische Forschung und Rechtsfragen*,[38] das 1971 durch König Faisal (gest. 1975) gegründet wurde, mit 414 Fatwas vertreten.[39] Dieses Komitee berät zum einen die Regierung Saudi-Arabiens in Sachen Politik und Gesetzgebung und ist zum anderen der Bevölkerung bei der Beantwortung von Fragen unterschiedlicher Art dienlich. ʿAbd al-ʿAzīz b. Bāz, der auf der Website *islamfatwa.de* mit 247 Fatwas präsent ist, leitete neben seinem Amt als Großmufti Saudi-Arabiens bis 1999 dieses Komitee.[40] Darüber hinaus sind dort der Reihe nach u. a. folgende Muftis stark vertreten: Muḥammad b. Ṣāliḥ al-ʿUṯaimīn (gest. 2001) mit 248 Fatwas, Ṣāliḥ al-Fawzān (geb. 1933) mit 121 Fatwas, Naṣr ad-Dīn al-Albānī (gest. 1999) mit 49 Fatwas, Ibn Taimiyya (gest. 1328) mit 25 Fatwas und Ibn Qaiyyim al-Ǧauzīya (gest. 1358) mit 23 Fatwas.[41] Es handelt sich demnach entweder um Vordenker des Salafismus oder um zeitgenössische führende Köpfe des Salafismus, die primär aus Saudi-Arabien stammen. Dies unterstützt die Vermutung, dass diese Website von saudischer Seite finanziert wird, wenngleich die Site selbst darüber keine Angaben macht. Vielmehr weisen sie die Behauptung zurück, „Wahhabiyyah-Agenten" zu sein. Sie seien „die Rufer zu Allah".[42]

Die Mitwirkenden der Website, die die Übersetzungstätigkeit angeblich ehrenamtlich übernehmen und die Website betreiben, bezeichnen sich als „[…] Muslime, die bestrebt sind dem Qur'aan und der Sunnah des Propheten […] zu folgen, nach dem Verständnis der

34 Vgl. https://www.al-qaradawi.net/; http://shahrour.org/ (letzter Aufruf 05.05.2018).

35 Vgl. https://islamfatwa.de/ (letzter Aufruf 14.04.2018).

36 Zu den dort verlinkten Webseiten zählen http://www.basseera.de/; https://erbederpropheten.de/; http://miraath.de/; https://al-madinah.de/ (letzter Aufruf 14.04.2018).

37 Vgl. https://islamfatwa.de/sitemap; https://islamfatwa.de/kleidung-schmuck/101-koerperpflege-a-kosmetik/301-augenbrauen-zupfen-wenn-ehemann-es-befiehlt (letzter Aufruf 15.04.2018).

38 Arabisch: *al-Laǧna ad-Dāʾima li-l-Buḥūṯ al-ʿIlmīya wa-l-Iftāʾ*.

39 Für Näheres zu diesem Komitee siehe AL ATAWNEH, *supra* Fn. 18, 17 ff.; http://www.alifta.net/; https://islamfatwa.de/biografien/89-das-staendige-komitee-fuer-rechtsfragen (letzter Aufruf 15.04.2018).

40 Vgl. http://www.alifta.net/MailList/contactwithus.aspx?languagename=ar&type=1; http://www.binbaz.org.sa/list/book (letzter Aufruf 22.05.2018).

41 Vgl. https://islamfatwa.de/gelehrte (letzter Aufruf 22.05.2018).

42 https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah, Punkt 25 (letzter Aufruf 14.05.2018).

rechtschaffenden Vorfahren (*Salaf-us-saalih*)".[43] Sie führen zwar ihre Namen an, diese lassen sich aber nicht weiter zuordnen. Es handelt sich möglicherweise um Pseudonyme.[44] In ihrer Selbstdarstellung werden insgesamt 34 Grundsätze aufgeführt, denen die Website in ihrer *ʿaqīda* („Glaubenslehre") und *daʿwa* („Missionierung") zu folgen beansprucht. Diese Prinzipien gehen auf die Schrift eines führenden Kopfes des Salafismus im Jemen Muqbil b. Hadī al-Wādiʿī (gest. 2001) zurück. Die Hauptmerkmale dieser Ideologie lassen sich wie folgt zusammenfassen:[45] Sie stützen sich auf Aussagen des Korans, der Sunna sowie der *Salaf* und lassen keine anderen Interpretationen der religiösen Quellen zu als ihre eigenen. Auch Interpretationen früherer Gelehrter, sei es auf dem Gebiet der Jurisprudenz (*fiqh*), der Koranauslegung (*tafsīr*) oder der islamischen Geschichte (*tārīḫ*), werden, sofern diese sich nicht auf Beweise aus dem Koran oder der Sunna stützen, nicht miteinbezogen.[46] Dies deutet auf eine klare Abgrenzung zu den Kontextualisierungspraktiken der Quellentexte hin, wie es indessen von vielen anderen zeitgenössischen Intellektuellen angestrebt wird.[47]

In der Antwort auf die Frage, welcher Rechtsschule die dargelegten Ansichten auf der Website folgen, wird betont, dass sich die Fatwa-Erstellung auf diesem Portal nicht auf eine bestimmte Rechtsschule beziehe, sondern „[…] [v]ielmehr wird dem Urteil gefolgt, welches Haqq (Wahrheit/rechtens) ist, so wie es für jeden Muslim verpflichtend ist. In einigen Angelegenheiten werden auch die unterschiedlichen Meinungen der Gelehrten aufgeführt."[48] Die Vertreter der Website erheben demnach Anspruch darauf, die Wahrheit zu erkennen und zu präsentieren. Indem sie behaupten, die Rechtsmeinungen anderer Rechtsschulen miteinzubeziehen, wollen sie Offenheit gegenüber anderen Ansichten suggerieren und geben damit vor, dass sie die Vielfalt des Islam aufzeigen würden.

Aufbauend auf ihrem buchstabengetreuen Textverständnis erfolgt in ihrer Ideologie eine strikte Unterscheidung zwischen den „Gläubigen" und den „Ungläubigen", was durchgehend zur Intoleranz und Diskriminierung gegenüber anderen religiösen Vorstellungen führt. Dazu gehören nicht nur Nichtmuslime, sondern auch alle andersdenkenden Muslime wie etwa die Schiiten.[49] Den Sprechern dieser Website gilt nur der Islam als „Wahrheit" und alle anderen Religionen müssen daher eine „Lüge" sein.[50] Der Islam wird dabei als holistisches Gebilde verstanden, das Regelungen für Staat und Religion aufstelle. Seine Regelungen gälten für jede Zeit und an jedem Ort. Ideen zur Trennung von Religion und Politik werden strikt abgelehnt. Es gebe „keine Ehre oder Sieg für die Muslime […], bis sie zum Buch Allahs und der Sunnah

43 Vgl. https://islamfatwa.de/ueber-uns/1730-das-islamfatwa-de-team (letzter Aufruf 22.04.2018).

44 Zu den dort angeführten Namen zählen Abu Abdul-Majid, Seyyid at-Turki, Abdurahman al-Albani, Abu Idris und Abou Obaida at-Tunisi. Vgl. https://islamfatwa.de/ueber-uns/1730-das-islamfatwa-de-team. (letzter Aufruf 18.05.2018).

45 Vgl. https://islamfatwa.de/ueber-uns/521-ueber-uns (letzter Aufruf 22.04.2018).

46 Vgl. https://islamfatwa.de/ueber-uns/1729-was-ist-islamfatwa-de, https://islamfatwa.de/ueber-uns/1730-das-islamfatwa-de-team; https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah, Punkt 8 (letzter Aufruf 22.04.2018).

47 Vgl. z. B. ABU ZAID NASR HAMID, Gottes Menschenwort, ausgewählt, übersetzt und kommentiert von Thomas Hildebandt, Freiburg i. B. 2008; KRÖNER FELIX, Alter Text - neuer Kontext. Koranhermeneutik in der Türkei heute, Freiburg i. B. 2006.

48 https://islamfatwa.de/ueber-uns/1736-welche-rechtsschule-madhhab-wird-auf-islamfatwa-de-vertreten (letzter Aufruf 25.04.2018).

49 Siehe ausführlich dazu EL-WERENY MAHMUD, Salafismus als Herausforderung für die Integration: Der religiös Andere in der salafistischen Ideologie, Demokratie-Dialog, Jg. 3 (2018), 38-45; OURGHI MARIELLA, Schiiten als Ungläubige: Zur situativen Kontingenz einer salafistischen Feindbildkonstruktion, in: Schneiders Thorsten Gerald (Hrsg.), Salafismus in Deutschland Ursprünge und Gefahren einer islamisch-fundamentalistischen Bewegung, Bielefeld 2014, 279-291.

50 Vgl. z. B. https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah (letzter Aufruf 07.05.2018).

des Gesandten Allahs […] zurückkehren."[51] Der Glaube daran stelle eine Voraussetzung zur Vollständigkeit des Glaubens eines jeden Muslims dar.[52]

Die auf dem Portal *islamfatwa.de* zur Verfügung gestellten Fatwas sind in sieben Kategorien unterteilt: Das Genre Glaubenslehre (*ʿaqīda*) behandelt Fragen theologischer Natur wie etwa der Glaube an Gott, Seine Attribute, Engel und Propheten, das Schicksal und der Tag der Auferstehung.[53] Im Rahmen der zweiten Kategorie der sog. *manhağ* („Methodik") werden unterschiedliche Themen besprochen wie z. B. die Notwendigkeit, die *salaf* zu befolgen, den Aufruf zum Islam zu betreiben (*daʿwa*) und mögliche Neuerungen (*bidʿa*) zu bekämpfen. Zudem werden in diesem Zusammenhang Fragen zur Politik, Gewaltanwendung und der Befolgung einer Rechtsschule thematisiert.[54] Die dritte Rubrik *ʿibādāt* („Gottesdienste") umfasst Fatwas zur rituellen Praxis wie etwa dem Gebet, Fasten und zur Pilgerreise.[55] Die darauffolgende Kategorie widmet sich exegetischen Fragen zu heiligen Schriften des Islam (Koran und Sunna) sowie auch zum Umgang mit den Schriften anderer Offenbarungsreligionen (Judentum und Christentum).[56] Die übrigen drei Kategorien befassen sich mit Fatwas gesellschaftlicher Art. Dort werden Rechtsgutachten zur Kleidung, Bildung, Arbeit, Musik, Krankheit, Ehe, Schwangerschaft, Scheidung, weiblichen Genitalverstümmelung und zum Umgang mit Mitmenschen, Speisevorschriften und mit Tieren dargestellt.[57] In Anbetracht dieser Kategorisierung beschränkt die Website die Fatwa-Funktion nicht nur auf die Erteilung von Antworten auf alltägliche Rechtsfragen soziökonomischer oder politischer Art. Vielmehr wollen Vertreter des Portals die Fatwa-Erteilung als allumfassendes Instrument verstanden wissen, das sich sowohl auf alltägliche Rechtsprobleme als auch ideologische, theologische und exegetische Fragen zum Koran und der Sunna erstreckt. Auf diesem Wege streben sie eine weitreichende Verbreitung ihrer salafistischen Ideologie an, welche alle Bereiche des Lebens in den Blick nimmt. Um diese nun als salafistisch zu bewertende Website in das salafistische Spektrum einordnen zu können, wird im Folgenden neben frauenbezogenen Fatwas auch die dort vertretene Haltung zu Politik und Demokratie thematisiert. Das sind zwei Themenschwerpunkte, die das möglich bestehende Konfliktpotenzial zwischen dem auf der Website vertretenen Islamverständnis und den in Deutschland bzw. im Westen herrschenden Gesetzen zutage fördern. Glaubens- und Ritusfragen sind in diesem Zusammenhang weniger relevant, da sie nach dem Grundgesetz den Schutz der Religionsfreiheit genießen. Die einschlägigen Ansichten werden auf ihre inhaltlichen Argumentationsweisen und in vergleichender Gegenüberstellung mit den Positionen der bereits oben erwähnten Autoren ausgewertet.

51 https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah, Punkt 19. (letzter Aufruf 08.05.2018). Für Näheres dazu FARSCHID OLAF, Salafismus als politische Ideologie, in: Said Behnam T./ Fouad Hazim (Hrsg.), Salafismus: Auf der Suche nach dem wahren Islam, Freiburg i. B. 2014, 160–193.

52 Vgl. https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah, Punkt 14, 18 und 19 (letzter Aufruf 06.05.18). Siehe ausführlich dazu Abschnitt 3 (Fallbeispiel II).

53 Vgl. https://islamfatwa.de/aqidah-tauhid (letzter Aufruf 09.05.2018).

54 Vgl. https://islamfatwa.de/manhaj (letzter Aufruf 09.05.2018).

55 Vgl. https://islamfatwa.de/gottesdienste-ibadah (letzter Aufruf 10.05.2018).

56 Vgl. https://islamfatwa.de/qur-an,-sunnah-offenbarungsschriften (letzter Aufruf 10.05.2018).

57 Vgl. https://islamfatwa.de/krankheit-heilung, https://islamfatwa.de/soziale-angelegenheiten; https://islamfatwa.de/kleidung-schmuck (letzter Aufruf 12.05.2018).

IV. Darstellung und Analyse ausgewählter Fatwas

1. Fatwas zur Stellung der Frau

Zum Thema Frauen bietet das Portal zahlreiche Fatwas, die unterschiedliche Fragen wie etwa die Kleidervorschriften, Körperpflege und Kosmetik, das Verlassen des Hauses und die Ausübung eines Berufes behandeln. Einschlägige Fatwas zu Kleidervorschriften, die an dieser Stelle etwas näher betrachtet werden, machen nicht nur das Kopftuchtragen zur Pflicht, sondern tendieren eher zur Vollverschleierung (*niqāb*). Die zentrale Argumentationsbasis bilden dabei Belege aus dem Koran und der Sunna. Im Koran heiße es beispielsweise: „Und sag zu den gläubigen Frauen, sie sollen ihre Blicke senken und ihre Scham hüten, ihren Schmuck nicht offen zeigen, außer dem, was (sonst) sichtbar ist. Und sie sollen ihre Kopftücher auf den Brustschlitz ihres Gewandes schlagen und ihren Schmuck nicht offen zeigen."[58] Zudem heiße es in 33:59: „O Prophet, sag deinen Gattinnen und deinen Töchtern und den Frauen der Gläubigen, sie sollen etwas von ihrem Überwurf über sich herunterziehen. Das ist eher geeignet, dass sie erkannt und so nicht belästigt werden. Und Allah ist Allvergebend und Barmherzig."[59] Auch zahlreiche Überlieferungen bestätigen nach der Darstellung der Website einmal mehr die *niqāb*-Pflicht. Über ʿĀʾiša wird beispielhaft berichtet, dass sie und andere Frauen des Propheten ihre Tücher vom Kopf runter auf ihr Gesicht nehmen sollten, als sie in Begleitung des Propheten auf einer Wallfahrt waren und ihnen Reisende entgegenkamen.[60] Ohne den historischen Hintergrund dieser Aussagen oder den Authentizitätsgrad der prophetischen Überlieferung zu hinterfragen, werden diese Beweise und dergleichen hingenommen und ihre praktische Umsetzung angestrebt.

Diese Position zur Niqab-Pflicht wird von vielen Gelehrten und zeitgenössischen Autoren widerlegt. Entsprechend seiner Differenzierung zwischen statischen und wandelbaren Teilen der Scharia bestreitet Šaḥrūr beispielsweise nicht nur das Niqab-, sondern auch das Kopftuchtragen. Auf seiner Website behandelt er zahlreiche einschlägige Fragen, wobei er diese Thematik in seiner Schrift *Naḥwa uṣūl ǧadīda li-l-fiqh al-islāmī. Fiqh al-marʾa* eingehend behandelt.[61] Die Koranstelle 24:31 interpretiert er, im Gegensatz zur oben angeführten Interpretation, als die Bedeckung des Dekolletés. Der erwähnte Koranvers besage nicht, dass Frauen ihren Kopf mit einem Tuch bedecken müssten, vielmehr sollten sie den Schlitz ihres Kleides bedecken. Die Koranstelle 33:59 liest er als Sonderregelung für Ehegattinnen des Propheten. Darauf aufbauend erklärt er, dass jene Verse keine rechtliche eindeutige Aussagekraft weder für die Niqab- noch für die Kopftuchpflicht haben.[62] Die Kopfbedeckung erachtet er als kulturspezifische Praxis im damaligen Arabien und führt sie auf die

[58] Koran 24:31. Zitiert nach https://islamfatwa.de/kleidung-schmuck/139-niqab-gesichtsschleier/217-darlegung-ueber-die-pflicht-des-niqab. Sieh auch https://beta.islamqa.info/ge/answers/36619/regeln-die-speziell-f%C3%BCr-die-frauen-in-der-hajj-gelten (letzter Aufruf 07.05.2018).

[59] https://islamfatwa.de/kleidung-schmuck/139-niqab-gesichtsschleier/215-darf-tugendhafte-frau-gesicht-a-haende-entbloessen (letzter Aufruf 07.05.2018).

[60] Koran 24:31. Zitiert nach https://islamfatwa.de/kleidung-schmuck/139-niqab-gesichtsschleier/217-darlegung-ueber-die-pflicht-des-niqab (letzter Aufruf 07.05.2018).

[61] Vgl. u. a. http://shahrour.org/?topic=%D8%A7%D9%84%D8%AD%D8%AC%D8%A7%D8%A8-3, http://shahrour.org/?topic=%D8%AE%D9%84%D8%B9-%D8%A7%D9%84%D8%AD%D8%AC%D8%A7%D8%A8 (letzter Aufruf 08.05.2018). Ausführlich dazu ŠAḤRŪR, *supra* Fn. 16; EL-WERENY, *supra* Fn. 18, 160 ff.

[62] Vgl. ŠAḤRŪR, *supra* Fn. 16, 347 f.

klimatischen Gründe zurück. Diese zeit- und ortsabhängige Praxis sei demnach je nach Zeit und Ort veränderbar.[63]

Unter der Rubrik *Fatāwā wa-aḥkām* bietet al-Qaraḍāwīs Internetportal[64] umfangreiche Abhandlungen zur Stellung der Frau im Islam, wobei all diese Fatwas seinen bereits publizierten Schriften entnommen sind. Anders als Šaḥrūr ist al-Qaraḍāwī in seiner Argumentation zum Thema Niqab- und Kopftuchtragen bemüht, die oben angeführten Beweise für die Niqab-Pflicht lediglich auf das Tragen von Kopftuch zu beschränken. Ihm zufolge implizieren die oben angeführten Beweise keine soliden Grundlagen für die Notwendigkeit, das Gesicht und die Hände zu bedecken. Selbst wenn jene Belege authentischer Natur wären, gelte die darin enthaltene Regelung nicht für alle Musliminnen, sondern nur für die Gattinnen des Propheten, die sogenannten Mütter der Gläubigen (*ummahāt al-muʾminīn*).[65]

In vielen weiteren Fatwas auf *islamfatwa.de* werden darüber hinaus Inhalte propagiert, die muslimische Frauen vor große Herausforderungen stellen. Alltägliche Fragen gehen damit einher. So sei muslimischen Frauen verboten, alleine ohne *maḥram* zu verreisen. Denn sie laufen Gefahr, in Kontakt mit fremden Männern zu kommen (*iḫilāṭ*), was schariagemäß verboten sei. Argumentiert wird an dieser Stelle vor allem mit dem Prophetenausspruch: „Eine Frau darf nur reisen, wenn ein *maḥram* dabei ist".[66] Viele andere zeitgenössische Gelehrte kontextualisieren diesen Hadith und erachten es für notwendig, ihn zeit- und ortsgemäß zu verstehen. Der Prophet hätte das verboten, weil es damals noch keine Züge oder Flugzeuge gegeben hätte, worin viele Menschen mitreisten. Die Begründung, Frauen seien während einer Reise allein und kämen zusammen mit fremden Männern, sei nicht mehr haltbar.[67]

In einer anderen Fatwa wird muslimischen Frauen auch verboten zu arbeiten oder überhaupt rauszugehen, außer wenn eine Notlage vorliege. Dies sei in ihrem Interesse:

„Der Mann macht seine Arbeit, welche normalerweise das Arbeiten um den Lebensunterhalt zu sichern und/oder der Nutzen der Ummah ist. Wenn sie [die Frau] daheim ist schaut sie nach ihm und den Kindern, denn dies ist ihre Aufgabe. Es ist zu alldem ein Schutz für sie, denn es schützt sie vor Unmoral, die im Zusammenhang mit dem Vermischen mit dem [fremden] Mann, aufkommt. […] Wenn ein Mann mit einer Frau zusammen trifft, dann wird er von ihr abgelenkt, besonders wenn sie jung und schön ist."[68]

Frauen sei es darüber hinaus verboten Passfotos zu machen, da das Gesicht *ʿaura* („ein zu verhüllender Teil des Körpers") sei, oder Hosen zu tragen, da sie so Männer nachahmen würden, was verboten sei.[69] Diese Fatwas und dergleichen mehr stellen eindeutig dar, wie

63 Vgl. ŠAḤRŪR, *supra* Fn. 16, 355 f.

64 Siehe ausführlich dazu GRÄF, *supra* Fn. 4, 244 ff.

65 Vgl. u.a. https://www.al-qaradawi.net/node/4053; https://www.al-qaradawi.net/node/1454 (letzter Aufruf 28.04.18). Mehr dazu al-Qaraḍāwī: *Fatāwā muʿāṣira*, Kuwait 2005, Bd. 2, 328 ff.; EL-WERENY, *supra* Fn. 9, 235 ff.

66 Vgl. https://islamfatwa.de/soziale-angelegenheiten/161-gesellschaft-aktuelles/sonstiges-speziell-fuer-frauen/407-darf-die-frau-ohne-mahram-reisen (letzter Aufruf 24.04.2018).

67 Vgl. z. B. www.qaradawi.net/new/Articles-5429 und http://shahrour.org/?page_id=1679 (letzter Aufruf 01.05. 2018).

68 https://islamfatwa.de/soziale-angelegenheiten/161-gesellschaft-aktuelles/sonstiges-speziell-fuer-frauen/774-ist-islam-ungerecht-weil-er-frauen-zuhause-behaelt (letzter Aufruf 01.05. 2018).

69 Vgl. https://islamfatwa.de/kleidung-schmuck/139-niqab-gesichtsschleier/216-das-gesichtsfoto-einer-frau-im-pass; https://islamfatwa.de/kleidung-schmuck/134-aura-von-frau-mann/293-einige-urteile-ueber-frauendie-hosen-tragen (letzter Aufruf 24.04.18). Frauen dürften darüber hinaus weder Absatzschuhe tragen, da sie somit den ungläubigen Frauen nachahmen würden, als auch verbotenerweise die Aufmerksamkeit von Männern auf sich zögen, noch Schuhe, die Männerschuhen ähnlich seien, mit der gleichen Begründung wie bei Hosen. Siehe auch

Frauenrechte nach dem Verständnis dieser Website beschnitten werden. Männer werden dort im Generellen über die Frauen gestellt. Die Argumentationsbasis bilden Belege aus dem Koran und der Sunna. Im Koran heiße es z. B.: „Die Männer stehen in Verantwortung für die Frauen wegen dessen, womit Gott die einen von ihnen vor den anderen ausgezeichnet hat und weil sie von ihrem Besitz (für sie) ausgeben." In einer prophetischen Überlieferung heiße es ferner: „Kein Volk wird jemals erfolgreich sein, welches eine Frau zu seinem Führer ernennt."[70]

Es lässt sich demnach erkennen, dass *islamfatwa.de* ein Frauenbild präsentiert, das Unterdrückung impliziert und erhebliche Zweifel an der Gleichberechtigung der Geschlechter aufkommen lässt. Dies basiert auf dem wortwörtlichen Verständnis der Quellentexte, das der Frau ausschließlich die Rolle als Ehe-, Hausfrau und Mutter zuerkennt.[71] Es widerspricht somit eindeutig dem in Art. 3 Abs. 2 und 3 Satz 1 GG garantierten Grundsatz der Gleichberechtigung von Mann und Frau.[72]

2. Haltung zur Politik und Demokratie

Die Website vermittelt unmissverständlich die Botschaft, dass Gottessouveränität Vorrang vor der Volkssouveränität – der Demokratie – eingeräumt werden müsse. Demokratie wird im Generellen als Gegenreligion zum Islam aufgefasst, da sie sich statt auf Gottes Herrschaft zu gründen, auf politische Instanzen und menschengemachten Gesetzen gründe. Nur Gottes Gesetze könnten Antworten auf alle Fragen des Lebens geben. Dies umfasse sowohl die religiöse als auch die politische Sphäre; beide seien eine inhärente Einheit, die nicht voneinander zu trennen seien. Säkularisierungsversuche zielten unweigerlich auf die Zerstörung des Islam und die Verbreitung von Chaos ab. Alle politischen Parteien werden als abtrünnig diskreditiert. Auch werden Ideologien wie Kommunismus, Sozialismus, Liberalismus und Säkularismus als *kufr* stigmatisiert.[73] Es gebe ausschließlich zwei Kategorien von Menschen; die Partei Gottes, die die Scharia und all ihre Regelungen auf alle Bereiche des Lebens anwenden, und die Partei des Teufels (*ḥizb aš-šayṭān*), die indessen „den Krieg gegen Allahs Scharia erklärt haben", d.h. jene, die die islamische Gesetzgebung in ihrem holistischen Gebilde nicht umsetzen oder infrage stellen. Nach den auf der Website vertretenen Rechtsansichten verfügt die Scharia als ganzheitliche Staats- und Gesellschaftsordnung über eine ewige Gültigkeit, die unabhängig von Zeit und Ort umgesetzt werden solle.[74]

Der Zustand der islamisch geprägten Gesellschaften wird wie folgt beschrieben: „Demokratie und Aberglauben! In der Politik wenden wir die Demokratie an, in der *ʿIbādah* (Gottesdienste) beten wie die Gräber an und in den Namen und Eigenschaften Allahs begehen wir *Taʾtiil* (das Verleugnen der Namen und Eigenschaften Allahs) […]."[75] Als Folge seien Muslime heute wie

https://islamfatwa.de/kleidung-schmuck/134-aura-von-frau-mann/425-darf-eine-frau-absatz-stoeckelschuhe-tragen (letzter Aufruf 24.04.2018).

70 https://islamfatwa.de/gottesdienste-ibadah/37-gebet-salah/gemeinschaftsgebete/1794-eine-frau-darf-weder-maenner-noch-jungen-im-gebet-leiten (letzter Aufruf 23.04.2018).

71 Vgl. mehr dazu FONTANA SINA, Universelle Frauenrechte und islamisches Recht, Tübingen 2017, 134 ff.; VINCENZO OLIVETI, Terror's Source. The Ideology of Wahhabi-Salafism and its Consequences, Birmingham 2002, 36 f. und 41 f.

72 Vgl. https://www.gesetze-im-internet.de/gg/art_3.html (letzter Aufruf 13.05.2018).

73 Vgl. z. B. https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah (letzter Aufruf 06.05.2018). Weiterführend zu ihrer Haltung zur Politik siehe u.a. FARSCHID, *supra* Fn. 51, 160-193; EL-WERENY MAHMUD, Wahlen und Demokratie versus Scharia? Salafismus und die Teilhabe am politischen Leben im Westen, Demokratie-Dialog, Jg. 1 (2018), 48-55.

74 Vgl. https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah (letzter Aufruf 27.04.18).

75 https://islamfatwa.de/manhaj/112-das-folgen-der-salaf-us-salih/876-verhalten-bei-verunglimpfung-des-propheten-sallallahu-alayhi-wa-sallam (letzter Aufruf 28.04.18).

„der Schaum am Meer, wertlos, mit Ausnahme einiger weniger".[76] An dieser Misere seien die demokratischen Systeme, die auf menschengemachten Gesetzen basieren und Gottes Recht außen vor lassen, Schuld. „Der Gesandte Allahs […] informierte uns über die Lösung dazu, dass wir [Muslime] zu unserer Religion zurückkehren. Wenn wir dies nicht tun, werden die Angriffe unserer Feinde [im Westen] zunehmen […]."[77] Die Notwendigkeit, demokratische Systeme abzulehnen und alle Fragen des Lebens nach der Scharia-Ordnung auszurichten, wird in erster Linie mit koranischen Aussagen gerechtfertigt:

„Und so richte zwischen ihnen nach dem, was Allah (als Offenbarung) herabgesandt hat, und folge nicht ihren Neigungen, sondern sieh dich vor ihnen vor, dass sie dich nicht der Versuchung aussetzen (abzuweichen) von einem Teil dessen, was Allah zu dir (als Offenbarung) herabgesandt hat! Doch wenn sie sich abkehren, so wisse, dass Allah sie für einen Teil ihrer Sünden treffen will. Viele von den Menschen sind fürwahr Frevler."[78]

Auf dem Fatwa-Portal wird nicht nur eine ablehnende Haltung gegenüber den politischen Systemen westlicher wie islamischer Staaten vertreten, die sich nicht nach der Scharia richten. Vielmehr werden Muslime in zahlreichen Fatwas dazu aufgerufen, sich von jenen Systemen loszusagen (*barāʾ*). Gestützt auf das Prinzip des sogenannten *al-walāʾ wa-l-barāʾ* („Loyalität und Lossagung") vertreten Salafisten die Ansicht, dass Muslime, die ein Mehrparteiensystem befürworten oder sich in diesem engagieren, sich unzulässiger Loyalität gegenüber politischen Führern schuldig machen und somit keine wahren Muslime mehr seien. Die Loyalität gebühre nur Gott, seinem Gesandten und den muslimischen Gläubigen.[79] Auch dieses Prinzip wird mit vielen Zitaten aus dem Koran und der Sunna untermauert, die wortgetreu verstanden werden. U. a. heiße es:

„Du findest keine Leute, die an Allah und den Jüngsten Tag glauben und denjenigen Zuneigung bezeigen, die Allah und Seinem Gesandten zuwiderhandeln, auch wenn diese ihre Väter wären oder ihre Söhne oder ihre Brüder oder ihre Sippenmitglieder. Jene – in ihre Herzen hat Er den Glauben geschrieben […]."[80]

Unter Berufung auf dieses Loyalitätsprinzip sind auf der Website eine Vielzahl an Fatwas zu finden, die ein Feindbild gegenüber Andersdenkenden vermitteln. Dabei wird eine dichotome Weltsicht aus „gut", „wahr", „gläubig" gegenüber „böse", „falsch", „ungläubig" vertreten.[81] Muslimen wird in diesem Sinne verboten, Kontakt mit Nichtmuslimen zu suchen oder ihnen

[76] https://islamfatwa.de/manhaj/112-das-folgen-der-salaf-us-salih/876-verhalten-bei-verunglimpfung-des-propheten-sallallahu-alayhi-wa-sallam (letzter Aufruf 20.04.18).

[77] https://islamfatwa.de/manhaj/112-das-folgen-der-salaf-us-salih/876-verhalten-bei-verunglimpfung-des-propheten-sallallahu-alayhi-wa-sallam; https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah (letzter Aufruf 20.04.18).

[78] https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah. Siehe für weitere Belege https://islamqa.info/ar/107166 (letzter Aufruf 01.05.2018).

[79] Vgl. https://islamfatwa.de/manhaj/28-gruppen-a-sekten/shia/911-die-aussage-schia-und-rafidah-sind-unsere-brueder; https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/901-kuffar-staatsbuergerschaft-annehmen, https://islamfatwa.de/soziale-angelegenheiten/147-gesellschaft-aktuelles/begruessung-a-beglueckwuenschung/1240-gratulieren-zum-neujahr-silvester (letzter Aufruf 01.05.2018). Für Näheres dazu WAGEMAKERS JOAS, Salafistische Strömungen und ihre Sicht auf *al-wala' wa-l bara'* (Loyalität und Lossagung), in: Said/Fouad (Hrsg.), *supra* Fn. 51, 55-79, hier 57 ff.

[80] Zitiert nach https://islamfatwa.de/aqidah-tauhid/164-tauhid-monotheismus/1246-die-bedingungen-von-la-ilaha-illa-allah (letzter Aufruf 01.05.2018).

[81] Vgl. https://islamfatwa.de/aqidah-tauhid/135-tag-der-auferstehung-anzeichen/paradies-hoelle/142-bedeutung-ewiger-aufenthalt-in-der-hoelle, https://islamfatwa.de/aqidah-tauhid/135-tag-der-auferstehung-anzeichen/paradies-hoelle?layout= und ähnlich bei https://islamqa.info/en/cat/234 (letzter Aufruf 01.05.2018).

zu ihren Festen und Ritualen zu gratulieren. Denn dies beinhalte eine Art Einverständnis mit ihrer „Falschheit" und impliziere gewisse Loyalität ihnen gegenüber.[82] Zur Rechtfertigung dieser und ähnlicher Positionen greifen Vertreter dieser Meinung auf Koranverse sowie auf die Ansichten früherer Gelehrter wie Ibn Taimiyya und Ibn al-Qaiyim zurück.[83] Dazu soll letzterer in Bezug auf die Teilhabe an jüdischen oder christlichen Feierlichkeiten gesagt haben: „So ist es auch den Muslimen nicht erlaubt, ihnen [Juden und Christen] dabei zu helfen oder ihnen dabei Gesellschaft zu leisten, gemäß dem Konsens der Gelehrten. […]. Wer das tue, begehe somit eine Sünde."[84] Obwohl Angehörige des Judentums und des Christentums von der Mehrheit der Muslime als „Besitzer einer Heiligen Schrift" (*ahl al-kitāb*) und somit als Gläubige einer anderen Religion anerkannt werden, werden sie in den auf *islamfatwa.de* angeführten Fatwas als „Ungläubige" (*kuffār* Sg. *kāfir)* bezeichnet und als Feinde des Islam und der Muslime dargestellt.[85]

Das *walāʾ*- und *barāʾ*-Prinzip dient darüber hinaus als weitere Argumentationsstütze, um Muslimen in mehrheitlich nichtislamischen Gesellschaften aufzuerlegen, die dort geltenden Gesetze nicht oder nur in Zwangslagen zu akzeptieren. Gerichtsurteile seien auch nur im Notfall anzunehmen. Man sollte seine möglich auftretenden Rechtskonflikte bestenfalls nicht vor Gerichte „der Ungläubigen/*kuffār*" tragen. „Ein Muslim muss sein Bestes tun, um Gerichte der *Kuffar* zu vermeiden. Wenn er jedoch keine andere Möglichkeit hat, darf er sie nutzen."[86] Die Ablehnung solcher Gerichte wird damit begründet, dass dort nicht nach der Scharia, sondern nach von Menschen gemachten Gesetzen gerichtet werde. In einer anderen Fatwa wird Muslimen ebenfalls verboten, die Staatsbürgerschaft eines nichtislamischen Landes zu erwerben. „Es ist nicht erlaubt die Nationalität der *Kuffar* anzunehmen, auch dann nicht, wenn man seine eigene behalten darf, weil es negativ auf den Muslim, seine Religion und Glauben einwirkt."[87] Als Grundlage dieses Verbots dient ihnen erneut der Koran.[88] Der Erwerb einer solchen Staatsbürgerschaft impliziere Loyalität gegenüber dem Land sowie eine bereitwillige Unterwerfung gegenüber den Ungläubigen. Dies widerspreche wiederum „der Perfektion des [muslimischen] Glaubens, oder es vernichtet ihn, je nach Situation."[89] In Anbetracht dessen

82 https://islamfatwa.de/soziale-angelegenheiten/147-gesellschaft-aktuelles/begruessung-a-beglueckwuenschung/1240-gratulieren-zum-neujahr-silvester; https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/492-es-ist-muslim-nicht-erlaubt-an-christlichen-festen; Ähnlich bei https://islamqa.info/ge/50074 (letzter Aufruf 01.05.2018). Für Näheres dazu EL-WERENY, *supra* Fn. 49, 39 ff.

83 Vgl. https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/1326-speisen-u-geschenke-der-kuffar-anlaesslich-ihrer-feste-essen-od-annehmen (letzter Aufruf 01.05.2018). An dieser Stelle wird u.a. 5:51 angeführt: „O die ihr glaubt, nehmt nicht die Juden und die Christen zu Schutzherren! Sie sind einer des anderen Schutzherren. Und wer von euch sie zu Schutzherren nimmt, der gehört zu ihnen. Gewiß, Allah leitet das ungerechte Volk nicht recht." Mehr dazu EL-WERENY, *supra* Fn. 18, 241 ff.

84 https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/1326-speisen-u-geschenke-der-kuffar-anlaesslich-ihrer-feste-essen-od-annehmen, https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/493-muslime-welche-feiertage-der-nicht-muslime-feiern (letzter Aufruf 01.05.2018).

85 Siehe weiterführend dazu https://islamfatwa.de/suche?query=kafir (letzter Aufruf 01.05.2018). Für Näheres dazu u.a. RUDOLPH EKKEHARD, Von „Schriftbesitzern" zu „Ungläubigen" Christen in der salafistischen Da'wa, in: Schneiders Thorsten Gerald (Hrsg.), Salafismus in Deutschland Ursprünge und Gefahren einer islamisch-fundamentalistischen Bewegung, Bielefeld 2014, 91-301.

86 https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/760-gerichtsverfahren-vor-kuffar-gericht-anstreben. Ähnlich bei https://islamqa.info/ge/92650 sowie https://islamqa.info/ge/176910 (letzter Aufruf 08.05.2018).

87 https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/901-kuffar-staatsbuergerschaft-annehmen (letzter Aufruf 13.05.2018).

88 In diesem Zusammenhang wird der oben angeführte Koranvers (58:22) zitiert.

89 https://islamfatwa.de/soziale-angelegenheiten/150-muslime-in-nicht-muslimischen-laendern/901-kuffar-staatsbuergerschaft-annehmen (letzter Aufruf 04.05.2018)

vermittelt dieses Fatwa-Portal ein Feindbild von Andersgläubigen sowie eine ablehnende Haltung gegenüber allen schariawidrigen Staatsordnungen.

Viele andere zeitgenössische Gelehrte befürworten indessen die Einbürgerung von Muslimen mit dem Argument, sie bekämen dadurch viele Vorteile. Explizit wird hier das Wahlrecht als Beispiel angeführt, was eindeutig auf ihre Zustimmung der Inanspruchnahme des Wahlrechts hindeutet.[90] Die Frage, ob sich Muslime gegenüber den Gesetzen oder den Mitbürgern loyal verhalten sollen, wird befürwortet. Die von salafistisch geprägten Gelehrten angeführten Beweise, wie oben gezeigt, werden entweder kontextualisiert oder ihre Authentizität infrage gestellt.[91] Zur weiteren Untermauerung dieser Position wird zwischen weltlicher und religiöser Loyalität unterschieden. Auf der Grundlage dieser Lesart werden Handlungen von Muslimen gegenüber Andersgläubigen begründet: In weltlichen Belangen dürften Muslime sich mit Nichtmuslimen zusammenschließen und mit ihnen kooperieren, solange dies von Nutzen für die gesamte Gesellschaft sei. Dazu gehöre auch die Erlaubnis, Nichtmuslimen zu ihren religiösen oder nationalen Feierlichkeiten zu gratulieren oder ihren Festen beizuwohnen. In religiösen Angelegenheiten hingegen bezieht sich die Loyalität auf Gott, Seinen Propheten und die anderen muslimischen Gläubigen.[92] Loyalität gegenüber dem Staat bzw. dessen Gesetzen bedeute die Einhaltung und Anerkennung aller Staatsregeln. Auch alle Formen von Verträgen oder Verabredungen, die ein Muslim mit dem Staat oder nichtmuslimischen Mitbürgern abschließt, sollten eingehalten werden. Die Argumentationsbasis bilden in diesem Zusammenhang die Prinzipien des islamischen Vertragsrechts, was anhand von zahlreichen Belegen aus dem Koran und der der Sunna untermauert wird.[93]

Wirft man nun einen Blick zurück auf die angeführten Ansichten, kann man hier die auf dem Internetportal *islamfatwa.de* zur Verfügung gestellten Fatwas dem traditionalistischen bzw. dem heute sog. salafistischen Spektrum zuordnen. Die Frage, um welche Gruppe es sich innerhalb des Salafismus handelt und ob die Inhalte dieser Site im Unterschied zu anderen, im Allgemeinen als moderat einzustufenden, Fatwa-Diensten rezipiert werden, steht im Mittelpunkt des folgenden Abschnitts.

V. *islamfatwa.de* – Einordnung in den Salafismus

Der Terminus „Salafismus“ geht auf das arabische Wort *salaf* zurück, was so viel wie „Altvorderer“ oder „Vorgänger“ bedeutet. Gemeint sind in diesem Zusammenhang *as-salaf aṣ-ṣāliḥ* („rechtschaffenen Altvorderen“) der ersten drei Generationen islamischer Zeitrechnung, etwa zwischen dem sechsten und dem neunten Jahrhundert n. Chr.[94] Sie haben bei Vertretern

90 Vgl. für einen Überblick SULṬĀN ṢALĀḤ AD-DĪN, *al-Iqāma fī ġair dār al-islām baina l-nāfin wa-l-muṯbitīn* (05/2007), unter: https://saaid.net/PowerPoint/568.pps (letzter Aufruf 12.02.2018). Ausführlich dazu EL-WERENY, *supra* Fn. 18, z. B. 232 ff., 238 ff.; SCHWEIZER URSI, Muslime in Europa: Staatsbürgerschaft und Islam in einer liberalen und säkularen Demokratie, Berlin 2008.

91 Vgl. ausführlich dazu EL-WERENY, *supra* Fn. 18, z. B. 241ff.

92 Vgl. mehr dazu https://www.al-qaradawi.net/node/4985 (letzter Aufruf 28.04.18); SCHWEIZER, *supra* Fn. 90, 40; EL-WERENY, *supra* Fn. 18, z. B. 185 ff.

93 Koran 17:34. In Sure 16 Vers 91 heißt es ähnlich: „Und erfüllt die Verpflichtung gegen Gott, wenn ihr eine (solche einmal) eingegangen habt, und brecht nicht die Eide, nachdem ihr sie (in aller Form) bekräftigt habt! Ihr habt ja Gott zum Garanten gegen euch gemacht. Gott weiß, was ihr tut.“ Zitiert in AL-QARAḌĀWĪ, *Min hady al-islām: Fatāwā muʿāṣira,* Kuwait 2003, Bd. 3, 642; EL-WERENY, *supra* Fn. 18, 241 ff.

94 Nach Nedza besteht kein Konsens darüber, welche Zeitspanne genau diese drei Generationen umfasst. Vgl. dazu NEDZA JUSTYNA, "Salafismus" – Überlegungen zur Schärfung einer Analysekategorie, in: Said/Fouad (Hrsg.), *supra* Fn. 51, 80-106, hier 97 f. Zur klaren Differenzierung zwischen dem oben dargestellten Salafismus und der „modernen“ Salafiyya,

dieses Fatwa-Portals sowie auch bei vielen anderen Muslimen einen hohen Stellenwert, da ihr Handeln und Islamverständnis aufgrund ihrer Nähe zu dem Propheten (gest. 632) und dessen Nachfolger als Idealzustand für die harmonische Einheit der Muslime, für religiöse Kompetenz und für Frömmigkeit angesehen wird.[95] Der Begriff Salafismus findet seit einigen Jahren sowohl im medialen als auch im wissenschaftlichen Diskurs zunehmend Verbreitung. Dabei handelt es sich um eine konservative Ideologie, deren Anhänger auf die Errichtung bzw. Wiedererrichtung einer an der Scharia orientierten Gesellschafts- und Staatsordnung nach dem Vorbild der ersten drei Generationen der Muslime abzielen.[96]

Der zeitgenössische Salafismus ist laut Steinberg von der im 18. Jahrhundert auf der Arabischen Halbinsel entstandene Wahhabiyya-Bewegung maßgeblich beeinflusst worden,[97] wobei es über die islamische Geschichte hinweg immer wieder Persönlichkeiten und Bewegungen gab, die diese Strömung geprägt haben.[98] Das wahhabitische Islamverständnis wurde von zeitgenössischen salafistischen Gelehrten und Autoritäten Saudi-Arabiens in unterschiedlicher Ausprägung übernommen. Zahlreiche Gelehrte wie Ibn Bāz und al-Uṯaimīn orientieren sich an den Lehren der Wahhabiyya. Theologisch richten sich Anhänger der Wahhabiyya, als auch des Salafismus, in erster Linie nach den Lehren des Korans, der Sunna und der Lebensweise der frommen Altvorderen. Sie lehnen die blinde Übernahme tradierter Lehrmeinungen früherer Gelehrter ab und wenden sich den Quellentexten zu. Mit dieser Herangehensweise streben sie selbstständige Normenfindung an, um ihre Überzeugungen allein auf der Grundlage der autoritativen Texte zu begründen, die allerdings aufgrund ihrer buchstabengetreuen Auslegung der Lebensrealität weitgehend fremd ausfallen.[99] Folgerichtig wird die Wahhabiyya-Bewegung als „die wohl größte Antriebsfeder für den gegenwärtigen Salafismus" erachtet.[100]

Innerhalb des salafistischen Spektrums gibt es unterschiedliche Strömungen, wobei die Übergänge fließend sind. Daher herrscht Meinungsverschiedenheit über eine systematische Aufteilung.[101] Die weitgehend verbreitete Klassifizierung geht auf Wiktorowicz zurück. Er unterscheidet zwischen drei Hauptgruppen, auf die die anvisierte Einordnung der *islamfatwa.de* erfolgen soll: Erstens die salafistischen Dschihadisten, zweitens die politischen

vertreten von Muḥammad ʿAbdu (gest. 1905) und Muḥammad Rašīd Riḍā (gest. 1935) siehe ebd., 85 f.; EL-WERENY MAHMUD, Salafiyya, Salafismus und Islamismus: Verhältnisbestimmung und Ideologiemerkmale, Demokratie-Dialog, Jg. 1 (2017), 32-40.

95 Vgl. CEYLAN RAUF/KIEFER MICHAEL, Salafismus. Fundamentalistische Strömungen und Radikalisierungsprävention, Wiesbaden 2013, 77 ff.; KOZALI ABDURRAHIM, Zur Bedeutung von salaf und „Salafismus", in: Ceylan Rauf/Jokisch Benjamin (Hrsg.), Salafismus in Deutschland. Entstehung, Radikalisierung und Prävention, Frankfurt a. M. 2014, 37-47.

96 Vgl. statt vieler SAID BEHNAM T/FOUAD HAZIM, Einleitung, in: Said/Fouad (Hrsg.), *supra* Fn. 51, 23 ff.

97 Vgl. CEYLAN/KIEFER, *supra* Fn. 95, 79; und mehr dazu bei STEINBERG GUIDO, Religion und Staat in Saudi-Arabien – Die wahhabitischen Gelehrten 1902–1953, Würzburg 2002, 28; GHARAIBEH MOHAMMAD, Zum Verhältnis von Wahhabiten und Salafisten, in: Schneiders Thorsten Gerald (Hrsg.), Salafismus in Deutschland Ursprünge und Gefahren einer islamisch-fundamentalistischen Bewegung, Bielefeld 2014, 117-125.

98 Zu nennen sind hier neben Aḥmad Ibn Ḥanbal (gest. 855) insbesondere die Gelehrten Ibn Ḥazm (gest. 1064) und Ibn Taimiyya (gest. 1328). Für Näheres dazu KOZALI, *supra* Fn. 95, 41; JOKISCH BENJAMIN, „Salafistische" Strömungen im vormodernen Islam, in: Ceylan/Jokisch (Hrsg.), *supra* Fn. 95, 15-37.

99 Vgl. STEINBERG GUIDO, Wer sind die Salafisten? Zum Umgang mit einer schnell wachsenden und sich politisierenden Bewegung, in: SWP-Aktuell 28. Mai 2012, URL: https://www.swp-berlin.org/fileadmin/contents/products/aktuell/2012A28_sbg.pdf (letzter Aufruf 07.05.2018), S. 5. Ausführlich zu Ibn ʿAbd al-Wahhābs Person siehe HASHMI SOHAIL H., Muhammad Ibn ʿAbd al-Wahhab (1703-1792), in: Martin Richard C. (Hrsg.), Encyclopaedia of Islam and the Muslim World, New York 2004, Vol. 1, 6.

100 Vgl. SAID/FOUAD, *supra* Fn. 96, 30.

101 Vgl. ausführlich dazu WIEDL NINA, Geschichte des Salafismus in Deutschland, in: Said/Fouad, *supra* Fn. 51, 411-442, hier 413 ff.

Salafisten und drittens die Puristen.[102] (1) Dschihadisten sehen in der Gewaltanwendung ein legitimes Mittel, um den vermeintlich reinen Islam zu verteidigen und ihre Vision eines islamischen Staates umzusetzen. Sie lehnen sowohl Missionsarbeit als auch politische Aktivitäten als Strategie für die Wiedererrichtung eines islamischen Gemeinwesens ab und erachten den Dschihad als den einzigen Weg zu dem ihnen vorschwebenden Staatswesen. Ihre Ideologie basiert in erster Linie auf dem ewigen Kampf zwischen dem Glauben an den *einen* Gott, *tauḥīd*, und sündhafter Götzendienerei, dem *širk*.[103] Auch wenn *islamfatwa.de* viele Andersdenkende, Muslime wie etwa die Schiiten und Nichtmuslime diskreditiert und für ungläubig erklärt, distanziert sie sich eindeutig von dschihadistischen Salafisten und spricht sich gegen Gewalt im Namen des Islam aus. Nicht nur in ihrer Selbstdarstellung positioniert sich die Site eindeutig gegen die Anwendung von Gewalt, sondern sie widmet dem Thema Extremismus und Terrorismus vielmehr eine eigene Website *islamgegenextremismus.de*, welche vom gleichen Betreiber der *islamfatwa.de* betrieben wird und auf Deutsch und Englisch abrufbar ist. In zahlreichen Beiträgen verurteilt die Homepage jede Form von Gewalt und distanziert sich von allen in der Neuzeit verübten Terrorakten.[104] Dementsprechend ist *islamfatwa.de*, zumindest in Anbetracht ihrer theoretischen Abhandlungen zur Gewalt, dem dschihadistischen Salafismus nicht zuzuordnen.

(2) Anders als die Dschihadisten beteiligen sich die politischen Salafisten aktiv am politischen Leben. Ihre Vorstellung von einem schariakonformen Gesellschafts- und Staatssystem wollen sie, im Gegensatz zu der obigen Gruppe, nicht im Wege der Gewalt, sondern auf friedlich-parlamentarische oder auch außerparlamentarische Art und Weise verwirklichen.[105] Durch Partizipation an Wahlen, Bildungsarbeit, medienwirksamen Auftritten und sozialen Initiativen bieten sie sich als Interessenvertreter und „Verteidiger" der Muslime gegenüber der Mehrheitsgesellschaft an und infiltrieren auf diese Weise das politische System. Der politische Salafismus wurde vor allem von der Muslimbruderschaft beeinflusst und wird oft dem Islamismus zugeordnet.[106] Die *islamfatwa.de* distanziert sich von der Muslimbruderschaft mit der Begründung, dass ihre Mission „[…] keine aufrechte und rechtschaffende Da'wah ist, welche die [muslimische] Gemeinde verbessert. Wahrlich, ihre Da'wah ist politisch, nicht religiös."[107] Die Website erachtet den Islam zwar als Religion und Staat, will dies aber nicht durch aktive Partizipation am politischen Leben umsetzen, vielmehr durch religiöse Schulungsveranstaltungen und umfangreiche öffentlichkeitswirksame missionarische Medienkampagnen. Das hat jedoch nicht zu bedeuteten, dass sie in überhaupt keiner Nähe zur Politik stehen möchte. Vielmehr wird zu einigen Fragen politischer Natur Stellung genommen, deren Inhalte Sympathie zu islamischen Regierungen aufweisen. So wird beispielsweise davon abgeraten, gegen Staatsführer zu rebellieren, „solange sie Muslime sind […]."[108] Demnach kann dieses Fatwa-Portal nicht an erster Stelle dem politischen, sondern eher dem im

[102] Vgl. WIKTOROWICZ QUINTAN, Anatomy of the Salafi Movement, in: Studies in Conflict & Terrorism, Vol. 29 (2006), Iss. 3, 207-239, hier 208, und ähnlich bei CEYLAN/KIEFER, *supra* Fn. 95, 82 ff.

[103] Vgl. weiterführend dazu u.a. CEYLAN/KIEFER, *supra* Fn. 95, 86 f.; SUKHNI ELHAKAM, Das gezielte Töten von Zivilisten und Nichtkombattanten im salafitisch-ǧihādistischen Diskurs, in: Ceylan /Jokisch, *supra* Fn. 95, 129-153. Zum dschihadistischen Salafismus in Deutschland siehe BAEHR DIRK, Dschihadistischer Salafismus in Deutschland, in: Schneiders Thorsten Gerald (Hrsg.), Salafismus in Deutschland Ursprünge und Gefahren einer islamisch-fundamentalistischen Bewegung, Bielefeld 2014, 231-251.

[104] Vgl. https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah und https://islamgegenextremismus.de (letzter Aufruf 08.05.2018).

[105] Vgl. weiterführend dazu FARSCHID, *supra* Fn. 51, S. 165.

[106] Vgl. STEINBERG, *supra* Fn. 99, S. 3 f.

[107] https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah, Punkt 15 (letzter Aufruf 08.05.2018).

[108] https://islamfatwa.de/ueber-uns/521-einblicke-in-unsere-aqiidah-und-da-wah, Punkt 13 (letzter Aufruf 08.05.2018).

Folgenden darzustellenden puristischen Salafismus zugerechnet werden, wenngleich die Übergänge zwischen den beiden als fließend zu betrachten sind. Denn Fatwas greifen im Grunde in alle Bereiche des Lebens ein und können auch politisch instrumentalisiert werden.[109] Dass die Site kaum politikbezogene Fragen behandelt, bestätigt die Annahme, dass es sich hierbei vorwiegend um den puristischen Salafismus handelt.

(3) Die Ideologie der Puristen weist zahlreiche Schnittpunkte mit der von der Website *islamfatwa.de* aus. Die Puristen haben zwar das gleiche Ziel wie die politischen und dschihadistischen Salafisten, wollen dies aber friedlich durch persönliche Frömmigkeit und individuell-frommes Handeln verwirklichen. Im Gegensatz zu den oben angeführten Gruppen lehnen Vertreter dieser Richtung aktive politische Partizipation und die Bildung von Parteien sowie die Gewaltanwendung ab. Sie sehen, dass sie das angestrebte islamische Gemeinwesen nur sukzessiv etablieren könne, und zwar wenn sich die Individuen, Familien und Gruppen gottgefällig verhalten. Um dieses langfristige Ziel zu erreichen, richten sie ihr Augenmerk insbesondere auf die Missionsarbeit, Erziehung und die religiöse Bildung.[110] Ihre ideologischen Grundlagen stammen vor allem von als Vordenkern des zeitgenössischen Salafismus angesehenen Gelehrten wie etwa Ibn Taimiyya, Ibn al-Qaiyim und Muḥammad b. ʿAbd al-Wahhāb und Naṣir al-Dīn al-Albānī[111] – Namen, deren Ansichten auf *islamfatwa.de* Beachtung finden.[112]

Im Vergleich zum Islamismus, mit dem der Begriff Salafismus häufig gleichgesetzt wird, ist letzterer eine Strömung innerhalb des sunnitischen Islam, dessen Anhänger eine Rückbesinnung auf die Frühzeit des Islam anstreben und sich in der Lebens- und Religionspraxis an den Traditionen der ersten drei Generationen orientieren. Islamismus ist hingegen eine im sunnitischen wie schiitischen Islam vertretene Ideologie politischer Natur die, ähnlich wie beim Salafismus, auf die Wiedererrichtung eines islamischen Gemeinwesens abzielt, aber nicht unbedingt nach dem Vorbild der ersten drei Generationen. Vielmehr wollen Vertreter des Islamismus den Islam und die Moderne versöhnen und sind infolgedessen bemüht, die Quellentexte des Islam zeitgemäß auszulegen, wie am Beispiel al-Qaraḍāwīs Theorien gezeigt, der der Muslimbrüderschaft zugerechnet wird. Die Muslimbrüderschaft Ägyptens gilt als Mutterbewegung und als organisatorische Wurzel des Islamismus, wenngleich sein ideologischer Ursprung in erster Linie auf die Reformbewegungen des 19. Jahrhunderts in der Auseinandersetzung mit dem Kolonialismus zurückgeführt wird. Ähnlich wie der Salafismus umfasst der Islamismus sowohl friedlich-politisch wirkende Gruppen als auch gewaltgeneigte bis terroristische Gruppen. Im Unterschied zu anderen salafistischen Gruppierungen ist der Islamismus in toto politisch ausgerichtet und stellt eine besondere Lesart des Islam als politisches Programm dar.[113]

[109] Für Näheres dazu siehe z. B. ARMBORST ANDREAS/ATTIA ASHRAF, Die Politisierung des Salafismus, in: Schneiders Thorsten Gerald (Hrsg.), Salafismus in Deutschland Ursprünge und Gefahren einer islamisch-fundamentalistischen Bewegung, Bielefeld 2014, 217-231.

[110] Vgl. STEINBERG GUIDO, Saudi-Arabien: Der Salafismus in seinem Mutterland, in: Said/Fouad, *supra* Fn. 51, 265-297; WAGEMAKERS, *supra* Fn. 79, 58 ff.

[111] Vgl. für Näheres dazu KRAWIETZ BIRGIT, Ibn Taymiyya, Vater des islamischen Fundamentalismus? Zur westlichen Rezeption eines mittelalterlichen Schariatsgelehrten, dies., Open Source Salafiyya Zugriff auf die islamische Frühzeit durch Ibn Qayyim al-Dschauziyya, in: Schneiders Thorsten Gerald (Hrsg.), Salafismus in Deutschland Ursprünge und Gefahren einer islamisch-fundamentalistischen Bewegung, Bielefeld 2014, 67-103.

[112] Vgl. https://islamfatwa.de/gelehrte (letzter Aufruf 10.05.2018).

[113] Vgl. EL-WERENY, *supra* Fn. 94, 36 ff.; HEINE PETER, Islamismus – Ein ideologiegeschichtlicher Überblick, in: Islamismus. Bundesministerium des Innern (Hrsg.), (ohne Jahrgang), 5–20.

Was die Rezeption der *islamfatwa.de* angeht, liegt sie laut *Alexa Traffic Rank* im globalen Ranking auf Position 467,415.[114] Sie schneidet somit zwar schlechter ab als die Website von al-Qaraḍāwī (auf Position 240,881) und von Šaḥrūr (auf Position 249,154), die dort übersetzten Fatwas finden aber vergleichsweise größere Popularität weltweit. Dies ist an dem Ranking der salafistischen Website *islamQA* zu sehen, deren Fatwas mit den der auf *islamfatwa.de* publizierten identisch und zugleich in 16 Sprachen zugänglich sind; sie steht im globalen Ranking auf Platz 5,850 und gilt somit als eines der meistbesuchten Fatwa-Foren. Auch das *Ständige Komitee für Rechtsfragen*, dessen Angebote in neun Sprachen online zur Verfügung stehen und von dem zahlreiche Fatwas auf dem Portal *islamfatwa.de* übersetzt vorliegen, schneidet mit 68,352 eindeutig besser ab als die Sites von al-Qaraḍāwī und Šaḥrūr.[115] Dies gilt auch für die Website von Ibn Bāz mit dem globalen Rank 22,348.[116] In Deutschland steht das Portal *islamfatwa.de* auf dem Rang 29,215, wobei 76.3% der Nutzer aus Deutschland und der Rest aus Österreich stammen.[117] Verglichen mit anderen deutschsprachigen Fatwa-Portalen wie *fatwazentrum.de* (auf Position 517,130)[118] darf man annehmen, dass *islamfatwa.de* die meistbesuchte Fatwa-Site im deutschsprachigen Raum ist. Die Frage, welcher Altersgruppe die Besucher der Website angehören, kann aufgrund mangelnder Datenlage nicht beantwortet werden. Aus verschiedenen Studien zum Internet ist jedoch bekannt, dass das Internet vor allem junge Leute nutzen.[119]

VI. Zusammenfassung

Im Mittelpunkt des vorliegenden Beitrags stand die Darstellung und Analyse des deutschsprachigen Fatwa-Portals *islamfatwa.de*. Dabei wurden die dort als Muftis fungierenden Akteure, ihre gesellschaftliche und politische Weltanschauung sowie ihre rechtsmethodischen Grundlagen der Erstellung von Fatwas herausgearbeitet. Um ihre Ansichten und verfolgte Agenda einordnen zu können, wurde zunächst die islamrechtliche Diskussion um die Relevanz und Modifizierbarkeit von Fatwas angeführt. Drei unterschiedliche Positionen lassen sich in diesem Zusammenhang nachzeichnen, die sich in der virtuellen Welt widerspiegeln: Während die eine alle überkommenen Normen und Fatwas, bis auf die dogmatischen, ethischen und rituellen Bestimmungen der Scharia, für kontextbedingt veränderbar betrachtet, die andere, die sog. *wasaṭīya*, dazu das Familien-, Erb- und Strafrecht hinzuzieht, vertritt die dritte eine konservative, dem salafistischen Denkmuster zuzurechnende Haltung: Sie machte sich für eine buchstabengetreue Lesart stark und sieht die Veränderbarkeit jedweder Fatwas nur dann ein, wenn dafür textuelle Grundlagen aus dem Koran oder der Sunna vorliegen.

Aus der Darstellung und Analyse ausgewählter Fatwas der Website *islamfatwa.de* ging hervor, dass sie dem salafistischen Spektrum zuzurechnen ist, was an Profilen und Rechtsansichten der dort als Muftis agierenden Gelehrten wie etwa Ibn Bāz, al-ʿUṯaimīn und al-Fawzān zu erkennen ist. Dieses Fatwa-Portal tritt für ein wortwörtliches Verständnis des Koran und der Sunna ein, nimmt darüber hinaus die Lebensweise der Altvorderen als Vorbild hinzu und lässt

[114] Vgl. https://www.alexa.com/siteinfo/islamfatwa.de (letzter Aufruf 19.06.2018).

[115] Vgl. https://www.alexa.com/siteinfo/alifta.net und http://www.alifta.net/default.aspx?languagename= (letzter Aufruf 07.05.2018).

[116] Vgl. https://www.alexa.com/siteinfo/binbaz.org.sa (letzter Aufruf 08.05.2018).

[117] Vgl. https://www.alexa.com/siteinfo/islamfatwa.de (letzter Aufruf 19.06.2018).

[118] Vgl. Vgl. https://www.alexa.com/siteinfo/islamfatwa.de; ausführlich zu fatwazentrum.de siehe http://fatwazentrum.de/ (letzter Aufruf 23.05.2018).

[119] Vgl. z. B. BUNT GARY, Islam in the Digital Age: E-Jihad, Online Fatwas and Cyber Islamic Environments, London 2003.

keine hermeneutischen Interpretationen zu. Das Portal propagiert ein starres Abbild aus der Frühzeit des Islam, das sich ausschließlich auf Aussagen des Korans, der Sunna und Lebensweise erster Muslime stützt. Diese werden als eindeutige, umfassende und ausreichende Grundlagen erachtet, nach denen zeitgenössische Muslime ihr Leben jenseits zeitlicher und örtlicher Gegebenheiten auszurichten hätten. Folgerichtig wird in den auf der Website zur Verfügung gestellten Fatwas fast ausschließlich mit religiösen Texten argumentiert. Der Grundsatz, nach dem Fatwas nach Zeit- und Ortsumständen ausgesprochen bzw. modifiziert werden sollten, findet keine Beachtung. Religiöse oder kulturelle Veränderungen im Leben werden als „unislamische Neuerung" (*bidʿa*) verurteilt.[120] Im Gegensatz zu diesem auf *islamfatwa.de* präsentierten Bild des Islam sind andere Websites, die im Rahmen der vorliegenden Untersuchung angesprochen wurden, indessen bemüht, die Quellentexte des Islam auf unterschiedliche Art und Weise kontextbedingt zu verstehen und zeitgemäß auszulegen.

Anhand der angeführten Fallbeispiele zur Geschlechterrolle und zur Haltung der Website zur Demokratie und Politik wurde ihre traditionell-salafistische Weltanschauung deutlicher. Der Frau stehe nur die Rolle zu, die der Koran, die Sunna und tradierte Fatwas früherer Gelehrter des 7. bzw. 8. Jahrhunderts vorsehen. In der Konsequenz ergibt sich Ungleichheit zwischen Mann und Frau, Abschottung und womöglich Unterdrückung der Frau. In Politikfragen wird die vermeintlich allumfassende Scharia einzig und allein als Verfassungs- und Gesetzgeber angesehen. Als holistisches Gebilde solle sie die Gesellschafts- und Staatsordnung regeln. Ausgehend davon wird den Muslimen auferlegt, sich von – aus der Sicht der Website schariawidrigen – Staatssystemen loszusagen. Dies spiegelt sich auch in einigen Fatwas für Muslime im Westen wider, wie etwa zur Einstellung gegenüber dem Staat, den nichtmuslimischen Mitbürgern und der Einbürgerungsfrage. In einschlägigen Fatwas vermittelt *islamfatwa.de* eine den Grundprinzipien der freiheitlichen Demokratie widersprechende Ideologie, die der Integration von Muslimen in mehrheitlich nichtislamischen Gesellschaften gefährden bzw. hindern könnte.

Auf Grundlage der vorangegangenen Analyse und gestützt auf die mittlerweile in der Wissenschaft etablierte Einteilung des Salafismus konnte dieses Fatwa-Portal vornehmlich dem puristischen Salafismus zugeordnet werden, wenngleich die Übergänge zum politischen Strang fließend bleiben. Immerhin kann man keine strengen Grenzen zwischen den drei Gruppen ziehen. Bezüglich der Gewaltanwendung konnte auf der Website kein unmittelbarer Aufruf zum bewaffneten Dschihad festgestellt werden. Sie distanziert sich eindeutig von Gewalt und setzt sich für eine schariakonforme Gesellschaftsordnung ein, die friedlich mittels der Missionierung, Bildung und karitativen Tätigkeiten anvisiert wird. Ihre Position steht soweit in erster Linie in Übereinstimmung mit der Ideologie des puristischen Salafismus.

[120] Siehe für Beispiele https://islamfatwa.de/suche?query=bida (letzter Aufruf 08.05.2018).